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Property

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In *Babin v. Babin*,[1] the plaintiff had built a house with her separate funds on separate property of her husband with his apparent consent; following their divorce, she demanded the full value of the house. Despite its detailed regulation of similar situations involving community funds,[2] community land,[3] and common labor,[4] the matrimonial regimes law contained no provision dealing with improvements of separate property of one spouse made with the separate funds of the other spouse. Thus the court had to turn to the general law of accession and, applying pre-1979 law, granted the plaintiff's request.[5] As explained in last year's property symposium article, had the court applied post-1979 accession law as it probably should have done,[6] it would have encountered another gap as, the Civil Code contained no provision regulating the fate of buildings built on the land of another with his consent, after such consent terminated.[7] Act 933 of 1984 filled both gaps by amending the relevant provisions of the Civil Code on accession and on matrimonial regimes. This article is devoted exclusively to Act 933 and discusses separately the two sets of amendments.

AMENDMENT OF THE GENERAL LAW OF ACCESSION

The Gap in the Pre-1984 Law of Accession

Under article 493, "[b]uildings, other constructions permanently attached to the ground, and plantings made on the land of another with his consent belong to him who made them. They belong to the owner

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1. 433 So. 2d 225 (La. App. 1st Cir. 1983), discussed in Symeonides, Developments in the Law, 1982-1983—Property, 44 La. L. Rev. 503, 519-21 (1983).

2. See La. Civ. Code art. 2366 (providing for improvements of separate property made with community funds). All articles referred to herein without further designation are articles of the Louisiana Civil Code of 1870 as revised through the 1983 legislative session. Articles revised by Act 933 of 1984 are referred to hereinafter as "new articles."

3. See La. Civ. Code art. 2367 (providing for improvement of community property made with separate funds).

4. See La. Civ. Code art. 2368 (providing for improvement of separate property as a result of the uncompensated common labor of the spouses).

5. See Symeonides, supra note 1, at 519-20.

6. See id. at 519 n.86.

7. See id. at 520-22 (explaining the gap) and id. at 522-27 (suggesting six alternate ways of filling the gap).

of the ground when they are made without his consent."[8] Unlike improvements[9] made without the landowner's consent, which, according to the same article, belong to the landowner[10] and which are regulated in detail by subsequent articles,[11] the Civil Code contained no provision regulating the fate of improvements made with the landowner's consent after such consent terminates. When the relationship between the landowner and the person who made the improvements [hereinafter referred to as a "consensual builder"] is based on an express contract, the contract may contain provisions regulating the fate of the improvements after its expiration. Very often, however, the contract may be silent on the question,[12] or there may be no contract at all, as in *Babin* and other cases where the parties are related by affinity, consanguinity, or friendship which seems to them to obviate the need for a formal contract.[13] When the relationship runs into difficulties, a dispute over the improvements is likely to arise for which the Civil Code provided no direct solution. Short of legislative intervention, the gap could be filled only by analogical interpretation of articles 495, 496, 497, or 670, or by

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8. After the revision of 1979, the full text of article 493 read as follows:

> Buildings, other constructions permanently attached to the ground, and plantings made on the land of another with his consent belong to him who made them. They belong to the owner of the ground when they are made without his consent.
>
> Things incorporated in, or attached to, an immovable so as to become its component parts under Articles 465 and 466 belong to the owner of the immovable.
>
> One who lost the ownership of a thing to the owner of an immovable may have a claim against him or against a third person in accordance with the following provisions.

9. The term "improvement" is used herein to denote collectively "buildings, other constructions permanently attached to the ground, and plantings."

10. See the second sentence of the first paragraph of article 493, quoted supra note 8.

11. See La. Civ. Code arts. 493 ¶ 3 (now appearing as new La. Civ. Code art. 493.2), 496, 497, 498.

12. Before its amendment by Act 933, article 2726 purported to provide a limited solution to the more frequent disputes between lessors and lessees by cross-reference to article 493. The cross-reference was incorrect and was instead meant to be a reference to article 495. However, as explained later in this Article, see infra text accompanying notes 19-21, article 495 is a narrower provision, dealing only with "component parts . . . under Articles 465 and 466," *i.e.*, building materials, plumbing materials, electrical installations and the like rather than with whole "buildings, other constructions . . . or plantings." For these latter improvements neither article 495 nor the erroneously referred to article 493 provided a solution. Act 933 fills the gap by amending article 493, see infra note 15, and by correcting the cross-references contained in article 2726, which now refer to new articles 493, 493.1, 493.2, and 495.

