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Civil Code and Related Subjects: Prescription

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that an award of custody properly made would have to be given full faith and credit in other states until a new award were made for cause.[50] There could then be no question of the right of a custodian to take a child to another jurisdiction to live and therefore there would be a rule of law much more consistent with what one ordinarily would expect in such circumstances.

Other custody pronouncements followed familiar patterns. The Supreme Court continued to interpret Article 157 of the Civil Code to mean that the mother is to be preferred to the father in custody cases, except where she is morally unfit, incapable of caring for the children, or mistreats them, whether or not she has been awarded the divorce or separation.[51] Perhaps the dictum on the subject in *Wilmot v. Wilmot* is the strongest statement yet made about it.[52] In two decisions the court affirmed the possibility of redetermining the custody issue after changes in circumstances of the parents and the children.[53] There is no express legislation on this subject covering instances not involving serious danger to the physical or moral welfare of the children,[54] and these decisions seem to be wise applications of the authority granted judges under Article 21 of the Civil Code. Finally, in one instance, the court explained again that the juvenile courts do not have jurisdiction in custody cases unless the child is "neglected."[55]

PRESCRIPTION

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The purpose and policy of liberative prescription are to remove doubt and uncertainty by fixing a time limit within which rights must be exercised. However, the exact legal na-

50. See Goodrich, Conflict of Laws, § 136 (3 ed. 1949).

51. State ex rel. Mouton v. Williams, 222 La. 457, 62 So. 2d 641 (1952); Rainwater v. Brown, 221 La. 1033, 61 So. 2d 730 (1952); Liner v. Liner, 222 La. 789, 64 So. 2d 4 (1953); Estopinal v. Estopinal, 66 So. 2d 311 (La. 1953); Wilmot v. Wilmot, 223 La. 221, 65 So. 2d 321 (1953).

52. 65 So. 2d 321, 325.

53. Sampognaro v. Sampognaro, 222 La. 597, 63 So. 2d 11 (1953); Pepiton v. Pepiton, 222 La. 784, 64 So. 2d 3 (1953).

54. La. R.S. 1950, 9:551-553, and of course the legislation on the authority of the juvenile courts, for example, La. R.S. 1950, 13:1567, 1697, and 1806.

55. In re Pratts, 222 La. 126, 62 So. 2d 124 (1952).

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ture of the rules which embody these limitations is not always the same; it would be an overstatement to say that the differences are always observed clearly and applied accurately. The texts themselves are not always very helpful. Thus, liberative prescription is described as "discharging debts" in one article of the Civil Code,[1] and "by which debts are released" in another.[2] From these it follows that prescription is "a peremptory and perpetual bar to every species of action"[3] and that the "courts can not supply the plea of prescription."[4] Accordingly, in these cases, the failure of a party to plead the prescription must result in enforcement of the cause of action, which is not extinguished.

Nevertheless, other provisions in closely related articles of the Civil Code use language of extinguishment in stating a rule of prescription. Throughout the various parts of the Civil Code (and statutes) there are time limits after which certain rights no longer exist or are extinguished.[5]

Where the liberative prescription is merely a bar, it must be pleaded. Where the limitation is one of extinguishment, it would not appear necessary for defendant to plead, but it should rather be for the plaintiff to assert and prove the continued existence of his cause of action despite the lapse of the specified time. Another distinction is between the liberative prescription, which is merely a bar and accordingly subject to interruption and suspension, and the limitation in the nature of a forfeiture where a cause of action is established with a specified duration after which it automatically ceases to exist. Sometimes the words "peremption" and "forfeiture" are used to describe the rules which produce extinguishment instead of a bar. The classification or characterization of a particular rule of limitation is naturally a vital question, especially where the specified amount of time has elapsed between the creation of the original cause of action and the institution of suit to enforce it.

One such problem was presented in the case of *Wise v. Watkins*,[6] where the question at issue was the retention or loss

1. Art. 3457, La. Civil Code of 1870.
2. Art. 3459, La. Civil Code of 1870. See also Arts. 3528 and 3529, La. Civil Code of 1870.
3. Art. 3459, La. Civil Code of 1870.
4. Art. 3463, La. Civil Code of 1870.
5. E.g., Arts. 191, 1561, 1994, 2498, 3466, La. Civil Code of 1870.
6. 222 La. 493, 62 So. 2d 653 (1952).

of mineral rights. The original mineral rights were created by reservation in a conveyance of the land and were therefore classified as a servitude,[7] for which there is a prescription of ten years in case of non-use.[8] By reason of the language in Article 783 that "Servitudes are *extinguished*: . . . 2. By prescription resulting from non-usage of the servitude during the time required to produce its *extinction*," and in Article 789 that "A right to servitude is *extinguished* by the non-usage of the same during ten years," and in Article 3546 that "The rights of usufruct, use and habitation and servitudes are *lost* by non-use for ten years," the court classified this prescription as one of extinguishment. (Italics supplied.) Accordingly, a reference to these mineral rights in a deed executed after the ten-year period of non-use was held to be unavailing as an acknowledgment to renounce a prescription already accrued[9] or as the creation of a new servitude, because there was no expressed or implied intent to do either of these things. Presumably this prescription can be interrupted while running, or renounced after completed, if the acknowledgment is accompanied by an expression of intent to that effect; this would be inconsistent with its classification as a peremption or forfeiture.

