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# Common, Public, and Private Things in Louisiana: Civilian Tradition and Modern Practice

A. N. Yiannopoulos\*

In the Civil Code of Louisiana,<sup>1</sup> things are classified into several categories, according to a number of criteria.<sup>2</sup> An important classification is made in Article 481 of the Code which declares that "Things, in their relation to those who possess or enjoy them, are divided into two classes; those which are not susceptible of ownership and those which are."<sup>3</sup> Several articles in the Code refer to things which belong to one or the other category.<sup>4</sup> In that regard, Article 449 is of particular importance. This article provides that "Things are either common or public. Things susceptible of ownership belong to corporations, or they are the property of individuals."<sup>5</sup> While, perhaps, "senseless as it is written,"<sup>6</sup> Article 449 becomes meaningful in the light of Article 481: it establishes the distinction of things into *common*, *public*, and *private*, and indicates which of those things are susceptible of ownership and which are not.<sup>7</sup>

The distinction of things according to their susceptibility or insusceptibility of ownership has its origin in Roman texts.<sup>8</sup> Con-

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1. In this study, the words *Code*, *Civil Code*, and *Louisiana Civil Code* refer always to the *Louisiana Revised Civil Code of 1870*.

2. See LA. CIVIL CODE arts. 449, 453, 459-461, 481 (1870). For classifications in other civil law systems, see BALLIS, *GENERAL PRINCIPLES OF CIVIL LAW* 489 *et seq.* (1955) (in Greek); 1 COLIN, *CAPITANT, ET JULIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL* 819 (1953); I 1 ENNECCERUS-NIPPERDEY, *LEHRBUCH DES BÜRGERLICHEN RECHTS* 503 (1949); LEHMANN, *ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES* 357 (1957); 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 59 (1952).

3. *Cf.* LA. CIVIL CODE (1808) (no corresponding article); LA. CIVIL CODE art. 473 (1825).

4. See e.g. LA. CIVIL CODE arts. 450-459, 482-486 (1870).

5. *Cf.* LA. CIVIL CODE p. 94, art. 2 (1808); LA. CIVIL CODE art. 440 (1825).

6. SAUNDERS, *LECTURES ON THE CIVIL CODE* 146 (1925).

7. Article 449 should, actually, read: "Things [which are not susceptible of ownership] are either common or public. Things susceptible of ownership belong to corporations or they are the property of individuals."

8. This distinction, originally made by Gaius, was taken over in the Institutes of Justinian. See GAIUS, *INSTITUTES* 2.1; JUSTINIAN, *INSTITUTES* 2.1 De R.D. pr.: "*Vel in nostro patrimonio sunt, vel extra nostrum patrimonium habentur.*" It has been said that the distinction was one of fact, namely reference was made to things presently "owned." However, it can easily be regarded as one of law,

temporary continental doctrine, however, and modern codes, generally, have abandoned this distinction in favor of another, analytically preferable, between things "in commerce" and things "out of commerce."<sup>9</sup> This last distinction, which is not without historical foundation,<sup>10</sup> is based on the realistic consideration that, while *all* things are by their nature susceptible of ownership, certain things may be withdrawn, entirely or in part, from the sphere of free private relations due to controlling considerations of public utility and convenience. Thus, ordinarily, things "in commerce" are *all* things which the law has not placed "out of commerce." Things out of commerce are, ordinarily, common things, things dedicated to public use, and things serving a public purpose.<sup>11</sup>

In Louisiana, the Civil Code, subsequent statutory legislation, and a body of jurisprudence adhere to the distinction of things according to their susceptibility of ownership. Though perhaps analytically deficient, the traditional classification will be adopted in the following discussion. Accordingly, the categories of common, public, and private things will be dealt with as instances within the broader categories of things susceptible of ownership and things not so susceptible.

### THINGS NOT SUSCEPTIBLE OF OWNERSHIP

Things "not susceptible of ownership" are divided by the Code into two categories: those which by their nature "can never become the object of it; as things in common of which all men have the enjoyment and use" (Article 482, paragraph 1) and those which "though naturally susceptible of ownership, may lose this quality" as having been dedicated to some public use, incompatible with private ownership, such as streets, highways,

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namely as a distinction between things susceptible of ownership and things not so susceptible. See GIRARD, *MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN* 251 n.1 (1924).

9. See ENNECCERUS-NIPPERDEY, I 1 *LEHRBUCH DES BÜRGERLICHEN RECHTS* 544 (1949); BALLIS, *GENERAL PRINCIPLES OF CIVIL LAW* 525 (1955) (in Greek). Cf. PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 700 (1952). See also GREEK CIVIL CODE arts. 966-970. Cf. FRENCH CIVIL CODE Art. 537. The German Civil Code and the Swiss Civil Code have not included corresponding provisions. It was thought that things out of commerce should be regulated exclusively by rules of public law which had no place in a Civil Code. See LEHMANN, *ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES* 368 (1957).

10. See, e.g., *DIGEST* 20.3.1.2. Cf. SOHM-MITTEIS-WENGER, *INSTITUTIONEN DES RÖMISCHEN RECHTS* 253 (1923); WEISS, *INSTITUTIONEN DES RÖMISCHEN PRIVATRECHTS* 129 (1949).

11. See, e.g., GREEK CIVIL CODE art. 966: "Things outside of commerce are those common to all, those subject to public use and those dedicated to serve public, municipal, communal, or religious purposes."

and public places (Article 482, paragraph 2).<sup>12</sup> The distinction is important because things of the second category, as soon as they cease being applied to that purpose, resume the quality of being susceptible of ownership (Article 482, paragraph 2), while things of the first category will remain forever insusceptible of private ownership.<sup>13</sup>

The interpretation of Article 482 and the classification of a number of things under one or the other of the two categories it establishes have been controversial matters in Louisiana.<sup>14</sup> Perhaps this article, as many others in the Code, can be best understood in the light of Roman sources. Things not susceptible of ownership in Roman law were distinguished into common things,<sup>15</sup> public things,<sup>16</sup> and things of Divine law.<sup>17</sup> The last category is expressly abolished in the Louisiana Civil Code; such things today are susceptible of private ownership.<sup>18</sup> Thus it seems that Article 482, paragraph 1, refers to *common things* and Article 482, paragraph 2 to *public things*, or, more accurately, to *things subject to public use*.

### COMMON THINGS

Common things are defined by the Code as "those the ownership of which belongs to nobody in particular, and which all men may freely use, conformably with the use for which nature has intended them; such as air, running water, the sea and its shores" (Article 450).<sup>19</sup> This provision reproduces a passage in the Institutes of Justinian,<sup>20</sup> based on the questionable assump-

12. Cf. LA. CIVIL CODE (1808) (no corresponding article); LA. CIVIL CODE art. 473 (1825).

13. It should be noted in this connection that such things are insusceptible of private ownership merely because the Code so provides. Thus, unless there is a constitutional prohibition, any other statute may establish exceptions, and even abolish the rule of the Code. Cf. argument by Edward Livingston in *Renthorp v. Bourg*, 4 Mart. (O.S.) 97, 98 (La. 1816); text at notes 78-80, 118 *infra*; Comment, 12 TUL. L. REV. 428, 438 (1938).

14. See *California Co. v. Price*, 225 La. 706, 74 So.2d 1 (1954); text at note 121 *infra*.

15. Common things in Roman law (*res omnium communes*) were things regarded as insusceptible of private ownership by their nature. See GIRARD, *MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN* 251-55 (1924); WEISS, *INSTITUTIONEN DES RÖMISCHEN PRIVATRECHTS* 129-32 (1949); text at note 21 *infra*.

16. Public things in Roman law (*res publicae*) were, in general, state property serving public purposes. See SOHM-MITTEIS-WENGER, *INSTITUTIONEN DES RÖMISCHEN RECHTS* 253-55 (1923); text at note 66 *infra*.

17. Things of Divine law (*res divini juris*) in Roman law were the *res sacrae* (sacred or holy things), *res sanctae* ("sanctioned" things), and *res religiosae* (religious things). See GAIUS, *INSTITUTES* 2.2-11.

18. See LA. CIVIL CODE art. 456 (1870).

19. Cf. LA. CIVIL CODE, p. 94, art. 3 (1808); LA. CIVIL CODE art. 441 (1825).

20. See JUSTINIAN, *INSTITUTES* 2.1.1: "*Et quidem naturali jure communia*

tion that common things are insusceptible of private ownership by their very nature.<sup>21</sup> This approach has been abandoned in modern civil codes as it became clear that insusceptibility of private ownership is merely a matter of legal prohibition and not an inherent characteristic of the things concerned. Thus, in the German<sup>22</sup> Civil Code there is no reference to common things; in the French Civil Code<sup>23</sup> there is merely an allusion; and in the Greek Civil Code,<sup>24</sup> where the traditional classification is retained, the category of common things has only academic significance.

In Louisiana, in accordance with the desire of the state to secure greater administrative and financial advantages, a number of statutes were enacted which asserted state ownership over things regarded by the Code as common.<sup>25</sup> This legislation resulted, on the one hand, in a near elimination of the category of common things, and, on the other hand, in substantial additions to the category of public things.<sup>26</sup> The reclassification thus brought into line Louisiana law and modern continental doctrine. To what extent the scheme of the Code has been altered will become apparent in the following discussion of things originally regarded as common.

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*sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum temen villis et monumentis et aedificiis absteineat, quia non sunt juris gentium sicut et mare. Flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portibus fluminibusque."*

21. See note 20 *supra*. Cf. SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 255 (1923). The designation *res omnium communes* seems to be post-classical. Originally, such things were regarded either as *res publicae* or as *res nullius*. See WEISS, INSTITUTIONEN DES RÖMISCHEN PRIVATRECHTS 132 (1949).

22. See LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 368 (1957).

23. Cf. FRENCH CIVIL CODE art. 714: "There are things which belong to nobody and the use of which is common to all. Police regulations govern the mode of their enjoyment." The seashore, and running waters, are parts of the public domain of the state. See FRENCH CIVIL CODE art. 538.

24. See, e.g., GREEK CIVIL CODE, art. 966, note 11 *supra*. Under the Greek Civil Code, "common" things are only the air and, perhaps, the open sea. See BALLIS, GENERAL PRINCIPLES OF CIVIL LAW 527 (1955) (in Greek). Running water and the seashore are classified as things of public use. See GREEK CIVIL CODE art. 967: "Things of public use are, particularly, freely and perpetually running water, roads, public squares, the seashore, harbors and roadsteads, the banks of navigable rivers, large lakes and their shores."

25. See, e.g., LA. R.S. 9:1101 (1950) (declaring that the waters of all bayous, lagoons, lakes, and bays are owned by the state. Cf. text at notes 35, 104 *infra*); LA. R.S. 49:3 (1950) (declaring that the portion of the Gulf of Mexico within Louisiana boundaries is owned by the state. Cf. text at note 59 *infra*).

26. See Zengel, *Elements of the Law of Ownership* 8, in WEST'S LOUISIANA CIVIL CODE preceding Art. 448 (1950).

*Air*

Only air, among the four things enumerated in Article 450 of the Louisiana Civil Code as common, has not been the subject of legislative reclassification. According to the Code air in its entirety is not susceptible of private ownership; anyone interested, however, may reduce finite quantities of air into possession and ownership.<sup>27</sup>

The question has been posed in the past whether Article 450 refers merely to "air" as a mixture of several chemical compounds or also to the airspace above the surface of the soil.<sup>28</sup> In contrast to what has been suggested by certain civilian writers elsewhere,<sup>29</sup> it is clear in Louisiana that airspace is not a common thing. According to Article 505 of the Code, airspace belongs to the owner of the soil over which it extends.<sup>30</sup> Though a private thing, however, airspace may be freely used for aerial traffic in reasonable altitudes.<sup>31</sup>

*Running Water*

Following Roman sources, the Civil Code of Louisiana includes "running water" in the category of common things.<sup>32</sup> Under the Code, "running water" is apparently distinguishable from the space it occupies and from the bed which contains it; while the water belongs to "nobody in particular," the bed may belong to the state or to private persons.

According to modern continental conceptions, running water should be regarded by the law as conceptually inseparable from its bed.<sup>33</sup> This means that running water should belong to the owner of the bed, be it the state or private persons. However, while regarded as a private or a public thing as the case might

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27. Cf. SAUNDERS, LECTURES ON THE CIVIL CODE 147 (1926).

28. See Comment, *Ownership of Airspace in Louisiana*, 8 LOUISIANA LAW REVIEW 118 (1947).

29. See 2 VALVERDE, TRATADO DE DERECHO CIVIL ESPAÑOL 79-81 (1925) (advancing the argument that airspace is a common thing).

30. See LA. CIVIL CODE art. 505 (1870); Comment, 8 LOUISIANA LAW REVIEW 118 (1947). Article 505 of the Louisiana Civil Code is almost identical with Article 552 of the French Civil Code. For contemporary doctrine in France, see 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 251 (1952).

31. It should be noted, however, that as yet the issue has not been presented to Louisiana courts. For possible solutions on the basis of a comparative study, see Comment, 8 LOUISIANA LAW REVIEW 118, 127 (1947).

32. See LA. CIVIL CODE art. 450 (1870). Cf. text at note 20 *supra*.

33. See BALLIS, GENERAL PRINCIPLES OF CIVIL LAW 528, 532 (1955) (in Greek). Cf. D.43.12.1.7: "*Impossibile est, ut alveus fluminis publici non sit publicus.*"

be, "running water" in modern codes is placed in the category of things subject to public use.<sup>34</sup>

In Louisiana, legislative and judicial action resulted, contrary to Article 450 of the Civil Code, in the recognition that several bodies of running water are owned by the state rather than "nobody in particular." This re-classification did not affect adversely the public use of waters.<sup>35</sup> Legislation and jurisprudence simply stress public interest and require that the user of running waters should consider the rights of other persons, particularly with regard to pollution.<sup>36</sup>

### Sea

In the light of actuality, "sea" in Article 450 of the Louisiana Civil Code can have no meaning other than the Gulf of Mexico. However, though "sea" (meaning the Gulf) has been classified as a "common" thing in the Code, subsequent statutory legislation asserted state ownership of the Gulf and of adjacent bodies of water.<sup>37</sup> As a result, the "sea" must be regarded today as a "public" rather than a "common" thing.

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34. See, e.g., GREEK CIVIL CODE art. 967 (public use); FRENCH CIVIL CODE art. 538 (public domain).

35. Cf. LA. R.S. 9:1101 (1950), as amended, La. Acts 1954, No. 443, p. 834: "The waters of and in all bayous, rivers, streams, lagoons, lakes, and bays . . . not under the direct ownership of any person on August 12, 1910, are declared to be the property of the State. There shall never be any charge assessed for the use of the waters of the State for municipal, industrial, agricultural, or domestic purposes."

The statute, drafted in broad terms, creates the implication that running waters *could* have been owned privately prior to August 12, 1910. Yet, under Article 450 of the Civil Code, running water is insusceptible of private ownership and *could not* have been owned privately by anyone at any time. Actually, the two texts can be reconciled on the ground that the statute intended to respect private rights acquired prior to August 12, 1910, on bodies of water other than bodies of running water.

36. See *Long v. Louisiana Creosoting Co.*, 137 La. 861, 69 So. 281 (1915); LA. R.S. 14:58; 38:216; 56:362; 56:1431; 56:1451 (1950). In addition, irrigation districts (LA. R.S. 38:2101 (1950)), the Sabine River Authority (*id.* 38:2321 *et seq.*), and the Southwest Water Conservation District (*id.* 38:2501 *et seq.*), are given authority to control water usage in designated areas. Cf. Comment, *Water Rights in Louisiana*, 16 LOUISIANA LAW REVIEW 500, 509 (1956); Comment, *Acquisition of the Right to Use Water*, 29 TUL. L. REV. 554 (1955).

37. See LA. R.S. 49:3, 56:421 (1950). Louisiana courts have indicated that the words "sea and its shore" in Article 450 of the Code refer to the water of the sea rather than the sea bottom. Thus, while under the Code sea-water is a "common" thing, the bottom is not. See *Saint v. Timothy*, 166 La. 738, 741, 117 So. 812, 813 (1928), holding that Article 450 does not "even impliedly, include the beds of any waters." See also *Louisiana Navigation Co. v. Oyster Commission*, 125 La. 740, 51 So. 706 (1910); *California Co. v. Price*, 225 La. 706, 734, 74 So. 2d 1, 11 (1954). In recent years, combined legislative and judicial action resulted in the recognition of private interests in the bottom of the Gulf. See text at note 121 *infra*.

The peculiar geological and geographical conditions prevailing in the Louisiana coast, with thousands of acres of marsh land and the beds of innumerable bayous, bays, and inlets, make it difficult to determine what is "sea." Due to the growth of oyster industries, the discovery of oil along the Gulf Coast, and the value of these waters as fishing areas, the significance of this determination is not merely academic. If such waters are "sea," whether navigable or not, they are subject to public use (whether as "common" things under the Code or as "public" under subsequent statutes) and, in principle, not susceptible of private ownership. If on the other hand, such areas are inland non-navigable waters, then they are not subject to public use and private ownership is possible.<sup>38</sup>

The courts of Louisiana have regarded as "sea" bodies of water known as "arms of the sea." What is an arm of the sea has been decided in a number of cases. In general, a body of water will be regarded as an arm of the sea if it is located in the immediate vicinity of the open coast and is overflowed by the tides directly. Thus, in the leading case of *Morgan v. Negodich*,<sup>39</sup> the Louisiana Supreme Court held that a bayou which joined a bay on the open coast with a bay further inland was not an arm of the sea. Although its waters were a mixture of salt water from the Gulf and fresh water from the Mississippi, the bayou was not located in the immediate vicinity of the coast and was not overflowed by the tides directly; the salt water first entered an arm of the Gulf and thence flowed into the bayou. The same test was applied in the case of *Buras v. Salinovich*.<sup>40</sup> It was held in that case that a body of water subject to tidal overflow is not merely for this reason an arm of the sea; the term applies only to tidal waters in lakes, bays, and sounds along the open coast. Special rules, however, apply to Lake Pontchartrain. Though not in the vicinity of the open coast, and not affected by the tides, Lake Pontchartrain has been consistently regarded as an arm of the sea.<sup>41</sup>

38. See *Louisiana Navigation Co. v. Oyster Commission*, 125 La. 740, 51 So. 706 (1910); Comment, *Seashore in Louisiana*, 8 TUL. L. REV. 272, 273 (1934); text at notes 103, 116, 140 *infra*.

