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McGraw v. City of New Orleans

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THE REMOVAL OF NEW ORLEANS CONFEDERATE MONUMENTS IN THE EYE OF THE LOUISIANA CIVIL CODE

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One does not typically expect civil code interferences in public affairs. However, the case of *McGraw v. City of New Orleans*[1] illustrates how the classification of property and the civilian doctrine of *negotiorum gestio* interact with local governance.

I. BACKGROUND

In the United States, monuments, statues, and other markers that depict controversial Confederate figures are being removed from public areas.[2] In this case, Mitchell Landrieu, the Mayor of New Orleans, signed a city ordinance, enacted on December 18, 2015, that provided for the removal of three monuments that memorialized

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1. McGraw v. City of New Orleans, 16-446 (La. App. 4 Cir. 03/29/17); 215 So. 3d 319.

2. Jess Bidgood et al., *Confederate Monuments Are Coming Down Across the United States. Here's a List*, N.Y. TIMES (Aug. 28, 2017), https://perma.cc/3YPA-TAED.

former leaders of the Confederate States of America.[3] Landrieu, whose father was the mayor of New Orleans during desegregation in the 1970s, faced tremendous pushback. He ultimately went through with his plan to remove the monuments because, as he put it, "[a] house divided against itself cannot stand, but to heal our divisions we must be able hear one another, see one another, understand one another and feel one another."[4] Since the conclusion of the lawsuit, all three monuments were removed as of May 20, 2017.[5]

Pierre McGraw was the president of a group who opposed removal of these Confederate monuments. Mr. McGraw had previously invested his own time and money into the maintenance and upkeep of the monuments.

The removal by the Mayor and the city council was authorized by article VII, Chapter 146 of the city's codified ordinance. The ordinance allows for removal of public monuments, plaques, or other works of art when certain requirements are met. First, the structure must constitute a nuisance such that it praises ideologies in conflict with the equal protection of citizens. Second, the site of the structure must have been, or may become, an area of violent demonstration. Finally, the structure's maintenance or security costs must be weighed against any historic or architectural significance it might have. If all requirements are met, the monument will be removed from public and placed in an indoor facility such as a museum, stored, or otherwise disposed.[6]

The first monument at issue enshrined P.G.T. Beauregard, a general in the Confederate army who was born on the outskirts of New Orleans. Beauregard was depicted wearing his Confederate uniform atop a horse, and the monument was located in an entrance to a city

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3. The city ordinance sought to remove four monuments, however only three of the four are the subject of this suit.

4. MITCH LANDRIEU, IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY 5-7 (Penguin 2018).

5. Tegan Wendland, *With Lee Statue's Removal, Another Battle Of New Orleans Comes To A Close*, NPR (May 20, 2017), https://perma.cc/H6WP-MFNN.

6. NEW ORLEANS, LA., CODE ORDINANCES § 146-611 (1956) [hereinafter CODE ORDINANCES], https://perma.cc/8PQR-QAHM.

park. The monument was paid for with private funds and was publicly dedicated in 1915. Since its dedication, it had been maintained through both public and private funds.

The second monument honored Jefferson Davis, the only president of the Confederate States of America. During the construction process, the street the monument was to be placed on was renamed Jefferson Davis Parkway. The monument was built by a private association and was publicly dedicated in 1911.

The third monument venerated Robert E. Lee, the commander of the Confederate army. This monument depicted Lee in his Confederate uniform atop a monolith in middle of a public square. The monument was authorized by the city in 1877, and although built by a private organization, it was donated to the city and publicly dedicated in 1884. Since that time, both public and private funds maintained the monument.

Since 1989, Mr. McGraw has invested his time, money, and labor into the monuments. He did so after learning that the city did not provide funding for their maintenance. In an affidavit, he stated that he devoted hundreds of hours and thousands of dollars to the monuments' upkeep. Further, he averred that he did this out of a sense of civic duty and for their historical preservation.

Shortly after the passage of the ordinance, various groups brought a suit in federal district court in an attempt to halt the removal of the Confederate statutes.[7] The day after a federal district judge denied the groups' injunctive relief claim, Mr. McGraw brought this suit for injunctive relief in the Civil District Court for the Parish of Orleans. At the hearing for preliminary injunction, the district judge denied Mr. McGraw's request because the city followed the strict mandates of their own ordinance and Mr. McGraw could not show that he had any property rights vested in the monuments. It is from this judgment that Mr. McGraw sought appeal. He

7. Monumental Task Committee, Inc. v. Foxx, 16-12495 (E.D. La. 2016); 157 F. Supp. 3d 573.

argued that he had acquired vested property rights in the monuments by operation of *negotiorum gestio* because he invested his time and money into maintenance of the monuments, and thus, without injunctive relief halting the removal of the monument, he would suffer irreparable harm.

