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Substantive Law - Private Law: Civil Law Property

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The Work of the Louisiana Supreme Court for the 1951-1952 Term

This symposium, presented for the fifteenth time in the LOUISIANA LAW REVIEW, examines the main work of the Supreme Court of Louisiana during the judicial term from October 1951 to September 1952.

I. Substantive Law—Private Law

CIVIL LAW PROPERTY

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SERVITUDES

The property law of Louisiana has always had to include provision for keeping its Mississippi River and other waterways within their channels by means of levees and other constructions. The appropriation of land or its use for this purpose, even without compensation, is not in contravention of due process.[1] One of the ways in which such appropriation has been provided is Article 665 of the Civil Code establishing certain servitudes as impositions on private property for the public or common utility. In the early days, the imposition was limited to land and labor and materials for constructing levees adjacent to the rivers. In order to meet the needs more fully and to prevent disasters of national import, both the federal and state governments have developed a co-operative program for more comprehensive flood control. Under this kind of plan, it becomes necessary not only to construct levees along the river but also to add other constructions, such as drainage canals, to protect the levees.

In *Board of Commissioners of Tensas Basin Levee District v. Franklin*,[2] the defendant objected to the construction of a drainage canal through his property and demanded that the plaintiff should use the regular expropriation procedure. He contended that the servitude under Article 665 was limited to property

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1. Eldridge v. Trezevant, 160 U.S. 452 (1896).
2. 219 La. 859, 54 So. 2d 125 (1951).

adjacent to the river. The court firmly set this aside without much historical elaboration[3] because a limited construction of the code provision would defeat the basic purpose of the article, and because the operation in question was considered by the proper governmental agents as an integral part of a whole project; the court recognized that a modern system of flood control is vital to our welfare and has to be comprehensive in its nature. No palpable abuse was shown in the decisions of the engineers and appropriate administrative authorities, and the Supreme Court affirmed the lower court's order enjoining defendant from interfering with the work as planned. A close examination of Article 665, and its historical antecedents,[4] reveals that the word "adjacent" belongs in the phrase pertaining to the space for a public river road ("footpath" in the Code Napoleon) and does not qualify the remainder of the article which includes provision for levee works. This last point was not discussed in the opinion and might have made unnecessary the dissent from the majority refusal to grant a rehearing.

PUBLIC ROADS

A landowner can always build himself a private road across his property, and as long as it is his own private road he can permit or exclude the use of it by others in accordance with his personal whims or wishes. But if the public authorities are requested and permitted to put maintenance and expense into this road, can it continue to be private or at what point does it become a public road?

In *Porter v. Huckaby*[5] such a situation existed and the defendant insisted it was still a private road, because he maintained three gates across it and had himself contributed some work in its maintenance at certain intervals. Reversing the lower court, the Supreme Court held the road to be a public road by virtue of R.S. 48:491 (formerly R.S. 1870, Section 3368, as amended by Act 220 of 1914) because it had been maintained and repaired at considerable expense by the police jury for over three years.

The retention of the gates across the road, and their occasional closing, may be evidence of an intent to keep the road pri-

3. See Dickson v. Board of Com'rs of Caddo Levee District, 210 La. 121, 26 So. 2d 474 (1946).

4. See under Article 665 in Compiled Edition of the Civil Codes of Louisiana, 3 La. Legal Archives 383 (1942).

5. 221 La. 120, 58 So. 2d 731 (1952).

vate; this would suffice to prevent the "tacit" dedication of such a road.[6] However, under the statute cited, there was a "forced" dedication of the road which occurs not with reference to the landowner's intent to keep it private but because of the three years' maintenance and expense by the police jury with the full approval of the landowner. A person can always keep his road to himself, or he may be able to establish some sort of a shared conditon by contract, but he cannot have the road maintained at public expense and still keep it private.

OWNERSHIP

In the case of *Lasyone v. Emerson*[7] an incidental question concerned the possibility of a partition in kind of a building, in a horizontal plane instead of the ordinary partition of property in a vertical plane (by lots, or metes and bounds). The horizontal idea was proposed as a separation of ownership between the lower floor of the building and the upper floor. Of course, the court made short shrift of such an unusual thought so foreign to the Louisiana property concepts. However, before completely brushing the idea aside, it might not be untimely to give it some consideration with reference to the basic policies and objectives of our property law. In many states it has proven feasible, and in the general interest, to have separate ownership of individual apartments in a large building, and in France it has been possible for several people to have the separate ownership of each floor of a building. The idea of a horizontal division of ownership in property may ultimately be found unsuitable and undesirable for Louisiana; nevertheless, it may not be amiss to give it some thought for legislative consideration.

CONFLICT OF LAWS

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DIVORCE RECOGNITION

Assertions of status and relationship are often generated for purposes of property succession, but it is unusual to find a person willing to brand herself as a bigamist by alleging seventeen years later the invalidity of the divorce which had been obtained by

6. Bomar v. City of Baton Rouge, 162 La. 342, 110 So. 497 (1926).
7. 220 La. 951, 57 So. 2d 906 (1952).

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