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CREATION OF SERVITUDES BY PRESCRIPTION AND DESTINATION OF THE OWNER

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Article 654 of the Louisiana Civil Code declares that "predial servitudes may be natural, legal, and voluntary or conventional."[1] There is a corresponding classification of predial servitudes in the French Civil Code.[2] In Germany and in Greece, however, the notions of natural and legal servitudes have given way to the idea of limitations on ownership; as a result, in the legal systems of these two countries all servitudes are conventional.[3]

In contrast with natural servitudes that arise from the natural situation of estates and with legal servitudes that are imposed by law, conventional or voluntary servitudes are established in Louisiana "by juridical act, prescription, or destination of the owner."[4] The creation of conventional servitudes by juridical act has been dealt with elsewhere.[5] This study is devoted to an analysis of Louisiana law governing the creation of conventional servitudes by prescription and destination of the owner. For purposes of comparison, brief reference will be made to French, German, and Greek law.

CREATION OF SERVITUDES BY PRESCRIPTION

Servitudes Created by Prescription

Acquisitive prescription is a mode of creation of servitudes in the legal systems of most civil law jurisdictions; there are, however, im-

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1. LA. CIV. CODE art. 654 (as revised in 1977); LA. CIV. CODE art. 659 (repealed in 1977); LA. CIV. CODE art. 655 (1825); LA. DIGEST OF 1808, bk. II, tit. IV, art. 3; FRENCH CIV. CODE art. 639 (J. Crabb trans. 1977) [hereinafter cited as FRENCH CIV. CODE]. In 1977 the Louisiana Civil Code articles governing predial servitudes were revised. *See* 1977 La. Acts, No. 514, § 1. Throughout this article, references to the current version of the Civil Code articles will contain no date.

2. *See* FRENCH CIV. CODE, bk. II, tit. IV, ch. 3 ("Servitudes Established by the Deed of Man").

3. *See* G. BALIS, CIVIL LAW PROPERTY 321 (3d ed. 1955) (in Greek); H. WOLFF-RAISER, SACHENRECHT 441 (10th ed. 1957).

4. LA. CIV. CODE art. 654. Predial servitudes may not be acquired by estoppel. Greene v. Greene, 373 So. 2d 756 (La. App. 3d Cir. 1979).

5. *See* Yiannopoulos, *Predial Servitudes: Creation by Title*, 45 TUL. L. REV. 459 (1971).

portant differences among these legal systems.[6] For example, in Greece, *all* kinds of servitudes may be created by prescription; in France, only *continuous and apparent* servitudes may be so created. In Louisiana and in Italy, prescription avails as to *apparent* servitudes only. In Germany and in other countries having a land register system, servitudes may not be created by prescription without an entry into the land register.

Louisiana

Under the regime of the Louisiana Civil Code of 1870, only continuous and apparent servitudes could be created by prescription.[7] Discontinuous servitudes (even if apparent) and nonapparent servitudes (even if continuous) could not be created by prescription; they could only be created by title.[8]

The 1977 revision broadened the availability of acquisitive prescription by dispensing with the requirement of continuity. According to revised article 740 of the Civil Code, apparent servitudes may be created by prescription, even though they may have been considered discontinuous and therefore insusceptible of creation by prescription under the 1870 Code.[9] Thus, in contrast with the 1870 Code, a right

6. For a comparative study, see Comment, *Acquisitive Prescription of Servitudes,* 15 LA. L. REV. 777 (1955).

7. *See* LA. CIV. CODE arts. 765 (repealed in 1977) & 3504 (repealed in 1979); Viering v. N.K. Fairbanks Co., 156 La. 592, 100 So. 729 (1924); Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So. 2d 856 (La. App. 3d Cir. 1965). Political subdivisions could also acquire continuous and apparent servitudes on the lands of private persons. *See* Dugas v. St. Martin Parish Police Jury, 351 So. 2d 271 (La. App. 3d Cir. 1977).

A conventional servitude of drain, contrary to the natural servitude of drain, may be established by acquisitive prescription. The prescription commences to run from the day works contrary to the natural servitude cause a change in the flow of water. The works may be erected by anyone on the dominant, the servient, or even a third estate. *See* Johnson v. Wills, 220 So. 2d 134 (La. App. 3d Cir. 1969), *writ refused* 254 La. 132, 222 So. 2d 883 (1969).

8. *See* LA. CIV. CODE art. 766 (repealed in 1977); Nash v. Whitten, 326 So. 2d 856 (La. 1976); Ogborn v. Lower Terrebone Ref. & Mfg. Co., 129 La. 379, 56 So. 323 (1911); Fisk v. Haber, 7 La. Ann. 652 (1852); Comment, *Acquisition of Rights of Way by Prescription,* 12 TUL. L. REV. 226 (1938).

9. *See* LA. CIV. CODE art. 740, comment (a). For the definition of apparent servitudes, see LA. CIV. CODE art. 707. The works and constructions that are exterior signs of a servitude may be on the servient estate or on the dominant estate. However, such works and constructions must be made in the place in which the servitude is exercised, and they must be visible by the owner of the servient estate. 3 M. PLANIOL ET G. RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS–SERVITUDES n° 964 (Picard 2d ed. 1952).

According to article 3485 of the Louisiana Civil Code (as revised in 1982), all private things are susceptible of acquisitive prescription. Further, according to comment (b) of article 723 (as revised in 1977) servitudes may not be established on public things by prescription.

of passage exercised over a railroad track, a paved road, or any other construction regarded as an exterior sign of a servitude may be created by prescription. However, article 740 may not be applied retroactively. Therefore, the possession of a servitude that would be discontinuous under the 1870 Code does not give rise to prescriptive rights except from the effective date of the new legislation.[10]

A prescription that commenced to run prior to the effective date of the new legislation for the acquisition of a servitude that would be classified as continuous and apparent under the prior law continues to run under the new legislation. Upon accrual of the prescription in such a situation, the right acquired will be an apparent servitude.[11]

France

The provisions of the Code Civil concerning creation of servitudes by prescription reflect a compromise of conflicting customs. According to the Custom of Paris, no servitude could be created by prescription, whereas according to the customs of most regions, all kinds of servitudes could be created by prescription.[12] Under the circumstances, the redactors of the Code Napoleon opted for an intermediary solution that was supported by certain customs: acquisitive prescription was accepted only as to continuous and apparent servitudes.

The compromise has been criticized by doctrinal writers as lacking "rational foundation."[13] The requirement that a servitude be apparent, that is, evidenced by an exterior sign, has been termed a "useless rigor."[14] The general requirement that for acquisitive prescription the adverse possession must be open and public ought to suffice.[15] For example, a servitude for the drawing of water or for pasturage ought to satisfy the requirement of open and public possession, if exercised in broad daylight. However, such a servitude may not be created by prescription in France because it is classified in the Code Civil as discontinuous.[16]

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10. *See* Daniel v. Department of Transp. and Dev., 396 So. 2d 967 (La. App. 1st Cir. 1981); Greene v. Greene, 373 So. 2d 756 (La. App. 3d Cir. 1979).

11. *See* LA. CIV. CODE art. 740, comment (a); *cf.* Wild v. LeBlanc, 191 So. 2d 146 (La. App. 3rd Cir. 1966) (drainage ditch); Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So. 2d 856 (La. App. 3rd Cir. 1965) (irrigation canal); Dugas v. St. Martin Parish Police Jury, 351 So. 2d 271 (La. App. 3rd Cir. 1977) (drainage ditch); Fuller v. Washington, 19 So. 2d 730 (La. App. 2d Cir. 1944) (sewer line; exterior signs).

12. *See* CUSTOM OF PARIS art. 186 (1510); 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 956 & 957.

13. 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 956.

14. *Id.* at n° 956.2.

15. *See* LA. CIV. CODE art. 3476 (as revised in 1982); FRENCH CIV. CODE art. 2229.

16. *See* FRENCH CIV. CODE art. 688. It was the same under article 727 of the Louisiana Civil Code of 1870.

The requirement that the servitude be continuous is even less justifiable. According to medieval scholars, discontinuous servitudes could not be created by prescription because such servitudes were considered to be insusceptible of continuous possession, a requirement for acquisitive prescription. However, modern writers have discarded this explanation as theoretically faulty. As a matter of fact, for purposes of acquisitive prescription, discontinuous servitudes are as much susceptible of continuous possession as corporeal immovables. Thus, the regular use of a servitude for the drawing of water is as much a continuous possession of the servitude as possession of the body of water itself and the regular use of a servitude of passage is as much a continuous possession of the right of way as adverse possession of the strip of land itself.[17]

Certain authors later proposed another explanation for the requirement that the servitude be continuous. Discontinuous servitudes may not be created by prescription because they are used by means of isolated acts that are insufficient to give notice to the owner of the would-be servient estate; therefore, such acts must be regarded as tolerated in the spirit of good neighborhood. This explanation is equally unacceptable, because it is based on the unrealistic presumption that in the absence of title, the possession of a discontinuous servitude is necessarily precarious.[18]

Greece

Aware of the criticism addressed to the system of the Code Civil, the redactors of the Greek Civil Code resolved the question of acquisitive prescription of servitudes by application of the general rules governing acquisitive prescription of immovables.[19] Thus, in Greece, all kinds of servitudes, continuous or discontinuous, apparent or nonapparent, and affirmative or negative, may be acquired by prescription.

