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## Private Rights of Way

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the selection of the jury there had been discrimination against laborers and women. The latter charge was summarily dismissed because women were not required by law to serve,<sup>39</sup> discrimination against them was not proved, and also defendants were not members of the excluded class.<sup>40</sup> The Court found that the charge of discrimination against laborers had not been proved. Although the Court has expressly left the door open for the consideration of charges of discrimination which fall outside the race or color category,<sup>41</sup> it has indicated that it will be extremely reluctant to grant relief in cases other than those covered by the 1875 Act of Congress.<sup>42</sup>

SANDERS R. CAZEDESSUS

### PRIVATE RIGHTS OF WAY

Private rights of way may be obtained by imposition of law<sup>1</sup> or by voluntary contract,<sup>2</sup> depending upon the purpose for which the right of way is sought. The right obtained may consist of (1) full ownership of the land underlying the right of way (2) a predial servitude of passage (3) a right of way which does not conform to the legal requirements of either full ownership or a predial servitude.

The owner of an estate which is completely surrounded by other lands has the right to claim a legal servitude of passage across a neighbor's land to the nearest public road,<sup>3</sup> for everything necessary

39. Nor are they required to serve in Louisiana, La. Const. of 1921, Art. VII, § 41. For a discussion of the problem as regards women jurors, see Fenberg, Matilda, *Jury Service for Women* (1947) 33 *Women Lawyers Journal* 45.

40. Cf. *State v. Dierlamm*, 189 La. 544, 180 So. 135 (1938) (relief denied to white man who objected that all negroes were excluded); and *Haraway v. State*, 203 Ark. 912, 159 S. W. (2d) 733 (1942) (relief denied to negro who objected that all white persons were excluded).

41. 67 S. Ct. 1613, 1625 (U. S. 1947).

42. The purpose of the statute as a whole is stated as follows: "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore, Be it enacted . . . Section 4 of the statute, dealing with exclusion of jurors, is confined in terms to prohibiting disqualification 'on account or race, color, or previous condition of servitude.'"

1. Art. 699 et seq., La. Civil Code of 1870.

2. Art. 709 et seq., La. Civil Code of 1870.

3. Art. 699, 702, La. Civil Code of 1870. La. Act 54 of 1896 [*Dart's Stats.* (1939) § 8736]. Article 699 states that the owner of enclosed lands may claim a right of passage to the nearest public road, railroad, tramroad, or water course.

for the use and working of his land,<sup>4</sup> upon proper indemnification.<sup>5</sup> This right is granted only in instances of necessity; mere convenience will not support the claim.<sup>6</sup> If there is disagreement regarding the location of this legal servitude of passage, the code recognizes the choice to be in favor of the owner of the servient estate; but the courts have not permitted the unfair abuse of his insisting on a circuitous, impractical and expensive route instead of the shortest route, which the code contemplates.<sup>7</sup> This legal servitude of passage may not be acquired by prescription because the right of passage is discontinuous;<sup>8</sup> for the same reason, it cannot be established by destination *du père de famille*.<sup>9</sup>

Other private rights of way have been established by law in favor of private corporations engaged in business which has a public interest, such as electric power and light companies;<sup>10</sup> canal irrigation and hydro-electric power companies;<sup>11</sup> pipe line companies;<sup>12</sup>

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However only the right of passage to the nearest public road is under discussion here. Following the words of the article it has been held that if the party seeking the right of passage can go across his own land to the public road, he will be refused the right to cross his neighbor's land. *Perry v. Webb*, 21 La. Ann. 247 (1869). It should also be noted that Art. 701, La. Civil Code of 1870, provides that if the vendor of the enclosed land owns adjoining lands, the right of passage shall be granted through the vendor's land, though a shorter way through another neighbor's land be present.

4. Art. 702, La. Civil Code of 1870.

5. Art. 699, La. Civil Code of 1870, La. Act 54 of 1896 [Dart's Stats. (1939) § 3737]. The cases seem clear that the owner of the enclosed land must tender an amount to pay for the damages he may occasion before he can obtain a judicial decree granting him this right of passage. *Ezernack v. Ezernack*, 18 La. App. 56, 137 So. 626 (1931).

6. *Martin v. Patin*, 16 La. 55 (1840); *Robinson v. Herring*, 20 So. (2d) 811 (La. App. 1945). Where a private road exists which is impassable during certain seasons of the year, the court has held that a necessity exists and has granted the right to locate a practical all weather private road. *Bouis v. Watts*, 25 So. (2d) 18 (La. App. 1946); 29 So. (2d) 783 (La. App. 1947).

