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Ruminations on Real Actions

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Prompted by some recent Louisiana judicial decisions involving real actions, this article attempts to explore some shadowy alleys of Louisiana's statutory scheme on real actions.[1] Real actions were defined by the Louisiana Code of Civil Procedure of 1960 as "the actions to determine ownership or possession of immovable property or of a real right."[2] Apparently influenced by the common law term "real property," the drafters of this Code used the term "real right" as applying only to immovable property. When it was eventually understood that one may have a real right not only in immovable, but also in movable property,[3] the Code of Civil Procedure was amended in 1981 by adding the word "therein" after the words "immovable property, or of a real right" in all the pertinent articles of the Code.[4] Thus, it can now be

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* Dedicated to the memory of my colleague George M. Armstrong, Jr., (1953-1990).

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1. For previous explorations of other alleys by the same author, see Symeonides, Developments in the Law, 1982-1983, Property, 44 La. L. Rev. 505, 505-13, 515-17 (1983) [hereinafter Symeonides, 1982-1983] (discussing petitory actions and possessory actions against the state); and Symeonides, Developments in the Law, 1984-1985, Property, 46 La. L. Rev. 655, 655-80 (1986) [hereinafter Symeonides, 1984-1985] (discussing possessory actions against the state and real actions involving servitudes). For a systematic discussion of real actions in Louisiana and comparative law, see A. Yiannopoulos, Property §§ 184-229, at 496-616, in 2 Louisiana Civil Law Treatise (2d ed. 1980). For other discussions of real actions since the 1960 enactment of the Louisiana Code of Civil Procedure, see, inter alia, Johnson, Real Actions: Procedural Changes Made by the New Code of Civil Procedure, 35 Tul. L. Rev. 541 (1961); McMahon, Real Actions, Louisiana Legislative Symposium: 1960 Regular Session, 21 La. L. Rev. 1, 46 (1960); Note, Action to Remove Cloud From Title Expanded—Effect on Use of Petitory Action, 38 Tul. L. Rev. 190 (1963).

2. L.S.A. 8 La. Code Civ. P. Title II, Introduction, 315 (West 1961). See also La. Code Civ. P. arts. 3651, 3654, 3655 (1961).

3. See La. Civ. Code art. 476; A. Yiannopoulos, supra note 1, at 404-05.

4. See, e.g., La. Code Civ. P. arts. 3651 ("The petitory action is one brought by a person who claims the ownership, but who is not in possession, of immovable property or of a real right therein"), 3654 ("When the issue of ownership of immovable property or of a real right therein is presented in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding"), 3655 ("the possessory action is one brought by the possessor of immovable property or of a real right therein.")

stated that, in Louisiana, real actions are the actions provided for the possession and protection of real rights in immovable property.[5]

Most of the statutory rules on real actions are contained in Title II of Book VII of the Louisiana Code of Civil Procedure,[6] which provides for four nominate real actions: the possessory action, the petitory action, the boundary action and the hypothecary action. This Title also provides for two other actions or proceedings, namely concursus proceedings and actions for a judgment declaratory of ownership[7] that, in the drafters' words, "actually or indirectly adjudicate rights of ownership, although not classified technically as real actions."[8] The provisions of this Title are duplicated or paralleled by some articles of the Civil Code[9] and are complemented by the articles of the Code of Civil Procedure on civil actions in general,[10] as well as by the rules of res judicata.[11] Since this is but a limited exploration of the statutory scheme on real actions, this article discusses only a few of these provisions. The article also contains a limited discussion of some provisions of Act 521 of 1990 (effective on January 1, 1991) which expands significantly Louisiana's law of res judicata and imports to Louisiana the doctrine of issue preclusion.[12]

Of the many cases involving real actions that reached Louisiana's appellate courts in the last twelve months,[13] only three cases involve new legal issues. This article is confined to these three cases and uses them as the springboard for a more general discussion of some aspects

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5. Real rights in movable property are protected by the revendicatory action (see La. Civ. Code art. 526) and other innominate actions under the Code of Civil Procedure. See A. Yiannopoulos, supra note 1, §§ 233-245, at 624-45.

6. See La. Code Civ. P. arts. 2651-3753.

7. See La. Code Civ. P. art. 3554.

8. 8 La. Code Civ. P. Book VII, Title II, Introduction, 315-316 (1961).

9. See, e.g., La. Civ. Code arts. 526, 531-532 (actions for the protection of ownership), 792-794 (boundary actions).

10. See, e.g., La. Code Civ. P. arts. 421-561.

11. See La. R.S. 13:4231 (Supp. 1990).

12. See infra text accompanying notes 126-29.

13. See, inter alia, Chevron U.S.A. Inc. v. Landry, 558 So. 2d 242 (La. 1990); Davis Oil Co. v. The Citrus Land Co., 563 So. 2d 401 (La. App. 1st Cir. 1990); Linder Oil Co. v. LaBoKay Corp., 556 So. 2d 899 (La. App. 3d Cir. 1990) (concursus proceedings); McNeal v. Normand, 552 So. 2d 1234 (La. App. 3d Cir. 1989) (boundary actions); Clifton v. Liner, 552 So. 2d 407 (La. App. 1st Cir. 1989); Bouligny v. Delatte, 550 So. 2d 929 (La. App. 3d Cir. 1989) (action for a declaratory judgment); Patin v. Dow Chemical Co., 546 So. 2d 1277 (La. App. 1st Cir.), writ denied, 551 So. 2d 1338 and 1339 (1989) (petitory actions); Morris v. Sonnier, 546 So. 2d 1296 (La. App. 1st Cir. 1989) (possessory actions); Cuthbertson v. Unopened Succession of Tate, 544 So. 2d 1236 (La. App. 3d Cir. 1989); Debetaz v. Kyzar, 540 So. 2d 394 (La. App. 1st Cir. 1989); Miller v. White, 539 So. 2d 1268 (La. App. 3d Cir. 1989).

of real actions in Louisiana. The first case, *Witter v. City of Baton Rouge*,[14] a possessory action against a municipality, illustrates some of the problems encountered in the application of Article 3657 of the Code of Civil Procedure, which prohibits the cumulation of the possessory and petitory actions ("rule of *non-cumul*"). The second case, *Johnston v. Bickham*,[15] offers an opportunity to examine the yet unexplored relationship between a possessory action and a boundary action. The third case, *Chevron U.S.A. Inc. v. Bergeron*,[16] raises some novel questions about the interrelationship between the adjudications of possession and ownership in a concursus proceeding, or, for that matter, in a boundary action or an action for a judgment declaratory of ownership. If a general conclusion can be drawn from these three cases, it is that if the courts' handling of real actions is satisfactory, it is despite rather than because of the codal scheme regulating these actions.

"Public Things" and the Rule of *Non-Cumul*

For better or worse, the provisions of the Louisiana Code of Civil Procedure on possessory actions were designed by their drafters "to keep the trial of the issues of possession and ownership as separate as possible."[17] To that end, Article 3657 of the Code of Civil Procedure prohibits the cumulation of the possessory and petitory actions by either the plaintiff or the defendant. If the plaintiff cumulates the two actions or pleads them in the alternative, his possessory action is deemed waived. If the defendant asserts title in himself "he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff."[18] Article 3661 of the same Code declares inadmissible any

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14. 546 So. 2d 848 (La. App. 1st Cir. 1989), discussed at infra text accompanying notes 32-59.

15. 559 So. 2d 15 (La. App. 1st Cir. 1990), discussed at infra text accompanying notes 61-95.

16. 551 So. 2d 746 (La. App. 1st Cir.), writ denied, 553 So. 2d 465 (1989), discussed at infra text accompanying notes 113-25.

17. La. Code Civ. P. art. 3657 comment (a).

18. La. Code Civ. P. art. 3657. The full text of the article is as follows:

> The plaintiff may not cumulate the petitory and the possessory actions in the same suit or plead them in the alternative, and when he does so he waives the possessory action. If the plaintiff brings the possessory action, and without dismissing it and prior to judgment therein institutes the petitory action, the possessory action is abated.
>
> When, except as provided in Article 3661(1)-(3), the defendant in a possessory action asserts title in himself, in the alternative or otherwise, he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff in the possessory action.
>
> If, before executory judgment in a possessory action, the defendant therein

evidence of ownership in a possessory action except for proving the extent and duration of a party's possession and his intent to possess as owner.[19]

Whatever its virtues with regard to actions among private parties, this regime of rigid separation of the two actions runs into considerable difficulties when the defendant in the possessory action is the state or one of its political subdivisions, and the immovable in question is claimed by the defendant to be a "public thing."[20] Since "[p]ublic things are *owned* by the state or its political subdivisions in their capacity as public persons,"[21] should an assertion by the defendant that the immovable in question is a public thing be treated as an assertion of ownership by the defendant?[22] If so, this assertion would not only convert the action from possessory to petitory but would also result in a judicial confession of the plaintiff's possession.[23]

These difficulties have been exacerbated by the decision of the Louisiana Supreme Court in *Todd v. Department of Natural Resources*,[24]

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institutes a petitory action in a separate suit against the plaintiff in the possessory action, the plaintiff in the petitory action judicially confesses the possession of the defendant therein.

19. La. Code Civ. P. art. 3661 provides as follows:

In the possessory action, the ownership or title of the parties to the immovable property or real right therein is not at issue.

No evidence of ownership or title to the immovable property or real right therein shall be admitted except to prove:

(1) The possession thereof by a party as owner;

(2) The extent of the possession thereof by a party; or

(3) The length of time in which a party and his ancestors in title have had possession thereof.

