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The Dation en Paiement: Problems with the Elusive Concept of Prejudice when Bringing the Revocatory Action

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NOTES

THE DATION EN PAIEMENT: PROBLEMS WITH THE ELUSIVE CONCEPT OF PREJUDICE WHEN BRINGING THE REVOCATORY ACTION

An unsecured creditor brought an action to revoke a dation en paiement made by a debtor to a secured creditor, alleging that the debtor was insolvent and that the dation gave an unfair preference to the secured creditor to the prejudice of the plaintiff. The supreme court affirmed the finding of insolvency by the first circuit and *held* the plaintiff was not prejudiced when preferred claims amounted to more than the value of the property given, thereby leaving nothing that could be applied to the unsecured debt owed to the plaintiff. *Martin LeBreton Insurance Agency v. Phillips*, 364 So. 2d 1032 (La. 1978).

The dation en paiement, or giving in payment, is an act by which a debtor gives a thing to his creditor in payment for the debt owed;[1] it generally has the effect of transferring title just as an ordinary contract of sale.[2] However, the ordinary sale is perfect by mere consent of the parties, while the dation en paiement requires actual delivery.[3]

According to article 3183 of the Civil Code, the property of a debtor is the common pledge of his creditors "unless there exist among the creditors some lawful causes of preference."[4] However, the debtor, although insolvent, may "lawfully sell for the price which is paid to him; but the law forbids to give in payment to one creditor, *to the prejudice of others*, any other thing than the sum of money due."[5]

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1. LA. CIV. CODE art. 2655.

2. Quality Finance Co. of Donaldsonville, Inc. v. Bourque, 315 So. 2d 656 (La. 1975).

3. LA. CIV. CODE art. 2656.

4. *See, e.g.*, Feist v. Willer & Gamm, 16 La. App. 618, 133 So. 797 (2d Cir. 1931).

5. LA. CIV. CODE art. 2658 (emphasis added). *See generally* Lowenberg, Marks & Co. v. H. & C. Newman, Ltd., 142 La. 959, 77 So. 891 (1918). *Lowenberg*, interpreting article 1978, held that an insolvent debtor's transfer of property will not be set aside unless there is injury to the complaining creditor.

6. In fact, there are three basic actions available to creditors to protect their rights: the revocatory action, the oblique action, and the action in declaration of simulation.

The revocatory action gives to creditors an action to annul any contract made in fraud of their rights, provided they are able to show that their rights were prejudiced by the action of the debtor. *See* LA. CIV. CODE arts. 1969-94; Deposit Guar. Nat'l Bank v. Shipp, 232 So. 2d 810 (La. App. 2d Cir. 1970). The oblique action allows a creditor to exercise all rights existing in favor of the debtor, but which the debtor has failed or neglected to exercise, for recovering possession of property to which the debtor is en-

In the event that a debtor transfers property out of his patrimony to one of his creditors, the revocatory action is available to protect the rights of the remaining creditors.[6] The revocatory action has its foundation in article 3183, which provides that the property of the debtor is the common pledge of his creditors, and further makes that property available to creditors who are prejudiced at the time a fraudulent transfer is made by their debtor.[7] If the revocatory action is successful, the transfer is set aside, but only for the benefit of the creditors who timely attack the transfer.[8] The property is not returned to the estate of the debtor. Rather, the transferred property is made available to satisfy the claims of creditors who sue timely; the original transferee is entitled to retain any excess over the claims of the complaining creditors.[9]

The revocatory action is not limited to the contract of sale. Article 1969 provides that "every act done by a debtor with the intent of depriving his creditor of the eventual right he has upon the property of such debtor, is illegal, and ought, as respects such creditor, to be avoided." It is well-settled that the revocatory action can be used to set aside a dation en paiement made by an insolvent creditor under article 2658.[10] An analysis of the Civil Code[11] and of the jurisprudence[12] reveals that in order for a complaining creditor to prevail in the revocation of a dation en paiement, he must prove the following four substantive elements:[13]

(1) The plaintiff was a creditor of the transferor on the date of dation.[14]

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titled. LA. CIV. CODE art. 1990. The action in declaration of simulation is available whenever the effects of an apparent transfer are suppressed by another contract which remains secret, called a counterletter. An action for nullity of the transfer will lie in favor of complaining creditors. LA. CIV. CODE art. 2239. *See generally* Willis v. Scott, 33 La. Ann. 1026 (1881). This note concerns only the revocatory action, or *actio Pauliana* (Paulian action) as it was originally called.

