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## Civil Code and Related Subjects: Property

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any existence,<sup>16</sup> but it is not always clear what is an absolute nullity.

The acquisitive prescription of thirty years—without good faith or just title—is based entirely upon continuous possession for the required time, and is limited to the property which is “actually possessed by the person pleading it.”<sup>17</sup> In *Parham v. Maxwell*,<sup>18</sup> there was evidence that crops were made and cattle pastured at irregular intervals on the disputed land, as well as occasional fence repairs and use of an old road, but the evidence was “of a vague and unconvincing character.”<sup>19</sup> While this decision is based on a simple inadequacy of proof, it reasserts the basic principle of a restrictive attitude towards the acquisitive prescription of thirty years and emphasizes the requirement of conclusiveness of the proof of possession which must be established by the person pleading this prescription.

## PROPERTY

*Jan P. Charmatz\**

Only one case of outstanding importance in this field was decided by the Supreme Court during the past term. In *Humble Oil & Refining Co. v. State Mineral Board*<sup>1</sup> a controversy over the ownership of the bed of a navigable lake, the same problem which had given rise to the much discussed decisions in *State v. Erwin*<sup>2</sup> and *Miami Corporation v. State*<sup>3</sup> was again presented to the court, only this time in a different context.<sup>4</sup> The facts of the case and a detailed analysis of the decision will be found elsewhere in this issue.<sup>5</sup> The result of the decision is, just as in *State v. Erwin*, recognition of private ownership of beds of navigable lakes. In neither case was there any dispute about the fact that the lakes in question, Duck Lake and Calcasieu Lake, were navigable at the time of the decision and in 1812 when Louisiana was

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16. 1 Planiol, *Traité Élémentaire de Droit Civil*, n° 2662 (12 ed. 1937).

17. Art. 3503, La. Civil Code of 1870.

18. 222 La. 149, 62 So. 2d 255 (1952).

19. 222 La. 149, 155, 62 So. 2d 255, 257.

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1. 223 La. 47, 64 So. 2d 839 (1953).

2. 173 La. 507, 138 So. 84 (1931).

3. 186 La. 784, 173 So. 315 (1936).

4. See *infra* note 10.

5. See Note, *infra* p. 267.

admitted to the Union.<sup>6</sup> There never has been any doubt about the basic proposition that the beds of navigable waters are "public things . . . the property of which is vested in a whole nation" under the principles of our Civil Code and the jurisprudence of the Supreme Court, and therefore not susceptible of private ownership.<sup>7</sup> Nevertheless, in the *Erwin* case the court had found it possible to obviate the application of this simple rule by basing its decision on the non-applicability of Articles 509 and 510 of the Civil Code and on the assumption that the beds of fresh water navigable lakes mean "their bottoms, as they existed, at the time the state was admitted to the Union."<sup>8</sup> The result was, as is well known, to recognize parts of the bed of Calcasieu Lake, as it then existed, as susceptible of private ownership.<sup>9</sup> In the instant case the court achieved the same result by holding that the state was barred forever, under Act 62 of 1912, from attacking the title of the Humble Oil & Refining Company and its predecessor.<sup>10</sup>

In both the *Erwin* and the *Humble* cases we may have difficulty in seeing an economic reason for adjudicating the proceeds of oil wells to the state and not to the private individuals or companies which were instrumental in discovering and developing them. But there is more involved in this case than the decision of the question who is to receive the oil royalties which

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6. See 173 La. 507, 509, 138 So. 84, 85 (1931), and 223 La. 47, 64 So. 2d 839, 840 (La. 1953). In the second case a stipulation existed between the parties to that effect.

7. Art. 453, La. Civil Code of 1870. *Miami Corporation v. State*, 186 La. 784, 812, 173 So. 315, 324 (1936). See also 186 La. 784, 806, 815, 173 So. 315, 322, 325. For an analysis of the jurisprudence see Comment, Alluvion and Dereliction in Lakes, 7 Tulane L. Rev. 438, 441 (1933), Comment, The Public and the Private Domains of the State, 12 Tulane L. Rev. 428 (1938), Comment, Navigability as Applied to Lakes in Louisiana, 6 LOUISIANA LAW REVIEW 698 (1946), Comment, Ownership of the Beds of Navigable Lakes, 21 Tulane L. Rev. 454 (1947).

