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Property

*Lee Hargrave**

I. ACCESSION

A. Mineral and Timber Revenues as Fruits

In the past, as in *Elder v. Ellerbe*,[1] cases tended to lump all income from mineral development together and classify it all as a product rather than a fruit. This was done with little discussion even though some of the payments involved did not deplete the land and thus met the definition of fruits.[2] Bonuses and lease proceeds, for example, are paid in return for granting a right to conduct operations. They are not contingent on production and do not deplete the substance of the soil. Royalties and other production payments, however, are paid upon removal of oil and gas from the ground and are not fruits.[3] Although the issue was not discussed, the result in these old cases is supported by the view that one should not benefit from transferring to another for a fee a right to drill for products that one has no right to take in the first place.

Succession of Doll v. Doll[4] departed from the older cases and more precisely examined the nature of the mineral income involved to determine whether it was a fruit. The supreme court concluded that bonus

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1. 135 La. 990, 66 So. 337 (1914) (half of a certain bonus and of certain royalties held not to be fruits); Gueno v. Medlenka, 238 La. 1081, 117 So. 2d 817 (1960) (declaratory judgment that the usufructuary of land had no right to lease the land for mineral development); *see* Comment (a) to La. Civ. Code art. 551.

2. La. Civ. Code art. 551.

3. Although the text of Louisiana Civil Code article 2339 respects the classification of bonuses and delay rentals as fruits in that it does not call them fruits, it treats them as the functional equivalent of fruits in making them community property if produced from the separate property of a spouse. As amended by 1980 La. Acts No. 565, Article 2339 treats all mineral proceeds the same; "minerals produced from or attributable to a separate asset, and bonuses, delay rentals, royalties, and shut-in payments arising from mineral leases" are community property unless the owner spouse has filed the appropriate declaration. This is in contrast to the law prior to the amendment, which listed as within the rule only non-depleting mineral revenues, namely, "bonuses, delay rentals, and shut-in payments arising from mineral leases." See Katherine S. Spaht and W. Lee Hargrave, *Matrimonial Regimes* § 3.8, at 53, in 16 Louisiana Civil Law Treatise (1989).

4. 593 So. 2d 1239 (La. 1992).

payments of $70,795 were paid in return for the right to drill on the property and, thus, were fruits. Such "mineral interests which result in the payment of bonuses . . . do not so diminish the substance as to amount to a partial alienation and are quite analogous to the rentals, given as an example of 'civil fruits.'"[5] The court also concluded that a donee was required to collate only the land donated, and not the fruits.[6] It would appear that the same approach would apply to possessors' and usufructuaries' rights to fruits.[7]

Doll was also an opportunity for the supreme court to clarify the developing rule that some proceeds from timber operations are fruits. Traditionally, revenues from the sale of timber were classified as products or capital assets "on account of their slow growth and high value."[8] However, cases and the comments to Louisiana Civil Code article 551 suggested that "trees in a tree farm or in a regularly exploited forest may be regarded as fruits, because they are produced according to the destination of the property and without diminution of its substance."[9] Indeed, Louisiana Civil Code article 562 particularized that rule to usufructs: "The proceeds of timber operations that are derived from proper management of timberlands belong to the usufructuary."

The supreme court followed these suggestions and looked to whether the funds received were compensation for seriously depleting the substance of the property. In *Doll*, the donee of the land obtained naturally seeded forest and timberland. She hired a forestry consultant and, following his recommendations, engaged in selective thinning and planting of new pine seedlings in the bulk of the open acreage. Revenues of $73,000 from sales of timber were received, but she rejected a bid of $103,000 to clear cut the remaining timber, "evidencing an intention to manage the property to provide sustained income."[10] Justice Cole, writing for the court, noted the criteria for the kinds of tree farming operations that would result in fruits:

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5. Id. at 1247 (*citing* Todd v. State Dept. of Nat. Resources, 474 So. 2d 430, 434 n.8 (La. 1985)).

6. *Id.* at 1256. *See also* La. Civ. Code arts. 1227-1288, 1559, 1569.

7. *Doll* does not purport to affect the provisions of the Mineral Code establishing the very narrow authority of a usufructuary to grant a valid mineral lease on a tract of land. See La. R.S. 31:192, 195 (1989). Ironically, even though only the naked owner can validly lease the land for mineral development, now it appears that bonuses would go to the usufructuary. This result would then parallel the provisions of La. R.S. 31:190(B) (1989) that apply to surviving spouses having usufructs. These spouses are entitled to the mineral proceeds, whether mineral development causes depletion or not, but they cannot validly lease the property for development without the consent of the naked owner. La. R.S. 31:190(B) (as amended by 1986 La. Acts No. 245).

