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## REAL RIGHTS IN LOUISIANA AND COMPARATIVE LAW: PART II

A. N. Yiannopoulos\*

### D. *Real obligations*

“Obligations” and “real rights” are distinct and distinguishable analytical categories in civil law. In the Louisiana Civil Code, however, the clarity of concepts is blurred by the category of obligations termed “real.”<sup>366</sup> The juridical nature of these “real obligations” and their relation to personal or real rights are the subject of the following discussion.

*Source Material.*—Obligations are distinguished in the Louisiana Civil Code into “strictly personal, heritable, and real.”<sup>367</sup> This classification, and the substantive provisions governing real obligations, have no equivalent in the French Civil Code or in the Louisiana Civil Code of 1808. They were first adopted in the 1825 Code on the recommendation of the redactors. The sources from which these provisions were taken were not cited but it was indicated that:

“The whole of this section is an addition to the Code. The distinction it establishes are [sic] important in the administration of justice. The principles on which it is founded have been long established in the civil law. The writers, however, who have been consulted establish only two kinds of obligations with respect to their effects on person or property, they call personal obligations, those we have designated as such, but confound those which pass to the representatives and those which are attached solely to real property under the common division of real obligations. We have distinguished them by calling the last, as they do *real* obligations, but distinguishing those which descend to representatives by the designation of *heritable* obligations; a division which was the more necessary, as *heritable* and real obliga-

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366. LA. CIVIL CODE arts. 1997, 2010-2019 (1870).

367. *Id.* art. 1997. See also Currier, *Heritability of Conventional Obligations*, 31 TUL. L. REV. 324 (1957).

tions are not only different in their nature but are subject to different rules."<sup>368</sup>

It is a matter of conjecture which were the "writers consulted" by the redactors of the Louisiana Code. Neither Domat nor Pothier<sup>369</sup> dealt with "real obligations," and insofar as the present writer was able to ascertain, the concept of real obligations and the detailed provisions in the Louisiana Civil Code had as their source the treatise of Toullier.<sup>370</sup> Most of the provisions in the French edition of the Louisiana Code read as if they were taken verbatim from the text of Toullier. The only difference between Toullier and the Louisiana Civil Code is one of nomenclature: according to Toullier the term "real obligations" includes heritable and strictly speaking real obligations while according to the Louisiana Civil Code the appellation "real obligations" applies only to the second branch of obligations classified by Toullier as real. A brief summary of Toullier's treatment of real obligations will precede analysis of corresponding provisions in the Louisiana Civil Code.

Toullier's classification is based on a passage in the Digest which indicates that some "*pacta*" are "personal" while others are "real."<sup>371</sup> This passage was interpreted by Toullier to mean that "obligations" are either personal or real. Personal obligations were defined to be nontransferable obligations binding the obligor personally and in case of nonperformance resulting in his full personal responsibility. Real obligations were defined to

368. 1 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 272 (1937).

369. See 3 TOULLIER, LE DROIT CIVIL FRANÇAIS 476 (1833) ("This division of obligations, [is] entirely omitted in the Treatise of Pothier.").

370. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS 476-99 (1833). Actually Toullier was the first commentator to develop the notion of "real obligation" in France. See GINOSSAR, DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE 97 (1960).

371. Digest 2.14.7.8: "*Pactorum quaedam in rem sunt, quaedam in personam.*" *Pacta* in Roman law were informal agreements which were invalid in civil law but could be enforced by the Praetor in equity. The passage does not deal with *real obligations*. It has been translated into English as follows: "There are certain agreements which relate to real property, and others which relate to personal property. Those that relate to real property are those by which I agree in general terms, not to bring suit; those which relate to personal property are those which I agree not to sue a certain individual, for instance: 'I will not sue Lucius Titius.'" 1-2 SCOTT, THE CIVIL LAW 302 (1932). An accurate translation, however, ought to read: "Informal agreements (*pacta*) operate either against anyone (*in rem*) or against a particular person (*in personam*). Informal agreements operating against anyone are those by which I agree, in general terms, not to bring suit; informal agreements operating against a particular person are those by which I agree not to sue a certain individual, for instance: 'I will not sue Lucius Titius.'" The idea conveyed by the passage is that certain *pacta de non petendo* (agreements not to demand a performance) are conceived in general terms (*in rem*, not to demand from any one) while others are conceived in specific terms (*in personam*, not to demand from a designated person).

be obligations transferable to one's heirs (heritable) or to one succeeding to immovable property by particular title (strictly real obligations). Obligations of the last subdivision "follow a thing like its shadow"<sup>372</sup> but do not result in personal responsibility of the transferee; he is responsible only *qua* possessor of the thing and he may free himself by abandoning the thing to the creditors. Obviously, Toullier was primarily concerned with the problem of transferability of obligations and only incidentally with the scope of a transferee's responsibility. In that regard, Toullier distinguished clearly between rights (*droits*) and duties (*obligations*). Rights, in principle, can be transferred by their holder to third parties unless transfer is excluded by the nature of the right, the law, or contractual provision. Rights in things are quite frequently transferred by operation of the law, even in the absence of specific mention in a contract designed to convey title. To this category belong servitudes, all other real rights attaching to immovable property, and the (personal) rights which the vendor of an immovable has acquired by contract or otherwise for the improvement of the immovable. Thus, according to Toullier, the right one acquires by contracting with an architect for the construction of a house on a certain lot passes to the purchaser of that lot.<sup>373</sup>

In contrast to rights, duties as a general rule do not pass to those succeeding to immovable property by particular title unless they consent thereto. But in the field of property law, a number of methods are available whereby a successor by particular title may be charged, without his consent, with the performance of obligations assumed by his ancestor in title. One method is to include in a contract for the alienation of immovable property charges or conditions which either suspend transfer of title until performed or render the transfer void *ab initio* if not performed. In all synallagmatic contracts, payment of the price is an implied resolutive condition. If the price is not paid, the thing may be reclaimed in whatever hands it is found. Thus, Toullier concluded, the duty one has assumed to pay the price passes to all persons acquiring the thing; but neither their person nor their patrimony is bound and they can avoid the obligation by abandoning the thing. The obligation of a third possessor is purely real, *non persona debet, sed res*. The clause of redemption stipulated by a vendor is also one of those obliga-

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372. 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS* 499 (1833).

373. *Id.* at 485. *But cf.* POTHIER, *TRAITÉ DES CHOSSES* 523 (1778).

tions imposed as a condition to transfer of title and the constitution of a rent charge in kind or money is still another example. These results are based on the maxim that no one can transfer a greater right than he himself has.

A second method consists in dismembering the right of ownership and transferring a real right to a person who will be able to assert this right against the world. The obligations of the landowner who dismembers his ownership pass to all successors who are "bound" to permit the exercise of real rights granted by the former landowner. Thus the holders of the rights of real mortgage, servitudes, usufruct, use, and habitation are entitled to exercise their rights in the hands of any owner or possessor. But not all real obligations are correlative of real rights. Real obligations may also be correlative of personal rights which attach to a piece of land and can be exercised by their holder without the assistance of the landowner. To this category belong rights deriving from a predial lease, the personal right of passage (which is neither servitude nor use or usufruct),<sup>374</sup> and conventional, legal, and judicial mortgages. In all these instances the duty of the third possessor of the immovable is a real obligation although the correlative right of the obligor is not a real right properly so called.<sup>375</sup> The last method for the creation of real obligations is the establishment of an *assignat* or *assiette*.<sup>376</sup> These are rights to the revenues of real property transferred to another person as security for a claim.

*The Civil Code.* — In the Louisiana Civil Code, an obligation is termed *strictly personal* "when none but the obligee can enforce the performance, or when it can be enforced only against the obligor" (Article 1997, Section 1). An obligation is heritable "when the heirs and assigns of one party may enforce the performance against the heirs of the other" (Article 1997, Section 2). And an obligation is *real* "when it is attached to immovable property, and passes with it into whatever hands it may come, without making the third possessor personally responsible" (Article 1997, Section 3). These definitions leave much wanting in clarity of concepts. In the light of their source materials, however, and on the basis of the text of the Code, it is apparent that the criteria for these definitions and distinc-

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374. See 3 TOULLIER, LE DROIT CIVIL FRANÇAIS 490, 491 (1833).

375. *Id.* at 489-90.

376. *Id.* at 487, 492-98. *Cf.* text at note 385 *infra*.

tions are *transferability* and the *nature of the transferee's responsibility*.

According to the criterion of transferability, obligations are either nontransferable ("strictly personal") or transferable whether actively or passively ("heritable" and "real" obligations). According to the criterion of the nature of the transferee's responsibility, transferable obligations are either heritable or real. Heritable are those transferable obligations which result in full personal responsibility of the transferee. Real obligations are those which attach to immovable property and which do not result in personal responsibility of the obligor. The obligor is thus held to a duty merely as possessor and may free himself by abandoning the immovable. It is apparent that the term "heritable" obligations is used in the Civil Code in a technical sense to designate transferable obligations resulting in full personal responsibility of the transferee rather than obligations transferable only by universal title—which would be the normal usage of the word "heritable." In this sense, "heritable" is contrasted to both "strictly personal" and "real" obligations. Strictly personal obligations are nontransferable; heritable obligations are transferable whether by universal or particular title<sup>377</sup> and result in full personal responsibility of the obligor. Real obligations are also transferable obligations whether by universal or particular title but result in limited responsibility of the transferee *qua* possessor of immovable property. Analysis of "strictly personal" and "heritable" obligations is beyond the scope of this study. The following discussion is confined to an analysis of the nature and function of "real obligations." According to the Code, the characteristics of a real obligation are three: (1) the real obligation attaches to *immovable* property; (2) it *passes* with the property; and (3) the third possessor does *not* become *personally* responsible.<sup>378</sup>

Following the civilian tradition, the Louisiana Civil Code employs the word "obligation" in a double sense. This word at times indicates merely a "duty" to perform and at times a legal relation, a *vinculum juris*, a complex of personal rights and duties whether imposed by law or deriving from juridical acts. It would seem that in connection with "real obligations" the Code speaks of "duties" imposed on the possessor of immovable

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377. LA. CIVIL CODE arts. 1997, 2009 (1870). *Cf.* Currier, *Heritability of Conventional Obligations*, 31 TUL. L. REV. 324, 327 (1957).

