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LEGAL RIGHTS AND THE PASSAGE OF TIME

In Louisiana the right to bring legal action is regulated by two peculiar time-bars, prescription and peremption, both of which consist of rather arbitrarily chosen periods of time. When prescription and peremption operate, the passing of the designated time may foreclose legal action. Functionally, a valid plea of either prescription or peremption will result in dismissal of a plaintiff's suit. The law provides this effect for various policy reasons, one of which is simply the desire for finality. While termination of the right to legal action may work an injustice upon an individual who seeks redress in the courts, the time-bar prevents the immortality of potential lawsuits and thus serves the common good.

Although prescription is established legislatively in the Civil Code and other statutes, the doctrine of peremption is a judicial creation, lacking any express legislative sanction. The distinctions between the two are not always easily understood or coherently defined. The difficulties caused by this absence of doctrinal clarity have made necessary the "establishment and use of clear concepts, clearly defined, and consistently followed."¹ Indeed, it is not even certain that a major distinction between prescription and peremption in fact exists. This point is underscored by a recent remark of the Louisiana Supreme Court that "peremption is but a form of prescription, a species thereof, but with the characteristic that it does not admit of interruption or suspension."²

Liberative Prescription

The notion that the lapse of time should extinguish the legal effect of obligations was first introduced into the law under the reign of the Roman emperor Theodosius.³ By the time of the French

1. *The Work of the Louisiana Appellate Courts for the 1967-1968 Term: Prescription*, 29 LA. L. REV. 230, 233 (1969). Professor Dainow repeatedly criticized the lack of clarity in the courts' characterization of prescription and peremption, stating that the confusing decisions "play havoc with the doctrinal basis of the law." *Id.* at 232. Professor Dainow's comments on prescription can be found at 33 LA. L. REV. 235 (1973), 26 LA. L. REV. 536 (1966), 25 LA. L. REV. 352 (1965), 24 LA. L. REV. 210 (1964), 22 LA. L. REV. 326 (1962), 21 LA. L. REV. 306 (1961), and 14 LA. L. REV. 129 (1953). See also Note, *Peremption—Prescription—Workmen's Compensation—Interruption of Workmen's Compensation Limitative Period by Filing Suit*, 4 LA. L. REV. 624 (1942).

2. *Flowers, Inc. v. Rausch*, 364 So. 2d 928, 931 (La. 1978).

3. 2 M. PLANIOL & G. RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* pt. 1, no. 634, at 347 (11th ed. La. St. L. Inst. trans. 1959); 28 G. BAUDRY-LACANTINERIE & A. TISSIER, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* no. 13, at 8 (4th ed. La. St. L. Inst. trans. 1972).

emperor Napoleon, the doctrine was well established in the civil law and was codified in the last title of the Code Napoleon, from which Louisiana's prescription articles were taken.⁴ The story is told that, when the French redactors reached the subject of prescription, they were weary of their work and in a hurry to finish and go home.⁵ It is therefore not unkind to suggest that the articles governing liberative prescription are not among the best-drafted in the Code.

The Legislative Scheme

In Louisiana prescription is legislatively created in title XXIII of Book III of the Civil Code. Articles 3457 through 3471 are general provisions applicable to both acquisitive and liberative prescription.⁶ More specific provisions are located in section three of the title, "Of the Prescription which Operates a Release from Debt," comprised of articles 3528 through 3555.

Liberative prescription is defined generally as "a manner of . . . discharging debts, by the effect of time, and under the conditions regulated by law."⁷ The exact nature of the effect of liberative prescription is described in various ways in the Civil Code. Article 3459 characterizes liberative prescription as a bar to every species of action when the creditor has been silent for a certain time without urging his claim. Article 3528 mentions liberative prescription as operating "a release from debts," in that it "discharges the debtor by the mere silence of the creditor during the time fixed by law, from all actions, real or personal, which might be brought against him." This language is slightly modified in article 3529, which states that "prescription has also the effect of releasing the owner of an estate from every species of real rights, to which the property may have been subject, if the person in possession of the right has not exercised it during the time required by law." In general terms, pleading the lapse of the prescriptive period will "discharge" and "release" the defendant from a legal action brought against him and "bar" the plaintiff from action.

4. See Code Napoleon, arts. 2219-81 (1804). "No citation of authority is needed in support of the proposition that our Civil Code is predicated on the Code Napoleon." *Pounds v. Schori*, 377 So. 2d 1195, 1199 (La. 1979).

5. G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 23 at 13. The story is attributed to Troplong. *Id.* at n.46. The position of the articles in the Code may also have affected the scholarship: the subject of prescription "is relegated to the end of the Code, as if to challenge the great commentators to reach it before they run out of breath or die." J. CARBONNIER, NOTES ON LIBERATIVE PRESCRIPTION 461 (La. St. L. Inst. trans. 1972).

6. See LA. CIV. CODE art. 3471.

7. LA. CIV. CODE art. 3457. Acquisitive prescription, on the other hand, is a manner of acquiring ownership by possession during the time fixed by law. See LA. CIV. CODE arts. 3457-58.

The Civil Code establishes prescriptive terms of one, three, five, ten, and thirty years.⁸ The length of the term is designed to correspond appropriately with the nature of the debt or right involved.⁹ Although the prescriptive periods for many types of actions are specified, article 3533 refers to "different prescriptions of actions, which are mentioned in other parts of this Code."¹⁰ And, perhaps to emphasize the strictly legislative source of prescription, article 3470 states that "[t]here are no other prescriptions than those established by this Code and the statutes of the State now in force." The Code thus specifically envisions that prescriptions may be established by statute from time to time, perhaps in conjunction with the creation of new causes of action.

The Plea of Prescription

Prescription commences to run at the time when a right or obligation becomes actionable.¹¹ While prescription accrues through the mere passage of the designated term, prescription can have no effect unless pleaded. "Courts can not supply the plea of prescrip-

8. See LA. CIV. CODE arts. 3534-55.

9. LA. CIV. CODE art. 3531. The terms given are somewhat arbitrary. For example, a one-year prescription is provided for the collection of debts owed to liquor retailers "who sell ardent spirits in less quantities than one quart." LA. CIV. CODE art. 3534. A three-year term is given liquor retailers "who do not sell ardent spirits in less quantities than a quart." LA. CIV. CODE art. 3538. Not surprisingly, actions "for immovable property" are prescribed by thirty years. LA. CIV. CODE art. 3548.

10. Among the prescriptions established in other titles of the Code are the following:

LA. CIV. CODE art. 362. "The action of the minor against his tutor" is subject to a four-year prescription, commencing upon the day the minor reaches majority.

LA. CIV. CODE arts. 1030-31. The "faculty of accepting or renouncing a succession become barred by the lapse of time" equivalent to the longest prescription of rights to immovables.

LA. CIV. CODE arts. 1392 & 1396. The warranty of the debtor's solvency "can not be claimed" after five years from the date of the partition; the action of warranty among co-heirs is prescribed by five years.

LA. CIV. CODE arts. 1413-14. The action for rescission of a partition is "prescribed by the lapse of five years from the date thereof" and may run against minors.

LA. CIV. CODE art. 2498. The action for the supplement or diminution of the sale price "must be brought within one year from the day of the contract, otherwise it is barred."

LA. CIV. CODE arts. 2534-35. The redhibitory action must be brought within a year from the date of the sale, unless the seller "had knowledge of the vice and neglected to declare it to the purchaser," and "the redhibition of animals can only be sued for within two months immediately following the sale."

11. Prescription "attaches to a right from the moment it may be exercised." *Andrews v. Rhodes*, 10 Rob. 52, 53 (La. 1845). For the computation of prescription by days, months, or years, see LA. CIV. CODE arts. 3467-69.

tion,"¹² although it may be pleaded, "expressly and specially," at every stage of a judicial proceeding prior to final judgment.¹³ According to the Code of Civil Procedure, prescription may be pleaded as a peremptory exception.¹⁴

The debtor who fails to raise the plea of prescription may be treated as if he has tacitly renounced the prescription in his favor.¹⁵ The policy underlying the requirement that the defendant raise the plea of prescription, rather than the court's so doing on its own motion, was explained long ago by the supreme court:

The law has provided defendants with the plea of prescription, that they may use it as a shield, to protect themselves against unjust claims—not to use it as a weapon to destroy just rights. The party who uses it in an unrighteous case, sins greivously, and the Court neither can nor ought to supply the want of it, *ex officio*.¹⁶

Prescription, unless properly pleaded, produces no effect.

The Effect of Prescription

The Civil Code describes liberative prescription as operating a discharge and release from, and a bar to, legal action. Yet prescription is also contemplated in the Code as producing an entire nullity of the creditor's claim. Article 3531 states that prescription operates a "discharge or extinction" of "debts or of real rights." Similarly, article 3466 speaks of "the extinguishment of an obligation by prescription." And the Civil Code chapter on "How Obligations are Extinguished," expressly declares that "obligations are extinguished . . . [b]y prescription, which shall be treated of in a subsequent Title."¹⁷ There is a sound basis for the view that, once prescription has accrued, its effect is to destroy the suitor's claim. The claimant, in short, no longer has a legal basis for pursuing judicial vindication of his demand. This perspective is given further support by expressions in the title "Of Obligations." Obligations are divided into three

12. LA. CIV. CODE art. 3463; LA. CODE CIV. P. art. 927.

13. LA. CIV. CODE art. 3464; LA. CODE CIV. P. art. 928. However, prescription cannot be pleaded in the supreme court "unless the proof of it appear from documents exhibited or testimony taken in the inferior court." LA. CIV. CODE art. 3465.

14. LA. CODE CIV. P. art. 927(1). Code of Civil Procedure article 928 states that a peremptory exception can be pleaded "prior to a submission of the case for a decision."

15. Civil Code article 3461 states that "a tacit renunciation results from a fact which gives a presumption of the relinquishment of the right acquired by prescription." See note 24, *infra*.

16. *Dunbar v. Nichols*, 10 Mart. (O.S.) 184, 185 (La. 1821). Ironically, the case involved rescission of the sale of a slave who had an incurable disease.

17. LA. CIV. CODE art. 2130.

categories: imperfect, natural, and civil.¹⁸ Natural obligations, which cannot be enforced by legal action,¹⁹ may be the residue of the operation of prescription: "When the action is barred by prescription, a natural obligation still subsists, although the civil obligation is extinguished."²⁰ A civil obligation is "a legal tie, which gives the party, with whom it is contracted, the right of enforcing its performance by law."²¹ An accurate statement of the effect of the plea of liberative prescription is thus that a valid plea of prescription discharges the "legal tie" of the defendant to the plaintiff and in so doing eliminates the plaintiff's right of legal enforcement of the obligation. The plea of prescription destroys the "civil" nature of the obligation and hence also destroys the right of legal action. However, this has not been the view of the courts.

