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Civil Code and Related Subjects: Property

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PROPERTY

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ACCRETION

In the consolidated cases of *Esso Standard Oil Co. v. Jones*[1] and *Esso Standard Oil Co. v. State*,[2] the court applied Civil Code Article 509 to accretion (alluvion) which was built up in one place as a result of a man-made cut-off at another part of the river. Although the causal relationship was established, this was distinguished from situations where the added land surface had been built up by dirt fill or by means of adjacent dikes. As long as the accretion is on the bank of a flowing body of water, and is gradual and imperceptible, the alluvion accrues to the riparian proprietor. The opinion is well reasoned and documented. It establishes a clear interpretation that will be practical in the solution of future problems where a relationship exists between the accretion and some act of man — until the fact situations get very close to the fine line of division depending upon the proximity of that relationship.

SERVITUDES

The case of *Buras Ice Factory, Inc. v. Department of Highways of the State of Louisiana*[3] was essentially an action to recover damages which resulted from the expropriation of a third person's property. The question of whether an expropriation gives rise to actionable damages where no property was taken, is discussed elsewhere;[4] the present comments are limited to a legal point of interest concerning servitudes.

Civil Code Article 767[5] provides for the establishment by destination of servitudes which are continuous and apparent. Article 769[6] contemplates the establishment, without a deed to

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1. 233 La. 915, 98 So.2d 236 (1957), 18 LOUISIANA LAW REVIEW 739 (1958).
2. 233 La. 954, 98 So.2d 250 (1957).
3. 235 La. 158, 103 So.2d 74 (1958).
4. Comment, 19 LOUISIANA LAW REVIEW 491 (1959).
5. "The destination made by the owner is equivalent to title with respect to continuous apparent servitudes.

"By destination is meant the relation established between two immovables by the owner of both, which would constitute a servitude if the two immovables belonged to two different owners."

6. "If the owner of two estates, between which there exists an apparent sign of servitude, sell one of those estates, and if the deed of sale be silent respecting

that effect, of a servitude which is apparent. Since Article 769 makes no reference to the continuous or discontinuous nature of the servitude, there has been question as to whether it went further than Article 767 or whether it had to be interpreted within the limitation of Article 767. In the present case, the court asserts the Louisiana position that discontinuous (although apparent) servitudes can be established only by title;[7] this restricts the meaning of Article 769 to the servitude which is both continuous and apparent.[8] The brevity and peremptory nature of the court's disposition of this issue might imply a perfectly clear and well-settled explanation of the question. The net result is the same as if Article 769 were not in the Code at all, and one may well wonder why the redactors put it there.[9]

BOUNDARIES

The commissioners who prepared the Civil Code of 1825 considered the existing law inadequate for the subject of surveying lands and establishing boundaries between adjacent proprietors, so they inserted an additional title of 30 articles.[10] They must have deemed these provisions perfectly clear and practically self-operating because their explanatory comments are very few and very brief. Nevertheless, after 130 years it cannot be said with certainty that all these code articles are clearly understood, especially the present Articles 852 and 853.[11] These are troublesome because they both include the possibility of one proprietor acquiring some land from his neighbor by means of acquisitive prescription.

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the servitude, the same shall continue to exist actively or passively in favor of or upon the estate which has been sold."

7. LA. CIVIL CODE art. 766 (1870).

8. 235 La. 14, 103 So.2d 74, 79, 82-83 (1958).

9. See Comment, 8 LOUISIANA LAW REVIEW 560 (1948).

10. Projet, Additions and Amendments to the Civil Code of the State of Louisiana 96-101 (New Orleans 1823).

11. Art. 852: "Whether the titles, exhibited by the parties, whose lands are to be limited, consist of primitive concessions or other acts by which property may be transferred, if it be proved that the person whose title is of the latest date, or those under whom he holds, have enjoyed, in good or bad faith, uninterrupted possession during thirty years, of any quantity of land beyond that mentioned in his title, he will be permitted to retain it, and his neighbor, though he have a more ancient title, will only have a right to the excess; for if one can not prescribe against his own title, he can prescribe beyond his title or for more than it calls for, provided it be by thirty years possession."

Art. 853: "If the boundaries have been fixed according to a common title, or according to different titles, and the surveyor had committed an error in his measure, it can always be rectified, unless the part of the land on which the error was committed, be acquired by an adverse possession of ten years, if the parties are present, and twenty years, if absent."

The case of *Sessum v. Hemperley*[12] went through five hearings, including rehearings in the court of appeal and Supreme Court with reversals of the original opinion at each appellate level. The last word on Article 852 is as follows. Where an incorrect boundary has been evidenced by a visible marker (e.g., fence, in present case) and there has been uninterrupted possession up to that boundary for thirty years, then this boundary becomes the legal boundary. The proprietor who has possessed beyond his actual title description will, in these circumstances, acquire full legal title to the extra strip of land, regardless of the lack of consent of the adjacent owner to the establishment of the boundary in the first place. This interpretation of Article 852 leaves the ten-year prescription of Article 853 for the situation where the visible boundary was established incorrectly but with the consent or active acquiescence of both proprietors.

This interpretation fits well into the pattern of Civil Code principles. If it sticks, it will be the marker to end the problem and let it rest in peace.

SUCCESSIONS, DONATIONS AND COMMUNITY PROPERTY*

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SUCCESSIONS

In *Succession of Martin*[1] a resident of New York left a will appointing two residuary legatees. The testator had been named residuary legatee in the will of Newton Blanchard Smith who died possessed of property situated in Louisiana. At the time of the testator's death he had not accepted the legacy bequeathed to him and had not received any property from the executor of the Smith estate. The issue presented for decision was whether the residuary legatees who were entitled to receive the property comprised in the legacy made by Smith to the deceased would have to pay the Louisiana inheritance tax twice — once in the Smith succession and again in the testator's succession in order to receive the property once. The court held that only one tax

12. 233 La. 444, 96 So.2d 832 (1947), 18 LOUISIANA LAW REVIEW 742 (1958).

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1. 234 La. 566, 100 So.2d 509 (1958).