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Private Law: Prescription

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Pledge

An interesting question involving an alleged private sale of pledged stock was raised in *D'Amico v. Canizaro*.[41] D'Amico had loaned $40,000 to G.B.C. Corporation, secured by the pledge of all of its corporate stock and the personal endorsement of the three corporate officers, including Canizaro. The pledge was evidenced by a stock power endorsed in blank. When the loan became in default, D'Amico had the stock registered in his name. However, before attempting to enforce the pledge, D'Amico entered into a continuing guaranty arrangement with Canizaro, whereby D'Amico agreed not to pursue Canizaro personally until his remedy had been exhausted against the other two endorsers. Both of the other endorsers subsequently filed bankruptcy.

Canizaro argued that D'Amico had effected a private sale of the stock by having it registered in his own name and thus was not entitled to a deficiency judgment. The court found the stock to be worthless, doubted that D'Amico would have taken it in satisfaction of so large an obligation, and held that no private sale had occurred as the result of registration in the pledgee's name. Its view was not altered by the fact that, in another lawsuit involving one of the stockholders, D'Amico had intervened and claimed to be the owner of some of the shares in dispute.

PRESCRIPTION

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ACQUISITIVE PRESCRIPTION

Allen v. Paggi Brothers Oil Co.[1] involves a number of interesting questions resulting from an unusual combination of facts. A piece of community property was sold by a married woman, identified as such in the deed, but without her husband's joinder. Acts of possession by the vendee were commenced only twenty years later. It was during this interval that the husband died. Pretermitting the issues concerning the tax adjudications

41. 256 La. 801, 239 So.2d 339 (1970).

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1. 244 So.2d 116 (La. App. 3d Cir. 1971), *writs denied*, 258 La. 247, 245 So.2d 713. The trial court sustained the defendants' plea of ten-year acquisitive prescription, and this was affirmed by the court of appeal which denied a rehearing. In refusing writs, the supreme court said: "Under the facts found by the Court of Appeal there is no error of law in the judgment."

and redemptions, and admitting *arguendo* that the activities of the vendee were sufficient to constitute an ordinary legal possession, there are still the following questions which merit attention.

The first question is whether the vendee obtained a "just title" because obviously it was not a good title. To meet the requirements of a just title for the ten-year acquisitive prescription, the Civil Code articles 3483-3486 provide that two elements must be established, an *objective* one and a *subjective* one. The objective test can be summed up in the requirement that the deed must appear to be a good one, and the subjective test is that the transferee "honestly believed" the transferor to be the real owner. Since ignorance of the law is no excuse,[2] the facts of the present case disclose a defect on the face of the deed (sale of community property by married woman without husband's joinder), thereby failing to meet the objective test of just title. The vendee's "honest belief" and the absence of any title examination may satisfy the subjective element of "just title" and supplement the legal presumption[3] for the additional requirement of "good faith,"[4] but leaves unfulfilled the objective requirement of "just title." Unfortunately, the subjective element of honest belief for "just title" often is confused with the separate and additional requirement of "good faith."

The second question arises as a result of the husband's death and the children's inheritance of his half of the community prior to any acts of possession by the vendee. Upon the husband's death, the wife became full owner of her one-half of the community and, by the after-acquired title doctrine, that interest may well have become perfectly vested in the vendee who thereby became co-owner in indivision with the children. The question then is whether the vendee's subsequent acts of possession were sufficiently overt and adverse to the children as co-owners to put them on notice that the vendee was claiming to be the sole owner of the whole property. This issue is pointed up in the dissenting opinion, but in the denial of rehearing and

2. LA. CIV. CODE art. 7.
3. LA. CIV. CODE art. 3481.
4. The description of the vendor as a married woman and including the name of her husband who was then living and who did not join in the sale, may even impugn the "good faith" of the vendee. *See* Heirs of Dohan v. Murdoch 41, La. Ann. 494, 6 So. 131 (1889).

review the question did not get the full airing which might have been given to it.

The third question is also pointed up in the dissenting opinion which takes the position that there must be a close time relationship between the acquisition of a void title (assuming it to be a "just title") and the commencement of the necessary acts of legal possession. A general statement of the broad question might be: "what is the starting point for the running of time in the ten-year acquisitive prescription?" Again, it is regrettable that the denial of rehearing and review precluded a fuller treatment of a question which has not been much discussed heretofore. To venture an opinion, it might be said that the ten-year acquisitive prescription begins to run when there is concurrence of all the requisite elements according to law.

