Individual Ownership of Apartments in Louisiana

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INTRODUCTION

The concept of separate ownership of living units on different levels within a building, as distinguished from ownership of the entire building, originated about the year 1100, and is

1. "From the 1100s onward we find extremely widespread in German Towns so-called 'Story' or 'Roomage' Ownership ('Stockwerks-', 'Geschoss-', 'Gelass-', 'Etageneigentum'), ownership of the individual stories of a building. Houses were horizontally divided, and the specific parts so created ... were held by different persons in separate ownership. ... Notwithstanding that this peculiar legal institute was totally irreconcilable with the alien law of the Reception, it remained part of the law.... It was preserved as a particularistic legal institution
actually employed today in many of the common law and civilian jurisdictions. This form of ownership is necessarily dependent on a recognition that ownership of lands and buildings may be divided by horizontal as well as vertical planes. Each separate layer or stratum is then treated as the surface and becomes subject to inheritance, taxation, encumbrance, levy, or sale.²

The prime utility of this form of ownership is of course to enable the occupant of a multiple dwelling unit to become the owner of the occupied unit rather than the mere tenant thereof. This concept of unit ownership also promotes the construction of the multiple dwelling unit which is so effective in utilization of limited land space per person in the large urban centers. By combining in cooperative efforts, prospective occupants can either purchase or construct multiple dwellings and prorate the burden of cost on a per unit basis. This renders the problem of financing much less burdensome than for the single landlord, the only other potential builder of this type dwelling. Further, with the advent of extensive rent control in most countries, other avenues of investment became far more attractive to those with sufficient capital.

This Comment will sketch the evolution and present status of the concept of unit ownership in both civilian and common law with particular emphasis on the permissible extent of use of this form of ownership in Louisiana under our present law.

ANALYSIS OF FRENCH LAW

The Law Prior to 1938

In the Roman law, ownership of the land carried with it ownership of all that formed a part of it.³ Consequently, if the surface was vested in A and the soil in B, it followed that A held an equitable right only, B being the owner. Admitting no exception to the rule, the Roman law accordingly excluded any possibility of unit ownership separate from ownership of the soil.⁴

Footnotes:
1. Townes v. Cox, 162 Tenn. 624, 39 S.W.2d 749 (1931).
2. In the Roman law, the principle of "Superficies Solo Cedit" (whatever is attached to the land forms part of it) was the rule. Buckland & McNaib, Roman Law and Common Law 101-02 (2d ed. 1952).
3. Baudry-Lacantinerie, Traité de Droit Civil — Des Biens no 341 (1905). See also note 1 supra.
Despite the adverse influence of the Roman law, separate ownership of living units became fairly common in Europe as far back as the 1100's in countries such as Bohemia, South Germany, and Switzerland. Today, Germany, the Netherlands, Belgium, Austria, and Spain are among some of the civilian jurisdictions which expressly provide for the separate ownership of living units.

In France, this form of ownership first appeared in the cities of Grenoble, Rennes, Lyon, and Chambery. Due to the increased popularity of this concept of ownership in France, Article 664 was inserted in the Civil Code of 1804. However, this article merely acknowledged the existence of the unit ownership custom in France. It provided simply that in the absence of contrary agreement relative to repair and reconstruction, each unit owner was obligated to repair his own floor and stairs leading thereto, and that all the owners were bound for the repair of the walls and the roof in proportion to the value of their holdings. The rights of the parties and the question of what to do in the event of complete destruction of the dwelling was left to conjecture. In effect, therefore, Article 664 did little else than afford indirect recognition to unit ownership in France.

