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CHATTEL MORTGAGE

In *First Nat'l Bank in Mansfield v. Lawrence*,³⁵ where the holder of a second chattel mortgage (on certain drilling rigs) had actual knowledge of the existence of a prior chattel mortgage on the same things, the court decided that the holder of the first chattel mortgage was relieved of a literal compliance with the law concerning registry. A writ of review has been granted in this case³⁶ and further comment is withheld at this time.

PRESCRIPTION

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LIBERATIVE PRESCRIPTION

Juridical Nature of the Loss of the Right of Action

There are two kinds of ways in which a person may lose his right of action as a result of failure to exercise it during a specified period of time.

(1) The first is the ordinary liberative prescription which causes the release of the debt by being a "bar" to the action, and it must be pleaded by the debtor.¹ Thus the defendant's failure to plead this prescription cannot be supplied by the court² and there would have to be a judgment for the plaintiff. Even when the action is barred by prescription, a "natural obligation" still subsists³ so that a voluntary payment made thereafter cannot be reclaimed as "undue."⁴ Furthermore, the ordinary liberative prescription is subject to interferences with the running of time through interruption by lawsuit or acknowledgment,⁵ and by reason of suspension on account of the various legal incapacities of certain individuals, as specified by law.⁶

(2) The second way in which a person loses a right through inaction is more rigid and more severe; it is called "peremption" or "forfeiture." This is not described in the Civil Code, but its two distinctive characteristics are (a) that the right is absolutely extinguished and ceases to exist—not even as a natural obligation, and (b) that there can be no—repeat, no—inter-

35. 207 So.2d 907 (La. App. 2d Cir. 1968).

36. 251 La. 1082, 208 So.2d 537 (1968).

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1. LA. CIV. CODE arts. 3459, 3463.

2. *Id.* art. 3463.

3. *Id.* art. 1758(3).

4. *Id.* art. 2307.

5. *Id.* arts. 3518, 3520, 3551-3553.

6. *Id.* arts. 3521-3527, 3554-3555, 3541.

ference with the running of time; there can be no interruption by suit or acknowledgment, nor suspension for minority or other reason. Although not mentioned as such in the Civil Code, peremptions (forfeitures) are discussed by all the French and other writers on civil law, and have always been recognized by the Louisiana jurisprudence as part of our law.⁷

The difference in the juridical nature and effect of the ordinary liberative prescription and the peremption is thus very serious and very important. The real problem is to determine when the limitation of time to exercise a right is not an ordinary liberative prescription but is a peremption.

Since the limitation must exist by virtue of a text of law, it would be simple if the Code or the statute specified the classification. However, this is hardly ever done, and the canon of statutory interpretation which gives operative effect to the "legislative intent" is often likely to be a process of rationalization because if the question had been considered the answer would have been stated.

Accordingly, the court has to "make" an answer for new cases, and usually does so by examining the language of the pertinent law to see whether it seems to be an ordinary or general limitation and subject to interruption, or whether the text indicates the creation of a right with a fixed duration of existence not subject to any interference with the running of time, and becoming absolutely extinct when the calendar period has elapsed.

When the lack of clarity between prescription and peremption⁸ is added to the indistinctness in the use of the terms interruption and suspension, the resulting forms of expression are

7. *E.g.*, Succession of Pizzillo, 223 La. 328, 335, 65 So.2d 783, 786 (1953) :

" . . . The difference between prescription and peremption is that the former simply bars the remedy whereas, in the latter, time is made of essence of the right granted and a lapse of the statutory period operates as a complete extinguishment of the right. *Guillory v. Avoyelles Ry. Co.*, 104 La. 11, 28 So. 899; *Brister v. Wray-Dickinson Co.*, 183 La. 562, 164 So. 415 and *Collier v. Marks*, 220 La. 521, 57 So.2d 43. Peremption admits of no interruption or suspension; performance of the required act must be accomplished within the specified time or else the right of action no longer exists." *See also* 2 *PLANIOL, TREATISE ON THE CIVIL LAW (PART 1)* no. 704 (La. St. L. Inst. transl. 1939); *The Work of the Supreme Court for the 1952-1953 Term—Prescription*, 14 LA. L. REV. 129 (1953).

8. *See* *Brandon v. Kansas City Southern Ry.*, 7 Fed. Supp. 1008 (W.D. La. 1934); *Sansone v. Louisiana Power & Light Co.*, 164 So.2d 151 (La. App. 1st Cir. 1964); *Mitchell v. Sklar*, 196 So. 392 (La. App. 2d Cir. 1940) *cert. denied*; *Myers v. Gulf Public Service Corp.*, 132 So. 416 (La. App. 2d Cir. 1931); *Matthews v. Kansas City Southern Ry.*, 10 La. App. 382, 120 So. 907 (2d Cir. 1929).

difficult to reconcile and they play havoc with the doctrinal basis of the law. Thus, the following statement appears in the recent case of *Marshall v. Southern Farm Bureau Cas. Co.*⁹

"All defendants filed a 'plea of peremption' alleging that the child died on December 15, 1962, and showing that suit was not filed until June 15, 1966.