8. 173 La. 507, 515, 138 So. 84, 87 (1931). In order to avoid quoting these words out of their context, the full text of this passage is repeated here: "So far as relates to fresh water navigable lakes, with which we are presently alone concerned, there can be no question that their bottoms belong to the state, up to the high water mark, by virtue of its sovereignty. But this means their bottoms, as they existed, at the time the state was admitted into the Union, and does not include that part of such bottoms, later formed by action of the waters in washing away the soil of lands, privately owned, and thereby submerging them. The submerged lands still belong to the owners."

9. *Miami Corporation v. State*, 186 La. 784, 812, 173 So. 315, 324 (1936). See also Comment, 7 Tulane L. Rev. 438, 441 (1933).

10. The court stated: "We do not deem it essential to consider the merits of the title claims of either the State or Salt Domes because it is perfectly apparent, from the foregoing statement of the case, that whatever right the State may have had to contest the title of Salt Domes has long since been barred by the peremption of six years provided by Act No. 62 of 1912." 223 La. 47, 64 So. 2d 839, 840 (1953).

were the object of the concursus proceeding instituted by the Humble Oil & Refining Company. It may well be pointed out that nearly a hundred years ago Justice Buchanan in a concurring opinion, after severely criticizing an article of our Civil Code<sup>11</sup> which he considered as proof "that the right of private property is less sacred in this country than it is in the monarchical States of Europe," nevertheless applied this article for the simple reason: "*Ita scripta est lex.*"<sup>12</sup>

Even if the court should feel reluctant to decide situations as those presented in the *Erwin* and *Humble* cases in what might be considered a "fundamentalist" fashion by simply applying the rules of our Civil Code concerning the susceptibility of things of ownership, it is submitted that the result of the *Humble* case could have been avoided by a careful interpretation of the language of Act 62 of 1912 under which the case was decided.

The applicable section of this act reads as follows:

"Be it enacted by the General Assembly of the State of Louisiana, etc., That all suits or proceedings of the State of Louisiana, private corporations, partnerships or persons to vacate and annul any patent issued by the State of Louisiana, duly signed by the Governor of the State and the Register of the State Land Office, and of record in the State Land Office, or any transfer of property by any subdivision of the State, shall be brought only within six years of the issuance of patent, provided, that suits to annul patents previously issued shall be brought within six years from the passage of this Act."<sup>13</sup>

Even under the rules of statutory construction of common law states, words used in special statutes must be construed within the frame of reference of the general statutes, and it is assumed that the intent of the Legislature is "to establish a more uniform and logical system of law."<sup>14</sup> There can be little doubt that in Louisiana the general frame of reference for interpreting the language of this act is provided by the Civil Code and that the basic concepts of our property law apply unless a contrary legislative intent is proved.<sup>15</sup> The words "transfer of property"

11. Art. 672, La. Civil Code of 1825, now Art. 676, La. Civil Code of 1870.

12. *Jeannin v. DeBlanc*, 11 La. Ann. 465, 467 (1856).

13. La. Act 62 of 1912, § 1. See now La. R.S. 1950, 9:5661.

14. 3 Sutherland, *Statutes and Statutory Construction* 159 (3rd ed., Horack, 1943). See also Crawford, *The Construction of Statutes* 280 (1940).

