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# Ownership of Navigable Waterbottoms - California Co. v. Price Revisited

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## NOTES

### OWNERSHIP OF NAVIGABLE WATERBOTTOMS— CALIFORNIA CO. V. PRICE REVISTED

Gulf Oil Corporation instituted a concursus proceeding to distribute accrued mineral royalties to the rightful owner of navigable waterbottoms leased to the company by both the state and private landowners. Relying upon *California Co. v. Price*,<sup>1</sup> the private litigants asserted that their title under a patent issued by Louisiana in 1911 had been rendered un-sailable by Act 62 of 1912<sup>2</sup> requiring that suits to vacate or annul state patents be brought within six years; the state contended that the patent was absolutely null because the ownership of all lands beneath navigable waters in Louisiana rests in the state. Overruling its prior decision in *Price*, the Louisiana Supreme Court *held* that patents purporting to convey the beds of navigable waterways in Louisiana for private ownership are ineffective and that Act 62 does not ratify such transfers. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1975).

The Louisiana Civil Code classifies navigable waterbottoms as public things and evinces a legislative desire to place such lands beyond the reach of private ownership.<sup>3</sup> The long-standing civilian tradition of insusceptibility of private ownership of navigable waterbottoms<sup>4</sup> was reinforced in 1812

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1. 225 La. 706, 74 So. 2d 1 (1954).

2. La. Acts 1912, No. 62: "Section 1. Be it enacted by the General Assembly of the State of Louisiana, . . . That all suits or proceedings of the State of Louisiana, private corporations, partnerships or persons to vacate and annul any patent issued by the State of Louisiana, duly signed by the Governor of the State and the Register of the State Land Office, and of record in the State Land Office, or any transfer of property by any subdivision of the State, shall be brought only within six years of the issuance of the patent, provided, that suits to annul patents previously issued shall be brought within six years from the passage of this Act. Section 2. Be it further enacted, . . . That all laws or parts of laws in conflict herewith be and the same are hereby repealed."

3. LA. CIV. CODE arts. 449-50, 453 and 482, when construed together, demonstrate a system of classification designed to separate property capable of being owned by individuals from property owned by the state, *i.e.*, public things, or owned by no one, *i.e.*, common things. Subsequent legislative action has reduced the scope of common things to air, making all navigable waters public things. See LA. R.S. 9:1011 (Supp. 1954); LA. R.S. 49:3 (1950); LA. R.S. 56:421 (1950).

4. This tradition dates back to Roman times. See 2 C. AUBRY & C. RAU,

upon Louisiana's admission to the Union, when the state's dominion<sup>5</sup> over all navigable waters and the lands beneath them was reaffirmed by the common law notion of inherent sovereignty.<sup>6</sup> Prior to the American Revolution, title to navigable waterbottoms was vested in the English Crown<sup>7</sup> or any entities granted such submerged lands by the Crown;<sup>8</sup> after the Revolution the people became the sovereign, and title to navigable waterbottoms vested in the states for public use.<sup>9</sup> All states admitted after adoption of the Constitution

DROIT CIVIL FRANCAIS §§ 168-71 (7th ed. Esmein 1961) in J. MAYDA, 2 CIVIL LAW TRANSLATIONS 45-61 (1966); W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 182-86 (3d ed. 1963); 1 M. PLANIOL, CIVIL LAW TREATISE pt. 2, nos. 2173-90 at 281-90 (11th ed. La. St. L. Inst. transl. 1959); 1 A. YIANNPOULOS, PROPERTY §§ 11-22 in 2 LOUISIANA CIVIL LAW TREATISE 26-63 (1966); Yianopoulos, *Introduction to the Law of Things: Louisiana and Comparative Law*, 22 LA. L. REV. 756, 763-65 (1962).

5. Under principles of international law, lands can be acquired by conquest, discovery and claim or some variety of cession. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 408-16 (1842). R. SWIFT, INTERNATIONAL LAW, CURRENT & CLASSIC 120-200 (1969). A government acquiring such lands could, depending upon the method of acquisition, acquire both *imperium* (control or sovereignty) and *dominium* (ownership). The King of England had both *dominium* and *imperium* over the colonies via the right of discovery and claim, and upon achieving independence, the thirteen original states claimed all the rights that belonged to the Crown as inherent to state sovereignty, and reserved *dominium* over the beds of inland navigable waters. *Shively v. Bowlby*, 152 U.S. 1, 14-15 (1894).

