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Civil Law Property - Levee Servitude - Civil Code Article 665

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existing law referred to was the rule of *United States v. Sands*,[18] since at the time of the proposed 1954 amendment *Gilbert* had not yet been applied by any court to a trustee in bankruptcy.[19]

That the Supreme Court in *Speers* was correct in its interpretation of congressional intent now seems certain in view of the 1966 amendment to section 70c of the Bankruptcy Act.[20] In an effort to clarify the trustee's powers under the section and erase the doubts which arose after the deletion of the words "judgment creditor" by the 1950 amendment[21] the new section 70c explicitly provides that as of the date of bankruptcy the trustee shall have "the rights and powers of: (1) *a creditor who obtained a judgment* against the bankrupt upon the date of bankruptcy . . . (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt . . . (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings . . . ." (Emphasis added.)[22] This clear grant of judgment creditor status to the trustee, in the absence of any change in the reference to "judgment creditor" in section 6323 of the Internal Revenue Code, should erase any doubt which may have existed after *Speers*.

Charles Romano

CIVIL LAW PROPERTY — LEVEE SERVITUDE — CIVIL CODE ARTICLE 665

Landowner brought suit to enjoin the levee board, without expropriation procedure, from entering upon or disturbing his property for purposes of repairing and strengthening the levee already situated on the land. Plaintiff contended the property

18. The Court also noted that the *Gilbert* case was not inconsistent with the rule announced in *Sands*. *Id.* at 274.

19. The Court summarily disposed of the government's last argument that §§ 70c and 6323 could not be taken to mean that the trustee should prevail over unrecorded tax liens because such an interpretation would preclude the possibility which appears to be contemplated by § 67(b) of the Bankruptcy Act, that a federal tax lien not perfected until after bankruptcy may nevertheless be "valid against the trustee." The Court said: "The purpose of section 67, sub. b, insofar as tax claims are concerned, is to protect them from section 60, . . . which permits the trustee to avoid transfers made within four months of bankruptcy. . . . It does not nullify or purport to nullify the consequences which flow from the government's failure to file its perfected lien prior to the date when the trustee's rights as a statutory judgment creditor attach." *Id.* at 278.

20. Act of July 5, 1966, 80 Stat. 269, 11 U.S.C. § 501.

21. H.R. Rep. No. 686, 89th Cong., 1st Sess. 9 (1966).

22. Act of July 5, 1966, 80 Stat. 269, 11 U.S.C. § 501.

was not adjacent to a river or navigable stream and, therefore, defendant had no right to appropriate his land. On certiorari, the Louisiana Supreme Court, *held*, plaintiff's property, not bordering a navigable river nor of riparian origin, did not owe a servitude for levee purposes under article 665 of the Civil Code[1] and could not be appropriated; but since the project for which plaintiff's land had been taken was necessary, the property could undoubtedly be expropriated[2] and plaintiff was entitled to recover the market value of his property in accordance with expropriation laws. *Jeanerette Lumber & Shingle Co. v. Board of Commissioners for the Atchafalaya Basin Levee District*, 249 La. 508, 187 So. 2d 715 (1966).

The only statutory provision granting the public a servitude for levees is Civil Code article 665,[3] upon which the board in the instant case based its right to appropriate. Despite the constitutional guarantee that one cannot be deprived of property except for public purposes and then only after adequate indemnification,[4] it is well settled that appropriation under article 665, even without just compensation, does not contravene due process.[5]

1. LA. CIVIL CODE art. 665 (1870): "Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

"All that relates to this kind of servitude is determined by laws or particular regulations."

2. Appropriation and expropriation distinguished: The right of *appropriation* exists independently of the provisions of the constitution restricting the exercise of the power of eminent domain. Appropriation is an exercise of the police power, and any loss sustained thereby entitles the injured party to no recompense except the previous year's assessed valuation, which the constitution provides as a mere gratuity. *Expropriation* is the exertion of the right of eminent domain, the damage entailed being compensable. Chaffe v. Trezevant, 38 La. Ann. 746 (1886); Bass v. State, 34 La. Ann. 494 (1882). Appropriation leaves title in the owner, to whom the right to use the land will revert in case it should no longer be needed for public purposes, whereas expropriation conveys to the state complete title. Wilson v. Aetna Ins. Co., 161 So. 650 (La. App. 2d Cir. 1935); Wilson v. Royal Ins. Co., 161 So. 653 (La. App. 2d Cir. 1935).

