PREDIAL SERVITUDES; GENERAL PRINCIPLES: LOUISIANA AND COMPARATIVE LAW

*A. N. Yiannopoulos**

INTRODUCTION: PREDIAL SERVITUDES AS DISMEMBERMENTS OF OWNERSHIP

The right of ownership, which according to traditional civilian analysis includes the elements of *usus, fructus,* and *abusus,*[1] may lawfully be dismembered in a variety of ways by the intention of the owner or by operation of law.[2] Book II, Titles III and IV, of the Louisiana Civil Code of 1870 deal specifically with permissible dismemberments of ownership known as servitudes. These dismemberments of ownership are real rights which, by their nature, confer direct and immediate authority over a thing belonging to another person.[3] They are distinguished from personal (obligatory) rights which confer authority merely over the person of a determined debtor who is bound by an obligation toward his creditor.[4]

Servitudes give rise to certain incidental and correlative duties imposed on the owner of the things burdened. These du-

*Research Professor of Law, Louisiana State University; Professor of Comparative Law, University of Thessaloniki.

1. *See* LA. CIV. CODE art. 491: "[O]wnership gives the rights to use, to enjoy and to dispose of one's property in the most unlimited manner. . . ."; Queensborough Land Co. v. Cazeaux, 136 La. 724, 736, 67 So. 641, 645 (1915): "As stated by article 491 of the Code, ownership is composed of the rights to use, to enjoy, and to dispose of. These three constituent elements of the ownership bear in the civil law the designation given to them in the Roman law: The usus, the fructus, and abusus."; *In re* Morgan R.R. & S.S. Co., 32 La. Ann. 371, 375 (1880), quoted in Regan 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): "The rights of use, enjoyment, and disposal are said to be the three elements of property in things."

2. For the limits of the owner's freedom to create real rights other than those regulated in the Louisiana Civil Code of 1870, see A. YIANNOPOULOS, CIVIL LAW PROPERTY § 96 (1966). For dismemberments of ownership created by operation of law, see A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 99-115 (1968).

3. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nos 46, 872 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 520 (3d ed. Chauveau 1905); 11 DEMOLOMBE, TRAITÉ DES SERVITUDES nº 2 (1876); PARDESSUS, TRAITÉ DES SERVITUDES nº 16 (1817). For the notion and function of real rights in general, see A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 87, 88, 90 (1966).

4. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 86, 88, 90 (1966); A. YIANNOPOULOS, PERSONAL SERVITUDES § 1 (1968). *Cf.* Martin v. Louisiana Pub. Util. Co., 13 La. App. 181, 127 So. 470 (1st Cir. 1930).

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ties may be termed "real obligations."[5] Thus, Article 2012 of the Louisiana Civil Code of 1870 declares that servitudes are "examples" of real obligations created by "alienating to one person the immovable property, and to another, some real right to be exercised upon it."[6] While the notion and function of real obligations is an involved matter in civilian theory, the nature of the duties of the owner should not give rise to difficulties in Louisiana. Article 2012 merely means that the acquirer of land subject to a real right of servitude incurs duties incidental and correlative to the rights of the holder of the servitude. These duties are "real" rather than "personal" obligations in the sense that the landowner is not bound to perform personally, *i.e.*, with his entire patrimony, and that they are transferable to subsequent acquirers, whether by universal or by particular title, as burdens on the land.[7] By abandoning the land to the obligee, the landowner may relieve himself of all responsibility.[8]

In the Louisiana Civil Code of 1870, servitudes are divided into personal and predial.[9] Personal servitudes are the rights of usufruct, use, and habitation;[10] predial servitudes, also known as real or landed servitudes,[11] are of so many varieties that enumeration is impractical. Personal servitudes may burden both movables and immovables, whereas predial servitudes are charges laid on an immovable;[12] personal servitudes are estab-

5. LA. CIV. CODE art. 2015: "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. . . ." *See also* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 112 (1966). The notion of real obligations is an awkward analytical tool which can be fully dispensed with. *Id.*

6. LA. CIV. CODE art. 2012.

7. *Id.* arts. 2010, 2015. Exceptionally, the creation of usufruct gives rise to real as well as personal obligations between the usufructuary and the naked owner. *See* A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 53, 62 (1968).

8. *See* LA. CIV. CODE arts. 775, 1097(3).

9. *See id.* art. 646(1): "All servitudes which affect lands may be divided into two kinds, personal and real." *Cf.* La. Civil Code art. 642 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are: "Digest, book 8, tit. 1, law 1. Pothier, coutûme d'Orléans, introduction to tit. 13, *of services*, Art. 1, No. 2." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 68 (1937). Personal servitudes are dealt with in Book II, Title III, of the Louisiana Civil Code of 1870; predial servitudes are dealt with in Book II, Title IV of the same Code.

10. *See* LA. CIV. CODE art. 646(2): "Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: usufruct, use and habitation." For the question whether parties may, in the exercise of contractual freedom, create additional forms of personal servitudes, see A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 123-25. (1968).

11. *See* LA. CIV. CODE art. 646(3): "Real servitudes, which are also called *predial* or *landed servitudes*. . . ."

12. *See id.* arts. 541, 650; A. YIANNOPOULOS, PERSONAL SERVITUDES § 4 (1968).

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lished in favor of a person, whereas predial servitudes are established in favor of an immovable;[13] and personal servitudes terminate with the life of the beneficiary whereas predial servitudes are ordinarily perpetual.[14] The division of servitudes into personal and predial derives from the Romanist tradition[15] and accords with terminology employed in Germany[16] and in Greece.[17] In France, the word servitude, standing alone, ordinarily refers to predial servitudes; the adjectives predial, real, or landed are rarely used.[18]

The following study is limited to a discussion of the general

13. *See id.* arts. 543, 646, 648.

14. *Id.* arts. 606, 646, 653. Limited personal servitudes, however, may be stipulated to be heritable rights. *See* A. YIANNOPOULOS, PERSONAL SERVITUDES § 125 (1968). *Cf.* Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 776-77, 91 So. 207, 214 (1922): "It is true that Article 646 declares that personal servitudes terminate with the life of the person for whose benefit they are established. . . . But that does not mean that a servitude cannot be established in favor of a person without the condition that it shall terminate at his death. . . ."

15. *See* DIGEST 8.1.1: *"Servitutes aut personarum sunt, ut usus et usus fructus, aut rerum, ut servitutes rusticorum praediorum et urbanorum"*; POTHIER, INTRODUCTION GÉNÉRALE AUX COUTÛMES, title XII, art. 1, § 1; 1 OEUVRES DE POTHIER nº 312 (Bugnet ed. 1861); H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 282 (2d ed. 1952); W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 261, 268 (2d ed. 1950); SÖHM-MITTEIS-WENGER, INSTITUTIONEN 324 (17th ed. 1923); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS nº 633 n.2 (7th ed. Esmein 1961); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 866 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 515 (3d ed, Chauveau 1905); 10 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS nº 170 (1875). On the question whether usufruct was or was not a servitude in classical Roman law, *see* Pugliese, *On Roman Usufruct*, 40 TUL. L. REV. 523 (1966); Buckland, *The Conception of Usufruct in Classical Law*, 43 L.Q. REV. 326 (1927); Kagan, *The Nature of Servitudes and the Association of Usufruct with Them*, 22 TUL. L. REV. 94 (1947); SCHULZ, CLASSICAL ROMAN LAW 382 (1951).

16. *See* WOLFF-RAISER, SACHENRECHT 431 (10th ed. 1957). Book III, ch. 5 of the B.G.B., dealing with "servitudes," is subdivided into predial servitudes (§§ 1018-1029), usufruct (§§ 1030-1089), and limited personal servitudes (§§ 1090-1093). German writers have pointed out that, in the light of fundamental differences among predial servitudes, usufruct, and limited personal servitudes, the generic "servitude" is almost meaningless. See BAUR, LEHRBUCH DES SACHENRECHTS 19 (2d ed. 1963); 3 STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1006 (11th ed. 1963); VON GIERKE, DAS SACHENRECHT DES BÜRGERLICHEN RECHTS 140 (4th ed. 1959); 3 OTTO GIERKE, DEUTSCHES PRIVATRECHT 637 (1905).

17. *See* G. BALIS, CIVIL LAW PROPERTY 293 (3d ed. 1955) (in Greek). Book III, ch. VII of the Greek Civil Code bears the heading "Predial Servitudes," whereas Book III, ch. VIII of the same code, bears the hearing "Personal Servitudes."

18. The redactors of the French Civil Code employed the terms "servitudes" or "predial services" but meticulously avoided reference in the Code to "personal servitudes" in order to prevent confusion with reprobated feudal tenures which had been suppressed by the Revolution. *See* 2 TOULLIER, DROIT CIVIL FRANÇAIS nº 94 (1833). French commentators, following the civilian tradition, do not hesitate to use the expressions "personal servitudes" and "predial servitudes." According to prevailing practice, however, usufruct, use, and habitation are referred to by their names rather than by the generic "personal servitudes"; and the word "servitude" is thus ordinarily reserved for predial servitudes. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 753 (2d ed. Picard 1952).

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principles governing predial servitudes in the legal systems of Louisiana, France, Germany, and Greece.

PREDIAL SERVITUDES

Definition

According to Article 647 of the Louisiana Civil Code of 1870, and corresponding Article 637 of the French Civil Code, a predial servitude is "a charge laid on an estate for the use and utility of another estate belonging to another owner."[1] This definition indicates clearly that predial servitudes are real rights burdening immovables; that the creation of these rights requires the existence of two distinct immovables belonging to different owners; and that these rights are for the benefit of an immovable rather than a person. The definition makes no reference to the purpose or content of predial servitudes. This omission is quite natural, because, in contrast to other real rights which have a single purpose or content, predial servitudes may serve a multitude of purposes and may have a variable content.[2] Reference in the Code to the purpose or content of predial servitudes might well be impractical. One might only state in a general way that the rights of predial servitudes either confer certain advantages of use without exhausting the utility of the burdened immovable or deprive the owner of the burdened immovable of certain specified prerogatives of his ownership.[3]

Language in the Louisiana and French Civil Codes indicates that predial servitudes are due to an estate rather than to the owner of an estate. This apparent *personification* of the so-called dominant estate has its roots in Roman sources. Roman jurisconsults have used colorful expressions, such as *servitus praedii magis quam personae videtur, jus hauriendi non hominis sed praedii est, jus fundi, fundus fundi servit,* and *servitus praedio videtur,* which might be taken to mean that the rights of servitudes belong to the dominant estate, a thing. According to modern analysis, however, things may not be subjects of

1. LA. CIV. CODE art. 647; La. Civ. Code art. 643 (1825); La. Civ. Code 126, art. 1 (1808); FRENCH CIV. CODE art. 637.

2. *Cf.* LA. CIV. CODE art. 709; FRENCH CIV. CODE art. 686; B.G.B. § 1018; GREEK CIV. CODE art. 1119; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 866 (2d ed. Picard 1952).

3. *See* POTHIER, INTRODUCTION GÉNÉRALE AUX COUTÛMES, tit. XII, art. 1, § 1; 1 OEUVRES DE POTHIER nº 312 (Bugnet ed. 1861): *"Just faciendi aut prohibendi aliquid in alieno";* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 867 (2d ed. Picard 1952); *cf.* 3 SOERGEL-SIEBERT-BAUR, KOMMENTAR ZUM B.G.B. 374 (9th ed. 1960); HECK, GRUNDRISS DES SACHENRECHTS 303 (1930).

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rights; rights belong to persons only.[4] Therefore, legislative declarations in Louisiana and in France that predial servitudes are due to an estate must be taken as metaphors; they merely mean that predial servitudes are not attached to a particular person but they are due to anyone who happens to be owner of the dominant estate. Modern civil codes have eliminated analytical inaccuracies and provide expressly that predial servitudes are due to the owner of the dominant estate.[5]

The German Civil Code contains a precise but cumbersome definition of predial servitudes (*Grunddienstbarkeiten*). These servitudes are charges laid on a tract of land in favor of the owner of another tract of land which confer on the latter certain advantages of use or exclude the doing of certain acts on the burdened land or prohibit the exercise of a right arising out of the ownership of the burdened tract of land in relation to the other tract of land.[6] The definition is cumbersome because it includes reference to the purpose or content of predial servitudes. In Greece, Article 1118 of the Civil Code declares that a predial servitude is a real right, burdening an immovable in favor of the owner of another immovable, which confers on the latter a certain advantage.[7] The following Article 1119, referring to the purpose or content of predial servitudes, specifies that the owner of the burdened immovable must tolerate certain uses by the owner of the other immovable or must refrain from the exercise of certain prerogatives of his ownership.[8]

In the civilian literature, the estate burdened with a predial servitude is designated as "servient" (*praedium serviens*); the estate in whose favor (or in whose owner's favor) the servitude is established is designated as "dominant" (*praedium dominans*).[9] In France, the redactors of the Code Civil have avoided these expressions in an effort to wipe out the memory

4. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 87 n.20 (1966).

5. *See* text at notes 6, 7 *infra;* G. BALIS, CIVIL LAW PROPERTY 294 (3d ed. 1955) (in Greek); WOLFF-RAISER, SACHENRECHT 433 (10th ed. 1957); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 921 (2d ed. Picard 1952).

6. *See* B.G.B. § 1018; WOLFF-RAISER, SACHENRECHT 432 (10th ed. 1957); BAUR, LEHRBUCH DES SACHENRECHTS 262 (2d ed. 1963). In Germany, predial servitudes are regulated to a large extent by state laws. See Introductory Law of the B.G.B., art. 115.

7. *See* GREEK CIVIL CODE art. 1118.

8. *Id.* art. 1119; G. BALIS, CIVIL LAW PROPERTY 296 (3d ed. 1955) (in Greek).

9. *See* POTHIER, INTRODUCTION GÉNÉRALE AUX COUTÛMES, tit. XII, art. 1, § 1. 1 OEUVRES DE POTHIER nº 312 (Bugnet ed. 1861); 3 PLANIOL, ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 870 (2d ed. Picard 1952); G. BALIS, CIVIL LAW PROPERTY 296 (3d ed. 1955) (in Greek).

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of reprobated feudal tenures. They resorted to descriptive statements, such as "the estate for which the servitude has been established," "he who has a right of servitude," and "the estate which owes the servitude."[10] Occasionally, however, reference is made in the French Civil Code to "the subject estate" or to the "servient estate."[11] The redactors of the Louisiana Civil Codes, perhaps unnecessarily, have likewise avoided reference to the "servient" and "dominant" estates. Feudal tenures have never had a place in Louisiana property law.[12] Accordingly, for the sake of brevity, the terms servient and dominant estate could have been used in the text of the Louisiana Civil Codes of 1808, 1825, and 1870. Today, these terms are consistently used in judicial decisions and in the headings of the annotated edition of the Louisiana Civil Code of 1870.

Content

According to Article 655 of the Louisiana Civil Code of 1870, predial servitudes may impose on the owner of the servient estate the duty either "to abstain from doing a particular thing, or to permit a certain thing to be done on his estate."[13] Corresponding provisions in foreign civil codes indicate that the content of predial servitudes may be the toleration of certain activities on the servient estate (*pati, servitus in patiendo*), the prohibition of certain material acts (*non facere, servitus in non faciendo*), or the restriction of certain rights belonging to the owner of the servient estate by virtue of his ownership.[14] In

10. *See, e.g.*, FRENCH CIV. CODE arts. 700, 702, 705; *cf.* LA. CIV. CODE arts. 776, 778, 805.

11. *See* FRENCH CIV. CODE arts. 695, 699, 701; *cf.* LA. CIV. CODE arts. 770, 775, 777.

12. *See* Xigues v. Bujac, 7 La. Ann. 498, 504 (1852): "In Louisiana, all titles to land were, and remain alodial, and not feudal. The feudal law, and its usages, never had a place in this region, under the Spanish government." Article 2, p. 126, of the Louisiana Civil Code of 1808, corresponding to Article 638 of the French Civil Code, provided that "the servitude does not establish any pre-eminence of one estate over the other." This provision was rightly suppressed in the 1825 revision. The redactors observed: "We have thought best to suppress this article which prescribed, that servitudes did not establish any right of pre-eminence of one estate over another, as it is copied from the Code Napoleon, and was adopted in France only for the purpose of preventing, that under the title of servitude feudal rights should be established, which had been before abolished. It is utterly useless among us." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, p. 71 (1937).

13. LA. CIV. CODE art. 655; La. Civ. Code art. 651 (1825). There is no precisely corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the source of this provision is "Digest, book 8, tit. 2, law 39." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 70 (1937).

