Real Rights: Limits of Contractual and Testamentary Freedom

A. N. Yiannopoulos
REAL RIGHTS: LIMITS OF CONTRACTUAL AND TESTAMENTARY FREEDOM

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In civil law systems, contractual and testamentary freedom in the field of property is limited by rules of public policy enacted in the general interest.1 Apart from general limitations, however, the creation of real rights by juridical act is subject to special rules which are largely insusceptible of modification by agreement of the parties. These rules, limiting contractual and testamentary freedom, are designed to effect a balance between individual demands for the recognition of modifications of property rights to suit individual needs and social demands for the preservation of a relatively simple system of unencumbered property.

The following discussion is devoted to an investigation of the scope of contractual and testamentary freedom in the creation of real rights, which may take the form of conventional servitudes, restraints on trade, restraints on alienation, and building restrictions. Attention will be focused, primarily, on the precepts of the Louisiana Civil Code of 1870 and on the jurisprudence of Louisiana courts. For purposes of comparison and for a better understanding of typical civilian solutions, reference will be made to Roman law and to the legal systems of France, Germany, and Greece.

1. Conventional Servitudes

Article 709 of the Louisiana Civil Code of 1870 and corresponding article 686 of the French Civil Code declare that “owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services imply nothing contrary to the public order.”2 There is no article directly corresponding in the German or Greek Civil Code, but similar limitations on con-

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tractual and testamentary freedom are acquired from the legislative definition of predial servitudes. The reason the redactors of the French Civil Code felt compelled to spell out the limits of contractual and of testamentary freedom in connection with the creation of predial servitudes may be properly understood in the light of historical developments.

In Roman law, predial servitudes were charges laid on an estate in favor of another estate, i.e., real rights on things belonging to another owner (jura in re aliena). In medieval French law, however, predial servitudes evolved into forms of feudal tenures, burdening lands as well as persons. Thus, the tenant of the servient estate owed certain personal duties to the owner of the dominant estate and occupied toward him a position of social inferiority. These feudal institutions were wiped out by the Revolution; and, in giving expression to the new social order, the redactors of the Code Civil sought ways to insure that the old tenures be not resurrected. The best assurance in that regard would be the elimination of real rights other than full ownership and the suppression of contractual freedom in the domain of property law. Yet, there was a legitimate demand for the recognition of proprietary interests less than full ownership, and one of the fundamental precepts of the new legislation was freedom of the will. Faced with these contradictory demands, the redac-

3. See BGB § 1018; GREEK CIV. CODE arts. 1118, 1119.
5. In pre-revolutionary French law, the distinction between personal and real rights applied to institutions of Roman origin only. Feudal institutions were insusceptible of this distinction because they involved charges on lands as well as on persons. See Brudant, La transformation de la propriété foncière dans le droit intermédiaire 122, 123 (Thesis, Paris 1889); Chénon, Les démembrvements de la propriété foncière en France avant et après la Révolution 18 (2d ed. 1923); 2 Chénon, Histoire générale du droit français public et privé § 372 (1929).
6. See 3 Planiol et Ripert, Traité pratique de droit civil français 916 (2d ed. Picard 1952). This is the reason why the redactors of the French Civil Code took care to state that "the servitude does not establish any pre-emience of one estate over the other." French Civ. Code art. 638. Article 2, bk. II, tit. IV, of the Louisiana Digest of 1808 contained a provision corresponding to article 638 of the French Civil Code. This provision was rightly suppressed in the 1825 revision. The redactors observed: "We have thought best to suppress this article which prescribed, that servitudes did not establish any right of pre-eminence of an estate over another, as it is copied from the Code Napoleon, and was adopted in France only for the purpose of preventing, that under the title of servitude feudal rights should be established, which had been before abolished. It is utterly useless among us." 1 Louisiana Legal Archives, Projet of the Civil Code of 1825, at 71 (1937).
tors of the Code Civil struck a happy balance. Contractual and testamentary freedom in matters of property law ought to be respected, provided that the limits of public policy are not transcended. Thus, neither feudal tenures may be resurrected nor interests be created contrary to article 686 of the Code Civil.7 Within these broad limits individuals may modify the provisions of the Code by dismembering their ownership as they see fit and by establishing "such servitudes as they deem proper."8

In addition to the general prohibition of servitudes in violation of the public order, Civil Codes require that "services be not imposed on the person or in favor of the person."9 These two restrictions on contractual and testamentary freedom form the subject of the following discussion.

Services may not be imposed on a person. In the absence of contrary provision of law, predial servitudes may not involve the performance of affirmative acts by the owner of the servient estate.10 For example, the owner of the servient estate may not be bound by virtue of a predial servitude to cultivate the dominant estate or to maintain that estate in good state of repair. Such duties may properly form the object of personal obligations.11 A predial servitude is a dismemberment of ownership, a real right by virtue of which the owner of the dominant estate is entitled to exercise certain prerogatives of ownership over the servient estate; correspondingly, the owner of the servient estate is merely charged with the duty to tolerate the acts of the owner of the dominant estate.12

The law prohibits services intended to form the main object

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7. See A. Yiannopoulos, Civil Law Property § 87 (1966); 3 Planiol et Ripert, Traité pratique de droit civil français 917 (2d ed. Picard 1952).
8. La Civ. Code art. 709; French Civ. Code art. 686. A survey of Louisiana and French jurisprudence indicates that there have been few instances in which parties sought to create servitudes contrary to public order. See Louisiana & A. Ry. v. Winn Parish Lumber Co., 131 La. 288, 59 So. 403 (1912). For French jurisprudence, see Montpellier, July 8, 1879, D. 1880.2.24, S. 1880.2.48 (stipulation establishing the right to open a window and throw refuse on the back yard of a neighbor; held, servitude not contrary to public order); cf. Reg., April 29, 1872, D. 1873.1.132, S. 1873.1.308.
11. Cf. Paris, Jan. 17, 1907, D. 1908.2.221; Note, Demogue, 9 Rev. Trim. Dr. Civ. 435 (1910). Accordingly, these obligations are transferable to acquirers by particular title only if expressly assumed. For the distinction between personal obligations, real obligations, and real rights, see A. Yiannopoulos, Civil Law Property §§ 88, 90, 112 (1966).
of the servitude; it does not exclude the imposition of certain incidental duties that may be necessary for the exercise or preservation of the servitude. Thus, parties may freely stipulate that the owner of the servient estate shall be charged with the duty to keep his estate fit for the purposes of the servitude or that he shall maintain in good state of repair certain works on his land needed for the use or preservation of the servitude. And, under all Civil Codes, if the exercise of the servitude requires certain structures, the owner of the servient estate must keep these structures fit at his expense, unless the contrary is stipulated. French jurisprudence goes still further: the owner of the servient estate may be charged with the duty to produce certain materials, such as coal needed for a factory on the dominant estate, or the generation and transmission of electricity. In these circumstances, the duties imposed on the owner of the servient estate form real rather than personal obligations which are transferable to particular successors without stipulation to that effect.

The prohibition against personal services, other than those regarded as incidental for the use or preservation of the servitude, applies to both conventional and legal servitudes. In the case of legal servitudes, however, the law may impose on the owner of the servient estate certain affirmative duties which could hardly be regarded as incidental. Thus, in France, owners fronting public streets may be charged with the duty to plant trees, forest owners may be required to keep safety zones for protection against fires, and homeowners may be charged with the duty to uplift the facade of buildings. In Louisiana, landowners may be charged with the duty to keep levees in good state of repair and navigable waterways free of growing vegetation on the banks.


19. 2 Feraud-Giraud, Les servitudes de voirie 113 (1850).


Services may not be imposed in favor of a person. According to traditional civilian precepts which have been incorporated in modern civil codes, predial servitudes may not be stipulated in favor of named persons; they must be stipulated in favor of anyone who happens to be owner of the dominant estate. Moreover, rights which have no direct relationship with the use or exploitation of the dominant estate may not be stipulated in the form of predial servitudes.

In Roman law, the creation of a predial servitude was subject to the requirements that there be two estates, and that the servitude have for its object the use or benefit of the estate in favor of which it was established. Rights which had no direct relationship with the use of the dominant estate could not form the object of predial servitudes. Thus, the right to take a walk, or to collect fruits or flowers, on the land of another could not be stipulated as a predial servitude; however, it could properly form the object of a usufruct or of a right of use because the beneficiary could derive the contemplated advantage whether he was owner of an estate or not. But the right to take certain materials from an estate could form the object of either a predial servitude or a usufruct, depending on whether the contemplated advantage was attributed directly to an estate or to a person. For example, the right to take dirt needed for the marketing of the agricultural products of the dominant estate in ceramic containers could be stipulated as a predial servitude. If, however, the dirt was needed for the operation of a pottery, the servient estate could be burdened only with a usufruct because the advantage was attributed to the owner of the manufacturing establishment.

The formulas used by Roman jurisconsults are reflected in the language of articles 709 of the Louisiana Civil Code of 1870 and 686 of the French Civil Code. These articles declare that services may not be imposed "in favor of the person, but only . . . in favor of an estate." French commentators of past generations have interpreted the provision literally to mean that predial servitudes must be advantageous to the dominant estate rather

22. See Ulpian, D. 8.4.1.: "Nemo . . . potest servitutem adquirere . . . nisi qui habet praedium. . . ."
than its owner. Modern authors, however, have observed that the contrast between the dominant estate and its owner is "unintelligible" since rights benefit persons rather than things. Accordingly, the legislative declaration that predial servitudes must confer an advantage on the dominant estate ought to be taken as a metaphor. It merely means that predial servitudes may not be stipulated in favor of a named person, but must be stipulated in favor of anyone who happens to be owner of the dominant estate. Modern civil codes have eliminated analytical difficulties by providing expressly that predial servitudes must confer an advantage on the owner of the dominant estate.

In addition to prohibiting services in favor of a named person, articles 709 of the Louisiana Civil Code and 686 of the French Civil Code give expression to the traditional idea that rights which have no direct relationship with the use or exploitation of the dominant estate may not be stipulated in the form of predial servitudes. The same idea is expressed in the legislative definition of the content of predial servitudes in the Civil Codes of Germany and Greece. Traditional ideas incorporated in modern civil codes, however, must be interpreted in the light of contemporary conditions, without regard to the narrow applications sanctioned by Roman jurisconsults. Accordingly, today, all kinds of rights that have a direct relationship with the use or exploitation of an immovable may be stipulated as predial servitudes. The rights to take a walk, to collect fruits or flowers, to enjoy a swimming pool or a tennis court, and use certain facilities on the land of another may have a direct relationship.

