Validity of Patents Conveying Navigable Waterbottoms - Act 62 of 1912, Price, Carter, and All That

A. N. Yiannopoulos
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It has been a well-established general proposition of Louisiana civil law that the beds or bottoms of navigable waters are public things, inalienable by the state and forever insusceptible of private ownership. An involved course of legislative and judicial action, however, has resulted in recent years in the recognition, under certain circumstances, of private ownership in the beds of navigable waters such as rivers, lakes, and bays.

Originally, the prohibition against alienation by the state of its navigable waters was based upon the interpretation placed by the courts on articles 449, 450, and 453 of the Civil Code. The first direct prohibition occurred in 1886, when Act 106 of that year declared that the state owned all waters adjoining the Gulf and at the same time provided that the public ownership of these waters should be continued and maintained. Subsequently, the prohibition against alienation was fortified by the judicial doctrine of "inherent sovereignty," and, finally, by the adoption of a constitutional provision in 1921 which prohibits alienation of "the bed of any navigable stream, lake or other body of water, except for purposes of reclamation." In the meanwhile, however, Act 247 of 1855 had authorized the sale by the state of shallow non-navigable lakes and swamplands recently acquired under grant from the United States, and Act 124 of 1882 had assimilated dried up navigable lakes to swamplands and had re-

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   See also concurring opinion by Justice Barham in Carter v. Moore, 258 La. 821, 937-38, 248 So. 2d 813, 818 (1971): "All doctrine and all jurisprudence with only slight inconsistencies, even recent jurisprudence including California Co. v. Price, recognize that even before the Constitution of 1921 (the Constitution only placed alienation beyond legislative authority) the bottoms of all navigable waters belonged to the State, and that it was inimical to public policy to permit private ownership."

2. Private ownership of navigable waterbottoms may derive from grant or patent only. It may not derive from accretion or dereliction. Compare California Co. v. Price, 225 La. 706, 74 So. 2d 1 (1954) with Miami Corp. v. State, 186 La. 784, 173 So. 315 (1938).


4. Apparently, the doctrine was first announced in State v. Bayou Johnson Oyster Co., 130 La. 604, 58 So. 405 (1912). For detailed discussion, see A. YIANNOPoulos, CIVIL LAW PROPERTY § 32 (1955).

moved the prohibition against the alienation of such lands. On the basis of these and subsequent similar statutes, patents were issued by the state purporting to convey to private interests or to public bodies large areas containing both navigable and non-navigable waters. No special mention was made reserving title to navigable waterbottoms in the state, and several years thereafter the question arose as to whether or not such patents could convey title to the bottoms of navigable waters.

In order to promote security of title, the Louisiana legislature passed Act 62 of 1912, a repose statute. This Act declared:

“All suits or proceedings of the State of Louisiana, private corporations, partnerships or persons to vacate and annul any patent issued by the State of Louisiana, duly signed by the Governor of the State and the Register of the State Land Office, and of record in the State Land Office, or any transfer of property by any subdivision of the State, shall be brought only within six years of the issuance of the patent, provided that suits to annul patents previously issued shall be brought within six years from the passage of this Act.”

The same act was re-enacted in the Louisiana Revised Statutes of 1950 to read:

“Actions, including those by the State of Louisiana, to annul any patent issued by the state duly signed by the governor and the register of the state land office, and of record in the state land office, are prescribed by six years, reckoning from the day of the issuance of the patent.”

On the basis of Act 62 of 1912, Louisiana courts have held that patents which included beds of navigable waters without reserving title to them in the state are valid and no longer assailable.

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6. La. Acts 1912, No. 62. For a legislative interpretation of this act, see text accompanying note 57 infra.
It is in this way that Louisiana arrived at private ownership of the bottoms of navigable waters.

In the last few years, Louisiana courts have reconsidered the proper interpretation and scope of application of the 1912 repose statute in a number of important cases. It is the purpose of this Article to determine the validity of state patents conveying navigable waterbottoms to private interests in the light of Louisiana legislation and recent jurisprudence.