14. *See* B.G.B. § 1018; GREEK CIV. CODE art. 1119; WOLFF-RAISER, SACHENRECHT 433-44 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 299-301 (3d ed. 1955) (in Greek). For French doctrine, *see* 3 PLANIOL ET RIPERT, TRAITÉ PRA-

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principle, predial servitudes may nowhere involve affirmative duties for the owner of the servient estate.[15]

Predial servitudes involving toleration of certain activities on the servient estate may be for the use of that estate for certain purposes, for example, in connection with rights of way, aqueducts, or support of structures;[16] or they may be for the taking of certain materials, as earth, stones, water, or wood.[17] The taking of mineral substances, however, ordinarily forms the objects of rights other than predial servitudes. In Louisiana, servitudes for the taking of minerals, as oil and gas, are *sui generis* real rights in the nature of limited personal servitudes rather than predial servitudes.[18] In France, mineral operations are subject to a special legal regime.[19] In Germany and in Greece, most minerals under the surface of the land are state-owned; landowners may thus grant predial servitudes for mineral operations only as to minerals which are not owned by the state.[20]

Servitudes involving prohibition of certain material acts may exclude, for example, the erection of a building on a vacant lot[21] or the use of the servient estate as a pasture or as an industrial establishment.[22] In Louisiana, restraints on the use of property may either take the form of *sui generis* real rights[23]

TIQUE DE DROIT CIVIL FRANÇAIS nº 867 (3d ed. Picard 1952); PARDESSUS, TRAITÉ DES SERVITUDES 34 (1817).

15. *See* LA. CIV. CODE 655: "One of the characteristics of a servitude is, that it does not oblige the owner of the estate subject to it to do anything"; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 918 (3d ed. Picard 1952); WOLFF-RAISER, SACHENRECHT 438 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 292 (3d ed. 1955) (in Greek). For exceptions to this principle, see text at notes 29, 30 *infra*.

16. *Cf.* LA. CIV. CODE arts. 712, 724, 727(3); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 875 (3d ed. Picard 1952); MEISNER-STERN-HODES, NACHBARRECHT 392 (3d ed. 1956); Stulz, *Dienstbarkeiten*, in 2 RECHTSVERGLEICHENDES HANDWOERTERBUCH 645, 646 (1929).

17. *Cf.* LA. CIV. CODE arts. 657, 721, 723; Ledoux v. Allegre, 10 La. Ann. 706 (1885) (servitude for the taking of timber).

18. *See* YIANNOPOULOS, CIVIL LAW PROPERTY §§ 99, 100 (1966); A. YIANNOPOULOS, PERSONAL SERVITUDES § 125 (1968); *cf.* Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922).

19. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nºs 523-49 (2d ed. Picard 1952).

20. *See* WOLFF-RAISER, SACHENRECHT 388 (10th ed. 1957); A. YIANNOPOULOS, PERSONAL SERVITUDES § 28 (1968).

21. *Cf.* LA. CIV. CODE art. 711. Further, predial servitudes may involve prohibition of building in any style other than the one agreed upon or prohibition of building above or below a certain height. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 104 (1966); *cf.* MEISNER-STERN-HODES, NACHBARRECHT 396 (3d ed. 1956); 3 STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1036 (11th ed. 1963); Kammergericht, February 6, 1911, 26 O.L.G. 81, 83 (1913) (prohibition of cutting trees so that the landscape may be preserved).

22. *See* BAUR, LEHRBUCH DES SACHENRECHTS 264 (2d ed. 1963).

23. See A. YIANNOPOULOS, CIVIL LAW PROPERTY § 104 (1966).

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or they may be veritable predial servitudes. Everywhere, the use or destination of immovable property is partly governed by zoning and building ordinances, *i.e.*, by rules of public law.

Predial servitudes may, finally, exclude certain rights that the owner of the servient estate would be entitled to exercise by virtue of his ownership. For example, the owner of the servient estate may be deprived of his right to drain waters into an estate situated below[24] or of his right to diffuse reasonable quantities of smoke, heat, or noise.[25] Conversely, the owner of the servient estate may be bound by virtue of a predial servitude to tolerate an excessive emission of smoke, heat, or noise from the dominant estate, which, without the servitude, he would be entitled to suppress.[26] Predial servitudes, however, may not exclude the performance of juridical acts affecting the servient estate; thus, a prohibition of alienation or partition may not form the content of a predial servitude.[27] The question whether a predial servitude may involve prohibition of a competing business on the servient estate is still largely unresolved.[28]

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24. Article 660 of the Louisiana Civil Code of 1870 provides that the estate situated below must "receive the waters which run naturally from the estate situated above." This servitude, arising from the natural situation of the places, may be restricted or altered by agreement. *See* LA. CIV. CODE art. 752.

25. Article 668 of the Louisiana Civil Code of 1870 declares that "every one has the liberty of doing on his ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor." This liberty may be restricted by means of a predial servitude. *Cf.* B.G.B. § 906; GREEK CIV. CODE art. 1003; WOLFF-RAISER, SACHENRECHT 435 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 301 (3d ed. 1955) (in Greek). Restrictions may also be imposed by municipal ordinances. *See* Dittus, *Grenzen der Andwendbarkeit von Servituten*, 7 N.J.W. 1825 (1954).

26. Article 669 of the Louisiana Civil Code of 1870 indicates that a landowner may be entitled to diffuse an excessive amount of smoke or smell by virtue of a predial servitude established in favor of his estate. *Cf.* Ellis v. Blanchard, 45 So.2d 100 (La. App. 2d Cir. 1950) (claim of a servitude for the toleration of excessive noise).

27. *See* R.G., Oct. 14, 1925, 111 R.G.Z. 384, 395 (1926); G. BALIS, CIVIL LAW PROPERTY 300 (3d ed. 1955) (in Greek). In Louisiana, absolute limitations on the alienability of property are invalid. See Female Orphan Society v. Young Men's Christian Ass'n, 119 La. 278, 44 So. 15 (1907). In the context of a subdivision, however, certain restrictions on the alienability of property may constitute valid *sui generis* real rights, *i.e.*, building restrictions. *See* Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915); *cf.* Shelly v. Kraemer, 334 U.S. 1 (1948); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 104 (1966).

28. In Germany and in Greece, an agreement prohibiting a competitive business on a neighboring lot may be a predial or a personal servitude. *See* G. BALIS, CIVIL LAW PROPERTY 299 (3d ed. 1955) (in Greek); 3 STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1048 (11th ed. 1963). According to French doctrine and jurisprudence, covenants not to compete do not establish predial servitudes. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 924 (2d ed. Picard 1952). *Cf.* Leonard v. Lavigne, 245 La. 1104, 162 So.2d 341 (1964). In this case, a recorded lease provided that "the lessors hereby bind and obligate themselves, their heirs and assigns not to sell or lease all or part of the adjoining premises owned by them to any other person, firm or corporation for the purpose of engaging in a competitive business with this lessee." The adjoining

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It is a principle of civil law that predial servitudes may not involve affirmative duties for the owner of the servient estate. Article 655 of the Louisiana Civil Code of 1870 thus declares that "one of the characteristics of a servitude is, that it does not oblige the owner of the estate subject to it to do anything."[29] This is a rule of public policy which may not be derogated from by juridical act,[30] unless the law provides otherwise.[31] The matter has been discussed extensively in *Louisiana & A. R.R. v. Winn Parish Lumber Co.*[32] In this case, a purchaser of timber lands stipulated, as a part of the consideration for the sale, to have the tonnage arising from the manufacture 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."[33] In an action brought by the seller for the enforcement of the tonnage agreement, the defendant invoked Articles 655 and 709 of the Civil Code and argued that the contract "cannot be so enforced, because that would be to establish a servitude upon the land and the owner, consisting, as to the latter, *in faciendo*."[34] The Louisiana Supreme Court held that the obligation assumed by the vendee "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,

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premises were subsequently sold by the lessor to a third person without mention of the restriction in the act of sale. When the new owners started erecting a competitive business on their land, the lessee sought an injunction. The Louisiana Supreme Court rightly held that the stipulation in the contract of lease gave rise to a personal obligation. In the absence of a dominant estate, it could not be a predial servitude; and, in the absence of a general development plan in a subdivision, it could not be a *sui generis* real right in the nature of a valid building restriction. The court did not have the opportunity to examine whether the stipulation in question might be classified as a limited personal servitude.

29. LA. CIV. CODE art. 655, note 13 *supra*. *See also* DIGEST 8.1.15.1; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT FRANÇAIS nº 918 (3d ed. Picard 1952); J. PARDESSUS, TRAITÉ DE SERVITUDES 34 (1817); WOLFF-RAISER, SACHENRECHT 438 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 292 (3d ed. 1955) (in Greek).

30. *See* LA. CIV. CODE art. 709: "Owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided... that such services imply nothing contrary to public policy"; *id.* art. 2013: "The real obligation... is susceptible of all the modifications that the will of the parties can suggest, except such as are forbidden by law." For the limits of contractual or testamentary freedom in the field of property law, see Succession of Franklin, 7 La. Ann. 395 (1852); A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 87, 96 (1966).

31. *See* text at notes 38-40 *infra*.

32. 131 La. 288, 59 So. 403 (1911).

33. *Id.* at 291, 59 So. at 404.

34. *Id.* at 298, 59 So. at 406.

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and also a personal obligation as to the vendees."[35] Upon rehearing, however, this language was repudiated. The court stated that a decision on the question whether the tonnage stipulation 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 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."[36] In a monumental separate opinion, based on an exhaustive analysis of the historical sources of the Louisiana Civil Code, Justice Provosty criticized the opinion of the court and concluded that real rights and real obligations are synonymous terms, and that all innominate land charges are "servitudes."[37] Hence, the tonnage stipulation was invalid as it purported to establish a reprobated servitude *in faciendo*.

The principle that servitudes may not involve affirmative duties for the owner of the servient estate admits an exception as to certain incidental duties necessary for the exercise of the servitude. Thus, parties may freely stipulate that the owner of the servient estate shall be charged with the duty to keep his estate fit for the purposes of the servitude[38] or that he shall maintain in good state of repair certain works necessary for the use and preservation of the servitude.[39] And, under all

35. *Id.* at 303, 59 So. at 408.

36. *Id.* at 312, 59 So. at 411.

37. *Id.*, 59 So. at 427: "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 imposed upon the title, is a servitude. A charge imposed upon property, by which the owners of it, are bound to do something, is a servitude. It is a servitude, and nothing else."

38. *See* 4 HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DE CODE CIVIL 495-96, 533 (1893). At least in connection with natural and legal servitudes, the law implies that the owner of the servient estate is charged with the duty to keep his estate fit for the purposes of the servitude. *See* Wild v. LeBlanc, 191 So.2d 146 (La. App. 3d Cir. 1966). For example, the owner of an estate owing a natural servitude or drainage may be compelled to remove, at his expense, underbrush choking the flow of the waters. *See* Brown v. Blankenship, 28 So.2d 496 (La. App. 2d Cir. 1946); Note, 8 LA. L. REV. 147 (1947). For a critical note, *see* 21 TUL. L. REV. 716 (1947). Further, a riparian proprietor may be under obligation to cut trees on the banks of a stream in order to keep the channel deep for the exercise of servitudes relating to navigation. *See* OP. ATTY. GEN. 715 (1938-40). An unlawful interference with the rights of the owner of the dominant estate, or a violation of the obligations of the owner of the servient estate, may give rise to an action for damages. See Wicknair v. Perrilloux, Orl. No. 8887 (1923) (unrep.); Maddox v. International Paper Co., 47 F. Supp. 829 (D.C. La. 1942); Note, 17 TUL. L. REV. 667 (1943).

39. *See* LA. CIV. CODE arts. 699, 712, 773; FRENCH CIV. CODE art. 698; B.G.B. § 1021; GREEK CIV. CODE art. 1126.

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Civil Codes, if the exercise of the servitude requires certain structures, the owner of the servient estate must keep these structures fit at his expense, unless the contrary is stipulated.[40] All these incidental affirmative duties of the owner of the servient estate qualify as land charges or real obligations;[41] accordingly, the owner of the servient estate may be relieved of these duties upon abandonment of the burdened property to the owner of the dominant estate.[42]

The owner of the servient estate may everywhere bind himself by a personal obligation to perform certain affirmative duties in connection with a predial servitude. These obligations may be heritable,[43] but they are not transferable to successors by particular title without express stipulation to that effect.[44] Whether a juridical act is intended to create a personal obligation, a permissible predial servitude, a *sui generis* real right, or a reprobated servitude *in faciendo*, may be a question of contractual or testamentary interpretation.[45]

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40. *See* LA. CIV. CODE art. 773; FRENCH CIV. CODE art. 698; B.G.B. § 1022; GREEK CIV. CODE art. 1127. Roman law recognized a remarkable exception to the principle that servitudes may not involve affirmative duties for the owner of the servient estate. The servitude *oneris ferendi*, a right to have one's wall supported by a neighbor's, imposed on him the duty of keeping the support in repair. See Digest, 8.5.6.2.; *Id.* 8.5.8.2.; W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 259 (2d ed. 1950).

41. *See* LA. CIV. CODE art. 1997(3); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 113, 114 (1966); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 920 (2d ed. Picard 1952); Civ., March 7, 1859, D. 1859.1.157, S. 1859.1.504; Req., February 22, 1881, D. 1881-1.407, S. 1882.1.111; B.G.B. § 1021(2) 1022(2); 2 OTTO GIERKE, DEUTSCHES PRIVATRECHT 648 (1905).

42. *See* LA. CIV. CODE arts. 774, 2012; FRENCH CIV. CODE art. 699. *Cf.* B.G.B. § 1108. For Greek law, *see* G. BALIS, CIVIL LAW PROPERTY 333 (3d ed. 1955) (in Greek).

43. *Cf.* LA. CIV. CODE art. 1997; Currier, *Heritability of Conventional Obligations*, 31 TUL. L. REV. 324 (1957).

44. *Cf.* LA. CIV. CODE art. 3556(28); A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 112, 113 (1966).

45. In Gambais v. Douglas, 167 La. 791, 120 So. 369 (1929), a purchaser of land had bound himself to erect on the "premises a single residence." The Louisiana Supreme Court held that since the obligation in question was one *in faciendo* it could not be a predial servitude; it was merely a personal obligation of the purchaser. It seems that the court grasped at a straw when it characterized the purchaser's obligation as one involving affirmative duties. Obviously, the parties had intended to exclude the erection of a building other than a single residence. What then if the parties had employed this negative expression? Could not this prohibition form the content of a predial servitude? Perhaps, the true ground of decision was that since the stipulation in question was not in favor of an estate it could not possibly be construed as creating a predial servitude. Further, as the court observed, "no general development plan" had been contemplated by the parties, as in a subdivision situation; in these circumstances the court was not willing to recognize the creation of a *sui generis* real right in the nature of a valid building restriction. Restraints on the use of property are not valid in Louisiana, unless, of course, they qualify as predial servitudes or as building restrictions in a subdivision. See A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 104, 114 (1966).

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Nature

According to traditional civilian analysis, predial servitudes are dismemberments of ownership, *jura in re aliena,* rather than distinct rights of ownership.[46] Article 658 of the Louisiana Civil Code of 1870 declares to the point that "the part of an estate upon which a servitude is exercised, does not cease to belong to the owner of the estate; he who has the servitude has no right of ownership in the part, but only the right of using it."[47] This analysis leads to a number of practical consequences. For example, the ownership of an immovable may not be lost by the effect of the prescription of non-use[48] whereas servitudes are extinguished if not exercised during the applicable period of time.[49] Further, the owner of an immovable may use it as he sees fit, whereas the holder of a right of servitude must use it in accordance with the purpose of the servitude.[50] When a person exercises certain rights on lands, it may thus be important to determine whether these rights are exercised by virtue of ownership or by virtue of servitude. If there are titles, determination of the nature of the rights involved is a matter of contractual or testamentary interpretation.[51] If there are no titles, conflicting claims are determined in the light of all available facts.[52]

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46. *See* POTHIER, INTRODUCTION GÉNÉRALE AUX COUTÛMES, tit. XII, art. 1, § 1; 1 OEUVRES DE POTHIER 312 (Bugnet ed. 1861); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 90 (1966). For the notion of easements as proprietary interests in common law, see Kagan, *Servitudes as Compared with Easements under English Law,* 25 TUL. L. REV. 336 (1951).

47. LA. CIV. CODE art. 658, 659; There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the source of this provision is "Digest, book 8, tit. 5, law 4 to this point." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 70 (1937).

48. *See* Buckley v. Catlet, 203 La. 54, 13 So.2d 384 (1943); Knox v. Louisiana Ry. & Nav. Co., 157 La. 602, 102 So. 685 (1925).

49. *See* LA. CIV. CODE arts. 789, 3546; FRENCH CIV. CODE art. 706. For a rapprochement of ownership and servitudes, see 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 874 (2d ed. Picard 1952).

50. *See, e.g.,* American Tel. & Tel. Co. v. East End Realty Co., 223 La. 532, 66 So.2d 327 (1953); Bond v. Texas & P. R. R., 181 La. 763, 160 So. 406 (1935); Louisiana Power & Light Co. v. Dileo, 79 So.2d 150 (La. App. 1st Cir. 1955). It follows that advantages of land ownership are attributed to the owner of the soil rather than to the holder of the servitude. *See, e.g.,* Sun Oil Co. v. Stout, 46 So.2d 151 (La. App. 2d Cir. 1950) (mineral rights); Chiasson v. Duplechain, 56 So.2d 615 (La. App. 1st Cir. 1952) (reversionary interest in land subject to extinguished servitude).

51. *See, e.g.,* Rock Island, A. & L.R.R. v. Gournay, 205 La. 125, 17 So.2d 8 (1944); Texas & Pac. Ry. v. Ellerbe, 199 La. 489, 6 So.2d 556 (1942); Arkansas Improvement Co. v. Kansas City Southern Ry., 189 La. 921, 181 So. 445 (1938); Bond v. Texas R.R., 181 La. 763, 160 So. 406 (1935); Knox v. La. Ry. & Nav. Co., 157 La. 602, 102 So. 685 (1925); Louisiana Power & Light Co. v. Dileo, 79 So.2d 150 (La. App. 1st Cir. 1955).

