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Private Law: Property

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is merely the English translation of a form of the word *devoir*[30] which means to have a duty to do something, that is, *ought* as equivalent to *must*. Judgment on this point in the aunt's favor would have carried dangers for a consistent application of the Civil Code far beyond the narrow field of tutorship.

PROPERTY

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PUBLIC THINGS

Public and Private Domain

Public property, namely, property of the state and its political subdivisions, is divided in Louisiana and in France into property of the public domain and property of the private domain. This division, which corresponds to some extent to the Roman distinction between *res publicae* and *res fisci*, has given rise to doctrinal controversies in France. Writers are not in agreement as to which things belong to the public domain and which to the private domain, nor as to the criteria for this division.[1] In Louisiana, courts have dealt with the practical implications of this division in a number of cases.[2]

In *Landry v. Council of Parish of East Baton Rouge*,[3] action was brought by persons using a municipal airport to enjoin its proposed closure and relocation by municipal authorities. In a scholarly opinion, the Court of Appeal for the First Circuit held that the decision to close and relocate the airport was not an abuse of discretion; hence, plaintiffs were not entitled to injunction. In the course of its opinion, the court classified the municipal airport as a thing of the private domain of the municipality, adopting the view that the criterion for the distinction between things of the public domain and of the private domain is the concept

30. The form was the third person singular indicative, *doit*. *See* 3 LOUISIANA LEGAL ARCHIVES, THE COMBINED EDITIONS OF THE CIVIL CODES OF LOUISIANA 151 (1940) for the French text of the article of the Civil Code of 1825 corresponding to the present article 263.

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1. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY, § 30 (1966).

2. *See e.g.*, Bullis v. Town of Jackson, 203 La. 289, 14 So.2d 1 (1943); Town of Farmerville v. Commercial Credit Co., 173 La. 43, 136 So. 82 (1931); City of New Orleans v. Salmen Brick & Lumber Co., 135 La. 828, 66 So. 237 (1914); Daublin v. Mayor of New Orleans, 1 Mart.(O.S.) 185 (La. 1810); Louisiana Highway Comm'n v. Raxsdale, 12 So.2d 631 (La. App. 2d Cir. 1943).

3. 220 So.2d 795 (La. App. 1st Cir. 1969).

of public use. Things subject to public use fall within the public domain, whereas things which "by their nature are not open to use by the general public but are employed for common good"[4] fall within the classification of things of the private domain. The decision is correct in the light of the criterion adopted, and conforms with the principles of the Louisiana Civil Code as well as prior jurisprudence. It would seem, however, that the injunction sought by plaintiffs should be refused, even if the airport in question were classified as a thing of the public domain. Governmental authorities do enjoy a measure of discretion in the administration of public property, which includes the relocation of facilities subject to public use.

Things Subject to Public Use

According to well-settled principles of Louisiana law, things subject to public use are burdened with a servitude in favor of the public.[5] The state, its political subdivisions, and any interested citizen may bring action for the removal of structures which tend to diminish public use.[6] Public bodies, however, may validly grant to private persons, by franchise, concession, or lease, exclusive rights over things subject to public use, as provided by law.[7]

The question whether exclusive rights may be granted over the banks of a navigable river within the confines of a port authority was raised in *Greater Baton Rouge Port Comm'n v. Cargill, Inc.*[8] The Louisiana Supreme Court held that, under the Constitution, the Port Commission had the authority to grant, and did grant, exclusive rights to the Cargill Company for the operation of grain elevators within the port of Baton Rouge. In the course of its opinion, the court had the opportunity to reaffirm *Lake Providence Port Comm'n v. Bunge Corp.*,[9] in which the Court of Appeal for the Second Circuit held that a private owner

4. *Id.* at 801.

5. *See* Comments, 16 LA. L. REV. 789, 792 (1956); 12 TUL. L. REV. 428, 431 (1938).

6. *See* LA. CIV. CODE art. 861; Parish of Jefferson v. Doody, 247 La. 839, 174 So.2d 798 (1965); State *ex rel.* Saint v. Timothy, 166 La. 738, 117 So. 812 (1928); Locke v. Lester, 78 So.2d 14 (La. App. 2d Cir. 1955). For this reason, the Court of Appeal for the 4th Circuit held in Cadow v. Jensen, 218 So.2d 355 (La. App. 4th Cir. 1969), that where a house encroached one foot on a public street, its title was suggestive of litigation and action for specific performance of the contract to sell was inadmissible.

7. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 36 (1966).

8. 252 La. 718, 214 So.2d 119 (1968).

9. 193 So.2d 363 (La. App. 2d Cir. 1967), *cert. denied*, 250 La. 269, 195 So.2d 147 (1967).

may not be prohibited by a Port Authority to erect on his premises structures which is no way diminish public use.

Highways, Roads, and Streets

In the 1968-69 term, Louisiana appellate courts were again faced with questions concerning the creation and termination of public interests in highways, roads, and streets.

According to R.S. 48:491, 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.[10] The interpretation of this statute has given rise to a growing gloss of jurisprudence.[11] In *Winn Parish Police Jury v. Austin*,[12] a road had been admittedly maintained with public funds for more than three years. Argument was made, however, that the road in question had not become public because "the statute contemplates that the acts of maintenance be authorized by the police jury as a whole, that is, by ordinance or resolution."[13] In a well-considered opinion, the Court of Appeal for the Second Circuit dismissed this argument and held that the statute requires "nothing more than that the work and maintenance be done by appropriate authority, whether legally authorized or not, and accomplished with materials and labor provided from public funds."[14] Actually, as the court pointed out, a formal resolution by the police jury to maintain a private road with public funds would be *ultra vires* and without effect.

Interpretation of R.S. 48:491 was also involved in *Town of Eunice v. Childs*,[15] a case in which the Town of Eunice sought judgment declaring that a certain passageway was a public road either as a result of non-statutory "implied dedication"[16] or by virtue of a "tacit dedication" under the terms of the applicable statute. The court refused to find dedication of either kind and held for the private landowner. There was no implied dedication because the evidence was insufficient to show either a definite offer by the owner or an acceptance by the public; and there

10. *See* LA. R.S. 48:491 (1950).
11. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 33 (1966).
12. 216 So.2d 166 (La. App. 2d Cir. 1968).
13. *Id.* at 168.
14. *Id.* The court indicated its approval of LeBoeuf v. Roux, 125 So.2d 444 (La. App. 3d Cir. 1960), and Fontenot v. Veillon, 72 So.2d 587 (La. App. 1st Cir. 1954).
15. 205 So.2d 897 (La. App. 3d Cir. 1968).
16. On the notion of implied dedication, *see* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 35 (1966).

was no tacit dedication because the passageway had not been worked peacefully and lawfully for three years after re-enactment of R.S. 48:491 in 1954 to cover municipal action.[17] In the course of its opinion, the court expressed doubts as to whether the statute was applicable to "alleys" (distinguished from roads and streets), and by-passed the question of the constitutionality of the statute insofar as it involves "taking by the governing authority."[18] The decision is of special significance because of the court's insistence that the re-enacted statute applies prospectively only[19] and that a protest by the landowner within the three-year period excludes acquisition of the public interest.

Questions relating to termination of the public interest in highways and other public roads were raised in *Gayle v. Department of Highways*[20] and *Luneau v. Avoyelles Parish Police Jury*.[21] Both actions involved claims for damages suffered as a result of unlawful abandonment of public roads. In the first case, the Court of Appeal for the First Circuit held that a state highway may be abandoned only upon substantial compliance with the provisions of the governing statute, R.S. 48:259.[22] An abandonment in fact is not an abandonment in law; hence, the state may be answerable in damages for personal injuries resulting from the condition of the unlawfully abandoned road. In the second case, the Court of Appeal for the Third Circuit found likewise that the road in question had been unlawfully abandoned by the police jury; but it refused to award damages for plaintiff's loss of access to and from his property. The decision was grounded on the doctrine of governmental immunity and on the consideration that "the state and its agencies should not be easily held for damages as a result of actions taken in performance of their governmental functions, even though their actions might subsequently be held to be unlawful."[23] There is no discrepancy between the two cases because according to the jurisprudence of

17. *See* La. Acts 1954, No. 639, now LA. R.S. 48:491 (1950). Until 1954, the statute applied only to action taken by police juries.

18. Town of Eunice v. Childs, 205 So.2d 897, 901 (La. App. 2d Cir. 1968).

19. To this extent, the decision tacitly overrules LeBoeuf v. Roux, 125 So.2d 444 (La. App. 3d Cir. 1961). *See* concurring opinion by Hood, J., and dissenting opinion by Culpepper, J., at 897, 901, 902.

20. 205 So.2d 775 (La. App. 1st Cir. 1968), *cert. denied*, 251 La. 932, 207 So.2d 538 (1968).

