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LOUISIANA LEGISLATION OF 1962: A SYMPOSIUM

CIVIL CODE AND RELATED LEGISLATION

*Robert A. Pascal**

CIVIL CODE

Effects of Separation and Divorce

Date of Dissolution of Community in Instances of Separation and Divorce; Effect on Liability for Alimony Pendente Lite

Article 155 has always provided that the judgment of separation from bed and board carries with it the separation of goods and effects. Practicing attorneys had long understood the effect of the judgment to be retroactive, so far as it concerned the dissolution of the community, to the date on which the petition for separation had been filed. Indeed, this most certainly was assumed to be the law in 1944 when Act 200 of that year amended Article 155 to provide that the spouses, on being reconciled, could re-establish the community "as of the date of the filing of the suit for separation from bed and board." Nevertheless, in 1956 the Supreme Court ruled, in *Tanner v. Tanner*,¹ that a judgment of separation (or divorce, by reason of Article 159) dissolved the community only as of the date of the rendition of the judgment, and not as of the date on which the suit had been filed. Act 178 of 1962 amended Article 155 to read: "The judgment of separation from bed and board carries with it the separation of goods and effects and is retroactive to the date on which the petition for same was filed." Thus it is now clear that a separation (or divorce) judgment dissolves the community as of the date on which the suit is filed.

Some of the effects of the judicial interpretation of Article 155 were that "the community" was charged with attorneys' fees for representation of the wife² and with alimony payable

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1. 229 La. 399, 86 So. 2d 80 (1956).

2. *Tanner v. Tanner*, 229 La. 399, 86 So. 2d 80 (1956).

to her, up to the judgment for separation or divorce.³ The amendment to Article 155 specifically exempts the first of these effects from the implications of having the community dissolved as of the date on which the suit was filed. Hence, attorneys representing the wife in separation and divorce suits may continue to collect from the husband, out of "the community,"⁴ their fees earned up to the date of the judgment for separation or divorce. On the other hand, it would seem quite clear that alimony *pendente lite* no longer can be charged "to the community" if a judgment of separation or divorce is rendered; once more the judiciary will have to consider whether such alimony *pendente lite* is (1) a personal obligation of the husband which he must discharge without hope of reimbursement in any case, or (2) an advance by the husband to the wife which he may recover from her if the suit results in a judgment of separation or divorce.⁵

The amendment to Article 155, moreover, declares that the retroactivity of the judgment of separation (or divorce) to the date on which suit was filed shall be "without prejudice . . . to rights validly acquired in the interim between commencement of the action and recordation of the judgment." This provision tracks the language in that portion of the article added by Act 304 of 1950 which limited the effect of the re-establishment of the community as of the date of suit so that "acquired rights" would not be affected. Presumably, this language was intended to apply only in favor of third persons acquiring rights without notice of the suit for separation or divorce, but certainly it is sufficiently lacking in clarity to give rise to some difficulties.

Marriage of Adulterer and Accomplice

Article 161 forbids marriage between a person divorced for adultery and his or her accomplice and declares their marriage a nullity. By Act 340 of 1958 a proviso was added ratifying such marriages "heretofore" contracted. Act 271 of 1962 amends the article by substituting the date December 31, 1962, for the "heretofore" and making it clear that the ratification shall be

3. *Messersmith v. Messersmith*, 229 La. 495, 86 So. 2d 169 (1956).

4. The Louisiana Supreme Court has ruled the husband not liable personally for the wife's attorney's fees. Thus the attorney is limited to collecting out of the community assets. *Franks v. Franks*, 236 La. 122, 107 So. 2d 415 (1958).

5. See the writer's discussion of this matter in connection with the decision in *Uchello v. Uchello*, 220 La. 1061, 58 So. 2d 385 (1952), in 10 LA. L. REV. 258-60 (1953). See also the Note on the same case in 13 LA. L. REV. 600 (1953).

good whether the marriage was celebrated "in this or any other state."

No doubt our legislators will be implored from time to time to amend Article 161 to ratify such marriages *as have been contracted* in contravention of its provisions; but the amendment by Act 271 goes beyond the ratification of such attempted marriages and *authorizes their celebration until the end of this year*. Perhaps it is more or less to be expected that legislators, possessing the weaknesses of all men, will act to ratify past violations of the law, even where they should not do so as a matter of morals; but to license future abuse of a law designed to protect morals and the public good, even for a limited time, is neither justifiable nor excusable.

