Louisiana Law Review

Volume 14 | Number 1
The Work of the Louisiana Supreme Court for the 1952-1953 Term
December 1953

Civil Law Property - Beds of Navigable Waters - Susceptibility of Private Ownership

Mary Ellen Caldwell

Notes

CIVIL LAW PROPERTY—BEDS OF NAVIGABLE WATERS—SUSCEPTIBILITY OF PRIVATE OWNERSHIP

The Humble Oil and Refining Company provoked a concursus proceeding[1] to determine the rightful claimants of the proceeds of oil production secured from Duck Lake, under dual leases from the state and Salt Domes, Incorporated. For the purpose of a judgment on the face of the pleadings, it was stipulated that Duck Lake was navigable in 1812 and is navigable now. The lake, not especially described in the patent under which Salt Domes claimed title, was located within a large tract of swamp land derived from the Swamp Land Grants of 1849 and 1850.[2] The state claimed ownership by virtue of its having acquired title upon admission to the Union in 1812,[3] and denied it had ever validly disposed of the property. Salt Domes, Incorporated, asserted that the transfer of the entire tract by the state to the Atchafalaya Basin Levee District, as well as the levee board's alienation in 1901 to Salt Dome's author in title, was authorized by statute.[4] It then urged the prescription of six years provided by Act 62 of 1912 in which the state was required to bring all suits to vacate and annul patents within six years of the date of the patent or the date of the act. *Held*, the state, under Act 62 of 1912, was forever barred from attacking the validity of the Salt Domes title to the bed of a lake conceded to have been navigable in 1812 and now. *Humble Oil & Refining Co. v. State Mineral Board*, 223 La. 47, 64 So. 2d 839 (1953).

The state's position was that the purported transfer which described the tract according to section, township and range, but without mention of the lake either as having been included or excepted, was wholly without statutory authority and therefore absolutely null. Salt Domes asserted that the transfer was authorized by Act 97 of 1890, in which the state conveyed to the Atacha-

1. La. R.S. 1950, 13:4811-4817.
2. Act of March 2, 1849, c. 87, 9 Stat. 352; Act of Sept. 28, 1850, c. 84, 9 Stat. 519.
3. State v. Bayou Johnson Oyster Co., 130 La. 604, 58 So. 405 (1912); State v. Richardson, 140 La. 329, 72 So. 984 (1916); State v. Capdeville, 146 La. 94, 83 So. 421 (1919); State v. Bozeman, 156 La. 635, 101 So. 4 (1924).
4. La. Act 97 of 1890.

falaya Basin Levee District certain "vacant lands," and that there was no constitutional prohibition against this alienation at the time of the transfer or in 1912 when the Legislature enacted the six-year peremption statute to settle titles derived from patents and transfers by the state. Pretermitting all questions of the merits of title and stating that it was of no importance whether the "deed of the public officers was beyond the powers vested."[5] by the statute conveying lands to the levee district, the court ruled as follows:

> "The transfer being an accomplished fact and the property having been acquired by private transferees, the state was accorded six years to contest the matter. Failure to institute suit within that time, constituted a ratification of the action of its officers in disposing of the property."[6]

The court's decision having been based solely upon Act 62 of 1912, the vital question raised is whether the language of this act evidences the intent to apply the six-year peremption to purported alienations of the beds of navigable waters, or whether, in view of the long enduring public policy of the state as to this type of public property, such an intent should have been imputed to the Legislature in the absence of a clear expression to that effect. The pertinent portion of the statute provides:

> "Section 1. Be it enacted . . . that all suits or proceedings of the State of Louisiana . . . or persons to vacate and annul any patent issued by the State of Louisiana, duly signed by the Governor of the State and the Register of the State Land Office and of record in the State Land Office, or any transfer of property by any sub-division of the State, shall be brought only within six years of the issuance of patent, provided, that suits to annul patents previously issued shall be brought within six years from the passage of this Act."[7]

The court in the *Humble Oil Company* case applied the provisions of this enactment to all patents or transfers, without inquiry as to whether state officers were acting within their statutory authority to alienate property in which the whole public is interested, and permitted private parties to acquire indirectly rights to certain public property which could not be acquired directly for want of legislative authority to grant such rights.

