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Prescription of a Mode of Use of a Servitude

Van R. Mayhall Jr.

cation of expropriation sums.[61] As the whole theory of just compensation in expropriation is geared to the value at the time of the taking, it seems rather anomalous to require the expropriator to pay these sums without their first being discounted to present value. It is submitted that the supreme court should expressly recognize this principle as being one required by law in the fixing of such adjudications.

Winston E. Rice

PRESCRIPTION OF A MODE OF USE OF A SERVITUDE

In 1949, plaintiff Hanks' ancestor in title conveyed to the defendant, Gulf States Utilities, the servitude which is described in part as follows: ". . . the right, privilege and servitude to enter upon and erect, construct, extend, . . . replace, remove, repair and patrol one line of poles, frames or towers which may be erected simultaneously or at some future time . . . [for] use as adapted for the transmission of electricity, electrical energy and power."[1] The defendant immediately erected a single line of poles supporting one electrical wire. Thirteen years later, defendant replaced the single line of poles with a double line known as H-frames. Plaintiff Hanks instituted an action for damages resulting from the alleged trespass. The court of appeal affirmed the lower court's decision that the replacement of the single line with the H-frames constituted a trespass. The appellate court reasoned that three modes of use, poles, frames and towers, of the servitude had been granted and the right to construct H-frames had prescribed by non-usage for ten years according to article 796 of the Civil Code.[2] The Supreme Court of Louisiana reversed, holding that the above-mentioned rights were accessory rights and as such had not prescribed. *Hanks v. Gulf States Util. Co.*, 253 La. 946, 221 So.2d 249 (1969).

The original existence of the right of Gulf States to replace

61. *See* State, Dep't of Highways v. Holmes, 253 La. 1099, 221 So.2d 811 (1969); State, Dep't of Highways v. Ferris, 227 La. 13, 78 So.2d 493 (1955); State, Dep't of Highways v. Thornton, 220 So.2d 217 (La. App. 3d Cir. 1969).

1. Hanks v. Gulf States Util. Co., 253 La. 946, 947, 221 So.2d 249, 250 (1969).

2. LA. CIV. CODE art. 796: "The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner.

"By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title."

the single line with an H-frame line was not disputed in this case as the parties had agreed that the original servitude grant did in fact create this right. The parties stipulated that the sole issue for determination was whether the right had been lost by liberative prescription of ten years for failure to have exercised the right. It is noted that there may indeed be more than one way of interpreting a contract of this type by which the landowner conveys a servitude.[3] However, because of the stipulations of the parties in this case, this Note will concern itself primarily with questions of property law rather than those of contractual interpretation.

Initially, consideration must be given to the nature of a servitude created for the transmission of electrical power (electrical servitude). It is important to note that even if it were conceded that there were three modes of use as the court of appeal has indicated, or if there were found three optional servitudes as Justice Summers has argued in his dissent, it may well be that application of article 796 to prescription of a mode of use in the former case or application of article 789 to prescription of a servitude in the latter case would be totally inappropriate where an electrical servitude is concerned. The applicability of these articles hinges upon a determination of the continuity of the electrical servitude. The Civil Code indicates that a continuous servitude is one whose use is or may be continual without the act of man.[4] The jurisprudence has construed this article to read that continuous servitudes are those whose use is or may be continual without the act of man *on the servient estate*.[5] In recent decisions, the courts have indicated further that it is only necessary that the use of the servitude *survive* the act

3. Hanks v. Gulf States Util. Co., 253 La. 946, 955, 221 So.2d 249, 252 (1969). In spite of the stipulation of the parties as to what the agreement meant, Justice Summers, in his dissent, found that the contract gave Gulf States three options, *i.e.*, to erect one line with poles, to erect one line with frames or to erect one line with towers. Use of one option for ten years precluded the use of any of the others.

4. LA. CIV. CODE art. 727: "Servitudes are either continuous or discontinuous.

"Continuous servitudes are those whose use is or may be continual without the act of man.

