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Private Law: Property

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It is submitted that such conclusions are the product of a false logic. Indeed, there is, first of all, no more reason for saying the parent is not liable in case the minor's wrong is both tortious and in breach of contract than there is for saying that he is liable. Is a harm less a tort because the wrongdoer caused it while under contract — unless the contract absolves him of liability — or because contract law quite independently of tort law would also make him liable for it? Let it be assumed that the contract is invalid — as the courts said it was in *Simoneaux* and may have considered it to be in *Nunez* — would there not be, even under the logic employed by the decisions, even more reason to recognize the liability in tort?

What has been said above does not deny that in particular cases liability may not exist because of other reasons. Thus, in *Simoneaux* the court found the insured "himself at fault" in allowing the minor to drive his automobile after the minor's father had told the insured he did not wish his son to do so. So, too, though this does not appear in the opinion, the insured in *Nunez* may have rented the airplane to the minor knowing him to be such and not to have the authorization of his father. In such a case, perhaps non-liability of the father might be based on an assumption of risk by the insured. But, regardless of the merit of such possible defenses, it can hardly be said that one is not liable in tort simply because he was in contractual relationship with the one wronged.

PROPERTY

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NAVIGABLE WATERWAYS

State v. Cenac[1] involved a state claim to ownership of the bed of a navigable lake which had been patented to the defendants' author in title. The defense was the six-year liberative prescrip-

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1. 132 So. 2d 897 (La. App. 1st Cir. 1961), writ refused, 241 La. 1055, 132 So. 2d 928 (1961). *Accord*, Olin Gas Transmission Corp. v. Harrison, 132 So. 2d 721 (La. App. 1st Cir. 1961), cert. denied Nov. 6, 1961.

tive period against suits to set aside state patents.[2] The state conceded that the decision in *California Co. v. Price*[3] holding that this prescriptive period would run against the state and would bar the state's assertion of title to the bed of a navigable waterway was "squarely in point," but contended that this decision, and the prior cases on which it was based, should be overruled.

The court of appeal characterized the state's contention that it had authority to set aside the prior decision by the Supreme Court as "astounding," stating it was not "unaware of its sheer fantasy and total lack of reason or legal foundation." The court then reviewed the prior jurisprudence dealing with the question and concluded that these decisions constituted "an insurmountable obstacle to the state's claim."

The real importance of the case, however, lies in the denial of certiorari by the Supreme Court. The court stated, "we find no error of law in the ruling complained of." Justices Hawthorne, Hamlin, and Sanders were of the opinion that the application for a writ should be granted. But Justice Fournet, who had dissented from the majority opinion in *California Co. v. Price*, concurred in the refusal to grant the application with written reasons, stating:

> "While it may be considered regrettable that I was unable to convince my learned colleagues of the far reaching effect of that decision at the time, I do not feel that this Court can now in good conscience afford to deal differently with respect to the rights of all other such patents. . . . Indeed there would be no stability of titles in this state if every time there is a change of membership of this Court previously adjudicated rights are to be changed to accord with the views of the individual members as newly composed."

This action by the Supreme Court should end the speculation that the state might be able literally to regain the ground which it lost as a result of the line of decisions culminating in *California Co. v. Price.* However, in view of the amounts of money involved and the state's present fiscal plight, it can hardly be doubted that the state will make yet another effort to convince one more Supreme Court Justice that all of the beds of navigable bodies of water — and particularly all of the min-

2. LA. R.S. 9:5661 (1950).
3. 225 La. 706, 74 So.2d 1 (1953).

erals lying under them — belong to the state notwithstanding patents to private owners and the apparent running of prescriptive periods against attacking those patents.