8. Comment (b) to La. Civ. Code art. 551.

9. *Id.*; Harang v. Bowie Lumber Co., 81 So. 769, 773-74 (La. 1919) (*citing* the French authorities that a different rule would apply to trees "under regulated felling").

10. Doll v. Doll, 593 So. 2d 1239, 1249 (La. 1992).

> From the foregoing we determine designation as a "tree farm" is premised upon the existence of management techniques aimed at securing continuous production of timber, a conclusion which comports with the principle of article 551 and comment b thereto. It is clear a tree farm can not be defined by reference to its character at the time of the growth, but rather by the land's ability, through proper management techniques such as selective thinnings and plantings, to provide sustained yields. The timber sales at issue here were nothing more than selective thinnings intended to spur a fruitful and continuous yield over a prolonged stretch of time.[11]

B. Lessee's Crops

Read literally, Louisiana Civil Code article 493 would apply to "plantings" made on the land of another with the owner's consent. Thus, crops that had been planted before the lessee's rights ended would be covered by the article, and, upon written demand of the landowner, the lessee could remove his growing crop within 90 days of demand. If not removed, the crop would then be owned by the landowner without compensation to the lessee.

Dictum in *Caballero Planting Co., Inc. v. Hymel*[12] questions whether this article, which poses problems of inequity even as to buildings,[13] would apply to crops. The first circuit court of appeal stated, "Initially, we have doubts as to whether the legislature intended art. 493 to apply to a crop such as sugarcane, . . . which has a growing season greatly in excess of ninety days."[14] However, it found it unnecessary to face that issue because it concluded that the landowner failed to make the type of demand required by Article 493. The court found that a letter from the landowner's attorney merely "advised" the lessee he could remove his crops. It did not so "demand."[15] The court reversed a

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11. *Id.* at 1249-50.

12. 597 So. 2d 35 (La. App. 1st Cir. 1992).

13. Symeon Symeonides, *Property, Developments in the Law, 1983-1984*, 45 La. L. Rev. 541 (1984).

14. *Hymel*, 597 So. 2d at 37.

15. The language of the letter was,

> Since Mr. Caballero no longer has the right to occupy my clients' property, as per my letter of December 29, 1989, this is to advise that Mr. Caballero may remove whatever improvements or plantings that belong to him which are located on my clients' property; with the obligation to restore the property to its former condition.
>
> Please keep in mind, however, that if Mr. Caballero removes any improvements or plantings that do not belong to him, my clients will file suit for damages.

Id.

summary judgment in favor of the landowner as against the lessee's claim for compensation for the plant sugar cane and stubble cane which it had previously planted.

Even if a proper demand had been made under Article 493, serious doubt remains as to the article's application to growing crops. Perhaps landscape plantings or even timber might be covered under the article since they do not normally produce fruits. But, the more specific code articles governing fruits would seem to govern crops. Louisiana Civil Code article 485 provides that if fruits belong to the owner of a thing by accession but "are produced by the work of another person, or from seeds sown by him, the owner may retain them on reimbursing such person his expenses." In such a case, even if demand were made and the lessee failed to remove the plant cane and stubble cane (a very unlikely event) so that the landowner became owner of the crop and then harvested it as a fruit, the former lessee would be entitled to reimbursement of his own expenses. This is a basic equitable tenet of the Civil Code, one so strong that even a possessor in bad faith is entitled to such reimbursement.[16] The lessee who plants sugar cane, a crop that takes so long to grow,[17] with the knowledge and consent of the landowner should at least be in as good a position as a bad faith possessor.

C. Accession Rules v. Accession Policies

The tension between a general policy against unjust enrichment that underlies the laws of accession and the specific rules of accession that sometime produce a seemingly inequitable result appeared in *Scott v. Wesley*.[18] The first circuit court of appeal applied the clearly applicable accession rules of the Louisiana Civil Code rather than trying to avoid application of the rule under unjust enrichment policy notions.

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16. La. Civ. Code art. 486.

