

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

March 2-3, 2018

Friday, March 2, 2018

Persons Present:

Bayhi, George	Knighen, Arlene D.
Bergstedt, Thomas M.	Kostelka, Robert "Bob" W.
Boudreaux, Bernard E., Jr.	Lavergne, Luke
Braun, Jessica	Lawrence, Quintillis Kenyatta
Breard, L. Kent	Little, F.A., Jr.
Brister, Dorrell J.	Lonegrass, Melissa T.
Carroll, Andrea B.	McIntyre, Edwin R., Jr.
Castille, Preston J., Jr.	Miller, Cody "C.J."
Castle, Marilyn	Morris, Glen G.
Crawford, William E.	Morvant, Camille A.
Crigler, James C., Jr.	Norman, Rick J.
Cromwell, L. David	Odinet, Christopher
Curry, Kevin C.	Riviere, Christopher H.
Curry, Robert L., III	Scalise, Ronald J., Jr.
Davidson, James J., III	Sole, Emmett C., Jr.
Dimos, Jimmy N.	Storms, Tyler
Domingue, Billy J.	Stuckey, James A.
Forrester, William R., Jr.	Surprenant, Monica T.
Gasaway, Grace B.	Talley, Susan G.
Griffin, Piper D.	Thibeaux, Robert P.
Hamilton, Leo C.	Tucker, Zelda W.
Hayes, Thomas M., III	Veron, J. Michael
Haymon, Cordell H.	Waller, Mallory
Hester, Mary C.	Weems, Charles S., III
Hogan, Lila T.	White, H. Aubrey
Holdridge, Guy	Wilson, Evelyn L.
Jewell, John Wayne	Ziober, John David
Johnson, Pamela Taylor	

President Susan G. Talley called the March 2018 Council meeting to order at 10:00 a.m. on Friday, March 3, 2018 at the Lod Cook Alumni Center in Baton Rouge. After asking the Council members to briefly introduce themselves, Ms. Talley called on Professor Christopher K. Odinet, Reporter of the Common Interest Ownership Regimes Committee, to present materials in response to Senate Concurrent Resolution No. 13 of the 2016 Regular Session.

Common Interest Ownership Regimes Committee

Professor Odinet began his presentation by informing the Council that Senate Concurrent Resolution No. 13 of the 2016 Regular Session requested the Law Institute to study the feasibility of authorizing a private right of action to enforce zoning restrictions. The Reporter explained that the Louisiana Constitution authorizes local governments to enact land use and zoning regulations, that the Revised Statutes provide for the enforcement thereof, and that typically, a private party who wishes to enforce an existing restriction must first complain to the local government. However, if the local government refuses to enforce a land use or zoning restriction, the private party cannot enforce the restriction himself but must instead seek a writ of mandamus, which is an extraordinary remedy that is not frequently used.

Professor Odinet reminded the Council that after his initial presentation of the issues in November of 2017, the Council took a policy vote and directed the Committee to draft a statute providing for the private enforcement of these restrictions in Louisiana. The Committee looked to the ten other states that also provide a private right of action and narrowly tailored this proposal with a geographic limitation and a requirement that the aggrieved plaintiff demonstrate some sort of actual and specific harm. The Committee placed the proposals in existing Title 33 with identical changes for both parish and municipality enforcement of building and zoning regulations and required notice and a liberative prescription period.

Looking specifically at proposed R.S. 33:4728(A), the Council questioned whether granting a private right of enforcement to any owner or lessee includes a trustee or usufructuary. The Reporter responded that those terms are specific and were not intended to include the dismemberment of the ownership of property. The Council further questioned why a lessee with only a contractual right would be allowed to seek enforcement but someone with a real property right would not. Several members asked whether the distance is measured as the crow flies, by route, or even by height. The final discussion point related to this Subsection was the concern over allowing private persons to seek enforcement of building restrictions as well as zoning and possible unintended consequences. The Reporter reiterated that in the few reported cases in other states, the success rate of private individuals was extremely low, and courts have stated that in questionable or close cases requiring expertise, they would defer to the decision of the local government for clear violations. The Reporter also noted that the standards being applied by courts in these cases are extremely high and that most courts will not overturn the decision of the local government absent an egregious violation or some showing of official lassitude or nonfeasance with respect to the enforcement of zoning restrictions. After much discussion, Subsection A was approved as follows:

R.S. 33:4728. Enforcement of building and zoning regulations; penalty for violations

A. If in case any building or structure is erected, structurally altered, or maintained, or any building, structure or land is used in violation of R.S. 33:4721 through R.S. 33:4729 or of any ordinance or other regulation made under authority conferred thereby, in addition to other remedies, the proper local authorities of the municipality, or any owner, usufructuary, holder of rights of habitation, or lessee of immovable property situated within twelve hundred feet of the land on which the building, structure, or use in question is located who is adversely affected by the violation, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, structural alteration, maintenance, or use,; to restrain, correct, or abate such violation,; to prevent the occupancy of the building, structure, or land,; or to prevent any illegal act, conduct, business, or use in or about such premises.

