Fixing Limits, and Surveying Land

Carl E. Heck
ples, a Louisiana rescuer could double his chances of recovery by basing his claim on both tort and quasi contract. Equity obliges the beneficiary to indemnify his benefactor. Although the majority of both common law and Louisiana cases have based recovery under the rescue doctrine on tort principles, the doctrine of quasi contract (restitution) could be applied in common law jurisdictions and negotiorum gestio (the civilian quasi contractual doctrine) in Louisiana. The rescuer need not prove negligence of the defendant under quasi contract or negotiorum gestio as is presently necessary under the tort principles. The courts have based the rescue doctrine on tort whether the rescuer has sought recovery against the person rescued, or the negligent third person who created the danger, or both of them. The doctrine of quasi contract could be applied in the same cases with the added advantage that the rescuer need only prove unjust enrichment of the rescued person and/or third party.68

Edward A. Kaplan

FIXING LIMITS, AND SURVEYING LAND

The objective of this Comment is to relate the engineer's role in surveying lands and fixing boundaries to the lawyer's role in determining the legal rights of the parties resulting from means of affording relief in all countries of the civil law in situations where special rules of Equity and especially those relating to constructive trusts would be invoked in Anglo-American law.

"There is a negotiorum gestio according to French law, if the following conditions exist: (1) the intervention must not have proceeded from a purely egotistical thought; (2) the intervention must not conflict with the legitimate opposition of the principal; (3) the intervention must have been useful to the principal. The courts no longer inquire into the intention of the gestor, but into his act, which they appreciate in a spirit of liberality. If the act is profitable to another, they presume that the gestor did not intend to serve his own ends exclusively." (Emphasis added.) Id. at 207.

68. The basic reasons possibly why the courts have failed to utilize a quasi contract remedy, despite its conceptual availability, have to do with the reasons why in Louisiana the courts have generally characterized suits for personal injuries as tort actions prescriptible within one year (See LA. Civil Code art. 3536 (1870), rather than contractual actions prescriptible in ten years as personal actions (see Id. art. 3544), even in cases where the personal injuries could have been described as resulting from breach of a contractual obligation. These have been dictated by policy reasons underlying the shorter prescriptive period for tort actions (medical examinations concurrent with injuries and others) than for contract actions. The ultimate answer may be to have by statute a general prescriptive period applicable in any event insofar as the claim seeks recovery for personal injury damages while permitting conceptual characterization of actions as either tort, contract, or quasi contract. This reasoning was suggested to the writer by Judge Albert Tate, Jr., Presiding Judge, Louisiana Court of Appeal, Third Circuit, on leave of absence to serve as Professor of Law, Louisiana State University, 1967-68.
such boundary-fixing. To provide their clients with adequate service and protection, it is important that the lawyer and engineer understand and coordinate their functions. Because of the important role that land titles play in the boundary action, a brief review of the origin of private titles and their relation to surveying principles is in order.2

THE ORIGIN OF PRIVATE TITLES AND SURVEYING PRINCIPLES

The Louisiana Purchase vested title to all lands in the Louisiana Territory in the United States which, pursuant to principles of international law, in turn recognized private claims under confirmed grants from prior sovereigns. Title to the land which the prior sovereigns had not transferred by private grants vested in the United States’ public domain.5

According to Louisiana Supreme Court decisions, the admission of Louisiana into the Union as a state in 1812 vested ownership of the beds of all navigable waterways and tidal overflow lands in the State of Louisiana by virtue of its inherent sovereignty.6 Title to all other publicly owned land remained in the United States subject to disposition by Congress.7