7. *Littlejohn v. Cox*, 15 La. Ann. 67 (1860); *Bandelin v. Clark*, 7 La. App. 64 (1927); *Mercer v. Daws*, 186 So. 877 (La. App. 1939); *Wells v. Anglade*, 23 So. (2d) 469 (La. App. 1945); *Martini v. Cowart*, 23 So. (2d) 655 (La. App. 1945).

8. Art. 727, La. Civil Code of 1870 (discontinuous servitudes defined); Art. 766, La. Civil Code of 1870 (discontinuous servitudes may be acquired only by title, continued use does not grant a vested right of passage); *Ezernack v. Ezernack*, 18 La. App. 56, 137 So. 626 (1931) (30 year use of passage did not give title); *Broussard v. Etic*, 11 La. 394 (1837); *Ogborn v. Lower Terrebonne Ref. & Mfg., Co.*, 129 La. 379, 56 So. 323 (1911); Comment (1938) 12 *Tulane L. Rev.* 226.

9. *Kelly v. Pipitone*, 12 La. App. 635, 126 So. 79 (1930).

10. La. Act 156 of 1926 [Dart's Stats. (1939) § 2880].

11. La. Act 268 of 1916 [Dart's Stats. (1939) § 2869].

12. La. Act 39 of 1906 [Dart's Stats. (1939) §§ 2888-2894]; La. Act 173 of 1942 [Dart's Stats. (1939) §§ 7980-7984].

telegraph and telephone companies;<sup>13</sup> and railroad companies.<sup>14</sup> Whether the expropriation comprises the property in full ownership or whether it gives only a right of way depends upon the provisions of the particular statute.<sup>15</sup> At the same time there is the doctrine of estoppel which operates against the landowner who has allowed the use of passage on his land for public purposes without expropriation proceedings.<sup>16</sup>

In the absence of a legal right to obtain a passage across the land of another, private rights of way can be established by voluntary agreement. Such agreements are regulated by the terms of the contract,<sup>17</sup> and by the appropriate law applicable to the transaction and to the right of way established thereby. Thus the legal classification of this right of way may be of paramount importance in the interpretation of the contract and in the determination of such matters as the applicable prescriptive period. The legal classification of each type of right of way is especially important in the field of private rights of way inasmuch as their cost may be large and their existence vital to the use of certain land or facilities, and because there are marked differences in the law applicable to the different types of rights of way.

In general, private rights of way may be classified into two categories: predial servitudes, and those which do not fulfill the requirements of predial servitude.<sup>18</sup> The situation where the full ownership is acquired over a strip of land need not be considered here since it presents no problem.

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13. La. Act 124 of 1880 [Dart's Stats. (1939) § 2868].

14. La. Act 176 of 1928 [Dart's Stats. (1939) § 2860].

15. For example, the court in *Knox v. Louisiana Ry. & Nav. Co.*, 157 La. 602, 102 So. 685 (1925), applying La. Act 208 of 1906, stated to the effect that a railroad in an expropriation suit may expropriate only the right shown to be needed, and would be granted a servitude unless a need for full ownership was shown to exist.

16. "... when the corporation has the right of eminent domain, the land owner waives his right to insist that the creation and exercise of the servitude be preceded by an expropriation proceeding and estops himself from asserting that right and restricts himself to a claim for damages or compensation when he fails to object to the actual exercise of a servitude for a purpose of public utility on and across his property. *Gumbel v. New Orleans Terminal Co.*, 190 La. 904, 909, 910, 183 So. 212, 213, 214 (1938).

17. Arts. 709, 722, La. Civil Code of 1870 (as to urban rights of ingress and egress); Art. 719, La. Civil Code of 1870 (as to rural servitude of passage); Art. 721, La. Civil Code of 1870.

18. That is, such stipulations as would constitute a lease, or a valid "innominate" contract.

The private servitude of passage is distinguished from other types of rights of way by the following requirements of predial servitudes in general.

Art. 646: "All servitudes which affect land 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 . . . ."

An examination of the portion of the Civil Code governing usufruct, use and habitation<sup>19</sup> shows that it has no concern with the servitude of passage. Thus, as a servitude affecting land, the servitude of passage must be a predial servitude under the definition of Article 646.<sup>20</sup> Further, the many references to the servitude of passage in Title IV of the Civil Code "Of Predial Servitudes or Servitudes of Land" seem to demonstrate that the redactors contemplated that the servitude of passage should be governed by that portion of the code.<sup>21</sup>

If the servitude of private passage is to be classified as a predial servitude, there must be two estates present, dominant and servient.<sup>22</sup> Moreover, a careful analysis of these code articles requiring

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19. Arts. 533-645, La. Civil Code of 1870.