While a custodian of federal territorial lands, Congress adopted the policy of reserving title to the beds of navigable waters, *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926), on the theory that the United States was the trustee for the citizens of the states to be formed from the territorial lands. *Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221-22 (1844).

6. See *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); *Rundle v. Delaware & Raritan Canal Co.*, 55 U.S. (14 How.) 80 (1852); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); 1 A. YIANNPOULOS, PROPERTY § 32 in 2 LOUISIANA CIVIL LAW TREATISE 90-96 (1966).

7. From an historical viewpoint, the interests of the public in navigation, fishing and commerce have been sought to be preserved, and limitations were placed upon the sovereign's ability to grant property used for such purposes to private owners. What has created a great deal of confusion is the question of the public's ability to assert rights in unique public lands against their own government. R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM (3d ed. Moore 1888). See also Fraser, *Title to the Soil under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313, 429 (1918).

8. *Shively v. Bowlby*, 152 U.S. 1 (1894).

9. English notions of sovereignty were tied to the concept of tidal activ-

were admitted on an equal footing<sup>10</sup> with the original thirteen states and enjoy the same rights of sovereignty.

By 1850, Louisiana had reacquired waste lands it ceded to the federal government as a condition of statehood, and an act of the legislature in 1855 again affirmed the state's desire to retain title to navigable waters and their beds by restricting the sale of shallow lakes under the act to those not navigable.<sup>11</sup> Act 124 of 1862 altered the classification of lakes navigable in 1812 but non-navigable in 1862 to that of "swamp lands" and allowed their private alienation, thus again impliedly retaining the policy of non-alienation of navigable waters and their bottoms. The legislature's continued disapproval of alienation of lands beneath navigable waters was demonstrated in a series of acts designed to foster the commercial development of the oyster industry in the state,<sup>12</sup> whereby the state would retain title to all navigable bodies of water primarily along the Gulf. Throughout the time of passage of the Oyster Statutes, judicial decisions<sup>13</sup> with respect

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ity. Bottoms subject to the ebb and flow of the tides were subject to the dominion of the Crown. In America, because of the numerous water areas unrelated to tidal waters, the broader concept of navigability was adopted as the controlling criterion. See Fraser, *Title to the Soil under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313 (1918); Comment, *The Federal Common Law of Accretion: A New Element in Property Law*, 35 LA. L. REV. 178 (1974).

10. *Shively v. Bowlby*, 152 U.S. 1 (1894); *Manchester v. Massachusetts*, 139 U.S. 240 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); 2 Stat. 641 (Feb. 20, 1811) (equal footing for Louisiana).

11. La. Acts 1855, No. 247.

12. La. Acts 1932, No. 67; La. Acts 1924, No. 139; La. Acts 1914, No. 54; La. Acts 1910, No. 189; La. Acts 1904, No. 52; La. Acts 1902, No. 153; La. Acts 1896, No. 121; La. Acts 1892, No. 110 and La. Acts 1886, No. 106 comprise the Oyster Statutes. Sections 1 and 2 of each act, subsequent to the initial act, generally repeated the provisions of the immediately preceding act, and all the acts recognize the state's ownership of all waterbottoms along the Gulf coast. An additional statute, La. Acts 1910, No. 258, extends state ownership to all inland waterbottoms not previously owned.

13. *State ex rel. Board of Comm'rs v. Capdeville*, 146 La. 94, 83 So. 421 (1919) (no navigable waterbottoms ever came under the jurisdiction of Congress so none could have been transferred back to the state by Congress); *State v. Richardson*, 140 La. 329, 72 So. 984 (1916) (by virtue of inherent sovereignty navigable waterbottoms are owned by the state); *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405 (1912) (authority of a levee district can extend only to non-navigable waterbottoms because of the state's inherent sovereignty claim to navigable waterbottoms); *Louisiana Navigation Co. v. Oyster Comm'n*, 125 La. 740, 51 So. 706 (1910) (patent grants of lands along the sea carry title only to the high water mark, since Louisiana does not allow private ownership of the bed of a navigable stream); *Milne v. Girodeau*,

to the ownership of navigable waterbottoms indicated that, under the Louisiana Civil Code, private persons could not own such lands.<sup>14</sup>

