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PROPERTY

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COMMON, PUBLIC, AND PRIVATE THINGS

Article 19, Section 16 of the Louisiana Constitution of 1921 provided that prescription did not run against the "State" in any civil matter.[1] In *Shell Oil Co. v. Board of Commissioners*[2] the question arose whether the constitutional prohibition applied to a levee board as an *agency* of the state. In the past, certain Louisiana courts had distinguished between the state and its agencies and had held that prescription ran against state agencies.[3] Such decisions, though rendered after adoption of the 1921 Constitution, had dealt with prescriptions previously accrued.[4] In *Shell* the state alleged that prescription had accrued after the effective date of the 1921 Constitution, and the court regarded the matter as res nova. In a well-considered opinion, the court declared that an agency of the state created as an arm of the executive branch of the government for the purpose of carrying out a governmental function is the "state" within the meaning of the pertinent constitutional provisions. Accordingly, the levee board did not have the power to alienate mineral rights, and acquisitive prescription could not run against it.

The decision is defensible on rational grounds. There is no reason why a distinction should be made in matters of prescription between the state and its agencies. The policy underlying the prohibition of prescription against the state is applicable with equal force to state agencies. The result reached

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1. *See* La. Const. art. 19, § 16 (1921). *See also* LA. CONST. art. 12, § 13 (containing an identical provision).

2. 336 So. 2d 248 (La. App. 1st Cir. 1976).

3. *See* Haas v. Board of Comm'rs, 206 La. 378, 19 So. 2d 173 (1944); King v. Board of Comm'rs, 148 So. 2d 138 (La. App. 3d Cir. 1962). In *Board of Comm'rs v. Toyo Kisen Kaisha*, 163 La. 865, 113 So. 127 (1927), the court declared that personal rights of state agencies may be lost by liberative prescription but public things administered by a state agency may not be lost by acquisitive prescription.

4. *See* Haas v. Board of Comm'rs, 206 La. 378, 383, 19 So. 2d 173, 174 (1944): "Since it was clearly established that the plaintiff's rights or prescriptive titles were acquired prior to 1921, neither the above referred to section of the Constitution nor act of the legislature are applicable here." In *King v. Board of Comm'rs*, 148 So. 2d 138 (La. App. 3d Cir. 1962), the court held that Article 4, Section 2 of the 1921 Constitution had only prospective application and that prescription in the case under consideration had accrued by the time the constitutional provision was adopted.

by the court in *Shell* would be the same under the express language of Article 9, Section 4(B) of the 1974 Constitution, which declares that "lands and mineral interests of the State, of a school board, or of a levee district shall not be lost by prescription." Though Article 12, Section 13 of the 1974 Constitution also reproduces verbatim the language of Article 19, Section 16 of the 1921 Constitution,[5] the mention of school boards and levee boards in Article 9, Section 4(B) might give rise to an argument that prescription runs against other state agencies.

Roads and streets dedicated to public use are things of the public domain. Depending on the mode of dedication, the public may own the soil or merely hold a servitude.[6] In *Pioneer Production Corp. v. Segraves*,[7] the court was asked, in a concursus proceeding for the distribution of oil royalties, to determine the question of ownership of the bed of a public road. The state had acquired by title in 1930 a servitude for the construction of the road. The land traversed by the road was subdivided in 1946, and the recorded plat of the subdivision showed the road and its dimensions. The plat also contained language declaring the intent of the subdivider to dedicate formally to "public use the streets as shown on the map." The court held that the subdivider was still owner of the bed; he never intended to dedicate formally the pre-existing road but showed it on the plat of the subdivision for "location and boundary purposes."[8] In so holding, the court was aware that its decision conflicted with *Chevron Oil Co. v. Wilson*[9] that it chose not to follow. The Louisiana Supreme Court granted certiorari.[10] It is hoped that the court will not only resolve the conflict between the circuits but will clarify much of the confusion surrounding the types, incidents and effects of dedication to public use.[11]

REAL RIGHTS AND PERSONAL RIGHTS

The classification of rights into personal and real carries significant practical consequences in various fields of law.[12] In *Prados v. South Central*

5. See note 1, *supra*.

6. *See* A. YIANNOPOULOS, PROPERTY in 2 LOUISIANA CIVIL LAW TREATISE §§ 33, 35 (1967) [hereinafter cited as PROPERTY].

7. 326 So. 2d 516 (La. App. 3d Cir. 1976).

8. *Id.* at 518.

9. 226 So. 2d 774 (La. App. 2d Cir.), *cert. denied*, 254 La. 849, 227 So. 2d 593 (1969).

10. 330 So. 2d 313 (La. 1976).

11. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Property*, 31 LA. L. REV. 196, 202 (1971).

12. *See* PROPERTY §§ 84, 87, 89, 90.

