

# Louisiana Law Review

---

Volume 9 | Number 2

*The Work of the Louisiana Supreme Court for the*

*1947-1948 Term*

*January 1949*

---

## Civil Code and Related Subjects: Property

Joseph Dainow

---

### Repository Citation

Joseph Dainow, *Civil Code and Related Subjects: Property*, 9 La. L. Rev. (1949)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol9/iss2/9>

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).

the court again on the defendant's objection that Louisiana Civil Code Article 167 limiting personal service contracts to a maximum term of five years absolved him from the contract. The court's view was that the mentioned article was not applicable because the contract was not one of personal service but was in the nature of a joint enterprise. It further found that the issuance of an injunction restraining conduct contrary to the contract would not compel the defendant to render personal services in violation of the Code provision.

### PROPERTY

*Joseph Dainow\**

#### *Servitudes*

The occasion has been taken in previous observations<sup>1</sup> to comment upon the manner in which code provisions on servitudes have been getting twisted to cover situations for which they are not pertinent. While great commendation is due to the courts for the results they have accomplished in working out a system of legal standards for the regulation of the oil and gas industry in Louisiana, great care must be exercised to prevent the distortion of the basic code provisions in their original context.

In the absence of statutes, the courts have had to make all the policy determinations, and in working out such decisions of policy for problems of mineral rights, they are certainly justified in using whatever basic materials are available for purposes of analogy and whatever judicial techniques are available for the accomplishment of the desired results. However, there is no justification in this process for taking code articles and turning them inside out so as to read into them, as matters of general interpretation, meanings and rules which are not there and which furthermore are alien and contrary to the fundamental principles of the articles as they are basically intended to apply to servitudes.

The question of the divisibility of a mineral servitude, as decided in the cases of *Ohio Oil Company v. Ferguson*<sup>2</sup> and *Byrd v. Forgotson*,<sup>3</sup> has been discussed extensively elsewhere in this

---

the Louisiana Supreme Court for the 1945-1946 Term (1947) 7 LOUISIANA LAW REVIEW. 231.

\* Professor of Law, Louisiana State University.

1. The Work of the Louisiana Supreme Court for the 1946-1947 Term—Property (1948) 8 LOUISIANA LAW REVIEW 234-236.

2. 213 La. 183, 34 So.(2d) 746 (1946).

3. 213 La. 276, 34 So.(2d) 777 (1945).

Review.<sup>4</sup> The critical comments which follow should not be misunderstood as overlooking so much of the discussion which is sound and clear. At the beginning of the majority opinion, an analysis is made of Article 803 of the Civil Code<sup>5</sup> in the following language:

“The first paragraph of that article deals with predial servitudes, or real servitudes, that is to say, with servitudes due to an estate, or a tract of land, as distinguished from personal servitudes, or those which are due to persons. . . . The second paragraph of article 803 deals, specifically, with personal servitudes, or those which are due to persons.”<sup>6</sup>

This distinction cannot be accepted. While the article may use language which refers to “persons,” the context contemplates definitely and exclusively the predial servitudes. The use of the word “persons” cannot be seized upon as an excuse for relating the second paragraph of Article 803 to a so-called “personal servitude.” The fact of the matter is that, while servitudes are defined as constituting a relationship between estates,<sup>7</sup> all acts pertaining to the exercise of discontinuous servitudes<sup>8</sup> must be performed by persons, as well as the establishment of those facilities which might be necessary for the existence of continuous servitudes. In none of these situations is there anything which can be considered as changing the nature of the predial servitude or as constituting a “personal servitude.”

Furthermore, the actual illustration given in the second paragraph of Article 803, namely the right of drawing water, is one of the servitudes which the codifiers repeated several times to illustrate the predial servitude.<sup>9</sup>

If a right of drawing water is stipulated in favor of a person and is not related to a dominant estate, there is an enforceable contract between the parties which creates a *personal right* but

4. Comment (1948) 8 LOUISIANA LAW REVIEW 534-540.

5. Art. 803, La. Civil Code of 1870. “When the estate to which the servitude is due ceases to be undivided, by means of a partition, each of those who were the coproprietors, only preserves the servitude by the use he makes of it, and the others lose it by non-usage during the time required for prescription.

