Acquisitive Prescription of Servitudes

John S. White Jr.
made" might have been applied. Under the first rule, the parish where the roads were to be built could be treated as the parish affected by the defendant’s criminal conduct and the one in which the district attorney would have more reason and be more likely to prosecute. While it should no longer be necessary to designate one particular parish as the locus of the crime, the court may still be confronted with questions as to whether a “substantial element” of the crime is present in the parish selected for prosecution. That the question is not always easy to answer is indicated by the Pollard case. In situations where the Louisiana Supreme Court has not had the opportunity to interpret amended article 13, the rules developed in venue cases in other jurisdictions should be of assistance.

James M. Dozier, Jr.

Acquisitive Prescription of Servitudes

Article 765, Louisiana Civil Code of 1870: “Continuous and apparent servitudes may be acquired by title, or by a possession of ten years . . . .”

Article 3504, Louisiana Civil Code of 1870: “A continuous apparent servitude is acquired by possession and the enjoyment of the right for thirty years uninterruptedly, even without a title or good faith.”

The foregoing articles of the Louisiana Civil Code provide two periods for the acquisitive prescription of continuous and apparent servitudes. Their distinctive language and the mere presence of two articles indicate that there are two distinct types of prescription. The purpose of this Comment is to ascertain the meaning of these two articles and to determine the requirements of each type of acquisitive prescription; to examine the treatment of the articles in the Louisiana jurisprudence; to consider briefly the prescription of servitudes in other systems of law; and to


1. The amendment to this article made by La. Acts 1904, No. 25, p. 30, dealing with the acquisition of public servitudes through possession of ten years is not discussed in this Comment. No problem has arisen in interpreting this amendment. See Landry v. Gulf States Utilities Co., 166 La. 1069, 118 So. 142 (1928); Bomar v. Baton Rouge, 162 La. 342, 110 So. 497 (1926); Frierson v. Police Jury of Caddo Parish, 160 La. 957, 107 So. 709 (1926).
indicate some factors which should be considered in any future revision of the Louisiana Civil Code.

Under either article 765 or 3504, only those servitudes which are continuous² and apparent³ may be acquired by prescription.⁴ Continuous servitudes do not require unceasing operation;⁵ they are "those whose use is or may be continual without the act of man."⁶ Apparent servitudes are "such as are to be perceivable by exterior works."⁷ The rule that only "continuous" and "apparent" servitudes can be acquired by prescription was taken over from the French Code Civil.⁸

² Art. 727, LA. CIVIL CODE of 1870.
³ Art. 728, LA. CIVIL CODE of 1870.
⁴ The right to minerals on someone else's land has been construed as a servitude, but being discontinuous, cannot be prescribed. Savage v. Packard, 218 La. 637, 50 So.2d 298 (1950); Daggett, MINERAL RIGHTS in LOUISIANA 26, 41, 43 (rev. ed. 1949); Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute (Part 2), 25 TUL. L. REV. 155, 157 (1951).
⁵ Fuller v. Washington, 19 So.2d 750, 751 (La. App. 1944). The case is discussed page 797 infra.
⁶ Art. 727, LA. CIVIL CODE of 1870; see Bonnabel v. Police Jury, 216 La. 798, 44 So.2d 872 (1950), citing Larcade v. Iseringhausen, 153 La. 976, 96 So. 830 (1923); Burgas v. Stoutz, 174 La. 556, 141 So. 67 (1932); Mallet v. Thi bault, 212 La. 79, 31 So.2d 601 (1947), for the proposition that right of passage cannot be prescribed. The fact that the definition of article 688, Code Civil, which is identical with that of article 727 of the Civil Code of 1870, may give rise to erroneous interpretations is pointed out in 3 PLANIOL ET RIFERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no 897, at 876 (2d ed. 1952).
⁷ Art. 728(2), LA. CIVIL CODE of 1870; see Bonnabel v. Police Jury, 216 La. 798, 44 So.2d 872 (1950), citing Larcade v. Iseringhausen, 153 La. 976, 96 So. 830 (1923); Burgas v. Stoutz, 174 La. 556, 141 So. 67 (1932); Mallet v. Thibault, 212 La. 79, 31 So.2d 601 (1947), for the proposition that right of passage cannot be prescribed. The fact that the definition of article 688, Code Civil, which is identical with that of article 727 of the Civil Code of 1870, may give rise to erroneous interpretations is pointed out in 3 PLANIOL ET RIFERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no 897, at 876 (2d ed. 1952).
⁸ For a discussion of the impossibility to prescribe rights of way, see Schoenrich, Acquisition of Rights of Way by Prescription, 12 TUL. L. REV. 226 (1938). But see Provosty, J., in Ogborn v. Lower Terrebonne Refining & Mfg. Co., 129 La. 379, 380, 56 So. 323 (1911): "The writer of this opinion thinks that a servitude, the exercise of which necessitates the permanent maintenance of a railroad, consisting of roadbed, cross-ties, rails, bridges, etc., of which the dominant estate has the exclusive use, and of which the servient estate has only the burden, is a continuous apparent servitude. It is admittedly so at common law, and, in the writer's opinion, must be so also under the civil law also, because the basic principles of prescription are the same in the two systems of law. The majority of the court think differently, however, and for the following reasons: [citing the Civil Code, Louisiana cases and French authorities]" and also Chief Justice Breaux's dissent in the same case. This dissent is not printed in the official Louisiana reports, but can be found in the Supreme Court Record Docket No. 18410. While conceding that the right of passage cannot be acquired by prescription, Chief Justice Breaux stated: "The right of way of a Rail Road Co. is apparent and continuous. It is more in the nature of a joint right of ownership than a simple servitude."
⁸ For a discussion of the French law see, e.g., 3 PLANIOL ET RIFERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no 855, at 932 et seq. (2d ed. 1952). LALAUER, TRAITÉ DES SERVITUDES RAËLLES, A L'USAGE DE TOUS LES PARLEMENTS ET SÉNÉS DU ROYAUME XIV (1786), the leading treatise in France before the Code Civil, mentions the dichotomy of continuous and discontinuous servitudes.
Before the adoption of Louisiana's first Civil Code in 1808, the property law of Spain, including the Siete Partidas, was in force in the territory. Although the Siete Partidas did not use the terms "continuous" and "apparent" the types of servitudes which under that Code could be acquired by prescription in a certain period of years are with one single exception considered continuous and apparent under the French Code Civil and our Civil Code. Under the Siete Partidas only a servitude which could be "daily used, without labour on the part of the person who enjoys it" was susceptible of acquisitive prescription. This as the most important one in the coûtumes. PARDESSUS, TRAITE DES SERVITUDES no 275, at 465 (4th ed. 1817) justifies the categories of the Code Civil and considers that it had adopted the "juste milieu." Lalaure also distinguishes this concept from that of the causa perpetua of the Roman law. Lalaure, op. cit. supra, at 10, 105 et seq. On the last point see also PARDESSUS, TRAITE DES SERVITUDES no 29, at 45 et seq. (4th ed. 1817) and 2 TOULLIER, LE DROIT CIVIL FRANCAIS no 597, at 171 (1833). The Roman law does not seem to have attached legal consequences to the classification of continuous and discontinuous servitudes, and certainly not for the purposes of acquisitive prescription. 1 WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS § 201, at 604, n. 9 (7th ed. 1879) considers the terms "servitudes continuæ—discontinuæ" as not found in the sources. Cf. DIGEST 8.1.14.pr. The most recent textbooks on Roman law, e.g., BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 157 (2d ed. 1939) and JOERS-KUNKEL-WENGER, ROMISCHES PRIVATRECHT §§ 81-88 (3d ed. 1949) do not mention this classification at all. See also LEE, THE ELEMENTS OF ROMAN LAW § 228, at 160 (3d ed. 1952).

The new Italian Codice Civile of 1942, while following the pattern of the French Code Civil, dispenses in article 1061 with the requirement of continuity for the prescription of servitudes and excludes only nonapparent servitudes from prescription. See page 802 infra.

For the purpose of acquisitive prescription the only important classification in the Roman law was that of positive and negative servitudes. See Part V and pages 799 and 800 infra and particularly the critique of the classification of the French Code Civil in the report on the revision of the Italian Codice Civile at pages 802-03 infra.

9. Tucker, Source Books of Louisiana Law, 6 Tul. L. Rev. 280, 284 (1932), citing Cottin v. Cottin, 5 Mart.(G.S.) 93 (La. 1817); La Croix v. Coquet, 5 Mart.(N.S.) 527 (La. 1827); Arayo v. Currel, 1 La. 528, 540 (1830); Berluchaux v. Berluchaux, 7 La. 538, 543 (1835). See also Dainow, Introductory Commentary to the Louisiana Civil Code, 1 L.S.A. Civil Code of 1870, at 1, 5 (192).

10. Servitudes of aqueduct, support, view or lights, drip. The servitude of preventing buildings or walls from being raised (altius non tollendi), which is a negative, nonapparent servitude, could also be acquired by possession. LAS SIETE PARTIDAS 3.31.15. For the distinction between positive and negative servitudes, see note 102 infra.