39. 40 La. Ann. 246, 3 So. 636 (1888).

40. 154 La. 495, 97 So. 748 (1923).

41. See *Bruning v. New Orleans*, 165 La. 511, 115 So. 733 (1928); *Burns v. Crescent Gun and Rod Club*, 116 La. 1038, 41 So. 249 (1906). See also *New Orleans Land Co. v. Board of Levee Commissioners of Orleans Levee District*, 171 La. 718, 132 So. 121 (1931); *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882); *Milne v. Girodeau*, 12 La. 324 (1838).

The determination whether a body of water is an arm of the sea or an inland fresh water lake was in the past important in the light of the rules governing alluvion and erosion.<sup>42</sup> While it was settled that both newly formed and submerged lands in an arm of the sea, whether navigable or not, belonged to the state,<sup>43</sup> it was by no means certain that the same rule applied to inland navigable waters other than rivers; and, at least prior to the enactment of Act 258 of 1910, the assumption was that, in contrast to arms of the sea, additions to lands at the shore of inland non-navigable waters belonged to the riparian landowner and his title to submerged lands was not lost.<sup>44</sup> Today, however, it is clear that the rules on alluvion additions do not apply to any state-owned waters other than rivers, whether regarded as arms of the sea or inland navigable or non-navigable waters.<sup>45</sup> Further, the same rules apply as to both arms of the sea and inland navigable waters with regard to eroded lands.<sup>46</sup> Thus, the determination whether a body of water is an arm of the sea or not may be important today only in connection with eroded lands and a finding that the water in question is an inland non-navigable body of water. In such a case, presumably, title is not lost for the private owner.

The matter of the classification of the sea has been further complicated by federal case and statutory law. Contrary to the long-held view that coastal states possessed all the incidents of ownership in off-shore land, the United States Supreme Court declared in a series of decisions that off-shore land beneath the waters is subject to federal "paramount rights."<sup>47</sup> It is by no

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42. See LA. CIVIL CODE arts. 509, 510 (1870). *Cf.* text at notes 98, 124 *et seq. infra*.

43. These principles may be illustrated with cases concerning Lake Pontchartrain. In *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882), it was held that the rules on alluvion and dereliction had no application since Lake Pontchartrain was an arm of the sea rather than an inland lake. And in several other cases it was held that land eroded by the waters of Lake Pontchartrain became insusceptible of private ownership and the property of the state. See *New Orleans Land Co. v. Board of Levee Commissioners*, 171 La. 718, 132 So. 121 (1931); notes 131-134 *infra*.

44. *Cf.* text at note 144 *infra*.

45. *Cf.* text at notes 101, 123, 132 *infra*.

46. See *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1937): "It appears to be the rule that where the forces of nature—subsidence and erosion—have operated on the banks of a navigable body of water, regardless of whether it be a body of fresh water or the sea, or an arm of the sea, the submerged area becomes a portion of the bed and is insusceptible of private ownership."

47. See *United States v. Louisiana*, 339 U.S. 699 (1950); *id.*, 340 U.S. 899 (1950); *United States v. Texas*, 339 U.S. 707 (1950); *id.*, 340 U.S. 900 (1950); *United States v. California*, 332 U.S. 19 (1947). See also Comment, 8 LOUISIANA LAW REVIEW 578 (1948).

means clear what the term means in the framework of either common law or civilian concepts, although it obviously includes incidents of both sovereignty and ownership.

Following these decisions, Congress enacted the Submerged Lands Act.<sup>48</sup> The act granted to the coastal states "title to and ownership of" valuable off-shore lands, the area to be determined by the boundary of each state at the time of its admission to the Union or by a boundary thereafter approved by Congress. The statutory route was necessary to enable the states to continue deriving economic benefits from these lands. The constitutionality of the act was upheld,<sup>49</sup> and in *United States v. Louisiana*,<sup>50</sup> the boundary for Louisiana was fixed at three statute miles from the shore.

Thus, the legal situation of the Gulf today appears to be as follows. Submerged lands up to three statute miles from the coast line,<sup>51</sup> within Louisiana boundaries, belong to the State of Louisiana, while submerged lands beyond this three-mile zone seaward belong to the United States. However, as it is not always clear what is the coast line in Louisiana (which should furnish the points of departure for the measurement of the three mile zone), cases involving disputed ownership between state and federal governments may arise.<sup>52</sup> In any event, whether owned by the state or by the federal government, the waters of the Gulf are subject to public use for the purposes of navigation and fishing.

### Seashore

Seashore is defined by the Code as "that space of land, over which the waters of the sea spread in the highest water, during the winter season" (Article 451).<sup>53</sup> This provision, which was suitable for application along the coast of the Mediterranean Sea where it originated,<sup>54</sup> could not apply intelligently to the

48. 67 Stat. 29 (1953), 43 U.S.C. §§ 1301-15 (1958).

49. *Alabama v. Texas*, 347 U.S. 272 (1954).

50. 363 U.S. 1 (1960). See *The Supreme Court*, 1959 Term, 74 HARV. L. REV. 101 (1960).

51. "Coast line" is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c) (1958).

52. Cf. text at notes 39-43 *supra*. Cf. Comment, *Federal Rights to Tidelands*, 8 LOUISIANA LAW REVIEW 578, 585 (1948).

53. Arts. 450-452 of the Louisiana Civil Code have their origin in DIGEST OF THE CIVIL LAWS IN FORCE IN THE TERRITORY OF ORLEANS, p. 94, arts. 3-5 (1808). Cf. LA. CIVIL CODE, arts. 441-443 (1825).

54. See JUSTINIAN, INSTITUTES 2.1.3: "*Est autem litus maris, quatenus hi-*

peculiar geographic conditions prevailing along the coast of Louisiana.

Thus, while the seashore is well defined along the coast of the Mediterranean, in Louisiana a myriad of bayous, bays, and other waters adjoining the open Gulf make an accurate definition of the seashore almost impossible. Further, in contrast to the almost tideless Mediterranean, the Louisiana coast is overflowed by considerable tides, with high waters occurring in the summer rather than in the winter season.<sup>55</sup> Accordingly, it has been settled in Louisiana that seashore is that space of land that lies between the mean low water mark and the mean high water mark.<sup>56</sup> What is sea has been discussed elsewhere.<sup>57</sup>

The "paramount rights" of the United States have never been extended beyond the low water mark landward, and, therefore, the seashore has always been subject to state legislation.<sup>58</sup> According to a number of statutes enacted by the Louisiana legislature the seashore has been declared — contrary to Article 450 of the Civil Code — to be property of the state.<sup>59</sup> This assertion of state title, however, did not affect the public use of the seashore, which continues to be governed by Article 452 of the Civil Code.<sup>60</sup>

### PUBLIC THINGS

The second category of things which, according to the Code, are insusceptible of private ownership are the "public things."<sup>61</sup>

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*bernus fluctus maximus occurrit.*" *Las Siete Partidas* declare that the seashore is "common to all living creatures of this world" [3.28.3], and define it as "that space of ground covered by the waters of the sea, in their highest annual swells, whether in winter or summer" [3.28.4]. The French and Spanish Civil Codes declare that the seashore is part of the public domain and not a common thing. See FRENCH CIVIL CODE art. 538; SPANISH CIVIL CODE art. 339(1). According to the GREEK CIVIL CODE, art. 967 the seashore is susceptible of private ownership, though subject to public use.

55. See Comment, 8 TUL. L. REV. 272, 274 (1934). For difficulties encountered in France in connection with the definition of seashore, see 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT FRANÇAIS* 135 (1952).

56. See Zengel, *Elements of the Law of Ownership* 11, in WEST'S LOUISIANA CIVIL CODE, preceding Art. 448 (1950). The same rule applies in the definition of "banks" of navigable rivers. *Of. text at note 93 infra.*

57. See text at notes 39-44 *supra*. See also Comment, 8 TUL. L. REV. 272, 275 (1934).

58. *Of. text at note 51 supra.* See also Comment, 8 LOUISIANA LAW REVIEW 578, 585, 586 (1948).

59. See LA. R.S. 9:1101, 49:3, 56:421 (1950). However, parts of the bottom of the Gulf and its shore may be privately owned. See text at note 119 *infra.*

60. *Of. Zengel, Elements of the Law of Ownership* 11, in WEST'S LOUISIANA CIVIL CODE, preceding Art. 448 (1950); text at note 215 *infra.*

61. *Of. LA. CIVIL CODE arts. 449, 482 (1870).* Several Louisiana cases have implied in the past that "public" things are inherently insusceptible of private

Such are "those, the property of which is vested in a whole nation, and the use of which is allowed to all members of the nation" (Article 453, paragraph 1). The Code further indicates that "of this kind are navigable rivers, seaports, roadsteads and harbors, highways, and the beds of rivers, as long as the same are covered with water" (Article 453, paragraph 1).<sup>62</sup> The following Article 454 adds to the list of public things those "which are for the common use of a city or other place, as streets and public squares."<sup>63</sup> The enumeration, obviously, was intended to be merely indicative rather than exclusive.<sup>64</sup>

These articles, as many others in the Code, can be best understood in the light of Roman sources. In early Roman law, "public things" (*res publicae*) constituted one of the categories of things not susceptible of patrimonial rights (*res extra nostrum patrimonium*). Public things were property of the Roman people and their use was free to all citizens. The incidents of public ownership were regulated by rules of law other than those of the civil law.<sup>65</sup> In the Justinian legislation, the term *res publicae* does not have a well-defined meaning. The term applied to public property which was insusceptible of private ownership as serving a public purpose;<sup>66</sup> the term also applied to property (of the state or its political subdivisions) which was susceptible of private ownership and subject to the rules of civil law like any other property held by private persons);<sup>67</sup> and, finally, the term applied to things which were "public" only in a technical sense,

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ownership. See *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936); *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *Milne v. Girodeau*, 12 La. 324 (1838); *Roussel v. Grant*, 14 Orl. App. 57 (La. App. 1916). In recent years, the realistic notion has prevailed that "public" things are insusceptible of private ownership merely as a result of code, statutory, or constitutional provisions. See *California Co. v. Price*, 225 La. 706, 74 So. 2d 1 (1954). Cf. note 14 *supra*; text at notes 78-80, 118 *infra*.

62. Cf. LA. CIVIL CODE, p. 94, art. 6 (1808); LA. CIVIL CODE art. 444 (1825).

63. Cf. LA. CIVIL CODE p. 94, art. 7 (1808); LA. CIVIL CODE art. 445 (1825).

64. Subsequent legislation and court action extending the category of things subject to public use to include *parks* (*Town of Vinton v. Lyons*, 131 La. 673, 60 So. 54 (1912)); *Town of Kenner v. Zito*, 13 Orl. App. 465 (La. App. 1916)), *cemeteries* (*Collins v. Zander*, 61 So. 2d 897 (La. App. 1952)), and *open space* (*Shreveport v. Walpole*, 22 La. Ann. 526 (1870)), are thus compatible with Article 453 of the Civil Code.

65. See SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 253 (1923). ULPIAN D.50.16.15: "*Sola enim ea publica sunt, quae populi Romani sunt.*"

66. *Ibid.* See also WEISS, INSTITUTIONEN DES RÖMISCHEN PRIVATRECHTS 131 (1949).

67. "*Res fisci, res in patrimonio universitatis.*" Cf. PAPINIAN D.18.1.72.1: "*Si res non in usu publico, sed in patrimonio fisci erit, venditio eius valebit.*" See also BUCKLAND, A MANUAL OF ROMAN LAW 107 (1939); WEISS, INSTITUTIONEN DES RÖMISCHEN PRIVATRECHTS 131 (1949).

as destined to public use.<sup>68</sup> Title to these things was not necessarily vested in the state, though in that regard the sources are in conflict.<sup>69</sup> It is "public things" of the last class that Articles 453 and 454 of the Louisiana Civil Code enumerate, and Article 453 defines.

The definition of "public things" in Article 453 of the Louisiana Civil Code may be subject to objections. Indeed, this definition unites two elements which civilian doctrine keeps apart, and which are actually differentiated in subsequent articles of the Code itself; namely *state title* and *public use*. If public things were those "the property of which is vested in a whole nation" (Article 453), one may wonder how "Things which are for the common use of a city or other place, as streets and public squares" can be "likewise public things" (Article 454). Ordinarily, title to things of the last category is vested in municipalities or even in private persons.<sup>70</sup> Furthermore, one may wonder how "highways" and the use of the banks of navigable rivers are "public" (Article 453, paragraph 1), since "the soil of public roads belongs to the owner of the land on which they are made" (Article 658) and "the ownership of the river banks belongs to those whose possess the adjacent lands" (Article 455). It is thus apparent that the words "public things" as used in the Code do not necessarily apply to *all* state property nor *exclusively* to things the title of which is vested in the state. In spite of the definition in Article 453, the essential characteristic of "public things" enumerated in Articles 453 and 454 is that they are subject to *public use*, rather than publicly owned. These things may be regarded as "out of commerce," namely as insusceptible of private relations *incompatible with public use*.<sup>71</sup> Private title,

68. "*Res publicae publico usui destinatae.*" Cf. D.18.1.6 pr. "*in publico usu habeantur.*" See also SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 253 (1923). It appears, therefore, that the term *res publicae* in the Justinian legislation was sufficiently broad to include things both of the public and private domain of the state. See GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 252, n.1 (1924). But cf. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 126 (1952), confining the term *res publicae* merely to things of the last category.

69. See BALLIS, GENERAL PRINCIPLES OF CIVIL LAW 539 (1955) (in Greek). The text of Gaius is obscure: "*Quae publicae sunt, nullius in bonis esse creduntur; ipsius enim universitatis esse creduntur.*" (D.I.8.1. pr.). With regard to "public" rivers in Roman law, the sources lead to the conclusion that such were public merely *quoad usum*. See BUCKLAND, A TEXT-BOOK OF ROMAN LAW 212 (1921).

70. See text at note 147 *et seq. infra*.

71. "Public" things enumerated in Article 453 of the Civil Code are "things which are not necessarily insusceptible of private ownership but which, because of their nature, are committed to public use exclusively." California Co. v. Price, 225 La. 706, 733, 74 So.2d 1, 10 (1954). Cf. Tulane Educational Fund v. Board of Assessors, 38 La. Ann. 292, 297 (1886): "[P]roperty, dedicated to a public

however, is possible and not necessarily incompatible with public use. This interpretation accords with both early sources and modern doctrine.

The use of the words "public things" to designate things merely subject to public use is confusing and should be avoided. Indeed, these words are used in the Code and everyday language in a variety of meanings, and clarification of terminology is necessary. The problem is not simply one of semantics because, as it will be shown, different rules apply to the various categories of things known as "public," namely things of the public domain of the state, things of the private domain, and things subject to public use. An accurate analysis of the Code, and the need for consistent terminology in that regard, may necessitate much new nomenclature. In the following analysis of the law governing things *subject to public use* ("public things"), distinction will be drawn between property belonging to the state and its political subdivisions, and property belonging to private persons. At the end, mention will be made of property which was originally regarded by the Code as belonging to no one in particular.

### *Things Subject To Public Use*

*State property.* Property of the state, and of its political subdivisions, is distinguished according to continental civilian doctrine into property of the *public domain* and property of the *private* (or *national*) domain.<sup>72</sup> This distinction, which corresponds to some extent to the Roman law distinction between *res publicae* and *res fisci*,<sup>73</sup> finds support in the Code though it is not spelled out with a desirable degree of clarity. Article 453 and Article 482 of the Code actually refer to the public domain of the state. Reference to the private domain of the state is made in Articles 485 and 486, though the word used is "national" rather than private domain. Further, such a distinction is clearly made in Ar-

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use, the revenues of which serve a public purpose, is public property although the title be not in the public."

72. See BALLIS, GENERAL PRINCIPLES OF CIVIL LAW 535 (1955) (in Greek); 1 COLIN, CAPITANT, ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 923 (1953); 1 ENNECERUS-NIPPERDEY, LEHRBUCH DES BÜRGERLICHEN RECHTS 547 (1949); LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 368 (1957); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 122 *et seq.* (1952). The distinction between the public and the private domain of the state is actually a doctrinal construction of the middle 19th century, and it was first clearly drawn in the celebrated treatise of PROUDHON, LA THÉORIE DES DOMAINES (1833). Detailed discussion of the characteristics of the public domain would exceed the scope of this study.

73. Cf. text at notes 65-67 *supra*.

article 458 concerning property of municipalities. This article distinguishes "things which belong in common to the inhabitants of cities and other places" into two categories: "common property, to the use of which all inhabitants of a city or other place, and even strangers, are entitled in common; such as streets, the public walks, and quays" (Article 458, paragraph 1), and "common property which, though it belongs to the corporation, is not for the common use of all the inhabitants of the place, but may be employed for their advantage by the administrators of its revenues" (Article 458, paragraph 2). It seems that Article 458, paragraph 1, actually refers to things belonging to the public domain, in accordance with Article 454. Article 458, paragraph 2, on the other hand, refers to things of the private domain.

