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Louisiana Recent Developments

Gary H. Love

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Gary H. Love
Blanchard, Waler, O'Quin & Roberts, A P.L.C.
Shreveport, Louisiana

I. Cases

A. Community Property

Harvey v. Amoco Production Co.,
No. 96-1714 (La. App. 1st Cir. 6/20/97); 696 So. 2d 672.

This case concerned a disputed mineral lease entered into by plaintiff in 1977. The mineral lease affected property purchased by the plaintiff and nine relatives from plaintiff's uncle, the deed reciting that the purchasers were acquiring with separate and paraphernal funds under separate management and control and for their separate estates. Plaintiff's husband did not sign the deed acknowledging plaintiff's declaration. Plaintiff and her husband subsequently divorced. Both plaintiff and her former husband executed leases affecting the property. At issue in this litigation was whether the property was community property or the separate property of the plaintiff. Because the husband did not join in the deed, the presumption that the property was community was not rebutted conclusively by the presence of the Adouble declaration.@ The court of appeal affirmed the jury verdict in favor of the plaintiff, holding that the plaintiff carried her burden of overcoming the presumption of community by clear and convincing evidence.

B. Dedication of Streets

State of Louisiana Department of Transportation and Development v. Scramuzza, No. 96-1796 (La. 4/8/97); 692 So. 2d 1024.

In 1988, the State expropriated land through a number of subdivisions which were platted and recorded, but never developed. The subdivision streets were statutorily dedicated to St. Charles Parish. The streets were never built and the property owners of the expropriated land, defendants in the expropriation suit proceedings, asserted that the land dedicated to the parish for subdivision streets had been abandoned and reverted back to the landowners. Supreme court holds that statutorily dedicated streets do not revert to the adjoining landowners upon mere abandonment by the parish and that a formal act of revocation by the parish is necessary to revoke a statutory dedication of streets under La. R.S. 48:701. La. R.S. 48:701 provides that the appropriate governing authorities may record and set aside the dedication of roads and streets that have been abandoned or are no longer needed.

Cantrelle v. Gaude,
97-20 (La. App. 5th Cir. 7/29/97); 700 So. 2d 523.

Landowners brought suit to establish ownership of alleyway between

their property and the property of their neighbors. The alleyway had previously been dedicated as a public roadway. The road was never constructed and the Parish executed an ordinance which closed this dedicated roadway and indicated it was not longer needed for a public purpose. This satisfied the requirements of a formal revocation of a statutorily dedicated roadway and failure to record the ordinance did not render it invalid. Court found that plaintiffs acquired the entire alleyway through ten-year acquisitive prescription but that the defendant neighbors were entitled to a predial servitude of passage to the entire alleyway.

Cavaness v. Norton,
No. 96-1411 (La. App. 1st Cir. 5/9/97); 694 So. 2d 1174.

Suit regarding whether a subdivision street was statutorily or impliedly dedicated for public use. The owner of the property recorded a subdivision plat showing numerous named streets and block and lot numbers. The plat did not contain a street dedication clause. A subsequent revised plat stated that the disputed road was dedicated to the public as a right of way only. The court of appeal holds that the plat initially filed substantially complied with La. R.S. 33:5051 and that the surrounding circumstances reflected an intent to dedicate. The court concluded that the disputed property was statutorily dedicated to public use and that ownership of the road vested in the public.

C. Gas Purchase Contracts

Louisiana Intrastate Gas Corp. v. Walsh Brothers - Gahagan, Ltd.,
No. 96-1295 (La. App. 3d Cir. 3/12/97); 692 So. 2d 1177.

Continued litigation regarding the interpretation of pricing provisions in a natural gas sales contract between LIG and Walsh Brothers. In this iteration, the court of appeal reversed the decision of the trial court and remanded the case again for trial of the issue of whether the parties intended that the NGPA Section 103 pricing formula control even after Section 103 was repealed.

D. Immovables

Bayou Fleet Partnership v. Dravo Basic Materials Co.,
106 F.3d 691 (5th Cir. 1997).

Defendant was the lessee of an aggregate yard from which it stored and sold limestone. The defendant built three stockpiles of loose limestone, each with a foundation made from hardened limestone known as a working base. The question in the suit was whether the defendant was entitled to remove the limestone working bases and the stockpile limestone from the property, or whether it was owned by a creditor of the landowner who had seized the land and acquired it at a judicial sale.

Court holds that because of their size, degree of attachment, and permanence, massive limestone working bases established by lessee were "other constructions permanently attached to the ground" and therefore

classified as immovable under Louisiana Civil Code Article 463. The loose stockpiles were not immovables. The court held that the lessee did not overcome the presumption that the owner of the land was the owner of the "other constructions permanently attached to the ground," because the lessee failed to evidence its separate ownership of the construction by filing an appropriate instrument in the public records.

E. Lesion

Cook v. Mixon,
No. 29491 (La. App. 2d Cir. 8/22/97); 700 So. 2d 1264, Rehearing denied.

