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Private Law: Property

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PROPERTY

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COMMON, PUBLIC, AND PRIVATE THINGS

Roads and streets dedicated to public use are things of the public domain. Depending on the mode of dedication, the public may own the roadbed or merely hold a servitude of passage. Thus, a statutory tacit dedication[1] and an implied dedication create merely a servitude in favor of the public. A formal dedication, whether statutory or non-statutory, vests ownership in the public.[2]

A formal statutory dedication is one made in substantial conformity with Revised Statutes title 33, section 5051, by a land developer dedicating the streets of a subdivision to public use.[3] In *Chevron Oil Co. v. Wilson*,[4] the court held that the recording of a survey showing an "improved highway" vested title of the roadbed in the public. In the course of its opinion, the court indicated that dedication under the statute is effected without reference to the intention of the subdivider, the requisite intention being generally presumed. The conclusion was bolstered by policy considerations concerning security of title and acquisition. The result reached by the court has been approved by doctrine.[5] Nevertheless, doubt has been cast on the rationale of *Chevron*.

In *Pioneer Production Corp. v. Segraves*,[6] the court was asked, in a concursus proceeding for the distribution of oil royalties, to determine the 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

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1. LA. R.S. 48:491 (Supp. 1954).

2. *See* A. YIANNOPOULOS, PROPERTY in 2 LOUISIANA CIVIL LAW TREATISE §§ 33, 35 (Supp. 1975) [hereinafter cited as PROPERTY].

3. LA. R.S. 33:5051 (1950 & Supp. 1962).

4. 226 So. 2d 774 (La. App. 2d Cir. 1969), *cert. denied*, 254 La. 849, 227 So. 2d 593 (1969); discussed in *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Property*, 31 LA. L. REV. 196, 202 (1971).

5. *See* Comment, *The Third Dimension of Dedication in Louisiana*, 30 LA. L. REV. 583, 603 (1970).

6. 326 So. 2d 516 (La. App. 3d Cir. 1976).

the streets as shown on the map." The Court of Appeal for the Third Circuit 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."[7] In so holding, the court was aware that its decision conflicted with *Chevron* but chose not to follow it. The Louisiana Supreme Court granted certiorari and affirmed.[8]

Justice Calogero, writing for the majority, resorted to literal interpretation of section 5051 and found that the language of the statute "does not necessarily contemplate the dedication to public use of a bordering, existing right of way or highway."[9] He distinguished *Chevron* on two grounds: (1) the road in that case completely traversed the subdivision in question whereas in the case under consideration the road ran along the edge of the subdivision; and (2) the road involved in *Chevron* was the subject of a non-recorded implied dedication whereas in the case under consideration the road was the subject of a recorded conventional servitude. Justice Calogero went further to state that when a "rational construction negates an intent on the part of the subdividing landowner to dedicate a particular piece of land, the fact that a reference to the land appears on a map does not, of itself, effect a dedication to public use."[10]

The distinctions between *Chevron* and *Pioneer* are technically correct but, it would seem, insufficient to justify different results. A literal interpretation of the statute may, of course, support the proposition that it applies merely to roads and streets traversing a subdivision, but one may wonder whether such a literal interpretation is warranted. The demands for certainty of acquisition and transaction point toward the need of an interpretation dispensing with technical distinctions. Moreover, the same demands point toward an interpretation dispensing with the search for an intent to dedicate roads and streets appearing on a subdivision plat. Under the rule of *Pioneer* a title examiner would have to reach a "rational" decision as to the intent of a subdivider *not* to dedicate to public use roads and streets that appear on the plat of the subdivision. The court has listed a number of criteria that a title examiner may weigh in reaching his decision, but these may not be present in all cases. Proliferation of litigation may thus be expected.

7. *Id.* at 518.
8. 340 So. 2d 270 (La. 1976).
9. *Id.* at 274.
10. *Id.* at 275.