Scope of Application of Act 62 of 1912; Relevance of Prior Legislation

At the time Act 62 of 1912 was enacted, Louisiana legislation prohibited alienation of navigable waterbottoms to private interests. Question, therefore, has arisen whether the 1912 statute was intended to apply to all patents indiscriminately or only to patents that did not include the beds of navigable waters. Since it is clear that the Louisiana legislature could, due to the absence of constitutional prohibition at that time, authorize the sale of navigable waters, it is merely a problem of statutory interpretation whether Act 62 of 1912 intended to cure patents conveying only non-navigable waters or both navigable and non-navigable waters. The majority view in the celebrated case of California Co. v. Price was that "the legislature intended that the Act was to be all-inclusive, in conformity with the language used therein."9 A vigorous dissent indicated that "a reasonable construction of the statute would be that it only applies to property susceptible of ownership. . . ."10 The reasoning of the majority opinion in the Price decision has been subjected to criticism on a variety of counts.11 It is indeed a strained interpretation of a repose statute to maintain that it repealed by implication all prior legislation expressly prohibiting alienation of navigable waters and that it rendered valid patents that were absolute nullities at the time they were issued. As a prescriptive statute, Act 62 of 1912 is stricti juris and must be narrowly construed.12 Be that

9. 225 La. 706, 739, 74 So.2d 1, 12 (1954).
10. Id. at 757, 74 So.2d at 17.
12. See Coastal States Gas Producing Co. v. State Mineral Bd., 199 So.2d 554, 557 (La. App. 3d Cir. 1967): "Nevertheless, the terms of the 1912 pre-
as it may, the narrow holding of the Price decision is that pre-1886 patents have been rendered unassailable by Act 62 of 1912, and this holding continues to control in the present state of Louisiana jurisprudence.

The question whether the 1912 statute intended to cure patents issued after 1886 contrary to express legislative prohibition, namely, patents that were absolute nullities at the time issued, remains open—dicta in the Price decision to the contrary notwithstanding. Indeed, it might be extravagant to assert, for example, that the 1912 statute intended to cure patents issued fraudulently. In Sinclair Oil & Gas Co. v. Delacroix Corp.,18 a concursus proceeding for the distribution of oil and gas royalties, private persons claimed the ownership of certain navigable waterbottoms by virtue of a 1902 patent. The Fourth Circuit Court of Appeal set aside a summary judgment, rendered by the lower court in favor of the claimants, on the ground that the case involved a genuine dispute as to facts, namely, allegations by the state that the patents in question had been obtained fraudulently. This disposition is an application of the maxim fraus omnia corrumpit.

Moreover, the Fourth Circuit Court of Appeal has recently reiterated its conviction that the 1912 repose statute did not intend to cure patents issued in violation of Louisiana legislation prohibiting the alienation of navigable waterbottoms which, at the time they were issued, were absolute nullities. In Stevens v. State Mineral Board,14 plaintiffs brought an action against the state mineral board to remove “clouds”15 from their title to certain waterbottoms on the east coast of Louisiana. The clouds consisted of recorded mineral leases granted by the state to private interests. Defendants moved for a summary judgment on the grounds that the state owned the property in question by virtue of an adjudication for non-payment of taxes, and that four links in plaintiffs’ title were fatally defective. Plaintiffs invoked in their favor the repose statute of 1912. The court considered

15. The action to remove a cloud from title is a non-statutory “fringe” or “quasi-real” action for the protection of ownership. See LA. CODE CIV. P. tit. II, Introduction.
only the question of the validity of plaintiffs' title and granted summary judgment in favor of the defendants. Plaintiffs' title was based on two transfers, dated April 2, 1895, and July 27, 1910, by the State of Louisiana to Lake Borgne Levee District, and on two patents which recited that the Plaquemines Land Company acquired the property from the State of Louisiana and from the Lake Borgne Levee District on September 20, 1911. The court distinguished Coastal States Gas Producing Co. v. State Mineral Board, and held, on the authority of Humble Oil & Refining Co. v. State Mineral Board, that the transfer of the property by the state to the levee district was covered by the repose statute of 1912. Nevertheless, the court concluded that the patents by the levee district to private interests were absolute nullities that could not be cured by the repose statute. Plaintiff's argument that the case was controlled by the decision of the Louisiana Supreme Court in California Co. v. Price was rejected. The Price case was distinguished on the ground that the patent involved therein had been issued in 1874, long before the enactment of the first Louisiana "oyster" statute. And, apparently drawing an argument a contrario from language in the Price decision, 18

16. 199 So.2d 554 (La. App. 3d Cir. 1967), text accompanying note 32 infra. The basis of the distinction was that the cited case involved a transfer by the State to private individuals whereas "in the instant case the transfer was by a subdivision of the State to private interests." Stevens v. State Mineral Bd., 221 So.2d 645, 646 (La. App. 4th Cir. 1970). A better basis of distinction would be that the Coastal States case involved a sale whereas the Stevens case involved the validity of a patent.

17. 223 La. 47, 64 So.2d 839 (1953). In this case, navigable waterbottoms transferred by the state to a levee district were subsequently sold by the levee district to private individuals. Since the sale took place in 1901, and acquirer's title was questioned by the state only in 1950, the court held that the matter was controlled by the repose statute of 1912; the title was valid and unassailable.

18. 225 La. 706, 74 So.2d 1 (1954).

