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Judging from the Wrong Side of the Tracks: Louisiana's Theory of Quasi-possession and Franks Investment Company L.L.C. v. Union Pacific Railroad Company

Anna Scardulla

Judging from the Wrong Side of the Tracks: Louisiana's Theory of Quasi-possession and *Franks Investment Company L.L.C. v. Union Pacific Railroad Company*

INTRODUCTION

Imagine that after more than 70 years of using something, someone destroyed it and stripped it from your possession overnight. Now picture being denied compensation because a court was unfamiliar with the relevant law that could provide a remedy. Nothing seems more frustrating, yet this is exactly what occurred in *Franks Investment Co. v. Union Pacific Railroad Co*.[1] Despite the United States Court of Appeals for the Fifth Circuit recently affirming the decision,[2] *Franks* is poor precedent for future Louisiana quasi-possession jurisprudence because it strictly applied the law of possession to a pure quasi-possession case.[3]

Franks arose in the context of a nationwide dispute as old and familiar as that between the wild Bo Duke and the stiff county commissioner, Boss Hogg.[4] For decades, railroad companies provided and maintained a number of private railroad crossings for farmers, allowing farmers convenient access to and from their land.[5] The railroad companies developed these crossways, mostly as a courtesy for farmers who granted the railroads a right-of-way for them to lay their rail lines across rural property.[6] After years of allowing farmers passage, however, one railroad—Union Pacific Railroad Company—folded to economic pressures and opted to

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1. Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *1 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012). Because of the procedural complexity of this case, a number of footnotes will reference cases entitled "Franks Investment Co. v. Union Pacific Railroad Co." For clarification purposes, when discussed in the body of this Comment, the term "Franks" refers to the juridical person, Franks Investment Company. When italicized, the term "*Franks*" refers to the district level case referenced in this footnote.

2. Franks Inv. Co. v. Union Pac. R.R. Co., 464 F. App'x 415 (5th Cir. 2012).

3. Louisiana Civil Code article 3421 defines quasi-possession as "[t]he exercise of a real right, such as a servitude, with the intent to have it as one's own . . . ." LA. CIV. CODE art. 3421 (2013).

4. *See generally Dukes of Hazzard* (CBS television broadcast).

5. For a discussion of claims based on similar factual backgrounds to those relevant to this Comment, see generally *Franks,* 2011 WL 6157484; Faulk v. Union Pac. R.R. Co., 449 F. App'x 357 (5th Cir. 2011); Seber v. Union Pac. R.R. Co., 350 S.W.3d 640 (Tex. App. 2011).

6. *See generally Franks*, 2011 WL 6157484; *Faulk*, 449 F. App'x 357; *Seber*, 350 S.W.3d 640.

close some of its private railroad crossings across the country in 2005.[7]

Having lost their ability to conveniently pass from one side of their land to the other, farmers are looking to sue.[8] A farmer's ability and avenue through which to sue the railroad can vary;[9] however,

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7. Brief for Appellee at 7−9, Franks Inv. Co. v. Union Pac. R.R. Co., 464 F. App'x 415 (5th Cir. 2012) (No. 11-30632). Union Pacific contended:

> [C]rossings impose maintenance burdens on the railroad that far exceed the maintenance required at areas of track without a crossing, costing the railroad an estimated $800.00 per square foot for installation and maintenance . . . . In the past fifteen years or so, federal policy has encouraged railroads to reduce the number of private crossings in order to improve public safety and enhance interstate rail transportation. The Federal Railroad Administration has promulgated policies encouraging railroads to close redundant and dangerous crossings. Union Pacific therefore began analyzing the quality, safety, and number of crossings on its tracks and identified crossings it believed should be closed.

Id. (citation omitted). However, in 2008, the Louisiana Legislature passed a law that requires railroad companies to obtain permission from the Louisiana Public Service Commission before closing or removing a private railroad crossing. LA. REV. STAT. ANN. § 48:394 (2004). For closure, railroad companies must meet the high burden of showing that the private crossing "unreasonably burdens or substantially interferes with rail transportation." *Id.* Attempting to avoid these stringent procedural limitations, railroads have challenged section 48:394 on constitutional grounds. *See Faulk,* 449 F. App'x 357 (staying the constitutional question until ownership issues were settled between parties), *on remand to* No. 07-0554, 2013 WL 1193069 (W.D. La. Mar. 22, 2013).

8. For a discussion of claims based on similar factual backgrounds to those relevant to this Comment, see generally *Franks*, 2011 WL 6157484; *Faulk*, 449 F. App'x 357; *Seber*, 350 S.W.3d 640.

9. A farmer's ability and avenue through which to sue the railroad is often dependent on two things: (1) whether the right-of-way agreement originally entered into between the parties consisted of transferring full ownership of the land beneath the rail lines to the railroad or merely consisted of granting a right of use in favor of the railroad on the farmer's property, and (2) whether the right-of-way agreement explicitly obligates the railroad to provide and maintain the crossways. The following diagram is illustrative:

	If . . .	**And . . .**	**Then . . .**
Variation 1	the right-of-way agreement transferred *full ownership* of land underneath the rail lines to the railroad	the right-of-way agreement explicitly burdens the railroad with providing and maintaining the crossways,	a farmer can bring a Louisiana petitory action, asserting full ownership of a servitude in the crossways; even so, it is customary to bring a Louisiana possessory action first, asserting the quasi-possession of a servitude of passage in the crossways.
Variation 2	the right-of-way agreement transferred *full ownership* of land underneath the rail lines to the railroad	the right-of-way agreement does *not* burden the railroad with any affirmative or negative duties relative to the crossways,	a farmer can only bring a Louisiana possessory action, asserting the quasi-possession of a servitude of passage in the crossways.
Variation 3	the right-of-way agreement grants the railroad a *right-of-use servitude* across the farmer's property	the right-of-way agreement explicitly burdens the railroad with providing and maintaining the crossways,	a farmer can bring a breach of contract action against the railroad; even so, alternative remedies may be available.
Variation 4	the right-of-way agreement grants the railroad a *right-of-use servitude* across the farmer's property	the right-of-way agreement does *not* burden the railroad with any affirmative or negative duties relative to the crossways,	a farmer has no petitory, possessory, or breach of contract claims available; even so, alternative remedies may be available.

See generally A.N. YIANNOPOULOS, PROPERTY § 256–79, *in* 2 LOUISIANA CIVIL LAW TREATISE 515–58 (4th ed. 2001) (discussing the facets of the petitory action generally); *Id.* § 332–43, at 650–81 (discussing the facets of the possessory action generally); A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 176, *in* 4 LOUISIANA CIVIL LAW TREATISE 476–79 (3d ed. 2004) (discussing the petitory action in relation to protecting the right of a servitude specifically); YIANNOPOULOS, *supra*, PROPERTY § 332–43, at 650–81 (discussing the facets of the possessory action generally); YIANNOPOULOS, *supra*, PREDIAL SERVITUDES § 177, at 480 (discussing

most parties at least begin by asserting the quasi-possession of a real right of passage, or a servitude,[10] in the private crossways through a Louisiana possessory action.[11]

The federal district court in *Franks* was the first to hear the merits of a Louisiana possessory action concerning the crossway closures.[12] As the first published ruling on the issue, *Franks* has the potential to set the legal standard for future cases with similar facts. Yet, in strictly applying the laws of possession, without recognizing the unique law that Louisiana scholarship and jurisprudence has attributed to a quasi-possession claim, the *Franks* court utilized the wrong line of reasoning. The court did not allow the plaintiff and defendant in the case to present relevant evidence on the true issue—the quasi-possession of a servitude in the land and crossways. This Comment discusses the flawed analysis in *Franks*, asserting that the court inappropriately applied the law of possession in a pure quasi-possession case.

Part I of this Comment discusses the facts, legal framework, and holding of *Franks Investment Co. L.L.C. v. Union Pacific Railroad Co*. Part II analyzes the *Franks* court's reasoning, positing that the

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the possessory action in relation to protecting the right of a servitude specifically); LA. CIV. CODE arts. 639–45 (2013) (rules governing the creation of a right-of-use servitude).

10. *See infra* Part II.A. The only real rights that can be quasi-possessed in Louisiana are predial servitudes and personal servitudes. *See* BAUDRY-LACANTINERIE & TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL VOL. XXVIII (4th ed. 1924), *reprinted in* LA. STATE LAW INST., PRESCRIPTION, *in* 5 CIVIL LAW TRANSLATIONS 112 n.21 (La. State Law Inst. Trans., 1972) ("Possession is not even applicable to all immovable real rights, but only to those which can be physically exercised."); MARCEL PLANIOL, TREATISE ON THE CIVIL LAW, VOL. 1 PT. 2, 341 (La. State Law Inst. trans., 2005).

11. Under Louisiana law, the possessory action is the legal avenue by which possessors seek judicial recognition and protection of their physical contact with and stake of dominance in a thing. *See* LA. CODE CIV. PROC. art. 3655 (2013). In cases such as these, establishing possession first can be a beneficial tactic in light of Louisiana Revised Statutes section 48:390. In 2008, the Louisiana Legislature mandated that all private railroad crossings closed "since January 1, 2006, shall be re-opened upon the attainment of thirty years peaceful and otherwise uninterrupted use or possession of servitude of use or passage across the railroad grade crossing with or without title." LA. REV. STAT. ANN. § 48:390 (2004). Section 48:390, however, has been questioned on constitutional grounds. *See* Henry v. Union Pac. R.R. Co., No. 12-694, 2012 WL 6602074, at *4 (La. Ct. App. Dec. 19, 2012).

12. *Franks*, 2011 WL 6157484, at *1. The long judicial battle, concerning whether state law was preempted by the Interstate Commerce Commission Termination Act and federal law is not within the scope of this Comment. *See* Franks Inv. Co. v. Union Pac. R.R. Co., 593 F.3d 404 (5th Cir. 2010) (reversing lower court opinion that held that federal law preempts state law in the context of private railway crossing closures).

court failed to acknowledge and apply the unique variations in the law of quasi-possession from the law of possession. Recognizing the potential for future confusion, Part III discusses necessary responses to the *Franks* decision. Specifically, it argues that future cases with facts similar to *Franks* should be judged solely using the concepts of quasi-possession and that the Louisiana Legislature should amend the Civil Code to better reflect the distinctive character of quasi-possession as a separate area of law. Courts and legislators must take immediate action because it is imperative that the uniquely civilian nature of quasi-possession be preserved.