Plaintiffs sold 160 acre tract of timberland to defendants in September, 1994 for $84,215. Six weeks later, the defendants received a bid from Willamette Industries to buy the property for $192,180. Willamette subsequently raised its bid and the defendants sold the property to Willamette in January, 1995 for $225,934. Plaintiff brought an action against defendants under Louisiana Civil Code Article 2594 to recover the profit the defendants realized from the sale. The trial court held that lesion applied and ruled in favor of the plaintiff. The court of appeal reversed, holding that even through the sale to Willamette was for over two and one-half times the price received by the plaintiff, the plaintiff nevertheless failed to carry her burden of proving that the price was less than one-half of the fair market value of the immovable sold. In reaching its conclusion, the court of appeal noted that the trial court placed too much emphasis on the Willamette transaction, and not having such transaction excluded from the Amarket@ analysis. The court of appeal said this approach ignored the Afair value@ and that for our law to provide relief under the policy for lesion in a setting closely akin to the sale of movable property (for which no lesionary remedy exists) which can be counted and priced to determine fair market value, the plaintiff was required to establish that Willamette's bid was accurate. The court concluded that plaintiff failed to do that and that Willamette's appraisal and purchase were not indicative of the fair market value of the property.

Hart v. Jack Mims, Inc.,
No. 29734 (La. App. 2d Cir. 8/20/97); 698 So. 2d 742.

Plaintiffs filed a suit to rescind a sale of immovable on grounds of lesion. The sale occurred on November 27, 1991 and suit was filed on November 27, 1995. At the time of the sale, Louisiana Civil Code Article 2595 provided for a four year prescriptive period for an action for lesion. Article 2595 was amended in 1993 to provide for a one year peremptive period. The court of appeal held that the legislature expressly provided that the provisions of Act 841 of 1993, including the peremption provision, were prospective in effect and do not apply to sales executed before January 1, 1995.

F. Partition

Connally v. Nevils,
No. 97-569 (La. App. 3d Cir. 10/29/97); 702 So. 2d 1043.

Co-owners of property brought action against the remaining owner seeking a partition in kind of approximately 80 acres of land. The parties stipulated that the property was capable of being divided in kind without loss of value or inconvenience to the parties. At trial, each party proposed different divisions of the land. The trial court initially adopted the defendant's proposal, but on a motion for new trial, adopted the plaintiffs' proposal. The defendant appealed. The court of appeal held that the trial court erred in failing to have experts divide the property into lots of equal value which would then be drawn by chance by the parties.

Ivanhoe Canal Corp. v. Bunn,
No. 95-0143 (La. App. 1st Cir. 10/6/97); 694 So. 2d 263.

Co-owner brought suit for partition by licitation. Texaco, one of the defendant co-owners, contended that property could not be partitioned because of the provisions of Louisiana Civil Code Article 808 which provide that property is excluded from partition when its use is indispensable for the enjoyment of another thing owned by one or more of the co-owners. The court of appeal held that a canal located on the property sought to be partitioned and used by Texaco in connection with its lease of other property, located adjacent to the property sought to be partitioned, was excluded from partition because the canal was indispensable for the enjoyment of Texaco's lease. The canal went through the property sought to be partitioned and gave Texaco access to other waterways where it had oil and gas exploration and production activities. The court of appeal found that Texaco's lease of the adjacent property was an incorporeal immovable thing and as such Louisiana Civil Code Article 808 was applicable.

G. Peremption

Reeder v. North,
No. 97-0239 (La. 10/21/97); 701 So. 2d 1291.

Plaintiff brought a legal malpractice action more than three years after the date of the alleged negligent act. The Louisiana Supreme Court holds that in enacting La. R.S. 9:5605, the peremptive period for actions in legal malpractice, the legislature intended that three years after the "act, omission, or neglect," the cause of action is extinguished, regardless of when the negligence is discovered and regardless of whether a malpractice action may be brought within that three-year period. The court of appeal had found that while the attorney-client relationship is in existence and the attorney is actively attempting to remedy the alleged malpractice, until the judgment giving rise to the malpractice claim becomes definitive, a legal malpractice claim does not ripen into a cause of action. The Supreme Court disagreed because La. R.S. 9:5605 establishes a peremptive period and not a

prescriptive period and thus the "continuous representation rule" was erroneously applied by the court of appeal.

H. Possession / Acquisitive Prescription

Bennett v. Louisiana Pacific Corporation,
No. 29,598 (La. App. 2d Cir. 5/9/97); 693 So. 2d 1319, writ denied.

Plaintiff brought an action seeking damages for the wrongful cutting of timber. The facts showed that plaintiff and defendant owned contiguous tracts of land with both deeds describing the property as running from the mouth of Cut-off Bayou to the center of the Section. The location of Cut-off Bayou was disputed. The court of appeal held that plaintiff acquired ownership of the disputed lands by thirty year acquisitive prescription. The disputed land had been fenced in 1939 and plaintiff's ancestors in title had possessed to the fence for more than thirty years without interruption.

