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## Water Rights in Louisiana

Jerry G. Jones

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## COMMENTS

### Water Rights in Louisiana

The recent adoption of legislation regulating water usage in certain sections of Louisiana has resulted in considerable confusion as to the exact principles which are to be applied in matters relating to the consumption of water. It is the purpose of this Comment to examine the principles of water law embodied in the Louisiana Civil Code<sup>1</sup> and to indicate how these Code principles have been affected by the recent legislation. It will be helpful in this respect to consider the policies concerning water rights which have been applied in common law jurisdictions, as many water problems are solved by interstate compact. Also, an analysis of common law methods may be helpful as a reference should a comprehensive scheme of water regulation be attempted in this state.

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1. For additional treatment of the subject, see Comment, 29 TUL. L. REV. 554 (1955).

*Water Rights at Common Law*

Common law jurisdictions apply one of two doctrines of water rights, either the riparian or the prior appropriation doctrines.<sup>2</sup> Although the riparian doctrine<sup>3</sup> has been referred to as the "common law" concept of water rights, it is seemingly of civilian origin.<sup>4</sup> Under this doctrine the sole requirement for use of water is possession of land abutting a stream.<sup>5</sup> Different theories have been advanced concerning this right to use the water in adjacent streams. The first is the "natural law" theory, which prevails in England and several jurisdictions in this country. Under this theory, the proprietor of the land enjoys the right of having the water flow across or adjacent to his property in its natural state.<sup>6</sup> This gives him the privilege to withhold an amount of water to satisfy his own needs, and to make artificial use of the water, so long as he does not materially affect the natural flow of the stream through the property of the downstream proprietor.<sup>7</sup> Another theory of riparian rights is that of "reasonable use," under which each riparian proprietor has the privilege of making beneficial use of the water for any purpose, provided that such use does not unreasonably interfere with the same privilege of the other riparian owners. Reasonableness is determined in each case on the peculiar set of facts, and depends not only upon the utility of the use itself, but also upon the gravity of its consequences on other proprietors. In cases where the owner desires excessive amounts of water beyond what might be considered beneficial, the use is governed by the amount of water in the stream available for such excessive purposes, the

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2. No attempt is made in this Comment to deal at great lengths with the law of waters in common law jurisdictions. For authoritative accounts, see LOUISIANA LEGISLATIVE COUNCIL, *WATER PROBLEMS IN THE SOUTHEASTERN STATES*, Research Report No. 5, p. 1 *et seq.* (mimeo., April 7, 1955); PROCEEDINGS, TEXAS WATER LAW CONFERENCES (1952); Marquis, *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797 (1953).

3. The riparian doctrine is accepted in most of the states east of the Mississippi River, and all of the states west of the Mississippi River with the notable exceptions of Arizona, Colorado, Idaho, Nevada, New Mexico, Utah, and Wyoming. For a discussion of the riparian doctrine, see Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEX. L. REV. 24, 27 (1954).

4. Wiel, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133 (1919), wherein the author cites numerous instances of Story, Kent, and Angell using the phraseology of the French Civil Code in speaking of riparian rights.

5. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEX. L. REV. 24, 26 (1954).

6. RESTATEMENT, TORTS, Scope Note, topic 3, c. 41, p. 339 (1939).

7. *Ibid.*

number of persons who use it, the size, situation and character of the stream, and the nature of the region.<sup>8</sup>

The second doctrine of water rights which is applied in some common law jurisdictions is the prior appropriation doctrine. Under this doctrine, the first to appropriate acquires the sole right to use the water, to the exclusion of all others who may seek to share it. Ownership of the land abutting the stream is not essential to the existence of the right. The doctrine permits the person who originally diverts the water for beneficial purposes to maintain a preference over all others who subsequently attempt to use the water. The doctrine originated during the rapid growth of the mining industry in the western states, where water shortages necessitated maximum utilization of available water supplies.<sup>9</sup>

Another approach to water law is taken by those common law jurisdictions which have attempted to utilize the better features of both the riparian and prior appropriation doctrines. One purpose in attempting such a reconciliation of the two doctrines is to permit the use of water under riparian principles, but to abolish the right of a riparian owner to assert claim to water which he does not use but to which, under strict riparian theory, only he would have the right.<sup>10</sup> Non-riparian owners are thus permitted to assert claim to the unused riparian rights. Another purpose in such a reconciliation of the two doctrines is to establish a system of preferences. A preference exists when "the preferred use may be initiated without regard to the fact that the supply is already fully appropriated for other purposes, and the preferred user may take water without paying compensation to persons whose uses are impaired."<sup>11</sup> A preference may be given by statute for a particular purpose, or one user may be given a preference over others, even though all may use the water for the same purpose. A preference may also be given one user to condemn the rights of another, provided that compensation is

