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Prescription Under Article 852

Bailey E. Chaney*

Article 852, Louisiana Civil Code of 1870: "Whether the titles, exhibited by the parties, whose lands are to be limited, consist of primitive concessions, or other acts by which property may be transferred, if it be proved that the person whose title is of the latest date, *or those under whom he holds*, have enjoyed, in good or bad faith, uninterrupted possession during thirty years, *of any quantity of land beyond that mentioned in his title*, he will be permitted to retain it, and his neighbor, though he have a more ancient title, will only have a right to the excess; for if one can not *prescribe* against his own title, *he can prescribe beyond his title* or for more than it calls for, provided it be by thirty years possession." (Italics supplied.)

One faced with a dispute between adjacent property owners over a strip of land between them should consider Article 852 as a possible means of establishing a prescriptive title. Under Article 3499,¹ in the title of the code on prescription *eo nomine*,² tacking of successive possessions³ might not be permitted, unless the land in dispute is included in the title description of the person pleading the prescription.⁴ Under Article 852 tacking of suc-

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1. Art. 3499, La. Civil Code of 1870: "The ownership of immovables is prescribed for by thirty years without any need of title or possession in good faith." See also Arts. 3458, 3475, and 3500, La. Civil Code of 1870.

2. Book III, 'Of the Different Modes of Acquiring the Ownership of Things,' Title XXIII, "Of Occupancy, Possession and Prescription," Chapter 3, "Of Prescription," Arts. 3457 et seq.

3. Art. 3493, La. Civil Code of 1870: "The possessor is allowed to make the sum of possession necessary to prescribe, by adding to his own possession that of his author, in whatever manner he may have succeeded him, whether by an universal or particular, a lucrative or an onerous title."

Art. 3494, La. Civil Code of 1870: "By the word *author* in the preceding article, is understood the person from whom another derives his right, whether by universal title, as by succession, or by particular title, as by sale, by donation, or any other title, onerous or gratuitous.

"Thus, in every species of prescription, the possession of the heir may be joined to that of the ancestor, and the possession of the buyer to that of the seller."

Art. 3495, La. Civil Code of 1870: "But to enjoy this advantage, the different possessions must have succeeded each other without interval or interruption."

4. Knight, Tacking of Possession for Acquisitive Prescription, 8 LOUISIANA

cessive possessions is permitted, whether or not the land in dispute is mentioned in the title description of the person pleading Article 852.⁵

It would appear that although Article 852 is located in the title on surveying,⁶ that article, like Article 3499, provides a rule for the acquisition of land by thirty years possession in good or bad faith.⁷ Article 852 should be usable, not only by a plaintiff⁸ or defendant⁹ in a boundary action, but also by any party wishing to establish ownership of a disputed strip of land in any action proper for that purpose.¹⁰

That Article 852 is a rule for the acquisition of ownership of land can hardly be questioned.¹¹ Either the word "prescribe" in

LAW REVIEW 105 (1947); *Beam v. Dudding*, 43 So. 2d 73 (La. App. 1949); *Sibley v. Pierson*, 125 La. 478, 51 So. 502 (1910).

5. *Knight*, supra note 4, at 107, n. 8; *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482 (1924).

6. Book II, "Of Things, and of the Different Modifications of Ownership," Title V, "Of Fixing the Limits, and of Surveying of Lands," La. Civil Code of 1870.

7. After all, there is a sound public policy inherent in the recognition and confirmation of a boundary which has existed for more than thirty years, irrespective of the language used in title descriptions. As the organ of the Louisiana Supreme Court stated in overruling the contrary case of *Vicksburg, Shreveport and Pacific Railway Co. v. Le Rosen*, 52 La. Ann. 192, 26 So. 854 (1899):

"... [I]f perchance it should be discovered that Bienville has misread the plan of his engineer and located his 'place d'armes' a few hundred feet higher up, or lower down, the Mississippi than such plan calls for, there is no title to a foot of land in the city of New Orleans, which would not call for correction; and since the land which each successive purchaser took possession of would not be the same land which his title called for, it follows (if we accept the *Le Rosen* case) that he could not 'tack' onto his own possession that of his supposed author, and thus could not protect his boundaries by the prescription of thirty years. That would be against all common sense; and law is common sense, as far as legislators, courts, and men of law will let it remain so." *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482, 485 (1924).