Falcone v. Springview Country Club, Inc.,
No. 96-0794 (La. App. 1st Cir. 3/2797); 691 So. 2d 314.

Plaintiffs brought a petitory action on November 3, 1993 against defendant claiming ownership of land upon which a golf course was constructed. The record reflected that Nicholl Spring acquired a 76 acre tract of land on July 10, 1948. On October 31, 1961, Nicholl Spring leased a 56 acre parcel to the defendant, and on April 10, 1964, Spring sold the parcel to the defendant. Both Spring and defendant apparently possessed, within fenced boundaries, lands other than those described in their title. The trial court held that the defendant established title under both ten and thirty year acquisitive prescription. The court of appeal affirmed, but held that the trial court erred in holding that the defendant established title by ten year acquisitive prescription because the parcel in question was not sufficiently described and therefore the element of just title was not established. The court of appeal held that the defendant established title by thirty year acquisitive prescription because the defendant, pursuant to Louisiana Civil Code Article 794, was entitled to tack its predecessor's possession, notwithstanding the failure of the 1964 deed to describe the disputed parcel. Even though defendant's 1964 deed did not sufficiently describe parcel in question for purposes of ten year prescription, it was a sufficient juridical link to permit tacking.

Crowell Land & Mineral Corp. v. Funderburk,
No. 96-1123 (La. App. 3d Cir. 3/5/79); 692 So. 2d 535. Writ not considered.

In October 1990, Crowell brought suit to be recognized as owner of certain property possessed by the defendants. Prudum Edwards bought certain lands in the 1930's and fenced the property purchased, together with five and one-half acres of an adjoining tract not included in the purchase. These five and one-half acres were the subject of the dispute. Edwards maintained the fence and used the land as pasture until 1950. From 1950

until 1961, Edwards did not use the property or maintain the fence. In 1961, Edwards allowed the defendants to put a camper trailer on the disputed property and the defendants repaired the fence and pastured cattle. The trial court held that the defendants acquired the disputed tract through thirty years acquisitive prescription, tacking defendant's possession to that of Edwards. The court of appeal reversed, holding that there was an interruption of possession during the period 1950 to 1961 and that the presumption of continuous possession under Louisiana Civil Code Article 3443 had been rebutted. Accordingly, the defendants were unable to show possession for the requisite thirty years.

Atwood v. Hylan,
No. 28,971 (La. App. 2d Cir. 12/11/96); 685 So. 2d 450.

Plaintiff and defendant are owners of adjoining lots on Lake Claiborne. In 1993, Atwood rebuilt and expanded a boathouse which extended over the extended property line. In 1992, Hylan built a pier twelve feet from the property line, but at one point only four feet from Atwood's structure. The court of appeal held that Atwood constructed his pier in good faith and was entitled to a servitude under Louisiana Civil Code Article 670 and reversed the trial court's order that Atwood remove part of his pier. The case was remanded for a determination of the consideration to be paid for the servitude.

I. Private Works Act

Hershell Corp. v. Fireman's Fund Ins. Co.,
No. 96-1155 (La. App. 3d Cir. 3/5/97); 692 So. 2d 521.

In 1983, plaintiff filed a notice of privilege under the Private Works Act for labor and materials supplied to a work site and filed suit naming Greener & Sumner, a trade name of the actual owner of the property, as defendant. Judgment was rendered in favor of the plaintiff and the lien was recognized. Subsequently, the present suit was filed against the surety for the property owner. The surety contended that because the plaintiff failed to properly name the owner in the previous suit, the plaintiff failed to interrupt the one year prescriptive period established by La. R.S. 9:4823. The court of appeal held that while the prior suit did not provide third parties notice because the suit did not correctly name the owner, the surety was not a third party and the prior suit properly resulted in a judgment against the owner of the property.

Cable & Connector Warehouse, Inc. v. Omnimark, Inc.,
No. 96-2831 (La. App. 4th Cir. 9/12/97); 700 So. 2d 1273.

This case involves a suit by an unpaid supplier of a supplier for materials ultimately used in a construction project. The action was commenced under the Private Works Act. The unpaid supplier sold cable to Omnimark, Inc. who then sold the cable to the cable installer subcontractor, Sandoz Group, Inc. The prime contractor paid Sandoz, but Sandoz did not

pay Omnimark and Omnimark did not pay the plaintiff. Sandoz and Omnimark were owned by the same individual. The court of appeal affirmed the trial court's grant of a summary judgment on the ground that a supplier to a supplier has no rights under the Private Works Act.

J. Royalty Issues

Babin v. First Energy Corp.,
No. 96-1232 (La. App. 1st Cir. 3/27/97); 693 So. 2d 813.