Germany

The institution of acquisitive prescription is severely circumscribed in Germany because the idea of acquisition of ownership and of other real rights by possession during a certain period of time is incompatible with the land register system.[20] On principle, predial servitudes may never be acquired by possession alone. However, if there is an entry into the land register purporting to establish a predial servitude

17. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 956.2.

18. *Id.* at n° 957.

19. *See* GREEK CIV. CODE arts. 1121, 1123; *cf.* GREEK CIV. CODE arts. 1041-1055. G. BALIS, *supra* note 4, at 324.

20. *See* STULZ, *Dienstbarkeiten,* in 2 RECHTSVERGLEICHENDES HANDWOERTERBUCH 645, 650 (1929).

and the owner of the dominant estate has used the servient estate for thirty years in accordance with his title, a predial servitude is established.[21] However, this only happens in exceptional circumstances.[22]

Creation of Servitudes of Light and View by Prescription

There has been much confusion in Louisiana concerning the modes of creation of servitudes of light and view and, especially, the creation of those servitudes by acquisitive prescription. For this reason, analysis of legislation, jurisprudence, and doctrine governing the creation of servitudes of light and view is undertaken at this point.

Servitude of Light

Article 703 of the Louisiana Civil Code declares that the servitude of light is the right by which the owner of the dominant estate is entitled to make openings in a *common* wall for the admission of light. Further, the article provides that the owner of the servient estate is prevented from making an obstruction in a common wall which will deny light to the owner of the dominant estate.[23] This provision defines the servitude of light narrowly, in conformity with the law governing common enclosures. A servitude of light, however, may also be established on a *private* wall.[24]

On a *common* wall, a servitude of light may be established by title, informal destination of the owner, or acquisitive prescription. An opening in a common wall is an exterior sign of a servitude because a co-owner of such a wall is forbidden to make any openings without the consent of the other co-owner.[25] Thus, the servitude of light in a common wall is by definition apparent and, under the 1977 revision, may be acquired by informal destination of the owner or by prescription.[26] Such a servitude could also have been acquired by

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21. *See* BÜRGERLICHES GESETZBUCH [BGB] arts. 900(2) & 1029 (W. Ger.). These requirements promote certainty of titles. *See* KOHLER, BEITRAEGE ZUM SERVITUTENRECHT, in 87 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 157, 247 (1897). For adverse criticism, see 2 O. GIERKE, DEUTSCHES PRIVATRECHT 646 (1905).

22. The owner of the servient estate has thirty years to bring an action for correction of the land register. *See* BGB art. 894.

23. *See* LA. CIV. CODE art. 703. This provision reproduces that part of article 717 of the Louisiana Civil Code of 1870 dealing with the servitude of light. It does not change the law.

24. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 915; 5 G. BAUDRY-LACANTINERIE, TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL n° 1015 (Chauveau 2d ed. 1899); G. BALIS, *supra* note 3, at 316.

25. *See* LA. CIV. CODE art. 681.

26. *See* LA. CIV. CODE art. 707 ("a window in a common wall"); LA. CIV. CODE art. 740; Note, *Adjoining Landowners—Right to Light and Air*, 34 TUL. L. REV. 599 (1960).

destination of the owner or by prescription under the regime of the Louisiana Civil Code of 1870, because it was considered to be apparent and continuous.[27]

In contrast, a servitude of light in a *private* wall may not be established by prescription[28] or by informal destination of the owner.[29] In Louisiana, the owner of a private wall is free to make as many openings in his wall as he sees fit; such openings are a prerogative of ownership rather than exterior signs of a servitude.[30] A servitude of light in a private wall is thus a *nonapparent* servitude involving exclusively the prohibition of construction that obstructs the light. Such a servitude must be acquired by title[31] or by a formal declaration of destination.[32]

When a servitude of light is established by title, by destination of the owner, or by acquisitive prescription, the owner of the servient estate may still erect constructions on his estate because the servitude of light does not involve an absolute prohibition of building; the owner is only prevented from raising constructions that obstruct the light.[33]

27. *See* LA. CIV. CODE arts. 715, 727, 728 (repealed in 1977). There are no reported decisions involving application of these provisions for the acquisition of a servitude of light in a common wall by destination of the owner or by acquisitive prescription. In Taylor v. Boulware, 35 La. Ann. 469 (1883), the court recognized the existence of a servitude of light in a *private* wall, established by destination of the owner. However, in Ribet v. Howard, 109 La. 113, 33 So. 103 (1902), the court correctly held that a servitude of light in a private wall is nonapparent and cannot be acquired by prescription or destination of the owner.

Until 1825, a landowner did not have an unlimited right to make openings in his wall; hence, one could acquire a servitude of light in his own wall by destination or by prescription. The existence of an opening in a private wall was an apparent sign of servitude. *See* Cleris v. Tieman, 15 La. Ann. 316 (1860) (destination of the owner); Durel v. Boisblanc, 1 La. Ann. 407 (1846) (destination of the owner). *A fortiori,* the co-owner of a common wall could acquire by destination or by prescription a servitude of light in the common wall. Lavillebeuvre v. Cosgrove, 13 La. Ann. 323 (1858).

28. *See* LA. CIV. CODE arts. 740 & 742.

29. LA. CIV. CODE art. 741(1).

30. *See* Ribet v. Howard, 109 La. 113, 33 So. 103 (1902); Bryant v. Sholars, 104 La. 786, 29 So. 350 (1901); Oldstein v. Firemen's Bldg. Ass'n, 44 La. Ann. 492, 10 So. 928 (1892). Conversely, the boarding of windows in a private wall may not be considered as an exterior sign of a servitude of prohibition of light. *See* Lavillebeuvre v. Cosgrove, 13 La. Ann. 323 (1858). The prohibition of light is a nonapparent servitude. *See* LA. CIV. CODE arts. 704 & 707.

31. *See* LA. CIV. CODE arts. 707(2) & 739.

32. *See* LA. CIV. CODE art. 741(2) (as amended by 1978 La. Acts. No. 479).

33. *See* Goodwin v. Alexander, 105 La. 658, 30 So. 102 (1901). The servitude of light is less onerous than the servitude of view. For the distinction between the servitude of light and the servitude of view, see Judgment of Jan. 28, 1925, Cour de Cassation. Requêtes [Cass. req.] Paris, Gaz. Pal. 1925.1.650; Judgment of March 16, 1932, Angers, Gaz. Pal. 1932.2.87.

Servitude of View

Article 701 of the Louisiana Civil Code defines the servitude of view as the right by which the owner of the dominant estate enjoys a view and the owner of the servient estate is prevented from raising constructions that obstruct the view.[34] The question then arising is whether this servitude may be acquired without title.

When the view is exercised through windows or other openings in a wall, the argument may be made that the servitude is apparent and that it may be acquired by prescription or informal destination of the owner. However, windows or other openings in one's own wall are not exterior signs of a servitude; they are the exercise of a prerogative of ownership.[35] Only windows or other openings in a *common* wall constitute exterior signs of a servitude.[36] It follows that a servitude of view in a *private* wall is a nonapparent servitude that must be established by title or by formal declaration of destination and that a servitude of view in a *common* wall is an apparent servitude that may be established by title, informal destination, or prescription.

According to article 727 of the Louisiana Civil Code of 1870, the servitude of view was *continuous,* and according to article 728 of the same code, an opening in a wall, such as a window or a door, was an exterior sign that qualified the servitude as *apparent.*[37] Hence it was assumed that the servitude of view was always continuous and apparent.[38] Sight was lost of the fact that the servitude of view was apparent only when it was established on a *common* wall and was nonapparent when it was established on a *private* wall.

This error may be easily explained. Article 728 of the Louisiana Civil Code of 1870 was the same as article 52 of the Louisiana Civil Code of 1808 and article 689 of the French Civil Code. Under articles 43 and 44 of the Louisiana Civil Code of 1808, corresponding with articles 676 and 677 of the French Civil Code, an owner did not have an unlimited right to have openings in a private wall adjoining a

34. LA. CIV. CODE art. 701. This provision reproduces that part of article 716 of the Louisiana Civil Code of 1870 dealing with the servitude of view. It does not change the law. The servitude of view, as defined in article 701, need not be exercised through openings in walls. *See* LA. CIV. CODE art. 701, comment (b).

35. *See* Bryant v. Sholars, 104 La. 786, 29 So. 350 (1901). *See also* Ribet v. Howard, 109 La. 113, 33 So. 103 (1902); Goodwin v. Alexander, 105 La. 658, 30 So. 102 (1901); Oldstein v. Firemen's Bldg. Ass'n, 44 La. Ann. 492, 10 So. 928 (1892); Jeannin v. DeBlanc, 11 La. Ann. 465 (1856). Conversely, the boarding of windows is not an apparent sign of a servitude of prohibition of view. Taylor v. Boulware, 35 La. Ann. 469 (1883).

