

The Effect of Insanity at the Time of Marriage

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hibition against the riparian owner's use of the water to serve non-riparian lands adjoining his riparian estate, but which have been purchased subsequent to the initial exercise of the servitude. It is submitted that the solution to the problem lies in the adoption of comprehensive legislation designed to treat all related problems of water law. The present system, composed only of statutes passed to meet limited problems, has produced a number of conflicts from which inequitable results are apt to follow.

Jerry G. Jones

The Effect of Insanity at the Time of Marriage

It is almost universally accepted that the marriage of an insane person is null. However, there exists considerable diversity of opinion as to the nature and effect of such nullity. A brief survey of various legal systems is offered as foundation for a discussion of the problems which the subject raises under the law of Louisiana.¹

In Other Legal Systems

The Canon Law Code² does not mention insanity in its enumeration of the impediments to marriage.³ The canonists employ a strict definition of the term impediment, that is, "a circumstance attaching to the person which . . . renders his marriage either illicit or invalid."⁴ By this is meant a condition of a person by reason of which he is forbidden either to marry or to marry certain persons. On the other hand, insanity in its relation to the marriage contract is considered to be a circumstance affecting consent rather than the person. The effect of insanity on marriage is drawn from the wording of Canon 1081⁵

solve problems in the field of mineral law. The present writer feels this same position may be taken by the court in matters of water law if legislative reform does not remedy the situation.

1. A discussion of the subject with respect to (a) degrees of insanity and (b) intoxication as having the effect of insanity is not within the scope of this Comment. See generally Annots., 28 A.L.R. 635, 648 (1924). See McCurdy, *Insanity as a Ground for Annulment or Divorce in English or American Law*, 29 VA. L. REV. 771, 790 (1943), for a discussion of insanity in divorce law.

2. CODEX CANONICI JURIS (1918).

3. The dirament (annulling) impediments are enumerated and defined in Canons 1067 through 1080 and the impedient impediments (rendering a marriage illicit but not null) in Canons 1058 through 1066.

4. BOUSCAREN & ELLIS, CANON LAW: A TEXT AND COMMENTARY 481-85, Canon 1035, commentaries 1, 2 (2d ed. 1951).

5. CODEX CANONICI JURIS, Canon 1081 (1918).

which requires consent "lawfully expressed between parties capable according to law" for a valid marriage. An insane person is held to be incapable of the necessary consent, and therefore a marriage attempted by such a person is null.⁶

This has been the standard disposition of the problem in modern law. Neither French law nor the common law prohibits the marriage of an insane person. In both systems, insanity results in a total lack of capacity to consent and the marriage is absolutely null in French law⁷ and void at common law.⁸

The formulation of the problem of insanity and marriage in terms of capacity and consent has certain logical consequences. A person subject to periodical insanity might marry during a lucid interval. The marriage would be valid⁹ because, in theory, it is not the insanity but the lack of consent produced by insanity which renders the marriage null. In such a case, the insane person would have had consensual capacity at the time of the marriage. Were insanity classified as an impediment, such a situation would not arise, for the mere existence of mental derangement would be sufficient to nullify the marriage and inquiry into the matter of consent would be unnecessary. Possibly it is felt that such extreme cases would be rare and that it is preferable to have the parties assume the risk in the interest of family and marital stability.

6. 1 BOUSCAREN, CANON LAW DIGEST 518 (1934), citing 10 A.A.S. 517; Rota, Dec. 7, 1918 (Jurgens-De Hoog); 12 A.A.S. 338; Rota, Dec. 23, 1918 (Lacroix-Shink).

7. 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL nos 708, 1035 (12th ed. 1939).

8. *Wightman v. Wightman*, 4 Jons. Ch. 343 (N.Y. 1820); 1 BL. COMM. 438, 439.

9. *Hamaker v. Hamaker*, 18 Ill. 138, 65 Am. Dec. 705 (1856).

There is a distinction between canon law, on one hand, and common and French law, on the other, in that under the latter systems, if a person has been adjudicated insane his subsequent marriage, though contracted during a lucid interval, may be null. In canon law there is no provision for a judicial declaration of insanity.

However, in both French and Anglo-American law, a controversy has developed as to whether a judgment of insanity produces an absolute legal incapacity to contract marriage, or prima facie evidence of such incapacity, or whether, in spite of the judgment, the question remains one of the fact of the party's actual capacity at the time of the ceremony. Annot., 28 A.L.R. 649 (1924); 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL no 709 (12th ed. 1939).