52. *Cf.* Louisiana Land Co. v. Blakewood, 131 La. 539, 59 So. 984 (1912).

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In Louisiana and in France, predial servitudes are immovable real rights, *i.e.*, incorporeal immovables,[53] governed, in principle, by rules applicable to immovable property.[54] In Germany and in Greece, however, the division of things into movables and immovables applies to corporeals only;[55] hence, predial servitudes are neither movables nor immovables. Nevertheless, the creation, function, and termination of predial servitudes is in both countries subject to the rules governing immovable property. In addition to directly applicable provisions to this effect, the German Civil Code provides that predial servitudes are inseparable component parts of the ownership of an immovable;[56] and the Greek Civil Code, in addition to directly applicable provisions, establishes the general rule that a person's "immovable patrimony" includes predial servitudes.[57]

Predial servitudes, according to the Romanist tradition, are

There is no legal presumption in Louisiana or in France for the determination of the question whether a person exercises certain rights on land by virtue of ownership or by virtue of a servitude. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 874-75 (2d ed. Picard 1952).

53. *See* LA. CIV. CODE art. 471; Coguenhem v. Trosclair, 137 La. 985, 69 So. 800 (1915); FRENCH CIV. CODE art. 526; A YIANNOPOULOS, CIVIL LAW PROPERTY § 60 (1966). The classification of predial servitudes as incorporeal immovables leads to a number of practical consequences. For example, predial servitudes are susceptible of quasi-possession rather than possession. *See* LA. CIV. CODE art. 3432. As incorporeals, predial servitudes are not susceptible of delivery but must be established by grant or by prescription. See Orleans Nav. Co. v. New Orleans, 2 Mart.(O.S.) 214 (La. 1812). And, since predial servitudes are immovables by the object to which they apply, they do not result in the creation of a separate estate. LA. CIV. CODE art. 658.

By analogy to predial servitudes, Louisiana courts have consistently held that the sale or reservation of minerals establishes a servitude, *i.e.*, an incorporeal immovable, rather than a corporeal estate. *See, e.g.*, Union Sulphur Co. v. Andrau, 217 La. 662, 47 So.2d 38 (1950); Childs v. Porter-Wadley Lumber Co., 190 La. 308, 182 So. 516 (1938); Lee v. Giauque, 154 La. 491, 97 So. 669 (1923); Wemple v. Nabors Oil & Gas Co., 154 La. 483, 97 So. 666 (1923). The sale or reservation of standing timber, on the other hand, confers ownership of a distinct corporeal immovable, the timber estate. See La. Acts 1904, No. 188, now LA. R.S. 9:1103 (1950); Stanga v. Lake Superior Piling Co., 214 La. 237, 36 So.2d 778 (1948); Big Pine Lumber Co. v. Hunt, 145 La. 342, 82 So. 363 (1919); Walker v. Simmons, 155 So.2d 234 (La. App. 3d Cir. 1963); A YIANNOPOULOS, CIVIL LAW PROPERTY § 103 (1966).

54. *See* Coguenhem v. Trosclair, 137 La. 985, 69 So. 800 (1915); A YIANNOPOULOS, CIVIL LAW PROPERTY § 63 (1966). Certain rules governing immovable property, however, may not apply to incorporeal immovables. For example, incorporeals are insusceptible of manual delivery and must be transferred by grant. See Orleans Nav. Co. v. New Orleans, 2 Mart.(O.S.) 214 (La. 1812). Further, Louisiana courts have refused to allow actions for lesion in cases involving sale of speculative mineral interests. See Wilkins v. Nelson, 155 La. 807, 99 So. 607 (1924); A YIANNOPOULOS, § 63 n.296 *supra*.

55. *See* B.G.B. §§ 90, 93-96; GREEK CIV. CODE arts. 947, 948, 954; A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 70, 71 (1966).

56. *See* B.G.B. §§ 96, 873, 1027, 1029.

57. *See* GREEK CIV. CODE arts. 949, 1121.

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inherent qualities of estates:[58] *praediis inhaerent.*[59] They may not exist independently of the dominant or of the servient estate. Once they are established, the rights of predial servitudes may not be alienated or seized separately from the dominant estate to which they belong. On the contrary, any alienation, seizure, or encumbrance of the dominant estate includes predial servitudes established in its favor: *ambulant cum dominio.*[60] Conversely, an alienation, seizure, or encumbrance of the servient estate is made subject to existing rights of servitudes. Thus, changes in the ownership of the two estates are immaterial; the person who happens to be owner of the servient estate is bound to suffer the exercise of the right of servitude by the person who happens to be owner of the dominant estate.[61] These principles have been expressly incorporated into the Louisiana Civil Code of 1870. Thus, Article 652 declares that "a servitude is an incorporeal right which cannot exist without the estate to which it belongs, and of which it is an accessory."[62] The following Article 653 makes it clear that "whatever changes may take in the place of the owners"[63] the servitude remains the same, and Article 654 provides that a predial servitude "is a right so inherent in the estate to which it is due, that the faculty of using it, considered alone and independent of the estate, can not be given, sold, let or mortgaged without the

58. DIGEST 50.16.fr.86.

59. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 872 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 522 (3d ed. Chauveau 1905); 2 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL nº 182 (1959).

60. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 872 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 522 (3d ed. Chauveau 1905); *cf.* Coguenhem v. Trosclair, 137 La. 985, 991, 69 So. 800 (1915): "The servitude is part and parcel of the estate to which it is due, and, as such, accompanies it when the latter is mortgaged or sold. It passes with the estate. C.C. 2011."

61. This follows from the nature of predial servitudes as real rights which give rise to real obligations. See LA. CIV. CODE arts. 2012, 2015.

62. LA. CIV. CODE art. 652; La. Civ. Code art. 648 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the source of this provision is "Digest, book 8, tit. 1, law 14 to this point." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 69 (1937). *Cf.* Simoneaux v. Lebermuth & Israel Planting Co., 155 La. 689, 99 So. 531 (1924). Not only the servitude, but also constructions necessary for the exercise of the servitude are component parts of the dominant estate. Coguenhem v. Trosclair, 137 La. 985, 69 So. 800 (1915).

63. LA. CIV. CODE art. 653; La. Civ. Code art. 649 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are "Domat, part 1, book 1, tit. 12, sec. 1, No. 3. Pardessus, treatise, *des servitudes*, No. 6, p. 9." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE of 1825, 70 (1937).

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estate to which it appertains."[64] There are no precisely corresponding provisions in the French, German, or Greek Civil Codes. Nevertheless, it is everywhere clear that predial servitudes are rights which cannot exist independently of the dominant or of the servient estate. According to French doctrine[65] and German legislation[66] predial servitudes are component parts of the ownership of an immovable. And in Greece, though not component parts, predial servitudes are regarded as accessorial rights inherent to things.[67]

Things Susceptible

Immovables

According to Article 647 of the Louisiana Civil Code of 1870, predial servitudes may be established on an "estate" in favor of "another estate."[68] Question thus arises as to the meaning of the word estate which is a translation of *héritage*, occurring in the French text of the Civil Codes of 1808 and 1825 as well as in the French Civil Code.[69]

It is well-settled in France that the word *héritage* in Article 637 of the Code Civil refers exclusively to tracts of lands and buildings.[70] These are the only immovables which may be burdened with a predial servitude or in whose favor a predial servitude may be established. Standing timber, immovables by destination, and incorporeal immovables are not susceptible of

64. LA. CIV. CODE art. 654; La. Civ. Code art. 650 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are "Domat, part 1, book 1, tit. 12, sec. 1, No. 3. Pardessus, treatise, *des servitudes*, No. 6, p. 9." LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 70 (1937). *See also* Simoneaux v. Lebermuth & Israel Planting Co., 155 La. 689, 99 So. 531 (1924); Brown v. Terry, 103 So.2d 541 (La. App. 1st Cir. 1958).

65. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 872 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 522 (3d ed. Chauveau 1905). *Cf.* Coguenhem v. Trosclair, 137 La. 985, 990, 69 So. 800, 802 (1915): "The servitude of way ... is an accessory of the plantation."

66. *See* B.G.B. § 96; A. YIANNOPOULOS, CIVIL LAW PROPERTY § 70 (1966). Accordingly, predial servitudes may not be transferred separately from the dominant estate in Germany. *See* R.G., June 1, 1918, 93 R.G.Z. 71, 73 (1918); 3 STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1029 (11th ed. 1963).

67. *See* G. BALIS, CIVIL LAW PROPERTY 296 (3d ed. 1955) (in Greek); G. BALIS, GENERAL PRINCIPLES 505 (7th ed. 1955) (in Greek).

68. See text at note 1 *supra*.

69. *See* La. Civ. Code art. 643 (1825); La. Civ. Code p. 126, art. 1 (1808); French Civ. Code art. 637.

70. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 867 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 516 (3d ed. Chauveau 1905); 2 COLIN, CAPITANT, ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL 189 (1959); Req., April 6, 1841, D.1841.1.214, S.1841.1.414.

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predial servitudes. Indeed, according to French law, standing timber and immovables by destination are parts of an immovable by nature rather than distinct immovables; hence, they may neither be burdened nor favored with a predial servitude. Incorporeal immovables, *i.e.*, rights which the law classifies as immovables, are insusceptible of predial servitudes by their nature; predial servitudes involve the exercise of material acts which relate to corporeal things only.[71] It follows that there can be no servitude on another servitude *(servitus servitutis non potest)*.[72]

In Louisiana, the word "estate" in Article 647 of the Civil Code of 1870 means, as in France, a distinct corporeal immovable. This is made clear by Article 710 of the same Code which indicates that predial servitudes may be established on, or in favor of, tracts of lands and buildings.[73] These were in 1870—and still are under the Code—the only immovables susceptible of servitudes. It follows that constructions other than buildings, though classified as immovables by nature under Article 464 of the Civil Code, are not susceptible of predial servitudes because they are not distinct immovables; and the same is true of immovables by destination and incorporeal immovables.[74] Timber

71. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 867 (2d ed. Picard 1952); G. BALIS, CIVIL LAW PROPERTY 292 (3d ed. 1955) (in Greek).

72. *See* note 71 *supra*. The burdening of a servitude with another servitude would involve alienation of the servitude separately from the dominant estate; such an alienation is not permissible. *Cf.* text at note 64 *supra*. This does not apply to usufruct which may be burdened with another usufruct in Louisiana and in France. See A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 4, 47 (1968).

73. *See* LA. CIV. CODE art. 710; La. Civ. Code art. 706 (1825); La. Civ. Code 138, art. 50 (1808); FRENCH CIV. CODE art. 687. It should be noted that Article 744 of the Louisiana Civil Code of 1870 declares that "servitudes may be established *on all things* susceptible of ownership" (emphasis added). This language is inaccurate and should be disregarded. It would be contrary to fundamental principles of our Code to admit that predial servitudes may be established on all kinds of things, movable or immovable, corporeal or incorporeal! Article 744 was first adopted in the 1825 revision and the redactors cited as its sources: "*Pardessus, des servitudes*, No. 47, p. 67." *See* 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 81 (1937). The pertinent passage in the treatise of Pardessus reads as follows: "All immovables susceptible of private ownership, to whomever they may belong, may be burdened with predial servitudes." PARDESSUS, TRAITÉ DES SERVITUDES nº 67 (1817). Accordingly, in the light of its sources, Article 744 should be given a restrictive interpretation which alone would make it compatible with the rest of the Code.

74. In Harwood Oil & Mining Co. v. Black, 240 La. 641, 124 So.2d 764 (1960), the Supreme Court held that a mineral lessee did not have an "estate" in land, and, therefore, could not claim a servitude of passage under Article 699 of the Civil Code. The same reasoning ought to apply also to the holder of a mineral servitude. For the proposition that a servitude may not be burdened with another servitude, *see* Gungy v. Commercial Solvents Corp., 170 So.2d 259 (La. App. 2d Cir. 1965): "Of course, two servitudes as to the whole of mineral interest cannot exist simultaneously on the same tract of land."

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estates[75] and individual apartments,[76] however, qualify today by virtue of special legislation as distinct corporeal immovables; hence, in spite of the restrictive enumeration of immovables susceptible of servitudes in Article 710 of the Civil Code, it ought to be clear that predial servitudes may be established on, or in favor of, timber estates[77] and individual apartments.

The German Civil Code provides expressly that predial servitudes may be established on, or in favor of the owner of, a tract of land.[78] According to German doctrine and jurisprudence, the notion of a tract of land includes ownership-like rights over immovables which are regarded as juridical *fundi*.[79] In Greece, Article 1118 of the Civil Code declares that predial servitudes may be established on, or in favor of the owner of, an immovable.[80] The word "immovable" in the Code refers exclusively to the ground and its component parts.[81] Nevertheless, separately owned mines qualify as distinct corporeal immovables under special legislation[82] and should be regarded as susceptible of predial servitudes. Further, the Greek Civil Code recognizes the ownership of individual apartments,[83] and, under special legislation, separately owned individual apartments qualify as distinct immovables[84] which should be susceptible of predial servitudes.[85]

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75. *See* La. Acts 1904, No. 188, now LA. R.S. 9:1103; A. YIANNOPOULOS, CIVIL LAW PROPERTY § 103 (1966). Of course, parties may, in the exercise of their contractual freedom, create a predial servitude for the taking of timber rather than a timber estate. See Ledoux v. Allegre, 10 La. Ann. 706 (1855).

76. *See* La. Acts 1962, No. 494, now LA. R.S. 9:1121-1142 (1967 Supp.); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 98 (1966). Under this legislation, an apartment "may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of juridical acts inter vovos or mortis causa, as if it were sole and entirely independent of other apartments in the building of which it forms a part, and the corresponding individual titles and interests shall be recordable." *Id.* § 1124.

77. *See* Kavanaugh v. Frost-Johnson Lumber Co., 149 La. 972, 90 So. 275 (1921); Walker v. Simmons, 155 So.2d 234 (La. App. 3d Cir. 1963) (servitude of passage in favor of a timber estate).

78. *See* B.G.B. § 1018.

79. *See* WOLFF-RAISER, SACHENRECHT 433 (10th ed. 1957). Thus, predial servitudes may be established on, or in favor of the owner of, a heritable building right (*Erbbaurecht*) or an exclusive right for the exploitation of natural resources (*Bergwerkseigentum*). *Id.* For the notion of ownership-like rights under German law, see A. YIANNOPOULOS, CIVIL LAW PROPERTY § 117 (1966).

80. *See* GREEK CIV. CODE art. 1118; G. BALIS, CIVIL LAW PROPERTY 296 (3d ed. 1955) (in Greek).

81. See GREEK CIV. CODE art. 948; A. YIANNOPOULOS, CIVIL LAW PROPERTY § 71 (1966).

82. *See* G. BALIS, GENERAL PRINCIPLES OF CIVIL LAW 492 (7th ed. 1955) (in Greek).

83. *See* GREEK CIV. CODE art. 1002.

84. *See* Law of Jan. 4/9, 1929, No. 3741, art. 10.

85. *Cf.* G. BALIS, CIVIL LAW PROPERTY 284, 285 (3d ed. 1955) (in Greek).

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Private and Public Things

In all legal systems under consideration, predial servitudes may be established on, or in favor of, immovable property of private persons as well as immovable property of the state and its political subdivisions.

In Louisiana and in France, the property of the state and its political subdivisions is distinguished into property of the private domain and property of the public domain.[86] The property of the private domain does not differ in nature from property held by private persons and ought to be subject to all the rules of the Civil Code governing predial servitudes. This idea is generally followed in France.[87] In Louisiana, however, the Constitution, legislation, and jurisprudence have worked out exceptions from the general rules of the Civil Code with respect to the alienation and prescription of state property. Thus, property of the private domain of the state must, ordinarily, be alienated in accordance with certain formalities and may not be lost for the state by the effect of any prescription.[88] It follows, then, that private persons may acquire servitudes on the private domain of the state only by title[89] and in accordance with the applicable formalities governing alienation of state property; the creation of servitudes on property of the private domain of the state by the effect of acquisitive prescription is excluded. Property of the private domain of political subdivisions, on the other hand, is subject to the general rules governing prescription;[90] hence, this property may be burdened with servitudes in favor of private persons by title as well as by the effect of acquisitive prescription.

According to Article 744 of the Louisiana Civil Code of 1870, servitudes may be established "even on the public domain, on

86. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 30, 38 (1966); Comment, *The Public and the Private Domains of the State*, 12 TUL. L. REV. 428 (1938).

87. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 127 (2d ed. Picard 1952).

88. *See* LA. CONST. art. XIX, § 16: "Prescription shall not run against the State in any civil matter, unless otherwise provided in this Constitution or expressly by law"; City of New Orleans v. Ricca, 217 La. 413, 46 So.2d 505 (1950); Saucier v. E. Sonderheimer Co., 212 La. 490, 32 So.2d 900 (1948); Ward v. South Coast Corp., 198 La. 433, 2 So.2d 689 (1941).

89. *Cf.* LA. CIV. CODE arts. 765, 766. With respect to continuous apparent servitudes, "the destination made by the owner is equivalent to title." *Id.* art. 767. Naturally, an owner transferring property to the private domain of the state may also reserve a predial servitude in favor of his estate.