Act 62 of 1912 limited the period for bringing "all suits to vacate or annul" any patents, issued previously or subsequently, to six years after the date of the patent or of the act, whichever occurred later.<sup>15</sup> The act seemed to grant validity to *all* patents not contested within six years, but in light of over 100 years of legislative and judicial pronouncements against private ownership of navigable waterbottoms, the question necessarily arose whether the legislature intended to abrogate past laws regarding ownership of the lands beneath navigable state waters by way of a statute of repose.

For over 40 years the Louisiana Supreme Court had few opportunities to examine the question,<sup>16</sup> but in the 1954 case of *California Co. v. Price*,<sup>17</sup> a majority of the court held that Act 62 was meant to apply to all patents, the aim of the legislation being stability of title even in void patents. Despite vigorous and well-reasoned dissents in *Price*,<sup>18</sup> a 1954

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12 La. 324 (1838) (land beneath the high water mark of Lake Ponchartrain insusceptible of private ownership).

14. La. Const. art. IV, § 2 (1921), expressly prohibited alienation of navigable waterbottoms. Thus any inquiry into the validity of waterbottom transfers must be viewed as addressed to circumstances existing prior to 1921. LA. CONST. art. IX, § 3 authorizes alienation of a navigable waterbottom by the state but only for the purpose of reclaiming such lands lost by erosion.

15. This six year prescriptive period was modeled after an 1891 federal statute, now 43 U.S.C. § 1166. Several federal cases interpreting the federal statute are listed at note 28, *infra*.

16. The question of applicability of Act 62 to navigable waterbottom patents as opposed to non-navigable waterbottom patents or dry land patents had arisen only four times prior to the *Price* case. *Humble Oil & Refining Co. v. State Mineral Bd.*, 223 La. 47, 64 So. 2d 839 (1953); *O'Brien v. State Mineral Bd.*, 209 La. 266, 24 So. 2d 470 (1945); *Realty Operators, Inc. v. State Mineral Bd.*, 202 La. 398, 12 So. 2d 198 (1942); *State v. Sweet Lake Land & Oil Co.*, 164 La. 240, 113 So. 833 (1927).

17. 225 La. 706, 74 So. 2d 1 (1954).

18. All the dissenting opinions in *Price* viewed the decision as doing violence to the fundamental principles of Louisiana property law shown in code articles and prior jurisprudence, as well as to principles of reasonable statutory construction. In addition, Justice Hawthorne's dissent analyzed the cases cited at note 16, *supra*, to show that *Sweet Lake* dealt with a non-navigable body of water, *Realty* did not deal with the issue of navigability, navigability was not determined in *O'Brien*, and the *Humble Oil* case relied upon the prior decisions. 225 La. 706, 752, 74 So. 2d 1, 17 (1954).

legislative act designed to interpret restrictively the imputed intent of the legislature of 1912,<sup>19</sup> and much criticism from doctrinal writers throughout the state,<sup>20</sup> the supreme court nevertheless refused to apply the 1954 "interpretative" statute and denied writs in the 1961 case of *State v. Cenac*,<sup>21</sup> which involved the same issue as *Price*.

The objections to the *Price* decision continued,<sup>22</sup> but not until the instant case did the Louisiana Supreme Court have another opportunity to confront the issue of Act 62's effect upon patents conveying navigable waterbottoms.<sup>23</sup> Writing for the majority, Justice Barham examined code provisions, legislative and judicial authorities, and the public policy they evidence to determine that state officials who issued patents encompassing navigable waters were without power to do so. If no power existed to transfer the beds, the patents would have been absolutely null and void were it not for Act 62 of 1912; hence the main question was whether Act 62 was intended to ratify absolutely null patents. Applying the rule of statutory construction that prescription is *stricti juris*,<sup>24</sup> the majority

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19. The Louisiana legislature enacted La. Acts 1954, No. 727 just eleven days after the *Price* decision. See LA. R.S. 9:1107-09 (Supp. 1954). The Act declared that the legislature in 1912 intended to confirm only patents of lands susceptible of private ownership. See *Carter v. Moore*, 258 La. 921, 934, 248 So. 2d 813, 817 (1971) (concurring opinion).

