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PREDIAL SERVITUDES; CREATION BY TITLE: LOUISIANA AND COMPARATIVE LAW†

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The predial servitude is traditionally defined as a charge or burden laid upon one estate for the use, benefit, or advantage of another.[1] Such servitudes may be established on immovable property,[2] whether public or private.[3] The essential features of a predial servitude are: (1) two different estates, one owing the servitude to the other;[4] (2) two different people, one person owning the benefited estate and the other person owning the encumbered estate;[5] and

† This article is a sequel to Yiannopoulos, *Predial Servitudes; General Principles: Louisiana and Comparative Law*, 29 La. L. Rev. 1 (1968); it has been prepared under the auspices of the Institute of Civil Law Studies, Louisiana State University School of Law.

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1 *See* La. Civil Code art. 647 (1870); La. Civil Code art. 643 (1825); La. Civil Code of 1808, 1.216.1; C. Civ. art. 637 (68e ed. Petits Codes Dalloz 1968-69). In Louisiana and in France, predial servitudes are incorporeal immovables. *See* Coguenhem v. Trosclair, 137 La. 985, 69 So. 800 (1915); La. Civil Code art. 471 (1870); C. Civ. art. 526 (68e ed. Petits Codes Dalloz 1968-69); A. Yiannopoulos, Civil Law Property § 60 (1965) [hereinafter cited as Property]. However, in Germany and in Greece predial servitudes are neither movables nor immovables, since the movable-immovable distinction applies to corporeals only. *See* BGB §§ 90, 93-96 (Kolhammer 1949); Greek Civil Code arts. 947-48, 954 (1946); Property, *supra*, §§ 70, 71. Nevertheless, the creation, function, and termination of predial servitudes in both Germany and Greece are subject to the rules governing immovable property. *See* BGB §§ 96, 873, 1027, 1029 (Kolhammer 1949); Greek Civil Code arts. 949, 1121 (1946).

2 *See* La. Civil Code art. 647 (1870); C. Civ. art. 637 (68e ed. Petits Codes Dalloz 1968-69); BGB § 1018 (Kolhammer 1949); Greek Civil Code art. 1118 (1946). For a discussion of the limitations on immovable property susceptible to predial servitudes, see Yiannopoulos, *Predial Servitudes; General Principles: Louisiana and Comparative Law*, 29 La. L. Rev. 1, 15-17 (1968) [hereinafter cited as *Predial Servitudes*].

3 *Predial Servitudes*, *supra* note 2, at 18-22.

4 La. Civil Code art. 648 (1870); *see* Property, *supra* note 1, §§ 101, 104.

5 La. Civil Code art. 649 (1870); *see Predial Servitudes*, *supra* note 2, at 24-26.

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(3) the object of benefiting the estate favored by establishment of the servitude.[6]

Predial servitudes differ from personal servitudes in that the number of personal servitudes is limited (the rights of usufruct, use, and habitation), whereas predial servitudes, also known as real or landed servitudes, 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; personal servitudes are established in favor of a person, whereas predial servitudes are established in favor of an immovable; and personal servitudes terminate with the life of the beneficiary, whereas predial servitudes are ordinarily perpetual.[7]

The creation of predial servitudes involves real rights and the relations existing between immovable properties. For the predial servitude to have effect, the creating parties must observe restrictions of substance and form set forth in the current civil codes. The following study is limited to a discussion of the substantive and formal requirements governing the creation of predial servitudes and the method of contractual interpretation applied to servitude contracts in the legal systems of Louisiana, France, Germany, and Greece.

SUBSTANTIVE REQUIREMENTS

Civil codes, in varying terminology, require servitudes to be created by juridical act. The Louisiana Civil Code and the French Civil Code declare that all conventional servitudes may be created by title.[8] Although the word "title" has many definitions, it is used in this context synonymously with juridical act:[9] it means not merely a written instrument, but a contract or a testament intended to create a servitude. Article 659 of the Louisiana Civil Code and, correspond-

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[6] La. Civil Code art. 650 (1870); *see Predial Servitudes*, *supra* note 2, at 24-26.

[7] *See generally Predial Servitudes*, *supra* note 2, at 1-4.

[8] *See* La. Civil Code arts. 765, 766 (1870); C. Civ. arts. 691, 692 (68e ed. Petits Codes Dalloz 1968-69).

[9] *See* McGuffy v. Weil, 240 La. 758, 765, 125 So. 2d 154, 157 (1960):

> The plaintiff attempts to equate "title" as used in the article [766 of the 1870 Code] with the deed, or act of sale, by which the servient estate is acquired. He contends that, in order to create the servitude, the restriction must be incorporated in the deed conveying the land. Such a narrow construction, necessarily, does violence to the codal provision . . . . The conclusion is inescapable that "title" as used in Article 766 refers to the method by which the servitude may be created and does not relate exclusively to the conveyance of the servient estate. It is a generic term which embraces any juridical act.

See also 6 G. Baudry-Lacantinerie, Traité Théorique et Pratique de Droit Civil 534, 821 (2d ed. E. Chauveau 1905) [hereinafter cited as Baudry-Lacantinerie]; 12 C. Demolombe, Traité des Servitudes 230-31 (1855) [hereinafter cited as Demolombe]; 3 M. Planiol & G. Ripert, Traité Pratique de Droit Civil Français 927 (2d ed. M. Picard 1952) [hereinafter cited as 3 Planiol & Ripert].

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ingly, article 639 of the French Civil Code speak of servitudes arising "from contract between the respective owners,"[10] but contract is merely given as one method—an example—of creating servitudes.[11] Article 743 of the Louisiana Civil Code, having no analogue in the French Code, declares all acts capable of alienating property equally capable of establishing servitudes.[12] These articles should leave no doubt that conventional servitudes may arise from contracts as well as testaments. Neither the German Civil Code nor the Greek Civil Code employs the word "title." The German Civil Code provides for the creation of predial servitudes by an agreement inscribed in the land register.[13] The Greek Civil Code provides for the creation of predial servitudes by juridical act in accordance with the requirements of form and substance governing transfers of immovables.[14]

The creation of a predial servitude by juridical act is "an alienation of a part of the property."[15] The substantive requirements determining the validity of disposition also govern the creation of predial servitudes.[16] Dispositive acts tend to divest the owner of his

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[10] La. Civil Code art. 659 (1870); C. Civ. art. 639 (68e ed. Petits Codes Dalloz 1968-69). Predial servitudes may be created by an act of partition. Talbot v. Kern, 62 So. 2d 548 (La. App. 1st Cir. 1953).

[11] *See* Baudry-Lacantinerie, *supra* note 9, at 534.

[12] La. Civil Code art. 743 (1870); La. Civil Code art. 739 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808. According to the redactors of the 1825 Louisiana Civil Code, the sources of this article are: "Pothier, coutume d'Orleans, 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, at 81 (1937) [hereinafter cited as 1 La. Legal Archives].

[13] *See* BGB § 873 (Kolhammer 1949). Under the German Civil Code (Bürgerliches Gesetzbuch) predial servitudes may not be created by will. The testator may simply impose on instituted heirs the obligation of establishing a servitude in favor of a legatee. *Cf.* A. Yiannopoulos, Personal Servitudes § 7, text at n.88 (1968) [hereinafter cited as Servitudes].

[14] *See* Greek Civil Code art. 1121 (1946). For the creation of predial servitudes by testament, see G. Balis, Civil Law Property 321 (3d ed. 1955) (in Greek) [hereinafter cited as Civil Law Property].

[15] La. Civil Code art. 731 (1870); La. Civil Code art. 727 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of this provision are: "Thoulier, droit civil, vol. 3, No. 568, p. 479. Pardessus, treatise, *des servitudes*, No. 246, p. 423." 1 La. Legal Archives, *supra* note 12, at 79. In Cougenhem v. Trosclair, 137 La. 985, 69 So. 800 (1915), the court, relying on article 731 of the Louisiana Civil Code of 1870, held that a predial servitude attached to the title of the dominant estate and passed with it into the hands of subsequent acquirers.

[16] *See* 3 C. Aubry & C. Rau, Droit Civil Français 101 (6th ed. Bartin 1938) [hereinafter cited as 3 Aubry & Rau]; Baudry-Lacantinerie, *supra* note 9, at 826; 3 Planiol & Ripert, *supra* note 9, at 928; *cf.* Civil Law Property, *supra* note 14, at 321-24; J. Wolff & L. Raiser, Sachenrecht 441-47 (10th ed. 1957) [hereinafter cited as Wolff & Raiser]. In Germany and in Greece, the requirements for the validity and effect of dispositive juridical acts are covered in general parts of civil law treatises. *See* G. Balis, General Principles of the Civil Law 97, 111, 172-74 (7th ed. 1955) (in Greek) [hereinafter cited as Civil Law Principles]; 1 L. Enneccerus & H. Nipperdey, Allgemeiner Teil des

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interest in the property and to deprive him, in part or in whole, of a real or a personal right.[17] The designation of a particular act as onerous or as gratuitous may vary the substantive requirements applicable to the act.[18] In all cases, however, the owner of the servient estate or persons acting under his authority must establish the predial servitude; the owner of the servient estate must have the capacity and the power to alienate; and the owner of the dominant estate or persons acting on his behalf must acquire the servitude.[19]

By the Owner

In accordance with the principle, "no one can transfer a greater right than he himself has,"[20] the person granting a predial servitude must be the owner of the servient estate or must act under the authority of the owner. Article 729 of the Louisiana Civil Code declares "[t]he right of imposing a servitude permanently on an estate belongs to the owner alone."[21] The owner need not act in person. He may be represented by a qualified mandatary or agent. The owner must vest his representative with special power:[22] the representative must have express authority to grant the specific predial servitude.

A possessor, whether in good or bad faith, cannot burden the

Bürgerlichen Rechts 882, 885 (15th ed. 1950) [hereinafter cited as Enneccerus & Nipperdey].

[17] Acts translative of ownership or of other real rights, as sales, exchanges, donations, the burdening of ownership with a servitude or a mortgage, the abandonment of a real right or the renunciation of a personal right, and the compromise of a claim, are examples of acts of disposition. For analysis of juridical acts as conservatory acts, acts of administration, and acts of disposition, see Servitudes, *supra* note 13, § 37.

[18] As a rule, more stringent requirements of substance and form govern valid gratuitous dispositions. *See, e.g.*, La. Civil Code arts. 1467, 1470, 1493, 1519, 1536, 2404 (1870).

[19] *See* text at notes 20, 77, 105 *infra.*

[20] La. Civil Code art. 2015 (1870); Property, *supra* note 1, § 114. A servitude granted without the authority of the owner is invalid; the owner may object to exercise of the servitude and may demand damages for the unlawful entry onto his property. An exception is provided, however, for public utility servitudes granted without the authority of the owner. The owner may demand damages, but he may not object to the exercise of the servitude. *See* Goins v. Beauregard Elec. Cooperatives, Inc., 44 So. 2d 715 (La. App. 1st Cir. 1950).

[21] La. Civil Code art. 729 (1870); La. Civil Code art. 725 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Part. 3, tit. 31, law 10. Febrero adicionado, part. 1, chap. 10, sec. 2, No. 90, p. 424. Thoulier, droit civil, vol. 3, No. 567, p. 479. Pothier, coutume d'Orleans, introduction to tit. 13 *des servitudes*, art. 2, No. 5." 1 La. Legal Archives, *supra* note 12, at 78.

[22] La. Civil Code art. 733 (1870); La. Civil Code art. 729 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the source of the article is: "Pardessus, treatise, *des servitudes*, No. 246, p. 424." 1 La. Legal Archives, *supra* note 12, at 79. *See also* Baudry-Lacantinerie, *supra* note 9, at 827.

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property he possesses with a predial servitude before the completion of acquisitive prescription.[23] Article 747 of the Louisiana Civil Code authorizes the creation of a predial servitude "in favor of an estate which does not exist, or of which one is not yet the owner."[24] No corresponding provision authorizes the granting of a servitude by a person who is not yet the owner of the servient estate. Therefore, the granting of a servitude by a nonowner or by a person acting without the authority of the owner merely creates the grantor's personal obligation to establish a servitude should he become the owner of the servient estate. A literal application of Louisiana Civil Code article 2452[25] might lead to the conclusion that the creation of a servitude by a nonowner is null and void, even as an executory contract or as a personal obligation of the grantor. No objection should be voiced, however, to regarding the alienation of a part of another's estate as a valid obligation of the grantor, giving rise to damages or to a claim for specific performance when the grantor acquires the servient estate. Moreover, an argument exists for applying article 739[26] by analogy and, thereby, enabling the servitude to attach as soon as the grantor acquires ownership of the servient estate. Application of the after-acquired title doctrine produces the same result.[27]

Generally, an administrator of another's property has no power of alienation; he may not burden the property with predial servitudes.[28] Neither a *negotiorium gestor*[29] nor a usufructuary can "establish on the estate of which he has the usufruct, any charges in the nature of servitudes . . . ."[30] A husband administering his wife's

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[23] *See* Baudry-Lacantinerie, *supra* note 9, at 826.

[24] La. Civil Code art. 747 (1870).

[25] La. Civil Code art. 2452 (1870). "The sale of a thing belonging to another is null . . . ."

[26] *See* text at note 45 *infra.*

[27] *See* Comment, *The After-Acquired Title Doctrine in Louisiana Mineral Law*, 27 La. L. Rev. 576 (1967).

[28] *See* Baudry-Lacantinerie, *supra* note 9, at 826; *cf.* Servitudes, *supra* note 13, § 37; Brown, *Right, Capacity and Authority to Enter into Mineral Transactions*, 13th Inst. of Mineral L. 33 (1966).

[29] Grenoble, July 1, 1902, Cas. Pal. 1902.2.506.

[30] La. Civil Code art. 737 (1870); La. Civil Code art. 733 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the source of the article is: "Thoulier, droit civil, vol. 3, No. 567, p. 479." 1 La. Legal Archives, *supra* note 12, at 80. *See also* Servitudes, *supra* note 13, § 46. French commentators are divided on the question whether the usufructuary may create real charges in the nature of predial servitudes for the duration of his enjoyment. One view would prevent the usufructuary from imposing predial servitudes, even for the period of the enjoyment, because predial servitudes involve the right of ownership and not merely the right of enjoyment. The usufructuary may thus undertake only personal obligations. Baudry-Lacantinerie, *supra* note 9, at 827. Another view would allow the usufructuary to validly impose charges in the nature of predial servitudes ceasing with termination of the usufruct. *See* 3 Aubry & Rau, *supra* note 16, at 102; Demolombe, *supra* note 9, at 229.

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dotal property cannot establish a servitude on her property, "even with her consent, unless it be expressly stipulated in the marriage contract that he shall be permitted to alienate her dotal property with her consent."[31] Under the regime of community property the husband, as head and master of the community, may alienate immovable property by onerous title without the consent of his wife when the property stands in his name.[32] He may also alienate property held in the names of both spouses, unless the wife has recorded by authentic act a declaration excluding alienation without her consent.[33] The husband may alienate property recorded in the name of the wife, but the wife must consent in writing.[34] The wife may also alienate community property held in her name, but the husband must give her written authority.[35] A person who acquires community property held in the wife's name and alienated by her without her husband's written authorization can perfect the title so acquired by acquisitive prescription.[36] The principles governing alienation of community property are applicable to the creation of predial servitudes.[37]

A person whose ownership is limited by a term or condition may grant predial servitudes only for the duration of his ownership.[38] As an application of this principle, article 735 of the Loui-

[31] La. Civil Code art. 732 (1870); La. Civil Code art. 728 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the source of the article is: "Thoulier, droit civil, vol. 3, No. 569, p. 480." 1 La. Legal Archives, *supra* note 12, at 79. *See also* 3 Aubry & Rau, *supra* note 16, at 100; Baudry-Lacantinerie, *supra* note 9, at 517.

[32] *See* La. Civil Code art. 2404 (1870); *cf. id.* art. 2334 (arguably contra). Under the Louisiana homestead law the husband must have the wife's consent for the alienation of homestead property, even though that part of the community property stands in the name of the husband. The homestead property is the family home and lot of ground. In rural areas the homestead property may consist of the family home and land not in excess of twenty acres. *See* La. R.S. 9:2801-04 (1950). Strict compliance with Louisiana Civil Code article 731 ought to lead to the conclusion that the creation by the husband of predial servitudes on homestead property requires the wife's consent.

[33] *See* La. Civil Code art. 2334 (1870) (added by La. Acts 1962, No. 353).

[34] *Id.; cf.* Otwell v. Vaughan, 186 La. 911, 173 So. 527 (1937); Young v. Arkansas La. Gas Co., 184 La. 460, 166 So. 139 (1936).

[35] *See* Bywater v. Enderle, 175 La. 1098, 145 So. 118 (1932); Vanzant v. Morgan, 181 So. 660 (La. App. 2d Cir. 1936).

[36] *See* Monsanto Chem. Co. v. Jones, 160 So. 2d 428 (La. App. 2d Cir. 1964). Courts have held that the acquirer may be in good faith even if the act of alienation reveals the existing marital status. For a critique, see 25 La. L. Rev. 973 (1965).

[37] *Cf.* La. Civil Code art. 731 (1870).

[38] *See id.* art. 736; La. Civil Code art. 732 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Lousiana Civil Code, the source of the article is: "Thoulier droit civil, vol. 3, No. 571, p. 481." 1 La. Legal Archives, *supra* note 12, at 79. *See also* Civil Law Property, *supra* note 14, at 323; Baudry-Lacantinerie, *supra* note 9, at 826. The first sentence of article 736 should read: "Those who have only an ownership subject to resolution, such as the person who is subject to restitution, or the heir of an estate be-

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siana Civil Code declares that "[t]he purchaser with a reservation of redemption, may impose servitudes on the property acquired by him; but they cease if the redemption takes effect."[39] One who acquires a predial servitude from a person whose ownership is likely to terminate upon the expiration of a term or the happening of a condition may not claim prescriptive rights, because no action for the dissolution of the servitude can be instituted against the servitude owner before the grantor's ownership terminates.[40]

The establishment of predial servitudes over an entire estate having undivided multiple ownership requires the consent of all the co-owners.[41] But, according to Louisiana Civil Code article 738, an act by a co-owner granting a predial servitude over the entire estate is not null; "its execution is suspended"[42] until the consent of the remaining co-owners is obtained.[43] Should the acquirer attempt to

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queathed under an unfulfilled condition, may establish servitudes thereon, but they cease with their rights . . . ." *See* 3 Louisiana Legal Archives, Compiled Edition of the Civil Codes of Louisiana 421 (1940) [hereinafter cited as 3 La. Legal Archives].

[39] La. Civil Code art. 735 (1870); La. Civil Code art. 731 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pardessus, treatise *des servitudes*, No. 244, p. 419. Thoulier, droit civil, vol. 3, No. 571, p. 481." 1 La. Legal Archives, *supra* note 12, at 79. *See also* Zeigler v. His Creditors, 49 La. Ann. 144, 21 So. 666 (1896).