13. See, e.g., Falgoust v. Inness, 163 So. 429 (La. App. Orl. 1935) (landowner allowed her son-in-law to erect a gas station on her land).

resorting to the general principle of unjust enrichment.[14] Act 933 fills the gap by adding the following paragraph to article 493.[15]

> When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within 90 days after written demand, the owner of the land acquires ownership of the improvements and owes nothing to their former owner.

Although this language is self-explanatory, it raises some questions of fairness which may be answered by comparing the article with other provisions of the Civil Code regulating the rights of persons similarly situated. Such a comparison may also help to clarify some ambiguities in these other provisions. The comparison centers on three themes: the builder's right of voluntary removal of the improvements; the landowner's right to force removal at the expense of the builder; and the landowner's obligation to reimburse the builder in case the improvements are not or cannot be removed. For the convenience of the reader, a chart depicting the operation of the pertinent Civil Code articles appears at the end of this paper.

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14. See Symeonides, supra note 1, at 523-27.

15. The full text of the new article 493 reads as follows:

> Buildings, other constructions permanently attached to the ground, and plantings made on the land of another with his consent belong to him who made them. They belong to the owner of the ground when they are made without his consent.
>
> When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within 90 days after written demand, the owner of the land acquires ownership of the improvements and owes nothing to their former owner.
>
> When buildings, of [*sic*] other constructions permanently attached to the ground, or of [*sic*] plantings are made on the separate property of a spouse with community assets or with separate assets of the other spouse and when such improvements are made on community property with the separate assets of a spouse, this Article does not apply. The rights of the spouse are governed by Articles 2366, 2367, and 2367.1.

The word "of" preceding "*sic*" in paragraph 3 of this code article is an obvious typographical error and should be disregarded. As is evident by comparing this text with the text of former article 493, quoted supra note 8, the first paragraph remains unchanged while the last two paragraphs are new. The last two paragraphs of former article 493 are redesignated without change as new articles 493.1 and 493.2 respectively. The third paragraph of new article 493 also makes clear that a *Babin*-type situation will no longer be governed by the general law of accession. See infra text accompanying notes 57, 58 & 64-66.

Comparison with Article 495

Article 495[16] is similar to the part of new article 493 under discussion here[17] in that both articles deal with precarious possessors making improvements on another's immovable with his consent.[18] However, unlike new article 493 which deals with "buildings, other constructions permanently attached to the ground, or plantings"[19] all of which retain their separate identity despite their attachment to the ground, article 495 deals with component parts "under Articles 465 and 466,"[20] i.e., things incorporated into or attached permanently to an immovable in such a way as to become, either in a physical or in a functional sense, an integral part of the immovable.[21] Because of this close degree of integration, the law does not allow ownership of these component parts separate from the ownership of the immovable.[22] This is so regardless of whether these component parts were attached to the immovable with the consent of its owner,[23] who acquires ownership of these component parts by mere virtue of their incorporation into or attachment to his immovable. His ownership is only nominal, however, in those cases in which he consented to the attachments, since he cannot prevent the

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16. Civil Code article 495 reads as follows:

> One who incorporates in, or attaches to the immovable of another, with his consent, things that become component parts of the immovable under Articles 465 and 466, may, in the absence of other provisions of law or juridical acts, remove them subject to his obligation of restoring the property to its former condition.
>
> If he does not remove them after demand, the owner of the immovable may have them removed at the expense of the person who made them or elect to keep them and pay, at his option, the current value of the materials and of the workmanship or the enhanced value of the immovable.

17. The part of new article 493 under discussion here is the second paragraph of the article; it will be referred to hereinafter as "new article 493."

18. Because of this similarity the redactors of the 1979 revision initially drafted a single article to cover both situations. See the text of this article and discussion in Symeonides, supra note 1, at 521-22.

19. New La. Civ. Code art. 493, quoted supra note 15.

20. La. Civ. Code art. 495, quoted supra note 16.

21. Civil Code article 465 deals with things such as building materials which are "incorporated into a tract of land, a building, or other construction, so as to become an integral part of it." Civil Code article 466 deals with "[t]hings permanently attached to a building . . . such as plumbing, heating, cooling, electrical or other installations." These things may or may not be integrated into the building in a physical sense, but are nevertheless viewed by society as functionally constituting a part of the whole building.

22. "Things incorporated in, or attached to, an immovable so as to become its component parts under Articles 465 and 466 belong to the owner of the immovable." La. Civ. Code art. 493 xP 2 (now appearing as new article 493.1). See La. Civ. Code art. 493, comment (d), as enacted in 1979. See also La. R.S. 9:5357 (1983) for a statutory exception for things subject to a chattel mortgage.

