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# Property Law - Continuous Servitude - Act of Man Test and Possession of Ten Years

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ceived from the host's insurer.<sup>12</sup> The insured can recover, therefore, a maximum of \$5,000.00, regardless of the number of policies under which he is covered. It is not clear from the decision in the instant case, however, whether the court, by awarding plaintiff \$2,000.00, was invalidating the standard "other insurance" clause approved by the Commissioner of Insurance, or whether it was merely interpreting the terms "limit of liability" and "applicable limits of liability" in the "other insurance" clause as meaning the *actual amount of recovery* available to the insured from each policy under the particular facts of each case. It is submitted that a clarification of the meaning and legal status of such clauses, under the factual situation of the instant case, is in order by both the courts and the Insurance Commissioner.

*Shelby H. Moore, Jr.*

PROPERTY LAW—CONTINUOUS SERVITUDE—ACT OF MAN  
TEST AND POSSESSION OF TEN YEARS

Plaintiff pumped irrigation water into his rice field, and at harvest time opened a gap to release it through a ditch across defendant's estate. He had been doing this two out of every four years for thirty years. *Held*: Irrigation drainage is a continuous-apparent servitude which may be acquired by possession of ten years. The flow of water or the exercise of the servitude is continuous even though acts of man on the dominant estate are necessary to replenish the supply, or to reset the state of affairs necessary for the exercise of the servitude. A servitude is continuous as long as the servitude's use survives an act of man performed outside the servient estate. *Wild v. LeBlanc*, 191 So.2d 146 (La. App. 3d Cir. 1966).

Since continuity and possession<sup>1</sup> are critical requirements for acquisitive prescription of servitudes, the meaning of these

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12. Of course the insured can only recover under his own policy as far as its total limits go. For example, if more than one person qualifies as an insured under his policy, the court might distribute the limits of plaintiff's policy between the other insured[s] or give plaintiff less than the difference between \$5,000.00 and what he recovered from the primary insurer.

1. "Continuous and apparent servitudes may be acquired by title, or by a possession of ten years. . . ." LA. CIVIL CODE art. 765 (1870).

"Continuous nonapparent servitudes, and discontinuous servitudes, whether apparent or not, can be established only by a title. . . ." *Id.* art. 766.

two concepts must be determined. Continuous servitudes are those whose use does not require an act of man. Discontinuous servitudes need the act of man to be exercised.<sup>2</sup> The French courts take the view that the act of man test should be applied to acts necessary to reset the state of affairs outside the servient estate as well as to the actual exercise of the servitude on the servient estate.<sup>3</sup>

“[C]ontinuous servitudes operate without man’s intervention, that is to say their exercise does not require successive and repeated acts by the owner of the dominant estate. [T]hey consist of a certain state of affairs . . . which, once established, lasts indefinitely.”<sup>4</sup>

For example, the French hold that a servitude of aqueduct is continuous even when its exercise depends on the opening of a gate, because once the gate is opened, the flow of water will continue without the intervention of man.<sup>5</sup> A servitude of drain may be continuous or discontinuous.<sup>6</sup> Rain water flowing through pipes would be continuous. “Once the . . . pipes are laid the servitude operates automatically whenever it rains. The owner has nothing to do to help the water flow.”<sup>7</sup> However, a drain from a household sink would be discontinuous, “because for water to flow somebody must pour it into the drain. The operation of this servitude requires man’s intervention.”<sup>8</sup> Both the Louisiana and French courts hold that continuous does not mean unceasing operation.<sup>9</sup> The sole criterion to distinguish continuous and discontinuous servitudes is the presence or

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2. *Id.* art. 727. Derived from FRENCH CIVIL CODE art. 716. See Note, 27 LA. L. REV. 634 (1967), and Note, 41 TUL. L. REV. 947 (1967), for a more detailed analysis of the discontinuous servitude.

3. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2894 (1959). Note, 40 TUL. L. REV. 397, 401 (1966): “In order to have a continuous servitude, the water must not only flow naturally over the servient estate, but also must come to the servient estate by the operation of natural forces.”

4. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2894 (1959).

5. *Id.* no. 2895 n.3.

6. *Id.* no. 2895.

