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Private Law: Property

Frederick W. Ellis

been intended that a person unable to manage his estate because of some mental deficiency short of insanity but able to care for his person should not be interdicted when he was wasting his property to his detriment?

The courts are moving in this direction of allowing interdiction when a person is unable to care for his property though he may be able to care for his person. This has been done by interpreting the caring-for-person requirement to mean more than performing menial tasks such as dressing, washing, and doing household chores. In the language of the decisions, insane persons are often able to do these things, and more capabilities than these must be present to thwart a judgment of interdiction.[49]

PROPERTY

*Frederick W. Ellis**

Predial servitudes are immovable[1] real rights.[2] The term " 'real right' under the civil law is anonymous with proprietary interest, both of which refer to a species of ownership."[3] This definition, although questionable as to some types of real rights, is certainly correct as to predial servitudes, since they result from a partial dismemberment of the elements of ownership.[4]

It must follow that rules on the acquisition of ownership of immovables are generally applicable to the acquisition of predial servitudes.[5] But an opposite conclusion was indicated[6] in *Blanda v. Rivers*.[7] The case posed a question of whether possession of

49. *In re* Corbin, 187 La. 968, 175 So. 636 (1937); Landry v. Landry, 171 La. 280, 130 So. 866 (1930).

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1. LA. CIV. CODE art. 471.

2. *Id.* art. 490.

3. 2 A. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE 265 (1967), quoting from Hardwood Oil & Mining Co. v. Black, 240 La. 641, 651, 124 So.2d 764, 767 (1960) and Reagan v. Murphy, 235 La. 529, 541, 105 So.2d 210, 214 (1958).

4. *See* 2 A. YIANNOPOULOS, CIVIL LAW TREATISE 265 (1967).

5. Of course, it would seem inappropriate to mechanically apply such general rules where there are contrary special rules on servitudes, or where special interpretation is appropriate to accommodate peculiarities of servitude problems.

6. The word "indicated" is advisedly used. It is questionable whether the court really "held" that the rules of the rejected articles were inapplicable, in spite of language to that effect. After rejecting the articles on precarious possession, the court stated that adverse possession "is essential in the acquisition of ownership by prescription . . . and must also be an element in the acquisition of a predial servitude." 210 So.2d 161, 166 (La. App. 4th Cir. 1968). It is impossible to hold at the same time that possession may be precarious but must be adverse.

7. 210 So.2d 161 (La. App. 4th Cir. 1968). The case is also interesting for its holding that visible gas, sewer, heating flue, and water pipes were the subject

pipes protruding over a neighbor's land was precarious under possessory rules relating to acquisition of ownership of immovables. The pipes had been installed more than ten years prior to suit in connection with a permanent and major remodeling of the defendant's building, for plumbing and heating service to numerous apartments made in remodeling, all pursuant to prior verbal permission of plaintiff's ancestor in title. Defendant used the permission successfully to show good faith. Plaintiff failed in contending the permission made acquisitive prescription impossible, under the articles on precarious possession.

The Fourth Circuit Court of Appeal refused to apply Civil Code Articles 3490 and 3556(25) on precarious possession to acquisitive prescription of a servitude under Article 765 because Article 3490 is in a section of the Code which relates to acquisition of ownership of property.[8] Curiously enough, a rule on good faith, being required for ten-year prescription of servitudes, applied in the opinion, was sired by the relationship between that very section of the Code and Article 765.[9]

The court may have been hard pressed to meet the surface logic of plaintiff's argument, based on Articles 3490 and 3556(25).[10] The argument called for a result that seemed clearly

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of a continuous, apparent servitude, where their usage entailed the act of man on the dominant estate, in turning on taps or flushing commodes. This holding is consistent with other Louisiana jurisprudence. *See* Note, 28 LA. L. REV. 134 (1967), for a treatment of jurisprudence on whether the act of man must be on the servient estate to render a servitude discontinuous.

8. 210 So.2d 161, 166. The court had reference to "Section 2 Of the Prescription By Which The Ownership of Property Is Acquired," which appears under LA. CIV. CODE bk. III, tit. XXIII, ch. III.

9. The court applied the rule that ten-year prescription of a continuous, apparent servitude under Article 765 requires good faith possession, but does not require the "just title" called for by the general articles on ten-year good faith prescription, citing Kennedy v. Succession of McCollam, 34 La. Ann. 568 (1882), and a discussion of that case in Comment, 15 LA. L. REV. 777, 790 (1955). 210 So.2d at 164, 165. It was the relationship between Article 3504 in Section 2, note 8 *supra*, and Article 765, which resulted in the interpretation that good faith is required for Article 765 prescription.