11. LAS SIETE PARTIDAS 3.31.15. 1 THE LAWS OF LAS SIETE PARTIDAS 416 (Moreau-Lislet & Carleton transl. 1820). According to 4 ESCRICH, DICCIONARIO RAZONADO DE LEGISLACION Y JURISPRUDENCIA—VERBO "SERVIDUMBRE" 1018 (rev. ed. 1876), discontinuous servitudes could be prescribed under the Spanish law (before the Código Civil of 1889) if they were based on a just title. Even in the absence of just title the knowledge and sufferance of the servient estate's owner and exercise on the part of the dominant estate's owner was, however, considered sufficient. 2 PALACIOS, INSTITUCIONES DEL DERECHO
language is essentially the same as our present definition of continuous servitudes. Although there was no express requirement that the servitude be apparent, it may be inferred from the examples given that only apparent servitudes, with the one single exception (right of preventing buildings or walls to be raised) mentioned before, could be acquired by prescription: aqueduct (“conveying water from a fountain which rose in another's field”), servitudes of support, lights, drip, “and all other similar services.”

Two methods of acquiring servitudes by the lapse of time were recognized by the Siete Partidas: (1) Continuous servitudes could be acquired by a person “acting in good faith, believing he had a right to do it, using no force, nor acting under . . . permission” by ten years' possession if the owner of the servient estate was present and twenty years' possession if the owner was absent. (2) Ownership of all servitudes, even those which under our system would be classified as discontinuous or nonapparent, could be acquired by the use of the servitude for so long a time that “the memory of man runneth not to the contrary.” Immemorial possession as a means of acquiring servitudes was expressly eliminated from our law by the Louisiana Codes following the example of the French Code Civil.

As in many other areas of the Spanish civil law of the eighteenth and early nineteenth century, considerable uncertainty exists as to the exact requirements for the acquisitive prescription of servitudes. Only one treatise could be found which supplements the rather general and vague language of the Siete Partidas. Palacios in his revised edition of Asso and Manuel's

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Civil de Castilla, que Escribieron los Doctores Asso y Manuel, Enmendadas, Ilustradas, y Aradidas Conforme a la Real Orden de 5 de Octubre de 1802, 4 (7th ed. 1806). See also Schmidt, The Civil Law of Spain and Mexico 295, art. 1396 (1851).

All translations of Las Siete Partidas are from Moreau-Lislet & Carleton, op. cit. supra.


13. Las Siete Partidas 3.31.15.

14. Ibid.

15. Las Siete Partidas 3.31.15 in fine; The Laws of Las Siete Partidas 417 (Moreau-Lislet & Carleton transl. 1820).


17. Code Civil art. 691; see 3 Planhol et Ripert, Traité Pratique de Droit Civil Français no 958, at 937 (2d ed. 1952).
Instituciones del Derecho Civil de Castilla, published in 1806, states that the ten- and twenty-year prescription of servitudes requires possession "with good faith, with notice to the owner of the servient estate, and without force, request (sufferance) or resistance; and this knowledge and forbearance shall serve as title if there none exists, but when it exists nothing but the lapse of ten years if the parties be present, and twenty if absent." All the other treatises and commentaries, like the commentary to the Siete Partidas by Gregorio Lopez, the previous editions of Asso and Manuel’s treatise, and Gustavus Schmidt’s The Civil Law of Spain and Mexico published in 1851, restrict themselves to paraphrasing the language of the Siete Partidas. Whereas they are very explicit as to how servitudes are extinguished, there is no complete description of the requirements of acquisitive prescription. It seems that Palacios’ edition of Asso and Manuel’s Instituciones was not known to the redactors of the 1825 Code and that our Supreme Court did not consider it in interpreting articles 765 and 3504 when it decided Kennedy v. Succession of McCollam, the leading case on acquisitive prescription of servitudes which is discussed in Part IV.

Although the Code of 1808 purported to be a digest of the then existing Spanish law in Louisiana, the articles in that Code listing the types of servitudes and the methods of acquiring them were verbatim copies of articles of the French Code Civil.

18. The English translation of the sixth edition of Asso and Manuel’s Instituciones of 1805, by Johnston, published in 1825 under the title Institutes of the Civil Law of Spain does not contain this comment. For the full title see note 19 infra.

19. 2 Palacios, Instituciones del Derecho Civil de Castilla, que Escribieron los Doctores Asso y Manuel, Enmendadas, Ilustradas, y Anadidas Conforme a la Real Orden de 5 de Octubre de 1802, 4 (7th ed. 1806).

20. 2 Gregorio Lopez, Las Siete Partidas del Sabio Rey Don Alonso el Nono 429-30 (1789).

21. Other treatises in the same category are, e.g., 2 Vizcaíno Pérez, Compendio del Derecho Publico y Común de España, o de la Leyes de Las Siete Partidas Colocado en Orden Naturel 54 (1764); 4 Escribe, Diccionario Razonado de Legislación y Jurisprudencia—Verbo “servidumbre” 1018 (rev. ed. 1768).


The articles of the Code Civil dealing with servitudes had been derived from various laws in effect in France prior to the adoption of the Code Civil in 1804. In the rules dealing with servitudes, as in most areas of private law, there was no uniformity. Even in the region of the droit écrit (written law) which observed the Roman law in one form or another, 24 different rules were expressed in the jurisprudence of the various Parlements, the sovereign high courts. 25 However, the establishment of continuous and affirmative servitudes by prescription was generally permitted under the droit écrit whenever possession, good faith, and title were present. 26

In the northern region of France governed by the coutumes of Germanic origin, the rules concerning the prescription of servitudes varied even more. 27 Merlin divided the various coutumes, whose number amounted to 490, 28 with regard to their treatment of acquisitive prescription of servitudes into three groups: 29

(1) Those which rejected completely acquisition of servi-
tudes by prescription, as, for example, the Custom of Paris. They were by far the majority. 30

(2) Those which rejected acquisitive prescription of certain servitudes while permitting prescription of others. 31

(3) Those which rejected acquisitive prescription of servitudes unless their possession was protested by the owner of the servient estate and was continued notwithstanding the protest. 32

The same lack of uniformity prevailed with regard to the "centennial possession" 33 and "immemorial possession." 34

All the various rules of pre-revolutionary France were all replaced by the simple rule of article 690 of the Code Civil of 1804:

"Continuous and apparent servitudes may be acquired by title or by a possession of thirty years."

Under this single short article acquisitive prescription of certain types of servitudes was made possible by simple possession of thirty years. 35

III

The rule of the Louisiana Civil Code of 1808, dealing with the prescription of servitudes in one single article, was copied from the Code Civil. It read:

"Perpetual and apparent services [servitudes] may be acquired by title or by a possession of thirty years."

Whether this article merely changed the time required to prescribe a servitude under the Spanish law, while retaining the other requirement necessary thereunder, or whether the Spanish law on this point was replaced by the rule of the Code Civil, like

30. LALAUDE, TRAITÉ DES SERVITUDES RÉELLES 109, 181 (1786). Lalauré reprints all excerpts from the coutumes expressly rejecting the establishment of servitudes by prescription. Id. at 182-88.
31. Id. at 189-238.
32. Id. at 317-22.
33. Id. at 276-86.
34. Id. at 287-92.
35. In his Exposé de Motifs to the Corps Legislatif, M. Berlier, the representative of the government, explained the introduction in article 690 of acquisition of continuous apparent servitudes by thirty years' possession, not in terms of prescription, but in terms of presumed consent of the neighboring owner based on daily and apparent acts performed for such a long time without protest. Furthermore, he explained that consent cannot be presumed in any of the other categories of servitude, i.e., continuous non-apparent, and discontinuous servitudes, whether apparent or not. 11 FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 312 (1836); see 12 MERLIN, RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE—VERBO "SERVITUDE" § XXVIII, at 579 (4th ed. 1815).
36. LA. CIVIL CODE OF 1808, 2.4.53, p. 138; Compiled Edition of the Civil Codes of Louisiana, 3 LA. LEGAL ARCHIVES 434 (1940).
most problems presented by the Code of 1808, has never been explored.

The redactors of the Civil Code of 1825 were familiar with both the French and Spanish rules on this point. They evidently felt that the problem could not be covered by one general article, for they provided for acquisitive prescription of servitudes in two different articles, which, in their essence, are still the law today. Their attitude is in accord with some French views, expressed by some of the commentators and even by one of the authors of the projet of the Code Civil, that the aim of the Code Civil to simplify the countless complicated rules governing servitudes resulted in an oversimplification of a complex problem.

Article 761 of the Code of 1825 stated:

"Continuous and apparent servitudes may be acquired by title or by a possession of ten years, if the parties be present, and twenty years if absent."

Article 3470 of the Code of 1825 provided that:

"Continuous and apparent servitudes are acquired by possession and the enjoyment of the right for thirty years uninterruptedly, even without a title, or good faith."

Except for the elimination of the special twenty-year period for absentee, article 761 was retained as article 765 in the Civil Code of 1870 without change. Article 3470 became article 3504. Since


38. The opening remark in 2 Toullier, Le droit civil français no 565, at 161 (1833), concerning the servitudes not created by law is: "On s'est dit M. Maleville, assez généralement plaint de la maigreur de ce chapitre, sur une matière aussi importante ...." Maleville was one of the authors of the projet. His original function was one of a "secrétaire rédacteur" to Tronchet, Bigot-Préameneu, and Portalis. 1 Féné, Recueil complet des travaux préparatoires du Code civil lxii (1836).

