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Private Law: Prescription

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Corp.,[14] where the court reiterated the well-established rule that a mortgage continues to have its full effectiveness despite a cancellation on the basis of a fraudulent release.[15] Likewise, during the interval allowed for inscription, vendors' liens[16] and building contract privileges[17] are temporarily secret liens not discoverable in the public records. Incidentally noteworthy incidents of the opinion in the principal case are (1) a footnote distinction between the civil law attitude concerning *stare decisis* in the branches of the law which call for greater certainty and those in which the nature of the subject calls for greater adaptability,[18] and (2) the forceful assertion that Civil Code article 21 does not open the door to the admission of equitable principles of the common law.[19]

PRESCRIPTION

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ACQUISITIVE PRESCRIPTION

Possession as Owner

Normally, one co-owner cannot prescribe against other co-owners because his possession is precarious. Even if he occupies physically the entire property, his status as co-owner incorporates recognition of the rights of the others, and therefore he is not in possession *as owner* of their shares. However, this does not completely exclude the possibility of acquisitive prescription where the physical occupation is under circumstances which are inconsistent with recognition of other rights and hostile to any such possible claims.

This is what occurred in *Continental Oil Co. v. Arceneaux.*[1]

14. 183 So. 2d 463 (La. App. 4th Cir. 1966), *writ granted*, 249 La. 385, 186 So. 2d 630 (1966).
15. Citing Zimmer v. Fryer, 190 La. 814, 183 So. 166 (1938); see also Gallagher v. Conner, 138 La. 633, 70 So. 539 (1915).
16. LA. CIVIL CODE art. 3274 (1870).
17. LA. R.S. 9:4801 *et seq.* (1950).
18. 183 So. 2d at 465, n. 1.
19. *Id.* at 467 — text supported by note 4.

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1. 183 So. 2d 399 (La. App. 3d Cir. 1966), *writ refused*, 249 La. 66, 184 So. 2d 736 (1966).

One child purchased the parental property at an administrator's sale which did not have all the elements of validity. Thirty-eight years later, the other children contested his title to the whole property but the court sustained his plea of 30-year acquisitive prescription. The court found that his possession of the entire tract had been "open, public and unequivocal possession as owner under a deed translative of title" and "even though the deed be invalid . . . the co-owner's possession ordinarily is then regarded as hostile to any claim of his co-owners."[2]

Obviously, each case must be examined in the light of its particular facts, and it is an interesting coincidence that the same court decided another case in the same way. In *Detraz v. Pere*,[3] one co-heir was found to have thirty-six years of satisfactory possession as owner of a whole tract which the other co-heir alleged had been acquired from their ancestor by a simulated sale. Under the circumstances, his possession was adverse and hostile as well as satisfying the other requirements for acquisitive prescription.

Just Title and Good Faith

For the ten-year prescription, both of these elements must be present. While there is often a relationship between just title and good faith, each is nevertheless a separate and distinct concept which must be tested independently of the other. It is confusing to find the two ideas run together.

Just title is an objective element and may be any appropriate mode of acquisition which appears on its face to be valid while in truth it is defective. Good faith is the honest and justifiable belief of having acquired full ownership of the property.

In *Lloyd v. Register*,[4] the wife acquired a property from her voluntarily separated husband, through the interposition of her mother. Under these circumstances, the title was an absolute nullity.[5] In disposing of the wife's plea of ten-year acquisitive prescription, the court said: "By just title means a title which the possessor may have received from any person whom he

2. 183 So. 2d at 401.
3. 183 So. 2d 401 (La. App. 3d Cir. 1966), *writ refused*, 249 La. 119, 185 So. 2d 529 (1966).
4. 184 So. 2d 279 (La. App. 1st Cir. 1966), *writ refused*, 249 La. 452, 187 So. 2d 438 (1966).
5. LA. CIVIL CODE arts. 12, 1790, 2446 (1870).

honestly believed to be the real owner."[6] Taking this statement from Civil Code article 3484, without the full context of articles 3483-3486, seems to confuse the concepts of good faith and just title. The court then reached the conclusion, "In the absence of good faith and just title, the ten year acquisitive prescription has no force here."[7]

In the facts of the present case, as found by the court, there can hardly be any doubt that the evidence rebutted the presumption of good faith of the possessor.[8] From the court's brief conclusion, it might further be implied that an absolute nullity can never be a just title, yet this, as a separate and an important legal question, was not discussed.

LIBERATIVE PRESCRIPTION

Classification of the Cause of Action

A substantial percentage of the actual problems which arise in connection with liberative prescription revolve around the nature of the cause of action against which the prescription is pleaded. There is no limit to the kinds of fact situations which may develop, and as long as there are so many different prescriptive period rules there will be litigation to fix the classification of the cause of action.