7. *Id.*

8. *Id.*

9. *Id.* no. 2896; Fuller v. Washington, 19 So.2d 730, 731 (La. App. 2d Cir. 1944): “There appears to be nothing in the codal provisions which would indicate that the character of a servitude as to whether it be continuous requires unceasing operation. Rather, the articles dealing with the point specifically denominate aqueducts and drains as being illustrative of continuous servitudes. It cannot be asserted that water must perpetually and unceasingly flow through an aqueduct or drain in order to meet the requirements and fulfill the definition of continuous servitudes.”

absence of man's intervention beyond an initial act setting up the state of affairs.<sup>10</sup>

The Louisiana courts take a much broader view of continuous servitudes.<sup>11</sup> Acts of man performed outside the servient estate, preliminary to the exercise of the servitude, do not preclude continuous characterization. The state of affairs may be reset from time to time without causing the servitude to be discontinuous. In the instant case, once the gap had been opened, fresh water had to be pumped into the field to bring about a subsequent exercise of the servitude. But unlike the French view, this did not cause the servitude to be discontinuous.<sup>12</sup>

The court relied on *Acadia-Vermilion Rice Irrigating Co. v. Broussard*,<sup>13</sup> which presented a factual situation identical to that of the instant case. *Broussard* in turn relied on *Fuller v. Washington*,<sup>14</sup> which held that a servitude of sewer was continuous and apparent. The owner of the servient estate alleged that "since the sewer [line's] . . . use is intermittent and subject to the will of man . . . it does not come under the codal definition of continuous servitude."<sup>15</sup> The court disagreed and held that unceasing operation is not an essential characteristic of continuous servitudes. The court ignored that each exercise of the servitude required man's intervention. This analysis led to the subsequent adoption of the Louisiana act of man test. In *Broussard*, the court admitted that it had difficulty reconciling the *Fuller* case with *Ogborn v. Lower Terrebonne Refining & Mfg. Co.*<sup>16</sup> (concerning a servitude of passage) but said that they could be reconciled by adopting the present Louisiana test.<sup>17</sup>

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10. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2896 (1959). It is of course well settled that the intervention of man may be through the medium of mechanical or other non-natural devices.

11. See *Acadia-Vermilion Rice Irrigating Co. v. Broussard*, 175 So.2d 856 (La. App. 3d Cir. 1965); *Fuller v. Washington*, 19 So.2d 730 (La. App. 2d Cir. 1944).

12. See Note, 40 TUL. L. REV. 397, 401 nn.10-11 (1966), and the accompanying text.

13. 175 So.2d 856 (La. App. 3d Cir. 1965). The court also relied on *Hale v. Hurlin*, 130 So.2d 519 (La. App. 3d Cir. 1961), where a man-made ditch for rain water drainage was held continuous. This case is not precisely in point, because such a ditch would be continuous under the French test as well as under the Louisiana test.

14. 19 So.2d 730 (La. App. 2d Cir. 1944).

15. *Id.* at 731.

16. 129 La. 379, 56 So. 323 (1911).

17. In *Fuller*, after water was brought to the dominant estate, it was necessary for the owner to flush the toilet each time he wished to exercise the servitude, just as the owner of the dominant estate in *Ogborn* had to

The concept of possession<sup>18</sup> of a servitude is not precisely dealt with in the *Wild* case. Since servitudes are not susceptible of corporeal possession, of what "species of possession" are "these rights susceptible"?<sup>19</sup> As to the *corpus*<sup>20</sup> element, Aubry and Rau state:

"The possession of apparent and continuous servitudes is acquired by establishing the state of facts which is the prerequisite for the existence and exercise of the servitude. Article 688 [La. Civil Code art. 727 (1870)]. The possession of discontinuous servitudes, whether apparent or not, is acquired by the exercise of human acts which create it. Articles 688, 1607 [La. Civil Code arts. 727, 2481 (1870)]."<sup>21</sup>

No possession may begin without the *animus*<sup>22</sup> element also being present. The mere setting up of the state of facts constitutes a beginning of possession for continuous servitudes. The actual exercise of the servitude is not necessary at all to acquire it by prescription.<sup>23</sup> This view of possession is in line

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drive the train across the servient estate each time he wished to exercise the servitude. Both cases require an act of man for the exercise of the servitude, though in *Fuller* that exercise does not occur upon the servient estate.

18. LA. CIVIL CODE art. 765 (1870); *id.* art. 3487: "To enable one to plead the prescription [of ten years] . . . it is necessary that the possession be distinguished by the following incidents:

"1. That the possessor shall have held the thing in fact and in right, as owner. . . .

"2. That the possession shall have been continuous and uninterrupted, peaceable, public and unequivocal; a clandestine possession would give no right to prescribe. . . ."

*Id.* art. 3490: "The circumstance of having been in possession by the permission or through the indulgence of another person, gives neither legal possession nor the right of prescribing."

No case directly facing the problem of defining possession of a servitude has been found, except in the area of mineral law, which is outside the scope of this Note.

19. *Id.* art. 3432: "Possession applies properly only to corporeal things, movable or immovable.

"The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a quasi possession, and is exercised by the species of possession of which these rights are susceptible."

20. See 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2954 (1959); LA. CIVIL CODE arts. 3436, 3487 (1870).

21. 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 179 (7th ed. 1966).

22. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2954 (1959); LA. CIVIL CODE arts. 3436, 3487 (1870).