Further proof of the fallacy of the notion that Article 3490 has no application to servitude prescription can be found in Article 3505, under Paragraph 2 of Section 2, which states: "All of the rules established in the preceding paragraph [including Article 3490] . . . are applicable to the prescription of thirty years . . . ." The prescription of thirty years unquestionally relates to the acquisition of servitudes under Article 3504. It would seem strange, and without reason, to have 3490 apply to thirty-year servitude prescription and not to ten-year servitude prescription.

10. The plaintiff contended that the defendant's possession was precarious because commenced by the consent of the owner of the alleged servient estate. The previously obtained consent of the owner of the neighboring estate formed the principal basis for the defendant's successful contention that the pipes had been possessed in good faith. Without considering other articles, the special facts of the case or the nature of the servitudes, the rule of Article 3490 would have seemingly defeated the defendant's plea of prescription.

wrong in the light of other recognized principles,[11] since defendant's possession seemed to be so clearly for the benefit of his own estate and in the good faith belief that he had a right to have the pipes so located. The abstract question of whether the Code section in question governed servitude problems may have been influenced accordingly.

This writer agrees with the result but by use of the rejected articles, interpreted in light of their purpose and the peculiar facts of the case.[12] Those facts, and especially the implied permanency of the permission, furnish a basis for distinguishing the case and avoiding its future misuse as precedent for an erroneous view.[13]

Whether an object may be acquired by prescription depends upon its susceptibility to private ownership; that is, whether it is a public or a private thing.[14] Civil Code Article 482 provides that there are things which "though naturally susceptible of ownership, may lose this quality in consequence of their being applied to some public purpose, incompatible with private ownership; but which *resume this quality as soon as they cease to be*

11. It was clear to the court that under the facts of the case: "At no time did Rivers [the defendant] possess or enjoy the right of servitude for or in the name of Landry, but always for the exclusive benefit of his estate." 210 So.2d at 166.

12. Defendant had a building with a party wall on the property line. There was never any building in the area near the wall on plaintiff's side. In 1951, defendant obtained the permission of Landry, plaintiff's ancestor in title, to install pipes through holes in the wall, to project over Landry's property, as a part of major alterations to create rental apartments in defendant's building. No complaints were made until Landry sold his property to plaintiff in1965. The court treated the matter purely as a servitude prescription problem, since the pipes projected over Landry's land, but it is interesing to speculate whether it might have been better approached by use of Article 685, relative to the right of an owner of a wall held in common to affix works thereto with the consent of the other.

13. The defendant would have reasonably believed the permission was permanent. It was for a permanent installation that could not be replaced without serious detriment to defendant's property. Continued possession of the space for the pipes would have been not by revocable indulgence, but in the good faith belief that it was pursuant to a right, *i.e.*, with "just reason to believe himself master of the thing" under Article 3451. The "thing" possessed was not the soil or the full ownership rights of the estate, but a right of servitude on the space related thereto. Even though commenced "by the leave of another" in one sense—as is indeed true of most if not all good faith possession commenced under a presumed real right obtained from another—the possession would not have been understood as lasting only "during his [the other's] pleasure." Article 3556(25) defines precarious in terms of *both* elements joined by the conjunctive "and." Even if "and" was loosely used in the sense of "or" in the article, the added phrase "during his pleasure" still shows the type of permission contemplated—revocable indulgence. The cause of precariousness involves an absence of purpose that the detainer retain the thing indefinitely and thus examples of precarious possession involve only those arrangements where a permanent right is not granted by the permission. *See* 1 PLANIOL, TREATISE ON THE CIVIL LAW nos. 2313, 2316 (La. St. L. Inst. transl. 1959).

14. LA. CIV. CODE arts. 3479 and 483.

applied to that purpose, such as the . . . streets." (Emphasis added.)

This Article received no mention in *Village of Folsom v. Alford.*[15] The opinion relied upon the insusceptibility of streets to private ownership in making the overly broad statement that "if there is, at any time, a dedication, no one thereafter is able, by prescription, to acquire title to the dedicated property."[16] The statement was in response to the contention that the street had become susceptible of private ownership because of nonuse and could be the object of acquisitive prescription.

