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Civil Code and Related Subjects: Property

Joseph Dainow

seded by a divorce judgment. This interpretation is confirmed by the third paragraph of R.S. 9:302, under which the award of a judgment of divorce to a spouse against whom a separation had been pronounced, because of non-reconciliation of the spouses during the one year and sixty days or more since the separation judgment, does not affect the custody rights of the spouse who obtained the separation judgment.

The termination of the alimony judgment in favor of the children is even less understandable. It is customary to permit the spouse seeking the custody of minor children after separation or divorce to ask for alimony in their behalf, but the claim of the children, though occasioned by the divorce or separation, is in no way connected with the separation or divorce proceedings as such. Nothing on alimony for children will be found in the Civil Code's title on separation and divorce. If children are entitled to alimony as of and after a judgment of separation or divorce, it is simply because they are children and in need.[31] If the spouse obtaining custody and tutorship of a minor asks for alimony for its support, it is really in the capacity of tutor or tutrix of the child. If it is customary to deal with this matter in the same suit as that for divorce or separation, and even to make the award to the wife in her own name rather than to her as tutrix, it is nevertheless true that it cannot be identified with the subject matter of the divorce or separation suit or be considered incidental to it.[32]

PROPERTY

*Joseph Dainow**

"PUBLIC THINGS"

The Commission Council of the City of New Orleans authorized the Commissioner of Public Buildings and Parks to sell land comprised within "Commerce Place" but the highest bidder refused to complete the transaction on the ground that the city could not transfer a merchantable title. The trial judge recognized the city's ownership and right of alienation for private use,

31. *Id.* arts. 227, 229.
32. *Id.* arts. 350, 229.

* Professor of Law, Louisiana State University.

but the Supreme Court reversed.[1] Several opinions were rendered on original hearing and rehearing. The net result is that the property was deemed a "public square" the ownership of which had vested in the city by dedication in 1836. In the classification of things under Civil Code Articles 449, 453, and 454, "public things" are those which are not susceptible of private ownership, and a public square is one of the specific illustrations cited. Of course, the Civil Code is a statute and special deviation may be made by subsequent legislation.

The city asserted certain provisions of its charter as implying this authority but the court properly held that such authority would have to be express, which was not the case. On rehearing, it was conceded that the 1948 amendment of the charter did have such authorization but that the necessary procedure had not been followed to show written approval by 70% of the property owners within a radius of 300 feet. The dissents differed from the majority on the interpretation of the city charter as embodying legislative authorization to change the classification of public things and alienate them for private use, and on the classification of the property as a public square. However, it would appear to be the sounder policy to protect as far as possible the insusceptibility to private ownership, and to insist upon specific compliance with express legislative authorization to change the classification of "public things."

OWNERSHIP

According to the principle of "accession," the landowner acquires the ownership of what is produced by the land.[2] An exception exists in favor of the bona fide possessor so that when he is evicted by the real owner and has to return the property he may keep the fruits as his own.[3] The person whose possession was not in good faith must restore all the fruits that were produced during his occupancy, and this is generally understood to include the rental value of the property itself.[4] In *Juneau v. Laborde*,[5] where the evicted party was a co-owner whose possession of the whole property was not in good faith, a distinction

1. City of New Orleans v. Louisiana Society of Prevention of Cruelty to Animals, 229 La. 246, 85 So.2d 503 (1956).
2. LA. CIVIL CODE arts. 498-501 (1870).
3. LA. CIVIL CODE arts. 502-503 (1870).
4. Succession of Hawthorne, 158 La. 637, 104 So. 481 (1925).
5. 228 La. 410, 82 So.2d 693 (1955).

was drawn between the objective fruits and the rental value of the personal use of the property.[6] The plaintiffs, who were found to be the real owners of almost a one-half interest in the property, had recovered their just proportion of the rents and revenues which had accrued during the defendant's occupancy, but for defendant's personal use of the land the court denied recovery of rental value duly calculated at a certain monthly rate.

The court pointed out that the right of co-owners to possession of the property is equal and coextensive[7] (until partition) so that neither becomes indebted to the other for his personal occupancy, use and enjoyment. It was therefore proper to refuse recovery on the basis that in the case of co-owners this element of restitution is distinguished from rents and revenues derived either from lease or exploitation.

SERVITUDES

In *English Realty Co. v. Meyer*[8] a number of factual and legal issues became interwoven in an unusual pattern. Plaintiff had owned a large tract of land, and after selling most of this land it sued one of its vendees for a right of passage under Civil Code Article 699 because it had no access to a public road. The trial judge granted a servitude but the Supreme Court reversed.