23. See supra note 22, and *a contrario* reasoning from article 493, first paragraph.

builder from unilaterally removing them. Despite some ambiguity,[24] this is the proper interpretation of article 495, which thus accords the builder the same right of unilaterally removing improvements as does new article 493. This right becomes important in cases where both parties want the improvements. In both situations the builder prevails. The 493 builder enjoys this right as a direct consequence of his ownership of the improvements. The 495 builder enjoys this right, despite his non-ownership of the improvements, because of considerations of equity and avoiding unjust enrichment. Whether as a practical matter the two builders enjoy the same facility of removal is a different question.[25]

The rights of the two builders differ in those cases in which they do not voluntarily remove the improvements. In both situations the ball lands in the landowner's court, but his rights differ. Under article 495 the owner of the immovable may either force the removal of the improvements at the expense of the builder, or choose to keep them and pay the builder reimbursement. Under new article 493, on the other hand, the landowner does not have the right to force removal at the builder's expense, but acquires ownership of the improvement without any obligation of reimbursement should the builder not remove the improvements "within 90 days after written demand." The fairness of the new provision depends on such factors as the facility and cost of removing the improvements, their bulk, and their relative value to the two parties. Although many combinations are possible, it seems that in the case of improvements which are valueless, yet costly to remove, the landowner is at the mercy of the builder, since he cannot force removal at the builder's expense. But in the case of valuable but physically inseparable improvements, the landowner is unjustly enriched since he acquires ownership of the improvements without having to pay reimbursement.

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24. The ambiguity results from the fact that the two paragraphs of article 495, see supra note 16, seem to grant to the two parties rights which, when exercised simultaneously, are in direct conflict. The first paragraph gives the builder the right to remove the attachments, while the second paragraph gives the owner of the immovable the right to keep the improvements and pay the reimbursement specified therein. If both wish to exercise their rights, a conflict is unavoidable unless the two rights are ranked one way or the other. The fact that under the second paragraph of article 493 (now new article 493.1) the owner of the immovable *owns* these improvements suggests that he should be able to keep them if he so wishes, and that only if he chooses not to keep them or does not pay the reimbursement should the builder be allowed to remove them. Nevertheless, the way article 495 is arranged suggests that the redactors intended the opposite solution: the builder has the first option of removing improvements, and only if he does not or cannot exercise his option does the owner of the immovable get to exercise his options.

25. The facility of removal depends on the degree of integration and the bulk and value of the improvements. Although there are infinite variations, it usually is easier to remove air conditioners or chandeliers than whole buildings.

It is certainly not a satisfactory answer to these problems to say that they can be avoided if the parties take care to agree on the fate of the improvements in advance—the reason for enacting the new provision was to provide for situations which the parties failed to regulate by contract. Nor is it a satisfactory answer to say that a builder who makes valuable improvements on the land of another without providing for ways to recoup his investment deserves no sympathy, and that the landowner should not bear the burden of the builder's imprudence. The principle of unjust enrichment, which permeates all the other pertinent articles on accession,[26] has little to do with the prudence or imprudence of the impoverishee. If anything, it is "imprudent" parties who are the most likely beneficiaries of the principle of unjust enrichment. In fact, even the "moral standing" of the impoverishee is not very relevant for purposes of unjust enrichment, as is evident from articles 486, 497 and 527,[27] which provide for reimbursement to the bad-faith possessor despite his bad faith and his knowledge that he is dealing with the land of another. What triggers the application of the doctrine of unjust enrichment is an enrichment, causally linked to the impoverishment, for which there is no "justification," i.e., which is not "the result of, or finds its explanation in, the terms of a valid juridical act between the impoverishee . . . and the enrichee."[28] It seems that the predicament of the 493 builder meets all those requirements for invoking the doctrine of unjust enrichement.[29] In making this doctrine inapplicable, new article 493 is in sharp contrast with the surrounding articles of the Civil Code, including article 495. Article 495, which also applies only "in the absence of other provisions of . . . juridical acts" avoids these inequities by not placing the parties in positions from which they can blackmail each other. Article 495 is more equitable in that it enables the landowner to force removal of improvements he does not want, but also requires him to pay for improvements that he wants and which enhance the value of his property.

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26. See, e.g., La. Civ. Code arts. 485 (providing for reimbursement of production costs to the person with whose work fruits belonging to the landowner have been produced), 486 (providing that the good-faith possessor is entitled to reimbursement for fruits he was unable to gather due to his eviction by the owner, and that the bad-faith possessor is entitled to reimbursement for fruits he restores to the owner), 495 (discussed in text), 496-497 (discussed infra text accompanying notes 32-37), 527 (providing that both the good-faith and the bad-faith possessors are entitled to reimbursement for "necessary expenses").

