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Property

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ERROR OF LAW AND ERROR OF FACT IN ACQUISITIVE PRESCRIPTION

I. Some Truisms About Errors and Prescription

Let us begin with some truisms: the reason a good faith possessor finds himself in the position of having to invoke the ten-year prescription is that he made the *mistake* of buying from someone who turned out not to be the owner of the property;[1] one of the most important functions of the ten-year prescription is to cure such mistakes; and, if *all* mistakes were considered inexcusable, the institution of prescription would be largely unnecessary.

One of the bases of the ten-year prescription for immovables is the requirement that the possessor be in good faith at the time of his acquisition.[2] The basis of his good faith is his *mistaken belief* in the seller's ownership.[3] Whether founded on an error of law or an error of fact, this belief is thus the first necessary ingredient of good faith. If this belief did not exist, the possessor would not have bought the property, or if he had, he would not be in good faith. If this belief is not mistaken, then the possessor is the owner of the property and does not need prescription.

The second ingredient of good faith is the requirement that the possessor's belief in the seller's ownership be reasonable by objective standards.[4] Viewed from the opposite angle, this process of evaluating

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1. This truism is graphically expressed in La. Civ. Code art. 3451 (1870), in force until 1983, which defined the possessor in good faith as "he who has just reason to believe himself the master of the thing he possesses, although he may not be in fact; as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which, in fact, belongs to another."

2. See La. Civ. Code arts. 3475, 3482.

3. See La. Civ. Code art. 3480 which provides that "a possessor is in good faith when he reasonably believes, in light of objective considerations, that he is the owner of the thing he possesses." Compare former La. Civ. Code art. 3451 (1870) supra note 1.

4. See La. Civ. Code art. 3480, supra note 3.

the reasonableness of the possessor's belief is simply a process of evaluating the seriousness of his mistake and its impact on society in general. Depending on the circumstances, the possessor's mistake may be objectively justifiable or excusable, or it may be inexcusable. While the legislature may determine in advance which mistakes are excusable and which are not, the better solution is to leave this determination to the courts. This latter solution was adopted by the 1982 revision of the Civil Code provisions on acquisitive prescription.[5] After restating the presumption of good faith,[6] new article 3481 declares categorically that "[n]either error of fact nor error of law defeats this presumption. This presumption is rebutted on proof that the possessor knows, or should know, that he is not the owner of the thing he possesses."

1. Old Sins

Article 3481 of the Civil Code of 1870 was no less categorical than the new article, though it was less specific. That article declared that "[g]ood faith is always presumed in matters of prescription; and he who alleges bad faith in the possessor, must prove it." Yet, under the regime of that article Louisiana courts developed a number of exceptions according to which certain errors by the possessor would negate automatically his claim to good faith. The first such exception pertained to all errors of law,[7] and the second to a particular species of an error of fact by the possessor—conducting a title search but failing to discover

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5. 1982 La. Acts No. 187, effective January 1, 1983, revised title XXIII of Book III of the Civil Code of 1870 dealing with occupancy, possession and acquisitive prescription. Any reference hereinafter to articles of the Civil Code without further designation is to the articles currently in force. The repealed articles are referred to as old articles. For a discussion of the new articles on prescription and a comparison with the old ones, see Symeonides, One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription, 44 La. L. Rev. 69 (1983).

6. For an excellent discussion of the function and true meaning of this presumption, see Hargrave, Presumptions and Burdens of Proof in Louisiana Property Law, 46 La. L. Rev. 225, 237-40 (1985).

7. See, e.g., Thibodeaux v. Quebodeaux, 282 So. 2d 845 (La. App. 3d Cir. 1973), and Dinwiddie v. Cox, 9 So. 2d 68 (La. App. 2d Cir. 1942). This jurisprudence was based on La. Civ. Code art. 1846(3) (1870), which was repealed by 1982 La. Acts No. 187, effective January 1, 1983. This paragraph provided that "[e]rror of law can never be alleged as the means of acquiring . . . . The error, under which a possessor may be as to the legality[illegality] of his title, shall not give him a right to prescribe under it." Nevertheless, it has been convincingly demonstrated that this paragraph pertained to just title rather than good faith and that, in any event, it purported only to regulate the vendor/vendee relationship without intending to affect third parties. See Hargrave, The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Prescription, 35 La. L. Rev. 329, 331 (1975); Note, Good Faith for Purposes of Acquisitive Prescription in Louisiana and France, 28 La. L. Rev. 662, 666-73 (1968).

the defect in the seller's title.[8] Both these errors were regarded as automatic rebuttals of the codal presumption and as fatal to the possessor's claim of good faith. Although the authority and soundness of these exceptions were questionable,[9] they were parroted in numerous judicial decisions, though more often in dicta than in holdings.

2. New Remedies

New article 3481 has corrected this jurisprudence, both directly and indirectly. The direct change pertains to errors of law. Rather than automatically and necessarily precluding good faith as it did under the pre-1982 jurisprudence, an error of law is now simply one of the factors for determining "in light of objective considerations"[10] the existence or lack of good faith. This means that, rather than ending the inquiry the moment an error of law is discovered, the court should continue the inquiry in order to determine whether, despite the error of law, the possessor's belief in the seller's ownership was reasonable under the circumstances of the particular case. Again viewed from the opposite angle, this means in turn that, depending on the circumstances, some errors of law may be found "excusable" while others may be found "inexcusable."[11]

The indirect change concerns errors of fact. It is submitted that new article 3481 has abolished not only the distinction between errors of law and errors of fact, but also the very notion that any type of error may be used to defeat the presumption of good faith in an *a priori* fashion, regardless of the circumstances of the particular case. As suggested elsewhere,[12] despite the lack of a change at the surface, the new law has thus opened the door for reexamining many other artificially constructed jurisprudential "rules" that over the years have undermined the presumption of good faith. One such "rule" is the one that treated an erroneous or incomplete title search as automatically rebutting the codal presumption of good faith.[13]

Two recent cases provide the ground for testing the accuracy of these observations. Although both were decided under pre-1983 law, these cases are well within the spirit of the new law, and are also

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8. See, e.g., Martin v. Schwing Lumber & Shingle Co., 228 La. 175, 182, 81 So. 2d 852, 854 (1955), and pertinent discussion in Note, supra note 7; Comment, The Ten-Year Acquisitive Prescription Of Immovables, 36 La. L. Rev. 1000, 1001-02 (1976).

9. See Hargrave, supra note 7; Note, supra note 7; Comment, supra note 8.

10. La. Civ. Code art. 3480, supra note 3; see also La. Civ. Code art. 3481 ("the possessor knows, or *should* know")(emphasis added).

11. See Symeonides, supra note 5, at 113.

12. See id. at 111-12.

13. See supra note 8.

illustrative of some of the problems likely to be encountered in its application.

