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COMMON WALLS, FENCES AND DITCHES: LOUISIANA AND COMPARATIVE LAW

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Articles 675 through 691 of the Louisiana Civil Code of 1870 deal with "Walls, Fences, and Ditches in Common." First adopted in the 1808 Louisiana Code, these provisions derive from French sources, and, for the most part, have exact counterparts in the Napoleonic Code.

The rules governing common enclosures are not of Roman origin. As a rule, the Romans used to leave free spaces between their houses in cities and in the villages; consequently, common walls (paries communis), and legal texts applicable to them, were rare. In walled French towns during the middle ages, however, economy of space and construction compelled utilization of fences and ditches as common enclosures of adjoining estates, and of walls as common supports of adjoining buildings. This led to the development of customary law dealing with common enclosures. The detailed rules of the Custom of Paris and of the Custom of Orleans in this field proved most influential in the drafting of the Napoleonic Code and of the Louisiana Civil Code.

The rules governing common enclosures are expounded

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1. See LA. CIV. CODE Bk. II, Tit. IV, Ch. 3, § 1, Of Walls, Fences, and Ditches in Common, arts. 675-91; La. Civ. Code arts. 671-87 (1825); La. Digest of 1808, pp. 132, 134, arts. 31-37.
2. See Batiza, The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance, 46 TUL. L. REV. 4, 69 (1971); 1972 COMPIL. EDITION OF THE CIVIL CODES OF LOUISIANA arts. 675-91 (J. Dainow ed.); text at note 25, infra. LA. CIV. CODE arts. 675-76, 686 (2), and 687 (1870) have no counterparts in the Code Napoleon (1804). In this work, the Code Napoleon refers to the 1804 text of the French Civil Code.
3. See Code Napoleon arts. 653-73 (1804). Several of these provisions dealing with common enclosures have been amended in France by the laws of August 20, 1881, February 12, 1921, and May 17, 1960. See Dalloz, CODE CIVIL arts. 653-73 (1974).
4. See, e.g., DIGEST 8.2.8: "One of the two neighbors does not have the right to demolish and rebuild a wall that is common by natural reason because he is not its sole owner." See also DIGEST 39.2.36, 37, and 39.
in France and in Louisiana in the framework of legal servitudes. Thus, the right that a landowner has in Louisiana to place one-half of a partition wall on the land of his neighbor, to acquire the co-ownership of an adjoining wall that his neighbor has built at or on the boundary, or to demand contribution for the making and repairing of common fences and ditches, is regarded as arising by virtue of a servitude imposed by law. Enclosures held in common are subject to a special regime of co-ownership. In principle, "the ownership of the soil carries with it the ownership of all that is directly above and under it." Application of this principle should lead to the conclusion that a boundary enclosure is divided by a vertical plane along its entire length, and each of the adjacent landowners owns the part of the enclosure that is located on his side of the boundary. This "subtlety," however, has been rejected in France and in Louisiana. Instead, the common enclosure is regarded as immovable property belonging to the adjacent landowners in indivision and insusceptible of partition in kind or by licitation.

The German and Greek civil codes, in accordance with modern analytical technique, leave no room for the notion of legal servitudes or for a legal regime of co-ownership of boundary enclosures. Interested neighbors may agree to build a

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6. On the notion of legal servitudes, see Yiannopoulos, Predial Servitudes; General Principles: Louisiana and Comparative Law, 29 LA. L. REV. 1, 43 (1968).
7. LA. CIV. CODE art. 505; FRENCH CIV. CODE art. 552. See also Oldstein v. Firemen's Bldg. Ass'n, 44 La. Ann. 492, 10 So. 928 (1892).
9. See 2 AUBRY ET RAU at 563-90; 3 PLAINOL ET RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANÇAIS 294-313 (2d ed. Picard 1952) [hereinafter cited as PLAINOL ET RIPERT]; 11 DEMOLOMBE, COURS DE CODE NAPOLEON 334-487 (1876) [hereinafter cited as DEMOLOMBE]; 2 TOULLIER, DROIT CIVIL FRANÇAIS 50-82 (1833) [hereinafter cited as TOULLIER].
See also Weil v. Baker, Sloo & Co., 39 La. Ann. 1102, 1103, 3 So. 361, 362 (1887): "There is no division of ownership of a wall in common. The whole belongs jointly, and in indivision, to the neighboring proprietors, and is intended to serve their common purposes, without reference to the dividing line between the lots."
10. On the date the German Civil Code acquired the force of law, common enclosures in Germany were subject to local customs and legislation. In Rheinland, for example, a body of law had developed on the basis of Articles 660 and 661 of the Code Napoleon. Provisions in the Introductory Law of the German Civil Code allowed the various states to continue developing their own laws in this field or retain the rules they had at the time of the adoption of the Civil Code. See C. MEISNER, H. STERN & F. HODES, NACHBARRECHT 119 (3d ed. 1956) [hereinafter cited as MEISNER, STERN & HODES].
common enclosure or to make an already built one common. But, in the absence of such an agreement, a wall or other enclosure belongs to the owner of the ground on which it is located by application of the principle *superficies solo credit*, namely, whatever is attached to the land forms part of it. If a wall straddles the boundary, it is considered to be divided into two strips along its entire length each belonging individually to the landowner on whose side it is located.\(^1\) The two codes have thus avoided the notion of a common enclosure as a distinct immovable that belongs in indivision to the owners of adjacent estates. Nevertheless, both codes establish a significant limitation on the individual ownership of enclosures straddling the boundary: in the absence of contrary evidence or other disposition, these are presumed to be for the common use of the adjoining neighbors.\(^2\)

In common law jurisdictions, reference is frequently made to “party” walls, fences, and ditches. A party wall is one “built partly on the land of one owner, and partly on the land of another, for the common benefit of both in supporting timbers used in the construction of contiguous buildings.”\(^3\) There are at least four distinct possibilities concerning the nature of interests in a party wall. A party wall may be a wall of which the two adjoining owners are tenants in common; a wall divided longitudinally into two strips, one belonging to each of the two adjoining neighbors; a wall that belongs entirely to one of the adjoining neighbors but is subject to an easement in favor of the other; or a wall divided longitudinally into two parts, each being individually owned but subject to reciprocal easements in favor of the adjoining owners.\(^4\)

\(^{11}\) See G. Balis, Civil Law Property 121 (3rd ed. 1955) (in Greek) [hereinafter cited as Balis]. This is also the prevailing view in Germany. See H. Westermann, Sachenrecht 331 (4th ed. 1960). For a critique, see Meisner, Stern, & Hodes at 100-03.

\(^{12}\) See Greek Civ. Code arts. 1021, 1022; BGB §§ 921, 922.

\(^{13}\) Black's Law Dictionary 1279 (4th ed. 1951). Article 103 of the New Orleans Building Code defines “party wall” as: “A wall constructed in the same manner as a ‘Fire Wall,’ and used, or built to be used, as a separation of 2 or more buildings; also, a wall constructed as above and built upon the dividing line between adjoining premises for their common use, extending to and above the roof, except where the roof is of fireproof or fire-resistive construction and the wall carried tightly against the underside of the roof slab.”

The Louisiana Civil Code speaks of *common* walls, fences, and ditches or of such enclosures *held in common*. These expressions are translations of the French *mur mitoyen* and *mitoyennet*. In Louisiana legal literature and judicial decisions, however, the term *party walls* is frequently used to denote either a partition wall that belongs to one of the two neighbors or a common wall. This is common law terminology that should be avoided because it lacks precision and leads to confusion of ideas: actually, in a leading Louisiana case, the litigants became so confused by terminology that each was pleading against interest. In the following study, a wall, fence, ditch, or other enclosure owned in indivision by the adjoining owners will be designated as a *common enclosure* or as one *held in common*. A wall, fence, ditch, or other enclosure that is not so owned will be termed a *private enclosure*.  


15. On etymology and history, see Masselin, Nouvelle Jurisprudence et Traité Pratique des Murs Mitoyens (4th ed. 1883-1888); Mejassol, La Mitoyenneté des Murs (Thesis, Paris 1939); 2 G. Ripert et J. Boulanger, Traité de Droit Civil 920 (1957).


18. See Monteleone v. Harding, 50 La. Ann. 1147, 23 So. 990, 991 (1898); Heine v. Merrick, 41 La. Ann. 194, 5 So. 760 (1889); Heiderich v. Heiderich, 3 Orl. App. 485, 486 (1906); Burns v. Briede, 2 Orl. App. 410, 411 (La. App. Orl. Cir. 1906). In Dorville v. Amat, 6 La. Ann. 566 (1851), the court distinguished a party wall from a wall in common: “This wall being the separating wall of adjoining houses in a city, was not only a party-wall in fact, but was a common wall, by presumption of law.”


20. Cf. 3 Planiol et Ripert at 294.
COMMON WALLS

Building a Wall on the Boundary; Article 675

Article 675 of the Louisiana Civil Code of 1870 establishes a legal servitude whereby a landowner may, under certain conditions, build a dividing wall partly on the land of his neighbor. This article declares:

He who first builds in the cities and towns, or their suburbs, of this State, in a place which is not surrounded by walls, may rest one-half of his wall on the land of his neighbor, provided he builds with stones or bricks at least as high as the first story, and not in frame or otherwise; and provided the whole thickness of this wall do not exceed eighteen inches, not including the plastering, which must not be more than three inches. But he cannot compel his neighbor to contribute to the raising of this wall.21

Historical derivation. There is no corresponding provision in the French, German, or Greek Civil Code, or in any other civil code enacted in the twentieth century. There is, however, a corresponding provision in the Quebec Civil Code of 1867.22 There has been much speculation in Louisiana con-

21. See LA. CIV. CODE art. 675; La. Civ. Code art. 671 (1825); La. Digest of 1808, p. 132, art. 23. There is no corresponding provision in the Code Napoleon. The phrase "not including the plastering" is a translation of the French "sans y comprendre l'empattement." In the 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA, it is noted that "The French 'empattement' is generally translated as 'foundation.' The editorial staff is not prepared to say that 'plastering' is an error." 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 675 (J. Dainow ed.).

In Pierce v. Musson, 17 La. 389, 393, 394 (1841), "empattement" is correctly translated as "the projecting part of the foundation." The redactors of the 1808 Code apparently intended to give to a landowner the right to take up to three inches of his neighbor's ground for the projection of the foundation of a wall built on the boundary. See text at note 26, infra. Louisiana courts, however, did not pay attention to the mistranslation as they routinely referred to the English text of the Civil Code. See Jeannin v. DeBlanc, 11 La. Ann. 465 (1856); Duncan v. Labouisse, 9 La. Ann. 49 (1854); Grailhe v. Hown, 1 La. Ann. 140 (1846).

22. See QUEBEC CIV. CODE art. 520: "Every person may oblige his neighbour, in incorporated cities and towns, to contribute to the building and repair of the fence-wall separating their houses, yards, and gardens, situated in the said cities and towns, to a height of ten feet from the ground or the level of the street, including the coping, and to a thickness of eighteen inches, each of the neighbours being obliged to furnish nine inches of ground; saving that he for whom such thickness is not sufficient may add to it at his own cost.
cerning the origin of Article 675 of the 1870 Code, which was first adopted as Article 23, page 132, in the 1808 Code. It has been suggested that the redactors of the 1808 Code were influenced by American sources, such as the statutes of Pennsylvania and building regulations of the District of Columbia.23 The de la Vergne volume refers to a text in the Fuero Real24 that deals with the relations of the co-owners of an immovable and has nothing to do with the common wall servitude that Article 675 establishes. Fanciful explanations as to the origin of this provision must yield to convincing proof. The presence of a corresponding provision in the Quebec Civil Code, which does not seem to have been borrowed from Louisiana, suggests the existence of a common source in the French tradition. This is to be found in Article 236 of the Custom of Orleans, which provides that a landowner may compel his neighbor to construct at common expense a wall of enclosure, made of stones and earth, one foot and a half in thickness, two feet in foundation, and seven feet in height above the ground.25 One may understand, therefore, the mathematical formula that the redactors of the Louisiana and Quebec Civil Codes adopted, equating a foot and a half with 18 inches.26


25. See Coutume d'Orléans art. 236: "Entres les deux hérités joignans & contigu l'un de l'autre, assis en la ville d'Orléans, & autres villes du Bailliage, & entre les maisons & cours joignans & contigus l'un l'autre, assis ès faubourges de ladite ville d'Orléans, le Seigneur de l'un desdits hérités peut contraindre l'autre Seigneur faire à communs dépens mur de clôture. Toutefois n'est tenu de le faire sinon de pierre & terre, & d'un pied et demi d'épaisseur, de deux pieds de fondement, & sept pieds de haut au dessus des terres." See also Coutume de Paris art. 209; POTHIER at nos. 192, 223, 234.

26. The proviso in LA. CIV. CODE art. 675 seems to contemplate a wall eighteen inches thick (one and one-half foot) and twenty four inches (two feet) wide in its foundation. The French text reads: "... pourvu aussi que l'épaisseur entière de ce mur, n'excède pas dix-huit pouces, sans y comprendre l'empattement qui ne doit pas avoir plus de trois pouces." It is reasonable to
Purpose. The power of the territorial legislature to establish a legal servitude for the construction of common walls was challenged, but the court upheld the constitutionality of the provision. In a related case, the court stated that the purpose of the legislature “was clearly to promote the enclosure of lots, with stone or brick walls, as much as possible,” that is, with fire resistive materials. It has been subsequently determined that Article 675 establishes a rule of public policy as it is designed to conserve land, labor, and materials, and “to encourage the improvement of urban property.” Indeed, a landowner need not wait for his adjoining neighbor to build a wall at the property line in order to make this wall common under Article 684; he may build first and locate one half of his wall on the land of his neighbor. In this light, Article 675 involves a logical extension of the idea of policy embodied in Article 684. At the same time, it encourages building with fire resistive materials.