In Louisiana, the Supreme Court has said, in reference to a conventional contract, that interdiction does not create incapacity, but is conclusive evidence of such, and the contract is null. *Succession of Lanata*, 205 La. 915, 18 So.2d 502

In French law¹⁰ and at common law,¹¹ a suit for nullity on grounds of insanity is allowed to either party. Since the marriage is absolutely null or void, it produces no legal relations and binds neither party.¹² Legally there is no marriage but a judgment to that effect is generally required as conducive to good order and peace of conscience of the parties.¹³

In comparatively recent times there has been a tendency to view the marriage of an insane person as relatively null or voidable rather than absolutely null or void. This change, usually by statute, has taken place in both civil law¹⁴ and in many Anglo-American jurisdictions. The rationale of this innovation is that, although the problem is still one of capacity to consent, insanity renders consent merely defective rather than totally lacking. The insane party, because of his defective consent, is afforded a privilege of avoiding the marriage.¹⁵ However, the marriage may be ratified after the insane party regains his sanity.¹⁶ If the party having the privilege of avoiding signifies an intent to affirm rather than avoid the marriage, it is perfected. Such af-

(1944). No case has been found in which consent to a marriage contract was at issue.

Where no judgment of insanity has been obtained, all three systems treat the problem in the same manner.

10. 1 *PLANIOLE ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* n° 1035 (12th ed. 1939).

11. *Daniele v. Margulies*, 95 N.J.Eq. 9, 121 Atl. 772 (1923).

12. *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774 (1877): "It [the marriage] was a nullity and the plaintiff [the sane party] was in no way bound to the defendant by any marriage relation."

13. *Ibid.*

14. See *PHILIPPINES CIVIL CODE* arts. 85(3), 87(3) (1949); *ITALIAN CODICE CIVILE* art. 120 (1942).

15. See discussion in *Walters v. Walters*, 168 N.C. 411, 84 S.E. 703, 51 A.L.R. 845 (1927).

16. *Ibid.*

In theory, a void marriage produces no legal relations, *PLANIOLE ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* n° 1045 (12th ed. 1939); *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774, 51 A.L.R. 852 (1877), and therefore is not susceptible of ratification, for there is nothing to be ratified.

However, in the leading case of *Wightman v. Wightman*, 4 Johns. Ch. 343, (N.Y. 1820), Chancellor Kent, though declaring the marriage absolutely void, added, "and [the marriage] never since obtained any validity, because the plaintiff has never, since the return of her lucid interval, ratified or consummated it." In *Powell v. Powell*, supra, similar language was used. These cases would tend to cast doubt on the proposition that marriages, void for want of mental capacity, were not susceptible of ratification at common law. But it should be remembered that at the time of these decisions the so-called common law marriage was generally recognized and it is difficult to determine whether the courts were speaking of ratification of the old marriage or of an entirely new exchange of consent, constituting a new marriage. See *McCurdy, Insanity as a Ground for Annulment or Divorce in English or American Law*, 29 VA. L. REV. 771, 780 (1943).

No such doubt seems to have existed in French law. See 1 *PLANIOLE ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* n° 1045 (12th ed. 1939).

firmation may be either tacit, as by voluntary cohabitation, or express.

When the marriage of an insane person is held to be relatively null or voidable the usual result is an impairment of the sane party's right to sue for nullity. Since the privilege of avoiding the marriage is based on the defect in the insane party's consent,¹⁷ there is little theoretical support for a like privilege in the sane person. His consent, it is presumed, was entirely unimpaired. Thus, in some jurisdictions relief is expressly limited to the insane party.¹⁸ However, in many jurisdictions the competent party is granted an action, but usually under certain limitations. He may be required to show that he was ignorant of the other party's condition at the time of the marriage,¹⁹ or that the parties have not cohabited²⁰ after the defective party has been restored to reason. In other jurisdictions, despite the fact that the marriage is held to be merely voidable, the right to sue is granted unconditionally to either party.²¹

The so-called eugenic laws recently adopted in many American jurisdictions evidence a change of approach to the problem of the marriage of an insane person. The basis of these laws is the possible transmission of certain types of insanity by inheritance and the environmental effects of parental insanity on offspring. Consequently, under such laws, it is the insanity itself, rather than a lack of consensual capacity, which impedes the marriage and such marriages are prohibited. The eugenic statutes vary as to the effects of insanity on the marriage. In some states the marriage is void,²² in others it is merely voidable,²³ whereas in others²⁴ only preventive machinery is established by