Civilian writers are not in agreement as to which things belong to the public and which to the private domain, nor as to the criteria for the distinction. According to one line of thinking, the essential characteristic of property within the public domain is that such property is not susceptible of private ownership.<sup>74</sup> Such property is regulated by rules of *public law* exclusively. As a result, to the public domain belongs all property of the state and its political subdivisions which is outside the sphere of civil law.<sup>75</sup> A somewhat different line of thinking finds the essential characteristic of property within the public domain in dedication to *public service*.<sup>76</sup> Consequently, all property of the state and of its political subdivisions serving a public purpose is within the public domain. Finally, according to a third view, which apparently is the prevailing one in France, the essential characteristic of property within the public domain is dedication to *public use*.<sup>77</sup> Thus, the public domain is co-extensive with property

74. See BERTHELEMY, *TRAITÉ DROIT ADMINISTRATIF* 470 (13th ed.); DUCROCQ, *COURS DE DROIT ADMINISTRATIF* 104 (2d ed.); PROUDHON, *TRAITÉ DU DOMAINE PUBLIC* 62-63 (1834). Cf. DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 315 (1874-1882). For a critique of this view, see DUEZ, *TRAITÉ DE DROIT ADMINISTRATIF* 759 (1952). Cf. 3 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 347 (1938): "The general distinction between public and private domain is unanimously accepted, and cannot be discarded. Frequently, the private domain is called national domain. More frequently, it is added: the public domain is inalienable and exempt from prescription; the private domain is alienable, subject to prescription, and also subject to the ordinary rules governing private property."

75. See DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 315 (1874-1882). Cf. 3 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 354 *et seq.* (1938). This is obviously a formal criterion. See DUEZ, *TRAITÉ DE DROIT ADMINISTRATIF* 758 (1952).

76. See 3 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 348, 353 (1938); HAURIOU, *PRÉCIS DE DROIT ADMINISTRATIF* 617 (1921); Zéze, [1921] *REV. DR. PUB.* 361. This is a substantive criterion. For a critique of this view, see DUEZ, *TRAITÉ DE DROIT ADMINISTRATIF* 759 (1952).

77. See 3 PLANIOL ET RIPERT, *TRAITÉ DE DROIT CIVIL FRANÇAIS* 126 (1952).

which is subject to public use. Such property is insusceptible of private ownership not because it is "state" property but because it is dedicated to public use.

The classification of state property into property of the public domain and property of the private domain needs reconsideration in the light of actualities and with the view to ascertaining its usefulness. In countries like France, Germany, and Greece, the distinction may well rest on the pragmatic consideration that property of the public domain is governed by rules of public law and that property of the private domain does not differ at all from the property held by private individuals.<sup>78</sup> But in Louisiana it would be contrary to reality to assert that any kind of state property is essentially subject to the same rules governing property held by private persons. All state property in Louisiana is exempt from prescription and seizure, and if alienation is possible, it has to be made in most instances in accordance with special procedures.<sup>79</sup> It seems, therefore, that in Louisiana state property may be classified into property which according to constitutional and statutory provisions is inalienable, and, therefore, insusceptible of private ownership and private relations in general, and property which can be alienated and is susceptible of private ownership and private relations.<sup>80</sup> The former may be designated as property of the public domain

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For a critique of this view, see DUEZ, *TRAITÉ DE DROIT ADMINISTRATIF* 759 (1952). Capitant, Note D.P. [1933] 3.49 proposed abandonment of the distinction between public and private domain and the introduction instead of the notion of "dedication to public service." Allegedly, this notion would be sufficiently subtle to allow accurate analysis.

78. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 127 (1952). But cf. 3 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 348, 362 (1938): "The truth is that, in a general way, all state holdings are subject to special rules which rest on completely different notions from those which are at the basis of private property. The legal situation of certain categories of state holdings approximates, perhaps, that of property belonging to individuals; but it is wrong to accept, in principle, assimilation of state holding with ownership because the two are completely different things. . . . [A] general theory of the public domain cannot be constructed."

79. See LA. CONST. art. XIX, § 16; art. IV, § 2; LA. CIVIL CODE art. 484 (1870). Cf. *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 66 So. 237 (1914). It should be also mentioned in this connection that the Louisiana Supreme Court in cases involving title to the bottom of navigable waters adopted common law notions according to which the state "owns" the bottom rather than civilian conceptions of a "public domain." See text at notes 90, 106 *et seq. infra*.

80. A possible objection to this approach may be presented in the form of an argument that "the cart is placed before the horse," namely, that certain things are inalienable *because* they are part of the public domain. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 126 (1952). The advantage of this approach, however, lies in the fact that the distinction between public and private domain is placed on rules of positive law rather than metaphysical constructions.

and the latter as property of the private domain. Sight should not be lost of the fact, however, that the *raison d'être* of this distinction and attendant nomenclature is simply convenience of understanding rather than inherent characteristics of the state property concerned.

In the light of the foregoing, it appears that to the public domain may belong several categories of state-owned things, whether dedicated to public use or not.<sup>81</sup> One of these categories consists of "public things," namely things dedicated to public use, which Article 453 of the Civil Code enumerates. Title to these things may be vested in the state, but this title should be regarded as one of a public law nature; and it should be regulated by rules of public law rather than the Civil Code.<sup>82</sup> The Code merely regulates, as it should, only some incidents of the public use of such property. This property is insusceptible of private ownership and thus exempt from seizure, prescription, and alienation in general.<sup>83</sup> This category of state property dedicated to public use corresponds to the Roman law category of *res publicae publico usui destinatae*. Another category of things belonging to the public domain consists of the things which Articles 454 and 458 enumerate, namely, streets, public walks, quays, and public squares. These things, dedicated to public use, and out of commerce,<sup>84</sup> ordinarily belong to political subdivisions of the state. The Code designates these things as "likewise pub-

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81. According to this view, the notion of the public domain is not co-extensive with property dedicated to public use. All property dedicated to public use, if owned by the state, is part of the public domain. But the public domain, as it includes all property which is inalienable, is a broader conception than state property dedicated to public use. Thus, to the public domain belong also things which are not subject to public use but which serve public functions in accordance with specific regulations. This may be the case of state educational and health institutions.

82. Several categories of state property are regulated in the Revised Statutes. See, e.g., LA. R.S. 41:1 *et seq.* (1950).

83. Cf. *Slattery v. Heilperin*, 110 La. 86, 91, 34 So. 139 (1902): "One takes nothing from the public domain by the plea of prescription;" *Kline v. Parish of Ascension*, 33 La. Ann. 562 (1881): "Property dedicated to public use cannot be the subject of private ownership. It is out of commerce and not liable to seizure."

84. Cf. *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 859, 66 So. 237, 248 (1914): "Property, to the use of which all the inhabitants of a city, and even strangers, are entitled in common, such as the streets, the public walks, quays, and other public places, are not subject to private ownership; and, as prescription is one of the means of acquiring title to property, it follows that public places cannot be acquired by prescription." See also *Turfitt v. Police Jury of Tangipahoa Parish*, 191 La. 635, 186 So. 52 (1939) ("public property" such as public squares, courthouses, and jails not subject to seizure). In *Anderson v. Thomas*, 166 La. 512, 526, 117 So. 573, 579 (1928), it was held that municipal property subject to public use "belongs to the people, i.e., to the state, and the municipalities have only the administration thereof, unless otherwise authorized by special laws."

lic" (Article 454), and as "common property" or property belonging "in common" to the inhabitants of "cities and other places" (Article 458). The corresponding notion in Roman law is *res universitatis*.

Property of the private (or national) domain of the state, on the other hand, is property susceptible of private ownership. This notion corresponds to the *res fisci* of the Roman law. Such property, though serving public purposes directly or indirectly, is not subject to public use. It is clearly alienable by the state, but, for reasons of policy, not subject to seizure and prescription against the state.<sup>85</sup> To the private domain belongs also property of political subdivisions of the state which is not destined to public use. As in the case of similar property held by the state itself, such property is susceptible of private ownership and alienable but not exempt from prescription.<sup>86</sup> This notion corresponds to the Roman law conception of *res (publicae) in patrimonio universitatis*.

A detailed analysis of the law concerning *all* state property dedicated to public use would exceed the scope of the present study. The following discussion will be confined to the law governing navigable rivers, other navigable waters, non-navigable waters, and highways, roads and streets.

(1) *Navigable rivers*. While "running water" has been classified by the Code as a "common thing," navigable rivers are declared to be "public" (Article 453).<sup>87</sup> Since the "beds of riv-

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85. See LA. CONST. art. XIX, § 16.

86. See *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 868, 66 So. 237, 251 (1914): "The only exception established by law in favor of municipal corporations is that their public property is not alienable and therefore cannot be acquired by prescription. The character of municipal property and the nature of its ownership, *i.e.*, whether of a private or public nature, whether alienable or inalienable, must be determined by the purpose to which the property is dedicated." See also *Louisiana Highway Commission v. Raxsdale*, 12 So.2d 631 (La. App. 1943); note 193 *infra*. In *Anderson v. Thomas*, 166 La. 512, 526, 117 So. 573, 579 (1928), the Louisiana Supreme Court indicated that municipal property of the private domain such as "public offices, police and fire stations, markets, schoolhouses . . . belongs to the municipality by which it has been acquired and may be dealt with as the municipality sees fit, subject only to the restrictions imposed by the deed of acquisition or by special laws."

87. Problems may arise in connection with the definition of the words "navigable" and "river." See text at notes 138, 139, 145 *infra*. In this study the word river refers to any body of flowing water. *Cf. Amerada Petroleum Corp. v. State Mineral Board*, 203 La. 473, 14 So.2d 61 (1943). Problems may arise also with regard to the definition of the words "banks" and "beds." See *Wemple v. Eastham*, 150 La. 247, 251, 90 So. 637, 638 (1922): "The bed of a navigable river—that is the land which the state holds in her sovereign capacity—is only the land that is covered by the water at its ordinary low stage. The land lying between the edge of the water at its ordinary low stage and the line which the edge of the water

ers" are mentioned separately in the same article, one could think that the words "navigable rivers" refer to the body of water rather than the bed. Thus, Article 453 read together with Article 450 could be taken to indicate that while other running water is a common thing, the water of navigable rivers is public. However, a more reasonable interpretation is that Article 453 concerns the problem of the public use of navigable rivers rather than the title to the waters, which as "running" are a common thing owned by no one. This accords with the sources on which Article 453 is based.<sup>88</sup>

The ownership of water bottom is a complicated matter in Louisiana.<sup>89</sup> According to Article 453 "the beds of navigable rivers, as long as the same are covered with water," are "public things." On the basis of this article, and the doctrine of "inherent sovereignty,"<sup>90</sup> Louisiana courts have consistently held that the beds of navigable rivers are not susceptible of private ownership and belong to the state. While this interpretation of Article 453 of the Civil Code is well settled today, its historical foundation may still be questioned. "Public" rivers in Roman law were merely rivers subject to public use, and as such, were not susceptible of private ownership, even by the state.<sup>91</sup> Further, in the French Civil Code, navigable rivers and their beds are part of the public domain of the state and this means that the interest of the state in navigable rivers and their beds is of a public law nature (*domanialité publique*) rather than private law ownership (*propriété privée*).<sup>92</sup> In the light of such sources, it is doubtful whether the redactors of the Louisiana Civil Code intended to vest full civil law ownership of the beds of navigable rivers in the state. Most probably, their intention was to place

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reaches at its ordinary high state—that is, the highest stage that it usually reaches at its ordinary high stage—is called the bank of the stream, and belongs to the owner of the adjacent land."

88. For an analysis of Roman sources bearing on the legal status of public rivers, see BUCKLAND, A TEXT-BOOK OF ROMAN LAW 186 (1921). Today, the use of the water in navigable rivers, and title to it, is regulated by the Revised Statutes. See note 35 *supra*.

89. See text at notes 47, 51 *supra*; text at notes 104, 106, 140 *infra*.

90. See text at notes 106-112 *infra*; Comment, 12 TUL. L. REV. 428, 433 (1938). Cf. *Miami Corp. v. State*, 186 La. 784, 807, 173 So. 315, 322 (1936): "The State as a sovereignty holds title to the beds of navigable bodies of water."

91. Cf. note 69 *supra*. In any case, "ownership" of the beds of navigable rivers or other waters had little significance as such prior to the discovery of oil. See *California Co. v. Price*, 225 La. 706, 749, 74 So.2d 1, 16 (1954): "I am most confident, too, that but for the discovery of oil, this issue would never have been raised."

92. See FRENCH CIVIL CODE art. 538; 3 DUGUIT, TRAITÉ DE DROIT CONSTITUTIONNEL 349 (1938).

navigable rivers in Louisiana "out of commerce" and subject them to public use in the interest of all. However, Louisiana courts, relying on the broad definition of public things in Article 453, and on the consideration that navigable rivers are not susceptible of *private* ownership (interpreting the words "private ownership" to mean ownership by private persons), reached the conclusion that navigable rivers are susceptible of state ownership, and actually belong in full title to the state. State ownership extends to the mean low water mark of the bank. The bank itself, namely the area between the low water mark and the mean high water mark, is susceptible of private ownership and actually belongs to "those who possess the adjacent lands" (Article 455, paragraph 2).<sup>93</sup>

State ownership of the beds of navigable rivers in full title has resulted in elimination of the public use of such beds. This, in spite of the definition of public things in Article 453 and the clear statement that "the use" of such things "is allowed to all the members of the nation." Indeed, it is clear today that the use and exploitation of the beds of navigable rivers is not free but depends on lease, license, or patent issued by the state for valuable consideration.<sup>94</sup>

In view of the foregoing, one may question whether the beds of navigable rivers in Louisiana are part of the public or of the private domain of the state. If the public domain includes only things subject to public use,<sup>95</sup> then riverbeds should be regarded, necessarily, as a part of the private domain of the state. If, on the other hand, as suggested, the criterion of the distinction between the public and the private domain is inalienability,<sup>96</sup> the beds of navigable rivers should be classified as part of the public domain, though they are not subject to public use.

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93. Cf. LA. CIVIL CODE, p. 96, art. 8 (1808); LA. CIVIL CODE art. 446 (1825). See *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *Morgan v. Livingston*, 6 Mart. (O.S.) 19 (La. 1819). See also *State v. Richardson*, 140 La. 329, 350, 72 So. 984 (1916). In this case, the contention of the state that all land below the ordinary high water mark belonged to it was rejected. The court held that all exposed land in the "ordinary stage" of the waters belonged to the adjacent owners. Ordinary stage must necessarily be understood as an imaginary line between the mean low water and the mean high water mark.

94. See *Smith v. Dixie Oil Co.*, 156 La. 691, 703, 101 So. 24, 28 (1924). The interest of the state in the water bottom was described in that case as "property which the state as owner had the right to lease to persons desiring to drill for oil." Unauthorized use of the beds of navigable waters is a trespass. See *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 307, 163 So. 145, 146 (1935); *Smith v. Dixie Oil Co.*, *supra*.

95. Cf. text at note 77 *supra*.

96. Cf. text at note 80 *supra*.

Problems arise in connection with changes in the physical characteristics of the beds of navigable rivers. When a navigable river ceases being navigable in fact, or completely dries out, it has been suggested that its bed is no longer "public" and should belong to the riparian landowners.<sup>97</sup> This is not the law in Louisiana, and it is at best questionable whether the law should be so. Though the river may no longer be subject to public use, it may well continue forming part of the private domain of the state.<sup>98</sup> Analogies drawn from the articles concerning alluvion and from Article 518 of the Code miss the point. Article 518 concerns the completely different situation where a river abandons its bed and forms a new channel. In that case, Article 518 declares that the abandoned bed belongs in proportion to the owners of the newly submerged lands. The conclusion then is that when a navigable river ceases to be navigable, or abandons its bed without forming a new channel, Article 518 is inapplicable, and the bed of the river belongs to the private domain of the state.<sup>99</sup> This solution is in accord with the action of the courts in analogous situations involving bottom ownership of other navigable waters.

By reference to code articles concerning alluvion, it is settled in Louisiana that lands formed in rivers, whether navigable or not, belong to the riparian landowners.<sup>100</sup> Newly submerged lands, covered by navigable rivers, become part of the public domain (Articles 453 and 518).<sup>101</sup>

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97. See Zengel, *Elements of the Law of Ownership* 13, at WEST'S LOUISIANA CIVIL CODE preceding Art. 448 (1950); Comment, 12 TUL. L. REV. 423, 432 (1938). However, Article 453 of the Civil Code indicates that the beds of navigable rivers are "public," "so long as the same are covered with water." Thus, unless a river dries out completely, it does not cease being "public"; the fact that a river is no longer navigable does not terminate the public interest. In Roman law, dried out beds of "public" rivers became the property of the adjoining owners. See D.41.30.1; *id.* 41.1.65.2. However, it should be noted that rivers in Roman law were public merely *quoad usum*, while in Louisiana title to river beds is vested in the state.

98. When a river is no longer navigable, or dries out completely, public use necessarily terminates and the bed cannot be regarded as "*res extra commercium*." If Article 453 merely intended to safeguard the public interest in navigation and transportation, and did not intend to vest full title in the state, in case of termination of the public use title to the bed could be granted to the former riparian owners. But in the light of the Louisiana decisions declaring that the state has title in full ownership to the beds of navigable rivers, the only possible conclusion is that, upon termination of the public use, the bed of the river becomes part of the private domain of the state.