27. See id.

28. Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 122 (La. 1974).

29. It may be countered that the enrichment is "the result of, or finds its explanation in" the agreement between the landowner and the builder about the making of the improvements. This agreement, however, does not provide either expressly or by clear implication for the fate of the improvements after termination of consent. If the agreement does provide otherwise, then the article is inapplicable. See La. Civ. Code art. 493, comment (c).

Comparison with Possessors

It may be helpful to recall at the outset that by definition a possessor, whether in good or bad faith, does not have the consent of the landowner to possess the land,[30] much less to make improvements thereon. Thus, unlike the improvements made by a consensual builder, any improvements made by a possessor belong to the landowner[31] and cannot, strictly speaking, be removed without his permission. Although articles 496 and 497 are silent on the question, this seems to be a direct consequence of the fact that the improvements belong to the landowner. This precept applies equally to both the good-faith and the bad-faith possessor, although the former may, as a practical matter, secure such permission more easily than the latter.[32]

In all other respects possessors are treated differently depending on their good or bad faith, and the good-faith possessor may in some cases be treated better than the consensual builder. For, unlike the consensual builder who risks losing the improvements without reimbursement unless he is able to remove them within 90 days, the good-faith possessor risks little. Although he cannot unilaterally remove the improvements, neither can he be forced to do so. Not only is the landowner "bound to keep them,"[33] but also, despite his "ownership" of the improvements, he must reimburse the good-faith possessor "either the cost of the materials and of the workmanship, or their current value, or the enhanced value of the immovable."[34] Although the option of choosing from these three kinds of reimbursement rests with the landowner, who is likely to choose the least expensive, the good-faith possessor still gets something[35] and is thus better off than the consensual builder who gets nothing for improvements he cannot remove. The better treatment of the good-faith possessor in this respect is justified since, unlike the consensual builder, he has no way to protect himself because, at the time he makes the improvements, he is justifiably unaware of his lack of ownership of the ground.

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30. The intent to possess the thing for oneself is an essential ingredient of the concept of possession. See La. Civ. Code arts. 3421, 3424.

31. "[The improvements] belong to the owner of the ground when they are made without his consent." La. Civ. Code art. 493 xP 1.

32. The landowner has an incentive to consent to the removal of the improvements since he is otherwise "bound" to keep them and reimburse the good-faith possessor. See La. Civ. Code art. 496. The landowner has no such obligation to the bad-faith possessor, unless the owner so chooses. See La. Civ. Code art. 497.

33. La. Civ. Code art. 496.

34. Id.

35. Concededly, the reimbursement may amount to zero if, for instance, the landowner opts to pay the "enhanced value of the immovable" (rather than the original or current value of the improvements) and offers evidence that the enhanced value is zero. Ultimately, however, it is a court, not the landowner, who will determine the amount of the enhanced value.

Things are more complicated with regard to the bad faith possessor. Article 497 draws a distinction between separable and inseparable improvements. The landowner owes nothing to the bad-faith possessor for inseparable improvements.[36] For separable improvements the landower has the option of either forcing their removal at the possessor's expense or keeping them upon the payment of reimbursement. Thus, with regard to unwanted improvements, the bad-faith possessor is in a position worse than that of the consensual builder—and for good reason. After all, the bad-faith possessor knows that he had no right to make any improvements. However, the bad-faith possessor may be in a better position than the consensual builder with regard to those improvements that the owner elects to keep, since the owner may keep them only on payment of some form of reimbursement.[37] Unjust enrichment is thus avoided.

Comparison with Usufructuaries

Civil Code article 601 provides that "[t]he usufructuary may remove all improvements he has made, subject to the obligation of restoring the property to its former condition."[38] In this sense the usufructuary is treated like other consensual builders, such as the 493 builder and the 495 builder, and in any event better than he was treated by the 1870 Code which prohibited him from removing improvements.[39] In fact it seems that now the usufructuary may unilaterally remove even improvements made without the consent of the owner;[40] if this is true, he is also treated better than possessors.[41]

However, with regard to the right of reimbursement for improvements that are not or cannot be removed, the usufructuary is treated

36. The bad-faith possessor may still be entitled to reimbursement if, as in the case of a drainage ditch, the improvement qualifies as a "necessary [expense] incurred for the preservation of the thing." La. Civ. Code art. 527.

37. See supra note 35.

38. The full text of article 601 reads as follows: "The usufructuary may remove all improvements he has made, subject to the obligation of restoring the property to its former condition. He may not claim compensation from the owner for improvements that he does not remove or that cannot be removed."