LIBERATIVE PRESCRIPTION

Classification of Cause of Action

There are such great differences in the periods of time for the liberative prescription of various causes of action that disputes frequently center on the preliminary issue of the classification of the nature of the cause of action. When the suit is a personal action for damages, there is often a tendency and quick reaction to think of offenses or quasi offenses (tort) for which the prescription is one year.[5] Among the recent decisions it is encouraging to note several in which a more critical evaluation of both the transaction and the circumstances resulted in two classifications as breach of contract,[6] another as breach of warranty[7] and also one in which the majority applied the statutory three-year prescription[8] for an action against the surety on a public

5. LA. CIV. CODE art. 3536.

6. Kegler's Inc. v. Levy, 239 So.2d 450 (La. App. 4th Cir. 1970) (failure to make satisfactory installation of wall-to-wall carpeting did not give rise to an action in contract for redhibition or reduction in price, with one-year prescription under Civil Code articles 2534 and 2544, nor in tort with one-year prescription under Civil Code article 3536, but constituted a claim for breach of contract with ten-year prescription under Civil Code article 3544); Harper v. Metairie Country Club, 258 La. 264, 246 So.2d 8 (1971), *reversing* 234 So.2d 66 (La. App. 4th Cir. 1970) (damage caused by subcontractor's negligent operation of bulldozer constituted breach of contract with ten-year prescription under Civil Code article 3544).

7. Weathermasters Parts & Service, Inc. v. McCay, 242 So.2d 306 (La. App. 4th Cir. 1970).

8. LA. R.S. 38:2189 (1950).

works contract[9] while the dissent maintained that the court should have applied the ten-year warranty prescription under Civil Code articles 2762 and 3545.[10]

Fraud and Contra Non Valentem

The question of whether the doctrine of *contra non valenten non currit praescriptio* (prescription does not run against a person unable to act) could be maintained by a plaintiff whose prescriptive time ran out due to the defendant's fraud was presented in *Gaspard v. Liberty Mutual Insurance Co.*[11] The court refused to admit the plaintiff's evidence concerning the allegation of fraud and sustained the defendant's plea of prescription, basing its decision on the provision of Civil Code article 7 that ignorance of the law is no excuse. However, in view of Civil Code articles 1847-1849 and the general principle that fraud cuts across many substantive rules of law, as well as the general principle that a person should not be permitted to benefit from his own fraud to the disadvantage of the person defrauded, perhaps more consideration should have been given to the dissenting opinion. The supreme court's writ denial because "[t]he result is correct" does not really answer the basic question stated above.

Interruption

In *Cambre v. Gerald*[12] a husband and wife both signed a promissory note as joint makers, not *in solido*, and both also endorsed the note. Within the prescriptive period the husband made a partial payment which interrupted the prescription as to his liability. Both the majority and dissenting opinions agreed that the husband's partial payment did not interrupt the prescription which had run on the wife's original share of the obligation. However, the majority held that the husband's acknowledgment also interrupted the prescription against the wife's obligation as an accommodation endorser for the husband's original share; the dissent maintained that all of the wife's obligations had prescribed because, since they were not originally

9. Orleans Parish School Bd. v. Pittman Constr. Co., 244 So.2d 641 (La. App. 4th Cir. 1971).

10. *Id.* This is an important question and it is gratifying to note that a writ of review has been granted, 258 La. 355, 246 So.2d 679 (1971).

11. 243 So.2d 839 (La. App. 3d Cir. 1971), *writ refused*, 258 La. 357, 246 So.2d 680 (1971).

12. 246 So.2d 73 (La. App. 4th Cir. 1971).

bound *in solido*, the husband's partial payment did not constitute an interruption as against the wife. In addition to the issue of interruption of prescription and the applicability of special rules of the Negotiable Instruments Law, there may also be an issue of suretyship involved in this kind of a situation; a rehearing or a review might have cleared up some questions.

General Matters

In *Hayes v. Muller*[13] there is an interesting and useful discussion leading to the conclusion that liberative prescription runs against the claimant's "action" and not against the "cause of action." This is related to another question as to whether liberative prescription "extinguishes" or merely "bars" the debtor's obligation.[14] In the principal case, the court held that the earlier lawsuit was based on the same cause of action and interrupted prescription even though different relief was demanded in the later suit which had been instituted more than ten years after the transaction between the parties.

In *Leach v. Leach*[15] there is the statement that an earlier case held "the acknowledgement of an indebtedness evidenced by a judgment does not revive the judgment but merely interrupts prescription on the debt,"[16] and taken out of context this is given as one of the headnotes at the beginning of the report despite the assertion on the same page of the opinion that the debt ceases to exist when it is merged in the judgment.

MINERAL RIGHTS

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MINERAL SERVITUDES

There were two cases decided during the 1970-71 term involving questions of prescription of mineral servitudes. The

13. 243 So.2d 830 (La. App. 3d Cir. 1971), *writ refused*, 258 La. 215, 245 So.2d 411.

14. LA. CIV. CODE art. 1758: "Natural obligations are of four kinds:

. . . .

"3. When the action is barred by prescription, a natural obligation still subsists, although the civil obligation is extinguished."

15. 238 So.2d 26 (La. App. 1st Cir. 1970).

16. *Id.* at 29.

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