Public Records & Property Rights

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I. INTRODUCTION

Louisiana law does not systematically establish a "public records doctrine." The term is used, but it is used to mean different things in different contexts. Indeed, several public records doctrines can be discerned. It is more precise and helpful to separate the different functions of the rules involved and to focus on the specific statutes and code provisions that govern in these areas.

As one analyzes the rules of recordation or registry, one sees an ongoing tension between two objectives. The first objective, often termed the negative aspect of the system, is that a person not a party to an act is entitled to rely on the absence from the public records of interests in immovable property stemming from the act. The second objective is that a party to an act is entitled to rely on the presence in the public records of interests in immovable property stemming from the act.

The term "recordation" is used as a generic term, interchangeably with "registry." Some texts refer to "recordation" in the mortgage records and "registry" in the conveyance records, but this distinction is not uniformly followed. William V. Redmann, The Louisiana Law of Recordation: Some Principles and Some Problems, 39 Tul. L. Rev. 491, 491 n.4. (1965).

See 1 Peter S. Title, Louisiana Real Estate Transactions § 8.13, at 181 (1991):
from that act. That person is protected in dealing with the property without
regard to the unrecorded instrument. The second objective is the attempt to
establish a positive force to recorded instruments, to allow non-parties to rely on
the recorded document and to be protected in acquiring rights based on those
documents, even if they are false or invalid. Absent a system that imposes
safeguards to allow recordation of only valid agreements, this second goal raises
possibilities of fraud and injustice. This essay will look at recent cases and
statutes that reflect these basic tensions.

Under Louisiana law, actual knowledge of the unrecorded document is not
important, nor is something called "constructive knowledge." As Judge
Redmann put it,

Where O sells to A by recorded deed, and then O sells the same
property to B by recorded deed, it makes no difference in result whether
A is said to prevail over B merely because his rights were preserved
and made effective by recordation or because B has constructive notice
of the prior recorded deed and therefore cannot be a good faith
purchaser for value without notice. In Louisiana, regardless of which
explanation is used, it is clear that recordation is both indispensable and
sufficient to the conclusion that A's title is superior to B's. 3

The basic notion is that in creating real rights that bind property in the hands of
subsequent owners, fairness requires that one give the subsequent owners an
opportunity to learn from an authoritative source that the property is so bound.
If that opportunity is not given, the property will not be bound. 4

Another basic aspect of the Louisiana law is that a third person's actual
knowledge of the execution of the act is not sufficient to defeat his claim; he

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In all parishes except Orleans, the Clerk of Court for the parish acts as the recorder for
instruments required to be filed in the mortgage and conveyance records. In Orleans
Parish alone, there is one separate officer, the Register of Conveyances, that registers
instruments required to be filed in the conveyance records and another separate officer,
the Recorder of Mortgages, that records instruments required to be filed in the mortgage
records. Additionally, in Orleans Parish there is an additional officer, the Custodian of
Notarial Records, that acts as the depository of the original instruments, a function that
in all other parishes is also delegated to the Clerk of Court.


3. Redmann, supra note 2, at 495. See also Redmann, supra note 2, at 498 (referring to the
notion of constructive notice as "technically inaccurate, unnecessary, and otherwise objectionable").
The supreme court in Phillips v. Parker, 483 So. 2d 972 (La. 1986), rejected the constructive
knowledge concepts: "[F]rom the standpoint of the operation of the public records doctrine,
knowledge is an irrelevant consideration. Any theory of constructive knowledge which imputes
knowledge of the contents of the public records to third persons forms no part of the public records
documentation." Id. at 976. See Symeon Symeonides, Developments in the Law, Property, 47 La. L. Rev.
429, 436 (1986).

4. Alejandro M. Garro, The Louisiana Public Records Doctrine and the Civil Law Tradition
97-98 (1989).
prevails over the interests of the unrecorded transferee.\textsuperscript{5} The policy of punishing persons in bad faith gives way to the stability policies of avoiding possible litigation about subjective mental states of alleged bad faith conveyancers. In any event, that is the rule applicable to documents that are not recorded at all.

On the other hand, if the issue is contesting the validity of recorded documents or claims to annul agreements, it appears that only a purchaser under onerous title who is in good faith is protected.\textsuperscript{6}

II. INSTRUMENTS THAT MUST BE RECORDED TO AFFECT THIRD PERSONS

The Louisiana Civil Code Obligations revision in 1984 adopted Article 1839 that provides that an instrument “involving” immovable property affects third persons only from the time of registry.\textsuperscript{7} The drafters described that article as a restatement of the basic principles of the prior law that was not intended to change the scheme of recordation.\textsuperscript{8} Under Old Article 2266, it was sales, contracts and judgments “affecting” immovable property that were mentioned.\textsuperscript{9} Old Article 2264 referred to a notarial act “concerning” immovable property.\textsuperscript{10} Old Article 2265 referred to sales of immovables, marriage contracts, and judgments “affecting” immovable property.\textsuperscript{11} The long-standing provisions of Louisiana Revised Statutes 9:2721 refer to a long listing of juridical acts “relating to or affecting immovable property.”\textsuperscript{12}

Without precise definitions of these quoted terms, the system is arguably left with some uncertainty about which agreements must be recorded. This section attempts to find some certainty in these matters.

\textsuperscript{5} Harang v. Plattsmier, 21 La. Ann. 426 (1869); McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909); Garro, supra note 4, at 277.


\textsuperscript{7} La. Civ. Code art. 1839.

\textsuperscript{8} La. Civ. Code art. 1839, cmt. b.

\textsuperscript{9} La. Civ. Code art. 2266 (1870).

\textsuperscript{10} La. Civ. Code art. 2264 (1870).

\textsuperscript{11} La. Civ. Code art. 2265 (1870).

\textsuperscript{12} La. R.S. 9:2721 (Supp. 1996).
A. Real Rights Established by Agreement

Real rights in immovables clearly meet the word formulas mentioned above and are included in the policies behind the recordation system. These are rights in things, as opposed to rights against persons requiring the "giving, doing, or not doing something." By their very purpose, these real rights are the premier interests that apply to, involve, affect, concern and relate to things. Indeed, it might be logically argued that only real rights should need recordation, but that view raises some issues that will be discussed later.

1. Ownership of Land & Superficies

Ownership is the basic real right, and any agreement transferring ownership of immovables is included in the recordation rule. Sales and donations are the classic examples of such transfers of ownership, but the rule extends to any transfers, as by exchange, dation en paiement, transfer to a trust, or whatever. Boundary agreements between contiguous landowners have the effect of transferring ownership rights up to the newly established boundary, and thus would come within the rule.

Superficies is a term referring to ownership of buildings and constructions apart from ownership of the land beneath them. It also includes crops and timber estates owned by persons who do not own the land. Rights in these things are ownership rights, and thus real rights subject to the basic rule. The Louisiana Civil Code establishes a presumption that the landowner owns these buildings, crops and trees, making it necessary to record the act providing for separate ownership to indicate the object involved is not owned by the landowner. These superficies are also treated as property subject to mortgage. Louisiana Civil Code Article 3286 allows mortgages of "[t]he lessee’s rights in a lease of an immovable with his rights in the buildings and other constructions on the immovable."

2. Servitudes

Personal servitudes are real rights binding a thing and in favor of a person. The Civil Code enumerates these personal servitudes as usufruct,

habitation and rights of use, and agreements establishing them come within the ambit of the recordation rule. Predial servitudes are real rights binding a tract of land and in favor of another tract of land. Agreements establishing them are also covered by the recordation rule.

3. Subdivision Restrictions

Subdivision restrictions governing building standards and uses of property are defined as real rights and can be established only by juridical act. Those acts must be recorded to affect subsequent buyers.

4. Mortgage and Vendor's Privilege on Immovables

Mortgage is a real right that, if established by agreement, must be recorded to affect third persons. The virtually extinct antichresis is a real right of security over immovables that requires, in addition to delivery of possession, that there be a written agreement. It would thus fall under the rule requiring recordation. A vendor's privilege on immovable property is also a real right. Although the privilege is arguably established by law rather than by agreement, traditional rules have treated the privilege as an accessory of the credit sale, thereby subjecting it to the recordation rule. The act of sale is the agreement that must be recorded to affect third persons. Normally, the sale would be recorded in the records of conveyances; to preserve the privilege, however, the Civil Code requires that it be recorded in the registry for recording mortgages.

5. Mineral Rights

Mineral rights, including mineral leases as well as servitudes and royalties, are established as real rights by Article 16 of the Mineral Code.