MOVABLES AND IMMOVABLES

Article 464 of the Louisiana Civil Code of 1870 declares that buildings "or other constructions," whether they have their foundation in the soil or not, are immovables by nature. According to well-settled Louisiana jurisprudence, constructions other than buildings are immovables by nature under this article when they meet the criteria of considerable size, permanence, and integration with the soil.[11]

House trailers or mobile homes on wheels are movables.[12] However, a mobile home permanently attached to a tract of land may qualify as an immovable by destination under article 468 of the Louisiana Civil Code of 1870[13] or as an immovable by nature under article 464 of the same Code.[14] In *Ellis v. Dillon*,[15] the court held that a mobile home was an immovable by nature as a building or other construction under article 464, and, therefore, its owner was entitled to protection under the homestead laws.[16] The court found that the mobile home in question was sufficiently integrated with the soil as it was sitting on its axle, was hooked to electrical wires, had piping to a pump of water, and was connected to a sewerage line; moreover, the owner had welded angle iron to the trailer and had sunk the iron in cement in the ground. Under the circumstances, there should be no doubt that the house trailer could qualify as another construction under article 464 of the Civil Code. The court properly held that the statutory provisions concerning immobilization of a mobile home by the recordation of a declaration of the owner and of other documents[17] do not preclude immobilization under other laws.

In *Sick v. Bendix-United Geophysical Corp.*,[18] plaintiffs, having an unrecorded mineral lease, brought a trespass action against defendants.

11. *See* Yiannopoulos, *Railroad Tracks as Immovables by Nature: Ruminations on American Creosote Co. v. Springer*, 19 LA. B.J. 37, 40 (1971).

12. *See* LA. R.S. 32:710 (Supp. 1975); *cf.* Osborne v. Mossler Acceptance Co., 214 La. 503, 38 So. 2d 151 (1949) (mobile home subject to chattel mortgage).

13. For immobilization, this article requires unity of ownership, that is, that the owner of the movable be also owner of the immovable. *See* PROPERTY, *supra* note 2, § 51 (1966).

14. For immobilization under article 464 it is not necessary that the movable and the immovable belong to the same owner. *See* State Dept. of Highways v. Illinois Cent. R. Co., 256 So. 2d 819 (La. App. 2d Cir. 1972); Marcellous v. David, 252 So. 2d 178 (La. App. 3d Cir.), *writ refused*, 259 La. 943, 253 So. 2d 383 (1971).

15. 345 So. 2d 1241 (La. App. 1st Cir. 1977).

16. *See* LA. CONST. art. XII, § 9; *id.* art. XIV, § 34.

17. LA. R.S. 32:710 (Supp. 1975).

18. 341 So. 2d 1308 (La. App. 1st Cir. 1977).

They alleged that defendants entered the lands covered by the lease without plaintiffs' permission and conducted geophysical operations which diminished the value of the lease. Defendants filed peremptory exceptions of no right and no cause of action. The court held that plaintiffs had a right of action but they did not state a cause of action because they failed to allege in their petition that defendants entered the lands without the permission of the record owner. In an elaborate opinion, Judge Ellis pointed out that the public records doctrine does not protect trespassers but persons who derive rights from the record owner vis-a-vis the true owner. The decision is correct.

According to Louisiana legislation and jurisprudence, a lease of immovable property must be filed for registry in the conveyance records of the parish in which the immovable is located in order to affect third persons.[19] In the absence of recordation, third persons dealing with the landowner may acquire rights in the immovable property priming those of the unrecorded lessee.[20] Insofar as these persons are concerned, the lease does not exist. Of course, the landowner may not authorize third persons to commit an offense or quasi-offense against the unrecorded lessee or his property. He may merely convey real or personal rights involving exercise of the prerogatives of ownership although they may be in derogation of the prior unrecorded lease; and if, as a result thereof, the unrecorded lessee sustains some damage, the landowner is responsible rather than one who has dealt with him in reliance on the public records.

