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Private Law: Property

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PROPERTY

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PUBLIC THINGS: HIGHWAYS, ROADS, AND STREETS

Highways, roads, and streets may be either private or public things in Louisiana. They may be public either in the sense that their ownership is vested in the public[1] or merely in the sense that they are subject to public use, whether they are owned by the state, its political subdivisions, or by private persons.[2] An interest in the public use of highways, roads, and streets may be established by dedication.

In *Ross v. City of Covington*,[3] the city claimed the ownership of a strip of land by virtue of an act of dedication made in 1814. The court held that the strip of land in question had been actually dedicated to the public and that the interest acquired by the public was full ownership. One may not quarrel with the result, but the reasoning of the court requires comment. The court declared that "Louisiana recognizes two types of dedication, statutory and implied or common law,"[4] and, in effect, treated the dedication in the case under consideration as "statutory." This rationalization is obviously incorrect because one may properly speak of statutory dedication only after the enactment of Act 134 of 1896. It is submitted that Louisiana actually recognizes *four* distinct types of dedication: "tacit dedication" under R.S. 48:491;[5] "statutory dedication" under R.S. 33:5051;[6] "formal" non-statutory dedication;[7] and informal (implied or common law) dedication.[8] In *Ross* the dedication was clearly a formal non-statutory dedication. This form of dedication, like statutory dedication, conveys full ownership to the public.[9]

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1. LA. CIV. CODE art. 453.

2. *See* A. YIANNOPOULOS, CIVIL LAW PROPERTY §§ 30, 33 (1966).

3. 271 So. 2d 618 (La. App. 1st Cir. 1972), *writ refused*, 273 So. 2d 844 (1972).

4. *Id.* at 620.

5. *See* Town of Eunice v. Childs, 205 So. 2d 897 (La. App. 3d Cir. 1967); *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Property*, 30 LA. L. REV. 181, 183 (1969). *See also* Martin v. Cheramie, 264 So. 2d 285 (La. App. 4th Cir. 1972), *writ refused*, 266 So. 2d 450 (1972).

6. *See* Parish of Jefferson v. Doody, 247 La. 839, 174 So. 2d 798 (1965); Chevron Oil Co. v. Wilson, 226 So. 2d 774 (La. App. 2d Cir. 1969).

7. *See* Banta v. Federal Land Bank, 200 So. 2d 107 (La. App. 1st Cir. 1967); Comment, 30 LA. L. REV. 583 (1970).

8. *See* City of Houma v. Cunningham, 225 So. 2d 613 (La. App. 1st Cir. 1969); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 35 (1972 Supp.). *See also* City of Baton Rouge v. State Nat. Life Ins. Co., 271 So. 2d 571 (La. App. 1st Cir. 1972).

9. *See* Banta v. Federal Land Bank, 200 So. 2d 107 (La. App. 1st Cir. 1967).

MOVABLES AND IMMOVABLES

In *Bailey v. Kruithoff*,[10] question arose whether a barbed wire fence was a movable or an immovable. Defendant, by written though unrecorded agreement, had leased pasture land and had reserved the right to remove, at the termination of the lease, a fence and hay shed that he might construct on the property. In accordance with the agreement, defendant erected a four-strand barbed wire fence with creosote posts, some of which were embedded in concrete. After termination of the lease, defendant entered the property and physically removed the fence. In the meanwhile, however, the land had been sold to plaintiff without any indication as to defendant's right to remove the fence. Plaintiff brought suit against defendant to recover the value of the fence.

In effect, plaintiff claimed ownership of the fence, and so did the defendant. Determination of the question of ownership depended on the classification of the fence in question as a movable or an immovable. According to well-settled Louisiana law, the transfer of a tract of land includes all things that are classified as immovable property, unless, of course, exception is made by law or by contract.[11] Conversely, the transfer of a tract of land does not include things classified as movable property.[12]

In Louisiana, movables form a residuary category; things that are not immovables are movables.[13] The question before the court was, therefore, whether the fence in question was immovable by virtue of some directly applicable provision. It could not be classified as an immovable by destination because it had not been placed by the owner, and, for the same reason, it could not be classified as an immovable by nature under article 467 of the Civil Code.[14] If the fence was an immovable, it could only be an immovable by nature under article 464 as a "construction." According to well-settled Louisiana jurisprudence, this article does not require unity of ownership.[15]

10. 280 So. 2d 262 (La. App. 2d Cir. 1973).