378. LA. CIVIL CODE art. 1997 (1870); *cf.* Comment, *Real Rights in Louisiana*, 21 LA. L. REV. 462, 463 (1961).

property rather than of a legal relation (Article 2010). But Article 2011 declares that "not only the obligation, but the right resulting from a contract relative to immovable property, passes with the property." Thus, the notion of real obligation is broadened to include rights attaching and passing with the immovable. As examples of rights passing with the property, the Code refers to "the right of servitude" and to the right of an heir or other acquirer "to enforce a contract made for the improvement of the property by the person from whom he acquired it."<sup>379</sup> The first example, involving a *real right*, does not present problems: real rights attach to property and pass with it. The real obligation imposed on the possessor of the property is merely correlative to the real right.<sup>380</sup> The second example does not involve problems insofar as an heir may be concerned: provided that the obligation is heritable, an heir should have the right to enforce a contract for the improvement of immovable property according to the general rules of successions and obligations. But the picture changes when the juridical situation of "another acquirer" is considered, namely, the rights and duties of one succeeding to immovable property by particular title. According to the principle that *res inter alios acta aliis non nocet*,<sup>381</sup> this person should not have any rights against one with whom his author in title had entered into a contractual relation concerning the improvement of the property. Nor can the duty of the obligor be regarded as a real obligation: apparently the obligee, the successor to the immovable, can enforce the contract and hold the obligor to full personal responsibility. The successor to the immovable, on the other hand, is under no duty to succeed to the obligations of his ancestor in title. Thus, if the third party would be interested in the performance of the contract concerning the improvement of the immovable he could not have recourse against the possessor or the new owner of the immovable; and if he had that right, the responsibility of the third possessor would be real. This example then presents an anomaly and raises unanswerable questions.<sup>382</sup>

According to Article 2019, as between contracting parties "some real obligations are also personal." Thus, a real mortgage

379. LA. CIVIL CODE art. 2011 (1870). Toullier terms this right "an accessory" of the contract of sale. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS 485 (1833).

380. Cf. LA. CIVIL CODE arts. 2011, 2015 (1870).

381. See LA. CIVIL CODE art. 1889 (1870): "No one can, by a contract in his own name, bind any one but himself or his representatives. . . ."

382. Perhaps the best construction is to regard the right of the successor by particular title as deriving from a *tacit* assignment and subrogation. In a contract of sale, the owner of an immovable may by express assignment transfer to

given by one to secure his own debt generates a personal obligation (since his entire patrimony may be seized and sold for the satisfaction of the creditor) and also a real obligation (since the thing subject to the real mortgage may be seized and sold). Other obligations are "strictly real, both as to the contracting party and his heirs or other successors." An example given in the Code is a mortgage securing the debt of another without assumption of personal responsibility by the mortgagor. As between a creditor and the subsequent possessor of the property, the responsibility of the possessor is always real, excepting the case where the third possessor has assumed personal responsibility "by his own act."<sup>383</sup>

According to Article 2012:

"Real obligations may be created in three ways: 1. By the alienation of immovable property, subject to a real condition, either expressed or implied by law; 2. By alienating to one person the immovable property, and to another some real right to be exercised upon it; 3. By the creation of a right of mortgage upon the immovable property."

These are the methods described by Toullier.<sup>384</sup> An example of the first method is "a sale subject to a rent charge, or to a right of redemption as consideration [condition] of the sale." Servitudes, the right of use, habitation, and usufruct are examples of the second method. These are real rights, namely permissible dismemberments of the right of ownership. The several kinds of mortgages and the creation of a rent charge are examples of the third method. Now how the "sale subject to a rent charge" may be an example of the first method and "the creation of a rent charge" of the third can only be understood in the light of Toullier's analysis of prerevolutionary French law.<sup>385</sup> A sale subject to a rent charge is for all practical purposes the sale of an immovable for a consideration consisting in a portion of the revenues it produces rather than a cash price. A rent charge is nothing else than an "*assignat*" or "*assiette*," namely, a right to the revenues of real property transferred to a creditor as security for his claim. According to the Code, a rent charge may be "imposed on particular property, independ-

the purchaser rights "resulting from a contract relative to immovable property." According to *id.* art. 2011, this assignment takes place by operation of law.

383. *Id.* art. 2019.

384. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS 487 (1833).

385. *Id.* at 492-98.



ent of any alienation of it, for the security or extinguishment of a debt; and it may be perpetual or temporary, and in either case, forms a real obligation which passes with the land" (Article 2017). The possession of the property does not pass to the obligee, and this distinguishes rent charge from antichresis (Article 2018).

The real obligation created by condition annexed to the alienation of an immovable "is susceptible of all the modifications that the will of the parties can suggest, except such as are forbidden by law" (Article 2013). It would seem that "forbidden by law" are those modifications which would tend to establish interests of a feudal nature and charges on land other than the recognized real rights.<sup>386</sup> The following articles indicate that there are also "conditions implied by law," such as "the obligation to pay the price to the seller and to furnish roads to the public." The obligation to pay the price to the seller is never a suspensive condition in Louisiana<sup>387</sup> and the obligation to furnish roads to the public is merely a legal servitude.<sup>388</sup>

Article 2015 declares that "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, although he have no stipulation on the subject, or they be not mentioned in the act of transfer."<sup>389</sup> This article is a puzzle. The French text in the corresponding Article 2010 of the Louisiana Civil Code of 1825 reading "leases and all other *real* rights"<sup>390</sup> seems to indicate that leases *are* real rights (which is contrary to the tradition) but at the same time regards real obligations as correlative to real rights (which fully accords with the tradition). The English version reading "leases and all other rights" avoids the question of the juridical nature of leases but at the same time implies that real obligations may be correlative to rights other than real. This is a questionable proposition. Excepting

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386. On this subject see the excellent discussion of Provosty, J., in his separate opinion on rehearing in *Louisiana & A. Ry. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 411-28 (1911).

387. See *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908). In certain circumstances, however, the obligation to pay the price may be a *resolatory* condition in Louisiana. See Comment, *The Action of Resolution as an Accessory of the Credit in Contracts of Sale*, 1 LA. L. REV. 800, 802 (1939).

388. LA. CIVIL CODE arts. 665, 705, 707 (1870).

389. *Id.* art. 2015.

390. "*Non seulement les servitudes, mais les beaux à ferme ou à loyer, et tous autres droits réels. . .*"

lease, which although a personal obligation functions as a real right by virtue of an express provision,<sup>391</sup> and contracts for the improvement of an immovable,<sup>392</sup> all other real obligations are correlative of real rights.

Real obligations, constituting an exception to the general principle that a contract cannot affect third parties,<sup>393</sup> are founded according to the Code on the maxim that "no one can transfer a greater right than he himself has" (Article 2015). The maxim admits an exception "where the neglect of some formality required by law has subjected the owner of the real encumbrance to a loss of his right, in favor of a creditor or a bona fide purchaser."<sup>394</sup>

*Louisiana Jurisprudence.* — The term "real obligation" has been used by Louisiana courts as synonymous with "servitude" and "real right,"<sup>395</sup> mostly for the characterization of mineral rights,<sup>396</sup> predial leases,<sup>397</sup> and restrictive covenants.<sup>398</sup> Contem-

391. LA. CIVIL CODE art. 2733 (1870); *cf.* text at notes 108-112 *supra*.

392. *Cf.* text at note 379 *supra*. In *Breaux v. Laird*, 223 La. 446, 65 So. 2d 907 (1953), a successor in title to a home brought action against the contractor's surety to recover for structural defects. The Louisiana Supreme Court found that contract and bond were "inseparable" and held that "the obligation which flows from the contract passes to the successors and assigns of the owner." *Id.* at 450, 65 So. 2d at 908. This holding was fortified by reference to Article 2011 of the Civil Code. The court said: "From our own research we find, and counsel for the defendant informs us likewise, that there is no decision under this Article. This court is, nevertheless, happy to be the first to interpret such a wise provision. The Article has no counterpart in the Code Napoleon, Legal Archives, Vol. 3, Part 2, page 1109. The article stands alone, unimpeached and unimpeachable. The words of the Code in this Article apply to descriptive acts in the light of consequences giving and granting in law rights and causes of action." *Id.* at 450, 65 So. 2d at 908. It is doubtful that the rule announced in this case will ever be extended beyond the specific facts there involved. This is a unique situation where a personal right of an ancestor in title is enforced by a successor by particular title without express assignment. *Cf.* *Cambais v. Douglas*, 167 La. 791, 120 So. 369 (1929) (the obligation to erect a building is a personal obligation).

393. LA. CIVIL CODE art. 1889 (1870).

394. *Id.* art. 2015. *Cf.* text at note 405 *infra*.

395. See *Schexnailder v. Fontenot*, 147 La. 467, 476, 85 So. 207, 210 (1920): "A mortgage, whether conventional or judicial, imposes a real right or obligation upon the property bound for its discharge."

396. See, *e.g.*, *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 764, 91 So. 207, 210 (1922) (mineral servitude: "a real right or obligation"); *Vincent v. Bullock*, 192 La. 1, 18, 187 So. 35, 40 (1939) (mineral royalty: "a real right or obligation"); *United Gas Pub. Serv. Co. v. Barrett*, 179 So. 506, 511 (La. App. 2d Cir. 1938) (mineral lease: "a real obligation").

397. See, *e.g.*, *Coyle v. Geoghegan*, 187 La. 308, 314, 174 So. 366, 368 (1937) ("the lease is a real obligation which accompanies the property leased in the hands of the person who acquires it"). See also *Canal & C. R.R. v. Orleans R.R.*, 44 La. Ann. 54, 10 So. 389 (1892); *Burke v. Wall*, 29 La. Ann. 38 (1877); *Ernest A. Carrere's Sons v. Levy*, 191 So. 747 (La. App. Or. Cir. 1939); *Manteris v. Baton Rouge Poster Advertising Co.*, 12 La. App. 162, 125 So. 293 (La. App. 1st Cir. 1929).

398. See *Clark v. Reed*, 122 So. 2d 344, 349 (La. App. 2d Cir. 1960) (re-

porary developments in the field of mineral law, however, have rendered the concept of "real obligation" meaningless: mineral rights in Louisiana are either personal or real rights.<sup>399</sup> Predial leases are no longer classified as real obligations but as personal rights.<sup>400</sup> The term real obligation is still being used in connection with restrictive covenants. But as uniform terminology in this field tends to be established, and the Louisiana Supreme Court declares that restrictive covenants are predial servitudes,<sup>401</sup> continuous use of the expression "real obligations" is a surplusage. This assimilation of real obligations with servitudes and real rights in contemporary Louisiana jurisprudence has effectively prevented the recognition of the "real obligation" as an entity distinct from "real right." As a result, the clarity of the distinction between "obligations" and "real rights" has been advisably preserved except in very few isolated instances.<sup>402</sup>

An example of the confusion which could result from the recognition of "real obligation" as a distinct entity is the case of *Tucker v. Woodside*.<sup>403</sup> In that case, subsequent purchasers

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restrictive covenants are "servitudes, real rights or obligations"). See also *Ouachita Home Site & Realty Co. v. Collie*, 189 La. 521, 179 So. 841 (1938); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915).