23. An extreme case might be imagined. *B*, to drain his property, digs a ditch on his lower estate connecting with a ditch in existence on *A*'s upper estate. After *B* has completed the ditch no rain falls for over ten years, or, alternatively, rain falls intermittently for the first year, but none falls for the following nine. Has *B* not acquired by prescription a servitude of

with the code provision on how continuous servitudes, once acquired, are lost.<sup>24</sup>

"[A] continuous and apparent servitude is lost if the dominant estate has been so changed by an act of man that the state of facts constituting the servitude has disappeared; or the servient estate has been so changed that the exercise of the servitude is impossible."<sup>25</sup>

The French view of continuity and possession focuses on the setting up of a state of affairs, which once established, lasts indefinitely without the intervention of man on the servient estate or elsewhere.<sup>26</sup> Acquisitive prescription requires an adverse use.<sup>27</sup> Only such a permanent state of affairs can logically constitute an adverse use.<sup>28</sup> If the state of affairs off the servient estate must be reset by the act of man with each use, the owner of the servient estate may tolerate the intrusion as a trespass. Acts of toleration cannot found possession or prescription. This furthers the object of the law. Owners fearful that servitudes might be acquired on their estates by prescription would be less forbearing. They would prevent many acts from taking place on their estates which are beneficial to all and of no detriment to the owners.<sup>29</sup> However, when the state of affairs once established requires no subsequent act of man, the owner should realize that this is a permanent invasion of his property rights—an adverse use. Possession also requires a means of establishing the starting point thereof so that the passage of time<sup>30</sup> necessary for the maintenance of the possessory action<sup>31</sup>

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drain across A's estate by a possession of ten years notwithstanding the absence of any exercise, or only one year's exercise of the servitude because of the dry spell?

24. LA. CIVIL CODE arts. 790, 791 (1870).

25. 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 179 (7th ed. 1966).

26. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2894 (1959).

27. See LA. CIVIL CODE arts. 3434, 3458, 3479, 3487 (1870); Note, 40 TUL. L. REV. 397 (1966).

28. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2954 (1959); *but see* Note, 40 TUL. L. REV. 397, 404 (1966), which concludes that the state of affairs need only be permanent on the servient estate to constitute an adverse use. "[T]o look beyond the acts occurring on the servient estate in deciding whether the servitude is adverse seems pointless."

29. 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2956 (1959); LA. CIVIL CODE arts. 3487(2), 3490 (1870).

30. *Cf.* Hale v. Hulin, 130 So.2d 519 (La. App. 3d Cir. 1961); Kennedy v. Succession of McCollam, 34 La. Ann. 568 (1882).

31. LA. CIVIL CODE arts. 3454-3456 (1870).

and for acquisitive prescription may be proved. This starting point may only be found if there exists a permanent state of affairs both on the servient estate and elsewhere so that no question of precariousness may arise. Otherwise under the Louisiana view, how is the court to know when the owner of the servient estate might realize that the exercise of the servitude is not a temporary thing, but one which the owner of the dominant estate intends to continue to exercise by his own intervention whenever necessary to replenish the water supply, or reset the state of affairs?

The holding in the *Wild* case can possibly be justified in the light of public policy to protect the rice industry. To hold that rice farmers have not prescribed for rice irrigation outlets would work grave hardship because irreplaceable drainage canals might be lost. Apparently this policy decision demanded enlargement of the concept of continuous servitudes to include drainage from dominant estate rice fields flooded periodically by acts of man.

But the *Wild* case is inconsistent with the requirement of a permanent state of affairs for possession and continuity. It is submitted that the French view is more consistent with the spirit of the code provisions.

*John C. Blackman*

#### SUSPENSIVE APPEAL IN EXPROPRIATION PROCEEDINGS

A pipeline corporation brought an action to expropriate a servitude. The defendant challenged the right to expropriate as well as the necessity for the taking. From an adverse judgment the landowner sought a suspensive appeal. The court of appeal denied the motion on the basis that Acts 92, 93, and 108 of 1960 had abolished suspensive appeals in expropriation proceedings.<sup>1</sup> The Louisiana Supreme Court granted certiorari. In the first hearing the court held that "the legislative fiat abolishing suspensive appeals in all expropriation cases is violative of limitations contained in Section 2 of Article 1 and Section 15 of Article 4 of our [Louisiana's] Constitution."<sup>2</sup> No property can be

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1. LA. R.S. 19:13 (1950), *as amended*, La. Acts 1954, No. 706, § 1; La. Acts 1960, No. 108, § 1; LA. CIVIL CODE art. 2634 (1870), *as amended*, La. Acts 1954, No. 705, § 1; La. Acts 1960, No. 92, § 1; LA. CIVIL CODE art. 2636 (1870), *as amended*, La. Acts 1960, No. 93, § 1.

2. Tennessee Gas Transmission Co. v. Violet Trapping Co., 248 La. 49, 72, 176 So.2d 425, 433-34 (1965).