Conditions for building wall. Under Article 675, one is entitled to take, under certain conditions, up to nine inches from the land of an adjoining neighbor for the construction of a partition wall, and, additionally, one and one-half inches for the plastering without any payment to the neighbor. This right belongs to the landowner and to persons acting under his authority, whether by virtue of a real right, as a usufructuary, or by virtue of a personal right, as a predial lessee. Under an early Louisiana decision, this right is also accorded to a person who possesses land for himself. The exercise of the right given by Article 675 is subject to certain requirements.

assume that the redactors of the 1808 Code meant that the projection of the foundation (empattement) should not exceed three inches on either side of the wall. Cf. note 21, supra. 27. See Larche v. Jackson, 9 Mart. (O.S.) 408 (La. 1821). Counsel argued that “by the ancient laws of Louisiana, FUERO REAL, liv. 3, tit. 4, chap. 5, no such servitude was admitted. Every individual was protected in the exclusive enjoyment of his soil... Could a legislature then, constitutionally invade this right?...” Judge Martin declared tersely that the territorial legislature was not in fact “disabled from passing this part of the Code.” 28. Larche v. Jackson, 9 Mart. (O.S.) 724, 726 (La. 1821). 29. Lavergne v. Lacoste, 26 La. Ann. 507, 510 (1874). 30. But see notes 21, 26, supra. Since one may take for his wall up to nine inches of his neighbor’s ground, not including the plastering, there is no encroachment when a wall extends only five inches into neighboring property. Mahaffey v. Miller, 159 La. 610, 105 So. 731 (1925). 31. See Larche v. Jackson, 9 Mart. (O.S.) 724 (La. 1821).
The person exercising the right must be the first to build "in a place not surrounded by walls." This condition is easily met when the adjoining property is vacant, but questions of interpretation arise when there are fences, buildings, or other constructions on the neighboring estate. Obviously, one does not have a right under Article 675 if his neighbor has already taken advantage of this provision and has built a partition wall of the type contemplated. But one has the right to build a wall under Article 675 if his neighbor has merely built a fence or a wooden wall on or at the property line. Likewise, the existence of a house or of a brick or stone wall more than nine inches away from the boundary does not preclude exercise of the right granted to a neighbor by Article 675. If the brick or stone wall is within the nine inch servitude, exercise of the right under Article 675 may be

32. See text at notes 38-41, infra. According to French doctrine and jurisprudence, the word "wall" refers to a masonry work made of materials bonded with plaster, lime, or cement. Rennes, February 29, 1904, S.1904.2.186, D.1904.2.326; 2 AUBRY ET RAU at 564. Such a wall is governed by the rules applicable to common walls, even if it cannot be used as a support for a building on the neighboring land. It serves at least as an enclosure. Id. But cf. Duncan v. Labouisse, 9 La. Ann. 49, 50 (1854): "The wall spoken of in that Article is the side wall, which supports equally the buildings erected on both sides of a line dividing the property of two individuals."

33. See Bellino v. Abraham, 15 La. App. 537, 132 So. 373 (La. App. 2d Cir. 1931) (frame building located eight inches from the boundary; next door neighbor was allowed to take, without objection, six inches of ground for the building of a brick wall); cf. Bryant v. Sholars, 104 La. 786, 29 So. 350 (1901): "The side of a wooden house is not a party wall held in common. It is not a wall at all."

34. See Carrigan v. DeNeufbourg, 3 La. Ann. 440 (1848). In this case, a neighboring lot was surrounded by a fence; the pavement of an alley extended to the boundary; the roof of the house, and the cistern and foundations, to the same line. The court held that the property was not surrounded by walls and that neighbor had the right to build a wall under Article 671 of the 1825 Civil Code, corresponding with LA. CIV. CODE art. 675. Cf. Larche v. Jackson, 9 Mart. (O.S.) 724, 726 (La. 1821): "The circumstance of a house being already erected on the adjoining lot does not preclude the party from the benefit of the provision, when the partition wall does not interfere with any building previously erected."

35. See Crocker v. Blanc, 2 La. 531, 532 (1831). In this case, the court declared that a wall built a few feet from the dividing line did not preclude exercise of the common wall servitude: "But the walls erected by a proprietor on his property, which still leave a space between them and his neighbours, cannot be considered as surrounding the premises;—they are not division walls, and it is only these which authorize one co-proprietor to refuse permission to another, to raise a separation between them on the land of both."
excluded, but question remains whether the wall may become one in common by application of Article 684.

No more than one-half of the wall may rest on the land of the neighbor. If more than one-half of the thickness of the wall is taken from the land of the neighbor, the wall encroaches to that extent, and the neighbor is entitled to the remedies that the law provides against encroachment.

The right under Article 675 is given to one who builds a wall with "stones or bricks at least as high as the first story." Iron columns are not a wall within the contemplation of this article. An early Louisiana decision indicates that a neighbor may enjoin one who attempts to build a wall with materials other than stones or bricks. Article 675, however, does not forbid the use of heavy timbers to make a firm and smooth basis for the foundation of a brick or stone wall. It has been held in France that any form of solid construction satisfies the requirements of Article 661 of the Napoleonic Code, which corresponds with Article 684 of the Louisiana Civil Code of 1870, even if the materials were unknown at the

36. See Heiderich v. Heiderich, 3 Orl. App. 485, 487 (La. App. Orl. Cir. 1906). "The wall was not built on the dividing line of the two properties in the proportion fixed by the Code, id est one half on the land of his neighbor, C.C. Art. 675, but it rested 12 inches on the Heiderich lot and but 1 inch on the Lecch lot, thus encroaching 5½ inches on the former."

In Davis v. Grailhe, 14 La. Ann. 338 (1859), the court indicated that a wall is encroaching to the extent that it occupies more than nine inches of the neighbor's ground; the neighbor may demand demolition of the part of the wall that exceeds the nine inch servitude or acquisition of the ownership of the wall upon payment of the price of workmanship and of the materials. See also Heiderich v. Heiderich, 3 Orl. App. 485, 489 (La. App. Orl. Cir. 1906), the court recognizing the neighbor's right to demand demolition of the wall to the extent that it encroaches or its reduction to "the proper proportion"; but, if the neighbor fails to exercise his right timely, prescription may run against him. See text at notes 117, 133, 137, infra.

37. It has been held that the action for damages on account of an encroaching wall is a personal action that is not transferred to the purchaser of the property encroached upon without express subrogation. Pokorny v. Pratt, 110 La. 609, 34 So. 706 (1903). For Louisiana jurisprudence concerning encroaching walls, see Esnard v. Cangelosi, 200 La. 703, 8 So. 2d 673 (1942); Barker v. Houssiere-Latreille Oil Co., 160 La. 52, 106 So. 672 (1925); Gordon v. Fahrenberg & Penn, 26 La. Ann. 366 (1874); Dupuy Storage and Forwarding Corporation v. Cowan, 216 So. 2d 610 (La. App. 4th Cir. 1968); Morehead v. Smith, 225 So. 2d 729 (La. App. 2d Cir. 1969).


Thus, the use of reinforced concrete is allowed. A similar solution ought to prevail in Louisiana, if Article 675 is to be interpreted in the light of its purpose.

The thickness of the wall may not exceed eighteen inches, not including the plastering. The foundation of this wall, however, under the land of each neighbor, may extend as far as it is necessary for solid construction. The Louisiana Supreme Court has declared in a leading case that "when the Code authorized the proprietor to rest one-half of an 18-inch wall on the land of his neighbor, it necessarily included authority to rest such wall upon the center of a foundation adequate to support it, and therefore extending a greater distance upon the land of each."43

Exercise of the right given by Article 675 does not require the consent of the neighbor. If the neighbor objects, entry into his land may be secured by injunction. Parties may modify by agreement the conditions of Article 675, but, according to an early decision, parol evidence is not admissible.45 A wall built under Article 675, without the neighbor's contribution, is a private wall: it belongs to the neighbor who built it, but it may become one in common at any time by application of Article 676 of the Civil Code.46

Making a Private Wall Common: Articles 676 and 684.

Articles 676 and 684 of the Louisiana Civil Code of 1870 establish legal servitudes whereby a landowner may, under certain conditions, acquire the co-ownership of a wall that his neighbor has built on or at the boundary. The rights that the two articles confer are imprescriptible. It has been said that

42. See text at notes 21, 26, supra.
43. Heine v. Merrick, 41 La. Ann. 194, 204, 5 So. 760, 765 (1889). This is technically dicta, because the case involved demolition and reconstruction of an already common wall.
47. LA. CIV. CODE art. 676 declares that "the neighbor who has refused to contribute to the raising of the wall, preserves still a right of making it a wall
the right given to an adjoining landowner to make a private wall common is, in effect, a right of expropriation though not for private utility; it is given in the general interest, that is, for the conservation of land, labor, and materials.

A private wall that a neighbor has built on the boundary in compliance with Article 675 may become common by application of Article 676(2). This declares that the neighbor who has refused to contribute to the raising of the wall preserves the right of making it a wall in common by paying to its owner "the half of what he has laid out for its construction." 48

If the person who built first did not take advantage of the legal servitude established by Article 675 of the Louisiana Civil Code of 1870 but located the wall on his own land at the boundary, the wall that he built may become common by virtue of the legal servitude established by Article 684 of the same Code. This article declares:

Every proprietor adjoining a wall has, in like manner, the right of making it a wall in common, in whole or in part, by reimbursing to the owner of the wall one-half of its value, or the half of the part which he wishes to hold in common, and one-half of the value of the soil upon which the wall is built, if the person who has built the wall has laid the foundation entirely upon his own estate. 49

This article reads the same as Article 661 of the Napoleonic Code, except for the proviso at the end that was added by the redactors of the Louisiana Civil Code of 1808. The purpose of the proviso was to draw a clear distinction between the situation contemplated by Article 675 and that by Article 684. In French it reads: "si celui qui a fait le mur l'a fait porter entièrement sur son heritage," which ought to be translated "if he who has built the wall has made it to rest entirely on his own estate." 50 The mistranslation was early noticed by Louisiana courts, and the English text has been "practically nullified... It is, indeed, so absurd and so incon-


49. LA. CIV. CODE art. 684; La. Civ. Code art. 680 (1825); La. Digest 1808, p. 134, art. 32; Code Napoleon art. 661. For present FRENCH CIV. CODE art. 661, see text at note 107, infra.

50. See Olsen v. Tung, 179 La. 760, 774, 155 So. 16, 21 (1934).
gruous that it is difficult to see how any other view could be taken of it."51 It is established that Article 684 does not require that the foundation of the wall be entirely on the land of the person who builds it, courts having taken judicial notice that "a high wall cannot be erected on the line of a lot on our farms and alluvial soil without the projection of the foundation on the adjacent land."52 The condition of the article is satisfied "if the base of the wall at the ground level is located entirely on one property."53

The right that Article 684 confers on an adjoining neighbor applies to walls exclusively.54 Other types of enclosures may be held in common by virtue of agreements or by application of the presumptions of Articles 688 and 689 of the Civil Code.55 The walls that Article 684 contemplates are of the same nature as those built under Article 675, namely, walls of solid masonry.56 Thus, when an adjoining owner brought suit to compel his neighbor to cede the co-ownership of a wooden wall at the boundary, the court rejected the demand on the ground that "the side of a wooden house is not a party wall held in common. It is not a wall at all."57 French jurisprudence and doctrine interpreting the corresponding provision of Article 661 of the Code Civil are in accord.58

All walls built with solid masonry, as bricks or stones, are susceptible of becoming common, whether they are located in towns or in the country, and whether they separate houses, yards, or gardens.59 The law encourages co-ownership of walls because it allows an interested neighbor to acquire as much or as little as he needs and thus make the wall common in

54. See 2 Aubry Et Rau at 564. French Civ. Code art. 668 as amended by the law of August 20, 1881, expressly excludes forced acquisition of the co-ownership of a boundary fence or ditch by the adjoining neighbor.
58. See Civ. December 15, 1857, S.1858.1.271; 3 Planiol Et Ripert at 307. See also 4 C. Beudant, Cours de droit civil français 392 (2d ed. 1938) [hereinafter cited as Beudant]; 4 T. Huc, Commentaire du Code Civil 419 (1893) [hereinafter cited as Huc]; 7 F. laurent, Principes de droit civil français 566 (2d ed. 1876) [hereinafter cited as Laurent].
59. See 3 Planiol Et Ripert at 308; cf. text at notes 38-41, supra.
whole or in part of its height or length. According to French doctrine and jurisprudence, which ought to be relevant for Louisiana, acquisition of the co-ownership of a wall is excluded in two situations only: when a wall belongs to the public domain, because the property of the public domain is inalienable; and when the owner of the wall enjoys servitudes of light and view on adjoining property, because a regime of co-ownership of the wall would be incompatible with these real rights.

The law accords the right to make an adjoining wall common to “every proprietor,” even to one who has abandoned his right to the wall in order to avoid contribution for repairs or rebuilding. In such a case, if he wishes to re-acquire the co-ownership of the wall, he must pay one-half of its value and one-half of the value of the soil on which the wall rests. It has been suggested in France that the co-ownership of a wall may be acquired not only by a landowner but also by persons enjoying real rights on the land of another, such as usufructuaries or purchasers under a contract of rent of lands.

In France, certain courts have held in the past that a neighbor may acquire the co-ownership of a wall that does not adjoin his property, if the distance from the boundary is negligible. Most courts have consistently maintained, however, that the owner of an estate may not force his neighbor

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62. See 3 Planiol et Ripert at 309; text at note 219, infra.

63. See La. Civ. Code art. 684; text at notes 93, 106, infra. The co-owner who abandons his interest in the wall also abandons his interest in the soil occupied by the wall. See text at note 218, infra. Accordingly, in case of re-acquisition of the co-ownership of the wall, payment should be made for the value of the soil, even if the wall was originally constructed under La. Civ. Code art. 675.

64. See 3 Planiol et Ripert at 309. But see Faisans v. Lovie, 1 McGloin 113 (La. App. Orl. Cir. 1881); 5 Baudry-Lacantinier, Traité Théorique et Pratique de Droit Civil 672 (2d ed. Chauveau 1899) [hereinafter cited as Baudry-Lacantinier]; Laurent at 593. For the notion of rent of lands, see Yiannopoulos, Property § 94. A lessee, having merely a personal right, may not acquire the co-ownership of a boundary wall in France or in Louisiana. See Auch v. Labouisse, 20 La. Ann. 553 (1868); text at note 82, infra.

65. See, e.g., Caen, January 27, 1860, D.1860.2.204.
to cede the co-ownership of a wall from which he is separated by a strip of land no matter how insignificant in size or value. The weight of French doctrine accords with this view.

Pothier has observed that the common wall servitude naturally presupposes a wall built at the edge of the property line: “if beyond that wall there were a space of land forming part of the property of my neighbor, I would not be able to attach the building that I propose to build to the wall of my neighbor, because I am not allowed to build on land that does not belong to me.” Indeed, the builder of the wall may need the space between the wall and the property line for his passage or in order to have lights and view. Moreover, he may legitimately build in this way in order to prevent a neighbor from acquiring the co-ownership of the wall; one who chooses to enclose his estate in this fashion does not abuse his right.