Moving to proposed Subsection B, the Reporter explained that this is existing law relative to enforcement by the municipality and that the Committee merely recommends changing the structure to improve the readability of the statute. The Council noted that the city architect may seek enforcement through a writing prior to bringing a proceeding, so the proposed reference to Subsection A is incorrect in that it may not be broad enough. To be clear that all independent remedies may be sought by the municipality, the Council voted to switch proposed Subsections B and C and the following was approved:

R.S. 33:4728. Enforcement of building and zoning regulations; penalty for violations

* * *

C. If enforcement of R.S. 33:4721 through 4729 or any other ordinance or regulation is sought by the municipality:

(1) The regulations shall be enforced by the city architect or other officer authorized to issue building permits, who is empowered to cause any building, structure, place or premises to be inspected and examined, to order in writing the remedying of any condition found to exist therein in violation of any provision of the regulations made under authority of R.S. 33:4721 through ~~R.S. 33:4729~~.

(2) The owner or general agent of a building or premises where a violation of any regulation has been committed or exists, or the lessee ~~or tenant~~ of an entire building or entire premises where the violation has been committed or exists, or the owner, general agent, or lessee ~~or tenant~~ of any part of the building or premises in which the violation has been committed or exists, or the general agent, architect, builder, contractor, or any other person who commits, takes part in, or who assists in any violation or who maintains any building or premises in which any violation exists shall be fined not less than ten dollars and not more than twenty-five dollars or be imprisoned for not more than thirty days for each day that the violation continues.

The Reporter next explained the new requirements of seeking a private right of action. The Committee is proposing to require written notice to be given to the municipality in case they wish to intervene and to the owner of the property if a lessee seeks enforcement because the rights of the lessee originate from the owner. The Council also inquired as to why the Committee did not propose requiring demand first, and the Reporter explained that demand is not required in general litigation. A motion was made and seconded to delete the notice requirement as to the owner, but the motion failed, and the following was adopted:

R.S. 33:4728. Enforcement of building and zoning regulations; penalty for violations

* * *

B. If the action or proceeding described in Subsection A of this Section is instituted by an owner, usufructuary, holder of right of habitation, or lessee:

(1) Written notice shall be given to the appropriate municipal officer, and if brought by a lessee to the owner of the leased property, at least thirty days prior to instituting the action or proceeding. The notice shall include a description of the violation and a statement of intent to institute an action or proceeding in accordance with Subsection A of this Section.

* * *

The final issue presented by Professor Odinet was a proposal for including a liberative prescription period from the first act constituting the violation or two years from a noticeable violation. The Reporter explained that this was borrowed from existing Civil Code Article 781 and R.S. 9:5625. One Council member opposed the inclusion of a prescription period and gave the example of an ongoing violation for ten years, but a lessee who just moved in and would not have the right to seek enforcement. The Reporter noted that the lessee would not be without a remedy because he could inform the municipality of the violation and ask them to pursue enforcement. Another Council member also explained that a longer period is justified for a municipality because the wheels of government may grind slowly. Without further discussion, the following was approved:

R.S. 33:4728. Enforcement of building and zoning regulations; penalty for violations

* * *

B. If the action or proceeding described in Subsection A of this Section is instituted by an owner, usufructuary, holder of right of habitation, or lessee:

* * *

(2) The action or proceeding shall be subject to a liberative prescription of two years from the first act constituting the commission of the violation, or in the case of a violation of a use regulation, within two years from a noticeable violation.

To complete the presentation, the Reporter asked the Council to approve the identical changes to R.S. 33:4780.48 and they did so. Professor Odinet then thanked the Council for their time and attention, and the President called on Mr. Charles S. Weems, III, Reporter of the Constitutional Laws Committee, to begin his presentation of materials.

Constitutional Laws Committee

Mr. Weems began his presentation by explaining that since his Committee had last presented to the Council, its name had been changed from the “Unconstitutional Statutes Committee” to the “Constitutional Laws Committee.” He reminded the Council that the Committee’s charge was to make recommendations to the legislature on a biennial basis for the repeal, removal, or revision of provisions of law that have been declared unconstitutional by final and definitive judgment. The Reporter also explained that the Committee’s initial report had been made in 2016 and noted that as indicated on page iii of the materials, its second report contained both new provisions and old provisions that had not yet been addressed by the legislature, as well as appendices containing provisions that had been addressed by the legislature in some fashion. Mr. Weems then noted that some of the provisions under consideration by the Council today had been reviewed by the Code of Criminal Procedure Committee, which made substantive recommendations as appropriate.