There should be no doubt that the lease of immovable property, whether recorded or unrecorded, is an incorporeal immovable,[21] and that an unlawful interference with it is an offense under article 2315 of the Civil Code.[22] Thus, a trespasser or one possessing adversely to the land-

19. *See* LA. CIV. CODE art. 2266; LA. R.S. 9:2722 (1950); Flower v. Pearce, 45 La. Ann. 853, 13 So. 150 (1893).

20. *See* Flower v. Pearce, 45 La. Ann. 853, 13 So. 150 (1893) (the right of the lessees "unavailing . . . without registry in the manner prescribed by law for conveyance of real estate").

21. *See* LA. CIV. CODE art. 470, 471; PROPERTY, *supra* note 2, § 60.

22. See Judge Culpepper's scholarly opinion in *Jardell v. Sabine Irrigation Co.*, 346 So. 2d 1365 (La. App. 3d Cir. 1977). In addition to liability under article 2315 of the Civil Code, a lessee "has a right of action against any person not claiming a right to the premises for damages caused by disturbance of the lessee's use or enjoyment of the leased premises, regardless of whether the lease is recorded. Bergeron v. Con-Plex, Inc., 255 So. 2d 397 (La. App. 1st Cir. 1971); Cane River Needle Art v. Reon, Inc., 335 So. 2d 751 (La. App. 3d Cir. 1976)." *Id.* at 1369. *See also* Hargroder v. Columbia Gulf Transmission Co., 290 So. 2d 874 (La. 1974) (Barham, J. and Tate, J., concurring); *The Work of the Louisiana Appellate Courts for the 1972-73 Term—Property*, 34 LA. L. REV. 207, 209-13 (1973).

owner and the lessee may be liable for damages toward the lessee on account of his interference with the lease or damage to the lessee's property. However, one who acquires real or personal rights from the landowner does not interfere unlawfully with the rights of an unrecorded lessee. This does not mean that one who deals with the landowner is licensed to commit an independent wrong against the lessee or his property. For example, if the unrecorded lessee erected a building on the property, the landowner may convey it to a third person and even authorize its destruction and replacement by another type of construction. But the landowner may not authorize reckless blasting that may cause damage to the lessee's movables.

In the light of the foregoing, determination of the question whether a third person is liable to the unrecorded lessee for damage to his property depends on whether that person merely exercised a right that the landowner could convey or committed a wrong that the landowner could not authorize. Thus, an unrecorded lessee does not state a cause of action when he merely alleges that a third person interfered with his lease without his permission. He must allege that the third person interfered with the lease without his permission *and* without the permission of the landowner. However, the landowner's permission is immaterial as to acts that constitute an independent wrong. Thus, the unrecorded lessee states a cause of action when he alleges facts that are sufficient to establish delictual responsibility regardless of the landowner's permission. In such a case, he does not need to allege that the acts of the defendant were not authorized by the landowner. In the case under consideration, the lessee complained of an invasion of his rights that the landowner could authorize, subject, of course, to the lessor's potential liability toward the unrecorded lessee. The exercise of these rights by defendant could not engage delictual responsibility toward the unrecorded lessee. The exception of no cause of action was, therefore, properly sustained.

PERSONAL SERVITUDES

In the absence of contrary provision of law or juridical act, the naked owner and the usufructuary may agree to sell the property free of the usufruct and to distribute the proceeds of the sale as they see fit. The Civil Code of 1870 did not provide expressly for the situation in which the usufructuary and the naked owner failed to determine the mode of distribution of the proceeds. The usufructuary's consent to the sale was not an

