

Establishment and Termination of Public Rights in Roads and Streets in Louisiana

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Repository Citation

Thomas D. Hardeman, *Establishment and Termination of Public Rights in Roads and Streets in Louisiana*, 16 La. L. Rev. (1956)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol16/iss3/7>

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case does not appear to have arisen in Louisiana, but there seems little doubt that the marriage would be held valid.

Daniel J. Shea

Establishment and Termination of Public Rights in Roads and Streets in Louisiana

In recent years the problem of determining the ownership of lands underlying roads and streets has become extremely important. This is particularly so in the fields of taxation and mineral rights, where it is necessary to ascertain the person who must bear the tax responsibilities or is entitled to the benefits of the revenues produced by the land. The right to explore for minerals along public roads has often hinged on determining the ownership of the underlying soil.¹ In real estate transactions, problems concerning property owners' rights and liabilities relating to public passageways have frequently been encountered.² It is the purpose of this Comment to examine the various legal methods by which the public use of roads and streets is created and terminated. It is felt that by this approach the task of determining ownership in these cases can be facilitated and the rights and liabilities of the parties more clearly determined.

Establishment of Rights in Roads and Streets

The rights acquired by the public in the opening of a road or street may be based on either ownership or servitude. The difficulty met by the courts in determining these rights seems to emanate from an inability to distinguish adequately between the methods by which ownership is obtained and those by which a servitude is acquired. In the following discussion an examination will be made of the six methods by which legal interests in roads and streets have been established: (1) purchase, (2) expropriation, (3) dedication, (4) three years' maintenance under R.S. 48:491, (5) appropriation of river roads, and (6) prescription. It should be noted that by the first three methods either ownership or a servitude may be obtained. In the latter three, however, only a servitude is acquired.

1. *State v. Evans*, 214 La. 472, 38 So.2d 140 (1948). In that case, the defendants were convicted of unlawfully prospecting for oil, gas, and other minerals by means of a mechanical device or otherwise on lands which were found to be private.

2. *E.g., Metairie Park, Inc. v. Currie*, 168 La. 588, 122 So. 859 (1929).

Purchase. The right to purchase property for the construction of public highways is expressly granted to the State Department of Highways in Title 48 of the Louisiana Revised Statutes. Parishes³ and municipalities⁴ are granted similar rights. Little difficulty seems to be encountered in determining the effects to be given a purchase of a right of way for a road or street. The governing body or agency may acquire either ownership or a servitude by this method. The problem apparently resolves itself into a question of interpretation of the statute or of the act of sale to ascertain which interest has been acquired. To be kept in mind, however, is the rule established in *Bonnabel v. Police Jury, Parish of Jefferson*,⁵ that the presumption is, in the absence of evidence to the contrary, that only a servitude is granted.

Expropriation. A second method by which a governing body or agency may obtain rights in land for roads and streets is through the exercise of its right of expropriation.⁶ Constitutional authority for the exercise of this right is provided in article I, section 2, of the Louisiana Constitution. Further basis for the compulsory sale is found in articles 497 and 2626-2641 of the Civil Code, which provide the authority and procedure for such action. In addition, Title 19 of the Louisiana Revised Statutes contains many provisions pertaining to this subject and should also be consulted. As in the case of the ordinary purchase, expropriation may result in the acquisition of either ownership or a servitude. The task of determining which right is obtained is one of interpretation of the statute or Code articles under which the right is exercised, or, in disputed cases, of the judgment of the court.⁷

Dedication. A third method by which the public may acquire rights in land for the purpose of opening roads and streets is through dedication of the land to that use by a private individual or corporation. This dedication may be according to a statutory scheme or implied from the conduct of the landowner.⁸ The

3. LA. R.S. 48:481 *et seq.* (1950).

4. *Id.* 33:3301 *et seq.*

5. 216 La. 798, 44 So.2d 872 (1950).

6. For detailed commentary on expropriation in Louisiana by Arthur B. Hammond of the Baton Rouge Bar, see 14 WEST'S LOUISIANA REVISED STATUTES ANNOTATED 475-98 (1950).