26. Cf. 2 Toullier, Droit civil français 165 (1833); 1 Demante, Cours de droit civil français 229 (1830); J. Pardessus, Traité des servitudes 24 (1817); 2 Marcard, Explication théorique et pratique du Code Civil 434 (1886).
27. 3 Planiol et Ripert, Traité pratique de droit français 921 (2d ed. Picard 1952).
29. See EGB § 1018; GREEK CIV. CODE arts. 1118.
30. See EGB § 1018; GREEK CIV. CODE arts. 1118-1119.
31. See 2 Toullier, Droit civil français 168 (1833); G. Batis, Civil Law Property 299 (3d ed. 1855) (in Greek). But see 3 Aubry et Bau, Droit civil français 88 (6th ed. Esmein 1888); 6 Aubry-Lacantinerie, Traité théorique et pratique de droit civil 806 (3d ed. Chauveau 1905).
32. See Req., July 6, 1874, D. 1875.1.372, S. 1875.1.108 (the vendor of a mill may validly reserve a predial servitude in favor of his estate for the grinding of grain into flour needed for the household). Of course, similar reservations in favor of named persons and their heirs or assigns would have created merely personal obligations. See Req., March 23, D. 1908.1.279; Paul, June 16, 1890, S. 1892.2.313.
with the use or exploitation of an immovable; hence, they may be stipulated as predial servitudes.33

Question has arisen whether fishing or hunting rights may form the object of a predial servitude. According to the prevailing view in France34 and in Greece35 these rights involve a strictly personal gratification for the beneficiary; hence, they may not be stipulated as predial servitudes. Nevertheless, argument may be made that the French, Greek, and Louisiana Civil Codes allow the creation of fishing or hunting servitudes in favor of the owner of an estate destined to the pursuit of fishing or hunting operations.36 In Germany, however, the creation of hunting servitudes is forbidden by special legislation whereas fishing rights may form the object of real charges under applicable local laws.37 In all legal systems under consideration, fishing or hunting rights may be leased for extensive periods of time; and since the validity of the lease is not affected by subsequent changes of ownership, the lessee is adequately protected. The question of the availability of fishing or hunting servitudes has thus mostly academic significance.

Questions whether restraints on trade and on the use or alienation of immovables may form the object of predial servitudes are discussed in the following sections.

2. Restraints on trade

Reasonable restraints on trade, as prohibitions against competition and agreements providing for the delivery of certain quotas of natural, agricultural, or industrial products, may undoubtedly establish personal obligations between the contracting

33. Likewise, the right to take wood for the heating of a house may be stipulated as a predial servitude. See Civ., April 15, 1833, S. 1833.1.278; cf. Colmar, Oct. 15, 1930, S. 1932.2.108, Note by Gézy; Ledoux v. Allegre, 10 La. Ann. 706 (1855). Whether a juridical act is intended to create a personal obligation, a permissible predial servitude, a sui generis real right, or a repubrated predial servitude, may be a question of contractual or testamentary interpretation.


36. See 3 Planigol et Ripert, Traité pratique de droit civil français 926 (2d ed. Picard 1952); 7 Laurent, Principes de droit civil français 170 (2d ed. 1876).

parties. Modern demands of business and finance, however, have given rise to the question whether such stipulations may also form the object of real rights in the form of predial servitudes imposed on, or in favor of, lands destined to commercial or industrial use.

Prohibitions against competition. Louisiana courts have not as yet been faced squarely with the issue whether prohibitions against competition may validly be stipulated as real rights. Vendors and lessors of immovables have, at times, stipulated that they shall not engage in a competitive business with the purchaser or lessee; but such stipulations were intended by the parties to create personal obligations of the vendors or lessors. In Leonard v. Lavigne, a recorded lease provided that "the lessors hereby bind and obligate themselves, their heirs and assigns not to sell or lease all or part of the adjoining premises owned by them to any other person, firm or corporation for the purpose of engaging in a competitive business with this lessee." The adjoining premises were subsequently sold by the lessor to a third person without mention of the restriction in the act of sale. When the new owners started erecting a competitive business on their land, the lessee sought an injunction. The Louisiana Supreme Court held that the stipulation in the contract of lease gave rise to a personal obligation. In the absence of a dominant estate, the stipulation could not establish a predial servitude; and, in the absence of a general development plan in a subdivision, it could not give rise to a sui generis real right in the nature of a valid building restriction. It is submitted that the solution ought to be the same even if the prohibition against competition had been stipulated in favor of an estate rather than a lessee. Prohibitions against competition should not be allowed to restrict the use of

39. See, e.g., Simmons v. Johnson, 11 So.2d 710 (La. App. 2d Cir. 1942). In this case, the vendor of an immovable obligated himself not to enter into competition with the purchaser in the restaurant business. Subsequently, he built a restaurant and sold it to a competitor of the purchaser. In an action for damages and for an injunction against the operation of the competitive business, the court rightly held that the vendor had not violated his agreement not to become a competitor of the purchaser.
40. See, e.g., Hebert v. Dupaty, 42 La. Ann. 343, 346, 7 So. 580, 581 (1889): "Dupaty did not stipulate that no livery stable should be kept on the balance of the property during plaintiff's lease, but that he would not keep a livery stable himself directly or indirectly during that time. It was not a burden that he placed upon the property itself, but an obligation that he imposed upon himself."
41. 245 La. 1004, 162 So.2d 341 (1964).
lands in Louisiana; existing economic needs may be amply satisfied by means of personal obligations.

In France, courts have taken the view that contracts not to compete may not give rise to real rights in the nature of predial servitudes. Beneficiary of the prohibition against competition is the owner of a commercial or industrial establishment rather than the estate on which the establishment is located; moreover, there is no direct relationship between the purpose of the intended servitude and the use of the dominant estate. Thus, prohibitions against the extraction of materials from the ground in favor of competing establishments have been held to create rights other than predial servitudes; and an obligation assumed by the vendor of lands not to sell other lands for the purposes of a competitive business has been held to be personal obligation. In Germany and in Greece, however, agreements not to compete may give rise to predial servitudes, provided that these agreements serve the permanent destination of the dominant estate. Thus, the prohibition of a competitive business on a neighboring estate may constitute a predial servitude in favor of an estate destined to serve permanently a specified commercial or industrial use, as a department store, a filling station, or a factory. But if the dominant estate is used as an office building for physicians or attorneys, a stipulation prohibiting the use of a neighboring building for similar purposes would not create a predial servitude. The building of the dominant estate is not destined to a specified commercial or industrial use; it may also be used as office space for accountants, commercial agents, or brokers. The object of the servitude would thus be a benefit attributed to the owner of the dominant estate rather than to the permanent destination of the immovable.
Quota requirements. Agreements providing for the purchase or sale of certain quotas of agricultural or industrial products may not form the object of real rights. These agreements involve the performance of affirmative acts, and, therefore, may properly form the object of personal obligations only.\(^4\) The question has been discussed extensively in Germany. Courts in that country have consistently refused to recognize as predial servitudes contracts imposing on business establishments the obligation to sell or to purchase exclusively the products of a certain manufacturer or producer.\(^4\) These contracts do not establish predial servitudes in Germany because, in addition to imposing affirmative duties contrary to law, they contemplate the prohibition of juridical acts rather than purely physical acts;\(^5\) moreover, they limit one's freedom to do business which is an attribute of personality rather than of the ownership of land.\(^5\) French courts, however held that charges involving the delivery of certain quantities of natural products needed for the operation of industrial establishments may be given the form of predial servitudes, provided that there is a direct relationship between the purpose of the servitude and the use of the dominant estate. Thus, predial servitudes may be established for the delivery of dirt,\(^5\) stones,\(^5\) or coal\(^4\) to factories; and according to at least one decision, the delivery of hydro-electric energy may become the object of a predial servi-


\(^{49}\) The question has frequently arisen in connection with quota requirements imposed by oil companies and beer breweries on distributors of their products. Private owners of filling stations and beer bars are ordinarily dependent on manufacturers for loans and cash advances. As a part of the consideration for the opening of credit, manufacturers would be interested in securing market outlets by means of predial servitudes. Courts and writers, however, are generally in agreement that quota requirements may not form the object of predial servitudes. See F. Baedtke, Lehrbuch des Sachenrechts 264 (2d ed. 1963); 3 Staudinger-Ring, Kommentar zum BGB. 1048 (11th ed. 1963); Palandt-Hoch, Kommentar zum BGB. 939 (22d ed. 1963); 3 Scheer-Obermayer-Baur, Kommentar zum BGB. 378 (9th ed. 1960); Westermann, Sachenrecht 607 (4th ed. 1960); but see Meisner-Stern-Hodes, Nachbarsrecht 389 (3d ed. 1955).

\(^{50}\) See Bay. OLG, Nov. 21, 1958, 13 MDR 220 (1959).

\(^{51}\) See BGR, Jan. 30, 1959, 9 BGR 244, 247 (1959); BGH, Dec. 6, 1961, 15 NJW 457 (1962).

\(^{52}\) Civ. Jan. 9, 1901.1.140, S. 1901.1.169.
tude. These solutions have been justified on the ground that the duties imposed on the owner of the servient estate are merely incidental to the lawful purpose and content of the servitude. Accordingly, it is doubtful that these solutions will ever be extended by analogy to agreements imposing on business establishments the obligation to sell or to purchase the agricultural or industrial products of a certain manufacturer.