With that introduction, the Reporter asked the Council to consider the provisions that had not been included in the Committee’s initial report, beginning with Article I, Section 10 of the Louisiana Constitution on pages 1 through 3 of the materials. He explained that this provision had been held unconstitutional by the Louisiana Supreme Court due to a procedural error whereby amendments that had been adopted by the legislature in 1997 were not incorporated into what was ultimately approved by the voters. As a result, the Committee recommended that the constitutional amendment to Article I, Section 10 be repealed and be resubmitted to the voters to include the correct language. A motion was made and seconded to adopt the Committee’s recommendation as presented, and the motion passed with no objection. The Council then considered Code of Criminal Procedure Article 795, on pages 4 and 5 of the materials, the constitutionality of which was called into question by both the Louisiana Supreme Court in *State v. Crawford* and the United States Supreme Court in *State v. Snyder*. Mr. Weems explained that both the Code of Criminal Procedure Committee and the Constitutional Laws Committee had reviewed these holdings and had recommended that Article 795 be amended to incorporate the “motivated in substantial part” language of the *State v. Snyder* opinion. A motion was made and seconded to adopt the Committees’ recommendation, substituting “whether” for “if” on line 24 of page 5, and the motion passed with no objection.

Next, the Council turned to R.S. 14:91.5, on pages 5 through 8 of the materials, concerning the unlawful use of networking sites by sex offenders, a total ban that was held unconstitutionally permissive by the Fourth Circuit in *State v. Mabens* in light of the United States Supreme Court’s decision in *Packingham v. North Carolina*. As a result, both the Code of Criminal Procedure Committee and the Constitutional Law Committee recommended that R.S. 14:91.5 be repealed, unless as a policy matter the legislature wishes to enact a more narrowly tailored provision in accordance with Supreme Court jurisprudence. A motion was made and seconded to adopt the Committees’ recommendation as presented, and the motion passed with no objection. The Council then considered R.S. 14:106(A)(6), on pages 8 through 10 of the materials, which was

held unconstitutional by the Louisiana Supreme Court in *State v. Russland Enterprises* for failing to incorporate the “contemporary community standards” language required by the United States Supreme Court in the *Miller* case. After discussing that this provision may not even be necessary in light of the fact that any conduct regulated by Paragraph (A)(6) would also be regulated by Paragraph (A)(3), the Committee ultimately decided to recommend either the repeal of R.S. 14:106(A)(6) or the incorporation of the requisite “contemporary community standards” language as indicated on page 10. A motion was made and seconded to adopt the Committee’s recommendation as presented, and the motion passed with no objection.

Mr. Weems then directed the Council’s attention to a series of provisions beginning with R.S. 14:359 and 368 concerning subversive activities and communist propaganda, on pages 10 through 12 of the materials. After discussing the United States Supreme Court’s decision in *Dombrowski v. Pfister* and debating whether to recommend repeal of only the specific provisions held unconstitutional or of these entire sections of law, the Committee ultimately recommended the repeal of both the Subversive Activities and Communist Control Law and the Communist Propaganda Control Law in their entirety. A motion was made and seconded to adopt the Committee’s recommendation as presented, and the motion passed with no objection.

At this time, the Council adjourned for lunch.

Marriage-Persons Committee

After lunch, the President called on Professor Andrea B. Carroll, Reporter of the Marriage-Persons Committee, to begin her presentation of a clarification needed in the previously approved materials on House Concurrent Resolution No. 79 of the 2017 Regular Session regarding domestic abuse and the assessment of costs.

Professor Carroll explained that Civil Code Article 2362.1 authorizes the awarding of attorney fees in domestic violence cases, but it is misplaced because this Article regards the classification of obligations as separate or community in the matrimonial context. At the February Council meeting, the Committee’s recommendation of retaining the intention of Civil Code Article 2362.1 as to the nature of the obligation but placing the authorization for the award of attorney fees and costs in Title 9 was approved. However, the Coordinating, Semantics, Style, and Publications Committee questioned whether the approved language accomplished the intent relative to the perpetrator’s own costs and fees. The Reporter stated that the approved language does classify as a separate obligation of the perpetrator any attorney fees of the victim that he is ordered by the court to pay, but existing law in Paragraph A of Civil Code Article 2362.1 would classify his own expenses as a community obligation. Professor Carroll therefore explained that the revised proposal clarifies that Paragraph B of this Article makes the obligation to pay any fees or costs assessed under R.S. 9:314 the separate obligation of the perpetrator of domestic abuse, and it also makes the obligation incurred by the perpetrator to pay his own attorney fees and costs the perpetrator’s separate obligation. Without any discussion, the Council adopted the following:

Article 2362.1. Obligation incurred in an action for divorce

A. An obligation incurred before the date of a judgment of divorce for attorney fees and costs in an action for divorce and in incidental actions is deemed to be a community obligation.

B. ~~Notwithstanding the provisions of Paragraph A of this Article, the court may assess~~ The obligation for attorney fees and costs incurred by the perpetrator of abuse or awarded against him in an action for divorce granted pursuant to Article 103(4) or (5) or in an action in which the court determines that a spouse or a child of one of the spouses was the victim of domestic abuse committed by the perpetrator during the marriage, and in incidental actions, ~~thereafter against the perpetrator of abuse, which shall be a separate obligation of the perpetrator.~~

Revision Comments – 2018

R.S. 9:314 authorizes a court to exercise its discretion to assess attorney fees and costs against the perpetrator of domestic abuse in divorce and incidental actions. Paragraph B of this article makes the obligation to pay any fees or costs assessed under R.S. 9:314 a separate obligation of the perpetrator of domestic abuse. It also makes the obligation incurred by the perpetrator to pay his own attorney fees and costs the perpetrator's separate obligation.

