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By

A.N. YIANNOPOULOS (deceased)

RONALD J. SCALISE JR.

John Minor Wisdom Professor of Civil Law
Tulane Law School



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PREFACE

In the years that elapsed since publication of Volume 3—Personal Servitudes, 5th Edition, the need for this annual Supplement has been felt. Property law in Louisiana is a part of the state's civil law. Developments in property have repercussions throughout the area of the civil law, and conversely, developments in other fields of civil law have their impact on property institutions. An updated volume, therefore, must give an accurate picture of the present state of property institutions. In this way, judges, lawyers, and law students may continue to rely on this part of the Louisiana Civil Law Treatise for solutions to both doctrinal and practical problems of everyday legal life.

This Supplement to Volume 3—Personal Servitudes, 5th Edition, contains textual material and citations intended to update the volume in the light of legislation enacted through the 2021 Regular Session of the Legislature, literature published and judicial decisions that have been reported up to May 1, 2021.

RONALD J. SCALISE JR.
John Minor Wisdom Professor of Civil Law
New Orleans, Louisiana
July 1, 2021

INTRODUCTION

La. Acts 2010, No. 881

Many of the provisions of, Book II, Title III, Chapter 2, of the Louisiana Civil Code were amended and reenacted by La. Acts 2010, No. 881, effective July 2, 2010. The amended texts, accompanied by comments submitted to the Legislature, have been incorporated into the 2012 Pamphlet Edition of the Louisiana Civil Code as they originally appeared in West's 2010 Session Laws. In November 2010, months after Acts 2010, No. 881, acquired the force of law, the Louisiana State Law Institute prepared a new set of comments for the amended texts. Because those comments have not been part of the legislative process and are merely doctrinal materials containing *ex post facto* explanations they have not been reproduced in the 2012 Pamphlet Edition of the Louisiana Civil Code. Though doctrinal materials, those comments are found in West's LSA-Civil Code.

Effective date and retroactivity of the 2010 amendments

Act 137 of 1977 declares that the provisions of Act 103 of 1976, enacting the Revision of the laws governing Personal Servitudes, Book II, Title III, of the Louisiana Civil Code, “apply to all personal servitudes, including those in existence on the effective date of this Act; but no provision may be applied to divest already vested rights or to impair the obligation of contracts.”¹ There is no corresponding provision, however, in Act 881 of 2010 that enacted massive amendments to the laws governing usufruct.² Question arises therefore, whether the 2010 amendments apply retroactively to pre-existing usufructs or merely prospectively to usufructs created after July 2, 2010, the effective date of Act 881 of 2010. That question involves issues of statutory interpretation and has constitutional implications.

In the absence of contrary legislative expression, substantive laws apply prospectively only.³ Accordingly, amendments to the laws governing usufruct that are substantive legislation should apply prospectively only. Quite apart from the legislative mandate for prospective operation of substantive laws, the retroactive ap-

¹ La. Acts 1977, No. 137, § 7.

² La. Acts 2010, No. 881, effective July 2, 2010.

³ La. Civil Code art. 6; La. R.S. 31:128.

plication of legislation gives rise to constitutional concerns because the Louisiana Constitution forbids ex post facto laws and laws impairing the obligation of contracts.⁴ Moreover, the divestiture of vested rights gives rise to issues of due process under both the Louisiana and the United States Constitutions.⁵

Statutory Interpretation

The issue of retroactive application of the 2010 amendments to the laws governing usufruct is related with the question of implied repeal of the prior legislation, the provisions of the 1976 Revision of the laws governing usufruct. These are matters of statutory interpretation. It is a well-established rule of statutory interpretation that when new legislation conflicts with prior legislation the prior legislation is impliedly repealed by the new legislation to the extent that the two conflict. For example, question arises of whether Article 2726 of the Louisiana civil Code governing leases of immovable property by the usufructuary has been partially repealed by the enactment of Article 468.2 in 2010.

Express and Implied repeal

Ordinarily, the repeal of a law has prospective effect only. A repealed law may, therefore, continue to be applied for an indefinite period of time to relations that arose under its regime. The question of the prospective or retroactive operation of repeal is a matter to be decided according to the rules governing the temporal effect of laws.⁶

Article 8 of the Louisiana Civil Code declares that Laws may be repealed either entirely or partially, by other laws and further explains that repeal is implied “when the new law contains provisions contrary to, or irreconcilable with those of the former law.”⁷ An express repeal ordinarily results in complete abrogation of the old law. In contrast, an implied repeal is almost always partial because it merely renders unenforceable those provisions of the old law that obstruct the effect of the new law.

In cases of express repeal, the courts have had no difficulty giving effect to the legislative intent but in cases involving questions of implied repeal Louisiana courts have encountered difficulties. As a general rule, “[r]epeals by implication, according

⁴ See La. Const. Art. 1, § 23 (1974); Yiannopoulos, 3 Louisiana Civil Law Treatise, Personal Servitudes, Introduction pp. XXV-XIX (5th ed. 2011); Yiannopoulos, Louisiana Civil Law System § 110-113 (2d ed. 1999).

⁵ For the Louisiana Constitution, see Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 5-6 (1974).

⁶ See Yiannopoulos, Louisiana Civil Law System §§ 110-113 (2d ed. 1999).

⁷ La. Civil Code art. 8.

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to our jurisprudence, are not favored.”⁸ The Louisiana Supreme Court stated emphatically: “The uniform jurisprudence is to the effect that all statutory provisions are to be given effect whenever possible. . . . If acts can be reconciled by a fair and reasonable interpretation, it must be done, since the repeal of a statute by implication is not favored and will not be indulged in if there is any other reasonable construction.”⁹

The cautious judicial attitude toward implied repeals is illustrated by the frequent invocation of a well-known maxim of statutory construction, *lex posterior generalis non derogat priori speciali* (a posterior general law does not abrogate the provisions of a prior special law). Louisiana courts have consistently declared that “a general statute does not have the effect of repealing a special law upon the same subject matter unless the intent to repeal is so plain and evident that it cannot be doubted.”¹⁰ It has also been said that “[a] general rule prescribed by a later statute is not accepted as manifesting any purpose to disturb the previously enacted special rule.”¹¹ The maxim, however, “has no application where the surrounding circumstances and the purpose to be accomplished show that the intention was that the special law must yield to the extent necessary to accomplish the purpose of the new legislation.”¹²

Like all “general rules” of statutory interpretation and their exceptions, these judicial pronouncements should be taken with a grain of salt. Neither the distinction of laws into general and special nor the labeling of a particular law as “general” or “special” is the product of an exact science. All these should be regarded as useful tools of a flexible judicial process.

⁸ *Wenck v. Anisman*, 211 La. 41, 651, 30 So. 2d 567, 571 (1947).

⁹ *Chappuis v. Reggie*, 222 La. 35, 43-44, 62 So. 2d 92, 95 (1952).

¹⁰ *State ex rel. Warren Realty Co. v. City of New Orleans*, 226 La. 297, 301, 76 So. 2d 308, 310 (1955). See also *City of New Orleans v. Doll*, 224 La. 1046, 71 So. 2d 562 (1954); *Wenck v. Anisman*, 211 La. 641, 30 So. 2d 567 (1947).

¹¹ *Osthoff v. Flotte*, 48 La. Ann. 1094, 1095-96, 20 So. 282, 283 (1896).

¹² *American Nat. Bank v. 173 La. 336, 346, 137 o. 54, 57 (1931).*



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