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NOTES

A RESTRICTED APPLICATION OF CIVIL CODE ARTICLE 3482:

BARTLETT v. CALHOUN

Plaintiffs, the alleged heirs of Mr. and Mrs. W. C. Thompson, brought a petitory action in 1977 challenging the validity of the November 30, 1949 act of sale between the Thompsons and defendant, Mrs. Stella Calhoun. Plaintiffs claimed that the Thompsons' signatures were forged. On December 10, 1949, defendant sold the land to Grey Ramon Brown, but in October of 1951, she reacquired the property from Brown, and possessed the land from that date. Defendant moved for summary judgment, contending that she acquired ownership of the land in question by acquisitive prescription of ten years. Plaintiffs argued that summary judgment could not be granted because defendant's good faith, a necessary element for acquisitive prescription of ten years, was a material issue of fact. Both the district court and the Louisiana Third Circuit Court of Appeal concluded that whether defendant purchased in good faith or bad faith was irrelevant since she was able to take advantage of Brown's good faith by tacking her possession to his, thereby acquiring ownership in December, 1959.¹ Overruling prior jurisprudence, the Louisiana Supreme Court reversed and remanded, *holding* that when ten-year acquisitive prescription has not run in favor of a vendor in good faith, a subsequent bad faith purchaser cannot benefit from the vendor's good faith and prescribe in ten years; the bad faith purchaser can tack his possession to his author's possession only for the purpose of thirty-year acquisitive prescription. *Bartlett v. Calhoun*, 412 So. 2d 597 (La. 1982).²

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1. The ten-year prescriptive period commenced in December, 1949; at that time Brown began possessing the land in good faith and with just title. See *Bartlett v. Calhoun*, 404 So. 2d 516 (La. App. 3d Cir. 1981), and, *infra* notes 7-10 and accompanying text.

The courts based their holdings on Civil Code article 3493 [3442] (see note 2, *infra*, and text at notes 12-14, *infra*) and the interpretation of Civil Code article 3482 as expressed in *Liuzza v. Heirs of Nunzio*, 241 So. 2d 277 (La. App. 1st Cir. 1970). *Liuzza* followed the holding of *Devall v. Choppin*, 15 La. 566 (1840), which is discussed in the text at notes 4-19, *infra*.

2. All articles of the Louisiana Civil Code cited in the text and footnotes, unless noted otherwise, refer to the code articles in use at the time of the *Bartlett* decision, April 5, 1982, and before the enactment of 1982 La. Acts, No. 187, § 1, which revised the articles relative to occupancy, possession, and prescription and which became effective January 1, 1983. If the article number has been changed by the 1982 revision, the new number is indicated in brackets following the former article.

The jurisprudence overruled by *Bartlett*³ originated in *Devall v. Choppin*,⁴ an 1840 decision of the Louisiana Supreme Court, which was followed consistently by Louisiana courts as late as 1976.⁵ In *Devall*, the plaintiff brought a petitory action claiming he was the true owner by grant of the Spanish government and that defendants' possession was based on an invalid grant by the French government. Without deciding which grant was superior, the court held that defendants had established a superior title by the prescription of ten years.⁶ This shorter prescriptive period of ten years requires that the possessor have a just title,⁷ be in good faith (believe himself to be the true owner),⁸ and maintain continuous, uninterrupted possession⁹ of a prescriptible object.¹⁰ The longer prescriptive period of thirty years requires only continuous, uninterrupted possession.¹¹

When suit in *Devall* was filed, the defendants had not possessed the land long enough to satisfy either prescriptive period. However, Civil Code article 3493,¹² from which the word "tacking" originated,

3. See, e.g., *Arnold v. Sun Oil Co.*, 218 La. 50, 48 So. 2d 369 (1949); *Liquidators of Prudential Savings & Homestead Soc. v. Langermann*, 156 La. 76, 100 So. 55 (1924); *Vance v. Ellerbe*, 150 La. 388, 90 So. 735 (1922); *Brewster v. Hewes*, 113 La. 45, 36 So. 883 (1904); *Sterling v. C. Marshall Martin, Inc.*, 409 So. 2d 1231 (La. App. 1st Cir. 1981), cert. denied, 413 So. 2d 496 (La. 1982) (denied on the same day that *Bartlett* was rendered, evidently because the decision was correct on other grounds); *Liuzza v. Heirs of Nunzio*, 241 So. 2d 277 (La. App. 1st Cir. 1970); *Wheat v. Bayer & Thayer Hardwood Co.*, 15 La. App. 306, 131 So. 307 (1st Cir. 1930).

4. 15 La. 566 (1840).

5. See *Jackson v. D'Aubin*, 338 So. 2d 575 (La. 1976).

6. At the time of *Devall*, the good faith prescriptive period was ten years if the true owner was present in Louisiana and twenty years if the true owner was absent from Louisiana. LA. CIV. CODE art. 3437 (1825). This provision was reenacted as article 3473 in the 1982 revision.

7. "[A] juridical act, such as a sale . . . sufficient to transfer ownership . . ." LA. CIV. CODE art. 3483, as amended by 1982 La. Acts, No. 187, § 1.

8. LA. CIV. CODE art. 3451 [3480]. "The possessor in bad faith is he who . . . well knows that he has no title to the thing, or that his title is vicious and defective." LA. CIV. CODE art. 3452.

9. LA. CIV. CODE art. 3487 [3476].

10. LA. CIV. CODE art. 3497 [3485]. For a discussion of the requirements of ten-year acquisitive prescription as mandated by LA. CIV. CODE art. 3479 [3475], see generally Comment, *The Ten-Year Acquisitive Prescription of Immovables*, 36 LA. L. REV. 1000 (1976).