II. Error of Law

The first case, *Lacour v. Sanders*,[14] involves an error of law. In this case, Sanders, the possessor, had bought the property in question from Jett, his friend and neighbor, shortly after the death of the latter's wife in 1959. Sanders knew that Jett had been married, but claimed complete ignorance of Louisiana community property law and its consequences on Jett's power to sell the entire property. Under *Dinwiddie v. Cox*,[15] this would be a classic error of law and would be fatal to Sanders' claim to good faith. After noting in passing that under the new law an error of law does not necessarily defeat the presumption of good faith, the trial court applied pre-1983 law and found the possessor in good faith. The court noted that Sanders was uneducated;[16] that he was "'ignorant of Louisiana community property laws'";[17] that "'at the time of the sale. . . the Head and Master rule, was in effect whereby the husband could transfer full interest in the community by onerous title without the permission of his wife'";[18] that a title search would not have revealed that Jett's wife was deceased;[19] and that "'the lawyers prepared the deed and kept everything straight.'"[20] Finding the record "'silent as to any information conveyed to Sanders which would place him on notice to inquire about his title,'"[21] the court held that it was "'abundantly clear that . . . Sanders was a good faith possessor of the entire 30.30 acres in dispute.'"[22] The court of appeals affirmed the trial court's decision, quoting in length the trial court's reasoning. The supreme court denied a writ by a 4-3 vote.[23]

Because it is essentially a trial court decision despite its affirmation by the higher courts, *Lacour* may not have much precedential value. Nevertheless, *Lacour* is worth discussing because it involves a recurring

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14. 442 So. 2d 1280 (La. App. 3d Cir. 1983), cert. denied, 446 So. 2d 1221 (La. 1984).
15. 9 So. 2d 68 (La. App. 2d Cir. 1942).
16. 442 So. 2d at 1283 (quoting from the decision of the trial court)(emphasis omitted).
17. Id.
18. Id.
19. Id. at 1284.
20. Id.
21. Id.
22. Id.
23. 446 So. 2d 1221 (La. 1984). Chief Justice Dixon and Justices Calogero and Dennis would grant the writ.

fact pattern, and because the result is intuitively equitable[24] and probably in line with the philosophy of the new law. The court's reasoning, however, is a different matter. In fact, it would appear that, taken individually, none of the reasons advanced by the trial court would suffice to sustain its decision, at least under the pre-1983 jurisprudence.

For example, the possessor's lack of education might be important in satisfying the first level of inquiry, i.e., determining the possessor's subjective belief in his seller's ownership. Nevertheless, the *individual* possessor's level of sophistication should be rather secondary in the second level of inquiry, i.e., evaluating the reasonableness of this belief on the basis of the average, "reasonable-person" standards. Although the line between the two inquiries may not be as clear as one would prefer, what should be clear is that a below-average sophistication of the individual possessor may benefit him in the first but not the second inquiry, for the same reason that an above-average sophistication would harm him in the first but not the second inquiry (assuming, of course, he ever overcomes the first).

Similarly, it is largely irrelevant that the "head and master rule" was still in force at the time of the sale. In the first place, it is inconsistent first to sanction the possessor's ignorance of community property law, and then selectively to invoke on his behalf one particular rule from that law. More practically, however, the head and master rule was actually inapplicable to these facts. Had this rule been applicable, the buyer would have acquired full and immediate ownership of the property at the time of his purchase, and thus he would not need prescription. However, at the time of the sale, the seller was no longer the head and master of the community, since the community had been dissolved by his wife's death.[25] Her children, of whose existence the buyer was fully aware, had already inherited her one half-interest in the property. It was their interest, not their mother's, that their father purported to sell. Thus, as in *Dinwiddie*,[26] the actual error of law involved in this case was an error about succession law rather than community property law.[27] The court appears to attribute to the buyer the syllogism that

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24. One of the reasons that makes this decision equitable is that the plaintiffs, Jett's children whose interest in the property was sold by their father without authority, had in fact accepted from their father their share of the proceeds of the sale. They also failed to communicate to their neighbor, Sanders, their alleged opposition to the sale until 22 years later. See 442 So. 2d at 1283. Although it may be doubtful whether technically these two facts may amount to either ratification or estoppel, the result is nevertheless intuitively equitable.

25. See 442 So. 2d at 1281. ("'Joe Sanders . . . knew [that Mrs.] Jett died. [He had even] attended the wake.'")(quoting from the decision of the trial court).

26. 9 So. 2d 68 (La. App. 2d Cir. 1942).

27. Insofar as the possessor knew that Mrs. Jett's interest in the property had been

the power accorded the husband by the head and master rule to sell community property during the marriage continues after, and is perhaps reenforced by, his wife's death. Such a self-serving syllogism, however, would transform the head and master rule from a rule of administration and disposition to a rule of absolute ownership, which was never intended to be.[28] In a way, the court is giving the possessor the best of both worlds.

This unnecessarily liberal treatment of the possessor is also obvious in the court's statement that, because a title search would not have revealed that Mrs. Jett was deceased, the possessor's actual knowledge of her death was irrelevant. It may be true that, under some questionable though often repeated old jurisprudence, a buyer who had reason to doubt the seller's ownership, but did not conduct a title search, is imputed with constructive knowledge of the contents of the public records.[29] To this author's knowledge, however, the reverse has not been true. A party who did not make a title examination may not claim the benefits accorded by law to a party who did make such examination. The court's reliance on the absence from the public records of any notation of Mrs. Jett's death and its willingness to disregard the buyer's actual knowledge of that death seem to echo, subconsciously perhaps, the rule of *McDuffie v. Walker*,[30] that a buyer who relies on the public records acquires the seller's interest free of unrecorded interests of third parties, despite his own actual knowledge of such interests. The *McDuffie* rule, however, never meant that such actual knowledge has no bearing on the good faith of a buyer who has *not* relied on the public records.

Be that as it may, the only aspect of *Lacour* that is important in terms of future trends is its treatment of the error of law problem. To understand this problem one must go back to *Dinwiddie*, the leading error of law case. In that case, the possessor knew that his seller's biological ancestor had left predeceased children other than the seller. Nevertheless, being ignorant of the rule of Louisiana succession law of inheritance by representation, i.e., that the share of predeceased children

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inherited by her children, he committed an error about the law of mandate. According to the possessor's testimony, the seller had told him that "'*the children all had agreed*'" to sell. 442 So. 2d at 1283 (quoting the trial court opinion). The possessor's error consisted in the belief that an alleged oral authorization, especially one communicated only to the mandatary, was legally sufficient to sell immovable property. See La. Civ. Code arts. 2992 and 2997 in connection with the jurisprudential "equal dignity rule" which requires that such authorization be clothed with the same formalities as provided by law for the authorized act.

