**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: Security Devices

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tion may properly bear on the question of whether a third person may enforce this kind of provision as beneficiary of a stipulation pour autrui, but it should not be controlling in determining whether the restriction constitutes a real obligation to which the land is subjected.

The question of the continued effectiveness of a general scheme or plan of land development despite some violations of the restrictions imposed was considered carefully and at length by the court in *Guyton v. Yancey*.[2] It was found that the plan as conceived and established by the subdividers had not been abandoned or discarded and continued to be legally effective. The court also found that an imperceptible violation by the plaintiff himself of the front set-back requirements did not debar him from complaining of the threatened flagrant violation by the defendant. The case represents a realistic application of the controlling principles.

## SECURITY DEVICES

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### *Widow's Homestead Privilege*

Privileges are a form of security device in Louisiana law and when they affect immovable property there is a close resemblance to mortgage. For mortgages, there is an inexorable rule that there must be proper recordation in order to affect third persons. For privileges which affect immovables, the same is generally true, but there are some exceptions.[1] In the case of such an exception, the privilege attaches to the property just as if it had been recorded, and the lack of recordation does not abbreviate or limit the scope of the effectiveness of the privilege, even as against third persons. At this time, there is no question of sympathy for the property owners who have so many other burdens, or the title examiners who already have a fantastic job in comparison to the simple checking of titles under a Torrens system type of recordation. Neither is this the time for sympathy to the patient funeral director, the devoted doctor, or the necessitous widow. These policy considerations were all

2. 240 La. 794, 125 So.2d 365 (1961).
1. LA. CONST. art. XIX, § 19 (1921); LA. CIVIL CODE art. 3276 (1870).

taken into account in the formulation of Article XIX, Section 19, of the Constitution and Article 3276 of the Civil Code. Nevertheless, the so-called "public records" doctrine has taken such a strong hold on the minds of the legal profession that, with the aid of a little wishful thinking and a lot of legal pyro-techniques, there develops a blind spot which refuses to see the established exceptions.

The case of *Washington v. Washington*,[2] with its several trials and a Supreme Court rehearing, reflects some of the foregoing difficulties and finally came out with what appears to be the correct conclusion, although there were many diverse contentions and opinions formulated in the total process.

The necessitous widow's claim and privilege for $1,000, together with the conditions governing its ranking, are set forth in Civil Code Article 3252; and it affects immovable as well as movable property. Article XIX, Section 19, of the Constitution and Article 3276 of the Civil Code specifically except this privilege from the recordation requirement. In the presence of the contemplated circumstances, the privilege comes into existence at the time of the husband's death.

If there were a recorded mortgage or vendor's privilege against this property at the time of the husband's death, there would be no question about such a mortgage or privilege being effective against the property even if it were conveyed in the succession settlement to a third person. Why then should there be so much resistance to the idea of the widow's homestead privilege being similarily effective? If this privilege had been recorded, there would of course be no objection; but since this privilege is excepted from the requirement of recordation it is just as effective as if it had the same benefits which recordation gives to those privileges and mortgages which do need it.

This is the conclusion reached by the majority of the Supreme Court on rehearing, despite the opposite position taken on the first hearing and the ingenious contentions to the contrary.

In addition to the foregoing issue about recordation, the principal contention against recognition of the widow's homestead privilege was the three-months prescription for a suit of

2. 241 La. 35, 127 So.2d 491 (1961); 116 So.2d 125 (La. App. 1st Cir. 1959). For comments about utilization of Planiol references, see Dainow, *The Planiol*

separation of patrimony.[3] When the widow obtained judgment on her original claim for the $1,000 homestead, no appeal was taken; but when she sought to enforce this judgment and requested recognition of the privilege, the argument was made that the privilege was lost by this three-months prescription because of her failure to pray for recognition of the privilege in the original suit.

This contention is predicated on the assimilation of the widow's homestead claim to the claims of the husband's creditors who can be kept out of the heir's personal property by the heir's suit for separation of patrimony. Much argument was developed to parallel the (questionable?) equity and justice of keeping the widow out of the property belonging to the husband's heirs. However, in the first place, the prescription of the action for separation of patrimony is something which works against the heirs and not against the decedent's creditors. Secondly, the widow's homestead claim has no resemblance to the heir's right to demand separation of patrimony. Thirdly, neither reason nor justice can provide a prescription in direct contradiction to Civil Code Article 3470 which provides: "There are no other prescriptions than those established by this Code and by the statutes of this State now in force." Finally, just as there is no specific prescription for the widow's homestead claim (thus leaving it subject to the omnibus provision of ten years for personal actions)[4] neither is there any for the accessory privilege which accompanies the claim.

