Artifical Accession to Immovables

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Nevertheless, on the basis of federal tax policy, this conclusion is unsatisfactory. The fiscal laws should apply to residents of different states equally so far as practical, and differences in state law should not produce substantially contrary results in this important area. Such policy considerations could convince Congress or the Commissioner to make changes in the present statute and regulations. Such a change could be accomplished by the enactment of a federal support standard for tax purposes.

The risks from indecision in this area can be substantially reduced by the tax planner. If the transfer is made into a discretionary support trust with an independent trustee, an adverse decision on the effect of the Louisiana support obligation would still result in substantially lower income and estate taxes than if the transfer had not been made. However, a favorable decision to the taxpayer would avoid taxation to the parent and result in another tax advantage to Louisiana residents because of their civil law heritage.

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ARTIFICIAL ACCESSION TO IMMOVABLES

Accession is the mode of acquiring ownership by the owner of a principal thing of whatever is produced by, or incorporated into, that principal thing. According to the Louisiana Civil Code, accession may be natural, brought about by forces of nature, or artificial, brought about by human works. Special rules in the Civil Code deal with accession as applied to movables and immovables.

This Comment is limited to a consideration of the rules governing artificial accession to immovables, contained in articles 507 and 508 of the Louisiana Civil Code. Insofar as article 508 is concerned, discussion is largely limited to a consideration of who may be characterized as "possessor in good faith," "landowner," and "third person," and to an examination of the rights

113. This assumes the usual case in which the parent is being taxed in a higher bracket than the child.
1. LA. CIVIL CODE arts. 498, 499, 504 (1870).
2. Id. arts. 509-519.
3. Id. arts. 505-508.
4. Id. arts. 520-532.
5. Id. arts. 505-519.
and obligations of these persons. Detailed discussion of what constitutes good or bad faith is omitted, although the good or bad faith of the parties may well influence the outcome of litigation. Finally, this Comment does not deal with the rights of persons to recover for expenses incurred on the land of another; these rights are governed by articles other than 507 and 508 of the Civil Code.

The general principle of accession is established in article 504 which declares “all that which becomes united to or incorporated with the property, belongs to the owner of such property, according to the rules hereafter established.” Some of the rules thus established are articles 505 through 508. According to article 505, “the ownership of the soil carries with it the ownership of all that is directly above and under it.” From this arises the rebuttable presumption of article 506, applicable to situations of artificial accession, that “all constructions, plantations and works made on or within the soil [were] done by the owner and at his expense and belong to him.” If this presumption is overcome, the situation will be governed by article 507, article 508, or by both of them.

Article 507 contemplates the situation in which a landowner uses another’s materials to build improvements on his own land. If a third person overcomes the presumption of article 506 by proving that his materials were used by the landowner to build the improvements, the landowner whether in good or in bad

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6. See id. arts. 502, 503, 3451-3453, 3489. See also Voiers v. Atkins Bros., 113 La. 303, 342, 36 So. 974, 989 (1903): “Cases may be found here and there in our Reports where the strong magnet of equity has swerved the court from the straight line of the rule.”

7. See LA. CIVIL CODE arts. 501, 1259, 2312-2314, 2509-2510, 2598, 3217(6), 3262 (1870); 2 Aubry & Rau, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) No. 219, § 323 (7th ed. 1966); 1 Yiannopoulos, CIVIL LAW OF PROPERTY §§ 47, at 138, text at note 227 (1966): “For the reimbursement of the possessor for expenses, distinction is made in civil law among necessary, useful, and luxurious expenses.” Recovery for useful and necessary expenses is allowed to the bona fide possessor. A bad faith possessor can recover for expenses incurred for the production of fruits and for the preservation of property. These are called necessary expenses. See generally Jackson v. Ludling, 99 U.S. 513, 522 (1878).

8. LA. CIVIL CODE arts. 1256, 1257, 2314, 2587 (1870).

9. Id. art. 506. For the French view of artificial accession, see 4 Huc, COMMENTAIRE DU CODE CIVIL 180 (1893); 2 Marcaudé, EXPLICATION DU CODE CIVIL 424 (18th ed. 1886).

10. LA. CIVIL CODE art. 507 (1870): “If the owner of the soil has made constructions, plantations and works thereon, with materials which did not belong to him, he has a right to keep the same, whether he has made use of them in good or bad faith, on condition of reimbursing their value to the owner of them and paying damages, if he has thereby caused him any injury or damages.”
faith, has a right to keep the materials but must indemnify
the third person the value of the materials, and pay any dam-
ages caused. The good or bad faith of the landowner may be
relevant in determining the quantum of recovery.\textsuperscript{11}

Article 508 contemplates the situation in which someone
builds improvements, with his own materials, on the land of
another.\textsuperscript{12} If the improvements were built by a good faith pos-
sessor who rebuts the presumption of article 506, the landowner
must keep the improvements and reimburse the possessor either
the value of the materials and price of workmanship or a sum
equal to the enhanced value of the soil. If the person who erected
the improvements was not a good faith possessor, the landowner
may elect to keep the improvements and reimburse the value of
the materials and price of workmanship, or demand demolition
or removal at the expense of the person who built them, who may
also be forced to pay damages "if the case require it."\textsuperscript{13}

It is possible that the person who makes improvements will
be neither landowner nor owner of the materials. This situation
is not expressly covered in the Civil Code. Yet it is reasonable
to apply articles 507 and 508 cumulatively in this case.\textsuperscript{14} The
landowner will have his rights under article 508 and the owner
of the materials his rights under article 507 vis-a-vis the land-
owner and the third person. The reimbursement provisions of

\textsuperscript{11} Id. art. 2315; cf. Amite Gravel & Sand Co. v. Roseland Gravel Co.,
148 La. 704, 87 So. 718 (1921).
\textsuperscript{12} Id. art. 508: "When plantations, constructions and works have been
made by a third person, and with such person's own materials, the owner
of the soil has a right to keep them or to compel this person to take away
or demolish the same.

"If the owner requires the demolition of such works, they shall be de-
molished at the expense of the person who erected them, without any com-
pensation; such person may even be sentenced to pay damages, if the case
require it, for the prejudice which the owner of the soil may have sustained.

"If the owner keeps the works, he owes to the owner of the materials
nothing but the reimbursement of their value and of the price of workman-
ship, without any regard to the greater or less value which the soil may
have acquired thereby.

"Nevertheless, if the plantations, edifices or works have been made by
a third person evicted, but not sentenced to make restitution of the fruits,
because such person possessed \textit{bona fide}, the owner shall not have a right to
demand the demolition of the works, plantations or edifices, but he shall
have his choice either to reimburse the value of the materials and the price
of workmanship, or to reimburse a sum equal to the enhanced value of the
soil."

\textsuperscript{13} Id. art. 508.
\textsuperscript{14} 1 Planol, Civil Law Treatise (An English Translation by the
Louisiana State Law Institute) no. 2722 (1959): "It is solved by the cumu-
lative application of Article 554 \textit{(La. Civil Code art. 507 (1870))}, as regards
the relations of the owner of the soil with the owner of the materials, and
of Article 555 \textit{(La. Civil Code art. 508 (1870))} in his relations with the builder."
articles 507 and 508 are specific applications of the broad principle that "no one should enrich himself at another's expense."\(^\text{15}\)

**CONSTRUCTION BY LANDOWNER WITH MATERIALS OF ANOTHER—ARTICLE 507**

The redactors of the Code of 1825, in regard to article 507, declared that "the owner of the soil who has made use of the materials of another, whether in good or bad faith, has the right to keep them, otherwise the buildings and other works in which they have been used must be destroyed, which is contrary to the public good."\(^\text{16}\) It follows that the application of article 507 is limited to the case of material incorporation so that the new thing has become part of an immovable by nature under article 464 or 467.\(^\text{17}\) In the absence of material incorporation the public good is not offended because removal can be accomplished without destruction of the building or other works. The article is designed not only to further this public policy but also to make clear that absolute ownership of the materials vests in the landowner. Article 507 is seldom the primary basis of a law suit. Although it establishes the foundation of liability, the remedy provided by the article\(^\text{18}\) is available under other provisions.\(^\text{19}\)

15. See La. Civil Code arts. 1965, 2292, 2297, 2299 (1870); 1 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 2721 (1959); Nicholas, Unjustified Enrichment in the Civil Law and Louisiana Law, 38 Tul. L. Rev. 605, 607-09 (1962).