The Civil Code provides three basic situations in which the movement of a river or stream (whether navigable or not) may change the ownership of riparian property. Articles 509 and 510 provide that where a river or other stream successively and imperceptibly adds soil to a bank, the riparian owner adjacent to the newly deposited or exposed land acquires ownership of the land. Where a river or stream suddenly opens a new bed, Article 518 is applicable, rather than the articles on accretion and dereliction. Under this article no change is made in the ownership of the land between the old bed and the new bed as would be the case with accretion and dereliction, but the owner of the soil taken by the new bed is given ownership of the old bed as indemnification for the land lost. A third possibility is envisaged by Article 511 of the Civil Code, which provides that when a river or stream by a sudden eruption carries away a considerable tract of land from one field and deposits it at another place in such a manner that the property is susceptible of being identified, the owner of the land carried away may claim his property if he does so within a year or before it is possessed by the person to whose property it becomes attached.

While the first two situations (imperceptible change and the opening of a new bed) occur frequently, the third situation, that of a piece of land being washed down a river and deposited intact at another area, would be a noteworthy geological phenomenon. Whether this could ever happen is doubtful but, in any event, there is no evidence that Article 511 of the Civil Code, dealing with such circumstances, has ever been utilized.

In *Stephens v. Drake*,[4] the plaintiff in an action of jactitation owned a peninsula of land on the Red River. After a flood, the river took a new course, cutting off a large section of the peninsula and leaving an ox-bow lake where the old bend had been. The defendant, the riparian owner of the other side of the old river bed, claimed ownership to the portion of the peninsula between the old river bed and the new bed, alleging that the land had been carried away and deposited against his land more than one year before and, apparently, alleging possession. The

4. 134 So.2d 674 (La. App. 2d Cir. 1961), cert. denied Jan. 15, 1962.

Court of Appeal, Second Circuit, affirmed the holding of the lower court to the effect that there was no carrying away of the land as contemplated in Article 511 of the Civil Code but, rather, a change in the bed of the river or stream as contemplated in Article 518. Thus, the plaintiff did not lose ownership of the portion of the old peninsula between the old river bed and the new. Furthermore, under Article 518, the plaintiff was decreed to be the owner of the old channel of the river.

This case provides a good illustration of the proper application of the law concerning the movement of rivers. It also gives an example of the aleatory quality of riparian ownership. The state formerly owned the bed of the river which encircled the plaintiff's peninsula.[5] When the river changed its bed to go across the neck of the peninsula, it necessarily took a shorter route than the old ox-bow. Thus, the plaintiff lost the small area taken by the new bed of the river and apparently gained from the state the much larger area that constituted the old river bed. On the other hand, the state gained and the riparian owners lost property while the bow was being formed and while the area covered by the bed of the river was thereby being increased.

BOUNDARIES

The case of *Baudin v. Charrier*[6] raises the issue of the difference between the acquisitive prescription of thirty years under Article 852 of the Civil Code and under Articles 3499-3505. Where estates are contiguous, each proprietor has a right to compel his neighbor to fix the limits of their properties.[7] To establish the boundary, the titles of the respective parties must be examined to determine the theoretical or ideal boundary, but this determination is not conclusive. Article 852 of the Civil Code provides, in effect, that the person who stands to lose by the drawing of the ideal boundary will be permitted to retain his land if he can show that either he, or those under whom he holds, have enjoyed uninterrupted possession of the land in question during thirty years.

A long line of jurisprudence, of which perhaps the most illustrious case is *Opdenwyer v. Brown*,[8] has distinguished the thirty-year prescription described in Article 852 from that of

5. LA. CIVIL CODE art. 453 (1870).
6. 137 So.2d 440 (La. App. 3d Cir. 1962).
7. LA. CIVIL CODE art. 823 (1870).
8. 155 La. 617, 99 So. 482 (1924).

Articles 3499-3505. Under the jurisprudence, to prescribe under Article 852 requires visible boundaries but does not require a juridical link for the "tacking" of possession, while prescription under Articles 3499-3505 requires a juridical link for "tacking" but is not dependent upon visible boundaries.

