

# Louisiana Law Review

---

Volume 51 | Number 3  
*January 1991*

---

## Possession

A. N. Yiannopoulos

---

### Repository Citation

A. N. Yiannopoulos, *Possession*, 51 La. L. Rev. (1991)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol51/iss3/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

## Possession

*A. N. Yiannopoulos\**

Articles 3421 to 3444 of the Louisiana Civil Code establish the substantive law governing possession.<sup>1</sup> These articles derive from the reservoir of the civilian tradition and have, generally, counterparts in modern civil codes.

In the 1982 revision of the laws governing possession, the redactors relied heavily on the provisions of the Louisiana Civil Code of 1870 and on Louisiana jurisprudence and doctrine. The innovations in this field are few and relate mostly to terminology and style rather than substance.<sup>2</sup> Perhaps the most important innovation is the possessory protection accorded to precarious possessors against any person who caused a disturbance of possession except the person for whom they possess.<sup>3</sup>

This article is an effort at systematic analysis of the provisions of the Louisiana Civil Code governing possession in the light of pre- and post-revision jurisprudence and doctrine. Procedural institutions, including the possessory action, have been discussed elsewhere;<sup>4</sup> reference to procedural institutions is only made here when necessary for a better understanding of the provisions of substantive law. For purposes of comparison, brief reference is made to the legal systems of France, Germany, and Greece.

### NOTION, NATURE, AND KINDS OF POSSESSION

#### *Definitions*

In Louisiana legislation, jurisprudence, and doctrine, the word *possession* is used in at least three different senses. In the first place,

---

Copyright 1991, by LOUISIANA LAW REVIEW.

Copyright 1991, by A. N. Yiannopoulos. The material for this article has been excerpted from a new Chapter of the author's forthcoming third edition of volume No. 2 in the Louisiana Civil Law Treatise series, Property, published by West Publishing Company, St. Paul, Minnesota.

\* W. R. Irby Professor of Law, Tulane University Law School.

1. See La. Civ. Code arts. 3421-3444.
2. See Symeonides, One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription, 44 La. L. Rev. 69, 70 (1983).
3. See La. Civ. Code art. 3440.
4. See A. Yiannopoulos, Civil Law Property §§ 325-343 (3d ed. 1991).

*possession* is used to denote a person's exercise of factual authority over a thing with the intent to have that thing as his own.<sup>5</sup> Second, *possession* is used to denote the exercise of factual authority over a thing by a person who has no intent to have it as his own on behalf of another person who does.<sup>6</sup> Third, *possession* is used to mean one's right to possess.<sup>7</sup>

For purposes of accurate analysis of legal institutions, the word *possession* is used in this article to qualify, exclusively, the factual authority that a person exercises over a corporeal thing with the intent to own it or the corresponding authority that a person exercises over a thing by virtue of a real right with the intent to have that right as his own.<sup>8</sup> This is possession in the proper sense of the word.<sup>9</sup>

The word *detention* is used to denote, exclusively, the exercise of factual authority over a thing without any pretension of ownership but on behalf of a person who qualifies as possessor.<sup>10</sup> Thus, lessees, depositaries, and precarious possessors in general have detention rather than possession.<sup>11</sup>

The term *right to possess* is used, exclusively, to signify the right of a possessor to be maintained in possession if he has been disturbed and to be restored in possession of the property if he has been evicted.<sup>12</sup>

#### *Possession and Detention: Animus and Corpus*

According to traditional civilian doctrine that is rooted in Roman law, possession comprises two elements: the *animus* and the *corpus*.<sup>13</sup>

5. See, e.g., La. Civ. Code art. 3424. Such a person is said to possess "as owner" or to possess "for himself." See La. Civ. Code arts. 3424, 3438.

6. See, e.g., La. Civ. Code art. 3437.

7. See, e.g., La. Code Civ. P. art. 3658.

8. See La. Civ. Code arts. 3421, 3424.

9. See La. Civ. Code arts. 3425, 3428, 3437. Cf. 3 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 158 (2d ed. Picard 1952): "Possession is a state of fact which consists in the detention of a thing in an exclusive manner and in the performance on the thing of the material acts of use and enjoyment as if the possessor were owner."

10. See La. Civ. Code arts. 3421, 3425, 3437; id. arts. 3426, 3428 (1870); 3 M. Planiol et G. Ripert, *supra* note 9, at 175.

11. La. Civ. Code arts. 3428, 3429, 3437; id. arts. 3441, 3433 (1870); La. Code Civ. P. art. 3656: "A predial lessee possesses for and in the name of his lessor, and not for himself."

12. See La. Civ. Code arts. 3422, 3440, 3444; id. arts. 3434(2), 3454(2) (1870); *Liner v. Louisiana Land & Exploration Co.*, 319 So. 2d 766 (La. 1975); *Pitre v. Tenneco Oil Co.*, 385 So. 2d 840 (La. App. 1st Cir.), writ denied, 392 So. 2d 678 (1980).

The right to possess is "no prescriptive right, but a procedural assurance of the fact of undisturbed possession." *Todd v. State, Dep't of Natural Resources*, 474 So. 2d 430, 438 (La. 1985).

13. See 3 M. Planiol et G. Ripert, *supra* note 9, at 161; Barton, *Animus and possessio*

The *corpus* is material; it is the sum total of the facts that establish physical control over a thing, that is, acts of use, detention, or enjoyment. The *animus* is volitional; it is the intent of the person who exercises physical control over a thing.

The volitional element of possession is often qualified in the civilian literature as *animus domini* (intent to own) or as *animus rem sibi habendi* (intent to have a thing as one's own). These terms, however, are not of Roman origin. They have been coined by Savigny who asserted in his celebrated treatise on possession that the intent to own the thing is an indispensable element of possession in the proper sense of the word.<sup>14</sup>

Savigny contrasted the *animus domini* with the *animus detinendi*, that is, the intent to detain a thing on behalf of another person who has the intent to own and qualifies as possessor. Thus, possession and detention are distinct and distinguishable notions. One who exercises physical control over a thing with the intent to own it has possession. In contrast, one who exercises physical control over a thing on behalf of another person has detention. Savigny's theory is known in the civilian literature as the *subjective* theory of possession because of its reliance on a person's subjective intent to own a thing. Jhering challenged this theory and sought to demonstrate that the subjective intent of the person who has physical control over a thing is implicit in his factual authority, but it is not determinative for the qualification of that authority as possession.<sup>15</sup> Jhering's theory is known as the *objective* theory of possession, because any intentional exercise of physical control over a thing is possession.

Jhering distinguished between possession and detention, but he did not ground the distinction on the presence or absence of the intent to own the thing. According to Jhering, a person has detention rather than possession when the *causa possessionis* (the "cause of possession") is of a nature that implies exercise of physical control over a thing on behalf of another person. When this happens, there can be no possession in the proper sense of the word, and the *causa possessionis* becomes a *causa detentionis*. Jhering asserted that when a court does not find that

---

*nomine alieno*, in New York Perspectives in the Roman Law of Property, Essays for Barry Nicholas 43 (Birks ed. 1989). See also Georgiadis, in V Georgiadis and Stathopoulos, Civil Code, Property art. 974 (1985) (in Greek).

14. See F. Savigny, *Das Recht des Besitzes* 110 (7th ed. Rudorff 1865). This famous treatise has been translated into many languages, including French and English. See F. Savigny's *Treatise on Possession* (6th ed. Perry transl. 1848); F. Savigny, *Traité de la possession en droit romain* (7th ed. Rudorff, Staedtler transl. 1870).

15. See R. Jhering, *Ueber den Grund des Besitzschutzes* 160 (1869). This famous work has also been translated into many languages. See, e.g., R. Jhering, *Sul Fondamento della Protezione del Possesso* (Forlani transl. 1872); R. Jhering, *Role de la volonté dans la possession* (Meulenaere transl. 1891).

a person has detention, that person's possession ought to be regarded as established by virtue of the objectively ascertainable signs of factual authority.

Article 3421 of the Louisiana Civil Code, following corresponding provisions of the 1870 Code and of the French Civil Code, appears to confuse possession with detention.<sup>16</sup> This article defines possession as the detention or enjoyment of a corporeal thing and does not mention the intent to own. Article 3424 of the Louisiana Civil Code, however, requires for the acquisition of possession the intent "to possess as owner,"<sup>17</sup> and the second paragraph of Article 3421 requires for the quasi-possession of a real right the intent "to have it as one's own."<sup>18</sup> These provisions are in *pari materia* and must be read together. Consequently, one is bound to conclude that despite the confusing terminology in Article 3421 of the Civil Code, there is a clear distinction between possession and detention. A person who exercises physical control over a corporeal thing with the intent to own it, or a person who exercises a real right with the intent to have it as his own, is a possessor. A person who exercises physical control over a thing or a person who exercises a real right on behalf of another person is a detainer.

#### *Possession and Quasi-Possession*

According to the Romanist tradition, possession in the proper sense of the word is the physical control that a person exercises over a corporeal thing with the intent to own: *possessio rei animo domini* or *rem sibi habendi*.<sup>19</sup> Following this tradition, Article 3421(1) of the Louisiana Civil Code declares: "Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name."<sup>20</sup>

Strictly speaking, one may not possess a real right because one cannot exercise physical acts over an incorporeal. However, one may

---

16. See La. Civ. Code art. 3421(1); *id.* La. Civ. Code art. 3426 (1870); Code Civil [C. Civil] 2228 (Fr.).

17. See La. Civ. Code art. 3424.

18. See La. Civ. Code art. 3421(2). The expression "intent to possess as owner" has the same meaning as "intent to possess for himself" and "intent to have the thing as his own." See La. Civ. Code arts. 3424, 3438; La. Code Civ. P. art. 3656.

19. See 3 M. Planiol et G. Ripert, *supra* note 9, at 159; P. Huvelin, *Cours élémentaire de droit romain* 419 (1927); G. Balis, *Civil Law Property* 9 (3d ed. 1955) (in Greek); *cf.* La. Civ. Code art. 3421.

20. See La. Civ. Code arts. 3424, 3480; *id.* arts. 3436, 3451, 3452 (1870). Likewise, Article 2228 of the French Civil Code declares that possession is "the detention or enjoyment of a thing." The use of the word detention to define possession is confusing and has been criticized. See Symeonides, *supra* note 2, at 73; 3 M. Planiol et G. Ripert, *supra* note 9, at 159.

hold a real right with the intent to have it as his own. In Roman law texts, the exercise of a right of servitude over another's immovable is qualified as *quasi-possessio* or *possessio juris*.<sup>21</sup> Following this tradition, Article 3421(2) of the Louisiana Civil Code declares: "The exercise of a real right, such as a servitude, with the intent to have it as one's own is quasi-possession."<sup>22</sup>

The distinction between possession and quasi-possession has mostly doctrinal significance. The Louisiana Civil Code notes the distinction for purposes of accurate analysis but does not establish special rules applicable to quasi-possession as distinguished from possession. The rules governing possession of corporeal things apply also to the quasi-possession of real rights to the extent that their application is compatible with their nature as incorporeals.<sup>23</sup> The Louisiana Code of Civil Procedure makes no distinction between possession and quasi-possession insofar as possessory protection is concerned. It speaks of the "possessor"<sup>24</sup> of immovable property or of a real right therein. Following established Louisiana practice, the word possession is used in this article to designate both the possession of corporeal things and the quasi-possession of real rights.

#### *Corporeal Possession and Civil Possession*

The exercise of factual authority over a thing by means of material acts or constructions is qualified in Article 3425 of the Louisiana Civil Code as "corporeal possession."<sup>25</sup> The same article defines corporeal possession as "the exercise of physical acts of use, detention, or enjoyment over a thing."<sup>26</sup> The definition confuses *possession* with *detention*; however, there should be no doubt that corporeal possession may only be exercised by one who possesses a thing with the intent to own.<sup>27</sup> The requirement of possession as owner is, therefore, implicit in the definition of corporeal possession.

---

21. See 3 M. Planiol et G. Ripert, *supra* note 9, at 159.

22. La. Civ. Code art. 3421; *id.* art. 3432 (1870); Louisiana Irrigation & Mill Co. v. Pousson, 262 La. 973, 265 So. 2d 756 (1972). For the quasi-possession of predial servitudes, see *Kizer v. Lilly*, 471 So. 2d 716 (La. 1985); Symeonides, *Developments in the Law, Property*, 46 La. L. Rev. 655, 671-80 (1986).

23. See La. Civ. Code art. 3421: "[T]he rules governing possession apply by analogy to the quasi-possession of incorporeals."

24. La. Code Civ. P. art. 3655.

25. See La. Civ. Code art. 3425; *id.* art. 3436(2) (1870).

26. See La. Civ. Code art. 3425. See also *Ellis v. Prevost*, 19 La. 251 (1841).

27. See La. Civ. Code art. 3424. Articles 3424 and 3425, being in *pari materiae*, must be read together. See La. Civ. Code art. 13.