39. See arts. 569 ¶ 2 and 594 ¶ 2 (as they appeared prior to their repeal by 1976 La. Acts, No. 103 § 7).

40. This argument finds support in the unqualified language of art. 601, "all improvements he has made," and an *a contrario* reading of art. 602 which, with regard to the set-off right of the usufructuary, does distinguish between improvements made with and those made without the owner's consent. See infra text accompanying note 44. While it is true that article 558 prohibits the usufructuary from making improvements without the consent of the owner or of the proper court, neither this article nor any other article provides that the sanction for violating the prohibition is forfeiture of the improvements. More likely, such a violation would probably constitute an abuse of the usufruct (see article 623) which may lead to termination of the usufruct by the court, if the owner choses to file a petition asking for such relief. See La. Civ. Code art. 624.

41. See supra text accompanying notes 31 and 32.

like the 493 builder and unlike the 495 builder: In keeping with the old law,[42] the second sentence of article 601 denies such a right to the usufructuary.[43] But the usufructuary is given a limited protection denied to the 493 builder: Article 602 provides that "[t]he usufructuary may set off against damages due to the owner . . . the value of improvements that cannot be removed, provided they were made in accordance with Article 558," i.e., with the consent of the owner or of the competent court. Conversely, the usufructuary has no set-off right for improvements which are separable, or for improvements which, whether separable or not, were made without consent.[44]

Comparison with Other Precarious Possessors Who Make Improvements Without the Owner's Consent

Precarious possessors possess the immovable with the owner's consent.[45] Whether consent to possess encompasses a consent to make improvements depends on the intent of the parties. Since consent to make improvements need not be in writing or express, the precarious possessor may in many cases be able to show an implied consent to make improvements. If so, his rights will be governed by new article 493 or 495, depending on the nature of the improvements. If such implied consent cannot be shown, the improvements "belong to the owner of the ground"[46] and the builder is relegated to the "following provisions,"[47] *i.e.*, articles 495, 496, and 497. However, none of these articles is directly applicable to this admittedly small category of builders. Article 495 is inapplicable because its own terms limit it to improvements made with the landowner's consent, and articles 496 and 497 are inapplicable because they are both limited to possessors rather than precarious possessors. The latter two articles may of course be applied by analogy, but the choice between which of the two to apply is not an easy one. Applying article 496 would result in treating non-consensual builders better than consensual builders.[48] The same would be true if one were to resort to the principle of unjust enrichment, which was apparently disregarded in the drafting of new article 493.[49] Thus, the application of article 497 by analogy is the only remaining solution,

42. See La. Civ. Code art. 594 ¶ 1 (as it appeared prior to its repeal by 1976 La. Acts, No. 103).

43. See supra note 38.

44. See La. Civ. Code art. 602, comment.

45. La. Civ. Code art. 3437.

46. See supra note 31.

47. La. Civ. Code art. 493 ¶ 3 (now appearing as new article 493.2).

48. See supra text accompanying notes 32-35 (comparing the rights of the good-faith possessor with those of the consensual builder).

49. See supra text accompanying notes 26-29.

though it too is not without problems.[50] This apparent gap would not exist if articles 496 and 497 were drafted in terms of improvements *made* in good or bad faith rather than in terms of improvements made *by possessors* in good or in bad faith. To be sure, this approach would entail a marked change of approach to, if not an outright change of, the law of accession, the ramification of which cannot be assessed here. But it would have at least one beneficial side effect on a seemingly unrelated front: as explained in more detail elsewhere,[51] in order to qualify as a possessor in good faith for purposes of accession, a builder must have a title describing the land on which he makes the improvements.[52] Thus a person who, as a result of an honest mistake caused by an erroneous description in his title, or a careless reading of the title, builds a house on the lot of his neighbor is considered in the eyes of the law a possessor in bad faith, and is treated accordingly under article 497. This inequity would be avoided if article 496 were redrafted in the manner suggested above. Be that as it may, this problem should not be blamed on the drafters of Act 933 of 1984 or of the 1979 revision, for it has been with us at least since 1825.[53]

AMENDMENT OF THE LAW OF MATRIMONIAL REGIMES

Act 933 of 1984 also amended the matrimonial regimes provisions of the Civil Code. To better appreciate these amendments, a brief overview of the pre-1984 provisions is in order.[54]

Improvements of Separate Property with Community Funds

Civil Code article 2366 read as follows:

> If community property has been used for the acquisition, use, improvement, or benefit of the separate property of a spouse, the other spouse is entitled upon termination of the community to one-half of the amount or value that the community property had at the time it was used.

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50. See supra text accompanying note 37 (comparing the rights of a bad-faith possessor with those of the consensual builder).