21. 212 So.2d 231 (La. App. 3d Cir. 1969). *See also* Luneau v. Avoyelles Parish Police Jury, 196 So.2d 631 (La. App. 2d Cir. 1967).

22. *Accord*, Lamartiniere v. Daigrepont, 168 So.2d 373 (La. App. 3rd Cir. 1964).

23. Luneau v. Avoyelles Parish Police Jury, 212 So.2d 231, 232 (La. App. 3d Cir. 1969).

the Third Circuit the doctrine of sovereign immunity has been expressly abrogated in actions against the Department of Highways;[24] moreover, the first case allowed damages for personal injuries attributable to the negligence of the Department of Highways whereas the second case disallowed remote or consequential property damages.

MOVABLES AND IMMOVABLES

Immovables by Nature and by Destination

Under the Louisiana Civil Code of 1870, certain movables closely associated with a tract of land or a building are designated as "immovables by nature" or "immovables by destination."[25] The classification carries practical consequences in various fields of law, because movables that are immobilized follow the immovable in cases of seizure, encumbrance, transfer, partition, and determination of matrimonial rights.[26]

In *Lafleur v. Foret*,[27] a landmark decision, the court faced the question whether certain window air-conditioning units, dog houses, and chicken sheds were movables or immovables. If movables, these things should belong to plaintiff, seller of a house; if immovables, in the absence of contrary stipulation in the contract of sale, they should pass to the purchaser. In a well-documented opinion, the court re-examined the legislative basis of immobilization and its relevance in the light of contemporary practices and demands. Moreover, the court undertook an exhaustive review of Louisiana jurisprudence in this area, and reached an interpretation that is worthy of praise. The window air-conditioners, the court decided, were and remained movables. There was no "permanent attachment" under articles 468(2) and 469 of the Civil Code, and, therefore, attention was focused on possible immobilization under articles 467 and 468(1).

The court held that the test of "service and improvement," established in article 468(1), was not applicable. This test has been consistently applied to both tracts of lands and buildings destined to agricultural and industrial uses. The court, as it

24. *See* Herrin v. Perry. 215 So.2d 177 (La. App. 3d Cir. 1968), *cert. granted*, 253 La. 305, 217 So.2d 407 (1969). *But see* Bazanac v. State, 218 So.2d 121 (La. App. 4th Cir. 1969, *cert. granted*, 253 La. 638, 219 So.2d 174 (1969).

25. *See* LA. CIV. CODE arts. 462-469.

26. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 49 (1966).

27. 213 So.2d 141 (La. App. 3d Cir. 1968).

should, left open the question whether the test of service and improvement should also apply to immovables destined to commercial uses,[28] but it held firmly that the test does not apply to residential immovables.[29] Turning then to article 467, the court held that the enumeration of "immovables by nature" is merely illustrative; the list may be expanded to include things not enumerated. Since air-conditioners are not enumerated, and the parties did not take care to specify their subjective intent, the court proceeded to a consideration of the tests of immobilization furnished by this article by application of objective standards, namely, notions prevailing in society. In the light of house construction practices, and taking into account the air-conditioners' degree of connection with the building, the court decided in favor of the seller of the house. Since the test of service and improvement did not apply to residential immovables, the dog houses were likewise movables; but the chicken sheds were classified as "structures" and immovables by nature under article 464 of the Civil Code.

Incorporeal Movables and Immovables

According to the Louisiana Civil Code of 1870, the division of things into movables and immovables applies to both corporeals and incorporeals.[30] In *St. Charles Land Trust v. St. Amant*,[31] the Louisiana Supreme Court was faced with the question whether a beneficial interest in an unincorporated land trust was an incorporeal immovable under article 471 or an incorporeal movable under article 474. The St. Charles Land Company, a defunct Maryland Corporation, owned mineral leases and servitudes in

28. This question was not before the court. It ought to be noted, however, that French courts have applied the test of service and improvement to buildings erected for commercial uses. *See* Comment, 5 TUL. L. REV. 90, 100 (1930). Application of article 468(1) to commercial destination of immovables seemed to be a relevant issue in Day v. Goff, 2 La. App. 75 (2d Cir. 1925). The court, however, avoided this issue by finding that the movables in question served the convenience of the business conducted in the building rather than that of the building.