To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing.<sup>28</sup> Once acquired, possession is maintained by the intent to possess as owner, even if the possessor ceases to possess corporeally.<sup>29</sup> In Louisiana, the retention of possession merely by the intent to own the thing is termed "civil possession."<sup>30</sup> Acts, such as the payment of taxes assessed on an immovable, or the execution of a juridical act affecting the thing, such as a lease, signify civil possession.<sup>31</sup> Vestiges of works, such as fences, buildings, roads, or other constructions may also signify civil possession.<sup>32</sup>

With respect to corporeal things, civil possession is presumed to exist and to last until possession is abandoned or the possessor is evicted by another person.<sup>33</sup> Like ownership, which cannot be lost by non-use, possession continues for an indeterminate period of time as civil possession.<sup>34</sup> However, civil possession may be affected by the vice of discontinuity.<sup>35</sup> Possession may be maintained by the intent to have the thing as one's own for as long as the thing remains materially at the disposal of the possessor. If an obstacle to the exercise of possession arises, other than an irresistible force such as the inundation of a field,

---

28. See La. Civ. Code art. 3424; *id.* art. 3436 (1870); *Ellis v. Prevost*, 19 La. 251 (1841).

29. See 3 M. Planiol et G. Ripert, *supra* note 9, at 169. See also Dig. XLI 2.2.7 (Digest of Justinian).

30. See La. Civ. Code art. 3431; Symeonides, *supra* note 2, at 80. The use of the term "civil possession" to designate the preservation of possession merely by the intent to own is a Louisiana innovation, established in *Ellis v. Prevost*, 19 La. 251 (1841). *Possessio civilis* did not have a well-defined meaning in Roman law. These words were applicable to possession that carried legal consequences under the *jus civile* and led to *usucapio*. See Savigny, *supra* note 14, at 71. Articles 3392 and 3394 of the Louisiana Civil Code of 1825, like Articles 3429 and 3431 of the Louisiana Civil Code of 1870, contained contradictory definitions of civil possession, inspired from the treatise of Pothier. See 9 Oeuvres de Pothier 269 (ed. Bugnet 1890); cf. Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey*, 47 Tul. L. Rev. 1, 111 (1972). In *Ellis v. Prevost*, *supra*, the Louisiana Supreme Court adopted the definition of civil possession in Article 3392 of the 1825 Code and did away with the definition of civil possession in Article 3394.

31. See La. Civ. Code art. 3431 comment (d); *id.* art. 3501 (1870).

32. See La. Civ. Code art. 3431 comment (d). But cf. Symeonides, *supra* note 2, at 81-82.

33. See La. Civ. Code arts. 3432, 3433; *id.* art. 3443 (1870).

34. Under Article 3444 of the Louisiana Civil Code of 1870, the presumption of intent to retain possession ceased when the possessor failed to exercise actual possession for ten years. Louisiana courts, however, frequently managed to avoid application of this provision by finding that the possessor had exercised corporeal possession within a given ten year period. See, e.g., *Womack v. Walsh*, 255 La. 217, 230 So. 2d 83 (1969). In the 1982 revision, the presumption that one intends to retain possession continues as long as possession has not been abandoned or has been lost to another.

35. See La. Civ. Code art. 3435.

possession may be lost despite the continued existence of the intent to own.<sup>36</sup>

Strictly speaking, one may not have corporeal possession of a real right because one cannot have physical control of an incorporeal. However, one may exercise a real right, such as a servitude, by means of material acts or constructions. This form of exercise of a real right is similar to the corporeal possession of a tract of land and produces the same legal effects.<sup>37</sup> Likewise, the intent to have a real right as one's own after the cessation of material acts or the removal of constructions is similar to the civil possession of a corporeal immovable.<sup>38</sup>

A question arises whether the provisions governing the civil possession of corporeal immovables are also applicable to real rights other than ownership. Determination of this question is important for a variety of matters, including the protection of real rights other than ownership by the possessory action in the absence of a title establishing the real right.<sup>39</sup> Article 3665 of the Louisiana Code of Civil Procedure provides that the civil possession of mineral rights lasts for a maximum period of one year after cessation of material acts of possession.<sup>40</sup> Perhaps this provision should be extended to apply to the civil possession of all real rights other than ownership.

What constitutes corporeal possession depends largely on the nature of the property that one claims to possess.<sup>41</sup> For example, depending on the nature of the land, the mowing of grass may or may not constitute corporeal possession.<sup>42</sup> A possessor with a title possesses within the limits

---

36. See 3 M. Planiol et G. Ripert, *supra* note 9, at 169.

37. Thus, one may acquire the right to possess a real right. See *Kizer v. Lilly*, 471 So. 2d 716 (La. 1985). Further, one may acquire a real right by acquisitive prescription. See La. Civ. Code arts. 3473, 3486.

38. See La. Civ. Code arts. 3421, 3431, 3432; *id.* arts. 3429, 3431, 3442 (1870).

39. According to Louisiana jurisprudence, the rules governing possession apply by analogy to the quasi-possession of incorporeals. See *Kizer v. Lilly*, 471 So. 2d 716 (La. 1985); *Louisiana Irrigation and Mill Co. v. Pousson*, 262 La. 973, 265 So. 2d 756 (1972); *Symeonides*, *supra* note 22, at 671-80.

40. See La. Code Civ. P. art. 3665. If there is adverse possession, the owner of the mineral right may bring the possessory action only within one year from the commencement of such possession. Cf. *id.* art. 3666.

41. See *Chevron U.S.A., Inc. v. Landry*, 558 So. 2d 242 (La. 1990); *Bossier v. Shell Oil Co.*, 430 So. 2d 771 (La. App. 5th Cir. 1983); *Jones v. Pringle*, 226 So. 2d 592 (La. App. 2d Cir. 1969); *Chauvin v. Kirchhoff*, 194 So. 2d 805 (La. App. 1st Cir. 1967); *Kilchrist v. Conrad*, 191 So. 2d 705 (La. App. 3d Cir. 1966).

Cf. *Chaney v. State Mineral Board*, 444 So. 2d 105 (La. 1983). Riparian owners claimed that they had corporeally possessed the bed of a non-navigable river by using the river bed for recreational purposes, posting "keep-off" signs on the banks, and removing sand from the river bed.

42. See *Manzanares v. Meche*, 506 So. 2d 957 (La. App. 3d Cir.), writ denied, 508 So. 2d 822 (1987); *Wagley v. Cross*, 347 So. 2d 859 (La. App. 3d Cir. 1977). But cf.



of his title, even if he does not exercise corporeal possession over the entire tract of land.<sup>43</sup> In contrast, a possessor without title is only in possession of the area that he has possessed inch by inch or within enclosures.<sup>44</sup> The word enclosures does not necessarily mean fences. An enclosure may be a natural or an artificial boundary that establishes with certainty the limits of one's possession.<sup>45</sup>

---

*Antis v. Miller*, 524 So. 2d 71 (La. App. 3d Cir.), writ denied, 531 So. 2d 271 (1988) (mowing of grass not sufficient possession for the maintenance of a possessory action). An occasional mowing of grass on neighboring property is not a disturbance of the neighbor's possession. *Richard v. Comeaux*, 260 So. 2d 350 (La. App. 1st Cir. 1972).

43. See La. Civ. Code arts. 3426, 3487. It makes no difference that the title is with or without warranty. See *Bossier v. Shell Oil Co.*, 430 So. 2d 771 (La. App. 5th Cir. 1983). When the property description in the title is not sufficiently clear to show the limits to which one intends to possess, corporeal possession must be shown. *Olinkraft, Inc. v. Allen*, 333 So. 2d 250 (La. App. 2d Cir. 1976).

In *Verzwyvelt v. Armstrong-Ratterree, Inc.*, 463 So. 2d 979 (La. App. 3d Cir. 1985), plaintiff produced a title containing expressly land lying under a non-navigable oxbow lake that was formed when the Red River changed course and abandoned its old channel. The court held that plaintiff's possession of the dry land within his title constituted constructive possession of all the land contained therein, including the land covered with water.

The possession of a described tract of land extends to include batture in the absence of actual physical possession by someone else. *River Lands Fleeting Corp. v. Ashland Plantation*, 498 So. 2d 38 (La. App. 1st Cir. 1986); *Hargrave, Developments in the Law 1986-1987, Property*, 48 La. L. Rev. 457, 469-71 (1987).

44. See *City of New Orleans v. New Orleans Canal, Inc.*, 412 So. 2d 975 (La. 1981); *Alford v. Jarrell*, 471 So. 2d 970 (La. App. 1st Cir. 1985); "[w]here a plaintiff claims only by corporeal detention, without title, he must show an adverse possession within enclosures." In *Chaney v. State Mineral Board*, 444 So. 2d 105 (La. 1983), the court declared that, in the absence of title, possession must be proved "inch by inch" within enclosures.

In *Manzanares v. Meche*, 506 So. 2d 957 (La. App. 3d Cir.), writ denied, 508 So. 2d 822 (1987), the court was aware of the necessity of enclosures. Nevertheless, the court found that plaintiff had possessed an unenclosed narrow strip of land adjacent to a roadway.

45. See *Chevron U.S.A., Inc. v. Landry*, 558 So. 2d 242 (La. 1990) (a water-course is an enclosure); *Souther v. Domingue*, 238 So. 2d 264 (La. App. 3d Cir.), writ denied, 256 La. 891, 239 So. 2d 544 (1970); *Jones v. Pringle*, 226 So. 2d 592 (La. App. 2d Cir. 1969).

A painted line is an enclosure. *Antulovich v. Whitley*, 289 So. 2d 174 (La. App. 1st Cir. 1973); but cf. *Olinkraft, Inc. v. Allen*, 333 So. 2d 250 (La. App. 2d Cir. 1976) (repainting of the boundary line is not a sufficient corporeal possession to support the possessory action). The placing of markers at the four corners of an immovable is not an enclosure. *Johnson v. LaBokay Corp.*, 326 So. 2d 589 (La. App. 3d Cir. 1976).

A ditch may be a visible bound. *Alvarez v. Hub City Iron Works, Inc.*, 405 So. 2d 590 (La. App. 3d Cir. 1981), writ denied, 410 So. 2d 763 (1982).

The toe of a levee may be a visible bound. *Merchant v. Acadia-Vermilion Irrigation Co.*, 476 So. 2d 1014 (La. App. 3d Cir. 1985).

### *Constructive Possession*

A person who is in possession of a tract of land by virtue of a title is deemed to have *constructive possession* within the limits of his title even if he does not exercise any physical acts of use, detention, or enjoyment.<sup>46</sup> If he does exercise such acts over a part of the immovable, he is deemed to be in constructive possession of the remaining part of the immovable.<sup>47</sup> In the absence of title, one has possession only of the area he actually possesses inch by inch or within enclosures.<sup>48</sup>

The title to which constructive possession attaches is an act translative of ownership, such as a sale, an exchange, or a donation. This title need not be valid in order to support a claim of constructive possession.<sup>49</sup> Moreover, one may be in constructive possession regardless of his good or bad faith.<sup>50</sup>

### *Things Susceptible of Possession*

Corporeal things and real rights that qualify as private things<sup>51</sup> are susceptible of possession. Public things of the state and of its political subdivisions are, generally, insusceptible of possession by private persons.<sup>52</sup> The state and its political subdivisions may grant to private

---

46. See Board of Comm'rs v. S.D. Hunter Foundation, 354 So. 2d 156 (La. 1977); Bolding v. Eason Oil Co., 248 La. 269, 178 So. 2d 246 (1965); Jackson v. Bouanchaud, 178 La. 26, 150 So. 567 (1933); Ryan v. Pekinto, 387 So. 2d 1325 (La. App. 1st Cir. 1980).

For constructive possession of alluvion formed beyond the limits of the riparian's title, see Riverlands Fleeting Corp. v. Milliken and Farwell, 515 So. 2d 512 (La. App. 1st Cir. 1987); Riverlands Fleeting Corp. v. Ashland Plantation, 498 So. 2d 38 (La. App. 1st Cir. 1986); Hargrave, supra note 43, at 469-71.

47. See La. Civ. Code art. 3426; Symeonides, supra note 2, at 76-81.

48. See La. Civ. Code art. 3426. Comment (d) under this article explains that actual possession "must be either inch by inch possession (*pedis possessio*) or possession within enclosures." Certain Louisiana courts, however, seem to require inch by inch possession within enclosures.

49. See Marks v. Collier, 216 La. 1, 43 So. 2d 16 (1949). One may have constructive corporeal possession or constructive civil possession. For functional implications, see Symeonides, supra note 2, at 76.

50. See La. Civ. Code art. 3426 comment (b); id. art. 3487 comment (b).

51. See La. Civ. Code arts. 453, 454. It follows that a private person may institute a possessory action against the state or a political subdivision of the state with respect to things that are susceptible of possession by such a person. See Todd v. State, Dep't of Nat. Res., 474 So. 2d 430 (La. 1985); Witter v. City of Baton Rouge, 546 So. 2d 848 (La. App. 1st Cir. 1989); Symeonides, Ruminations on Real Actions, 51 La. L. Rev. 493 (1991); Symeonides, supra note 22, at 655-70.

