Louisiana Law Review

Volume 18 | Number 4
June 1958

Property - Thirty-Year Prescription in Boundary Action

Allen B. Pierson Jr.

accretion so formed does not belong to the riparian owners would remove hundreds of acres from private use and ownership to lie idle until the state should see fit to make some use of them. The criterion announced by the court in the instant case provides a fair, workable guide for future litigation on this subject.[15]

Sidney D. Fazio

PROPERTY — THIRTY-YEAR PRESCRIPTION IN BOUNDARY ACTION

In accordance with an informal survey defendant's author in title erected a fence in 1904 between his land and that now belonging to the plaintiff. Upon discovering that this fence encroached on his land, plaintiff brought suit under Article 823 which provides for judicial determination of boundaries in certain situations. Defendant contended that the fence line should be recognized as the boundary under the provisions of Article 852 relative to thirty year boundary prescription.[1] After reversing the trial court on original hearing, the court of appeal reversed itself on rehearing and affirmed judgment for the plaintiff, holding that under Article 852 mutual consent was necessary to establish a boundary.[2] The Supreme Court granted writs and *held,* on rehearing, reversed for defendant. Uninterrupted possession of land for thirty years beyond title and up to a visible separation is sufficient under Article 852 to establish a boundary at the line of the visible separation. Mutual consent to such a boundary is not necessary. *Sessum v. Hemperley,* 233 La. 444, 96 So.2d 832 (1957).

At French law[3] any possessor may have his ideal rural bounds judicially determined at any time, provided there has been no written agreement between the parties fixing a bound-

15. This case is also noted in 32 TUL. L. REV. 319 (1958).

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

2. Sessum v. Hemperley, 83 So.2d 546 (La. App. 1955).

3. 1 ENCYCLOPÉDIE DALLOZ, DROIT CIVIL, "*Bornage*" nos 40-47 (1951); 2 CODE CIVIL ANNOTÉ art. 646, p. 81, n. 100 (1935). See also AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS, "*Du bornage,*" § 199 (6th ed. 1935); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 431-42 (2d ed. 1952).

ary. Physical bounds are presumed correct and are not uncertain, though they are open to attack. However, if the markers are ancient or if there has been adverse possession in accord with them for thirty years or more the action cannot be successfully brought. Mutual consent to the establishment of the markers is not required. The action also may be successfully maintained if bounds, once determined, are lost. At common law[4] the courts recognize a doctrine of adverse possession which requires open, notorious, and continuous possession of specific lands for a statutory period (usually twenty years), and a hostile intent to possess as owner, with or without knowledge of the encroachment. Some common law courts also accept the doctrine of acquiescence, which requires mutual recognition of bounds, and that the bounds be in doubt or dispute at the time the statute of limitations begins to run.[5]

In Louisiana boundaries may be judicially determined in three basic situations: where no bounds have ever been established, where bounds once established have been lost, and where bounds have been incorrectly established. In the first situation the bounds must be determined in accordance with the written titles[6] and in the second they must be redetermined and placed where they formerly stood.[7] In neither of these situations will prescription run so as to prevent the bringing of the boundary action.[8] Conceivably, incorrect bounds could be established in any one of three ways. If fixed judicially, the decision will become *res judicata* in one year, and may be attacked within that period only for fraud.[9] Boundaries may be established extra judicially by mutual consent *or*[10] in accordance with a formal

4. For general discussion, see BROWN, BOUNDARY CONTROL AND LEGAL PRINCIPLES 60 (1957).

5. *See* Comment, *Real Property: Acquiescence in Lieu of Adverse Possession in Boundary Line Cases*, 8 OKLA. L. REV. 486 (1955), and cases cited therein.

6. LA. CIVIL CODE arts. 823, 845 (1870).

7. Zeringue v. Harang, 17 La. 349 (1841).

8. LA. CIVIL CODE art. 825 (1870). *Accord:* Opdenwyer v. Brown, 155 La. 617, 621, 99 So. 482, 483 (1924): "As long as there exist no physical bounds, whether because none have ever been placed or because those once placed have disappeared, the action to place or replace them cannot be prescribed against."

