

non distribuer
Douglas' par
une note d'avis
6 Mars 1923

M O R T G A G E

(AN ALTERATION SUGGESTED FOR SECTION 736)

No servitudes or other real rights created by agreement or will upon a mortgaged property by which the value of the property is depreciated registered after the registration of the mortgage may be set up against the mortgagee unless he has agreed to it.

Cf. 146 Draft on Things.

COMMENT. - When drafting the Book on Things, the Commission have always considered that a servitude may be created by will as well as by agreement. The words "by agreement or will" have consequently been used of in all sections concerning servitudes. It is proposed to do the same in section 736 which in the present Drafting deals with servitudes created "by agreement" only.

Otherwise the section remains the same, but the wording has been made more explanatory, because the policy for servitudes in the Book on Things allows now to do so; it may be noted especially that servitudes are void if not made in writing and registered; then the dates of registration are the

criterion in case of conflict between a mortgage and a servitude or other real right. However, it must be pointed out - this being a important matter of policy - that leases under three years duration are not registered according to the Draft Civil Code which follows the present practice of the Department of Land Records. If the above criterion (registration) is adopted, it will ensue that leases under three years, being not registered, can be set up against a mortgagee. This consequence seems harmless because leases under three years are unlikely to depreciate the property to the prejudice of a previous mortgagee: they are transitory and mere acts of usual management. The Commission of Codification will have to decide finally upon this policy.

The wording of the above draft is similar to the wording as amended by Dr. James.

*Pour la solution
de cette question,
voir III (rapport
de July, 1923 et
meeting. subsequent).*