By various acts Congress transferred title to most of the land

1. LA. CIVIL CODE art. 845 (1870): “The limits must be fixed according to the respective titles of the parties; in absence of title, on both sides, possession governs.”
in Louisiana to the State of Louisiana or to private citizens. In 1807 a federal statute established a commission to investigate claims to land through grants of prior sovereigns. In 1841 Congress donated 500,000 acres of land to Louisiana to assist the state in making internal improvements. Section sixteen of each township was reserved by Congress at an early date for educational use by the states to be formed out of the Louisiana Purchase. To aid the states in the construction of levees and dams, Congress granted them the swamp and overflowed lands which had not been sold prior to September 28, 1950. Land was also granted to the state or to railroad companies for construction of railroads in Louisiana. Congress also transferred a great quantity of land to private individuals through homestead entries and sales of timber and stone land. Additionally, Congress donated land to members of the armed forces, their widows, or heirs as bounty for services in the War of 1812, the Mexican War, and certain Indian Wars. It should be noted that issuance of a patent accompanied by a federal survey is required for the transfer of title from the United States to a private claimant, and with rare exception the issuance of a patent is necessary for transfer of land from the United States to the State of Louisiana.

Once the states acquired title to lands they sometimes transferred title to private individuals through homestead entries.

8. 43 U.S.C. §§ 1-25, 72-107, 161-302 (1946). The United States Land Department which included a General Land Office and District Land Offices was established and methods of disposal of public lands were prescribed and regulated.
9. For a discussion of foreign grants and the Commission established for confirmation, see McMicken v. United States, 97 U.S. 204 (1877).
10. 4 Stat. 453 (1841).
16. Patent information concerning approved township plats may be found at the State Land Office. Complete information regarding Spanish and French grants and acquisitions from the United States can be obtained from either the Bureau of Public Land Management or the State Land Office. Some patents will be found of record in the conveyance records.
18. On March 3, 1857, Congress passed full title to certain swamp lands without issuance of patents.
or sales. Another method was through transfers to levee boards with subsequent sales to private individuals.

It should be noted that the fountainhead of all private titles is their severance from the federal government's public domain. Without this severance possession for time immemorial will not serve as a basis for acquisitive prescription against either the federal or state government. By virtue of the supremacy clause of the Federal Constitution the rules promulgated by the Bureau of Public Land Management pursuant to congressionally delegated powers prime Louisiana legislation in determining conflicts with regard to initial severance of public lands by grants, patents, or other transactions.

A United States patent conveys title to a tract defined in terms of monuments established by federal surveyors and described in the official plat. The term "plat" as employed technically refers to the drawing which represents the lines surveyed, established, retraced, or resurveyed. It shows the direction and length of each of such lines, the relation to the adjoining official surveys, and the boundaries, description, and area of each parcel of land. Ordinarily an original survey of public lands does not ascertain boundaries; it creates them. Public lands are not to be deemed surveyed or identified until the survey is approved and the plat filed in the district land office by direction of the Bureau of Land Management. Also, no subdivisions are to be "disposed of" until so identified.

The legal significance of the plats and field notes is discussed in *Alaska United Gold Mining Co. v. Cincinnati Alaska Mining*

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22. U.S. Const. art. VI, § 2; Richard v. Poitevent & Favre Lumber Co., 10 La. App. 608, 120 So. 235 (La. App. 1st Cir. 1929). Patents from state must yield to grants from United States as shown by United States survey so far as limits of the tract are concerned.

23. Rev. Stat. § 453, 43 U.S.C. § 2 (1946): "The Director of the Bureau of Land Management shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands; and, also such as relate to private claims of lands and the issuing of patents for all grants of land under the authority of the Government."


27. United States v. Hurlburt, 72 F.2d 427, 428 (10th Cir. 1934).
There the court observed that both federal and state courts refer to plats and field notes referred to in patents to determine the limits of the area that passed under such patents. In *Cragin v. Powell* the United States Supreme Court said:

"It is a well settled principle that when lands are granted according to an official survey of such lands the plat itself with all its notes, lines, descriptions and landmarks becomes as much a part of the grant or deed by which they were conveyed and control so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or grant itself."

