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Private Law: Prescription

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a part of his alleged deliveries to the job site by signed receipts. To establish the balance, he called a reconstruction expert to testify as to the amount of like materials actually used in construction. The court found such testimony "helpful" but insufficient to establish that the lien claimant had supplied materials in excess of that reflected by signed invoices.

The supplier further claimed interest at the rate of eight per cent from date of delivery as stipulated in his agreement with the contractor. The court refused, pointing out that the owner was not a party to that contract, and limited the claim for interest to the legal rate from the date the lien was perfected by filing.¹⁶

In *I-10, Inc. v. Justice*,¹⁷ a motel construction job was shut down and a notice of default recorded by the owner. The general contractor filed a lien affidavit in the amount of the entire contract price less payment received to date, his claim covering not only the balance due him but also for "potential or contingent liability to subcontractors." The Fourth Circuit rejected his claim that the lien secured contingent claims and ordered a partial erasure to that extent. His notice of suit also claimed that the "potential or contingent liability to subcontractors" was due in *quantum meruit*. This was viewed as a non-contractual claim, which was not secured by liens created by the PWA.

PRESCRIPTION

*Joseph Dainow**

Due to restricted budgets and corresponding reduction in pages for printing the LAW REVIEW, these comments are necessarily limited to those which are important and necessary. Under the circumstances, the more important comments are the critical ones; this should not be misunderstood as a generalization because, on the contrary, I find there has been a marked improvement in the way in which civil law problems are being handled and in the way that opinions are being written. With this observation, it is hoped that the comments which follow will be considered seriously and will serve a constructive purpose.

16. See *Pringle-Associated Mtg. Corp. v. Eanes*, 254 La. 705, 226 So.2d 502 (1969), for the proposition that the lien claimant's personal right against the owner does not arise unless *and until* the lien is filed.

17. 260 So.2d 89 (La. App. 4th Cir. 1972).

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ACQUISITIVE PRESCRIPTION

*Doiron v. Schwing Lumber & Shingle Co.*¹ started as a petitory action and finished with sustaining the defendant's pleas of ten-year and thirty-year acquisitive prescription. In connection with the ten-year plea, there was no dispute about the defendant's "possession," and the court made clear and succinct disposition of the issues concerning "good faith" and "just title." In also sustaining the thirty-year plea, the court took a position on the interpretation of certain Civil Code articles which raises an important question. Stated generally, when one Civil Code article incorporates by reference the applicability of provisions in another article, is this limited to the text of the incorporated article as it existed when the reference was enacted, or does the reference also include amendments which were subsequently made to the article in question?

In the section on thirty-year acquisitive prescription, Civil Code article 3505 provides that the rules established (in the preceding section) for ten-year acquisitive prescription "are applicable to the prescription of thirty years, except in the provisions contained in the present paragraph [section] which are contrary to or incompatible with them."² By reason of this incorporation by reference, the court treated as applicable the special rule in article 3478 which permits the running of ten-year acquisitive prescription against a minor (but to accrue only when he reaches 22).³ Article 3505 was first enacted as article 3471 of the Civil Code of 1825 in substantially the same language which is in the text today. At that time, the text of article 3442 (RCC 3478) provided for the shorter acquisitive

1. 251 So.2d 506 (La. App. 1st Cir. 1971), *writ refused*, 259 La. 903, 253 So.2d 223 (1971).

2. LA. CIVIL CODE art. 3505: "All the rules established in the preceding paragraph with regard to the prescription of ten years, are applicable to the prescription of thirty years, except in the provisions contained in the present paragraph, which are contrary to or incompatible with them."