11. *See* American Creosote Co. v. Springer, 257 La. 116, 241 So. 2d 510 (1970); A. YIANNOPOULOS, CIVIL LAW PROPERTY § 57 (1966).

12. *Id. See also* Gibson v. Dalton, 220 So. 2d 168 (La. App. 3d Cir. 1969); LA. R.S. 9:1106 (Supp. 1954); 9:5351-57 (1950), *as amended*.

13. *See* LA. CIV. CODE art. 475.

14. *Id.* arts. 468(2), 467. For a fence that might have qualified as immovable by destination under article 468(2), see *Latiolais v. Rowe*, 170 So. 2d 406 (La. App. 3d Cir. 1965).

15. *See* American Creosote Co. v. Springer, 257 La. 116, 241 So. 2d 510 (1970); Buchler v. Fourroux, 193 La. 445, 190 So. 640 (1939); Vaughn v. Kemp, 4 La. App. 682 (2d Cir. 1926).

In a well-reasoned and scholarly opinion, Judge Hall, writing for the majority, held that the fence in question was an immovable by nature as a construction under article 464. Relying on Louisiana jurisprudence and literature as well as on pertinent French doctrine, the court declared that the criteria for the classification of a thing as an immovable under this article are size, permanence, and a certain degree of integration with the soil. These criteria were satisfied. As immovable property, the fence was transferred to the purchaser of the land; hence, the former lessee did not have the right to remove the fence. His ownership of the fence was lost, and his claims should be addressed against the lessor.[16]

The disposition of the case depended on appreciation of facts and on a judicial determination in accordance with prevailing notions in society. When property is sold without any contrary indication, a fence of the type involved in this case is considered to form part and parcel of the land. Question remains, however, whether the law ought to protect a purchaser relying on the public records or a person making improvements on the land of another without the benefit of a recorded instrument. This question has been resolved by the Louisiana supreme court in *American Creosote Co. v. Springer*[17] in favor of the innocent purchaser. From the doctrinal viewpoint, the solution seems to conflict with the tenet of the Louisiana Civil Code that the sale of the thing of another is null.[18] The conflict, however, is only apparent. In the context of immovable property laws, the integration of a movable with the soil results in a legal loss of identity; the movable is no longer a distinct thing, but a component part of the immovable.[19] Hence, under the circumstances, the landowner may transfer title as if the former movables were his own.

In *Hargroder v. Columbia Gulf Transmission Co.*,[20] a predial lessee, cultivating lands by virtue of a verbal lease, sued a pipeline company for damage to his crops. The pipeline company had ac-

16. *See* Prevot v. Courtney, 241 La. 313, 129 So. 2d 1 (1961).

17. 257 La. 116, 241 So. 2d 510 (1970); Yiannopoulos, *Railroad Tracks as Immovables by Nature: Ruminations on American Creosote Company v. Springer*, 19 LA. BAR. J. 37 (1971).

18. *See* LA. CIV. CODE art. 2452.

19. *Id.* arts. 464, 505-08. Technically, the combination of these articles results in an exception from the principle that no one can transfer a greater right than he himself has. The vendor of the land, though not owner of the things that have become immovable by nature under article 464, may confer a valid title to a purchaser of the land. This result may be justified as a concession to the demands of security of title and acquisition. The purchaser becomes owner of the things by application of the public records doctrine.

