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latter case, the landlord is not relieved of all responsibility, because he is still liable for vices and defects in parts of premises not leased, in common areas, for injuries caused by his own negligence, and for injuries involving defects which he knew or should have known of.

A lessor who is not the owner of leased premises guarantees the lessee against vices in the property. The language of Article 2695 containing this warranty has been followed in limiting it to the lessee alone. This warranty to a sub-lessee, it seems, may be dispensed with by the sub-lessee assuming responsibility. However, it remains to be seen how a third person will be affected thereby.

Ben R. Miller, Jr.

Real Actions To Determine Ownership or Possession Under the Proposed Louisiana Code of Civil Procedure

Under present Louisiana law, rights of ownership and possession of immovables are asserted in four principal real actions.¹ The petitory action and the possessory action are provided for expressly in the Code of Practice;² the action of jactitation is a creature of jurisprudence;³ and the action to establish title was created by statute.⁴ Firmly embraced within this group of actions is the fundamental civilian distinction between an action to determine possession and an action to determine ownership. Which action a litigant should employ depends essentially upon whether he or the opposing litigant, or neither, is in possession of the contested immovable.

Because of the inflexibility of the present real actions and the technical manner in which the rules applicable thereto have been applied by the courts, they have been criticized as hypertechnical and unworkable.⁵ The Louisiana State Law Institute was in-

1. LA. CODE OF PRACTICE art. 4 (1870): "A real action is that which relates to claims made on immovable property, or to the immovable rights to which they are subjected. . . ."

For a comprehensive treatment of present real actions in Louisiana, see JOHNSON, LOUISIANA REAL ACTIONS (1959).

2. LA. CODE OF PRACTICE arts. 5, 43 (petitory action); 6, 46 (possessory action) (1870).

3. *Riley v. Kaempfer*, 175 So. 884, 886 (La. App. 1937): "A jactitation or slander of title action is a creature of our jurisprudence. It is not provided for in the codal or statutory laws of this state."

4. LA. R.S. 13:5062 (1950), formerly La. Acts 1908, No. 38.

5. Comment, *The "Writ" System in Real Actions*, 22 TUL. L. REV. 459 (1948).

structed by the legislature in 1948 to prepare a comprehensive projet for the revision of the Louisiana Code of Practice.⁶ Actual work by the Law Institute pursuant to this legislative mandate commenced late in 1950 and is now ready for legislative consideration. Among the myriad of changes encompassed by the proposed Code of Civil Procedure are rules which will greatly modify the system of real actions now prevailing. The purpose and scope of this Comment is to conduct a brief survey of the present real actions to determine ownership and possession, and to examine the impact that the more important changes in the proposed code will exert on these actions.

Petitory Action Under Present Law

The petitory action is brought by one out of possession who is alleging ownership of an immovable, or of a real right, against another in possession, in order to determine ownership.⁷ The plaintiff must allege in his petition: (1) that he is the owner of the immovable or real right;⁸ and (2) that the defendant has the actual possession of the property.⁹ The petition must include a proper description of the property¹⁰ and conclude with the prayer that plaintiff be recognized as the owner of the property and that the opposing litigant be ordered to deliver possession to him.¹¹ It is incumbent upon the plaintiff to prove every fact necessary to establish title in himself, for his action rests essen-

6. La. Acts 1948, No. 335.

7. LA. CODE OF PRACTICE art. 5 (1870): "The petitory action is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person having the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it, to which he is entitled."

8. Haas v. Irion, 125 La. 1034, 52 So. 149 (1910); Edwards Co. v. Dunnington, 58 So.2d 225 (La. App. 1952).

9. LA. CODE OF PRACTICE arts. 5, 43 (1870); Thurman v. Hogg, 225 La. 263, 72 So.2d 500 (1954); Whalen v. Davis, 200 La. 1066, 9 So.2d 424 (1942); Allison v. Maroun, 193 La. 286, 190 So. 408 (1939); Cherami v. Cantrelle, 174 La. 995, 142 So. 150 (1932); Bossier's Heirs v. Jackson, 114 La. 707, 38 So. 525 (1905); Girard's Heirs v. New Orleans, 13 La. Ann. 295 (1858); Dreux v. Kennedy, 12 Rob. 489 (La. 1846); Henderson v. Graham, 199 So. 439 (La. App. 1940).

10. Pittman v. Gulf Refining Co., 141 F.2d 478 (5th Cir. 1944); Wood v. Mayo, 230 La. 389, 88 So.2d 705 (1956); Cupples v. Harris, 202 La. 336, 14 So.2d 609 (1942); Daigle v. Calcasieu Nat. Bank, 200 La. 1006, 9 So.2d 394 (1942); Harrill v. Pitts, 194 La. 123, 193 So. 562 (1940); Smith v. Chappell, 177 La. 311, 148 So. 242 (1933); Ducre v. Milner, 165 La. 433, 115 So. 646 (1928); Bayard v. Baldwin Lbr. Co., 157 La. 994, 103 So. 290 (1925); Wilfert v. Duson, 131 La. 21, 58 So. 1019 (1912).

11. Smith v. Chappell, 177 La. 311, 148 So. 242 (1933); Ramos Lbr. & Mfg. Co. v. Labarre, 116 La. 559, 40 So. 898 (1905); Young v. Anderson, 43 So.2d 280 (La. App. 1949); A. J. Hodges Ind. v. Fobbs, 39 So.2d 91 (La. App. 1949).

tially on the strength of his own title and not on the weakness of his opponent's.¹² However, if the defendant has possession without a title translatable of ownership, the plaintiff need only establish a superior title in himself, as against the possessor.¹³ Should the plaintiff fail to allege that the defendant is in actual possession, an exception of no cause of action will be sustained and the suit dismissed. Dismissal of the suit will result also if, on the trial on the merits, the plaintiff is unable to prove his allegations of possession.¹⁴ If no exception is tendered, the defendant must file an answer; and the usual issue made by the answer is that of title. Then, the court will decide on the merits whether the plaintiff will prevail in his claim to the immovable or real right in dispute.