Louisiana decisions are not conclusive. In an early case, the court allowed a neighbor to acquire the co-ownership of a wall by application of Article 684 although a part of it did not extend to the property line. The court observed: “this space outside of the wall is almost imperceptible, and it grows less until it reaches the line at the other end.” In Heine v. Merrick, however, the Louisiana Supreme Court declared that “the right of a proprietor to maintain exclusive ownership of a wall built entirely within his own line, and away from that of his neighbor, and not invading the latter's property even in the foundation, seems too evident and fundamental to be permitted to be frittered away.” Of course, if more than nine inches are left between the property line and the wall, the adjacent neighbor may take advantage of the servitude established by Article 675.

Literally, Article 684 presupposes an “adjoining” wall, namely, a wall located along its entire length at the boundary line. If a wall is removed, even a fraction of an inch, from the boundary, a literal application of Article 684 would exclude the possibility that this wall may ever become common.

66. See Bordeaux, January 3, 1888, D.1888.2.320; Civ. March 26, 1862, D.1862.1.175, S.1862.1.473; Douai, August 7, 1845, D.1847.4.446.

67. POTHIER at no. 244, p. 333.

68. See 3 PLANIOL ET RIPERT at 308.


70. 41 La. Ann. 194, 204, 5 So. 760, 765 (1889).

Moreover, the existence of this wall would exclude application of Article 675 because the premises would be surrounded by a wall. Thus, for all practical purposes, the common wall servitude would be limited to the two situations provided for expressly in the Code, namely, when neighboring estates are not surrounded by walls or when there is a wall at or on the property line. The existence of a wall near the property line would effectively preclude the creation of a partition wall as a common enclosure.

Articles 675 and 684, containing exceptional rules in derogation of common right, have been construed narrowly. Such strict construction, however, "cannot be carried to the point of attaching an impossible meaning to the law or rendering it practically nugatory." Accordingly, it has been suggested that in order to accomplish the purposes of Articles 675 and 684, namely, the conservation of space, labor, and materials, the two provisions ought to be read together and given an expansive interpretation. A neighbor should be allowed to take advantage of Article 684 even if the wall is built some distance from the boundary, though within the nine-inch servitude contemplated by Article 675. If the wall is located more than nine inches from the boundary, the servitude under Article 684 is effectively avoided. The adjoining owner, however, may take advantage of Article 675 to build a partition wall on the property line. Thus, under an expansive interpretation, the existence of a wall on, at, near, or far from the property line will not prevent the creation of a regime of co-ownership but will determine whether a neighbor is entitled to the advantage of Article 675 or of Article 684.

Use of Adjoining Wall; Payment

A landowner who wishes to use an adjoining wall belonging to his neighbor should first obtain the owner's permission.

72. See text at note 32, supra. A construction that does not qualify as a wall, for example, an iron column, does not preclude the building of a wall under LA. CIV. CODE art. 675. See Duncan v. Labouisse, 9 La. Ann. 49 (1854).

73. See Jamison & McIntosh v. Duncan, 12 La. Ann. 785 (1857). For a wall built partly on the boundary and partly at or close to the boundary, see Lavergne v. Lacoste, 26 La. Ann. 507 (1874).


or demand that the wall be made common.77 One who has not contributed to the raising of the wall "has no right, without the owner's consent, to make any use thereof whatever; and the most simple structure, leaning against or attached to the wall, is a violation of the right of the owner."78 The owner of the wall may protect his ownership against unauthorized interference by all procedural means, including injunctions79 and personal as well as real actions.80 Quite frequently, however, the owner of the wall allows the works to be completed and then proceeds against his neighbor for reimbursement on the ground that the wall in question has been treated as one in common.81

The owner of the wall is entitled to demand reimbursement if his neighbor, or a person acting under him, such as a lessee,82 makes "any use at all"83 of the wall or if he derives

77. See Faisans v. Lovie, 1 McGloin 113, 116 (La. App. Orl. Cir. 1881): "The Code seems to require a person desiring to make such a wall, one in common, to prepay his share of its cost, and until such prepayment, the exclusive proprietor can prevent the other from making use of the wall." See also Jamison & McIntosh v. Duncan, 12 La. Ann. 785 (1857).


80. See 3 PLANIOL ET RIPERT at 312-13; YIANNOPOULOS, PROPERTY §§ 137-41.

81. See Olsen v. Tung, 179 La. 760, 155 So. 16 (1934); Cordill v. Israel, 130 La. 138, 57 So. 778 (1912); Murrell v. Fowler, 3 La. Ann. 165 (1848). See also Faisans v. Lovie, 1 McGloin 113, 116 (La. App. Orl. Cir. 1881): "[B]ut he may, if he chooses, suffer the works to be completed, and, if they be not in character casual or trifling, proceed against the neighbor for his share of the cost. . . . The owner may treat the action of the other as an assumption of the character of owner in common, and as incurring of the obligation defined by law as accompanying such assumption, and may demand payment in cash, or take a note, or otherwise deal with the debt, at his pleasure." The owner of the wall, however, has "no lien" on the property of the neighbor "as security for the claim." Hurwitz v. Recorder of Mortgages, 165 La. 334, 115 So. 582 (1928).

82. See Faisans v. Lovie, 1 McGloin 113 (La. App. Orl. Cir. 1881): "Whether the adjoining proprietor makes use of the wall for his own personal ends, or permits another to do so for himself, is no concern of the owner. The law accords no such right to strangers, but reserves it exclusively to the proprietor of the adjoining soil, and if the tenant avails himself of it, he does so by authority of the lessor, and the liability to the owner is that of the latter." It has been held that the lessor-landowner is alone responsible when the lessee uses the wall of a neighbor, even if the lease gives the lessee the right to make improvements. Auch v. Labouisse, 20 La. Ann. 553 (1868).

83. Olsen v. Tung, 179 La. 760, 771, 155 So. 16, 19 (1934). For similar solutions in France, see 2 AUBRY ET RAA at 583.
from it an advantage of use other than what is "merely a natural or necessary consequence or incident of the proximity of the wall, provided the benefit or advantage is not the result of any act on his part." \(^8\) The neighbor may thus render himself liable to the owner of the wall without making full use of the rights accorded by Article 680 of the Civil Code to the co-owner of a wall. Indicatively, it has been held that the use of a wall to support the roof, floors, and walls of a building renders the neighbor liable for one-half of what he, by such use, has treated as common. \(^8\) When the roof of a building "flashes" into the neighbor's wall, \(^8\) when a neighbor's wall is used for lateral support of a building as well as a means of preventing a roof from leaking, \(^8\) or when a shed rests on the wall, \(^8\) there is likewise use sufficient to render the neighbor liable to the owner of the wall.

The use of a wall to enclose the side of a building, with minimal or no connection at all with the wall, has proved to be a troublesome question. In an early case, the court declared that a neighbor "by attaching the roof of this shed, whether by tar, paste or nails, to the wall in question, and building against it in such a manner that it served to exclude the rain, and prevent the access of thieves or intruders . . . there was an exercise of the right of making this wall one in common," \(^8\) In another case the court declared: "when a neighbor uses an adjoining wall as a wall or protection to

\(^8\) Olsen v. Tung, 179 La. 760, 774, 155 So. 16, 19-20 (1934). The test is the same in case the co-owner of a wall wishes to abandon his right in order to avoid responsibility for maintenance or reconstruction. See text at note 220, infra.

\(^8\) See Grailhe v. Hown, 1 La. Ann. 140 (1846). See also Olsen v. Tung, 179 La. 760, 155 So. 16 (1934) (use of posts supporting the roof and floor of a building upon the foundation of the wall, and tying the ends and roof of the building to the wall).


\(^8\) Faisans v. Lovie, 1 McGloin 113, 117 (La. App. Orl. Cir. 1881). See also Costa v. Whitehead, 20 La. Ann 341, 342 (1868). In this case, the court found that a wall served for a side to the upper portion of defendant's building, and that without the wall defendant's house would not be habitable; under the circumstances, the court was satisfied that plaintiff's wall "is and always has been of great benefit to the defendant." Hence, defendant was cast in judgment.
enclose his building, ... he must pay one-half of the value of the wall used by him at the moment of using it.”

But in a case in which there was ample evidence that the neighbor did not derive any benefit from the presence of the wall, and in a case in which the use of the wall was a mere trifle, the neighbor was exonerated from responsibility.

“Cost” and “value” of the wall. The amount of reimbursement due the owner of the wall, that is, the price for the acquisition of the co-ownership, varies according to whether the wall is built on the land of the neighbor at the property line or on the boundary in accordance with Article 675. For a wall built by the adjoining neighbor on his own land, Article 684 requires reimbursement of one-half of the “value” of the wall or of its part that is made common, and one-half of the value of the soil occupied by the wall. For a wall built on the boundary, Article 676 requires payment to the owner of the wall of “half of what he has laid out for its construction,” namely, one-half of its original cost. There is no require-

90. Canal-Villere Realty Co. v. Gumble Realty & Securities Co., 1 La. App. 123, 126 (La. App. Orl. Cir. 1924). Broad language in this case, that it was not necessary for a wall to support in any way the building of the defendant, and that the mere use of the wall as an enclosure was sufficient to render the neighbor liable, was repudiated in Grand Lodge v. Thompson & Bros., 13 La. App. 258, 260, 127 So. 32, 34 (La. App. Orl. Cir. 1930). The court was now of the opinion that “use of the wall for any purpose makes the user liable, provided the word ‘use’ be interpreted to mean voluntary and beneficial use.”

91. See Grand Lodge v. Thompson & Bros., 13 La. App. 258, 127 So. 32 (La. App. Orl. Cir. 1930). The court stressed the fact that the neighbor had to spend an additional amount of money for his construction because he could not make use of the existing wall.

92. See Bellino v. Abraham, 15 La. App. 537, 538, 132 So. 373, 374 (La. App. 2d Cir. 1931). In this case, the buildings were separated by a space of two inches, there was evidence that the defendants, in repairing their building, “had connected the roof with the wall constructed by plaintiff by cementing the material of which the roof was constructed to the wall, and placing flashing between the bricks of the wall above the point where the roofing material was cemented.” The connection, however, was later removed upon plaintiff’s protest.


94. See LA. CIV. CODE art. 676. It has been held that, as to a wall made
ment for the payment of one-half of the value of the soil occupied by the wall because the wall rests in equal proportions on the adjoining estates. The different measures of reimbursement, "value" on the one hand and "cost" on the other, has been noticed by Louisiana courts. The difference is, of course, inconsequential in cases in which value and original construction cost are the same, and in such cases courts tend to use the two terms indiscriminately. The difference becomes material, however, in cases in which the present value of a wall is either lower or higher than its original construction cost, namely, when the value of the wall has either depreciated or appreciated.

When the value of a wall, at the time it was first used by the neighbor, was less than the cost of construction, Louisiana courts typically awarded value rather than cost. This was accomplished by a narrow construction of Article


It would seem that whether the court awards the "value" of a wall under article 684, or the "cost" of a wall under article 676, interest should not be due prior to judicial demand. In Auch v. Labouisse, 20 La. Ann. 553 (1868), interest was demanded from the day the wall in question had been treated as common by the adjoining neighbor's lessee. The court, without discussion, awarded one-half of the cost of construction of the wall without interest.

95. See Olsen v. Tung, 179 La. 760, 155 So. 16 (1934). When a part of the wall rests at the edge of the property, and another part straddles the boundary, the measure of compensation should be determined by application of both articles 676 and 684. Cf. Lavergne v. Lacoste, 26 La. Ann. 507 (1874).


98. See Augustin v. Farnsworth, 155 La. 1053, 99 So. 868 (1924); Grailhe v. Hown, 1 La. Ann. 140 (1846). In Olsen v. Tung, 179 La. 760, 776, 155 So. 16, 21 (1934), the court observed that "it seems to have been assumed in these cases, that any wall, on account of age and depreciation, would be worth less than the cost of reconstruction."
676. The court declared that the neighbor is bound to pay half the cost of the wall whenever he undertakes to make it a wall in common. "But it is only on his refusal to contribute that he is held to be so bound; and, before refusing, he must certainly have an opportunity of assenting; he must be asked to contribute—he must, at least, be notified, and have an opportunity of contributing to the common cost of the wall, and of seeing that no useless expense is incurred for negligence, extravagance, or want of skill and that the work, is substantially and thoroughly executed. If, when called upon, he should refuse to contribute, or pay no attention to the notice, which amounts to the same thing, then and in that case the law binds him to reimburse his neighbor half the cost, whenever he makes use of the law."99 Since Article 676 does not apply in the absence of a demand to contribute, the matter of the amount of reimbursement is to be determined by application of "general principles" and by analogy from Article 684.100 One case only was found in which a neighbor was asked to contribute and refused, and in this case the court actually awarded the cost of construction.101 There was no indication, however, that the cost of construction differed from the value of the wall. In another case, although plaintiff had failed to prove that notice of the demand for contribution had been received by his neighbor, the court awarded him the construction cost on the ground that he “had shown that the work was done at a reasonable figure, after soliciting bids therefor, and that defendant made use of said wall within seven or eight months after it was reconstructed.”102

When the value of the wall, at the time it was first used by the neighbor, was more than the cost of construction, Louisiana courts consistently awarded cost rather than value.103 These decisions are based on the ground that a neighbor should not be held to a greater degree of responsibil-

100. Grailhe v. Hown, 1 La. Ann. 140 (1846). In Augustin v. Farnsworth, 155 La. 1053, 99 So. 868 (1924), however, the court applied Article 686 directly to a wall built under Article 676!
102. See Board of Administrators of Tulane Educ. Fund v. Israel, 132 La. 676, 61 So. 734 (1913).
ity than one who refused to contribute to the raising of a wall. In an effort at reconciliation of conflicting past determinations, the Louisiana Supreme Court declared that "a party who converts his neighbor's wall into 'a wall in common' must pay half of the replacement value, or present value of the wall, unless he contends that, not having refused to contribute to the original cost of construction, he prefers to pay half of the original cost of construction, and, in that event, the burden of proof is on him to show what was the original cost of construction.'"\(^{104}\) In most instances, this will be an impossible burden to carry, and the neighbor will be bound to pay the value of the wall.\(^{105}\) If this interpretation were to be followed, the measure of reimbursement that Article 676 provides would be written out of the Civil Code. Under the present state of the jurisprudence, it would seem that a neighbor should preferably refuse to contribute to the raising of a wall under Article 675. Should he ever decide to make the wall one in common, he would have a good chance to limit his liability to whichever is the lesser amount, original cost or current value of the wall.

