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Louisiana Property Law—The Civil Code, Cases and Commentary

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BOOK REVIEWS

JOHN A. LOVETT, MARKUS G. PUDER & EVELYN L. WILSON,
LOUISIANA PROPERTY LAW—THE CIVIL CODE, CASES AND
COMMENTARY

(Carolina Academic Press, Durham, North Carolina 2014)

Reviewed by Yaëll Emerich*

Although this interesting work, by John A. Lovett, Markus G. Puder and Evelyn L. Wilson, styles itself as “a casebook about *Louisiana* property law,”¹ it nevertheless has some stimulating comparative insights. The book presents property scholarship from the United States and beyond, taking into account property texts from other civilian and mixed jurisdictions such as Québec, South Africa and Scotland. As underlined by the authors, Louisiana’s system of property law is a part of the civilian legal heritage inherited from the French and Spanish colonisation and codified in its Civil Code: “property law . . . is one of the principal areas . . . where Louisiana’s civilian legal heritage has been most carefully preserved and where important substantive differences between Louisiana civil law and the common law of its sister states still prevail.”² While the casebook mainly scrutinizes Louisiana jurisprudence and its Civil Code in local doctrinal context, it also situates Louisiana property law against a broader historical, social and economic background. Rather than concentrating only on the technicalities of property law, it insists on understanding principles and practices as reflections of local conditions and cultures. There is also a clear desire to present and understand some of the recent controversies within property law.

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1. JOHN A. LOVETT, MARKUS G. PUDER & EVELYN L. WILSON, *LOUISIANA PROPERTY LAW—THE CIVIL CODE, CASES AND COMMENTARY* 3 (Carolina Academic Press, Durham, North Carolina 2014).

2. *Id.* at xxiii.

The book is divided into sixteen chapters that follow a relatively traditional presentation of property law. The first chapter explains the sources of Louisiana property law and underlines the role of codification in the civil law tradition in Louisiana, mainly through two texts that are then annotated and questioned by the authors. It is a fascinating story, as it explains “how Louisiana, alone among the fifty states, came to have a civil code modeled on a European civil code.”³ The book offers some general background to explain the history of civil law in Europe and codification in Louisiana and underlines “the complementary and sometimes competing relationships between judge and legislator.”⁴ As Peter G. Stein has shown, the prevailing ideology when Louisiana’s first Civil Code, sometimes referred to as a Digest, was drafted in 1808 was quite different from the revolutionary spirit that had preceded the drafting of the French Civil Code; many wanted the “status quo”⁵ rather than a fresh beginning. As for “[t]he compilers of the Louisiana Civil Code of 1825, [they] not only added more detail, they also included explanatory comment.”⁶ One of the main debates here, as David Gruning explains, is the role of the old law, given that the Louisiana Supreme Court ruled that the Great Repealing Act of 1828 could not affect “principles of law [...] established or settled by the decisions of the courts of justice” under the old law.⁷ It is also worth noting that “the 1870 Code, unlike the 1825 Code or the 1808 Digest, was published in English only, without the French text.”⁸ On a final note, the authors underline that the comments found in the Civil Code are not law

3. *Id.* at 15.

4. *Id.* at 3.

5. Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. L. REV. 241, 242–57 (1986), quoted by LOVETT ET AL., *supra* note 1, at 12.

6. LOVETT ET AL., *supra* note 1, at 13.

7. David Gruning, *Mapping Society through Law: Louisiana, Civil Law Recodified*, 19 TUL. EUR. & CIV. L.F. 1, 1–12, 14–20, 31–34 (2004), quoted by LOVETT ET AL., *supra* note 1, at 17.

8. LOVETT ET AL., *supra* note 1, at 17.

strictly speaking but are rather of explanatory value.⁹ While this chapter is one of the most stimulating of the book it might have been interesting to have more discussion of the tension between the civil law and common law as potential models for Louisiana law, rather than limiting comments to the debate about which civilian system should prevail.

Chapter 2 deals with ownership, real rights and the right to exclude. It briefly explains the civilian concept of ownership versus the common law estate, underlines the role of exclusivity in ownership, and compares real rights to personal rights. Ownership, one of the most fundamental concepts in property law, is defined in article 477 of the Civil Code as: “the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.”

As for real right, it is described by the authors as “a *right in a thing* that is good *against the entire world*.”¹⁰

To illustrate the importance of this distinction between real and personal rights, several examples are given, including some taken from the jurisprudence, and the question of the openness of the list of real rights is discussed. As the authors underline, the drafters “appear to conceptualize ownership as that particular real right, alone among the entire universe of real rights” that confers on a person “direct . . . immediate . . . [and] exclusive authority over a thing.”¹¹ Article 477 also refers to the classic triad of ownership in that it “suggests that ownership comprises at least three particular elements, which some property scholars conceptualize as options (or *facultés*) accruing from ownership.”¹²

9. *Id.* at 23.
10. *Id.* at 29.
11. *Id.* at 34.
12. *Id.*

John Merryman's well-known article "Ownership and Estate" is added as a reference to distinguish civil law ownership from common law estate.¹³

Chapters 3 and 4 deal with "The Division of Things" and "Classification of Things." Chapter 3 relates to common, public and private things. This corresponds to the first classification scheme detailed in Book II of the Louisiana Civil Code. This chapter contains important developments related to water and navigability, notably those that make a distinction between running water, territorial sea and the seashore. Chapter 4 classifies things between corporeal movables, corporeal immovables and incorporeal immovables and movables. It is worth noting that the 1978 revision of the Civil Code suppressed the French tripartite classification of immovables and simplified the law by adopting two basic categories of immovables: corporeal immovables and incorporeal immovables.¹⁴ The authors look at how corporeal movables attached to land (buildings and other constructions) become component parts of land, and they also scrutinize the reversed situation of deimmobilization.