17. Cultivation practices for sugar cane, with its long growing season, were described in Michigan Wisconsin Pipe Line Co. v. Walet, 225 So. 2d 76 (La. App. 3d Cir. 1969). The court explained:

> To consider appellants' contentions, we must review the evidence concerning the problems of cultivating and harvesting sugar cane. Sugar cane is a crop that must be cultivated over a period of approximately fourteen months. It is planted in August or early September and is not harvested until the end of October, or in November and December of the following year. After harvesting, the crop reappears for two successive seasons (stubble cane) and is harvested in each of the two following years. Good farming practice allows three harvests (plant, first year stubble, and second year stubble). In the fourth year, the land is allowed to lie fallow, or is planted with peas or corn to enrich the soil for future plantings of cane.

Id. at 80.

18. 589 So. 2d 26 (La. App. 1st Cir. 1991).

The builder of a shell home for Wesley obtained a judgment for the contract price, but he was unable to collect on it. The house was built on property owned by Wesley's mother-in-law, but Wesley subsequently divorced his wife and apparently left the state. The mother-in-law completed the house and moved in. The builder then sued her under an unjust enrichment theory for the contract price of the shell home. The lower court held for plaintiff; the court of appeal reversed.[19]

If the house was built without the consent of the mother-in-law, as she testified, Article 493 governed, and she owned the house as soon as it was built. Since Articles 494-497 do not provide compensation from the landowner to a person in plaintiff's position,[20] it would seem to follow that no compensation was due. Presumably the underlying notion here is that a builder should be careful enough not to build on the property of an owner whose consent is not obtained. Or, perhaps if he contracts with another to build on land of a third person, the builder should look to the contracting party for payment.

Indeed, the plaintiff apparently recognized that no compensation was due under the law of accession and instead relied on the more vague concept of unjust enrichment. In that regard, the court of appeal found that he did not meet one element of the requirements for recovery under that theory—he had another remedy available. The plaintiff had recourse against the person who contracted with him. Indeed, he had a judgment against that person, even if he had been unable to collect on it.[21]

This approach of the first circuit court of appeal in *Scott* contrasts with that of the third circuit in *Beacham v. Hardy Outdoor Advertising*.[22] In *Beacham*, the builder constructed an advertising sign on plaintiff's property under a contract with Onebane but without plaintiff's consent. The court concluded that Article 493 applied; the sign was built without the landowner's consent and was thus owned by the landowner. However, the court also invoked unjust enrichment[23] and developed what it perceived as an equitable solution not provided in the Code. If the plaintiffs chose to keep the sign, they had to pay defendant's costs. Or, they could give up their ownership of the sign and require defendants to

19. *Id.* at 27-28.

20. He was neither a person whose materials were used by another (Article 494), nor a consensual builder (Article 495), nor a possessor (Articles 496-497).

21. *Scott*, 589 So. 2d at 28.

22. 520 So. 2d 1086 (La. App. 3d Cir. 1987).

23. *Id.* at 1089. The court cited as authority a passage from the *Expose des Motifs* written by the drafters of the property law revision. That excerpt provided, in explaining Articles 494-498: "These provisions are based on considerations of equity and fairness to all concerned. They may be regarded in part as applications of the principle that forbids unjust enrichment." 1979 La. Acts. No. 180, at 434.

remove it and restore the property to its prior condition.[24] The court did not discuss the issue of whether defendant had other recourse, namely, a claim against Onebane for his loss.

The fifth circuit also swayed away from the clear application of the Civil Code articles (and in favor of unjust enrichment notions) in *Berot v. Norcondo Partnership*.[25] Prospective purchasers of a condominium spent substantial funds to decorate and add improvements to the unit. Ultimately, they failed to obtain financing, did not complete the purchase, and sought compensation for their improvements. Involved were drapes as well as "carpet, tile flooring, wallpaper, ceiling fans, and the burglar alarm."[26] The items that were component parts under Louisiana Civil Code articles 465-466 became owned by the owner of the condominium. Under Article 495, the plaintiffs had the right to remove those items, since they apparently were constructed with the consent of the landowner. If not removed after demand, the owner could remove them at the expense of the builders or elect to keep them, in which case he would pay the current value of the materials. The case may be explained by some kind of tacit indication that the owner wanted to keep the items, thus invoking the obligation to pay the cost. However, the court did not rely solely on that approach, probably because it would not explain the requirement that the landowners compensate plaintiffs for the drapes, which normally would not be components. The court instead relied on Article 1757's unjust enrichment principles and *Beacham*.[27]

In any event, the courts of appeal appear to be splitting on these matters of basic theory and jurisprudence. What happens when the specification of a principle appears to conflict with the purpose and policy behind the principle? In that regard, Professor Symeonides, writing on a similar problem and the alternative solutions, has stated: "Hopefully, the preceding discussion has demonstrated that there are sufficient analogous interpretations to choose from without resorting to unjust enrichment. The preceding discussion may also have demonstrated that none of the above solutions is fully satisfactory. If that is the case, legislative correction is both necessary and desirable."[28] Perhaps one

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24. This option in effect gives the builder the same status as a bad faith possessor.