In France, the measure or reimbursement for the acquisition of the co-ownership of an adjoining wall is established by Article 661 of the Code Civil, which corresponds with Article 684 of the Louisiana Civil Code of 1870.\(^{106}\) As amended by the law of May 17, 1960, Article 661 provides that the neighbor is bound to pay one-half of the cost of the wall or of the part that he wishes to make common, and one-half of the value of the soil on which the wall is built. The cost of the wall is determined as of the date of acquisition of the co-ownership by the neighbor, taking into account the condition of the wall.\(^{107}\)

Olsn v. Tung, 179 La. 760, 776, 155 So. 16, 21 (1934). Since the case involved a wall made common by application of Article 684, the declaration constitutes \textit{dicta} insofar as the measure of compensation under Article 676 is concerned.

In Olsen v. Tung, 179 La. 760, 776, 155 So. 16, 21 (1934), the court realized that proof of the original cost of construction in the case under consideration was "impossible."

\(^{104}\) Olsen v. Tung, 179 La. 760, 776, 155 So. 16, 21 (1934). Since the case involved a wall made common by application of Article 684, the declaration constitutes \textit{dicta} insofar as the measure of compensation under Article 676 is concerned.

\(^{105}\) In Olsen v. Tung, 179 La. 760, 776, 155 So. 16, 21 (1934), the court realized that proof of the original cost of construction in the case under consideration was "impossible."

\(^{106}\) See text at note 49, supra. LA. CIV. CODE arts. 675-76 have no counterpart in the FRENCH CIVIL CODE.

\(^{107}\) See FRENCH CIV. CODE art. 661, as amended by the law of May 17, 1960; 2 Aubry \textit{et} Rau at 581. For decisions interpreting the original provision see CIV. July 3, 1958, D.1958.618, GAZ. PAL. 1958.2.162; Paris, October 23,
In case of disagreement between the parties, the price is fixed by experts.\(^{108}\) If a wall is built partly on the land of the neighbor, with his consent, Article 661 still furnishes the measure of reimbursement.\(^{109}\) On the contrary, when a wall is built on the boundary without the consent of the neighbor Article 661 is inapplicable. But in cases to which Article 663 of the Code Civil applies, if the neighbor wishes to use the wall rather than cause its removal, he is bound to pay one-half of the construction cost.\(^{110}\)

**Situation of particular successors.** A landowner whose wall has been used by an adjoining neighbor may alienate his property without having claimed or received payment either under Article 676 or under Article 684 of the Civil Code. In such a case, payment is due to the new owner of the property,\(^{111}\) and this payment protects the neighbor against claims by the former owner.\(^{112}\) The result may be explained on the ground that the conveyance of an estate includes a wall at or on the boundary, and that it is the new owner of the wall who cedes co-ownership to the adjoining neighbor. Hence, the compensation is his.

Likewise, the neighbor who used the wall, but did not pay for it, may alienate his property. Question arises then whether the owner of the wall has the right to demand reimbursement from either the transferor or the transferee, or from both on a theory of solidary responsibility. Question also arises as to the responsibility of the transferor toward the transferee. In an early Louisiana decision, the owner of the......
wall obtained judgment against both the vendor and the vendee on the ground that his wall was first used by the vendor and continued to be used by the vendee.\textsuperscript{113} In other cases, however, Louisiana courts have proceeded on the assumption that the transferee, that is, the new owner of the property, is alone responsible toward the owner of the wall.\textsuperscript{114} The result may be explained on the ground that payment for the use of a neighbor's wall is an obligation \textit{propter rem}, namely, a real obligation that follows the ownership of the immovable property.\textsuperscript{115} The owner of the wall does not need to record his claim in order to preserve his right to demand payment from successors of the neighbor who first used the wall; he may assert his claim against an acquirer of the property even in the absence of any recordation.\textsuperscript{116} The claim, however, may be lost by prescription.\textsuperscript{117}

As to the relations between vendor and vendee, argument might be made that the vendor is responsible by virtue of his warranty to reimburse the vendee for any payment he may have been compelled to make to an adjoining neighbor for the use of a wall.\textsuperscript{118} It has been repeatedly held, however, that the vendor does not warrant that a wall on the boundary is common, and that it is the duty of the vendee to inquire whether such a wall is common.\textsuperscript{119} The rule is justified on the ground that the vendor may not transfer, and, therefore, does not purport to transfer, a greater right than he has; the


\textsuperscript{114} See Cordill v. Israel, 130 La. 138, 57 So. 778 (1912); Chism v. Lefebre, 27 La. Ann. 199 (1875); Winter v. Reynolds, 24 La. Ann. 113 (1872). \textit{But cf.} Howell v. Cohen, Man. Unrep. Cas. 244 (1877). In this case the owner of the wall accepted in payment a promissory note. The note was dishonored, and the owner of the wall sought payment from the new owner of the immovable property. The court held that the acquirer of the property was not responsible. For solutions in France, see 2\textsuperscript{nd} AUBRY ET RAU at 583; 3\textsuperscript{rd} PLANIOL ET RIPERT at 312-13.

\textsuperscript{115} See 3 PLANIOL ET RIPERT at 305. For the notion of real obligations, see YIANNOPOULOS, PROPERTY §§ 113, 114.


purchaser acquires nothing more than the right of the vendor to make the wall common upon payment of the price to the adjoining neighbor.\textsuperscript{120}

\textit{Effects of acquisition of co-ownership of a wall.} After acquisition of the co-ownership of a wall by the adjoining neighbor, vestiges of the previously exclusive ownership are not allowed to remain. The co-owners of the wall are on an entirely equal footing, and each is entitled to equal use of every part of the wall.\textsuperscript{121} Gutters, chimneys, or other works that are incompatible with the co-ownership of the wall shall be removed, and windows or other apertures shall be closed.\textsuperscript{122} Nevertheless, the acquirer of the co-ownership of a previously private wall is bound to respect conventional servitudes that the owner of the wall has acquired on adjoining property for the benefit of his estate, such as a servitude of drip or a servitude of view.\textsuperscript{123}

The acquisition of the co-ownership of an adjoining wall by a neighbor partakes of the nature of both a sale and an expropriation. As a forced sale, the operation should not give rise to a warranty for vices of construction of the thing sold.\textsuperscript{124} The neighbor cedes the co-ownership of the wall in the state in which it is; the acquirer should make sure that the wall is fit for its intended purpose. In all other respects, the operation is regarded as a sale of immovable property. In France, the acquisition of co-ownership of the wall must be registered in order to be effective against third persons, and this means that it must be made in the form of an authentic act or of a judicial decision.\textsuperscript{125} The former owner of the wall

\begin{footnotes}
\item[121.] See Weil v. Baker, Sloo & Co., 39 La. Ann. 1102, 3 So. 361 (1887); Civ. July 1, 1861, D.1862.1.138, S.1862.1.81; Civ. May 11, 1925, D.H.1925.449. It has been suggested in France that after a wall has been made common, it belongs in indivation to the adjacent landowners along with the soil on which it rests. See 2 Aubry et Rau at 564. Most commentators, however, merely define a common wall as one that belongs in indivation to the adjacent owners. See 5 Baudry-Lacantinerie at 655; 4 Beudant at 392; Laurent at 566; 3 Planiol et Ripert at 294.
\item[122.] See Civ. May 7, 1873, D.1874.1.88; Civ. July 18, 1859, D.1859.1.400.
\item[124.] See Civ. February 17, 1864, D.1864.1.87, S.1864.1.117.
\item[125.] See 2 Aubry et Rau at 582.
\end{footnotes}
has a privilege on it and the right of dissolution of the sale in case of non-payment of the price.\textsuperscript{126} Similar solutions ought to obtain in Louisiana in the light of contemporary legislation and jurisprudence establishing the public records doctrine. Specifically, it would seem that agreements or judgments establishing the co-ownership of a wall ought to be recorded in order to be effective toward third persons.\textsuperscript{127}

\textbf{Proof of Co-ownership of Enclosure}

Quite frequently a question arises concerning the ownership of a wall or other enclosure built at or on the boundary between two adjacent estates. The enclosure may belong exclusively to one of the neighbors or it may be one held in common. The law generally presumes that works belong to the owner of the ground on which they are built.\textsuperscript{128} Accordingly, a wall or other enclosure built at the boundary is presumed to belong to the neighbor on whose side it is located, and, if the adjacent neighbor claims that this enclosure is common, he ought to have the burden of proof. The presumption that works belong to the owner of the ground on which they are located, however, does not apply to walls or other enclosures that straddle the boundary between two estates. These are presumed to be common by virtue of special provisions\textsuperscript{129} that take precedence; accordingly, it would seem that the neighbor who asserts his exclusive ownership of an enclosure straddling the boundary ought to have the burden of proof.

The co-ownership of a wall or other boundary enclosure may be established by title, by acquisitive prescription, or by

\begin{itemize}
\item \textsuperscript{126} See \textit{Req.} April 10, 1889, D.1889.1.321, S.1889.1.401; 3 \textit{Planiol et Ripert} at 312. \textit{But see} Howell \textit{v.} Cohen, Man. Unrep. Cas. 244 (1877).
\item \textsuperscript{127} See \textit{La. Civ. Code} art. 2266 (1); \textit{La. R. S.} 9:2721 (1950); Blevins \textit{v.} Manufacturers Record Publishing Co., 235 La. 708, 105 So. 2d 392 (1958); McDuffie \textit{v.} Walker, 125 La. 152, 51 So. 100 (1910). As early as 1854, the Louisiana Supreme Court held that agreements between neighbors varying the terms of the common wall servitude involve alienation of immovable property; hence, they may not be established by parol evidence. Duncan \textit{v.} Labouisse, 9 La. Ann. 49 (1854). Claims, however, against a neighbor who used a private wall without authority need not be recorded in order to be effective against particular successors of the neighbor. \textit{See note 116, supra.}
\item \textsuperscript{129} See \textit{La. Civ. Code} arts. 677, 688, 689 (1870); \textit{French Civ. Code} arts. 653, 666, as amended by the law of August 20, 1881.
\end{itemize}
application of the presumption of co-ownership that the Civil Code establishes in Louisiana and in France.

**Title.** When co-ownership is claimed by virtue of an act translatif of ownership, duly recorded, and emanating from the original owner of the enclosure, acquisition by title is clearly established. This, however, is seldom feasible. French doctrine and jurisprudence, therefore, suggest that the word “title” in this context ought to be given a broad meaning; it should include declarative acts as well as acts translatif of ownership, and even documents that do not feature both neighbors or their ancestors as parties. Of course, the weight attributed to such title is a matter left to the discretion of the trial court.

**Acquisitive prescription and destination of the owner.** The co-ownership of an enclosure may also be established by acquisitive prescription. In this respect, the general rules governing acquisitive prescription of immovable property are directly applicable. There should be no doubt that an enclosure is common if the adjoining neighbors have possessed it in common, peaceably, and without interruption, for a period in excess of thirty years. Acquisition of co-ownership by the ten year good faith acquisitive prescription is also possible, but this prescription may be difficult to accomplish in the light of the special situation of boundary enclosures. Of course, not only co-ownership, but also the exclusive owner-

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133. See 2 Aubry et Rau at 570; 3 Planiol et Ripert at 296.

134. See, in general, Civ. November 8, 1905, D.1906.1.52; Rouen, August 31, 1867, S.1868.2.215; cf. Douai, February 10, 1925, D.H.1925.357; Civ. April 3, 1895, D.1895.1.242; Req. December 13, 1886, D.1887.1.386; Civ. August 26, 1856, D.1856.1.340. Cf. Kelly v. Taylor, 43 La. Ann. 1157, 10 So. 255 (1891). Plaintiff claimed that a wall was one held in common, having “been so established, recognized, and used by the occupants of said two adjoining premises for more than thirty years.” The court, however, found that the wall in question was common on grounds other than prescription.

135. See Canal-Villere Realty Co. v. Gumble Realty & Securities Co., 1 La. App. 123 (La. App. Orl. Cir. 1924); cf. Lotz v. Hurwitz, 174 La. 638, 651, 141 So. 83, 88 (1932). In this case, defendant claimed that he had acquired the right to use a wall as one in common by acquisitive prescription. The court rejected his claim, stating that “ten years had not elapsed since the owner of both properties parted with the two lots.”

ship of an enclosure may be acquired by one of the neighbors by acquisitive prescription. And, apart from ownership, a neighbor may acquire the right to the exclusive possession of an enclosure by a peaceable and uninterrupted corporeal possession of the same for a period in excess of one year. According to French doctrine and jurisprudence, this neighbor may bring the possessory action for the maintenance or restoration of his possession, and, moreover, he may rely on his right to possess as an inference of ownership in the absence of any other evidence.

Question has arisen in Louisiana whether the co-ownership of a wall may be acquired by a destination du père de famille. Courts have correctly refused to apply the doctrine of destination to the acquisition of the co-ownership of an enclosure. A neighbor, however, may acquire by destination or by acquisitive prescription an apparent and continuous servitude for the use of a wall belonging to the owner of an adjacent estate.

Presumption. If neither title nor acquisitive prescription is available, a neighbor may rely on the presumption that a wall straddling the boundary is common. Article 677 of

137. One may acquire the exclusive ownership of a wall that a neighbor has built on his own land in the same way one may acquire by acquisitive prescription the ownership of an immovable. See La. Civ. Code arts. 3478, 3499. Further one may possess for the required period of time a wall that encroaches into the land of his neighbor and thereby acquire the ownership of the strip of land occupied by his wall or at least a predial servitude for the support of the wall. See Heiderich v. Heiderich, 3 Orl. App. 485 (La. App. Orl. Cir. 1906) (wall built one inch on one lot and 12 inches into the neighbor's lot); cf. Woodcock v. Baldwin, 51 La. Ann. 989, 26 So. 46 (1899) (servitude to have a part of a building on the land of another).

138. See 2 Aubry et Rau at 569; 5 Baudry-Lacantinerie at 671.

139. See Olsen v. Tung, 179 La. 760, 155 So. 16 (1934). In Murrell v. Fowler, 3 La. Ann. 165 (1848), the court had left open the question whether the co-ownership of a wall may be acquired by destination of the owner.