Unless Article 482 and *City of New Orleans v. Salmen Brick & Lumber Co.*[17] are inapplicable, or unless formal revocation of a statutory dedication is equated with the question of whether a street is any longer "applied" to a public purpose, the court's broad statement is questionable, although perhaps supported by other broad language in the jurisprudence.[18]

There is no valid pragmatic reason to exclude property from commerce and private use or acquisition which has for many score years never been even partially used for a public purpose. There are numerous old stillborn subdivisions where streets are dedicated but never used, and the public authority never gets around to a formal revocation of the dedication, perhaps in the hope of ultimately picking up a little oil money from "cow pasture streets." Although the instant case and other jurisprudence dictates the use of caution by a title examiner in dealing with private claims of ownership to privately possessed statutorily dedicated[19] street areas, in this writer's view the legislation does not call for treating such areas as "public things" when they have ceased to be or never were applied to public use. Article 482 plainly supports this view. Revocation of dedications is a method of abandoning public title and vesting it in ad-

15. 204 So.2d 100 (La. App. 1st Cir. 1967).

16. *Id.* at 105.

17. 135 La. 826, 66 So. 237 (1914). On rehearing in this case, prior jurisprudence was construed as meaning that a thing ceases to be applied to a public purpose when it is no longer used for the public purpose. The facts did not seem to actually make such a situation, but it was rather a case where the property never was used for public purposes.

18. *See, e.g.*, Kemp v. Town of Independence, 156 So. 56 (La. App. 1st Cir. 1934). The case did not actually involve a claim that the property had been acquired by acquisitive prescription because of alleged susceptibility to private ownership due to cessation of public use.

19. Streets which are impliedly dedicated, or which, for other reasons, are only the subject of a servitude of passage, pose a different question, since the servitude is subject to ten-year liberative prescription. *See* Paret v. Louisiana Highway Comm'n, 178 La. 454, 151 So. 768 (1933).

joining landowners. It may incidentally cause a street to become susceptible of private ownership, but it is not the *only* means of causing a street area to resume its susceptibility to private ownership. The statutes which authorize revocation ought not to be construed as repealing Article 482 and reversing the *City of New Orleans* case.[20] Even though a street is dedicated to public use, this should not prove that it is applied to a public purpose. Actual public use should be necessary for this purpose even though unnecessary for vesting title in the public, a completely different matter. The public interest in possible future use of the streets can be guarded by other means. If municipalities are not presently applying dedicated lands to public use and if they have long range legitimate intentions to use such land, a special statute permits them to file a notice to protect against acquisitive prescription.[21] By analogy to possession and servitude rules, municipalities which actually apply part of contiguous street areas to public use, the whole of which were dedicated to public use by a single act,[22] ought to be viewed as having applied the whole street to public use. Indeed, close study of the *Village of Folsom* case shows such facts, which might serve as a basis for distinguishing or limiting its future application. This accords with what seems to be the real purpose behind making public streets insusceptible of private ownership—to prevent real streets from being partially whittled away by encroaching private claims.

Two other cases illustrate interesting application of well-established principles governing the nature of rights created by or requirements for dedication of roads or streets, but reflect some questionable analysis.

In *Milliet v. Bonnette*,[23] an unrecorded plat showed a road and adjoining land was sold off by reference to the road and the plat. An implied or tacit dedication was correctly recognized as creating a servitude. The court fortified its conclusion that a public servitude of passage existed by dictum pointing to the fact that the Louisiana Highway Department had built the road

20. City of New Orleans v. Salmen Brick & Lumber Co., 135 La. 826, 66 So. 237 (1914).

21. LA. R.S. 9:5804 (1950).

22. *Cf.* Paret v. Louisiana Highway Comm'n, 178 La. 454, 151 So. 768 (1933), where the road was the subject of two rights-of-way servitude grants, one for its original width, and another to widen the road. The extra width, being the subject of a separate grant, prescribed from non-use. A contrary result might have been reached if the whole width was the subject of one grant and part of it was used, although even this view is complicated by Article 798.

23. 203 So.2d 809 (La. App. 4th Cir. 1967).

and maintained it for more than three years, quoting the prescription provisions of R.S. 48:491. Actually, the three-year maintenance prescription correctly pertains only to maintenance by parish or municipal authority. Perhaps R.S. 48:491 might have been correctly employed, if—and this was not discussed—the opening of the road by the State Highway Department was by virtue of an act of the legislature,[24] or by virtue of some arrangement with the parish.