[40] La. Civil Code art. 736 (1870).

[41] *See id.* art. 738; La. Civil Code art. 734 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Digest, book 8, tit. 1, law 2. Ibid. tit. 2, law 19. Partida 3, tit. 31, law 10. Pardessus, *des servitudes*, No. 250, p. 427. Thoulier, droit civil, vol. 3, No. 573, p. 482. Pothier, coutume d'Orleans, introduction to tit. 13, *des servitudes*, art. 2, No. 6." 1 La. Legal Archives, *supra* note 12, at 80. Note the error in English translation of French text: "coproprietor" should be translated "other coproprietors or their heirs." 3 La. Legal Archives, *supra* note 38, at 422.

For German law, see BGB § 747 (Kohlhammer 1949); 2 H. Soergel & W. Siebert, Bürgerliches Gesetzbuch 824 (9th ed. 1962) [hereinafter cited as 2 Soergel & Siebert]. For Greek law, see Greek Civil Code art. 1122 (1946); Civil Law Property, *supra* note 14, at 323.

[42] Greater Baton Rouge Port Comm'n v. Morley, 232 La. 87, 93 So. 2d 912 (1957); La. Civil Code art. 738 (1870). Articles 738-42 have been applied to mineral servitudes and leases. *See* Superior Oil Producing Co. v. Leckelt, 189 La. 972, 181 So. 462 (1938); State *ex rel.* Bush v. United Gas Pub. Serv. Co., 185 La. 496, 169 So. 523 (1936); Gulf Ref. Co. v. Carroll, 145 La. 299, 82 So. 277 (1919). Act 513 of 1952, now La. R.S. 30:186-88 (Supp. 1969), authorizes the State Mineral Board to execute mineral leases on lands owned in indivision by 500 or more persons for the benefit of all the owners when any 50 or more of the co-owners have petitioned the board to lease the property. The constitutionality of the Act has been tested and upheld. Sun Oil Co. v. State Mineral Bd., 231 La. 689, 92 So. 2d 583 (1957).

[43] *See* Superior Oil Producing Co. v. Leckelt, 189 La. 972, 181 So. 462 (1938), a suit for the cancellation of a mineral lease where the court held the consent of co-owners may be given merely by *acquiescence*. In proceedings for the expropriation of a servitude, all co-owners must be made parties. An exception may exist when co-owners have reached an amicable agreement

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exercise the servitude, the co-owners who have not consented may successfully object, but the grantor cannot prevent exercise of the servitude by raising the lack of consent of the other co-owners.[44] Further, the grantor of the servitude is bound to permit the exercise of the servitude that he has granted, if he subsequently becomes owner of the entire estate.[45] Likewise, a transferee of the grantor who subsequently becomes owner of the entire estate by licitation is bound to permit the exercise of the servitude over the entire estate.[46] These provisions indicate that the creation of a predial servitude by a co-owner over the entire undivided estate establishes, in effect, a conditional grant. The grant becomes absolute either upon approval by the remaining co-owners or upon acquisition of ownership of the entire estate by the grantor or his successors.[47]

In Germany and in Greece, a co-owner may not burden his undivided share with a predial servitude.[48] The grantee of the servitude has no interest in the property, so he has no standing to bring

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with the expropriating authority. *See* Greater Baton Rouge Port Comm'n v. Morley, 232 La. 87, 93 So. 2d 912 (1957).

[44] La. Civil Code art. 739 (1870); La. Civil Code art. 735 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Digest, book 8, tit. 3, law 11. Thoulier, droit civil, vol. 3, No. 573, p. 482. Pothier, coutume d'Orleans, introduction to tit. 13, des servitudes, art. 2, No. 6." 1 La. Legal Archives, *supra* note 12, at 80.

[45] *See* La. Civil Code art. 739 (1870). The English translation of the French text is incomplete. The second paragraph of Article 739 should read: "If he becomes owner of the whole estate, *by any means whatever*, he is bound to permit the exercise of the servitude to which he has before consented." (Emphasis added.) *See* 3 La. Legal Archives, *supra* note 38, at 422-23.

[46] *See* La. Civil Code art. 742 (1870); La. Civil Code art. 738 (1825). No corresponding provision appears in the Louisiana Civil Code of 1825 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the source of the article is: "Thoulier, droit civil, vol. 5, No. 573, p. 485." 1 La. Legal Archives, *supra* note 12, at 81. For the legislative basis of this provision, see J. Pardessus, Traité des Servitudes 437 (1817) [hereinafter cited as Pardessus]:

> This right, once established on the property sold, cannot be extinguished by the alienation, because servitudes follow the burdened estates even if the sale has been made free of any charges . . . . The right is merely suspended, and it must have its effect once the obstacles for its exercise are set aside. The acquirer, in such a case, must tolerate the servitude in the same way that he would have tolerated it if the estate had belonged in its entirety to his vendor.

[47] *See* 3 Aubry & Rau, *supra* note 16, at 102; Baudry-Lacantinerie, *supra* note 9, at 826. If the grantor misrepresents himself as owner of the entire estate or undertakes the obligation to secure the consent of his co-owners and if the remaining co-owners refuse to consent, the grantee may have an action for damages against the grantor. Pardessus, *supra* note 46, at 431.

[48] *See* Civil Law Property, *supra* note 14, at 258, 298; 3 H. Soergel & W. Siebert, Bürgerliches Gesetzbuch 824 (9th ed. 1960) [hereinafter cited as 3 Soergel & Siebert]; 3 J. Staudinger & J. Ring, Kommentar zum B.G.B. 1027 (11th ed. 1963); *cf.* BGB § 747 (Kohlhammer 1949); Greek Civil Code art. 1122 (1946).

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an action for partition.[49] He only has contractual remedies against the grantor. In Louisiana and in France, however, a co-owner may burden his own share with a servitude, but, since predial servitudes are indivisible,[50] the exercise of the servitude is suspended[51] until termination of the state of indivision and acquisition of a part or of the entire estate by the grantor or by his successors.

A state of indivision may terminate in a variety of ways. The Louisiana Civil Code deals specifically with termination of indivision by an action for partition. Under article 740, the acquirer of a servitude on undivided property may compel the grantor to bring an action for partition or the acquirer may bring the action himself.[52] In a partition in kind, the servitude attaches to the part attributed to the grantor; [53] all other parts are free of the burden. In a partition by licitation, the rights of the grantee of the servitude are determined by application of article 741. Originally, article 741 provided that, following partition by licitation resulting in ownership of the whole estate being in the grantor of the servitude, the servitude then existed "on the whole estate, as if he had always been the sole owner . . . ."[54] If the estate was awarded to another person, the same article provided that "the servitude becomes extinct, and the person who granted it is bound to return the price he

[49] *See* Civil Law Property, *supra* note 14, at 275; 2 Soergel & Siebert, *supra* note 41, at 826; *cf.* BGB § 749(1) (Kohlhammer 1949); Greek Civil Code arts. 795, 799 (1946). In Greece, creditors of a co-owner may exercise his right to demand partition by virtue of an oblique action accorded to them by the Code of Civil Procedure. Argument might be advanced that the grantee of a servitude from a co-owner is a creditor who has a legitimate interest in the partition of the common estate.

[50] *See* La. Civil Code art. 656 (1870); 3 Planiol & Ripert, *supra* note 9, at 873.

[51] *See* La. Civil Code art. 740 (1870); La. Civil Code art. 736 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pothier, *coutume d'Orleans*, introduction to tit. 13, des servitudes, art. 2, No. 6. Thoulier, vol. 3, No. 573, p. 482 & 483. Pardessus, No. 254 & 255, p. 433 & 434." 1 La. Legal Archives, *supra* note 12, at 80. *See also* 3 Aubry & Rau, *supra* note 16, at 102; Baudry-Lacantinerie, *supra* note 9, at 826.

[52] La. Civil Code art. 740 (1870). *See also* J.C. Trahan Drilling Contractor, Inc. v. Younger, 169 So. 2d 15 (La. App. 2d Cir. 1964). The right of the holder of a mineral servitude to bring an action for partition is discussed in Hightower v. Maritzky, 194 La. 998, 195 So. 518 (1940). The action for partition is available to the grantee of the servitude as long as the estate remains in indivision. If the estate becomes wholly owned by one person, the remedy of the grantee is an action for recognition of the servitude rather than an action for partition. Fawvor v. Crain, 6 So. 2d 227 (La. App. 1st Cir. 1942).

[53] *See* Fawvor v. Crain, 6 So. 2d 227 (La. App. 1st Cir. 1942); Pardessus, *supra* note 46, at 433. For the availability of partition in kind, see Servitudes, *supra* note 13, § 17.

[54] La. Civil Code art. 741(2) (1870); La. Civil Code art. 737 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Civil Code, the source of the article is: "Thoulier, droit civil, vol. 3, No. 573, p. 485." 1 La. Legal Archives, *supra* note 12, at 80.

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received for it."[55] Louisiana courts applied the article in cases involving acquisition of mineral rights,[56] but the results were incompatible with the demands of a growing oil and gas industry.[57] Article 741 was, therefore, amended in 1940 and in 1950,[58] legislatively overruling the earlier jurisprudence. The amended article reflects Anglo-American drafting techniques and takes a casuistic approach. It recognizes the interests of all concerned and secures protection for the grantee of a servitude or of mineral rights whose grantor has only an undivided interest in an estate.

Under the amended article 741, making the one who acquires a servitude or a mineral interest from a co-owner a party to the proceedings may vary the effects of a partition by licitation. When the grantee is a party to the proceedings, and the estate is adjudicated to the grantor or his successor in title, "the servitude or mineral interest shall then exist on the whole estate,"[59] and the grantee shall not be entitled to participate in the distribution of the proceeds of licitation. When the grantee is a party and the grantor or his successor in title acquires only a partial interest in the licitated estate, the interest of the grantee "shall be ipso facto perfected to the extent of the interest in the property acquired by such grantor,"[60] and the grantee shall not be entitled to participate in the distribution of the proceeds of the licitation. Should the estate be adjudicated to a person other than the grantor of the servitude, the servitude or mineral interest "shall become extinct and the owners of such ser-

[55] La. Civil Code art. 741 (1870).

[56] *See, e.g.*, Amerada Petroleum Corp. v. Murphy, 204 La. 721, 16 So. 2d 244 (1943); Amerada Petroleum Corp. v. Reese, 192 La. 359, 196 So. 558 (1940); Hightower v. Maritzky, 194 La. 988, 195 So. 518 (1940); Superior Oil Producing Co. v. Leckelt, 189 La. 972, 181 So. 462 (1938); State *ex rel.* Bush v. United Gas Pub. Serv. Co., 185 La. 496, 169 So. 523 (1936); Gulf Ref. Co. v. Carroll, 145 La. 299, 82 So. 277 (1919).

[57] *See* Denègre, *Co-ownership of Oil and Gas Interests in Louisiana*, 24 Tul. L. Rev. 288, 291-92 (1950). Louisiana courts interpreting Article 741 have held that the owner of an undeveloped mineral lease was not a necessary party to proceedings for the partition of the property by licitation, and that the mineral interest was extinguished when the property was adjudicated to a person other than the co-owner who granted the lease. *See* Amerada Petroleum Corp. v. Murphy, 204 La. 721, 16 So. 2d 244 (1943); Amerada Petroleum Corp. v. Reese, 195 La. 359, 196 So. 558 (1940); Young v. Staman, 200 So. 187 (La. App. 2d Cir. 1941). The status of a developed mineral lease is discussed in Liles v. Barnhart, 152 La. 419, 93 So. 490 (1922).

[58] *See* La. Acts 1940, No. 336; La. Acts 1950, No. 521. Act 336 of 1940 has not been given retroactive effect. Amerada Petroleum Corp. v. Murphy, 204 La. 721, 16 So. 2d 244 (1943); Young v. Staman, 200 So. 187 (La. App. 2d Cir. 1941).

[59] La. Civil Code art. 741 (1870), *as amended*, La. Acts 1940, No. 336, La. Acts 1950, No. 521.

[60] The provision was apparently intended to achieve the result reached in cases involving partition in kind and the grantor's acquisition of a divided part of the estate. The provision cannot be applied to predial servitudes. Since predial servitudes are indivisible and the exercise of the servitudes is suspended during indivision, there can be no perfection of a predial servitude on an undivided interest in the licitated estate.

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vitudes, mineral interests or interest therein, shall be relegated to the proceeds of the sale of the property for distribution."[61] The Code provides in detail for the appraisement of the estate as a whole, for the appraisement of each interest, and for an equitable distribution to the parties "in the proportion the interest of each bears to the whole."[62] When the grantee is not a party to the proceedings, the judicial sale is valid,[63] but the servitude or mineral interest "shall continue to exist on the estate unaffected and unimpaired by the licitation"[64] as if no sale were made.[65] The application of article 741 to predial servitudes presents a difficult question. How can the interest of the grantee remain unaffected by the licitation? Presumably, after termination of the state of indivision, the grantee may no longer bring an action for the partition of the property.[66] This provision may simply mean that the conditional grant of the servitude remains suspended, as it was prior to partition, until the grantor acquires ownership of the licitated estate or of a divided part of the estate. But the grantee could argue that the provision enables a grantee who is not a party to the proceedings to assert his rights against the adjudicatee. The servitude or mineral interest should, as previously asserted, attach to the whole estate, whether the adjudicatee is the grantor[67] or a third person regarded as successor of the grantor.[68]

Servitudes granted by all the co-owners, by a single act, or by separate acts, burden the land and follow it into the hands of any acquirer. The grantee already may exercise these servitudes during the state of indivision. Partition of the servient estate does not af-

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[61] La. Civil Code art. 741 (1870), *as amended*, La. Acts 1940, No. 336, La. Acts 1950, No. 521.

[62] *Id.*

[63] La. Civil Code art. 741 (1870), *as amended*, La. Acts 1940, No. 336; La. Acts 1950, No. 521. In Sun Oil Co. v. Smith, 216 La. 27, 43 So. 2d 148 (1949), the court held that a partition is invalid if a person having an interest in the property is not made a party. The decision prompted the 1950 amendment of article 741 declaring that a judicial sale is valid but that the interest of persons who are not made parties to the proceedings remain unaffected by the licitation. In Martin Timber Co. v. Roy, 244 La. 1050, 156 So. 2d 435 (1963), the court held that a person who acquires mineral interests after institution of an action for partition among co-owners is an indispensable party to the proceedings under article 641 of the Louisiana Code of Civil Procedure. The question whether the provisions of article 741 are inapplicable to "minerals which were acquired subsequent to the commencement of the present action" was left open by the court. The proposition that the holder of mineral interests is an indispensable party to the proceedings of partition should not be interpreted as denying the validity of a judicial sale made without the participation of that indispensable party.

[64] La. Civil Code art. 741 (1870), *as amended*, La. Acts 1940, No. 336, La. Acts 1950, No. 521.

[65] La. Civil Code art. 741 (1870), *as amended*, La. Acts 1940, No. 336, La. Acts 1950, No. 521.

[66] La. Civil Code art. 740 (1870).

[67] *Id.* arts. 739, 741.

[68] *Id.* art. 742.

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fect the servitudes.[69] The acquirer in partition by licitation purchases subject to the pre-existing servitudes. The acquirer of each divided part in partition in kind may take the part subject to the burden of pre-existing servitudes under the rules governing division of the servient estate.[70] Articles 738-42 of the Louisiana Civil Code should apply by analogy, in cases involving acquisition of a divided part of the estate or of the entire estate by the grantor through transactions other than partition. For example, the servitude granted by a person who subsequently acquires ownership of the entire estate by sale, donation, or exchange should attach to the whole.[71] The servitude granted by a person who subsequently acquires a divided part of the estate should burden only the part he acquires.[72] The servitude on land that is subsequently acquired by a third person who is not a successor of the grantor should be extinguished.[73] The servitude granted by a person whose successor subsequently acquires the entire estate should exist on the whole.[74] In this light, the grantee of a servitude on an undivided part of an estate apparently acquires, in Louisiana and in France, a conditional right on the property, a predial servitude subject to the condition that the grantor or his successors will acquire the entire estate or a divided part of it. Upon fulfillment of the condition, the right becomes absolute.[75] In the absence of fulfillment of the condition, the servitude continues to be suspended until extinguished by the prescription of nonuse.[76]

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[69] *See* La. Civil Code art. 741 (1870), *as amended*, La. Acts 1940, No. 336, La. Acts 1950, No. 521. The adjudicatee who is unaware of the existence of predial servitudes may consider the title unmerchantable and may reclaim his deposit. Goodwin v. Sanders, 231 So. 2d 727 (La. App. 4th Cir. 1970).

[70] *See Predial Servitudes*, *supra* note 2, at 29.

[71] *Cf.* La. Civil Code arts. 739-42 (1870).

[72] *Id.* art. 741.

[73] *Id.* art. 740.

[74] *Id.* art. 742. *See also* note 46 *supra*; *cf.* Fawvor v. Crain, 6 So. 2d 227, 230 (La. App. 1st Cir. 1942):

> If the co-proprietor who has established a servitude sells his undivided interest to a person who afterwards becomes owner of the whole, either by licitation or the purchase of the interest of the remaining co-owners who have not granted the servitude, then he is, like his vendor, bound to permit the exercise of the servitude as established by his vendor.

[75] *Cf.* Pardessus, *supra* note 46, at 437:

> The grantee becomes absolute owner of the right of servitude from the moment of the grant; the stipulation is perfect and obligatory; but he may not exercise his right to the prejudice of the co-owners who have not consented . . . . The right is merely suspended and it must have its effect once the obstacles for its exercise are set aside.

[76] *See* Hightower v. Maritzky, 194 La. 998, 1014, 195 So. 518, 523 (1940):

> The obstacle that prevents the exercise of the servitude in the situation contemplated in article 738 of the Civil Code . . . is not an obstacle which the grantee of the servitude can neither prevent nor remove. He can remove the obstacle at any time by suing for a partition of the estate . . . . [I]t is only the right to use the servitude,—and not the prescription by which the right may be forfeited for nonuse,—that is suspended until the consent of the co-proprietor or co-proprietors is given,—or until the grantee avails himself of this right to provoke a partition of the estate.

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Capacity of the Grantor and the Power to Alienate

Since the creation of a predial servitude by title involves the execution of a juridical act, the grantor "must be master of his rights."[77] He must be a competent natural person or an entity possessing juridical personality. Incompetent persons cannot establish servitudes on their estates, "except according to the forms prescribed for the alienation of their property."[78] Detailed provisions in the Louisiana Code of Civil Procedure[79] and in the Revised Statutes[80] deal specifically with alienation of the property of minors and interdicts by tutors and curators. Article 731 of the Louisiana Civil Code[81] includes married women among the incompetents, but the married women's emancipation acts[82] tacitly repealed this inclusion.

