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Civil Law Property - Encroachments on River Banks by Riparian Owners

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Abrams cases. There is no inference that the decision purports to limit the discretion exercised in those cases. Hence, although the *Reich* case does not necessarily manifest a change in the interpretation of the law, at least it represents a changed attitude in its application to certain factual situations. The approach now taken seems to be more logical and correct, as a strict adherence to the *Scott* and *Abrams* cases would lead to the paradox of a wife being deprived of alimony for a period during which she was entitled to it as a matter of law.

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CIVIL LAW PROPERTY—ENCROACHMENTS ON RIVER BANKS BY RIPARIAN OWNERS—Defendant owned a warehouse that extended from the adjacent land across the bank[1] to the water line of a navigable river, within the corporate limits of Madisonville. Plaintiff city brought suit to compel the defendant to destroy or remove the warehouse on the ground that it obstructed and embarrassed the use of the bank, which is common to all. *Held,* under Article 862 of the Civil Code,[2] the building should be permitted to remain, for it merely encroaches upon the bank and does not *absolutely* prevent its use. *Town of Madisonville v. Dendinger,* 38 So.(2d) 252 (La. 1948).

It is elementary that "the use of the banks of navigable streams or rivers is public,"[3] and Louisiana courts have almost

1. Art. 457, La. Civil Code of 1870: "The banks of a river or stream are understood to be that which contains it in its ordinary state of high water; for the nature of the banks does not change, although for some causes they may be overflowed for a time.

"Nevertheless on the borders of the Mississippi and other navigable streams, where there are levees, established according to law, the levees shall form the banks."

"The bank of a river is that space which the water covers when the river is highest in any season of the year." Sweeney v. Shakespeare, 42 La. Ann. 614, 7 So. 729, 21 Am. St. 400 (1890).

2. Art. 862, La. Civil Code of 1870: "If the works, formerly constructed on the public soil, consist of houses or other buildings, which can not be destroyed, without causing signal damage to the owner of them, and if these houses or other buildings merely encroach upon the public way, without preventing its use, they shall be permitted to remain, but the owner shall be bound, when he rebuilds them, to relinquish that part of the soil or of the public way, upon which they formerly stood."

3. Art. 455 La. Civil Code of 1870: "The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.

"Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands."

uniformly sustained injunctions under Article 861[4] preventing the erection and ordering the removal of permanent installations located on property subject to this type of servitude.[5] The courts have said that these banks are a *locus publicus*, in which the entire public have rights, irrespective of the ownership of the adjacent property, or of the rights of the riparian proprietor of the soil.[6] It may be significant that Las Siete Partidas,[7] which was once a part of Louisiana law, provided that if the common use was obstructed this alone was sufficient to warrant the removal or destruction of the building.

In an early case,[8] the court ordered the removal of a house built on the banks of the Red River, saying that the evidence showed conclusively that the building *interrupted* the use which is common to all. In *Town of Napoleonville v. Boudreaux*[9] the court sustained an injunction prohibiting the erection of a building on the banks of Bayou Lafourche, saying, "Whether such banks be batture or not, the adjacent owner of the soil cannot use it as private property for such purposes, and such buildings can be removed at the instance of the municipal officers or by individuals living in the municipal corporation." In neither of these cases did the court inquire whether the construction did or would *absolutely* prevent the use of the bank or whether their removal would cause signal damage.

A building that encroached upon but did not prevent the use

4. Art. 861, La. Civil Code of 1870: "Works which have been formerly built on public places, or in beds of rivers or navigable streams, or on their banks, and which obstruct or embarrass the use of these places, rivers, streams or their banks, may be destroyed at the expense of those who claim them, at the instance of the corporation of the place, or of any individual of full age residing in the place where they are situated.

"And the owner of these works can not prevent their being destroyed under pretext of any prescription or possession, even immemorial, which he may have had of it, if it be proved that at the time these works were constructed, the soil on which they are built was public, and has not ceased to be so since."

5. Trustees of Natchitoches v. Coe, 3 Mart.(N.S.) 140 (La. 1824); Henderson v. Mayor, 3 La. 563 (1832); Herbert v. Benson, 2 La. Ann. 770 (1847); McKeen v. H. Kurfust, 10 La. Ann. 523 (1855); Sweeney v. Shakespeare, 42 La. Ann. 614, 7 So. 729 (1890); Louisiana Const. and Imp. Co. v. Illinois Cent. R. Co., 49 La. Ann. 527, 21 So. 891, 37 L.R.A. 661 (1897); Town of Napoleonville v. Boudreaux, 142 So. 874 (La. App. 1932).

6. Louisiana Const. and Imp. Co. v. Illinois Cent. R. Co., 49 La. Ann. 527, 539, 21 So. 891, 897, 37 L.R.A. 661, 664 (1897).

7. 1 Laws of Las Siete Partidas, Partida Third, tit. XXVIII, Law 8, p. 338. Translation by L. Moreau Lislet and Henry Carleton: "No man has a right to dig a new canal, construct a new mill, house, tower, cabin or any other building whatever, in rivers which are navigated by vessels; nor upon their banks, by which the common use of them, may be obstructed, and if he does, . . . if it interferes with such common use, it ought to be destroyed."