7. LA. CIV. CODE arts. 1978 & 2658.

8. Tate, *The Revocatory Action in Louisiana Law*, in ESSAYS ON THE CIVIL LAW OF OBLIGATIONS 134 (J. Dainow ed. 1969). The action must be brought within one year. LA. CIV. CODE 1987 & 1994.

9. Tate, *supra* note 8, at 134.

10. *See, e.g.*, Harman v. Defatta, 182 La. 463, 162 So. 44 (1935); Lovell v. Payne, 30 La. Ann. 511 (1878); Taylor v. Knox, 2 La. 16 (1830).

11. *See* LA. CIV. CODE arts. 1968-84 & 2655-59.

12. *See, e.g.*, Harman v. Defatta, 182 La. 463, 162 So. 44 (1935); Lowenberg, Marks & Co. v. H. & C. Newman, Ltd., 142 La. 959, 77 So. 891 (1918); Perigoni v. McNiece, 307 So. 2d 407 (La. App. 4th Cir. 1975).

13. These four elements are not specifically listed in any article or case, but can be gleaned from an analysis of the relevant Civil Code articles and the jurisprudence interpreting them.

14. *See* Perigoni v. McNiece, 307 So. 2d at 410; Lowenberg, Marks & Co. v. H. & C. Newman, Ltd., 142 La. at 967, 77 So. at 893; LA. CIV. CODE art. 1993. *See also* LA. CIV. CODE arts. 1972 & 1975.

(2) On the date of the transfer, the transferor was insolvent.[15]

(3) The transfer was in fraud of the rights of creditors.[16]

(4) The complaining creditor was prejudiced by the transfer.[17]

The first element indicates that the revocatory action is available only to a creditor that is prejudiced *at the time* the transfer takes place. It cannot be exercised by a party that becomes a creditor of the transferor after the transfer takes place.[18]

In order to rescind the transfer made in fraud of his rights, the creditor must file suit against the transferee. The general provision in the Civil Code dealing with the revocatory action is article 1970, which gives *every* creditor the right to annul any contract made in fraud of his rights.[19] However, article 1972 modifies this right so as to allow only judgment creditors to annul fraudulent transfers.[20] A complaining creditor must either reduce his claim to judgment against the original debtor prior to instituting the revocatory action, or he must elect at the time he brings the revocatory action against the transferee to join also an action against the debtor, seeking to reduce his claim to judgment.[21] The rationale for securing judgment against the original debtor was set forth in *Williams & Miller v. Jones*.[22] The first circuit explained that in the absence of a valid

15. LA. CIV. CODE arts. 1984-85. *See* Perigoni v. McNiece, 307 So. 2d at 410; Lowenberg, Marks & Co. v. H. & C. Newman, Inc., 142 La. at 967, 77 So. at 893.

16. LA. CIV. CODE art. 1978. *See* Perigoni v. McNiece, 307 So. 2d at 410; Harman v. Defatta, 182 La. at 468, 162 So. at 46; Lowenberg, Marks & Co. v. H. & C. Newman, Inc., 142 La. at 967-68, 77 So. at 893-94.

17. LA. CIV. CODE art. 2658. *See, e.g.*, Harman v. Defatta, 182 La. 463, 162 So. 44 (1935); Jackson v. Miller, 32 La. Ann. 432 (1880); Deposit Guar. Nat'l Bank v. Shipp, 232 So. 2d 810 (La. App. 2d Cir. 1970).

18. LA. CIV. CODE art. 1993 provides: "No creditor can, by the action given by this section, sue individually to annul any contract made before the time his debt accrued." *See, e.g.*, Lowenberg, Marks & Co. v. H. & C. Newman, Ltd., 142 La. at 967, 77 So. at 893; Pilsbery v. Fricke, 139 La. 153, 71 So. 349 (1916) (creditor has no standing to complain of the transfer of property by his debtor until the debt has been created).

