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Civil Code and Related Subjects: Property

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formally for adoption, declared abandoned, criminally neglected, or its physical or moral welfare seriously endangered by its parents' vicious or immoral habits or associations,[32] yet in *State* ex rel. *Deason v. McWilliams*,[33] though none of these causes seem to have been made out under the facts, the court affirmed a judgment denying the parents the right to recover the custody of their child from persons to whom they had once entrusted it with the view to permitting its adoption. It is true that the parents' decision to recover their child probably was motivated by family indignation over their action, but the writer must agree with Justice Ponder's dissent that this is insufficient reason under the law to deny them that custody.

Other decisions on the subject of custody were of more routine character.[34]

PROPERTY

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SERVITUDES

In the combined cases of *Fontenot v. Magnolia Petroleum Co.* and *Young v. Magnolia Petroleum Co.*,[1] the court achieved a result which might well seem to be the right and equitable one in the administration of justice, but an analysis of its opinion leaves one in unavoidable confusion. The two plaintiffs, Fontenot and Young, owned adjacent properties; the defendants were petroleum and engineering companies prospecting for oil. The plaintiff Young gave oral permission to the defendants to enter upon his land and there conduct geophysical operations; the plaintiff Fontenot had refused entry on his property. As a result of defendants' sub-surface blasting explosions, certain damages were caused in the homes of the two plaintiffs. The court rendered judgment in favor of both plaintiffs covering actual damage in-

32. LA. R.S. 9:401 *et seq.* 9:551 (1950).
33. 227 La. 957, 81 So.2d 8 (1955).
34. Wyatt v. Wyatt, 228 La. 77, 81 So.2d 775 (1955), denying the availability of a suspensive appeal in custody cases; and Decker v. Landry, 227 La. 603, 80 So.2d 91 (1955) and Sharp v. Sharp, 228 La. 126, 81 So.2d 833 (1955), dealing with issues of fact rather than law in the award of custody after separation and divorce.

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1. 227 La. 866, 80 So.2d 845 (1955).

curred plus an additional amount for invasion of privacy, inconvenience, and mental anguish.

The court stated "that clearly the plaintiffs in this instance do not bring an action in tort but one that springs from an obligation imposed upon property owners by the operation of law"[2] and cited as authority Civil Code article 667[3] and the case of *Devoke v. Yazoo & M.V.R.R.*[4] Article 667 appears in the Civil Code in the chapter "Of Servitudes Imposed by Law" and comes after the general principles of predial servitudes, which repeatedly insist upon the predial servitude being a charge on one estate for the benefit of another estate.[5] Only one significant departure has been made, and that was in connection with the so-called "mineral servitude," which is not so much an exception to the primary requirement that there be two separate properties and two distinct owners as it is the development of a branch of law that is practically *sui juris.*

In the *Fontenot* case, the defendants were not owners of any of the property concerned, and it is not seen how this action for damages comes under the *"sic utere"* servitude of article 667. It may well have been the socially desirable result — in determining where to place the burden of loss resulting from such blasting operations — to hold defendants responsible without reference to any question of negligence; however, it is submitted that the use of Civil Code article 667 was not the proper instrument in this case.

If any application were to be found for article 667, it might have been considered as grounds for suit by Mr. Fontenot against his neighbor Mr. Young, because Mr. Young's property had been used, with his permission, in such a way that damage was caused to Mr. Fontenot's property.

A few years ago, the present writer observed with appreciation[6] the first recent application of article 667 in the case of *Devoke v. Yazoo & M.V.R.R.*,[7] but in that case the defendant was

2. *Id.* at 879, 80 So.2d at 849. For a discussion of the torts aspect of the two cases, see page 267 *infra.*

3. "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

4. 211 La. 729, 30 So.2d 816 (1947).

5. LA. CIVIL CODE arts. 646-654 (1870).

6. *The Work of the Louisiana Supreme Court for the 1946-1947 Term — Property,* 8 LOUISIANA LAW REVIEW 236 (1948).

7. 211 La. 729, 30 So.2d 816 (1947).

a property owner and was held responsible in that capacity for the way in which it utilized its property. The remarks the writer made at that time were not directed toward the indiscriminate use of the *"sic utere"* servitude for situations to which it did not apply. If the defendant was conducting activities but not in the capacity of a property owner, and if it is felt that there should be liability for damages without reference to negligence or fault, the "predial or landed"[8] servitude of article 667 is not the appropriate legal basis for the decision.

PUBLIC ROADS

In *Wharton v. City of Alexandria*[9] the plaintiff opposed the paving of a street on the ground that it had never been dedicated. It was conceded that no formal dedication had taken place. However, the road had been in public use for twenty-five years, and there was evidence that it had been worked and maintained by the police jury of the parish for a period in excess of three years. Accordingly, under R.S. 48:491, the street was held to be public and subject to paving, and so forth. This part of the statute may generally be considered as applying to rural parish roads as distinguished from city streets, but the language of the statute is very broad and applies to the maintenance or working of roads or streets by either the parish or the municipal authorities.

To reinforce its decision, the court pointed out that the plaintiffs and their authors had acknowledged that there was a road in front of their property. This appeared in two conveyances as part of the boundary descriptions of the property, and in the signing of a petition to change the name of the street. The insertion of this issue leaves two other questions: (1) how far would a court go in holding a street or road to be public merely on the basis of such acknowledgments, and (2) is the acknowledgment that one's property fronts on a road tantamount to an assertion that it is a "public road"? Why could it not be a "private" road?

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8. LA. CIVIL CODE art. 646 (1870).

9. 226 La. 675, 77 So.2d 1 (1955). For a discussion of this case from the aspect of local government, see page 315 *infra*.