19. See note 3 supra.

20. See California Co. v. Price, 225 La. 706, 722, 74 So.2d 1, 7 (1954): "The recital [in the oyster statutes] that the described waterbottoms 'shall be, continue and remain the property of the State of Louisiana,' which is principally relied on by counsel, has reference only to such bottoms as have not been conveyed by the State theretofore to private interests; and to them, obviously the 1912 Act cannot have any application." From this language, the court in the Stevens case drew an argument a contrario that "as to property thereafter conveyed to private parties" the 1912 Act cannot have any application. 221 So.2d 645, 648 (La. App. 4th Cir. 1970).

It ought to be noted, however, that application of the 1912 repose statute to an 1899 patent conveying navigable waterbottoms was sustained in State v. Cenac, 132 So.2d 897 (La. App. 1st Cir. 1961), writ refused, 241 La. 1055, 132 So.2d 928 (1961). See also Miami Corp. v. State Mineral Bd., 122 F. Supp. 489 (W.D. La. 1954) (1883 patent conveying navigable waterbottoms). The 1912 statute has been correctly applied to a number of cases involving patents conveying dry lands. See Fiedler v. Pipes, 236 La. 105, 107 So.2d 409 (1958); McCarthy v. Gonnet, 163 So.2d 840 (La. App. 4th Cir. 1964); Thiber-
the court held that the repose statute of 1912 does not apply to transfers made after the enactment of the oyster statutes.

The decision was grounded, specifically, on an interpretation of Acts 189\textsuperscript{21} and 258\textsuperscript{22} of 1910. Section 1 of Act 189, declaring that certain waterbottoms "shall be, continue and remain the property of the State of Louisiana," was interpreted to mean that the transfer of the property to the levee district was revoked. This interpretation was based on language in \textit{State v. Board of Commissioners of Caddo Levee District},\textsuperscript{23} dealing with analogous declarations in Section 1 of Act 258. In that case, the Louisiana Supreme Court had, indeed, indicated that Act 258 "intended unequivocally to retake title to the beds [of navigable waters] where they had not been conveyed to the several levee boards, and where the rights of third parties had not intervened."\textsuperscript{24} Since plaintiffs could not show any transfer of the property to them until the patents were issued in 1911, Acts 189 and 258 of 1910 would have operated to "retake title" of the property and reinvest it in the state. "Hence," the court concluded, "the Levee District had no title to the property here involved at the date of the two purported patents . . . and therefore such purported patents could convey no title to Plaquemines Land Company."\textsuperscript{25} The conclusion was bolstered by reference to the language in Section 1 of Act 189, declaring that no sale or conveyance of waterbottoms "shall thereafter be made . . . by any other official, or by any subordinate political corporation."\textsuperscript{26}

This interpretation of Acts 189 and 258 of 1910 may appear strained. It is difficult to see how the enactment of these statutes could have resulted in the cancellation of completed transfers of property to agencies of the state.\textsuperscript{27} In effect, this decision limits

\textsuperscript{23}188 La. 1, 175 So. 678 (1937).
\textsuperscript{24}Id. at 13, 175 So. at 681.
\textsuperscript{25}221 So.2d 645, 649 (La. App. 4th Cir. 1970).
\textsuperscript{26}Id. (Emphasis by the court.)
\textsuperscript{27}Cf. \textit{State v. Board of Comm'rs of Caddo Levee Dist.}, 188 La. 1, 175 So. 678 (1937).
the applicability of the Price decision to pre-1886 patents, and illustrates the desire of lower courts to restrict the implications of the Price case, even at the cost of tenuous reasoning. The Louisiana Supreme Court should re-examine the soundness of the Price case with the view to overruling it or adopting a narrower interpretation of the 1912 statute.\textsuperscript{28} A forceful argument may be made that the repose statute did not intend to cure patents conveying the beds of navigable waterways, which had been historically declared "out of commerce" and insusceptible of private ownership.\textsuperscript{29} In Stevens, however, the Louisiana Supreme Court granted certiorari, set the summary judgment aside on the ground that the case involved a genuine dispute as to facts, and remanded it to the district court.\textsuperscript{30} It might be expected that, after full trial, the lower courts will reach the same conclusions as before.

Indicatively, in \textit{White v. State},\textsuperscript{31} plaintiff brought a petitory action to regain possession of two tracts of land located in the bed of Quarantine Bay, a body of water which has been navigable since 1812. Plaintiff's claim was based on various links, including a sale by the state to the Grand Prairie Levee District in 1905, a sheriff's sale on the authority of the levee district to private interests in 1910, and a patent issued by the state to plaintiff's ancestor in title in 1911. The court granted summary judgment in favor of the defendants on the grounds that these links were nullities and that there was no genuine dispute as to the facts. The court declared that the 1905 sale to the levee district was a nullity, because Act 27 of 1904 merely authorized the transfer of dry lands and Act 52 of the same year expressly prohibited the transfer of navigable waters; that the 1910 sheriff's sale was a nullity, because after Act 215 of 1908 was enacted no levee board had authority to transfer lands to private owners and all patents had to be issued by the state; and that the 1911 patents were invalid under Acts 189 of 1910 and 258 of the same year, and could not be rendered valid by application of the 1912 statute.