52. See La. Civ. Code arts. 450, 458; Bruning v. City of New Orleans, 165 La. 511, 115 So. 733 (1926); Keefe v. City of Monroe, 9 La. App. 545, 120 So. 102 (2d Cir. 1929).

persons exclusive rights of use and enjoyment over public things.<sup>53</sup> In such a case, the grantee may be in possession of a real right that is protected by the possessory action.<sup>54</sup>

Personal rights are not susceptible of possession. Lessees and depositaries who have physical control over a thing by virtue of personal contracts are detainers rather than possessors. Expressions such as "possession of an obligation" or "possession of status" are figures of speech.<sup>55</sup> It is only obligations embodied in an instrument to the bearer that are susceptible of possession because such an instrument is a corporeal thing. A universality of rights, such as a succession or an enterprise, is not susceptible of possession because it is not a thing.

### *Nature of Possession*

The question concerning the nature of possession is an old one. There are indications in the preparatory works of the French Civil Code that possession was regarded as a real right.<sup>56</sup> The French Civil Code, however, as finally promulgated, is silent on this question. Under the circumstances, controversies among French commentators with respect to the nature of possession were to be expected.

Demolombe asserted last century that one's possession of a thing with the intent to own it is a real right.<sup>57</sup> He grounded this assertion on the observation that the rights accorded by law to possessors derive from the presumption of ownership that Article 2279 of the French Civil Code establishes rather than from the law governing personal obligations. In contrast, Planiol insisted that possession is a matter of fact and criticized as erroneous the view that possession is a juridical institution.<sup>58</sup> Such an institution is the means that the law employs for the protection or suppression of a matter of fact. The fact of possession is generally protected by the law, though not always. In certain circum-

---

53. See La. Civ. Code art. 723; A. Yiannopoulos, *Predial Servitudes*, § 8 in 4 *Louisiana Civil Law Treatise* (1983); cf. *City of New Orleans v. New Orleans Canal, Inc.*, 412 So. 2d 975 (La. 1981), rev'd on reh'g (1982); *Giardina v. Marrero Furniture Co.*, 310 So. 2d 607 (La. 1975); *State ex rel. Saint v. Timothy*, 166 La. 738, 117 So. 812 (1928); 3 M. Planiol et G. Ripert, *supra* note 9, at 160.

54. See *Parkway Dev. Corp. v. City of Shreveport*, 342 So. 2d 151 (La. 1977). A private person may, exceptionally, have actual or constructive possession of a navigable water body. See *St. Mary Parish Land Co. v. State Mineral Bd.*, 167 So. 2d 509 (La. App. 1st Cir.), writ denied, 246 La. 908, 168 So. 2d 821 (1964).

55. See 3 M. Planiol et G. Ripert, *supra* note 9, at 161.

56. See 3 P. Fenet, *Recueil complet des travaux préparatoires du Code Civil* 459-60 (1836).

57. See 9 C. Demolombe, *Traité de la distinction de biens* 366 in *Cours de Code Napoleon* (1874-82).

58. See 3 M. Planiol et G. Ripert, *supra* note 9, at 159 n.2.

stances, the law withdraws possessory protection in order to safeguard the right of ownership.

Controversies concerning the nature of possession may be interesting from the viewpoint of legal philosophy but do not involve practical consequences in Louisiana. Article 3422 of the Louisiana Civil Code, which has no equivalent in the French Civil Code, declares that possession is "a matter of fact; nevertheless, one who has possessed a thing for over a year acquires the right to possess it."<sup>59</sup> This article indicates that possession, a fact that is recognized and protected by the law, gives rise to the right to possess, a *sui generis* right that is neither personal nor real. This view accords with the historical sources of the Louisiana Civil Code and with contemporary continental doctrine.<sup>60</sup>

### *Rights of Possessors*

Possession is a matter of fact to which the law attaches significant legal consequences. Article 3422 of the Louisiana Civil Code declares that a person who has possessed a thing for over a year acquires the right to possess it.<sup>61</sup> This right entitles a possessor of immovable property to protection by the nominate possessory action of Article 3655 of the Louisiana Code of Civil Procedure.<sup>62</sup> Exceptionally, however, a possessor of immovable property is entitled to institute the possessory action even if he did not acquire the right to possess. This happens when such a possessor is evicted by force or fraud.<sup>63</sup> The possession of movables is protected by an innominate civil action.<sup>64</sup>

Article 3423 of the Louisiana Civil Code declares that a possessor is considered provisionally as owner of the thing he possesses, that is, until another person's ownership is established.<sup>65</sup> This is a presumption

---

59. La. Civ. Code art. 3422; *id.* art. 3434 (1870). For the distinction between possession and the right to possess, see also *Liner v. Louisiana Land and Exploration Co.*, 319 So. 2d 766 (La. 1975).

60. See Wolff-Raiser, *Sachenrecht* 19 (10th ed. 1957); G. Balis, *supra* note 19, at 3-7; but cf. 2 Maasdorp's *Institutes of South African Law, The Law of Things* 16 (7th ed. 1960) (possession termed a "real right").

61. See La. Civ. Code art. 3422. The right to possess is a *sui generis* property right. This right is protected by Article 2315 of the Louisiana Civil Code. Thus, the possessor of a stray cat may sue for damages when the cat is destroyed through the fault of another person. See *Peloquin v. Calcasieu Parish Police Jury*, 367 So. 2d 1246 (La. App. 3d Cir. 1979).

62. See La. Code Civ. P. art. 3655.

63. See La. Code Civ. P. art. 3658(2). In this instance, the possessory action protects *possession* rather than the *right to possess* in the interest of preservation of public peace. *Id.* art. 3655.

64. See La. Civ. Code art. 3444.

65. See La. Civ. Code art. 3423. See also La. Civ. Code art. 530.

of ownership accorded by the law to a person who exercises factual authority over a thing,<sup>66</sup> movable or immovable.<sup>67</sup> Therefore, when a petitory action is instituted against a person in possession of immovable property, or when a revendicatory action is instituted against a person in possession of a movable, the burden of proof of ownership rests on the plaintiff.<sup>68</sup>

Possession leads to acquisitive prescription.<sup>69</sup> A possessor in good faith may acquire ownership of movables in three years, and of immovables in ten years. A possessor in bad faith may acquire ownership of movables in ten years, and of immovables in thirty years. Scattered provisions in the Civil Code govern a possessor's right to fruits, reimbursement for expenses and improvements, and his right to retain the thing until he is reimbursed.<sup>70</sup> These rights are accorded to possessors regardless of the duration of their possession.

### *Comparative Law*

In Louisiana and in France, the legal institution of possession has been structured around three basic ideas. First, the intent to possess as owner is an indispensable requirement for possession.<sup>71</sup> In the absence of such an intent, the exercise of factual authority over a thing is detention rather than possession. Second, possession applies to corporeal things and real rights only.<sup>72</sup> Personal rights are not susceptible of possession. Third, though distinct and distinguishable from ownership, possession is linked to ownership by a presumption that a possessor is provisionally considered to be owner of the thing he possesses until the right of the true owner is established.<sup>73</sup> The institutionalization of possession within the framework of these ideas has been criticized as having resulted in a rather narrow conception of possession in comparison with that of modern civil codes.<sup>74</sup>

---

66. See 3 M. Planiol et G. Ripert, *supra* note 9, at 182. The presumption of ownership under Article 3423 of the Louisiana Civil Code is accorded to a *possessor* even before he has acquired the *right to possess*. See Symeonides, *supra* note 2, at 94.

67. For movables, see also La. Civ. Code art. 530.

68. See La. Civ. Code art. 531; La. Code Civ. P. art. 3653.

69. See La. Civ. Code arts. 3473-3491.

70. See La. Civ. Code arts. 486, 488, 496, 497, 527-529.

71. See La. Civ. Code arts. 3421, 3424.

72. See La. Civ. Code art. 3421.

73. See La. Civ. Code art. 3423. See also 2 C. Aubry et C. Rau, *Droit civil français* 117 n.4 (7th ed. 1961): "[W]hat the law protects is the probable right of ownership or servitude, the existence of which it assumes, rather than possession itself."

74. See 3 M. Planiol et G. Ripert, *supra* note 9, at 163.

In Germany, possession is the exercise of factual authority over a corporeal thing (*Sachbesitz*).<sup>75</sup> The intent to possess as owner is not an indispensable requirement for possession. Any person who exercises factual authority over a thing is a possessor, even if he exercises that authority on behalf of another person. Thus, a lessee or a depositary is a possessor. Nevertheless, a distinction is drawn between a person who possesses as owner (*Eigenbesitzer*) and a person who lacks that intent (*Fremdbesitzer*).<sup>76</sup> This distinction is pertinent for acquisitive prescription, because prescriptive rights accrue only in favor of a possessor who possesses as owner. Possessory protection is accorded to both a possessor who possesses as owner and a possessor who possesses on behalf of another person.

Several persons may be simultaneously in possession of the same thing. In this respect, a distinction is drawn between *direct* possession and *indirect* possession. A person who possesses a thing as usufructuary, pledgee, lessee, depositary, or under a similar relationship that establishes a right or obligation to possess for a period of time is a direct possessor.<sup>77</sup> Normally, the owner of the thing subject to usufruct, pledge, lease, deposit, or similar relationship is the indirect possessor. A thing may be subject to several layers of direct and indirect possession. When, for example, a lessee executes a sublease, the lessor and the lessee are indirect possessors and the sublessee is the direct possessor.<sup>78</sup>

Despite the elimination of intent to own as a requisite for possession, the German Civil Code has not completely dispensed with the notion of detention. Certain persons may exercise factual authority over a thing without being possessors. A person who exercises factual authority over a thing on behalf of another person in that person's household or place of business, or elsewhere under a similar relationship that obligates him to conform to instructions with respect to the thing, is a detainer known as possession-helper (*Besitzdiener*).<sup>79</sup> In such a case, possessor is the person for whom the possession-helper exercises factual authority. The distinction between an indirect possessor and a possession-helper is not always easy to draw. For example, depending on the circumstances, a spouse or a mandatary may qualify both as a possession-helper and an indirect possessor.

---

75. See Bürgerliches Gesetzbuch [BGB] § 854. Under the German Civil Code, a thing is a corporeal object. See BGB § 90. The German Civil Code leaves no room for the notion of quasi-possession of real rights. However, such rights are protected by the possessory action. See BGB § 1029 (servitudes).

76. See BGB § 872.

77. See BGB § 868.

78. See BGB § 871.

79. See BGB § 855.

The Greek Civil Code has been, generally, patterned after the model of the German Civil Code, but the institution of possession has been structured within the conceptual framework of the Roman-Byzantine tradition. In accord with the Romanist doctrine, the Greek Civil Code has preserved the distinction between possession and detention. A possessor is a person who exercises factual authority over a corporeal thing with the mind of an owner.<sup>80</sup> In the absence of such an intent, there is detention rather than possession. The Greek Civil Code has also preserved the notion of quasi-possession. Article 975 declares that with respect to the rights of pledge and servitudes, possession consists in the exercise of these rights with the mind of a person entitled to these rights.

The code contains detailed provisions governing the acquisition, exercise, transfer, and loss of possession.<sup>81</sup> The German influence, though limited, is still apparent. Detailed provisions governing possessory protection reflect the German approach, and Article 986 introduces the notion of possession helpers and grants them the right to exercise self-help for the suppression of disturbances of possession.<sup>82</sup>

The German conceptions of possession did not influence the 1982 revision of the Louisiana Civil Code. The Romanist tradition was firmly established in Louisiana, and it has proved to be sound and functional. As in France, innovation was necessary only for the protection of precarious possessors, and this was easy to accomplish within the existing conceptual framework.

#### *Acquisition of Possession and of the Right to Possess*

A person acquires possession when he exercises physical control over a thing with the intent to have it as his own.<sup>83</sup> In civilian terminology, possession is acquired upon the concurrence of its two constituent elements, the *corpus* and the *animus*.<sup>84</sup>

The *corpus* is acquired either as a result of unilateral acts of use, detention, or enjoyment over a thing or as a result of relinquishment of possession by a previous possessor. The acquisition of possession, like the acquisition of ownership, may be original or derivative. It is *original* when a person commences to possess for himself without regard

---

80. See Greek Civ. Code art. 974; Georgiadis, *supra* note 13; G. Balis, *supra* note 19, at 3-85.

81. See Greek Civ. Code arts. 976-983.

82. See Greek Civ. Code arts. 984-998.

83. See La. Civ. Code art. 3424; *id.* art. 3436 (1870); 3 M. Planiol et G. Ripert, *supra* note 9, at 166; 2 C. Aubry et C. Rau, *supra* note 73, at 119.

84. See D. 41.2.3 § 1: "*Etpiscimur possessionem corpore et animo, neque per se animo, aut per se corpore.*"

to any other person's possession. It is *derivative* when a person acquires possession by a transfer from another person.

The *animus* is, ordinarily, inferred from the exercise of physical control over a thing or from certain juridical acts or facts that imply its existence, such as a tradition *brevi manu* and a *constitutum possessorium*. A tradition *brevi manu* takes place when a precarious possessor, by virtue of an agreement with the possessor, commences to possess for himself.<sup>85</sup> This happens, for example, when a lessor sells the leased property to the lessee. There is a *constitutum possessorium* when a possessor agrees to exercise possession for another person.<sup>86</sup> This happens when a thing is sold and the vendor agrees to keep the thing for the purchaser or when an owner transfers ownership and retains a usufruct.

