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NOTES

CIVIL LAW PROPERTY — ALLUVION — DISTINGUISHING LAKES. FROM RIVERS AND STREAMS

The classification of a body of water as a river, stream, or lake has important consequences in Louisiana property law. According to the Louisiana Civil Code "accretions formed successively and imperceptibly to any soil situated on the shore of a *river* or *other stream*, are called alluvion, which belongs to the owner of the soil situated on the edge of the water, whether it be a *river* or *stream*, and whether the same be navigable or not."¹ (Emphasis added.) Since this article does not refer to lakes, the question immediately arises whether the rules of accretion apply to such bodies of water.

French Civil Code articles 556 and 557 are almost identical with the corresponding Louisiana Civil Code articles dealing with alluvion and dereliction.² However, French Civil Code article 558, which has no counterpart in the Louisiana Civil Code, provides that the laws regarding alluvion do not apply to lakes.³ Assuming the omission was deliberate, it may signify the intent of the draftsmen to change the French rule. On the other hand, they may have thought a specific exclusion of lakes from the rules of accretion and dereliction was unnecessary since articles 509 and 510 by their terms apply only to rivers and

1. LA. CIVIL CODE art. 509 (1870).

2. Compare FRENCH CIVIL CODE arts. 556, 57, with LA. CIVIL CODE arts. 509, 10 (1870). LA. CIVIL CODE art. 510 (1870) provides that "the same rule [that contained in art. 509; see text at note 1 *supra*] applies to derelictions formed by running water retiring imperceptibly from one of its shores and encroaching on the other."

There is a slight difference between articles 556 of the French Civil Code and 509 of the Louisiana Civil Code. The former applies to *fleuves* and *rivieres*, which may be translated as rivers and *creeks*. Originally, the French draft of the Louisiana Civil Code of 1808 read the same; this was carried forth in the Louisiana Civil Code of 1825. However, in the 1870 revision, the wording was changed to "river(s) and other stream(s)." See text at note 1 *supra*. It is at least arguable that the change in wording was intended to broaden the application of article 509 to bodies of water which might be considered lakes, but through which a current runs. See 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA, PART I 291 (1940).

3. FRENCH CIVIL CODE art. 558 (Cachard's transl. 1930): "Alluvion does not take place in connection with lakes and ponds, of which the owner always retains the land covered by the water when it reaches the level of the outlet of the pond, even if the volume of water should decrease.

"On the other hand, the owner of a pond does not acquire any right to the riparian lands which the water covers in cases of extraordinary rise."

streams. However, regardless of the purpose of the omission, the jurisprudence is settled that Louisiana Civil Code article 509 applies only to rivers and streams, not to lakes.⁴ The crucial question in the cases has been whether a particular body of water is to be classified as a lake, or as a river or stream, and what test should be employed to make the classification.

The Louisiana Supreme Court first encountered the question in *State v. Erwin*,⁵ a case considering Calcasieu Lake, a large expanse of water through which the Calcasieu River flows. One of the holdings in the *Erwin* case was that the better view was to regard vast expanses of water, such as Calcasieu Lake, as a lake even though a river empties into it and flows through it into the sea.⁶ No authority was given for the holding. It is in direct conflict with the French law under which a body of water through which a river flows, though called a lake, is deemed, in the application of the laws governing alluvion, a section of the river.⁷ Other aspects of *State v. Erwin* were overruled in *Miami Corp. v. State*,⁸ but no light was shed on the characteristics distinguishing a lake from a river or stream.

*Amerada Petroleum Corp. v. State Mineral Bd.*⁹ involved a narrow arm of Grand Lake. The court indicated that a lake does not imply a body of water in which a current flows, but a body of water, more or less stagnant, in which the water is supplied from drainage. In rainy seasons drainage would increase, and hence the level of the water would rise and a current could form. A river was said to be distinguished from a lake in that it flows

4. See *Esso Standard Oil Co. v. Jones*, 233 La. 915, 98 So.2d 236 (1957); *Doiron v. O'Bryan*, 218 La. 1069, 51 So.2d 628 (1951); *State v. Aucoin*, 206 La. 787, 20 So.2d 136 (1944); *Amerada Petroleum Corp. v. State Mineral Bd.*, 203 La. 473, 14 So.2d 61 (1943); *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936); *State v. Erwin*, 173 La. 507, 138 So. 84 (1931); *Bank of Coushatta v. Yarborough*, 139 La. 510, 71 So. 784 (1916); *Slatery v. Arkansas Natural Gas Co.*, 138 La. 793, 70 So. 806 (1916); *Sapp v. Frazier*, 51 La. Ann. 1718, 26 So. 378 (1899); *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882).