Bell Telephone Co.,[13] a question arose concerning the classification of rights under an expired predial lease. A provision in the properly recorded lease declared that the lessee had the privilege to erect improvements on the land and to remove the same at the end of the lease. The lease expired in 1973, and the lessor sold the land to her son. The new owner promptly demanded that Bell remove certain concrete structures, shell and other debris that had been placed on the land during the term of the lease. When Bell refused to do so, the landowner cleared the land at his expense and brought suit against Bell for damages, representing the cost of clearing. The Louisiana Supreme Court held on rehearing that the present owner did not have the right to recover damages against the former lessee.

Chief Justice Sanders, in a scholarly opinion, pointed out that according to well-settled Louisiana jurisprudence and doctrine predial leases give rise to personal obligations. In certain respects, however, in accordance with directly applicable legislative provisions, rights and obligations arising under a predial lease may be asserted against third persons and to that extent they function as real rights and obligations. Had the lease been in force at the time of the sale of the land, there should be no question that the purchaser would have been subrogated in the rights and obligations of the seller vis-à-vis the lessee by application of article 2733 of the Civil Code.[14] Since, however, the lease had expired, liabilities *ex contractu* between the present owner and the former lessee ought to be determined in the light of the rules of the Civil Code concerning subrogation. There was no express subrogation in favor of the purchaser; and rights under an expired lease could not pass under article 2490 of the Civil Code because personal rights are not "accessories" of the thing sold under this provision. These conclusions are supported by an impressive array of French authorities. Quite apart from doctrinal considerations, the court observed that the buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to the sales price. Thus, the denial of a remedy against the former lessee is not an inequitable solution.

Justices Tate and Summers dissented, pointing out that the obligation to remove the structures, arising under article 2726 of the Civil Code, is a *real obligation* that passes with the land. The notion of real obligations, however, is frequently misunderstood; according to accurate analysis, a real obligation is merely the passive side of a *real right*.[15] Thus, if the former lessee had a real obligation, the present owner ought to have a correspond-

13. 329 So. 2d 744 (La. 1976), noted in 37 LA. L. REV. 282 (1976).
14. *See* PROPERTY § 95.
15. *Id.* at § 115.

ing real right for the removal of the structures. One would search in vain for such a real right.

A different result might have been reached had the interested parties relied on principles of property law instead of obligations. Under such an approach rights and obligations under the expired lease would be immaterial. In our system, ownership is presumed to be free of charges, and a landowner is entitled to demand the removal of structures encroaching on his property.[16] Bell had the right to keep the structures on the land as long as the lease was in force and to remove them at the end of the term of the lease.[17] According to well-settled Louisiana jurisprudence, since the lease was properly recorded, Bell could assert its rights against third persons.[18] After expiration of the lease Bell had still the right to remove its structures but no longer the right to keep them on the premises; the present landowner could force removal of the structures at Bell's expense by virtue of a faculty inherent in his ownership.

LEGAL SERVITUDES

Obligations of neighborhood

The interpretation and application of articles 667-669 of the Louisiana Civil Code of 1870 continue to give rise to difficulties. In *Carr v. City of Baton Rouge*,[19] the court imposed on a municipality liability without negligence for damage caused to a private home by the backup of sewer effluent. The municipality was considered a "proprietor" within the meaning of article 667 of the Civil Code because it was charged with the operation and maintenance of the main sewerage line located on an eight foot servitude. One may wonder whether this is a correct application of article 667, especially if this article imposes liability for abuse of the right of ownership.[20] The *Carr* decision was followed in *La Croix v. Travelers Indemnity Co.*,[21] also involving a suit against a municipality for damage

16. *See* LA. CIV. CODE arts. 488, 491, and 508; Blocker v. Mizell, 202 So. 2d 357 (La. App. 1st Cir. 1967); Jim Walker Corp. v. Hunt, 183 So. 2d 91 (La. App. 1st Cir. 1966).

17. 329 So. 2d at 751 (La. 1976) (Tate, J., dissenting).

18. *See* George v. Gateway Barge Line, Inc., 295 So. 2d 841 (La. App. 1st Cir. 1974); State Dep't of Highways v. Illinois Cent. R.R., 256 So. 2d 819 (La. App. 2d Cir. 1972); Flowers v. Patton, 230 So. 2d 654 (La. App. 2d Cir. 1970); PROPERTY §§ 48, 48.5 (Supp. 1975).

19. 314 So. 2d 527 (La. App. 1st Cir. 1975).

20. *See* Yiannopoulos, *Civil Responsibility in the Framework of Vicinage: Articles 667-69 and 2315 of the Civil Code*, 48 TUL. L. REV. 195, 216 (1974).