Professor Carroll then concluded her presentation, and the President called on Mr. Weems to resume his presentation of materials from the Constitutional Laws Committee.

Constitutional Laws Committee

Mr. Weems resumed his presentation by asking the Council to turn to R.S. 18:505.2, on page 13 of the materials. He explained that this provision was held unconstitutional as applied to expenditure-only committees by the Eastern District of Louisiana in *Fund for Louisiana's Future v. Louisiana Bd. of Ethics* pursuant to the United States Supreme Court's decision in *Citizens United*. As a result, the Committee recommended that a validity note be added with respect to this provision, and after a motion was made and seconded, the Council approved this recommendation with no objection. The Council also considered R.S. 33:1997, on page 14 of the materials, and the Reporter explained that this provision had been held unconstitutionally vague and ambiguous by the Third Circuit in *City of Natchitoches v. State*. As a result, the Committee recommended that the statute be repealed in its entirety, and a motion was made and seconded to adopt this recommendation as presented. The motion passed with no objection, and the Council then turned to R.S. 37:831, on pages 14 through 16 of the materials. Mr. Weems explained that in *St. Joseph Abbey v. Castille*, a district court case that was affirmed by the Fifth Circuit, the court held that this provision was unconstitutional because there was no rational relationship between requiring persons selling caskets to become funeral directors and to sell caskets only from funeral establishments. As a result, the court determined that prohibiting persons other than funeral directors from selling caskets was a violation of equal protection rights. The Reporter then explained that the Committee's recommendation was to remove the offending phrase concerning the purchase, sale, and display of caskets from the definition of "funeral directing" as indicated on page 16 of the materials. A motion was made and seconded to adopt the Committee's recommendation as presented, and the motion passed with no objection.

Next, the Council considered R.S. 47:301, on pages 16 through 18 of the materials, which was held unconstitutional by the Louisiana Supreme Court in *Arrow Aviation Company, LLC v. St. Martin Parish School Board Tax Sales Dept.* because the statute enacted tax exclusions that were not uniformly applicable to the taxes of all local political subdivisions; rather, the tax exclusion was mandatory for taxing authorities in East Feliciana Parish. As a result, the Committee recommended removing the reference to East Feliciana Parish in both this provision and in R.S. 47:337.10(F), as indicated on pages 17 and 18 of the materials. A motion was made and second to adopt the Committee's recommendation as presented, and the motion passed with no objection. The Council then turned to R.S. 51:712, on pages 18 and 19 of the materials, concerning the unlawful sale of securities, a prior version of which was held unconstitutional by the Louisiana Supreme Court in *State v. Powdrill*. Mr. Weems explained that the Committee had engaged in much discussion with respect to the offending burden-shifting language, reflected in bold on page 19 of the materials, and the fact that the 1999 legislative amendments had rendered the meaning of the statute obscure and of doubtful application. As a result, the Committee recommended amending the statute to clarify its meaning in the civil context, and the Reporter questioned whether a validity note should be added explaining that the provision had been held unconstitutional in the criminal context because, as explained in the *Powdrill* case, the burden-shifting language could not be severed due to the resulting lack of *mens rea* in criminal cases.

A motion was then made and seconded to adopt the Committee's recommendation and the Reporter's suggestion with respect to R.S. 51:712, and a great deal of discussion

ensued after one Council member questioned whether the intent of the statute – to allow the plaintiff to recover if the defendant bears the burden of proof – would have been better served by retaining the burden-shifting language in the civil context and adding a separate Paragraph to address the burden of proof applicable in criminal cases. After another suggestion was made that perhaps some sort of rebuttable presumption could be incorporated, the Council ultimately decided that this complicated issue should be recommitted for further study by both the Constitutional Laws Committee and the Corporations Committee. As a result, a substitute motion was made and seconded to recommit R.S. 57:712, and the motion passed with no objection. The Council then considered R.S. 56:1761 through 1766, on pages 20 through 22 of the materials, concerning the Louisiana Supreme Court's decision in *City of New Orleans v. State* that these provisions dealing with the Audubon Park Commission constituted an unconstitutional taking of property. After Mr. Weems explained that the Committee's recommendation was to repeal these provisions in their entirety, a motion was made and seconded to adopt the recommendation as presented, and the motion passed with no objection.