29. *See also* Guillot v. Adams, 212 So.2d 193 (La. App. 3d Cir. 1968). In this case a question arose as to the classification of a tractor-mowing machine. Plaintiff, purchaser of a house, claimed the tractor as an immovable by destination under article 468(1) of the Civil Code. The court held that the tractor was a movable: it was not for the service and improvement of an immovable, but merely for the personal convenience of the owner. In effect, the court refused to apply the test of service and improvement to residential immovables, pointing out that the tractor was not used and it could not be used for farming purposes.

30. *See* LA. CIV. CODE arts. 470, 471, 474.

31. 253 La. 243, 217 So.2d 385 (1969).

St. Charles Parish, Louisiana. Instead of distributing these assets to former shareholders directly, the liquidator of the corporation transferred the leases and servitudes to a newly created St. Charles Land Trust, to be administered by trustees for the benefit of the former shareholders. The trust instrument designated the shareholders as beneficiaries for both principal and income in the same proportion as their former stock ownership; it also classified the interests of the beneficiaries as "movable property."[32] When a beneficiary of the trust died at her domicile in California, a California court granted an order for the transfer of the Louisiana trust interest. The trustees applied to a Louisiana court for instructions under R.S. 9:2233, seeking authority to transfer the deceased beneficiary's interest in the trust without ancillary proceedings or the payment of inheritance taxes in Louisiana. Determination depended on the classification of the interest as an incorporeal movable or an incorporeal immovable. If the interest was movable, it should be free from Louisiana inheritance taxes; if it was immovable, it should be taxed.[33]

The Supreme Court found that a valid trust had been created, and held that the interest of the deceased beneficiary was an incorporeal immovable subject to ancillary administration and the payment of Louisiana taxes. Since the trust laws of Louisiana were silent as to the classification of the interest, the court relied on the basic property concepts of the Civil Code. According to article 471, which is merely illustrative in its enumeration of incorporeal immovables, the mineral leases and servitudes held by the trustees should be clearly regarded as incorporeal immovable property;[34] and, since the trust was upon such property, the court concluded that the beneficial interest was an immovable by its object. The trustees contended that the matter was governed by article 474, which declares that "shares or interests in banks or companies of commerce, or industry or other speculations, although such companies be possessed of immovables" are incorporeal movables. The argument was answered by the observation that article 474 merely creates a special exception to the general rule of article 470, which exception applies

32. *Id.* at 250, 217 So.2d at 388.

33. *See* LA. R.S. 47:2404 (1950).

34. *See* Succession of Simms, 250 La. 177, 195 So.2d 114 (1967). In Robichaux v. Pool, 209 So.2d 77 (La. App. 1st Cir. 1968), the Court of Appeal for the First Circuit reaffirmed the classification of an overriding royalty interest as a real right and incorporeal immovable; hence, title to such royalty could not be proved by parol evidence.

exclusively to entities possessing juridical personality.[35] Moreover, the trust being "a unique institution of Anglo-American origin,... the beneficial interest in trust does not fall within the exception of Article 474."[36] Finally, the court dismissed the argument that the classification of the interest in question was controlled by the declaration in the trust instrument that the property was movable. "We find no sound basis in Louisiana law for enforcing such a clause against the State of Louisiana," the court declared. "It would permit the parties to a trust instrument to upset long established legislative property classifications to the prejudice of state tax agencies, though the State is stranger to the instrument."[37]

It is submitted that the result reached by the majority is correct in the light of both legal precepts in the Civil Code and policy considerations concerning the payment of taxes. Of course, as the dissenting opinion pointed out, the nature of the property held in trust should not by itself determine the quality of the beneficiary's interest. This determination ought to depend on whether or not the trust possesses juridicial personality under Louisiana law, and on the nature of the beneficiary's interest as a personal right against the trustee or a real right in immovable property. If a trust possesses juridical personality, as Justice Barham assumed in his dissenting opinion, it ought to be included in the category of associations mentioned in article 474 of the Civil Code. If, on the other hand, a trust does not possess juridical personality, there is no entity interposed between the immovable property held in trust and the beneficiary; his interest in the trust is a direct interest in immovable property. In this respect, it is my understanding of the law that prior to the enactment of the Louisiana Corporation Code[38] a land trust did not possess juridical personality. Turning now to the nature of the beneficiary's interest as a personal or a real right, the Louisiana Trust Estates Code declares that the trustee has title to the property subject to trust.[39] This might be interpreted to mean that the beneficiary has no ownership interest, but merely a personal right against the trustee, which ought to be classified as

35. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 66 (1966).