20. 278 So. 2d 864 (La. App. 3d Cir. 1973).

quired a right of way servitude from the landowner while the verbal lease was in force. The servitude agreement provided that the pipeline company was bound to pay "damages which may arise to growing crops" from the construction of the pipeline, but another clause in the same agreement declared that such damages had been "anticipated and paid in advance at the time of the execution of this instrument."[21]

In a suit by the landowner and the verbal lessee for damage caused by debris *off* the right of way, the district court sustained an exception of no cause of action against the lessee. On appeal, the Court of Appeal for the Third Circuit affirmed on the ground that "an unrecorded lease is ineffective against third persons to establish separate crop ownership. LSA-R.S. 9:2721. As to them the standing crop is considered as part of the land. LSA-C.C. Art. 465."[22] The court distinguished *Andrepont v. Acadia Drilling Co.*[23] on the ground that the lessee in that case had properly recovered by virtue of a *stipulation pour autrui*. It is submitted that both reasoning and result are contrary to Louisiana legislation, jurisprudence, and doctrine.

Leaving aside the question of *stipulation pour autrui*, a matter of the law of obligations, this comment will address itself to the status of standing crops. According to article 465 of the Louisiana Civil Code of 1870, standing crops are immovables in the sense that they are "part of the land to which they are attached." Under this provision, and in accordance with the rules of accession, unharvested crops might be regarded as immovable property for all purposes and as insusceptible of separate ownership.[24] Legislative and judicial action, however, have resulted in the recognition that standing crops are *not* always to be treated as immovables[25] *nor* necessarily as a part of the land to which they are attached.[26] Indeed, for a number of purposes, standing crops are regarded as *movables by anticipation*, as the law

21. *Id.* at 866.

22. *Id.* at 867.

23. 255 La. 347, 231 So. 2d 347 (1969); Yiannopoulos, *Standing Crops: Movables or Immovables?*, 17 LOYOLA L. REV. 323 (1971).

24. *See* LA. CIV. CODE arts. 504-19.

25. *See. e.g.*, LA. CIV. CODE art. 3217 (privilege on growing crops); LA. R.S. 9:4341 (1950) (pledge of standing crops); LA. R.S. 9:5105 (1950) (lessee's crops not subject to debts or mortgages of the landowner recorded after the date of the lease); Humble Pipe Line Co. v. Burton Ind., Inc., 253 La. 166, 217 So. 2d 188, 191 (1968): "We are cognizant of the fact that *under certain circumstances* such as those contemplated by article 465, supra, crops are immovables." (Emphasis added.)

26. *See* Louisiana Farms Co. v. Yazoo & M.V.R.R., 172 La. 519, 132 So. 747 (1931); Fallin v. J.J. Stovall & Sons, 141 La. 220, 74 So. 911 (1917)(recognizing expressly the possibility of separate ownership in standing crops).

looks to future rather than present status.[27] In the leading case of *Citizens Bank v. Wiltz*,[28] the court declared that "the existence of a right on the growing crop is a mobilization by anticipation, a gathering as it were in advance, rendering the crop movable *quoad* the right acquired thereon."[29]

Separate ownership of standing crops may derive from a variety of contractual relationships, as leases of land or sales of standing crops.[30] It may also arise from real rights on the land of another, as usufruct, or even from the possession of land in good faith. The owner of the crops may always assert his ownership against the owner of the land,[31] and by virtue of the public records doctrine, he may assert his ownership of the crops against creditors of the landowner or third acquirers of the land if there is a recorded document. In this way, purchasers of standing crops as well as lessees of land may be protected in cases of transfer, mortgage, or seizure of the land.

Louisiana courts have consistently held that, as between lessor and lessee, crops raised by the lessee belong to him[32] as movables by anticipation.[33] This separate ownership of the crops as movable property may be asserted against the landowner always and against creditors and transferees of the landowner only if the lease is recorded.[34] In the absence of recordation, creditors and transferees of the landowner are protected by the public records doctrine; insofar as they are concerned, standing crops are immovables, as a part of the land to which they are attached. In *Andrepont v. Acadian Drilling Co.*,[35] on rehearing, the court disposed of the case without regard to the classification of standing crops as movable or immovable property. In this respect, the original opinion remains undisturbed and stands for three significant propositions of property law: (1) Standing crops belonging to a lessee, whether under a recorded or unrecorded lease,

27. *See generally* Frejaville, Des meubles par anticipation (Diss. Paris 1927); 3 PLANIOL ET RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS 105 (2d ed. Picard 1952).