In a dissenting opinion, Justice Hamiter asserted the legal arguments that the accrued prescription of a mineral servitude can be renounced under Article 3460, and that the written acknowledgment of the owner of the servient estate suffices to establish a mineral servitude under Article 770. However, the weight of opinion as to the policy objectives was not on his side.

In the case of *Succession of Pizzillo*,[10] the claim of the decedent's adopted child was disputed by the surviving spouse on the ground that the purported adoption was void because it did not conform to statutory requirements in effect at the time. The court sustained the adoption by reason of the provision in the 1932 validating statute,[11] which set a six-month

7. Wemple v. Nabors Oil & Gas Co., 154 La. 483, 97 So. 666 (1923); Logan v. State Gravel Co., 158 La. 105, 103 So. 526 (1925). There is no attempt here to consider the questions that might arise where mineral rights are classified as *lease* rights, and where the three-year prescription of Article 3538 might be involved.

8. Arts. 789, 3546, La. Civil Code of 1870.

9. Arts. 3460-3461, La. Civil Code of 1870.

10. 223 La. 328, 65 So. 2d 783 (1953).

11. La. Act 46 of 1932, § 13.

limitation on actions to annul adoptions prior to that date. Although the statute used the phrase "shall be prescribed," the court classified the limitation as one of peremption because the statute created a right of action of limited duration: "The time allotted is integral to the right of action; it could not be suspended or interrupted for the various reasons applicable to periods of prescription."[12] The lapse of the statutory period operated as a complete extinguishment of the right of action; since there was no right of action in the present case, there was no need for any plea to be interposed against it.

It is not within the scope of these observations to consider whether there are also further differences in the nature of limitations which are called peremptory and those which are called periods of forfeiture, or whether either of these is different from the provision which creates a cause of action with a specific limited duration. There are important implications in each classification, and a clearer delineation of all of them would be a contribution in an anticipated Civil Code revision.

Article 3543 of the Civil Code provides a prescription to cure "informalities of legal procedure" in public sales. In *Hicks v. Hughes*,[13] it was held that a sale of succession property made on the order of a clerk of court is not within the scope of this rule because the absence of a statement of debts of the succession[14] was more than a procedural informality; it was a jurisdictional requirement and an indispensable condition for the clerk's exercise of this authority. This holding with reference to the clerk is distinguished from the succession sale made on the order of a judge,[15] where the absence of a statement of debts was treated as a procedural informality within the application of Article 3453 because the judge's authority exists independently of the statement of debts.

In another aspect of the *Hicks* case, the court held that, since the purported sale was an absolute nullity, it could not be a "just title" for the ten-year acquisitive prescription. Under the facts of this case, the defect was one which must be considered—in the light of existing law—as patent on the face of the title. An absolute nullity is deemed never to have had

12. 65 So. 2d 783, 786 (La. 1953).
13. 223 La. 290, 65 So. 2d 603 (1953).
14. La. R.S. 1950, 13:901.
15. Thibodaux v. Barrow, 129 La. 395, 56 So. 339 (1911).

any existence,[16] but it is not always clear what is an absolute nullity.

The acquisitive prescription of thirty years—without good faith or just title—is based entirely upon continuous possession for the required time, and is limited to the property which is "actually possessed by the person pleading it."[17] In *Parham v. Maxwell*,[18] there was evidence that crops were made and cattle pastured at irregular intervals on the disputed land, as well as occasional fence repairs and use of an old road, but the evidence was "of a vague and unconvincing character."[19] While this decision is based on a simple inadequacy of proof, it reasserts the basic principle of a restrictive attitude towards the acquisitive prescription of thirty years and emphasizes the requirement of conclusiveness of the proof of possession which must be established by the person pleading this prescription.

PROPERTY

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Only one case of outstanding importance in this field was decided by the Supreme Court during the past term. In *Humble Oil & Refining Co. v. State Mineral Board*[1] a controversy over the ownership of the bed of a navigable lake, the same problem which had given rise to the much discussed decisions in *State v. Erwin*[2] and *Miami Corporation v. State*[3] was again presented to the court, only this time in a different context.[4] The facts of the case and a detailed analysis of the decision will be found elsewhere in this issue.[5] The result of the decision is, just as in *State v. Erwin*, recognition of private ownership of beds of navigable lakes. In neither case was there any dispute about the fact that the lakes in question, Duck Lake and Calcasieu Lake, were navigable at the time of the decision and in 1812 when Louisiana was

16. 1 Planiol, Traité Élémentaire de Droit Civil, nº 2662 (12 ed. 1937).
17. Art. 3503, La. Civil Code of 1870.
18. 222 La. 149, 62 So. 2d 255 (1952).
19. 222 La. 149, 155, 62 So. 2d 255, 257.

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1. 223 La. 47, 64 So. 2d 839 (1953).
2. 173 La. 507, 138 So. 84 (1931).
3. 186 La. 784, 173 So. 315 (1936).
4. See infra note 10.
5. See Note, infra p. 267.