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# THE PUBLIC USE OF THE BANKS OF NAVIGABLE RIVERS IN LOUISIANA

A. N. Yiannopoulos\*

All kinds of things, common, public, or private, may be subject to public use in Louisiana by virtue of directly applicable provisions of law or as a result of a dedication to public use.<sup>1</sup> From among private things subject to public use,<sup>2</sup> the Louisiana Civil Code of 1870 regulates expressly only the public use of the banks of navigable rivers. Article 455 thus declares that "the use of the banks of navigable rivers or streams is public," although, according to the same article, "the ownership of the river banks belongs to those who possess the adjacent lands." The content of the public use is that "every one has the right freely to bring his vessels to land there, to make fast the same to trees which are there planted, to unload the vessels, to deposit his goods, to dry his nets, and the like."<sup>3</sup> The following discussion is devoted to an analysis of the nature, scope, and extent of the public use of the banks of navigable rivers<sup>4</sup> in Louisiana. Attention will be focused on the rights of individual members of the public, of the owners of the banks, and of the public authorities charged with the administration of the public use.

## NATURE OF THE PUBLIC USE OF RIVER BANKS

The questions of the nature of public use, and of the nature

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1. For the notions of common, public, and private things, see A. YIANNPOULOS, CIVIL LAW PROPERTY §§ 23-39 (1966).

2. Private things subject to public use are sometimes referred to as "public things." See, e.g., *Locke v. Lester*, 78 So.2d 14 (La. App. 2d Cir. 1955); cf. *Administrators of the Tulane Educ. Fund v. Board of Assessors*, 38 La. Ann. 292 (1886). These things, however, are not public in the sense of article 453 of the Louisiana Civil Code of 1870, nor are they necessarily things of the public domain. They are public merely in the sense that they are destined or dedicated to public use. This category of things corresponds to the Roman law category of *res publicae usui publico destinatae*. See A. YIANNPOULOS, CIVIL LAW PROPERTY §§ 30, 34 (1966).

3. LA. CIV. CODE art. 455; La. Civ. Code art. 446 (1825); La. Digest of 1808, bk. II, tit. I, art. 8; cf. *LAS SIETE PARTIDAS* bk. 3, tit. 28, l. 6 (Lislet & Carleton transl. 1820).

4. Louisiana cases dealing with the scope of application of article 509 of the Civil Code might be taken to establish a distinction between "rivers" and "other streams." See *Esso Standard Oil Co. v. Jones*, 233 La. 915, 98 So.2d 236 (1957); *Amerada Petroleum Corp. v. State Mineral Bd.*, 203 La. 473, 14 So.2d 61 (1943); *State v. Cockrell*, 162 So.2d 361 (La. App. 1st Cir. 1964). Actually, these cases extend the rules governing rivers to bodies of waters having a perceptible stream which are thus classified as rivers in the legal sense. In the following discussion, the word "rivers" is used to mean "rivers or streams," the expression employed in article 455 of the Civil Code.

of legal relations that arise from the dedication of things to public use, have been discussed extensively elsewhere.<sup>5</sup> For the purposes of the following discussion, it suffices to state the public use is generally regarded in Louisiana as a servitude on land in the interest of the public.<sup>6</sup> This conception is clearly applicable to the public use of the banks of navigable rivers.<sup>7</sup>

The servitude of public use burdening the banks of navigable rivers has been recognized by the United States Supreme Court and has been held to be consistent with the fourteenth amendment of the United States Constitution.<sup>8</sup> Louisiana courts have likened this servitude to a usufruct, the public being "a great usufructuary," with the right to all the profit, utility, and advantages that the property may produce, and the public authorities being the "administrator."<sup>9</sup> According to well-settled Louisiana jurisprudence, the servitude for the public use of the banks of navigable rivers is distinguishable from other servitudes burdening riparian lands and especially from the road and levee servitude of article 665 of the Civil Code. The last servitude is "a very much onerous one, extending much further inland."<sup>10</sup>

#### PREREQUISITES OF PUBLIC USE: NAVIGABLE RIVERS

The servitude of public use under article 455 of the Louisiana Civil Code of 1870 burdens the privately owned banks of navigable rivers. Indeed, the banks of inland navigable waters other than rivers belong to the state rather than to private individuals and are subject to public use as "public" things under article 453 of the Code;<sup>11</sup> the banks of non-navigable rivers or other

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5. See A. YIANNPOULOS, CIVIL LAW PROPERTY §§ 34-36 (1966).

6. See Comments, 16 LA. L. REV. 789 (1956), 12 TUL. L. REV. 428 (1938). See also Pruyne v. Nelson Bros., 180 La. 760, 157 So. 585 (1934). The servitude of public use is *sui generis*. See Anderson v. Thomas, 166 La. 512, 527, 117 So. 573, 579 (1928): "Dedications to public use, and servitudes in favor of the public, are not governed by the strict rules which apply to private property." Accordingly, administrative authorities and courts have broad powers with respect to the regulation and protection of the public use. See LeBlanc v. City of New Orleans, 138 La. 243, 70 So. 212 (1915).

7. See State v. Richardson, 140 La. 329, 72 So. 984 (1916); Note, 29 TUL. L. REV. 799 (1955).

8. See *Town of Vidalia v. McNeely*, 274 U.S. 676 (1927).

9. *Pulley & Erwin v. Municipality No. 2*, 18 La. 278 (1841).

10. *Village of Moreauville v. Boyer*, 138 La. 1070, 1074, 71 So. 187, 189 (1916). See also *Powell v. Porter*, 172 La. 681, 135 So. 24 (1931).

11. State ownership of inland navigable waters other than rivers extends to the mean high water mark of the banks. See *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936); *State v. Cockrell*, 162 So.2d 361 (La. App. 1st Cir.

inland waters are private things that are not subject to public use.<sup>12</sup> It is therefore important to determine in each case whether the prerequisites for public use under article 455 of the Code are met—namely, that a particular body of water is a river and that it is navigable.

The question whether a body of water is a river or an inland lake has arisen in Louisiana in cases involving claims to alluvial additions or rights to submerged lands. Judicial solutions reached in these cases ought to apply to cases concerning claims of a servitude of public use. In *State v. Erwin*,<sup>13</sup> the Supreme Court of Louisiana, following common law rather than pertinent French authorities, reached the conclusion that “a vast expanse of water as Calcasieu Lake” is “in fact a lake, although a river empties into the sea through it.” This case was overruled on other grounds by *Miami Corp. v. State*,<sup>14</sup> but the Supreme Court of Louisiana was apparently prepared to adhere to the view that a vast expanse of water traversed by a stream, as Grand Lake, is a lake rather than a river. The rule of the *Erwin* case as to what constitutes a lake was overruled *sub silentio* in *Amerada Petroleum Corp. v. State Mineral Board*<sup>15</sup> and *Esso Standard Oil Co. v. Jones*.<sup>16</sup> Today, it appears to be settled that a river is “a body of water through which a current flows with such capacity and velocity and power as to form accretions.”<sup>17</sup> This definition of a river may include, in addition to natural water courses, artificial navigation canals.<sup>18</sup> Of course, it is a different question

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1964), A. YIANNPOULOS, CIVIL LAW PROPERTY § 32 (1966). By analogy to the banks of navigable rivers, Louisiana courts have held that the use of the banks of navigable lakes “is public and under the administration of the State agencies.” *Evans v. Dugan*, 205 La. 398, 408, 17 So.2d 562, 566 (1944). The same result ought to follow by application of article 453 of the Civil Code.

12. See *Amite Gravel & Sand Co. v. Roseland Gravel Co.*, 148 La. 704, 87 So. 718 (1921); *McCearley v. Lemennier*, 40 La. Ann. 253, 3 So. 649 (1888). The riparian owners are thus entitled to the exclusive use of the banks and of the bed of the river up to the middle of the thread.

13. 173 La. 507, 514, 138 So. 84, 86 (1931). *But cf.* *Chaison v. Wehrt*, 104 La. 487, 29 So. 179 (1901) (Lake Charles classified as a stream).

14. 186 La. 784, 173 So. 315 (1936).

15. 203 La. 473, 14 So.2d 61 (1943).

16. 233 La. 915, 98 So.2d 236 (1957).

17. *State v. Cockrell*, 162 So.2d 361, 368 (La. App. 1st Cir. 1964).