3. See note 1 *supra*. The servitude is traceable to the provisions for tow paths in articles 649 and 650 of the FRENCH CIVIL CODE. In addition, it is said that it was impressed upon riparian lands in the original grants from the Spanish government. Eldridge v. Trezevant, 160 U.S. 452, 463 (1896). For an elaborate discussion of the history of article 665 and the levee servitude, see Dickson v. Board of Comm'rs, 210 La. 121, 26 So. 2d 474 (1946). See Hart v. Board of Levee Comm'rs, 54 Fed. 559, 561 (E.D. La. 1893); Ruch v. City of New Orleans, 43 La. Ann. 275, 9 So. 473 (1891), which, though a road case, is applicable in principle. See article in 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 665, at 383 (1942).

4. LA. CONST. art. I, § 2; LA. CIVIL CODE art. 497 (1870); U.S. CONST. amends. V, XIV; Wolfe v. Hurley, 46 F.2d 515 (W.D. La. 1930).

5. Eldridge v. Trezevant, 160 U.S. 452 (1896); Wolfe v. Hurley, 46 F.2d 515 (W.D. La. 1930); Hart v. Board of Levee Comm'rs, 54 Fed. 559 (E.D. La. 1893); Board of Comm'rs v. Franklin, 219 La. 859, 54 So. 2d 125 (1951); Dickson v. Board of Comm'rs, 210 La. 121, 26 So. 2d 474 (1946). See *The Work*

It was only in 1898 for Orleans Parish[6] and 1921 for the remainder of the state,[7] that any compensation was provided for land taken under this servitude. Flood control was becoming of general concern and the burden on the riparian proprietor was slightly alleviated and partially distributed throughout the state by these constitutional changes.[8] However, compensation is limited to the property's assessed value for the preceding year[9] and is merely a gratuity.[10]

Extensive litigation has resulted from the ambiguity of article 665. A question repeatedly presented is whether nonriparian land may be appropriated under the article. In some of the earlier cases the courts were lenient in applying the servitude not only to property actually adjoining a navigable stream but also to all lands "within the range of the reasonable necessity of the situation, as produced by the forces of nature unaided by artificial causes."[11] In *Hart v. Board of Commissioners*, the court held:

> "The levees . . . having been located by the lawful authorities . . . notwithstanding their remoteness from the natural bed of the river . . . are by statute wisely made riparian, and subject to the levee servitude."[12]

In *Board of Commissioners v. Franklin*[13] the Supreme Court,

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of the Louisiana Supreme Court for the 1959-1960 Term — Property, 21 LA. L. REV. 277, 294 (1961). See Comment, 21 TUL. L. REV. 653 (1947); Note, 21 TUL. L. REV. 496 (1947).

6. LA CONST. art. 312 (1898).

7. LA. CONST. art. XVI, § 6: "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, . . . shall be paid for at a price not to exceed the *assessed value of the preceding year*; provided, that this shall not apply to batture, nor to property the control of which is vested in the State or any subdivision thereof for the purpose of commerce. . . ." (Emphasis added.)

8. See discussion in Mayer v. Board of Comm'rs, 177 La. 1119, 150 So. 295 (1933). See also Dickson v. Board of Comm'rs, 210 La. 121, 26 So. 2d 474 (1946).

9. LA. CONST. art. XVI, § 6; Richardson & Bass v. Board of Levee Comm'rs, 226 La. 761, 772, 77 So. 2d 32, 35 (1954).

10. This term, often used by the courts, refers to the fact that the state is not required by the United States Constitution to compensate for land appropriated under the levee servitude. See Eldridge v. Trezevant, 160 U.S. 452 (1896), where the court quotes with approval from Ruch v. City of New Orleans, 43 La. Ann. 275, 9 So. 473 (1891). See also United States v. General Box Co., 224 F.2d 7 (5th Cir. 1955); Dickson v. Board of Comm'rs, 210 La. 121, 26 So. 2d 474 (1946).