15. See Art. 17, La. Civil Code of 1870, and particularly *Melancon v. Mizell*, 216 La. 711, 727, 44 So. 2d 826, 831 (1950).

as used in the context of Act 62 of 1912 therefore can hardly mean anything but "transfer of things susceptible of ownership."<sup>16</sup> As in many other cases, the court did not really try to interpret the statute or the articles of the Civil Code, preferring to rest its decision on "an unbroken line of jurisprudence"<sup>17</sup> and disposing rather summarily of the contention of counsel for the state that this jurisprudence is inapplicable. The argument of the court disposing of the state's contention is subject to the same objection which applies to the entire decision. It assumes that beds of navigable lakes can be the object of a "transfer of property." Particularly in view of several recent decisions of our Supreme Court showing an increasing emphasis on our civilian tradition and deep respect for the principles of our Civil Code it is hard to believe that the *Humble* case will remain its last word on the problems presented therein.<sup>18</sup>

The position taken in the *Erwin* case was rectified by the Supreme Court within five years in the *Miami Corporation* case by declaring it erroneous and overruled in spite of the vigorous dissent of Chief Justice O'Niell. The deep sense of judicial responsibility shown by Chief Justice Fournet in recognizing past mistakes in his opinion in *Speed v. Page*<sup>19</sup> and the above mentioned

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16. Compare the interpretation of Section 11 of La. Act 97 of 1890 in *State v. Capdeville*, 146 La. 94, 108, 83 So. 421, 425 (1919).

17. *State v. Sweet Lake Land & Oil Co.*, 164 La. 240, 113 So. 833 (1927); *Realty Operators v. State Mineral Board*, 202 La. 398, 12 So. 2d 198 (1942); *O'Brien v. State Mineral Board*, 209 La. 266, 24 So. 2d 470 (1945). It must be noted that the *Sweet Lake Land & Oil Co.* case involved a lake which "has never been navigable either in fact or as the word is defined by law." (164 La. 240, 246, 113 So. 833, 835 [1927].) The *Realty Operators* case assumed "for the sake of argument only, that the lake was navigable in fact in 1812." (202 La. 398, 413, 12 So. 2d 198, 203 [1942].) The sole case in point, the *O'Brien* decision, loses a great deal of its value as authority by the fact that six judges noted that they concurred. (209 La. 266, 278, 24 So. 2d 470, 473 [1946].) For an analysis of the applicability of this jurisprudence, see also Note *infra* p. 267, 271.

18. See, e.g., the language used by Justice Moise in a recent decision, *Succession of Gladney*, 67 So. 2d 547, 548 (La. 1953): "Our Civil Code is the legal monarch over all things it surveys. It is both subject and object, creator and created, preserver and preserved. In fact, it is legally Louisiana's Ark of the Covenant. However, for the better preservation of the law, we must put an end to the idolatry of precedent worship of decisions that are not in accord with the views and aspirations of the present and refuse to adopt the legal abstractions of other jurisdictions. We should more closely safeguard our own codal articles as to the devolution of property, in order to prevent our being drawn into the vortex of federal governmental regulations. There should be less focusing on the words of judges, and we should become imbued with the spirit of 'what is right is right'."

19. In this case the Chief Justice wrote: "It would appear that much of this confusion and lack of harmony stems from pronouncements of this Court, made without citations of authority, without due consideration of the object and purpose of the Act, and in total disregard of the admonition of

awareness of the entire court of our civilian tradition strengthen this writer's hope that Louisiana judicial history will repeat itself and that the *Humble* decision will share the fate of the *Erwin* case.

None of the other decisions in the field of property law are likely to create much controversy. In *Bishop v. Copeland*<sup>20</sup> the court reiterated one of the basic rules of our property law, namely, that the law of registry of title to immovable property, Articles 2251-2266, "is not applicable when the ownership of, or claim affecting, the immovable has been vested in the claimant by mere operation of law."<sup>21</sup> In the same case an interesting question concerning the rights of a good faith possessor to be reimbursed for the expenses incurred improving the property under Article 3453 was decided. The defendant in a petitory action for a piece of real estate had to give up three-fourths of it to the co-heirs of his author in title.<sup>22</sup> Having unsuccessfully pleaded estoppel against the claim of the co-heirs who had brought suit against him, he claimed the right to retain the thing until he was reimbursed the expenses which he had incurred in it. The court found that the general principle of Article 3453 "does not mean that [the good faith possessor] must recover in the petitory action brought against him for the purpose of establishing joint ownership of the land, particularly when the possessor is not wholly evicted and is recognized as owner in indivision, like in this case."<sup>23</sup>