Even this limited contribution by Article 664 was unnecessary in view of the French code provisions with respect to the right of accession in connection with real estate. Article 552 contains the basic principle that ownership of the land carries

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5. See note 1 supra.
6. Law of March 15, 1951 (Germany); Law of Dec. 10, 1951 (The Netherlands); Belgian Civil Code art. 577 (Belgium); Law of July 8, 1948, as amended (Austria); Law of Oct. 26, 1939 (Spain).
7. COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS n° 1053 (11th ed. 1945); 1 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 2522, 2523 (12th ed. 1939).
8. 11 DEMOLOMBE, COURS DE CODE NAPOLÉON n° 426 (1876).
9. FRENCH CODE CIVIL art. 664 (Dalloz ed. 1954) provided that: "When the various floors of a building belong to different owners, if the title deeds do not determine the manner in which the repairs and reconstructions shall be undertaken, they shall be made as follows: The main walls and the roof shall be paid for by the owners, each one in proportion to the value of the floor belonging to him. The owner of each floor makes the flooring upon which he walks. The owners of the first floor makes the staircase leading thereto; the owner of the second floor makes the staircase leading to his floor from the first floor and so on." (Translation by Cachard)
10. 11 DEMOLOMBE, COURS DE CODE NAPOLÉON n° 426 (1876), where the author suggests these questions.
11. CODE CIVIL arts. 551-564.
with it ownership of what is above and below it. However, the subsequent article provides two important exceptions to this principle, which relegates it to a mere presumption. First, the presumption can be overcome by contrary proof. Second, the presumption cannot prejudice the rights of a third party acquired by prescription as to any subterranean part of the land or any part of the building. Both the courts and writers recognize this rebuttal possibility. The nature of the resulting right when the presumption is rebutted is held to be a real right of ownership. Thus, it is entirely possible for one to become the owner of a divided part of what was once one immovable in France, the division being accomplished by means of a horizontal plane.

Increased use of this form of ownership in France brought to light another problem which Article 664 could not cope with. It became the custom for a partnership to be formed for the purpose of acquiring buildings susceptible of horizontal division into living units for the benefit of its members. The French Civil Code defines the partnership as a contract by which two or more persons agree to pool things in common with a view towards dividing the profits which may result therefrom. This definition was interpreted by the courts as requiring that the benefit expected be a pecuniary or material gain. Apparently, there was conflict as to whether the benefit derived from partnerships formed to facilitate ownership of living units by its members could be so classified. Hence, the legal validity of such partnerships was questionable.

12. Id. art. 552: "Ownership of the land carries with it ownership of what is above and below it..." (Translation by Cachard.)
13. Id. art. 553: "All constructions, plantations and works on a piece of land, or below it, are supposed to have been made by the owner at his expense, and to belong to him, if the contrary is not proved; without prejudice to the ownership, either of a subterranean work under a building or to any part of a building, which a third party may have acquired or might have acquired by prescription." (Emphasis supplied.) (Translation by Cachard.)
14. See note 13 supra.
15. 6 Baudry-Lacantinerie, Traité de Droit Civil — Des Biens no 340, 348 (3d ed. 1905); Labbé note au. S.74.1.457; 1 Planiol, Traité élémentaire de Droit Civil n° 2525 (12th ed. 1939).
16. Demolombe, Traité de la Distinction des Biens no 483 (1861). See also note 15 supra.
17. Code Civil art. 1832.
18. 1 Colin et Capitant, Cours élémentaire de Droit Civil Français n° 1054 (11th ed. 1945); 1 Planiol, Traité élémentaire de Droit Civil n° 2523 (12th ed. 1939). For discussion of the cases, see Denis, Sociétés de Construction et Copropriété des Immeubles Divisés par Appartements 13 et seq. (1954).
19. See note 18 supra.
Another problem that arose concerned the reconciliation of this concept of ownership with the provisions of the French articles on partition. The basic tenor of these provisions is that no one can be compelled to hold property in common with another.\(^{20}\) This seems to oppose the concept of unit ownership due to the necessity for the perpetual co-ownership of the common parts, such as the stairs, floors, the roof, etc., by all the living-unit owners. However, it is the general consensus of opinion that the partition articles are inapplicable to this form of ownership in common.\(^{21}\) By their very nature and destination, these common parts must be held in forced indivision.\(^{22}\) Thus, the right of ownership in the horizontal sense in France, as in most other civilian systems, was considered as a combination of two rights: (1) the share in the undivided co-ownership of the common parts; and (2) the separate right of ownership in the unit itself.\(^{23}\) These were indivisible and together formed a real right over the immovable.\(^{24}\)