17. See discussion in *Walters v. Walters*, 168 N.C. 411, 84 S.E. 703, 51 A.L.R. 845 (1915).

18. ORE. REV. STAT. §§ 106.030, 107.020 (1953); W. VA. CODE ANN. §§ 4701[1], 4702[2], 4703[3] (1955).

19. English Marital Causes Act, L.R. Stat., 1 EDW. VIII and GEO. VI, c. 57, § 7(1) (b) (1937).

20. HAWAII REV. LAWS § 122006 (1945): ". . . have not freely cohabited as man and wife" after restoration to sanity; MONT. REV. CODE §§ 48-202(3), 48-203(3) (1947).

21. NEV. COMP. LAWS §§ 4067, 4069 (1929); VA. CODE §§ 20-45, 20-89 (1950) and *Cornwall v. Cornwall*, 160 Va. 183, 163 S.E. 439 (1933).

22. KY. REV. STAT. § 402.020 (1953); MO. ANN. STAT. § 451.020 (Vernon 1949); UTAH CODE ANN. § 30-1-2(1) (1953).

23. See, e.g., DEL. CODE ANN. 13:101(b)(1) (1953).

24. CAL. CIV. CODE § 69 (Deering 1949) issuing officers forbidden to issue licenses to imbeciles or the insane; and KY. REV. STAT. § 402.990(2) (1953), which provides a fine to be levied upon any person who marries or aids and abets in the marriage of a feeble-minded person, idiot, or lunatic.

means of which the state attempts to discourage the marriage, but may afford the marriage full validity should it occur. Where the marriage is considered void, either party is allowed to sue for annulment.²⁵ If it is considered voidable, the standing of the sane party to sue depends upon the particular statute. While the eugenic laws represent an exception to the usual approach to the marriage of an insane person, they do not represent an abandonment of the theory of consent. Normally, the statutes apply only to persons afflicted with certain types of hereditary insanity²⁶ and age groups most likely to produce offspring.²⁷ Therefore these states retain conventional consent statutes to cover situations not embraced by the eugenic laws.

In Louisiana

The marriage of an insane person presents a peculiar problem in Louisiana, for, although the system of law is fundamentally statutory, there is no specific legislation on the subject.²⁸ A similar situation exists in only two other American jurisdictions²⁹ and there the common law is employed. It might be expected that the Louisiana court would resort to French authorities, since the problem is basically one of interpretation of code provisions similar to those of the Code Napoleon.³⁰

25. KY. REV. STAT. § 402.250 (1953); UTAH CODE ANN. § 30-1-17 (1953).

26. See, e.g., NEB. REV. STAT. § 42-102 (1952), which provides that: "No person who has been . . . adjudged afflicted with hereditary epilepsy or heredity insanity shall marry in this state, until after he or she has submitted to an operation for sterilization."

27. See, e.g., N. D. REV. CODE § 14-0307 (1953), which prohibits the marriage of a woman under the age of forty-five years or of a man of any age, except with a woman over the age of forty-five years, if either the man or the woman "is a common drunkard, a habitual criminal, an epileptic, an imbecile, a feeble-minded person, an idiot, an insane person or one afflicted with hereditary insanity . . ."

28. See I.A. CIVIL CODE title IV, cc. 2-4 (1870), where the questions of nullity and annulment are covered. No mention is made of insanity or mental competence as such.

29. Alabama: *Willis v. Willis*, 238 Ala. 153, 189 So. 873 (1939); Florida: *Savage v. Olson*, 151 Fla. 241, 9 So.2d 363 (1942).

30. That insanity produces nullity in Louisiana does not appear to have been questioned, although it is not mentioned as having such effect in the Civil Code.

It seems clear that insanity as a cause of nullity in Louisiana may be drawn from LA. CIVIL CODE art. 90 (1870). "As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties, at the time of making them, were:

"1. Willing to contract.

"2. Able to contract.

"3. Did contract . . ." (Emphasis added.)

Consent is a necessary element of any contract and mental capacity is necessary for consent. Therefore, by unavoidable implication, article 90 makes insanity a grounds for nullity in Louisiana.