Because of the interrelationship between the disposition and surveying and identification of federal public lands the United States Department of the Interior, Bureau of Land Management, periodically publishes a manual of instructions for the surveying of the public lands of the United States, as well as rules pertaining to location of boundaries. The rules for United States surveys provide that the public lands are to be divided by lines running north and south according to the meridians and by crossing them at right angles to form townships of six square miles. These townships are further divided into thirty-six sections, each containing as nearly as possible six hundred and forty acres. When this is impossible, irregular townships and sections are created.

The boundaries and contents of the several sections, half sections, and quarter sections are ascertained in conformity with the principles recognized by the Bureau of Public Lands.

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29. 128 U.S. 691, 696 (1888).
32. Id.:
"First. All the corners marked in the surveys returned by Director shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate, and the corners of half and quarter sections not marked on the surveys shall be placed as nearly as possible equidistant from two corners which stand on the same line.
"Second. The boundary lines actually run and marked in the surveys returned by the Director shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines as returned shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of
The Bureau of Land Management recognizes the following rules pertaining to location of boundaries:

"First. That the boundaries and subdivisions of the public lands as surveyed under approved instructions by the duly appointed engineers, the physical evidence of which survey consists of monuments established upon the ground, and the record evidence of which consists of field notes and plats duly approved by the authorities constituted by law, are unchangeable after the passing of the title by the United States.

"Second. That the physical evidence of the original township, section, quarter section, and other monuments must stand as the true corners of the subdivisions which they were intended to represent, and will be given controlling preference over the recorded directions and lengths of lines.

"Third. That quarter-quarter-section corners not established in the process of the original survey shall be placed on the line connecting the section and quarter section corners, and midway between them, except on the last half mile of section lines closing on the north and west boundaries of the township, or on other lines between fractional or irregular sections.

"Fourth. That the center lines of regular sections are to be straight, running from the quarter-section corner on one boundary of the section to the corresponding corner on the opposite section line.

"Fifth. That in a fractional section where no opposite corresponding quarter-section corner has been or can be established, the center line of such section must be run from the proper quarter-section corner as nearly in a cardinal direction to the meander line, reservation, or other boundary
of such fractional section, as due parallelism with section lines will permit.

"Sixth. That lost or obliterated corners of the approved surveys must be restored to their original locations whenever it is possible to do so. Actions or decisions by surveyors, Federal, State or local, which may involve the possibility of changes in the established boundaries of patented lands, are subject to review by the State courts upon suit advancing that issue."33

In addition to the rules of federal surveys and the rules of the Bureau of Land Management, guides for determining boundaries or location of lines can be found in the jurisprudence, which ranks the evidence presented in order of their importance as: (a) natural monuments, (b) artificial monuments, (c) distances, (d) courses, and (e) quantity.34 In Barrataria Land Co. v. Louisiana Meadows35 the court, in a boundary action between litigants claiming under government titles and surveys, held that parties are entitled to have the lines re-established as originally located by the government surveyor, but where there are no lines or established corners to be found, and certain natural objects referred to in the field notes of the surveyor are admittedly misplaced, the court must decide whether the original boundary is to be re-established with reference to the erroneous location of such objects or with reference to the field notes not shown to be otherwise erroneous.

Other jurisprudential guidelines involving ranking of evidence were stated in Louisiana Central Lumber Co. v. Stephenson:36 (1) lines marked on the ground control in case of discrepancy between them and those called for in maps, plats, or field notes; (2) a plat drawn from field notes gives way to the latter in case of discrepancy as to best evidence of the actual original survey; and (3) government plats made from erroneous surveys or from no surveys may be shown to be erroneous in the location of water courses. In the landmark case of Cragin v. Powell37 the United States Supreme Court recognized error in

35. 146 La. 999, 84 So. 334 (1920).
36. 13 La. App. 671, 128 So. 696 (2d Cir. 1930).
37. Cragin v. Powell, 128 U.S. 691 (1888). The power to make and correct surveys of public lands belongs to the political department of the government and subject to the supervision of the General Land Office, yet the
the original government survey but held the re-survey as always subject to rights of a purchaser under the original survey. In Union Production v. Placid Oil38 two oil companies had separate leases covering the same acreage because the official surveys of two adjoining townships overlapped. The Louisiana appellate court held that the party who acquired rights in the township first surveyed primed the party who acquired rights under the later survey of the adjoining township because the second surveyor had no contractual authority to enter the township first surveyed.

