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Establishment of Servitudes by Destination

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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[29] or that it should be governed by one of the titles on particular types of contract such as lease[30] or sale[31] 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.

JOHN C. CAMP

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.[1]
>
> 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.[2]
>
> 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.[3]

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

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.

tinuous and apparent servitude is involved. Thus, if the owner of two immovables has established a relationship of service between these properties, which would constitute a continuous and apparent servitude if the two properties belonged to different owners, a predial servitude comes into existence when the ownership is later divided.

The preceding Article 766[4] provides that ". . . discontinuous servitudes, whether apparent or not, can be established only by title. . . ."

A problem arises, however, upon reaching Article 769. Immediately there emerges a discrepancy in the two articles although they are found in the same section of the code and purport to deal with the same subject. Under Article 769 the servitude would come into existence if there is merely an apparent sign of servitude, without regard to whether it is continuous or not. Can these two articles be reconciled? Does one control, modify or exclude the other or is there an interpretation by which this seeming discrepancy may be clarified? For the purposes of this comment, servitudes will be considered in their classifications of continuous or discontinuous,[5] and of apparent or non-apparent,[6] without individual discussion as to respective classifications.

I

The present text of Article 767 is the continuation of its predecessors in the Civil Code of 1825[7] and in the Code of 1808.[8] The French text of this article in both our earlier codes is exactly the same as Article 692 of the French Civil Code.[9] Likewise, the provisions of Article 769 are found in both of our earlier codes,[10] with the same French text as Article 694 of the French Civil Code.[11] The same may be said of Article 768 of our code.[12] Consequently, there is justification in seeking enlightenment from the French commentators.

4. Ibid.
5. See Art. 727, La. Civil Code of 1870, for definitions and illustrations.
6. See Art. 782, La. Civil Code of 1870, for definitions and illustrations.
7. Art. 763, La. Civil Code of 1825.
8. Art. 55, p. 138, La. Civil Code of 1808.
9. Compiled Edition of the Civil Codes of Louisiana, 3 La. Legal Archives 435 (1942).
10. Art. 765, La. Civil Code of 1825; Art. 57, p. 143, La. Civil Code of 1808.
11. Compiled Edition of the Civil Codes of Louisiana, 3 La. Legal Archives 435 (1942).
12. Art. 764, La. Civil Code of 1825; Art. 56, p. 138, La. Civil Code of 1808; Compiled Edition of the Civil Codes of Louisiana, 3 La. Legal Archives 435 (1942).

Five possible theories have been advanced by the French commentators in attempting to find a solution to this problem. All of these theories are set out by Aubry et Rau as follows:[13]

1—Article 694[14] [Article 769] is applicable only to continuous apparent servitudes because it is merely complementary to Articles 692[15] [Article 767] and 693[16] [Article 768].[17]

2—Article 694 explains Article 692; therefore, the requisites are met in all cases if the servitude is apparent.[18]

3—The distinction lies in the fact that Article 694 refers to cases where the owner *disposes*[19] of one of the estates, while Articles 692 and 693 refer only to the situation where the division was brought about by a partition.[20]

4—Article 694 applies only to reviving a servitude which had been extinguished by confusion, whereas Articles 692 and 693 refer to establishing a servitude for the first time.[21]

5—Article 694 means that when the servitude is apparent, even though discontinuous, there is a presumption that the parties intended the relation of service to remain; but in such a situation this presumption must be supplemented by a showing that there is no convention to the contrary in the act by which the properties were separated. However, by dealing with the situation under Article 692 when the servitude is both continuous and apparent, there is no need to establish the absence of a contrary stipulation in the act of separation.[22]

The French writers have offered serious objections to each and every one of these theories. It is claimed that the first and second theories are equally untenable since each would place all the em-

13. 3 Aubry et Rau, Cours de Droit Civil Francais (5 ed. 1900) 148, § 252, nº 9.

14. Art. 769, La. Civil Code of 1870.

15. Art. 767, La. Civil Code of 1870.

16. Art. 768, La. Civil Code of 1870.

17. 1 Delvincourt, Cours de Code Civil (1834) 417-418; 2 Maleville, Analyse Raisonnée de la Discussion du Code Civil (1805) 146.

18. Contra: 12 Demolombe, Cours de Code Napoleon, 2 Traité des Servitudes ou Services Fonciers (1876) 318, § 818.

19. *"Dispose"* has been translated "sell" in the corresponding English text of Art. 765, La. Civil Code of 1825, which has been combined into Art. 769, La. Civil Code of 1870. Compiled Edition of the Civil Codes of La., 3 La. Legal Archives 436 (1942).

20. 8 Laurent, Principes de Droit Civil Francais (2 ed. 1876) 228, § 189.

21. 2 Marcadé, Explication Théorique et Pratique du Code Civil (1886) 640-646.