**The Law After 1938**

The insufficiency of Article 664, as pointed out above, combined with the increased use of this type of ownership in France after the first world war, pointed to the need for legislation in this area.\(^{25}\) As a result, the law of June 28, 1938, was passed, and subsequently amended in 1939 and 1943.\(^{26}\) The first chapter is devoted to the associations or partnerships formed to acquire buildings susceptible to unit ownership. These partnerships are given legal sanctity notwithstanding the provisions of Article 1832 of the Civil Code. Of immediate concern in this Comment is the second chapter of the law of June 28, 1938, as amended. However, with one exception,\(^{27}\) the applicability of Chapter Two

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20. Code Civil arts. 815-842.
21. 2 Aubry et Rau, Droit Civil Francais no 221 (5th ed. 1897); 6 Baudry-Lacointemerrie, Traité de Droit Civil—Des Biens n° 272 (3d ed. 1905); 11 Demolombe, Cours de Code Napoleon n° 444 (1876); 1 Planiol, Traité élémentaire de Droit Civil n° 2501 (12th ed. 1899).
22. See note 21 supra.
23. 1 Planiol Traité élémentaire de Droit Civil n° 2527 (12th ed. 1899); 2 Ripert, Traité de Droit Civil—D’Apres le Traité de Planiol n° 2652 (1957).
24. See note 21 supra.
25. 1 Colin et Capitant, Cours élémentaire de Droit Civil Français n° 1053 (11th ed. 1945); 2 Ripert, Traité de Droit Civil—D’Apres le Traité de Planiol n° 2651 (1957).
27. Law of June 28, 1938, as amended, art. 11 (Dallos ed. 1954) contains the only mandatory provision. This article deals with the privilege granted to the group upon their payment of a defaulter’s share of the common expenses. This
is made dependent on the absence of contrary agreement between the parties. Thus, prior to discussion of the rules set forth in Chapter Two, it is advisable to examine briefly the form and context of typical agreements between apartment owners in France.

Contrat de Convention. Full freedom of contract is afforded in France in this area of the law, and regulation of this type of ownership by voluntary agreement is the rule rather than the exception.\textsuperscript{28} Hence, the legislation is of secondary importance. It should be noted, however, that the existence of an agreement is not mandatory because, as will be shown later, the legislation simply provides that in the absence thereof, the administration of this type of ownership will be by an organization comprised of the joint owners.\textsuperscript{29} The agreement, when made, may be either under private signature, or by notarial act.\textsuperscript{30} The agreement is binding on all joint owners and their assigns, provided: (1) that as between the parties, the agreement be unanimously agreed to or adhered to; and (2) that as to third parties, the agreement be recorded in the mortgage books of the district wherein the building is situated.\textsuperscript{31} The agreement should be as inclusive as possible. Hence, it should specify: (1) the common parts and the private parts; (2) the rights of the owners and their obligations; (3) the common charges to be made and manner of apportionment thereof; (4) the governing body of the group and its official representative; and (5) the rights and the powers of the governing body and its official representative. In order to provide for expeditious and economic settlement of controversies among the joint owners, the legislation allows the insertion of an arbitration clause in the agreement.\textsuperscript{32}

Chapter Two of the Law of June 28, 1938, as Amended. Chapter Two is silent, concerning the private rights (separate right of ownership in the unit) and so these are usually regulated by agreement. In the absence of agreement, as rights in an immovable, the general rules applicable to the creation and

\textsuperscript{28} In general, see \textsc{Colin et Capitán}, \textit{Cours élémentaire de droit civil français} n° 1063 (11th ed. 1945). See also Law of June 28, 1938, as amended, arts. 5-10, 12-14 (Daloz ed. 1954).

\textsuperscript{29} Law of June 28, 1938, as amended, art. 7 (Daloz ed. 1954).

\textsuperscript{30} Id. art. 8. In general, see \textsc{Denis}, \textit{Société de Construction et Co-propriété des immeubles divisés par appartements} 46 et seq. (1954).

\textsuperscript{31} See note 30 supra.