But the decisions of the Supreme Court make it clear that this course has not been followed. In the recent case of *Stier v. Price*³¹ the court's opinion on the question was clearly defined.³² The plaintiff, wife of the defendant for twelve years, sued to have the marriage annulled, alleging that her husband was insane at the time of the marriage. The ground for annulment alleged was that the defendant's consent was not free because of his insanity.³³ The court said: "As to the plaintiff's contention in regard to the lack of consent on the part of her husband, if he did not consent due to his mental condition, under the provisions of [Louisiana Civil Code] article 110 he or his legal representatives are the only persons who can be heard to complain."³⁴ Article 110³⁵ enumerates the persons who may maintain an action in nullity on the grounds of a lack of free consent to a marriage. Hence, the court holds that insanity results in a lack of "free" consent. The right to sue is limited to that party whose consent is not free and the marriage is susceptible of ratification.³⁶ It is clear from the opinion that the court considers the question of marriage by an insane person to be a case of relative nullity in Louisiana.

The *Stier* decision does not find firm support in either the Code or French writings. In basing its opinion on article 110, the court stated that in chapter 4 of title IV,³⁷ wherein article 110 is found, the specific grounds for nullity are enumerated.³⁸ But

31. 214 La. 394, 37 So.2d 847 (1947).

32. In an earlier case, the court cited LA. CIVIL CODE arts. 110, 111 (1870), in ruling that where a couple have lived together as man and wife subsequent to a marriage, the validity of the marriage could not then be contested on the grounds that the husband was insane at the time of celebration. The court did not express an opinion on the question of relative or absolute nullity. It merely cited articles 110 and 111. *Sabalot v. Populus*, 31 La. Ann. 854 (1879). No other cases have been found where the question of nullity based on insanity was at issue.

33. The plaintiff also alleged that her own consent was not free in that she would not have consented had she known of her husband's insanity. 214 La. 394, 399, 37 So.2d 847, 849 (1948). The specific plea was "mistake respecting the person," and the court held that insanity is not such a quality of a person that a mistake, respecting the existence thereof in the other party to a marriage, will cause nullity. *Delpit v. Young*, 51 La. Ann. 923, 25 So. 547 (1899).

34. 214 La. 394, 400, 37 So.2d 849, 850 (1947).

35. LA. CIVIL CODE art. 110 (1870): "Marriages celebrated without the free consent of the married persons, or one of them, can only be annulled upon application of both the parties, or that one of them whose consent was not free.

"When there has been a mistake in the person, the party laboring under the mistake can alone impeach the marriage."

36. LA. CIVIL CODE art. 111 (1870).

37. LA. CIVIL CODE title IV (1870): Of Husband and wife. Chapter 4 of title VI: Of the Nullity of Marriages (arts. 110-118).

38. *Stier v. Price*, 214 La. 398, 37 So.2d 848 (1947).

from a reading of that chapter in conjunction with chapter 2³⁹ of the same title, it becomes apparent that it is chapter 2 which enumerates the specific grounds for nullity and that chapter 4 deals only with the effects of nullity, and with the suit for nullity and who may bring it. Planiol⁴⁰ concurs in this view. Further, Civil Code article 113 of chapter 4 speaks of suits based on "the other incapacities or nullities enumerated in the second chapter of this title." Hence, article 110 neither identifies nor defines grounds for nullity, this being the function of the articles in chapter 2. Article 110 limits the persons to whom an action in nullity is given on grounds of a lack of free consent, restricting the action to both parties or the one whose consent was not free.⁴¹ Article 111⁴² states that in such instances annulment will not be granted if the parties have cohabited freely "after recovering their liberty or discovering the mistake." Thus, the characteristics of a limited right to sue and the possibility of ratification identify such nullities as are within the application of article 110 as relative nullities. Article 113⁴³ specifically grants the right to sue for nullity on all grounds enumerated in chapter 2 not covered by article 110. Suit is allowed to either party, any interested person, or the attorney general; and no provision is made for ratification. Of necessity such nullities are absolute. Therefore the questions raised by these articles must be: to which causes of nullity in chapter 2 is article 110 applicable and is insanity among them?

The very wording of article 110 makes its application to the grounds for nullity stated in article 91⁴⁴ of chapter 2 apparent.

39. Title IV, chapter 2: How Marriages May Be Contracted or Made (arts. 90-98).

40. 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 995 (12th ed. 1939). In this section, Planiol discusses the relation of the chapters of the title on marriage in the *Code Civil*, which title is essentially the same as to subject matter and organization as title IV of the Louisiana Civil Codes of 1825 and 1870.

41. See note 35 *supra*.

42. LA. CIVIL CODE art. 111 (1870).

43. LA. CIVIL CODE art. 113 (1870) reads in part: "Every marriage contracted under the other incapacities or nullities enumerated in the second chapter of this title may be impeached either by the married persons themselves, or by any person interested, or by the Attorney General . . ."