20. According to La. Civ. Code art. 450, public things are those that are owned by the state or its political subdivisions in their capacity as public persons. Public things that may belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore. Public things that belong to political subdivisions of the state are such as streets and public squares.

21. Id. (emphasis added).

22. This question arises only with regard to things claimed by the defendant to be public things owned *by that defendant* in its capacity as a public person. For example, if the defendant is the state then proof that the land in question is part of the bottom of a navigable water-body is tantamount to proof that the land is a public thing owned by the defendant in its capacity as a public person. Similarly, if the possessory action is against a municipality, then proof that the land in question is part of a public street or square may, (except in instances where the municipality merely has a servitude over the property) be tantamount to proof that the land is a public thing owned by the defendant in its capacity as a public person. On the other hand, in an action against a municipality, proof that the land in question is covered by navigable waters is proof that the land is a public thing, but one owned by the state rather than the city defendant.

23. See La. Code Civ. P. art. 3657.

24. 456 So. 2d 1340 (La. 1983) (original hearing), 465 So. 2d 712 (rehearing), 474

which could be read as making the possessory action unavailable against the state with regard to immovables classified as "public things." Indeed the court did say that "public things may not be the objects of [adverse] possession by private individuals,"[25] and that "[t]he availability of a possessory action depends . . . upon whether the property is . . . [public or private]."[26] This language not only increases the importance of the distinction between public and private things, but also raises an important procedural issue. Which party should carry the burden of proving that the immovable in question falls within one category or the other? One possibility would be to require the plaintiff to prove, as a condition for qualifying for a possessory action, that the immovable he claims to possess is a private thing. The other possibility would be to treat the classification of the immovable as a public thing as a defense to the possessory action. If the defendant chooses to invoke this defense, the defendant should also have the burden of proving it.[27]

In two previous writings,[28] this author explored these questions and advanced the following arguments, *inter alia*: (1) *Todd*'s true holding should not be sought in the court's statement that "[t]he *availability* of a possessory action depends . . . upon whether the property is . . . [public or private],"[29] but rather in the court's statement that "the *success or failure* of a possessory action against the state will depend in part on . . . whether the property is public or private in nature";[30]

So. 2d 430 (La. 1985) (second rehearing). All references hereinafter to the *Todd* decision are to the court's opinion on original hearing.

25. "[W]hile public things may not be objects of possession by private individuals, our jurisprudence, consistent with Louisiana's Civil Code and French theories, allows private things . . . to be the objects of a possessory action." 456 So. 2d at 1349.

26. "The availability of a possessory action then depends . . . upon whether the property is of the sort which can be freely disposed of . . . by the state in its capacity as a private person." 456 So. 2d at 1350.

27. See La. Code Civ. P. art. 1005.

28. See Symeonides, 1984-1985, supra note 1, at 655-70 (discussing the opinions of the supreme court in *Todd*) and Symeonides, 1982-1983, supra note 1, at 505-13 (discussing the opinion of the court of appeal).

29. 456 So. 2d at 1350 (emphasis added).

30. 456 So. 2d at 1349 (emphasis added). See Symeonides, 1984-1985, supra note 1, at 660-61, where this author argued that *Todd*'s pronouncement that "public things may not be the objects of [adverse] possession by private individuals," 456 So. 2d at 1349, simply meant that

> with regard to things *proven* to be public, "the possessor . . . may [not] retain possession of the thing until he is reimbursed for expenses and improvements which he is entitled to claim." [La. Civ. Code art. 529] He must deliver possession "at once." However, since the determination that the disputed property is in fact a public thing presupposes adjudication of ownership, here public ownership, and since ownership cannot be adjudicated in a possessory action, the distinction between public and private things is simply irrelevant to the

(2) "the plaintiff should not be required to prove that the disputed property is *not* a public thing"; (3) "that burden should rest with the state, if it chooses to assert it"; and (4) "depending on how the state phrases its pleadings, its assertion that the disputed property *is* a public thing might be either a defense to the possessory action, or may amount to converting the suit into a petitory action and judicially confessing the plaintiff's possession."[31]

Although the above arguments were entirely consistent with the spirit of *Todd*, they did not flow freely from the ambiguous language employed in the majority opinion. In *Witter v. City of Baton Rouge*,[32] the first circuit court of appeal drew similar conclusions[33] from *Todd*, and did so without the hesitation that might have been warranted by the inherent ambiguity of *Todd*'s language. *Witter* was a possessory action filed by a private citizen seeking to be declared in possession of a certain tract of land in downtown Baton Rouge near the Mississippi River.[34] Exploiting to the fullest the ambiguities of *Todd*, the defendant city of Baton Rouge filed a "peremptory exception of no cause of action" arguing that "the possessory action does not lie against the city of Baton Rouge, a political subdivision of the state, with respect to things that the city owns in its capacity as a public person."[35] This exception was only

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question of the availability of the possessory action against the state. In fact, in that context, any reference to the disputed property as public is what grammarians call *proteron hysteron*. As the *Todd* court correctly recognized, "referring to land as 'public' at the outset of a possessory action . . . presupposes a state of affairs which may well not be the case. It presupposes that the property in question is owned by the state. . . . Such a determination will more properly be made in a petitory, or perhaps some other action." Hence, while it is correct to say that "the success or failure of a possessory action against the state will depend in part on the judicial determination concerning . . . whether the property is public or private in nature," it is not correct to say that "[t]he availability of a possessory action . . . depends . . . upon whether the property is" private or public. The possessory action is available with regard to all things, public or private, and against all defendants, public or private, for the simple reason that its objective is not to determine ownership, but rather the factual state of affairs we call possession.

31. Symeonides, 1984-1985, supra note 1, at 667-68.

32. 546 So. 2d 848 (La. App. 1st Cir. 1989).

33. The only point on which the *Witter* court reached a different conclusion was point (4) above, see supra text accompanying note 31. The court did *not* treat the City's assertion of ownership as tantamount to converting the action from a possessory into a petitory pursuant to Article 3657 of the Code of Civil Procedure. This point is discussed below, see infra text accompanying notes 45-53.

34. The disputed property is bounded on the north by France Street (the first parallel to Government Street to the south), on the east by Natchez Street (the railroad tracks), on the south by South Street, and on the west by the Mississippi River.

35. Peremptory Exception of No Cause of Action or Innominate Peremptory Exception at 83, Witter v. City of Baton Rouge, 546 So. 2d 848 (La. App. 1st Cir. 1989) (No. CA87-1146) [hereinafter referred to as *Witter* Record] on reserve with the LSU Law Library.

slightly narrower than the exception filed by the state in defending the possessory action in *Todd*. Because the constitutional prohibition of the running of prescription against the state protects property the state owns in both its public and private capacity, the state in *Todd* did not have to confine its exception to immovables claimed to be public things. On the other hand, such a confinement was necessary in *Witter* since only the public things owned by a political subdivision of the state are protected from loss by acquisitive prescription. Predictably, the City argued that "Mr. Witter, in addition to establishing the requisite elements for a possessory action, had the burden of proving that the land he claims to have possessed is a private thing . . . [or] that the disputed property is not public property owned by the municipality."[36]

The trial court overruled the City's exception[37] and the court of appeal affirmed, holding that "proof that the property at issue is a public thing owned by the city is a defense, proof of which rests upon the defendant in a possessory action."[38] The court based its holding on *Todd*,[39] but was rather selective in quoting from it. For instance, the court quoted the following excerpt from *Todd*: "The state, of course, will defeat the possessory action if *they* can show that the disputed property is 'public,' be it by nature or by use."[40] However, this sentence may be read as simply stating the obvious, namely that, if the state chooses to prove, and succeeds in proving, that the thing in question is a public thing, the possessory action is defeated. This sentence does not necessarily say that this burden may be forced upon the state. Furthermore, the ambiguity is continued in the next *Todd* sentence, which the *Witter* court did not quote: "The private litigant plaintiff otherwise entitled will succeed in the possessory action if the disputed property *is shown* to be 'private' in nature, irrespective of whether the owner is ultimately found to be a private person or the state in its private capacity."[41] The use of the impersonal passive expression "is

36. 546 So. 2d at 851.

37. See Judgment by Judge Foil, *Witter* Record, at 138-39.

38. 546 So. 2d at 851.

39. The court also relied on Brasseaux v. Ducote, 6 So. 2d 769, 770 (La. App. 1st Cir. 1942), which indeed contains the statement that the assertion that the disputed property forms part of a public street is "a special defense on which the burden of supporting the same rested upon the defendant." Id. at 770. However, the significance of this statement is limited by the fact that, unlike both *Todd* and *Witter*, *Brasseaux* was an action between two private parties. Indeed, it would seem ludicrous in such an action to require the plaintiff to prove that the property in question is not public.

40. Witter v. City of Baton Rouge, 546 So. 2d 848, 851 (La. App. 1st Cir. 1989), quoting Todd v. Department of Natural Resources, 456 So. 2d 1340, 1350 (La. 1983). The *Witter* court also quoted an excerpt from *Todd* that is more pertinent to an action for a declaratory judgment.

41. 456 So. 2d at 1351 (emphasis added).

shown," as opposed to a direct reference to either the plaintiff or the defendant, might well have been a symptom of the *Todd* court's ambivalence as to who should bear the burden of proof. If the *Witter* court shared that ambivalence, it did not show it. It is just as well. For reasons explained elsewhere,[42] the court's holding is intuitively but eminently correct, and the *Witter* court must be applauded for not allowing itself to be confused by the Byzantine language of *Todd*. Indeed it would be totally inconsistent with the Louisiana scheme of real actions[43]

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42. See Symeonides, 1984-1985, supra note 1, at 661-68.