\textsuperscript{32} See note 30 supra.
transfer of such rights apply.\textsuperscript{33} Thus, the owner may freely lease, encumber, sell, repair, etc., so long as he does not unduly burden his neighbor.\textsuperscript{34} The only important questions which have arisen in this area are whether the owner of the top floor has the right of adding other floors thereto; and whether the owner of the bottom floor has the right of excavating. Both have been answered in the negative,\textsuperscript{35} unless, of course, the agreement allows it. By negative implication from the definition given to the common parts in Chapter Two, all that is not common is private.\textsuperscript{36} In practice, private rights usually attach to all that is within the interior of the unit.

In the absence of contrary agreement, common ownership is presumed to extend to such common parts as the roof, floors, stairs, elevators, janitor quarters, passages, corridors, central heaters, chimneys, etc.\textsuperscript{37} This co-ownership right, together with the right in the unit, forms a single real right over the immovable limited only by the principle that the rights of the other owners over the common parts be respected.\textsuperscript{38} The end result achieved is an affirmation of the fact that this co-ownership is one in forced indivision due to its nature.\textsuperscript{39} Interior partition walls are owned jointly by the adjoining apartment owners.\textsuperscript{40}

Chapter Two clarifies the several obligations imposed on the unit owners. The broad principle is stated that each joint owner is under a duty to contribute to the expenses incurred in the conservation, maintenance, and administration of the common parts.\textsuperscript{41} The owners usually enter into detailed agreements with respect to the distribution of these expenses. In the absence of such, the legislation stipulates that the expenses are to be distributed in proportion to the value of the living units held by the owners.\textsuperscript{42} Common expenses encompass such items as major repairs to the building, maintenance costs, costs for water, gas,
and electricity, insurance and taxes.\textsuperscript{43} In order to enforce the payment of these common expenses, the legislation gives to the group the right to pay any defaulter’s share.\textsuperscript{44} Upon payment, a privilege in favor of the group attaches to the defaulter’s right in the living unit and his right in the common parts.\textsuperscript{45}

The parties are free to enter into any organization in order to administer their joint ownership.\textsuperscript{46} In the absence of agreement, the legislation provides that the owners must form a “Syndicat” which then acts as the legal representative of the group.\textsuperscript{47} Provision is also made for the appointment of a “Syndic” to act as the executive officer of the “Syndicat.”\textsuperscript{48} The Syndicat is charged with the duty of administration of the common parts. Decisions are to be made upon convocation of all interested parties, or their agents, with each having a voice therein proportionate with the importance of his rights in the building.\textsuperscript{49} All decisions made in accordance with the law are made obligatory on all the parties.\textsuperscript{50} It is also provided that, upon taking the proper steps, the Syndicat may reconstruct in the event of complete destruction of the building.\textsuperscript{51}

\textbf{ANALYSIS OF COMMON LAW}

\textit{Historical Inception}

At common law, ownership in the theoretical sense is no more nor less than ultimate possession, with legal title to the land vested in the crown or state. Thus, where possession is possible, ownership is possible. The early common law theory relative to the extent of the landowner’s ownership was very similar to that of the Romans. As expounded by Lord Coke, the owner of the soil owned, or had the exclusive right of control, to all that was on the land or below it to an indefinite extent.\textsuperscript{52}

However, the development of aviation led to the rejection of Lord Coke’s theory by many states, and the imposition of re-

\textsuperscript{43} DENIS, SOCIÉTÉS DE CONSTRUCTION ET COPROPRIÉTÉ DES IMMEUBLES DIVISÉS PAR APPARTEMENTS 52 (1954).
\textsuperscript{44} Law of June 28, 1938, as amended, art. 11 (Dalloz ed. 1954).
\textsuperscript{45} Ibid.
\textsuperscript{46} Id. art. 7.
\textsuperscript{47} Ibid.
\textsuperscript{48} Id. art. 10.
\textsuperscript{49} Id. art. 9.
\textsuperscript{50} Ibid.
\textsuperscript{51} Id. art. 12.
\textsuperscript{52} Co. Litt. 4a.; Baten’s Case, 77 Eng. Rep. 810.
strictions thereto by others, insofar as airspace was concerned.\textsuperscript{53} Similarly, the development of mineral research led to the conclusion that land could be horizontally divided for purposes of ownership, the surface belonging to one person, and a stratum below the surface to another.\textsuperscript{54} Hence, the common law theory concerning the landowner's extent of ownership has been reduced to a mere rebuttable presumption.