Action To Establish Title Under Present Law

The action to establish title to real estate is a litigant's remedy against an adverse claimant where neither is in actual possession and both claim by recorded title.¹⁵ The petition must allege the following: (1) that neither claimant is in actual pos-

12. LA. CODE OF PRACTICE art. 44 (1870): "The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand." *Blevins v. Manufacturer's Record Publishing Co.*, 235 La. 708, 105 So.2d 392 (1958); *Collins v. Sun Oil Co.*, 223 La. 1094, 68 So.2d 184 (1953); *Dugas v. Powell*, 197 La. 409, 1 So.2d 677 (1941); *Chachere v. Superior Oil Co.*, 192 La. 193, 187 So. 321 (1939); *Cook v. Martin*, 188 La. 1063, 178 So. 881 (1938); *Smith v. Chappell*, 177 La. 311, 148 So. 242 (1933); *Verdun v. Gilmore*, 128 La. 1063, 55 So. 675 (1911); *Millaudon v. Ranney*, 18 La. Ann. 196 (1866); *DeVille v. Robertson*, 108 So.2d 681 (La. App. 1959); *Simmons v. Jones*, 68 So.2d 663 (La. App. 1953); *Edwards Co. v. Dunnington*, 58 So.2d 225 (La. App. 1952); *Niette v. Stringfellow*, 3 So.2d 911 (La. App. 1941).

13. *Hutton v. Adkins*, 186 So. 908 (La. App. 1939); *Peters v. Crawford*, 185 So. 716 (La. App. 1939); *Griggs v. Martin*, 170 So. 355 (La. App. 1936); *Mower v. Barrow*, 16 La. App. 227, 133 So. 782 (1931); *Zeringue v. Williams*, 15 La. Ann. 76 (1860).

14. As to plaintiff's failure to allege or prove possession in the defendant, see *Cherami v. Cantrelle*, 174 La. 995, 142 So. 150 (1932); *Girard's Heirs v. New Orleans*, 13 La. Ann. 295 (1858); *Barnes v. Gaines*, 5 Rob. 314 (La. 1843); *Brown v. Mayfield*, 45 So.2d 912 (La. App. 1950); *A. J. Hodges Ind. v. Fobbs*, 39 So.2d 91 (La. App. 1949).

15. LA. R.S. 13:5062 (1950): "In all cases where two or more persons lay claim to land by recorded title and where neither of the claimants are in the actual possession of the land so claimed, either of the claimants may bring suit against one or all the adverse claimants, and for that purpose may join one or more adverse claimants in the same suit as defendants, to have the titles to the land adjudicated upon by the court having jurisdiction of the property. It shall not be necessary for the plaintiff to allege or prove possession in himself or the defendants. This action shall be known as the action to establish title to real estate. The judge shall decide which of the claimants are the owners of the land in dispute, provided such judgment shall in no case be res adjudicata as to persons not made parties to the suit."

session;¹⁶ (2) that both parties claim under recorded titles;¹⁷ and (3) that the defendant is asserting an adverse claim.¹⁸ The petition must also include a proper description of the property.¹⁹ The legislature in creating the action to establish title apparently intended that the court would weigh the competing claims of ownership and that the plaintiff would have only the burden of proving a title better than that of his opponent.²⁰ However, the more recent cases appear to hold that the plaintiff has the same burden of proving valid title as is imposed upon a plaintiff in the petitory action.²¹ For this reason, these decisions have been criticized as erroneous.²²

The Broadened Petitory Action Under Proposed Code

Article 3651 of the proposed Code of Civil Procedure provides:

"The petitory action is one brought by a person who claims the ownership, but who is not in possession, of immovable property or of a real right, against another *who is*

16. *Duffoure v. Constantin*, 189 La. 826, 181 So. 183 (1938); *Long v. Chailan*, 187 La. 507, 175 So. 42 (1937); *Aaron v. Pitts*, 186 La. 116, 171 So. 713 (1936); *Charnley v. Edenborn*, 163 La. 945, 113 So. 156 (1927); *Doiron v. Vacuum Oil Co.*, 164 La. 15, 113 So. 748 (1927); *Griffing v. Taft*, 151 La. 442, 91 So. 832 (1922); *City of Baltimore v. Lutcher*, 135 La. 873, 66 So. 253 (1914); *McHugh v. Albert Hanson Lbr. Co.*, 129 La. 680, 56 So. 636 (1911); *Henry v. Radisciah*, 86 So.2d 635 (La. App. 1956); *Ducron v. Couret*, 82 So.2d 782 (La. App. 1955); *Doll v. Dearie*, 41 So.2d 84 (La. App. 1949); *Blanchard v. Martel*, 146 So. 480 (La. App. 1933); *Duson v. Hunsicker*, 9 La. App. 657, 120 So. 86 (1929); *Wilson v. Ferguson*, 6 La. App. 536 (1927); *Bodcaw Lbr. Co. v. The Pardee Co.*, 3 La. App. 162 (1925).

17. *Charnley v. Edenborn*, 163 La. 945, 113 So. 156 (1927); *Fortner's Heirs v. Good Pine Lbr. Co.*, 146 La. 11, 83 So. 319 (1919); *Blum v. Allen*, 145 La. 71, 81 So. 760 (1919); *City of Baltimore v. Lutcher*, 135 La. 873, 66 So. 253 (1914); *Blanchard v. Martel*, 146 So. 480 (La. App. 1933); *Schoultz v. Keller*, 7 La. App. 575 (1928).

18. McMAHON, LOUISIANA PRACTICE 266, n. 15.1 (1956 Supp.); *Fried v. Edmiston*, 218 La. 522, 50 So.2d 19 (1951).

19. *Long v. Chailan*, 187 La. 507, 175 So. 42 (1937); *Charnley v. Edenborn*, 163 La. 945, 113 So. 156 (1927); *City of Baltimore v. Lutcher*, 135 La. 873, 66 So. 253 (1914).

