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constitutional amendment to protect the unborn child will be unlikely to abandon their efforts in reliance on hypothetical scientific developments and on the reasoning of the instant case. Indeed, the Court might prove reluctant to see the "right to abortion" circumscribed by science, and might re-strike the *Roe* balance by answering one or more of the above questions in the negative—thus rendering the state's "compelling interest" in protecting the viable unborn child ineffective as a limit on abortion.

Grover Rees, III

PREDIAL LEASES AND PERSONAL RIGHTS

Plaintiff, who purchased property after the expiration of a lease between his author-in-title and defendant lessee, sought to compel defendant to remove constructions it had erected during the lease. The plaintiff claimed the right to compel removal by virtue of a specific provision contained in the lease and on the basis that the lessor's obligations arising under the lease¹ continued after its termination. The Louisiana Supreme Court *held* on rehearing that the lessor's right to compel removal of constructions is a personal right that does not pass as an accessory to the sale of the property. *Prados v. South Central Bell*, 329 So. 2d 744 (La. 1976).

The distinction between a personal right and a real right² is not always clear. A right is deemed personal if it is the correlative of a duty owed by the person of the debtor;³ it is termed real if it is a right that confers direct and immediate authority over the thing of another person.⁴ At Roman law this

age—relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

1. LA. CIV. CODE arts. 2719, 2720.

2. It is improper to speak only of rights and ignore the function of obligations. Rights are simply the correlatives of obligations. For purposes of convenience, the author will use the term "rights," but one should not ignore the obligations which attach to the rights. See 1 A. YIANNPOULOS, PROPERTY § 113 in 2 LOUISIANA CIVIL LAW TREATISE 337 (1966) [hereinafter cited as YIANNPOULOS].

3. *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210 (1958); 2 C. Aubry & C. Rau, DROIT CIVIL FRANCAIS § 172 (7th ed. Esmein 1961) in J. Mayda, 2 CIVIL LAW TRANSLATIONS 62 (1969) [hereinafter cited as 2 AUBRY & RAU]; YIANNPOULOS at § 90.

4. LA. CIV. CODE arts. 1997, 2010; *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210 (1958); 2 AUBRY & RAU at § 172; 1 M. Planiol, CIVIL LAW TREATISE pt. 2, no. 2158 at 270 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as 1 PLANIOL]; Comment, *Real Rights in Louisiana*, 21 LA. L. REV. 462 (1961).

distinction was recognized, but was dealt with in terms of actions available to a particular party rather than as inherent in the nature of the right.⁵

The French Code Civil does not define either real or personal rights, but French doctrine and jurisprudence have developed a distinction,⁶ much of which is implicit in the Louisiana Civil Code.⁷ Besides being a terminological distinction, it is often suggested as an additional consequence that real rights follow the thing whereas personal rights do not. However, the Louisiana Supreme Court has held that there are certain personal rights that do follow the sale of a thing.⁸

Predial leases have traditionally been regarded as creating personal rights.⁹ The Louisiana Civil Code has no express provision on the subject but implies that predial leases create personal rights,¹⁰ and Louisiana courts, following the majority of French doctrinal writers,¹¹ have generally adhered to that view.¹² While expressions that leases create real rights can be found in a number of cases involving mineral leases,¹³ it is significant to note that there is a fundamental difference between the obligations created by a predial lease and an agreement for the extraction of minerals from the soil, even though that agreement has been termed a lease.¹⁴ Only a few cases, that

5. YIANNOPOULOS at § 85.

6. 2 AUBRY & RAU at § 172; 1 PLANIOL at no. 2166; YIANNOPOULOS at § 86.

7. See LA. CIV. CODE arts. 1761, 1883, 1997, 2011-15.

8. See, e.g., *Town So. Estates Homes Ass'n v. Walker*, 332 So. 2d 889 (La. 1976).

9. E.g., La. Acts 1976, No. 103, "Exposé des Motifs"; YIANNOPOULOS at § 95.

10. LA. CIV. CODE arts. 2669, 2674. Note also that the codal articles on lease are located between other sections concerning personal rights such as sale, exchange, rents and annuities, and partnership.

11. 2 AUBRY & RAU at § 172; 1 PLANIOL at nos. 2158, 2160, 2166; 2 M. Planiol, CIVIL LAW TREATISE pt. 2, nos. 1707, 1708 at 43 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as 2 PLANIOL].