11. Wolfe v. Hurley, 46 F.2d 515 (W.D. La. 1930); Board of Comm'rs v. Franklin, 219 La. 859, 54 So. 2d 125 (1951); Dickson v. Board of Comm'rs, 210 La. 121, 26 So. 2d 474 (1946).

12. 54 Fed. 559, 563 (E.D. La. 1893).

13. 219 La. 859, 868, 54 So. 2d 125, 128 (1951). The view expressed in the *Franklin* case is to be compared with that in the later case of Hebert v. T. L.

holding that the constitutional provisions providing compensation extended the provisions of article 665,[14] said:

> "A construction of this codal article so as to apply only to the shores of navigable streams would be too narrow and defeat the purpose sought to be obtained."[15]

These early cases indicate that under certain circumstances land may be subject to a servitude for levee purposes, even though it does not front on a navigable stream and was not riparian at the time the tract was transferred from the public domain to private ownership.

On the other hand, the courts have frequently said the servitude exists only on property actually fronting on navigable rivers or streams.[16] In *Delaune v. Board of Commissioners*[17] the court held that lands not shown to be riparian in origin are not subjected to the servitude. Further, upon proof of the property's riparian origin,[18] it must then be determined whether

James & Co., 224 La. 498, 70 So. 2d 102 (1953), where the court gave article 665 of the Civil Code a restrictive interpretation when applied to a servitude for road purposes.

14. This assumption was shown to be unwarranted in Delaune v. Board of Comm'rs, 230 La. 117, 127, 87 So. 2d 749, 752 (1956), where it was said that this constitutional provision "does not and could not, for obvious constitutional reasons, burden land already separated from the public domain with a servitude." See also Justice Hawthorne's dissent in the *Franklin* case, in which he indicated that, if article 16, § 6, of the Louisiana Constitution extended the servitude of article 665, our constitutional provision could possibly violate the provision of the fourteenth amendment to the Federal Constitution that no state shall deprive any person of property without due process of law.

15. 219 La. 859, 868, 54 So. 2d 125, 128 (1951).

16. In Pontchartrain R.R. v. Board of Comm'rs, 49 La. Ann. 570, 21 So. 765 (1897), the court held that plaintiff's land, situated away from the river, did not owe a levee servitude, although the court's opinion makes it clear that it was necessary for such property to be taken for levee construction. See especially Koerber v. New Orleans Levee Board, 51 La. Ann. 523, 25 So. 415 (1899), where payment of compensation was ordered for earth taken by levee board from nearby property to broaden a protective levee which ran at right angles to the Mississippi River, the court holding that this property was not subject to a servitude, not being adjacent to the river. (This is almost the identical situation which exists in the instant case.) The restrictive nature of the public servitude was also noted in Village of Moreauville v. Boyer, 138 La. 1070, 71 So. 187 (1916) and McGeehan v. Board of Levee Comm'rs, 165 La. 241, 115 So. 473 (1928).

17. 230 La. 117, 87 So. 2d 749 (1956).

18. The court explained that: "This servitude comes into existence at the time the property bordering on the navigable stream is separated from the public domain. Accordingly, in order to ascertain whether a particular (non-riparian) property appropriated for levee purposes is subject to a servitude, *it is essential to trace the title to the original grant.*" *Id.* at 131, 87 So. 2d at 754. (Emphasis added.) See also Board of Comm'rs for the Pontchartrain Levee Dist. v. Baron, 236 La. 846, 109 So. 2d 441 (1959), where the court held that land along a man-made drainage ditch which was not a navigable river or stream and which was located over three miles from a river could not be appropriated under the statute for levee purposes in absence of a showing that land sought

the property taken "is within range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes."[19] This restrictive line of jurisprudence holds that, despite the necessities of the situation, property cannot be appropriated unless it is presently riparian or riparian when separated from the public domain.[20]