Plaintiffs are 131 royalty and overriding royalty owners who brought suit for underpayment of royalties. The defendants had constructed gas processing facilities at a cost of $9.7 million and charged non-royalty owners $0.35 to $0.60 per MMBtu to process gas. According to the plaintiffs, actual gas processing costs ranged from $0.08 to $0.17 per MMBtu, but defendants deducted $0.20 to $0.25 per MMBtu in calculating royalty and overriding royalty payments. The trial court granted summary judgment in favor of defendants, holding that the defendants could charge the "fair market value" of the processing services. The court of appeal reversed, holding that the lessee may deduct for reasonable costs, but not additional amounts for profit. According to the court of appeal, in cost accounting terms, deduction for the fair market value of the processing is a charge for profit.

Lewis v. Texaco Exploration Prod. Co.,
No. 96-1458 (La. App. 1st Cir. 7/30/97); 698 So. 2d 1001.

Plaintiffs are mineral lessors and royalty owners who sought to bring a class action for an accounting and royalties on take-or-pay settlements. The court of appeal affirms trial court's certification of the class. The court of appeal also holds that a letter written by five royalty owners, purportedly on behalf of themselves and the entire class, was sufficient to constitute notice to Texaco for the entire class under Article 137 of the Mineral Code.

Louisiana Land & Exploration Company v. Unocal Corp.,
93-1540, (E.D. La. 12/5/97); WL 756597 (Not reported in Federal Supplements).

Plaintiff sued for withheld extraction charges and gathering payments collected by defendant, and royalties not collected by defendant as a result of a settlement reached by defendant with a gas purchaser concerning a take or pay claim. The plaintiff and defendant were parties to a joint operating agreement. LL&E sought a percentage of the proceeds paid to the processor for condensate produced from the leases in question. The processor was allowed to keep 25% of condensate extracted from gas produced from leases. The court held that LL&E was not entitled to any money for this claim because it had prescribed pursuant to Louisiana Civil Code Article 3494(5). Court also held that even if not prescribed, LL&E received its percentage of the selling price as required in the operating agreement.

Court then discussed reimbursements Unocal had received for gathering costs actually received by Unocal from its gas purchaser. According to the relevant provision of the joint operating agreement, the court found that the value of the gas sold was its selling price (including premiums or allowance). These gathering costs can be added to selling price, citing Section 110 of the Natural Gas Policy Act (15 U.S.C. 3320) and further such allowances are royalty bearing, citing *Mesa Operating Partnership v. U.S. Department of the Interior*, 931 F. 2d 318 (5th Cir. 1991), cert denied 502 U.S. 1058, 112 S. Ct. 934, 117 L. Ed 2d 106 (1992). LL&E was entitled to the amount held in suspense by Unocal for these reimbursed gathering charges. These claims had not prescribed because of the operation of the doctrine of contra non valentem.

K. Mineral Leases

Mattie Connell Caskey, et al. v. Kelley Oil Company,
No. 30,278 (La. App. 2d Cir. 2/25/98); WL 78826.*

Plaintiffs, owners of a tract of land in Webster parish, granted a mineral lease with respect to the subject property. Kelley Oil later acquired a partial interest in the lease. Kelley improved and used a road that crossed the plaintiff's tract to drill and operate a well on adjacent property not owned by the plaintiffs. Plaintiffs objected to these improvements and sought injunctive relieve and damages against Kelley Oil. Kelley relied on provisions in the lease that arguably allowed the leasee to construct roads on property in connection with operations on any adjacent lands. The court held Kelley failed to prove by a preponderance of the evidence that construction of the road conferred any benefit upon the plaintiffs. In assessing Kelly's actions, the court of appeal relied upon the duty of mutual benefit as expressed in Mineral Code Article 122. The court of appeal reversed the trial court and rendered judgment granting plaintiffs the injunctive relief prayed for.

L. Successions

Succession of Rivers,
No. 97-542 (La. App. 3d Cir. 10/8/97); 702 So. 2d 910.

Clarence Rivers died intestate on October 29, 1981, survived by ten children born of two different marriages. The decedent owned an interest in 12 acres of land. The succession was judicially opened by the seven children of the second marriage in 1993, and the administratrix, a daughter of the second marriage, petitioned the court for authority to sell property to her brother. The petition was approved and the property sold, but the description of the property in the succession, included in the sworn descriptive list, described only one acre and not the entire twelve acre tract. This error in the description also appeared in the petition for authority to sell, the advertisements, the judgment authorizing the sale and the sale itself, even though the succession representative and the buyer apparently

intended to convey the entire tract. Suit was subsequently brought to reform the act of sale to include the entire property. The trial court reformed the deed. The court of appeal reversed, holding that reformation was not available because there was no mutual error or mistake. As to the seller (the succession), there was no error as the authorized sale was only for one acre. The intention of the succession representative was irrelevant, because the succession representative was not the seller.

Succession of Eliza Laviolette,
No. 97-885 (La. App. 3d Cir. 12/10/97); 704 So. 2d 339.