21. 333 So. 2d 724 (La. App. 2d Cir. 1976).

caused to private property by the backup of sewage. In this case, however, the court refused to award damages under article 667 because of diminution of the value of plaintiff's property. According to Judge Bolin's well-reasoned opinion, diminution of land value is a recoverable item under *Hero Lands Co. v. Texaco, Inc.*[22] when a landowner abuses his ownership by undertaking ultra-hazardous activities on his property. Since a sewer system is not an ultra-hazardous construction, the diminution of land values in the vicinity is *damnum absque injuria*.[23]

In *Sahuque Realty Co. v. Employers Commercial Union Insurance Company*[24] plaintiff brought suit against NOPSI, its contractor, and its liability insurer for damage caused to a building by construction activities on the street in front of it. The defendants impleaded the municipality as owner of the street and demanded contribution. The court denied the claim for contribution on the ground that the municipality was not owner of the street or of the works within the meaning of article 667 of the Civil Code. The court distinguished *Lombard v. Sewerage & Water Board*[25] on the ground that the drainage facilities involved in the case under consideration did not belong to the city. One may question the validity of this distinction, and, moreover, may note the conflict between the circuits.[26]

The Louisiana Civil Code does not provide expressly for the prescriptive period governing actions for damages under articles 667 and 669, and courts have "vacillated"[27] trying to choose between the one year prescription applicable to delictual actions and the ten year prescription applicable to personal actions in the absence of other regulations.[28] In *Dean v. Hercules, Inc.*,[29] the Louisiana Supreme Court took the correct view that determina-

22. 310 So. 2d 93 (La. 1975); Note, 36 LA. L. REV. 711 (1976).

23. *See* Yiannopoulos, *Violations of the Obligations of Vicinage: Remedies Under Articles 667 and 669*, 34 LA. L. REV. 475, 513 (1974).

24. 327 So. 2d 563 (La. App. 4th Cir. 1976).

25. 284 So. 2d 905 (La. 1973).

26. See text at note 19, *supra*.

27. Craig v. Montelepre Realty Co., 252 La. 502, 518, 211 So. 2d 627, 631 (1968). In this case, action was brought under article 667 for damage to a residence, and for worry, inconvenience, and anguish resulting from construction activities on abutting property. The court avoided the troublesome question of the prescriptive period governing actions under article 667 by a finding that the damage suffered by the plaintiffs was continuous, and, therefore, their cause of action had not prescribed at all. It was pointed out in a concurring opinion that the responsibility under article 667 rests on quasi-contract rather than fault; hence, actions under article 667 are subject to the ten-year prescriptive period applicable to personal actions generally. For arguments in support of this view, see 4 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 421 (1924).

28. LA. CIV. CODE arts. 3536, 3544.

29. 328 So. 2d 69 (La. 1976).

tion of the applicable period of prescription ought to be made in light of the responsibility that article 667 imposes. Since this article imposes a legal responsibility the incidents and effects of which are ordinarily determined by analogous application of the rules governing delictual responsibility, application of the one year prescriptive period is amply justified.[30] Justice Dixon, writing for a unanimous court, reached this conclusion in a scholarly and well-reasoned opinion based on an exhaustive analysis of doctrine and jurisprudence. In accordance with article 3537 of the Civil Code, prescription begins to run from the day the injured party acquired, or should have acquired, knowledge of the injury and other pertinent facts,[31] namely, from the day the damage becomes apparent.[32]

The action was for damages suffered by a landowner as a result of emissions from defendant's chemical plant. It would seem, therefore, that the cause of action arose under article 669 rather than 667.[33] Since,

30. For earlier decisions applying the one year prescription to actions for damages governed by article 667, see Gulf Ins. Co. v. Employers Liab. Assurance Corp., 170 So. 2d 125 (La. App. 4th Cir. 1964); Beauvais v. D.C. Hall Transp., 49 So. 2d 44 (La. App. 2d Cir. 1950); Mayer v. Ford, 12 So. 2d 618 (La. App. 1st Cir. 1943); *cf.* Egan v. Hotel Grunewald Co., 134 La. 740, 64 So. 698 (1914). In *Union Fed. Sav. & Loan Ass'n v. 451 Florida Corp.*, 256 So. 2d 356, 358 (La. App. 1st Cir. 1971), the court declared that "it is now well settled that the prescriptive period as applicable to L.S.A.-C.C. Art. 667 is that of one year." The case was remanded, however, because the only evidence in support of the plea of prescription was an affidavit by a subcontractor pertaining to a single cause of damage.

31. *See* LA. CIV. CODE art. 3537; Rhodes v. International Paper Co., 174 La. 49, 139 So. 755 (1932); Spyker v. International Paper Co., 173 La. 580, 138 So. 109 (1931); Mayer v. Ford, 12 So. 2d 618 (La. App. 1st Cir. 1943).

32. *See* Dean v. Hercules, Inc., 328 So. 2d 69, 73 (La. 1976): "In modern technology damages from industrial emissions and the like may not become apparent until some years after the occurrence. Additionally, it might be impossible for the injured party to know what or who caused the damage, until an investigation can be made after the damage in fact becomes apparent. In such cases, the prescriptive period would run only from the date the damage becomes apparent."

