Private Law: Property

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fear of the public humiliation which might result from the
child's later exercising the strengthened rights of inheritance
which it would retain under article 214 of the Civil Code.

PROPERTY
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PUBLIC THINGS

According to Louisiana civilian classification, the category
of public things includes property of the public domain, prop-
erty of the private domain, and things subject to public use,
whether they belong to a public body or to a private person.¹
In the 1969-1970 term, Louisiana courts decided a number of
interesting cases dealing with property of the public domain,
such as navigable waterbottoms, and things subject to public
use, such as roads and streets, parks, cemeteries, and banks of
navigable rivers.

Navigable Waterbottoms

According to well-settled principles of Louisiana civil law,
navigable waterbottoms are things of the public domain which,
by definition, are insusceptible of private ownership.² An in-
volved course of legislative action, however, and judicial inter-
pretation of obscure texts, have resulted in the recognition of
private ownership in beds of certain navigable waters.

Originally, the prohibition against alienation by the state
of the navigable waters was based upon the interpretation placed
by the courts on article 453 of the Civil Code. The first direct
prohibition occurred in 1886 when Act 106³ of that year declared
that the state owned all waters adjoining the Gulf and at the
same time provided that the public ownership of these waters
should be continued and maintained. Subsequently, the prohi-
bition was fortified by the judicial doctrine of “inherent sover-

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¹ See A. YIANNOPOULOS, CIVIL LAW PROPERTY § 30 (1966).
² See La. Cv. Code arts. 453, 462; Miami Corp. v. State, 186 La. 784, 173
So. 315 (1936); State ex rel. Saint v. Timothy, 166 La. 738, 117 So. 812 (1928);
State ex rel. Bd. of Commrs v. Capdeville, 146 La. 94, 83 So. 421 (1919); Louis-
iana Navigation Co. v. Oyster Comm'n, 125 La. 740, 51 So. 706 (1910); Milne
74 So.2d 1, 11 (1954), declaring that the bottoms of navigable lakes and bays
“are by their nature susceptible or capable of private ownership.”
eighty,” and, finally, by the adoption of a constitutional pro-
vision in 1921 which prohibits the alienation of “the fee of the
bed of any navigable stream, lake or other body of water, except
for purposes of reclamation.”

In the meanwhile, Act 247 of 1855 had authorized the sale
by the state of shallow non-navigable lakes and swamplands
recently acquired under grant from the United States, and Act
124 of 1862 had assimilated dried out navigable lakes to swam-
plands and had removed the prohibition against the alienation of
such lands. On the basis of these and subsequent similar statutes,
patents were issued by the state purporting to convey to private
interests large areas containing both navigable and non-navigable
waters. No special mention was madereserving title to navigable
waters in the state, and several years thereafter the question
arose as to whether or not such patents could convey title to the
bottoms of navigable waters. In order to promote security of
title, the Louisiana Legislature passed Act 62 of 1912, a repose
statute, which provided that all suits to annul or vacate patents
issued by the state or by its political subdivisions must be
brought within six years of the issuance of the patent, or within
six years of the passage of the act. On the basis of this statute,
it has been held that conveyances which included beds of
navigable waters without reserving title to them in the state
are valid and no longer assailable. It is in this way that Lou-
isiana arrived at private ownership of the bottoms of navigable
waters.

that the Louisiana legislature could, in the absence of constitutional
prohibition, authorize the sale of navigable waters, it is merely a problem of
interpretation whether the Act of 1912 intended to cure patents conveying
only non-navigable waters or both navigable and non-navigable waters. The
majority view in California Co. v. Price, 225 La. 706, 739, 74 So.2d 1, 12 (1954),
was that “the Legislature intended that the Act was to be all inclusive, in
conformity with the language used therein.” A vigorous dissent indicated,
however, that “a reasonable construction of the statute would be that it only
applies to property susceptible of ownership...” Id. at 750-51, 74 So.2d at 17.
6. See California Co. v. Price, 225 La. 706, 74 So.2d 1 (1954); Humble Oil
State Mineral Bd., 209 La. 266, 24 So.2d 470 (1945); Realty Operators, Inc. v.
State Mineral Bd., 202 La. 298, 12 So.2d 198 (1942); State v. Sweet Lake Land
& Oil Co., 164 La. 240, 115 So. 833 (1927). The Louisiana legislature sought to
overrule legislatively this line of cases by La. Acts 1954, No. 727, now La.
R.S. 9:1107-1109 (1965), which declares that La. Acts 1912, No. 62 did not in-
tend to cure patents to beds of navigable waters and that all patents “here-
tofore or hereafter” issued, conveying beds of navigable waters are null and
void. Insofar as La. Acts 1954, No. 727 purports to apply retroactively, it may
be regarded as unconstitutional. Cf. State v. Cenac, 241 La. 1055, 132 So.2d
923 (1961).
In the 1969-1970 term, the applicability of the 1912 repose statute to pre-1921 patents was considered in at least three cases. In *Sinclair Oil and Gas Co. v. Delacroix Corp.*, a concursus proceeding for the distribution of oil and gas royalties, private persons claimed the ownership of certain navigable waterbottoms by virtue of a 1902 patent. The Fourth Circuit Court of Appeal set aside a summary judgment, rendered by the lower court in favor of claimants, on the ground that the case involved a genuine dispute as to facts, namely, allegations by the state that the patents in question had been obtained fraudulently. In *Carter v. Moore*, a mandamus proceeding to compel state officials to void a corrective patent which had allegedly divested plaintiffs of their interests in navigable waterbottoms, the state urged the court to adopt a restrictive interpretation of the 1912 repose statute and to reconsider the validity of *California Co. v. Price* as a precedent. Plaintiffs claimed the ownership of a part of the bed of Grand Lake by virtue of an original patent issued in 1881. In 1962, however, the state land office had issued a corrective patent limiting plaintiffs' ownership to lands other than waterbottoms that were navigable in 1812. The land office justified its action as a correction of a clerical error. The First Circuit Court of Appeal held that the 1912 repose statute, as interpreted in the *Price* decision, precluded correction of the original patent. Judge Blanche dissented, mainly on the ground that the *Price* decision has been legislatively overruled. The supreme court has granted certiorari, and, for this reason, comments are withheld until final disposition of the case.

In *Stevens v. State Mineral Board* plaintiffs brought action against the state mineral board to remove "clouds" from their title to certain waterbottoms on the east coast of Louisiana. The clouds consisted of recorded mineral leases granted by the state to private interests. Defendants moved for a summary judgment on the grounds that the state owned the property in question by virtue of an adjudication for nonpayment of taxes and that four links in plaintiffs’ title were fatally defective. Plain-

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10. *Cf. note 6 supra.*
tiffs invoked the repose statute of 1912. The Court of Appeal for the Fourth Circuit considered only the question of the validity of plaintiffs' title and granted summary judgment in favor of the defendants. The Supreme Court of Louisiana set the summary judgment aside on the ground that the case involved a genuine dispute as to facts and remanded it to the district court. Justices Sanders and Hamlin dissented. The involved discussion of questions of law by the court of appeal and by Justice Hamlin in his vigorous dissent will not be considered at this point, because, presumably, the same questions will arise in the new proceedings. It suffices to state that the decision of the court of appeal represents, in effect, a valiant effort to limit the applicability of the 1912 repose statute to pre-1886 patents, namely, to patents issued before the enactment of the first oyster statute. The supreme court should, perhaps, re-examine this approach with the view to adopting a broadly acceptable interpretation of the 1912 statute.