II. DECISION OF THE COURT

The Court of Appeal, Fourth Circuit, in avoiding the politics of the situation, limited its ruling to "whether the district judge erred in denying Mr. McGraw's request for preliminary injunction."[8] The court addressed Mr. McGraw's claims of *negotiorum gestio*, his constitutional vested rights claim,[9] and whether the record established that the monuments were public things. In sum, the Fourth Circuit found "regardless of the theory advanced by Mr. McGraw, he has failed to establish that he acquired any type of vested property right in the monuments at suit."[10] Therefore, he could not prove that he would suffer any irreparable harm through their removal, and he was not entitled to preliminary injunction.

The court correctly noted that the rules governing the doctrine of *negotiorum gestio* are found in Title V, Book III of the Civil Code. *Negotiorum gestio* or management of affairs is "when a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances."[11] Further, the court noted that the doctrine applies only when the manager acts for the benefit of the owner. In contrast, ownership in the Civil Code is defined as "the right that confers on a person direct, immediate, and exclusive authority over a thing."[12] After reviewing these

8. *McGraw*, 215 So. 3d at 323.
9. Because this claim is not rooted in civilian theory, it will not be discussed further.
10. *McGraw*, 215 So. 3d at 332.
11. LA. CIV. CODE ANN. art. 2292 (2018).
12. LA. CIV. CODE ANN. art. 477 (2018).

articles, the court concluded "the doctrine of *negotiorum gestio* confers no ownership rights upon the manager . . . . At most, the manager who acts as a prudent administrator acquires a right of reimbursement against the owner."[13]

Although Mr. McGraw did not argue the issue, the court concluded that the monuments were public things held by the city, a political subdivision, in its public capacity. The court noted that Civil Code article 448 divides things into the categories of common, public, and private. Further, the court restated article 450 paragraph 1 that "[p]ublic things are owned by the state or its political subdivisions in their capacity as public persons" and paragraph 3 of the same article that "[p]ublic things that may belong to political subdivisions of the state are such as streets and public squares." Using these articles, the court concluded that "the monuments at issue are public things given that the undisputed evidence clearly establishes that they were erected on public property, owned by the city in its public capacity, and subsequently dedicated to public use."[14] As such, the monuments were "inalienable, imprescriptible and exempt from seizure."[15]

III. COMMENTARY

This commentary will first discuss the codification, application, and incompatibility with ownership of the civilian doctrine of *negotiorum gestio*. Next, a more thorough analysis of the court's conclusion that the monuments were obviously public things is warranted. The court did not address that although a public thing is held in public capacity, it is possible to change from the public to the private domain.

13. *McGraw*, 215 So. 3d at 330.
14. *Id*. at 332.
15. *Id*.

A. Negotiorum Gestio

The civilian doctrine of *negotiorum gestio* is codified in Title V, Book III of the Civil Code. As article 2292 indicates, *negotiorum gestio* requires a manager, or a person who "acts without authority to protect the interest of another," and an owner, or a person whose affairs are being managed. Further, article 2292 requires the manager to have "the reasonable belief that the owner would approve of the action if made aware of the circumstances."[16] In addition, article 2294 requires the manager "give notice to the owner" and "wait for directions of the owner, unless there is immediate danger."

The doctrine of *negotiorum gestio* has its roots in early Roman Law.[17] Originally, an intervenor, or gestor, would not be able to recover reimbursement when they intervened to help another, and therefore, an individual would not feel compelled to be altruistic to their neighbor.[18] Thereafter, the doctrine of *negotiorum gestio* was born through an action called *actio negotiorum gestorum contraria*, and on account of this action, a voluntary intervenor could receive reimbursement through a court if they voluntarily, altruistically managed the affairs of another.[19] The Louisiana Civil Code adopted the doctrine based on "[a]ltruism, the duty or need to help and assist others."[20]

The Fourth Circuit correctly concluded that *negotiorum gestio* does not impart the manager with any ownership rights. Further, it is does not seem likely that Mr. McGraw established that he managed the affairs of the city as required by the Civil Code.

At the outset, the length of time Mr. McGraw claims to manage the affair seems incompatible with the reason for the provision. Mr. McGraw maintained the monuments from 1989 until the beginning

16. *Id*. at 330.
17. ALAIN LEVASSEUR, LOUISIANA LAW OF UNJUST ENRICHMENT IN QUASI-CONTRACTS 58 (Butterworth Legal Publ'g 1991).
18. *Id.*
19. *Id*. at 58-59.
20. *Id*. at 68.

of suit at issue.[21] This appears to be contrary to the notice to owner requirement in article 2294. Further, the notice requirement implores the manager to wait for direction from the owner, unless there is a case of immediate danger. The facts of this case do not clarify if notice was adequately given, and it seems illogical that an event of immediate danger would span a period of more than twenty-five years.

Unless an emergency occurred that required citizen intervention, the general maintenance and upkeep of public monuments also appears contrary to the spirit of *negotiorum gestio*. Although the Civil Code does not give an exhaustive list of the types of affairs that may be managed, revision comment (b) to article 2292 suggests that the "affair managed may be a material act, such as the protection of property from fire or flood, or the execution of a juridical act, such as the sale of perishable things." These examples reflect a dire situation in which the affair must be managed in order to save it. Although maintenance is a material act, it is not of the same character as protection from fire or flood.