18. *Cf.* *Harvey Canal & Land Improvement Co. v. Koch-Ellis Marine Contractors, Inc.*, 34 So.2d 66 (La. App. Orl. Cir. 1948). In this case, the district court considered an artificial canal as a river the banks of which were subject to public use under article 455 of the Civil Code. The decision was affirmed on other grounds.

whether a canal is built by public authorities on public lands or servitudes or by private entrepreneurs on private land.<sup>19</sup>

The question whether a river is navigable has arisen in a variety of contexts, including a determination of the ownership of water bottoms<sup>20</sup> and of the existence of a servitude of public use.<sup>21</sup> In general, a body of water is navigable if it is susceptible of being used, in its ordinary condition, as a highway of commerce "over which trade and travel are or may be conducted in the customary modes of trade and travel on water."<sup>22</sup> This is the legal test of navigability, and a river is navigable in law if it is navigable in fact.<sup>23</sup> Thus, navigability must be proved, unless the court is prepared to take judicial notice that a river is navigable in fact.<sup>24</sup>

The servitude of public use clearly burdens the banks of rivers that were navigable in 1812 (the year Louisiana was admitted into the Union) and continue to be navigable. Questions may arise, however, whether the servitude exists on the banks of rivers that cease to be navigable or that have become navigable since 1812.<sup>25</sup> In the absence of directly applicable legis-

19. It would seem that a navigation canal built entirely on private property for private purposes is a private thing for the same reasons that a road built on private property for private purposes is a private thing. But a navigation canal constructed by public authorities on a right of way servitude or on public lands is certainly a public waterway. See *United Geophysical Co. v. Vela*, 231 F.2d 816 (5th Cir. 1956) (artificial canal "public" as a part of the navigable waters of the United States).

20. See, e.g., *Amite Gravel & Sand Co. v. Roseland Gravel Co.*, 148 La. 704, 87 So. 718 (1921).

21. See, e.g., *Chaison v. Wehrt*, 104 La. 487, 29 So. 179 (1901); *McCearley v. Lemennier*, 40 La. Ann. 253, 3 So. 649 (1888); *Town of Napoleonville v. Boudreaux*, 142 So. 874 (La. App. 1st Cir. 1932).

22. *State v. Aucoin*, 206 La. 786, 855, 20 So.2d 136, 158 (1944). See also *Amite Gravel & Sand Co. v. Roseland Gravel Co.*, 148 La. 704, 87 So. 718 (1921); *Delta Duck Club v. Barrios*, 135 La. 357, 65 So. 489 (1914).

23. See *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 319, 163 So. 145, 150 (1935): "A body of water is navigable in law, when it is navigable in fact." See also *United Geophysical Co. v. Vela*, 231 F.2d 816 (5th Cir. 1956). The burden of proof is on the party claiming that the body of water in question is or has been navigable. See *Transcontinental Petroleum Corp. v. Texas Co.*, 209 La. 52, 24 So.2d 248 (1945); *Olin Gas Transmission Corp. v. Harrison*, 132 So.2d 721 (La. App. 1st Cir. 1961); *Comments*, 30 *TUL. L. REV.* 332 (1956), 6 *LA. L. REV.* 698 (1946).

24. See *Town of Napoleonville v. Boudreaux*, 142 So. 874 (La. App. 1st Cir. 1932). In this case, the court took judicial notice of the navigability of Bayou Lafourche.

25. Questions may also arise whether the servitude exists on the banks of a body of water that was not a river in 1812, when Louisiana was admitted into the Union, but is a river today. It would seem that this question ought to be answered in the same way as the question concerning the public use of the banks of rivers that were not navigable in 1812. In *State v. Cockrell*, 162 So.2d 361 (La. App. 1st Cir. 1964), the court avoided the

lation or controlling jurisprudence, the answer is to be gained by interpretation of the pertinent provisions of the Civil Code and by application of general principles.

A literal interpretation of article 455 of the Civil Code leads to the conclusion that the banks of a river that is no longer navigable are freed of the servitude of public use.<sup>26</sup> This conclusion is bolstered by the consideration that the waters of a non-navigable river are no longer an avenue of commerce and the servitude for the public use of the banks has no reason to exist. Analogous application of article 784 of the Civil Code, establishing the general rule for the termination of servitudes, would lead to the same result.

Again, a literal interpretation of article 455 of the Civil Code leads to the conclusion that the banks of a river that was non-navigable in 1812, but is navigable today, are burdened with the servitude of public use. This interpretation, however, may give rise to a question of constitutionality under the fifth and fourteenth amendments of the United States Constitution. Indeed, a strong argument may be made that the imposition of a servitude of public use on the banks of formerly non-navigable rivers is a taking of property without compensation. The original private owner of the land that is now traversed by a navigable river did not acquire his property *sub modo*, as did the proprietors of lands fronting navigable rivers.<sup>27</sup> But, on the other hand, an argument may also be made that any acquisition of property in Louisiana is subject to the terms of article 455 of the Civil Code, namely, should the property ever front the waters of a navigable river, it would be burdened with a servitude of public use. Perhaps the best solution is to exclude public use of the banks of rivers that were non-navigable in 1812, in accordance with the modern tendency to limit the scope and burden of riparian servitudes.<sup>28</sup>

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question of the applicability of article 509 of the Civil Code to a body of water claimed to be an inland lake in 1812 by a finding that the body of water in question was actually a river in 1812.

26. For the question whether the beds of rivers that cease to be navigable belong to the private domain of the state or to the riparian owners, see A. YIANNPOULOS, *CIVIL LAW PROPERTY* § 31 (1966).

27. See *Eldridge v. Trezevant*, 160 U.S. 452 (1896); cf. *Town of Vidalia v. McNeely*, 274 U.S. 676 (1927).

28. See LA. CONST. art. XVI, § 6; *Jeanerette Lumber & Shingle Co. v. Board of Comm'rs*, 249 La. 508, 187 So.2d 715 (1966); *Hebert v. T. L. James & Co.*, 224 La. 498, 70 So.2d 102 (1953).

Non-navigable rivers may become navigable either as a result of natural forces or as a result of artificial works, as drainage, irrigation, or dredging. Further, formerly dry lands may become banks of an artificial navigation canal.<sup>29</sup> In all these situations, questions may arise as to the ownership of water bottoms,<sup>30</sup> freedom of navigation,<sup>31</sup> and public use of the banks.<sup>32</sup> Definitive answers to these questions may await the passage of special legislation, but, in the meanwhile, application of article 455 of the Civil Code should be avoided in cases in which navigability is the consequence of artificial works.<sup>33</sup>

#### AREA SUBJECT TO PUBLIC USE: BANKS

A river consists of three things: "the water, the bed, and the banks."<sup>34</sup> The water and beds of navigable rivers are public things,<sup>35</sup> whereas the banks are private things subject to public

29. A navigation canal constructed by public authorities on public lands ought to be classified as a public thing under article 453 of the Civil Code. A navigation canal constructed by public authorities on a right of way servitude is public merely in the sense that it is dedicated to public use; the water bottom belongs to a private person. In both cases, the canal is a public water way. *See* United Geophysical Co. v. Vela, 231 F.2d 816 (5th Cir. 1956).

A navigation canal may fit the definition of a navigable river. *See* text at note 18 *supra*. If the banks of the canal are within the right of way acquired by the public authorities, they would ordinarily be subject to public use by virtue of dedication. If the banks of the canal belong to private individuals, public use should be excluded. Even if the rule of Miami Corp. v. State, 186 La. 784, 173 So. 315 (1936) were to be applied for the determination of the ownership of submerged lands, it should not follow that the banks are subject to public use. The two questions are distinct and distinguishable. *Cf.* Harvey Canal & Land Improvement Co. v. Koch-Ellis Marine Contractors, Inc., 34 So.2d 66 (La. App. Or. Cir. 1948).

30. The question whether the beds of water bodies that were not navigable in 1812, but are navigable today, belong to the state or to private owners has not as yet been decided by Louisiana courts. In *State v. Aucoin*, 206 La. 786, 20 So.2d 136 (1944), the body of waters in question was found to be navigable in 1812. In *Olin Gas Transmission Co. v. Harrison*, 132 So.2d 721 (La. App. 1st Cir. 1961), the body of waters in question was found to be non-navigable both in 1812 and at the present time. Of course, lands eroded by waters that were navigable in 1812 belong to the state. *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936). Further, these waters are subject to public use. *D'Albora v. Garcia*, 144 So.2d 911 (La. App. 4th Cir. 1962).

31. *See* *D'Albora v. Garcia*, 144 So.2d 911 (La. App. 4th Cir. 1962).

32. *See, e.g.,* United Geophysical Co. v. Vela, 231 F.2d 816 (5th Cir. 1956); *Harvey Canal & Land Improvement Co. v. Koch-Ellis Marine Contractors, Inc.*, 34 So.2d 66 (La. App. Or. Cir. 1948).

33. *Cf. Slattery v. Arkansas Natural Gas Co.*, 138 La. 793, 70 So. 806 (1916).