Louisiana jurisprudence abounds with dogmatic assertions that liberative prescription merely "bars the remedy" but does not destroy the underlying legal right. The supreme court has held that prescription simply "cuts off resort to the courts for the enforcement of an existing substantive right," but does not affect directly the claim itself.²² This holding is faithful to the scheme of the Code only if the concept of an "existing substantive right" mysteriously includes unenforceable natural obligations. When the plea of prescription is raised validly, the creditor's "substantive right" is transformed into a natural obligation, the vindication of which cannot be pursued through legal action. The courts apparently have been influenced by the language of article 3459, which treats prescription as a "bar" to legal action, implying that prescription does not affect the existence of the cause of action.²³ This view is consistent with the procedural requirements for invoking prescription, since the creditor's claim is not affected by prescription until the plea is raised;²⁴ the debtor who fails to plead a legitimate

18. LA. CIV. CODE art. 1757.

19. LA. CIV. CODE arts. 1757(2) & 1759.

20. LA. CIV. CODE art. 1758.

21. LA. CIV. CODE art. 1757(3).

22. *Ancor v. Belden Concrete Products, Inc.*, 260 La. 372, 381, 256 So. 2d 122, 125 (1972).

23. *Id.* See also *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102 (1971); *Kenney v. Trinidad Corp.*, 349 F.2d 832, 837 (5th Cir. 1965); *Jones v. Butler*, 346 So. 2d 790, 791 (La. App. 1st Cir. 1977); *Blanchard v. Liberty Mut. Ins. Co.*, 280 So. 2d 592, 595 (La. App. 3d Cir. 1973); *Istre v. Diamond M. Drilling Co.*, 226 So. 2d 779, 790 (La. App. 3d Cir. 1969).

24. See LA. CIV. CODE art. 3463; LA. CODE CIV. P. art 927. A tacit renunciation of prescription can occur when circumstances give rise to a "presumption of the relinquishment of the right acquired by prescription." LA. CIV. CODE art. 3461. Since the courts cannot supply the plea of prescription, such a relinquishment may be

prescription will still have a "legal tie" to the creditor, allowing pursuit of judicial enforcement of the civil obligation. But, because prescription, if pleaded, will reduce a civil obligation to a non-actionable natural obligation, it cannot be doubted that prescription acts directly upon the underlying substantive right. The plaintiff whose claim meets a proper exception of prescription no longer has an enforceable legal right, for the defendant's natural obligation does not give rise to a legal remedy.²⁵ Thus, a "bar" to legal action does in fact occur, but only because the right of legal enforcement, which attends a civil obligation, no longer exists after prescription eliminates the actionable quality of the claim. The courts may continue to declare that prescription simply "bars the remedy," but it should be noted that the remedy is barred only by virtue of the complete extinguishment of the underlying right itself.²⁶

The idea that prescription may extinguish fully a right or obligation is nowhere more pronounced than in the case of servitudes and mortgages: "Servitudes are extinguished . . . by prescription resulting from non-usage of the servitude during the time required to produce its extinction";²⁷ [m]ortgages are extinguished . . . by prescription."²⁸ In these two instances, it clearly would be erroneous to assert that the effect of prescription is merely to "bar the remedy"—the question of a remedy is not even at issue. Simply put, prescription completely destroys the real rights, which become dead things, not some other form of "substantive rights." The liberative prescription which thus affects servitudes and mortgages is the same liberative prescription which extinguishes civil obligations. It is strange that the courts should ascribe one effect of prescription to

presumed when prescription is not pleaded "before the final judgment." LA. CIV. CODE art. 3464. See also *The Work of the Louisiana Appellate Courts for the 1971-1972 Term: Prescription*, 33 LA. L. REV. 235, 238-40 (1973).

25. Of course, a natural obligation is "a sufficient consideration" for a new civil obligation. LA. CIV. CODE art. 1759(2).

26. LA. CODE CIV. P. art. 421 states that "[a] civil action is a demand for the enforcement of a legal right." Because a plea of prescription extinguishes the "legal right" of the claimant, the civil action will fail. That is, prescription destroys the right of the claimant to pursue a civil action. The traditional view, that prescription merely bars the remedy without acting upon the right, is thus somewhat anomalous. As Judge Tate observed, "[a] right for which the legal remedy is barred is not much of a right." *Istre v. Diamond M. Drilling Co.*, 226 So. 2d at 800 (La. App. 3d Cir. 1969) (Tate, J., dissenting). Baudry-Lacantinerie & Tissier stated that "[l]iberative prescription is not only a denial of action, but also a loss of remedy. In our law it brings about the extinction of the non-exercised right." G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 25, at 15. See notes 93-98, *infra*, and accompanying text.

27. LA. CIV. CODE art. 783(2).

28. LA. CIV. CODE art. 3411(6). See also LA. CIV. CODE art. 3277: "Privileges become extinct . . . [b]y prescription."

"substantive" rights and the Code another effect to particular kinds of real rights.

The Civil Code forthrightly declares that prescription extinguishes civil obligations and leaves only natural obligations in its wake. The remedy for the latter lies not in the courts, but in the conscience of the debtor. It is irrational and contrary to the positive law for the courts to rule repeatedly that prescription, when pleaded, merely bars a remedy — prescription in fact extinguishes the right to sue.

Interruption and Suspension

The Civil Code provides that liberative prescription can be interrupted by the same causes which interrupt acquisitive prescription.²⁹ Articles 3516 through 3520 specify these causes. Essentially, there are two modes of interrupting prescription—natural and legal interruption.³⁰ The natural interruption applicable to liberative prescription occurs when the debtor acknowledges the right of the claimant.³¹ By the terms of the Code, legal interruption occurs in one of two ways: when citation is served upon the defendant to appear in court, "whether the suit has been brought before a court of competent jurisdiction or not,"³² and by the actual filing of suit in a court of competent jurisdiction.³³ The two forms of legal interruption have been embodied in a single statute, which also encompasses the idea of venue:

All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors or interdicts, by the commencement of a civil action in a court of competent jurisdiction and in the proper venue. When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process.³⁴

29. LA. CIV. CODE art. 3551.

30. LA. CIV. CODE art. 3516.

31. See La. Civ. Code art. 3520. The form of a valid acknowledgement is further described in articles governing specific prescriptive periods. For example, if the applicable prescription is one year under article 3534, natural interruption can occur when there has been "an account acknowledged, a note or bond given." LA. CIV. CODE art. 3535. If the prescription is of three years, article 3538 provides that prescription will be interrupted if there has been "an account acknowledged in writing, a note or bond given."

32. LA. CIV. CODE art. 3518.

33. LA. CIV. CODE art. 3518.

34. LA. R.S. 9:5801 (Supp. 1960).

If performed within the prescriptive period, either the service of process upon the defendant or the proper filing of suit will thus effect a legal interruption.

Other rules of interruption are found in articles 3552 and 3553, providing that the interruption of prescription as to one debtor in *solido* will have effect "with regard to all the others and even their heirs."³⁵ Similarly, a natural or legal interruption of prescription as to a principal debtor will have a like effect upon his surety.³⁶

Interruption of acquisitive prescription may be a single event, after which the prescriptive term begins anew, or may be of a continuing nature.³⁷ It is not unreasonable to believe that, in terms of liberative prescription, an interruption such as the filing of suit is of a continuing nature during the pendency of the action, while a natural interruption merely causes the prescriptive period to recommence. The basic rationale underlying interruption is to guarantee that the debtor is aware that the creditor seeks to preserve his claim or to have it adjudicated.³⁸ When a debtor acknowledges the claimant's right, it is not necessarily with the intent to validate the obligation in perpetuum;³⁹ when the debtor is served with notice of the claimant's suit, he is on continual notice of the demand.

Suspension, a period in which prescription is said to "slumber,"⁴⁰ is legislatively authorized only as to certain persons and in certain instances. The general provisions concerning suspension are found in articles 3521 through 3527; prescription is suspended as to minors and interdicts, unless the law provides otherwise.⁴¹ Prescription ceases to run when suspension takes effect; after the suspensive term is ended, however, prescription begins to run from the point at which the time-period was suspended.⁴² The basic rationale underly-

35. La. Civ. Code art. 3552. A recent case discussing interruption of prescription on a solidary obligation is *Foster v. Hampton*, 381 So. 2d 789 (La. 1980). The case rejected the characterization of solidary obligations as either perfect or imperfect; previously, prescription could be interrupted as to all solidary debtors by interrupting prescription against one of them only if the relationship was one of perfect solidarity.

36. LA. CIV. CODE art. 3553.

37. 12 C. AUBRY & C. RAU, DROIT CIVIL FRANÇAIS § 215 at 351 (7th ed. La. St. L. Inst. trans. 1966). See also *Levy v. Stelly*, 277 So. 2d 194 (La. App. 4th Cir. 1973).

38. *Nini v. Sanford Brothers, Inc.*, 276 So. 2d 262, 266 (La. 1973).

39. However, the jurisprudence has held that a natural interruption can be of a continuing nature, as in the case of pledge. See *Kaplan v. University Lake Corp.*, 381 So. 2d 385 (La. 1979); *Succession of Picard*, 238 La. 455, 115 So. 2d 817 (1959); *Scott v. Corkern*, 231 La. 368, 91 So. 2d 569 (1956). Payment on an obligation secured by pledge also constitutes an acknowledgement sufficient to interrupt prescription of the obligation secured by the pledge. See LA. R.S. 9:5807 (Supp. 1970 & 1975).

40. G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 415, at 221.

41. LA. CIV. CODE art. 3554.

42. See, e.g., *Smith v. Escoubas*, 43 La. Ann. 932, 934, 9 So. 907, 908 (1891).

ing suspension of prescription is that, when a right cannot be exercised because an individual lacks legal capacity, he should not be punished by the loss of his right.⁴³ This rationale is also the basis for the doctrine of *contra non valentem*, when the claimant is without the physical or mental capacity to act.⁴⁴

Policy

Although various policies have been suggested as the basis for prescription, perhaps none is as persuasive as the traditional desire for legal finality.⁴⁵ Without a final termination of legal rights, the ensuing uncertainty would be more burdensome to society than the injustice caused to an individual who is deprived of his claim or the unjust enrichment accorded the debtor.⁴⁶ It has also been suggested that a creditor deserves to lose his right of legal action if he has been passive in availing himself of that right; in this sense, prescription punishes the inaction of the creditor.⁴⁷ Certain articles of the Code appear to subscribe to this view. Article 3530 states that "the neglect of the creditor operates the prescription"; article 3550 observes the creditor "can only blame himself for not having taken his measures within the time directed by law." It has also been declared that a presumption of abandonment or waiver of a claim occurs after the creditor is silent for a certain time.⁴⁸

There are several practical considerations which support foreclosing litigation by the passage of time. As the events which give rise to legal liability recede into the past, memories fade, documents become misplaced, and witnesses become more difficult to locate; the availability of evidence diminishes as the passage of time increases.⁴⁹ Moreover, individuals who have incurred obligations in the distant past would have difficulty in planning for the im-

43. G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 368, at 193.

44. *Id.* See also *Corsey v. State*, 375 So. 2d 1319 (La. 1979). The rule of *contra non valentem* "means that prescription does not run against one who is incapable of interrupting it." G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 389, at 207-08.