99. This means that the state can validly transfer title to private individuals. Past practice, however, indicates that an enabling act authorizing sale may be necessary. Thus, sale by the state of lands in dried out navigable lakes was specifically authorized by Act 124 of 1862. *Cf.* text at note 119 *infra*.

100. See *State v. Richardson*, 140 La. 330, 72 So. 985 (1916).

101. The question seems to have been settled definitively in *Miami Corp. v.*

(2) *Other navigable waters: Lakes, bays, and sounds.* Waters, other than the sea and rivers, are not classified by the Code. However, navigable waters, such as lakes, bays, and sounds, are also excluded from the sphere of private ownership and belong to the state.<sup>102</sup>

Navigable waters are subject to public use for the purpose of navigation and transportation, and thus the central problem in this area concerns title to the water bottom.<sup>103</sup> In that regard, state "ownership" of navigable waters and their bottoms seems to be the rule. Such ownership is founded on statutory legislation, the judicial doctrine of "inherent sovereignty," and on a broad interpretation of Article 453 of the Civil Code.

A series of statutes enacted by the Louisiana legislature since the middle of the past century resulted in establishing state ownership on several bodies of water and their bottoms.<sup>104</sup> Such statutes could not, and did not, encroach upon existing private rights; their effect, in accordance with principles of constitutional law, was to vest title in the state of lands and waters heretofore owned by no one.<sup>105</sup>

As statutory legislation could not have retroactive effect, Louisiana courts assumed the task of promoting state interests by proclaiming that navigable waters and their bottoms had been insusceptible of private ownership since 1812, the date Louisiana

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State, 186 La. 784, 809, 173 So. 315, 323 (1936). The court in that case held that the state acquired title to submerged lands, without deciding the issue whether or not the particular body of navigable water involved was a river or a lake. It was simply declared that "the rule is, that when submersion occurs, the submerged portion becomes a part of the bed of the navigable body of water in fact, and therefore the property of the State, by virtue of its inherent sovereignty, as a matter of law." This solution accords with Roman sources. See D.43.12.1.7: "*Ille abveus quem sibi flumen fecit et si privatus ante fruit, incipit tamen esse publicus.*"

102. See text at notes 104, 116, 120 *infra*. See also Comments, *Navigability as Applied to Lakes in Louisiana*, 6 LOUISIANA LAW REVIEW 698 (1946); *Ownership of Beds of Navigable Waters*, 30 TUL. L. REV. 115 (1955); *Ownership of the Beds of Navigable Lakes*, 21 TUL. L. REV. 454 (1947); *Alluvion and Dereliction in Lakes*, 7 TUL. L. REV. 438 (1933).

103. Even when beds of navigable waters are privately owned, "their full enjoyment may be said to be somewhat impaired by reason of the superior rights of the government and the public to the unhampered use of the water above them for navigation, commerce, fishing and the like." *California Co. v. Price*, 225 La. 706, 734, 74 So.2d 1, 11 (1954).

104. See, e.g., La. R.S. 49:3 (1950), incorporating La. Acts 1886, No. 106; La. R.S. 9:1101 *et seq.* (1950), incorporating La. Acts 1910, No. 258. See also text at note 241 *infra*.

105. La. Acts 1910, No. 258, and La. Acts 1886, No. 106, confirmed in express terms pre-existing private rights. *Cf.* text at notes 141-143 *infra*; Comment, 21 TUL. L. REV. 454, 469 (1947). See also *Miami Corp. v. State*, 186 La. 784, 820, 173 So. 315, 327 (1936).

was admitted to the Union. This was done by relying on the doctrine of "inherent sovereignty" and on Article 453 of the Louisiana Civil Code.

The doctrine of "inherent sovereignty" is a judicial construction of dubious antiquity<sup>106</sup> designed to rationalize state "ownership" of the bottoms of navigable waters. According to this doctrine, the original states in the Union took sovereignty over all navigable waters within their territories from the British Crown. Subsequent admissions to the Union were on an equal basis. For this reason, Louisiana in 1812 took ownership of all navigable waters within the state. The historical and dogmatic premises of the doctrine have been questioned repeatedly;<sup>107</sup> yet, it seems to be still determinative of the outcome in most cases involving disputed ownership of riparian lands and water bottoms.

Actually, the doctrine of inherent sovereignty confuses sovereignty and ownership ("imperium" and "dominium") and accords with obscure medieval conceptions rather than ancient Roman law or continental civil law.<sup>108</sup> State sovereignty naturally extends over *all* property situated within its borders — and not only over navigable waters. State property, on the other hand, may be acquired in accordance with the provisions governing acquisition of ownership in general, or in accordance with legislation proclaiming state title over property belonging to no one in particular. It is confusing to talk of deriving "ownership" from "sovereignty."

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106. The doctrine was first announced in *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405 (1912). Actually, this was an adoption of the common law rule according to which title to the bottom of navigable waters is vested in the sovereign. Cf. *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145 (1935); *State v. Standard Oil Co.*, 164 La. 334, 113 So. 867 (1927); *Ellerbe v. Grace*, 162 La. 846, 111 So. 185 (1926); *State v. Bozeman*, 156 La. 635, 101 So. 4 (1924); *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *State v. Capdeville*, 146 La. 94, 83 So. 421 (1919); *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *Slattery v. Arkansas Natural Gas Co.*, 138 La. 793, 70 So. 906 (1916). Early Louisiana cases indicate that the bottom of navigable waters was "not susceptible of private ownership" rather than it belonged to the state in full ownership. See *Milne v. Girodeau*, 12 La. 324 (1838).

107. See Comments, 30 TUL. L. REV. 115 (1955), 21 TUL. L. REV. 454, 457 (1947), 12 TUL. L. REV. 428 (1938).

108. Cf. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 198 (1930): "In modern law, as a result of the medieval confusion of the power of the sovereign to regulate the use of things (imperium) with ownership (dominium) and of the idea of the corporate personality of the State, we have made the second category into property of public corporations. And this has required modern systematic writers to distinguish between things which cannot be owned at all, such as human beings, things which may be owned by public corporations but may not be transferred, and things which are owned by public corporations in full dominium."

Further, it is difficult to see how Louisiana took an original title to the bottoms of navigable waters by its mere admission to the Union. The only mention of navigable waters, at that time, was the following: "the river Mississippi and navigable rivers and waters leading into the same or into the Gulf of Mexico, shall be common highways and for ever free, as well to the inhabitants of the said states as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said state."<sup>109</sup> Thus, clearly, there was no federal grant of ownership on the beds of navigable rivers, or, for that matter, on the bottoms of any navigable waters. Nor did the admission on an equal basis mean that Louisiana *had* to follow the common law rule that the state is owner of the beds of navigable rivers and lakes.<sup>110</sup> Indeed, there are common law states that do not follow this rule.<sup>111</sup> Thus, the doctrine of inherent sovereignty may simply explain state sovereignty ("imperium") over all navigable waters and water bottoms, a self-evident fact. It may also explain state ownership ("dominium") of waters and beds owned by no one at the time the doctrine was first announced. But it cannot explain vesting of title in the state over navigable waters and beds at the time Louisiana was admitted into the Union.<sup>112</sup>

Finally, it is apparently on the basis of Article 453 of the Civil Code that the state claims ownership of the beds of navigable waters other than rivers, although that article mentions only "navigable rivers."<sup>113</sup> Analogous application of Article 453 to other bodies of water is, perhaps, the least questionable basis

109. Act of April 14, 1812, c. 57, 2 Stat. 641, 642, 703.

110. *Cf. Appleby v. New York*, 271 U.S. 364 (1926). See also Comments, 12 TUL. L. REV. 428, 434 (1938), 21 TUL. L. REV. 454, 457 (1947).

111. See *e.g.*, Michigan: *Lorman v. Benson*, 8 Mich. 18, 17 Am. Dec. 435 (1860). In New York, navigable lakes may be either public or private. See *Smith v. The City of Rochester*, 92 N.Y. 463 (1883); *People v. System Properties*, 281 App. Div. 433, 120 N.Y.S. 2d 269 (3d Dep't 1953). See also Illinois Central Ry. v. Illinois, 146 U.S. 387, 435 (1892); *Thies v. Platte Valley Public Power and Irrigation District*, 137 Neb. 344, 289 N.W. 386 (1939).

112. It seems that private ownership of the beds of navigable waters was a legal impossibility in the period preceding statehood. Indeed, under French and Spanish laws, at least navigable rivers and their beds were considered insusceptible of private ownership, whether by the state or by any other person. See note 114 *infra*.

113. See LA. CIVIL CODE art. 453 (1870). *Cf. Miami Corp. v. State*, 186 La. 784, 795, 173 So. 315, 319 (1936): "Although Article 453 and the other Articles cited do not specifically mention navigable lakes among public things, the courts have included such lakes among public things, and have repeatedly held that if a lake is navigable in fact, and was navigable in fact as of date 1812, the bed of the lake is a public thing, and title is vested in the State."

of exclusive state rights since the period preceding statehood.<sup>114</sup> The public interest protected by Article 453 is the free use of navigable waters for transportation and other commercial purposes. And if, as a guaranty of that interest, ownership of the beds of navigable rivers should be vested in the state, for the same reasons, ownership of the bottoms of other navigable waters might be vested in the state.<sup>115</sup>

The issue concerning the dogmatic foundation of state rights in the beds of navigable waters has as such little practical significance today. What is important to determine is the scope of that inherent sovereignty, and, particularly, whether the property vested in the state is part of the public or of the private domain, and whether it is subject to public use or not.

It has been a well-established general proposition in Louisiana that the bottoms of navigable waters are inalienable by the state and forever insusceptible of private ownership.<sup>116</sup> An involved course of legislative action, however, and judicial interpretation thereof, resulted in recent years in the recognition of private ownership in the beds of navigable waters other than rivers.

Originally, the prohibition against alienation by the state of the bottoms of navigable waters was based on the interpretation placed by the courts on Article 453 of the Civil Code. The first statutory prohibition occurred in 1886 when Act 106 of that year declared that the state owned all waters adjoining the Gulf and at the same time provided that state ownership of these waters

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114. The provision of Article 453 has its origin in the so-called Code of 1808, entitled *Digest of the Civil Laws in Force in the Territory of Orleans*, p. 94, art. 6. However, designation of rivers and their beds as "public" does not necessarily mean vesting of full title in the state. Cf. text at note 92 *supra*. Under pre-existing French and Spanish law in Louisiana, the beds of navigable rivers were not owned by anyone. See 1 OEUVRES DE DOMAT 115 (1931); LAS SIETE PARTIDAS 3.28.6 (Transl. by Moreau Lislet and Carleton, 1820).

115. See *Miami Corp. v. State*, 186 La. 784, 809, 173 So. 315, 323 (1936): "If this were not so, there could be a complete rim of privately owned submerged lands around the entire circumference of a navigable lake. This is wholly undesirable and destructive of progress, because it would practically deprive the public of the use of the lake under State laws." But cf. text at notes 133-135 *infra*.

116. See *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936); *Saint v. Timothy*, 166 La. 738, 117 So. 812, 813 (1928); *State v. Capdeville*, 146 La. 94, 83 So. 421 (1919); *Roussel v. Grant*, 14 Orl. App. 52 (1916); *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 615, 58 So. 405, 409 (1912); *Navigation Co. v. Oyster Commission*, 125 La. 740, 51 So. 706 (1910); *Milne v. Girodeau*, 12 La. 324 (1838). But cf. *California Co. v. Price*, 225 La. 706, 734, 74 So.2d 1, 11 (1954) holding that the bottoms of navigable lakes and bays "are by their nature susceptible or capable of private ownership."

should be continued and maintained.<sup>117</sup> Subsequently, the prohibition was fortified by the judicial doctrine of "inherent sovereignty," and, finally, the Constitution of Louisiana was amended in 1921 to include a provision prohibiting the alienation of "the fee of the bed of any navigable stream, lake or other body of water, except for purposes of reclamation."<sup>118</sup>

In the meanwhile, however, Act 247 of 1855 authorized sale by the state of shallow non-navigable lakes and swamplands recently acquired under grant from the United States,<sup>119</sup> and Act 124 of 1862 assimilated dried out navigable lakes to "swamp-land" and removed the prohibition against alienation as to such lands.<sup>120</sup> On the basis of these two statutes, patents were issued by the state frequently involving large areas containing both non-navigable and navigable waters. Whether by inadvertence or intentionally, no special mention was made reserving title to navigable waters in the state, and several years thereafter the question arose as to whether or not such patents could convey title to navigable waters. Thus, in order to promote security of titles, the Louisiana legislature passed Act 62 of 1912. This act provided that all suits to annul or vacate patents issued by the state must be brought within six years of the issuance of the patent, or within six years of the passage of the act.<sup>121</sup> On the

117. See La. Acts 1886, No. 106, now LA. R.S. 49:3 (1950). Issues raised under this act were involved in *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405 (1912). See also La. Acts 1892, No. 10; 1896, No. 121; 1902, No. 153; 1904, No. 52; 1910, No. 189; 1914, No. 54; 1924, No. 139; 1932, No. 67.

118. See LA. CONST. art. IV, § 2. See also Comment, 21 TUL. L. REV. 454 (1947). "Prior to 1921 the Legislature had the power to change the mentioned codal or legislative declaration and to make such property alienable to individuals." *California Co. v. Price*, 225 La. 706, 715, 74 So.2d 1, 3, 4 (1954). However, the dissent in the same case indicated that no act has ever been enacted in Louisiana authorizing sale of *navigable* waters, and this manifests a firm legislative and judicial policy against alienability of such waters. *Id.* at 760, 74 So.2d at 20. In England, the Crown can alienate the beds of navigable waters, subject to the continuation of the public use. See *Blundell v. Catterall*, 5 B. and Ald. 268, 275, 106 Eng. Rep. 1190 (K.B. 1821); *The Attorney General v. Terry*, 9 Ch. App. 423 (1874).

119. See La. Acts 1855, No. 247. By Acts of March 2, 1849 (9 Stat. 352, c. 87) and of Sept. 28, 1950 (9 Stat. 519, c. 84), the United States conveyed to Louisiana certain lands for reclamation purposes. These lands were not insusceptible of private ownership and could be conveyed by the state to private individuals. However, though this was perhaps unnecessary, sale of such lands was authorized by La. Acts 1855, No. 247.

120. See La. Acts 1862, No. 124. Perhaps, as in the case of the lands acquired under the federal grant (note 119 *supra*), legislative authorization for the sale of dried out navigable lakes was unnecessary. Such lands were no longer subject to public use, and formed part of the private rather than the public domain.

121. See LA. R.S. 9:5661 (1950). Since it is clear that the Louisiana legislature could, in the absence of constitutional provision, authorize the sale of navigable waters, it is merely a problem of interpretation whether Act 62 of 1912

basis of this statute it has been held that conveyances which included beds of navigable waters without special mention reserving title of them to the state are valid and no longer assailable.<sup>122</sup> It is in this way that Louisiana arrived at private ownership of the bottom of navigable waters.<sup>123</sup>

This development might lead to the conclusion that the bottoms of navigable waters other than rivers belong to the private rather than the public domain of the state. This conclusion, however, is not warranted today. The cases which recognized private ownership in the bottoms of navigable lakes were decided on the basis of facts occurring prior to the 1921 amendment of the Louisiana Constitution.<sup>124</sup> This amendment, prohibiting alienation, brought all navigable waters within the public domain of the state. Thus, patents issued after 1921 purporting to alienate tracts which include both non-navigable and navigable waters would be clearly ineffectual as to the latter.

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intended to cure patents conveying only non-navigable waters or both navigable and non-navigable waters. The majority view in the celebrated case, *California Co. v. Price*, 225 La. 706, 739, 74 So.2d 1, 12 (1954), was that "the legislature intended that the Act was to be all inclusive, in conformity with the language used therein." A vigorous dissent indicated that "a reasonable interpretation of the statute would be that it only applies to property susceptible of ownership." *Id.* at 750, 74 So.2d at 17.

122. See *Humble Oil Co. v. State Mineral Board*, 223 La. 47, 64 So.2d 839 (1953), Note, 14 LOUISIANA LAW REVIEW 267 (1953). See *O'Brien v. State Mineral Board*, 209 La. 266, 24 So.2d 470 (1946); *Realty Operators Inc. v. State Mineral Board*, 202 La. 398, 12 So.2d 198 (1943); *State v. Sweet Lake Land and Oil Co.*, 164 La. 240, 113 So. 833 (1927) (all cases involving title to the bottom of inland waters). In *California Co. v. Price*, 225 La. 706, 74 So.2d 1 (1954), the rule was extended to the bed of an arm of the sea. This holding has been criticized: see Dainow, *The Work of the Louisiana Supreme Court of the 1953-1954 Term, Property*, 15 LOUISIANA LAW REVIEW 273, 275 (1955). By La. Acts 1954, No. 727, now LA. R.S. 9:1107-1109 (1950), the Louisiana legislature sought to overrule the *California* case. The act states that the previous Act 62 of 1912 did not intend to cure patents to the beds of navigable waters, and that all patents "heretofore or hereafter" issued purporting to convey beds of navigable waters are null and void. Doubts as to the constitutionality of the act have been voiced. See Comment, 30 TUL. L. REV. 115, 125, 126 (1955); Hebert and Lazarus, *Legislation Affecting the Civil Code*, 15 LOUISIANA LAW REVIEW 9, 21 (1954).