28. Such a syllogism would also be inconsistent with the possessor's claim that the children had agreed to the sale. See supra note 27.

29. See infra text accompanying notes 35-40.

30. 125 La. 152, 51 So. 100 (1909).

is inherited by their own descendants,[31] the possessor did not try to find out whether such descendants existed. According to *Dinwiddie*'s oft-parroted dictum, this error of law prevented the buyer from claiming the status of a good faith possessor, because "if he purchased and possessed under error of law, he *thereby* became a possessor in bad faith."[32] Herein lies the court's own error, i.e., the *automatic* assumption that the possessor was in bad faith *because* of his error of law. What the court meant was that the buyer's belief in the seller's ownership was not reasonable, because at the time of the purchase, the buyer knew of facts—the existence of predeceased children—which would raise doubts in the mind of the average reasonable buyer about the seller's ownership. Although this conclusion might well have been correct under the circumstances, it should not have been reached without first addressing the intermediate and more pertinent question of whether the possessor's belief in the seller's ownership was reasonable in light of his erroneous assumptions about the law.

The *Lacour* court did slightly better in this respect in that it at least paused somewhat to consider this question. This aspect of *Lacour* appears in line with the philosophy of the new law. Nevertheless, the process by which the decision was reached, and perhaps the correctness of the ultimate conclusion, is a different story. The *Lacour* facts were strikingly similar to *Dinwiddie*. In *Lacour*, the buyer knew that the seller was married and that his deceased wife was survived by children who were, in fact, from a marriage other than that with the seller. In the absence of an error of law, these facts would be sufficient to raise doubts in the mind of the average buyer about the seller's right to sell the entire property, and to render his belief in the seller's ownership unreasonable. Should the buyer's error of law alter this conclusion? The court appeared all too ready to answer this question in the negative, without much scrutiny of the particular circumstances, and without any discussion of *Dinwiddie*. Unable to distinguish *Dinwiddie*, and apparently perceiving itself unable to overrule it, the *Lacour* court chose instead to disregard it.[33]

Fortunately, *Dinwiddie* has been legislatively overruled by the new revision. This does not, however, automatically make *Lacour* a correct decision. The abolition of the error of law doctrine does not mean that

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31. See La. Civ. Code arts. 881-886, replacing La. Civ. Code arts. 894-899 (1870).

32. 9 So. 2d at 71 (emphasis added).

33. The court did distinguish the case before it from Juneau v. Laborde, 219 La. 921, 54 So. 2d 325 (1951) and Thibodeaux v. Quebodeaux, 282 So. 2d 845 (La. App. 3d Cir. 1973). *Juneau* was distinguished because the possessor therein "'*was warned against buying the property and told that the title was not good.*'" *Lacour*, 442 So. 2d at 1283 (quoting the trial court opinion). *Thibodeaux* was distinguished on the ground that the possessor therein "'*was aware of the Louisiana community property laws.*'" Id.

an error of law has no bearing on the question of good faith. As said earlier, it simply means that, rather than automatically defeating good faith, an error of law becomes one of the many factors on the basis of which good faith will be determined. The buyer's belief in his seller's ownership must still meet the objective standards of reasonableness. The individual buyer's sophistication, if it happens to be below average, would seem almost immaterial in this determination. The question is not so much whether the individual buyer could honestly believe that he was buying from a full owner, but rather whether the average buyer could have reasonably harbored such a belief. In cases involving an error or ignorance of law,[34] the reasonableness of that belief cannot be divorced from the status in the community at large of the particular legal rule whose ignorance is invoked. The more widely known a rule is to the community at large, the less likely it is that its ignorance by the particular buyer would be excusable, and vice versa. Although there may be room for disagreement, it would seem that, whether it pertained to community property, succession, or mandate law, the legal rule whose ignorance caused the error in *Lacour* is a rule that is widely known among Louisianians regardless of educational background.

III. Error of Fact

The second case, *Phillips v. Parker*,[35] involved a very common error of fact by the possessor: conducting a title examination but failing to discover a defect in the seller's title. In this case the defect was a mere thirteen-foot overlap with a neighbor's lot sold to the neighbor by the same seller in a previous but nearly contemporaneous sale. The title examiner, an attorney hired by the possessor's attorney, testified that he had missed the overlap. The court of appeal felt bound by the often stated but rarely tested jurisprudential theory that "if a purchaser has

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34. Technically, an error of law is different from ignorance of the law. According to La. Civ. Code art. 7, "[a]fter the promulgation, no one can allege ignorance of the law." According to La. Civ. Code arts. 1949-1950, an error of law may vitiate consent under certain circumstances specified therein, and may thus serve as a ground for the rescission of a contract. Also according to La. Civ. Code art. 3481, see supra text accompanying note 6, a possessor may be able to prescribe despite his error of law. Practically, however, the line between an error of law and ignorance of it cannot be easily drawn, insofar as the latter is usually the reason for the former. One way of resolving the potential conflict between La. Civ. Code art. 7 on the one hand, and articles 1949-1950 and 3481 on the other, is to consider the latter as specific exceptions to article 7, which as such, but also as more recent provisions (enacted in 1982 and 1984 respectively) would prevail over article 7. At the same time, it must be recognized that a jurisprudence that is willing to excuse all, or even most, errors of law may go a long way towards undermining the socially useful principle underlying article 7 of not sanctioning ignorance of the law. To the extent that *Lacour* reflects such a tendency, it must be discouraged.

35. 483 So. 2d 972 (La. 1986).

notice of facts as to a possible defect in his title to excite inquiry or voluntarily undertakes a title search, he is charged with the defects the title examination would reveal in the public records."[36] Believing that "[t]his theory of law based upon the public records doctrine . . . has not been altered by the new Civil Code Articles,"[37] the court found the possessor in bad faith since he "voluntarily instituted a title search and . . . [was] *therefore* charged with the title defects contained in the public records."[38] Once again, an error of fact was treated as an automatic rebuttal of the codal presumption of good faith without any discussion of reasonableness, e.g., how easily could the error have been avoided, or how likely it was that a reasonably thorough search could have revealed it. In an almost unanimous decision,[39] the Supreme Court reversed the decision of the court of appeal and overruled the so-called theory of constructive notice of the contents of the public records.[40]

1. Old Sins Again

This theory of constructive notice has been often repeated but has rarely been subjected to the scrutiny of reason by Louisiana courts. Constructive notice would perhaps make sense in a system that makes title examination a compulsory requirement in the purchase of immovables, at least as an element of good faith. However, Louisiana has never ascribed to such a requirement. The jurisprudence continues to adhere to the view that a possessor's claim to good faith is not affected by his failure to conduct a title search, *unless* he had notice of facts sufficient to raise doubts about the seller's ownership.[41] Viewed independently, this "rule" may have its own merits, and is in fact perfectly consistent with the statutory presumption of good faith. Nevertheless, when juxtaposed to the other "rule" about constructive notice, the inconsistency of the current system becomes obvious. The first rule rewards the buyer who is imprudent enough to take the chance of buying without a title search, while the latter rule penalizes the prudent buyer who, even though not required to do so, did conduct a title search, but was unlucky enough not to have discovered the defect. This difference in treatment approaches the schizophrenic.