25. 544 So. 2d 508 (La. App. 5th Cir. 1989); *see also* Orleans Onyx, Inc. v. Buchanan, 428 So. 2d 841 (La. App. 5th Cir. 1983) (noted in Thomas A. Harrell, *Security Devices, Developments in the Law, 1982-1983*, 44 La. L. Rev. 535, 549 (1983) and Symeon Symeonides, *Property, Developments in the Law, 1982-1983*, 44 La. L. Rev. 505, 526 n.128 (1983).

26. *Berot*, 544 So. 2d at 509-11.

27. *Id.* at 511.

28. *See* Symeonides, *supra* note 25, at 526.

signpost here is the latest expression of the legislative will, the 1984 amendments to Article 493 which obviously veered from the notions of unjust enrichment by providing that the landowner obtains ownership of things without owing any compensation if the builder does not remove them within ninety days after written demand.[29]

II. SERVITUDES

A. Servitudes by Destination

Establishment of servitudes by destination, since no agreement is required, hinges primarily on the concept of notice—notice that a relationship of service between tracts of land exists. It is the type of notice that should be seen and appreciated by a reasonable purchaser of the property.[30] Only "apparent" servitudes may come into being by destination solely by operation of law. Apparent servitudes are "perceivable by exterior signs, works, or constructions; such as a roadway, a window in a common wall, or an aqueduct."[31] But whether a particular use gives such notice is not always simple. The inquiry is much like Boyd Professor Wex Malone's description of the difficulties in the concept of *res ipsa loquitur*—"Sure the thing speaks for itself, but what does it say?"

The fourth circuit court of appeal gave the destination concept a narrow construction and denied a claim for a servitude of passage in *730 Bienville Partners v. First National Bank of Commerce*.[32] Involved was land occupied by a hotel, a garage, and a passageway between the two. For many years, guests went from the hotel, through the passage, into the garage and from there to the street. When ownership of the garage tract was separated from the rest of the tract, the use of the passage and garage continued pursuant to an agreement between the hotel owners and the garage owners. When the hotel cancelled its agreement and moved its parking operations elsewhere, the garage owners sought to end the use by hotel guests of the garage as an exit to the street. The hotel countered, claiming a servitude by destination.[33] The court of appeal held that such a servitude was not created.

The visible indications of a servitude arguably were a doorway from the hotel to the garage; a sign on the wall reading "Entry to Hotel";

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29. *See* Symeonides, *supra* note 13.

30. La. Civ. Code art. 741; Taylor v. Boulware, 35 La. Ann. 469 (1883).

31. La. Civ. Code art. 707. Nonapparent servitudes are also established by destination if the owner records a document in the public records so indicating. La. Civ. Code art. 741. In that case, the public recordation constitutes the notice.

32. 596 So. 2d 836 (La. App. 4th Cir. 1992).

33. *Id.* at 837-38.

an illuminated sign above the door reading "The Saint Louis Hotel"; and a sign indicating the door was an entrance to the Louis XVI Restaurant which is located in the hotel. The garage wall near the door was painted to match the decor of the doorway. In the hotel were signs stating "To Parking" and "Exit."[34] Of course, there was also the sight of many people walking through the garage for many years, some parking in the garage, some not. The court concluded that there was not enough indication of a right of servitude of passage from the hotel through the garage to the street.

The court is probably on solid ground, especially considering the rule of construction that in case of doubt as to the establishment of a servitude, the issue should be resolved in favor of the servient estate.[35] Here, there was obvious and regular use by persons, but it was use of a public place where many of the users paid for parking and where there was a long-standing contractual arrangement between the garage and the hotel for such parking and entry into the hotel. The strongest argument for the servitude would appear to be the doorway; but does the existence of a door indicate a right to walk through a garage to a street?

The court is on shakier ground when it focuses on the actual intent of the parties and concludes there was no intent to establish a servitude.[36] The important element is the degree of visible notice that a relationship exists—enough that a reasonable person would be apprised that the relationship will continue. In that objective inquiry it may be helpful for some purposes to call the servitude the result of a "tacit agreement."[37] But the very fact of calling it tacit means there was no real agreement, and the issue is not the subjective intent of the parties.