3. LA. CIV. CODE art. 3478: "He who acquires an immovable in good faith and by just title prescribes for it in ten years. This prescription shall run against interdicts, married women, absentees and all others now excepted by law; and as to minors this prescription shall accrue and apply in twenty-two years from the date of the birth of said minor; provided that this prescription once it has begun to run against a party shall not be interrupted in favor of any minor heirs of said party." (*As amended by Acts 1920, No. 161, and 1924, No. 64. The further amendment of this article by Acts 1972, No. 346 is not relevant to the present discussion.*)

prescription with good faith and just title;⁴ and article 3488 of the Civil Code of 1825 provided⁵ that prescription does not run against minors. The qualified deletion of the suspension was introduced by the 1920 and 1924 amendments of the RCC 3478 and was expressly limited to "this prescription." To say that the legislators, in the 1920 and 1924 amendments, intended the new rule to be incorporated by reference for the thirty-year prescription, strikes me as unrealistic in fact and erroneous in analysis. I would therefore conclude that the present article 3505 does not incorporate by reference the rules in article 3478 on the running of prescription against minors.

Referring to the general question stated at the beginning of these comments, I would not say that every incorporation by reference must be limited to the texts existing at the time of the incorporating enactment. Each problem may have special characteristics as a result of the subject matter and the actual texts involved, and needs to be considered as an individual matter.

Incidentally, it may be noted that the particular problem here discussed no longer exists because it has been resolved legislatively—although badly placed⁶—by the 1958 amendment to Civil Code article 3541 which provides expressly that the thirty-year prescription "whether acquisitive or liberative, shall run against . . . minors." However, this provision was not available for the decision of the case being discussed because the enactment occurred after the events of the case.

LIBERATIVE PRESCRIPTION

Prescription and Peremption

The time limitation for the exercise of a particular cause of action may be of two kinds, and it is important to classify it correctly. If it is an ordinary liberative prescription, it is subject to the regular rules of interruption and suspension which interfere with the running of time. However, if it is a peremption, it is an absolute calendar calculation which brooks no

4. See complete history in COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA (LOUISIANA LEGAL ARCHIVES) art. 3505 (1942). [Hereinafter cited as COMPILED EDITION.]

5. With the same text as today in LA. CIV. CODE art. 3522.

6. See *Legislative Symposium: 1958 Regular Session—Property*, 19 LA. L. REV. 65, 71-72 (1958).

interference with the running of time, and completely extinguishes the right whose lifetime has expired. In the case of liberative prescription, even after the lapse of the prescribed time there remains a natural obligation which has certain legal effects.⁷

This distinction is not always understood and identified, and sometimes the classification is a difficult one depending on the exact language and intent of the legislative text on which the determination has to be based. For these reasons, it is important to note that in the recent case of *Ancor v. Belden Concrete Products, Inc.*,⁸ there is a clear statement of this distinction between ordinary liberative prescription and peremption.

Waiver of Prescription?

First National Bank v. Gaddis was decided correctly on the basis that prescription was interrupted by the existence of a valid pledge which is a continuous acknowledgment of the indebtedness. However, the opinion also discusses the issue of whether an express waiver of prescription must be recorded in order to affect third persons. The purpose of the present comment is to question the concept of a "waiver of prescription." The court said:

"Our conclusion is that the waiver signed by Mrs. Gaddis on March 11, 1965, had the effect of interrupting the running of prescription on the note, and that it was unnecessary that that waiver be recorded in the public records, or that notice of the waiver be given to any third party, in order to preserve the rights of the holder of the note to foreclose on the mortgage which secured it."⁹

Civil Code article 3460 states "[o]ne can not renounce a prescription not yet acquired, but it is lawful to renounce prescription when once acquired." Giving up the benefit of prescription *when once acquired* is properly called "renunciation" and is the debtor's valid exercise of a choice which he is authorized to make. However, giving up the benefit of prescription *not yet*

7. See previous *Symposia* comments on prescription in 14 LA. L. REV. 129-31 (1953); 29 LA. L. REV. 230-33 (1969).

8. 260 La. 372, 256 So.2d 122 (1971).

