

Louisiana Law Review

Volume 21 | Number 2

*The Work of the Louisiana Supreme Court for the
1959-1960 Term*

February 1961

Real Rights in Louisiana

Edward C. Abell Jr.

Repository Citation

Edward C. Abell Jr., *Real Rights in Louisiana*, 21 La. L. Rev. (1961)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol21/iss2/28>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

judge wide discretion in determining whether the records are sufficiently reliable to be admitted. Business is defined broadly enough to include commercial, industrial, professional, and non-profit activities. It is submitted that Louisiana should consider future legislation in order to provide a guide for admitting business records, thereby eliminating much of the uncertainty in this area of Louisiana law.

Robert A. Hawthorne, Jr.

Real Rights in Louisiana

It is the purpose of this Comment to examine the nature of the real right in Louisiana in the light of the Civil Code, the Louisiana jurisprudence, and French and common law materials.

The real right in France is apparently seen as a right held by one person against all other persons in the world,¹ with the object of the right being the thing upon which it is exercised. As a correlative to the right, all persons owe an obligation to abstain from disturbing the holder of the right in his enjoyment of it. An example is the right of ownership. The owner of property has a right against all men that they should abstain from disturbing him in the exercise of his ownership. This right can be asserted against all the world, and thus the owner can be said to have rights of pursuit of the property into the hands of adverse possessors, and preference over any ordinary creditor of the possessor. Under French law, then, the rights of pursuit and preference are the two major advantages that the holder of any real right has over the holder of a mere personal right or right of credit.²

The real right in Louisiana as explained in the Civil Code is not quite so comprehensive, however. Though the Code does not deal specifically with real rights, it is clear that the real right is a necessary correlative of the real obligation, which is defined as any obligation attached to immovable property.³ The characteristics of a real obligation, and consequently of a real right,

form Statutes Relating to Business Entries as Evidence, 31 TUL. L. REV. 49, 54 (1956).

1. I PLANIOL, CIVIL LAW TREATISE (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 2160 (1959).

2. *Id.* § 2165.

3. LA. CIVIL CODE art. 2010 (1870).

are: (1) that it passes with the land in the same manner as a right of servitude in favor of an estate passes with the estate,⁴ and (2) enforcement of the purely real right does not impose personal liability upon the possessor of the immovable property.⁵ The property is liable, yet the possessor can relieve himself of all responsibility by abandoning the property to the holder of the real right.⁶ On the basis of the Code, therefore, since mere abandonment of the property removes all responsibility from the possessor, it seems that the exercise or vindication of a real right should be accomplished without obtaining a personal judgment against any person.

The Louisiana Supreme Court has announced in the case of *Reagan v. Murphy*⁷ that a real right is synonymous with a proprietary interest, and that both of these terms refer to a species of ownership. Thus, it seems that the court has restricted the use of the term "real right" to an interest in property as owner.⁸ It is submitted that this restriction is difficult to reconcile with

4. *Id.* arts. 2011, 2012.

5. *Id.* art. 2012 reads in part as follows: "Real obligations may be created in three ways: . . ."

"All these contracts give rise to obligations purely real on the part of those who acquire the land, under whatever species of title they possess it; they are not personally liable, but the real property is, and, by abandoning it to the obligee, they relieve themselves from all responsibility. . . ."

6. *Ibid.*

7. 235 La. 529, 541, 105 So.2d 210, 214 (1958). The language in the *Reagan* case that is pertinent to the subject matter of this Comment was quoted verbatim in the case of *Harwood Oil & Mining Co. v. Black*, 124 So.2d 764 (La. 1960), rehearing denied.

This language in part is as follows: "The rights of use, enjoyment, and disposal are said to be the three elements of property in things. They constitute the *jura in re*. The right of a lessee is not a real right, i.e., a *jus in re*. In other words, the lessee does not hold one of the elements of property in the thing. His right is a *jus ad rem*, a right upon the thing. . . .' Accordingly, it is clear that the term 'real right' under the civil law is synonymous with proprietary interest, both of which refer to a species of ownership. Ownership defines the relation of man to things and may, therefore, be declared against the world. A personal right, on the other hand, defines man's relationship to man and refers merely to an obligation one owes to another which may be declared only against the obligor."