B. Encroachment Servitudes

If an encroacher is in "good faith," Louisiana Civil Code article 670 allows establishment of a servitude for a "building that encroaches

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34. Id. at 839. The court also found it significant that "no exterior sign on the garage . . . directs foot or vehicular traffic from Iberville St. through the Garage. . . ." *Id.* The fact situation is reminiscent of the photograph in the 1983 edition of Professor Yiannopoulos' casebook in which a squatter purports to give notice of acquisitive prescription claims by putting up a sign to that effect tacked onto a stake driven into the ground. A.N. Yiannopoulos, Civil Law Property Casebook 381 (1983). Similarly, are these signs an *exterior sign, work or construction* that would make the servitude perceivable under Louisiana Civil Code article 707?

35. La. Civ. Code art. 730.

36. The court stated there was no proof that the former owners "intended to establish a servitude of passage . . . no evidence to support the appellants' contention that the Garage was intended as a path." *730 Bienville*, 596 So. 2d at 840.

37. The court cites Professor Yiannopoulos for the proposition that the policy behind servitudes by destination is a tacit agreement theory. *Id.* at 839.

on an adjacent estate." The third circuit court of appeal gave the article an expansive construction in *Lakeside National Bank of Lake Charles v. Moreaux,*[38] applying it to "a septic tank with field lines" and "underground air-conditioning system pipes." The court reasoned that components of a building were included in the textual reference to buildings and that the two systems in question were components of the building under Louisiana Civil Code articles 465 and 466. Judge King dissented, arguing that the servitude should not apply to nonapparent uses that are not in fact buildings.[39] His view would seemingly draw an analogy to the laws on establishment of servitudes by destination and prescription—some visible notice of the use of property would be required.

Indeed, if the thing constructed is visible there is reason for allowing the servitude, even if the thing technically is not a building or a component of a building. A satellite antenna, for example, may not be a component of a house. Yet if the satellite antenna visibly encroaches on the boundary, it would seem to be within the equitable policy premises of Article 670, and more so than the underground lines involved in *Moreaux.*

C. Roads and Streets—Three Year Maintenance

The facts of *Moret v. Williams*[40] support the conclusion that a road had not become public by three year maintenance under Louisiana Revised Statutes 48:491. Despite some public maintenance of a road by police jury workers, the first circuit court of appeal concluded the road had not become public because the landowner had indicated opposition to the maintenance and to the road becoming public. The landowners embedded pipes across the roadway and felled a tree across the road to block its use. The landowners had never requested the maintenance and contacted the police jury to express objections to the maintenance. Apparently, public work on the road was done to accommodate a tenant living on neighboring land.[41]

The conduct of the landowners in attempting to block use of the road is quite similar to the facts of the early case of *Elliott v. Police Jury of Evangeline Parish,*[42] where the landowner repeatedly fenced his property and intentionally felled trees in an attempt to block access to the road. It was in *Elliott* that the court developed the view that the three year maintenance must be peaceable and without coercion. *Moret*

38. 576 So. 2d 1094 (La. App. 3d Cir. 1991).
39. *Id.* at 1098-99 (King, J., dissenting).
40. 582 So. 2d 975 (La. App. 1st Cir. 1991).
41. *Id.* at 976.
42. 15 La. App. 542, 132 So. 368 (La. App. 1st Cir. 1931).

is also akin to *Town of Eunice v. Childs*,[43] where the landowner objected to the city placing gravel on her alley by phoning and writing a letter to the city attorney. There, the court stated that the statute was inapplicable because the maintenance was not "peaceful or lawful," with Judge Fruge citing *Elliott* as authority.[44]

In light of those cases, *Moret* is quite traditional and ordinary. It is true, as the court says, that an underlying rationale of the statute (one that makes it constitutional) is that the landowner consents or acquiesces in the maintenance. It is also true that the cases do not require actual, subjective consent; rather, an objective standard is applied. The court acknowledges that "constructive knowledge" is enough to infer acquiescence if the work is visible enough to alert a reasonable landowner and the landowner does not protest.[45]

But some of the court's language is questionable. It states that the rationale underlying the rule is "protection of the public fisc, guarding against the use of public monies for the benefit of private landowners."[46] Sometimes, it is true that even though a landowner does not intend to give the public any use rights at all—and even bars public use by never permitting use of his road—the statute still applies by its terms. Three year maintenance after request in *Porter v. Huckaby*[47] was enough to make the road public. In effect, the use of public funds to maintain a private road was adequate justification for the state to take a right of servitude from the private landowner without compensation.

