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Donation - Optional Payment Homestead Stock May Be the Subject of a Manual Donation

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NOTES

DONATION—OPTIONAL PAYMENT HOMESTEAD STOCK MAY BE THE SUBJECT OF A MANUAL DONATION

The decedent had owned optional payment shares in a homestead association represented by a certificate or optional share account book. Three days prior to her death, she filled in the back of her optional share account book transferring and assigning to minor donees and donees' mother all right, title, and interest in all optional payment shares represented by the certificate, and she gave the book to donees' mother. The day before the death of decedent, the mother presented and surrendered the book to the homestead association which transferred the $11,630.48 balance to defendants. Decedent's optional share account book and its ledger card were cancelled and a new optional share account book and accompanying ledger card were issued in the name of defendants. The administrator of decedent's succession filed an action to have returned to the succession decedent's optional share account book, or alternatively, judgment against defendants in the amount of $11,630.48. The court of appeal affirmed the trial court's judgment dismissing plaintiff's suit and *held* that decedent's delivery of the executed transfer form and the optional share account book to defendant was a valid manual gift of the money represented by the book. *Menard v. Muhs*, 196 So.2d 536 (La. App. 4th Cir.), *cert. denied*, 250 La. 744, 199 So.2d 181 (1967).

Under Louisiana law, a donation *inter vivos* is defined as an act by which the donor divests himself presently and irrevocably of the thing given in favor of the donee who accepts it.[1] The Louisiana Civil Code requires that the donation *inter vivos* of immovable property or of incorporeal rights must be made by a notarial act under penalty of nullity.[2] The *inter vivos*

1. LA. CIV. CODE art. 1468.

2. *Id.* art. 1536. Article 931 of the Code Napoleon formulates the rule as follows: "All instruments which contain an *inter vivos* donation shall be concluded before a notary in the form usual for contracts, and the original will be kept on file by the notary, under the sanction of nullity." The rule was formulated by Daguesseau and made its appearance in the French *Ordinance* of 1731. 3 PLANIOL, CIVIL LAW TREATISE no. 2525 (La. St. L. Inst. transl. 1959). The reasons for this requirement are: 1. The protection of the donor, for the freedom of his action can be fraudulently influenced, and he can deprive himself of his property under a dominating outside influence. 2. The revocability of the donation. This seems to have been the principal consideration, for if the instrument is under private signature the donor has the power to abolish the donation by destroying the evidence of title; thus the requirement that the instrument be filed and preserved by the notary. *Id.* no. 2526.

donation of movables may be made through the use of an authentic act whether the movable is corporeal or incorporeal.[3] However, the manual gift is the donation of corporeal movables accompanied by real delivery and is exempt from this formality.[4]

The requirement of authentic form has been the source of some judicial confusion. The main problems have arisen in connection with alleged manual donations of credit instruments and other documents which purport to have legal effect. When dealing with such documents it becomes necessary to distinguish between the document and the obligation which it represents.[5] The necessity of this distinction arises out of the fact that the document is a corporeal movable and may be donated by manual delivery.[6] The obligation or credit represented by the document, however, is an incorporeal movable and may be validly donated only through the use of an authentic act.[7] The practical problem, then, becomes one of determining whether the manual donation of a legal document results in the valid transfer of both document and obligation.

Louisiana jurisprudence has been inconsistent in making a distinction between the document and the obligation which it represents. On the one hand, there are cases in which the distinction between the corporeal document and the incorporeal credit has been followed and the requirement of authentic form applied. Thus certificates of deposit,[8] the donor's own promissory note,[9] capital stock in a homestead,[10] and the promissory note of a third party[11] have been held to be insus-

3. LA. CIV. CODE art. 1538.

4. *Id.* art. 1539. In French law exceptions to the formality requirement for donations included manual donations of corporeal chattels and credit instruments payable to the bearer. The actual transfer of the chattel suffices to transfer the title by donation. This is the only remaining case in French law of tradition as a mode of transfer, distinct from the agreement. The rule is traditional in French law. Manual gifts were implicitly recognized by Article 6 of the Budgetary Act of May 18, 1850, which subjected instruments and judgments acknowledging a manual gift to the respective tax. 3 PLANIOL, CIVIL LAW TREATISE nos. 2533, 2536, 2537 (La. St. L. Inst. transl. 1959).