Next, the Council considered a series of provisions that were included in the Constitutional Laws Committee's initial report but had not yet been addressed by the legislature. For example, the Council agreed to reaffirm its recommendations with respect to Article XII, Section 15 of the Louisiana Constitution and Civil Code Articles 89 and 3520, on pages 23 through 26 of the materials, after discussing that these recommendations were consistent with the Marriage-Persons Committee's proposed legislation on same-sex marriage. The Council then turned to Code of Criminal Procedure Article 800(B), on pages 26 and 27 of the materials, and Mr. Weems explained that both the Code of Criminal Procedure Committee and the Constitutional Laws Committee struggled to draft a suitable amendment with respect to the exclusion in certain capital cases of jurors who voice general objections to or conscientious or religious scruples against the death penalty. Rather, as indicated on page 27 of the materials, the Committees ultimately agreed to add a validity note to Article 800(B) explaining the holdings of the *Anderson*, *Witherspoon*, and *Wainwright* cases. A motion was made and seconded to adopt the recommendation as presented, and after one Council member questioned the meaning of adding a validity note, the motion passed with no objection.

After reaffirming its previous recommendations on pages 27 through 32 of the materials, the Council then turned to R.S. 14:47 through 49 on pages 33 through 35. Mr. Weems explained that both the Code of Criminal Procedure Committee and the Constitutional Laws Committee had reviewed these provisions and had discussed whether they should simply be repealed in light of the civil remedies for defamation. Ultimately, however, the Committees agreed to add a validity note to each of these provisions explaining the Louisiana Supreme Court's decisions in *State v. Snyder* and *State v. Defley* and the United States Supreme Court's decision in *Garrison v. State of La.* A motion was made and seconded to adopt the Committees' recommendations as presented, and the motion passed with no objection. The Council then reaffirmed its recommendations concerning the provisions appearing on pages 35 through 51 of the materials.

Next, the Council turned to R.S. 14:100.13 on page 53 of the materials, and Mr. Weems explained that although the initial recommendation was to repeal only Subsection A, the Code of Criminal Procedure Committee reviewed the provision and determined that the entire statute should be repealed. A motion was made and seconded to adopt this amended recommendation as presented, and the motion passed with no objection. The Reporter then explained that there were several provisions that were not included in the Committee's initial report and had been declared unconstitutional but had, in the Code of Criminal Procedure Committee's view, been addressed by the legislature. He further explained that all of these provisions concerned the sentencing of juveniles to life imprisonment without the possibility of parole and that the Constitutional Laws Committee agreed with the Code of Criminal Procedure Committee's assessment but had decided to include for informational purposes each of these provisions and their analyses as Appendix A to the report. After additional discussion concerning the holdings of the *Miller* and *Montgomery* cases as well as the decisions of each court of appeals that found no issue with the fact that the legislative fix with respect to this issue was made in a separate

provision rather than by amending the substantive statutes themselves, a motion was made and seconded to approve the Committee's treatment of these provisions as presented. The motion passed with no objection, and pages 53 through 58 of the report were adopted.

Finally, the Reporter explained that Appendix B to the report preserved provisions that were included in the Committee's initial report and had subsequently been addressed by the legislature. A motion was made and seconded to approve the inclusion of pages 59 through 72 of the materials in the report, and the motion passed with no objection.

At this time, Mr. Weems concluded his presentation, and the President reminded the Council that the Law Institute's Annual Banquet would be held later that night. The Friday session of the March 2018 Council meeting was then adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

March 2-3, 2018

Saturday, March 3, 2018

Persons Present:

Bayhi, George	Morris, Glen G.
Bergstedt, Thomas M.	Norman, Rick J.
Breard, L. Kent	Price, Donald W.
Brister, Dorrell J.	Scalise, Ronald J., Jr.
Crawford, William E.	Sole, Emmett C., Jr.
Crigler, James C., Jr.	Storms, Tyler
Cromwell, L. David	Stuckey, James A.
Curry, Kevin C.	Talley, Susan G.
Curry, Robert L., III	Tate, George
Dimos, Jimmy N.	Thibeaux, Robert P.
Forrester, William R., Jr.	Thibodeaux, Catherine Parsiola
Hamilton, Leo C.	Trahan, J. Randall
Hogan, Lila T.	Tucker, Zelda W.
Jewell, John Wayne	Veron, J. Michael
Kostelka, Robert "Bob" W.	Waller, Mallory
Little, F.A., Jr.	White, H. Aubrey
McIntyre, Edwin R., Jr.	Ziober, John David
Miller, Cody "C.J."	

President Susan G. Talley called the Saturday session of the March 2018 Council meeting to order at 9:00 a.m. on Saturday, March 3, 2018 at the Lod Cook Alumni Center in Baton Rouge. She then called on Professor John Randall Trahan, Reporter of the Lesion Beyond Moiety Committee, to begin his presentation of materials.

Lesion Beyond Moiety

Professor Trahan began his presentation by reminding the Council that he had most recently presented materials from the Lesion Beyond Moiety Committee in January, and he asked Council members to first turn to the document labeled "Lesion Beyond Moiety Council Presentation." Specifically, the Reporter requested that the Council reconsider Item II(A)(6) on line 19 of page 2 concerning whether the law of lesion should be changed or clarified to provide that the seller's ability to pursue a third person to whom the original buyer has transferred the thing is the same regardless of whether the transfer was onerous or gratuitous. Professor Trahan then explained that he feared that the Council's previous decision with respect to this point was based on an erroneous understanding of a particular part of the law of lesion. A motion was made and seconded to reconsider this issue, and the motion passed with no objection.