34. *Morgan v. Livingston*, 6 Mart(O.S.) 19, 229 (La. 1819).

35. The beds of navigable rivers are public things under article 453 of the Louisiana Civil Code of 1870. Article 450 of the same Code declares that running water is a common thing; nevertheless, legislative and judicial action in Louisiana resulted in the reclassification of running water as a

use. Determination of the area that is subject to public use under article 455 of the Civil Code necessitates accurate definition of the words "bed" and "banks."

According to article 457 of the Louisiana 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," but in navigable rivers "where there are levees, established according to law, the levees shall form the banks."<sup>36</sup> The word "bed" is not defined in the Code, but according to well-settled Louisiana jurisprudence the bed is "the land covered by the water in its ordinary low stage."<sup>37</sup> Early Louisiana decisions held that the bank of a river is that "which contains the river in its utmost height" or "that space which the water covers when the river is highest in any season of the year."<sup>38</sup> These decisions must be regarded as overruled by article 457 of the Louisiana Civil Code of 1870 and by subsequent decisions which declare that "banks are 'that which contains' the river in its ordinary state of high water,"<sup>39</sup> namely, the area between the ordinary low and the ordinary high stage of the waters.<sup>40</sup> Actual determination of the space of

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public thing. See LA. R.S. 9:1101 (1950); A. YIANNPOULOS, CIVIL LAW PROPERTY §§ 26, 31 (1966).

36. LA. CIV. CODE art. 457; La. Civ. Code art. 448 (1825). There is no corresponding provision in the Louisiana Digest of 1808. The redactors of the 1825 Louisiana Civil Code observed: "The banks of navigable rivers being public, we have thought proper to describe what they were, and to add such modifications as the peculiarities of the river Mississippi required. See Digest, book 43, tit. 12, law 1, sec. 5, and law 3, sec. 1." 1 LOUISIANA LEGAL ARCHIVES, PROJET 36 (1937). It ought to be noted that the word *lit* in the French text of article 448 of the Louisiana Civil Code of 1825, corresponding with article 457 of the 1870 Code, was translated as banks rather than bed. Perhaps, the mistranslation was intentional, because the projet used the word *rives*, meaning banks. See 1 LOUISIANA LEGAL ARCHIVES, PROJET 36 (1937).

37. *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *State v. Cockrell*, 162 So.2d 361 (La. App. 1st Cir. 1964), *cert. denied*, 246 La. 343, 164 So.2d 350 (1964).

38. *Morgan v. Livingston*, 6 Mart.(O.S.) 19, 229 (La. 1819). See also *Lyons v. Hinckley*, 12 La. Ann. 655, 657 (1856): "[T]he banks are those portions of land between the water's edge and the highest line attained by high water."

39. *State v. Richardson*, 140 La. 329, 349, 72 So. 984, 991 (1916). See also *Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931).

40. See *Wemple v. Eastham*, 150 La. 247, 251, 90 So. 637, 638 (1922): "The land lying between the edge of the water at its ordinary low stage and the line which the edge of the water reaches at its ordinary high stage—that is, the highest stage that it usually reaches at any season of the year—is called the bank of the stream, and belongs to the owner of the adjacent land." See also *State v. Cockrell*, 162 So.2d 361 (La. App. 1st Cir. 1964), *cert. denied*, 246 La. 343, 164 So.2d 350 (1964): "The land lying between the edge of the water at its ordinary low stage and the line which the water reaches in its ordinary high stage, belongs to the owner of the adjacent land subject to the right of the public use of the bank."



land designated as bank may be made in accordance with a variety of methods. In *Seibert v. Conservation Comm'n of La.*,<sup>41</sup> the Supreme Court of Louisiana refused to adopt the method established by the Mississippi River Commission or that established by the State Board of Engineering and held that this determination is to be made by lay testimony.

Due to the peculiarities of Louisiana geography, a functional definition of banks had to take into account the existence of levees, and it was early established that "the levee . . . is a part of the bank."<sup>42</sup> The rule was adopted in the 1825 revision of the Louisiana Civil Code and assumed its present form in article 557 of the 1870 Code.<sup>43</sup> Literal application of this provision would be inequitable today, and, perhaps, contrary to the intent of the legislature.<sup>44</sup> Accordingly, Louisiana courts seem prepared to take levees as the banks of a navigable river only when the levees are close to the edge of the waters.<sup>45</sup> The requisite degree of proximity will have to be determined as cases continue to arise. The levee itself belongs to the levee board;<sup>46</sup> and it would seem that members of the general public have no right to use the levee itself because "the public cannot claim the use of the entire surface of the declivity of a hill or mountain, the base of which is washed by a navigable stream."<sup>47</sup>

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41. 181 La. 237, 159 So. 375 (1935).

42. *Morgan v. Livingston*, 6 Mart.(O.S.) 19, 229 (La. 1819).

43. See note 36 *supra*.

44. See *Mayer v. Board of Comm'rs*, 177 La. 1119, 1131, 150 So. 295, 298 (1933); "When article 457, defining the banks of rivers, was carried into the present Code . . . levees, comparatively speaking, were small affairs, and were generally constructed close to the river, say between 60 feet and an acre or two. The levees could then serve with some degree of exactness as the banks of the river, and may do so, in many instances, now. Today, however, the levees are usually built much larger, and not infrequently some distance from the natural bank of the river. As for example (though this would seem to be an extreme case) in *Wolfe v. Hurley* (D.C.) 46 F. (2d) 515, the levee was set back 4 or 5 miles from the river. To apply the codal definition of the banks of a river, and thereby make, with the aid of Article 453 of the Civil Code, all land lying between the levee and the river a part of the bed of the river, and a public thing, no longer available for private use, without reservation or qualification, to present methods of building levees, would be going further, we think, than the legislature ever intended by its enactment."

45. *Cf. Lake Providence Port Comm'n v. Bunge Corp.*, 193 So.2d 363 (La. App. 2d Cir. 1966) (levee one-quarter mile from the edge of the waters).

46. See 1966-68 LA. ATT'Y GEN. ANN. REP. 213.

47. *Lyons v. Hinckley*, 12 La. Ann. 655, 657 (1856). See also *Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970).

## CONTENT OF PUBLIC USE: RIGHTS OF THE GENERAL PUBLIC

According to well-settled Louisiana jurisprudence, the servitude of public use under article 455 of the Civil Code is not "for the use of the public at large for all purposes."<sup>48</sup> The language of this article is illustrative of possible uses rather than exclusive,<sup>49</sup> but all uses of the banks must be incidental to the navigable character of the river and its enjoyment as an avenue of commerce.<sup>50</sup> Thus, the use "must not only be a public one, but must be of the particular public use specified in the reservation."<sup>51</sup>

Members of the general public do not have the right to hunt<sup>52</sup> on the banks of navigable rivers nor the right to trap<sup>53</sup> fur-bearing animals without permission from the riparian owner. Moreover, in case there are levees, hunting or trapping may be excluded by the rules and regulations of the levee board, which has authority to post levees against such uses.<sup>54</sup> Presumably, the public has the right to fish from the banks of a navigable river, but has no right to fish in ponds or borrow pits in the batture.<sup>55</sup> Further, the public does not have the right to cross privately owned lands in order to go to the banks of navigable rivers.<sup>56</sup> The list of rights that members of the general public do not have is, indeed, a long one. Louisiana decisions indicate that the public does not have the right to camp<sup>57</sup> on the banks,

48. *Lyons v. Hinckley*, 12 La. Ann. 655, 657 (1856).

49. *See Pulley & Erwin v. Municipality No. 2*, 18 La. 278, 285 (1841): "[T]he expression for the mooring of vessels, spreading nets, building cabins, &c., used in the Code, whilst they are permissive for those purposes, are not intended as restrictions of the use of those purposes alone, but as examples or illustrations of its applications."

50. *See Hebert v. T. L. James & Co.*, 224 La. 498, 70 So.2d 102 (1954); *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *Lyons v. Hinckley*, 12 La. Ann. 655 (1856); *Chinn v. Petty*, 163 So. 735 (La. App. 2d Cir. 1935).

51. *State v. Richardson*, 140 La. 329, 341, 72 So. 984, 988 (1916).

52. *See 1938-40 LA. ATT'Y GEN. ANN. REP. 96; cf. Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970). In this case, the court refused to enjoin the district attorney from prosecuting for trespass persons engaged in hunting and fishing on the banks of a navigable river. *See also Delta Duck Club v. Barrios*, 135 La. 357, 65 So. 489 (1914). In this case, an injunction was issued against trespassing by a professional hunter in a game preserve belonging to plaintiff. Navigable waters and the seashore were exempted from the injunction, though river banks were apparently included in it.