I. A CLOUDED COURT: *FRANKS INVESTMENT CO. L.L.C. V. UNION PACIFIC RAILROAD CO.*

Through diversity jurisdiction, a federal court heard *Franks* on its merits in June 2011.[13] In deciding the case, the *Franks* court relied on the analogy found in Louisiana Civil Code article 3421, noting that "the rules governing possession apply by analogy to the quasi-possession of incorporeals."[14] However, Louisiana jurisprudence and scholarship have suggested that the law of quasi-possession has unique variations from the law of possession.[15] This Section addresses the manner in which the *Franks* court ignored these variations by strictly applying the law of possession to a quasi-possession claim. The facts, the articulation of law, and the analysis of *Franks* demonstrate that the *Franks* court treated the quasi-possession of a right to cross a railroad crossway and the possession of an actual physical railroad crossway as one and the same thing.

A. A Right of Way: The Facts of Franks

Sometime before 1923, Franks's predecessor in title purchased land in Caddo Parish, Louisiana.[16] In 1923, full ownership of a parcel of that land was transferred to Union Pacific's predecessor in title, Texas and Pacific Railway Company, for the company to lay and utilize its rail lines.[17] The right-of-way extended for approximately two miles along Highway 1,[18] and the deed included the following provision:

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13. *Franks*, 2011 WL 6157484, at *1.
14. *Id.* at *2. *See* LA. CIV. CODE art. 3421 (2013).
15. *See infra* Part II.
16. Brief for Appellant at 4, Franks Inv. Co. v. Union Pac. R.R. Co., 464 F. App'x 415 (5th Cir. 2012) (No. 11-30632), 2011 WL 4350951, at *4.
17. *Id.*
18. *Franks*, 2011 WL 6157484, at *1.

> It is understood and agreed that the Texas and Pacific Railway Company shall fence said strip of ground and shall maintain said strip of ground and shall maintain said fence at its own expense and *shall provide three crossings across said strip at the points indicated on said Blue Print hereto attached and made part hereof* and the said Texas and Pacific Railway hereby binds itself, its successors and assigns, to furnish proper drainage out-lets across the land herinabove conveyed.[19]

Following the purchase, the railroad company developed four private crossways along the rail tracks.[20] The company acted as the sole maintenance provider of the crossways and allowed neighbors to use them to access property on the other side of the railroad tracks.[21]

A number of years later, Franks purchased the property adjacent to the railroad tracks.[22] Upon purchase, the land consisted of approximately 1,000 acres, and the property boundaries were as follows: (N) public road, (S) public road, (W) Sand Beach Bayou and Bayou Pierre, and (E) right-of-way in favor of Union Pacific Railroad Company.[23] The four private crossways still existed, and while there were three other access points to the property, the four private crossings permitted convenient access to and from the Franks property and the highway.[24]

Over several years, Franks and its subsidiaries used the private crossways extensively.[25] Joe Dill, a lessee of Franks, used the crossways to access the property and move his agricultural equipment to and from the highway.[26] Additionally, pipeline inspectors, real estate developers, and those responsible for maintaining the sewer lines and levees on the property all used the crossways as an access point.[27] In using the crossways, Franks admitted that it never

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19. Brief for Appellant, *supra* note 16, at 4. The title language suggests that the *Franks* case falls into Variation 1. *See supra* note 9. However, while a petitory action may have been available, counsel chose to bring the possessory action first. In a possessory action, the title to the land, the crossways, or even a servitude therein is irrelevant. *See* PLANIOL, *supra* note 10, at 538; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 116–17. The articulation in the deed is merely helpful in establishing how long Franks and its ancestors in title have utilized the crossways.

20. Brief for Appellant, *supra* note 16, at 4.

21. Brief for Appellee, *supra* note 7, at 7.

22. *Id.* at 9.

23. *Franks*, 2011 WL 6157484, at *1.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

intended to interfere with either Union Pacific's ownership or its daily business; every day, at least six scheduled trains and one detour train traversed the Union Pacific tracks.[28]

Union Pacific placed signs on all four private crossways that said: "Crossing. No trespassing. Right to pass by permission subject to control of owner."[29] Union Pacific, however, never accused Franks of trespassing, and the company made no attempt to prevent Franks and its subsidiaries from using the crossways.[30] Additionally, Union Pacific often temporarily closed the crossways for maintenance and repair operations.[31] Franks never placed any signage on the crossway and never intended to perform or fund any maintenance.[32]

On May 17, 2005, Union Pacific placed a sign on one of the four crossways informing the public that the crossway was selected for closure.[33] On October 7, 2005, it placed similar postage on the remaining three crossways.[34] On December 27, 2007, Union Pacific closed the two northernmost crossings.[35] Removal of the remaining crossways was pending when Franks filed a possessory action on January 7, 2008, seeking an injunction to force Union Pacific to rebuild the two destroyed crossings and refrain from breaking down the two remaining crossings.[36] Franks claimed that it possessed a real right in each of the four private crossways.[37]

B. Analogous Laws: Citing Possession Law in a Quasi-possession Case

In deciding the claim, the court relied on a number of civil law property concepts articulated in the Louisiana Civil Code.[38] To begin, the court explained that in a possessory action "the ownership or title of the parties to the immovable property or real right therein is not at issue"; only the *possession* of the real right is relevant for possessory

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at *2.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* As a reminder, only the real rights of predial and personal servitudes can be quasi-possessed. Necessarily, Franks claimed to quasi-possess either a predial servitude or a personal right of use in the railroad's estate and crossways. *See infra* Part II.A.
38. *Franks*, 2011 WL 6157484, at *2–4.

actions.[39] The requirements for a possessory action are found in Louisiana Code of Civil Procedure article 3658.[40] In light of article 3658, the court correctly stated that a successful possessory action requires a showing that possession was established and maintained for more than a year such that the right to possess was gained and was never subsequently lost.[41]

The court noted that possession is limited to corporeal things,[42] or "things that have a body, whether animate or inanimate, which can be felt or touched."[43] Intangible things, like the right Franks claimed in the crossways, are technically insusceptible of possession.[44] However, the court briefly recognized that these things are susceptible to something similar to possession—quasi-possession.[45]

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39. *Id.* Once again, title to the land, the crossways, or servitude therein is only relevant for a petitory action. Title or true ownership has no bearing for a possessory action. *See* PLANIOL, *supra* note 10, at 538; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 116–17.

40. LA. CODE CIV. PROC. art. 3658 (2013). First, the possessor must prove that his possession was disturbed in fact or in law. *Id.* Disturbances in fact are actions that prevent a possessor from enjoying his possession quietly, like eviction or interactions with property. *Id.* art. 3659. Disturbances in law are actions that assert adverse ownership to the possessor's property, like the drafting or filing of a document. *Id.* Next, the possessor must show that he had factual possession of the immovable property at the time the disturbance occurred. *Id.* art. 3658. Third, the possessor must show that he had possession "quietly and without interruption" for more than one year before the disturbance. *Id.* Courts have articulated this stipulation to require a showing of two things: (1) the possessor gained the right to possess, and (2) the possessor never lost the right to possess before the disturbance occurred. *See* Mire v. Crowe, 439 So. 2d 517, 522 (La. Ct. App. 1983). There are, however, two exceptions. When the possessor is evicted by force or fraud, he can protect his possession without having gained the right to possess. Art. 3658. Fourth, a possessor must file the possessory action within one year of the disturbance. *Id.*

41. *Franks,* 2011 WL 6157484, at *2.

42. *Id.*

43. LA. CIV. CODE art. 461 (2013).

44. JOHN RANDALL TRAHAN, LOUISIANA LAW OF PROPERTY, A PRÉCIS 52 (LexisNexis 2012). *See also* PLANIOL, *supra* note 10, at 341; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 105.

45. *Franks*, 2011 WL 6157484, at *2. *See* PLANIOL, *supra* note 10, at 341; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 106. The word "quasi" is used commonly in the civil law tradition to reference a concept that would be exactly the same as its root but for one distinctive and determinative feature. For example, quasi-possession would be possession but for the fact that one cannot exercise physical acts over an incorporeal. LA. CIV. CODE art. 3421 cmt. c (2013). The concepts, however, are analogous enough to constitute the use of a similar root. Other examples include the quasi-contract and quasi-occupancy.

Quasi-possession is "[t]he exercise of a real right, such as a servitude, with the intent to have it as one's own."[46] Although the definition of quasi-possession seems to necessitate the existence of a real right in a servitude before the servitude can be quasi-possessed, such is not the case. As long as the potential servitude is apparent,[47] and thus capable of being obtained through acquisitive prescription,[48] then the requirements for quasi-possession can be met without proof of title.[49] A right of passage, like the one that Franks claimed, is an apparent servitude, capable of being quasi-possessed without title.[50] Despite quasi-possession's civilian roots,[51] the current Civil Code provides no specific and direct rules to govern quasi-possession of intangible things. The Civil Code only provides that "the rules governing possession apply by analogy to the quasi-possession of incorporeals."[52]

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46. Art. 3421.

47. Apparent servitudes are those "that are perceivable by exterior signs, works, or constructions, such as a roadway, a window in a common wall, or an aqueduct." *Id.* art. 707.

48. A servitude can be created through acquisitive prescription. TRAHAN, *supra* note 44, at 175; PLANIOL, *supra* note 10, at 735. Acquisitive prescription is a method by which possession turns into ownership. LA. CIV. CODE art. 3446 (2013); PLANIOL, *supra* note 10, at 571. Specifically, after so many years of uninterrupted possession, the law provides the possessor with full ownership rights. Art. 3446; TRAHAN, *supra* note 44, at 89. It is important to note that in the case of real rights less than ownership (like servitudes), a sufficient number of years of quasi-possession is required for acquisitive prescription. TRAHAN, *supra* note 44, at 89. Only apparent servitudes can be created by acquisitive prescription. LA. CIV. CODE art. 742 (2013). With just title and good faith, a quasi-possessor can become owner of an apparent servitude after ten years of uninterrupted quasi-possession. *Id.* arts. 742, 3473, 3475, 3480, 3481, 3482, 3483. Without just title and good faith, a quasi-possessor can become owner of an apparent servitude after 30 years of uninterrupted quasi-possession. *Id.* arts. 742, 3473, 3475, 3480, 3481, 3482, 3483.