3. Restraints on alienation

According to traditional civilian precepts, juridical acts imposing restraints on the alienation of immovable property give rise to personal obligations only. These obligations are enforceable against the original obligor and his universal successors, that is, heirs, universal legatees, or legatees under universal title. Third persons, and particular successors of the obligor, that is, buyers, donees, or legatees of particular things, are not bound to respect the obligatory relationship between the obligor and the obligee, unless, of course, they are made parties to the re-

56. See 2 Colin, CAPITANT ET JULLIOT DE LA MORANDÈRE, TRAITÉ DE DROIT CIVIL 96 (1959); 1 Josserand, COURS DE DROIT CIVIL POSITIF FRANÇAIS 956 (1932); 4 Huc, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL 103-106 (1893); 11 Laurent, PRINCIPES DE DROIT CIVIL FRANÇAIS 601 (1876). See also BGB § 137; ENNECCERUS-NUFFKNEY, ALLGEMEINER TEIL DES BÜRGERLICHEN REchts 891 (15th ed. 1960); GREEK CIV. CODE art. 177; G. BALd, GENERAL PRINCIPLES OF CIVIL LAW 179 (7th ed. 1955) (in Greek).
58. It is a fundamental principle of civil law that personal obligations are without effect on third persons: res inter alios acta allii non nocet. See LA. CIV. CODE art. 1889: “No one can, by a contract in his own name, bind any one but himself or his representatives...”; FRENCH CIV. CODE art. 1165; cf. 1 LA. LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, at 263 (1937): “The rule is, that contracts neither avail nor injure any but the parties.” For general discussion, see A. Weill, LA RELATIVITÉ DES CONVENTIONS EN DROIT PRIVÉ FRANÇAIS 1-27 (1939); 1 Planiol, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 114 (10th ed. Ripert 1925).
59. See LA. CIV. CODE arts. 1179, 1780, 1797. See also id. art. 3556(28): “The particular successor succeeds only to the rights appertaining to the thing which is sold, ceded or bequeathed to him”; 10 Duranton, COURS DE DROIT FRANÇAIS 269 (1834): “Successors by particular title... merely have the rights that their author had. They are not bound by his personal obligations, but must tolerate the exercise of real rights which he has imposed on the object for the benefit of third persons. In one word, habent causam auctoris sui propter rem.”
60. It follows from the principle of relativity of personal obligations that contractual remedies are unavailable against third persons. According to modern trends, however, the interference with a contractual relationship may give rise to delictual actions. See A. YIANNOPOULOS, CIVIL LAW PROPERTY § 88 (1966).
relationship by their own consent. As a rule, therefore, transfers of immovable property by particular title ought to be valid in spite of the violation of restraints on alienation imposed by juridical acts.

This traditional approach attributes excessive significance to the general interest in the free alienability of property. It fails to recognize that, at least in exceptional circumstances, the general interest in the free alienability of property should be balanced against the interest of individuals to dispose of their property under modifications that contemporary needs dictate. Indeed, in the framework of a well-defined public policy, individuals may have legitimate claims for the enforcement of reasonable restraints on alienation against anyone and in the annulment of unauthorized transfers of immovable property. This may be accomplished in civil law jurisdictions either by straining the notion of personal obligations or by attributing to restraints on alienation the character of real rights, which, by their nature, are effective against anyone.

62. Cf. BGB § 137; Greek Civ. Code art. 177. In case of a threatened violation of a restraint on alienation imposed by juridical act, the obligee's remedy in Germany and in Greece is an injunction brought against the obligor or his universal successors. After violation, the obligee's remedy is ordinarily an action for damages brought likewise against the obligor or his universal successors. Exceptionally, however, the law may provide that an alienation in violation of a restraint imposed by juridical act may be null. See Enneccerus-Nipperdey, Allgemeiner Teil des Bürgerlichen 891 (15th ed. 1960); G. Balis, General Principles of Civil Law 179 (7th ed. 1955) (in Greek). When a restraint on alienation is coupled with a resolutory condition, an attempted transfer of the property is ineffective by virtue of the resolutory condition rather than the prohibition of alienation. Cf. La. Civ. Code art. 2013.
63. Cf. La. Civ. Code art. 491: "Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided that it is not used in any way prohibited by law or ordinances"; French Civ. Code art. 544; BGB § 903; Greek Civ. Code art. 1000.
64. Cf. La. Civ. Code art. 2013: "The real obligation, created by condition annexed to the alienation of real property, is susceptible of all the modifications that the will of the parties can suggest, except such as are forbidden by law." There are no corresponding provisions in the Civil Codes of France, Germany, or Greece.
65. Cf. Queensborough Land Co. v. Cazeaux, 136 La. 724, 727, 67 So. 641, 642 (1915): "[I]t would be unfortunate if our system of land tenure were so hidebound, or if the public policy of the general government or of the state were so narrow, as to tender impracticable a scheme such as the one in question in this case, whereby an owner has sought to dispose of his property advantageously to himself and beneficially to the city wherein it lies."
66. See 2 Carbonnier, Droit civil 93-97 (1967). In common law jurisdictions, chancery courts faced with the problem of the validity of restrictions concerning use of lands among persons other than the original contracting parties gradually fashioned old institutions of contract law into a doctrine
In a leading decision, *Queensborough Land Co. v. Cazeaux*, the Louisiana Supreme Court declared that a restriction of limited duration on the landowner’s right to alienate property to persons of a particular race was valid and enforceable as a charge on the land. The three elements of the right of ownership, the *usus*, *fructus*, and *abusus*, the court reasoned, are susceptible of subdivision within certain limits prescribed by rules of public policy. Thus, whereas absolute or perpetual restraints on alienation are invalid, restraints of limited duration imposed by persons having a substantial interest are valid and enforceable against any acquirer of the land with notice. Restrictions on the right to alienate property to persons of a particular race, religion, or nationality are no longer valid; but restraints on alienation imposed on other grounds may still give rise to veritable real rights in Louisiana. In case of an impending violation, the

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68. See Female Orphan Society v. Y.M.C.A., 119 La. 278, 44 So. 15 (1907); Succession of Franklin, 7 La. Ann. 395 (1852); Henderson v. Rost, 5 La. Ann. 441 (1850).

69. See Queensborough Land Co. v. Cazeaux, 136 La. 724, 730, 67 So. 641, 643 (1915): “The question of how far such a condition will be sustained is one dependent very much upon the facts of each particular case. If the condition is founded upon no substantial reason but merely in caprice, and is of a character to tie up property to the detriment of the public interest, it will not be sustained; otherwise, it will.” The narrow holding of the case is that reasonable restraints on alienation may validly be imposed by an ancestor in title who wishes to secure a general development plan for a subdivision. In this respect, a restraint on alienation may be likened to a building restriction. According to dicta, however, and under the *ratio decidendi*, reasonable restraints on alienation may be validly imposed by any person having a legitimate interest, for example, a testator. For corresponding developments in France, see text at note 80 infra.

70. In *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915), the restraint on alienation had been inserted in the act by which the property was acquired by defendant. The acquirer, however, may be charged with notice by virtue of the public records doctrine. See La. Civ. Code arts. 2264-2266; La. R.S. 9:2721 (1950); McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909); cf. text at notes 124-129 infra.


72. See Queensborough Land Co. v. Cazeaux, 136 La. 727, 737, 67 So. 641, 646 (1915): “This right thus withheld from him [i.e., the right of alienation] is part of the ownership; a dismemberment of it . . . ” It might be argued, of course, that restraints on alienation form real obligations under article 2013 of the Louisiana Civil Code of 1870. Real obligations, however, are not an independent category of real rights under the Code but merely the passive side of all real rights. See A. Yianoupolos, Civil Law Property § 115 (1968).
restraint may be enforced by an action for injunction brought by the person who imposed the restraint or by persons in whose favor the restraint was imposed. After violation, depending on the facts and circumstances of each case, a proper plaintiff may demand damages, resolution of the original transfer of the property, or merely annulment of the alienation made in violation of the restraint.

In France, restraints on alienation may not be stipulated as predial servitudes because the advantage of the restraint is attributed to a person rather than an estate. According to a well-settled jurisprudence, however, which has no direct foundation on the Code Civil, restraints of limited duration, imposed by persons having a legitimate interest, are effective against third

73. See LA. CODE CIV. P. art. 3601.
74. See Queensborough Land Co. v. Cazeaux, 136 La. 724, 737, 67 So. 641, 646 (1915): "[(If these occupants of the other lots in the subdivision were the parties plaintiff in the suit . . . ) their remedy would seem to have to be restricted to injunction . . . and damages." The court based its conclusion on the ground that the restraint was "a sort of stipulation pour autrui."
75. Id.
76. Any transfer of property may be made subject to an express resolutory condition. See LA. CIV. CODE art. 2013. But, at least in onerous transfers of property, a restraint on alienation may be regarded as an implied resolutory condition. See Queensborough Land Co. v. Cazeaux, 136 La. 724, 737, 67 So. 641, 646 (1915): "This stipulation was an essential feature in the scheme of the company; therefore, obviously, the company would not have been willing to enter into contract without it, and, as a consequence, it constitutes a resolutory condition." Resolution, however, ought to be available only when actions for injunction or damages do not afford adequate relief. See also Hebert & Lazarus, The Louisiana Legislation of 1988, 1 LA. L. REV. 80, 113 (1939).
77. See Queensborough Land Co. v. Cazeaux, 136 La. 724, 738, 67 So. 641, 646 (1915): "The defendant Cazeaux may be able, however, to obtain from his vendee a cancellation of the sale by which this condition has been breached, and may prefer to do so rather than have the sale by the company to himself dissolved. The property may, perhaps, have increased in value. The court is at liberty, in its discretion, to grant him time in which to do this, and thereby avoid a dissolution of the sale." In cases involving inter vivos or mortis causa donations of immovables subject to reasonable restraints on alienation, annulment of the alienation made in violation of the restraint rather than resolution of the donation ought to be the rule. Presumably, a donor who imposes a restraint on alienation wishes that the property remain in the patrimony of the donee. Hence, resolution of the donation would be contrary to the intention of the donor and the best interest of the donee. For extensive discussion of this problem in France, see text at note 80 infra.
78. See Civ., Nov. 27, 1907, D. 1908.1460, S. 1909.1.262 (prohibition of alienation to a person planning to engage in a competitive business).
79. See Cheron, La jurisprudence sur les clauses d'inalienabilité, 5 REV. TRIM. DR. CIV. 339, 340 (1906): "There is a radical, irreducible antinomy, between the law and the jurisprudence"; Tissier, Note, S. 1904.1.225, 226: "This system has developed apart from the law, and in our opinion, contrary to law." For a criticism of this jurisprudence, see 11 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 601-14 (1876); 4 HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL 103-08 (1893).
persons in the sense that any alienation in violation of such a restraint is a relative nullity. Commentators have suggested various constructions for the reconciliation of the jurisprudence with the principles of the Code Civil. According to one view, restraints on alienation give rise to a personal incapacity to alienate. This view, however, conflicts with article 1123 of the Code Civil (corresponding to article 1782 of the Louisiana Civil Code), which forbids limitations on the contractual capacity of any person. According to a second view, restraints on alienation give rise to personal obligations not to do. Any alienation in violation of such an obligation may allegedly be set aside by application of article 1143 of the Code Civil (corresponding to article 1928 of the Louisiana Civil Code of 1870), which declares that “the obligee may require that any thing which has been done in violation of a contract, may be undone.” It has been aptly observed, however, that article 1143 of the Code Civil contemplates merely the undoing of material acts; it has nothing to do with the annulment of juridical acts. According to a third view, which is the prevailing one today, restraints on alienation give rise to sui generis real rights.