Filing a request for Notice of Application for Appointment as Administrator does not constitute the "judicial opening" of a succession for purposes of Louisiana Code of Civil Procedure Article 2893. This article provides that no testament will be admitted to probate unless a petition therefor has been filed in a court of competent jurisdiction within five years after the judicial opening of the succession of the deceased. La. R.S. 9:5643 provides for a five year prescriptive period on the right to probate testaments, measured from judicial opening of succession. A judicial opening was distinguished from opening of succession as contemplated in Louisiana Code of Civil Procedure Article 934. To give meaning to Louisiana Code of Civil Procedure Article 3091, the court determined that filing the request for notice can occur before or after succession is opened and as such does not judicially open succession.

Succession of Becker,
No. 96-2169 (La. App. 4th Cir. 12/5/97); 704 So. 2d 825.

Appeal from a judgment of the trial court requiring the widow of decedent to furnish security to the adult children and forced heirs of decedent. The children were from a previous marriage and not children of the widow and decedent. Decedent left these children his separate property which included an interest in a lease. The decedent's widow was granted a usufruct of the lease and the decedent directed in his will that the usufruct be without bond. The court concluded that the rights of forced heirs to compel the furnishing of security could not be derogated from by testament. However, the court then found that the rentals from a sublease on the lease interest were fruits of the usufruct of the lease and the forced heirs were not entitled to security for these rental payments.

Succession of Reeves,
97-20 (La. App. 3rd Cir. 10/29/97); 704 So. 2d 252.

Decedent died in 1992, with a statutory will that left approximately one-half of his estate to his second wife and the remaining one-half of his estate to nine of his ten children from a previous marriage. The child that was excluded from the will filed this lawsuit to annul his father's will alleging that the second wife exerted undue influence on the father. The trial court held that the decedent's second wife of eleven years had exerted

undue influence and nullified all bequests to her. The court of appeal held that the trial court erred in concluding that the second wife exerted undue influence over the testator and reversed.

The trial court relied heavily on the opinion of a forensic psychiatrist that supported a finding that the decedent was susceptible to undue influence. The psychiatrist never met the testator or his second wife and based his opinion on interviews with people who knew the decedent. The court observed that a surviving spouse of eleven years was not the intended target of Louisiana Civil Code Article 1479 (voiding wills based on undue influence). The trial court relied upon the exploitation of decedent's sexual dependency, fear of abandonment and his need for companionship in finding undue influence. The court of appeal suggested that love, companionship and intimacy are the primary reasons for marriage and called these things the "marriage imperatives." As a result, the court specifically held that the granting or withholding of love, companionship and intimacy, "the marriage imperatives," are matters reserved to the married couple and shall not, standing alone, serve to invalidate a will. The court of appeal also put much weight on the testimony of those who actually knew the decedent rather than the psychiatrist who relied upon second-hand recollections. The psychiatrist's opinion was not enough to overcome the presumption of statutory capacity.

Succession of Roniger,
No. 97-1088 (La. App. 4th Cir. 1/14/98); WL 12535.*

Decedent died on February 1, 1996 and on March 1, 1996 decedent's will dated December 12, 1996 was submitted for probate. Decedent's nephew filed a petition to annul the probated testament for failure to meet statutory requirements. Defendants filed an exception of no cause of action and trial court maintained the exception and found the testament to be authentic. Extrinsic evidence was allowed to clarify the date. There was one written dissent based on the fact that the case was before the court on an exception of no cause of action and for that reason no extrinsic evidence should have been considered.

Succession of Hackney v. Russell,
No. 97-859 (La. App. 3d Cir. 2/4/98); WL 40376.*

Son of testator brought this action to contest the will. Trial court annulled the will and named son executor. Testatrix's third husband and testamentary executor appealed. Court of appeal considered the following bequests:

> "Second: I give, devise and bequeath unto my husband, Paul Raymond Hackney, the disposable portion of my interest in and to the Community of Acquets and Gains which existed between us, subject to the right of usufruct of, my husband, Paul Raymond Hackney, until such time as he shall remarry or until his death..."

The court held these bequests did not cancel each other out, but concluded that testator intended to confer full ownership of disposable portion of her interest in the community to her husband and the balance of her interest in the community property to her son, subject to the usufruct in favor of her husband. Court of appeal said that in seeking to resolve the ambiguity it was appropriate to consider the testimony of the notary who prepared the will and it was also appropriate to consider language contained in the husband's will executed on the same day the testatrix executed her will before the same notary.

Succession of Hagelberger,
No. 96-2049 (La. App. 4th Cir. 8/27/97); 700 So. 2d 226.

Decedent died without children and was never married and was predeceased by his parents. Issue in this case was meaning of term "heirs" in his olographic will. The will set forth specific legatees then left any residual "to be equally divided between my heirs." Court held this term indicated testator's intent to provide for those persons called by law to inherit from him.

M. Tax sales

Oliver v. Zeringue,
No. 97-329 (La. App. 3d Cir. 10/29/97); 702 So. 2d 1086.