Business corporations,[83] as well as nonprofit corporations,[84] possess juridical personality and have the capacity, limited only by law or by their acts of incorporation, to enter into juridical acts. Corporations may thus establish servitudes on their property "in the cases and with the forms in which they can alienate."[85] Officers of business corporations ordinarily possess the authority to alienate property,[86] but the law requires approval by the nonprofit corporation's governing body of the alienation of immovable property.[87] Unincorporated associations in Louisiana possess certain aspects of legal personality and are entitled to own immovable property.[88]

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[77] La. Civil Code art. 731 (1870). *See also* Baudry-Lacantinerie, *supra* note 9, at 827; Civil Law Property, *supra* note 14, at 322.

[78] La. Civil Code art. 731 (1870).

[79] *See* La. Code Civ. P. arts. 4301-63 (1960); *cf. id.* arts. 4271, 4554.

[80] Tutors and curators are authorized to enter into mineral leases covering lands that are owned wholly or partially by minors or interdicts they represent. La. R.S. 9:711-13 (1965). The tutor of a minor or the curator of an interdict is authorized to sell or lease, for any legitimate purpose, a right of way over, across, and through lands owned in whole or in part by his ward, in the manner provided by the applicable provisions of the Code of Civil Procedure. *Id.* 9:731.

[81] La. Civil Code art. 731 (1870). Note particularly the second paragraph of the article.

[82] *See* La. R.S. 9:101-05 (1950).

[83] *See* Business Corporation Law, La. R.S. 12:41A, B(4) (1969).

[84] *See* Non-profit Corporation Law, La. R.S. 12:207A, B(4) (1969). *See also* La. Civil Code art. 433 (1870) (the capacity of corporations to enter into juridical acts).

[85] La. Civil Code art. 734 (1870); La. Civil Code art. 730 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pardessus, treatise *des servitudes*, No. 244, p. 419. Thoulier, droit civil, vol. 3, No. 571, p. 481." 1 La. Legal Archives, *supra* note 12, at 79.

[86] *See* Business Corporation Law, La. R.S. 12:121(e) (1969). *But cf.* McCormick v. Louisiana & N.W. Ry., 109 La. 764, 33 So. 762 (1903), indicating that the general manager of a company does not have authority to grant a predial servitude on company property.

[87] *See* Non-profit Corporation Law, La. R.S. 12:207(D) (1969).

[88] *See* La. Civil Code art. 446 (1870).

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They may alienate their property, either under their constitutions and bylaws or by acts signed by all the members of the association.[89]

A person may own property and may have the capacity to enter into juridical acts without having the power to alienate. One of the most important prerequisites for the creation of predial servitudes by title is, therefore, the power to alienate.[90]

Generally, competent persons may freely dispose of their property.[91] Only provisions enacted in the public interest[92] or the existence of prior real rights in favor of third persons limit the competent person's power to alienate. Thus, the owner of an estate subject to a usufruct "can not subject it to a servitude without the consent of the usufructuary, unless it be to take effect at the termination of the usufruct,"[93] or unless it be of "no injury to the usufructuary."[94] For example, the naked owner may validly grant a mineral lease or a mineral servitude on lands subject to a usufruct, but with no mineral exploitation when the usufruct was created, as long as the usufructuary's use of the surface is not unreasonably disturbed.[95] The owner of a mortgaged estate may not diminish the security of the mortgage by granting predial servitudes contrary to the interests of the mortgage creditor. "[I]f the establishment of the servitude evidently depreciates the value of the estate,"[96] the mortgage credi-

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[89] *See* Carpenters Local No. 1846 v. Stephens Broadcasting Co., 214 La. 928, 39 So. 2d 422 (1949); *cf.* Burke v. Wall, 29 La. Ann. 38 (1877), holding that a church congregation had actually clothed priests with authority to create servitudes for the convenience of the owners of burial plots in a cemetery.

[90] La. Civil Code art. 731(1) (1870). *See also* 3 Aubry & Rau, *supra* note 16, at 102; Civil Law Property, *supra* note 14, at 322.

[91] *See* La. Civil Code art. 484 (1870).

[92] *See, e.g.*, La. Civil Code arts. 1481, 1790, 2357, 2363, 2446 (1870).

[93] *Id.* art. 730; La. Civil Code art. 726 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Thoulier, droit civil, vol. 3, No. 570, p. 480. Pardessus, treatise, *des servitudes*, No. 244, p. 418 and 419." 1 La. Legal Archives, *supra* note 12, at 78. *See also* Baudry-Lacantinerie, *supra* note 9, at 827.

[94] La. Civil Code art. 602 (1870); La. Civil Code art. 597 (1825); La. Civil Code of 1808, 3.4.47. No corresponding articles appear in the civil codes of France, Germany, and Greece. Commentators, nevertheless, have reached the same conclusion by application of general principles. *See* Civil Law Property, *supra* note 14, at 341; 3 Planiol & Ripert, *supra* note 9, at 830.

[95] *See* King v. Buffington, 240 La. 955, 126 So. 2d 326 (1961); Gueno v. Medlenka, 238 La. 1081, 117 So. 2d 817 (1960); Wilson v. King, 165 So. 2d 70 (La. App. 4th Cir. 1964); Servitudes, *supra* note 13, § 75.

[96] La. Civil Code art. 750 (1870); La. Civil Code art. 746 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Thoulier, droit civil, vol. 3, No. 571, p. 481. Merlin, repertoire de jurisprudence, verbo servitudes, vol. 12, sec. 10, No. 2." 1 La. Legal Archives, *supra* note 12, at 82. The mortgage creditor must have "a serious interest." 3 Aubry & Rau, *supra* note 16, at 103.

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tor has the right to have the estate sold free of all servitudes established after the creation of the mortgage.[97]

According to Louisiana Civil Code article 749, the owner's right to grant additional servitudes on an estate presently encumbered with a predial servitude is limited to servitudes not affecting the existing servitude owner's rights.[98] Proper application of the article should invalidate a servitude created to the prejudice of a pre-existing servitude. The grantee of the second servitude may have contractual remedies against the grantor, but no real right on the property. Accordingly, the holder of a pre-existing servitude may enjoin any unwarranted interference with his rights, or, if he prefers, may recognize the new grant and claim damages or other relief from the owner of the servient estate.

Applying the principles concerning pre-existing interests in the land to transactions between private parties should not involve difficulties. But when the acquirer of a new servitude is a public authority with the privilege of expropriation, reasons may arise for deviation from the rules of the Civil Code. In *Arkansas Louisiana Gas Co. v. Louisiana Department of Highways*,[99] the owner of an estate burdened with a pipeline servitude voluntarily granted to the Department of Highways a right of way for the construction of a new road. The Department of Highways requested plaintiff, holder of the pipeline servitude, to lower and to encase a section of his pipeline lying within the newly acquired right of way. Plaintiff complied with the request. He then sought reimbursement of the compliance costs from the Department of Highways, advancing the theory that

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[97] *See* Baudry-Lacantinerie, *supra* note 9, at 827; 3 Planiol & Ripert, *supra* note 9, at 929. The owner of the dominant estate should have the right to preserve his servitude by paying the mortgage creditor the full amount of the debt. *See* 3 Aubry & Rau, *supra* note 16, at 103. *See also* Civil Law Property, *supra* note 14, at 546; Wolff & Raiser, *supra* note 16, at 548.

[98] La. Civil Code art. 749 (1870); La. Civil Code art. 745 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Digest, book 8, tit. 3, law 15. Thoulier, droit civil, vol. 3, No. 572, p. 481." 1 La. Legal Archives, *supra* note 12, at 82. *See also* 3 Aubry & Rau, *supra* note 16, at 102; Baudry-Lacantinerie, *supra* note 9, at 827; Civil Law Property, *supra* note 14, at 304; 3 Planiol & Ripert, *supra* note 9, at 928.

In Ritchey v. Desser, 203 So. 2d 735 (La. App. 3d Cir. 1967), the court apparently assumed that the owner of an estate burdened with a predial lease may not grant a predial servitude contrary to the interests of the lessee. The assumption is questionable since leases are personal rights. Fortunately, the court held as a matter of contractual interpretation that the landowner had reserved the right to grant the predial servitude in question.

[99] 104 So. 2d 204 (La. App. 2d Cir. 1958). *But cf.* Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958) (suit against the Department of Highways for interference with an alleged previous servitude, no recovery in the absence of a recorded servitude).

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his property had been appropriated for a public purpose. The court, granting plaintiff's demand, quoted, but did not follow, Civil Code article 749. The court attached no significance to the fact that the landowner had granted the right of way voluntarily to the prejudice of a pre-existing servitude, apparently reasoning that the Department of Highways could have, and should have, expropriated the right of way.[100] In *Louisiana Power & Light Co. v. Dileo*,[101] landowners of estates burdened with a power line servitude gratuitously granted to the Department of Highways a right of way for the extension of an existing highway. The highway work necessitated relocation of a number of utility poles. The utility company, holder of the pre-existing servitude, planned to use a portion of the highway right of way and to expropriate previously unburdened strips of land in relocating the poles. The Department of Highways consented to the plan; the landowners objected to the use of the highway right of way by the utility company. The court correctly held that the Department of Highways had no authority to permit another use of its right of way for a purpose not contemplated in the original grant. The utility company should have secured the consent of the landowners. But the court erroneously concluded that the utility company should reimburse the landowners in full for taking a new servitude. Had the court applied article 749, quoted in the opinion, it would have concluded that the highway right of way had been granted improperly. Under article 749, the utility company could have refused to recognize the right of way and could have objected to the new works, unless the Department of Highways had expropriated the pre-existing utility servitude. The utility company's failure to seek an injunction should not have prejudiced a claim for damages against the landowners or a claim for the relocation of the servitude by analogous application of article 777 of the Civil Code.[102] Further, if the Department of Highways had expropriated the pre-existing servitude for a public purpose, the Department, rather than the utility company, would have borne the costs of relocating.

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[100] *Cf.* Columbia Bas Transmission Co. v. Hoyt, 252 La. 921, 215 So. 2d 114 (1968). The claim of contractual right of way asserted over land burdened with a recorded predial lease by a utility company enjoying the privilege of expropriation was regarded as the taking of the lessee's property without prior compensation. The court reasoned that, since the public utility could have expropriated the right of way, it was under an obligation to do so. Such reasoning should apply a fortiori to cases involving predial servitudes. *See generally* Yiannopoulos, *The Work of the Louisiana Appellate Courts for the 1968-69 Term—Property*, 30 La. L. Rev. 181, 189 (1969).

[101] 79 So. 2d 150 (La. App. 1st Cir. 1955).

[102] La. Civil Code art. 777 (1870). The third paragraph of this article, particularly, would support a claim for relocation of the servitude.

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Capacity of the Grantee

Articles 759-64 of the Louisiana Civil Code [103] deal with the requisite capacity for the acquisition of predial servitudes. Though these articles primarily contemplate acquisition of predial servitudes by contract, they could apply to all modes of acquisition, including prescription and destination *du père de famille*.[104] No corresponding provisions appear in the civil codes of France, Germany, or Greece; but other civilian states reach most of the solutions sanctioned by the Louisiana Civil Code either by applicaton of general principles[105] or by analogous application of the rules governing acquisition of ownership.[106]

On principle, "[t]hose who can establish servitudes on their land can also acquire servitudes."[107] But, in contrast with the grantor of the predial servitude who must be competent, own the servient estate, and have the power of alienation, the acquirer of a servitude in Louisiana need be neither a competent person[108] nor owner of the dominant estate.[109] In fact, article 747 of the Louisiana Civil Code declares that "[a] servitude may be . . . acquired in favor of an estate which does not exist, or of which one is not yet the owner . . . ."[110]

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[103] La. Civil Code arts. 759-64 (1870).

[104] "[D]estination du père de famille" [means] . . . the use which the owner has intentionally established on a particular part of his property in favor of another part, and which is equal to a title with respect to perpetual and apparent servitude thereon; and by this "destination du père de famille" is meant the disposition which the owner of two or more estates has made for their respective use.

Woodcock v. Baldwin, 51 La. Ann. 989, 1005, 26 So. 46, 53 (1899), *quoting* Gottschalk v. De Santos, 12 La. Ann. 473, 474 (1857).

[105] *See* Baudry-Lacantinerie, *supra* note 9, at 826: "Truly, a special text on the subject would be unnecessary for the resolution of problems; it suffices to resort to general principles."

[106] *See* Civil Law Property, *supra* note 14, at 321; Wolff & Raiser, *supra* note 16, at 442.

[107] La. Civil Code art. 759 (1870); La. Civil Code art. 755 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pardessus, servitudes, No. 259, p. 438. Thoulier, vol. 3, No. 675, p. 484. Pothier, coutume d'Orleans introduction to tit. 13, *des servitudes* art. 2, No. 9." 1 La. Legal Archives, *supra* note 12, at 84.

[108] *See* La. Civil Code art. 759(2) (1870). The article codifies, as to minors and interdicts, views expounded by Toullier, Pardessus, and Pothier. *See* note 107 *supra*; Pardessus, *supra* note 46, at 438; 2 C. Toullier, Droit civil français 164 (1833) [hereinafter cited as Toullier]. In the absence of a provision in the French Civil Code corresponding to Article 759(2) of the Louisiana Civil Code, the views of the early commentators are no longer followed in France. *See* note 112 *infra*.

[109] *See* La. Civil Code arts. 747, 760, 762, 764 (1870).

[110] *Id.* art. 747; La. Civil Code art. 743 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the

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In France, according to the prevailing view among commentators, the acquirer of a predial servitude need not own the dominant estate;[111] he must, however, have the capacity to contract or to receive by gratuitous title under the general rules of the Code Civil.[112] In Germany and in Greece, the acquirer of a predial servitude must have, at least, limited capacity, as defined in the respective Codes, to enter into juridical acts.[113] Although the owner of the dominant estate need not be a party to a transaction resulting in another's personal obligation to grant a predial servitude, he must join in a real contract establishing the predial servitude.[114]

Article 759 of the Louisiana Civil Code enables incompetents[115] to acquire valid predial servitudes in favor of their estates without the consent of their tutors or curators, because the acquisition of a predial servitude "augments the value and convenience of an estate."[116] The article establishes an exception to the Code's general rules requiring the consent of tutors or curators for contracts made by unemancipated minors or interdicts.[117] Whether the servitude is

article are: "Digest, book 8, tit. 2, law 23, sec. 1. Ibid. tit. 3, law 10." 1 La. Legal Archives, *supra* note 12, at 81.

111 *See* 3 Aubry & Rau, *supra* note 16, at 104; Demolombe, *supra* note 9, at 254. *But see* Baudry-Lacantinerie, *supra* note 9, at 254.

112 *See* Baudry-Lacantinerie, *supra* note 9, at 257; Demolombe, *supra* note 9, at 257. Modern treatises are silent on this issue, obviously assuming that the general rules of the Code Civil are applicable. *See* 3 Aubry & Rau, *supra* note 16, at 104; 3 Planiol & Ripert, *supra* note 9, at 928.

113 *See* Civil Law Principles, *supra* note 16, at 114-16; Enneccerus & Nipperday, *supra* note 16, at 930. In Germany, persons enjoying limited capacity, minors over seven years old and certain interdicts, may enter into only advantageous juridical acts. *See* BGB §§ 107, 114 (Kohlhammer 1949). In Greece, persons enjoying limited capacity, minors over ten years old and persons provided a legal representative because of dubious sanity, infirmity, prodigality, or habitual drunkenness, may enter into juridical acts only when the law so provides and under conditions prescribed by law. Greek Civil Code arts. 129, 133, 1705 (1946). Interdicts have no capacity to enter into juridical acts. *Id.* art. 128. Minors over ten years old may enter into only advantageous juridical acts. *Id.* art. 134. Persons provided with a legal representative enjoy the same privilege, because the consent of the legal representative is required only for certain enumerated onerous transactions. *Id.* art. 1707.

114 *See* Civil Law Property, *supra* note 14, at 443; Wolff & Raiser, *supra* note 16, at 443. A contract giving rise to a predial servitude as a real right and a personal obligation assumed to establish a predial servitude on the property in favor of the owner of another estate are distinguished in Germany and in Greece. Such an obligation may be assumed on behalf of a third party beneficiary. *Cf.* Balis, Obligations 356 (2d ed. 1954) (in Greek); 1 H. Soergel & W. Siebert, Bürgerliches Gesetzbach 1112 (9th ed. 1959).

115 Article 759 of the Louisiana Civil Code includes married women who are "not authorized" by their husbands among those who "cannot exercise their rights." This disposition must be regarded as abrogated by the married women's emancipation acts. *See* La. R.S. 9:101-05 (1950).

116 La. Civil Code art. 759 (1870).

117 *See id.* arts. 31, 401, 1784, 1785. Detailed provisions deal specifically with the capacity of emancipated minors. *Id.* arts. 370-76. Even donations made to incompetents, whether inter vivos or mortis causa, must be accepted by their tutors, curators, or parents. *Id.* arts. 1004, 1546, 1547. Juridical acts

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acquired by onerous or by gratuitous title, the incompetent gains a present right in favor of his estate, rather than merely the faculty to enforce the grant upon termination of his disability.[118] But he can annul or refuse to execute an onerous servitude contract.[119]

Tutors, curators, and other administrators may acquire predial servitudes in favor of the property under their control.[120] Married women and husbands who administer dotal property or the community of acquets and gains also have the authority to acquire predial servitudes.[121] Further, a possessor, in good faith or in bad faith, a mandatary, a *negotiorum gestor*,[122] or a person who makes a *stipulation pour autrui*[123] may acquire a servitude for the owner. In each case, if acquisition is by onerous title, the owner, competent or incompetent, may annul the contract or refuse to execute it by re-

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made by incompetents may be ratified by tutors or curators. *Id.* art. 1785(6), 1791. An incompetent may enforce a contract he has made as soon as his disability ceases. *Id.* art. 1791.

[118] *Cf.* La. Civil Code art. 1791 (1870).

[119] *Id.* art. 761; La. Civil Code art. 757 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pardessas [*sic*], servitudes, No. 260, p. 440. Thoulier, droit civil, vol. 3, No. 576, p. 485." 1 La. Legal Archives, *supra* note 12, at 84.

[120] *See* La. Civil Code art. 759 (1870). The Code does not require compliance with formalities. This provision primarily contemplates, however, acquisition of servitudes by gratuitous title or by prescription. Tutors and curators should comply with the formalities governing alienation of the property of minors and interdicts when acquiring servitudes by onerous title. Administrators do not generally have power of disposition; any onerous engagement they undertake in connection with the acquisition of a servitude should be regarded as their own personal obligation.

[121] *Id.*; *see* note 115 *supra*.