49. YIANNOPOULOS, *supra* note 9, PREDIAL SERVITUDES § 182, at 491. Yiannopoulos provides:

> If plaintiff has no title and the servitude he claims is nonapparent, the availability of the possessory action depends on whether one may acquire the right to possess a servitude that may not be possessed and acquired by acquisitive prescription. Thus posed, the question contains its own answer: one may not acquire the right to possess a nonapparent servitude without title because one cannot possess such a servitude and acquire it by prescription.

Id.

50. Art. 707.

51. *See* PLANIOL, *supra* note 10, at 341; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 106.

52. LA. CIV. CODE art. 3421 (2013). *See* Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *2 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012). "Incorporeals are things that have no body, but are

Relying on this analogy, the *Franks* court cited a number of Louisiana Civil Code articles regarding the possession of corporeals to decide Franks's claim of an incorporeal right in the crossways.[53] In particular, the court cited Louisiana Civil Code article 3424, which notes that to establish possession over a thing, a person must show (1) corporeal possession of the thing and (2) intent to possess the thing as owner.[54] This posits both a material and mental element into the possession analysis.[55]

The material, or physical, element of possession is known as *corpus* in the civil law tradition.[56] Louisiana Civil Code article 3425 defines corporeal possession as "the exercise of physical acts of use, detention, or enjoyment over a thing."[57] In other words, *corpus* involves *physical* contact with a thing.[58] While not explicitly annotated in the article, the level of physical contact with the thing must meet a certain threshold to be sufficient for the *corpus* element of possession.[59]

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comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property." LA. CIV. CODE art. 461 (2013).

53. *Franks*, 2011 WL 6157484, at *2.

54. LA. CIV. CODE art. 3424 (2013). Corporeal possession is later defined in Louisiana Civil Code article 3425.

55. TRAHAN, *supra* note 44, at 53.

56. *See* YIANNOPOULOS, *supra* note 9, PROPERTY § 302, at 599; TRAHAN, *supra* note 44, at 53; PLANIOL, *supra* note 10, at 342; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 118. The term *corpus* is not of Roman origin; instead, it was coined by Savigny. *See* FRIEDRICH KARL VON SAVIGNY, VON SAVIGNY'S TREATISE ON POSSESSION (Erskine Perry trans., 6th ed. 1848).

57. Art. 3425. The term "use" is given its common meaning. TRAHAN, *supra* note 44, at 53. The terms "detention" and "enjoyment" are legal terms of art. *Id.* "Detention" means to hold or exercise custody over a thing, while "enjoyment" refers to taking the fruits of a thing. *Id.* Fruits are defined in Louisiana Civil Code article 551.

58. *See* YIANNOPOULOS, *supra* note 9, PROPERTY § 302, at 599; TRAHAN, *supra* note 44, at 53; PLANIOL, *supra* note 10, at 342.

59. To consider if contact with a thing is enough to meet the *corpus* element of possession, courts consider four general factors. TRAHAN, *supra* note 44, at 53. First, courts consider whether the supposed possessor had title to the thing. *Id.* at 54. Second, courts consider whether the supposed possessor was in good faith. *Id.* Third, courts consider the nature and condition of the thing. *Id.* Fourth, courts consider the duration of physical contact with the thing. *Id.* at 53. Accordingly, courts have found that things like growing crops, *see* Liner v. La. Land & Exploration Co., 319 So. 2d 766, 769 (La. 1975), and grazing cattle, *see* Souther v. Domingue, 238 So. 2d 264 (La. Ct. App. 1970), on land are enough to meet the element of *corpus*. While items like paying property taxes, *see* Manson Realty Co. v. Plaisance, 196 So. 2d 555, 556 (La. Ct. App. 1967), and occasional hunting or fishing, *see* Whitley v. Texaco, Inc., 434 So. 2d 96, 104–05 (La. Ct. App. 1983), on land are insufficient. *See* YIANNOPOULOS, *supra* note 9, PROPERTY § 304, at 604; TRAHAN, *supra* note 44, at 53.

The mental element of possession is known as *animus domini*.[60] *Animus* requires a possessor to intend to possess a thing as owner.[61] This specific intent is a subjective state of mind—not that the person *believes* that he is the owner but instead that the person intends to *act* as if he is the owner.[62] Moreover, the Louisiana Civil Code does not explicitly require that a possessor be in good faith.[63] The possessor must only make a conscious decision to hold a thing for himself and to hold and protect that thing against anyone if his stake in the thing is challenged.[64] Accepting a grant of permission to use, detain, or enjoy a thing is the "kiss of death" for *animus*.[65] Persons that detain items with permission are generally called precarious possessors.[66]

The court noted that precarious possession is defined in Louisiana Civil Code article 3437 as "the exercise of possession over a thing with the permission of or on behalf of the owner or possessor."[67] The term "precarious possessor" is inherently confusing because precarious possessors are not "possessors" at all.[68] Precarious possessors meet the *corpus* element for possession, but they do not meet the *animus* element because precarious possessors do not intend to own the things they use, detain, or enjoy.[69] As such, precarious possessors do not have all the rights of true possessors.[70]

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60. *See* YIANNOPOULOS, *supra* note 9, PROPERTY § 302, at 599; TRAHAN, *supra* note 44, at 54; PLANIOL, *supra* note 10, at 342–43; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 106. The term *animus domini* is not of Roman origin; instead, it was coined by Savigny, who posited in his treatise on possession that intent to own a thing is an indispensible element of possession. *See* SAVIGNY, *supra* note 56.

61. LA. CIV. CODE art. 3424 (2013).

62. TRAHAN, *supra* note 44, at 54. *See also* PLANIOL, *supra* note 10, at 342–43; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 106.

63. TRAHAN, *supra* note 44, at 54. *See* BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 128.

64. *See* TRAHAN, *supra* note 44, at 55 ("From what has been said so far about the content of *animus domini,* it should be clear that a grant of 'permission' to use the thing is the 'kiss of death' for this state of mind."); *see also* Harper v. Willis, 383 So. 2d 1299 (La. Ct. App. 1980).

65. *See* TRAHAN, *supra* note 44, at 55; *see also Harper*, 383 So. 2d 1299.

66. LA. CIV. CODE art. 3437 (2013). *See* PLANIOL, *supra* note 10, at 362.

67. Art. 3437. *See* PLANIOL, *supra* note 10, at 362; Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *3 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012).

68. *See* YIANNOPOULOS, *supra* note 9, PROPERTY § 301, at 598; PLANIOL, *supra* note 10, at 364; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 106. Remember that possession is a matter of fact; a person must sufficiently meet the elements of *corpus* and *animus* to be labeled a possessor.

69. The most common example of precarious possession is the lessor–lessee relationship. *See* Simon v. Charles, 689 So. 2d 716 (La. Ct. App. 1997). The lessee

assumes the role of precarious possessor, while the lessor assumes the role of what one might call the "true possessor." TRAHAN, *supra* note 44, at 65. The lessee generally asserts acts of use, detention, and enjoyment on the land, but he knows that he is not, and further does not *intend* to act like, the owner of the land he uses. The lessor, in contrast, does have the intention to act like he is the owner. Under Louisiana Civil Code article 3429, the lessee's acts of use, detention, and enjoyment of the thing are of no benefit to the lessee; instead, these acts are attributed to the lessor's possessory interests. LA. CIV. CODE arts. 3428–29 (2013); TRAHAN, *supra* note 44, at 58. In turn, a lessor can meet the elements of possession (*animus* and *corpus*) without ever stepping foot on his own land. All of the acts of *corpus* by his lessees are transferable to his possessory interests. Arts. 3428–29; TRAHAN, *supra* note 44, at 58. *See* PLANIOL, *supra* note 10, at 362–63.

70. LA. CIV. CODE art. 3439 cmt. c (2013). Establishing and maintaining possession results in a number of legal effects or rights. Most importantly, the possessor benefits from a presumption of ownership, *see id.* art. 3423, the possessor can acquire the right to possess, *see id.* art. 3422, and the possessor can protect his interests in a possessory action, s*ee* LA. CODE CIV. PROC. art. 3655 (2013). The presumption of ownership is articulated in Louisiana Civil Code article 3423, which states: "[a] possessor is considered provisionally as owner of the thing he possesses until the right of the true owner is established." Art. 3423. This presumption gives the possessor an upper hand in any legal proceeding related to the thing in question. TRAHAN, *supra* note 44, at 51, 72. When necessary, this automatically puts the burden of proving ownership on the challenging party. *Id.* at 72; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 123. Proving ownership is a high burden. *See generally* YIANNOPOULOS, *supra* note 9, PROPERTY § 256–79, at 515–58; YIANNOPOULOS, *supra* note 9, PREDIAL SERVITUDES § 176, at 476–79. Another effect of establishing factual possession over a thing is the potential for a possessor to gain the right to possess. Louisiana Civil Code article 3422 posits that "[p]ossession is a matter of fact; nevertheless, one who has possessed a thing for *over a year* acquires the right to possess it." Art. 3422 (emphasis added). The right to possess is not complex. After more than one year of possession, a possessor gains a judicially protectable right in a thing. YIANNOPOULOS, *supra* note 9, PROPERTY § 310, at 614; TRAHAN, *supra* note 44, at 72. The right to possess, however, is subject to limitations. To establish the right to possess, possession must be sufficiently established from the outset; the possession must be without vice, *see* LA. CIV. CODE arts. 3435–36 (2013); YIANNOPOULOS, *supra* note 9, PROPERTY § 314–18, at 623–29; TRAHAN, *supra* note 44, at 63–64, and the possession must be uninterrupted. YIANNOPOULOS, *supra* note 9, PROPERTY § 310, at 614. It is the case of an interruption that requires further discussion. Louisiana Civil Code article 3434 declares that possession is interrupted when the right to possess is lost. LA. CIV. CODE art. 3434 (2013). Similar to the factual state of possession, the right to possess can dissolve upon abandonment or eviction. *Id.* Upon abandonment, the right to possess is lost instantaneously. *Id. See* TRAHAN, *supra* note 44, at 72. In the case of eviction, the right to possess is only lost if after one year of being evicted a possessor has not regained possession. Art. 3434. *See* YIANNOPOULOS, *supra* note 9, PROPERTY § 313, at 622; TRAHAN, *supra* note 44, at 72; Mire v. Crowe, 439 So. 2d 517, 521–23 (La. Ct. App. 1983); Liner v. La. Land & Exploration Co., 319 So. 2d 766 (La. 1975). Possession can be regained in two manners. First, the possessor can recover possession by counterevicting the evicting party. TRAHAN, *supra* note 44, at 72–73. This would require an act that interferes with *corpus* and brings home to the