19. LA. CIV. CODE art. 1970 provides:

> The law gives to *every* creditor, when there is no cession of goods, as well as to the representatives of all the creditors where there is any such cession, or other proceedings by which they are collectively represented, an action to annul any contract made in fraud of their rights.

(Emphasis added.)

20. LA. CIV. CODE art. 1972 states: "It can not be exercised by individual creditors, until their debts are liquidated by a judgment, unless the defendant in such action be made a party to the suit for liquidating the debt brought against the original debtor in the manner hereinafter directed."

21. LA. CIV. CODE arts. 1972 & 1975.

22. 180 So. 140 (La. App. 1st Cir. 1938). The revocation of a transfer of immovable property was set aside because the complaining creditor failed to reduce his claim to a judgment. *Id.* at 142.

judgment, there might otherwise be situations where courts would set aside transfers made by debtors when the creditor would not legally be entitled to judgment against the debtor.[23]

The second prerequisite for a successful revocatory action is that the transferor must have been insolvent on the date of the transfer. Civil Code article 1985 provides that a party is considered insolvent when the whole of his assets is exceeded by his liabilities.[24] The complaining creditor bears the burden of proof of establishing the existence of the debtor's liabilities. However, once this is accomplished, the burden of proving that assets are greater than liabilities is shifted to the transferee against whom the revocatory action is brought.[25]

A third requirement is that the transfer must be fraudulent as to the complaining creditor. Article 1984 provides the formula for determining fraud, stating that fraud will be found when the transferee had knowledge of the insolvency of the transferor and the contract gives the transferee an advantage over other creditors. This has been jurisprudentially extended to include instances where the transferee should have had knowledge.[26] The Louisana Supreme Court addressed the requirement of fraud in *Harman v. Defatta*[27] when the plaintiff, pursuant to Civil Code article 2658, attacked a dation en paiement made by the defendant to his son, alleging that the law forbids the giving in payment to one creditor a thing other than money, where such a transfer works prejudice upon other creditors. The defendant countered with a claim that the dation was not fraudulent, and hence could not be revoked since article 1978 protects good faith transfers.[28] The supreme court rejected the defendant's argument, holding that a transfer made by an insolvent debtor to one of his creditors in payment of a delinquent debt is *presumed* to be made in fraud of the rights of other creditors. This presumption may be overcome by testimony to the contrary.[29] In

23. *Id.* at 142. Absent a requirement that the claim be reduced to judgment, the courts arguably would be establishing a presumption that the transferor is legally indebted to the plaintiff. In actuality, the Code views the property of the debtor as the common pledge of his creditors. LA. CIV. CODE art. 3183. To assure that a plaintiff is entitled to a share in the property of a debtor, he must first prove that he is the legal creditor of the debtor.

24. Solvency is defined in the Civil Code as "the ability to pay one's debts. He who cannot pay all that he owes is not solvent." LA. CIV. CODE art. 3556(26).

25. LA. CIV. CODE art. 1985.

26. Acknowledging the need to further protect the rights of creditors, the Louisiana Supreme Court extended the knowledge requirement in *Swift & Co. v. Bonvillian*, 139 La. 558, 71 So. 849 (1916).

27. 182 La. 463, 162 So. 44 (1935).

28. Article 1978 provides that a transfer made in good faith cannot be annulled even though it is injurious to creditors.

29. 182 La. at 469, 162 So. at 46.

short, *Harman* provides that when a dation en paiement is made and a complaining creditor is able to establish his pre-existing debtor status and the insolvency of the transferor, the first two elements of the revocatory action, a rebuttable presumption arises as to the existence of the third element of fraudulent intent.