8. Trustees of Natchitoches v. Coe, 3 Mart. (N.S.) 140 (La. 1824).

9. 142 So. 874, 876 (La. App. 1932).

of the public way has been permitted to remain in only one previous instance.[10] In another case,[11] the court said that the defendant would have the protection of Article 862 if an attempt was made to remove or destroy the stoops of his building which encroached only 1.2 inches on a sidewalk.

The comment of the redactors in their report on Article 862 indicates that good faith on the part of the encroacher is a necessary element for the operation of its provisions.[12] In view of our jurisprudence and this comment, the applicability of Article 862 in the principal case is disputable. The court did not question good or bad faith, or the presence or absence of knowledge on the part of the defendant. It could be logically inferred from the comment of the redactors that they also considered that signal damage would have to be incurred by the removal or destruction of the building before an encroacher could have the benefit of this article. On this point the court merely said, "According to defendant's testimony, it would cost approximately $3,000 to move the building."[13] No mention is made in the judgment of the fact that when the defendant had advertised the building for sale the highest bid he received was $390.[14] These circumstances hardly appear to meet the "signal damage" test in Article 862 and in the comment of the redactors.

Generally, the mere presence of the building on the river bank (subject to a public servitude), coupled with any embarrassment or obstruction of the public use of the property, has been considered sufficient justification for removal. It appears that in the principal case the court shifted their basis of decision from the restrictive "obstruct or embarrass the use of" in Article 861 to the permissive "without preventing its use" in Article 862. Added to this shift was the word *absolutely*, for here the court said, "insofar as . . . [it is alleged that] the warehouse *absolutely* prevents the use of the banks of the river, the plaintiff failed to make out his case. . . ."[15] The dearth of cases[16] makes every deci-

10. Village of Moreauville v. Boyer, 138 La. 1070, 71 So. 187 (1916).

11. Mendoza v. Glosioso, 167 La. 701, 120 So. 57 (1929).

12. Louisiana Legal Archives, 1 Projet of the Civil Code of 1825 (1937) 103. "It may happen that a man may have built or encroached on the public soil, without knowing it, and in good faith. It would be unjust to demolish his buildings which might cause his ruin, especially when they have stood a long time, and merely encroach upon the public soil without absolutely preventing its use, as in the case of this article."

13. Town of Madisonville v. Dendinger, 38 So.(2d) 252, 254 (La. 1948).

14. Brief for the Appellees, p. 7, Town of Madisonville v. Dendinger, 38 So.(2d) 252 (La. 1948).

15. Id. at 254.

16. See note 5, supra.

sion on this subject important. This latest holding may very well have the effect of increasing the efforts to obtain a more extensive application of Article 862 to the factual situations that arise.

Perhaps this decision is one of public policy. In view of the minor position of water transportation in our present economic system and the wharf facilities that are currently open to the public along our navigable waters, the need for keeping these banks clear has diminished greatly. On the other hand, progressing urbanization and the exploration for oil have brought forth a great demand for this space.

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CONSTITUTIONAL LAW—TAXATION OF VESSELS—Appellees were nonresident corporations engaged in transporting freight in interstate commerce on inland waterways—The Mississippi and Ohio Rivers. Each maintained an office or agent in Louisiana but had its principal place of business elsewhere. On trips into Louisiana a tugboat brought a line of barges to New Orleans, left them for unloading and reloading, then picked up loaded barges for return trips to ports outside of Louisiana. These "turn-arounds" were accomplished as quickly as possible so that the vessels were within Louisiana for only a short period of time during the year.[1] No regular or fixed schedules were maintained in the operation of the vessels. Louisiana and the City of New Orleans levied ad valorem taxes on these vessels under assessments based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of their entire lines.[2] The property was not taxed by the states of incorporation. The circuit court affirmed the judgment of the district court finding the taxes to be a violation of the commerce and due process

1. The district court found that of the total time covered by the appellees' interstate commerce operation in 1943, the approximate amount spent by their vessels in Louisiana or in New Orleans was as follows: American Barge Line's tugboats, 3.8%; Mississippi Valley Barge Line's tugboats, 17.25%; and Mississippi Valley Barge Line's barges, 12.7%. The time so spent in 1944 was found approximately to be as follows: Mississippi Valley Barge Line's tugboats, 10.2%; Mississippi Valley Barge Line's barges, 17.5%; Union Barge Line's tugboats, 2.2%; and Union Barge Line's barges, 4.3%. Ott v. Mississippi Valley Barge Line Co., 69 S.Ct. 432, 433, n. 1, 93 L.Ed. 431 (U.S. 1949).

2. Under La. Act 170 of 1898, § 29, as amended by La. Act 59 of 1944, § 1 [Dart's Stats. (1939) § 8370].

3. American Barge Line Co. v. Cave, 68 F. Supp. 30 (E.D. La. 1946), affirmed by Ott v. DeBardeleben Coal Corp., 166 F.(2d) 509 (C.C.A. 5th, 1948), insofar as the present appellees were concerned. For a discussion of this