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THE HISTORY OF LAND TITLES IN LOUISIANA

*Leslie Moses**

TO the ordinary lawyer, he who practices in a common law state, the legal system of Louisiana can be a vague rumor, an unprofitable subject often misunderstood, or a topic of scant misinformation. Usually the slightest mention of the "civil law" brings a shudder of dismay or a gesture of disapproval from him. He looks upon the civil law as that of a foreign land, difficult to learn and impossible to understand and appreciate. Yet for this lack of understanding and appreciation there is no good reason. The advantage of code law is now so generally recognized that it appears that most of the other states in the Union, as well as many foreign countries, have either codified their laws or made provisions for so doing.

Probably the inability of the common law attorney to comprehend some of the principles of the Louisiana civil law is due to his lack of knowledge of the background of the civil law. What is the Civil Code of Louisiana, from whence did it come, and how does it differ from the laws of the surrounding states? To any understanding of Louisiana law these questions are most pertinent. The Civil Code comes to Louisiana from Rome, via France and Spain. It is the fundamental law of continental Europe as well as most Central and South American countries. It is a written law, embodying, in brief but to the point form, the legal relationships of persons to persons and persons to property. It differs from the laws of Louisiana's sister states in that the latter are based upon the common law of England. The common law consists of precedents, carried down through the ages, recognized by the courts and contained

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in the reports of decisions. It is, therefore, heterogeneous in nature. The civil law, on the contrary, is logical, with each provision of the law following the other with sequence and regularity. Nevertheless, the law of Louisiana is largely tinged with common law. Criminal law and procedure as well as admiralty law have been copied from the common law. Furthermore, Louisiana has adopted by statute most of the uniform laws recognized and approved by the American Bar Association.

The historic background of Louisiana is sufficient *raison d'être* for the civil law in the State. Louisiana was permanently settled by the French about 1700 and remained a French dominion until it was ceded to Spain in 1762. Under the French domination, Louisiana was governed by, and its people lived under, the laws of France, a civil law country.

Spain owned Louisiana from 1762 until 1800. During the period it was under the Spanish influence, Louisiana was governed by an Irish soldier-of-fortune bearing the captivating name of Don Alexandro O'Reilly. O'Reilly attempted to abolish the French laws and French institutions in the territory, and created in their place a formulary of Spanish laws which was known as O'Reilly's Codè. As the laws of Spain, as well as those of France, were derived from the same source, the Corpus Juris Civilis, and as there was a great similarity in their provisions with respect to matrimonial rights, testaments and laws of succession, the transition, if any, was not perceived before it became complete, and no inconvenience resulted from the change. In fact, the Code had little or no effect on the jurisprudence of the country, and was never intended to be more than a stop-gap until the general law of Spain could be introduced into the State. In view of the short period of Spanish domination, this was never done, for in 1800 the territory was ceded back to France, and on Christmas Day, 1803, France sold the entire Louisiana territory to the United States. In 1804 the Territory of Orleans (comprising what is now the State of Louisiana) was organized.

The commissioners representing the United States in purchasing Louisiana from France were James Wilkinson and W. C. C. Claiborne. The former was a United States General and the latter a famed common law attorney. Claiborne naturally attempted to institute a system of laws in Louisiana based upon the common law. As a practical matter he found this impossible. The people were French, their ideas were French, their customs were French, their thinking was French, and they knew only the French law and customs. Public resistance was so great that Congress passed a law on March 26, 1804, providing that the civil law should prevail in the Territory of Orleans unless it was contrary to the Constitution of the United States. This definitely settled the matter, and the civil law remained as it prevailed at the time of the Louisiana Purchase, and so it has remained even unto this day.

The main source of the Louisiana civil law is found in the Twelve Tables of Kings, codified almost 2500 years ago. For over a thousand years these Twelve Tables continued to be the basic law of Rome. As society and commerce grew, the need for new laws was recognized, and new principles were enunciated from time to time. So great were these changes that when Justinian became emperor in the middle of the Sixth Century, the laws of Rome were in hopeless confusion. One of his first tasks was to appoint a noted lawyer, Tribonian, and a staff of nine to reduce the law to a code. In fourteen months these lawmakers created the Code of Justinian, contained in twelve books after the example of the Twelve Tables. Thereafter they prepared a digest of the laws, a volume of institutes, and a number of new laws, called "Novels." The Code, Digest, Institute and Novels constitute the great "Corpus Juris Civilis." Justinian went down in history in a dual role: he was cruel and selfish, yet wise and just. His armies conquered the then known world and his lawmakers built a monument more lasting than stone. The historian, Gibbons, said: "The vain titles of the victories of Justinian are crumbled into dust, but the name of the legislator is inscribed on a fair and everlasting monument."