39. See report by M. Albisson, representative of the government, to the Tribunat: "Enfin la matière des servitudes, régie jusqu’ici par des lois, la plupart purement locales, souvent contradictoires entre elles ou très-difficiles à concilier, et dont le nombre allait au-delà de mille dans le seul corps du droit romain, ouvrait un champ vaste à l’esprit de controverse et une abondante pâture à la chicane. Il était donc instant d’y pourvoir par une théorie simple et lumineuse, adaptée avec discernement à ce que la jurisprudence offrait de plus sain, et les différents usages de plus raisonnable, et qui, sans affaiblir le respect dû à la propriété, fixait avec précision le caractère, l’étendue et la limite des services qui lui imposent ou peuvent lui imposer les lois de la nature, l’ordre social, les devoirs du voisinage et la foi due aux conventions." 8 Locré, La législation civile, commerciale et criminelle de la France 382-83 (1827). This passage is cited in most treatises on the
the articles of the 1825 Code remained essentially the same in the 1870 Code, article references in this Comment will be to the numbers of the latter Code.

(1) If article 765 is read alone without considering the existence of article 3504 and the historical background of these two articles, it would seem that a continuous and apparent servitude can be acquired by mere possession for ten years without just title and good faith which are required for the short-time prescription of all other immovables. This would make article 765 the counterpart of Code Civil article 690 with only one change, the shortened period. However, article 3504 expressly provides a prescription of thirty years by a possessor "without a title or good faith." If article 3504 is to have a raison d'être, and is not to be considered mere surplusage, it is necessary to assume that something more than simple possession is required for the short-term prescription under article 765.

(2) Assuming that under this article some additional requirements are necessary, two equally permissible interpretations may be reached as to the nature of the additional requirements.

(a) The two articles, being in pari materia, should be con-

subject of servitudes. See, e.g., Vanier, Questions notables sur les servitudes etc., v (2d ed. 1880).

40. Arts. 3478-3486, La. Civil Code of 1870. In order to avoid possible misunderstandings as to the meaning of the term "title" in article 765 as distinguished from the term "just title" used in articles 3478-3486 dealing with the requirements for the ten-year prescription of immovables (particularly articles 3483 and 3484), it must be noted that "title" as used in article 765 means a legal transfer of ownership giving the receiver an immediate right to the servitude. If "title" to a servitude in this sense exists, there can be no need for prescription. Compare Art. 3484, La. Civil Code of 1870.

As to "just title" there are two articles, 3483 and 3484, in the present Civil Code defining it as one of the prerequisites for the acquisitive prescription of immovables. Article 3483, if read alone, might imply that it refers to the juridical act transferring ownership. As is pointed out in the immediately following articles, however, "just title" is not a title that has transferred ownership, "for then no true prescription would be necessary" (article 3484), but one which "would have been sufficient to transfer the ownership of the property, provided it had been derived from the real owners." (article 3485) This is also the traditional concept of "just title" under French law. 3 Planiol et Ripert, Traité pratique de droit civil français, n° 701, at 710 (2d ed. 1952). Article 3484 defines "just title" as "a title which the possessor may have received from any person whom he honestly believed to be the real owner" as part of the definition of "just title." This definition incorporates the essence of the French and Louisiana definitions of good faith. 3 Planiol et Ripert, op. cit. supra, n° 709 et seq., at 716 et seq.; Art. 3451, La. Civil Code of 1870, which requires a "just reason" for belief by the possessor that he is the master of the thing.

In order to make a comprehensive study of the acquisitive prescription of servitudes it will be necessary to analyze the more recent Louisiana jurisprudence on the concept of "just title." At present the only available investigation of this concept is a comment in 15 Tul. L. Rev. 436 (1941).
strued together. Since the second article provides that a servitude can be acquired by possession of thirty years without title or good faith, the logical implication is that in order to prescribe within the ten-year period of the first article just title and good faith are necessary. This interpretation is consistent with the general rules governing the short- and long-term acquisitive prescription of other immovables. Article 3478 provides: "He who acquires an immovable in good faith and by just title prescribes for it in ten years . . . ." and article 3499 provides: "The ownership of immovables is prescribed for by thirty years without any need of title or possession in good faith." Since the Code declares that real servitudes are immovables, the general rules of acquisitive prescription of immovables are applicable unless the special articles dealing with the prescription of servitudes provide differently. There is nothing in article 765 which compels us to conclude that the short-term prescription of servitudes does not also require good faith and just title.

By assuming that good faith and just title are required under article 765, we give meaning to both article 765 and article 3504, and, furthermore, make the interpretation of the rules concerning the prescription of servitudes fit into the general rules of the Code governing the acquisitive prescription of immovables. The fact that servitudes are the only incorporeal real rights susceptible of being acquired by prescription may explain the presence of these special articles which under our foregoing analysis merely restate the general rule.

As mentioned before, the French Code Civil provides expressly only for a thirty-year prescription of servitudes. Despite this, it has been recognized in some of the most authoritative recent French treatises that the general rules for the acquisitive prescription of immovables are applicable also to servitudes and that the express thirty-year provision (article 690, Code

41. Art. 17, La. CIVIL CODE of 1870: "Laws in pari materia, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another." Melancon v. Mizell, 216 La. 711, 44 So.2d 826 (1950).

42. The pertinent part of the French text of article 3470 of the 1825 Code read: "... sans qu'il soit besoin d'aucun titre ni de bonne foi dans celui qui oppose cette prescription." The French version lends itself to the interpretation that the acquisitive prescription under article 3504 can be used only as a defense but not as the basis for an action based on right of servitude.

43. The corresponding article in 1825 read: "The property of immovable is prescribed for by thirty years, and that of slaves by fifteen years, without any need of title or possession in good faith." Art. 3465, La. CIVIL CODE of 1823.

44. Art. 471, La. CIVIL CODE of 1870; CODE CIVIL art. 528.
Civil) applies only when there is no title nor good faith. They conclude that under the general rules concerning prescription of immovables (article 2265, Code Civil) a servitude may be acquired in ten years by possession in good faith and with just title.\(^{45}\) It should, however, be remembered that in this, as in other instances, the French treatises cannot be used as authority in interpreting articles of our Civil Code unless they are based exclusively upon the Code Civil.\(^{46}\)

(b) At first glance it would seem that our rules were de-

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\(^{45}\) They argue that article 2265 of the Code Civil provides that an immovable can be prescribed in ten (or twenty) years in good faith and under just title, and that this provision can be applied also to real servitudes, since they are immovables. In their view, a more explicit prohibition than article 690 would be necessary to exclude application of article 2265 to servitudes. 3 Planiol et Ripert, Traité pratique de droit civil français no 965, at 944-45 (2d ed. 1952); 4 Beudant, Cours de droit civil français no 764, at 846 et seq. (2d ed. Voiron, 1938). Of the older authors the following recognize this view: 1 Delvincourt, Cours de code civil—Notes et explications 413 (1834); 5 Duranton, Cours de droit français no 593, at 603 et seq. (3d ed. 1834); Vazeille, Traité des prescriptions no 416, at 178 et seq., and 523, at 222 et seq. (rev. ed. 1834); 2 Troplong, De la prescription no 853 et seq., at 423 et seq. (1835), particularly no 855, at 425, criticizing the 1834 decision of the cour de cassation, infra.

Some of the older treatises vigorously reject this view. The most important argument seems to be that the simple rule of article 690 of the Code Civil was devised to exclude all the legal problems and difficulties of the old law without going to the extreme of the maxim “nulle servitude sans titre” of the Custom of Paris. See particularly 12 Demolombe, Cours de code Napoléon no 769-82, particularly no 781, at 269-74 (1876), who, after spelling out the argument pro et contra, joins the majority of the older writers, citing among others Toullier, Pardessus, Solon, Zachariae, Marcadé, etc., and the decision of the cour de cassation, Floret v. Dumay, of Dec. 10, 1834, [1835] S. I. 24 together with other jurisprudence; 2 Maleville, Analyse raisonnée de la discussion des code civil au conseil d’État 142 (1805), although noting that it seems strange that even with (just) title one should not be able to prescribe a servitude in ten or twenty years, whereas one can prescribe in the same time the ownership of the immovable under article 2265, rejects the short-term prescription in view of the silence of the Code. See also 1 Julliot de la Morandière, Traité de droit civil de Ambroise Colin et Henri Capitant no 1895, at 1050 (1953).

Another problem discussed by the French commentators is whether discontinuous or continuous nonapparent servitudes can be acquired by ten- or twenty-year prescription with title and good faith. 3 Gavini de campile, Traité des servitudes no 1197, at 384 et seq. (1869), citing Delvincourt, Toullier, Favard and Maleville as favoring an affirmative answer to the problem whereas the author himself, with Vazeille and Troplong, as against it. See particularly 2 Toullier, Le droit civil français no 629, at 183 (1833), who points out that also d’Argentré supported the view that even discontinuous servitudes could be prescribed with title and good faith and makes reference to Pothier, Coutumes d’Orléans, tit. XIII (des servitudes réelles) no 8 [7 Pothier, Oeuvres 249 (Merlin ed. 1831)] and cites 2 Maleville, Analyse raisonnée de la discussion du code civil au conseil d’État 141 (1805) discussing article 691 of the Code Civil. Both Toullier and Maleville reject, however, the applicability of article 2265 of the Code Civil to servitudes.