Further, it is conceded by the common law that the airspace is susceptible to division into strata for the purpose of separate ownership.\textsuperscript{55} Insofar as the division of buildings for the purpose of ownership is concerned, the English courts have held since an early date that such was possible.\textsuperscript{56} Thus, Lord Coke himself later states that "a man may have an inheritance in an upper chamber, though the lower buildings and soile [sic] be in another, and seeing it is an inheritance corporeal it shall pass by livery."\textsuperscript{57} Common law jurisdictions in the United States also accede to the proposition that for purposes of separate ownership, buildings may be divided horizontally as well as vertically.\textsuperscript{58}

**Present State of the Law**

*With Regard to Unit Ownership*

Most of the common law material concerning this subject under discussion is treated under the heading of cooperative apartments. The legal structure of these so-called cooperative arrangements seems to partake of one of three general forms.\textsuperscript{59}

Under the first form, outright legal ownership of the cubic

\textsuperscript{53} There appear to be four major theories regarding the landowner's rights in the airspace. These are: (1) the landowner's rights in the airspace are limited to that part in which he has effective control; (2) the landowner's rights in the airspace are limited to that which he actually uses; (3) the landowner's rights in the airspace are recognized but are subject to the right of aviation under certain restrictions; and (4) the landowner has no right in the airspace. See 2 TIFFANY, *Real Property* § 584 (3d ed. 1939); 1 THOMPSON, *Real Property* § 70 (1939); RESTATEMENT, *Torts* § 159 (1934).

\textsuperscript{54} 2 *American Law of Property* § 10.6 (Casner ed. 1952); 2 TIFFANY, *Real Property* § 585 (3d ed. 1939); 1 THOMPSON, *Real Property* § 89 (1939).

\textsuperscript{55} 2 TIFFANY, *Real Property* § 683 (3d ed. 1939); 1 THOMPSON, *Real Property* §§ 63-64 (1939).


\textsuperscript{57} Co. Litt. 48(b) (1823).

\textsuperscript{58} 1 *American Law of Property* § 3.10 (Casner ed. 1952); 4 POWELL, *Real Property* § 632 (1954); 2 TIFFANY, *Real Property* § 583 (3d ed. 1939); 1 THOMPSON, *Real Property* § 63 (1939); 2 WASHBURN, *Real Property* 342 (6th ed.).

\textsuperscript{59} 1 *American Law of Property* § 3.10 (Casner ed. 1952); 4 POWELL, *Real Property* § 632 (1954).
footage of the apartment is held by the occupant. The title in fee is conveyed to the person, together with cross easements of support and right of way and a contract regulating the use and maintenance of the common parts. The determinant factor relative to the rights and duties of the parties is therefore the contract of agreement. This form obviously presents problems of easements and covenants running with the fee interests in land rather than of landlord and tenant. Few persons have resorted to this cumbersome and complicated method in order to acquire unit ownership. Thus, the use of this form has not been as favored as two other forms, the trust and the corporation.

Under the trust form, an express trust is established and title to the property is transferred to the trustee, who then issues beneficial certificates to the individual occupant. The declaration of trust sets out rights and duties arising under the beneficial certificates, including the right of occupancy given to the holders. The certificates themselves will designate the unit allocated and contain a summary of the obligations and rights of the beneficiary as set out in the declaration of trust, but more in detail in the light of the specific unit allocated. Generally, enforcement of the terms of the agreement is achieved by granting to the trustee the authority to sell the interest of any defaulting beneficiary. Provision is made for the application of the proceeds from such a sale to the obligation, with any excess going to the defaulter. The primary disadvantage of this form is the necessity to vest managerial control in the trustee. “This lessens both the supposed glamour and the substance of the ownership of the beneficial-tenants.” It should also be noted that under both the trust and corporate devices, the only “ownership” vested in the person is the ownership of the corporate stock, or the ownership of the beneficial certificates. Hence,