Under Louisiana Civil Code article 3438, a precarious possessor "is presumed to possess for another although he may intend to possess for himself."[71] To prove personal *animus*, a precarious possessor must terminate his precarious possession.[72] With the exception of co-owners,[73] a precarious possessor can terminate his precarious possession by providing *actual notice* to the person on whose behalf he began possessing.[74] "Actual notice" has never been defined in the Civil Code,[75] but scholars have provided some guidance in defining the term:

> This standard must mean something different from the standard that is applicable to co-owners, but precisely how it is different is not immediately clear. If the word "actual" as used in the expression "actual notice" has its common and generally prevailing meaning, which one must suppose it does, then what is required is notice *in fact.* To give such notice, the precarious possessor would have to inform the true possessor, be it in writing or orally, that he now intends to possess for himself, using more or less those very words. If that is so, then many of the kinds of acts that would suffice

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possessor that his dominion is seriously challenged. *See Liner*, 319 So. 2d 766; Evans v. Dunn, 458 So. 2d 650 (La. Ct. App. 1984); Richard v. Comeaux, 260 So. 2d 350 (La. Ct. App. 1972). Second, the possessor can recover possession by filing a possessory action against the evictor. YIANNOPOULOS, *supra* note 9, PROPERTY § 313, at 622; TRAHAN, *supra* note 44, at 72–73. If the possessory action is filed within one year of eviction, and the filer is successful in having his possession recognized, possession is officially recovered. YIANNOPOULOS, *supra* note 9, PROPERTY § 313, at 621–22. Whether it be through reeviction or a successful possessory action, after possession is recovered, the law considers any interruption of possession to have never occurred. *Id.* at 622. As a result of establishing the right to possess and never losing it, the final legal effect of possession becomes available to the possessor—the possessory action. *See* LA. CODE CIV. PROC. art. 3655. The possessory action is limited in availability to the possession of immovables. TRAHAN, *supra* note 44, at 75; BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 123–24. Protection of the possession of movables is left for revendicatory actions. TRAHAN, *supra* note 44, at 75.

71. LA. CIV. CODE art. 3438 (2013). *See* PLANIOL, *supra* note 10, at 367.

72. Art. 3439. *See* PLANIOL, *supra* note 10, at 365.

73. Under the first paragraph of Louisiana Civil Code article 3439, a co-owner, as a special precarious possessor, commences to possess for himself when "he demonstrates this intent by overt and unambiguous acts sufficient to give notice to his co-owner." Art. 3439.

74. *Id.*

75. YIANNOPOULOS, *supra* note 9, PROPERTY § 321, at 635.

> as "overt and unambiguous acts" by a co-owner will not be sufficient here.[76]

Despite the exact definition of "actual notice," once a precarious possessor provides what a court deems sufficient notice of his intention to possess for himself to the person on whose behalf he began possessing precariously, he becomes a "true possessor" with his own possessory interests.[77]

Unless termination is successful, the only possible opportunity for a precarious possessor to protect his possession is under Civil Code article 3440.[78] As a general rule, precarious possessors are allowed to bring possessory actions on behalf of the person for whom they are possessing.[79] However, the *Franks* court noted that article 3440 limits the parties against whom the action can be brought to "anyone except the person for whom he possesses."[80]

C. A Rigid Application: Treating Franks *as a Possession Case*

In applying the laws of possession to Franks's quasi-possession case, the *Franks* court easily found that Franks met the *corpus* requirement for establishing possession because Franks and its subsidiaries had used the crossways extensively over several years.[81] The court, however, did not find that Franks had met the *animus* requirement for establishing possession. Specifically, the court held that Franks did not have *animus* because it was a precarious possessor.[82]

In light of the facts, the *Franks* court called Franks a precarious possessor for three reasons. Specifically, Franks was a precarious possessor because (1) it used the crossways with permission, (2) its use of the crossways was not "adverse" to Union Pacific's

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76. TRAHAN, *supra* note 44, at 67.
77. *Id.*
78. LA. CIV. CODE art. 3440 (2013).
79. *Id.*
80. *Id.*; Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *3 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012). Granting a precarious possessor the right to protect his precarious possession against third parties is a break from the civilian tradition. TRAHAN, *supra* note 44, at 80. This new legislative provision is the product of a number of cases that found that a precarious possessor was entitled to injunctive relief against third parties. Art. 3440. *See, e.g.*, Indian Bayou Hunting Club, Inc. v. Tolbert, 294 So. 2d 894 (La. Ct. App. 1974).
81. *Franks*, 2011 WL 6157484, at *1–3.
82. *Id.* at *3.

ownership, and (3) it never sufficiently terminated its precarious possession.[83]

Looking to the court's first reason, Franks was a precarious possessor because, in using the crossways, it was acting with Union Pacific's permission.[84] By calling the actions of using the crossways permissive, the court relied on the fact that Union Pacific built, maintained, and operated the crossways with no assistance from Franks or its subsidiaries.[85] It also found that Union Pacific's "no trespass" signs showed that Union Pacific knew of the crossways and facilitated Franks's use of them.[86] Acting with Union Pacific's permission, Franks could not develop the proper *animus* to act as owner of the crossways.[87]

The court then reasoned that Franks was a precarious possessor because its use of the crossways was not "adverse" to Union Pacific's ownership or possessory interests.[88] The court specifically relied on the fact that Franks had never acted to put Union Pacific on notice that its ownership was being challenged.[89] Franks testified that it never intended to interfere with Union Pacific's ownership, operation, or daily business.[90]

Finally, the court pointed to the fact that Franks never terminated its precarious possession.[91] The court ruled that Franks failed to give Union Pacific sufficient actual notice of its intention to possess the crossways for itself because mere continuous use of the crossways had not been enough to terminate precarious possession.[92] The court noted that Franks had not engaged in "overt and unambiguous" acts, such that Union Pacific would have believed that its possession and ownership had been challenged.[93]

Because the court labeled Franks as a precarious possessor, it held that Franks had no personal possessory rights.[94] Therefore, Franks could bring a possessory action against anyone except Union Pacific. Citing Louisiana Civil Code article 3440 as strong authority, the court held in favor of Union Pacific.[95]

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83. *Id.* at *3–4.
84. *Id.* at *3.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at *4.
92. *Id.*
93. *Id.*
94. *See supra* note 70.
95. *Franks*, 2011 WL 6157484, at *4.

Overall, in holding for Union Pacific, the *Franks* court strictly applied the Louisiana Civil Code articles relating to possession. Specifically, the court focused on its determination that Franks had acted under Union Pacific's permission to label it a precarious possessor and thus bar it from having a possessory action against the railroad company. Louisiana jurisprudence and scholarship have recognized, however, that permission plays a different role in quasi-possession than it does in possession. The court failed to recognize this key distinction between the two areas of law, treating the claimed quasi-possession of a servitude in the crossways as possession of the physical crossways themselves. As such, the court applied improper reasoning by failing to acknowledge and apply the jurisprudentially recognized distinctions in the law of quasi-possession.

II. A LESS THAN PERFECT ANALOGY: THE UNIQUE APPLICATION OF QUASI-POSSESSION TO *FRANKS INVESTMENT CO. L.L.C. V. UNION PACIFIC RAILROAD CO.*

In deciding the *Franks* case, the court relied extensively on the proposition that the laws of possession apply by analogy to quasi-possession.[96] For years, however, scholars have recognized that this analogy is less than perfect.[97] Specifically, there are jurisprudentially recognized differences in the law of quasi-possession when contrasted with the law of possession.[98] These variations, while not necessarily codified, are persuasively relevant in quasi-possession cases like *Franks*.[99] The *Franks* court, while applying the Civil Code articles relevant to possession appropriately on their facts, failed to recognize, acknowledge, or apply the unique law relevant to the quasi-possession of incorporeals.[100]

This Section articulates why the *Franks* case is poorly reasoned by pointing out the differences between the law of possession and the law of quasi-possession. First, it addresses the subject matter of a quasi-possession case—the servitude—specifically noting the ways in which the nature of a servitude, contrasted with that of a corporeal

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96. *Id.* at *2.

97. *See* YIANNOPOULOS, *supra* note 9, PREDIAL SERVITUDES § 178, at 481 ("The rules governing possession of corporeal things apply also to the quasi-possession of real rights *to the extent that their application is compatible with their nature as incorporeals*." (emphasis added)); TRAHAN, *supra* note 44, at 53.

98. *See infra* Part II.

99. For an overview on how the Civil Code interacts with alternative sources and interpretations of law see A.N. Yiannopoulos, *The Civil Codes of Louisiana, in* LA. CIV. CODE XLIX−LXXII (2013).

100. *See supra* Part I.C.

object, can modify a court's decision in a quasi-possession claim. Next, it addresses the differences in the elements of possession and quasi-possession, looking notably at Louisiana jurisprudence supporting the premise that, unlike possession, permission is not detrimental to the formulation of *quasi-animus* for a quasi-possession case. Finally, this Section looks to the procedural matter that Louisiana Civil Code article 3440 addresses, positing that, unlike with possession, when suing under a quasi-possession theory of law, limited circumstances allow a precarious possessor to sue the person on whose behalf he is possessing.[101]

A. The Varying Subject Matters of Possession and Quasi-possession—The Servitude

The first variation between the law of possession and the law of quasi-possession appears in terms of subject matter. Possession relates to physical things,[102] whereas quasi-possession relates to rights.[103] *Franks* is squarely a quasi-possession case because the plaintiff articulated its claim as the possession of a real right in the land and crossways.[104] Further, this right can only be understood in practice as either a predial or a personal servitude because, within the larger category of incorporeals, *only* those real rights[105] that can be physically exercised are susceptible of quasi-possession.[106]

Although Franks's claim can only be understood as asserting the quasi-possession of a servitude, the *Franks* court decided the entire case without mentioning the word "servitude." The court in no way spoke of a servitude's nature or its impact on a quasi-possession claim. This was a mistake because a servitude's intangible nature and structure makes its possession very different from that of a physical object. Accordingly, to decide the quasi-possession of a servitude, understanding its substance is imperative.