"Such are aqueducts, drain, view and the like.

"Discontinuous servitudes are such as need the act of man to be exercised.

"Such are the rights of passage, of drawing water, pasture and the like."

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

of man on the servient estate.[6] Presumably then, if there is no act of man on the servient estate, even though man acts elsewhere, or if the use of the servitude survives the act of man on the servient estate, a servitude should be considered continuous. Conceptually an electrical servitude agrees with both of the above-stated criteria. Outside of construction of the works necessary for the use of the servitude,[7] there is no act of man on the servient estate. In addition, the use of the servitude does survive the act of man, in the same way that the use of a servitude of drain, as in the above cases, survives the opening or closing of a sluice gate. The difference in potential between the ends of an electrical servitude is directly analogous to the difference in levels between the ends of a servitude of drain or aqueduct. The argument has been made that the servitude of drain utilizes only the gravitational forces of nature and in so doing remains uncontaminated by the act of man.[8] One can only wonder at this distinction and ask what difference there is between man harnessing the gravitational forces of nature in the servitude of drain and man harnessing the electro-magnetic forces of nature in the electrical servitude. Moreover, the courts have found such things as sewer lines,[9] gas lines, water pipes, and gas heater flues[10] to constitute continuous, apparent servitudes. In light of the trends established by the above jurisprudence and after a careful consideration of the legislation, there appears little reason to create a distinction as to the electrical servitude, when in fact there is no conceptual difference between it and others heretofore con-

6. Wild v. LeBlanc, 191 So.2d 146 (La. App. 3d Cir. 1966).

7. *See* Yiannopoulos, *Predial Servitudes; General Principles: Louisiana and Comparative Law*, 29 LA. L. REV. 1, 32 (1968): "The notion of 'act of man' furnishes the criterion for the division of servitudes into continuous and discontinuous in Louisiana and French law. This criterion, however, refers solely to the manner in which a servitude operates and has nothing to do with the creation of the servitude. Further, acts of man may be necessary for the building or keeping in repair constructions which are needed for the use of the servitude, but these are not acts of man within the meaning of Article 727 of the Louisiana Civil Code of 1870 and Article 688 of the French Civil Code. In effect, a servitude is defined and classified in the light of its use rather than with reference to constructions which make its use possible."

8. *See* Acadia-Vermilion Rice Irrigating Co. v. Broussard, 175 So.2d 856, 858 (La. App. 3d Cir. 1965). It should be observed that the *Acadia-Vermilion Rice* case declared the servitude involved to be continuous for the purposes of acquisitive prescription. Conversely, the noted case only concerns a determination of continuity for the purposes of liberative prescription. Given analogous servitudes, the latter application of the laws of continuity would appear to be more favorable than the former.

9. Fuller v. Washington, 19 So.2d 730 (La. App. 2d Cir. 1944).

10. Blanda v. Rivers, 210 So. 2d 161 (La. App. 4th Cir. 1968).

sidered continuous servitudes.[11] Therefore, it is submitted that electrical servitudes should be considered as continuous servitudes.

If an electrical servitude were considered as continuous, for reasons outlined above, then in view of article 790 of the Civil Code, which announces the conditions for the running of prescription for non-usage, there must have occurred some act contrary to the servitude in order to begin prescription.[12] There was no such contrary act here, as the servitude has been in constant use since its inception. Therefore it could be safely argued that without the required act contrary to the servitude, the applicable prescriptive period had never begun to run. Hence, the servitude and all rights attributable thereto would still be intact. The court in the noted case, however, did not address itself to the resolution of this problem. Since there has been no judicial determination that an electrical servitude is continuous, this Note proceeds on the assumption that the servitude is discontinuous.