17. La. Civil Code art. 467 (1870) applies because the person who constructs with the materials of another is also owner of the soil; 1 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 2722 (1959): "[Article 554 (La. Civil Code art. 507 (1870)][] assume[s] that there has been material incorporation, that is to say that the issue revolves around construction material that has been used in a building and that has become an immovable by nature. It is only in such a case that accession causes the acquisition of ownership. The materials used lose their individuality. There is neither brick, nor wood nor stones. There is a house. On the contrary, there would be neither accession nor acquisition of ownership, if the owner of a lot, having at his disposal somebody else's movable made of It a mere Immovable by destination." See 2 Aubry & Rau, Droit Civil Français (An English Translation by the Louisiana State Law Institute § 204, § 211 (1966). La. Civil Code art. 507 (1870): "[The landowner] has a right to keep [the materials], whether he has made use of them in good or bad faith, on condition of reimbursing their value to the owner of them and paying damages, if he has thereby caused him any injury or damage."

18. In the case of incorporation of intentionally or negligently converted materials of another into the landowner's property, the general tort law under La. Civil Code art. 2315 (1870) provides an adequate remedy. In the case of an innocent conversion by the landowner, the principles of unjust enrichment provide an adequate remedy. See La. Civil Code arts. 1965, 2292, 2295-2299, 2301, 2311-2314 (1870).

19. The only application of article 507 known to the writer is the recent case of Gray v. State, Through the Department of Highways, 191 So.2d 802 (La. App. 3d Cir. 1966), reversed, 250 La. 1045, 202 So.2d 24 (1967).
When the state or its subdivision, having the power of expropriation, erects improvements on its own land which become public things, using another's materials, damages and reimbursement of the value of materials will be under the expropriation laws, not under article 507. However, this should not preclude the application of article 507 to the state in other situations.

**ARTICLE 508 IN GENERAL**

*The Code*

As originally drafted by the French, article 508 contained only the first three paragraphs of its present form and was intended to regulate the legal status of all persons who built on the land of another. But before being enacted into law, the fourth paragraph was added to increase the rights of possessors in good faith. The article is intended to regulate the legal status of at least some third persons other than good or bad faith possessors. All persons not classified as bona fide possessors under the fourth paragraph are governed by the provisions of the first three paragraphs of the article.

Article 503 defines the bona fide possessor as one who, with-

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21. Despite broad language in Gray declaring article 507 to be "without relevance to the state and its subdivisions," it is submitted that the ratio decidendi should be limited to the facts of the case. It would seem reasonable to apply article 507 to the state when acting in its private capacity without the power of expropriation, just as it is applied to any other private individual. Thus the article should govern when the state utilizes another's materials to build on its own land when acting in its private capacity, without the power of expropriation. It should also apply to the state when its materials have been used by another to build on the other person's land.

22. The article should not be interpreted to regulate the legal status of third persons whose rights are governed by other more specific articles of the Code.

23. Voiers v. Atkins, 113 La. 303, 339, 36 So. 974, 988 (1903): "Article 508 is taken verbatim from the Code Napoleon, art. 555. As originally drafted and reported, this article did not contain the fourth paragraph; so that the possessor in good faith, like him in bad faith, had no other right than that of removing his materials, etc., in case the owner elected not to keep them. In other words, he was not entitled to recover for the enhanced value of the property. In the course of the discussions before the tribunate, it was amended by the addition of the fourth paragraph. The consideration which led to this amendment was the following: 'The law attaches so much favor to the possessor in good faith that it permits him to retain the fruits he has received; it would then be repugnant to principle to treat him with the same severity as the individual whose possession is tainted with bad faith. He ought not to lose his expenses. To that end the tribunate proposes to compel the proprietor to pay him either the price of his materials and the wages of the workmen, or the enhanced value of the soil.' See also 1 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) nos. 2728, 2736 (1939).
out knowledge of any defect, possesses as owner, by virtue of an act translative of title. The article declares that the person ceases to be a bona fide possessor from the moment the defects in his title are made known to him, or from the moment the defects have been declared to him by the institution of suit.

The Jurisprudence

Rules Applicable to All Persons Governed by Article 508

In applying article 508, the Louisiana Courts have developed several rules to protect the parties. From the rule that "the ownership of the soil carries with it the ownership of all that is directly above and under it" (article 505), the rebuttable presumption arises that all improvements on the soil were "done by the owner" (article 506). Thus the person who builds on another's land has the burden of overcoming this presumption, and parol evidence may be used. Once the evicted person has overcome this presumption, article 508 regulates the rights and obligations of the parties.

If a good faith builder of improvements loses possession of them, he is nevertheless entitled to reimbursement absolutely

24. See Vance v. Sentell, 178 La. 749, 152 So. 513 (1934). Contra, Note, 8 Tul. L. Rev. 596, 599 (1934), which concludes that there should be a distinction between the good faith necessary to acquire property and that necessary to acquire fruits under article 503, which would be equally applicable to the good faith necessary under the fourth paragraph of article 508. As to the good faith necessary to acquire fruits the writer declared: "The existence of an act translative of property should be considered only as some evidence of good faith, and not as a constitutive element thereof." See also 1 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) Nos. 2290-95 (1959).


27. Sims v. Matassa, 200 So. 666, 669 (La. App. 1st Cir. 1941): "As the parol evidence of ownership offered by Plaintiff was not evidence of a transfer, it was properly admitted." See also 2 Aubry & Rau, Droit Civil Francais (An English Translation by the Louisiana State Law Institute) § 192, ¶ 147 (1966).

but, if in bad faith, only when the owner elects to keep the improvement. The vendee of the person who builds is subrogated to any right that person may have to claim reimbursement. The one who builds does not lose his right to claim reimbursement by failing to set up a claim to it in his answer. If the builder of improvements is constructively evicted by the landowner selling the land and improvements, for which he pays the builder himself, the builder may nevertheless be entitled to appropriate reimbursement. The courts should scrutinize the situation carefully before applying this rule. Persons with knowledge of the facts who contract for the sale or purchase of land will not fail to consider the reimbursement due to the purchaser who erected the improvement in determining the terms of the contract.