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36. Phillips v. Parker, 469 So. 2d 1102, 1107 (La. App. 2d Cir. 1985)(citing Martin v. Schwing Lumber & Shingle Co., 228 La. 175, 81 So. 2d 852 (1955)).

37. Id. Indeed, the comments accompanying the new articles, see infra note 42, may render some support to this assumption. But see infra text accompanying notes 60-64.

38. 469 So. 2d at 1107 (emphasis added).

39. Justice Marcus concurred in the result.

40. 483 So. 2d 972 (La. 1986).

41. See, e.g., Richardson & Bass v. Board of Levee Comm'rs, 226 La. 761, 77 So. 2d 32 (1954); Arnold v. Sun Oil Co., 218 La. 50, 48 So. 2d 369 (1949); Attaway v. Culpepper, 386 So. 2d 674 (La. App. 3d Cir. 1980).

2. Time for a New Approach

This differentiation is not justified, much less required, by either the old or, especially, the new law. While it is true that the above two rules have been restated by the comments accompanying the new law, such a restatement should not necessarily be taken as approval.[42] If anything, the *text* of the new law, with its renewed emphasis on reasonableness, invites a reevaluation of this jurisprudence and makes possible a wholly new approach to this old problem. In a previous article, this author suggested the bare outlines of this approach.[43] The following is a continuation of those outlines.

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42. Comment (d) under new La. Civ. Code art. 3480 reads as follows:

> This provision does not affect the public records doctrine. According to Louisiana jurisprudence, an acquirer of immovable property is not charged with constructive knowledge of the public records, nor is he bound to search the public records in order to ascertain ownership. According to certain decisions, however, an acquirer . . . who knows facts sufficient to excite inquiry is bound exceptionally to search the public records and is charged with the knowledge that a reasonable person would acquire from the public records.

This language is essentially repeated in comment (e) under La. Civ. Code art. 3481 where it is followed by this statement: "The same is true when an acquirer *voluntarily* undertakes to search the public records; he also is charged with the knowledge that a reasonable person would acquire from the public records, and the presumption of good faith may be rebutted." (emphasis added).

It is unclear whether the jurisprudence referred to in these comments is viewed by the author of the comments as part of the public records doctrine and thus as "not affect[ed]" by the new law, or whether it is restated, simply for information purposes, independently from the public records doctrine. Be that as it may, saying that this jurisprudence is *not affected* by the new law is not the same as *sanctioning* the jurisprudence and does not close the door to reexamining it, if the letter and spirit of the new law so require.

As suggested elsewhere, see Symeonides, supra note 5, at 112, this restatement of the old jurisprudence by the comments could be rendered compatible with the spirit of the new law, if proper emphasis were placed on the word "reasonable" in the above quoted statement from comment (e). On the other hand, "[i]f . . . the doctrine [described by comment (e)] means that a person who undertakes a title search is charged with knowledge of any defect in the seller's chain of title which is contained in the records, *regardless* of whether such defect would be discoverable by a reasonably thorough search, then changes will be necessary in order for the doctrine to conform to the reasonable person standard." Symeonides, supra note 5, at 112. This is essentially the difference between the opinions of the court of appeal and the supreme court in *Phillips*. The court of appeal's reading of the jurisprudence was to the effect that the very existence of the title defect in the public records automatically rebuts the presumption of good faith, regardless of whether the defect was actually discovered or could have been discovered by a reasonably thorough title search. It is this reading of the jurisprudence by the court of appeal that necessitated the supreme court's intervention. See infra text accompanying note 64. Depending on one's viewpoint, the decision of the supreme court in *Phillips* may thus be seen either as a direct overruling of that jurisprudence, or as a clarification of it with a shift of emphasis on reasonableness.

43. See Symeonides, supra note 5, at 110-12.

(a) Title search and reasonableness

The development of the new approach must begin by reassessing, in light of contemporary practices, the role of a title search in determining good faith. One of the first jurisprudential rules to be affected by such a reassessment would be the rule which requires a title search only in suspicious circumstances.[44] This rule seems to be based on the dated assumption that a title examination is the exception rather than the norm and is therefore not a required element of reasonableness. In light of contemporary practices, this assumption is unrealistic and unnecessarily liberal. If this premise is true, then a title examination should be viewed as one of the elements by which to evaluate the reasonableness of the possessor's belief in the seller's ownership. From this premise flow two corollaries: (a) that, in the absence of special circumstances,[45] failure to conduct a title examination is a factor that normally points against rather than towards reasonableness; and (b) that the conducting of a title examination should weigh in favor rather than against a finding of good faith. Indeed, a title examination that fails to reveal any defect in the seller's title reinforces, not only the buyer's subjective belief in his ownership, but also his claim that such belief is reasonable by objective standards.

If both corollaries are accepted, then the above jurisprudential rule should be modified in both directions, i.e., (a) failure to conduct a title examination should be weighed against the possessor when evaluating the reasonableness of his conduct by objective standards; while (b) the conducting of a reasonably thorough title examination which failed to reveal any defects in the seller's title should be weighed in favor of the possessor in evaluating the reasonableness of his belief in the seller's ownership. It may well be that the system is not yet ripe for accepting the first modification. The second one, however, is long overdue, and may be implemented without the first. If this second modification were accepted there would be little room for the theory of constructive notice.

(b) Title search and the theory of constructive notice

In any event, even if both of the above corollaries were rejected together with their underlying premise, there would still be little reason for retaining the second rule described above, i.e., the rule that imputes the possessor who conducted a title search with constructive knowledge of the contents of the public records. In other words, even if a title

44. See supra note 41.

45. Such special circumstances might be "e.g., a bond of confidence between seller and buyer deriving from family relationships or long friendship, the seller's long and notorious possession, etc." Symeonides, supra note 5, at 112.

examination is viewed as the exception rather than the norm in contemporary transactions, there would be little reason for either discouraging title searches in general, or for penalizing those buyers who, out of an abundance of caution, find it advisable to search the public records before they make their investment.[46]

If the public records in Louisiana were in such perfect condition that any search of them would easily reveal whatever defects exist in the seller's title, then perhaps the theory of constructive notice would be somewhat realistic. As any title examiner would testify, however, the condition of Louisiana's public records leaves much to be desired. The only reason that would seem to render support for the theory of constructive notice might be the desire to prevent fraud or collusion between a title examiner and a possessor. To be sure, it is conceivable that a possessor who has actual knowledge of defects in the seller's title might use a title examination that shows no such defects as a shield against claims of bad faith. Nevertheless, this scenario is not very likely to occur. Speculators aside, one does not invest money because he hopes to acquire property ten years later by prescription, but rather because he believes that he is acquiring ownership immediately upon purchase. Furthermore, one can not assume lightheartedly that a title examiner would endanger his reputation or livelihood by participating in a collusive scheme with the possessor. In any event, the judicial process is capable of detecting fraud where fraud exists. A remote possibility of fraud in some cases is no justification for penalizing everybody in all cases.