45. "This peremption of instance was introduced in Favour of the Publick, lest Suits should otherwise be rendered immortal and perpetual." AYLIFF, *PARERON* 151 (1726).

46. G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 29, at 19: "In terms of its social utility, prescription can be compared with the rule of *res judicata*. Their function is analogous. There comes a moment when it is necessary to say the last word, where the uncertainty of the law is more burdensome than injustice."

47. *Id.*, no. 368, at 193.

48. *Id.* See also *Harris v. Traders & Gen. Ins. Co.*, 200 La. 445, 458, 8 So. 2d 289, 293 (1942).

49. 2 M. PLANIOL & G. RIPERT, *supra* note 3, pt. 1, no. 630, at 345; J. CARBONNIER, *supra* note 5, at 462.

mediate future if no means existed for the prediction or calculation of past liability.⁵⁰ Prescription therefore offers a means of liquidating the past.⁵¹

Despite the factors favoring prescription, certain legal actions are imprescriptible.⁵² Arguably, this is a recognition that, in certain cases, the policies supporting prescription may be outweighed by the social interest in preventing the termination of the right to legal redress. It is also true that, whatever the legislative policy favoring prescription, judicial policy tends toward a strict construction of ambiguous prescription statutes and in favor of "the obligation sought to be extinguished by it."⁵³

Peremption

The series of cases that culminated in the formation of a doctrine of peremption in Louisiana began in 1897. At issue was the validity of certain parish elections which authorized levying special taxes intended to assist the construction of railroads. Before 1892 the courts of Louisiana apparently were without general authority to entertain claims contesting the validity of elections.⁵⁴ In that year the state legislature passed Act 106, which expressly vested the courts with the power to hear pleas challenging an election on the grounds of "frauds, illegality, or irregularity" if the action was filed within three months of the promulgation of the election results.⁵⁵ Subsequently, the issue of timeliness in challenging elections was addressed on several occasions.⁵⁶

50. See *Harris v. Traders & Gen. Ins. Co.*, 200 La. 445, 458, 8 So. 2d 289, 293 (1942).

51. M. PLANIOL & G. RIPERT, *supra* note 3, pt. 1, no. 630, at 345.

52. Among the imprescriptible actions are the following: the boundary action, LA. CIV. CODE art. 788; the action of partition, LA. CIV. CODE arts. 1304 & 1306; and the donation omnium bonorum, LA. CIV. CODE art. 1497.

53. *State ex rel. Guste v. Simoni, Heck & Assoc.*, 331 So. 2d 478, 486 (La. 1976). See also *United Carbon Co. v. Mississippi River Fuel Corp.*, 230 La. 709, 717-18, 89 So. 2d 209, 212 (1956).

54. See note 56, *infra*.

55. 1892 La. Acts, No. 106. Section one of the Act provided "[t]hat any election . . . may be contested by any party or parties in interest, on grounds of frauds, illegality, or irregularity, before any Court of Competent Jurisdiction." *Id.* Section two provided "[t]hat suit brought to contest any election . . . shall commence by petition . . . and any suit under the provision of this Act, shall be brought within three months after the promulgation of the result of the election contested." *Id.*

56. In *Taxpayers v. O'Kelly*, 49 La. Ann. 1039, 22 So. 311 (1897), the supreme court considered a challenge to a tax election. The court ruled that the plaintiffs' suit came "too late . . . to raise the question of . . . irregularity, in announcing the result." 49 La. Ann. at 1042, 22 So. at 312. A similar challenge was again brought before the supreme court in 1898, in *Taxpayers of Webster Parish v. Police Jury*, 52 La. Ann.

However, another case heard by the supreme court, *Guillory v. Avoyelles Ry. Co.*,⁵⁷ was to have a profound effect upon the Louisiana law of time limitations. The results of the railroad tax election in question had been promulgated on July 30, 1894. Although two prior suits had been filed to contest the election, the plaintiff's action was not instituted until April 29, 1899. The defendant pleaded "the limitation of Act 106 of 1892 in bar of plaintiff's suit."⁵⁸ The court ruled that the prior challenges to the election could not "have the effect of suspending the prescription or peremption of the statute in favor of those other taxpayers who did not sue in time . . ."⁵⁹ Noting that the statute gave the "only right the law accords" to contest elections, the court went on to state:

When a statute creates a right of action, and stipulates the delay within which that right is to be executed, the delay thus fixed is not, properly speaking, one of prescription, but it is one of peremption. Statutes of prescription simply bar the remedy. Statutes of peremption destroy the cause of action itself. That is to say, after the limit of time expires the cause of action no longer exists; it is lost.⁶⁰

This language has been cited with talismanic effect in numerous subsequent state and federal decisions.

465, 27 So. 102 (1898). The plaintiffs alleged that the subject railroad had not been properly incorporated at the time of the election and the petition for the election had not been signed by the required number of taxpayers. The defendants "pleaded the prescription of three months . . . on the ground that the petition was not filed in time." 52 La. Ann. at 467, 27 So. at 103. The election results had been promulgated on January 5, 1898, and the plaintiffs had filed their petition on February 14 of the same year, clearly within the mandated period. The court specifically stated that Act 106 provided a prescriptive term and ruled that "prescriptions begin from the day of promulgation," not the day of the election. 52 La. Ann. at 468, 27 So. at 104. In *Vicksburg, S. & Pac. R.R. Co. v. Scott*, 52 La. Ann. 512, 27 So. 137 (1900), the supreme court expounded upon the legislative policy of fixing a period of relatively short duration in which to challenge elections. The plaintiff's action had been filed "long after the result of the election" had been promulgated. 52 La. Ann. at 521, 27 So. at 141. The court stated that the legislature provided a fixed time so that a railroad

in whose favor a special tax has been declared to have been voted, is now advised of the danger of acting upon the strength and faith of such announcement, and, should it proceed to the expenditure of money and the construction of its road before the period when such contest can be raised, it does so prematurely, and at its own peril.

52 La. Ann. at 524, 27 So. at 142. The period was said to have been fixed "to guide the corporation as to its safety or its risk." 52 La. Ann. at 524, 27 So. at 142.

57. 104 La. 11, 28 So. 899 (1900).

58. 104 La. at 14, 28 So. at 900.

59. 104 La. at 17, 28 So. at 901.

60. 104 La. at 15, 28 So. at 901.

The pronouncement of the doctrine of peremption in *Guillory*, presented as a fixed rule of law, can be no more than a rule of judicial interpretation, if a rule at all.⁶¹ No legislative authority existed for the court's definition, which, it is worthwhile to note, was entirely obiter dictum, since the plaintiff's action would have failed even if the term was characterized as prescriptive. The *Guillory* court relied only upon two common law cases as authority for its pronouncement.⁶² However, common law precedent is not perfectly applicable in a civil law state, since under the common law a cause of action may exist which is not provided by statute, and legislatively-established laws are said to derogate from the common law created by the courts;⁶³ in a civilian system, all law is in theory statutory.⁶⁴ The strict construction adopted from the common law cases in *Guillory* was a deferential response to legislatively-created law that had previously not existed. Although Act 106 of 1892 was

61. The court did not look to French cases or doctrine, which do suggest an analogous rule, terming such periods "forfeitures":

Aubry and Rau state that when a statute gives an action on condition that it be brought within a certain time, the expiration of this term causes a forfeiture . . .

This doctrine, and the classification based on it seem incorrect to us. In the first place, liberative prescription does not extinguish only the remedy. It acts also on the right. On this basis it is impossible to distinguish prescription and forfeiture.

G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 38 at 25.

62. *Taylor v. Canberry Iron & Coal Co.*, 94 N.C. 386 (1886), involved a negligence claim under North Carolina's wrongful death statute. The *Taylor* court stated the statute "gives a right to action that would not otherwise exist, and the action to enforce it, must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it." *Id.* at 387. Nowhere in its opinion did the court mention the term "peremption." The other case cited, *Cooper v. Lyons*, 77 Tenn. 489 (1882), involved a creditor's action in Tennessee. The time-bar created by the applicable statute had become effective, but the creditor claimed that his debtor had repeatedly promised to pay him. The court stated that "[t]he statute . . . is a positive *prescription*, which not only affects the remedy, but extinguishes the right." 77 Tenn. at 492 (emphasis added). However, a majority of common law states are apparently governed by the principle articulated in *Guillory*.

The principle is well settled in a majority of the jurisdictions where the question has arisen, that, as a statute which creates a cause of action not known to common law, and fixes the time within which an action must be commenced thereunder, is not a statute of limitation, but the right given thereby is a conditional one, and the commencement of the action within the time fixed is a condition precedent to any liability under the statute.

Note, 51 L.R.A. (N.S.) 721 (1914).

63. Note, *Prescription—Interruption—Commencement of Action—Improper Joinder of Parties Plaintiff—Articles 2315 and 3518, Louisiana Civil Code of 1870*, 9 TUL. L. REV. 285, 286-87 (1935).

64. LA. CIV. CODE art. 1 states: "Law is a solemn expression of legislative will." It has been quipped that the principle of stare decisis has no application in Louisiana, and that the courts can cite cases to prove it.

apparently the first law that gave courts the general power to entertain election contests, the same degree of deference accorded under the then-current common law theory was not necessarily due in Louisiana.