28. La. Civ. Code art. 3271. See Meyer, supra note 1, at 434:
   However, there is a retroactive aspect to the vendor's privilege. The vendor's privilege must be recorded in the mortgage office and will be superior in rank over all legal and conventional mortgages of the purchaser, if the notarial act is filed in strict accordance with the time limitations in article 3274.
   La. Civ. Code art. 3274 requires recordation within seven days or 15 days from the act of sale.
29. La. Civ. Code art. 3271; see also supra note 2.
6. **Emphyteusis**

Emphyteusis or “rent of lands,” a seldom used institution, is a real right. It is a transfer of land to a buyer in which the seller reserves “an annual rent of a certain sum of money, or of a certain quantity of fruits, which the other party binds himself to pay him.”\(^3\) It must be a transfer in perpetuity. If not, it is a lease, the more common institution, which is discussed in the following section.

7. **Any Other Real Rights?**

In the absence of clear code limitations, Louisiana courts seem to have allowed individuals to establish some new real rights in addition to those defined in the Louisiana Civil Code.\(^3\) New forms of servitudes, including mineral servitudes\(^3\) and limited personal servitudes,\(^3\) were allowed. Subdivision building restrictions were permitted.\(^3\) Upon their acceptance, these institutions were refined and codified in subsequent civil code and statutory revisions.\(^3\) It appears that some limited restraints on alienation, including first refusal clauses, are being allowed.\(^3\) The basic concept is the freedom to contract on any subject so long as public policy is not violated.\(^3\) The revision of Louisiana Civil Code Article 476 in 1978 appears to have continued the existing state of the law; it provides that rights in things include ownership, servitudes and such “other real rights as the law allows.” Comment (d) explains that “parties to a contract may create real rights ‘apart and beyond’ those created in the Civil Code, subject to close judicial scrutiny in the general interest of the public. However, little use of this facility has been made in practice.” A basic public policy reflected in property law is simplicity of title and keeping property in commerce, and perpetual or unreasonable limits on ownership and use are not allowed. Another basic notion is that real rights cannot impose on persons the personal obligation to perform acts.

In any event, if the basic policies are met so that a new real right will be permitted, it should follow that agreements establishing such rights will not affect third persons until recorded.

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32. Yiannopoulos, supra note 19, at § 217.
Agreements to purchase items from a certain supplier would normally establish personal rights that would not bind subsequent owners of the property on which the items are sold. Attempts to make such agreements function as real rights have so far been unsuccessful, even if they were recorded. In Huber Oil Co. v. Save-Time, the court construed an agreement to purchase gas and oil products as intended to establish only personal rights, even though it was recorded. However, in U-Serve Petroleum & Investments v. Cambre, the parties agreed specifically that the terms of the contract "were to be binding upon and to run with the land." The contract was recorded in the conveyance records. The district court determined the agreement was "a lease which formed a real obligation, binding upon Moreau when he acquired the property." The court of appeal suggested that such agreement was not real "because it favored the person of U-Serve and not a dominant estate." That fact, however, should be irrelevant since servitudes in favor of a person are permitted. The crucial issue is whether it binds an estate. And on that point, the case is inconclusive, especially since the court found that the purchaser personally assumed the obligation. Indeed, it made that determination on a sparse factual record. Even then, the case is problematic on another ground, in that the assumption was not in writing as required by Civil Code Article 1821. The court thus rendered judgment in favor of U-Serv against Cambre and then Cambre’s subsequent third party demand against Moreau. The central issue remaining would seem to be whether such contracts contravene a public policy against making the owners of property subject to a real right to perform affirmative duties.

B. Personal Rights Established by Agreement

Ordinarily, personal rights would not be part of a land registration scheme since personal rights are defined in terms of requiring a performance from a person instead of rights in things. However, for various useful reasons, some personal rights are given greater reach when they affect interests in immovable

39. 422 So. 2d 597 (La. App. 3d Cir. 1982).
40. 486 So. 2d 821 (La. App. 1st Cir.), writ denied, 491 So. 2d 18 (1986).
41. Id. at 823.
42. Id. at 824.
43. Id.
44. From the foregoing, we come to the inescapable conclusion that Moreau in fact knew of and assumed the obligations. The fact that he closed the sale knowing the contract existed and that U-Serve intended to hold him to it, signifies his voluntary act of assumption of Cambre’s obligations. Had Moreau not intended to assume these obligations as he testified, he had ample opportunity to express that intention prior to sale. His failure to avail himself of those opportunities is probative of his intention to assume the obligations.
property. Recrodation has been a device to make these personal rights function like real rights, at least insofar as the right to follow the property into the hands of third persons is concerned. As the next sections will indicate, special legislation has been required to impose the recordation requirement for these personal rights.

1. *Lease of Immovables*

Unlike the common law, which treats leasehold interests as property rights or real rights, the civil law majority view has been that a lease is a contract that produces only personal rights and obligations. But the need to protect lessees when ownership is transferred has produced devices to make the lease function like a real right, at least in terms of the right to assert the right of occupancy of the lessee against subsequent owners. Fairness in that scheme requires notice to buyers, and the device to accomplish notice is the requirement of registration.

Indeed, if one applied Louisiana Civil Code Article 2733 literally, a lease could be enforced against the new buyer even without recordation. However, that article was not construed as written. Early Louisiana cases established the proposition that a lease was not a real right binding the property, and third persons could acquire the property subject to the lease without being bound. Dictum suggested, however, that a recorded lease would be upheld as against a third person who acquired the property. The authority cited for the dictum was usually an 1810 territorial statute which required recordation of a "notarial act concerning immovable property." Later, citing Articles 2264 and 2266 of the 1870 Civil Code, the successors of the 1810 statute, the supreme court stated, "[t]hese are negatives pregnant with affirmatives to the effect that contracts 'affecting' or 'concerning' immovables (and therefore leases thereof), will have effect against third persons, if duly recorded; just as sales, mortgages, etc. affect them when recorded."

The development, however, was not simply a case-driven one in which the courts exercised freedom in deciding what types of agreements concerned immovables. A new article in the 1825 Code, which was also continued in 1870, attempted to explain the concept of real obligations binding land by stating,
"[n]ot only servitudes, but leases and all other [real] rights, which the owner had imposed on his land before the alienation of the soil, form real obligations which accompany it in the hand of a third person who acquires it." Herein was clearer statutory authority supporting the dictum.

In the famous case of Porche v. Bodin,[^53] which protected the farmer-lessee's ownership of a crop as against a seizing creditor of a prior mortgage, the lease was recorded. Little attention was given to that fact in the opinion, however, which rests more on equitable concepts and the fiction of mobilization by anticipation. The subsequent decision in Flower & King v. Pearce & Son[^54] did emphasize the recordation of the lease in relying on Porche. Indeed, if one applied strict real rights theory to Porche, it should have been decided otherwise, because the mortgage was of record when the lease was contracted and then recorded.

The issue of the nature of a mineral lease revived the real versus personal rights debate and prompted clearer statutory responses. In 1950, Louisiana Revised Statutes 9:2721 was adopted in response to the supreme court's decision in Arnold v. Sun Oil Co.,[^55] which hesitated in considering the mineral lease as a real right.[^56] Still in effect, the statute enumerates the types of documents that need to be recorded to affect third persons, including a "surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property."[^57]

In any event, the law is well settled that a written lease must be recorded to affect third persons. A long term statutory pattern played an important part in making the lease a semi-real right, and it was not simply a matter of judicial innovation based on defining which agreements or acts "affected" or "concerned" immovable property. The influence of the common law, the uncertainty of the civil code and French history were a part of the matter as well.

It is also true that the focus was on recordation of instruments being the operative, important concern. Actual knowledge of others was not involved, nor was the subjective good or bad faith of the acquirer given much importance. Notice in the generic sense was not important; the recordation of the juridical act was what mattered.

Under this approach, there is also posed the problem of attempting to make an oral lease function as a semi-real right. Arguably, since it is not an instrument of writing, it does not come under the terms of Louisiana Revised Statutes 9:2721. Could it nonetheless be binding on subsequent buyers under Louisiana Civil Code

[^52]: The English translation of the French text was incomplete. The English version refers to "all other rights" whereas the French text is "tous les autres droits reels" which would be better translated as "all other real rights."


[^55]: 218 La. 50, 48 So. 2d 369 (1950).


Art. 2733? The cases have concluded otherwise, the position apparently being that the lease does not become "semi-real" until recordation, and if there is no written instrument to record, there is no opportunity to make it real. In other words, there seems, at least historically, no basis for a lessee to simply record a unilateral document notifying third persons that an oral lease of the property does exist. However, in response to the cost of recording long, complicated leases, a 1986 statute made an exception to the requirement of recording the actual documents. Now, an "extract of the lease" may be recorded by simply giving basic information about the persons and property involved. The extract, however, cannot be a unilateral document. It must contain the "names and signatures of the lessor and lessee." Presumably the lease would function as a real right if the extract is recorded, even if the lease is not written.

