Louisiana Law Review

Volume 30 | Number 2
The Work of the Louisiana Appellate Courts for the 1968-1969 Term: A Symposium
February 1970

Private Law: Prescription

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PRESCRIPTION

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LIBERATIVE PRESCRIPTION

In *Carte Blanche Corp. v. Pappas*,[1] this well-known credit card company sued for the amount of certain purchases and one of the defenses was liberative prescription. The prescriptive period for an action on account is three years,[2] whereas for a general action on contract the period is ten years.[3] Since the debts were incurred as "accounts for merchandise . . . at the time of origin they were open accounts for which purchasers received monthly statements,"[4] and since the assignee credit card company steps into the shoes of the assignor, the court held the action to be one "on account" and subject to the three-year prescription.

The conclusion of the court in this case may well be sound, but it would be too broad a generalization to say that all claims by credit card companies will be classified as "actions on account." It is more significant to emphasize the court's point that the assignee has "the rights possessed by the assignor at the time of the assignment"[5] so that if the original claim was that of an "innkeeper . . . on account of lodging and board" the appropriate prescription against the credit card company would be one year under Civil Code article 3534; and if the original claim was based on a general contract, the ten-year prescription under Civil Code article 3544 would apply.

Pursuant to this analysis, where an insurance agent transmits premiums on behalf of his client to the insurer, the agent's claim against his client (the insured) is on the general contract of insurance and subject to the ten-year prescription,[6] even though the agent may have sent a monthly statement to his client showing the balance due on his account.

In *Demery v. Voelker*,[7] a suit against a notary for negligence

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1. 216 So.2d 917 (La. App. 2d Cir. 1968).
2. LA. CIV. CODE art. 3538.
3. *Id.* art. 3544.
4. Carte Blanche Corp. v. Pappas, 216 So.2d 917, 919 (La. App. 2d Cir. 1968).
5. *Id.* For a discussion of the "assignment" and other analytical theories of the credit card operation, *see* Note, 30 LA. L. REV. 162 (1969).
6. *See* Cusimano, Inc. v. Cusimano, 216 So.2d 344 (La. App. 4th Cir. 1968).
7. 216 So.2d 328 (La. App. 4th Cir. 1968).

in failing to record an act of servitude was treated as sounding in tort although it is indicated that the claim "might possibly have been filed either under contract or tort."[8] The answer to this question is not really clear, and it would be necessary to establish succinctly the nature of the notary's duties and the relationship with his client. In this connection, there should also be examined for comparison the classification problems incident to malpractice suits against physicians.[9]

In *Pelican States Associates, Inc. v. Winder*,[10] the court of appeal held that the claim of a hospital for room and board, x-rays, drugs, and so forth was an action on account within the meaning of Civil Code article 3538 and therefore prescribed in three years. On this issue, the Louisiana Supreme Court[11] confirmed the classification of the nature of the cause of action—but neither of the two judicial opinions cites any authority for this conclusion.

Articles 3534-3543 of the Civil Code contain the enumeration of several different kinds of actions for which the specific prescriptive periods range from one year to five years. Three of these items in article 3538 refer to "accounts" which are subject to a three-year prescription. Article 3544 provides: "In general, all personal actions, except those before enumerated, are prescribed by ten years."

Hospital charges for room and board, and so on, are not included among "those before enumerated" and should therefore be subject to the general ten-year prescription for personal actions. If the submission of a statement or an account were to transform any creditor's claim into an "action on account," then every action for a claim even among "those before enumerated" for which a statement or account had been submitted would be an "action on account." This hardly fits in with the purpose of the redactors in making such a detailed enumeration, followed by the omnibus provision and the exception in Article 3544.

A clear judicial interpretation of the matter was made some

8. *Id.* at 331.

9. *See* cases and discussion in 24 LA. L. REV. 210, 213 (1964); 25 LA. L. REV. 355, 356 (1965); 26 LA. L. REV. 539-541 (1966).

10. 208 So.2d 355 (La. App. 1st Cir. 1968).

11. Pelican States Associates, Inc. v. Winder, 253 La. 697, 219 So.2d 500 (1969).

time ago in *Antoine v. Franichevich*,[12] where the court stated "the prescriptive period is fixed by the nature of the debt and not by the fact that an account is rendered showing that the debt is due" and "in the Code it is intended that the word [accounts] shall include sales on account, and not the mere fact that an account must be rendered."

Freiberg v. Rembert[13] was instituted as an action on an "open account," the several items of which were spread over a period of several years. Within three years prior to suit, some payments had been made and these were imputed by the debtor to certain specific items; this left unpaid certain other items which dated more than three years prior to suit and as to these older items the court held that liberative prescription had run and discharged the debtor.

In terms of legal analysis, this decision leaves an unclear impression on three issues: (1) what is the nature of an open account for which the liberative prescription is three years?[14] (2) what is the effect of a debtor's imputation of payment on the nature of the cause of action? and (3) what is the starting point for the running of prescription on an "open account"?

To begin with, an action on an open account is a single claim and is not the cumulation of several separate claims, and a payment made by the debtor constitutes an acknowledgment which interrupts prescription for the balance of the account which continues to be one claim, as one whole.