The validity of this dichotomy is doubtful. The French Civil Code, from which our prescriptive articles were copied, although providing an action to establish boundaries, does not provide special prescriptive rules in boundary actions.[9] The redactor's comment on Article 848 of the Louisiana Civil Code of 1825 (now Article 852 of the Louisiana Civil Code of 1870) does not reveal any intention to establish a separate rule of prescription for boundary matters.[10] It seems more likely that the intention was to make it clear that, in determining a boundary, the legal boundary is not always what might be shown in the titles of the parties, because ownership may have changed through acquisitive prescription. The slight differences of language between Article 852 and the general articles on prescription may have arisen from the abbreviated form in which Article 852 mentions concepts described in detail in the general articles on prescription.[11] Further, the Louisiana Civil Code contains numerous inaccuracies, particularly where articles not found in the French Civil Code were added by the redactors, as was the case with Article 852. Justice St. Paul, in the *Opdenwyer* case, may have been too charitable when he stated that the redactors of our Code "understood perfectly the language they used, and wrote what they wrote, not hastily but with extreme care."[12]

In *Baudin v. Charrier*, the plaintiff and defendant had acquired their property from a common ancestor. The plaintiff

9. FRENCH CIVIL CODE art. 646.

10. The comment merely states: "The rules of prescription certainly require, that one cannot prescribe against his own title. (Code Art. 48, p. 485). But this means, that one cannot change at his own pleasure the cause and principle of his possession, and it does not prevent a person from prescribing beyond his title. Thus, it is conceded that the purchaser of a piece of land designated as containing one arpent can, by prescription, extend his right to a greater quantity, as a stranger could do without title, that is by possession of thirty years." 1 LOUISIANA LEGAL ARCHIVES, PROJECT OF THE CIVIL CODE OF 1825, 101 (1942).

11. The apparent difference in the right to utilize the possession of prior holders has, perhaps, been exaggerated in our jurisprudence by a restrictive interpretation of the right to add possessions under the general prescriptive articles. "Tacking" could have been allowed in all prescriptions of 30 years where there is a juridical link between the parties as to land contiguous to the disputed area, even if the land in dispute is not described in the title. If this view had been accepted, there would probably be no difference in the right "to make the sum of possessions" under the two sets of articles.

12. 155 La. 617, 624, 99 So. 482, 484 (1924).

brought an action to establish a boundary, and the court-appointed surveyor determined that the tract of the common ancestor contained less than it had been described as containing. Thus, under Article 851 of the Civil Code, each lot would have to be reduced proportionately "in the absence of possession by one or more of the parties sufficient to establish prescription."

The north and south boundaries of the land in question were fixed by a fence and a bayou. The defendant owned the tract immediately to the west of the plaintiff and for twenty years farmed beyond his boundary to a certain turn-row. After twenty years, the defendant, by agreement with the plaintiff's ancestor in title, farmed even beyond the old turn-row to a new turn-row and continued this farming operation in excess of an additional ten years.

Judge Tate, of the Court of Appeal, Third Circuit, in a careful and well-written opinion, held that the defendant's possession of the property up to the old turn-row for thirty years was sufficient for thirty years acquisitive prescription. The opinion reviewed the line of cases distinguishing prescription under Article 852 and under Articles 3499-3505. The cases cited by the plaintiff to the effect that defendant's possession was insufficient for lack of a visible boundary were distinguished on the ground that those cases applied to possession under Article 852, while in the instant case, by constant farming, the defendant's possession was sufficient to acquire prescription under the general articles.

No question of "tacking" was at issue, as the defendant himself had possessed the property for thirty years. It is interesting to consider what the result would have been if the defendant and his ancestor had had to add their possesions together to have thirty years possession and both had possessed beyond their titles. Under the jurisprudence, since there was no visible boundary, there would not have been sufficient possession for prescription under Article 852, and since there was not a juridical link, the possession would not be sufficient under Articles 3499-3505.