8. *Broussard v. Winn*, 41 So. 2d 486 (La. App. 1949).

9. *Vicknair v. Langridge*, 57 So. 2d 714 (La. App. 1952); *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482 (1924).

10. *Rock v. Varuso*, 61 So. 2d 741 (La. App. 1952) (petitory action). But see *Franz v. Mohr*, 186 So. 114 (La. App. 1939), holding that the issue of title could be litigated only in a petitory action, and the subsequent case of *Franz v. Mohr*, 4 So. 2d 584 (La. App. 1941), where, in a petitory action, defendant was finally permitted to plead the prescription of ten years *acquiritendi causa* in good faith.

11. The redactors' comment on the proposed Art. 848, La. Civil Code of 1825 (now Art. 852, La. Civil Code of 1870) is: "The rules of prescription certainly require, that one cannot prescribe against his own title. (Code Art. 48, p. 485). But this means, that one cannot change at his own pleasure the cause and principle of his possession, and it does not prevent a person from prescribing beyond his title. Thus, it is conceded that the purchaser of a piece of land designated as containing one arpent can, by prescription, extend his right to a greater quantity, as a stranger could do without title, that is by possession of thirty years." 1 Louisiana Legal Archives 101.

the article is comprehended by the definition of the word "prescription" in Article 3457,¹² or the redactors said one thing and meant another.

"But the authors of our Code were men of ability and learning; their ideas of the law were exact and not hazy; they understood perfectly the language they used, and wrote what they wrote, not hastily, but with extreme care."¹³

Jurisprudence interpreting Article 852 reveals that although the article does not in terms mention *visible bounds*,¹⁴ cases in which the article has been applied unanimously have involved such bounds.¹⁵ Further, although the article in terms seems to require that the party pleading the article should have the latest dated title, the writer has found no case in which title dates were compared or discussed. However, the leading case of *Opdenwyer v. Brown*¹⁶ was a case where the defendant's title predated plaintiff's title by ten years; defendant pleaded Article 852 and won the lawsuit.¹⁷

The rules of possession¹⁸ under Article 852 and Article 3499 appear to be the same. One may possess through others;¹⁹ one who does not have the intention to possess as owner cannot plead prescription under the article even in a boundary action,²⁰ and

12. Art. 3457, La. Civil Code of 1870: "*Prescription* is a manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law.

"Each of these prescriptions has its special and particular definition."

Art. 3458, La. Civil Code of 1870: "The prescription by which the ownership of property is acquired, is a right by which a mere possessor acquires the ownership of a thing which he possesses by the continuance of his possession during the time fixed by law."

13. *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482, 484 (1924).

14. Such as are suggested by Art. 826, La. Civil Code of 1870.

15. *Vicknair v. Langridge*, 57 So. 2d 714 (La. App. 1952); *Tate v. Cutrer*, 53 So. 2d 285 (La. App. 1951); *Picou v. Curole*, 44 So. 2d 354 (La. App. 1950), affirmed on rehearing at 49 So. 2d 620 (La. App. 1950); *Crow v. Braley*, 47 So. 2d 357 (La. App. 1950); *Broussard v. Winn*, 41 So. 2d 486 (La. App. 1949); *Henly v. Kask*, 11 So. 2d 230 (La. App. 1942); *Latiolais v. Robert*, 8 So. 2d 347 (La. App. 1942); *De Bakey v. Prater*, 147 So. 734 (La. App. 1933); *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482 (1924).

16. 155 La. 617, 99 So. 482 (1924).

17. Accord: *Picou v. Curole*, 44 So. 2d 354 (La. App. 1950); affirmed on rehearing at 49 So. 2d 620 (La. App. 1950); *Henly v. Kask*, 11 So. 2d 230 (La. App. 1942).