Conflicts arising after initial severance from the public domain of the federal government are resolved by Louisiana legislation and jurisprudence. The remainder of this Comment is focused on the settlement of these conflicts.

**FIXING LIMITS**

*Fixing with a Survey*

The Louisiana Civil Code provides that land may be separated judicially or extra-judicially by mutual consent if the parties are of full age; but if one of the parties is a minor, or interdict, it must be done judicially.39 The Code also provides that in either case the separation must be made by a sworn surveyor of this state, who is bound to make a procès verbal of his work in the presence of two witnesses.40 It is the theory and policy of the law that the survey by a sworn surveyor is an official act and the procès verbal is written evidence of the proper location of land in accordance with the title papers of the parties, and thus is sufficient to transfer the ownership of property or serve as the basis for ten-year acquisitive prescription.41

The courts have been hypertechnical in the past in requiring compliance with the letter of the law when boundaries are

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38. 178 So.2d 392 (La. App. 1st Cir. 1965).
39. La. Civil Code art. 832 (1870); 2 Toullier, Droit civil n° 172, at 48 (1833).
40. La. Civil Code art. 833 (1870): "Whether the limits be fixed judicially or extra judicially, it must be done by a sworn surveyor of this State, who shall be bound to make a proces verbal of his work in the presence of two witnesses, called for the purpose, who shall sign the proces verbal with him, or mention shall be made therein of the causes which prevented them from signing."
physically fixed by a surveyor. In *Talbot v. Pittman* the trial court's judgment was set aside because of the surveyor's failure to give the notice required under article 834. In *Randazzo v. Lucas* the court-appointed surveyor's work was defective because only one witness was present at the survey; therefore, the court ordered a resurvey. In *Pan American Prod. v. Robichaux* the co-owners of a tract of land hired a surveyor to partition land. During the survey each party was present but the surveyor made a mistake of some 470 feet. Ten years later the defendant, in an action to correct the erroneous survey, pleaded ten-year prescription under article 853. The court denied the plea of prescription because the surveyor made no procès verbal as required by article 833. The defendant then contended that even if there was no formal survey, the plaintiff was bound by his good faith consent to the fixing by their surveyor. The court rejected the defendant's plea, basing its decision on mutual error as to the principal cause of the contract, and allowed relocation of the boundary. Hence, if the formalities of the Code dealing with fixing of limits are not strictly followed, the fixing will be ineffective and either party may later demand a redetermination. Also, if the formalities have been followed and the surveyor makes an error, the error can always be corrected, unless one of the parties has ultimately acquired the disputed area by acquisitive prescription.

**Fixing with No Survey**

The Civil Code does not include as a method of fixing boundaries mutual consent of the parties without the use of a formal survey. However, the parties may achieve the same result by actual sale of immovable property unaccompanied by a survey. In this case the stability of land ownership is protected by the formal requirements of such a sale. Article 2440 requires that all sales of immovable property be made by authentic act or under private signature. The minimum requirements of a sale of immovable property are outlined in article 2275; namely, if a verbal sale is made it is good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, if delivery has been made of the immovable property thus sold.

