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Coliseum Square Association v. City of New Orleans: Streets for Rent, or Public Things Doctrine of Inalienability

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Recommended Citation

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form of the due process clause is an open question⁵⁴ that the Court at present seems reluctant to address.⁵⁵ When the Court decides the issue, however, it may well go beyond *Browning-Ferris* and hold that the due process clause, like the excessive fines clause, provides no federal standard for excessive damages. During BFI's oral argument, Justice Scalia suggested that the Constitution does not set an outer parameter to limits on damages set at the state level.⁵⁶ Although it seems safe to speculate that dissenting Justices O'Connor and Stevens, along with concurring Justices Brennan and Marshall, would hold the fourteenth amendment's due process guarantee applicable,⁵⁷ a majority composed of the Chief Justice and Justices Blackmun, White, Scalia, and Kennedy might well disagree, leaving the limitation of excessive punitive damages awards a matter of state law.

J.C. LIVINGSTON

COLISEUM SQUARE ASSOCIATION V. CITY OF NEW ORLEANS: STREETS FOR RENT, OR PUBLIC THINGS AND THE UNDERMINING OF THE DOCTRINE OF INALIENABILITY

Trinity Episcopal Church in New Orleans operates a school in the lower Garden District, where its campus is bisected by one block of Chestnut Street.¹ In late 1985 Trinity sought to buy the street from the City. The school commissioned a traffic impact study, which found that 285 vehicles unrelated to Trinity

54. *Id.* at 2921, 2923 (Brennan, J., concurring).

55. The Supreme Court has recently denied certiorari in cases seeking to raise this issue. *See, e.g., Miller v. Cudahy Co.*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989).

56. Slobodin, *Judicial Restraint Means No Big Wins for Corporate America*, *Legal Times*, July 24, 1989, at 45.

57. Justices O'Connor and Stevens dissented from the majority's holding that the eighth amendment is inapplicable to punitive damages awards. *See Browning-Ferris*, 109 S. Ct. at 2924-34 (O'Connor, J., dissenting). Justices Brennan and Marshall concurred in the majority opinion "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." *Id.* at 2923 (Brennan, J., concurring).

1. Chestnut Street is about 45 blocks long, extending from the lower Garden District to the Audubon Park area.

travelled that block of Chestnut every day, despite its closure during school hours. The study concluded that Trinity's careful traffic plan would benefit the neighborhood. The City Council ordered hearings by the City Planning Commission, and the Department of Streets and the Planning Advisory Committee rendered opinions. The Commission recommended a long-term lease subject to certain conditions; it had found that the benefits to Trinity would outweigh any negative impact. The Council therefore authorized a sixty-year lease after making a formal finding that the street was no longer needed by the public. Four days later, neighbors and area business associations filed suit against the City to nullify the ordinance and enjoin long-term closure of the street. Plaintiffs contended that the City had no authority to lease a publicly used street to a private party, and that even if it did, the City's decision was arbitrary and capricious. Trinity intervened on the defendant's side. After a trial-court ruling for Trinity and the City, the court of appeal affirmed,² and the supreme court granted writs.³ The high court at first reversed, finding the City without authority to alienate a publicly used street because streets are public things and therefore inalienable.⁴ On rehearing, the court reversed itself and held that the City did have authority to alienate a public street, under its home-rule charter, and that the Council was not arbitrary and capricious in its decision. *Coliseum Square Association v. City of New Orleans*, 544 So. 2d 351 (La. 1989).

Under traditional civilian doctrine, streets and similar things⁵ that are subject to public use cannot be alienated. Streets are also public things⁶ under the current Louisiana Civil Code; however, the definition of a public thing in the Civil Code provides little help in determining the practical effects of classification as a public thing. Only the jurisprudence and civil-law doctrine, which contain several overlapping theories of public things, explain what happens when a thing is considered public.

Louisiana courts often employ the theory that public things, such as streets and navigable water bodies, are "insusceptible of

2. *Coliseum Square Ass'n v. City of New Orleans*, 528 So. 2d 205 (La. Ct. App. 4th Cir. 1988), *aff'd on reh'g*, 544 So. 2d 351 (La. 1989).