The allowance of only an extract to suffice explains another basic effect of recordation. Registry makes the lease function as a real right in the sense that the rights of the lessee attach to the property and remain through subsequent purchasers. However, the recordation does not put the subsequent owners in privity with the lessee. Not all the personal obligations under the lease will be in existence between the new owner and the lessee. There will simply be the right in the lessee to continue to occupy the premises and the obligation to pay the rent in return for that right. Other terms of the lease are not necessarily binding. The new statute reflects this principle by not even requiring those other terms to be recorded, yet requiring recordation of the length of the lease and a reference to any renewal or purchase options. Both the term and the option would be binding, but not other provisions.

58. Title, supra note 2, § 8.1, at 160.

The court noted that a purchaser of property subject to an outstanding lease cannot, without an assignment of the right, recover from the lessee rent that had accrued prior to the sale, nor can a purchaser recover for damages caused to the property by third persons prior to the sale. Furthermore, a purchaser of property subject to an outstanding lease cannot recover from the lessee for damages to the property incurred prior to the sale. Thus, the court concluded that in a sale of property encumbered by a lease, "accessories do not include the personal rights of the seller." This categorical statement, however, requires qualification since the right to receive rent, a personal right of the lessor, does pass as an accessory to the sale of immovable property in certain instances.

Id. at 287. See also Leonard v. Lavigne, 245 La. 1004, 162 So. 2d 341 (1964); Toomer v. Lowenthal, 430 So. 2d 353 (La. App. 3d Cir. 1983). Former Louisiana Civil Code Article 2011 provided an exception to the general rule in stating that an acquirer of property "will have the right to enforce a contract made for the improvement of the property by the person from whom he acquired it." That article was repealed in 1984 and replaced with Louisiana Civil Code Article 1764 which does not continue the quoted language. Comment d to Article 1764 states the former article was "suppressed because its provisions are conceptually inconsistent with other provisions of Louisiana law."
2. Preparatory Conveyancing Documents

Several types of contracts preparatory to passage of title to immovables were among the first to be transformed into semi-real rights. Here again, uncertainty existed in the cases, reflecting the conflict between the civil law principle that such agreements establish only personal rights and the common law influenced practice in other states that treated options as effective against third persons. The conflict was resolved by amendments to the Louisiana Civil Code in 1910 and 1920. By amendment to Article 2462, options and promises to sell were said to be enforceable by specific performance. And, despite some early caselaw to the contrary, the right to follow under these contracts has required their recordation.

These developments were confirmed by the sales law revision in 1993 with the adoption of Louisiana Civil Code Article 2629:

An option, right of first refusal, or contract to sell that involves immovable property is effective against third persons only from the time the instrument that contains it is filed for registry in the parish where the immovable is located.

Here again, developments were fueled more by statutory tinkering making a personal right function partially as a real right, rather than by judicial innovation based on an expansive conception of the types of contracts that affect or involve immovable property.

Indeed, the legislation seems clear here in the specific reference in Article 2629 to three named and defined types of agreements. But that article does not refer to irrevocable offers. Such offers are governed by Louisiana Civil Code Article 1928, which is also the product of a recent revision in 1984. As the comment to Article 1933 indicates, little difference between irrevocable offers and options exist, except that an option is assignable and does not necessarily expire upon the death of the offeror. However, a clear decision seems to have been made in this regard, and the legislative history would be contrary to including the irrevocable offer within the documents that become semi-real by recordation.

3. Bond for Deed Contracts

Bond for deed contracts produce personal rights and obligations rather than real rights. They are promises to sell and would seem to come within the

provisions of Louisiana Civil Code Article 2629 that makes them effective as to third persons only upon recordation.

It would also appear that if the prospective purchaser's bond for deed contract were recorded before the sale to the third party, he could prevail against the third party purchaser by bringing a possessory action, if in possession, or a petitory action . . . once the required number of installments were paid. 66

Under proposed new legislation, bond for deed contracts will be technically considered “a special contract which is neither a sale nor a contract to sell.” 67 However, recordation in both the conveyance and mortgage records is required under proposed 9:2944, as well as the requirement that the contract be executed in authentic form. Louisiana Revised Statutes 9:2944(B) as proposed also states explicitly that the grantee acquires a real right in the immovable which is effective against third persons from the time the contract is filed for registry. Cancellation of the agreement under the new law would require court approval and could not be undertaken simply by agreement. The result would be a judgment that would cancel a real right and thus would have to be recorded to affect third persons.

The 1934 legislation governing bond for deed contracts included other recordation requirements designed primarily to protect prospective purchasers from fraud. If the property subject to the contract is encumbered by a mortgage or privilege, the owner must record “a written guarantee from the mortgage and privilege holders to release the property upon payment by the buyer of a stipulated mortgage release price.” 68 This goes beyond the normal requirements of publicity in conveyancing matters and is more akin to consumer protection legislation. Also, if the prospective buyer fails to complete the agreement, the prospective seller has the option to “have the bond for deed cancelled by proper registry in the conveyance records,” provided notice requirements are met. 69 Under the proposed legislation, the recordation requirement is dropped in new 9:2942(B), and it is simply required that such a written agreement must be obtained.

4. Community Property & Matrimonial Agreements

Since the legal community regime is so pervasive, most people ordinarily deal with most married persons assuming they are under such a regime. In light of such expectations, it is not unreasonable to put the burden on the married couple of notifying others if they depart from that system, at least insofar as it

affects third persons. Louisiana Civil Code Article 2332 provides that a matrimonial agreement "is effective toward third persons as to immovable property, when filed for registry in the conveyance records of the parish in which the property is situated." Similarly, Civil Code Article 2375, in reestablishing the community upon reconciliation after filing a petition for divorce, makes the reestablishment effective toward third persons only upon registry in the public records. The amendment to Article 2375 providing for the recordation of a notice of reestablishment of the community establishes a unique device; it is not an instrument or agreement that must be recorded, it is "a notice thereof" that must be filed for registry. Presumably a unilateral declaration that a reconciliation has occurred would be sufficient.

Although marriage contracts do not establish real rights in immovables, they were routinely recorded with the greffier of the Superior Council during colonial Louisiana. Territorial legislation also contemplated recordation of marriage contracts. Chapter 25, Acts of 1810 required registry of every mortgage and "notarial act" and also established fees for recordation of a "donation, bill of sale, conveyance, marriage contract." The 1855 legislation specifically provided for recordation of: 

[A]ll marriage contracts made within this State, tending in anywise to convey, transfer, assure, or affect the estates of the parties, or being only intended to ascertain the dotal rights of the wife, or that her marriage portion is liable to some reserves, or stipulated to be parapernaalia, or extra dotal property.

That statute was continued as Article 2265 of the 1970 Civil Code and thence into Louisiana Revised Statutes 9:2755.

A community property regime comes into existence upon marriage although the fact of the marriage is not shown in the conveyance or mortgage records. The rules regulating management of community assets thus come into play even though nothing in these public records indicate that a community exists. Especially important, since 1980, is the rule that one spouse acting alone cannot alienate, encumber, or lease community immovables regardless of the name in which those assets are listed in the public records. The basic notion is that a contract of marriage is not among those documents that must be recorded to affect third persons. A registry of marriage licenses exists, along with a return

73. For the history of recordation statutes in Louisiana, see Garro, supra note 4, at § 74.
74. 1855 La. Acts No. 275, § 1.
that indicates whether the marriage was celebrated, but failure to complete the registry requirements does not invalidate the marriage and the resulting community property regime. Even if the license is registered, the information is located in the parish where the license was obtained, not necessarily where the property is located or where the couple currently resides. Moreover, a person married in another state or country is not required to record evidence of his or her status upon moving to this state. The functional result of all this is that a person’s marital status must be determined by reputation and from information outside a reliable public record.

Even if some public record of the marriage happens to exist in a particular parish, a separation or divorce judgment need not be recorded in that same parish. In the United States, no identity documents exist to attest to one's marital status. Therefore, under current practice, third persons undertake some risk that a spouse exists even though the person with whom they are dealing declares otherwise in some juridical act. This seems to have been the rule at least since Succession of James.77

The supreme court applied the rule again in Camel v. Waller,78 saying the wife acquired an interest in property acquired by the husband during marriage despite his false declaration in the act of acquisition that he was judicially separated. A judicial separation that terminated the community regime was subsequently obtained, but it was not recorded in the conveyance records when the husband sold the property to a third person. The court reasoned that the judgment of separation was subject to Louisiana Revised Statutes 9:2721 and had to be recorded to affect third persons. Absent such recordation, third persons could deal with the husband as married even though he declared otherwise in his act of sale.79

However, since the sale in Camel occurred in 1977, before the 1980 community property revision, the husband had the authority as head of the community to convey ownership of the community immovable without consent of the wife. Therefore, the purchaser had acquired good title, and the court denied the wife’s claim to half ownership of the property.

The result preserves the James approach while also protecting the third-party purchaser. Some language in the opinion, however, suggests that the court might be willing to reconsider the James result if necessary to protect third persons. More importantly, since the 1980 revision, facts similar to Camel v. Waller will result in annulment of the transfer upon the request of the nonconsenting spouse because the consent of both is required to alienate a community immovable.80

This current state of the law presents a basic irony in the Camel situation. The marriage contract is not in the public records but affects third persons’ rights.