51. See Symeonides, One Hundred Footnotes to the Law of Possession and Acquisitive Prescription, 44 La. L. Rev. 69, 114-15 (1983).

52. See La. Civ. Code art. 487.

53. See Symeonides, supra note 51, at 114-15.

54. For detailed discussions of these provisions see Riley, Analysis of the 1980 Revision of the Matrimonial Regimes Law of Louisiana, 26 Loy. L. Rev. 453, 516-21 (1980); Spaht & Samuels, Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law, 40 La. L. Rev. 83, 141-43 (1979); Note, Analysis and Interpretation of the New Matrimonial Regimes Law: Termination of the Community, 42 La. L. Rev. 789, 799-804 (1982).

The word "improvement" in this article was broad enough to encompass "buildings, other constructions permanently attached to the ground, and plantings,"[55] as well as attachments which became component parts under Civil Code articles 465 and 466.[56] Thus interpreted, article 2366 derogated from the general law of accession not only with regard to the "measure of compensation" as stated in the official comments,[57] but also with regard to the ownership of the improvements[58] during, or at least after the termination of, the community. Unlike the law of accession, article 2366 provided in effect (though not expressly) that the improvements belong to the owner of the ground,[59] despite his presumed consent to making the improvements. Act 933 makes this explicit by adding the following new paragraph to article 2366:

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55. See La. Civ. Code art. 493, quoted supra note 8.

56. See La. Civ. Code art. 495, quoted supra note 16.

57. "This provision establishes a different measure of compensation for improvements made on separate property than that provided for under the law of accession." La. Civ. Code art. 2366, comment (a), as enacted by 1979 La. Acts, No. 709, § 1. See article 2367, comment.

58. Stated differently, article 2366 was consistent with the pre-1979 law of accession according to which improvements made on the land of another belonged to the landowner. See La. Civ. Code art. 504 (as it appeared prior to its repeal by 1979 Acts, No. 180); Succession of Spann, 407 So. 2d 441 (La. App. 3d Cir. 1981); Deliberto v. Deliberto, 400 So. 2d 1096 (La. App. 1st Cir. 1981); Richard V. Richard, 383 So. 2d 806 (La. App. 1st Cir. 1980). These three cases were decided under the pre-1979 law of matrimonial regimes and accession. Article 2366 has its source in La. R.S. 9:2853 & 2839(3), which were enacted by the ill-fated Act 627 of 1978 (*i.e.*, before the revision of the law of accession in 1979) but were repealed by Act 709 of 1979. A footnote in *Deliberto*, 400 So. 2d at 1099 n.3, suggests that "after January 1, 1980 . . . LSA-CC Art. 491 . . . would have permitted the spouses to have established ownership of the family domicile separate from the husband's land" on which the domicile had been built by community funds. It is true that, as of the aforementioned date, article 491 permits horizontal divisions of ownership, and that article 2366, being merely a suppletive provision, would not prevent such an agreement between spouses. However, in the absence of such an agreement article 2366, being more specific, would prevail over the more general article 493 or the equally general and non-dispositive article 491. As explained later, see infra note 59, this result would mean that the improvement would belong to the owner of the ground. But see Spaht, Developments in the Law, 1981-1982—Matrimonial Regimes, 43 La. L. Rev. 513, 519-21 (1982).

59. If the landowner-spouse did not acquire ownership of the improvements there would be no justification for imposing on him the obligation to reimburse the other spouse. It could be argued that since reimbursement is due only upon termination of the community, ownership vests in the owner of the ground only upon termination of the community, and that until then the improvements belong to the community since they were made with the consent of the landowner (new article 493 ¶ 1). If this interpretation is correct, then the new paragraph added to article 2366 by Act 933, see text following note 58, changes the law by vesting ownership in the landowner immediately at the time the improvements are made, rather than upon termination of the community. Even so, the practical effect of such an interpretation would be minimal given article 491 which provides that, *vis-a-vis* third parties, improvements on the land of another are deemed to belong to the landowner unless their separate ownership appears from a document properly recorded.

> Buildings, other constructions generally attached to the ground, and plantings made on the separate property of a spouse with community assets belong to the owner of the ground. Upon termination of the community, the other spouse is entitled to one-half of the amount or value that the community assets had at the time they were used.