60. See note 59 supra.
61. See note 59 supra.
62. 1 AMERICAN LAW OF PROPERTY § 3.10 (Casner ed. 1952).
63. 4 POWELL, REAL PROPERTY § 632 (1954).
64. See note 59 supra. See also Castle, Legal Phases of Co-Operative Buildings, 2 So. CALIF. L. REV. 1 (1918).
65. 1 AMERICAN LAW OF PROPERTY § 3.10 (Casner ed. 1952); McCullough, Co-Operative Apartments in Illinois, 26 CHI-KENT L. REV. 303 (1948).
66. See note 64 supra.
67. See note 64 supra.
68. See note 64 supra.
69. 4 POWELL, REAL PROPERTY § 632 (1954).
70. See notes 62-65 supra.
the relation between the occupant and the trustee or corporation as to the right of occupancy is essentially that of landlord and tenant and is governed accordingly. Nevertheless, with sound planning and meticulous organization, the trust and corporation devices are effective means whereby persons may acquire essential attributes and indicia of ownership of the apartment and of a proportionate interest in the common parts.

The use of the corporate device is by far the most common in the area of the so-called cooperative housing arrangements. Of necessity, as with the trust, this device must be treated in general terms due to the variations in treatment given in the several states. Under this scheme, the corporation is the repository of the title and is responsible for management and maintenance. Usually, the incorporation is under the state's general incorporation act, although some states provide special statutes more appropriate in this field. In general, articles of incorporation and by-laws are drawn and directors chosen. The by-laws of the corporation formed for the purpose of acquiring buildings for cooperative housing serve the same purposes as the contract of agreement in the French system, and those of the trust declaration under the common law trust device.

The most important instrument in the corporation device is the proprietary lease, so-called because of its indicia of ownership. As stated earlier, neither the beneficiary nor the shareholder is vested with any ownership in the property except in the derivative sense as owners of the beneficial interest or the stock. Further, under the corporate form, the only importance of stock ownership is that it qualifies the holder to obtain the proprietary lease and to vote for members of the board of directors. Inasmuch as the corporation formed for the purposes of cooperative housing is not an organization for profit, and inasmuch as the reversionary interest in a building subject to long term leases is of little value, the other attributes of stock ownership are of insignificant worth. Hence, the lease is the foundation of the cooperative arrangement. Apart from con-

71. See notes 62-65 supra.
72. See note 59 supra.
73. See note 59 supra.
74. See note 59 supra.
76. See notes 62-65 supra.
77. See notes 62-65 supra.
taining the usual clause of apartment leases, it is unique in that its continuance depends upon the lessee owning a pre-specified quantity of shares in the corporation.\(^7\) In short, the lease defines the limits of the shareholders' interest and strikes a balance between the authority of the individual and the authority of the group. The term or period of the lease is usually quite long. In general, it will contain provisions for termination upon the lessee's loss of the required amount of stock, further agreements to pay expenses, authority to the directors to adopt house rules, and elaborate provisions in the event of sale or assignment.\(^7\)

Under the corporate form of organization, it is possible to accumulate more capital for the initial investment. The tenant will also hold an equity interest and will be allowed tax deductions from his gross income for his proportionate share of the expenses in the nature of real estate taxes, and mortgage interest (if the building be financed).\(^8\) Further, corporate unexpended income is not taxable when distributed among the stockholders as refunded rent.\(^6\) However, under the corporate form, the parties are completely interdependent in matters of expense and administration. Indeed, the tenant's right of occupancy in a financed cooperative is dependent on the economic ability of his fellow tenants to meet their share of financing costs.\(^8\) Further, he has only a qualified control over the property as a tenant, and his right to sell his occupancy is burdened with many restrictions.\(^8\) Needless to say, there is also quite a bit of personal involvement among the tenants.