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8. *McCook Irrigation and Water Power Co. v. Grews*, 70 Neb. 109, 96 N.W. 996 (1903); *Redwater Land and Canal Co. v. Reed*, 26 S.D. 466, 128 N.W. 702 (1910). Also, for legal consequences of the "reasonable use" theory, see generally RESTATEMENT, TORTS, topic 3, c. 41, p. 344 (1939).

9. See Marquis, *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797, 825 (1953), and cases cited therein.

10. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEX. L. REV. 24, 27 (1954).

11. Trelease, *Preferences to the Use of Water*, 27 ROCKY MT. L. REV. 133, 134 (1955).

given for the rights taken.<sup>12</sup> A study of preferences in western states indicates that the following priorities exist: domestic and municipal purposes which are usually superior, followed by irrigation, manufacturing, mining, railroad transportation, power and navigation.<sup>13</sup>

### *Louisiana Riparian Rights*

Article 661 of the Louisiana Civil Code, pertaining to predial servitudes, provides:

"He whose estate borders on *running water*, may use it as it runs, for the purpose of watering his estate, or for other purposes.

"He through whose estate water runs, whether it originates there or passes from lands above, may make use of it, while it runs over his lands; but he cannot stop or give it another direction, and is bound to return it to its ordinary channel, where it leaves his estate." (Emphasis added.)

This article is a typical expression of the riparian doctrine, as water usage is given only to those whose land abuts a stream. Its source is apparently article 644 of the French Civil Code,<sup>14</sup> since the language of the two articles is similar. For this reason, consideration of relevant French materials should prove useful to help clarify questions arising under the Louisiana provision.

According to both the French and the Louisiana law a riparian owner is one whose land borders the stream at the time the claim of a right to use the water is made.<sup>15</sup> This definition might be of aid in applying the provisions of article 661, because, ac-

12. *Ibid.*

13. *Id.* at 158.

14. CODE CIVIL art. 644: "A person whose property is on the border of a stream which has not been declared to belong to the Public Domain by article 538 of the title *Of Different Kinds of Property*, can use the water as it flows past to irrigate his land.

"A person through whose tenement such water flows can even use it over the distance it runs through such tenement, provided it is put back in its ordinary channel when it leaves his tenement." (As translated by Henry Cachard, 1930); 3 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 76 (5th ed. 1900); 1 COLIN ET CAPITANT, TRAITÉ DE DROIT CIVIL 1583 (1953); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 494 (1952).

15. 7 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 327 (2d ed. 1876). See *Doiron v. O'Bryan*, 218 La. 1069, 1081, 51 So.2d 628 (1951), where the Louisiana Supreme Court gave a similar construction to the term when it said: "Riparian rights are the rights of owners of land on the *banks* of watercourses relating to water [and] its use." (Emphasis added.)

'cording to the equivalent French provision, non-riparian owners have no right to the water.<sup>16</sup> The question might arise as to the effect of a separation, such as a road, between the property and the stream. Whether or not the owner of the property thus separated has the right to use the water depends upon the title to the roadbed. If the roadbed is owned by the adjacent landowner, and is merely burdened with a servitude of passage, the Louisiana courts have held the owner remains a riparian owner, because title to the roadbed remains in him.<sup>17</sup> If, however, the roadbed is owned entirely by one not the riparian owner, the strict French approach is that the front proprietor loses all interest he possessed in the water, and the owner of the bed of the road becomes the new riparian owner.<sup>18</sup> Another question which may be of importance is the effect to be given the situation where the bed of the stream changes. If the bed of the stream changes so that the estate no longer borders on the stream, again under the French view, the right of the proprietor to use the water has terminated.<sup>19</sup> Under this strict interpretation, irrigation works to conduct the water to the former riparian estate presumably would not be permitted, as the necessary physical relationship between estate and stream no longer exists.