5. 223 La. 47, 64 So. 2d 839, 841 (1953).
6. Ibid.
7. La. Act 62 of 1912, La. R.S. 1950, 9:5661.

It would appear from the wording of the statute that it was certainly intended to apply to patents issued pursuant to legislative authority to alienate but lacking in some element of validity. But it is submitted that with reference to property an intention to alter the previous concepts concerning the nature of navigable water bottoms should not be presumed in the absence of an unequivocal legislative expression to that effect.

Since 1812 the beds of navigable waters have been regarded as belonging peculiarly to the state.[8] Originating from French and Spanish sources, the same idea has been found, since 1808, in the Civil Code's classification of public and private property according to its susceptibility of private ownership.[9] Article 449 establishes the three categories of things, or property: common, public and private. Common things are described as those which belong to nobody, Article 450; public things as those the property of which is vested in a whole nation, Article 453; and private, those things which belong to individuals, Article 459. The code subdivides public things (property) according to susceptibility of private ownership.[10] As to navigable waters, Article 453 states that the property of navigable waters and their beds as long as covered with water is "vested in a whole nation and the use of which is allowed to all the members of the nation"; this corresponds to the class of things insusceptible of private ownership of Article 482, that is, those "of which all men have the enjoyment and use."[11]

The elaborate classification system employed in the codal articles relating to property has served as the basic framework within which the Legislature and the judiciary have adjusted

8. The state, upon being admitted into the Union in 1812, acquired by original title the beds and bottoms of all navigable lakes and streams within its borders. Cf. cases cited in note 3 supra.

The Legislature has consistently adhered to that fundamental concept of property law in both the codal and statutory provisions respecting public lands and their alienation.

9. Articles cited herein refer to the Louisiana Civil Code of 1870.

10. Art. 458, La. Civil Code of 1870.

11. It is to be noted that the word "common" as used in Article 450 designates those things which are absolutely insusceptible of any kind of ownership, whereas "common" in Article 458 refers to things which "belong in common" to citizens of a place. Things which are owned by the public and are used in common by the public, are distinguished in Article 458 from those which though owned by the political unit are not used in common. The classification of navigable rivers and beds of rivers, as *public* things "as long as the same are covered with water" of Article 453 is logically in the first category of Article 458, i.e., the property of the beds of such bodies of water is "vested in a whole nation and the use" is allowed all its members.

property relationships since the establishment of this state. It is not a conclusive argument to point to the 1921 Constitution as the beginning of the concept of inalienability of navigable water bottoms. Whether the Legislature had the power to alienate the beds of navigable waters prior to 1921 becomes a subordinate issue when investigation reveals that the Legislature has consistently and expressly excluded navigable water bottoms in general legislation authorizing the disposition of public lands.[12] At no time has the Legislature affirmatively alienated or authorized the alienation of beds of navigable waters. The judiciary has demonstrated a corresponding awareness of the peculiar nature of navigable water beds. The court announced its inalterable adherence to the codal concept that beds of navigable waters are insusceptible of private ownership in the celebrated *Miami Corporation v. State*[13] decision. This landmark case culminated five years' legal debate on the proposition of "insusceptibility" which constituted the most thorough examination of the matter of ownership of beds of navigable waters in the history of the state. On the theory that a prior holding which permitted private ownership of a lake bed[14] was "out-of-line with the Louisiana jurisprudence on the subject of 'lakes'," the court sacrificed the sanctity of private title, which had been acquired under patent from the state, to the extent that such title purported to cover land which had become a part of the bed of a navigable lake; and it reversed a rule of property, asserting that such a reversal was a lesser evil than perpetuation of the practice of permitting private ownership of this species of property. The court repeated its basis for arriving at the decision at numerous points in that lengthy opinion. In essence it was:

> "This is of necessity the law, because, to hold otherwise would be contrary to sound principles and public policy upon which the rule is predicated. It is the rule of property and of title in this State, and also a rule of public policy that the

12. Acts purporting to authorize alienation of swamp, overflow and seamarsh lands donated by Congress: La. Acts 75 of 1880, 195 of 1898, 125 of 1902. La. Act 188 of 1902 authorized the sale of other "lands acquired from the United States." La. Act 55 of 1912 authorized the sale of lands adjudicated to the state for unpaid taxes. La. Act 247 of 1855 authorized sale of "swamp and overflow lands" and *"non-navigable lakes after the same were surveyed."* (Italics supplied.) La. Act 185 of 1906 provided for approximately the same disposition as Act 124 of 1902.

13. 186 La. 784, 173 So. 315 (1936).

14. State v. Erwin, 173 La. 507, 138 So. 84 (1931).

State, as a sovereignty, holds title to the beds of navigable bodies of water."[15]

". . . public navigable bodies of water are insusceptible of private ownership, being a public thing, . . . they belong to the sovereign state."[16]

The overriding consideration in the *Miami Corporation* case was the long established rule of law based upon the insusceptibility of private ownership doctrine.[17] It should be noted that this conclusion was reached without reference to the 1921 constitutional prohibition. Yet in the *Humble Oil Company* case that principle of insusceptibility was not even acknowledged. In both the *Miami* and *Humble* cases, the claims of private persons were the same and the lakes in dispute were both navigable. However, in the one case, the state was conceded to have patented the land to a private individual. In the other, it is submitted that there was at least a serious doubt as to whether the state conveyed title.

Although the court in *Humble Oil Co. v. State Mineral Board* cited four cases, "an unbroken line of jurisprudence,"[18] in support of its conclusion, none of these was decisive of the matter presented in the instant suit. Not one purports to extend the legislative intent of the 1912 act to cover unauthorized transfers of beds of navigable waters. For example, in *O'Brien v. State Mineral Board*,[19] the court invoked the act but made no finding with respect to the navigability of the lake bed in question. Virtually the same treatment was made in the case of *Realty Operators v. State Mineral Board.*[20] The case of *State v. Sweet Lake Land and Oil Company*[21] is without application because the court found as a fact that the water bottom in question was *not* navigable. *The Atchafalaya Land Co. v. F. B. Williams Cypress Co.*[22] case did not even involve a lake, navigable or otherwise.

15. 186 La. 784, 807, 173 So. 315, 322 (1936).
16. 186 La. 784, 816, 173 So. 315, 325.
17. After citing cases beginning with Milne v. Girodeau, 12 La. 324 (1838), the court said:
"Now, there is no doubt that the foregoing authorities announce a rule of law which has been in effect in this State since May, 1838." 186 La. 784, 812, 173 So. 315, 324.
18. Atchafalaya Land Co. v. F. B. Williams Cypress Co., 146 La. 1047, 84 So. 351 (1920), State v. Sweet Lake Land and Oil Co., 164 La. 240, 113 So. 833 (1927); Realty Operators v. State Mineral Board, 202 La. 398, 12 So. 2d 198 (1942); O'Brien v. State Mineral Board, 209 La. 266, 24 So. 2d 470 (1945).
19. 209 La. 266, 24 So. 2d 470 (1945).
20. 202 La. 398, 12 So. 2d 198 (1942).
21. 164 La. 240, 113 So. 833 (1927).
22. 146 La. 1047, 84 So. 351 (1920).

