II. Things

III. Possession

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IV. Ownership

A. In general

B. Extent of ownership: accession

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1. Ownership in indivision

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1. Servitudes

a. Predial servitudes

Read CC art. 654. What, according to this article, are the different kinds of predial servitudes? Are all of these supposed “kinds” of predial servitudes really predial servitudes? See CC art. 654 cmts. (c) & (d); Yiannopoulos, Treatise § 12, in Yiannopoulos, Text, 801-03.

1) Definition

What's a predial servitude? Read CC art. 646, par. 1; Yiannopoulos, Treatise, § 3, in Yiannopoulos, Text, 789-90.

a) Charge on a servient estate

(1) Estate

PH 225. Just inside the Belle Terre's boundary with Terre Puante stands an old barn, one that Pascal, the owner of Belle Terre, never uses anymore. Olide, however, would like to use it. So, he persuades Pascal to sell him a "right of shelter," which the act of sale describes as follows: "As against Pascal and any future owner of Belle Terre, Olide and any future owner of Terre Puante shall have the right to shelter up to ten farm animals at a time in the old barn that stands near Belle Terre's border with Terre Puante.” Is this thing—the barn—the kind of thing to which a predial servitude might attach? Explain. See CC art. 646 & cmt. (b); Yiannopoulos, Treatise § 7, in Yiannopoulos, Text, 795-96.

(2) Servient

What is meant by the expression "servient estate”? See CC art. 646.

Is it true that a predial servitude burdens the servient estate? See 3 Marcel Planiol & Georges Ripert, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS § 37, at 42 (Maurice Picard, ed., 2d ed. 1952) (“A relation of a juridical order cannot exist between a person and a thing: that would be nonsensical. By definition, every right is a relation between persons. This is the elementary truism on which the entire science of the law is founded . . . .”); 1 A.N. Yiannopoulos, PROPERTY § 204, at 373, in LOUISIANA CIVIL LAW TREATISE (3d ed. 1991) (“According to a broadly accepted definition, a real right is the judicially recognized authority to draw from a thing directly all or part of its economic advantages. The thing appears subjected to the authority of a person—one speaks of a right in the thing—and figures as an essential feature in the legal relationship. This, however, is a metaphor, because, by definition, things cannot participate in a legal relationship.”)

(3) Charge

What is meant by the expression "charge”? See CC art. 651; Yiannopoulos, Treatise §§ 4-5, in Yiannopoulos, Text, 790-93.

PH 226. Pascal, the owner of Belle Terre, enters into a contract with Olide, the owner of Terre Puante. In that contract, Pascal, acting on behalf of himself and all future owners of Belle Terre, (i) grants Olide and all future owners of Terre Puante the right to draw water from any of several water wells on Belle Terre, (ii)
promises to keep the water wells in good repair for the benefit of Olide and all future owners of Terre Puante, and (iii) promises to carry water from the wells to Terre Puante at the request of Olide or any other future owner of Belle Terre. The contract is entitled "Act of Predial Servitude." Which, if any, of these duties may properly constitute the charge of a predial servitude? Why? See CC art. 651 & cmt. (b).

b) Benefit of a dominant estate

(1) Estate

PH 227. Pascal, the owner of Belle Terre, sells the timber standing thereon to Olide. Because the shortest way from the stand of timber to the nearest public road lies through Terre Facile, Clodice's estate, Olide buys a right of passage from Clodice. The act of sale provides that the right of passage shall enure to the benefit of Olide and all future owners of the Belle Terre timber estate. Is this thing—a timber estate—the kind of thing to which a predial servitude might attach? Explain. See CC art. 646 & cmt. (b).

(2) Dominant estate

What is meant by the term "dominant estate"? See CC art. 646 & cmt. (c).

PH 228. A certain Kilborn owns a residential lot in the Riverbend subdivision on which stands a swimming pool. For a price, he executes in favor of his neighbor, a certain Loup, an act that reads as follows: "I, Kilborn, on behalf of myself and all future owners of my lot do hereby grant to Loup the right to swim in the swimming pool on my lot subject to the following conditions . . . ." Is this right a predial servitude? Why or why not? See CC art. 647 & cmt. (c).

