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HILLMAN V. ANDRUS: THE GHOST OF CIVIL POSSESSION

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This case presents unresolved issues in Louisiana property law with respect to acquisitive prescription and possession of immovables. Particularly, *Hillman* requires consideration of the relationship, or lack thereof, between the doctrine of civil possession and the vice of discontinuity. Although undecided definitively by Louisiana courts, the issue has largely been a subject of academic discussion among French and Louisiana commentators. This case note seeks to identify the solution used by the Louisiana Third Circuit Court of Appeals in *Hillman* as well as two other possible solutions that have gained academic support.

I. BACKGROUND

This case involves a property dispute over the ownership of a .94 acre tract of land.[1] The parties were record owners of two contiguous tracts.[2] The plaintiff purchased the northern tract in 2007.[3] The act of sale specifically described the .94 acre tract as one of three tracts being conveyed.[4] The act of sale also identified the property as being located in Evangeline Parish and referenced a survey map annexed thereto.[5]

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1. Hillman v. Andrus, 2011-5 (La. App. 3d Cir. 5/4/11), 63 So. 3d 1164.
2. *Id.* at 1166.
3. *Id.* at 1165.
4. *Id.*
5. *Id.* at 1172.

The defendants purchased the southern tract in 1977.[6] The act of sale conveyed 2.07 acres of land located in St. Landry Parish.[7] The document included a list of calls and specifically provided that "said property being bounded now or formerly as follows: North by Bayou DeCannes."[8]

Sometime later, the plaintiff asserted that the defendants were encroaching on the .94 acre tract of land.[9] He filed the action to have the boundary between the two tracts designated as the line dividing Evangeline Parish and St. Landry Parish.[10] The defendants reconvened asserting ownership of the .94 acre tract by title or alternatively by thirty-year acquisitive prescription.[11] The parties agreed that Bayou DeCannes was rerouted to the north from its original location some time prior to the defendant's acquisition.[12] To prove possession, the defendants claimed that they had maintained the property for thirty years and that their children had periodically used the land for recreational purposes.[13] However, the record also indicated that in 1981 the defendants moved away from their property for six years.[14] During this time, other individuals lived in the defendants' home but never entered the disputed .94 acre tract.[15]

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6. In 1994, the defendant purchased an adjacent tract increasing his ownership to four acres. The act of sale similarly described the property as lying within St. Landry Parish and being bound on the north by Bayou DeCannes. A list of calls was likewise provided.

7. *Id*. at 1166.

8. *Id.*

9. *Id.*

10. *Id*. The line dividing the two parishes is also the former centerline of Bayou DeCannes.

11. *Id.* at 1167.

12. *Id.* at 1166-67. The disputed .94 acre tract was that piece of land bound on the south by the former channel of the bayou and on the north by the current channel.

13. *Id*. at 1170.

14. *Id.* at 1171.

15. *Id*. The Court did not explore the relationship between these individuals and the defendants. However, the language of the opinion appears to treat them as precarious possessors. The only mention of these individuals was that "no evidence existed regarding the extent these individuals may have 'possessed' the property during that period." In any event, they were likewise treated as if they

II. DECISION OF THE COURT

The trial court sustained the defendants' exception of prescription for two reasons.[16] First, the trial court determined that the defendants had acquired ownership of the .94 acre tract by thirty year acquisitive prescription.[17] Second, the trial court concluded that the defendants were entitled to a presumption of ownership by virtue of having possessed the tract in excess of one year free from vice.[18] For these reasons, the trial court declared the defendants to be owners of the .94 acre tract and dismissed the plaintiff's suit.[19]

The 3rd Circuit Court of Appeals reversed the trial court's determination of acquisitive prescription, concluding that the defendants' possession[20] had been tainted by discontinuity.[21] The Court's decision rested firmly on the fact that the defendants had left their home for six years.[22] Critically, the majority found that the defendants' "lack of evidence regarding this period of time" precluded a finding of continuous possession for thirty years.[23]

The Court then addressed the plaintiff's demand to fix the boundary and the defendants' alternative argument of ownership by title. The Court held that the plaintiff's title "very clearly includes the disputed property."[24] In support of that conclusion, the

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never stepped foot on the disputed tract. Thus, they remained within the defendants' record boundaries. For that reason, precarious possession analysis and eviction analysis are made irrelevant in the context of possessing the disputed tract. *See id*. at 1171.

16. *Id*. at 1167-68.
17. *Id.*
18. *Id*. at 1168.
19. *Id.* at 1169. The trial court's acquisitive prescription determination rendered it unnecessary to address defendant's alternative argument of ownership by title.
20. In fact, the Court questioned whether the defendants ever engaged in acts sufficient to support corporeal possession, but simply assumed it as fact for the sake of analysis and discussion. *Id*. at 1170.
21. *Id.* at 1170.
22. *Id.* at 1171.
23. *Id.*
24. *Id.* at 1172.