53. *See Delta Sec. Co. v. Dufresne*, 181 La. 891, 160 So. 620 (1935). In this case, a professional trapper was punished for contempt because he violated an injunction against trapping on the banks of a navigable river.

54. *See Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970); LA. R.S. 14:63 (1950); 1966-68 LA. ATT'Y GEN. ANN. REP. 213.

55. *See Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970); 1966-68 LA. ATT'Y GEN. ANN. REP. 214.

56. *See Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931).

57. *See 1938-40 LA. ATT'Y GEN. ANN. REP. 708. See also Delta Sec. Co. v. Dufresne*, 181 La. 891, 160 So. 620 (1935).

to keep vessels<sup>58</sup> or dry docks<sup>59</sup> tied to the bank indefinitely, to use without compensation wharves or other facilities at the bank,<sup>60</sup> to drive piles into the batture for the mooring of vessels,<sup>61</sup> to use the batture as a coal yard or wood yard,<sup>62</sup> and to erect permanent structures on the banks without the consent of the riparian owner<sup>63</sup> or without license from the authorities.<sup>64</sup> Persons acting without authority may be prosecuted as trespassers,<sup>65</sup> and structures erected by them may be removed or demolished in an action brought by the riparian owner<sup>66</sup> or by the

58. See *Tourne v. Lee*, 8 Mart.(N.S.) 548 (La. 1830); 1938-40 LA. ATT'Y GEN. ANN. REP. 708. See also *Delta Sec. Co. v. Dufresne*, 181 La. 891, 894, 160 So. 620, 621 (1935): "The boat was moored to the bayou bank . . . for a week or ten days . . . The boat was used . . . as living quarters or as a base of operations for trapping fur-bearing animals . . . which relator was enjoined from doing."

59. *Duverge Heirs v. Salter*, 6 La. Ann. 450 (1851). In this case, the court declared that defendant's claim to maintain a dry dock permanently in front of plaintiff's property was a "mere mockery." The maintenance of the hull of a vessel on the river front may constitute a nuisance that can be abated by appropriate action. Members of the general public may not abate the nuisance, without recourse to law, by the destruction of the thing that caused it. *Valette v. Patten*, 9 Rob. 367 (La. 1844).

60. *Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931).

61. See *Pittsburgh & S. Coal Co. v. Otis Mfg. Co.*, 249 F. 667 (5th Cir. 1918). Nor does the owner have the right to drive piles into the batture. See *Sweeney v. Shakspeare*, 42 La. Ann. 614, 7 So. 729 (1890); *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412 (1886). Of course, the driving of piles may be permissible under license from the appropriate authorities. Cf. *O'Niell v. Sonnier*, 195 So.2d 724 (La. App. 1st Cir. 1967).

62. *Dennistoun v. Walton*, 8 Rob. 211 (La. 1844). See also *Carrollton R.R. v. Winthrop*, 5 La. Ann. 36, 37 (1850): "The conversion of a portion of the batture . . . into a wood yard, is not one of those uses. It is a private destination of property which, so long as it continues, must inure to the benefit of the owner of the soil." Of course, members of the public may use parts of the batture as a coal or wood yard under license from the appropriate authorities. See *St. Anna's Asylum v. City of New Orleans*, 104 La. 392, 29 So. 117 (1900); *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1887).

63. See *Pittsburgh & S. Coal Co. v. Otis Mfg. Co.*, 249 F. 667 (5th Cir. 1918); *Chinn v. Petty*, 163 So. 735 (La. App. 2d Cir. 1935). See also *Mayor v. Magnon*, 4 Mart.(O.S.) 2, 10 (La. 1815): "[A]s the fisherman could not justify the enclosure of a space of ground on the bank of a river, for the safety of his net when spread to be dried, nor the erection of a warehouse for the storage of his fish, the carpenter cannot justify the erection of a permanent shed or building for the safety of his tools, or the materials which he uses, nor to fence the ground for the protection of timber which it may be his interest to accumulate."

64. See *Herbert v. Benson*, 2 La. Ann. 770 (1847); cf. *Warriner v. Board of Comm'rs*, 132 La. 1098, 62 So. 157 (1913). The riparian owner, however, may build structures without license from the authorities. See text at note 125 *infra*.

65. See *Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970).

66. See *Pittsburgh & S. Coal Co. v. Otis Mfg. Co.*, 249 F. 667 (5th Cir. 1918); *Means v. Hyde & Mackie*, 18 La. Ann. 515 (1866); *Chinn v. Petty*, 163 So. 735 (La. App. 2d Cir. 1935). Of course, the riparian owner may not evict a person who occupies the banks under license from the public authorities. See *Evans v. Dugan*, 205 La. 398, 17 So.2d 562 (1944). The "general right"

public authorities,<sup>67</sup> upon proof that these structures obstruct the public use.<sup>68</sup> These persons are squatters of the public domain or private property, as the case may be.<sup>69</sup>

The long list of negatives confines, in effect, the scope of public use of the banks of navigable rivers to the rights granted by article 455 of the Civil Code expressly—namely, the rights of the general public to dry nets, to tie vessels to the banks, to unload cargo, and to deposit it there. Changed circumstances, however, and possibly *contra legem* customs, have further emasculated the terms of article 455. The right to dry nets is practically meaningless today in most of Louisiana's navigable rivers. It is true that Louisiana courts have held that the rights "of landing or launching boats, receiving or shipping freight . . . may be exercised by every individual, whenever his interests require,"<sup>70</sup> and there is no doubt that vessels may be temporarily moored to the banks of navigable rivers.<sup>71</sup> There is strong doubt, however, whether these rights may be exercised "freely" as article 455 declares. Public authorities are clearly entitled to charge fees for the use of port facilities,<sup>72</sup> and there are indications that customs permit riparian owners to charge fees for the use of banks in rural areas.<sup>73</sup> The rights to unload vessels and to de-

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under article 455 of the Civil Code must yield to the "special right" granted by the authorities.

67. See *Herbert v. Benson*, 2 La. Ann. 770 (1847); *Mayor v. Magnon*, 4 Mart.(O.S.) 2 (La. 1815); *Town of Napoleonville v. Boudreaux*, 142 So. 874 (La. App. 1st Cir. 1932).

68. See note 67 *supra*; cf. text at note 133 *infra*; *Shepherd v. Third Municipality*, 6 Rob. 349, 350 (La. 1844): "No one has a right to a permanent occupancy of the banks of a river. The planter may land his crop thereon, but he must remove it. He cannot leave it there until he has found a purchaser. The fisherman may, with a few boards, erect a temporary hut, in which he may shelter himself during the storm; but he cannot erect any permanent building."

69. See *Town of Napoleonville v. Boudreaux*, 142 So. 874 (La. App. 1st Cir. 1932).

70. See *Worrell v. Cordill*, Gunby's Dec. 101 (La. App. 2d Cir. 1885).

71. See *United Geophysical Co. v. Vela*, 231 F.2d 816 (5th Cir. 1956). In this case, the court declared that persons have the right to moor vessels to the banks of navigable rivers, at least temporarily, under both Louisiana and federal law. Cf. *Tourne v. Lee*, 8 Mart.(N.S.) 548 (La. 1830).

72. Special laws and regulations ordinarily establish the right of the public authorities to exact fees for the use of facilities. See, e.g., LA. R.S. 34:22 (1950) (New Orleans Port Authority). Cf. 1934-36 LA. ATTY GEN. ANN. REP. 1035: "The State Parks Commission is entitled to charge wharfage fees from boats moored in front of its property for periods exceeding reasonable use for navigation, that is, continually and permanently. Even in the case that boats are not continually and permanently in front of the property, the State Parks Commission is entitled to charge a fee for the time in which said boats actually occupy the banks beyond a reasonable navigation use."

73. Cf. *Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931). The ques-

posit goods may be clearly exercised in public landings or other facilities,<sup>74</sup> but it is at best questionable whether these rights may be exercised in all banks. One can hardly imagine a modern tanker depositing a cargo of oil on the banks of navigable rivers that are not designated for such use! The illustrative language of article 455 of the Louisiana Civil Code of 1870 may be taken to mean that the general public has a right of free passage over the banks of navigable rivers in their natural state. This does not mean, however, that every member of the public may claim the right to construct a roadway on the banks or to use a private road that may be located there.<sup>75</sup> Of course, if there is a public road on the banks, established by virtue of the road servitude under article 665 of the Civil Code or in any other way in which public roads may be established,<sup>76</sup> the general public has the right to use that road.<sup>77</sup>

#### CONTENT OF PUBLIC USE: POWERS OF PUBLIC AUTHORITIES

The real significance of the servitude of public use burdening the banks of navigable rivers in Louisiana does not lie in the rather limited rights of use accorded to members of the general public; it lies instead in the powers that it confers upon the state and its political subdivisions to regulate the public use of the banks, and to appropriate the banks themselves for the construction of works serving the general interest. Thus, along with

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tion of the right of a riparian owner to charge fees for the mooring of vessels was raised in *Harvey Canal & Land Improvement Co. v. Koch-Elis Marine Contractors, Inc.*, 34 So.2d 66 (La. App. Ori. Cir. 1948). In this case, the district court dismissed an action for mooring fees by application of article 455 of the Civil Code. The court of appeal affirmed merely on the ground that plaintiff's claim was uncertain as he had failed to prove that defendant's vessels had actually moored to his property. Evidence in the case tended to establish the fact that riparian owners customarily charged fees for the use of the banks.