#### TAX TITLES

The importance of tax titles in the property law of Louisiana is not only documented by the inclusion in the Constitution of a special section dealing with them but also by the number of cases which come up for decision by the Supreme Court.<sup>24</sup>

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the lawmakers that its provisions should be liberally construed in favor of the employee. We think, therefore, that a reexamination of the subject is required." *Speed v. Page*, 222 La. 529, 537, 62 So. 2d 824, 827 (1952).

20. 222 La. 284, 62 So. 2d 486 (1952).

21. 222 La. 284, 292, 62 So. 2d 486, 488.

22. See *Long v. Chailan*, 187 La. 507, 175 So. 42 (1937); *Dugas v. Powell*, 207 La. 316, 21 So. 2d 366 (1945). The other aspects of this case are discussed *infra* p. 152, in the part of the symposium dealing with Successions.

23. 222 La. 284, 300, 62 So. 2d 486, 491 (1952). This, of course, does not preclude the defendant's right to bring an independent action for compensation which will have to overcome the difficulty of proving the amount to which he may be entitled. *Ibid.*

24. See, e.g., *The Work of the Louisiana Supreme Court for the 1948-1949 Term—Taxation*, 10 LOUISIANA LAW REVIEW 148 (1950).

Although the broad language used in Section 11 of Article X of the 1921 Constitution "announces the public policy of this State to set at rest tax titles once and for all,"<sup>25</sup> the reports are full of decisions involving attacks against tax titles in one form or another.

In *Kaufman v. Jackson*,<sup>26</sup> a proceeding to confirm and quiet tax title, the claim of defendants that they and the deceased original tax debtor had continued in "actual, corporeal possession of the property" gave rise to a discussion of the nature of the possession of a piece of land, owned in undivided parts. In the instant case the controversy involved title to an undivided one-third interest in a certain property which had been acquired by the plaintiff's author in title in a tax sale duly recorded in 1931. The entire property consisted of 81 acres, of which 27 acres, or exactly one-third of the property, located next to the plaintiff's farm, was divided from the rest by a small creek. Over this part he had exercised full control but had done little to exercise possession as co-owner over the remaining 54 acres. Whereas the court of appeal centered its attention on plaintiff's possession<sup>27</sup> the Supreme Court correctly emphasized that in a case involving the validity of a tax title it is not the purchaser's possession (in this case the plaintiff's) which must be scrutinized but that "the possession to be considered in cases of this kind is the one that is retained or exercised by the tax debtor after the tax sale of his property."<sup>28</sup> What is important is whether there existed a debtor's "claim operating as a continuing protest against the tax title."<sup>29</sup> Only the defendants' exclusive control and dominion over the whole property could have defeated a tax title recorded more than five years previously. In the instant case defendants had openly acknowledged the tax sale purchaser's rights and never protested against his assertions of possession. Therefore the Supreme Court held that they had failed to prove a claim which might have justified an exception from the general rule of Section 11, Article X, of the 1921 Constitution, reversed the

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25. *King v. Moresi*, 223 La. 54, 64 So. 2d 841, 842 (1953).

26. 221 La. 957, 60 So. 2d 886 (1952).

27. The court of appeal had stated in its opinion: "There is not the least question about the fact that [plaintiff] Kaufman never exercised the least possession insofar as the 54 acres was concerned." 55 So. 2d 39, 41 (La. App. 1951).

28. 221 La. 957, 966, 60 So. 2d 886, 889 (1952).