140. See Burns v. Briede, 2 Orl. App. 410, 415 (La. App. Orl. Cir. 1905): "The defendant had the right to use the walls as common walls, because they were made such par destination du père de famille." In context, the court meant that the neighbor merely acquired a servitude for the use of the walls. The walls in question were located 13 inches from the boundary and could not become common by application of La. Civ. Code art. 684. See text at note 70, supra. For the acquisition of a servitude for the use of a common wall by destination of the owner, see Lavillebeuvre v. Cosgrove, 13 La. Ann. 323 (1858).

the Louisiana Civil Code of 1870, corresponding with Article 653 of the Napoleonic Code, declares:

Every wall which is a separation betwixt buildings as high as the upper part of the first story, or betwixt the yard and garden in the cities and towns, and their suburbs, of this State, and even any other enclosure in the fields, shall be presumed to be common, if there be no title, proof of mark to the contrary.\footnote{LA. CIV. CODE art. 677; La. Civ. Code art. 673 (1825); La. Digest of 1808, p. 132, art. 25; FRENCH CIV. CODE art. 653. Note error in English translation of the French text; "as high as the upper part of the first story" should be "up to the point of disjunction." 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 677 (J. Dainow ed.). The words "and even any other enclosure in the fields" in LA. CIV. CODE art. 677 actually refer to walls surrounding rural estates. The French text reads: "mme entre enclos dans les champs."}

According to well-settled jurisprudence in Louisiana and in France, the presumption of co-ownership applies in the absence of other evidence\footnote{See Weil v. Baker, Sloo, & Co., 39 La. Ann. 1102, 3 So. 361 (1887); Fisk v. Haber, 7 La. Ann. 652 (1852); 3 PLANIOL ET RIPERT at 297.} to walls straddling the boundary that separate two buildings.\footnote{See Olsen v. Tung, 179 La. 760, 155 So. 16 (1934); Kelley v. Taylor, 43 La. Ann. 1157, 10 So. 255 (1891); Fisk v. Haber, 7 La. Ann. 652 (1852); cf. Burns v. Briede, 2 Orl. App. 410 (La. App. Orl. Cir. 1905).} Thus, if the wall is located on one side of the boundary, the presumption does not apply,\footnote{See Olsen v. Tung, 179 La. 760, 155 So. 16 (1934); Murrell v. Fowler, 3 La. Ann. 165, 166 (1848) (presumption inapplicable: "The wall is entirely on the land of plaintiff"). The presumption is not defeated if the wall rests unequally on the lands of the adjoining neighbors. Kelly v. Taylor, 43 La. Ann. 1157, 10 So. 255 (1891).} even if the foundation of the wall extends into the land of the neighbor.\footnote{See Olsen v. Tung, 179 La. 760, 155 So. 16 (1934); Murrell v. Fowler, 3 La. Ann. 165 (1848).} In cases to which the presumption applies, the entire wall is presumed to be common if the adjoining buildings are of the same height; if one building is higher than the other, the wall is presumed to be common up to the highest part of the lower building.\footnote{See Civ. February 22, 1932, GAZ. PAL. 1932.1.909; Weil v. Baker, Sloo, & Co., 39 La. Ann. 1102, 3 So. 361, 362 (1887): "In the absence of evidence to the contrary, the whole wall, as it stands, including the projection above referred to on the third floor, is presumed to be a wall in common."} The presumption of co-ownership applies also to walls on the boundary that separate
yards or gardens, and to walls that separate fields. When these assumptions are contradicted by the factual situation the presumption of co-ownership has no application. In determining the question whether the presumption applies, courts take into account not only the contemporary situation of the premises but also their situation at the time the wall was erected. Thus, if there is evidence that one of the adjoining buildings was erected after the construction of the wall, the owner of that building may not avail himself of the presumption of co-ownership. Of course, if the contemporary situation has existed for over thirty years, evidence as to the original situation becomes immaterial.

A wall separating a building from a yard or from a garden is not presumed to be common. Such a wall is considered to

148. See Cordill v. Israel, 130 La. 138, 142, 57 So. 778, 780 (1912): "A dividing wall between yards and gardens necessarily benefits the adjoining proprietors from the time of its completion. It is otherwise with a division wall between a house and vacant lot." According to the prevailing opinion in France this is so even if one of the adjacent estates is not enclosed. 2 AUBRY ET RAU at 566; 5 BAUDRY-LANCANTINIERE at 660; 11 DEMOLOMBE at 335. But cf. 3 PLANIOL ET RIPERT at 298.


150. See Canal-Villere Realty Co. v. Gumble Realty & Securities Co., 1 La. App. 123 (La. App. Orl. Cir. 1924): "The presumption being that it is the neighbor, who needed the wall for his building who caused it to be built upon his lot and at his expense, and that the other neighbor, who had no interest in the construction of the wall, having no building against it, has not contributed to it." See also Req. April 25, 1888, D.1889.1.262, S.1888.1.380; Req. June 15, 1881, D.1883.1.259, S.1883.1.401; 2 AUBRY ET RAU at 565.

151. See CIV. October 24, 1951, D.1951.772, GAZ. PAL. 1952.1.29.


153. See 2 AUBRY ET RAU at 567.

have been constructed by the owner of the building, because it is improbable that the owner of the yard or garden would have contributed anything for the erection of a wall designed to support his neighbor's building. The same is true of all cases in which, under the circumstances, only one of the neighbors had an interest in the erection of a supporting wall.

Articles 688 and 689 of the Louisiana Civil Code of 1870 establish a presumption of co-ownership of fences and ditches on the boundary between two estates. The corresponding provisions of the Napoleonic Code were amended in France by the law of August 20, 1881. Under the present version of Article 666 of the Code Civil all kinds of boundary enclosures, even those formed by poles and wire, are reputed to be common unless only one of the estates is enclosed. According to French doctrine and jurisprudence, application of the presumption depends on evidence that both estates were enclosed at the time of the construction of the enclosure.

The presumptions of co-ownership established by Articles 677, 678, and 689 of the Louisiana Civil Code of 1870, and by corresponding provisions of the Code Civil, may be rebutted by contrary evidence, such as a title of exclusive ownership, acquisitive prescription, or a sign contradicting co-ownership. Article 654 of the Code Civil, which has no counterpart in the Louisiana Civil Code, enumerates certain physical features that are signs contradicting co-ownership. It declares that when the upper end of a wall is straight at one side and inclined at the other, when the crested roof of the wall overlaps one side only, or when protective pieces of wire or stone were placed on one side of the wall at the time it was constructed, there is a sign contradicting co-ownership.

155. See Canal-Villere Realty Co. v. Gumble Realty & Securities Co., 1 La. App. 123 (La. App. Orl. Cir. 1924): "When the wall supports buildings which are only on one side, and when on the other side there were neither buildings nor indications that there have been any, the wall is presumed to belong only to that one of the neighbors whose building it supports."


158. See Olsen v. Tung, 179 La. 760, 155 So. 16 (1934); Lotz v. Hurwitz, 174 La. 638, 141 So. 83 (1932); 2 AUBRY ET RAU at 567 n.14.

159. The enumeration is merely indicative. See Req. July 8, 1928, D.P.1928.1.8; Req. Nov. 12, 1902, D.1902.1.568, S.1903.1.29; Pau, March 20, 1863, S.1863.2.162. When the enclosure is a ditch, a feature contradicting
These and similar signs establish the exclusive ownership of the neighbor on whose side they exist, if they originated at the time the wall was built or if they have been in existence, visible and known to the neighbor, for at least thirty years. In Louisiana, Articles 677, 688, and 689 of the Civil Code declare that the presumptions of co-ownership they establish may be rebutted by contrary signs. In the absence of legislative provisions determining what constitutes such signs the matter is left to the discretion of the courts.

The presumptions of co-ownership may also be rebutted by parol evidence and by expert testimony. Application of the presumption is excluded rather than rebutted on proof that the enclosure is located on the land of one of the neighbors only or when one establishes that his building was erected before that of his neighbor at a time in which the wall ought to be regarded in his exclusive ownership.

Under the Greek and German civil codes, boundary enclosures, though individually owned, are presumed to be for the common use of the adjacent landowners. Article 1021 of the Greek Civil Code, corresponding with Section 921 of the German Civil Code, declares: "If two immovables are separated by an alley, a strip of land, a fence, a wall, a ditch, or by any other construction that serves both immovables, it is presumed that the adjacent owners are entitled to use them in common, unless it is established by external signs or by

co-ownership is a pile of excavated dirt on one side of the ditch; in this case, the ditch is considered to belong exclusively to the owner on whose side the bank has been raised. FRENCH CIV. CODE art. 666 (2) (3); Toulouse, November 20, 1933; GAZ. PAL. 1934.1.53; REQ. July 22, 1861, D.1861.1.475, S.1861.1.825. 160. See 2 AUBRY ET RAU at 569. But see 5 BAUDRY-LAHCANTINERIE at 667.

161. See Cordill v. Israel, 130 La. 138, 141, 157 So. 778, 779 (1912): "On the face of this article, [667] the presumption is only prima facie, and must yield to proof that the adjoining owner, claiming to own one-half of the wall erected by his neighbor, did not contribute to the building of the wall, and has not paid one-half of the cost of construction." See also Orleans, July 4, 1891, D.1893.2.126.

162. See text at notes 145, 146, supra; Murrell v. Fowler, 3 La. Ann. 165 (1848); CIV. October 24, 1951, GAZ. PAL. 1952.1.29; REQ. January 11, 1864, S.1865.1.262.

163. See text note 152, supra; Murrell v. Fowler, 3 La. Ann. 165, 166 (1848). The court held that the presumption of co-ownership is "repelled by the situation and condition of the property at the time it was occupied by the original owner. See also Cordill v. Israel, 130 La. 138, 57 So. 778 (1912); Oldstein v. Firemen's Building Ass'n., 44 La. Ann. 492, 10 So. 928 (1892).

164. See text at note 10, supra.
This provision establishes a limitation on ownership rather than a legal servitude. The enumeration is indicative of natural or artificial formations that may serve as enclosures. The presumption applies only to enclosures that straddle the boundary, even in unequal proportions, and serve both of the adjacent estates. The presumption is rebutted by contrary evidence, including external signs or local customs that establish exclusive use in favor of one of the neighbors.166

Rights and Obligations of the Co-owners of a Wall

The co-owner of a wall may use it freely according to its destination, provided that he does not obstruct the use of his co-owner. The Louisiana and French civil codes establish specifications of this principle, indicating certain uses that are permissible and others that are forbidden; moreover, the two codes seek to reconcile the conflicting interests of co-owners by means of certain conservatory or protective measures.167

Uses of the common wall. Article 680 of the Louisiana Civil Code of 1870, corresponding with Article 657 of the Code Civil, provides that each co-owner may build against a wall held in common, and cause beams or joists to be placed within two inches of the whole thickness of the wall; the neighbor, however, has the right to diminish the length of the beams to half the thickness of the wall, if he wishes to place beams in the same place or build a chimney there.168 Further, according to Article 685 of the Louisiana Civil Code and Article 662 of the Code Civil, the co-owner of a wall may make cavities in its body for a variety of purposes, such as the construction of closets or chimneys.169 For such uses of the common wall,
however, the co-owner needs the consent of his neighbor. If the neighbor refuses to give his consent, cavities in the wall may be made in accordance with expert advice obtained from persons skilled in building for the purpose of determining the necessary precautions to be taken for the avoidance of injury to the rights of the neighbor. Cavities made in the wall or works attached to it without the consent of the neighbor or without the benefit of expert advice may be removed or modified, if they affect the structural integrity of the wall or if they cause excessive inconvenience to the neighbor. In this respect, courts enjoy much discretion.

Apertures. According to Article 696 of the Louisiana Civil Code of 1870, corresponding with Article 675 of the French Civil Code, a co-owner of a wall may not, without the consent of his neighbor, open a window or other aperture in the wall, "in any manner whatever, not even with the obligation, on his part, to confine himself to lights, the frames of which shall be so fixed within the wall that they cannot be opened." The prohibition applies to doors as well as windows. Lights are, of course, allowed in private walls, but they are incompatible with the destination of a common wall which is to enclose the adjoining estates.

If openings were made at a time when a wall at or on the

D.1848.2.103, S.1848.2.137, indicating that the thickness of the wall must be such as to permit a similar use by the neighbor. FRENCH CIV. CODE art. 671, as amended by the law of August 20, 1881, allows a co-owner to attach light constructions to the common wall without the consent of his co-owner. Cf. 3 PLANIOL ET RIPERT at 300.

170. Mere silence or acquiescence does not satisfy the requirement of consent. Moreover, the appointment of experts is "a mere precaution, and cannot have the effect of discharging the neighbor from the obligation of repairing the injury caused by the new work." Pierce v. Musson, 17 La. 389, 396 (1841). See also Req. April 7, 1858, D.1858.1.408.

171. See Loney v. High, 13 La. 271 (1839) (demolition of flues and privies in the wall). See also Req. February 2, 1897, D.1897.1.71. The co-owner who makes cavities in the wall and through his fault causes damage to his neighbor is bound to repair the damage. Marion v. Johnson, 23 La. Ann. 597 (1871).


173. See LA. CIV. CODE art. 696; La. Civ. Code art. 692 (1825); La. Digest of 1808, p. 136, art. 42; FRENCH CIV. CODE art. 675. For derogation from this principle, see text at note 281 infra.

