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Navigability as Applied to Lakes in Louisiana

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qualifying provision that under the circumstances prevailing in that case the trial judge correctly found the defendant sane and that there was no abuse of discretion, since all the testimony showed sanity.[18]

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NAVIGABILITY AS APPLIED TO LAKES IN LOUISIANA

Louisiana's peculiar topographical structure including an abundance of bayous, creeks, swamps, and lowlands frequently covered by water has been, with the discovery of rich oil deposits under these waters, a source of frequent litigation in the past few decades. The jurisprudence on the legal questions involved has been most controversial. However, through diligent efforts on the part of the courts, legal doctrines derived in the more recent cases[1] would appear to solve many of the more crucial problems.

Since the drafters of our code omitted an express provision regarding lakes,[2] perhaps the most troublesome issue presented has been whether or not Articles 509 and 510 of the Civil Code apply to these bodies of water. An examination of the cases does not reveal to the student of the subject a clear definition of the word "lake." Any adequate treatment of the problems raised by these uncertainties must necessarily be concerned with the divergent rules applicable to navigable and non-navigable lakes.

Navigable Lakes

Litigation on the question may arise by a claim on the part of a riparian owner to alluvion additions to the bed of a waterway when the waterline has receded. It may also arise through a claim by the state to an area which has been submerged by the waters of the lake.[3]

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18. In State v. Messer, 194 La. 238, 193 So. 633 (1940), the supreme court held that the judge did not abuse his discretion when he refused to allow the defendant to withdraw a not guilty plea and plead present insanity on the day of the second trial following a mistrial in the original trial when the judge was convinced by examination and observation of the defendant that he was presently sane and felt that the plea of present insanity was filed solely for purposes of delay.

1. State v. Aucoin, 206 La. 787, 20 So. (2d) 136 (1944); Transcontinental Petroleum Corp. v. Texas Co., 24 So. (2d) 248 (La. 1946).

2. Art. 558, French Civil Code, was omitted from the Louisiana Codes. The French article stated: "Alluvion does not take place in connection with lakes and ponds, of which the owner always retains the land covered by the water when it reaches the level of the outlet of the pond, even if the volume of water should decrease."

3. State v. Capdeville, 146 La. 94, 83 So. 421 (1919); State v. Bozeman, 156

The former question was first raised in cases involving Lake Pontchartrain.[4] In these decisions, the court, by classing Lake Pontchartrain as an "arm of the sea," eliminated any necessity for deciding whether Articles 509 and 510 were applicable to lakes. In one of these cases,[5] however, there are dicta to the effect that lakes do not come within the scope of the laws of alluvion and dereliction. Since that decision, the courts have consistently held that the rights of riparian owners under Articles 509 and 510 do not extend to lakes.[6]

The establishment of this rule considered in the light of the Roman maxim, *"Qui sentit onus, sentire debet commondum,"*[7] was the foundation for argument in the bitterly contested cases of the second class to which we have referred (where the state claimed eroded areas which had been submerged by the waters of a navigable lake).

The issue was squarely presented to the court in *State v. Erwin.*[8] In this case the body of water was Lake Calcasieu, which had submerged certain lands claimed by the defendant under patents conveying title up to the shore line of the lake as it was at the time Louisiana was admitted into the Union. The purpose of the suit was to establish title to that land. Justice Overton, in presenting the majority opinion, reviewed the history of Articles 509 and 510,[9] sustaining the view previously expressed that those articles were not applicable to lakes. It was held that the defendant retained title to the land, even though it now formed part of the bed of a navigable waterway. Three members of the court dissented vigorously to this holding, contending that public policy as expressed in Articles 450 and 453 of the Civil Code precluded private ownership of the bed of a navigable lake. This dissent invited a renewed argument on the question, when it was again presented in *Miami Corporation v. State.*[10] This was five

La. 635, 101 So. 4 (1924); Smith v. Dixie Oil Co., 156 La. 691, 101 So. 24 (1924); State v. Jefferson Island Salt Mining Co., 183 La. 304, 163 So. 145 (1935).