90. *See* City of New Orleans v. Salmen Brick & Lumber Co., 135 La. 828, 66 So. 237 (1914); Lincoln Parish School Board v. Ruston College, 162 So.2d 419 (La. App. 2d Cir. 1964). As to the imprescriptibility of property of the public domain of political subdivisions, *see* text at note 95 *infra*.

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the common property of cities and other incorporated places."[91] Some of these servitudes arise from the natural situation of places, as drainage through public waterways;[92] others arise by operation of law, as servitudes of public use, dealt with elsewhere;[93] and others are purely conventional. Conventional servitudes on property of the public domain of the state[94] and its political subdivisions[95] may not be acquired by acquisitive prescription; they must be granted by title.[96] Article 861 of the

91. LA. CIV. CODE art. 744; La. Civ. Code art. 740 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Code, the source of this provision is "Pardessus, *des servitudes*, No. 47, p. 67." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 81 (1937).

92. *Cf.* LA. CIV. CODE art. 660; 3 AUBRY ET RAU, DROIT CIVIL FRANÇAIS nos. 12, 47 (5th ed. 1900).

93. *Cf.* LA. CIV. CODE arts. 453, 454; A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 34-36 (1966). *See also* LA. CIV. CODE arts. 664-674. *Cf.* Parish v. Municipality No. 2, 8 La. Ann. 145, 148 (1853): "We agree fully with the authority cited from Dalloz, that the fact of having a door opening upon a street, constitutes a servitude on that street—in the sense, that if the destination of the street is changed, and it is adjudged by government to an individual, it remains subject to the servitude of passage."

94. For the proposition that the public domain of the state is imprescriptible, see LA. CONST., art. XIX, § 16; LA. CIV. CODE arts. 453, 861; State v. Aucoin, 206 La. 786, 20 So.2d 136 (1944); Ingram v. Police Jury of Parish of St. Tammany, 20 La. Ann. 226 (1868); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 36 n.219 (1966). Further, it is well established in Louisiana that servitudes that the public domain of the state may have on private property may not be lost by the prescription of non-use. See Scorsune v. State through Department of Highways, 230 La. 254, 88 So.2d 211 (1956), and authorities cited *Cf.* LA. R.S. 48:226 (1950): "Prescription does not run against immovable property or rights thereto legally acquired by the department [of highways] for the use as rights of way for public purposes."

95. For the proposition that public property of the political subdivisions of the state is imprescriptible, see City of New Orleans v. Salmen Brick & Lumber Co., 135 La. 828, 868, 66 So. 237, 251 (1914): "The only exception established by law in favor of municipal corporations is that their public property is not alienable and therefore cannot be acquired by prescription"; Anderson v. Thomas, 166 La. 512, 117 So. 573 (1928); Sheen v. Stothart, 29 La. Ann. 630 (1877); Mayor v. Magnon, 4 Mart.(O.S.) 2 (La. 1815); Locke v. Lester, 78 So.2d 14 (La. App. 2d Cir. 1955); Kemp v. Town of Independence, 156 So. 56 (La. App. 1st Cir. 1934); *cf.* Burthe v. Blake & Town of Carrolton, 9 La. Ann. 244 (1854). Possessory actions against the public interest may not be brought. See Bruning v. City of New Orleans, 165 La. 511, 115 So. 733 (1926); Martin v. City of Lafayette, 162 La. 262, 110 So. 415 (1926); Keefe v. City of Monroe, 9 La. App. 545, 120 So. 102 (2d Cir. 1929).

Louisiana decisions indicate that servitudes belonging to the public domain of political subdivisions of the state may be lost by *non-use*. See Paret v. Louisiana Highway Commission, 178 La. 454, 151 So. 768 (1933); Mitchel v. Board of Commissioners of Jefferson and Plaquemines Drainage District, 161 So.2d 384 (La. App. 4th Cir. 1964); Louisiana Highway Commission v. Raxdale, 12 So.2d 631 (La. App. 2d Cir. 1943); Jouett v. Keeney, 17 La. App. 323, 136 So. 175 (2d Cir. 1931). These decisions could, perhaps, be explained on the ground that the political subdivisions in question had not actually acquired the servitudes they claimed; they had a right to acquire a servitude for the public domain and this right was lost by prescription.

96. *Cf.* text at note 89 *supra*. Servitudes for the use or exploitation of things of the public domain may be granted by the authorities or reserved by the owner upon dedication of a thing to public use. See A. YIANNOPOULOS, CIVIL LAW

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Louisiana Civil Code of 1870 declares to the point that works which "obstruct or embarrass" the use of the public domain "may be destroyed at the expense of those who claim them" and "the owner of these works can not prevent their being destroyed under the pretext of any prescription or possession, even immemorial, which he may have had of it, if it be proved that the time these works were constructed, the soil on which they are built was public, and has not ceased to be since."[97] Demolition of the works may be avoided only if they "consist of houses or other buildings, which cannot be destroyed, without causing signal damage to the owner of them, and if these houses or other buildings merely encroach upon the public way, without preventing its use."[98] But, in this case, if the owner undertakes to rebuild the works, he must "relinquish that part of the soil or of the public way, upon which they formerly stood."[99]

PROPERTY § 36 n.236 (1966). These servitudes are ordinarily granted by a franchise. A franchise, in order to be valid as a title for the creation of the servitude, must conform with certain formalities and substantive requirements. *Cf.* Keefe v. City of Monroe, 9 La. App. 545, 120 So. 102, 105 (2d Cir. 1929): "Now, as to the contention that the city, through its mayor and commissioners, by virtue of the contract alleged upon, granted to the plaintiff 'real rights' in said real estate which must now be respected, the answer is that the officers of the city had no authority or power under the general law to vest in plaintiff, by private contract and agreement, such as this was, the private and exclusive right and privilege to hold and possess the public property as against not only the city, but against the world. The contract in that respect is wholly ultra vires." The extent to which servitudes in favor of private persons may interfere with the public use of the things of the public domain is subject to judicial review, though within the limits of a broad administrative discretion.

97. LA. CIV. CODE art. 861; La. Civ. Code art. 857 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. See comment by the redactors of the 1825 Code in 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 103 (1937): "By an act of the legislature of the 15th Feb. 1808, entitled an act concerning the police of the shore of navigable rivers, and for other purposes; it is said, that those who construct works or place any impediment in the beds of navigable rivers, or on their banks, or on other public places, shall be prosecuted by information, and punished by fine, and that the works shall be destroyed at their expense. As the effects of this act cannot extend to works erected or put in places prior to its promulgation, we have thought proper to repeat here the dispositions of our ancient laws, which order the destruction of them, and which are founded on the principle that no one can acquire any property in public places by possession. Part 3, tit. 32, laws 3 & 23. Ibid. tit. 28, law 4." *Cf.* State *ex rel.* Saint v. Timothy, 166 La. 738, 117 So. 812 (1928) (building encroaching on Lake Pontchartrain ordered to be demolished).

98. LA. CIV. CODE art. 862; La. Civil Code art. 858 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. The redactors of the 1825 Louisiana Civil Code observed: "It may happen that a man may have built or encroached on the public soil, without knowing it, and in good faith. It would be unjust to demolish the buildings which might cause his ruin, especially when they have stood a long time, and merely encroach upon the public soil without absolutely preventing its use, as in the case of this article." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 103 (1937).

99. *Id.*

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It is generally accepted in France that property of the public domain may be burdened with servitude-like rights[100] in favor of private persons.[101] Some of these rights correspond to the very destination of the things of the public domain. On this kind are rights of passage, of ingress and egress, of lights and view,[102] and of drainage,[103] that owners of immovables have over adjacent public lands or waterbodies—subject to the applicable administrative regulations. Other servitude-like rights are merely compatible with the destination of the things of the public domain and are accorded by the administration. Of this kind are subterraneous passageways, overpasses, and bridges connecting properties separated by a highway, a railway, or a canal.[104] There is no general agreement in France as to the precise classification of these rights. Some courts consider these rights to be servitudes;[105] other courts, under the influence of the doctrine developed by Aubry and Rau,[106] avoid reference to servitudes and prefer to speak of *sui-generis* rights.[107] Commentators classify these rights as administrative servitudes.[108] Be that as it may,

100. These rights are characterized as "servitude-like" rather than "servitudes" because, according to strict doctrine, the public domain is inalienable and may not be burdened with predial servitudes. See 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 517 (3d ed. Chauveau 1905). Exceptionally, however, an owner who transfers his property to the public domain may reserve in his favor a veritable servitude. See Paris, July 10, 1925, D.H. 1925.563.

101. The public domain is susceptible of private rights (*jura propria*) which are compatible with, and in most instances serve the public interest. These rights may be based on a concession (franchise), a lease, or a mere license. Concessions ordinarily establish real rights, in the nature of predial or personal servitudes, whereas leases and licenses create merely personal rights. In no case rights accorded on things of the public domain may obstruct or deter the public use. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 150 (2d ed. Picard 1952).

102. *See* Req., May 1, 1912, S. 1913.1.31; Civ., Feb. 5, 1879, D. 1879.1.52, S. 1879.1.167; Civ., May 16, 1877, D. 1877.1.431, S. 1878.1.27.

103. *See* Civ., March 15, 1887, D. 1887.1.448, S. 1887.1.158; Civ., March 22, 1876, D. 1876.1.206, S. 1876.1.445; and, in general, DE LAVAISSIÈRE DE LAVERGNE, L'ÉCOULEMENT DES EAUX PLUVIALES, MÉNAGÈRES ET INDUSTRIELLES SUR LES COURS D'EAU PUBLIC ET PRIVÉS (Thesis, Paris 1912). Servitude-like rights of drainage into property of the public domain extend to household outflows (*aux ménagères*). See Req., June 4, 1872, D. 1874.1.160, S. 1872.1.163. On principle, industrial outflows are excluded; and, *a fortiori*, servitude-like rights or drainage do not include polluted outflows. See Req., Dec. 31, 1879, D. 1880.1.109, S. 1880.1.213; Req., April 10, 1900, D. 1901.1.34.

104. *See* 3 PLANIOL DE RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 868 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÈORIQUE ET PRATIQUE DE DROIT CIVIL nº 518 (3d ed. Chauveau 1905).

105. *See* Req., March 22, 1876, D. 1876.1.206, S. 1876.1.445; Req., June 3, 1891, D. 1892.1.264, S. 1892.1.259.

106. *See* 3 AUBRY ET RAU, DROIT CIVIL FRANÇAIS nos. 122-23 (5th ed. 1900).

107. *See* Civ., March 15, 1887, D. 1887.1.448, S. 1887.1.158; Req., June 21, 1909, D. 1913.5.54.

108. *See* DUEZ ET DEBEYRE, TRAITÉ DE DROIT ADMINISTRATIF 803 (1952); RIGAUD, LA THÈORIE DES DROIT RÉELS ADMINISTRATIFS 209, 289 (Thesis, Tou-

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the rights of adjacent owners over things of the public domain are protected in France against invasion by third persons by analogous application of the rules governing protection of servitudes.[109] Vis-a-vis the administration, however, the rights of adjacent owners are somewhat precarious; the authorities may, in the interest of the general public, suppress or restrict the rights of adjacent owners by abandoning a right of way, relocating it, or by undertaking the execution of public works.[110] The adjacent owners may recover compensation for damages suffered as a result of the execution of public works;[111] and, in cases of abuse of administrative discretion, they may resort to justice for the annulment of prejudicial administrative acts.[112]

The notions of the private and of the public domain have been avoided in the Civil Codes of Germany and of Greece. Under these Codes, property belonging to the state and its political subdivisions does not differ in nature from property held by private persons.[113] State property, therefore, may be burdened with predial servitudes in favor of private persons.[114] But property subject to public use, whether it belongs to the state, its political subdivisions, or to private persons, may be burdened with private rights only to the extent that these rights do not exclude or deter the public use.[115] This follows from the characterization of property subject to public use as out of commerce.[116]

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louse 1914); Mestre, Note S. 1911.2.109. For the notion of administrative real rights, *see* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 87 (1966).

109. For the availability of the petitory (confessory) action, *see* Civ., June 2, 1875, D. 1875.1.418, S. 1876.1.349; Civ., June 3, 1872, D. 1872.1.236; Civ., Jan. 5, 1869, D. 1869.1.12, S. 1869.1.168; for the availability of possessory protection, *see* Civ., June 15, 1895, D. 1895.1.506, S. 1895.1.419; Civ., May 15, 1889, D. 1889.5.72, S. 1891.1.122; for the availability of actions for damages, *see* Req., May 1, 1912, S. 1913.1.31; and for criminal law sanctions, *see* Crim., Feb. 4, 1910, D. 1914.1.74, S. 1911.1.289; Crim., Dec. 14, 1906, D. 1908.1.444, S. 1909.1.421.

110. *See* Civ., May 16, 1877, D. 1877.1.431, S. 1878.1.27; Civ., Feb. 25, 1880, D. 1880.1.255, S. 1881.1.167. In the case of déclassement of a public thing and transfer to a private person, the administration ordinarily imposes the condition that the acquirer should respect pre-existing rights in favor of adjacent owners. *See Req.*, April 15, 1890, D. 1891.1.52, S. 1891.128; Civ., June 25, 1879, D. 1879.1.324, S. 1879.1.448.

111. *See* Council of State, April 25, 1890, S. 1892.3.81; April 8, 1890, D. 1892.3.38; Jan. 28, 1887, S. 1888.3.56.

112. *See* Council of State, March 12, 1909, D. 1911.3.98.

113. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY § 30 (1966); 1 ENNECCERUS-NIPPERDEY, ALLEGEMEINER TEIL DES BÜRGERLICHEN RECHTS 826 n.7 (15th ed., 1959); G. BALIS, GENERAL PRINCIPLES OF THE CIVIL LAW 535 (7th ed. 1955) (in Greek).

114. *See* WOLFF-RAISER, SACHENRECHT 433 (10th ed. 1957); G. BALIS, GENERAL PRINCIPLES OF THE CIVIL LAW 537 (7th ed. 1955) (in Greek).

115. *Cf.* GREEK CIV. CODE art. 970; LEHMANN, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 368 (10th ed. 1957).

116. See A. YIANNOPOULOS, CIVIL LAW PROPERTY § 12 (1966); G. BALIS, GENERAL PRINCIPLES OF THE CIVIL LAW 527 (7th ed. 1955) (in Greek).

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Essential Features of Predial Servitudes

According to traditional civilian precepts which have been incorporated into modern civil codes, predial servitudes are characterized by a number of essential features.

In the first place, it is necessary that there be "two different estates, one of which owes the servitude to the other."[117] Indeed, no servitude may be imposed on an estate in its own favor;[118] nor may a servitude be imposed on a person in favor of an estate;[119] and, if a servitude is imposed on an estate in favor of a person rather than of another estate, it is a personal servitude.[120]

Second, it is necessary "that these two estates belong to two different persons."[121] In Louisiana and in France, if the two estates belong to the same person, "the application which the owner makes of one to the advantage of the other is not called a servitude, but a disposition of the owner"[122] *(destination du*

117. LA. CIV. CODE art. 648; La. Civ. Code art. 644 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the source of this provision is "Thoullier, droit civil, vol. 3, Nos. 586 & 587, p. 491 & 492." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 69 (1937); *cf.* Harwood Oil & Min. Co. v. Black, 240 La. 641, 124 So.2d 764 (1961); Efner v. Ketteringham, 41 So.2d 130 (La. App. 2d Cir. 1949). It is due to the absence of a dominant estate that building restrictions and mineral servitudes are classified in Louisiana as *sui generis* real rights rather than predial servitudes. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 100, 104 (1966).

118. *Cf.* LA. CIV. CODE art. 649; *id.* art. 619: ". . . No servitudes can be due by a thing to the owner of such thing"; Efner v. Ketteringham, 41 So.2d 130 (La. App. 2d Cir. 1949); text at note 123 *infra.*

119. *See* LA. CIV. CODE art. 709; La. Civ. Code art. 705 (1825); La. Civil Code p. 138, art. 49 (1808); FRENCH CIV. CODE art. 686.

120. *See* LA. CIV. CODE art. 757; *cf.* Simoneaux v. Lebermuth & Israel Planting Co., 155 La. 689, 99 So. 531 (1924); A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 1, 125 (1968).

121. LA. CIV. CODE art. 649; La. Civ. Code art. 645 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of these provisions are "Digest, book 8, tit. 2, law 39. Pardessus, treatise *des servitudes*, No. 16, p. 31." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 69 (1937).

A partnership possesses distinct juridical personality; therefore, a predial servitude may be established on the land of one of the partners in favor of land belonging to the partnership. The requirement that there be two different owners is fulfilled. Levet v. Lapeyrollerie, 39 La. Ann. 210, 1 So. 672 (1887). Further, a private corporation created by a public corporation possesses a distinct juridical personality; therefore, the property of the private corporation may be burdened with a servitude in favor of an agency of the state. See Audubon Park Commission v. Board of Commissioners for the Port of N.O., 153 So.2d 574, (La. App. 4th Cir. 1963). But property belonging to the state may not be burdened with a servitude in favor of the state or in favor of a state agency; the requirement that there be two different owners is not met. See City of New Orleans v. Board of Commissioners of the Port of N.O., 148 So. 782 (La. App. 4th Cir. 1963): "We conclude that because there is only one owner, i.e., the state, the subject property is not burdened by the predial servitude of LSA-Civil Code Art. 665."