\(^{46}\) A similar situation prevails in Quebec where the rules of the Civil Code on the prescription of servitudes are not taken from the Code Civil, but from the Custom of Paris. 3 Montpetit et Taillefer, Traité de droit civil du Québec 465 (1845).
rived from the *Code Civil*. The single article dealing with this problem in the Code of 1808 was copied verbatim from the *Code Civil* as were most of the rules governing servitudes. However, prior to the Code of 1808 the Spanish law was in force in Louisiana and, although the text of the 1808 Code was largely copied from the text of the French *Code Civil* and its *projet*, it seems to have been generally assumed that the Code merely restated the Spanish law. Spanish authorities were considered controlling when the text of the Code was not certain. Since the *Siete Partidas* required good faith in order to acquire a servitude by prescription, it might have been the opinion of the redactors of the Code of 1825 that the single article of the Code of 1808 required good faith and that merely the form of the *Code Civil*, not its substance, had been followed. The comment of the redactors, explaining the change in time necessary to prescribe under the corresponding article of the Code of 1825, supports this view:

“We have thought these terms [the time] of ten and twenty years, which were those required by the former laws of this state, sufficient for the prescription of perpetual and apparent servitudes. Partida 3, tit. 31, law 15.”

This language indicates that it was the intention of the authors of our 1825 Code merely to shorten the period of prescription of the single article of the 1808 Code; there is no indication that any other change was contemplated. If the redactors had considered mere possession sufficient under that article, as it was under the *Civil Code*, even the shortening of the period would not have provided a need for another provision (article 3504). By assuming that it was the redactors' opinion that possession in good faith, necessary under Spanish law, had

47. See page 783 supra.
48. The official title of the 1808 Civil Code is “A Digest of the Civil Laws now in force in the Territory of Orleans, with alterations and amendments adapted to its present system of government.” See also the statement in the famous *Cottin* case: “It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.” *Cottin v. Cottin*, 5 Mart. (o.b.) 93, 94 (La. 1817). See Tucker, *Source Books of Louisiana Law*, 6 TUL. L. REV. 280, 281-86 (1932).
50. Redactors' comment, *ibid*.
51. See page 783 supra.
also been necessary under the Code of 1808 and that the only change made by them in what is now article 765 was to restate the time periods required by the old Spanish law, we can explain their adding the forerunner of article 3504.

In summing up, it is, of course, possible to explain the addition of the present article 3504 to the 1825 Code by assuming that the redactors wanted to make the general rules for the acquisitive prescription of immovables applicable also to servitudes and that article 765, as the counterpart of article 3478, requires good faith and just title. If we accept this as correct, the result fits into the general structure of the rules on prescription, but it does not explain the above comment of the redactors in which they stated: "We have thought these terms . . . sufficient for the prescription of perpetual and apparent servitudes." This necessarily implies that they were not changing the requirements, but merely shortening the time period. Since the French equivalent of that article (article 690, Code Civil) did not require good faith, or just title, had the redactors intended to shorten the period, there would have been no need for adding the article which is now 3504. A very remote possibility exists that the existence of two articles on the same subject matter may be due to an oversight of the redactors of the Code, but no such conclusion should be drawn unless there is no alternative. Summing up, it seems more probable that the redactors thought that the article of the 1808 Code was subject to the Spanish requirements. Although the Siete Partidas mentioned title as a requirement in addition to good faith, it does not seem that it required a title which we would call a "just title" under our present Civil Code. Thus under the Spanish law, a title in writing was evidently not a prerequisite to acquiring a servitude under the short-term prescription. This interpretation, as mentioned before, by removing the articles governing the prescription of servitudes from the general rules for prescribing immovables, creates a lack of consistency within the system of the Civil Code. However, in a Code such as ours, drawn from many different sources, incongruities will result.

52. "The uniform jurisprudence is to the effect that all statutory provisions are to be given effect whenever possible. LSA—Civil Code of Louisiana, Art. 17; State v. Texas Co., 205 La. 417, 17 So.2d 568; Town of Abbeville v. Police Jury, 207 La. 779, 22 So.2d 62; Melancon v. Mizell, 216 La. 711, 44 So.2d 826." Chappuis v. Reggie, 222 La. 35, 43, 62 So.2d 92, 95 (1952).

53. As shown, for example, by the incongruity of articles 670 and 2222, LA. CIVIL CODE of 1870. See Comment, Liability of Lessor or Property Owner to Third Persons for Accidental Personal Injury Caused by Defective Premises, 4 Tul. L. Rev. 611, 613 (1930).
IV

The Louisiana jurisprudence reflects the existing difficulties in interpreting the articles 765 and 3504 of our Civil Code. The dearth of litigation under article 3504 and the attitude of counsel to rely on article 765 without alleging either good faith or title, together with the impression created by some of the language used in recent court decisions, can make us wonder whether article 3504 has not become to be considered superfluous by the legal profession.

The leading case, Kennedy v. Succession of McCollam, decided by the Supreme Court in 1882, supports the interpretation of article 765 of the present Civil Code which we have reached above under 2(b). In the Kennedy case the court pointed out that the distinguishing factor between article 765 and article 3504 is the requirement of good faith under article 765. The court stated: “There is no antagonism between the two Articles [765 and 3504]: that which refers to the prescription of ten years relates to those cases in which good faith is required, the other, which mentions the prescription of thirty years, concerns the cases in which no good faith is required and, therefore, applies to those where the possession is even characterized by bad faith.” The court relied on two prior decisions to support its position, namely, Vincent v. Michel and Guesnard v. Executors of Bird, stating that these “two decisions clearly constitute an unqualified affirmation of the right, even in the absence of an apparent or just title in writing, to acquire such servitude by mere quiet and uninterrupted possession for ten years, by virtue of Art. 765, R.C.C.”

55. Id. at 574.
56. 7 La. 52 (1834). The plaintiff sued to abate an alleged nuisance of drip from defendant’s neighboring house. Defendant pleaded acquisitive prescription of ten years of a servitude of drip. The court upheld defendant’s plea without requiring written evidence of title. “His right of servitude rests solely on the acquiescence of the plaintiff in the burden imposed on his property, by suffering ten years and upwards, without complaint, the drip from the defendant’s house to fall on his lot.” Id. at 55. This is in accord with the description of the old Spanish law. 2 Palacios, Instituciones del Derecho Civil de Castilla, que Escribieron los Doctores Asso y Manuel, enmendadas, ilustradas, y añadidas conforme a la Real Orden de 5 Octubre de 1802, 4 (7th ed. 1806); and Schmidt, The Civil Law of Spain and Mexico 295, art. 1396 (1851). See page 781 supra.
57. 33 La. Ann. 796 (1881). The court recognized defendant’s claim to a servitude of drainage by acquisitive prescription of ten years without requiring written proof of just title.
However, it is doubtful that the *Guesnard* case really can be considered a precedent for an interpretation of article 765. Although the suit in the *Guesnard* case had been brought by the plaintiff claiming a right to use drainage ditches on the basis of ten-year prescription, the court expressed the opinion that the issue involved could be reduced to two simple questions of fact. The first factual question was described as follows: "Do the waters on the upper and rear portions of Belemont Plantation drain naturally in a southwestern direction, and towards the southeastern portion of Bellevale Plantation?" The formulation of this question, together with the fact that the court's discussion is primarily concerned with whether the right of the plaintiff to the use of drainage ditches originated from "the natural flow of waters from the southeastern portion of his plantation to the southwestern part," therefore deals with "servitudes which originate from the natural situation of the places" (articles 660-663) and not with "conventional or voluntary servitudes" which can be established only by title, prescription or *destination de père de famille*. Only the second question of fact in issue in the *Guesnard* case was directed to a problem of prescription of servitudes. It was formulated as follows: "Has plaintiff, through his own right and through the previous owners of Belemont Plantation, enjoyed, without legal interruption for more than ten years, the right of draining the waters of the upper portion of said plantation . . . ?" Although this question of fact as posed by the court seems to assume that mere possession without more is sufficient for the acquisition of a servitude by prescription, the discussion in the *Guesnard* case concerning possession was directed exclusively to the question whether the right of drainage once acquired was interrupted and the right of servitude thereby extinguished. There is no indication that the court's opinion was directed to the question

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59. As in other cases plaintiff based his claim in the alternative on contract (title) and *destination de père de famille*. *Guesnard v. Executors of Bird*, La. Sup. Ct. Record, Docket No. 8214 (May 1881).
61. Id. at 798.
whether the alleged possession led to the acquisition of the servitude by prescription, the subject matter of article 765.

Apart from a discussion of these factual questions the only treatment of "the law" in the Guesnard case refers to article 660. When the court states that "the law applicable to this case having been frequently expounded in numerous decisions of the Supreme Court," it specifically mentions only cases decided under article 660. The Guesnard case, therefore, in spite of the reliance placed on it in the Kennedy decision cannot be considered authority for what the requirements of the acquisitive prescription under article 765 are.