3. 532 So. 2d 138 (La. 1988).

4. *Coliseum Square Ass'n v. City of New Orleans*, 544 So. 2d 351, 354 (La. 1989).

5. "Thing" is a technical legal term used in the Civil Code. See LA. CIV. CODE ANN. arts. 448-450 (West 1980).

6. The Louisiana Civil Code states: "Public things are owned by the state or its political subdivision in their capacity as public persons." *Id.* art. 450.

private ownership."⁷ Another theory historically used by the courts is that public things are out of commerce, as opposed to private things, which are in commerce.⁸ Under either of these doctrines, public things cannot be alienated by the governmental owner because they are out of commerce or insusceptible of private ownership. In addition to these civilian schemes, the common-law theory of the public trust was adopted by a Louisiana court in 1841.⁹

A third civil-law theory divides public property into the public domain and the private domain. In some sense, this the-

7. See *Coliseum Square*, 544 So. 2d at 359 n.8; *City of New Orleans v. Salmen Brick & Lumber Co.*, 135 La. 828, 859-60, 66 So. 2d 237, 248 (1914); *City of New Orleans v. Carrollton Land Co.*, 131 La. 1092, 1094-95, 60 So. 695, 696 (1913) (quoting *City of Shreveport v. Walpole*, 22 La. Ann. 526 (1870)); *Fradella Constr., Inc. v. Roth*, 503 So. 2d 25, 26 (La. Ct. App. 4th Cir. 1986); see also A. YIANNOPOULOS, PROPERTY §§ 32, 34 (2 LOUISIANA CIVIL LAW TREATISE 2d ed. 1980). See generally *State v. Cenac*, 241 La. 1055, 132 So. 2d 928 (1961).

Some scholars believe the concept of insusceptibility of private ownership can be traced to classical Roman law. See A. YIANNOPOULOS, *supra*, § 16 & n.52. The language on which this argument is based is Gaius's distinction between "*res quae in nostrum patrimonium sunt*" and "*res extra nostrum patrimonium.*" *Id.* (The quoted Latin appears to be Professor Yiannopoulos's paraphrase of Gaius and Justinian. Gaius's exact words, as best we can tell from the twentieth century, are: "*Superiore commentario de iure personarum exposuimus; modo uideamus de rebus: quae uel in nostro patrimonio sunt uel extra nostrum patrimonium habentur.*" Institutes of Gaius [G. Inst.] 2.1. Justinian's language follows Gaius's almost exactly. See INSTITUTES OF JUSTINIAN [J. INST.] 2.1).

The Latin phrases *res quae in nostrum patrimonium sunt* and *res extra nostrum patrimonium* translate to "things that are in our patrimony" and "things outside our patrimony." This language does not mean that extrapatrimonial things are insusceptible of private ownership. It simply states that they are not owned at the time. The theory of susceptibility of ownership was not developed until the nineteenth century. See *infra* notes 10-11 and accompanying text.

8. The courts applied this formulation before Louisiana became a state, and it is still in use today. See *City of New Orleans v. Louisiana Soc'y for the Prevention of Cruelty to Animals*, 229 La. 246, 259, 85 So. 2d 503, 507 (1956); *Carrollton Land Co.*, 131 La. at 1094-95, 60 So. at 696 ("hors de commerce"); *City of Baton Rouge v. Bird*, 21 La. Ann. 244, 247 (1869) (same); *Daublin v. Mayor of New Orleans*, 1 Mart. (n.s.) 185, 187 (1810) (streets are "hors de commerce"); *Mayor of New Orleans v. Metzinger*, 3 Mart. (n.s.) 296, 297-99 (1814) (Moreau arguing that streets are out of commerce); see also A. YIANNOPOULOS, *supra* note 7, § 16. See generally *DeArmas v. Mayor of New Orleans*, 5 La. 132 (1833), *dismissed with opinion for lack of jurisdiction*, 34 U.S. (9 Pet.) 224 (1835).