20. *Doiron v. Vacuum Oil Co.*, 164 La. 15, 113 So. 748 (1927); *Ellis v. Louisiana Planting Co.*, 146 La. 652, 83 So. 885 (1920); *Board of Com'rs v. Concordia Land & Timber Co.*, 141 La. 247, 74 So. 921 (1917); *Metcalf v. Green*, 140 La. 950, 74 So. 261 (1916); *City of Baltimore v. Lutcher*, 135 La. 873, 66 So. 253 (1914); *In re St. Vincent de Paul Benev. Ass'n of New Orleans*, 175 So. 140 (La. App. 1937); *Quaker Realty Co. Praying for Confirmation of Title*, 10 Orl. App. 79 (La. App. 1914). See also McMAHON, LOUISIANA PRACTICE 266-67, n. 15.1 (1956 Supp.); Note, 18 LOUISIANA LAW REVIEW 360 (1958).

21. *Albritton v. Childers*, 225 La. 900, 74 So.2d 156 (1954); *Stockstill v. Choctaw Towing Corp.*, 224 La. 473, 70 So.2d 93 (1953); *Dugas v. Powell*, 197 La. 409, 1 So.2d 677 (1941); *Thomas & Bullis v. Stricker Land & Timber Co.*, 181 La. 784, 160 So. 413 (1935); *Properties, Inc. v. Beckman*, 77 So.2d 161 (La. App. 1954).

22. McMahon, Louisiana Practice 266-67, n. 15.1 (1956 Supp.); Note, 18

in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership."
(Emphasis added.)

This article will effect a drastic change in the procedural law by combining the petitory action and the action to establish title. Frequently the plaintiff in a petitory action or action to establish title may not be certain whether the defendant is in possession or not. Such a situation obtains because possession is not solely a matter of fact but is frequently a matter that can be determined only by the application of principles of law that are themselves obscure.²³ To preclude dismissal of his suit in the event that he is mistaken about the defendant's possession, or lack of it, the plaintiff is forced to urge both actions alternatively.²⁴ The necessity for this procedure will be eliminated under the broadened petitory action which may be brought by the non-possessor against: (1) a person claiming ownership and in possession; (2) a person in possession who may not be asserting any adverse claim of ownership; or (3) a person claiming ownership and out of possession. In the case where the pleadings raise an issue as to the defendant's possession, this issue will have to be determined on the trial of the case on its merits.

The defendant's possession, or lack of it, will determine the burden of proof imposed on the plaintiff under Article 3653 of the proposed procedural code which provides:

"To obtain judgment recognizing his ownership of the immovable property or real right, the plaintiff in a petitory action shall:

"(1) Make out his title thereto, if the court finds that the defendant is in possession thereof; or

"(2) Prove a better title thereto than the defendant, if the court finds that the latter is not in possession thereof."

LOUISIANA LAW REVIEW 360 (1958); Comment, 29 TUL. L. REV. 617 (1955); Comment, 13 TUL. L. REV. 434 (1939).

23. See Comments, 20 TUL. L. REV. 524 (1946); 12 TUL. L. REV. 608 (1938).

24. A cause of action under La. Acts 1908, No. 38, was pleaded alternatively with the petitory action in the following cases: *Thomas & Bullis v. Stricker Land & Timber Co.*, 181 La. 784, 160 So. 413 (1935); *Crichton v. Krouse*, 142 So. 635 (La. App. 1932). See also *Carbajal v. Leopold Weil Building & Improvement Co.*, 146 La. 342, 83 So. 645 (1920); and *Blocker v. Continental Securities Corp.*, 157 So. 155 (La. App. 1934), where the plaintiff urged the jactitory action and the action to establish title alternatively because of being uncertain of his own possession.

Under virtually every system of law, the lawful possessor is entitled to remain in possession until he who asserts ownership proves his title.²⁵ Thus, possession determines the burden of proof. This is also the criterion which governs the imposition of the burden of proof in the present petitory, possessory, and jactatory actions. Under these actions, the claimant disturbing one in possession or asserting his ownership rights against one in possession must carry the burden of proof. It would appear, therefore, that where neither party is in possession, no necessity exists for the plaintiff to shoulder the burden of proving a valid title. This is the view embraced by the proposed procedural code; and where the defendant is not in possession, both titles are at issue and the better will prevail. Article 3653, therefore, will work a legislative overruling of recent jurisprudence²⁶ which has placed upon the plaintiff in an action to establish title the same burden of proving a valid title as is imposed upon a plaintiff in the petitory action where the defendant is admittedly in possession.

The proper party defendant under the proposed petitory action is the adverse claimant of ownership, or, if there is no adverse claim, the person in possession. There is no requirement that the action be brought against the tenant, as required under Article 43 of the Code of Practice,²⁷ since the tenant does not possess for himself but only for his lessor.²⁸ Article 43 not

25. See 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 29 (2d ed. 1899). See also BUCKLAND & MCNAIR, *ROMAN LAW AND COMMON LAW* 62 (1952).

26. See note 21 *supra*.

27. LA. CODE OF PRACTICE art. 43 (1870): "The petitory action, or one by which real property, or any immovable right to such property may be subjected, is claimed, must be brought against the person who is in the actual possession of the immovable, even if the person having the possession be only the farmer or lessee.

"But if the farmer or lessee of a real estate be sued for that cause of action, he must declare to the plaintiff the name and the residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and who must defend it in the place of the tenant, who shall be discharged from the suit."

28. LA. CIVIL CODE art. 3441 (1870): "Those who possess, not for themselves, but in the name of another, as farmers, depositaries and others who acknowledge an owner, can not acquire the legal possession, because, at the commencement of their possession, they had not the intention of possession for themselves but for another."

Id. art. 3433: "One may possess a thing not only by one's self, but also by other persons.

"Thus the proprietor of a house or other tenement possesses by his tenant, or by his farmer; the minor, by his tutor; and, in general, every proprietor, by the persons who hold the thing in his name."