399. Mineral servitudes and mineral royalties are real rights. See text at notes 141-149, 172-204 *supra*. Mineral leases are personal rights. See text at notes 150-171 *supra*.

400. See *In re Morgan R.R. & S.S. Co.*, 32 La. Ann. 371 (1880), reaffirmed in *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210 (1958) and *Harwood Oil and Mining Co. v. Black*, 240 La. 641, 124 So. 2d 764 (1960).

401. See text at notes 254-256 *supra*.

402. *Cf. Louisiana & A.R.R. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403 (1911). In this case, a purchaser of timber lands agreed (as a part of the consideration for the sale) to have the tonnage arising from the manufacturing of timber transported by the railway of the seller. A clause in the contract provided that "all the obligations and conditions herein contained are declared to extend to and be binding upon the legal representatives and assigns of the parties hereto." *Id.* at 291, 59 So. at 404. In interpreting this contract, the Louisiana Supreme Court held that "the obligation (assumed by the vendees in the act by which they acquired the property) with respect to the future disposition of the timber, then forming part of the real estate purchased by them, was a condition, annexed to the alienation of the property, which created, not a servitude, either upon the property or upon the vendees, but a real obligation, other than servitude, as to the property and the vendees, which passes with the title, and also a personal obligation as to the vendees." *Id.* at 303, 59 So. at 408. Upon rehearing, however, this language was repudiated. The court stated that a decision on the question whether the tonnage contract constituted a real obligation was "unnecessary" since the purchaser had not parted with his title. "These contracts suggest a return to feudal times," the court said, "when the lord of the manor held the small farmers under his control and domination. But this is a matter which commends itself to the careful consideration of the General Assembly, which is now in session in this state. We prefer under the circumstances, not to express our opinion upon this very weighty matter." *Id.* at 312, 59 So. at 411.

403. 53 So. 2d 503 (La. App. 1st Cir. 1951).

of a farm sought to annul a stipulation incorporated in the deed of transfer to their ancestor in title which prohibited erection on the premises, forever, of a "saloon, nightclub, or tourist court." An additional clause in the same deed provided that "all obligations herein assumed, shall inure to the benefit of and be binding upon the heirs, successors and assigns of the respective parties thereto." The validity of the restriction, and its binding effect on subsequent purchasers, was upheld on several grounds. The court declared: (1) that the enumeration of methods for establishment of real obligations in Article 2012 of the Civil Code was merely demonstrative and not exclusive; accordingly, the restriction in question was a "real obligation" though not included in the enumeration of Article 2012; (2) that the first purchaser "did not acquire . . . the full, free and unrestricted use of the land," and, therefore, "could not transfer a greater right than she herself had acquired"; (3) that "under the express terms of the deed, the restrictive covenant inured to the benefit of and was binding upon the heirs, successors, and assigns" of the first purchaser; and (4) that the stipulation was valid since it was neither forbidden by law nor contrary to good morals and public order.

All these grounds require comment. In the first place, there is room for doubt that the enumeration of methods for the creation of real obligations in Article 2012 is merely demonstrative. Actually, analysis of the historical sources of this article tend to confirm the view that the enumeration of methods is exclusive.<sup>404</sup> But, assuming *arguendo* that real obligations may be created by methods other than those enumerated, there is still a pretermitted question as to the permissibility of the particular method employed and the validity of the stipulation. Secondly, although the first purchaser did not acquire the free and unrestricted use of the land, it does not necessarily follow that subsequent purchasers should be bound by the restriction. The court said that the first purchaser "could not transfer a greater right than she herself had acquired," but this is not always so. Application of this *maxim* depends on the preliminary question whether the restriction is an obligation or a real right. In the field of the law of obligations the *maxim* functions

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404. See separate opinion by Provosty, J., in *Louisiana & A.R.R. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 411-28 (1911). See also *Cambais v. Douglas*, 167 La. 791, 120 So. 369 (1929). Indeed, if "real obligation" is another name for "real right," the enumeration in Article 2012 ought to be regarded as exclusive. See text at note 386 *supra*.

freely; in the field of the law of property ordinarily one cannot transfer a greater *real* right than one has but one can always transfer ownership free of all obligations<sup>405</sup> contracted with respect to the thing transferred. This analysis indicates that the court, perhaps without realizing it and by clear implication, classified the restriction in question as a real right, which should necessarily burden the land in case of transfer.<sup>406</sup> Thirdly, the court stated that one may contract an obligation binding on his "assigns," namely successors by particular title. This is one of the most controversial issues in the law of obligations.<sup>407</sup> In general, "onerous" stipulations *pour autrui* are not binding on third parties to the contract.<sup>408</sup> An obligation assumed on behalf of third parties may be valid and binding only according to the principles of representation. Obligations binding on successors by particular title are not "obligations" but duties cor-

405. For example, a reprobated land charge, e.g., a servitude *in faciendo* imposed as a condition for the transfer of an immovable, may constitute a valid personal obligation of the transferee. This obligation is not transmitted to a subsequent acquirer by particular title who thus "acquires a greater right" than that of his ancestor in title. See *Louisiana & A. R.R. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403 (1911). Similarly, the transferee of a tract of land may bind himself to erect a certain type of building. This constitutes a valid personal obligation. But a subsequent acquirer by particular title is *not* bound to perform the obligation of his ancestor in title. See *Cambais v. Douglas*, 167 La. 791, 120 So. 369 (1929). Conversely, a successor in title may acquire a greater right than that accorded to him by his ancestor in case of a transfer subject to an invalid condition. Thus a "conditional sale" vests full title in the transferee. See *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908). And where a transfer is made subject to a perpetual restriction on alienation, the transferee acquires by operation of law a greater right than that accorded to him by his ancestor since the condition is disregarded. See *Female Orphan Society v. Young Men's Christian Ass'n*, 119 La. 278, 44 So. 15 (1907).

406. In civil law, land charges binding on successors by particular title are *always* obligations correlative of real rights. Conversely, *only* real rights generate correlative obligations which are transmitted to a successor by particular title by operation of the law. *Cf.* separate opinion by Provosty, J., in *Louisiana & A. R.R. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 427 (1911). Justice Provosty concluded on the basis of an exhaustive analysis of the historical sources of the Louisiana Civil Code that real rights and real obligations are synonymous terms and that all "innominate" land charges are "servitudes": "We cannot change the nature of this charge, or disguise the fact that it is a servitude, by refusing to call it a servitude, and designating it by its generic name of a real obligation, or of a condition imposed upon the title; but a real right of that kind, or a condition of that kind imposed upon the title, is a servitude. A charge imposed upon property, by which the owners of it, simply because they are owners of it, are bound to do something, is a servitude. It is servitude, and nothing else." 59 So. at 427.

407. See in general WEILL, *LA RELATIVITÉ DES CONVENTIONS EN DROIT PRIVÉ FRANÇAIS* 1007-30 (1939).

408. See separate opinion by Provosty, J., in *Louisiana & A. R.R. v. Wynn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 426 (1911): "By contract, then, a person has the widest liberty to bind himself; his right to do so is what is known as liberty to contract; he has no power, however, to bind third persons, not parties to his contract." *Cf.* Smith, *Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 *TUL. L. REV.* 18 (1936).

relative of real rights. Nothing but confusion results when these duties are termed "real obligations." And fourthly, another objection relates to the declaration that a real obligation is valid if not forbidden by law and not in conflict with good morals and public order. These are loose tests, and if the analysis that "real obligation" is nothing else but the passive side of a real right is correct, then the door is left wide open for the creation of an "unregulated brood" of interests which have no place in a civil law jurisdiction.<sup>409</sup> What cannot be accomplished by the "real right" concept is easily accomplished through the magic of "real obligation."

The stipulation in the original deed of transfer was intended to bind all subsequent owners of the land and the question is whether it could accomplish this purpose. According to the system of the Civil Code successors by particular title are not bound by purely personal obligations of their ancestor but are bound to respect all existing real rights.<sup>410</sup> Did this stipulation create a real right? This question should be answered directly. Clearly, the stipulation was not a *building restriction* imposed by a subdivider in the interest of future owners of neighboring property nor one which could be classified as a *predial servitude*. Nor was it a dismemberment of ownership in the nature of a *personal servitude* in favor of a person having a legitimate interest in the restriction.<sup>411</sup> It was a perpetual restriction on the use of property heretofore unknown to Louisiana law and one which defied classification within the established categories of real rights. Indeed, the court's reliance on the *Frost-Johnson* case<sup>412</sup> is sufficient indication that a new kind of real right was being enforced. And one may wonder whether there was sufficient

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409. Separate opinion by Provosty, J., in *Louisiana & A. R.R. v. Wynn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 419 (1911).

410. See 10 DURANTON, *COURS DE DROIT FRANÇAIS* 259 (1834): "Successors by particular title. . . merely have the rights that their author had. They are not found by his personal obligations, but must tolerate the exercise of real rights which he has imposed on the object for the benefit of third persons. In one word, *habent causam auctoris sui propter rem.*"

411. *Cf.* separate opinion by Provosty, J., in *Louisiana & A. R.R. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 419 (1911): "Personal servitudes . . . terminate with the life of the beneficiary, and . . . 'this kind of servitudes is of three sorts — usufruct, use, and habitation.' Not of four or more sorts, note. Not whatever unregulated brood of personal servitudes owners of estates may choose to create; but of three sorts — usufruct, use, and habitation."

412. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922), recognizing the "new" real right of mineral servitude. Characteristically, the *Frost-Johnson* case was cited as authority for the recognition of still another real right, the mineral royalty. See *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

social interest to justify recognition of the restriction as a real right and whether a Pandora's box had not been opened quite unnecessarily.