18. Arts. 3426 et seq., La. Civil Code of 1870.

19. Arts. 3433 and 3438, La. Civil Code of 1870; *Picou v. Curole*, 44 So. 2d 354 (La. App. 1950), affirmed on rehearing at 49 So. 2d 620 (La. App. 1950).

20. Arts. 3436 and 3441, La. Civil Code of 1870; *Aubrey v. Deggs*, 165 So. 719 (La. App. 1936); *Simmons v. Miller*, 170 So. 521 (La. App. 1936). Cf. *City of New Orleans v. Shakespeare*, 39 La. Ann. 1033, 3 So. 346 (1887).

one whose possession was corporeally begun may preserve it by external signs.²¹

If possession has been disturbed within a year prior to suit, a possessory action is available.²² Injunctive relief may be sought to prevent any further disturbance of possession.²³ A boundary action could be cumulated, with one's claim under Article 852 set out.

If one's possession has been ousted for more than a year previous to suit, a boundary action and Article 852 may be preferable to a petitory action.²⁴ Particularly is this true when defects in one's title preclude successful resort to a petitory action. In a boundary action the burden of proof rests on each party to prove his boundary; titles are consulted merely to assist in establishing the fact of possession.²⁵ In other words it is preferable for the court to probe *possession* rather than *title* of one's self and one's ancestors in title.

If one is faced with the defense of a petitory action, it would appear that a boundary action and Article 852 could be properly pleaded in a reconventional demand.²⁶ Aside from ownership of the strip of land in dispute, titles of the respective parties are seldom at issue.²⁷ In reality only the proper location of a boundary is at issue. Is not one element of plaintiff's cause of action in a petitory action the delimitation of the title sued upon?²⁸ Regardless of the state of the remainder of his title, if plaintiff in a petitory action claims a boundary which includes land lost by the effect of prescription under Article 852, then plaintiff should not be permitted to regain the land by his *form* of action alone. Since the outcome of a boundary action would give the

21. Arts. 3442, 3443, 3444 and 3501, La. Civil Code of 1870. Suggested in *Vicknair v. Langridge*, 57 So. 2d 714, 716 (La. App. 1952); *Schillings' Heirs v. Kent Piling Co.*, 51 So. 2d 329, 331 (La. App. 1951) (the latter not a boundary action).

22. Arts. 4, 6, and 46-60, La. Code of Practice of 1870. Damages are demandable for the trespass. *Neal v. Farm Development Corporation*, 42 So. 2d 319 (La. App. 1949).

23. Arts. 298 (3) and (5), La. Code of Practice of 1870.

24. Arts. 5, and 43-45, La. Code of Practice of 1870.

25. *Davis v. Moore*, 156 La. 488, 100 So. 691 (1924).

26. Art. 375, La. Code of Practice of 1870, as amended by La. Act 50 of 1886.

27. *Hunter v. Forest*, 195 La. 973, 197 So. 649 (1940); *Boanno v. Cooper*, 138 So. 174 (La. App. 1931); *Meyer v. Comegys*, 147 La. 851, 86 So. 307 (1920). Cf. *Thompson v. Futral*, 136 So. 654 (La. App. 1931).

28. *Alford v. Alford*, 141 So. 479 (La. App. 1932); *Etchison v. Richardson Oil Co.*, 6 La. App. 404 (1927); *Russell v. Producers Oil Co.*, 143 La. 217, 78 So. 473 (1918).

land to defendant, it is not logical to permit a plaintiff to escape such an outcome by resort to the petitory action. It is submitted that even should such a petitory action be filed by one who was unsuccessful in a prior boundary action, an exception of no cause of action²⁹ or a plea of *res adjudicata*³⁰ should be sustained.

In conclusion it is submitted as follows:

- (1) Article 852 states a rule of prescription by which one may acquire ownership of land outside one's title description if the land has been possessed within visible bounds for a period in excess of thirty years; and,
- (2) Article 852 can be utilized in any action proper to determine ownership or the right to possession of such land.

29. Arts. 345 and 346, La. Code of Practice of 1870.

30. *Ibid.*; Arts. 2286 and 3556 (31), La. Civil Code of 1870.