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## Civil Code and Related Subjects: Part II

*Joseph Dainow\**

### PROPERTY

#### *Passage over Private Property to and from Water*

Under existing law, a public road servitude is established by tacit dedication when the road has been "kept up, maintained or worked for a period of three years" by the appropriate public authority.<sup>1</sup> Act 463 of 1958<sup>2</sup> seeks to obtain for the public the voluntary permission of a landowner to pass over his property for convenient access to and from a recreational site or a body of water for boating, by precluding the establishment of a servitude even if there is upkeep, maintenance, or work by any public authority.

#### *Revocation of Dedication of Parks*

In 1957, the Louisiana Supreme Court decided the case of *Police Jury, Parish of Jefferson v. Noble Drilling Corp.*<sup>3</sup> and held that once a plot of land had been dedicated for a park there was no way for the police jury to renounce or disclaim its title despite the fact that the park was never developed. The law which permits revocation of the dedication of roads, streets, and alleyways<sup>4</sup> did not cover parks. Act 229 of 1958<sup>5</sup> fills this gap, and it provides that the parish governing authorities and municipal corporations (except Orleans) may revoke the dedications of parks, public squares, or plots dedicated to public use when these have been abandoned or are no longer needed for public purposes. The title then reverts to the person who was the owner at the time of the dedication.

#### *Transfer of Land Adjacent to Abandoned Road*

When the dedication of an abandoned road, street, or alley is duly revoked, the land reverts to the then present owners of

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1. LA. R.S. 48:491 (1950). Also by ten years' public use after being declared a public highway. LA. CIVIL CODE art. 765 (1870).

2. LA. R.S. 9:1251 (Supp. 1958).

3. 232 La. 981, 95 So.2d 627 (1957); *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Property*, 18 LOUISIANA LAW REVIEW 31 (1957).

4. LA. R.S. 48:701 (1950).

5. LA. R.S. 33:4718 (Supp. 1958), added by La. Acts 1958, No. 229.

the contiguous properties.<sup>6</sup> If such owner thereafter made a conveyance or mortgage describing his property as bounded by such road, the transfer was limited to this description.<sup>7</sup> To give greater clarity and stability to these land titles, a conclusive presumption has been established that the transfer or mortgage of land adjacent to an abandoned road includes all the transferor's interest in the road unless expressly excluded.<sup>8</sup> The new law is retroactive, saving however the transferor's right to preserve and protect his interests within one year.

This new statute is a companion to a somewhat similar one which was passed in 1956.<sup>9</sup> The 1956 law established a conclusive presumption that a transaction affecting land described as fronting on a road or canal or other right of way includes all the transferor's interest in and under the right of way unless expressly excluded.

### *Expropriation*

The sovereign right of expropriation is exercised primarily by the state and secondarily by other bodies under delegated authority for specified purposes and under certain conditions.<sup>10</sup> Generally, compensation is settled before the taking; in some instances an earlier acquisition is expressly authorized. Act 204 of 1958 added a Part IV to Title 19 of the Revised Statutes<sup>11</sup> providing that in any suit for the expropriation of property, all port commissions and port authorities along with Louisiana State University and the Department of Public Works may acquire the property prior to judgment in the trial court. The necessary procedures are outlined for both the acquisition and the determination of compensation; the only basis on which the acquisition can be defeated is by a court finding that the property was not taken for a public purpose.

## MINERAL RIGHTS

### *Mineral Leases on State Lands*

Act 353 of 1958<sup>12</sup> transferred to the State Mineral Board

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6. LA. R.S. 48:701 (1950).

7. *Hollingsworth v. Chaffe*, 33 La. Ann. 547 (1881).

8. LA. R.S. 9:2981-2984 (Supp. 1958), added by La. Acts 1958, No. 528.

9. *Id.* 9:2971-2973, added by La. Acts 1956, No. 555.

10. LA. R.S. 19:1-107 (1950), and cross references there cited. See Comment, *Expropriation — A Survey of Louisiana Law*, 18 LOUISIANA LAW REVIEW 509 (1958).