Publication of the Sentence or Judgment of Interdiction

Article 398 was repealed by Oct 70 of 1962, at the suggestion of the Louisiana State Law Institute, on the ground that Article 4552 of the Code of Civil Procedure provides adequate means of notice of an interdiction. Under that article notice of proceedings and the judgment of interdiction itself must be recorded in the conveyance records of certain parishes. Thus recordation in conveyance records as required by Article 4552 of the Code of Civil Procedure now replaces publication of the judgment of interdiction.

Tutors and Curators Ad Hoc for Partition Proceedings

Article 1369 was repealed by Act 70 of 1962. It has been replaced by Article 4643 of the Code of Civil Procedure, added by Act 92 of 1962, which is discussed elsewhere in this symposium.⁶

Substitutions and Fidei Commissa

Act 45 of 1962 amended Article 1520 of the Civil Code to reflect the changes made in Article IV, Section 16, of the Louisiana Constitution as amended in 1962.⁷ The amendment to Article 1520 changed that article in three important respects: (1) to have it recognized that the general prohibition against substitutions is not to extend to substitutions (a) *provided for*

6. See p. 61 *infra*.

7. For discussion of this amendment see text accompanying note 11 *infra*.

in trusts and (b) permitted by the laws on trusts; (2) to delete the reference to *fidei commissa*; and, consistently, (3) to delete the paragraph affirming the abolition of the fiduciary or substituted donee's right to the trebellianic portion. Substitutions in trusts will be discussed under the amendments to the Trust Estates Law.⁸ Here the amendment to Article 1520 will be discussed only in terms of its effect on substitutions and *fidei commissa* not in trusts.

First, substitutions not in trust are still prohibited by Article 1520 and by Article IV, Section 16, of the Louisiana Constitution as amended in 1962. It is no more possible today than it was before to create a substitution outside a disposition under the Trust Estates Law. Secondly, although reference to *fidei commissa* has been deleted from Article 1520, the substance of the law has not been changed in any respect. The *fidei commissum* which Article 1520 sought to forbid is in reality an *indirect* substitution. In the (direct) substitution, the second or substituted donee takes directly by operation of the donor's will or act; in the *fidei commissum* the second donee takes indirectly from the donor through exercise of the first donee's will in accordance with the charge or condition imposed upon him by the donor. In either case, nevertheless, there is a substitution, and all substitutions not in trusts and not authorized by the laws on trusts remain prohibited. It is true that our jurisprudence sometimes characterized the Anglo-American type trust as a kind of *fidei commissum*; but today this kind of trust, whether or not properly so characterized, is expressly permitted under the Trust Estates Law and legislation to this effect has been constitutional since 1921. Hence there was no reason whatsoever to continue the reference to *fidei commissa* in Article 1520. Finally, there was no need to continue the reference to the abolition of the trebellianic portion. To the extent substitutions are still prohibited the reference was superfluous. To the extent substitutions may be permitted in trust legislation, now or in the future, all the rights and obligations under the substitutions should be specified by the trust legislation itself.

*Sale, Lease, or Mortgage of an Immovable Standing in the
Names of both Husband and Wife*

Act 353 of 1962 adds a paragraph to Article 2334 under

8. See p. 48 *infra*.

which immovable property standing "in the names of both the husband and wife may not be leased, mortgaged or sold by the husband without the wife's written authority and consent *where she has made a declaration* by authentic act that her authority and consent are required . . . and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated." (Emphasis added.) Once more the authority of the husband to use his discretion in the management of the assets of the community has been reduced. No doubt rules of this kind give some protection to the wife with an irresponsible husband, but it may be well to ask whether that protection is not being sought at the expense of depriving the family of the kind of peace which can exist only where the authority to plan and direct its activities is clear and final.

CIVIL CODE ANCILLARIES — CHANGES IN LA. R.S. TITLE 9

Quaker Marriage Celebrants

Act 66 of 1962 added a new section, R.S. 9:201.1, to authorize "clerks" of congregations of the Religious Society of Friends to act as celebrants of marriage in Louisiana. Louisiana's first legislation on marriage⁹ recognized the marriage of Quakers celebrated according to the customs of the sect. The new act differs from the older legislation in that it authorizes Quaker "clerks" to celebrate marriages even of persons not of that sect, placing them on equal footing with priests and ministers of the gospel.