9. The adoption of the public trust doctrine was apparently a mistake, but it continues in use today. See, e.g., *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576, 589 (La. 1975). The common-law notion was introduced in a dissent in *DeArmas*, 5 La. at 189-211 (Porter, J., dissenting). In 1833, opinions were still delivered seriatim, and the dissent by the senior justice was given before the decision of the majority. A later court apparently mistook the dissent for the majority opinion, and the common-law concept thus became part of Louisiana law. Comment, *The Effect of Dedication to Public Use in Louisiana*, 13 TUL. L. REV. 606, 609 (1939); see *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 237 (1841).

ory is the most important in Louisiana because the legislature used it in the Civil Code of 1870.¹⁰ Nineteenth-century French doctrinal writers, particularly Proudhon,¹¹ developed this theory, and modern civilian conceptions of public things were derived from these authors. The underpinnings of the theory of separate domains are esoteric and voluminous. Louisiana courts, however, merely inquired whether a thing was out of commerce or insusceptible of private ownership.¹² If so, the courts held the thing to be in the public domain.

Under all of these theories, a city street currently used by the public is a public thing or its equivalent.¹³ Proudhon did not consider all roads to be in the public domain; instead he looked to their nature and usage. According to his test, publicly used city streets were certainly part of the public domain:¹⁴ because they were "subject to the usage . . . of all, [they could] not belong privately and exclusively to anyone."¹⁵ Planiol and Ripert used Proudhon's same basic tests, with an identical result, noting the use of the phrase "not susceptible of private ownership" in the *Code civil*.¹⁶ Professor Yiannopoulos uses this phrase as well, although he prefers the "out of commerce" formulation.¹⁷ The current Louisiana Civil Code itself enumerates streets as public things, but without any theoretical or practical elaboration.¹⁸

10. LA. CIV. CODE ANN. arts. 453, 482(2), 485, 486 (1870) (West comp. ed. 1972); A. YIANNPOULOS, *supra* note 7, § 33. See generally Comment, *The Public and the Private Domains of the State*, 12 TUL. L. REV. 428 (1938).

11. The seminal work is J. Proudhon's multivolume *Traité du domaine public*, published in 1833 and 1844. See 3 M. PLANIOL & G. RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* no. 117 n.1 (2d ed. 1952); A. YIANNPOULOS, *supra* note 7, § 33 n.39. Proudhon drew a sharp distinction between the public and the private domains. In a concise statement of his theory, he did not even classify what we call common and public things as *propriété* because they are not capable of ownership to the exclusion of all others, although they are things (*biens*). J. PROUDHON, *TRAITÉ DU DOMAINE DE PROPRIÉTÉ, OU DE LA DISTINCTION DES BIENS* no. 6 (Belg. ed. 1842).

12. See authorities cited *supra* note 8.

13. Some taxonomical problems arise when examining civil-law sources that are not written in English and that may have been written before the English term "public thing" existed. For the sake of simplicity, however, this Note uses that term consistently, even when it is anachronistic or a liberal translation. Also, "property" is used in its general English sense and not necessarily as an equivalent of *propriété* as used by Proudhon.

14. See J. PROUDHON, *TRAITÉ DU DOMAINE DU PROPRIÉTÉ*, *supra* note 11, nos. 818-20.

15. *Id.* no. 816. This is my translation. The original French phrase is "*asservis à l'usage . . . de tous, ne peuvent appartenir privativement et exclusivement à personne.*"

16. M. PLANIOL & G. RIPERT, *supra* note 11, nos. 118-19, 128 (this is my translation of Planiol & Ripert); see also C. CIV. art. 538.