Court emphasized that the plaintiff's deed of acquisition referenced a survey naming the .94 tract as one of three tracts being sold and showing the southern border as the *old* centerline of Bayou DeCannes.[25] The Court also pointed to the deficiency of evidence presented by the defendants to prove that the disputed tract was included within his call list measurements or that his northern border fell within Evangeline Parish.[26] However, the Court declined to "fix"[27] the boundary.[28] Rather, the Court simply recognized that the plaintiff's title, which designated the southern boundary as the old centerline of Bayou DeCannes, was superior to the defendants' title.[29]

III. COMMENTARY

The troubling feature of this opinion is the Court's determination that possession was not continuous during the defendants' six-year absence without any discussion of civil possession. Louisiana Civil Code article 3476 provides that possession must be continuous. Possession is discontinuous when it is not exercised at regular intervals, and possession that is discontinuous has no legal effect.[30] However, Louisiana Civil Code article 3431 instructs that "once acquired, possession is retained by the intent to possess as owner [*animus domini*] *even if* the possessor ceases to possess corporeally."[31] Further, the intent to retain possession is presumed unless there is clear proof of a contrary intention.[32]

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25. *Id*.
26. *Id.* at 1172-73.
27. After 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. LA. C.C.P. Art. 3693.
28. *Id.* at 1173.
29. *Id.*
30. LA. CIV. CODE art. 3435 and 3436.
31. Emphasis added.
32. LA. CIV. CODE art. 3432.

As stated in the introductory remarks, legal commentators have identified at least three possible solutions to resolve the apparent tension between civil possession and the vice of discontinuity. The first solution is the traditional French view, which treats the doctrine of civil possession and the vice of discontinuity as two wholly distinct and separate concepts. This is the solution that the court in *Hillman* appeared to use. The second solution, supported by Professor A.N. Yiannopoulos, recognizes a relationship between civil possession and the vice of discontinuity whereby a possessors' *animus*, sufficient to support civil possession, is affected by subsequent acts of corporeal possession or a lack thereof. The third solution is the modern French view, which also recognizes a relationship between civil possession and the vice of discontinuity. Under this view, civil possession requires acts of corpus by a precarious possessor in the actual owner or possessor's absence.

A. The Traditional French View

Although the Third Circuit in *Hillman* did not expressly identify the position underlying their judgment, the reasoning seems to align with the traditional French view. Under that theory, as explained by Planiol:

> Possession exists just as soon as its two essential elements, the *corpus* and the *animus* are united. It, however, can be affected by certain vices that make it useless, principally for the bringing of possessory actions and for the acquisition of ownership by prescription. These two effects, which are the principal advantages of possession, are attached solely to a possession free of vices (or defects). A vice of possession is therefore a certain state of affairs which, without destroying possession, makes it juridically valueless.[33]

33. MARCEL PLANIOL. 1 PLANIOL CIVIL LAW TREATISE (PART 2) 346-47 (West 1939).

Thus, according to Planiol, the acquisition and maintenance of possession, whether it be by corporeal, civil, or constructive possession, is a matter wholly independent from the determination of whether such possession can result in ownership by acquisitive prescription. In that sense, it may very well be that a party satisfies the requirements of civil possession. However, for purposes of acquisitive prescription, that civil possession remains subject to the ordinary vices of possession—namely, discontinuity.

Broadly speaking, the traditional French view posits that no relationship exists between civil possession and the vice of discontinuity. Subsequent gaps between acts of *corpus* sufficient to trigger the vice of discontinuity will not then destroy a civil possession. Rather, those gaps simply preclude the possibility of having civil possession blossom into ownership by prescription. This appears to be the view adopted by the court in *Hillman*, and under those facts, the result would appear correct. However, one would be apt to question whether the Louisiana Civil Code supports the traditional French view. Under Louisiana Civil Code article 3476, the possessor must have corporeal possession,[34] *or civil possession preceded by corporeal possession*, to acquire a thing by prescription. Thus, the Civil Code seems to suggest that some relationship exists between civil possession and the vice of discontinuity for purposes of acquisitive prescription.