Highways, Roads, and Streets

Highways, roads, and streets may be either private things or public things in Louisiana. They may be public things either in the sense that their ownership "is vested in a whole nation,"¹³ or merely in the sense that they are subject to public use, whether they are owned by the state, its political subdivisions, or by private persons.¹⁴

In Foshee v. Longino¹⁶ the Third Circuit Court of Appeal found that a road had become public by application of La. R.S. 48:491, which provides that an interest in the public use of a road or street may be established through the maintenance by a parish or municipality of a road or street for a period of three years. The court indicated that public authorities need not spend large sums of money and that maintenance of the road two or three times a year would suffice. In St. Martin Parish Police Jury v. Michel¹⁶ a public road established under the same provision was formally abandoned by resolution of the police jury, but this resolution was rescinded a few days later. When private owners of the roadbed attempted to block access to it by the erection of fences, the police jury brought an action for injunct-

¹⁵. 236 So.2d 870 (La. App. 3d Cir. 1970).
¹⁶. 229 So.2d 463 (La. App. 3d Cir. 1969).
tion. The court held that the formal resolution of the police jury had freed the property of the servitude of public use and that the servitude could not be re-established by the rescission of the resolution; hence, an injunction would not lie. According to the court, the rescission of the formal resolution would have divested the owners of the roadbed of their property rights in violation of article 4, section 15, of the Louisiana Constitution. In the context of public law, the result appears to be plausible. In Lichtentag v. City of New Orleans plaintiff brought suit against the city claiming compensation for a strip of land allegedly appropriated by the city for the construction of a sidewalk and for damages to his remaining property. The court set aside a summary judgment in favor of the city on the ground that the case involved a genuine dispute as to the fact of appropriation and the amount of damages. In the course of its opinion, the court indicated that if the property had been wrongfully appropriated by the city there should be an award for damages under the authority of St. Julian v. Morgan L. & T. Railroad. The applicability of the St. Julian doctrine in this context is questionable; moreover, since the paving of the sidewalk was done in 1962 and since the suit was brought in 1968, the case may well be covered by R.S. 48:491.

Apart from "tacit dedication" under the terms of R.S. 48:491, an interest in the public use of highways, roads, and streets may be established by statutory dedication, by "formal" non-statutory dedication, or by "implied" non-statutory dedication.

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17. 237 So.2d 733 (La. App. 4th Cir. 1970).
18. 35 La. Ann. 924 (1883).
19. In support of its decision, the court quoted language from Ford v. City of Shreveport, 204 La. 618, 16 So.2d 127 (1943), a case involving an implied dedication of a sidewalk. That language was obviously pertinent in 1943, under the old version of La. R.S. 48:491 (1954). But after the 1954 amendment of La. R.S. 48:491 (1954) to include the maintenance of an alley or street by a municipality, the dictum in the Ford case may no longer be relevant. It would seem that a decision on the merits in the case under consideration ought to focus attention on the applicability and interpretation of La. R.S. 48:491 (1954).
20. Louisiana decisions lend support to the proposition that there are four types of dedication. The dedication resulting from La. R.S. 48:491 (1954) has been aptly termed "tacit dedication." Town of Eunice v. Childs, 205 So.2d 897 (La. App. 2d Cir. 1968). The dedication resulting from La. R.S. 33:5051 (1962) is commonly designated "statutory dedication." Chevron Oil Co. v. Wilson, 226 So.2d 774 (La. App. 2d Cir. 1969). A third species of dedication is a "formal" non-statutory dedication. Banta v. Federal Land Bank, 200 So.2d 107 (La. App. 1st Cir. 1967). The fourth species of dedication is an "implied" non-statutory or "common law" dedication. City of Houma v. Cunningham, 225 So.2d 613 (La. App. 1st Cir. 1969).
In *City of Houma v. Cunningham* the court found that a certain road had become public by virtue of an implied dedication, since the owner had actually intended to dedicate the strip of land in question and had manifested his intent by acts rather than words. Interesting questions pertaining to statutory dedication were raised in *Chevron Oil Co. v. Wilson*, a concursus proceeding for the distribution of royalties attributable to certain roadbeds. A country road established in early 19th century on the west bank of Lake St. John was improved and partly relocated in 1921; then it became part of the federal and state highway systems. Lands adjoining the highway were subdivided in 1926, and maps of the subdivisions were recorded at the clerk's office. There was no express dedication of the road traversing the subdivisions, but the plats marked the "improved highway." The state contended that the recording of the survey showing the "improved highway" constituted a statutory dedication under R.S. 33:5051, vesting title of the roadbed in the public. Successors in title of the original subdividers, however, claimed that the dedication was merely tacit under R.S. 48:491; hence, they had title to the roadbed subject to servitude in favor of the public. The court held that prior to 1926 the road in question was public under R.S. 48:491 and that the title of the roadbed vested in the public in 1926 by virtue of substantial compliance with Act 134 of 1896, now R.S. 33:5051. In the course of its opinion, the court indicated that dedication under this statute is effected without reference to any intention of the subdivider, the requisite intention being generally presumed. The conclusion was bolstered by policy considerations concerning security of title and acquisition. The result reached by the court is plausible. Yet,

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21. 225 So.2d 613 (La. App. 1st Cir. 1969). *See also* Hack v. Fontenot, 238 So.2d 877 (La. App. 3d Cir. 1970). In this case, the court declared that the servitude of the public use of a road, though discontinuous and thus insusceptible of acquisition by prescription, may be acquired by implied dedication.

22. 226 So.2d 774 (La. App. 2d Cir. 1969); Comment, 30 La. L. Rev. 583, 587 (1970).

23. *Chevron Oil Co. v. Wilson*, 226 So.2d 774, 777 (La. App. 2d Cir. 1969): "The rule of *Arkansas-Louisiana Gas Co. v. Parker Oil Co.* (supra) is now a rule of property in this state. It lends itself to certainty in title examination. An examiner now knows that, if a map is recorded, the roads shown on the subdivision plat are public and the ownership of the beds of the roads is in a municipality, a parish or the state. To require an examiner to determine whether a road shown on a recorded subdivision plat had been the subject of an implied dedication prior to recording the plat would place a considerable burden on an examiner."

24. *See Comment, 30 La. L. Rev. 583, 603 (1970).* The author points out correctly that the *Wilson* case involved a "formal" though not statutory
it is regrettable that the Supreme Court of Louisiana passed this opportunity to clarify much of the confusion surrounding the types, incidents, and effects of dedication.25

Parks and Cemeteries

In Akin v. Caddo Parish Police Jury26 taxpayers brought suit to enjoin the police jury from expanding the parish courthouse located in a public square, on the ground that the proposed improvements would impair the public use of the square as a park and as a place of rest, recreation, and entertainment. The court held that, in the absence of allegations showing that plaintiffs had an interest different from that of the general public, an exception of no right of action should have been maintained; but, since the suit affected "the orderly administration of an important local government function,"27 the court also considered the merits of the lawsuit and held that an injunction would not lie. The square was public property, its title being vested in the police jury and the police jury did not abuse its discretion in undertaking the proposed improvements. The disposition on the merits is correct: dedication does not exclude modifications of the public use in the general interest, and, in this respect, public authorities enjoy a wide measure of discretion. The alternate holding as to the exception of no right of action may be justified under one line of decisions dealing with taxpayers' suits; it is not relevant for suits tending to safeguard the general interest in the use of public places. Indeed, according to well-settled Louisiana jurisprudence, the state, its political subdivisions, and any interested citizen may bring actions for the preservation of public use.28