11. LA. R.S. 19:141-160 (Supp. 1958), added by La. Acts 1958, No. 204.

12. LA. R.S. 30:126, 130, 136 (1950), amended by La. Acts 1958, No. 353.

certain functions and authority which had previously been vested in the Register of the State Land Office. Hereafter, the Board will publish the advertisements for bids, and handle the ten thousand dollar fund set aside for this purpose. The Board will authorize one of its members or staff to sign documents for the state; it will also review and approve all payments received. While the Register will still be official custodian of all documents and records, there will be a duplicate set kept by the Board.

A new special authority for the State Mineral Board was established by Act 352 of 1958<sup>13</sup> to meet the needs of situations where a controversy exists as to the ownership of the lands in question. With the concurrence of the State Attorney General, the Board is authorized to make agreements respecting the issuance of new leases or the operation under existing leases, and providing for conditional payments or escrow deposits pending final adjudication or settlement of the controversy.

#### *Prescription of Mineral Rights and Servitudes*

R.S. 9:5806<sup>14</sup> provided that when the federal government or its agencies acquired land subject to existing mineral rights, these rights would be imprescriptible. In 1958<sup>15</sup> this section was amended by the addition of a similar provision concerning the acquisition of such land by certain state governmental agencies. To this new provision is attached the proviso that, if the land reverts to private ownership, the ten-year non-user prescription<sup>16</sup> would run against the holder of such rights or servitude, in favor of the person who owned the land at the time of its acquisition by the state agency. The text is very confused, probably due to the fact that amendments were proposed, rejected, compromised, and adopted before final passage. The proviso concerning reversion may have been intended for inclusion in both parts of this section but as it appears only in the second part (acquisitions by state agencies), it would be inapplicable to the federal acquisitions under the first part of the section.

To clarify a troublesome question, a new statutory definition was established to fix the point of time for the beginning of the non-user prescription of mineral servitudes as the day on which the servitude is created. Production or bona fide attempts to do

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13. LA. R.S. 30:178 (Supp. 1958), added by La. Acts 1958, No. 352.

14. Source: La. Acts 1940, No. 315.

15. La. Acts 1958, No. 278.

16. LA. CIVIL CODE arts. 789, 3546 (1870).

so interrupt the prescription, which resumes, however, when activity ceases. Prescription is also interrupted by shut-in payments in lieu of production, but resumes after the term of payment.<sup>17</sup> It is expressly provided that the new provision does not affect the imprescriptibility rule of R.S. 9:5806 (presumably as amended in the same session).

### SECURITY DEVICES

#### *Suretyship*

Without changing the liability of either a person (principal) or his surety as established by the terms of a surety bond, a new statutory provision<sup>18</sup> authorizes the principal by agreement with the surety to deposit for safekeeping any moneys and assets for which they might be held responsible. The transaction is subject to the supervision and instruction of the courts.

#### *Vendor's Privilege and Mortgage of Building and Loan Association*

The building and loan associations have made possible a high percentage of individual home ownership in Louisiana, and their detailed statutory regulation not only protects the individuals but also incorporates special advantages for the associations. One of these was the sale and resale transaction to provide the additional security of a vendor's privilege, along with the usual conventional mortgage. One of the special advantages of the vendor's privilege was the leeway of seven days (or fifteen if in a different parish) for recordation while preserving the date of execution for ranking purposes under Civil Code Article 3274. Since this has been the customary practice for all these many years, there had been intermittent proposals that the transaction itself be simplified so as to minimize the documents and the costs while preserving all the security rights. Act 317 of 1958<sup>19</sup> finally achieved this purpose, and became applicable for all building and loan association mortgages executed after twelve o'clock noon, August 1, 1958. The duration of effectiveness of the original recordation is for twenty-five years from date of filing, and reinscription is effective for twenty years.

#### *Building Construction Privileges*

In the construction of housing projects, one general contractor is likely to use the same crew of workmen simultaneously

17. LA. R.S. 30:112 (Supp. 1958), added by La. Acts 1958, No. 332.

18. *Id.* 9:3904, added by La. Acts 1958, No. 356.