20. See, e.g., *The Work of the Louisiana Supreme Court for the 1953-1954 Term—Property*, 15 LA. L. REV. 273, 275 (1955); Hebert & Lazarus, *Survey of the 1954 Louisiana Legislation—Legislation Affecting the Civil Code*, 15 LA. L. REV. 9, 21-25 (1955).

21. 132 So. 2d 897 (La. App. 1st Cir. 1961), *cert. denied*, 241 La. 1055, 132 So. 2d 928 (1961).

22. Subsequent cases in this area have indicated a general dissatisfaction with the *Price* decision and the lower courts have narrowed the application of Act 62. See *Stevens v. State Mineral Bd.*, 221 So. 2d 645 (La. App. 4th Cir. 1969) (patent void in view of oyster statute, La. Acts 1910, No. 189 and La. Acts 1910, No. 258), *annulled on other grounds*, 255 La. 857, 233 So. 2d 542 (1970); *Coastal State Gas Producing Co. v. State Mineral Bd.*, 199 So. 2d 554 (La. App. 3d Cir. 1967) (patent not properly signed and not issued by a subdivision of the state, but by the state itself, and therefore in technical violation of the statute); *State v. Scott*, 185 So. 2d 877 (La. App. 1st Cir. 1966), *cert. denied*, 249 La. 485, 187 So. 2d 451 (1966). See also Yiannopoulos, *Validity of Patents Conveying Navigable Waterbottoms—Act 62 of 1912, Price, Carter and All That*, 32 LA. L. REV. 1 (1971).

23. Indirect confrontation occurred in *Carter v. Moore*, 258 La. 921, 248 So. 2d 813 (1971), in which the court held that state officials need not void a corrective patent in order to reinstate an original patent to a navigable waterbottom.

24. *State v. Stewart Bros. Cotton Co.*, 193 La. 16, 190 So. 317 (1939);

reasoned that the prescriptive statute, by its very nature, demanded a narrow reading.<sup>25</sup> Certainly a literal reading of Act 62 did cover *all* patents, but this reading could not be aligned with the prior legislation. To the majority, the narrow and more reasonable interpretation was that the legislature never intended to ratify absolutely null transfers of property but only to grant stability of title to formally defective patents of lands that were initially susceptible of ownership. Because the statute was susceptible of more than one construction, the court felt justified in construing the broad provision *in pari materia* with the public policy of the state as evidenced by legislation and jurisprudence before and after the passage of Act 62.

The majority did not favor a construction of the act that impliedly would repeal prior laws prohibiting private ownership of navigable waterbottoms; accordingly the court found that Act 62 and other legislative statements could be construed together<sup>26</sup> if Act 62 were considered inapplicable to navigable waterbottoms. The court noted that the federal statute<sup>27</sup> upon which Act 62 was based had been construed to apply only to transfers of lands that were already alienable public lands.<sup>28</sup> Another factor the majority considered in determining the purpose of the act was an evaluation of the state's interest in navigable waterbottoms transferred to the

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Garland v. Estate of Scott, 15 La. Ann. 143 (1860). "Prescription is stricti juris and prescriptive statutes cannot be extended by analogy to cases beyond the strict letter of the law." Coastal States Gas Producing Co. v. State Mineral Bd., 199 So. 2d 554, 557 (La. App. 3d Cir. 1967); Hayes v. Levy, 81 So. 2d 172 (La. App. 2d Cir. 1955).

25. 317 So. 2d at 585. In *State v. Bayou Johnson Oyster Co.*, the Louisiana Supreme Court said, "It may be, and probably is, true that there is no legal impediment in the way of the state's alienating such property [navigable waterbottoms] in favor of particular individuals . . . but as we have already seen, her [Louisiana's] declared policy has always been not to do so, and any statute or contract from which such effect were claimed would, necessarily, be strictly construed against the grantee." 130 La. 604, 618, 58 So. 405, 410 (1912).