122. *See* LA. CIV. CODE arts. 649, 767-769; FRENCH CIV. CODE arts. 692-694; *cf.* Lavillebreuve v. Cosgrove, 13 La. Ann. 323 (1858); Efner v. Kettering-

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père de famille). The disposition of the owner involves exercise of the prerogatives of ownership rather than of a right of servitude. This is expressed in the *maxim nemini res sua servit*[123] (no one has right of servitude in his own things), which has been incorporated into the Civil Codes of Louisiana,[124] France,[125] and Greece.[126] The maxim refers to situations in which two estates belong in their entirety to the same owner. Thus, the co-owner of an estate held by undivided shares may have a right of servitude on an estate of which he is the sole owner; and, conversely, the sole owner of an estate may have a right of servitude on an estate in which he has an undivided interest.[127] The maxim that no one may have a right of servitude on his own things has been abrogated in Germany by the Civil Code.[128]

Third, it is necessary "that the servitude have for its object the use or benefit of the estate in favor of which it is established."[129] This principle of *utility*, expressed in the adage *ser-*

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ham, 41 So.2d 130 (La. App. 2d Cir. 1949). The disposition of the owner is without effect in Germany and in Greece. In Germany, however, the owner of two immovables may establish a predial servitude on one immovable in favor of the other. See WOLFF-RAISER, SACHENRECHT 442 (10th ed. 1957). This is not possible in Greece. See G. BALIS, CIVIL LAW PROPERTY 292 (3d ed. 1955) (in Greek).

123. *Cf.* DIGEST, 8.2. fr. 26.

124. *See* LA. CIV. CODE art. 619; note 83 *supra*; City of New Orleans v. Board of Commissioners of the Port of N.O., 148 So.2d 782, 786 (La. App. 4th Cir. 1963): "That there is no servitude where there is but one owner would appear to be obvious even in the absence of the quoted articles because of the fact that ownership necessarily would include all of the rights which could be derived from a servitude." *See also* Bryant v. Shoolars, 104 La. 786, 29 So. 350 (1901) (openings in a wall which stands entirely on one's own land involves the exercise of prerogatives of ownership rather than a servitude.)

125. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 871 (2d ed. Picard 1952); 3 AUBRY ET RAU, DROIT CIVIL FRANÇAIS nº 113 (5th ed. 1900).

126. *See* GREEK CIV. CODE art. 1118; G. BALIS, CIVIL LAW PROPERTY 332 (3d ed. 1955) (in Greek).

127. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 871 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 521 (3d ed. Chauveau 1905); 3 AUBRY ET RAU, DROIT CIVIL FRANÇAIS nº 113 (5th ed. 1900); Trib. civ. Beauvais, March 30, 1944, Gaz. Pal. 1944.1.251. *Cf.* Levet v. Lapeyrollerie, 39 La. Ann. 210, 1 So. 672 (1887). *See also* B.G.B. § 1009; GREEK CIV. CODE art. 1114.

128. *See* B.G.B. § 889; WOLFF-RAISER, SACHENRECHT 442 (10th ed. 1957).

129. LA. CIV. CODE art. 650(1); La. Civ. Code art. 646 (1825): There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are "Digest, book 8, tit. 1, law 15 to the same point, and law 19. Pardessus, treatise on servitudes, Nos. 10 ,13, & 14, p. 19, 27, 28 & 29. Thoulier, droit civil, vol. 3, Nos. 589 and 593, p. 496 and 500." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 69 (1937). *Cf.* Gottschalk v. De Santos, 12 La. Ann. 473 (1857). Note that "use or benefit" in Article 650(1) of the Louisiana Civil Code of 1870 ought to read "use and benefit." 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 375 (1940). Be that as it may, the words *use*, *benefit*, and *advantage* are synonymous in the Louisiana Civil Code and in the French Civil Code. See 3

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vitus utilis esse debet,[130] sets the outer limits of party autonomy in the field of predial servitudes. The law will allow contractual or testamentary freedom to the extent that a servitude may serve a useful purpose; unreasonable whims of parties, serving no socially useful purpose, may not give rise to predial servitudes.[131] The utility to be derived from the servitude need not be economic; it may be merely esthetic.[132] Further, the utility need not "exist at the time of the contract; a mere possible convenience or remote advantage is sufficient to support a servitude."[133] But, if there is proof that the servitude "at no time, and under no circumstances, can it possibly become useful to the person in whose favor it is enacted,"[134] it will be decreed null.

The utility of the servitude must derive from the servient estate and must be attributed to the person who, at any given time, happens to be owner of the dominant estate.[135] If the utility

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PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 871 (2d ed. Picard 1952).

130. *Cf.* DIGEST, 8.1.8.pr.; *id.* 8.1.15 pr.; *id.* 8.1.19; B.G.B. § 1019; GREEK CIV. CODE art. 1118. The requirement of utility has been criticized in Germany as unfit under the land-register system. See HECK, GRUNDRISS DES SACHENRECHTS 305 (1930). Utility, however, is determined according to contemporary ideas rather than on the basis of narrow Roman law notions. See 1 OTTO GIERKE, DEUTSCHES PRIVATRECHT 647 (1905). And, since land today may be the basis of family life and of professional activities, the requirement of utility has to be determined in the light of the family and professional needs of landowners. See *Kohler, Beitraege zum Servitutenrecht,* 87 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 157, 173 (1897); WOLFF-RAISER, SACHENRECHT 436 (10th ed. 1957).

131. See Parish v. Municipality No. 2, 8 La. Ann. 145 (1853).

132. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 871 (3d ed. Picard 1952); BAUR, LEHRBUCH DES SACHENRECHTS 264 (2d ed. 1963); G. BALIS, CIVIL LAW PROPERTY 298 (3d ed. 1955) (in Greek).

133. LA. CIV. CODE art. 650(2). Note that "convenience or remote advantage" ought to read: "convenience or proximate or remote advantage." 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 375 (1940).

134. LA. CIV. CODE art. 650(3); note 129 *supra*; *cf.* Parish v. Municipality No. 2, 8 La. Ann. 145 (1853). Note that Article 650(3) ought to read: "It would be necessary then that the uselessness be manifest, in order for the servitude to be null; and he who has granted it cannot avoid it if the uselessness be only apparent." 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 375 (1940).

135. The Louisiana and French Civil Codes speak of the "use or utility" of an estate. *See* LA. CIV. CODE arts. 647, 650; *cf. id.* art. 709; FRENCH CIV. CODE arts. 637; *cf. id.* art. 686. This is a metaphor. Text at note 4 *supra.* Servitudes in the last analysis benefit persons rather than things; what the Louisiana and French Civil Codes mean is that the "use or utility" must be attributed to the person who happens to be owner of the dominant estate rather than to a designated owner of that estate. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 921 (2d ed. Picard 1952). In Greco v. Frigerio, 3 La. App. 649, 651 (Orl. Cir. 1926), question arises whether a servitude for the maintenance of a bathroom was personal or predial. The court declared that the servitude was "so obviously advantageous to the property possessing the bathroom as to permit of little discussion. The fact that bathing is a personal habit can not affect the situation." Indeed, the utility of the servitude was attributed to any

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is attributed to a designated owner, the servitude is personal rather than predial.[136] For example, a servitude in favor of a named owner of an estate for the enjoyment of a swimming pool or of a tennis court in another estate is a limited personal servitude;[137] but the same stipulation in favor of an estate, or any owner of that estate, gives rise to a predial servitude.[138] Likewise, the prohibition of certain activities on an estate, for example the prohibition of erecting a building on a certain lot, may be a limited personal servitude or a predial servitude, depending on whether the advantage is attributed to a designated person or to an estate.[139]

Non-essential Features of Predial Servitudes

Servient and dominant estates are ordinarily located in the same geographical area. Neither contiguity, however, nor vicinity are conditions "essential to the existence of the servitude"[140] under modern Civil Codes.[141] It suffices that the two estates are so located as to allow "one to derive benefit from the servitude on the other."[142] Accordingly, certain species of servitudes, as those for the extraction of materials from the ground or for the

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person who happened to be owner of the dominant estate rather than a named owner.

136. LA. CIV. CODE arts. 648(2), 757.

137. *See* G. BALIS, CIVIL LAW PROPERTY 299 (3d ed. 1955) (in Greek).

138. *See* WOLFF-RAISER, SACHENRECHT 436 (10th ed. 1957). A servitude for the enjoyment of a neighbor's tennis court in favor of an industrial establishment, however, would fail; the use of the land for industrial purposes does not benefit from such a servitude.

139. *See* text at note 21 *supra*.

140. LA. CIV. CODE art. 651; La. Civ. Code art. 647 (1825). There is no corresponding article in the Louisiana Civil Code of 1825 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are "Digest, book 8, tit. 1, law 14, sec. 2, and laws 38 & 39. Ib. tit. 3, law 7, sec. 1. Thoulier, droit civil, vol. 3, No. 595, p. 503." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 69 (1937). Note that "not a condition" in Article 651(2) ought to read: "rather the result of the usual state of things than a condition"; further, "whom" in Article 651(3) should read: "which." 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 376 (1940). Article 646(3) of the Louisiana Civil Code of 1870 declares that "real servitudes, which are also called predial or landed servitudes, are those which the owner of an estate enjoys on a *neighboring* estate for the benefit of his own estate" (emphasis added). This article merely refers to the ordinary state of affairs; that there is no requirement concerning vicinity is made abundantly clear in Article 651.

141. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 872 (2d ed. Picard 1952); 2 OTTO GIERKE, DEUTSCHES PRIVATRECHT 648 (1905); WOIFF-RAISER, SACHENRECHT 437 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 297 (3d ed. 1955) (in Greek). It was otherwise in Roman law (*praedia debent esse vicina*). See SÖHM-MITTEIS-WENGER, INSTITUTIONEN 329 (23d ed. 1923); *cf.* DIGEST, 8.3.5.1. For the requirement of vicinity under Spanish laws prevailing in Louisiana prior to 1808, see French v. New Orleans & C. R.R., 2 La. Ann. 80 (1847).

142. LA. CIV. CODE art. 651(3); Coguenhem v. Trosclair, 137 La. 985, 69 So. 800 (1915).

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maintenance of an aqueduct, are ordinarily imposed on estates located far away from the dominant estate.[143]

Predial servitudes are perpetual in the sense that, if properly used, they do not terminate upon the lapse of any period of time. The perpetuity of predial servitudes is a consequence of their qualification as inseparable component parts of the ownership of an immovable.[144] Nevertheless, perpetuity is not an essential feature of predial servitudes because they may be stipulated for a term or under a suspensive or a resolutory condition.[145] It was otherwise in Roman law, which required that servitudes have a perpetual cause *(causa perpetua)*.[146] Today, in all legal systems under consideration, a predial servitude may be established for the satisfaction of temporary needs of the dominant estate and the utility to be derived from the servient estate may be exhaustible.[147] Of course, if there is no longer need or if the utility of the servitude is exhausted, the servitude may be declared terminated;[148] but there is no reason to exclude the validity of the servitude in advance if future events are certain to cause the termination of the servitude.

Indivisibility of Predial Servitudes

In all legal systems under consideration, predial servitudes are indivisible.[149] Article 656 of the Louisiana Civil Code of 1870 declares to the point that "the rights of servitudes, considered

143. *Cf.* Civ., Nov. 26, 1861, D. 1861.1.471, S. 1862.1.77; WOLFF-RAISER, SACHENRECHT 437 (10th ed. 1957).

144. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 873 (2d ed. Picard 1952); *cf.* Civ., May 5, 1919, D. 1923.1.230.

145. *See* LA. CIV. CODE art. 2013; Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So.2d 845 (1961); Coguenhem v. Trosclair, 137 La. 985, 69 So. 800 (1915); Civ., May 5, 1919, D. 1923.1.230; G. BALIS, CIVIL LAW PROPERTY 297 (3d ed. 1955) (in Greek).

146. *See* Digest, 8.2.28; STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1029 (11th ed. 1963); HECK, GRUNDRISS DES SACHENRECHTS 304 (1930).

147. Thus, for example, a predial servitude may well be established on a mine or a quarry. See Civ., Nov. 26, 1861, D. 1861.1.471, S. 1862.1.77; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 873 (2d ed. Picard 1952); WOLFF-RAISER, SACHENRECHT 438 (10th ed. 1957). Perpetuity, however, may be material for the creation of a servitude by disposition of the owner. In Durel v. Boisblanc, 1 La. Ann. 407, 408 (1846), the court denied the existence of a servitude of privy because privies "want the essential requisites of servitudes, and have not that permanence and charactère de perpetuité, which the law requires."

148. *See* G. BALIS, CIVIL LAW PROPERTY 297 (3d ed. 1955) (in Greek); *cf.* text at note 134 *supra*.

149. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 873 (2d ed. Picard 1952); Req., Feb. 26, 1912, D. 1913.1.365; WOLFF-RAISER, SACHENRECHT 444 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 297 (3d ed. 1955) (in Greek).

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in themselves, are not susceptible of division, either real or imaginary. It is impossible that an estate should have upon another estate part of a right of way, or of view, or any other right of servitude, and also that an estate be charged with a part of a servitude."[150]

The principle of indivisibility of predial servitudes carries significant practical applications,[151] especially in the field of mineral servitudes.[152] At this point, attention is focused merely on the consequences of the division of the dominant or of the servient estate. Division may result from a juridical act of the owner, as sale, donation, or partition; it may also result from judicial or administrative action, as adjudication or expropriation. Article 656(3) of the Louisiana Civil Code of 1870 speaks of a sale only, but this is merely an illustration of possible methods of division.

If the dominant estate is divided into parts, the principle of indivisibility requires that every acquirer "of a part has the right of using the servitude *in toto*."[154] Nevertheless, the division of the dominant estate may not result in the placing of an "additional burden . . . to the estate which is subject to the ser-

150. LA. CIV. CODE art. 656; La. Civ. Code art. 652 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are "Pothier, *coutume d'Orleans* introduction to tit. 13, *des servitudes*, art. 1, No. 3. Pardessus, des servitudes No. 24, p. 40 & 41. Analyse raisonée de Maleville, vol. 2, p. 158 to 160. Digest, book 8, tit. 3, law 25." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 70 (1937).

151. For example, it follows from the principle of indivisibility that no predial servitude may be established on, or in favor of, an undivided part of an estate. The creation of a predial servitude on an estate held in common by several co-owners requires the consent of all; and the release of a servitude in favor of an estate held in common requires the consent of all the co-owners. *See* LA. CIV. CODE arts. 738, 818; FRENCH CIV. CODE arts. 700, 709, 710 (arg.); B.G.B. §§ 747, 875; GREEK CIV. CODE arts. 1122, 1138; *cf.* Fawvor v. Crain, 6 So.2d 227 (La. App. 1st Cir. 1942).

152. *See, e.g.*, Elson v. Mathewes, 224 La. 417, 69 So.2d 734 (1954); Ohio Oil Co. v. Ferguson, 213 La. 183, 34 So.2d 746 (1947); Superior Oil Prod. Co. v. Lickilt, 189 La. 972, 181 So. 462 (1938); Doyle, *Division of the Servitude*, 5 LA. B.J. 138 (1957); Comment, *Is a Mineral Servitude Divisible?*, 8 LA. L. REV. 534 (1948); Comment, *Divisibility of the Mineral Servitude*, 3 LA. L. REV. 617 (1941); *cf.* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 957 (2d ed. Picard 1952); BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 870 (3d ed. Chauveau 1905); 3 AUBRY ET RAU, DROIT CIVIL FRANÇAIS nº 162 (5th ed. 1900).

154. LA. CIV. CODE art. 656(3). Note that "every purchaser of a part has the right of using" ought to read: "every purchaser of a part has the right of saying that the servitude is due to him, and of using the servitude *in toto*." 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 378 (1940).

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vitude."[155] Each acquirer of a part is entitled to use the servitude in its entirety but the use made by all of the acquirers may not exceed the limits of the use previously made. For example, the quantity of water or wood due by the servient estate remains the same, even if the needs of the dominant estate have increased as a result of its division.[156] And if the servitude was one of a right of way, all acquirers of parts of the dominant estate "are bound to exercise that right through the same place."[157] If the water, wood, or right of way available is not sufficient for the satisfaction of the new needs, the use of the servitude must be apportioned among the various acquirers of parts.[158] If, on the other hand, after the division of the dominant estate, the servitude is useful only for a part, the servitude is extinguished as to the parts for which it is no longer useful. This is provided for expressly in the German and Greek Civil Codes.[159] The same solution is suggested by doctrinal writers in France and ought to be followed in Louisiana.[160]

Neither the Louisiana Civil Code of 1870, nor the French Civil Code provides expressly for the consequences of the division of the servient estate. Nevertheless, on principle as well as in the light of a proper interpretation of pertinent provisions in the two Codes, it is clear that the division of the servient estate does not affect adversely the interests of the owner of the dominant estate. Insofar as these interests are concerned, the servitude remains the same.[161] This does not mean that each part of the divided estate is necessarily burdened with the servitude; determination of this matter depends on the purpose of the servitude and the circumstances of each case. For example, a servitude of light and view on a vacant lot is not modified at all by the division of the servient estate; the servitude is now

155. LA. CIV. CODE art. 776; FRENCH CIV. CODE art. 700. See also B.G.B. § 1025; GREEK CIV. CODE art. 1130.

156. *Cf.* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 957 (3d ed. Picard 1952); WOLFF-RAISER, SACHENRECHT 444 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 319 (3d ed. 1955) (in Greek).