In the case of *Birdsong v. Barber*,[9] the defendant termite contractor pleaded the one-year tort prescription[10] against an action for termite damages which developed on account of the defendant's negligence in failing to inspect the upper story of the house. The court held that this action was based on breach of contract and therefore it was subject only to the ten-year prescription.[11] As the law now stands, this decision is correct; if the prescriptive periods for tort and contract actions were the same, this case and so many like it would be obviated. Whether the difference warrants continuation is a question of policy interests in our society and it merits serious consideration.

6. 184 So. 2d at 281.
7. *Ibid.* For a well-drawn distinction between just title and good faith, see Bel v. Manuel, 234 La. 135, 99 So. 2d 58 (1958), and comments in 19 LA. L. REV. 327-28 (1959).
8. LA. CIVIL CODE art. 3481 (1870).
9. 176 So. 2d 239 (La. App. 4th Cir. 1965).
10. LA. CIVIL CODE art. 3536 (1870).
11. *Id.* art. 3544.

A similar problem of classification of the cause of action, but conceivably a different combination of policy interests, was involved in *Victory Oil Co. v. Perret.*[12] The one-year prescription against an action in redhibition[13] was pleaded against a claim for damage to trucks caused by delivery of a type of oil different from that specified in the sale contract. Even though there may have been negligence in delivering the wrong kind of fuel, the court held it was an action for damages arising out of breach of contract and subject only to the ten-year prescription.[14]

Another problem of classification occurred in *Giroir v. Dumesnil,*[15] where a declaratory judgment action sought recognition of ownership of land purchased from the legatees of a testamentary succession. Prescriptive pleas of five years as against the nullity of a testament[16] and ten years against a personal action[17] were properly displaced by the classification of the action as one for the ownership of immovable property for which the prescription is thirty years.[18]

Interruption of Prescription

In *LeBoeuf v. Riera,*[19] suit was filed in 1962 for the balance due on an open account for insurance premiums, the last of which had been charged in 1958. Two payments made in 1959 were unequivocally identified with two specific invoices and, by reason of this imputation, did not interrupt the three-year prescription against open accounts[20] because these payments could not be treated as partial payments in reduction of the entire indebtedness.

The question of interruption by the institution of a lawsuit in a federal court was the issue in *Venterella v. Pace.*[21] Suit was filed, but the citation was not served, within the prescriptive period. The decisive issue, therefore, was the question of the

12. 183 So. 2d 360 (La. App. 4th Cir. 1966), *writ refused*, 249 La. 65, 184 So. 2d 735 (1966).
13. LA. CIVIL CODE arts. 2534, 2546 (1870).
14. *Id.* art. 3544.
15. 248 La. 1037, 184 So. 2d 1, 8-9 (1966).
16. LA. CIVIL CODE art. 3542 (1870).
17. *Id.* art. 3544.
18. *Id.* arts. 3548, 3499; Buckley v. Catlett, 203 La. 54, 13 So. 2d 384 (1943).
19. 176 So. 2d 216 (La. App. 4th Cir. 1965).
20. LA. CIVIL CODE art. 3538 (1870).
21. 180 So. 2d 240 (La. App. 4th Cir. 1965), *writ refused*, 248 La. 796, 182 So. 2d 73 (1966).

competence of the court.[22] Lack of diversity of citizenship[23] caused the dismissal of that suit, and it was therefore not a court of competent jurisdiction, so that the timely *filing* alone did not create an interruption of the prescription.

Choice of Cause of Action

In some kinds of situations, a person may have a choice of two causes of actions, and if his claim for damages results from breach of contract, he can avoid the one-year prescription against torts. Sometimes a person may have two distinct claims with an independent separate prescription running against each. A decision which could create many hardship cases was rendered in *Williamson v. S.S. Kresge Co.*[24] An injured employee accepted a permanent disability compensation award for a certain length of time until it was discovered that these payments were being made in error since the occupation and the business were not hazardous. The ensuing suit in tort was dismissed on the ground of one-year liberative prescription which had meanwhile lapsed. It may be technically correct to say that ignorance of the law is no excuse and that the employee has slept on his right. Therefore, since a suit in tort is precluded where a claim is covered by the workman's compensation act,[25] it may be necessary for an injured person to get a judicial determination in order to protect himself against the risk of an erroneous award.

MINERAL RIGHTS

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MINERAL SERVITUDES

Minority Suspension

The writer has already discussed at considerable length the Supreme Court's decision in *Mire v. Hawkins*,[1] in which the

22. LA. CIVIL CODE art. 3518 (1870); LA. R.S. 9:5801 (1950).
23. One of the defendants as well as the plaintiffs were citizens of Louisiana.
24. 186 So. 2d 696 (La. App. 4th Cir. 1966), *writ refused*, 249 La. 580, 187 So. 2d 741 (1966).
25. LA. R.S. 23:1032 (1950).

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1. 249 La. 278, 186 So. 2d 591 (1966). The court's decision on the issue on which writs were granted is thoroughly discussed in Hardy, *Comments on Mire v. Hawkins*, 27 LA. L. REV. 5 (1966).