5. 173 La. 507, 138 So. 84 (1931).

6. *Id.* at 513-14, 138 So. at 86.

7. See, e.g., 25 FUZIER-HERMAN, REPERTOIRE DU DROIT FRANÇAIS 783 (1896).

8. 186 La. 784, 173 So. 315 (1936). By applying LA. CIVIL CODE arts. 450 and 453 (1870), the court in *Miami* decided that the bed of a navigable body of water belongs to the state. Therefore the court found it unnecessary to consider the applicability of articles 509 and 510.

9. 203 La. 473, 14 So.2d 61 (1943). The arm of Grand Lake, being a part of the Atchafalaya River, consisting of running water, and possessing all the characteristics of a river in its ability to remove and deposit soil, was held to be a stream within the meaning of the code article defining alluvion as accretions formed successively and imperceptibly on the shore of a river or other stream. See text at note 1 *supra*.

with a current, more or less, in a permanent bed or channel between defined banks or walls, whereas streams are bodies of flowing water including rivers. Applying these definitions, the court concluded that a river or other stream is distinguished from a lake by the power of a stream or river to remove and deposit soil so as to form accretions along its shores.¹⁰

Subsequently, in *Esso Standard Oil Co. v. Jones*,¹¹ the court applied the *Amerada* test to Deer Park Bend. The court held that a body of water does not have to flow continuously to be classified as a stream. The current in Deer Park Bend was capable of carrying alluvion and depositing it along its banks. This satisfied the definition of a stream and prevented Deer Park Bend from being classified as a lake or pond.¹²

Thus all jurisprudence prior to the recent case of *State v. Cockrell*,¹³ with the exception of *Erwin*, indicates that a body of water is a river or stream if the water moves, even though it does not flow constantly, and if it has the power to carry silt and form alluvion.¹⁴ It should be noted that in *Erwin* a wide expanse of water was involved, whereas in *Amerada* and *Esso* relatively small and narrow bodies of water were in controversy.¹⁵ Consequently, it may be inquired whether the same test applies to vast expanses of water such as that involved in *Erwin*. In *State v. Cockrell*, the first case involving a large expanse of water since *Erwin*, the First Circuit Court of Appeal apparently ignored the possibility that the test could be different, and simply applied the *Amerada* test.¹⁶ The court indicated that *Erwin* had been overruled by *Amerada*.

There is doubt, however, whether the court relied solely on

10. *Id.* at 495, 14 So. 2d at 68-69.

11. 233 La. 915, 98 So. 2d 236 (1957).

12. *Id.* at 938, 98 So. 2d at 244.

13. 162 So. 2d 361 (La. App. 1st Cir. 1964).

14. See *Esso Standard Oil Co. v. Jones*, 233 La. 915, 98 So. 2d 236 (1957); *Amerada Petroleum Corp. v. State Mineral Bd.*, 203 La. 473, 14 So. 2d 61 (1943); *State v. Erwin*, 173 La. 507, 138 So. 84 (1931).

15. In *Erwin* Calcasieu Lake varied from 4½ to 12 miles in width. The arm of Grand Lake in *Amerada* was 4,400 feet wide opposite the property in controversy, and Deer Park Bend in *Esso* was a narrow channel formed when the Mississippi River changed its course.

16. 162 So. 2d at 368. In *Cockrell* the water involved covered an expanse of three miles at the site of the accretion in controversy. The expanse of water is known as Six Mile Lake, and it forms a portion of the Atchafalaya River Basin. The Atchafalaya River loses its identity as a river at a point above Six Mile Lake, and flows through a network of smaller waterways of which Six Mile Lake is a part. Below Six Mile Lake, the Atchafalaya River regains its identity, the network of intervening waterways uniting to form one continuous river.

the *Amerada* test in reaching its conclusion that Six Mile Lake was a stream, for the court went beyond the evidence of current sufficient to carry alluvion and considered other geological characteristics presented by experts as being typical of streams as opposed to lakes.¹⁷ Among these traits were the winding, serpent-like course and the changing, sinuous bank line of Six Mile Lake; the absence of peat moss deposits, which are found in lakes; the presence of a channel and "V"-shaped basin of Six Mile Lake; and the lack of wave action which causes erosion, beaches, headlands, and cliffs along lakes.¹⁸ On the other hand, this evidence may have been considered simply to show that there was sufficient current to carry alluvion.¹⁹ Whether the court considered these factors independent criteria or further substantiation of the presence of current, is not clear from the opinion.