157. LA. CIV. CODE art. 776(2); FRENCH CIV. CODE art. 700(2).

158. In this respect, the rules governing apportionment of use among co-owners apply by analogy. *See* G. BALIS, CIVIL LAW PROPERTY 319 (3d ed. 1955) (in Greek); *cf.* B.G.B. § 1024.

159. *See* B.G.B. § 1025; GREEK CIV. CODE art. 1130.

160. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 957 (3d ed. Picard 1952); *cf.* text at note 134 *supra*; Parish v. Municipality No. 2, 8 La. Ann. 145 (1853).

161. *See* Brown v. Terry, 103 So.2d 541 (La. App. 1st Cir. 1958); Civ., April 13, 1880, D. 1880.1.248, S. 1880.1.345; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 957 (3d ed. Picard 1952).

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due by each part. It is the same in the case of a servitude for the taking of sand, earth, or stones from a borrow pit or a quarry; after the division of the borrow pit or of the quarry, each part will have to furnish a proportionate quantity of earth, sand, or stones. But if a servitude of right of way or of a right to draw water from a well was localized on a certain part of the servient estate, the division of this estate will result in the release of the servitude as to parts which are no longer needed for the exercise of the servitude.[162] Similar solutions are reached in Germany and in Greece in the light of provisions in the Civil Codes of the two countries dealing with the division of the servient estate.[163]

The principle of indivisibility of predial servitudes does not exclude division of the advantages resulting from predial servitudes, provided, of course, that these advantages are susceptible of division. For example, "the right of taking a certain number of loads of earth from the land of another, or of sending to pasture a certain number of animals on the land of another"[164] may be divided among several estates entitled to the servitude. Thus, if a servitude for the pasturage of one hundred heads of cattle exists in favor of an estate belonging to two owners, each of them may be attributed the right to send to pasture fifty animals. Limitations on the use of the servitude, however, do not constitute division of the servitude or of the advantages of the servitude. The limitation of the use to "certain days or hours . . . is an entire right, and not part of a right."[165]

Divisions of predial servitudes

For systematic purposes, and with a view to practical applications, predial servitudes are divided into affirmative and negative; urban and rural; continuous and discontinuous; apparent and non-apparent; and natural, legal, and conventional.

Affirmative and Negative Servitudes

Servitudes which confer on the owner of the dominant estate

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162. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no 957 (3d ed. Picard 1952) ; *cf.* text at note 134 *supra.*

163. *See* B.G.B. § 1026; GREEK CIV. CODE art. 1131.

164. LA. CIV. CODE art. 657; La. Civ. Code art. 653 (1825). There is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are "Analyse raisonnée de Maleville, vol. 2, p. 60. Pardessus, treatise *des servitudes* Nos. 22 & 23, p. 38 to 40." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 70 (1937) ; *cf.* Childs v. Washington, 229 La. 869, 87 So.2d 111 (1956) ; Holladay v. Darby, 177 La. 297, 148 So. 55 (1933).

165. LA. CIV. CODE arts. 656(2), 751.

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the right to take certain materials from the servient estate or to use this estate for certain purposes[166] are termed affirmative servitudes.[167] Servitudes which deprive the owner of the servient estate of certain prerogatives of his ownership, *i.e.*, prohibit certain material acts or the exercise of certain rights,[168] are termed negative servitudes. In Louisiana and in France, the distinction is merely doctrinal; in Germany and in Greece, it involves limited practical consequences.[169]

Urban and Rural Servitudes

According to Article 710 of the Louisiana Civil Code of 1870, and corresponding Article 687 of the French Civil Code, servitudes may be either urban or rural.[170] Urban servitudes are those established "for the use of houses" whereas rural servitudes are those established "for the use of lands."[171] This division of servitudes carried significant consequences in Roman law[172] and in medieval French law. It does not involve any practical applications in Louisiana or in France, and it is not mentioned in the German or in the Greek Civil Code.[173]

Continuous and Discontinuous Servitudes

This division of servitudes is implied in the German and Greek Civil Codes[174] but is expressly established in Louisiana and in France. According to Article 727 of the Louisiana Civil Code of 1870, and corresponding Article 688 of the French

166. *See* text at notes 16, 17 *supra*.

167. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS § 875 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 821 (3d ed. Chauveau 1905); WOLFF-RAISER, SACHENRECHT 431 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 294 (3d ed. 1955) (in Greek).

168. *See* text at notes 21-25 *supra*.

169. *See, e.g.*, GREEK CIV. CODE art. 1123 (acquisitive prescription of negative servitudes). For German law, see WOLFF-RAISER, SACHENRECHT 431 (10th ed. 1957); HEDEMANN, SACHENRECHT DES BÜRGERLICHEN GESETZBUCHES 248 (3d ed. 1960). In Louisiana and in France, negative servitudes are always continuous and non-apparent; hence, the significance attached to negative servitudes in German and Greek law is attached in Louisiana and in France to continuous and non-apparent servitudes. See 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 821 (3d ed. Chauveau 1905).

170. *See* LA. CIV. CODE art. 710; La. Civ. Code art. 706 (1825); La. Civ. Code 138, art. 50 (1808); FRENCH CIV. CODE art. 687.

171. See note 170 *supra*.

172. *See* W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 262 (2d ed. 1950); SÖHM-MITTEIS-WENGER, INSTITUTIONEN 329 (17th ed. 1923).

173. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 875 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 812 (3d ed. Chauveau 1905); G. BALIS, CIVIL LAW PROPERTY 312 (3d ed. 1955) (in Greek).

174. *See* WOLFF-RAISER, SACHENRECHT 431 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 295 (3d ed. 1955) (in Greek).

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Civil Code, "servitudes are either continuous or discontinuous. Continuous servitudes are those whose use is or may be continual without the act of man. . . . Discontinuous servitudes are such as need the act of man to be exercised."[175] These definitions indicate that continuous servitudes involve the maintenance of a certain state of affairs which is beneficial for the dominant estate and that, once these servitudes are established, they last indefinitely and procure by themselves the expected advantages; in contrast, discontinuous servitudes require for their use and preservation successive or repeated acts of man.[176] The language employed in Article 727 of the Louisiana Civil Code of 1870 and Article 688 of the French Civil Code, however, is slightly misleading; it might be taken to mean that a servitude is continuous if it is exercised without interruption and discontinuous if its exercise is intermittent. This interpretation would be obviously wrong.[177] The servitude of drip is continuous, although it is exercised on rainy days only.[178]

The notion of "act of man" furnishes the criterion for the division of servitudes into continuous and discontinuous in Louisiana and French law. This criterion, however, refers solely to the manner in which a servitude operates and has nothing to do with the creation of the servitude. Further, acts of man may be necessary for the building or keeping in repair constructions which are needed for the use of the servitude, but these are not acts of man within the meaning of Article 727 of the Louisiana Civil Code of 1870 and 688 of the French Civil Code.[179] In effect, a servitude is defined and classified in the light of its use

175. LA. CIV. CODE art. 727; La. Civ. Code art. 723 (1825); La. Civ. Code 138, art. 51 (1808); FRENCH CIV. CODE art. 688.

176. *See* Wild v. LeBlanc, 191 So.2d 146 (La. App. 3d Cir. 1966); Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So.2d 856 (La. App. 3d Cir. 1965); Fuller v. Washington, 19 So.2d 730 (La. App. 2d Cir. 1944); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 876 (2d ed. Picard 1952).

177. *Cf.* Fuller v. Washington, 19 So.2d 730, 731 (La. App. 2d Cir. 1944): "There appears to be nothing in the codal provisions which could indicate that the character of a servitude as to whether it be continuous requires unceasing operation"; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS § 876 (2d ed. Picard 1952).

178. *See* LA. CIVIL CODE arts. 713, 727 (1870); Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905); Vincent v. Michel, 7 La. 52 (1834); Efner v. Kettering-ham, 41 So.2d 130 (La. App. 2d Cir. 1949). Likewise, the servitude of view is continuous, although, in a sense, its exercise depends on the presence of a person looking out of an opening. *See* 2 MARTY ET REYNAUD, DROIT CIVIL 167 (1965).

179. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 877 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 814 (3d ed. Chauveau 1905); 4 HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL 503 (1893); 12 DEMOLOMBE, TRAITÉ DES SERVITUDES nº 708 (1882); Note, 40 TUL. L. REV. 397, 398 n.3 (1966). Actually , by the listing of aqueduct and drain as continuous sevitudes, the Louisiana and French Civil Codes presuppose human works.

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rather than with reference to constructions which make its use possible.[180]

According to one view, any human influence on the use of a servitude, whether taking place on the servient estate or elsewhere, is an "act of man" determinative of the status of the servitude as discontinuous. Thus, a servitude for the drainage of a mine by pumps which work day and night should be regarded as discontinuous because it requires acts of man for its exercise.[181] According to another view, which leads to preferable practical results and is followed in Louisiana, the criterion of "act of man" applies only to operations on the servient estate;[182] thus, acts necessary for the use of the servitude which take place on the dominant estate are immaterial for the classification of a servitude as discontinuous.[183]

The Louisiana and French Civil Codes declare that the servitudes of aqueduct,[184] drain,[185] and view[186] are examples of con-

180. *See* 4 BEUDANT ET LEREBOURS-PIGEONNIÈRE, COURS DE DROIT CIVIL FRANÇAIS 646 (2d ed. 1938); *cf.* Roy v. Roy. 5 La. Ann. 590 (1850); Hale v. Hulin, 130 So.2d 519 (La. App. 3d Cir. 1961).

181. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 876 (2d ed. Picard 1952). According to this view, the servitude of drain is continuous if the water flows naturally over the servient estate and comes to it by the operation of natural forces. *See also* text at note 198 *infra.*

182. *See* Wild v. LeBlanc, 191 So.2d 146 (La. App. 3d Cir. 1966); Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So.2d 856 (La. App. 3d Cir. 1965); Note, 40 TUL. L. REV. 397, 404 (1966). This interpretation reaches results consistent with the examples given in Articles 727 of the Louisiana Civil Code of 1870 and 688 of the French Civil Code. Further, in confining the scope of the test of continuity to acts occurring on the servient estate, this view "is more consistent with the usual justification for limiting the acquisition of servitudes by prescription, that is, only usage which is adverse to the interests of the owner of the servient estate should vest rights by acquisitive prescription; to look beyond the acts occurring on the servient estate in deciding whether the servitude is adverse seems pointless." *Id.* at 404. *See also* text at notes 191, 214 *infra.*

183. *See* 12 DEMOLOMBE, TRAITÉ DES SERVITUDES nos. 710-12 (7th ed. 1882); *cf.* 2 MARTY ET REYNAUD, DROIT CIVIL 167 (1965); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 818 (3d ed. Chauveau 1905). For example, the servitude of view is continuous although, in a sense, it is exercised when a person looks out of an opening in the dominant estate.

184. Aqueduct is the right "by which one conducts water from his estate through the land of his neighbor by means of an aqueduct or ditch." LA. CIV. CODE art. 724; La. Civ. Code art. 720 (1825). There are no corresponding definitions in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1870, the source of this provision is "Digest, book 8, tit. 3, law 4." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 416 (1937).

185. The right of drain "consists in the servitude of passing water collected in pipes or canals through the estate of one's neighbor." LA. CIV. CODE art. 714; La. Civ. Code art. 710 (1825). There is no corresponding definition in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are: "Digest, book 8, tit. 2, law 20, sec. 5. Part. 3, tit. 31, law 2." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 76 (1937).

186. The right of view consists of "every opening which may, more or less, facilitate the means of looking out of a building." LA. CIV. CODE art. 715; La.

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tinuous servitudes.[187] Additional examples, according to doctrine and jurisprudence, are the servitudes for the maintenance of a structure on the land of another,[188] certain building restrictions in a subdivision,[189] and prohibitions of building on a neighboring estate.[190] It has long been assumed in Louisiana that the examples given in Article 727 of the Civil Code of 1870 are controlling for the classification of a servitude as continuous or discontinuous.[191] This view accords with the ideas of certain French commentators who suggest that the servitudes of aqueduct, drain, and view are always continuous.[192] According to French jurisprudence,[193] however, and recent Louisiana decisions,[194] the examples given in the Civil Codes are not controlling; the final test for the classification of a servitude as continuous or discontinuous is the requirement of acts of man.

According to Louisiana jurisprudence, the servitudes of aqueduct, drain, and view are always continuous either on the assumption that the examples given in Article 727 of the Civil Code of 1870 are determinative of the status of these servitudes or on the theory that the criterion of acts of man applies only to operations on the servient estate. Thus, "though acts of man may regulate the flow of the water through the ditch or canal, the servitude is 'continual without the act of man' in the sense

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Civ. Code 711 (1825). There is no corresponding provision in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are: "Digest, book 8, tit. 3, law 16. Domat, book 1, part 1, tit. 12, sec. 2, No. 4." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 76 (1937).

187. *See* LA. CIV. CODE art. 727; French Civ. Code art. 688.

188. *See* Woodcock v. Baldwin, 51 La. Ann. 989, 26 So. 46 (1899) (building). Of course, if one claims that he is entitled to *use* a building on the land of another, the servitude is discontinuous. *See* Lovecchio v. Graffagnini, 90 So.2d 694 (La. App. Orl. Cir. 1956) (shed and storeroom use on the land of another).

189. *See* McGuffy v. Weil, 240 La. 758, 125 So.2d 154 (1960); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 104 (1966).

190. *See* Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905); Ribert v. Howard, 109 La. 113, 33 So. 103 (1903); Goodwin v. Alexander, 105 La. 658, 30 So. 102 (1902).

191. *See, e.g.*, as to *aqueducts* and *drains*: Levet v. Lapeyrollerie, 39 La. Ann. 210, 1 So. 672 (1887); Kennedy v. Succession of McCollam, 34 La. Ann. 568 (1882); Hale v. Hulin, 130 So.2d 519 (La. App. 3d Cir. 1961); *drips*: Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905); Vincent v. Michel, 7 La. 52 (1834); Efner v. Ketteringham, 41 So.2d 130 (La. App. 2d Cir. 1949); *sewerage*: Fuller v. Washington, 19 So.2d 730 (La. App. 2d Cir. 1944); *view*: Cleris v. Tieman, 15 La. Ann. 316 (1860); Lavillebéuve v. Cosgrove, 13 La. Ann. 323 (1858); Durel v. Boisblanc, 1 La. Ann. 407 (1846).

192. *See* 2 MARTY ET REYNAUD, DROIT CIVIL 167 (1965); 12 DEMOLOMBE, TRAITÉ DES SERVITUDES nº 710-12 (7th ed. 1882); *cf.* Note, 55 REV. TRIM. DR. CIV. 365 (1957).

193. *See* text at notes 196-201 *infra*.

194. *See* Wild v. LeBlanc, 191 So.2d 146 (La. App. 3d Cir. 1966); Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So.2d 856 (La. App. 3d Cir. 1965).

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that it may be used uninterruptedly without the act of man."[195] French courts, however, following the view that the criterion of acts of man applies to any human influence on the use of the servitude, whether taking place on the servient estate or elsewhere, have reached solutions which are not "always perfectly consistent."[196] According to French jurisprudence, the servitude of aqueduct is continuous if the water flows naturally over the servient estate and comes to it by the operation of natural forces; the fact that the aqueduct may have a flood gate or a sluice which must be raised or lowered in order to permit the flow of the water is without influence on the classification of the servitude.[197] Under these holdings, the servitude of aqueduct might be discontinuous if repeated acts of man are required to replenish the supply of the water or to force it over the servient estate.[198] With respect to the servitude of drain, French courts declare that the drain of rain waters is a continuous servitude because its exercise requires no act of man;[199] the drain of refuse waters, however, is discontinuous because the running of the water depends on an act of man.[200] For the same reasons, it has been held in France that the servitude of view is continuous if exercised through an opening in the wall or a window[201] and discontinuous if exercised by the opening of a door.[202]

Continuous servitudes are ordinarily associated with certain artificial works; for example, a servitude of view is exercised by means of openings in walls and a servitude of aqueduct by means

195. Wild v. LeBlanc, 191 So.2d 146, 148 (La. App. 3d Cir. 1966). *See also* Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So.2d 856 (La. App. 3d Cir. 1965). In the last case, the court indicated that any acts of man preliminary to the running of the water across the servient estate are without influence on classification of a servitude of aqueduct.

196. 2 MARTY ET REYNAUD, DROIT CIVIL 167 (1965).

197. *See* Civ., Nov. 5, 1956, Note, Solus, 55 REV. CR. DR. CIV. 365 (1957); Req., Nov. 23, 1898, D. 1899.1.37; Civ., Oct. 25, 1887, D. 1888.1.106, S. 1888.1.309; Civ., Aug. 6, 1872, D. 1872.1.240, S. 1873.1.127.

198. *Cf.* text at note 181 *supra.*

199. *See* Req., Dec. 10, 1888, D. 1889.1.157, S. 1889.1.156; Req., June 19, 1865, D. 1865.1.478, S. 1865.1.337.