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101. LA. CIV. CODE art. 3440 (2013).
102. *Id.* art. 3421. *See* TRAHAN, *supra* note 44, at 52–53.
103. Art. 3421. *See* TRAHAN, *supra* note 44, at 52–53.
104. Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *1 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012).
105. Real rights confer "direct and immediate authority over a thing." LA. CIV. CODE art. 476 cmt. b (2013). These rights are not strictly personal. Strictly personal rights are generally called personal or credit rights. Credit rights merely confer authority over a certain debtor. The epitome of a credit right is a contract. Credit rights are governed by the law of obligations. *See id.* arts. 1756–2324.2. Unlike credit rights, real rights are rights that can be defended against any interfering party. *Id.* art. 1763 cmt. b. For more, see PLANIOL, *supra* note 10, at 623.
106. BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 112 n.21 ("Possession is not even applicable to all immovable real rights, but only those which can be physically exercised.").

There are two types of servitudes in Louisiana, predial servitudes and personal servitudes.[107] Predial servitudes involve rights connected to various estates. Louisiana Civil Code article 646 provides that a predial servitude is a "charge on a servient estate for the benefit of a dominant estate."[108] Thus, there must be two separately owned estates for a predial servitude to exist.[109]

One estate is the "servient" estate,[110] the owner of which is charged with the duty *not to do anything at all.*[111] This means that the servient estate's owner must either (1) abstain from doing something he has the right to do on his own estate or (2) allow someone else to do something on the servient estate without interference.[112] The other estate involved in a predial servitude is the "dominant" estate.[113] This estate obtains a benefit from the predial servitude.[114] Because a predial servitude's duties and benefits are correlative, a dominant estate owner can obtain either (1) the right to prevent a servient estate owner from doing something on the servient estate that the servient estate owner would otherwise be able to do or (2) a right to do something on the servient estate that the dominant estate owner would not otherwise be able to do.[115]

Limitations, however, are imposed on what rights can be "predialized." Article 647 provides that "there is no predial servitude if the charge imposed cannot be reasonably expected to benefit the dominant estate."[116] The question turns not on whether only the owner who obtains the servitude will find the right useful, but instead on whether *all* future reasonable owners of the estate will

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107. LA. CIV. CODE art. 533 (2013).
108. *Id.* art. 646.
109. *Id. See* PLANIOL, *supra* note 10, at 698.
110. LA. CIV. CODE arts. 646, 651 (2013). *See* PLANIOL, *supra* note 10, at 698.
111. Art. 651; TRAHAN, *supra* note 44, at 157.
112. Art. 651; TRAHAN, *supra* note 44, at 157.
113. LA. CIV. CODE arts. 646–47 (2013). *See* PLANIOL, *supra* note 10, at 698.
114. Art. 646; TRAHAN, *supra* note 44 at 156. *See* PLANIOL, *supra* note 10, at 698.
115. TRAHAN, *supra* note 44, at 158.
116. Art. 647. "The law will allow contractual or testamentary freedom to the extent that a servitude may serve a *useful* purpose; unreasonable whims of the parties, serving no socially useful purpose, may not give rise to predial servitudes." *Id.* cmt. b (emphasis added). Professor Trahan calls the dichotomy between useful benefits to the estate and other benefits that parties may want to predialize the difference between benefits to the *estate* and benefits to a *person.* TRAHAN, *supra* note 44, at 159. Benefits to an estate can be predialized, while mere benefits to a person cannot be predialized. *Id.* A benefit to the estate is "a benefit that any reasonable owner of the supposed dominant estate, in light of the nature, objective situation, or destination of the estate, would or at least might want to get." *Id.* at 160. For more, see PLANIOL, *supra* note 10, at 698–99, 728–29.

find the right useful.[117] In turn, although a right of passage can be predialized, a right to swim in a neighbor's pool most probably cannot.[118]

Personal servitudes are similar to predial servitudes with a few key distinctions. Specifically, "[a] personal servitude is a charge on a thing for the benefit of a person."[119] There are three types of personal servitudes:[120] usufruct,[121] habitation,[122] and right of use.[123] All three can be the subject of quasi-possession; however, the most relevant for this discussion is the right of use. [124] A right of use is identical to a predial servitude but for one distinction.[125] For a right of use, the right that the parties agree on does not benefit the dominant estate; it instead benefits an individual.[126] In this way, the servient estate remains burdened with a duty no matter who owns it, but the counteracting right only benefits a person.[127] It does not matter whether that person is tied to a certain estate.[128] While the right-of-use benefit is personal to an individual, this real right is heritable and can be transferred to another contractually.[129]

In the possessory action stage of property litigation, it does not matter whether Franks quasi-possessed a predial or a personal right-

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117. TRAHAN, *supra* note 44, at 158–60.

118. Louisiana Civil Code article 699 provides further examples of rights that can be predialized.

> The following are examples of predial servitudes: right of support, projection, drip, drain, or of preventing drain, those of view, of light, or of preventing view or light from being obstructed, of raising buildings or walls, or of preventing them from being raised, of passage, of drawing water, of aqueduct, or watering animals, and of pasturage.

LA. CIV. CODE art. 699 (2013).

119. *Id.* art. 534.

120. *Id.*

121. *Id.* The Louisiana Civil Code articles governing usufruct are articles 535–629. *See* A.N. YIANNOPOULOS, PERSONAL SERVITUDES, *in* 3 LOUISIANA CIVIL LAW TREATISE (5th ed. 2000); TRAHAN, *supra* note 44, at 184–202.

122. Art. 534. Louisiana Civil Code articles 630 through 638 govern habitation. *See* YIANNOPOULOS, *supra* note 121, PERSONAL SERVITUDES; TRAHAN, *supra* note 44, at 203.

123. Art. 534. Louisiana Civil Code articles 639 through 645 govern a right of use.

124. *Id.* art. 639. Louisiana Civil Code article 639 provides that "the personal servitude of right of use confers in favor of a person a specified use of an estate less than full enjoyment." *Id.*

125. TRAHAN, *supra* note 44, at 203.

126. *Id.*; PLANIOL, *supra* note 10, at 630–31.

127. TRAHAN, *supra* note 44, at 203; PLANIOL, *supra* note 10, at 630–31.

128. TRAHAN, *supra* note 44, at 203; PLANIOL, *supra* note 10, at 630–31.

129. LA. CIV. CODE arts. 643–44 (2013).

of-use servitude.[130] What courts have found determinative, however, is the common nature of how predial and personal servitudes are created. As intangibles that are tied to land in at least some part, servitudes cannot exist without some variation of human behavior. Specifically, the parties must agree to enter into a servitude agreement by creating a servitude through title,[131] or the servitude

130. The issue as to what type of servitude to which a person has *quasi-animus* is generally left for discussion in the petitory phase of litigation. However, courts look to the servitude interpretation articles for guidance. *See id.* arts. 730–34. Louisiana Civil Code article 730 provides that "[d]oubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate." *Id.* art. 730. Accordingly, because a servitude burdens the servient estate and the free disposal and use of property, unclear agreements should always be interpreted to be a personal obligation or, at most, a personal servitude. *Id.* cmt. b. The above seems to be a hardline rule; however, reading further, the Code is slightly less clear. Louisiana Civil Code article 733 provides that "[w]hen the right granted be of a nature to confer an advantage on an estate, it is presumed to be a predial servitude." *Id.* art. 733. Also, "[w]hen the right granted is merely for the convenience of a person, it is not considered to be a predial servitude, unless it is acquired by a person as owner of an estate for himself, his heirs and assigns." *Id.* art. 734. Here, whether a predial or personal agreement is entered is not dependent on the burden to the servient estate, but instead, is dependent on the nature of the right in question. Louisiana Civil Code articles 732 through 734 are out of line with article 730. One offers a bright-line rule that parties generally do not intend to enter predial agreements. Art. 730. The other allows for the determination of whether a party intended to enter a predial or personal agreement to be based on the nature of the right in question. *Id.* arts. 732–34. Which one is the appropriate tool of interpretation? Courts are unsure; whether one method is used over another is generally left to the judge. *See* Parish v. Municipality No. 2, 8 La. Ann. 145 (La. 1853); Burgas v. Stoutz, 141 So. 67 (La. 1932); Simoneaux v. Lebermuth & Israel Planting Co., Ltd., 99 So. 531 (La. 1924). For more, see PLANIOL, *supra* note 10, at 730−31.

131. Any predial or personal servitude can be created by title. TRAHAN, *supra* note 44, at 175. In the simplest of terms, two parties agree in written or oral contract that a servitude will be created between them. For a predial servitude, the agreement may look something like: "I, [insert party name], in my capacity as owner of the servient estate, grant [insert party name], in his capacity as owner of the dominant estate, a right of passage." The right-of-use servitude may look like the following: "I, [insert party name], in my capacity as owner of the servient estate, grant a right of passage in favor of [insert party name]." Not all parties, however, have the legal capacity to create servitudes by title. *Id.* at 174. For example, the Civil Code provides that "[t]he right of imposing a servitude permanently on an estate belongs to the owner alone." LA. CIV. CODE art. 708 cmt. b (2013). Accordingly, *only* the owner of a servient estate can impose a duty on that estate; however, in contrast, the owner or any person acting in his name or on his behalf can receive a benefit on behalf of the dominant estate or himself. *Id.* art. 735; TRAHAN, *supra* note 44, at 171–74. Finally, parties must be careful to fulfill the specific form requirements relevant to transfers by title. LA. CIV. CODE arts. 1833, 1837, 1839, 1541, 1543 (2013). For onerous transfers of servitudes, form requirements are met if the parties act under authentic act, act under private signature, or by oral agreement when the property is delivered and the transferor

will arise through operation of law because of some specific human behavior that creates a servitude through acquisitive prescription or destination.[132]

If the parties agree to enter into a servitude through title, permission is a necessary element of the servitude's creation. No matter what, there must be some point in time in which a servient estate owner allows a person to either come on to his property or allows that person to prevent him from doing something on his own property. The servitude agreement itself is a codification of the parties' consent and permissive frame of mind.