36. St. Charles Land Trust v. St. Amant, 253 La. 243, 257, 217 So.2d 385, 390 (1968).

37. *Id.* at 258, 217 So.2d at 390.

38. *See* La. Acts 1968, No. 105, LA. R.S. 12:1 (1950) and following. According to LA. R.S. 12:491-493 (1950), real estate investment trusts are now accorded legal personality for a variety of purposes.

39. *See* LA. TRUST ESTATES CODE arts. 1731, 1781.

an incorporeal movable. Such an interpretation, however, would be contrary to modern trends in trust law, according to which the beneficiary of a trust has a real right in the property itself.[40] This right of beneficial ownership ought to be classified as movable or immovable, depending on its object, namely, the nature of the property subject to trust.

REAL RIGHTS

According to Louisiana jurisprudence, interpreting the pertinent articles of the Civil Code, predial leases give rise to personal rights, whether they are made for a short or for a long period of time, and whether they are recorded or not.[41] Recordation may enable the lessee to assert his rights against third persons, but it does not alter the nature of his right. In the 1968-69 term, the question of the classification of predial leases as personal or real rights was involved in *Columbia Gulf Transmission Co. v. Hoyt.*[42] In this case, lessors granted to Columbia a conventional servitude for the laying of pipelines on land subject to a recorded predial lease. Columbia, being a public utility, had the right to demand expropriation of a right of way under R.S. 19:1, but did not follow this course because it was able to reach agreement with the landowners. When Columbia began operations for the laying of its pipeline, the lessee objected and interposed obstacles. Columbia then brought a suit for injunction, claiming that the lessee had only a personal right against the lessor; hence, any claim for interference with the lease should be addressed against the lessor rather than against Columbia who was a third person to the contract of lease. The lessee claimed that his lease was "property" within article 1, section 2, of the Louisiana Constitution of 1921 and that the laying of the pipeline on property subject to lease constituted a taking without adequate and just compensation. The court admitted that "Louisiana law, following the civil law tradition, classifies the lessee's rights under a predial lease as personal rights,"[43] but held that the lessee was entitled to compensation before the lease rights were damaged by the laying of a pipeline. The "consti-

40. *See* F. LAWSON, INTRODUCTION TO THE LAW OF PROPERTY 45 (1958); Pascal, *Of Trusts, Human Dignity, Legal Science and Taxes*, 23 LA. L. REV. 639 (1963).

41. *See* Leonard v. Lavigne, 245 La. 1004, 162 So.2d 341 (1964); *cf.* Harwood Oil & Mining Co. v. Black, 240 La. 641, 124 So.2d 764 (1960); Reagan v. Murphy, 235 La. 529, 105 So.2d 210 (1958).

42. 252 La. 921, 215 So.2d 114 (1968).

43. *Id.* at 936, 215 So.2d at 120.

tutional designation *private property*," the court declared, "is restricted to no particular type of private property. It is sufficiently broad, in our opinion, to include leases, though lease rights may be classified as personal rights in the structuring of our codal system."[44]

After application for rehearing was filed, the case was compromised. Since, however, the issues raised by the case are of great importance to the law of the state, a brief comment is appropriate. The decision of the court accords with a long line of Louisiana cases declaring predial leases to be compensable interests in expropriation proceedings.[45] Under this jurisprudence, if Columbia had not reached agreement with the landowners, it should have requested expropriation of the right of way against both the landowners and the lessee.[46] This, however, was not the issue before the court since Columbia had obtained a conventional pipeline servitude from the landowners. Under the circumstances, the question was whether landowners of land subject to a recorded lease are entitled to grant a predial servitude without the concurrence of the lessee. The answer to this question ought to be in the affirmative, unless, of course, a recorded predial lease is classified as a real right burdening the land itself. The court, in effect, concluded that the landowner could not grant a predial servitude without the concurrence of the lessee, although at the same time insisting that predial leases give rise to personal obligations. Perhaps, it might be preferable for the court to admit that predial leases are hybrid contracts under our system of law, partaking of the nature of both personal and real rights. In expropriation proceedings, predial leases function as real rights; in other situations, and especially in so

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44. *Id.*

45. *See* State v. Holmes, 253 La. 1099, 221 So.2d 811 (1969); State v. Ferris, 227 La. 13, 78 So.2d 493 (1955); *In re* Morgan R.R. & S.S. Co., 32 La. Ann. 371 (1880).