19. *Id.* 6:796.

on several different buildings just as he would make a single purchase of materials for use in several active construction projects going on at the same time. When this occurred on adjacent tracts belonging to one owner, it was not feasible to identify the exact amount of an individual's work or of a single shipment of supplies which went into each building. There were justifiable reasons to treat the whole operation as one construction project and establish the laborers' and materialmen's privilege on all the buildings and land involved.<sup>20</sup> However, as housing developments became more extensive, encompassing a much larger number of units and extending over a much longer time, it was equally reasonable to re-introduce some limitation upon the scope of this privilege. Accordingly, Act 448 of 1958 added the proviso that such privilege shall not affect any building (or land on which situated) "where all material and services have been furnished and all labor has been performed [on that building] . . . more than sixty days prior to the filing of said privilege."<sup>21</sup> This period coincides with the delay allowed under R.S. 9:4812 for filing claims where there is no recorded contract. It does not follow, nor is it clear, that the Legislature intended to extend the time for filing claims under R.S. 9:4802 (thirty days after registry of acceptance or default) where there is a recorded contract and bond. It is expressly provided that this amendment would have no retroactive effect.<sup>22</sup>

### *Privileges on Oil, Gas, and Water Wells*

Privileges are a security device which give certain creditors special protection by means of a priority against the proceeds of specified property. Just as laborers and materialmen on a construction project were given a privilege on the land and improvements to which they had contributed, so were they also recognized in the first statutes governing oil, gas, and water wells.<sup>23</sup> This original relatively simple social purpose, constituting a balance between conflicting interests in the field, gradually took on the form of a tug of war. On one side, the privileged claimants were getting extensions of the base of their privileges so as to cover not only the well and the equipment but also the lease

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20. La. Acts 1926, No. 298, § 15½, added by La. Acts 1944, No. 79, now in LA. R.S. 9:4816 (1950).

21. LA. R.S. 9:4816 (1950), as amended by La. Acts 1958, No. 448.

22. La. Acts 1958, No. 448, § 2.

23. La. Acts 1916, No. 232.

and every other element of value connected with the enterprise. On the other side, more and more categories of claimants got themselves included in the list of privileged claims.<sup>24</sup> In the middle, the unlucky debtor-operator was torn to shreds in any case. Of course, if he struck it rich, everybody was happy.

After all these years, the attorney's fees were also finally included among the privileged claims against oil, gas and water wells.<sup>25</sup> Considering the intimacy said to exist between lawyers and the law, this tardiness may seem surprising. It will be even more surprising then to note that until this time, there have been only two privileges in favor of attorneys for their professional fees: one on "all judgments obtained by them, and on the property recovered thereby;"<sup>26</sup> and the other on workmen's compensation awards.<sup>27</sup> Does the 1958 statute represent a late start but a new trend?

### *Legal Mortgages*

Articles 2376 and 3319 of the Civil Code provide that the wife has a legal mortgage on the property of her husband for the restitution of her dowry and for the reinvestment of the dotal property sold by her husband. Dowry is the contribution made by the wife, or by others on her behalf, to support the expenses of the marriage, and a settlement of dowry can only be made before the marriage in the so-called "marriage contract" (better described as an ante-nuptial property agreement) which must be an authentic act in notarial form.<sup>28</sup>

A tradition of sentiment and value in the Parish of West Baton Rouge is the continuing Julien Poydras legacy of dowries to indigent brides every year. Act 147 of 1958 provided that the legal mortgage to secure a wife's dowry shall no longer apply to these Poydras dowries, and that all existing encumbrances of this category shall be cancelled.

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24. La. Acts 1928, Nos. 171, 172; La. Acts 1932, No. 161; La. Acts 1934, No. 145; La. Acts 1940, No. 100; La. Acts 1942, No. 68. See DAGGETT, *MINERAL RIGHTS IN LOUISIANA* 351 *et seq.* (rev. ed. 1949).

25. LA. R.S. 9:4861 (1950), as amended by La. Acts 1958, No. 23.

26. *Id.* 9:5001, incorporating LA. R.S. § 2897 (1870) and La. Acts 1906, No. 124.

27. *Id.* 23:1141, first incorporated in the Workmen's Compensation Act with the amendments in La. Acts 1926, No. 85. Current changes made by La. Acts 1958, No. 496, in the permissible amount of attorney's fees is discussed *infra* page 113.