44. LA. CIVIL CODE art. 91 (1870): "No marriage is valid to which the parties have not freely consented.

"Consent is not free:

"1. When given to a ravisher, unless it has been given by the party ravished, after she has been restored to the enjoyment of liberty;

"2. When it is extorted by violence;

"3. When there is a mistake respecting the person, whom one of the parties intended to marry."

Article 110 concerns "marriages celebrated without the free consent of the married persons or one of them," and article 91 states that "no marriage is valid to which the parties have not freely consented." In no other article in either chapter is freedom of consent mentioned. Therefore, for article 110 to be applicable to the case of insanity, insanity as a grounds for nullity must be within the purview of article 91, or, more specifically, it must be within the meaning of the concept, *a lack of free consent*, found in article 91.

That this is not the case is amply established in both the Code and in French writings. Article 91 provides an explanation of the term "free consent," to wit: "Consent is not free: 1. When given to a ravisher . . . ; 2. [E]xtorted by violence; 3. When there is a mistake respecting the person . . ." ⁴⁵ That is, a lack of free consent is an issue of violence, threats, and error. Whether the three situations mentioned be considered an exclusive enumeration or as exemplary of the type of cases to be included, insanity would not be included. In civil, canon, and at common law insanity is separated from the idea of violence, threats, and error. As explained above, insanity is held to be a question of *capacity* to consent,⁴⁶ resulting in French law in a total absence of consent,⁴⁷ whereas threats, violence, and error are considered to be *vices affecting the consent of a person of full capacity*,⁴⁸ resulting in present but defective consent. While many common law and civil law jurisdictions hold that both situations result in relative nullity, the essential difference between the two cases continues to be recognized. That this distinction was recognized by the redactors of the Code of 1825 is evidenced by article 90,⁴⁹ which states that the law recognizes those marriages to which the parties were "1. *Willing to contract*; 2. *Able to contract*; 3. *Did contract*." (Emphasis added.) The result is that by the words of

45. *Ibid.*

46. 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL nos 708, 1010 (12th ed. 1939).

47. CODE CIVIL art. 146; 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL no 1010 (12th ed. 1939).

48. 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL nos 1056-68 (12th ed. 1939).

49. LA. CIVIL CODE art. 90 (1870). It should be noticed that CODE CIVIL art. 146, concerning the lack of consent and under which the French hold insanity falls was not incorporated into the Louisiana Code. 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL no 1010 (12th ed. 1939). Also, article 90 of the Louisiana Civil Code does not appear in the French *Code Civil*. The inference may be that article 90 of the Louisiana Civil Code was to take the place of article 146 of the French *Code Civil* and function in the manner described in note 30 *supra*.

article 91 insanity is excluded from the meaning of "free consent" and, since article 110 speaks only of "marriages celebrated without the free consent," insanity as a grounds for nullity does not come within the application of that article. For that reason it does not produce relative nullity. Rather, it must fall under article 113 of chapter 4, which article classifies all grounds for nullity not covered by article 110 as absolute nullities. Such a view is consistent with that of the French writers.⁵⁰

However, identifying the proper construction of the Code does not provide a satisfactory solution to all of the problems raised by the marriage of insane persons. This fact is well demonstrated by a comparison of the two interpretations just discussed. Consider first the interpretation adopted by the Supreme Court in the *Stier* case, that the marriage was relatively null, and suit could be brought only by the insane person and only on condition that there has been no free cohabitation after restoration to sanity. This position conforms to the most severe stand taken by certain common law jurisdictions and involves the difficulty implicit in that view, specifically, that of leaving the sane person entirely destitute of remedy, no matter how deserving his cause may be. The correct interpretation, as suggested above, would hold the marriages of the insane to be absolutely null, allowing suit by either party, at any time and under any circumstances. This position would harmonize with French and canon law, but the consequences of this view are well demonstrated by the facts of the *Stier* case itself. Thus, despite the fact that there the plaintiff had been married to the defendant for twelve years and there were indications that she had married him with knowledge of his alleged infirmity, the marriage would still have to be regarded as a nullity. No doubt the decision was influenced by the extreme delay in bringing suit and the court may have felt compelled to interpret the Code so as to deny relief. Undoubtedly the majority of the common law jurisdictions would have rejected a plea under such circumstances. Also administrative considerations might have been persuasive to the court. Quite probably, the fact situation presented in the *Stier* case would be more apt to arise than one more favorable to the plaintiff. To have declared the marriage an absolute nullity might have exposed the court to a flood of similar litigation, thus presenting a serious disturbance to the underlying objective of marital stability.

