

# Louisiana Law Review

---

Volume 8 | Number 2

*The Work of the Louisiana Supreme Court for the*

*1946-1947 Term*

*January 1948*

---

## Civil Code and Related Subjects: Property

Joseph Dainow

---

### Repository Citation

Joseph Dainow, *Civil Code and Related Subjects: Property*, 8 La. L. Rev. (1948)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol8/iss2/10>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

## PROPERTY

*Joseph Dainow\***Servitudes*

The Louisiana law of servitudes is a fascinating subject to those who find interest in an interwoven pattern of civil law principles. While some of these were more meaningful in the historical conditions of property for which they were formulated, most of them are still serving well as a basis for regulating legal relations in the field of law which they cover. These titles in the Louisiana Civil Code are the embodiment of a great deal of civil law doctrine. The word "servitude" is a technical term, and the inaccurate use of the word in a more general sense is not only misleading in its immediate context, it creates the dangerous possibility of switching a whole line of interpretation into a wrong direction. This is what happened in the case of *Mallet v. Thibault*<sup>1</sup> in which the court asserted that "the creation of a *personal servitude* by convention will be approved provided, of course, that it does not contravene the public order."<sup>2</sup> This conclusion is based upon (1) the finding of irreconcilability between certain code provisions which are not conflicting but rather corroborative,<sup>3</sup> and (2) the use as authority, for a basic doctrinal question, of a mineral rights case<sup>4</sup> which represents at best a tenuous extension of the law of servitudes for want of any better device in the available legal materials.

Article 709 of the Civil Code provides that "Owners have a right to establish on their estates, or in favor of their estates, such servitude as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services imply nothing contrary to public order." This appears in Book II, Title IV "Of Predial Servitudes or Servitudes of Land" and it reiterates the first basic principle of predial servitudes that they constitute essentially a relationship between two estates.<sup>5</sup>

---

\*Professor of Law, Louisiana State University.

1. 31 So. (2d) 601 (La. 1947).

2. 31 So. (2d) 601, 604 (Italics supplied).

3. "However, that article [709] cannot be reconciled with Articles 757 and 758." 31 So. (2d) 601, 604.

4. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

5. Arts. 647-650, La. Civil Code of 1870.

The whole title of servitudes is keyed to this fundamental concept which is followed consistently throughout the chapter on conventional servitudes, and is repeated and elaborated in Articles 754-758.

Article 754 provides "Servitudes being established on estates in favor of other estates, and not in favor of persons, if the grant of the right declare it to be for the benefit of another estate, there can be no doubt as to the nature of this right, even though it should not be called a servitude." Articles 755 to 758<sup>6</sup> consider the possible variations both in the manner of description used and in the real purpose to be accomplished, the latter being the only test to distinguish the true predial servitude from a service or a right of mere personal convenience.

To take Articles 757 and 758 out of their immediate context, and to read into them the phrase "personal servitude" which does not appear there, and then to state that there is an irreconcilable conflict between these articles and Article 709, is both misleading and dangerous.

The phrase "personal servitude" does appear at the very beginning of the title, in Article 646,<sup>7</sup> and the purpose there is to distinguish the personal servitudes of usufruct, use and habitation from the predial servitudes which are the only ones dealt with in Title IV.

---

6. Art. 755, La. Civil Code of 1870: "If, on the other hand, the act establishing the servitude does not declare that the right is given for the benefit of an estate, but to a person who is the owner of it, it must then be considered whether the right granted be of real advantage to the estate, or merely of personal convenience to the owner."

Art. 756, La. Civil Code of 1870: "If the right granted be of a nature to assure a real advantage to an estate, it is to be presumed that such right is a real servitude, although it may not be so styled."

"Thus, for example, if the owner of a house contiguous to lands bordering on the high road, should stipulate for the right of passing through lands, without it being expressed that the passage is for the use of his house, it would be not the less a real servitude, for it is evident that the passage is of real utility to the house."

Art. 757, La. Civil Code of 1870: "If, on the other hand, the concession from its nature is a matter of mere personal convenience, it is considered personal, and can not be made real but by express declaration of the parties."

"Thus for example, if the owner of a house near a garden or park, should stipulate for the right of walking and gathering fruits and flowers therein, this right would be considered personal to the individual, and not a servitude in favor of the house or its owner."