However, it is to be remembered that the statute, until recent tinkering, never required any intent to dedicate or, indeed, any mental state. It only focused on governmental conduct—maintenance for three years. The problem with that simple approach is that it can border on taking private property without due process. But not in a case like *Porter*, where the reasonableness of the taking is the exchange of the requested maintenance for the public rights that are exacted. But due process concerns can be met in other ways, even when the landowner does not subjectively consent to maintenance or to giving any rights of public use. In *Moret*, even if the landowner never benefitted by using the road (and it was the tenants next door who used the road and asked for the maintenance), by its literal wording the statute would still apply if the maintenance was significant, lasted for three years, and the landowners did not object. It is not necessary, as the court seems to imply, that the landowner benefit.

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43. 205 So. 2d 897 (La. App. 3d Cir. 1967).
44. *Id.* at 900.
45. *Moret*, 582 So. 2d at 977.
46. *Id.*
47. 221 La. 120, 58 So. 2d 731 (1952).

Acquiescence or failure to object when a reasonable person knows that some rights are being asserted on one's property over a reasonable period of time is sufficient to make the taking of rights in accordance with due process. This is the basic justification for acquisitive prescription by noticeable acts of possession on another's property. It is the basic justification for the notion of tacit dedication—consent to granting a public right by toleration of the use for a long period. It is also the basis for the three year prescription.[48]

Recent amendments to Louisiana Revised Statutes 48:491 reflect these basic concerns. It is now clearly stated that maintenance will make the road public "if there is actual or constructive knowledge of such work by adjoining landowners exercising reasonable concern over their property." Consent is not necessary.[49] Actual knowledge is not necessary. Actual notice is not necessary. "Constructive knowledge" is enough. In other words, the type of maintenance that would be visible to a reasonable person managing the property in a reasonable way is sufficient to justify the state's taking a road without compensation.

D. Drainage Servitudes—Remedies

Gaharan v. State[50] arose in an odd procedural setting that is unlikely to arise again, but it contains troublesome dictum that may resurrect a problem thought to be resolved in *Poole v. Guste*.[51] In *Poole*, Justice

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48. The supreme court in Frierson v. Police Jury of Caddo Parish, 107 So. 709 (La. 1926) stated:

> Perhaps the statute would be unconstitutional if construed to mean that a private road that had been kept up, maintained, or worked under authority of the police jury for 3 years before the statute was enacted was converted into a public road by virtue of the statute. We rest our decision in this case upon the fact that the road was kept up and maintained by authority of the police jury for a period exceeding 3 years subsequent to the enactment of the statute.

Id. at 711.

49. The court rejected the argument that a landowner must actually consent to the dedication of the property in LeBoeuf v. Roux, 125 So. 2d 444 (La. App. 3d Cir. 1960). Judge Albert Tate wrote that since the landowner knew the disputed strip was maintained for more than three years, "she cannot validly argue that her property was taken without notice to her simply because of a present claim that she did not then know that the true location of her western boundary included part of the roadway. . . ." *Id.* at 447. *Accord* Lincoln Parish Police Jury v. Davis, 559 So. 2d 935 (La. App. 2d Cir. 1990); Wise v. Key, 445 So. 2d 98, 100 (La. App. 2d Cir. 1984), where the court stated, "But intent of the landowner to dedicate the property as a street is unnecessary, if there is the requisite maintenance without adequate protest. Tschirn v. Morse, 394 So. 2d 286 (La. App. 1st Cir. 1980); Town of Sorrento v. Templet, 255 So. 2d 246 (La. App. 1st Cir. 1971); Winn Parish Police Jury v. Austin, 216 So. 2d 166 (La. App. 2d Cir. 1968)."

50. 579 So. 2d 420 (La. 1991).

51. 262 So. 2d 339 (La. 1972). *See* A.N. Yiannopoulos, *Property* § 299, at 579, in 2 Louisiana Civil Law Treatise (3d ed. 1991).