In O'Quin v. Burks29 plaintiffs, owners of lots in a subdivision, brought action for a judgment declaring that a certain area in the subdivision had been dedicated to public use as a park. A certain tract had indeed been designated in the recorded plat of the subdivision as a "Proposed Park"; further, the same plat contained language expressly dedicating streets and serv-

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27. Id. at 208.
29. 231 So.2d 660 (La. App. 2d Cir. 1970).
tudes for public utilities. The court held that the tract had not been effectively dedicated as a park and that the subdividers were under no obligation to comply with "proposed" uses of their property. The reasoning seems to run as follows: (1) there was no statutory dedication, because the subdividers did not actually intend to dedicate the tract as a park—this lack of intention became apparent from the fact that streets and servitudes for public utilities were expressly dedicated; (2) there was no implied dedication, because the subdividers did not manifest by subsequent acts an intention to dedicate; moreover, since "a dedication may be either statutory or implied but . . . it cannot be both," the statutory dedication of streets and servitudes precluded an implied dedication of the tract as a park. The validity of this reasoning and the conclusion reached by the court are questionable. Recent cases tend to protect the interests of persons buying property in a subdivision by finding a statutory dedication upon substantial compliance with the terms of the statute and by dispensing with the requirement of intention to dedicate. The designation of a tract as a "Proposed Park" should suffice as an effective statutory dedication. Moreover, a valid argument could be made that the requirements of a formal non-statutory dedication had been met. There is no reason why the statutory dedication of streets and servitudes should exclude the possibility of this third dimension of dedication.

In Vidrine v. Vidrine action was brought to declare public the Te Mamou Cemetery and to enjoin the record owner of the land from imposing charges for gravesites and from interfering with the public use of the cemetery. Defendant conceded that the cemetery was subject to public use, and thus the only issue before the court was his right to charge for gravesites. It appeared from the evidence that persons had been buried in the cemetery since the middle 1800's and that charges had been at times imposed by the record owners. The court held that the property had been dedicated to public use by virtue of an informal dedication; hence, title remained with the record owner who had the right to charge for gravesites. The ruling that the ownership of land had remained with the record owner is clearly compatible with a long line of Louisiana decisions dealing with...

30. Id. at 663.
33. 225 So.2d 691 (La. App. 3d Cir. 1969).
the effects of informal dedication.\textsuperscript{34} It does not necessarily follow, however, that the record owner has the right to charge for grave-
sites. The existence of this right should depend on the scope and
extent of dedication to public use, namely, whether the owners
of the land had or had not donated to the public the right to
bury dead without charge. The majority of the court was obvi-
ously satisfied with the evidence tending to show that the record
owners had not abandoned to the public that prerogative of
ownership, but had merely destined their land to be used as a
cemetery in perpetuity. In this light, the disposition of the case
is correct. In the course of its opinion, the court considered the
status of the cemetery as a public thing and the nature of the
interest of the general public in its continued use. “This dedica-
tion is in the nature of an irrevocable covenant running with
the land,” the court declared. “It is a real right, not a servitude
or usufruct, but an implied contractual relationship that binds
the owner irrevocably.”\textsuperscript{35} This language obviously confuses “cove-
nants running with land,” a typical common law institution,
with “real rights,” a purely civilian classification of rights. More-
over, it assimilates “real rights,” which are proprietary interests,
with “contractual relationships,” which give rise to merely per-
sonal rights. Judge (now Justice) Tate’s dissenting opinion is a
refreshing effort at reconciliation of the Louisiana jurisprudence
applicable to cemeteries with civilian principles. According to
him, cemeteries like the Te Mamou Cemetery are public things in
the sense that they are subject to public use; the interest of the
public is “a real right in the nature of a servitude.”\textsuperscript{36}

\textbf{Banks of Navigable Rivers}

With respect to private things subject to public use, the
Civil Code expressly regulates only the public use of the banks
of navigable rivers. Article 455 declares that “the use of the
banks of navigable rivers or streams is public,” although, ac-
cording to the same article, “the ownership of the river banks
belongs to those who possess the adjacent land.” The content of
the public use is that “every one has the right freely to bring
his vessels to land there, to make fast the same to trees which
are there planted, to unload the vessels, to deposit his goods, to
dry his nets, and the like.”\textsuperscript{37} According to well-settled Louisiana

\textsuperscript{34} See A. Yianopoulos, Civil Law Property § 35 (1968).
\textsuperscript{35} 225 So.2d 691, 697 (La. App. 3d Cir. 1969).
\textsuperscript{36} Id. at 693.
\textsuperscript{37} LA. Civ. Code art. 455.
jurisprudence, the servitude of public use under article 455 of the Civil Code is not "for the use of the public at large for all purposes." The language of this article is indicative of possible uses, but all uses must be incidental to the navigable character of the river and its enjoyment as an avenue of commerce.

In the 1969-1970 term, Louisiana courts considered the scope and extent of the public use of the banks of navigable rivers in three interesting cases. In *Tenneco, Inc. v. Oil, Chemical & Atomic Workers Union* the question arose as to whether picketing on the levee of a navigable river in furtherance of a labor dispute was a permissible public use. The majority of the court held that article 455 of the Civil Code does not encompass "picketing on the levee—a decidedly private use—and not one incidental to navigation or commerce on the river." Judge Redman dissented on the ground that picketing is a lawful exercise of the servitude of public use. The majority opinion is supported by a long line of Louisiana decisions placing a restrictive interpretation on article 455. In *Warner v. Clarke* suit was brought to enjoin the sheriff of East Carroll Parish from prosecuting plaintiffs for trespassing on a posted levee and on lands lying between the levee and a navigable river. Plaintiffs claimed that they had, as members of the general public, the right to fish and hunt on the banks of rivers under article 455, although the banks may be privately owned and posted under R.S. 14:63. The court correctly held that a declaratory judgment on this issue would have been improper due to the absence of indispensable parties, the landowners, and that an injunction could not lie because plaintiffs did not possess a property right threatened with invasion. Turning to the servitude of public use under article 455, the court observed that legislation enacted since the turn of the century made it clear that the general public does not have the right to fish and hunt on levees and on lands lying between levees and navigable rivers. Moreover,

   "The expression for the mooring of vessels, spreading nets, building cabins, etc., used in the Code, whilst they are permissive for those purposes, are not intended as restrictions of the use to those purposes alone, but as examples or illustrations of its applications."
40. *See Hébert v. T. L. James & Co., 224 La. 498, 70 So.2d 102 (1955); State v. Richardson, 140 La. 829, 72 So. 984 (1916); Chinn v. Petty, 163 So. 735 (La. App. 2d Cir. 1935).*
41. 234 So.2d 246 (La. App. 4th Cir. 1970).
42. *Id. at 249*
43. 232 So.2d 99 (La. App. 2d Cir. 1970).
44. *Id. at 102.*
under the jurisprudence interpreting article 455, fishing and hunting are not uses incidental to the navigable character of a stream.\textsuperscript{45} In \textit{Parish of Jefferson v. Universal Fleeting Co.}\textsuperscript{46} the Parish of Jefferson brought an action to enjoin defendants, the riparian landowner and his lessee, from using batture for commercial purposes, namely, for the mooring of barges. Plaintiff claimed that the use of the batture should be restricted to residential purposes in accordance with a directly applicable parish zoning ordinance. Question thus arose as to the validity of the zoning ordinance. The court correctly held that the zoning ordinance violated articles 455 and 457 of the Civil Code in that it attempted to do away with the servitude of public use and constituted an unauthorized exercise of the zoning power. The tying up of barges was the most logical use of the batture, the court observed, "since it is in the interest of commerce and navigation and is substantially similar to the uses contemplated and specifically guaranteed to the public in Article 455 of the Civil Code."\textsuperscript{47} The court pointed out that the riparian owner may use the batture himself, provided he does not unreasonably obstruct the public use of the banks.\textsuperscript{48}