B. Professor Yiannopoulos' View

Professor Yiannopoulos' view promotes a logical relationship between the doctrine of civil possession and the vice of discontinuity.[35] Again, it is important to note that civil possession is the retention of possession solely by the intent to possess as owner.[36] That intent is presumed in the absence of a clear proof of

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34. Corporeal possession is the exercise of physical acts of use, detention, or enjoyment over a thing. LA. CIV. CODE. art. 3425.
35. A.N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 528 (1991).
36. LA. CIV. CODE art. 3431.

a contrary intention.[37] On the other hand, possession must be continuous for purposes of acquisitive prescription,[38] and discontinuous possession has no legal effect.[39] Referring to these principles, Professor Yiannopoulos observes that:

> There is an apparent conflict between the notion of civil possession and the requirement that possession be continuous. . . . Properly understood, the two sets of provisions are fully reconcilable. In the first place, continuity of possession is more significant in cases involving the issue of whether possession has been acquired rather than retained. Second, depending on the nature of the property, long intervals in the exercise of possession may constitute sufficient evidence to rebut the presumption of retention of possession.[40]

There are three main ideas to take away from Professor Yiannopoulos' commentary. First, he recognizes a relationship between civil possession and the vice of discontinuity. His view is phrased in terms of the affirmative requirement of continuity under Louisiana Civil Code article 3476. This notion reflects the reciprocal paradigm of possession attributes within the Louisiana Civil Code. Louisiana Civil Code article 3476 affirmatively requires that possession be continuous for purposes of acquisitive prescription. Conversely, Louisiana Civil Code article 3435 provides that discontinuous possession, possession not exercised at regular intervals, has no legal effect.

Following this idea, he recognizes that long intervals in the exercise of *corpus* may be used to prove that the possessor no longer has the requisite *animus* sufficient to support civil possession.[41] As a result, civil possession would cease altogether under Louisiana Civil Code article 3433, which provides that

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37. LA. CIV. CODE art. 3432.
38. LA. CIV. CODE art. 3476.
39. LA. CIV. CODE art. 3435.
40. Yiannopoulos, *supra* note 35, at 550.
41. It should be noted that this view does not purport to require *corpus* to sustain civil possession, but, rather, that corporeal acts are simply used as proof of the existence or lack thereof of *animus*.

possession is lost upon a corresponding loss of *animus*. This is precisely the relationship that the Louisiana Civil Code seems to suggest when evaluating civil possession sufficient to support acquisitive prescription.

Third, his observations can be understood as altering the continuity standard between the successive acts of *corpus* required to obtain corporeal possession and the successive acts of *corpus* required to retain possession through civil possession. Stated simply, the continuity standard is relaxed once the possessor has acquired corporeal possession and is subsequently attempting to lean on civil possession. Thus, under Yiannopoulos' view, the primary issue is how lengthy the gaps in between successive acts of *corpus* can be in order to support civil possession. The issue does not lend itself to any black letter rule of law largely due to the fact-sensitive nature of possession disputes.[42] Nevertheless, there is some guidance.

Article 3444 of the Louisiana Civil Code of 1870 provided that the presumption of intent to retain possession existed no longer than ten years without "actual possession."[43] However, this article was subsequently repealed by the legislature, and the Civil Code continues to lack any express limitation on the length of civil possession. The reason for removing former article 3444 is unclear, but one might speculate that it was intended to accommodate current Louisiana Civil Code article 3433. Tracking the language of article 3433,[44] Professor Yiannopoulos explains when civil possession is lost:

> With respect to corporeal things, civil possession is presumed to exist and to last until possession is abandoned or the possessor is evicted by another person. Like ownership, which cannot be lost by non-use, possession

42. Rathborne v. Hale, 667 So. 2d 1197, 1201.

43. Comment (c), LA. CIV. CODE art. 3432. Corporeal possession is likely the intended equivalent of "actual possession."

44. Possession is lost when the possessor manifests his intention to abandon it or when he is evicted by another by force or usurpation. LA. CIV. CODE art. 3433.

> continues for an indeterminate period of time as civil possession. However, civil possession may be affected by the vice of discontinuity (abandonment). Possession may be maintained by the intent to have the thing as one's own for as long as the thing remains materially at the disposal of the possessor (eviction).[45]

Thus, civil possession is extinguished as a consequence of either: (1) abandonment,[46] or the loss of *animus* as affected by the vice of discontinuity or (2) eviction. The concept of abandonment and Yiannopoulos' view that *animus* can be destroyed by long intervals in the exercise of possession are consistent with the idea of civil possession from the Civil Code. "Abandonment is predicated on a manifestation of the intent to abandon, which may be established in light of objective criteria." That objective criteria includes whether the possessor has exercised sufficient acts of possession on the land as determined by the very nature of the land in question.