20. La. Civil Code of 1870.

21. Art. 699, La. Civil Code of 1870: "The owner whose estate is inclosed, and who has no way to a public road, . . . may claim the right of passage on the estate of his neighbor or neighbors to the nearest public road . . . ." See also related Arts. 700 and 701, La. Civil Code of 1870.

Art. 711, La. Civil Code of 1870: "The principal kinds of urban servitudes are the following: . . . that of passage. . . ."

Art. 719, La. Civil Code of 1870: "The right of passage in cities is a servitude by which an owner permits his neighbor to pass through his house or lot to arrive at his own. . . ."

Art. 721, La. Civil Code of 1870: "The principal rural servitudes are those of passage, of way. . . ."

22. This basic principle that two estates must be present for the existence of a predial servitude is shown by the following articles:

Art. 648, La. Civil Code of 1870: "From the definition contained in the preceding article, it follows that *to establish a predial or real servitude there*

the existence of two estates for the existence of a predial servitude also presents the inescapable observation that the redactors intended a servitude to be created on an estate only in favor of an estate. If this be a fact, a personal servitude affecting land can exist only in the manner heretofore noted, namely, usufruct, use and habitation.

Additional evidence that the redactors of the Civil Code intended all servitudes against land (other than usufruct, use and habitation) to require the existence of two estates, may be found in code articles providing that servitudes may be imposed on estates only in favor of other estates and indicating that if persons are granted rights against estates, they are to be defined as mere personal conveniences.<sup>23</sup>

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*must first be two different estates, one of which owes the servitude to the other. If then a stipulation be made of a servitude in favor of a person, and not in favor of an estate, the obligation will not be null on that account, but it will not create a real servitude.*" (Italics supplied.)

Art. 649, La. Civil Code of 1870: "It is necessary, in the second place, that these two estates belong to two different persons. . . ."

Art. 650, La. Civil Code of 1870: "*It is necessary in the third place, that the servitude have for its object the use or benefit of the estate in favor of which it is established. . . .*" (Italics supplied.)

Art. 649, La. Civil Code of 1870: ". . . *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. . . .*" (Italics supplied.)

Art. 647, La. Civil Code of 1870: "A real or predial servitude is a charge laid on an estate for the use and utility of another estate belonging to another owner."

Art. 651, La. Civil Code of 1870: "*Predial servitudes, being due from one estate to another, it commonly happens that these estates are in the same neighborhood. . . .*"

Art. 652, La. Civil Code of 1870: "*A servitude is an incorporated [incorporeal] right which can not exist without the estate to which it belongs, and of which it is an accessory.*" (Italics supplied.)

Arts. 653, 654, 655, La. Civil Code of 1870, are related to the above articles and also illustrate the necessity of the existence of two estates before a predial servitude may be established.

23. Art. 709, La. Civil Code of 1870: "Owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person of in favor of the person, but only on an estate or in favor of an estate; . . . ." (Italics supplied.)

Art. 754, La. Civil Code of 1870: "*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.*" (Italics supplied.)

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." (Italics supplied.)

Art. 757, La. Civil Code of 1870: "If, . . . the concession from its nature is a matter of mere personal convenience, it is considered personal, and can not

If this analysis of the articles of the Civil Code concerning personal and predial servitudes is correct, a general definition of a servitude of passage should specify a relationship between two estates, not necessarily contiguous,<sup>24</sup> whereby one estate owes a right of passage to the other for the benefit of the dominant estate.

However, these legal requisites of a servitude of passage do not appear in the case of *Mallet v. Thibault*<sup>25</sup> wherein the Louisiana Supreme Court held that a right of passage could be a personal servitude due from an estate to a person. In the *Mallet* case, plaintiff, owner of a lot adjoining that of defendant, sought to enforce a stipulation pour autrui in defendant's deed for a right of passage over defendant's lot. The court cited *Frost Johnson Lumber Company v. Salling's Heirs*<sup>26</sup> as authority in ruling that a servitude could be created upon lands in favor of a person. The *Frost Johnson* case applied the rules of predial servitudes to an agreement by a landowner granting to another person the right to extract oil and gas from his land. Later cases have consistently followed the practice of applying the law of servitudes to mineral rights. But the *Frost Johnson* case represents at best a tenuous extension of the law of servitudes, for want of any better device in the available legal materials.<sup>27</sup>

To use the *Frost Johnson* extension of the law of servitudes as the basis for decision in a field unrelated to mineral rights creates the dangerous possibility of still further misapplication of the law of servitudes. A re-examination of the code articles governing servitudes leads to the conclusion that, with the exception of the personal servitudes of usufruct, use and habitation, the redactors of the Civil Code intended all servitudes affecting land to be predial servitudes, wherein two estates exist, one owing a service to the other, for the benefit of the dominant estate. There seems to be little justification for the court to graft the noted extensions in the field of mineral

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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. . . .*" (Italics supplied.)