22. 3 Aubry et Rau, op. cit. supra note 13, at 149-150.

phasis on one article causing the complete suppression of the other. The redactors could not have intended that either of two articles so closely related should nullify the other.

The third theory of interpretation has also been subjected to the severe criticism that it draws exaggerated effects from the French word "dispose," which was evidently used by the French legislators merely to express the idea of division of two estates as an aftermath of any juridical act.

Although the fourth theory represents an explanation which was given during the legislative debates on the Code Napoleon—that both articles were necessary to overcome the difficulties found in the ancient law—[23] the objection has been raised that Article 694 is completely foreign to and makes no mention of *reviving* a servitude. It has also been suggested that there is no reasonable basis for providing a different, and perhaps easier, method to revive a servitude than to establish one.

Likewise, the fifth interpretation has been criticized because there is nothing in the articles with regard to the question of burden of proof or the burden of negativing the presence of a contrary stipulation in the act of separation.

II

Each of these methods of attempting to reconcile Articles 767 and 768 with Article 769 of the Louisiana Civil Code would be open to the very same kind of objections and criticisms. It might be noted that the fourth theory is eliminated altogether because the Louisiana Civil Code has an additional provision in Article 812[24] which is not found in the French Civil Code. In the Louisiana Civil Code of 1825, Article 808[25] was added under the section on how servitudes are extinguished, and it provides that only a continuous and apparent servitude may be revived by destination. No device of statutory interpretation can produce the conclusion that Article 769 revived by destination a servitude which is merely apparent

23. 11 Fenet, Recueil Complet des Travaux Preparatiores du Code Civil (1836) 327-328.

24. Art. 812, La. Civil Code of 1870: "Except in the cases herein mentioned, and similar cases, servitudes extinguished by confusion do not revive, except by a new contract; with the exception of continuous and apparent servitudes, with respect to which the disposition made by the owner of both estates is equivalent to title."

25. Compiled Ed. of the Civil Codes of La., 3 La. Legal Archives 458 (1942).

when this is directly inconsistent with the specific provisions of another article of the code.

Thus, with only the fourth theory absolutely untenable, any of the remaining four theories, although subject to some criticism, might have been adopted by the Louisiana courts. But the Louisiana jurisprudence has failed to yield a single case in which the court openly recognized and discussed the conflict in these provisions of the code. Furthermore, the cases have not been unvacillating.

Between 1825 and 1870 the term "perpetual" is used in a number of cases instead of "continuous." This is undoubtedly the result of the translation of the French "continues" as "perpetual" in the English text of Article 763[26] of the Code of 1825 [Article 767].[27] But there is no indication that the legislature intended any different meaning because the definitional Article 723 of the Civil Code of 1825 substituted the word "continuous" for the word "perpetual" in the Civil Code of 1808 which had described "perpetual" exactly the same as "continuous" was defined in the French Civil Code and is defined now in the Code of 1870: ". . . those whose use is or may be continual without the act of man."[28] However, the court has placed a somewhat different interpretation upon the term "perpetual." In one case,[29] the Louisiana court cited Toullier as authority for the proposition that "perpetual" referred to the intention of the owner of the two estates to allow the relationship of service to remain indefinitely. However, a close examination of the writings of the French commentator cited in that case reveals that the requirement of *"caractère de perpetuité"* was not intended to have any bearing on whether the use of the servitude might be continual without the act of man.[30]

One of the early Louisiana cases on the subject was *Barton v. Kirkman*.[31] The plaintiff sought recognition and enforcement of a servitude of passage (which is discontinuous). The defendant vendor had boarded up a door which gave access to a yard upon which plaintiff claimed the servitude. Plaintiff asserted that there was a servitude in his favor by reason of the fact that the defendant

26. Art. 767, La. Civil Code of 1870.
27. Compiled Edition of the Civil Codes of Louisiana, 3 La. Legal Archives 435 (1942).
28. Id. at 417.
29. Durel v. Boisblanc, 1 La. Ann. 407, 408 (1846).
30. 2 Toullier, Le Droit Civil Francais (1848) 283.
31. 5 Rob. 16 (La. 1843).
Accord: Durel v. Boisblanc, 1 La. Ann. 407, 408 (1846); Rozier v. Maginnis, 12 La. Ann. 108 (1857). See Gottschalk v. De Santos, 12 La. Ann. 473, 474 (1857).

had at one time owned both properties. Without discussing whether the servitude was continuous or perpetual the court concluded it was "clear that the servitude is within the provisions of Articles 763 and 764[32] [Articles 767 and 768 of the Civil Code of 1870], and that the defendant, by whom it was established, has now no power to destroy it. The use, says the law, which the owner has intentionally established on a particular part of his property in favor of another part, is equal to title, with respect to perpetual and apparent servitudes thereon."