No one building on the land of another has a privilege on the property to guarantee indemnity. But as between the evicting landowner and good faith possessor, title does not pass to the landowner until he pays the possessor the appropriate compensation; and he will be maintained in possession until the

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30. Dawson v. Victoria Lumber Co., 172 La. 676, 679, 135 So. 22, 23 (1931): "As Defendant bought the property from [his original vendee], it has the same right, if any, which Hester might have to reclaim the value of the improvements." Foster v. Meyers, 117 La. 216, 41 So. 551 (1908); Payne v. Anderson, 35 La. Ann. 977 (1883); Pearce v. Frantum, 16 La. 414 (1840).
31. Packwood v. Richardson, 1 Mart. (N.S.) 405, 406 (1823): "[D]efendant has not lost his right to indemnity, by failing to set up a claim to it in the answer . . . . [T]here is no law which positively requires defendant to do this." But see Heirs of Wood v. Nicholls, 33 La. Ann. 744 (1881).
32. La. Civil Code art. 2500 (1870); Manning v. Quaker Realty Co., 14 Orl. App. 136, 137 (1917): "The mere fact . . . that Plaintiff subsequently became owner in no way affects his right to recover for improvements put by him upon the property while it was owned by another."; Wilson v. Benjamin, 26 La. Ann. 857 (1874).
34. Edwards v. S. & R. Gas Co., 73 So.2d 590, 595 (La. App. 2d Cir. 1954); "... Article 508 ... contemplates that the owner of the property shall not receive title to the thing ... until he gives compensation."; Atkins v. Smith, 207 La. 560, 21 So.2d 728 (1945); Ouachita Parish School Board v. Clark, 197 La. 131, 1 So.2d 54 (1941); Davis Wood Lumber Co. v. Insurance Co., 154 So. 760 (La. App. 1st Cir. 1934), followed, 154 So. 767; Kibbe v. Campbell, 34 La. Ann. 1163 (1882); Fletcher's Heirs v. Caveller, 10 La. 116 (1836); The Work of the Louisiana Supreme Court for the 1960-1961 Term—Civil Law Property, 22 La. L. Rev. 310 (1963).
compensation is paid. The courts seem to apply article 3453 (2), which maintains the good faith possessor in possession until his expenses are reimbursed, by analogy to the good faith possessor under article 508. Although the jurisprudence is not clear, it would seem logical that these same rules should apply to the person in bad faith whenever the landowner elects to keep the improvements. However, regardless of good or bad faith, it would seem that title to improvements inseparable from the principal thing, such as ditches, wells, and component parts of immovables by nature, should vest in the landowner immediately upon coming into existence.

Rules Applicable to Good Faith Possessors

The landowner is compelled to keep the improvements erected by the evicted possessor in good faith, but is given his choice "either to reimburse the value of the materials and price of workmanship, or to reimburse a sum equal to the enhanced value of the soil." To entitle the possessor in good faith to compensation, the improvement must be entirely on the land of the evicting owner. If the improvement is partially on the land of a stranger to the suit, even the good faith possessor may be required to remove it.

35. Pearce v. Frantum, 16 La. 423, 432, 433 (1840): "The right to be paid for the useful improvements is a real right, that is to say, the party evicted may retain possession until he is remunerated."; Hammonds v. Buzbee, 170 La. 573, 128 So. 520 (1930); Larido v. Perkins, 152 La. 660, 61 So. 728 (1913); Beard v. Morancy, 2 La. Ann. 347 (1947); Baldwin v. Union Ins. Co., 2 Rob. 133 (La. 1842); Packwood v. Richardson, 1 Mart. (N.S.) 405 (La. 1823); Cloud v. Cloud, 145 So. 2d 331 (La. App. 3d Cir. 1962); Peters v. Crawford, 199 So. 433 (La. App. 2d Cir. 1940); Gregory v. Kedley, 185 So. 105 (La. App. 2d Cir. 1938); Di Crispino v. Barres, 5 Orl. App. 69 (La. App. 1908); 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2731 (1959); 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 219, ff (1966).


37. Cf., Volers v. Atkins Bros., 113 La. 303, 36 So. 974 (1903); Davis-Wood Lumber Co. v. Insurance Co., 154 So. 760 (La. App. 1st Cir. 1934); 1 YIANNOPOULOS, CIVIL LAW OF PROPERTY, § 43(4) (1966): "Some of these component parts are insusceptible of separate real rights in place while others may be owned by persons other than the owner of the tract of land." For further discussion of this subject see note 38 infra and accompanying text.

38. LA. CIVIL CODE art. 508 (1870).

39. Uthoff v. Thompson, 176 La. 599, 607, 146 So. 161, 164 (1933): "... the improvement must be on the land of the one from whom reimbursement is demanded, and not wholly or partially on the land of another. Where, for instance, the improvement is a house, the possessor, although in good faith,
If the owner wishes to pay the enhanced value of the soil, he must produce evidence of that value. Proper allowance for depreciation may be made. If the landowner does not establish the enhanced value, the burden will be on the good faith possessor to establish the cost of the materials and price of workmanship; but if the costs cannot be estimated, present value will be awarded. The possessor in good faith is entitled to indemnification for improvements constructed at any time prior to judicial demand without setoff for the value of fruits, since the possessor in good faith is always entitled to keep them. The possessor originally in good faith is treated as a third person in bad faith under the first three paragraphs of article 508 for constructions erected after judicial demand.

**Rules Applicable to Third Persons and Bad Faith Possessors**

To classify all persons not in good faith who build on another's land as bad faith possessors is technically inaccurate. These two classifications are not exclusive under article 508, since it may apply to some "third persons" who are not strictly possessors at all. However, since the same rules apply to all persons not classified as good faith possessors, it is a moot point in this area and all may be termed "third persons in bad faith." It should be noted, however, that some third persons classified as in bad faith may be in moral good faith.

When the improvement has been made with his own materials by a third person in bad faith, the owner may either keep must remove that part of the house resting on the land of the one from whom reimbursement is claimed."; Gordon v. Fahrenberg, 26 La. Ann. 366 (1874).


41. Peters v. Crawford, 199 So. 433 (La. App. 2d Cir. 1940).


43. Guinea Realty Co. v. Battle, 1 So.2d 153 (La. App. 2d Cir. 1941); 1 Planiol, Civil Law Treatises (An English Translation by the Louisiana State Law Institute) no. 2729 (1959).

44. La. Civil Code art. 502 (1870); Pearce v. Frantum, 16 La. 414 (1840); 2 Aubry & Rau, Droit Civil Français (An English Translation by the Louisiana State Law Institute) § 204, ¶ 215 n.18 (1986): Such a set off would deprive the bona fide possession of the benefits of Article 549 [La. Civil Code art. 502 (1870)] under which he owns the benefits he takes, although he does not consume or spend them." But see Beard v. Morancy, 2 La. Ann. 547 (1847).

45. Roussel v. Railways Realty Co., 165 La. 536, 115 So. 742 (1928).

46. See text at note 135 infra.

47. See note 14 supra and accompanying text for a cumulative application of articles 507 and 508 when the builder owned neither the land nor the materials.
the improvement and indemnify the third person the cost of the materials and price of workmanship, or compel demolition or removal and recover damages if the case require it. It should be noted that when the owner elects to retain the improvement under article 508, the person in bad faith is entitled to more indemnity than the good faith possessor if the enhanced value of the land is less than the cost of materials and price of workmanship. The owner is given no choice but to indemnify the cost and price to the bad faith person if he elects to keep, but many elect enhanced value or costs and price when the person possessed in good faith. The French, recognizing this anomaly, amended their comparable article in 1960 to give the owner an election of costs and price or enhanced value whether the person possessed in good faith or was a third person in bad faith.

In *Voiers v. Atkins*, the Supreme Court held that the person in bad faith cannot recover for improvements inseparable from the soil such as wells and ditches, because the owner is deprived of his option to keep or compel removal. The court declared it would not "let an intermeddler recover for willfully

[48] See Sanders v. Jackson, 192 So.2d 654, 657 (La. App. 3d Cir. 1966): "Article 508 . . . also treats the subject of bad faith possessors. It is only they who can be assessed with damages."; Elrod v. Hart, 148 So. 737 (La. App. 2d Cir. 1933); 1 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 2727 (1959): "He may be condemned . . . to pay damages to the owner if, for example, the retaking of possession is delayed by the work of demolition."