\textsuperscript{28} See text accompanying notes 74 and 75 \textit{infra}.
\textsuperscript{29} See \textit{California Co. v. Price}, 225 La. 706, 757, 74 So.2d 1, 17 (1954) (dissenting opinion); concurring opinion by Justice Barham in \textit{Carter v. Moore}, 258 La. 921, 948, 248 So.2d 813, 823 (1970): "[the] intent . . . [of Act 62 of 1912] was to provide for validation of only those patents which had some lawful sanction and not patents to lands insusceptible of alienation."
\textsuperscript{31} 239 So.2d 484 (La. App. 4th Cir. 1970).
According to its terms, the 1912 repose statute applies to “any patent issued by the State of Louisiana . . . or any transfer by any subdivision of the State.” Thus, according to a literal interpretation, the 1912 statute does not cure by the passage of six years invalid transfers made by the state or on its behalf by a subdivision, if the transfers have not been made by virtue of patents. In Coastal Gas Producing Co. v. State Mineral Board, a concursus proceeding, the issue was whether prescription prevented the state from attacking an 1885 transfer by it as invalid insofar as it included the bed of a navigable river. The land was originally part of the sixteenth section school lands granted to Louisiana by the United States Government, and the sale was properly made by the parish treasurer in the name of the State of Louisiana under the authority of the Revised Statutes of 1870. The act of sale included within its description of the lands the bed of Bayou Lacassine which has been navigable since 1812. The court, relying on the doctrine of inherent sovereignty, article 453 of the Civil Code, and on strong public policy, declared that the sale of state school lands by the parish treasurer did not convey the ownership of any part of the bed of Bayou Lacassine, even though the bed was included within the description of the lands sold. The state could assert its ownership in spite of the repose statute of 1912, because this statute was inapplicable under the circumstances. The court pointed out that no patent had been issued and emphasized “the circumstance that the deed represented a sale by the State (not by a subdivision of it) and that it was signed by the parish treasurer (not by the Governor and by the State Register).” The 1912 statute, “protects ‘patents’ by the State (those signed by the Governor and State Register, at any rate) and ‘transfers’ by State subdivisions—but not transfers by the State.” The case of California Co. v. Price was distinguished on the ground that it involved a transfer made by virtue of a state patent.

Patents issued after 1921 are clearly invalid to the extent that they purport to transfer navigable waterbottoms. This is
presumably so even if the post 1921 patent is issued on the basis of a pre-1921 land warrant and in replacement of a defective patent. In Lewis v. Louisiana, the state had issued a defective patent in 1862, and subsequent holders of the patent applied to the state, under Act 104 of 1888, for a land warrant to be located upon lands of the same class as those distributed by the defective patent. This was promptly done. In 1942, application was made under the warrant for patents in Calcasieu Parish, and a patent was issued in 1943. The new patent contained no express reservation of minerals to the state, and years later the patentees instituted action against the state to establish title to the mineral rights in the lands. The state argued that Article IV, Section 2 of the Louisiana Constitution of 1921 excluded conveyance of the mineral rights to the patentees. Plaintiffs, however, contended that the constitutional provision was inapplicable because the land had been conveyed on the basis of rights accrued in 1862, and that the repose statute of 1912 precluded contest as to the validity of the patent. The Louisiana Supreme Court held that the constitutional provision was clearly applicable and that there was no vested right under the facts or the law. The repose statute, the court declared, “must yield to the Constitution of 1921, which embodies the clearly stated public policy that mineral rights in all lands sold by the state must be reserved. The state cannot lose by prescription that which it cannot constitutionally alienate.” This reasoning is clearly applicable by analogy to cases involving transfer of navigable waterbottoms.