express renunciation of his right,[23] and argument could be made that the usufruct attached to the proceeds by application of the principle of real subrogation.[24] However, according to French doctrine and jurisprudence, in such a case the usufruct terminates and each vendor is attributed the value of his interest.[25] In *Succession of Gabriel*,[26] the court followed the latter solution and determined the value of the respective interests of the usufructuary and of the naked owner by application of the mortality tables. The result would, however, be otherwise under article 616 of the Civil Code as revised in 1976, which declares that when property subject to usufruct "is sold by agreement between the usufructuary and the naked owner, the usufruct attaches to the proceeds of the sale unless the parties provide otherwise." This is a preferable solution in the framework of both legal and conventional usufructs. It accords with the spirit of legislation underlying the most common usufruct of the surviving spouse in community and with the probable intent of the grantor of a conventional usufruct. Moreover, it obviates difficulties connected with the valuation of the usufruct and of the naked ownership as well as reliance on mortality tables which seldom accord with the life expectancies of particular individuals. The interests of the naked owner are protected by article 618 which accords him the right to demand within one year from the receipt of the proceeds by the usufructuary that they be safely invested.

PREDIAL SERVITUDES

Article 765 of the Louisiana Civil Code of 1870 declares that "continuous and apparent servitudes may be acquired by title, or by possession of ten years"[27] whereas article 3504 of the same Code declares that "a continuous apparent servitude is acquired by possession and the enjoyment of the right for thirty years uninterruptedly, even without title

23. *See* LA. CIV. CODE art. 624(2).

24. *See* PROPERTY, *supra* note 2, § 79; A. YIANNOPOULOS, PERSONAL SERVITUDES in 3 LOUISIANA CIVIL LAW TREATISE § 87 (1968) [hereinafter cited as PERSONAL SERVITUDES].

25. *See* Civ., Nov. 24, 1858, D. 1858.1.438, S. 1859.1.129; Lyon Nov. 7, 1863, S. 1864.2.54, S. 1864.2.276; 3 M. PLANIOL ET G. RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS 830 (2d ed. Picard 1952).

26. 344 So. 2d 24 (La. App. 4th Cir.), *writ refused*, 346 So. 2d 217 (La. 1977).

27. Article 765 of the Louisiana Civil Code of 1870 derives from the 1825 revision. The Louisiana Civil Code of 1808 provided that "perpetual and apparent servitudes may be acquired by title or by possession of thirty years." La. Civ. Code of 1808, art. 53. The Louisiana Civil Code of 1825 provided that "continuous and apparent servitudes may be acquired by title or by possession of ten years, if the parties be present, and twenty years if absent." La. Civ. Code of 1825, art. 761. The "if" clause was suppressed in the 1870 revision.

or good faith."[28] The interpretation and application of these provisions have given rise to doctrinal arguments and conflicting jurisprudence.[29] According to one line of Louisiana decisions, a continuous and apparent servitude may be acquired by ten years' possession even if the possessor is in bad faith and has no title.[30] This interpretation is not acceptable because it writes article 3504 out of the Civil Code. According to a second line of decisions, a continuous and apparent servitude may be acquired by ten years' possession if the possessor is in good faith even though he may have no title.[31] This interpretation was followed in *Nuckolls v. Louisiana State Highway Department.*[32] According to a third line of decisions, the possessor must have both just title and good faith in order to acquire a continuous and apparent servitude by ten years' possession; in the absence of either good faith or just title, the servitude may be acquired only by thirty years' possession. This is the correct solution, adopted by the Louisiana Supreme Court in *Kennedy v. Succession of McCollam*,[33] when the issue was last considered by the highest tribunal.[34] In that case, the court indicated that "title" should not be confused with a written instrument and that, for purposes of acquisitive prescription of servitudes, the requisite just title may be oral, provable by parol evidence. Indeed, in this connection, just title means an act sufficient to convey a servitude,[35] and good faith means

28. Article 3504 of the Louisiana Civil Code of 1870 derives likewise from the 1825 revision. *See* 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE LOUISIANA CIVIL CODE OF 1825, at 409 (1937). The 1977 revision has dispensed with the categories of continuous and discontinuous servitudes. Apparent servitudes, regardless of whether they might be considered as continuous or discontinuous under the regime of the Louisiana Civil Code of 1870, may be acquired by prescription. *See* LA. CIV. CODE art. 740, *as amended by* 1977 La. Acts, No. 514. Article 742, as revised in 1977, 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."

