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Private Law: Property

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for wrongful death. The court decided she could by reasoning that a minor emancipated by marriage or otherwise may certainly compromise a claim for money if he or she may *alienate* his or her movables. The writer submits that a compromise is not an *alienation,* or transfer for value in return, but a *disposition,* or transfer not necessarily for value. Nevertheless, the decision is correct, for under the Civil Code the emancipated minor not only may alienate his movables, but may also *dispose* of them otherwise than by way of donation inter vivos.[33]

PROPERTY

*Joseph Dainow**

WATER BOTTOMS

An interesting discussion of the difference in the application of *California Co. v. Price*[1] and *Miami Corp. v. State*[2] appears in the new case of *State v. Scott.*[3] It involved the ownership of a submerged area of land which was within the description of an 1883 patent, and which is now part of the bed of the Gulf of Mexico. As stated by the court: "If the land described in the patent was under water at the time of the issuance of patent then this case would come under the *Price* case, *supra.* However, if it were marsh land subject to overflow as set out in the patent and survey then it would come under the case of *Miami Corporation v. State, supra.*"[4] The majority of the court adopted the

LA. CIVIL CODE arts. 365(1,2), 366, 367, and 379 construed in light of 382. Persons who are majors although under twenty-one are (1) those over eighteen relieved of "the time prescribed by law for attaining the age of majority" and (2) married persons over eighteen. See *id.* arts. 382, 385 as interpreted in light of the title to section 4 of the chapter on emancipation. A late decision not otherwise mentioned in this *Symposium,* Speziale v. Kohnke, 194 So. 2d 485 (La. App. 4th Cir. 1967), made the error of confusing the *major* under article 385 with an emancipated minor.

33. LA. CIVIL CODE art. 373 forbids the emancipated minor to "alienate, affect, or mortgage his immovables" except by following certain procedures, and article 374 forbids him "to dispose by donation inter vivos" except in one instance. Thus the inference must be that the emancipated minor may "alienate, affect, or mortgage" his movables absolutely (subject, of course, to the remedy for simple lesion) and "dispose" of them *otherwise than by donation inter vivos.*

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1. 225 La. 706, 74 So. 2d 1 (1954).

2. 186 La. 784, 173 So. 315 (1936).

3. 185 So. 2d 877 (La. App. 1st Cir. 1966), *writ refused,* 249 La. 485, 187 So. 2d 450, 451 (1966).

4. 185 So. 2d at 882.

stipulation of the parties that "the area in litigation had been washed away and had subsided, and had been covered by water for more than six years before the present suit was filed."[5] Consequently, the *Price* case was inapposite, and the *Miami* case was applied decreeing ownership in the state. In the opinion of the dissenting judge,[6] it had not been established that the area had been exposed land in 1883, and therefore he deemed that the situation was covered by the *Price* case.

Actually, the *Miami* case involved a "lake" although the language of the opinion extends comprehensively to other kinds of navigable bodies of water. Giving direct application of the *Miami* case to the "sea," without any discussion or other authority, is regrettable. No reference is made to Civil Code article 450 concerning the sea and its shores, nor to R.S. 49:3 proclaiming the state ownership of the waters and bed and shores of the Gulf of Mexico.[7]

LEVEE SERVITUDE

Civil Code article 665[8] imposes on riparian properties a servitude for making and repairing levees. This has been extended to include levees constructed inland from the actual riparian property where such levees constitute part of a more comprehensive flood control program.[9] The justification of the original servitude, as an appropriation which does not violate due process, rests on the historical fact that the original grants were gratuitous and the servitude burden was not unreasonable.[10]

The case of *Jeanerette Lumber & Shingle Co. v. Board of Commissioners for the Atchafalaya Basin Levee District*[11] establishes for the first time a new and important aspect of this levee servitude. The original riparian grants were generally long narrow tracts of land with a relatively small frontage on the

5. *Id. at* 884.
6. *Id.* at 886.
7. See YIANNOPOULOS, CIVIL LAW OF PROPERTY §§ 27, 28 (1966).
8. LA. CIVIL CODE art. 665 (1870): "Servitude imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.
"All that relates to this kind of servitude is determined by laws or particular regulations."
9. LA. R.S. 38:81 *et seq.* (1950); Dickson v. Board of Commissioners of Caddo Levee Dist., 210 La. 121, 26 So. 2d 474 (1946).
10. Eldridge v. Trezevant, 160 U.S. 452 (1896).
11. 249 La. 508, So. 2d 715 (1966), noted 27 LA. L. REV. 321 (1967).

river. With the passage of time and the availability of other modes of access and transportation, these tracts became subdivided and parts united in various combinations, but these transactions did not affect or alter the levee servitude.[12]

The significance of the instant case of first impression is that while the levee servitude continues to rest upon any presently non-riparian property which was once a part of an original riparian tract, it does not exist upon a presently non-riparian property which was never part of an original riparian grant. A levee district, which finds it necessary to have such areas for the construction of levees as part of a flood control program, can of course exercise the right of eminent domain to obtain them, but in this event the compensation required is market value instead of the previous year's assessed value. The distinction made in the principal case is legally and historically sound, but whether it is in the best interests of society at large is another matter.[13]