*Critique.* — The distinction of obligations in the Civil Code into strictly personal, heritable, and real tends to confuse the traditional notion of "obligation" (which is either a personal duty or a complex of personal rights and duties, a *vinculum juris* between two persons) with "real right" (which is a proprietary interest in things available against the world). Neither the French Civil Code nor any other modern Civil Code has formally established this distinction, the Louisiana Civil Code being an isolated example in the civil law world.<sup>413</sup> Problems dealt with in terms of this distinction by Toullier and the Louisiana Civil Code are consistently handled by continental jurisprudence and doctrine as problems of transferability of obligations and responsibility of a successor to property.<sup>414</sup>

In most of the great commentaries on the French Civil Code the notion of real obligation is either completely ignored or merely mentioned briefly.<sup>415</sup> Real obligations have been discussed extensively only by Toullier<sup>416</sup> and by certain modern writers in a number of monographs.<sup>417</sup> While several writers

413. Cf. text at note 370 *supra*. The concept of "land charges" (*Reallasten*) is known in the German Civil Code. Arts. 1105-1112. But these land charges are not an intermediary category of rights between personal and real rights; they are *either* personal rights *or* real rights, namely servitudes. See WOLFF AND RAISER, *SACHENRECHT* 510 (1957).

414. See 6 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 421-427 (1952). See also 4 AUBRY ET RAU, *COURS DE DROIT CIVIL FRANÇAIS* 60 (1902); 11 BAUDRY-LACANTINERIE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 249 (1900); 2 DELVINCOURT, *COURS DE CODE CIVIL* 116 (1824); 6 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 75 (1931); 14 DEMOLOMBE, *TRAITÉ DES CONTRATS* 263-270 (1877); 10 DURANTON, *COURS DE DROIT FRANÇAIS* 259 (1834); 2 JOSSERAND, *COURS DE DROIT CIVIL POSITIF FRANÇAIS* 135 (1933); 2 ZACHARIAE, *LE DROIT CIVIL FRANÇAIS* 217 (1855); 3 *id.* at 361-62 (1855).

415. Cf. 6 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 75 (1931). Under the heading of "different kinds of obligations" the author merely refers to "real obligations, whose debtor is bound as possessor of certain things. This is the case of the third possessor of a mortgaged immovable, and of the acquirer of a leased immovable bound to respect the lease." See also 4 AUBRY ET RAU, *COURS DE DROIT CIVIL FRANÇAIS* 60 (1902); 2 DELVINCOURT, *COURS DE CODE CIVIL* 116 (1824); 2 MAZEAUD, *LEÇONS DE DROIT CIVIL* 17 (1956); 1 PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 770 (1925); 3 ZACHARIAE, *LE DROIT CIVIL FRANÇAIS* 361-62 (1855).

416. 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS* 476-99 (1833).

417. See ABERKANE, *ESSAI D'UNE THÉORIE GÉNÉRALE DE L'OBLIGATION PROPTER REM EN DROIT POSITIF FRANÇAIS* (Diss. Algiers 1957); GINOSSAR, *DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE* 89-106 (1960); JUGLART, *OBLIGATION RÉELLE ET SERVITUDE* (Diss. Bordeaux 1937); KORNBROST, *ÉTUDE SUR LA NOTION DE SERVITUDE* (Diss. Strasbourg 1936); MICHON, *LES OBLIGATIONS PROPTER REM DANS LE CODE CIVIL* (1891). See also BAUDRY-LACANTINERIE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 314-436 (V Supp. by Bonnecase 1930).

have used the term "real obligation" to denote a variety of ideas,<sup>418</sup> the broadly accepted meaning of this word is an obligation incurred as a result of the ownership or possession of a thing burdened with a real right,<sup>419</sup> an obligation *propter rem* or *in rem scripta*.<sup>420</sup> The essential characteristic of this obligation is that the responsibility of the owner or possessor is limited to the value of the thing. Real obligations in this sense do not attach to immovable property only. Pledge, chattel mortgage, and usufruct of movables, being real rights, generate obligations *propter rem*. It is only in the framework of the French Civil Code that obligations *propter rem* ordinarily attach to immovable property, as a result of the sweeping declaration of Article 2279 of the Code which equates possession of movables with perfect title thereto. In Louisiana, there is no corresponding provision in the Civil Code;<sup>421</sup> and, to the extent the common law *bona fide* purchase doctrine may not be applicable,<sup>422</sup> the holder of a real right in movable property may assert it in the hands of any possessor within the time allowed for the running of acquisitive prescription.<sup>423</sup> In all cases where the holder of a real right in movable property may assert it in the hands of a third possessor, the obligation of the third possessor may be said to be one *propter rem* and correlative of the real right.

#### Controversies surrounding the juridical nature of real ob-

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418. JUGLART, OBLIGATION RÉELE ET SERVITUDE 283 (Diss. Bordeaux 1937) (real obligation described "as an intermediary relationship between the real right and the personal right"); MICHON, LES OBLIGATIONS PROPTER REM DANS LE CODE CIVIL No. 2 (1891) (real obligations are "mere accessories of a right vested in the obligee, a right which he may abandon; they are attached to the thing, and they do not burden the person except as possessor of the thing and not as personally responsible"). For the ambiguity of the term "real obligation," see 3 ZACHARIAE, LE DROIT CIVIL FRANÇAIS 361-62 (1855).

419. See note 416 *supra*.

420. Frequently distinction is made between an obligation *propter rem* and an obligation *in rem scripta*. Both are obligations incurred by a successor to property by particular title. But the debtor of an obligation *propter rem* is freed by the alienation of the thing whereas the debtor of an obligation *in rem scripta* remains personally bound in spite of the transfer of the thing. See GINOSSAR, DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE 166 (1960). According to this distinction the obligation of the mortgagor is one *in rem scripta* whereas the obligation of the third possessor of a mortgaged immovable is one *propter rem*.

421. See Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 539 (1932).

422. Cf. *Jeffrey Motor Co. v. Higgins*, 230 La. 857, 89 So.2d 369 (1956), 17 La. L. Rev. 854, 857 (1957); *Thomas v. Mead*, 8 Mart.(N.S.) 341 (La. 1829).

423. See LA. CIVIL CODE arts. 3476, 3506-3509 (1870); *Security Sales Co. v. Blackwell*, 167 La. 667, 120 So. 45 (1928); *Davis v. Hampton*, 4 Mart.(N.S.) 288 (La. 1826).



ligations and the meaning of this term are reduced in the last analysis to semantics and personal preferences as to the classification of rights and duties. Conflicting assertions may thus be easily traced to various definitions given to the terms "obligation" and "real right." According to the traditional definition of these terms there is no room for the notion of "real obligation" as a distinct entity.<sup>424</sup> Strictly speaking, real obligations are always duties incidental and correlative to real rights. They are "obligations" in the sense that they are duties imposed on a particular person who owns or possesses a thing subject to a real right, and they are "real" in the sense that, as correlative of a real right, these obligations attach to a particular thing and are transferred with it without the need of an express assignment and subrogation. They are also "real" in the sense that the responsibility of the obligor is limited to the value of the thing. In this light it appears that the use of the term "real obligations" is confusing and should be avoided; "duties incidental and correlative of a real right" is a much more preferable description.

This explains why real obligations are not mentioned in civil codes other than the Louisiana Civil Code and why these obligations are not given much attention in the great commentaries on the Code Napoleon. They are a theoretic construct of no practical significance and can be dispensed with for the purpose of a logical and comprehensive analysis of civilian institutions. Obligations are thus distinguished into transferable and non-transferable (and not into "strictly personal," in opposition to "heritable," and "personal" in opposition to "real"). As a general rule, obligations are transferable by universal title both actively and passively. Specific provisions indicate which obligations are nontransferable. With regard to the transfer of obligations by particular title ("assignment"), distinction is ordinarily made between rights and duties. Rights deriving from an obligation are, in principle, transferable while the transfer of duties involves conceptual difficulties as certain codes fail to provide for forms of transfer.<sup>425</sup> In the absence of contractual assignment and subrogation, the successor to property by particular title does not assume the obligations of his

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424. See RIGAUD, *LE DROIT RÉEL* 429-30 (1912) (the obligation *propter rem* termed "a clumsy concept, simply destined to mask the existence of real rights *in faciendo*").

425. See 2 COLIN, *CAPITANT ET JULLIOT DE LA MORANDIÈRE, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 436-39 (1953).

author contracted with respect to the thing. He assumes, however, duties which are correlative of real rights burdening the property. If this were not so, real rights would be extinguished by the transfer of property to third persons.

The preceding analysis shows that the notion of "real obligations" in the Louisiana Civil Code creates more problems than it can solve and that adoption of traditional civilian apparatus may be preferable. It is therefore submitted that in case of a future revision of the Louisiana Civil Code the notion of real obligations should be suppressed. Regulation of real rights could easily include treatment of correlative and incidental duties.<sup>428</sup> On the other hand, problems of transferability of rights, and duties, and problems connected with responsibility of the transferee of a movable or immovable could be dealt with in appropriate titles in the Code without employing confusing terminology.

#### IV. COMMON LAW

Analytical jurists in England and the United States, in an effort at systematization of the common law, have drawn a widely accepted distinction between "rights *in rem*" and "rights *in personam*."<sup>427</sup> The terms derive from Roman sources<sup>428</sup> and correspond roughly to the civilian concept of real and personal rights.<sup>429</sup> A right *in rem* is ordinarily defined as "a right availing against the world"<sup>430</sup> or "against persons generally"<sup>431</sup> and a right *in personam* as one which "binds only a particular per-

426. Cf. LA. CIVIL CODE arts. 599-605 (1870) (obligations of the owner of a thing subject to usufruct). Similar provisions could be enacted with respect to all real rights.

427. AUSTIN, JURISPRUDENCE 381-91 (5th ed. 1885); HOLLAND, JURISPRUDENCE 145-47 (13th ed. 1924); KOCOUREK, JURAL RELATIONS 189-202 (1927); PATON, JURISPRUDENCE 232-36 (2d ed. 1953); SALMOND, JURISPRUDENCE 252-56 (10th ed. 1947); Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); LAWSON, *Rights and Other Relations in Rem*, in Festschrift MARTIN WOLFF 103 (1952). Cf. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921); Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938).

428. Cf. BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 89 (2d ed. 1952).

429. The adjectives "real" and "personal" are sometimes used by English writers to designate rights *in rem* and rights *in personam*. This terminology, however, is ordinarily avoided as it can be easily confused with the distinction of real and personal property and the division of rights into "proprietary" and "personal." Cf. text at note 441 *infra*.