If the criterion for classification of large bodies of water is to be the mere capacity to carry alluvion, there seems to be a practical problem in its application. Suppose that instead of an entire body of water having a current, as in *Cockrell*, a river flows into a large expanse of water producing a current sufficient to move and deposit alluvion along the west bank, but the water along the east bank is more or less stagnant and deposits no alluvion. Or suppose a river enters and flows down the middle of the large body of water with sufficient current to carry and deposit alluvion, while the water along the shore is relatively stagnant. Would the fact that even a small portion of the body of water has a current be sufficient to classify the whole

17. *Id.* at 369. If the court was willing simply to apply the test set forth in the *Amerada* and *Esso* cases, the question why the court went into a detailed consideration of the evidence introduced in *Cockrell* immediately arises. Was the court setting forth additional tests besides the power and capacity of a body of water to carry alluvion? Or did the court merely enter into a detailed consideration of the evidence establishing the physical characteristics of Six Mile Lake to show that this body of water had sufficient current to carry alluvion?

18. *Id.* at 369-70. From a geological point of view, the serpent-like, winding characteristic, the absence of peat moss deposits on the water bottom, the "V"-shaped basin, and the lack of wave action in Six Mile Lake all indicated that it was not a lake.

Lakes in the Louisiana Coastal Region all have typical saucer-shaped basins, whereas the "V"-shaped basin is characteristic of a body of running water. The latter shape results from the current eating away at the bottom. Likewise, because of the current in running bodies of water, peat moss does not form on the bottoms; on the other hand, peat moss is generally found on the bottom of lakes. Wave action in lakes will generally produce erosion, beaches, headlands and cliffs along the shore, but in running bodies of water, the current will wash away the deposits along the shore.

19. *Ibid.*

body of water as a river or stream in these situations? These questions are truly confusing if we simply rely on the test set forth in *Amerada* and *Esso*.

The geological characteristics which the court considered in *Cockrell* could be the answer to these complex problems. Instead of the flat statement that a body of water is a river or stream if it has the power to carry and deposit alluvion, this decision makes possible the use of expert testimony and physical evidence. It is submitted that the law regarding alluvion and the difficulty of characterizing a body of water as a river or stream will be greatly simplified should the Supreme Court accept the geological characteristics dealt with in *Cockrell*.

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CONSTITUTIONAL LAW — FREEDOM OF ASSOCIATION — STATE REGULATION OF LEGAL PROFESSION

The Virginia State Bar sued under state legislation to enjoin the Brotherhood of Railroad Trainmen and others from engaging in a legal aid program alleged to constitute unauthorized practice of law and solicitation of legal business.¹ Under the program, the United States was divided into sixteen regions and a local lawyer or firm was selected by the Brotherhood in each region as the most competent counsel to settle personal injury suits of union members. When a worker was injured or killed, the secretary of his local lodge would visit him or his family and urge that the claim not be settled without prior legal advice, and that in the Brotherhood's judgment the best lawyer to consult was the regional counsel recommended by it.² The result of the plan was to channel substantially all of the personal injury cases

1. Suit was instituted pursuant to 2 VA. CODE 619 (1950); 171 Va. xviii (1938), wherein the Virginia Supreme Court of Appeals virtually promulgated the American Bar Association's Canons of Ethics into official Rules of Court in accordance with the authority granted by statute. See VA. CODE §§ 54-42—54.83.1 (1950).

2. A great deal of uncertainty surrounds the actual relationships of attorney, client, and union in the principal case. In the past, the union official who contacted the injured had received a substantial gratuity from the lawyer involved; it also appears that the attorney paid for free trips offered to the injured, that he might consult with the attorney in question before signing a contract. Often the injured was shown a photostatic copy of checks previously recovered. See *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958).