9. 250 So.2d 504, 508 (La. App. 3d Cir. 1971).

acquired would constitute an advance waiver of the right to plead prescription altogether. The prohibition in article 3460 is in the nature of a rule of public policy because it expressly takes away the power of obligating one's self not to plead prescription. In other words, an advance waiver of prescription is of no legal effect and should be treated as if it had not been made.¹⁰

Louisiana Civil Code article 3460 is a verbatim reproduction of the French Civil Code article 2220. Planiol states that the general system of prescription "is justified by the necessity of establishing a term for the exercise of actions"¹¹ which could be destroyed if it were possible to waive prescription. Planiol also adds that "contractual prolongations of prescription are null, as being equivalent to anticipatory renunciations," and he sums the topic up in the conclusion that "the organization of prescription is a matter of general interest, as to which private agreements should have no effect."¹² Elsewhere, Planiol says that "prescription is a matter of public policy."¹³

Baudry-Lacantinerie reiterates the same position in the following statements:

"It is easy to understand why prescription can not be renounced in advance. A rule which would permit it would be contrary to social interest. It would encourage negligence and carelessness of title holders. It would go against the purpose of prescription. 'Prescription,' the exposé of the legislative motives states, 'is necessary for the maintenance of public order. Thus it is part of public law from which no individual is free to derogate.'

. . . .

"It is not quite correct to say that prescription is part of public law; but it is certain that the social interest which lies at the base of prescription is contrary to allowing freedom to renounce it in advance."¹⁴

Reverting to the case being considered, the court's com-

10. See *Nabors Oil & Gas Ref. Co. v. Louisiana Oil Ref. Co.*, 151 La. 361, 91 So. 765, 777 (1921).

11. 2 PLANIOL, CIVIL LAW TREATISE no. 630 (La. St. L. Inst. transl. 1959).

12. 2 PLANIOL, CIVIL LAW TREATISE nos. 648-49 (La. St. L. Inst. transl. 1959).

13. 1 PLANIOL, CIVIL LAW TREATISE no. 2712 (La. St. L. Inst. transl. 1959).

14. 23 BAUDRY-LACANTINERIE & TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL no. 53 (4th ed. 1924), in the English translation (of Jaro Mayda) at 37 (La. St. L. Inst. transl. 1972).

ments about waiver of prescription and the issue about whether such a waiver must be recorded, can be disregarded without affecting the conclusion which is amply supported by the existence of a valid pledge. However, it is extremely important to place the concept of a waiver of prescription in its proper and more complete context.

Classification of the Cause of Action

As often expressed in previous *Symposium* comments,¹⁵ the nature of the claim carries with it the time limitation for its prescription. Thus a tort claim is prescribed in one year,¹⁶ a secretary's salary in three years,¹⁷ a promissory note in five years,¹⁸ general contract claims in ten years¹⁹ and so forth. A complication of this problem occurs where a third party pays the principal obligation and then seeks reimbursement.

In *State Farm Fire & Casualty Co. v. Cities Service Oil Co.*,²⁰ the insurance company paid its insured for damage sustained and then brought a subrogation suit against the person who was allegedly liable in tort for the accident. The trial court sustained the plea of one-year prescription, and this was affirmed on appeal. The contention that the cause of action was one *de in rem verso* (ten-year prescription) was correctly dismissed, not only because the necessary elements were not present but essentially because the insurer's course of action was the same as that of the insured's, namely *ex delicto*.

In *LeBlanc v. Big Jim's, Inc.*,²¹ the purchaser of a mobile home brought a redhibitory action against his vendor, the dealer, who in turn filed a third party petition against the manufacturer for indemnification should judgment be rendered against the dealer. The manufacturer pleaded the one year prescription against redhibition²² which was sustained in the lower court but

15. 20 LA. L. REV. 235 (1960); 24 LA. L. REV. 210, 211 (1964); 25 LA. L. REV. 352, 355 (1965).

16. LA. CIV. CODE art. 3536.

17. LA. CIV. CODE art. 3538.

18. LA. CIV. CODE art. 3540.

19. LA. CIV. CODE art. 3544.

20. 251 So.2d 201 (La. App. 3d Cir.); *writ refused*, 259 La. 879, 253 So.2d 214 (1971).

21. 252 So.2d 181 (La. App. 3d Cir. 1971).