11. LA. CIV. CODE arts. 3499 & 3500 [3486].

12. This article was amended in 1982 and was reenacted, changed in form but not in substance, in Civil Code article 3442. It now reads: "The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession." Tacking for purposes of acquisitive prescription should be distinguished from that which is allowed in regard to boundaries. See LA. CIV. CODE art. 794; *Opden-*

provides: "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." The defendants argued that, by use of article 3493, their author in title had completed the shorter prescriptive period despite having possessed the land himself for less than the necessary time. They reasoned that their author in title could tack his possession (eight years)¹³ to his predecessor's possession (two years)¹⁴ in order to complete the prescriptive period. However, the plaintiff argued that because defendants' author in title possessed in bad faith, defendants could not benefit from the shorter prescriptive period of ten years which requires good faith possession.

Conceding that defendants' author in title was in bad faith, the court noted that this bad faith possessor's predecessor had possessed in good faith. The court turned to Civil Code article 3482,¹⁵ which read:

wyer v. Brown, 155 La. 617, 99 So. 482 (1924); McPherson v. Roy, 390 So. 2d 543 (La. App. 3d Cir. 1980); Chaney, *Prescription Under Article 852*, 13 LA. L. REV. 582 (1953).

13. The number of years listed parenthetically is only illustrative. The fact situation in *Devall* is rather complex. Defendants' chain of title originated in a grant from the French government to Pierre Perrault in 1767. In 1774, Perrault sold the land in question to Joseph Hebert, a good faith purchaser, who commenced actual possession. Catherine Bidou inherited the land from her brother, Joseph Hebert, and also possessed the land in good faith. See text at note 30, *infra*. Alexander Baudin, the bad faith possessor, purchased a portion of the tract of land owned by Bidou at a sheriff's sale in 1814. Baudin purchased the balance of the tract in 1820 from Guinault, who purchased the same tract from Bidou in 1814. Defendants' purchased the land from the succession of Baudin in 1836. 15 La. at 572-73.

14. Note that a juridical link must exist in order for a successor to acquire his predecessor's prescriptive rights. See LA. CIV. CODE art. 3442, comment (d), *as amended by* 1982 La. Acts, No. 187, § 1; *Stutson v. McGee*, 241 La. 646, 130 So. 2d 403 (1961); *Sibley v. Pierson*, 125 La. 478, 51 So. 502 (1909); Comment, *infra* note 21, at 106-07. *Contra* *Noel v. Jumonville Pipe & Mach. Co.*, 245 La. 324, 158 So. 2d 179 (1963).

15. Article 3482 of the Civil Code of 1825 remained unchanged until the enactment of the revisions approved by the 1982 Regular Legislative Session. 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 3482 (J. Dainow ed.). The 1982 revision changes the wording of article 3482, but comment (a) states, "[i]t does not change the law." Therefore, *Bartlett's* interpretation of former article 3482 still is applicable to revised article 3482. The new article reads: "It is sufficient that possession has commenced in good faith; subsequent bad faith does not prevent the accrual of prescription of ten years." Since *Bartlett* was rendered on April 5, 1982, before the above act was approved, the legislature is presumed to have known of the supreme court's interpretation of that article. During the passage of the property revisions, no attempt was made to amend article 3482 in order to overrule the court's interpretation of that article. The act was approved by the Louisiana House of Represent-

"It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription." Based on this article, the *Devall* court reasoned that the bad faith possessor could tack his possession to his predecessor's possession and benefit from the shorter prescriptive period since his predecessor commenced possession in good faith. Consequently, when defendants purchased from the bad faith possessor, they received a title superior to that of plaintiff's from a vendor who had established ownership by acquisitive prescription. As a basis for the court's interpretation of article 3482, it quoted from the French writer Troplong.

I do not understand why the bad faith of an intermediate possessor would prevent the tacking of the good faith possessions which have preceded it, because it suffices that the good faith existed at the commencement, so that the bad faith occurring later does not vitiate the possession. What difference does it make, then, that one of the possessors be in bad faith, if his possession is not the one which begins the running of the prescription?¹⁶

As the initial moment of acquisition is the only point in time to be considered, it follows that when an individual has possessed an estate in good faith but dies before the completion of prescription, the heir who succeeds him will validly continue to prescribe, even if he is in bad faith. . . .

Similarly, a successor by particular title who in bad faith acquires an immovable that was possessed, with title and in good faith, by his vendor is able to continue the prescription begun by the latter and to maintain it to completion, without anyone

tatives on May 18, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 8th Reg. Sess. at 37 (May 18, 1982); by the Louisiana Senate on June 24, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA, 8th Reg. Sess. at 36 (June 24, 1982); and by the Governor of Louisiana on July 15, 1982. 1982 La. Acts, No. 187.

16. 1 M. TROPLONG, DROIT CIVIL EXPLIQUÉ—PRESCRIPTION no. 432, at 610 (4th ed. 1857) (footnote omitted), quoted in *Devall*, 15 La. at 578-79. Translated by Patricia McKay, under the auspices of the Center of Civil Law Studies. At present, no official English translation of Troplong's works exists. The French version reads:

[J]e ne comprends pas pourquoi la mauvaise foi d'un possesseur intermédiaire empêcherait la jonction des possesseurs de bonne foi qui ont précédé; car il suffit que la bonne foi ait existé au commencement, et la mauvaise foi survenue plus tard ne vicie pas la possession. Qu'importe donc que l'un des possesseurs soit de mauvaise foi, si sa possession n'est pas celle qui ouvre le temps de la prescription?