In sum, implicit in the theory of constructive notice is the notion that no mistake in a title search is tolerable. That such a notion is unrealistic, mechanistic, and consequently unfair is too obvious for argument. It is unrealistic because of the condition of the public records; it is mechanistic because it treats all mistakes alike, regardless of their gravity or the likelihood of their being avoided; and, consequently, it is unfair because it penalizes prudent innocent parties. The net result of this theory is to restrict the availability of the ten-year prescription to those imprudent innocent possessors who did not conduct a title search. This result alone makes the whole theory suspect. It is not suggested that a title search should automatically insulate possessors from a finding of bad faith, or that any title search should suffice for a finding of good faith. What is suggested instead is that, rather than preventing the inquiry into the reasonableness of the possessor's belief, a title search should become one of the objects of that inquiry. The

46. At the very least, the courts should have differentiated between, on the one hand, possessors who, with the statutory presumption of good faith on their side, *voluntarily* undertook a title search, and, on the other, possessors who did so only after receiving "knowledge of facts sufficient to excite inquiry."

possessor's actual good or bad faith should be determined, not by artificial fictions, but rather by evaluating, on a case by case basis, all of the surrounding circumstances, including the condition of the public records, the thoroughness of the particular title search, the competence and reputation of the title examiner, the type of title defect involved, the possibility of it being missed, and other similar factors. This is essentially the supreme court's approach in *Phillips*, described below.

3. The Phillips Approach

(a) Title search and reasonableness

In *Phillips*, the supreme court accepted, and successfully discharged, the challenge of restoring sanity and consistency to the law of good faith by reexamining the theory of constructive notice. The court recognized the absurdity of treating a possessor who made a title search worse than a possessor who did not.[47] Although the court stopped short of requiring a title search as an element of reasonableness in good faith determinations, the whole tenor of the opinion suggests that the court ascribes to the view that, *if conducted*, a title examination is an element that reinforces rather than weakens the possessor's claim to good faith. A footnote in the court's decision[48] suggests that the court may have more to say on this issue when the right case arises.

(b) Title search and constructive notice

The main thrust of the opinion is the court's overruling of the jurisprudence that imputed knowledge of the contents of the public records to the possessor who conducted a title search. Although the court was careful not to base its decision directly on the new law so as to avoid any potential problems of retroactivity, it is clear that the court was encouraged in its decision by the spirit of the new law. The court acknowledged that "[t]he 1982 amendments . . . removed the questionable basis"[49] of this jurisprudence, and that the court's new "better approach . . . [was] required by the clarification provided by the 1982 revisions."[50] As suggested earlier, this new approach was also possible, if not required, under the old law.

After liberating the jurisprudence from the constraints of the theory of constructive notice, the court was free to address the merits in the

47. 483 So. 2d at 977.

48. Id. at 976 n.6: "[P]rudent prospective purchasers or mortgagees will check the public records to determine if there are any sales, mortgages, privileges . . . affecting the property in which he [sic] is interested."

49. Id. at 978.

50. Id. at 977.

light of its new "better approach."[51] Beginning with the correct premise that good faith is statutorily presumed,[52] this approach seeks to determine whether the presumption has been rebutted by considering "*all* of the factors of the particular case relevant to the definition of good faith in the Civil Code, and not merely by any reference to the public records doctrine or to any theory of constructive knowledge."[53] To the illustrative list of factors traditionally considered in good faith determinations, the court added the "age and nature of the title defect, and other such factors bearing on the likelihood of discovery."[54] "Here," said the court, "the defect was not . . . easily discoverable."[55] It was "a simple overlap in a nearly contemporaneous sale (which had no survey showing the exact location relative to the . . . [possessor's] property) that the examiner could easily have missed."[56] "To discover the defect, the examiner . . . had to calculate and lay out the measurements of the two properties."[57] Given the "bad condition of the records in that parish at the time," the court reasoned "[i]t would truly be a distortion of the term 'good faith' to decide that defendants lacked . . . good faith under these circumstances, inasmuch as a reasonable man under like circumstances certainly would have believed that the seller had a valid title."[58] The possessor had "reasonably relied on the professional opinion of the attorney . . . employed for that purpose."[59] Having started with the correct premise that the possessor's good faith was presumed by operation of law, the court found nothing else in the record which could rebut the presumption.

(c) Title search and the public records doctrine

Before addressing the merits, the court first had to clarify the confusion surrounding the so called "public records doctrine."[60] This confusion had been confounded by a statement in the comments accompanying new article 3480 that "[t]his provision does not affect the public records doctrine."[61] While this statement is literally true, it was

51. See text accompanying supra note 50.
52. 483 So. 2d at 979.
53. Id. at 977 (emphasis added).
54. Id. at 978.
55. Id at n.11.
56. Id. at 979.
57. Id. at 978 n.11.
58. Id. at 979.
59. Id.
60. See id. at 975-76. The public records doctrine is codified in La. R.S. 9:2721 and 9:2756. The best treatment of the subject remains Redmann's, The Louisiana Law of Recordation: Some Principles and Some Problems, 39 Tul. L. Rev. 491 (1965).
61. La. Civ. Code art. 3480, comment (d).

followed by references to the two jurisprudential rules mentioned above,[62] thus justifying an inference that these two rules *are* part of the public records doctrine. In a scholarly opinion for the court, Justice Lemmon dispelled this terminological, and perhaps substantive, confusion. According to this opinion, "[a]ny theory of constructive knowledge which imputes knowledge of the contents of the public records to third persons forms no part of the public records doctrine."[63] The public records doctrine simply means that an unrecorded interest is not assertible against third parties, and that a recorded interest is assertible against third parties whether or not they have checked the records. While fully applicable to the question of immediate acquisition of ownership, this doctrine does not prevent the subsequent acquisition of ownership by prescription. In *Phillips*, the prior recordation by the neighbor of his purchase of the thirteen-foot strip prevented the possessor from acquiring immediate ownership of the strip at the time of his own subsequent purchase, regardless of whether he had any knowledge of such recordation, actual or constructive. In a system that does not make a title search compulsory, however, neither recordation alone nor any imputed, and thus fictional, knowledge of recordation should *ipso facto* preclude a finding of good faith in subsequent buyers who had no actual knowledge of the defect. In the court's language, if such recordation "would *absolutely* preclude a finding of good faith . . . then the theory of constructive notice would write ten-year acquisitive prescription completely out of the Code. Such a result is totally unacceptable."[64]