430. SALMOND, JURISPRUDENCE 252 (10th ed. 1947); Campbell, *Some Footnotes to Salmond's Jurisprudence*, 7 CAMB. L.J. 206, 212 (1940).

431. 1 AUSTIN, JURISPRUDENCE 370 (5th ed. 1885). From rights *in rem* are distinguished rights *ad rem*. A right *ad rem* is a specific claim against a particular person with respect to a thing, i.e., a right *in personam*. Cf. SALMOND, JURIS-

son or persons."<sup>432</sup> According to Hohfeld's definition, a right *in rem* ("multital right") is "one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people."<sup>433</sup> A right *in personam* ("paucital right") is "a unique right residing in a person (or a group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing against a few definite persons."<sup>434</sup>

This analysis is based on the assumption that rights involve two persons, a *res*, and an act or forbearance.<sup>435</sup> In rights *in rem* the relation to the *res* is prominent, while in rights *in personam* attention is focused on the relationship between persons. A typical example of a right *in rem* is that of a landowner against persons generally that they shall not interfere with his right of ownership. A typical example of a right *in personam* is that arising between the parties to a contract. These examples correspond to the analytical distinction between "property," in the sense of title, and "obligations." Property gives rise to rights *in rem*; obligations give rise to rights *in personam*. The word property, however, is also used in a broader sense to include all pecuniary rights whether *in rem* or *in personam*.<sup>436</sup> In this sense, property rights and rights *in rem* are not coextensive concepts: the law of property does not include all rights *in rem* while it includes also rights *in personam*.<sup>437</sup>

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PRUDENCE 256 (10th ed. 1947): "I have a *jus ad rem* when I have a right that some other right shall be transferred to me."

432. PATON, JURISPRUDENCE 232 (2d ed. 1953); cf. AUSTIN, JURISPRUDENCE 370, 394 (5th ed. 1885).

433. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718 (1917); cf. KOCUREK, JURAL RELATIONS 201 (1927): "A right *in rem* is one of which the essential investitive facts do not serve directly to identify the person who owes the incident duty. This right is unpolarized."; Lawson, *Rights and Other Relations in Rem*, in FESTSCHRIFT MARTIN WOLFF 103, 107 (1952): "They are *in rem* not because they exist toward all other persons in the world, or as Hohfeld would have preferred to say, toward persons generally, but because there is no other person at the other end of the relation."

434. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718 (1917); cf. KOCUREK, JURAL RELATIONS 201 (1927): "A definition of a right in personam will be formulated in the affirmative — there the essential investitive facts serve directly to identify the person who owes the incident duty. This right is polarized."; Lawson, *Rights and Other Relations in Rem*, in FESTSCHRIFT MARTIN WOLFF 103, 108 (1952): "The right in personam may be expressed in terms of a line; the right in rem in the nature of a field."

435. See 1 AUSTIN, JURISPRUDENCE 347 (5th ed. 1885).

436. Cf. text at note 441 *infra*.

437. See PATON, JURISPRUDENCE 408 (2d ed. 1953).

A right *in rem* need not relate to a corporeal object. The right to one's own reputation, availing against persons generally, is regarded as a right *in rem*.<sup>438</sup> The breach of a right *in rem* gives rise to a right *in personam* against the aggressor.<sup>439</sup> Most rights *in rem* generate correlative duties of a negative nature, *i.e.*, duties of forbearance, but this is not necessarily so.<sup>440</sup> Rights *in personam* generate either affirmative duties, *i.e.*, claims to a performance, or duties of forbearance.

Following civilian terminology, analytical jurists indicate that rights *in rem* and rights *in personam* may be either "proprietary" or "personal" rights.<sup>441</sup> "Property," however, is an ambiguous term<sup>442</sup> and the adjective "proprietary" has defied efforts at a generally acceptable definition. Personal rights have been defined "as the residuary rights which remain after proprietary rights have been subtracted."<sup>443</sup> These rights supposedly differ from proprietary rights in that they are necessary for the development of the human personality, are non-transferable, and have no pecuniary value. While none of these tests suits common law,<sup>444</sup> accurate definition of proprietary rights is important in the United States in the light of constitutional guarantees accorded to property and in England in the light of the maxim that equity will act to protect only rights of property. Proprietary rights *in rem* are divided into *jura in re propria* and *jura in re aliena*. According to Salmond, a right of the second category is one "which limits or derogates from some more general right belonging to some other person in respect of the same subject matter. All other are *jura in re propria*."<sup>445</sup> Austin has singled out ownership as the only *jus in re propria* and has described the *jura in re aliena* as fractions or particles of the right of ownership.<sup>446</sup>

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438. *Id.* at 233.

439. See Lawson, *Rights and Other Relations in Rem*, in Festschrift MARTIN WOLFF 103, 118 (1952): "It is not unreasonable to say that the peculiarity of a right *in rem* is not that it operates against persons generally but that it imposes a duty in personam upon anybody who takes possession of the thing over which it exists."

440. See Campbell, *Some Footnotes to Salmond's Jurisprudence*, 7 CAMB. L.J. 206, 213 (1940). *But cf.* 1 AUSTIN, JURISPRUDENCE 371 (5th ed. 1885).

441. See PATON, JURISPRUDENCE 236-38 (2d ed. 1953); SALMOND, JURISPRUDENCE 256-61 (10th ed. 1947). Example of a "personal" right *in rem* is the right to one's own reputation.

442. See NOYES, THE INSTITUTION OF PROPERTY 351-53, 535-37 (1936).

443. PATON, JURISPRUDENCE 236 (2d ed. 1953).

444. See Campbell, *Some Footnotes to Salmond's Jurisprudence*, 7 CAMB. L.J. 206, 215 (1940) (the distinction termed "unreal").

445. See SALMOND, JURISPRUDENCE 261 (10th ed. 1947).

446. See 2 AUSTIN, JURISPRUDENCE 847 (5th ed. 1885).

The distinction between rights *in rem* and *in personam* is sometimes confused with well-established distinctions in common law procedure between actions, judgments, and execution of judgments *in rem* and *in personam*.<sup>447</sup> Thus, it has been asserted that in the framework of the common law the term right *in rem* may indicate, apart from a right which avails against persons generally, a power to recover a specific thing<sup>448</sup> and that classification does not depend only on the nature of a potential claim but also on the availability of an action for specific restitution. Historically, land has been the only thing that could be specifically recovered at common law because in the case of movables the defendant might choose between returning the thing and paying damages. Accordingly, the questionable conclusion has been reached that only ownership of lands can be classified as a right *in rem* and that the ownership of personal property is a right *in personam*.<sup>449</sup>

The preceding brief reference to the doctrine of analytical jurisprudence shows that the analytical jurists have failed to establish generally acceptable criteria for the distinction between "property" and "obligations" and between rights *in rem* and rights *in personam*. Indeed, no clear line of demarcation can be drawn between "persons generally" and "a particular person or persons."<sup>450</sup> It is plain that the dichotomy does not suit the peculiarities of common law which "stubbornly resists Roman classification."<sup>451</sup> It is surprising, therefore, that in spite of disagreement concerning the discovery of an analytically valid criterion and the definition of the terms right *in rem* and right *in personam*, the dichotomy has been said to be "useful" for systematic purposes.<sup>452</sup>

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447. For these distinctions see STONE, *THE PROVINCE AND FUNCTION OF LAW* 128 (1950); Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 714 (1917); Cook, *The Powers of Courts of Equity*, 15 *COLUM. L. REV.* 37-54, 106, 228 (1915).

448. See PATON, *JURISPRUDENCE* 233, 417 (2d ed. 1953). Obviously, the author has confused the distinction between right *in rem* and right *in personam* with the entirely different distinction between real and personal actions in English law. Cf. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 73-78 (1936).

449. See PATON, *JURISPRUDENCE* 233, 417 (2d ed. 1953).

450. See KOCOUREK, *JURAL RELATIONS* 197 (1927). In the Restatement of the Law of Property, the terms right *in rem* and right *in personam* have been dispensed with because the "term right *in rem* has no single fixed meaning." *RESTATEMENT, PROPERTY* § 5, Comment d (1936).

451. PATON, *JURISPRUDENCE* 235 (2d ed. 1953); cf. HARRISON, *ON JURISPRUDENCE AND THE CONFLICT OF LAWS* 62 (1919): "This analytic division, and in like manner, most of the analytic groupings of Austin, have only an abstract or logical value and . . . they are usually inapplicable to the concrete purposes of technical law."

452. PATON, *JURISPRUDENCE* 235 (2d ed. 1953).

## V. GERMAN LAW

According to the civilian doctrine in Germany, "private rights" are divided into "personal rights" (*Personenrechte*), "family rights" (*Familienrechte*), and "patrimonial rights" (*Vermögensrechte*).<sup>453</sup> This classification rests on the purpose of the particular rights, and, indirectly, refers to their object. Personal rights are those closely connected with one's own personality. They guarantee the life, health, integrity, and the free development of individuals.<sup>454</sup> Family rights are those deriving from, and intended to protect, family relations. Certain family rights have a patrimonial content, which is regarded as incidental to the predominantly moral character of the family relationship. Patrimonial rights are those which serve the economic needs of a person. These rights, in contrast to personal and family rights, are ordinarily heritable and transferable.<sup>455</sup> The patrimonial rights are divided into real rights (*Dingliche Rechte*), rights of intellectual property (*Immaterialgüterrechte*), obligatory rights (*Forderungsrechte*), and the right of inheritance (*Erbrecht*).<sup>456</sup>

The right of inheritance and the rights of intellectual property may be mentioned briefly. Under the system of the German Civil Code, the right of inheritance vests in the person of the heir upon the death of the testator or intestate decedent.<sup>457</sup> The right does not only bear on the particular objects composing the decedent's estate but also on the succession as a whole. Accordingly, under Section 2018 of the Civil Code the heir may bring an action for the recovery of assets retained by one claiming an adverse inheritance right. This is regarded as an infringement of the heir's right of succession. In all other cases, an adverse possession is regarded as infringement of a particular right rather than as violation of the heir's right of inheritance. The right of inheritance may also be an "expectancy" of remote

453. See 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 291 (1952); cf. 2 BIERLING, ZUR KRITIK DES JURISTISCHEN GRUNDBEGRIFFE 174-214 (1883); LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 80 (1957); Sohm, *Die subjektiven Rechte im deutschen Bürgerlichen Gesetzbuch*, 73 JHERINGS JAHRBÜCHER FÜR DIE DOGMATIK DES BÜRGERLICHEN RECHTS 268 (1923).