Although article 661 involves a servitude to use water, it may be helpful to determine the question of ownership of the "running water" to which it refers. According to article 450 of the Code, running water is classified as *res communes*, that is, the ownership belongs to no one in particular and all men may use it freely, conformably with the use for which nature intended it. Almost identical wording can be found in Roman<sup>20</sup> and Spanish<sup>21</sup> property law. At Roman law, however, water could become susceptible of ownership once extracted from the stream.<sup>22</sup> This same reasoning could be applied in Louisiana, for although article 482 of the Civil Code<sup>23</sup> speaks of common things as being

16. See 3 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 48 (5th ed. 1900).

17. *Delachaise v. Mongennis*, 44 La. Ann. 1043 (1892).

18. 3 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 48 (5th ed. 1900).

19. See entry on "*servitudes*" in [1884] Dalloz, *Jurisprudence* I. 277, I. 187.

20. INSTITUTES 2.1.1: "By natural law the following things belong to all men, namely: air, *running water*, the sea, and for this reason the shores of the sea." (Emphasis added.)

21. 1 LAWS OF LAS SIETE PARTIDAS 335 (Moreau-Lislet & Carleton transl. 1820): "The things which belong in common, to all the living creatures of this world, are, the air, rain, water, the sea and its shores; for every living creature may use them, according to their wants."

22. 1 KINNEY, IRRIGATION AND WATER RIGHTS 962 (2d ed. 1912).

23. LA. CIVIL CODE art. 482 (1870): "Among those which are not susceptible of

insusceptible of ownership, it also refers to things in common of which all men have the enjoyment and use. Thus, segregation of water is authorized and it would seem to follow that, once separated, it would become the property of him who appropriates it, and no longer be subject to the use of others. This conclusion would not violate the basic proposition that the *corpus* of the water is insusceptible of ownership, as the water remaining in the stream would be a common thing, owned by no one.

Although this classification of running water as a common thing may have been possible originally under the Code, subsequent legislation appears to have eliminated this interpretation. R.S. 9:1101<sup>24</sup> provides that "the waters of and in all bayous, rivers, streams, lagoons, lakes, and bays . . . not under the direct ownership of any person on August 12, 1910, are declared to be the property of the State. There shall never be any charge assessed against any person for the use of the waters of the State for municipal, industrial, agricultural or domestic purposes." The effect of this statute is to exclude running water from those common things enumerated in article 450 of the Civil Code and classify it as *res publicae*, that is, property vested in a nation which may be used by all its citizens.<sup>25</sup> The statute expressly provides that waters under private ownership on August 12, 1910, are not affected. However, under article 450 of the Civil Code, running water is a common thing insusceptible of private ownership and thus could not have been owned by anyone at any time. R.S. 9:1101, raising as it does the inference that there could have been private ownership of running water before August 12, 1910, seems irreconcilable with article 450 of the Civil Code. Although the Legislature must have been primarily concerned with the ownership of beds of streams and not the water, waters are specifically mentioned in the legislation.<sup>26</sup>

A similar problem is whether the term "running water" in article 661 includes both navigable and non-navigable streams. Under article 644 of the *Code Civil*,<sup>27</sup> comparable to article 661 of the Louisiana Code, the term "running water" refers only to water in non-navigable streams. However, unlike the *Code Civil*,

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ownership, there are some which can never become the object of it; as things in common, of which all men have the *enjoyment and use*." (Emphasis added.)

24. LA. R.S. 9:1101 (1950), as amended, La. Acts 1954, No. 443, p. 834.

25. LA. CIVIL CODE art. 453 (1870).

26. See Note, 15 LOUISIANA LAW REVIEW 463 (1955).

27. See note 14 *supra*.

the equivalent article in the Louisiana Code is not confined to non-navigable streams. It is arguable that the redactors meant to include both navigable and non-navigable streams under the term "running water" in article 661. On the other hand, R.S. 9:1101,<sup>28</sup> providing for state ownership of the waters of all streams, does definitely make some qualification as to the types of streams from which water may be appropriated. It provides that if the water is contained in a *navigable* stream, the state may divest its citizens of the right of use by entering into possession of the waters. Conversely, no provision is made for divestment by the state of riparian owners who use water from *non-navigable* streams. The right to use the water of non-navigable streams, therefore, is governed only by article 661. As regards navigable streams, the provisions of article 661 appear to have been restricted by R.S. 9:1101, since the right to use those waters may be divested by the state.