The fourth and final element of the revocatory action is that the transfer must have prejudiced the rights of the complaining creditor. A complaining creditor is required to show that he was prejudiced by the transfer in order to have standing to bring the revocatory action, regardless of whether any other creditors were similarly prejudiced.[30] The determination of prejudice is a factual question for which the courts have developed a straightforward test based on the relationship between the value of the property given in payment and the ranking of the indebtedness recorded against the property. As the test is applied, if the value of all recorded judgments, mortgages, and privileges which outrank the claim of the complaining creditor exceeds the value of the property given in payment, then the creditor has not been prejudiced.[31] Under these circumstances, if the property were to be sold for its fair market value, all proceeds would be applied to the superior claims, leaving nothing to satisfy the claim of the complaining creditor. On the other hand, prejudice would result if the value of the preferred claims does not exceed the value of the property. Should the property be sold and the preferred claims satisfied, part of the proceeds would still remain for application to the claim of the complaining creditor. By denying him this remainder of the proceeds for the satisfaction of his claim, the creditor would be prejudiced.

The Louisiana Supreme Court first addressed the issue of prejudice caused by a dation en paiement in *Jackson v. Miller*.[32] In *Jackson*, a debtor made a dation of property worth only one-third of the amount of the debt for which the property was given. The court held that there was no prejudice to the complaining creditor because a forced sale in foreclosure of the mortgage would have consumed a large part of the proceeds, leaving a large part of the debt unsatisfied.[33] The issue of prejudice arose again in *Deposit Guaranty National Bank v. Shipp*,[34] in which the second circuit found no prejudice to the complaining creditor in a dation of immovable property to a creditor in satisfaction of a preferred debt of equal value to the

30. See note 17, *supra*. See also note 48, *infra*.

31. *See generally* Jackson v. Miller, 32 La. Ann. at 435; Succession of Cottingham, 29 La. Ann. 667, 670-71 (1877); Deposit Guar. Nat'l Bank v. Shipp, 232 So. 2d at 814.

32. 32 La. Ann. 432 (1880).

33. *Id.* at 435.

34. 232 So. 2d 810 (La. App. 2d Cir. 1970).

property transferred. Judge (now Justice) Dixon, writing for the court, held that inferior creditors were not prejudiced since the net patrimony of the debtor had not been adversely affected. Further, if the conveyance were set aside, the mortgage reinstated, and a sheriff's sale provoked, it was apparent that the complaining creditor could recognize nothing from the proceeds unless the property were sold for a price which exceeded its value.[35] It is clear that a prerequisite to a court's determination of the issue of prejudice should be an affirmative showing that the value of the property exceeds all recorded claims ranking above that of the complaining creditor.

The instant case presented a much more complicated factual situation to which the test for determining prejudice could not be so easily applied. In 1972, the Lamastuses borrowed $150,000, secured by a collateral mortgage on a marina in favor of the defendant, First Metropolitan Bank. Sometime in 1974, these debtors became delinquent in their payments to the bank; suit was filed and a judgment in the sum of $200,000, including interests, costs, and attorney's fees, was rendered in favor of the bank.[36] This judgment was subsequently recorded. Various judgments of other creditors were later recorded; however, no attempt at collection was made until one of the inferior creditors had the property seized in an unsuccessful effort to have it sold in August of 1976.[37]

In October of 1976, the bank began negotiating with the Lamastuses in order to liquidate the outstanding indebtedness. Ultimately, the parties agreed that the bank would accept a dation of the property in payment of the debt.[38] Before this dation was executed, the Lamastuses executed a promissory note for $30,000 in favor of the plaintiff in this action, Martin LeBreton Insurance Agency; the note was secured by a collateral mortgage on the same marina. Prior to recordation of the mortgage by Martin LeBreton, the bank secured partial releases from other secured judgment creditors[39] having claims totaling $56,207.47, and accepted the dation

35. *Id.* at 814.

36. Transcript of Proceedings Before Twenty-Second Judicial District Court, Brief for Defendant-Appellee at 1, Martin LeBreton Ins. Agency v. Phillips, 364 So. 2d 1032 (La. 1978).

37. In actuality, there were two attempted sheriff's sales, the second taking place in October of 1976. *Id.* at 6. Again, after the minimum bid had been announced three times, no bids were made on the property.

38. Transcript of Proceedings Before Twenty-Second Judicial District Court, Testimony at 39-45, Martin LeBreton Ins. Agency v. Phillips, 364 So. 2d 1032 (La. 1978).