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77. 147 La. 944, 86 So. 403 (1920).
78. 526 So. 2d 1086 (La. 1988).
80. For the effect of false declarations, see La. R.S. 35:11 (Supp. 1996), discussed infra Part 7.
in immovables transferred by the spouses, yet the separation and divorce judgments must be recorded to affect third persons. In Judge Redmann’s words, "It appears anomalous to hold recordation necessary for a judgment terminating the community, on the ground that such a judgment is one affecting immovables, while holding that the contract of marriage establishing the community need not be recorded, even though it is, in one sense, a contract affecting immovables."\(^81\)

It might be possible to reconsider James and conclude under the clear text of the legislation that marriage is a contract affecting immovable property and, therefore, must be recorded to affect third persons. However, that would be contrary to long-established expectations and to a policy of protecting innocent spouses against the loss of important community assets. Furthermore, the view that recordation is not required was implicitly recognized in the 1980 matrimonial regimes legislation, which provides for establishment of the community simply by the fact of marriage and requires that matrimonial agreements providing for some alternative to the community regime must be recorded to affect third persons.\(^2\)

Another important principle was applied by the court in Camel v. Waller. Third parties are not entitled to rely on false declarations in recorded acts. The court analyzed the legal situation in the case without regard to the husband’s false declarations. The result depended on the lack of recordation of the separation judgment, not on the buyer’s ability to rely on the declaration of marital status. This approach is necessary, for no mechanism exists whereby notaries can ever guarantee the correctness of a person’s declaration regarding marital status. Indeed, the fundamental concept of the public records doctrine is that it is a negative doctrine. It protects third persons against the effects of unrecorded documents. It does not and, as presently organized, cannot guarantee the correctness of recorded documents.

5. Co-Ownership Contracts

Agreements among co-owners not to alienate the property or not to partition would normally not be allowed because they tend to keep property out of commerce. Special statutes, however, do allow such agreements. Louisiana Revised Statutes 9:1112 allows agreements not to alienate, encumber or lease the property for a period not to exceed fifteen years.\(^3\) Louisiana Revised Statutes 9:1702 permits agreements not to partition, not to exceed fifteen years.\(^4\) Recently amended Civil Code Article 807 also allows such agreements for up to fifteen

81. Redmann, supra note 2, at 504.
84. La. R.S. 9:1702 (Supp. 1996). However, persons holding in common a nuclear electric generating plant or unit may agree that such plant or unit shall not be partitioned for a period of time not to exceed ninety-nine years. Id.
years. The statutes do not clearly specify that such agreements establish real rights nor address the recordation issue. Also, recent code revisions governing co-ownership contemplate agreements between or among co-owners to govern management of the thing. Ordinarily, such agreements would be personal contracts between individuals, not real rights subject to recordation.

In general, parties have been allowed to contract new real rights not provided for in the civil code if they result in only partial alienation of the property. That was the case with building restrictions, mineral servitudes and servitudes in favor of a person. It appears that the jurisprudence is allowing individuals to contract first refusal clauses and make them real rights. Agreements not to partition would seem to be consistent with public policy as long as they do not last more than 15 years. However, they would tend to keep the property out of commerce more than first refusal clauses.

Louisiana Civil Code article 801 also allows contracts among co-owners to control the use and management of the thing. Again, no specific statute provides for recordation and for binding third persons. Any such requirement would involve construing 9:2721 to consider this an agreement affecting immovable property. Professor Symeonides seems to suggest the agreement could bind third persons if recorded. A strong policy supporting this view allows the agreement to affect third persons to avoid the use of court determinations of such matters, which is the solution if the agreement is not binding and there is no right to partition the thing.

6. Any Other Contracts?

Louisiana Revised Statutes 9:2712, after listing several types of contracts, states that any other instrument of writing affecting immovable property does not affect third persons unless recorded. This negative statement does not necessarily mean, however, than any instrument affecting immovables that is recorded will bind third persons who buy the property. In principle, only real rights would follow the property. As the discussion in the previous paragraphs indicates, some personal rights, by virtue of law or by virtue of contracts that are permitted by law, are granted the right to follow if recorded. As to other personal rights, however, there is no mechanism to make them function as real rights.

For example, it is arguable that a contract between an owner and a roofer to re-roof a house is a contract affecting immovable property. But recording such a contract would not bind the subsequent buyer of the house, absent some provision

89. See Symeonides & Martin, supra note 88, at 118.
of law making it binding. Similarly, a contract to cut grass on a lot for a year is one affecting an immovable in a generic sense. But it is not a real right, and absent some statute or other provision of law providing otherwise, there is no mechanism to make it binding on subsequent buyers.

In a sense then, the core problem is not an amorphous examination of the meaning of the terms “affecting” or “involving” immovable property, followed by a conclusion that if so, it binds subsequent owners if recorded. The central problem is one of substantive real rights law rather than that of the recording system. The issue is whether the substantive law allows individuals to establish, by agreement, new real rights not specifically provided by law. The answer in Louisiana has been a limited yes, as illustrated by the aforementioned building restrictions and personal servitudes cases. If that answer is yes, in a particular contract where a new real right or right to follow is allowed, then recordation would be required to affect third persons. If not, recordation would not make the right follow the immovable property in any event. As discussed earlier, supply contracts have not been effective against buyers of property even if recorded.

III. RIGHTS THAT NEED NOT BE RECORDED TO AFFECT THIRD PERSONS

A. Real Rights

If a real right is not established by a judgment or an instrument of writing, Louisiana Revised Statutes 9:2721 by its terms does not require recordation to affect third persons. If a real right is established by law, the general rule that real rights follow the thing into the hands of third persons applies without there being an indiction of the existence of the right in the public records. This general rule continues to apply in a number of cases, but legislation has reduced the scope of such unrecorded rights.

1. Legal Usufructs

   a. Surviving Spouse Usufruct

Implementing a strong policy of protecting the interests of a surviving spouse, Louisiana Civil Code Articles 890 and 890.1 establish legal usufructs in

91. See Yiannopoulos, supra note 19, §§ 216-223.
92. Yiannopoulos, supra note 19, § 226.
93. See supra Section II(A)(7).
favor of these spouses if a testament does not provide otherwise. The usufruct applies to former community property inherited by descendants of the deceased spouse. It applies to immovable as well as movable property and goes into effect without the necessity of formal succession proceedings. The impact of such rights on the conveyancing system is temporary, however, for these usufructs must expire at the death or remarriage of the usufructuary.

b. Parental Usufruct of Minor Child’s Property

A literal reading of Louisiana Civil Code Article 223 suggests that the parental usufruct over the property owned by minor children arises automatically by operation of law. However, Article 3350 provided that the parents could “enjoy the fruits and revenues” only after “an inventory and appraisement” of the property was made and recorded. The implication was that “the right of usufruct springs into existence only if the parents have complied with Article 3350.” Thus, establishment of the usufruct depended on recordation and was not binding on property if the public records did not disclose its existence.

The 1992 revision of the law of mortgages repealed Article 3350, so that the requirement of inventory and recordation no longer exists. It is thus likely that the usufruct comes into being automatically by operation of law under the terms of Article 223 and does not need to be recorded to affect third persons. If that is the case, the impact may not be great on real estate conveyancing since the father is also administrator of the minor’s property and can alienate it in any event. But the automatic establishment of the usufruct may have tax consequences in making the income from the minor’s property that of the parents and taxable to the parents. The parent can renounce the usufruct, but under Louisiana Civil Code Article 626, a renunciation must be in writing. If the property subject to the usufruct is immovable, such a writing would be an instrument affecting immovable property and would have to be recorded to affect third persons, including creditors.

c. Marital Portion

The marital portion can be claimed by a poor spouse from the property of a spouse who dies rich. It is a right which must be asserted by the spouse and which can be in the form of a usufruct if the deceased is survived by children. It has to be established over certain described property, by judgment or agreement,
and thus has to be recorded to affect third persons. A similar result should follow with respect to the usufruct granted to a surviving spouse or child in necessitous circumstances, up to $1,000. That right must be asserted against the succession of the deceased, and then would be established by judgment or agreement. 98

2. Natural Servitudes and Legal Servitudes

Established by law rather than by agreement, the obligation of a lower estate to receive the waters from the higher one is not required to be recorded to affect third persons. 99 Similarly, the obligation to return water to its normal channel is not a matter of private contract and is imposed directly by law. 100 No prior appropriation doctrines developed in Louisiana to control water use. Instead, the riparian rights to use such surface waters are automatic and not dependent on any system of recordation. 101 Landowners are allowed to alter the natural drainage by agreement. 102 Such agreements are instruments of writing establishing real rights and thus must be recorded to affect third persons.