Banta v. Federal Land Bank of New Orleans[25] involved facts which make one wonder if the rule that an intent to dedicate must be clearly established really means that an intent to dedicate need *not* be *clearly* established, in practical application. A very large tract of rural property had been surveyed and divided into numerous "lots," ranging between 40 and 100 acres in size, with strips shown on the recorded plat of survey. The disputed strip did not separate the two lots upon which a mineral servitude had been reserved in 1935, but traversed both lots. The ultimate issue was whether the north and south portions were contiguous for mineral prescription purposes, which turned on whether the strip was owned by the public in full ownership. The plat bore an inscription that the "public roads laid out... as indicated and shown on said map... while reserved for the purchasers, ourselves and the public, shall at all times be subject to the right" of the sugar company subdivider or its assigns to use it for railroads. The court recognized that there is no doubt that an intent to dedicate *"must be clearly established,"*[26] but reversed the trial court's finding that the intent was not sufficiently proved. The trial court's finding was buttressed by additional facts: the word "road" did not appear on the unsurveyed strip in question while other strips on the plat were clearly marked "road" and surveyed by compass courses and distances; the lot numbering system at the strip in question,

24. LA. R.S. 48:491 (1950) also provides that "all roads . . . opened, laid out or appointed by virture of any act of the legislature" shall be public roads. This or the appropriation doctrine seems to vest the state with title to a servitude immediately upon actual opening or construction of a road by the state, except when a landowner might speedily seek an injunction and thus avoid an estoppel which would preclude his objection to the unconstitutionality of the appropriation. As a practical matter, judicial refinement of the appropriation theory may make the prescription method of acquiring public servitudes largely moot. *See* Gray v. State, Through the Department of Highways, 250 La. 1045, 202 So.2d 24 (1967), noted 28 LA. L. REV. 652 (1968).

25. 200 So.2d 107 (La. App. 1st Cir. 1967), *writ refused.*

26. 200 So.2d 107, 112 (La. App. 1st Cir. 1967) (emphasis added), citing Mecobon, Inc. v. Police Jury of Jefferson, 224 La. 793, 70 So.2d 687 (1954), which used the rule in holding that certain symbols on a plat and other circumstances were not enough to evidence an intent to dedicate a park.

unlike lot numbering at the other strips on the plat, suggested that the land on either side was all one lot; a road would have been neither necessary nor desirable along the disputed strip due to a nearby parallel and pre-existing public road; and the strip's presence on the plat was explainable as merely reflecting the physical presence of a tram railroad apparently used in private sugar operations. The court of appeal based its reversal of the trial court's finding on the intent question—which to this writer was at least arguably a finding of fact that ought to be subject to the manifest error rule—on the grounds that the language on the plat and the lines marking the strips and tramroads *"clearly"* indicated an intention to dedicate the disputed strip to the same extent as the other strips shown on the plat.

This writer long ago developed a belief that subjective rules pertaining to whether facts must be "clearly" established may prove unreliable when one analyzes details of the actual application.[27] With all due respect to the court which decided *Banta,* and while its view that there was an intent to dedicate the strip is not unreasonable, only a legal mind can understand how such unclear evidence could *clearly* establish an intent to dedicate the disputed strip. Realistic analysis of the *Banta* case suggests that if a subdivision plat is recorded and reflects a strip which might reasonably be interpreted as evidencing an intent to dedicate the space as a public road, even if that intent is *not clearly* established, a dedication sufficient to vest the public with title to the soil will probably be judicially recognized. It is not even necessary, if the case is correct as it seems on this point, to have an intent to dedicate pursuant to any statute. Such a result fosters greater employment of prescription to extinguish unused portions of mineral servitudes by dividing larger tracts into non-contiguous parcels, thus encouraging greater efforts at mineral development and simplifying title problems, *i.e.,* the result serves the more basic public interest in causing land to be kept in commerce and utilized. It also favors public claims over private claims to oil revenue attributable to road or street spaces, title to which has long been of no concern to anyone until oil is discovered. But as suggested in the discussion of the *Village of Folsom* case, for dedicated areas long unused as streets or roads the basic public interest in having land used and in commerce is better served by favoring private possessory

27. *Cf.* Note, 17 LA. L. REV. 833 (1957).

interests through classification of unused streets and roads as private things susceptible to acquisitive prescription.