26. This principle is discussed in 2A J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 56.01-.05 (4th ed. 1973).

27. 43 U.S.C. § 1166 (1891).

28. See *La Roque v. United States*, 239 U.S. 62 (1915); *Northern Pacific Ry. v. United States*, 227 U.S. 355 (1913); *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1908). Each of the above decisions examined other federal laws to determine if those laws allowed transfer of the lands before applying the federal prescriptive statute.

state through Louisiana's entrance to the Union<sup>29</sup> and the state's position of holding the land in trust for its citizens. This "public trust"<sup>30</sup> theory, that only the citizens may divest themselves of their collective right in navigable waterways, would invalidate even legislative enactments expressly permitting the alienation of navigable waterbottoms; however, the court chose to limit the public trust idea to a requirement that any alienation of these lands by the legislature be express and specific. Finally, while not actually finding the 1954 act to be truly interpretative,<sup>31</sup> the court found it persuasive additional evidence, in view of the special circumstances of *Price*,<sup>32</sup> and the prompt legislative action,<sup>33</sup> that the legislature never intended to allow the private ownership of navigable waterbottoms by passing a law of prescription.

It is clear from the Louisiana legislation and jurisprudence that no authority existed for the sale of or subsequent issuance of a patent to the navigable waterbottoms in question, and any validity the patent might have had to be based upon Act 62. Although the statute of repose on its face did encompass all patents, an inquiry into legislative intent was proper because a literal reading of the statute extended its effects to lands long considered inalienable. Moreover, the majority opinion that Act 62 was aimed only at lands initially susceptible of private alienation seems a reasonable construction of legislative intent.

With the reversal of *California Co. v. Price*, uniformity finally has been achieved in the Louisiana law of waterbottom ownership.<sup>34</sup> Although the dissent considered *California*

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29. The equal footing doctrine has been partially examined in the text at notes 7-10, *supra*. See also *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57 (1873); *State ex rel. Board of Comm'rs v. Capdeville*, 146 La. 94, 83 So. 421 (1919).

30. 317 So. 2d 567, 589 (La. 1975).

31. The French view of interpretative legislation is that such laws are valid clarifications of legislative intent. 1 *PLANIOL, CIVIL LAW TREATISE* pt. 1, no. 155 at 120 (11th ed. La. St. L. Inst. transl. 1959).

32. The writer of the majority opinion in the *Price* case actually seemed to request an amendatory law from the legislature, and the legislature responded to the request. See *California Co. v. Price*, 225 La. 706, 741-42, 74 So. 2d 1, 13 (1954).

33. See explanation in note 19, *supra*.

34. Today all navigable bodies of water in the state belong to the state, whether by operation of the principles of inherent sovereignty and inextricable dominion considerations, or by virtue of LA. CIV. CODE arts. 509 and 510 as applied in *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936), *cert. denied*,



*Co. v. Price* part of an "unbroken line of jurisprudence,"<sup>35</sup> creating a rule of property that had achieved the dignity of jurisprudence constante,<sup>36</sup> Justice Summers' analysis of that line of cases does not withstand close examination. To obtain the status of jurisprudence constante, a series of adjudicated cases must be all in accord, and the cases cited by the dissent<sup>37</sup> were not in accord regarding the applicability of Act 62 to navigable waterbottoms. The first cases did not even deal with navigable waters and the later cases were based on broad dicta in the first.<sup>38</sup> Moreover, the *Price* decision has been narrowly applied by the lower courts<sup>39</sup> and has been thoroughly criticized by members of the Louisiana Supreme Court,<sup>40</sup> doctrinal writers<sup>41</sup> and even the legislature.<sup>42</sup> Under these circumstances the decision could hardly have become customary law.<sup>43</sup>

Of special interest in the instant case is the initial emergence of a judicial statement of the public trust doctrine in Louisiana. According to one writer,<sup>44</sup> cited favorably by the majority, Louisiana holds navigable waterbottoms in trust for the people, and this trust may be dissolved only by means

302 U.S. 700 (1937). Non-navigable bodies of water belong ratably to the riparian landowners with the exception of navigable waters turned non-navigable which still belong to the state. *State v. Aucoin*, 206 La. 787, 20 So. 2d 136 (1944). The continued maintenance of the *Aucoin* exception is questionable, especially when a riparian landowner is denied continued access to water. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

35. 317 So. 2d at 602.