**Louisiana Law**

Louisiana's applicable code provisions in this area are identical with those of the French and read as follows:

"Art. 505. *The ownership of the soil carries with it the ownership of all that is directly above and under it. The owner may make upon it all the plantations, and erect all the buildings which he thinks proper,* under the exceptions established in the title: Of Servitudes. He may construct below the soil all manner of works, digging as deep as he deems convenient,\(^7\)

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7. See notes 62-65 *supra.*
8. See notes 62-65 *supra.*
6. See note 59 *supra.*
5. See note 59 *supra.*
4. See note 59 *supra.*
3. See note 59 *supra.*
2. See note 59 *supra.*
1. See note 59 *supra.*
and draw from them all the benefits which may accrue, under such modifications as may result from the laws and regulations concerning mines and the laws and regulations of the police."84

"Art. 506. All the constructions, plantations and works, made on or within the soil, are supposed to be done by the owner, and at his expense, and to belong to him, unless the contrary be proved, without prejudice to the rights of third persons, who have acquired or may acquire by prescription the property of a subterranean piece of ground under the building of another, or of any part of the building."85

The case of Lasyne v. Emerson86 is the only Louisiana case wherein the concept of horizontal ownership in light of the above articles was directly considered. This case involved an action for partition by licitation of a two-story structure. The facts of the case show that the common author in title had separately sold undivided interests in the lower and upper floors respectively. Defendants, as owners of the undivided interest in the lower floor, opposed the action, contending that two separate estates had been created by means of horizontal division and therefore partition in kind was the proper remedy. The Louisiana Supreme Court affirmed for the plaintiff and ordered division by licitation, remarking: "In the instant case, however, the defendant's argument that this property is susceptible of division in kind, that is, horizontally (as to which counsel offers no legal precedent in Louisiana), cannot be sustained in view of the substantive provisions of our law above referred to and also the provision that 'The ownership of the soil carries with it the ownership of all that is directly above and under it. ** *.' R.C.C. Art. 505. The various forms of tenure of real property permitted in common law states which are irreconcilable with the provisions of the Civil Code cannot receive the sanction of our courts."87

The substantive law referred to by the court in the above quotation was that contained in Article 1289 of the Civil Code, which reads as follows:

"No one can be compelled to hold property with another, un-

84 LA. CIVIL CODE art. 505 (1870). Compare with FRENCH CODE CIVIL art. 552 in note 12 supra.
85. LA. CIVIL CODE art. 506 (1870). Compare with FRENCH CODE CIVIL art. 553 in note 13 supra.
86. 220 La. 951, 57 So.2d 906 (1952).
less the contrary has been agreed upon; any one has a right to demand the division of a thing held in common, by the action of partition."

This right of partition has been in our law since its earliest codification.88 The exception made in Article 1289 is severely restricted. Thus, Article 1297 provides that it cannot be stipulated that there shall never be a partition and subsequent articles provide that one may hold in indivision only for a certain limited time.89 Neither can the right of partition be prescribed against.90 Note further that the owner of the undivided portion entertains proprietary rights therein and may alienate or encumber his portion.91

Analysis of the Louisiana Law in Light of the French and Common Law

The court in the Lasyne case relied on the assumption that Article 505 embodied the conclusive presumption that ownership of the soil carried with it ownership of all that was above and below it. They reinforced this view by reiterating the principle that every person has a fundamental right to demand partition of that which is held in common. This right of partition being irreconcilable with the concept of horizontal ownership which of necessity requires forced indivision over the common parts, the court concluded that horizontal ownership was not possible in Louisiana. No mention was made of Article 506 quoted above, nor of the applicable French law on the subject.92

The two identical principles relied on by the court in the Lasyne case exist in the French law. The French authorities had little difficulty in overcoming the old Roman law presumption concerning the landowners' extent of ownership.93 Indeed, the French Civil Code is recognized as providing two exceptions to this presumption94 in Article 553. This same article is reproduced almost verbatim in our own Code.95 It would seem to follow that, if the French conclusions are correct, the exceptions recognized in France should also exist in Louisiana. Thus, the

88. See LA. CIVIL CODE art. 1215 (1825); LA. CIVIL CODE art. 156 (1808).
89. LA. CIVIL CODE arts. 1297-1301 (1870).
90. Id. art. 1304.
92. See page 680 supra.
93. See notes 11-16 supra.
94. See note 85 supra. See also page 671 supra.
95. See note 85 supra.
presumption that the landowner owns all that is above and below the land could be rebutted by a showing of either contrary proof or third parties' prescriptive rights.\textsuperscript{96} If this view be taken, then the common law can also be accorded its proper argumentive force in our state because of its reconcilability. Under the common law, it has been shown that airspace and the stratum below the surface is susceptible of horizontal division.\textsuperscript{97} It is therefore submitted that, in view of the French and common law on the subject and their conclusions, it would be entirely proper to hold that the presumption embodied in Article 505 can be rebutted.