In Germany and in Greece, restraints on alienation may form the object of personal obligations but not of predial servitudes or other real rights. According to the applicable principles of the law of obligations, alienations made in violation of restraints

80. See Thomas, Des clauses portant défense d’alléner, de céder, ou de saisir dans les dispositions entre vifs ou testamentaires, 32 Rev. Gén. Dr. 39, 117, 241 (1908); Chéron, La jurisprudence sur les clauses d'inaliabilité, 5 Rev. Trim. Dr. Civ. 339 (1908).
81. See 1 Jossesrand, Cours de droit civil positif français 956 (2d. 1932).
82. See 2 Colin, Capitiant, et Juliott de la Morandière, Traité de droit civil 96 (1939).
84. See 3 Planiol et Ripert, Traité pratique de droit civil français 237 n.2 (2d ed. Picard 1952).
85. See 2 Marty et Reynaud, Droit civil 70 (1965); 3 Planiol et Ripert, Traité pratique de droit civil français 230 (2d ed. Picard 1952); 4 Beaudant et Lerbergues-Figuière, Cours de droit civil français 289 (2d ed. Voirin 1938); 11 Aubry et Rau, Droit civil français 196, n.37 septies (5th ed. Bartin 1919); Tissier, Note, S. 1904.1.225. For a dogmatic analysis, see Béraud, L'indisponibilité juridique, D. 1952. Chr. 187.
86. See Meisner-Stern-Hodes, Nachbarrecht 395 (3d ed. 1956); G. Balis, Civil Law Property 303 (3d ed. 1955) (in Greek).
87. In Germany and in Greece, the principles of contractual and testamentary freedom have only limited applications in the field of property law. The number and incidents of real rights are specified in the law, and the creation of real rights other than those established by legislation is excluded. Interested parties, however, are free to work modifications on recognized real rights when the law so provides. See A. Yiannopoulos, Civil Law Property §§ 117, 118 (1966).
imposed by juridical acts are valid, unless the law establishes some exception.88

4. Restraints on the use of immovables; building restrictions

According to traditional civilian precepts, restraints on the use of immovables may form either personal obligations or servitudes.88 Contemporary developments in Louisiana and in France, however, have brought into focus the question whether restraints on the use of immovables may also form sui generis real rights distinct and distinguishable from servitudes.90 Perhaps due to the inadequacy of building and zoning ordinances to meet demands for the preservation and enhancement of property values, landowners and developers of land in the two countries since the turn of the century have imposed restrictions limiting the future use of immovables to certain specified purposes, prohibiting the erection of certain types of structures, or specifying the type and value of buildings to be erected.91

Certain types of restraints on the use of immovables may be stipulated everywhere as predial servitudes, provided that the essential requirements for the creation of predial servitudes are met. Thus, an estate may be charged in favor of another estate

88. See BGB § 137; GREEK CIV. CODE art. 177; ENNECERUS-NIPPERDNY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 891 (5th ed. 1960); G. BALIS, GENERAL PRINCIPLES OF CIVIL LAW 179 (7th ed. 1955) (in Greek).
89. See Louisiana & A. Ry. v. Winn Parish Lumber Co., 131 La. 288, 59 So. 403 (1912). See also Cambais v. Douglas, 167 La. 791, 120 So. 369 (1929); cf. Leonard v. Lavigne, 245 La. 1004, 162 So.2d 341 (1964). A restraint on the use of an immovable imposed in favor of another immovable should be qualified as a predial servitude; a similar restraint established in favor of a person might be qualified as a limited personal servitude. On the freedom of interested parties to create personal servitudes other than usufruct, use, or habitation, see A. YIANNOPOULOS, PERSONAL SERVITUDES §§ 123, 125 (1968).
Restrains on the use of immovables that may qualify as servitudes are enforceable against anyone as charges on the land. In contrast, personal obligations are enforceable against the original obligor and his universal successors, i.e., heirs, universal legatees, or legatees under universal title. They are not enforceable against particular successors, i.e., buyers, donees, or legatees of particular things, unless expressly assumed. See La. CIV. CODE art. 3556(28); Cambais v. Douglas, 167 La. 791, 120 So. 369 (1929); Herzberg v. Harrison, 102 So.2d 554 (La. App. 1st Cir. 1958); Murphy v. Marino, 60 So.2d 128 (La. App. 1st Cir. 1952); LeBlanc v. Palmisano, 43 So.2d 263 (La. App. Orl. Cir. 1949); A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 104, 113 (1966).
90. See A. YIANNOPOULOS, CIVIL LAW PROPERTY § 104 (1966). For a general discussion concerning the freedom of individuals to create real rights other than those recognized in the Civil Codes, see id. §§ 87, 96.
with restrictions pertaining to the height of buildings,92 buildings
set off from property lines,93 and the exclusion of commercial or
industrial uses.94 But restraints involving affirmative acts, as
those concerning the type and value of buildings to be erected,
may not properly form the object of predial servitude.95 Never-
theless, landowners who acquired or alienated property in reli-
ance upon restrictions that may not give rise to predial servitudes
may have a legitimate interest in the enforcement of these re-
strictions against any violator. In order to afford protection in
appropriate cases, French courts have occasionally strained the
notion of personal obligations96 whereas Louisiana courts have
developed a body of law dealing with "building restrictions"97
as distinct species of real rights.

So. 102 (1901); French Civ. Code art. 689; 3 Planiol et Ripert, Traité
Pratique de droit civil français no 923 (2d ed. Picard 1952); Greek
Civ. Code art. 1120; G. Balis, Civil Law Property 315 (3d ed. 1955)
in Greek); cf. BGB § 1018; Meisser-Stern-Hodes, Nachbarrecht 395 (3d ed. 1955). In Roman law,
this servitude was known as servitus non altius tollendi. See W. Buckland.
A Text-Book of Roman Law 264 (2d ed. 1950).

93. See La. Civ. Code art. 728(3), which, by clear implication, authorizes
the creation of such servitudes. Interested parties, however, ordinarily im-
pose set-off limitations in the form of building restrictions, i.e., sui generis
real rights, rather than in the form of predial servitudes. For France,
Germany, and Greece, see Req., Oct. 28, 1938, Gaz. Pal. 1938.2.839; Req., Feb.
5, 1934, Gaz. Pal. 1934.1.724; Civ., May 5, 1919, D. 1923.1.230; Meisser-Stern-
Hodes, Nachbarrecht 396 (3d ed. 1956); G. Balis, Civil Law Property 300 (3d
ed. 1955) (in Greek).

94. See McGuffy v. Weil, 240 La. 758, 125 So.2d 154 (1960), involving a
veritable predial servitude prohibiting commercial usage of the servient
estate; cf. Holloway v. Ransome, 216 La. 317, 43 So.2d 673 (1949), involving
similar limitations in the form of building restrictions. French courts have
held, with the approval of doctrinal writers, that the exclusion of com-
mercial or industrial usage may form the object of a predial servitude. See
Civ., June 30, 1938, D. 1938.1.65, Note by Besson; Paris, June 6, 1930, Gaz.
Trib. 1930.2.191, 29 Rev. Trim. Dr. Civ. 1110 (1930); Paris, March 27, 1924, D.H.
1924.398; 3 Planiol et Ripert, Traité pratique de droit civil français no 923
(2d ed. Picard 1952); cf. Civ., March 29, 1933, Gaz. Pal. 1933.2.42 (restraints
on the use of immovables may form the object of predial servitudes but
there must be an express stipulation that the restraints are imposed in
favor of another estate); Note, Solus, 32 Rev. Trim. Dr. Civ. 904 (1933).
Contra: Bruxelles, March 1, 1909, S. 1909.4.15 (the prohibition of commercial
or industrial usage may form the object of personal obligations only). For
Germany and Greece, see F. Baur, Lehrbuch des Sachenrechts 264 (2d ed.
1953); G. Balis, Civil Law Property 300, 313 (3d ed. 1955) (in Greek).

95. See Cambais v. Douglas, 167 La. 791, 120 So. 369 (1929); but cf. 3
Planiol et Ripert, Traité pratique de droit français no 923 (2d ed. Picard
1952); Civ. May 5, 1919, D. 1923.1.230 (affirmative duties incidental to the servitute).

96. See, e.g., Civ., Dec. 12, 1899, D. 1900.1.361, Note by Gény (clauses re-
lieving the operator of a mine from liability for damage to the surface are
obligations effective against third persons).

97. See Comment, 21 La. L. Rev. 488 (1961). In this respect, courts had to
balance the demands of a firmly established policy opposing restrictions on
the use and alienability of property with the requirements of contractual
freedom and the right of individuals to dispose of their property as they
Building restrictions constitute the most important category of restraints on the use or disposition of immovables from the viewpoints of urban and suburban developments in Louisiana. They have been defined as limitations “inserted in deeds in pursuance of a general plan devised by the ancestor in title to maintain certain building standards and uniform improvements ...”98 The requirements of an ancestor in title and of a general development plan are essential features of building restrictions as sui generis real rights. Unlike predial servitudes under the Civil Code, building restrictions may involve certain affirmative duties99 and may exclude the performance of certain judicial acts, as alienation to certain classes of persons;100 moreover, building restrictions may be imposed even in the absence of a dominant estate.101

Nature of building restrictions. The matter of classification

please. See LA. CIV. CODE arts. 491, 1764 cf. Female Orphan Society v. Young Men's Christian Ass'n, 119 La. 278, 44 So. 15 (1907); Comment, 8 Tul. L. Rev. 262 (1933).