PH 229. Same as before, except that the act reads as follows: "I, Kilborn, on behalf of myself and all future owners of my lot do hereby grant to Loup and any future owner of his lot the right to swim in the swimming pool on my lot subject to the following conditions . . . ." What result now? Why? See CC art. 647 & cmt. (c).

(3) Benefit

What is meant by the term "benefit"? See CC art. 651, 646, 647.

PH 230.1. Clodice, on behalf of herself and all future owners of Terre Facile, grants to "Olide and any future owner of Terre Puante the right to enter onto Terre Facile and, once there, to amuse himself by hacking up the shrubbery at will." Does this act create a predial servitude? Why or why not? See CC art. 647 & cmt. (b); Yiannopoulos, Treatise § 9, in Yiannopoulos, Text, 798-99.

PH 230.1. Clodice, on behalf of herself and all future owners of Terre Facile, grants to "Olide and any future owner of Terre Puante the right to enter onto Terre Facile and, once there, to hunt, trap, and fish." The act, which is entitled "Act of Predial Servitude," further provides that "the rights conferred hereby shall run with the land," that is, shall belong to whosoever may happen to own Terre Puante." Does this act create a predial servitude? Why or why not? See CC art. 647 & cmt. (c); Yiannopoulos, Treatise § 9, in Yiannopoulos, Text, 798-99; Trahan, Supp, 184-93.

c) Separate ownership of estates

PH 231. The widower Pascal, the owner of Belle Terre, dies intestate, survived by his three children, Ti-Boy, Lil-Fille, and Gros-Boy. Lil-Fille later buys Terre Lourde, a neighboring estate, from Moncle Jean Sot. Acting on her own behalf and on behalf of all future owners of Terre Lourde, she grants Ti-Boy, Gros-Boy, herself and all future owners of Belle Terre a right of passage across Terre Lourde. Is this right a predial servitude? Explain. See CC art. 646 & cmt. (f); Yiannopoulos, Treatise § 9, in Yiannopoulos, Text, 798-99 (down to "Third, . . . .").

Read CC art. 646, par. 2.

2) Nature


3) Characteristics

a) Inseparability

Read Yiannopoulos, Treatise § 6, in Yiannopoulos, Text, 794-95 (the part after * * *).

(1) From the servient estate

PH 232. Pascal, the owner of Belle Terre, enters into a contract with Olide, the owner of Terre Puante. In that contract, Pascal, acting on behalf of himself and all future owners of Belle Terre, (i) grants Olide and
all future owners of Terre Puante the right to draw water from any of several water wells on Belle Terre and (ii) promises to carry water from the wells to Terre Puante at the request of Olide or any other future owner of Belle Terre. The contract, entitled "Act of Predial Servitude," is recorded in the public records. Later Pascal sells Belle Terre to Clodice. Upon moving in, she starts walling off Belle Terre from Terre Puante, thereby preventing Olide from drawing his water. When Olide asks that she carry him some water, she refuses. At about the same time, Pascal dies, survived by his children, Ti-Boy, Lil-Fille, and Gros-Boy. Olide then calls you, his attorney, for advice. He wants to know, if at all, he can reestablish his right to draw water from Belle Terre's wells and his right to have water carried from those wells to his doorstep or, in lieu thereof, get damages. What do you say? Why? See CC art. 651 & comment (c).

(2) From the dominant estate

PH 233. The same as before, but with the following modifications. After the suit is resolved in Olide's favor, Olide sells his right of passage to Jean Sot, the owner of Terre Lourde, which also borders on Belle Terre. Olide retains the ownership of Terre Puante. The next day, when Jean Sot goes skipping across Belle Terre pretty as you please, Clodice drives him off the place with a shotgun. Jean Sot then repairs to court, seeking an injunction restraining Clodice from interfering with his right of passage over Belle Terre. Who wins? Why? See CC art. 650 & cmt. (b).

b) Indivisibility

Read Yiannopoulos, Treatise § 11, in Yiannopoulos, Text, 800-01.