50. 1 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL nos 708, 1010 (12th ed. 1939).

Nevertheless, the decision does have the effect of denying a remedy to the sane party no matter what his circumstances may be.

This dilemma does not appear to be insolvable. A recommended solution would be to amend the Code so as to declare the marriage of an insane person absolutely null, thereby allowing suit by either party, while also holding such marriages to be susceptible of ratification, thus allowing suit only to those who have not subsequently confirmed the marriage. This approach is not wholly inconsistent with French theory. Planiol⁵¹ points out that although the rule is that absolute nullities cannot be ratified, exceptions to the rule are made in the cases of want of puberty, clandestine marriages and incompetence of public officers. These situations, along with the case of insanity, are distinct from other absolute nullities, such as bigamy and incest, in that the parties are not prohibited from marrying each other. The marriages are null only by reason of some defect of form or capacity. Should such defect be corrected there seems little reason not to allow the marriage to stand. In the case of nullity on the grounds of insanity, it being purely a question of the absence of consent, a renewal of consent, either affirmative or tacit, at a time when both parties are capable, should work a perfection of the marriage.

It should be noticed that the suggested solution does not dispose of the problem of marriage during the lucid interval. It is quite possible that no satisfactory solution to that particular difficulty can be found so long as the question of the marriage of the insane is treated in terms of capacity and consent.⁵² Such a

51. *Id.* nos 1048, 1049. See note 16 wherein it is shown that ratification of void marriages may have been allowed at common law.

52. *Id.* no 709 suggests that judicial interdiction is a solution to the lucid interval problem, for during the period of interdiction, the person is de facto incapable of consent and his marriage would be null though celebrated in a period of actual capacity.

But interdiction would appear to be a doubtful solution in view of the usual distaste for judicial interdiction on the part of the relatives of an insane person. Moreover, as pointed out in note 9 *supra*, there exists a controversy as to whether interdiction produces de facto incapacity, or prima facie evidence of incapacity or whether capacity remains a question of fact even in the case of an interdicted person.

In Louisiana, in the analogous case of a will executed by a person under judicial interdiction, the Supreme Court has held that the presumption in favor of a testator's mental capacity at the time of the execution of a will can be overcome only by proof of incapacity in fact and that judicial interdiction is merely evidence and not proof of such incapacity. Succession of Schmidt, 219 La. 675, 53 So.2d 834 (1951).

case does not appear to have arisen in Louisiana, but there seems little doubt that the marriage would be held valid.

Daniel J. Shea

Establishment and Termination of Public Rights in Roads and Streets in Louisiana

In recent years the problem of determining the ownership of lands underlying roads and streets has become extremely important. This is particularly so in the fields of taxation and mineral rights, where it is necessary to ascertain the person who must bear the tax responsibilities or is entitled to the benefits of the revenues produced by the land. The right to explore for minerals along public roads has often hinged on determining the ownership of the underlying soil.¹ In real estate transactions, problems concerning property owners' rights and liabilities relating to public passageways have frequently been encountered.² It is the purpose of this Comment to examine the various legal methods by which the public use of roads and streets is created and terminated. It is felt that by this approach the task of determining ownership in these cases can be facilitated and the rights and liabilities of the parties more clearly determined.

Establishment of Rights in Roads and Streets

The rights acquired by the public in the opening of a road or street may be based on either ownership or servitude. The difficulty met by the courts in determining these rights seems to emanate from an inability to distinguish adequately between the methods by which ownership is obtained and those by which a servitude is acquired. In the following discussion an examination will be made of the six methods by which legal interests in roads and streets have been established: (1) purchase, (2) expropriation, (3) dedication, (4) three years' maintenance under R.S. 48:491, (5) appropriation of river roads, and (6) prescription. It should be noted that by the first three methods either ownership or a servitude may be obtained. In the latter three, however, only a servitude is acquired.

1. *State v. Evans*, 214 La. 472, 38 So.2d 140 (1948). In that case, the defendants were convicted of unlawfully prospecting for oil, gas, and other minerals by means of a mechanical device or otherwise on lands which were found to be private.

2. *E.g., Metairie Park, Inc. v. Currie*, 168 La. 588, 122 So. 859 (1929).