In France and in Louisiana, the intent to possess does not alone suffice for acquisition of possession. Article 3424 of the Louisiana Civil Code declares: "To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing."<sup>87</sup> This provision contemplates, primarily, the commencement of an original possession. When the acquisition of possession is derivative, the transferee need not take corporeal possession; his intent to possess the thing, that is, his civil possession, is tacked onto the transferor's corporeal possession.<sup>88</sup>

*Acquisition of possession through another person.* Article 3428 of the Louisiana Civil Code declares that one may acquire possession of a thing "through another who takes it for him and in his name."<sup>89</sup> In such a case, the person who exercises physical control over the thing supplies the material element of possession, the *corpus*. The volitional element, the *animus*, must exist in the mind of the person for whom possession is acquired. The Civil Code requires that the person taking possession "must intend to do so for another."<sup>90</sup> If he lacks that intent, he would be presumed to possess for himself. A person who acquires possession for another is a precarious possessor.

---

85. See G. Balis, *supra* note 19, at 15; 2 C. Aubry et C. Rau, *supra* note 73, at 121. See also F. Savigny, *supra* note 14, at 243.

86. See G. Balis, *supra* note 19, at 21; 2 C. Aubry et C. Rau, *supra* note 73, at 121.

87. La. Civ. Code art. 3424; *id.* art. 3436 (1870). A person may acquire possession over a thing that no one else possesses or over a thing that somebody else possesses. If possession is not acquired with the consent of the person having possession, there is an eviction or usurpation of another's possession.

88. See La. Civ. Code art. 3424 comment (c); *Ellis v. Prevost*, 19 La. 251 (1841). See also La. Civ. Code arts. 3441-3443.

89. La. Civ. Code art. 3428; *id.* arts. 3438, 3445 (1870); C. Civ. art. 2228 (Fr.). In civilian terminology, possession may always be acquired, and maintained, *corpore alieno*. See Dig. 41.2.3. § 12: "*Possessionem acquirimus et animo et corpore; animo utique nostro, corpore vel nostro, vel alieno.*"

90. La. Civ. Code art. 3428.



Incompetents may acquire possession by their own acts and intent or through their legal representatives.<sup>91</sup> Article 3439 of the Louisiana Civil Code of 1870 stated that "a natural person who labors under some incapacity may acquire possession through his tutor or curator." This provision was not reproduced in the 1982 revision because it was unnecessary. Since possession is a matter of fact, capacity to enter into juridical acts is not required for original acquisition of possession. Incompetents may take, therefore, possession of a thing without the consent of their tutors or curators.<sup>92</sup> However, tutors and curators may also take possession, whether original or derivative, for the incompetents they represent.<sup>93</sup> Juridical persons acquire possession through their legal representatives.<sup>94</sup>

*Acquisition of the right to possess.* Article 3422 of the Louisiana Civil Code declares that a person "who has possessed a thing for over a year acquires the right to possess." The right to possess signifies a possession protected by the possessory action.<sup>95</sup> Possession, as factual authority over a thing, is distinguishable from the right to possess, that is, a possessor's claim to remain in undisturbed possession if he has been disturbed and to be restored to the possession of the property if he has been evicted. These ends are achieved by the possessory action which has been designed to protect the right to possess and exceptionally the factual authority over a thing.<sup>96</sup>

For acquisition of the right to possess, the possession must be corporeal at its inception, uninterrupted, and free of vice.<sup>97</sup> A precarious possession cannot acquire the right to possess while he exercises possession for another person; however, a precarious possessor may institute a possessory action against any one who disturbs his enjoyment except the person for whom he possesses.<sup>98</sup> When a precarious possessor gives notice that he intends to possess for himself, there is a concurrence of

---

91. See La. Civ. Code, Book III, Title XXIII, Occupancy and Possession, Exposé des Motifs 48, 50 (Supp. 1990).

92. Cf. Symeonides, *supra* note 2, at 83. Of course, an incompetent who lacks the ability to form the intent to own a thing cannot acquire possession. *Id.*

93. See 3 M. Planiol et G. Ripert, *supra* note 9, at 167: "On principle, the volitional element must exist in the person who must possess; the will of another person cannot make us possessors. However, for persons incapable of having an *animus* of their own, such as children and insane persons, we must admit that they acquire possession through the intent of another person; they borrow, in a way, the *animus* of their representatives."

94. See La. Civ. Code art. 3430; *id.* art. 3440 (1870).

95. See Symeonides, *supra* note 2, at 94.

96. See La. Code Civ. P. art. 3658(2). The mere factual authority of less than one year's duration is protected in case of fraudulent or violent eviction. *Id.* For the protection of precarious possession, see La. Civ. Code art. 3440.

97. See La. Code Civ. P. art. 3658(2).

98. See La. Civ. Code art. 3440.

*corpus* and *animus*, and one year later the former precarious possessor acquires the right to possess.<sup>99</sup>

Like the possessor of a corporeal immovable, the possessor of a real right may acquire the right to possess. The law does not require exercise of the real right for an entire year; constructive possession or civil possession preceded by corporeal possession suffices.<sup>100</sup> The requirement of continuity of possession is satisfied when a real right is used regularly according to its nature.<sup>101</sup>

The institution of a possessory action against a person who usurped another's possession prevents the defendant from acquiring the right to possess. According to Article 3462 of the Louisiana Civil Code, prescription is interrupted when the owner commences action against the possessor.<sup>102</sup> This provision should be applied by analogy to a possessory action.

#### *Possession as Owner*

A possessor in the proper sense of the word is a person who possesses as owner,<sup>103</sup> that is, has the intent to own a corporeal thing or the intent to have as his own a real right in another person's property.<sup>104</sup> A person who lacks that intent is either a precarious possessor<sup>105</sup> or no possessor at all.

---

99. See La. Civ. Code arts. 3439, 3478; *Satsuma Pentecostal Church v. Harris*, 563 So. 2d 1247 (La. App. 1st Cir. 1990).

100. See *Parkway Dev. Corp. v. City of Shreveport*, 342 So. 2d 151 (La. 1977).

101. See *Louisiana Irrigation & Mill Co. v. Pousson*, 262 La. 913, 265 So. 2d 756 (1971). See also A. Yiannopoulos, *supra* note 53, at § 181.

102. See La. Civ. Code art. 3462; cf. *Jones v. Skannal*, 384 So. 2d 492 (La. App. 2d Cir. 1980). The right to possess is not acquired by means of acquisitive prescription. See *Todd v. State, Dept. of Natural Resources*, 474 So. 2d 430, 438 (1985). The court declared that the right to possess is "no prescriptive right, but a procedural assurance of the fact of undisturbed possession." Nevertheless, the filing of a suit by an evicted possessor should prevent the person who usurped plaintiff's possession from acquiring the right to possess during the pendency of the action.

103. See La. Civ. Code art. 3424; *Symeonides*, *supra* note 2, at 73; Comment, Possession, the 1982 Revision of the Louisiana Civil Code, 58 Tul. L. Rev. 573, 575 (1983). For what constitutes possession as owner, see *City of New Orleans v. New Orleans Canal, Inc.*, 412 So. 2d 975 (La. 1981), *rev'd on reh'g* (1982); *Hammond v. Averett*, 415 So. 2d 226 (La. App. 2d Cir. 1982); *Harper v. Willis*, 383 So. 2d 1299 (La. App. 3d Cir.), writ denied, 390 So. 2d 202 (1980). In *Oliver v. Kennington*, 458 So. 2d 130 (La. App. 2d Cir.), writ denied, 460 So. 2d 610 (1984), the court held that the occasional cutting of timber from an isolated tract of land is not proof of actual possession as owner.

104. The expressions "possesses as owner," "possesses for himself," or "possesses with the intent to have it [the thing] as his own" have the same meaning. Cf. La. Civ. Code arts. 3421, 3424, 3438; La. Code Civ. P. art. 3656.

105. See La. Civ. Code art. 3437. In contemporary civil law systems, precarious possession is qualified as *detention*.

The benefits of possession are generally attributed to a person who possesses as owner.<sup>106</sup> By way of exception, however, a precarious possessor enjoys limited possessory protection. According to Article 3440 of the Louisiana Civil Code, the possessory action is available to a precarious possessor, such as a lessee or a depositary, against anyone who causes a disturbance of possession except the person for whom he possesses.<sup>107</sup> Therefore, it is important to determine whether the plaintiff in a possessory action possesses as owner or for another person.

The intent to possess as owner is not necessarily a specific and conscious intent to own a thing. A general intent may suffice, at least as to things that are destined to be possessed and are placed in a space relationship suitable for the exercise of possession. For example, the addressee is in possession of his mail even before he acquires knowledge that the mail has been deposited in his box.<sup>108</sup>

The possessor's intent to possess as owner is presumed, unless he began to possess in the name of and for another, in which case the presumption does not arise.<sup>109</sup> When the presumption arises, it may be rebutted by any of the parties.<sup>110</sup> Occasionally, a party's own admissions

---

106. See La. Civ. Code art. 3423; *id.* arts. 486, 488, 527-529. For the question whether a surviving spouse in community enjoys de jure possession of his undivided share of the community, see *Gauthier v. Gauthier*, 502 So. 2d 140 (La. App. 3d Cir. 1987); *Succession of Dunham*, 428 So. 2d 876 (La. App. 1st Cir. 1983). For the requirement of "possession as owner" in the framework of the community property regime, see *Hargrave*, *supra* note 43, at 465-69.

107. See La. Civ. Code art. 3440. In the past, the possessory action could be instituted only by a person who possessed as owner; a precarious possessor could not be plaintiff in a possessory action. See La. Code Civ. P. art. 3656; *Dutile v. Aymond*, 338 So. 2d 350 (La. App. 3d Cir. 1976). La. Code Civ. P. art. 3556 has been impliedly repealed to the extent that it conflicts with La. Civ. Code art. 3440.

108. See 3 M. Planiol et G. Ripert, *supra* note 9, at 163.

109. See La. Civ. Code art. 3427; C. Civ. art. 2230 (Fr.); *Chevron U.S.A., Inc. v. Landry*, 558 So. 2d 242 (La. 1990); *Williams v. McEacharn*, 464 So. 2d 20 (La. App. 2d Cir. 1985); *Freeman v. Williams*, 450 So. 2d 1030 (La. App. 1st Cir. 1984); *Mulkey v. Cate*, 424 So. 2d 1098 (La. App. 1st Cir. 1982), writ denied, 429 So. 2d 144 (1983).

In *Harvill v. Casey*, 461 So. 2d 373 (La. App. 2d Cir. 1984), writ denied, 464 So. 2d 318 (1985), the presumption did not arise because the person claiming possession was a relative who had possessed for himself and his co-owners. In *Chaney v. State Mineral Board*, 444 So. 2d 105 (La. 1983), the court declared that use of the river bed for recreational purposes, posting "keep-off" signs on the banks, and removing sand from the river bed were not indicative of possession of the river bed with the intent to own it. It would seem that plaintiffs were entitled to rest on the presumption of La. Civ. Code art. 3427 but failed to prove acts of corporeal possession. The two requisites for possessory protection are distinct and distinguishable; they should not be confused.

110. See *Levy v. Germania Plantation, Inc.*, 395 So. 2d 366 (La. App. 1st Cir. 1981). However, the person who claims that he has the possession of a thing does not have the burden of proof that he possesses as owner; it is for the opposing party to show that his adversary possesses for another or he is no possessor at all.

result in rebuttal of the presumption to possess as owner.<sup>111</sup> A person who began to possess for another is not presumed to possess for himself; on the contrary, he is presumed to be a precarious possessor although he may actually intend to possess for himself.<sup>112</sup>

A person who has a real right on another's immovable, such as a personal servitude or a predial servitude, possesses the real right with the intent to have it as his own.<sup>113</sup> However, he does not possess the immovable that is burdened with his real right because he has no intent to own that immovable. He exercises physical acts of use, detention, or enjoyment over the immovable, but as a precarious possessor. His acts of possession benefit the person from whom he acquired his real right.<sup>114</sup> In accord, Article 3660(2) of the Louisiana Code of Civil Procedure declares that a person who claims the ownership of immovable property "possesses"<sup>115</sup> through a person who has the use or usufruct of the immovable. One may, therefore, conclude that the holder of a real right possesses that right for himself and is a detainer rather than possessor of the immovable.<sup>116</sup>

---

111. In *Briggs v. Pellerin*, 428 So. 2d 1087 (La. App. 1st Cir. 1983), the defendant rendered his possession precarious by acknowledging before witnesses that the fence enclosing his property was erroneously placed at a point beyond the limits of his title thus enclosing partly the land of his neighbor. In *Comeaux v. Davenport*, 452 So. 2d 818, 821 (La. App. 3d Cir. 1984), plaintiff signed a lease from the record owners of the disputed property after having possessed it adversely as owner for 23 years. Had this lease been valid, it would have constituted an acknowledgment capable of rendering subsequent possession precarious. However, after expressing "serious misgivings regarding the validity of plaintiff's consent" because he could not read and did not know what he was signing, the court declared the lease invalid because, of the two co-owners named as lessors in the lease document, only one had signed it.