Acting on the assumption that the servitude is discontinuous and hence lacking the requirement of an obstacle to give notice of the beginning of the running of the prescriptive period, we return to a discussion of the problem of primary importance. The relevant inquiry is whether the right of Gulf States to erect new supporting poles on their servitude had prescribed by non-usage for ten years under article 796 concerning prescription of a mode of use of a servitude. The Louisiana Supreme Court in discussing the problem presented in the noted case states that the right of Gulf States to replace the single pole line with an H-frame line was merely an accessory right and as such could not have prescribed.[13] The court does not cite a source or authority for this statement, so it can only be presumed that it was

11. It is noted that there may be some conceptual differences between the "true" servitude and the public utility servitude such as the apparent lack of the two estates required for a true servitude. Although it could be argued that the final consumer estate is the dominant estate, it is submitted that an analogous application of these statutes is all that is required in this situation. If the statutes regarding the so-called true servitudes cannot be applied by analogy to the public utility servitude, then it appears we have no law on this subject.

12. LA. CIV. CODE art. 790: "The time of prescription for non-usage begins for discontinuous servitudes, from the day they ceased to be used; for continuous servitudes, from the day any act contrary to the servitude has been committed."

13. Hanks v. Gulf States Util. Co., 253 La. 946, 954, 221 So.2d 249, 251 (1969).

made in reference to article 771 of the Civil Code.[14] That article provides that upon the establishment of a servitude, everything which is *necessary* to use the servitude is granted in the form of accessory rights. However, the article also declares that these rights must be the most direct and least inconvenient means of using the principal servitude.[15] This definition of accessory rights encompasses two things—necessity and economy of use. If either of these items is not present, the conclusion is evident that the right in question must be something other than an accessory right. Since the electrical servitude had been in actual physical use since 1949, there was no necessity to erect H-frames in order to use the servitude. It is inconsistent and contradictory to say that some element is necessary for the use of a servitude, when in fact the servitude is already in use. Therefore, it must be conceded that a characterization of the disputed rights as accessory rights is an inaccurate description of the nature of these rights, as they simply do not appear to meet the statutory qualifications of accessory rights. Indeed, if anything which could be used to operate a servitude is included in the definition of accessory rights, there would never be any prescription of a mode of use of a servitude. A judicial expansion of this terminology could conceivably lead to undesirable results. The development of such a catch-all classification could lead to the judicial repeal of article 796 as to the prescription of a mode of a servitude for nonusage.

Prior to the instant case, this area of the law concerning the prescription of a mode of use of a servitude has received little judicial attention. Examination of recent jurisprudence reveals two related cases.[16] However, both of these cases can be distinguished from the instant case on a factual basis. In each of these cases, the defendant, Columbia Gulf Transmission Co., sought to locate an additional pipeline *off* the original servitude area. In

14. LA. CIV. CODE art. 771: "When a servitude is established, everything which is necessary to use such servitude is supposed to be granted at the same time with the servitude.

"Thus the servitude of drawing water out of a spring carries necessarily with it the right of passage.

"But the passage, in this case and in all others in which it is permitted as an accessory to some other servitude, must be made in the way most direct, the shortest, and the least inconvenient to the state subject to the servitude."

15. *Id.*

16. Veillon v. Columbia Gulf Trans. Co., 192 So.2d 646 (La. App. 3d Cir. 1966); Columbia Gulf Trans. Co. v. Fontenot, 187 So.2d 455 (La. App. 3d Cir. 1966).

light of this fact, there were two distinct servitudes, the second of which prescribed after ten years of complete non-usage under article 789 of the Civil Code.[17] There are also two earlier Louisiana cases[18] which discuss the prescription of the mode of use of a servitude. Although neither of these cases concern electrical servitudes, the basic problems in each are similar to those in the noted case. In the first, the Louisiana Supreme Court found that a railroad company's right to locate a railroad depot on its servitude had not been retained by its use as a lumber storage area.[19] The court emphasized the fact that the two modes of use were different and incompatible. In the second case, the Court of Appeal for the Second Circuit held that the servitude owner had the right to make internal improvements and changes although the servitude itself could not be extended or enlarged so as to encroach further upon the servient estate.[20] These cases indicate that if the nature of the servitude is not changed, the owner of the servitude may make reasonable improvements and alterations, and that it is only a mode of use of a servitude that is different in essence from that given in the original servitude grant that is precluded by ten years' non-usage.