454. On personal rights and the so-called "right of personality," see Yiannopoulos, *Introduction to the Law of Things*, 22 LA. L. REV. 756, 757, n. 5 (1962).

455. See 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 295 (1952).

456. *Ibid.* For other classifications see LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 72-81 (1957).

457. Cf. B.G.B. §§ 1922, 1942.

heirs to be called in the succession in case closer heirs renounce or die without heirs. The rights of intellectual property form an independent category of patrimonial rights. They do not bear on things but on values (not necessarily "economic" ones) produced by the human intellect. In them personal and real elements are combined, and their distinguishing characteristic is the presence of a moral right (*droit moral*) to the products of one's own intellect.<sup>458</sup> They are heritable and transferable and enjoy an almost absolute protection in the light of special legislation.<sup>459</sup>

Obligatory rights are those patrimonial rights which a person (*creditor*) has against another person (*debtor*) for the satisfaction of a protected interest.<sup>460</sup> This interest need not be pecuniary; its violation, however, gives rise to an action for damages measured in money. The obligatory right, and its corresponding duty, may bear on a thing but only indirectly: the right is always directed against the person of the debtor and his heirs. Thus, in contrast to real rights and other "absolute" rights, obligatory rights are "relative" rights which function only against the debtor and his heirs.

Real rights are those patrimonial interests which bear on a thing directly.<sup>461</sup> They are divided into rights of dominion (*Beherrschungsrechte*) and rights of appropriation (*Erwerbserwerbungen*). The real rights of the first category confer on the holder a direct and absolute dominion over a thing, *i.e.*, the right to use and enjoy the thing in whole or in part, for all or for some purposes, and the right to exclude interferences by other persons. According to their content, these rights are distinguished into ownership, ownership-like rights

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458. See 1 ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 300 (1952) (with bibliography).

459 See, *e.g.*, Law of May 5, 1936, RGBL, 1936 II 117 (patents); Law of May 5, 1936, RGBL, 1936 II 130 (designs); Law of May 5, 1936, RGBL, 1936 II 134 (trade and industrial marks); Law of June 7, 1909, RGBL, 1909 II 499 (unfair competition).

460. See 1 ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 301 (1952); VON GIERKE, DAS SACHENRECHT DES BÜRGERLICHEN RECHTS 2 (1959); 1 LARENZ, LEHRBUCH DES SCHULDRECHTS 7 (1957); LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHES 74 (1957); 1 SOERGEL-SIEBERT, BÜRGERLICHES GESETZBUCH 795 (1959).

461. See BAUR, LEHRBUCH DES SACHENRECHTS 6 (1960); 1 ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 295 (1952); VON GIERKE, DAS SACHENRECHT DES BÜRGERLICHEN RECHTS 3 (1959) HECK, GRUNDRISSE DES SACHENRECHTS 1-2 (1930); HEDEMANN, SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES 20 (1960); LENT, SACHENRECHT 1 (1960); WOLFF-RAISER, SACHENRECHT 3 (1957). Cf. 3 STAUDINGER, KOMMENTAR ZUM B.G.B. 8 (1956); WESTERMANN, SACHENRECHT 4-6 (1951).

of enjoyment, rights of limited enjoyment, rights of real security, and real charges.<sup>462</sup>

Ownership is the most complete of the real rights. The owner of a thing movable or immovable has the right to enjoy the thing and to dispose of its substance, except as his right may be limited by provisions of law or by rights of other persons.<sup>463</sup> The ownership-like rights of enjoyment confer on the holder the right to use and enjoy the thing, in whole or in part, but they do not confer the right to dispose of the substance of the thing because this right is vested in its owner. These rights attach only to immovables and are *emphyteusis*, *superficies*, and a number of Germanic feudal institutions which, for the most part, have been converted into full ownership.<sup>464</sup> They are heritable and transferable subject to certain limitations. The German Civil Code regulates in some detail the heritable right to maintain a structure under or above another's land (*Erbbaurecht*).<sup>465</sup> The rights of limited enjoyment are servitudes, distinguished into personal and predial.<sup>466</sup> Personal servitudes are those created in favor of a certain person; they are nonheritable and nontransferable. The personal servitudes are subdivided

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462. See I. ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 295 (1952). Real rights may also be divided according to their *content*, into rights of use and enjoyment, rights of appropriation, rights of disposition, and rights of real responsibility; according to their *object*, into rights on movables and immovables and rights in *re propria*, in *re nullius*, and in *re aliena*; finally, according to their *subject* into rights belonging to a certain individual and rights belonging to the owner of an immovable. See WOLFF-RAISER, *SACHENBECHT* 13-17 (1957). Cf. BAUR, *LEHRBUCH DES SACHENRECHTS* 15-22 (1960).

463. See B.G.B. § 903.

464. See I. ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 296 (1952). The Introductory Law to the Civil Code had originally allowed certain ownership-like rights of enjoyment which were permissible under the law of the German *Länder* (states) to remain in force. See, e.g., arts. 59-65. Most of these provisions have been abrogated by other legislation. The rights recognized by the Civil Code. With respect to several other real rights the legislative jurisdiction of the *Länder* has been expressly preserved. See Introductory Law to the Civil Code arts. 113, 184. But as to certain real rights which were permissible under the law of the *Länder*, provision was made for the recognition of the existing ones excluding their creation in the future. See Introductory Law to the Civil Code art. 189.

465. See B.G.B. §§ 1012-1017. Heritable building rights are now governed by the Decree of Jan. 15, 1919 (*Verordnung über das Erbbaurecht*, RGBI. 1919 I 72) which has abrogated, for the future, the provisions of the Civil Code. The right is treated as a distinct immovable which can become subject of special mortgages and of other real rights. It is usually granted for a defined period and it is freely transferable. The structure erected above or under the land is regarded as a "component part" of the right. Upon termination of the right the building becomes the property of the owner of the land who owes compensation to the holder of the right. See VON GIERKE, *DAS SACHENBECHT DES BÜRGERLICHEN RECHTS* 134 (1959).

466. See B.G.B. §§ 1018, 1030.



into usufruct and limited personal servitudes of a variable content. Habitation is the only limited personal servitude regulated by the Civil Code in detail.<sup>467</sup> Today, transferable and heritable rights of habitation, and use of buildings not suitable for habitation, may be established by virtue of special legislation enacted in 1951.<sup>468</sup> The predial servitudes are limited rights of enjoyment created in favor of another immovable and belonging to the owner of the dominant estate.

The rights of real security and the real charges confer on their holder authority to dispose of the thing, namely, to derive satisfaction from its value following a judicial sale. The rights of real security are either accessorial rights securing the performance of an obligation or self-contained rights independent of any obligation. Security devices on movable effects are always accessorial rights; and, according to the system of the Civil Code, delivery of possession to the creditor is a prerequisite for their valid creation by contract.<sup>469</sup> Rights of pledge created by provision of the law either presuppose possession by the holder or confer on him a right of possession. Security devices on immovables are the various kinds of real mortgages,<sup>470</sup> which are always accessorial rights, and "land-debts" (*Grundsschulden*) which may, but do not ordinarily, secure the performance of an obligation.<sup>471</sup> Land-debt is the right to obtain satisfaction from an immovable in case of nonpayment of certain sums of money due to the holder of the right. It is distinguished from mortgage because the owner of the immovable does not incur a "personal" responsibility for the payment of the indebtedness. The land-debt is an "abstract" debt for which the immovable itself is bound. The notion corresponds to a "strictly real obligation" under the Louisiana Civil Code.<sup>472</sup>

Contractual land-debts are rare today. The main importance of the institution is that it may come into existence by operation

467. See B.G.B. § 1093.

468. See Law of March 15, 1951, RGB1. I 1951 175; HEDEMANN, SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES 221-225 (1960).

469. See 1 ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 298 (1952); B.G.B. §§ 1204, 1252, 1205.

470. See B.G.B. §§ 1113-1190; VON GIERKE, DAS SACHENRECHT DES BÜRGERLICHEN RECHTS 161-184 (1959).

471. See B.G.B. §§ 1191, 1192; ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 298 (1952); BAUR, LEHRBUCH DES SACHENRECHTS 366 (1960).

472. LA. CIVIL CODE art. 1997 (1870): "[An obligation] is real when it is attached to immovable property, and passes with it into whatever hands it may come, without making the third possessor personally responsible."

of law, sometimes without the knowledge and intention of the parties and without any entry in the land-register (*Grundbuch*).<sup>473</sup> In most such cases land-debts are held by the owner of the immovable himself. They are called "owner's land-debts" (*Eigentümergrundschulden*) and their function is to secure to the owner a share in the proceeds of an enforced auction which corresponds to the rank of the land-debt in the order of priority of claims. Consequently, a land-debt held by the owner of the immovable prevents junior mortgages from rising in the order of priority. To achieve this retention of the original rank of junior mortgages and land-debts, the Code provides in a number of cases that the real security, instead of being held by the person who is entered in the land register, is actually held by the owner of the immovable.<sup>474</sup> Land-debts are regulated by a number of special provisions in the German Civil Code.<sup>475</sup> The provisions governing mortgages apply by analogy, insofar as they do not presuppose a personal obligation of the mortgagor.<sup>476</sup> A land-debt may be converted into a mortgage and vice versa.<sup>477</sup> A species of the land-debt is the "annuity-debt" (*Rentenschuld*), namely, a right to the payment of an annuity or rent rather than a lump sum out of an immovable.<sup>478</sup> The notion corresponds to the "rent-charge" of the Louisiana Civil Code.<sup>479</sup> In general, the annuity debt is subject to the rules governing the land-debt. The indebtedness may be capitalized and redeemed at the option of the landowner, subject to the requirement of a six-months statutory notice.<sup>480</sup> The right of redemption cannot be excluded by agreement for a period exceeding thirty years. The holder of the annuity-debt may demand redemption only in case his security is imperilled and his notice for removal of the cause of danger has lapsed.<sup>481</sup> The economic justification of the institution of land-debt is controversial. It has been predicted that land-debts would lead to the "mobilization" of land ownership and its fragmentization into a bundle of independent patrimonial rights. It has been also criticized as favoring the creation of

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473. See Cohn, *The Law of Things*, 1 FOREIGN OFFICE, MANUAL OF GERMAN LAW 112, 143 (1950).

