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Private Law: Property

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proper are to deprive an insane or otherwise incapable individual of the care and management of his affairs for his own good and to make possible the appointment of a curator to administer the estate. In the instant case there can be little doubt that the defendant had some interests in this state requiring administration, otherwise the petition for interdiction probably would not have been filed. And there can hardly be better evidence of the inability to care for one's affairs than mental unsoundness justifying actual commitment for over nineteen years.

The writer will go so far as to say that in his opinion neither domicile nor presence is essential to the legislative and judicial competence of this state in interdiction cases if the person has interests in this state which need administration. Even Article 392 of the Civil Code, which states "Every interdiction shall be pronounced by the competent judge of the domicile or residence of the person to be interdicted," would seem to refer to intrastate or interparish domicile or residence, and therefore to *venue* rather than to *jurisdiction.* If the person is not domiciled or residing in the state, there is no question of its application.

PROPERTY

*Joseph Dainow**

SERVITUDES

There have been many instances in which a Louisiana landowner conveys or grants a right-of-way across his property, but the so-called "right-of-way" does not per se identify fully the relationship or the rights of the parties. This uncertainty results from the failure of the parties to realize or to specify whether the transaction is a transfer of ownership or the establishment of a servitude. In the absence of a clearly expressed intent to transfer ownership of the strip of land, the court has treated the right-of-way as a servitude. Accordingly, in *Bonnabel v. Police Jury, Parish of Jefferson*[1] the court held that the right-of-way was a servitude and had been extinguished by the prescription of ten years non-use, even where the deed used the following language: "sell, transfer, convey, assign, set over and deliver . . . a right-of-way . . . which right-of-way is hereby conveyed, transferred, assigned and delivered unto said grantee . . . in perpetuity to have and retain the absolute title to same. . . ."

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1. 216 La. 798, 44 So. 2d 872 (1950).

The redundant multiplication of words of conveyances cannot add any strength to a transaction where the subject matter is inadequately described as a "right-of-way." It would greatly clarify the situation if the deed had described the subject matter specifically as a transfer of perfect ownership or the establishment of a servitude.

Another point of interest in this case is the holding that Section 3368 of the Revised Statutes (1870) and Act 220 of 1914,[2] providing for the dedication of public roads, does not apply to sidewalks. Being nothing more than a right-of-passage—which is a discontinuous servitude—such sidewalk could be established only by title.[3]

The case of *O'Neal v. Southern Carbon Company*[4] brings up the overlapping area of servitudes and torts which was discussed from both points of view in a previous symposium.[5] The plaintiff alleged damages from defendant's operation of a carbon plant through the escaping smoke and carbon particles. The suit was originally instituted as a tort action, but the supreme court brushed aside the negligence concept as inapplicable and decided the case on the basis of the legal obligations of property owners. Articles 667 through 669 of the Civil Code embody the servitude which requires every property owner to use his property so as not to injure the use of other property. Since their decision in the *Devoke* case,[6] the court seems to have adopted the servitude approach to these situations. Neither the fact of damage nor even knowledge is determinative, but the decision rests on a balancing of the interests involved,[7] which permits the fullest leeway in reaching proper decisions.

Building Restrictions

It has long been established that building restrictions may validly be imposed on specific property so as to limit the kinds of uses to which it can be put. Usually the same provision is inserted in all the deeds when a subdivision is opened and individual lots are sold. The restriction has been classed as a servitude which creates a relationship between estates, and which stays with the property through changes of ownership and regardless of whether the limitation is mentioned or omitted in

2. La. R.S. (1950) 48:491, 48:493.
3. Arts. 727, 766, La. Civil Code of 1870.
4. 216 La. 96, 43 So. 2d 230 (1949).
5. 8 Louisiana Law Review 236-237, 248-249 (1948).
6. Devoke v. Y. & M.V. Ry., 211 La. 729, 30 So. 2d 816 (1947).
7. See comments in section on Torts, infra p. 188.

subsequent transfer deeds. The courts have come to describe such a building restriction as a "covenant running with the land," although the use of this phrase should not be taken to incorporate all the aspects of the common law institution known by that name.

In *Holloway v. Ransome*,[8] the restriction that the property must not be used "for business or commercial purposes" appeared in some of the title deeds of the subdivision, but not in others. The defendant showed that there was no restriction in his own deed, nor did it appear in any of the deeds in his chain of title to the original owner. In fact, the defendant's deed contained a provision specifically authorizing the use of the property for commercial purposes. The lower court sustained the restriction on the grounds that other recorded deeds contained reference to the lot in question as covered by the restriction, on the basis of which the court considered that there was a general scheme or plan to restrict all the lots in the subdivision.[9]

While the supreme court recognized the possibility of an enforceable restriction being established in pursuance of a general plan devised by an ancestor in title, it reversed the lower court and concluded that the restriction could not be enforced against the defendant. The absence of the restriction in all the deeds of his title precluded its effectiveness on the lot in question. It is difficult to see how the references in some deeds of restricted lots could establish a servitude (restriction) on another lot for which the deeds were all clear. The court did not indicate whether the restriction could be enforced in the same subdivision against an owner in whose deed it did appear. This question raises some interesting speculation, as a result of the existence of several unrestricted lots which might destroy the effectiveness of the general plan.

From a practical point of view, the principal case focuses attention on a special problem of title examination, whenever it is necessary to assure a purchaser that there does exist a general enforceable building restriction in the subdivision.

EMINENT DOMAIN

In expropriation proceedings there is not so much dispute about the right to expropriate as about the value of the property involved. Several criteria are possible; they, of course, produce

8. 216 La. 317, 43 So. 2d 673 (1949).
9. Transcript, p. 40.

varying results. In the case of *City of New Orleans v. Noto*[10] the defendant claimed a "fair valuation," citing a very recent "succession appraisal" of the same property and contending for inclusion of the "replacement cost of the buildings." The court sustained the city's offer of the "market value" of the lots and improvements, defining market value as "a price which would be agreed upon at a voluntary sale between a willing seller and purchaser." In the present case, the determination of the market value was based on actual sales of similar property in the immediate vicinity. In the absence of such similar sales, other circumstances and factors would have to be considered. In any event, the court reasserted its statement in an earlier case that replacement cost is not a fair method of calculating the value of improved property.

SALE

*J. Denson Smith**

The principle that a purchaser may not be compelled to accept a title suggestive of litigation was applied in two cases during the 1949-1950 term. In *Trasher v. Flintkote Company*[1] the court refused to order a buyer specifically to perform a contract with the plaintiff, it appearing that a prior suit by plaintiff to quiet title brought under the supposed authority of Act 106 of 1934[2] was defective. This, the court found, resulted from the fact that the mentioned act applies only to cases where the property in question is adjudicated to an individual and not to the state, or as held in the instant case, to a municipality. Plaintiff had acquired title from the City of New Orleans, to which the property had been adjudicated at a tax sale for want of bidders. In *City of New Orleans v. Ricca*[3] the court refused to order a defendant to purchase property from the city as the adjudicatee in an auction sale for want of any record of ownership by an individual. The court pointed out that such a title is suggestive of litigation in that prescription does not run against the state or the United States nor against minors or interdicts nor against parties holding under any other chain of title who are not parties to the suit.

A reduction in the price of a potato dehydrator was allowed

10. 47 So. 2d 36 (La. 1950).

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1. 216 La. 73, 43 So. 2d 222 (1949).
2. La. R.S. (1950) 47:2228.
3. 217 La. 413, 46 So. 2d 505 (1950).