123. A certain inconsistency in judicial action should be noted: on the one hand, private ownership of the bottoms of navigable waters *may* be acquired through state patents (*California Co. v. Price*, 225 La. 706, 74 So.2d 1 (1954)), and, on the other hand, the same bottoms are declared insusceptible of private ownership in cases involving eroded lands or receding waters (*Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936), text at note 132 *infra*).

124. See *California Co. v. Price*, 225 La. 706, 74 So.2d 1 (1954). However, the gates are wide open for private individuals to "claim title under old patents to the beds of numerous bays of the Gulf, large lakes, etc. from which oil is being or will be produced." *Id.* at 785, 74 So.2d at 29, dissenting opinion. Earlier cases recognizing private interests in the beds of inland navigable waters based their holdings on the additional consideration that the waters involved, though navigable, were insignificant for commercial purposes. See *O'Brien v. State Mineral Board*, 209 La. 266, 24 So.2d 470 (1945). This criterion has been obviously abandoned in the *California Company* case.

State ownership of navigable waters other than rivers extends to the mean high water mark of the banks. With regard to such waters, there is no article in the Code corresponding to Article 455, paragraph 2, which vests title to the banks of navigable rivers in the riparian landowners, and it has been held that the banks or shores of such waters belong to the state.<sup>125</sup> Changes in the physical characteristics of navigable bodies of water, other than rivers, involve therefore distinct problems. The most troublesome question in that regard is whether Articles 509 and 510 of the Civil Code concerning alluvion and dereliction apply to these bodies of water.<sup>126</sup> Litigation on this question may arise by a claim of the riparian owner to alluvion additions or to lands uncovered by receding waters, or through a claim by the state to submerged lands.

The question of title to alluvion additions and lands uncovered by receding waters was first raised in cases involving Lake Pontchartrain. In these early cases, Lake Pontchartrain was classified as an "arm of the sea," and it was announced at the same time that the rules concerning alluvion and dereliction were inapplicable to the sea and its arms.<sup>127</sup> The same rule was subsequently applied in the leading case of *Slattery v. Arkansas Natural Gas Co.*,<sup>128</sup> involving disputed title to uncovered lands

125. See *Miami Corp. v. State*, 186 La. 784, 173 So. 315, 325 (1936); *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145 (1935); *New Orleans Land Co. v. Board of Levee Commissioners*, 171 La. 718, 132 So. 121, 123 (1930); *State v. Bozeman*, 156 La. 635, 101 So. 4 (1924); *Sapp v. Frazier*, 51 La. Ann. 1718, 26 So. 378 (1899). See also Comment, *Alluvion and Dereliction in Lakes*, 7 TUL. L. REV. 438 (1933).

126. The question whether state and private rights are affected by subsequent non-navigability of waters which were navigable in fact in 1812 has been settled long ago. The rule is that the state's title is not lost by subsequent non-navigability of a lake which can be shown to have been navigable in 1812. See *State v. Aucoin*, 206 La. 787, 20 So.2d 136 (1944); *Slattery v. Arkansas Natural Gas Co.*, 138 La. 793, 70 So. 806 (1916).

127. See *Bruning v. New Orleans*, 165 La. 511, 115 So. 733 (1928); *Burns v. Crescent Gun and Rod Club*, 116 La. 1038, 41 So. 249 (1906); *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882). *Of. text at notes 39, 43 supra.* In *Zeller v. Southern Yacht Club*, *supra*, dicta indicated that alluvion and dereliction applied to rivers exclusively, the only waters mentioned in Articles 509 and 510 of the Code. Today, the issue whether a navigable body of water is an arm of the sea or an inland fresh water lake cannot be determinative of the outcome of a case involving disputed ownership to water bottoms or uncovered lands. In *New Orleans Land Co. v. Board of Levee Commissioners*, 171 La. 718, 132 So. 121, 123 (1930), the court declared that "the legal situation . . . is the same in either case."

128. 138 La. 793, 70 So. 806 (1916). In that case, the lands in question had been uncovered as a result of artificial drainage. The court held that Article 510 could not apply for the additional reason that the change was not "imperceptible." An apparent inconsistency in judicial action should be mentioned in this connection. If the rule *inclusio unius est exclusio alterius* is to be followed in interpreting Articles 509 and 510 of the Code, perhaps the same rule should apply in

in formerly navigable lakes along the Red River. The lack of specific provisions concerning alluvion and dereliction along the banks of navigable waters other than rivers, and the lack of a provision similar to Article 355, paragraph 2, was thus seized upon by the courts to defeat claims for extension of private ownership. In measuring the boundary between private and state property, in cases involving claims to uncovered lands, the high water mark of 1812 is ordinarily taken as an immutable line.<sup>129</sup> In one case, however, the low water mark of 1812 was taken into account, and in another the boundary was measured from the low water mark existing at the time of litigation.<sup>130</sup> General adoption of the latter rule would achieve the same result as the application of the law of alluvion and accretion to navigable waters other than rivers.

One would, perhaps, expect that since additions to the land become state property, submerged lands would not be lost to the riparian owners. This issue was involved in *State v. Erwin*.<sup>131</sup> In that case, it was announced that since Articles 509 and 510 of the Civil Code did not apply to navigable waters other than rivers, riparian owners retained title to newly submerged lands. A vigorous dissent, however, indicated that the public policy expressed in Articles 450 and 453 of the Civil Code precluded private ownership of the beds of all navigable waters. In the subsequent case of *Miami Corp. v. State*,<sup>132</sup> a divided court over-

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the interpretation of Article 453. Yet the latter article has been applied by analogy to waters other than rivers. The explanation seems to be in the concern of the courts to promote state interests rather than in the fact that the restrictive interpretation placed on Articles 509 and 510 accords with Roman law sources. Cf. SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 303 (1923).

129. It was so held in the leading cases *State v. Aucoin*, 206 La. 786, 20 So.2d 136 (1944), and *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145 (1935).

130. *Smith v. Dixie Oil Co.*, 156 La. 691, 702, 101 So. 24 (1924) (low water mark of 1812); *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922). In the latter case, a bayou which was navigable in 1812 had ceased to be so at the time of the suit, and the waters had uncovered a large tract of land. The court granted title to these lands to the riparian owner, by measuring the boundary from the low water mark existing at the time of litigation. In effect, the court applied to the bayou the rule governing alluvion in rivers and streams. Cf. text at note 101 *supra*.

131. 173 La. 507, 138 So. 84 (1931).

132. 186 La. 784, 173 So. 315 (1936). Considerable doubt has been cast upon the holding in the *Miami* case by the majority in *California Co. v. Price*, 225 La. 706, 74 So.2d 1 (1954). The dissent pointed out that "the majority ruling in effect overrules the holding in the *Miami* case" (*id.* at 747, 74 So.2d at 15) and that "the majority of the court, by permitting an arm of the sea to be privately owned, is *reinstating* the holding in the *Erwin* case, *supra*, that water bottoms or beds of this kind are susceptible of private ownership." *Id.* at 784, 74 So.2d at 23. The majority, indeed, disagreed with the holding in the *Miami* case that navigable waters are insusceptible of private ownership under Articles 450 and

ruled the *Erwin* case. The majority was now of the opinion that the bottom of a navigable body of water belongs to the state by virtue of its sovereignty, and also as being a public thing, not susceptible of private ownership under Articles 450 and 453 of the Civil Code.

This obviously inequitable result was merely the consequence of confusion of two separable concepts, namely "public use" and "state ownership." Indeed, reliance on public policy in connection with Article 453 of the Civil Code to divest riparians of their title to submerged lands was allegedly in the interest of the "public use" of such waters. Justice Higgins, writing for the majority, reasoned that: "Beyond the points where the shore was in 1812, one using the lake, although navigable, would be a trespasser on private property, and the trespasser would have no right to use the bank which was not inundated, since it would not be the bank of a navigable public water."<sup>133</sup> However, public use and state title may be well separable, as it has been already stated;<sup>134</sup> and, further, private ownership of submerged lands is not necessarily incompatible with public use. The real problem is, who should be entitled to derive economic benefits from the exploitation of the minerals beneath the water bottom? And, as the dissent pointed out, the navigability of lakes is "not obstructed any more" where oil derricks are erected in accordance with leases acquired from private owners than leases acquired from the state.<sup>135</sup>

Thus, apart from the confusion of ideas, there appears to

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482 of the Civil Code, but actually distinguished the *Miami* case on the ground that it dealt with erosion rather than acquisition by state patent. The implication seems to be that the *Miami* case is still the law to the extent it stands for the limited proposition that lands eroded by navigable waters are insusceptible of private ownership. Cf. note 101 *supra*.

133. 186 La. 784, 798, 173 So. 315, 319 (1937).

134. Cf. text at notes 70-71 *supra*. Separation of the problem of title from the problem of public use was recognized in *California Co. v. Price*, 225 La. 706, 734, 74 So.2d 1, 11 (1954). The dissent in the same case failed to realize that private ownership is not necessarily incompatible with public use (*id.* at 770, 74 So.2d at 23). However, in case of private ownership, public use results in the restriction of rights incidental thereto "by reason of the superior rights of the government and the public to the unhampered use." (*Id.* at 734, 74 So.2d at 11, majority opinion). English law has made private ownership and public use of navigable waters compatible by subjecting the use of these waters to a public servitude. *A. G. v. Tomline*, 14 Ch. D. 57 (1878); *Williams v. Wilcox*, 8 Ad. & E. 314, 112 Eng. Rep. 857 (Q.B. 1838). To the same effect is the holding of the United States Supreme Court in *United States v. Cress*, 243 U.S. 316 (1917).

135. *Miami Corp. v. State*, 186 La. 784, 863, 173 So. 315, 341 (1936). However, application of Article 453 by analogy to navigable waters other than rivers for the limited purpose of navigation and transportation rather than to establish state title to the bed is well-founded. See Franklin, *Equity in Louisiana*, 9 TUL. L. REV. 485 (1935).

be no other reason for vesting title to submerged lands in the state, and thus "enriching" the latter unjustifiedly at the expense of its citizens.

As *Miami Corp. v. State* was decided on grounds of public policy, and by reference to Articles 450 and 453 of the Civil Code, the issue of applicability of Articles 509 and 510 to waters other than rivers was circumvented.<sup>136</sup> Subsequent cases seem to concede inapplicability, and concentrate mostly on the issue whether or not a body of water is a river. Obviously, the applicability of Articles 509 and 510 with regard to uncovered lands depends on that determination.<sup>137</sup> According to a test devised by Louisiana courts, a body of water having no current and being merely a wide area in the course of a river, will be regarded as a lake or bay.<sup>138</sup> On the other hand, a body of water which has a current and which does not enjoy a popular identity separate from the river of which it is a part will be regarded as a river.<sup>139</sup> Under such tests, conflicting determinations may be expected in case a body of water has a current and is large enough to be popularly regarded as a lake or bay.

(3) *Non-navigable waters.* Non-navigable bodies of water lie outside the public domain and are susceptible of private ownership. Such bodies of water are not covered by the code provisions concerning public things or the inherent sovereignty

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136. Cf. *Miami Corp. v. State*, 186 La. 784, 819, 173 So. 315, 327 (1936): "[T]he bed or bottom of Grand Lake, a navigable body of water . . . belongs to the State of Louisiana, by virtue of its sovereignty, it being a public thing and insusceptible of private ownership under the provisions of articles 450 and 453 of the Revised Civil Code. Having reached the above conclusion, it is unnecessary to consider the applicability of articles 509 and 510 of the Revised Civil Code to this case."

137. See *State v. Aucoin*, 206 La. 786, 20 So.2d 136 (1944); *Amerada Petroleum Corporation v. State Mineral Board*, 203 La. 473, 13 So.2d 61 (1943). The issue whether a navigable body of water is a river or not is important, and may determine the outcome of case, only with regard to uncovered lands. With regard to lands eroded by navigable waters, the rule is the same as to all waters. See *Miami Corp. v. State*, 186 La. 784, 173 So. 315, 323 (1936): "[T]he rule is, that when submersion occurs, the submerged portion becomes a part of the bed or bottom of the navigable body of water in fact, and therefore the property of the State, by virtue of its inherent sovereignty, as a matter of law."

138. See *State v. Erwin*, 173 La. 507, 138 So. 84 (1931). See also *Miami Corp. v. State*, 186 La. 784, 791, 173 So. 315, 317 (1936): "The name 'lake' is applied to various wide places in the river, some of which are widened to so little extent that the widening is scarcely perceptible"; *Amerada Petroleum Corp. v. State Mineral Board*, 203 La. 473, 495, 14 So.2d 61, 68 (1943): "[A] lake does not imply a body of water in which a current flows, but it indicates a body of water more or less stagnant, in which the water is supplied from drainage."

139. See *Amerada Petroleum Corp. v. State Mineral Board*, 203 La. 473, 495, 14 So.2d 61, 69 (1943): "A river is distinguished from a lake in that it flows, more or less, in a permanent bed or channel between defined banks or walls with a current, whereas streams are bodies of flowing water including rivers."

doctrine, and are consistently held to belong to the riparian landowners.<sup>140</sup> The ownership of each landowner extends apparently to the geographical center of the body of water.<sup>141</sup>

Drastic changes in the water and property law occurred in 1910, when the Louisiana legislature passed Act 258. This act provided that "The waters of and in all bayous, lagoons, lakes and bays and the beds thereof, within the borders of the state not at present under the direct ownership of any person, firm, or corporation are hereby declared to be the property of the State."<sup>142</sup> Though the language of the act is sufficiently broad to include both navigable and non-navigable waters, its practical significance has been mostly felt in connection with problems involving non-navigable waters. By the time the act was passed, the law governing navigable waters had been settled and state title had been repeatedly affirmed.

The act did not encroach upon existing private rights; it merely vested title in the state to waters and beds which were not under the "direct" ownership of any person. What is "direct" ownership, however, is not clear. Perhaps the term was inserted in the statute to exclude future claims by riparian landowners to alluvion additions and derelictions based on bank or shore ownership. Indeed, additions to the land cannot be regarded as being under the direct ownership of the riparian owner. Yet, this interpretation cannot be reconciled with the cases holding that with regard to lands adjoining non-navigable water the ownership of the riparians extends to the geographical center of the water involved.<sup>143</sup>

In any case, it seems that before 1910, there were bodies of non-navigable waters which were not owned directly either by the state or by private persons. As to these waters, Articles 509

140. See *Burns v. Crescent Gun and Rod Club*, 116 La. 1038, 41 So. 249 (1906); *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922). There are, indeed, several decisions holding that the bed of a non-navigable body of water belongs to the adjoining landowners. It has been observed, however, that in each of them the water concerned was not a "lake," as to which different rules might apply. See Comment, 6 LOUISIANA LAW REVIEW 698, 703 (1946).

141. "The beds of streams that are not and never were navigable belong to the riparian owners, to the thread or middle of the stream." *Wemple v. Eastham*, 150 La. 247, 253, 90 So. 637, 638 (1922). See also *Amite Gravel and Sand Co. v. Roseland Gravel Co.*, 148 La. 704, 87 So. 718 (1921); *Palmer Co. v. Wilkinson*, 141 La. 874, 75 So. 806 (1917); *State v. Aucoin*, 206 La. 786, 861, 20 So. 2d 136, 160 (1944) (dissenting opinion).

142. See La. Acts 1910, No. 258, now LA. R.S. 9:1101 *et seq.* (1950). Issues raised under this act were involved in *State v. Standard Oil Co.*, 164 La. 334, 113 So. 887 (1927).

143. Cf. text at note 141 *supra*.

and 510 of the Code could be determinative of the issue of title to additions and derelictions. After 1910, as title was vested in the state, claims to accretions by riparians became claims against state owned rather than against unclaimed land. And it should be expected that the courts will be reluctant to extend private property at the expense of the state. In the case of *State v. Aucoin*,<sup>144</sup> strong dicta indicated that the law of alluvion and dereliction would not apply to non-navigable bodies of water other than rivers. The case actually involved a suit by the state to determine the boundary between the land that once was the bed of Lake Long, and the adjoining land owned by the private defendant. The issue was decided on a finding, in accordance with the contentions of the state, that Lake Long was navigable in 1812. As a result, according to long-established practice, Articles 509 and 510 of the Code were not controlling.

In the converse situation that lands bordering state-owned non-navigable waters become inundated, no reasons of public policy may be invoked to divest riparian landowners of their title to the submerged lands. Accordingly, it may be expected that in proper cases Louisiana courts will refuse to press state claims to that extreme.

Since, at least prior to 1910, different rules applied to navigable and non-navigable waters with regard to both accretion and erosion, and after 1910, different rules may apply with regard to erosion, it may be of importance in some cases to determine whether a body of water is or has been navigable. No clear test of navigability has been devised, however, and the determination is made in most instances as a question of fact.<sup>145</sup> In the case of *State v. Aucoin*, it was declared that to be navigable it is necessary that a body of water "either be used or be susceptible of being used 'in their ordinary condition, as high-

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144. See *State v. Aucoin*, 206 La. 786, 826, 20 So.2d 136, 149 (1944): "Certainly the riparian rights of an owner of land bordering upon a lake do not entitle him to become the owner of the bed of the lake by the effect of its becoming dry, either in whole or in part, if the state owns the bed of the lake while it is covered with water." Non-navigable lakes alienated by the state under Act 247 of 1855 have been classified by the courts as "land," as to which the law of accretion and dereliction does not apply. See *McDade v. Bossier Levee Board*, 109 La. 625, 634, 33 So. 628, 631 (1902).