(footnote omitted).

being able to object to his bad faith. It is as if the vendor himself had come to be in bad faith following his acquisition of the property.¹⁷

With this interpretation of article 3482 firmly in hand, the supreme court in *Devall* confidently stated, "This doctrine is, *undoubtedly*, a proper and correct interpretation of the article [3482] . . ."¹⁸ Succinctly stated, *Devall* stood for the proposition that once the elements necessary for the ten-year prescriptive period were established, *i.e.*, good faith, a just title, corporeal possession, and a prescriptable object, any subsequent purchaser, even if in bad faith, could tack his period of possession to that of the previous possessors in order to complete the ten-year prescriptive period begun by the initial good faith possessor.¹⁹

Over a hundred years later, the soundness of this proposition was

17. 2 M. TROPLONG, *DROIT CIVIL EXPLIQUÉ—PRESCRIPTION* nos. 937 & 938 (4th ed. 1857) (footnotes omitted), quoted in *Devall*, 15 La. at 579. Translated by Patricia McKay, under the auspices of the Center of Civil Law Studies. The French version reads:

Puisque le moment initial de l'acquisition est le seul point à considérer, il s'en suit que lorsqu'un individu a possédé de bonne foi un héritage et qu'il meurt avant l'accomplissement de la prescription, l'héritier qui lui succède continuera valablement à prescrire, quoiqu'il soit de mauvaise foi . . .

De même, le successeur à titre particulier qui acquiert de mauvaise foi un immeuble possède avec titre et bonne foi par son vendeur, peut continuer la prescription commencée par ce dernier et la conduire à fin sans qu'on puisse lui objecter sa mauvaise foi. C'est à peu près comme si le vendeur lui-même fût devenu de mauvaise foi depuis son acquisition.

(footnotes omitted).

18. 15 La. at 579 (emphasis added).

19. The interpretations of article 3482 made by the supreme court in *Devall* and *Bartlett* apply only to one specific situation involving transfers of title to immovable property, *i.e.*, when a good faith possessor sells land to a purchaser who is in bad faith (one who knows or should know that he is not purchasing from the true owner) before the ten-year acquisitive prescriptive period has accrued in the vendor's favor. This note does not specifically deal with any of the following types of transfers: (1) where both vendor and vendee are in good faith, (2) where both vendor and vendee are in bad faith, and (3) where the vendor who has possessed only in bad faith sells land to a vendee in good faith. In the first two transfers, the vendee simply tacks his time of possession to his vendor's possession in order to complete the applicable prescriptive period begun by the vendor, *i.e.*, ten and thirty years respectively. *Barnett v. Botany Bay Lumber Co.*, 172 La. 205, 133 So. 446 (1931); *Evasovich v. Cognevich*, 159 La. 1035, 106 So. 556 (1925). However, the last transfer enables the vendee to prescribe in either of two ways. If, at the time of purchase, less than ten years remain to complete the thirty-year prescriptive period begun by the bad faith vendor, the vendee may tack his possession to his vendor's possession and complete the thirty-year prescriptive period. But, if more than ten years remain to complete the thirty-

questioned in *Arnold v. Sun Oil Co.*²⁰ The supreme court recognized that Troplong's logical analysis had been criticized.²¹ However, as one writer observed, "justification for the *Devall* doctrine can be found in social philosophy rather than in the confines of logic."²² After discussing several Louisiana cases which followed the *Devall* doctrine, the court stated, "However questionable the soundness of this doctrine of law may be, it is a well-settled rule of property."²³

Indeed, "[t]his interpretation [had] become the rule in our jurisprudence."²⁴ Even as late as 1976, the Louisiana Supreme Court stated that "it is sufficient that the possession commenced in good faith, and the fact that it is afterwards held in bad faith, whether by the original possessor or his successor in title, does not affect the running of the ten-year acquisitive prescription."²⁵ Surely, a rule of property law so well established and so often relied upon would require compelling reasons for its abrogation.

In *Bartlett*, the defendant, allegedly knowing that she was not the true owner,²⁶ sold the land to a good faith vendee, who went into possession of the property.²⁷ Less than two years later, the defendant repurchased the property and retained possession from that time. Never before had a Louisiana court been confronted with a fact situation where the selling and repurchasing of land was done in order to benefit from the good faith of another.²⁸ Thus the potential for abuse

year period, tacking will be less advantageous and the vendee will want to begin his own prescriptive period because he is able to take advantage of his own good faith, thereby becoming owner in only ten years. See Comment, *infra* note 21, at 110; 1 PLANIOL, *infra* note 30, pt. 2, no. 2677.

20. 218 La. 50, 48 So. 2d 369 (1949).

21. Comment, *Tacking of Possession for Acquisitive Prescription*, 8 LA. L. REV. 105 (1947).

22. *Id.* at 112. The same author also wrote that the "*Devall* doctrine, though questionable in logic, is well settled from a practical viewpoint, and a reversal in that respect is a rather remote possibility." *Id.*

23. 218 La. at 83, 48 So. 2d at 380.

24. *Liuzza v. Heirs of Nunzio*, 241 So. 2d 277, 281 (La. App. 1st Cir. 1970).

25. *Jackson v. D'Aubin*, 338 So. 2d 575, 582 n.8 (La. 1976) (emphasis added).

26. On remand, the district court held that the defendant was in good faith at the time of her purchase from Brown. *Bartlett v. Calhoun*, No. 12,519 (7th La. Jud. Dist. Ct. July 15, 1982).

27. *Bartlett v. Calhoun*, 404 So. 2d 516, 517 (La. App. 3d Cir. 1981). At this point the requirements necessary to prescribe by means of acquisitive prescription of ten years were satisfied.

28. After exhaustive research, no fact situation could be found in which a person possessed land in bad faith, sold it to a good faith possessor, later bought it back before the ten-year prescriptive period had run, and then claimed ownership based on ten-year acquisitive prescription. *Liuzza v. Heirs of Nunzio*, 241 So. 2d 277 (La.

of the *Devall* doctrine became evident. Although Mrs. Calhoun may not have intended from the outset to take advantage of the *Devall* doctrine, the *Bartlett* court undoubtedly contemplated that such could have been the case.