36. *See* LA. CIV. CODE art. 707(1).

37. *See* LA. CIV. CODE arts. 727 & 728 (repealed in 1977).

38. *See* Lieber v. Rust, 398 So. 2d 519 (La. 1981).

neighboring estate. Hence a door or window in a private wall could be an exterior sign of a servitude. However, articles 43 and 44 of the Louisiana Civil Code of 1808 were supressed in the 1825 revision;[39] owners from then on had the right to make openings in private walls as they saw fit. The declaration in article 728 of the Louisiana Civil Code of 1870 that openings in a wall were exterior signs of an apparent servitude was thus accurate as to common walls only.

There has been much confusion in Louisiana jurisprudence concerning the scope of the servitude of view and its relation to the servitude of prohibition of building (or servitude of prospect). Dicta abounded that the servitude of view was continuous and apparent and, therefore, could be acquired by title, destination of the owner, or prescription.[40] However, the same decisons also declared that the servitude of view did not include as an accessory a prohibition of building unless the servitude of view was created by title.[41] Thus, presumably, if a servitude of view had been created by destination of the owner or by prescription, the neighbor would have the right to raise constructions and block the view.

These decisions gave a restricted application to article 716 of the Louisiana Civil Code of 1870, according to which the servitude of view included "the power of preventing one's neighbor from raising any buildings which obstruct it."[42] This provison applied to servitudes of view established by title; it was thought to be inapplicable to servitudes of view established by destination of the owner or by prescription. The net result was that according to dicta, a servitude of view established by destination of the owner or by prescription was devoid of meaning.

These seemingly contradictory decisions may be reconciled on the ground that a servitude of view could be acquired on a *private* wall by title only.[43] Such a servitude was continuous but nonapparent, and it could not be acquired by destination of the owner or by prescription.[44] However, the servitude of view on a *common* wall was

39. *See* Jeannin v. DeBlanc, 11 La. Ann. 465 (1856); 1 Louisiana Legal Archives, PROJET OF THE CIVIL CODE OF 1825, at 73 (1937).

40. *See* Lieber v. Rust, 398 So. 2d 519 (La. 1981), and cases cited therein.

41. *See id.*; Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905). *But see* Barton v. Kirkman, 5 Rob. 16 (1843).

42. LA. CIV. CODE art. 716 (repealed in 1977).

43. *See* Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905); *cf.* Parish v. Municipality No. 2, 8 La. Ann. 145 (1853); French v. New Orleans C. R. Co., 2 La. Ann. 80 (1847).

44. *See* Ribet v. Howard, 109 La. 113, 33 So. 103 (1902); Goodwin v. Alexander, 105 La. 658, 30 So. 102 (1901); Bryant v. Sholars, 104 La. 786, 29 So. 350 (1901); Oldstein v. Firemen's Bldg. Ass'n, 44 La. Ann. 492, 10 So. 928 (1892); Taylor v. Boulware, 35 La. Ann. 469 (1883); Jeannin v. DeBlanc, 11 La. Ann. 465 (1856).

apparent and continuous,[45] and it could be acquired by title, destination of the owner,[46] or prescription.[47]

When the servitude of view is established, whether by prescription or otherwise, the owner of the servient estate may not raise constructions that block the view.[48] However, the servitude of view is not the same as the servitude of prohibition of building. The servitude of prohibition of building is much more onerous; it prevents the owner of the servient estate from raising *any* construction on his estate, rather than merely preventing the owner from raising constructions that obstruct the view.[49]

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45. *See* LA. CIV. CODE arts. 716, 727, & 728 (repealed in 1977).

46. *See* LA. CIV. CODE art. 767 (repealed in 1977); *cf.* Cleris v. Tieman, 15 La. Ann. 316 (1860); Lavillebeuvre v. Cosgrove, 13 La. Ann. 323 (1858). See note 27, *supra.*

47. *See* LA. CIV. CODE art. 765 (repealed in 1977); Note, *supra* note 26, at 599.

> There is a servitude of view which consists in having openings or windows for prospect on the estate of another person, and which prevents the owner of the servient estate from obstructing the view by raising buildings. There has never been any doubt that such a servitude may be established by title. According to the Code Civil it may also be established by prescription.

8 C. LAURENT, PRINCIPES DE DROIT CIVIL FRANCAIS 83-84 (1876).

48. The servitude of view established by thirty years possession has the same effects as the one established by title, because the law places the two modes of acquisition on the same line. There is no reason whatever to draw a distinction between the effects of the servitude of view according to the mode of its acquisition, by title or by prescription. In both cases, we must apply the provision of Article 701 which provides: 'The owner of the estate which owes the servitude can do nothing tending to diminish its use, or to make it more inconvenient.' Thus, when the servitude of view is established by prescription, the owner of the servient estate can no longer obstruct the view by building anything. Such is the theory of the Code. . . .

8 C. LAURENT, *supra* note 47, at 84.

49. What is the extent of the charge that burdens the servient estate? But the very nature of the servitude implies that the owner of the servient estate cannot obstruct the view by raising constructions on his estate; according to Article 701 he cannot do anything that diminishes the use of the servitude or that renders it more inconvenient; thus, he cannot build in such a manner as to prevent the owner of the dominant estate from using his right. But in what does this right consist? First of all, to receive light and air, and to look out: the owner of the servient estate may not interfere with the enjoyment of these rights. Does it mean that he cannot build at all? No, because the servitude of view is not the prohibition of building (servitude of prospect), it is not incompatible with the right of the neighbor to build on his property. Nevertheless, this right is restricted by the servitude of view. The difficulty is to determine the precise limits: in what distance from the dominant estate may the owner of the servient estate build? . . . Definitively, there is no legal provision on this point, since Article 678 has another purpose. There remains Article 701, the application of which is a matter of fact.

Id.

Acquisition of Additional Rights by Prescription

The owner of the dominant estate may make a more extensive use of a servitude than that granted by title or established by prescription. In such a case, the question arises whether the owner of the dominant estate may acquire *additional* rights by prescription.

Article 760 of the Louisiana Civil Code declares that a more extensive use of the servitude than that granted by the title does not result in the acquisition of additional rights for the dominant estate "unless it be by acquisitive prescription."[50] This provision refers to apparent servitudes and must be applied in combination with article 740 of the Civil Code[51]—the additional rights acquired can be only extensions of the scope or manner of use of an *apparent* servitude. Thus one who enjoys a servitude of light in a common wall may acquire by prescription the right to have additional openings, and one who enjoys a servitude for passage on foot on a paved road may acquire by prescription the additional right to pass on horseback or in a vehicle.[52] However, one who enjoys a nonapparent servitude, such as a prohibition of light or of view, cannot acquire additional rights by prescription. In all these cases, the additional rights must be themselves susceptible of acquisition by prescription, that is, they must be rights that could form the object of an apparent servitude.

Prescriptive Periods

In Louisiana, the prescriptive periods for the acquisition of an apparent servitude are ten years, if the possessor is in good faith and has just title, and thirty years, if the possessor is in bad faith or has no just title.[53]

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50. LA. CIV. CODE art. 760. This provision is new. It is based in part on article 797 of the Louisiana Civil Code of 1870. It changes the law as it allows acquisition by prescription of additional *apparent* servitudes, even though they might be considered as *discontinuous* under the prior law and therefore insusceptible of acquisition by prescription. There is no corresponding provision in the French Civil Code. However, article 708 of the Code Civil, corresponding with article 796 of the Louisiana Civil Code of 1870, has been interpreted in France to mean that additional *apparent and continuous* servitudes may be acquired by prescription. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 959.

In Poole v. Guste, 261 La. 1110, 262 So. 2d 339 (La. 1972), the court refrained from deciding whether the existence of a conventional servitude precludes the acquisition by prescription of a different or more extensive servitude. The court noted, however, that there is French authority for an affirmative answer to this question and that articles 797 and 800 of the Louisiana Civil Code of 1870 lead to the same answer.

51. *See* LA. CIV. CODE art. 740.

52. *Cf.* LA. CIV. CODE art. 707; 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 959.

53. *See* LA. CIV. CODE art. 742. *Cf.* GREEK CIV. CODE arts. 1121 & 1123 (ten and twenty years); G. BALIS, *supra* note 3, at 324.

For purposes of acquisitive prescription, good faith is defined in article 3480 of the Louisiana Civil Code.[54] As applied to servitudes, this provision requires that the possessor honestly believe that he is entitled to the right he exercises.[55] Good faith is always presumed; accordingly, the person who alleges that the possessor is in bad faith has the burden of proof of his allegation.[56] Whether good faith may exist in the absence of just title is at best questionable; even if good faith does exist, it does not alone suffice for the acquisition of a servitude by the prescription of ten years.[57]

Just title is defined in article 3483 of the Louisiana Civil Code.[58] As applied to servitudes, this provision requires that the possessor have a title that would have established a servitude if it had been granted by the owner of the servient estate. The title should not be confused with the written instrument. For purposes of acquisitive prescription of servitudes, the requisite just title, under the regime of the Louisiana Civil Code of 1870, could be oral, as it was provable by parol evidence.[59]

Under the regime of the Louisiana Civil Code of 1870, controversy existed as to the applicable period of prescription. Article 765 of that code declared that "continuous and apparent servitudes [could] be acquired by title, or by possession of ten years,"[60] and article 3504

54. *See* LA. CIV. CODE art. 3480 (as revised in 1982). *Cf.* LA. CIV. CODE art. 3451 (repealed in 1982):

> The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact; as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which, in fact, belongs to another.