29. 221 La. 957, 966, 60 So. 2d 886, 888, citing *Board of Commissioners v. Sperling*, 205 La. 494, 500, 17 So. 2d 720, 722 (1944), which decision, in turn, relies on *Levenberg v. Shanks*, 165 La. 419, 422, 115 So. 641, 642 (1928), which cites a whole line of previous cases.

judgment of the court of appeal and ordered the judgment of the district court for plaintiff affirmed.<sup>30</sup>

In *King v. Moresi*<sup>31</sup> another aspect of the validity of tax titles came before the court. Plaintiff had brought suit to have declared null and void a tax sale which had taken place and had been duly recorded more than five years before. The contention was that the tax sale was void ab initio since the property had been acquired in violation of Act 94 of 1902, now R.S. 47:2194,<sup>32</sup> by the sheriff in his wife's name and therefore not susceptible of peremption. Although the language of this statute declares direct or indirect purchase by the sheriff as "null and void," the court, citing *Close v. Rowan*,<sup>33</sup> recognized the plea of peremption and upheld the tax title, distinguishing the situation in the instant case from judicial sales "made in violation of a prohibitory law."<sup>34</sup> In a dissenting opinion Justice Moise pointed out that both in the instant case and in *Close v. Rowan*, its main authority, the Supreme Court had "overlooked the first ruling" on this problem, namely *Pitre v. Haas*.<sup>35</sup> He forcefully argued on the basis of Articles 12 and 1892 of the Civil Code that the rule in *Pitre v. Haas* excluding a tax sale in violation of Act 94 of 1902 from the constitutional peremption should have been applied. It may be well to note, however, that in that case four Justices concurred in the decree only and that the facts were essentially different from those of the instant case. Both for this reason and in view of the policy expressed in our Constitution "to set at rest tax titles once and for all"<sup>36</sup> the majority opinion appears to be sound.

#### SERVITUDES

The doubts which may exist in many a Louisiana lawyer's mind whether the subject matter of Articles 667-669 of our Civil

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30. The court stated: "It was necessary for [the defendants] to have the exclusive control and dominion over the whole property in order to defeat the tax title which the plaintiff had acquired and which had been recorded more than five years previously." *Kaufman v. Jackson*, 221 La. 957, 967, 60 So. 2d 886, 889 (1952).

31. 223 La. 54, 64 So. 2d 841, 842 (1953).

32. The full text of La. R.S. 1950, 47:2194, reads: "It is unlawful for any sheriff, tax collector or their deputies or any other officer, state, municipal or parochial, whose duties are to assess or collect taxes of any nature whatsoever for the state, parish or municipality, to buy either directly or indirectly, any property, movable or immovable, sold or offered for sale, for taxes; any sale of such property to such an officer shall be null and void."

33. 171 La. 263, 130 So. 350 (1930).

34. 223 La. 54, 64 So. 2d 841, 842 (1953).

35. 110 La. 163, 179, 34 So. 361, 367 (1903).

36. 223 La. 54, 64 So. 2d 841, 842 (1953).



Code should be treated under the aspect of "Servitudes Imposed by Law" as indicated by the chapter heading of the code or under the tort aspect<sup>37</sup> will most probably remain unchanged in spite of the Supreme Court's recent emphasis on the articles of the code in *Frederick v. Brown Funeral Homes*.<sup>38</sup> Although a statement like

"While the common-law authorities [on nuisance] relied upon and cited by plaintiffs may be persuasive, they are not decisive of the issue in view of our codal articles [667-669] and jurisprudence."<sup>39</sup>

will certainly be appreciated by all those who cherish the code, the fact remains that the common law nuisance doctrine is deeply imbedded in our jurisprudence.<sup>40</sup> In this respect the situation in this state is little different from other civil law jurisdictions which became exposed to common law influences like Puerto Rico and the Philippines.<sup>41</sup>

In *Frederick v. Brown Funeral Homes* plaintiffs-respondents, property owners in the immediate vicinity of a proposed funeral home, prayed for and obtained a preliminary injunction against its establishment, claiming that it would constitute a nuisance in a strictly residential neighborhood.<sup>42</sup> The defendant, having

37. See Stone, *The Loesch Case and Article 667*, 17 *Tulane L. Rev.* 596 (1943); *The Work of the Louisiana Supreme Court for the 1946-1947 Term—Property*, 8 *LOUISIANA LAW REVIEW* 234, 236; *Torts*, 8 *LOUISIANA LAW REVIEW* 248 (1948); *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Property*, 11 *LOUISIANA LAW REVIEW* 178, 179; *Torts*, 11 *LOUISIANA LAW REVIEW* 186, 188 (1951).