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42. 114 So.2d 117 (La. App. 1st Cir. 1959).
43. 92 So.2d 398 (Orl. App. 1957); La. Civil Code art. 833 (1870).
44. 200 La. 666, 8 So.2d 635 (1942).
The Louisiana Supreme Court, in *Opdenwyer v. Brown*, cited a line of cases for the proposition that the parties may mutually fix their bounds without a formal survey and without the protection accompanying a sale of immovable property. A careful reading of the cited cases shows that an actual physical separation on the ground was not involved. Rather the issue was what property was transferred in the acts of sale. In *Gaude v. Williams*, the court held that owners are not bound by a mere consent regarding boundaries fixed by themselves in error without consulting experts. A mutual fence for fifteen years was held insufficient to bar a readetermination in this case. It should be noted that although the parties by convention may transfer immovable property, which transfer has the effect of creating new boundaries, this type of fixing is a paper transaction and not a physical separation and marking of the limits in the field. In *Harper v. Learned*, the Supreme Court held that it was not against public policy for the parties to fix their boundaries without a survey, if it was in writing. In the *Harper* case there was only a verbal agreement, but the court relied upon equitable estoppel to prevent the plaintiff from bringing the boundary action because the verbal agreement was mentioned in numerous recorded instruments by both parties subsequent to the agreement. A recent line of cases holds that a party may be deemed to have physically fixed the boundary where he and his neighbor informally agree to a visible boundary verbally or actively acquiesce in its location.
It would seem that if the parties fix their boundaries without a survey for this fixing to amount to a transfer of immovable property, the minimum formal requirements of a sale of immovable property should be met. When the parties fixing their bounds without a survey commit an error of fact, the ten-year acquisitive prescription of article 853 should not bar a redetermination of boundaries, unless one of the parties can produce a title or procès verbal in lieu of title (when a formal survey is made) upon which to base his ten-year acquisitive prescription. In Gray v. Couillon the parties attempted physically to fix their boundaries extra-judicially but the survey was ineffective because the formalities of article 833 were not followed; therefore, the court found that the ten-year acquisitive prescription of article 853 was not applicable.

It is suggested that a fixing of boundaries without a formal survey accompanied by an actual transfer of land should under no circumstances be valid against third party good faith purchasers unless such agreement is recorded in the conveyance records of the parish in which the land is located.

Fixing Boundaries When the State of Louisiana Is a Party

The Louisiana legislature, subsequent to the adoption of the Revised Civil Code of 1870, outlined a special procedure to be followed in fixing boundaries between lands belonging to the State of Louisiana and contiguous lands belonging to another person.
DETERMINATION OF THE RIGHTS OF THE PARTIES

Under the 1960 Code of Civil Procedure the possessory, peticitory, and boundary actions are available to determine questions concerning the right to possession or ownership of land. These actions are not new and deal with related subject matter. Despite the relationship, the jurisprudence at an early date concluded that questions of validity of titles could not be determined in a boundary action, but rather must be brought in a separate peticitory action. The new Code of Civil Procedure legislatively overruled this line of cases and permits the court to determine questions of title and ownership in an action of boundary.\(^5\)\(^4\) The more basic question of whether the substantive rules of the boundary action should be used to determine questions of title and ownership in the peticitory action in general remains in spite of adoption of the new Code of Civil Procedure. In \textit{Sattler v. Pellichino},\(^5\)\(^5\) the First Circuit, even before the new Code of Civil Procedure, relied upon a law review article\(^5\)\(^6\) to support its opinion allowing article 852, dealing with the boundary action, to be pleaded as a defense in a peticitory action. It is submitted that this conclusion is correct and the substantive rules of the boundary action could be of great value in determining questions of validity of titles or ownership of immovables in a peticitory action.