The French Civil Code also contains an article dealing with the problem of prescription of a mode of use of a servitude.[21] The French would not, however, find themselves in the present difficulty as, although the Code articles are the same, the French jurisprudence has indicated that the partial loss, in all cases, of the use of a servitude, is too harsh a penalty for non-usage.[22]

17. LA. CIV. CODE art. 789: "A right to servitude is extinguished by the non-usage of the same during ten years." *See* Note, 27 LA. L. REV. 634 (1967).

18. Moore Planting Co. v. Morgan's La. & T.R. & S.S. Co., 126 La. 840, 53 So. 22 (1910); Southerland v. Streeter, 41 So.2d 708 (La. App. 2d Cir. 1949).

19. Moore Planting Co. v. Morgan's La. & T.R. & S.S. Co., 126 La. 840, 858, 53 So. 22, 40 (1910).

20. Southerland v. Streeter, 41 So.2d 708, 709 (La. App. 2d Cir. 1949).

21. FRENCH CIV. CODE art. 708.

22. *See* PLANIOL ET RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANÇAIS 978 (2d. ed. Picard 1952): "According to Article 708 [corresponding with Article 796 of the Louisiana Civil Code of 1870], the mode of servitude is subject to prescription as well as the servitude itself, and in the same manner. This means that the partial non-usage has an extinctive effect similar to that of complete lack of use, and that the servitude is diminished to the extent that it has not been used. The servitude that has been utilized only in part is diminished after thirty years [in Louisiana after ten years], and cannot be exercised in its entirety in the future. The Code makes no distinction; but the Court of Cassation has made one. It holds that the servitude is preserved in its entirety, when its exercise is voluntarily diminished in scope by the owner of the dominant estate, who has used it only according to his needs; the servitude is not diminished, unless the restriction of the mode of its exercise is due to a physical obstacle."

The French distinguish between the case where the servitude owner voluntarily limits the manner in which he uses the servitude, and the case where such additional mode of use is prevented by a physical obstacle for the required period of time.[23] In this way, the conservative use of another's property rather than the fullest exploitation thereof beyond immediate needs of the servitude owner is encouraged. Under the French jurisprudence, there would appear to be no question as to Gulf States' right to improve the use of its servitude by changing the supporting poles.

An examination of the jurisprudence of other American states is also helpful in obtaining some insight into possible solutions to problems pertaining to prescription of a mode of use of a servitude.[24] In *Pacific Gas & Electric Co. v. Crockett Land & Cattle Co.*,[25] the court considered changes to be made in an electrical easement and said:

> "[S]o long as the use of the easement is confined to the purposes under which it was acquired and created, without increasing the burden upon the servient estate, it inflicts no injury upon the owner and within these limits the owner of the easement may make improvements or changes that do not impair or affect its substance. This is not only a right, but in many cases it becomes a positive duty and public service corporations should be encouraged rather than embarrassed in the betterment of their property in order that they may carry out the purposes for which they were created."[26]

In the general area concerning changes to be made in the modes of use of an easement, the Maryland Supreme Court has held that there might be increases in the volume and kinds of use of an easement and that alterations may be made in the means of use or instrumentalities of an easement according to the reason-

23. It should be observed that Louisiana has sufficient statutory law to allow it to obtain the French solution if the electrical servitude were determined to be a continuous servitude as article 790 of the Civil Code would then properly apply, causing prescription to commence running only as of the occurring of some act contrary to the servitude.

24. In spite of differences between the common law and civil law property systems, it is submitted that the common law has similar policy problems incident to the maintenance of public utilities. Therefore, a consideration of the manner in which some of these problems have been handled will prove helpful.