46. In State v. Holmes, 253 La. 1099, 221 So.2d 811, 814 (1969), noted at 30 LA. L. REV. .... (1969), the Louisiana Supreme Court reaffirmed the rule that "in expropriation of property encumbered with a lease, the rights of both the owner and the lessee must be reckoned with in acquiring perfect ownership. . . . Consequently, the expropriator to acquire perfect ownership must expropriate the rights of the landowner and that of the lessee." Further, the court held that when the valuation of the property has taken into account the interest of the lessee, the lessee as well as the landowner must be compensated out of the common fund. The decision has cast doubts on the validity of State v. Ferris, 227 La. 13, 78 So.2d 493 (1955), as a precedent. The lease may no longer need to be expropriated as an entirely independent right, but merely as a part and parcel of the ownership, with apportionment of the funds between landowner and lessee.

far as the admissibility of possessory action is concerned, predial leases function as personal rights.[47]

PREDIAL SERVITUDES

Nature of Servitudes

In *Kansas City Southern Railroad Co. v. City of DeRidder*,[48] a case of first impression in Louisiana, the question arose whether a railroad company may be subjected to liability for a pavement assessment as owner of a right of way. Plaintiff railroad company argued, *inter alia*, that it had only a servitude and that the governing statute, R.S. 33:3301-3319, contemplated assessments against owners of "real property." The court held that a railroad right of way is real property within the contemplation of the statute, and, therefore, a municipality may properly levy a special assessment against the railroad. The reason for this, the court indicated, is "that a servitude for railroad purposes is usually for such long duration and is of such a nature that in practical effect it is equivalent to the fee ownership of the property. The fee owner in such instances ordinarily has no use of the property, and he would not be benefitted by the improvement of an abutting street, whereas the railroad may be benefitted by the improvement."[49] The decision was based upon the majority view in common law jurisdictions. The result reached by the court may be equitable, but involves judicial law-making rather than application of long-established principles of Louisiana civil law. Under the Civil Code, "the part of an estate upon which a servitude is exercised, does not cease to belong to the owner of the estate; he who has the servitude has no right of ownership in the part, but only the right of using it."[50] This rule applies to all servitudes, including railroad rights of way. It would seem that it was the function of the legislature to establish exceptions; and it is a stretched interpretation to maintain that the words "real property" in special legislation were intended to cover railroad rights of way.

Creation of Servitudes

One of the modes of creation of predial servitudes is by ex-

47. LA. CODE CIV. P. art. 3656; *cf.* LA. CIV. CODE art. 3441.

48. 206 So.2d 562 (La. App. 3d Cir. 1968), *cert. denied*, 251 La. 1075, 208 So.2d 534 (1968).

49. Kansas City R.R. v. City of DeRidder, 206 So.2d 562, 565 (La. App. 3d Cir. 1968).

50. LA. CIV. CODE art. 658.

propriation in favor of a public utility.[51] Questions concerning this mode of acquisition arose in a number of recent cases. In *Humble Pipe Line Co. v. Wm. T. Burton Industries, Inc.*,[52] the Louisiana Supreme Court held that the landowner is entitled to recover for damages to crops, even if the best use of the land taken by the public utility is for industrial purposes. The court declared that crops, to the extent that they belong to the owner of the ground, are immovables by nature under article 465 of the Civil Code, but based its decision on the ground that crops, whether movables or immovables, are "property" in expropriation proceedings. In *Michigan-Wisconsin Pipe Line Co. v. Sugarland Development Corporation*,[53] the Court of Appeal for the Third Circuit held that the expropriation of a second pipeline, when a first pipeline is already in existence, does not exclude payment for severance damages. In a second case involving the same public utility,[54] the court held that the owner of "a real right akin to a personal servitude" must be joined in the expropriation proceedings; and, in a third case,[55] that defendant landowners forfeit their defense to the taking of the servitude when they fail to file answer within ten days from the service of process, and that there is no right to trial by jury in expropriation proceedings.

Predial servitudes may also be acquired by the effect of acquisitive prescription of ten or thirty years. In *Johnson v. Wills*,[56] the Court of Appeal for the Third Circuit held that a conventional servitude of drainage, contrary to the natural servitude of drainage under article 660 of the Civil Code, may be acquired by the acquisitive prescription of ten years. This prescription begins to run from the day works contrary to the natural servitude cause changes in the flow of the waters. The works

51. *See* LA. R.S. 19:1 (1950); *id.* 45:254. In the absence of a dominant estate, servitudes in favor of public utilities ought to be classified as limited personal servitudes. The rules of the Civil Code governing predial servitudes apply by analogy to limited personal servitudes. *See* A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 123-25 (1968).