The instant case continues the tendency to restrict the scope of the servitude. Although the board only sought to repair an existing levee, a project proved to be a necessity, the court refused to apply the servitude since the land was not riparian nor part of a riparian tract when title left the sovereign. The board urged that "adjacent" in article 665[21] does not necessarily connote adjoining or bordering upon a navigable river, but that it means near or close by. When property is near or close by a navigable river, and its taking comes within the demands of a flood control or levee project, the board argued, it owes the servitude without regard to whether it abuts a navigable river or has ever been part of a riparian tract. In support of this position the board relied on *Wolfe v. Hurley*[22] and *Board of Commissioners v. Franklin.*[23] Although the *Wolfe* case held that under certain circumstances land, wherever located, may owe a servitude for levee purposes regardless of its present or prior situation in respect to a navigable stream, the court rejected the argument.[24] Instead, the court relied heavily on two more recent cases,[25] and treated *Wolfe* and *Franklin* as standing

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to be appropriated was riparian property when separated from the public domain.

19. Board of Comm'rs v. Baron, 236 La. 846, 853, 109 So. 2d 441, 444 (1959); Delaune v. Board of Comm'rs, 230 La. 117, 131, 87 So. 2d 749, 754 (1956). See also A. K. Roy, Inc. v. Board of Comm'rs, 237 La. 541, 111 So. 2d 765 (1959), where the court held that, although the land was part of a larger tract which was originally riparian, defendant failed to show that the purpose for which the property was taken was "within the range of the reasonable necessities of the situation as produced by the forces of nature unaided by artificial causes" — thus the servitude not owing.

20. Delaune v. Board of Comm'rs, 230 La. 117, 87 So. 2d 749 (1956). See also Board of Comm'rs v. Baron, 236 La. 846, 109 So. 2d 441 (1959), where this conclusion was specifically affirmed.

21. See note 1 *supra.*

22. 46 F.2d 515 (W.D. La. 1930).

23. 219 La. 859, 54 So. 2d 125 (1951).

24. The court said that the language of approval of such doctrine in Board of Comm'rs v. Franklin, 219 La. 859, 54 So. 2d 125 (1951), appears to be dicta inasmuch as the decision therein was based primarily on the assumption that LA. CONST. art. XVI, § 6 (see note 7 *supra*), extended the provisions of article 665 (which assumption was shown to be unwarranted in Delaune v. Board of Comm'rs, 230 La. 117, 87 So. 2d 749 (1956)).

25. Board of Comm'rs v. Baron, 236 La. 846, 109 So. 2d 441 (1959); Delaune v. Board of Comm'rs, 230 La. 117, 87 So. 2d 749 (1956).

only for the proposition that *if the property is shown to have been riparian* when separated from the state, it can be appropriated if within range of the reasonable necessities of the situation.[26] Since the levee in the instant case was already in existence the board also noted that the Supreme Court has held that whenever an authorized state agency legally locates a levee, the levee becomes the bank of the river or stream[27] and, thereafter, under Civil Code article 457,[28] all adjacent property becomes riparian. But the court ruled that its statements were dicta[29] and had previously been denounced.[30] Thus the court makes it clear that for land not bordering a navigable river to be subject to the servitude for levee purposes it must (1) be of riparian origin, and (2) be within range of reasonable necessities of the situation, as produced by forces of nature, unaided by artificial causes. Mere necessity is insufficient to invoke article 665.

It is suggested that the court's interpretation of the levee servitude in the instant case is correct because of the nature of the servitude itself. The constitutionality of the levee servitude stems from the fact that the riparian property owner has always owned his land subject to the right of the public for levees and roads. The same holds true for non-riparian land which was part of a riparian tract when ownership left the state. The state, in appropriating such land for levee purposes, is doing nothing inconsistent with the right it has always had.[31] For

26. The holdings in Board of Comm'rs v. Baron, 236 La. 846, 109 So. 2d 441 (1959) and Delaune v. Board of Comm'rs, 230 La. 117, 87 So. 2d 749 (1956) are in conformity with earlier decisions of this court to the effect that not all lands, even those in reasonable proximity to navigable streams, are subject to servitudes under article 665 merely because they are deemed necessary for use in constructing or repairing levees. The court cites with approval Pontchartrain R.R. v. Board of Levee Comm'rs, 49 La. Ann. 570, 21 So. 765 (1897) and Koerber v. New Orleans Levee Board, 51 La. Ann. 523, 25 So. 415 (1899).