> In the absence of a statutory provision to the contrary, the possessor should not be required to prove affirmatively that the thing he possesses physically is also legally susceptible to possession. Whenever such requirement was felt necessary, it has been expressly provided for by legislation, such as in Civil Code article 3475 which requires that the person asserting acquisitive prescription must prove, among other things, that the thing is "susceptible of acquisition by prescription." It would be more fitting to consider the "insusceptibility of the thing to possession" as an exception of no cause of action, to be proven by the party who asserts the exception, rather than to make susceptibility to possession an element of the cause of action to be proven by the party who files the action. After all, private things are the residual and by far the largest category. Things that are not expressly declared by law to be common or public are necessarily private. If any presumption is applicable on this issue, it is that things are presumed to be private, unless proven to be public or common, and not the other way around. The burden of rebutting that presumption must rest with the party who denies it.

Id. at 664-65 (footnotes omitted).

43. See Symeonides, 1984-1985, supra note 1, at 664-66.

> Moreover, as the court pointed out in Todd, "[a] party bringing a possessory action need not allege or prove that the property is not owned by the defendant, nor that he has title to the land; nor must the Court address the matter of ownership in order to rule in a possessory action." In fact, the plaintiff in a possessory action must be careful not to assert his title in a way that exceeds the confines of Code of Civil Procedure article 3661, lest he may be considered as having waived his possessory action under article 3657(1). Admittedly, in many cases proof that the disputed property is not a public thing is not the same as proof that the property is not owned by the state, because the state may own the property in its private capacity. Also, in some cases, the plaintiff may be able to prove that the disputed property is not a public thing, without asserting his own title and thus potentially waiving his possessory action. . . . However, . . . in many cases the plaintiff may have no way of proving that the disputed property is not a public thing without proving that he himself owns it. Suppose, for instance, that the disputed property which is possessed by the plaintiff is claimed by the state as forming part of a public park, a public cemetery, a public square, or a public road. To require the plaintiff to prove that the disputed property is not a public thing is to require him to prove that the property is not contained in the state's title. In many cases it will be impossible for him to do so without asserting his own title and proving that the property is included in that title. However, such assertion exceeds the confines of Code of Civil Procedure article 3661, and, unless the court is prepared to take a more liberal view, would amount to a waiver of the possessory action.

Id. at 665-66 (footnotes omitted).

to require the plaintiff to prove affirmatively, as a condition to the availability of his possessory action, "that the land he claims to have possessed is a private thing . . . [or] that the disputed property is not public property owned by the municipality."[44]

Following the overruling of its exception and, apparently unable to disprove the plaintiff's possession, "the City contended that Mr. Witter was not entitled to a judgment of possession because the City allegedly *owns* the Witter property by dedication in 1806 by Elie Beauregard, or by grant from the U.S. Congress to the City in 1860."[45] Obviously, this was nothing short of an assertion of ownership. If the second paragraph of Article 3657 of the Code of Civil Procedure were to be applied literally, this assertion would convert the possessory action into a petitory action.[46] Yet, neither the opinion of the court of appeal nor the trial court opinion contains any reference to Article 3657. A search of the record reveals that the defendant sought to prevent the application of this article by prefacing its assertion of ownership with the following reservation:

> All references to title and ownership are, of course, made in the framework of a possessory action and in accordance with Article 3661 of the Code of Civil Procedure. No implication is warranted that the possessory action has been converted by the defendant into a petitory action.[47]

However, the City's assertion of ownership exceeded the confines of Article 3661 of the Code of Civil Procedure since it was made for purposes other than proving the duration and length of its possession or its intent to possess as owner as opposed to possessing precariously.[48] The City's assertion was designed to show that the plaintiff's possession was legally ineffective because the disputed immovable was a public thing. However, since in order to show that the thing was public the City had to show that it owned the thing, albeit in its public capacity,

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44. Witter v. City of Baton Rouge, 546 So. 2d 848, 851 (La. App. 1st Cir. 1989).

45. 546 So. 2d at 850 (emphasis added).

46. Article 3657 provides in pertinent part that "[w]hen, except as provided in Article 3661(1)-(3), the defendant in a possessory action asserts title in himself, in the alternative or otherwise, he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff in the possessory action." According to the official revision comments, the action is converted into a petitory action "*whenever* [the defendant] injects the issue of ownership through his answer." La. Code Civ. P. art. 3657 comment (d) (emphasis added).

47. Post Trial Memorandum of the City of Baton Rouge, et al., page 3, *Witter* Record, at 269.

48. Article 3661 is reproduced at supra note 19.

this assertion amounted to nothing less than an assertion of ownership.[49] If this is true, then the second paragraph of Article 3657 of the Code of Civil Procedure should not be rendered inoperable merely because one party expressed a desire not to have it applied. At the same time, the fact that in a truly adversarial proceeding like this one the plaintiff chose not to object to defendant's desire and that the court apparently acquiesced to it[50] indicates that, at least in actions like *Witter*, the rule of *non-cumul* is an impediment rather than an aid to the progress of the trial.

Apparently the *Witter* plaintiff pondered the possibilities and concluded that he had nothing to gain by invoking the *non-cumul* rule of Article 3657 or objecting to the City's offer to prove ownership. If nothing else, this offer would allow plaintiff an early look into the City's armory and would provide him with time and data to decide whether a second battle (petitory action) would be winnable in the event he lost the first one (possessory action). Indeed, at the time of the trial, Louisiana's rules of res judicata and issue preclusion did not seem to preclude a petitory action when the issue of ownership was not directly adjudicated in a previous possessory action between the same parties with regard to the same property.[51] Thus, if the City were to be successful in proving that the disputed immovable is a public thing, the plaintiff

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49. This problem was recognized by the Louisiana Supreme Court more than a century and a half ago in Gleisse & Holland v. Winter, 9 La. 149 (1836), a possessory action against the city of Lafayette. The city claimed that the property in question was a public thing and that, hence, "no possession of it can be acquired, and no possessory action maintained." The court pointed out that "[t]his argument assumes as a fact that there has been a destination of public use, while the principal if not the sole question in the case is, whether evidence of that fact be admissible in this action, it being merely possessory. There is, therefore, the appearance of reasoning in a circle." Id. at 153.

50. Neither the opinion nor the record of the *Witter* case contains any objection by the plaintiff to the non-application of Article 3657 or any independent discussion of the issue by the court.

51. The last supreme court decision on this subject, Board of Comm'rs v. S.D. Hunter Foundation, 354 So. 2d 156 (La. 1978), is not exactly on point but is indicative of the rigidity of Louisiana law on this issue. In a previous possessory action filed by the Hunters, the court found them to be in possession and ordered the Board to file a petitory action within 60 days under Article 3662 of the Code of Civil Procedure. One of the issues in this petitory action was whether the court should be bound by its findings of possession in the previous possessory action. In a rather surprising opinion, the court reached a negative conclusion, holding that, at least in a petitory action filed pursuant to a court order under La. Code Civ. P. art. 3662, the court's previous judgment on the issue of possession "is not res judicata as to any issue of ownership or possession." 354 So. 2d at 166. The court explained this conclusion as follows:

> Res judicata requires identity in the two suits of object demanded, of cause, and of parties. La. C.C. art 2286. Here, the possessory and petitory action had different objects (things demanded)—i.e., to be maintained in possession, vs.

would of course lose his possessory action but would also obtain valuable information on whether a subsequent petitory or boundary action against the City would be winnable. If the City were to fail to prove ownership, either in its public or private capacity, the resulting judgment would not only be a temporary victory for the plaintiff but would also serve as a deterrent against the City coming back with a petitory or a boundary action. Perhaps similar thoughts went through the trial judge's mind when he decided not to address this issue. Indeed, both the parties and the system in general would benefit from an earlier rather than a later resolution of the dispute, without the expenses of a new trial. In this sense, the *Witter* experience signifies that, at least in actions involving

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> to be recognized as owner—,as well as different causes—possession founded upon the juridical or material fact of undisturbed possession for one year or more, vs. ownership based upon record title. . . . The possessory-action holding that the Hunters were in *possession* of the disputed acreage did not, consequently, preclude a contrary conclusion in the petitory action timely-instituted to try *title* in accordance with the possessory-action judgment.

Id. Although *Witter* involves the inverse scenario, one could argue based on the above, albeit questionable, logic that there would be "no identity of objects demanded" and "no identity of causes" between *Witter* and a subsequent petitory action. The objects demanded would be different—"to be maintained in possession, vs. to be recognized as owner." The causes would also be different—ownership for purposes of declaring adverse possession legally ineffective vs. ownership for its own sake.

During the summer of 1990, the Louisiana Legislature passed and the Governor signed into law Act 521 of 1990 which will become effective on January 1, 1991. The Act amended and re-enacted La. R.S. 13:4231 which contained Louisiana's rules of res judicata in force at the time of the *Witter* decision. The new section 4231 contains a totally new paragraph which provides that "[a] judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment." The official comments accompanying Act 521 point out that

> R.S. 13:4231 . . . changes present law by adopting the principle of issue preclusion. This principle serves the interests of judicial economy by preventing relitigation of the same issue between the same parties. For example, if a plaintiff brings an action against a defendant to recover for injuries sustained in an automobile accident, the judgment rendered in that action would preclude relitigation of any issue raised in a subsequent action brought by defendant against plaintiff to recover for his injuries sustained in the same accident provided that the issue had been actually litigated and essential to the judgment, e.g., fault of either party.