"Prescription" of Marriage License

Under R.S. 9:206(c), added by Act 116 of 1962, a marriage license *ceases to be valid* at the end of thirty days from issuance. The "prescribed," or rather perempted, license is to be surrendered to the issuing officer in the event the parties seek a new license. The act does not state whether parties must surrender the license if they do not seek a new one. The act also provides that before a new license may issue the parties must submit new medical certificates. It would seem that the motive for introducing this legislation may have been to avoid the possibility of a marriage without medical examinations of recent date.

9. La. Acts 1807, ch. 17, § 37.

Marriages Licenses. Requirement of Birth Certificate

Act 207 of 1962 amended R.S. 9:242(B) to require that the birth certificate which must be submitted with an application for a marriage license shall have been issued not more than forty-five days before the application. The writer fails to understand the need for this legislation. Birth registries are seldom altered. If the harm being legislated against is the possible use of a birth certificate issued before correction of the birth registry, which certificate, therefore, might not reveal an impediment to the marriage, then it would seem that it would have sufficed to include in the license application a question concerning the current accuracy of the birth certificate.

Consent of Parents to Adoption

Under R.S. 9:422.1 as amended by Act 268 of 1960 the consent of a parent to the adoption of his legitimate child was not necessary if (1) the petitioner for adoption was the other parent, a grandparent, or the grandparents of the child having its custody by judgment, *and* (2) the parent whose consent otherwise would be necessary had failed to comply for one year with a court order for its support. Act 106 of 1962 amends R.S. 9:422.1 again to add an alternative to condition (2), above. This alternative is that the parent's consent need not be obtained if he is a "nonresident" and has failed to support the child for a period of one year after the award of custody to the other parent, grandparent, or grandparents. Very obviously the alternative to condition (2) was meant to eliminate the need for a parent's consent where he has *culpably* failed to support a child and it has not been possible to obtain jurisdiction over him to order him to support the child. But the words of the amendment are broader than that. A parent may have "failed" to support a child because he was not able to do so at the time or because he had not been apprised of its need. "Failure" under such circumstances would not be sufficient justification for terminating the relationship of parent and child, and adoption does just that. The judiciary will be required to interpret this inartfully drawn legislation with care to prevent it from being an instrument of injustice.

Horizontal Ownership of Apartments

R.S. 9:1121-9:1144 is a veritable code introducing, stating the conditions for, and regulating the rights and obligations of

persons at interest in the "horizontal ownership" of apartments. The main features of the act may be stated here. "Horizontal property" is described as a "regime" and is created by the *recordation* — not the execution — of a "master deed" to that effect executed by all co-owners of a building. Thereafter each separate apartment may be "conveyed and encumbered," leased, or otherwise dealt with independently of other apartments in the building. The owners of the individual apartments share the "common elements" (land, main walls, roofs, halls, stairways, lobbies, entrances, exits, and the like) in accordance with the scheme agreed upon at the time of the constitution of the regime or agreed upon later by all owners of the apartments. The administration of every building owned horizontally is to be in accordance with by-laws inserted in or appended to the "master deed."

There can be no doubt that horizontal ownership, or the separate ownership of apartments in a building, is a necessity which comes with urbanization. The act, however, is obviously a copy of an Anglo-American model, and so faithful is it to that model that the terminology is often foreign to our system of property. The most astonishing provision in the whole act in this regard is R.S. 9:1125, under which "any apartment may be held and owned by more than one person as *joint tenants*, as *tenants in common*, as *tenants by the entirety* or in any other *real estate* tenancy relationship recognized under the laws of this State." Strictly speaking, Louisiana property law does not have the concept "real estate" or "tenancy," but our judges are accustomed to dealing with the loose usage of these terms by the legislature and the bar. Probably, too, our judges would not find it difficult to translate "tenants in common" into owners in indivision. But what can a judge do with such terms as "joint tenants" and "tenants by the entirety"? Louisiana law does not employ these terms or have reasonably similar concepts. Did the author of this legislation intend to introduce these Anglo-American forms of property interests into our law? If he did, then he must necessarily have failed in the attempt, for incorporation of foreign law by reference only — and this is all we have in the words "joint tenants" and "tenancy by the entirety" — is forbidden by the Louisiana Constitution.¹⁰ There

10. LA. CONST. art. III, § 18: "The Legislature shall never adopt any system or code of laws by general reference to such system or code of laws; but in all cases shall recite at length the several provisions of the laws it may enact."

is a severability clause in the act, R.S. 9:1143, and so it should be possible to preserve the possibility of ownership of apartments in indivision by holding the references to "joint tenants" and "tenants by the entirety" to be unconstitutional.