[122] *See* La. Civil Code art. 760 (1870); La. Civil Code art. 756 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pardessas [*sic*], servitudes, No. 260, p. 440. Thoulier, droit civil, vol. 3, No. 576, p. 485." 1 La. Legal Archives, *supra* note 12, at 84; *cf.* Ronaldson v. Vicknair, 185 So. 52 (La. App. 1st Cir. 1939). *See also* 3 Aubry & Rau, *supra* note 16, at 104; Demolombe, *supra* note 9, at 255; 3 Planiol & Ripert, *supra* note 9, at 928. *But cf.* Baudry-Lacantinerie, *supra* note 9, at 829. For Germany and Greece, see note 114 *supra*.

[123] La. Civil Code art. 762 (1870); La. Civil Code art. 758 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pardessus, servitudes, No. 260, p. 440. Thoulier, droit civil, No. 577, p. 485. Partida 3, tit. 31, law 11." 1 La. Legal Archives, *supra* note 12, at 84. *But cf.* Mallet v. Thibault, 212 La. 79, 31 So. 2d 601 (1947). The Louisiana Supreme Court indicated that a predial servitude may not be created directly by the effect of a *stipulation pour autrui*. The court further indicated that a *stipulation pour autrui* may give rise to a limited personal servitude. The reasoning of the court, that there can be a stipulation in favor of a person but not in favor of an estate, appears to be tenuous. Louisiana Civil Code Article 762 clearly provides for the creation of predial servitudes by the effect of a *stipulation pour autrui*.

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nouncing the servitude.[124] The grantor of the servitude has no similar option. He may not revoke the servitudes he has granted by alleging they are onerous or by claiming the owner was not a party to the contract, since "it is not to the person but to the estate they are granted."[125]

A co-owner in Louisiana may acquire a predial servitude in favor of an undivided estate, "because the partnership, which exists between him and his coproprietor, authorizes him and makes it his duty to ameliorate the property in common."[126] The remaining co-owners may refuse to exercise the servitude by asserting that the acquisition of a servitude is not an administrative act, but is an innovation on the estate requiring their consent.[127] Lack of the remaining co-owners' consent does not excuse the grantor from recognizing the servitude,[128] but he may sue the contracting co-owner for recission and for damages.[129] In France, even in the absence of a codal provision corresponding with Louisiana Code article 763, the prevailing view among commentators confirms a co-owner's right to acquire a predial servitude in favor of the common estate without the consent of his coproprietors.[130] As in Louisiana, nonconsenting French co-owners are not bound by the agreement, and they may refuse to execute an onerous agreement. The grantor of the refused servitude may sue the party with whom he has contracted for recission and damages.[131] In Germany and in Greece, the real contract

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[124] *See* La. Civil Code art. 761 (1870). The English translation of the French text is incomplete; it should include the sentence "whose affairs have been administered." 3 La. Legal Archives, *supra* note 38, at 432.

[125] La. Civil Code art. 760 (1870). If the owner renounces a contract made on his behalf, the grantor of the servitude may have recourse against the person with whom he has contracted for damages resulting from nonperformance. *See* Pardessus, *supra* note 46, at 440.

[126] La. Civil Code art. 763 (1870); La. Civil Code art. 759 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pardessus, servitudes, No. 262, p. 442 & 443. Thoulier, droit civil, No. 579, p. 486." 1 La. Legal Archives, *supra* note 12, at 84. Under Article 763, a co-owner is presumed to have acquired a servitude in favor of the estate that is held in common. If a co-owner wishes to acquire a servitude under the condition that he should become owner of a divided part or of the entire estate following partition, he should make a declaration to this effect. *See* Pardessus, *supra* note 46, at 448.

[127] *See* La. Civil Code art. 763 (1870).

[128] *Id.*

[129] *See* note 132 *infra.*

[130] *See* 3 Aubry & Rau, *supra* note 16, at 104; Demolombe, *supra* note 9, at 256. *But see* Baudry-Lacantinerie, *supra* note 9, at 828, maintaining the view that the acquisition of a predial servitude by a co-owner is merely a conditional grant, becoming a servitude should the co-owner become owner of the whole or of a divided part of the estate.

[131] *See* 3 Aubry & Rau, *supra* note 16, at 104; Pardessus, *supra* note 46, at 444.

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establishing a valid predial servitude requires all the co-owners as parties. A co-owner may, however, enter into an obligatory relationship with a third person who assumes the personal obligation to establish a predial servitude in favor of the owners of a common estate.[132]

In Louisiana and in France, a co-owner may, by express declaration,[133] acquire a predial servitude taking effect only should he become owner of a divided part of the estate or of the entire estate following partition by licitation or partition in kind.[134] In Germany and in Greece, however, a co-owner may merely acquire a claim for the creation of a predial servitude, assertible should he ever become owner of the estate or a divided part of the estate.[135]

In Louisiana, the usufructuary, as administrator of the property subject to his enjoyment, may acquire predial servitudes for the owner.[136] He must, however, declare that he acts for the owner or that the servitude is established in favor of all subsequent possessors of the property.[137] The servitude he acquires as usufructuary terminates with the usufruct.[138] The provision for automatic termination should apply only to the acquisition of predial servitudes by title; servitudes that the usufructuary acquires by acquisitive prescription should accrue to the benefit of the estate.[139]

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[132] *See* note 114 *supra*; Civil Law Property, *supra* note 14, at 323.

[133] *See* note 126 *supra*. For the proposition that no predial servitude may be established in favor of an undivided part of an estate, see 3 Planiol & Ripert, *supra* note 9, at 873. *But see* Pardessus, *supra* note 46, at 448.

[134] *See* 3 Aubry & Rau, *supra* note 16, at 104; Demolombe, *supra* note 9, at 256; Pardessus, *supra* note 46, at 445.

[135] *See* Civil Law Property, *supra* note 14, at 323; 2 Soergel & Siebert, *supra* note 41, at 323.

[136] La. Civil Code art. 764 (1870); La. Civil Code art. 760 (1825). No corresponding article appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the sources of the article are: "Pardessus, *servitudes*, No. 260, p. 441. Thoulier, droit civil, vol. 3, No. 580, p. 486." 1 La. Legal Archives, *supra* note 12, at 85. The majority view of French commentators is that the usufructuary may acquire predial servitudes for the owner. *See* 3 Aubry & Rau, *supra* note 16, at 104; Demolombe, *supra* note 9, at 254. *But see* Baudry-Lacantinerie, *supra* note 9, at 829.

[137] *See* La. Civil Code art. 764 (1870). The article codifies views expressed by Toullier and Pardessus. *See* note 136 *supra*; Pardessus, *supra* note 46, at 441; Toullier, *supra* note 108, at 164. In the absence of a provision in the Code Civil corresponding with article 764 of the Louisiana Civil Code of 1870, the majority view of commentators in France is that a usufructuary is *presumed* to have acquired a servitude in favor of the estate he enjoys, unless there is a declaration to the contrary or unless the acquisition of the servitude is by gratuitous title. *See* 3 Aubry & Rau, *supra* note 16, at 104; Demolombe, *supra* note 9, at 255.

[138] *See* La. Civil Code art. 764 (1870).

[139] *See* Pardessus, *supra* note 46, at 441: "In this case, the acquisition is always reputed to have been made in favor of the estate."

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FORMAL REQUIREMENTS; MATTERS OF PROOF

A testament or a contract translative of ownership—a sale, an exchange, or a donation—may create a conventional servitude.[140] So also may a voluntary or a judicial partition.[141] The owner may reserve a predial servitude and transfer the ownership to another person; he may reserve the ownership and grant a servitude; or he may alienate the thing completely by granting a servitude to one person and transferring the ownership to another.[142] In all cases, the formal requirements governing the transfer of ownership of immovables also govern the creation of predial servitudes.

Although creation of predial servitudes by will is rarely encountered in practice, brief reference to this mode of creation is appropriate. In Louisiana and in France, the effect of wills may directly create predial servitudes.[143] Since, however, the legacy of a predial servitude is not a universal legacy, the legatee of a predial servitude has no seisin. Technically, he must demand delivery of quasi-possession from the heirs, universal legatees, legatees under universal title, or the executors of the will.[144] In Germany, the leg-

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[140] *See* La. Civil Code art. 743 (1870); McGuffy v. Weil, 240 La. 758, 125 So. 2d 154 (1960); text at notes 12-14 *supra*. *See also* Civil Law Property, *supra* note 14, at 321; 3 Planiol & Ripert, *supra* note 9, at 928; 3 Soergel & Siebert, *supra* note 48, at 376; note 144 *infra*. For the proposition that servitudes must be established by acts translative of ownership and that agreements establishing personal obligations among co-owners are not sufficient to give rise to predial servitudes, see Kelly v. Pippitone, 126 So. 79 (La. App. Orl. 1930).

[141] *See* Talbot v. Kern, 62 So. 2d 548 (La. App. 1st Cir. 1952); Ronaldson v. Vicknair, 185 So. 52 (La. App. 1st Cir. 1938); La. Civil Code art. 740 (1870).

[142] *See* La. Civil Code art. 2012 (1870): "Real obligations may be created . . . [b]y alienating to one person the immovable property, and to another, some real right to be exercised upon it . . . . Servitudes . . . are examples . . . ." *See also* Theriot v. Consolidated Cos., Inc., 160 La. 459, 107 So. 305 (1926) (reservation of predial servitude); James v. Buchert, 144 So. 2d 435 (La. App. 4th Cir. 1962) (grant of predial servitude by vendor).

[143] *See* La. Civil Code art. 743 (1870); Baudry-Lacantinerie, *supra* note 9, at 822; 3 Planiol & Ripert, *supra* note 9, at 928.

[144] *See* La. Civil Code arts. 1613, 1630 (1870); C. Civ. art. 1011 (68e ed. Petits Codes Dalloz 1968-1969). In the absence of forced heirs, only universal legatees have seisin. La. Civil Code art. 1609 (1870); C. Civ. art. 1004 (68e ed. Petits Codes Dalloz 1968-1969). Seisin, according to the better view, should not be confused with possession. The legatees under universal title or under particular title continue the possession of the testator, but have no seisin. *See* 4 M. Planiol & G. Ripert, Traité Pratique de Droit Civil Français 321 (2d ed. J. Maury & H. Vialleton 1956).

Note that article 743 of the Louisiana Civil Code, which has no equivalent in the French Civil Code, declares that, since servitudes "are not susceptible of real delivery, the use of which the owner of the estate to whom the servitude is granted, makes of this right, supplies the place of delivery." *See also* La. Civil Code art. 2481 (1870); C. Civ. art. 1607 (68e ed. Petits Codes Dalloz 1968-69), stating: "The tradition of incorporeal rights is to be made either by the delivery of the titles and of the act of transfer, or by the use made by

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acy of a servitude merely establishes the obligation of instituted or *ab intestat* heirs to create the servitude.[145] In Greece, an instituted heir may be the legatee of a predial servitude; even a particular legatee of a servitude may acquire the right directly upon the testator's death.[146] Universally, the formal requirements governing mortis causa dispositions also govern the creation of predial servitudes by will.

The formal requirements governing both gratuitous and onerous dispositions govern the creation of conventional servitudes by contract. In the legal systems under consideration, therefore, inter vivos donations of servitudes must be dressed in the appropriate forms to be valid, even between the parties to the transaction.[147] Specifically, articles 1536 and 1538 of the Louisiana Civil Code require an authentic act for the validity of inter vivos donations of both corporeal and incorporeal movables and immovables. An exception for manual gifts of corporeal movables, established in article 1539,[148] does not apply to donations of servitudes; servitudes are incorporeal things.[149]

Agreements under private signature can establish, in Louisiana and in France, a predial servitude by onerous title.[150] The agreements bind the parties even though not reduced to writing,[151] pro-

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the purchaser, with the consent of the seller." In cases involving legacies of predial servitudes, therefore, the use of the servitude by the legatee supplies the place of delivery. Moreover, under article 3062 of the Louisiana Code of Civil Procedure, a judgment of possession constitutes prima facie evidence of the legatee's right of quasi-possession.

[145] *See* BGB §§ 873, 2174 (Kohlhammer 1949); T. Kipp & H. Coing, Erbrecht 299 (12th ed. 1965); 3 Soergel & Siebert, *supra* note 48, at 376; *cf.* Servitudes, *supra* note 13, § 7, text at n.88. The notion of instituted heir in the German Civil Code corresponds to the notion of universal legatee or legatee under universal title in the Louisiana and French Civil Codes.

[146] *See* Greek Civil Code art. 1121 (1946); Civil Law Property, *supra* note 14, at 321.

[147] *See* La. Civil Code arts. 1536, 1538 (1870); C. Civ. arts. 931, 948 (68e ed. Petits Codes Dalloz 1968-69); BGB § 518 (Kohlhammer 1949) (promise of donations); Greek Civil Code art. 438 (1946). For Louisiana decisions dealing with the requisite formalities for the validity of inter vivos donations of immovable property, see Simoneaux v. Lebermuth & Israel Planting Co., 155 La. 689, 99 So. 531 (1924); Moore v. Pitre, 149 La. 910, 90 So. 252 (1921); Castleman v. Smith, 148 La. 233, 86 So. 778 (1920); Bailey v. Ward, 32 La. Ann. 839 (1880).

[148] La. Civil Code art. 1539 (1870).

[149] *See id.* arts. 652, 743.

[150] *See id.* art. 2240; 3 Planiol & Ripert, *supra* note 9, at 929. For the question whether an act establishing a servitude is onerous or gratuitous, see Simoneaux v. Lebermuth & Israel Planting Co., 155 La. 689, 99 So. 531 (1924).

[151] *See* 3 Aubry & Rau, *supra* note 16, at 104; Baudry-Lacantinerie, *supra* note 9, at 929. *But see* Stinson v. Lapana, 62 So. 2d 291 (La. App. Orl. 1953), declaring that a predial servitude cannot be established by oral agreement. The court obviously interpreted the word "title" to mean written instrument. For the correct meaning of the word "title," see text at note 9 *supra*.

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vided, of course, the existence of the agreements may be proven.[152] In Germany, an informal agreement, inscribed in the land register, is sufficient to create predial servitudes by onerous title.[153] In Greece, the creation of predial servitudes requires an agreement dressed in the notarial form and an inscription in the public records, even to be valid between the parties.[154]

Louisiana Civil Code article 2275 declares ". . . if a verbal sale or other disposition of such [immovable] property be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided that actual delivery has been made of the immovable property thus sold."[155] The article implies that oral agreements, if proved, could establish predial servitudes. Of course, predial servitudes cannot be delivered, but the use of the servitude by the dominant estate owner supplies the delivery.[156] Louisiana courts have not applied article 2275 in cases involving the creation of predial servitudes. Instead, at least one Louisiana court has required a written instrument for the creation of predial servitudes by title.[157]

According to article 770 of the Louisiana Civil Code, and corresponding article 695 of the French Civil Code, "[t]he title by which such servitudes are established as can not be acquired by prescription, can be replaced only by a title by which such servitude is acknowledged by the owner of the estate which owes the servitude, or by a final judgment condemning him to permit the exercise of the servitude."[158] Well-settled French doctrine and

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[152] *See* text at notes 155, 159 *infra*.

[153] *See* BGB § 873 (Kohlhammer 1949); 3 Soergel & Siebert, *supra* note 48, at 376; Wolff & Raiser, *supra* note 16, at 443.

[154] *See* Greek Civil Code art. 1121 (1946), referring by implication to articles 1033, 1192, and 1198 of the same code; Civil Law Property, *supra* note 14, at 322.

[155] La. Civil Code art. 2275 (1870); La. Civil Code art. 2255 (1825); La. Civil Code of 1808, 6.2.241. No corresponding article appears in the French Civil Code. Neither the French, German, nor Greek Code has an equivalent article.

[156] La. Civil Code art. 743 (1870); note 144 *supra*.

[157] Stinson v. Lapana, 62 So. 2d 291 (La. App. Orl. 1953). For the purpose of good faith acquisitive prescription of servitudes, Louisiana courts have rightly held that oral agreement suffices to satisfy the requirement of title and that this agreement may be proved by parol evidence. *See* Kennedy v. Succession of McCollam, 34 La. Ann. 568 (1882); Greco v. Frigerio, 3 La. App. 649 (La. App. Orl. 1926); *cf.* Blanda v. Rivers, 210 So. 2d 161 (La. App. 4th Cir. 1968).

[158] La. Civil Code art. 770 (1870); La. Civil Code art. 766 (1825); La. Civil Code of 1808, 2.140.58; C. Civ. art. 695 (68e ed. Petits Codes Dalloz 1968-69). The words "or by a final judgment condemning him to permit the exercise of the servitude" were added to the Louisiana Code in the 1825 revision. The redactors observed: "If a right of servitude on an estate be contested and it be determined by a judgment that the servitude exists, it is clear that this judgment is equal to any title or act of recognition which the parties

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jurisprudence interpret the ambiguous[159] language of article 695 to allow the title of discontinuous and non-apparent servitudes to be replaced by a recognitive act executed by a person who was owner of the servient estate at the time the act was made.[160] The provision does not mean a recognitive act may not replace the title of continuous and apparent servitudes. Nor does it mean a recognitive act made by a person who did not own the servient estate at the time the act was created may replace the title of discontinuous and non-apparent servitudes.[161] Article 695 of the French Code Civil applies the principles established in articles 1350 and 1356 of the same Code, dealing, respectively, with legal presumptions arising from decisive oaths and judicial confessions.[162] The recognitive act, then, has probative force, even if the conditions and formalities required by article 1337 of the Code Civil have not been met,[163] and even if the acknowledgment of the servitude has not been accepted by the owner of the dominant estate.[164] The recognitive act has the same effect as an oath or a judicial confession by the servient estate's owner concerning the existence of a predial servitude previously established by title.[165]

Recordation

In the legal systems being considered, either the creation of predial servitudes by title or their effect toward third parties depends upon compliance with requirements of publicity. Both mortis causa dispositions and inter vivos juridical acts designed to create predial servitudes must comply with recordation requirements.

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can make. Pandectes françaises, vol. 5, No. 288, p. 492." 1 La. Legal Archives, *supra* note 12, at 86. The acknowledgement is effective against third persons only from the time of recordation. *See* Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958).

159 3 Planiol & Ripert, *supra* note 9, at 930.

160 *Id. See also* 3 Aubry & Rau, *supra* note 16, at 107. Article 695 of the Code Civil does not exclude, in the absence of written instrument, proof of the existence of a servitude by other means of evidence. *See* Demolombe, *supra* note 9, at 249. Indeed, the word "title" in this article means the mode of creating the servitude, rather than a written instrument. 3 Planiol & Ripert, *supra* note 9, at 930.

161 *See* 3 Aubry & Rau, *supra* note 16, at 106 n.18. Article 695 of the Code Civil deals specifically with discontinuous and non-apparent servitudes, which cannot be acquired by prescription. With respect to continuous and apparent servitudes, title may obviously be replaced by acquisitive prescription. Demolombe, *supra* note 9, at 249.

162 Note that article 1350(4) of the French Code has no equivalent in the Louisiana Civil Code of 1870. *See* La. Civil Code art. 2285 (1870). Article 1356 of the French Code, on the other hand, corresponds with article 2291 of the Louisiana Civil Code of 1870.