Coastal States Gas Prod. Co. v. State Mineral Board[28] illustrates the possible continuing importance of the question of whether waterbodies are and were navigable in 1812 and therefore public things insusceptible of alienation, even in a case where there is an *apparent* severance from sovereignty. It may also create an undesirable addition to our title law. It was conceded that the disputed portion of the bed of Bayou Lacassine had been included within a governmental half section described in a school lands transfer in 1885 and that the bayou was navigable now and in 1812.[29] The plea of six-year prescription based on Act 62 of 1912 was rejected by two lines of reasoning.

First the school lands grant was said to be a sale by the state, because the deed, signed by the parish treasurer, recited it was sold in the name of the state.[30] Although the form and procedure of the sale were in accord with school lands statutes, the 1912 statute's terms made the prescription (as to transfers *by the state*) applicable only to patents signed by the Governor and Register of the State Lands Office, of record in the State Land Office. Prescription was said to be stricti juris, and therefore the statute could not be extended beyond the strict letter of the law, nor could the court explore whether the distinctions created by the letter of the law were arbitrary and not purposeful.[31] The court recognized, however, that if the sale had been by a subdivision of the state, the statute's terms would apply.

Secondly, Judge Tate reasoned that navigable waterbottoms were not "school lands" and therefore the 1885 sale did not affect the disputed bed.[32] This reason was largely based upon

28. 199 So.2d 554 (La. App. 3d Cir. 1967).

29. The contrary presumption that lands conveyed by a patent are of the character described therein and as shown by the survey, used in State v. Scott, 185 So.2d 877 (La. App. 1st Cir. 1966), *writ refused*, was not discussed, probably because of the factual concessions. One may guess that the school lands grantee faced losing his case under Article 509 dereliction or erosion principles if he had relied on the presumption.

30. This ignored that the sale was under laws which referred to the lands as belonging to "townships," required the approval of voters of these subdivisions, was for their benefit, and made not by state officers, but by parish officers. *See* La. Rev. Stats. §§ 2958, 2960, 2963 (1870). *But Cf.* State v. Nicholls, 42 La. Ann. 209, 7 So. 778 (1890).

31. Strict construction theory and supposed inability of courts to reasonably construe prescription statutes loses some weight when one recalls liberal construction afforded other prescription laws, *e.g.*, Articles 852 and 853 and Justice St. Paul's "common sense" reasoning in Opdenwyer v. Brown 155 La. 617, 99 So. 482 (1924).

32. Although there are reasons for distinguishing State v. Scott, 185 So.2d

the insusceptibility of navigable waterbeds to private ownership argument, derived from Article 453 of the Civil Code and the famous public policy against private ownership of navigable waterbottoms.[33]

There are probably 500,000 or more acres of school or in lieu lands in Louisiana and unknown quantities of other types of land which may have been severable from state sovereignty other than by patents under the pot pourri of ancient laws on sales or grants of state lands. Undoubtedly, this poses much chance for technical deficiencies in numerous ancient state transfers, even though a large majority of school lands may have not been sold. Have our courts, in the course of protecting state titles to waterbottoms, created unreasonable headaches for dry land title examiners, and a happy hunting ground for title or lease busters? This writer trusts that our courts will understand this hazard to the public interest in stability of titles, and in any case where navigable waters are not involved, refuse to extend or reverse a regretable decision.

Given the probable paucity or antiquity of jurisprudence, and resultant uncertainty in interpreting these old laws, the unfamiliarity of the bar with their requirements for valid sales by the state, the economic cost of investigating ancient transactions, the complications of gathering and the unreliability of ancient evidence, the probable constitutional impossibility of any new prescriptive statute to quiet titles insofar as mineral rights are affected, the abundance of caution which title examiners must employ, and the simple injustice of divesting or clouding numerous long-recognized titles, there are ample policy reasons to reverse the decision, or at least not extend it to dry land titles. There are equally sound legal reasons.[34]

SUCCESSIONS AND DONATIONS

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In *Succession of Young*,[1] and *Succession of Ramp*,[2] the court was again called upon to inquire into the nature and concept of

877 (La. App. 1st Cir. 1966), still it seems ironic that a presumption contrary to this reasoning was employed to support the state title in the *Scott* case. Moreover, the basic logic employed by Judge Tate on this point was rejected by the majority in California Co. v. Price, 225 La. 706, 74 So.2d 1 (1954).

33. *See e.g.*, Miami Corp. v. State, 186 La. 784, 173 So. 315 (1937).

34. See notes 29-33 *supra*.

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1. 205 So.2d 791 (La. App. 1st Cir. 1967).

2. 205 So.2d 86 (La. App. 4th Cir. 1967), 252 La. 600, 212 So.2d 419 (1968).