7. *Knox v. Louisiana Ry. & Nav. Co.*, 157 La. 602, 102 So. 685 (1925).

8. *B. F. Trappey's Sons v. City of New Iberia*, 225 La. 466, 73 So.2d 423 (1954); *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229

difficulties in this area are in distinguishing between the two types of dedication and in determining the results of each. As a general rule, statutory dedication conveys title to the parish or municipality while implied or common law dedication,⁹ on the other hand, grants only a servitude of passage.¹⁰

The basis for statutory dedication is R.S. 33:5051,¹¹ which outlines the procedure to be followed by a property owner desiring to create a subdivision in a municipality or parish. In order to create a subdivision, the statute provides that a landowner must file a map with the Registrar of Conveyances of the parish, describing the lots, streets, alleyways, and other places, together with the names and dimensions of each. The owner is also obliged to make a formal dedication of the passages designated on the map. Courts have been very liberal in applying

(1938); *Collins v. Zander*, 61 So.2d 897 (La. App. 1952), 25 TUL. L. REV. 88 (1950).

9. The term "common law" is used to signify that the principle is part of the customary or non-statutory law of the state, rather than borrowed from the Anglo-American system of common law.

10. *James v. Delery*, 211 La. 306, 29 So.2d 858 (1947); *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938); *Collins v. Zander*, 61 So.2d 897 (La. App. 1952); *Brasseaux v. Ducote*, 6 So.2d 769 (La. App. 1942); *Life v. Griffith*, 197 So. 646 (La. App. 1940).

11. LA. R.S. 33:5051 (1950): "Whenever the owner of any real estate desires to lay off the same into squares and lots with streets or alleys between the squares or lots and with the intention of selling or offering for sale any of the squares or lots, he shall, before selling any square or lot or portion of the same, cause the real estate to be surveyed and platted or subdivided by a licensed surveyor or civil engineer into lots or blocks or both, each designated by number, and set stakes at all of the corners of every lot and block thereof, properly marked so as to designate the correct number of each lot and block; write the legal description of the land on the plat or map, and cause to be made and filed in the office of the keeper of notarial records of the parish wherein the property is situated and copied into the conveyance record book of such parish, and a duplicate thereof filed with the assessor of the parish a correct map of the real estate so divided, which map shall contain the following:

"(1) The section, township, and range in which such real estate or subdivision thereof lies according to government survey.

"(2) The number of squares by numerals from 1 up, and the dimensions of each square in feet and inches.

"(3) The number of each lot or subdivision of a square and its dimensions in feet and inches.

"(4) The name of each street and alley and its length and width in feet and inches.

"(5) The name or number of each square or plat dedicated to public use.

"(6) A certificate of the parish surveyor or any other licensed surveyor or civil engineer of this state approving said map and stating that the same is in accordance with the provisions of this Section and with the laws and ordinances of the parish in which the property is situated.

"(7) A formal dedication made by the owner or owners of the property or their duly authorized agent of all the streets, alleys and public squares or plats shown on the map to public use." See also LA. R.S. 33:31 (1950).

the statute and have held that substantial compliance is all that is necessary to complete a statutory dedication.¹²

The leading case on the subject of statutory dedication is *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*¹³ In that case the court stated, first, that a dedication in compliance with the statute is complete in itself and does not require an acceptance, and, second, that by statutory dedication the public authority acquires not a servitude, but complete ownership of the soil underlying the streets and other designated passages. A more recent case in which the same conclusion was reached is *Collins v. Zander*.¹⁴ There, the court of appeal stressed that no acceptance is necessary by declaring that "the dedication becomes complete immediately upon the recordation of the plan or map and substantial compliance with Act 134 of 1896."¹⁵

Although the *Parker Oil* case dealt specifically with statutory dedication, it has also been cited as establishing the principles of common law dedication.¹⁶ The court announced in that case that a distinguishing difference between statutory and common law dedication is that the latter operates by way of an estoppel *in pais* while the former operates by way of a grant. Also, common law dedication confers only a servitude,¹⁷ while statutory dedication vests title in the public authority to which the dedication is made. The essential elements of a common law dedication are a definite intention to dedicate and an acceptance by the public. While neither of these elements must be formally expressed, they must both be demonstrated so as to exclude any