On the other hand, a servitude created through operation of law should technically arise only when no permissive act is involved. However, as evidenced in the following Section, when it comes to acquisitive prescription, Louisiana courts have allowed an informal permissive act to play a key role in quasi-possession and, furthermore, in the creation of servitudes.[133]

This role that permission plays in the creation of servitudes, both inside and outside of the realm of title, not only makes servitude rights wholeheartedly different than corporeal objects, but it accordingly acts as the key distinction between the elements of possession and quasi-possession.

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recognizes the transfer under oath. *Id.* arts. 1833, 1837, 1839. For more, see PLANIOL, *supra* note 10, at 731–32.

132. For discussion of the creation of servitudes through acquisitive prescription, see *supra* note 48. Also, predial servitudes can be created by destination. TRAHAN, *supra* note 44, at 177. Louisiana Civil Code article 741 explains that "[d]estination of the owner is a relationship established between two estates owned by the same owner that would be a predial servitude if the estates belonged to different owners." LA. CIV. CODE. art. 741 (2013). While it is technically possible for nonapparent servitudes, *see id.* art. 707, to be created by destination, it is rare. Art. 741; TRAHAN, *supra* note 44, at 178. As such, the concept is generally discussed in the context of apparent servitudes. In the most basic terms, when a landowner uses his single estate in a manner that is reflective of a predial servitude, if and when the single estate is divided into two, a predial servitude *automatically* comes into existence as between the two estates. TRAHAN, *supra* note 44, at 177–78. For example, say a landowner builds a driveway from the public road to the far end of his estate. He then sells the far end of his estate, while maintaining the ownership of the parcel closest to the public road. In the instant he divided his land, a predial servitude of passage was developed as between the two estates. The seller's estate is now the servient one, and the buyer's estate is the dominant one. The buyer, in his capacity as owner of the dominant estate, benefits from a right of passage on the driveway of the seller's land.

133. *See infra* Part II.B.

B. The Varying Elements of Possession and Quasi-possession

Because the nature of predial and personal servitudes is distinguishable from that of corporeal immovables, the way in which servitudes can be quasi-possessed is distinguishable as well. Possession requires sufficient *corpus*, physical contact with a thing, and *animus*, intention to act like the thing's owner.[134] Quasi-possession, however, requires sufficient *quasi-corpus* and *quasi-animus.*[135] *Quasi-corpus* is very similar to *corpus*. Applying Louisiana Civil Code article 3425 by analogy, *quasi-corpus* of a servitude is "the exercise of acts of use or enjoyment of the rights afforded by that servitude."[136] In turn, the mere use of a servitude right is enough to meet the threshold requirement of *quasi-corpus*.[137]

Quasi-animus is much more complex than *quasi-corpus*. The definition of *quasi-animus* is provided by analogy in article 3421: "The exercise of a real right, such as servitude, *with the intent to have it as one's own* is quasi-possession."[138] Accordingly, one must believe or, at the very least, decide to act as though a servitude right is his own to have *quasi-animus* in a servitude.[139] Generally, in the possession context, permission is the "kiss of death" for *animus*; those that initiate possessive acts under a grant of permission are called precarious possessors.[140] In fact, this general characteristic of possession was one of the determining factors in the *Franks* analysis.[141] According to the court, Franks could not possess the right in the crossways because it was acting on behalf and with the permission of Union Pacific.[142] However, the court failed to recognize that in the permission context, *animus* and possession are wholly and distinctly different from *quasi-animus* and quasi-possession.

As mentioned in the previous Section, unlike for possession, a permissive act plays a unique role in the creation of servitudes both within and outside the realm of title.[143] Because of the role permission plays in servitude creation, permission from the servient

134. *See supra* Part I.B.
135. TRAHAN, *supra* note 44, at 176.
136. *Id.*
137. *Id.*
138. LA. CIV. CODE art. 3421 (2013) (emphasis added).
139. TRAHAN, *supra* note 44, at 176.
140. *See supra* Part I.B.
141. Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *2 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012).
142. *Id. See supra* Part I.C.
143. *See supra* Part II.A.

estate owner does not preclude the dominant estate owner's formulation of *quasi-animus.*

When considering the quasi-possession of servitudes created through title, Louisiana property scholars recognize the following:

> Quasi-possession, far from being incompatible with such a grant of permission, presupposes it! Take, for example, the case in which one of two neighboring landowners grants to the other a predial servitude of passage across his estate. The "grant" of the servitude, by definition, entails a giving of permission, specifically, a giving of permission to enter upon and to cross the land. To be sure, with respect to the underlying thing—the corporeal immovable called the "servient estate"—the grantee of this servitude is but a "precarious possessor." Nevertheless, with respect to the servitude right itself, he is still a (true) quasi-possessor.[144]

A servitude created through title presupposes permission. By signing the servitude agreement, the servient estate owner is allowing the servitude holder to use his property. Accordingly, because permission is inherent to a servitude's creation through title and because the law allows a servitude to be quasi-possessed, permission cannot necessarily preclude the intent or *quasi-animus* necessary for quasi-possession.

Further, when considering how servitudes can be created through title, Louisiana courts have gone so far as to allow the creation of a servitude with an oral grant of permission to use property without any other formal documentation. This shows that even when a servitude does not yet exist, a quasi-possessor can form the proper quasi-animus for the quasi-possession of a servitude while working under permission from the servient estate owner.

For example, in *Guillotte v. Wells*, a Louisiana court held that a pipeline right-of-use servitude was created by title after a landowner merely gave permission "as a neighbor" to the owner of adjacent property to build a gas line across his property and later acknowledged that permission under oath at trial.[145] The court recognized that a servitude was created by title under the oral transfer exception found in Louisiana Civil Code article 1839, which

144. TRAHAN, *supra* note 44, at 176. *See also* BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 161−62 ("A usufructuary is a precarious possessor since his very title implies the acknowledgment of the right of the naked owner. But with regard to the right of the usufruct he is not a precarious possessor, for he exercises and therefore possesses this right *animo domini.*").

145. Guillotte v. Wells, 485 So. 2d 187, 189 (La. Ct. App. 1986).

requires delivery and recognition of the transfer under oath at trial.[146] Delivery of a servitude is sufficient when either (1) the act of transfer is delivered or (2) the right is *used* by the dominant estate owner.[147] In this case, the servitude was delivered when it was used.[148] Additionally, the transferor, Wells, recognized the transfer under oath when he told the court that he granted Guillotte permission to connect his line across the Wells property.[149] Overall, the court recognized that a mere neighborly grant of permission to use land for a limited purpose was enough to establish a real obligation on the property.[150]

Even outside of the creation of servitudes through title, Louisiana courts have recognized that the proper *quasi-animus* for the quasi-possession of servitudes can be formed while acting under a grant of permission. In *Levet v. Lapeyrollerie*, the court held that a right-to-drain servitude was created through acquisitive prescription after Lapeyrollerie, as owner of Tract B, consented to digging a drainage line through Tract B to connect the alternatively owned neighboring Tracts A and C.[151] The drainage canal was essential to Tract C; without it, Tract C could not be cultivated.[152] The court recognized the servitude's creation, noting that "[t]here is no dispute

146. *Id.* at 188. "A transfer of immovable property must be made by authentic act or by act under private signature. *Nevertheless, an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated under oath*." LA. CIV. CODE art. 1839 (2013) (emphasis added).

147. LA. CIV. CODE art. 722 (2013).

148. *Guillotte*, 485 So. 2d at 189.

149. *Id.* at 188.

150. *Id.* at 191. *See also* Steinberg v. La. Land & Exploration Co., 927 So. 2d 474, 478–79 (La. Ct. App. 2006) (discussing the holding of *Guillotte* as reasonable in light of Louisiana Civil Code article 1839); Jones v. Tezeno 758 So. 2d 896, 899 (La. Ct. App. 2000) (discussing the holding of *Guillotte* in the context of the plaintiff's asserted claim of a predial servitude by title); Miller v. Long Oil & Gas Exploration, Ltd., 542 So. 2d 75, 79–81 (La. Ct. App. 1989) (holding that because a servitude can be verbally created through *Guillotte,* a servitude agreement can be orally amended); Marina Enters. v. Ahoy Marine Servs., 496 So. 2d 1080, 1084 n.2 (La. Ct. App. 1986) (noting that the servitude agreement between Blue Streak Enterprises and Ahoy Marine could have been proven even without a writing). *But see* Robert Inv. Co. v. Eastbank, Inc., 496 So. 2d 465, 469 (La. Ct. App. 1986) (noting that conventional predial servitude agreements must be in writing and disputes are always resolved in favor of the servient estate); Stinson v. Lapara, 62 So. 2d 291, 294–95 (La. App. Ct. 1953) ("And surely it cannot be successfully contented that real property can be transferred by verbal agreement.").

151. Levet v. Lapeyrollerie, 39 La. Ann. 210, 213 (La. 1887). Please note that there is a drafting mistake in the Southern Reporter edition of *Levet. See* Levet v. Lapeyrollerie, 1 So. 672, 674 (La. 1887). Please rely solely on the original text in the Louisiana Annual Reports series.