"The nature of the land or the *use to which it is destined* governs the possession necessary to support prescription."[47] That is to say that the nature of the land or the use to which it is destined may provide insight into what a "regular interval" is under Louisiana Civil Code article 3436,[48] such that possession does not become discontinuous. Under Yiannopoulos' view, the regular intervals between successive acts of *corpus* necessary to "retain" possession may be longer than those intervals required in order to "acquire" possession.

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45. Yiannopoulos, *supra* note 43, at 528.
46. Comment (c), LA. CIV. CODE art. 3433.
47. McDaniel v. Roy O. Martin Lumber Co., Inc., 560 So. 2d 676, 680 (La. App. 3d Cir. 1990) (emphasis added). *See also* Chevron U.S.A. Inc. v. Landry, 558 So.2d 242, 244 (La. 1990).
48. "Possession is…discontinuous when it is not exercised at regular intervals…" LA. CIV. CODE. art. 3436.

C. Modern French View

In France, a school of thought emerged suggesting that, in addition to the intent to possess as owner, possession always requires *corpus*. The physical presence may be accomplished by the original possessor or through a precarious possessor.[49] In case of precarious possession, the original possessor retains possession through his intent to possess as owner in addition to the precarious possessor's actual physical presence. This does not mean that possession is exercised without *corpus*. *Corpus* is exercised by someone else. Modern French doctrine has made a very subtle distinction between possession *solo animo*, and discontinuous possession:

> One may legitimately believe that the one who possesses by his sole intent, *animo solo*, cannot exert possession in a continuous manner, that is to say in all occasions and at all moments where it should be continuous. One may also say that possession *solo animo* comes close to discontinuous possession. As a matter of fact, it seems that the rule of *solo animo* possession acknowledges that possession may be kept even in the absence of acts of possession. This may be true, but only in the absence of discontinuity, namely in those instances where the owner, once in possession, would not have normally accomplished acts of possession, due to the nature of the premises and their prevailing use.... [I]ntermittent acts do not exclude continuity, provided they do not result in a discrepancy that goes against the idea of possession, and if they are covered by anterior or subsequent acts of possession.[50]

Although the argument could be made under the language of Louisiana Civil Code article 3431, it is unlikely that the modern French view could find support in light of the judicial interpretation given to article 3431. It is worth noting, once again,

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49. By "precarious possession" I mean the exercise of possession over a thing with the permission of or on behalf of the owner or possessor (LA. CIV. CODE art. 3437).

50. Jamel Djoudi, *Possession*, at no. 49, published in 9 RÉPERTOIRE DE DROIT CIVIL (Dalloz 2012) (citations omitted).

that Louisiana Civil Code article 3431 *expressly* provides that "Once acquired, possession is retained by the intent to possess as owner even if the possessor ceases to possess corporeally." Also, the Louisiana Civil Code *expressly* allows that acquisitive prescription run in favor of a civil possessor who previously held corporeal possession.[51]

Louisiana Civil Code article 3429 provides that "possession may be exercised by the possessor or by another who holds the thing for him and in his name. Thus a lessor possesses through his lessee." However, nowhere in the code or the cases interpreting Louisiana Civil Code article 3431 is it required that precarious possession support civil possession (*solo animo*). In fact, quite the contrary is indicated throughout. Comment (c) Louisiana Civil Code article 3431 is instructive and provides that:

> Civil possession is the retention of the possession of a thing *merely by virtue of the intent to own it*, as when a person, without intending to abandon possession ceases to reside in a house or on the land which he previously occupied or when a person ceases to exercise physical control over a movable without intending to abandon possession.[52]

Further, acts sufficient to support civil possession are those such as payment of taxes or the execution of juridical acts affecting the thing, such as a lease. Moreover, vestiges of works, such as the ruins of a house, may signify civil possession. These activities require no actual presence on the land by anyone and appear to indicate that the modern French view is quite different to the requirements under the Louisiana Civil Code.

IV. CONCLUSION

As a practical matter, in *Hillman*, the court's apparent use of the traditional French view had a compelling and arguably prejudicial effect on the litigation. Generally, the party pleading

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51. LA. CIV. CODE art. 3476.
52. Emphasis added.

acquisitive prescription bears the burden of proving all essential facts.[53] Indeed, in *Hillman* the court based its judgment on a lack of evidence presented by the *defendants* proving corporeal possession during their six-year absence. Had the civil possession articles been employed, the defendants would have only needed to prove that they had *acquired* possession of the disputed tract. As a result, the plaintiff would have the burden of proving a contrary intention by clear proof—a much more burdensome standard than a preponderance. Unfortunately for the defendants in *Hillman*, they were left carrying the burden of proof at trial, affording the plaintiff a substantial litigious advantage.

53. *See* Hooper v. Hooper, 941 So. 2d 726.