33. *See* Yiannopoulos, *supra* note 23, at 478: "Responsibility under article 667 is founded on the notion of abuse of the right of ownership whereas responsibility under article 669 is founded on the notion of an exceptional use of property that is unreasonable under the circumstances. Responsibility under this article goes far beyond the idea of abuse of right." The *projet* for the revision of Title III, Book II, of the Louisiana Civil Code of 1870, which will be submitted to the Louisiana legislature in 1977, distinguishes clearly between responsibility for abuse of the right of ownership, and responsibility on account of emissions. Article 661 of the *projet*, designed to replace article 667 of the 1870 Code, provides: "An act, activity, or work of a property owner that, under the circumstances existing when it is done, exceeds the normal exercise of the right of ownership constitutes an abuse of the right. An abuse of the right of ownership that may cause damage to another or deprive him of the enjoyment of his property subjects the property owner to civil responsibility."

however, courts do not always distinguish between the two provisions, one may expect that the one year prescriptive period will be applied in the future to actions arising under either article 667 or 669.[34]

The court refrained from expressing opinion on the doctrine of "continuing damages."[35] According to this doctrine, developed by Louisiana courts, distinction is made between continuous and discontinuous causes of injury and resulting damage. When the operating cause of the injury is "not a continuous one of daily occurrence,"[36] there is a multiplicity of causes of action and of corresponding prescriptive periods. Prescription is completed as to each injury, and the action is barred upon the lapse of one year from the date in which plaintiff acquired, or should have acquired, knowledge of the damage. According to several decisions, the burden of proof of the date of knowledge rests on the plaintiff, namely, the party against whom prescription is pleaded.[37]

When, however, "the operating cause of the injury is a continuous one, giving rise to successive damages from day to day,"[38] it has been suggested that "prescription, whatever the length of time, has no application."[39] In context, however, these declarations merely mean that, under the particular facts involved in the case, prescription had not run. It is, indeed, unacceptable to say that an action for damage is imprescriptible

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Article 662, designed to replace article 669 of the Louisiana Civil Code of 1870, provides: "An unreasonable use of an estate that causes damage to property or excessive inconvenience to persons of normal sensibilities by the diffusion of smoke, dust, vapor, noise, heat, vibrations, odors, and the like, may be enjoined. Damages may be recovered without regard to defendant's negligence. Whether the use of an estate is unreasonable is determined in the light of the nature of the neighborhood, governmental regulations, local customs, and the attending circumstances."

34. There has been scant authority for the proposition that the one year prescription is applicable to actions governed by article 669. *Cf.* Young v. International Paper Co., 179 La. 803, 155 So. 231 (1934); Rhodes v. International Paper Co., 174 La. 49, 139 So. 755 (1932); Spyker v. International Paper Co., 173 La. 580, 138 So. 109 (1931) (involving responsibility under article 2315 of the Civil Code).

35. Dean v. Hercules, Inc., 328 So. 2d 69, 73 (La. 1976).

36. Devoke v. Yazoo & M.V.R. Co., 211 La. 729, 749, 30 So. 2d 816, 822 (1947).

37. *See* Spyker v. International Paper Co., 173 La. 580, 138 So. 109 (1931); Mayer v. Ford, 12 So. 2d 618 (La. App. 1st Cir. 1943).

38. *See* Craig v. Montelepre Realty Co., 252 La. 502, 515, 211 So. 2d 627, 632 (1968); Devoke v. Yazoo & M.V.R. Co., 211 La. 729, 748, 30 So. 2d 816, 822 (1947). *See also* Daigle v. Continental Oil Co., 277 F. Supp. 875 (W.D. La. 1967); Di Carlo v. Laundry & Dry Cleaning Serv., 178 La. 676, 152 So. 327 (1933); Werges v. St. Louis, Chicago & N.O. R.R., 35 La. Ann. 641 (1883).

39. See note 38, *supra*. *But see* Young v. International Paper Co., 179 La. 803, 155 So. 231 (1934); Rhodes v. International Paper Co., 174 La. 49, 139 So. 755 (1932); Egan v. Hotel Grunewald Co., 134 La. 740, 64 So. 698 (1914).

merely because the operating cause of the injury is continuous. When the operating cause of the injury is a continuous one, it may be that prescription does not begin to run from the date the injury was first inflicted, but it ought to run at least from the date the damage was completed and the injured party acquired knowledge of it. Thus, it has been correctly held that damage caused by such continuous operating causes as discharge of industrial wastes,[40] excavations,[41] pile driving operations,[42] salt water escaping from an oil well,[43] and from the construction of a freight terminal,[44] prescribed upon the lapse of one year from the date the damage was completed and the owner acquired knowledge of it.