174. See Bordeaux, December 13, 1894, D.1895.2.216.


176. See 3 PLANIOL ET RIPERT at 301.
boundary was private, the adjoining neighbor has an impre- 
scription right to make the wall common and close the open-
ings.177 Quite frequently, a neighbor wishes to make a wall 
common for this very purpose.178 If openings are made in a 
common wall, and are allowed to remain for a long period of 
time, the co-owner who made the openings may acquire by 
prescription a continuous and apparent servitude of light or 
of view.179 The legal servitude prohibiting apertures in a 
common wall does not apply to the part of a common wall 
raised by one of the co-owners, and ceases to exist when the 
neighboring estate is acquired by the public domain for the 
construction of a public road.180

Raising the height of the wall. Article 681 of the 
Louisiana Civil Code of 1870, corresponding with Article 658 
of the Napoleonic Code,181 grants to the co-owner of a wall the 
right to increase its height. He may exercise this right freely 
for any lawful purpose he wishes to pursue without the prior 
consent of his neighbor or the benefit of expert advice, be-
cause the requirements for making a cavity in the wall have

177. See Oldstein v. Firemen's Bldg. Ass'n, 44 La. Ann. 492, 10 So. 928 
(1892); Lavergne v. Lacoste, 26 La. Ann. 507 (1874); Jeannin v. DeBlanc, 11 
La. Ann. 465 (1856). This is so because no one can acquire a servitude of light 
or view on his own wall. See LA. CIV. CODE art. 619. Instead of closing the 
windows, the co-owner of a common wall may build opposite them a wall of 

178. See Bryant v. Sholars, 104 La. 786, 29 So. 350 (1901).

179. See REQ. June 15, 1881, D.1883.1.259, S.1883.1.401; Bordeaux, March 
7, 1873, D.1874.2.76; REQ. April 19, 1849, D.1849.5.364. Cf. Oldstein v. Fire-
men's Bldg. Ass'n, 44 La. Ann. 492, 10 So. 928 (1892). Language in this case 
seems to indicate that a servitude of view may not be acquired on a common 
wall by prescription, and that for the acquisition of such a servitude title is 
indispensable. Actually, the wall in question belonged exclusively to the 
neighbor who claimed the servitude, and, therefore, no servitude could have 
possibly arisen; moreover, the court confused the servitude of view under 
Article 716 of the Louisiana Civil Code of 1870 with the servitude of prospect 
under Article 718 of the same Code. It is, of course, the latter that requires 
title. For a servitude of light and view acquired on a common wall by destina-
tion of the owner, see Lavillebreuve v. Cosgrove, 13 La. Ann. 323 (1858).

180. See 2 AUBRY ET RAU at 580; 3 PLANIOL ET RIPERT at 301.

181. LA. CIV. CODE art. 681; La. Civ. Code art. 677 (1825); La. Digest of 
1808, p. 132, art. 29; FRENCH CIV. CODE art. 658. This article was amended in 
France by the law of May 17, 1960, to read: "Every co-owner may cause a 
common wall to be raised; but he is alone bound to pay for the expense of 
raising it and for the repairs and maintenance of the raised part of the 
common enclosure; moreover, he is alone bound to pay for the maintenance 
expense of the common part of the wall attributed to the raising, and he must 
reimburse the neighboring landowner for all the expenses that he necessarily 
incurred as a result of the raising of the wall."
nothing to do with the raising of its height.\textsuperscript{182} Nevertheless, a co-owner does not have the right to raise the wall if his sole purpose is to cause harm to his neighbor; this would constitute an abuse of right.\textsuperscript{183} The co-owner who wishes to raise the height of the wall may not be enjoined from doing so on the ground that the construction will likely cause damage to an adjoining building, nor may he be compelled to use the same materials as in the old part of the wall or to construct the raised part on the entire width of the old part of the wall.\textsuperscript{184} If the co-owner proceeds to the raising of the wall without making sure that the wall can support the additional weight, or without taking the appropriate precautions, he is responsible for the damage caused to the common wall and to the property of the neighbor.\textsuperscript{185}

The co-owner who causes the common wall to be raised to an additional height is bound to pay the cost of construction, the cost of repairing and keeping the new part in good order, and an indemnity to the neighbor “for the added burden, by reason of the increase of the height and according to its value.”\textsuperscript{186} This indemnity, known as surcharge, is accorded to the neighbor because the raising of the wall may be expected with certainty to cause an increase in the frequency of repairs for the old part. The amount of the indemnity is left to the discretion of the judge. According to French jurisprudence, there can be no indemnity if the increase in the height of the wall is negligible or if, on account of special precautions, the solidity of the old part is not impaired.\textsuperscript{187}

\textsuperscript{182} See Heine v. Merrick, 41 La. Ann. 194, 5 So. 760 (1889); Req. April 18, 1866, D.1866.1.336, S.1866.1.430; 3 Planiol et Ripert at 302. But see 2 Aubry et Rau at 572 n. 35.


\textsuperscript{185} See Aix, May 4, 1863, S.1864.2.73; Bordeaux, April 21, 1864, D.1865.2.239, S.1864.2.219; Req. March 16, 1881, D.1882.1.76, S.1881.1.223.

\textsuperscript{186} La. Civ. Code art. 681, corrected English text. The phrase “he alone is liable for all expenses from its being raised higher according to its value” is a mistranslation from the French: “et en outre l’indemnité de la charge, en raison de l’exhaussement et suivant la valeur.” 1972 Compiled Edition of the Civil Codes of Louisiana art. 681 (J. Dainow ed.).

\textsuperscript{187} Req. July 2, 1895, D.1896.1.178, S.1896.1.145; 3 Planiol et Ripert at 303.
Contribution to maintenance, repairs and rebuilding. Article 678 of the Louisiana Civil Code of 1870, corresponding with Article 655 of the French Civil Code, declares that "the repairs and rebuilding of walls in common are to be made at the expense of all who have a right to the same, and in proportion to their interest therein." Thus, a co-owner may compel his neighbor to contribute to the cost of repair or reconstruction of a common wall, if the expense is necessary for the use of the wall in accordance with its destination; but if a co-owner repairs or reconstructs a wall exclusively in the pursuit of his own interest, he is alone responsible for the cost of repair or reconstruction. The co-owner who undertakes to repair or reconstruct the common wall is liable for the damage he causes to his neighbor through his fault.

In Germany and in Greece, if a boundary enclosure is subject to common use of adjoining landowners, each is entitled to use it according to its destination, provided that he does not obstruct the use of the other. Maintenance expenses are divided equally between the neighbors. If one of the neighbors has an interest in the preservation of the enclosure, it may not be removed or altered without his consent. For the rest, the provisions concerning co-ownership apply by analogy.

Demolition and Rebuilding of a Common Wall

If the common wall cannot support the additional weight

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188. See La. Civ. Code art. 678; La. Civ. Code art. 674 (1825); La. Digest of 1808, p. 132, art. 26; FRENCH CIV. CODE art. 655. Note error in English translation of French text: "building" should be "rebuilding." 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 678 (J. Dainow ed.). A neighbor should not be required to contribute to the rebuilding of a common wall if he has no use for it. See Davis v. Marshall & James, 9 La. Ann. 480 (1854). In this case, the court held that the adjoining neighbor was not liable to contribute for the reconstruction of a wall destroyed by fire in the absence of evidence that he had used the reconstructed wall. Quite frequently one landowner rebuilds a common wall destroyed by accidental causes and demands contribution from his neighbor when the latter attempts to use the reconstructed wall. See Monteleone v. Harding, 50 La. Ann. 1147, 23 So. 990 (1898); Sullivan v. Smith, 11 La. Ann. 701 (1856). For solutions in France, see Civ. March 18, 1872, S.1872.1.213; Paris, March 26, 1895, D.1895.2.239.


191. See text at note 165, supra.

192. See GREEK CIV. CODE art. 1022; BGB § 922. For analysis, see BALIS at 124; MEISNER, STERN & HODES at 115.
of raising it, the co-owner who wishes to have it made higher "is bound to rebuild it anew entirely, at his own expense, and the additional thickness must be taken from his property."\textsuperscript{193} The additional thickness for the foundation, however, need not be taken from the property of the co-owner who builds the new wall, because he has "the legal right to extend the foundation equally on either side of its center to the extent necessary to make it sufficient to support this new and thicker wall."\textsuperscript{194} Question has arisen in Louisiana whether a co-owner, having destroyed a common wall that did not occupy nine inches of his neighbor's land, may erect a new wall taking full advantage of the legal servitude established by Article 675 of the Civil Code.\textsuperscript{195} In an early case, argument was made that the co-owner is always bound to take the additional thickness from his land, regardless of the location and size of the original wall, and the court thought that the argument had "great force";\textsuperscript{196} judgment, however, was rendered on other grounds.

A co-owner has an unconditional right to demolish the old and to erect a new wall that is stronger and thicker.\textsuperscript{197} In so doing, he may disturb the neighbor's enjoyment and enter into his property "for the purpose and to the extent necessary to exercise the principal right."\textsuperscript{198} The neighbor is thus bound to bear, without indemnity, the inconvenience and injury resulting from the demolition and reconstruction of the wall to the extent that they are inseparable from the exercise of the right.\textsuperscript{199} In the absence of fault, there is no compensation for

\textsuperscript{193} LA. CIV. CODE art. 682; La. Civ. Code art. 678 (1825); La. Digest of 1808, p. 132, art. 30; FRENCH CIV. CODE art. 659. This right is accorded to the owner of a wall "held in common." In Gettwerth v. Hedden, 30 La. Ann. 30 (1878), however, the court apparently allowed a landowner to demolish and rebuild a wall belonging to his neighbor!

\textsuperscript{194} Heine v. Merrick, 41 La. Ann. 194, 205, 5 So. 760, 766 (1889).

\textsuperscript{195} See Comment, The Party Wall Servitude in Louisiana, 17 LA. L. REV. 619, 627 (1957); text at note 21 supra.

\textsuperscript{196} Pokorny v. Pratt, 110 La. 603, 34 So. 703 (1903). According to this argument, the servitude for the taking of nine inches of ground from neighboring property may be partially defeated. Cf. Comment, May the Servitude of Party Walls be Avoided?, 4 TUL. L. REV. 619, 622 (1930).


\textsuperscript{198} Heine v. Merrick, 41 La. Ann. 194, 201, 5 So. 760, 763 (1889).

\textsuperscript{199} See Levy v. Fenner, 48 La. Ann. 1389, 20 So. 895 (1896); Heine v. Merrick, 41 La. Ann. 194, 5 So. 760 (1889); Gernon v. Soule, 1 Orl. App. 185, 186 (La. App. Orl. Cir. 1904): "So long and insofar as these injuries are insepae-
the privation of the use of a house, for the malfunction of chimneys, or for the loss of rents during construction. 200

The co-owner who exercises the right to demolish and rebuild a common wall is, of course, responsible for all damage caused to his neighbor through his fault. 201 He is bound to take "every precaution that prudence and a due regard for the rights and comfort of the neighbor require; and if he fails to do this, he is responsible for such actual loss and damage as the neighbor has suffered which might have been avoided." 202 Co-owners are thus responsible for every exaggeration of necessary damage, and bound by every means in their power "to reduce to a minimum the injury and inconvenience occasioned to their neighbor, to occupy his property to the least extent, and for the shortest time, consistent with the exercise of their right, and to hasten by all practical means the completion of the wall and the restoration of the neighbor to the full enjoyment of his property." 203 Apart from the responsibility for damage, the co-owner who demolishes and rebuilds a wall is under obligation, enforceable by injunction, to restore each part of his neighbor's building "as nearly as possible as it was before the wall was taken down." 204

If the demolition and rebuilding of a common wall has caused damage to a lessee of neighboring property, the lessor is not liable under his warranty to repair the loss. 205 The right that the co-owner of a wall has to demolish and rebuild "is so universally known that the owner of the property subject to it and his lessee must be considered as having notice of its existence, and it might be exercised at the pleasure and


201. See Paris, February 7, 1872, D.1872.2.84; Paris, February 5, 1868, D.1868.2.67; Aix, May 4, 1863, S.1864.2.73; Bordeaux, May 18, 1849, D.1850.2.86.

202. Gettwerth v. Hedden, 30 La. Ann. 30, 32 (1878). See also Pierce v. Musson, 17 La. 389 (1841); Loney v. High, 13 La. 271 (1839): "The privilege which is given to persons desirous of building houses contiguous to those of their neighbors, and for that purpose to demolish and rebuild the walls of the latter, is one which cannot be exercised with too much care and attention."


204. See Pokorny v. Pratt, 110 La. 609, 34 So. 706 (1903).

convenience of the adjoining proprietor.\textsuperscript{206} The lessee, however, may claim of the lessor reduction of the rent,\textsuperscript{207} and, only if the situation should become untenable, dissolution of the lease.\textsuperscript{208} In addition, the lessee has the right to recover from the adjoining neighbor who rebuilt the wall the damage that he has suffered through the latter’s fault.\textsuperscript{209}

The co-owner who increased the height of a common wall in accordance with Article 681 of the Louisiana Civil Code of 1870 becomes exclusive owner of the raised part. If the old wall has been demolished, and a new thicker wall has been built in accordance with Article 682, the new wall is common up to the height of the old wall.\textsuperscript{210} The neighbor who has not contributed to the raising or rebuilding of the common wall has the right to acquire the co-ownership of the raised part upon payment of one-half of the cost of construction and one-half of the value of the soil taken for the additional thickness, if such is the case.\textsuperscript{211} The demolition of a common wall for the purpose of rebuilding it does not result in extinction of servitudes; by virtue of a directly applicable provision, all servitudes, active or passive, continue to exist on the new wall.\textsuperscript{212}

\textbf{Abandonment of the Co-ownership of a Wall}

The obligation to contribute to the maintenance of the

\textsuperscript{207} See H. B. Stevens, Co. v. Board of Administrators of Tulane Educ. Fund, 136 La. 1013, 68 So. 109 (1915); Dorville v. Amat, 6 La. Ann. 566 (1851).
\textsuperscript{210} See 2 AUBRY ET RAU at 576; REQ. July 2, 1895, D.1896.1.178, S.1895.1.445.
\textsuperscript{211} See LA. CIV. CODE art. 683; La. Civ. Code art 679 (1825); La. Digest of 1808, p. 134, art. 31; Code Napoleon art. 660. According to French decisions interpreting Article 660 of the Napoleonic Code, the neighbor who wishes to acquire the co-ownership of the raised part of the common wall is bound to pay the original cost of construction rather than present depreciated value. See CIV. Dec. 22, 1924, D.H.1925. 101. Article 660, however, was amended in France by the law of May 17, 1960 to read: “The neighbor who has not contributed to the raising of the wall may acquire the co-ownership of it by paying one-half of the cost of construction and the value of one-half of the soil furnished for the additional thickness, if such is the case. The cost of the raising is estimated on the date of acquisition, taking into account the condition of the raised part of the wall.”
\textsuperscript{212} See LA. CIV. CODE art. 786; FRENCH CIV. CODE art. 665.
common wall in a good state of repair may be quite onerous. The Louisiana and French civil codes afford relief by provisions that accord to the co-owner of a wall the right to abandon his interest in it, that is, the co-ownership of the wall and of the soil that it occupies. This right is easily explained in the light of the nature of the obligations imposed on the co-owners of the wall. These are not personal obligations but real ones (propter rem) incurred by whoever happens to be owner of the immovable property. Thus, the obligor is exonerated as soon as he ceases to be co-owner of the wall as a result of abandonment. In Louisiana, the abandonment must be made in writing. In case suit is brought for contribution to the cost of repairs or reconstruction, a plea of abandonment made on the day of trial is ineffective. The right of the co-ownership of an enclosure is clearly divisible; hence, the co-owner of a wall is exonerated from the obligation to contribute by abandoning merely the part of the wall that requires repair or rebuilding.