9. LA. CODE OF PRACTICE art. 613 (1870). *Accord*: Sessum v. Hemperley, 233 La. 444, 96 So.2d 832 (1957).

10. Article 832 requires that extra-judicial bounds be fixed by mutual consent and Article 833 adds the requirement of a formal survey. But courts have modified these provisions, allowing a boundary to stand if either mutual consent or a formal survey can be shown. The prescription of ten years under Article 853 has been applied in both cases, though this latter article contemplates a formal survey. See LeBlanc v. Barrios, 89 So.2d 447, 453 (La. App. 1956) (boundary never "fixed or mutually agreed upon"); Arabie v. Terrebonne, 69 So.2d 516 (La. App. 1953) (neither survey or consent shown); Picou v. Curole, 44 So.2d 354 (La.

survey. In either case, the action to correct bounds so established will prescribe in ten years.[11] The third possibility is the extra judicial fixing of bounds by the erection and maintenance of a visible separation by one party for thirty years. However, a uniform line of courts of appeal decisions has refused to accept this method as a basis for starting prescription in Louisiana and has required consent by both parties or acts indicating acquiescence to the separation by the party whose lands are encroached on before prescription would commence.[12] As a direct result of these decisions mutual consent became a requirement to begin prescription under Article 852 as well as under Article 853, which deals with the rectification of an error in establishing boundaries.

The instant case rejects mutual consent as a requirement to begin boundary prescription of thirty years under Article 852. Relying on the language of the Code the court outlines the two requirements to begin this prescription: a visible separation and uninterrupted possession for thirty years beyond the possessor's title.[13] The courts appear willing to accept any reasonable marker as a sufficient visible separation,[14] having read that requirement into Articles 852 and 853. Where there has been no separation of the lands, the action in boundary will not prescribe, although lands may be acquired by thirty-year prescrip-

App. 1950) (boundary must be fixed by survey or consent); Blanchard v. Monrose, 12 La. App. 503, 125 So. 891 (La. App. 1930) (Article 853 not applicable without survey or active acquiescence).

11. LA. CIVIL CODE art. 853 (1870).

12. See Williams v. Bernstein, 51 La. Ann. 115, 25 So. 411 (1899) (land held in occupancy until adverse possession recognized by neighbor); LeBlanc v. Barrios, 89 So.2d 447 (La. App. 1956) (illogical to believe crooked ditch was considered as boundary in spite of cultivation up to it); Beene v. Pardue, 79 So.2d 356 (La. App. 1955) (fence not evidence of adverse ownership without recognition as boundary); Arabie v. Terrebonne, 69 So.2d 516 (La. App. 1953) (consent required under Articles 852 and 853); Simmons v. Miller, 170 So. 521 (La. App. 1936) (must show fence is an extra-judicial boundary by consent).

13. "First, there must be a visible boundary, artificial or otherwise; second, there must be actual uninterrupted possession, either in person or through ancestors in title, for thirty years or more of the land extending beyond that described in the title and embraced within the visible bounds." Sessum v. Hemperley, 233 La. 444, 476, 96 So.2d 832, 843 (1957).

14. See Blanc v. Duplessis, 13 La. 334 (1839) (oak tree plus acts of possession proven by parol sufficient); LeBlanc v. Barrios, 89 So.2d 447 (La. App. 1956) (cultivation to crooked ditch not sufficient for lack of consent); Vicknair v. Langridge, 57 So.2d 714 (La. App. 1952) (remains of old fence sufficient, possibly old post holes would be); Strickland v. Butler, 64 So.2d 22 (La. App. 1953) (cultivation to fences along lane sufficient); Harmon v. Dufilho, 139 So. 530 (La. App. 1932) (fence taken in by canal sufficient); New Orleans v. Joseph Rathborne Land Co., 209 La. 93, 108, 24 So.2d 275, 280 (1945) (artificial markers "consist of marked lines, stakes, roads, fences, buildings, and similar matters marked or placed on the ground by the hand of man").

tion *acquirendi causa* under Article 3499.[15] Boundary prescription and prescription *acquirendi causa* are similar. The tests applied to determine what constitute acts of possession under Articles 852 and 3499[16] should not differ materially except that to prescribe against an action in boundary there must be a visible separation between the two tracts of land. However, there is a difference between the acts necessary to interrupt prescription of the action in boundary and those necessary to interrupt prescription *acquirendi causa* by acknowledgment. A court of appeal case[17] indicated that informal acknowledgment of an encroachment would not be sufficient to interrupt prescription under Article 853 and place the possessor in the position of a mere occupant. But verbal acknowledgment is sufficient to interrupt prescription *acquirendi causa* under Article 3520.[18]