"Petitioners met this issue by an 'exception of estoppel and res judicata' directed to defendants' plea of peremption. Petitioners' exception showed that within one year of the date of the death petitioners had filed suit in the United States District Court against Southern Farm Bureau Casualty Insurance Company. This suit was dismissed by the United States District Court, its judgment was affirmed by the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States denied an application for writs on April 18, 1966. *The District Court held, and correctly so, that the pendency of that matter in the Federal Court suspended the prescriptive or peremptive period* from the time it was filed, July 11, 1963, to the action of the United States Supreme Court on April 18, 1966." (Emphasis added.)

The approval of the lower court's holding that the pendency of the federal suit "suspended the prescriptive or peremptive period" must be considered as part of the *ratio decidendi* (and not as dictum) because the court did go on to a consideration and decision on the merits, whereas a contrary determination on the first question would have settled the case by a dismissal without reference to the merits.

The case was a wrongful death action by parents for the loss of their child, presumably under Civil Code Article 2315, although this is not stated. It must also be presumed that the defendants' plea of "peremption" is likewise based on the limitation in the same article, which reads as follows: "The right to recover . . . shall survive for a period of one year from the death. . . ."

This reads more like a peremption than a prescription, and as a peremption there could not be any interruption or suspension as an interference with the running of time to keep the cause of action alive for a longer period. To classify the limitation as a peremption and to permit interruption or suspension

9. 204 So.2d 665, 667 (La. App. 3d Cir. 1967); writ refused, 206 So. 711 (1968).

is a contradiction in terms. (Incidentally, on the merits, the lower court's judgment for plaintiff was reversed.)

Furthermore, even if classified as a prescriptive period and the *institution* (or service) of the lawsuit considered as an interruption, it is not really correct to treat the *pendency* of the suit as a "suspension." In the first place, there is no code or statutory text¹⁰ for such a suspension. In the second place, the result is not altogether correct; after a suspension, time resumes to run from where it was stopped, whereas after an interruption (or a continuous interruption), time resumes to run from the beginning. Since the institution or service of a lawsuit is established as an "interruption" (of an ordinary liberative prescription), the pendency of such a suit is a continuous interruption until it is completed by final judgment or abandoned as if never instituted.¹¹

The present comments are not intended as criticism of the result in any actual case but are rather a plea for the establishment and use of clear concepts, clearly defined, and consistently followed.

Classification of the Cause of Action

With so many different prescriptive periods in our law for the various causes of action, it is inevitable that the critical issue in a case will often be one of classification. An unusual and interesting situation occurred in *Minyard v. Curtis Products, Inc.*¹² For the fulfillment of a subcontract to do the caulking on a construction project, the subcontractor proposed a certain caulking compound; he endorsed the properties of this material and guaranteed that it would comply with the specifications. The job was unsatisfactory on account of the inadequacy of the material; and after the general contractor had been cast in damages for the necessary repairs, he in turn got a judgment against the subcontractor and this was satisfied. The present case by the subcontractor, seeking recovery from the manufacturer who had produced the caulking compound was instituted eight months later, but meanwhile more than ten years had elapsed from the original purchase of the supplies.

The court of appeal affirmed the trial court and held that this was "a demand for damages caused by a breach of warranty

10. LA. CIV. CODE art. 3521.

11. *Id.* art. 3519.

12. 251 La. 624, 205 So.2d 422 (1967).

in a contract of sale and is to be regarded as founded upon redhibition and subject to the codal prescription of one year as applied to redhibitory actions. R.C.C. arts. 2520 et seq.”¹³ Furthermore, the court of appeal maintained that the general prescription of personal actions also applied because more than ten years had elapsed since the cause of action accrued—that is, from the date of the purchase.

The Supreme Court’s analysis of the cause of action took quite a different direction. The subcontractor had been cast in judgment for damages caused entirely by the defective product of the manufacturer. Thus, since the subcontractor was seeking indemnity from the manufacturer and not from the party who sold the defective materials, there was no buyer-seller relationship involved in this case and, therefore, it was not a suit in redhibition.

For this kind of situation the court found no express statutory remedy, but they did find, in the jurisprudence and the doctrine, the general principle of unjust enrichment. The court cited Civil Code Articles 21 and 1965¹⁴ as establishing the basis in Louisiana for the broad principle of unjust enrichment, and referred to several other Code articles¹⁵ as expressions of fundamental quasi-contractual responsibilities recognized in the law.