\textbf{MOVABLES AND IMMOVABLES}

According to article 461 of the Louisiana Civil Code "the third and last division of things is into movables and immovables."\textsuperscript{49} The significance of this division lies primarily in the fact that different rules of property law apply to the different categories of things classified as movable or immovable, in connection with the scope, acquisition, protection, and transfer of rights.\textsuperscript{50}

In \textit{American Creosote Co. v. Springer}\textsuperscript{51} question arose as to whether the sale of a tract of land "with buildings and improvements" also included railroad trackage belonging to a person other than the vendor. The act of sale made no mention of the

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\footnotetext{45. See Delta Sec. Co. v. Dufrene, 181 La. 891, 160 So. 620 (1935); Delta Duck Club v. Barrios, 135 La. 357, 65 So. 489 (1914); Op. ATT'Y GEN. 214 (1968-68).}
\footnotetext{46. 234 So. 2d 88 (La. App. 4th Cir. 1970).}
\footnotetext{47. Id. at 91.}
\footnotetext{49. LA. CIv. CODE art. 461.}
\footnotetext{50. See A. YIANNOPOULOS, CIVIL LAW PROPERTY § 40 (1966).}
\footnotetext{51. 232 So.2d 532 (La. App. 4th Cir. 1969).}
\end{footnotes}
railroad trackage, but plaintiff, the vendor, claimed that the act had been passed with the understanding between the parties that the trackage was not included. Further, plaintiff claimed that the trackage had been leased from, and belonged to, the Illinois Central Railroad Company in accordance with the terms of a written though unrecorded lease of which the purchaser was aware, and that as a result of defendant's acts plaintiff had become obligated to Illinois Central Railroad Company in the amount of an indemnity bond securing execution of the terms of the lease. Plaintiff demanded a money judgment in the amount of his loss, that is, the amount of the indemnity bond. Defendant filed an exception of no cause of action, claiming that the railroad trackage was immovable property the title to which had passed to him along with the land as he had bought on the faith of the public records. The Court of Appeal for the Fourth Circuit affirmed a judgment sustaining defendant's exception of no cause of action. The railroad trackage, the court declared, was an immovable by nature as a "construction" under article 464 of the Civil Code. Therefore, in the absence of recorded claims against it, the trackage passed along with the land to the purchaser who had relied on the public records; moreover, parol evidence would be inadmissible to contradict the terms of the written act of sale. In determining that the railroad trackage was an immovable by nature, the court followed Morgan's Louisiana & Texas Railroad & Steamship Co. v. Himalaya Planting & Manufacturing Co.\(^{52}\) The view of the court was that this case has been only partly overruled by Caldwell v. Laurel Grove Co.,\(^{53}\) namely, to the extent that a vendor's privilege is concerned, and that the holding in the Morgan case that a railroad track is an immovable by nature under article 464 is still controlling. Another case, Louisiana Railway & Navigation Co. v. Cash Grocery & Sales Co.,\(^{54}\) involving classification of railroad tracks was distinguished. Judge Barnette dissented and filed a separate opinion. In his view, the Caldwell case is authority for the proposition that a railroad track may be movable property. The case under review involves highly interesting questions pertaining to the availability of oral testimony to clarify the terms of an act of sale as between the parties to the transaction, application of the public records doctrine in so far as the purchaser of land is concerned, and to the purposes and effects of the classification.

\(^{52}\) 143 La. 460, 78 So. 735 (1918).
\(^{53}\) 175 La. 928, 144 So. 718 (1932).
\(^{54}\) 150 So. 57 (La. App. 1st Cir. 1933).
of things as movable or immovable; but, since the supreme court has granted certiorari, comments will be withheld until final disposition.

In *Andrepont v. Acadia Drilling Co.* a tenant farmer sued for damages to his crops caused by defendant's mineral operations. Plaintiff had raised crops under a verbal lease while defendant had undertaken mineral exploration under a recorded lease over the same property. The Supreme Court of Louisiana on original hearing, affirmed a judgment dismissing the suit on the ground that the farmer tenant could not assert his separate ownership of the standing crops against the defendants. Following well-settled jurisprudence, the court declared that a lease, to be effective against third persons, must be recorded in accordance with R.S. 9:2721. In the absence of recordation, the court reasoned, standing crops are regarded as movables in the relationship between tenant and landlord and as immovables under article 465 of the Civil Code insofar as third persons are concerned. On rehearing, the court held that plaintiff could recover under a theory of stipulation *pour autrui*, namely, on the ground that the mineral lease between defendants and landowners contained a provision making defendants responsible for the damage to the crops. The court pointed out that plaintiff did not assert "secret claims or equities" unknown to defendants and that defendants were not third persons protected by the laws of registry insofar as plaintiff's claim was concerned. Justices Hamiter, Sanders, and Barham dissented, adhering to the views expressed in the original hearing. The final disposition of the case rested on the narrow ground that the separate ownership of standing crops, arising under the terms of a lease, whether recorded or unrecorded, might be asserted against a third person tortfeasor who has made a stipulation in favor of the lessee. It might be argued, however, that a tortfeasor should also be responsible to a lessee under Civil Code article 2315, even in the absence of any stipulation. Be that as it may, the final disposition of the case has nothing to do with the classification of standing crops as movable or immovable property. In this respect, the original opinion remains undisturbed and stands for three significant propositions of property law: (1) standing crops belonging to a lessee, whether under a recorded or unrecorded lease, are movable property; (2) this

separate ownership of movable property may always be asserted against the landlord—it may be asserted against third persons (other than tortfeasors) only if the lease is recorded; and (3) if the lease is unrecorded, third persons (other than tortfeasors) are entitled to regard the crops as part of the immovable property under article 465 of the Civil Code.

In *Flowers v. Patton*, an action on a promissory note issued for the purchase of a chicken broiler house, defendant pleaded failure of consideration. He argued that he did not acquire title to the chicken house since it was not located on land belonging to his vendor but on that of a third person, and as an immovable by nature, the chicken broiler house belonged to the owner of the land on which it was located. The court rightly held for plaintiff, pointing out that the builder of a house on the land of another may validly sell the house to third persons. Indeed, from the viewpoint of the law of obligations, defendant had bargained solely for a chicken broiler house and delivery of possession had been made. The fact that defendant could be disturbed in his possession in the future by the owner of the land should not cause a failure of consideration. From the viewpoint of property law, a house built by one on the land of another may be regarded as a distinct immovable by nature for certain purposes and as a part of the land for other purposes. However, according to well-settled jurisprudence, until such time as the owner exercises his options under Civil Code article 508, the builder is regarded as owner and may dispose of the house as he sees fit.

**Personal Servitudes;Usufruct**

In *Succession of Branch*, a recently emancipated minor brought action against his mother and former natural tutrix seeking a final accounting. Plaintiff's property consisted of a share in his deceased father's separate property and of a share in the community property subject to his mother's testamentary usufruct. The trial court ordered the mother "to file an accounting as to the community property, and a final accounting as to the separate property." Apparently, the order meant that

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56. 230 So.2d 654 (La. App. 2d Cir. 1970).
60. Id.
the mother should identify the property subject to her usufruct without undertaking actual distribution; but she should make, as tutrix, a final accounting of the separate property in order to terminate the tutorship. The court of appeal affirmed, adopting in part the reasoning of the trial court. The court seemed to distinguish between the obligations of the mother as tutrix and as usufructuary. Even if the usufructuary happens to be a tutrix, there can be no final accounting of the property subject to usufruct until termination of the enjoyment; but the tutrix must certainly render a final accounting as to property that is not subject to usufruct upon the emancipation of the minor.