The classification of running water as a common thing in the Code and as a public thing in the Revised Statutes would lead to the conclusion that any person has the right to use the water,<sup>29</sup> with the qualification that in neither case is the water susceptible of private ownership. But this right would seem to be limited by article 661 to those whose estates border on a stream or through whose estate water runs. In France, this problem is treated somewhat differently.<sup>30</sup> Article 644 of the French Civil Code, comparable to Louisiana article 661, provides for use by riparian owners only. Special legislation provides that non-riparian owners may apply to administrative agencies for authority to irrigate lands. Thus, the right to use water is provided both riparian and non-riparian owners. Provisions for non-riparian use were completely excluded by the redactors of the Louisiana Civil Code. Likewise, the Code is virtually silent as to what purposes of use are to be given preference. The only right granted by article 661 which might be considered a preference as to purpose of use is in the provision that "he whose estate borders on running water, may use it as it runs, for the purpose of watering his estate, *or for other purposes.*" (Emphasis add-

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28. LA. R.S. 9:1101 (1950), *as amended*, La. Acts 1954, No. 443, p. 834.

29. The definitions of public and common things usually connote that everyone has the use of the things, but not the ownership.

30. 3 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 60 (5th ed. 1900); 1 COLIN ET CAPITANT, TRAITÉ DE DROIT CIVIL 1583 (1953); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 494 (1952); 2 PICARD, TRAITÉ DES EAUX 59, as translated in 6 CALIF. L. REV. 342, 370 (1918).

ed.) Just what is meant by the phrase "for other purposes" is an open question. Likewise open is the question of the amount of water that may be taken by the riparian owner.<sup>31</sup>

The rights granted to riparian owners by article 661 are qualified by other provisions of the Code. The front proprietor, for example, may not transfer his right to the use of the water to a non-riparian owner, as articles 652, 653, and 654 provide that servitudes are non-transferable separate and apart from the dominant estate.<sup>32</sup> Thus, the only transfers of the right of water usage permitted are those accomplished by a transfer of the title in the riparian estate. Where the front proprietor acquires land not bordering a stream, but which is adjacent to his riparian estate, there may be a difference of opinion as to whether or not he may use the water to benefit the land which does not abut the stream. Article 777 of the Louisiana Civil Code<sup>33</sup> prohibits the transfer of the exercise of a servitude by the owner of the servient estate to a place different from that to which it was originally assigned. The theory is that by making such a transfer of the exercise of the servitude an increased burden is placed on the dominant estate. If the water is used to serve land which does not abut the stream, other riparian own-

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31. For a discussion of the amount of water that may be taken, see 5 LABOR, REPERTOIRE DE DROIT FRANÇAIS 414 (1881), as translated in Weil, *Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law*, 6 CALIF. L. REV. 245, 263 (1917), wherein it is said: "The riparian proprietors have, in fact, an equal right to the use of the water, and aside from that, it is proper to regulate this use to the end that each of the riparian owners may count upon a share as near equal as possible of what water there is."

The Louisiana Code of 1808 contained a provision that empowered the judge to balance the interests when determining the proper amount of water to be taken, but this was excluded from the Civil Code of 1825, because it contained advice rather than command. See *Compiled Editions of the Civil Codes of Louisiana*, 1 LOUISIANA LEGAL ARCHIVES 71, Comment of Redactors (1937).

32. LA. CIVIL CODE arts. 652, 653, 654 (1870). 7 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 356 (2d ed. 1876): "The quality of being riparian does not transfer itself by means of the agreement to those who do not possess anything along the rivers, hence the rights attached to the quality of being riparian are equally non-transferable to others as well as to the riparian owners."

33. LA. CIVIL CODE art. 777 (1870): "The owner of the estate which owes the servitude can do nothing tending to diminish its use, or to make it more inconvenient.

"Thus he can not change the condition of the premises, nor transfer the exercise of the servitude to a place different from that on which it was assigned in the first instance.

"Yet if this primitive assignment has become more burdensome to the owner of the estate which owes the servitude, or if he is thereby prevented from making advantageous repairs on his estate, he may offer to the owner of the other estate a place equally convenient for the exercise of his rights, and the owner of the estate to which the servitude is due can not refuse it."

ers might well suffer as a result of the smaller volume of water which reaches them. Article 777 appears to prohibit such conduct by the servient owner upstream, and might well be used by the courts to prevent the exercise of the servitude on lands which do not form part of a contiguous riparian estate. However, this argument may not be completely valid when it is considered that article 777 is a rule of conventional servitudes, and article 661 concerns servitudes that originate from the natural situation of the places. French writers, commenting on similar situations in their Code, contend that rules of conventional servitudes cannot be applied to the rules of natural servitudes.<sup>34</sup> Following this strict French approach, it would seem possible to apply the provisions in article 661 to any land acquired by the riparian owner, whether contiguous to the riparian estate or not. It is submitted, however, that the true implication of article 661 is that its application should be restricted. As thus applied there could be no utilization of the riparian right on any land acquired subsequent to the time the initial claim of use is made.