Since the Louisiana code provisions were taken from the French, reference was made to the doctrine and jurisprudence of France, where the subject has been more fully developed; and the court classified the present case as an action *de in rem verso* seeking recovery for unjust enrichment. This cause of action came into existence only when judgment was rendered against the subcontractor, and that was when prescription could start to run. As a claim in quasi-contract, the appropriate prescription is the ten-year prescription against personal actions; and in the present case it had not run.

13. 192 So.2d 208, 211 (La. App. 4th Cir. 1966).

14. LA. CIV. CODE art. 21: “In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.”

Id. art. 1965: “The equity intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity.”

15. LA. CIV. CODE arts. 2292, 2293, 2294.

These comments cannot do justice to the well-written opinion, which should be read in full to be appreciated. Furthermore, by reason of its forthright recognition and assertion of general principles of the civil law, and in particular the action *de in rem verso*, this decision is likely to become one of landmark significance.

The classification of the cause of action for damages under Civil Code Article 667 (*sic utere servitute*) has been discussed in previous comments;¹⁶ it is obviously a critical issue in determining the appropriate rule of prescription. In *Craig v. Montelepre Realty Co.*,¹⁷ the court of appeal very bluntly and briefly classified the action as one in tort, subject to the one-year prescription of Civil Code Article 3536. The opinion cites only one case,¹⁸ which, as it happens, was the subject of a critical and carefully analyzed casenote,¹⁹ and fails to mention any other prior decisions or doctrinal comments.

The Supreme Court's majority opinion²⁰ makes reference to this issue but pretermitted passing on it because it disposed of the case on other grounds. However, it is met squarely and clearly in the concurring opinion,²¹ which categorically stated that the cause of action under Civil Code Article 667 is not an action in tort as indicated in the one case cited by the court of appeal. Justice McCaleb very properly classified the landowner's obligation to his neighbor as an obligation "imposed by law," the violation of which "gives rise to a cause of action on a quasi-contract." Consequently, it is subject to the general prescription of ten years for personal actions. A question might be asked whether the category of "obligations imposed by law" is synonymous with the category of "obligations arising from quasi-contract;"²² but that is not within the scope of the present comments and would make no difference for purposes of liberative prescription.

16. E.g., *The Work of the Louisiana Supreme Court for the 1946-1947 Term—Property*, 8 LA. L. REV. 234, 236 (1948); *The Work of the Louisiana Appellate Courts for the 1964-1965 Term—Prescription*, 26 LA. L. REV. 536, 538 (1966); *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Property*, 27 LA. L. REV. 436, 438-39 (1967).

17. 202 So.2d 432 (La. App. 4th Cir. 1967).

18. *Gulf Ins. Co. v. Employers Liab. Assur. Corp.*, 170 So.2d 125 (La. App. 4th Cir. 1964).

19. Note, 26 LA. L. REV. 409 (1966).

20. 252 La. 502, 211 So.2d 627 (1968).

21. *Id.* at 633.

22. Cf. QUEBEC CIV. CODE art. 983: "Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of the law solely." See also 2 OEUVRÉS DE POTHIER, TRAITÉ DES OBLIGATIONS no. 2, at 113-123 (2d ed. 1861).

Several other cases involving liberative prescription also turned upon the classificataion of the cause of action. In *Woodward v. St. Cyr*,²³ a man left his car for repairs with a mechanic who failed to take proper care of it, causing loss to the owner. The claim for damages was met with the plea of the one-year tort prescription, but the court considered the relationship between the parties as one of deposit, giving the depositor ten years within which to pursue an action against the depositary.

In *American Ins. Co. v. Hartford Acc. & Indem. Co.*,²⁴ the court found a buyer-seller relationship as the basis of the plaintiff's claim for damages caused by the breaking of a defective axle, and therefore the action was one in redhibition subject to its own rules of prescription.²⁵

In *DeRouin v. Hinphy*,²⁶ there was a document which read "I have this day borrowed \$12,100 from David DeRouin, to be paid on demand." If treated as an acknowledgment of indebtedness for money loaned, the prescriptive period would be three years,²⁷ but the court considered the last phrase as a promise to pay and therefore classified the document as a promissory note, for which the prescription is five years.²⁸

In *Calvert v. Harper*,²⁹ an insurance agent paid certain premiums on behalf of the insured, and it was more than three years later when this action was brought for recovery. The court held that it was not a claim for repayment of a loan, nor the action on an account, but by reason of subrogation the claim was the same as an original claim for the premiums, which has been classified as an ordinary personal action subject to the general ten-year prescription.