213. See LA. Civ. Code art. 679; La. Civ. Code art. 675 (1825); La. Digest of 1808, p. 132, art. 27; FRENCH Civ. CODE art. 656. “Giving up his right of common” (in French “en abandonnant le droit de mitoyenneté”), is understood to mean: abandoning the right to the wall and the soil that the wall occupies. 3 PLANIOL ET RIPERT at 305; 5 BAUDRY-LACANTINERIE at 700.

214. See Bank of West Carroll v. Brower, 5 La. App. 469 (La. App. 2d Cir. 1927). For the nature of real obligations, see YIANNOPoulos, PROPERTY §§ 112-114. The neighbor should cease to be responsible for repairs to the common wall as soon as he alienates his property. Even if repairs were needed prior to a sale, contribution should be made by the vendee. Cf. Davis v. Marshall & James, 9 La. Ann. 480 (1854). If action for contribution is brought, however, the neighbor may be personally liable, even though he has sold the property, at least when he attempts to file a plea of renunciation on the day of trial. See Cacioppo v. Doll, 202 So. 2d 419 (La. App. 4th Cir. 1967).


217. See LA. Civ. Code arts. 678, 679, 815; FRENCH Civ. CODE arts. 655, 656; Civ. April 3, 1865, D.1865.1.176, S.1865.1.159. Cf. Doll v. Cacioppo, 90 So. 2d 688 (La. App. Orl. Cir. 1956). A co-owner of a wall was required to contribute one-half of the cost of its reconstruction although he used only twelve feet of the wall which was fifty feet high. The City of New Orleans has ordered the wall repaired or demolished as being unsafe. The co-owner stated that he had no intention of relinquishing any part of his one-half interest in the wall, and the court stated: “having refused to surrender his interest in the wall, we think that he was the common owner of the entire wall.”
Upon abandonment of the co-owner’s interest, the neighbor becomes exclusive owner of the wall and of the soil that it occupies.\textsuperscript{218} The former co-owner may no longer use the wall without the consent of its owner; he may, however, reacquire the co-ownership of the wall that he has abandoned under the conditions of Article 676 or 684 of the Louisiana Civil Code of 1870.\textsuperscript{219} Abandonment is always considered to have been made subject to the implied condition that the neighbor shall maintain or reconstruct the common wall; if the neighbor fails to do so, and the common wall falls into ruin, the abandonment is ineffective. Accordingly, the soil and the materials of the ruin belong to the adjacent neighbors in equal parts.\textsuperscript{220}

A co-owner does not have the right to abandon his interest in a common wall if “a building belonging to him be actually supported by the wall.”\textsuperscript{221} The provision has been interpreted broadly so as to exclude abandonment in all cases in which the co-owner wishing to make it retains in fact an advantage of use.\textsuperscript{222} According to French doctrine and jurisprudence, a co-owner may not abandon his interest when the common wall supports a building, even if he promises to cause its demolition. Abandonment becomes effective upon demolition of the building, and the owner who undertakes this operation is responsible for the damage that it may cause to his neighbor.\textsuperscript{223} Further, a co-owner does not have the right to abandon his interest in a common wall if the need for repair.

\textsuperscript{218} See 3 PLANIOL ET RIPERT at 305; cf. note 214, supra.

\textsuperscript{219} See text at notes 93, 94, supra. In France, re-acquisition of the co-ownership of the wall may be made under the conditions of Article 661. Cf. 5 BAUDRY-LANCANTINERIE at 706.

\textsuperscript{220} See 2 AUBRY ET RAU at 574.

\textsuperscript{221} LA. CIV. CODE art. 679; FRENCH CIV. CODE art. 656. See Bank of West Carroll v. Brower, 5 La. App. 469 (La. App. 2d Cir. 1927). After destruction of his building by fire, a co-owner effectively abandoned certain walls to his neighbor because “no part of its building was supported by these walls.” According to French Civ. Code art. 667(2), as amended by the law of August 20, 1881, the co-owner of a ditch does not have the right to abandon his interest in it, if the ditch serves as a drain. The exception is justified on the ground that if the co-owner had the right to abandon his interest in such a ditch, he would in fact continue to enjoy it despite the abandonment.

\textsuperscript{222} See Olsen v. Tung, 179 La. 760, 155 So. 16 (1934); see text at notes 83-92, supra.

\textsuperscript{223} See Paris, November 27, 1877, D.1879.2.21, CIV. December 16, 1863, D.1864.1.109.
or reconstruction is attributable to an act or event for which he is responsible.224

Article 656 of the French Civil Code, corresponding with Article 679 of the Louisiana Civil Code of 1870, accords the right of abandonment to "every co-proprietor of a wall in common." Article 663 of the Code Civil, however, corresponding with Article 686 of the Louisiana Civil Code of 1870, declares that "every one has a right to compel his neighbor, within the cities and suburbs, to contribute to the making and repairing of enclosures separating their houses, yards, and gardens." According to French jurisprudence, Article 663 does not limit the application of Article 656 and a co-owner is always free to abandon a wall held in common in cities and suburbs as well as in the country.225 According to most doctrinal writers, however, this jurisprudence is erroneous. A combined reading of Articles 656 and 663 ought to lead to the conclusion that the right of abandonment exists only as to estates that are not subject to forced enclosure; Article 663 derogates from the terms of Article 656, and, accordingly, the co-owner of a wall that serves as an enclosure in cities or suburbs does not have the right of abandonment.226

**FENCES, DITCHES, AND TREES ON THE BOUNDARY**

Articles 686 through 691 of the Louisiana Civil Code of 1870 deal with fences, ditches, and trees on the boundary between two estates.227 Most of these provisions were inspired from certain roughly corresponding articles of the Napoleonic Code,228 which, however, were drastically amended in France by the law of August 20, 1881.229 Since Louisiana law has always differed in this area from the law of France, reference to French doctrine and jurisprudence may

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225. See CIV. July 26, 1882, D.1883.1.342, S.1884.1.79; CIV. November 7, 1884, S.1884.1.506; CIV. December 3, 1862, S.1863.1.33; 2 AUBRY ET RAU at 571.

226. See 5 BAUDRY-LANCANTINERIE at 705, and works cited; 3 PLANIOL ET RIPERT at 306.


229. For the present text of FRENCH CIV. CODE arts 663, 666, 669-71, see Dalloz, CODE CIVIL (1974).
be useful for purposes of comparison though not persuasive for the interpretation of the provisions of the Louisiana Civil Code.

Fences

The Louisiana Civil Code, following the model of the French Civil Code, draws a distinction between lots in cities, towns and suburbs, and open fields in the country. Lots in urban areas are subject to forced enclosure,²³⁰ that is, neighbors are bound to contribute to the construction and maintenance of enclosures, whereas the enclosure of open fields in rural areas is voluntary.²³¹

The first paragraph of Article 686 of the Louisiana Civil Code of 1870, corresponding in part with Article 663 of the French Civil Code, declares that "every one has a right to compel his neighbor within the cities and towns, and their suburbs, of this State, to contribute to the making and repairing of fences held in common, by which their houses, yards, and gardens are separated."²³² These are to be made in the manner prescribed by police regulations that local governments are authorized to adopt.²³³ The word "fence" in this

²³⁰ See LA. CIV. CODE art. 686; FRENCH CIV. CODE art. 663; Fréjaville, La clôture forcée, [1934] D. H. Jur., Chr. 77. Cf. Jones v. Fortenberry, 142 So. 2d 561 (La App. 4th Cir. 1962): "A fair and reasonable interpretation of LSA-C.C. Art. 686 is that it applies to urban and suburban residential sections, while LSA-C.C. Art. 687 applies to rural estates."

²³¹ See LA. CIV. CODE art. 687. There is no corresponding provision in the FRENCH CIVIL CODE. Nevertheless, courts and writers maintain by virtue of an argument a contrario from LA. CIV. CODE art. 663 enclosure of rural estates is voluntary. See 3 PLANIOL ET RIPERT at 445. Determination of the question whether an area is urban or rural is left entirely to the discretion of the trier of facts. See REQ. February 28, 1905, D.1905.1.303; CIV. August 11, 1886, D.1887.1.36, S.1887.1.168.

²³² See LA. CIV. CODE art. 686; LA. CIV. CODE art. 682 (1825); LA. Digest of 1808, p. 134, art. 34; FRENCH CIV. CODE art. 663 (first part). For the right of a landowner to enclose his estate, see LA. CIV. CODE art. 662; FRENCH CIV. CODE art. 647; Parle v. D'Arcy, 28 La. Ann. 424 (1876); McDonough v. Calloway, 2 La. Ann. 518 (1847); cf. Dubos v. Hardin, 13 Orl. App. 210, 212 (La. App. Orl. Cir. 1916): "Every proprietor has the right to inclose his premises regardless of the wishes of his neighbor. If he builds a "fence" he has under some circumstances the right to compel the neighbor to contribute (C.C. 686); but if he chooses to build it alone, the necessary consequence is that the fence belongs to him alone."

²³³ See Polizzi v. Lotz, 240 La. 734, 125 So. 2d 146 (1960); cf. LA. CIV. CODE art. 686: "[I]n the manner in which is or may be prescribed by the regulations of police on this subject."
article ought to be understood broadly to include all kinds of
constructions separating houses, yards, or gardens.\textsuperscript{234}

Instead of asking his neighbor to join in the construction
of the enclosure, a landowner in an urban area may build a
surrounding fence himself and then demand contribution
from his neighbor. The second paragraph of Article 686 of the
Louisiana Civil Code of 1870, which has no equivalent in the
French Civil Code, declares that "if one of the proprietors has
been alone at the expense of making the inclosures held in
common, he may compel the other to make it in his turn."\textsuperscript{235}
Since urban lots are under the Civil Code subject to forced
enclosure, the neighbor benefits from the construction; he is,
therefore, liable for a part of its cost. The landowner who
undertakes to build the fence has the right to place it on the
property line, and, for this purpose, to enter into his
neighbor's land; if the neighbor interferes with the construc-
tion of the fence, injunction is an appropriate remedy.\textsuperscript{236} Of
course, if the fence encroaches on the land of the neighbor, he
has the right to demand its removal.\textsuperscript{237}

Louisiana courts have, in effect, abandoned the distinc-
tion that the Civil Code draws between lots in urban areas
and open fields in the country. They have drawn instead a
distinction between enclosed lots and unenclosed ones with-
out regard to location. In a leading case, the Louisiana Su-
preme Court declared that Articles 686 and 687 apply to en-

\textsuperscript{234} The word "fence" in the first paragraph of Article 686 is a transla-
tion of "clôture" in the French text of the Louisiana Civil Code of 1825 and
1808. \textsuperscript{See} 1972 \textsuperscript{COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA} art. 686
(J. Dainow ed.). \textsuperscript{Cf.} Polizzi v. Lotz, 240 La. 734, 125 So. 2d 146 (1960); "Fence"
is "an enclosing structure, a visible and tangible obstruction to part off or
shut in property, an enclosing barrier intended to prevent intrusion from
without."

\textsuperscript{235} The words "inclosures held in common" in the second paragraph of
Article 686 ought to be translated "boundary inclosures." \textsuperscript{See} 1972 \textsuperscript{COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA} art. 686 (J. Dainow ed.). Note,
however, that according to French doctrine and jurisprudence Article 663 of
the French Civil Code contemplates merely division \textit{walls}; hence the article
does not apply to hedges or fences of wire and poles. \textsuperscript{See} Req. February 1,
1860, S. 1860.1.972; Civ. December 15, 1857, S.1858.1.271; \textit{3 Planiol et Ripert}
at 444.

\textsuperscript{236} \textsuperscript{See} Farrell v. Bouche, 100 So. 2d 226 (La. App. Orl. Cir. 1958).

\textsuperscript{237} \textsuperscript{Cf.} Polizzi v. Lotz, 240 La. 734, 746, 125 So. 2d 146, 150 (1960). In this
case, the court refused to order removal of a fence that encroached at certain
points one-half inch on the land of the neighbor. The court pointed out that
"as a practical matter, the placing of half of a one inch board on each side of a
boundary line is difficult or even impossible of exact accomplishment."
closed lots only, and that "the owner of the unenclosed lot cannot be made to contribute to a separation fence for the exclusive benefit of the neighbor." The underlying principle of the joint liability for the expense of walls and fences held in common," the court went on, "is the common need the neighbors have for them. In case one of the neighbors has no earthly need of a fence, he should not be made to pay one-half of its cost." Thus, perhaps contrary to the letter of the Code, a landowner adjacent to a vacant and unenclosed city lot may not compel the owner of that lot to contribute to the making and repairing of a boundary fence. He may build a fence and demand contribution only when the adjacent property is built or enclosed. The liability to contribute is imposed on the present owner of the property rather than his ancestor in title. This liability does not give rise to a lien or privilege on the immovable property.

The construction and maintenance of common fences is now a matter largely regulated by local ordinances. Indicatively, the New Orleans Building Code provides that he who first builds a fence may erect it on the property line, and may compel his neighbor to contribute to its cost if he complies with the requirements of Article 4502 of this Code. This artic-
Article provides that the owner of a lot who wishes to build a common fence must give notice to the owner of the adjoining lot. If the neighbor refuses to join in the building of the fence, or after ten days of the delivery of the notice, the owner desiring to build the fence may proceed to construct a fence of the type specified in the ordinance. He will then be entitled to recover from the adjoining owner one-half of the cost of the fence. Recovery is always predicated on substantial compliance with the ordinance. In the process of building a fence of the type contemplated by the ordinance, a landowner has the right to destroy a fence of a different kind.

In rural areas, boundary enclosures between estates are made at common expense only if both the adjacent estates are enclosed. Enclosure is thus essentially voluntary; and if a landowner chooses to enclose his land, he may not demand contribution from his adjacent neighbor whose land remains unenclosed. This neighbor derives no benefit from the fence, and he is not bound to the cost of its construction.