Id. art. 3438: "One may acquire possession of a thing, not only by himself, but also through others who receive it for him and in his name. But in this case it is

only runs counter to civilian theory but is anachronistic as well.²⁹ Today, with the conveyance records in each parish in relatively good order, it is not difficult to ascertain who is the adverse claimant of ownership; and even where there is no adverse claim to ownership but only adverse possession, it is not difficult to determine who is in possession. However, the new procedure is sufficiently flexible to permit the plaintiff, in his discretion, to join the tenant as a co-defendant.³⁰ If the tenant has a long-term lease, the plaintiff more than likely will desire to have his right of ownership established against the adverse claimant and his right to the possession established against the tenant in the same suit.

Possessory Action Under Present Law

The function of the possessory action³¹ is to give the possessor of immovable property, or of a real right, a legal remedy to aid in maintaining his possession or being restored to possession when there has been either a disturbance in fact or a disturbance in law.³² A disturbance in fact results from any act by another which presents a physical obstacle to the enjoyment of posses-

necessary that the person receiving the possession should have had intention of receiving for the other."

29. *Cf. Lawrence v. Sun Oil Co.*, 166 F.2d 466 (5th Cir. 1948).

30. Proposed Louisiana Code of Civil Procedure art. 3652, para. 2: "A lessee or other person who occupies the immovable property or enjoys the real right under an agreement with the person who claims the ownership thereof adversely to the plaintiff may be joined in the action as a defendant."

31. LA. CODE OF PRACTICE art. 6 (1870): "A possessory action is that by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted."

Id. art. 46: "The possessory action, which is a branch of real actions, may be brought by any possessor of a real estate, or of a real right, who is disturbed either in the possession of the estate or in the enjoyment of the right, against him who causes the disturbance, in order to be maintained in, or restored to the possession, whether he has been evicted or disturbed; provided his possession be accompanied by the qualifications hereafter required."

LA. CIVIL CODE art. 3454(2) (1870): "Rights which are common to all possessors in good or bad faith, are: 2. That every person who has possessed an estate for a year, or enjoys peaceably and without interruption a real right, and is disturbed in it, has an action against the disturber, either to be maintained in his possession, or to be restored to it, in case of eviction, whether by force or otherwise."

Id. art. 3455: "The action which a possessor for one year has against a person disturbing his possession, to be maintained in it or restored to it, as is said in the preceding article, shall be decided before pronouncing on the question of ownership, and the real owner shall not be allowed to repel it by endeavoring to prove his right."

32. LA. CODE OF PRACTICE art. 49(3) (1870): "In order that the possessor of a real estate, or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required: . . . (3) That he should have suffered a real disturbance either in fact or in law. . . ."

sion.³³ A disturbance in law is more narrow and takes place only when one, pretending to be the true possessor, alleges that he is disturbed by the real possessor and brings the possessory action against him. The true possessor in such a case is disturbed by this action and is granted the right to counter with a possessory action in his own name for the purpose of quieting his possession.³⁴ However, it is likely that the real possessor in such a case will merely defend the suit brought against him, and, by proving possession in himself, will have the suit dismissed.³⁵ Therefore, as a practical matter, the possessory action is predicated on a disturbance in fact. The plaintiff in the possessory action must include the following allegations in his petition: (1) that the plaintiff possesses as owner;³⁶ (2) that he has had actual possession, quietly and uninterruptedly, for more than a year previous to the disturbance, and that this possession existed at the instant when the disturbance occurred;³⁷ and (3) that there has been a real disturbance of possession.³⁸ The petition must contain also a proper description of the property³⁹ and would allege that less than one year has elapsed since the dis-

33. *Id.* art. 51: "Disturbance in fact occurs when one by any act, prevents the possessor of a real estate, or of a right growing from such estate, from enjoying the same quietly, or throws any obstacle in the way of that enjoyment, or evicts him through violence, or otherwise."

34. *Id.* art. 52: "Disturbance in law takes place when one, pretending to be the possessor of a real estate, says that he is disturbed by the real possessor, and brings against the latter the possessory action; for in such a case the true possessor is disturbed by this action, and may also bring a possessory action in order to be quieted in his possession."

"But in no case shall the mere demand in revendication of a real estate, or of a real right, be considered as a disturbance in the enjoyment of a possessor, and entitle him to bring a possessory action."

35. *Crowell & Spencer Lbr. Co. v. Duplissey*, 130 La. 837, 58 So. 590 (1912).

36. LA. CODE OF PRACTICE art. 47 (1870): "The possessors entitled to bring these actions are those who possess as owners."

"Persons entitled to the usufruct or to the use of a real estate, and others having real rights growing from such real estate, may also bring their action, when disturbed in the enjoyment of their rights."

37. *Id.* art. 49(1-2) (1870): "In order that the possessor of a real estate or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required: 1. That he should have had the real and actual possession of the property at the instant when the disturbance occurred; a mere civil or legal possession is not sufficient;

"2. That he should have had that possession quietly and without interruption, by virtue of one of the titles prescribed in the forty-seventh article, for more than a year previous to his being disturbed; provided the possession of less than one year be sufficient, in case the possessor should have been evicted by force or by fraud."

38. See note 32 *supra*.

39. *Wright v. Holder*, 72 So.2d 529 (La. App. 1954); *Bossier Enterprises v. Carbone*, 66 So.2d 521 (La. App. 1953); *Neal v. Farm Development Corp.*, 42 So.2d 319 (La. App. 1949); *Loper v. White*, 1 La. App. 695 (1925); *McDonough v. Childress*, 15 La. 556 (1840).

turbance.⁴⁰ If the plaintiff succeeds in proving his allegations, his right of possession is protected regardless of whether he is the legal owner in possession, or a mere usurper.⁴¹ The action has been criticized⁴² because the defendant is prevented, without the plaintiff's consent, from changing the action into a petitory action to determine ownership. As a result, the defendant, who may be the lawful owner, is forced to bring a petitory action in a separate suit against the possessor who may actually be a trespasser. Without the plaintiff's consent, the issue of ownership is left dangling.

