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unused servitude.<sup>14</sup> The latter occurrence, however, should have had no bearing on whether a trespass occurred. Despite the rather broad holding, there were indications that the result might be limited to the facts of the present case.<sup>15</sup> Application of unqualified language in the case would indicate that the existence of a constitutional remedy forecloses the use of a civil remedy or modifies the damages recoverable by the latter.<sup>16</sup> Considering the express waiver of sovereign immunity, it would seem that there are few persuasive reasons why the state should not be responsible for damages arising from an unlawful entry to the same extent as an individual.

*Robert W. Collings*

#### FEDERAL LAW AND SEASHORE ACCRETION

Plaintiff, owner of a tract of land on the Pacific Ocean in the State of Washington, brought an action in state court to quiet title to alluvion formed since 1889, the date of the state's admission to the Union. Title derived from a federal patent issued before statehood which conveyed title "to the line of ordinary high tide."<sup>1</sup> Plaintiff claimed all alluvion formed after 1889. The trial court held that federal rather than state law governed since title derived from a federal patent issued before statehood and that under common law plaintiff had a right to the alluvion. Under state law she would not have acquired title to the alluvion because the State Constitution<sup>2</sup> provided that all lands accreted

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14. 250 La. 1045, 1063, 202 So.2d 24, 30 (1967): "In truth, the supplemental order of expropriation was invalid solely because of a legal error of a technical nature and, as a result of it, plaintiffs obtained a windfall of \$37,145, or as (sic) least \$36,000, for the unused borrow pit."

15. By way of dicta the court offered two other possible bases for the holding in the case. They indicated that under the facts given there had been no tortious act committed and, in any event, the plaintiff was estopped by his failure to get an injunction to prevent the unlawful action by the state. It is interesting to speculate whether the cost of an injunction proceeding to the state, in possibly closing down an interstate highway construction project, would have exceeded the damages sought for the alleged trespass.

16. 250 La. 1045, 1059, 202 So.2d 24, 29 (1967): "The measure of compensation is to be estimated by the same standards whether the property is formally expropriated in accordance with law or appropriated by the condemning authority so long as it is intentionally taken for a public use."

1. *Hughes v. State*, 67 Wash. 2d 799, n.801, 410 P.2d 20 (1966).

2. WASH. CONST. art. 17, § 1: *Declaration of State Ownership*. "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."

after statehood are public beach and shore.<sup>3</sup> The State Supreme Court reversed, holding that state law controlled because "riparian rights in the several states are settled by the respective states for themselves,"<sup>4</sup> and because "littoral rights of the upland owners have terminated" in 1889.<sup>5</sup> In reversing, the United States Supreme Court *held* that federal law governs the ownership of accretion gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. *Hughes v. Washington*, 88 S.Ct. 438 (1967).

Federal courts have held that federal law alone governs the disposition of public lands,<sup>6</sup> the construction of grants by the United States<sup>7</sup> and the navigability of a river which determines the extent of a federal grant.<sup>8</sup> Where a patent borders on navigable water, the Supreme Court has said that the patent extends only to the mean high water mark, and that state law governs riparian or littoral rights and ownership below the high water mark.<sup>9</sup> Accretion or erosion had been commonly considered a problem of riparian or littoral rights. Changes in the low water mark pose no factual conflict between federal principles and state laws governing accretion or erosion. Modification of the high water line probably posed no occasion for a conflict of law because the common law heritage was shared by the bulk of the states and the federal government. The old decisions,<sup>10</sup> therefore, had no reason to clarify whether changes in the high water line were controlled by state riparian or federal boundary law. But concerning the seashore, the law of a few states is now quite different from the federal common law on changes in the seashore. Those states that do not apply the rules of accretion along the seashore use the theory that the seaward boundary was fixed permanently at the date of the state's admission to the union. The *Hughes* decision has the effect of saying that where there is a federal patent issued before statehood, the boundary is

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3. *Hughes v. State*, 67 Wash. 2d 799, 410 P.2d 20 (1966).

4. *Id.* at 812.

5. *Id.* at 816.

6. *E.g.*, *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1871); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1939).

7. *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10 (1935); *United States v. Oregon*, 295 U.S. 1,701 (1935); *French-Glenn Livestock Co. v. Springer*, 185 U.S. 47 (1902); *Packer v. Bird*, 137 U.S. 611 (1891).

8. *E.g.*, *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922).

9. *E.g.*, *Shively v. Bowlby*, 152 U.S. 1 (1894).