27. Hart v. Board of Levee Comm'rs, 54 Fed. 559, 563 (E.D. La. 1893).

28. LA. CIVIL CODE art. 457 (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 cause 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."

29. The court noted that the federal tribunal first found that the subject property was originally part of a larger riparian tract and, hence, owed the servitude even though it had become separated from the river front by the sale of river front lots.

30. Mayer v. Board of Comm'rs, 177 La. 1119, 150 So. 295 (1933).

31. See Ruch v. New Orleans, 43 La. Ann. 275, 281, 9 So. 473, 475 (1891), where the court said: "The right of appropriation proceeds upon the principles . . . that the riparian owner enjoys his property *sub modo, i.e.*, subject to the right of the public to reserve space enough for levees, public roads, and the

this reason the right of the state to appropriate property under article 665 is not in contravention of due process even though market value is not paid. This analysis also explains why only the immediate riparian property owners, and those non-riparian owners whose property was part of an original riparian tract, must bow to the servitude of article 665 and why the state cannot legally use the servitude to acquire other non-riparian property although it is equally necessary for levee purposes. For example, if tract *A*, situated two miles from the river, is necessary for levee purposes, the owner cannot complain if his property is appropriated under article 665 provided it was once part of a larger tract *B* which was riparian at the time it left the public domain. He has always owned this property (tract *A*) subject to the servitude, even though the tract to which the servitude originally was attached (tract *B*) has since been subdivided. At the same time, the owner of tract *C*, situated adjacent to tract *A* and also two miles from the river, will not owe the servitude if his land was not part of a larger tract which was riparian at the time it left the state. Although the owners of tracts *A* and *C* are neighbors and both tracts are non-riparian, one owes the levee servitude while the other does not. The obligation under the servitude is controlled, not by the location of the property, but by the accident of ancient ownership. As a result, a jig-saw effect has been produced. This arbitrary distinction is justifiable legally but not practically. Modern Louisiana no longer needs this ancient servitude, for its inequities vastly outweigh its usefulness,[32] and the legislature should look to the feasibility of repealing the relevant part of article 665.

The levee servitude was inherited from generations living under different conditions from our own. Then, as now, flood control was of paramount importance, but the methods used then were notably different from those used today. As early as 1770 riparian landowners were obligated to construct levees themselves. Their burden was not really lightened until the end of the Civil War,[33] and all this time the levees were built on the

like. Over this space the front proprietor never acquires complete dominion. It never passes free of this reservation by a deed to a purchaser."

32. See A. K. Roy, Inc. v. Board of Comm'rs, 237 La. 541, 549, 111 So. 2d 765, 768 (1959), where counsel for defendant argued that "the entire jurisprudence as established under art. 665 and art. XVI, sec. 6 of the Louisiana constitution should be re-examined in the light of modern trends."

33. The obligation of building the levees shifted from the riparian owner and his burden somewhat lightened in 1852 by the formation of the first levee district and the levying, in addition to revenues derived from the sale of overflowed

river's edge. Another important difference was the former system of landowning along rivers and streams. The riparian tracts consisted of long, narrow strips running for miles perpendicular to the river's edge. When narrow tracts and riparian levees were the rule, the servitude fulfilled its purpose equitably. The levees served to protect mainly the plantation owners,[34] so there was nothing unfair in having these proprietors shoulder their cost. Further, since the levees were built on the river's edge, the inequitable contrast between appropriating riparian property while expropriating non-riparian lands for the identical purpose never arose.