"But the right becomes real and is a predial servitude, if the person stipulating for the servitude, acquires it as owner of the house, and for himself, his heirs and assigns."

Art. 758, La. Civil Code of 1870: "When the right granted is merely personal to the individual, it expires with him, unless the contrary has been expressly stipulated."

It is well recognized that the law of servitudes in the Civil Code did not contemplate the regulation of the oil and mineral industry in Louisiana. That the courts have done an admirable job in providing a system of property control with inadequate and unsuitable materials is a very commendable achievement in the administration of justice. However, it should not be in this extension of the law of servitudes to the field of mineral rights that one should seek the answers to general questions regarding the fundamental principles of servitudes—especially where there is really no question and no conflict.

Even if the court's argument were accepted, and a so-called personal servitude recognized, the very Article 758 upon which it bases this right would preclude the conclusion that the plaintiff had stated a cause of action. The plaintiff is not the original owner, but the heir of the person in whose favor this right was created; whereas under Article 758 a "right" which is personal expires with that individual.

The facts of the case may make the court's decision appear as the socially desirable result to prevent what might have been a harsh injustice. The cause, however, lies not in the law of servitudes, but in the carelessness or dishonesty of the original owner who failed to include the agreed stipulations in the final acts of conveyance.

The decision here discussed was merely the dismissal of an exception of no cause of action, and at the time of this writing, there is no information as to any further proceedings. However, the language used by the court has rather serious implications, and the purpose of this extended discussion is to clarify one of the most basic of all the principles in the law of servitudes, before it gets "developed" into more complicated situations.

In the case of *Devoke v. Yazoo & Mississippi Valley Railroad Company*<sup>8</sup> there is an interesting discussion about a servitude which

---

7. Art. 646, La. Civil Code of 1870: "All servitudes which affect lands may be divided into two kinds, personal and real.

"Personal servitudes are those attached to the person for whose benefit they are established, and terminate with his life. This kind of servitude is of three sorts: usufruct, use and habitation.

"Real servitudes, which are also called *predial or landed servitudes*, are those which the owner of an estate enjoys on a neighboring estate for the benefit of his own estate.

"They are called *predial or landed servitudes*, because, being established for the benefit of an estate, they are rather due to the estate than to the owner personally.

"This kind of servitude forms the subject of the present title."

8. 271 La. 729, 30 So. (2d) 816 (1947), noted in (1947) 21 Tulane Law Review 699.

is generally observed amicably and therefore seldom litigated. It is sometimes described as the "sic utere"<sup>9</sup> servitude. When a person suffers damage from his neighbor's use of the adjoining property, the usual idea for legal redress would be an action in tort, without much thought being given to the possible applicability of this rule of servitudes. In the present case, the complaint of the plaintiff property owners was directed at the defendant on account of the damage done by smoke and cinders emanating from the locomotives in the railway company's terminal facilities (located in a residential section of Bossier City). This case was the sequel to the earlier case of *McGee v. Yazoo & Mississippi Valley Railroad Company*<sup>10</sup> in which the plaintiffs obtained injunctive relief and compensatory damages; and the present suit followed as a result of the defendant's continued operation of the facilities. In the *McGee* opinion, there was no reference to Articles 666-669 of the Civil Code; the *Devoke* case seems to have been worked over more thoroughly (with many participating *amici curiae*), and these code provisions are pointed out as "the basic law of this state on the subject." This is a servitude imposed by law on every estate to the effect that its use should not damage or cause unreasonable inconvenience to other estates. In the present case, the court found that the defendant was violating this servitude without justification by reason of its failure to install and employ modern available equipment (round house building and tall central smokestack with a smoke eliminator) to reduce the inconvenience and damage to neighboring estates. The court stated specifically that this was not an action in tort, thereby eliminating from consideration the question of fault and negligence. There are probably many more civil law principles and institutions which could serve society very well if they were not being forgotten and overlooked into disuse.

A different kind of a servitude problem, regarding dedication of a road, was presented in the case of *James v. Delery*.<sup>11</sup> From the clarity of the opinion and the virtual agreement as to facts, it may be puzzling that the case was litigated to the state supreme court. The dedication was shown by the combination of a positive intent to dedicate the road in question and an actual use of it. Nevertheless, the dispute is not surprising because the law on the subject is none too clear. To the Civil Code provisions regarding the private servi-

9. *Sic utere tuo ut alienum non laedas* (so use your own as not to injure another's property).