(d) Title search and the law of mandate

One of the beneficial side-effects of *Phillips* is that it reduces the scope of another related jurisprudential rule: the rule which imputed the possessor with notice of whatever knowledge, actual or constructive, was obtained by his title examiner.[65] With regard to *actual* knowledge received by the title examiner in the context of a title examination, this rule was, and remains, justified by the principles of the law of mandate,[66] insofar as the title examiner is a true mandatary of the buyer. Without this rule, the possessor would be able to immunize himself from accusations of bad faith by simply delegating the title examination to someone else. Nevertheless, nothing in the law of mandate ever justified extending this rule to constructive knowledge imputed to the title ex-

62. See text accompanying supra note 41.

63. 483 So. 2d at 976.

64. Id. at 977.

65. See, e.g., Martin v. Schwing Lumber & Shingle Co., 228 La. 175, 183, 81 So. 2d 852, 854 (1955).

66. See La. Civ. Code arts. 2985 et. seq.

aminer. As a result of *Phillips*, this rule would now be confined to defects actually discovered by the title examiner, whether or not those defects are actually communicated to the possessor.[67]

A question still worth asking even after *Phillips* is whether the title examiner is actually the mandatary of the possessor or of someone else. In *Phillips*, the possessor had tried to raise this question by arguing that he had not "directly hired or paid"[68] the title examiner. The court of appeal excluded such evidence as "irrelevant."[69] This evidence would indeed be irrelevant, if, as it seems likely from the facts, the possessor's attorney were acting within his implied authority when he hired the title examiner.[70] In this case, the title examiner would have become the possessor's mandatary, and his actual knowledge would be imputed to his principal, whether or not he was paid by him.[71] On the other hand, if for some reason the title examiner cannot be characterized as the agent or subagent of the possessor, the law of mandate is inapplicable, and there is no basis for imputing the possessor with the acts or ommissions of the title examiner. Such may often be the situation in a typical financed purchase where the title examiner is selected, paid, and controlled, not by the buyer, but by the finance company.[72]

ACCESSION AND SERVITUDES

Article 493 of the Louisiana Civil Code provides in part that "[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." Until 1984, this article did not provide for the fate of these improvements upon termination of the landowner's consent for their placement on his land. This gap was identified by this author in a previous symposium article which also suggested six alternative ways for judicially filling the gap.[73] One year later, the gap was filled leg-

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67. A footnote in the supreme court's opinion may suggest that the court will assume bad faith only as to defects actually communicated to the possessor: "Of course, if the attorney *revealed* to the purchaser that the seller's title was defective, the purchaser cannot claim good faith." 483 So. 2d at 978 n.13 (emphasis added). This reading, however, seems to be negated at least in part by language in the body of the opinion: "*At worst*, such a purchaser lacks objective good faith only as to the defects actually discovered in the title examination." Id. at 978 (emphasis added). But see the underlined phrase. Of course, both of the above quoted statements are no more than dicta, since the court was dealing with non-discovered rather than discovered defects.

68. 469 So. 2d at 1107 n.3.

69. Id. On this issue, see Hargrave, supra note 6, at 239 n.43. In light of the way it disposed of the case, the supreme court did not have to address this issue.

70. See La. Civ. Code art. 3000.

71. A contrario from La. Civ. Code arts. 3007-3009.

72. See Symeonides, supra note 5, at 112.

73. See Symeonides, Developments in the Law, 1982-1983—Property, 44 La. L. Rev. 505 at 519-27 (1983).

islatively by Act 933 of 1984 which, among other things, added a new paragraph to Civil Code article 493. This new paragraph provides that, upon termination of the landowner's consent,

> [the person who made the improvements] 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.

This provision, and Act 933 of 1984 in general, were discussed at length in another symposium article which identified several shortcomings of the new provision.[74] Among other things, it was pointed out that

> [t]he 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 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 reinbursement.[75]

Guzzetta: The Case of the Unwanted Pipeline

Guzzetta v. Texas Pipe Line Co.[76] involved the very fact pattern envisioned in the italicised portion of the above quotation. The improvement consisted of a pipeline buried in plaintiff's land on the basis of a servitude agreement with the defendant. Although the value of the pipe is not mentioned in the facts, it was presumably much lower than the $12,000.00 estimated cost of removal in 1986, and perhaps not much higher than the $250.00 plaintiff's ancestor had received in 1955 in consideration for the servitude. Asserting that the servitude had expired, the plaintiff landowner sought a judgment for damages amounting to the cost of removal. The court of appeal held that the servitude had not terminated, and consequently, the defendant had the right to keep the pipeline in plaintiff's land.[77] The supreme court held that the servitude

74. See Symeonides, Developments in the Law, 1983-1984—Property, 45 La. L. Rev. 541 (1984).

75. Id. at 545 (emphasis added).

76. 485 So. 2d 508 (La. 1986).

77. Guzzetta v. Texas Pipeline Co., 477 So. 2d 1221 (La. App. 1st Cir. 1985). The court of appeal held that the servitude agreement did not contain a term or a resolutory condition, and thus the servitude could be terminated only by a written renunciation or prescription of non-use, neither of which was shown in this case.

could have terminated,[78] but since this was a factual question, it should be decided by the district court, to which the case was remanded for trial on the merits. The supreme court then went on to opine that "assuming as correct plaintiffs' allegation that the servitude agreement has terminated, . . . Louisiana law provides that ownership of an abandoned pipeline reverts to the owner of the land if the owners refuse to remove it within ninety days of demand. C.C. 493."[79]

The court presents this conclusion as flowing inevitably from a straightforward application of Civil Code article 493. Whether this conclusion is inevitable, however, depends on the answer one gives to the following questions: (a) whether one should resort automatically to the Civil Code provisions on accession without first scrutinizing the servitude agreement and trying to ascertain the implicit intent of the parties; (b) whether this case should be decided on the basis of Civil Code article 495 rather than article 493; and (c) whether, despite appearances, article 493 encompasses improvements which, as in *Guzzetta*, neither party wants.

1. Abandonment and occupancy

Before exploring these questions, a few words may be necessary with regard to a secondary basis for the court's decision. In addition to article 493, the court relied in part on, or at least cited with approval, *Breaux v. Rimmer & Garret, Inc.*[80] *Breaux* had been based on former Civil Code article 3421, which provided that "[h]e who finds a thing which is abandoned . . . becomes master of it in the same manner as if it had never belonged to any body." In other words, the landowner was held to acquire ownership of the abandoned pipeline by means of occupancy.