74. See *Worrell v. Cordill*, Gunby's Dec. 101 (La. App. 2d Cir. 1885); "Every person has the right to receive and ship his own freight at a public landing."

75. See *Worrell v. Cordill*, Gunby's Dec. 101 (La. App. 2d Cir. 1885): "The banks of the Mississippi are public for two purposes: . . . 2. For passing along its banks, a right which can only be exercised when the Police Jury declare that there shall be a public road along the banks, which they have an absolute right to do whenever they deem it expedient." See also *Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970) (levee road closed to the public); cf. *Lyons v. Hinckley*, 12 La. Ann. 655 (1856) (no right of passage over part of the land that cannot be said to be "banks" of a navigable river).

76. See A. YIANNPOULOS, *CIVIL LAW PROPERTY* § 33 (1966); cf. *Ruch v. City of New Orleans*, 43 La. Ann. 275, 9 So. 473 (1891).

77. See *Davis v. City of Alexandria*, 69 So.2d 587 (La. App. 2d Cir. 1953) (roadway between levee and water subject to a servitude of passage in favor of the public under articles 457 and 665 of the Civil Code).

inherent police powers,<sup>78</sup> and several other articles of the Louisiana Civil Code,<sup>79</sup> the servitude of public use under article 455 has been utilized by Louisiana courts to invest public authorities with broad powers of regulation and administration.<sup>80</sup> Moreover, it was by reference to the servitude of public use that the constitutionality of Louisiana legislation, enabling political subdivisions of the state to appropriate river banks, was upheld and declared to be consistent with the fifth and fourteenth amendments of the United States Constitution.<sup>81</sup>

The power of the sovereign to control the public use of the banks of navigable rivers and to grant exclusive rights of use to private persons, individuals or corporations, was early recognized.<sup>82</sup> Further, it was early established that the state may delegate its powers to the governing bodies of its political subdivisions<sup>83</sup> which may develop the banks<sup>84</sup> or may grant, within certain limits, exclusive rights of use to private individuals and corporations.<sup>85</sup> Political subdivisions may therefore lease the

78. See *Louisiana Construction & Improvement Co. v. Illinois Cent. R.R.*, 49 La. Ann. 527, 21 So. 891 (1897); *Ruch v. City of New Orleans*, 43 La. Ann. 275, 9 So. 473 (1891).

79. See LA. CIV. CODE arts. 457, 665, 861, 863.

80. See *State v. Richardson*, 140 La. 329, 342, 72 So. 984, 988 (1916): "The right of use of such property (i.e., the banks of a stream and the alluvion attached to the riparian land) being vested in the public, its administration, for the purpose of that use, devolves upon the state, and is, ordinarily, committed by the state to the governing bodies of its various subdivisions." See also *Evans v. Dugan*, 205 La. 398, 17 So.2d 562 (1944).

81. See *General Box Co. v. United States*, 351 U.S. 159 (1956); *Town of Vidalia v. McNeely*, 274 U.S. 676 (1927); *Eldridge v. Trezevant*, 160 U.S. 452 (1896).

82. See *De Armas v. Mayor of New Orleans*, 5 La. 132 (1833) (patent over public property granted by the United States to private individuals). See also *City of New Orleans v. New Orleans, Mobile & C. R.R.*, 27 La. Ann. 414, 415 (1875): "The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has been long settled."

83. See *Evans v. Dugan*, 205 La. 398, 17 So.2d 562 (1944); *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1887); *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412 (1886); *Watson v. Turnbull*, 34 La. Ann. 856 (1882).

84. See *Young v. Town of Morgan City*, 129 La. 339, 56 So. 303 (1911). Political subdivisions have authority under the Civil Code to erect such works as are needed for the public use, including the construction of roads and railroad tracks on the batture. *Warriner v. Board of Comm'rs*, 132 La. 1098, 62 So. 157 (1913). See also *Ruch v. City of New Orleans*, 43 La. Ann. 275, 9 So. 473 (1891).

85. See *St. Anna's Asylum v. City of New Orleans*, 104 La. 392, 29 So. 117 (1900); *Watson v. Turnbull*, 34 La. Ann. 856 (1882); cf. *Evans v. Dugan*, 205 La. 398, 17 So.2d 562 (1944). It is doubtful, however, whether the legislature may constitutionally enable political subdivisions to grant perpetual and exclusive rights to private persons. *Louisiana Construction & Improvement Co. v. Illinois Cent. R.R.*, 49 La. Ann. 527, 21 So. 891 (1897). See also *City of Shreveport v. St. Louis Southwestern Ry.*, 115 La. 885, 891, 40

river front for limited periods of time and for such public purposes as the establishment of a ferry landing<sup>86</sup> or the construction of a coal yard and coaling station.<sup>87</sup> A municipality, however, may not give to private persons "a right to erect permanent structures upon the bature which will obstruct or embarrass the free use of a public servitude, and to maintain the same in perpetuity."<sup>88</sup> The discretion of political subdivisions to regulate commerce and traffic on the banks of navigable rivers is not to be disturbed by the courts lightly;<sup>89</sup> but when this discretion is abused, courts may intervene.<sup>90</sup> Further, when administrative action violates the equality of all persons under the law with respect to the use of banks of navigable rivers, both state and federal courts may intervene for the protection of individual rights.<sup>91</sup>

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So. 298, 300 (1905): "The public has a right of way along navigable streams. We conclude it is not within the power of the municipality or of the riparian owner to cut the public off entirely from all communication with a navigable stream upon which rests a city." Special rights granted by a municipality to private persons may be freely revocable. See *Herbert v. Benson*, 2 La. Ann. 770 (1847); *Shepherd v. Third Municipality*, 6 Rob. 349 (La. 1844).

86. See *Watson v. Turnbull*, 34 La. Ann. 856 (1882); cf. *Town of Vidalia v. McNeely*, 274 U.S. 676 (1927).

87. See *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 285, 4 So. 241, 246 (1887). In this case, the court held that the leasing of the river front for a coaling yard and a coaling station is a public use, since the works are in the interest of the commercial prosperity of the city, and to meet the wants of the people. The land was used in fact, the court declared, "for purposes of a public character, though through the medium of private parties, who act under the city's authority, only temporarily granted. . . . The public character of such uses is not destroyed by the fact that they are temporarily farmed out to particular individuals." The riparian owner has no standing to complain for the use of the banks by the person who has acquired exclusive rights from the public authorities. See *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412 (1886).

88. *Louisiana Construction & Improvement Co. v. Illinois Cent. R.R.*, 49 La. Ann. 527, 547, 21 So. 891, 894 (1897). In this case, a city ordinance granting exclusive rights to a railroad company for a period of 99 years was declared to be *ultra vires*. The court declared that "if this ordinance be maintained, there would remain to the city no right of supervision or use of either bature of this particular segment of the city, or of the wharves, or of their enjoyment. Her control over them in the interest of, or for the benefit of, the public, would be entirely lost for a period of 99 years; that is to say, in perpetuity." Cf. LA. CONST. art. XIV, § 30; note 125 *infra*.

89. See *Warriner v. Board of Comm'rs*, 132 La. 1098, 62 So. 157 (1913); *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412 (1886); *Watson v. Turnbull*, 34 La. Ann. 856 (1882); *Tourne v. Lee*, 8 Mart.(N.S.) 548 (La. 1830); cf. *Evans v. Dugan*, 205 La. 398, 17 So.2d 562 (1944).

90. See *Louisiana Construction & Improvement Co. v. Illinois Cent. R.R.*, 49 La. Ann. 527, 21 So. 891 (1897). A municipal zoning ordinance restricting the use of bature to residential purposes only contravenes articles 455 and 457 of the Civil Code; hence, it is an unauthorized use of the zoning power. *Parish of Jefferson v. Universal Fleeting Co.*, 234 So.2d 88 (La. App. 4th Cir. 1970).