4. Zeller v. Southern Yacht Club, 34 La. Ann. 837 (1882); Burns v. Crescent Gun and Rod Club, 116 La. 1038, 41 So. 249 (1906); Bruning v. City of New Orleans, 165 La. 511, 115 So. 733 (1928).

5. Zeller v. Southern Yacht Club, 34 La. Ann. 837 (1882).

6. Zeller v. Southern Yacht Club, 34 La. Ann. 837 (1882); State v. Standard Oil Co., 164 La. 334, 113 So. 867 (1927); Slattery v. Arkansas Natural Gas Co., 138 La. 793, 70 So. 806 (1916).

7. "He who bears the burden of a thing ought also to experience the advantage arising from it." Black's Law Dictionary (1933) 1482.

8. 173 La. 507, 138 So. 84 (1931).

9. Arts. 556 and 557 of the French Civil Code are substantially, and in fact almost literally, the same as our Code Articles 509 and 510.

10. 186 La. 784, 173 So. 315 (1936).

years after the *Erwin* decision, and in the meanwhile a change in the personnel of the court had occurred.

The facts and issues presented in the *Miami Corporation* case were substantially the same as those of the *Erwin* case. Nevertheless, in the later case, a majority of the court refused to accept the *Erwin* decision. The court was of the opinion that the bed of a navigable body of water belongs to the state by virtue of her sovereignty, it being a public thing and insusceptible of private ownership under the provisions of Articles 450 and 453 of the Civil Code. Having arrived at this conclusion, the court deemed it unnecessary to consider the applicability of Articles 509 and 510. As in the *Erwin* case there was a dissent by three members of the court. Chief Justice O'Niell, who wrote the dissenting opinion, not only insisted that the majority view of the earlier decision was in accordance with the law, but realistically challenged the court's public policy as a basis for the decision. He pointed out that the extent of the hindrance to navigation interposed by the presence of an oil derrick is in no wise affected by the fact that the lease was acquired through public, rather than private, ownership. While this argument is worthy of careful consideration it cannot be deemed to refute the basis of public policy offered to substantiate the majority view. Justice Higgins, in supporting the decision, stated:

> "Beyond the point where the shore was in 1812, one using the lake, although navigable, would be a trespasser on private property, and the trespasser would have no right to use the bank which was not inundated, since it would not be the bank of a navigable public water."[11]

From a practical viewpoint, the decision is actually justified on the ground of public policy, as the ownership of the banks of the lake by private individuals would for all practical purposes preclude navigation. Since the *Miami Corporation* case is a later decision it might be assumed that the law governing navigable waters is well established and it seems highly improbable that the court would again reverse its position. However, as the *Miami Corporation* case is based on public policy, the question as to the applicability of Articles 509 and 510 is still open to argument.

If the law is settled that Articles 509 and 510 have no application to lakes, what, then is the basis of the persistent litigation that has taken place in later years? One of the many factors that foster such controversies is illustrated in *Amerada Petroleum*

11. 186 La. 784, 798, 173 So. 315, 319.

Corporation v. State Mineral Board.[12] In this case it was virtually conceded by the contending parties that the articles of the Civil Code on alluvion and dereliction did not apply to lakes. But there was a bitter contest as to whether the body of water under consideration, the arm of Grand Lake, was a lake or a "river or other stream." The court, after considering numerous definitions of rivers, lakes, and streams, concluded

> "that a lake does not imply a body of water in which a current flows, but it indicates a body of water, more or less stagnant, in which the water is supplied from drainage. . . . A river is distinguished from a lake in that it flows, more or less, in a permanent bed or channel between defined banks or walls with a current, whereas streams are bodies of flowing water including rivers. A stream, therefore, includes any body of flowing water."[13]

Justice Rogers found under this definition that since the arm of Grand Lake was a body of flowing water with the power to form accretions, it was necessarily a stream. Consequently, Article 509 was held applicable and the plaintiff was entitled to the accretions formed to the shore. This decision, considered in the light of Louisiana jurisprudence, exemplifies the fact that, despite all else, the geophysical factors involved will of necessity continue to prove a prolific source of litigation.