SIC UTERE SERVITUDE

The case of *Hamilton v. City of Shreveport*,[14] after a series of vicissitudes of litigation, established that the Civil Code articles 660 and 667[15] on servitudes are applicable against municipalities, and that in the event of the violation of these servitudes there is absolute liability without the need to find any fault. However, in reference to the legal nature of this liability, a certain ambivalence of ideas creeps into the discussion, because in addition to identifying the servitude as a property limitation imposed by law there is also mentioned the tort idea that violation of the duty in article 667 constitutes "fault" under article

12. LA. CIVIL CODE art. 656 (1870). It would have been inappropriate to apply Civil Code articles 783(1) and 784 because dividing up the boundaries of the property could not properly be considered the same as physical changes or destruction which extinguish the servitude.

13. See Note, 27 LA. L. REV. 321 (1967).

14. 180 So. 2d 30 (La. App. 2d Cir. 1965), *writ refused*, 248 La. 700, 181 So. 2d 399 (1966).

15. LA. CIVIL CODE art. 660 (1870): "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude.

"The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of the water.

"The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome."

"Art. 667. Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

2315.[16] If a suit was promptly instituted, the successful plaintiff does not care about the *legal* concepts, but if some time has elapsed before the institution of the suit, he might be very concerned whether the one-year tort prescription applies. This confusion has existed for some time and is reflected both in the jurisprudence and in the doctrine.[17] Where the law is clear and free from ambiguity, it is unnecessary and erroneous to create doubt and confusion.[18] If liability rests on the basis of article 2315, it is a tort matter; if based on article 667, it is a property matter. To say that liability is based on both articles at the same time is confusion.[19]

Civil Code article 667 appears under the chapter heading "Of Servitudes Imposed by Law." It is sometimes referred to as the *sic utere*[20] servitude and constitutes a limitation on an owner's use of his property in the interest of neighboring property. For a long time it was overlooked. Then it was brought into use as the direct basis for imposing liability without fault[21] as an incident of property ownership. This in turn was embellished by the theory that the violation of the duty set out by article 667 constituted "fault" within the meaning of article 2315.[22] The idea is ingenious but quite unnecessary. The language of article 667 is clear and its location in the Code classification is specific. A tendency always to equate an action for damages with tort is obviously wrong because damages can be claimed for breach of contract (even if due to negligence), for failure to live up to responsibilities of care for other people's property (as in deposit or agency as well as with tutors and administrators), and so forth. The liability for damages caused by the violation of a servitude is part of a property relationship and not a matter of torts.

16. 180 So. 2d at 34.

17. Stone, *Tort Doctrine in Louisiana: The Obligations of Neighborhood*, 40 TUL. L. REV. 701, 708-10 (1966).

18. LA. CIVIL CODE art. 13 (1870).

19. See clear statement of the distinction in Hanemann v. Deep South Dismantling Co., 185 So. 2d 81, 82 (La. App. 4th Cir. 1966). See also Klein v. Highway Department, 175 So. 2d 454, 457 (La. App. 4th Cir. 1965): "A cause of action under Civil Code article 667 is neither ex delicto nor ex contractu but is a form of strict liability."

20. "*Sic utere tuo ut alienam non laedas.*"

21. Devoke v. Yazoo & Mississippi Valley R.R., 211 La. 729, 30 So. 2d 816 (1947), and comments in 8 LA. L. REV. 234, 236 (1948).

22. See cases cited at 180 So. 2d 30, 34. Stone, *Tort Doctrine in Louisiana*, 17 TUL. L. REV. 159, 211 (1942).

CONVENTIONAL SERVITUDES

All conventional servitudes can be acquired by title or by judgment,[23] but only those servitudes which are continuous and apparent can be acquired by prescription or by destination.[24] Accordingly, the critical issue in a particular fact situation may be the classification of the servitude involved. Such a problem arose in the case of *Acadia-Vermilion Rice Irrigating Co. v. Broussard*,[25] where the parties agreed that a servitude of aqueduct for irrigation purposes was apparent but centered their dispute on whether it was continuous or discontinuous.[26] Although the aqueduct involved some initial construction by the act of man, and its operation required the manual opening of gates from the main canal, the water flowed by gravity alone through the aqueduct and for this reason the court classified the servitude as continuous.[27]

REMEDY FOR SERVITUDE VIOLATION

If suit is instituted before the servitude violation takes place, the contemplated action can be prevented.[28] However, after the violation has already taken place, there may sometimes be a question as to the remedy. If the violation cannot be undone, the only recourse is in damages; but if the violation can be stopped or removed, it is not always clear whether the violation should be undone and discontinued, or whether compensatory damages is a sufficient remedy. As a general rule, the common law doctrine of "balancing of equities" is inapplicable; however, there have been instances in which a similar approach has been used to award damages instead of an injunction.[29] In the case of *Kaffie v. Pioneer Bank & Trust Co.*,[30] a joint driveway had been properly established by agreement of the adjacent proprietors, and one of them built a second-story projection on his house thereby obstructing the neighbor's use of the driveway. The