It is worth recalling at this point that one of the essential elements of acquisition of ownership by occupancy is the taking of possession of the abandoned thing "*with the intent to own it.*"[81] This requirement was satisfied in *Breaux* and previous decisions on which *Breaux* had

78. The supreme court found that the servitude agreement contained a resolutory condition in a clause which provided that the defendant holder of the servitude would retain its rights under the agreement only "so long as such pipe lines . . . are maintained." 485 So. 2d at 510. The plaintiff had argued that this resolutory condition was met in 1982 when the defendant "'abandoned' the pipeline." Id. What the plaintiff apparently meant was that the defendant had abandoned the servitude, not the pipeline. The supreme court held that "[w]hether or not any 'abandonment' of the pipeline or right of way triggered the resolutory clause in the contract, terminating the servitude, is an issue of fact," id., and remanded the case to the trial court.

79. 485 So. 2d at 510.

80. 320 So. 2d 214 (La. App. 3d Cir. 1975).

81. La. Civ. Code art. 3418, replacing old article 3421 (emphasis added).

relied. If only because they arose at a time when mineral exploration was at a peak and steel was scarce, all these cases involved *wanted*, not unwanted, pipelines. Indeed, the landowners in those cases had taken possession of the abandoned pipelines with the intent to own them. Obviously, this was not true in *Guzzetta*, the first such case of the oil glut era. If it were true that the pipeline company abandoned the pipeline, it was certainly not true that the landowner intended to own it. To forcibly make him the owner of the abandoned pipeline would be a grave misapplication of the law of occupancy.

2. The intent of the parties

In connection with the first question raised above, it should be recalled that most of the accession provisions of the Civil Code, and unquestionably the above quoted amendment of article 493, are suppletive in character.[82] These articles apply only when the parties have not provided otherwise in their agreement. Consequently, before resorting to article 493, the agreement must be scrutinized with a view towards ascertaining the parties' intent on the issue of the eventual removal of the pipeline. In *Guzzetta*, the servitude agreement was silent on this issue. Obviously, however, silence does not necessarily entail lack of intent. For, according to Civil Code article 2054, "[w]hen the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind." Thus, the court should have first looked to these extracontractual sources, i.e., usages and equity, in order to infer the parties' unexpressed intent on the issue of the removal of the pipeline. Apparently believing it to be either unnecessary or fruitless, the majority did not undertake such an inquiry, either before or after resorting to article 493.

In a concurring opinion, Justice Lemmon did undertake a similar inquiry, although he did not base it on Civil Code article 2054. Justice Lemmon began with the assumption that "[a]rticle 493 is silent as to the allocation of the cost of removal of constructions permanently attached to the ground, and the court should therefore look to the intention of the contracting parties."[83] Taken in context, Justice Lemmon's statement that article 493 is silent on the issue was apparently intended to be confined to unwanted constructions, like the pipeline at stake, as distinguished from wanted constructions.[84] However, as sug-

82. See Symeonides, supra note 74, at 546.
83. 485 So. 2d at 512 (Lemmon, J. concurring).
84. See text accompanying infra notes 102-104.

gested earlier, one should look to the intent of the contracting parties even if article 493 were *not* silent on the particular issue.

According to Justice Lemmon the intent of the parties should be determined "from the circumstances of the agreement and the conditions generally prevailing at the time."[85] This determination "turns on many considerations such as the character of the land at the time of the agreement, the location of the land, the type of construction . . . and the effect of the construction on the landowner's ability to use the land at the termination of the servitude."[86] Conspicuously absent from this indicative enumeration is any reference to the *value* of the construction to the two parties. Finding "nothing in this case to suggest that any of the parties . . . contemplated, at the time of the signing of the agreement, that the pipeline company would ever be expected to remove the pipeline,"[87] Justice Lemmon agreed with the majority that the plaintiff landowner had no right to force removal of the pipeline at the defendant's expense.

Although lacking in detail, Justice Lemmon's approach was essentially correct as a matter of law. Because of its flexibility and deliberate vagueness, this approach is also preferable to that of the majority of the court. On the other hand, as a matter of equity, there remain some doubts about the fairness of the ultimate conclusion. Without an opportunity to see and evaluate the record, these doubts cannot be substantiated. Nevertheless, two factors should have been taken into account. The first is the ancient civilian principle that *ownership is presumed to be free of burdens*, and that such burdens cannot be imposed by mere implication.[88] While it is true that this principle contemplates primarily legal burdens, such as servitudes, it is broad enough to encompass physical burdens as well. Although recognizing "a certain attraction to . . . [this] idea,"[89] Justice Lemmon was apparently not convinced by it.

The second factor is that it is difficult to accept that, in a typical onerous transaction, the average landowner would agree to impose on his land such a heavy legal and physical burden for so little in return. Leaving aside the cost of the legal burden to the servient estate for the duration of the servitude, and discounting for inflation and similar factors, it should not be readily assumed that, for as little as two hundred and fifty 1955 dollars, the landowner would agree to impose on his land a physical burden the removal of which would cost twelve thousand 1986 dollars. The potential inequity of the *Guzzetta* decision

85. 485 So. 2d 508 at 512 (Lemmon, J., concurring).

86. Id.

87. Id.

88. See Symeonides, Developments in the Law, 1984-1985: Property, 46 La. L. Rev. 655, 665 n.61, 677 (1986) and authorities cited therein; cf. La. Civ. Code arts. 730, 708.

89. 485 So. 2d at 512 (Lemmon, J., concurring).

becomes even more evident if one also considers the potential environmental hazards accompanying the presence of such a pipeline, not only to the landowner's own land, but also to the adjacent estates.[90] Obviously, these arguments apply with equal force against the majority opinion.

3. Article 493 versus article 495

Assuming for the moment that this case had to be decided under the law of accession, the second question is whether article 493 or article 495 is more pertinent.

The difference in the scope of these two articles has been explained in detail elsewhere.[91] Suffice it to recall for the moment: that article 493 applies to "buildings, other constructions permanently attached to the ground, and plantings,"[92] that is, improvements which, if owned by the landowner are classified as component parts of the land by article 463, and as separate things by article 464; that article 495 applies to "things that become component parts of the immovable under Articles 465 and 466;"[93] and that, among them, the most pertinent to the case at hand are those described by article 465 as "[t]hings incorporated into a tract of land . . . so as to become an integral part of it." Thus, the answer to the above question hinges on whether the pipeline is classified as an "other construction permanently attached to the ground,"[94] in which case article 493 would apply, or rather as an "integral part"[95] of the ground, in which case article 495 would apply.