A few years later, the court decided, in *Durel v. Boisblanc*,[33] that the servitude of passage was apparent and therefore established by destination, although certain other servitudes involving a well and a privy had not the permanence and *"caractère de perpetuité"* which the law requires for establishments by destination.

The most interesting opinion during this period was handed down in 1852 in the case of *Fisk v. Haber* wherein Justice Rost said: "It may be observed that the servitude of passage claimed, is not a continuous servitude, and could, *under no circumstances* result from destination of the père de famille."[34]

To add to the confusion, the court indicated by way of dictum in *Gottschalk v. De Santos*[35]—decided just five years after *Fisk v. Haber*[36]—that a servitude of passage might be established by destination. Then in 1860, three years after the *Gottschalk* case,[37] the case of *Cleris v. Tieman*[38] the supreme court reverted to the *Fisk v. Haber* doctrine.

These cases show the inconsistent treatment during this period which the court had accorded to the problem of establishing a servitude by destination. There appears to be no basis on which these contradictory decisions can be reconciled.

After 1870, the word "perpetual" was dropped from the civil code, and the court has followed a much more consistent pattern. In fact the cases during this later period have been decided entirely

32. Arts. 767 and 768, La. Civil Code of 1870.

33. Durel v. Boisblanc, 1 La. Ann. 407 (1846); Rozier v. Maginnis, 12 La. Ann. 108 (1857).

34. 7 La. Ann. 652 (1852) (Italics supplied.). Accord: Cleris v. Tieman, 15 La. Ann. 316 (1860).

35. 12 La. Ann. 473, 474 (1857). Accord. Durel v. Boisblanc, 1 La. Ann. 407 (1846); Barton v. Kirkman, 5 Rob. 16 (La. 1843); Rozier v. Maginnis, 12 La. Ann. 108 (1857).

36. See note 34, supra.

37. See note 35, supra.

38. Cleris v. Tieman, 15 La. Ann. 316 (1860).

and exclusively on the basis of Article 767.[39] Article 769 is sometimes cited,[40] noticeably in cases which deal with servitudes which happen to be both continuous and apparent, but it never constitutes a determining factor. Even more important in cases in which the servitude is discontinuous, there is little attention devoted to explaining that servitudes must be continuous *and* apparent in order to be established by destination; the court merely states that discontinuous servitudes, whether apparent or not, can be established only by title.[41]

In spite of the fact that the earlier cases to the contrary have not been expressly overruled, it seems safe to conclude that, without much discussion of the conflict in the articles, the Louisiana courts have finally settled on the first of the five theories of the French commentators. The result is that our Article 769 is unnecessary and meaningless—*in all cases* the servitude must be continuous and apparent in order to be established or revived by destination.

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EFFECT OF PAYMENT OF WAGES AFTER DISABILITY AS A CREDIT TOWARD WORKMEN'S COMPENSATION

In interpreting the Louisiana Workmen's Compensation Act,[1] the courts have concluded that an employee may be totally and permanently disabled if he cannot do work of the *same* character that he was performing prior to the accident.[2] The fact that he may be able to perform the same work with pain[3] or through assistance[4]

39. Taylor v. Boulware, 35 La. Ann. 469 (1883); Woodcock v. Baldwin, 51 La. Ann. 989 (1899); Capo v. Blanchard, 1 La. App. 3 (1924); Giarratano v. Angermeier, 7 La. App. 375 (1927); Kelly v. Peppitone, 12 La. App. 635, 126 So. 79 (1930); Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932).

40. Taylor v. Boulware, 35 La. Ann. 469 (1883); Woodcock v. Baldwin, 51 La. Ann. 989 (1899).

41. Capo v. Blanchard, 1 La. App. 3 (1924); Giarratano v. Angermeier, 7 La. App. 315 (1927); Kelly v. Peppitone, 12 La. App. 635, 126 So. 79 (1930); Burgas v. Stoutz, 174 La. 586, 141 So. 67 (1932).

1. La. Act 20 of 1914, as amended [Dart's Stats. (1939) §§ 4391-4432].

2. Black v. Louisiana Central Lumber Co., 161 La. 889, 109 So. 538 (1926); Knispel v. Gulf States Utilities Co., 174 La. 401, 141 So. 9 (1932); Stieffel v. Valentine Sugars Co., 188 La. 1091, 179 So. 6 (1938).

3. Stieffel v. Valentine Sugars Co., 188 La. 1091, 179 So. 6 (1938); Hingle v. Maryland Casualty Co., 30 So. (2d) 281 (La. App. 1947).

4. Norwood v. Lake Bisteneau Oil Co., 145 La. 823, 83 So. 25 (1918); Hulo v. City of New Iberia, 153 La. 284, 95 So. 719 (1923); Carlino v. United States Fidelity and Guaranty Co., 196 La. 400, 199 So. 228 (1940).