In *Williams*, 464 So. 2d 20, the court held that a declaration against interest after adverse possession that lasted for more than thirty years "is not sufficient to rebut the presumption of possession as owner . . . which possession as owner is also established by the lengthy use of the property." *Id.* at 24.

112. See La. Civ. Code art. 3438.

113. See La. Civ. Code art. 3421 para. 2. See also La. Code Civ. P. art. 3656: "A person entitled to the use or usufruct of immovable property, and one who has a real right therein, possesses for himself."

114. See *Board of Comm'rs of the Caddo Levee Dist. v. S.D. Hunter Foundation*, 354 So. 2d 156 (La. 1977); *Manson Realty Co. v. Plaisance*, 196 So. 2d 555 (La. App. 4th Cir. 1967).

115. La. Code Civ. P. art. 3660 para. 2. See also *id.* art. 3656 comment (b): "A person who is entitled to the use or usufruct possesses the property or right both for himself and for the naked owner, and hence either may bring the possessory action."

116. See *A. Yiannopoulos*, *supra* note 53, at § 179. In *Faust v. Mitchell Energy Corp.*, 437 So. 2d 339, 343 (La. App. 2d Cir. 1983), the court properly held that the holder of a real right, a Cemetery Association, had possession for "cemetery purposes only" and did not have possession of the land.

*Exercise of Possession by Another*

Possession may be maintained through the acts of another person. Article 3429 of the Louisiana Civil Code declares that possession "may be exercised by the possessor or by another who holds the thing for him and in his name. Thus a lessor possesses through the lessee." A lessor ceases to exercise factual authority over the leased property; but, since the lessee detains the property for the lessor, the latter continues to enjoy all the benefits of possession. The lessor may continue to execute juridical acts with respect to the leased premises and perform acts indicative of civil possession, such as the payment of taxes. However, material acts of use, detention, and enjoyment are performed by another person. In civilian terminology, the lessor possesses *corpore alieno*.<sup>117</sup>

A person who exercises possession for another is a precarious possessor. This person has the detention of the property rather than possession in the proper sense of the word.

*Loss of Possession and of the Right to Possess*

*Civil law doctrine.* According to civilian doctrine, possession may be lost as a result of the loss of the *corpus*, of the *animus*, or of both elements.<sup>118</sup>

Quite frequently, possession is lost by a simultaneous loss of factual authority and termination of the intent to possess as owner. This happens when the possessor of an immovable gives up his possession of a disputed strip of land at the boundary. This also happens when the possessor of a movable abandons it or throws it away, as in the case of favors thrown from a Mardi Gras parade.<sup>119</sup>

Possession may also be lost as a result of the loss of the factual authority over a thing despite the continuous existence of the intent to possess as owner. This happens when a person usurps another's possession, when a thing is destroyed, or when a wild animal recovers its natural liberty.<sup>120</sup> In such cases, the person who had possession still has the intent to possess as owner, but he cannot exercise acts of use, detention, or enjoyment over a thing.

117. See 3 M. Planiol et G. Ripert, *supra* note 9, at 168.

118. *Id.* at 167; 2 C. Aubry et C. Rau, *supra* note 73, at 123; G. Balis, *supra* note 19, at 34.

119. Cf. La. Civ. Code art. 3418: "A thing is abandoned when its owner relinquishes possession with the intent to give up ownership." Things thrown from Roman parades were known as *jacta missilia*. See Dig. 41.1.9.7: "qui missilia jactat in vulgus" In such cases, there is a simultaneous loss of the *corpus* and the *animus*.

120. Cf. La. Civ. Code art. 3414. This provision speaks of loss of ownership but it applies, *a fortiori*, to the loss of possession. In such a case, there is loss of possession as a result of loss of the *corpus* alone.

Finally, possession may be lost when the possessor ceases to possess as owner but continues to exercise factual authority over the thing. A typical example is that of a vendor who has agreed to keep the thing in the name and on behalf of the purchaser. In such a case, the vendor becomes a precarious possessor and the transaction is termed a *constitutum possessorium*.<sup>121</sup>

*Louisiana Civil Code*. Article 3433 of the Louisiana Civil Code provides that possession is lost "when the possessor manifests his intention to abandon it or when he is evicted by another by force or usurpation." This article contemplates a loss of possession either as a result of the loss of the *animus* or as a result of the loss of both the *animus* and the *corpus*. Article 3433 does not cover the loss of possession as a result of the *corpus* alone, as in the case of destruction of a thing, because this is a matter of general principle rather than positive law. The two modes of loss of possession covered by Article 3433 are a unilateral abandonment of possession by the possessor and an eviction or usurpation perpetrated by another person who commenced to possess for himself. The transfer of possession by one possessor to another does not entail a loss of possession. The former possessor ceases to possess but possession is continued by the transferee who benefits by tacking.<sup>122</sup>

What constitutes an abandonment of possession is a question of fact that is determined in light of all the circumstances. Ordinarily, abandonment of possession is established when the possessor manifests his intent by overt and unambiguous acts, for example, by throwing away a movable thing. The intent to abandon is subjective, but its existence may be established in light of objective considerations.

An eviction from possession or usurpation occurs when a person takes corporeal possession of a thing that was in another's possession.<sup>123</sup> It is distinguished from a mere disturbance of possession that falls short of eviction; possession is lost not when a possessor is merely disturbed in his possession but when he is evicted.<sup>124</sup> What constitutes an eviction

---

121. See G. Balis, *supra* note 19, at 21; 2 C. Aubry et C. Rau, *supra* note 73, at 121.

122. La. Civ. Code art. 3433 comment (b); *id.* art. 3442.

123. An eviction or usurpation is a disturbance in fact. See La. Code Civ. P. art. 3659. It is a maxim of Roman law that two persons cannot possess simultaneously the same thing. Therefore, it is only upon the eviction of the previous possessor that the new possessor commences to possess. See La. Civ. Code arts. 3424-3425.

124. See *Liner v. Louisiana Land and Exploration Co.*, 319 So. 2d 766 (La. 1975). See also *Norton v. Addie*, 337 So. 2d 432 (La. 1976) (occasional hunting; no eviction); *Boneno v. Lasseigne*, 534 So. 2d 968 (La. App. 5th Cir. 1988) (pile driving in batture); *Gaulter v. Gennaro*, 345 So. 2d 92 (La. App. 1st Cir. 1977) (picking of berries and pecans).

A series of disturbances in fact does not necessarily result in usurpation of one's

is a question of fact determined, like abandonment of possession, in light of all the circumstances. Ordinarily, the erection of a fence or other enclosure,<sup>125</sup> or the use of the property according to its nature by a person claiming it adversely to the possessor,<sup>126</sup> is an eviction. However, acts of simple tolerance, such as an occasional mowing of grass across the boundary of adjacent tracts of land, do not constitute an eviction.<sup>127</sup> Corporeal, civil, or constructive possession is lost as a result of the corporeal possession of the same thing by another person. However, acts of civil possession cannot result in the loss of another's corporeal or civil possession, and a mere constructive possession cannot oust another's corporeal, civil, or constructive possession.<sup>128</sup> Likewise, a disturbance in law cannot be an eviction.<sup>129</sup>

---

possession. See *Richard v. Comeaux*, 260 So. 2d 350, 354 (La. App. 1st Cir. 1972). In *Meche v. Graham*, 421 So. 2d 461 (La. App. 3d Cir. 1982), the court held that the placement of stakes along a disputed boundary did not suffice to usurp possession. In other words, the placement of stakes was considered by the court as a mere disturbance of possession rather than eviction.

There is no eviction when property is surveyed and lines are marked on the ground. *McIlwain v. Manville Forest Products Corp.*, 499 So. 2d 1138 (La. App. 2d Cir. 1986); *Pitre v. Tenneco Oil Co.*, 385 So. 2d 840 (La. App. 1st Cir.), writ denied, 392 So. 2d 678 (1980); *Holliday v. Continental Can Co.*, 351 So. 2d 181 (La. App. 2d Cir. 1977).

125. See *Hongo v. Carlton*, 241 So. 2d 34 (La. App. 3d Cir. 1970); *Kilchrist v. Conrad*, 191 So. 2d 705 (La. App. 3d Cir. 1966).

126. See La. Civ. Code art. 3433 comment (d).

127. See *Richard v. Comeaux*, 260 So. 2d 350 (La. App. 1st Cir. 1972). Once possession has been acquired, however, mowing of the grass may constitute sufficient corporeal possession. See also *Wagley v. Cross*, 347 So. 2d 859 (La. App. 3d Cir. 1977). Cf. La. Civ. Code art. 3490 (1870). This provision declared: "The circumstance of having been in possession by the permission or through the indulgence of another person, gives neither legal possession nor the right of prescribing." Plenty has been lost in the translation from the French text of art. 3456 of the Louisiana Civil Code of 1825, same as art. 2232 of the Code Napoleon: "Les acts de pure faculté et ceux de simple tolerance, ne peuvent fonder ni possession ni prescription" (acts that are the exercise of a prerogative, and those of simple tolerance, cannot be the foundation of either possession or prescription). The provision has not been reproduced in the 1982 revision because it is self-evident.

128. See La. Civ. Code arts. 3424, 3425; *Oliver v. Kennington*, 458 So. 2d 130 (La. App. 2d Cir.), writ denied, 460 So. 2d 610 (1984); *Souther v. Domingue*, 238 So. 2d 264 (La. App. 3d Cir.), writ denied, 256 La. 891, 239 So. 2d 544 (1970).

In *Whitley v. Texaco, Inc.*, 434 So. 2d 96 (La. App. 5th Cir. 1982), on rehearing, the court held that of two conflicting constructive possessions the one first established prevails, since once established, possession is ousted only by adverse corporeal, not constructive possession. For discussion, see Symeonides, *Developments in the Law, 1982-83, Property*, 44 La. L. Rev. 505, 513-515 (1983); Note, *Property: Conflicting Constructive and Civil Possessions*, 45 La. L. Rev. 979 (1985).

129. See *Chauvin v. Kirchoff*, 194 So. 2d 805, 813 (La. App. 1st Cir. 1967). See also *Ree Corp. v. Shaffer*, 261 La. 502, 521, 260 So. 2d 307, 314 (1972) (Tate, J., concurring): "Although the recordation itself is a disturbance in law for *such* purpose, the prior jurisprudence never held such 'disturbance in law' by mere recordation to be

*Interruption of possession; loss of the right to possess.* The loss of possession is distinguished from the *interruption* of possession. Under Article 3658(2) of the Louisiana Code of Civil Procedure, possessory protection is available to a possessor who had possession "without *interruption* for more than a year immediately prior to the disturbance."<sup>130</sup> The Code of Civil Procedure does not determine what constitutes an interruption of possession. However, Article 3434 of the Louisiana Civil Code declares that possession is interrupted "when the right to possess is lost." This right is lost upon abandonment of possession, and, in case of eviction, if the possessor does not recover possession within a year of the eviction.<sup>131</sup> If the possessor recovers possession within one year, or if he recovers possession later as a result of an action brought within the year, the interruption of possession is considered never to have occurred.<sup>132</sup>

*Loss of the possession of real rights.* The possession of a real right other than ownership is lost when another person exercises the right according to its nature with the intent to have it as his own. In such a case, there is a usurpation of the possession of the real right that corresponds with an eviction from the possession of a corporeal thing.

The possession of a real right other than ownership may also be lost when the property burdened with such a right is in the possession

---

a sufficient interruption of possession to prevent the physical possessor of property from being nevertheless considered to be 'possession quietly and without interruption,' La.C.Civ.P. Art. 3658(2)."

130. La. Code Civ. P. art. 3658(2). See also La. Civ. Code arts. 3442, 3476. La. Civ. Code art. 3442 requires uninterrupted possession for tacking, and Article 3476 requires uninterrupted possession for acquisitive prescription. Interruption of possession is also distinguishable from interruption of acquisitive prescription. Possession is interrupted when the right to possess is lost. See *infra* text accompanying note 131. Acquisitive prescription is interrupted when possession is lost. See La. Civ. Code art. 3465.

131. La. Civ. Code art. 3465. See also *Liner v. Louisiana Land and Exploration Co.*, 319 So. 2d 766 (La. 1975). *Mire v. Crowe*, 439 So. 2d 517 (La. App. 1st Cir. 1983), contains an excellent discussion of the requirements for the possessory action and specifically the *loss of the right to possess*. Plaintiff was in possession for a number of years. Defendant disturbed his possession by occasionally walking through, hunting, and fishing on the disputed property. Held: These isolated disturbances-in-fact gave rise to possessory actions which, if brought timely, might entitle plaintiff to damages. However, failure to bring possessory action timely would not cause loss of the right to possess. For a disturbance to cause loss of the right to possess, it must amount to eviction, i.e., in the court's words, "it must bring home to the actual possessor the realization that his dominion is being seriously challenged," and must last for more than a year. *Id.* at 522. See also *Boise Southern Co. v. Stanfield*, 509 So. 2d 475 (La. App. 3d Cir.), writ denied, 510 So. 2d 376 (1987) (plaintiff had the right to possess and did not lose it in the year prior to the disturbance).