23. LA. CIVIL CODE arts. 766, 770 (1870).
24. *Id.* arts. 765, 767.
25. 175 So 2d 856 (La. App. 3d Cir. 1965); see also later opinion in same case, 185 So. 2d 908 (La. App. 3d Cir. 1966).
26. LA. CIVIL CODE arts. 727, 728 (1870).
27. For further discussion of this case and additional problems involved, see Dainow, *Planiol Citations in Louisiana Cases: 1959-1966*, 27 LA. L. REV. 231 (1967); and Note, 40 TUL. L. REV. 397 (1966).
28. See LA. CIVIL CODE art. 856 *et seq.* (1870) and LA. CODE OF CIVIL PROCEDURE art. 3601 *et seq.*
29. Adams v. Town of Ruston, 194 La. 403, 193 So. 688 (1940); Busby v. International Paper Co., 95 F. Supp. 596 (W.D. La. 1951).
30. 184 So. 2d 595 (La. App. 2d Cir. 1966).

construction was quite expensive, but the agreement was perfectly clear; and the right of passage must be reestablished to meet the reasonable necessities of the plaintiff unless the defendant could supply an "equally convenient" alternative within the permitted scope of Civil Code article 777.[31]

BUILDING RESTRICTIONS

The nature and interpretation of building restrictions are always going to increase; and since each new situation has to be decided on the particular facts of the case, there is inevitably going to be continued litigation to obtain the necessary decisions. Accordingly, it is of interest to note that in *Metry Club Gardens Asso. v. Newman*[32] it was held that air conditioning compressors and the concrete slabs on which they rested were not "buildings" within the scope of a covenant restricting their location to at least ten feet from the property line; nor were they "garages or other outbuildings" within the requirement to "correspond in style and architecture to the main building." It may be disconcerting and ungainly to have the neighbor's compressor right up against the property line but, in order to avoid it, the express language in building restrictions will have to be more specific. As pointed out in the principal case, restrictive covenants are in derogation of the free use of property and are therefore given a *stricti juris* interpretation.[33]

DEDICATION

In *Deville v. City of Oakdale*,[34] the failure of a recorded plat of a new subdivision to meet some of the formal requirements of statutory dedication[35] or to contain an express dedication of streets, did not prevent their dedication from being effective in

31. 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."

32. 182 So. 2d 712 (La. App. 4th Cir. 1966).

33. *Id.* at 714.

34. 180 So. 2d 556 (La. App. 3d Cir. 1965).

35. LA. R.S. 33:5051 (1950).

accordance with the recorded plat.[36] However, the actual opening of the streets by the municipality is not a "ministerial duty required by law" and, in the absence of any abuse of discretion in the refusal to open any of these streets, mandamus does not lie to force such action.[37]

In *Jefferson Parish School Board v. Assets Realization Co.*,[38] there was a resolution which formally dedicated "all streets, avenues, highways, drives, drainage canal areas, and etc., as shown hereon." The fact that the plat contained a square marked "Reserved for Schools" was held not sufficient to show a deliberate intent to dedicate because it was also consistent with the possibility of sale or other transfer for school purposes. However, there was enough difference in *Best Oil Co. v. Parish Council of the Parish of East Baton Rouge*[39] for the court to find an unequivocal intent to dedicate a drainage canal area in accordance with its location on a map.

SUCCESSIONS AND DONATIONS

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VALIDITY OF TESTAMENTS

Form

It now seems to be the generally accepted rule that an olographic will dated in the slash form which is uncertain as to the day, month, or year[1] is invalid, and that no extrinsic evidence is admissible to resolve the uncertainty.[2] This rule was

36. No mention is made of the Supreme Court decision to the same effect: Parish of Jefferson v. Doody, 247 La. 839, 174 So. 2d 798 (1965), and comments in 26 LA. L. REV. 467-68 (1966).

37. LA. CODE OF CIVIL PROCEDURE arts. 3861 *et seq.* (1960).

38. 182 So. 2d 818 (La. App. 4th Cir. 1966).

39. 176 So. 2d 630 (La. App. 1st Cir. 1965), *writ refused*, 248 La. 365, 178 So. 2d 656 (1965).

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1. It must be conceded that there is no uncertainty in a slash date such as 12/12/60, 8/8/60, 9/13/60. Whether the first date is 12 December or December 12, makes no difference. The same applies to the second illustration. As to the third, it can only mean September 13th, for there are only 12 months in the year. As to the century, see Succession of Kron, 172 La. 666, 135 So. 19 (1931).

2. For a critical review of the jurisprudence on this question see Successions of Gaudin, 98 So. 2d 711 (La. App. 1st Cir. 1957); 140 So. 2d 384 (La. App. 1st Cir. 1962), noted and discussed in *The Work of the Louisiana Appellate*