50. This can be explained because of the manner in which the French article 555 comparable to La. Civil Code art. 508 (1870) was drafted. See note 23 supra and accompanying text.


In the absence of an amendment to our law, the owner has a practical means of escaping the result mentioned by threatening the person in bad faith with a demand for removal unless he accepts the indemnity offered. Saunders, Lecture on the Civil Law 162, 163 (1925): "The owner's right to order the thing removed entirely generally puts it in his power to take them for whatever price he chooses to give for them, as the value of the material from the demolished structure would hardly equal the cost of demolition." 1 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 1729 (1959).

[52] 113 La. 303, 36 So. 974 (1903); see also Juneau v. Laborde, 224 La. 672, 70 So.2d 451 (1953); Roussel v. Railways Realty Co., 165 La. 536, 115 So. 742 (1928); Southwestern Gas & Electric Co. v. Nowlin, 164 La. 1044, 115 So. 140 (1927); Nabors Oil & Gas Co. v. Louisiana Oil & Refining Co., 151 La. 362, 91 So. 765 (1921); Davidson v. McDonald, 131 La. 1047, 60 So. 679, 681 (1913); Boagni v. Stamen, 136 La. 35, 66 So. 389 (1914); Quaker Realty Co. v. Bradbury, 123 La. 20, 45 So. 570 (1909); Heirs of Wood v. Nicholls, 33 La. Ann. 744 (1881); Succession of Davis, 6 Orl. App. 69 (La. App. 1909).
doing what . . . the owner might not wish to have done,"\(^5^3\) thus finding the principle of unjust enrichment inapplicable. The same rule should apply to new works, not merely repairs or the replacement of old structures, which have become component parts of a building and thus classified as immovable by nature under article 464.\(^4^4\) These new works are likewise inseparable, not from the soil, but from the building or other structure.\(^5^5\) In the case of separable improvements the owner must reimburse the third person in bad faith if he elects to keep them because it is presumed that he has benefitted from the improvements and must not be unjustly enriched. The court then established the rule that the person in bad faith who builds on another's land may setoff the claim by the owner for fruits and revenues\(^6^6\) against a claim for the enhanced value of the soil resulting from inseparable improvements, even though he would not otherwise be entitled to reimbursement.\(^5^7\)

Likewise, "a [person in bad faith] may recover for improvements inseparable from the soil when the owner would have himself been legally bound to make such improvements."\(^5^8\) Since under Voters v. Atkins the landowner is liable to the third person in bad faith only for those improvements which are removable, the third person cannot recover for improvements such as fences in common, in which the economic interests of adjoining landowners deprive the evicting owner of his right to demand removal.\(^5^9\)

The landowner must make his election to demand removal of separable improvements before final determination of the suit, or he will be considered to have elected to keep the im-


\(^{54}\) LA. CIVIL CODE art. 464 (1870): "Lands and buildings or other constructions, whether they have their foundations in the soil or not, are immovable by their nature."

\(^{55}\) See text at note 63 infra.

\(^{56}\) See LA. CIVIL CODE art. 502 (1870).

\(^{57}\) Voters v. Atkins, 113 La. 303, 342, 36 So. 974, 989 (1903), quoting from McDade v. Bossier Levee Board, 109 La. 625, 33 So. 628 (1902): "The claim for fruits and revenues is nothing more than a claim in indemnity for loss, and naturally may be defeated by proof that, instead of a loss, there has been a gain."

\(^{58}\) Succession of Davis, 6 Orl. App. 69, 71 (La. App. 1909); Gele v. Contonio, 3 Orl. App. 165 (1906). For example, where a city ordinance requires the property owner to fill in his property with dirt, the person in bad faith may recover if he filled the property in.

The landowner's sale of the land and improvements to a third party is considered an election to keep. If the third person in bad faith fails to remove the improvements within a reasonable time after demand (which may be oral and informal), he will be deemed to have abandoned the improvement.

Nature of the Rights: Personal or Real and Applicable Prescription

"[T]hird person[s]... who construct improvements on land owned by another have consistently been held to be the owner of the improvements constructed unless and until the owner of the land elects to exercise any right he may have to pay their fair value and retain the improvements." Despite this all-inclusive statement by the court it must be realized that "some of these [improvements] are insusceptible of separate real rights in place while others may be owned by persons other than the owner of the tract of land." Ownership of improvements inseparable from the land, such as ditches, wells, and new rooms which are component parts of buildings, must be said to vest in the owner immediately upon coming into existence. In this case, the person who builds can have no more than a personal right to claim reimbursement.

However, since the courts have recognized the possibility of separate ownership of the land and separable improvements

60. Juneau v. Laborde, 224 La. 672, 70 So. 451 (1953); Snider v. Smith, Man. Unrep. Cas. 262 (La. 1913); contra, Guinea Realty v. Battle, 1 So.2d 153, 156 (La. App. 2d Cir. 1941); "In Snider v. Smith... it is said that the Plaintiff 'ought' to make the election before final judgment, but it is not said that the failure to do so forfeits the right."


64. 1 YIANNOPOULOS, CIVIL LAW OF PROPERTY § 43, n.22 (1966); cf. Delachaise v. Maginnis, 44 La. Ann. 1043, 11 So. 715 (1892); but see Prevot v. Courtney, 241 La. 313, 129 So.2d 1 (1961); Louisiana Land & Pecan Co. v. Gulf Lumber Co., 134 La. 784, 64 So. 713 (1913); Meraux v. Andrews, 145 So.2d 104 (La. App. 4th Cir. 1962); Davis-Wood Lumber Co. v. Insurance Co., 154 So. 760 (La. App. 1st Cir. 1934). However, since these cases consider only separable improvements such as buildings, they should not be interpreted to mean that the court will hold ownership of inseparable improvements to be in the one who erected the improvement on the land of another.
which are characterized as distinct immovables by nature,\textsuperscript{65} the person who builds should enjoy the protection of the immovable property laws when no transfer is involved, even if his interest is unrecorded. In the absence of a transfer of the land, he would clearly have a real action\textsuperscript{66} for the protection of his ownership during the existence of the improvement until divested of title by the landowner reimbursing him.

The third person's or good faith possessor's real right in and unrecorded title to the separable improvement are subject to divestment by a sale of the land (and improvements) to a third party bona fide purchaser who records.\textsuperscript{67} The third person would be relegated to a personal action for reimbursement from the former landowner, having lost his action against the purchaser.\textsuperscript{68} “It would follow, that, in order to protect his interest against

\textsuperscript{65} See generally 1 YIANNOPOULOS, CIVIL LAW OF PROPERTY § 46, at 93 (1966). The builder's right in the separable improvement should, as a matter of clear analysis, be regarded as a superficiary right rather than ownership.

\textsuperscript{66} See Prevot v. Courtney, 241 La. 313, 129 So.2d 1 (1961); Carol Lumber Co. v. Davis, 133 La. 415, 63 So. 93 (1913); Kidd v. Page, 121 La. 1, 46 So. 35 (1908); Pearce v. Frantum, 16 La. 414 (1840); Meraux v. Andrews, 145 So.2d 104 (La. App. 4th Cir. 1962); Edwards v. S & R Gas Co., 73 So.2d 590 (La. App. 2d Cir. 1954); Barque v. Darby, 69 So.2d 145 (La. App. 1st Cir. 1953); Davis-Wood Lumber Co. v. Insurance Co., 154 So. 760 (La. App. 1st Cir. 1934); Meyers v. Burke, 189 So. 462 (La. App. 1st Cir. 1959); Kibbe v. Campbell, 34 La. Ann. 1163 (1882); Di Crispino v. Barra, 5 Orl. App. 69, 71 (La. App. 1908): “In no sense can this house owned by one person and built on the land of another, be deemed inseparable from the land, from the standpoint of law or fact.” The owner of the distinct immovable having a real right may claim homestead exemptions, Cloud v. Cloud, 145 So.2d 331 (La. App. 3d Cir. 1962), and may subject his immovable to a real mortgage, La. R.S. 9:5102 (1950).