The Vincent case, the other decision relied on by the court in the Kennedy case, does not discuss the requirements for the ten-year prescription under article 765 either. It merely states that "a possession or continuation of the servitude claimed in the present instance, is proven to have existed more than ten years before this suit was brought." The question of other requirements, in addition to mere possession, does not seem to have been raised by the parties. The court referred to the fact that "no written evidence of title [was] shown" and stated that the "right of servitude [of drip] rests solely on the acquiescence" of his opponent. Good faith is neither mentioned in the opinion nor in the pleadings of the parties. As distinguished from the Guesnard case, which did not purport to interpret article 765, the court in the Vincent case squarely based its decision on an interpretation of this article. This case clearly stands for the proposition that a servitude can be acquired by prescription under article 765 in the absence of a written or oral title and that acquiescence on the part of the owner of a servient estate is sufficient to justify the application of this article. The fact that good faith is not mentioned in the Vincent case

64. Delahoussaye v. Judice, 13 La. Ann. 587 (1858) involving a claim by the defendant to acquisitive prescription of a servitude was decided on the basis of "tacit remission of whatever right may have been acquired by prescription." Id. at 589. The court did not go into the requisites of prescription under article 765 (article 761 of the 1825 Civil Code).
67. Ibid.
68. Ibid.
69. That acquiescence may be substituted for title under Spanish law is brought out by Schmidt, The Civil Law of Spain and Mexico 295, art. 1396 (1851): "In order to acquire a servitude on the property of another requires, "1. Good faith.
"2. Title, or knowledge of the owner of the property.
"3. Possession for the time prescribed by law."
does not, however, speak against the requirement of good faith, since under article 3481 of our Civil Code good faith is always presumed.

The court in the *Kennedy* case therefore could base its decision that the ten-year prescription under article 765 does not require just title in writing on only one of the two decisions relied upon, namely, the *Vincent* case. But the *Kennedy* decision went far beyond the *Vincent* case and attempted a thorough analysis of article 765. The court's main argument that the ten-year prescription under this article does not require (as do the general rules of acquisitive prescription of ownership of immovables) the existence of just title in writing is the following: for servitudes there exist two ways of acquisition "in which real estate cannot be acquired," namely, "by *destination de père de famille* which is equivalent to title and the prescription of ten years, by possession, both of which it is lawful to prove by oral testimony." 71 By stressing the fact that—just as there is no equivalent for *destination de père de famille* for the acquisition of the ownership of immovables—the prescription under article 765 is a mode of acquisition *sui generis*, unrelated to the ten-year prescription of immovables, the court found a way to escape the application of the general rules concerning the short-term acquisitive prescription of immovables under articles 3478-3498, namely, the requirement of just title, which has to be in writing according to articles 2275 and 2440.

After repeating that no written evidence is necessary for the prescription of ten years of a servitude under article 765, the court flatly stated: "The fact of the possession with the characteristics thereof, as prescribed by law, is all that is required." 72 By this statement the court recognized that the ten-year possession under article 765 demanded certain "characteristics" or additional requirements. In order to find the correct interpretation of article 765 with a view of the existence of article 3504 the *Kennedy* case went to the history of the Civil Code of 1825 and to the remark of the redactors referring to *Partida* 3.31.15, 73 which mentions only good faith as a requirement for the ten- or twenty-year prescription. As to the ques-

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70. For a discussion of Macheca v. Avegno, 25 La. Ann. 55 (1873), cited in the *Kennedy* case (34 La. Ann. 568, 571 (1882)), for the proposition that "servitudes may be proved by parol when they are based on prescription," see p. 794 infra.


72. *Ibid*.

73. See p. 788 *supra*.
tion of title, the court simply stated that "it is manifest that, this mode of acquiring a right to a continuous and apparent servitude can be established by oral testimony, when there exists no written evidence to justify title," and found the distinguishing element between the two articles in the requisite of good faith under article 765.

It is to be noted that the term good faith as used in the Kennedy case is not identical with "legal" good faith as used in article 3478 et seq., where it is interwoven inextricably with "just title." It can be said, however, that the good faith required by the court may be within the scope of articles 3450 and 3451, which define the general meaning of good faith under our Civil Code. Under the general rules of the prescription of ownership, "legal" good faith cannot exist without just title. By considering the prescription of servitudes in ten years as one sui generis and not as a species of the ten-year prescription of immovables, the Kennedy case got around the requirement of just title in writing. The court's statement, "It is settled that servitudes may be proved by parol when they are based on prescription. Macheca vs. Avegno, 25 A. 56. This is necessary to show the kind of possession and the duration thereof," seems to be addressed merely to the proof of the fact of possession and not to the question of how to prove title, as for instance in the case of an agreement. The opinion in the Macheca case stated that "all agreements in relation to such use may also be proven by parol unless it is shown that they were reduced to writing which was not done." This, however, is dictum since the court found that possession of the alleged servitude was precarious. The study of the Supreme Court record of the Macheca case discloses that plaintiff had claimed a servitude of drain "as having been possessed by him and his vendor for nearly ten years" and could not have alleged acquisitive prescription. The plaintiff had designated his suit a "possessory action" and did not base it on article 765.

74. Arts. 3451, 3484, LA. CIVIL CODE of 1870, dealing with good faith and just title show that under the concepts of our Code "legal" good faith is inextricably tied in with "just title." Knight v. Berwick Lumber Co., 130 LA. 233, 57 So. 900 (1912). Although the Code Civil has no corresponding articles, the French law, even in the absence of a code provision, has developed the same concept of good faith and relates it to the right of ownership of the grantor, which presupposes an agreement, i.e., title: "La seconde condition pour prescrire par dix à vingt ans est d'être de bonne foi. Le possesseur est de bonne foi lorsqu'il croit que celui qui lui a transmis l'immeuble en était légitime propriétaire. La bonne foi de l'acquéreur doit être entière; s'il a le moindre doute sur la propriété de son auteur, on doit le considérer comme étant de mauvaise foi." 3 Planiol et Ripert, TRAITÉ DE DROIT CIVIL FRANÇAIS n° 709, at 716 (2d ed. 1952).

There is a basic inconsistency in the Kennedy case which it shares with the treatises of the Spanish law in force in Louisiana before 1803. While the court declares that the distinguishing feature between article 765 and 3504 is good faith, it nevertheless goes into the question of proof of title by oral evidence. If good faith alone without title were sufficient, why should there be any necessity to prove title, by written evidence or otherwise? It also is difficult to conceive how one can speak of good faith on the part of the possessor without the existence of some “just title.” The definitions in our Civil Code and our jurisprudence make title an integral part of the very concept of good faith. Another feature about the Kennedy case which is hard to understand is how it could follow the Macheca case dictum ignoring the requirements of articles 2275, 2440 and 3486(1) of the Civil Code. According to Palacios’ Instituciones, title could be replaced by knowledge and forbearance of the owner of the servient estate but it does not appear that the Supreme Court had access to this detailed treatise of Spanish law and the language used by the court does not indicate any reliance on it. The court, after referring to the comment of the redactors and paraphrasing some of the language of

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76. See pages 780-01 supra.
77. Arts. 3478, 3479, La. Civil Code of 1870. “[T]here can be no bona fide possessor except one who possesses under a title transitive of property and not defective on its face. Gibson v. Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772; Brashear v. Dwight, 10 La. Ann. 645.” Vance v. Sentell, 178 La. 749, 758, 152 So. 513, 516 (1933), on rehearing Jan. 2, 1934. See also Ruth v. Buwe, 185 La. 204, 168 So. 776 (1936) and the language in a more recent decision by Hamiter, J.: “Defendant was not a good faith possessor of the five acres within the meaning and intendment of Civil Code, Article 3451. Undoubtedly she sincerely and seriously believed herself to be the master of the property, having lived thereon for many years; but she, to her own knowledge, held under no instrument transitive of ownership, and, therefore, she possessed in legal bad faith. Civil Code, Article 3452; Vance et al. v. Sentell, 178 La. 749, 152 So. 513; Ruth v. Buwe et al., 185 La. 204, 168 So. 776; Guinea Realty Company, Inc., v. Batte et al., La. App., 1 So.2d 153.” Levy v. Clemons, 3 So.2d 440, 442 (La. App. 1941).
78. Articles 2440 and 2275 respectively require that “All sales of immovable property shall be made by authentic act or under private signature” and “every transfer of immovable property must be in writing,” and article 471 considers a servitude established on an immovable estate as an immovable. Article 3486(1) expressly provides that “just title” has to be “valid in point of form; for if the possession commenced by a title void in that respect, it can not serve as a foundation for prescription.” The courts never explained how under this provision an agreement which is not in writing can be proved by parol evidence unless one accepts the basic premise that the rules contained in articles 3478-3503 on prescription of immovables are not applicable to servitudes and that the prescription of servitudes is one sui generis to which the rules dealing with the acquisition of ownership are not applicable.
79. See page 781 supra.
80. See page 788 supra.
Siete Partidas 3.31.15 simply stated: "It is manifest that, this mode of acquiring a right to a continuous and apparent servitude can be established by oral testimony, when there exists no written evidence to justify title."  

It seems that some of the later decisions by the Supreme Court and the courts of appeal have over-simplified the rule of the Kennedy case by stressing out of their context certain words of that decision to the effect that mere quiet and uninterrupted possession for ten years is enough for the acquisitive prescription of servitudes and by not mentioning the requirement of good faith or the court's going into the question of proving title to a servitude by oral testimony. Some of the decisions make the reader wonder whether our courts do not consider article 3504 as meaningless after all and are of the opinion that all situations in which a servitude is claimed on the basis of prescription are covered by article 765.