28. 31 La. Ann. 244 (1879).

29. *Id.* at 246.

30. *See* Minter v. Union Central Life Ins. Co., 180 La. 38, 156 So. 167 (1934).

31. *See* Flower v. Pearce & Son, 45 La. Ann. 853, 857, 13 So. 150, 152 (1893) (lessee's right of ownership "perfectly good and valid" against the lessor even without recordation).

32. *See* Lewis v. Klotz, 39 La. Ann. 259, 1 So. 539 (1887); Potche v. Bodin, 28 La. Ann. 761 (1876); *cf.* Sandel v. Douglass, 27 La. Ann. 628 (1875); Federal Land Bank v. Carpenter, 164 So. 487 (La. App. 2d Cir. 1935).

33. Pickens v. Webster, 31 La. Ann. 870 (1879).

34. Flower v. Pearce, 45 La. Ann. 853, 13 So. 150 (1893); Napper v. Welch, 2 La. App. 256 (2d Cir. 1925).

35. 255 La. 347, 231 So. 2d 347 (1969).

are movable property; (2) This separate ownership of movable property may be asserted against the landlord always; it may also be asserted against third persons protected by the public records doctrine, namely, persons acquiring interests in the land, only if the lease is recorded; (3) If the lease is unrecorded, third persons (other than tortfeasors) are entitled to regard the crops as part of the immovable property under article 465 of the Civil Code.

It is true that in *Andrepont*, on rehearing, the Louisiana supreme court sustained a claim for damages to the crops of a verbal lessee on the narrow ground of a *stipulation pour autrui*. Nevertheless, the court took care to point out that plaintiff did not assert secret claims or equities unknown to defendant and that the defendant was not a third person protected by the laws of registry. Indeed, the public records doctrine has nothing to do with the law of delictual obligations and with the liability of a person who causes damage to the crops of a lessee. The lessee's interest in growing crops is *property*, protected by article 2315 of the Civil Code[36] and by article 1, § 2 of the Louisiana Constitution.[37] A tortfeasor is thus liable for the destruction of the property of the lessee, and the lessee does not need a stipulation in his favor to recover damages from the tortfeasor. In the case under consideration, the verbal lessee did not question the validity of the servitude on the leased land, nor did he claim damages for the destruction of crops on the right of way. He merely claimed that the pipeline company was liable for the destruction of his crops *off* the right of way as a tortfeasor under the general law of delictual obligations. It seems that the lessee had a cause of action.

In *Long Leaf Lumber, Inc. v. Summer Grove Developers, Inc.*,[38] a real mortgage creditor claimed in a foreclosure proceeding that the component parts of a central heating and air-conditioning system in a residence were part of the security of the mortgage as immovables by destination or by nature. An intervenor, however, claimed that the component parts in question were subject to his vendor's lien and chattel mortgage, unaffected by the prior real mortgage. The court held that intervenor had entered into a building contract under article 2756 of the Civil Code rather than a sale; hence, he had no vendor's privilege under article 3227. Further, the court found that the intervenor's chattel mortgage was valid, and correctly held that the component parts of the central heating and air-conditioning system

36. *Cf.* Louisiana Farms Co. v. Yazzo & M.V.R.R., 172 La. 569, 134 So. 747 (1931); Miller v. Texas & Pac. Ry., 148 La. 936, 88 So. 123 (1921).

37. *See* LA. CONST. art. I, § 2; Humble Pipe Line Co. v. Burton Ind., Inc., 253 La. 166, 217 So. 2d 188 (1968).

38. 270 So. 2d 588 (La. App. 2d Cir. 1972).

remained movable property insofar as the interests of the chattel-mortgagee were concerned. Accordingly, the proceeds of the sale of these parts were attributed to the chattel mortgagee rather than the real mortgage creditor.

PERSONAL SERVITUDES: USUFRUCT

In *Succession of Hyde*,[39] testator left to his widow of a second marriage the usufruct of his entire property and to his descendants of the first marriage the naked ownership thereof in the proportions provided by law. Since the property subject to usufruct was not community property inherited by issue of the marriage, the usufruct was clearly testamentary.[40] Such a donation of usufruct raises the question whether the legitime of forced heirs has been impinged.