Ironically, the supreme court often had faced the issue of timeliness in challenging elections long before the *Guillory* case. By Act 319 of 1855,⁶⁵ a candidate for parish office was allowed to challenge an election if, "within ten days after the election," a petition was filed "setting forth the facts on which he intends to contest the election."⁶⁶ During the post-Civil War era of reconstruction, many such lawsuits were instituted, involving charges of fraud, illegality, and chicanery.⁶⁷ The statute which permitted such suits, like the statute in *Guillory*, created a cause of action and stipulated the time within which the action could be brought. Nevertheless, when confronted with an exception of untimeliness, the supreme court did not choose to refer to the ten-day period as peremption.⁶⁸ Nor did the court in an 1875 case interpret the statutory time-period as preemptive, but, presaging the *Guillory* doctrine without in any sense validating it, stated that: "Where a statute authorizes an action and prescribes the delay within which it must be instituted, suit must be filed within this delay or the action, if excepted to, will be dismissed."⁶⁹

The Judicial Scheme

The doctrine of peremption, as formulated by *Guillory*, involves several concepts. Foremost is the notion that, if the statute which

65. Act 319 of 1855 was reenacted by Act 164 of 1868 and was embodied in section 1419 of the Revised Statutes of 1870. The modern counterpart of this provision can be found in LA. R.S. 18:1405 (Supp. 1976).

66. 1855 La. Acts, No. 319.

67. See, e.g., *Belden v. Sherburne*, 27 La. Ann. 305 (1875); *Madison v. Dyer*, 27 La. Ann. 305 (1875); *Deslonde v. Lozano*, 23 La. Ann. 794 (1871); *Davis v. Maxwell*, 22 La. Ann. 66 (1870).

68. The plaintiff in such cases was sometimes said to have "failed in using due diligence" in pursuing his claim. *Davis v. Maxwell*, 22 La. Ann. 66, 67 (1870). Or, the court simply stated that the plaintiff's right to contest the election was "barred." *Deslonde v. Lozano*, 23 La. Ann. 794, 795 (1871).

69. *Belden v. Sherburne*, 27 La. Ann. 305, 306 (1875). Without explaining the plaintiff's argument, the court stated that the plaintiff's position would be entitled to great weight if the question was within the discretion or equity powers of the court, or if the law was ambiguous; but there is no room for construction here; the statute in precise terms limits the period within which such suits shall be instituted; and the court must administer the law as it is, however unwise some of its provisions may appear.

Id.

creates the cause of action also stipulates the period within which the right must be exercised, the delay is preemptive rather than prescriptive. The *Guillory* court was strongly influenced by the fact that the creation of the previously nonexistent cause of action was coupled closely with a time limit in a single statute. The right to contest an election existed for only three months after the promulgation of the results, and the time period was the same for everyone with standing to sue. The right to contest the election was thus a right of limited duration: After the delay elapsed, the cause of action perished. In *Guillory* this aspect was pronounced, since the right to contest the tax election began at a fixed date and terminated upon a fixed date. However, this circumstance alone does not necessarily distinguish the period as non-prescriptive.⁷⁰

The *Guillory* interpretation may be considered a matter of judicial deference to the draftsmanship of statutes, based upon the reasoning that, if no time period is expressed in a particular provision, the time limit upon the action will be governed by the articles on prescription. And, when the legislature states the delay within which the right should be exercised, its intent presumably is to remove the action from the limits of ordinary prescription. This interpretation is not without merit, but it discounts the possibility that the legislature may have been uncertain which prescriptive period would attach to the action and so designated the period out of caution. Or, the legislature may have desired that the period of action be shorter than the prescriptions afforded in the Civil Code and thus stipulated expressly the shorter time. Insofar as the *Guillory* case is concerned, the time period granted was particularly short: there is no question that the legislature, in passing Act 106, intended to set forth a fixed period of limited duration for the resolution of election disputes. However, it may be questioned whether this fact alone justifies the use of a term other than "prescription" to designate the time period.

Despite the confusion surrounding the doctrinal basis of preemption, the courts have divined many instances of legislatively-established preemptive periods. One such example is that of tax sales, which under the Louisiana Constitution cannot be set aside unless a suit for annulment is filed within five years of the recordation of the sale.⁷¹ The courts have referred to this period as both "prescriptive"

70. "When the statute limits in time the exercise of a right under the sanction of forfeiture, it establishes a prescription in favor of the person against whom this right could be claimed." G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 40 at 28.

71. LA. CONST. art., 10 § 11 (1921) provided that, if no notice of the tax sale was given, the tax sale could not be set aside unless suit was filed within five years of

and "peremptive" and also have held that the term can be interrupted and suspended.⁷² However, the three-year period provided by the constitution for redeeming property sold at tax sales has been ruled incapable of interruption.⁷³

A classic example of the uncertainty which has attended the characterization of statutory time limits as either prescriptive or peremptive can be found in a line of workers' compensation cases. Louisiana law provides that all claims for compensation payments "shall be forever barred . . . unless one year after the accident proceedings have been begun."⁷⁴ In the first case interpreting this provision, the supreme court unambiguously stated that the period was prescriptive.⁷⁵ Sixteen years later, the supreme court, citing *Guillory*, labelled the statute peremptive.⁷⁶ Thereafter, the courts vacillated, either avoiding the problem or deeming the distinction unimportant.⁷⁷ Finally, in 1972, the supreme court expressed its

recording of the sale. LA. CONST. art., 7 § 25(C) corresponds to the provision in the 1921 Constitution.

72. The five-year period underwent a crazy-quilt pattern of designations. It has been referred to as an express and explicit constitutional prescription, admitting no exceptions. *Hirst v. Xeter Realty*, 138 La. 398, 403, 70 So. 339, 341 (1915). The court in *Hollingsworth v. Schanland*, 155 La. 825, 99 So. 613 (1924), cited *Guillory* and found that the constitutional provision created a peremption, even though no cause of action to annul a tax sale was created by the constitution. The provision was said to have established a "condition precedent" to the exercise of the right, inhibiting exercise of the right. 155 La. at 834, 99 So. at 616. In *Magnolia Petroleum Co. v. Marks*, 225 La. 805, 74 So. 2d 36 (1954), the period was labelled a "constitutional peremption." 225 La. at 823, 74 So. 2d at 42. In a more recent case, the ostensibly undecided court referred to the period as both "prescriptive" and "peremptive," but held that the delay could be interrupted by adverse possession of the property, if the possession was sufficient for ten years' acquisitive prescription. *Jackson v. Hanna*, 206 So. 2d 779, 784 (La. App. 2d Cir. 1968). See also *Securities Mortg. Co., Inc. v. Triplett*, 374 So. 2d 1226, 1230 (La. 1979).

73. *Securities Mortg. Co., Inc. v. Triplett*, 374 So. 2d 1226, 1231 (La. 1979). See also LA. CIV. CODE arts. 2568-71 (treating the vendor's right of redemption). See note 125, *infra*.

74. LA. R.S. 23:1209 (1950 & Supp. 1975). Section 1209 treats prescription and is entitled "Prescription," but it is part of a body of law which creates a special cause of action for workers.

75. *Norwood v. Lake Bisteneau Oil Co.*, 145 La. 823, 827, 83 So. 25, 27 (1919).

76. *Brister v. Wray Dickinson Co.*, 183 La. 562, 565, 164 So. 415, 416 (1935).

77. *Mitchell v. Sklar*, 196 So. 392 (La. App. 2d Cir. 1940), contains language to the effect that the distinction is insignificant: "If a statute of prescription, the current thereof under certain facts may be interrupted; if a statute of peremption, its term, under like facts, may be tolled." *Id.* at 394. Nonetheless, the court ruled the delay to be prescriptive. In *Harris v. Traders & Gen. Ins. Co.*, 200 La. 445, 8 So. 2d 289 (1942), the supreme court exhibited little respect for the *Brister* decision, observing that the *Brister* court indulged in dicta in labelling the period peremptive: "For the purposes of the present case, we deem the distinction unimportant." 200 La. at 452, 8 So. 2d at

respect for the traditional view of peremption,⁷⁸ equating prescription with statutes of limitation and observing that "we have often held that after a peremptive period has expired no cause of action or substantive right exists."⁷⁹ Only a year later, the supreme court ignored its prior ruling that the period was peremptive and declared that, whether the statutory period was one of prescription or peremption, the period ceases to run "at the institution of legal action upon the claim."⁸⁰ Thus, in more than sixty years of litigation upon a statute that has in all essentials remained the same,⁸¹ the supreme court has been unable to make a definitive ruling on whether the period involved is prescriptive or peremptive. The same confusion is evidenced in wrongful death claims under article 2315 of the Civil Code.⁸²

Perhaps the ultimate test of the *Guillory* rationale for identifying peremptions, in terms of sheer incongruity, occurred in *Succession of Pizzillo*.⁸³ In that case, the decedent's widow was opposed by the decedent's adopted daughter for the power of administration over his estate; the widow claimed that the daughter's adoption was not made in conformity with statute and was for that reason invalid. The applicable law was Act 46 of 1932, which validated all adoptions made prior to its passage and provided that actions to annul such adoptions would be "prescribed after the lapse of six months from

291-92. The plaintiff was said to have done all that reasonably could be required of him to have his claim adjudicated. Moreover, the court attempted to discern the policy underlying the time limit in the statute. 200 La. at 458, 8 So. 2d at 293. For a discussion of the case, see W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE 491-93 (1951). The case is noted at 4 LA. L. REV. 624 (1942). The period also escaped designation by an adroit court in *Gilmore v. State*, 79 So. 2d 192 (La. App. 1st Cir. 1955).

78. *Ancor v. Belden Concrete Prod., Inc.*, 260 La. 372, 256 So. 2d 122 (1972).

79. 260 La. at 381, 256 So. 2d at 125. *Accord*, *Blanchard v. Liberty Mutual Insurance Co.*, 280 So. 2d 592, 595 (La. App. 3d Cir. 1973).

80. *Nini v. Sanford Brothers, Inc.*, 276 So. 2d 262, 264 (La. 1973). The court cited *Harris* approvingly and observed that "the elemental basis of legal interruption of liberative prescription . . . is informing the defendant of the legal demand." *Id.* at 266.

81. 1914 La. Acts, No. 20 § 31, the original act establishing a workers' compensation system in Louisiana, stated that "all claims for payments shall be forever barred unless within one year after injury . . . proceedings have been begun." See note 74, *supra*, and accompanying text.

82. A recent case which has apparently set the matter to rest is *Guidry v. Theriot*, 377 So. 2d 319 (La. 1979), which holds that the wrongful death action is distinct from the survival action and is subject to prescription, not peremption. For a complete discussion of this topic, see Johnson, *Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1, 29-41 (1976); Note, *Wrongful Death: Prescription? Peremption? Confusion!* 39 LA. L. REV. 1239 (1979).