Signed by the Governor

According to its terms, the 1912 repose statute applies to patents “duly signed by the Governor of the State and the Register of the State Land Office.” It would seem, therefore, that application of the statute presupposes a showing that the patent

37. 244 La. 1039, 156 So.2d 431 (1963).
38. Id. at 1049, 156 So.2d at 434. In King v. Board of Comm’rs, 148 So.2d 138 (La. App. 3d Cir. 1962), writ refused, 224 La. 118, 150 So.2d 585 (1963), the court held that prior to 1921 prescription ran against mineral rights held by a levee board. In this case, property had been transferred to a levee board in 1911 and plaintiffs claimed title to the same property, including minerals, by virtue of a sheriff’s sale in 1912. The court held for plaintiffs and declared that “Section 2, Article IV of the Constitution of 1921, must be limited strictly to property sold by the State since its adoption, and that since absolute title to property was in the Levee Board in 1911, including fee title to said land together with the mineral rights in, on or under the property in the instant suit, the Levee Board has lost the mineral rights to said property by prescription.” Id. at 144.
was signed as required by law. In *Valvoline Oil Co. v. Concordia Parish School Board*, however, the court *presumed* that the original patent had been validly issued and signed. Thus, the validity of an 1861 patent that had conveyed public school lands to private individuals was upheld. In the same case, an attempted cancellation of the original patent by the state in 1917 was declared invalid, by application of the jurisprudential rule that "patents, valid on their face, are presumed valid until revoked by judgment of court in judicial proceedings instituted for that purpose."  

*Suits or Proceedings*

According to its terms, the 1912 repose statute applies to "all suits or proceedings . . . to vacate and annul" state patents. Question has arisen, therefore, whether the statute prevents the state from cancelling a defective patent without recourse to judicial proceedings. A literal interpretation of the statute would obviously support the view that it applies to "suits or proceedings" for the annulment of patents and has nothing to do with cancellations of defective patents by the administrative authorities. Nevertheless, Louisiana courts have declared that patents valid on their face may only be annulled "in court proceedings instituted for that purpose," and that a cancellation by the administrative authorities is without effect. Moreover, in *Carter v. Moore*, the Court of Appeal for the First Circuit held that the 1912 repose statute excludes cancellations of defective patents by the administrative authorities. The judgment was reversed by the Louisiana Supreme Court on other grounds. In the view of the supreme court, the state must normally bring a "suit" for the correction of a deficient patent, but such a suit is not required when the patent has been corrected at the request of one of the patentees.

**Eroded Lands**

The repose statute of 1912, as interpreted in *California Co. v. [Vol. 32]*

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40. *Id.* at 706.
42. 234 So.2d 823 (La. App. 1st Cir. 1970).
43. 258 La. 921, 248 So.2d 813 (1971).
44. *Id.* at 932, 248 So.2d at 817.
Price,\textsuperscript{45} precludes contest by the state of the validity of patents conveying navigable waterbottoms. In the Price case, however, the court left open the question whether the state acquires the ownership of patented lands that have been eroded by navigable waters. This result appears to be a natural consequence of the rule in Miami Corp. \textit{v.} State.\textsuperscript{46} Indeed, in State \textit{v.} Scott,\textsuperscript{47} the Court of Appeal for the First Circuit reached the conclusion that if the land described in a patent was marsh land subject to overflow it ought to be governed by the Miami case; conversely, if the land was under water at the time of the issuance of the patent, it ought to be governed by the Price decision.

\textbf{Erroneous or Ambiguous Descriptions}

The question whether patents containing erroneous or ambiguous descriptions are valid and unassailable was unanswered until recently in Louisiana. In Carter \textit{v.} Moore,\textsuperscript{48} however, the Louisiana Supreme Court declared that Act 62 of 1912 does not bar “an otherwise timely suit by the State to secure correction of the ambiguous or void description: The demand and object . . . is to carry out the mutual intention of the parties as to the description of the area patented, not to take away any area actually described by it.”\textsuperscript{49} Plaintiff's ancestor in title had applied in 1881 for a state patent covering \textit{Fractional Section 21}, Township 13 South, Range 4 West. The patent was issued to the applicant, but, through clerical error, it purported to convey \textit{Fractional South-Half Section 21}. The error was material: The governmental division shown by the official survey as fractional section 21 included 45 acres of overflow lands adjacent to Grand Lake whereas the south half of section 21, which apparently had never been surveyed, would include 320 acres in the bed of Grand Lake. The clerical error was discovered in 1962 by a successor of the original patentee, and, at his request, a corrective patent was issued containing 45 acres of overflow lands in accordance with the original application. In 1963, all heirs of the original patentee joined in a mandamus suit; they prayed for an order compelling the issuance of a new corrective patent voiding...

\textsuperscript{45} 225 \textit{La.} 706, 74 So.2d 1 (1954).
\textsuperscript{46} 186 \textit{La.} 784, 173 So. 315 (1936).
\textsuperscript{47} 185 So.2d 877 (La. App. 1st Cir. 1966), \textit{writ refused}, 249 \textit{La.} 485, 187 So.2d 450 (1968). \textit{See also} concurring opinion by Judge Redmann in Stevens \textit{v.} State Mineral Board, 221 So.2d 645 (La. App. 4th Cir. 1969).
\textsuperscript{48} 258 \textit{La.} 921, 248 So.2d 813 (1971).
\textsuperscript{49} \textit{Id.} at 932, 248 So.2d at 817.
the 1962 correction and recognizing them as owners of the south half of section 21. The trial court dismissed the suit, but the court of appeal reversed. On certiorari, the Louisiana Supreme Court reinstated the judgment of the trial court.