In the case under consideration, forced heirs of the deceased, issues of his first marriage, claimed that the bequest to the surviving spouse impinged their legitime and should be reduced by application of article 1752 of the Civil Code to one-third of the property *in usufruct*. The district court rendered judgment in favor of the forced heirs, but the Court of Appeal for the Third Circuit reversed. In a well-reasoned and scholarly opinion, Judge Hood re-examined the pertinent provisions of the Civil Code and declared that article 1752 does not compel reduction of the donation to one-third of the property *in usufruct*. The decision is eminently correct and furnishes a refreshing example of civilian methodology. Unhampered by erroneous lines of jurisprudence, the court was able to reach the proper result by direct reliance on Code provisions.

When the forced heirs of a spouse are issues of a former marriage, the validity and effect of testamentary dispositions in favor of the surviving spouse are matters governed, *prima facie*, by article 1752 of the Louisiana Civil Code. Prior to 1916, this article established a disposable portion that was distinct and distinguishable from that established for donations to strangers; hence, perhaps not without justification, donations of usufruct to the surviving spouse of a second marriage were reduced to the maximum allowed by article 1752 without regard to any other article in the Civil Code.[41] The present version

39. 281 So. 2d 136 (La. App. 3d Cir. 1973).

40. *See* A. YIANNOPOULOS, PERSONAL SERVITUDES § 104.5 (1972 Supp.).

41. *See* Succession of Braswell, 142 La. 948, 77 So. 886 (1918). It should be noted, however, that French courts had consistently reduced donations of usufruct to a spouse of a second marriage by application of article 917 of the Code Civil, corresponding with article 1499 of the Louisiana Civil Code. *See* 5 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANCAIS 199 (2d ed. Trasbot et Loussouarn 1957).

of article 1752 makes it clear that the testator may give to his spouse of a second marriage the same portion of his property that he may give to a stranger. Hence, by necessity, the rights of a forced heir of a former marriage must be determined as if the excessive donation in favor of the surviving spouse had been made to a stranger. Nevertheless, Louisiana decisions rendered under the present version of article 1752, have uncritically and erroneously followed the earlier jurisprudence applying the pre-1916 version of the same article.[42] In *Succession of Hyde*, however, the court signaled the error and correctly held that article 1752 must be interpreted in combination with articles 1493 and 1499. An excessive donation in *full ownership*, made to the surviving spouse of a second marriage, or for that matter to a stranger, must be reduced at the request of forced heirs of the descending line in accordance with article 1493 of the Civil Code. If the donation is *in usufruct*, it must be reduced in accordance with article 1499. In the past, this last article has been infrequently cited, seldom applied, and at times overlooked.[43] Indeed, Louisiana courts relying on article 1710, which declares that the forced portion may not be diminished by "a charge or condition" imposed by the testator, have held that the legitime of forced heirs may not be satisfied by the devolution of property in naked ownership,[44] regardless of its value: the forced heirs are entitled to take their legitime unencumbered by a usufruct, which, of course, is a charge on the property. Accordingly, donations of the usufruct of the deceased's entire property have been erroneously reduced to the usufruct of the disposable protion.[45] This jurisprudence is directly in conflict with article 1499 of the Civil Code which confers an option on the forced heirs, if the value of the usufruct given exceeds the disposable portion, either to execute the donation or to abandon to the donee of the usufruct the disposable portion

42. *See* Succession of Young, 205 So. 2d 791 (La. App. 1st Cir. 1967); Succession of Ramp, 205 So. 2d 86 (La. App. 4th Cir. 1967); *aff'd*, 252 La. 660, 212 So. 2d 419 (1968). For a case involving application of article 1493 rather than 1499, see *Succession of McLellan*, 144 So. 2d 291 (La. App. 4th Cir. 1962).

43. *See* Comment, 37 TUL. L. REV. 710, 739 (1963); Note, 41 TUL. L. REV. 210 (1967). *Clarkson v. Clarkson*, 13 La. Ann. 422 (1858) seems to be the only reported Louisiana case in which article 1499 (article 1846 of the 1825 Code) was applied literally.