Trusts

Substitutions, Fidei Commissa, and Trusts.—Article IV, Section 16, of the Louisiana Constitution was amended¹¹ pursuant to a proposal of the Louisiana State Law Institute. The amendment specifically (1) allows the legislature to "authorize the creation of express trusts for any purpose, including, but not limited to, private trusts, trusts for the benefit of employees, trusts for educational, charitable, or religious purposes, and mixed trusts for any "combination of purposes" (emphasis added); (2) permits substitutions contained in trusts to the extent authorized by the legislature; (3) permits the legitime to be placed in trust to the extent authorized by the legislature; (4) deletes the reference to "fidei commissa" formerly contained in the section; and (5) eliminates all language previously found in the section on the permissible duration of trusts. The purposes of the amendment should be clear: (a) to free the legislature to enact laws authorizing any and all kinds of trusts, but to prohibit all kinds of trusts not authorized by legislation; (b) to eliminate the unnecessary prohibition against *fidei commissa*, all *fidei commissa* being either substitutions (in which case the prohibition is superfluous) or (as our courts have sometimes implied) trusts expressly authorized by Article IV, Section 16, since 1921; (c) to affirm emphatically that a trust authorized by legislation shall not be deemed unconstitutional on the ground that it itself involves a substitution, thus avoiding difficulties resulting from the decisions in *Succession of Guillory*¹² and *Succession of Meadors*,¹³ (d) to affirm that particular dispositions in trusts may involve or contain such substitutions as may be authorized by legislation on trusts, thus opening the way for the possible enactment of legislation permitting class gifts and other future interests; and (e) to eliminate doubt as to the constitutionality of placing the legitime in trust to the extent authorized by legislation. In brief, the amendment was enacted to place all aspects of

11. Amendment No. 521 of 1962.

12. 232 La. 213, 94 So. 2d 38 (1957).

13. 135 So. 2d 679 (La. App. 2d Cir. 1961), cert. denied. See the discussion of this and the *Guillory* decision (cited in note 12, *supra*) in Note, Trusts—Prohibited Substitutions, 22 LA. L. Rev. 889 (1962).

trust legislation directly under the control of the legislature with only one constitutional limitation, that the legitime may not be avoided through the trust device, though it may be placed in trust in accordance with legislation in force at the time the trust is created.

Lawfulness of Trusts.—Act 44 of 1962 deleted from R.S. 9:1791 the words: “Nothing in this Chapter shall be construed as applicable to or affecting donations in trust, or otherwise, for educational, charitable, or religious purposes; or as abolishing forced heirship; or as authorizing the creation of substitutions, *fidei commissa*, or trust estates except to the limited extent expressly provided for herein.” Presumably this change, sponsored by the Louisiana State Law Institute, is intended primarily to render the section in conformity with Article IV, Section 16, of the Louisiana Constitution as amended in 1962.¹⁴ Moreover, the last phrase of the clause had been seized upon in *Succession of Meadors*¹⁵ in such a manner as to give rise to doubt that any but the most restricted kinds of trusts could be created, and it is very well that this language shall not be of trouble in the future. In fact, the whole section could have been repealed without harm, for it adds nothing to the constitutional and other statutory provisions on trusts.

Maximum Allowable Duration of Trusts. — Act 74 of 1962 amended R.S. 9:1794 to clarify the law on the measure of the life of a trust. Before the amendment, R.S. 9:1794 provided that a trust must end, *inter alia*, at “the death of the [natural person] beneficiary.” This wording left much to interpretation. Some persons believed each trust was partitionable and had to end as to each beneficiary on his death, even though this construction would have been difficult to justify under the language of R.S. 9:1903. Others were of the opinion a trust could continue in existence as long as any beneficiary, of either principal or income, remained alive. Still others, perhaps those in the majority, thought the trust might continue until the death of the last surviving income beneficiary, but not thereafter. The amendment fixes this last view as the law and, furthermore, makes it clear that a principal beneficiary is to be considered as income beneficiary, for purposes of determining the maximum duration of the trust, if by stipulation of the settlor he is to

14. See p. 48 *supra*.

15. 135 So. 2d 679 (La. App. 2d Cir. 1961).

receive income from the trust after the death of the last surviving income beneficiary.