To say that the debtor's imputations of payments to certain intermediate items does not constitute an interruption as to the earlier items and thereby results in their prescription, has the effect of changing the nature of the cause of action to a series of separate claims which contradicts the nature of the cause of action on an open account as a single claim.

The basic principle of the starting point for the running of liberative prescription is the time at which the creditor could have acted to enforce payment, that is, to institute suit if necessary. On a credit transaction, the creditor cannot enforce payment until the expiry of the credit period. The fact situations

12. 163 So. 784, 786 (La. App. Orl. Cir. 1935), *aff'd*, 184 La. 612, 167 So. 98 (1936). *See also* Jones v. Jones, 236 La. 52, 106 So.2d 713 (1958); 20 LA. L. REV. 235, 236 (1960).

13. 213 So.2d 104 (La. App. 1st Cir. 1968).

14. *See* LA. CIV. CODE art. 3538.

vary widely, but the principle remains the same. Similarly, an interruption of prescription by the acknowledgment inherent in a payment on account also reflects a basic principle which holds firm despite the variables in fact situations.

From the application of these principles to the case under consideration, it follows that the debtor's imputations may well cause the extinction and the elimination of certain specific items from the account. But this does not change the nature of the action from being a single claim for the balance of one whole account on which prescription starts to run anew after an acknowledgment through a partial payment, whether such payment is in reduction of the general balance or for specific items by the debtor's imputation.[15]

Another vexatious problem concerning classification of the nature of the cause of action was well settled in the companion cases of *Booth v. Fireman's Fund Ins. Co.*[16] and *Thomas v. Employers Mut. Fire Ins. Co.*[17] The action by an insured against his own insurer, under the "Uninsured Motorist Provision" of his liability policy, for damages caused by an uninsured motorist, was classified as an action *ex contractu*[18] arising out of the contract of insurance and not as an action *ex delicto*[19] arising from the tort of the uninsured motorist who caused the damage. The court's statements that "the uninsured motorist provision is not insurance or indemnification for the uninsured motorist, and the insurer does not stand in the shoes of the uninsured motorist who is the tortfeasor," and that "the intent of our uninsured

15. The court's statement "such imputed payments do not interrupt the tolling of prescription on the balance of the account" (213 So.2d at 107) is a confused mixture of civil law and common law terminology in a context where the presumed meaning in civil law concepts is that such payments do not interfere with the running of prescription—for which the court cites as authority the case of LeBoeuf v. Riera, 176 So.2d 216 (La. App. 4th Cir. 1965), which in turn refers to Cohen v. Toy, 150 So.2d 605 (La. App. 4th Cir. 1963). In this latter case, the creditor had terminated the debtor's "open account" and had put him on a "cash" basis, so that the debtor's subsequent imputation of payments on the "cash" purchase had nothing to do with the creditor's separate claim for the balance on the open account. The other case cited in *LeBoeuf* is Grand Isle Shipyard, Inc. v. St. Pierre, 163 So.2d 132 (La. App. 4th Cir. 1964) in which the creditor and debtor had a number of separate transactions which were on a "job-by-job" basis and here again the debtor's imputation of a payment against a specific item had no relation to any others because these were several separate claims and not an action on open account.

16. 253 La. 521, 218 So.2d 580 (1969).

17. 253 La. 531, 218 So.2d 584 (1969).

18. Ten-year prescription under LA. CIV. CODE art. 3544.

19. One-year prescription under *id.* art. 3536.

motorist statute and the policy endorsement issued thereunder is to afford protection to the insured when they become the innocent victims of the negligence of uninsured motorists"[20] give a clear description of the legal relationships in this fact situation. The decision is sound and well grounded, and it does away with the uncertainty and confusion of differences previously expressed by the courts of appeal.[21]

MINERAL RIGHTS

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MINERAL SERVITUDES

Prescription—Effect of Unit Operations

In *Barnwell, Inc. v. Carter*[1] the question whether a mineral servitude owner's rights remained alive turned on whether unit drilling operations conducted within ten years of the creation of the subject servitude interrupted prescription. The servitude had been created in 1954. A compulsory drilling unit was formed in 1962, and operations were conducted thereon but at a location off the servitude tract. A second well was drilled on the servitude tract and completed as a producer in 1966. The Second Circuit Court of Appeal affirmed a lower court judgment holding that prescription accruing against the servitude had been interrupted by the unit operations.

Although the decision rendered by the Louisiana Supreme Court in *Boddie v. Drewett*[2] had not been overruled at the time the unit drilling operations in question were conducted, the court chose to abide by and apply the decision later rendered in *Mire v. Hawkins*.[3] The latter decision expressly overruled *Boddie* as to the effect of dry hole drilling operations on a unit but at a location off a tract burdened by a mineral servitude included in the unit. *Boddie* had held that the operations were not effective as an interruption of prescription. *Mire* reversed that position.

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20. Booth v. Fireman's Fund Ins. Co., 253 La. 521, 527, 218 So.2d 580, 583 (1969).

21. *See* cases cited *id.* at 525 n.4, 218 So.2d at 582 n.4.

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1. 220 So.2d 741 (La. App. 2d Cir. 1969).

2. 229 La. 1017, 87 So.2d 516 (1956).

3. 249 La. 278, 186 So.2d 591 (1966).