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circumstances, leaving only the *amount* of the alimony to the discretion of the court.³

CIVIL LAW PROPERTY

*Joseph Dainow**

Accession

Accession is the means whereby a person acquires ownership of a new thing by reason of its relationship to something else already belonging to him.¹ This determination of ownership may be separate and distinct from the idea of compensation to some other person pursuant to the general doctrine of unjust enrichment.² Thus, if a landowner makes a construction with materials belonging to somebody else, the *ownership* of the improvement vests in the landowner but subject to *adjustment* in favor of the other person for the value of the materials.³ Conversely, if a person makes a construction with his own materials on somebody else's land, the *ownership* of the improvement vests in the landowner subject to *adjustment* in favor of the other person, unless the latter was not a possessor in good faith, in which event, the landowner can demand demolition of the construction.⁴

In the case of *Prevot v. Courtney*,⁵ there was such a situation of improvements constructed by a person who was not the landowner, but it was somewhat complicated by the fact that the property (described as including improvements) was sold to a new owner after the original owner's election to keep the improvements but before they had been paid for. The district court

3. In 1957 the writer had the opportunity to comment on the Supreme Court's construction of Article 160 and did so in these words: "This kind of statement can give rise to the impression the Supreme Court wishes to justify whatever it does in awarding alimony after divorce by denying that the wife, though in necessitous circumstances, has any *right* to alimony. Certainly the court cannot intend this meaning any more than it would be conceivable that the legislatures since 1827 intended to grant such power to the judiciary. It would seem more reasonable to recognize that Article 160 creates a *right of alimony* in favor of the divorced wife in necessitous circumstances, and gives discretion to the judge only as to the amount to be paid." *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Persons*, 18 LOUISIANA LAW REVIEW 24 (1957).

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1. LA. CIVIL CODE arts. 498, 504 (1870).

2. Cf. *id.* arts. 501, 507, 508, 521, 526, 529.

3. *Id.* art. 507.

4. *Id.* art. 508.

5. 241 La. 313, 129 So.2d 1 (1961).

and court of appeal⁶ held that compensation was due from the new (present) owner, but the Supreme Court reversed and concluded that the compensation must be paid by the former owner.

The court of appeal considered the problem to be a "factual question" and on the basis of the evidence concluded that the purchaser had elected "to substitute himself" for the vendor in the payment of this compensation. The Supreme Court's reversal is predicated on the "public records" doctrine,⁷ which gives the purchaser valid title to all the buildings and improvements on the land; there was nothing in the records to the contrary, nor is this result affected by any knowledge outside of the records.

As between the original owner and the person who made the improvements, title to these improvements does not pass upon the owner's mere election to keep them but only when he makes payment of the appropriate compensation.⁸ Nevertheless, the purchaser as a third party acquires clear title to the land and all the improvements, leaving the obligation of payment on the original owner.

Analytically, the Supreme Court's decision appears to be sound. Functionally, it leaves the door open for the original owner to obtain a price for the property which includes the value of improvements and then perhaps to get away without reimbursing the person who made the constructions.

From the foregoing, it would follow that, in order to protect his interest against *any* owner of the land, a person who constructs improvements should record his title to these improvements. Presumably, this is just as pertinent for the person who constructs on land which he believes he owns because his title may turn out to be defective.

Alluvion

One kind of accession of special interest in Louisiana is the gradual and imperceptible alluvial formation along the banks of rivers or streams⁹ or bodies of flowing water.¹⁰ For the situa-

6. *Prevot v. Courtney*, 121 So.2d 561 (La. App. 2d Cir. 1960).

7. *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909).

8. *Davis-Wood Lbr. Co. v. Insurance Co. of North America*, 154 So. 760 (La. App. 1st Cir. 1934).