The Reporter explained that because Article 2594 presently mentions only buyers from the original buyer, as opposed to gratuitous transferees, there is a presumption that the original seller may have the benefit of revindication when the original buyer transfers the property to a third party gratuitously. However, others have argued that when reading this provision *in pari materia* with Article 2597, which provides that the buyer is not liable to the seller for any deterioration that occurs prior to the seller's demand for rescission because the sale was lesionary, the conclusion is that the original buyer should be able to destroy the thing not only physically but also juridically, such that the seller should have no recourse under Article 2594 even when the original buyer transfers the property gratuitously. The Reporter then noted that during his last Council presentation, a question was raised as to whether a buyer who has destroyed property would be required to provide some other remedy to the seller, such as the payment of a supplemental price, since the property cannot actually be returned, and Council members appeared to answer this question in the affirmative. However, after conducting additional research, Professor

Trahan discovered that this may not be the case, and he pointed the Council to §13:20 of the Louisiana Civil Law Treatise on Sales. He then explained that if this provision of the Civil Law Treatise is correct, then the argument about extending physical destruction to juridical destruction stands; if, however, the buyer would be forced to pay a supplemental price in a situation that arises under Article 2597, then perhaps the seller should be entitled to revindication against the original buyer for gratuitous transfers.

The Reporter continued by explaining that under Article 2594, the seller has no recourse against the original buyer who sells the property to a third person, but the seller may recover from the original buyer any profit that the original buyer made. Professor Trahan then provided the example of the sale of a tract of land worth \$100,000 to a buyer for \$49,000 who then proceeds to sell the tract of land to a third person for \$49,000. He explained that in this situation, the original buyer would have made no profit, and thus the seller would have no remedy. If the original buyer sells the tract of land to the third person for even less - \$30,000; \$20,000; \$10,000; \$5,000 – the seller would still have no remedy; why, then, when that number reaches \$0 should the seller automatically have a remedy against the original buyer because the transfer is now gratuitous? One Council member then noted that this hypothetical does not account for the possibility of collusion between the original buyer and the third person for the express purpose of avoiding any remedy for lesion, but Professor Trahan reminded the Council that at its January meeting, it had decided, in response to Item II(A)(5) on page 2 of the “Council Presentation” materials, to provide an exception to the general rule in cases where the transferee and the original buyer acted in bad faith to defraud the seller. The Council member then noted that on page 4 of the document labeled “Avant-Projet #4,” the transferee is required to be in good faith, but the transferor – the original buyer – is not, and perhaps the remedy against the original buyer ought to be preserved unless he too is in good faith.

Members of the Council then discussed the greater potential for fraud in donations as opposed to sales, as well as the fact that the Committee had not yet considered this issue or proposed a recommendation and that tracts of land can really never be destroyed as is contemplated by the above analogy to Article 2597. One Council member then questioned the Reporter’s recommendation with respect to this issue, and Professor Trahan explained that he disagreed with the policy of Article 2597 to exculpate the buyer from liability for deterioration or loss and would instead provide the seller with the remedy of recovering a supplemental price. However, he also noted that this would represent a significant change from existing law and suggested that if Article 2597 remains as presently drafted, then perhaps Article 2594 should be expanded to include gratuitous transfers from the original buyer and to also address the possibility of bad faith or collusion on the part of the original buyer, the transferee, or even both. One Council member then suggested that Article 2594 be recommitted for purposes of being considered by the Committee, and the Reporter responded that he would like a policy vote by the Council on the issue of whether gratuitous transferees of the original buyer should be protected under Article 2594 in the absence of bad faith or collusion.

The Council then discussed issues that could potentially arise in the event that the gratuitous transferee of the original buyer is really an LLC of which the original buyer is the sole member, as well as whether the gratuitous transferee should be protected but the seller should have recourse against the original buyer under principles of subrogation. Members of the Council also expressed concern with respect to stability of title and suggested that perhaps some direction should be given to the gratuitous transferee of the original buyer with respect to the consequences that may arise from accepting such a donation. One Council member then questioned the meaning of “bad faith” in this context, and Professor Trahan noted that bad faith has not yet been defined but that Comments (d) and (e) on page 3 of the “Avant-Projet” materials attempt to explain the sorts of actions that would constitute bad faith. After additional discussion concerning the holding of the *Morgan* case cited in these Comments and the fact that the exception to Article 2594 in cases of bad faith is presently jurisprudential as opposed to legislative, one Council member again suggested that the issue of expanding Article 2594 to include gratuitous transfers should be recommitted for consideration by the Committee in light of the Council’s discussion. A motion was made and seconded to that effect, and the motion passed with no objection.