474. See, e.g., B.G.B. §§ 1163, 1168; BAUR, LEHRBUCH DES SACHENRECHTS 384-391 (1960).

475. B.G.B. §§ 191-1198.

476. B.G.B. § 1192.

477. B.G.B. § 1198.

478. B.G.B. § 1199; BAUR, LEHRBUCH DES SACHENRECHTS 392-3 (1960).

479. LA. CIVIL CODE arts. 2017, 2018 (1870).

480. B.G.B. § 1202.

481. B.G.B. § 1201, referring to § 1133.

secret encumbrances and as leading to an "unnatural" division between "personal" and "real" obligations. Land-debts, however, have been used cautiously and the predicted dangers have not materialized. On the contrary, the institution has proved its usefulness as a source of additional credit for landowners and as an increased security for lenders.<sup>482</sup>

The real charges (*Reallasten*) are rights whereby the holder is entitled to demand from the owner of an immovable periodically recurring performances.<sup>483</sup> Holder of the right may be a designated individual or the owner of a certain immovable. The performances may consist in the payment of money, the delivery of natural products, or the rendering of services. A modern example is the charge on the property of electricity works to furnish electric current to the holder of the right. The duration of the right is unlimited; its scope, however, may be specifically determined. A right to the periodical payment of fungibles is termed ground-rent (*Grundrent*).<sup>484</sup> Such a rent may be payable in fixed sums of money or in the value of certain quantities of products. In addition to being a real right so that the holder may obtain satisfaction directly from the immovable, the real charge generates in the absence of contrary agreement an obligatory right against the landowner whose immovable is charged. In this case, the landowner is personally responsible, with his entire patrimony, for the performance which the real charge guarantees. Where personal responsibility is excluded, the landowner's responsibility for the payment of accrued performances is limited to the value of the immovable. The regulation of real charges in the Civil Code is sketchy and the matter has been relegated for details to the law of the several states (*Länder*).<sup>485</sup> Real charges have practically fallen into disuse in Germany and the main importance of the institution today consists in the fact that the provisions governing real charges are applicable by analogy in a number of special laws imposing public charges upon privately owned land.<sup>486</sup> The juridical nature of real

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482. See VON GIERKE, *DAS SACHENRECHT DES BÜRGERLICHEN RECHTS* 186 (1959).

483. B.G.B. § 1105; BAUR, *LEHRBUCH DES SACHENRECHTS* 270-272 (1960).

484. See VON GIERKE, *DAS SACHENRECHT DES BÜRGERLICHEN RECHTS* 157 (1959).

485. B.G.B. §§ 1105-1112. Cf. Introductory Law to the Civil Code art. 113; note 464 *supra*.

486. See Cohn, *The Law of Things*, 1 FOREIGN OFFICE, *MANUAL OF GERMAN LAW* 112, 143 (1950); Prussian Law of Dec. 28, 1937, relating to *Landesrentenbank*, Prussian *GESETZSAMMLUNG* 283.

charges was a *cause célèbre* prior to the enactment of the Civil Code because they could not easily classify as real rights within the framework of Roman law. But under the regime of the Civil Code real charges are clearly real rights akin to real security.<sup>487</sup> Real charges differ from mortgages in that they do not necessarily presuppose indebtedness of a capital sum and in that their economic function resembles rights of use and enjoyment. Real charges differ from servitudes because they may consist *in faciendo* and also because there is no requirement that they must be beneficial to the holder of the right. Finally, real charges differ from land-debts and annuity-debts since ordinarily they are nontransferable, may result in personal responsibility of the landowner, and upon termination of the right are completely extinguished.<sup>488</sup>

The number and incidents of rights of dominion are specified in the law and the creation of new rights or the modification of the existing ones by private agreement is excluded. The principle of contractual freedom in the field of property law has only limited application. The parties to a contract are free to create one of the recognized real rights and work modifications only where the law specifically allows it. It should be noted, however, that unlike in France and Louisiana where under the Civil Codes the real rights are few and inflexible, in Germany the recognized forms of real rights are many and sufficiently flexible to satisfy contemporary economic needs for the exploitation of wealth.

The real rights of appropriation are mostly regulated by the law of the several states.<sup>489</sup> The Civil Code regulates only the right of the finder of a thing to become its owner after the lapse of one year from the day he deposits it with the police authorities;<sup>490</sup> the right of a landowner to cut and appropriate roots and branches of trees in neighboring estates extending to his land;<sup>491</sup> the right of the state fiscal authorities to appropriate abandoned immovables;<sup>492</sup> the right of the possessor of a thing belonging to another to separate and appropriate its substantial

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487. See VON GIERKE, *DAS SACHENRECHT DES BÜRGERLICHEN RECHTS* 158 (1959).

488. *Id.* at 189. *Cf.* text at notes 473-474 *supra*.

489. See 1 ENNECCEBUS-NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 299 (1952).

490. B.G.B. § 973.

491. *Id.* § 910.

492. *Id.* § 928.

component parts;<sup>493</sup> the right of a person to acquire ownership or other real rights of dominion by virtue of recordation of a caution;<sup>494</sup> and the rights of preemption of an immovable.<sup>495</sup> These rights are classified as "real" because they refer to a thing directly and are operative against third persons.

The right of preemption (*Vorkaufsrecht*) confers on its holder the power to acquire the ownership of an object by virtue of a sale upon transfer of this object to a third person.<sup>496</sup> This right may be founded on a contract or on a legal provision. The Civil Code regulates only the legal right of preemption accorded to a co-heir with respect to objects forming part of the succession.<sup>497</sup> Apart from the Civil Code, legal rights of preemption are created by special federal legislation and by laws enacted by the several states.<sup>498</sup> Contractual rights of preemption may be either obligatory rights, regulated in Sections 504-514 of the Civil Code, or real rights, regulated in Sections 1094-1104 of the same Code. Obligatory rights of preemption may exist as to both movables and immovables; real rights of this kind may be established only as to immovables. The contractual real right of preemption may belong to a designated individual or to the owner of a certain estate. This right is in the nature of an encumbrance and is governed in part by the provisions governing real rights applied by analogy.<sup>499</sup> The right vests upon the completion of an attempted alienation, whether by contract or as a result of a forced sale. It is exercised by an informal unilateral declaration of intention addressed to the landowner. The main practical significance of the institution is that the relevant provisions of the Civil Code apply by analogy in a number of special laws. Thus, under the Reich Settlement Law (*Reichssiedlungsgesetz*) local authorities have a right of preemption on "large" estates within their jurisdiction<sup>500</sup> and

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493. *Id.* § 997, 951.

494. *Id.* §§ 883, 888.

495. *Id.* §§ 1094, 873.

496. *Id.* § 1097; VON GIERKE, *DAS SACHENRECHT DES BÜRGERLICHEN RECHTS* 153-55 (1959); BAUR, *LEHRBUCH DES SACHENRECHTS* 172-174 (1960).

497. B.G.B. § 2034.

498. See notes 500-501 *infra*; VON GIERKE, *DAS SACHENRECHT DES BÜRGERLICHEN RECHTS* 153 (1959).

499. *Id.* at 154.

500. The *Reichssiedlungsgesetz* of August 11, 1919 (RGB1. I 364, as amended, RGB1. 1923 I 364 and 805) has authorized the creation of two types of settlement organizations charged with the task to convert large scale agricultural holdings into peasant settlements, the *public settlement organizations* and the *land supplying associations*. These organizations have a right of preemption over estates in their district of 25 hectares or more. This right does not require

under the Reich Homestead Law (*Reichsheimstättengesetz*) the seller has a right of preemption on the homestead.<sup>501</sup>

From the right of preemption is distinguished the right of redemption (*Wiederkaufsrecht*). This right confers on its holder the power to re-acquire the ownership of an object previously sold.<sup>502</sup> It may be founded on a contract or on a legal provision and may be either obligatory or real. The Civil Code regulates only contractual obligatory rights of redemption specifically reserved in contracts of sales.<sup>503</sup> The law of the several states, the Reich Homestead Law and the Reich Settlement Law create legal rights of redemption. The real right of redemption, whether contractual or legal, is an encumbrance on the immovable. It may become effective in several specified circumstances and not only in case of an attempted alienation.<sup>504</sup>

## VI. GREEK LAW

An accepted division of private rights in Greek civilian theory is into obligatory rights, real rights, family rights, inheritance rights, rights of personality, rights on the products of one's own intellect, and the right to one's own name.<sup>505</sup>

Particularly interesting is the distinction between obligatory and real rights. Obligatory rights are defined as those whereby one person (creditor) is entitled to demand from another person (debtor) a performance, *i.e.*, an act, an omission, or a forbearance.<sup>506</sup> These rights are also termed "personal," in contra-

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recordation. The organizations have also a right of preemption if the settler does not cultivate the land, if he sells or abandons it, or if he does not permanently reside there.

501. The *Reichsheimstättengesetz* of May 10, 1920, as amended, November 25, 1937 (RGB1. 1291) has authorized the creation of homesteads in favor of former soldiers, families with many children, and widows of war victims. The homestead consists of a house suitable for a family with garden or of an agricultural or horticultural tract of land. The holder of the homestead acquires ownership subject to certain limitations. Partition, enlargement, or encumbering of the homestead may be made only with the consent of the grantor, *i.e.*, the *Reich*, a *Land*, or municipality. The character of the immovable as homestead is indicated in the land register. The grantor has a legal right of preemption at a fixed price if the holder sells the homestead, and a right of redemption at the same price if the holder grossly neglects the homestead, does not cultivate the land, or if he does not reside there.