The plaintiff had argued strenuously for the application of article 495, which would enable him to have the pipeline removed at the defendant's expense. The court summarily dismissed the plaintiff's argument, reasoning that article 495 "only applies to things that become component parts of an immovable, and other constructions permanently

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90. The majority purported to address this issue in a footnote which provides that "[t]his decision, of course, does not affect the duties and powers of the Commissioner of Conservation under R.S. 30:4(E)(2) to investigate and force corrective measures when an abandoned pipeline constitutes a hazard to the public's health or safety." Id. at 512, n.3. Nevertheless, this simply accentuates the potential inequity of the court's decision since the "corrective measures" mentioned in La. R.S. 30:4(E)(2) are taken against the "owner of the pipeline" who, according to *Guzzetta*, is now the landowner. Nor should one underestimate the potential danger to the landowner's own health or that of his neighbors who, if such danger materializes, may have an action against him based on La. Civ. Code arts. 667-669. See Salter v. B.W.S. Corp., 290 So. 2d 821 (La. 1974).

91. See Symeonides, supra note 74, at 544-46; Symeonides, supra note 73, at 521-22.

92. La. Civ. Code art. 493.

93. La. Civ. Code art. 495.

94. La. Civ. Code arts. 463, 493.

95. La. Civ. Code art. 465.

attached to the ground are *not* component parts of a tract of land when they belong to a person other than the owner of the ground, as here."[96] Thus, without explanation, the court assumed that the pipeline was *not* "incorporated into [the] . . . land so as to become an integral part of it,"[97] but was rather in the category of "other constructions permanently attached to the ground."[98] Opinions may reasonably differ as to whether this assumption is technically correct,[99] but this may well be a secondary point in the long run.

What is more regrettable in the long run is the loss of a good opportunity for a judicial delineation of the potentially overlapping scope of articles 493 and 463 on the one hand, and 495 and 465 on the other, and, more importantly, for an evaluation of the logic underlying these articles. Had the court engaged in such an evaluation, it would have discovered that there is simply no logic underlying these articles.

This absence of logic becomes more evident when these two groups of articles are juxtaposed, after having been translated into simple English. Here is how they would sound to the layman landowner:

> If a thing is incorporated into your land in such a way as to become an integral part of it, we call that thing a component part of your land (La. Civ. Code art. 465). This means that the thing is yours, whether or not you consented to its incorporation (La. Civ. Code art. 493.1). If, however, you consented to such incorporation, you may force the person who made it to remove the thing at his expense (La. Civ. Code art. 495), although the thing belongs to you and no longer to him.
>
> On the other hand, if the thing is not so incorporated into your land, but is merely attached to it permanently with your consent, then we do not call that thing a component part of your land (La. Civ. Code arts. 463, 464, 493 par.1). Obviously,

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96. 485 So. 2d at 511.

97. La. Civ. Code art. 465.

98. La. Civ. Code arts. 463, 493.

99. According to the official comments accompanying article 465 (see comment (c)), "[i]ncorporation is a question of fact to be determined by the trier of facts. It may be regarded as established when movables lose their identity or become an integral part of the immovable." It may be difficult to accept that the pipeline in *Guzzetta* had lost its separate identity and became an integral part of the ground. On the other hand, since it was buried *in* the ground, the pipeline could more easily be regarded as "incorporated into" rather than merely "attached to" the ground. It is also worth mentioning that one of the two cases cited by the above comments as illustrative of the intended scope of article 465 involved a gas tank buried in the ground. Monroe Auto & Supply Co. v. Cole, 6 La. App. 337 (2d Cir. 1927), held that the gas tank had "become merged into the immovable [the land] and [had] become so far a part of it as to lose entirely the character of movables." Id. at 340.

> this means that the thing is not yours (La. Civ. Code art. 493 par.1). Although it is not yours and you may not want to have it, it may somehow become yours, if the person who put it there does not want to remove it (La. Civ. Code art. 493 par.2 as interpreted in *Guzzetta*).

The layman should not be blamed for feeling perplexed by all of this. Nor should the court be blamed for creating this anomaly, but only for not detecting it. After all, it is a common secret by now that this entire area of the Civil Code resembles a pile of "cans of worms," and this author for one has had the misfortune of opening some of them.[100] *Guzzetta* helps open yet another one.

Now that this anomaly has been revealed, the remaining question is how to eliminate it. A legislative intervention is of course conceivable, but, as with the last one,[101] there is no guarantee that it will not lead to new anomalies. Thus, the only remaining avenue and the only one available to a court is judicial interpretation. This brings us back to *Guzzetta*. Since article 495 was found inapplicable there, could not the problem be resolved judicially by a "creative" application or non-application of article 493? This question is addressed below.

4. Application of article 493

A "creative" interpretation of article 493 could begin by drawing a distinction between "wanted" and "unwanted" improvements, and then by inquiring whether the article is applicable to both types of improvements. With regard to the first type, i.e., improvements which either *both* parties *or at least one* party wants, the answer would be clear and unavoidable: article 493 would apply on all fours. With regard to the second type, however, i.e., improvements which, as in *Guzzetta*, *neither* party wants, the answer would not be as categorical.

Article 493 does not address this question directly. In terms of literal interpretation, one could argue that, since the article does not on its surface distinguish between wanted and unwanted improvements, no such distinction should be made by judicial fiat. Nevertheless, as *Guzzetta* itself demonstrates, such interpretation may lead to potentially harsh results. It would therefore appear more equitable if the article were interpreted as simply being *silent* on the question of the removal of improvements which neither party wants. This latter interpretation would be more in line with the whole tenor of the 1984 amendment of the article and the background against which the amendment was drafted.

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100. See Symeonides, supra note 673, at 519-27; Symeonides, supra note 74, at 541-650; Symeonides, supra note 88, at 687-90.

101. See 1984 La. Acts No. 933, discussed in Symeonides, supra note 74.

It should be recalled at this point that *Babin v. Babin*,[102] the case which caused the 1984 amendment of article 493, involved wanted, not unwanted, improvements. Although the amendment employed language that is broad enough to encompass unwanted improvements, a fact for which it has been severely criticized by this author,[103] it would be preferable to subject this language to a restrictive interpretation. Such an interpretation would be consistent with the cardinal principle that ownership is presumed free of burdens[104] and would allow the court to focus more closely on the peculiarities of the particular case and to reach a more individualized and equitable solution. In this sense, Justice Lemmon's view that "article 493 is silent"[105] on the question is the more equitable approach in the long run, even though his final conclusion on the facts might not have been as equitable.

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102. 433 So. 2d 225 (La. App. 1st Cir. 1983), discussed in Symeonides, supra note 73, at 519 et. seq.

103. See Symeonides, supra note 74, at 519 et. seq. and 543 et. seq.

104. See supra note 88.

105. See text accompanying supra note 83.