PH 234. The widower Pascal, the owner of Belle Terre, dies intestate, survived by his three children, Ti-Boy, Lil-Fille, and Gros-Boy. At Lil-Fille's request, Jean Sot, the owner of Terre Lourde, grants to Lil-Fille, as 1/3 co-owner of Belle Terre, and to all future owners of her 1/3 share, a right of passage across Terre Lourde. Is this right a predial servitude? Why or why not? See CC art. 652, ¶ 1, sent. 1, & cmt. (b).

PH 235. Acting on behalf of himself and all future owners of Terre Puante, Olide grants Pascal and all future owners of Belle Terre the right to draw water from any of the water wells on Terre Puante. A few years later, Pascal and Olide die together in a freak boating accident. Pascal is survived by his three children, Ti-Boy, Lil-Fille, and Gros-Boy; Olide, by his two children, Avarice and Désirée. In connection with the succession proceedings, each set of children obtains a partition in kind of the respective estates. After that, Ti-Boy, Lil-Fille, and Gros-Boy begin using the wells on Terre Puante, some of which were located on Avarice's half, the rest of which were located on Désirée’s half. The daily aggregate of the volumes of water withdrawn by Pascal's three children was equal to or less than the daily volume withdrawn by Pascal. Avarice and Désirée each argues (i) that, at most, only one of the three children should be allowed to draw water from the wells and (ii) that that child should be able to draw water only from the wells on half of Terre Puante that is closer to his or her share of Belle Terre. What result? Why? See CC art. 652 & cmt. (c); art. 653.

4) Limitations

PH 236. Pascal, acting on behalf of himself and all future owners of Belle Terre, executes two acts. The first grants to Olide and all future owners of Terre Puante a right of passage over Belle Terre, exercisable between midnight and noon. The second grants to Clodice and all future owners of Terre Facile a right of passage over Belle Terre, exercisable between noon and midnight. Is there anything wrong with these servitudes? In particular, has Pascal improperly divided up the servitude or its advantages? Why or why not? See CC arts. 652, ¶ 2; 653 & cmt. (c).

5) Varieties

a) Classification based on nature of charge on servient estate: affirmative v. negative

PH 237. On behalf of himself and all future owners of Belle Terre, Pascal executes an act in favor of Olide and all future owners of Terre Puante in which he (i) grants a right of passage across a certain gravel path on Belle Terre and (ii) promises not to erect any buildings or other constructions on Belle Terre within 100 yards of its boundary with Terre Puante. The rights that Olide acquires through this act both predial servitudes. Classify each of them according to its nature, that is, determine whether it is affirmative or negative. Explain. See CC arts. 706, ¶¶ 2 & 3.
b) Classification based on evidence of charge on servient estate: apparent v. nonapparent

PH 238. The same as before. Now, classify each of the servitudes according to the public evidence of its existence, that is, classify it as apparent or non-apparent. Explain. See CC art. 707, ¶ 1.

6) Acquisition
a) By title
(1) Domain
What kinds of predial servitudes can be acquired by title? See CC arts. 739 and 740.

(2) Requirements
(a) Substantive requirements
[1] Re the act

What do we mean when we say that predial servitudes may be established "by title"? See CC art. 708.

PH 239. The widower Pascal, the owner of Belle Terre, dies, survived by his three children, Ti-Boy, Lil-Fille, and Gros-Boy. Gros-Boys then demands a partition. The court orders a partition in kind and, to make sure the owner of each of the three resulting lots will have access to the nearest public road, orders that there shall be a right of passage over each of those lots in favor of the owners of the other lots. It's clear that Gros-Boy now has a servitude over Ti-Boy's and Lil-Fille's lots, but can we say it was created by "title"? Why or why not? See CC art. 722 cmt. (b).