Next, Professor Trahan explained that another question related to this issue is whether Article 2594 should also protect transferees of all onerous transfers – rather than only sales under current law – from the original buyer. He then recognized that this may be unnecessary since the articles on sales also apply in the context of exchanges absent good reason, but nevertheless questioned whether the applicability of Article 2594 to sales, exchanges, *dations en paiement* – which are types of sales – and other innominate onerous transfers from the original buyer should be expressly provided. A motion was made and seconded to take a policy vote in favor of doing so, and the Council engaged in a great deal of discussion with respect to this issue. Specifically, the Council questioned how exchanges of property with sentimental value could be monetarily valued for purposes of lesion, and members also discussed the applicability of this provision in the context of divorce and community property settlements. Members of the Council discussed whether community property settlements would be acts translatives of ownership considered transfers under Article 2594, and the Reporter explained that these settlements would likely be governed by the articles on co-ownership rather than subject to the provisions on lesion. A vote was then taken on the motion to provide as a matter of policy that all onerous transferees of the original buyer should be protected under Article 2594, and the motion passed over one objection.

The Council then turned to pages 2 and 3 of the “Council Presentation” materials to consider Item III concerning whether the Committee’s mandate should be expanded to include the modification of principles of obligations law generally, such as the concept of good faith and the vices of consent of duress and error, rather than in the context of lesion specifically. Professor Trahan provided the examples of a seller who is ignorant of the fair market value of the property and sells for less and a seller who knows the fair market value of the property but is desperate for money and sells for less, noting that the former appears to be a form of error, the latter appears to be a form of duress, but ignorance and economic hardship are not presently contemplated as proper vices of consent under general obligations law. The Reporter also noted that perhaps the requirement of good faith in the performance of contractual obligations should be expanded as has been done in other civil law jurisdiction to require precontractual good faith, and he provided the example of a person who suspects that his neighbor’s tract of land contains mineral interests and offers to buy the neighbor’s land for \$49,000 when he suspects that it is really worth \$100,000, questioning whether this person should have an obligation to disclose his suspicions to his neighbor.

A motion was then made and seconded to expand the Committee’s jurisdiction to allow them to address these sorts of issues in the context of obligations generally rather than lesion specifically, and a great deal of discussion ensued. One Council member voiced his objection with respect to expanding the principles of good faith and error while noting that he would potentially be interested in studying the expansion of duress to include economic hardship because other states and civil law jurisdictions have already made such a decision. Professor Trahan then explained that the Committee voted to refer this issue to the Council over his objection and articulated that the rationale for doing so was that existing Louisiana law is much more similar to common law jurisdictions than to other civil law jurisdictions, such as French law, which has already expanded the concept of duress and perhaps even error and also imposes the requirement of precontractual good faith. On the other hand, existing Louisiana law favors arms-length transactions and a lack of intervention into the creation of contracts. After also discussing the cultural differences between Louisiana and other civil law jurisdictions such as France, members of the Council expressed that allowing the Committee to potentially expand the concepts of good faith, error, and duress far exceeds their mandate under the legislative resolution that simply asks the Law Institute to study and make recommendations concerning the law of lesion beyond moiety. As a result, a vote was taken on the motion to expand the Committee’s mandate, and the motion failed by a vote of three in favor and all others opposed.

Professor Trahan then directed the Council’s attention to Article 2590, on page 1 of the “Avant Projet” materials, and reminded the Council that at its January meeting, it had approved as a matter of policy amending this provision to clarify that in determining the fair market value of the property, the court should consider only the information that was known at the time of the sale and not any additional information concerning the

property's value. It was then moved and seconded to adopt the proposed changes to Article 2590, at which time one Council member suggested deleting "happen to" on line 7 of page 1, to which the Reporter agreed. Professor Trahan also agreed to another Council member's suggestion to change "property" on line 5 and "thing" on line 7 to "immovable" for purposes of consistency. The Council member also questioned the use of "after the time of valuation" on lines 7 and 8, explaining that a valuation may not ever take place, or there may be a difference in valuation. As a result, the Council member suggested changing "valuation" to "the sale or contract" on line 8, and the Reporter agreed to make this change as well.

At this time, one Council member questioned whether "discovered" should be replaced with "known" on line 7 of page 1 of the "Avant Projet" materials, as well as whether to specify that the discovery must be made, or the knowledge must be had, by a party to the sale as opposed to any member of the general public. A great deal of discussion then ensued with respect to this issue, and Professor Trahan explained that the language used is deliberately vague because French scholars also leave open the possibility of different interpretations as to who must have discovered the relevant qualities and why. Members of the Council then debated whether this language should be retained, with one Council member providing the example of a buyer who discovers treasure on the property prior to the sale and questioning whether this constitutes discovery for purposes of Article 2590, since the treasure would not be known to the market or general public for purposes of assessing fair market value but would be known to one of the parties to the sale. Another Council member noted that in this case, because the buyer actually knew of the treasure prior to the sale, surely that information should be taken into account when determining the fair market value of the property for purposes of lesion. Other Council members, however, were less convinced, and Professor Trahan noted that the problem identified by the Council is one that exists under current law. One Council member then explained that in his view, obtaining information often costs money, and perhaps the buyer who invests in the discovery of this information should not be required to disclose or share it, and therefore the information should not be taken into account for purposes of lesion. Another Council member agreed, noting his belief that this is existing law even if not specifically provided by the Civil Code and that perhaps the proposed revisions to Article 2590 should be adopted as amended without any additional specification. Other Council members agreed, noting that perhaps additional concerns involving appraisals and industrial espionage are better suited for courts to handle jurisprudentially. After discussing additional alternatives to use of the word "discovered," such as "known" and "discovered in the market," one Council member suggested clarifying in the Comments that the discovery that must take place is discovery in the market at large or by the general public rather than by one individual. A vote was then taken on the motion to adopt the proposed changes to Article 2590 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