5. LA. CIV. CODE art. 1762. *See also* Comment, 9 TUL. L. REV. 602 (1935).

6. LA. CIV. CODE art. 1539.

7. *Id.* art. 1536.

8. Vercher v. Roy, 171 La. 524, 131 So. 658 (1930).

9. Succession of Leroy, 157 La. 1077, 103 So. 328 (1925); Miller v. Andrus, 1 La. Ann. 237 (1846); Barriere v. Gladding, 17 La. 144 (1841).

10. Succession of McGuire, 151 La. 514, 92 So. 40 (1922). Capital stock in a homestead was held to be an incorporeal and could not be the object of manual donation. However, the Uniform Stock Transfer Act permitted valid transfer without authentic act. *See* LA. R.S. 12:601-651 (1950).

11. Succession of DePouilly, 22 La. Ann. 97 (1870).

ceptible of being the object of a manual donation. On the other hand, the courts have allowed the manual donation of cash,[12] bonds payable to bearer,[13] and checks[14] to result in the transfer of the obligation without requiring authentic form. The distinction between the former and latter class of cases is not readily apparent but seems to hinge upon whether some act other than delivery, such as endorsement, is required.[15]

The instant case involved an alleged manual donation of homestead association "optional payment" shares. Louisiana law allows homestead associations to divide their capital into different classifications of stock,[16] including "optional payment" shares which are installment shares. The purchaser may, after the first payment has been made, deposit any amount at any time desired in lieu of the regularly prescribed payment.[17] This type of stock is distinguished from "fully paid" shares in that fully paid shares are paid for in full at the date of their issue.[18] Optional payment shares may be redeemed for fully paid shares and the value of either type of stock may be withdrawn at any time.[19] Optional payment shares are further distinguished from fully paid shares in that a certificate is issued to the owner of the latter while the owner of the former receives an account book in which all deposits and withdrawals are entered. In-

12. Succession of Byrnes, 206 La. 1026, 20 So.2d 301 (1944); Guss v. Mathews, 179 La. 1033, 155 So. 765 (1934); Gibson v. Hearn, 164 La. 65, 113 So. 766 (1927); Succession of Zacharie, 119 La. 150, 43 So. 988 (1907); Succession of Bidwell, 51 La. Ann. 1970, 26 So. 692 (1899); Succession of Hale, 26 La. Ann. 195 (1874); Azar v. Azar, 185 So.2d 113 (La. App. 4th Cir. 1966); Succession of Moran v. Moran, 25 So.2d 302 (La. App. 1st Cir. 1946); Ory Bros. v. Muller, 128 So. 903 (La. App. Orl. Cir. 1930).

13. Succession of Sanders, 171 La. 569, 131 So. 674 (1930); Succession of McBurney, 162 La. 758, 111 So. 86 (1926).

14. Succession of Leroy, 157 La. 1077, 103 So. 328 (1925); Succession of Turgeau, 130 La. 650, 58 So. 497 (1912); Succession of Desina, 123 La. 468, 49 So. 23 (1909); Stauffer v. Morgan, 39 La. Ann. 632, 2 So. 98 (1887); Burke v. Bishop, 27 La. Ann. 465 (1875); Succession of DePouilly, 22 La. Ann. 97 (1870); Succession of Browne, 176 So.2d 217 (La. App. 2d Cir.), *cert. denied*, 248 La. 365, 178 So.2d 656 (1965).

15. In French law it is a traditional rule that manual gifts comprise only corporeal chattels. A creditor's claim cannot, therefore, be transferred by a manual gift, even if it is represented by a negotiable instrument transferable by endorsement. The ownership of the claim can be transferred only by an appropriate endorsement. By exception, a creditor claim represented by an instrument to the bearer can be the object of a manual gift. In such a case, the claim is said to be incorporated in the instrument and belonging to the actual bearer. 3 PLANIOL, CIVIL CODE LAW TREATISE no. 2539 (La. St. L. Inst. transl. 1959).

16. LA. R.S. 6:740 (1950).

17. *Id.* 6:741(1)(b).

18. *Id.* 6:741(3)(a).