10. *Id.*

not a fixed unchanging line, but shifts with the movement of the mean high water mark.

The *Hughes* decision relied heavily on *Borax Consolidated v. City of Los Angeles*,<sup>11</sup> which involved a federal patent issued after statehood on an island in Los Angeles Harbor. The issue being the definition of mean high tide, the Supreme Court in that case affirmed the judgment of the court of appeals which chose the federal definition rather than the definition developed by the state courts.<sup>12</sup> It further stated that:

“the question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.”<sup>13</sup>

The *Hughes* Court acknowledged that *Borax* did not deal with the question of accretion, but pointed out that the *Borax* rule applies “whether doubt as to any boundary is based on a broad question as to the general definition of shoreline or on a particularized problem relating to the ownership of accretion.”<sup>14</sup>

The rule set forth in *Hughes*, however, seems to conflict with the line of cases holding that “the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.”<sup>15</sup> Although this particular statement of the rule was clouded by the issue of ownership of nonnavigable lakes,<sup>16</sup> it was set forth more explicitly in *Shively v. Bowlby*:<sup>17</sup> “The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject

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11. 296 U.S. 10 (1935).

12. The Court chose the formula of the United States Coast and Geodetic Survey which is the average height of the high water over a period of 18.6 years. *Id.* at 27.

13. *Id.* at 22.

14. 88 S. Ct. at 440.

15. *Hardin v. Jordan*, 140 U.S. 371, 384 (1891); *accord*, *Port of Seattle v. Oregon & W. R.R.*, 255 U.S. 56 (1921); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Packer v. Bird*, 137 U.S. 661 (1891); *Barney v. Keokuk*, 94 U.S. 324 (1876).

16. The *Hardin* rule is somewhat confusing insofar as it relates to non-navigable waters. Compare *Hardin v. Jordan*, 140 U.S. 371, 384 (1891), with *United States v. Oregon*, 295 U.S. 1 (1935).

17. 152 U.S. 1, 57-58 (1894).

to the rights granted to the United States by the constitution." The rationale underlying the rule stemmed from earlier decisions that upon admission to the Union, states acquire title to the bottoms of navigable waters by virtue of their inherent sovereignty.<sup>18</sup> Because the states owned the lands below the high water mark, it was only reasonable that state law should govern the disposition of the beds. The rule in *Shively* speaks of the "rights of riparian or littoral proprietors," but, in fact, the cases it summarized dealt only with a limited number of riparian rights. The *Shively* court summarized the historical development of the rule and cited numerous cases, none of which treated the question of accretion as a riparian right. The cited cases concerned primarily the question of ownership to the high water mark or low water mark or thread of the river, the right to build piers, or the right to fill in portions of the bed. A later case added to the list the question of water rights of the public.<sup>19</sup>

Prior to *Hughes* the question of rights to littoral alluvion had never been put squarely before the Court.<sup>20</sup> But in the case of *Jones v. Johnston*,<sup>21</sup> concerning the right to alluvion on Lake Michigan, the Court said, "Land gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining." This is in line with the common law, which reasons that if an owner bears the risk of losing land by action of the water, it is only equitable that he also should have the chance to gain. Another important consideration is the right of access to the water.<sup>22</sup> The French would describe the situation as a kind of aleatory contract; however, under French law and Louisiana law, the rule does not apply to the seashore.<sup>23</sup> In Louisiana today the littoral owner on the Gulf of Mexico or on arms of the sea has no right to alluvion and no right to the beds of

18. *E.g.*, *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471 (1850); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Waddel*, 41 U.S. (16 Pet.) 367 (1842). This rule, however, was severely limited by the case of *United States v. California*, 332 U.S. 19 (1947), which restricted its meaning to inland waters.

19. *St. Anthony Falls Water-Power Co. v. St. Paul Water Comm'rs*, 168 U.S. 379 (1897).

20. Technically, there is a distinction between the terms riparian and littoral. The former pertains to water courses; the latter, to the sea. But the courts often use them interchangeably.

21. 59 U.S. (18 How.) 150, 156 (1855).

22. See Hall, *Rights of the Crown in the Sea-Shore*, in A HISTORY OF THE FORESHORE, 787 (S. Moore, ed. 1888); Annot., 58 L.R.A. 193 (1901).

23. LA. CIVIL CODE arts. 450, 451, 453, 510 (1870); *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882); *Milne v. Girodeau*, 12 La. 324 (1838); French Civil Code arts. 556, 557; LAURENT, PRINCIPES n° 291 (2d ed. 1876).

adjoining waters which might have encroached upon his former boundaries by erosion.<sup>24</sup> Except in the case of erosion, the law treats the boundary as unchanged since 1812.