[2] Re the grantor
[a] Who can grant

PH 240.1. The widower Pascal, the owner of Belle Terre, dies intestate, survived by his three children, Ti-Boy, Lil-Fille, and Gros-Boy. Belle Terre is not partitioned. Lil-Fille then executes an act in which she purports to grants to Clodice and to all future owners of Terre Facile a servitude of grazing over Belle Terre, i.e., the right to graze her cattle on Belle Terre's pastures. The next day Clodice drives her cattle onto Belle Terre for grazing. Ti-Boy then files suit to stop her. Is Clodice's servitude effective against Ti-Boy? Explain. See CC art. 714.

PH 240.2. Same as before, except as follows. After Ti-Boy's successful suit against Clodice, Lil-Fille demands a partition, the court orders partition by licitation, and Lil-Fille is the high bidder at the sale. Shortly thereafter Clodice again drives her cattle onto Belle Terre for grazing. Ti-Boy then files suit to stop her, arguing that the grazing servitude was subject to a condition--consent of her co-owners--that was never fulfilled. Who wins? Why? See CC art. 715, ¶ 2.

[3] Adverse possessor of the servient estate (servitude on after-acquired immovable)?

PH 241. Pascal, presently the owner of Belle Terre, marries Julie, his sweetheart from the time that they studied the catechism together. During the marriage, they produce three children: Ti-Boy, Lil-Fille, and Gros-Boy. Years later Pascal dies in a freak nutria-hunting accident. By testament, he grants to Julie a usufruct over and to his children the naked ownership of Belle Terre, his separate property. A short time later Julie, without consulting the children, executes an act purporting to grant Olide and all future owners of Terre Puante a right of passage over Belle Terre. Is the act effective? Why or why not? See CC art. 711.

[b] Capacity to grant

PH 242. Clodice, the owner of Terre Facile, mortgages it to Jambalaya Bank & Trust Co. Acting on behalf of herself and all future owners of Terre Facile, Clodice then grants Jean Sot and all future owners of Terre Lourde a right of pasturage over Terre Facile. Is the servitude valid? Why or why not? If it is valid,
does that mean that Clodice's act has no consequences, that is, Jamabalaya must suffer the servitude to exist? What, precisely, are Jamabalaya’s remedies? See CC art. 721.

PH 243. Acting on behalf of herself and all future owners of Terre Facile, Clodice then grants Jean Sot and all future owners of Terre Lourde a right of pasturage over Terre Facile. A few days later, she does the same thing, but this time in favor of Olide and all future owners of Terre Puante. Is the second servitude valid? Why or why not? See CC art. 720 & cmt. (c).

[3] Re the grantee

[1] Who can receive

Who can receive a predial servitude? See CC art. 735.

Does that mean that the owner is going to be stuck with any and all servitudes that these do-gooders might receive for his benefit or on his behalf? Suppose, e.g., that the servitude comes with a price tag attached. Must the owner pay it? See CC art. 737.

[2] Capacity

Must the owner of the dominant estate have any particular capacity in order to receive a predial servitude? See CC art. 736.

[3] Power

Is the power of the owner of the dominant estate to acquire servitudes subject to any particular restrictions?

(b) Formal requirements

[1] General rule

As a general rule, is any particular form required for a sale, exchange, or other contract that purports to convey an interest in immovable property, such as a predial servitude? See CC arts. 2440 & 1839, ¶ 1, sent. 1.

[2] Exception

Is this "form" rule an absolute rule, applicable to all conceivable situations, or just a generalization, one that admits exceptions? See CC art. 1839, ¶ 1, s. 2.