Plaintiff brought suit to quiet title to property acquired at a tax sale. According to stipulated facts, plaintiff acquired interests in property owned by the defendant, Zeringue, in two separate tax sales held in 1989 and 1990. It was stipulated that notices of the tax delinquency and the tax sales in 1989 and 1990 were sent only to Louisiana Bank and Trust Company, a mortgage holder on the property, and that Zeringue did not receive any notice. The court of appeal held that notice sent to Zeringue in care of a bank was not reasonably calculated to apprise interested parties of the pendency of the action and offer them an opportunity to present their objections. Accordingly, the tax sales were null.

McChesney v. Penn,
No. 29776 (La. App. 2d Cir. 8/20/97); 698 So. 2d 705.

Plaintiff held a mortgage covering lands subsequently sold at tax sale. Plaintiff brought suit to declare the tax sale a nullity on grounds that he was not provided notice of the sale. The defendant argued that plaintiff was not entitled to notice under La. R.S. 47:2180.1, which provides for notice to mortgage holders who have notified the tax assessor and also provides that no tax sale shall be set aside for lack of notice to a mortgagee. The court of appeal holds that under *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), if a mortgagee is not reasonably identifiable, constructive notice by publication of a tax sale satisfies due process requirements. The court held that the plaintiff was not reasonably identifiable in the mortgage and therefore constructive notice by publication was adequate. The

mortgage was made payable to any future holder and plaintiff was not identified anywhere in the document. Plaintiff argued that he was named in an assignment of rents and leases on the subject property and this document was filed into the mortgage records directly behind the mortgage, but the mortgage itself did nothing to indicate the existence of the assignment of rents and leases. The court of appeal did not reach the constitutionality of La. R.S. 47:2180.1. See *Murchisons v. Marzullio*, below.

Murchisons v. Marzullio,
No. 97-815 (La. App. 3d Cir. 12/10/97); 1997 WL 75804.

Plaintiff brought suit to homologate his tax title. Trial judge dismissed petition to homologate annulling the tax sale and court of appeal affirmed. Plaintiff purchased subject property at a tax sale in May, 1991. The original property owners defaulted on the mortgage in October 1993. The mortgagee proceeded to seize and sell the property by executory process. Plaintiff sued mortgagor, mortgagee and purchaser of property in foreclosure proceedings. In affirming trial court's decision, the court of appeal held that Louisiana's statutory request notice scheme alone does not satisfy due process requirements. The mortgagee failed to request notice under the Louisiana statutes, but this failure was not a waiver of it's due process rights. The court citing Mennonite stated that "a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending...". Actual knowledge does not replace the Mennonite requirement of notice reasonably calculated to apprise a party with a legally protected property interest of a pending sale. The result is that Louisiana's notice request scheme is not constitutional.

Federal Deposit Insurance Corporation, as receiver for New Orleans Federal Saving and Loan Association v. Harry Lee,
96-31127 (5th Cir. 12/29/97); 130 F. 3d 1139.

In the 1980s, I-12 passed near the corner of certain real estate located in Jefferson Parish. New Orleans Federal Savings and Loan held a mortgage on the property. New Orleans Federal was declared insolvent in 1986 and the FSLIC was appointed receiver and later replaced by the FDIC. The FSLIC filed a request to receive notice of foreclosure, but did not include in its request a request for notice of any tax sale. A tax sale occurred in 1991, and the buyer at the tax sale later inquired whether the FDIC was going to redeem. Apparently, the FDIC said no. More than three years after tax sale the FDIC filed a writ of mandamus to compel the Sheriff to issue a redemption deed. The state court denied and dismissed the writ of mandamus. The FDIC then filed suit in federal district court to declare the tax sale null and void as a violation of the FDIC's constitutional due process right to notice before the sale. Trial court declared tax sale null and void for lack of notice. FDIC also argued on appeal that 12 U.S.C. 25(b)(2) requires their consent before proceeding with tax sale. The Fifth Circuit Court of Appeals decided the case on this statutory basis rather than a constitutional

due process basis, holding that the tax sale was null and void because the FDIC did not consent to sale.

N. Mandatory Arbitration

Sun Drilling Products Corporation v. Rayborn,
No. 97-2112, (La. App. 4th Cir., 12/3/97); 703 So. 2d 818.

Contract contained a mandatory arbitration clause subject to the Federal Arbitration Act. Contract alleged to have been entered as a result of "fraud in the inducement of a contact." The court held that a defense based on the invalidity of the contract (and the binding effect of the contract) is not subject to arbitration. Court was reluctant because of potential for abuse in avoiding arbitration clauses, but nevertheless held it is the policy of the state, as originally declared by *George Engine, Co., Inc. v. Southern Shipbuilding Corp.*, 350 So. 2d 881 (La. 1977), that the question of fraud in the inducement should be resolved in court rather than through arbitration.