Finally, and most glaringly, to be reimbursed under *negotiorum gestio*, the manager cannot act with his own interest in mind.[22] Here, Mr. McGraw testified that "[h]is actions were motivated out of a sense of civic concern, historical preservation, and filial duty, given that several of his ancestors served under both Generals Beauregard and Lee."[23] While civic concern may fit into the city's interest, it appears far more likely that Mr. McGraw acted because of his ancestors' service. Thus, Mr. McGraw would not have been acting for the benefit of the city's interest but, instead, for his own benefit as illustrated by the affidavit he submitted to the court.[24]

It is not clear that Mr. McGraw would have been able to benefit from reimbursement if he tried to recover under *negotiorum gestio*.

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21. *McGraw*, 215 So. 3d at 325-26.
22. *See* Kirkpatrick v. Young, 83-CC-2627 (La. 09/10/1984); 456 So. 2d 622; *see also* LA. CIV. CODE ANN. art. 2292 (2018), comment (d).
23. *McGraw*, 215 So. 3d at 326.
24. *Id*. at 325-26.

To be doubly sure, the Fourth Circuit also concluded that the point was moot because the monument was a public thing held in public capacity. However, this conclusion is not as easily reached as their findings related to *negotiorum gestio*.

B. Classification of Property

The Louisiana Civil Code separates property, which is not common into that which is public and that which is private. However, the 1978 revision of the Civil Code dispensed with the classification of property into separate domains, and instead, classifies noncommon property as either public things or private things.[25] When property is a public thing, the classification can be further subdivided into things that are public through constitutional or legislative provisions or things that are public because they are owned by the state and put to a public purpose.[26] Further, the state or its political subdivisions may own private things in their capacity as private persons.[27] Therefore, the classification of property owned by the state depends on the use and pertinent provisions of law because the state may hold property in either its public or private capacity.

The Fourth Circuit relied on jurisprudence that had previously interpreted article 450 to include public parks as a thing that the city owned in its public capacity.[28] With respect, the court could have conducted a more thorough examination of the city's capacity in which it held the monuments. Article 450 paragraph 3 states the following: "[p]ublic things that *may* belong to political subdivisions of the state are such as streets and public squares" (emphasis added). The use of the word *may* indicates that the listed items are not de-

25. LA. CIV. CODE ANN. art. 448 (2018).
26. *Id*. at art. 450 (2018), comment (c).
27. *Id*. at art. 453 (2018).
28. *McGraw*, 215 So. 3d at 331-32.

terminate of public capacity. Therefore, if a political subdivision terminates public use, the street or public square would be a thing owned by the political subdivision in its private capacity.[29]

The Second Circuit has previously held that "[w]hen the political subdivision formally determines that the thing dedicated to public use is no longer needed by the public, the thing ceases to be public and becomes a private thing of the political subdivision."[30] This holding suggests that the time the political subdivision "formally determines" that a thing is no longer needed for public use is when the thing ceases to be public. This proposition, however, is only persuasive and has no support in the text of the Civil Code. Here, the New Orleans City Council voted to remove the monuments from public display.[31] Given that the city council followed the procedures set in place for removal, it may seem to appear that they "formally determined" that the monuments were no longer needed by the public.

Upon close inspection of the removal ordinance, subsection (d) provides that the removed monument "may be displayed indoors at an appropriate facility, such as a museum or stored, donated . . . or otherwise disposed."[32] If displayed in a public museum, the monument would remain public.[33]

The monuments at issue were clearly public things held in public capacity for the years they stood undisturbed in the city's parks. However, once the city enacted the removal ordinance, it began a process to remove the monuments from the public, and thus, a process that might change the status of the monuments from public to

29. *See* A.N. YIANNOPOULOS, 2 LOUISIANA CIVIL LAW TREATISE—PROPERTY § 3:8 (5th ed., West 2015).

30. Walker v. Coleman, 20309-CA (La. Ct. App. 2 Cir. 2/22/1989); 540 So. 2d 983, 985-86.

31. *McGraw*, 215 So. 3d at 323-24.

32. *See* CODE ORDINANCES, *supra* note 6.

33. There is room for debate, at least in Louisiana, if the museum charges an entrance fee. In Landry v. Council of East Baton Rouge Parish (La. Ct. App. 1st Cir. 4/14/1969); 220 So. 2d 795, 801, the First Circuit held that public property is open to all people "indiscriminately and without charge and which serve no quasi-commercial or proprietary purpose." France has many public museums charging an entrance fee but nobody would dispute that the exhibits are public things.

private. The text of the article is not clear, if a public thing becomes private when the formal determination is made or when the thing is, in fact, removed from the public space. Only persuasive authority exists on the topic, and the court did not entertain the possibility that the monument could have become a private thing when the city passed the ordinance. Therefore, it is not clear if the monuments were correctly determined to be public things held in public capacity, or if the monuments cease to be public things as soon as a legal act is taken, possibly to the contrary.