\textbf{Elements of the Boundary Action}

The purpose of the boundary action is to separate physically one parcel of land from another and to mark limits by visible bounds.\(^5\)\(^7\) The boundary action, like that of partition, is by its nature imprescriptible;\(^5\)\(^8\) however, the action may be without object in cases in which a party acquires the land in dispute by the effect of acquisitive prescription. The action is therefore fruitful where the boundaries have never been fixed or where the tracts have once been separated but the physical bounds are no longer visible,\(^5\)\(^9\) or where the bounds have been fixed incorrectly.\(^6\)\(^0\) The parties to the boundary action include the owner

\(^{54}\) LA. CODE Civ. P. art. 3693 (1960).
\(^{55}\) Sattler v. Pellichino, 71 So.2d 689 (La. App. 1st Cir. 1954).
\(^{57}\) LA. CIVIL CODE art. 826 (1870); Sessum v. Hemperley, 233 La. 444, 96 So.2d 822 (1957); Talbot v. Pittman, 114 So.2d 117 (La. App. 1st Cir. 1959).
\(^{58}\) LA. CIVIL CODE art. 825 (1870).
\(^{59}\) Id. art. 823; Opdenwyer v. Brown, 155 La. 617, 99 So. 482 (1924).
\(^{60}\) LA. CIVIL CODE art. 853 (1870); Opdenwyer v. Brown, 155 La. 617, 99 So. 482 (1924).
of the land involved, one who possesses as owner, or one vested with a real right in an immovable. The forum of the boundary action is the court which has jurisdiction over the land involved.

Determination According to Titles, Where Both Parties Have Titles

The basic rule of the Civil Code on fixing limits in the boundary action is that reference must be made to the ancient titles of the parties, and the limits must be fixed in accordance with the titles unless it be proved that the bounds have been since changed or that the land has been increased or diminished by changes caused by succession, by the will of the owner, or other events. The purpose of referring to the titles in order to fix limits is obviously to determine who owns what quantity of land by the use of the best evidence available—the titles of the parties.

Prior to the passage of the new Code of Civil Procedure, the jurisprudence was to the effect that “titles of the parties” merely referred to the titles under which the parties held their claim to ownership. The question of validity of title was never at issue because the courts held that the issue must be tried in a petitory action. The new Code of Civil Procedure, however, expressly provides that the issue of validity of titles may be determined in a boundary action, therefore, the rule providing for the fixing of limits according to the titles of the parties takes on new significance. Now, when both parties have titles, and only one is held valid against the world, this title must surely prime the title not good against the world. This leaves the rules pertaining to the fixing of boundaries where both parties present titles applicable to the situation where both parties have titles good against the world, or where neither is good against the world. The following are guides to the interpretation of the titles presented:

(A) A Common Author in Title Exists

When the owner of two estates alienates one of them and describes the estate transferred by metes and bounds, and the

62. LA. CIVIL CODE art. 840 (1870).
63. Id. arts. 843, 845.
64. "Metes and bounds" means boundary lines of land with their terminal points and angles.
When the parties claim under primitive concessions (land grants of the federal, state or foreign governments) or prove their dates and contents in case their concessions should be lost, if there be less land than is called for in the different titles, he who has the oldest concession takes the quantity of land mentioned, the other parties having a right only to the remainder.\textsuperscript{66}

If the parties or those from whom they have acquired present titles having a common author, the preference is given to him whose title is of the most ancient date.\textsuperscript{67}

(B) \textit{No Common Author in Title}

If the parties or those from whom they acquired hold titles from different proprietors, the priority of date is immaterial\textsuperscript{68} and one of the following three rules must be followed:

1. If the titles exhibited by one of the parties fix the extent of land which he ought to have and those exhibited by the other make no mention of the extent, the first takes the quantity mentioned in his title and the second takes only the excess; unless the latter establishes by legal proof or by past possession that quantity of land to which he is entitled.\textsuperscript{69}

2. If the titles exhibited fail to mention the quantity of land which each person ought to have, and the quantity can not be established in a legal manner, the limits must be fixed so as to divide the land equally between them.\textsuperscript{70}

3. If the titles exhibited call for a greater or lesser extent of land than the land which is to be bounded contains,

\textsuperscript{65} \textit{La. Civil Code} art. 844 (1870); \textit{Lemoin v. Moncla}, 9 \textit{La. Ann.} 515 (1854): "In action of bornage, a dividing line long established between the parties, and referred to in the proces verbal of sale of the plantation to the plaintiff, will be taken as the true one, in preference to running a new line more in accordance with the calls and distances, and which gives plaintiff a larger boundary." \textit{Nattin v. Glassell}, 156 \textit{La.} 423, 426, 100 \textit{So.} 609, 609-10 (1924): "The polar star in all controversies of this kind [arising out of descriptions in deeds] should be, if it can be seen, the intention of the parties."