12. E.g., *Ree Corp. v. Shaffer*, 258 La. 970, 246 So. 2d 313 (1971); *Columbia Gulf Transmission Co. v. Hoyt*, 252 La. 921, 215 So. 2d 114 (1968); *Leonard v. Lavigne*, 245 La. 1004, 162 So. 2d 341 (1964); *Harwood Oil & Mining v. Black*, 240 La. 641, 124 So. 2d 764 (1960); *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210 (1958); *Gulf Refining Co. of La. v. Glassell*, 186 La. 190, 171 So. 846 (1936); *In re Morgan*, 32 La. Ann. 371 (1880); *Wolfe v. North Shreveport Dev. Co.*, 228 So. 2d 148 (La. App. 2d Cir. 1969).

13. *Munn v. Wadley*, 192 La. 874, 189 So. 561 (1939); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939); *Shaw v. Watson*, 151 La. 893, 92 So. 375 (1922); *Jennings-Heywood Oil Syndicate v. De Baillon*, 113 La. 481, 37 So. 481 (1904). The Legislature has repeatedly stated that mineral leases create real rights. LA. R.S. 9:1105 (1950); LA. MIN. CODE art. 16, comment; Comment, art. 18. See also *Mire v. Sunray DX Oil Co.*, 285 F. Supp. 885 (W.D. La. 1968); *Jennings-Heywood Oil Syndicate v. De Baillon*, 113 La. 572, 37 So. 481 (1904).

14. Mineral leases cannot be considered true predial leases; however, courts

must be regarded as aberrant, have denominated rights created by predial leases as real;¹⁵ these are apparently based on a literal reading of article 2015 of the Civil Code.¹⁶

The Civil Code does not treat the predial lease as creating rights that are distinctly real or personal. A predial lease is a synallagmatic contract creating various kinds of rights and obligations.¹⁷ It is unrealistic to treat the predial lease as creating *only* personal rights, inasmuch as they can often function as having certain attributes that are similar to real rights. For example, in Louisiana a lessee with a recorded lease has a right to assert his possession against all persons.¹⁸

The lessor has a duty not to turn out the lessee prior to the expiration of the lease.¹⁹ Consistent with the theory that real rights pass with the thing,²⁰ this obligation follows the land into hands of the lessor's successor-in-title according to article 2733 of the Civil Code. The right of the lessee functions as a real right in that it may be ascertained against the world, but the obligation not to turn out the tenant is personal. Hence there exists a personal obligation that passes with the land.

In the instant case the court classified the duty of the lessee to restore the property to its original state as a personal obligation. This is a correct classification,²¹ but it is submitted that the case could have been decided on

have traditionally thought it appropriate to analogize mineral leases to predial leases. Parties to mineral leases necessarily have different expectations than parties to true predial leases. For example, predial leases are normally for a fixed term, whereas mineral leases may be indefinite as long as minerals are produced; a mineral lease is subject to the ten-year prescription of non-use, where a predial lease has no prescriptive limitation; mineral leases contemplate exhaustion of the property, while predial leases normally anticipate return of the property in the same state as which it was leased.

15. *E.g.*, *Coyle v. Geoghegan*, 187 La. 308, 174 So. 366 (1937); *A. Manteris Co., Inc. v. Baton Rouge Poster Advertising Co.*, 125 So. 293 (La. App. 1st Cir. 1929).

16. LA. CIV. CODE art. 2015: "Not only servitudes, but lease and all other rights, which the owner had imposed on his land before the alienation of the soil, form real obligations which accompany it in the hands of the person who acquires it, although he have made no stipulation on the subject, or they be not mentioned in the act of the transfer. . . ." *See also* Comment, *Real Rights in Louisiana*, 21 LA. L. REV. 462, 467 n.26 (1961).

17. LA. CIV. CODE art. 2669; *Prados v. South Central Bell*, 329 So. 2d 744 (La. 1976); YIANNOPOULOS at § 95 (Supp. 1975); *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Property*, 30 LA. L. REV. 181 (1969).

18. *E.g.*, *Port Arthur Towing Co. v. Owens-Illinois*, 352 F. Supp. 392 (W.D. La. 1972); Comment, *Disturbance of the Lessee's Possession in Louisiana*, 29 LA. L. REV. 101, 107 (1968).

19. *Cf.* note 17, *supra*.

20. *See* LA. CIV. CODE art. 2011.

21. *See* LA. CIV. CODE arts. 2719-20; *Riggs v. Lawton*, 231 La. 1019, 93 So. 2d

other bases without resorting to classification of the right. For example, because the lease had expired and the property had been sold, it might be argued that the right created by the lease to compel removal had likewise expired. However, the court did not treat this argument in detail, perhaps because expiration of the lease is precisely what creates the tenant's obligation to restore the property to its original condition.²² In addition, the terms of the lease implied a departure from the Code obligation to remove constructions by giving the lessee the "privilege" to remove the improvements.²³ It might be argued that the lessee thus had the option to remove the improvements and the right of the owner to compel removal had therefore been waived.²⁴ Despite the availability of these two alternative approaches, the court categorized the right to compel removal as personal without a thorough analysis of why this particular right does not follow the thing.