9. LA. CIVIL CODE art. 509 (1870).

10. *Amerada Petroleum Corp. v. State Mineral Board*, 203 La. 473, 14 So.2d

tion where alluvion is formed in front of the property of several proprietors, the Civil Code provides that "the division is to be made according to the extent of the front line of each at the time of the formation of the alluvion."¹¹ As a statement of general policy, one could not ask nor expect a more equitable principle, but its application becomes very complicated and difficult on account of the irregularities of width and extension which occur in alluvial land formations.

In working out a proportionate distribution, two mathematical elements of reference are necessary: (1) the basis in relation to which the division is to be determined, and (2) the basis for dividing the land that is to be distributed. The first reference could possibly be the original acreage of the respective properties, but the Code specifically fixes this reference as the respective lineal water frontages. For the second reference, the Code is silent and simply says "the division [of the alluvion] is to be made." The reference here could likewise be on the basis of either (a) acreage of the alluvion, or (b) its water frontage. Obviously, these alternatives could produce more or less satisfactory results to the respective proprietors depending on the haphazard possibilities of the shape of the alluvial formation in relation to the relative original frontages of the riparian properties. No single formula could always do justice to everyone's satisfaction, because the formula which produces a completely satisfactory result in one situation would produce a very different kind of result for an alluvial formation of a different shape.

On three previous encounters with this problem, the Louisiana Supreme Court applied the frontage system of division once and the acreage system twice.¹² In the latest case of *Jones v. Hogue*,¹³ the court recognized the difficulty inherent in both the frontage and acreage methods of dividing alluvion, and while rejecting each one as an exclusive reference it adopted a formula which incorporates them both. In order for an alluvial land formation to be apportioned equitably, the test of fair proportion should consider both frontage and acreage.¹⁴ This means that

61 (1943); *Eso Standard Oil Co. v. Jones*, 233 La. 915, 98 So.2d 236 (1957), noted in 18 LOUISIANA LAW REVIEW 739 (1958).

11. LA. CIVIL CODE art. 516 (1870).

12. See Note, 21 LOUISIANA LAW REVIEW 803 (1961).

13. 241 La. 407, 129 So.2d 194 (1960), noted in 21 LOUISIANA LAW REVIEW 803 (1961).

14. See discussion in Note, 21 LOUISIANA LAW REVIEW 803 (1961).

sometimes the court might decide according to frontage, or at other times according to acreage (as in the present case), or perhaps by splitting the difference between the results of both the frontage and acreage formulas.

From the court's point of view, this leaves full leeway for the individualization of cases according to the irregular and peculiar formations of alluvion, but where does it leave the attorneys who may be trying in all sincerity to advise their clients about their rights so as to achieve an amicable settlement and avoid litigation?

Another issue in such a case is the determination of the *time* at which the division is to be calculated and made. Sedimentation of alluvion is a continuing process. In the present case, there existed several government surveys of the area in question, in between which there had been successive increases in the alluvion. The ingenious contention that there should be a series of successive calculations, making a separate apportionment of each addition in accordance with the respective surveys, was set aside as impractical. This would mean apportionment foot by foot, as it was formed; furthermore, the intervals between the actual surveys varied between 4 years and 20 years, and the dates of the surveys do not establish the time of the alluvial formations. Nor is there any basis for assuming that the formations always grow with imperceptible regularity. Consequently, the court established the time for division as the time when the action was instituted seeking the apportionment.

By the application of these principles in the present case, the court concluded that "each riparian proprietor will receive his proportion of the area and at the same time will retain a frontage on the river."¹⁵

Servitudes

"A real or predial servitude is a charge laid on an estate for the use and utility of another estate belonging to another owner."¹⁶ These fundamental attributes of predial servitudes have interposed many difficult problems in the development of the law governing mineral operations, and in the absence of legislation the courts have sought solutions as the needs arose. In *Harwood*

15. 129 So.2d at 203.

16. LA. CIVIL CODE art. 647 (1870).

Oil & Mining Co. v. Black,¹⁷ the Supreme Court had to re-establish two points of law concerning the servitude of passage.