*Building Contract Privileges*

The private building contract law[5] provides two kinds of protection for a great many different creditors whose services or supplies contributed to the construction or repair of a building. One security device is the lien or privilege against the property, the other is the surety bond which the contractor should put up. Sometimes there is also the personal liability of the property owner to make good for the contractor's shortcomings.[6] However, this does not mean that *all* the creditors

*Treatise on the Civil Law: French and Louisiana Law for Comparative Study*, 10 AM. J. COMP. L. 175, 182-184 (1961).

3. LA. CIVIL CODE art. 1456 (1870).
4. *Id.* art. 3544.
5. LA. R.S. 9:4801 *et seq.* (1950).
6. *Id.* 9:4806, 4812.

of the contractor are always protected for what has been contributed to the accomplishment of the project. It must be remembered that the subject of privileges is an area of exception[7] and the rule of very strict interpretation is required by law.[8]

In the case of *National Surety Corp. v. Highland Park Country Club, Inc.*,[9] the creditor claiming a privilege and seeking participation in the fund of the surety's concursus proceeding was the lessor of equipment which had been rented to the contractor. There is no question that the use of this machinery and equipment contributed to the construction project, nor was there any issue about the contractor's indebtedness for the unpaid rentals. In enumerating the creditors protected by the building contract law,[10] the statute includes the "furnisher of . . . machinery . . . who performs work" and by a strict construction of this text, the Supreme Court was impelled to deny both the privilege and the participation in the surety's fund on the basis that the creditor who rented equipment without performing any work was not covered by the statute.

When there is doubt or dispute concerning the meaning or scope of a statute, the matter is for judicial interpretation and decision. In the present case, the Supreme Court has given its answer; and in the light of the governing rule of *stricti juris*, its decision can be supported.

In a less strict interpretation of the statute, the court of appeal[11] considered that "furnishers of machinery" included not only the supplier who sold machinery which actually went into the construction and the vendor of necessary tools for the workmen, but also the *lessor* of machinery which was used for necessary operations of the construction. This interpretation found some support by analogy in the statute providing protection (privileges and surety bond) for creditors who have contributed to a mineral development project.[12] Nevertheless, on this point, the Supreme Court had to say that the two statutes are not *in pari materia* but are distinguishable.[13] Furthermore, in an

7. LA. CIVIL CODE arts. 3183-3184 (1870); Dainow, *Privileges in Louisiana Law*, 13 LOUISIANA LAW REVIEW 537 (1953).
8. LA. CIVIL CODE art. 3185 (1870).
9. 240 La. 747, 125 So.2d 151 (1960).
10. LA. R.S. 9:4801 (1950).
11. 111 So.2d 811 (La. App. 2d Cir. 1959).
12. LA. R.S. 9:4861 (1950).
13. 125 So.2d at 154.

area of law which is *stricti juris* like privileges, there is no room to make any concessions.

As a question of getting at legislative intent or as a matter of re-examining policy considerations on the issue of the principal case, there is room for a different point of view. The current Civil Code provision[14] and all its antecedents to 1808[15] gave the protection of a privilege to those who did direct work or who supplied materials for a construction or repair job. Planiol refers to this privilege as coming from the old French law with even older Roman origins, and he gives as the reason for the privilege that the creditor has contributed something to the patrimony of another.[16] Since 1916, the Louisiana statutes have superseded the Code provisions, and with the increasingly complex operations involved in modern construction and repair work, the scope of the statutory protection has been expanded to include more categories of protected creditors and secured claims for necessary services and supplies which contributed to the accomplishment of the job.

In the drafting of the current statute, there was probably no thought given specifically to the lessor of machinery who performs no work. Since this area of the law must remain one of *stricti juris*, the only proper answer is one of legislative consideration. In this process, it might well be an improvement toward clarification if the category of those who contribute services be treated separately from the category of those who furnish supplies, instead of having two complicated subject elements and two separate verb phrases in one clause of a much longer sentence which in turn incorporates a variety of other similar but not the same enumerations.

## PRESCRIPTION

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### *Acquisitive Prescription (Ten-Year)*

The case of *Boyet v. Perryman*[1] raises several points of in-

14. LA. CIVIL CODE art. 3249(2,3) (1870).
15. Compiled Edition of the Civil Codes of Louisiana, under Art. 3249.
16. 2 PLANIOL, TREATISE ON THE CIVIL LAW no. 2913 *et seq.* (Eng. transl. 1959).

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1. 240 La. 339, 123 So.2d 79 (1960), reversing 98 So.2d 593 (La. App. 2d Cir. 1957).