Notwithstanding the court's treatment, the significance of the right to compel removal is not its categorization as real or personal, but rather its implications as to who can compel performance of the obligation, and under what circumstances the obligor can be compelled to perform.²⁵ Although it might appear that this is what the classic distinction between personal rights and real rights addresses, such a contention is unpersuasive in light of the aforementioned holding that a personal right can pass with the land.²⁶

Clearly, in the instant case had the lessor sought to compel removal after the expiration of the lease but prior to the sale to the plaintiff, the

543 (1957); *Dietz v. Superior Oil Co.*, 252 So. 2d 198 (La. App. 3d Cir. 1971); R. Pothier, *CONTRAT DE LOUAGE* § 197 in G. Mulligan, *POTHIER'S TREATISE ON THE CONTRACT OF LETTING AND HIRING* 79 (1953).

22. It is also suggested that another consideration should be the operation of prescription on the right to compel removal. See LA. CIV. CODE art. 3544.

23. 329 So. 2d at 744.

24. On its original hearing, the court, without any analysis, found that this did not modify the defendant's obligations under the code. On rehearing, however, the Court did not consider the issue.

25. At common law, the general rule is to the effect that a tenant who has erected constructions with the knowledge and consent of the lessor is not obligated to restore the property to its original state in the absence of an express provision in the lease. *E.g.*, *Formosa Corp. v. Rogers*, 108 Cal. 2d 397, 239 P.2d 88 (1951); *Lamonic v. Bosenberg*, 73 N.M. 452, 389 P.2d 216 (1964). For a more general discussion, see 51 C.J.S. *Landlord and Tenant* § 411 (1968). *Cf.* *Riggs v. Lawton*, 231 La. 1019, 93 So. 543 (1957). When the lessor sells the property during the term of the lease, he may expressly reserve the right to enforce an express stipulation to return the property to its original state, but absent such reservation he does not retain the right. *E.g.*, *Griffin Grocery Co. v. McBride*, 217 Ark. 949 235 S.W.2d 38 (1950). For a more general discussion, see 51 C.J.S. *Landlord and Tenant* § 413 (1968).

26. See note 8, *supra*.

defendant could not have resisted such demand because of the lessee's specific obligation under the Code.²⁷ Alternatively, the right to compel removal could have been expressly assigned to the plaintiff.²⁸ However, none of the parties so specified their intent, thus the instant litigation resulted.

Prados presents two issues: whether the right to compel removal is personal or real, and whether that right if personal passes as an accessory of the sale to the purchaser. Unless it is assumed that no personal rights under a predial lease pass with the land, it is necessary to formulate guidelines to distinguish those that are transferred from those that are not. Since the Civil Code furnishes no standards, it is helpful to seek out analogies to other situations. Thus, analogize comparable problems involving the rights under a usufruct and the rights to future rents under a recorded lease. Usufruct is a real right,²⁹ and the usufructuary is bound to use the property as a prudent administrator and to restore the property to the naked owner at the termination of the usufruct.³⁰ The naked owner may not impede the rights of the usufructuary or his enjoyment of the property³¹ and thus ordinarily may not sue the usufructuary during the period of the usufruct. If the usufructuary becomes liable to the naked owner for damages due to mismanagement of the property and the naked owner disposes of his interest prior to the termination of the usufruct, who should be allowed to sue the usufructuary for damages upon termination of the usufruct? Because the obligation to pay damages is personal and is owed to the naked owner, it would seem that only the original naked owner's vendee should be entitled to enforce the obligation.³² Likewise, the right to future rents under a recorded lease after the lessor sells the property is a personal right that passes with the sale.³³

It is also possible to distill distinguishing guidelines from other rights and obligations that arise under a lease contract. In *Prados*, the court

27. *Payne v. James*, 42 La. Ann. 230, 7 So. 457 (1890). There are no cases dealing with the maximum time limit in which a lessor can demand from a former lessee that he remove his constructions. It is suggested that the maximum limit would be the prescriptive period of ten years in Civil Code article 3544.

28. LA. CIV. CODE art. 2009. *See also* *Urban Management Corp. v. Ford Motor Credit Co.*, 263 So. 2d 404 (La. App. 2d Cir. 1972).

29. La. Acts 1976, No. 103, art. 535.

30. LA. CIV. CODE art. 567; La. Acts 1976, No. 103, art. 576.

31. LA. CIV. CODE art. 600; La. Acts 1976, No. 103, art. 605.

32. *Cf.* 2 A. YIANNOPOULOS, PROPERTY § 95 in 3 LOUISIANA CIVIL LAW TREATISE 304 (1968).