152. *Levet*, 39 La. Ann. at 213.

that the servitude here has been possessed or enjoyed for more than 10 years without interruption."[153] This statement shows that the court set Levet's quasi-possession time to start from the moment Lapeyrollerie granted the permission to dig the drainage canal across his land.[154] The court also seemingly relied on the fact that the right that the parties contemplated—drainage—was of "real advantage to the estate."[155] Overall, this case provides that when permission is exchanged between parties and that permission involves a right that can be of real advantage to an estate, sufficient quasi-possession can begin for acquisitive prescription from the moment the right is contemplated and used by the parties.[156]

Overall, as mere permission is enough to *create* a servitude, it cannot simultaneously *hinder* the quasi-possession of a servitude. Because of the nature of servitude rights and the jurisprudential trends in Louisiana, a potential quasi-possessor is more than capable of forming the proper *quasi-animus* for quasi-possession while acting under permission. As a result, quasi-possessors often embody a dual status, acting as both precarious possessors *and* quasi-possessors simultaneously.[157] Relative to the possession of corporeal property, they do not have sufficient *animus* and are precarious possessors having no possessory interests.[158] However, relative to the quasi-possession of the incorporeal servitude, quasi-possessors are true possessors with proper *quasi-animus* and with full possessory interests.[159]

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153. *Id.* Please note that this sentence is misprinted in its parallel citation of the Southern Reporter. Only rely on the original print in the Louisiana Annual Reports series. *Id.* at 210–13. Additionally, note that the law at the time of this case allowed for a servitude to be created by acquisitive prescription of ten years *without* just title and good faith. *See* LA. CIV. CODE art. 742 cmt. b (2013).

154. *Levet*, 39 La. Ann. at 214.

155. *Id.* at 213–14. *See supra* notes 116, 118.

156. *But see* YIANNOPOULOS, *supra* note 9, PREDIAL SERVITUDES § 138–39, at 399–402; PLANIOL, *supra* note 10, at 742–44. Notice that the holding of *Levet* seems to ignore the *adverse* intent generally necessary for an acquisitive prescription claim. The court seems to recognize the unique nature of a servitude and hold that as long as the right used is one of true advantage to the estate, it can be quasi-possessed for acquisitive prescription despite any permission involved.

157. TRAHAN, *supra* note 44, at 66.

158. *Id. See* BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 161–62.

159. TRAHAN, *supra* note 44, at 66. *See* BAUDRY-LACANTINERIE & TISSIER, *supra* note 10, at 161–62. Notably, the fact that quasi-possessors can be precarious possessors and quasi-possessors at the same time does not mean that the Louisiana Civil Code articles on precarious possession, *see* LA. CIV. CODE arts. 3437–40 (2013), do not apply to quasi-possession cases. The best explanation is through example. Consider the *Franks* case. There were two apparent partnership relationships in the case. The most obvious was Franks and Union Pacific. However, there was a second: Franks and its subsidiaries. The court articulated

Further, the inherent nature of servitudes created by title, the holding in *Guillotte*, the holding in *Levet*, and the widely recognized dual status of quasi-possessors show that the *Franks* court was mistaken in allowing the court's determination that Franks acted under the railroad company's permission to preclude it from a remedy. While the court could have ultimately ruled for Union Pacific for alternative reasons, it could not allow the permissive act to be automatically determinative.[160] Franks could have formed the proper *quasi-animus* in reference to the servitude-like language in the 1923 title agreement.[161] Alternatively, in accordance with *Guillotte*, Franks could have formed the proper *quasi-animus* when it used a servitude right under Union Pacific's permission that was later recognized under oath at trial. Under *Levet*, Franks could have even formed the proper *quasi-animus* from the moment the parties contemplated the right of passage. Any of these options were viable, yet the *Franks* court ignored them all, not even allowing the parties to address evidence relevant to this issue. Because of a quasi-possessor's dual status, the court correctly labeled Franks as a precarious possessor relative to its possession of the physical crossways; however, relative to the plaintiff's true claim—the quasi-possession of a servitude right—the court simply ended its inquiry prematurely.

In fact, the court ended its inquiry so prematurely that it allowed its determination to completely preclude Franks from maintaining a cause of action.[162] Once again, the *Franks* court was mistaken because, like the subject matter and elements of possession and quasi-possession, the parties against whom remedy is available in each field of law differ.

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that Franks let a number of its subsidiaries, like Dill, the pipeline inspector, the oil company, the real estate developer, and the sewer maintenance inspectors, use the crossways to enter the Franks property. Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *1 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012). Relative to Franks's quasi-possession of the servitude in the crossways, these subsidiaries were precarious quasi-possessors. They did not have *quasi-animus* sufficient for quasi-possession. They used the right but *not* with the intent that it was their own. Accordingly, if any one of them wanted to protect its use of the servitude, it would be able to bring a possessory action against anyone except Franks, limited by article 3440. *See* Art. 3440.

160. The term "automatically" is used in reference to *supra* notes 150, 156 and accompanying text. It is possible for a court to accept jurisprudence conflicting with the holdings of *Guillotte* and *Levet.* However, because it is unclear, a court would have to allow the parties to present evidence as to this issue specifically.

161. *See supra* Part I.A.

162. *Franks*, 2011 WL 6157484, at *4.

C. The Varying Parties Against Whom Remedy Is Available in Possession and Quasi-possession

The final variation between possession and quasi-possession is the parties against whom the possessory action provides a remedy. For possession and the claimed possession of corporeal things, if a person is labeled as a precarious possessor, then, under Louisiana Civil Code article 3440, he can bring a possessory action against anyone except the person for whom he is possessing.[163] Civil Code article 3440 is exactly what the *Franks* court relied on in barring Franks's possessory claim.[164] The court believed that Franks possessed the crossways on behalf of Union Pacific and, therefore, could not bring a possessory action against Union Pacific.[165] The court failed to acknowledge, however, that quasi-possessors can *also* be true possessors of the *right* to cross land that another possesses and, as such, can bring an independent possessory action against anyone.[166]

The same elements of the possessory action must be met for quasi-possession cases.[167] However, whether a quasi-possessor can bring a possessory action against the possessor of the corporeal thing is dependent on what interests he is asserting in the action. If the quasi-possessor asserts his interest in the *real right* of the servitude, then he may bring a possessory action against anyone, including the possessor of the underlying corporeal thing.[168] On the other hand, if the quasi-possessor brings an action to protect his precarious interests in the possession of that *corporeal thing itself*, he is limited by Civil Code article 3440.[169]

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163. Art. 3440.
164. *Franks*, 2011 WL 6157484, at *4.
165. *Id.*
166. Louisiana Code of Civil Procedure article 3655 provides that:

> The possessory action is one brought by the possessor of immovable property *or of a real right therein* to be maintained in his possession of the property or *enjoyment of the right* when he has been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted.

LA. CODE CIV. PROC. art. 3655 (2013) (emphasis added).
167. *See supra* note 40.
168. *See* YIANNOPOULOS, *supra* note 9, PREDIAL SERVITUDES § 179, 186, at 482, 496 ("The possessory action may be brought against any person who has caused a disturbance of possession, be he the owner of the servient estate or another person."); YIANNOPOULOS, *supra* note 9, PREDIAL SERVITUDES § 186, at 496.
169. LA. CIV. CODE art. 3440 (2013).

Franks exclusively asserted an interest in a real right burdening Union Pacific's land and crossways.[170] It did not purport to possess the physical crossways.[171] Accordingly, article 3440 did not bar it from bringing a possessory action against Union Pacific to assert a quasi-possessory right to cross the land. In asserting its interest in the quasi-possession of a right to traverse the crossways, Franks was capable of bringing a possessory action against anyone, including Union Pacific.

Overall, in deciding the *Franks* claim, the court failed to recognize and distinguish the unique variations between possession and quasi-possession, such as the nature of the thing quasi-possessed, the elements necessary for quasi-possession, and the parties against whom a quasi-possession claim can be brought. The court instead treated Franks's claim in a real right connected to the crossways as if it was purely a claim for possession of the physical crossways themselves.[172] In doing so, the court blurred the lines between possession and quasi-possession to such a degree that the case can in no way serve as proper precedent for future quasi-possession jurisprudence.

III. A LASTING EFFECT: APPROPRIATE RESPONSES TO *FRANKS INVESTMENT CO. L.L.C. V. UNION PACIFIC RAILROAD CO.*

In light of the court blurring the concepts of possession and quasi-possession, *Franks* has the potential to effectuate a number of poor consequences. Most importantly, Louisiana courts and lawyers are likely to be confused about the concept of quasi-possession in the future. It is not necessarily true that the *Franks* court's ultimate holding in favor of Union Pacific is incorrect. Instead, the court utilized the wrong line of reasoning, not even allowing the plaintiff and defendant in the case to present relevant evidence on the true issue—the quasi-possession of a servitude in the land and crossways.[173]

As such, the poor analysis in the case has the potential to confuse quasi-possession jurisprudence, extending far beyond that concerning railroads and farmers. For example, any common servitude case regarding a right of passage on a neighbor's driveway to access property could be considered a claim for the possession of

170. *Franks*, 2011 WL 6157484, at *1.
171. *Id.*
172. *Id.* at *1–4.
173. The *Franks* court adjudicated the case from the sole perspective of the physical crossways. The court did not mention the term and considered no evidence regarding cases similar to, or even opposing, *Levet* or *Guillotte*.

the driveway itself. A case regarding a right to utilize a drainage line could be treated instead as a claim for the possession of the actual land. In this manner, quasi-possessors would never be capable of moving beyond their simultaneous status as precarious possessors.[174] Servitude holders and users could be completely barred from bringing a possessory action against the grantor of the servitude.

It is imperative that the above result be prevented. Specifically, future cases with similar facts to *Franks* should utilize a pure quasi-possession line of reasoning, and the Louisiana Legislature should amend the Civil Code to clarify the faulty proposition that the laws of possession apply by analogy to the quasi-possession of incorporeals.[175]

A. An Exemplary Case: How Future Louisiana Cases Like Franks *Should Be Decided Using Quasi-possession Principles*

The *Franks* court blurred the lines between possession and quasi-possession, utilizing the incorrect line of reasoning relative to Franks's asserted interest of a real right burdening the Union Pacific land and crossways.[176] Because it is likely that cases with similar facts will be filed throughout the state, it is imperative that federal and Louisiana state courts acknowledge and apply the unique aspects of the law of quasi-possession. Future possessory actions, filed to assert quasi-possession of a real right, should be decided using principles of quasi-possession alone.

Franks's holding and line of reasoning are of no true precedential value. The facts of *Franks*, however, are exemplary for articulating a proper line of reasoning for a quasi-possession case.