The narrow issue before the Louisiana Supreme Court was this:

"Where an original patent had contained an erroneous and ambiguous description, and this had subsequently been corrected at the instance of a successor to the patentee, does mandamus now lie to compel state officials to issue a new corrective patent reinstating the original ambiguous (and erroneous) description?"

Plaintiffs contended that the state officials had a ministerial duty to act, and that the extra-judicial correction of the 1881 patent had the effect of annulling it insofar as it conferred title to them of a part of the bed of Grand Lake. In their view, the correction was forbidden by Act 62 of 1912, as interpreted by California Co. v. Price.

In a well-considered opinion by Justice Tate, the court held that the state officials could not be compelled to reinstate the original description. Relying on a long line of decisions, the court pointed out that a government survey creates, not merely identifies, the township sections and the boundaries thereof. Since the only governmental survey subdivision pertaining to the area at issue was fractional section 21, containing the 45 acres of overflow land adjacent to Grand Lake, and since no official survey had created any south half, let alone any fractional south half, the court concluded that the description in the original patent was at least ambiguous; hence, the defendant officials were not required to reinstate it.

Turning to the repose statute of 1912, the court held that it was inapplicable. The 1881 patent did not describe any portion of the bed of Grand Lake: "It did not describe any governmental subdivision, for there was (and is) no 'south half' of Section 21, nor any 'fractional south half' thereof . . . ." "The description of the land patented as being in the non-existent 'fractional south half' of Section 21," the court went on, "was ambiguous, if not

51. 258 La. 921, 248 So.2d 813 (1971).
52. Id. at 931, 248 So.2d at 816.
Hence, the court concluded that the 1912 statute did not bar an otherwise timely suit by the state to correct the ambiguous or void description. The narrow holding is merely that a mandamus proceeding will not lie to compel state officials to re-issue a patent with an ambiguous or erroneous description, when the original patent was cancelled at the request of a successor to the patentee. Broad language in the majority opinion, however, a monumental concurring opinion by Justice Barham, and Justice Tate's concurrence in denial of rehearing, indicate that patents containing erroneous or ambiguous descriptions are generally assailable and suggest the possible overruling of California Co. v. Price. It is for this reason that the Carter case is much more important than its peculiar facts might suggest.

In his scholarly and persuasive concurring opinion, Justice Barham made perhaps the most complete and authoritative survey of Louisiana legislation and jurisprudence governing navigable waterbottoms to date. He stated at the outset that the "fundamental, important, and pressing problem" before the court was a reconsideration of the Price decision, and then proceeded methodically to determine the development of Louisiana waterbottoms law from colonial times to the enactment of Act 62 of 1912, and beyond. He concluded that articles 449, 450, and 453 of the Civil Code have mandated the inalienability of navigable waterbottoms and that this inalienability could be abrogated only by express constitutional or statutory authority. Since Act 62 of 1912 was not such an authority, the conclusion of the court was "built upon a tenuous and untenable foundation" and was "inversely pyramided." Therefore, the Price decision ought to be judicially overruled. A buttressing reason for the judicial overruling of Price was also found in Act 727 of 1954, which ought to be regarded as constitutional. Quite apart from its technical aspects, this concurring opinion deserves attention in Louisiana as an example of civilian methodology at its best.

Concurring in the denial of an application for rehearing, Justice Tate reiterated his conviction that the Carter case was correctly decided on a narrow issue, and concurred with Justice Barham's view that the Price decision should be overruled if and

53. Id. at 931-32, 248 So.2d at 816-17.
54. Id. at 934, 248 So.2d at 817.
55. Id. at 962, 248 So.2d at 827.
56. See note 57 infra.
when the question is presented to the court. He further took
care to point out that in case the Price decision is overruled, in-
occent parties ought to be accorded the same rights as good faith
possessors and that judicial determinations already made would
be covered by the effect of res judicata.