In Heyse v. Fidelity & Casualty Co. question arose as to the right of a father having the enjoyment of his child's property to proceed in forma pauperis in an action for the recovery of damages for personal injuries suffered by the child. In Louisiana, "fathers and mothers . . . have, during marriage, the enjoyment of the estate of their children until their majority or emancipation." This right of parental enjoyment is regarded as a legal usufruct and is governed by the general rules of usufruct as well as by a number of special provisions. Thus, whereas article 588 of the Civil Code deals with the question of the apportionment of litigation costs as between usufructuaries and naked owners in general, article 589 declares that "[f]athers and mothers who enjoy the legal usufruct of the property of their children, are bound to support the expenses of all suits concerning that property, in the same manner as if they were owners of it."

Application of article 589 is subject to two conditions: the minor must have property subject to parental enjoyment and the litigation must be one "concerning that property." In the case under consideration, although the father had means he claimed that he was entitled to proceed in forma pauperis in an action brought by him as administrator of his child's property because the child did not have any property of his own. He relied on Fontenot v. United States Fidelity & Guaranty Co., which had held that a father's action for personal injuries suffered by his child is not an action "concerning that property" within the

61. See A. YIANNOPOULOS, PERSONAL SERVITUDES § 92 (1968).
63. LA. CIV. CODE art. 223.
64. See A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 52, 110 (1968).
65. LA. CIV. CODE art. 589.
66. 113 So.2d 33 (La. App. 1st Cir. 1959).
meaning of article 589. The Supreme Court of Louisiana overruled the *Fontenot* case and declared that a child's cause of action for personal injuries constitutes "property"; moreover, an action brought by a father having parental enjoyment for the recovery of damages suffered by his child as a result of personal injuries is an action "governing that property" within the meaning of article 589. Since the father is bound to bear the cost of litigation, he cannot proceed in *forma pauperis* under articles 5181 and 5182 of the Code of Civil Procedure, unless, of course, he is impecunious. The decision of the supreme court makes the availability of the *in forma pauperis* proceeding depend upon the financial condition of the father rather than the child. Since any cause of action that a child may have constitutes property, the child will never be found to be impecunious. This solution may not be an orthodox interpretation of articles 5181 and 5182 of the Code of Civil Procedure. If it were to be applied to all cases, the benefit of an *in forma pauperis* proceeding would be denied to all plaintiffs asserting valuable causes of action. But it is certainly a fully acceptable interpretation of articles 5181 and 5182 in relation to articles 223 and 589 of the Civil Code. Thus the father having the enjoyment of the property of his child under Civil Code article 223 must support expenses of litigation in accordance with Civil Code article 589, unless he is impecunious himself, in which case he may claim the benefit of *in forma pauperis* proceeding under articles 5181 and 5182 of the Code of Civil Procedure.

In *Succession of Bellinger*\(^67\) the issue was whether an income interest in trust given to a surviving spouse should be treated as equivalent to a usufruct for Louisiana inheritance tax purposes. The trust instrument had designated the settlor's descendants as principal beneficiaries and had conferred authority on the trustee to invade the principal for the maintenance and support of the income beneficiary. The tax collector claimed that the entire principal of the trust was taxable to the income beneficiary; the surviving spouse claimed that the income interest should be treated as a usufruct and taxed as such. The court held that the part of the deceased's disposable portion which fell within the trust was taxable to the income beneficiary because of the invasion provisions of the trust instrument; but that as to "the nondisposable portion or forced portion of the estate of the decedent which is in trust, the tax rules and regulations as

\(^{67}\) 229 So.2d 749 (La. App. 1st Cir. 1969).
The court reasoned that "income interest" is synonymous with "usufruct" insofar as the application of R.S. 47:2405 is concerned, although that statute does not use the term income beneficiary or income interest. They declared that an income interest in trust in favor of the surviving spouse over the forced portion of an estate inherited by children of the marriage is equivalent to a legal usufruct under article 916 of the Civil Code. Therefore, the court concluded the income interest of the surviving spouse was partially exempt from inheritance tax liability. The assimilation of an income interest in trust with usufruct may be correct for most purposes, including certain matters of taxation. One may question, however, the assimilation of an income interest in trust in favor of the surviving spouse, even if that interest is attributed to the forced portion inherited by children of the marriage, with the legal usufruct under article 916 of the Civil Code, which applies to community property exclusively. It is true that the legal usufruct of the surviving spouse may be confirmed by will, and that confirmation, for inheritance tax purposes, does not convert the legal usufruct into a testamentary usufruct. But it seems far-fetched to say that the creation of an income interest in trust in favor of the surviving spouse merely confirms the legal usufruct under article 916. A will granting a usufruct over community property inherited by issue of the marriage is quite different from an instrument creating an income interest in trust.

In Barry v. United States Fidelity & Guaranty Co. action was brought for the recovery of damages for the destruction of an automobile by plaintiff who was a surviving spouse in community. Plaintiff sued as owner of an undivided half and legal usufructuary of the other half of the automobile. The district judge rejected plaintiff's claim for damages to the automobile, apparently on the ground that indispensable parties, namely, the naked owners of an undivided one-half of the automobile, had not been joined. In a well considered opinion grounded on the applicable articles of the Civil Code, the Court of Appeal for the Third Circuit held that the naked owners of an undivided share in

68. Id. at 751.
71. 236 So.2d 229 (La. App. 3d Cir. 1970).
the automobile were not indispensable parties within the meaning of article 646 of the Code of Civil Procedure. The conclusion reached by the court is a welcomed functional application of legislative texts, designed to achieve desirable practical results.

The appellate court founded its decision on the ground that the usufruct of the surviving spouse does not terminate when an individual thing subject to his or her legal enjoyment is totally destroyed as a result of the fault of a third person; it attaches instead to the claim for damages due by the wrongdoer. This ground accords with both law and reason. According to a proper interpretation of articles 613-15 of the Civil Code, made in the light of historical sources, a usufruct terminates only as to individual things totally destroyed by accident as a result of a fortuitous event (cas fortuit).\(^{72}\) If the total loss of an individual thing is attributed to the fault of the usufructuary or the naked owner, the usufruct continues to exist and the consequences of the loss are determined under the general rules of delictual obligations or under the provisions governing the respective obligations of the usufructuary and the naked owner.\(^{73}\) If the total loss is attributed to the fault of a third person, the principle of real subrogation governs and the usufruct attaches to the claim against the wrongdoer.\(^{74}\) Indeed, it would be both inequitable and contrary to reason to deprive the usufructuary of his enjoyment in case the property is destroyed as a result of the fault of a third person; it suffices that the usufructuary bears the risk of a purely accidental loss. Modern civil codes go even further and declare that, in all cases of loss or destruction of the property, the usufruct attaches to the claim for payment, compensation, or indemnity due by reason of insurance or damages for the destruction of the thing.\(^{75}\)

Civil Code articles 613-15 contemplate the destruction of individual things and are clearly applicable to a usufruct created by particular title. The applicability of these articles to a universal usufruct or to a usufruct by universal title is at best questionable. It should be apparent that a usufruct bearing on a mass

\(^{72}\) See Planiol et Ripert, Traité de droit civil français 841 (2d ed. Picard 1952).