In its analysis of article 3482, the majority differentiated between transfers by universal title and transfers by particular title.²⁹ The majority agreed with the French commentators³⁰ that a universal successor's possession is simply a continuation of the deceased's possession. Consequently, the universal successor is bound by his author's good or bad faith and is unable to alter the prescriptive rights transmitted to him. On the other hand, a possessor by particular title "commences a new possession, completely distinct from that of his grantor."³¹ A majority of the French commentators³² agree that there is a distinction to be made. The court quoted from Planiol concerning the implications of this distinction.

Assuming that the preceding possessor was himself in the process of prescribing, several combinations may arise. If both of them were entitled to prescribe within from ten to twenty years, the new possessor would certainly have a right to consolidate the two possessions. The same result would obtain if neither of them was entitled to prescribe within these terms. In both cases, the thirty year period would be the only one available. In these two cases, the two successive possessions of the successor and of his author

App. 1st Cir. 1970) is, however, analogous. In *Liuzza*, an heir, who also was the administrator of the estate of the deceased, although knowing of the existence of other heirs, caused the judicial sale of succession property in disregard of their claims to the property. He bought the land eight months later from the purchaser at the administrative sale, who was admittedly in good faith. The circuit court followed *Devall* and held that the heir was owner because of ten-year acquisitive prescription, despite his bad faith.

29. A successor by universal title receives title through a testamentary disposition. A successor by particular title usually receives title by an act of sale. See LA. CIV. CODE arts. 1606, 1612, 1625, & 3556(28).

30. See 1 M. PLANIOL, CIVIL LAW TREATISE pt. 2, nos. 2661 & 2674 (12th ed. La. St. L. Inst. trans. 1959) [hereinafter cited as PLANIOL]; 2 C. AUBRY & C. RAU, DROIT CIVIL FRANCAIS § 218 (7th ed. Esmein 1961) in J. MAYDA, 2 CIVIL LAW TRANSLATIONS 365 (1966) [hereinafter cited as AUBRY & RAU]; 28 G. BAUDRY-LACANTINERIE & A. TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL—PRESCRIPTION nos. 346 & 347 (4th ed. 1924) in J. MAYDA, 5 CIVIL LAW TRANSLATIONS 181 (1972) [hereinafter cited as BAUDRY-LACANTINERIE].

31. *Bartlett*, 412 So. 2d at 600 (quoting 28 BAUDRY-LACANTINERIE, *supra* note 30, no. 350, at 184).

32. 28 BAUDRY-LACANTINERIE, *supra* note 30, nos. 350 & 351; 2 AUBRY & RAU, *supra* note 30, § 218, at 365-66.

may be added together. They are of the same nature and of the same quality.

But if it be assumed that the two successive possessors are not in the same position, from the standpoint of prescription—but one of them have a just title and being in good faith—complications arise. They are solved by this very simple rule: The years that apply to the thirty years prescription, which requires neither just title nor good faith, cannot be used in completing the prescription running from ten to twenty years. The latter prescription requires that both conditions exist. But, on the contrary, the years that have run in connection with this favored prescription may be counted in computing the thirty years prescription. All that it requires is possession.³³

The *Bartlett* majority³⁴ interpreted article 3482 as envisioning “only one possession and applying when property is transferred to a universal successor.”³⁵ In conclusion, the majority held that for a particular successor to cumulate his and his author’s possession for ten-year acquisitive prescription, “both must have *all* the statutory characteristics and conditions required for the completion of [this] prescription.”³⁶

As a purchaser, the *Bartlett* defendant is a successor by particular title;³⁷ therefore, she does not receive the benefit of her vendor’s good faith under article 3482. Since good faith is a necessary element of acquisitive prescription of ten years, the resolution of whether defendant was in good or bad faith when she reacquired the land from Brown is essential to defendant’s success or failure. If she was in good faith, she became owner in December, 1959.³⁸ On the other hand, if she was in bad faith, the filing of suit by plaintiff in 1977 interrupts her possession³⁹ and precludes her claim of ownership, which she could not have asserted until December, 1979.⁴⁰

33. 412 So. 2d at 600-01 (quoting 1 PLANIOL, *supra* note 30, pt. 2, nos. 2676 & 2677).

34. Justice Marcus dissented. He saw “no compelling reason to change [Devall’s interpretation of article 3482] at this time.” 412 So. 2d at 602.

35. 412 So. 2d at 600.

36. *Id.* (emphasis in original).

37. See note 29, *supra*.

38. See note 1, *supra*.

39. LA. CIV. CODE art. 3518 [3462].

40. The thirty-year prescriptive period commenced in December, 1949, when Brown went into possession of the land. Even if defendant is in bad faith, she still can count her good faith vendor’s possession towards completion of the thirty-year prescriptive period applicable to her. *Bartlett*, 412 So. 2d at 601. See text at note 33, *supra*.

The analysis adopted by the majority is logically appealing, yet the distinction between transfers by universal title and transfers by particular title is apparently the sole basis for the majority's decision to overturn a rule of law in an area where the need for predictability and stability is the greatest. "Of all civil law institutions, prescription is the most necessary for social order."⁴¹ No practical reasons or policy considerations were expressed by the majority in *Bartlett* as impetus for their decision to overrule almost 142 years of jurisprudence.⁴² Although Louisiana courts have not adopted the common law rule of "stare decisis,"⁴³ judicial precedents are given great weight in Louisiana, and a subsequent court should not overrule an established rule of property simply because their interpretation of an article more readily suits the court's disposition than does the former interpretation.

The majority wrote that "it is *evident* that . . . C.C. art. 3482 . . . envisions only one possession,"⁴⁴ *i.e.*, possession by a single possessor, as distinguished from possession by two consecutive possessors succeeding each other by particular title. However, this interpretation is not as "evident" as the court assumes because another similar article, Civil Code article 3487, consistently has been interpreted in an opposite manner by Louisiana courts.⁴⁵ In describing the attributes of possession required for acquisitive prescription, Civil Code article 3487 provides:

To enable one to plead the prescription treated of in this paragraph, it is necessary that the possession be distinguished by the following incidents:

1. That the possessor shall have held the thing in fact and in right, as owner; when, however, it is only necessary to complete a *possession* already begun, the civil possession shall suf-

41. 28 BAUDRY-LACANTINERIE, *supra* note 30, no. 29, at 18.