25. Pacific Gas & Elec. Co. v. Crockett Land & Cattle Co., 70 Cal. App. 283, 233 P. 370 (1924).

26. *Id.* at 294, 233 P. at 374.

able necessities of the case.[27] In general, the decisions of our sister states indicate that the test used to determine the right to make a particular alteration is whether the alteration is so substantial as to result in the creation and substitution of a different servitude from that which previously existed.[28] If the approach of other American jurisdictions to the problem were applied to the instant case, it seems likely that Gulf States would have had the right, if not the duty, to replace the single pole lines with H-frames, as a court could easily have found that there was no change in the essence of the servitude, nor was there a material increase in the burden to the owner.[29]

In the final analysis, it is suggested that the mode of use of a servitude should be defined in terms of reasonableness of use and in terms of additional burden to the landowner. The first criterion envisions a distinction between changes in kind or type of use and changes in degree of use. An alteration in the use of the servitude which was clearly not foreseeable in the original intent of the parties as manifest by the servitude grant should be considered as a change in kind of use and therefore a change in mode of use so as to prescribe in ten years. This should be the case even though the landowner is not additionally burdened. On the other hand, an alteration or improvement made in a servitude that is *reasonable* in view of the nature of the use of the servitude, as envisioned in the original grant, which does not materially increase the *burden* of the owner of the servient estate should not be considered as a different mode of use. It should be considered as only a variation in the degree of use of the original servitude. Therefore, these changes, not being different modes of use, would not be subject to prescription. There are circumstances imaginable, where a change or alteration, though reasonable, would constitute an inconvenience to the landowner. However, in light of the theme and intent behind certain Code articles,[30] an improvement that merely inconveniences the owner

27. Tong v. Feldman, 152 Md. 398, 136 A. 822 (1927).

28. Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 P. 215 (1891); Vance v. Davis, 195 Va. 730, 80 S.E.2d 396 (1954).

29. Hanks v. Gulf States Util. Co., 253 La. 946, 950, 221 So.2d, 249, 250 (1969). That a court could have found that there was no increase in burden to the owner is evidenced by the stipulated fact that the H-frames were 150 feet further apart than were the poles in the single line.

30. *See, e.g.*, LA. CIV. CODE art. 668: "Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

"Thus he who is not subject to any servitude originating from a par-

of the servient estate, but is in line with the original use of the servitude should not be considered a different mode of use so as to prescribe by ten years non-usage. On the other hand, if a change in the use of a servitude is so material as to depart from the nature of the servitude or is an additional burden to the landowner, then this should be deemed a different mode of use and should prescribe in ten years. A rigorous application of article 796 might lead to such absurdity as the necessity of renegotiating a servitude agreement merely to improve the type of pole insulators after ten years. A definition of mode of use in terms of reasonableness and additional burden would safeguard the respective rights of all parties concerned. If this formula is applied to the noted case, it is submitted that the replacement of a single line of poles with a double line of poles does not constitute a departure from the nature of the original use of the servitude. For purposes of the instant discussion, transmission of electrical power through a wire supported by two poles is essentially the same use of the servitude as transmission of the power through a wire supported by a single pole. The essence of the servitude is intact. The mode of use of the servitude is changed only in degree and not in kind by such an alteration. Neither would this change appear to have increased the burden suffered by the landowner. The new poles are 150 feet further apart than the old ones, which might, indeed, tend to lessen the burden borne by the servient estate.

In the resolution of a problem of this type, there are many subjective influences which tend to weigh heavily upon the court's decision. Certain interests of public utilities must be balanced against the interests of landowners in the free and unencumbered use of their property. Of primary concern in balancing these interests is the reasonableness of one party's actions versus any additional harm or burden caused by these actions to the other party. It is submitted that the injection of some of these influencing elements into an interpretation of the applicable statutory law provides a better solution to the problem, as by so doing, an allowance is made for increased fairness and flexibility in the law.

Van R. Mayhall, Jr.

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ticular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's (*sic*) house, because this act occasions only an inconvenience, but not a real damage."