Civil Code and Related Subjects: Property

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or physical welfare of the child required it, but that statute was repealed by Act 111 of 1956. Proceedings to that effect and without reference to the tutorship of the child are possible now only in juvenile court and within the framework of the laws on neglected children. Perhaps this is not as the law should be, but it is what the legislation would indicate to be the law.17

PROPERTY

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Seashore

The case of Roy v. Board of Commissioners for Pontchartrain Levee District1 was an action by a landowner for damages for taking property adjacent to Lake Pontchartrain used for levee purposes. Lake Pontchartrain has sometimes been considered as an arm of the sea, and under the Civil Code classification of things, seashore is a “common thing” which is not susceptible of ownership (neither private nor public) but which all men may freely use.2 If the area in question is seashore, the adjacent landowner is not entitled to any damages when the property is used for levee purposes. In a prior litigation, the court remanded the case while equivocating about the classification of the body of water.3 In the present suit, the levee board’s defense rested largely on the proposed definition of seashore as “that land normally covered by the highest tides of the year.”4 (Emphasis added.) The court refused to accept this because it differs from the Civil Code boundary of seashore at “the highest water during the winter season.”5 (Emphasis added.) However, “conceding defendant’s contention to be sound,”6 the court was not impressed with the defendant’s evidence, and affirmed an award in favor of the plaintiff.

Does this treatment of the problem mean inferentially that

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1. 238 La. 926, 117 So.2d 60 (1960).
Lake Pontchartrain is hereby classified as an arm of the sea? Since this result is not necessarily implied, the present decision does not really go any further on this point than the previous one did.

**Levees**

Property adjacent to a navigable river (or other navigable waters) is subject to a legal servitude in favor of the public for levee purposes.\(^7\) It was only in 1898 for Orleans Parish, and in 1921 for all of the state, that any compensation was provided by the Constitution.\(^8\) With flood control becoming a program of general concern, the burden on the adjacent proprietor was alleviated and thereby distributed throughout the state.\(^9\) However, the constitutional compensation is limited to the assessed value for the preceding year. In the cases of *Weiss v. Board of Commissioners for Pontchartrain Levee District*\(^10\) and *Eiseman v. Board of Commissioners for Pontchartrain Levee District*,\(^11\) plaintiffs' properties had been taken for levee purposes, but they claimed full market value rather than accept the assessed value. The critical question was whether the appropriated land was property subject to the levee servitude of Civil Code Article 665. Since the facts established that the strip of land in question did not border on the water but was 200 feet from the shoreline and behind a highway which formed a protecting levee, there was no such servitude and the plaintiffs were entitled to recover fair market value for the property taken.

**Sic Utere Servitude**

Article 667 of the Civil Code provides for the legal servitude that one property may not be used in such a way as to cause damage to another. There are also principles of tort law which impose liability on a landowner for damage caused to another—sometimes based on fault or negligence, sometimes as a strict liability. This multiplication of devices permits the court to have a greater range of flexibility in the handling of specific cases and in directing the development of the law concerning responsibility where both damage and causality are proven. How-

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9. See discussion in *Mayer v. Board of Commissioners for Caddo Levee Dist.*, 177 *La.* 1119, 150 *So.* 295 (1933); *Dickson v. Board of Commissioners of Caddo Levee Dist.*, 210 *La.* 121, 28 *So.2d* 474 (1946).
10. 238 *La.* 419, 115 *So.2d* 804 (1959).
ever, it is not a very substantial contribution when the court
simply renders a judgment for plaintiff without identifying any
underlying theory for the decision.

In the case of *Divicent v. Sanderson*, the court found that
the pile-driving on one lot had caused damage to a recently con-
structed house on the adjacent lot, and rendered a judgment for
the plaintiff. Since the driving of piles was done in compliance
with local building requirements, and since there was no sug-
gestion of any inefficiency or carelessness in the work, the de-
cision might appear to be based upon the strict responsibility of
Civil Code Article 667, which makes the defendant proprietor
liable regardless of all his care and efficiency simply by reason
of the operation and its harmful effects. However, the court
did not mention this code provision; neither did it cite any of
the previous Louisiana cases involving damage caused by pile-
driving in which liability was predicated upon this Article 667.

The present case might be cited in the future as an applica-
tion of the *sic utere* servitude of property law, or (since damage
and causality were established) the tort doctrine of *res ipsa
loquitur*. Does it make any difference?

*Tacit Dedication of Public Street*

A landowner may construct a street or road on his property
and keep it just as private as his home. However, if he permits
the public (as individuals) to use it, and the public (as local gov-
erning authority) to work or maintain it for three years, it be-
comes a public street or road on the theory of implied dedication
as provided in R.S. 48:491.

In *Wyatt v. Hagler*, a private road (dirt and gravel) had
been in use by the public for seventeen years when the land-
owner closed it with a barricade. During this time, there had
been some maintenance by the municipality, and some objection
by the landowner. In deciding that it had become a public street
by implied dedication, the court made two points that have gen-
eral significance.

The first is with reference to the element of maintenance by

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13. E.g., Hauck v. Brunet, 50 So.2d 495 (La. App. 1951), noted in 6 Loyola
App. 1953).
the public. The facts showed that the municipality had "dragged it and cleaned out the ditch three or four times a year and, on occasion, placed gravel on it." Since the landowner had also spread some crushed rock and gravel during four of the seventeen years, and once had it graded, the maintenance by the public could not be said to have been complete maintenance. However, the court found it to be "substantial maintenance" and that the municipality had "largely maintained" it. This interpretation as satisfying the requirement of the statute is significant.

The second point concerns the somewhat more subjective element of presumed intent which is the basis of the theory of implied dedication. The whole idea of dedication is necessarily a voluntary one because the property in such cases is absolutely private and there is no question of its being "taken" for any public purpose. In the present case, the landowner had repeatedly asserted his ownership and made objection to the municipal employees when they worked the road (but apparently without sufficient vigor to keep them away). It was on this point that the court of appeal sustained the defendant's position that there was no intent to dedicate. However, the Supreme Court took the position that the circumstances of the case, the public use and maintenance by the municipality required "affirmative and timely action" to prevent the dedication, and that the landowner's objections to the workmen without making any protest to the Mayor or Council of the town "do not bespeak of the action of a reasonably prudent man in like circumstances." When a person has for so many years accepted substantial maintenance by the municipality, it may not appear unfair to deny his right to barricade the public out of the use of the street, but it does have the significant effect of placing upon him the burden of proving the sufficiency of his protestations against the loss of his property. A landowner cannot take the position that since the public is making some use of his property, it is only fair to let the public contribute something to its upkeep. In the absence of totally preventing such a public contribution, do the statutory elements of public use and (substantial) maintenance for three years constitute a conclusive presumption of intent to dedicate?

15. Id. at 238-39, 114 So.2d at 877.
16. Ibid.
17. Id. at 239, 114 So.2d at 878.
20. Ibid.