Termination of riparian rights by prescription,<sup>35</sup> a subject of much litigation in other states,<sup>36</sup> is not likely to present a problem in Louisiana. Article 795 of the Louisiana Civil Code<sup>37</sup> provides that the normal ten-year prescriptive period for non-usage of servitudes does not run where the servitude is one that originates from the natural situation of the places. One French writer concludes that "the right cannot be lost to those to whom it is vested, merely by non-use; it matters little that the other riparian owners have enjoyed the water to a greater extent than they could have done if the co-riparian owner had himself exercised his right; he may always complain of an excessive use of the other riparian owners with a view to himself enjoying a right which he had kept in reserve, however long his inaction may have lasted."<sup>38</sup> An analogous situation has arisen in Louisiana involving drainage. In *Becknell v. Weindhal*<sup>39</sup> an action was brought to prevent the obstruction of what plaintiff claimed was the nat-

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34. 5 LABORI, REPERTOIRE DE DROIT FRANÇAIS 413 (1881).

35. See, generally, Comment, 15 LOUISIANA LAW REVIEW 777 (1955).

36. Craig, *Prescriptive Water Rights in California and the Necessity for a Valid Statutory Appropriation*, 42 CALIF. L. REV. 219 (1954), and authorities cited therein.

37. LA. CIVIL CODE art. 795 (1870): "Prescription for non-usage does not take place against natural or necessary servitudes, which originate from the situation of the places."

38. 5 LABORI, REPERTOIRE DE DROIT FRANÇAIS 415 (1881).

39. 7 La. Ann. 291 (1852).

ural drain of the land. The Louisiana Supreme Court, contrary to article 795 and the view of the French authorities, held that when the works are made openly, and in the presence of the party who has a right to object to them, and he does not object, the implied acquiescence is considered a *waiver* of the right of servitude. This theory of waiver may be an exception made by the court to the general rule of article 795. On the other hand, it may be argued that prescription was not involved in the case, as plaintiff had not lost the right of servitude by failure to make use of it, but rather had lost it by failure to make objection to the construction which had damaged his estate. Moreover, the court was influenced in its determination by what it considered to be the best interests of agriculture.

#### *Administrative Regulation*

Three agencies, irrigation districts,<sup>40</sup> the Sabine River Authority,<sup>41</sup> and the Southwest Water Conservation District,<sup>42</sup> are given authority to control water usage in designated areas. The legislation creating these agencies is not intended as a comprehensive scheme of water law, as each statute was adopted to meet the needs immediately presented. Also, the creation of these agencies does not seem consistent with the riparian doctrine expressed in article 661 of the Civil Code. An examination of this legislation will reveal several of these inconsistencies.

Irrigation districts may be created by the police jury of any parish "for the purpose of constructing and operating canals for irrigation by gravity."<sup>44</sup> The powers granted such corporations<sup>45</sup> are almost plenary, including the general power of expropriation. *Exclusive* control of the water within the established district is in the governing agency. There is an absence in the statute of any protection for riparian owners who have acquired rights under article 661. Thus, under this legislation, the location of the land with relation to a stream is insignificant in determining rights to appropriate water for irrigation purposes.

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40. LA. R.S. 38:2101 *et seq.* (1950).

41. *Id.* 38:2321 *et seq.*

42. *Id.* 38:2501 *et seq.*

43. For a discussion of the operation of these agencies, see LOUISIANA LEGISLATIVE COUNCIL, WATER PROBLEMS IN THE SOUTHEASTERN STATES, Research Report No. 5, p. 24 *et seq.* (mimeo., April 7, 1955).

44. LA. R.S. 38:2101 (1950).

45. *State v. Coulon*, 197 La. 1058, 3 So.2d 241 (1941).