28. LA. CIVIL CODE arts. 2328-2331, 2337 *et seq.* (1870).

If, by any chance, the Poydras legacy is given to a bride without a settlement of dowry in a notarial property agreement between the spouses before their marriage, it is doubtful whether this gift to the wife would properly be classified as dowry. In such event, she would still have a legal mortgage to secure the restitution or reimbursement of this as her paraphernal property.<sup>29</sup> However, she would not have the privilege on the husband's movable assets which protects only dotal property.<sup>30</sup> Although the 1958 act abolishes the legal mortgage, the privilege still remains where the Poydras legacy is properly classified as dowry. However, if it is dowry, this property of the wife is now less protected than her paraphernal property which still has the benefit of a legal mortgage.

In view of the fact that ante-nuptial property agreements ("marriage contracts") are hardly ever used in Louisiana, it would be much simpler to remove the dowry provisions and all references to dowry from the Civil Code and the statutes. The Poydras legacies will continue to be what they have always been — a beneficent assistance to marriage for the qualified brides.

#### PRESCRIPTION

Every statute incorporates a policy objective, and for each there is a problem of drafting. Draftsmanship involves not only the choice of appropriate words and terms of art but also an understanding of where to place them. Despite the reverence always professed for the Civil Code (and pretermitted issues of policy) the technique of code article amendment has sometimes been used without regard for the internal classification and coordinated plan of the Code as a whole. This lack of understanding of the composition of the Civil Code is distressing, to say the least. The Civil Code chapter on prescription is divided into three parts: (1) general provisions, (2) acquisitive prescription, and (3) liberative prescription. Act 341 of 1958 amended an article in the part on liberative prescription so as to make a certain provision applicable also to acquisitive prescription.

Over the years, the original principle that prescription is suspended against minors, interdicts, and married women has

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29. *Id.* art. 3319(3).

30. *Id.* arts. 2376, 3191.



become more and more limited so that prescription now does run against these persons in several situations. Article 3541 in the part on liberative prescription was amended by Act 736 of 1954 so as to make the thirty-year (*liberative*) prescriptions run against these persons.<sup>31</sup> Act 341 of 1958 further amended this same article so as to make this provision cover both liberative and acquisitive thirty-year prescriptions. Prior amendments concerning the running of the ten-year acquisitive prescription against minors, interdicts, married women, and absentees, were duly incorporated in the appropriate article.<sup>32</sup> The 1958 amendment concerning acquisitive prescription would have had a proper location in Article 3499.

An important immediate and transitional feature of this 1958 act is not in the express article amendment but in another section of the statute. This provides that the amended article "shall operate retrospectively, as well as prospectively"; however, there is the proviso that no prescription of thirty years shall accrue before the expiration of 6 months from the effective date of the act.<sup>33</sup>

## Courts and Civil Procedure

*Henry G. McMahon\**

### APPELLATE REVISION

The most acute problem which has confronted the legal profession in Louisiana during the past few years has been the overload thrown upon our Supreme Court by its ever-increasing civil appellate docket. To solve this problem the Judicial Council, through a committee of its own, and in cooperation with the Chief Justice, the judges of all of the appellate courts, the Judicial Administrator, and committees of the state and local bar

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31. Hebert & Lazarus, *1954 Legislation Affecting the Civil Code*, 15 LOUISIANA LAW REVIEW 9, 16-18 (1954), considered the 1954 act as covering both liberative and acquisitive prescription. Their comments are predicated upon Louisiana decisions there cited which fuse Articles 3499 (acquisitive prescription) and 3548 (liberative prescription) as one, upon the assumption that the only thirty-year prescription involves title to immovable property. However, there are also other actions subject to the thirty-year liberative prescription in LA. CIVIL CODE arts. 68, 78, 1030 (1870), and LA. R.S. 9:5701 (1950), which deny the generalization that Article 3548 is the counterpart or affirmance of Article 3499.

32. LA. CIVIL CODE art. 3478 (1870), as amended by La. Acts 1920, No. 161, and La. Acts 1924, No. 64.

33. La. Acts 1958, No. 341, § 2.

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