39. These other mortgage creditors relinquished only their rights as to the marina, reserving their personal rights as against the debtors. The judgments were not cancelled in any way. Although there was testimony by Mr. Lamastus to the effect

of the marina from the Lamastuses on February 24, 1977.[40] The trial court made a determination that at the time of the dations, the Lamastuses were indebted to the bank for $257,442.52, and that the value of the property given in payment was $303,500.00, exceeding the amount of the debt by some $46,000. The insurance agency did not record its mortgage until March 24, 1977, and thus was considered to be an unsecured creditor.[41] Shortly thereafter, Martin LeBreton filed a revocatory action[42] against the bank to rescind the dation.[43]

The insurance agency claimed that it had been prejudiced by the dation of its insolvent debtors and that the dation should be rescinded because it was forbidden under article 2658 of the Civil Code. The trial court found that the debtors were solvent[44] and that the insurance agency had the status of an unsecured creditor at the time of the dation; therefore, it denied the relief sought since the secured indebtedness exceeded the appraised value of the property. The court of appeal reversed the trial court's determination of solvency but nevertheless found that the dation did not prejudice the in-

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that these inferior secured creditors were to receive $15,000 from the bank to be divided among them in payment for the partial releases, the trial court did not indicate whether it credited this testimony or not. *Id.* at 43 & 235.

40. 364 So. 2d at 1033. In fact, the mortgage by Martin LeBreton had been executed a month prior to the dation en paiement, but the mortgagee failed to record the mortgage until after execution of the dation and therefore had the status of an unsecured creditor.

41. *Id.*

42. It is noteworthy that the complaining creditor may bring a petition for involuntary bankruptcy against a debtor that has removed a part of his property with the intent to hinder, delay or defraud his creditors or any of them. 11 U.S.C. § 21 (1952). However, under involuntary bankruptcy proceedings, the action for rescission benefits all creditors of the debtor. It is likely that the complaining creditor opted for the revocatory action, which benefits only the creditors that timely attack the transfer, because the plaintiff's debt would possibly have been only partially discharged, if at all, had a bankruptcy proceeding effected a distribution of assets. See text at notes 9-10, *supra.*

43. 364 So. 2d at 1033-34. The record indicates that a separate suit was filed by Mr. Lamastus against the bank to have the dation declared null by reason of fraud. Mr. Lamastus claimed that in exchange for the dation, the bank had promised him the option of repurchasing the marina prior to its sale to any third party. Mr. Lamastus' suit was consolidated with the suit in the instant case for purposes of trial. The trial court determined that there was no fraud, finding the dation to be valid. Mr. Lamastus did not appeal.

44. Civil Code article 1985 provides that a party is considered insolvent when the whole of his assets is exceeded by his liabilities. See note 25, *supra*, and accompanying text. Nevertheless, although the liabilities of the Lamastuses exceeded their assets by $13,000, the trial judge felt this was "not an appreciable amount" and found the debtor solvent. Transcript of Proceedings Before Twenty-Second Judicial District Court, Reasons for Decision at 4 Martin LeBreton Ins. Agency v. Phillips, 364 So. 2d 1032 (La. 1978) [hereinafter cited as Reasons for Decision].

surance company.[45] The Louisiana Supreme Court affirmed the First Circuit Court of Appeal, holding that no prejudice resulted when the claims of the inferior secured creditors ($56,207.47) would exhaust the excess of the value of the property given in payment over the value of the debt extinguished ($46,000), thereby leaving nothing for the insurance agency, an unsecured creditor.[46]

The majority's opinion is arguably an insufficient response to the complexities of this case.[47] In the first place, although insolvency of the debtor was established, the majority failed to address the requirement of articles 1970 and 1978 that the transfer of property by a debtor be in fraud of the rights of creditors.[48] However, as the dissent points out, the existence of fraud[49] can be found through the concept of constructive fraud. Articles 1983 and 1984 provide that constructive fraud occurs when a creditor, knowing his debtor to be in insolvent circumstances, obtains an advantage over the other creditors of the debtor. It is submitted, however, that it was not necessary to use articles 1983 and 1984, which require a showing of

45. 357 So. 2d 883 (La. App. 1st Cir. 1978).