When the operating cause of the damage is a continuous one, and has not ceased to exist in the year preceding the institution of suit, a question arises, whether plaintiff may recover the whole of the damage or only the portion of it that he incurred within a year from the filing of the suit. Earlier decisions indicate that "prescription is not suspended by the fact that the damage is continuous, but runs on each item from the date it was inflicted."[45] Plaintiff may thus recover only the damage that he suffered in the year preceding the institution of the suit; "he cannot postpone bringing the action for some time after the year and then sue for the whole damage."[46] According to the same decisions, plaintiff has the burden of proof to show what part of the damage has not prescribed.[47] In *Devoke v. Yazoo &*

40. Young v. International Paper Co., 179 La. 803, 155 So. 231 (1934). *See also* Rhodes v. International Paper Co., 174 La. 49, 139 So. 755 (1932); Spyker v. International Paper Co., 173 La. 580, 138 So. 109 (1931).

41. Mayer v. Ford, 12 So. 2d 618 (La. App. 1st Cir. 1943).

42. Gulf Ins. Co. v. Employers Liab. Assurance Corp., 170 So. 2d 125 (La. App. 4th Cir. 1964).

43. Parro v. Fifteen Oil Co., 26 So. 2d 30 (La. App. 1st Cir. 1946).

44. Beauvais v. D.C. Hall Transp., 49 So. 2d 44, 50 (La. App. 2d Cir. 1950). In this case an action was brought for the diminution of the value of land over three years after the construction of the terminal and commencement of the alleged damage. The court declared that "in cases where the commission of a wrongful act is attended immediately by resulting damage, the Louisiana courts have held that the initial point for the one year prescription, under Articles 3536 and 3537 of the Civil Code, is the date on which the damaging act is completed."

45. Young v. International Paper Co., 179 La. 803, 155 So. 231, 232 (1934). *Accord*, Rhodes v. International Paper Co., 174 La. 49, 139 So. 755 (1932); Parro v. Fifteen Oil Co., 26 So. 2d 30 (La. App. 1st Cir. 1946).

46. Egan v. Hotel Grunewald Co., 134 La. 740, 64 So. 698, 702 (1914). *Accord*, Spyker v. International Paper Co., 173 La. 580, 138 So. 109 (1931); Parro v. Fifteen Oil Co., 26 So. 2d 30 (La. App. 1st Cir. 1946). These cases must be regarded as overruled in part *sub silentio*. See text at note 55, *infra*.

47. See note 46, *supra*. *See also* Beauvais v. D.C. Hall Transp., 49 So. 2d 44 (La. App. 2d Cir. 1950).

M.V.R. Co.,[48] however, the Louisiana Supreme Court distinguished these cases on the ground that although the damages there involved "were progressive," the operating cause of the injury was discontinuous. This distinction is at best tenuous. The earlier decisions ought to be considered overruled to the extent they held that prescription ran as to each item of damage incurred from a continuous cause, and that plaintiff had the burden to show which part of the damage was still recoverable. Although in *Devoke* the court seemed to indicate that "prescription . . . has no application"[49] when damage is attributed to a continuous cause, in *Craig v. Montelepre Realty Co.*[50] the court declared that prescription does run but the party pleading it has the burden to show "what portion of the damages proved occurred anterior to the year preceding the institution of the suit, or in other words, to prove what part of the plaintiff's demand is prescribed." In the absence of such a showing, plaintiff is entitled to recover for all his damage. Perhaps, instead of relying on procedural rules, the court should have stated a substantive rule of law: in case of continuously damaging operations, such as pile driving;[51] use of heavy machinery causing vibrations;[52] running of a railroad that causes emissions of smoke, dust or soot;[53] and the operation of a freight terminal,[54] there is no multiplicity of actions and of prescription accrual dates; there is only one period of prescription running from the date the damage is completed and the injured party acquires knowledge of it rather than from the date the injury is inflicted.[55]

Enclosed Estates

Articles 699-708 of the Louisiana Civil Code of 1870 deal with the

48. 211 La. 729, 748, 30 So. 2d 816, 822 (1947).

49. *Id.*, 30 So. 2d at 822.

50. 252 La. 502, 515, 211 So. 2d 627, 632 (1968), *following* DiCarlo v. Laundry & Dry Cleaning Serv., 178 La. 676, 683, 152 So. 327, 329 (1933).

51. *See* D'Albora v. Tulane Univ., 274 So. 2d 825, 828 (La. App. 4th Cir. 1973).

52. DiCarlo v. Laundry & Dry Cleaning Serv., 178 La. 676, 152 So. 327 (1933).

53. Devoke v. Yazoo & M.V.R. Co., 211 La. 729, 30 So. 2d 816 (1947). *Cf.* Daigle v. Continental Oil Co., 277 F. Supp. 875 (W.D. La. 1967); Werges v. St. Louis, Chicago & N.O. R.R., 35 La. Ann. 641 (1883).

54. *See* Beauvais v. D.C. Hall Transp., 49 So. 2d 44 (La. App. 2d Cir. 1950). In this case, the court correctly held that a claim for diminution of the value of property adjoining a freight terminal had prescribed; but a claim for damages on account of excessive inconveniences had not prescribed.