163 The corresponding Louisiana article is La. Civil Code art. 2271 (1870).

164 *See* Planiol & Ripert, *supra* note 9, at 930.

165 *See* Req., Nov. 21, 1881, D. 1882.1.478, S. 1882.1.83; Civ., Jan. 25, 1893, D. 1893.1.382.

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French law requires recordation of wills creating predial servitudes.[166] German law requires an entry in the land register to establish a predial servitude in a legacy.[167] Greek law requires that the acceptance of a legacy establishing a predial servitude must be inscribed into the public records.[168] Louisiana law requires a judgment of possession to be recorded to have effect toward third persons.[169] All thus reach a similar end by similar means.

In Louisiana[170] and in France,[171] inter vivos juridical acts creating predial servitudes, whether by gratuitous title or by onerous title, must be recorded to have effect against third persons. In Louisiana, the recordation requirement extends to instruments made under private signature as well as to notarial acts. In France, all acts subject to recordation demand the authentic form.[172] Article 2246 of the Louisiana Civil Code declares instruments under private signature "are valid against *bona fide* purchasers and creditors only from the day on which they are registered in the manner required by law."[173] Further, article 2253 declares the recording "of an act under private signature, purporting to be a sale or exchange of real property, shall not have effect against creditors or *bona fide* purchasers, unless, previous to its being recorded, it was acknowledged by the party, or proved by the oath of one of the subscribing witnesses, and the certificate of such acknowledgment . . . , [properly executed, be] recorded with the instrument."[174] In practice, court decisions have written the article out of the Code by restricting its application to proof of the signature and by declaring a recorded act under private signature to constitute notice to third persons, regardless of acknowledgment.[175] Article 2264 of the Louisiana Civil

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166 *See* Decree-Law of Oct. 30, 1935, [1935] J.D. 11463, [1935] B.L.D. 887; Decree-Law of Jan. 4, 1955 [1955] J.D. 346, [1955] B.L.D. 94; 2 C. Aubry & C. Rau, Droit Civil Français 406 (7th ed. Esmein 1961) [hereinafter cited as 2 Aubry & Rau].

167 *See* BGB § 873 (Kohlhammer 1949); 3 J. Staudinger & J. Ring, Kommentar zum B.G.B. 103 (11th ed. 1956).

168 *See* Greek Civil Code art. 1193 (1946) (recordation of the acceptance of a legacy creating a real right on an immovable).

169 *See* La. Code Civ. P. arts. 2951, 3061 (1960); *cf.* La. Civil Code art. 2266 (1870).

170 *See* La. Civil Code art. 2266 (1870); La. R.S. 9:2721 (1950).

171 *See* Law of March 23, 1855, art. 1, [1955] Duvergier 55; Decree-Law of Jan. 4, 1955 [1955] J.D. 346, [1955] B.L.D. 94; 2 Aubry & Rau, *supra* note 166, at 409.

172 *See* Decree-Law of Jan. 4, 1955, [1955] J.D. 346, [1955] B.L.D. 94. By virtue of the requirements of publicity, acts creating predial servitudes, whether by onerous or by gratuitous title, must be reduced to notarial form and inscribed in the public records to have effect against third persons.

173 La. Civil Code art. 2246 (1870).

174 *Id.* art. 2253.

175 *See* Lepine v. Marrero, 116 La. 941, 41 So. 216 (1906); Horton, *The Public Records Doctrine and Louisiana Mineral Interests*, 11th Inst. of Mineral L. 16, 17 (1964).

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Code declares "[n]o notarial act concerning immovable property shall have any effect against third persons, until the same shall have been deposited in the office of the parish recorder, or register of conveyances of the parish where such immovable property is situated."[176]

The requirement of recordation seeks to protect the interest of third persons.[177] Failure to record does not negate the existence of a servitude, but the servitude has effect only between the parties.[178] Article 2266 of the Louisiana Civil Code declares "[a]ll sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except as between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of recording."[179] Further, "[n]o sale, contract . . . or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons . . . unless and until filed for registry. . . ."[180] Obviously, predial servitudes created by prescription, by destination *du père de famille*, or by operation of law require no recordation.[181] Nevertheless, agreements among interested owners as to the scope, location, and method of exercise of a servitude must be recorded to have effect against third persons, no matter how the servitude was created.[182]

In Germany and in Greece, the very existence of a real right of servitude depends upon compliance with requirements of publicity.[183] Before inscription in the land register in Germany or in the

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[176] La. Civil Code art. 2264 (1870).

[177] *See* Young v. Sartor, 152 La. 1054, 95 So. 223 (1922); Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tul. L. Rev. 491, 494 (1965) [hereinafter cited as *Recordation*]: "[T]he language of the basic texts indicates that their prime concern is the protection of the third persons against the specified unrecorded interests."

[178] *See* 2 Aubry & Rau, *supra* note 166, at 388, 395, 420; 3 G. Ripert & J. Boulanger, Traité de Droit Civil 68 (1958) [hereinafter cited as Ripert & Boulanger]. *See also Recordation, supra* note 177, at 494: "The explicit language, 'except between the parties thereto,' in article 2266 of the Code makes it clear that recordation is not necessary to create or make effective rights in immovables as between the parties concerned, but only as to third persons."

[179] La. Civil Code art. 2266 (1870). Recordation affords protection even against the adjudicatee of the property in a judicial sale. *See* La. Civil Code art. 2620 (1870); La. Code Civ. P. arts. 2371, 2372 (1960); *cf.* Barthold v. Dover, 153 So. 49 (La. App. 2d Cir. 1934). The absolute ineffectiveness of unrecorded instruments toward third persons "constitutes a practical mandate to record all interests otherwise visited with nullity." *Recordation, supra* note 177, at 492.

[180] La. R.S. 9:2721 (1965).

[181] *See Recordation, supra* note 177, at 491, 506.

[182] *See* 3 Planiol & Ripert, *supra* note 9, at 931.

[183] *See* BGB § 873 (Kohlhammer 1949); Greek Civil Code art. 1121 (1946); Civil Law Property, *supra* note 14, at 322; Wolff & Raiser, *supra* note

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conveyance records in Greece, only the grantor's personal obligation to create a servitude exists.[184] Recordation transforms the personal obligation into a real right, the servitude.

Public Records Doctrine

Louisiana courts have developed a public records doctrine based on the legislative texts concerning recordation of instruments.[185] The contours of the doctrine have not, as yet, been fully defined, but the doctrine has settled general outlines. The courts have formulated three basic tenets of the doctrine: (1) an acquirer of immovable property is conclusively presumed to have constructive notice of all recorded instruments affecting the property; (2) any personal knowledge that the acquirer may have outside the records is immaterial; and (3) a bona fide purchaser for value is entitled to rely on the public records. This section is devoted to a discussion of the public records doctrine as it relates to predial servitudes.

According to Louisiana jurisprudence, the acquirer of an immovable burdened with recorded servitudes is presumed to have notice of the outstanding real rights in favor of third persons,[186] but this theory of constructive notice has been called "technically inaccurate, unnecessary, and otherwise objectionable."[187] Indeed, judi-

16, at 442. Inscription is made in Germany in the section of the land register devoted to the servient estate. Additional entry in the section devoted to the dominant estate is possible, but legally immaterial. *See* GBO § 9 (1935). Predial servitudes created in Germany before the establishment of the land register system continue to be valid without inscription. *See* Introductory Law of the German Civil Code arts. 184, 187, 189; C. Meisner, H. Stern & F. Hodes, Nachbarrecht 483 (3d ed. 1956).

[184] *See* Greek Civil Code art. 1198 (1946); Civil Law Property, *supra* note 14, at 166, 414.

[185] *See generally* Horton, *The Public Records Doctrine and Louisiana Mineral Interests*, 11th Inst. of Mineral L. 16 (1964); *Recordation*, *supra* note 177; Comment, *Registration of Title to Immovables in Louisiana*, 32 Tul. L. Rev. 677 (1958); Comment, *Recordation Problems in Louisiana Mineral Matters*, 23 Tul. L. Rev. 259 (1948).

[186] *See* Burgas v. Stoutz, 174 La. 586, 593, 141 So. 67, 69 (1932). Recordation of a separate document was there held to constitute "sufficient recorded notice to have placed defendant on inquiry, and to have enabled him to have ascertained the true facts of the case" before purchasing the property. *See also* Anderson v. Courtney, 190 So. 2d 493, 495 (La. App. 1st Cir. 1966): "This court recognizes the principles that the civil law favors the free use and alienability of immovable property and that unless a purchaser is given recorded notice of restrictions and impairment of such use purchaser cannot be affected thereby"; *cf.* Blevins v. Manufacturers Record Publishing Co., 235 La. 708, 776, 105 So. 2d 392, 416 (1958): "A third party in dealing with property is charged with knowledge revealed by the recorded instruments affecting the property." Recordation constitutes effective notice of the incidents and scope of the real right actually created. But determination of what is actually created may be a matter of contractual interpretation. *See* Hasslocher v. Recknagel, 160 So. 2d 421 (La. App. 2d Cir. 1964).

[187] *Recordation*, *supra* note 177, at 498. The author concludes that "[r]ecordation does not constitute 'constructive notice' to third persons, but

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cial applications of the theory have merely meant that a valid recorded instrument affecting the property may be asserted against the acquirer of the immovable.[188] The grant of the servitude may appear in the act transferring the property to the grantor, in the act transferring the property to the grantor's ancestors, or in a separate document.[189] The servitude need appear neither in the act by which the present owner acquired the property nor in his chain of title; it suffices that the act creating the servitude was an act translative of title and was recorded at the time of the transfer of ownership.[190] In the absence of recorded servitudes, the property is, therefore, transferred free of any conventional servitudes created by title.[191] An exception is made, however, if the property is burdened with an unrecorded public utility servitude; the acquirer then may not object to the exercise of the servitude.[192] Personal knowl-

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only preserves the recorded right from ineffectiveness and makes it effective against third persons, whether or not the third persons have actual knowledge of the recorded interest." *Id.* at 511.

[188] *See* Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958) (purchase of immovable *with* recorded servitudes; the court held that one of the servitudes had been lost by confusion and that the absence of a dominant estate precluded the creation of another). Indeed, every recorded instrument is *not* irrebuttable proof of its own validity. *Recordation, supra* note 177, at 502. What is recorded is not always effective: the acquirer of an immovable burdened with recorded servitudes may still contest the validity of the recorded instruments. Proof that a recorded contract is a forgery or that a recorded judgment was fraudulently obtained is admissible against third persons. *Id.*

[189] *See* McGuffy v. Weil, 240 La. 758, 125 So. 2d 154 (1960); James v. Buchert, 144 So. 2d 435 (La. App. 4th Cir. 1962); *cf.* James v. Delery, 211 La. 306, 29 So. 2d 858 (1947); Clark v. Reed, 122 So. 2d 344, 349 (La. App. 2d Cir. 1960): "[T]he servitude need not be necessarily established by a deed or created in an act of sale. It suffices that the servitude was created and imposed in an act sufficient in form for the transfer of property."

[190] *See* Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932); Journet v. Gerard, 173 So. 2d 263, 266 (La. App. 3d Cir. 1965): "[I]t is not necessary, once [a servitude] has been established, that the instrument by which one subsequently acquires the property mention the servitude for it to continue to affect the land." Of course, an erroneous recordation may have no effect. For example, if a recorded act purports to impose a servitude upon lot A but describes lot B, lot A is not burdened with a servitude insofar as third persons are concerned. Lot A may be sold free of the servitude. *Cf.* Loeb v. Badalamenti, 192 So. 2d 246 (La. App. 4th Cir. 1966).

[191] *See* Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958). *See also* Demery v. Voelker, 216 So. 2d 328 (La. App. 4th Cir. 1968). Notaries who fail to record a servitude-creating act may incur delictual responsibility. *Id.; cf.* McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909) (unrecorded acts affecting immovables may not be asserted against third persons); Jackson v. Golson, 91 So. 2d 394 (La. App. 2d Cir. 1956) (third persons dealing with immovables have the right to depend on the public records). For mineral rights, see Chicago Mill & Lumber Co. v. Ayer Timber Co., 131 So. 2d 635 (La. App. 2d Cir. 1961). The acquirer of immovable property is not protected against every prior unrecorded servitude, since not every servitude need be recorded to be effective against third persons. *See* note 181 *supra.*

[192] *See* Webster Sand, Gravel & Constr. Co. v. Vicksburg, S. & P. Ry., 129

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edge that the acquirer may have of unrecorded servitudes is immaterial.[193]

A prospective purchaser of immovable property is not, however, required to search the public records to verify the existence or nonexistence of recorded servitudes. If existing recorded servitudes were not disclosed to him at the time of the sale, the sale contract is invalid, because the vendor's title is not clear.[194] Moreover, if the existence of servitudes is doubtful, the purchaser may refuse specific performance of the contract, because the vendor's title is suggestive of litigation.[195] The vendor may not subsequently demand specific performance by alleging that recorded servitudes have been abandoned or terminated by prescription, since a determination of these issues in an action for specific performance would not be binding on third persons who might sue to enforce the servitudes against the new purchaser.[196] In such situations, the vendor should request additional time to seek a declaratory judgment perfecting his title.[197]

The purchaser of an immovable, who also possesses recorded

La. 1096, 57 So. 529 (1912); Goins v. Beauregard Electric Cooperatives, Inc., 44 So. 2d 715 (La. App. 1st Cir. 1950).

[193] *See* Anderson v. Courtney, 190 So. 2d 493 (La. App. 1st Cir. 1966); *cf.* Blevins v. Manufacturers Record Publishing Co., 235 La. 708, 771, 105 So. 2d 392, 414 (1958): "[A] third party purchaser may rely upon the conveyance records and is not bound or barred by unrecorded claims against the property purchased, even though he has actual notice thereof gained from outside the records."

[194] *See* Goodwin v. Sanders, 231 So. 2d 727 (La. App. 4th Cir. 1970); Norgren v. Harwell, 172 So. 2d 723 (La. App. 4th Cir. 1965); Germain v. Weller, 67 So. 2d 332 (La. App. Orl. 1953); Stauss v. Kober, 51 So. 2d 121 (La. App. Orl. 1951); *cf.* McGee v. Demery, 176 So. 2d 679 (La. App. 4th Cir. 1965) (action for judgment decreeing that property is not encumbered with servitudes, and, in the alternative, for rescission of the sale). Article 2515 of the Louisiana Civil Code provides "[i]f the inheritance sold be incumbered with non-apparent servitudes, without any declaration having been made thereof, if the servitudes be of such importance that there is cause to presume that the buyer would not have contracted, if he had been aware of the incumbrance, he may claim the cancelling of the contract, should he not prefer to have an indemnification." This article has been held inapplicable to recorded non-apparent servitudes. DuTreil v. Wohlert, 210 So. 2d 511 (La. App. 4th Cir. 1968). For applications of Article 2515, see Lallande v. Wentz & Pochelu, 18 La. Ann. 289 (1866); Couret v. Hopkins-Rhodes & Co., 13 Orl. App. 161 (La. 1916); *cf.* Durel v. Boisblanc, 1 La. Ann. 407 (1846); O'Reilly v. Poche, 162 So. 2d 787 (La. App. 4th Cir. 1964) (sufficient disclosure).

[195] *Cf.* Oubre v. Stassi, 56 So. 2d 598 (La. App. Orl. 1952); Williams v. Meyer, 29 So. 2d 599 (La. App. Orl. 1947); Giacoma v. Yochim, 126 So. 84 (La. App. Orl. 1930); Hebert v. Vezoux's Succ., 126 So. 461 (La. App. Orl. 1930). *See also* Rabouin v. Dutrey, 181 La. 725, 160 So. 393 (1935). These cases involving building restrictions are relevant because such restrictions are classified as continuous and non-apparent servitudes. *See* Property, *supra* note 1, at § 104.

[196] *See* Oubre v. Stassi, 56 So. 2d 598 (La. App. Orl. 1952).

[197] *See* McGuffy v. Weil, 240 La. 758, 125 So. 2d 154 (1960); La. Code Civ. P. arts. 1871-73 (1960).

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predial servitudes, may rely on the public records.[198] This tenet of the public records doctrine has been misunderstood, because broad judicial language seems to say that a third person dealing with immovables is fully protected by relying upon the public records.[199] Indeed, decisions involving the acquisition of immovable property declare "[t]he conveyance records are the only thing to which one dealing with real estate needs to look . . . . Neither fraud, nor want of consideration, nor secret equities between the parties, who have placed on the public records a title valid upon its face, can be urged against a bona fide purchaser for value, who has acted on the faith of such recorded title."[200] In context, however, most of the decisions merely restate the rule that actual knowledge outside the records is immaterial.[201] A precise statement of the reliance principle is "a third party is entitled to rely on the *absence* from the public record of those interests that are required to be recorded."[202]

The public records doctrine protects third persons against unrecorded instruments in two ways: by permitting inspection of the recorded instruments, and by making unrecorded instruments inoperative against third parties.[203] The public records doctrine is thus essentially a *negative* doctrine. Creating no rights, it merely makes ineffective any unrecorded rights asserted against third persons. A recorded instrument containing the grant of a servitude from the owner of the servient estate establishes the servitude in

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[198] *Cf.* Buras Ice Factory Inc. v. Department of Highways, 235 La. 158, 165, 103 So. 2d 74, 77 (1958): "[I]nnocent third parties who deal on the faith of the public records are protected thereby."

[199] *See Recordation, supra* note 177, at 500. This language loses sight of the essentially negative character and limited scope of recordation by construing recordation as creating rights rather than as simply making rights effective against third persons. *See* text at notes 203-05 *infra.*

[200] Hasslocher v. Recknagel, 160 So. 2d 421, 423 (La. App. 2d Cir. 1964), *quoting* Cole v. Richmond, 156 La. 262, 274-75, 100 So. 419, 423 (1924). Actually, there is no requirement that the purchaser be in good faith; one having knowledge of matters outside the public records is in bad faith, yet this is immaterial. *See* text at note 193 *supra.*

[201] *See* note 193 *supra; cf.* Pittsburgh Plate Glass Co. v. Woodcock, 150 So. 2d 660, 663 (La. App. 3d Cir. 1963): "[A] party dealing with immovable property need look only to the public records and, if such records do not show the recordation of any adverse claim sufficient to put such third person on notice, he obtains a good title notwithstanding that he may have had knowledge of defects therein."

[202] *Recordation, supra* note 177, at 500. The author concludes that the Louisiana law for affected interests is not that "being in the records makes it so," but rather that "not being in the records makes it not so." *Id.* at 501.