83. 223 La. 328, 65 So. 2d 783 (1953).

and after the promulgation of this Act," specifically referring to the period as one of prescription.⁸⁴ Thus, the case involved a statute which created a cause of action, stipulated the period within which it had to be exercised, but, in direct opposition to *Guillory*, stated expressly that the period was to be considered prescriptive. The designation of the term was critical, for if the period had been termed "prescriptive," the daughter would have been barred from raising the plea before the supreme court.⁸⁵ The supreme court upheld its *Guillory* doctrine over the clear expression of legislative intent.⁸⁶ "While it is true that the Legislature, in providing the time within which suits may be brought, labelled the period as one of prescription, this was inaccurate for, actually, the time provided for the filing of suits was not a period of prescription but one of peremption."⁸⁷ The court, reverting to the *Guillory* rationale, pointed out that the statute in question created a "right of action of limited duration."⁸⁸

The Effect of Peremption

Guillory, the cornerstone of the peremption doctrine, not only defined peremption but described its effect as well: "Statutes of peremption destroy the cause of action itself. That is to say, after the limit of time expires the cause of action no longer exists; it is lost."⁸⁹ This notion still is accepted by the courts and often is cited as the primary distinction between prescription and peremption.⁹⁰ The distinction is not a valid one, since a plea of prescription will also extinguish the right sued upon.⁹¹ The difference between the two is that prescription must be pleaded to have an effect, while peremption is considered to be a condition imposed by operation of the very law upon which the claim is based.⁹²

84. 1932 La. Acts, No. 46.

85. 223 La. at 334, 65 So. 2d at 786. See LA. CIV. CODE art. 3465, which states that prescription cannot be pleaded in the supreme court, "unless the proof of it appear from documents exhibited or testimony taken in the inferior court." See also LA. CODE CIV. P. art. 928, regarding the filing of peremptory exceptions.

86. Note that *Succession of Pizzillo* was prior to *Flowers*, in which peremption was regarded as "but a form of prescription." 364 So. 2d at 931.

87. 223 La. at 335, 65 So. 2d at 786.

88. 223 La. at 336, 65 So. 2d at 786.

89. 104 La. at 15, 28 So. at 901.

90. See, e.g., *Pounds v. Schori*, 377 So. 2d 1195, 1198 (La. 1979); *Ancor v. Belden Concrete Prod., Inc.*, 260 La. 372, 381, 256 So. 2d 122, 125 (1972); *Blanchard v. Liberty Mut. Ins. Co.*, 280 So. 2d 592, 595 (La. App. 3d Cir. 1973); *Istre v. Diamond M. Drilling Co.*, 226 So. 2d 779, 791 (La. App. 3d Cir. 1969).

91. See notes 17-28, *supra* and accompanying text.

92. See, e.g., *Succession of Pizzillo*, 223 La. 328, 335, 65 So. 2d 783, 786 (La. 1953); *Istre v. Diamond M. Drilling Co.*, 226 So. 2d 779, 791 (La. App. 3d Cir. 1969).

A term applicable to the effect of peremption, and grounded in French legal scholarship, is "forfeiture."⁹³ This term is also said to describe accurately the effect of failing to bring timely a legal action as required by procedural law.⁹⁴ Under the forfeiture doctrine, however, a claimant may forfeit "the accomplishment of an act offered by law to conserve a right"; the cause of action is not affected as much as the procedural right to secure vindication.⁹⁵ From this point of view, the peremption or forfeiture merely bars resort to the courts, rather than extinguishes the right which is the subject of litigation.⁹⁶ This is decidedly not the view espoused in *Guillory*, although the term "forfeiture" has been cited by the supreme court as corresponding with peremption.⁹⁷ Other terms, variously used by French legal scholars, loosely apply to Louisiana's doctrine of peremption: the fixed delay, the delay fixed in advance, the strict prescription, the prescription-prefixé, foreclosure, and déchéance.⁹⁸

The Plea of Peremption

The correct procedure for bringing a plea of peremption has never been explained directly in the jurisprudence, possibly because the courts and litigants prefer to couch exceptions in an all-inclusive

93. See *Flowers, Inc. v. Rausch*, 364 So. 2d 928, 931 (La. 1978).

94. Planiol believed that "fixed delays" foreclosed the accomplishment of an act needed to conserve a legal right and thought that such delays were primarily a matter of procedural law. 2 M. PLANIOL, CIVIL LAW TREATISE pt. 1 nos. 704-05 at 380 (11th ed. La. St. L. Inst. trans. 1959).

95. Aubry and Rau compared the effect of forfeitures to that of procedural time limits, but found it difficult to distinguish forfeitures from prescriptions. "The fact that the time period limits the exercise of a faculty rather than extinguishes upon its expiration an action or a right, does not justify a different regime." 12 C. AUBRY & C. RAU, DROIT CIVIL FRANÇAIS, no. 771 at 422 (La. St. L. Inst. trans. 1972).

96. These forfeitures are in our opinion nothing but shortened prescriptions; but being special prescriptions, they can escape from the reach of some general rules to which ordinary prescriptions are subject. In sum, the distinction between prescriptions and forfeitures seems to us an unnecessary complication and a source of confusion. It is impossible to define precisely the difference between them. And the distinction can not be understood in French law where liberative prescription is based on social need and not on negligent lack of action by the creditor, and where it extinguishes the right instead of providing merely an exception-defense against an action.

G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 40 at 30. Furthermore, "[l]iberative prescription does not extinguish only the remedy. It acts also on the right. On this basis it is impossible to distinguish prescription and forfeiture." *Id.*, no. 38, at 25.

97. *Flowers, Inc. v. Rausch*, 364 So. 2d 928, 931 (La. 1978).

98. C. AUBRY & C. RAU, *supra* note 95, no. 771 at 421 ("strict prescription," "prescription-prefixé"); J. CARBONNIER, *supra* note 5, at 468-69 ("Strict Limitation," "déchéance"); M. PLANIOL, *supra* note 94 ("fixed delay," "delay fixed in advance").

series, such as a peremptory exception of prescription and/or peremption and/or no cause of action. Ostensibly, if peremption does destroy a cause of action, the correct procedural device for raising the issue would be the peremptory exception of no cause of action under article 927(4) of the Code of Civil Procedure. However, it has been suggested that the proper exception is one of no right of action:

If a suit to enforce recovery under the statute is filed after this period of peremption has expired, the plaintiff's petition may state a perfect cause of action, but sets forth no right of action, for the reason that the suit was not brought within the peremptive period.⁹⁹

Under the ordinary definition of right of action, this opinion is incorrect: a right of action exists when there is sufficient interest in the plaintiff to bring the suit.¹⁰⁰ A cause of action exists when the plaintiff's petition sets forth grounds upon which the law grants a remedy¹⁰¹ and refers to "whether the law affords a remedy to anyone for the particular grievance alleged by plaintiff."¹⁰² If the cause of action truly expires after the running of the peremptive period, the correct peremptory exception to raise would be that of no cause of action. And, if peremption is a term or condition imposed by the very statute upon which the plaintiff's claim is based, rather than a bar to suit which may be exercised at the defendant's option, it might not even be necessary for the defendant to raise the plea, although it could be raised at any time "prior to a submission of the cause for a decision."¹⁰³

It has been stated that peremption is not waived even if it is not expressly pleaded and that the plea cannot be renounced.¹⁰⁴ However, no decision can be found in which a court noticed the lapse of the peremptive period *sua sponte*. The policy forbidding courts to raise the issue of prescription is codified; no such detailed doctrine exists as to peremption. Nevertheless, the view that peremptions are created by the legislature to enforce a strict limitation upon certain types of actions is consistent with the notion that the court should be able to raise the issue of its own motion. Indeed, the

99. H. McMahon, *The Exception of No Cause of Action in Louisiana*, 9 TUL. L. REV. 17, 29 (1934).

100. See LA. CODE CIV. P. art. 927(5).

101. *Marionneaux v. King*, 331 So. 2d 180, 181 (La. App. 1st Cir. 1976).

102. *Babineaux v. Pernie-Baily Drilling Co.*, 262 So. 2d 328, 333 (La. 1972). See also McMahon, *supra* note 99, at 29-30.

103. LA. CODE CIV. P. art. 928.

104. *Gilmore v. State*, 79 So. 2d 192, 197 (La. App. 1st Cir. 1955).

courts should be unable to grant judgment for a plaintiff who, by the very terms of the law sued upon, has no cause of action.

Interruption and Suspension

The courts have held consistently that a peremptive period cannot be interrupted or suspended¹⁰⁵ even though the *Guillory* case, which originated the doctrine of peremption in Louisiana, did not so rule.¹⁰⁶ This is the most important consequence of the doctrine of peremption and the clearest feature distinguishing peremption from prescription.¹⁰⁷ The view that peremption cannot be interrupted or suspended is possibly a consequence of the strict construction of statutes, which gave rise to the notion of peremption in the first instance: since the legislature provided the time period in the statute creating the cause of action, rather than allowing the prescription articles to apply, the legislative intent must have been to prevent the application of the rules of prescription, and the statute must be applied exactly as it is written. Another possible source of the rule may be traced to early jurisprudence.

In the 1840's a line of cases arose which involved the failure to re-inscribe mortgages within the proper time. Article 3333 of the Civil Code of 1825¹⁰⁸ stipulated that, for mortgages to affect third parties or even the contracting parties themselves, a re-inscription was required within ten years from the date of the initial recordation. The effect of the registry ceased, "even against the contracting parties, if the inscriptions have not [been] renewed before the expiration of this time."¹⁰⁹ *Shepherd v. Orleans Cotton Press Co.*,¹¹⁰ the first of the line of cases treating this article, ruled that the ten-year

105. See, e.g., *Pounds v. Schori*, 377 So. 2d 1195, 1200 (La. 1979); *Flowers, Inc. v. Rausch*, 364 So. 2d 928, 931 (La. 1978); *Succession of Pizzillo*, 223 La. 328, 335, 65 So. 2d 783, 786 (La. 1953).

106. It is interesting that the *Guillory* court fully accepted the idea of "suspending" prescription or peremption by the filing of suit, even though no suspension was allowed on the facts alleged. 104 La. at 17, 28 So. at 901. Thus, the rule of non-interruption has been engrafted upon the *Guillory* dicta to form the Louisiana doctrine of peremption. And, when wrongful death actions were thought to be governed by peremption rather than prescription, the courts nevertheless allowed the period to be "interrupted." See *Thompson v. Gallien*, 127 F.2d 664, 665-66 (5th Cir. 1942); Note, *supra* note 82, at 1244.

107. "There is indeed a difference between prescription and peremption Nevertheless we conclude that peremption is but a form of prescription, a species thereof, but with the characteristic that it does not admit of interruption or suspension" *Flowers, Inc. v. Rausch*, 364 So. 2d 928, 931 (La. 1978).