It seems that this provision would overrule the *Hunter* case, supra, and would affect the statement made in the text about the *Witter* case. It seems that a judicial finding in a possessory action that the disputed property is a public thing should preclude a subsequent petitory action by the private litigant. Similarly, a judicial finding in a possessory action like *Witter* that the disputed property is *not* a public thing would not preclude a subsequent petitory action by the city, since the city might own the property in its private capacity, but should preclude a relitigation of the question whether the property is a public thing.

the state and its political subdivisions, the insistence of the Code of Civil Procedure on "keep[ing] the trial of the issues of possession and ownership as separate as possible"[52] may not be such a great idea after all. In fact, it could be argued that none of the three reasons given by the *Exposé des Motifs* of the Code of Civil Procedure in support of this idea seems to apply squarely in actions such as *Witter*. The three reasons given by the *Exposé* are that "(1) It is necessary to discourage self help, which leads to breaches of the peace; (2) The settling of the issue of possession frequently facilitates proof of ownership; (3) The matter of possession should not be subject to the delays ordinarily inherent in the issue of ownership."[53] First, self help against or by the state or its political subdivisions is not very likely. Second, in actions like *Witter*, "the issue of possession" is "settled" *through* "proof of ownership" and thus, third, *is* "subject to the delays ordinarily inherent in the issue of ownership."

Be that as it may, the *Witter* court concluded that the City's proof of ownership of the property as a public thing was insufficient. Pursuant to a request by the plaintiff based on Article 3662(2) of the Code of Civil Procedure, the trial court's judgment recognizing the plaintiff's possession also ordered the defendant "to file, within sixty (60) days, any adverse claims of ownership or be precluded thereafter from asserting ownership of the subject property."[54] This order was not challenged by the City and was not discussed by the court of appeal. However, it might have been worth a pause because of *Todd*'s holding that such an order would be unconstitutional as applied against the state. The *Todd* holding was based on the court's conclusion that "the sixty day period is a form of liberative prescription,"[55] and that the issuing of such an order against the state "would impose on the state a form of liberative prescription, which is constitutionally impermissible under La. Const. art. 12 § 13."[56] Since, unlike the state itself, its political subdivisions are not protected from the running of liberative prescription, the above *Todd* holding would not protect the city of Baton Rouge. However, the *Todd* holding was alternatively based on "the Constitution's prohibiting the loss of state lands by *acquisitive* prescription."[57] Since the same constitutional prohibition extends to public lands of the political subdivisions of the state,[58] these subdivisions could invoke the

52. La. Code Civ. P. art. 3657 comment (a).

53. Louisiana State Law Institute, Code of Practice Revision, Exposé des Motifs, No. 19. p. 4 (1954).

54. Written Reasons for Judgment, *Witter* Record, at 371.

55. Todd v. Department of Natural Resources, 456 So. 2d 1340, 1353 (La. 1983).

56. Id.

57. Id. at 1352 (emphasis added).

58. See A. Yiannopoulos, supra note 1, § 34, at 97.

protection of the above *Todd* holding, at least with regard to lands the status of which as public or private things had not been judicially determined. However, because the *Witter* court did adjudicate this question and determined that the property in question was *not* a public and thus not an imprescriptible thing, the City could not avoid the application of Article 3662(2) of the Code of Civil Procedure and the sixty-day order authorized by that article.[59]

POSSESSORY AND BOUNDARY ACTIONS

For some reason, the preoccupation of the Code of Code Civil Procedure with "keep[ing] the trial of the issues of possession and ownership as separate as possible"[60] is, or seems to be, confined to the petitory action and does not extend to other real actions. Article 3657, which prohibits the cumulation of the possessory action and the petitory action, is conspicuously silent with regard to other real actions such as boundary actions, actions for a judgment declaratory of ownership, and concursus proceedings covered by Article 3654 of the Code of Civil Procedure. Whether or not this silence means that these latter actions should be included within the scope of the *non-cumul* rule is an extremely difficult question. This section attempts to explore this question with regard to the boundary action. The next section examines the relation between the adjudication of possession and ownership in concursus proceedings, actions for a judgment declaratory of ownership, and boundary actions.

Possessory Action in Response to a Boundary Action

In *Johnston v. Bickham*,[61] the plaintiff filed a boundary action and the defendant reconvened with a possessory action. The plaintiff filed a dilatory exception raising an objection of improper cumulation of

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59. On the other hand, if it is true that, under Louisiana res judicata principles as pronounced in Board of Comm'rs v. S.D. Hunter Foundation, 354 So. 2d 156 (La. 1978) (see discussion supra note 51), *Witter*'s determination that the disputed property is a private thing would not be binding in a subsequent petitory action, this determination should not be allowed to attain the status of res judicata indirectly through the City's failure to file the action within the sixty day period. Otherwise, the mere inaction of city officials, would result in alienating property that could well be an "inalienable" thing. The same can be said with regard to alienable city property that is rendered imprescriptible by the filing of the appropriate declarations under La. R.S. 9:5804. An order against the city pursuant to La. Code Civ. P. art. 3662(2) would essentially cancel out the protection of La. R.S. 9:5804. This result, however, may be more palatable because this statute applies to private things of the city and is of no higher footing nor more specificity than La. Code Civ. P. art. 3662.

60. La. Code Civ. P. art. 3657 comment (a).

61. No. CA88-1677 (La. App. 1st Cir. 1990).

actions. Relying on *Harvey v. Harvey*,[62] the trial court sustained the exception and dismissed the reconventional demand. The court of appeal reversed and remanded the case to the trial court for further proceedings. Distinguishing *Harvey*, which had held that the defendant could not cumulate a petitory and a boundary action,[63] the court of appeal found no cumulation, much less an improper one, in this case since each party was pursuing one action only.

The court's decision was entirely correct. The defendant could have taken a completely defensive posture, such as merely denying the allegations of the plaintiff, or he could have counter-attacked by "assert[ing] in a reconventional demand *any* [causes of action] which he may have against the plaintiff."[64] A defendant who opts for the latter strategy retains complete freedom in choosing the weapon with which to carry out his counter-attack. He could employ a weapon of equal range and potency as that of the plaintiff (i.e., another boundary action) or a seemingly lesser weapon such as the possessory action. Both types of weapons are permitted by the Code of Civil Procedure[65] as well as by Article 792 of the Civil Code which provides that "if neither party proves ownership, the boundary shall be fixed according to limits established by possession." Perhaps because he had sufficient confidence in his ability to prove his possession of the disputed property and was unimpressed by the plaintiff's ability to prove his ownership, the defendant in the *Johnston* case chose not to assert ownership. In so doing, he was entirely within his rights.

Boundary Action in Response to a Possessory Action

However, if the *Johnston* facts were to be reversed, more difficult questions would arise. If the plaintiff were to begin with a possessory action and the defendant were to reconvene with a boundary action, there would still be no cumulation of actions since each party would be pursuing a single action only. This scenario, however, would pose a question that is not directly answered by the Code of Civil Procedure; that is, whether the filing of a boundary action is an "assertion of

62. 345 So. 2d 113 (La. App. 1st Cir.), writ denied, 347 So. 2d 246 (1977).

63. This part of *Harvey* is not beyond controversy. It is discussed below, see infra text accompanying notes 90-95.

64. La. Code Civ. P. art. 1061 (emphasis added). This part of Article 1061 has not been affected by its reenactment by Act 521 of 1990. See infra text accompanying notes 126-29.

65. See La. Code Civ. P. arts. 3691-3693 and especially Article 3693 which provides that "[a]fter considering the evidence, including the testimony and exhibits of a surveyor or other expert appointed by the court or by a party, the court shall render judgment fixing the boundary between the contiguous lands in accordance with the ownership or possession of the parties."

title" that, according to Article 3657, entails a judicial confession of the original plaintiff's possession. As seen earlier, this article provides that, if the defendant in a possessory action "asserts title in himself . . . he thereby converts the suit into a petitory action, and judicially confesses the possession of the plaintiff in the possessory action."[66] One of the consequences of such a confession is to raise the confessing party's burden of proof from merely proving "better title" than the other party to the higher standard of proving "ownership."[67] Although the official revision comments suggest that this is the case "*whenever* [the defendant] injects the issue of ownership through his answer,"[68] many courts have taken a liberal view of this provision and have held that "[t]he assertion of title, in order to be sufficient to convert the suit into a petitory action, should consist of some formal claim of recognition of title, rather than an offhand allegation."[69] On the other

66. La. Code Civ. P. art. 3657. The full text of the article is reproduced at supra note 18. Similar questions are raised by the third paragraph of the article which provides that "[i]f, before executory judgment in a possessory action, the defendant therein institutes a petitory action in a separate suit against the plaintiff in the possessory action, the plaintiff in the petitory action judicially confesses the possession of the defendant therein." The question here would be whether the filing of a boundary action would also entail a "judicial . . . confess[ion of] the possession of the defendant therein."

67. See La. Civ. Code art. 531 ("One who claims the ownership of an immovable against another in possession must prove that he has acquired ownership. . . . If neither party is in possession, he need only prove a better title."); La. Code Civ. P. art. 3653 ("To obtain a judgment recognizing his ownership . . . the plaintiff in a petitory action shall: (1) Prove that he has acquired ownership . . . if the court finds that the defendant is in possession . . .; or (2) Prove a better title thereto than the defendant, if the court finds that the latter is not in possession. . . .").