In the writer's opinion, the amended R.S. 9:1794 still contains a questionable rule. It is that a settlor is presumed to have intended the trust to last for the maximum allowable period unless he stipulates an earlier termination. Suppletive legislation such as R.S. 9:1794, which spells out a provision for use in the absence of contrary stipulation, ought to provide a rule which conforms to the most probable intention of the settlor. It is a mistake to assume that every settlor must desire a trust to last as long as possible. A settlor creating a trust for minors, for example, may intend that the trust last only until their majority; yet by reason of his being unadvised or ill advised he may fail to state a termination date. It is bad enough to permit trusts to endure so long. The presumption with regard to its duration should not aggravate the situation by going counter to both the interests of the beneficiary and the possible intention of the settlor. It would be preferable to presume a short duration for the trust if none is specified.

Mixed Trusts. — *Succession of Maguire*¹⁶ cast doubt on the lawfulness of a single trust containing provisions in favor of a charity and provisions in favor of a person. R.S. 9:1844, added by Act 44 of 1962, should dispel those doubts. For as long as there is a private beneficiary, the trust is to be administered under the Trust Estates Law; thereafter it is to be administered under the laws relating to charitable trusts. Of course, the *validity* of a disposition in a mixed trust, as distinguished from the *administration* of the trust, is governed by the appropriate statute, that on private trusts or that on charitable trusts, even though for the time being the trust as a whole may have to be administered under the laws on private trusts.

Number and Kinds of Beneficiaries. — Although R.S. 9:1903 and other provisions of the Trust Estates Law had always made it very clear that there might be beneficiaries of income, beneficiaries of principal, and beneficiaries of both income or principal, in whole or in part in any trust, the *Succession of Guilloy*¹⁷ has raised doubts whether or not the Supreme Court would recognize a trust for multiple beneficiaries. The amendment to R.S. 9:1903, by Act 44 of 1962, should remove all doubts. There may be beneficiaries of any beneficial interest or combination

16. 228 La. 1096, 85 So. 2d 4 (1955).

17. 232 La. 213, 94 So. 2d 38 (1957).

of beneficial interests in trust, in whole or in part. It may be noted that although the amended section speaks only of interests in income and principal, there is no reason to doubt there may be usufruct and naked ownership beneficial interests as well, for under the Trust Estates Law itself any interest in property recognized in Louisiana law may be placed in trust.¹⁸

Effect of Death of a Beneficiary. — The amendment to R.S. 9:1921 by Act 74 of 1962 changes the wording and possibly the substance of the rule. Formerly this section read that upon "the beneficiary's death" his interest vested in his heirs or legatees subject to the trust. Now the word "principal" has been inserted before "beneficiary." Thus today an income beneficiary's interest does not survive his death any more than a usufructuary's interest survives his. The amended section, however, does not specify what happens to the deceased income beneficiary's interest. If the trust instrument provides for a successor income beneficiary, then he receives it.¹⁹ Otherwise, by analogy to the case of usufruct, the principal beneficiaries would be entitled to it.²⁰

Investment of Trust Funds. — Act 44 of 1962 amended R.S. 9:2061-2062 and repealed R.S. 9:2064-2065 in order to (1) abolish the legal list for trust investments and (2) substitute therefor the "prudent man rule" now found in the law relating to investments by tutors and curators.²¹ In addition, the criterion for permissible court approval for investments deviating from the settlor's instructions, stated in R.S. 9:2062, has been changed. Formerly it was necessary that the court find that adherence to the settlor's instructions would affect the interests of the beneficiary adversely "to a serious extent." Those four words have been eliminated, and now it is only necessary that the court find that the beneficiary's interest would be affected "adversely."

The writer regards very favorably these changes in the rules on the investment of trust funds, for after a person has parted

18. LA. R.S. 9:1861 (1950).

19. *Id.* 9:2100 (E) recognizes the possibility of successive income interests. Successive usufruct interests are recognized by LA. CIVIL CODE art. 609 (1870).

20. SCOTT, *THE LAW OF TRUSTS* § 143 (1939) lists four possible dispositions under Anglo-American law: "(1) it might be paid to the surviving life beneficiaries; (2) it might be paid to the estate of the deceased beneficiary; (3) it might be paid to the estate of the settlor as property not disposed of by his will; (4) it might be accumulated and on the termination of the trust paid to the persons entitled to the principal of the trust estate."