\textsuperscript{67} See La. Civil Code art. 2266 (1870); La. R.S. 9:2721 (1950); Prevot v. Courtney, 241 La. 313, 129 So.2d 1 (1961); Westwego Canal & Terminal Co. v. Fizzan, 174 La. 1068, 142 So. 691 (1932); McDuffie v. Walker, 152 La. 512, 51 So. 100 (1909); Davis-Wood Lumber Co. v. Insurance Co., 154 So. 760 (La. App. 1st Cir. 1934); Vaughan v. Kemp, 4 La. App. 682 (2d Cir. 1926); but see Gregory v. Kedley, 185 So. 105 (La. App. 2d Cir. 1938), where under the “peculiar facts” the court seemingly sympathizing with the person who erected the improvement held the sale to the purchaser by the landowner to be, in effect, by quitclaim so that title to the improvement remained in the one who erected it.

\textsuperscript{68} Although the one who built has a real right in the distinct immovable improvement, valid against a purchaser if recorded, his action for reimbursement against the purchaser is still a personal action in the nature of unjust enrichment under article 508. Recordation gives him the right to assert his personal right against the purchaser for reimbursement, and a real right to defend his ownership of the immovable against the purchaser or anyone. See Police Jury v. McDonogh, 10 La. Ann. 395 (1855); Harrison v. Faulk, 2 La. 92, 94 (1830) : “A claim for the value of improvements gives no real action.”
any owner of the land, a person who constructs improvements should record his title to these improvements.”

Different rules of liberative prescription seem to apply depending on whether the improvement is inseparable or separable from the soil. Since inseparable improvements do not vest in the builder and accede to the landowner immediately upon coming into existence prescription on the builder’s right of action for reimbursement commences upon eviction from the land.  

On the other hand, the person’s right of action for reimbursement for separable improvements, owned by him as a real right and distinct immovable by nature, should be virtually imprescriptible. Under the jurisprudence, title and possession remain in the one who constructs until the owner reimburses him. In effect then there can be no eviction to commence a prescription of the personal action. If the landowner does not reimburse the one who built and thus become owner, and the builder does not bring an action against the landowner to force reimbursement, the status of the parties as landowner and distinct immovable owner remains, until some other law, for example, acquisitive prescription, intervenes to change the status of the parties. Our courts should recognize this distinction between the prescription of the right of action for separable and inseparable improvements.

69. The Work of the Louisiana Supreme Court for the 1960-1961 Term—Civil Law Property, 22 LA. L. Rev. 310, 311 (1962): “Presumably, this is just as pertinent for the person who constructs on the land which he believes he owns because his title may turn out to be defective.”

70. This of course assumes that the builder has a right of action. The person in bad faith has no right of action for reimbursement for inseparable improvements which enhance the value of the soil unless there is a claim by the landowner for fruits and revenues. See text at note 57 supra.


71. Dawson v. Victoria Lumber Co., 172 La. 676, 679, 135 So. 22, 23 (1931): “The right to claim the value of [inseparable] improvements put upon the land does not arise until a person be evicted therefrom. Hence prescription cannot run against such a claim until after eviction.”

72. Of course, if the builder was in bad faith and the owner demands demolition or removal of the separable improvement, he has no right of action.

73. See note 63 supra.

74. It is conceivable that the owner of the distinct immovable could acquire a servitude to maintain his building on the land. See LA. CIVIL CODE arts. 727, 765, 3432, 3504 (1870). The owner of the distinct immovable may also begin an adverse possession and acquire the land after thirty years. Also, the landowner might acquire ownership of the distinct immovable by adverse possession for 30 years. See id. arts. 3436, 3448, 3499.
Scope of Applicability as to Things

As in the case of article 507,75 article 508 has no application unless the improvement has become "united to or incorporated with the property."76 However, with one exception, article 508 applies only when the improvement has become either a distinct immovable or a component part of an immovable by nature, or the soil under article 464. Article 507 applies when the improvement has been immobilized either under article 464 or 467.77 The exception is where the person who builds on another's land first constructs the building and later adds an improvement as owner of the building, thus meeting the requirement of article 467. In this case article 508 clearly applies. In the absence of the exception, improvements added to the soil, building, or other structure, which are merely replacements of old works78 should be classified as repairs,79 and governed by the articles of the Code concerning recovery of expenses.

However, if the construction by the third person is not simply a repair of old works but is a new work so incorporated into the soil or building as to become a component part the removal of which would destroy either improvement or princi-

75. See note 17 supra and accompanying text.
76. La. Civil Code art. 504 (1870).
77. Id. art. 464: "Lands, and buildings or other constructions, whether they have their foundations in the soil or not, are immovable by their nature."

Id. art. 467: "Wire screens, water pipes, gas pipes, sewerage pipes, heating pipes . . . when actually connected with or attached to the building by the owner for the use or convenience of the building are immovable by their nature."

See Atkins v. Smith, 207 La. 560, 21 So.2d 728 (1945); Edwards v. S & R Gas Co., 73 So.2d 590, 593 (La. App. 2d Cir. 1954): "[I]n order for immobilization to take place the owner of the fundus must have title to the movable which he dedicates to the interest of the fundus." But see Folsom v. Lorcauville Sugar Factory, 156 So. 667 (La. App. 1st Cir. 1934); see 1 YIANNOPOULOS, CIVIL LAW OF PROPERTY §§ 45, 46 (1966).

78. See 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 204, ¶ 216 (1966); 1 YIANNOPOULOS, CIVIL LAW OF PROPERTY § 47 (1966): "[B]uildings and other structures may become component parts of a tract of land, even if they have not been attached to the ground by the owner. But component parts of a building, in order to become immovable by nature under Article 467 must be installed by the owner or on his behalf . . . . Improvements and additions made with the consent of the owner may not become part of the immovable."

79. 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 204 ¶ 216 (1966): "In such a case the owner of the land cannot demand the elimination of the works even against a possessor in bad faith." The owner's obligation to the builder in regard to expenses and repairs is governed by other articles of the Code. See note 7 supra; 1 PLANIOUL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2732 (1959).
pal thing, it should be classified as an immovable by nature under article 464,\textsuperscript{80} even though constructed by a nonlandowner. In this situation, article 508 should govern just as it does in the case of ditches and wells which are component parts of the soil. The rule of \textit{Voiers v. Atkins}\textsuperscript{81} should also apply when the improvement is built by a third person in bad faith. Since persons in bad faith are never entitled to reimbursement for more than necessary expenses,\textsuperscript{82} the fact that new works could not be classified as necessary seems to indicate that third persons in bad faith would be denied reimbursement for new works as recovery of expenses.\textsuperscript{83}

It can be seen, therefore, that absent application of the lone exception, article 508 contemplates new works separable or inseparable from the soil or component parts of an already existing structure, not repairs and replacement of old structures governed by articles on the recovery of expenses. “By the same token, [article 508] applies only to new plants, not to replacement of dead trees.”\textsuperscript{84} Although the French view\textsuperscript{85} as to when article 508 applies and when the expense articles apply is somewhat different, the view expressed seems to be more consistent in light of contemporary Louisiana jurisprudence.