91. See *Town of Vidalia v. McNeely*, 274 U.S. 676 (1927).

Today the broad powers of the political subdivisions of the state that are charged with the administration of the public use of the banks of navigable rivers are specified in constitutional provisions and in comprehensive special statutes.<sup>92</sup> Prior to the adoption of this legislation, however, the powers of political subdivisions were largely based on an expansive interpretation of articles 455, 457, 665, 861, and especially, article 863 of the Civil Code. This last article confers upon cities, towns, and villages authority to "construct and maintain on public places, in beds of rivers or bayous or lakes, on their banks or shores, wharves and/or other works which may be necessary for public utility, for the mooring of vessels and the loading or discharging of their cargoes, within the extent of their respective limits."<sup>93</sup> Louisiana courts have declared that this article confers "plenary powers, and should be liberally construed, when the whole community is to be benefited, and an individual injured no further than being deprived of such profits as he supposed he could have made."<sup>94</sup> The interest of the general public has been likened to a usufruct, which confers upon the administrative authorities the right to derive all the profit, utility, and advantages that the property may produce as well as the right "to make works and improvements to increase the revenues."<sup>95</sup> It should follow then that any charges or fees exacted from the users of the public facilities ought to inure to the benefit of all rather than to the benefit of the riparian owners<sup>96</sup> whose interest has been likened

92. See, e.g., LA. R.S. 34:21-23, 203, 243, 293, 323 (1950).

93. LA. CIV. CODE art. 863, *as amended*, La. Acts 1932, No. 129. See also LA. CIV. CODE art. 859 (1825). There is no corresponding provision in the 1808 Louisiana Digest. The language of article 863 has been held to be merely indicative. See *Pulley & Erwin v. Municipality No. 2*, 18 La. 278, 285 (1841): "[T]he expression for the mooring of vessels, spreading nets, building cabins, &c, used in the Code, whilst they are permissive for those purposes, are not intended as restrictions of the use of those purposes alone, but as examples, or illustrations of its application." Article 863, however, "does not authorize the erection of buildings for private emolument." *Herbert v. Benson*, 2 La. Ann. 770 (1847). See also *Louisiana Construction & Improvement Co. v. Illinois Cent. R.R.*, 49 La. Ann. 527, 548, 21 So. 891, 898 (1897): "But this provision of law [article 863] does not authorize the city to build permanent structures on the battures or banks or navigable rivers for the exclusive enjoyment and use of private individuals or corporations, or to grant them permission to do so."

94. *Pulley & Erwin v. Municipality No. 2*, 18 La. 278, 285 (1841).

95. *Id.* See also *Warriner v. Port of New Orleans*, 132 La. 1098, 62 So. 157 (1913).

96. See *St. Anna's Asylum v. City of New Orleans*, 104 La. 392, 29 So. 117 (1900); *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1887); *Watson v. Turnbull*, 34 La. Ann. 856 (1882); *but cf.* *Carrollton R.R. v. Winthrop*, 5 La. Ann. 36 (1850), declaring that a municipality has no right to establish wood yards, brick yards, or saw mills on the batture,



to a naked ownership of the banks<sup>97</sup> and who have no standing to complain for damage suffered by the use to which the banks are put by the public authorities.<sup>98</sup>

Article 861 of the Louisiana Civil Code of 1870 grants to public authorities the power to remove or demolish structures erected in the beds or on the banks of navigable rivers at the expense of those who claim them, if these structures "obstruct or embarrass the use of these places."<sup>99</sup> Apart from this article, the state and its political subdivisions may have constitutional as well as statutory authority to destroy trees growing on batture<sup>100</sup> and structures erected by riparian owners on batture or even on the area between the high water mark and the levees.<sup>101</sup> Article XIV, section 30, of the Louisiana Constitution of 1921 authorizes governing bodies of the political subdivisions to expropriate, without compensation, structures erected by riparian owners with prior permission on the banks of navigable rivers within the port of New Orleans or within the limits of municipalities having over 5,000 inhabitants, "whenever the riparian front shall be required for public purposes."<sup>102</sup> Further, article

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and that any rental from such operations ought to inure to the benefit of the owner of the banks.

97. See *Warriner v. Port of New Orleans*, 132 La. 1098, 62 So. 157 (1913).

98. See *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1887); *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412 (1886); *Watson v. Turnbull*, 34 La. Ann. 856 (1882).

99. See LA. CIV. CODE art. 861; LA. CIV. CODE art. 857 (1825). There is no corresponding article in the 1808 Louisiana Digest. See the comment by the redactors of the Louisiana Civil Code of 1825 in 1 LOUISIANA LEGAL ARCHIVES, PROJET 103 (1937).

100. See 1938-40 LA. ATT'Y GEN. ANN. REP. 716: "In a case where the cutting of trees on the banks of a navigable stream is necessary to influence the flow of waters to keep the channel deep, such cutting is a work necessary or convenient to the exercise of the servitudes relating to navigation which the public enjoys on the banks. Therefore, the riparian proprietor is not entitled to any indemnity for the cutting of trees in such cases."

101. See *Hart v. Town of Baton Rouge*, 10 La. Ann. 171 (1855); *Henderson v. City of New Orleans*, 3 La. 563 (1832). See also 1938-40 LA. ATT'Y GEN. ANN. REP. 716: "Since the banks of a navigable stream are subject to these servitudes, no indemnity is due the owner for any inconvenience or damage that may be caused him by the use of the servitudes or the doing of works on the banks necessary or convenient to the exercise of the servitudes."

102. LA. CONST. art. XIV, § 30. Under this provision, if structures are erected "with the prior consent of the authorities and in conformity with plans and specifications approved by the authorities," the riparian owner may claim just compensation. But the owner's right to claim compensation is defeated, and the prior permit is immaterial, when the river banks are appropriated for levee purposes. See text at note 103 *infra*. Prior to the adoption of article 290 of the Louisiana Constitution of 1898, the source of article XIV, § 30, of the Louisiana Constitution of 1921, a riparian owner could not claim compensation for the destruction of his structures by mu-

XVI, section 6, of the Louisiana Constitution of 1921 authorizes levee boards to take or destroy for levee purposes, without compensation, batture and "property the control of which is vested in the state or any subdivision thereof for the purposes of commerce."<sup>103</sup> The exclusion of compensation in this respect has been justified on the ground that "such property was for all practical purposes already forever lost to the owner"<sup>104</sup> by virtue of the servitude of public use. Owners of property, taken or destroyed by levee boards, which is neither batture nor under the control of a political subdivision, namely, owners of rural property lying between the high water mark and the levee, have a claim for compensation at a price not to exceed the assessed value of the preceding year.<sup>105</sup>

#### PREROGATIVES OF OWNERSHIP

The banks of navigable rivers in Louisiana are private things burdened with a servitude of public use; the ownership of the ground, down to the ordinary low water mark, remains vested in the riparian proprietors.<sup>106</sup> This private ownership of the banks may be severely impaired by the exigencies of public use; but, in principle, the riparian owner retains all prerogatives of owner-

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nicipal authorities, even if he had obtained permission to erect them. *See* *Shepherd v. Third Municipality*, 6 Rob. 349, 350 (La. 1844): "[T]he banks of the river are '*loci publici*'—out of commerce, and the municipal authorities are bound to see that the use of them by the public be not obstructed; but they have no power to allow any erection thereon which may render their use incommodious. They may, indeed, temporarily tolerate works thereon, which they may deem not injurious to the rights of the public; but no permission of a Council can prevent a subsequent Council from putting an end to such toleration." *See also* *Herbert v. Benson*, 2 La. Ann. 770 (1847).

103. LA. CONST. art. XVI, § 6. Trees growing on the batture may be destroyed for levee purposes without compensation or prior notice. *General Box Co. v. United States*, 351 U.S. 159 (1956). The same rule applies to buildings and other improvements erected on the batture. *Kelly v. United States*, 272 F.2d 195 (5th Cir. 1957). *See also* *Hanson v. City of Lafayette*, 18 La. 295 (1841).

104. *Boyce Cottonseed Oil Mfg. Co. v. Board of Comm'rs*, 160 La. 727, 107 So. 506 (1926).

105. *Id.* *See also* 1966-68 LA. ATT'Y GEN. ANN. REP. 217: "[B]atture may be used for levee district purposes, when such use is reasonable, without compensation being paid for said use. So far as the balance of the area is concerned, that is the area between the banks and the high water mark, compensation can only be paid according to the assessed value of the preceding year."