12. *Metairie Park v. Currie*, 168 La. 588, 122 So. 859 (1929) (formal dedication requirement not complied with); *Collins v. Zander*, 61 So.2d 897 (La. App. 1952); *Life v. Griffith*, 197 So. 646 (La. App. 1940); *Sliman v. Village of Palmetto*, 145 So. 410 (La. App. 1933) (plat filed in the office of the keeper of notarial records but not copied into the conveyance record book).

13. 190 La. 957, 183 So. 229 (1938).

14. 61 So.2d 897 (La. App. 1952).

15. *Id.* at 899.

16. *Emery v. Orleans Levee Board*, 207 La. 386, 21 So.2d 418 (1945); *Ford v. Shreveport*, 204 La. 618, 16 So.2d 127 (1943); *Collins v. Zander*, 61 So.2d 897 (La. App. 1952); *Brasseaux v. Ducote*, 6 So.2d 769 (La. App. 1942); *Life v. Griffith*, 197 So. 646 (La. App. 1940); Comment, 13 TUL. L. REV. 606 (1939); Note, 25 TUL. L. REV. 88 (1950).

17. It has been suggested that rural roads should be distinguished from city streets in that dedication of land for road purposes vests a servitude in the public, while dedication for purposes of a city street vests ownership in the public. The jurisprudence affords no support for such a distinction, which would seem to create additional confusion, *e.g.*, what would be the effect upon the ownership of a road bed which is included in a town's extension of its corporate limits? See Flory, *Who Gets the Royalty on Unit Production Allocated to Streets and Public Roads?*, THIRD ANNUAL INSTITUTE ON MINERAL LAW 51 (1955).

other rational hypothesis except that of dedication.¹⁸ The acceptance must be positive and for the purposes intended by the landowner; however, it has been held that the mere use by the public for the purposes intended is sufficient.¹⁹ It seems that common law dedication is in reality only an expression by the landowner, through words or conduct, that he intends to grant to the public a servitude of passage, coupled with an acceptance by the public.

It should be noted that the courts have not always followed the views announced in the *Parker Oil* case concerning common law dedication. Prior to that decision, a majority of the cases stated that land dedicated to public use became a public thing, out of commerce and not susceptible of private ownership.²⁰ The governing authority within whose limits the dedicated land was situated was given control of the land and had the power to administer it as a public trust.²¹ These principles still seem to be applicable where land is dedicated for use other than as a road or street.²²

Three years' maintenance under R.S. 48:491. In addition to the possible acquisition of a servitude of passage by implied dedication, a servitude may also be acquired through the main-

18. *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 133 So. 229 (1938); *Landry v. Gulf States Utilities Co.*, 166 La. 1069, 118 So. 142 (1928); *Donaldson's Heirs v. New Orleans*, 166 La. 1059, 118 So. 134 (1927); *Bomar v. Baton Rouge*, 162 La. 342, 110 So. 497 (1926); *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695 (1913); *Torres v. Falgoust*, 37 La. Ann. 497 (1885); *Heirs of David v. New Orleans*, 16 La. Ann. 404 (1862); *Soulet v. New Orleans*, 10 La. Ann. 81 (1855); *Brasseaux v. Ducote*, 6 So.2d 769 (La. App. 1942); *Kemp v. Town of Independence*, 156 So. 56 (La. App. 1934).

19. *Ford v. Shreveport*, 204 La. 618, 16 So.2d 127 (1943); *Bomar v. Baton Rouge*, 162 La. 342, 110 So. 497 (1926); *Heirs of Leonard v. Baton Rouge*, 39 La. Ann. 275, 4 So. 241 (1887); *Police Jury of Plaquemines Parish v. Foulhouze*, 30 La. Ann. 64 (1878); *Shreveport v. Walpole*, 22 La. Ann. 526 (1870); *Baton Rouge v. Bird*, 21 La. Ann. 244 (1869); *Pickett v. Brown*, 18 La. Ann. 560 (1868); *Brasseaux v. Ducote*, 6 So.2d 769 (La. App. 1942).