PH 243a (based on Guillotte v. Wells (La. App. 2d Cir. 1986)). In the course of time a large natural gas reservoir was discovered under the neighboring estates of Terre Puante (owned by Olide) and Belle Terre (owned by Pascal). In return for the right to develop the gas, Cajun Oil & Gas Co. authorized both Olide and Pascal to run natural gas service lines from Cajun’s well to their houses and, further, gave them the right to take “as much gas as you might need.” Pascal put in his service line first. Then Olide, whose house was much farther away from the well than Pascal’s, asked Pascal for permission to “tie in” his service to to Pascal’s service line. Pascal said, “Sure. Why not? You’ve always been a good neighbor.” And so, Olide “tied in.” A few years later, after Ti-Boy, with Pascal’s permission, built himself a little house at the far end of Belle Terre, Pascal and Ti-Boy asked Olide if Ti-Boy, who also needed gas, could “tie in” his service line to Olide’s service line. Ingrate that he was, Olide said, “No!” Pascal then retaliated by disconnecting Olide’s service line from his (Pascal’s) service line. At that point, Olide sued Pascal, alleging that Pascal had violated their “servitude agreement.” At the trial though Olide admitted that he and Pascal “hadn’t signed anything,” Pascal admitted that he had, in fact, granted Olide a “tie in” right “as a neighbor.” What result would you predict? Why?

b) By acquisitive prescription

(1) Domain

PH 244. Olide, masquerading as the owner of Belle Terre (it really belongs to Pascal), and Jean Sot, the owner of Terre Lourde, execute an act in which Olide, purporting to act on behalf of himself and all future owners of Belle Terre and for the benefit of Jean Sot and all future owners of Terre Lourde, promises not to build any buildings on Belle Terre above 40 feet in height. Twelve years later, Pascal constructs a multi-story mansion on Belle Terre, one whose roof reaches 60 feet high. Jean Sot then sues Pascal, seeking an injunction to order him to tear the mansion down or, at the very least, reduce its height to 40 feet. What result? Why? See CC arts. 739, 740, 742, 707, ¶ 2.

(2) Modes

Through which mode or modes of acquisitive prescription can a predial servitude be acquired? Just
ordinary acquisitive prescription? Just extraordinary acquisitive prescription? See CC art. 742.

(3) Requirements

(a) Common requirements

[1] Possession

Read CC art. 3421, ¶ 2.

[a] Constitutive elements

1° Corpus

What does it mean to have corpus of a predial servitude? See CC art. 3421, ¶ 1.

PH 245. While returning from a hunting trip one day in 1965, Jean Sot walks along a path that cuts across the corner of Belle Terre, Pascal's estate, on his way home. Over the next thirty-one years, Jean Sot repeats this conduct two or three times a year. It's now 1996. Assume that Jean Sot had the necessary animus, i.e., believed that he was exercising a servitude of passage. Does he now have such a servitude? Why or why not?

PH 246. Olide, masquerading as the owner of Belle Terre (it really belongs to Pascal), grants Jean Sot, the owner of Terre Lourde, a predial servitude of passage over Belle Terre. If Jean Sot uses the servitude "sufficiently," two things will take place simultaneously: (i) Jean Sot will be quasi-possessing the rights of the servitude and (ii) Olide, through his precarious possessor Jean Sot, will be vicariously possessing the part of Belle Terre over which the servitude lies. Why? Remember Manson Realty? Isn't that precisely what happened there? Now, here's my question: will the level or intensity of activity required for Jean Sot to quasi-possess his servitude rights necessarily and invariably be the same as the level or intensity of activity required for him to possess the strip of Belle Terre for Olide? Explain.

PH 247. Olide, masquerading as the owner of Belle Terre (it really belongs to Pascal), grants Jean Sot, the owner of Terre Lourde, a predial servitude of passage over Belle Terre. But the predial servitude is subject to a severe limitation: it may be exercised only in connection with Jean Sot's annual deer hunt, which takes place one week a year. Since Jean Sot doesn't come and go every day during the hunt, he is expected to use the servitude for only one round trip per year—once as he goes out to the hunting grounds and once as he returns. Through the passing years, Jean Sot consistently uses the servitude in the manner and with the intensity that he and Olide originally contemplated, i.e., one round trip per year during the hunt. At the end of ten years and a day, we can safely say, Jean Sot will have acquired his servitude by acquisitive prescription. But can we say that at the end of thirty years and a day, Olide, through Jean Sot, will have acquired ownership of the strip of Belle Terre itself through acquisitive prescription? Why or why not?