17. See A. YIANNPOULOS, *supra* note 7, §§ 16, 33-34.

18. LA. CIV. CODE ANN. art. 450 (West 1980).

The usual conclusion under all of these doctrines is that streets are inalienable because they are public things and subject to public use.¹⁹

This result is not inescapable, however. Doctrinal writers disagree about what causes public things to be inalienable; commentators have debated whether they are insusceptible of private ownership because of their very nature, or only because the law forbids private ownership.²⁰ The latter is considered the better view.²¹ Since several civil-law jurisdictions allow private ownership of what we would consider public things,²² and because for many years the bottoms of navigable water bodies could be owned privately in Louisiana, public things obviously may be privately owned unless the law provides otherwise.²³ Furthermore, no Louisiana Civil Code article prohibits the alienation of public things,²⁴ and the Revised Statutes provide for revocation of dedication of public streets²⁵ and for other acts that would render streets alienable.²⁶ Also, both doctrinal writers²⁷ and Louisiana courts²⁸ agree that streets which have fallen into disuse may be alienated.

The state legislature by statute could alienate public things

19. See M. PLANIOL & G. RIPERT, *supra* note 11, no. 119; A. YIANNPOULOS, *supra* note 7, § 34; cf. J. PROUDHON, TRAITÉ DU DOMAINE DE PROPRIÉTÉ, *supra* note 11, no. 817 (streets are public things because they are subject to public use).

20. For instance, according to Professor Yiannopoulos, Gaius thought public things were inalienable because of their susceptibilities, but other Roman jurists thought they were inalienable because they were out of commerce, regardless of their susceptibilities. A. YIANNPOULOS, *supra* note 7, § 16 (citing DIGEST OF JUSTINIAN [DIG.] 20.3.1.2); see also *supra* note 7 and accompanying text.

21. See A. YIANNPOULOS, *supra* note 7, §§ 16, 33.

22. *Id.* § 16 (Germany and Greece).

23. For a full discussion of this phenomenon, see *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576 (La. 1975). The bottoms of navigable water bodies now can be owned only by the state. *Id.*; LA. CONST. art. IX, § 3.

24. See *Coliseum Square Ass'n v. City of New Orleans*, 544 So. 2d 351, 356 (Dennis, J., dissenting), *rev'd on reh'g*, 544 So. 2d at 361 (La. 1989); LA. CIV. CODE ANN. art. 450 (West 1980). This silence in the Code is not surprising, however, because property in the public domain is generally governed by public law and constitutional law, not civil codes. M. PLANIOL & G. RIPERT, *supra* note 11, no. 121; J. PROUDHON, TRAITÉ DU DOMAINE DE PROPRIÉTÉ, *supra* note 11, no. 816; A. YIANNPOULOS, *supra* note 7, § 33 & n.39.

25. LA. REV. STAT. ANN. §§ 48:701-720 (West 1984 & Supp. 1989). Not all of these sections apply to New Orleans.

26. *Id.* § 33:4712 (West 1988).

27. M. PLANIOL & G. RIPERT, *supra* note 11, no. 119.

28. *Caz-Perk Realty v. Police Jury*, 207 La. 796, 806, 22 So. 2d 121, 124 (1945) (street overgrown and abandoned); *Schernbeck v. City of New Orleans*, 154 La. 676, 98 So. 84 (1923) (street never opened); *Torrance v. Caddo Parish Police Jury*, 119 So. 2d 617 (La. Ct. App. 2d Cir. 1960) (overgrown, seldom-used street).

not constitutionally protected because the legislature can overrule jurisprudence, ignore doctrine, and repeal Civil Code provisions.²⁹ The prerogatives of political subdivisions of the state are generally more limited, but these prerogatives may be expanded under the home-rule³⁰ sections of the constitution. Section 5 of article VI of the Louisiana Constitution of 1974 empowers home-rule entities to perform any function necessary or proper for the management of their affairs, unless prohibited by general law or the constitution.³¹ Provisions in the home-rule charter itself limit this broad grant of authority.³² Under the Constitution of 1921, the reverse was true; no self-executing grant of authority was included in the constitution, so local entities were given their powers by the legislature.³³ After 1974, therefore, home-rule communities generally have had much greater authority. Under the new scheme they have all powers except the ones specifically denied, instead of only those powers specifically granted.³⁴

In the noted case, the supreme court held on rehearing that the City of New Orleans, as a home-rule entity, had the authority to close a publicly used street to lease it to a private school.³⁵ The court observed that the Louisiana Constitution of 1974 allows a home-rule charter to include any power necessary or proper for local management, provided the power is not denied by law.³⁶ The majority opinion said that the general law does not prohibit "a home rule entity from closing a public street and alienating it for a private purpose," and that no constitutional provision contains such a prohibition either.³⁷

To buttress its position, the court quoted a statute that

29. In the analysis section *infra*, it is contended that the legislature has in fact ignored jurisprudence and doctrine. See *infra* text accompanying notes 42-44.