55. *See* Kennedy v. Succession of McCollam, 34 La. Ann. 568 (1882).

56. *See* LA. CIV. CODE art. 3481 (as revised in 1982); Nuckolls v. Louisiana State Highway Dept., 337 So. 2d 313 (La. App. 2d Cir. 1976).

57. *See* LA. CIV. CODE art. 742. It was otherwise under the regime of the Louisiana Civil Code of 1870. According to one line of Louisiana decisions, a predial servitude could be acquired by ten years prescription without just title; only "simple or moral good faith" was necessary. Blanda v. Rivers, 210 So. 2d 161 (La. App. 4th Cir. 1968).

58. *See* LA. CIV. CODE art. 3483 (as revised in 1982). *Cf.* LA. CIV. CODE art. 3484 (repealed in 1982):

> By the term *just title,* in cases of prescription, we do not understand that which the possessor may have derived from the true owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the ownership of the property.

59. *See* Kennedy v. Succession of McCollam, 34 La. Ann. 568 (1882); Guesnard v. Executors of Bird, 33 La. Ann. 796 (1881); Vincent v. Michel, 7 La. 52 (1834); Blanda v. Rivers, 210 So. 2d 161 (La. App. 4th Cir. 1968); Greco v. Frigerio, 3 La. App. 649 (Orl. Cir. 1926).

60. *See* LA. CIV. CODE art. 765 (repealed in 1979). This provision was derived from the 1825 revision. The Louisiana Digest of 1808 provided that "perpetual and apparent

of the same code declared that "a continuous apparent servitude [was] acquired by possession and the enjoyment of the right for thirty years uninterruptedly, even without title or good faith."[61] The interpretation and application of these provisions gave rise to doctrinal arguments and conflicting judicial determinations.[62] According to one line of decisions, a continuous and apparent servitude could be acquired by ten years possession even if the possessor was in bad faith and had no title.[63] This interpretation, in effect, wrote article 3504 out of the Civil Code. According to a second line of decisions, a continuous and apparent servitude could be acquired by ten years possession if the possessor was in good faith, even though he had no title.[64] According to a third line of decisions, the possessor had to have just title and had to be in good faith in order to acquire a servitude by ten years possession; in the absence of either good faith or just title, the servitude could be acquired by thirty years possession only. The third line of decisions, which began with the Louisiana Supreme Court decison in *Kennedy v. Succession of McCollam,*[65] provided the correct interpretation.

In France, the ownership of an immovable may be acquired by

servitudes [could] be acquired by title or by a possession of thirty years." LA. DIGEST OF 1808, bk. II, tit. IV, art. 53. The Louisiana Civil Code of 1825 provided that "continuous and apparent servitudes [could] be acquired by title or by possession of ten years, if the parties [were] present, and twenty years if absent." LA. CIV. CODE art. 761 (1825). The "if" clause was suppressed in the 1870 revision, as was the "twenty years" clause.

61. *See* LA. CIV. CODE art. 3504 (repealed in 1979). This provision was likewise derived from the 1825 revision. See 1 Louisiana Legal Archives, PROJET OF THE CIVIL CODE OF 1825, at 409 (1937). For applications, see Viering v. N.K. Fairbanks Co., 156 La. 592, 100 So. 729 (1924) (post supporting a guywire); Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So. 2d 856 (La. App. 3d Cir. 1965) (irrigation canal).

62. *See* Comment, *supra* note 6. The Louisiana Supreme Court granted an application for writ in the case of Poole v. Guste, 261 La. 1110, 262 So. 2d 339 (1972) to determine this matter. The question, however, was not raised under the facts and pleadings and the court wisely avoided determination by way of dicta. *See* Yiannopoulos, *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Property,* 33 LA. L. REV. 172 (1973).

63. *See* Levet v. Lapeyrollerie, 39 La. Ann. 210 (1887) (drain); Guesnard v. Executors of Bird, 33 La. Ann. 796 (1881) (drain); Vincent v. Michel, 7 La. 52 (1834) (drip); Dugas v. St. Martin Parish Police Jury, 351 So. 2d 271 (La. App. 3d Cir. 1977) (drain); Nuckolls v. Louisiana State Highway Dept. 337 So. 2d 313 (La. App. 2d Cir. 1976) (drain); Johnson v. Wills, 220 So. 2d 134 (La. App. 3d Cir. 1969) (drain); Blanda v. Rivers, 210 So. 2d 161 (La. App. 4th Cir. 1968) (plumbing and other installations); Wild v. LeBlanc, 191 So. 2d 146 (La. App. 3d Cir. 1966) (drain); Hale v. Hulin, 130 So. 2d 519 (La. App. 3d Cir. 1961) (drain); Fuller v. Washington, 19 So. 2d 730 (La. App. 2d Cir. 1944) (sewer).

64. *See, e.g.,* Blanda v. Rivers, 210 So. 2d 161 (La. App. 4th Cir. 1968); *cf.* Nuckolls v. Louisiana State Highway Dept., 337 So. 2d 313 (La. App. 2d Cir. 1976).

65. 34 La. Ann. 568 (1882). *See also* Greco v. Frigerio, 3 La. App. 649 (Orl. Cir. 1926); *cf.* Randazzo v. Lucas, 106 So. 2d 490 (La. App. Orl. Cir. 1958).

prescription in ten, twenty, or thirty years. According to article 2265 of the Code Civil, an adverse possessor in good faith and under just title acquires the ownership of an immovable by prescription in ten years if the real owner resides in the district of the court of appeal in whose jurisdiction the immovable is situated. Ownership is acquired in twenty years if the owner is domiciled out of that district and possession is in good faith and under just title. Further, according to article 2262 of the same code, an adverse possessor acquires the ownership of an immovable by prescription in thirty years regardless of his good faith or just title.

With respect to servitudes, article 690 of the Code Civil declares that continuous and apparent servitudes are acquired by title or by possession of thirty years. There is no provision corresponding to that of article 2265 and no affirmative indication that servitudes may also be acquired in ten or twenty years if the possessor is in good faith and has just title. Article 2265 could, of course, be applied by analogy to servitudes; however, the view has prevailed in France that servitudes may be acquired only by the prescription of thirty years and that the good faith and just title of the possessor are immaterial.[66]

The prevailing view is grounded on a celebrated decision of the Court of Paris which declared that article 690 of the Code Civil was drafted in order to exclude acquisition of servitudes in either ten or twenty years.[67] However, it has been convincingly demonstrated that this was *not* the purpose of article 690. This article was actually adopted in order to abrogate those rules of the Custom of Paris and of the Custom of Orleans according to which no servitude could be acquired without title.[68] The redactors of the Code Civil were thinking merely of the situation in which the servient estate is in the hands of the true owner; the redactors wished to supress the requirement that the possessor of the servitude should have a title. They were not thinking of the situation in which the servient estate is in the hands of an adverse possessor who without right grants a servitude, because under prerevolutionary law, a person who had title from an adverse possessor of the servient estate could acquire the servitude by prescription.

The preferable view is that article 2265 of the Code Civil ought to apply by analogy to the acquisition of a continuous and apparent servitude by prescription. In order to exclude application of this pro-

66. *See* C. AUBRY ET C. RAU, DROIT CIVIL FRANCAIS n° 251 (5th ed. 1900); 12 C. DEMOLOMBE, TRAITE DES SERVITUDES n° 283 (1855); 8 C. LAURENT, *supra* note 48, at 234.

67. Judgment of Aug. 25, 1834, Cour d'Appel, Paris, D.1835.2.1, S.1835.2.134.

68. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 965.

vision by analogy, exception ought to have been established by an express legislative text. Moreover, there is no rational justification for application of the prescription of ten or twenty years to ownership but not to its dismemberments.[69]

Requisite Possession for Prescription

For the acquisition of servitudes by prescription, article 742 of the Louisiana Civil Code requires either "peaceable and uninterrupted possession . . . for ten years in good faith and by just title" or "uninterrupted possession for thirty years without title or good faith."[70] However, these are not the only attributes of the requisite possession. The first sentence of article 742 declares that the laws governing prescription of immovables apply to apparent servitudes; thus the attributes of possession are those of article 3475 for the ten-years prescription and those of article 3486 for the thirty-years prescription.[71] In all cases, the possessor must have the *corpus* and the *animus*;[72] the possession must be uninterrupted, and the possession must be free of vice, that is, it must be continuous, public, peaceable, and unequivocal.[73]

Moreover, the possession must be *adverse*; it must be an unauthorized use that infringes on the ownership of the servient estate. One who merely exercises a right has nothing to prescribe.[74] Thus one who makes an opening in his own wall acquires neither a servitude of light nor a servitude of view, because he merely exercises a prerogative of ownership.[75] He may be forced to close the opening if the neighbor exercises his right to make the wall common.[76] However, if a co-owner of a common wall makes openings in the wall, he infringes on the rights of his co-owner;[77] if the openings are allowed to remain for over thirty years, he acquires by prescription a servitude of light or a servitude of view.[78]

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69. *Id.* at n° 965.