\textit{Scope of Applicability as to Persons}

\textbf{Public Persons}

It seems fairly clear today that as a matter of public policy article 508 “is not applicable to materials used, and labor expended, in making settlements on the national domain.”\textsuperscript{86}

\textsuperscript{80} Cf. \textit{Industrial Outdoor Displays v. Reuter}, 162 So.2d 160 (La. App. 4th Cir. 1964); \textit{Lighting Fixture Co. v. Pacific Fire Ins. Co.}, 176 La. 499, 511, 146 So. 35, 39 (1932): “Some of these betterments and improvements, probably, were so incorporated into the building as to become a component part of it.”; \textit{Monroe Auto & Supply Co. v. Cole}, 6 La. App. 337 (2d Cir. 1927).

\textsuperscript{81} See text at note 52 \textit{supra}.

\textsuperscript{82} \textit{La. Civil Code} arts. 2314 (1870); \textit{Gibson v. Hutchins & Vaughan}, 12 La. Ann. 545, 548 (1857); 1 \textit{Yianopoulos, Civil Law of Property} § 137, text at n.242 (1968).

\textsuperscript{83} \textit{La. Civil Code} arts. 501, 1258, 2312-2314, 2509-2510, 2598, 3217(6), 3262 (1870).

\textsuperscript{84} 2 \textit{Aubry & Rau, Droit Civil Français (An English Translation by the Louisiana State Law Institute)} § 204, ¶ 216 (1966). See also \textit{Planiol, Civil Law Treatises (An English Translation by the Louisiana State Law Institute)} no. 2733 (1959). \textit{But see id. Planiol supra, at no. 2734.}

\textsuperscript{85} \textit{Id.}

One who erects improvements on United States land which is subsequently sold to another is left without remedy upon eviction. 87

The same rule probably applies to one who builds on land in the public 88 or private 89 domain of the state, although it would seem improper to so hold in the latter case where the state acts in the capacity of a private person. There is clear indication today that the Supreme Court will hold article 508 inapplicable to the state and its subdivisions acting in the capacity of builder of a public thing on another's land with the power of expropriation. 90 However, this should not be interpreted to mean that article 508 could never apply to the state. If the state builds on another's land in any capacity other than of expropriator and builder of a public thing, the article should govern.

Private Persons

In General

Two requirements must be met before third persons who are not possessors are governed by article 508: First, the person who builds the improvement must not be landowner when he builds. 91 Second, he must be in a residuary category of third persons not governed by other more specific articles of the Code.

“It happens rather often that constructions or plantations are placed upon the land by someone who is its owner at the time, but who subsequently loses his ownership.” 92 Under this circumstance article 508 is not applicable. Thus one from whom land is recovered by the exercise of a right of redemption, 93

88. Town of Vinton v. Lyons, 131 La. 673, 60 So. 54 (1912).
90. In Ouachita Parish School Board v. Clark, 197 La. 131, 1 So.2d 54 (1941), the Supreme Court did not suggest that the article was inapplicable, but had a clear basis for avoiding the issue. However, in the recent case of Gray v. State, Through the Department of Highways, 250 La. 1045, 1062, 202 So.2d 24, 30 n.6 (1967), the court held that the companion article 507 was “without relevance to the state and its subdivisions.”
91. See PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2737 (1959).
92. Id.
93. LA. CIVIL CODE arts. 2567-2588 (1870).
because of a resolutory condition in a sale\textsuperscript{94} or donation,\textsuperscript{95} or because of the recission of the contract on account of lesion,\textsuperscript{96} is not a person governed by article 508. The rights of this person and all former landowners to be reimbursed by the new owner, as well as obligations to the new owner, are regulated by other provisions of the Code.\textsuperscript{97}

The history\textsuperscript{98} of article 508 reveals that the first three paragraphs are intended to apply to at least some "third persons" who are not bad faith possessors. It is submitted that the third persons governed by the article are a residuary category of persons not regulated by other more specific articles of the Code. These third persons are to be regulated by the first three paragraphs of the article and treated no better than bad faith possessors, regardless of the fact that they were in moral good faith.\textsuperscript{99} The first three paragraphs make no mention of good or bad faith or of possession.

An example of the application of these two requirements may be obtained by examining the usufructuary. He is not a landowner,\textsuperscript{100} however, he is a third person regulated more specifically by articles 594 through 598. Thus the usufructuary's right to obtain compensation is regulated by these articles. The Louisiana courts, not always keeping these two requirements clearly in mind, have sometimes applied article 508 where other provisions of the Code were applicable.\textsuperscript{101}

\section*{In Particular}

\begin{enumerate}
\item \textbf{Co-Owner.} Distinction must be made in the case of co-ownership of immovable property\textsuperscript{102} between a person who
\end{enumerate}

\begin{itemize}
\item \textsuperscript{94} See id. arts. 1901, 2021, 2045, 2046, 2561.
\item \textsuperscript{95} Id. arts. 1256-1265. See 2 Aubry & Rau, Droit Civil Francais (An English Translation by the Louisiana State Law Institute) § 204, ¶ 219 (1966); 1 Planiol, Civil Law Treatise (An English Translation by the Louisiana State Law Institute) no. 2737 (1959).
\item \textsuperscript{96} La. Civil Code art. 2559 (1870).
\item \textsuperscript{97} See generally id. 1559-1569, 2045, 2046, 2575-2577, 2586-2588, 2592, 2597-2600.
\item \textsuperscript{98} See note 23 supra and accompanying text.
\item \textsuperscript{99} Cf. Vance v. Sentell, 178 La. 749, 758, 152 So. 513, 516 (1934), on rehearing: "It is immaterial that defendant was in moral good faith, ... articles 3451, 3453 ... must be read in connection with articles 503, 502 ... There is no difference between a 'possessor in good faith' and a 'bona fide' possessor. And there can be no bona fide possessor except one who possesses under a title transitive of property and not defective on its face."
\item \textsuperscript{100} La. Civil Code Art. 553 (1870).
\item \textsuperscript{101} See Cascio v. Depaula, 27 So.2d 453 (La. App. 1st Cir. 1946), where article 508 was applied after the resolutory condition in a donation occurred.
\item \textsuperscript{102} La. Civil Code art. 494 (1870).
\end{itemize}
builds improvements during ownership in indivision, and one who builds before an ownership in indivision which was brought about by a partial eviction. In the former case, article 508 should not apply because the person was an owner, not an adverse possessor, when he built. In the latter, he was not a true owner but merely a good or bad faith possessor of the evictor's interest. Article 508 can be applied by analogy here to the case of complete eviction, with the exception that removal of the improvement could never be demanded. As the evicting co-owner "only recovered an undivided interest in the land [and improvements, he is] not authorized to require the removal and demolition against the will of [his] co-owner (the person who built) and must therefore be confined to reimbursement of the cost of materials and price of workmanship. The Louisiana courts have invoked article 508 in cases of partition in kind where the person who built was not awarded the improvement in his portion, and in partitions by licitation. It is submitted that this is an improper use of article 508 since the person erecting the improvement was also landowner, and that reimbursement in this area should be under the general principle of unjust enrichment, or under rules governing recovery of expenses when applicable.

b. Vendee in an Executory Contract of Sale Who Builds on the Premises. It often happens that the vendee in an executory contract of sale or in a bond for deed agreement will erect improvements on the property with the vendor's consent before passage of title. If the sale is never consummated so that title remains in the vendor, the Louisiana courts sometimes hold the