It would also seem that the Louisiana articles on partition are inapplicable to the concept of horizontal ownership for the same reasons as those expounded by the French authorities.\textsuperscript{98} Hence, due to the inherent nature and destination of the common parts under the concept of horizontal ownership, they are in forced indivision. Further, the same public policy that sanctions the existence of party walls, the right of light and view, and the carrying off of water from the roofs, etc.,\textsuperscript{99} would seem to dictate that in the area of horizontal ownership, it is to the advantage of the owners that the common parts be held in forced indivision for the common use and enjoyment. These factors, combined with the voluntary nature of the co-ownership status under the concept of horizontal ownership, should be sufficient to hold that the partition articles are inapplicable to this form of ownership.

However, even if the \textit{Lasyne} case be followed in the future, it is still possible to use the common law corporation device in order to achieve individual unit ownership as nearly as possible without actually doing so.\textsuperscript{100} With title to the land vested in the corporation, the rule of Article 505 would be complied with, and the articles dealing with partition would be inapplicable. Although used satisfactorily in the common law, the trust device in Louisiana is of little value due to its limited nature and short duration of time for which it is allowed.\textsuperscript{101}

\textbf{CONCLUSION}

In the final analysis, the prospective "owner" of an apartment in Louisiana under the existing law may have two possible

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{96} See note 85 \textit{supra}.
\item \textsuperscript{97} See notes 53-58 \textit{supra}.
\item \textsuperscript{98} See notes 20-24 \textit{supra}.
\item \textsuperscript{99} \textit{La. Civil Code} arts. 674-708 (1870).
\item \textsuperscript{100} \textit{Id. art. 427 et seq.}
\item \textsuperscript{101} \textit{La. Const. art. IV, § 16.}
\end{itemize}
\end{footnotesize}
means to achieve his desired goal. The first is by collaboration with others in the formation of a corporation to hold legal title to the property. Shares of stock would then be issued to the prospective occupants, the number depending on the value of the designated unit. "Proprietary" leases would then be issued to the shareholders with the predetermined requisite number of shares. Provisions relative to management, and regulations of the project, would be in the form of by-laws. This corporate form, with limited liability, opportunity for effective democratic control, and possible tax advantages approaching those of separate ownership, has offered the best means for achieving the purposes of cooperative housing and is the one most widely used in the common law.

The second method open to the prospective "owner" of an apartment in Louisiana is to proceed under the theory that outright unit ownership is sanctioned by our Code. Both the French and common law principles applicable in this area could be employed in an attempt to have the courts reach this interpretation of our code articles. The success of this method must, however, remain in doubt until such a ruling is made by our courts. On the other hand, if ownership of individual living units grows popular and its utility be proven and appreciated as in the other civilian jurisdictions and common law jurisdictions covered in this Comment, legislation may well be forthcoming in this area. Legislation would of course be necessary in order to initiate this concept of property ownership in Louisiana in the event the Lasyne case remains the judicial rule. Legislation would also be desirable even if the Lasyne case be overturned in order to clarify and set forth clearly the relationships involved under this concept of ownership. The success of the French legislation in this area may prompt legislation of a similar type in this state.

The desirability of this type of ownership is of course up to the interested parties. It will be for them to weigh the several advantages and disadvantages accompanying this concept. If their choice be affirmative, either of two results can be foreseen in the near future. Unit ownership would perhaps be cast aside in favor of the corporate cooperative device used at common law. Or, unit ownership can be attempted and the Lasyne case may be overturned by the courts or by the legislature.

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