70. LA. CIV. CODE art. 742.

71. *See* LA. CIV. CODE arts. 3475 & 3486 (as revised in 1982); LA. CIV. CODE arts. 3487 & 3500 (repealed in 1982).

72. LA. CIV. CODE art. 3424 (as revised in 1982); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 211 (2d ed. 1980); 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 960.

73. *See* LA. CIV. CODE arts. 3434 & 3435 (as revised in 1982).

74. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 960.

75. See text at notes 30 & 36, *supra*.

76. *See* Yiannopoulos, *Common Walls, Fences, and Ditches: Louisiana and Comparative Law*, 35 LA. L. REV. 1249, 1281 (1975).

77. *Id. See* LA. CIV. CODE art. 681.

78. *See* LA. CIV. CODE arts. 740 & 3486 (as revised in 1982).

Precariousness

One who exercises possession over a thing on behalf of another or with the permission of the owner is a precarious possessor.[79] Such a possessor may acquire neither ownership nor a servitude by prescription. Thus one who uses a servitude of passage by virtue of a lease granted to him by the owner of the dominant estate may not acquire by prescription the servitude of passage for himself, and one who uses an aqueduct with the express or tacit permission of the owner of the estate on which the aqueduct is located may not, by prescription, acquire a servitude of aqueduct. The owner of the estate on which the passage or aqueduct is located may tolerate certain invasions in the spirit of good neighborhood or in the pursuit of his own interests; in neither case is he presumed to have consented to a servitude. Moreover, the person who encroached on the rights of the landowner with his express or tacit permission does not have the intent to acquire a servitude; he implicitly recognized that the ownership of the estate is unencumbered and that prescription does not run in his favor.[80]

Article 3490 of the Louisiana Civil Code of 1870, corresponding with article 2322 of the French Civil Code, declared that acts of simple tolerance could not be the foundation of either possession or

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79. *See* LA. CIV. CODE arts. 3437, 3438 & 3477 (as revised in 1982); FRENCH CIV. CODE art. 2236; McCormick v. La. & N.W. R. Co., 109 La. 764, 33 So. 762 (1903) (license to occupy land for railroad purposes; no servitude); Macheca v. Avegno, 20 La. Ann. 339 (1868) (drain); Macheca v. Avegno, 25 La. Ann. 55 (1873) (drain). *But see* Blanda v. Rivers, 210 So. 2d 161 (La. App. 4th Cir. 1968). In this case, the court erroneously held that installations on a common wall, made with the permission of a co-owner, resulted in the acquisition of a servitude by prescription. The holding was founded on the assumption that "the precariousness of title based upon permission referred to in this article [3490 of the 1870 Code], applicable to ownership, cannot by analogy be extended to predial servitudes." 210 So. 2d at 166.

Under certain circumstances, the "permission" of the owner of the servient estate could be, in reality, an oral title for the creation of a servitude. See Greco v. Frigerio, 3 La. App. 649 (Orl. Cir. 1926). Such a title was provable by parol evidence.

See also 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 960; Judgment of Dec. 20, 1871, Dijon, S.1872.2.72; Judgment of Dec. 20, 1906, Besancon, S.1907.2.298.

80. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 961. A precarious possessor may change the nature of his possession by taking a title from a third person. *See* LA. CIV. CODE art. 3478 (as revised in 1982); FRENCH CIV. CODE art. 2238. However, according to French doctrine and jurisprudence, article 2238 of the Code Civil does not apply to the precarious possessor of a servitude. *See* 3 M. PLANIOL ET G. RIPERT, *supra;* 25 G. BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 222 (Tissier 3d ed. 1905); 2 C. AUBRY ET C. RAU, DROIT CIVIL FRANCAIS § 136 (7th ed. Esmein 1961) in C. LAZARUS, 5 CIVIL LAW TRANSLATIONS 83 (1966).

prescription.[81] The purpose of this self-evident provision is to maximize the use of immovable property in the general interest. If acts of simple tolerance were to be considered as acts of adverse possession, landowners would be compelled to object to innocent or occasional invasions for fear that their lands would be burdened with predial servitudes.

The vice of precarious possession is relative. Thus one's possession may be precarious vis-a-vis the owner who has tacitly or expressly given permission for the use of his estate but it may be adverse toward third persons.[82]

Acquisition by Prescription of Ownership or of Servitude

An adverse possessor of a part or of the whole of an estate may acquire by acquisitive prescription ownership or merely a servitude. Thus one who uses a part of the estate of another as a passage may acquire either the ownership of the strip of land or a servitude of passage; one who uses an estate for the grazing of cattle may acquire the ownership of that estate or merely a servitude of pasturage. Whether ownership or a servitude is acquired by prescription depends on the particular facts and circumstances.

When one possesses under a title, the right he acquires is determined by the title. If the title is translative of ownership, the adverse possessor acquires the ownership of the land he has possessed; if the title purports to establish a servitude, the adverse possessor acquires a servitude. In the latter case, the adverse possessor of the servitude is regarded as a precarious possessor vis-a-vis the owner of the servient estate;[83] therefore, unless he changes the nature of his posses-

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81. *See* LA. CIV. CODE art. 3490 (repealed in 1982). This provision declared: "The circumstances of having been in possession by the permission or through the indulgence of another person, gives neither legal possession nor the right of prescribing." Plenty has been lost in the translation from the French text of article 3456 of the Louisiana Civil Code of 1825, which was identical to article 2232 of the Code Napoleon. Article 2232 stated, "Les acts de pure faculte, et ceux de simple tolerance, ne peuvent fonder ni possession ni prescription" (acts that are the exercise of a prerogative, and those of simple tolerance, cannot be the foundation of either possession or prescription).

82. *See* Judgment of March 6, 1855, Cass. civ. 1re, D.1855.1.82, S.1855.1.507; Judgment of Jan. 3, 1877, Cass. Req., D.1877.1.14; 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 961. *But see* 25 G. BAUDRY-LACANTINERIE, *supra* note 80, n° 221.

83. *See* John T. Moore Planting Co. v. Morgan's La. & T.R. & S.S. Co., 126 La. 840, 854, 53 So. 22, 32 (La. 1910):

> The person enjoying a servitude is a precarious possessor. No matter how numerous may be the acts done by him animo domini, they cannot serve to show

sion by overt and unambiguous acts that are sufficient to give notice to the owner, he cannot acquire the ownership of the estate by prescription.[84]

However, one who has possessed a part of the whole of the estate of another without title for thirty years will normally claim that he has acquired ownership. If he were to claim that he had acquired a servitude only, that servitude would have to have been apparent, and under the regime of the Louisiana Civil Code of 1870, it would have to have been *continuous and apparent.* Nonapparent servitudes cannot, and under the regime of the Louisiana Civil Code of 1870 nonapparent or discontinuous servitudes could not, be acquired by prescription.[85]

In France, the nonavailability of prescription as to discontinuous or nonapparent servitudes has had an unexpected result. Courts may not declare that an adverse possessor has acquired by prescription a servitude of passage, a servitude of pasturage, or a servitude for the taking of water because such servitudes are discontinuous. However, courts may declare, and usually do, that an adverse possessor has acquired the ownership of the land he has used for more than thirty years for passage, for pasturage, or for the taking of water.[86]

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possession of the fee when the proof is made that the possession began by virtue of a title which conferred only a right of servitude.

In Thevenet v. Clause, 302 So. 2d 649 (La. App. 3d Cir. 1974), holders of a right of way servitude claimed that they possessed the land as owners. The court held tersely that the acts of possession exercised by plaintiffs and their ancestors in title were "consistent with their recorded title to a servitude of passage." In Journet v. Gerard, 173 So. 2d 263, 267 (La. App. 3d Cir. 1965), the court declared that the acts of possession were little more than the exercise of rights under the servitude, and in all probabilities appeared to the owners of the land "as only a use of the servitude." *See also* Culligan Water Conditioning, Inc. v. Heirs of Watson, 370 So. 2d 129 (La. App. 2d Cir. 1979) (railroad right of way; no adverse possession of ownership).

84. *See* John T. Moore Planting Co. v. Morgan's La. & T.R. & S.S. Co., 126 La. 840, 857, 53 So. 22, 34 (La. 1910):

> The precarious possessor who acquires a title from a third person and desires no longer to hold precariously but animo domini, cannot content himself with simply continuing the old possession, without outward change, and rely simply upon the bare fact of his new title and of its registry to inaugurate a new possession. He must give some outward sign, of a nature to let the owner know of the intention to put an end to the old order and inaugurate the new.