\(^{73}\) See 2 Aubry et Rau, Droit civil français 694 (7th ed. Esmein 1961); 5 Baudry-Lacantinerie, Traité théorique et pratique de droit civil 485 (2d ed. Chauveau 1899).

\(^{74}\) See note 73 supra; A. Yiannopoulos, Personal Servitudes § 87 (1968).

\(^{75}\) See, e.g., Greek Civ. Code art. 1171; but cf. BGB § 1065 (Kohlhammer 1949).
of things does not terminate because a single thing has been destroyed. Question may arise, however, whether the usufruct terminates insofar as the thing that has been destroyed is concerned. In the case under consideration, the court reached the conclusion that "it would not be good policy to allow partial termination" of the survivor's usufruct. This conclusion is fully justified. There is no reason why a universal usufructuary or a usufructuary under universal title should be subjected to a series of suits for accounting as things subject to the usufruct are lost or destroyed. One accounting at the end of the usufruct is what the law provides and what is needed, unless of course things are destroyed by the fault of the usufructuary and the interests of the naked owner are imperiled. If the usufructuary by universal title happens to be the survivor in community, additional reasons exist why the usufruct should not terminate even as to individual things lost or destroyed. According to well settled Louisiana jurisprudence, the survivor's usufruct does not terminate "merely because the property to which the usufruct attached was changed in form"; termination of the usufruct would be inconsistent with the policy underlying article 916 of the Civil Code.

Once it is determined that the usufruct of the surviving spouse does not terminate where individual things are destroyed by the fault of a third person, it ought to follow that the naked owners are not indispensable parties under article 646 of the Code of Civil Procedure in an action brought by the usufructuary against the wrongdoer. Since the perfect usufruct is now imperfect, the usufructuary is owner of the claim for damages; the former naked owner is merely a creditor of the usufructuary for the amount of the claim. As creditor, the former naked owner may be a necessary party in certain circumstances though not an indispensable party. Of course, if the usufructuary commits any fault in the collection of the claim, the former naked owner may collect damages from him at the end of the usufruct.

It is true that in Tennessee Gas Transmission Co. v. De-rouen the Supreme Court of Louisiana indicated that a naked

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77. State, Dep't of Highways v. Costello, 158 So.2d 850, 852 (La. App. 4th Cir. 1963). See also Succession of Dielmann, 119 La. 101, 43 So. 972 (1907).
79. Id. art. 567 (2).
80. 239 La. 467, 118 So.2d 889 (1960).
owner is an indispensable party in an expropriation proceeding. Leaving aside the question whether a single decision may be a binding precedent in Louisiana, the Derouen case is distinguishable from the Barry case. In the first place, it can be argued that expropriation is quite different from the destruction of property by the fault of a third person, and that a usufruct other than that of the surviving spouse does terminate. Secondly, in cases of expropriation of immovable property, the naked owner may be an indispensable party because expropriation is a forced sale and the usufructuary is without authority to dispose of the property. In cases involving destruction of things by the fault of a third person, the naked owner is not an indispensable party because the usufructuary does not dispose of any property; he merely collects his own claim.

PREDIAL SERVITUDES

In Rockhold v. Keaty plaintiffs sought a right of passage over defendant's property under article 699 of the Civil Code. Plaintiffs originally owned a tract of land which had access to a public highway; however, following expropriation of part for the construction of a controlled-access highway, plaintiffs' remaining property was landlocked. The controlled-access highway was the public road nearest to plaintiffs' property, but there could be no access to it under either federal or state law. Hence, plaintiffs asked for a right of passage over a neighbor's property, which would give access to other property of plaintiffs that was still connected with a public road. The lower court, relying on the authority of English Realty Co. v. Meyer, held that property is not "enclosed" within the meaning of article 699 when it borders a highway, even though the highway is access-controlled and allows neither ingress nor egress. Accordingly, it sustained an exception of no cause of action and granted a motion for summary judgment. On certiorari, the supreme court affirmed though for different reasons. In a well reasoned opinion, Justice Barham undertook to give a functional interpretation to Civil Code article 699 in the light of contemporary exigencies, and concluded that plaintiffs' land had become enclosed within the contemplation of the article; the English Realty case was

81. See A. Yianopoulos, Personal Servitudes § 87, text at n. 45 (1968).
83. 237 So.2d 663 (La. 1970).
84. 228 La. 423, 82 So.2d 698 (1955).
confined to its own facts. Since, however, the passage sought by plaintiffs was not to a public road but to other land of the plaintiffs, and since there were shorter, more direct, and more feasible routes of passage to public roads, plaintiffs were not entitled to the relief granted by the Civil Code.

In Nicholson v. Holloway Planting Co.\textsuperscript{85} plaintiff landowner brought action against the owner of adjacent land for the enforcement of a natural servitude of drain under article 660 of the Civil Code. Plaintiff claimed that his estate was situated above defendant's and that he was entitled to empty waters into the estate situated below both through natural channels and by means of certain artificial works. He sought to enjoin defendant from obstructing the natural flow of the waters and to compel him to remove all obstacles blocking this flow. Defendant claimed that the two estates had the same elevation, thus denying the existence of a servitude of drain; in the alternative, defendant argued that plaintiff was not entitled to increase the volume or velocity of the flow by artificial works and asked for an injunction prohibiting plaintiff from constructing and maintaining such artificial works.

The lower court found, on the basis of conflicting evidence, that plaintiff's estate was situated above, but held that plaintiff did not have the right to make the natural servitude more burdensome for the servient estate by man-made works. It conceded that plaintiff had the right to improve his plantation for agricultural purposes and could construct artificial means of drainage, but any excess flow resulting therefrom could not be emptied onto defendant's land. The court was rightly impressed with defendant's argument that article 660 of the Civil Code should be given a functional or objective interpretation in the light of modern engineering discoveries and present day scientific knowledge of draining farm lands by comprehensive artificial systems. Had plaintiff undertaken the construction of a modern irrigation system, he would be able to empty waters into a public waterway. Such an approach would not ignore rules of enacted law. It would permit a logical application of the rules of the Civil Code in the light of contemporary technological development, and it would realize the original intent of the law, which is to encourage the productive use of lands. The court, however, did not find it necessary to indulge in such an interpretation of article 660,

\textsuperscript{85} 255 La. 1, 229 So.2d 679 (1969).
since it was able to find that plaintiff was not entitled to the relief sought under the plain language of the law. Defendant's alternative demand for an injunction against plaintiff was not considered for procedural reasons.

Defendant applied to the supreme court for certiorari, assigning as errors the recognition by the lower court of the servitude of drain and the refusal to consider the demand for an injunction against plaintiff. A divided supreme court affirmed the judgment of the lower court on the grounds that there was sufficient evidence to establish the existence of a natural servitude of drain and that defendant was not entitled to an injunction under the substantive law. According to the majority opinion, plaintiff had the right to accelerate the flow of waters by artificial means, though not the volume of the waters emptying into defendant's land. But, since the record contained neither evidence that plaintiff had abused his privilege nor evidence that the artificial works of plaintiff had diverted any additional water, injunction could not lie. Justice Sanders dissented on the ground that plaintiff had not carried the burden of proof of the existence of a natural servitude of drain.