44. *See* Succession of Young, 205 So. 2d 791 (La. App. 1st Cir. 1967); Succession of Ramp, 205 So. 2d 86 (La. App. 4th Cir. 1967), *aff'd*, 252 La. 660, 212 So. 2d 419 (1968).

45. *See* note 42 *supra*. For cases involving the converse situation, namely, reduction of excessive donations of naked ownership, see *Succession of Blossom*, 194 La. 635, 194 So. 572 (1940); McCalop v. Stewart, 11 La. Ann. 106 (1856); Succession of Williams, 184 So. 2d 70 (La. App. 4th Cir. 1966).

in perfect ownership. In *Succession of Hyde*, the court correctly held that reduction of the donation must be made at the option of the heirs in accordance with article 1499.

The literal meaning of article 1499 is that forced heirs may exercise the option of that article upon proof that the usufruct is of greater value that the disposable portion. However, in order to obviate the difficulty of the valuation of the usufruct, certain French commentators have suggested, and courts interpreting the corresponding provision of the Code Civil have held, that forced heirs may take advantage of the option granted to them without regard to the value of the usufruct.[46] In effect, forced heirs may exercise their option in all cases in which a disposition in usufruct in favor of a stranger exceeds the *quantum* rather than the *value* of the disposable portion. It has been suggested elsewhere, however, that article 1499 is susceptible of literal application without difficulty and that courts ought to accord an option to the forced heirs only upon a showing that the value of the usufruct exceeds that of the disposable portion.[47]

PREDIAL SERVITUDES

Legal Servitudes: Articles 666-69

In *D'Albora v. Tulane University*,[48] a landowner brought suit against an adjacent landowner, his long term lessee, the lessee's general contractor, and the latter's subcontractor for damage caused to immovable property as a result of pile driving operations. The adjacent landowner third-partied his insurer, the insurer third-partied the contractor and his insurer, and they in turn third-partied the subcontractor for indemnity or contribution. In his distinct good style, Judge Redmann rendered an opinion that deserves attention. In-depth critique of this opinion in the light of pertinent jurisprudence and rich literature would require the length of a leading article. It is sufficient for present purposes to indicate solutions reached by the court without any critical comments.

The court first disposed of the question of prescription, holding that the one year prescription under article 3536 of the Civil Code had not run because the action was brought within one year from the date the last part of the damage was done. Turning to the question of

46. *See* 11 AUBRY ET RAU, DROIT CIVIL FRANCAIS 50 (6th ed. Esmein 1956); 3 COLIN, CAPITANT ET JULLIOT DE LA MORANDIERE, COURS ELEMENTAIRE DE DROIT CIVIL FRANCAIS 810 (2d ed. 1950).

47. *See* A. YIANNOPOULOS, PERSONAL SERVITUDES § 16 (1968).

48. 274 So. 2d 825 (La. App. 4th Cir. 1973).

liability, the court held that the adjacent landowner's liability was without negligence under article 667. As to the liability of the other defendants, the court considered the recent opinions of the Louisiana supreme court and concluded that these persons were likewise liable without regard to negligence. In the court's opinion, the liability of these persons rested both on article 667 as interpreted in *Chaney v. Travelers Ins. Co.*,[49] and on article 2315 as interpreted in *Langlois v. Allied Chemical Corporation*.[50] According to dictum in *Chaney*, article 667 furnishes the basis to hold not only the adjacent owner but also his "agent or contractor"; according to *Langlois*, pile driving operations qualify as inherently dangerous activities and, therefore, as "fault" in the broadened sense of the word. Stressing the idea that liability arose without regard to negligence, the court declared that the owner, contractor, subcontractor, and the long term lessee were responsible *in solido*. By virtue of an interpretation placed on the contract of lease, defendant landowner was able to claim indemnity and cost of litigation from his lessee. But the lessee could claim neither indemnity nor contribution from the contractor, and, likewise, the contractor could claim neither indemnity nor contribution from the subcontractor. This does not mean that the subcontractor may not claim indemnity from the contractor and the latter from the lessee. Indeed, language in the decision indicates that, in the relations among the defendants, ultimate responsibility is to be borne by the lessee.