85. See text at note 7, *supra.*

86. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 957; Judgment of Feb. 7, 1883, Cass. Req. D.1884.1.128, S.1884.1.320; Judgment of May 1, 1888, Cass. Req., D.1888.1.219, S.1890.1.439; Judgment of Oct. 22, 1924, Cass. Civ. 1re, Gaz. Pal. 1924.2.695. *See also* 3 C. AUBRY ET C. RAU, *supra* note 66, n° 251.1.

CREATION OF SERVITUDES BY DESTINATION OF THE OWNER

Definition of Destination

Destination of the owner is a mode of creation of servitudes arising out of the relationship between two parts of the same estate or between two estates owned by the same person that would be an apparent servitude if there were two estates belonging to different owners.[87] As long as there is only one owner, there can be no servitude, because no one may have a servitude on his own property—*neminem rea sua servit.*[88] However, when the single estate is divided or when the two estates cease to belong to the same owner, a predial servitude may be created without an express agreement. This mode of creation of servitudes forms the topic of the following discussion.

Nature of Destination

The destination of the owner appears to be a distinct mode for the creation of apparent servitudes. However, according to French doctrine, it is considered to be merely a variation of the creation of servitudes by title.

The creation of servitudes by destination of the owner is grounded on the idea that when the owner of two estates transfers one of them to another person, there is a tacit agreement between the parties that the existing relationship between the estates will be maintained.[89] The law simply recognizes and enforces this tacit agreement that is the equivalent of a title.[90] This explanation of destination conforms to historical precedents of the institution,[91] accounts for the jurisprudential requirement that the common owner of the two estates must have the intent to establish a servitude,[92] and generally reflects the inter-

87. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 965; Marie-France Mialon, La Servitude par destination du pere de famille, D.1974.Chr.15; Comment, *Establishment of Servitudes by Destination,* 8 LA. L. REV. 560 (1948).

88. *See* Yiannopoulos, *Predial Servitudes; General Principles: Louisiana and Comparative Law,* 29 LA. L. REV. 1, (1968).

89. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 966; Judgment of Apr. 9, 1900, Cour d'appel, Agen, D.1907.2.196.

90. Article 767 of the Louisiana Civil Code of 1870, which was identical to article 692 of the French Civil Code, declared that, with respect to continuous and apparent servitudes, "the destination made by the owner [was] equivalent to title." This language has not been reproduced in the 1977 revision; however, the nature of destination has not changed.

91. *See* CUSTOM OF PARIS art. 91 (1510); *but cf.* CUSTOM OF PARIS art. 216 (1580).

92. *See* Judgment of Apr. 15, 1872, Cass. Req., D.1872.1.415, S.1873.1.146; Judgment of June 19, 1893, Cass. Req., D.1893.1.526, S.1893.1.340; Judgment of May 8, 1895, Cass. Civ., S.1895.1.272; Judgment of Dec. 3, 1901, Cass. Req., D.1902.1.267. *Cf.* note 118, *infra.*

pretation given by French courts to article 694 of the Code Civil.[93]

In Louisiana, article 741 of the Civil Code declares that when the two estates between which there is a relationship of destination cease to belong to the same owner, an apparent servitude comes into existence of right "unless there is express provision to the contrary."[94] This language expresses the traditional idea that the creation of a predial servitude by destination is grounded on a tacit agreement, which, of course, may be rescinded by express provision to the contrary. As to nonapparent servitudes, article 741 of the Louisiana Civil Code requires a formal declaration by the owner.[95] Creation of the nonapparent servitude is subject to the suspensive condition that the two estates shall cease to belong to the same owner. As soon as the condition happens, the servitude is created by title.

Kinds of Destination

In France, the destination of the owner is always informal. That is, the relationship between the parts of the same estate or between the two estates is established without any formal act. In Louisiana, however, the destination of the owner may be either formal or informal.

A formal destination is established by a declaration filed for registry in the conveyance records of the parish in which the immovable property is situated.[96] An informal destination is established by means of exterior signs that are sufficient to indicate the existence of the relationship between the parts of the same estate or between the two estates and the intent of the owner to establish a servitude.[97]

Servitudes Created by Destination

Under the regime of the Louisiana Civil Code of 1870, only continuous and apparent servitudes could be created by destination of the owner.[98] Today, however, both apparent and nonapparent ser-

93. *See* FRENCH CIV. CODE art. 694; *cf.* LA. CIV. CODE art. 769 (repealed in 1977).

94. LA. CIV. CODE art. 741 (as revised in 1977 and amended by 1978 La. Acts, No. 479). For a decision on the question of whether the title of the *dominant* estate is merchantable, see Papalia v. Harrison, 52 So. 2d 775 (La. App. Orl. Cir. 1951).

95. *See* LA. CIV. CODE art. 739 (as revised in 1977 and amended by 1978 La. Acts, No. 479). The requirement of title under article 739 includes expressly a declaration of destination under article 741.

96. *See* LA. CIV. CODE art. 741 (as revised in 1977 and amended by 1978 La. Acts, No. 479).

97. See text at note 115, *infra*.

98. *See* LA. CIV. CODE arts. 767-769 (repealed in 1977); Lotz v. Hurwitz, 174 La. 638, 141 So. 83 (1932); Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905); Taylor v. Boulware, 35 La. Ann. 469 (1883); Cleris v. Tieman, 15 La. Ann. 316 (1860); Lavillebeuvre v.

vitudes may be so created, and the classificaton of a servitude as discontinuous under the prior law is immaterial.

In the absence of a contrary agreement, an apparent servitude comes into existence of right as soon as two estates or two parts of the same estate between which there is a relationship of destination cease to belong to the same owner.[99] A nonapparent servitude likewise comes into existence in the absence of a contrary agreement when two estates or two parts of the same estate cease to belong to the same owner, *if* that owner has taken care to file for registry in the appropriate public records a formal declaration establishing the destination.[100]

Article 741 of the Louisiana Civil Code may be taken to mean that only a nonapparent servitude may be created by a formal destination, but there is no reason for such a restrictive interpretation. Apparently, the redactors of this provision, thinking that an apparent servitude would come into existence of right, felt that a formal declaration of destination was unnecessary. An owner, however, has a legitimate interest in avoiding uncertainty. Thus he may file a formal declaration designed to establish an apparent servitude in the future.

In France, only apparent servitudes, whether continuous or discontinuous, may be created by destination of the owner.[101] In Germany, the Civil Code contains no provision dealing with destination of the owner, and doubts existed in the past as to whether a predial servitude could be created[102] without an agreement.[103] However, in the light of practical necessity, German courts have dispensed with the requirement of agreement and have enforced unilateral juridical acts

Cosgrove, 13 La. Ann. 323 (1858); Durel v. Boisblanc, 1 La. Ann. 407 (1846); Alexander v. Boghel, 4 La. 312 (1832); Efner v. Ketteringham, 41 So. 2d 130 (La. App. 2d Cir. 1949). Discontinuous servitudes, such as servitudes of passage, could not be established by destination. *See* Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932); Fisk v. Haber, 7 La. Ann. 652 (1852); Williams v. Colomb, 206 So. 2d 104 (La. App. 4th Cir. 1968); Kelly v. Pippitone, 12 La. App. 635, 126 So. 79 (Orl. Cir. 1930). For doctrinal controversies concerning the requirements of destination under the prior law, see Comment, *supra* note 87.

99. *See* LA. CIV. CODE art. 741 (as revised in 1977 and amended by 1978 La. Acts, No. 479).

100. LA. CIV. CODE art. 741. The declaration of destination may be cancelled, of course, by the owner of the estate prior to the transfer of the estate or of a part of it to another person; it may also be cancelled at any time by agreement.

101. *See* FRENCH CIV. CODE arts. 692-694; 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 967-972.

102. *See* Regelsberger, *Gesetz und Rechtsanwendung,* 58 JHERINGS JAHRBUECHER 146, 161 (1911).

103. Judgment of Jan. 26, 1901, Reichsgericht in Zivilsachen, Hamburg, 1901 [R.G.Z.] 47, 202, 204; Oberlandes-gericht Hamburg, [O.L.G.] 1, 427. *Cf.* O. GIERKE, *supra* note 21, at 641.

establishing servitudes on one's own immovable.[104] Doctrinal writers have overwhelmingly approved of the solution reached by the German courts.[105] In Greece, servitudes may be created either by title or by prescription and no one can have a servitude on his own immovable. However, the intent to establish a servitude by title may be tacit. Thus, in Greece, when the owner of two contiguous tracts that are served by the same construction sells one of the tracts to another person, a servitude may be created without express agreement.[106] In such a case, the result resembles the creation of a servitude by destination of the owner.