29. *See* Comment, *Acquisitive Prescription of Servitudes*, 15 LA. L. REV. 777 (1955).

30. *See, e.g.*, Hale v. Hulin, 130 So. 2d 519 (La. App. 3d Cir. 1961).

31. *See, e.g.*, Blanda v. Rivers, 210 So. 2d 161 (La. App. 4th Cir. 1968).

32. 337 So. 2d 313 (La. App. 2d Cir. 1976).

33. 34 La. Ann. 568 (1882).

34. The Louisiana Supreme Court granted an application for a writ in the case of *Pool v. Guste*, 361 La. 1110, 262 So. 2d 339 (1972) to determine this issue. The question, however, was not raised under the facts and pleadings, and the court wisely avoided determination by way of dicta. *See The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Property*, 33 LA. L. REV. 172, 175 (1973).

35. *Cf.* LA. CIV. CODE art. 3484: "By the term *just title*, in cases of prescription, we do not understand that which the possessor may have derived from the true

the subjective but justified belief that the possessor has the right of servitude.[36] Whether good faith may exist in the absence of any title is at best questionable, but even if it exists, it does not suffice for acquisition of a servitude by the ten years' prescription.

Contracting parties dealing with immovables do not always take care to designate by its proper name the right they intend to establish. They use instead descriptive language, and the question frequently arises whether an instrument was intended to transfer ownership, to establish a real right, such as a predial or personal servitude, or to impose merely personal obligations. The resolution of this question is a matter of contractual interpretation governed by the general rules of construction of juridical acts[37] as well as by rules applicable specifically to instruments that purport to establish servitudes.[38]

Instruments reserving or granting rights of way may contain ambiguous language making uncertain whether the contracting parties intended to create a servitude or to transfer the ownership of a strip of land. In *Damson Oil Corp. v. Sarver*,[39] the court was faced with the question of the interpretation of such an instrument. The court looked properly to the instrument as a whole and at the available extrinsic evidence to implement the intention of the contracting parties, and held that the instrument in question conveyed merely a servitude.

Instruments establishing a real right may contain ambiguous language making uncertain whether the contracting parties intended to create a predial servitude or a limited personal servitude.[40] This question is resolved by application of articles 754 through 758 of the Louisiana Civil

owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the ownership of the property." This provision speaks of ownership but is applicable to all real rights.

36. *Cf.* LA. CIV. CODE art. 3451: "The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact; as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which, in fact, belongs to another." This provision is applicable to ownership as well as all other real rights.

37. *See* LA. CIV. CODE arts. 1945-1962; Yiannopoulos, *Predial Servitudes: Creation by Title: Louisiana and Comparative Law*, 45 TUL. L. REV. 459 (1971).

38. *See* LA. CIV. CODE art. 753-58; *cf. id.* arts. 730-34, *as amended by* 1977 La. Acts, No. 514.

39. 346 So. 2d 1304 (La. App. 3d Cir. 1977).

40. For the notion of limited personal servitudes, *see* PERSONAL SERVITUDES, *supra* note 24, §§ 123-25. *See also* LA. CIV. CODE arts. 639-45, *as amended by* 1976 La. Acts, No. 103.

Code of 1870.[41] In *McLure v. Alexandria Golf & Country Club, Inc.*,[42] in an exhaustive opinion, Judge Guidry concluded that the instrument in question was intended to establish a predial servitude. In *Farrell v. Hodges Stock Yards, Inc.*[43] and in *Parkway Development Corp. v. City of Shreveport*,[44] in the light of different facts, the Louisiana Supreme Court concluded that the instruments in question conveyed a limited personal servitude rather than a predial servitude. These decisions deserve attention because they recognize contractual freedom under the regime of the Louisiana Civil Code of 1870 for the creation of limited personal servitudes, that is, charges in favor of a person on immovable property other than usufruct, use, or habitation. The creation of such rights is authorized expressly by the 1976 legislation.[45]