A number of other obligations imposed by law and referred to as legal servitudes are not shown in the public records, but rather in the statute books. They include:

Art. 660 - Keeping buildings in repair
Art. 661 - Demolition of buildings in danger of falling
Art. 662 - Precautions when building near a wall
Art. 663 - No projections over a boundary
Art. 664 - Roof not to project rainwater over a boundary
Art. 665 - Public use of banks; levee construction
Art. 666 - River road replacement
Art. 667, 668, 669- No unreasonable use of property
Art. 670 - Encroaching building servitudes
Art. 671 - Destruction of property to arrest fire
Art. 673-683 - Common Walls
Art. 684 - Right to enclose land
Art. 685 - Common fences
Art. 686 - Common ditches
Art. 687, 688 - Trees on the boundary
Art. 689-696 - Rights of Passage for enclosed estates

Most of these general duties are not especially burdensome or unusual and cause little difficulty. However, some problems can arise.

100. La. Civ. Code art. 658.
a. **Levee Servitude**

The levee servitude allows public authorities to locate levees on and take fill from riparian land. It applies to tracts of land that were riparian at the time of severance of the property from a sovereign.\(^{103}\) Even after subdivision into smaller tracts, some of which are not riparian, all of the tract remains bound by the servitude.\(^{104}\) Only to the extent that a title examination reveals the character of the property at severance from the sovereign can one determine whether the current tract is subject to the servitude. No other formal recordation of the servitude is required.

b. **Encroaching Building Servitude**

The owner of a building that encroaches over a boundary has a claim under Louisiana Civil Code Article 670 to a forced servitude in favor of the encroachment upon paying for it. This right exists upon establishment of certain facts—good faith, lack of complaint and substantial completion of construction—rather than on an instrument. It follows that this right can be claimed at any time without there being a recorded document to indicate its existence. It is a claim that is off the public records, but it should be visible since the right only arises upon the happening of visible acts. Once the claim is made, there would exist a servitude established by a court judgment, and it should be recorded to affect third persons. But even if not recorded, the existing facts would still qualify under Article 670, and the encroacher should be able to proceed against a subsequent title holder. But, under the terms of the article, only upon payment for the servitude again. The encroacher thus has a strong motivation to record. The underlying policy here is to avoid destruction of buildings, which would be defeated if the right to remain was lost by failing to record.

c. **Enclosed Estate**

The Louisiana Civil Code grants a right of passage to an enclosed estate. Existence of the right is based on a state of facts—the fact of enclosure. Article 689 simply states that “the owner of an estate that has no access to a public road” may claim the right. Whether the public records disclose that the estate has no access to a road seems to be irrelevant. Indeed, there is no mechanism for requiring that public records indicate the location of public roads, and it would be impossible to guarantee from a title search whether a tract of land is

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enclosed or not. Further, the imposition of a mandatory legal right to passage that exists over a period of time has to assume that tracts are going to be subdivided and recombined over time, making the rights rise and fall as conditions change. Indeed, since the essence of the recordation rule is that failure to record a document releases third persons from being bound by it, the recording of a map that would show access or not would be irrelevant.

Under Article 689, the owner of the enclosed estate has to pay for the passage, in that “he is bound to indemnify his neighbor for the damage he may occasion.”

A related provision does pose some problems for a buyer of enclosed property, however. Under Louisiana Civil Code Article 693, if the estate became enclosed as a result of a “voluntary act or omission of its owner,” the neighbors are not forced to provide a passage to him “or his successors.” Presumably, the general reference to successors includes particular successors who buy the land as well as universal successors who inherit.105 In such a case, the public records do not give the buyer of the opportunity to learn that the property is susceptible to remaining without access to a road.

Also complicating the matter is the provisions of Article 694 which provide a free servitude to an enclosed estate when the enclosure results from a “partition, or a voluntary alienation.” The supreme court, without compelling authority to support the decision, suggested in Dallas v. Farrington106 that the provision was not a “legal” servitude but was a rule of construction of agreements and that its basis was conventional. In that case, failure to record the agreement by which the enclosure occurred would deny the free passage as against a third person buying the property with access to a road. The court stated, however, that in such a case, there would be a right to passage under Article 689.107

3. Possession

Possession is essentially a matter of fact, which includes the fact of corporeal detention or enjoyment of a thing accompanied by an intent to possess as owner.108 If those facts exist, the law grants the possessor rights with respect to


However, particular successors, such as vendees and donees under particular title, are third parties to the transactions contemplated by Article 694. Therefore, strong argument may be made that the particular successors of a person who enclosed himself are free to claim a right of passage for indemnity under Article 689.

It is also true that strong policy reasons exist to construe this limitation on the right narrowly, as the supreme court did in LeBlanc v. Thibodeaux, 615 So. 2d 295 (La. 1993).


107. See generally Yiannopoulos, supra note 105, at § 99.

the property which can be asserted against anyone. What occurs, without any
instrument of writing being involved, is a right that arises by operation of law that
does not have to be recorded. This result, of course, is a fundamental aspect of the
whole law of possession, which is designed to protect the interests of those who
actually detain and develop property in a way that shows the world that they are
asserting rights to it. It is the antithesis of the “paper title” scheme which hinges
on transfer records.

One who has possessed openly so as to notify the world is entitled to a
presumption of ownership\textsuperscript{109} which, by the workings of the possessory and
petitory actions,\textsuperscript{110} requires a non-possessor to prove good title to oust the
possessor. An evicted possessor is entitled to some compensation from the evicting
owner for constructions and repairs to the property possessed.\textsuperscript{111}

4. Acquisitive Prescription

\textit{a. Thirty Years}

Possession of immovable property for thirty years results in acquisition of
ownership of the thing possessed.\textsuperscript{112} All that is necessary is the acquisition of
possession by physical activity plus an intent to possess as owner. If one has no
initial title, prescription extends to only that which is seen as actually being
possessed. If one has a title document describing a tract, possession extends to the
limits described. If the physical activity ceases, but there still is the intent to
possess as owner, prescription continues to run. Indeed, it is presumed that the
intent to possess continues. Tacking or joining of the possessions of successors and
predecessors is allowed so long as there is a juridical link between the possessors.
In the application all of these rules the emphasis is on visible activity that would
alert the real owners of the property that someone is treating the property as their
own. It is not necessary that the public records reflect any of these matters.
Constructive possession and tacking occur without the need for recordation of any
transactions. In essence, the activity on the land is rewarded, and if the activity
continues long enough, the “paper titles” are disregarded.

\textit{b. Ten years}

If possession is accompanied by good faith and a just title to the immovable
property, prescription under traditional Louisiana law accrues in a shorter ten year
period.\textsuperscript{113} Until 1983, a just title was simply one that would transfer ownership if

\textsuperscript{110}. La. Code Civ. P. arts. 3651-3663.
\textsuperscript{111}. La. Civ. Code arts. 496-498, 527-528.
\textsuperscript{112}. La. Civ. Code art. 742 borrows the rules of prescription of ownership and applies them to
\textsuperscript{113}. La. Civ. Code arts. 3473-3485.
the purported transferor owned the property. By virtue of a questionable provision added in Louisiana Civil Code Article 3483 in 1982, however, it is now provided that to qualify as a just title for acquisitive prescription, "[t]he act must be written, valid in form, and filed for registry in the conveyance records of the parish in which the immovable is located." The provision is not retroactive and applies to periods of prescription beginning to run after January 1, 1983.

Presumably the purpose of the drafters of the change was to limit the application of ten year prescription. However, since the ordinary conveyancing practice is to record sales of property as a matter of course, it is unlikely to have that effect. Indeed, it is likely that problems will arise only in the case of an honest mistake resulting in lack of recordation. It is likely that the bad faith possessor will be much more careful to ensure recordation in the hope that bad faith will never be proved. Also, since recordation is usually the mechanical task of the attorney or notary, it may well be the default of someone other than the good faith possessor that will result in loss of the prescription.

Presumably, the theory of the drafters was that recordation would be, in addition to physical acts on the land, likely to bring notice to the real owner that others were claiming the property. The indexing system, however, is based on the names of the transferors and transferees rather than on a tract identification system; therefore, it is unlikely that even regular inspection of courthouse records would disclose the fact of the recordation. It is rare that the requirement would work to the advantage of the real owner.