46. 364 So. 2d at 1034-35.

47. Though the Civil Code requires that a debt be reduced to judgment prior to instituting the revocatory action, or, in the alternative, that the creditor join the suit against the debtor with the revocatory action filed against the transferee, see notes 21-23, *supra*, and accompanying text, no attempt had been made by Martin LeBreton to secure a judgment against the debtors. Nevertheless, the court did not dismiss the revocatory action, choosing, instead, to note the deficiency in a footnote and base its decision on other grounds.

As a practical matter, the supreme court made the proper determination on this issue. Had the court rejected the claim for rescission for failure to seek judgment against the Lamastuses, the plaintiff would have simply had to amend its petition to include a plea for judgment. LA. CIV. CODE arts. 1972 & 1975. *See* Block v. Marks, 47 La. Ann. 107, 16 So. 649 (1895). In *Block*, the complaining creditor's revocatory action was rejected when the creditor failed to make the debtor a defendant and plead for judgment. The creditor was allowed to amend his petition to include a plea for judgment against the debtor. After a ruling on the plea for judgment by the trial court, the supreme court would likely be confronted with the issue of prejudice again.

48. Since fraud is not mentioned in the majority opinion, it is impossible to determine whether the court overlooked this requirement of the revocatory action or whether fraud was presumed under the circumstances. The court may have been confused by the distinction between the required showing of fraud under articles 1970 and 1978 and of prejudice under article 2658, since the terms appear somewhat related. However, they are separate and distinct prerequisites for bringing a revocatory action. In order for a transfer to be rescinded, it must have been made in fraud of the rights of creditors. The concept of fraud concerns the giving to one creditor an unfair preference over the other creditors. On the other hand, the issue of prejudice goes to the question of standing, for not every creditor has standing to bring the revocatory action. Rather, only those creditors who have been prejudiced by the fraudulent transfer may bring it.

49. 364 So. 2d at 1035 (Tate, J., dissenting). See note 57, *infra*.

knowledge of insolvency by the transferee to establish fraud, since *Harman* may be relied upon for a presumption of fraud when there is a dation en paiement and the debtor is insolvent.[50]

The court's treatment of the issue of prejudice to the complaining creditor, the central issue presented in the case, is also unsatisfactory. Recall that Civil Code article 2658 forbids the insolvent debtor to give a thing other than money in payment to one creditor to the prejudice of the others. Stating that "the test for determining prejudice is a factual one, based on the value of the property and the ranking of indebtedness,"[51] the supreme court noted that, had the property been sold for its fair market value at a judicial sale, the complaining creditor would have received nothing since the claims of the inferior secured creditors exceeded the excess value of the property given in payment.[52] The court's position appears tenable only if the Lamastuses gave the property in payment to the bank before the bank obtained the releases from the other secured creditors.[53] Under these circumstances, at the time of the transfer,[54] there existed secured creditors with claims against the property preferable to that of the complaining creditor. These preferred claims totalled more than the excess of the value of the property given over the value of the debt to the bank. Thus, there would have been nothing left for the complaining creditor.

However, the court states that the dation was executed "after securing releases from the other mortgage creditors."[55] If indeed the releases were obtained prior to the execution of the dation en paiement, quite a different result should have been reached. Once the releases were executed, the inferior secured creditors lost their preferred status and became unsecured creditors like the plaintiff. Under these conditions, at the time of the transfer, there were no creditors whose preferred claims would have exhausted the excess given in payment over the amount owed. Rather, all remaining

50. See text at notes 26-29, *supra*.

51. 364 So. 2d at 1034.

52. *Id.* at 1034-35. The court stated that preferred claims totalled $313,649.99, while the value of the marina was only $303,500.00. Since the property was worth some $10,000 less than the total outstanding secured indebtedness, the court said that an unsecured creditor could not be prejudiced by the transfer. As a practical matter, even if the property should appreciate slightly between the appraisal and the sale, the expenses of a judicial sale are likely to consume the whole of the proceeds.

53. See notes 39-43, *supra*, and accompanying text. It is noteworthy that neither the trial court nor the first circuit addressed the timing of the releases.