22. LA. CIV. CODE art. 2520.

dismissed on appeal. The court rejected the classification of this cause of action as one in redhibition because the dealer no longer had title to the mobile home and could not tender its return; also, he could not claim indemnification before being cast in judgment. Furthermore, the court added that for an action in indemnification the prescription would be ten years.²³

The distinction between these two cases may seem tenuous and technical with procedural and pleading involvements, but this should not be surprising because the facts and legal issues are not necessarily the same in the two separate relationships out of which the respective causes of action arise. For example, when a surety pays the principal obligation and then brings suit against the debtor for reimbursement,²⁴ the nature of his cause of action arises out of the surety-debtor relationship and is unrelated to the nature of the original claim of the creditor against the debtor.²⁵

A controversial problem of classification is the nature of the cause of action under Civil Code article 667²⁶ for violation of the *sic utere* servitude. In *Union Federal Savings & Loan v. 451 Florida Corp.*,²⁷ an action for damages arising out of construction activities on neighboring property was brought under article 667, and it was classified as *ex delicto* subject to the one-year prescription of article 3536. As authority, the court quoted from the earlier case of *Gulf Insurance Co. v. Employers Liability Assurance Corp.*²⁸ as if this answer was obvious and well settled—which it is not. The *Gulf Insurance* case was dissected pretty thoroughly in a well-documented casenote²⁹ which also discussed the French commentators, and it was again criticized in the faculty *Symposium* comments,³⁰ but neither of these items is mentioned in the *Union Federal* case.

As additional authority, two other cases are cited. One is

23. LA. CIV. CODE art. 3544.

24. LA. CIV. CODE art. 3052.

25. Cf. *Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 218 So.2d 580 (1968), and *Symposium* comments in 30 LA. L. REV. 235, 238-39 (1969).

26. LA. CIV. CODE art. 667: "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

27. 256 So.2d 356 (La. App. 1st Cir. 1971).

28. 170 So.2d 125 (La. App. 4th Cir. 1965).

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

30. 26 LA. L. REV. 536, 538-39 (1966).

the court of appeal opinion in *Craig v. Montelepre Realty Co.*,³¹ which does nothing more than cite the *Gulf Insurance* case on this point. However, no reference is made to the supreme court decision³² in the *Craig* case in which the majority opinion referred to the recent vacillation in the classification of the cause of action under Civil Code article 667 but found it unnecessary to pass on that question.³³ Furthermore, two justices in a concurring opinion stated "it is not an action in tort, as otherwise indicated by the decision of the Court of Appeal, Fourth Circuit, in *Gulf Insurance Co. v. Employers Liability Assurance Corp.*"³⁴ These justices considered the action to be one on a quasi-contract prescribable in ten years.

The other case cited in *Union Federal* is *Langlois v. Allied Chemical Corp.*³⁵ in which the supreme court justice, who joined in the *Craig* case concurring opinion, classified the action under article 667 as quasi-contract, cited the *Craig* case as holding the action *ex delicto* when actually the *Craig* majority opinion described the issue as controversial and did not pass on the question. Furthermore, the majority opinion in the *Langlois* case draws a distinction between the cause of action under article 669 (which was there involved) and one under article 667. Whether such a distinction is warranted is still another issue, which is not directly pertinent to these comments.

In view of the state of flux in the classification of the cause of action under Civil Code article 667, the inadequate opinion in the *Union Federal* case can not carry much weight and does not contribute to a clarification or stabilization of the issue.

In conclusion, it is submitted as stated in previous *Symposium* comments³⁶ that the cause of action under article 667 is neither *ex delicto* nor *ex contractu*; neither is it quasi-contract;³⁷ this code provision creates *by the operation of law* an obligation and a limitation on property ownership within the fifth category of the sources of obligations. Obligations arise

31. 202 So.2d 432 (La. App. 4th Cir. 1967).

32. 252 La. 502, 211 So.2d 627 (1968).

33. *Id.* at 513, 211 So.2d at 631.

34. *Id.* at 518, 211 So.2d at 633. See *Symposium* comments in 29 LA. L. REV. 235 (1969).