36. See generally Dagget, Dainow, Hebert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12 (1937); Tête, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 TUL. L. REV. 1 (1973); Tucker, *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739 (1955).

37. See cases discussed in notes 16 & 18, *supra*.

38. See Justice Hawthorne's dissent cited in note 18, *supra*.

39. See cases in note 22, *supra*.

40. See criticisms at note 18, *supra*, and the concurring opinions of Justices Tate and Barham in *Carter v. Moore*, 258 La. 921, 923, 933, 248 So. 2d 813, 817, 827 (1971).

41. See note 20, *supra*. E.g., Yiannopoulos, *Validity of Patents Conveying Navigable Waterbottoms—Act 62 of 1912, Price, Carter and All That*, 32 LA. L. REV. 1 (1971).

42. See note 19, *supra*.

43. See H. WILKINSON & T. CAFFERY, *LEASE ADMINISTRATION FROM THE LESSOR'S STANDPOINT* 37, 47-50 (Inst. Min. L. 1972) for a skeptical analysis of the viability of the *Price* decision, even prior to the instant case.

44. J. MADDEN, *FEDERAL AND STATE LANDS IN LOUISIANA* 334-35 (1973).

of a constitutional amendment; no legislative enactment would be sufficient to divest the state of title to navigable waterbottoms. This view seems far stronger than other statements of the doctrine<sup>45</sup> and may be too severe to serve as a practical guide for the future. The requirement of a constitutional amendment as a condition precedent to alienation of natural resources by the state government would inhibit the state's ability to act for the public good and in effect seems to recognize a public interest in property distinct from the state's interest as representative of the people. A better view of the public trust doctrine is that the state is committed only to maintain the public use of property held in trust, and an inquiry into the validity of state transfers, therefore, centers on whether the transfers permit continued use of a property by the public and retention of state regulatory power over that use.<sup>46</sup> From this view, Act 62, if intended to apply to navigable waterbottoms, could be seen as a prohibited abdication of the state's general control over navigable waterbottoms since the statute made no provision for continued public use. If applied in the future, the public trust doctrine may serve as an effective weapon in preserving ecologically important areas in Louisiana.<sup>47</sup>

Although the court's decision in the instant case appears

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45. Leighty, *The Source & Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391 (1970); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Comment, *Conveyances of Sovereign Lands Under the Public Trust Doctrine: When Are They in the Public Interest?*, 24 U. FLA. L. REV. 285 (1971).

46. This view is consistent with the public trust doctrine as announced in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), and in *Stone, Public Rights in Water Uses and Private Rights in Land Adjacent to Water* in 1 WATERS AND WATER RIGHTS ch. 3, at 193-202 (R. Clark ed. 1967). There is no general bar against the sale of these properties, but courts generally interpret such transfers restrictively, and the state cannot grant lands to any private parties if the grant is such that the state effectively abdicated its duty as trustee.

47. State court decisions extending the public trust concept beyond the narrow area of navigable waterbottoms are: *Gould v. Greylock Reservation Comm.*, 350 Mass. 410, 215 N.E.2d 114 (1966) (citizens as beneficiaries of the trust succeeded in halting the lease of parklands); *Parks v. Simpson*, 242 Miss. 894, 137 So. 2d 136 (1962) (ecology interests successfully claimed oyster shell deposits in tidal waters as a part of the public trust and inalienable in the absence of an express provision to sell); *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937) (protection afforded all waters subject to use in public recreation).