20. *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695 (1913); *Kline v. Parish of Ascension*, 33 La. Ann. 562 (1881); *Police Jury of Plaquemines Parish v. Foulhouze*, 30 La. Ann. 64 (1878); *Sheen v. Stothart*, 29 La. Ann. 630 (1877); *Shreveport v. Walpole*, 22 La. Ann. 526 (1870); *Baton Rouge v. Bird*, 21 La. Ann. 244 (1869); *Municipality No. Two v. Orleans Cotton Press*, 18 La. 122 (1841); *Livaudais v. Municipality No. Two*, 16 La. 509 (1840); *Kemp v. Town of Independence*, 156 So. 56 (La. App. 1934); *Town of Napoleonville v. Boudreaux*, 142 So. 874 (La. App. 1932).

21. *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695 (1913); *Tilton v. New Orleans City R.R.*, 35 La. Ann. 1062 (1883); *Kemp v. Town of Independence*, 156 So. 56 (La. App. 1934).

22. See *Locke v. Lester*, 78 So.2d 14 (1955), 16 *LOUISIANA LAW REVIEW* 582 (1956), concerning the dedication of land used as a public cemetery; *Macobon, Inc. v. Police Jury of Jefferson Parish*, 70 So.2d 687 (La. App. 1954), where a plot of ground was alleged to have been dedicated as a public park.

tenance or repair by a parish or municipality of a road or street for a period in excess of three years. The Legislature has provided in R.S. 48:491²³ that "all roads and streets . . . which have been or are hereafter kept up, maintained or worked for three years by authority of any parish governing authority in its parish or by authority of any municipal governing authority in its municipality shall be public roads or streets as the case may be." Part of the original act,²⁴ providing for an arbitrary measure of compensation for deprivation of the land, was declared unconstitutional in *Gibbon v. Police Jury of Parish of St. Mary*,²⁵ but the remainder of the provisions are still applicable.

The statute has received interpretation in the recent case of *Porter v. Huckabay*.²⁶ In that case the defendant landowner maintained three gates across the road in question and repaired the road through the use of private funds. He did not, however, object to extensive repairs made by parish authorities. The court stated that the gates were only an indication that the owner intended to keep the road private and although this would defeat the public acquisition of a servitude by implied dedication, it would not prevent the application of R.S. 48:491. It was pointed out that the statute does not require an intention to dedicate and that it is sufficient if the parish authorities work the road for the required period without protest by the landowner. On the other hand, in *Bordelon v. Heard*²⁷ the court held that an occasional "brushing up" of a pathway by public workmen was not "working or maintaining" within the meaning of the statute.

23. LA. R.S. 48:491 (1950): "All roads or streets in this state that are opened, laid out or appointed by virtue of any act of the legislature or by virtue of an order of any parish governing authority in any parish, or any municipal governing authority in any municipality, or which have been or are hereafter kept up, maintained or worked for a period of three years by authority of any parish governing authority in its municipality shall be public roads or streets as the case may be. Also all roads or streets made on the front of their respective tracts of lands by individuals when the lands have their front on any of the rivers or bayous within this state shall be public roads when located outside of municipalities and shall be public streets when located inside of municipalities." As amended, La. Acts 1954, No. 639, § 1, p. 1150.

24. La. Acts 1914, No. 220, p. 417, which provided that: [I]t shall be lawful for any individual through whose land the police jury shall cause a public road to be laid out, to claim a compensation of double the assessed value of the said land."

25. 140 La. 854, 74 So. 172 (1916).

26. 50 So.2d 684 (La. App. 1951).

27. 33 So.2d 88 (La. App. 1947); see *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Civil Law Property*, 13 LOUISIANA LAW REVIEW 230, 231 (1953).