35. 258 La. 1067, 249 So.2d 133 (1971).

36. *E.g.*, 27 LA. L. REV. 436, 438-39 (1967); 26 LA. L. REV. 536, 538-39 (1966); 8 LA. L. REV. 234, 236-37 (1948).

37. See LA. CIV. CODE art. 2294.

from (1) contracts, (2) quasi-contracts, (3) delicts, (4) quasi-delicts, (5) the operation of law.³⁸ The separate category of obligations "imposed by the sole authority of the laws" is identified in Civil Code article 2292 which states,

"Certain obligations are contracted without any agreement, either on the part of the person bound, or of him in whose favor the obligation takes place.

"Some are imposed by the sole authority of the laws, others from an act done by the party obliged, or in his favor.

"The first are such engagements as result from tutorship, curatorship, *neighborhood*, common property, the acquisition of an inheritance, and other cases of a like nature.

"The obligations, which arise from a fact, personal to him who is bound, or relative to him, result either from quasi-contracts, or from offenses and quasi-offenses." (Emphasis added.)

Louisiana Civil Code article 2292 comes from Code Napoleon article 1370 and the French *projet*.³⁹ Article 2292 is the first article in Title V of Book III, under the general heading "Of Quasi-Contracts, and of Offenses and Quasi-Offenses" whereas Code Napoleon article 1370 appears under the heading "*Des engagements qui se forment sans convention*" (Of Obligations which are formed without any agreement) and contains the following text:

"Certain obligations are formed without any agreement either on the part of the person bound, or of him in whose favor the obligation takes place.

"Some result from the sole authority of the law. Others arise from a fact personal to him who is obligated.

"The first are engagements formed involuntarily, such as those between neighboring landholders."⁴⁰

This classification of the five sources of obligations was

38. See LA. CIV. CODE arts. 1760, 2292. Cf. QUEBEC CIV. CODE art. 983: "Obligations arise from contracts, quasi-contracts, offenses, quasi-offences, and from the operation of the law solely."

39. See COMPILED EDITION art. 2292.

40. See COMPILED EDITION art. 2292.

emphasized by Pothier⁴¹ and has been consolidated in France, Quebec and Louisiana. For some reason, the fifth category—obligations which arise from the operation of law—is being overlooked in Louisiana and should be more clearly recognized. On the issue of the appropriate period for liberative prescription, it does make a difference.

*State Lumber & Supply Co. v. Gill*⁴² involved a claim against the owner for supplies furnished on a construction project where the supplier had not fulfilled all the statutory requirements for the preservation of his lien against the property. The statute provides a special one-year prescription for the personal cause of action against the owner but adds that "this shall not interfere with the personal liability of the owner for material sold to or services or labor performed for him or his authorized agent."⁴³ Thus the court succinctly stated the question on which depended the classification of the cause of action as "whether this was a contract job or whether Rousset was hired as an employee or agent by defendant Gill."⁴⁴ On the evidence, the court found that Rousset was employed by Gill and therefore the statutory prescription of one year did not apply. Consequently, the supplier's cause of action was classified as one on open account subject to the three-year prescription of Civil Code article 3538.

MINERAL RIGHTS

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MINERAL LEASES

Implied Obligations

The appellate opinion in *Baker v. Chevron Oil Co.*¹ was discussed in last year's *Symposium*.² In that discussion it was noted that the case suggests the possibility that a lessee might be impliedly obligated to a lessor who has granted a lease on a min-

41. POTHIER, OBLIGATIONS no. 2: "The sources of obligations are contracts, quasi-contracts, offenses, quasi-offenses; sometimes the law or equity alone."

42. 259 So.2d 639 (La. App. 1st Cir. 1972).

43. LA. R.S. 9:4812 (1950).

44. 259 So.2d 639, 641 (La. App. 1st Cir. 1972).

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1. 245 So.2d 457 (La. App. 2d Cir. 1971).

2. *Symposium*, 32 LA. L. REV. 254, 261 (1972).