Four items should concern courts within a quasi-possession possessory action: (1) whether the plaintiff developed sufficient *quasi-corpus*; (2) whether the plaintiff developed sufficient *quasi-animus*; (3) whether both lasted for more than a year such that the right to quasi-possess was gained; and (4) whether the right to quasi-possess was never subsequently lost.[177] Using this and the *Franks* facts as a framework, a future quasi-possession case like *Franks* could be successful.

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174. *See supra* Part II.B.
175. *See* LA. CIV. CODE art. 3421 (2013).
176. *See supra* Part II.
177. Applying the requirements of Louisiana Code of Civil Procedure article 3658 by analogy. *See supra* note 40.

First, a court must consider *quasi-corpus*. Sufficient *quasi-corpus* for the quasi-possession of real rights is mere use.[178] Under facts like those in *Franks*, this element is likely met. Franks and its subsidiaries used the crossways continuously for a number of years, most notably of which was Joe Dill, a lessee who used the crossways to access the property and move his agricultural equipment to and from the highway.[179] These acts should be enough to constitute use sufficient for the *quasi-corpus* element for quasi-possession.

Second, a court must consider *quasi-animus.* This element was the determining factor for the court in *Franks*; however, as posited in this Comment, the court mistakenly came to its determination under the framework of the law of possession. The following analysis is more appropriate for a quasi-possession case.

Quasi-animus is the intent to hold a real right as one's own.[180] Unlike for possession, evidence that a potential quasi-possessor used a servitude with permission does not automatically preclude the proper formulation of *quasi-animus*.[181] Beyond established presumptions,[182] courts must only consider whether the potential quasi-possessor acted in a manner reflective of dominion over a real right.[183] Under facts like those in *Franks*, the *quasi-animus* element would likely be met as well. The fact that servitude-like language existed in the deed to the property is persuasive evidence that a servitude of passage was created through title.[184] Accordingly, because a servitude created through title presupposes permission, that permission does not preclude the development of *quasi-animus.*[185] Further, Franks acted in a manner reflective of an intent to use the servitude right as its own. Specifically, Franks extended its right to others.[186] Franks gave permission to Dill and other workers to use a right to cross as if Franks exclusively had the power to do so. This exercise of dominion over a right to cross is probably reflective of an assertion of ownership.[187]

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178. *See supra* Part II.B.

179. Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *1 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012).

180. *See supra* Part II.B.

181. *See supra* Part II.B.

182. One who establishes *quasi-corpus* is presumed to have *quasi-animus. See* LA. CIV. CODE art. 3427 (2013).

183. *See supra* Part II.B.

184. *See supra* Part I.A.

185. *See supra* Part II.B.

186. Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *1 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012).

187. For examples of acts that are reflective of an assertion of ownership, see LA. CIV. CODE art. 3431 cmt. d (2013).

Third, courts must guarantee that the right to quasi-possess has been gained. The establishment of sufficient *quasi-corpus* and *quasi-animus* for more than one year results in a quasi-possessor gaining the right to quasi-possess.[188] The right to quasi-possess grants a quasi-possessor a judicially protectable right in a certain thing.[189] Under facts similar to *Franks*, it is highly probable that the right to quasi-possess was gained. Both the elements of *quasi-corpus* and *quasi-animus* were probably met, and they would likely have lasted more than a year because the crossways were developed in 1923 and Franks brought the action in 2008.[190]

Finally, courts must guarantee that the right to quasi-possess has never been lost.[191] For this inquiry, courts commonly consider whether the quasi-possessor was ever evicted.[192] The right to quasi-possess is not lost post-eviction as long as the quasi-possessor regains quasi-possession or files a possessory action within one year

188. *Id.* art. 3422.

189. *See* YIANNOPOULOS, *supra* note 9, PROPERTY § 310, at 614; TRAHAN, *supra* note 44, at 72.

190. *See supra* Part I.A.

191. LA. CIV. CODE art. 3434 (2013). *See* YIANNOPOULOS, *supra* note 9, PROPERTY § 313, at 622; TRAHAN, *supra* note 44 at 72; Mire v. Crowe 439 So. 2d 517, 521–23 (La. Ct. App. 1983); Liner v. La. Land & Exploration Co., 319 So. 2d 766 (La. 1975).

192. *See* LA. CIV. CODE arts. 3421, 3433, 3434 (2013). For general possession, Louisiana Civil Code article 3433 recognizes the concept of eviction, noting that "possession is lost when the possessor . . . is evicted by another by force or usurpation." Louisiana jurisprudence posits two criteria for eviction: (1) there must be an act by another that prevents the possessor from doing physical acts with the thing he possesses (*corpus*); and (2) this act must be such that if the actual possessor would have witnessed it, it would have "seriously challenged" the possessor's dominion. *See* Liner v. La. Land & Exploration Co., 319 So. 2d 766 (La. 1975); Evans v. Dunn, 458 So. 2d 650 (La. Ct. App. 1984); Richard v. Comeaux, 260 So. 2d 350 (La. Ct. App. 1972). Courts have found items like erecting a fence or other enclosure to be sufficient for eviction; however, acts such as occasionally mowing grass on another's land will not be adequate. YIANNOPOULOS, *supra* note 9, PROPERTY § 313, at 620. Eviction for quasi-possession purposes is more complex than for the purposes of regular eviction of possession. Specifically, to evict a quasi-possessor a person "must exercise the right according to its nature with the intent to have it as ones own." *Id.* at 622. Because the nature of a real right is different than that of a corporeal thing, the acts that a person must do to interfere with *quasi-corpus* must meet a higher threshold than those for regular eviction. Specifically, the act must actually interfere with a quasi-possessor's use of his right. *Id.* For example, if a servitude agreement contemplates the right to pass across a driveway in the morning, adverse use of the driveway at night would not be sufficient for eviction. While the standard is high, courts have found that eviction can occur if a building that inhibits the use of a quasi-possessor's real right is constructed. *Id.*

of the eviction.[193] Under facts similar to *Franks*, the right to quasi-possess was likely maintained. The only act of Union Pacific that was intrusive enough to constitute an eviction was its complete removal of the crossways.[194] Franks, however, filed the possessory action to maintain the right to quasi-possess well within one year of that eviction.

Overall, it is very likely that future possessory actions with similar claims and facts to *Franks* could be successful. While the result in future cases may differ, cases with similar facts can use the above reasoning to adjudicate a pure quasi-possession claim.

B. A Need for Clarification: Call to the Louisiana Legislature

In light of the complexity of quasi-possession, it is unsurprising that the *Franks* court incorrectly applied the quasi-possession analogy laid out in Louisiana Civil Code article 3421 on possession.[195] Accordingly, the Louisiana Civil Code must accurately reflect how Louisiana courts and scholars treat quasi-possession cases. To prevent any further confusion, the Louisiana Civil Code should be amended to include the following:[196]

> Article 3421: Possession
> Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name.
>
> The exercise of a real right, such as a servitude, with the intent to have it as one's own is quasi-possession. The rules governing possession apply by analogy to the quasi-possession of incorporeals.
>
> Proposed Amendment:
> Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name.
>
> The exercise of a real right, such as a servitude, with the intent to have it as one's own is quasi-possession. The rules

193. In this context, quasi-possession is exactly the same as possession. *See supra* note 70.

194. Franks Inv. Co. v. Union Pac. R.R. Co., No. 08-0097, 2011 WL 6157484, at *2 (W.D. La. June 14, 2011), *aff'd*, 464 F. App'x 415 (5th Cir. 2012).

195. Art. 3421.

196. The italicized language encompasses proposed additions to the current Louisiana Civil Code.

governing possession apply by analogy to the quasi-possession of incorporeals *to the extent that their application is compatible with the nature of incorporeals*.

Article 3437: Precarious possession
The exercise of possession over a thing with the permission of or on behalf of the owner or possessor is precarious possession.

Proposed Amendment:
The exercise of possession over a thing with the permission of or on behalf of the owner or possessor is precarious possession.

Precarious possessors can hold a dual status. They may be precarious possessors relative to a corporeal and quasi-possessors relative to an incorporeal simultaneously. Nevertheless, the use of an incorporeal, such as a servitude, without the intent to have it as one's own is precarious quasi-possession.

Article 3440: Protection of precarious possession
Where there is a disturbance of possession, the possessory action is available to a precarious possessor, such as a lessee or a depositary against anyone except the person for whom he possesses.

Proposed Amendment:
Where there is a disturbance of possession, the possessory action is available to a precarious possessor, such as a lessee or a depositary against anyone except the person for whom he possesses.

If asserting only the quasi-possession of an incorporeal, precarious possessors who are also quasi-possessors may bring a possessory action against anyone. Nevertheless, a precarious quasi-possessor may bring a possessory action against anyone except the person for whom he quasi-possesses the incorporeal.

In amending the Civil Code, the comments to article 3437 must reflect the fact that permission is not a burden on establishing the

proper *quasi-animus* for quasi-possession cases.[197] When the quasi-possession is of an existing servitude, the actual creation of that servitude presupposes a permissive act.[198] When the quasi-possession is of a potential servitude, cases such as *Guillotte* and *Levet* show that Louisiana courts recognize that the development of the proper *quasi-animus* for a quasi-possession claim is possible, despite any permission involved.[199]

These revisions would in no way change the law. Rather, they would simply clarify it. In amending the Code, the Legislature would ensure that the incorrect line of reasoning reflected in *Franks* would not be utilized in future quasi-possession cases. Consequently, courts would no longer be able to blur the lines between possession and quasi-possession to such a degree that the concepts are treated as one and the same. Although they are admittedly analogous in many respects, quasi-possession is not possession. Its unique nature and treatment must be preserved.

CONCLUSION

In *Franks Investment Co. v. Union Pacific Railroad Co.*, the court failed to acknowledge and apply the unique variations that make quasi-possession distinguishable from possession. Consequently, the court blurred the lines between quasi-possession and possession to such a degree that this case could cause confusion in the area of quasi-possession for many years. Recognizing this potential for confusion, future cases with similar facts to *Franks* must be decided using solely the principles of quasi-possession. Additionally, the Louisiana Legislature should amend the Civil Code to adequately reflect the manner in which courts and scholars treat the uniquely civilian concept of quasi-possession.

Anna Scardulla*

197. *See supra* Part II.B.
198. *See supra* Part II.A, B.
199. *See supra* Part II.B.

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