Article 699 contemplates "the owner whose estate is enclosed, and who has no way to a public road, a railroad, a tramroad or a watercourse." This was written a long time ago, and transportation conditions have changed sufficiently to warrant a realistic and reasonable interpretation of the Code article. In passing, the court mentioned that the contiguity of plaintiff's property to a railroad might not preclude his estate from being "enclosed," and under present conditions this point might well be made stronger. Today, even a property with access to a watercourse could well be considered as "enclosed" with need for access to a public road.

In the present case, the plaintiff's property was also contiguous to a public road but was cut off from access to it. For part of this frontage, an overpass and embankment made access impossible; and for the remainder of the frontage, the City of

6. See prior decisions between same parties in Juneau v. Laborde, 219 La. 921, 54 So.2d 325 (1951); and 224 La. 672, 70 So.2d 451 (1954).
7. LA. CIVIL CODE art. 494 (1870).
8. 228 La. 423, 82 So.2d 698 (1955).

Shreveport had duly prohibited access because this would constitute a serious traffic hazard. The facts that the plaintiff had acquired the original large tract subsequent to the construction of the overpass and embankment, and that it had plenty of access to available public roads before selling most of the property was apparently and understandably an important element in the decision of the case.

However, two points should be noted. First, the court held that a proprietor adjoining a public road does not have an enclosed estate within the purview of Article 699 because neither the state nor its political subdivisions has the right to deny him access to the adjoining public way, and, even if the denial is justified, this does not suffice to burden another person's adjacent property with a servitude of passage. These statements contain some measure of contradiction, but might be reconciled on the basis of the court's suggestion that the proprietor has recourse against the public authority for damages or compensation on account of such denial of access to an adjoining public road.

Secondly, the changes in modern transportation and the new developments of highway and city traffic problems warrant a re-examination of the limited scope of the rule in Article 699.

LEVEES

Since the earliest history of Louisiana, there has been a servitude for levee purposes on riparian properties bordering navigable rivers and streams.[9] With the necessity of treating levees as part of a larger flood control program, their construction could no longer be located exclusively at the edge of the water[10] and even when placed at a considerable distance inland this is considered as being within the operation of the levee servitude. However, nowhere is there mention of property bordering on "lakes." In the case of *Delaune v. Board of Commissioners for the Pontchartrain Levee District*[11] a levee had been constructed along the shore of the lake and the landowner sued to recover for the land thus appropriated. The trial court dismissed the suit on an exception of no cause of action by reason of the legal servi-

9. LA. CIVIL CODE art. 665 (1870); Dickson v. Board of Commissioners, 210 La. 121, 26 So.2d 474 (1946); Eldridge v. Trezevant, 160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 490 (1896).

10. *Cf.* LA. CIVIL CODE art. 457 (1870). See Wolfe v. Hurley, 46 F.2d 515 (W.D. La. 1930), *aff'd* 283 U.S. 801 (1930); Board of Commissioners of Tensas Basin Levee Dist. v. Franklin, 219 La. 859, 54 So.2d 125 (1951).

11. 230 La. 117, 87 So.2d 749 (1956).

tude of Article 665; the Supreme Court reversed and remanded. Property on Lake Pontchartrain is not *a priori* subject to a public servitude for levees under Article 665. At the same time, it does not follow that it may not be subject to this servitude. However, the burden of proof is on the levee board to show that the property "is within range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes."[12]

SUCCESSIONS

*Harriet S. Daggett**

Succession of Ryan[1] is concerned with the question of revocation of a principal will by a later one valid in form but allegedly containing a prohibited substitution and hence invalid in substance. The matter was argued on an exception of no right of action brought by a niece of the testatrix claiming only as a legatee under the prior will. Thus, the question of whether or not the language of the second will should be interpreted as a substitution was not passed upon. On rehearing the court held that the first will was tacitly revoked by the second which was valid in form and indicated a change of intention by the testatrix whether the bequest showing this change could be executed or not.

This distinction between invalidity of form and substance adds further complexity to the question of revocation of wills, an already most disturbing subject. The historical and legislative intent approach was taken in arriving at the conclusion. Article 1519 of the Revised Civil Code of 1870 states that "those [conditions] which are contrary to the laws . . . are reputed not written." *If* the bequest in the later will was a prohibited substitution (which was not passed upon) and thus "not written," the later will might have been said to be bare of substance and thus not to have exhibited a change of intention by the testatrix. The author of the opinion on first hearing, wherein this distinction between form and substance was not found, dissented on the rehearing.

12. 87 So.2d at 754.

*Professor of Law, Louisiana State University.

1. 228 La. 447, 82 So.2d 759 (1955).