8. It is notable that in reaching the conclusion that a real right is synonymous with proprietary interest, the court equated the real right to a *jus in re*. This is a phrase that, according to Planiol, originated with the early French commentators who used it to distinguish the right to property that could be enforced only through the intervention of the debtor (*jus ad rem*), from the real right that was enforceable against all persons (*jus in re*). It is clear that the French definition of the term "real right" did not restrict it to an interest as owner, but the term *jus in re* has come to be so restricted. See BLACK, LAW DICTIONARY (4th ed. 1951). Thus in equating the real right to the *jus in re*, the court reaches the logical conclusion that the real right is the same as a proprietary interest. It seems that, though the *jus in re* means ownership today, it did not originally restrict itself to that definition, and to equate it to a real right is to change the meaning of the real right also, perhaps unadvisedly. See 1 PLANIOL, CIVIL LAW TREATISE (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 2166 (1959).

the use that the court has previously made of the term,⁹ and neither does it seem to follow the definition of the real right given in the Code.

Ownership, of course, involves real rights. The owner of property has a right to the property which can be asserted against the world, and which is real in the sense that it can be asserted without obtaining a personal judgment against anyone. The owner of property who wishes to assert his title against an adverse possessor brings a petitory action which results in a declaration that he is the owner.¹⁰ The adverse possessor is not personally cast in judgment, and can relieve himself of any responsibility by simply abandoning the property to the owner.

The right that the owner of property has to the peaceable possession of his property is of a different nature, however, and calls for a different remedy. When an owner asserts his right to peaceable possession against a trespasser, the judgment he obtains is personal in nature. The trespasser is personally enjoined from disturbing the owner, and may be compelled to pay damages.¹¹ Therefore, though the right to peaceful possession is certainly an attribute of ownership, it cannot be classified as a real right under the Civil Code because the trespasser becomes personally liable.

The right against the trespasser would clearly be classified as a real right under the French law,¹² however, and it seems that

9. See, e.g., the cases involving building restrictions where the court has said that building restrictions are real rights and covenants running with the land. *Salerno v. De Lucca*, 211 La. 659, 30 So.2d 678 (1947); *Edwards v. Wiseman*, 198 La. 382, 3 So.2d 661 (1941); *LeBlanc v. Palmisano*, 43 So.2d 263 (La. App. 1950).

The person who buys property subject to a building restriction never obtains ownership of the property in its fullest sense. His rights of ownership are reduced in some particular, depending on the nature of the restriction. Since his rights are restricted, he comes under a duty not to do a certain thing, and this duty necessarily creates a right in someone to demand that the owner of the property subject to the restriction obey the restriction. Any exercise of this right results of necessity in a judgment against the owner of the restricted property commanding him not to do something, or perhaps, compelling him to pay damages for the violation of his duty. Thus it seems that this right to enforce a building restriction cannot be called a real right under the Civil Code definition, since the enforcement of the right results in a personal judgment against the possessor of the property. For a detailed discussion of building restrictions, see Comment, 21 LOUISIANA LAW REVIEW 468 (1960).

10. LA. CODE OF CIVIL PROCEDURE art. 3651 (1960).

11. *Geisenheimer Realty Co. v. Board of Commissioners for the Pontchartrain Levee District*, 237 La. 306, 111 So.2d 123 (1959); *Gliptis v. Fifteen Oil Co.*, 204 La. 896, 16 So.2d 471 (1943). See also *State v. Martin*, 199 La. 39, 5 So.2d 377 (1941), for an example of a criminal action against a trespasser.

12. 1 *PLANIOL, CIVIL LAW TREATISE (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* § 2160 (1959).

it would be counted as a right in rem or a property right under the common law.¹³ It seems, then, that in comparing the real right in France with the real right under the Louisiana Civil Code, the former includes almost any right in relation to property that is held against all men,¹⁴ but the real right in Louisiana is restricted to those rights in relation to property that can be enforced without obtaining a personal judgment against anyone.¹⁵

Despite the language of the court in *Reagan v. Murphy*,¹⁶ indicating that a real right must involve an interest as owner, it seems that there are some instances of real rights that do not constitute ownership interests in property. Several illustrations of such real rights are given in Article 2012 of the Civil Code. For example, if there is a recorded mortgage on immovable property¹⁷ and the property is acquired by a third party who has not assumed the payment of the mortgage indebtedness, the mortgagee has a real right which may be enforced against the property although no personal judgment condemning the possessor to pay could be obtained.¹⁸ The real right stemming from the recorded mortgage does not rest on an interest as owner in the property. It is real, nevertheless, because the purchaser is not

13. See 4 CORBIN, CONTRACTS § 860 (1951).

14. I PLANIOL, CIVIL LAW TREATISE (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 2160 (1959). Planiol's discussion of the nature of the real right is not so restrictive as the discussion in this Comment. The analysis contained herein is based not so much on the nature of the right as it is on the nature of the remedy that it affords, or theoretically could afford. Planiol did not look at the real right from this point of view, but simply considered a right against all men generally as a real right as opposed to the personal right against a certain person or group of persons. The same is true of the discussion of rights in rem or property rights by Corbin. The property right that Corbin refers to is a right in relation to property that is opposable against all men generally instead of a specific person. These concepts are broad enough to include the rights that would be counted as real rights under the Louisiana Civil Code, and also those rights such as the right an owner of property holds against a trespasser. These latter rights are denominated "real" by Planiol even though they are enforced by means of a personal judgment.