106. *See* LA. CIV. CODE arts. 455(2), 457; *Seibert v. Conservation Comm'n*, 181 La. 237, 159 So. 375 (1935); *Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931); *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *Lyons v. Hinckley*, 12 La. Ann. 655 (1856); *Morgan v. Livingston*, 6 Mart.(O.S.) 19 (La. 1819); *State v. Cockrell*, 162 So.2d 361 (La. App. 1st Cir. 1964).

ship that are not incompatible with public use. In effect, the rights of the private owner of the banks of navigable rivers are residual; the content of these rights is determined in the light of the superior claims of the general public or of the public authorities that are charged with the control and administration of the servitude of public use.

The riparian owner "cannot himself enjoy the bank in such a way as to prevent its common enjoyment by all,"<sup>107</sup> nor is he entitled "to be preferred over others in the use of the banks as a landing place,"<sup>108</sup> but he may use the bank, "provided he does not prevent the use of it by others, as regulated by . . . the Code . . . and in conformity to the police regulations."<sup>109</sup> As a general rule, the riparian owner in rural areas enjoys quite a few more prerogatives of ownership over the banks than the riparian owner within ports or within the limits of municipalities. Thus, the rural riparian owner may be entitled to fish, hunt, or trap fur-bearing animals on the banks;<sup>110</sup> he may also undertake mineral operations for the discovery and exploitation of oil and gas.<sup>111</sup> Further, in all areas, the owner may lease whatever rights he has on the banks,<sup>112</sup> and in rural areas he may exact fees from the public for the permanent mooring of vessels or for camping on the banks.<sup>113</sup> When the owner uses or leases his rights, his ownership of the banks may be assessed and taxed.<sup>114</sup>

The riparian proprietor owns the batture, and he may also

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107. *Dennistoun v. Walton*, 8 Rob. 211, 214 (La. 1844). See also *Sweeney v. Shakspeare*, 42 La. Ann. 614, 7 So. 729 (1890); cf. *Evans v. Dugan*, 205 La. 398, 407, 17 So.2d 562, 566 (1944): "Plaintiff, as a riparian proprietor, has no right to appropriate to his exclusive use the shore of Lake Bistineau lying in front of his land, nor has he any private property right in the use thereof, which is public and under the administration and control of the state agencies designated in the legislative acts."

108. *Town of Vidalia v. McNeely*, 274 U.S. 676, 684 (1927).

109. *Dennistoun v. Walton*, 8 Rob. 211, 214 (La. 1844).

110. Cf. *Delta Sec. Co. v. Dufresne*, 181 La. 891, 169 So. 620 (1935); *Warner v. Clarke*, 232 So.2d 99 (La. App. 2d Cir. 1970); 1938-40 LA. ATT'Y GEN. ANN. REP. 96.

111. See *State v. Richardson*, 140 La. 329, 72 So. 984 (1916). While the riparian owner within limits of municipalities may not have the right to undertake mineral operations on the banks; nevertheless, he should be entitled to emoluments derived from the land by means of directional drilling.

112. See *Pittsburgh & S. Coal Co. v. Otis Mfg. Co.*, 249 F. 667 (5th Cir. 1913); *Carrollton R.R. v. Winthrop*, 5 La. Ann. 36 (1850); *Dennistoun v. Walton*, 8 Rob. 211 (La. 1844); *O'Niell v. Sonnier*, 195 So.2d 724 (La. App. 1st Cir. 1967). The lessor's privilege may extend to a dry dock located in front of the leased banks. *Cochran v. Ocean Dry Dock Co.*, 30 La. Ann. 1365 (1878).

113. Cf. *Delta Sec. Co. v. Dufresne*, 181 La. 891, 160 So. 620 (1935); 1938-40 LA. ATT'Y GEN. ANN. REP. 703.

114. See *Mathis v. Board of Assessors*, 46 La. Ann. 1570, 16 So. 455 (1894).

own trees,<sup>115</sup> buildings, and other constructions located thereon.<sup>116</sup> He may enjoin members of the general public from crossing his land to go to the banks and from using his private facilities without his consent.<sup>117</sup> Structures erected by third persons on the banks may be removed or demolished pursuant to an action by the owner,<sup>118</sup> unless, of course, these structures were erected under license from the public authorities.<sup>119</sup> When the banks are appropriated by political subdivisions of the state according to law, the owner may still claim from the public authorities any part of the batture that is not needed for public use.<sup>120</sup> And no one, not even public authorities, may take gravel and sand from the batture in rural areas,<sup>121</sup> unless the taking is for levee purposes.<sup>122</sup>

One of the most important prerogatives of riparian ownership is the qualified right of the owner to build on the banks structures for the accommodation of the public<sup>123</sup> or for his pri-

115. See 1932-34 LA. ATT'Y GEN. ANN. REP. 658.

116. See *Town of Madisonville v. Dendinger*, 214 La. 593, 38 So.2d 252 (1948); *Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931).

117. See *Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931).

118. See *Pittsburgh & S. Coal Co. v. Otis Mfg. Co.*, 249 F. 667 (5th Cir. 1918); *Duverge Heirs v. Salter*, 6 La. Ann. 450 (1851); *Carrollton R.R. v. Winthrop*, 5 La. Ann. 36 (1850); *Dennistoun v. Walton*, 8 Rob. 211 (La. 1844); *Chinn v. Petty*, 163 So. 735 (La. App. 2d Cir. 1935). In addition, the owner may sue for the removal of structures obstructing the public use under article 861 of the Civil Code. But the owner may not enjoin a lessee from driving piles in the river front when the lease is valid and the lessee has obtained permission from the public authorities. See *O'Niell v. Sonnier*, 195 So.2d 724 (La. App. 1st Cir. 1967).

119. See *Warriner v. Port of New Orleans*, 132 La. 1098, 62 So. 157 (1913). The owner may not bring a petitory action against a ferry operator alone, because the operator is neither owner nor possessor of the river front; the municipality must be made a party to the proceedings. *Chaison v. Wehrt*, 104 La. 487, 29 So. 179 (1901). Nor can the owner enjoin the public authorities from driving piles into the river front. *Watson v. Turnbull*, 34 La. Ann. 856 (1832).

120. See *Minor's Heirs v. New Orleans*, 115 La. 301, 38 So. 999 (1905); LA. R.S. 9:1102 (1950); *but cf.* *St. Anna's Asylum v. City of New Orleans*, 104 La. 392, 29 So. 117 (1900); *Heirs of Leonard v. City of Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1887) (no recovery; land needed for public purposes).

121. See *Seibert v. Conservation Comm'r*, 181 La. 237, 159 So. 375 (1935). It would seem, however, that municipalities have the right to take earth from the batture when the river front is appropriated to public use. See *Pulley & Erwin v. Municipality No. 2*, 18 La. 278 (1841).

122. See LA. CONST. art. XIV, § 6: "Land and improvements thereon hereafter actually used or destroyed for levees or levee 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. . ." It was held in the past, however, that riparian owners have the right to enjoin police juries from taking earth from the bank for the construction of a levee in front of another's property. *De Ben v. Gerard*, 4 La. Ann. 30 (1849).

123. See *Worrell v. Cordill*, *Gunby's Dec.* 101 (La. App. 2d Cir. 1885).

vate use and enjoyment.<sup>124</sup> Article XIV, section 30, of the Louisiana Constitution of 1921 declares that riparian owners within the port of New Orleans or within the limits of municipalities having over 5,000 inhabitants "have the right to erect and maintain on the batture or banks owned by them, such wharves, buildings or improvements, as may be required for the purpose of commerce, navigation, or other public purposes."<sup>125</sup> These improvements are subject to the administration and control of the governing authorities "with respect to their maintenance and to the fees and charges to be exacted from their use by the public."<sup>126</sup> Whenever the riparian front is required for public purposes, governing authorities have the power of expropriation. If structures were erected without prior permission from the authorities, expropriation is made without compensation; if, however, the riparian owner took care to obtain permission, he is entitled to claim just compensation.<sup>127</sup>

The constitutional provision granting to riparian owners the right to build structures on the banks of navigable rivers within the port of New Orleans or within the limits of municipalities having over 5,000 inhabitants does not exclude the right of riparian owners in rural areas to do the same. As a matter of fact, in rural areas "the restriction on development of land by ri-

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124. See *Town of Madisonville v. Dendinger*, 214 La. 593, 38 So.2d 252 (1948); *Pizanie v. Gauthreaux*, 173 La. 737, 138 So. 650 (1931); *Hart v. Town of Baton Rouge*, 10 La. Ann. 171 (1855); *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122 (1841); *Lake Providence Port Comm'n v. Bunge Corp.*, 193 So.2d 363 (La. App. 2d Cir. 1966).