Albert Tate suggested that "relegation of a landowner to compensatory damages instead of to injunctive relief" when a servitude of drain was involved would hardly ever be allowed.[52] That rule would seem to be required by the substantive law, for Louisiana Civil Code article 655 states that the lower estate "is bound to receive the surface waters that flow naturally." A literal reading of the text would require a court order to receive the waters.[53] As Professor A. N. Yiannopoulos pointed out after *Poole v. Guste* was decided, Louisiana's "different civilian procedural background" leads to the conclusion that injunctions should be granted rather than damages.[54]

In *Gaharan*, Chief Justice Calogero suggested in dictum that an injunction prohibiting interference with the servitude of drain was not automatic: "In this case, upon remand, if the trial court finds that the State is obstructing plaintiffs' natural servitude but that compelling circumstances exist, it may fashion a reasonable alternative remedy to mandating removal of the obstruction. Compensatory damages is one possibility."[55]

That language cannot be taken too seriously, however, for it comes in the context of a case in which a claim for damages was prescribed because of liberative prescription but the action for an injunction was not. The court allowed the action for an injunction to proceed but not the action for damages. However, the court then stated that in an injunction action, an alternate remedy could be damages.[56]

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52. *Poole*, 262 So. 2d at 345; *accord* Barr v. Smith, 598 So. 2d 438 (La. App. 2d Cir. 1992); Boxill v. Metrailer, 358 So. 2d 986 (La. App. 1st Cir. 1978). *But cf.* Wood v. Gibson Constr. Co., 313 So. 2d 898 (La. App. 2d Cir. 1975). Judge Dennis wrote:

> The record does not support a finding that, if the flooding of his property recurs, the damage thereto will be so extensive that it cannot be adequately measured and compensated by a money award, in the event it is determined that defendant is legally responsible. Therefore, the injunction should not have been issued.

Id. at 901. *Also cf.* Dyer & Moody Inc. v. Dynamic Constructors, Inc., 357 So. 2d 615 (La. App. 1st Cir. 1978) (injunction "harsh and impractical"; damages of $19,203 awarded, an amount that would be "the cost of providing a facility that would be adequate to accomplish what the natural drain used to accomplish on the adjoining property.") *Id.* at 617.

53. *Observe* Louisiana Civil Code article 779, which provides that injunctions to enforce building restrictions are to be issued "without regard to the limitations of Article 3601 of the Code of Civil Procedure." Thus, the injunctions are to be issued even if no irreparable harm, injury or loss is involved.

54. A.N. Yiannopoulos, *Property, Work of Appellate Courts—1971-1972 Term*, 33 La. L. Rev. 172, 175 (1973). In his treatise, he states, "Injunctive relief is available as a matter of right without regard to the historical limitations developed by the chancery court." A.N. Yiannopoulos, *Predial Servitudes* § 21, at 72, in 4 Louisiana Civil Law Treatise (1983).

55. Gaharan v. State, 579 So. 2d 420, 423 (La. 1991).

56. *Id.*

It may also be impossible, because of the nature of court precedent, for one court ever to authoritatively bind later judges to a rule that an injunction will always issue in drainage cases. Even Justice Tate in *Poole* had to state the rule in terms that an injunction would *almost* always be issued and that only in very exceptional circumstances would an alternate remedy be provided. A strict adherence to the civil code provisions, however, would require injunctions.

In any event, it should still be clear that injunction is the preferred remedy and that relegation to a damage remedy is available only in exceptional circumstances. Indeed, the leading supreme court authority for limiting relief to damages is *Adams v. Town of Ruston*[57] and *Gaharan v. State*. Both cases involve governmental violators of the drainage servitude. In *Adams*, the town drained swimming pool waters in violation of its rights, and in *Gaharan* the State was allegedly blocking a natural drain. In both cases, governmental violators were involved; it is important to note that these violators were entities that could either expropriate the land involved or obtain a servitude upon paying a price, even if an injunction was issued. Relegation of the plaintiff to damages is perhaps just a quicker and easier way of accomplishing the same result as an expropriation but with less intrusion on private rights. That explanation of *Adams* and *Gaharan* leaves the old case of *Young v. International Paper Co.*[58] as the only apparent case in which the state supreme court used common law authorities to balance the equities and provide damages instead of injunction in a case involving a private person violating a drainage servitude. The result in *Young* of allowing chemical discharges in a natural drain is very suspect now in light of pollution control legislation. The extreme facts there also indicate the extent of the burden required to justify that kind of balancing: "To enjoin defendant from using the stream to take off its waste water, and thereby deprive it of its only means of doing so, is virtually to close down mills costing several millions of dollars to prevent some possible damage, of no particular moment, on land, which has but slight value, save possibly for mineral purposes."[59]

III. Changes in Waterbodies—Accretion and Dereliction

Statutes designed to ameliorate the problems of changing shorelines and uncertain shorelines that establish the boundaries between state and private ownership are slowly developing.