Action of Jactitation Under Present Law

Under French law,⁴³ from which Louisiana's possessory action is taken, the possessory action was sufficiently broad to cover both a disturbance in fact and a disturbance in law. However, the definition of disturbance in law under the Code of Practice⁴⁴ is so narrow and confusing that it has been virtually impossible to follow French law in the possessory action where there has been anything other than a physical disturbance. Instead, Louisiana borrowed the jactitory action from Spanish law⁴⁵ to cover the situation where there was a disturbance in

40. LA. CODE OF PRACTICE art. 49(4) (1870): "In order that the possessor of a real estate, or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required: . . .

"4. That he should have brought his suit, at the latest, within the year in which the disturbance took place."

Id. art. 59: "If one who is disturbed in or evicted from his possession, suffer a year to elapse without bringing a possessory action, that action shall be prescribed, and he must then resort to a petitory action."

LA. CIVIL CODE art. 3456 (1870): "But this, which is called the possessory action, must be commenced by the possessor within a year, reckoning from the time when he was disturbed; for if he leaves the person evicting him in possession for one year, without complaint, he shall lose his possession, whatever apparent right he may have had to it, and shall be driven to his action for the ownership of the property."

41. LA. CODE OF PRACTICE art. 49 (1870): ". . . When the possession of the plaintiff is accompanied with all those circumstances, it matters not whether he possesses in good or in bad faith, or even as a usurper, he shall nevertheless be entitled to his possessory action."

42. Comment, 20 TUL. L. REV. 524 (1946).

43. CODE DE PROCÉDURE CIVILE arts. 23-27 (France 1806).

44. See definition in note 34 *supra*.

45. LAS SIETE PARTIDAS 3.2.46: "No person can be compelled, against his will, to sue another, unless in certain particular cases, wherein the judge may, by law, oblige him to do it. As where a man publicly says that another is his slave, or defames him in presence of other persons. In these, and the like cases, he who is defamed, may petition the judge of the place, to oblige the defamer to bring a suit, and prove what he has said, or to retract, or to make such reparations as the judge shall deem just. And if he be contumacious, and refuse to institute his suit in obedience to the order of the judge, we say that party aggrieved shall be forever absolved from the charge made against him, so that neither the person defaming him, nor anyone else for him, can thereafter sue him

law. Under Spanish law, this action lay to prevent defamation of person or property, whether movable or immovable. Louisiana courts have limited the action to one protecting possession where there is a defamation or disturbance in law involving immovable property. The object of the action is to force the defendant to desist from the slander, or to set forth his title in the answer or in another suit.⁴⁶ The slander may be any conceivable claim prejudicial to the plaintiff's rights in immovable property. Physical acts⁴⁷ as well as declarations made orally,⁴⁸ in writing,⁴⁹ placed of record,⁵⁰ or asserted in a previous unsuccessful suit,⁵¹ have given rise to the action; and it is immaterial whether they are made to the plaintiff,⁵² or to other persons.⁵³ The action is founded exclusively on possession, is a form of the possessory action, and is governed by the rules established for the possessory action under present procedure, as far as they are applicable.⁵⁴ There are, however, important differ-

on that account. And if such defamer afterwards repeat the same defamatory language against the same person, the judge ought to punish him, so that by his example others may be deterred from unjustly speaking ill of any one." See *Livingston v. Heerman*, 9 Mart.(O.S.) 656 (La. 1821).

46. *Young v. Town of Morgan City*, 129 La. 339, 56 So. 303 (1911); *Matthews v. Slattry*, 126 La. 120, 52 So. 238 (1910); *Dalton v. Wickliffe*, 35 La. Ann. 355 (1883); *Livingston v. Heerman*, 9 Mart.(O.S.) 656 (La. 1821); *Riley v. Kaemper*, 175 So. 884 (La. App. 1937).

47. *La Del. Oil Properties v. Magnolia Petroleum Co.*, 169 La. 1137, 126 So. 684 (1930); *Albert Hanson Lbr. Co. v. Mestayer*, 130 La. 688, 58 So. 511 (1912); *Chatellier v. Bradley*, 57 So.2d 805 (La. App. 1952); *Finch v. Schexnayder*, 53 So.2d 484 (La. App. 1951).

48. *Board of Trustees v. Rudy*, 192 La. 200, 187 So. 549 (1939); *Dalton v. Wickliffe*, 35 La. Ann. 355 (1883); *Packwood v. Dorsey*, 4 La. Ann. 90 (1849); *Walden v. Peters*, 2 Rob. 331 (La. 1842); *Millaudon v. McDonough*, 18 La. 102 (1841); *Proctor v. Richardson*, 11 La. 186 (1837); *Livingston v. Heerman*, 9 Mart.(O.S.) 656 (La. 1821).

49. *Miami Corp. v. State Mineral Board*, 218 La. 163, 48 So.2d 643 (1950); *Realty Operators v. State Mineral Board*, 202 La. 398, 12 So.2d 198 (1942); *Baird v. Atlas Oil Co.*, 146 La. 1091, 84 So. 366 (1920); *Remick v. Lang*, 47 La. Ann. 914, 17 So. 461 (1895); *Jackson v. Davis*, 49 So.2d 497 (La. App. 1950).

50. *Ware v. Baucum*, 221 La. 259, 59 So.2d 182 (1952); *Roy O. Martin Lbr. Co. v. Hodge-Hunt Lbr. Co.*, 190 La. 84, 181 So. 865 (1938); *Rudd v. Land Co.*, 188 La. 490, 177 So. 583 (1937); *Meraux & Nunez v. Gaidry*, 171 La. 852, 132 So. 401 (1931); *Cepro v. Matulich*, 152 La. 1072, 95 So. 226 (1923); *Atchafalaya Land Co. v. Brownell-Drews Lbr. Co.*, 130 La. 657, 58 So. 500 (1912); *Teddle v. Riser*, 121 La. 666, 46 So. 688 (1908); *Patterson v. Landru*, 112 La. 1069, 36 So. 857 (1904); *Handlin v. Dods*, 110 La. 936, 34 So. 881 (1903); *Boyet v. Brushwood Methodist Church*, 98 So.2d 593 (La. App. 1957); *Bickham v. Crawford*, 64 So.2d 11 (La. App. 1953); *Green v. George*, 37 So.2d 547 (La. App. 1948).