The federal cases, however, seem to look upon the riparian boundary not as a fixed line, but as a shifting line. In the *Jones* case as in the case of *County of St. Clair v. Lovington*,<sup>25</sup> the Court discussed the question of accretion as a boundary problem. The discussion was centered on the nature of the property description and on the effect of a description in the deed which included a river as one boundary. A later case, citing *Jones* with approval, said, "it justifies the view announced by the circuit court in its opinion, that when a water-line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line."<sup>26</sup> Thus one might conclude that the Court looks upon the question of accretion not so much as a riparian or littoral right but merely a question of shifting boundaries. If this is the case, then the application of the rule that state law applies to the determination of riparian rights can be obviated by declaring that it applies only below the high water mark and that the high water mark shifts with the alluvion.<sup>27</sup>

It should be noted that the boundary in question in the *Hughes* rule is the boundary of the original federal grant and that such a boundary governs modern titles only when the modern boundary purports to be the same as that of the federal grant. State law governs the question of title to and disposition of property within the state once title is no longer vested in the United States.<sup>28</sup> Thus, for example, if a party fulfills the requirements of ten- or thirty-year acquisitive prescription, he

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24. See *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936), dealing with a navigable lake, which based its decision not on LA. CIVIL CODE art. 510 but on arts. 450, 453 (1870).

25. 90 U.S. (23 Wall.) 46 (1874).

26. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 196 (1890).

27. *But cf. St. Louis Public Schools v. Risely*, 77 U.S. (10 Wall.) 91 (1869), where the Court spoke in terms of a right to accretion along property in Missouri acquired prior to the Louisiana Purchase and confirmed by Act of Congress in 1812.

28. *Kerr v. The Devisees of Moon*, 22 U.S. (9 Wheat.) 565 (1824); *Clark v. Graham*, 19 U.S. (6 Wheat.) 577 (1821); *United States v. Crosby*, 11 U.S. (7 Cranch.) 115 (1812), which hold that the title to and disposition of real property is governed exclusively by the law of the state in which the property is located.

may acquire alluvion on the basis of his possession, thereby changing the boundary of the federal grant.<sup>29</sup>

Apart from the issue of the federal law of shifting boundaries, the *Hughes* case raises by implication the question of the constitutionality of any state statute which purports to deprive the riparian owner of the alluvion even where there is no federal patent involved. The *Lovingston* case stated that the right to alluvion is a natural and vested right.<sup>30</sup> One might conclude from this that a state legislature is not free to arbitrarily fix the boundary on a watercourse or on the seashore, regardless of the policy reasons favoring such an action. There might be sound reasons for permanently fixing the boundaries, especially in regard to mineral rights.<sup>31</sup> In the case of *Philadelphia Co. v. Stimson*,<sup>32</sup> the Court proceeded on the assumption that a state has such a power, but it dodged the issue by holding that the right of Congress to regulate commerce and navigation takes precedence over any private rights. Even if a state does have the power to fix the boundary along a watercourse or the seashore, the Louisiana rule regarding the seashore lacks the balancing factors which would justify such a rule. To make the Louisiana rule more reasonable it would be necessary to grant to the littoral proprietor title to the bed of the sea which encroached upon his former boundaries by erosion.<sup>33</sup> Under the present state of the law the littoral owner loses title to land eroded by the sea or arms of the sea.<sup>34</sup>

Although the federal law appears to be consistent on the issue of the extent of seashore patents, one case, *Ker & Co. v. Couden*,<sup>35</sup> applied the traditional civil law rule of accretion on the seashore. But the setting of the dispute was the Philippine Islands, at that time within the jurisdiction of the Court. There it was pointed out that the law of the Philippines on the matter

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29. *Saulet v. Shepherd*, 71 U.S. (4 Wall.) 504 (1867).

30. 90 U.S. (23 Wall.) 46 (1874). Compare *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122 (1841) with *Heirs of Delord v. City of New Orleans*, 11 La. Ann. 699 (1856). The former case states that the right to alluvion is a vested right while the latter states that it is a pure gratuity by the state.

31. LA. R.S. 9:1151 (1952) prescribes that changes in ownership resulting from accretion or dereliction on a navigable stream, bay, or lake will not affect existing mineral leases on the property. Cf. LA. CONST. art. IV, § 15, forbidding divestiture of vested rights unless for purposes of public utility and for just and adequate compensation previously paid. If the right to alluvion is a vested right, the constitutionality of R.S. 9:1151 is doubtful.