[203] *Cf.* Pittsburgh Plate Glass Co. v. Woodcock, 150 So. 2d 660, 663 (La. App. 3d Cir. 1963): "[A]ll persons have constructive notice of . . . recorded instruments affecting immovable property, and . . . where an instrument contains language which fairly puts a purchaser on inquiry as to the title of the property which he intends to buy, and he does not avail himself of the means and factilities [*sic*] at hand to obtain knowledge of the true facts, he is to be considered as having bought at his own risk and peril."

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favor of the dominant estate, not because of the recordation, but because of the grant itself. An unrecorded instrument containing a grant from the owner of the servient estate does not establish a right of servitude enforceable against third persons; a recorded instrument executed by a person who is not the owner of the servient estate does not create a servitude at all. The rule, what is not recorded is not effective, does not mean what is recorded is always effective.[204] Third persons may rely on, and are protected by, the absence from the public records of any servitude required to be recorded, but they are not protected in relying upon the recordation of any document supporting a servitude in their favor, except that a valid recorded document may be asserted against the owner of the servient estate. Additionally, the rules excluding parol evidence usually protect third persons who rely on the essential recitals of a recorded instrument.[205]

Interested persons may, therefore, contest recorded servitudes, even though the owner of the dominant estate relied on the public records and purchased the property in good faith.[206] Proof that a recorded instrument is a forgery or that a judgment was obtained fraudulently is clearly admissible against third persons. Thus, one is not protected in relying upon the recordation of a grant of a servitude based on a forged juridical act, either a contract or a will, on a fraudulent judgment, or on any other document subject to annulment for fraud.[207] Moreover, recorded servitudes may be contested

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[204] *Cf.* Succession of Rosinski, 158 So. 2d 467, 469 (La. App. 3d Cir. 1963). Counsel argued that a purchaser has an absolute right to rely on the public records. The court declared that the argument had no merit: "[T]his is in effect an attempt to give LSA-C.C. Articles 2264-2266 a positive rather than a negative effect. These articles do not, as defendants contend, provide that all purchasers may rely implicitly upon what is shown in recorded instruments conveying real property, nor do they mean that purchasers relying on such recorded instruments can acquire good title from a vendor who has none. These articles provide that unrecorded instruments relating to the title to real property shall be ineffective except as between the parties thereto. The articles do not provide that all recorded instruments must be deemed valid nor that they must be accepted as conveying the title which they purport to convey." *See also* Comment, *Registration of Title to Immovables in Louisiana,* 32 Tul. L. Rev. 677, 685 (1958): "[T]he statement that a title can be established on the strength of the public records is erroneous."

[205] *See* text at notes 210-13 *infra.*

[206] *See* Charles M. Gillis & Co. v. Nelson & Donalson, 16 La. Ann. 275 (1861) (recorded instrument creating predial servitude was open to all objections except an objection to its execution).

[207] A recorded title, obtained by fraud, may be annulled even when held by a bona fide purchaser for value. *See* Tate v. Fakouri, 118 So. 2d 464 (La. App. 1st Cir. 1959); *cf.* Tensas Delta Land Co. v. Fleischer, 132 La. 1021, 62 So. 129 (1913); McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909). A mere allegation of fraud, however, is not sufficient; the complaint must be specific. Loeb v. Badalamenti, 192 So. 2d 246 (La. App. 4th Cir. 1966). Further, the mere knowledge that an owner does not have the right to dispose of the property is not a fraud. Tate v. Fakouri, *supra.*

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if they do not meet the essential requirements of the Code. For example, the two estates must belong to two different owners.[208] Servitudes may also be contested if they have been extinguished by the prescription of nonuse, by confusion, or by any other mode of extinction.[209] An apparent exception exists in cases involving annulment of title for want of consideration. A conveyance reciting consideration cannot, after recordation, be rescinded by alleging lack of consideration after a third person has purchased the property relying on the public records.[210] The owner of the servient estate may not contest, by alleging lack of consideration, the validity of a servitude granted by an instrument reciting consideration after a subsequent acquirer of the dominant estate has relied on the public records in purchasing the property. The exception is merely apparent because it is based on the inadmissibility of oral testimony, not on the applicability of the public records doctrine.[211]

Questions may arise concerning the validity of servitudes granted by the record owner of the servient estate whose title was subsequently declared nonexistent or was annulled for defects. According to Louisiana substantive law, the declaration of nullity clearly results in the cancellation of all real rights granted by the person whose title is annulled.[212] In *Jefferson v. Childers*,[213] however, the Louisiana Supreme Court declared the grant of a mineral right by a record owner whose title was subsequently annulled for want of consideration valid and binding on the true owner. The court held the property may not be recovered to the detriment of "a third person who relied upon the public records"; it may only be recovered "subject to transactions" between the apparent owner and third persons acting in good faith.[214] The result applies the parol evidence exclusionary rule making an authentic act "full proof of the agree-

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[208] *See* Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958); *Predial Servitudes*, *supra* note 2, at 24.

[209] *See* Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958).

[210] *See* Brown v. Johnson, 11 So. 2d 713 (La. App. 2d Cir. 1942).

[211] *See* text at notes 215-16 *infra*.

[212] *See* La. Civil Code art. 736 (1870): "Those . . . whose ownership in the estate ceases on a certain condition, or at a particular time, may establish servitudes thereon, but they cease with their rights." *See also* Property, *supra* note 1, § 109, text at n.336.

[213] 189 La. 46, 179 So. 30 (1937). This was an exceptional case where a vendor sued his vendee to rescind the sale. Had the property passed into the hands of a subsequent purchaser who had bought relying on the public records, rescission for want of consideration would not have been allowed. *See* note 210 *supra*.

[214] Jefferson v. Childers, 189 La. 46, 52-53, 179 So. 30, 32 (1938); *cf.* Blevins v. Manufacturers Record Publishing Co., 235 La. 708, 772, 105 So. 2d 392, 414 (1958), *quoting* Baker v. Atkins, 107 La. 490, 493, 32 So. 69, 70 (1902): "There can be no actual owner of immovable property, so far as third persons are concerned, other than the owner of record."

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ment contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery."[215] The parol evidence rule, not the public records doctrine, enables third persons to rely on the essential recitals of recorded acts.[216] If the ownership of the grantor is declared nonexistent, or if his title is set aside for reasons other than want of consideration, the parol evidence exclusionary rule does not apply, and the servitudes granted by the apparent owner are no longer valid.[217]

In France and in Greece, as in Louisiana, the requirements of publicity perform the function of providing a means of information for the general public.[218] Recordation merely proves a fact, an instrument creating a predial servitude has been recorded; it does not prove the validity of the act or the existence of the servitude.[219] In France, the right of servitude may exist without recordation, but an unrecorded servitude may not be asserted against third persons; conversely, recordation does not prevent contestation of the right.[220] In Greece, however, compliance with the requirement of publicity is essential for the creation of the right of servitude, even between the parties to the agreement.[221] Recordation does not prevent contestation based on the invalidity of the instrument granting the

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[215] La. Civil Code art. 2236 (1870).

[216] For this explanation of the holding in Jefferson v. Childers, 189 La. 46, 179 So. 30 (1937), see Johnson v. Johnson, 191 La. 408, 185 So. 299 (1938); McGee v. Finley, 65 So. 2d 384 (La. App. 2d Cir. 1953). *See also Recordation, supra* note 177, at 501.

[217] In sales of immovables, the resolutory action may be used against the original purchaser and also against third persons acquiring real rights or title to the property. Ragsdale v. Ragsdale, 105 La. 405, 29 So. 906 (1901). The Civil Code does not specifically require recordation of sales of immovables as a prerequisite for the exercise of the right of resolution against third persons, and the Louisiana Supreme Court has held repeatedly that "the question of registry has nothing to do with the case." Louis Werner Saw Mill Co. v. White, 205 La. 242, 249, 17 So. 2d 264, 266 (1944), *quoting* Stevenson v. Brown, 32 La. Ann. 461, 464 (1880). Thus, whether the original sale is recorded or not, the unpaid vendor may obtain resolution and reclaim the immovable from a subsequent purchaser. The resolution operates retroactively, and all transfers or encumbrances made by the original purchaser are cancelled. *See* Adler v. Adler, 126 La. 472, 52 So. 668 (1910). The action for dissolution, however, may not be maintained against a third person who relied on affirmative recorded statements that the purchase price has been paid. *See* Schwing Lumber & Shingle Co. v. Arkansas Natural Gas Co., 166 La. 201, 116 So. 851 (1928). This is another application of the rule excluding parol evidence.

[218] *See* Civil Law Property, *supra* note 14, at 419; Ripert & Boulanger, *supra* note 178, at 75. The knowledge that a person may have outside the records is, as in Louisiana, immaterial. Civil Law Property, *supra* note 14, at 416. In Greece recordation also serves a limited affirmative function since it preserves rights acquired from a record owner whose title is subsequently annulled. *See* note 223 *infra*.

[219] *See* Civil Law Property, *supra* note 14, at 419; Ripert & Boulanger, *supra* note 178, at 68, 75.

[220] *See* 2 Aubry & Rau, *supra* note 166, at 388.

[221] *See* text at note 183 *supra*.

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servitude, but specific articles of the Greek Civil Code provide that a judgment dissolving the title of the grantor is effective only from the date of recordation.[222] Real rights granted by the record owner whose title has been subsequently annulled remain in effect.[223]

The German system of publicity, based on land registers, provides information for the general public and serves both a negative and an affirmative function. Interested persons may not only rely on the absence in the land register of ownership titles or of acts creating predial servitudes, they may also rely on the recordation of acts either establishing the grantor's ownership or creating predial servitudes. An entry in the land register thus creates a rebuttable presumption that the recorded right exists.[224] Moreover, if the entry in the land register is incorrect, an acquirer of a real right may rely on the public records and may regard them as correct, unless an inscription has been entered challenging the correctness of the records or unless the acquirer has personal knowledge of the incorrectness.[225] The German system offers important advantages and merits a detailed study should Louisiana decide to revise her Civil Code.

CONTRACTUAL INTERPRETATION

In General

Contracting parties dealing with immovables do not always carefully designate the kind of right they intend to establish. Instead of using the proper name, they describe the right. The question frequently arises whether the instrument was intended to transfer ownership, to establish a dismemberment of ownership, or to impose merely personal obligations. The resolution of this question is a matter of contractual interpretation and is governed by both the general rules for construction of juridical acts[226] and the rules of construction applicable specifically to instruments purporting to create servitudes.[227]

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[222] *See* Greek Civil Code art. 1203 (1946). If the title of the record owner is void *ab initio* and not merely voidable, all servitudes granted by the record owner are invalid. In this case, third persons are not protected in relying on the public records. A person who has obtained a final judgment declaring the nullity of a juridical act, however, is required to record the judgment; if he fails to do so, he is responsible to third persons for any damage they suffered through his omission. *Id.* art. 1202.

[223] *See* Greek Civil Code art. 1204 (1946).

[224] BGB § 891 (Kohlhammer 1949); Wolff & Raiser, *supra* note 16, at 139.

[225] *See* BGB § 892 (Kohlhammer 1949); Wolff & Raiser, *supra* note 16, at 141.

[226] *See* La. Civil Code arts. 1945-62 (1870); *cf.* Civil Law Principles, *supra* note 16, at 241; Enneccerus & Nipperdey, *supra* note 16, at 1246; 3 Planiol & Ripert, *supra* note 9, at 930.

[227] *See* La. Civil Code arts. 753-58 (1870).

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A cardinal rule of contractual interpretation is that the intention of the parties must govern.[228] Intention "must be determined from the stipulations in the entire instrument, with a view of giving effect to all of the provisions therein contained and thereby avoid neutralizing or ignoring any of them or treating any of them as surplusage."[229] Extrinsic evidence is clearly admissible to prove the intention of the parties to an ambiguous instrument.[230] Precise technical terms are not necessary to create a predial servitude, nor is use of the word servitude sacramental.[231] For example, a contract provision granting "the privilege of using" a driveway has been held sufficient to create a predial servitude of passage.[232] The parties to a contract may even use common law terminology to establish a valid predial servitude under the civil law.[233] On the other hand, use of the word servitude or of equivalent expressions is not determinative in the presence of provisions irreconcilable with the notion of predial servitudes.[234]

Another cardinal rule of contractual interpretation is, in case of doubt, instruments purporting to establish a predial servitude

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[228] *See* McGuffy v. Weil, 240 La. 758, 125 So. 2d 154 (1960); Ham v. Strenzke Realty Co., 218 La. 499, 50 So. 2d 11 (1950); Rock Island, A. & L. Ry. v. Gournay, 205 La. 125, 17 So. 2d 8 (1943); Texas & Pac. Ry. v. Ellerbe, 199 La. 489, 6 So. 2d 556 (1942); Parish of Jefferson v. Texas Co., 192 La. 934, 189 So. 580 (1939); Arkansas Improvement Co. v. Kansas City S. Ry., 189 La. 921, 181 So. 445 (1938); Bond v. Texas & Pac. Ry., 181 La. 763, 160 So. 406 (1935); Ducournau v. Marigny, 4 Mart. (o.s.) 708 (La. 1817); James v. Buchert, 144 So. 2d 435 (La. App. 4th Cir. 1962); Sun Oil Co. v. Stout, 46 So. 2d 151 (La. App. 2d Cir. 1950).

[229] Rock Island, A. & L. Ry. v. Gournay, 205 La. 125, 130, 17 So. 2d 8, 9 (1943).

[230] *See* Arkansas Improvement Co. v. Kansas City S. Ry., 189 La. 921, 181 So. 445 (1938).

[231] Noel Estate, Inc. v. Kansas City S. & G. Ry., 187 La. 717, 723, 175 So. 468, 470 (1937). The court here declared that "it is not uncommon for the owners of land in granting servitudes thereon to use the language and a form generally used in the sale of realty, coupled with qualifying clauses designating the servitude."

[232] Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932). For another case in which a predial servitude was established by description rather than by use of the word servitude, see Theriot v. Consolidated Cos., Inc., 160 La. 465, 107 So. 305 (1926). *But cf.* Haggard v. Rushing, 76 So. 2d 52 (La. App. 2d Cir. 1954) (quitclaim authorized a neighbor to use, without cost, the surface of a tract of land; held, it established a usufruct).

[233] *Cf.* Rock Island, A. & L. Ry. v. Gournay, 205 La. 125, 17 So. 2d 8 (1943); Parish of Jefferson v. Texas Co., 192 La. 934, 189 So. 580 (1939).

[234] *See* Ham v. Strenzke Realty Co., 218 La. 499, 50 So. 2d 11 (1950); Parish v. Municipality No. 2, 8 La. Ann. 145 (1853); Ducournau v. Marigny, 4 Mart. (o.s.) 708 (1817); *cf.* Arkansas Improvement Co. v. Kansas City S. Ry., 189 La. 921, 930, 181 So. 445, 448 (1938): "The courts hold generally that a reference to the land involved as 'right of way' or 'for railroad purposes' does not necessarily indicate that the intent was to convey a mere easement or servitude, but that the intention must be ascertained by construing the instrument as a whole, and that in this connection extrinsic evidence may be considered."

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"are always interpreted in favor of the owner of the property to be affected."[235] This rule incorporates the civilian principle that any doubt regarding the free use of immovable property must be resolved in *favorem libertatis*.[236] The Louisiana Supreme Court has repeatedly declared that "servitudes are restraints on the free disposal and use of property, and are not, on that account, entitled to be viewed with favor by the law."[237] Therefore, "servitudes claimed under titles are never sustained by implication—the title creating them must be express, as to their nature and extent, as well as to the estate owning them, and the estate to which they are due."[238] The rule that servitudes may not be sustained by implication has one limitation: where the owner of a tract of land subdivides it into lots, designates streets or roads on a map or survey of the subdivision, and then sells property with reference to the map or survey, he thereby creates by title a servitude of passage over the designated streets or roads.[239]

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[235] La. Civil Code art. 753 (1870); La. Civil Code art. 749 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the source of this provision is: "Thoulier, droit civil, vol. 3, No. 654, p. 571." 1 La. Legal Archives, *supra* note 12, at 82.

[236] *See* J. Domat, Les Lois Civiles Dans Leur Ordre Naturel, 1 Oeuvres de Domat 329 (J. Remy ed. 1828); Toullier, *supra* note 108, at 192.

[237] Parish v. Municipality No. 2, 8 La. Ann. 145, 147 (1853), cited with approval in Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958); *see* Gottschalk v. De Santos, 12 La. Ann. 473, 475 (1857); Declouet v. Borel, 15 La. Ann. 606 (1860). *See also* McGuffy v. Weil, 240 La. 758, 767, 125 So. 2d 154, 158 (1960) ("any doubt as to the interpretation of a servitude encumbering property must be resolved in favor of the property owner"); Boudreaux v. Landry, 120 So. 2d 535 (La. App. 1st Cir. 1960). Louisiana courts have applied in a variety of contexts the rule that the proper interpretation of an ambiguous instrument is that which least restricts the ownership of the land. *See, e.g.*, Whitehall Oil Co. v. Heard, 197 So. 2d 672 (La. App. 3d Cir. 1967) (whether a landowner created a single mineral servitude over contiguous tracts or a series of multiple interests).

[238] Parish v. Municipality No. 2, 8 La. Ann. 145, 147 (1853), cited with approval in Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958); *see* Gottschalk v. De Santos, 12 La. Ann. 473, 475 (1857); Declouet v. Borel, 15 La. Ann. 606 (1860). In France, servitudes may be exceptionally established by implication in cases in which the parties necessarily contemplate the creation of a servitude but fail to express themselves. *See* Pardessus, *supra* note 46, at 450. It would seem, for example, the sale of an enclosed timber estate would include, by necessary implication, a servitude of passage for the cutting of timber. *Cf.* Kavanaugh v. Frost-Johnson Lumber Co., 149 La. 972, 90 So. 275 (1921). In Germany and in Greece, contractual intent to create a predial servitude may be implied. Thus where two contiguous tracts contain structures needed for the exercise of a servitude, a servitude may be created by implication when the owner sells one of them. *See* Wolff & Raiser, *supra* note 16, at 443; Civil Law Property, *supra* note 14, at 322.

[239] *See* James v. Delery, 211 La. 306, 29 So. 2d 858 (1947); Iseringhausen v. Larcade, 147 La. 515, 85 So. 224 (1920). These cases were cited by interested parties in Buras Ice Factory, Inc. v. Department of Highways, 235 La. 158, 103 So. 2d 74 (1958), to support their contention that a servitude had

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Insufficient descriptions of the location or extent of a predial servitude may be remedied by actual exercise of the servitude over part of the servient estate.[240] Further, insufficient descriptions of a predial servitude may be remedied by reference to an annexed plat. If a variance exists between the description in the instrument and the description in the annexed plat, the description in the plat controls,[241] unless clear evidence shows the parties had a different intention.[242] Extrinsic evidence to clarify vague or ambiguous descriptions is certainly admissible.[243] In *Burgas v. Stoutz*,[244] an act of sale provided "the purchaser, its successors and assigns, shall have the privilege of using the paved driveway in the rear of the [vendor's] property." A subsequent purchaser of the vendor's property contested the validity of the grant by alleging that the failure to state the length and width of the driveway made the description too vague, too uncertain, and too indefinite to give a good faith purchaser notice. The court held: "[T]his particular ground of attack is without merit, since the paved runways are located as physical objects on the surface . . . as shown by photographs filed in evidence, and the length and width of same are easily ascertainable. That which can be made certain is considered in law as certain."[245] Indeed, since the property had only one set of runways, describing the driveway as located "in the rear" of the vendor's property was neither misleading nor erroneous. And, since the instrument creating the servitude was recorded, the purchaser could have discovered the true facts before purchasing the property.