10. 206 La. 121, 19 So. (2d) 21 (1944).

11. 211 La. 306, 29 So. (2d) 858 (1947).

tude of passage<sup>12</sup> and the legal servitude of public roads,<sup>13</sup> there have been added statutes relating to the dedication of streets and public roads<sup>14</sup> and also the crystallization of custom in the jurisprudence.<sup>15</sup> It would not be untimely to reexamine all this law with a view to its coordination.

### *Building Restrictions*

The validity of building restrictions is no longer questioned, but occasionally a problem arises with regard to the interpretation of one. In the case of *Salerno v. de Lucca*<sup>16</sup> the building restriction "that there shall be no business establishments" was invoked as a bar to the maintenance of a sign or billboard on one of the lots in the subdivision. While it was admitted that the activity would be excluded if the restriction were against the use of the property for "business purposes," it was contended that the disputed use did not come within the scope of "business establishments."

Since the restriction in this case is one so commonly encountered, the court's opinion as to its interpretation will probably be more far-reaching than the immediate litigation. The significance of the decision lies in the fixing of a good faith or comprehensive rule of interpretation rather than a narrow literal rule. Thus the entire context must be considered in order to ascertain the real intention behind the restriction. In this particular subdivision there were a few exceptional lots reserved "for business purposes for the convenience of lot owners." Accordingly, the court concluded that the restriction intended all other lots to be used for residential purposes exclusively. Under this interpretation, the sign or billboard came within the prohibition.

However, the violation had been going on for more than two years; and by virtue of Act 326 of 1938, the property had become free from "the restriction which had been violated." This can hardly be taken to mean freedom from the whole commercial restriction, but only freedom to the extent that there had been a two-year unopposed violation, namely, in the placing of signs or billboards on the property.

---

12. Arts. 699 et seq., 719, 722, 780, La. Civil Code of 1870.

13. Arts. 665, 658, 707, La. Civil Code of 1870.

14. E.g., La. Act 220 of 1914 [Dart's Stats. (1939) § 3634]; La. Act 51 of 1930 [Dart's Stats. (1939) §§ 5344-47].

15. *Bomar v. City of Baton Rouge*, 162 La. 342, 110 So. 497 (1926).

16. 211 La. 659, 30 So. (2d) 678 (1947).

*Ownership*

It is not so long ago that a vast amount of property which had no previous value of any consequence, became the subject of extensive litigation involving every phase of property law. The swamps and the wastelands and every sort of water bottom received a full legal treatment and respectable classification. The cases are now thinning out and getting down to some of the more specific details. *Amerada Petroleum Corporation v. Case*<sup>17</sup> was a concursus proceeding to determine the ownership of certain oil royalties, which in turn depended upon the ownership of the property from which the oil was produced. The land was alluvion or accretion which had accumulated gradually to a riparian property, but there was dispute as to whether it was on Grand Lake or on the body of water called the Arm of Grand Lake. It has already been decreed that Grand Lake itself is a navigable lake, and that its bed belongs to the state.<sup>18</sup> Since the law of accretion<sup>19</sup> applies to the shores of rivers and streams, the natural question is how to draw the line between the two bodies of water where one flows into the other. Still the court must decide cases, and in the present case they followed their prior decision regarding the adjacent lot,<sup>20</sup> that the land in question was on the Arm of Grand Lake which was classified as a navigable stream, and that the accretion belonged to the riparian proprietor.

## PRESCRIPTION

*Joseph Dainow\***Acquirendi causa*

In *Meridian Land & Mineral Corporation v. Bagents*,<sup>1</sup> two petitory actions were brought by the record owners of a certain property. The defendants were in physical possession and they pleaded ownership by virtue of the thirty-year prescription. The basic concept of acquisitive prescription is *possession*, and this concept is quite different from actual physical control of the property. In the present case, there was evidence that the defendants' ancestor had fenced the land about 1911 and used it as a pasture. However, there

---

17. 210 La. 630, 27 So. (2d) 431 (1946).

18. *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1937).

19. Art. 509, La. Civil Code of 1870.

20. *Amerada Petroleum Corporation v. State Mineral Board*, 203 La. 473, 14 So. (2d) 61 (1943).

\*Professor of Law, Louisiana State University.

1. 211 La. 627, 30 So. (2d) 563 (1947).