In Viering v. N. K. Fairbanks Co., decided by the Supreme Court in 1924, plaintiff sued to have removed two iron posts on his property which supported guy wires attached to defendant's smokestack. Although no specific plea of possession under article 765 seems to have been made by the defendant, the Supreme Court based its decision upholding defendant's claim to a servitude acquired by prescription on article 765, and in spite of the fact that it found that he had exercised a continuous apparent servitude of support for over thirty years. Although the defendant had based his claim to the servitude on his possession for more than thirty years, the court did not even cite article 3504 and relied exclusively on article 765 without insisting on either good faith or title. This seems to be characteristic of the presently prevailing view that the acquisitive prescription of

82. For a recent example, see Stinson v. Lapara, 62 So.2d 291, 293 (La. App. 1953) (dictum). In Ellis v. Blanchard, 45 So.2d 100, 102 (La. App. 1950), the court mentions that appellant's brief contended that there had been an acquisition of a servitude under article 765 although no allegation of good faith or title was made.
83. In Levet v. Lapeyrollerie, 39 La. Ann. 210, 1 So. 672 (1887), involving a suit for a perpetual injunction to restrain defendants from interfering with a servitude of drain claimed "acquired by a possession of ten years," the court recognized plaintiff's right to the use of the drainage canal. The short opinion does not go into the requirements of article 765; it only mentions that the canal was dug with the consent of the owner and that the dominant estate has "enjoyed uninterrupted outlet through this canal" from 1871 to 1884. Id. at 213, 1 So. at 673 and that "there was no express title." Id. at 214, 1 So. at 674.
84. 156 La. 592, 100 So. 729 (1924), rehearing denied by whole court, ibid.
apparent and continuous servitudes under article 765 requires nothing more than mere possession for ten years.

On the other hand the courts of appeal in two cases have paid at least lip service to the Kennedy case after the Supreme Court handed down the Viering decision. Greco v. Frigerio,85 decided in 1926, involved a demand by plaintiff for the removal as a nuisance of an outdoor shed toilet and bathroom constructed by defendant's predecessor. Parol evidence was introduced to prove defendant's contention of fifteen or twenty years' enjoyment of the facility with the permission of plaintiff's predecessor. The Orleans Court of Appeal, quoting at length from the Kennedy case, upheld defendant's plea of acquisitive prescription of ten years. In Fuller v. Washington,86 decided by the Court of Appeal for the Second Circuit, although the court did not discuss the requirement of good faith, it nevertheless seems to have accepted the doctrine of the Kennedy case when it stated: "It is well established that agreements with reference to continuous apparent servitudes may be proved by parol evidence, and the agreement of the owners of the property in the year 1928 is definitely established by testimony in this record."87 Parol evidence was admitted to prove an agreement for the construction of a sewer line across plaintiff's property and his claim to acquisitive prescription of ten years was upheld. On the basis of testimony that a written agreement "which . . . evidenced the acquiescence of the respective owners of the property in the laying of the sewer line"88 had been signed in 1928 and evidence of continuous use for more than fifteen years, the court found, without going into the requirement of good faith, that a servitude had been created in favor of the defendant by prescription under article 765. The chief problem considered by the court was whether a sewer line constituted a continuous servitude.

85. 3 La. App. 649 (1926).
86. 19 So.2d 730 (La. App. 1944).
87. Id. at 732. Before this statement we find, however, the following language in the court's opinion which might be interpreted that article 765 does not require good faith and an agreement: "In a written opinion refusing plaintiff's application for rehearing, the learned Judge of the District Court quoted Articles 727, 724 and 728 of the Civil Code in support of his conclusion that it was unnecessary to go beyond the plain language of the codal articles in determining that the sewer constituted an apparent continuous servitude, subject to acquisition through possession of 10 years, under the provisions of Article 765 of the Civil Code. With this conclusion we are in complete accord." Id. at 731.
88. Ibid.
No cases could be found in which the Louisiana courts based the acquisition of a servitude exclusively on article 3504. Even the allegation by the parties claiming a servitude by prescription as a rule rely on article 3504 only in the alternative. This situation results from the court's not insisting on a just title in addition to the ten years' possession in good faith as a condition for prescription under article 765. Since good faith is always presumed under article 3481 and since proof of mere possession for ten years has been considered sufficient in several recent cases to justify the application of article 765, there is hardly any need for the parties claiming a servitude to urge the application of article 3504. Furthermore, the long-term prescription of thirty years can have only limited importance since the possessor can within the same time limit prescribe not only a servitude on, but the ownership of, the immovable property. This is shown by Franz v. Mohr. In this case plaintiff brought a petitory action to be recognized as owner of a parcel of land allegedly in possession of defendants without color of title. Defendants pleaded "estoppel," ownership on the basis of the prescription of ten years acquirendi causa and in the alternative acquisition of a continuous and apparent servitude by prescription of ten years under article 765 of the Civil Code. The court of appeal in reversing judgment for plaintiff held that defendant had acquired the ownership of the land under article 3478. Since defendant had acquired ownership of the land, there was no need for the court to go into the plea of acquisitive prescription of the servitude under article 765.

In addition to the cases discussed here there seem to be quite a number of decisions whose records and briefs might yield some indications with regard to the fact how our courts have

89. The case of Roe v. Bundy's Heirs, 45 La. Ann. 398, 12 So. 759 (1893) mentioned in LSA—Civil Code under article 3504 was not decided on the basis of this article.

90. Art. 3481, LA. CIVIL CODE of 1870: "Good faith is always presumed in matters of prescription; and he who alleges bad faith in the possessor, must prove it." See, e.g., Harrill v. Pitts, 194 La. 123, 141, 193 So. 562, 568 (1940); Meraux & Nunez, Inc. v. Gaidry, 171 La. 852, 864, 132 So. 401, 405 (1931).


92. See 3 PLANIOL ET RIFERT, TRAITé PRATIQUE DE DROIT CIVIL FRANÇAIS no 965, at 945 (2d ed. 1952) and note 131 infra.

treated pleas of acquisitive prescription. One of these cases is Oldstein v. Firemen's Building Association, where the district court maintained the “pleas of prescription and estoppel” of the plaintiff who had pleaded “the prescription of 10, 20 and 30 years” in addition to “a special plea of immemorial possession” to his servitude of “air and light” whereas the Supreme Court seems to have based its decision on the principles of party walls and walls in common. Many of the cases dealing with acquisition of servitudes by destination de père de famille and particularly cases concerning servitudes originating from the natural situation of the places (articles 660-663, Civil Code of 1870), may also yield information on the question of prescription of servitudes.

V

The Roman jus civile had originally recognized the creation of servitudes by acquisitive prescription (usucapio). This was changed in the early period of the Empire by the lex Scribonia, which abolished the usucapio of servitudes. The Corpus Juris of Justinian, by merging the jus civile with the jus honorarium and combining certain features of the longi temporis praescriptio with the interdicta destined to protect servitudes stated that all types of servitudes could be acquired by exercise of the right ten years inter praesentes and twenty years inter absentes provided that the possession was nec vi, nec clam, nec precario. From the times of Justinian to that of the codifications of the civil law on the continent in the nineteenth century the Roman law concerning this period underwent many changes and con-
siderable difference of opinion existed among commentators. This led an author of the last century to start the preface to his book on the acquisition and protection of servitudes with the following sentence: “Among the controversies of the Roman law one of the oldest is: how can servitudes be acquired by prescription?” The situation prevailing in southern France under the Roman law before the enactment of the Code Civil described in Part I of this Comment is indicative of confusion which prevailed under the usus modernus pandectarum.

The Roman-Dutch law, which is still in force in South Africa, recognizes the acquisition of all positive servitudes “by prescriptive user without interruption for thirty years.” The distinction between negative and affirmative servitudes, which in the old Roman law was of particular importance for the loss of servitudes, but not for their acquisition, under the Roman-Dutch became of importance also in the question of acquisitive prescription. Negative servitudes cannot be acquired by prescription unless the parties claiming them asserted them by some acts and the opponents yielded to them. In addition to the thirty-year acquisitive prescription the existence of a servitude can be proved by vetustas. Vetustas (immemorial use) is described as “a condition of affairs which has been so long in existence that its origin dates back to a time when the memory of man can no longer recall.” The law on this point was restated in a 1943 act, together with all the other rules on prescription, to the effect that acquisitive prescription will operate

100. HEDEMANN, UEBER DEN ERWERB UND SCHUTZ DER SERVITUTEN NACH ROMISCHEM RECHT 1 (1864). This author went so far as to deny that the Roman law recognized acquisitive prescription of servitudes, which view, however, was not accepted. Cf. 1 WINDSCHEID, LEHRBUCH DES PANDEKTERRECHTS § 213, at 642, n. 1 (7th ed. 1891). The recent German authoritative treatises on Roman law do not cite Hedemann. See, e.g., JOERS-KUNKEL-WENGER, ROMISCHES PRIVATRECHT § 86, at 148-49 (3d ed. 1949).
101. 2 MAASDORP, INSTITUTES OF SOUTH AFRICAN LAW 179 (7th ed., Hall 1948); 4 NATHAN, THE COMMON LAW OF SOUTH AFRICA no. 2457, at 2407 (1907). In the original Roman-Dutch law the time was a third of a century. This rule still prevails in Ceylon. LEE, AN INTRODUCTION TO ROMAN-DUTCH LAW 172 (5th ed. 1953). For the statutory basis of the change in South Africa see note 105 infra.
102. 2 MAASDORP, INSTITUTES OF SOUTH AFRICAN LAW 178 (7th ed., Hall 1948).
103. 1 NATHAN, THE COMMON LAW OF SOUTH AFRICA no. 691, at 495 (2d ed. 1913).
104. 2 MAASDORP, INSTITUTES OF SOUTH AFRICAN LAW 179 (7th ed., Hall 1948). Public servitudes may be created only by immemorial use, not by prescription. 2 id. at 180; LEE, AN INTRODUCTION TO ROMAN-DUTCH LAW 174 (6th ed. 1953).
by "the use of a servitude in respect of an immovable property, continuously for thirty years nec vi, nec clam, nec precario."105