Non-Navigable Lakes

In the recent case of *State v. Aucoin,*[14] the court found the lake in question navigable. Nonetheless the complex problems involving the law as to non-navigable lakes were presented. Justice Fournet strenuously dissented from the majority view. He arrived at the conclusion that the body of water in question had not been navigable in 1812 and thus the law as to non-navigable lakes applied. The purpose of the suit was to establish the boundary between the land, which was once the bed of Lake Long, in Lafourche Parish, and the adjoining land owned by the defendant. The plaintiff's contention was that since the lake had been navigable at the time of Louisiana's admission to the Union title to the land was vested in the State of Louisiana by virtue of her sovereignty. In the alternative the state maintained she had acquired ownership of the lake bed by the swamp land grants of

12. 203 La. 473, 14 So. (2d) 61 (1943).
13. 203 La. 473, 495, 14 So. (2d) 61, 68.
14. 206 La. 787, 20 So. (2d) 136 (1944).

1849 and 1850.[15] Aucoin contended that if he had not acquired his title to the land in question by deed or by prescription, then he had acquired the lake bed by accretion and dereliction, on the theory that since the lake was a non-navigable body of water, the riparian proprietor's title extended into the bed of the lake to the center thread thereof. The court rendered judgment for the state, finding Lake Long to have been navigable in 1812. In order to bring the merits of Fournet's dissent into focus, however, let us assume that the majority opinion had found the lake to be non-navigable.

Under this assumption, the interesting proposition is presented: What are the riparian rights of one whose land borders upon the lake? This question assumes importance when considered with Act 258 of 1910,[16] which provides that the beds of lakes not under the direct ownership of any person, firm or corporation are property of the state. If this act is to be accepted at face value, a claim by a riparian owner will be adverse to that of the state in *every* case except where the lake is under the direct ownership of some person, firm or corporation. Thus, in the *Aucoin* case, even if the state's claim to the land under the swamp land grant could not be sustained, the state would have title to the bed of the lake under the statute of 1910. Therefore, the proposition which at first blush appears to be superfluous is in essence the only question that will confront the courts. Obviously, if there is direct ownership, riparian rights will not be claimed under the law of dereliction.

As in the situation regarding navigable lakes, the factual set-up may be presented in either of two ways. The lake may go dry and the riparian proprietor will claim to the center thread of the bed; or the waters of the lake may submerge the owner's land and the state will claim the submerged area. If Lake Long had been found non-navigable, the former situation would have been similar to that presented in the *Aucoin* case. Chief Justice O'Niell said in answer to the above mentioned proposition:

> "Certainly the riparian rights of an owner of land bordering upon a lake do not entitle him to become the owner of the bed of the lake by effect of its becoming dry, either in whole or in part, if the state owns the bed of the lake while it is covered with water."[17]

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15. Act of Congress of 1849, 9 Stat. 352 (1850), 43 U.S.C.A. § 982 et seq., granted the State of Louisiana all swamp and overflowed lands in the state.
16. Dart's Stats. (1939) §§ 9182-9183.
17. 206 La. 787, 826, 20 So. (2d) 136, 149 (1944).

This dictum is based upon the court's holding that Articles 509 and 510 have no application to lakes.[18]