In *Farrell v. Hodges Stock Yards, Inc.*,[46] the court was faced with the question whether the contracting parties had intended an automatic termination of a limited personal servitude upon the happening of a resolutory condition, or termination upon demand of the grantor and his successors. A majority of the court concluded that the parties had provided for termination of the servitude upon demand rather than upon the happening of the resolutory condition. The court went on to hold that, since a predial servitude is indivisible, the demand for termination could be properly made by all the owners of parts of the servient estate. The solution is based on consistent theory and accords with French doctrine and jurisprudence. Indeed, the division of the servient estate is without effect on an existing servitude, that is, it does not result in the division of the servitude.[47] And an owner of a divided part burdened by the servitude may not demand its termination without the concurrence of all the successors of the original owner of the servient estate.[48]

41. *Cf.* LA. CIV. CODE arts. 730-34, *as amended by* 1977 La. Acts, No. 514.
42. 344 So. 2d 1080 (La. App. 3d Cir. 1977).
43. 343 So. 2d 1364 (La. 1977).
44. 342 So. 2d 151 (La. 1977).
45. *See* LA. CIV. CODE arts. 639-45, *as amended by* 1976 La. Acts, No. 103.
46. 343 So. 2d 1364 (La. 1977).
47. *See* M. PLANIOL ET G. RIPERT, *supra* note 25, at 957: "When the servient estate is divided, the servitude continues to exist as if no division took place."
48. *Id.* at 873 ("If a servitude is established prior to the creation of the state of indivision, it may not be terminated by the will of one or several of the co-owners; it may not be extinguished for a part and be maintained for the rest."); *id.* at 982 ("If a cause of extinction is operative only for one or several of the undivided parts of the servitude, the servitude subsists for the whole.").

BUILDING RESTRICTIONS

Building restrictions are sui generis real rights likened to predial servitudes.[49] Like predial servitudes, building restrictions are "property rights."[50] In *Hospital Service District Number 2 of St. Landry Parish v. Dean*,[51] plaintiff sought to expropriate for hospital use a tract of land which, according to building restrictions in force, was restricted to residential use. Affected landowners in the subdivision intervened and claimed compensation for the taking of their property rights. In a thoughtful opinion, the court re-examined pertinent Louisiana jurisprudence as well as solutions reached in sister states, and noted that the Louisiana Supreme Court has not passed on this issue. The court, following what is perhaps the minority view in sister states, held that landowners in a subdivision are not entitled to compensation for the taking of their rights to enforce building restrictions. Consistent theory points to the opposite conclusion,[52] but the determinative issue is whether the constitutional guarantees against taking extend to this kind of property rights. It is to be regretted that the Louisiana Supreme Court, perhaps overwhelmed with non-civil litigation, passed the opportunity to consider this *res nova*.[53]

REAL ACTIONS

Public things, that is, property of the public domain of the state and of its political subdivisions, may not be owned by private persons.[54] Moreover, in the absence of contrary provision of law, a private person encroaching on property of the public domain does not acquire the right to possess,[55] and, therefore, he is not protected by the possessory action. In

49. *See* Yiannopoulos, *Real Rights: Limits of Contractual and Testamentary Freedom*, 30 LA. L. REV. 44, 63 (1969); *cf.* LA. CIV. CODE art. 777, *as amended by* 1977 La. Acts, No. 170.

50. Willis v. New Orleans East Union of Jehovah's Witnesses, Inc., 156 So. 2d 310, 313 (La. App. 4th Cir. 1963).

51. 345 So. 2d 234 (La. App. 3d Cir.), *writ refused*, 346 So. 2d 1106 (1977).

52. *See* Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation*, 1945 WIS. L. REV. 5, 23-24; Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 IOWA L. REV. 293, 306 (1970); Comment, 53 MICH. L. REV. 451 (1955). *See also* Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).