52. 253 La. 166, 217 So.2d 188 (1968). Justice Barham dissented on the ground that the value of growing crops had been included in the valuation of the land.

53. 221 So.2d 593 (La. App. 3d Cir. 1969), *cert. denied*, 223 So.2d 872 (La. 1969).

54. Michigan Wisconsin Pipe Line Co. v. Fruge, 210 So.2d 375 (La. App. 3d Cir. 1968).

55. Michigan-Wisconsin Pipe Line Co. v. Bonin, 217 So.2d 741 (La. App. 3d Cir. 1969), *cert. denied*, 253 La. 735, 219 So.2d 513 (1969).

56. 220 So.2d 134 (La. App. 3d Cir. 1969), *cert. denied*, 222 So.2d 883 (La. 1969).

may be erected by anyone on the dominant, servient, or even a third estate. The decision is correct: the servitude of drainage is an apparent continuous servitude, susceptible of acquisition by prescription; and, according to a proper interpretation of the pertinent articles of the Civil Code, the natural servitude of drainage may be lost or modified by the effect of prescription.[57]

Legal Servitudes

In *Craig v. Montelepre Realty, Inc.*,[58] action was brought under article 667 of the Civil Code for damages to a residence, and for worry, inconvenience, and anguish resulting from construction activities on abutting property. The court of appeal ruled that plaintiff's cause of action had been partially prescribed under the one-year prescriptive period of article 3536 which is applicable to delictual actions. The Supreme Court reversed on the ground that the damage suffered by plaintiff was continuous, and, therefore, his cause of action had not prescribed at all. By so holding, the court avoided the troublesome question of the prescriptive period governing actions under article 667. In a concurring opinion, it was pointed out that article 667 establishes strict liability that is founded on a quasi-contract rather than fault; hence, actions under article 667 are subject to the ten-year prescriptive period applicable to personal actions generally.

In *Hathorn v. Board of Comm'rs*,[59] the court dealt with questions pertaining to the exercise of a levee servitude under article 665 of the Civil Code. A levee board had adopted a resolution which required landowners to remove fences along the levee crown, unless cattle guards were installed in them by a certain date. Affected landowners brought an action for injunction, claiming that the resolution constituted an unlawful exercise of authority and an unreasonable exercise of the legal servitude for making and repairing flood-protection levees. In a scholarly opinion, the court undertook a review of the historical and legislative bases of the levee servitude and concluded that the levee board had the right to demand the removal of fences or installation of cattle guards at the expense of the landowners. The lands were located within the jurisdiction of the levee board,

57. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 501, 975 (2d ed. Picard 1952).

58. 252 La. 502. 211 So.2d 627 (1968).

59. 218 So.2d 735 (La. App. 3d Cir. 1969), *cert. denied*, 253 La. 881, 220 So.2d 461 (1969).

which was authorized to adopt resolutions; the resolution in question involved a lawful and reasonable exercise of power under the applicable legislation; and, in the absence of "palpable abuse," the actions of a public agency in locating, building, and maintaining a levee are not subject to judicial review.

Termination

In *Hanks v. Gulf States Utilities Co.*,[60] plaintiff landowner brought action in trespass against the power company. According to the terms of a 1949 instrument, plaintiff's ancestor in title had granted to the power company the right to erect on the land "one line of poles, frames or towers," which could be erected simultaneously or at some future time, for the transmission of electricity. The power company had originally constructed one line of poles on the center line of the right of way; more than ten years later, the company sought to replace the single pole line with an "H-frame line,"[61] carrying increased voltage. It was stipulated by the parties that the grant of the servitude included the right to erect the H-frame line; thus, the issue before the court was whether this right had been lost by the prescription of non-use. Plaintiff argued that three different servitudes had been conferred, two of which had prescribed under article 789 of the Civil Code; in the alternative, if one servitude had been conferred, that servitude contemplated three modes of use, namely, poles, frames, and towers, and the right to construct H-frames had prescribed under article 798 of the Civil Code. The court held that there was a single servitude for the transmission of electricity; poles, frames, or towers were not modes of use, nor three different servitudes, but merely accessorial rights provided within the grant of the servitude. Since the principal right had not been lost by non-use, these accessorial rights had been preserved; hence, there was no trespass.