Unity of Ownership; Causes of Separation

For servitudes to be created by destination of the owner, the dominant estate and the servient estate must have belonged in the past to the same person.[107] This may be proven by all sorts of evidence, including oral testimony.[108]

According to well-settled French doctrine and jurisprudence, an owner may establish a relationshp of destination between two separate estates or between two parts of the same estate. Thus the owner of an estate may establish a charge on a part of his estate in favor of another part, and he may create a servitude by destination upon transfer of one of the parts to another person.[109] This reasoning should be applicable in Louisiana also, as witnessed by the fact that article 741 of the Civil Code speaks of "the owner *of the immovable.*"[110]

104. *See* Judgment of Nov. 14, 1933, Amtsgericht Bargteheide, 1933 [R.G.Z.] 142, 231, 234.

105. *See* O. VON GIERKE, DAS SACHENRECHT DES BURGERLICHEN RECHTS 142 (4th ed. 1959); J. HEDEMANN, SACHENRECHT DES BURGERLICHEN GESETZBUCHES 249 (3d. ed. 1960); 3 H. SOERGEL-SIEBERT-BAUR, KOMMENTAR ZUM B.G.B. 376 (9th ed. 1960); 3.2 J. VON STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1030 (11th ed. 1963); H. WESTERMANN, SACHENRECHT 608 (4th ed. 1960); WOLFF-RAISER, *supra* note 4, at 441.

106. *See* G. BALIS, *supra* note 3, at 322.

107. *See* Barton v. Kirkman, 5 Rob. 16 (1843). Article 768 of the Louisiana Civil Code of 1870 expressly required proof that in the past, the two estates had "belonged to the same owner." This provision has not been reproduced in the 1977 revision. However, there has been no change in the law. It should be evident that "there is no destination under article 741 of the Civil Code unless there is proof that the two estates belonged to the same owner." LA. CIV. CODE art. 741, comment (b) (as revised in 1977 and amended by 1978 La. Acts, No. 479).

108. *See* Rozier v. Maginnis, 12 La. Ann. 108 (1857); 3 C. AUBRY ET C. RAU, *supra* note 66, n° 252; 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 967.

109. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 967; Judgment of Nov. 17, 1847, Cass. Civ., S.1848.1.30; Judgment of April 7, 1863, Cass. Req., S.1863.1.369; 3 C. AUBRY ET C. RAU, *supra* note 66, at n° 252.

110. LA. CIV. CODE art. 741(2) (as revised in 1977 and amended by 1978 La. Acts, No. 479) (emphasis added). *See also* Hebert v. Champagne, 144 La. 659, 81 So. 217 (1919); Rozier v. Maginnis, 12 La. Ann. 108 (1857).

It is not necessary for the creation of a servitude by destination of the owner that the dominant estate and the servient estate be contiguous.[111] It suffices that the two estates are in such proximity that the dominant estate may derive some utility from the charge on the servient estate.

The cause by which the dominant and the servient estate cease to belong to the same owner is immaterial. The owner may alienate one of the two estates voluntarily, an estate may be partitioned by the heirs or legatees of the owner, or there may be a judicial sale or expropriation of an estate or of a part of it.[112] Further, according to French doctrine and jurisprudence, a servitude may be created by destination when the two estates cease to belong to the same owner because an adverse possessor has acquired the ownership of one of them by acquisitive prescription.[113]

Exterior Sign of Servitude

For the creation of a servitude by destination of the owner, there must be a relationship between two estates or two parts of the same estate that would be a servitude if there were two different owners.[114] In the case of a formal destination, the relationship is established by the recordation of the declaration. In the case of an informal destination, the relationship is established by exterior signs on either the dominant estate or the servient estate.[115] Article 769 of the Louisiana Civil Code of 1870 expressly required "an apparent sign of servitude"[116] between the two estates. This language has not been reproduced in the 1977 revision. However, there is no change in the law. Article 741 indicates clearly that in the absence of a formal declaration, only *apparent* servitudes may be created by destination of the owner, namely, servitudes "perceivable by exterior signs, works, or constructions."[117]

111. *See* Judgment of Feb. 9, 1885, Cour d'appel, Pau, 1885, D.1886.2.173.

112. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 971; 5 G. BAUDRY-LACANTINERIE, *supra* note 24, n° 1118.

113. *Id.;* 3 C. AUBRY ET C. RAU, *supra* note 66, n° 252.

114. *See* LA. CIV. CODE art. 741(1) (as revised in 1977 and amended by 1978 La. Acts, No. 479).

115. *See* Judgment of April 2, 1954, Cass. Req., D.1854.1.272, S.1855.1.117; 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 968.

116. LA. CIV. CODE art. 769 (repealed in 1977); FRENCH CIV. CODE art. 694.

117. LA. CIV. CODE art. 707.

A servitude by which a building is permitted to encroach on neighboring property is apparent and may be created by destination of the owner. *Cf.* Carlon v. Marquart, 10 So. 2d 246 (La. App. Orl. Cir. 1942). Likewise, a servitude for the maintenance of a building on the property of another person is apparent. *See* Woodcock v. Baldwin, 51 La. Ann. 989, 26 So. 46 (1899); Lovecchio v. Graffagnini, 90 So. 2d 694 (La. App.

According to French doctrine and jurisprudence that ought to be pertinent for Louisiana, the exterior sign must be characteristic of the particular kind of servitude that the owner of the dominant estate claims and it must also be indicative of the intent of the former owner to establish the servitude.[118] Further, the sign must exist at the time of separation of the dominant estate from the servient estate and it must be of a nature to support the idea of a tacit agreement for the creation of the servitude. Works made for the personal convenience of the owner of an estate and, in general, works that are not indicative of an intent to establish a servitude do not meet this requirement.[119]

For both formal and informal destination, the relationship between the two estates or between the parts of the same estate must be established or at least maintained by the owner.[120] Personal action by the owner is not required; action by a mandatary or other representative suffices. A lessee, a tenant farmer, or a usufructuary does not represent the owner and may not establish a destination between two estates or between parts of the same estate.

An owner under a resolutory condition may establish a servitude by destination, but the servitude is extinguished upon the dissolution of his right.[121] A co-owner may not establish a destination between two parts of an estate that is held in indivision. Thus despite the existence of exterior signs of servitude that have been erected by

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Orl. Cir. 1956) (servitude for the maintenance of a storeroom on the property of another). Such a servitude, though discontinuous under the prior law, may now be acquired by destination of the owner.

118. *See* Judgment of July 9, 1867, Cass. Civ., S.1867.1.323; Judgment of April 15, 1872, Cass Req., D.1872.1.415, S.1873.1.146; Judgment of June 19, 1893, Cass. Req., D.1893.1.526, S.1893.1.340; Judgment of May 8, 1895, Cass. Civ., S.1895.1.272. *See also* Gottschalk v. De Santos, 12 La. Ann. 473 (1857).

119. *See* Judgment of July 15, 1875, Cass. Req., D.1877.1.127, S.1875.1.419; Judgment of March 7, 1876, D.1878.1.69, S.1876.1.204. *See also* Barton v. Kirkman, 5 Rob. 16 (1843). Article 768 of the Louisiana Civil Code of 1870 indicated that the intention to establish a servitude by destination could be presumed upon proof that the two estates had belonged to the same owner and that exterior signs of servitude were erected by that owner. This provision has not been reproduced in the 1977 revision. The intent to establish a destination is no longer presumed; the court is free to draw the appropriate inferences from proof that the two estates belonged in the past to the same owner and that he erected the exterior signs of servitude.

120. *See* 3 C. AUBRY ET C. RAU, *supra* note 66, n° 252; 5 G. BAUDRY-LACANTINERIE, *supra* note 24, n° 585. Article 768 of the Louisiana Civil Code of 1870 required proof that the exterior signs of servitude were erected by the former owner. This provision has not been reproduced in the 1977 revision. However, it should be evident that there is no destination under article 741 of the Civil Code unless there is proof that the exterior signs were erected by the former owner.

121. *See* LA. CIV. CODE art. 774.

a co-owner, no servitude comes into existence upon partition of the property.[122] This is a consequence of the qualification of partition as a declarative act.

OTHER MODES OF CREATION OF SERVITUDES

Expropriation; St. Julien Doctrine

Conventional servitudes may also be created in civil law systems by modes not regulated in civil codes. One such mode is the expropriation of a servitude for public utility.[123]

Ordinarily, entities having the power of expropriation enjoy discretion to expropriate the ownership of immovable property or to expropriate merely a servitude.[124] When a servitude is expropriated, the owner of the immovable property is entitled to receive an indemnity for the value of the servitude taken[125] plus severance damages.[126] The servitude established by expropriation may be permanent or temporary.[127]

When land sought to be expropriated is burdened with a servitude, the expropriating authority must expropriate both ownership and servitude. The person entitled to the servitude is a necessary party to

122. *See* 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 969.

123. *See, e.g.,* LA. R.S. 12:428 (Supp. 1968); LA. R.S. 19:1 (Supp. 1975); LA. R.S. 45:254 (1950); M. DAKIN & M. KLEIN, EMINENT DOMAIN IN LOUISIANA (1970); Comment, *Expropriation—A Survey of Louisiana Law,* 18 LA. L. REV. 509, 533-536 (1958). For France, see 3 M. PLANIOL ET G. RIPERT, *supra* note 9, n° 338-340. For Germany, see H. WOLFF-RAISER, *supra* note 3, at 444; 3.2 J. VON STAUDINGER-RING, *supra* note 105, at 1044. For Greece, see G. BALIS, *supra* note 3, at 186.