The first point is that the mineral lessee of a bed of a river cannot claim a right of passage across the adjacent riparian land by reason of being an "enclosed estate"¹⁸ because the mineral lessee does not have any property right but only a personal right. This has nothing to do with the question of navigability of the river. Would it follow that if he had *purchased* the minerals acquiring a *servitude* and a real right or proprietary interest, he would be entitled to a right of passage within the meaning of Civil Code Article 699?¹⁹

The second point involves the public servitude of passage on public roads along rivers and bayous. In classifying as *public* the roads that are built along the rivers and bayous, R.S. 48:491 does not specify that these must be navigable. The court reiterated its position that the statute must be construed with Civil Code Articles 455 and 665, which limit this servitude to the areas along navigable waterways, and decided accordingly.

Building Restrictions

It has become well established in Louisiana law that building restrictions can be imposed upon a specified group of properties so that the rights of their owners are thereby limited as in the case of predial servitudes.²⁰ However, unopposed violations of a building restriction may destroy the original purpose, and the restriction is no longer enforceable on the theory of waiver or relinquishment.²¹

The case of *Guyton v. Yancey*²² involved a subdivision in which the original owners had included the following building restrictions: (1) exclusive residential use, (2) minimum house cost of \$10,000, (3) thirty feet clearance from each side property line, and (4) eighty feet setback from the front property line. The defendant's proposed construction would have violated the

17. 240 La. 641, 124 So.2d 764 (1960).

18. LA. CIVIL CODE art. 699 (1870).

19. It would have to be shown that one servitude could be a dominant or servient estate for a different servitude.

20. *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641, L.R.A. 1916B 1201, Ann. Cas. 1916D 1248 (1915); *Hill v. Ross*, 166 La. 581, 117 So. 725 (1928); *Ouachita Home Site & Realty Co. v. Collie*, 189 La. 521, 179 So. 841 (1938). See also *McGuffey v. Weil*, 240 La. 758, 125 So.2d 154 (1960).

21. *Edwards v. Wiseman*, 198 La. 382, 3 So.2d 661 (1941).

22. 240 La. 794, 125 So.2d 365 (1961).

frontal setback requirement by approximately twenty-seven feet. When the plaintiff sought an injunction to prevent this violation, the defendant contended that existing violations had already destroyed the whole original scheme of the development.

The evaluation of whether the unopposed violations are sufficient to constitute a waiver or relinquishment of the building restrictions must be individualized on the facts of each case. In the present case, the Supreme Court agreed with the two lower courts in concluding that there had not been a waiver or abandonment, and they enforced the restriction. It is not the purpose of these comments to examine the statistics on the number and degree of the existing violations or the admissibility of evidence problem, but rather to discuss three points which were not critical issues in this case. They do raise interesting questions of law, and could be critical in later cases.

The first point of interest is the defendant's attack against the entire scheme of the original development, in his contention that there had been a waiver or abandonment of *all* the building restrictions. Since the Supreme Court concluded that the existing violations of the front line setback (5 violations) and of the side line requirement (4 violations) were relatively minor or so little as to be negligible, there was no need, as a practical matter, to break down the defendant's contention.²³ It might possibly be inferred that the court accepted the defendant's presentation of considering the question of waiver or abandonment with reference to the whole plan including all the restrictions at the same time. If this approach were adopted, and if the facts would show a great many serious violations of only the side line requirement, would this mean a waiver also of the front line setback? And if both the side line and front line requirements had been violated sufficiently to constitute a waiver, would this mean that the subdivision could no longer be considered as residential? and so forth. The leading Louisiana case of *Edwards v. Wiseman*²⁴ was very clear and emphatic in the individualization of each restriction, and it would seem best to keep it that way.

The second point of interest is the defendant's companion contention that the abandonment of the original scheme was accompanied and confirmed by "an entirely new and different

23. As was done by the court of appeal; see 115 So.2d 622, 626-627 (1959).

24. 198 La. 382, 3 So.2d 661 (1941), noted in 4 LOUISIANA LAW REVIEW 329 (1942).

scheme" which had "emerged in its stead."²⁵ Again, for practical purposes, since the court affirmed the injunctive relief to the plaintiff, there was no need to go into the questions of whether and how a new scheme of development could "emerge." There might be some interesting speculation on these points, including a comparison with the prescriptive acquisition of certain servitudes; the *tacit* "emergence" of a whole scheme of building restrictions for a residential subdivision would indeed be a novel but unfounded idea in Louisiana law.