correct regarding the scope of Act 62,<sup>48</sup> its application in future cases may result in harsh consequences. In Louisiana property law a good faith possessor usually is entitled to retain fruits born and reborn of the soil, but must return products such as oil to the true owner;<sup>49</sup> good faith possession continues until notification is given the possessor of the defects of his title.<sup>50</sup> In the present decision the court found that the private litigants had possessed in good faith until sued and, on a one-time basis,<sup>51</sup> treated the mineral royalties received by them as fruits that need not be returned. In the future, however, good faith possessors of navigable waterbottoms might well be required to restore all products taken, in accordance with the normal rules of the Civil Code. Even if the court extends the "equitable" treatment of royalties as fruits to later cases, the instant decision may constitute the notice needed to place good faith possessors in bad faith, thereby terminating any right to retain fruits. Although the mineral lessee in the instant case protected itself by taking leases from both the state and private landowners, other oil companies may be in the unfortunate position of having made large expenditures to bring in producing wells on property for which they no longer hold valid leases. If such a situation should arise in a later case, the state hopefully will follow the example set in *State v. Placid Oil Co.*<sup>52</sup> by adopting and ratifying the already existing leases.

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48. The argument has been advanced that the time for answering questions of ownership of navigable waterbottoms and mineral royalties in favor of the state has passed and that considerations of stability of title should prevail over state ownership contentions. F. ELLIS, ANOTHER LOOK AT LOUISIANA WATERBOTTOM PROBLEMS 113, 118 (Inst. on Min. L. 1972). *But see* text at notes 26-33, *supra*.

49. LA. CIV. CODE arts. 501-03 and 3453, when construed together, indicate that a good faith possessor is entitled to the fruits produced by the things possessed and that timber, materials, and royalties are not fruits but are products. *Harang v. Bowie Lumber Co.*, 145 La. 96, 81 So. 769 (1919); *Elder v. Ellerbe*, 135 La. 990, 66 So. 337 (1914).

50. The good faith possessor holds land "under a title translative of property and not defective on its face." *Vance v. Sentell*, 178 La. 749, 758, 152 So. 513, 516 (1934). Good faith possession continues until the defects of the possessor's title have been made known to him. LA. CIV. CODE arts. 3453-54; *Woodcock v. Baldwin*, 110 La. 270, 34 So. 440 (1902).

51. The majority accorded the rights of bona fide possession to the private litigants "without making an exception to a rule or stating any general rule of law." 317 So. 2d at 592.

52. 300 So. 2d 154 (La. 1974).

Severe consequences to good faith possessors, should the state demand a return of the products removed from water-bottoms, could provide incentive for reversal of the instant decision. If the court is willing to extend its fruits analogy to others holding similar patents, that extension of equitable relief would go far toward relieving the harsh results of a decision that has finally corrected an aberration in Louisiana property law. Hopefully the decision in *Gulf Oil Corp. v. State Mineral Board* will not fall beneath the pressures brought by dissenting groups. Mere changes in the composition of the court should not be relied upon at a later time to overturn a decision bringing harmony to the law of navigable water-bottom ownership.<sup>53</sup>

*Francis J. Crosby*

#### PUTATIVE MARRIAGES: WHAT ARE "CIVIL EFFECTS"?

Two recent decisions by the Louisiana Supreme Court highlight the difficulty traditionally attending determination of the "civil effects" that flow to good faith spouses in a putative marriage.<sup>1</sup> The difficulty arises in the courts' attempts to articulate a difference between rights and duties that arise solely as a result of a marriage contract and are therefore "civil effects" and rights and duties that are personal and would exist regardless of the existence of a marriage.<sup>2</sup> The supreme court's decisions in *Cortes v. Fleming*<sup>3</sup>

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53. Chief Justice Fournet, after dissenting in *Price*, did, however, concur in the denial of writs in *Cenac*, stating, "Indeed, there would be no stability of title in this state if every time there is a change of the membership of this court, previously adjudicated property rights are to be changed in accord with the views of the individual members as newly composed." 241 La. at 1059, 132 So. 2d at 929. While this view has not been followed in overruling the erroneous *Price* decision, hopefully the instant case will put an end to the apparently endless controversy over Act 62 of 1912.

1. LA. CIV. CODE art. 117: "The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith."

2. Professor Pascal has noted that "by emphasizing 'civil effects' rather than 'effects' in general, the articles imply that the *purely personal* rights and obligations of the parties, as distinguished from the *civil* effects of marriage, always cease with the declaration of nullity. . . ." R. PASCAL, LOUISIANA FAMILY LAW COURSE 56 (1973) [hereinafter cited as PASCAL].

3. 307 So. 2d 611 (La. 1975).