Other cases have further interpreted the statute. It has been consistently held that the statute does not provide a method by which police juries or municipalities may obtain title to the land needed for public road purposes, but only a method by which a servitude of passage may be acquired.²⁸ Naked ownership remains in the landowner who acquiesced in the maintenance of the property.²⁹ A grant in writing is not required to create the servitude, nor is a resolution by the governing body declaring the road to be public necessary.³⁰ For R.S. 48:491 to be applicable, however, the maintenance or repair of the road or street by the governing authority must be done peacefully and without coercion.³¹

*Appropriation of river roads.*³² Article 665 of the Civil Code³³ provides for the appropriation of a servitude upon a "space to be left for public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works." The constitutionality of this provision was sustained by the United States Supreme Court in *Eldridge v. Trezevant*, which held that "the subject-matter of such rights and regulations falls within the control of the States, and the provisions of the Fourteenth Amendment to the Constitution of the United States are satisfied if . . . the State law, with its benefits and obligations, is impartially administered."³⁴

Very little difficulty has been encountered in the administration of this provision, although several problems are worthy of mention. It should be noted that article 665 grants only a servitude, ownership remaining in the riparian owner.³⁵ In most

28. *Paret v. Louisiana Highway Commission*, 178 La. 454, 151 So. 768 (1933); *Fuselier v. Police Jury*, 109 La. 551, 33 So. 597 (1903); *Bradley v. Pharr*, 45 La. Ann. 426, 12 So. 618, 19 L.R.A. 647 (1893).

29. *Goree v. Midstates Oil Corp.*, 205 La. 988, 18 So.2d 591 (1944).

30. *Fontenot v. Veillon*, 72 So.2d 587 (La. App. 1954).

31. *Elliot v. Police Jury of Evangeline Parish*, 132 So. 368 (La. App. 1931).

32. A brief history of the riparian servitude of passage shows that its origin is European and goes back to the Romans. It had its birth in the necessity of a towage path along the banks of floatable water courses. By the time of the settlement of Louisiana the servitude had grown into a royal road and was much wider than the original towage path.

33. LA. CIVIL CODE art. 665 (1870): "Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works. . . ."

34. 160 U.S. 452, 468 (1896).

35. *Landry v. Gulf States Utilities Co.*, 166 La. 1069, 118 So. 142 (1928).

cases involving river roads the plaintiff landowner seeks damages for what he claims is an expropriation of his property. This argument was satisfactorily answered in *Peart v. Meeker*,³⁶ where the court held that in the application of article 665 the state does not "expropriate" property but lawfully "appropriates" it for a use to which it is subject under a condition implied in the owner's title. An appropriation is an exercise of the police power, and any loss does not entitle the injured party to recompense, the same being *damnum absque injuria*.³⁷ Expropriation is an exertion of the right of the public to possess itself, by compulsory sale, of lands within the state, the resulting damages being compensable.³⁸

Concerning the extent to which the riparian owner's property is subject to the servitude, the article has been interpreted so as to limit its applicability to purposes incidental to the use of the stream. An interesting case on this point is *Hebert v. T. L. James & Co.*³⁹ in which the plaintiff sought to prevent the defendant from widening a thirty-foot road into a seventy-five-foot highway. In upholding the plaintiff's injunction, the court stated that the servitude imposed by law on property bordering a navigable stream was not intended to serve the public for any purpose other than that which is incidental to the nature, navigability, or use of the stream. In another case it was indicated that to use the land for other than riparian purposes would constitute a taking of private property without compensation and would be violative of the United States and Louisiana Constitutions.⁴⁰

For article 665 to be applicable, it is first necessary to establish that the river or stream in question is navigable. It is well settled that if the waterway is or was once navigable, the adjacent land is subject to the servitude in favor of the public.⁴¹ To be navigable, a river or stream must be susceptible of being used in its natural state as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel over water.⁴² Once the test of navigability is

36. 45 La. Ann. 421, 12 So. 490 (1893).

37. *Ruch v. New Orleans*, 43 La. Ann. 275, 9 So. 473 (1891).

38. *Ibid.*

39. 224 La. 498, 70 So.2d 102 (1953).