19. *Id.* 6:739, 791.

cluded within the account book is a "certificate" for the number of shares for which the depositor initially subscribes. The balance in the account book determines the number of shares actually owned at any given time. Certificates are not issued for additionally acquired shares except upon request.[20]

Stock certificates have been consistently treated by the courts as incorporeal movables not subject to manual donation.[21] However, it has been held that the Uniform Stock Transfer Act establishes a method of transferring these incorporeal movables which supersedes the authentic act requirement of the Civil Code for donations *inter vivos*.[22] Although a valid transfer may be made under its provisions, it has been held that such a transfer is not a manual gift and is still subject to collation.[23] Stock may be transferred under the Uniform Stock Transfer Act by delivery of the "certificate" endorsed either in blank or to a specified person by the person appearing on the certificate to be the owner of the shares represented thereby.[24] When endorsed to a specified person, that person is considered the owner unless and until he endorses the certificate to another.[25]

The sole issue in the instant case was whether a valid donation *inter vivos* of the "optional payment" shares had been made. To resolve this question it was necessary to determine (1) whether the account book was a "certificate" sufficient in legal contemplation to bring the transfer within the provisions of the Uniform Stock Transfer Act, or (2) whether the account book represented cash thus making the account similar to a savings or checking account.

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20. Menard v. Muhs, 196 So.2d 536, 538 (La. App. 4th Cir. 1967).

21. Succession of McGuire, 151 La. 514, 92 So. 40 (1922); Succession of Sinnott v. Hibernia Nat'l Bank, 105 La. 705, 30 So. 233 (1901); LeBlanc v. Volker, 198 So. 398 (La. App. Orl. Cir. 1940).

22. Succession of McGuire, 151 La. 514, 92 So. 40 (1922); Succession of Hall, 198 So.2d 511 (La. App. 2d Cir. 1967); LeBlanc v. Volker, 198 So. 398 (La. App. Orl. Cir. 1940). The Uniform Stock Transfer Act is LA. R.S. 12:601-651 (1950).

23. In LeBlanc v. Volker, 198 So. 398, 401 (La. App. Orl. Cir. 1940), the court, after stating a manual gift is not subject to collation, went on to say "[t]he transfer of the homestead stock in this case was, in view of the provisions of the Uniform Stock Transfer Statute, a valid donation inter vivos, but it is, nevertheless, the subject of collation, since it is not and could not be the subject of a manual gift." *But see* Succession of Gomez, 223 La. 859, 67 So.2d 156 (1953), where the court stated that manual gifts are not per se exempt from collation.

24. LA. R.S. 12:624(A)(1) (1950).

25. *Id.* 12:623.

The trial court held that regardless of whether the account book represented "stock" or "cash" a valid donation had occurred. The court of appeal, however, preferred the "cash concept" and made an analogy between the homestead account and money on deposit in a bank checking account. The executed transfer form contained in the back of the account book was said to be in all respects similar to an executed check in the full amount on deposit in a checking account. It was not considered an obligation but an unconditional order to pay. It was not viewed as representing money but for all practical intents as being money. Thus the court held that the giving of the optional share account book was a manual gift of the corporeal movable money, the transfer form and account book simply being the "vehicle of delivery."[26]

The above reasoning appears to be consistent with the Louisiana jurisprudence regarding checks. It has been held that the execution and delivery of the donor's own check is a valid manual donation where it has been accepted or certified by the drawee before the death of the donor.[27] The manual donation of the check of a third party drawn to the donor's order and endorsed by the donor is valid, although the check is presented for payment after the donor's death.[28] Seemingly, as a check is not considered an obligation but an unconditional order to pay, the sole test applied is one of irrevocability. The reasoning in the first instance is that the donor loses control over the funds on deposit as soon as the check is accepted or certified by the drawee.[29] In the second instance, the donor loses control over both the check and the credit represented thereby, by endorsement and delivery.[30] There appears to have been only one Louisiana case dealing with the situation of a donor's check being presented for payment after his death. In *Succession of Schneider*[31] the court held that the gift of a check did not, as a matter of law, constitute a valid manual gift of corporeal movable effects. It was held that the donation of a check was

26. Menard v. Muhs, 196 So.2d 536, 538 (La. App. 4th Cir. 1967).

27. Stauffer v. Morgan, 39 La. Ann. 632, 2 So. 98 (1887); Succession of DePouilly, 22 La. Ann. 97 (1870); Succession of Browne, 176 So.2d 217 (La. App. 2d Cir.), *cert. denied*, 248 La. 365, 178 So.2d 656 (1965).