30. Home rule allows local communities to govern themselves to some extent and makes them less dependent on the legislature.

31. LA. CONST. art. VI, § 5(E). The constitution does not define the term "general law."

32. See 7 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 1397-1408 (1977) [hereinafter 7 RECORDS OF THE CONVENTION]; Kean, *Local Government and Home Rule*, 21 LOY. L. REV. 63, 66-67 (1975).

33. 7 RECORDS OF THE CONVENTION, *supra* note 32, at 1397-1408.

34. This distinction tends to prove Justice Dennis's point that after 1974 home-rule governments have powers that are generally as broad as the state's. See *Coliseum Square Ass'n v. City of New Orleans*, 544 So. 2d 351, 356 (Dennis, J., dissenting), *rev'd on reh'g*, 544 So. 2d at 361 (La. 1989).

35. *Id.* at 359.

36. *Id.* at 358 (quoting LA. CONST. art. VI, § 5(E)).

37. *Id.* at 358-59.

allows municipalities to lease property to private persons for up to ninety-nine years, if the governing authority of the city decides that the property is not needed for public purposes.³⁸ Not only does the general law not prohibit the city's action; the law expressly condones it. Further, the Council, in leasing the street, was acting pursuant to a specific grant of authority in its home-rule charter, under which the City may lease property for more than one year subject to any requirements it may impose by ordinance.³⁹

Once the court decided that the City Council had the legal authority to lease a block of Chestnut Street to Trinity, it applied an arbitrary-or-capricious standard in reviewing the Council's finding that the street was no longer needed for public purposes.⁴⁰ Justice Marcus stated:

The mere fact that the street is being used by the public does not mean that it is "needed" for public purposes, [and] it is the duty of the Council, after reviewing and weighing the evidence presented, to determine whether discontinuance of the present use and any inconvenience resulting therefrom would outweigh whatever benefits would flow from the closure of the street.⁴¹

After noting that local governments, including the one in New Orleans, had alienated streets before and that these actions had been approved by the courts, the majority conducted an extensive review of the evidence and declined to find the Council's determination that the block was no longer needed for public purposes arbitrary and capricious. In reversing the judgment on first hearing, the court characterized its turnaround as a refusal to substitute the court's judgment for that of the Council. Two justices dissented.⁴²

In analyzing the supreme court's decisions, one must separate the two main problems in *Coliseum Square*. The court focused in the first hearing on whether a well-traveled street

38. *Id.* at 359 (citing LA. REV. STAT. ANN. § 33:4712(A) (West 1988)). The statute also contains several technical requirements.

39. See HOME RULE CHARTER OF THE CITY OF NEW ORLEANS § 6-307(4) (rev. ed. 1986). Under the home-rule theory of the present Louisiana Constitution, the court is not theoretically correct in saying, "Under . . . the home rule charter, the Council is empowered to adopt proposed ordinances alienating any immovable property." *Coliseum Square*, 544 So. 2d at 359. Rather, § 5 of article VI of the constitution is the provision that empowers the city generally to perform functions necessary or proper for its management. LA. CONST. art. VI, § 5(E); see *supra* notes 29-32 and accompanying text.

40. *Coliseum Square*, 544 So. 2d at 360.