40. *Village of Moreauville v. Boyer*, 138 La. 1070, 71 So. 187 (1916).

41. *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922).

42. *McGilura v. Ross*, 215 U.S. 70 (1909) (lakes in the State of Washington); *State v. Aucoin*, 206 La. 787, 20 So.2d 136 (1944) (Lake Long in Lafourche

satisfied, the public is entitled to the use of a road or street along the stream, the width of which is to be determined by the governing authorities according to their discretion,⁴³ as limited, however, by the restriction in the *Hebert* case.

*Prescription.*⁴⁴ In Louisiana a servitude of passage is discontinuous and therefore not susceptible of acquisitive prescription.⁴⁵ This is so even if the passage is evidenced by structures that are apparent and of a permanent nature.⁴⁶ An exception to this rule, however, is provided in article 765 of the Civil Code. It states that the public may acquire a servitude of passage "by the open and public possession and use of a road for the space of ten years, after the said road or servitude has been declared a public highway by the Police Jury, provided such servitude so acquired shall not extend beyond the width of forty feet." This article has received little application in the jurisprudence. In *Bomar v. Baton Rouge*⁴⁷ the Supreme Court declared in dictum that the provisions of article 765 have no application to streets or roads within a municipality. In *Town of Ruston v. Adams*⁴⁸ this dictum was cited as authority for the proposition that a town cannot acquire land for a street by prescription. The applicability of article 765 was denied in *Landry v. Gulf States Utilities Co.*⁴⁹ with the statement that the prescription provided for by that article will begin to run only from the time when the road has been declared a public highway by the police jury. Although the statute authorizes acquisition of a passage forty feet in width, the Attorney General has ruled that prescription will

Parish); *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 163 So. 145 (1935) (Lake Peigneur in Iberia Parish); *State v. Sweet Lake Land & Oil Co.*, 164 La. 240, 113 So. 833 (1927) (Sweet Lake in Cameron Parish); *Delta Duck Club v. Barrios*, 135 La. 357, 65 So. 489 (1914) (Cubitt's Gap in Plaquemines Parish); *Goodwill v. Police Jury*, 38 La. Ann. 752 (1886) (Mack's Bayou in Bossier Parish).

43. *Village of Moreauville v. Boyer*, 138 La. 1070, 71 So. 187 (1916).

44. For a complete discussion, see Schoenrich, *Acquisition of Rights of Way by Prescription*, 12 TUL. L. REV. 226 (1938).

45. LA. CIVIL CODE art. 722 (1870): "Servitudes are either continuous or discontinuous.

"... Discontinuous servitudes are such as need the act of man to be exercised. Such are rights of passage, of drawing water, pasture and the like."

LA. CIVIL CODE art. 766 (1870): "Continuous nonapparent servitudes, and discontinuous servitudes, whether apparent or not, can be established only by title. Immemorial possession itself is not sufficient to acquire them. . . ." See Comment, 15 LOUISIANA LAW REVIEW 777 (1955).

46. *Ogborn v. Lower Terrebonne Refining & Mfg. Co.*, 129 La. 379, 56 So. 323 (1911); *Torres v. Falgoust*, 37 La. Ann. 497 (1885).

47. 162 La. 342, 110 So. 497 (1926).

48. 9 La. App. 618 (1929).

49. 166 La. 1069, 118 So. 142 (1928).

run only as regards the amount of land actually used by the public, if less than forty feet.

Termination of Rights in Roads and Streets

It frequently becomes necessary to determine the ownership of property after a road or street is no longer used by the public. In this respect the problem in most instances will resolve itself into a question of whether the public owned the land initially or possessed merely a servitude of way. It will also be necessary to determine whether or not the public has actually ceased to use the right of way. Where the public has only a servitude of passage the owner of the land retains title to the land throughout the existence of the servitude. Termination of the servitude merely results in restoration of full ownership. The problem is quite different, however, where title to the land was vested in the governing body when the right of way was created.