38. 222 La. 57, 62 So. 2d 100 (1952).

39. 222 La. 57, 89, 62 So. 2d 100, 111 (1952).

40. The two decisions relied upon in the instant case, *Borgnemouth Realty Co. v. Gulf Soap Corporation*, 212 La. 57, 31 So. 2d 488 (1947) and *Moss v. Burke & Trotti*, 3 So. 2d 281 (1941), accepted the common law nuisance doctrine.

41. When the Philippines gained their full independence after nearly a half-century of American sovereignty and decided on a revision of the Spanish Civil Code of 1889, the Code Commission formally stated: "One of the most serious hindrances to the enjoyment of life and property is a nuisance, whether public or private. Provisions for its abatement, both judicial and extra-judicial, are therefore indispensable in a well rounded Civil Code," and included in their new Civil Code of 1950 a new chapter on "Nuisance" after the chapter on "Easements and Servitudes." The substance of the articles of this chapter was taken from the Civil Code of California. 2 *Garcia & Alba, Civil Code of the Philippines* 930 (1951). The Spanish Civil Code of 1889, like the Napoleonic Code, contained no articles equivalent to Articles 667-669, La. Civil Code of 1870.

On the common law influence in Puerto Rico generally, see Dainow, *The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico*, 22 *Revista Juridica de la Universidad de Puerto Rico* 108 (1953).

42. 222 La. 57, 61, 62 So. 2d 100, 101 (1952).

been granted devolutive but not suspensive appeal, applied for writs to the Supreme Court, which ordered issuance of a writ of certiorari with a stay order and an order to respondents to show cause why the relief sought in relator's application should not be granted. In its first opinion the court recalled the writs issued in the case and remanded it to the district court, finding that the trial judge had not abused his discretion in denying to the defendant-relator a suspensive appeal. As to the merits of the case, the court carefully distinguished between a nuisance per se and a nuisance per accidens or in fact, quoting from *Borgnemouth Realty Co. v. Gulf Soap Corporation*<sup>43</sup> and stated that "[t]he greater weight of modern authority is to the effect that the establishment and operation of a funeral home is sufficiently objectionable to make it a nuisance in fact."<sup>44</sup> It found that of twenty-two states whose courts had passed on the question whether the establishment and operation of a funeral home should be enjoined in a strictly residential neighborhood, nineteen followed the majority rule and only three took the view that a funeral home in such a district does not become a nuisance per accidens by the fact of its being located there. After quoting extensively from decisions of other jurisdictions<sup>45</sup> and pointing out that in a semi-commercial area or in one in transition from residential to commercial area an injunction will not issue, the opinion stated: "The principle underlying the majority rule is found in Article 667 of our LSA-Civil Code." Justices McCaleb and LeBlanc dissented in separate opinions, both pointing out that under the *Moss v. Burke & Trotti* case,<sup>46</sup> physical annoyance is necessary to warrant an injunction and that on the basis of Articles 667 and 668 inconvenience alone is not enough.<sup>47</sup>

Because of its concern "whether or not the provisions of Articles 667, 668 and 669 of the LSA-Civil Code were properly interpreted in the majority opinion," the court granted a rehearing and set aside the injunction. In the new opinion the court

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43. 212 La. 57, 31 So. 2d 488 (1947).

44. 222 La. 57, 63, 62 So. 2d 100, 102 (1952).

45. The court discussed *Higgins v. Bloch*, 213 Ala. 209, 104 So. 429 (1925); *Saier v. Joy*, 198 Mich. 295, 164 N.W. 507 (1917); *Williams v. Montgomery*, 184 Miss. 547, 186 So. 302 (1939); *Streett v. Marshall*, 316 Mo. 698, 291 S.W. 494 (1927); *Blackburn v. Bishop*, 299 S.W. 264 (Tex. Civ. App. 1927), and cited dozens of decisions from other jurisdictions following the majority rule, 222 La. 57, 64, 62 So. 2d 100, 105 (1952).