The Prussian General Code of 1794, which purported to be nothing more than a mere compilation of the existing law, did not introduce any changes in the rules of Roman law governing real rights then in force in Prussia. The extreme conservatism was particularly noticeable in the rules affecting rural property. The acquisitive prescription of servitudes was governed by the general rules of prescription of ownership. When based on title, a servitude could be acquired within ten years; without title, in thirty years. Certain servitudes which could not be exercised regularly at least once a year could not be acquired by "regular" prescription but only by "irregular" prescription in forty years.106 As in the Corpus Juris no distinction between continuous and non-continuous, apparent and nonapparent, servitudes was made. All types of servitudes were susceptible of acquisitive prescription.107

As pointed out in Part I the French Code Civil of 1804 was a compromise between the rules of the Roman law favoring the acquisition of servitudes by prescription and the rule of the Custom of Paris doing away completely with acquisitive prescription of servitudes.108 The Spanish Código Civil of 1889 fol-

105. Section 2: "(1) Acquisitive prescription is the acquisition of ownership by the possession of another person's movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years nec vi, nec clam, nec precario.

"(2) As soon as the period of thirty years has elapsed such possessor or user shall ipso jure become the owner of the property or the servitude as the case may be." Act to amend and consolidate the laws relating to prescription. UNION OF SOUTH AFRICA STATS. No. 18, at 76, 78 (1943).

106. 1 DERNBURG, LEHRBUCH DES PREUSSISCHEN PRIVATRECHTS §§ 175-78, at 361 et seq., § 298, at 655 (1875).

107. There was no requirement of registration. It should be noted that at the time of the enactment of the Prussian Code the land registers existed only in very few cities and in the rest of the country only the acquisition of mortgages was subject to registration but not ownership, servitudes, and other real rights. Id. § 191, at 385 et seq.

108. On the general attitude of the redactors of the Code Civil, see the well-known phrase in Portalis' Discours préliminaire: "Nous avons fait, s'il est permis de s'exprimer ainsi, une transaction entre le droit écrit et les coutumes, toutes les fois qu'il nous a été possible de concilier leurs dispositions, ou de les modifier les unes par les autres, sans rompre l'unité du système, et sans choquer l'esprit général. Il est utile de conserver tout ce qu'il n'est pas nécessaire de détruire: les lois doivent ménager les habitudes, quand ces habitudes ne sont pas des vices." 1 FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 481 (1836).

This statement was made after expressing the high esteem in which the redactors held the Roman law in the following words: "Le droit écrit, qui se compose des lois romaines, a civilisé l'Europe. La découverte que nos aieux firent de la Compilation de Justinien, fut pour eux une sorte de révélation.
follows the French Code Civil but reduces the time necessary to prescribe a servitude from thirty to twenty years. This shortening of the prescriptive period seems to be the reason why in the opinion of the Spanish commentators, as distinguished from some French authors, that there is no room in the Spanish law for the general ten- or twenty-year prescription of servitudes with just title and in good faith. The Spanish text books recognize that for continuous and apparent servitudes there exists only one special prescription and not one ordinary and another extraordinary, as for other real rights. In the revision of the Spanish law in the Philippines in 1949 the uniform time period for the prescription of continuous and apparent servitudes was shortened from twenty to ten years in order to make it conform with the rule of the Code of Civil Procedure "regarding the prescription of real rights of which servitude is one."

The new Italian Civil Code of 1942 admits the prescription of all apparent servitudes in ten years. It dispenses with the requirement that servitudes, in order to be susceptible of acquisitive prescription, be both apparent and continuous. The change was justified in the report on the projet as the "return to the tradition of the Roman law, interrupted and deflected by the French coutumes which on this point were followed by the French Code Civil." The old rule which Italy had accepted from France is ...
declared as “corresponding neither to the juridical social conscience nor to the juridical reality.”

The new Italian Code also dispenses with a special article corresponding to article 690 of the French Code Civil and deals with the prescription of servitudes in one general article, 1158, covering acquisitive prescription of both ownership and other real rights in immovable property in twenty years.

In view of the extreme variety of rules governing the acquisitive prescription of servitudes under the Roman law and the local legal systems in western and central Europe, it is not surprising that there originated a rather widespread tendency to do away with the institution of the acquisition of servitudes by possession altogether. The existing confusion in this area of law, together with the spreading hostility against servitudes, originally a residue of a system of collective ownership which did not fit in anymore with the trend in the direction of individual ownership, intensified the attitude expressed in the well-known maxim of the Custom of Paris “No servitude without title.” The codes which originated in central Europe in the course of the nineteenth century insisting on inscription in the land registers for the acquisition of real rights in immovable property rejected the acquisitive prescription of servitudes unless possession was coupled with inscription of the servitude in the land registers.

The Austrian Civil Code of 1811 recognized the acquisitive prescription of non-registered servitudes by possession only


According to 2 TOULLIER, LE DROIT CIVIL FRANÇAIS nô 597, at 171, n. 4 (1833), Caepola in 1477 created the present concept of continuous servitudes.

116. The original projet of 1937 had recommended a uniform prescription of immovables in ten years. Article 577. [ROYAL COMMISSION FOR THE REFORM OF THE CODES—SUBCOMMISSION FOR THE CIVIL CODE], CODICE CIVILE—SECONDO LIBRO—COSE E DIRITTI REALI—PROGETTO 169 (1937); id. at RELAZIONE AL PROGETTO, p. 248. For a full discussion of the problems of acquisitive prescription of servitudes under Roman law and the modern Civil Code with ample references to Italian and German legal literature, see GROSIO E DEJANA, LE SERVITU' PREDIALI nô 168-73 (1951).

117. 2 GIERKE, DEUTSCHES PRIVATRECHT 645, n. 28 (1905) lists the different rules in the various nineteenth century codes of central Europe.

118. See note 123 infra. This maxim can be traced in its origins to the fourteenth century. BERISSAUD, A HISTORY OF FRENCH PRIVATE LAW 425, n. 2 (2d ed., Howell transl. 1912).

A typical expression of the prejudice against servitudes is found in the phrase of Basnages: “L'avarice et l'ambition ont détruit la liberté, et ont introduit esclavage sur les hommes et la servitude sur les biens.” Quoted in LALAURE, TRAITÉ DES SERVITUDES RÉELLES 14 (1786).
in those places where no land registers existed. The same rule was accepted in the Swiss Civil Code of 1907. The German Civil Code of 1896 does not recognize acquisitive prescription of servitudes by possession at all. Only when a servitude is reported erroneously for thirty years in the land register can it be acquired by prescription on the basis of the fact of registration, provided that it was actually exercised during that time. This solution was adopted in spite of the doubts expressed by the famous legal historian Gierke. No economic or other social ill effects seem to have arisen from the lack of recognition of prescription of servitudes by possession for a certain number of years.

The Civil Code of Quebec in its article 549, following the rule of the Custom of Paris, rejects the acquisitive prescrip-

119. Article 1469 of the Austrian Civil Code of 1811 provides that “servitudes and other special rights exercised on somebody else’s land are acquired, in the same way as ownership, in three years by the person in whose name they are registered in the public registers.” In those places where no public registers exist, or if the right of servitude is not registered, the bona fide possessor can prescribe only after thirty years. (Article 1470) Article 1469 was repealed in 1817 and replaced by new rules concerning the cancellation of inscriptions in the public registers. 6 KLANG, KOMMENTAR ZUM ABGB 584, 587 (1951). There is no clear authority whether apparent servitudes are subject to the general rule that where public land registers exist servitudes can be acquired only by registration. Authority can be found in the treatises and jurisprudence for either view. The most recent treatises seem to favor exemption from the necessity of registration, and the greater number of Supreme Court decisions is to the same effect. 2 id. at 561, nn. 17, 18; 1 EHRENZWEIG, SYSTEM DES ÖSTERRREICHISCHEN ALLGEMEinen PRIVATRECHTS, (Part 2), § 258. II. 2, at 373-74 (1923).

120. HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW 353 (Philbrick transl. 1918); TUOG, DAS SCHWEIZERISCHE ZIVILGESETZBUCH 548 (6th ed. 1963).

121. § 108, at 378 (8th ed. 1929); 2 ARMINJON-NOLDE-WOLFF, TRAITÉ DE DROIT COMPARÉ 543, 559 (1895).

122. GIERKE, DER ENTWURF EINES BÜRGERLICHER GESETZBUCHS UND DAS DEUTSCHE RECHT 315 et seq. (1899); 2 GIERKE, DEUTSCHE PRIVATRECHT 646, n. 31 (1905).