Effect of Act 727 of 1954

In order to resolve authoritatively the question of the effect
of patents conveying the beds of navigable water bodies, the Lou-
isisiana legislature enacted in 1954 Act 727.57 The act declares
that:

“It has been the public policy of the State of Louisiana at
all times since its admission into the Union that all navigable
waters and the beds of the same within its boundaries are
common or public things and insusceptible of private owner-
ship; that no act of the Legislature of Louisiana has been
enacted in contravention of said policy, and that the intent
of the Legislature of this State at the time of the enactment
of Act 62 of the year 1912, now appearing as R.S. 9:5661, and
continuously thereafter was and is at this present time to
ratify and confirm only those patents which conveyed or
purported to convey public lands susceptible of private own-
ership of the nature and character, the alienation or transfer
of which was authorized by law but not patents or transfers
which purported to convey or transfer navigable waters and
the beds of the same.”58

This act has not yet been applied by Louisiana courts.

In State v. Cenac,59 a majority of the Louisiana Supreme
Court refused to grant writs when a lower court followed the
Price decision and confirmed the validity of an 1899 patent con-
vveying to private interests the beds of navigable waterbottoms.
Neither the district court nor the court of appeal had passed on
the pertinence of the 1954 act. In a concurring opinion, Chief
Justice Fournet expressed the view that the second Price de-
cision60 had already disposed of arguments based on Act 727 of
1954. In another concurring opinion, Justice Summers expressed

58. Id.
the view that the 1954 act cannot change the meaning of the 1912 reposes statute, because this would be contrary to the principle of separation of powers; he declared that "it does not lie within the domain of the lawmakers to interpret their own laws." 61 In a dissenting opinion, Justice Sanders observed that the 1954 act is "clothed with a presumption of constitutionality," 62 and in a separate dissenting opinion, Justice Hawthorne indicated that "[i]f by the denial of this writ the court intends to declare the act unconstitutional, the case becomes even more unusual and without precedent." 63 Finally, in his brief but vigorous dissenting opinion, Justice Hamlin argued that "the jurisprudence should be corrected or changed as to conform to public policy." 64

Questions may arise as to the constitutionality of Act 727 of 1954. Specifically, it may be argued that this act is obnoxious to the principle of separation of powers and to the prohibition against non-retroactivity of legislation. These arguments, though not without foundation, may be overcome.

In systems of codified laws, the authority of the legislature to interpret its enactments is a correlative of its power to legislate. Logically, the legislature ought to be the appropriate agency to clarify the meaning of statements that purport to express the collective will. According to an ancient maxim, *ejus est interpretari cuius est condere*, that is, the task of interpreting the laws belongs properly to one who has authority to make them. 65 In France, in the period following the promulgation of the Code Civil, the ultimate authority for the interpretation of laws was vested in the legislative assembly, in accordance with a rigid application of the principle of separation of powers. In the event of conflicting determinations of the Court of Cassation with other tribunals, the question about the meaning of a controversial text was put to the legislative assembly for resolution by interpretative legislation. This procedure, known as "reference to the legislative body," still exists in theory but it is no longer used on...

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64. *Id.* at 1077, 132 So. 2d at 936.
account of inherent delays and other difficulties. Quite apart
from this procedure, however, interpretative legislation is en-
acted in France either on the government's own motion or as a
result of petitions of interested persons. In the United States,
the authority of Congress to enact interpretative legislation has
been clearly recognized by the Supreme Court.

Expressions may be found in Louisiana decisions that the
interpretation of laws is exclusively a judicial function and that
the legislature lacks authority to enact interpretative legislation.
This view is allegedly based on the principle of separation of
powers; yet, in France, rigid application of the principle of sepa-
ration of powers has led to the opposite conclusion—that the ulti-
mate authority for the interpretation of laws is vested in the
legislative body. It is true, however, that the principle of sepa-
ration of powers leaves no room for the adjudication of cases by
the legislature, and this may be the true holding of certain Lou-
isiana decisions. The principle of the separation of powers does
not exclude the authority of the legislature to enact clearly in-
terpretative laws, clarifying the meaning of previously enacted
texts outside the context of litigation. Of course, it is a different
matter when the legislature actually amends previously enacted
legislation by laws designated as interpretative. This again may
be an improper exercise of power tending to attribute, contrary
to constitutional guarantees, retroactive effect to new legislation.

In light of the foregoing, it is submitted that Act 727 of 1954
does not violate the principle of the separation of powers. There
remains, however, the question of whether the act is unconsti-
tutional as retroactive legislation. In Louisiana, in addition to
the principle of non-retroactivity of laws established in article 8
of the Civil Code, which may be superseded by subsequent legis-
lation, certain types of retroactive legislation are contrary

66. See Loussouarn, The Relative Importance of Legislation, Custom
67. See Red Lion Broadcasting Co. v. Federal Communications Com-
of an earlier statute is entitled to great weight in statutory construction."
68. See, e.g., State Licensing Bd. of Contractors v. State Civil Service
Comm'n, 240 La. 331, 123 So.2d 76 (1960).
69. See concurring opinion by Justice Barham in Carter v. Moore, 258
La. 921, 960-61, 248 So.2d 813, 827 (1971): "If ever the Legislature were ent-
titled to have an interpretative act upheld as not being an invasion of the
judicial function or an abrogation of the theory of separation of powers of
government, certainly this legislation [Act 727 of 1954] should be accorded
that status."
to the state and federal constitutions. Thus, the prohibition against non-retroactivity may be both a qualified constitutional guarantee and a rule of statutory interpretation. The Louisiana Constitution forbids, specifically, ex post facto penal laws, laws impairing the obligation of contracts, and laws divesting vested rights without previous just and fair compensation. The Louisiana legislature, therefore, may constitutionally enact retroactive laws as to matters falling outside the constitutional prohibitions.