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been granted to them by implication, but the Louisiana Supreme Court promptly distinguished them. "In each of those cases", the court declared, "it clearly appears that the servitude of passage therein recognized related to a public road for the benefit of purchasers of lots in the subdivision, so designated on the recorded surveyor's plat. Here, however, the deeds and the attached plats in no manner indicate that the [canal] was to be a public passageway for use by owners of adjoining properties."

240 *See* J.C. Trahan, Drilling Contractor, Inc. v. Younger, 169 So. 2d 18 (La. App. 2d Cir. 1964): "Regardless of the failure to describe the exact location of the servitude at the time of the grants this failure was remedied by the construction of the pipeline. It follows that which was uncertain has been made certain."

241 *Cf.* Casso v. Ascension Realty Co., 195 La. 1, 196 So. 1 (1940); Lotz v. Hurwitz, 174 La. 638, 141 So. 83 (1932); Isacks v. Deutsch, 114 So. 2d 746 (La. App. 1st Cir. 1959).

242 *See* James v. Buchert, 144 So. 2d 435 (La. App. 4th Cir. 1962); *cf.* Pan-Am. Prods. Co. v. Robichaux, 200 La. 666, 8 So. 2d 635 (1942); Burt v. Carrier, 92 So. 2d 86 (La. App. 1st Cir. 1957).

243 *See* Ritchey v. Desser, 203 So. 2d 735 (La. App. 3d Cir. 1967); *cf.* Mid-States Homes, Inc. v Knapp, 156 So. 2d 122 (La. App. 3d Cir. 1963); Burt v. Valois, 144 So. 2d 196 (La. App. 1st Cir. 1962).

244 174 La. 586, 141 So. 67 (1932).

245 *Id.* at 590, 141 So. at 68.

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Servitude or Ownership

Instruments purporting to convey a tract of land for certain designated purposes, such as the building of a railroad depot,[246] a house of worship,[247] or a city market,[248] may contain ambiguities making uncertain whether the contracting parties intended to establish a servitude or to transfer ownership subject to a resolutory condition. Further, instruments reserving[249] or granting rights of way for railroads,[250] canals,[251] or other purposes, may also contain ambiguous language making uncertain whether the contracting parties intended to create a servitude or to transfer perfect ownership. Faced with interpreting such an instrument, the Louisiana courts have looked at the instrument as a whole and at the available extrinsic evidence to implement the intention of the contracting parties.

Where instruments have granted land for designated purposes, courts have consistently found the intent of the contracting parties was to transfer ownership subject to a resolutory condition rather than merely to create a servitude. This result has been called "consistent with the usual practice of religious and community service organizations to acquire a regular fee title to the land on which its [*sic*] buildings may rest."[252] For example, in *Voinche v. Town of Marksville*,[253] the court considered a donation to the town intended to help establish a market. The instrument provided "should it happen that said market be not built," the donation would be null

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246 *See* Askew v. Vicksburg, S. & Pac. Ry., 171 La. 947, 132 So. 510 (1931).

247 *See* Sun Oil Co. v. Stout, 46 So. 2d 151 (La. App. 2d Cir. 1950).

248 *See* Voinche v. Town of Marksville, 124 La. 712, 50 So. 662 (1909).

249 *See* Ducournau v. Marigny, 4 Mart. (o.s.) 708 (La. 1817).

250 *See* Rock Island, A. & L. Ry. v. Gournay, 205 La. 125, 17 So. 2d 8 (1943); Texas & Pac. Ry. v. Ellerbe, 199 La. 489, 6 So. 2d 556 (1942); Noel Estate, Inc. v. Kansas City S. & G. Ry., 187 La. 717, 175 So. 468 (1937); Bond v. Texas & Pac. Ry., 181 La. 763, 160 So. 406 (1935); Askew v. Vicksburg, S. & Pac. Ry., 171 La. 947, 132 So. 510 (1931); Knox v. La. Ry. & Nav. Co., 157 La. 602, 102 So. 685 (1925); Nelson v. Texas & Pac. Ry., 152 La. 117, 92 So. 754 (1922); Leader Realty Co. v. Taylor, 147 La. 256, 84 So. 648 (1920); John T. Moore Planting Co. v. Morgan's La. & T. Ry. & S.S. Co., 126 La. 840, 53 So. 22 (1910).

251 *See* Louisiana Land & Exploration Co. v. Parish of Jefferson, 59 F. Supp. 260 (E.D. La. 1945); Hunter Co. v. Ulrich, 200 La. 536, 8 So. 2d 531 (1942); Parish of Jefferson v. Texas Co., 192 La. 934, 189 So. 580 (1939).

252 Sun Oil Co. v. Stout, 46 So. 2d 151, 154 (La. App. 2d Cir. 1950).

253 124 La. 712, 50 So. 662 (1909). *See also* Segura Realty Co. v. Segura Sugar Co., 145 La. 510, 82 So. 684 (1919), involving a donation of land to be used for a sugar refinery. The instrument provided that it was "well understood that should the donee herein fail to use the lands herein donated for the purpose herein mentioned, that the said lands revert to the donor." 82 So. at 685. The refinery was constructed, but it was later destroyed by fire and its machinery was dismantled and sold. The court concluded that the act of donation had been revoked by the happening of the resolutory condition.

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and the lot should revert to the donor. The court held there was a donation of ownership subject to a resolutory condition that had materialized. In *Sun Oil Co. v. Stout*,[254] an instrument conveying one acre of land to a church recited that the grantor had "sold, conveyed and delivered" the property "to be used exclusively for the purpose of erecting a house of worship." The instrument also provided "when and if said property should ever be used for any other purpose or if it should ever be discontinued as a church, then and in that event the title thereto is to revert to the owner." The court held that the ownership of the land had been transferred subject to a resolutory condition that had not materialized. In *Askew v. Vicksburg, Southern & Pacific Railway*,[255] the contested instrument granted both a railroad right of way and an adjacent two acre tract for a depot site. Counsel contended the grant of the two acres of land constituted a servitude only. The court distinguished property granted for a railroad right of way from property granted for a railroad depot, and found the expression "for purpose of a railroad depot" merely described the purpose or one of the considerations of the grant. "The language of the instrument," the court declared, "does not limit the conveyance to that of a mere servitude on the two acres of land. On the contrary, a clause was written in the deed, immediately following the description of the two acres of land, declaring that it was understood that the grant of the right of way along the line of the proposed railroad was a grant of only a right of way, to be used only for a right of way."[256] Since no similar clause limited the two acres of land granted for a railroad depot, the court concluded the instrument was intended to convey ownership subject to a resolutory condition, not merely to create a servitude.

An instrument granting a right of way may intend either to create a servitude of passage[257] or to transfer the ownership of a strip of land.[258] Louisiana courts have consistently held "whether

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254 46 So. 2d 151 (La. App. 2d Cir. 1950).

255 171 La. 947, 132 So. 510 (1931).

256 *Id.* at 948-49, 132 So. at 510.

257 *See* Polk v. Ball, 149 F.2d 263 (5th Cir. 1945); Rock Island, A. & L. Ry. v. Gournay, 205 La. 125, 17 So. 2d 8 (1943); Hunter Co. v. Ulrich, 200 La. 536, 8 So. 2d 531 (1942); Texas & Pac. Ry. v. Ellerbe, 199 La. 489, 6 So. 2d 556 (1942); Parish of Jefferson v. Texas Co., 192 La. 934, 189 So. 580 (1939); Noel Estate, Inc. v. Kansas City S. & G. Ry., 187 La. 717, 175 So. 468 (1937); Bond v. Texas & Pac. Ry., 181 La. 763, 160 So. 406 (1935); Leader Realty Co. v. Taylor, 147 La. 256, 84 So. 648 (1920); John T. Moore Planting Co. v. Morgan's La. & T. Ry. & S.S. Co., 126 La. 840, 53 So. 22 (1910).

258 *See* Arkansas Improvement Co. v. Kansas City S. Ry., 189 La. 921, 181 So. 445 (1938); Nelson v. Texas & Pac. Ry., 152 La. 117, 92 So. 754 (1922); *cf.* Parish of Jefferson v. Texas Co., 192 La. 934, 189 So. 580 (1939); Knox v. La. Ry. & Nav. Co., 157 La. 602, 102 So. 685 (1925). Likewise, an instrument reserving a passage may contemplate either a servitude or the ownership of

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the one or the other is meant in any particular instrument must be gathered from the instrument as a whole."[259] The general rule states: "[T]he conveyance of a right of way is generally meant to be merely a servitude, 'unless the deed itself evidences that the parties intended otherwise.' "[260] Indeed, in cases involving grants of rights of way, courts tend to find an intention to create merely a servitude rather than to transfer ownership. One court has found this result "in line with the modern practice of companies constructing cross-country pipelines, and the like, to acquire only right-of-way rights through the lands over which the lines run."[261]

Landowners granting servitudes often couple the language and forms used in sales of immovable property with qualifying clauses designating the creation of a servitude instead of a transfer of ownership. In *Noel Estate, Inc. v. Kansas City Southern & Gulf Railway*,[262] an instrument stated that a described tract of land had

a strip of land. In the early case of Ducournau v. Marigny, 4 Mart. (o.s.) 708 (La. 1817), the vendor of a large tract of land reserved to himself "a passage of thirty feet" on both sides of a canal traversing the property sold. The court held the vendor had reserved the ownership of the strip rather than created merely a servitude. The decision was based on the use of the Spanish word for "passage" and on the intention of the vendor to safeguard the interests of his saw mill.

259 John T. Moore Planting Co. v. Morgan's La. & T. Ry. & S.S. Co., 126 La. 840, 53 So. 22 (1910), cited in a number of subsequent cases.

260 Ham v. Strenzke Realty Co., 218 La. 499, 508, 50 So. 2d 11, 14 (1951), *quoting* Texas & Pac. Ry. v. Ellerbe, 199 La. 489, 492, 6 So. 2d 556, 557 (1942). *See also* Welsh S. Oil Co. v. Scurlock Oil Co., 201 So. 2d 376 (La. App. 3d Cir. 1967); Sohio Petroleum Co. v. Hebert, 146 So. 2d 530 (La. App. 3d Cir. 1962); Esso Standard Oil Co. v. Texas & N.O. Ry., 127 So. 2d 551 (La. App. 3d Cir. 1961). In the absence of stipulations specifying the width of a railroad right of way, it has been held that the right extends "the entire width of the space occupied by the railroad embankment . . . down to the toe of said embankment, and including the ditches, their inner and outer slopes, along said embankment . . . ." John T. Moore Planting Co. v. Morgan's La. & T. Ry. & S.S. Co., 126 La. 840, 901-02, 53 So. 22, 43 (1910).

261 Sun Oil Co. v. Stout, 46 So. 2d 151, 154 (La. App. 2d Cir. 1950).

262 187 La. 717, 175 So. 470 (1937); *see* Leader Realty Co. v. Taylor, 147 La. 256, 84 So. 648 (1920); *cf.* Polk v. Ball, 149 F.2d 263 (5th Cir. 1945) (grants of rights of way for railroad purposes; held, they established servitudes only). *See also* Texas & Pac. Ry. v. Ellerbe, 199 La. 489, 6 So. 2d 556 (1942). The grantor there declared that he "sells and delivers . . . the right of way now occupied" by the grantee Railway Company. The court held that the instrument conveyed a servitude only. "Nowhere in the instrument," the court declared, "is found anything evidencing an intention . . . to grant to the railroad more than an absolute right to continue to use his land for the purpose for which it was then being occupied and used by the company." *Id.* at 489, 6 So. 2d at 557. In Parish of Jefferson v. Texas Co. 192 La. 934, 189 So. 580 (1939), a notarial act declared that the Parish of Jefferson did "grant, donate, convey, transfer, assign and set over unto the United States of America for perpetual use as a right of way for the Barataria Bay Waterway" a described tract of land situated in the Parish of Jefferson. The court held the Parish intended to convey, and did actually convey, a servitude. *Cf.* Hunter Co. v. Ulrich, 200 La. 536, 8 So. 2d 531 (1942) (grant of right of way for canal purposes; the court found from an examination of the entire instrument and the surrounding circumstances that the intention of the grantor was to create a servitude).

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been "sold and conveyed for railroad purposes only" and that the grant was "in perpetuity or so long as it is used by said Company, its successors, or assigns, for railroad purposes, but if abandoned . . . for such use and purpose, then said land shall revert to the grantor herein or his heirs or assigns."[263] The court, by interpreting the instrument as a whole, found an intention to create a servitude only. In *John T. Moore Planting Co. v. Morgan's Louisiana & Texas Railway & Steamship Co.*,[264] the court again encountered an instrument conveying a right of way for railway purposes. No width was assigned to the right of way; a stipulation did provide that no more than two lines of track were to be constructed. The grantor had reserved the right to cultivate land on either side of the line not being used by the railroad company. The court found an intention to create a servitude only, because "if a strip of land running across the plantation had been intended to be conveyed, the parties would hardly have failed to specify its width." Further, the court pointed to the stipulations regulating the use of the right of way and concluded: "[T]hese stipulations are inconsistent with the idea of the fee of a strip of land having been intended to be conveyed to the railroad; and indicate strongly that a mere right of passage was intended to be given."[265]

In *Rock Island, Arkansas & Louisiana Railroad v. Gournay*,[266] the granting clause of an instrument recited that the grantors "do hereby grant, convey, sell and deliver" to a railroad company and

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[263] Noel Estate, Inc. v. Kansas City S. & G. Ry., 187 La. 717, 719-20, 175 So. 468, 469 (1937).

[264] 126 La. 840, 53 So. 22 (1910).

[265] *Id.* at 869, 53 So. at 32. *See also* Bond v. Texas & Pac. Ry., 181 La. 763, 160 So. 406 (1935). In this case, the instrument before the court declared that the grantor "does give, grant and donate unto the Natchitoches Railroad Company a right of way 150 feet in width over any of his land through which the line of road of said Company now passes," that the Company shall have "the right to fell all timber within reach of center line of said road," that the donor shall have the right "to cultivate all land included in this grant or to use the same, provided such cultivation or use does not interfere with the management or operation of said railroad," and that the "grant is to be perpetual or so long as it is to be used as a railroad." The court held the stipulations in the grant were inconsistent with the claim that the parties intended to convey the ownership of the land.

[266] 205 La. 125, 17 So. 2d 8 (1943). When an instrument conveys a tract of land "less" a certain "right of way," the jurisprudence is agreed that "the entire tract described in the deed, including the land under the right-of-way, is conveyed. The mention of the right-of-way under these particulars operates as an acknowledgment of the existence of the right-of-way servitude and thus removes it from the vendor's warranty. The vendors under such a deed are stripped of all vestiges of ownership in the property conveyed, and such clauses are not ambiguous under the settled jurisprudence of this State." Hendrick v. Texas & Pac. Ry., 212 So. 2d 745, 747 (La. App. 2d Cir. 1968). *See also* Rock Island, A. & L. Ry. v. Guillory, 205 La. 141, 17 So. 2d 13 (1943); Welsh S. Oil Co. v. Scurlock Oil Co., 201 So. 2d 376 (La. App. 3d Cir. 1967); Green v. Chamberlain, 60 So. 2d 120 (La. App. 1st Cir. 1952).

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its successors and assigns "in perpetuity, a strip of land, one hundred (100) feet in width, over and upon the following described land." Additional stipulations in the same instrument referred to "the right of way" and conferred upon the grantee "the right to change water courses, and to take stone, gravel and timber and to borrow earth, on said right of way for the construction and maintenance of said railroad." The court found that the instrument was not in the usual form employed for the sale of lands and that only the granting clause supported an intention to transfer ownership. But the court declared that the granting clause, like any other clause, cannot be isolated and construed alone. Further, the meaning of the granting clause had been made uncertain by the words "in perpetuity" and "over and upon." Had the parties intended a transfer of ownership, these words would have been unnecessary; indeed, these words were more consistent with an intention to create a servitude only. Turning to other stipulations in the same instrument, the court observed that the words "right of way" had been employed several times. More importantly, the language giving the railroad company the right to change the water courses, to take stone, gravel, and timber, and to borrow earth on the right of way, would have been useless if a transfer of ownership had been intended. Obviously, the right to use the property for these purposes and in these ways would have been a mere incident of ownership. The court concluded that the parties had intended to create a servitude of passage. The use by contracting parties of the expressions "right of way" and "for railroad purposes" does not "necessarily indicate that the intent was to convey a mere easement or servitude."[267] The courts may, based on a proper interpretation, conclude that the parties intended to transfer ownership. In *Arkansas Improvement Co. v. Kansas City Southern Railway*,[268] the instrument in question provided that the grantee was "to have and to hold, the above described premises . . . for railroad purposes . . . for ever." The court found the instrument to have all the characteristics

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[267] Arkansas Improvement Co. v. Kansas City S. Ry., 189 La. 921, 930, 181 So. 445, 448 (1938).

[268] 189 La. 921, 181 So. 445 (1938); *see* Nelson v. Texas & Pac. Ry., 152 La. 117, 92 So. 754 (1922) (interpretation of instrument conveying right of way for railroad purposes; held, "the deed . . . is an absolute conveyance of a strip of land . . . . It is perfect on its face, contains all the elements essential to constitute a sale, and transfer the ownership of the land itself, without any exception or reservation"); *cf.* Parish of Jefferson v. Texas Co., 192 La. 934, 189 So. 580 (1939) (interpretation of judgment of expropriation; held, Parish acquired the ownership of a right of way rather than merely a servitude over a canal). *See also* Louisiana Land & Exploration Co. v. Parish of Jefferson, 59 F. Supp. 260 (E.D. La. 1945) (same); Knox v. Louisiana Ry. & Nav. Co., 157 La. 602, 102 So. 685 (1925) (interpretation of judgment of expropriation; held, railroad company acquired the ownership of a strip of land rather than merely a right of way for railroad purposes).