125. LA. CONST. art. XIV, § 30; see also LA. R.S. 34:22 (1950). Article XIV, § 30 of the Louisiana Constitution of 1921 derives from article 290 of the Louisiana Constitution of 1898. Before the adoption of this article, "riparian owners wishing to build wharves did not have to obtain the consent of the public authorities; but the wharves were removable at the discretion of the public authorities, whenever the public exigencies required, without formal expropriation and without compensation. It was to change this order of things, and provide a more reliable tenure for private wharves, that article 290 was adopted." *State ex rel. Illinois Cent. R.R. v. Board of Levee Comm'rs*, 109 La. 403, 431, 33 So. 385, 397 (1902).

126. LA. CONST. art. XIV, § 30. See also LA. R.S. 34:22 (1950).

127. *Id.* It ought to be noted, however, that article XIV, § 30, of the Louisiana Constitution of 1921 reserves to levee boards "their authority with respect to levees in their respective districts . . . to appropriate, without compensation, such wharves, buildings, or improvements." See also LA. CONST. art. XVI, § 6. Under the 1898 Constitution, the authority whose consent should be obtained by riparian owners desiring to build wharves in the port of New Orleans was the City Council of New Orleans. *State ex rel. Illinois Cent. R.R. v. Board of Comm'rs*, 109 La. 403, 33 So. 385 (1902). Article XIV, § 30, of the 1921 Constitution declares, however, that the authority whose consent should be obtained is "the governing authority of the port of New Orleans, or of the municipality as the case may be."

parian owners or their representatives need not be as extensive as in cities."<sup>128</sup> Of course, the rural riparian owner, as his counterpart in the cities, may not build structures on the banks which "obstruct or embarrass the use of these places."<sup>129</sup> If he does so, his structures may be removed or demolished at his expense on a suit brought by the public authorities<sup>130</sup> or by adversely affected members of the general public.<sup>131</sup> The question whether a structure erected by the owner on the banks of a navigable river obstructs or embarrasses the public use is "a question of fact."<sup>132</sup> In the absence of proof as to the obstruction of the public use, the owner, as any other person, is benefited by article 862 of the Louisiana Civil Code of 1870 which allows structures to remain if they "can not be destroyed, without causing signal damage to the owner of them" and if they "merely encroach upon the public way, without preventing its use."<sup>133</sup>

In *Town of Madisonville v. Dendinger*,<sup>134</sup> the Supreme Court

128. *Lake Providence Port Comm'n v. Bunge Corp.*, 193 So.2d 363, 367 (La. App. 2d Cir. 1966). In this case, the court declared that "it seems reasonable that the owners outside of municipalities can use and develop their river banks so long as the use by the public is not obstructed. The character of the use reserved to the public must be considered as well as the nature of the lands so burdened."

129. LA. CIV. CODE art. 361; see note 99 *supra*. See also *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412 (1886); *McKeen v. Kurfust*, 10 La. Ann. 523 (1855); *Hart v. Town of Baton Rouge*, 10 La. Ann. 171 (1855); *Henderson v. City of New Orleans*, 3 La. 563 (1832); *Trustees of Natchitoches v. Coe*, 3 Mart.(N.S.) 140 (La. 1824).

130. See, e.g., *Henderson v. City of New Orleans*, 3 La. 563 (1832); *Trustees of Natchitoches v. Coe*, 3 Mart.(N.S.) 140 (La. 1824). *But cf.* *Lake Providence Port Comm'n v. Bunge Corp.*, 193 So.2d 363 (La. App. 2d Cir. 1966), holding that the Port Commission had neither constitutional nor statutory authority to prohibit erection of structures on the banks of a navigable river.

131. See *McKeen v. Kurfust*, 10 La. Ann. 523 (1855). See also *Pickles v. McLellan Dry Dock Co.*, 38 La. Ann. 412 (1886) (action brought by person claiming rights under license from the public authorities).

132. *McKeen v. Kurfust*, 10 La. Ann. 523 (1855). See also *Town of Madisonville v. Dendinger*, 214 La. 593, 38 So.2d 252 (1948); *Lake Providence Port Comm'n v. Bunge Corp.*, 193 So.2d 363, 367 (La. App. 2d Cir. 1966): "There is no evidence in the present case to establish that defendant's elevator would obstruct or prevent the public use of the banks of the river."

133. LA. CIV. CODE art. 862; La. Civ. Code art. 859 (1825). There is no corresponding provision in the 1808 Louisiana Digest. The redactors of the 1825 Louisiana Civil Code observed: "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," 1 LOUISIANA LEGAL ARCHIVES, PROJET 103 (1937). Obviously, the redactors had in mind persons building on property of the public domain rather than owners of the banks of navigable rivers building on their own property.

134. 214 La. 593, 38 So.2d 252 (1948).

of Louisiana allowed a warehouse, erected by the owner on the bank of a navigable river, to remain on the ground that it merely encroached but did not "absolutely" prevent the use of the bank by the public. This formula, and especially the use of the word "absolutely," has been criticized as out of line with prior jurisprudence<sup>135</sup> and as an unwarranted distortion of the text of article 862 of the Civil Code.<sup>136</sup> Indeed, Louisiana decisions indicate that constructions erected on public places must be removed on proof that they obstruct the public use although they may not absolutely prevent it.<sup>137</sup> In an early case, which has been followed broadly, a house built on the bank of the Red River was ordered removed merely on proof that it was "placed on the bank of a navigable river, and that it interrupts the use of it, which is common to all."<sup>138</sup> It is submitted, however, that the actual

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135. See Note, 9 LA. L. REV. 542 (1949). Counsel in *Lake Providence Port Comm'n v. Bunge Corp.*, 193 So.2d 363, 365 (La. App. 2d Cir. 1966), termed the *Dendinger* case "a 'maverick' in our jurisprudence."

136. See Note, 9 LA. L. REV. 542, 544 (1949): "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. 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 . . . before an encroacher could have the benefit of this article." These observations are clearly applicable to cases in which a member of the general public builds structures on property of the public domain. In the *Dendinger* case, however, it was the owner of the banks who built on his own property. Obviously, the question of good or bad faith had nothing to do with the case; and it would seem that when the owner builds on the banks of a navigable river the only material consideration is whether his structures obstruct the public use.

137. See *McKeen v. Kurfust*, 10 La. Ann. 523, 524 (1855). In this case, action was brought by a member of the public to compel the riparian owner to remove certain cotton sheds that he had erected on the bank. The defense was that a large portion of the land was left "free to be used as a landing, or for any other purpose of public utility." The court held that "the shores of navigable rivers must be left free. . . . Here it is evident that by reason of the obstructions complained of, the public cannot 'deposit their goods' upon the bank in the usual stage of high water, when the principal business of that kind is done. The shore is obstructed by the cotton sheds." See also *Henderson v. City of New Orleans*, 3 La. 563, 567 (1832): "[N]o building, or any other work or fabrication, is permitted to be made on them [the banks], which may prevent or hinder such use, or its enjoyment, to the full extent of public utility."

138. *Trustees of Natchitoches v. Coe*, 3 Mart.(N.S.) 140, 141 (La. 1824). See also *City of Baton Rouge v. Cross*, 142 La. 476, 77 So. 121 (1917) (building encroaching four inches to two feet on public street ordered removed); *City of Thibodaux v. Maggioli*, 4 La. Ann. 73 (1849) (building removed). For buildings which were allowed to remain, see *Mendoza v. Glorioso*, 167 La. 701, 120 So. 57 (1929) (stoops of building encroaching 1.2 inches on sidewalk); *Village of Moreauville v. Boyer*, 138 La. 1070, 71 So. 187 (1916). When a building encroaches, even slightly, on a public place, its title is suggestive

holding of the *Dendinger* case is that the question whether a structure obstructs the public use is not to be decided as a matter of law,<sup>139</sup> unless it is obvious that the obnoxious structure absolutely prevents the public use. This holding does justice to the text of article 862 as well as to that of article 455, which does not contemplate "an absolute prohibition to the rural riparian owner to build between the waterline and the levee."<sup>140</sup>

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of litigation and not merchantable. *Cadow v. Jensen*, 218 So.2d 355 (La. App. 4th Cir. 1968).

139. *Cf. Lake Providence Port Comm'n v. Bunge Corp.*, 193 So.2d 363, 367-68 (La. App. 2d Cir. 1967): "[I]n the *Dendinger* case, cited *supra*, the Supreme Court denied the municipality the right to remove or destroy a warehouse owned by the landowner under the provisions of Article 861 of the Louisiana Civil Code holding the warehouse merely encroached upon the bank and did not prevent its use within the contemplation of the codal article. . . . We do not agree with plaintiff's position that the proposed construction is prohibited *per se* as a matter of law."

140. *Lake Providence Port Comm'n v. Bunge Corp.*, 193 So.2d 363, 367 (La. App. 2d Cir. 1966).