53. *See* 346 So. 2d 1106 (1977) (writ refused, two justices dissenting).

54. *See* LA. CIV. CODE arts. 453, 481, 482.

55. *See id.* art. 861. Article 862 of the same Code establishes a limited exception as to houses or other buildings that cannot be destroyed "without causing signal damage to the owner of them," if they merely encroach on public property without

Parkway Development Corp. v. City of Shreveport,[56] question arose whether possessory protection is available to a private person who claims a real right on property of the public domain of a municipality by virtue of a grant. In a well-considered opinion, Justice Dennis concluded that the grantee of such a right may maintain a possessory action against the grantor as well as others. The decision is eminently correct. There should be no doubt that the state and its political subdivisions may grant real rights on property of the public domain,[57] and that the holders of such rights may avail themselves of all the appropriate actions for the protection of their interests.

Article 3653(1) of the Louisiana Code of Civil Procedure declares that the plaintiff in a petitory action must "make out" his title, if the court finds that the defendant is in possession of the property. A plaintiff makes out his title when he proves his ownership either by an unbroken series of valid transfers from a previous owner or by acquisitive prescription of ten or thirty years.[58] When the court finds that the defendant is not in possession of the property, plaintiff's burden is to prove a "better title."[59]

Proof of a more ancient title from a common ancestor is not proof of ownership but merely proof of a better title.[60] Nevertheless, in *Voisin v. Luke*,[61] the Court of Appeal for the First Circuit held that a plaintiff in a petitory action is entitled to judgment recognizing his ownership against a defendant in possession upon proof of a more ancient title from a common ancestor. There may be good practical reasons why the law ought to be so, but it is not. Fidelity to law would require overruling of *Voisin* or amending article 3653 of the Code of Civil Procedure.

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preventing its use. It would seem that the owner of these buildings should be entitled to possessory protection.

56. 342 So. 2d 151 (La. 1977).

57. *See* LA. CIV. CODE art. 744: "Servitudes may be established on all things susceptible of ownership, even on the public domain, on the common property of cities and other incorporated places." *See also* LA. CIV. CODE art. 723, *as amended by* 1977 La. Acts, No. 514: "Predial servitudes may be established on public things, including property of the state, its agencies and political subdivisions."

58. *See* LA. CODE CIV. P. art. 3653(2); Pure Oil Co. v. Skinner, 294 So. 2d 797 (La. 1974); PROPERTY, *supra* note 2, § 137.

59. *See* LA. CODE CIV. P. art. 3653(2).

60. *See* Professor Maraist's comments on *Clayton v. Langston*, 311 So. 2d 74 (La. App. 3d Cir. 1975), in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Civil Procedure*, 36 LA. L. REV. 556, 572-73 (1976) ("it is obvious that [the common author rule] is only a better title").

61. 341 So. 2d 6 (La. App. 1st Cir. 1976), *writ refused*, 342 So. 2d 224 (La. 1977).

It ought to be noted in this respect that the 1977 legislation concerning the fixing of boundaries conforms with the text of article 3653 of the Code of Civil Procedure rather than the rule of *Voisin*. Article 792 of the Louisiana Civil Code, as revised in 1977, declares that the court shall fix the boundary according to the ownership of the parties and if neither party proves ownership "the boundary shall be fixed according to limits established by possession." As in the case of a petitory action, ownership may be proved by a series of valid transfers from a previous owner or by acquisitive prescription. If neither party carries this burden of proof as to the disputed strip of land, the judgment shall determine the line of separation between the contiguous tracts in the light of possession. And if neither party has possession, "preference shall be given to the more ancient title, from a common ancestor."[62]