68. La. Code Civ. P. art. 3657 comment (d) (emphasis added).

69. Crowell Land & Mineral Corp. v. Neal, 428 So. 2d 496, 499 (La. App. 3d Cir. 1983). See also Haas Land Co. v. O'Quin, 187 So. 2d 208 (La. App. 3d Cir. 1966), holding that a possessory action "is not converted into a petitory action to try title by incidental allegations of ownership by a party, where the pleadings as a whole and especially the prayer show that possessory and not petitory relief is what is sought." Id. at 211. *Haas* also concludes that

> a strict and technical construction of the Article 3657 would . . . be far beyond the statutory intent . . . [and is not] required by the limited statutory purpose of the code article "to keep the trial of the issues of possession and ownership as separate as possible, and to encourage the determination of the issue of possession before the institution of the petitory action." Official Revision Comment (a). So strict and technical a construction of this code article will constitute it a trap by which unwary or inartistic counsel may inadvertently by two or three ill-chosen words plead away irrevocably valuable substantive and procedural rights of their clients. Such a technical and literal application of the code provision, without consideration of the pleadings as a whole or of the limited statutory purpose of the code article, violates the legislative mandate of LSA-C.C.P Art. 5051 that "The articles of this Code are to be construed liberally, and with due regard for the fact that [the] rules of procedure implement the

hand, there is little doubt that the plaintiff's possession is "judicially confessed" when the defendant's response to the possessory action contains "formal enough" allegations of ownership,[70] or, especially, when it is formally styled a petitory action.[71] The question now is whether the same consequences should be attributed to the filing of a boundary action.

In searching for an answer to this question, it is helpful to keep in mind that, unlike a petitory action, the exclusive objective of which is "to obtain judgment recognizing the plaintiff's ownership"[72] and which cannot succeed unless the plaintiff proves his ownership,[73] the objective of a boundary action is "to fix the boundary,"[74] that is, to "determin[e] . . . the line of separation between contiguous lands,"[75] even if neither party is able to prove ownership.[76] In fact, until the enactment of the Code of Civil Procedure and in line with the civilian tradition,[77] Louisiana courts had taken the position that the ownership of the parties

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substantive law and are not an end in themselves."
Id. at 212.

70. See, e.g., Wallace C. Drennan, Inc. v. Torrania Realty, Corp., 524 So. 2d 231 (La. App. 5th Cir.), writ denied, 531 So. 2d 273 (1988); Sylvester v. Qualls, 520 So. 2d 1030 (La. App. 3d Cir. 1987); Phillips v. Donaldson, 494 So. 2d 1379 (La. App. 3d Cir. 1986); Avery v. Nash, 448 So. 2d 841 (La. App. 2d Cir. 1984); Anderson v. Police Jury of East Feliciana Parish, 452 So. 2d 730 (La. App. 1st Cir.), writ denied, 457 So. 2d 13 (1984).

71. See La. Code Civ. P. art. 3657 para. 3, reproduced at supra note 18.

72. La. Code Civ. P. art. 3651.

73. Since the plaintiff admits to not being in possession by the very filing of a petitory action, he, of course, cannot prevail in that action unless he proves ownership (or at least better title, if the defendant is not in possession either). If he fails to do so, his action is dismissed. While such a dismissal is a victory for the defendant, it does not entail any recognition of the defendant's ownership unless he pleaded and proved his own ownership. Thus, although possession determines the burden of proof in a petitory action, the action itself remains one about ownership and cannot be decided unless one or the other party proves ownership.

74. La. Code Civ. P. art. 3691.

75. La. Civ. Code art. 785.

76. "[I]f neither party proves ownership, the boundary shall be fixed according to limits established by possession." La. Civ. Code art. 792. See also La. Code Civ. P. art. 3693 ("the court shall render judgment fixing the boundary between the contiguous lands in accordance with the ownership or possession of the parties."). Compare with La. Code Civ. P. art. 3654 with regard to concursus proceedings or actions for a declaratory judgment ("the court shall render judgment in favor of the party: (1) Who would be entitled to the possession of the immovable property or real right therein in a possessory action, unless the adverse party proves that he has acquired ownership.").

77. "Historically, the action of boundary has been available for the determination of the line of separation between contiguous lands and for the placement of markers on the ground without regard to claims of ownership." A. Yiannopoulos, supra note 1, § 225, at 599 with supporting authorities.

could not be decided in a boundary action but only in a petitory action.[78] This jurisprudence has been overruled by Article 3693 of the Code of Civil Procedure which now permits boundary disputes to be resolved "in accordance with the ownership or possession of the parties."[79] Both this article, however, and its substantive law counterpart, Article 792 of the Civil Code,[80] make it clear that proof of ownership is only one of the two means of resolving a boundary dispute, the other one being proof of possession. Thus, since the filing of a boundary action does not necessarily entail an assertion of ownership as opposed to possession, the filing of a boundary action in reconvention to a possessory action should not be automatically treated as a confession of the other party's possession under Article 3657. In the absence of some formal prayer for a declaration of *ownership*, a boundary action can be viewed as a judicial demand to delineate on the ground the respective *possessory* rights of the parties.[81]

Cumulating the Possessory and Boundary Actions

If the above syllogism is correct, it might help answer another related and equally unexplored question: whether a plaintiff in a possessory action should be allowed to cumulate, or plead in the alternative, the boundary action.[82] Here again the differences between the boundary and the petitory actions could help support an affirmative answer and hence the opposite answer to the one applicable to petitory actions.

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78. Id. at 599, n.504.

79. In its 1960 version, the corresponding language was "in accordance with the rights and titles of the parties." This language was amended in 1978 so as to be made consistent with La. Civ. Code art. 792. See infra note 80.

80. La. Civ. Code art. 792 provides as follows: "The court shall fix the boundary according to the ownership of the parties; if neither party proves ownership, the boundary shall be fixed according to limits established by possession."

81. Fontenot v. Chapman, 377 So. 2d 492 (La. App. 3d Cir. 1979), involved similar facts and supports the conclusion stated in the text. The trial court had concluded that defendant's boundary action filed in response to a possessory action "was in reality a petitory action." Id. at 495. The court of appeal disagreed, pointing out that the defendant's formal "prayer . . . simply sought the dismissal of the plaintiff's possessory action and a fixing of the boundary between plaintiff's and defendant's land." Id. at 496. The court concluded that it would be contrary to the spirit of the Code of Civil Procedure, the objective of which was to "simplify and liberalize these articles [regulating real actions] and to do away with their former hypertechnicality," to treat the defendant's demand for a fixing of the boundary as a formal assertion of ownership. Id.

82. To this author's knowledge, only one case involved this precise question but the court did not squarely rule on it. In McPherson v. Roy, 390 So. 2d 543 (La. App. 3d Cir. 1980), writ denied, 396 So. 2d 910 (1981), the plaintiff had cumulated a possessory action with a boundary action. The court of appeal held that "[w]e . . . consider both actions to be viable in that even if improperly cumulated under LSA-C.C.P Articles 461 et seq., the defendant Roy by failing to timely object has waived his right to question the cumulation of such actions. LSA-C.C.P Articles 926 and 928." Id. at 547.

Since the filing of a petitory action presupposes that the plaintiff "is *not* in possession,"[83] this action is obviously "inconsistent,"[84] in fact incompatible, with the possessory action, the objective of which is to obtain a judgment to the effect that the plaintiff *is* in possession.[85] Consequently, the prohibition of cumulation of these two actions by Article 3657[86] is not only logical but necessary as well. On the other hand, the filing of a boundary action does not entail any admission by the plaintiff that he is not in possession of the disputed property.[87] This could be the reason Article 3657 of the Code of Civil Procedure refers only to the petitory action and says nothing about other ownership actions, thus leaving room for arguing *a contrario* that cumulation or alternative pleading of such other real actions with the possessory action should be permitted.[88]

Another literal argument in support of this position can be derived from Article 462 of the Code of Civil Procedure which provides that, "[e]xcept as otherwise provided in Article 3657, inconsistent or mutually exclusive actions may be cumulated in the same judicial demand if pleaded in the alternative." Thus, *even if* the possessory and boundary actions were "inconsistent or mutually exclusive actions" their alternative pleading would be permitted "[e]xcept as otherwise provided in Article 3657" of the same Code. Since the latter article says nothing about boundary actions, it would seem that, literally speaking, such actions may be pleaded in the alternative with a possessory action. Moreover,

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83. La. Code Civ. P. art. 3651 (emphasis added). However, the filing of a petitory action does not entail any admission on the part of the plaintiff that the defendant *is* in possession. See La. Code Civ. P. art. 3653 (1) and (2), reproduced in pertinent part, see supra note 67. The only exception is provided in the third paragraph of Article 3657, see supra note 18, where the person filing the petitory action was already a defendant in a possessory action between the same parties.

84. See La. Code Civ. P. art. 462.

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

86. See supra note 18.

87. See La. Code Civ. P. arts. 3654, 3693. See also La. Code Civ. P. art. 3657 comment (c).

88. Decatur-St. Louis Combined Equity Properties Venture v. Abercombie, 421 So. 2d 253 (La. App. 4th Cir. 1982), reversed the trial court decision that maintained an exception of improper cumulation, under La. Code Civ. P. art. 3657, of a possessory action and an action for a declaratory judgment. The court of appeal's decision was based on the difference between a petitory action and an action for a declaratory judgment. The court pointed out that

> plaintiff's first action was not a petitory action under C.C.P. 3651 but a declaratory judgment action allowed under C.C.P. 3654. Plaintiff alleges it was in possession through its lessee and its first action was thus not by a claimant "who was not in possession," C.C.P. 3651, and was therefore not a petitory action. It was therefore error to maintain the exception.