55. *See* D'Albora v. Tulane Univ., 274 So. 2d 825, 828 (La. App. 4th Cir. 1973). The court interpreted *Craig* to mean that "there is no multiplicity of causes of action and of prescription-accrual dates for a continuously damaging operation such as pile driving: there is one cause of action and one prescriptive period, which runs from the date the last part of the damage is done." For corresponding solutions in France, see 4 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 448 (1924).

legal servitude of passage in favor of an enclosed estate. In *Picard v. Shaubhut*,[56] plaintiff brought suit for declaratory judgment recognizing the existence of a servitude of passage in favor of his estate, and, in the alternative, for a judgment establishing a servitude of passage under article 701 of the Civil Code. The parties stipulated that a servitude of passage had been reserved in favor of plaintiff's estate in an act of partition of 1949, and that neighbors would testify that the servitude so reserved had not been used in the last twenty or thirty years. The court found that the act of partition did not establish a conventional servitude of passage but merely recognized the existence of a legal servitude. Since the faculty accorded to the owner of an enclosed estate for passage over neighboring lands is imprescriptible, judgment was rendered in plaintiff's favor on his main demand. In *Morgan v. Culpepper*,[57] plaintiff brought an action for an injunction prohibiting defendant from interfering with an alleged right of passage in favor of plaintiff's estate, and, in the alternative, for the establishment by the court of a servitude of passage under article 701 of the Civil Code. A lower court judgment refusing injunctive relief was affirmed in the absence of allegations and proof that the passageway had been fixed by the parties or determined by judicial decision. The court found, however, that plaintiff's estate was enclosed and passage was due under articles 669 and 700 of the Civil Code. In the opinion of the court, article 701 was inapplicable because "a gratuitious servitude is due to an enclosed estate only when the estate is enclosed at the time it is excised from the larger tract,"[58] a burden plaintiff failed to carry out.

St. Julien Doctrine

In *Lake, Inc. v. Louisiana Power & Light Co.*,[59] the Louisiana Supreme Court prospectively overruled the line of decisions establishing the St. Julien doctrine. This jurisprudential doctrine derived its name from *St.*

56. 324 So. 2d 517 (La. App. 1st Cir. 1975). *See also* De Felice Land Corp. v. Citrus Lands of Louisiana, Inc., 330 So. 2d 631 (La. App. 4th Cir. 1976) (enclosed estate, but conventional servitude of passage established in its favor); Watson v. Scott, 324 So. 2d 508 (La. App. 2d Cir. 1975) (same); Harvey v. McMurray, 319 So. 2d 876 (La. App. 1st Cir. 1975) (same).

57. 324 So. 2d 598 (La. App. 2d Cir. 1975). For pertinent discussion, see *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Property*, 32 LA. L. REV. 172, 183 (1972).

58. 324 So. 2d at 603. *Cf. The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Property*, 35 LA. L. REV. 266, 270-73 (1975).

59. 330 So. 2d 914 (La. 1976). *But see* Istre v. South Cent. Bell Tel. Co., 329 So. 2d 486 (La. App. 3d Cir. 1976) (an expression of the *St. Julien* doctrine prior to the *Lake* decision).

Julien v. Morgan Louisiana & Texas Railroad Co.,[60] which held that a corporation having power of expropriation could acquire a servitude by the unopposed use and occupancy of another's land for some public purpose. The landowner could no longer sue for damages or for the removal of works but merely for the value of the servitude taken. Justice Dixon, in a staccato opinion, gave convincing reasons for the "abandonment of the deviant and conflicting" jurisprudence and for "return to the Civil Code provisions governing the establishment of servitudes."[61] The Louisiana legislature, however, enacted Act No. 504 of 1976.[62] The act provides that when the state, its political subdivisions, or private corporations having power of expropriation, take, in good faith, possession of the immovable property of another person and construct on, under, or over it facilities with the consent or acquiescence of the landowners a presumption arises that the landowner waived his right to receive just compensation prior to the taking; in such a case the landowner's remedy shall be an action for determination whether the taking was for a public and necessary purpose and for just compensation. The act does not overrule legislatively the *Lake* decision. Thus, *St. Julien* is not resurrected; it is merely un-dead, feeding on servitudes established prior to *Lake*.