The anomaly of our present jurisprudence on fixing boundaries is further demonstrated in the recent case of *Aycock v. Carter*.[13] The defendant in a boundary action, as in the *Charrier*

13. 141 So.2d 45 (La. App. 2d Cir. 1962).

case, claimed possession beyond his title, but made the additional claim that there had actually been a fence (rather than a mere turn-row) marking the extent of his possession. The court of appeal rejected defendant's claim because he had not shown that the fence had been in existence and continually maintained for thirty years. If the reasoning of the *Charrier* case were to be applied, it might be irrelevant whether the fence had been maintained for thirty years, if there had been possession by farming up to the boundary supposedly marked by the fence for a period of thirty years. The *Aycock* case relies on *Sessum v. Hemperley*,[14] which states the law as follows:

> "Clearly, the now well-established rule, as a result of our codal provisions and the cited authorities, is that where there is a visible boundary which has been in existence for thirty years or more and the defendant in a boundary action and his predecessors in title have, in addition to the land described in the title, actually possessed land extending to that visible boundary, a plea of prescription of thirty years should be sustained. It is our view that for the rule to be applicable two conditions must concur: First, there must be a visible boundary, artificial or otherwise; second, there must be actual uninterrupted possession, either in person or through ancestors in title, for thirty years or more of the land extending beyond that described in the title and embraced within the visible bounds. The lack or failure of consent on the part of the adjacent owner cannot affect the rights that accrue by operation of law to the possessor under the thirty-year prescriptive plea. We feel that the foregoing conditions have been completely met in the instant case."

The court in the *Aycock* case may have concluded from the language of the *Sessum* case that, where a boundary action is involved, contrary to the *Charrier* case, there must be both a visible boundary and continuous possession. Judge Tate's position seems more reasonable, namely, that if the requirements of prescription under either Article 852 or Articles 3499-3505 are met, the boundary must be made accordingly. This is so, because the purpose of the boundary action is to show what the parties presently own, and that must take into account what they have acquired by prescription of any variety whatsoever.

The distinction between the prescription under Article 852

14. 233 La. 444, 476, 96 So.2d 832, 843 (1957).

and Articles 3499-3505 is well-entrenched in our jurisprudence, but both its origin and usefulness are questionable. The same problems of setting boundaries have been handled under French law without separate rules of prescription. It is hoped that in any general revision of the Louisiana Civil Code this matter will be re-examined.

In *McMichael v. Williams*,[15] a trespass action was converted into a boundary action, but the decision of the trial court did not follow the report of the surveyor appointed by the court. The court of appeal held that in the absence of proof to the contrary, the survey must be considered correct. Inasmuch as the record did not show that all of the formalities of the survey had been complied with, the court remanded the case so that the surveyor's testimony might be taken.

McDaniels v. Miller[16] was a similar case in which the plaintiff alleged trespass and the defendant reconvened to have the boundary fixed. The surveyor appointed by the court did not make a *proces verbal* as required by Articles 833 and 834 of the Civil Code and ignored certain other formalities. The trial court nevertheless fixed the boundaries. The court of appeal held that the survey was an absolute nullity, that the boundary could not be fixed without a proper survey, and that it could not be determined if defendant had trespassed until the boundary had been fixed. The plaintiff's suit was dismissed.

In *Brashears v. Hood*[17] the Court of Appeal for the First Circuit held that a plaintiff who instituted a boundary action without first offering to fix the disputed boundary extrajudicially in accordance with the procedures set forth in the section of the Civil Code beginning with Article 832 should be cast for costs of the suit,[18] but that the expense of establishing the boundary should be divided equally between the parties.[19] The court also held that ownership of the property lying between

15. 138 So.2d 22 (La. App. 1st Cir. 1962).
16. 136 So.2d 763 (La. App. 1st Cir. 1962).
17. 137 So.2d 88 (La. App. 1st Cir. 1962).
18. *Cf.* Lucas v. Asset Realization Co., 51 So.2d 652 (La. App. Orl. Cir. 1951) holding that "where there is a bona fide boundary dispute and a judicial determination of the boundary is the only possible means for a final settlement of the dispute, costs of the proceedings should be divided between the parties . . . ." *Id.* at 658. The court there observed that "it is not shown that plaintiff arbitrarily or capriciously refused to enter into negotiations with the defendants before filing suit . . . . We doubt whether the parties could ever have reached an amicable agreement as to a fixing of the boundary . . . ." *Ibid.*
19. See LA. CIVIL CODE art. 663 (1870).

the disputed boundaries should not be adjudicated in the absence of an express prayer for this relief; instead, the court should merely declare the right to possession of the property disputed in the boundary action.