123. “This article which is a mere repetition of article 186 of the Custom of Paris, declares that servitudes cannot be established by prescription; that in all cases, there must be a title . . . ; it is in lieu of articles 690, 691 of the Code Napoleon, the first deciding that continuous and apparent servitudes are acquired by title and by prescription of thirty years; and the second, that those which are continuous and non-apparent, and those which are discontinuous, whether apparent or non-apparent, cannot be established but by title; in this adopting the system of the Roman law contrary to that generally followed in France in the provinces where customary law prevailed, and in which the maxim of the Custom of Paris: ‘No servitude without title’ was followed.

“Our article confirms that rule and makes it apply to all kinds of servitudes, without any exception; the destination of the father of family not being one, since, even in its case there must be a title as will be shown in the proper place.

“This title so absolutely required, can only be supplied by an act of recognition, proceeding from the proprietor of the land subject to the right . . . .” THIRD REPORT OF THE COMMISSIONERS, CIVIL CODE OF LOWER CANADA 403 (1865); cf. 3 MONPETIT ET TAILLEFER, TRAITÉ DE DROIT CIVIL DU QUÉBEC 464 (1945).
tion of servitudes. Possession alone, not based on title (an agreement, donation inter vivos, or legacy), even when immemorial, is not sufficient to create a servitude. If the original title creating the servitude is lost or destroyed, "the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto." As in Germany no ill social effects appear to have been produced by the rule not to allow acquisitive prescription. The jurisprudence does not seem to have created any controversies and the treatment of the acquisition of servitudes in the treatises of Quebec law on this point are impressive in its clarity and preciseness.

The common law of easements shows considerable similarity to the Roman law of predial servitudes in spite of many differences in detail. In England the law governing the prescription of easements was restated in the Prescription Act of 1832. In the United States the acquisitive prescription of all types of servitudes is generally recognized. Whereas the treatises confined themselves to descriptions of the traditional principles and of the major developments introduced by statute or precedent without attempting any critique of the prevailing rules, some of the court decisions have posed the policy problem behind the prescription of easements, namely, whether the general principle of adverse possession should prevail or whether certain uses should be considered merely "an enjoyment of neighborly courtesy."


126. "Destination du père de famille," expressly recognized by article 551 as "equivalent to a title," is considered not a separate legal institution but "only a form of constitution by title." Marler, The Law of Real Property—Quebec § 303, at 124 (1932); 3 Montpetit et Taillefer, Traité de droit civil du Quebec 462, 467-68 (1945).


130. Weaver v. Pitts, 191 N.C. 747, 749, 133 S.E. 2, 3 (1926).
VI

In view of the existing difficulties in interpreting articles 765 and 3504 of our Civil Code and of the rather unsatisfactory state of the Louisiana jurisprudence the present rules dealing with the acquisitive prescription of servitudes should be thoroughly reconsidered in any future revision of the Civil Code. Even a most conservative approach should take into consideration the criticism which has been addressed to the rules of the Code Civil concerning the prescription of servitudes in the French legal literature and consider the fact that at least two of the codes derived from it, the Italian Codice Civile of 1942 and the Civil Code of the Philippines of 1949 have introduced important basic changes in this area.

Apart from the question of how to revise the present rules the problem may be posed whether the situations involved in the cases decided by our Supreme Court and the courts of appeal which found that servitudes were acquired by prescription justify the retention of the institution of acquisitive prescription of servitudes. It is submitted that the possibility that a servitude can be prescribed by possession without written title is not conducive to fostering good neighborly relations and may tend to diminish the willingness of landowners to acquiesce in minor uses of their land by neighbors since such acquiescence can eventually lead to the creation of an encumbrance of the land or building by a servitude which might substantially affect the use or market value of the property involved. In view of the fact that acquisitive prescription of servitudes under just title and in good faith cannot have much practical importance, the question might be asked whether it is socially desirable to protect a person

131. It has been pointed out that such a situation can present itself only very rarely since it presupposes a rather complicated combination of circumstances: (1) that the servitude be constituted by the possessor of the servient estate who is not the owner; (2) that the neighbor believes that he is dealing with the real owner; (3) that the neighbor have the time to acquire by acquisitive prescription in ten years (in France also twenty years inter absentes); (4) that the real owner bring the petitory action in the necessarily restricted interval which elapses between the acquisitive prescription of the servitude by the neighbor (who finished the necessary time of possession) and the running of the thirty-year prescription which would accomplish that the possessor of the servient estate becomes its owner. This is so because as soon as the possessor of the servient estate acquires the ownership of the land by prescription, the servitude constituted by him becomes valid without the necessity of prescription (by the doctrine of after-acquired title). 3 Planhol et Ripert, Traité pratique de droit civil français no 965, at 945 (1952).
who commits trespass on somebody else’s land for ten, twenty, or thirty years and to create in his favor a real right which might substantially diminish the value of land thus encumbered. The reported cases of our Supreme Court and courts of appeal are mostly of the neighbors’ quarrel variety and do not show an overriding social interest for the protection of persons who cannot base their claims to a servitude on a valid title which interest should prevail over the recognized need for certainty with regard to rights in immovables.

The needs for the types of claims to servitudes involved in the cases discussed in Part IV, involving mostly drainage, sewer pipes, drip, and passage, can be adequately provided for in the legislation outside the Civil Code as, for instance, in the statutes dealing with drainage and sewerage districts or in local

132. LA. R.S. 38:1481-2032 (1950). See particularly LA. Acts 1916, No. 242, p. 511, incorporated as LA. R.S. 38:1482 (1950) (“The drainage districts may resort to expropriation proceedings in the same manner and under the same conditions as they are now authorized to do for acquisition of the land necessary for the cutting of the canals . . . .”); LA. Acts 1921 (E.S.), No. 85, § 26, p. 147, LA. Acts 1924, No. 235, § 1, p. 467, incorporated as LA. R.S. 38:1627 (1950) (expropriations for rights of way, etc., for drainage districts); LA. Acts 1924, No. 238, § 38, p. 505, LA. Acts 1926, No. 297, § 1, p. 536, incorporated as LA. R.S. 38:1796 (1950) (right of gravity drainage district or sub-drainage district to expropriate). For an excellent short treatment of Louisiana drainage law, see LOUISIANA LEGISLATIVE COUNCIL, WATER PROBLEMS IN THE SOUTHEASTERN STATES, Research Report No. 5, p. 29 et seq. (Mimeo., April 7, 1955), based on ASSEF, SPECIAL DISTRICTS IN LOUISIANA 35 et seq. (1951) and literature cited there. The various drainage statutes at the turn of the twentieth century are collected in MILLING, A RE-PRINT OF THE DRAINAGE LAWS OF LOUISIANA (1912). For the importance of irrigation districts provided in LA. R.S. 38:2101-2123 (1950), see Wiegmann & Bolton, A Preliminary Discussion of Crop Irrigation in Louisiana, 16 LA. RURAL ECONOMIST No. 1, at 6 (Feb. 1954). For the importance of the drainage districts, see, e.g., WILLIAMSON, ECONOMIC ASPECTS OF SUGARCANE PRODUCTION IN LOUISIANA, 1941, pp. 62-66 (Mimeo. cir. No. 26, June 1942).

The police jury and the public have no legal servitude of drain, sewer, and water lines. Such servitudes can be acquired only under article 765 of the Civil Code by title or possession of ten years. Bonnabel v. Police Jury, 216 LA. 798, 811, 44 So.2d 872, 876 (1950). In that case there was no sufficient evidence of possession for the necessary time period.

133. LA. R.S. 33:3881-4091 (1950). See particularly LA. Acts 1924, No. 222, § 5, p. 430, LA. Acts 1936, No. 244, § 1, p. 649, incorporated as LA. R.S. 33:3885 (1950) (right of sewerage districts to “expropriate property for the purpose of acquiring rights of way for the laying and installing of sewers”); LA. Acts 1950 (E.S.), No. 6, § 2, p. 11, incorporated as LA. R.S. 33:3962 (1950) (“powers of expropriating . . . for the purpose of laying and installing and operating said [sewerage] system” lodged in municipal districts and subdistricts); LA. Acts 1934, No. 31 § 1, p. 191, incorporated as LA. R.S. 33:4001 (1950) (right to “acquire by gift, grant, purchase, condemnation or otherwise all necessary lands, rights of way” on the part of municipalities in order to construct sewerage systems); LA. Acts 1899 (E.S.), No. 6, § 17, p. 23, LA. Acts 1902, No. 111, § 1, p. 170, incorporated as LA. R.S. 33:4078 (1950) (right of the City of New Orleans “to expropriate any property convenient or necessary for the sewerage, water, or drainage systems”).
building regulations. Several statutes have been enacted during the last decades which provide persons desirous to obtain drainage or sewerage servitudes with adequate means to obtain them if the neighboring landowners refuse to grant such servitudes by private agreement.\footnote{Before the Louisiana drainage and sewerage legislation of the twentieth century the right of police juries to provide for new drainage ditches (as distinguished from opening "such ancient natural drains as have been obstructed by the owners") was strictly limited. La. Acts 1813, § 6, p. 160, as explained by La. Acts 1814, p. 46, incorporated as LA. REV. STAT. § 2743 (1870).}

John S. White, Jr.