41. *Id.*

42. *Id.* at 360-61.

could be alienated, and it answered in the negative. Although Justice Dennis in dissent attacked the majority's stiff application of the doctrine of inalienability, he shifted the emphasis to the second problem: Whether the city, as opposed to the state, could alienate the street. On rehearing, the majority focused on this issue, which involves the powers of home-rule cities, and the court left civil-law doctrine in the underbrush. After it avoided civilian theory, the issue was not difficult. The City had broad powers under the 1974 constitution, and its home-rule charter spoke of the alienation and leasing of property. All that could stand in the way would be a specific denial of power in the general law or the constitution, and because none exists,⁴³ the court decided to let the city govern its own affairs, as the constitution contemplated.

The final decision was therefore correct in its interpretation of the law. The ample legislation it cited, including the constitution and statutory law, "is a solemn expression of legislative will," as the Civil Code itself states.⁴⁴ Certainly legislation preempts doctrine and jurisprudence.⁴⁵ The conflicting opinions of the supreme court, however, demonstrate that the statutes have seriously undermined the classic civilian doctrine of inalienability of public things.

The doctrine is similar to the common-law theory of the public trust,⁴⁶ and it exists to protect the rights of all who rely on the availability of public things, whether the things be streets or navigable rivers. The doctrine of inalienability of public things is not civilian arcana; its purpose is to protect the public. Although vesting power to alienate public things in local representatives may be useful, the Legislature of Louisiana should not undertake lightly to undermine the state's civil-law tradition. *Coliseum Square* shows that the stakes in these instances are not mere theoretical nicety. The same civilian theories that bind the

43. *Id.* at 354 & n.8. The statute quoted by Justice Watson is inapposite because it only applies to leases granted under the Part in which it is contained. See LA. REV. STAT. ANN. § 41:1217(A) (West Supp. 1989). The court, however, quite reasonably found the applicable statute was revised statute § 33:4712. *Coliseum Square*, 544 So. 2d at 359 (citing LA. REV. STAT. ANN. § 33:4712(A) (West 1988)).

44. LA. CIV. CODE ANN. art. 2 (West 1989).

45. *Id.* art. 1 comment (c).

46. See, e.g., *Illinois Cent. Ry. v. Illinois*, 146 U.S. 387 (1892), cited with approval in *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576, 589 (La. 1975).

civil law into a coherent whole exist first to protect the people, here represented by families, neighbors, and businesses.

D.V. SNYDER

EIMANN V. SOLDIER OF FORTUNE MAGAZINE, INC. :
FIFTH CIRCUIT LIMITS PUBLISHER LIABILITY FOR
AMBIGUOUS ADVERTISEMENTS

The September, October, and November 1984 issues of *Soldier of Fortune* magazine, a "Journal for Professional Adventurers"¹ ran a classified advertisement submitted by John Wayne Hearn.² In response to this ad, Robert Black offered Hearn \$10,000 to murder his wife. After an unsuccessful first attempt, Hearn shot and killed Sandra Black on February 21, 1985. Subsequently, Gary Wayne Black and Marjorie Eimann, the son and mother of the victim, filed a wrongful death suit against Soldier of Fortune Magazine, Inc. and its parent company, Omega, Ltd. in the United States District Court for the Southern District of Texas, claiming that Soldier of Fortune was negligent under Texas law for publishing Hearn's classified ad. Defendant's motion for summary judgment was dismissed when the court determined that first amendment protection of commercial free speech did not preclude a negligence action against the publisher.³ At trial, the jury found that Soldier of Fortune was negligent and awarded plaintiffs a total of \$1.9 million in compensatory damages and \$7.5 million punitive damages. The Fifth Circuit reversed on appeal and *held* that the magazine "owed no duty to refrain from publishing a facially innocuous classified advertisement when the ad's context—at most—made its message ambiguous."⁴ *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 729 (1990).

1. L.A. Times, Mar. 4, 1988, § 1, at 24, col. 1.

2. The advertisement read: "EX-MARINES-67-69 'Nam Vets, Ex-DI, weapons specialist-jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. (404) 991-2684." *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 831 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 729 (1990).

3. *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F. Supp. 863 (S.D. Tex. 1988), *rev'd*, 880 F.2d 830.

4. *Eimann*, 880 F.2d at 834.