As long as the recordation requirement remains in the law, it should follow as Professor Yiannopoulos points out in his Editor's note to Article 3483, that when a new possession is involved, the prescription starts to run when all the requirements are met—physical activity sufficient to give notice to third persons, good faith, just title written and recorded. However, as Professor Symeonides points out, if one is tacking possessions and thus continuing an old one, a later recordation should be considered as relating back to the time of execution. Otherwise, the requirement would destroy the benefits of tacking of possession, a result not contemplated in light of the continuation of Articles 3441-3444 in the same revision that added the requirement of just title being recorded.

c. Boundaries

Louisiana Civil Code Article 794 establishes a 30 year boundary prescription. Even though there is no juridical link to the excess property beyond that described in one's title, if "a party and his ancestors in title possessed for thirty

115. Indeed, if there is a likely place to see conflicting claims to property, it is more likely to be in the tax assessor's records, which tend to have tract indexes.
years without interruption, within visible bounds, more land than their title called for, the boundary shall be fixed along these bounds.” Here again, the emphasis is on activity on the ground that displaces the ideal boundary. Public records have no effect or role to play in this prescription, which is an entirely off record activity. Under Article 794, the possessor acquires ownership of the property after thirty years. This is unlike the provisions of Article 670, which grant the encroacher a servitude upon payment of damages to the owner.

d. St. Julien Doctrine

A servitude can be established on property in favor of a governmental unit or a private entity with power to expropriate without an indication on the public records. By virtue of the St. Julien doctrine,117 which was overruled prospectively118 and then re-established by statute,119 the builder of “facilities” on property with the “consent or acquiescence” of the owner acquires the right, subject to a claim for compensation if timely brought.120 Here again, the physical presence of the visible construction takes precedence over “paper titles.”

5. Co-Ownership Shares

If two or more persons agree to purchase an immovable, but decide to execute an act of sale that names only one of them as the purchaser, they are co-owners as between or among themselves. However, the unnamed co-owner has an interest that was acquired by an agreement that was not recorded, and third persons can deal with the named co-owner as though he were the sole owner. The interest of the other co-owner is not recorded and does not bind third persons.121 The same result should follow if a full owner sold a fractional interest in the immovable by a sale that was not recorded. This unrecorded instrument does not affect a third person. On the other hand, if a person acquires title in one name and that person is married and living under the community property regime, the spouse acquires an interest by operation of law. That interest is a real right, an ownership interest that would ordinarily have the right to follow. Absent a requirement of recordation of that interest arising by operation of law, third persons are affected by it.

Somewhat in between the previous two examples is the impact of a presumption established by Louisiana Civil Code Article 797 which states, “[i]n

121. The text of Louisiana Revised Statutes 9:2721 states, “[n]either secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.” La. R.S. 9:2721 (Supp. 1996).
the absence of other provisions of law or juridical act, the shares of all co-
owners are presumed to be equal.” That presumption should of course apply
between or among the co-owners. It is not clear whether the presumption would
apply to third persons, however. There is an argument that it does since this
presumption is not an interest that arises by agreement. It is a presumption that
arises by operation of law. If the co-owners listed their names as buyers without
stating the interest of each, it would seem that the article’s presumption can be
taken advantage of. It is a rebuttable presumption, since the presumption applies
only in the absence of other provisions of law or juridical act. If it is a juridical
act that establishes otherwise, it is arguable that an unrecorded juridical act does
not apply and the presumption cannot be overcome. If it is a provision of law
that establishes a different share, then such an interest is not required to be
recorded and could be used to establish a different interest. In any event, there
is also an element of estoppel here, as to a buyer who fails to specify that he or
she has a greater interest than the other co-owners, especially in light of a
common notion that most co-owners have the same interest. That is the usual
conception since co-ownership is most often between spouses and siblings where
the interests are actually equal.122

6. Privileges on Immovables

Several privileges123 arise by operation of law to protect contractors,
suppliers and workers who construct immovable property. Special provisions,
however, require they be recorded to affect third persons. Under Louisiana Civil
Code article 3274, the privilege is effective if it is recorded within seven days
or fifteen days of the act or obligation of debt. In that interim period, a third
person is at some peril if there is the recordation of such a claim. The mortgage
holder can protect himself by taking advantage of the Private Works Act.124

7. Judicial Mortgage

A judicial mortgage is created by filing a judgment with the recorder of
mortgages.125 The judgment does not establish a real right in the defendant’s
property absent such a recordation. Louisiana Revised Statute 9:2721 itself
establishes the requirement that judgments must be recorded to affect third
persons. Such a mortgage burdens “all the property of the obligor that is made

122. Symeonides & Martin, supra note 88, at 85; Thomas A. Harrell, Problems Created by Co-
Ownership in Louisiana, 32 Min. L. Inst. 381 (1986).
123. Though it can be debated whether privileges are personal or real rights, “[t]he notion of
privilege, or right of preference, includes the assumption that the privilege is valid against third
persons, for it is only when there are conflicting claims to the same property of the debtor that the
privilege becomes operative.” Garro, supra note 4, at 250.
susceptible of mortgage,"\(^{126}\) which is located in the parish of the recordation.\(^{127}\) It also affects "future property of the obligor when he acquires it."\(^{128}\)

It follows that the mortgage burdens property whether the public records reflect the debtor's ownership or not.

Legislation in 1992 amending the provisions on mortgages made clear that recordation of a document has only the negative effect provided by law, which is that third persons are not affected by it. Louisiana Civil Code article 3320(C) states a truism—that recordation "is not evidence of the validity of the obligation that the encumbrance secures. It does not give the creditor greater rights against third persons than he has against the person whose property is encumbered."

B. Non-Real Rights

1. Forced Heirs & Donors of All Their Property

The rights of forced heirs are not established by contract, but arise by operation of law. Traditionally, upon death of the ancestor, those rights could be asserted against the property of the deceased and, by specific provisions, against property donated by the deceased. However, legislation in 1981 changed the latter rule, limiting the forced heir to proceed only against the donee or the donee's successors by gratuitous title.\(^{129}\) Third party purchasers by onerous title were thus freed from the claims by the forced heirs against the property.

Similarly, a donation "omnium bonorum" under Louisiana Civil Code article 1497 could be annulled under prior law even as against a third person. Amendments to that article limited its reach, no longer allowing the donor to proceed against the third person who acquires by onerous title from the donee.

In both of these instances, it is not the classic public records doctrine that is at work. The fact of recordation is not important. It is the fact that a specific statute created a right and limited it in such a way as not to affect certain persons. In these two instances, it is not just the existence or non-existence of the recorded right that is important. The type of transfer, an "onerous title," is important. Even more important, the good or bad faith of the buyer is not important. The nature of the transfer from the donee to the third person is the decisive issue. In a sense, the policy of protecting buyers of immovables as against unrecorded claims is enhanced. But the donor or the forced heir cannot protect himself simply by recording the nature of his interest in the public records. His interest has been limited by law. In effect, where the substantive law had established a right that was quasi-real, it has been changed to be less


\(^{127}\) La. Civ. Code art. 3320(B).


expansive. But when it applies, as against a donee or a successor donee, the right can still be asserted without recordation.

IV. WHO ARE THIRD PERSONS?

Unrecorded documents bind the participants or parties to the act, including witnesses to it. Often, conveyancing documents affecting immovables are executed by authentic acts, which require a notary and two witnesses. A witness to such an act is bound by it even if not recorded. Presumably the same would be true for the notary.

On principle, all other persons constitute "third persons" who would not be bound by the unrecorded document. Louisiana Civil Code article 3506(32) has long provided: "With respect to a contract or judgment, third persons are all who are not parties to it." The concept was "redefined" in 1950 legislation to include:

any third person or third party dealing with any such immovable or immovable property or acquiring a real or personal right therein as purchaser, mortgagee, grantee or vendee of servitude or royalty rights, or as lessee in any surface lease or leases or as lessee in any oil, gas or mineral lease and all other third persons or third parties acquiring any real or personal right, privilege or permit relating to or affecting immovable property.

That language is overly detailed and was in reaction to the dispute over whether mineral rights were real or not, but it nonetheless accomplishes the purpose of including basically all persons who are not a party to the act. It perhaps narrows the concept to those who have some sort of "standing" or claim to an interest in the immovable property involved. This limitation is consistent with the basic purpose of providing security in property transactions and would not extend to other areas.


131. King v. Peoples Bank & Trust Co., 371 So. 2d 257 (La. 1979) (A bank attorney acted as notary on a sale and a counterletter. The court held the bank was not a third person protected by the lack of recordation of the counterletter stating, "we deem it appropriate to hold that the bank was a witness to the act of sale from the Kings to Gill." Id. at 263).

132. La. Civ. Code art. 3506 (32). It adds that, "In case of failure, third persons are, particularly, those creditors of the debtor who contracted with him without knowledge of the rights which he had transferred to another."

133. La. R.S. 9:2722 (1991) (adopted by 1950 La. Acts No. 7, § 2). See also the definition adopted as La. Civ. Code art. 3309 in the 1992 revision of the law governing mortgages: "Third persons to a mortgage are those who are neither parties to the contract of mortgage or the judgment that the mortgage secures, nor their universal successors, nor those bound by contract to recognize the mortgage."