108. See LA. CIVIL CODE art. 3369 (modern counterpart).

109. LA. CIV. CODE art. 3333 (1825).

110. 2 La. Ann. 100 (1847).

limit was not equivalent to a "prescription" of mortgages, since it was not expressed as such in article 3333. The court declared that the "general view of the civil law" was that "legal delays are fatal in all cases, unless expressly declared to be otherwise."¹¹¹ In the same year, two other cases referred to the *Shepherd* decision as providing for a "peremption of mortgages," and held that litigation upon the mortgage within the ten-year period did not dispense with the need to re-inscribe it.¹¹² These cases are, perhaps, the source of the view that a peremptive period cannot be interrupted. The proposition was flatly stated that, even when the plaintiff filed suit on the obligation secured by the mortgage prior to the lapse of ten years, "the institution of suit does not arrest the peremption of the inscription."¹¹³ In subsequent cases the term "peremption" was used intermittently in discussing the failure to re-inscribe mortgages timely.¹¹⁴

In one of the most recent cases to deal with the subject, *Flowers, Inc. v. Rausch*,¹¹⁵ the supreme court had to decide the effect of the state's failure to re-inscribe tax judgments against certain property. State law provides that no prescription will run against the state for the purposes of such judgments.¹¹⁶ Thus, if the usual distinction between prescription and peremption were upheld, the state's judicial mortgage might have been lost, since no provision of

111. *Id.* at 112.

112. *Hyde v. Bennett*, 2 La. Ann. 799, 800 (1847); *McElrath v. Dupuy*, 2 La. Ann. 520, 523 (1847).

113. *Hyde v. Bennett*, 2 La. Ann. 799, 800 (1847).

114. *Hyatt v. Gallier*, 6 La. Ann. 321 (1851) referred to the "peremption of the mortgage for want of reinscription during more than ten years." *Id.* at 321. The court held that citation upon the mortgagor did not obviate the need to re-inscribe. However, *Union Bank v. Bowman*, 9 La. Ann. 195 (1854), forwarded the notion that prescription governed the re-inscription period, but refused to rule that the period could be interrupted. *Id.* at 196. Confusion became more pronounced in *John I. Adams & Co. v. Dauris*, 29 La. Ann. 315 (1877), which posed the question of "whether it was the inscription which was thus preempted." *Id.* at 324. The court eventually ruled that the mortgage rights had been extinguished by the lapse of the period. *Id.* at 325. In 1878 the court again aired its view that a mortgage which had not been re-inscribed timely had "perempted" and "lost its effect." *Watson v. Bondurant*, 30 La. Ann. 111 (1878). By 1932 the courts seemed finally to reach a stable disposition by ruling on the defendant's claim that an action filed to foreclose on mortgaged property "prevented peremption from running"; the court held that the filing of the foreclosure suit was not sufficient to dispense with the required re-inscription. *Murff v. Ratcliff*, 19 La. App. 109, 110, 138 So. 908, 909 (1932). Citing the prior authorities, the court in *Friedrich v. Handy Andy Community Stores of Louisiana*, 164 So. 486 (La. App. 2d Cir. 1935), ruled flatly that the filing of suit cannot interrupt peremption.

115. 364 So. 2d 928 (La. 1978).

116. LA. CONST. art. XII § 13 provides: "Prescription shall not run against the state in any civil matter, unless otherwise provided in this constitution or expressly by law." See LA. R.S. 47:1581 (1950) (regarding the recordation of tax assessments).

law declared that peremption could not run against the state. The court declared that, even though the ten year re-inscription period is preemptive in nature, peremption is "but a form of prescription," and that no form of prescription can run against the state, including peremption.¹¹⁷ The court continued to affirm its support for the rule that peremption cannot be interrupted or suspended.¹¹⁸

The idea that the filing of suit upon a mortgage does not dispense with the need to re-inscribe it has a fundamental legitimacy, since the law provides re-inscription, and not institution of suit, as the sole method for conserving the effect of registry. However, the rule that peremption cannot be interrupted by filing suit has been applied inflexibly in other cases as well,¹¹⁹ where there is no method other than filing suit by which to conserve the right in question. In these cases the rule is essentially meaningless, the outgrowth of an artificial system of semantic distinctions. The preemptive period, like the prescriptive term, commands that some form of juridical action be taken within the designated time. As to mortgages, re-inscription is the legal action required to preserve the rights which flow from the recordation system. But with other rights, the preemptive period ceases to apply when the cause of action subject to the peremption is exercised—that is, when legal action upon the claim is instituted in the courts. Filing of suit is one way in which prescription can be interrupted legally as well. Thus, the institution of action accomplishes the same effect whether the period is denominated "peremption" or "prescription," yet the filing of suit is termed an "interruption" of prescription, while interruption technically does not apply to peremption. The court's choice of classification, then, determines whether the institution of suit creates a legal interruption or produces some innominate effect.

A practical distinction between the interruption of prescription and the innominate effect upon peremption may exist in two instances. Prescription can be interrupted legally by the service of citation within the designated period, even if suit is not filed in a court of competent jurisdiction or venue. It is not known whether such citation will also dissolve the preemptive barrier, although the supreme court has recently indicated that it will not.¹²⁰ Moreover,

117. 364 So. 2d at 931.

118. *Id.*

119. See text at note 105, *supra*.

120. In *Pounds v. Schori*, 377 So. 2d 1195 (La. 1979), the supreme court was disinclined to accept the view that service of citation within the period mandated by statute can "interrupt" the "peremption." Finding that the statute involved was preemptive in nature, the court ruled that the provisions of R.S. 9:5801 were "inapplicable inasmuch as we are not here concerned with an interruptible form of prescrip-

the natural interruption applicable to prescription may have no effect upon a claim which perempts.¹²¹ In functional terms, though, the filing of suit in a court of competent jurisdiction and venue will produce an interruption of prescription that is indistinguishable from the effect upon a peremptive term, at least where the statute does not command some other form of juridical action. Once this effect is produced, neither device can validly obstruct the claim.

Policy

Little can be ascertained about the policy underlying peremption which would clearly distinguish it from prescription. The fact that peremptive periods have been held to be unsusceptible of interruption and suspension does indicate that the courts have extrapolated a legislative intent to require a strict and rigid obedience to the stipulated term. If the courts' interpretations of legislative intent have been accurate, peremption is founded on a policy of limiting potential litigation more severely than prescription does. This policy, in turn, may rest upon the public interest in having certainty, even at the expense of the private interest in having claims adjudicated. This policy is in fact quite strong in many of the cases where peremptions have been discerned by the courts: there can be no doubt that the public has a strong interest in the validity of elections, the security of titles, and the legitimacy of children, which may well outweigh the individual's interest in litigating a dispute. Peremptive terms, requiring that legal action be initiated with dispatch and in strict conformity with the law, definitely strike a balance favoring the public interest.

If the policy underlying peremption differs from prescription, it is because the public interest in foreclosing litigation is more

tion." 377 So. 2d at 1200. In a much earlier case that involved a cause of action that was peremptive under the *Guillory* formulation, it was held that

whether suit has been brought before a competent court or not, a mistake as to the tribunal, it seems, will not destroy the effect of a suit in the interruption of prescription. And by analogy it ought not when the error occurs in the manner of prosecuting such suit, in consequence of which it may be dismissed.

Prall v. Peet's Curator, 3 La. 274, 281-82 (1832). Yet another problem arises when a suit is voluntarily abandoned or dismissed. According to Civil Code article 3519, "the interruption is considered as never having happened." However, if a second suit is properly filed before the initial suit is abandoned or dismissed, prescription will not accrue against the second suit. See *Franklin v. Ins. Co. of North America*, 284 So. 2d 158, 161 (La. App. 3d Cir. 1973); *Levy v. Stelly*, 277 So. 2d 194, 196 (La. App. 4th Cir. 1973). It is unknown what effect will obtain if the time period involved is considered to be peremptive.

121. See text at notes 122-24, *infra*.

acute.¹²² This policy would militate against allowing the natural interruption of the term, whereby the defendant, without regard to the public interest, can prolong the period in which litigation can be initiated; the policy also would seem to forbid the suspension of the term, since to allow suspension would extend the possibility of litigation far into the future.¹²³ The impermissibility of suspension, in turn, would indicate that the doctrine of *contra non valentem* has no bearing on peremptive periods.¹²⁴

Prescription or Peremption?

There are many articles in the Civil Code that create causes of action and provide for specific time delays. According to the *Guillory* doctrine, these articles are identifiable as peremptive. For example, article 511 states in part that, if a river should carry away "a considerable tract of land," the owner "may claim his property, provided he does it within a year." This article creates a cause of action and stipulates the time within which the right must be exercised; the time is therefore technically peremptive, even though there is no apparent reason for imposing greater strictness than prescription would impose. In the same vein, article 1561 provides that donations may be revoked "for cause of ingratitude," but the action "must be brought within one year from the day of the act of ingratitude." The mere circumstance that the delay is provided for in the article creating the cause of action renders the period peremptive. And, a peremption may even be found in title XXIII of Book III, which specifically governs prescriptions: servants "must make a demand of their wages within a year from the time when they left service . . ."¹²⁵

122. The only remaining issue is to decide, in the case of each limitation established by law, which ordinary rules of prescription one will abrogate in a particular case; whether all of them or only specific ones. In doing so we must draw inferences from the words of the statute—whether it uses the term prescription or the terms forfeiture or foreclosure—but even more from its spirit and the possible reasons for setting up a particularly strict time limitation.

C. AUBRY & C. RAU, *supra* note 95, no. 6 at 422. "Classification of strict limitation can be an oblique way to prevent the application of an extension of time through suspension or interruption, which would leave unprotected for too long categories of defendants considered worthy . . ." J. CARBONNIER, *supra* note 5, at 469-70.

123. See e.g., LA. CIV. CODE arts. 2568-71 (regarding the vendor's right of redemption: the redemptive period cannot exceed ten years; it must be "rigorously adhered to"; it "cannot be prolonged by the judge"; and it "runs against minors").

124. But see J. CARBONNIER, *supra* note 5, no. 16 at 470: "[T]he courts first state the principle that strict limitations are not subject to any extension, and then reserve for themselves at least in some cases as an escape valve the possibility of resorting to the maxim 'contra non valentem agere . . .'"