46. 198 La. 76, 3 So. 2d 281, 285 (1941).

47. Both Justices stress the text of Articles 667-669. 222 La. 57, 78, 62 So. 2d 100, 107 (1952).

concluded, after again reviewing the two recent decisions in the *Borgnemouth* and *Moss* cases:

"From a careful reading of the aforementioned articles of the LSA-Civil Code [667 and 668], it is apparent that, unless the establishment and operation of the funeral home is prohibited by rules of police or custom of the place, it cannot be enjoined prior to its operation and then only if it is operated in such a manner as to cause damage to those living in the neighboring houses."<sup>48</sup>

Justice Hawthorne, the writer of the first opinion, dissented, emphasizing that he could not believe "that the average person in this jurisdiction is any less sensitive to the depressing effects of a funeral home than is the average person in the common-law jurisdictions" and that "a comparative evaluation of the conflicting interests in this case" would justify an injunction if it can be shown that the area is exclusively residential. It would seem, however, that the majority opinion rendered upon rehearing is more in accord with the text of the article. The court's statement that common law authorities may be persuasive but not decisive "in view of our codal articles and jurisprudence"<sup>49</sup> will be appreciated by all civilians.

#### EMINENT DOMAIN

During the last term more cases were decided dealing with expropriation questions than with any other problem in the field of property law.<sup>50</sup> Just as in the past the issues decided by the Supreme Court did not concern the right to expropriate,<sup>51</sup> but the value of the expropriated property.<sup>52</sup> In all the cases the court could do little more than either find that the trial judge had correctly ascertained the "fair and reasonable value" and

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48. 222 La. 57, 87, 62 So. 2d 100, 110 (1952).

49. 222 La. 57, 89, 62 So. 2d 100, 111.

50. See Statistical Survey, Table IV, *supra* pp. 69 and 70.

51. Only in *Interstate Oil Pipe Line Co. v. Cowley*, 223 La. 672, 66 So. 2d 588 (1953), decided on the question whether there was a right to suspensive appeal, the constitutionality of La. R.S. 1950, 45:254 was contested.

52. Compare also *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Property*, 11 LOUISIANA LAW REVIEW 180 (1951).

The evaluation of expropriated land as the basis of the jurisdictional amount for appeal to the Supreme Court was involved in *Maxfield v. Gulf States Utilities Co.*, 222 La. 987, 64 So. 2d 243 (1953). Procedural aspects of eminent domain cases were decided in *Tennessee Gas Transmission Co. v. Wyatt Lumber Co.*, 221 La. 886, 60 So. 2d 713 (1952) and *Interstate Oil Pipe Line Co. v. Cowley*, 223 La. 672, 66 So. 2d 588 (1953), which refers to the first mentioned case.

that the award represented "just and adequate compensation,"<sup>53</sup> or amend the evaluation of the trial judge and ascertain the compensation from the often rather meager evidence contained in the record of the case. The latter happened in *American Tel. & Tel. Co. v. East End Realty Co.*<sup>54</sup> In spite of the paucity of evidence in the trial record the court did not hesitate to apply unquestionably sound judgment in assessing the value of a servitude for the purpose of laying a cable along a public highway. Chief Justice Fournet refused to recognize as authority decisions of other states "controlled by their statutory law or by rules of real property tenure foreign to our legal system."<sup>55</sup> The same independence and directness of approach of the Chief Justice was also evidenced in his opinion in *Patin v. New Orleans*.<sup>56</sup>