15. LA. CIVIL CODE art. 2012 (1870).

16. 235 La. 529, 541, 105 So.2d 210, 214 (1958).

17. LA. CIVIL CODE art. 3282 (1870): "The mortgage is a real right on the property bound for discharge of the obligation. . . ." See *Schexnaider v. Fontenot*, 147 La. 467, 476, 85 So. 207, 210 (1920), wherein it was said that "a mortgage, whether conventional or judicial, imposes a real right or obligation upon the property bound for its discharge."

18. See *Gauche v. Gerdes*, 10 Orl. App. 56 (La. App. 1912) to the effect that one who purchases property subject to a mortgage, without assuming the same, incurs no personal liability for the amount thereof, but the property itself remains liable for the amount of the mortgage debt. On the contrary, it appears that if the purchaser of mortgaged property assumes the payment of the mortgage debt, he becomes personally liable to the mortgagee, in addition to the real right that the mortgagee holds against the property. *Schlatre v. Greaud*, 19 La. Ann. 125 (1867).

personally bound in the absence of an assumption of the debt by him. In addition to mortgages, Article 2012 sets forth several other transactions which create real obligations, and thus real rights. Among these are a sale subject to a rent charge¹⁹ or a right of redemption;²⁰ servitudes; the right of use and habitation and usufruct.²¹ An examination of each of these situations indicates that they create obligations which are binding on the property, but not on the individual who acquires the land. Each should, therefore, be enforceable by a judgment that recognizes the right of the obligee, and should require no personal judgment against the possessor of the property.²² None of these rights stem from an interest as owner, however, but are rights arising generally from contracts.

Another transaction which creates a real right in favor of a non-owner is the case where the owner of property gives an option to buy which is recorded, and the property is sold to a third party before the option expires. As regards the grantor of the option, the option holder has a personal right to demand specific performance.²³ With respect to the third purchaser, however, the option holder has a real right.²⁴ The purchaser has taken the property subject to the option, and it seems that the option holder, by exercising his option and bringing a petitory action, could be declared the owner of the property. Recordation of a judgment declaring him owner would satisfy his claim, and the third party who purchased the property subject to the outstanding option would simply abandon the property to the new owner, retaining, of course, his personal action against the vendor.

The question concerning the nature of the right of a lessee has been considered by the court on numerous occasions.²⁵

19. LA. CIVIL CODE art. 2017 (1870).

20. *Id.* art. 2567 *et seq.*

21. *Id.* art. 556.

22. LA. CODE OF CIVIL PROCEDURE art. 1871 (1960), which provides for declaratory judgments, would seem to allow vindication of the rights of the parties who have servitudes, etc., without obtaining a personal judgment. Simple recognition of the right would seem sufficient in most cases.

23. *Watson v. Bethany*, 209 La. 989, 26 So.2d 12 (1946).

24. *Kinberger v. Drouet*, 149 La. 986, 999, 90 So. 367, 372 (1922): "A promise of sale, duly accepted and recorded, confers a real right on the purchaser, of which third persons are bound to take notice, and such right cannot be defeated by a subsequent sale of the same property recorded prior to the execution of the deed pursuant to the promise of sale. *Lehman v. Rice*, 118 La. 975, 43 South. 639."

25. The leading case in this area is *Gulf Refining Co. of La. v. Glassell*, 186 La. 190, 201, 171 So. 846, 850 (1936), where it was said: "It therefore appears

Though the Code specifically provides that a lease is a real obligation on the property,²⁶ the court has consistently said that a lessee has a personal right only.²⁷ It is clear that the relation between a lessee and his lessor is of a personal nature. The lessee is personally bound, for example, to pay rent,²⁸ and the lessor is bound to guarantee the lessee peaceful possession of the property.²⁹ But, even though these obligations are personal, it is clear that a purchaser of property subject to a recorded lease must honor the rights of the lessee.³⁰ It also seems clear that, if the public records doctrine is given full effect,³¹ a recorded lease should be effective against other third parties as well.³² It therefore appears that, should the lessee desire to assert his right to possession of the property, a judicial recognition of his rights as shown on the public records should suffice to establish his claim to possession.³³ With a judgment recognizing his right to pos-

to us that an oil and gas lease and farm lease are quite alike and should be placed in the same legal category, i.e., leases—personal rights and not real rights." Thus, while deciding that the mineral lessee could not maintain a petitory action, the court also made it clear that the predial lessee has only a personal right. The proposition that a mineral lessee has only a personal right has been followed in many cases. *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210 (1958); *Arnold v. Sun Oil Co.*, 218 La. 50, 48 So.2d 369 (1949); *Weber v. H. G. Hill Stores*, 207 La. 500, 21 So.2d 510 (1945); *Tomlinson v. Tomlinson*, 181 So. 206 (La. App. 1938); *Marchand v. Gulf Refining Co. of La.*, 187 La. 1002, 175 So. 647 (1937).