In *Reymond v. State, Department of Highways* a landowner brought action against the state and its contractor for the recovery of damages resulting from highway construction. Plaintiff claimed "severance or consequential damages"; namely, an indemnity for deprivation of easy and direct access to the property, for impairment of view, and for the inconvenience and noise resulting from heavy traffic in the vicinity. In addition, plaintiff claimed an indemnity for structural damages to her home resulting from pile-driving operations. On certiorari, a divided supreme court held that the department of highways is no longer immune from suit and liability; that "[d]amages which cause discomfort, disturbance, inconvenience, and even sometimes financial loss as an ordinary and general consequence of public improvements are not compensable, and are considered damnum absque injuria," and that recovery for structural damage may be claimed under article 1, section 2, of the Louisiana Constitution though not under article 667 of the Civil Code. In the course

87. Id. at 449, 231 So.2d at 384. Justices Hamlin, Summers, and Sanders dissented from this holding and filed separate opinions.
of its opinion, the court undertook to clarify, by way of dictum,\textsuperscript{88} the scope of articles 667-69 in the field of civil responsibility.

Discussion of the proper interpretation of article 1, section 2, of the Louisiana Constitution is omitted, because this is an expropriation matter discussed elsewhere in this symposium. The question whether recovery for structural damage should be based on article 1, section 2, of the Constitution or on article 667 of the Civil Code may be disposed of briefly. One may argue that article 667 should not determine the liability of public bodies or their contractors undertaking the execution of public works.\textsuperscript{89} This liability may be adequately covered by rules of public law which render unnecessary resort to the Civil Code. The question of the scope of application of articles 667-69, however, requires comment, because it concerns fundamental principles of Louisiana civil law.

According to the majority opinion, grounded on a literal interpretation of the text of Domat,\textsuperscript{90} article 667 "prohibits a proprietor of an estate from constructing and keeping buildings, edifices, structures, levees, and other such works upon his estate which do damage to a neighbor or deprive the neighbor of the facility of enjoying his own estate. This article is applicable only to structural changes in or on the land, and it is the existence of the thing, the construction, or the change upon the estate which must give rise to the damage."\textsuperscript{91} Thus, article 667 "is inapplicable to the activities of man . . . . The redress which the article affords, if any, exists only in favor of a proprietor and then only

\textsuperscript{88} Cf. dissent by Justice Hamlin, \textit{Id.} at 463, 231 So.2d at 389: "I do not believe that the discussion of Article 667 of the Revised Civil Code in the majority opinion was necessary to a decision in the instant matter"; and dissent by Justice Sanders, \textit{Id.} at 466, 231 So.2d at 390: "Although reliance upon Article 667 of the Louisiana Civil Code is unnecessary for recovery in the present case, I must note that the language of the majority opinion unsettles the prior jurisprudence construing this Article."

\textsuperscript{89} It ought to be noted that certain Louisiana courts have been reluctant to apply article 667 of the Civil Code against the state. \textit{See, e.g., Klein v. Department of Highways, 175 So.2d 454 (La. App. 4th Cir. 1965), cert. denied, 248 La. 369, 178 So.2d 658 (1965) (streets and highways are not the subject of ownership contemplated by article 667 to bring a plaintiff within the right of action for damages to property against the state). See also Picou v. Department of Highways, 224 So.2d 102 (La. App. 4th Cir. 1969); Bazanac v. State, Dept' of Highways, 218 So.2d 121 (La. App. 4th Cir. 1969) (exception of no right of action sustained; Department of Highways immune from liability). On certiorari, the two cases were consolidated and reversed. Bazanac v. Department of Highways, 255 La. 418, 231 So.2d 373 (1970)."

\textsuperscript{90} \textit{See 1 OEUVRES DE J. DOMAT} 333 (ed. Remy 1835).

\textsuperscript{91} \textit{Reymond v. State, Dept' of Highways, 255 La. 425, 442, 231 So.2d 375, 381 (1970).}
against the proprietor of a nearby estate for construction or plantings upon that estate which by their very existence deprive the former of the use and enjoyment of his property or which cause him damage."92 The court noted that Louisiana courts have "fallaciously interpreted and applied Article 667 for many years"93 but did not overrule the jurisprudence "which has allowed recovery for damages resulting from the use of dangerous instrumentalities and materials or man's engagement in inherently hazardous activities."94 It simply found article 667 inapplicable in such situations, and declared that there is no need to "state the basis, authority, or source for recovery in cases of this nature."95 Further, since article 667 has often been treated in parity with articles 668 and 669, the court concluded that article 669 "does not establish a predial servitude under the Louisiana civilian concept."96

The literal interpretation of the text of Domat, expounded by the majority opinion, is undoubtedly correct. The examples furnished by Domat refer, indeed, to "constructions" rather than "acts." Question arises, however, whether the text of Domat ought to control in the interpretation of the word "work" in article 667. It is true, of course, that article 667 reproduces verbatim a passage from the treatise of Domat. According to the newly published notes of Moreau-Lislet, however, article 15, page 130, of the Digest of 1808, corresponding with article 667 of the 1870

92. Id. at 444-45, 231 So.2d at 382.
93. Id.
94. Id. at 445, 231 So.2d at 383.
95. Id.
96. Id. at 443, 231 So.2d at 382 n. 6. According to the majority opinion, the reasons why article 669 does not establish a servitude are these: "First, by providing redress for those in the same house it would require a servitude on an estate in favor of the same estate. Second, by providing redress for those in neighboring houses it appears to give a cause of action for enforcing its provisions to persons other than the proprietor of an estate. Such results are contrary to our theory that predial servitudes run with land and in favor of the proprietor of the estate." Id. It is submitted that neither reason is well taken. Under the Louisiana Civil Code, as well as under special legislation, an apartment in a house may be a separate immovable. See La. Civ. Code art. 506; La. R.S. 9:1121-42 (1950). Thus, article 669 does not necessarily presuppose a servitude on an estate in favor of the same estate, which, of course, is not legally possible. Moreover, there is no validity to the assertion that the express language of this article should be disregarded simply because it is contrary to the "theory" that predial servitudes run with the land in favor of the proprietor of the estate. According to the civilian tradition, the so-called natural servitudes must be regarded as limitations on the content of ownership rather than as servitudes in the strict sense of the word. See 2 Aubry et Rau, Droit civil français 280-283 (7th ed. Esmein 1961); 2 Marty et Rhyanda, Droit civil 182-85 (1965); Yiannopoulos, Predial Servitudes; General Principles: Louisiana and Comparative Law, 29 La. L. Rev. 1, 44 (1968).
Code, refers to part 3, tit. 32, law 13; Fuero Real, book 3, tit. 4, law 3; Domat, vol. 1, part 1, book 1, tit. 12, sec. 2, law 8; Febrero, cont. vol. 2, ch. 4, s. 9 no. 166-169. Thus, the text of Domat appears to be only one of the references and third in order of sequence. First in order of sequence is the reference to the Siete Partidas, which until 1825, and possibly until 1828, were directly applicable in Louisiana. In the light of this newly found evidence it is submitted that the redactors of the Digest of 1808 apparently intended to utilize the text of Domat in order to express an idea common to all the sources they had inspected. Partida 3, tit. 32, law 13, indicated in the Moreau-Lislet notes as the primary source of article 667, declares the principle which all other sources, including Domat, reiterate: "For as was said by the ancient sages, although a man has the power to do what he pleases, upon his own ground, yet he ought to do in such a manner, as to cause no damage, or harm, to any other person." This is a fundamental principle of the civil law, formulated first by Ulpian and expounded by civilian writers through the centuries. Quite independently from Domat and from the other authors cited in the Moreau-Lislet notes, Pothier declared: "Vicinage obliges the neighbors to use their estate in such a manner as to cause no damage to their neighbors. This rule must be understood in the sense that, although one is at liberty to do with his estate whatever he pleases, still one can do nothing which may cause injury to his neighbor." In the light of this unbroken civilian tradition, a literal interpretation of the word "work" in article 667 to mean exclusively "construction" is too narrow. This article, as Justice Sanders pointed