“If a servitude be due to several persons, but on different days, as the right of drawing water, he who does not exercise his right, loses it, and the estate subject to the servitude becomes free from it, as respects him.”

6. 34 So.(2d) 746, 749 (1946).

7. Art. 646 et seq., La. Civil Code of 1870.

8. Art. 727, La. Civil Code of 1870.

9. E.g., Arts. 711, 721, 727, La. Civil Code of 1870.

which does not constitute a servitude at all under this title of the Civil Code.

The present comments are in no way directed at the policy decision reached by the court with reference to the regulation of certain phases of mineral rights problems. However, it is like switching horses in midstream to start by identifying the mineral right as a personal servitude and then concluding by absolute analogy to something which the code itself uses as an illustration of a predial servitude. As a matter of policy decision, no comment is here made about the following statement:

“There is no difference, in the applicable principles of law, between a servitude which gives to two or more persons the right to draw water from the land of another and a servitude which gives to two or more persons the right to take the mineral oil or gas from the land of another.”<sup>10</sup>

However, the idea is carried much too far in the further developments of this idea as follows:

“Nor is there any difference, in the applicable principles of law, between the dividing of the advantage of such a servitude by stipulating on what days each of the persons to whom the servitude is due may exercise his right, and dividing the advantage by stipulating the part of the land on which each of the persons to whom the servitude is due may exercise his right. Hence we may substitute, the words “mineral oil or gas” for the word “water,” and substitute the words “different parts of the land” for the words “different days,” and thus paraphrase the second paragraph of Article 803 of the Civil Code, by saying that if a mineral servitude be due to two or more persons, but on different parts of the land that is subject to the servitude, he who does not exercise his right to explore for the oil, gas or other minerals in that part of the land on which he has the right loses it for nonuse for the period of 10 years, and the land subject to the servitude becomes free from it as respects him.”<sup>11</sup>

In many parts of the various opinions written in these present cases, reference is made to the fact that the articles on predial servitudes have been used wherever feasible for the decision of mineral rights problems, by means of considering the mineral right *in the nature of* a servitude. In the present case, if the

10. 34 So. (2d) 746, 750 (1946).

11. 34 So. (2d) 746, 750.

opinion had merely supported its decision in favor of divisibility by the principles in Article 803, that would have been a straight policy determination. There was no need to try reading into the code itself alien meanings which it does not contain and distinctions which do not exist.

### *Revocation of Dedication of Street*

Streets are usually planned at the time of the creation of a new subdivision, and actual developments sometimes take unexpected turns. In order to permit readjustments and the return of dedicated areas into complete private ownership, the legislature has provided, as last expressed in Act 382 of 1938, for the revocation by proper authorities of such dedications. In the case of *Caz-Perk Realty, Incorporated v. Police Jury of Parish of East Baton Rouge*,<sup>12</sup> the plaintiff had created a new subdivision in 1921, with the recordation of a survey for the purpose of dedicating the streets and roads shown thereon. After the subdivision had been developed, and as a result of one person having acquired several lots as one consolidated estate, the roadway in controversy was never improved or incorporated into the parish system of roads. In 1942 the Police Jury of East Baton Rouge officially revoked the dedication of the strip of road in question. This action of the police jury was taken by virtue of the express authority granted under Act 382 of 1938 when a street is abandoned or not necessary for public purposes. Since the action of the police jury was so directly within the statutory authorization, the contest and the bulky record could only have been directed at the question of whether it had abused the power by acting capriciously or arbitrarily. Although there was conflicting evidence as to the necessity and usefulness of retaining the dedication, the court did not find sufficient basis to reject the police jury's conclusion that the street was no longer used or needed for public purposes.

### PRESCRIPTION

*Joseph Dainow\**

### *Acquirendi Causa*

For the ten-year acquisitive prescription, the Civil Code requires possession coupled with good faith and just title.<sup>1</sup> Each of these three elements has received extensive treatment by the

12. 213 La. 935, 35 So.(2d) 860 (1948).

\* Professor of Law, Louisiana State University.

1. Art. 3478 et seq., La. Civil Code of 1870.