51. *New Orleans Land Co. v. Slattry*, 145 La. 256, 82 So. 215 (1919); *Henry v. Dufilho*, 14 La. 48 (1839).

52. *Henry v. Dufilho*, 14 La. 48 (1839).

53. *Proctor v. Richardson*, 11 La. 186 (1837); *Livingston v. Heerman*, 9 Mart.(O.S.) 656 (La. 1821).

54. *Green v. George*, 213 La. 739, 35 So.2d 595 (1948); *Chatellier v. Bradley*,

ences. The jactitory action does not require a physical disturbance,⁵⁵ and it is convertible into a petitory action without the consent of the plaintiff.⁵⁶ If the defendant does convert the action, he, as the non-possessor, becomes the plaintiff in the petitory proceeding and has the burden of proving every fact necessary to establish title in himself.⁵⁷

The Broadened Possessory Action Under Proposed Code

The proposed Code of Civil Procedure provides for a possessory action which is a consolidation of the present possessory and jactitory actions, with the procedural rules currently applicable to the action of jactitation applicable to the broadened possessory action. This merger is achieved by three distinct changes in the law: (1) broadening the definition of disturbance in law; (2) permitting the defendant to convert the suit into a petitory action; and (3) broadening the judgment to be rendered for the successful plaintiff.

A broadened definition of disturbance in law is embodied in the third paragraph of Article 3659, which provides:

“A disturbance in law is the execution, recordation, registry, or continuing existence of record of any instrument which asserts or implies a right of ownership or to the possession of immovable property or of a real right, or any claim or pretension of ownership or right to the possession thereof except in an action or proceeding, adversely to the possessor of such property or right.”

This new definition of disturbance in law will make it possible for the proposed possessory action to perform the functions of the present jactitory action. The effected change, therefore, will

57 So.2d 805 (La. App. 1952); *Ledet v. Ledet*, 192 So. 551 (La. App. 1939); *Brashears v. Chandler*, 183 So. 546 (La. App. 1938).

55. *Jackson v. Davis*, 49 So.2d 497 (La. App. 1950).

56. *Crowell & Spencer Lbr. Co. v. Burns*, 191 La. 733, 186 So. 85 (1939).

57. *Parham v. Maxwell*, 222 La. 149, 62 So.2d 255 (1952); *Miami Corp. v. State Mineral Board*, 218 La. 163, 48 So.2d 643 (1950); *Marks v. Collier*, 216 La. 1, 43 So.2d 16 (1949); *Frost Lbr. Industries v. Union Power Co.*, 182 La. 439, 162 So. 37 (1935); *Arent v. Hunter*, 171 La. 1059, 133 So. 157 (1931); *Mereaux & Nunez v. Gaidry*, 171 La. 852, 132 So. 401 (1931); *Williams v. Horn*, 170 La. 663, 129 So. 122 (1930); *Federico v. Nunez*, 168 La. 914, 123 So. 618 (1929); *Baird v. Atlas Oil Co.*, 146 La. 1091, 84 So. 366 (1920); *Garrett v. Spratt*, 131 La. 707, 60 So. 199 (1912); *Poland v. Dreyfous*, 48 La. Ann. 83, 18 So. 906 (1896); *Remick v. Lang*, 47 La. Ann. 914, 17 So. 461 (1895); *Sully v. Spearing*, 40 La. Ann. 558, 4 So. 489 (1888); *Gay v. Ellis*, 33 La. Ann. 249 (1881); *Bidwell v. Cavaroc and the Bank of New Orleans*, 27 La. Ann. 307 (1875); *Havard v. Atkins*, 24 La. Ann. 511 (1872); *Short v. Trustees of the Methodist Episcopal*

bring us closer to the position of the French law on the matter.⁵⁸ Another change resulting from this article should also be examined. Presently, the institution of the possessory action is a disturbance in law of the defendant's possession, if the latter actually has possession.⁵⁹ Under the proposed article above it is not. However, this will leave no hiatus in the new procedure, for the defendant may reconvene and bring the possessory action against the plaintiff, and obtain the same relief as if he had filed a separate possessory action. The acts of possession on which the original plaintiff relied to prove his possession would constitute disturbances in fact; and any recorded title to the plaintiff would constitute a disturbance in law, of the original defendant's possession, if the latter actually had possession.

The second paragraph of Article 3657 of the proposed code aids in implementing the merger of the two actions by providing:

"When . . . the defendant in a possessory action asserts title in himself, in the alternative or otherwise, he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff in the possessory action."

It is clear that this provision will make the procedural rule presently applicable to the jactitory action applicable to the broadened possessory action. It not only will permit the defendant, at his option, to convert the suit into a petitory action but also provides that he will do so whenever he injects the issue of ownership in his answer. As a consequence of this change, the issue of ownership in a possessory action will not be left suspended if the defendant desires to raise the issue. Therefore, the requirement of a separate suit by the defendant in the possessory action to try title will be eliminated. It is pertinent to note that under the jactitory action, the defendant can convert the suit into a petitory action through his answer,⁶⁰ a reconventional demand,⁶¹ or a supplemental answer filed after judgment ordering the defendant to institute the petitory ac-

Church South, 11 La. Ann. 174 (1856); *Millaudon v. McDonough*, 18 La. 102 (1841).

58. See note 43 *supra*.

59. See note 34 *supra*.

60. *Board of Trustees of Ruston Circuit v. Rudy*, 192 La. 200, 187 So. 549 (1939); *Barrow v. LeBlanc*, 35 So.2d 469 (La. App. 1948).

61. *Carmody v. Land*, 207 La. 625, 21 So.2d 764 (1945).

tion.⁶² It is apparently intended that the second paragraph of Article 3657 will encompass all three of these methods of effecting conversion.⁶³

The joining of the two actions is facilitated also by expanding the judgment to be rendered for the successful plaintiff in the broadened possessory action. Article 3662(2) of the proposed code provides:

"A judgment rendered for the plaintiff in a possessory action shall: . . .