28. Succession of Leroy, 157 La. 1077, 103 So. 328 (1925); Burke v. Bishop, 27 La. Ann. 465 (1875).

29. LA. R.S. 7:70, 187, 188 (1950). *See also* Note, 42 TUL. L. REV. 669, 672 (1968).

30. LA. R.S. 7:30, 52 (1950). *See also* Note, 42 TUL. L. REV. 669, 672 (1968).

31. 199 So.2d 564 (La. App. 3d Cir.), *cert. denied*, 251 La. 34, 202 So.2d 652 (1967).

not a gift of the money represented thereby, but merely the gift of an incorporeal right to the donee to present the check to the bank for payment. Since a check does not operate as an assignment of funds,[32] the drawer retained the power to revoke the gift at any time before the check was accepted by the drawee.

While the court in the instant case was correct in upholding the validity of the donation, it would appear that the analogy drawn between the executed transfer form and a check is incorrect. Treating the two instruments alike overlooks the fact that a check is a negotiable instrument.[33] Such instruments may be negotiated by transfer from one person to another so as to constitute the transferee a holder,[34] who may enforce payment in his own name.[35] If payable to bearer they are negotiated by delivery; if payable to order they are negotiated by the endorsement of the holder completed by delivery.[36] The account book in the instant case does not appear to be a negotiable instrument as it is not an unconditional order to pay.[37] On the face of the certificate contained therein is stated the condition that the account will not be transferred "unless and until" the transferee has made application and has been accepted as a member of the association.[38] It would appear that if the account must be regarded as cash, then it is more closely related to a bank savings account. It has generally been held that an account on deposit in a bank is an incorporeal right, the valid donation of which would require a notarial act.[39] Where a power of attorney was given authorizing one to withdraw any money he desires from a bank savings account, this did not of itself operate as a donation of the funds even though they were reduced to possession.[40] However, where it was shown satisfactorily that the document was executed as a means of establishing a donation and the donor's volition to make a gift was still in operation when the donee actually received the money

32. LA. R.S. 7:189 (1950).
33. *Id.* 7:185.
34. *Id.* 7:191.
35. *Id.* 7:51.
36. *Id.* 7:30.
37. *Id.* 6:1(2).
38. Brief for Appellees, Appendix 1, Menard v. Muhs, 196 So.2d 536 (La. App. 4th Cir.), *cert. denied*, 250 La. 744, 199 So.2d 181 (1967).
39. Succession of Housknecht, 135 La. 818, 66 So. 233 (1914); Succession of Grubbs, 170 So.2d 256 (La. App. 2d Cir.), *cert. denied*, 247 La. 409, 171 So.2d 666 (1965); Bordelon v. Brown, 84 So.2d 867 (La. App. 2d Cir. 1956); Northcott v. Livingood, 10 So.2d 401 (La. App. 2d Cir. 1942).
40. Succession of Housknecht, 135 La. 818, 66 So. 233 (1914).

from the bank, the manual donation was valid.[41] Therefore in order to complete the manual gift of funds on deposit in a bank it is sufficient that the will of the donor to donate operates simultaneously with the actual receipt of the corporeal money into the possession of the donee.[42]

Applying the results of the jurisprudence to the facts of the instant case, a valid donation would have occurred under either the check concept or the savings account concept. There was a manual delivery of the account book followed by cancellation of that book and an actual transfer of the funds to the donee during the lifetime of the donor. The donative intent was established, and the funds were put beyond the control of the donor; thus the gift was irrevocable.[43] Real delivery was accomplished, as the money was put into the power and control of the donee.[44] However, under either concept, if the donor had died before transfer of the funds to the donee, there would have been no real delivery of corporeal movable effects within the meaning of Civil Code article 1539 and thus no valid manual gift.[45]