200. *See* Req., Feb. 17, 1875, D. 1876.1.504, S. 1877.1.74; Limoges, June 15, 1891, and May 23, 1894, D. 1896.2.362, S. 1896.2.295; Pau, Jan. 29, 1890, D.1891.2.122; Riom, March 8, 1888, D. 1888.2.215. These holdings are not entirely consistent with decisions declaring that the servitude of aqueduct is continuous even if there is a gate or sluice which must be raised to permit the flow of the waters. See 2 MARTY ET REYNAUD, DROIT CIVIL 167 (1965). Further, from the viewpoint of practical considerations relative to the acquisition of servitudes by prescription, there should be no difference between the servitudes for the drain of rain waters and of refuse waters. *See* 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 818 (3d ed. Chauveau 1905).

201. *See* Civ., June 21, 1921, D. 1925.1.31; Req., Nov. 26, 1907, S. 1909.1.12; Civ., Oct. 19, 1886, D. 1887.1.116, S. 1890.1.251; Civ., Dec. 28, 1863, S. 1864.1.123.

202. *See* Civ., Dec. 18, 1894, D. 1895.1.365; Req., July 15, 1852, D. 1852.1.167.

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of pipes and ditches. The existence of artificial works, however, is not an indispensable feature of continuous servitudes. Thus, a prohibition of building or planting which requires that a certain lot remain unimproved is a continuous servitude. The essential feature of all continuous servitudes is that their exercise "*does* survive the act of man; it does not cease the moment the act ceases; and the servitude continues to be exercised after the owner of the dominant estate ceases to occupy or be on the servient estate."[203] The water runs in the aqueduct, the opening in the wall lets the light in, and the servient estate remains unbuilt.

Discontinuous servitudes confer on the owner of the dominant estate the right to do certain material acts on the servient estate. If the owner of the dominant estate remains inactive, the servitude is not exercised. Of this nature are the servitudes of passage[204] and of way,[205] of drawing water from a well or a spring,[206] of pasturage,[207] of watering one's animals at the pond or spring of another,[208] and servitudes for the extraction of

203. Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So.2d 856, 863 (La. App. 3d Cir. 1965).

204. *See* LA. CIV. CODE art. 727; FRENCH CIV. CODE art. 688; Mallet v. Thibault, 212 La. 79, 31 So.2d 601 (1947); Broussard v. Etie, 11 La. 394 (1837); Estopinal v. Storck's Estate, 44 So.2d 704 (La. App. Orl. Cir. 1950); Martini v. Cowart, 18 So.2d 849 (La. App. 2d Cir. 1944); *accord*, Civ., May 8, 1901, D. 1905.1.79.

205. *See* Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932); Cleris v. Tieman, 15 La. Ann. 316 (1860); Durel v. Boisblanc, 1 La. Ann. 407 (1846); Kelly v. Pippitone, 12 La. App. 635, 126 So. 79 (1930). *See* also Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So.2d 74 (1958) (right of way over canal exercised by means of a boat); Ogborn v. Lower Terrebonne Refining & Mfg. Co., 129 La. 379, 56 So. 323 (1911) (tramway); Lovecchio v. Craffagnini, 90 So.2d 694 (La. App. Orl. Cir. 1956) (shed and storeroom on the land of another). A servitude binding the owner of the servient estate to tolerate excessive emissions from the land of a neighbor would be a discontinuous servitude. See Ellis v. Blanchard, 45 So.2d 100 (La. App. 2d Cir. 1950).

206. *See* LA. CIV. CODE art. 727; FRENCH CIV. CODE art. 688. However, the taking of water by means of pipes or ditches gives rise to the continuous servitude of aqueduct. *See* Civ., Nov. 22, 1892, D. 1894.1.45, S. 1893.1.29; Civ., July 19, 1864, D. 1864.1.341, S. 1864.1.361; Civ., Jan. 24, 1860, S. 1860.1.317; *cf.* Wild v. LeBlanc, 191 So.2d 146 (La. App. 3d Cir. 1966).

207. *See* LA. CIV. CODE art. 727; FRENCH CIV. CODE art. 688; Req., Jan. 9, 1899, D. 1899.1.119. Pasturage is the "right of grazing one's cattle on the estate of another." LA. CIV. CODE art. 726; La. Civ. Code art. 722 (1825). There is no corresponding definition in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the source of this provision is: "Partida 3, tit. 31, law 6." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 78 (1937).

208. *See* LA. CIV. CODE art. 725; La. Civ. Code art. 721 (1825); there is no corresponding article in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the Louisiana Civil Code of 1825, the sources of these provisions are "Digest, book 8, tit. 3, law 7, sec. 1. Partida 3, tit, 31, law 6." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825 p. 78 (1937). For French jurisprudence, *see* Req., Feb. 20, 1907, D. 1907.1.227; Civ.,

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materials from the servient estate.[209] These servitudes are discontinuous even if certain works have been erected to facilitate their exercise[210] or if they become visible by the existence of a gate,[211] a paved road,[212] or a railroad track.[213]

The practical significance of the division of servitudes into continuous and discontinuous relates to the rules governing the creation, protection, and termination of servitudes. Thus, discontinuous and continuous non-apparent servitudes may be acquired by title only;[214] continuous apparent servitudes may be acquired by title as well as by destination of the owner[215] and

July 5, 1900, D. 1901.1.294; Civ., Dec. 4, 1888, D. 1889.1.193, S. 1890.1.105; Pau, March 29, 1893, D. 1894.2.34, S. 1893.2.150.

209. *See* text at note 17 *supra*. In Louisiana, mineral servitudes are *sui generis* real rights rather than predial servitudes; hence strictly speaking, mineral servitudes are neither continuous nor dicontinuous. In the light of functional considerations, however, the Louisiana Supreme Court has analogized mineral servitudes to discontinuous predial servitudes and has held that mineral servitudes may be acquired by title only. *See* Savage v. Packard, 218 La. 637, 50 So.2d 298 (1950); *cf.* Long Petroleum Co. v. Tritico, 216 La. 426, 43 So.2d 782 (1949); Goldsmith v. McCoy, 190 La. 320, 182 So. 519 (1938); Hanby v. Texas Co., 140 La. 189, 72 So. 933 (1916).

210. *See* Civ., Dec. 4, 1888, D. 1889.1.193, S. 1890.1.105; Req., June 19, 1865, D. 1865.1.478, S. 1865.1.337; Limoges, June 15, 1891, and May 23, 1894, D. 1896.-2.362, S. 1896.2.295; Pau, Jan. 29, 1890, D. 1891.2.122; Riom, March 8, 1888, D. 1888.2.215.

211. *See* Civ., March 9, 1846, S. 1846.1.307; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 877 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 813 (3d ed. Chauveau 1905).

212. *See* Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932); Durel v. Boisblanc, 1 La. Ann. 407 (1846).

213. *See* Ogborn v. Lower Terrebonne Refining & Mfg. Co., 129 La. 379, 56 So. 323 (1911). These solutions have been criticized in the light of functional considerations. *See* text at notes 230, 231 *infra*.

214. *See* LA. CIV. CODE art. 766; FRENCH CIV. CODE art. 691; Comment, *Private Rights of Way*, 8 LA. L. REV. 553 (1948). In Louisiana, mineral servitudes may be acquired by title only. *See* Savage v. Packard, 218 La. 637, 50 So.2d 298 (1950). When the mineral rights are not severed from the ground by the creation of a mineral servitude, the possessor of the surface possesses the minerals for the purpose of acquisitive prescription and possessory protection. When the mineral rights are severed from the ownership of the ground by the creation of a mineral servitude, the jurisprudence strongly indicates that the owner of the ground must furnish prima facie evidence that the servitude has expired in order to avail himself of possessory protection. *See* Lenard v. Shell Oil Co., 211 La. 265, 29 So.2d 844 (1947); International Paper Co. v. Louisiana Central Lumber Co., 202 La. 621, 12 So.2d 659 (1943); Connell v. Muslow Oil Co., 186 La. 491, 172 So. 763 (1937); *cf.* Dixon v. American Liberty Oil Co., 226 La. 911, 77 So.2d 533 (1955). In these circumstances, the possessor of the surface may acquire rights to the minerals under the surface by actual adverse possession and exploitation during the applicable period of time. Further, the mineral servitude may be lost by the effect of the prescription of non-use, in which case the title of the landowner is re-integrated and includes the mineral rights.

215. *See* LA. CIV. CODE art. 767; FRENCH CIV. CODE art. 692; Comment, *Establishment of Servitudes by Destination*, 8 LA. L. REV. 560 (1948). Destination of the owner is not a mode of acquisition of predial servitudes under the German and Greek Civil Codes. In Germany, however, the owner of two estates may validly create by juridical act a predial servitude burdening one of the estates

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by acquisitive prescription.[216] Continuous apparent servitudes are everywhere protected by possessory actions whereas doubts exist as to the protection of discontinuous servitudes by the same actions.[217] And, the prescription of non-use for discontinuous servitudes begins "from the day they ceased to be used; for continuous servitudes, from the day any act contrary to the servitude has been committed."[218]

Continuous servitudes, whether apparent or non-apparent, are clearly protected in Louisiana by the possessory action.[219]

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in favor of the other. See WOLFF-RAISER, SACHENRECHT 442 (10th ed. 1957); 3 STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1030 (11th ed. 1963).

216. *See* LA. CIV. CODE art. 765; FRENCH CIV. CODE art. 690; *see* Comment, *Acquisitive Prescription of Servitudes*, 15 LA. L. REV. 777 (1955); Comment, *Acquisition of Rights of Way by Prescription*, 12 TUL. L. REV. 226 (1938). In Germany and in Greece, all kinds of servitudes may be acquired by acquisitive prescription. In Germany, however, due to the requirement of entry into the land-register, acquisition of predial servitudes by prescription is rare. *Cf.* B.G.B. §§ 900(2), 1029; 2 OTTO GIERKE, DEUTSCHES PRIVATRECHT 644-46 (1905). In Greece, the acquisition of predial servitudes by prescription is a common as in Louisiana and in France. With respect to negative servitudes, corresponding to continuous apparent servitudes in Louisiana and in France, the Greek Civil Code provides that the prescription starts to run from the day the owner of the dominant estate prohibits to the owner of the servient estate performance of the act whose omission is the content of the servitude. *See* GREEK CIV. CODE art. 1123; G. BALIS, CIVIL LAW PROPERTY 325 (3d ed. 1955) (in Greek).

217. *See* text at notes 219-27 *infra*.

218. *See* LA. CIV. CODE art. 790; FRENCH CIV. CODE art. 707; *Cf.* GREEK CIV. CODE art. 1139. For Louisiana jurisprudence, *see* Paret v. Louisiana Highway Commission, 178 La. 454, 151 So. 768 (1933); Swain v. Webre, 106 La. 161, 30 So. 331 (1901); Ledoux v. Allegre, 10 La. Ann. 706 (1855); Persigo v. Johnson & Co., 18 So.2d 186 (La. App. Orl. Cir. 1944); Ronaldson v. Vicknair, 185 So. 52 (La. App. 1st Cir. 1938); Talbot v. Kern, 62 So.2d 548 (La. App. 1st Cir. 1953); *Cf.* OP. ATT'Y. GEN. 883 (1936-38). When a servitude is never exercised, prescription begins to run from the day of the creation of the servitude. See De La Croix v. Nolan, 1 Rob. 321 (La. 1842). For the prescription of non-use, as applied to mineral servitudes, *see* LA. R.S. 30:112 (Supp. 1968): "[P]rescription shall begin to run on a mineral servitude on the day on which the servitude is created;" Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So.2d 845 (1961); Mays v. Hansbro, 222 La. 557, 64 So.2d 232 (1953); Currier, *The 1958 Louisiana Statutes on Liberative Prescription of Mineral Interests*, 34 TUL. L. REV. 51 (1959).

For French law, *see* Civ., Jan. 26, 1944, S. 1945.1.20; Req., Dec. 4, 1934, S. 1935.1.62; Lyon, April 9, 1881, D. 1882.2.20, S. 1884.2.164; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 976 (2d ed. Picard 1952); 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRAITIQUE DE DROIT CIVIL nº 892 (3d ed. Chauveau 1905).

In principle, servitudes may not be lost by non-use in Germany. *See* B.G.B. § 902, WOLFF-RAISER, SACHENRECHT 446 (10th ed. 1957); 3 STAUDINGER-RING, KOMMENTAR ZUM B.G.B. 1012 (11th ed. 1963). For an exception, *see* B.G.B. § 1028; *cf. id.* §§ 195, 894.

219. See LA. CIV. CODE arts. 3432, 3454, 3456; LA. CODE CIV. P. arts. 3655, 3656, 3658. For the protection of mineral servitudes by the possessory action, see Dixon v. American Liberty Oil Co., 226 La. 911, 77 So.2d 533 (1955); *Cf.* Lenard v. Shell Oil Co., 211 La. 265, 29 So.2d 844 (1947); International Paper Co. v. Louisiana Central Lumber Co., 202 La. 621, 12 So.2d 659 (1943); Connell v. Muslow Oil Co., 186 La. 491, 172 So. 763 (1937); Nabors, *Report to the Mineral Law Committee of the Louisiana State Law Institute*, 26 TUL. L. REV. 172, 182-84 (1952); Comment, *The Louisiana Mineral Lease as a Contract Creating Real Rights*, 35 TUL. L. REV. 218 (1960).

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Article 3658 of the Louisiana Code of Civil Procedure of 1961 declares that the possessor of a real right, in order to maintain the possessory action, must allege and prove that he and his ancestors in title had possession "for more than a year immediately prior to the disturbance."[220] This prerequisite seems to exclude the protection of discontinuous servitudes by the possessory action. The possession of a discontinuous servitude "does not survive the act of man; it ceases the moment the act ceases. Such is the servitude of way; it is exercised each time the owner of the dominant estate passes over the servient estate and only during the time occupied in his passing."[221] Accordingly, Louisiana courts have declared that an action for the protection of a discontinuous servitude is "neither possessory not petitory in nature"[222] and have afforded remedies by reference to Articles 864 and 865 of the Civil Code of 1870[223] rather than the provisions of the Code of Civil Procedure dealing with the possessory action.[224] In France, possessory protection is ordinarily avail-

220. LA. CODE CIV. P. art. 3658(2); *Cf.* LA. CIV. CODE arts. 3454, 3455.

221. Ogborn v. Lower Terrebonne Refining & Mfg. Co., 129 La. 379, 381, 56 So. 323 (1911); Acadia-Vermilion Rice Irrigation Co. v. Broussard, 175 So.2d 856 (La. App. 3d Cir. 1966), quoting from 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE DE DROIT CIVIL nº 813 (3d ed. Chauveau 1905). The passage has been mistakingly attributed by the court to Aubry et Rau. It ought to be noted, however, that Article 3432 of the Louisiana Civil Code of 1870, which has no equivalent in the French Civil Code, declares that servitudes are susceptible of quasi-possession. No distinction is made between continuous and discontinuous servitudes; hence, argument could be made that *all* servitudes are susceptible of quasi-possession in Louisiana. *Cf.* Michel v. Buchert, 144 So.2d 435 (La. App. 4th Cir. 1962); Benoit v. Dupre, 109 So.2d 833 (La. App. 1st Cir. 1959), Texas & Pac. Ry. v. Burch, 3 So.2d 470 (La. App. 2d Cir. 1941) (possession of rights of way).

222. Michel v. Buchert, 144 So.2d 435, 440 (La. App. 4th Cir. 1962). In this case, an action had been brought for the elimination of a fence interfering with a right of way. Defendant argued that an injunction could not issue because plantiff had no possession for more than a year, as required by Article 3663(2) of the Louisiana Code of Civil Procedure of 1961. The court questioned the applicability of this Article since the action was neither possessory nor petitory in nature. But, "assuming arguendo," the court said, "that possession relative to real estate is analogous to use of a servitude for purposes of this statute's application ... it is easily shown that the plaintiffs did enjoy the use of 'possession' of the servitude in question for more than one year prior to the erection of the fence." See also Benoit v. Dupre, 109 So.2d 833, 835 (La. App. 1st Cir. 1959): "Even if we consider the action [for interference with a right of way] a possessory one, we believe the trial judge was correct in concluding that plaintiff and his authors in title were in possession of the servitude...."

223. *See* LA. CIV. CODE arts. 864, 865; Kaffie v. Pioneer Bank & Trust Co., 184 So.2d 595 (La. App. 2d Cir. 1965), and cases cited; *cf.* Parish of Jefferson v. Doody, 247 La. 839, 174 So.2d 798 (1965); Waters v. Backus, 8 Mart.(O.S.) 1 (La. 1820); Freestate Industrial Development Co. v. T. & H., Inc., 188 So.2d 746 (La. App. 2d Cir. 1966); Matassa v. Finnazzi, 159 So.2d 732 (La. App. 4th Cir. 1964); Michel v. Buchert, 144 So.2d 435 (La. App. 4th Cir. 1962); Bell v. Tycer, 97 So.2d 448 (La. App. 1st Cir. 1957); Talbot v. Kern, 62 So.2d 548 (La. App. 1st Cir. 1953); Ronaldson v. Vicknair, 185 So. 52 (La. App. 1st. Cir. 1938).

224. *But see* Texas & Pac. Ry. v. Burch, 3 So.2d 470 (La. App. 2d Cir. 1941) (possessory action brought for the protection of a right of way).