42. See cases cited in notes 3 & 5, *supra*.

43. "In a jurisdiction such as Louisiana which applies civilian theories of legal method, prior judicial decisions do not represent law: They are merely judicial interpretations. They should therefore be overruled when not in accord with what is now determined to be the legislative intent." *Holland v. Buckley*, 305 So. 2d 113, 119-20 (La. 1974).

44. 412 So. 2d at 600 (footnote omitted) (emphasis added). Interestingly, both the *Devall* and *Bartlett* opinions use language which intimates that no other interpretation of article 3482 is plausible. See text at note 18, *supra*.

45. See text at notes 49-52, *infra*. See, *e.g.*, *Liner v. Louisiana Land & Exploration Co.*, 319 So. 2d 766, 774 (La. 1975); *Searles v. Costillo*, 12 La. Ann. 203 (1857). See also *Riseman, The Possessory Action in Louisiana*, 20 TUL. L. REV. 524, 534-35 (1946).

fice, provided it has been preceded by the corporeal possession.⁴⁶

Consequently, for either the ten-year or the thirty-year prescription to commence, one must initially possess the land corporeally (exercise physical authority over the land).⁴⁷ The last part of section one in article 3487, however, allows a possession begun corporeally to continue by means of civil possession (the continuation of possession solely by the intent to possess as owner, without actual physical possession of the land).⁴⁸ Although article 3487 deals with corporeal possession and article 3482 deals with good faith (both of which are necessary elements for ten-year acquisitive prescription), the two articles are identical in that they allow the possessor to continue enjoying the benefits of his initial corporeal possession and initial good faith when, at a later time, he no longer has corporeal possession or is in good faith.

The concept of continuing possession, in article 3487, was taken one step further in the landmark case of *Ellis v. Prevost*.⁴⁹ The supreme court had to decide whether plaintiff, who had only civil possession, had the right to maintain a possessory action based on his vendor's actual and corporeal possession of the land. The court decided "that the possession acquired by the plaintiff's vendor . . . ought to enure to the benefit of said plaintiff."⁵⁰ However, *Ellis* not only allows the subsequent possessor to maintain a possessory action without ever physically possessing the land himself but, more importantly, has been interpreted to mean that the physical possession necessary to begin acquisitive prescription is not required of subsequent purchasers if their vendor or some other ancestor in title corporeally possessed the land.⁵¹

46. (Emphasis added). Article 3487 was revised in 1982 and now appears as article 3476. The revised article requires the same attributes of possession.

47. LA. CIV. CODE arts. 3428 & 3430. The best expression of this concept is found in Civil Code article 3425, as amended by 1982 La. Acts, No. 187, § 1: "Corporeal possession is the exercise of physical acts of use, detention, or enjoyment over a thing."

48. LA. CIV. CODE arts. 3429 & 3431 [3426].

49. 19 La. 251 (1841).

50. *Id.* at 256.

51. See *Bennett v. Calmes*, 116 La. 598, 40 So. 911 (1906); *Levy v. Gause*, 112 La. 789, 36 So. 684 (1904); Johnson, *Good Faith as a Condition of Ten Year Acquisitive Prescription*, 34 TUL. L. REV. 671, 682-83 (1960). For example, assume *A* possessed the land corporeally between 1960 and 1962. *A*'s vendee, *B*, receives the benefit of *A*'s corporeal possession and may complete the ten-year prescriptive period in 1970 by tacking *A*'s possession to his possession without ever corporeally possessing the land himself. Even if *B* sold the land in 1965 to *C*, *A*'s corporeal possession still would inure to the benefit of *C*, who, by tacking, would complete the ten-year prescriptive period in five years (1970). All successive vendees, as long as there is no interruption of possession, receive the benefit of *A*'s corporeal possession.

Ellis and *Devall* are consistent in their respective interpretations of articles 3487 and 3482. Together, the two cases stand for the proposition that once possession begins corporeally and in good faith, subsequent lack of either by the original possessor or by his transferee, whether a transferee by universal title or by particular title, is immaterial. *Bartlett* destroys the symmetry established by *Ellis* and *Devall* by overruling the latter, and perhaps *Bartlett* undermines the vitality of the former as well.⁵²

The distinction between successors by universal title and successors by particular title made in *Bartlett* regarding the tacking issue is not as solid a basis for *Bartlett's* holding as it may first appear. Article 3448 provides that "[p]ossession is lost with the consent of the possessor: 1. When he transfers this possession to another with the intention to divest himself of it." A typical manner in which loss of possession by consent occurs is a sale. A sale is a transfer by particular title.⁵³ According to article 3448, the vendor's possession is not extinguished (as *Bartlett* contemplates), but is transferred to the vendee. Although *Bartlett* allows the vendee to tack the vendor's time of possession, possession encompasses more than time. For instance, under *Ellis*, the vendee receives the benefit of the vendor's corporeal possession, and formerly under *Devall*, the successor by particular title received the benefit of his vendor's good faith. Therefore, when the successor by particular title purchases the land, he is buying not only the land but also, arguably, an inchoate right: the vendor's expectation of becoming owner at the completion of the ten-year prescriptive period. Thus *Bartlett*, by requiring the vendee to commence a new possession of his own, necessarily denies the vendee all the rights flowing from the vendor's possession.