124. *See, e.g.,* LA. R.S. 48:217 (Supp. 1955 & 1970). Such servitudes are ordinarily established in favor of a person rather than an estate; accordingly, they are limited personal servitudes rather than predial servitudes. The rules governing predial servitudes apply by analogy to limited personal servitudes. *See* A. YIANNOPOULOS, PERSONAL SERVITUDES § 119 (2d ed. 1978).

125. For valuation, see Central Louisiana Elec. Co. v. Fontenot, 159 So. 2d 738 (La. App. 3d Cir. 1964):

> It has been established that where only a servitude or easement is expropriated, and the landowner will continue to have some use of the property included within the right of way, the servitude taken should be valued at a percentage of the fee value of the land and not at its full value. . . However, where the expropriation of a servitude completely destroys the suitability of the land for the purposes for which it is best suited, it is proper to award the landowner the full fee value even though merely a servitude is expropriated.

Id. at 741.

126. *See* Michigan Wisconsin Pipe Line Co. v. Bonin, 217 So. 2d 741 (La. App. 3d Cir. 1969); Michigan Wisconsin Pipe Line Co. v. Sugarland Dev. Corp., 221 So. 2d 593 (La. App. 3d Cir. 1969).

127. *See* State v. Cefalu, 233 So. 2d 273 (La. App. 1st Cir. 1970).

the expropriation proceedings[128] and has a right to an indemnity for the taking of his property.[129] When the land sought to be expropriated is subject to a recorded lease, the leasehold interest must likewise be expropriated.[130] If there is an unrecorded lease, the indemnity of expropriation is apportioned between the lessor and the lessee in proportion to the value of the interest of each.[131] In such a case, there is no separate expropriation of the leasehold interest.

In Louisiana, servitudes may not be created by estoppel.[132] However, in the past a judicially created estoppel, known as the *St. Julien* doctrine, allowed entities having power of expropriation to acquire servitudes by unopposed use and possession of another's land for some public purpose.[133] The landowner could sue for the value of the servitude taken,[134] but not for damages or for the removal of works.

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

129. *See* Arkansas Louisiana Gas Co. v. Louisiana Dept. of Highways, 104 So. 2d 204 (La. App. 2d Cir. 1958).

130. *See* State v. Holmes, 221 So. 2d 811 (La. 1969); Columbia Gulf Transmission Co. v. Hoyt, 252 La. 921, 125 So. 2d 114 (1968).

131. Michigan Wisconsin Pipe Line Co. v. Walet, 225 So. 2d 76 (La App. 3d Cir. 1969).

132. *See* Greene v. Greene, 373 So. 2d 756 (La. App. 3d Cir. 1979); United Gas Pipeline Co. v. Bellard, 286 So. 2d 109 (La. App. 3d Cir. 1973); Prentice v. Amax Petroleum Corp., 220 So. 2d 783 (La. App. 1st Cir. 1969).

133. The doctrine was named after its parent case—St. Julien v. Morgan's La. & Tex. Ry. Co., 35 La. Ann. 924 (1883). In Doll v. Sewerage & Water Board of New Orleans, 43 So. 2d 271, 273 (La. App. Orl. Cir. 1949), the court designated the servitude as "extra-codal." In Veillon v. Columbia Gulf Transmission Co., 192 So. 2d 646, 648 (La. App. 3d Cir. 1966), the servitude was labelled the "St. Julien servitude." For the reasons why Louisiana courts developed the doctrine, see Harrison v. Louisiana Power & Light Co., 288 So. 2d 37, 40 (1974) ("Since a public utility has the right of expropriation, allowing retention of the property taken extra-legally, upon payment of just compensation merely avoids an eviction and subsequent reacquisition by expropriation."). *See also* Istre v. South Central Bell Tel. Co., 329 So. 2d 486, 491 (La. App. 3d Cir. 1976) ("The St. Julien doctrine is founded on public policy and natural equity, to prevent one who by silence acquiesces in a taking for a public purpose from thereafter disrupting or making unduly burdensome the use for such a purpose.").

For acquisition of a servitude by the St. Julien doctrine, there was no need for a prescriptive period. Occupancy of the land with the knowledge, consent, or acquiescence of the owner sufficed. Doll v. Sewerage and Water Board of New Orleans, 43 So. 2d 271, 273 (La. App. Orl. Cir. 1949).

134. *See* Taylor v. New Orleans Terminal Co., 126 La. 420, 52 So. 562 (1910); State Dept. of Highways v. Poole, 243 So. 2d 539 (La. App. 1st Cir. 1970). The action for recovery of the value of the servitude was subject to a ten-year prescriptive period. *See* Brewer v. Yazoo & M.V.R. Co., 128 La. 544, 54 So. 987 (1911); McCutchen v. Texas, P. Ry. Co., 118 La. 436, 43 So. 42 (1907). *But cf.* LA. CIV. CODE art. 2630; LA. R.S. 9:5624 (1950) & 19:2.1 (Supp. 1974); Brooks v. New Orleans Public Service, Inc., 370 So. 2d 686 (La. App. 4th Cir. 1979), *cert. denied*, 373 So. 2d 512 (1979).

The action for the value of the servitude taken is *personal*. A subsequent purchaser

In *Lake, Inc. v. Louisiana Power & Light Co.*, the Louisiana Supreme Court prospectively overruled the line of decisions establishing the *St. Julien* doctrine.[135] The court gave convincing reasons for the abandonment of the "deviant and conflicting" jurisprudence generated by the doctrine and for "return to the Civil Code provisions governing the establishment of servitudes."[136]

Subsequently, the Louisiana legislature enacted Act No. 504 of 1976.[137] The act provides that when the state, its political subdivisions, or private corporations having power of expropriation take, in good faith, possession of the immovable property of another person and construct on, under, or over its facilities with the consent or acquiescence of the landowner, a presumption arises that the landowner waived his right to receive just compensation prior to the taking; in such a case, the landowner's remedy is an action for determination of whether the taking was for a public and necessary purpose and for just compensation. The act did not overrule legislatively the *Lake* decision. Thus the *St. Julien* doctrine is not resurrected; it merely feeds on servitudes established prior to *Lake*.[138]

CONCLUSION

The provisions of the Louisiana Civil Code governing the creation of predial servitudes by acquisitive prescription and destination of the owner were revised in 1977. The preceding analysis has demonstrated that the revision did not depart in any way from the civilian tradition. The revised articles of the Louisiana Civil Code continue, for the most part, to relate to the provisions of the Louisiana Civil Codes of 1870, 1825, and 1808, and to the corresponding provisions of the Napoleonic Code. Thus, prior Louisiana jurisprudence and doctrine, as well as French jurisprudence and doctrine, continue to

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of the land has no right of action for indemnity in the absence of express assignment. Rogers v. Louisiana Power & Light Co., 391 So. 2d 30 (La. App. 3d Cir. 1980).

135. 330 So. 2d 914 (La. 1976). *See* Rogers v. Louisiana Power & Light Co., 391 So. 2d 30 (La. App. 3d Cir. 1980); State v. Champagne, 371 So. 2d 626 (La. App. 1st Cir. 1979); Note, *The Fall and Rise of the St. Julien Doctrine*, 22 LOY. L. REV. 1066 (1976); *cf.* Sutherland, *Two Decisions in Search of a Reversal*, 24 LA. B.J. 31 (1976).

136. 330 So. 2d at 918.

137. *See* 1976 La. Acts, No. 504 (now LA. R.S. 19:14). For a commentary, see *Legislative Symposium: Expropriation*, 37 LA. L. REV. 147-150 (1976). *Cf.* Willis v. Southwest La. Elec. Membership Corp., 357 So. 2d 1313 (La. App. 3d Cir. 1978) (acquisition of servitude under LA. R.S. 12:428).

138. *See* Yiannopoulos, The Work of the Louisiana Appelate Courts for the 1975-1976 Term—Property, 37 LA. L. REV. 327 (1977); Note, *Property-Expropriation-Demise and Resurrection of the St. Julien Doctrine*, 51 TUL. L. REV. 375 (1977).

be relevant for the interpretation and application of the new legislation.

Changes in the law have been interstitial. They have been made in the light of contemporary needs and demands. An important change in the law has resulted from the suppression of the distinction of servitudes into continuous and discontinuous. According to Article 742, *all* apparent servitudes may be acquired by prescription. The revision has thus broadened the availability of acquisitive prescription by dispensing with the requirement of continuity. Another change in the law is the extension of the destination of the owner to nonapparent servitudes by means of a prerecorded juridical act. The last significant improvement in the law is the clarification of the requirements for the acquisitive prescription of ten years and thirty years.

For the rest, the revised articles of the Louisiana Civil Code in this field will not be interpreted and applied in isolation but against the background of the entire Civil Code, special legislation, jurisprudence, and doctrine.