Fournet's dissent maintained that the law of Louisiana provides that the bed of a non-navigable body of water is deemed to be the property of the adjoining landowners to the center thread thereof. To substantiate that contention he made reference to four Louisiana decisions.[19] This argument is weakened, however, by the fact that each of the cases referred to may be distinguished from the case at bar. In each of them it is clear that the body of water under consideration was not a lake. Possibly the confusion on the matter of riparian rights as to non-navigable lakes has been occasioned by a failure to distinguish between those cases where navigability or non-navigability was the crux of the state versus private ownership issue. Prior to the act of 1910 it was possible to have a body of water classified as a non-navigable lake which was not under the direct ownership of either the state or private individuals. Consequently, it was argued that Articles 509 and 510 should be applied so that ownership of the bed of the lake would be vested. However the act under question would provide for this situation and the state would become owner of the property. In essence, the situation is so changed by the statute that when riparian rights are claimed as to non-navigable lakes, they are not against unclaimed land but against state owned land. As brought out in the *Aucoin* case, there seems to be no reason why the state should lose her title under such conditions, a non-navigable lake being a private thing and susceptible of private ownership. This conception is in accord with the French theory that a non-navigable lake should be treated as real property.[20] Granting the state's right to own real property, the riparian owner's rights should be the same with respect to both private and state ownership. Certainly in a case where a person owns only the bed of a non-navigable lake, the courts are not going to extend the riparian owner's rights to the center thread thereof. Therefore, it would seem that the rule proclaimed in the *Aucoin* case as to non-navigable lakes, even though it be considered no more than dictum, should be followed.

18. See McDade v. Bossier Levee Board, 109 La. 625, 33 So. 628 (1902); Bank of Coushatta v. Yarborough, 139 La. 510, 71 So. 784 (1916). These cases concern non-navigable lakes but may be distinguished from the supposititious case proposed.

19. Palmer Co. v. Wilkinson, 141 La. 874, 75 So. 806 (1917); Amite Gravel and Sand Co. v. Roseland Gravel Co., 148 La. 704, 87 So. 718 (1921); Wemple v. Eastham, 150 La. 247, 90 So. 637 (1922); Bodcaw Lumber Co. of La. v. Kendall, 161 La. 337, 108 So. 664 (1926).

20. I Colin et Capitant, Droit Civil Français (7 ed. 1902) 80, § 246.

Of course, the adoption of this rule would by implication include in the second category of cases (where the state as owner of a non-navigable lake is claiming a submerged area) the law expressed in the *Erwin* case relative to navigable lakes. Certainly there would be no reason for interposing public policy upon which the decision in the *Miami Corporation* case was based. Thus, as to non-navigable lakes we would have an application of the maxim, *"Qui sentit onus, sentire debet et commondem,"* or at least a preservation of the status quo in accordance with the Roman law theory as to non-navigable lakes.[21]

What then is Navigable Water?

This question has frequently been presented to Louisiana courts.[22] In setting up criteria for determining navigability, the court's definitions often lead to divergent results. It is not the purpose here to consider the isolated rules, but rather to compare the recent decisions with the long line of jurisprudence on the subject. A definition adhered to rather consistently by the courts provides that in order that a stream be regarded as navigable it is necessary that it

> "either be used or be susceptible of being used 'in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' "[23]

In the previously discussed *Aucoin* case, Chief Justice O'Niell makes a diligent effort to explain the Louisiana rules on the conflicting doctrines regarding the navigability of lakes. He points out that in considering the question, the terms *navigable* and *navigated* should not be confused. He also urges that it is important to bear in mind the undeveloped state of water transportation at the time of Louisiana's admission to the Union. Both of these factors are certainly important. Louisiana, by vir-

21. D.41.1.12. 9 Scott, The Civil Law (1932) 161: "Although lakes and ponds sometimes increase in dimensions, and sometimes dry up, they still retain their original boundaries, and therefore the right of alluvion is not admitted, so far as they are concerned."

22. State v. Capdeville, 146 La. 94, 83 So. 421 (1919); Amite Gravel and Sand Co. v. Roseland Gravel Co., 148 La. 704, 87 So. 718 (1921); State v. Bozeman, 156 La. 635, 101 So. 4 (1924); State v. Jefferson Island Salt Mining Co., 183 La. 304, 163 So. 145 (1935); State v. Aucoin, 206 La. 787, 20 So. (2d) 136 (1944).