In the main, rights of way are extinguished in two ways: (1) abandonment of the ownership or servitude, and (2) termination of a servitude by ten years' non-use. The remainder of this Comment is devoted to a discussion of these two methods.

Abandonment. Roads or streets may be abandoned by the public by one of two modes: (a) by a formal act of revocation and setting aside of a dedication in accordance with R.S. 48:701;⁵¹ or (b) by an informal revocation evidenced by the clear and well-established proof of an intention to abandon the road on the part of the governing body. Title to the land underlying roads or streets can be relinquished only by the first method. The abandonment of a servitude of passage may be implied by many and varying circumstances or simply by a declaration by the governing authorities that the servitude has been abandoned. Intention to abandon has been established by the relocation of the road or street under the authority of the governing body of the municipality or parish and the maintenance by that body of the relocated road.⁵² It should be noted, however, that R.S.

50. OPS. LA. ATT'Y GEN. 428 (1938-40).

51. LA. R.S. 48:701 (1950): "The parish governing authorities and municipal corporations of the state, except the parish of Orleans, may revoke and set aside the dedication of all roads, streets, and alleyways laid out and dedicated to public use within their respective limits, when the roads, streets, and alleyways have been abandoned or are no longer needed for public purposes.

"Upon such revocation, all of the soil covered by and embraced in the roads, streets, or alleyways up to the center line thereof, shall revert to the then present owner or owners of the land contiguous thereto. . . ."

52. *Starnes v. Police Jury of Rapides Parish*, 27 So.2d 134 (La. App. 1946).

48:701, applying to formal abandonment, can have no application to the abandonment of a servitude,⁵³ because, under that statute, title to the property under the roads or streets up to the center line vests in the contiguous landowners upon abandonment. To apply the statute to abandonment of a servitude might constitute a deprivation of property without due process of law.

An important case on the subject of formal abandonment is *State ex rel. Young v. Hickman*.⁵⁴ There the court of appeal ruled that it is within the discretion of the municipal authorities whether a dedication shall be set aside when a street has been abandoned or is no longer of use to the public. It indicated that a presumption arises that the action of the authorities in abandoning a street is proper, which presumption can be rebutted by contrary allegations. This proposition was affirmed by the Supreme Court in *Caz-Perk Realty, Inc. v. Police Jury of Parish of East Baton Rouge*,⁵⁵ where the court declared an injunction against enforcement of an ordinance revoking a dedication and closing the street to be an unwarranted interference with the police jury's discretion. The court indicated, however, that a municipality should not take such action without first conducting an investigation of the situation and providing property owners with a proper hearing to voice their objection. In *Jeffries v. Police Jury of Rapides Parish*⁵⁶ it was reiterated that the courts will not interfere with the police jury's discretionary power to declare a road abandoned unless the action of that body was fraudulent, capricious or arbitrary. In *Bordelon v. Heard*⁵⁷ it was pointed out that action by an individual member of the police jury in declaring a road abandoned would not suffice, and that the abandonment must be authorized by the police jury as a body.

The effect to be given an abandonment under R.S. 48:701 was clearly established in the case of *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*⁵⁸ In that case the plaintiff's lessor had subdivided a tract of land into squares, lots and streets in substantial compliance with act 134 of 1896 (R.S. 33:5051). The subdivision was never developed and some years later the police jury of Caddo Parish abandoned the tract of land in accordance

53. *Arkansas-Louisiana Gas Co. v. Parker Oil Co.*, 190 La. 957, 183 So. 229 (1938).

54. 13 La. App. 173, 127 So. 659 (La. App. 1930).

55. 190 La. 957, 183 So. 229 (1938).

56. 207 La. 796, 22 So.2d 121 (1945).

57. 53 So.2d 157 (La. App. 1951).

58. 33 So.2d 88 (La. App. 1947).

59. 190 La. 957, 183 So. 229 (1938).

with R.S. 48:701. Defendant subsequently obtained a lease from an adjacent landowner, which lease included the land underlying the street in question. When defendant began drilling operations, plaintiff sued claiming that the revocation vested full title to the beds of the streets in its lessor, thus entitling it to the right to develop the property. The court, however, applied R.S. 48:701 and held that defendant was entitled to develop the property underlying the street "up to the center line thereof."