Court also identified an apparent conflict between *Ackel v. Ackel*, 97-70, (La. App. 5th Cir. 5/28/97); 696 So. 2d 140 and *Freeman v. Minolta*, 29655, (La. App. 2nd Cir. 9/24/97); 699 So. 2d 1182. In Freeman the court took the position that only fraud in the inducement of the arbitration clause could be decided by the courts. This was distinguished from fraud in the inducement of a contract generally. The Court in Ackel held that the presence of an arbitration clause in a contract did not divest the district court of jurisdiction to determine the validity and legality of the underlying contract.

TRCM, LLC v. The Twilight Partnership,
No. 30,331 (La. App. 2d Cir. 1/21/98); WL 18037.*

TRCM alleged vices of consent in the inducement of its contract with the defendant. Defendant Twilight argued that the contract called for arbitration of this issue. The contract specifically required that the validity of the contract be settled by arbitration. The court of appeal initially affirmed the trial court's denial of the motion to compel arbitration. On remand from the Louisiana Supreme Court, the court of appeal enforced the arbitration provision, apparently relying on the specific contractual requirement that the validity of the contract be settled by arbitration. The court also followed the rule that arbitration provisions are enforced in this instance unless the arbitration provision itself is based upon fraud or misrepresentation. Compare with *Sun Drilling Products* above, indicating an apparent conflict among the circuits.

O. Non-Competition Agreements

Henderson Implement Co., Inc. v. Langley,
97-1197 (La. App. 3d Cir. 2/4/98); WL 40373.*

Action by plaintiff seeking a restraining order against Langley for solicitation of customers in violation of a non-competition agreement between the parties. Defendant Langley argued that agreement was null and

void because it sought to restrict his ability to compete with plaintiff's affiliates as well as plaintiff and because the agreement did not define the business of plaintiff. Court of appeal affirmed the trial court's preliminary injunction of Langley holding that the contract limited the area of the non-compete covenant to a single parish. Further, the court allowed a reformation of the non-compete provisions to exclude affiliates.

Louisiana Smoked Products, Inc. v.
Savoie's Sausage and Food Products, Inc.,
96-1716, 96-1727 (La. 7/1/97); 696 So. 2d 1373.

The question in this case was whether a non-competition clause contained in a manufacturing and processing agreement was null and void under La. R.S. 23:921(A). In the contract, Savoie agreed to manufacture and process smoked alligator and smoked venison sausage. The contract, prepared by Savoie, contained a non-competition clause prohibiting the parties from engaging in activities which directly competed with the other party's business activity for a period of three years after termination of the agreement. After termination of the agreement, the plaintiff claimed Savoie breached the non-competition clause and filed this suit. The Supreme Court held La. R.S. 23:921 was inapplicable to this situation as it was not intended to protect independent corporations on equal footing.

P. Zoning

Parish of St. Charles v. Grimaldi Corp.,
No. 96-663 (La. App. 5th Cir. 5/28/97); 696 So. 2d 161.

Parish brought an action to enjoin the defendant from using property zoned for residential purposes to operate a business engaged in storing abandoned, junked, wrecked and derelict vehicles. The defendant contended that the two year prescriptive period established under La. R.S. 9:5625(A) was applicable. The court of appeal holds that the two year prescriptive statute for zoning use violations, as amended in 1972, does not begin to run until the appropriate governmental agency is notified in writing of the violation.

Q. Other

Plaquemines Parish Comm. Council v. Delta Dev. Co.,
No. 96-0270 (La. App. 4th Cir. 1/29/97); 688 So. 2d 169, writ denied.

Two levee boards, the predecessors to the parish council, granted oil and gas leases to Delta Development Company. Delta Development Company granted subleases to Gulf Refining Company, reserving overriding royalty interests. The parish contended that Leander Perez, Sr., the parish district attorney, had a conflict of interest and breached his fiduciary duties to the levee boards in connection with his acquisition of those overriding royalty interests. The court of appeal affirmed the trial court's judgment that the overriding royalty interests were obtained through a breach of fiduciary duty by Perez and that Perez's grandson, who acquired

his interest as an heir or donee, was required to account for all sums received attributable to those interests.

Lafayette Parish School Board, Sales Tax Division v. State of Louisiana, through The Department of Revenue and Taxation,
97-519 (La. App. 3d Cir. 10/29/97); 701 So. 2d 734.

Held that La. R.S. 47:301(3)(d), enacted by Acts 1990, No. 719, 1990 applies prospectively only. This statute deals with election of an alternative method of computing the use tax on measurement while drilling systems.

St. Charles Mortgage & Loan, Inc. v. Oubre,
97-371 (La. App. 5th Cir. 10/15/97); 701 So. 2d 1020.

St. Charles Mortgage sought the reinscription of a mortgage which was executed on April 23, 1985. St. Charles reinscribed the mortgage on October 30, 1995 and the reinscription was cancelled by the Clerk of Court on December 12, 1996 as untimely. The court held that in accordance with La. R.S. 9:5161, the cancellation of the untimely reinscription was proper, but clarified that the mortgage was still effective as between the contracting parties.