98. See Salerno v. DeLucca, 211 La. 659, 666, 30 So.2d 678, 679 (1947), and cases there cited. According to firmly established Louisiana jurisprudence, building restrictions constitute real rights only in the framework of subdivision planning. They must be imposed, at least by implication, in favor of lots in a subdivision in accordance with a general development plan. See text at note 118 infra. If the restrictions are imposed on individual lots without regard to a general development plan, they may constitute veritable predial servitudes, provided, of course, that the requirements for the creation of predial servitudes are met. See McGuffy v. Well, 240 La. 758, 125 So.2d 154 (1960) (restriction of commercial usage imposed on a single lot in favor of another lot). If the requirements for the creation of predial servitudes are not met, the restrictions may only be personal obligations. See Leonard v. Lavigne, 243 La. 1004, 162 So.2d 341 (1964); Cambais v. Douglas, 167 La. 791, 120 So. 399 (1929); LeBlanc v. Palmisano, 43 So.2d 263 (La. App. Orl. Cir. 1949). But see Tucker v. Woodside, 53 So.2d 503 (La. App. 1st Cir., 1951), criticized in A. YIANNOPOULOS, CIVIL LAW PROPERTY § 114 (1966). This isolated decision, deviating from well-established principles of property law, should be regarded as confined to its own facts.

99. See, e.g., restrictions as to the value of buildings to be erected: Edwards v. Wiseman, 198 La. 352, 3 So.2d 661 (1941); Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938); Cunningham v. Hall, 148 So.2d 808 (La. App. 4th Cir. 1963); Herzberg v. Harrison, 102 So.2d 554 (La. App. 1st Cir. 1958); and, as to the type of buildings to be erected, see, e.g., Salerno v. DeLucca, 211 La. 659, 30 So.2d 678 (1947); Rabouin v. Dutrey, 131 La. 723, 160 So. 393 (1935); Willis v. New Orleans East Unit of Jehovah's Witnesses, Inc., 156 So.2d 310 (La. App. 4th Cir. 1963); Community Builders, Inc. v. Scarborough, 149 So.2d 141 (La. App. 3d Cir. 1963).

100. See Queensborough Land Co. v. Cazeaux, 135 La. 724, 67 So. 641 (1915); cf. Guyton v. Yancey, 240 La. 794, 125 So.2d 365 (1961); McGuffy v. Well, 240 La. 758, 125 So.2d 154 (1960); Rabouin v. Dutrey, 131 La. 723, 160 So. 393 (1935); Bollan v. Porche, 149 So. 272 (La. App. Orl. Cir. 1933); but cf. text at note 71 supra.

101. See text at note 111 infra. Restrictions imposed by subdivider prior to the creation of a subdivision do not qualify as predial servitudes because the requirement of two estates is not met. See LA. CIV. CODE art. 648. After the first lot is sold, however, restrictions involving passive duties may certainly constitute veritable predial servitudes. See note 98 supra.
of building restrictions has given rise to analytical difficulties in Louisiana. In one line of cases, building restrictions are likened to predial servitudes\(^\text{102}\) under article 728 of the Louisiana Civil Code of 1870.\(^\text{103}\) This classification, however, may properly apply to building restrictions involving prohibition of material acts in favor of a dominant estate; it may not apply to restrictions involving affirmative duties.\(^\text{104}\) In a second line of cases, building restrictions are termed real obligations accompanying the land in the hands of any acquirer. This classification allegedly rests on article 2012 of the Louisiana Civil Code of 1870.\(^\text{105}\) According to accurate analysis, however, real obligations are not an independent category of rights but merely the passive side of all real rights. Moreover, the Louisiana Supreme Court has held that the enumeration of real obligations in article 2012 is exclusive rather than merely illustrative;\(^\text{106}\) and, since building restrictions are not mentioned in that article, they should not be classified as real obligations. Finally, in a third line of cases, building restrictions have been classified as covenants running with the land.\(^\text{107}\) This is common law terminology deriving from institutions so foreign to civil law property that its continued use may only result in confusion.\(^\text{108}\) The common law doctrine of covenants running

\(^{102}\) See, e.g., Gerde v. Simonson Investments, Inc., 251 La. 893, 207 So.2d 360 (1968); McGuffy v. Weil, 240 La. 758, 125 So.2d 154 (1960); Holloway v. Ransome, 216 La. 317, 43 So.2d 673 (1949); Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938). Quite frequently, however, Louisiana courts use the expressions “real obligations” and “covenants running with the land” as equivalents to predial servitudes. See, e.g., Clark v. Reed, 122 So.2d 344 (La. App. 2d Cir. 1960) (building restrictions termed “servitudes, real rights or obligations, or covenants running with the land”).

\(^{103}\) See LA. CIV. CODE art. 728(3): “Non-apparent servitudes are such as have no exterior sign of their existence; such, for instance, as the prohibition of building on an estate, or of building above a particular height.” This article is merely illustrative of permissible servitudes affecting buildings.

\(^{104}\) Thus, in Cambais v. Douglas, 167 La. 791, 120 So. 369 (1929), the Louisiana Supreme Court held that a contract imposing affirmative duties gives rise to personal obligations rather than servitudes.

\(^{105}\) See LA. CIV. CODE art. 2012; Leonard v. Lavigne, 245 La. 1004, 162 So.2d 341 (1964); Salerno v. De Lucca, 211 La. 659, 30 So.2d 678 (1947); cf. Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938) (“real obligations” which “may be likened to servitudes”).


\(^{108}\) See Comment, 33 TUL. L. REV. 822 (1959). In Leonard v. Lavigne, 245 La. 1004, 1007, 162 So.2d 341, 342 (1964), the lower court had held that a stipulation in a lease was a covenant running with the land. The Louisiana Supreme Court reversed and stated tersely that “the appellate court . . . relied primarily on the law universally obtaining in the common law states . . . While these rules of common law jurisprudence are sometimes persuasive, they are not controlling under our system of civil law.”
with the land dates back to the time when common law refused to recognize the assignability of contractual rights and obligations. The development of the doctrine brought about a set of technical and sometimes artificial rules designed to determine the existence of "privity of estate" and the question whether a covenant "touches and concerns" land. Some of these rules have been subjected to criticism in modern times as inapposite to contemporary demands. It would thus be a mistake for Louisiana courts to adopt this body of law in its entirety, with all its historical coloring and artificialities, when they can turn to the Civil Code for simpler solutions.

Preferably, building restrictions that may not qualify as predial servitudes under the Louisiana Civil Code of 1870 should be classified as sui generis real rights akin to predial servitudes. Thus, they should be governed by the general rules applicable to predial servitudes, subject to any exceptions established by special legislation or jurisprudence as to the creation, enforcement or termination of building restrictions.

Creation of building restrictions. Building restrictions are ordinarily created by developers of land who intend to subdivide their property into individual lots destined to residential, commercial, or industrial uses. After the establishment of a subdivision, however, landowners may occasionally enter into agreements designed to restrict the use of their property. Unlike restrictions created by developers of land, which do not qualify as veritable servitudes due to the absence of a dominant estate, restrictions imposed by landowners after the creation of a subdivision may qualify either as predial servitudes or as sui generis real rights.

110. Id.; RESTATEMENT OF PROPERTY, Introductory notes at 3150 (1944).
111. Cf., e.g., C. CLARK, REAL COVENANTS ch. IV (1929).
112. See, e.g., Guyton v. Yancey, 240 La. 794, 125 So.2d 365 (1961) (real rights running with the land); Edwards v. Wiseman, 198 La. 382, 3 So.2d 661 (1941); Community Builders, Inc. v. Scarborough, 149 So.2d 141 (La. App. 3d Cir. 1963); Herzberg v. Harrison, 102 So.2d 554 (La. App. 1st Cir. 1958).
115. Outside of subdivision planning, agreements among landowners imposing restrictions on individual lots in favor of other lots may give rise to veritable predial servitudes. See LA. CIV. CODE arts. 646, 709; McGuffy v. Weil, 240 La. 758, 125 So.2d 154 (1960) (restriction affecting a single lot). The Civil Code specifically permits the creation of a servitude on one estate in favor of several estates or of servitudes on several estates in favor of one estate. See LA. CIV. CODE art. 745. Agreements among landowners imposing
In the past, building restrictions were inserted by developers of land in each individual act of transfer of property in a subdivision. Today, however, building restrictions are ordinarily contained in recorded notarial acts or are annexed to recorded plats of subdivisions. Individual transfers of property then incorporate by reference the recorded acts or plats.

The creation of building restrictions as sui generis real rights is subject to the requirement that there be a general plan that is feasible and capable of being preserved. Thus, when restrictions are imposed by stipulations inserted in individual acts of sale, care should be taken to impose uniform restrictions on most, if not all, individual lots in the subdivision. Omission to make the restrictions uniform or to insert them in a substantial number of sales may be taken to indicate failure of a general development plan. In these circumstances, the stipulations establishing the restrictions may create personal obligations rather than sui generis real rights.

By analogy to continuous and non-apparent servitudes, building restrictions must be created by title, which, in order to constitute building restrictions, i.e., sui generis real rights, rather than predial servitudes. See Gerde v. Simonson Investments, Inc., 251 La. 893, 207 So. 2d 360 (1968); cf. Pizzolato v. Cataldo, 202 La. 675, 12 So.2d 677 (1943). Since the rules governing building restrictions as sui generis real rights differ in certain particulars from the rules governing predial servitudes, question may arise as to the precise nature of the rights created by the agreement among landowners. This is a matter of contractual interpretation, resolved in the light of the facts of each case and in accordance with the intention of the parties.


118. See Gerde v. Simonson Investments, Inc., 251 La. 893, 207 So.2d 360 (1968); Salerno v. DeLuca, 211 La. 659, 30 So.2d 678 (1947); Alfortish v. Wagner, 200 La. 198, 7 So.2d 708 (1942); Community Builders, Inc. v. Scarborough, 149 So.2d 141 (La. App. 3d Cir. 1963); Olivier v. Berggren 138 So.2d 325 (La. App. 4th Cir. 1962). In the absence of a general plan, however, the building restrictions may constitute veritable predial servitudes. See McGuffy v. Well, 240 La. 758, 125 So.2d 154 (1960).

119. See Murphy v. Marino, 60 So.2d 128 (La. App. 1st Cir. 1952).

120. See In re Congregation of St. Rita Roman Catholic Church, 130 So.2d 425 (La. App. 4th Cir. 1961) (restrictions on 40 percent of the lots; failure of plan); Herzberg v. Harrison, 102 So.2d 554 (La. App. 1st Cir. 1958); Munson v. Berdon, 51 So.2d 157 (La. App. 1st Cir. 1951); cf. Raboulin v. Dutrey, 181 La. 725, 160 So. 393 (1935).