2° Animus

What animus is required for quasi-possession of a servitude? See CC art. 3421, ¶ 2.

Summary of Levet v. Lapeyrollerie (La. 1887). Levet & Lapeyrollerie ("L&L"), a partnership, acquired Tract A in 1866 and Tract C in 1867. Later in 1867 Lapeyrollerie himself acquired Tract B, which lay between Tracts A and C. In 1872 L&L, "with the consent of Lapeyrollerie," dug a drainage canal from one of its tracts, Tract C, to the other, Tract A, through Lapeyrollerie's tract, Tract B. Water ran through the canal from Tract C, through Tract B, to an existing canal on Tract A. The drainage canal was essential to the exploitation of Tract C: without it, Tract C could not be cultivated. In 1905 Lapeyrollerie died. The partnership property, including Tracts A & C, were then partitioned between Levet and Lapeyrollerie's children. By judgment Tracts A & C, "with all the rights, ways, privileges, improvements and appurtenances thereunto belonging," were awarded to Levet. In 1906 Lapeyrollerie's children closed off the canal at the point where in crossed from Tract C into Tract B. Levet then sued Lapeyrollerie's children, seeking an injunction to restrain them from stopping up the canal. His theory? That "Tract C" had acquired a servitude of drain over Tract B by acquisitive prescription. What result would you predict? Why?

[b] Qualities (absence of vices)

[2] Delay

(b) Requirements unique to the each mode of prescription

[1] Ordinary acquisitive prescription

Read CC art. 742, sent. 2, cl. 2.

3) By destination
   a) Definition
      Read & brief Alexander v. Boghel (La. 1832) [Yiannopoulos, Text, 967].
   b) Manner of creation
      (1) Apparent servitudes
         PH 248 (based loosely on 730 Bienville Partners Ltd. v. First Nat’l Bank., 596 So. 2d 836 (La. App. 4th Cir. 1992) [Yiannopoulos, Text, 972-77], which opinion you do NOT have to read). In downtown Nulle Part Pascal owns two large buildings that are situated just a few feet from each other on a lot that’s bounded on the west by Canard Street (north-south), on the south by Cochon Street (east-west), on the east by Poule Street (north-south), and on the north by Mouton Street (east-west). One building (the Westy) faces Canard Street; the other (the Easty) faces Poule Street. In the Easty, Pascal runs a small nutria-processing factory; the Westy Pascal uses for various purposes, including storage. The two buildings are joined by a short, covered concrete walkway that runs east-west from the back door of one building to the back door of the other. Inside the Westy there’s an enclosed corridor (with windows to the outside) that runs from the back door, westward through the building, to a door that opens onto Canard Street. Pascal and his employees use the concrete walkway between the buildings and the enclosed corridor within the Westy to pass back and forth between the Easty and Canard Street, where they park their cars. (Parking is not permitted on Conchon Street, Poule Street, or Mouton Street.) Pascal sells the Easty and the land beneath it (together with his business) to Jean Sot. Once Jean Sot begins operations in the Easty, he and his employees, as had Pascal and his employees before them, use the concrete walkway between the buildings and the enclosed corridor within the Westy to pass back and forth between the Easty and Canard Street, where they park their cars. Pascal has come to you, asking whether he can close off the corridor. What will you tell him? Why? See CC arts. 739 & 741, ¶ 2.

   (2) Nonapparent servitudes
         PH 249. The same as Alexander, except that this time Alexander sells the undeveloped lot, keeping the developed lot for himself, and Alexander claims a servitude servitude of view over Boghel's lot, in particular, of a view unobstructed by developments. What result now? Why? See CC arts. 739 & 741, ¶ 2.