CONVENTIONAL SERVITUDES

In *Nash v. Whitten*,[63] a majority of the Louisiana Supreme Court held that a natural gas pipe line, "mostly above ground and visible, and partly below the surface"[64] of the land, constitutes a discontinuous predial servitude that may not be acquired by acquisitive prescription. Justice Marcus, writing for the majority, undertook a re-examination of Louisiana jurisprudence dealing with the classification of predial servitudes as continuous and discontinuous; and, in a scholarly opinion studded with frequent reference to civilian authorities, concluded that when acts of man are required for the exercise of a servitude, the servitude is discontinuous "whether those acts occur on the servient estate or elsewhere."[65] Louisiana decisions declaring that a servitude is continuous when it may be exercised without an act of man on the servient estate must be regarded, to this extent,

60. 35 La. Ann. 924 (1883).
61. 330 So. 2d at 918.
62. La. Acts 1976, No. 504.
63. 326 So. 2d 856 (La. 1976).
64. *Id.* at 858. What if counsel had argued that defendant had acquired by acquisitive prescription the right to have the visible pipe line on the land of plaintiff? *Cf.* Farrell v. Hodges Stock Yards, Inc., 333 So. 2d 745 (La. App. 4th Cir. 1976).
65. 326 So. 2d at 862.

as overruled.[66] Justice Tate dissented eloquently.[67] He objected to the abandonment of a working Louisiana jurisprudential solution in favor of a French doctrinal view, "for dictionary reasons, without weighing the functional or practical values." He termed this "an abdication of the judicial function in favor of blind application of 'rules' without regard to their purpose or reason." This is a rare occasion when both sides of an argument are right for different reasons. The majority opinion represents a respectable effort at interpretation of the Civil Code in the light of theoretical considerations and in accord with a pertinent gloss of doctrine and jurisprudence. The dissenting opinion is an equally respectable effort at interpretation in the light of actualities and in accord with Gény's methodology. Thus, the difference between the two approaches relates to legal philosophy and methods of interpretation. Be this as it may, the projet for the revision of Book II of the Louisiana Civil Code of 1870, scheduled for submission to the Louisiana legislature in 1977, offers a simple solution. It suppresses the distinction of predial servitudes into continuous and discontinuous, and provides that only apparent servitudes may be acquired by acquisitive prescription.[68]

In *Dickerson v. R.J.M. Pipeliners, Inc.*,[69] the agreement granting a right of way for the construction and maintenance of a pipeline provided for a right to lay additional lines. When interested parties sought to exercise this right more than ten years after establishment of the servitude, the court held that the ten year prescription of non-use had accrued. The court followed *Columbia Gulf Transmission Co. v. Fontenot*[70] and found *Hanks v. Gulf States Utilities Co.*[71] to be inapposite as it "dealt with an assessory (sic) right to the use of a servitude to transmit electric power" rather than a "mode of use."[72] The question of prescription of the mode of use of a

66. *See, e.g.*, Acadia Vermillion Rice Irrigating Co. v. Broussard, 175 So. 2d 856 (La. App. 3d Cir. 1965).

67. 326 So. 2d at 862 (Tate, J., dissenting).

68. Article 739 of the *projet*, designed to replace article 766 of the 1870 Code, declares: "Nonapparent servitudes may be acquired by title only." Article 740 of the *projet*, designed to replace article 765 of the 1870 Code, declares: "Apparent servitudes may be acquired by title, by destination of the owner, or by acquisitive prescription." With respect to acquisitive prescription of predial servitudes, article 742 of the *projet*, which is new, declares: "The laws governing acquisitive prescription of immovable property apply to apparent servitudes. An apparent servitude may be acquired by peaceable and uninterrupted possession of the right for ten years in good faith and by just title; it may also be acquired by uninterrupted possession for thirty years without title or good faith."

69. 331 So. 2d 501 (La. App. 2d Cir. 1976).

70. 187 So. 2d 455 (La. App. 3d Cir. 1966).

71. 253 La. 946, 221 So. 2d 249 (1969).

72. 331 So. 2d at 504.

servitude has been discussed adequately in prior years.[73] It suffices, perhaps, to state that since Louisiana doctrine is apparently not followed, the Louisiana Supreme Court ought to clarify the law. In the opinion of the writer, *Hanks* ought to have controlled the outcome of *Dickerson*.

BUILDING RESTRICTIONS

In Louisiana, building restrictions are restraints on the use of immovables in accordance with a general plan for the maintenance of building standards and uniform improvements.[74] According to Louisiana decisions, building restrictions are *sui generis* real rights akin to predial servitudes;[75] they are governed by the general rules applicable to predial servitudes, subject to certain exceptions established by special legislation or jurisprudence as to the creation, enforcement or termination of these rights.[76]

In *Smith v. DeVincent*,[77] recorded restrictions prohibited the location of trailers on the lot of a subdivision. In a scholarly opinion, Judge Marvin undertook a comparative excursus; chose "not to resort to the holdings in other jurisdictions, but to employ the civil law principles;"[78] and concluded that mobile homes, being indistinguishable from trailers, were forbidden under the restrictive plan. In *East Parker Properties, Inc. v. Pelican Realty Co.*,[79] however, the court decided the case as if it were sitting in a common law jurisdiction. The results may be correct but the methodology leaves much to be desired. In *Town South Estates Homes Association v. Walker*,[80] recorded restrictions required that each purchaser of a lot in the subdivision become automatically a member of the Home Association, a corporation formed to provide maintenance for the common grounds; that each member be subject to an annual assessment; and that "this assessment, together with interest, costs, and reasonable attorney fees was the personal obligation of the property owner upon the due date of the assessment." The

73. *See The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Property*, 33 LA. L. REV. 172, 191-97 (1973); *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Property*, 30 LA. L. REV. 181, 194-95 (1969).