This concept of transferring possession also is recognized in Act 187 of 1982, which amended the occupancy, possession, and prescription articles of the Civil Code. Although Act 187 deletes part one of article 3448, comment (b) to the new article 3433 states that "a transfer of possession is not a loss of possession. It is true that the possessor ceases to possess, but his possession is *continued* by the transferee who benefits by tacking."⁵⁴ Comment (b) then refers to new Civil Code article 3442, which states, "The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession." Article 3442 and comment (b) to article 3433 indicate that the transferee does not commence a new possession; instead, the

52. See text at notes 55-59, *infra*.

53. See note 29, *supra*.

54. (Emphasis added).

transferee continues the transferor's possession by tacking not only his corporeal possession and his years of possession but, arguably, his possession in *good faith* as well. Neither new article 3442 nor former article 3448 indicates that the only part of the possession tacked is the years of the transferor's possession, nor does either article draw a distinction regarding tacking between successors by universal title and successors by particular title. Although such a distinction may exist according to many of the French commentators and the *Bartlett* majority, the distinction made in regard to tacking is not consistent with the above Civil Code articles.

In fact, this inconsistency and the language in *Bartlett* that a particular successor can cumulate his and his author's possession only if "*both . . . have all the statutory characteristics and conditions required for the completion of prescription*"⁵⁵ may have overruled *Ellis* by implication. A literal application of this language would require each successor by particular title to establish corporeal possession through his own efforts in order to commence his own prescriptive period.⁵⁶ Civil possession (the intent to possess as owner) would continue to benefit the possessor who has at one time possessed corporeally, but a literal application of this language would deny the vendee the benefit of the previous corporeal possession of his vendor or any other ancestor in title.⁵⁷

55. 412 So. 2d at 600 (emphasis in original).

56. See *supra* note 51 and accompanying text.

57. Another note could be written solely on the problems such an interpretation would cause. Several questions arise immediately. (1) Can an owner maintain a possessory action if he has never corporeally possessed the property when his author in title did? This question, which was answered affirmatively in *Ellis* (see *supra* text accompanying notes 49-51), is now governed by article 3660 of the Code of Civil Procedure which allows a possessory action by one who "has the corporeal possession thereof, or civil possession thereof preceded by corporeal possession by him or his ancestors in title." (emphasis added). (2) Assuming corporeal possession by an author in title, would the period for acquisitive prescription continue running from the commencement of actual physical possession by the vendee or would it continue running from the time of purchase if, sometime during the prescriptive period, the vendee established corporeal possession? See generally LA. CIV. CODE art. 3483, comment (d), as amended by 1982 La. Acts, No. 187, § 1. Comment (d) states: "Prescription commences to run from the date of filing for registry rather than from the date of entry into possession." See also Note, *Working With the New Civil Code Property Scheme: The 1982 Book III Revision*, 43 LA. L. REV. 1079, 1083-84 (1983). (3) Would ten-year acquisitive prescription commence if the vendee was in good faith at the time of purchase but learned before he began his corporeal possession that he did not buy from the true owner? See *supra* note 17 and accompanying text; 1 PLANIOL, *supra* note 30, pt. 2, no. 2669; note 75, *infra*.

However, the *Ellis* doctrine has become an accepted rule of property in Louisiana, and therefore it is probably too strong to be overruled by mere implication. Furthermore, in the new Civil Code articles dealing with possession and prescription (enacted after *Bartlett*), comment (c) to article 3424 contains an apparent confirmation of the rule established by *Ellis*.⁵⁸ The troubling language found in *Bartlett* which declares that each particular successor must "have *all* the statutory characteristics and conditions"⁵⁹ necessary for acquisitive prescription is overly broad and should not serve as authority for the demise of the *Ellis* doctrine.

The change in property law brought about so abruptly by *Bartlett* undoubtedly is welcomed by true owners because *Bartlett* extends the time period that true owners had under *Devall* for asserting their ownership against adverse possessors. To illustrate the effect of *Bartlett*, consider a possessor in good faith who commences the ten-year prescriptive period in 1970. If during the next ten years he sells the land to a vendee in bad faith, the true owner, because of *Bartlett*, may assert his right of ownership up to the year 2000 (absent a subsequent good faith possession for ten years), because the bad faith vendee must resort to the prescription of thirty years. (The applicable year is 2000 and not thirty years from the date of purchase because the bad faith vendee can still tack his possession to his predecessor's possession for purposes of thirty-year acquisitive prescription.)⁶⁰ Consequently, the bad faith vendee is exposed to a petitory action by the true owner for at least twenty additional years,⁶¹ while under

58. "One may acquire possession without taking corporeal possession of the thing by means of a transfer from one who has satisfied the requirements of this article. In such a case, the transferor's corporeal possession is tacked to the transferee's intent to own the thing. See *Ellis v. Prevost*, 19 La. 251 (1841)." LA. CIV. CODE art. 3424, comment (c), as amended by 1982 La. Acts, No. 187, § 1.

59. 412 So. 2d at 600 (emphasis in original).

60. See note 40, *supra*.

61. For example, assume the good faith vendor began his ten-year prescriptive period in 1970 and sold to the bad faith vendee in 1975. The bad faith vendee may tack his vendor's time of possession (five years), but he has twenty-five years left before completing the thirty-year prescription. The twenty-five years consist of the five years remaining in the ten-year period (after which, under the *Devall* interpretation, title would have vested in the vendee) plus the twenty years left to complete the thirty-year period (now required after *Bartlett*). The time remaining in the vendee's prescriptive period will vary depending upon the number of years his vendor had possessed the land. However, the prescriptive period remaining may be less than twenty years if the vendor's ancestors in title corporeally possessed the land and no interruption of possession occurred.