97. See Reprint of Moreau-Lislet's Copy of a Digest of the Civil Laws Now in Force in the Territory of Orleans art. 15 at 130 (1808), known as the de la Vergne Volume.
98. See La. Civ. Code art. 3521 (1825); Cottin v. Cottin, 5 Mart. (O.S.) 93 (La. 1817); Hayes v. Berwick, 2 Mart. (O.S.) 138 (La. 1812).
100. 1 Moreau-Lislet and Carleton, The Laws of the Siete Partidas 440 (1820). It is significant that the translators cited in this connection "C. art. 15, p. 130." Id.
101. See Ulpian, Digest bk. 1, tit. 1, l. 10: Iuris praecpta sunt haece: honeste vivere, alterum non-laedere, suum quique tribuere (The precepts of the law are these: to live honorably, to harm no one, and to attribute to each his own.)
102. See Pothier, De la société No. 235, 4 Oeuvres de Pothier 330 (6d. Bugnet 1861).
out in his dissenting opinion, was apparently intended to recognize the sic utere doctrine.\textsuperscript{103}

While the literal interpretation of article 667 in the light of its historical sources might leave room for the view that the word "work" means merely "constructions," a teleological interpretation of the same article leads to the conclusion that the word "work" ought to include "acts." In other words, as a matter of policy, it is preferable to apply article 667 to all situations in which constructions or activities cause unwarranted harm to property. The contrary view would not only unsettle Louisiana jurisprudence and would write out of the Code the sic utere doctrine,\textsuperscript{104} but it would eliminate a most important legislative basis for civil responsibility and result in unnecessary importation of a common law tort doctrine.

For almost two centuries, Louisiana courts, following an uninterrupted civilian tradition, have understood article 667 to establish the sic utere doctrine and to cover constructions as well as activities on an estate that cause unwarranted harm to another estate. It is true, of course, that courts have not always been consistent in the application of article 667, and that this article has been said to establish liability for negligence, liability without fault, and even quasi-contractual liability. In this respect, there is room for clarification and for a much needed improvement of the law, but it is an unacceptable solution to suppress the article and to sweep the old cases "under the rug."\textsuperscript{105}

In the Louisiana Civil Code, the sic utere doctrine does not presuppose a servitude in the ordinary sense, and, therefore, the obligation not to cause harm to property need not be regarded as a charge laid on an estate in favor of another estate. The concept of sic utere is, indeed, much broader than that of an obligation arising from a servitude. The doctrine may have been formally established in the framework of legal servitudes as an obligation arising by operation of law, but it is not necessary that its applications be limited to relations between estates. It is just an historical accident that obligations arising from vicinage

\textsuperscript{103} See Reymond v. State, Dept of Highways, 255 La. 425, 466, 231 So.2d 375, 390 (1970): "The majority advances the opinion that Article 667 applies only to buildings, edifices, structures, levees and other structural changes in and on the land that produce damage to the neighbor. It restricts the Article to only one category of estate use, undermining the assumption that the Article serves as a statutory base for the sic utere doctrine."

\textsuperscript{104} See dissenting opinion by Justice Sanders, Id. at 466, 231 So.2d at 391.

\textsuperscript{105} Id.
have been classified in the Louisiana and French Civil Codes as servitudes arising by the operation of law. According to accurate analysis, adopted in modern civil codes, the obligations of vicinage are treated as limitations on the right of ownership. But whether regarded as limitations on the right of ownership or as legal servitudes, the obligations arising from vicinage are specific applications of the sic utere doctrine. Writing the sic utere doctrine out of the Louisiana Civil Code would thus affect not only the law of predial servitudes but also broad fields of the civil law.

From another viewpoint, it is important for courts in a state of codified laws to have a legislative basis in order to achieve flexibility in the administration of justice. Article 667 of the Civil Code has served this function well and it may continue to do so. The diversity of opinion as to its meaning and ramifications, as to the kind and measure of the liability that it imposes, is in this respect welcome because it allows a variety of approaches for the resolution of important social conflicts. This article may well be expanded to form the basis of a doctrine of "risk" liability or even the basis of a Louisiana doctrine of abuse of rights. It should not be condemned to obscurity by a narrow interpretation. It is hoped that, should the occasion arise, the Supreme Court of Louisiana will reconsider the matter of the proper interpretation of article 667 and will remove the uncertainty presently surrounding it.

In effect, the majority opinion of the supreme court has sought to excessively restrict the area of application of article 667 of the Civil Code, leaving room for the expansion of common law tort doctrine. The wisdom of this approach may be

106. See BGB §§ 906, 907, 908 (Kohlhammer 1949); GREIK Civ. Code arts. 1003, 1004, 1005.
108. Cf. dissenting opinion by Justice Sanders, Reymond v. State, Dep't of Highways, 255 La. 425, 468, 231 So.2d 375, 390 (1970). In the majority opinion, the court declared that "we need not and do not state the basis, authority, or source for recovery in cases of this nature." Id. at 446, 231 So.2d at 383. This is a surprising assertion, because Louisiana is a state of codified laws.
109. In France, even in the absence of a legislative foundation, courts have developed a doctrine of abuse of rights. See 3 Planiol et Ripert, Traité pratique de droit civil français 452 (2d ed. Picard 1952). In modern civil codes, the doctrine of abuse of rights has been codified. See, e.g., GREIK Civ. Code art. 281: "The exercise of a right is prohibited if it obviously exceeds the limits imposed by good faith, good mores, or those imposed by the social or economic purpose of the right."
110. This occasion may well be the case of Chaney v. Travelers Ins. Co., 238 So.2d 847 (La. App. 1st Cir. 1970), cert. granted, 239 So.2d 358 (La. 1970).
questioned. Of course, common law may be perfectly competent to give remedies in most matters of tort law, but so is the civil law. Apart from the relevance of article 667 in the field of civil responsibility in general, one ought to consider its relevance in cases regarded as matters of "nuisance" in common law jurisdictions. If the intention of the majority opinion of the supreme court were to facilitate adoption of the common law of nuisance, additional questions arise as to the advisability of the court's action. The law of nuisance is perhaps the least developed branch of the common law of torts. Wholesale adoption of the common law of nuisance, therefore, may not be in the best interests of Louisiana.

SUCCESSIONS AND DONATIONS

Carlos E. Lazarus*

SUCCESSIONS

Transmission Upon Death

In Succession of Willis v. Martin¹ some two weeks after the death of Olan Willis, his daughter Audry, as his sole surviving heir, sold two lots formerly belonging to the deceased. This suit was instituted by the vendees to traverse the descriptive list filed by the administratrix in the succession of Olan, and to remove therefrom the two lots which were listed by the administratrix as forming part of the estate of the deceased. Although the court admitted that the property of the deceased was transmitted to the heir by operation of law, and that the heir could validly convey his interest therein, the vendee, the court stated, held

¹See W. Prosser, Torts § 87 at 592 (3d ed. 1964): "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; . . . there has been a rather astonishing lack of any full consideration of 'nuisance' on the part of legal writers. It was not until the publication of the Restatement of Torts in 1939 that there was any really significant attempt to determine some definite limits to types of tort liability which are associated with the name."

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