But today there exists a different situation. By 1878 it was apparent that efficient and unified plans protecting the entire state against inundation were necessary.[35] Today's larger levees no longer hug the meanderings of the stream, and modern spillways sprawl far inland from the river. These devices perform the purposes of the ancient riparian levee to a much higher degree. So, too, the old riparian plantations have been sliced into numerous individual tracts, with the result that the inequities of the servitude show themselves today. The levees no longer protect only the riparian landowner who often owns only a small portion of land. Why should he suffer the burden of the levee without being fully compensated when its purpose is the protection of every citizen? Since levees are no longer built only adjacent to the stream, another inequity results. As the non-riparian landowner does not owe the levee servitude,[36] a fact made clear in the instant case, he must be paid market value for his property under expropriation laws. But the riparian owner, whose lands are taken for the identical purpose, owes the

and swamp lands granted the state by Congress, of a tax to raise funds for levee work. In 1866 all laws authorizing the construction of levees at the expense of the riparian proprietors were repealed. La. Acts 1866, No. 20. Russell v. Board of Comm'rs, 159 La. 330, 105 So. 361 (1925).

34. The reason for this being that inundation ordinarily would seriously affect only riparian owners since their tracts extended so far away from the river.

35. It was for this purpose that the Board of State Engineers, originally created by La. Acts 1871, No. 7, was reconstituted and the duty imposed upon it of, among other things, carefully surveying the water courses and levees to be constructed "which are of prime importance to the state at large." La. Acts 1878 (E.S.), No. 5.

36. Unless his property can be shown to have been riparian at the time it left the state, and also shown to be within the reasonable necessities of the situation. Jeanerette Lumber Co. v. Board of Comm'rs, 249 La. 508, 187 So. 2d 715 (1966).

servitude of article 665 and, therefore, can only receive the previous year's assessment value as compensation.

A repeal of the levee servitude under article 665 would not hurt Louisiana. Any land needed for the purpose could readily be obtained through expropriation and the added cost will not be so great as to overshadow the good that this change would bring about. The flood control program is for the benefit of all the state and all taxpayers should share the burden. The cost of other public works is distributed in an equitable manner and flood control should be no exception.

John W. Jewell

CONSTITUTIONAL CRIMINAL JUSTICE—BLOOD TESTS—DUE PROCESS

The automobile petitioner was driving skidded and struck a tree. Suspecting that he had been drinking, police arrested him at a hospital where he was being treated. A sample of Schmerber's blood drawn by a physician over his objection was used as evidence to convict him of driving while under the influence of intoxicating liquor. The United States Supreme Court affirmed, *held*,[1] the privilege against self-incrimination protects an accused only from being compelled to testify against himself or from otherwise providing the state with evidence of a testimonial or communicative nature. The taking of blood was justified and under reasonable conditions, therefore petitioner's

1. Decision was 5-4 with Chief Justice Warren, Justices Black, Douglas, and Fortas dissenting. The Chief Justice assigned his reasoning in Breithaupt v. Abram, 352 U.S. 432 (1957) as the basis for his present dissent; Justices Douglas and Fortas also cited Warren's *Breithaupt* dissent. *Breithaupt* involved a conviction of involuntary manslaughter on evidence of intoxication supplied by a blood sample taken from the accused while he was unconscious by a physician under medically proper conditions. Justice Douglas felt that the true issue was the right of privacy recognized in Griswold v. Connecticut, 381 U.S. 479 (1965) and that the right coincided with the fourth amendment right of persons to be secure "in their persons." He felt that there was a clear invasion of personal dignity and privacy in the case at hand (*cf.* State v. Findlay, 145 N.W.2d 650 (Iowa 1966), where the Iowa Supreme Court held that the taking of a blood sample from an unconscious defendant was not an unreasonable invasion of privacy and that in view of bodily assimilation of alcohol an emergency existed justifying taking the sample though defendant was not under arrest, and that the procedure did not constitute brutality or deprive defendant of due process of law; it was another automobile case). Justice Fortas felt that the states have no right to commit violence upon a person, or to make use of the results of such violence, and that the extraction of blood, over protest, was an act of violence.