145. See *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145, 150 (1935): "[A] body of water is navigable in law, when it is navigable in fact." 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). See also Comment, 6 LOUISIANA LAW REVIEW 698 (1946).

ways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.'"<sup>146</sup>

(4) *Highways, roads and streets.* The Civil Code of Louisiana has placed highways, roads, and streets in the category of "public things," namely "things . . . the property of which is vested in a whole nation, and the use of which is allowed to all members of the nation" (Article 453). However, notwithstanding the wording of Article 453, it is an accepted principle in Louisiana today that highways, roads, and streets are "public" merely in the sense that they are subject to public use and not, necessarily, the property of the state.<sup>147</sup> Accordingly, title to the soil of highways, streets, and roads may be vested in the state, municipalities, or even private persons. While public use continues, the issue of title has some practical significance,<sup>148</sup> although considerations of public convenience are generally controlling. Upon termination of the public use, however, the question of title regains its full significance as it may be determinative of conflicting claims concerning ownership of the land formerly occupied by the highway, road, or street. Ordinarily, the question of title depends on the nature of the thing con-

146. 206 La. 787, 855, 20 So.2d 136, 158 (1944). See also *Amite Gravel and 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); Comment, *Tests of Navigability of Stream*, 30 TUL. L. REV. 332 (1956).

147. Thus, it has been held that title to things subject to public use cannot be acquired by acquisitive prescription. See *Locke v. Lester*, 78 So.2d 14, 16 (La. App. 1955); *Mayor v. Magnon*, 4 Mart.(O.S.) 2. 9 (La. 1815); *Kemp v. Town of Independence*, 156 So. 56 (La. App. 1934). The right of the public to the unobstructed use of things dedicated to public use cannot be lost by (liberative) prescription. See *Saint v. Timothy*, 166 La. 738, 117 So. 812, 814 (1928); *Ingram v. Police Jury of Parish of St. Tammany*, 20 La. Ann. 226, 228 (1868). Neither the land nor the revenues from land subject to public use may be seized. See *Kline v. Parish of Ascension*, 33 La. Ann. 562 (1881). Possessory actions adverse to the public claim may not be brought. See *Keefe v. City of Monroe*, 120 So. 102 (La. App. 1929). Finally, it has been frequently asserted that property dedicated to public use is inalienable by the city or parish. See *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695 (1913); *Shreveport v. Walpole*, 22 La. Ann. 526 (1870); *Burthe v. Blake and Town of Carrollton*, 9 La. Ann. 244 (1854); *McNeil v. Hicks*, 34 La. Ann. 1090 (1882). See also *New Orleans v. Louisiana Society for Prevention of Cruelty to Animals*, 229 La. 246, 259, 85 So.2d 503, 507 (1956) (municipality has no right to sell, without express legislative authority, property devoted to public use; municipality holds such property "in trust for the use and benefit of the citizens").

148. For example, while the public use continues, the private owner may have the right to extract minerals, provided that such operations are not incompatible with public use. Cf. *Placid Oil Co. v. Hebert*, 194 La. 788, 194 So. 893 (1940); *Flory, Who Gets the Royalty on Unit Production Allocated to Streets and Public Roads?*, THIRD ANNUAL INSTITUTE ON MINERAL LAW 51 (1955). The same principles apply in connection with private owned waterways. See *California Co. v. Price*, 225 La. 706, 74 So.2d 1 (1954); *State v. Richardson*, 140 La. 329, 350, 72 So. 984 (1916).

cerned, and on the method according to which the public interest is established. In that regard, distinction should be made between state highways, public roads, and streets.

The legal regime of state highways is regulated in considerable detail by the Revised Statutes. State highways are constructed, maintained, and administered by the Louisiana State Department of Highways.<sup>149</sup> The Department may acquire "any immovable property, or the use thereof, including servitudes, lands, and improvements on lands, necessary for the right of way . . . by expropriation, by donation, by purchase, by exchange, or by lease."<sup>150</sup> Thus, title to the soil of state highways may be vested in the state, municipalities, or private persons, depending on the circumstances.

Lands acquired by purchase, exchange, donation, or expropriation in accordance with Articles 2626 through 2641 of the Civil Code, or similar procedures established in the Revised Statutes,<sup>151</sup> becomes the property of the state. Such property, while public use continues, is clearly out of commerce,<sup>152</sup> and is always exempt from the rules governing prescription.<sup>153</sup> Upon termination of the public use, the soil of former state highways may become part of the private domain of the state. Accordingly, such lands may be sold at the discretion of the department by public or private sale.<sup>154</sup>

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149. See LA. R.S. 48:1 *et seq.* (1950). The word "highway" is defined as "a public way for vehicular, mounted, and pedestrian traffic, including the entire area dedicated thereto and the bridges, culverts, appurtenances, and features necessary to or associated with its purposes." *Id.* 48:1(11). See also *id.* 48:191 defining the highways which belong to the State Highway System. See *id.* 48:21: "The functions of the department shall be to study, administer, construct, improve, maintain, repair, and regulate the use of the state highway system."

150. See *id.* 48:217.

151. See LA. R.S. 48:218 (1950).

152. *Cf.* text at notes 70-71 *supra*; text at note 202 *infra*. In France, and in other continental countries, it is a generally acceptable proposition that public roads are part of the public domain of the state, whatever this term may mean. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 139 (1952); text at note 72 *supra*. A similar statement in connection with Louisiana law would be almost meaningless. The term public domain does not have a settled meaning in Louisiana, and it has been suggested that an acceptable criterion would be inalienability. *Cf.* text at note 80 *supra*. Streets, roads, and highways, if state owned, are not freely alienable state property. Yet, abandonment, relocation, and sale of the soil are possible not only after termination of the public use, but also while public use continues within the limits of a broad administrative discretion. *Cf.* text at notes 202-203 *infra*. An analytically correct classification should regard streets, roads, and highway in Louisiana as things subject to public use, whether state or privately owned. Whatever limitations are imposed on the owner of the soil are the result of dedication to public use.

153. See LA. R.S. 48:226 (1950).

154. See *id.* 48:224.

Special provisions in the Revised Statutes regulate the legal regime of "public roads"<sup>155</sup> which are not part of the state highway system.<sup>156</sup> The administration, construction, and maintenance of such roads is delegated, in principle, to parish governing authorities and road districts created under the authority of parish boards.<sup>157</sup> The title to such roads may be vested in the state, its political subdivisions, or even private persons. "Streets" within the limits of municipalities, if not a part of the state highway system or not under the control of parish authorities<sup>158</sup> are administered by municipal authorities. As in the case of highways and public roads, however, title to streets does not necessarily belong to the municipality; it may well belong to the state, parish, or private persons.

Rights-of-way for public roads and streets may be acquired by parish and municipal authorities by any of the methods prescribed for the State Department of Highways,<sup>159</sup> and may consist in the mere use of the soil or in full title to it.<sup>160</sup> In addition, rights-of-way may be acquired by certain other methods which need be considered separately.

An interest in the public use of a road or street may be established through the maintenance by a parish or municipality of a road or street for a period of three years. Indeed, Section 48:491 of the Revised Statutes<sup>161</sup> provides that "all roads and streets . . . which have been or are hereafter kept up, maintained or worked for three years by authority of any parish governing authority in its parish or by authority of any municipal governing authority in its municipality shall be public roads or streets as the case may be." This statute has been interpreted as establishing an independent basis for acquisition of rights-of-way by the public, distinguishable from dedication.<sup>162</sup> For the applica-

155. See *id.* 48:491, as amended: "All roads or streets in this state that are opened, laid out or appointed by virtue of any act of the legislature or by virtue of any order of any parish governing authority in any parish, or any municipal governing authority in any municipality . . . shall be public roads or streets as the case may be."

156. *Cf. id.* 48:471.

157. See *id.* 48:481, 48:571, 48:582.

158. *Cf. id.* 48:193, 48:491, 48:671, 48:701. See text at note 150 *supra*. *Cf. id.* 48:491, 48:493, 48:582, and 33:3301 *et seq.*

159. In Louisiana, a municipality can acquire property by direct purchase, expropriation, and dedication. *Brasseaux v. Ducote*, 6 So. 2d 769 (La. App. 1942).

160. Land acquired under 48:491 *et seq.* of the Revised Statutes is a servitude only. See *Paret v. Louisiana Highway Comm.*, 178 La. 454, 151 So. 768 (1933); *Fuselier v. Police Jury*, 109 La. 551, 33 So. 597 (1903).

161. See La. R.S. 48:491 (1950), as amended, La. Acts 1954, No. 639.

162. *Porter v. Huckabay*, 50 So. 2d 684 (La. App. 1951). See also *Wharton*

tion of the statute it is sufficient that the authorities concerned work the road without protest by the landowner. "Working and maintaining" within the meaning of the statute should be something more than an occasional "brushing up" of a pathway by public workmen.<sup>163</sup> According to a consistent line of cases, the nature of the public interest created under the statute is a servitude of passage; title to the property is retained by the owner,<sup>164</sup> and, in case of termination of the public use, his ownership becomes complete.

A legal servitude may be imposed according to Article 665 of the Civil Code on the lands of "adjacent proprietors on the shores of navigable rivers" for the "making and repairing of . . . roads." No compensation is due to the landowner for the acquisition of a right-of-way in accordance with this article. To defeat claims to compensation, Louisiana courts resorted to legalistic constructions, holding that under Article 665 land is not expropriated" but "appropriated" for the use to which it is subject in accordance with an implied condition in the title of the owners.<sup>165</sup> The nature of the public interest is, according to the Code, a mere servitude.

A number of cases limit application of Article 665 to purposes incidental to the use of the river.<sup>166</sup> It was correctly pointed out that to use the land for other than riparian purposes would conflict with constitutional guaranties of property rights.<sup>167</sup> Further, according to the terms of the Code, application of Article 665 is limited to the shores of navigable rivers.<sup>168</sup>

In general, rights-of-way cannot be acquired in Louisiana

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v. City of Alexandria, 226 La. 675, 77 So. 2d 1 (1955); *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Property*, 16 LOUISIANA LAW REVIEW 229 (1956).

163. *Bordelon v. Heard*, 33 So. 2d 88 (La. App. 1947). *Cf. The Work of the Louisiana Supreme Court for the 1951-1952 Term — Property*, 13 LOUISIANA LAW REVIEW 230, 231 (1953).

164. See *Paret v. Louisiana Highway Commission*, 178 La. 454, 151 So. 768 (1933); *Fuselier v. Police Jury*, 109 La. 551, 33 So. 597 (1903); *Bradley v. Pharr*, 45 La. Ann. 426, 12 So. 618 (1893). See also *Goree v. Midstates Oil Corp.*, 205 La. 988, 18 So. 2d 591 (1944).

165. See *Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490 (1893).

166. See *Hebert v. T. L. James and Co.*, 224 La. 498, 70 So. 2d 102 (1953); *Village of Moreauville v. Boyer*, 138 La. 1070, 71 So. 187 (1916). *Cf. The Work of the Louisiana Supreme Court for the 1953-1954 Term — Property*, 15 LOUISIANA LAW REVIEW 275 (1955).

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

168. For tests of navigability, see text at note 146 *supra*. See also Comments, *Tests of Navigability of Stream*, 30 TUL. L. REV. 332 (1956); *Nature and Limits of the Servitude of Roads along Navigable Rivers*, 29 TUL. L. REV. 799 (1955).

by acquisitive prescription.<sup>169</sup> Article 765 of the Civil Code, however, provides that the public may acquire a servitude of passage "by the open and public possession and use of a road for the space of ten years, after the said road or servitude has been declared a public highway by the Police Jury, provided that such servitude so acquired shall not extend beyond the width of forty feet." For several reasons, and perhaps mostly due to the development of the law governing dedication to public use, Article 765 has never been applied by the courts. In a number of cases in which Article 765 was invoked to establish public interests, its application was avoided by a statement that roads and streets within the limits of a municipality were outside the scope of that article.<sup>170</sup> And in a relatively recent case application of Article 765 was avoided on the ground that the prescriptive period of ten years starts to run from the time the road is declared to be public by the police jury.<sup>171</sup>

Public interests may also be created in roads and streets by dedication of land to public use. Dedication by private individuals or corporations may be effected in either of two ways: formally or informally. The difficulties in this area consist in distinguishing the two kinds of dedication and in determining the results of each.

The rules concerning informal dedication in Louisiana are in the main borrowed from common law jurisdictions.<sup>172</sup> Early in the last century, the Louisiana Supreme Court sought to check the influx of common law notions in this field,<sup>173</sup> but later either through inadvertence<sup>174</sup> or intentionally, the trend was reversed

169. See in general, Schoenrich, *Acquisition of Rights of Way by Prescription*, 12 TUL. L. REV. 226 (1938). Right of way cannot be acquired by acquisitive prescription in Louisiana because servitudes of passage are regarded by the Civil Code as "discontinuous." Cf. LA. CIVIL CODE art. 722 (1870).

170. See *Bomar v. Baton Rouge*, 162 La. 342, 110 So. 497 (1926) (dictum); *Town of Ruston v. Adams*, 9 La. App. 618 (1929).

171. *Landry v. Gulf Utilities Co.*, 166 La. 1069, 118 So. 142 (1928).

172. See Comment, *The Effect of Dedication to Public Use in Louisiana*, 13 TUL. L. REV. 606, 607, 610 (1939). But cf. Comment, *Establishment and Termination of Public Rights in Roads and Streets in Louisiana*, 16 LOUISIANA LAW REVIEW 521, 523, n.7 (1956). See also Comment, *Dedication of Land to Public Use*, 16 LOUISIANA LAW REVIEW 789 (1956); Robinson, *Dedication of Streets and Alleyways in Louisiana*, 25 TUL. L. REV. 88 (1951).

173. See *De Armas v. Mayor and City of New Orleans*, 5 La. 132, 189 (1833) (holding that the common law doctrine of dedication to public use was incompatible with the French and Spanish laws prevailing in Louisiana at the time preceding statehood).

174. See *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122 (1841) (holding that the question of dedication was governed by the principles of *City of Cincinnati v. White's Lessee*, 31 U.S. (6 Pet.) 431 (1832), a common law case, and citing as authority the dissenting opinion in the *De Armas* case!).

and civilian conceptions were gradually displaced by common law rules.

The essential characteristic of common law dedication to public use is the absence of requisite formalities. Though intention by the landowner to dedicate (frequently assimilated to "offer"), and acceptance by the public are indispensable,<sup>175</sup> the intention may be manifested by mere toleration of the public use<sup>176</sup> and the acceptance by actual use by the public.

The nature of the public interest created in roads and streets by an informal dedication has been a controversial subject in Louisiana, and has given rise to conflicting judicial determinations. The earliest Louisiana case to present the issue was *Renthrop v. Bourg*,<sup>177</sup> decided in 1816. The Louisiana Supreme Court citing Roman<sup>178</sup> and Spanish<sup>179</sup> authorities, held that the title to public roads was vested in the public. However, dicta in subsequent cases cast considerable doubt on that rule.<sup>180</sup> In the meanwhile, the Louisiana Civil Code of 1825 was enacted, and Article 654 thereof provided that "the soil of public roads belongs to the owners of the land on which they are made."<sup>181</sup> Thus, when in 1848, in *Hatch v. Arnault*,<sup>182</sup> the Louisiana Supreme Court reconsidered the issue of title to public roads, its conclusion was that the rule of Roman law vesting title in the public could obtain only restricted application in Louisiana. In the course of its opinion the court made the somewhat obscure distinction between *grande chemins* (highways) which belong

175. See *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 989, 183 So. 229, 240 (1938); *Town of Carrollton v. Jones*, 7 La. Ann. 233 (1852); *Livaudais v. Municipality No. 2*, 16 La. 509 (1840); *Jouett v. Keeney*, 17 La. App. 323, 136 So. 175 (1931). Comment, 13 TUL. L. REV. 606, 610 (1939).

176. See *Goree v. Midstates Oil Corp.*, 205 La. 988, 18 So.2d 591 (1944). *Cf. Shreveport v. Walpole*, 22 La. Ann. 526 (1870); *Picket v. Broad*, 18 La. Ann. 560 (1866); *Saulet v. New Orleans*, 10 La. Ann. 81 (1855); *New Orleans and Carrollton Ry. v. Town of Carrollton*, 3 La. Ann. 282, 284 (1848); *Cook v. City of Opelousas*, 4 La. App. 300 (1925). In addition to a finding of intention to dedicate, implied dedication has sometimes been based on estoppel *in pais*. *Ford v. Shreveport*, 204 La. 618, 16 So. 2d 127 (1943); *Torres v. Falgoust*, 37 La. Ann. 497 (1855); *Saulet v. New Orleans*, 10 La. Ann. 81 (1855).

177. 4 Mart.(O.S.) 97 (La. 1816).

178. D.43.8.2.21.

179. LAS SIETE PARTIDAS 3.23.6. See also *Morgan v. Livingston*, 6 Mart.(O.S.) 19 (La. 1819) (dicta).

180. *Cf. De Armas v. Mayor and City of New Orleans*, 5 La. 132 (1833).