In the future what disposition would the court make of a dispute over the patent to a private person, issued prior to 1912, wholly without statutory authorization, which purports to alienate the bed of the Mississippi, the Red, the Atachafalaya, or some other river or body of water which has always been navigable? Though it was argued in the instant case that Act 97 of 1890 referred only to swamp lands and lands adjudicated to the state for taxes, the court took no cognizance of its own or the Legislature's long-standing policy in dealing with navigable water beds. Instead the court stated that it is "a matter of no importance whether the deed of the public officers was beyond the powers vested in them by Act 97 of 1890,"[23] and "the bed of Duck Lake was *unquestionably* embraced in the transfer of vacant lands." (Italics supplied.)[24] Is it conceivable that the Legislature could have intended two types of situations with respect to ownership of navigable water bottoms to co-exist, that is, state ownership under the "insusceptibility" doctrine, and private ownership under Act 62 of 1912? The issues raised and passed over in the *Humble Oil Company* case as non-essential could provide a factual distinction supporting a decision compatible with the state's established rule of property as regards beds of navigable waters.[25] In its earlier interpretation of the act conveying lands to the Atchafalaya Basin Levee District, the court was cognizant of the same principles adhered to in the *Miami Corporation* case—beds of navigable waters are not governed by the same rules as other public property. Of Act 87 of 1890, the court said in *State v. Capdeville*,

> "Even granting that it was the intention of the legislature to grant to the levee board all lands however acquired (which is quite doubtful, in view of the restrictive language as to swamp lands and tax purchases or forfeitures) it can hardly be said that this included land that was covered by navigable waters such as the beds of the Mississippi, Red, and other rivers."[26]

---

23. 223 La. 47, 64 So. 2d 839, 841 (1953).

24. Ibid.

25. The court did not construe La. Act 67 of 1890, but negatived investigation by stating the peremption statute of 1912 was applicable irrespective of the intent or effect of La. Act 67 of 1890.

26. 146 La. 94, 108, 83 So. 421 (1919). The court emphasized this point further by stating: "This view is further emphasized by the very statute (No. 124 of 1861-62) which the appellants cite in support of their contention and in which the Legislature seems to have deemed it necessary to provide by legislative enactment that the beds of any and all lakes, subsequently becoming dry or land, should be swamp lands in order to impress

In view of the court's repeated acknowledgment of the principle of state ownership of beds and navigable waters in the *Miami Corporation* decision, and further in view of the invocation of the same principle in the above quotation with reference to the very act under which the successful litigant in the *Humble Oil Company* case claimed title, it is surprising that the conclusion reached in the instant case was so "perfectly apparent."[27] It is submitted, therefore, that a re-examination of that conclusion is warranted in future cases involving the question of private title to beds of navigable waters.

Mary Ellen Caldwell

CRIMINAL PROCEDURE—DOUBLE JEOPARDY—DUPLICITY

The defendant had committed two batteries in connection with a single affray. He had been tried and convicted of one of the batteries and entered a plea of former jeopardy when brought to trial for the second. *Held*, the plea of former jeopardy could not be maintained as the defendant had committed distinct batteries on two individuals. The batteries were separate offenses regardless of the fact that they were closely connected in point of time and were accomplished by defendant while engaged in one unlawful transaction. *State v. Ysasi*, 222 La. 902, 64 So. 2d 213 (1953).

The *Ysasi* decision clearly enunciates the proposition that two criminal offenses are not to be considered as one crime because they result from a single unlawful transaction. The majority of the common law authorities take the same position and hold that if two or more persons are injured by several shots or blows the offender may be prosecuted for each as a distinct crime. Thus, where several shots are fired in rapid succession killing more than one person, indictments will lie for each killing.[1] The same rationale is applied in cases where the defendant

them with that character." See note 12 supra for other statutes purporting to alienate beds of navigable waters *after* they become dry.

27. 223 La. 47, 64 So. 2d 839, 840 (1953).

1. State v. Taylor, 138 Kan. 407, 26 P. 2d 598 (1933); Slone v. Commonwealth, 266 Ky. 366, 99 S.W. 2d 207 (1936); State v. Coolack, 17 N.J. Super. 192, 85 A. 2d 353 (1951); State v. Billot, 104 Ohio St. 13, 135 N.E. 285 (1922). In State v. Singleton, 66 Ariz. 49, 182 P. 2d 920 (1947), the court stated: "As to the contradiction that the defendant claims is inherent in the verdicts, we find it to be the settled majority rule of law that although several shots