The following hypothetical illustrates the operation of both paragraphs of article 2366. Community funds of $100,000 are used for the construction of a house on a lot which is the separate property of the wife. Despite her consent to the building of the house, and in derogation from the law of accession, the house belongs to the wife. Because of that, the husband is entitled, upon termination of the community, to $50,000, *i.e.*, 100 percent of his original contribution, without interest. His contribution is in effect treated as an "interest-free loan."[60]

Improvements to Community Property with Separate Funds

The same reasoning applies to article 2367, which provided for the situation converse from that of article 2366, *i.e.* for improvements to community property made with the separate funds of one of the spouses.[61] Act 933 adds a new paragraph to article 2367 and makes explicit what was implicit in the pre-1984 text, namely that the improvements belong to the community.[62] The new paragraph also duplicates the reimbursement provisions of the first paragraph of the article. According to both provisions, if a spouse used $100,000 of his separate funds to build a house on land belonging to the community, he would be entitled to a reimbursement of $50,000 upon termination of the community. Moreover, because the house and the land belong to the community, the

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60. La. Civ. Code art. 2364, comment (d). See Riley, supra note 54, at 518-21; Spaht & Samuel, supra note 54, at 141-42.

61. Article 2367 read as follows:

> If separate property of a spouse has been used for the acquisition, use, improvement, or benefit of community property, that spouse, upon termination of the community, is entitled to one-half of the amount used or one-half of the value that the property had at the time it was used if there are community assets from which reimbursement may be made.

See also La. Civ. Code art. 2368 (dealing with improvements of separate property caused by the uncompensated common labor of both spouses). This article is not affected by Act 933.

62. See supra notes 57-58 and accompanying text. The new paragraph reads as follows:

> Buildings, other constructions permanently attached to the ground, and plantings made on community property with the separate assets of a spouse become community property. Upon termination of the community, the spouse whose assets were used is entitled to one-half of the amount or value that the separate assets had at the time they were used if there are community assets from which reimbursement may be made.

same spouse would be entitled to one-half of the value of both. Thus, this spouse eventually gets 100 percent of his original contribution and, unlike the husband in the previous hypothetical,[63] participates equally with the other spouse in the appreciation or depreciation of the value of the house over the years.

Improvements of Separate Property of One Spouse with Separate Funds of the Other

Until 1984, the Civil Code's provisions on matrimonial regimes did not expressly deal with improvements on separate property of one spouse made with separate funds of the other. Thus a case like *Babin*[64] had to be decided under the general law of accession, which, as shown earlier, was also inconclusive.[65] Act 933 fills the gap by enacting new article 2367.1, which reads as follows:

> Buildings, other constructions permanently attached to the ground, and plantings made on the land of a spouse with the separate assets of the other spouse belong to the owner of the ground. Upon alienation of the land, legal separation, or termination of the marriage, the spouse whose assets were used is entitled to reimbursement of the amount or value that the assets had at the time they were used.

The new article derogates from the law of accession by vesting ownership of the improvements in the spouse who owns the ground rather than the one whose funds were used.[66] In so providing, article 2367.1 is consistent with articles 2366 and 2367 which, since 1979, also derogated from the law of accession "in light of the special relationship between the spouses."[67] In this respect the new article promotes certainty of title and eliminates the uneconomical and often unrealistic option of removing the improvements either voluntarily or forcibly.[68]

The new article is also consistent with articles 2366 and 2367 in carrying forward the concept of the "interest-free loan"[69] by fixing the measure of reimbursement at the "amount or value that the assets had at the time they were used."[70] Thus the spouse whose funds were used

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63. See supra text accompanying note 59.

64. 433 So. 2d 225 (La. App. 1st Cir. 1983).

65. See supra notes 7, 11 & 14 and accompanying text.

66. Cf. article 493 ¶ 1, quoted supra note 8. See also new article 493 ¶ 3.

67. La. Civ. Code art. 2367.1, comment (e). See La. Civ. Code arts. 2366, comment (a) and 2367, comment.

68. See supra note 25 and accompanying text.

69. See supra note 60.

70. La. Civ. Code art. 2367.1; cf. La. Civ. Code arts. 2366-67. Comment (d) under new article 2367.1 provides that the sentence of the article quoted in the text

loses not only the interest but also the amount by which the property has appreciated over the years. Consistency, of course, is not a virtue in itself. In an inflationary economy, new article 2367.1 as well as article 2366 may be particularly harsh on the builder-spouse.[71] Nevertheless, given the limited mandate of the drafters of Act 933, any criticism of the doctrine of the "interest-free loan" would more appropriately be addressed to the drafters of Act 709 of 1979, which revised the entire law of matrimonial regimes and set forth the basic policy decisions. Aside from this problem, the removal of this last interspousal problem from the scope of the articles on accession represents a major step in the right direction. Indeed, none of the accession articles discussed earlier would result in better treatment of the builder-spouse. Treating him as a good-faith possessor would not result in more generous reimbursement, because article 496 allows the landowner to choose the lowest of the three measures of reimbursement provided therein;[72] treating him as a bad-faith possessor would not only be doctrinally unsound, but would also result in reimbursement only for those separable improvements that the landowner *elects* to keep.[73] And applying new article 493 would mean that he would face the possibility of not receiving any reimbursement if he could not remove the improvements within 90 days.[74]

Under article 2367.1, reimbursement is due "upon alienation of the land, legal separation or termination of the marriage,"[75] whereas under articles 2366 and 2367 reimbursement is due "upon termination of the community." The difference arises from the fact that, unlike the other two articles, article 2367.1 contemplates situations where there may be no community at all, or where the community encompasses neither the land nor the funds used for its improvement.

