Private Law: Property

Joseph Dainow
planned to settle in Louisiana after discharge, but was held not to be a domiciliary anyway, since he owned no property here, belonged to no church or civic club, and had in general performed no acts indicating an intention to make Louisiana his domicile. In Fresolone the serviceman who testified he intended to retire here was also held not to be a domiciliary, since he had never lived outside his army post, and did not have a car registered here.

According to Kinchen v. Kinchen\textsuperscript{42} the defendant in a divorce action may, according to the terms of Code of Civil Procedure article 1061, reconvene for divorce on any grounds. This had not been so under Code of Practice article 363; the court rejected cases decided under that article.

In Broussard v. Domingue\textsuperscript{43} the trial court's judgment of separation cast against a husband domiciled in another state was upheld by the court of appeal, but its award of alimony \textit{pendente lite} was annulled. It was held to be a money judgment and hence unobtainable through service of process on an attorney at law unless the absent defendant were actually domiciled within the state.\textsuperscript{44}

\textbf{PROPERTY}

\textit{Joseph Dainow*}

\textbf{CLASSIFICATION}

\textbf{Public Property}

According to the Civil Code classification, public property comprises two kinds of things: (a) those which belong to a public body and \textit{are not} susceptible of private ownership, and (b) those which belong to a public body but \textit{are} susceptible of private ownership.\textsuperscript{1} The authority for the distinction is in the

\textsuperscript{42} 147 So. 2d 761 (La. App. 1st Cir. 1962).
\textsuperscript{43} 146 So. 2d 445 (La. App. 3d Cir. 1962).
\textsuperscript{44} \textit{L.A. Code of Civil Procedure} art. 6 (1960): "Jurisdiction over the person is the legal power and authority of the court to render a personal judgment against a party to an action or proceeding. This jurisdiction must be based upon: . . . (2) The service of process on the attorney at law appointed by the court to defend an action or proceeding brought against an absent or incompetent defendant who is domiciled in this state. . . ."

*Professor of Law, Louisiana State University.

legislative enactment based on historical sources and for the rea-
son that the former (res publicae) are things committed to a
public purpose while the latter (res fisci) are not so committed
by their nature although owned by a public body. Streets and
highways are res publicae, but ordinary public-owned lands are
res fisci. The importance of this classification was an issue in
the case of Klause v. State of Louisiana through the Department
of Highways.2

The Highway Commission acquired four lots (28, 29, 57, 58)
from a homestead association and used lots 28 and 29, except a
five-foot strip, in the construction of a highway. As the succes-
sor agency, the Department of Highways leased the remainder
to the Louisiana Department of Public Safety to be used as a
State Police Troop Headquarters. Ten years later, all four lots
formed the subject of a sheriff's sale3 from the state to Mr.
Klause, who instituted the present suit to confirm his title to
those parts of his purchase which were not incorporated into the
highway. The court of appeal held4 that Klause's pretended title
was a nullity because in effect the property was res publica
and not susceptible of private ownership; this was affirmed by
the Supreme Court.

The dispute centered only on those parts of the property
which had not been used for the highway and which had been
leased to another state agency; and it was a fact that Klause
had knowledge of an earlier tax adjudication to the state about
which the Register of the State Land Office did not know. On
account of this error, there was no legal consent, thereby mak-
ing the patent to Klause a nullity.

Insofar as the property classification is concerned, the sig-
nificant position of the majority was to treat all four lots as one
entire whole acquired by the Highway Commission for highway
purposes, and refusing to separate the part actually used as such
from the other part which was leased to another state agency.5
Since the classification is predicated upon the Highway Com-
misson's acquisition having been for highway purposes, the
lease of the parts not so used might just as well have been to a
private corporation as to a public agency. This would be much
difficult more difficult to accept. Even on the actual facts, there were

2. 243 La. 242, 142 So. 2d 410 (1962).
4. 135 So. 2d 580, and 135 So. 2d 583 (La. App. 4th Cir. 1961).
5. 243 La. at 255, 142 So. 2d at 415.
two short but pointed dissents with reference to the leased property; and one concurring opinion which considered the property leased to the Department of Public Safety as a "public place" under the seldom cited last phrase of Civil Code article 482.

The classification of all the four lots as res publicae by reason of a single purchase, when less than two were actually used for highway purposes, is fraught with dangerous possibilities against the basic policies of protecting private ownership and keeping property in commerce.