Conventional Servitudes

In *Armstrong v. Red River, Atchafalaya and Bayou Bouef Levee Board*,[51] question arose as to the proper interpretation and application of article 798 of the Civil Code. In the year 1949 plaintiff had granted defendant, by written instrument, a servitude for levee purposes. The levee board promptly constructed a large drainage canal on a portion of the land burdened with the servitude. In 1969, plaintiff filed suit to cancel the servitude over the part of his land that had not been used by the levee board, claiming that the servitude over that part had been extinguished by non-use in accordance with article 798. The court of appeal held that the servitude continued to burden the entirety of plaintiff's land and the Louisiana supreme

49. 259 La. 1, 249 So. 2d 181 (1971).

50. 256 La. 877, 239 So. 2d 539 (1970).

51. 278 So. 2d 496 (La. 1973). For extensive analysis, see *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Property*, 33 LA. L. REV. 172, 191-97 (1973).

court affirmed.

In a well-reasoned opinion and staccato style, Chief Justice Sanders clarified an important question in the field of Louisiana property law: article 798 of the Civil Code cannot be taken out of context, but must be interpreted and applied in the light of article 790. The court classified the servitude of drain as a continuous and apparent servitude, and declared that, according to article 790, prescription against such a servitude begins to run from the date contrary works are constructed. The court further held that article 798 deals solely with the prescription of the *mode* of a servitude, and that prescription of the *area* of the servitude is governed by the well-settled rule that use of any part of a continuous tract of land under a servitude preserves the servitude over the entire land. The opinion accords clearly with the historical sources of the Civil Code and the intent of the redactors.

In *Cyr v. Louisiana Intrastate Gas Corp.*,[52] a 1942 servitude agreement for a pipeline right of way provided that the grantee should bury the pipelines "so that they will not interfere with the cultivation of the land." When a pipeline was laid the following year, the property was used for the growing of rice although the predominant crop in the area was sugar cane. The property continued to be used for rice farming until 1970 when preparations were made for sugar cane farming. It was then discovered that the 1943 pipeline was not laid deep enough to permit tilling for sugar cane purposes.

Plaintiffs, successors in title of the original grantor, sued defendant, likewise successor of the original grantee, for rescission of the 1942 agreement, and, in the alternative, for specific performance. In a well-considered opinion, Judge Landry found that the contracting parties had "intended that the line be initially buried sufficiently deep to allow cultivation of any and all crops then being raised in the area, including sugar cane,"[53] and sustained defendant's plea of 10 year liberative prescription. As the case was presented under a theory of obligations, the result was almost inevitable for the additional reason that both plaintiffs and defendants were third parties to the original contract. One may wonder, however, why the case was not pursued under a theory of property law.

Assuming that the *St. Julian* doctrine[54] was inapplicable, plaintiffs might have brought an action for the *removal* of the pipeline on

52. 273 So. 2d 694 (La. App. 1st Cir. 1973).

53. *Id.* at 696.

54. *See* St. Julian v. Morgan La. & Tex. R.R., 35 La. Ann. 924 (1883).

the ground that it encroached on their ownership.[55] Defendant would, of course, claim that he had the right to maintain the line by virtue of a predial servitude. But there was none. Defendant did not have a servitude by title, because his title provided for a line so buried that it would not interfere with the cultivation of the surface. Nor did defendant acquire the right to have the pipeline in its present location by acquisitive prescription, because the servitude was non-apparent.[56]

55. In case of unauthorized interference with immovable property, the landowner may have at his disposal various remedies. He may bring a possessory action, a petitory action, a quasi-real action of trespass, or an action for mandatory injunction without the historical limitations developed by the Chancery court. In the light of Louisiana's "different civilian procedural background" an injunction "has historically been recognized as a remedy available to protect possession of property." Poole v. Guste, 261 La. 1110, 1126, 262 So. 2d 339, 345 (1972).

56. LA. CIV. CODE art. 766.