132. See La. Civ. Code art. 3456. This provision is *in pari materia* with Article 3434 and is applicable to interruption of possession as well as to interruption of acquisitive prescription. See *O'Quinn v. Haas Inv. Co.*, 458 So. 2d 612 (La. App. 3d Cir. 1984).



of an adverse possessor. The possession of an immovable by the adverse possessor is not necessarily adverse to the possession of the real right. Depending on facts and circumstances, the adverse possession of the immovable may be compatible with the possession of the real right, it may be a mere disturbance of the possession of the real right, or it may amount to a usurpation of the real right. The person entitled to the possession of the real right loses possession only in the last case, namely when the adverse possessor usurps the possession of the real right and possesses the immovable as if it were free of the burden. This happens when the adverse possessor of the immovable performs material acts of use, detention, or enjoyment or when he erects constructions that contravene the possession of the real right. In such a case, the acts and constructions mark the commencement of an adverse possession of both the immovable and the real right burdening it.

The possession of a real right other than ownership may also be lost upon the lapse of one year from the last use of the right by means of material acts or constructions. If the immovable is in the possession of an adverse possessor, that possessor commences to possess the immovable as if it were free of the burden from the date of the last use of the real right. Thereafter, if the non-use continues for ten years, the right itself is extinguished by the prescription of non-use.<sup>133</sup>

Special rules apply to the loss of the possession of a mineral right when the immovable burdened with it is in the hands of an adverse possessor. The possession of the surface may or may not include the mineral right. Article 154 of the Mineral Code declares that one who "establishes corporeal possession of land as owner under an act translatif of title is in possession of the rights in minerals inherent in perfect ownership of land except to the extent mineral rights are reserved in the act or the act is expressly made subject to outstanding mineral rights." Further, Article 155 of the same Code declares that a "possessor of land as owner without title possesses the mineral rights inherent in perfect ownership of land."

---

133. See La. Civ. Code art. 3448; A. Yiannopoulos, *supra* note 53, at § 163. According to well-settled French doctrine and jurisprudence, an adverse possessor of the servient estate, with or without title, does not possess a servitude adversely to the owner of the dominant estate. Therefore, an adverse possessor of the servient estate in good faith and under a just title that does not disclose a servitude may acquire the ownership of the servient estate in ten or twenty years but subject to the servitude. See 3 M. Planiol et G. Ripert, *supra* note 9, at 978; 3 Baudry-Lacantinerie, *Traité théorique et pratique de droit civil* 890 (3d ed. Chauveau 1905). An adverse possessor of the servient estate may acquire its ownership free of servitudes by the effect of the prescription of nonuse, which, in France, is thirty years.

## VICES OF POSSESSION

*Notion and Terminology*

According to civilian conceptions, possession may be affected by certain *vices* that exclude possessory protection and prevent the running of acquisitive prescription in favor of the possessor.<sup>134</sup> A vice of possession is an attribute which, without being a cause of termination of possession, deprives the possessor of the two principal advantages of possession.

In Louisiana and in France, the vices of possession are four: violence, clandestinity, discontinuity, and equivocality.<sup>135</sup> In accord, Article 3435 of the Louisiana Civil Code declares: "Possession that is violent, clandestine, discontinuous, or equivocal has no legal effect."<sup>136</sup>

Courts and commentators occasionally refer to the vice of precariousness. It ought to be clear, however, that under a proper understanding of the provisions of the Civil Code precariousness is not a vice of possession. Precarious possession does not lead to acquisitive prescription, and it is not fully protected by the possessory action; but this is so because precarious possession is detention rather than possession.

Article 3476 of the Louisiana Civil Code declares that, for purposes of acquisitive prescription, the possession must be "continuous, uninterrupted, peaceable, public, and unequivocal." This provision tracks the language of Article 3487 of the Louisiana Civil Code of 1870 and lumps together interruption of possession and vices of possession.<sup>137</sup> It ought to be clear, however, that the interruption of possession is not a vice but the loss of the right to possess.<sup>138</sup>

---

134. See 3 M. Planiol et G. Ripert, *supra* note 9, at 169; 2 C. Aubry et C. Rau, *supra* note 73 at 130. It is possession free of vice that leads to acquisitive prescription and is protected by the possessory action. See La. Civ. Code art. 3476 para. 2; La. Code Civ. P. art. 3658(2).

135. 3 M. Planiol et G. Ripert, *supra* note 9, at 169; La. Civ. Code art. 3435; cf. C. Civ. art. 2229 (Fr.).

136. La. Civ. Code art. 3435. Cf. La. Civ. Code arts. 3487(2), 3491 (1870); C. Civ. art. 2229 (Fr.).

137. See La. Civ. Code art. 3487 (1870); C. Civ. art. 2229 (Fr.).

138. See La. Civ. Code art. 3434 para 2. La. Civ. Code art. 3476 comment (c) states that the requirements that the possession "be continuous, uninterrupted, peaceable, public, and unequivocal, restate the rule that, for purposes of acquisitive prescription, the possession must be free of vice." The requirement of uninterrupted possession, however, is not a requirement for possession free of vice. It is instead a requirement for the existence of possession. See 3 M. Planiol et G. Ripert, *supra* note 9, at 725.

### *Violence*

In Roman law, possession was affected by the vice of violence when it was acquired by force.<sup>139</sup> There was no requirement that possession be maintained without violence in order to qualify for possessory protection or acquisitive prescription. The possession could be freed of the vice of violence only by the restoration of the property to the lawful owner or possessor.

Article 3491 of the Louisiana Civil Code of 1870, corresponding with Article 2233 of the French Civil Code, declared: "A possession by violence, not being legal, does not confer the right of prescribing. That right only commences when the violence has ceased."<sup>140</sup> On the basis of this provision, argument could be made that possession was not violent when it was merely maintained by violent acts.<sup>141</sup> According to the prevailing view in France, however, possession is violent when it is acquired *and* maintained by violent acts.<sup>142</sup> Following this view, Article 3436 of the Louisiana Civil Code declares that possession is violent "when it is acquired or maintained by violent acts."<sup>143</sup> The possession is freed of the vice when the violence ceases. From that moment, acquisitive prescription commences to run and one year later the possessor acquires the right to possess.<sup>144</sup>

The vice of violence is relative. When a person evicts another with violent acts and commences to possess for himself, his possession is violent towards the former possessor. However, the same person's possession is not violent towards the owner of the property or towards a third person who was not exposed to the violent acts.<sup>145</sup>

---

139. See 3 M. Planiol et G. Ripert, *supra* note 9, at 171.

140. La. Civ. Code art. 3491 (1870); C. Civ. art. 2233 (Fr.). Louisiana decisions under the regime of the 1870 Code did not elaborate on violence as a vice of possession. Cf. *Liner v. Louisiana Land and Exploration Co.*, 319 So. 2d 766 (La. 1975). For French decisions, see Cass. Req. May 10, 1865, D.P.I. 1865.1.411, S. 1865.1.264; Civ. Cass. August 26, 1884, D.P.I. 1885.1.159, S. 1886.1.165.

141. See 2 C. Aubry et C. Rau, *supra* note 73, at 138: "Possession free of vice in its inception . . . is not affected by vice merely because the possessor resorts to violence in order to maintain his possession." See also Symeonides, *supra* note 2, at 93.

142. See Symeonides, *supra* note 2, at 93; 2 C. Aubry et C. Rau, *supra* note 73, at 137; 3 M. Planiol et G. Ripert, *supra* note 9, at 171.

143. La. Civ. Code art. 3436. The disjunctive "or" gives rise to an argument that a possession peaceful in its inception becomes violent when it is maintained by violent acts. See Symeonides, *supra* note 2, at 93. It would seem, however, that the intent of the Louisiana legislature was to follow the interpretation that French courts and commentators had given to Article 2233 of the French Civil Code and that the use of the disjunctive "or" instead of the conjunctive "and" was an inadvertence.

144. For acquisition of the right to possess, Article 3658(2) of the Louisiana Code of Civil Procedure requires that the possession be exercised "quietly." For acquisitive prescription, Article 3476 of the Louisiana Civil Code requires that the possession be "peaceable." The words "quietly" and "peaceable" have the same meaning; they refer to a possession that is free of the vice of violence.

145. See 3 M. Planiol et G. Ripert, *supra* note 9, at 171.

### *Clandestinity*

In order to be legally effective, one's possession must be open or public.<sup>146</sup> The possessor must act as a person would act who has the right that the possessor claims to exercise. If the possessor seeks to hide his acts from those who would have an interest to know, his possession is clandestine.<sup>147</sup>

The vice of clandestinity is, like violence, relative. Possession may be clandestine as to some persons and public as to others to whom the acts of possession have been revealed. Further, like violence, clandestinity is a temporary vice of possession. As soon as the possessor commences to possess publicly, his possession is freed of the vice.

Clandestinity is mostly pertinent for movables. With respect to immovables, it is hardly possible for any person to exercise factual authority without being seen.<sup>148</sup> In French jurisprudence, the classical example is of a person who dug a cave under neighboring property with extreme precautions and without any exterior sign of the encroachment, such as a ventilator.<sup>149</sup>

A possession that was public at its inception does not become clandestine if the possessor ceases to perform observable acts of corporeal possession. Such a situation may be merely indicative of civil possession. However, according to one view, possession becomes clandestine if the possessor take extra-ordinary precautions to hide the continued exercise of acts of use, detention, or enjoyment.<sup>150</sup>

### *Discontinuity*

In order to be legally effective, possession must be continuous.<sup>151</sup> Discontinuity is a vice of possession that excludes both possessory protection and acquisitive prescription.<sup>152</sup>

---

146. See La. Civ. Code arts. 3435, 3436; C. Civ. art. 2229 (Fr.). See also 2 C. Aubry et C. Rau, *supra* note 73, at 136; 3 M. Planiol et G. Ripert, *supra* note 9, at 173.

147. See La. Civ. Code art. 3436: "Possession is clandestine when it is not open or public. . . ." For acquisitive prescription, Article 3476 requires that the possession be "public." In the fields of possession and prescription, the words "open" and "public" have the same meaning; they refer to a possession that is not clandestine.

148. Cf. *James Harvey Ramsey Estate, Inc. v. Pace*, 467 So. 2d 1202 (La. App. 2d Cir.), writ denied, 472 So. 2d 918 (1985).

149. See 3 M. Planiol et G. Ripert, *supra* note 9, at 173.

150. See 2 C. Aubry et C. Rau, *supra* note 73, at 137.

151. See La. Civ. Code arts. 3435, 3436, 3476; *id.* art. 3487 (1870); 3 M. Planiol et G. Ripert, *supra* note 9, at 171.

152. See La. Civ. Code arts. 3435-3436, 3476; *id.* art. 3487 (1870); 3 M. Planiol et G. Ripert, *supra* note 9, at 171. Cf. *James Harvey Ramsey Estate, Inc. v. Pace*, 467 So. 2d 1202 (La. App. 2d Cir.), writ denied, 472 So. 2d 918 (1985) (the court declared the *occasional* cutting of timber in isolated woodland is not *continuous* possession.); see also *Romar v. Estate of Gay*, 454 So. 2d 431 (La. App. 3d Cir. 1984) (cutting of logs for

Article 3436 of the Louisiana Civil Code declares that possession is discontinuous "when it is not exercised at regular intervals. . . ."<sup>153</sup> Continuity consists in successive acts of use, detention, or enjoyment at regular intervals that are sufficiently short to constitute proof of abandonment of possession. The law does not require the exercise of corporeal possession at all times; civil possession suffices for the maintenance of possession.<sup>154</sup>

There is an apparent conflict between the notion of civil possession and the requirement that possession be continuous. According to Article 3431 of the Louisiana Civil Code, possession is retained by the intent to possess as owner, and according to Article 3432, this intent is presumed in the absence of proof of a contrary intention. However, Article 3435 declares that discontinuous possession, namely, possession that is not exercised at regular intervals, has no legal effect, and Article 3476 declares that, for purposes of acquisitive prescription, the possession must be continuous. Properly understood, the two sets of provisions are fully reconcilable. In the first place, continuity of possession is more significant in cases involving the issue of whether possession has been acquired rather than retained. Second, depending on the nature of the property, long intervals in the exercise of possession may constitute sufficient evidence to rebut the presumption of retention of possession.

The question of continuity of possession is one of fact, resolved in light of the nature of the property that is being possessed. If, according to its nature, the property is used every season or even every other year, the possession is continuous.<sup>155</sup> In the words of the French Court of Cassation, the possession is continuous "when it is exercised on all occasions and at all times that it should be exercised."<sup>156</sup>

Article 3443 of the Louisiana Civil Code, corresponding with Article 2234 of the French Civil Code, establishes a rebuttable presumption in favor of a possessor who proves that he had possession at different times; such a possessor is "presumed to have possessed during the

---

three months duration in 1963, 1964, and 1965, *not* continuous possession of timber lands); cf. *Oliver v. Kennington*, 458 So. 2d 130 (La. App. 2d Cir.), writ denied, 460 So. 2d 610 (1984); (the court held that the occasional cutting of timber from an isolated tract of land is not proof of actual *possession as owner*.)