125. LA. CIV. CODE art. 3206.

There are many other such curious time limits in the Civil Code.¹²⁶

It is readily apparent that peremptions are not easily identifiable and that the *Guillory* doctrine is inadequate for that purpose. Again, early jurisprudence is informative as to the nature of codal time-bars that are not technically prescriptions. *Ashbey v. Ashbey*¹²⁷ is particularly illuminative and bears upon the historical development of the doctrine of peremption. This 1889 case involved a revocatory action. The plaintiff was the tutrix of a minor child who was the judgment creditor of one Joseph Ashbey. The latter executed a mortgage in favor of his two children, the defendants. At the time the mortgage was confected, Ashbey was hopelessly insolvent; the plaintiff contended that the mortgage was a fraudulent attempt to deprive her minor child of the amount owed on the judgment and petitioned the court to nullify the mortgage insofar as it impinged upon the debt owed. The defendants raised the plea of untimeliness under article 1987, which states in part: "No contract made between the debtor and one of his creditors for the purpose of securing a just debt, shall be set aside under this section . . . if such contract were made more than one year before bringing the suit to avoid it." Because the plaintiff had not filed suit within one year of

126. Article 2762, for example, establishes a limited warranty of workmanship for architects and contractors. The warranty is that the building constructed will not "fall to ruin either in whole or in part, on account of the badness of workmanship . . ." LA. CIV. CODE art. 2762. The architect or undertaker must bear the loss if, in the case of a stone or brick building, "the building falls to ruin in the course of ten years . . ." LA. CIV. CODE art. 2762. It should be noted that it is the warranty which thus extends ten years and not the cause of action: the cause of action arises only if the building should actually "fall to ruin." However, this potential cause of action is of a limited duration, for, if a brick building should totally deteriorate eleven years after its construction, no cause of action will lie under article 2762, being totally extinguished by the lapse of the term. Thus, the article provides for a potential cause of action and stipulates its precise duration. The courts have referred to the period as "prescriptive," not "peremptive." State *ex rel. Guste v. Simoni, Heck, & Assoc.* 331 So. 2d 478, 484 (La. 1976); *Hill v. John L. Crosby, Inc.*, 353 So. 2d 421, 422 (La. App. 4th Cir. 1977). Cf. LA. CIV. CODE art. 3545 (an action against an undertaker or architect "is prescribed by ten years.").

The following articles create a cause of action and stipulate the period within which the right may be exercised:

LA. CIV. CODE art. 2630. "All claims for land, or damages to the owner caused by its expropriation . . . shall be barred by two years' prescription."

LA. CIV. CODE art. 1431. When the testator bequeaths more than the disposable portion, the creditors shall have an action against the succession, "prescribed by three years."

LA. CIV. CODE art. 1711. A donation may be revoked when "the action be founded on a grievous injury done to the memory of the testator," if it is "brought within a year from the day of the offense."

127. 41 La. Ann. 102, 5 So. 539 (La. 1889).

the execution of the mortgage, the defendants argued that the cause of action could not be maintained.¹²⁸ The plaintiff countered by claiming that no prescription could run against minors.¹²⁹

In addressing the issues of whether the plaintiff's right had prescribed under article 1987 and whether prescription was suspended in the case of minors, the court remarked that the "proposition naturally suggests the inquiry whether the delay prescribed by the article is technically a term of prescription, as contemplated in civil law."¹³⁰ Citing article 3457, the court declared that

the essence of prescription is that the party who invokes it as a remedy thereby acquires the ownership of property, or is thereby discharged from a debt or obligation. Now, in the contract herein assailed by the revocatory action, the defendants can acquire no property, or be discharged from no debt or obligation The only advantage which [the] co-defendants can derive from the plea is the defeat of the plaintiff's right.¹³¹

Noting then that the time limit given did not seem to fall into the Code category "Of the Prescription Which Operates a Release from Debt," the court stated:

The grant of that right to creditor, known as the "revocatory action," is coupled with a condition, and that is the limit of time within which it must be exercised. It would therefore seem that the lapse of time thus prescribed by law is more in the nature of a term of forfeiture than a term of prescription. Nothing is acquired by that lapse of time, but a right is destroyed by inaction during the prescribed time.¹³²

The court felt that this conclusion was bolstered by the fact that the applicable right and its time limit were not in the title "Of Prescription," but under the title "Of Conventional Obligations," which evidenced the idea "in the minds of the compilers of the Code" that the period was not prescriptive.¹³³ However, the court conceded

128. The mortgage was executed on May 20, 1885. The judgment in favor of the plaintiff's child was rendered on May 11, 1885, but was not signed until May 29. The revocatory action apparently was filed more than a year after the execution of the mortgage. It appeared that Ashbey did in fact owe the amount secured by the mortgage, as the court ruled that the debt was a just one. 41 La. Ann. at 109, 5 So. at 543.

129. The plaintiff cited Civil Code articles 3522 and 3554.

130. 41 La. Ann. at 110, 5 So. at 543.

131. *Id.*

132. *Id.*

133. *Id.*

arguendo that article 1987 "can be construed as meaning technically 'prescription,' " but nonetheless held that the article was excepted from the general rule that prescription could not run against minors. The court cited *Sewell v. Willcox*¹³⁴ to explain the policy of allowing prescription to run against minors in a similar case: "It is of the very essence of the reason which requires a short term for action that it should apply alike to minors, for otherwise the object of the law could frequently be defeated."¹³⁵ The *Sewell* court had ruled that a "short and absolute prescription was found conducive to the security and alienation of immovable property."¹³⁶ In deciding the issue before it—whether the prescription was suspended against the minor—the *Ashbey* court gave a functional answer. However, the court's exposition of the analytical distinctions between prescriptive and other terms posed an intriguing dichotomy. The *Ashbey* rationale was posited on the "wide distinction" which exists in the civil law between "the rules which regulate the mode of acquiring rights by the lapse of time, which is, strictly speaking, prescription, and the principles which govern the mode of circumscribing certain judicial actions or proceedings within a prescribed limit or space of time."¹³⁷ The *Ashbey* decision thus contrasted prescriptive and procedural delays, noting that the former provided rules for "discharging debts," while the latter were governed by rules "of judicial procedure." The only element in common between prescriptive and procedural delays "is . . . the time; in the former it is the essential element, in the latter it is only incidental, and intended only to regulate or limit the exercise of the act."¹³⁸ The *Ashbey* court thus countenanced the idea that a distinction existed between "the rules which govern prescription, strictly speaking, and those which prescribe the lapse of time which limits the exercise of the right of the revocatory action,"¹³⁹ which was analogous to the distinction be-

134. 5 Rob. 83, 17 La. 46 (1843). The *Sewell* case involved an action to cancel a sale under article 2474 of the Code of 1825. See LA. CIV. CODE art. 2498.

135. *Id.*

136. 5 Rob at 85, 17 La. at 47. The *Sewell* court had held that

[t]he prescription of one year, created for this particular case, forms an exception to that of five years established by article 3507 for the rescission of contracts in general. It runs against minors from the day of sale; while that created by article 3507, in relation to all other contracts, commences against them only from the time of their majority.

Id.

137. *Ashbey v. Ashbey*, 41 La. Ann. 111-12, 5 So. 539, 544.

138. The *Ashbey* court cited the case of *Widow and Heirs of Beaird v. Russ*, 34 La. Ann. 315, 41 La. 208 (1882), in which the court had rejected the plaintiff's claim that the delay for taking an appeal could be interrupted just as could liberative prescription. 34 La. Ann. at 317-18, 41 La. at 210.

139. 41 La. Ann. at 112, 5 So. at 544.

tween prescriptive and procedural delays. Although all time limitations technically could be considered prescriptions, some delays existed which would foreclose the right to utilize procedural or juridical action. The importance of *Ashbey* lies in its focus upon the policy underlying the delay, rather than upon the language of the statute, and in its assertion that forfeitures, unlike prescriptions, govern the exercise of legal action rather than the claim upon which the action is based.

There is evidence of a newly-developing approach to peremption in the jurisprudence, which to some extent has departed from the *Guillory* doctrine for identifying peremptions. *Pounds v. Schori*¹⁴⁰ is an example of the emerging trend. The case involved an action for the disavowal of paternity of a child. The applicable Civil Code article provided that "the father, if he intends to dispute the legitimacy of the child, must do it within six months, if he be in the place where the child is born."¹⁴¹ This article gave the only right the law allowed for disavowal of paternity and stipulated the delay within which the action should be brought. Also involved was the paramount public interest of the law in favoring legitimacy. The court of appeal, citing French doctrine rather than *Guillory*, held the period to be peremptive, since it involved "a short pre-established delay entailing forfeiture during which the action must be brought or the party is foreclosed from asserting it effectively."¹⁴²

It must be noted that, if the period had been found to be prescriptive in the ordinary sense, the court might have felt obliged to apply the ordinary prescriptive rules concerning interruption and suspension. The companion article to the one at issue provided that if the presumptive father died within the stipulated term, his heirs would have additional time in which to bring the action.¹⁴³ Thus, if the term could be designated an ordinary prescription, the rule of suspension might apply in case the heirs were minors. This would have had the effect of holding the action in abeyance for an extended

140. 377 So. 2d 1195 (La. 1979).

141. LA. CIV. CODE art. 191 (as it appeared prior to 1976 La. Acts, No. 430). Article 191 was repealed in 1976 and supplanted by article 189. However, the father's disavowal action was brought before the repeal. The *Pounds* court ruled that article 189 could not be applied retroactively, since it affected substantive rights. 377 So. 2d at 1198. This ruling may have affected the outcome of the litigation, since article 189 expressly provides for suspension of the term if "the husband for reasons beyond his control is not able to file suit timely"; allowing the term to be suspended may indicate that the period is an ordinary prescriptive term, not "peremptive" in nature. See text at notes 122-24, *supra*.

142. 369 So. 2d at 1492.

143. LA. CIV. CODE art. 192 (as it appeared prior to 1976 La. Acts, No. 430).

time before the issue of legitimacy could be resolved. The legislature, however, clearly intended to allow only a short and strict delay. Thus, the court's decision was faithful to the legislative intent in requiring rigid adherence to the Code article, preventing any of the methods of arresting the delay that normally accompany prescriptions: the particularly short time period and the traditional policy favoring legitimacy evinced a need to restrict the action severely. The concept of peremption fulfilled this policy, since peremption technically does not admit interruption or suspension.