23. State v. Aucoin, 206 La. 787, 855, 20 So. (2d) 136, 158 (1944). See Delta Duck Club v. Barrios, 135 La. 357, 65 So. 489 (1914); State v. Capdeville, 146 La. 94, 83 So. 421 (1919); Amite Gravel and Sand Co. v. Roseland Gravel Co., 148 La. 704, 87 So. 718 (1921); State v. Jefferson Island Salt Mining Co., 183 La. 304, 163 So. 145 (1935).

tue of her sovereignty, was declared owner of all navigable streams in 1812. There appears no sound basis for maintaining that these streams must have actually been navigated. Certainly the grant, based on public policy, was merely in anticipation of the future navigation of the then scarcely settled state. Equally important is a consideration of the modes of water transportation which were in use at that date. Included were only scows, rafts, and flatboats.[24] With these factors in mind the latest definition as established by the court would appear to be the present indication of the rule of navigability—a body of water is considered navigable when, by its depth, width, and location it is available for commerce, irrespective of whether it is actually so used or not.[25] Thus, the question becomes one of fact.[26]

There are many who contend that the above mentioned rule is too easily satisfied and that under so loose a definition almost any body of water may be classified as navigable. In view of the decision in the recent case of *Transcontinental Petroleum Corporation v. Texas Company*,[27] that criticism loses much of its significance in practice. In this case the plaintiffs were claiming title to mineral rights under a lease from the state to the former bed of Bayou Ledet. Title depended upon the establishment of the navigability of Bayou Ledet in the year 1812. While the lake had been decreased considerably in size at the time of the trial, the plaintiffs offered abundant evidence to sustain the allegation that the body of water had been navigable in 1812. The lake had become partially filled in as a result of the removal of a raft from the Atchafalaya River in 1860. The plaintiff introduced expert testimony in its attempt to account for the present condition of the basin. It claimed that there were three factors that had accelerated sedimentation: (1) the removal of the great raft in the Atchafalaya River, (2) the construction of artificial levees in the basin in the past ten years, and (3) the construction of a railroad bed through the central part of the basin. On the other hand, the defendants advanced substantive evidence to sustain their theory that the basin had filled in before 1812 and that Bayou Ledet had ceased to be navigable prior to that date. The only facts, however, of which the court readily took cogni-

24. Smith v. Dixie Oil Co., 156 La. 691, 101 So. 24 (1924); State v. Aucoin, 206 La. 787, 20 So. (2d) 136 (1944).

25. Burns v. Crescent Gun and Rod Club, 116 La. 1038, 41 So. 249 (1906); Caddo Levee District v. Glassel, 120 La. 400, 45 So. 370 (1907); Atchafalaya Land Co. v. James, 146 La. 109, 83 So. 426 (1919); State v. Capdeville, 146 La. 94, 83 So. 421 (1919).

26. Ibid.

27. 24 So. (2d) 248 (La. 1946).

zance, was proof that large cypress trees, whose germination and growth could be traced back into the centuries, had grown in the bed of Bayou Ledet. This evidence was supported by the testimony of the defendants' ecologist. Hence, according to the theory of the defendants, the bayou could not have been navigable in 1812.

Concerning the numerous theories offered and of the copious evidence presented to sustain them, the court said:

> "Although I am not prepared to say that the defendants have established the fact that Ledet was not navigable on April 30, 1812, likewise, I am unprepared to say that plaintiffs have established the fact that it was. The plaintiffs have therefore failed to discharge their legal burden of proving their case by a preponderance of the evidence, and hence cannot succeed in their claim."[28]

This decision, which placed the burden of proof on the party who claimed that the body of water was navigable, completes the composite picture of navigability previously discussed. This position, if adhered to, should lead to consistent, equitable decisions.

Conclusion

After considering many of the court's decisions, it would appear that the law as expressed in *State v. Aucoin* is substantially correct as to navigable and non-navigable lakes and as to the criterion for determining navigability itself. While it is recognized that there are strong arguments on both sides of these controversial matters, it would appear that for purposes of security of property rights and stability of commercial transactions the *Aucoin* case should be followed for settling future controversies.

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28. Id. at 253.