The Sabine River Authority is authorized to provide irrigation within the watershed of the Sabine River and its tributaries for agricultural purposes and for equitable distribution to all other uses.<sup>46</sup> Again, the statute makes no mention of the riparian rights acquired by authority of article 661. The obvious conclusion is that the Legislature intended to supersede that article, and rely on the discretion of the Authority to provide for an equitable distribution of water.

The Southwest Louisiana Water Conservation District, comprising a much larger area than that authorized to the preceding agencies,<sup>47</sup> was created in 1954 to furnish fresh water to *all* lands within the designated area for domestic, municipal, irrigational and industrial purposes. Authority is granted to tax and to purchase facilities for the distribution and sale of water. While the district may sell water, the statute provides that no charge shall be assessed which would have the effect of impairing vested water rights.<sup>48</sup> Thus, a riparian owner within the jurisdiction of the district is free to use the water if he can show that his rights are vested by virtue of article 661. The legislation creating the district also conflicts with R.S. 9:1101, which provides that no charge shall be assessed for the use of water from any stream within the state. However, R.S. 9:1101 is not controlling as it is the earlier expression of the legislative will.

### *Conclusion*

As previously noted, the basic legislation governing water usage is article 661 of the Civil Code. This article has become virtually meaningless in those areas where irrigation is controlled by administrative agencies. Further doubt has been cast upon the usefulness of article 661 by the enactment of R.S. 9:1101 declaring all waters to be the property of the state, with the privilege of free use by everyone. Granting that article 661 may be construed as not having been affected by the above legislation, if the general rules of servitude are applied to that article, many inequitable results follow.<sup>49</sup> An illustration is the pro-

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46. LA. R.S. 38:2321 (1950).

47. The district encompasses the parishes of Acadia, Allen, Beauregard, Calcasieu, Cameron, Evangeline, Iberia, Jefferson Davis, Lafayette, St. Landry, Vermilion and that portion of the Parish of St. Martin lying west of the Atchafalaya River. LA. R.S. 38:2503 (1950).

48. LA. R.S. 38:2504 (1950).

49. See Nabors, *Report on Mineral Law*, 25 TUL. L. REV. 30, 33 (1950), wherein the author criticizes the technique of analogizing obscure servitude articles to

hibition against the riparian owner's use of the water to serve non-riparian lands adjoining his riparian estate, but which have been purchased subsequent to the initial exercise of the servitude. It is submitted that the solution to the problem lies in the adoption of comprehensive legislation designed to treat all related problems of water law. The present system, composed only of statutes passed to meet limited problems, has produced a number of conflicts from which inequitable results are apt to follow.

*Jerry G. Jones*

### The Effect of Insanity at the Time of Marriage

It is almost universally accepted that the marriage of an insane person is null. However, there exists considerable diversity of opinion as to the nature and effect of such nullity. A brief survey of various legal systems is offered as foundation for a discussion of the problems which the subject raises under the law of Louisiana.<sup>1</sup>

#### *In Other Legal Systems*

The Canon Law Code<sup>2</sup> does not mention insanity in its enumeration of the impediments to marriage.<sup>3</sup> The canonists employ a strict definition of the term impediment, that is, "a circumstance attaching to the person which . . . renders his marriage either illicit or invalid."<sup>4</sup> By this is meant a condition of a person by reason of which he is forbidden either to marry or to marry certain persons. On the other hand, insanity in its relation to the marriage contract is considered to be a circumstance affecting consent rather than the person. The effect of insanity on marriage is drawn from the wording of Canon 1081<sup>5</sup>

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solve problems in the field of mineral law. The present writer feels this same position may be taken by the court in matters of water law if legislative reform does not remedy the situation.

1. A discussion of the subject with respect to (a) degrees of insanity and (b) intoxication as having the effect of insanity is not within the scope of this Comment. See generally Annots., 28 A.L.R. 635, 648 (1924). See McCurdy, *Insanity as a Ground for Annulment or Divorce in English or American Law*, 29 VA. L. REV. 771, 790 (1943), for a discussion of insanity in divorce law.

2. CODEX CANONICI JURIS (1918).

3. The dirament (annulling) impediments are enumerated and defined in Canons 1067 through 1080 and the impedient impediments (rendering a marriage illicit but not null) in Canons 1058 through 1066.

4. BOUSCAREN & ELLIS, *CANON LAW: A TEXT AND COMMENTARY* 481-85, Canon 1035, commentaries 1, 2 (2d ed. 1951).

5. CODEX CANONICI JURIS, Canon 1081 (1918).