\textsuperscript{66} \textit{La. Civil Code} art. 846 (1870). The courts are bound to consider treaties in determining the validity of a French or Spanish land grant as against a grant of same lands by the United States. See \textit{Garcia v. Lee}, 37 U.S. (12 Pet.) 511 (1838).

\textsuperscript{67} \textit{La. Civil Code} art. 847 (1870).

\textsuperscript{68} \textit{Id.} art. 848.

\textsuperscript{69} \textit{Id.} art. 849.

\textsuperscript{70} \textit{Id.} art. 850.
the limits must be fixed so as to provide proportionally among the interested parties the resulting profit or loss.\textsuperscript{71}

It is understood that the rules prescribed in the preceding articles only take effect in the absence of possession by one or more of the parties, sufficient to establish prescription.

Article 848 and the preceding rules\textsuperscript{72} pertaining to the situation where parties hold titles from different authors may have been of considerable use in France and countries where the chain of titles might go back many hundreds of years and in countries where public records were not adequately kept. However, in Louisiana, where titles and confirmations of grants date back only as far as the Louisiana Purchase, the article’s usefulness is limited to those cases where adjoining land possessors each have a title which is not good against the world. In this case the parties having their limits fixed are not interested in a determination of ownership, but only wish to have the limits described in their titles marked.

A question of more immediate importance is whether the guides provided for settling disputes where there is no common author in title should also be used where there is a common author in title. In \textit{Waguespack v. Lower Lafourche Planting \& Mfg. Co.}\textsuperscript{73} the State of Louisiana was the common author in title, yet the court applied the proportioning provision of article 851, a provision applicable to situations where there is no common author in title. It is submitted that the results are correct because the source of the provision regulating the situation where there is no author in title was the writings of the French jurist, Toullier,\textsuperscript{74} who did not discuss the dichotomy between the situation where there is a common author in title and where there is none, but simply applied the provisions to each case indiscriminately.

\textbf{Where Only One or No Parties Have Title}

Where only one or none of the parties to a boundary action present titles, the French writers favored resolving the dispute

\textsuperscript{71} \textit{Id.} art. 851.
\textsuperscript{72} Article 848 contemplates the use of articles 849, 850, and 851 in situations where the parties each have a title, but from different authors in title.
\textsuperscript{73} \textit{Waguespack v. Lower Lafourche Planting \& Mfg. Co.}, 160 La. 1046, 107 So. 901 (1926).
\textsuperscript{74} 2 Toullier, \textit{Droit civil} no 175 (1833).
according to the rules of possession. The redactors of the Louisiana Civil Code, however, never accepted this principle and provided that possession is determinative only where neither party has a title. Thus, where only one party has a title, his title will be determinative.

Determination According to Prescription

(1) Article 852 (Acquisitive)

The Civil Code provides that the foregoing substantive rules on the boundary action shall be primed by the prescription of thirty years. An interesting jurisprudential disagreement has been brewing over the past fifty years as to whether the thirty-year prescriptive period mentioned in article 852 is a mere reference to the thirty-year prescription articles of the Civil Code under Title XXIII, Of Occupancy, Possession and Prescription, or a separate thirty-year acquisitive prescription article particular to the boundary action.