On rehearing the instant case the Supreme Court did not find it necessary to consider the ten-year prescription established by Article 853. However, this decision apparently would not reject the prior jurisprudence which requires mutual consent to start the prescriptive period in Article 853. It appears that this shorter period could have been found applicable by finding mutual consent to the fence as a boundary for any ten-year period or mutual reliance on a formal survey for ten years. Louisiana courts have consistently held that mutual consent is not to be implied from passive failure to object to a visible separation.[19] There must be an "active acquiescence with the realization that they [are] actually consenting to a boundary

15. See Roscue v. Mitchell, 190 La. 758, 182 So. 740 (1938) (irregular fence ignored but acts of possession good for thirty years prescription under Article 3499); Odenwyer v. Brown, 155 La. 617, 99 So. 482 (1924) (prescription of Article 852 is not same as prescription *acquirendi causa*); Duplantis v. Locascio, 67 So.2d 125 (La. App. 1953) (prescription *acquirendi causa* applied to cultivated land); Schilling's Heirs v. Kent Piling Co., 51 So.2d 329 (La. App. 1951) (applied prescription *acquirendi causa* requiring corporeal possession).

16. General article for principle of thirty-year acquisitive prescription. "The ownership of immovables is prescribed for by thirty years without any need of title or possession in good faith."

17. DeBakey v. Prater, 147 So. 734 (La. App. 1933).

18. See Blades v. Zinsel, 15 La. App. 104, 130 So. 139 (1930) (offer to buy was acknowledgment and prescription under Article 3500 was interrupted thereby); A. M. Edwards Co. v. Dunnington, 58 So.2d 225 (La. App. 1952) (verbal acknowledgment sufficient under Article 3520 to interrupt prescription).

19. See Opdenwyer v. Brown, 155 La. 617, 99 So. 482 (1924); Owens v. T. Miller & Sons Building Supply Co., 101 So.2d 773 (La. App. 1958) (plea of ten-year prescription under Article 853 based on visible bounds fixed by mutual acquiescence overruled); Picou v. Curole, 44 So.2d 354 (La. App. 1950) (adverse possession no indication of consent); Kobler v. Koch, 6 So.2d 55 (La. App. 1941).

and acquiescing in the location thereof."[20] When the requisite consent is not present, the possessor is considered to hold as an occupant and not by adverse possession as is required by Article 853.[21] In this situation it will be necessary to establish thirty years possession as a prerequisite to prescription under Article 852.

Allen B. Pierson, Jr.

PROPERTY — TRANSFER OF IMMOVABLE COMMUNITY PROPERTY — ESTOPPEL AND THE PAROL EVIDENCE RULE

Plaintiff brought suit to be declared owner of land which his wife had purchased during marriage and sold to a third party without his written consent. There was no recital in the act of sale that the property was purchased by the wife in her name as her separate property, and the district court, applying the presumption that such property was part of the community of acquets and gains, annulled the purported sale because it lacked the husband's signature. The court of appeal *held*, reversed. Since the husband was instrumental in arranging the sale by the wife, was actually present at its execution and received a part of the consideration, he ratified the act of sale and could not sue to rescind it because his signature was absent. The vendee was not acquiring property by estoppel since the wife here had a deed in her name. *Cato v. Bynum*, 98 So.2d 257 (La. App. 1957).

The opinion in the instant case lends itself to two distinct interpretations. On first reading it would appear that the husband's signature is being supplied by parol testimony, under a plea of estoppel, to pass title to community property of which the wife is record owner. On the other hand, the court's language may easily be taken to mean that the husband, by his conduct at the time of the sale, is estopped to assert the character of the property in question as community, thus making a sale by the wife alone translative of title, since a sale of the separate property of the wife does not require the signature of the husband. The first of these interpretations involves a consideration of the parol evidence rule.

It is the generally accepted principle in Louisiana that title

20. Blanchard v. Monrose, 12 La. App. 503, 506, 125 So. 891, 893 (1930).
21. Williams v. Bernstein, 51 La. Ann. 115, 25 So. 411 (1899).