502. See VON GIERKE, *DAS SACHENRECHT DES BÜRGERLICHEN RECHTS* 156 (1959).

503. B.G.B. § 497.

504. See VON GIERKE, *DAS SACHENRECHT DES BÜRGERLICHEN RECHTS* 157 (1959).

505. See BALIS, *GENERAL PRINCIPLES OF THE CIVIL LAW* 74-83 (1955) (in Greek).

506. *Id.* at 74. *Cf.* GREEK CIVIL CODE art. 287 (1946): "Obligation is the

distinction with "real" rights, because they confer authority over the person of a determined debtor. Obligatory rights need not be appreciable in money; in such a case, however, a judgment obtained by the creditor cannot be specifically enforced. Correlative to the right of the creditor is the duty of the debtor. The legal relation between the two is termed "obligation." Obligations may derive from juridical acts or directly from a legal provision.<sup>507</sup>

Real rights are defined as those which confer an immediate and absolute authority over a thing.<sup>508</sup> These rights avail against the world (*erga omnes*). They are analyzed as involving legal relationships between persons rather than between persons and things. But unlike obligatory relationships whose immediate content is power over the person of a determined debtor and only indirectly over a thing, the immediate content of real rights is power over a thing and only indirectly over an indeterminate number of persons. When the power over a thing exhausts all its utility, the right is ownership. When this power exhausts only part of the thing's utility, the right is a *jus in re aliena*, i.e., servitude, pledge, or mortgage. Possession, detention, and quasi-possession are *sui generis* rights, neither real nor personal. Real rights other than those enumerated cannot be created by private agreement nor can the content of these rights be altered.<sup>509</sup> Modifications of recognized real rights in the exercise of contractual freedom are operative only between the parties to the contract. Only exceptionally, in the case of predial and personal servitudes, the law permits the parties to determine the "utility" to be derived by the dominant estate or the holder of the personal servitude.<sup>510</sup> Real rights can be established only on things, i.e., corporeal objects in commerce individually determined.<sup>511</sup> By way of exception, the Civil Code recognizes usufruct and pledge of incorporeals, and mortgage

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relationship whereby one person is bound toward another person to furnish a performance. The performance may consist in a forbearance." See also Fragistas, *General Introduction to the Law of Obligations*, in II ERM. A.K. 2, 7 (1959) (in Greek).

507. See 1 ZEPOS, *LAW OF OBLIGATIONS* 54 (1955) (in Greek); BALIS, *GENERAL PRINCIPLES OF THE CIVIL LAW* 74-75 (1955) (in Greek).

508. BALIS, *GENERAL PRINCIPLES OF THE CIVIL LAW* 76 (1955) (in Greek); cf. ZEPOS, *Law of Things and Real Actions in Greece*, 29 TUL. L. REV. 697 (1955).

509. See BALIS, *GENERAL PRINCIPLES OF THE CIVIL LAW* 76 (1955); *id.*, *LAW OF PROPERTY* 5 (1955) (in Greek).

510. GREEK CIVIL CODE arts. 1118, 1188 (1946). See also *id.* arts. 1220-1222 (determination by the parties of the scope of pledge).

511. On the notion of "things" in Greek civil law, see Yiannopoulos, *Introduction to the Law of Things*, 22 LA. L. REV. 756, 763 (1962).

of the usufruct of an immovable.<sup>512</sup> Where several things are subject to a real right in favor of the same person, there are as many real rights as there are things. This means that there can be no real right over a universality.<sup>513</sup> The creation of *jura in re aliena*, even in performance of an obligation, is a real transaction and as such subject to the rule of temporal priority (*prior tempore potior jure*). Real rights may be of limited duration either by law or agreement, and may be subject to term or conditions. When the real right terminates, all rights granted by the holder of the right over the thing are extinguished.

The differences between real rights and obligations may be summarized as follows. Real rights, in contrast to obligations, are subject to the rule of temporal priority and confer the right to follow and the right of preference; as to their content and form, real rights are subject to rules authoritatively determined by law rather than to the principle of contractual freedom; they are "static" as tending to perpetuate themselves while obligations are "dynamic" as tending to be extinguished upon performance; they are "absolute" as available against the world while obligations are "relative" as available against a determined debtor; real rights, finally, confer "immediate" power over a thing rather than "indirect" authority through the intervention of a debtor.<sup>514</sup> These differences, though tending to disappear in connection with a number of particular rights, sufficiently warrant the validity of the distinction for systematic purposes.

#### CONCLUSIONS

The distinction between personal and real rights is a systematic generalization deeply embedded in the civilian tradition and known to all western systems of law. Yet, neither analytical jurisprudence<sup>515</sup> nor civilian theory<sup>516</sup> succeeded to furnish generally acceptable criteria for this distinction and for the determination of the respective nature of personal and real rights. As a result, there is still much disagreement among jurists concerning the classification of certain rights as personal or real within the framework of contemporary legal systems. Classifications made by commentators, legislatures, and courts seem

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512. GREEK CIVIL CODE arts. 1178, 1247, 1259 (1946).

513. On the notion of "universalities," see Yiannopoulos, *Introduction to the Law of Things*, 22 LA. L. REV. 756, 781 (1962).

514. See 1 ZEPOS, *LAW OF OBLIGATIONS* 39-45 (1955) (in Greek).

515. See text at notes 450-452 *supra*.

516. See text at notes 17-20, 43-48 *supra*.



to be in connection with particular rights more arbitrary than consistent with a coherent theory.

Perhaps, as in the case of most analytical generalizations, the search for everlasting criteria is doomed to failure. A living and growing law cannot be put on a conceptual Procrustean bed. The living law of growing societies adjusts itself to new forms of human relations and it is to be expected that some of these forms would resist, and perhaps defy, classification within conceptual patterns of the past. The distinction between real and personal rights was devised to explain the structure and function of certain institutions of Roman law at a time when that law has ceased to grow and actually was a law in the books. Today, this distinction may serve only as a starting point of analysis and may be useful for pedagogical purposes. But, certainly, it does not adequately correspond with the actual function of several types of rights in contemporary legal systems.

In Louisiana, the theory of real rights has remained obscure, in part because of the lack of doctrinal studies. There is much confusion concerning the nature, structure, and function of real rights as distinguished from personal rights. As a consequence, there is some judicial ambivalence concerning the classification of certain rights as personal or real; in turn, this has led to a questionable interpretation of the Code and of special legislation.

The question concerning the *nature* and *structure* of real rights in Louisiana is a theoretical one but has practical implications where courts are asked to grant relief on the basis of conflicting claims concerning the nature of the rights involved in litigation. In these circumstances generalizations derived from previously decided cases and legislative texts may determine the outcome of the judicial proceedings. But these generalizations, the very concepts of real and personal rights, proved to be in part inadequate and in part incoherent. In the light of Louisiana law it can only be stated that real rights are the rights of ownership and its recognized dismemberments. However, this is an ambiguous proposition which begs the question because the nature and structure of ownership and of its "recognized" dismemberments remain undefined and unknown. Ultimately, classification of new forms of rights will depend on the characterization of particular interests as "dismemberments of ownership" in accordance with a sound judicial process. It is in the

light of these considerations that in this study attention has been focused on the *function* of particular rights as a prerequisite for an acceptable classification. The results have been tested against the traditional ideas and it has been indicated which rights may be classified in Louisiana as real, consistent with the premises of the Civil Code and the civilian tradition. The question of the nature and structure of these rights has been left open along with the question of the desirability of the distinction between real and personal rights in Louisiana.

Real rights in Louisiana can be divided into those established by the Civil Code and those created by special legislation and jurisprudence. Under the Civil Code real rights are ownership and the *jura in re aliena*.<sup>517</sup> Ownership, whether perfect or imperfect, is a real right whether its object is a movable or an immovable. *Jura in re aliena* are the predial and personal servitudes (*i.e.*, usufruct, use, and habitation), rights of real security (*i.e.*, pawn, antichresis, and mortgage), superficies, emphyteusis, and a number of real charges.<sup>518</sup> With the exception of usufruct and use which can exist on both movables and immovables, and pawn which can exist on movables only, all other *jura in re aliena* can exist only on immovables. Possession under the Civil Code is a *sui generis* right.<sup>519</sup> Predial lease is a personal right though, in some respects, it functions as a real right.<sup>520</sup> Real rights can exist on both corporeal and incorporeal things. Thus, there can be pledge of an incorporeal<sup>521</sup> and mortgage of the usufruct of an immovable.<sup>522</sup> Privileges under the Civil Code are causes of preference rather than real rights. However, the vendor's recorded privilege on the immovable sold is a veritable mortgage.<sup>523</sup> The vendor's privilege on movables,<sup>524</sup> and the lessor's privilege<sup>525</sup> are merely causes of preference. The vendor's right of dissolution is neither personal nor real but a right to transform a legal relationship.<sup>526</sup> And the promise to sell an immovable, if recorded, is not a distinct real right but plain ownership.<sup>527</sup>

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517. See text at notes 67-68 *supra*.

518. See text at notes 68-69, 73-89, 90-104, 384-94 *supra*.

519. See text at notes 70-72 *supra*.

520. See text at notes 105-112 *supra*.

521. LA. CIVIL CODE art. 3281 (1870).

522. *Id.* art. 3289.

523. See text at notes 322-3 *supra*.

524. See text at note 322 *supra*.

525. See text at notes 359 *supra*.

526. See text at note 340 *supra*.

527. See text at note 365 *supra*.

Under special legislation real rights are the "timber estates"<sup>528</sup> (which could be classified as a species of emphyteusis), the ownership of individual apartments<sup>529</sup> (which could be regarded as a species of superficies), chattel mortgages,<sup>530</sup> and mineral leases.<sup>531</sup> Under the jurisprudence real rights are the mineral servitudes and the mineral royalties.<sup>532</sup> Mineral leases are classified as personal rights, though in most aspects, they function as real rights.<sup>533</sup> Restraints on the use and disposition of property, including building restrictions, are clearly real rights in the nature of predial servitudes.<sup>534</sup>

The preceding list of real rights in Louisiana is not exclusive. The principle of contractual freedom may function in the field of property law within the limits of a broadly defined public policy and parties may create new forms of real rights and may modify the recognized ones.<sup>535</sup> This jurisprudential approach is sound. Progressive legal systems have either abandoned the doctrine of limited number of real rights<sup>536</sup> or have permitted the creation of real rights within the pattern of several flexible forms sufficient to satisfy the needs of a growing economy.<sup>537</sup>

In case of a future revision of the Louisiana Civil Code the concept of real rights could, perhaps, be avoided. Specific rules applicable to each category of rights now known as real could, at the cost of possible duplication, solve perennial problems concerning application by analogy of rules enacted to apply to sets of quite different rights. If for historical and systematic reasons the concept of real rights were to be preserved, then care should be taken to specify which rights are real. A measure of contractual freedom ought to be guaranteed by special provision which would also prescribe the limits of this freedom. A set of rules designed to apply to all real rights could be drafted with appropriate exceptions in indicated cases. And, by virtue of a special provision, rules governing real rights in general could be made applicable to certain personal rights without thereby affecting their nature.

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528. See text at notes 205-233 *supra*.

529. See text at notes 119-138 *supra*.

530. See text at notes 258-278 *supra*.

531. See text at notes 156-158 *supra*.

532. See text at notes 148, 177 *supra*.

533. See text at notes 160, 163-67 *supra*.

534. See text at notes 234-257 *supra*.

535. See text at notes 113-117 *supra*.

536. See text at note 32 *supra*.

537. See text at notes 488-489 *supra*.