While the court adopted the "cash concept" it did not clearly indicate whether the Uniform Stock Transfer Act was applicable. It is submitted that the statute should have been applied. The court's opinion seemed to be based upon the characterization of optional payment shares in a homestead made in *Succession of Mulqueeny*[46] where such stock was viewed essentially as funds deposited at a fixed rate of interest, both principal and interest being subject to withdrawal at any time. That case involved contradictory testamentary dispositions. The testator had stipulated a number of cash legacies in addition to a legacy of any homestead stock or "any interest I may have therein" to another legatee. After payment of the succession debts there was not sufficient cash to meet the legacies as the bulk of the estate remained in the homestead accounts. The Louisiana Supreme Court applied Civil Code article 1635[47] and held that

41. Succession of Gorman, 209 La. 1092, 26 So.2d 150 (1946).
42. *Id.*
43. LA. CIV. CODE art. 1468.
44. *Id.* art. 2477: "The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer."
45. Succession of Schneider, 199 So.2d 564 (La. App. 3d Cir.), *cert. denied*, 251 La. 34, 202 So.2d 652 (1967); *cf.* Bordelon v. Brown, 84 So.2d 867 (La. App. 2d Cir. 1956).
46. 248 La. 659, 667, 181 So.2d 384, 387 (1965).
47. LA. CIV. CODE art. 1635: "If the effects do not suffice to discharge the particular legacies, the legacies of a certain object must be first taken

since there was no reference to definitely designated certificates of stock the legacy was of an uncertain object. Therefore the homestead accounts were treated as cash and the legacies were granted out of the accounts. The holding of *Mulqueeny* has no application to the instant case because in *Mulqueeny* the court was concerned with ascertaining the true intention of the testator so as to give full effect to the dispositions stated in the will. In the instant case there was an actual transfer of the account book coupled with sufficient proof of the donor's intent.

While there are no Louisiana cases directly in point concerning the legal nature of the certificate involved, it has been held in another state that the provisions of the Uniform Stock Transfer Act are applicable to shares in savings and loan associations and that a passbook of such associations *including an optional share certificate* is a stock certificate within the meaning of that act.[48] In addition, it has been held in Louisiana that a "certificate" of stock is merely paper evidence of ownership of stock created for convenience.[49] Fully paid shares of homestead stock have also been characterized as cash on deposit[50] in the same manner as optional payment shares, and there is no doubt that they may be transferred under the provisions of the Uniform Stock Transfer Act.[51] It would appear, therefore, that the optional share certificate should be regarded as a stock certificate which may also be validly transferred under the provisions of that act. The account book in the instant case contained a "certificate" for fifteen initially subscribed shares with a par value of $100.00 per share. According to the terms of the transfer form, the stock represented by the account book was tranferable on the books of the association when presented by the holder thereof, in person, and properly endorsed.[52] The certificate was presented by the donee properly endorsed and a transfer was accomplished. Therefore it is not the similarity of the homestead account with checks or cash which should have governed, but the Uniform

out. The surplus of the effects must then be proportionally divided among the legatees of sums of money, unless the testator has expressly declared that such a legacy shall be paid in preference to the rest, or that the legacy is given as a recompense for services."

48. Marino Estate, 88 Pa. D. & C. 35 (1954).

49. Succession of McGuire, 151 La. 514, 92 So. 40 (1922).

50. Succession of Homan, 202 La. 591, 605, 12 So.2d 649, 653 (1943); Dimitry v. Shreveport Mut. Bldg. Ass'n, 167 La. 875, 877, 120 So. 581, 582 (1929).

51. Succession of McGuire, 151 La. 514, 92 So. 40 (1922); LeBlanc v. Volker, 198 So. 398 (La. App. Orl. Cir. 1940).

52. Brief for Appellees, Appendix 1, Menard v. Muhs, 196 So.2d 536 (La. App. 4th Cir.), *cert. denied*, 250 La. 744, 199 So.2d 181 (1967).

Stock Transfer Act. Applying its provisions would have eliminated the need for making any distinction between the corporeal document and the incorporeal obligation which it represents. That act makes no such distinction and merely provides for a transfer of ownership by endorsement and delivery of the certificates.[53] In addition there would have been no doubt as to the validity of the transfer in the event of the death of the donor prior to receipt of the funds. A proper endorsement will be effectual even though the transferor may die or become legally incapacitated or no consideration has been received.[54] In *Succession of Hall*[55] a valid donation was upheld under the provisions of the Uniform Stock Transfer Act when the donor had endorsed stock certificates, handed them to the donee who replaced them in the donor's bank box where they remained until after the donor's death. Such a result gives true effect to the will of the donor.