"(2) Order the defendant to assert his adverse claim of ownership of the immovable property or real right in a petitory action to be filed within a delay to be fixed by the court not to exceed sixty days after the date the judgment becomes executory, or be precluded thereafter from asserting the ownership thereof, if the plaintiff has prayed for such relief."

Under present procedure, the relief provided in the preceding article is made available only to the successful plaintiff in the jactitory action. Therefore, a change will be made in the law by granting the successful plaintiff in the broadened possessory action such relief, notwithstanding the fact that the disturbance complained of was of a physical nature. Of course, a plaintiff may not wish to have the defendant ordered to institute a petitory action. However, the new provision is sufficiently flexible to leave this matter to the election of the plaintiff. It is material to note that the last paragraph of this article will assist greatly in expediting a definitive judgment in the possessory action by limiting the period for a devolutive appeal to thirty days.⁶⁴

Cumulation Of Actions Under Present Law

The possessory and petitory actions cannot be cumulated or joined together except by consent of the parties.⁶⁵ This rule is intended to keep the trial of the issues of possession and ownership as separate as possible. If the plaintiff in the possessory

62. *Sherburne v. Iberville Land Co.*, 192 La. 1091, 190 So. 227 (1939).

63. See Proposed Louisiana Code of Civil Procedure art. 3657, Comment (e).

64. See *id.* art. 3662: ". . . A suspensive appeal from the judgment rendered in a possessory action may be taken within the delay provided in Article 2123 [15 days], and a devolutive appeal may be taken from such judgment only within thirty days of the applicable date provided in Article 2087(1)-(2)."

65. LA. CODE OF PRACTICE art. 55 (1870).

action consents to the defendant's injection of the petitory action into the suit, the plaintiff is considered as having renounced the possessory action. The court then decides only the question of ownership.⁶⁶ If the plaintiff sues for both possession and ownership of the property at the same time, he is considered as having waived the possessory action in favor of the petitory action. Furthermore, if the plaintiff brings a petitory action, he cannot afterwards bring the possessory action.⁶⁷

Cumulation Of Actions Under Proposed Code

The first paragraph of Article 3657 of the proposed Code of Civil Procedure provides:

"The plaintiff may not cumulate the petitory and the possessory actions in the same suit or plead them in the alternative, and when he does so he waives the possessory action. If the plaintiff brings the possessory action, and without dismissing it and prior to judgment therein institutes the petitory action, the possessory action is abated."

While the first sentence of the preceding article will make no change in the law, the subsequent sentence will incorporate a much needed one into a procedural area which is fraught with technicality and rigidity. Presently, the penalty for the cumulation of the two actions is the judicial confession of the possession of the defendant.⁶⁸ This result not only amounts to a waiver of the possessory action, but makes it impossible for the plaintiff to dismiss the suit, and later renew the possessory action alone in the second suit. This seems too harsh a penalty when the improper cumulation, or alternative pleading, of the two actions results from mere oversight or inadvertence of counsel. Under the proposed procedure, where there is alternative pleading or improper cumulation, the plaintiff may have the suit dismissed without prejudice — as of right, if application therefor is made prior to a general appearance by the defendant;⁶⁹ or at the discretion of the court, when application is made thereafter.⁷⁰ Then, the plaintiff may renew his possessory action

66. *Id.* art. 57.

67. *Id.* art. 54.

68. *Williams' Heirs v. Zengel*, 117 La. 599, 42 So. 153 (1906).

69. Proposed Louisiana Code of Civil Procedure art. 1671: "A judgment dismissing an action without prejudice shall be rendered upon application of the plaintiff and upon his payment of all costs, if the application is made prior to a general appearance by the defendant. . . ."

70. *Id.* art. 1671: ". . . If the application is made after a general appearance, the court may refuse to grant the judgment of dismissal except with prejudice."

alone in a second suit without being barred by a judicial confession of the possession of the defendant.

Although the plaintiff in the possessory action under Article 3657 does not judicially confess the possession of the defendant by instituting the petitory action before judgment, the concluding paragraph of that article provides:

"If, before executory judgment in a possessory action, the defendant therein institutes a petitory action in a separate suit against the plaintiff in the possessory action, the plaintiff in the petitory action *judicially confesses* the possession of the defendant therein." (Emphasis added.)

This provision will prevent a defendant in a possessory action from defeating the efforts of the plaintiff in the possessory action to have the issue of his possession adjudicated therein. It also will prevent him from relitigating the issue in a petitory action filed in a separate suit, and in which he would allege that the defendant was not in possession. Thus, it is clear that the rules of Article 3657 are intended to facilitate, as far as possible, a separation of the issues of possession and ownership and to encourage the resolution of the issue of possession before the institution of the petitory action.

Adjudication Of Rights To Property In Actions Other Than Real Actions

As a practical matter many issues of ownership of immovables or real rights are involved and adjudicated in some so-called fringe actions. For example, the concursus proceeding⁷¹ is frequently invoked by mineral lessees holding leases from opposing claimants to the same tract of land.⁷² The lessee deposits funds into the registry of the court and cites the adverse claimants to appear and assert their rights to the funds. In this situation, since the ownership of the funds depends upon ownership of the land, the claimants are required to litigate their rights to the ownership of the land. In addition to the concursus proceeding, the action for a declaratory judgment has been

71. LA. R.S. 13:4811-4817 (1950).

72. California Co. v. Price, 234 La. 338, 99 So.2d 743 (1957); Texas Co. v. McDonald, 228 La. 353, 82 So.2d 37 (1955); California Co. v. Price, 225 La. 706, 74 So.2d 1 (1954); Placid Oil Co. v. George, 221 La. 200, 59 So.2d 120 (1952); Barnsdall Oil Co. v. Applegate, 218 La. 572, 50 So.2d 197 (1950); Amerada Petroleum Corp. v. State Mineral Board, 203 La. 473, 14 So.2d 61 (1943).

utilized to adjudicate the ownership of land and mineral rights.⁷³ However, it is not presently clear to what extent this action may be employed to assert a claim to immovable property. Dicta in the *Burton v. Lester*⁷⁴ decision makes it dubious that the Declaratory Judgments Act⁷⁵ is appropriate where one of the traditional actions would be available. However, all such doubt will be dispelled by the proposed code⁷⁶ which provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. It is also possible that issues of ownership may be presented in expropriation and similar proceedings where adverse claimants of ownership are urging conflicting claims to the compensation to be paid for the taking of immovable property.