54. The first element of the revocatory action requires that a complaining creditor be prejudiced *at the time* of the transfer. See text at notes 18-23, *supra*.

55. 364 So. 2d at 1033. Chief Justice Sanders, the organ of the court, writes: "After securing releases from the other mortgage creditors, [the bank] and the Lamastuses entered into a dation en paiement on February 24, 1977." *Id.*

creditors had similar unsecured status and were equally prejudiced under article 2658. Any and all unsecured creditors should have been able to bring the revocatory action.

Justice Tate, in a dissenting opinion, argued that when the bank obtained the property in the dation for less than its actual value, it obtained an unfair preference. The result was a diminution of the estate of the Lamastuses available for the payment of their remaining unsecured creditors, in the amount of $46,000 which the bank received in excess of the debt actually owed.[56] By viewing the excess given in payment as exhausting the remainder of the debtor's assets which would otherwise have been available for the pro rata claims of each of the unsecured creditors,[57] the transfer prejudiced the rights of all remaining unsecured creditors.[58] This argument is apparently based on a factual determination that the releases from the other secured creditors were obtained before the dation. There can be no finding of prejudice to the plaintiff if the releases came after the dation. If that were the case, there would be preferred creditors at the time of the dation, which would preclude a finding of prejudice.[59]

There are problems, however, with the implications of the dissent. In the instant case, the property given in payment was worth approximately $46,000 more than the $257,442.52 debt.[60] The dissent claims that the dation en paiement should have been set aside because the remainder of the debtor's assets was diminished by this $46,000, to the prejudice of the rest of the unsecured creditors. Are all dations, however slight the excess, to be set aside upon a showing of prejudice to the remaining unsecured creditors? This appears to be the result which the logic of the dissent would demand. In

56. 364 So. 2d at 1036 (Tate, J., dissenting).

57. Justice Tate points out that the debtor, though insolvent, was not bankrupt. Since the excess $46,000 was not used to reduce the claims of existing unsecured creditors, there was in fact $46,000 less in the net patrimony of the debtor available for the claims of the creditors. *Id.* at 1035.

58. The dissent indicated that the conduct of the bank, in taking the property for less than its fair market value, constituted constructive fraud against the rights of the remaining creditors under article 1984. LA. CIV. CODE art. 1984 provides: "Every contract shall be deemed to have been made in fraud of creditors, when the obligee knew that the obligor was in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." Since this constructive fraud resulted in the bank's receiving an unfair preference, the dissent argues that the transfer should be set aside regardless of any good faith on the part of the bank. 364 So. 2d at 1036 (Tate, J., dissenting).

59. See text at note 31, *supra.*

60. 364 So. 2d at 1035 (Tate, J., dissenting). The value of the property was $303,500 and the debt owed to the bank by the Lamastuses was $257,442.52. Hence, the excess given over the amount due was $46,057.48, or just under one-fifth. See note 62, *infra.*

other words, under the dissent's rationale, had the value of the property exceeded the amount of the debt by a single dollar instead of $46,000, the transfer should nevertheless have been set aside.[61]

Although the Code gives some guidance as to when a transfer should be set aside because of the existence of fraud,[62] it does not aid in the determination of prejudice.[63] A strict construction of the dissent's view in conjunction with a finding of article 2658 prejudice would indicate that even the slightest excess transferred over the amount of the debt extinguished would necessitate rescission; this slight excess would reduce the net patrimony of the debtor and eventually prejudice all creditors down the line. Perhaps the court was not willing to extend the revocatory action this far since it believed that the excess transferred would merely go to satisfy the claims of creditors superior to that of the plaintiff. Indeed, under the reasoning of the court, had the transfer been rescinded and still

61. A realistic illustration of the problems that would arise under this theory is a situation in which property worth several hundreds of thousands of dollars exceeds the value of the debt by only a few thousand dollars or less. Among the practical problems encountered would be an accurate determination of the value of the property given in payment. For example, in the instant case, the trial judge listened to the testimony of various witnesses before selecting the appraisal of one expert over that of others. Reasons for Decision, *supra* note 44, at 2-3. When the actual amount of the valuation will determine whether a transfer of this magnitude will be set aside, the parties will place additional pressures on the trial court to make its determination with minute exactness. More in-depth appraisals will be required and the trial court's assessment of those appraisals will become of critical importance. For example, in most appraisals of property similar to this marina, the value is often determined per measure. Buildings are based on a square foot valuation while land is often valued on a per acre basis. However, when the appraised value of the property given in payment approximates the amount of the debt, the parties to a revocatory action will certainly place much greater emphasis on determining the exact value of the property, down to the smallest detail. An approximation based on a per measure valuation will no longer be sufficient.