Apart from chapter 8, which is related to possession, chapters 5 to 9 deal with acquisition of ownership. Chapter 5 relates to "Voluntary Transfer of Ownership" and gives an introduction to the basic principles governing three types of voluntary transfer of ownership described in the Louisiana Civil Code: donation, sale and exchange. This chapter notably explains the public records doctrine and how Louisiana law differs from the French *principe du consensualisme*.¹⁵ Relating to the voluntary transfer of ownership of an immovable, a good explanation is given of the significance of the *Louisiana Public Records Doctrine*, according to which such a transfer "has no effect against third parties unless

13. John Henry Merryman, *Ownership and Estate (Variations on a Theme by Lawson)*, 48 TUL. L. REV. 916, 921–25, 927–29 (1974).

14. LOVETT ET AL., *supra* note 1, at 158.

15. *Id.* at 256.

evidence of the transfer is recorded in the appropriate public records.”¹⁶ As for movables, according to article 518 of the Civil Code, the transfer of ownership in this case is effective “against third persons when the possession of the movable is delivered to the transferee”—so that “the delivery or ‘tradition’ . . . serves the function of putting third parties on notice.”¹⁷ The authors interestingly discuss what happens in the context of incorporeal movables.

Accession is discussed in chapter 6, which contains developments on natural accession, with the example of acquisition of the ownership of fruits and the impact of good faith; artificial accession of Immovables; and improvements made by precarious and adverse possessors. Occupancy is the subject of chapter 7. As stated by the authors, “Roman law made occupancy (*occupatio*) available as a function of natural reasoning (*ratione naturali*),” which is not far from the idea of first possession in the common law.¹⁸

Chapter 8 contains interesting developments on possession and possessory actions, and chapter 9 deals with Acquisition prescription with respect to immovable.

[If] ownership of a thing cannot be lost by non-use . . . [i]t can, however, be lost to another person through acquisitive prescription, [namely as] a mode of acquisition of ownership which accrues in favor of a person that the Civil Code calls “an adverse possessor.”¹⁹

As expressed by the authors, it is clear that “in addition to the physical detention or enjoyment of a thing, a person must also have a particular state of mind in order to qualify as an adverse possessor.”²⁰ The requirement of giving notice to the true owner is discussed. Also, the question of the delay, in relation to just title

16. *Id.* at 257.

17. *Id.* at 260.

18. *Id.* at 345.

19. *Id.* at 365.

20. *Id.* at 366.

and good faith, is interestingly presented. The authors then discuss the possessory action that is recognized by Louisiana's Civil Code to protect a person's right to possess immovable property and stress that such an action may not be cumulated with the petitory action in the same suit. Moreover, there is a discussion of relevant developments on quasi-possession of incorporeals and, notably, servitudes.

The question of vindicating ownership is dealt with in chapter 10 that looks both at immovables and movables. In the context of immovables, the authors notably discuss the Louisiana Supreme Court decision in *Pure Oil Co. v. Skinner*. As for revendicatory actions for the recovery of movables, they underline the presence of an innominate real action, grounded in French doctrine.

The remaining chapters of the book deal with co-ownership or ownership in indivision (chapter 11), usufruct (chapter 12), servitudes (chapter 13 and 14), habitation and right of use (chapter 15) and finally building restrictions (chapter 16). The book addresses the general rules for owners in indivision but does not look at the Louisiana Condominium Act. As stated by the authors

Louisiana law allows a person to take the fundamental constitutive elements of ownership outlined in Article 477 of the Civil Code—the right to use a thing, to enjoy its fruits, and to dispose of it (*usus, fructus* and *abusus*)—and reconfigure them in new forms to create real rights other than ownership.²¹

Conclusion

While it might have been interesting to have more developments on the tensions between civil law and common law, this book makes a useful contribution in many respects. It is valuable for Louisiana students and its community of jurists. It is also interesting for lawyers and researchers interested in comparative law, who will be able to find in this book a very good

21. *Id.* at 566.

introduction to Louisiana property law based on its civil code, doctrine and jurisprudence. Louisiana law has become fruitful for comparatists, and especially for scholars interested in civil law or mixed jurisdictions, as well as for scholars attentive to comparative legal history. Moreover, the book might also be interesting to jurilinguists or jurist interested in the linguistic of law, because civil law in English is still underrepresented in the literature. For this reason, this book has the potential to give a new range of vocabulary to civil property law that is expressed in English.