BUILDING RESTRICTIONS

The courts continue to confront new problems in the interpretation and application of building restrictions. One question which frequently arises is whether the violation of one restriction for more than two years[20] causes prescription to accrue against the enforcement of other covenants contained in the same set of restrictions. The language of the statute which enacted the prescriptive period indicates clearly that the property is free only "from the restriction which has been violated."[21] However, when the property is freed from the restriction which has been violated, is that restriction wholly set aside, or is the restriction still enforceable for other purposes?

In *Olivier v. Berggren*[22] the Court of Appeal, Fourth Circuit, said that the use of a lot for a commercial purpose in violation of a restriction limiting its use to construction of a single family dwelling would not so invalidate the restriction as to permit the lot to be used for a two-family dwelling.

The violation of a restriction in one respect should not wholly abrogate that restriction. Granting this, there appears to be an undue literalness in the court's application of the rule to the facts of the present case. A failure to object to a greater violation should presumably bar a later objection to lesser violations. If property is free for commercial use by virtue of a failure to object to such use for the statutory prescriptive period, it should be likewise available for multifamily residences. Because of the restrictive effect of these covenants, doubts concerning their interpretation should be resolved in favor of free use of the property.[23]

The existence of restrictive covenants which would prevent the use of immovable property for the purpose for which the buyer proposes to employ it has been held sufficient to justify

20. LA. R.S. 9:5622 (1950).
21. *Id.* ¶ A.
22. 136 So.2d 325 (La. App. 4th Cir. 1962).
23. See 14 AM. JUR. COVENANTS, CONDITIONS AND RESTRICTIONS § 212 (1938).

the buyer's rejecting title. Where the proposed buyer is a public body, does the same rule apply? The Louisiana courts have never determined whether restrictive covenants would apply against a public body which acquires and uses the land for a public purpose. The decisions in other states are conflicting.[24]

In one case which came before the Supreme Court, a school board had agreed to purchase property for use as a school site. Upon examination of title the property was found to be subject to a restrictive covenant, which would, if enforceable, restrict use of the land to residential purposes. The Supreme Court refused to decree specific performance of the purchase agreement.[25] The title was "suggestive of serious litigation," and the court would not undertake to resolve the issue of enforceability of the restrictions in a matter to which the other landowners who would be affected by its decision were not parties.

SUCCESSIONS AND DONATIONS

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In *Succession of Gaudin*,[1] the First Circuit Court of Appeal was called upon to decide whether extrinsic evidence establishing the testator's custom of using the slash date form to indicate month, day and year, in that order, was sufficient as determinative that an olographic testament dated "9/12/55" was actually dated September 12, 1955. Although the question of whether extrinsic evidence should be admitted in the first place had already been decided in the affirmative five years previously when the case was before the court the first time,[2] it nevertheless took occasion to reaffirm its position on this question and thus held that extrinsic evidence is not only admissible to ascertain an otherwise ambiguous date, but that the evidence adduced by the proponents was sufficient to resolve the ambiguity.

24. See 2 NICHOLS, EMINENT DOMAIN § 5.73 (3d ed. 1950); 18 AM. JUR. *Eminent Domain* § 157 (1938).

25. Gremillion v. Rapides Parish School Board, 242 La. 967, 140 So.2d 377 (1962).

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1. 140 So. 2d 384 (La. App. 1st Cir. 1962).

2. Succession of Gaudin, 98 So. 2d 711 (La. App. 1st Cir. 1957), *cert. denied* 1958.