Common Things

Common things are defined as those which are not susceptible of any ownership, neither public nor private, and among the illustrations given in the Civil Code⁶ are the sea and its shores. By enlarging the sea to include an "arm of the sea," and by judicial legislation over the years, the shores of Lake Pontchartrain have been kept out of private ownership. Now, with the aid of the Louisiana courts, the oceans are being further enlarged. In the case of D'Albora v. Garcia,⁷ the court of appeal held, and the Supreme Court presumably agreed,⁸ that a canal attached to Lake Pontchartrain is also an arm of the sea. The canal was dug as a borrow pit in the construction of a highway, and became the access to the lake for properties located along its length of about 2,000 feet. The canal is sixty feet wide and four to five feet deep. One can hardly criticize the result of the decision, which was to prevent the proprietor at the mouth of the canal from obstructing its use by the others, but it takes a little while to get accustomed to the idea of a borrow pit canal being an arm of the sea.

Servitudes

Natural Servitudes

The servitudes which originate from the natural situation of the places, whereby the lower estate must receive the waters from an upper estate, and whereby the upper estate which uses running water must return it to its ordinary channel as it goes to the lower estate,⁹ are exclusively applicable to surface waters

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6. LA. CIVIL CODE art. 450 (1870).
7. 144 So. 2d 911 (La. App. 4th Cir. 1962).
8. Writ denied.
9. LA. CIVIL CODE arts. 660, 661 (1870); LA. R.S. 38:218 (1950).
and do not apply to subsurface waters. This was the holding of the court of appeal in the case of Adams v. Grigsby,\textsuperscript{10} and it was approved by the Supreme Court.\textsuperscript{11} The issue presented was \textit{res nova}, and the decision is a very important one. Defendant was an oil operator using fresh water from a subsurface reservoir in such quantities as to endanger the supply for the plaintiff's needs through individual water wells. The court stated that water is a liquid mineral and, by analogy, subterranean waters must be classified with oil and gas as fugitive substances. Accordingly, ownership is acquired only upon reducing the water to possession; the matters of regulation and control of the water supply and use are for the legislature. Since there is presently no statutory regulation, the court could not limit the defendant's activity and affirmed the dismissal of the plaintiff's suit. In so doing, the court indicated that there could conceivably be responsibility under Civil Code articles 667 and 2315, and until the legislature fills the gap, it may well be that future litigation under these articles will supplement the present holding as to ownership with more specific rules concerning reasonableness of use.

\textit{Legal Servitudes}

An unusual aspect of legal servitudes was the basis of decision in the case of \textit{City of New Orleans and Audubon Park Commission v. Board of Commissioners of the Port of New Orleans}.\textsuperscript{12} The Board was extending the harbor facilities and, claiming a legal servitude under Civil Code article 665,\textsuperscript{12a} wanted to use the Mississippi River waterfront of Audubon Park. The city and the park commission brought suit to enjoin the board from taking this strip of river bank. The court found that the property belonged to the state, which had set up and authorized the park commission to administer it. As property of the state, there could not be a public servitude on the property in favor of the state or its agency, the Dock Board. There cannot be a servitude on a property in favor of its owner; and if there had once

\textsuperscript{10} 152 So. 2d 619 (La. App. 2d Cir. 1963).
\textsuperscript{11} Writ refused, judgment correct, 244 La. 662, 153 So. 2d 880 (1963).
\textsuperscript{12} 148 So. 2d 782 (La. App. 4th Cir. 1962), writ refused, result is correct, 244 La. 204, 151 So. 2d 493 (1963).
\textsuperscript{12a} "Servitudes 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."
been such a servitude when this was private property, it had been extinguished by confusion when the state acquired ownership of the park property. An owner can make such dispositions as he pleases, and in this instance it would have to be done by legislative action.

An interesting point is made in the concurring opinion of Judge Yarrut that Civil Code articles 664 and 665 refer to public servitudes on private lands, and that one governmental agency cannot have any right of servitude or expropriation over public property already dedicated to a public purpose and entrusted to another governmental agency without a constitutional or legislative authorization.\(^{13}\)

The same problem, or what looked like the same problem, came up again in connection with the property adjacent to the park and known as the Mengel Tract in the case of *Audubon Park Commission and Audubon Park Natatorium, Inc. v. Board of Commissioners for the Port of New Orleans*.\(^{14}\) However, in this case, the plaintiff’s suit for an injunction against the Dock Board was unsuccessful, because the court found that the record ownership of the property in question was in the Natatorium, which was a *de facto* private corporation. Although all the stock of this corporation was owned by the park commission, a state agency, the Natatorium had been organized under the laws relating to private business corporations. The park commission may have exceeded the scope of its authority in setting up the natatorium as a separate entity, but it functioned as a *de facto* private corporation, and it was the record owner of the property in question. Accordingly, it was held that there was a public servitude which the Dock Board could exercise for the purpose of harbor facilities.