33. *Carmouche v. Jung*, 157 La. 441, 102 So. 518 (1925); *Lasseigne v. Cedar Grove Realty Co.*, 150 La. 641, 91 So. 36 (1922).

considered situations involving assignment and subrogation of rights³⁴ as well as accessories to a sale.³⁵ The court noted that a purchaser of property subject to an outstanding lease cannot, without an assignment of the right, recover from the lessee rent that had accrued prior to the sale,³⁶ nor can a purchaser recover for damages caused to the property by third persons prior to the sale.³⁷ Furthermore, a purchaser of property subject to an outstanding lease cannot recover from the lessee for damages to the property incurred prior to the sale.³⁸ Thus the court concluded that in a sale of property encumbered by a lease, “*accessories* do not include the personal rights of the seller.”³⁹ This categorical statement, however, requires qualification since the right to receive rent, a personal right of the lessor, does pass as an accessory to the sale of immovable property in certain instances.⁴⁰

The Civil Code provides that the sale of a thing includes all its accessories and whatever has been destined for its constant use, unless there is an express reservation to the contrary.⁴¹ Article 2011 provides that a contract for the improvement of immovable property passes with the sale of the property so that the purchaser may enforce the contract made by his author-in-title. Arguably, the contract in *Prados* was simply the converse of that contemplated by article 2011. Instead of a contract for improvement, the defendant in the instant case had a contract, based on his obligations under the Code, to “disimprove” the property.⁴² However, the constructions in *Prados* were built during the ownership of the plaintiff’s author-in-title, and it is arguable that only the seller of the property would have a personal right of action against the defendant for the removal of the constructions, absent an express assignment.⁴³ Only through such a labyrinth-like analysis does the court reach a result compatible with prior jurisprudence.⁴⁴

34. 329 So. 2d at 749.

35. *Id.* See also LA. CIV. CODE arts. 2461, 2490.

36. 329 So. 2d at 750.

37. *Id.*

38. *Id.*

39. *Id.*

40. See text at note 33, *supra*.

41. LA. CIV. CODE arts. 2461, 2490.

42. There have been very few cases interpreting article 2011, the first being *Breaux v. Laird*, 223 La. 446, 65 So. 2d 907 (1953). See also *Edwards v. Terminex 57, Inc.*, 292 So. 2d 851 (La. App. 2d Cir. 1974).

43. This argument simply ignores the converse of article 2011 instead of refuting it.

44. *Gumbel v. New Orleans Terminal Co.*, 197 La. 439, 1 So. 2d 686 (1941); *McCutchen v. Texas & Pacific Ry. Co.*, 118 La. Ann. 436, 43 So. 42 (1907); *Matthews*

Prados is clearly consistent with the body of Louisiana and French jurisprudence holding that predial leases create personal rights. However, the court should have recognized what the dissent termed a “well-settled principle,”⁴⁵ that predial leases create hybrid rights and obligations.⁴⁶ The development of coherent jurisprudence would be aided by the acknowledgment that although the predial lease is by nature a personal obligation and creates rights that are generally personal, it also functions in certain situations to create rights which operate as real rights. The analysis would be more complex but more accurate if it were accompanied by the recognition that the classification of a right as personal does not necessarily mean that it may not pass with the thing. This view would recognize the true nature of predial leases without disregarding traditional civilian theory.

The classification of a right, whatever its source, must be determined by examining both the nature of the right and of the correlative obligation. The analysis must also consider whether the performance of the obligation is a personal duty or is a burden on the owner of an estate, and whether the benefits flow to a person or to the owner of an estate. Since parties to a contract can create rights that are consensual, the intent of the parties, evidenced either by careful drafting of the document or inferred by the court, as to whether the right is to pass as an accessory when the thing is sold should be the overriding consideration. Where the intent cannot be divined on a case-by-case basis, the development of principles for analysis would guide not only future court decisions, but would also assist attorneys in more clearly determining their client’s rights and duties without resorting to litigation.

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v. Alsworth, 45 La. Ann. 465, 12 So. 518 (1893); *Clark v. Warner*, 6 La. Ann. 408 (1871).

45. 329 So. 2d at 751.

46. On its original hearing, the Court looked to the Code articles on the effect of a sale of property upon the rights and obligations of the lessor and lessee, LA. CIV. CODE articles 1733, 2008, 2009, 2011, and 2015, “rather than resorting to any broad determination of the nature of the interests flowing from a lease.” 329 So. 2d at 747. Nevertheless, the decisions in both hearings do in fact resort to such a broad determination as support for the holdings.