Sudwischer v. Hoffpauir,
*97-0785, (La. 12/12/97); WL 771216. Rehearing denied.**

In this action to establish filiation, the Louisiana Supreme Court considered whether Louisiana Civil Code Article 209 is procedural or substantive. Louisiana Civil Code Article 209 establishes the burden of proof in filiation cases. The court held the article was procedural and thus retroactive.

Property Asset Management, Inc. v. Pirogue Cove Apartments,
97-0212 (La. App. 4th Cir. 4/11/97); 693 So. 2d 1217.

This case involved a suit to enforce a defaulted in rem mortgage by ordinary proceedings. The court of appeal reversed the trial court's ruling that in rem proceedings can only be brought against nonresidents. The court confirmed that a mortgage is a real right and that an action to enforce a mortgage is, in all cases, an in rem action. The court reiterated that both ordinary and executory proceedings are in rem proceedings available to enforce a mortgage.

II. Legislation

A. Acts 1997, No. 208 - Office of Conservation hearings

- Provides that the commissioner of conservation shall implement monthly public hearings in Shreveport, provided that funds for such meetings are appropriated by the legislature.
- Money to fund these meetings were appropriated in Acts 1997,

* Please note that these opinions have not been released for publication in the permanent law reports and until released, are subject to revision or withdrawal.

No. 18.

B. Acts 1997, No. 230 - Effect of work or compliance orders

- Amended La. R.S. 30:27 to provide that a work order or a compliance order issued by the commissioner of conservation shall be sufficient authority for the operator or persons acting on his behalf to enter upon lands of another person, whether or not leased by the operator, for purposes of conducting site assessments, site restoration, pit closure, plugging and abandonment operations, or other matters covered by the work order.
- Written notice provisions are included.

C. Acts 1997, No. 257 - Conflict of laws - Forced Heirship

- Amendment of La. Civil Code Article 3533 providing that the forced heirship law does not apply if the deceased was domiciled outside the state at the time of death and he left no forced heirs domiciled in the state at the time of his death.

D. Acts 1997, No. 261 - Mandate

- Comprehensive revision of Louisiana Civil Code Articles 2985 through 3032 relating to mandate.

E. Acts 1997, No. 530 - State Mineral Board

- Amendment of La. R.S. 30:209 provides that the State Mineral Board shall have the authority to enter into operating agreements in various circumstances, including when title is disputed. Act ratifies operating agreements previously entered by the State Mineral Board.

F. Acts 1997, No. 584 - Tax sale notice

- Repeals La. R.S. 9:5201, 5202 and 5203 which permitted any person holding a mortgage to file a request for notice of each and every tax sale and liability of the clerk for failure to comply.

G. Acts 1997, No. 818 - Inheritance and Estate Transfer Taxes

- Amendment of La. R.S. 47:2401, 2431 and 2432(A) and enactment of La. R.S. 47:2403(E) and 2420(D) providing, among other things, that no inheritance tax shall be due for deaths occurring after June 30, 2004 when judgment of possession is rendered or succession is judicially opened within nine months after death. Also provides for reductions in the rates of tax each year until 2004.

H. Acts 1997, No. 993 - Sheriffs sale - Notice to Commissioner

- Provides that prior to any sheriff's sale or public auction of "any property related to the operation of oil and gas wells," the person seeking such sale shall notify the commissioner of conservation of the sale not less than 30 days prior to such sale. The sale shall not occur unless the commissioner consents thereto in writing. Further provides for a lien in favor of the commissioner and that the failure to provide

notice renders the person seeking the sale and the purchaser liable to the office of conservation for the fair market value of the property at the time of the seizure and sale.

- This act amends and reenacts La. R.S. 30:74(A)(30 and enacts La. R.S. 30:74(a)(4).

I. Acts 1997, No. 1040 - Oil, Gas and Water Well Privileges

- Amends oil and gas well privilege act (La. R.S. 9:4881 through 9:4889) to provide operators a privilege over the property of non-operators to secure payment of obligations incurred in the conduct of operations which the non-operator is personally bound to pay or reimburse.

- Also provides the non-operator with a privilege over the property of the operator to secure payment of all obligations owed by the operator from the sale or other disposition of hydrocarbons of the non-operator produced from the well.

J. Acts 1997, No. 1118 - Child Support Privilege and Mortgage

- Provides for effect of award for past due child support. Also provides that an affidavit filed by the Department of Social Services shall have the effect of a judgment which shall operate as a first lien, privilege and legal mortgage on all movable (excluding motor vehicles) and immovable property of the obligee from the date of filing.

- Amends and reenacts La. R.S. 13:4291 and enacts La. R.S. 46:236.10.

K. Acts 1997, No. 1421 - Successions

- Provides comprehensive revision of succession articles, effective July 1, 1999.

L. Acts 1997, No. 1474 - Filing fees

- Enactment of La. R.S. 9:5217 provides for uniform filing fees charged for recording multiple indebtedness mortgage executed under Louisiana Civil Code Article 3298.