The legislature has enacted statutes for the purpose of classifying the right of a mineral lessee as real, but the court has refused to accept this classification thus far. See *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210 (1958); *Arnold v. Sun Oil Co.*, 218 La. 50, 48 So.2d 369 (1949); and LA. R.S. 9:1105 (1950). A detailed discussion of this problem is beyond the scope of this Comment.

26. LA. CIVIL CODE art. 2015 (1870): "Not only servitudes, but leases and all other rights, which the owner had imposed on his land before the alienation of the soil, form real obligations which accompany it in the hands of the person who acquires it. . . ."

It is interesting to note that in the *Projet* of the Civil Code of 1825, the word "real" was inserted before "right," thus making it clear that the intent was that the lessee has a real right. The word was omitted from the Civil Code of 1870, however, and it is not clear whether this was a fault in translation of the French, or an intentional omission. See 1 LOUISIANA LEGAL ARCHIVES 272 (1938); DART'S LA. CIVIL CODE ANN. art. 2015 (1870).

27. See cases cited in note 25 *supra*.

28. LA. CIVIL CODE art. 2710 (1870).

29. *Id.* art. 2692.

30. *Coyle v. Geoghegan*, 187 La. 308, 174 So. 366 (1937); *Summers and Brannins v. Clark*, 30 La. Ann. 436 (1878). See also LA. CIVIL CODE arts. 2266, 2733 (1870).

31. LA. CIVIL CODE art. 2266 (1870). See also LA. R.S. 9:2721 (1950), which strengthens and expands the public records doctrine.

32. In *Summers and Brannins v. Clark*, 30 La. Ann. 436, 437 (1878), it was said: "All sales, contracts, and judgments affecting immovable property which shall not be so recorded, shall be utterly null and void, except between the parties thereto." C.C. 2266. See also C.C. 2264, which provides: "No notarial act concerning immovable property shall have any effect against third persons, unless recorded in the conveyance office. These are negatives pregnant with affirmatives to the effect that contracts 'affecting' or 'concerning' immovables (and therefore leases thereof), will have effect against third persons, if duly recorded. . . ."

33. LA. CODE OF CIVIL PROCEDURE art. 1871 (1960).

session, the lessee's right would be vindicated without a personal judgment, and his right could, in this respect, be classified as real under the Code.

In conclusion, it seems that there has never been any definitive judicial statement as to the true nature of a real right in Louisiana. The latest position taken by the court is that a real right is the same as an interest as owner. An examination of the code provisions indicates, however, that the true characteristics of the real right are: (1) that it passes with the land,³⁴ and (2) that it does not make anyone personally liable, but is merely a charge on the property.³⁵

If the court should choose to interpret real rights in strict adherence to the terms of the Code, it seems that the position taken in the *Reagan* case must be amended to include those real rights that are not synonymous with an interest as owner. If, however, the present position is adhered to, and a real right is confined to those rights which constitute an interest as owner, it would seem that another name must be found for those real rights that are not compatible with that definition. In any event, it seems that the position of the court as to the nature of a real right should be clarified.

Edward C. Abell, Jr.

Building Restrictions in Louisiana

The purpose of this Comment is to examine and analyze the Louisiana law pertaining to building restrictions.¹ In this analysis a comparison with other means of restricting the use of property will be made.

The building restriction is a limitation on the use of property imposed by an ancestor in title in accordance with a general plan where the purpose is to maintain certain building standards and uniformity in improvements.² The law of building restrictions has primarily developed from judicial decisions beginning

34. LA. CIVIL CODE art. 2011 (1870).

35. *Id.* art. 2012.

1. See Comment, 8 TUL. L. REV. 262 (1933).

2. See *Ouachita Home Site & Realty Co. v. Collie*, 189 La. 521, 179 So. 841 (1938); *Rabouin v. Dutrey*, 181 La. 725, 160 So. 393 (1935); *Hill v. Wm. P. Ross, Inc.*, 166 La. 581, 117 So. 725 (1928); *Munson v. Berdon*, 51 So.2d 157 (La. App. 1951).