Devall the true owner would lose a petitory action brought after 1980, regardless of whether the possessor in good faith sold to a vendee in bad faith before 1980.⁶²

Despite the natural sympathy one may feel for true owners, the *Devall* rule was not as harsh to them as it may first appear. Consider, for example, that *A* acquires land in good faith and satisfies the other elements necessary for ten-year acquisitive prescription. If during the next ten years *A* learns that he is not the true owner, Civil Code article 3482 nevertheless allows *A* to become the owner at the end of the ten-year period. Because the *Devall* court focused on the true owner and his continuing inertia in asserting his ownership rights, it saw no reason to distinguish the above situation from the situation in which *A* sells to a bad faith purchaser before ten-year acquisitive prescription accrues in his favor. In the latter situation, the true owner has done nothing warranting better treatment. In fact, he continues to allow the land to sit idle and out of commerce, contrary to public policy in the area of property law. Solely as a result of *A*'s sale to a bad faith purchaser, *Bartlett* gives the true owner a "windfall." The *Bartlett* court seemed to focus on the adverse possessor and the moral element of good faith inherent in ten-year acquisitive prescription, for it held that a possessor who obtains possession by particular title and who has never been in good faith does not deserve the benefit of the shorter prescriptive period.

If applied retroactively, *Bartlett* would necessitate a reappraisal of any title based on acquisitive prescription of ten years⁶³ when a good faith possessor sold his property to a bad faith purchaser before prescription accrued in the vendor's favor. Consider again an instance in which a possessor in good faith commences ten-year acquisitive prescription in 1970. In 1975, he sells the land to a bad faith purchaser. Under the former jurisprudence, the bad faith purchaser would become owner in 1980. But if *Bartlett* is applied retroactively, his status as owner since 1980 is negated and he is relegated to the status

62. The effect of *Bartlett* possibly can be limited through the use of a lease-purchase agreement. The agreement would need to provide that the lease would last for the period of time necessary for the good faith vendor to complete the ten-year prescription, with the option to purchase exercisable after this period. The lessee/vendee, of course, would benefit as well by such an agreement because the title would be secured sooner. However, this situation involves a lessee/vendee who *knows* the lessor/vendor is not the true owner. Because of this, very few lessees would risk the investment, which might be lost because of an eviction.

63. In practice, titles usually are not warranted based on the shorter prescriptive period of ten years. However, the shorter prescriptive period becomes more valuable when litigation is required to establish ownership.

of an adverse possessor who must complete the thirty-year prescription, which would accrue in the year 2000. *Bartlett's* application of the longer prescriptive period inevitably increases the chances that interruption or suspension of prescription will occur.⁶⁴ Therefore, proof of ownership by means of prescription grows more difficult in many instances. The problem of establishing ownership could not be more acute than in a state such as Louisiana, where lucrative oil and gas interests accentuate any problems which may arise in establishing a valid title.⁶⁵

Although the retroactivity question arises most often in cases dealing with constitutional questions and criminal statutes, the Louisiana Supreme Court has applied judicial precedents prospectively in the area of property law,⁶⁶ even though such an application is the exception and not the rule.⁶⁷ In *Lovell v. Lovell*,⁶⁸ the Louisiana Supreme Court was concerned with the retroactive application of its determination that Louisiana's provision for alimony was "violative of the equal protection clauses of the state and federal constitutions"⁶⁹ because the provision unfairly discriminated between husband and wife. In deciding that the decision should be applied prospectively, the court weighed the following factors:

(1) The decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the merits and demerits must be weighed in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation; and (3) the inequity imposed by retroactive application must be weighed.⁷⁰

64. See LA. CIV. CODE arts. 3462-3472, as amended by 1982 La. Acts, No. 187, § 1.

65. Sixty-two of the sixty-four parishes in Louisiana have oil or gas production. There are approximately 28,755,200 acres of surface area in the state, and as of January 1, 1982, approximately 7,000,000 of these acres have proved productive, while 9,100,000 acres remain nonproductive but leased. Consequently, the proper establishment of ownership of over 56% of the land area in Louisiana affects the lucrative oil and gas interests of many. THE OIL PRODUCING INDUSTRY IN YOUR STATE: 1982 at 49 (Petroleum Indep. Publishers, Inc. 1982).

66. See *Lake, Inc. v. Louisiana Power & Light Co.*, 330 So. 2d 914 (La. 1976).

67. *Jackson v. Doe*, 296 So. 2d 323 (La. 1974).

68. 378 So. 2d 418 (La. 1979).

69. *Id.* at 421.

70. *Id.* at 421-22. These factors originally were expressed by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). For a recent discussion of these factors, see *Succession of Clivens*, 426 So. 2d 585 (La. 1983) (on rehearing).

These three factors weigh heavily in favor of applying *Bartlett* prospectively only.

According to the first factor, *Bartlett* should have only a prospective impact. *Bartlett* establishes a new principle of law in Louisiana which overrules clear past precedent in the form of a "rule of property."⁷¹ Moreover, no previous decision or statutory change foreshadowed *Bartlett's* holding. Indeed, the supreme court relied on the *Devall* doctrine as recently as 1976 in *Jackson v. D'Aubin*.⁷²

The second prong in *Lovell* militates against a retroactive application since such an application would retard the effect of article 3482.⁷³ Under canon law, which heavily influenced the content of the French Civil Code, good faith was required throughout the ten-year prescriptive period.⁷⁴ Article 3482, which Louisiana adopted from the French Civil Code,⁷⁵ tempers the canon law requirement. It enables a possessor

71. See cases cited in note 3, *supra*, and text at note 23, *supra*.

72. 338 So. 2d 575 (La. 1976). One question in *Jackson* was whether the legatee was in good faith for purposes of LA. R.S. 9:5682 (as it appeared prior to 1975 La. Acts, No. 642, § 1). Answering this question in the affirmative, the court noted that the good faith or bad faith of the purchaser of the legatee's interest at the tax sale was not relevant to its inquiry since the prescriptive period began in good faith and subsequent bad faith "by the original possessor or his successor in title, does not affect the running of the ten-year acquisitive prescription." 338 So. 2d at 582 n.8 (emphasis added).