4) By expropriation
   7) Rights & duties of the owners of the servient & dominant estates

8) Extinction
   a) Destruction
      Read & brief Vincent v. Meaux (La. App. 3d Cir. 1975) [Yiannopoulos, Text, 991-94]. Consider, first, the argument that the servitude had been lost through the “destruction” of the servient estate. How did the court resolve that question? How would the Vincent case be resolved under current law? See CC art. 752. Suppose that Ovey hadn't deepened and refurbished the well until 1972? What result then? Walter loses. Why? See CC art. 755; Trahan, Supp, 195-98 (re extinction of predial servitudes via destruction of the servient estate).

   b) Nonuse
      a) Substantive elements
         Recall Vincent v. Meaux (La. App. 3d Cir. 1975). Consider, now, the argument that the servitude had been lost through prescription. How did the court resolve that question? Did the court resolve it correctly? Consider the following opinion of the Roman jurisconsult, Paulus: “A party is not held to use a servitude except when he believes that he is exercising a right which belongs to him; and therefore where anyone makes use of it as a highway or as a servitude belonging to another, he will not be entitled to an interdict or to any other legal proceeding.” Paulus, Sentences bk. 4, in 3 Corpus Juris Civilis: The Civil Law bk.
Read & brief Tilley v. Lowery (La. App. 2d Cir. 1987) [Yiannopoulos, Text, 994-97]. Did the court of appeal correctly resolve the "failure of condition" issue? Consider (i) this opinion of the Roman jurisconsult Pomponius: “[W]hen selling a portion of my land, I provide in the contract that I shall have a right to conduct water over that portion to the remainder of my premises, and the time prescribed by law elapses before I excavate a ditch. . . . [Do I] lose my right? I do not lose any right, as there is no place for the water to flow.” Pomponius, On Sabinus bk. 32, in 3 Corpus Juris Civilis: The Civil Law bk. 8, tit. 6, l. 19, at 320 (S.P. Scott tr. 1973); (ii) this excerpt from an early Louisiana Supreme Court opinion:

The owners of adjacent tracts of land enter into an agreement whereby one grants to the other what appears to be a present servitude of passage. The act of transfer says nothing about who is to designate or ask for the designation of the location of the servitude. Time rolls by, yet nothing happens. What happens at ten years and one day? Is the servitude prescribed? . . . [H]is right to this servitude cannot be lost by non-usage . . . because the road had never been delivered to him; . . . no prescription can run on account of the non-usage of a thing which has never been used, the road never having been located or fixed on any particular place . . . . As the proprietor of the estate owing the servitude is bound to fix the place where he wishes it to be exercised, so long as he does not do so, prescription does not begin to run for non-usage.

De La Croix v. Nolan, 1 Rob. 321, 323 (La. 1842); (iii) CC arts. 1772 & 1773.

Read & brief Ashland Oil Co. v. Palo Alto, Inc. (La. App. 1st Cir. 1993) [Yiannopoulos, Text, 998-1002]. Did the court resolve the abn prescription question correctly? Consider what Toullier, the author of the sources from which our CC arts. 753 et seq. were ultimately drawn, had to say: "The extinction of servitudes by non-use is founded on the presumed abandonment of his right by him to whom it is due." Can we fairly infer that someone who is clearly attempting to preserve a servitude wants to "abandon" his rights?

Read & brief Thompson v. Meyers (La. 1882) [Yiannopoulos, Text, 1016-18].

b) Procedural incidents

Who bears the burden of proof with respect to the prescription of nonuse? See CC art. 764.

c) Confusion

PH 249. Pascal, as owner of Belle Terre, grants Olide, as owner of Terre Puante, a nonapparent right of passage across Belle Terre. One day Pascal sells Belle Terre to Clodice. The next day Olide sells Terre Puante to Clodice. The day after that Clodice sells Belle Terre to Ti-Boy and Terre Puante to Lil-Fille. Lil-Fille now demands that Ti-Boy allow her to cross Belle Terre. Must Ti-Boy honor the demand? Why or why not? See CC arts. 765, 769.

d) Resolutory condition

e) Abandonment

9) Protection

a. The petitory action

1) Substantive matters: lack of quasi-possession

PH 250. Pascal, as owner of Belle Terre, grants to Olide, as owner of Terre Puante, a right of passage between Terre Puante and Bayou Egout across a gravel road that lies on Bell Terre. Olide uses the servitude. Pascal later dies, survived by his daughter, Lil-Fille. Lil-Fille informs Olide that she will not respect his supposed servitude and, further, plans to block off the gravel road at the earliest opportunity. Can Olide file a petitory action against Lil-Fille at this time? Why or why not? See C. Civ. Proc. art. 3651, in Yiannopoulos, Text, 581.