Id. at 253-54.

again speaking literally, it would seem that in those cases in which they are *not* "inconsistent" with each other, the possessory and boundary actions "may be cumulated in the same judicial demand . . . [without being] pleaded in the alternative."[89] One of these cases could be a situation in which neither side is willing or able to prove ownership, both sides rely on possession only, and both ask the court for a "determination of the line of separation between contiguous lands . . . [and/or] the placement of markers on the ground."

Cumulating the Petitory and Boundary Actions

If the proposition that the possessory and boundary actions are not necessarily inconsistent with each other sounds far-fetched, the same should not be true about the relation between the boundary action and the petitory action. Indeed, rather than being inconsistent, the boundary action and the petitory action are mutually complementary. While the petitory action seeks a judicial determination of the plaintiff's ownership, the boundary action seeks a judicial localization of this ownership on the ground. Article 462 of the Code of Civil Procedure permits cumulation of actions that "are mutually consistent and employ the same form of procedure." Article 3693 of the same Code, which authorizes a "judgment fixing the boundary between contiguous lands in accordance with the ownership or possession of the parties,"[90] and which was enacted in 1960 in order "to overrule legislatively the cases holding that questions of title and ownership cannot be determined in an action of boundary,"[91] should have removed any doubts as to whether these two actions are "mutually consistent."[92] It seems that the only post-1960 case that took the opposite view was *Harvey v. Harvey*.[93] Fortunately, however, the supreme court did not sanction this proposition, although it did deny writs in the *Harvey* case. The supreme court's denial of writs was accompanied by the explanation that "[t]he *result* is correct. Denial herein is without prejudice to applicant to bring boundary action."[94] In a brief opinion concurring in the writ denial, Chief Justice Dixon said

89. La. Code Civ. P. art. 462.

90. La. Code Civ. P. art. 3693.

91. La. Code Civ. P. art. 3693 official comment.

92. See A. Yiannopoulos, supra note 1, § 225, at 600. "One who claims the ownership of a strip of land adjoining the land of a neighbor may bring the petitory action or the action of boundary or he may cumulate the two."

93. 345 So. 2d 113 (La. App. 1st Cir.), writ denied, 347 So. 2d 246 (1977). Other cases have either held or assumed that cumulation of boundary and petitory actions is permissible. See McCartney v. Stafford, 307 So. 2d 782 (La. App. 3d Cir. 1975); Johnson v. Horton, 262 So. 2d 158 (La. App. 2d Cir.), writ denied, 262 La. 459, 263 So. 2d 724 (1972); A. Yiannopoulos, supra note 1, § 225, at 600.

94. 347 So. 2d 246 (La. 1977) (emphasis added).

that "defendant, plaintiff in reconvention, was entitled to cumulate petitory action with boundary action, and, to the extent the court of appeal ruled otherwise, it was in error."[95]

THE RELATIONSHIP BETWEEN POSSESSION AND OWNERSHIP ADJUDICATIONS IN REAL ACTIONS OTHER THAN PETITORY

In stark contrast to Articles 3657 and 3653 of the Code of Civil Procedure which essentially provide that the possessory and petitory actions cannot co-exist in the same proceeding, the articles regulating the action for a declaratory judgment, concursus proceedings, and the boundary action contemplate a non-antagonistic, in fact complementary, relationship between possession and ownership adjudications. Article 3654 of the Code of Civil Procedure provides that

> [w]hen the issue of ownership of immovable property . . . is presented in an action for a declaratory judgment or in a concursus . . . proceeding . . . the court shall render judgment in favor of the party: (1) Who would be entitled to the possession of the immovable property . . . in a possessory action, unless the adverse party proves that he has acquired ownership.[96]

Similarly, Article 792 of the Civil Code provides that "[t]he court shall fix the boundary according to the ownership of the parties; if neither party proves ownership, the boundary shall be fixed according to limits established by possession." Through a series of questions, this section attempts to explore the interrelationship of possession and ownership adjudications in actions for a judgment declaratory of ownership, concursus proceedings, and boundary actions. In all of these questions, it

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95. Id.

96. The full text of La. Code Civ. P. art. 3654 is as follows:

> When the issue of ownership of immovable property or of a real right therein is presented in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding, or the issue of the ownership of funds deposited in the registry of the court and which belong to the owner of the immovable property or of the real right therein is so presented, the court shall render judgment in favor of the party:
>
> (1) Who would be entitled to the possession of the immovable property or real right therein in a possessory action, unless the adverse party proves that he has acquired ownership from a previous owner or by acquisitive prescription; or
>
> (2) Who proves better title to the immovable property or real right therein, when neither party would be entitled to the possession of the immovable property or real right therein in a possessory action.

is to be assumed that Ms. *A* is the possessing party[97] and Mr. *B* is her non-possessing adversary.

QUESTION 1. If Mr. *B asserts but is unable to prove* ownership of the disputed property, what should the court's judgment be? Article 3654 of the Code of Civil Procedure requires the court to "render judgment in favor of the party . . . [w]ho would be entitled to the possession of the immovable property,"[98] i.e., Ms. *A*, while Article 792 of the Civil Code requires the court to fix the boundary "according to limits established by [*A*'s] possession."[99] Thus, in all three actions under discussion, Ms. *A* wins simply because her opponent lost. Mr. *B* lost because he tried and failed to prove ownership, the only right ranked higher than *A*'s possession. However, should the court declare *A* the *owner* of the disputed property if she did not actually prove ownership?[100] This question may be of academic significance only, since, even if it does not recognize *A* as the owner of the property, the judgment for *A* has the same practical effect since the doctrine of res judicata would bar *B* from relitigating the issue of ownership.[101] However, an answer

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97. It is also assumed that Ms. *A*'s possession is of the quality and duration that would entitle her to a victory in a possessory action under La. Code Civ. P. art. 3658. According to Article 3654 of the same Code, in a concursus proceeding or an action for a declaratory judgment, the fact of *A*'s possession places the burden of proving ownership on *A*'s opponent, Mr. *B* and defines that burden as "proving ownership," rather than merely proving "better title," which is the standard when neither party is in possession. The discussion in the text does not encompass cases in which neither party is in possession.

98. La. Code Civ. P. art. 3654.

99. La. Civ. Code art. 792.

100. If this were a petitory action, the answer would clearly be a negative one. Since under the facts of this scenario, *A* is in possession, the petitory action must have been filed by *B*. Since *B* was unable to prove ownership, his action should be dismissed. This means that Ms. *A* will remain in possession, but not because she has been declared the owner, but rather because Mr. *B*, her non-possessing adversary, has not proven any right (such as ownership) that is of a higher rank than Ms. *A*'s possession. Under La. Code Civ. P. art. 3653, in order "[t]o obtain a judgment recognizing his ownership" a party must either "(1) Prove that he has acquired ownership from a previous owner or by acquisitive prescription . . .; or (2) Prove a better title" than his adversary. If Ms. *A* proves neither, the judgment should not declare her the owner. See Weaver v. Hailey, 416 So. 2d 311 (La. App. 3d Cir.), writ not considered, 420 So. 2d 159 (1982); Symeonides, 1982-1983, supra note 1, at 515-17.

101. See La. R.S. 13:4231 (Supp. 1990); Ward v. Pennington, 523 So. 2d 1286 (La. 1988). In Tassin v. Sayes, 386 So. 2d 995 (La. App. 3d Cir. 1980), plaintiff Tassin filed an action styled "Suit For Declaratory Judgment Establishing Title and Boundaries." The court found that plaintiff Tassin was in possession of only 7 of the 75 acres in dispute and that defendant Sayes was in possession of the remaining acres. The court found also that, although Tassin had proved better title than Sayes to the 7 acres, "plaintiff Tassin failed in his burden of proving title good against the world . . . as to any of the land in dispute possessed by defendant Sayes. . . . Accordingly, [the court] recognized plaintiff Tassin's ownership of 7 acres of the land in dispute and confirmed defendant Sayes'

to this question will help supply the answer to other related questions that are important not only from a theoretical but also from a practical perspective.

(a) Action for a judgment declaratory of ownership.

If the above action were one for a judgment declaratory of ownership filed by *A* against *B*[102] and neither party proves ownership, the action should be dismissed for failure to establish the plaintiff's entitlement to the requested declaration of ownership. This is despite the fact that Article 3654 of the Code of Civil Procedure requires the court to "render judgment in favor of the party . . . [w]ho would be entitled to the possession of the immovable property," i.e., Ms. *A*. The fact that *A* is in possession elevates *B*'s burden of proof to one of proving "ownership" rather than merely a "better title"[103] and explains why *B* should lose because he has not carried that burden. While *A*'s possession entitles her to a de facto victory vis a vis *B*, who was unable to prove a right of a higher rank, the requested relief was a declaration of ownership and *A* should not receive that declaration on the basis of her possession alone.[104]

(b) Concursus proceedings.

If the above question were to arise in a concursus proceeding instituted by a third party, then, according to Article 3654 of the Code of Civil Procedure, *B*'s assertion and failure to prove ownership would

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possession of the remainder [68 acres]." 386 So. 2d at 996-97. After that judgment became final, Tassin filed against Hayes a new action styled "Petition for Recognition As Owner of Immovable Property and For Partition In Kind" of the above described 68 acres. Tassin argued that since the prior judgment did not adjudicate ownership of the 68 acres but merely recognized the defendant's possession of them, that judgment did not preclude Tassin's new suit for recognition of his ownership. After a thoughtful discussion of Louisiana's law of res judicata, Judge Culpepper, writing for the court, responded as follows:

> We agree with Tassin that there was no adjudication on the issue of defendant Sayes' ownership. We do not agree, however, that the issue of Tassin's ownership was not adjudicated. We decided that plaintiff Tassin's ownership in the disputed property is limited to the 7 acres described in our decree. As to the land possessed by Sayes, Tassin seeks to relitigate the same title which he alleged, and the court rejected in the prior suit. He is clearly precluded by res judicata.