After Justinian, the period of the dark ages settled over Europe, and laws and codes were forgotten. Mental, moral and social conditions were at their lowest ebb. Not until Napoleon came into power was any attempt made to revise and redraft the laws of the continent. Strange it is that two world conquerors recognized that in addition to force of arms there was needed an additional force to maintain order. Using Justinian's great work as a base, Napoleon's lawmakers produced, in four months, the Code Napoleon. While it had many defects, it must be borne in mind that it has survived repeated and violent changes in the government of France; that it supplied other nations in Europe with a model upon which they based similar codes; and that it crossed the ocean and formed the groundwork for the Code of Louisiana. Like Justinian, the victories of Napoleon are forgotten, but his code of laws lives on.

Louisiana's first Civil Code was written in 1808. It preserved the fundamentals of the civil law based on the Code Napoleon, but added to it certain additional principles of French and Spanish law which had become familiar to Louisianians during the colonial period. Louisiana was admitted into the Union in 1812, but it was not until 1825 that a new Code was adopted. Every Constitution of the State,¹ beginning with the first one adopted in 1825, has provided that the civil law system shall not be supplanted by any other.² This is a continuing safeguard against the institution of common law or any other system of law into the State.

The Civil Code, therefore, is the source of legal authority in Louisiana with respect to property rights and personal rights, except, of course, as modified or supplemented by the Constitution and the various acts of the Legislature. The Code of 1825 remained in effect until after the Civil War. As a result of the war and the changes brought about in economic and political life,

¹ 1825, 1845, 1852, 1861, 1864, 1868, 1879, 1898, 1913, 1921.

² LA. CONST. (1921) Art. III, §18.

it had to be revised, rewritten and modernized in 1870. Basically, however, the principles were the same, and it is under the Code of 1870 that Louisianians live today. It has often been said that any legal problem arising in the State of Louisiana can be solved by some portion of the Civil Code.

By virtue of having established their independence in the Revolutionary War, the original Thirteen States succeeded to all of the rights of the English Crown within their confines, including the ownership of all ungranted lands. The United States, therefore, had no title to any land within the boundary of the original states and thereafter acquired only such land as was ceded or granted to it by such states. In 1812, when Louisiana was admitted into the Union, one of the provisions for admittance was that all land not previously disposed of became the property of the Federal Government. Thus, from 1812 on, all land titles in the State emanated from the United States. Most of the land in North Louisiana, with the exception of a few Spanish and French grants, derive their source of title directly from the United States. However, for many years prior to 1812 hundreds of thousands of tracts of land in South Louisiana had been acquired by private individuals. Titles to these lands, naturally, must be traced to the sovereignty owning Louisiana at the time of severance of the tract from the public domain, to-wit, France or Spain.

The French and Spanish grants which were completed at the time of the admission of the State into the Union, that is, those which absolutely divested themselves of the prevailing sovereignty, were owned in full by the respective private parties. They were valid titles without any further action.³ There were any number of grants which were incomplete,⁴ lacking some of the necessary procedure for acquiring the property either from France or Spain. Provisions were made instituting boards of commissioners for the purpose of investigating such titles, and confirming the

³ Acts of Congress, March 2, 1805, March 3, 1811, April 25, 1812, April 12, 1814.

⁴ Those made prior to December 20, 1803, were confirmed by Act of Congress, April 12, 1814.

grants, if proper.⁵ In the end practically all were confirmed by special acts of Congress.⁶ In some cases, out of an abundance of caution, confirmation was obtained from the United States, and in some instances even, patents were obtained from the Federal General Land Office.

It is interesting to comment that what is known as the Florida Parishes of Louisiana, constituting all of those parishes lying east of the Mississippi River, claimed that their land never belonged to the United States because in 1810 they threw off the yoke of Spain, formed the independent State of West Florida, and exercised all powers of sovereignty for a short time. Toward the latter part of 1810 the government of West Florida issued an invitation to the United States to assume jurisdiction over the "State," but reserved to itself title to all ungranted land. The Parishes further claimed that the United States accepted the invitation and received them as part of its territory under such conditions. The United States, however, has never recognized such claim.⁷

As has been said, the vast majority of private titles in Louisiana have been derived from the Federal Government since 1812. The United States General Land Office (now known as the Bureau of Land Management) had complete control over the public lands under the supervision of the Department of Interior. The public lands of Louisiana were divested from the Government principally by patents, railroad and public improvement grants, and swamp land grants. Under swamp land grants the State of Louisiana obtained title to vast tracts of swamp and overflow lands and thereafter divested itself of title to much of the land by means of State patents. Once the land was severed from the public domain, it then, of course, became subject to the prevailing principles of property law of Louisiana with respect to ownership and transfer, some of which are outstandingly different from those of sister states.