R.S. 48:701 received further interpretation in *Martin v. Fuller*.⁵⁹ In that case a lease had been entered into prior to the recording of a revocation of a dedication of streets adjacent to the leased property. Under the terms of the lease the lessee was granted the option to purchase the property, but this option was not exercised until after the recording of the revocation. The court held that, because transactions relative to immovable property must be recorded,⁶⁰ a statutory abandonment would not affect the rights of third parties until recorded. Consequently, the unrecorded revocation provided no notice to the parties, and when the lessee exercised the option to purchase the land he acquired a portion of the road.

Proof of abandonment was considered in the case of *Starnes v. Police Jury of Rapides Parish*.⁶¹ There, a new road had been established after a bridge on the old road had been washed out. The plaintiff brought suit claiming that he was entitled to resume ownership and use of the land underlying the old road, since the establishment of the new road constituted an abandonment. The court, however, pointed out that there had been no formal abandonment of the road, that the relocation had been done in a haphazard fashion and without the authority of the police jury, and that there had been no evidence presented which indicated an intention on the part of the police jury to abandon the road. By so holding the court confused formal and informal abandonment. Although the decision may be questioned for this reason, the case is of value in that it indicates that an informal abandonment requires unequivocal evidence of an intention to abandon. Earlier, in a 1927 case, *Lecour v. Lecour*,⁶² the court of

59. 214 La. 404, 37 So.2d 851 (1948); see Note, 23 TUL. L. REV. 402 (1949); *The Work of the Louisiana Supreme Court for the 1948-1949 Term — Civil Law Property*, 10 LOUISIANA LAW REVIEW 176 (1950).

60. LA. CIVIL CODE arts. 2264, 2266 (1870).

61. 27 So.2d 134 (La. App. 1946).

62. 6 La. App. 360 (1927).

appeal stated that "the owner of the soil on which a public road shall pass may resume and take possession of the same 'whenever said road shall have been abandoned by the public, or shall have been transferred elsewhere with the consent of the owner and with that of the competent authority.'"⁶³ The court based its decision on a portion of section 3368 of the Revised Statutes of 1870, which was not carried into the Revised Statutes of 1950. Although there is no statutory provision today which authorizes implied abandonment, the courts, as with implied dedication, continue to recognize this method of abandonment.

Termination of servitude of passage by ten years' non-use. A second method by which the public may lose a servitude of passage or way is through liberative prescription of ten years, as expressed in article 789 of the Civil Code.⁶⁴ Although the Louisiana Constitution states that "prescription shall not run against the State in any civil matter,"⁶⁵ it was declared in *New Orleans v. Salmen Brick & Lumber Co.*⁶⁶ that this constitutional provision does not prevent prescription from running against a parish or municipality where the subject involved is alienable. This principle is well established in the jurisprudence. Thus, in *Baret v. Louisiana Highway Commission*⁶⁷ the police jury of Calcasieu Parish had obtained a servitude on additional ten-foot strips of land on the sides of an old road. The court held that non-usage of the strips of land for more than ten years extinguished the right to their use. Similarly, in *Jouett v. Keeney*,⁶⁸ the grantee of a servitude of passage was ruled to have lost the rights and privileges over the strip by non-usage during the prescribed period.

Thomas D. Hardeman

The Degree of Cruelty Necessary to Justify Separation from Bed and Board in Louisiana

Article 138(3) of the Louisiana Civil Code provides that if one spouse is guilty of such cruel treatment toward the other as to "render their living together insupportable" the other spouse

63. *Id.* at 362.

64. LA. CIVIL CODE art. 789 (1870): "A right to servitude is extinguished by the non-usage of the same during ten years."

65. LA. CONST. art. XIX, § 16.

66. 135 La. 828, 66 So. 237 (1914).

67. 178 La. 454, 151 So. 768 (1933).

68. 17 La. App. 323, 136 So. 175 (La. App. 1931).