153. La. Civ. Code art. 3436.

154. See La. Civ. Code arts. 3424, 3431, 3476; La. Code Civ. P. art. 3660; *Parkway Dev. Corp. v. City of Shreveport*, 342 So. 2d 151 (La. 1977).

155. Cf. *Louisiana Irrigation and Mill Co. v. Pousson*, 262 La. 973, 265 So. 2d 756 (1972). In this case, the defendant in a possessory action had possessed a rice irrigation canal servitude in 1967 and 1968 during the irrigation season only, namely, from March through July. The court held that possession during the irrigation season was the only kind of possession of which the servitude was susceptible.

156. Cass. Req. June 5, 1839, S. 39.1.621, quoted in 3 M. Planiol et G. Ripert, *supra* note 9, at 171.

intermediate period." This is not a presumption that one's possession is free of the vice of discontinuity. It is instead a presumption that one's possession has not been interrupted.<sup>157</sup>

### *Equivocality*

Equivocality is a vice of possession that renders possession legally ineffective.<sup>158</sup> Article 3436 of the Louisiana Civil Code declares that possession is equivocal "when there is ambiguity as to the intent of the possessor to own the thing."<sup>159</sup>

Generally, a person's possession is equivocal when his acts of use, detention, or enjoyment of the thing are susceptible of more than one explanation. This is often the case when property is held in indivision and one of the co-owners exercises corporeal possession over the entire property. His acts may be explained as constituting possession of his share and detention of the property on behalf of the co-owners. The same acts, however, may also be explained as constituting adverse possession of the entire property. In order to minimize the ambiguity, Article 3439 of the Louisiana Civil Code declares that a co-owner commences to possess for himself when he demonstrates his intent by overt and unambiguous acts that are sufficient to give notice to his co-owners.<sup>160</sup> Possession is also equivocal when objects of value belonging to the succession of a deceased person are found in the custody of an heir or a servant who shared a residence with the deceased.<sup>161</sup>

Aubry and Rau maintained that equivocality is not a distinct vice of possession but the doubt that may surround either the existence of possession or one of the requisites for a legally effective possession, such as continuity. In their words, "every time the word equivocal is used, one of the necessary elements of possession is missing so that either there is no possession at all or the existence of possession is in doubt."<sup>162</sup> For example, if the claim of a co-owner for exclusive possession of the property held in common is rejected, it is because the possession of his co-owners is established and not because the co-owner's

---

157. See 2 C. Aubry et C. Rau, *supra* note 73, at 491; 3 M. Planiol et G. Ripert, *supra* note 9, at 726.

158. See La. Civ. Code art. 3435; C. Civ. art. 2229 (Fr.).

159. La. Civ. Code art. 3436. See also *New Orleans v. New Orleans Canal, Inc.*, 412 So. 2d 975 (La. 1981), *rev'd on reh'g* (1982). See also *Trahan v. Broussard*, 459 So. 2d 210, 213 (La. App. 3d Cir. 1984) (the court held that "a possession manifested only by the passing over unfenced land is equivocal in the highest degree").

160. See La. Civ. Code art. 3439; see also *id.* art. 3478.

161. See 3 M. Planiol et G. Ripert, *supra* note 9, at 174. For the possession of property by one of the spouses under the community property regime, see *Hargrave*, *supra* note 43, at 465-69.

162. See 2 C. Aubry et C. Rau, *supra* note 73, at 139.

possession is equivocal. According to this view, the matter of equivocality is reduced to a question of proof; the requirement that the requisites for a legally effective possession be certain merely means that these requisites must be proven.

Marcel Planiol has eloquently criticized this view and has convincingly demonstrated that when possession is equivocal the doubt bears upon one of its constituent elements, the intent to possess as owner,<sup>163</sup> and not upon one of the secondary requisites for a legally effective possession. It is only when the intent to possess as owner is in doubt that the possession is equivocal.

### PRECARIOUS POSSESSION

#### *Notion and Effects*

Article 3437 of the Louisiana Civil Code defines precarious possession as the "exercise of possession over a thing with the permission of or on behalf of the owner or possessor. . . ."<sup>164</sup> The definition indicates the difference between *possession* in the proper sense of the word and precarious possession, that is, *detention*.<sup>165</sup> A possessor is one who possesses as owner, whereas a precarious possessor or detainer is one who exercises factual authority over a thing with the permission of or on behalf of another person.<sup>166</sup>

The term "precarious possession" derives from Roman sources. The Roman *precarium*, however, was a special contract whereby an owner ceded the possession or enjoyment of a thing to another person under the condition of free revocability.<sup>167</sup> The precarious possessor had a veritable possession that was protected by possessory interdicts against anyone except the grantor. The legal position of a detainer under the

---

163. See 3 M. Planiol et G. Ripert, *supra* note 9, at 174.

164. La. Civ. Code art. 3437; La. Civ. Code 3426 (1870); C. Civ. art. 2228 (Fr.).

165. See La. Civ. Code art. 3437 comment (b). A precarious possessor is called in France *possesseur precaire* or *detenteur*. See 3 M. Planiol et G. Ripert, *supra* note 9, at 175. Detention is also known as *possessio naturalis* in civilian sources. *Id.* The words "natural possession" were used in Articles 3428 and 3430 of the Louisiana Civil Code of 1870.

166. The distinction between possession and detention figures prominently in the doctrinal debate between Savigny and Jhering. According to Savigny, a detainer is not a possessor because he lacks the intent to possess as owner. According to Jhering, intent alone cannot play a decisive role. A possessor has the same intent to possess as a detainer; the difference between the two is found in the negative function of the *causa possessionis*, that is, the existence of an agreement or a provision of law that qualifies a possessor as detainer on behalf of another person. See *supra* text accompanying notes 14-15; 3 M. Planiol et G. Ripert, *supra* note 9, at 175.

167. See B. Schmidlin et C. Cannata, *Droit Privé Romain* 146 (1984).

Louisiana Civil Code is quite different. However, like a precarious possessor under the Roman law, the possessory action is available to a Louisiana precarious possessor against anyone except the person for whom he possesses.<sup>168</sup> It is also possible for a person to be a precarious possessor in Louisiana in the Roman sense of the word. This happens, for example, when a landowner permits another person to occupy his land gratuitously for a term or until revocation of the license.<sup>169</sup>

The vice of precarious possession is relative. Thus, one's possession may be precarious vis-a-vis the owner who has tacitly or expressly given permission for the use of his land and adverse toward third persons.<sup>170</sup>

In contrast with possession, which may be grounded on unauthorized taking, precarious possession is always founded on a juridical act or a provision of law that implies the recognition of another person's possession or ownership. Property is placed under the control of a precarious possessor for a certain purpose and the precarious possessor is bound by an obligation to restore the property to the person for whom he possesses.

Among the precarious possessors are included co-owners, lessees, and tenant farmers to whom property has been delivered under a contract of lease, pledgees of corporeal movables under a contract of pawn, depositaries having in their custody things under the laws governing deposit and sequestration, borrowers under a contract of loan for use, and administrators of another's property, such as mandataries, tutors, and curators.<sup>171</sup> The enumeration is merely illustrative of persons who exercise acts of use, detention, or enjoyment over a thing under a title that implies the ownership of another person.<sup>172</sup> Persons who have a real right on the property of another person, such as a personal servitude or a predial servitude, have a double status. They are possessors of the

---

168. See La. Civ. Code art. 3440. A precarious possessor may not be plaintiff in a possessory action brought against the person for whom he possesses. *Caruthers v. Caruthers*, 484 So. 2d 750 (La. App. 1st Cir. 1986).

169. See La. Civ. Code arts. 2893, 2894, 2906, 2907. See also *Falgoust v. Innes*, 163 So. 429 (La. App. Or. 1935). For French jurisprudence, see 3 M. Planiol et G. Ripert, *supra* note 9, at 176.

170. See 3 M. Planiol et G. Ripert, *supra* note 9, at 941; Cass. civ. 1re March 6, 1855, D.P.I. 1855.1.83, S. 1855.1.507; Cass. Req. January 3, 1877, D.P.I. 1877.1.14. But see 25 Baudry-Lacantinerie, *Traité théorique et pratique de droit civil* 221 (3d ed. Tissier 1906).

171. See La. Civ. Code arts. 2669, 2893, 2926, 3154, 3439, 3478; 3 M. Planiol et G. Ripert, *supra* note 9, at 177.

172. For example, a co-owner possesses his share for himself and the property precariously for his co-owners. See La. Civ. Code arts. 3439, 3478. Courts have held that a vendor who retains possession of the thing sold is a precarious possessor toward the vendee. *Frost Lumber Industries, Inc. v. Harrison*, 215 La. 767, 41 So. 2d 674 (1949); *Roe v. Bundy's Heirs*, 45 La. Ann 398, 12 So. 759 (1893); *James Harvey Ramsey Estate, Inc. v. Pace*, 467 So. 2d 1202 (La. App. 2d Cir.), writ denied, 472 So. 2d 918 (1985).



real right and precarious possessors of the property that is burdened with the real right.

When a thing is under the control of a precarious possessor, its possession belongs to the person for whom the precarious possessor possesses. The precarious possessor enjoys none of the rights attributed to possessors,<sup>173</sup> with the exception of the right to institute a possessory action against anyone except the person for whom he possesses.<sup>174</sup> Thus, a lessee may not bring a possessory action against the lessor. When a precarious possessor institutes a possessory action against a third person, the judgment does not have the effect of *res judicata vis-a-vis* the person for whom the precarious possessor possesses, unless the latter has been made a party to the proceedings.<sup>175</sup>

### *Legal Presumptions*

The distinction between possession and detention carries significant legal consequences, but the proof that a person possesses as owner or in the name of another person is difficult to establish. Therefore, Articles 3427 and 3438 of the Louisiana Civil Code contain rules intended to minimize the difficulty of proof.

Article 3427 declares that "one is presumed to intend to possess as owner unless he began to possess in the name of and for another."<sup>176</sup> A person who exercises factual authority over property may rely on this presumption and opt not to introduce any evidence as to his intent to possess as owner. However, this presumption may be rebutted on proof that the person who exercises factual authority is a precarious possessor or no possessor at all.<sup>177</sup> When there is proof that the possession was

---

173. See La. Civ. Code art. 3423. Acquisitive prescription does not run in favor of a precarious possessor. La. Civ. Code art. 3477. He has no claim for the fruits of the property and is not entitled to reimbursement for expenses or improvements as a good or bad faith possessor. See La. Civ. Code arts. 486, 488, 527-529.

174. See La. Civ. Code art. 3440. A precarious possessor may not be plaintiff in a possessory action brought against the person for whom he possesses. *Caruthers v. Caruthers*, 484 So. 2d 750 (La. App. 1st Cir. 1986). Under modern civil codes, possessory protection is available to a precarious possessor for the protection of his detention vis-a-vis third persons. See, e.g., Greek Civ. Code art. 997. In France, two articles were added to the Civil Code in 1975 in order to accord possessory protection to precarious possessors. See C. Civ. arts. 2282, 2283 (Fr.).

175. See La. R.S. 13:4231; La. Civ. Code art. 3440 comment (d).

176. See La. Civ. Code art. 3427; *Chevron U.S.A., Inc. v. Landry*, 558 So. 2d 242 (La. 1990); *Williams v. McEacharn*, 464 So. 2d 20 (La. App. 2d Cir. 1985); *Freeman v. Williams*, 450 So. 2d 1030 (La. App. 1st Cir. 1984).

177. See *Levy v. Germania Plantation, Inc.*, 395 So. 2d 366 (La. App. 1st Cir. 1981). Occasionally, a party's own admissions rebut the presumption of the intent to possess as owner. See *Briggs v. Pellerin*, 428 So. 2d 1087 (La. App. 1st Cir. 1983). However, a declaration against interest after accrual of the acquisitive prescription was held insufficient

precarious at its inception, the presumption set forth in Article 3427 of the Civil Code does not arise.<sup>178</sup>

Article 3438 declares that a precarious possessor, such as a lessee or a depositary, "is presumed to possess for another although he may intend to possess for himself." Once there is proof that the possession was precarious at its inception, the possession is presumed to be for another even if the precarious possessor has changed his mind and intends to possess as owner. He may not rely on the presumption of Article 3427, but he may rebut the presumption of precariousness in accordance with Articles 3439 and 3478 of the Louisiana Civil Code.