21. LA. CODE OF CIVIL PROCEDURE arts. 4269, 4554 (1960).

with property by transferring it to another, whether subject to a trust or not, he should have little if anything to say about its management. The interest is then the donee's or beneficiary's and, if there is a trust, the trustee should be regarded as the beneficiary's fiduciary, not that of the settlor.

*Termination of Obligations Imposed in Acts of Donation
to Religious Entities*

R.S. 9:2321 and 9:2322 were added by Act 462 of 1952 in order to provide that conditions and charges with regard to the provision and use of land donated to religious entities would be considered satisfied if the property had been possessed and used for the purposes intended by the donation for a period of sixty years. Act 226 of 1960 reduced the period to thirty years, but otherwise left the original legislation intact. Act 439 of 1962, however, added to R.S. 9:2321 the requirement that the act of donation be of record in the parish in which the land is situated. Why recordation or nonrecordation should make a difference in this matter is not known by the writer, for it is not the recordation which terminates the conditions and charges, but "possession" and "use" for the prescribed time, and these are not matters of record.

At the same time Act 439 of 1962 amended R.S. 9:2322 presumably to make its language grammatical and clear, but unfortunately a senseless requirement has been introduced in the process. Apparently R.S. 9:2322 was originally intended (1) to declare that the donees could treat the immovable as owned free of conditions and charges *upon* declaring it to have been possessed and used for the purpose intended for the required period of years and (2) to declare the purpose and principle of the statute, that is to say, the "public policy . . . against restricting property from commerce." Before amendment in 1962, the section read "and" where it should have read "upon" in order to require the declaration of use in the act of transfer or encumbrance by the donee. The "and" was deleted and the "upon" properly inserted by the 1962 amendment. But at the same time a second "upon" was inserted before the clause declarative of the purpose and principle of the legislation, so that now, apparently, the act of transfer or encumbrance by the donee must contain a clause declaring the "public policy" behind the legislation. Such a requirement could not have been

intended by the drafters of the amending legislation, but it is there.

Registry of Donations

R.S. 9:2371, added by Act 22 of 1962, leaves much to be desired in terms of both style and content. The first clause declares: "No donation of property which may be legally mortgaged shall be effective as to the donees or third persons until the act of donation, as well as the acceptance thereof, is registered in the office of the parish register or recorder of mortgages." A proviso clause, however, states that recordation of the donation and acceptance in *either* the mortgage *or* the conveyance records shall constitute recordation (apparently rendering the donation effective as to the donee) and render the donation effective as to third persons. Thus the donation is effective between donor and donee and as to third persons as well whether recorded in the mortgage or conveyance records. The legislation is declared to be remedial in character.

The language of the first clause of the new section follows that of Article 1554 of the Civil Code and the sponsors of the legislation may have intended originally to make it an amendment to that article. Be that as it may, the new legislation certainly amends the law. First, under Article 1550, all donations are complete between the parties without registry or recordation. Now under R.S. 9:2371 "property which may be legally mortgaged" cannot be donated effectively even as to the donee without registration in the mortgage or conveyance records. Secondly, whereas formerly a donation of property which was subject to mortgage — an immovable, considering the date of the adoption of this article — was to be recorded in the mortgage records, now it may be recorded in either the mortgage or the conveyance records and in either case it is valid as to all persons. But it may be well to state a *caveat*. The new legislation does not have the effect of freeing the third party acquirer of the obligation of reduction in the event the donation exceeds the disposable portion. All that the legislation states is that the donation shall be *valid* as to third parties if recorded. Collation can be urged only where the donation is, in the first place, valid.

Privilege on Works on Adjacent Lots; Partial Release

Act 102 of 1962 amended R.S. 9:4816 to add a Subsection (C) providing for partial release of the single privilege, granted by

Subsection (A), to persons furnishing labor or materials for simultaneous or continuous constructions on adjacent parcels of land. Under the new section a partial release may be obtained upon presentation to the recorder of a receipt for full payment of a portion of the work. If the person furnishing labor or material refuses to execute such a receipt, then he is allowed sixty days (beyond the sixty allowed for the filing of the original claim) in which to record a claim for the balance due him, which recordation will preserve his privilege as to such balance. In the absence of the filing of a claim for the balance due, the recorder may cancel the inscription as to the land on which the works have been completed. If the claim for the balance due is filed, the new claim, it is to be assumed, defines the limits of the privilege.