⁵ Act of Congress, June 22, 1860.

⁶ Acts of Congress, March 2, 1807, and June 10, 1877.

⁷ H.R. Exec. Doc. No. 31, 48th Cong., 1st Sess., Nos. 79 and 79A (1895).

In considering certain features of property law in Louisiana, one must bear in mind that the civil law endeavors to protect the sanctity of the home to the greatest degree possible. This is true both as to the French and the Roman Codes. Until recently in Louisiana one could get a divorce only on two grounds, adultery or the sentence of the other spouse to an infamous punishment.⁸ To disinherit a child is almost an impossible task. The Code is most specific in giving a few strict causes for disinheritance⁹ and in providing that the last will must not only contain specific and exact language of disinheritance, naming the child so disinherited, but also give in definite language the reasons for such disinheritance, which reasons must be proven to the satisfaction of the court by the remaining heirs.¹⁰ These and other provisions, some of which will hereinafter be mentioned, are illustrative of the extent to which the civil law goes toward providing for the protection of children and the home.

Those persons from common law states accustomed to dealing with the interest of a minor through a guardian will find in Louisiana that they must deal with a tutor,¹¹ the civil law version of the office of a guardian. They will be astonished and quite often dismayed to learn that in addition to the tutor there must be an under-tutor of the minor.¹² One can imagine their perplexity if they had been confronted with the necessity of convoking a family meeting (which was done up to a short time ago), which must approve the recommendations of the tutor and under-tutor and authorize them to act on behalf of the minor.¹³ No matter how small the transaction, it was necessary to go through the complicated and time-consuming procedure of having the court appoint people and order them to hold a family meeting. The techni-

⁸ LA. CIV. CODE ANN. (West, 1952) Art. 139.

⁹ *Id.*, Art. 1617, *et seq.*

¹⁰ Art. 1624.

¹¹ Art. 246 *et seq.*

¹² Art. 273 *et seq.*

¹³ Art. 281 *et seq.*

calities with reference to appointment, oaths, notice, attendance and return (which is called "*proces verbal*" and means the written report of the deliberations conducted at the family meeting) were sacramental, and any deviation from the rigid requirements of the law was often a fatal defect in the sale of a minor's property. With the advance of modern civilization, the necessity of holding family meetings was gradually relaxed, and for all practical purposes such holdings are now obsolete. Even so, unto this very day, the requirements for dealing in commerce with an interest in land owned by a minor are very strict and subject to the rigid adherence by the tutor and under-tutor, under the supervision of the court.

Another principle of law peculiar to Louisiana is what is called the doctrine of the "*legitime*."¹⁴ When a testator has what we call "forced heirs," that is, heirs who under the law must be left a certain portion of the testator's property, such testator is not free to dispose of all of his property through gift, either inter vivos or mortis causa.¹⁵ For instance, a person with one child cannot dispose of more than two-thirds of his estate. In other words, with one child, that child's *legitime*, or guaranteed portion of inheritance, is one-third of the estate. Similarly, with two children, the disposable portion of the estate cannot exceed one-half, and with three or more children, the disposable portion cannot exceed one-third. Any gift of more than the disposable portion is subject to be set aside at a later date, or reduced to the disposable portion.¹⁶ This can be quite complicated and may cause some difficulty in acquiring a valid title, because the attack on any excessive donation can be made only after the death of the donor, and prescription (limitation in the common law) does not run until five years after the date of death.¹⁷ Bear in mind, however, that this restriction applies to donations only, not to sales of property. It is con-

¹⁴ Art. 1495.

¹⁵ Art. 1493.

¹⁶ Art. 1502.

¹⁷ Art. 3542.

ceivable, therefore, that title to a tract of land can be defective as a result of a donation made early in life by a person who lives to an exceedingly old age. As a result, title examiners in Louisiana are usually suspicious of the validity of donations.