Under the regime of the Louisiana Civil Code of 1870, a co-owner as well as any other precarious possessor could rebut the presumption of precariousness on proof that he had commenced to possess for himself by overt and unambiguous acts sufficient to give notice of his intent to the person for whom he possessed.<sup>179</sup> There is no change in the law in so far as co-owners are concerned. All other precarious possessors, however, must give actual notice that they intend to possess as owners.<sup>180</sup>

#### *Termination of Precarious Possession*

Precarious possession may last indefinitely.<sup>181</sup> The obligation of a precarious possessor to restore the property is heritable,<sup>182</sup> and the universal successors continue the possession of the deceased without any

---

to rebut the presumption of the intent to possess as owner. *Williams v. McEacharn*, 464 So. 2d 20 (La. App. 2d Cir. 1985). In *Comeaux v. Davenport*, 452 So. 2d 818 (La. App. 3d Cir. 1984), plaintiff signed a lease from the record owners of the disputed property, after having possessed it adversely as owner for 23 years. Had this lease been valid, it would have constituted an acknowledgment capable of rendering subsequent possession precarious. However, after expressing "serious misgivings regarding the validity of plaintiff's consent" because he could not read and did not know what he was signing, the court declared the lease invalid because, of the two co-owners named as lessors in the lease document, only one had signed it.

178. In *Harvill v. Casey*, 461 So. 2d 373 (La. App. 2d Cir. 1984), writ denied, 464 So. 2d 318 (1985), the presumption did not arise because the person claiming possession was a relative who had possessed for himself and his co-owners. In *Chaney v. State Mineral Board*, 444 So. 2d 105 (La. 1983), plaintiff failed to prove acts of corporeal possession. Hence, they could not rely on the presumption of Article 3427 of the Louisiana Civil Code.

179. See *Hammond v. Averett*, 415 So. 2d 226 (La. App. 2d Cir. 1982); *Champagne v. Broussard*, 401 So. 2d 1060 (La. App. 3d Cir. 1981); *Symeonides*, supra note 2, at 85-87.

180. See La. Civ. Code art. 3439(2), 3478(2).

181. See 3 M. Planiol et G. Ripert, supra note 9, at 178. It may last "even for one thousand years" (*etiam per mille annos*) said Demoulin. *Id.*

182. Cf. La. Civ. Code art. 1765.

change of its nature and qualities.<sup>183</sup> The possession of the universal successors is precarious even if they are ignorant of the obligation to restore the property and believe that they possess as owners.<sup>184</sup>

Precarious possession, however, may terminate. The precarious possessor may convey the property to successors by particular title, that is, persons such as purchasers, or he may commence to possess as owner. When a precarious possessor conveys the property by particular title, whether *inter vivos* or *mortis causa*, the transferee possesses as owner.<sup>185</sup> This is an application of the principle that a transferee by particular title is not bound by the personal obligations of the transferor.<sup>186</sup>

A precarious possessor may commence to possess for himself as provided in Articles 3439 and 3478 of the Louisiana Civil Code. These articles draw a distinction between co-owners and all other precarious possessors. A co-owner commences to possess the entire property for himself when he demonstrates his intent by overt and unambiguous acts that are sufficient to give notice to his co-owners.<sup>187</sup> The acquisition and recordation of a title to the property from a third person may mark the termination of a co-owner's precarious possession.<sup>188</sup> For purposes of Articles 3439 and 3478 of the Civil Code, the requisite title need not meet the requirements of Article 3483 of the Civil Code, namely, the title need not be an act translative of ownership. Thus, the recordation of an act of partition,<sup>189</sup> a donation invalid as to form,<sup>190</sup> a simulated sale,<sup>191</sup> and the recordation of an *ex parte* judgment of

---

183. See La. Civ. Code art. 3441; *id.* art. 3656(28).

184. See 3 M. Planiol et G. Ripert, *supra* note 9, at 179.

185. See La. Civ. Code art. 3479. See also *Jordan v. Richards*, 114 La. 329, 38 So. 206 (1905); *Allen v. Paggi Bros. Oil Co.*, 244 So. 2d 116 (La. App. 3d Cir. 1971).

186. See La. Civ. Code art. 3556(28).

187. See La. Civ. Code art. 3439(1); *id.* art. 3478(1). *Franks Petroleum, Inc. v. Babineaux*, 446 So. 2d 862 (La. App. 2d Cir. 1984). A mere occupancy, use, payment of taxes will *not* suffice to constitute notice of adverse possession. See also *Headrick v. Lee*, 471 So. 2d 904 (La. App. 2d Cir. 1985). Nor is a co-owner's redemption of the common property an act of adverse possession. *Boase v. Edmonson*, 471 So. 2d 847 (La. App. 2d Cir. 1985).

188. See La. Civ. Code art. 3478(1). In *Towles v. Heirs of Morrison*, 428 So. 2d 1029 (La. App. 1st Cir. 1983), the precarious possessor (co-owner) overcame the presumption that he was possessing precariously the land of his co-owner by recording a deed translative of title which purported to convey to him the land of his co-owner. See also *General American Oil Co. of Texas v. Williams, Inc.*, 441 So. 2d 1268 (La. App. 1st Cir. 1983), writ denied, 445 So. 2d 1230 (1984).

189. See *Dupuis v. Broadhurst*, 213 So. 2d 528 (La. App. 3d Cir. 1968); *Minton v. Whitworth*, 393 So. 2d 294 (La. App. 1st Cir. 1980).

190. See *Givens v. Givens*, 273 So. 2d 863 (La. App. 2d Cir.), writ refused, 275 So. 2d 868 (1973).

191. See *Detraz v. Pere*, 183 So. 2d 401 (La. App. 3d Cir. 1966).

possession for the entire property rather than a share in indivision,<sup>192</sup> have been held sufficient to mark the commencement of a co-owner's possession of the entire property.

A precarious possessor other than a co-owner commences to possess for himself when he gives *actual* notice to the person on whose behalf he is possessing that he intends to possess for himself.<sup>193</sup> Under the regime of the Louisiana Civil Code of 1870, such a precarious possessor could commence for himself when he acquired title to the property from a third person.<sup>194</sup> It is doubtful that this is so under the 1982 revision. Article 3478 of the Civil Code declares that a *co-owner* may commence to possess for himself when he acquires a title to the property from a person other than a co-owner but both Article 3478 and Article 3439 require possessors other than co-owners to give *actual* notice of their intent to possess as owners.<sup>195</sup> However, the words "actual notice" have not been defined in the Civil Code and argument may be made that the acquisition and recordation of a title to the property from a third person constitutes actual notice to the person for whom the precarious possessor had possessed the property.

#### TRANSFER, TACKING AND PROOF OF NON-INTERRUPTED POSSESSION

##### *Transfer of Possession*

Article 3441 of the Louisiana Civil Code declares that possession, that is, the factual authority that a person exercises over a thing, is transferable by universal title or by particular title.<sup>196</sup> There is no provision referring expressly to the transferability of the right to possess. This right is heritable and transferable in the same manner as other property rights.

---

192. See *Franks Petroleum, Inc. v. Babineaux*, 446 So. 2d 862 (La. App. 2d Cir. 1984).

193. See La. Civ. Code art. 3439(2), 3478(2). The precarious possessor commences to possess adversely from the time he gives notice and acquires the right to possess one year later. See *Satsuma Pentecostal Church v. Harris*, 563 So. 2d 1247 (La. App. 1st Cir. 1990). See also *Morris v. Sonnier*, 546 So. 2d 1296 (La. App. 1st Cir. 1989) (no actual notice given).

194. See La. Civ. Code art. 3512 (1870).

195. For critical observations, see Symeonides, *supra* note 2, at 87. There was no requirement of actual notice under the regime of the Louisiana Civil Code of 1870. *Id.* See also *Succession of Zebriska*, 119 La. 1076, 44 So. 893 (1907); *Thompson's Succession v. Cyprian*, 34 So. 2d 285 (La. App. 1st Cir. 1948).

196. See La. Civ. Code art. 3441; *id.* arts. 3493, 3494, 3496 (1870); C. Civ. art. 2235 (Fr.). For the distinction between succession by universal title and succession by particular title, see La. Civ. Code art. 3556(28).

A universal title implies, necessarily, succession *mortis causa*. In Louisiana, the possession of a deceased person is transferred by operation of law or by his will to universal successors, that is, heirs, universal legatees, or legatees under universal title,<sup>197</sup> who continue the possession of the deceased without any change in its nature and qualities. Thus, if the possession of the deceased was precarious or in bad faith, the possession of the universal successors is precarious and in bad faith. However, if the decedent's possession was civil, nothing prevents the universal successors from exercising corporeal possession; and, if the decedent's possession was corporeal, the possession of the universal successors may be civil.

In Louisiana, the possession of a deceased person is not transferred directly to particular successors, that is, legatees under particular title. It is the duty of the universal successors of the deceased to place the particular legatees in possession of the property that the testator bequeathed to them. A particular title may be either an act *inter vivos* or an act *mortis causa*. For the transfer of possession, the title need not be translative of ownership; an act designed to transfer possession suffices.

A successor by particular title does not continue the possession of his ancestor in title and his possession may be of a different nature. For example, if the ancestor was a precarious possessor or a possessor in bad faith, the particular successor may possess for himself and be in good faith.<sup>198</sup>

### *Tacking of Possession*

A possessor, in order to meet the requirements for acquisition of the right to possess and for acquisitive prescription, may add his possession to that of his ancestor in title. This is called tacking of possessions.<sup>199</sup> Article 3442 of the Louisiana Civil Code, corresponding with Article 2235 of the French Civil Code, declares that the possession of the transferor is tacked to that of the transferee if there has been no interruption of possession.

Strictly speaking, tacking takes place only in cases of succession by particular title. In cases of universal succession, the universal successors continue the possession of the deceased without any change in its nature and qualities. It has been aptly said that, in such a case, "there is only

---

197. For discussion, see A. Yiannopoulos, Personal Servitudes § 10, in 3 Louisiana Civil Law Treatise (3d ed 1989).

198. See La. Civ. Code art. 3479.

199. See *Bartlett v. Calhoun*, 412 So. 2d 597 (La. 1982); Note, A Restricted Application of Civil Code Article 3482: *Bartlett v. Calhoun*, 43 La. L. Rev. 1221 (1983); Symeonides, *supra* note 2, at 102.

one possession which is continued by the heirs rather than two possessions which need to be joined."<sup>200</sup> Nevertheless, Louisiana legal texts characteristically speak of tacking in cases of universal succession.<sup>201</sup>

Ordinarily, the tacking of possessions requires a juridical link, that is, an act sufficient to transfer possession or ownership. It is by virtue of such a link that the possession of the successor is tacked to the possession of his ancestor in title. Exceptionally, tacking is permitted without a juridical link in cases falling under Article 794 of the Louisiana Civil Code. If a party and his ancestors in title possessed for thirty years without interruption, within visible bounds, more land than their title called for, the boundary is fixed along these bounds despite the non-existence of a juridical link as to the part of the land that lies beyond the limits of the possessor's title.

Civil possession may be tacked to corporeal possession,<sup>202</sup> and vice versa, because both kinds of possession suffice for acquisition of the right to possess and for acquisitive prescription.<sup>203</sup> Good faith possession may be tacked to good faith possession, and bad faith possession may be tacked to bad faith possession. However, a good faith successor may not tack his possession to the bad faith possession of his ancestor in order to meet the requirements for good faith acquisitive prescription, and neither can a bad faith successor tack to the good faith possession of his ancestor for the completion of good faith prescription.<sup>204</sup> A good faith possessor may tack to the bad faith possession of his ancestor in order to meet the requirements for bad faith acquisitive prescription, and a bad faith possessor may also tack to the good faith possession of his ancestor in order to meet the requirements for bad faith prescription.

One may hardly speak of tacking in the framework of precarious possession. A precarious possessor may not convert his detention into possession by tacking to the possession of his ancestor, and a possessor who possesses as owner has nothing to gain from tacking to the precarious possession of his ancestor.

#### *Presumption of Non-interrupted Possession*

In order to be legally effective, possession must be continuous<sup>205</sup>

---

200. Symeonides, *supra* note 2, at 105.

201. See, e.g., La. Civ. Code art. 3442 comment (b).

202. See *Ellis v. Prevost*, 19 La. 251 (1841). See also La. Civ. Code art. 3424 comment (c); La. Code Civ. P. art. 3660.

203. See La. Civ. Code art. 3476; La. Code Civ. P. art. 3660. It is, of course, understood that possession must be corporeal at its inception. *Id.*

204. See *Bartlett v. Calhoun*, 412 So. 2d 597 (La. 1982); Note, *supra* note 199. For critical discussion, see also Symeonides, *supra* note 2, at 102-03.

205. For the vice of discontinuity, see La. Civ. Code arts. 3436, 3476.

and uninterrupted.<sup>206</sup> Yet, it frequently would be an impossible task for any possessor to prove that he was in possession at all times. In order to alleviate difficulties of proof, Article 3443 of the Louisiana Civil Code declares that a person who proves that he had possession at different times "is presumed to have possessed during the intermediate period."<sup>207</sup> This is a rebuttable presumption that one's possession has not been interrupted. It is not a presumption that the possession is free of the vice of discontinuity.<sup>208</sup>

---

206. For interruption of possession, see La. Civ. Code art. 3434. For interruption of prescription, see La. Civ. Code art. 3465; cf. *id.* art. 3476.

207. La. Civ. Code art. 3443; C. Civ. art. 2234 (Fr.); 3 M. Planiol et G. Ripert, *supra* note 9, at 726.

208. See 3 M. Planiol et G. Ripert, *supra* note 9, at 726; 2 C. Aubry et C. Rau, *supra* note 73, at 490.