181. See LA. CIVIL CODE art. 654 (1825). *Cf. LA. CIVIL CODE* art. 658 (1870).

182. 3 La. Ann. 482 (1848). Deviation from the Roman rule was justified on the ground that while Roman roads were constructed to be as permanent as man could make them and were built on land previously acquired by the state, the roads in the new and unsettled colony of Louisiana were of necessity temporary and subject to change.

to the nation, and *chemins publics* (public roads) which belong to private owners. This distinction, however, was merely academic since Louisiana roads were held to be generally *chemins publics*, namely privately owned. Subsequent cases seem to have obscured the issue, some of them holding that title to the soil of public roads is vested in the public,<sup>183</sup> and others that title to the property is retained by the owners.<sup>184</sup> According to the latter view, which is fully supported by Article 658 of the Civil Code, and which is the prevailing one today, the public acquires merely a servitude of passage on the land.<sup>185</sup> In an effort at reconciliation and harmonization of these seemingly inconsistent cases, a distinction has been urged between country roads, on the one hand, and streets within the limits of municipalities, on the other.<sup>186</sup> Thus, in the case of roads the alleged rule seems to be that title is retained by the former owner, while in the case of streets title is vested in the public.<sup>187</sup> Though the distinction may find some support in the wording of the Code,<sup>188</sup> no real policy ground may be seen for it. Perhaps these seemingly inconsistent adjudications may be reconciled merely by reference to the particular issues involved, and on the basis of controlling legislative texts enacted during the period.<sup>189</sup>

183. See *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695 (1913); *Kline v. Parish of Ascension*, 33 La. Ann. 562 (1881); *Sheen v. Stothart*, 29 La. Ann. 630 (1877); *Baton Rouge v. Bird*, 21 La. Ann. 244 (1869); *Kemp v. Town of Independence*, 156 So. 56 (La. App. 1934); *Town of Napoleonville v. Boudreaux*, 142 So. 874 (La. App. 1932).

184. *James v. Delery*, 211 La. 306, 29 So.2d 858 (1947); *Landry v. Gulf States Utilities Co.*, 166 La. 1069, 118 So. 142 (1928); *Collins v. Zander*, 61 So.2d 897 (La. App. 1952); *Life v. Griffith*, 197 So. 646 (La. App. 1940). *Shreveport v. Simon*, 132 La. 69, 60 So. 795 (1912); *Bradley v. Pharr*, 45 La. Ann. 426 (1893).

185. See *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938). The notion that the public acquires ownership seems to remain applicable to lands other than roads or streets. See Comment, 16 LOUISIANA LAW REVIEW 789, 797 (1956); *Locke v. Lester*, 78 So.2d 14 (La. App. 1955).

186. See Comment, 13 TUL. L. REV. 606, 611 (1939). The distinction is not supported by the cases, and may lead to confusion. See Comment, 16 LOUISIANA LAW REVIEW 521, 524, n.17 (1956). Cf. Flory, *Who Gets the Royalty on Unit Production Allocated to Streets and Public Roads?*, THIRD ANNUAL INSTITUTE ON MINERAL LAW 51 (1955).

187. Cf. *Jaenke v. Taylor*, 160 La. 109, 117, 106 So. 711, 714 (1926) (the owner "divested himself of the fee as completely as if he had made a direct sale or donation of the said streets to the public").

188. Articles 454 and 458 of the Louisiana Civil Code of 1870 mention "streets" only and seem to refer to cities. Article 658, on the other hand, speaks only of "public roads" and seems to refer to country roads as distinguished from city streets. Both streets and roads, however, are clearly within the scope of Article 482, and "insusceptible" of private ownership while public use continues.

189. Cf. *Wilkie v. Walmsley*, 173 La. 141, 136 So. 296 (1931); *Jaenke v. Taylor*, 160 La. 109, 106 So. 711 (1926); *Town of Napoleonville v. Boudreaux*, 142 So. 874 (La. App. 1932).

A common law dedication may terminate by formal revocation made by the proper authorities in accordance with statutory provisions,<sup>190</sup> or by informal abandonment and non-use. Abandonment may be express, based on a declaration that the right-of-way has been abandoned, or implied, from many and varying circumstances. In any case, abandonment must be based on clear proof of intention on the part of the proper authorities to abandon the road. Intention to abandon must be established by the relocation of the road under the authority of the governing agency, and the maintenance of the relocated road.<sup>191</sup> No such intention was found, however, when relocation was made in a haphazard way and without the authority of the proper governing agency.<sup>192</sup> Non-use, and corresponding liberative prescription of ten years in accordance with Article 789 of the Civil Code, may also be relevant in connection with termination of a common law dedication. Thus, even in the absence of clear proof as to intention on the part of the proper authorities to abandon a road, non-use of a strip of land as a public road or street for a period in excess of ten years may result in termination of the public use.<sup>193</sup>

According to the prevailing view, after termination of a common law dedication the title to the soil belongs in full ownership to the original owner, since the "fee" was never alienated.<sup>194</sup> Louisiana Act 382 of 1938<sup>195</sup> provides that upon revocation of dedication the soil of roads or streets "up to the center line . . . shall revert to the then present owner or owners of the land

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190. See LA. R.S. 48:701 (1950).

191. See *Starnes v. Police Jury of Rapides Parish*, 27 So.2d 134 (La. App. 1946).

192. See *Bordelon v. Heard*, 33 So.2d 88 (La. App. 1947); *Starnes v. Police Jury of Rapides Parish*, 27 So.2d 134 (La. App. 1946). See also *Caz-Perk Realty, Inc. v. Police Jury of Parish of East Baton Rouge*, 207 La. 796, 22 So.2d 121 (1945); *Jeffries v. Police Jury of Rapides Parish*, 53 So.2d 157 (La. App. 1951); *Young v. Hickman*, 13 La. App. 173, 127 So. 659 (La. App. 1930).

193. Although Article XIX, § 16, of the Louisiana Constitution of 1921 states that "prescription shall not run against the State in any civil matter," it is established that the constitutional prohibition does not apply to *alienable* municipal or parish property. See *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 66 So. 237 (1914) (involving interpretation of the same constitutional prohibition in Article 113 of the Louisiana Constitutions of 1898 and 1913). Cf. *Paret v. Louisiana Highway Commission*, 178 La. 454, 151 So. 768 (1933); *Jouett v. Keeney*, 17 La. App. 323, 136 So. 175 (La. App. 1931).

194. See *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938); *Mendez v. Dugart*, 17 La. Ann. 171 (1865); *Ayer v. Kirkwood*, 9 La. App. 306, 308 (1928) (soil of the public roads belongs to owners of the land on which they are made). Cf. *Goree v. Midstates Oil Corp.*, 205 La. 988, 18 So.2d 591 (1944); LA. R.S. 48:491 (1950).

195. See LA. R.S. 48:701 (1950). Cf. *Robinson, Dedication of Streets and Alleyways in Louisiana*, 25 TUL. L. REV. 88, 89 (1950).

contiguous thereto." This provision, however, was apparently intended to apply to statutory rather than common law dedication. In the former case, the owner is divested of title and the land may well be granted by the statute to the owners of the contiguous land; but in the latter case, this solution would apparently conflict with constitutional provisions guaranteeing property rights.

Louisiana Act 51 of 1930<sup>196</sup> provides the procedures which a landowner may follow to create a subdivision of a city or town, and to dedicate its streets and alleyways to public use. The provisions of the act have been construed to be "directory," hence in most instances substantial compliance with the requisite formalities will be sufficient for a valid dedication.<sup>197</sup> There is no provision in the act requiring formal acceptance by the public and it has been held that no such acceptance is necessary. Further, in contrast to common law dedication, actual use by the public is unnecessary; dedication becomes complete upon recording of a map containing a description of the streets and alleyways dedicated.<sup>198</sup> The effect of formal dedication is to divest the original owner of title and vest it in the municipality.<sup>199</sup> The act of dedication, however, may define the nature of the public interest created, and title to the soil may be expressly reserved. In that case the public interest is confined merely to the use of the street.<sup>200</sup>

Formal dedication may terminate only by a formal act of revocation.<sup>201</sup> Abandonment, and non-use by the public do not have the same effect as in common law dedication. However, formal revocation is ordinarily predicated on abandonment: if the street is still needed by the public, the municipality does not have authority to revoke the dedication.<sup>202</sup> The discretion of

196. See LA. R.S. 33:5051 (1950). See also *id.* 33:31.

197. See *Arkansas Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938); *Collins v. Zander*, 61 So. 2d 897, 899 (La. App. 1952); *Life v. Griffin*, 197 So. 646 (La. App. 1940); *Sliman v. Mayor and Board of Aldermen*, 145 So. 410 (La. App. 1933).

198. *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938); *Collins v. Zander*, 61 So. 2d 897 (La. App. 1952).

199. *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 2d 229 (1938); *Kamp v. Town of Independence*, 156 So. 56 (La. App. 1934). *Cf.* LA. R.S. 33:5051, 31 (1950).

200. See *Jaenke v. Taylor*, 160 La. 109, 117, 106 So. 711, 714 (1925).

201. See Robinson, *Dedication of Streets and Alleyways in Louisiana*, 25 TUL. L. REV. 88 (1950).

202. See *Caz-Perk Realty, Inc. v. Police Jury of Parish of East Baton Rouge*, 207 La. 796, 22 So. 2d 121 (1945). *Cf. The Work of the Louisiana Supreme Court for the 1944-1945 Term — Property*, 6 LOUISIANA LAW REVIEW 554 (1946). See

municipal authorities to revoke dedication of an abandoned street is very broad, and there is a rebuttable presumption that revocation is proper.<sup>203</sup> Judicial intervention is confined to cases in which the action of the authorities appears to be fraudulent, capricious, or arbitrary.<sup>204</sup> In case of termination of formal dedication by revocation, title to the soil is acquired by the adjacent landowners in accordance with Act 382 of 1938.<sup>205</sup> However, to affect interests of third parties, revocation must be recorded.<sup>206</sup>

### PRIVATE THINGS

Things belonging to the "private domain" of the state or its political subdivisions, and things belonging to private persons may be given to public use by provision of law or private act of dedication.<sup>207</sup> The Code regulates expressly only the public use of the banks of navigable rivers. Though the ownership of such banks is vested in the riparian landowners (Article 455, paragraph 2), "the use of the banks of navigable rivers or streams is public" (Article 455, paragraph 1).<sup>208</sup> The content of public use is that "everyone has the right freely to bring his vessels to land there, to make fast the same to trees which are there

also Police Jury, Parish of Jefferson v. Noble Drilling Corp., 232 La. 981, 95 So.2d 627 (1957), holding that a police jury cannot revoke the dedication of a park, since LA. R.S. 48:491 (1950) did not make provision for parks. LA. Act 229 of 1958 filled this gap by authorizing revocation whenever the area in question is abandoned or no longer needed. Upon revocation, title reverts to the former owner.

203. See *Caz-Perk Realty, Inc. v. Police Jury of Parish of East Baton Rouge*, 207 La. 796, 22 So.2d 121 (1945); *Young v. Hickman*, 13 La. App. 173, 127 So. 659 (La. App. 1930).

204. See *Jeffries v. Police Jury of Rapides Parish*, 53 So.2d 157 (La. App. 1951); *La Rocca v. Dupepe*, 97 So.2d 845 (La. App. 1957).

205. See LA. R.S. 48:701 (1950); *Robinson, Dedication of Streets and Alleyways in Louisiana*, 25 TUL. L. REV. 88, 90 (1950). In case the land in question has been mortgaged or transferred, a conclusive presumption has been established that the transfer or mortgage of land adjacent to an abandoned road includes all the transferor's interest in the road, unless expressly excluded. LA. R.S. 9:2981-2984 (Supp. 1958), added by La. Act 528 of 1958. See also *id.* 9:2971-2973, added by La. Act 555 of 1956.

206. See *Matin v. Fuller*, 214 La. 404, 37 So.2d 851 (1948); *The Work of the Louisiana Supreme Court for the 1948-1949 Term—Property*, 10 LOUISIANA LAW REVIEW 176 (1950).

207. Things enumerated in Articles 453 and 454 of the Civil Code are by definition subject to public use. Thus, Article 453, § 2, declares that "it follows" from the definition given that "every man has the right freely to fish in the rivers, ports, roadsteads, and harbors." This is simply indicative of the fact that such things are subject to public use; "fishing" is only one instance mentioned expressly. *Cf. Johnson v. Johnson*, 50 So.2d 490 (La. App. 1951).

208. *Cf. 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 purposes of that use, devolves upon the state, and is, ordinarily, committed to the governing bodies of its various subdivisions."

planted, to unload the vessels, to deposit his goods, to dry his nets, and the like." The last clause makes it clear that the enumeration is indicative rather than exclusive. Further, it is a consequence of the public use that the riparian landowner is forbidden to obstruct the bank or deter the exercise of the public right, and that no compensation is due to him.

Article 456 of the Civil Code defines the word "banks." Thus, according to the Code, "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."<sup>209</sup> Exception is made with regard to the banks of the Mississippi and other navigable rivers where levees are constructed according to law. In such case, "the levees shall form the banks" (Article 457, paragraph 2).

Connected with the public use of the banks of navigable rivers is the burden placed on riparian lands with regard to construction and maintenance of levees. This burden may affect not only riparian lands, but also adjacent lands, in accordance with a broad discretion of the governing agency with jurisdiction over levees.<sup>210</sup> Originally, landowners were required to construct levees at their own expense. In the last part of the nineteenth century, however, the Louisiana legislature established levee districts under the authority of levee boards authorized to build and maintain levees at public expense.<sup>211</sup> Further, while originally no compensation was due for taking lands for the construction of levees, a constitutional amendment in 1921 provided for payment to be made for lands "actually used or destroyed" by levee construction.<sup>212</sup> The amount paid is the assessed value of the land for the preceding year, or the actual value if the latter is less than the former.<sup>213</sup> Title to the lands

209. But cf. *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 its ordinary high stage—is called the Gauthreaux, 173 La. 737, 138 So. 650 (1932).

210. See *Wolfe v. Hurley*, 46 F.2d 515 (D.C. La. 1930); Note, 21 TUL. L. REV. 649 (1947).

211. See Zengel, *Elements of the Law of Ownership* 16, WEST'S LOUISIANA CIVIL CODE, preceding art. 448 (1950).

212. See LA. CONST. art. XVI, § 6. This constitutional provision has been construed in a number of cases. See *Wolfe v. Hurley*, 46 F.2d 515 (D.C. La. 1930); *Dickson v. Board of Commissioners of Caddo Levee District*, 210 La. 121, 26 So. 2d 474 (1946); *Mayer v. Board of Commissioners of Caddo Levee District*, 177 La. 1119, 150 So. 295 (1933).

213. See *Colonial Land Co. v. Board of Commissioners of Pottchartrain Levee*

so used or destroyed remains in the riparian landowner, for the lands are not "expropriated" for levee construction; the payment is merely an indemnity for the public use of the lands.<sup>214</sup>

### COMMON THINGS

In addition to things of the public domain of the state and its political subdivisions, and private things, "common things" are also subject to public use — by definition. This is true of the air, the sea, running water, and the seashore. The reclassification affected by the Louisiana legislature and court action whereby parts of the Gulf, running water, and the seashore were declared to be state property rather than common things did not circumscribe or restrict the public use of such things.<sup>215</sup>

The Code contains detailed provisions only with regard to the public use of the seashore. Article 452 enumerates a number of rights vested in all. Such are the "right to build cabins thereon for shelter, and likewise to land there, either to fish or shelter himself from the storm, to moor ships, to dry nets, and the like, provided that no damage arise from the same to the buildings and erections made by the owners of the adjoining property." This enumeration is, obviously, indicative rather than exclusive. An amendment to the above article, made in 1914, added a further proviso that "the seashore of an incorporated city or town . . . shall be subject to the police power of such city or town . . . and no cabins or other structures shall be built on such seashore or in the waters adjacent thereto except upon such conditions as the city or town may prescribe." This amendment does not alter the character of the seashore within city limits, nor does it result in conceptual differentiation between seashore within city limits and seashore outside city limits. It merely stresses the public interest in the use of seashore within city limits. Such use, though available freely to all as before, is now subject to regulation in the interest of all.

### *Nature of the Public Use*

According to continental civilian conceptions, the dedication of a thing to public use generates legal relations of a two-fold nature. On the one hand, the relation of the state to the thing is one of *public law*, and, on the other hand, the relation of pri-

District, 170 La. 1057, 129 So. 635 (1930). Cf. Comment, 5 TUL. L. REV. 106 (1930).

214. See *Ruch v. New Orleans*, 43 La. Ann. 275, 9 So. 473 (1891).

215. Cf. text at notes 36, 60 *supra*.

vate persons to the thing is one of *private law*.<sup>216</sup> The content of the public law relation consists in the authority of the state ("imperium") to administer and regulate the public use in the interest of all. The content of the private law relation consists in the use itself by all persons concerned.<sup>217</sup> The rights of those making actual use of a thing dedicated to public use do not constitute a power over the thing itself; they are not regarded as real rights, possession, or detention.<sup>218</sup> One's right to public use is merely regarded as an incident of a comprehensive right to one's own personality. Accordingly, the right to public use enjoys the same protection accorded to the right of personality. It may give birth to an action for damages in case of unwarranted interference; it is inalienable; it cannot be prescribed against; and while public use continues, it cannot be lost by resignation or non-use.<sup>219</sup> This complex theoretical construction may be of considerable utility elsewhere but for several reasons cannot be a useful guide for the development of Louisiana law.

In Louisiana, public use is generally regarded as a servitude on land in the interest of the public.<sup>220</sup> While this conception

216. See BALLIS, GENERAL PRINCIPLES OF CIVIL LAW 535 (1955) (in Greek); I 1 ENNECCERUS-NIPPERDEY, LEHRBUCH DES BÜRGERLICHEN RECHTS 545, 550 (1949). In general, however, the nature of public use is a controversial matter. Cf. 3 DUGUIT, TRAITÉ DE DROIT CONSTITUTIONNEL 348 *et seq.* (1938); LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 370 (1957); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 130 (1952).

217. See I 1 ENNECCERUS-NIPPERDEY, LEHRBUCH DES BÜRGERLICHEN RECHTS 552 (1949). Cf. *LeBlanc v. New Orleans*, 138 La. 243, 251, 70 So. 212, 215 (1916).