2) Procedural matters: burden of proof

PH 251. Pascal, as owner of Belle Terre, grants to Olide, as owner of Terre Puante, a right of passage between Terre Puante and Bayou Egout across a gravel road that lies on Bell Terre. Olide uses the servitude off and on for 15 months. Some months later, Jean Sot, claiming that Pascal has given him an exclusive right to use the gravel road to pass between his estate, Terre Lourde, and Bayou Egout, bars Olide from entering onto the road. Olide then brings a petitory action against Jean Sot. Is the defendant in possession or out of possession? If he’s in possession, of what is he in possession? Explain.

PH 252. Pascal, as owner of Belle Terre, grants to Olide, as owner of Terre Puante, a right of passage...
between Terre Puante and Bayou Egout across a gravel road that lies on Bell Terre. Olide uses the servitude. Pascal later dies, survived by his daughter, Lil-Fille. Lil-Fille then blocks off the gravel road, preventing Olide from using it. Olide then brings a petitory action against Lil-Fille. Is the defendant in possession or out of possession? If she’s in possession, of what is she in possession? Explain.

a) **Defendant in possession**

What's the BOP where the defendant is in possession? The plaintiff must prove title "good against the world." What does that mean in the case of a servitude?

b) **Defendant out of possession**

What's the BOP where the defendant is not in possession? The plaintiff must prove "better title." What does that mean in the case of a servitude?

b. **The possessory action**

1) **Requirements**

   a) **Possession at the time of the disturbance**

   Read & brief *Kizer v. Lilly* (La. 1985) [Yiannopoulos, Text, 1037-43].

   b) **Disturbance in fact or in law**

   (1) **In fact**

   What's a "disturbance" in fact of the quasi-possession of a servitude? See *C. Civ. Proc. art. 3659, ¶ 2* [Yiannopoulos, Text, 246].

   PH 253. Pascal, as owner of Belle Terre, grants Olide, as owner of Terre Puante, a right of passage between Terre Puante and Bayou Egout over a certain gravel road that runs through Belle Terre. The servitude is subject to the restriction that it be used only on weekends and holidays. Olide uses the servitude. Then one Jean Sot, without pretense of title, begins to use the gravel road to pass back and forth between his estate, Terre Lourde, and Bayou Egout on isolated weekdays. Can Olide bring a possessory action against Jean Sot? Why or why not? 

   PH 254. The same as before, except that there's no restriction on Olide's servitude, in other words, he can use it on weekdays as well as weekends. What result now? Why?

   (2) **In law**

   What's a "disturbance" in law of the quasi-possession of a servitude? See *C. Civ. Proc. art. 3659, ¶ 3* [Yiannopoulos, Text, 246].

   PH 255. Pascal, as owner of Belle Terre, grants Olide, as owner of Terre Puante, a right of passage between Terre Puante and Bayou Egout over a certain gravel road that runs through Belle Terre. Olide uses the servitude. A few months later, Jean Sot records an act whereby Pascal purportedly granted to him a servitude of passage between his estate, Terre Lourde, and Bayou Egout over the same road. Can Olide bring a possessory action against Jean Sot? Has there been a disturbance? Explain.

   c) **Possession quietly & without interruption for more than a year immediately prior to the disturbance**

   Read & brief *Louisiana Irrigation & Mill Co. v. Pousson* (La. 1972) [Yiannopoulos, Text, 1032-37].

   2) **Reaction: the negatory action**

   **EXCURSUS**

   The “Legal Servitude” of “Right of Passage for an Enclave”

   . . .

   b. **Personal servitudes**

   . . .