104. See Rivas v. Hunstock, 2 Rob. 187 (La. 1842).
106. LA. CIVIL CODE arts. 1337-1338 (1870); LA. CODE CIV. P. art. 4606 (1960).
107. LA. CIVIL CODE arts. 1339, 1340 (1870); LA. CODE CIV. P. art. 4607 (1960); Lasyone v. Emerson, 220 La. 951, 57 So.2d 906 (1952); Grouchy v. Williams, 161 La. 909, 109 So. 545 (1923).
108. Cf. Peck v. Bemiss, 10 La. Ann. 160 (1855); Trichel v. Home Ins. Co., 155 La. 459, 464, 99 So. 403, 404 (1924): "[A]ny agreement for the sale of real estate, which is not intended to be the final writing between the parties, but, on the contrary, to be followed by another and final deed, is a mere promise of sale and not a sale, and does not transfer the title to said property, unless it clearly appears that the parties contemplated that the new deed should be only a confirmation of the first, and not indispensable for the transfer of title."
prospective purchaser to be a possessor in good faith, and apply
the fourth paragraph of article 508.\textsuperscript{111} Some of the French com-
mentators take this view.\textsuperscript{112} However, the article should be
inapplicable because no prospective purchaser could technically
be a possessor in good faith when he actually has no title,\textsuperscript{113}
although he might have been in unquestionable moral good faith.
A better basis for decision would be an application of contract
law rather than article 508. The courts might well consider
an implied consent to build despite the possibility of non-
execution of the contract as a part of the agreement.\textsuperscript{114} Since
damage caused by nonexecution after building would be a fore-
seeable consequence the court could adjust the rights of the
parties and permit removal or compel reimbursement on a
contractual basis.\textsuperscript{115} If no consent to build was given by
the vendor, whether expressly or implicitly, the first three para-
graphs of article 508 should govern.

c. Predial and Mineral Lessee. The French hold article 555
of their Code, the near-identical counterpart of article 508,
applicable to the predial lessee of the landowner who erects
improvements on the property during the lease.\textsuperscript{116} This is
understandable since the Code Napoleon contains no article
\textsuperscript{111} See Atkins v. Smith, 207 La. 560, 21 So.2d 728 (1945) (executory con-
tact of sale, held in good faith); Heeb v. Codifer & Bonnabel, 182 La. 139, 110
So. 178 (1928) (bond for deed agreement; plaintiff acted in good faith with
intent of ultimately paying for and becoming owner of lots as improved
by them); Izquierdo v. Kenner, 123 So. 366 (La. App. Orl. Cir. 1929) (execu-
tory contract of sale; vendee held in good faith); Kibbe v. Campbell, 34 La.
Ann. 1163 (1882) (executory contract of sale; vendee held in good faith).

\textsuperscript{112} See 2 Aubry & Rau, Droit Civil Français (An English Translation
by the Louisiana State Law Institute) § 204, ¶ 217 n.22, ¶219 n.23 (1966).

\textsuperscript{113} La. Civil Code arts. 503, 3451 (1870); Vance v. Sentell, 178 La. 749,
Cir. 1916): “The term ‘possessor in good faith’ is purely technical, and has
no application to one who acknowledges another owner than (sic)
himself.” Obviously, the courts held the purchaser not in bad faith out of sym-
pathy to preclude the landowner-vendor from having the right to demand
removal or demolition under the first three paragraphs of article 508.

\textsuperscript{114} See La. Civil Code art. 1964 (1870).

\textsuperscript{115} Id. arts. 1901, 1965; see Roux v. Statier, 225 La. 913, 74 So.2d 161
(1954), where the Supreme Court evidently on the basis of contract held
that the trial court did not err in awarding improvement damages to the
purchaser in a void executory contract of sale; Ekman v. Vallery, 185 La.
488, 169 So. 521 (1938), where the Supreme Court evidently applied contract
law to compel the vendor to pay for the improvements. It is suggested that
this is the proper law to apply.

\textsuperscript{116} See Aubry & Rau, Droit Civil Français (An English Translation by
the Louisiana State Law Institute) § 204, ¶ 218 (1966).
comparable to Louisiana Civil Code article 2726. Although Louisiana courts in the past had difficulty deciding whether to follow the French view and apply article 508, or to apply the lease articles, modern cases firmly establish applicability of the lease articles when the lessor consents to construction of the improvement.

In Riggs v. Lawton, the Supreme Court held article 508 inapplicable because the lessee was not a possessor in good faith. He was not a possessor at all because he possessed for his lessor and not for himself, the applicable articles being those on lease (articles 2719, 2720, 2726). Since article 508 can apply to some third persons who are not possessors at all, the correct basis for holding article 508 inapplicable is not that the lessee was not a possessor, but simply because his legal status is governed by the specific articles of the Code on lease.

A lessee who builds improvements without consent of the landowner may be governed by article 508 since he has removed himself from contractual relation with his lessor. When the lease articles thus become inapplicable, article 508 becomes operative to govern the rights of the parties. The lessee of a nonowner should be considered a third person governed by article 508 vis-a-vis the real owner who evicts him, because his

117. LA. CIVIL CODE art. 2726 (1870): "The lessee has a right to remove the improvements and additions which he has made to the thing let, provided he leaves it in the state in which he received it. "But if these additions be made with lime and cement, the lessor may retain them, on paying a fair price." See also id. arts. 2719, 2720.
119. Elrod v. Hart, 146 So. 797 (La. App. 2d Cir. 1933); Young v. Coen, 53 So.2d 508 (La. App. 2d Cir. 1951); DiCrispino v. Bares, 5 Orl. App. 69 (La. App. Orl. Cir. 1908); 1 YIANNOPOULOS, CIVIL LAW OF PROPERTY § 46, text at n.58 (1966): "[I]t is settled that a lessee or any other person having a contractual or real right may erect, with the consent of the landowner, buildings which thus belong to these persons rather than to the owner of the ground. The ownership of the lessee, however, is imperfect because it is liable to terminate upon expiration of the lease."
120. 231 La. 1019, 93 So.2d 543 (1957); The Work of the Louisiana Supreme Court for the 1956-1957 Term—Lease, 18 LA. L. REV. 47 (1957).
121. See LA. CIVIL CODE arts. 3433, 3441, 3445, 3446 (1870).
122. See text at note 137 infra to the effect that a mere precarious possessor (not a real possessor) is a third person governed by article 508.
123. See 1 YIANNOPOULOS, CIVIL LAW OF PROPERTY § 46, at n.58 (1966).
rights cannot be governed by the lease articles when there is no contractual relationship between the parties.\textsuperscript{124}

The right of the mineral lessee to be reimbursed the value of improvements by the landowner\textsuperscript{125} differs significantly from that of an ordinary lessee possessing personal rights. If the mineral lessee is the owner of a real right\textsuperscript{126} and possesses for himself,\textsuperscript{127} it would seem he may be a possessor in good or bad faith who, upon eviction by the real landowner, is entitled to appropriate reimbursement under article 508 without reference to the lease articles governing mere personal rights.