A legal servitude which is not often litigated is the one which pertains to common fences. Therefore, the case of *Avrill, widow of) Jones v. Fortenberry*\(^{15}\) is significant. Plaintiff claimed from defendant one-half the cost of a fence erected on the dividing line between their properties. Defendant disclaimed liability because his lot is not entirely enclosed, on the authority of Civil Code article 687. The court rendered judgment for the plaintiff on the authority of article 686, which, it held, applies

\(^{13}\) 148 So. 2d at 787.

\(^{14}\) 153 So. 2d 574 (La. App. 4th Cir. 1963), writ denied, 244 La. 1011, 156 So. 2d 223 (1963).

\(^{15}\) 142 So. 2d 561 (La. App. 4th Cir. 1962), writ denied.
to urban and suburban residential areas while article 687 applies to rural estates. This is not any more than the articles themselves state, but since the provisions are so little litigated, it may be useful to have the details spelled out and the policies rationalized.

**Conventional Servitudes**

In *Sohio Petroleum Co. v. Hebert*, there had been a sale of land in which the vendor made the reservation “less right of way for canal and public road.” The dispute centered on the question of whether this created a servitude or whether it was a reservation of the ownership of the land underlying the canal and the road. The real concern was the right to the oil royalties due to the owner of that area of land. Considering the use of the phrase “right of way” and in the light of the deed as a whole, the court concluded that the reservation was only a servitude so that ownership passed to the vendee along with the rest of the property. On this score of getting at the intent of the parties, as expressed in the deed, the decision is clear and proper. However, it is not so easy to understand why Louisiana courts resort to common law terminology in order to emphasize civil law property concepts. To distinguish “ownership” from “servitude,” the phrase “fee title” is used and italicized in the opinion. It is bad enough for the only published report of this case to appear under the publisher’s key number headnotes of “Easements” without compounding the distraction in the body of the opinion. Even in the absence of a deliberate intent to pour the Louisiana civil law into a common law mold, bypassing the constitutional injunction against doing this very thing, the continual use of common law terms and concepts must inevitably lead in that direction.

In *James v. Buchert*, a conventional servitude of passage was established on one property for pedestrian and vehicular access to another property. A subsequent owner of the servient estate put up a fence with a gate so that the passage continued to be used only for pedestrian passage. The question was whether the servitude had been lost by reason of the obstructing fence or by the later construction of a carport on the strip of land in question. The court held that the servitude had not

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17. LA. CONST. art. III, § 18.
18. 144 So.2d 435 (La. App. 4th Cir. 1962).
been extinguished because the owner of the dominant estate had not consented to the erection of the fence or the construction of the carport. The trial court had held the servitude extinguished on the basis of Civil Code article 784, and on this point the court of appeal reversed, citing as authority the 1858 case of Lavillebeuvre v. Cosgrove.\textsuperscript{19}

It is submitted that there are some points of analysis which were not treated very clearly. The Lavillebeuvre case, from which the language of decision was paraphrased, referred to article 816 of the Civil Code of 1825 (article 820 in the Code of 1870) in the statement that consent is necessary, and this article deals with the mode of extinguishing servitudes by renunciation; it is therefore not appropriate for a situation which involves a question of extinction by obstruction.

To begin with, the trial court’s use of Civil Code article 784 was altogether inappropriate because this article deals with the extinction of servitudes by the destruction or physical change in the servient property.

The Louisiana codifiers were very systematic in the drafting of the section on “How Servitudes Are Extinguished.” The first provision in article 783 is a numbered list of seven ways in which servitudes are extinguished, and then each of these is elaborated seriatim in the following articles. The first method of extinguishing servitudes is listed as “destruction” or such change of the servient property that the servitude cannot be used (article 783, par. 1). This mode of extinction is elaborated and discussed in articles 784-788. The second is prescription for non-use (article 783, par. 2), and this is discussed in articles 789-804. And so forth.\textsuperscript{20}

“Obstruction” to the use of a servitude is not a direct method of extinguishing it, but is treated in the Code as a means of causing non-use\textsuperscript{21} which will in due time bring about its extinction by prescription.