134. See Garro, supra note 4, at 158: "Traditional civilian doctrine distinguishes between the 'third party at law' and the 'third party vis-a-vis the records.'" The former is any person, and the
Protected persons would not include, for example, victims injured by the condition of property. The actual owners of a building, under the text of Louisiana Civil Code article 2322, are responsible for the damages. This is so even if the transfer from a former owner was not recorded. The victims of such damages are not likely to depend on the absence of the transfer from the public records in dealing with the property. More relevant are the policies imposing on some persons the duties to care for the property and on others to exercise caution in going on such property. Special policy concerns and constitutional protections justify concluding that when the state expropriates property, it must compensate lessees under unrecorded leases. The state is not a "third person" in such a situation.

Although not explicitly stated in the statute, third persons do not include universal successors of a deceased person; universal heirs, for example, are bound by the unrecorded acts of their ancestor. In Robinette v. Myers, for example, a daughter was bound by her mother’s unrecorded transfer so as to lose her interest in property inherited from the mother. However, she did not lose the interests in that property that was acquired by purchase. In Sick v. Bendix-United Geophysical Corp., the holder of an unrecorded mineral lease was able to maintain a tort claim for geophysical trespass against a defendant “trespasser who does not act under any color of authority or permission granted by any record owner.” Here the third person tortfeasor was not acting on the basis of a right from any record owner and was not relying on the public records. The court stated:

As we understand and appreciate the application of the public records doctrine, it is intended to protect those third parties by what they find or what they could have found in the public records. That is, one who deals with the record owner is protected vis-a-vis the true owner. However, we do not believe the public records doctrine was ever intended to protect one who did not deal with anybody from the harm that he might have done.

latter refers to one who acquires or is likely to acquire an interest in the thing. See also id. at 304.

135. Pellegrin v. Ditto, 625 So. 2d 1356 (La. App. 1st Cir. 1993). The petitioners were not considered third parties with respect to their tort claim. However, the court suggested: "If petitioners had acquired the Trust property from the Brady children trusts, the public records doctrine would have required that the lease be recorded to affect them." Id. at 1364 n.9. See also G.I. Joe, Inc. v. Chevron U.S.A. Inc., 561 So. 2d 62 (La. 1990) (alleged tortfeasor was not a third person with respect to an unrecorded sublease).

136. State Dep’t of Transp. & Dev. v. Jacob, 483 So. 2d 592 (La. 1986).
138. 510 So. 2d 1332 (La. App. 3d Cir. 1987).
139. 341 So. 2d 1308 (La. App. 1st Cir. 1976).
140. Id. at 1311.
141. Id. at 1312.
Normally, a spouse's interest in community property acquired by the other spouse is a derivative one provided by law and not one that would be acquired as a third person relying on the absence of some instrument in the public records. It would follow that if the sale to the husband was invalid, the wife could claim no rights under Louisiana Revised Statutes 9:2721 to claim a valid interest in the property. 142 Also, under Louisiana Civil Code article 2357, creditors can reach "property of the former community" without regard to recordation of their interests. Even after partition and allocation of the former community asset to the spouse who did not incur the obligation, the property remains bound without regard to any recordation. In that regard, it might be said that the other spouse is not a third person acquiring on the basis of any recorded right and cannot invoke Louisiana Revised Statutes 9:2721. 143

And, as stated earlier, the statute also reflects the traditional view in Louisiana that the third person does not have to be in good faith to take advantage of the lack of registry. If one is a "third person," one does not forfeit those rights because one has actual knowledge of the unrecorded transaction.

V. LIMITED RELIANCE ON THE VALIDITY OF RECORDED DOCUMENTS

No law guarantees the truth or validity of a document simply because it is recorded in the public records. "But being recorded, like being in writing, is itself not proof of anything, and particularly it is neither proof nor promise of the genuineness or validity of the recorded or written instrument which alone can be the source of the rights asserted." 144 This traditional rule was adopted as legislation in the mortgages revision of 1992; Louisiana Civil Code article 3320(C) provides,

Recordation has only the effect given it by legislation. It is not evidence of the validity of the obligation that the encumbrance secures. It does not give the creditor greater rights against the third persons than he has against the person whose property is encumbered.

This aspect of the recordation system results in some uncertainty, as compared with the Torrens145 and Grundbuch146 systems that allow third persons to rely on the validity of recorded documents. Attempts arise occasionally to try to give greater credence to the documents, but the Louisiana system is so structured that additional credence is not merited. Louisiana does not have

144. Gulf South Bank & Trust Co. v. DeMarest, 354 So. 2d 695, 697 (La. App. 4th Cir. 1978) (Redmann, J.).
145. Garro, supra note 4, at ch. 9.
146. Garro, supra note 4, at ch. 5.
the safeguards that would scrutinize documents for validity before recordation, and without that type of procedure, it is impossible to guarantee accuracy of recorded documents.

Forged documents are the prime candidates for refusing to protect a third person who relied on the forged act.\(^\text{147}\) Sales of property not owned by the seller do not transfer ownership simply because they are recorded. False statements as to the price of the thing sold do not form the basis for annulling the document, just as their recordation does not make them true. Disguising a donation by executing a document of sale and recording it does not change the character of the transaction simply because of the recordation. Recording an act of donation, when no intent to transfer the property exists, does not make the transaction binding upon third party creditors. Recording a donation of immovables that is not in authentic form does not remedy the defect of form.\(^\text{148}\) The list goes on. In any event, this basic rule has to exist to protect against many forms of trickery and fraud.

A. Estoppel

A related analysis can be pursued, however, that gives some certainty to third persons once it is established that a party to an act executed it and, incidentally, recorded it to lead others to rely on it. If the parties execute an act that third persons will rely upon, they will be estopped from contesting the act as against third persons who relied on their representations.\(^\text{149}\) The classic case is that of the husband who appears in an act executed by his wife and does not object to her assertion that the property involved is her separate asset. The spouse is estopped from claiming the community interest as against persons who relied on his failure to object to the wife’s assertion. That principle was codified in Louisiana Civil Code Article 2342 in the 1979 matrimonial regimes revision. The operative fact is not the recordation or the fact of the wife’s statement. It is the husband’s acquiescence in the statement that supports the estoppel. Article 2342 is but one instance of a more general principle often referred to as estoppel by deed, but it has been applied to statements in instruments other than

\(^{147}\) Gulf South Bank & Trust Co., 354 So. 2d at 695; Lacour v. Ford Inv. Corp., 183 So. 2d 463 (La. App. 4th Cir. 1966); Succession of Rosinski, 158 So. 2d 647 (La. App. 3d Cir. 1963); Watkins v. Zeigler, 147 So. 2d 435 (La. App. 2d Cir. 1962).

\(^{148}\) Frazier v. Frazier, 499 So. 2d 229 (La. App. 2d Cir. 1986); see Meyer, supra note 1, at 29; Owen v. Owen, 336 So. 2d 782 (La. 1976).

\(^{149}\) Frazier, 499 So. 2d at 229. See Shael Herman, Detrimental Reliance in Louisiana Law—Past, Present, and Future (?): The Code Drafter’s Perspective, 58 Tul. L. Rev. 707, 750-57 (1984). The author cites new Louisiana Civil Code articles 2033 and 2035 and states, “[i]t is submitted that the reporter and the committee on revision of obligations, by including among the proposed articles such generalized statements recognizing reliance as an interest worthy of protection, have reemphasized the importance of detrimental reliance in this sensitive area of law.” Id. at 755-56.
However, the heirs of the spouses in such a situation are not bound by the statements of their parents, which could be used to secretly convert community funds to separate property.  

Until the 1981 revision of Louisiana Civil Code article 1516, persons tried to avoid the uncertainty resulting from the right of forced heirs to reduce donations would put the donation of property in the form of a sale. Third persons would be protected to some extent by estoppel principles because the donor could not undo the donation. However, forced heirs, until changes in the law in 1981, would not be totally estopped and could assert their claims in some instances. Now, however, the forced heirs claim is only against the donee and the donee’s successors by gratuituous title. Third persons under an onerous title no longer need rely on estoppel for protection against the claims of forced heirs.

A person who lies about his marital status in an act, presumably trying to lead others to believe he is not married and thus not subject to community property rules, could be estopped from denying his asserted status. An unmarried person who lies and states he is married could similarly be estopped.

There are other examples, but as suggested above, the operative doctrine here is that one who leads others to believe facts to their detriment cannot deny those facts, at least as to innocent persons. This rule applies whether the juridical acts are written or not, or recorded or not.