218. See BALLIS, GENERAL PRINCIPLES OF CIVIL LAW 535 (1955) (in Greek); I 1 ENNECCERUS-NIPPERDEY, LEHRBUCH DES BÜRGERLICHEN RECHTS 553 (1949). Louisiana courts have reached the same conclusion. See *Keefe v. City of Monroe*, 120 So. 102, 105 (La. App. 1929): "Mere physical possession of public places which are not subject to private ownership is not such possession as entitles a possessor to maintain himself against the public." See also *Bruning v. New Orleans*, 165 La. 511, 521, 115 So. 733 (1928).

219. See BALLIS, GENERAL PRINCIPLES OF CIVIL LAW 536 (1955); I 1 ENNECCERUS-NIPPERDEY, LEHRBUCH DES BÜRGERLICHEN RECHTS 553 (1949). In Roman law, the public interest in the free use of things dedicated to public use was controlling and generated the concept of *usus publicus*, namely a public right protected by the *Praetor*. The inalienability of things subject to public use and their insusceptibility of private ownership was the guaranty of the public right. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 126 (1952).

220. See Comments, 16 LOUISIANA LAW REVIEW 789, 792 (1956); 12 TUL. L. REV. 428, 431 (1938); Zengel, *Elements of the Law of Ownership* 15, in WEST'S LOUISIANA CIVIL CODE, preceding Art. 448 (1950). Cf. *Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585 (1934); *State v. Richardson*, 140 La. 329, 72 So. 984 (1916). The servitude of public use, however, is a *sui generis* one. Cf. *Lyons v. Hinckley*, 12 La. Ann. 655 (1856). Accordingly, administrative authorities and courts have broad powers in connection with the regulation and protection of the public use. See *LeBlanc v. New Orleans*, 138 La. 243, 276, 70 So. 212, 223 (1916). In case of conflict of interests, due to insufficiency of the thing subject to public use to satisfy all needs, the authorities may define priorities and attendant limitations. Cf. Comment, 16 LOUISIANA LAW REVIEW 500, 507 (1956), in connection with the

may not be fully compatible with traditional civilian notions concerning servitudes,<sup>221</sup> it has several advantages, and if consistently followed, it could furnish an acceptable basis for the solution of a number of legal problems. The rights of all concerned could be defined, regulated, and protected by applying the code provisions relating to servitudes rather than restoring to the common law rules of nuisance.<sup>222</sup> Further, in case of termination of the public use due to natural or legal causes, and the *déclassement* of the thing subject to public use, the involved problem of title<sup>223</sup> could find an easy solution: being no longer burdened with a public servitude, the thing should return in full ownership to its original owner, be it the state, its political subdivisions, or private persons.

In Louisiana, public use is not necessarily incompatible with private rights over a thing subject to public use. It has been already stated that private ownership may well co-exist with dedication to public use.<sup>224</sup> Further, in certain cases, exclusive private rights of use and exploitation may be accorded by the authorities or reserved by the private owner upon dedication of a thing to public use.<sup>225</sup> Such rights are, ordinarily, based on a lease. The extent to which exclusive private rights may interfere with public use is ordinarily subject to judicial determination, though within the limits of a broad administrative discretion.<sup>226</sup>

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regulation of water rights. The public right to the free and unobstructed use of things dedicated to public use may be protected by actions brought either by public officers or private citizens. *Schoeffner v. Dowling*, 158 La. 706, 104 So. 624 (1925); *Locke v. Lester*, 78 So. 2d 14, 17 (La. App. 1955). *Cf. Mayor v. Magnon*, 4 Mart.(O.S.) 2, 10 (La. 1815). See also *Saint v. Timothy*, 166 La. 738, 117 So. 812 (1928); *Johnson v. Johnson*, 50 So. 2d 490 (La. App. 1951).

221. *Cf.* 3 ENNECCERUS-NIPPERDEY, *LEHRBUCH DES BÜRGERLICHEN RECHTS* 430 (1949); GIERKE, *DAS SACHENRECHT DES BÜRGERLICHEN RECHTS* 134 *et seq.* (1959); HEDEMANN, *SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES* 242 *et seq.* (1960). See also LA. CIVIL CODE art. 647 (1870): "A real or predial servitude is a charge laid on an estate for the use and utility of another estate belonging to another owner."

222. *Cf. Boyce Cottonseed Oil Mfg. Co. v. Board of Commissioners of Red River, Atchafalaya and Bayou Boeuf Levee District*, 160 La. 727, 107 So. 506 (1926); *Lambert v. American Box Co.*, 144 La. 604, 81 So. 95 (1919); *Mayor v. Magnon*, 4 Mart.(O.S.) 2 (La. 1815); *Town of Amite City v. Southern United Ice Co.*, 34 So. 2d 60 (La. App. 1948).

223. See text at notes 183, 194, 199 *supra*. *Cf. GREEK CIVIL CODE* art. 971 providing that upon termination of the public use the thing in question ceases being out of commerce. In that case, ownership is free of all restrictions; and if the same thing belonged to the state, now is a part of the private domain.

224. *Cf.* text at notes 132-133 *supra*.

225. *Cf. LA. CIVIL CODE* art. 744 (1870): "Servitudes may be established on all things susceptible of ownership, even on the public domain, on the common property of cities and other incorporated places." See also LA. R.S. 41:1211 *et seq.* (1950); *LeBlanc v. New Orleans*, 138 La. 243, 70 So. 212 (1916).

226. See *Shreveport v. Kansas City, S. and G. Ry.*, 167 La. 771, 120 So. 290

Exclusive private rights ("*jura propria*") on things subject to public use, compatible with, and in most instances serving the public interest, are termed by civilian doctrine "concessions."<sup>227</sup> Concessions are regarded as unilateral acts of the public authorities, even where they are based on a contract with the recipient of the concession. Ordinarily, the content, duration, and transferability of the rights created depend on the particular circumstances and on the terms of the official act itself. These rights are in most instances regarded as servitudes, personal or predial. Except where the thing belongs to the state, or is expropriated, consent by the owner is a prerequisite for a valid concession. Another prerequisite is that the exclusive private rights should not obstruct or deter the public use.<sup>228</sup> Concession is subject to revocation only if the official act so provides. In the absence of other provisions, concession is regarded as establishing a real right, and revocation may be made only in accordance with the law of eminent domain. This actually distinguishes concession from a mere *license* by the authorities, which is freely revocable.

### THINGS SUSCEPTIBLE OF OWNERSHIP

According to Article 483 of the Civil Code, "Things susceptible of ownership, are all those which are held by individuals, and which may be alienated by sale, exchange, donation, prescription, or otherwise."<sup>229</sup> The usefulness of this definition is questionable. If susceptible of ownership were things "held by individuals" ("held" meaning factual control), then anything that could be held by individuals could become the object of ownership. This, however, cannot be so since factual control does not always lead to ownership. If "held" means "owned" (the only rational hypothesis), then Article 483 tells us that susceptible of ownership are things owned by individuals. This

(1929) (declaring city ordinance, subsequently converted into contract, null and void as involving maintenance of structures encroaching on public use of street); *Anderson v. Thomas*, 166 La. 512, 117 So. 573 (1928) (municipality enjoined from erecting building in city park which allegedly would encroach on public use). *Cf. La Rocca v. Dupepe*, 97 So.2d 845 (La. App. 1957): "[I]t is well-settled that courts will not interfere with the functions of police juries or other public bodies in the exercise of the discretion vested in them unless such bodies abuse this power by acting capriciously or arbitrarily."

227. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 150 (1952).

228. *Id.* at 151 *et seq.* See also BALLIS, *GENERAL PRINCIPLES OF CIVIL LAW* 536 (1955) (in Greek).

229. *Cf. LA. CIVIL CODE* (1808) (no corresponding article); *LA. CIVIL CODE* art. 475 (1825).

is also a questionable circular statement. Susceptible of ownership, or rather more accurately, susceptible of *private* ownership are not things "owned" at a given moment by individuals but things which the law permits individuals to own.<sup>230</sup>

Further susceptible of private ownership are not only things owned "by individuals." Ownership by corporations, both private and public, is recognized by the Code;<sup>231</sup> and things owned by such corporations are obviously susceptible of ownership. Finally, susceptible of private ownership are not only things which "may be alienated." Indeed, there are things which though inalienable, may still be susceptible of private ownership.<sup>232</sup> The definition, therefore, of things susceptible of private ownership in terms of their alienability is not correct.

Apparently, the intention of the redactors of the Civil Code was to draft a provision corresponding to the preceding Article 482, which defined things *not* susceptible of private ownership. Then, as susceptible of private ownership should be regarded all things which are neither "common" nor "public" in the sense of being part of the public domain.<sup>233</sup> Such are things which according to law may be owned by private persons, individual and corporations, and things belonging to the private domain of the state and its political subdivisions.

Indeed, the Code distinguishes things susceptible of private ownership into two categories: things which belong to private persons and things which belong to the private domain of the state. According to Article 459 of the Code, "Private estates and fortunes are those which belong to individuals."<sup>234</sup> This article simply means that things belonging to private persons, whether individuals or corporations, are private things. Referring to the private domain Article 486 of the Code declares that "The national domain, properly speaking, comprehends all the landed estate of all the rights which belong to the na-

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230. *Cf.* *International News Service v. Associated Press*, 248 U.S. 215, 246 (1918): "Property, a creation of law, does not arise from value" (dissenting opinion by Justice Holmes); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935). See also *Sentel v. New Orleans and C.R.R.*, 166 U.S. 698 (1897) (discretion of the Louisiana Legislature to recognize property rights in dogs); *Harper v. Stanbrough*, 2 La. Ann. 377 (1847) (every government has the right to establish and regulate the rights of property within its jurisdiction).

231. See LA. CIVIL CODE arts. 449, 484 (1870).

232. *Cf. e.g.*, LA. CIVIL CODE art. 2357 (1870) (dotal property).

233. *Cf.* text at notes 79, 80 *supra*.

234. *Cf.* LA. CIVIL CODE, p. 96, art. 10 (1808); LA. CIVIL CODE art. 450 (1825).

tion, whether the latter is in the actual enjoyment of the same, or has only a right to reenter on them."<sup>235</sup> This is no more than a general definition of property belonging to the private domain of the state and, necessarily, must be supplemented by other articles in the Code and by special statutes.<sup>236</sup>

The distinction between things belonging to private persons and things of the private domain is important since different rules may apply to each category of things. In that regard, Article 484 of the Code declares that "Individuals have the free disposal of the property which belongs to them, under the restriction [restrictions] established by law." Things of the private domain, on the other hand (the Code uses the expression "property of corporations of cities or other corporations") are "administered according to laws and regulations which are peculiar to them, and can only be alienated in the manner and under the restrictions prescribed in their several acts of incorporation."<sup>237</sup>

Civilian scholars are not in agreement as to which things are part of the private domain of the state.<sup>238</sup> In the light of the legal situation in Louisiana,<sup>239</sup> it may be stated that to the private domain clearly belong moneys accruing from taxes and special assessments, revenues from enterprises whether of a sovereign or non-sovereign nature, properties and rights granted to the state, and buildings and lands which are not subject to public use.<sup>240</sup> Thus, unclaimed swamp land held by the state under grant from the United States,<sup>241</sup> and the bottoms of non-navigable waters in general are part of the private domain.<sup>242</sup>

Problems are posed by certain statutes which asserted state ownership over a number of things which according to the Code were originally regarded as *res nullius*, namely, belonging to no one. Statutory provisions, for example, declare that the state owns

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235. Cf. LA. CIVIL CODE, p. 100, art. 33 (1808); LA. CIVIL CODE art. 478 (1825). This article obviously reflects terminological difficulties encountered by the redactors of the French Civil Code. Cf. DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 320 ( ) ; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 124 (1952).

236. See, e.g., note 140 *supra*; notes 241, 242 *infra*.

237. Cf. LA. CIVIL CODE, p. 100, art. 32 (1808); LA. CIVIL CODE art. 476 (1825).

238. Cf. text at note 74 *supra*.

239. Cf. text at note 78 *supra*.

240. Cf. text at notes 84-85 *supra*.

241. Act of March 2, 1849, c. 87, 9 Stat. 352; Act of Sept. 28, 1850, c. 84, 9 Stat. 519. See also La. Acts 1862, No. 124.

242. See text at notes 140 *et seq. supra*. Cf. La. Acts 1910, No. 258.

wild animals, fish, birds, alligators, salt water shrimp, oysters, and crabs;<sup>243</sup> and it has been suggested that such things today are part of the private domain of the state.<sup>244</sup>

Perhaps, in civilian terminology, "ownership" as applied to wildlife would be a misnomer. According to traditional notions, ownership presupposes possession, and may be acquired only in accordance with well-defined rules of civil law. Particularly with regard to things already owned, transfer of title by the owner, or acquisitive prescription is the rule. Thus, in the framework of traditional conceptions, state title to wildlife would make impossible the acquisition of title by any captor, unless a fictitious tradition or prescription is resorted to. All this points to the fact that state ownership of wildlife is a new conception, and, in order to fit the traditional conceptual framework, new constructions and distinctions are necessary. In any case, sight should not be lost of the fact that statutes asserting state ownership of wildlife are the result of an effort at conservation of natural resources in the interest of all,<sup>245</sup> and this predominant feature sets out the limits of state ownership. Thus, transfer of title to any private person would be inconceivable. On the other hand, conceptual difficulties apart, the magic of the word "ownership" may become apparent in the light of federal jurisprudence. Assertion of ownership by the state over wildlife may be the guaranty of a more effective regulation. Indeed, attempts at regulation of *res nullius* by state authorities in the past were held in some cases to conflict with the due process clause of the Federal Constitution.<sup>246</sup> Similar regulation of "state property" would obviously be free of such objections.

### CONCLUSIONS

The conceptual structure of the Louisiana Civil Code of 1870, Book II, Title I, has proved analytically deficient in certain instances. Perhaps, due to the fact that two distinct masses of materials were used — Roman sources and preparatory works of the French Civil Code as well as that Code itself — the concepts are sometimes blurred and a number of contradictions are present. In addition, subsequent legislative activity and case law

243. See La. Acts 1926, No. 273; 1932, No. 68; 1918, No. 83; 1926, No. 80; 1932, No. 50; 1932, No. 67; 1918, No. 104.

244. See Comment, *The Public and the Private Domains of the State*, 12 TUL. L. REV. 428, 438 (1938).

245. Cf. Pound, *The End of Law*, 27 HARV. L. REV. 195, 234 (1914).

246. Cf. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937).

altered the conceptual framework of the Code and made revision imperative. Indeed, a persisting dichotomy between "law in the books" and "living law" in Louisiana may be a disservice both to society and to a venerable text. Respect for the law and our Civil Code commands at this point an effort at establishing a clear correspondence between legal precepts and rules in the Code and in actual practice.

With the view to a possible legislative activity in that direction, the following observations may be of some value.

1. In contemporary continental systems, the primary distinction of things is between those *in commerce* and those *out of commerce*. The distinction rests on the pragmatic consideration that things in commerce are governed by the rules of civil law, while things out of commerce are for the most part governed by rules of public law, and only exceptionally and as to certain issues by rules of civil law. Things out of commerce, though susceptible in certain cases of private ownership, are not susceptible of private relations incompatible with their destination; private ownership, where possible, is limited by controlling considerations of public utility and convenience. Things out of commerce may be *common* things, certain *public* things, and things *subject to public use*. Common things are the air and the waters of the sea. Public things out of commerce are certain categories of state property, excluded from the sphere of the civil law due to controlling considerations of public utility. And things dedicated to public use, whether state or privately owned, are out of commerce as a result of their dedication to public use. Things in commerce may be defined as those which are fully susceptible of private relations and private rights. These things are governed by the rules of the Civil Code, and may be owned by the state or by private persons.

2. The distinction of things between those susceptible of private ownership and those not so susceptible is founded in the Louisiana Civil Code, subsequent statutory legislation, the Louisiana Constitution, and case law. This distinction may be retained for systematic and historical reasons. Difficulties, however, will arise in connection with the definition of things which belong to one or the other category. Insusceptible of private ownership are the common things and certain public things. These common and public things may not be "owned" by any one, even by the state. As to such things the rules of the civil law do not

apply. Things susceptible of private ownership, on the other hand, may be things in commerce or things out of commerce. Things which, though susceptible of private ownership, are out of commerce are things dedicated to public use. Things susceptible of private ownership may be owned by private persons, individuals and corporations, and by public corporations. Such things are governed by the relevant provisions of the Civil Code.

3. The distinction of things into common, public, and private, though actually subsumed under the preceding two classifications, may also be retained for systematic and historical reasons. Redefinition of the concepts, however, is necessary. Common things are out of commerce and insusceptible of private ownership by any one, including the state. Public things are, in general, things belonging to the state and its political subdivisions. As such, they may be in or out of commerce, susceptible of private ownership or not, and subject to public use or not. Detailed regulation of each category of public things should be made in specific statutes rather than the Civil Code which should be confined to the regulation of private property. Finally, private things may be defined as those which according to law may be owned by private persons, individuals, and corporations. These things are by definition susceptible of private ownership, though not necessarily in commerce.

4. The distinction between the *public* and the *private domain*, though supported by the Civil Code, has become almost meaningless in practice. Yet, it could be reintroduced into our law by a clear distinction between state property which is insusceptible of private ownership and out of commerce, and state property which is both susceptible of private ownership and in commerce. Thus, while property of the public domain would be governed by rules of law other than those of the Civil Code, property of the private domain would be subject to the same rules of law governing property held by private persons.