Id. at 999.

102. If the action were to be filed by *B*, then it would have to be styled as a petitory action, since under the facts of this scenario *A* is in possession and *B* is not. See La. Code Civ. P. art. 3651. For the consequences of *B*'s failure to prove ownership in such an action, see supra note 100.

103. See La. Code Civ. P. art. 3654.

104. Ironically, *despite* her failure to prove ownership, Ms. *A* can still invoke, vis a vis *B*, the presumption of La. Civ. Code art. 3423, which provides that "[a] possessor is considered provisionally as owner of the thing he possesses until the right of the true owner is established." *Because* of her failure to prove ownership, Ms. *A* is not entitled to a judicial declaration of ownership.

entitle *A*, at a minimum, to a judgment declaring her the owner of the "*funds* deposited in the registry of the court."[105] If these funds represent the natural or civil "fruits" of the property produced before the filing of the action and *A*'s possession of the property was in good faith, then *A* would be the rightful owner of these funds by virtue of her status as a good faith possessor, even if she were not the owner of the property.[106] On the other hand, if, as is usually the case, the funds represent proceeds from mineral exploration,[107] then they would belong to the owner of the property.[108] Should, or could, the court's judgment declare Ms. *A* the owner of these funds if she did not assert and prove ownership of the land? Luckily for her, Article 3654 of the Code of Civil procedure does *not require* her to prove ownership, if she is in possession and her adversary pleads and is unable to prove ownership. Because *B* would be barred by the rules of res judicata from returning with a petitory action, *A* will become vis a vis *B* the de facto owner of the funds and of the property.

(c) Boundary action.

Here the pertinent article provides that "if neither party proves ownership, the boundary shall be fixed according to limits established by possession."[109] The fact that in our hypothetical *A* is in possession of the disputed property and *B* asserted but was unable to prove ownership of that property again means another de facto victory for *A*. The court should fix the boundary in such a way as to leave the disputed property on *A*'s side of the boundary. Again, technically, if *A* did not prove ownership of the property on her side of the boundary, the resulting judgment should not proclaim her the owner, but should simply fix the boundary. However, since it would bar a subsequent boundary action by *B*, this judgment would have, vis a vis *B*, the practical effect of proclaiming *A* the owner of the property on her side of the line.

QUESTION 2. A more difficult and practically more important question is whether *B*'s assertion of ownership in the above scenario would amount to a judicial confession of *A*'s possession and thus would, *inter alia*, place on *B* the higher burden of proving ownership rather than merely "better title" than *A*. The answer to this question is clearly affirmative if *B*'s assertion of ownership takes the form of a petitory action filed in response to a possessory action filed by *A*.[110] As discussed in the previous section, the answer is less than clear if *B*'s assertion of

105. La. Code Civ. P. art. 3654.

106. See La. Civ. Code art. 486.

107. Or if they represent civil or natural fruits but *A* does not qualify as a good faith possessor for purposes of accession as defined by La. Civ. Code art. 487.

108. See La. Civ. Code art. 488.

109. La. Civ. Code art. 792. See also La. Code Civ. P. art. 3693, reproduced at supra note 76.

110. See La. Code Civ. P. arts. 3657, 3653.

ownership takes the form of a boundary action filed in response to a possessory action by *A*.[111] The answer is equally unclear for cases in which *B*'s assertion of ownership takes place in the context of the other actions under discussion here, that is, concursus proceedings, actions for a judgment declaratory of ownership, and boundary actions. However, on balance, it seems that *B*'s assertion of ownership should not be penalized by ascribing to it the drastic consequences of a judicial confession of *A*'s possession. After all, Article 3657 of the Code of Civil Procedure, the only article that penalizes an assertion of ownership in this way, does not, by its terms, purport to apply to these other real actions. Second, unlike Article 3657, the objective of which is the adjudication of possession rather than ownership, the articles providing for these other real actions[112] contemplate and aspire to the adjudication of ownership. It would be illogical to attribute to these articles an intent to discourage, much less penalize, a party from asserting his ownership. If any such assertion would amount to a judicial confession of the adversary's possession, then at least *A*, the possessing party, would be foolish to assert it.

QUESTION 3. Should *B* have the option not to assert ownership? As explained in question 1 above, if Mr. *B*, the non-possessing party, asserts but fails to prove ownership in any of the three real actions under discussion, then Ms. *A*, his possessing adversary, would prevail. If *A* proved her own ownership, the judgment would so declare. If she did not prove her ownership, the judgment should not declare her the owner. Nevertheless, because of the rules of res judicata, the judgment would have the same practical effect vis a vis *B* as if it did declare *A* the owner because it would bar *B* from re-litigating the issue of ownership. Now, if *B* does not assert ownership, *A* would again prevail. The question here is whether the resulting judgment for *A* would bar *B* from litigating the issue of ownership in a subsequent action. Another way of asking this question is whether the articles regulating the real actions under discussion permit adjudication of possession and ownership to take place in separate proceedings or instead require as opposed to merely encourage their cumulation in a single proceeding.

(a) Bergeron and the Old Law of Res Judicata.[113]

Chevron U.S.A. Inc. v. Bergeron,[114] involved a similar question. *Bergeron* began as a possessory action filed by Ruffin Bergeron against Alvin Paul. At the behest of the plaintiff, this action was consolidated

111. See supra text accompanying notes 66-81.

112. See La. Code Civ. P. arts. 3654, 3693; La. Civ. Code art. 792.

113. See generally Dixon, Booksh & Zimmering, Res Judicata in Louisiana Since Hope v. Madison, 51 Tul. L. Rev. 611 (1977).

114. 551 So. 2d 746 (La. App. 1st Cir.), writ denied, 553 So. 2d 465 (1989).

for trial with a concursus proceeding involving the same property and initiated by the Chevron Oil Company against Bergeron and Paul. Throughout the consolidated trial, Paul did not attempt to prove ownership, and in fact he studiously avoided the issue. Although he introduced a title to the property, he did so only in order to show the extent of his possession, and thus he remained entirely within the confines of Article 3661 of the Code of Civil Procedure. Paul's stated reason for not asserting ownership was that, had he done so, he "would have judicially confessed Bergeron's possession, and then would have to prove title 'good against the world.'"[115] Indeed, as explained earlier,[116] the quoted sentence echoes Article 3657 of the Code of Civil Procedure and describes accurately the effect of Paul's assertion of ownership on Bergeron's possession as well as on Paul's burden of proof *in a possessory action*. However, the fact that this proceeding had been converted into, or actually consolidated with, a concursus proceeding should give the court some pause. As seen earlier, Article 3654, the article regulating concursus proceedings, is based on a markedly different philosophy than Article 3657 on possessory actions. While Article 3657 prohibits or penalizes an assertion of ownership in the context of a possessory action, Article 3654 seems to require, or at least to encourage, such an assertion. It would therefore be inconsistent with the philosophy of Article 3654 to attach such negative consequences to the assertion of ownership by either party.

Be that as it may, the trial court found that Bergeron was in possession and rendered a judgment to that effect. However, rather than recognizing Bergeron as the owner of the funds that were the subject of the concursus proceeding, the trial court ordered Paul to file a petitory action within 60 days, presumably under the authority of Article 3662(2) of the Code of Civil Procedure. Bergeron appealed this part of the judgment, relying on Article 3654 of the same Code[117] and arguing that

> the trial court was obligated to render judgment recognizing him as owner once it found him to be in possession of the property and no one proved ownership in the concursus proceeding, . . . that whenever the issues of possession and ownership arise in a concursus proceeding, those issues must be adjudicated in a single proceeding, on which a single judgment must be entered. . . . [and] that what the trial court did was to imper-

115. 551 So. 2d at 748 (citing La. Code Civ. P. art. 3657); Pure Oil Company v. Skinner, 294 So. 2d 797 (La. 1974).

116. See supra notes 18, 66-71 and accompanying text.

117. This article provides in part that "[w]hen the issue of ownership of immovable property . . . is presented . . . in a concursus . . . proceeding . . . the court shall render judgment in favor of the party: (1) Who would be entitled to the possession of the immovable property . . . in a possessory action, unless the adverse party proves that he has acquired ownership." The full text of the article is reproduced at supra note 96.

missibly allow a separate action to be brought to adjudicate the ownership of the funds.[118]

Treating this as a concursus proceeding rather than as a possessory action, the court of appeal phrased the issue as "whether the rules regulating real actions . . . apply where real rights are adjudicated in a concursus proceeding."[119] The court answered its question in the affirmative, and concluded as follows:

> We reject Bergeron's argument that when real rights arise in a concursus proceeding, a single action must adjudicate both the issues of possession and ownership. We hold that where adverse claimants dispute possession and ultimately ownership of immovable property involved in a concursus proceeding, possession is a preliminary matter which must be resolved prior to adjudication of the issue of ownership. Thus, the Paul claimants were entitled to challenge Bergeron's possession by asserting they were in possession of the property, without being forced to prove ownership at the outset of the proceedings. We conclude, therefore, that the trial court was correct in allowing the Paul claimants, who were found to be out of possession in the possessory action, to assert their claims of ownership of the disputed property through a petitory action.[120]

The court's decision is probably a good one, but not because "the rules regulating real actions . . . apply where real rights are adjudicated in a concursus proceeding."[121] Rather it is because this proceeding began as a possessory action and was then converted to, or consolidated with, a concursus proceeding at the behest of the original plaintiff, Bergeron. With its inherent sense of equity, the court was perhaps trying to ensure that the position of Paul, the original defendant, should not become any worse by this conversion than it would have been had the action remained a possessory one. Since Paul could not be compelled to adjudicate ownership in an unconverted possessory action, perhaps he should not be forced to do so in an action converted into, or consolidated

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118. 551 So. 2d at 748. Implicit in this argument is the argument that the "single judgment" demanded by the appellant must bar a subsequent petitory action by the appellee. Otherwise, appellant's argument would give him only a temporary victory. For instance, if the defendant were permitted by Louisiana's res judicata rules to return with a petitory action, and if such action were successful, then the appellant would have to restore to the appellee the funds received in the concursus proceeding.