In *Lewis Roy Motors v. Pontier*,³⁰ the plaintiff sought a deficiency judgment after foreclosure of a chattel mortgage because the proceeds of the execution were insufficient to discharge the indebtedness. Since the basis of the suit was the defendant's original promissory note, the court held the appropriate prescription to be five years,³¹ dismissing the contention that the trial court's order for the use of executory process was a judg-

23. 201 So.2d 205 (La. App. 4th Cir. 1967).

24. 198 So.2d 757 (La. App. 1st Cir. 1967).

25. LA. CIV. CODE arts. 2534, 2545-2546.

26. 209 So.2d 352 (La. App. 4th Cir. 1968).

27. LA. CIV. CODE art. 3538.

28. *Id.* art. 3540.

29. 205 So.2d 193 (La. App. 2d Cir. 1967).

30. 204 So.2d 423 (La. App. 3d Cir. 1967).

31. LA. CIV. CODE art. 3540.

ment subject to a ten-year prescription.³² Further, the court indicated that the new starting point for the running of prescription, after the interruption of the executory proceeding, was the date of the sheriff's sale, at which time the deficiency and its amount were first established.

In *Pelican State Associates, Inc. v. Winder*,³³ the court of appeal reversed the trial court and held that the claim of a hospital for room and board, X-rays, drugs, and so forth, was an action on account and prescribed in three years.³⁴ A writ of review has been granted, so further comment is withheld at this time.³⁵

In *Thomas v. Employers Mutual Fire Ins. Co.*,³⁶ an action for medical expenses and personal injuries under the uninsured motorist provision of an automobile insurance policy was held to be an action *ex contractu* but subject to a one-year prescription because of the special provision in the insurance contract. A writ of review has also been granted in this case.³⁷

To reiterate a comment made several years ago—

“. . . Instead of having so many different prescriptive periods, with the resulting manipulation of the classification of the nature of the cause of action, all liberative prescriptions could be made uniform at ten years, or perhaps limit the groups to two, using the five- and ten-year terms. This would also take into account the tremendous change in the modern economic system which is so much predicated upon an extremely extensive credit basis. . . .”³⁸

Interruption of Prescription

A debtor's acknowledgment of his indebtedness constitutes an interruption of the prescription,³⁹ and the partial payment of a debt is clearly such an acknowledgment. In *Marr v. Johnson*,⁴⁰ this is carried one step further in the holding that the issuance of a check for the purpose of a partial payment constitutes an interruption even if the check is not honored by the bank or

32. *Id.* art. 3547.

33. 208 So.2d 355 (La. App. 1st Cir. 1968).

34. LA. CIV. CODE art. 3538.

35. 252 La. 178, 210 So.2d 56 (1968).

36. 208 So.2d 374 (La. App. 1st Cir. 1968).

37. 252 La. 177, 210 So.2d 56 (1968).

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

39. LA. CIV. CODE art. 3520.

40. 204 So.2d 806 (La. App. 2d Cir. 1967).

converted to cash by the debtor. This is perfectly sound because the basis of the interruption is the acknowledgment by the debtor and not the receipt of cash by the creditor.

In *Klotz v. Nola Cabs*,⁴¹ a taxi struck a parked police car, injuring the policeman and damaging the vehicle. A suit was timely filed for the personal injuries; and on the date set for trial, more than one year later, the City of New Orleans intervened to claim recovery for the damages to their car. The court held that the city's claim had been prescribed by one year, and the policeman's suit for personal injury did not constitute an interruption in favor of the city's claim because this was a totally different cause of action for property damage.

Informality in Auction Sale

It should be noted that the jurisprudence has added a condition to Civil Code Article 3543, which provides the two-year prescription to cure defects in judicial sales, in limiting the benefit of this plea to purchasers in good faith.⁴²

MINERAL RIGHTS

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MINERAL SERVITUDES

Use

*Pan American Petroleum Corp. v. O'Bier*¹ is an addition to the rules of use applicable to mineral servitudes. Production of gas was obtained from the servitude tract in question and was continued for a period of sixteen years, at which time the pipeline connections were removed and the well capped. Two events were relied upon by the servitude owners as constituting interruptions of prescription. First, the landowner, who also had an interest in the minerals, continued to use gas to supply his residence even after the well was shut in because it was no longer capable of production in paying quantities. Second, for a number of years, the lessee of the tract paid or offered to pay shut-in royalties to those entitled to share in them, including both the servitude owners and the landowner.

41. 209 So.2d 158 (La. App. 4th Cir. 1968).

42. Middle Tennessee Council, Boy Scouts of Am. v. Ford, 205 So.2d 867, 877 (La. App. 1st Cir. 1967), *citing* Bordelon v. Bordelon, 180 So.2d 855 (La. App. 4th Cir. 1965).

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1. 201 So.2d 280 (La. App. 2d Cir. 1967).