Mortgaging of Mineral Rights; Remedies

Act 444 of 1962 amended R.S. 9:5101 to enlarge it extensively and convert it almost into a code on the mortgaging of mineral rights. This new legislation is far reaching and in some respects revolutionary, *e.g.*, giving the mortgagee the right to operate the property and to apply all revenues from it, to which the mortgagor may be entitled, to the payment of the principal indebtedness, in effect converting the mortgage into a kind of anti-chresis.

Actions To Enforce Zoning, Building, or Subdivision Restrictions

Act 455 of 1962 changed Subsection (B) of R.S. 9:5625 to provide that once the prescription provided by Subsection (A) has run the property violating the restriction "shall enjoy the same legal status as land uses, construction features of building[,] or subdivisions made non-conforming by the adoption of any zoning restriction, building restriction or subdivision regulation." The former provision was to the effect that the property in question "shall be forever free of the restriction or regulation violated. . . ." It would seem, therefore, that the amendment was intended to reduce the effect of the prescribed violation from (1) an acquisition of freedom from future restriction of the same kind to (2) the lesser right of non-conforming, but not necessarily perpetual, use.

NOTES ON STATUTES RELEVANT TO THE CIVIL CODE AND
ITS ANCILLARIES

Second Mortgages.—New legislation, R.S. 6:766.1, added by Act 100 of 1962, permits homestead and building and loan associations to make loans secured by second mortgages on property on which they own first mortgages.

Act 317 of 1958, which became R.S. 6:796, made it possible for homestead and building and loan associations to take conventional mortgages on immovables and yet enjoy the vendor's privilege and other rights obtained in a sale and re-sale transaction. Act 191 of 1962, R.S. 6:766.2, now adds still another way in which such organizations may accept mortgages and obtain the vendor's privilege. The homestead or building and loan association may participate in the sale of an immovable and accept from the purchasers, for the credit portion of the price, a note secured by a special mortgage and vendor's privilege. Thus little by little the law is coming to recognize directly what it had long recognized indirectly, that the lender of the purchase price is entitled to the same security as the vendor who extends credit. Why the recognition of this right should extend only in favor of some purchase money lenders, *i.e.*, homestead and building and loan associations, is not clear. It would seem that all purchase money lenders should enjoy the security rights enjoyed by all vendors.

Lease and Hire of Services.—Act 104 of 1962 adds a proviso clause to R.S. 23:921 under which, completely contrary to the spirit and letter of the section as originally written, an employee may contract not to engage in his employer's business, over the same route or in the same territory, for a period of two years, if the employer has incurred "an expense" in either training the employee or advertising the business. No definition of "expense," "training," or "advertising" is contained in the act.

Prescription of Actions Arising out of Public Contracts.—R.S. 38:2189, added by Act 15 of 1962, establishes a three-year prescriptive period in relation to all suits against the contractor or his surety growing out of public works contracts by the state, its agencies, boards, and subdivisions.

Prescription of Claims of Materialmen and Laborers on Public Works.—Act 16 of 1962 added a clause to R.S. 38:2247 which cer-

tainly will require clarification. The section now reads in part as given below, the added clause being designated by italics:

“Nothing in this Part shall be construed to deprive any person or claimant within the terms of this Part of his right of action on the contractor’s bond which shall accrue at any time after maturity of his claim, *which said action must be brought against the surety and/or the contractor within one year from the registry of acceptance of the work or of notice of default of the contractor. . . .*”

No opinion is expressed on the meaning or significance of this amendment.

Private Sale of Certain Expropriated Land.—R.S. 48:221 provides for the expropriation of the “balance” of a tract or lot of land as well as that part of it desired for highway purposes whenever that “balance” is less than a specified size. Formerly the state could dispose of that “balance” parcel only by public sale. Under the section as amended, however, the state may sell that parcel back to the original owner, his successor in title, or the adjoining landowner, *who owns land separated from the highway by that parcel*. The price must be the original cost to the state or the present market value, whichever is higher.

CIVIL PROCEDURE

*Henry G. McMahon**

Only six statutes adopted at the 1962 session affect the subject, but these make a number of rather important changes in our procedural law. For convenience of treatment, this section of the legislative symposium will be divided into two parts. The first of these will be devoted to consideration of the amendments of the Louisiana Code of Civil Procedure made by two of these statutes; the remaining statutes, affecting other provisions of our procedural positive law, will be considered in the second part.

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