119. Id.

120. Id. at 749-50.

121. Id. at 748.

with, a concursus proceeding at the behest of the plaintiff.[122] On the other hand, had this been a pure concursus proceeding initiated by Chevron against Paul and Bergeron, there would seem to be little justification for allowing either Paul or Bergeron to burden the judicial system with a second trial to adjudicate ownership. If for some reason the non-possessing party needs more time to gather and prepare his evidence of ownership, then perhaps the court should grant a continuance.[123] Otherwise, to allow a second trial on essentially the same issue between the same parties is to allow one trial too many. This should be so even under Louisiana's extremely narrow law of res judicata. In the words of Justice Lemmon in *Ward v. Pennington*:[124]

> [E]ven the narrowly defined res judicata in the *Mitchell [v. Bertolla]* decision recognizes an exception in actions for ownership of immovable property. In such actions both plaintiff and defendant in the first suit must present all claims that they have to establish their title or be precluded from asserting theories that might have been asserted in the first action. . . . This exception to the narrow interpretation of res judicata is predicated upon the necessity of protecting and insuring stability and security of title, preventing undue hardship or fraud with respect to third party purchasers, and obviating unnecessary successive litigation.[125]

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122. A more difficult question would arise if this consolidation/conversion were to take place at the behest of the defendant Paul. Here again, the issue would be whether such a motion by Paul should be treated as an assertion of ownership that, according to La. Code Civ. P. art. 3657, would result in a judicial confession of Bergeron's possession. See supra text accompanying notes 66-81 for a discussion of the analogous issue of filing a boundary action in reconvention to a possessory action.

123. The court came close to this position when it said that "[b]y rendering a judgment recognizing one party's possession and ordering the loser to bring a petitory action, the trial court is not rendering a final judgment in the concursus proceeding, but is awaiting rendition of a final judgment until the issue of ownership is finally resolved." 551 So. 2d at 748-49 n.2.

124. 523 So. 2d 1286 (La. 1988).

125. Id. at 1292. See also Hope v. Madison, 194 La. 337, 343, 193 So. 666, 668 (1940) ("that parties litigant in a petitory action, whether plaintiff or defendant, must set up whatever title or defense they may have at their command or a judgment on that issue will bar a second action based on a right or claim which existed at the time of the first suit, even though omitted therefrom."); Gajan v. Patout & Burguieres, 135 La. 156, 177, 65 So. 17, 25 (1914) ("a party litigant, whether plaintiff or defendant, is bound to set up whatever title or defense may be at his command or within his knowledge, and is not at liberty to reserve what he pleases and make it the basis of a new litigation."); Tassin v. Sayes, 386 So. 2d 995, 1000 (La. App. 3d Cir. 1980) ("petitory actions, or other actions in which the ownership of immovables is at issue, are an exception to the general civil law rule of res judicata that only "causes" pleaded and decided in the prior case are precluded in a subsequent case. Our jurisprudence has recognized that in actions

(b) New Law of Res Judicata.

Several months after *Bergeron* was decided, the Louisiana Legislature enacted Act 521, effective January 1, 1991, which attempts to modernize Louisiana's law of res judicata and brings to Louisiana the concept of issue preclusion. As amended by this Act, Article 425 of the Code of Civil Procedure provides that "[a] party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation,"[126] while Louisiana Revised Statutes 13:4231 as amended by Act 521 provides that "a valid and final judgment is conclusive between the same parties . . . [as to] all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation."[127] It seems that whether the

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involving the ownership of immovables our rule of res judicata is similar to that in the common law states, i.e., res judicata precludes relitigation of not only causes which were pleaded and decided in the prior case, but also causes which the party could have pleaded.").

126. See also La. Code Civ. P. art. 1061, as amended by Act 521, which provides in part that "[t]he defendant in the principal action shall assert in a reconventional demand all causes of action that he may have against the plaintiff that arise out of the transaction or occurrence that is the subject matter of the principal action." The accompanying official comments explain that "[j]udicial efficiency is served by requiring the defendant through a compulsory reconventional demand to assert all causes of action he may have against the plaintiff that arise out of the transaction or occurrence that is the basis for the plaintiff's action. . . . Furthermore, if the defendant has a cause of action arising out of the subject matter of the plaintiff's action, then the defense of res judicata will prevent relitigation of issues common to both causes of action except as otherwise provided by law. The requirement of a compulsory reconventional demand therefore also serves the interest of fairness by giving the defendant notice that he must assert his related cause of action."

127. The full text of La. R.S. 13:4231 is as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment;
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action;
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

1990 La. Acts No. 521.

The accompanying official comments recognize that this provision "makes a substantial

action is one for a declaratory judgment or a boundary action initiated by either *A* or *B*, or a concursus proceeding initiated by a third party, Mr. *B* will no longer be allowed to adopt an entirely defensive posture and not plead his ownership. If he chooses not to plead his ownership, then, according to Louisiana Revised Statutes 13:4231, the resulting judgment for *A* would be "conclusive between the same parties" and would bar *B* from litigating ownership later. Although section 4231 is introduced by the phrase "[e]xcept as otherwise provided by law," the specific articles regulating the real actions under discussion here, namely Article 3654 of the Code of Civil Procedure and Article 792 of the Civil Code, do not provide otherwise. Thus, it would seem that under the new Act Mr. Paul, the non-possessing party in *Bergeron*, would not have the option of not asserting his ownership in the concursus proceeding. However, Section 4232 of Title 13 as amended by Act 521 allows the court to "reserve . . . the right of the plaintiff to bring another action."[128] Although the comment accompanying this section seems to indicate that the drafters did not contemplate the application of this exception to real actions,[129] it is conceivable that a court adjudicating any one of the three actions discussed here may for some serious reason reserve to *B* the right to litigate ownership in a later action as the *Bergeron* court did.

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change in the law. Under the present law a second action would be barred by the defense of res judicata only when the plaintiff seeks the same relief based on the same cause or grounds. This interpretation of res judicata is too narrow to fully implement the purpose of res judicata which is to foster judicial efficiency and also to protect the defendant from multiple lawsuits." According to the comments it "serves the purpose of judicial economy and fairness by requiring the plaintiff to seek all relief and to assert all rights which arise out of the same transaction or occurrence. This will prevent needless relitigation of the underlying facts and will free the defendant from vexatious litigation."

128. The full text of La. R.S. 13:4232 is as follows:

> A judgment does not bar another action by the plaintiff:
>
> (1) When exceptional circumstances justify relief from the res judicata effect of the judgment;
>
> (2) When the judgment dismissed the first action without prejudice; or,
>
> (3) When the judgment reserved the right of the plaintiff to bring another action.

1990 La. Acts No. 521.

129. The Official Comment states:

> This [provision] would be particularly useful in custody, support and divorce actions and in cases involving injunctions and installment contracts. It could also be useful in cases where the plaintiff may be unsure whether he will suffer future injuries from the event which he is presently litigating, e.g., risk of contracting cancer from exposure to asbestos.

1990 La. Acts No. 521.

CONCLUSIONS

With only the tools of statutory exegesis and the aid of some recent cases, this article has attempted to explore some of the darkest alleys of Louisiana's network of rules on real actions. The attempt has revealed the existence of numerous "potholes" that can dangerously entrap the unsuspecting practitioner and can baffle the overburdened judge. When one adds to these potholes those exposed during a previous exploration of real actions involving servitudes,[130] a good case can be made for the need for a comprehensive legislative overhaul of the entire statutory scheme regulating real actions. Mere judicial overlays simply will not do the job. Although the courts manage to avoid many of these potholes, it is hard to know to what extent this is due to the courts' intellectual prowess, sheer luck, or simply the fact that oftentimes courts avoid the shadowy alleys by simply ignoring the statutory scheme altogether. Indeed, the fact that truly outrageous court decisions on this subject are rather rare should not be credited to this statutory scheme, but rather to the courts' innate common sense. At the same time, the fact that, in order to reach sensible results, the courts often have to either bend or ignore the statutory scheme suggests a need for its complete legislative restructuring or *perestroika*. As said on a previous occasion

> [p]erhaps the time has come to think of bold ways of enhancing the efficiency and flexibility of the system by reducing its rigidity and technicality. In 1960, the redactors of the Code of Civil Procedure took the long overdue step of merging some real actions and simplifying the rest. Perhaps now is the time for the most drastic step of merging all real actions into one civil action, of abolishing, in other words, not only in theory but in practice as well, these "forms of actions" that still dominate our way of thinking. . . . It is time, for instance, to reconsider whether the rigid separation of the possessory and petitory actions by the Code of Civil Procedure has outlasted its usefulness . . . "keep[ing] the trial of the issues of possession and ownership as separate as possible" . . . is hardly conducive to a speedy and efficient resolution of real property disputes.[131]

130. Symeonides, 1984-1985, supra note 1, at 668-80.
131. Symeonides, 1984-1985, supra note 1, at 668-69.