121. See In re Congregation of St. Rita Roman Catholic Church, 130 So.2d 425 (La. App. 4th Cir. 1961); Herzberg v. Harrison, 102 So.2d 554 (La. App. 1st Cir. 1958); LeBlanc v. Palmisano, 43 So.2d 263 (La. App. 4th Cir. 1948); Cambals v. Douglas, 167 La. 791, 120 So. 369 (1929).

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to be effective against third persons, must be recorded. In this respect, title means any juridical act; hence, restrictions may validly be established by declarations of intent made in the act of sale to the present owner, to an ancestor, or in a separate document. By virtue of the public records doctrine, an acquirer of immovable property burdened with recorded restrictions is presumed to have notice. Thus, the restrictions need not appear in the act by which the present owner acquired the property nor in his chain of title; it suffices that the restrictions were recorded in some form at the time the original subdivider conveyed the property to the ancestor of the present owner. It follows that in the absence of recorded restrictions at the time of the first sale by the subdivider, the property is transferred free from any restrictions; and if, after the first sale, the subdivider imposes blanket restrictions by a recorded

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124. See McGuffy v. Well, 240 La. 758, 766, 125 So.2d 154, 157 (1960): "The plaintiff attempts to equate 'title' as used in the article [766 of the 1870 Code] with the deed, or act of sale, by which the servient estate is acquired. He contends that, in order to create the servitude, the restriction must be incorporated in the deed conveying the land. Such a narrow construction, necessarily, does violence to the codal provision . . . . The conclusion is inescapable that 'title' as used in Article 766 refers to the method by which the servitude may be acquired and does not relate exclusively to the conveyance of the servient estate. It is a generic term which embraces any juridical act."

125. See, e.g., Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938).

126. See McGuffy v. Well, 240 La. 758, 125 So.2d 154 (1960); Clark v. Reed, 122 So.2d 344 (La. App. 2d Cir. 1960); cf. Pizzolato v. Cataldo, 202 La. 675, 12 So.2d 677 (1943). If there has been no recordation of a general plan nor restrictions in the chain of title, the use of the property is unrestricted insofar as third persons are concerned. Holloway v. Ransome, 216 La. 317, 43 So.2d 673 (1949).

127. See Anderson v. Courtney, 190 So.2d 493, 495 (La. App. 1st Cir. 1966): "This court recognises the principle that the civil law favors the free use and alienability of immovable property and that unless a purchaser is given recorded notice of restrictions and impairment of use such purchaser cannot be affected thereby." See also Community Builders, Inc. v. Scarborough, 149 So.2d 141 (La. App. 3d Cir. 1963); Willis v. New Orleans East Unit of Jehovah's Witnesses, Inc., 158 So.2d 310 (La. App. 4th Cir. 1963).

128. See McGuffy v. Well, 240 La. 758, 125 So.2d 154 (1960); Anderson v. Courtney, 190 So.2d 493 (La. App. 1st Cir. 1966); Clark v. Reed, 122 So.2d 344 (La. App. 2d Cir. 1960).

129. See Anderson v. Courtney, 190 So.2d 493, 495 (La. App. 1st Cir. 1966): "In the absence of recorded . . . covenants, the original purchasers of lots 5 and 6 acquired the usus, the fructus, and the abusus of these two lots of ground in their purest and most complete forms, with all of the attributes thereunto appertaining." See also Holloway v. Ransome, 216 La. 317, 43 So.2d 673 (1949).
A prospective purchaser of immovable property, however, is not charged with notice of recorded building restrictions affecting the property. Accordingly, if existing restrictions were not disclosed to him at the time of the conclusion of the contract to sell, the contract is invalid because the title of the vendor is not clear. Moreover, if there is doubt as to the existence or validity of building restrictions, the purchaser is entitled to refuse specific performance because the title of the vendor is suggestive of litigation. The vendor may not demand specific performance on the grounds that existing restrictions have been abandoned or terminated by prescription. A judgment determining these issues in an action for specific performance would not be binding on third persons; and, after completion of the sale, the purchaser might be subjected to litigation by persons seeking to enforce the restrictions. Under the circumstances, the best solution for the vendor is to seek additional time to perfect his title by an action for declaratory judgment.

Protection and enforcement of building restrictions. As real rights burdening an immovable in favor of other immovables, building restrictions involve an active side (right) and a passive side (real obligation). The active side consists of the claim of landowners whose property benefits from the restrictions to have the enjoyment of their rights without interference from anyone. The passive side consists of the duty of landowners whose property is burdened to do nothing in violation of the

130. See Anderson v. Courtney, 190 So.2d 493, 495 (La. App. 1st Cir. 1966): 
"[W]hen these lots were alienated by the original subdivider of this land without recorded notice of restrictions such restrictions cannot thereafter be applied unless or until a vendor specifically imposes such restrictions in his act of alienation." By analogy to the rules governing predial servitudes, building restrictions imposed after the recordation of a real mortgage may not "prejudice or diminish the rights of the mortgagee or any future purchaser under a foreclosure sale." See Vernon v. Alphin, 98 So.2d 280, 284 (La. App. 1st Cir. 1957); cf. La. Civ. Code art. 750.


restrictions. It ought to follow, then, that actions for the protection and enforcement of building restrictions may be brought against any violator\textsuperscript{137} by the persons entitled to these “property rights.”\textsuperscript{138}

A decision of the Louisiana Supreme Court, based mostly on common law authorities, might be taken to indicate that actions for the protection and enforcement of building restrictions may be brought only by landowners in the immediate vicinity of the alleged violation.\textsuperscript{139} It would seem, however, that any landowner in a subdivision is adversely affected by violations,\textsuperscript{140} and has a substantive right as well as procedural standing to bring action.\textsuperscript{141} Persons whose property is located outside the restricted area may not sue for the enforcement of building restrictions as \textit{sui generis} real rights;\textsuperscript{142} these persons, however, may have claims for the enforcement of building restrictions as personal obligations.\textsuperscript{143} Dicta in a number of Louisiana decisions might be taken to indicate that landowners whose property is free of restrictions may not bring actions to set aside violations on restricted property in the subdivision.\textsuperscript{144}

\textsuperscript{137} See, e.g., Finn v. Murphy, 72 So.2d 358 (La. App. Orl. Cir. 1954) (action brought against the landowner whose property was bound by restrictions as well as against a contractor making works in violation of the restrictions).

\textsuperscript{138} Willis v. New Orleans East Union of Jehovah’s Witnesses, Inc., 156 So.2d 310, 313 (La. App. 4th Cir. 1963). Quite apart from property theory, the building restrictions imposed by a subdivider constitute a tacit \textit{stipulation pour autrui} in favor of the purchasers of individual lots. Queensborough Land Co. v. Cazeaux, 136 La. 724, 737, 67 So. 641, 646 (1915). Accordingly, landowners in a subdivision may have recourse to both contractual and property actions.

\textsuperscript{139} See Guyton v. Yancey, 240 La. 794, 125 So.2d 365 (1960); Comment, 21 LA. L. REV. 468 (1961).

\textsuperscript{140} The effect of violations of restrictions is bound to be felt, sooner or later, in the entire subdivision. Accordingly, any landowner should be entitled to enforce the restrictions before they creep from distant parts of the subdivision to the property next door. See Comment, 21 LA. L. REV. 468 (1961).

\textsuperscript{141} See LA. CODE CIV. P. art. 681.

\textsuperscript{142} See Lillard v. Jet Homes, Inc., 129 So.2d 109 (La. App. 2d Cir. 1961); Begnaud v. Hill, 109 So.2d 562 (La. App. 1st Cir. 1959). This is so because building restrictions constitute \textit{sui generis} real rights only in the framework of subdivision development. See text accompanying note 98 supra.

\textsuperscript{143} An obligee may have recourse to contractual remedies for the violation of restrictions that constitute valid personal obligations, whether his property is located inside or outside a subdivision. See In re Congregation of St. Rita Roman Catholic Church, 130 So.2d 425 (La. App. 4th Cir. 1961); Herzberg v. Harrison, 102 So.2d 554 (La. App. 1st Cir. 1958); Murphy v. Marino, 60 So.2d 128 (La. App. 1st Cir. 1952); LeBlanc v. Palmisano, 43 So.2d 263 (La. App. Orl. Cir. 1949); cf. Leonard v. Lavigne, 245 La. 1004, 162 So.2d 341 (1964).

\textsuperscript{144} See, e.g., Alfortish v. Wagner, 200 La. 198, 210, 7 So.2d 708, 712 (1942): “[W]e notice that the defendant complains that two of the plaintiffs . . . are without a right to maintain the present suit because the building
It would seem, however, that restrictions may be imposed in favor of any lot in a subdivision without the necessity of mutuality of obligations. Hence, depending on the particular plan of a subdivision, owners of unrestricted property may have "a real and actual interest" in the enforcement of restrictions as real rights.

Building restrictions are ordinarily enforced by actions for injunction brought by the original subdivider or by landowners in a subdivision. Violators may thus be forced to cease activities in contravention of the restrictions or to remove objectionable structures. Apart from the injunctive process, however, violators of building restrictions may be sued for damages; and, in case the building restrictions form part of a contract that has been violated, proper parties may have recourse to contractual remedies under the law of conventional obligations. Moreover, if the violation of a restriction fulfills the

restrictions were omitted from their original titles. This point is of no importance whatsoever as it is clear that the dismissal of the suit as to these plaintiff's would not affect the right of the other five plaintiffs to obtain the redress granted by the trial Judge."


146. See, e.g., Gerde v. Simonson Investments, Inc., 251 La. 893, 207 So.2d 360 (1968); Guyton v. Yancey, 240 La. 794, 125 So.2d 365 (1960); McGuffy v. Weil, 240 La. 758, 125 So.2d 154 (1960); Salerno v. DeLucca, 211 La. 659, 30 So.2d 678 (1947); Alfortish v. Wagner, 200 La. 188, 7 So.2d 708 (1942); Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938); Hill v. Wm. P. Ross, Inc., 166 La. 581, 117 So. 725 (1928).

147. See, e.g., Gerde v. Simonson Investments, Inc., 251 La. 893, 207 So.2d 360 (1968); Guyton v. Yancey, 240 La. 794, 125 So.2d 365 (1960); McGuffy v. Weil, 240 La. 758, 125 So.2d 154 (1960); Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938).