The case is discussed extensively elsewhere.[62] At this point, it is sufficient to say that the case was a close one and that decision could go one or the other way, depending on policy considerations infused into the applicable rules of law. From the viewpoint of contractual interpretation, valid argument could be made

60. 253 La. 946, 221 So.2d 249 (1969).

61. An H-frame consists of double poles connected by a cross-arm; it is so named because of its resemblance to the letter H.

62. *See* Note, 30 LA. LAW REV. 354 (1969).

that the grant contemplated three distinct servitudes, two of which had prescribed.[63] But once the court determined that a single servitude had been granted, the conclusion that the power company had not lost the right to erect H-frames was certain to follow. From the viewpoint of property law, the characterization of the right to erect "poles, frames or towers" as an accessory of the servitude does not seem to be correct; these were distinct modes of use. Nevertheless, the result reached by the majority is correct. The servitude for the transmission of electricity ought to be classified as a continuous and apparent servitude.[64] The prescription of such a servitude, or of its various modes of use, begins to run from the day the owner of the servient estate has interposed obstacles to the use of the servitude.[65] Hence, neither the servitude nor its modes of use had prescribed.

PROTECTION OF OWNERSHIP

Immovables

The ownership of immovable property is protected in Louisiana by real actions, a host of "quasi-real" or "fringe actions," and by a variety of personal actions.[66]

According to civilian classification, the action for rescission on account of lesion is a mixed action, real in that it involves restoration of property and personal in that it involves nullification of the obligation arising from the sale. In *O'Brien v. Legette*,[67] plaintiff brought an action for the rescission of a sale of standing timber[68] on account of lesion. In the meanwhile, however, the property had been transferred by the purchaser to a third person, and plaintiff amended his petition to demand the difference between the unjust price he received and the value of the timber. Defendant raised an exception of no cause of action on the ground that plaintiff's remedy under article 2589 of the

63. *See* dissenting opinion by Justice Summers, Hanks v. Gulf States Utilities Co., 253 La. 946, 955, 221 So.2d 249, 252 (1969).

64. Yiannopoulos, *Predial Servitudes; General Principles; Louisiana and Comparative Law*, 29 L. REV. 1, 38 (1968).

65. LA. CIV. CODE art. 790.

66. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 135-141 (1966).

67. 223 So.2d 165 (La. 1969). *See also* Peterson v. Herndon, 221 So.2d 615 (La. App. 2d Cir. 1969) (action for rescission on account of lesion; remanded for determination of the value of the property sold).

68. Standing timber is corporeal immovable property. *See* LA. CIVIL CODE art. 465; LA. R.S. 9:1103 (1950).

Civil Code is rescission; since the property could not be restored in kind, plaintiff's action had abated. Plaintiff maintained that his action on account of lesion continued to exist, although, under the circumstances, the demand was necessarily limited to the difference in value. The court observed that under the second paragraph of article 1681 of the French Civil Code, a seller may demand rescission of a sale even if the property is transferred to a third person. The corresponding article 2591 of the Louisiana Civil Code of 1870 does not contain an equivalent provision. The omission, the court concluded, was intentional; therefore, the seller does not have a cause of action in Louisiana against subsequent acquirers of the property. The Code, however, does not exclude an action against the original purchaser. Taking into account the purposes of the action for lesion, the court declared that it was not the intention of the framers of the Code to deny to the seller any remedy merely because the purchaser has sold the property. Relying then on article 2597 of the Civil Code, the court held that "if the vendee (before demand) has caused or permitted some or all of the property to be alienated, or has otherwise made it impossible to restore it to the vendor, he is liable to the latter to the extent that he has profited from such action."[69] Since there was no proof as to the profit of the purchase, the case was remanded for determination of that matter.

Three justices filed separate opinions, concurring in part and dissenting in part. The entire court was in agreement that plaintiff had a cause of action against defendant, but there was much disagreement as to the applicable legislation and plaintiff's measure of recovery. According to the three dissenting justices article 2597 was inapplicable. Justice Barham suggested application of article 1681(2), and Justices Sanders and Summers application of Articles 2591 and 2592. The writer cannot help but agree with the dissenting justices that article 2597 is inapplicable, because it applies only when the seller resumes possession of the property sold. In effect, the measure of recovery allowed by the majority was the unjust enrichment of the seller. The action on account of lesion, however, has not been limited historically to the amount of the enrichment; it goes beyond that and requires return of the property or payment of the true value.

69. O'Brien v. Legette, 223 So.2d 165, 168 (La. 1969).