24. Art. 651, La. Civil Code of 1870 (quoted in footnote 22).

25. 212 La. 79, 31 So. (2d) 601 (1947), discussed in *The Work of the Louisiana Supreme Court for the 1946-1947 Term—Property* (1948) 8 LOUISIANA LAW REVIEW 234; noted in (1948) 8 LOUISIANA LAW REVIEW 427.

26. 150 La. 756, 91 So. 207 (1922).

27. *The Work of the Louisiana Supreme Court for the 1946-1947 Term—Property* (1948) 8 LOUISIANA LAW REVIEW 234.

rights onto these ancient laws governing servitudes of private passage.

This examination of the basic elements of the predial servitude of private passage was made for the purpose of identifying this servitude in such a manner as to make possible a distinction between a servitude of passage and a right of way which is not a servitude. If an agreement granting a right of way across land does not possess the elements necessary for the creating of a servitude on the land or constitute a sale of full ownership of the land, it is obvious that another type of right was created.

Consider, for example, the case of a corporation which makes agreements with landowners across the State of Louisiana stipulating that the corporation shall have a right of way for a pipeline across the landowner's property, without any intent to purchase the land in full ownership. Assume further that this corporation possesses no real property in Louisiana with which any reasonable sort of predial service relationship could be established. Such conditions would apparently preclude the right of way from being classified as a servitude, since a predial servitude of passage cannot exist without a relationship of service existing between two estates. Further, it would seem to make no difference in this case if the pipeline company had been a public carrier and possessed the right of eminent domain, inasmuch as the statutes granting pipe line companies the right of expropriation are similar to the expropriation statutes covering most public utilities and do not specifically classify the legal nature of the right of way thus obtained. Where the public utility has not shown a need for full ownership of the land, the nature of the right of way thus obtained under the expropriation proceedings should be governed by the same rules which determine the legal classification of other rights of way. It is important to note, however, that no cases or statutes could be found wherein cognizance was taken of the fact that this type of right of way is neither a servitude nor a conveyance in full ownership. However, there is little doubt that a contract creating such a right of way would be valid.<sup>28</sup>

In order to protect the rights of parties to a contract creating such a right of way, a determination should be made by the legislature or the courts of the specific legal classification of the right of

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28. Art. 1764, La. Civil Code of 1870: "All things that are not forbidden by law, may legally become the subject of, or the motive for contracts; . . . ."

way. This is especially important in view of the fact that contracts now exist wherein the parties probably thought they were establishing servitudes of right of way when merely creating other rights which do not come under that classification.

To state here that a contract creating such a right of way should be governed by the title of the Civil Code concerning conventional obligations<sup>29</sup> or that it should be governed by one of the titles on particular types of contract such as lease<sup>30</sup> or sale<sup>31</sup> would be pure speculation. However, it should be noted that when the court or the legislature does make a specific legal classification of this private right of way, important policy considerations will be involved, not the least of which will be the question as to what prescriptive period will best serve the state's economic and general needs.

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#### ESTABLISHMENT OF SERVITUDES BY DESTINATION

Art. 767. The destination made by the owner is equivalent to title with respect to continuous apparent servitudes.

By destination is meant the relation established between two immovables by the owner of both, which would constitute a servitude if the two immovables belonged to different owners.<sup>1</sup>

Art. 768. Such intention is never presumed till it has been proved that both estates, now divided, have belonged to the same owner, and that it was by him that the things have been placed in the situation from which the servitudes result.<sup>2</sup>

Art. 769. If the owner of two estates, between which there exists an apparent sign of servitude, sell one of those, and if the deed of sale be silent respecting the servitude, the same shall continue to exist actively or passively in favor of or upon the estate which has been sold.<sup>3</sup>

For the establishment of servitudes, Article 767 provides that the destination made by the owner is equivalent to a title when a con-

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29. Arts. 1761-2291, La. Civil Code of 1870.

30. Arts. 2668-2777, La. Civil Code of 1870.

31. Arts. 2438-2659, La. Civil Code of 1870.

1. La. Civil Code of 1870.

2. *Ibid.*

3. *Ibid.*