Another interesting feature of Louisiana law is the doctrine of "lesion beyond moiety."¹⁸ This principle of law protects the seller of property by guaranteeing him at least a reasonable and fair price for the sale. It means that if a person sells his real estate for what is later proved to be less than one-half of its actual value at the time of the sale, the sale is subject to attack and nullification within a prescribed period. If attacked, the purchaser may validate the sale by making up the difference between the sale price and the amount necessary to bring it out of the lesion category. Lawyers from other states are usually shocked by this principle of law, for in most states any consideration is valid.

Still another feature of Louisiana law, which is followed in many of the other states, is the almost absolute safety with which one may deal with the record owner of property notwithstanding that one may have actual knowledge that the true ownership is in someone other than the record owner.¹⁹ Under this principle of law, if one is interested in a piece of property and the courthouse records show that it is owned by John Smith, one may safely purchase the property from John Smith even though he has actual knowledge that John Smith previously sold the property to Bill Jones and that Bill Jones did not place his deed of record.

Most of those people living outside Louisiana who are interested in Louisiana property law are usually in it because of the situation with respect to mineral rights. A brief discussion of the historical reason for the limited life of mineral rights in Louisiana should be of value. It has been seen that the law of Louisiana

¹⁸ Art. 2589 *et seq.*

¹⁹ Art. 2266 reads: "All sales, contracts, and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except as between the parties thereto. The recording may be made at any time, but shall only affect third parties from the time of recording."

has always been written law, and that the Civil Code is the absolute law with reference to personal and property rights, as it may have been supplemented by legislative acts and provisions of the State Constitution. The first Civil Code was written over 100 years ago, and the one upon which Louisianians rely at the present time is a revision over 50 years old. At the time of the last revision in 1870, the oil and gas industry was not only unknown but also undreamed of. It can readily be understood that there are no provisions in the Civil Code pertaining to property rights in oil and gas. The first commercial oil production in Louisiana was discovered in 1902, and litigation naturally developed immediately thereafter over what was fast becoming vastly valuable property rights. The Supreme Court of Louisiana was confronted with the most difficult task of deciding questions with respect to such rights under articles of the Civil Code, when everyone knew that the articles were written with no intention of their covering such rights. The law, therefore, with respect to mineral rights has grown up through judicial decisions involving the interpretation of articles of the Code and the attempt by judges to apply such articles of the Code as they thought were applicable, while still admitting that those articles were written without even the remotest thought of oil and gas problems. One of the first questions to arise was what was sold when mineral rights were disposed of. Would the person sell the oil and gas lying beneath his land, if any, so as to create a separate and permanent estate different and apart from the surface rights? This was the theory adopted by a number of common law states. Or did he sell merely a limited right of the use of his land in the form of an easement, or what in Louisiana is called a servitude? These questions were not decided by the supreme court until the 1920's when the oil industry had become one of vast importance.

The landmark case of *Frost Johnson Lumber Company v. Salling Heirs*²⁰ brought this issue squarely before the supreme court,

²⁰ 150 La. 756, 91 So. 207 (1922).

and the legal profession as well as the oil and gas industry wanted the matter settled once and for all as to whether a separate estate or a servitude was created. On January 5, 1920, a decision was rendered, three judges out of seven dissenting, holding that a sale of mineral rights or a reservation of mineral rights only amounted to the creation or the reservation of a servitude, that the right to take oil and gas from the land did not constitute a joint ownership with the fee title owner, and that such sale or reservation was a servitude which would be lost by prescription if not exercised within ten years. The court further held that the creation of a permanent interest in the land as to the actual ownership of the oil and gas was an attempt to create an estate prohibited under civil law.

A rehearing was granted, and on May 2, 1921, a new decision was rendered reversing the first decision and holding just the opposite, that the sale or reservation of mineral rights created an estate which was permanent and everlasting. Again three judges dissented.

One of the things that makes this case a landmark case is not only that it created unique and new jurisprudence in Louisiana with respect to mineral rights, but also the fact that the supreme court did a rare and unusual thing in that it granted a second rehearing. A third decision was accordingly rendered, again with three judges dissenting. This third decision reaffirmed the first decision and definitely established that oil and gas in place are not subject to absolute ownership apart from the soil, that a grant or reservation gives only the right to extract oil and gas from the soil, and that such right to extract is a servitude prescribed by non-user for ten years.

No attempt has been made to give any lengthy discourse with respect to property rights both in fee and in minerals. All that was intended was to give to the common law attorney an insight into the reasons behind the basic property laws of Louisiana. If

one can understand the "why's" of the laws, one can better appreciate their workings. To delve more deeply into the laws themselves would be a task too great at this time and too lengthy for any law review article.

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