62. *See, e.g.*, LA. CIV. CODE arts. 1980-84. For example, article 1981 provides that a creditor may set aside a fraudulent transfer by his debtor when the value of the property transferred exceeds by one-fifth the price of consideration given for it. Article 1982 extends this to situations when the property is transferred in consideration of a sum that is due and both the transferor and the transferee are parties to the fraud. The remedy is the placement of the parties in the *situ quo ante*. In the instant case, the property given in payment exceeded the amount of the debt by slightly less than one-fifth. See note 52, *supra*. These articles, however, are not the exclusive remedy for the creditor. Rather, they serve as a guideline to aid the creditor in meeting his difficult burden of proving fraud.

63. There are provisions in the Code which define the threshold of fraud in certain instances. For example, article 1861, dealing with lesion beyond moiety, requires that this excess be greater than one-half before the transferor is allowed to rescind. Article 1981 requires this excess to be greater than one-fifth the value received when the transfer is made in fraud of creditors. However, there is no general formula for determining the amount of excess given over the value received that will cause the transfer to be set aside because of prejudice.

another judicial sale provoked, it is likely that even if the proceeds exceeded the fair market value of the property, any such excess would have been consumed by the costs involved in the judicial sale.[64]

Thus, the rationale of the majority in refusing to set aside the dation is apparent: had the dation en paiement been rescinded, the complaining creditor nevertheless would have received nothing once the claims of superior creditors had been paid.[65] The dissent claims that any excess value given over the amount of the debt resulted in prejudice to all remaining unsecured creditors, allowing any of them to bring the revocatory action. It is submitted that the court should not have reached these issues without first making a clear determination of the timing of the releases. If indeed the releases of the inferior secured creditors were obtained prior to the execution of the dation en paiement, these creditors were reduced to the status of unsecured creditors and the action for rescission should have been granted. On the other hand, if the court had inadequate information before it in the record to ascertain the time sequence involved, the case should have been remanded for a factual determination of the timing of the dation and the releases; only then could a factual determination of prejudice be made.

By failing to address the question of the timing of the releases given by inferior secured creditors, the supreme court has left uncertain the ability of creditors to rescind a dation en paiement made in fraud of their rights and to their prejudice. The Civil Code contains only vague references to the concept of prejudice; the resultant difficulty in defining the scope of prejudice is evident in the majority and dissenting opinions of the instant case. Given the present ambiguity, it would be highly desirable for the court to confront the issue of prejudice directly and illuminate each element of this elusive concept. Otherwise, creditors may continue to be denied the right to initiate a successful revocatory action.

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64. The complaining creditor raised a contrary argument, stating that depriving creditors of the right to buy the property at a judicial sale, regardless of the likely outcome, resulted in prejudice, citing *Quality Finance Co. of Donaldsonville, Inc. v. Bourque*, 315 So. 2d 656 (La. 1975). Transcript of Proceedings Before Twenty-Second Judicial District Court, Brief for Plaintiff—Appellant at 2-3, Martin LeBreton Ins. Agency v. Phillips, 364 So. 2d 1032, (La. 1978). The supreme court dimissed the argument, saying that the decision in *Quality* was limited to the narrow issue of whether a transferee of property in a dation is entitled to have the inferior mortgages and liens recorded against the property cancelled. 364 So. 2d at 1035.

65. It is noteworthy that the complaining creditor had not done everything it could have done to secure its interest. Although Martin LeBreton could have protected its claim by a timely recordation of its mortgage, it delayed doing so for a month and the dation was executed in the interim. See note 40, *supra*.