74. *See* Yiannopoulos, *Real Rights: Limits of Contractual and Testamentary Freedom*, 30 LA. L. REV. 44, 54-75 (1969).

75. *See* Canova v. St. Germain, 335 So. 2d 508 (La. App. 1st Cir. 1976); Camelot Citizens Ass'n v. Stevens, 329 So. 2d 847 (La. App. 1st Cir. 1976); Fitzwater v. Walker, 281 So. 2d 790 (La. App. 3d Cir. 1973).

76. *See* Gerde v. Simonson Invs. Inc., 251 La. 893, 207 So. 2d 360 (1968); McGuffy v. Weil, 240 La. 758, 125 So. 2d 154 (1960).

77. 322 So. 2d 257 (La. App. 2d Cir. 1975).

78. *Id.* at 264.

79. 335 So. 2d 466 (La. App. 1st Cir. 1976).

80. 332 So. 2d 889 (La. App. 2d Cir. 1976).

court routinely enforced this provision which is *res nova* in Louisiana and raises a battery of questions concerning its validity. Assuming that certain affirmative duties may be imposed on owners of lots in a subdivision, is an annual assessment such a permissible affirmative duty? May such an affirmative duty be assumed as a "personal obligation" without express stipulation to that effect? It would seem that satisfaction of "the requirement of notice to third parties as set forth in LSA-R.S. 9:2721"[81] is immaterial for the assumption of a personal obligation.

REAL ACTIONS: RECOVERY OF MOVABLES IN KIND

Civil law and common law systems differ substantially in the protection they afford to the dispossessed owner of a movable or a chattel. The common law has never provided a real action for the recovery of chattels in kind, and today the tort of conversion dominates the field in sister states.[82] In contrast, in civil law systems, the dispossessed owner of a movable may recover it by the revendicatory action.[83] In Louisiana, the revendicatory action for the recovery of movables in kind is an *innominate real action*.[84] Of course, in case of a wrongful dispossession, the owner of a movable may prefer to claim damages under the law of delictual obligations rather than restoration of his possession.[85]

Delictual actions based on unlawful interference with the ownership or possession of movables are sometimes designated in Louisiana practice as actions for "conversion." Despite this denomination, these delictual actions are not identifiable with the common law tort of conversion which is an intentional wrong giving rise to strict liability for the recovery of the value of a chattel. One is justified in stating that the common law tort of conversion is not a part of the Louisiana law of delictual obligations. In adopting parts of the Uniform Commercial Code, the Louisiana legislature was careful to substitute the word "misappropriation" for "conversion"; and in refusing writs in *Lincecum v. Smith*,[86] the Louisiana Supreme Court indicated that

81. *Id.* at 890.

82. *See* F. LAWSON, INTRODUCTION TO THE LAW OF PROPERTY 32 (1958): "It is a matter for the discretion of the judge whether he will order the return of goods or give judgment for either the return of the goods or payment of their value at the option of the defendant. Thus a person who loses goods can never be certain that he will recover them *in specie*."

83. *See* 2 AUBRY ET RAU, DROIT CIVIL FRANCAIS n° 147 (7th ed. Esmein 1961); 2 CARBONNIER, DROIT CIVIL 249 (1955).

84. *See* PROPERTY § 145.

85. *See, e.g.*, Ray v. Cook, 250 So. 2d 525 (La. App. 3d Cir. 1971); Smith v. Carrollton Refrigeration & Home Appliances, 243 So. 2d 356 (La. App. 4th Cir. 1971).

86. 287 So. 2d 625 (La. App. 3d Cir. 1973), *cert. denied*, 290 So. 2d 904 (La. 1974).

the "result" was correct under article 2315 of the Civil Code. Concurring, Justice Barham declared: "Trover and conversion are common law remedies. The civil law of Louisiana does not follow the common law and especially does not follow these common law concepts. Recovery is had for all damage caused by the fault of another under Civil Code Article 2315." Nevertheless, in *Deshotels v. Statewide Trailer Sales*,[87] the court cited *Lincecum* for the proposition that "our courts have long employed common law concepts in determining liability for tortious conversion of property." One may wonder about the heralded renaissance of the civilian tradition in Louisiana.[88] Professor Gordon Ireland would have reasons to rejoice.[89]

87. 333 So. 2d 259 (La. App. 1st Cir. 1976). *But cf.* McVay v. McVay, 318 So. 2d 660 (La. App. 3d Cir. 1975) (court awarded damages under article 2315 of the Civil Code without regard to the tort of conversion).

88. *See* Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357 (1973).

89. *See* Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937).