On appeal to the supreme court, another issue came to the foreground: the putative father had filed suit within the time provided, and service was made upon the mother within the term, but the initial suit was dismissed for lack of personal jurisdiction.¹⁴⁴ The putative father contended that the filing of suit and the service of citation interrupted the period. The supreme court, after affirming the lower court's judgment that the period was preemptive, dismissed as inconsequential the argument regarding interruption, since the court considered peremptions to be non-interruptable forms of prescription.¹⁴⁵ This ruling begged the question.¹⁴⁶ The suitor had attempted to exercise his right, and the defendant was notified of the claim, all within the designated term. It was mere semantics for the court to state that the delay could not be "interrupted"; regardless of the appellation given, peremptions are affected by certain types of legal action.¹⁴⁷ The critical question was whether the running of the term was arrested "as to the defendant served by the service of process,"¹⁴⁸ as with an ordinary prescription, or whether the only legal action which affected the "preemptive" term was the institution of suit in a court of competent jurisdiction which also has in personam jurisdiction over the defendant. The latter question cannot be resolved by resort to doctrine or to terminological distinctions; the issue must be decided on the basis of the policy which underlies "peremption" in the first place.

The importance of *Pounds v. Schori* lies in the court's willingness to analyze the legislative policy underlying the time delay,

144. 377 So. 2d at 1197.

145. *Id.* at 1200.

146. Dissenting, Justice Dixon stated: "We have attacked the problem backward. Having found the Oklahoma suit was timely filed and service timely made, we should then determine how it affected the suit in Louisiana. R.S. 9:5801 says it interrupted all prescriptions." 377 So. 2d at 1200. See Note, *supra* note 82, at 1244-45 (wrongful death cases allowing "interruption" by filing of suit in competent court, despite the fact that the period was treated as preemptive).

147. See text at notes 119-21, *supra*.

148. LA. R.S. 9:5801 (Supp. 1960). See LA. CIV. CODE art. 3518, which provides for interruption when the defendant has been cited "to appear before a court of justice."

rather than relying upon the *Guillory* rationale. The court discussed its "historical position of zealously guarding and enforcing the presumption" of legitimacy and based its holding entirely upon policy considerations.¹⁴⁹ Indeed, the court stated that "each case of this nature should be considered separately on its merits, bearing in mind that the main consideration is the purpose sought to be achieved by the particular limitation period involved."¹⁵⁰ The *Guillory* method of identifying peremptions thus has been discarded.¹⁵¹ However, *Pounds v. Schori* perpetuates two concepts of doubtful validity—that prescriptions merely bar the remedy without affecting the underlying legal rights and that peremptions cannot be interrupted.¹⁵² In relying upon these notions, the court reached a questionable result.

Conclusion

The jurisprudential dichotomy between prescription and peremption is largely insupportable. Prescription is a legislatively mandated, well-established doctrine in the civil law. Peremption is a judicial invention, imported from the common law by way of dicta, engrafted with rules peculiar to mortgages, and made respectable through the years by the unquestioning reliance upon precedent. The doctrine may have the blessing of age but is nevertheless of dubious lineage. If the use of the doctrine is to continue in Louisiana, peremption should be more coherently defined and applied.

Periods of "peremption" cannot be unerringly identified through the use of the *Guillory* doctrine. The mere circumstance that a statute creates a cause of action and stipulates the delay within which the suit must be instituted is not a feature unique to "peremptions." Moreover, to say that "peremptions" afford causes of action of limited duration is essentially meaningless; almost all causes of action have a limited duration, unless the party against whom the right can be asserted wishes to extend it. If the period of "peremption" commands that the right be exercised within the term

149. 377 So. 2d at 1200.

150. *Id.* at 1199-1200.

151. In *Guidry v. Theriot*, 377 So. 2d 319 (La. 1979), the supreme court stated that specification of the time limit for bringing an action in the same statute that created the right of action, is not the sole test of peremption as distinguished from prescription. In *Pounds* . . . we held that peremption, as differentiated from prescription, is a matter to be determined by legislative intent revealed by the statute in its entirety, including the purpose sought to be achieved.

Id. at 325.

152. 377 So. 2d at 1198.

or not at all, the term accomplishes little more than an ordinary prescriptive period, in which the ability to foreclose the right is at the debtor's option. When a statute creates a cause of action and fixes the period within which legal action must be instituted, timely action may well be a necessity for proceeding under the statute. If the statute is not obediently followed, no right to proceed under the statute may exist: it is for this reason only that the cause of action may be said to be extinguished, since the statute does not allow a claimant to take action at variance with explicit statutory terms.

What a "peremption" does do that distinguishes it from a prescription is to command that a certain type of juridical action be taken within a specific period, in conformity with the terms of the law. With mortgages, for example, timely re-inscription may be required; with almost all other forms of "peremption," filing a suit is required. Thus, the courts may interpret such statutes to mean that strict adherence to the terms of the law is required; whether the statute calls for institution of suit or for some other form of juridical action, nothing else will suffice. "Peremptions" are in this sense merely limited prescriptions, since only the fulfillment of the statutory condition, rather than other forms of legal or natural interruption or suspension, will interrupt the term. When a statute stipulates the form of juridical action required to vindicate the right, the ordinary rules of prescription may not apply.¹⁵³

Peremption, a judicial creation, is subject to judicial alteration. If the courts persist in finding distinctions between certain time limits and prescription, the dividing line should be drawn in functional terms, rather than with analytically unsound characterizations of nature and effect. There are only two important distinctions in the jurisprudence between prescriptions and peremptions—the modes of interruption and suspension.

It is pointless to pretend that peremptions cannot be "interrupted"—they can be tolled, arrested, interfered with, and intervened upon.¹⁵⁴ In short, the claimant can take legal action which will render the term moot, irrelevant, and without force or effect.

153. For example, it has been held that a claim filed against a health care provider under the terms of the Medical Malpractice Act will not interrupt prescription as to individuals not qualified under the Act. *Ferguson v. Lankford*, 374 So. 2d 1205 (La. 1979). The special provisions for filing claims under the Medical Malpractice Act do not invoke the ordinary Civil Code rules governing prescriptions. The filing of a claim under the Act does not constitute a suit or acknowledgement sufficient to interrupt prescription as to a solidary debtor. *Id.* at 1208.

154. *Hyde v. Bennett*, 2 La. Ann. 799, 800 (1847)("[T]he institution of suit does not arrest the peremption of the inscription"); *Mitchell v. Sklar*, 196 So. 392, 394 (La. App. 2d Cir. 1940) ("if a statute of peremption, its term . . . may be tolled").

"Interruption" is merely a convenient short-hand form of describing this effect. The basic issue is whether peremptions can be interrupted to the same extent and in the same manner as prescriptions. It is certain that, unless the relevant statute commands some other form of juridical action, the filing of suit in a court of competent jurisdiction which has in personam jurisdiction over the defendant will interrupt the peremptive period. The inquiry thus narrows to two questions: Can peremptions be interrupted in any other manner? And can peremptions be suspended? Both inquiries could be answered negatively, although there may be no sound basis for disallowing interruption when the claimant files suit in an improper court but nevertheless has citation served upon the defendant in time.¹⁵⁵ However, the disposition of these issues can await judicial resolution, depending upon the circumstances of the case and relevant functional considerations.

Where the courts have erred is not in the discernment or interpretation of legislative intent, but in the analysis of the legal nature of the problem. No amount of precedent can justify analyses inconsistent with the positive law, which does not authorize the courts' traditional treatment of peremptions. It is suggested that all time limits upon legal actions are prescriptions in Louisiana, the only irregularity being that some prescriptions are governed by different rules than others.

Recently, the supreme court has apparently resolved to examine and to apply to the problem of peremption the scholarship of French doctrinal writers, whose chief contribution to the subject has been to highlight the confusion.¹⁵⁶ A case-by-case approach may lack the

155. One comment indicates that peremptions can be "interrupted" by filing suit in a court of competent jurisdiction or by service on the defendant within the delay allowed. Comment, *Survival of Actions in Art. 2315 of the Louisiana Civil Code: The Victim's Action and the Wrongful Death Action*, 43 TUL. L. REV. 330, 346 (1969). It should also be remembered that the supreme court has stated that peremption is "but a form of prescription." *Flowers, Inc. v. Rausch*, 364 So. 2d 928, 931 (La. 1978). R.S. 9:5801 states that "all prescriptions" are interrupted by either the filing of suit or the service of citation. LA. R.S. 9:5801 (Supp. 1960) (emphasis added). As to suspension, it is interesting that Civil Code article 189 expressly permits suspension, even though the article upon which it was based was ruled to be peremptive in *Pounds v. Schori*, 377 So. 2d 1195 (La. 1979).

156. "In sum, the distinction between prescriptions and forfeitures seems to us an unnecessary complication and a source of confusion. It is impossible to define precisely the difference between them." G. BAUDRY-LACANTINERIE & A. TISSIER, *supra* note 3, no. 40 at 30. "The fact that the time period limits the exercise of a faculty rather than extinguishes upon its expiration an action or a right, does not justify a different regime." C. AUBRY & C. RAU, *supra* note 95, no. 771, at 422. "The quarrel is above all terminological." J. CARBONNIER, *supra* note 5, at 468.

symmetry favored by the civil law but offers the advantage of tailoring judicial analysis to the issues at hand, rather than rigidly imposing dogmatic categories. As the analysis evolves, several factors may gradually emerge to guide the bench and bar:

(1) *Context of the statute.* The fact that a stipulated time period does not appear in title XXIII of the Code does not mean automatically that the period is not prescriptive. However, if a prescriptive period in title XXIII does apply to the action, that term should govern the case.

(2) *Character of the claim.* If the claim sued upon is of a private-law character, the claim probably will be governed by ordinary prescription. However, if the right which is the subject of litigation is of a public-law nature, such as the right to contest elections, there is more likely to be a strong interest in regulating the litigation, with the attendant implication that public policy would favor a strict interpretation of the requirements for interrupting the term.

(3) *Desirability of a strict term.* If it is apparent that the public interest would be disserved by permitting suspension of the term—where, for example, a minor's action could be held in abeyance for a prolonged period, it is reasonable to conclude that the period is non-prescriptive in the ordinary sense. The same would hold true if the public interest would be thwarted by permitting the defendant to prolong the period of potential litigation through the acknowledgment of the claimant's right.

(4) *Length of the term.* If the term provided for instituting legal action is less than one year, the shortest prescriptive term appearing in title XXIII, the short period would indicate that there is a public interest in regulating closely the subject of litigation.

Many of the "peremptions" found in the jurisprudence have exhibited one or more of these characteristics, the chief factor being that, where an important public policy or interest of the state is likely to be affected adversely if the delay in question is termed "prescriptive," the courts have reached for the doctrine of peremption. But the courts would be best-advised to forego use of the term "peremption" altogether, since it does nothing but induce semantic controversies: the use of a special term implies a deep-seated distinction, whereas in functional terms peremption is merely a prescription which is not governed by the ordinary rules of title XXIII. The confusing decisions of the courts have played havoc with the doctrinal basis of the law, and the problem demands correction.

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