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of a sale of land, and, after a careful interpretation of the document as a whole, aided by extrinsic evidence, the court concluded that the parties had intended to convey full ownership rather than merely a servitude. In another case, *Ham v. Strenzke Realty Co.*,[269] an instrument likewise bearing all the attributes of a valid sale of land had been placed in the records. Interested parties contended the instrument had merely conveyed a servitude for highway purposes, because an annexed map bore the legend "Plat showing Right of Way of the Baton Rouge-L.S.U. Highway across property of Fred Arbour," and because the instrument itself stipulated that the embankment of the proposed highway should not exceed a certain height. The court found the map to be part of an original plan for the creation of a servitude that had not been carried out and the clause in the instrument to be for the protection of the vendor's remaining property. Interpreting the instrument as a whole, aided by extrinsic evidence, the court concluded the intention of the parties was to convey ownership. Finding that the parties had affixed and cancelled United States documentary stamps, an unnecessary act had they merely intended to create a servitude, bolstered this conclusion.

Predial Servitude, Personal Servitude, or Personal Obligation

When contracting parties do not specify the kind of right they intended to create, the question may arise whether they intended to create a predial servitude, a personal servitude, or merely a personal obligation. This question is resolved in Louisiana by applying Civil Code articles 754-58, the rules of interpretation used to ascertain the kinds of rights created by juridical acts lacking express designation. These articles have no analogue in the Civil Codes of France, Germany, or Greece; they were first introduced in the 1825 Louisiana Civil Code and were based on Toullier's treatise.[270]

Article 754 of the 1870 Louisiana Civil Code declares: "Servitudes being established on estates in favor of other estates, and not in favor of persons, if the grant of the right declare it to be for the benefit of another estate, there can be no doubt as to the nature of this right, even though it should not be called a servitude."[271] Thus, when a right of passage is expressly reserved "for the benefit and advantage of the property,"[272] a predial servitude is clearly estab-

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269 218 La. 499, 50 So. 2d 11 (1950).

270 For detailed discussion, see Servitudes, *supra* note 13, § 125.

271 La. Civil Code art. 754 (1870); La. Civil Code art. 750 (1825). According to the redactors of the 1825 Louisiana Civil Code, the source of this provision is "Thoulier, droit civil, vol. 3, No. 588, p. 494." 1 La. Legal Archives, *supra* note 12, at 82.

272 Theriot v. Consolidated Cos., Inc., 160 La. 465, 107 So. 305 (1926).

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lished. But when the act establishing the servitude either does not declare that the right is given for the benefit of an estate or declares that the right is given to the owner of an estate, whether the parties intended to create either a predial servitude or another right is to be determined by applying articles 755-57.[273] Article 755 provides:

> If . . . the act establishing the servitude does not declare that the right is given for the benefit of an estate, but to a person who is the owner of it, it must be considered whether [from its nature] the right granted be of real advantage to the estate, or merely of personal convenience to the owner.[274]

Article 756 provides:

> If the right granted be of a nature to assure a real advantage to an estate, it is to be presumed that such a right is a real servitude, although it may not be so styled.
>
> Thus, for example, if the owner of a house contiguous to lands bordering on the high road, should stipulate for the right of passing through [these] lands, . . . it would be not the less a real servitude, for it is evident that the passage is is of real utility to the house.[275]

And article 757 declares:

> If, on the other hand, the concession from its nature is a matter of mere personal convenience, it is considered personal, and can not be made real but by express declaration of the parties.
>
> Thus, for example, if the owner of a house near a garden or park, should stipulate for the right of walking and gathering fruits and flowers therein, this right would be considered personal to the individual, and not a servitude in favor of the house or its owner.
>
> But the right becomes real and is a predial servitude, if the person stipulating for the servitude, acquires it as owner of the house, and for himself, his heirs, and assigns.[276]

Whether an instrument created a *predial servitude* or merely a *personal obligation* was the question in *Burgas v. Stoutz*.[277] An act

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[273] La. Civil Code arts. 755-57 (1870).

[274] *Id.* art. 755; La. Civil Code art. 751 (1825). According to the redactors of the 1825 Louisiana Civil Code, the source of this provision is "Thoulier, droit civil, vol. 3, No. 588, p. 494." 1 La. Legal Archives, *supra* note 12, at 83.

[275] La. Civil Code art. 756 (1870); La. Civil Code art. 752 (1825). According to the redactors of the 1825 Louisiana Civil Code, the source of this provision is "Thoulier, droit civil, vol. 3, Nos. 586 p. 495." 1 La. Legal Archives, *supra* note 12, at 83.

[276] La. Civil Code art. 757 (1870); La. Civil Code art. 753 (1825). According to the redactors of the 1825 Louisiana Civil Code, the source of this provision is "Thoulier, droit civil, vol. 3, No. 588, p. 495." 1 La. Legal Archives, *supra* note 12, at 83.

[277] 174 La. 586, 141 So. 67 (1932).

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of sale stipulated that "the purchaser, its successors and assigns, shall have the privilege of using the paved driveway in the rear" of the vendor's property. The act had been recorded, but the words "its successors and assigns" were omitted from the public records. A subsequent purchaser of the vendor's property, relying in part on the omission of those words, argued the recorded act had established merely a personal obligation. The court found a predial servitude established by the act of sale as originally executed, because the right of passage was acquired by the purchaser as owner of an estate and for his successors and assigns. But, since the act, as recorded, granted the right of passage to the purchaser only (and did not declare that the right was given for the benefit of an estate), the court felt the issue ought to be determined in light of the tests furnished by articles 755-57. In the court's opinion, the right of passage was of utility to the property; the right gave the property "more free space either for building or for flowers, or for a garden" and made the property "more desirable and valuable."[278] The court bolstered its conclusion (the act, as recorded, established a predial servitude) by observing that the right of passage was given not to a named individual but to the purchaser,[279] "thereby connecting the servitude with the property as a real advantage to it, and not as a mere matter of convenience to a particular person and terminating with him."[280]

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[278] *Id.* at 592, 141 So. at 69. *See also* Charles M. Gillis & Co. v. Nelson & Donalson, 16 La. Ann. 275, 279 (1861) (irrigation servitude; the court declared that "the contract does not appear to us to be personal, for its object could only be for the advantage of the respective tracts of land"). The question whether the parties had intended to create a personal right rather than a servitude might have arisen in the early case of Ducournau v. Marigny, 4 Mart. (o.s.) 708 (La. 1817). The vendor of a tract of land had reserved to himself "a passage of thirty feet" on both sides of a canal traversing the property sold. The issue before the court, however, was whether ownership or merely a predial servitude of passage was reserved. *See* note 258 *supra.*

[279] *Cf. Predial Servitudes, supra* note 2, at 26. For cases involving the creation of personal rights in favor of named persons rather than predial servitudes, see Declouet v. Borel, 15 La. Ann. 606 (1860), in text at note 294 *infra;* Martin v. Louisiana Pub. Util. Co., 127 So. 470 (La. App. 1st Cir. 1930) (oral contract to connect property with sewage lines; held, it was a rental agreement, not a predial servitude); Kelly v. Pippitone, 126 So. 79 (La. App. Orl. 1930). In *Kelly,* landowners entered into agreements for the use of a community driveway located on the boundary of their adjacent lots. The driveway was expressly stipulated to be for the benefit of the named parties who assumed the obligation to inform future purchasers of their properties about the existence of the agreement. When one of the landowners sold his property to a third person who promptly blocked the driveway, the other landowner claimed that a servitude had been created by destination *du père de famille,* conceding that there was no servitude by title. The court held the conditions for the creation of a servitude by destination had not been met.

[280] 174 La. at 592, 141 So. at 69. Application of the public records doctrine would, of course, yield the same result. The court pointed out that since the original document had been deposited in the recorder's office, showing that the right of passage had been granted to the purchaser and his successors and

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The question whether property is burdened with a predial servitude or is used through a personal right may also arise in the absence of any title. This question is likewise to be resolved by applying articles 755-57. In *Levet v. Lapeyrollerie*,[281] counsel argued that a right of drain was a predial servitude acquired by prescription rather than a personal right established in favor of a dissolved partnership. The court found the right of drain to have been established for the benefit of a tract of land by viewing the right "of such advantage to [the tract] that, without it, the tract should not be successfully cultivated." Supported by this finding, the court held the claimant of the servitude entitled to the full benefit of the presumption of article 757 and recognized the servitude.

Instruments raise not only the question whether contracting parties intended to create a predial servitude or a personal obligation, but also the question whether contracting parties intended to create a *predial servitude* or a *limited personal servitude*, a real right of enjoyment other than usufruct, use, or habitation.[282] Articles 755-58 indicate that contracting parties may create either predial servitudes or merely personal obligations. Actually, in addition to furnishing rules for the interpretation of juridical acts, these articles authorize, by clear implication, the creation of limited personal servitudes as well as the creation of predial servitudes and personal obligations. Toullier, whose text was closely followed by the redactors of the 1825 Louisiana Civil Code, had originally declared that personal servitudes other than usufruct, use, and habitation were forbidden and that rights of enjoyment that do not qualify as predial servitudes or as usufruct, use, or habitation, were necessarily personal obligations.[283] He revised this view, however, in the third volume of his treatise, concluding that a real right of enjoyment, binding on all subsequent acquirers of the property, may be validly stipulated in favor of a person rather than an estate. This right would not be a predial servitude because it would terminate with the life of the beneficiary; nor would it be a personal service forbidden by article 686 of the Code Civil.[284]

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assigns, the purchaser of the vendor's property had constructive notice. Indeed, according to Louisiana jurisprudence, "an act of conveyance is effective against third persons as soon as deposited for record in the recorder's office." *Id.*, 141 So. at 69.

[281] 39 La. Ann. 210, 1 So. 672 (1887). *See also* Greco v. Frigerio, 3 La. App. 649 (La. App. Orl. 1926) (bathroom servitude; held, a predial servitude for the benefit of the dominant estate rather than a personal right for the convenience of the owner).

[282] For a discussion of limited personal servitudes, see Servitudes, *supra note* 13, §§ 123-25.

[283] *See* Toullier, *supra* note 108, at 167; *cf.* Servitudes, *supra* note 13, § 125; text at note 151 *supra*.

[284] *See* 3 C. Toullier, Droit civil français 401 (1833). For a translation of the pertinent passage, see Servitudes, *supra* note 13, at § 125; text at note 153

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The obvious conclusion is, then, that the expression "personal to the individual" in articles 757 and 758 of the 1870 Louisiana Civil Code does not mean that if a right is not a predial servitude it is necessarily a personal obligation binding only the parties to the agreement. The right may also be a limited personal servitude expiring upon the beneficiary's death in the absence of contrary stipulation.[285] If the right were necessarily a contractual right of enjoyment, it should not terminate upon the beneficiary's death. Obligations are, in principle, heritable;[286] only personal servitudes, real rights of enjoyment, terminate upon the beneficiary's death.[287] Of course, usufruct, use, and habitation may not become heritable by contrary stipulation;[288] but, in contrast, limited personal servitudes may validly be stipulated as heritable.[289] Quite apart from the Civil Code, Louisiana statutes provide for the creation of servitudes in favor of public utilities and governmental agencies. Such servitudes may be neither predial servitudes nor usufruct, use, and habi-

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supra. The corresponding Louisiana article is La. Civil Code art. 709 (1870). Usufruct, use, and habitation are the only personal servitudes regulated in the Louisiana and French Civil Codes. A question, therefore, has arisen in the two jurisdictions as to the freedom of interested parties to create by will or agreement additional kinds of personal servitudes. Article 646 of the 1870 Louisiana Civil Code, which has no equivalent in the French Civil Code, declares that personal servitudes are "of three sorts: usufruct, use and habitation." Further, article 709 of the 1870 Louisiana Civil Code, corresponding with article 686 of the French Civil Code, declares that services may not be imposed "in favor of the person." These provisions seem to exclude the creation of personal servitudes other than usufruct, use or habitation. Nevertheless, French courts and commentators today agree that charges may be laid on an estate in favor of a person as limited personal servitudes expiring with the life of the beneficiary. Article 686 of the Code Civil thus prohibits services imposed on a person in favor of another person and services imposed on an estate in favor of a person and his heirs. Limited rights of enjoyment on an estate in favor of a person are designated in France by the generic "rights of use." In Louisiana, the scope of articles 646 and 709 of the 1870 Civil Code is modified by articles 754-58 of the same Code, which have no equivalents in the French Code, and by special legislation. *Cf.* note 289 *infra*.

285 *See* La. Civil Code art. 758 (1870); La. Civil Code art. 754 (1825). No corresponding provision appears in the Louisiana Civil Code of 1808 or in the French Civil Code. According to the redactors of the 1825 Louisiana Civil Code, the source of this provision is "Thoulier, droit civil, vol. 3, No. 588, p. 495." 1 La. Legal Archives, *supra* note 12, at 83.

286 *See* La. Civil Code art. 1999 (1870); Comment, *Heritability of Conventional Obligations*, 31 Tul. L. Rev. 324 (1957).

287 *See* La. Civil Code arts. 646, 758 (1870).

288 *See* Servitudes, *supra* note 13, §§ 12, 118, 122.

289 La. Civil Code art. 758 (1870). In a landmark decision, Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 863-64, 91 So. 207, 245 (1922), the Louisiana Supreme Court declared: "[T]he right to establish a servitude in favor of a person *and his heirs* seems to be forbidden by C. C. arts. 646, 709. But, on the other hand, it seems to be allowed by C. C. arts. 607, 758, 2013. And with these conflicting provisions before us we cannot say that the law clearly prohibits the creation of a servitude upon lands in favor of a person *and his heirs*. And hence the intention of the parties should govern in such matters." For detailed discussion, see Property, *supra* note 1, §§ 99, 100.

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tation.[290] These so-called servitudes do not conform to the Civil Code definition of predial servitudes because they are not charges laid on an estate in favor of another estate;[291] nor do they conform with the definitions of usufruct, use, and habitation.[292] Like predial servitudes, these rights are transferable to heirs and assigns, and their duration is unlimited; like usufruct, use, and habitation, these rights are charges laid on an estate in favor of a person. They should be classified as limited personal servitudes, real rights of enjoyment established in favor of a person, governed by the rules for both predial and personal servitudes.[293]

Under both the Civil Code and special legislation, the content of a predial servitude may be stipulated as a limited personal servitude. In the early case of *Declouet v. Borel*,[294] one of the parties to a contract of exchange reserved for himself, his heirs and assigns, the right to cut timber on the other party's property. The party contended that the right reserved was either a predial servitude or, at the least, a personal servitude transferable to heirs and assigns. The court held that no predial servitude was established, because the right had not been reserved in favor of an estate but in favor of named persons. Further, the court held that no personal servitude was created, because if personal servitudes were "capable of such perpetuity by inheritance and transfers as contemplated by plaintiff, it is obvious that titles to estates would become by their complications far removed from that simplicity which has ever been the policy of our own law to preserve."[295] The court, therefore, regarded the words of inheritance as not written and concluded that the contract established purely personal rights. Insofar as this case refuses to recognize the validity of limited personal servitudes, it must be considered overruled.[296]

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[290] *See generally* La. R.S. 19:1-2 (1950) (expropriation of ownership or servitudes by public corporations and public utilities); *id.* 2:82, 389 (expropriation of air rights); *id.* 12:428 (electric cooperatives); *id.* 38:2334 (Sabine River Authority); *id.* 45:64 (irrigation canals); *id.* 48:833 (servitudes for highway purposes).

[291] *See* La. Civil Code art. 648 (1870). *See also* New Iberia Rice-Milling Co. v. Romero, 105 La. 439, 29 So. 876 (1901) (irrigation right established in favor of a corporation; held, not a predial servitude on account of the absence of a dominant estate).

[292] La. Civil Code arts. 533, 626, 627 (1870).

[293] Thus, for example, limited personal servitudes ought to confer a determined advantage to the beneficiary without imposing affirmative duties on the owner of the servient estate. *See* La. Civil Code arts. 654, 655 (1870). On the other hand, as personal servitudes, they ought to expire with the individual beneficiary's death, unless the contrary has been stipulated. *Id.* at art. 758.

[294] 15 La. Ann. 606 (1860).

[295] *Id.* at 608; *cf.* Louisiana & A. Ry. v. Winn Parish Lumber Co., 59 So. 403, 411 (La. 1912) (Provosty, J., separate opinion on rehearing).

[296] *See* Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So.

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In *Simoneaux v. Lebermuth & Israel Planting Co.*, [297] the court seemed willing to recognize a right of passage as a valid personal servitude. Plaintiff had granted to defendant a right of way over her property to construct a railway needed to transport crops to defendant's refinery. Years later, defendant sold both the refinery and the right of way to a third person. Plaintiff sued to annul the grant, contending it was a personal servitude granted in favor of the defendant and could not be transferred. The court declared:

> The right granted, whether it be considered a real or a personal servitude, may be sold. . . . If the right granted be considered a personal servitude, we think that its sale is authorized by article 2449 of the Civil Code . . . . There is nothing in article 758, cited by plaintiff, that provides to the contrary, directly or indirectly. All that the article provides is that, unless the contrary be expressly stipulated, a servitude personal to the individual expires with him. If the servitude in contest be considered personal, it can be so considered only in the sense that it is not predial, or in favor of an estate. It cannot be considered personal in the sense of being nonheritable or nontransferable. It is only to personal servitudes that are nonheritable or nontransferable that article 758 refers.[298]

In a subsequent case, *Mallet v. Thibault*,[299] the court clearly recognized the validity of limited personal servitudes, finding a servitude of passage had been established in favor of a person.

> [W]e are not unmindful of Article 709 of the Code which seems to forbid conventional establishment of a servitude in favor of a person. However, that article cannot be reconciled with Articles 757 and 758 which are contained in Section 2 of Chapter 4 of Title IV dealing with the establishment of servitudes and which provide directly to the contrary. . . .

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207 (1920), note 289 *supra;* Mallet v. Thibault, 212 La. 79, 31 So. 2d 601 (1947), note 300 *infra.*

[297] 155 La. 689, 99 So. 531 (1924). *See also* Theriot v. Consolidated Cos., Inc., 160 La. 465, 107 So. 305 (1926). In *Theriot*, an act of sale established a predial servitude and, in addition, the vendor's right to have the "use, for himself and the members of his immediate family, of one-half of the garage located on the property sold and conveyed." This use was further stipulated to be strictly personal to the vendor and his immediate family, and to exist only so long as the vendor occupied his residence. When the vendor sold his residence, the purchaser did not even claim that he had the right to use the garage. Obviously, whether the right of passage was a limited personal servitude or merely a personal right would make no difference, because in either case the right could not be exercised by third persons.

[298] Simoneaux v. Lebermuth & Israel Planting Co., 155 La. 689, 694-95, 99 So. 531, 533 (1924).

[299] 212 La. 79, 31 So. 2d 601 (1947). For another case involving a personal servitude of passage, see Brown v. Terry, 103 So. 2d 541 (La. App. 1st Cir. 1958). A stipulation in an act of sale created a right of passage in favor of

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Thus the creation of a personal servitude by convention will be approved provided, of course, that it does not contravene the public order.[300]

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the purchaser and provided that the "servitude shall remain in effect only as long as [vendee] shall be record owner."

[300] Mallet v. Thibault, 212 La. 79, 89-90, 31 So. 2d 601, 604 (1947).

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