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able for continuous apparent servitudes;[225] discontinuous or non-apparent servitudes, being insusceptible of possession according to French doctrine and jurisprudence, are not protected by the possessory actions.[226] By way of exception, however, courts have allowed possessory protection in cases in which a discontinuous or non-apparent servitude is established by title; in these cases "possession is based on the title."[227]

The application of different rules to the various kinds of servitudes with respect to possessory protection and acquisitive prescription has been justified by theorists on the ground that only an adverse use should be protected and should give rise to prescriptive rights.[228] Continuous apparent servitudes satisfy the requirement of adverse use whereas discontinuous servitudes involve irregular acts on the servient estate which may be merely tolerated. This rationalization, however, does not explain why the use of a paved road or of a railroad track, which is as adverse as the use of an aqueduct, should not be protected by possessory actions and should not give rise to prescriptive rights.[229] Modern writers thus suggest that all servitudes made visible by exterior works should be classified as continuous; in these circumstances, the servitudes "constitute a permanent menace justifying the continuity of the servitude."[230] And, even in the framework of the traditional classification, it ought to be

225. *See* Req., Oct. 26, 1936, Gaz. Pal. 1936.2.926; Civ., May 5, 1925, S. 1925.1.373; Req., Nov. 6, 1871, D. 1872.1.299, S. 1871.1.227; Civ., Dec. 28, 1863, D. 1864.1.163. The possession must have lasted for at least one year and must meet the requirements of Article 2229 of the French Civil Code. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 967 (2d ed. Picard 1952).

For German and Greek law concerning the protection of servitudes, *see* A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 150-52 (1966); WOLFF-RAISER, SACHENRECHT 447 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 326 (3d ed. 1955) (in Greek).

226. *See* Req., May 2, 1919, S. 1920.1.184; Req., July 9, 1918, S. 1920.1.115; Civ., Dec. 6, 1871, S. 1872.1.27; Req., Dec. 26, 1865, S. 1866.1.65.

227. *See Req.*, July 11, 1932, Gaz. Pal. 1932.2.620; Req., July 31, 1930, S. 1931.1.128; Civ., Oct. 17, 1928, S. 1929.1.54; Civ., Feb. 20, 1922, D. 1925.1.80; Req., March 27, 1866, D. 1866.1.339, S. 1866.1.215. The *réintégrande*, however, is never available for the protection of servitudes. *See* Req., Feb. 17, 1914, D. 1917.1.194; Req., July 15, 1852, D. 1852.1.167; 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 970 (2d ed. Picard 1952).

228. *See* 4 HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DE CODE CIVIL 513-14 (1893); 8 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 233 (2d ed. 1876).

229. *See* Ogborn v. Lower Terrebonne Refining & Mfg. Co., 129 La. 379, 380, 56 So. 323 (1911); "The writer of this opinion thinks that a servitude, the exercise of which necessitates the permanent maintenance of a railroad, consisting of road-bed, cross-ties, rails, bridges, etc., of which the dominant estate has the exclusive use, and of which the servient estate has only the burden, is a continuous apparent servitude.... The majority of the court think differently."

230. 4 BEUDANT ET LEREBOURS-PIGEONNIÈRE, COURS DE DROIT CIVIL FRANÇAIS 648 (1934); 2 MARTY ET REYNAUD, DROIT CIVIL 167, 171 (1965).

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admitted that discontinuous servitudes which are publicly and constantly used give rise to a continuous possession, protected by the possessory actions and leading to acquisitive prescription.[231]

Apparent and Non-Apparent Servitudes

Article 728 of the Louisiana Civil Code of 1870, and corresponding Article 689 of the French Civil Code, declare that "servitudes are either visible and apparent or non-apparent. Apparent servitudes are such as are to be perceivable by exterior works.... Non-apparent servitudes are such as have no exterior sign of their existence."[232] This division of servitudes was developed in medieval French law, as a sub-classification of continuous and discontinuous servitudes.[233] In the Louisiana Civil Code of 1870 and in the French Civil Code, however, the division of servitudes into apparent and non-apparent is independent of any other division. There is no corresponding division of servitudes in the Roman, German, and Greek legal systems.

The classification of a particular servitude as apparent or non-apparent depends on facts and circumstances rather than the nature of the servitude. Thus, a servitude of right of way may be apparent or non-apparent. If the right of way is exercised over an arid tract of land, without a trace, the servitude is non-apparent; if it is exercised on a paved road or a railway track, the servitude is apparent.[234] Likewise, if the pipes of an aqueduct are buried into the ground, the servitude is non-apparent; if the pipes are visible, the servitude is apparent.[235] Several kinds

231. *See* 1 PLANIOL, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL 964 (10th ed. Ripert 1925).

232. LA. CIV. CODE art. 728; La. Civ. Code art. 724 (1825); La. Civ. Code p. 138, art. 52 ((1808); FRENCH CIV. CODE art. 689. Whether certain appearances may be taken as a sign of a servitude is a question of law. For example, branches of trees extending over the land of a neighbor are not signs of an apparent servitude. Civ., June 26, 1867, D. 1867.1.254, S. 1867.1.388. Further, boards nailed across a window are not signs of an apparent servitude. Taylor v. Boulware, 35 La. Ann. 469 (1883).

233. *See* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 878 (2d ed. Picard 1952).

234. *See* Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932); Ogborn v. Lower Terrebonne Refining & Mfg., 129 La. 379, 56 So. 323 (1911); Durel v. Boisblanc, 1 La. Ann. 407 (1846).

235. *See* Levet v. Lapeyrollerie, 39 La. Ann. 210, 1 So. 672 (1887); Kennedy v. Succession of McCollam, 34 La. Ann. 568 (1882); Wild v. LeBlanc, 191 So.2d 146 (La. App. 3d Cir. 1966); Acadia-Vermilion Rice-Irrigation Co. v. Broussard, 175 So.2d 856 (La. App. 3d Cir. 1965); Hale v. Hulin, 130 So.2d 519 (La. App. 3d Cir. 1961); Effner v. Ketteringham, 41 So.2d 130 (La. App. 2d Cir. 1949). *See also* Fuller v. Washington, 19 So.2d 730 (La. App. 2d Cir. 1944) (partly exposed sewerage); Vincent v. Mitchel, 7 La. Ann. 52 (1834) (same); Greco v. Frigerio, 3 La. App. 649 (La. App. Orl. Cir. 1926) (bathroom). An occasional

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of servitudes are almost by necessity apparent; for example, servitudes of view,[236] of drip,[237] of support,[238] and levee servitudes.[239] Other kinds of servitudes are almost by necessity non-apparent; for example, building restrictions in a subdivision[240] and prohibitions of building on a neighboring estate.[241]

The combination of apparent and non-apparent servitudes with continuous and discontinuous servitudes gives rise in Louisiana and in France to four categories of servitudes: continuous apparent servitudes, as the rights of view, drain, and support;[242] continuous non-apparent servitudes, as prohibitions of building;[243] discontinuous apparent servitudes, as rights of way over a paved road or a railroad track;[244] and discontinuous non-apparent servitudes, as pasturage.[245] The practical significance of this combination relates to the rules governing creation, protection, and termination of servitudes.[246]

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overflow which leaves no apparent signs, however, does not give rise to an apparent servitude of drain. *See* Wild v. LeBlanc, *supra*.

236. *See* Cleris v. Tieman, 15 La. Ann. 316 (1860); Lavillebeuve v. Cosgrove, 13 La. Ann. 323 (1858). A window is a sign of an apparent servitude, even if it is closed and boards are nailed across it. Taylor v. Boulware, 35 La. Ann. 469 (1883). Of course, openings in a wall which stands entirely on one's own land involves the exercise of prerogatives of ownership rather than a servitude. Bryant v. Sholars, 104 La. 786, 29 So. 350 (1901).

237. *See* Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905); Effner v. Ketteringham, 41 So.2d 130 (La. App. 2d Cir. 1949); *accord*, Req., May 14, 1941, S. 1941.1.143.

238. *See* Woodcock v. Baldwin, 51 La. Ann. 989, 26 So. 46 (1899) (building on the land of another); Greco v. Frigerio, 3 La. App. 649 (Orl. Cir. 1926) (bathroom on a common wall).

239. *See* Lallande v. Wentz, 18 La. Ann. 289 (1866).

240. *See* McGuffy v. Weill, 240 La. 758, 125 So.2d 154 (1960).

241. *See* Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905); Ribert v. Howard, 109 La. 113, 33 So. 103 (1902); Goodwin v. Alexander, 105 La. 658, 30 So. 102 (1901); *accord* Civ., Jan. 12, 1948.202; Civ., June 29, 1921, D. 1925.-1.31; Req., July 6, 1891, D. 1892.1.244, S. 1892.1.55.

242. See, *e.g.*, *view:* Cleris v. Tieman, 15 La. Ann. 316 (1860); Laveillebeuve v. Cosgrove, 13 La. Ann. 323 (1858); *drain:* Levet v. Lappeyrollerie, 39 La. Ann. 210, 1 So. 672 (1887); Kennedy v. Succession of McCollam, 34 La. Ann. 568 (1882); Hale v. Hulin, 130 So.2d 519 (La. App. 3d Cir. 1961); *support:* Woodcock v. Baldwin, 51 La. Ann. 989, 26 So. 46 (1899); Greco v. Frigerio, 3 La. App. 649 (La. App. Orl. Cir. 1926).

243. *See* McGuffy v. Weil, 240 La. 758, 125 So.2d 154 (1960); Bernos v. Canepa, 114 La. 517, 38 So. 438 (1905); Ribet v. Howard, 109 La. 113, 33 So. 103 (1902).

244. *See* Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932); Ogborn v. Lower Terrebonne Refining & Mfg. Co., 129 La. 379, 56 So. 323 (1911); Durel v. Boisblanc, 1 La. Ann. 407 (1846).

245. *See* LA. CIV. CODE art. 726; note 207 *supra*.

246. *See* text at notes 214-27 *supra;* Comment, *Acquisitive Prescription of Servitudes*, 15 LA. L. REV. 777 (1955); Comment, *Establishment of Servitudes by Destination*, 8 LA. L. REV. 560 (1948); Comment, *Private Rights of Way*, 8 LA. L. REV. 553 (1948); Comment, *Acquisition of Rights of Way by Prescription*, 12 TUL. L. REV. 226 (1938).

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Natural, Legal, and Conventional Servitudes

Article 659 of the Louisiana Civil Code of 1870 and corresponding Article 639 of the French Civil Code declare that "servitudes arise either from the natural situation of the places, from the obligations imposed by law, or from contract between the respective owners."[247] There is no corresponding classification of predial servitudes in the German and Greek Civil Codes.

In Louisiana and in France, servitudes may thus be natural, arising from the natural situation of the places;[248] legal, imposed by law;[249] and conventional, arising from destination of the owner,[250] acquisitive prescription,[251] or juridical act. Article 659 of the Louisiana Civil Code of 1870 and Article 639 of the French Civil Code speak of servitudes arising from "contract between the respective owners," but this is only an example of the methods available for the creation of conventional servitudes. Elsewhere in the two Codes, conventional servitudes are designated as "voluntary"[252] or as arising "from an act of man";[253] and Article 743 of the Louisiana Civil Code of 1870, which has no equivalent in the French Civil Code, declares to the point that "servitudes are established by all acts by which property can be transferred."[254] Hence, there should be no doubt that conventional servitudes may arise from contracts as well as from unilateral juridical acts.

This tripartite division of servitudes has been subjected to vivid criticism in France. In the first place, critics have observed that the division of servitudes into natural and legal is arbitrary; both kinds of servitudes are legal in the sense that they arise by operation of law and are imposed by directly applicable legislative texts. Predial servitudes, like personal servitudes,

247. LA. CIV. CODE art. 659; La. Civ. Code art. 655 (1825); La. Civ. Code 126, Art. 3 (1808); FRENCH CIV. CODE art. 639.

248. *See* LA. CIV. CODE arts. 660-663; FRENCH CIV. CODE arts. 640-648.

249. *See* LA. CIV. CODE arts. 664-708; FRENCH CIV. CODE arts. 649-685.

250. *See* LA. CIV. CODE arts. 767-769; FRENCH CIV. CODE arts. 692-694.

251. *See* LA. CIV. CODE arts. 765, 3504; FRENCH CIV. CODE art. 690.

252. *See* LA. CIV. CODE Book II, Title IV, Chapter 4 titled: "Of Conventional or Voluntary Servitudes."

253. *See* FRENCH CIV. CODE, Book II, Title IV, Chapter 3, titled: "Of Servitudes Established by an Act of Man."

254. LA. CIV. CODE art. 743; La. Civ. Code art. 739 (1825). There is no corresponding article in the Louisiana Civil Code of 1808. According to the redactors of the Louisiana Civil Code of 1825, the sources of this provision are: "Pothier, Coutûme d'Orléans, Introduction to tit. 13, *des servitudes* art. No. 10. Thoulier, droit civil, vol. 5, No. 601, p. 511." 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE of 1825, 81 (1937).

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should thus be divided into legal and conventional.[255] This criticism has been answered by the observation that natural servitudes are not, strictly speaking, imposed by the law; the law merely takes cognizance of certain natural situations of fact. In contrast, legal servitudes are solely creatures of the law and are imposed in the light of considerations of policy.[256]

Secondly, critics have observed that, from the viewpoint of accurate analysis, natural and legal servitudes involve limitations on the content of ownership rather than veritable servitudes.[257] Indeed, it is often impossible to determine which is the dominant estate, in whose favor a legal servitude is established, and which is the servient estate owing the servitude.[258] And, in practice, the word servitude is ordinarily reserved for conventional servitudes; thus, the vendor of an immovable may well declare that his immovable is free of servitudes although it may be burdened with natural or legal servitudes.[259] This criticism is "difficult to answer."[260] In modern civil codes, the concepts of natural and legal servitudes have thus given way to the idea of limitations on the content of ownership.[261]

It seems that the redactors of the French Civil Code grouped together natural, legal, and conventional servitudes as a matter of convenience, in their concern to alter pre-revolutionary conceptions as to the nature of the charges imposed by law on the ownership of immovable property. In medieval French law, limitations on the right of ownership were regarded as personal

255. *See* 2 MARTY ET REYNAUD, DROIT CIVIL 162 (1965); 3 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 2 (5th ed. 1900); 7 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 202 (1876); 4 TOULLIER, DROIT CIVIL FRANÇAIS 136 (1833).

256. *See* 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL FRANÇAIS nº 534 (3d ed. Chauveau 1905); *cf.* 1 DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER 433 (Strahan transl. 1853).

257. *See* 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 280-323 (7th ed. Esmein 1961); 2 MARTY ET RAYNAUD, DROIT CIVIL 162-65 (1965).

258. *See* LA. CIV. CODE arts. 663, 691; FRENCH CIV. CODE arts. 646, 671. These articles confer rights which "seem to be the very opposite of servitudes." 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 534 (3d ed. Chauveau 1905).

259. *See* 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 534 (3d ed. Chauveau 1905); *cf.* Lallande v. Wentz, 18 La. Ann. 289 (1866).

260. 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 535 (3d ed. Chauveau 1905).

261. *See* B.G.B. §§ 903-924; GREEK CIV. CODE arts. 999-1032; WOLFF-RAISER, SACHENRECHT 178-94 (10th ed. 1957); G. BALIS, CIVIL LAW PROPERTY 86-137 (3d ed. 1955) (in Greek). In the Greek Civil Code, for example, the duty of the estate situated below to receive naturally running waters from the estate situated above figures as a limitation of the right of ownership. See GREEK CIV. CODE arts. 999-1032. *See also* SWISS CIV. CODE art. 689; ITALIAN CIV. CODE art. 913.

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obligations founded on a quasi-contract of vicinage.[262] The redactors of the Code Civil wished instead to classify these limitations as real obligations[263] founded on directly applicable texts. As real obligations, these limitations on the right of ownership could be, on principle, subject to the rules governing conventional servitudes. Thus, disputes concerning limitations on the right of ownership could be resolved in the venue available for conventional servitudes; and the owner of the burdened immovable could exonerate himself of these obligations by abandoning his immovable.[264] Yet, vestiges of the old conceptions may still be found in the Code Civil and in the Louisiana Civil Code of 1870. In both Codes, obligations arising from the vicinity of estates are designated as "obligations contracted without any agreement,"[265] arising from the "authority of the law."[266]

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262. *See* POTHIER, TRAITÉ DU CONTRACT DE SOCIÉTÉ nº 230, 4 OEUVRES DE POTHIER 328 (ed. Bugnet 1861).

263. For the notion of real obligations in general, *see* A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 112-115 (1966).

264. *See* LA. CIV. CODE art. 679, FRENCH CIV. CODE art. 656. These articles refer to obligations arising from common walls but should be applied by analogy to all legal servitudes. *See* 6 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nº 536 (3d ed. Chauveau 1905).

For the right of abandonment in connection with conventional servitudes, *see* LA. CIV. CODE art. 775; FRENCH CIV. CODE art. 699.

265. *See* LA. CIV. CODE art. 2292; FRENCH CIV. CODE art. 1370.

266. *See* note 265 *supra*. *Cf.* LA. CIV. CODE arts. 659, 666, 674; FRENCH CIV. CODE arts. 639, 651, 652.

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