While Louisiana Civil Code art. 1536 prohibits the donation *inter vivos* of incorporeal rights except by authentic act, its provisions have been superseded by the Uniform Stock Transfer Act as well as by the Negotiable Instruments Law. Both of these statutes provide a method for effectively transferring incorporeal rights or, at the very least, transferring title to instruments which control the enforcement of these rights. Recognizing this view, or what is perhaps the better view—that article 1536 of the Civil Code applies only to such credits or obligations not transferable by delivery[56] would give full effect to the provisions of those statutes and would render unnecessary the technical and sometimes artificial distinctions made in the noted case.

In conclusion it must be pointed out that while the requirement of formality with regard to donations has for its purpose the protection of the alleged donor as well as his heirs by requiring evidence of his donative intent, this policy must be balanced

53. LA. R.S. 12:624 (1950).

54. *Id.* 12:629.

55. 198 So.2d 511, 514 (La. App. 2d Cir.), *cert. denied*, 250 La. 974, 200 So.2d 664 (1967). The court found both sufficient intent and delivery to sustain the validity of the gift.

56. *See* Succession of Leroy, 157 La. 1077, 103 So. 328 (1925). The concurring opinion of Justice St. Paul states that Article 1536 should apply only to such credits as are not transferable by mere delivery of title: "Treasury notes, bank notes, gold and silver certificates, are likewise mere promises to pay money; yet no one doubts that *they* are subject to *manual* gift under R.C.C. art. 1539. Government bonds, state bonds, municipal bonds, corporate bonds are also mere promissory notes, with interest coupons attached, and this court has held that *these* are proper objects of a manual gift without formality whatever, and by mere *delivery* to the donee." *Id.* at 1084, 103 So. at 331.

against the desire and need for stability and efficiency with regard to transfers of commercial documents. The uniform laws were adopted to fulfill these needs with a minimum of formality. Nor should the absence of a notarial act arouse fear that the donor will not be protected against fraud and coercion. The Uniform Stock Transfer Act provides such protection by allowing rescission in the event an endorsement or delivery has been made under fraud, mistake, or duress.[57]

Fred Sutherland

PRESCRIPTION OF A CREDIT CARD PURCHASE

Suit was filed by a credit card corporation to recover a sum of money allegedly due for cardholder's purchases made seven years before from various business establishments. Defending cardholder answered, alleging that the credit card purchase was an open account and thus prescriptible in three years. No payments had been made between purchase and suit. *Held*, that the prescriptive period of three years was applicable, and that since the plaintiff was an assignee, the period had run. *Carte Blanche Corp. v. Pappas*, 216 So.2d 917 (La. App. 2d Cir. 1968).

Credit cards are a modern phenomenon,[1] and their increasing use has recently caused considerable debate as to the exact legal nature of the credit card transaction.[2] In the instant case, the main question confronting the court was the classification of the cause of action arising from a credit card purchase. It is settled that the prescriptive period for an obligation arising *ex contractu* is generally ten years,[3] and because there was a written contract between the plaintiff and the defendant it could be argued that a ten-year period would be applicable. On the other hand, the prescriptive period for an open account, which is also an obliga-

57. LA. R.S. 12:630 (1950).

1. The first case dealing with a credit card was Wanamaker v. Megary, 24 Pa. Dist. 778 (Phil. Mun. Ct. 1915). One of the best known credit card plans, Diners' Club, was founded in 1950. In 1964, there were approximately 70 consumer credit card plans in the United States. By 1967, the number of plans had increased to about 1,000. Wall Street Journal (Midwest Edition), Jan. 17, 1967, at 1, col. 8.

2. Bergsten, *Credit Cards—A Prelude to the Cashless Society*, 8 B.C. IND. & COM. L. REV. 485 (1967); Davenport, *Bank Credit Cards and the Uniform Commercial Code*, 1 VALPARAISO U.L. REV. 218 (1967); Comment, 48 CALIF. L. REV. 459 (1960); Note, 35 NOTRE DAME LAW. 225 (1960).

3. LA. CIV. CODE art. 3544: "In general, all personal actions, except those before enumerated, are prescribed by ten years."