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Civil Code and Related Subjects: Property

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PROPERTY

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OWNERSHIP OF BEDS OF NAVIGABLE WATERS

It is in the nature of a civil law system to establish classifications and to provide general principles in the basic texts of law, leaving to the courts the function and the duty of determining the application of the principles in relation to the fundamental classifications and in the furtherance of the best interests of society (public policy). From time to time, an extremely important issue strikes this incompletely charted area of the law, creating doubt and disagreement as to the proper solution. About two decades ago, this happened in the *Erwin*[1] and *Miami*[2] cases, when it had to be decided whether Civil Code Articles 509 and 510—concerning accretion and dereliction—applied to "lakes," and whether the bed of a navigable lake could be vested in private ownership. The process was not without pain and suffering, but it can be said that the final outcome in the *Miami* decision was consistent with the basic classifications and general principles of the law, and in conformity with the public policy of the state.

Another such question has returned to plague the body-legal involving the possibility of private ownership of the bed of a navigable water. In 1953, the *Humble* case[3] resulted in the protection of the private ownership of the bed of a navigable water known as Duck Lake, the decision being based upon the interpretation of a so-called "statute of repose"—Act 62 of 1912. In the following 1954 term of court, the same issue came up with reference to the private ownership of the bed of another body of navigable water—Grand Bay—and the decision went the same way in this case of *California Company v. Price*.[4]

Grand Bay is admittedly a navigable body of water, but the area involved was included within the description of a

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

2. Miami Corp. v. State, 186 La. 784, 173 So. 315 (1936).

3. Humble Oil & Refining Co. v. State Mineral Board, 223 La. 47, 64 So.2d 839 (1953), 14 LOUISIANA LAW REVIEW 267. See also *The Work of the Louisiana Supreme Court for the 1952-1953 Term—Property*, 14 LOUISIANA LAW REVIEW 133 (1953).

4. 74 So.2d 1 (La. 1954), 15 LOUISIANA LAW REVIEW 463 (1955).

much larger area in a patent which the state had issued in 1874 to a private individual. Act 62 of 1912[5] provided that ". . . all suits . . . to vacate and annul any patent issued by the State of Louisiana . . . or any transfer of property by any subdivision of the State, shall be brought only within six years. . . ." On the basis of this statute, the court rejected the state's claim to the bed as being an inalienable thing because it is insusceptible of private ownership. The area involved was within the description of the patent and the time to contest its validity had run out on the state.

Six opinions were written for the *California* case, replete with technical arguments and counter-arguments. It would be redundant to keep repeating them again, and it would not serve a useful purpose to try picking out individual issues for logical evaluation or criticism. Neither would it appear to be fruitful at this time to insist upon clarification and separation of the different ideas which may be involved in the sometimes interchangeable terms of "peremption" and "prescription" and "statute of repose." Another issue would concern the "arm of the sea" point. Still another potential issue would be the separate identification and classification of "common things" and "public things" instead of treating them as the same in a compound phrase "common and public things." The issue on which the case was decided was the "intent of the legislature" which passed Act 62 of 1912, and since they said "any patent . . . or any transfer of property" it was held that the statute must be given effect.

At this time, only one point will be stressed. It is a mild understatement to say that the *Humble* and *California* cases focused on an issue of statutory interpretation about which there was great doubt and serious uncertainty. Of the six different opinions written in the *California* case, three are dissents. In the light of these facts, it cannot be denied that either one solution or the other could be sustained by reasonably adequate legal argument—especially since the so-called intent of the 1912 legislature is necessarily an imputed intent formulated by people here and now about what may or may not have been in the minds of other people more than forty years ago. Under such circumstances, the decision of the case should have been in conformity with the public policy of the state, that is, to

5. LA. R.S. 9:5661 (1950).

sustain the inalienability by the state of the beds of navigable waters because they are insusceptible of private ownership.

The combination of the *Humble* and the *California* cases evoked legislative reaction in the 1954 regular session. Two acts,[6] aimed directly at these decisions, purport to override their holding. Act 727 declares that "all navigable waters and the beds of same . . . are common or public things and insusceptible of private ownership." Even though *common* things and *public* things are to be distinguished on other grounds, and it may be regrettable to have the two terms used as if they were synonymous, they do have the same significance which this context specifically identifies as being insusceptible of private ownership. Insofar as this statute goes further to declare that the intent of the 1912 legislature, in its Act No. 62, was to limit its scope to patents or transfers of land susceptible of private ownership, it is performing the same operation that the court used in imputing a legislative intent of which there is no direct evidence. When, in turn, the court gets to interpret the 1954 statutes, the question may well be whether it is the court or the legislature that has the superior authority to declare which intent is to be read into the texts of prior legislatures.[7]

SERVITUDES

Land bordering on navigable rivers is subject to a number of servitudes, one of which is to allow space for a public road.[8] The interpretation and scope of this servitude is the subject of decision in the case of *Hebert v. T. L. James & Co.*[9] The State Highway Commission started to widen an old 30-foot road into a 75-foot servitude, and the proprietor obtained an injunction claiming a right to compensation for the additional land. With a historical outline of the development of river roads, Justice Hamiter shows that this servitude "was not intended to serve the public for any purpose other than that which is incident to the nature, navigable character, or use of the stream."[10] The construction of a new wide highway may be in the general public

6. La. Acts 1954, No. 727, LA. R.S. 9:1107-1109 (Supp. 1954); La. Acts 1954, No. 443, LA. R.S. 9:1101 (Supp. 1954). See Hebert & Lazarus, *Legislation Affecting the Civil Code*, 15 LOUISIANA LAW REVIEW 21 (1954).