d. Mortgagee. The right to reimbursement of a purchaser of mortgaged land who is evicted after building improvements is regulated by article 3407 of the Civil Code and by article 2703 of the Code of Civil Procedure, not by article 508.\textsuperscript{128} This situation must be distinguished from the situation where one enters the land as a person governed by article 508, and then grants a mortgage on the improvements which he makes. If the true owner evicts him, the mortgagee will be held to have exactly the same legal status as the mortgagor-builder.\textsuperscript{129}

e. Warrantor. The possessor in good faith, or in bad faith when the owner elects to keep, evicted by the true owner can recover against his warrantor the price, costs,\textsuperscript{130} and value of useful improvements.\textsuperscript{131} If the warrantor pays for these im-

\begin{footnotes}
\textsuperscript{124} See LA. CODE Civ. P. art. 3652, comment (b) (1960); Hammonds v. Buzbee, 170 La. 573, 128 So. 520 (1930).
\textsuperscript{125} The rights of the mineral lessee to be reimbursed for improvements is beyond the scope of this comment. For a complete discussion of this subject, see Comment, 15 Tul. L. Rev. 291 (1941).
\textsuperscript{126} LA. CODE OF Civ. P. art. 3864 (1859); LA. R.S. 9:1106 (1950). Article 508 has been applied to mineral leases, (Nabors Oil & Gas Co. v. Louisiana Oil Refining Co., 151 La. 362, 91 So. 65 (1922)); even though legislation clearly indicates that a mineral lease is a real right, the Louisiana Supreme Court has at times been very reluctant to so hold. See Gulf Refining Co. of Louisiana v. Glassell, 188 La. 190, 171 So. 846 (1938); Reagan v. Murphy, 235 La. 529, 105 So.2d 210 (1958). For a recent case holding that a mineral lease is a real right, see Succession of Simms, 250 La. 177, 195 So.2d 114 (1967).
\textsuperscript{128} See Glass v. Ives, 169 La. 809, 818, 126 So. 69, 72 (1930): “These articles [508, 3407] are not applicable to a case where the possessor is evicted by the holder of a mortgage recorded previous to the possessor's acquiring title to the property.” New Orleans Land Co. v. Southern States Fair—Pan American Exposition Co., 143 La. 884, 79 So. 525 (1918); Citizens' Bank v. Miller, 44 La. Ann. 198, 10 So. 779 (1892). The measure of recovery under article 3407, unlike 508, is always enhanced value.
\textsuperscript{130} LA. CIVIL CODE art. 2506 (1870).
\textsuperscript{131} Id. art. 2508.
\end{footnotes}
provements he is subrogated\textsuperscript{132} to the rights of his vendee against the evicting landowner. If the landowner reimburses the vendee for the improvements, the warrantor's obligation is discharged.\textsuperscript{133} If the owner demands removal or demolition of the improvements made by the possessor in bad faith under valid warranty,\textsuperscript{134} he is left only with an action against his warrantor.

\textit{f. Precarious Possessors and Trespassers.} Other than bona fide possessors, three categories of persons having no contractual relationship with the landowner may exist: first, the possessor in bad faith; second, the person called precarious possessor who makes improvements on the land of another with his consent; third, the person called trespasser who without consent erects improvements on land he admits belongs to another, with no intent to prescribe for the land.\textsuperscript{135} Since only bona fide possessors are regulated by the fourth paragraph of article 508, all other persons are regulated by the first three paragraphs. Because of this, these three categories were collectively called “third persons in bad faith” in the section of this Comment discussing the jurisprudential rules applicable to them.\textsuperscript{136} Unlike the bad faith possessor, the precarious possessor and trespasser are not even possessors in the technical sense. They do not hold for themselves or believe themselves to be owner.\textsuperscript{137}

The rule that the landowner may demand demolition or removal of the improvement, and possibly recover damages, seems very harsh when applied to some precarious possessors who build with the landowner's consent. However, when the article is strictly applied the landowner's consent to building the

\textsuperscript{132} Id. art. 2161; Juneau v. Laborde, 224 La. 672, 70 So.2d 451 (1953).
\textsuperscript{133} La. Civil Code art. 2509 (1870): “The seller is bound to reimburse or cause to be reimbursed, to the buyer, by the person who evicts him, all useful improvements made by him on the premises.” See also Elliott v. Labarre, 3 La. 541 (1832); \textit{contra}, Fletcher's Heirs v. Caveller, 10 La. 116 (1836), under the Civil Code of 1825 art. 57, at 354, which has no counterpart in the present Code.
\textsuperscript{134} See La. Civil Code arts. 2501, 2503 (1870). It is doubtful that many cases will arise where the buyer is in bad faith but still under valid warranty deed.
\textsuperscript{135} Id. arts. 3436, 3441.
\textsuperscript{136} See text at note 46 supra.
improvement is immaterial. The precarious possessor cannot be transformed into a good faith possessor by consent of the landowner, since he is not possessing the land for himself as owner. The Louisiana courts have literally applied the first three paragraphs of article 508 to these categories of persons.

g. Encroacher. If a landowner in erecting a building or other improvement slightly encroaches upon the land of his neighbor either in good or bad faith, what is his legal status? "The provisions of [article 508] have been literally applied by the Louisiana Courts," in such cases. The court expressly rejected an argument that the common law doctrine of "Balancing the Equities in Trespass Cases" should be invoked. The application of the rule is very harsh both on the person whose improvement encroaches when he is in technical bad faith but moral good faith, and on the landowner when the person whose improvement encroaches is in technical good faith. However, as a matter of analysis, the court seems imminently correct in invoking the article. Any effort to moderate the harsh effect should be left to the legislature.

139. This factual situation must be carefully distinguished from the case where a person, not being an adjoining landowner, erects improvements partially upon the land of the plaintiff in the suit and partially on the land of an adjoining landowner who is a stranger to the suit. This case is regulated by different rules. See Gordon v. Fahrenberg & Penn, 26 La. Ann. 366 (1874), followed by Uthoff v. Thompson, 176 La. 559, 146 So. 161 (1933), and text at note 39 supra. The court in Ponder v. Fussell, 180 So.2d 413 (La. App. 1st Cir. 1965), in dicta misapplied the rule of the Gordon and Uthoff cases to a situation similar to the one contemplated in the text because of a failure to make this distinction.

141. Esnard v. Cangelosi, 200 La. 703, 8 So.2d 673 (1942). It might be noted that both Aubry & Rau and Planiol seem to favor the balancing the equities approach. See 2 Aubry & Rau, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 204, ¶ 220 n.41 (1966); 1 Planiol, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2735 (1969).
CONCLUSION

This examination of article 508 and the jurisprudence interpreting it discloses that legislation is needed to soften the effect of the article in certain situations, and to govern the legal status of certain persons not expressly covered by this or any other article. Perhaps the precarious possessor who erects improvements on another's land with consent could be treated more equitably by a new rule placing primary emphasis on moral rather than technical good faith in applying article 508. The technical good and bad faith requirements could still be applied in the situation of adverse possessors. Further, detailed legislation is needed to govern the legal status of the possessor whose building encroaches on his neighbor's land to alleviate the inequitable results which may presently be reached under article 508 with regard to both parties.

Legislation is also needed to govern the situation which may arise when improvements are made by a co-owner. Although article 508 can be applied by analogy when a present co-owner improved the property before the ownership in indivision, it does not adequately cover the situation. The co-owner who partially evicts a possessor in bad faith who erected improvements is denied the right usually given him in article 508 to demand removal. The rights of the vendee in an executory contract of sale or bond for deed agreement who builds with his vendor's consent are not expressly covered by any legislation. In this day of high finance and subdivision development programs, it is imperative that his legal status be rendered more certain by comprehensive legislation.

Finally, Louisiana should follow the French example by amending article 508 to give the landowner the option to reimburse the price of the materials and cost of workmanship or the enhanced value of the soil under the first three paragraphs, just as he has now under the fourth paragraph of the article. A historical accident in the enactment of the article over a century and a half ago in France should not force Louisiana to continue approval of the anomalous result reached under the present reimbursement provisions of article 508.

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