73. What should serve as the "rule in question" under the second prong of *Lovell* is unclear. Generally, courts have considered as the "rule in question" the new holding which overruled past precedents or declared a new rule. Therefore, the courts considered the history and purpose of the new holding and the effect of its retroactive application. For instance, in the recent case of *Succession of Clivens*, 426 So. 2d 585 (La. 1983) (on rehearing), the Louisiana Supreme Court had to decide to what extent, if any, its holding in *Succession of Brown*, 388 So. 2d 1151 (La. 1980) (that former Civil Code article 919 was unconstitutional) should be applied retroactively. The court weighed the merits and demerits by considering both the purpose and effect of its holding in *Brown* and whether a retroactive application of *Brown* would further or retard its holding. The court decided on a limited retroactive application of *Brown* to the effective date of the 1974 Louisiana Constitution, January 1, 1975. Other decisions have examined the statute with which a new holding was concerned and the effect that a retroactive application of the new holding would have on the intended purpose of the statute. For instance, *Lovell* discussed the objectives of Civil Code article 160 prior to its amendment by 1979 La. Acts, No. 72, § 1, and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) examined the purpose underlying the adoption of state law as federal law in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1976 & Supp. II 1978). *Bartlett* dealt with the application of article 3482, the "rule in question"; therefore, the effect *Bartlett* has on the operation of article 3482 should be considered.

74. 28 BAUDRY-LACANTINERIE, *supra* 30, at no. 685; 1 PLANIOL, *supra* note 30, pt. 2, no. 2669, n.7; 2 AUBRY & RAU, *supra* note 30, § 218, 365 n.35.

75. "It suffices that good faith existed at the time of acquisition." FRENCH CIV. CODE art. 2269 (J. Crabb trans. 1977).

to acquire ownership through acquisitive prescription of ten years even though during those ten years he may learn that he is not the true owner.⁷⁶ Since article 3482 does not require good faith throughout the prescriptive period, it enables property titles to stabilize more quickly because the ten-year acquisitive prescriptive period, rather than the thirty-year period, is more often available. To this extent, *Bartlett* is inimical to the operation of article 3482 because it limits the instances in which the ten-year prescriptive period is applicable and, therefore, has an adverse impact on the stability of titles.

Third, substantial inequities will result if *Bartlett* is given retroactive effect since many property owners have relied on the *Devall* doctrine. Since *Bartlett* extends the period in which the true owner may assert his ownership, many titles which were secure before *Bartlett* would be susceptible to being proved defective. Clearly, the overall stability of land titles would be adversely affected. Also, if *Bartlett* is applied retroactively, the extra twenty years⁷⁷ given the record owner for asserting his ownership may expose many good faith vendors to unforeseen liability. For instance, if the land was sold with warranty, the bad faith vendee may have an action in warranty to recover the price from his vendor.⁷⁸ Exposing the good faith vendor to such potential liability is inequitable when the warranty action is brought after the good faith vendor would have become owner had he not sold, because of his completion of the ten-year prescriptive period. What the supreme court wrote in *Lake, Inc. v. Louisiana Power & Light Co.*⁷⁹ after overruling the *St. Julien* doctrine,⁸⁰ another "rule of property," could well be written about this situation:

However, the [*Devall*] doctrine has become a rule of property, probably relied on by [society] since its establishment. Because the doctrine has been so entrenched and repeatedly affirmed by [the supreme] court, the ruling in this case . . . will be prospec-

76. See text at notes 15-17, *supra*.

77. See *supra* note 61 and accompanying text.

78. See LA. CIV. CODE arts. 2133 & 2506; *Boyer v. Amet*, 41 La. Ann. 721, 6 So. 734 (1889); *Hall v. Nevill*, 3 La. Ann. 326 (1848). If title is passed without warranty, the vendee will recover nothing because he is in bad faith and, therefore, is presumed to assume the risk of eviction. LA. CIV. CODE art. 2505; *New Orleans & Carrollton R.R. v. Jourdain's Heirs*, 34 La. Ann. 648 (1882). Of course, an express stipulation that the buyer purchases at his risk and peril will cut off any claims by the vendee against the vendor. *New Orleans & Carrollton R.R. v. Jourdain's Heirs*, 34 La. Ann. 648 (1882). The common law transfer known as the "quit-claim" deed also bars any recovery by the vendee from the vendor because of eviction. See *Benton v. Sentell*, 50 La. Ann. 869, 24 So. 297 (1898).

79. 330 So. 2d 914 (La. 1976).

80. *St. Julien v. Morgan La. & Tex. R.R.*, 35 La. Ann. 924 (1883).

tive only, affecting [acquisitive prescription periods accruing] after the finality of this judgment.⁸¹

Despite the harsh facts of *Bartlett*, the court could have reached an equitable result without overruling an established rule of property law. The court could have prevented the defendant, who allegedly was always in bad faith, from selling to the good faith possessor and subsequently repurchasing in order to benefit from the vendor's good faith by holding that an initial bad faith possessor cannot change the thirty-year prescriptive period applying to him simply by selling and buying back from a good faith possessor. Arguably, the court could have decided that this fact situation was not provided for in the Civil Code; it then could have reached a decision based on equity principles, as provided for in Civil Code article 21.

A major deficiency in *Bartlett* is the majority's failure to explain fully why a well-settled codal interpretation that had been applied in a practical manner for so many years needed changing.

The [majority should offer] some functional or practical view why, at this late date, [they] should reject the Louisiana interpretation of Article [3482] which has worked so well for Louisiana conditions. . . . [T]he majority view is a respectable interpretation adopted (for French conditions) by a majority of French commentators.

However, the [traditional] Louisiana interpretation is equally respectable and equally available. To discard it for dictionary reasons, without weighing the functional or practical values, seems to [be] (to exaggerate, for the moment) an abdication of the judicial function in favor of blind application of "rules" without regard to their purpose or reason.⁸²

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81. 330 So. 2d at 918.

82. *Nash v. Whitten*, 326 So. 2d 856, 864 (La. 1976) (Tate, J., dissenting).