The third point of interest is the possible implication that a plaintiff must show damage in order to enjoin the proposed violation of a building restriction. In affirming the injunctive relief in the present case, the court asserted "for obviously he would be materially and adversely affected in the enjoyment of his home"²⁶ although this element was not made any part of the *ratio decidendi* in the court of appeal. Building restrictions have been assimilated to servitudes²⁷ and it should not be necessary to show damage in order to prevent the violation of a servitude. In a very exceptional case, the court has awarded damages instead of injunctive relief,²⁸ but this does not detract from the right to enforce property interests. In view of the fact that the building restriction scheme generally has a value interest which can be presumed, it is a different situation if the plaintiff should have an affirmative burden of proving damage in order to prevent a violation. And what would the man do who wanted to enjoin a commercial enterprise in his residentially restricted neighborhood when the abandonment of that restriction might well give his property much greater value for commercial purposes?

Another case which stirred considerable interest in the subject of building restrictions was *McGuffy v. Weil*.²⁹ The owner of a large corner lot sold a strip on the side, and in a recorded companion document the corner lot was subjected to a residential restriction which "shall constitute a covenant running with the land and shall be binding upon appearer and all subsequent owners thereof." In subsequent sales of the corner lot, the restriction was not mentioned.

25. 125 So.2d at 367.

26. *Id.* at 371.

27. *Ouachita Home Site & Realty Co. v. Collie*, 189 La. 521, 179 So. 841 (1938).

28. *Adams v. Town of Ruston*, 194 La. 403, 193 So. 688 (1940).

29. 240 La. 758, 125 So.2d 154 (1960).

Building restrictions have long been assimilated to predial servitudes.³⁰ This is reiterated in the present case by the court's holding that the restrictive covenant involved was a "continuous nonapparent servitude" and could be established only by a "title."³¹ The court clarified the point that this title refers to the transaction creating the servitude or building restriction, and not to the subsequent transfers of the property. Since the language of the document was clear and unequivocal, the building restriction constituted a servitude or real obligation running with the land,³² binding on subsequent transferees. Although building restrictions are generally established by the original owners of a new subdivision, this is not an exclusive method, and there appears no reason why a servitude or a building restriction cannot be established on a single servient estate for the benefit of one other dominant estate.³³

SUCCESSIONS

*Alvin B. Rubin**

Effect of Acceptance

In *Boyet v. Perryman*¹ the court dealt again with the problem of heirs who seek to dispute the title to property conveyed by the person from whom they inherit.² The plaintiffs brought an action of slander of title which was converted by the defendants into a petitory action. The plaintiffs' grandfather owned half of a quarter section. He conveyed 10 acres taken from this tract to the defendant. When the seller died, the judgment of possession in his succession sent the heirs into possession of the entire tract, without excepting the portion which had been sold. By successive conveyances, the plaintiff's father acquired the interest of his six brothers and sisters. The plaintiffs contended that they had acquired ownership of the 10-acre tract by prescrip-

30. *Ouachita Home Site & Realty Co. v. Collie*, 189 La. 521, 179 So. 841 (1938).

31. LA. CIVIL CODE arts. 727, 728, 766 (1870).

32. See also LA. CIVIL CODE art. 2015 (1870).

33. *Cf.* the individual servitude of prohibition of building above a particular height, mentioned in LA. CIVIL CODE art. 728 (1870).

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1. 240 La. 339, 123 So.2d 79 (1960).

2. See, for example, *Mims v. Sample*, 191 La. 677, 186 So. 66 (1938); *Chevalley v. Pettit*, 115 La. 407, 39 So. 113 (1905).