Without doubt, the most serious problem inherent in the employment of these fringe actions to determine issues of ownership is whether or not the highly important role played by possession in the civil law of immovables will be impaired. Under present law there is no guaranty to the possessor that the opposing claimant will be required to establish a perfect right as the litigant out of possession would be required to do in the petitory action. Adjudication of real rights to property in other than the traditional real actions has been vigorously attacked as offering "the claimant out of possession advantages that are inconsistent with the prevailing system of real actions."⁷⁷ Certainly there would be no basis for this criticism if the action were tried on the merits, giving full effect to the substantive and

73. *Calhoun v. Gulf Refining Co.*, 235 La. 494, 104 So.2d 547 (1958); *Smith v. Smith*, 230 La. 509, 89 So.2d 55 (1956); *Parker v. Tillman*, 228 La. 214, 81 So.2d 866 (1955); *Bierhorst v. Kelly*, 225 La. 934, 74 So.2d 168 (1954); *La Terre Co. v. Naquin*, 225 La. 210, 72 So.2d 481 (1954); *Horn v. Skelly Oil Co.*, 224 La. 709, 70 So.2d 657 (1954); *Arkansas La. Gas Co. v. Thompson*, 222 La. 868, 64 So.2d 202 (1953); *Hastings v. McDowell*, 75 So.2d 383 (La. App. 1954); *Levenson v. Chancellor*, 68 So.2d 116 (La. App. 1953); *Krokroskia v. Martin*, 61 So.2d 630 (La. App. 1952).

74. 227 La. 347, 349, 79 So.2d 333, 335 (1954): "[W]e do not believe that the statute should be employed as a substitute for the well defined actions provided for in the Code of Practice or those which have been established by jurisprudence unless, by reason of the special circumstances of the case, the codal procedure does not furnish an adequate remedy."

75. LA. R.S. 13:4231-4246 (1950).

76. Proposed Louisiana Code of Civil Procedure art. 1871: "Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree." (Emphasis added.)

77. Comment, 29 TUL. L. REV. 617, 633 (1955).

procedural rights accorded the possessor under the existing real actions. This is distinctly provided for in Article 3654 of the proposed code:

“When the issue of ownership of immovable property or of a real right is presented in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding, or the issue of the ownership of funds deposited in the registry of the court and which belong to the owner of the immovable property or of a real right is so presented, the court shall render judgment in favor of the party:

“(1) Who would be entitled to the possession of the immovable property or real right in a possessory action, unless the adverse party makes out his title thereto; or

“(2) Who proves better title to the immovable property or real right, when neither party would be entitled to the possession of the immovable property or real right in a possessory action.”

This article insures that possession will perform its historic role of determining the burden of proof in all actions which actually or indirectly adjudicate rights of ownership, although technically not classified as real actions. The possession required of a plaintiff in a possessory action, employed as determinative of the burden of proof, will prevent one of the parties from taking possession of the property briefly prior to rendition of judgment, or from dispossessing the rightful possessor, so as to obtain the benefit of the rules as to burden of proof.

Summary and Conclusion

In summary, it may be observed that the proposed actions to determine ownership or possession will introduce several important changes into our present procedural law. The petitory action will be broadened to include both the present action of the same name and the action to establish title, with possession of the defendant merely determining the burden of proof to be imposed upon the plaintiff. The possessory action will be expanded so as to embrace both the present possessory action and the jactitory action, with some of the procedural rules of the latter made applicable to the proposed action. Also, new rules will be incorporated into the law which will permit possession to perform its time-honored role of determining the burden of

proof in actions which directly or indirectly adjudicate rights of ownership, although not categorized technically as real actions. Other changes of less importance, some of which have not been treated in this Comment, are proposed so that the new petitory and possessory actions will be better adapted to modern conditions. It should be observed that the changes suggested in this revision will effect simplification and liberalization in the procedural law, yet accord with the civilian concepts of property and possession, as well as with the basic principles on which the present procedural law is predicated. It is submitted that the adoption of this revision will do much to reduce the rigidity of the present real actions and to preclude the hypertechnical manner in which they have been applied.

Joseph W. Milner

Multiple Total and Permanent Disabilities in Louisiana Workmen's Compensation

The purpose of this Comment is to investigate two problems of Louisiana Workmen's Compensation. The first of these is the possibility of multiple total and permanent disabilities under the act and the judicial interpretations thereof. The second is the recovery which is or should be available to a worker so disabled.

Successive Total and Permanent Disabilities

The Louisiana Workmen's Compensation Act provides that "total disability" is inability to do work of *any reasonable character*.¹ The Louisiana courts have interpreted this language as meaning inability to perform work of the same or similar character as the employee is accustomed to performing.² When the

1. LA. R.S. 23:1221 (1-2) (1950). The act allows 400 weeks of compensation for total and permanent disability. The amount is set at 65% of wages within the limits of \$10 to \$35. For temporary total disability compensation is recoverable during the period of disability, not to exceed 300 weeks. For partial disability, compensation payments are set at 65% of the difference between the wages received before the accident and those received afterwards. These benefits are recoverable during the period of disability, not to exceed 300 weeks. See *id.* 23:1202, 1221 (1-3). In addition to the disability provisions, the act provides compensation for certain permanent bodily impairments. The periods for which compensation is recoverable varies from ten weeks for the loss of a toe to 400 weeks for the loss of both hands or both feet. See *id.* 23:1221(4).

2. See *Knispel v. Gulf States Utilities Co.*, 174 La. 401, 141 So. 9 (1932); *Myers v. Jahneke Service Inc.*, 76 So.2d 436 (La. App. 1955); *Strother v. Stand-*