32. 223 U.S. 605 (1912).

33. See YIANNPOULOS, CIVIL LAW OF PROPERTY § 32, at 98, 99 (1966).

34. See note 24 *supra*.

35. 223 U.S. 268 (1912).

derived from the ancient Spanish law, dating back to the Institutes of Justinian.<sup>36</sup> However, the Court also explicitly stated that "we are dealing with the law of the Philippines, not with that which prevails in this country, whether of mixed antecedents or the common law."<sup>37</sup> In Louisiana, a mixed jurisdiction, a large portion of the property titles derive from grants made under the common law. The state title in the waterbottoms rests upon a common law doctrine, and the lands divested from the federal government were originally governed by the common law. Thus where the Court is faced with a rule of property law that it views as unjust, it might turn to the common law origin of the title to justify applying the federal law.<sup>38</sup>

However, if the Court restricts its future decisions to the strict holding of *Hughes*, the effect on Louisiana property law will be relatively small since the large majority of littoral federal patents in this state were issued after statehood. However, there is no logical reason for limiting the rule to patents granted before statehood. The *Borax* case, relied upon heavily by the Court, involved a patent issued after statehood, as did a lower court decision cited by the Court. This latter case held that federal law governs the right to alluvion on the seashore of property granted under a trust patent issued to a Quinault Indian.<sup>39</sup> But this case might be distinguished on the grounds that the property was still owned by the United States. If the Court were to decide not to extend the rule, it could hold that in the case of property patented after statehood the ancestors in title of the plaintiff were never governed by the federal common law. But the Court could easily apply the *Borax* rule and hold that the question of the extent of a federal grant is necessarily a federal question and thus even patents issued after statehood are governed by federal law, insofar as the boundaries are concerned.

The problem is by no means moot in Louisiana. Considerable litigation has resulted from the question of the seaward shifting political boundaries of the state, which was not at issue in *Hughes*.<sup>40</sup> Because of *Hughes* the dispute in the future will be

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36. INSTITUTES 2.1.1.

37. 223 U.S. 268, 279 (1912).

38. Compare LA. R.S. 9:1101 (1950) with the holding of *United States v. Oregon*, 295 U.S. 1 (1935), which reflect an apparent conflict between the federal and state law insofar as the latter purports to vest title of the beds of non-navigable waters in the state.

39. *United States v. Washington*, 294 F.2d 830 (9th Cir. 1961), cert. denied, 369 U.S. 817 (1962).

40. See 43 U.S.C. § 1301-1312 (1953), which both resolved and created litigious issues.

more involved with the private law than with the political debate. Under this law arises the question of how to treat those bodies of water classified as arms of the sea, such as Lake Pontchartrain,<sup>41</sup> to which heretofore the rule of accretion has not applied. There is also the question of what effect the new rule has on the French and Spanish land grants confirmed by Congress. It probably will have no effect since it has been held that the nature of such a confirmation is that of a quitclaim deed because title never vested in the United States.<sup>42</sup>

If the rule of *Hughes* is extended to include patents issued after statehood and applied to Louisiana, it would greatly affect Louisiana property law. Such an application would oppose the basic policy of the law which seeks security and stability of titles. The only persons who would gain by such a drastic change in the law are the littoral proprietors, but the result would be a great expense to Louisiana taxpayers. Even though the Court has recently said, "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,"<sup>43</sup> the decision of *Hughes* suggests that the Court views the type of rule found in Louisiana as unfair, and in all probabilities will change it insofar as it relates to federal patents.

P. Michael Hebert

#### GOOD FAITH FOR PURPOSES OF ACQUISITIVE PRESCRIPTION IN LOUISIANA AND FRANCE

Ten-year acquisitive prescription of immovables in Louisiana is regulated by Civil Code articles 3478-3482. These articles require that the adverse possessor be in good faith. As defined by article 3451, the good faith possessor is he "who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact."<sup>1</sup> Conversely, as defined by

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41. *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882).

42. *Beard v. Federy*, 70 U.S. (3 Wall.) 473 (1865).

43. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (mineral leases).

1. Article 503 defines the bona fide possessor for purposes of determining the ownership of fruits of an immovable. "He is a *bona fide* possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of." This definition is consistent with that of article 3451. The courts have construed the two definitions *in part materia*. *Vance v. Sentell*, 178 La. 749, 758, 152 So. 513, 516 (1934).