According to civilian theory, truly interpretative legislation does not violate the principle of non-retroactivity of laws. This is justified on the ground that this legislation does not establish new rules; it merely determines the meaning of existing laws and may thus be applied to facts occurring prior to its promulgation. In these circumstances, there is an apparent rather than real retroactivity because it is the original rather than the interpretative law that establishes rights and duties. It is another question, of course, when the legislature misuses the technique of interpretation and a law containing new rules is branded as interpretative.

It is submitted that Act 727 of 1954 constitutes truly interpretative legislation. It does not purport to attribute a new meaning to the repose statute of 1912 or to establish new rights and duties. On the contrary, it merely confirms a strong public policy, in existence since colonial days, and attributes to the 1912 statute the meaning that it had until the Louisiana Supreme Court rendered the Price decision. If the Louisiana Supreme Court were prepared to overrule this decision, there would be no serious objection to the constitutionality of the 1954 legislation.

70. See La. Const. art. 4, § 15. See also id. art. 1, § 2; U.S. Const. art. I, § 10.
71. As early as 1855, the Louisiana Supreme Court declared in Municipality No. One v. Wheeler & Blake, 10 La. Ann. 745 (1855) that "retrospective laws in civil matters do not violate the Constitution, unless they tend to divest vested rights or to impair the obligation of contracts." See also Long v. Northeast Soil Conservation Dist., 226 La. 824, 77 So. 2d 408 (1955).
73. See concurring opinion by Justice Barham in Carter v. Moore, 258 La. 921, 248 So. 2d 813, 827 (1971): "... the act of 1954 has not changed any law; it is not a new law; it is not a new rule of law; it does not divest vested rights or impair contractual obligations.
    "... If the 1954 legislation is accepted as an interpretative act and not as new law, there is no problem of impairment of contracts or divesting vested rights in violation of constitutional provisions."
Conclusion

A survey of Louisiana legislation and recent jurisprudence dealing with the validity of state patents conveying navigable waterbottoms to private interests leads to the conclusion that the interpretation of Act 62 of 1912 is not yet judicially settled. The ill-starred Price decision rests, indeed, on a “weak jurisprudential foundation,”4 is contrary to the whole spirit of Louisiana legislation, and does violence to fundamental precepts of Louisiana property law by allowing public things to be privately owned. Lower courts have consistently voiced opposition to the Price rule, and have sought ways and means to limit the scope of its authority as a binding precedent. In Carter v. Moore, the majority of the Louisiana Supreme Court, in effect, established a major exception to the Price decision, and Justices Tate and Barham voiced their conviction that Price ought to be overruled. Moreover, Justices Hamlin and Sanders have expressed in the past their opposition to the Price decision;7 thus, should the appropriate case arise, a majority might be formed for the dispatch of Price. If, as it seems, the overruling of Price is quite probable, concern ought to be expressed for the rights of innocent parties who might have relied on Price. Perhaps the Louisiana legislature should take the lead and should establish a special regime for these parties; in the absence of legislative action, the courts would be in a position to fashion solutions along the lines suggested by Justices Hamlin and Tate.

With Price on the way out, much of the learned discussion concerning the validity of state patents conveying navigable waterbottoms to private interests loses its object. An issue that has been blown entirely out of proportion in the state might finally be set to rest: Navigable waterbottoms which have been historically declared to be public, will continue to be insusceptible of private ownership. Moreover, Act 62 of 1912 may finally be relegated to its intended function, that is, it may be treated as a statute of repose covering state patents other than those conveying navigable waterbottoms.76

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4. Id. at 954, 248 So.2d at 825.
76. The 1912 repose statute has been correctly applied to a number of cases involving transfers of non-navigable waterbodies or dry lands. See, e.g., Fiedler v. Pipes, 236 La. 105, 107 So.2d 409 (1958); McCarthy v. Gonnet, 163 So.2d 840 (La. App. 4th Cir. 1964); Olin Gas Transmission Corp. v. Harrison, 182 So.2d 721 (La. App. 1st Cir. 1961).