7. That the court would defer to the expressed statements of the legislature might be inferred from the court's reference in some cases, *e.g.*, Cassiere v. Cuban Coffee Mills, 74 So.2d 193, 197 (1954), that the absence of legislative expression after a court's decision is treated as an assumption of approval—implying at the same time an authority to disapprove.

8. Arts. 665, 707, LA. CIVIL CODE of 1870.

9. 224 La. 498, 70 So.2d 102 (1953).

10. *Id.* at 508, 70 So.2d at 106.

interest of improved and safer vehicular travel, but the land needed must be expropriated with compensation in the regular manner, and cannot simply be taken without compensation as within the river road servitude.

The servitude on riparian property for levee purposes and flood control[11] is no longer, in itself, the subject of many disputes; however, there still recur questions as to its scope and the extent of its exercise. In *Board of Levee Commissioners of Orleans Levee District v. Kelly*,[12] the Levee Board and the United States Army Engineers were preparing to carry out an approved levee project, and they wanted to remove certain structures and dwellings located on the batture along the Mississippi River. Even though some portions of the work could have been executed without removal of the buildings, this would have hampered and delayed the achievement of the program, besides risking the loss of available federal funds. In affirming the lower court's injunction ordering removal, it was held that this request was within a reasonable exercise of the servitude. Although the batture dwellers in this case were not riparian owners and had no semblance of any legal right to reside there, the test of the manner in which the levee servitude is exercised in any case would still be one of reasonableness under the circumstances, and that private interests must yield to reasonable demands of public necessity and economy.[13] While this may make for individualization of judicial examination of facts, it does insure against arbitrary or unreasonable action by a levee board.

DEDICATION

The dedication of streets within a municipality can be either express or tacit, and the formal or statutory express dedication of a street in a certain location does not preclude the possibility of a public street being established by tacit dedication at a different location on the same property. In *B. F. Trappey's Sons, Inc. v. City of New Iberia*,[14] a street had been opened across plaintiff's property as a by-pass while an adjacent regular street was being paved. This was in use before and continued to be used after the formal dedication at a different location; the plaintiff asserted this formal dedication as a bar to the existence of

11. Art. 665, LA. CIVIL CODE of 1870.
12. 225 La. 411, 73 So.2d 299 (1954).
13. 73 So.2d at 302; *cf.* Pruyn v. Nelson, 180 La. 760, 157 So. 585 (1934).
14. 225 La. 466, 73 So.2d 423 (1954).

any tacit dedication of the street in question. However, in the presence of the three necessary elements: (1) use by the public, (2) maintenance by the municipality, and (3) acquiescence (consent) of the proprietor, there was held to be a tacit dedication. Despite the logic and reasoning, it is not hard to understand the plaintiff's displeasure when, in addition to all that had already happened, he found paving liens and assessments recorded against his property for the further improvement of this street. Nevertheless, even if it is unavoidable to heap all these misfortunes upon the poor proprietor, is it also necessary to inflict upon our civil law the description of an implied dedication in terms of a common law "estoppel in pais"?

In *Mecobon v. Police Jury*[15] an alleged dedication failed for lack of evidence concerning intent to dedicate, and because there did not appear to be such a use for public purposes as would exclude the idea of private ownership.

In addition to the property cases here discussed, there were a number of cases on expropriation,[16] which is treated in the Civil Code as a forced sale[17] rather than as a property matter. The dispute usually centers on either the extent and value of the land to be taken, the location of the right of way, or, most frequently, the amount of compensation. Another group of cases[18] concerning land involve problems which derive from tax sales.

SUCCESSIONS AND DONATIONS

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SUCCESSIONS

In *Bierhorst v. Kelly*[1] the court held that Articles 76, 77, 78, and 79, dealing with rights falling to an absentee after he de-

15. 224 La. 793, 70 So.2d 687 (1954).

16. City of Shreveport v. Abe Meyer Corp., 223 La. 1079, 67 So.2d 732 (1953); Louisiana Rural Electric Corp. v. Guillory, 224 La. 73, 68 So.2d 762 (1953); Greater Baton Rouge Port Commission v. Watson, 224 La. 136, 68 So.2d 901 (1953); Housing Authority of New Orleans v. Brinkman, 224 La. 262, 69 So.2d 37 (1953); Calcasieu & S. Ry. v. Bel, 224 La. 269, 69 So.2d 40 (1953); Housing Authority of New Orleans v. Boudwine, 224 La. 988, 71 So.2d 541 (1954).

17. Art. 2626 *et seq.*, LA. CIVIL CODE of 1870.

18. New Orleans v. Doll, 224 La. 1046, 71 So.2d 562 (1954); Cortinas v. Murray, 224 La. 686, 70 So.2d 589 (1954); Housing Authority of New Orleans v. Banks, 224 La. 172, 69 So.2d 5 (1953); Knapp v. Jefferson-Plaquemines Drainage Dist., 224 La. 105, 68 So.2d 774 (1953).

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1. 74 So.2d 168 (La. 1954).