In this case the question arose whether the city was responsible for damage resulting from diversion of traffic. Plaintiffs alleged their property had suffered injury as a result of the construction of an overpass. The trial judge found on the basis of considerable evidence that the property, formerly operated and leased as an oil station and automobile repair shop, had suffered a total diminution in value of \$10,000 of which three-fourths was due to the diversion of traffic for which no liability existed, since it was effected in exercise of the city's police power. He therefore awarded plaintiffs only \$2,500. Since plaintiffs-appellees had cited *Harrison v. Louisiana Highway Commission*<sup>57</sup> as holding, that contrary to the general rule, diminution in value due to diversion of traffic is compensable damage,<sup>58</sup> this decision was carefully analyzed by the Chief Justice in his opinion. He found that in that case the award had been made not for mere diversion of traffic but for "interference with ingress to and egress from properties, as well as obstruction of light and air and the impairment of view,"<sup>59</sup> circumstances which are not present in the instant case. The judgment of the district court therefore was affirmed. To have decided this case differently would have im-

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53. La. Const. of 1921, Art. I, § 2.

54. 223 La. 532, 66 So. 2d 327 (1953).

55. 66 So. 2d 327, 328.

56. 223 La. 703, 66 So. 2d 616, 617 (1953). In this case the Chief Justice preferred to base his opinion on one single Louisiana decision—*Harrison v. Louisiana Highway Commission*, 202 La. 345, 11 So. 2d 612 (1942)—discarding "other authorities . . . as they are not apposite from either a factual or legal standpoint."

57. 202 La. 345, 11 So. 2d 612 (1942).

58. 223 La. 703, 66 So. 2d 616, 617 (1953). For the treatment of this problem in common law jurisdictions, see Jahr, *Law of Eminent Domain—Valuation and Procedure*, §§ 47-56 (1953).

59. 223 La. 703, 66 So. 2d 616, 617 (1953).

posed serious financial burdens on any future traffic improvement projects.

As on previous occasions the Supreme Court refused to take into consideration "mere possibilities" in fixing the market value of expropriated land.<sup>60</sup> In *Plaquemines Parish School Board v. Miller*,<sup>61</sup> a case in which the issue was a "matter solely of the value of the lands" it was stated again that "it will not do for the owner to say that at some indefinite time it is foreseeable that his property, because it adjoins a growing town, will have an added value as a subdivision project."<sup>62</sup>

## SALES

*J. Denson Smith\**

The cases falling under this heading that were decided by the court during the last term included a few of more than passing jurisprudential interest. High on this list was a group of fifteen suits consolidated for trial, *Breaux v. Laird*.<sup>1</sup> The court reversed the judgment of the trial court sustaining an exception of no right or cause of action and held that the purchaser of a defective home from a subdivision developer was entitled to sue the surety on the contractor's bond. The decision was bottomed on Article 2011 of the Civil Code. This article provides for the transmission of rights resulting from a contract relative to immovable property in favor of the transferee of the property. No exactly similar application of this article has

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60. See *Louisiana Highway Commission v. Guidry*, 176 La. 389, 403, 146 So. 1, 5 (1933); *Louisiana Ry. & Nav. Co. v. Sarpy*, 125 La. 388, 51 So. 433 (1910).

61. 222 La. 584, 63 So. 2d 6 (1953).

62. 222 La. 584, 589, 63 So. 2d 6, 8 (1953). See also *Louisiana Highway Commission v. Guidry*, 176 La. 389, 146 So. 1 (1933). The instant case shows just as the *American Tel. & Tel. Co.* case a paucity of evidence relating to the value of land, as pointed out by Justice LeBlanc. In *Texas Pipe Line Co. v. Johnson*, 223 La. 380, 65 So. 2d 884, 886 (1953), Justice Hamiter correctly refused a motion by defendant-appellant to remand the cause for the reception of additional evidence, and cited language from *Kinnebrew v. Louisiana Ice Co.*, 216 La. 472, 501, 43 So. 2d 798, 808 (1949), that our Supreme Court is "not disposed to permit litigants to try their cases piecemeal and continue protracted litigation as to facts that could have been established on the original trial," just as he had done once before in *Young v. Mulroy*, 216 La. 961, 971, 45 So. 2d 357, 360 (1950).

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1. 223 La. 446-465, 65 So. 2d 907-913 (1953).