Finally, Act 933 adds another new article which reads as follows:

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reflects the general principle established in Civil Code Articles 2366, 2367 and 2368 (Rev. 1979). During marriage, or prior to the alienation of the improved property, the spouse whose funds were used to improve it has the use of that property; therefore, reimbursement is limited to the value of that his separate assets had at the time they were used.

However, at least in cases not involving the family home, the builder-spouse may or may not "have the use" of the improved property. The doctrine of the "interest-free loan" must, therefore, find its justification in broader considerations, such as the presumed donative intent of the builder-spouse.

71. On the other hand, the article may be equally harsh on the landowner-spouse should the property depreciate, or the improvement be destroyed.

72. See supra notes 34-35 and accompanying text.

73. See supra text accompanying notes 36-37.

74. See new article 493 ¶ 2.

75. According to comment (c) under 2367.1, a "spouse does not have the right to reimbursement at any other time, unless, of course, he has reserved that right under a contract with the other spouse."

Art. 2367.2.

When a spouse with his own separate assets incorporates in or attaches to a separate immovable of the other spouse things that become component parts under Articles 465 and 466, Article 2367.1 applies.

Before the enactment of this new article, the improvements specified therein would be governed by Civil Code article 495, which differs from the new article in allowing voluntary or forcible removal of the improvements.[76] Such removal is no longer possible. The same solution was already provided in articles 2366 and 2367 for the situations specified therein.[77] The cross-reference to article 2367.1 contained in article 2367.2 also means that the reimbursement now available to the builder-spouse consists of the original cost of the improvements, rather than their current value or the enhanced value of the immovable, as would be the case under article 495.

IN LIEU OF CONCLUSIONS

The following chart depicts, with some oversimplification, the current scheme of the Civil Code pertaining to improvements made by one person on an immovable of another. Because of the oversimplification, the chart should be read with appropriate caution and with reference to the text of this article.

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76. See supra text accompanying notes 23-25.
77. See supra text accompanying note 56.

IMPROVEMENTS ON ANOTHER'S IMMOVABLE

Article of the Civil Code	New Art. 493 para. 1 first sentence, and para. 2	New Art. 493.1 and Art. 495	New Art. 493 para. 1, second sentence, and New Art. 493.2			
			Art. 496	Art. 497		
Type of improvements	buildings, other construction and plantings	component parts of Arts. 465 and 466	any type	any type		any type
Status of "builder" and relationship to the landowner	precarious possessor	precarious possessor	possessor in good faith	possessor in bad faith		precarious possessor
Consent of landowner to the making of improvements	yes	yes	no	no		no
Ownership of improvements	builder	landowner	landowner	landowner		landowner
Builder's right to remove improvements	yes	yes	no	no		no
Landowner's right to keep if builder wants to remove	no	no	yes	yes		yes
Landowner's right to force removal	yes	yes	no	yes		yes
Reimbursement, if builder does not remove and landowner elects to keep	no	yes	yes	sep-arable: yes	insep-arable: no	??*
Type of reimbursement	none	"current value" or "enhanced value"	"original cost" or "current value" or "enhanced value"	"current value" or "enhanced value"	none	??*

*See pertinent discussion in text accompanying notes 47-50 supra
**See pertinent discussion in note 40 supra

IMPROVEMENTS ON ANOTHER'S IMMOVABLE

Arts. 558, 601, 602		New and Old Art. 2366	New and Old Art. 2367	New Art. 2367.1	New Art. 2367.2
any type		any type	any type	buildings, other constructions, or plantings	component parts of arts. 465 & 466
usufructuary		community	spouse in community	spouse	spouse
yes	no	irrelevant	irrelvant	irrelevant	irrelevant
usufructuary	naked owner	landowner	landowner	landowner	landowner
yes	yes?**	no	no	no	no
no	yes?**	yes	yes	yes	yes
no	yes	no	no	no	no
no, but set off	no	yes	yes	yes	yes
set off; "value" of improve-ments	none	original "amount or value"	original "amount or value"	original "amount or value"	original "amount or value"