The "freeze statute," Louisiana Revised Statutes 9:1151, provides that if ownership of land or water bottoms changes because of changes

57. 194 La. 403, 193 So. 688 (1940).
58. 179 La. 803, 155 So. 231 (1934).
59. *Id.* at 810, 155 So. at 233.

in a waterbody, then-existing mineral leases remain in force. The rights under the mineral leases remain in effect, including the right to royalties from production. The supreme court suggested that the statute was constitutional in *State v. Placid Oil Co.*,[60] but the court's decision on rehearing made that point moot. In *Cities Service Oil and Gas Corp. v. State*,[61] the second circuit court of appeal applied the statute to ownership changes that occurred after the Red River changed its course. The court also determined that the statute did not violate the constitution.[62]

The statute violates neither the takings clause nor the clause prohibiting the state from alienating its property. Nothing is taken from the riparian landowner who has gained land by accretion if he obtains the land without the mineral rights; he had no vested interest in the land to begin with. "Article IX, Section 3 of the state constitution does not prohibit the state, which obtains land by dereliction, from obtaining less than full ownership, as no alienation or authorization of alienation has occurred."[63]

The False River boundary statute—Act 285 of 1975 and now Louisiana Revised Statutes 9:1110—raises more serious constitutional problems. The statute simply states that private landowners along the stream own up to fifteen feet above mean sea level, at which point state ownership begins; "[t]he boundary line formed at fifteen feet above mean sea level marks the division between land owned by the State and land owned by private persons along the banks of False River."

The statute can be applied constitutionally only if in 1975 the dividing line between state and private ownership was in fact at that level. (If False River is considered a lake, the line between state and private ownership is the mean high water mark as of 1812; if it is a river or stream, the line is the low water mark as of today or 1975). If the actual line was higher than fifteen feet, the effect of the statute is to transfer to private owners the property and mineral rights of the bed of a navigable waterbody in violation of the Louisiana Constitution, Article IX, Sections 3 and 4(A). If the actual line was lower than fifteen feet, the statute was a taking of private property without compensation in violation of the Louisiana Constitution, Article I, Section 4, as well as the Fourteenth Amendment Due Process Clause of the United States Constitution.[64]

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60. 300 So. 2d 154, 166 (La. 1973), *cert. denied*, 419 U.S. 1110, 95 S. Ct. 784 (1975).

61. 574 So. 2d 455 (La. App. 2d Cir. 1991).

62. *Id.* at 461.

63. W. Lee Hargrave, *"Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974*, 43 La. L. Rev. 647, 662 (1983).

64. It is also probably a violation of the local notice requirements imposed by the

The constitutional argument was discussed offhandedly in *Chevron U.S.A., Inc. v. Lorio*,[65] The first circuit court of appeal simply said that the statute did not violate Article IX, Section 4(A) since the actual dividing line was higher than fifteen feet and thus there was no alienation of the bed of a navigable waterbody. The court did not discuss whether the statute was a taking without due process. This term, in *Chevron U.S.A., Inc. v. Aucoin*,[66] the court again did not discuss the constitutional question, simply referring to "the fifteen feet traditionally used after passage of LSA-R.S. 9:1110."[67] The holding of the case was that False River was not a lake in 1812, but a stream. The rules of accretion and dereliction would thus apply to make changes in ownership as the stream shrank over the years.[68]

Even though the statute is unconstitutional insofar as it would change the limits of state and private ownership in 1975, it might be construed to be a freeze statute that would halt the application of the laws of accretion and dereliction on False River after that date. If construed as fixing a boundary when the constitution is not violated, the statute would require that any accretions formed after 1975 above the fifteen foot mark would remain the property of the State. One could also argue that any dereliction occurring that would result in private owners losing ownership of land below fifteen feet would be prohibited. Granted, such a result would be contrary to the state's public policy[69] against private ownership of the beds of the navigable waterbodies, but that policy would have to give way to the effect of a statute to the contrary, especially since the statute would not appear to be in violation of the constitution.[70]

Louisiana Constitution for local and special laws. La. Const. Art. III, § 13. *Cf.* Chevron U.S.A., Inc. v. Lorio, 496 So. 2d 611, 616 (La. App. 1st Cir. 1986) (dismissing the local and special argument).

65. *Chevron*, 496 So. 2d at 615.

66. No. 91-CA-2270 (La. App. 1st Cir. Jun. 29, 1992).

67. *Id.* at 5.

68. La. Civ. Code art. 499.

69. Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1975); Miami Corp. v. State, 173 So. 315 (La. 1937).

70. It would not be the alienation of the bed of a navigable waterbody because the land in question is not yet part of the bed. It would be halting the acquisition of ownership of such a bed.