Indeed, the long term existence of a sometimes criticized doctrine relating to counterletters emphasizes the point. As Louisiana Civil Code article 2025 explains, a written document purporting to be a contract may not reflect the intent of the parties, and “[i]f the true intent of the parties is expressed in a separate writing, that writing is a counterletter.” Thus, the disguised donation in the form of the sale may result in the recordation of a sale, but with a counter-letter in existence that is not recorded. That unrecorded counterletter would not affect third persons, who can rely on the public form of the document under the estoppel theory discussed above. As now stated in Article 2028, such untrue documents “may have effects as to third persons.” However, once the counterletter is disclosed to an individual or recorded in the public records, it would have effect. The third person who acts after seeing the counterletter is no longer in a position to rely on the original. The third person who sees a recorded counterletter can no longer claim the negative aspect of the public

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150. The text of Louisiana Civil Code Article 2342 refers to statements in acts of acquisition of property. Prior case law, however, applied the estoppel principle to representations in a separate document that was not an act of acquisition. McElwee v. McElwee, 255 So. 2d 883 (La. App. 2d Cir. 1971). See Albert v. Albert, 625 So. 2d 765 (La. App. 1st Cir. 1993) (Property held separate; wife acknowledged it was husband’s separate property in a dation en paiement and a collateral mortgage. “Mrs. Albert’s signature rebuts the presumption of community and she is prevented from controverting the separate nature of the property.” Id. at 767).


records doctrine as to that letter, and the initial estoppel may no longer be operative because the recordation of the counterletter removes the reasonable basis for reliance on the original document.\textsuperscript{153}

\textbf{B. Beyond Estoppel—Declarations of Separate Property}

The previous section considered estoppel principles that apply to all types of representations in many types of acts. As stated, Louisiana Civil Code article 2342, paragraph 1, simply applied these principles to spouses affirming declarations of the other spouse that certain property was separate rather than community. The 1980 matrimonial regimes went further, however, in the second paragraph of the article.

Nevertheless, when there has been such a declaration, an alienation, encumbrance, or lease of the thing by onerous title may not be set aside on the ground of the falsity of the declaration.

The problem is whether the reference is to a unilateral declaration or to one that has been concurred in by the other spouse. To give a unilateral declaration such an effect goes beyond the estoppel roots of the concept and, by the strict language of the text, would protect even a third person who knew that the declaration was false. The opportunity for fraud is obvious. Nonetheless, Comment (a) to the article can be so construed broadly: "That person acquires ownership from the transferor spouse in reliance on the declaration in the act by which the transferor acquired the thing that it is separate property." Such a construction would be a departure from the traditional negative aspect of the public records.

Article 2342 was amended in 1982 to make the rule retroactive and to apply to such declarations and concurrences made any time prior to the adoption of the rule. To ensure the constitutionality of the retroactive application, a special statute allowing six months from the date of the 1982 amendment for contesting such actions was adopted.

Presumably, the justification for this approach is that such statements would be made by a spouse at an unsuspicious time, the time of acquisition. Or, at least, at a less suspicious time than if it were simply made at the time of sale. But, in \textit{Camel v. Waller,}\textsuperscript{154} the husband made his false statement at the the time of acquisition when marital difficulties had already begun, and the false statement was apparently made to allow him to deal with the property without hinderance by the wife. In any event, the provision is limited to declarations in acts of acquisition that the property is separate.


\textsuperscript{154} 526 So. 2d 1086 (La. 1988).
Also, the provision departs from the traditional rule in protecting only persons who acquire the property or a right in it "by onerous title." Donees cannot rely on such declarations. Presumably, the policy is to protect buyers in routine real estate transactions, but not the family or charitable beneficiaries. The provision, however, does not go as far as it might. It does not limit its protection to persons in good faith. Third persons buying the property even with knowledge of the falsity of the declaration are not excluded from protection under the literal terms of the second paragraph.

McAlister v. Federal Land Bank\(^{155}\) appeared to apply the second paragraph, but the case proceeds with little discussion of the issue, and the case is otherwise weakened for its result appears justified by the fact that the property involved was indeed separate property apart from the declaration.

C. Declarations of Marital Status Under 35:11

The situation has been complicated by a 1987 statute that, though adopted without the usual scrutiny given to civil code related legislation, might be construed to give conclusive effect to some false declarations before notaries.\(^{156}\) Louisiana Revised Statutes 35:11 governing notaries now contains the following provisions:

B. A declaration as to one's marital status in an acquisition of immovable property by the person acquiring the property creates a presumption that the marital status as declared in the act of acquisition is correct and, except as provided in Subsection C of this Section, any subsequent alienation, encumbrance, or lease of the immovable by onerous title shall not be attacked on the ground that the marital status was not as stated in the declaration.

C. Any person may file an action to attack the subsequent alienation, encumbrance, or lease on the ground that the marital status of the party as stated in the initial act of acquisition is false and incorrect; however, such action to attack the alienation, encumbrance, or lease shall not affect any right or rights acquired by a third person acting in good faith.

By its terms, the provision establishes a presumption of marital status based solely upon one person's declaration in an act of acquisition of an immovable. Presumably, it does not apply to any other types of transactions, so that the statement by a seller of property in an act of sale would not be given that effect.

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155. 566 So. 2d 173 (La. App. 2d Cir. 1990).
156. With respect to the placement of the provision outside of Title 9, see Meyer, supra note 1, at 88 n.5: "Many practitioners, including the author, find their attempts to amend Title 9 or the Civil Code beset with delay and consequently resort to the backdoor solution of amending statutes in Title 13 and Title 35. Sometimes, however, these efforts are disastrous."
The presumption exists despite the fact that a notary before whom the declaration would be made has no means of assuring the truthfulness of the declaration. It would seem that one spouse acquiring an asset without the knowledge or participation of the other spouse could thus establish a presumption that he or she is single by a simple declaration. A consequence of that presumption would be that the property could not be community; it would be property of the single person. That presumption is inconsistent with the presumption that any property in fact acquired or possessed during the existence of the community is community property.\(^{157}\)

Although the presumption can be rebutted in some cases, the legislature may have made it conclusive as to third person acquirers who are in good faith. If the declarant subsequently alienates, encumbers or leases the immovable, an action to attack the transaction on the grounds of the false declaration of the person's status "shall not affect any right or rights acquired by a third person acting in good faith." However, the language used here is not as clear as it might be. If the provision had included only Part B, it would have been clear that any alienation, encumbrance or lease "shall not be attacked." Such language indicates a conclusive presumption. However, Part C states that an action to avoid a transfer "shall not affect any right or rights acquired by a third person acting in good faith."

In the normal case in which a married person states that he or she is unmarried and purports to transfer a community asset, the third person does not acquire ownership. All that person gets is a relatively null title, which could be either ratified or annulled by the other spouse. Since "no right [was] acquired by a third person," it is then arguable that the statute does not preclude the other spouse from attacking the transfer. That seems to be the technical, literal meaning of the words here.\(^{158}\) On the other hand, it is questionable that the legislation would have had any other purpose than to protect such third persons.

In any event, the ambiguity of the statute's language might provide the courts with a basis for returning to the basic principles and policies of the public records system in construing the statute. In view of the placement of the statute outside of the main provisions dealing with protecting good faith purchasers,\(^{159}\) and considering the danger that a conclusive presumption would encourage fraud, the courts may have sufficient grounds to limit the statute's effect.

VI. (RELATIVELY) ANCIENT DOCUMENTS

As with many legal institutions, the inability to depend on the correctness of recorded property transfers and other recorded documents is cured by the

\(^{157}\) La. Civ. Code art. 2340. See Meyer, supra note 1, at 83: "This statute, when combined with the precepts of the Public Records Doctrine, may actually override the presumptions of article 2340 and the nullity provided by articles 2347 and 2452."

\(^{158}\) See Title, supra note 2, at § 6.7.

\(^{159}\) See Meyer, supra note 1, at 88 n.5.
passage of time. Louisiana statutes have been adopted to presume the validity of documents recorded for nineteen and, in some cases, thirty years.

Louisiana Revised Statutes 13:3727 covers written acts in the conveyance or mortgage records, making them, after nineteen years, "prima facie proof of the contents." Revised Statutes 13:3729-30 cover documents in any other official records and, after thirty years of recordation, gives them "a prima facie presumption of the execution and of the genuineness of such instrument."\(^{160}\)

This rule of evidence is justified by the difficulty, after so many years, of finding witnesses to prove the old documents. Stability is fostered, as is the case of all rules involving statutes of limitation and repose. Also present is the notion that the existence of the document for so long a period without objection or correction corroborates its correctness.\(^{161}\) The choice of the thirty year period is consistent with the longest period of prescription for actions and for acquisition of ownership. The shorter period was originally twenty-two years, the age of majority plus one year, then changed to nineteen years when the age of majority was reduced to eighteen years. The presumption is rebuttable.\(^{162}\)

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161. "The Ancient Records Statute is a sort of procedural prescriptive statute. However, one should carefully note that the passage of time does not convert an act under private signature to authentic form." Meyer, supra note 1, at 36.
162. The presumption, of course, is rebuttable. In Watkins v. Zeigler, 147 So. 2d 435 (La. App. 2d Cir. 1962), the transfer was determined to be a forgery by testimony of several witnesses. Dixie Elec. Membership Corp. v. Jones, 360 So. 2d 216 (La. App. 1st Cir. 1978), applied the presumption to a servitude agreement signed by J. D. Jones and held the presumption was not overcome simply by the testimony of Jones that he had not signed the agreement.