148. See, e.g., Salerno v. DeLucca, 211 La. 659, 30 So.2d 678 (1947); Community Builders, Inc. v. Scarborough, 149 So.2d 141 (La. App. 3d Cir. 1963); Willis v. New Orleans East Unit of Jehovah's Witnesses, Inc., 156 So.2d 310 (La. App. 4th Cir. 1963); Sherrouse Realty Co. v. Marine, 46 So.2d 156 (La. App. 2d Cir. 1950).

149. Dicta in Queensborough Land Co. v. Cazeaux, 136 La. 724, 737, 67 So. 641, 646 (1915), indicates that, upon violation of restrictions, "the occupants of the lots in the subdivision" are entitled to claim "damages." Cf. La. R.S. 9:5622 (1950). It would seem that the action for damages contemplated by the Queensborough decision and by the statute should be grounded on contractual faults. No litigation concerning actions for damages for violations of restrictions seems to have reached the appellate level. See Comment, 21 La. L. Rev. 468 (1961).

150. For example, an obligor under a contract imposing building restrictions may be sued by the obligee for specific performance or for dissolution of the contract. See La. Civ. Code arts. 1926-1929. These contractual remedies are not available to landowners in a subdivision seeking to enforce restrictions as real rights, i.e., against violators with whom the landowners are not in a contractual relationship. Cf. Queensborough Land Co. v. Cazeaux, 136 La. 724, 737, 67 So. 641, 646 (1915): "If these occupants of the other lots in the subdivision were the parties plaintiff in the suit, and were the sole
elements of delictual responsibility for damage to property,\textsuperscript{151} if it constitutes an unreasonable use of property,\textsuperscript{102} or if it amounts to a disturbance of possession,\textsuperscript{153} landowners may demand protection of their property rights under the general law.\textsuperscript{154}

**Termination of building restrictions.** Building restrictions may terminate according to terms prescribed in the act that created them,\textsuperscript{155} under rules enacted by special legislation,\textsuperscript{156} or under rules adopted by jurisprudence.\textsuperscript{157} In addition, since building restrictions are likened to predial servitudes, the methods provided in the Louisiana Civil Code of 1870 for the extinction of predial servitudes\textsuperscript{158} may be applied by analogy, to the extent that application of these methods is compatible with the notion and function of building restrictions.\textsuperscript{159}

Persons imposing building restrictions may, in the exercise of their freedom of will, prescribe rules for termination, pro-

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\textsuperscript{151} See LA. CIV. CODE art. 3454(2), 3455; LA. CODE CIV. P. art. 3656; A. Yiannopoulos, Civil Law Property § 141 (1966).


\textsuperscript{153} See LA. CIV. CODE arts. 3454(2), 3455; LA. CODE CIV. P. art. 3656; A. Yiannopoulos, Civil Law Property § 138 (1966).

\textsuperscript{154} For the availability of additional remedies for the protection of immovable real rights, see A. Yiannopoulos, Civil Law Property § 141 (1966). For the availability of actions for declaratory judgments as to the existence or validity of building restrictions, see McGuffy v. Weil, 240 La. 758, 125 So.2d 154 (1960); Johnston v. Frantom, 139 So.2d 404 (La. App. 2d Cir. 1963); In re Congregation of St. Rita Roman Catholic Church, 130 So.2d 423 (La. App. 4th Cir. 1961); LA. CODE CIV. P. arts. 1271-1273.

\textsuperscript{155} See notes 167-168 infra; cf. LA. CIV. CODE art. 709(2).

\textsuperscript{156} See LA. R.S. 9:5622 (1950), as amended. See also text at notes 165-166 infra.

\textsuperscript{157} See text at notes 173-178 infra.


\textsuperscript{159} For example, the ten-year prescription of non-use "from the day any act contrary to the servitude has been committed" (La. CIV. CODE art. 790), has been superseded by special legislation establishing a two-year prescriptive period. See text at note 165 infra.
vided, of course, that these rules imply nothing contrary to the
public order. Thus, provision may be made for termination of
the restrictions upon the lapse of a period of time or upon
the happening of an event; moreover, provision may be made for
termination of the restrictions by agreement among the
landowners in whose favor the restrictions are imposed and for
the procedures by which this consent is to be obtained. In the
absence of pertinent provisions in the act that imposed the
restrictions, special legislation confers on landowners represent-
ing a majority of the square footage of land in a subdivision
the right to terminate by agreement restrictions that have been
in effect for at least fifteen years. This agreement must be
recorded in the conveyance and mortgage records of the parish
in which the land is located. The language of the statute
permits the interpretation that building restrictions may be
terminated by the statutory majority either for the whole or
only a portion of the restricted area.

According to special legislation, actions to enjoin or to
obtain damages for any violation of building restrictions are
subject to a two-year liberative prescription that begins to run
upon the commission of a violation. Courts interpreting the
statute, however, have rightly declared that the prescriptive

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\text{160. Cf. La. Civ. Code art. 709.}
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\text{161. See Gerde v. Simonson Investments, Inc., 251 La. 893, 900, 207 So.2d 360, 363 (1968): "The Act in the present case provided such a method [of termination]. It required the affirmative vote in writing of the owners of a majority of the lots, after notice to all lot owners and a meeting. Such a provision is valid. L.S.A.-C.C. Arts. 709-821."}
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\text{162. See La. R.S. 9:5622 (1950), as amended. This statutory provision has been declared to be constitutional. Johnston v. Franton, 159 So.2d 404 (La. App. 2d Cir. 1964).}
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\text{163. La. R.S. 9:5622 (1950), as amended. No reason has been ascertained as to why the legislature thought it necessary to require recordation of the agreement in the mortgage records. See Comment, 21 La. L. Rev. 468 (1961).}
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\text{164. See Comment, 21 La. L. Rev. 468 (1961). For the question whether a restricted area is a subdivision or a part of a subdivision, see Lillard v. Jet Homes, Inc., 129 So.2d 109 (La. App. 2d Cir. 1961); cf. Johnston v. Franton, 159 So.2d 404 (La. App. 2d Cir. 1964).}
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\text{165. See La. R.S. 9:5622 (1950), as amended. This prescription does not merely bar actions for the enforcement of building restrictions as sui generis real rights; it extinguishes the real right itself in the same way that the prescription of non-use extinguishes the right of a servitude. See note 169 infra. Accordingly, any action based on principles of property law would become without object after the completion of the two-year prescriptive period. But actions for the enforcement of building restrictions that constitute personal obligations rather than real rights are subject to the ten-year liberative prescription applicable to personal actions. See La. Civ. Code art. 3544; LeBlanc v. Palmisano, 43 So.2d 263 (La. App. 1st Cir. 1949). There should be no doubt that the two-year prescriptive period is inapplicable to violations of zoning ordinances. See Lake Charles v. Fungay, 93 So.2d 232 (La. App. 1st Cir. 1957).}
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period begins to run upon the commencement\textsuperscript{166} of a noticeable violation.\textsuperscript{167} Thus, an activity carried on a modest scale may not be noticeable or not a violation at all; but the same type of activity, if expanded, could become a noticeable violation.\textsuperscript{168} Upon completion of the prescription, the land is “forever free from the restriction which has been violated.”\textsuperscript{169} Determination of the restriction that has been violated is a matter of statutory as well as contractual interpretation. In case restrictions exclude the use of the property for commercial purposes, question may arise whether activities in violation of the restrictions free the property from any limitations relating to commercial use or only from limitations relating to the particular use that has been practiced. It has been suggested that the language of the statute “can hardly be taken to mean freedom from the whole commercial restriction, but only freedom to the extent that there had been a two-year unopposed violation.”\textsuperscript{170} Louisiana courts have held that when an owner uses his property for commercial purposes contrary to restrictions during a period in excess of two years, the property is free from any limitation pertaining to commercial activities; the landowner is thus entitled to enlarge his business, and even to conduct a business of a different nature.\textsuperscript{171} According to well-settled interpretation

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\textsuperscript{166} See Metry Club Gardens Ass'n v. Newman, 166 So.2d 579 (La. App. 4th Cir. 1964); Chexnayder v. Rogers, 95 So.2d 381 (La. App. Orl. Cir. 1957); Harris v. Pierce, 73 So.2d 330 (La. App. Orl. Cir. 1954); Rhodes v. Foti, 54 So.2d 834 (La. App. Orl. Cir. 1951). The prescription begins to run from the commencement of the violations rather than from the day the plaintiff acquired knowledge of the violations. Fatjo v. Mayer, 247 La. 327, 170 So.2d 859 (1965).

\textsuperscript{167} See Roche v. St. Romain, 51 So.2d 666 (La. App. Orl. Cir. 1951). It suffices for the commencement of the prescription that the violation of restrictions is neither secretive nor clandestine. See Fatjo v. Mayer, 247 La. 327, 170 So.2d 859 (1965).

\textsuperscript{168} See Wolley v. Cinquigranna, 188 So.2d 701 (La. App. 4th Cir. 1966) (activities of a door to door salesman did not violate building restrictions limiting the property to residential use; but the activities of the same defendant as field manager for door to door salesmen violated the restrictions).


\textsuperscript{170} The Work of the Louisiana Supreme Court for the 1946-1947 Term—Building Restrictions, 8 LA. L. REV. 189, 238 (1948); cf. Salerno v. DeLucca, 211 La. 659, 30 So.2d 678 (1947).

\textsuperscript{171} See Chexnayder v. Rogers, 95 So.2d 381 (La. App. Orl. Cir. 1957). In reaching this conclusion, the court aptly distinguished the case of Salerno v. DeLucca, 211 La. 659, 30 So.2d 678 (1947), and declared that “the ratio decidendi thereof is not applicable to this matter” (95 So.2d at 383 n. 4). See also Cush v. South Acres Missionary Baptist Church, Inc., 194 So.2d 788 (La. App. 2d Cir. 1967). In this case the court concluded that the entire restriction relating to commercial uses was violated “since the property was
of the statute, however, prescription of one type of restriction on a particular lot does not free that lot from other restrictions\textsuperscript{172} nor other lots from restrictions of the type that has been violated,\textsuperscript{173} unless, of course, there has been a general abandonment of the restrictive plan or of particular restrictions.