Under the regime of the Louisiana Code of Practice, courts recognized a "fringe" or quasi-real action to remove clouds from title. This action differed from the petitory action in that the plaintiff did not need to allege title in himself. The only relief granted to a successful plaintiff under this action was the cancellation of a recorded instrument from the public records.[63] It was expected that this nonstatutory action would fall into oblivion after the enactment of the Code of Civil Procedure, but the Louisiana Supreme Court granted it a new lease on life in *Walmsley v. Pan-American Petroleum Corp.*[64] This decision has been strongly criticized[65] but, at the time it was rendered, it served a practical purpose: in effect, the action to remove clouds from title afforded relief to private persons claiming rights to lands against the state in circumstances in which a petitory action would be inadmissible on account of the then prevailing doctrine of sovereign immunity. Sovereign immunity, however, has been suppressed and there is no reason whatsoever for the perpetuation of an anomaly. Yet certain courts still follow the path that leads to a labyrinth.

In *Harrison v. Alombro*,[66] plaintiffs sued for the cancellation of certain instruments from the public records and for an injunction restraining the defendants from asserting any interest in plaintiffs' property. The court characterized this action as one to remove clouds from title and proceeded to fashion much new law—unnecessarily. The court held that

62. *See* LA. CIV. CODE art. 793, *added by* 1977 La. Acts, No. 169.

63. PROPERTY, *supra* note 2, § 141.

64. 244 La. 513, 153 So. 2d 375 (1963).

65. *See The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Mineral Rights*, 24 LA. L. REV. 215, 229-36 (1964). *See also* Verret v. Norwood, 311 So. 2d 86 (La. App. 3d Cir.), *writs refused*, 313 So. 2d 842 (La. 1975).

66. 341 So. 2d 1165 (La. App. 1st Cir. 1977).

the prescription of one year applicable to a possessory action is not applicable to an action to remove clouds from title,[67] and that in an action to remove clouds from title the burden of proof is controlled by article 3653 of the Code of Civil Procedure. Although unable to find any jurisprudence granting injunctive relief in the framework of an action to remove clouds from title, the court also held that such a remedy is available under article 3601 of the Louisiana Code of Civil Procedure.[68] Further, since plaintiffs had failed to demand recognition of their ownership, the court held that all references to plaintiffs as record owners of the property should be stricken from the judgment under review.

The Louisiana Supreme Court refused writs, stating that "the result is correct."[69] Three justices dissented, and Justice Tate gave cogent reasons for the dissent: "[T]he writ should be granted to clarify that the action to remove cloud on title is no longer applicable under the Code of Civil Procedure of 1960, which broadened the [petitory] and possessory actions so as to include a comprehensive and coherent proceeding to decide land claims such as the present."[70] It is to be regretted that the application for writ was denied, because, apart from the reasons given by Justice Tate, it is by no means certain that the result reached by the court of appeal is correct. If the action were to be characterized as possessory for the removal of a disturbance in law, it should have been dismissed on the merits because the court found that plaintiff was out of possession.[71] If the action were to be characterized as petitory, plaintiff should have prevailed, as he did, because he proved a better title under the terms of article 3653(2) of the Code of Civil Procedure. But in such a case, according to *Clayton v. Langston*,[72] he should be recognized as owner although he did not make such a demand expressly. By refusing the application for writs, the Louisiana Supreme Court has allowed a conflict between circuits to remain.

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67. Had the action been characterized as possessory for the elimination of a disturbance in law, the one year prescription would also be inapplicable. *See* Chauvin v. Kirchhoff, 194 So. 2d 805, 814 (La. App. 1st Cir. 1967).

68. It ought to be noted that if the action were qualified as possessory, injunctive relief would be appropriate under article 3663 of the Louisiana Code of Civil Procedure rather than under article 3601 which requires proof of irreparable harm. If the action were qualified as petitory, injunctive relief would be appropriate as inherent in ownership without regard to the limitations of article 3601 of the Code of Civil Procedure.

69. 343 So. 2d 1063 (La. 1977).

70. *Id.*

71. *See* LA. CODE CIV. P. art. 3658.

72. 311 So. 2d 74 (La. App. 3d Cir. 1975); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Property*, 36 LA. L. REV. 360, 360-61 (1976).