Failure to observe the classification on which the codifiers organized the Civil Code provisions results in the misapplication of rules to situations for which they were not intended. In the case of Dufilho v. Bordelon,\textsuperscript{22} Judge O’Neill spoke for the Su-

\textsuperscript{19} 13 La. Ann. 323 (1858).
\textsuperscript{20} See full enumeration and discussion in Dufilho v. Bordelon, 152 La. 88, 92 So. 744 (1922).
\textsuperscript{21} LA. CIVIL CODE arts. 790-792 (1870).
\textsuperscript{22} Supra note 20.
private Court in reasserting this proposition and in holding that articles 784 and 785 could not be used for a situation which involved the extinction of a servitude by confusion.

Returning to the principal case (*James v. Buchert*) under discussion, it may be noted that the court also dismissed the contention of prescription for non-use because there had been constant use of the pedestrian passage, and less than ten years non-use of vehicular passage. If there had been ten years non-use of the latter, this aspect of the servitude would have been extinguished\(^2\) without losing the former.

The net result of these comments is that the court of appeal’s decision was correct, in that there had been no showing of any extinction of a properly-created conventional servitude, but the inappropriateness of some of the arguments and the supporting reasons should be noted in order to avoid their repetition or their extension to still other situations.

In passing, one final observation about this case is that it illustrates what appears to be a less-known exception to the well-known general rule that if there is a discrepancy between the description in a deed and the drawing on an accompanying map, the latter controls. In the present case, the map contained an obvious and meaningless error; when the map discrepancy amounts to an error and is something not intended by the parties because of a lack of consent it is not within the scope of these comments.

**Building Restrictions**

In the case of *Community Builders, Inc. v. Scarborough*,\(^2\) a tract of land had been developed as a subdivision, including a few commercial lots as well as the residential ones. Among the issues concerning the properly-established building restrictions, the most serious one required the commercial lots to have off-street parking facilities equal to twice the square footage of the building floor space. In the present case, the parking area was less than one-third of the building floor space. Despite this discrepancy, the trial judge held that the purpose of the requirement had been satisfied because there was adequate off-street parking for all the customers who might be there at any one time, thereby complying with the substance and intent of the covenant although not with its letter. On this point, the court

\(^{23}\) LA. CIVIL CODE arts. 790, 798 (1870).

\(^{24}\) 149 So. 2d 141 (La. App. 3d Cir. 1963).
of appeal reversed and held that there was a violation of the covenant because the purpose of the restriction was not only to prevent cars from parking on the streets and the incidental noises, and so forth, but also to limit the size of the commercial buildings so as to preclude those businesses which need very large or numerous buildings.

While disposing of the immediate litigation, the opinion of the court of appeal does not clarify the penetrating issue raised by the trial judge as to whether the court may disregard the clear language of a properly-established building restriction under the pretext of enforcing the substance and intent which the court distills out of the document. The court of appeal's technique might argue for the affirmative; their holding could be argued the other way. How far is it necessary for real estate developers to go into details of intent when they set up new subdivisions?

SUCCESSIONS AND DONATIONS

Carlos E. Lazarus*

Succession of Butler¹ involved the validity of a revocatory act in the form of a testament which was offered for probate as the statutory will of the decedent. The act was attacked on the grounds (1) that the formalities prescribed by the statute had not been complied with, not having been signed by the testatrix who had merely affixed her mark, and (2) that the testatrix was precluded from making a statutory will because she could not read.² The instrument in question had been executed before

*Associate Professor of Law, Louisiana State University.

1. 152 So. 2d 239 (La. App. 4th Cir. 1963), cert. den., 244 La. 668, 153 So. 2d 153 (1963).

2. LA. R.S. 9:2442 (Supp. 1962) : "In addition to the methods provided in the Louisiana Civil Code, a will shall be valid if in writing (whether typewritten, printed, mimeographed, or written in any other manner), and signed by the testator in the presence of a notary public and two witnesses in the following manner:

"(1) Testator. In the presence of the notary and both witnesses the testator shall signify to them that the instrument is his will and shall sign each separate sheet of the instrument.

"(2) Notary public and witnesses. The notary and both witnesses must sign at the end of the will

"(a) In the presence of the testator, and

"(b) In the presence of each other.

"(3) The foregoing facts shall be evidenced in writing above the signatures of the notary public and witnesses and the testator at the end of the will. Such