Louisiana Law Review

Volume 22 | Number 2
The Work of the Louisiana Supreme Court for the 1960-1961 Term
February 1962

Civil Code and Related Subjects: Successions

Alvin B. Rubin

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).

*Member, Baton Rouge Bar, Special Lecturer, Louisiana State University Law School.

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).

tion. The court of appeal decided that the plaintiffs were owners of 4/7ths of the tract.[3] In its original opinion the court reversed the court of appeal on the ground that the requisites of ten-year good faith prescription had not been met.

On rehearing, the court reached the same result, but based on the conclusion that the defendants' plea of "estoppel by warranty" should have been sustained. The plaintiffs' grandfather had sold the tract of land with warranty. The plaintiffs' father had accepted his succession unconditionally. The plaintiffs were therefore bound by the "obligation of warranty" made by the original vendor. The obligation was not destroyed when some of the coheirs conveyed title to another coheir. The court distinguished 30 years prescription in this regard: "In such a case the 30 year possession is in no way disputing the title of the record owner. . . . In the instant case plaintiffs are pleading the 10 years' acquisitive prescription and are asserting a title derived from [plaintiffs' father's] coheirs, all of whom, as stated, were bound by their father's warranty."

The question raised by the court's rationale of this decision is whether either the warranty of title or estoppel binds a person against future acts. This question and other aspects of this decision are discussed in Note elsewhere in this issue.

In *Washington v. Washington*,[4] the court held that the privilege granted the widow in necessitous circumstances was not extinguished by her failure to claim the privilege or to institute a suit for a separation of patrimony within three months from the acceptance by the heirs of her husband's succession. Neither did the widow waive her privilege on the succession property by failing to pray for recognition of her privilege when she sought to recover her "widow's homestead."[5]

The question whether the privilege of the widow in necessitous circumstances prescribes if she fails to institute a suit for separation of patrimony within 90 days of the acceptance of the succession by the heirs had been considered by the Court of Appeal for the First Circuit in *Danna v. Danna*,[6] and by the

3. 98 So.2d 593 (2d Cir. 1958).
4. 241 La. 35, 127 So.2d 491 (1960).
5. The court relied upon Perot's Estate v. Perot, 177 La. 640, 148 So. 903 (1933), in which a lessor's privilege was held not to have been waived when the lessor filed a suit for personal judgment against a lessee without asserting the privilege, and other cases.
6. 161 So. 348 (La. App. 1st Cir. 1935).

Court of Appeal for the Second Circuit in *Beck v. Beck*.[7] In its original opinion, the Supreme Court followed the decision in the *Danna* case. On rehearing, the court stated that further study had convinced it that the *Beck* decision was sound.

The court said that the suit for a separation of patrimony must be instituted within 3 months, but this 3-month period does not cause either the debt due the widow in necessitous circumstances or the privilege created by law to secure the payment of that debt to prescribe. A privileged creditor need not seek a separation of patrimony; so long as the debt itself has not prescribed, "the privilege, which is an accessory right to secure payment, does not . . . prescribe."

The Title Examination Committee of the New Orleans Bar Association filed a brief amicus curiae, urging that the 90-day prescription allowed for the filing of suits for separation of patrimony should apply to the privilege accorded the widow in necessitous circumstances. The court therefore must have considered the effect of its decision on title examination. In this case, one of the coheirs had purchased an interest in the succession from the other coheirs, and it was held that the privilege of the widow in necessitous circumstances applied to the interest which he had purchased. Other privileged debts affecting immovable property which exist without recordation[8] should be treated in the same fashion. Justice Hamiter, dissenting in part, thought that the privilege should not affect the interest thus purchased. Justice Hamlin, dissenting, urged that title examiners should not "be compelled . . . to require affidavits to the effect that the 'widow's thousand' has been satisfied before finally passing upon the merchantability of a title."

The decision appears inescapably to imply that the unrecorded privileges for expenses of last illness and those arising on death of the owner of the property follow succession property into the hands of third persons, who purchase it in good faith from the heirs following a judgment sending the heirs into possession of the estate. It therefore is necessary for title examiners to satisfy themselves that these debts have in fact been paid if their clients are to be protected.[9]

7. 181 So. 635 (La. App. 2d Cir. 1938).
8. See LA. CONST. art. XIX, § 19.
9. The Code of Civil Procedure does not affect the problem. Article 3007 permits the creditor of a succession to require security for the payments of the debt due him within 3 months from the date of the judgment of possession when