Article 2590. Time of valuation for determination of lesion

To determine whether there is lesion, the immovable sold must be evaluated according to the state in which it was at the time of the sale. If the sale was preceded by an option contract, or by a contract to sell, the ~~property~~ immovable must be evaluated in the state in which it was at the time of that contract. In determining the fair market value, no account shall be taken of any qualities of the immovable that may be discovered only after the time of the sale or contract.

The Council then considered the proposed Comments to Article 2590, on pages 1 and 2 of the "Avant Projet" materials, and the Reporter explained that Comment (b) cites to a series of sources concerning the discovery after the sale has taken place of information relating to the qualities of the property and whether those qualities should be taken into account in the valuation of the property. Professor Trahan then noted that all of these sources provide the same well-settled principle and asked how many of them were necessary, and a motion was made and seconded to adopt Comment (b) as presented. At this time, a substitute motion was made and seconded to retain the quotation from Pothier but to simply cite to all of the other sources without quoting them,

and this substitute motion passed with no objection. A motion was also made and seconded to combine Comments (a) and (b), and this motion similarly passed with no objection. The Council then discussed Comment (c) – which would now be redesignated as Comment (b) – on page 2 of the materials, and ultimately agreed to eliminate the example by deleting the sentence appearing on lines 7 through 12 of page 2 and by citing to Civil Code Articles 1948 through 1950 on line 7. The adopted Comments read as follows:

Revision Comments

(a) The third sentence of this Article is new and codifies a principle that has long been recognized by the doctrine. See, e.g., Robert Jean Pothier, *TREATISE OF THE CONTRACT OF SALE* §§ 346, at 219 (L. S. Cushing tr. 1839) (“345. In order to know whether the contract includes a lesion sufficient to give rise to a rescission, we ought neither to regard the situation nor the present value of the estate; but we ought to estimate what the estate is worth, at the time of the contract, having regard to its situation, and to the value of estates at that time. And, therefore, this estimation ought to be made by experts, who have knowledge of the situation of the estate, at the time of the contract. 346. It follows from this principle, that, in the estimation of the estate, we ought not to regard the discovery of a treasure or a mine, made subsequent to the contract; for until such discovery, the value of the estate is not increased. When the buyer purchases the estate, for what it is worth before the discovery and at the time of the contract, the seller has nothing to claim. The discovery is a piece of good fortune, of which the buyer ought to profit, according to the rule: *Cujus est periculum rei, eum et commodum sequi debet. . .*”). See also 16 Alexandre Duranton, *COURS DE DROIT FRANÇAIS* no 445, at 463-64 (3d ed. 1834); 9 C.-B.-M. Toullier, *LE DROIT CIVIL FRANÇAIS* no 88, at 207-08 (nouv. ed. 1838); Philippe-Antoine Merlin, *RÉPERTOIRE DE JURISPRUDENCE, Lésion*, no III, at 776 (5th ed. 1827).

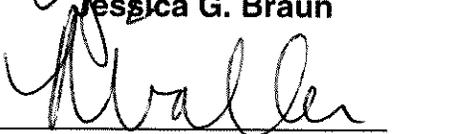
(b) The rule expressed in the new sentence of this Article limits the right of a seller to rescind a sale only under the law of *lesion*. That rule does not, however, limit – or, for that matter, affect in any way – a seller’s right to rescind a sale on other possible grounds, such as a *vice of consent* properly so called. See Civil Code Articles 1948-1950.

Finally, the Council turned to Article 2594, on page 2 of the “Avant Projet” materials, and Professor Trahan noted that this provision could not be approved entirely because it may need to be expanded to include gratuitous transferees, but that perhaps the incorporation of all onerous transferees as indicated on lines 18 through 20 of page 2 could presently be approved. One Council member suggested removing “to a transferee” and “to the transferee” on lines 18 and 19 and 22 of page 2, and another Council member noted that in his view, it would be premature for the Council to approve any changes in language without having the benefit of considering the entire Article, which had previously been recommitted for purposes of determining the gratuitous transferee issue. As a result, a motion was again made and seconded to recommit the provision, and the motion passed with no objection. The Council then generally discussed whether a definition of “good faith” should be included in the second paragraph of Article 2594 or whether this should be relegated to the Comments.

At this time, Professor Trahan concluded his presentation, and the March 2018 Council meeting was adjourned.



Jessica G. Braun



Mallory C. Waller