Indeed, according to Louisiana \textit{jurisprudence constante}, building restrictions terminate by abandonment of the entire restrictive plan\textsuperscript{174} or by a general abandonment of a particular restriction.\textsuperscript{175} Abandonment of the entire restrictive plan is ordinarily predicated on a great number of violations of all or most restrictions.\textsuperscript{176} Upon abandonment of the entire plan all restrictions fall, and the use of the property is free for all purposes. Abandonment of a particular restriction is predicated on a sufficient number of violations of that restriction in relat-

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not used \textit{exclusively} for residential purposes and therefore the particular parcel of land is forever free from the restriction which has been violated." \textit{Id.} at 790.


174. \textit{See} Guyton v. Yancey, 240 La. 794, 125 So.2d 365 (1961). In this case, defendant took the position that certain violations, "considered along with other infractions and changes throughout the subdivision, constituted a complete subversion of the original scheme of development; and that, consequently, all imposed restrictions must be considered as having been abandoned and relinquished." \textit{Id.} at 799, 125 So.2d at 367. The court held, however, that the alleged infractions were "relatively minor in nature and certainly cannot be said to be so substantial, even when considered with the other violations shown, as to constitute a waiver of the subdivision's entire general plan or scheme." \textit{Id.} at 808, 125 So.2d at 370. For additional decisions raising the issue of abandonment of the entire plan for a subdivision, \textit{see} Alfortish v. Wagner, 200 La. 198, 7 So.2d 708 (1942); Hill v. Wm. P. Ross, Inc., 166 La. 581, 117 So. 725 (1928). For cases involving failure of the general plan devised by the subdivider, \textit{see} notes 119, 120 supra.

175. \textit{See}, \textit{e.g.}, Edwards v. Wiseman, 198 La. 382, 3 So.2d 661 (1941); Willis v. New Orleans East Unit of Jehovah's Witnesses, Inc., 156 So.2d 310 (La. App. 4th Cir. 1963); Finn v. Murphy, 72 So.2d 358 (La. App. Orl. Cir. 1954); Sherrouse Realty Co. v. Marine, 46 So.2d 158 (La. App. 2d Cir. 1950). Abandonment does not merely bar the right of action for the enforcement of restrictions; it extinguishes the real right itself. Edwards v. Wiseman, 198 La. 382, 392, 3 So.2d 661, 666 (1941): "The question before the Court is not one of prescription as a bar to a right of action where it otherwise presently exists under the laws of this state, but an issue of whether or not the right to enforce the restrictions has been lost through waiver and relinquishment by acquiescence on the part of the landowners. As the restrictive clauses were waived and relinquished by plaintiffs' acquiescence, they are no longer legally in existence and, hence, there is no right of action to prescribe." Building restrictions that establish merely personal obligations do not terminate by abandonment. \textit{See} LeBlanc v. Palmisano, 43 So.2d 263 (La. App. Orl. Cir. 1949).

tion to the number of lots affected by it.\textsuperscript{177} Thus, if a restriction requires that a building should face a certain street, or should be erected a number of feet from the property line, only violations on property subject to the same restrictions are considered in determining the question of abandonment.\textsuperscript{178} When the violations are sufficient in number to warrant the conclusion that a particular restriction has been abandoned, the property is freed from that restriction only.\textsuperscript{179} Thus, a change in the neighborhood from residential to commercial does not affect restrictions relating to the setback from property lines.\textsuperscript{180} Changes in the vicinity of the restricted area, but not within it, are without effect on the validity of building restrictions in the subdivision.\textsuperscript{181}

Zoning ordinances neither terminate nor supersede existing building restrictions.\textsuperscript{182} For example, the zoning of a restricted residential area as commercial does not prevent the enforcement of existing restrictions; it may merely give rise to an inference that the general plan has been abandoned in the area.\textsuperscript{183} Zoning ordinances affecting previously unrestricted areas involve a valid exercise of police power and exclude the freedom of landowners to establish building restrictions that are incompatible with the public acts.\textsuperscript{184}

\textbf{Matters of interpretation.} According to well-settled Louisiana jurisprudence, documents establishing building restrictions are subject to strict interpretation. Any doubt as to the existence, validity, or extent of building restrictions must be resolved, therefore, in favor of the unrestricted use of the

\textsuperscript{177} See Edwards v. Wiseman, 198 La. 382, 3 So.2d 661 (1941); Finn v. Murphy, 72 So.2d 358 (La. App. Orl. Cir. 1954); Rhodes v. Foti, 54 So.2d 534 (La. App. Orl. Cir. 1951). Conversely, a limited number of violations in a remote part of the subdivision does not constitute abandonment of the restriction. See Guyton v. Yancey, 240 La. 794, 125 So.2d 365 (1961); Plauche v. Albert, 42 So.2d 876 (La. App. 1st Cir. 1949).

\textsuperscript{178} See Edwards v. Wiseman, 198 La. 382, 3 So.2d 661 (1941); Finn v. Murphy, 72 So.2d 358 (La. App. Orl. Cir. 1954).


\textsuperscript{180} See Alfortish v. Wagner, 200 La. 198, 7 So.2d 708 (1942).


\textsuperscript{182} See \textit{La. Civ. Code} art. 1945(2): "[N]o general or special legislative act can be construed as to avoid or modify a legal contract previously made." See also \textit{La. Civ. Code} art. 8; \textit{La. Const.} art. IV, § 15; Alfortish v. Wagner, 200 La. 198, 7 So.2d 708 (1942); Olivier v. Berggren, 136 So.2d 325 (La. App. 4th Cir. 1962).

\textsuperscript{183} Cf. Munson v. Berdon, 51 So.2d 157 (La. App. 1st Cir. 1951).

property.\textsuperscript{185} Thus, when there was doubt as to the intent of a person to impose restrictions,\textsuperscript{186} or as to the existence of a general plan,\textsuperscript{187} the doubt was resolved in favor of the owner whose property was allegedly restricted.

Apart from the rule of strict interpretation, documents establishing building restrictions are subject to the general rules of the Louisiana Civil Code of 1870 governing the interpretation of juridical acts.\textsuperscript{188} Words used are to be understood in the common and usual signification;\textsuperscript{189} terms of art or technical phrases are to be interpreted according to their received meaning.\textsuperscript{190} Accordingly, if the document provides that the property shall be used for residential purposes only, churches may not be erected;\textsuperscript{191} if commercial establishments are excluded, the erection of an advertising billboard sign violates the restriction;\textsuperscript{192} and if the document requires that only single residences be erected, multiple dwellings or apartment houses are forbidden.\textsuperscript{193}

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\item \textsuperscript{185} See Fatjo v. Mayer, 247 La. 327, 170 So.2d 859 (1965); Leonard v. Lavigne, 243 La. 1004, 162 So.2d 341 (1964); McGuffy v. Weil, 240 La. 755, 123 So.2d 154 (1960); Salerno v. DeLucca, 211 La. 659, 30 So.2d 678 (1947); Herzberg v. Harrison, 102 So.2d 554 (La. App. 1st Cir. 1958). Since building restrictions are rights akin to predial servitudes, the rule of strict interpretation accords with article 753 of the Louisiana Civil Code of 1870 which declares that doubts as to the extent or manner of using servitudes must be resolved "in favor of the owner of the property to be affected." Surprisingly, in Cunningham v. Hall, 148 So.2d 808, 810 (La. App. 4th Cir. 1963), the court declared that documents establishing building restrictions must be interpreted "against, rather in favor of, the individual owner." See also Fisher v. Smith, 190 So.2d 105 (La. App. 4th Cir. 1966).
\item \textsuperscript{186} See Herzberg v. Harrison, 102 So.2d 554 (La. App. 1st Cir. 1958); Munson v. Berdon, 51 So.2d 157 (La. App. 1st Cir. 1951); cf. Begnaud v. Hill, 109 So.2d 582 (La. App. 1st Cir. 1959) (no clear intention); Abate v. Hebert, 100 So.2d 273 (La. App. 1st Cir. 1958) (impossible restrictions). Within certain limits, restraints on the use of immovables may be given the form of predial servitudes, personal obligations, or strictly speaking, building restrictions, i.e., \textit{sui generis} real rights. Which type of right the parties intended to create may be a matter of interpretation. See, e.g., McGuffy v. Weil, 240 La. 755, 123 So.2d 154 (1960) (predial servitude); Cambais v. Douglas, 167 La. 791, 120 So. 369 (1929) (personal obligations); Gerde v. Simonson Investments, Inc., 251 La. 893, 207 So.2d 360 (1968) (building restriction).
\item \textsuperscript{187} See notes 119, 120 supra.
\item \textsuperscript{189} See \textit{La. Civ. Code art. 1946.}
\item \textsuperscript{190} \textit{Id.} art. 1947.
\item \textsuperscript{191} Willis v. New Orleans East Unit of Jehovah's Witnesses, Inc., 156 So.2d 310 (La. App. 4th Cir. 1963); cf. Cush v. South Acres Missionary Baptist Church Inc., 194 So.2d 788 (La. App. 2d Cir. 1967); In re Congregation of St. Rita, Roman Catholic Church, 130 So.2d 425 (La. App. 4th Cir. 1961).
\item \textsuperscript{192} Salerno v. DeLucca, 211 La. 659, 30 So.2d 678 (1947); cf. Rhodes v. Fotti, 54 So.2d 534 (La. App. Orl. Cir. 1951); Harris v. Pierce, 73 So.2d 330 (La. App. Orl. Cir. 1954); Sherrouse Realty Co. v. Marine, 46 So.2d 156 (La. App. 2d Cir. 1950).
\item \textsuperscript{193} See Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938); Olivier v. Berggren, 136 So.2d 325 (La. App. 4th Cir. 1962);
The Louisiana law of building restrictions, therefore, allows private parties considerable freedom within the bounds of public policy, to create real rights limiting the use of real property. As this body of law expands it is hoped that the courts will keep in mind that it is founded upon the theory of *sui generis* real rights and conventional servitudes and that unnecessary reliance on common law terminology will result in nothing but confusion.

*Plauche v. Albert, 42 So.2d 876 (La. App. 1st Cir. 1949); cf. Cunningham v. Hall, 148 So.2d 808, 809 (La. App. 4th Cir. 1963); “The words ‘one dwelling home’ or ‘single dwelling house’, as used in deed restricting construction, indicate a manifest intent that a residence erected should be limited in design to the accommodation of a single family, precluding the erection of a single building containing three wholly distinct apartments.”*