Boundary fences in urban areas are presumed to belong to the landowner on whose side they are nailed, unless there is title or proof to the contrary. With respect to boundary

244. See Hughes v. Brignac, 72 So. 2d 22 (La. App. Orl. Cir. 1954); Hubbs v. Bivelette, 56 So. 2d 198 (La. App. Orl. Cir. 1952); cf. Geier v. Miranne, 199 So. 2d 622 (La. App. 4th Cir. 1967). In this case, the court did not allow recovery of one-half the cost of the construction of the fence on the ground that there was no proof that the fence was on the boundary.


247. See LA. CIV. CODE art. 687; La. Civ. Code art. 683 (1825); La. Digest of 1808, p. 134, art. 35. There was no corresponding Article in the Code Napoleon. FRENCH CIV. CODE art. 667(1), however, as amended by the law of August 20, 1881, declares that "a common enclosure must be maintained at common expense."

248. See text at note 239, supra.

249. See LA. CIV. CODE art. 686(2). Cf. Dubos v. Hardin, 13 Orl. App. 210, 212 (La. App. Orl. Cir. 1916): "There is no such thing as a wall or fence 'held in common' unless both parties have contributed to its erection."
fences in the country, however, Article 688 of the Louisiana Civil Code of 1870 declares that "every fence, which separates rural estates, is considered as a boundary inclosure, unless there be but one of the estates inclosed, or unless there be some title or proof to the contrary." This article establishes merely a presumption that a fence separating two rural immovables is common; it has nothing to do with the boundary itself. In France, Article 666(1) of the Code Civil, as amended by the law of August 20, 1881, declares that every enclosure separating two estates is presumed to be common, unless only one of the estates is enclosed or unless there is title, prescription, or sign to the contrary. Common enclosures are to be maintained at common expense; a neighbor, however, may exonerate himself by abandoning his co-ownership of the enclosure.

Ditches

Article 689 of the Louisiana Civil Code of 1870, corresponding with Article 666 of the Napoleonic Code, declares that every ditch is presumed to be common unless there is title or other proof to the contrary. According to well-
settled French doctrine and jurisprudence, the provision applies to ditches that straddle the boundary line.256 The landowner whose estate adjoins a ditch does not have the right to acquire its co-ownership against the wishes of his neighbor.257

Article 690 of the Louisiana Civil Code of 1870, corresponding with Article 669 of the Napoleonic Code, declares that a common ditch is to be kept at the expense of the contiguous owners.258 It would seem that the co-owner of a ditch may be exonerated by abandonment of his co-ownership, unless, of course, he would retain benefits despite the abandonment.259 It would also seem that the co-owner of a ditch would have the right to fill it up to the limit of his property, if the ditch merely serves as a boundary enclosure. If the ditch serves as a drain such a right should not be recognized.260

Trees

Article 691 of the Louisiana Civil Code of 1870 declares that the owner of immovable property in an urban area is forbidden to plant trees on the boundary “that may be of any injury whatsoever to the neighbor.”261 If the neighbor suffers any damage from trees planted on the boundary, he has the

256. See Req. March 20, 1828, D.1828.1.186; 11 Demolombe at 542; Par-dessus at 309. The co-ownership of the ditch is subject to forced indivision; partition is not available. 2 Aubry et rau at 587.

257. See French Civ. Code art. 688(1), as amended by the law of August 20, 1881. The same solution ought to obtain in Louisiana in spite of the absence of a corresponding provision in the 1870 Code. La. Civ. Code art. 684, allowing for the acquisition of the co-ownership of an adjoining wall, is an exceptional provision that may not be applied by analogy. Cf. text at notes 74-76, supra.

258. See La. Civ. Code art. 690; La. Civ. Code art. 686 (1825); La. Digest of 1808, p. 134, art. 37; Code Napoleon art. 669. French Civ. Code art. 667(1), as amended by the law of August 20, 1881, declares: “the common enclosure is to be maintained at common expense; but the neighbor may exonerate himself from this responsibility by abandoning his co-ownership.”

259. See text at note 222, supra. French Civ. Code art 667(2), as amended by the law of August 20, 1881, expressly forbids abandonment of the co-ownership of a fence serving as a drain.

260. French Civ. Code art. 668, as amended by the law of August 20, 1881, permits the filing of a ditch that merely serves as an enclosure under the obligation of constructing a wall in its place on the boundary.

right to demand that they be torn up or the branches that extend into his property be cut off; if roots extend into his estate, he has the right to cut them himself.\textsuperscript{262} Louisiana courts interpreting these provisions have held that a neighbor does not have the right to cut limbs of boundary trees or bushes extending into his property without the consent of the owner, and that unauthorized action results in liability for trespass.\textsuperscript{263} A municipality may not authorize the cutting of limbs extending into a public street, unless, of course, these obstruct the use of the street by the public.\textsuperscript{264}

Article 691 does not apply to trees, bushes, or hedges planted on one's own property.\textsuperscript{265} It would seem that in such a case no one is authorized by law to resort to self-help, even to remove roots extending into his property.\textsuperscript{266} The French Civil Code contains detailed provisions concerning boundary hedges and trees. A landowner may not acquire, against the wishes of his neighbor, the co-ownership of a hedge that adjoins his property.\textsuperscript{267} If a boundary hedge is common, each of the co-owners is entitled to an equal portion of its fruits.\textsuperscript{268} The co-owner has the right to destroy the hedge up to the limit of his property under the obligation of constructing an

\textsuperscript{262} See \textit{La. Civ. Code} art. 691(2), (3). As to damage caused by falling limbs, see Loescher v. Parr, 312 So. 2d 347 (La. App. 1st Cir. 1975); Gibbs v. Tourres, 50 So. 2d 652 (La. App. 2d Cir. 1951).


\textsuperscript{265} See Bright v. Bell, 117 La. 947, 42 So. 436 (1906); Gibbs v. Tourres, 50 So. 2d 652 (La. App. 2d Cir. 1951).

\textsuperscript{266} See Gibbs v. Tourres, 50 So. 2d 652 (La. App. 2d Cir. 1951); Oglesby v. Town of Winnfield, 27 So. 2d 137, 143 (La. App. 2d Cir. 1946): "[T]rees belong to the owner of the soil whereon they stand regardless of their proximity to property lines and no one has the absolute right and may not with impunity, under any guise, go upon the land, climb the trees and remove limbs therefrom without incurring the penalty the law makes certain for such unauthorized acts. If he has valid complaint on account of the tree's location, the spreading of its boughs, etc. he may appeal to the courts for relief..." But cf. Bright v. Bell, 117 La. 947, 42 So. 436 (1906) (destruction of runners of neighbor's hedge trained into another's hedge; no liability).

\textsuperscript{267} See \textit{FRENCH CIV. CODE} art. 668, as amended by the law of August 20, 1881.

\textsuperscript{268} \textit{Id.} art. 669, as amended by the law of August 20, 1881.
Trees located in a common hedge or planted on the property line between two estates are deemed to be common. If these trees die, or if they are cut down or uprooted, their wood belongs to the co-owners in equal portions; their fruits are gathered at common expense and are divided equally between the co-owners, whether they fall naturally, their fall is provoked, or they are collected; and each co-owner has the right to demand that a common tree be uprooted. Additional provisions indicate the distance that must be observed in planting trees, shrubs, or bushes at the boundary, and the conditions for the destruction of those planted without having observed the proper distance. Article 673 of the Code Civil provides that a landowner may compel his neighbor to cut branches of trees, shrubs or bushes extending into his property, and that fruits falling naturally into his property belong to him; that the landowner may himself cut roots, brambles or sprigs extending into his property up to the property line; and that the right to compel the removal of branches or to cut roots is imprescriptible.

According to Roman notions, a tree on the boundary between two estates is divided by the property line and each of the adjacent neighbors is owner of the part of the tree that is located on his side. This solution was rejected in Germany and in Greece as impractical. Instead, the civil codes of the two countries have established the rule that a tree on the boundary is owned in indivision by the adjacent landowners. The tree is a distinct thing subject to a regime of forced co-ownership. A co-owner may not transfer his interest to another person nor demand partition; he has, however, an imprescriptible right to demand the tree's removal, unless the tree serves as a boundary marker. For the rest, the rules governing co-ownership apply, especially as they concern the co-owner's right to fruits and his obligation to contribute for expenses.

Under the German and Greek civil codes, the roots and branches of a tree planted on one's own land are component
If such roots or branches impede the use of his immovable, the neighbor has the right to cause their removal and thus terminate the adjacent landowner's right of ownership without his consent. The neighbor has the right himself to cut the roots that extend into his property and appropriate them to his own use. If branches extend into his property, the neighbor is bound before resorting to self-help to demand that these be cut by the adjacent landowner within a certain fixed time. Upon the lapse of the deadline, the neighbor has the right to cut the branches himself and to keep them along with any fruits that may be hanging. If such roots or branches impede the use of his immovable, the neighbor has the right to cause their removal and thus terminate the adjacent landowner's right of ownership without his consent. The neighbor has the right himself to cut the roots that extend into his property and appropriate them to his own use. If branches extend into his property, the neighbor is bound before resorting to self-help to demand that these be cut by the adjacent landowner within a certain fixed time. Upon the lapse of the deadline, the neighbor has the right to cut the branches himself and to keep them along with any fruits that may be hanging. A neighbor who cuts branches without a prior demand for trimming commits a civil wrong and is liable for damages. The rules governing trees apply also to roots and branches of shrubs or bushes that extend into neighboring property.

MUNICIPAL BUILDING CODES

In 1910, the Louisiana legislature enacted a statute that authorized the governing bodies of municipalities of one hundred thousand or more inhabitants to adopt ordinances concerning "the construction, alteration, and repair of buildings, structures, walls, and common walls." The same statute declared that such ordinances "shall supersede any laws enacted prior to 1910." The legislature thus authorized the adoption of local ordinances superseding the provisions of the Civil Code dealing with common walls. When the statute was attacked as unconstitutional, the Louisiana Supreme Court upheld its constitutionality.

Under the authority of the 1910 statute, New Orleans

276. See BGB § 910; GREEK CIV. CODE art. 1008; BALIS at 107; MEISNER, STERN & HODES at 280-87.
277. For corresponding rules of Roman law, see DIGEST 43.27.1.1,2,7,8; 47.7.6.2.
279. Id.
adopted in 1927 an ordinance which authorized the opening of "approved fire windows"281 in common walls for the admission of ventilation and light. When a co-owner of a common wall opened such windows, the adjacent neighbor brought suit to compel him to close them claiming that apertures were forbidden by Article 696 of the Civil Code.282 The court rejected the claim on the ground that Article 696 of the Civil Code had been superseded by the local ordinance,283 to the extent, of course, that it was irreconciliable with it.284 The 1927 ordinance was itself superseded by the New Orleans Building Code, adopted on December 17, 1948.285 During the period the ordinance was in effect, acquisitive prescription could not run in favor of one who opened approved fire windows in a common wall.286 Acquisitive prescription implies possession contrary to the rights of others; one who merely exercises a right given to him by law does not prescribe. A co-owner, however, should be entitled to claim a servitude of light or view in a common wall if he has maintained openings, contrary to Article 696 of the Civil Code and not in conformity with the ordinance, for the requisite period of time.287

The New Orleans Building Code makes reference to common walls and seems to presuppose the common wall servitude that the Civil Code establishes.288 It seems that New Orleans alone has taken advantage of the 1910 statute which authorizes the adoption of local ordinances superseding the provisions of the Civil Code. Other Louisiana municipalities, as Baton Rouge and Shreveport, have adopted building codes under the authority of a 1948 statute289 which does not au-

281. New Orleans, Ordinance 9756, June 8, 1927.
282. See text at note 173, supra.
285. See New Orleans, Ordinances 17, 525, December 17, 1948, effective February 1, 1949.
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thorize local ordinances superseding state legislation. Some of these building codes define common walls and contain provisions applicable to them.\footnote{See \textit{SHREVEPORT BUILDING CODE} § 201.2 which defines “party wall” as “a wall on an interior lot line, used or adapted for joint service between two (2) buildings.” Shreveport has adopted the Standard Building Code, formerly known as Southern Standard Building Code. Baton Rouge has adopted the National Building Code on September 8, 1967 (revised January 16, 1974). This code contained a definition of party walls that has been subsequently suppressed.}

CONCLUSION

It is a fair guess that few landowners took advantage during the twentieth century of the legal servitudes established by Articles 675 and 684 of the Louisiana Civil Code of 1870. In the suburbs, where most of the building activity concentrated, zoning ordinances and building restrictions secure minimum distances between buildings and strike out the possibility of common supporting walls. In the heart of the cities, the use of modern materials, such as reinforced concrete, steel, and glass, has largely eliminated the utilization of supporting boundary walls which took a strip of land from neighboring property. Thus, technological progress along with social and economic developments appeared to taint with obsolescence the Civil Code provisions governing common walls. Jurisprudence in this field became progressively rare, and most reported cases concerned walls built in past centuries. Elsewhere, as in Germany, in Greece, and in other countries following the model of the German Civil Code, the idea of forced co-ownership of boundary enclosures has been suppressed.

Should, then, the provisions of the Louisiana Civil Code dealing with common walls, fences, and ditches be completely suppressed in the current revision in favor of a regime of contractual arrangements between neighbors? Should, instead, the servitudes of Articles 675 and 684 be abolished for the future, leaving in the Civil Code only provisions of a suppletive nature designed to apply to enclosures that neighboring landowners agree to make common? Or, perhaps preferably, should the status quo be preserved in a modern draft with such minor amendments as may be desirable? in order to qualify for flood insurance under the national Flood Insurance Act of 1968.
These are conceivable solutions to be considered by the Louisiana State Law Institute charged with the responsibility of code revision.

Revision, if any, must necessarily focus attention on the future because existing common walls and enclosures will continue to be governed by the provisions of the Louisiana Civil Code of 1870 on account of constitutional guarantees. Thus, the price of any substantial revision may be a confusing dualism. In this respect, the German experience may be a cause of concern: in spite of the abolition of the common wall servitudes in 1900, treatises on property continue to include much learned discussion concerning old common walls. One should also note that the legal servitudes for common walls have served their purpose well in Louisiana, as indicated by the rich jurisprudence that has been analyzed in this study. Moreover, the pendulum may have already swung back, as can be seen in the proliferation of townhouses and condominium developments which foreshadows the need for legislation governing common walls and enclosures.