From the comments of the redactors on the boundary articles, we see that the French jurist, Toullier, was relied upon heavily. It is almost certain that Toullier's writings were the source of the portion of our article 852, which deals with the thirty-year acquisitive prescription. From his writings it is cer-

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75. Id. no 176: "If there are no titles from one or the other or from both then the sole possession must make the law." (transl. by Yves Verret.)

76. LA. CIVIL CODE art. 845 (1870): "The limits must be fixed according to the respective titles of the parties; in the absence of title, on both sides, possession governs."

77. Id. art. 852: "Whether the titles, exhibited by the parties, whose lands are to be limited, consist of primitive concessions or other acts by which property may be transferred, if it be proved that the person whose title is of the latest date, or those under whom he holds, have enjoyed, in good or bad faith, uninterrupted possession during thirty years, of any quantity of land beyond that mentioned in his title, he will be permitted to retain it, and his neighbor, though he have a more ancient title, will only have a right to the excess; for if one can not prescribe against his own title, he can prescribe beyond his title or for more than it calls for, provided it be by thirty years possession."

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78. Concordance Table

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tain that the thirty-year prescription contemplated by him in the boundary action was a mere reference to the thirty-year prescription following the Civil Code. The determination of whether article 852 is a separate prescription article or a reference to the thirty-year prescription of the Civil Code is relevant because of the established line of jurisprudence surrounding the thirty-year acquisitive prescription of the Civil Code pertaining to such things as the requirement of a juridical link to tack on the possession of one's ancestor in title, and the procedure for interrupting prescription.

The Louisiana Supreme Court, in *Opdenwuyer v. Brown*, expressly overruled *Vicksburg Southern & Pacific Ry. v. Le Rosen* and held that, "either article 852 (1870) is inaccurate in its terms and means the same as article 3493 et seq. or that the article was actually intended to mean something different." The court chose the latter alternative and proceeded to draw a distinction between the tacking of possession requirements of article 3493 and following as interpreted by the jurisprudence and those of article 852. The court held that if there exists a visible boundary between the two estates and the tract in dispute has been possessed under visible bounds for thirty years, such visible bounds should prevail over the ideal bounds called for in the titles. This case is often cited for the proposition that under article 852 a possessor under visible bounds may tack onto his possession that of his author in title without the requirement of a juridical link. This decision appears unfortunate because the wrong alternative was chosen and under the facts of this case there was a juridical link and the court could have arrived at the same conclusion while following the prior jurisprudence. As the court pointed out, "according to titles,

79. See 2 TOULLIER, DROIT CIVIL n° 175 (1833) (the source, in part, of article 852, which supports the proposition that article 852 is a mere reference to the thirty-year acquisitive prescription of the Code): "Thus the respective titles make the rule, unless ... by the trenetenarian possession of land for 30 years following the Civil Code, one of the neighbors may have prescribed beyond his title; for if one cannot prescribe against his title, one can prescribe over and beyond his title . . . ."

80. For a thorough discussion of tacking of successive possessions for acquisitive prescription in Louisiana, see Comment, 8 LA. L. REV. 105 (1949).


82. 155 La. 617, 99 So. 482 (1924).

83. 52 La. Ann. 192, 26 So. 854 (1899).

84. This choice was questioned in Barlow, Boundary Problems in Louisiana Land Title Examinations, in 10 MINERAL LAW INSTITUTE 3, 26 (1963); and in Rubin & Sachse, Boundaries, 23 LA. L. REV. 237, 260 (1963).
defendant owns only the north half of the northeast quarter of section 35 for this reason: That his vendor owned no more, having purchased by that description. But it will be observed that defendant himself did not purchase by that description." It was intended that the defendant's title describe the property up to the visible boundary and therefore there was a juridical link.85

In *Sessum v. Hemperley*86 the court again encountered difficulty in applying article 852 as evidenced by the fact that the case was heard twice by the court of appeal and twice by the Supreme Court with lengthy decisions each time. The Supreme Court finally held that where visible boundaries separate two tracts for more than thirty years these boundaries will prevail over actual boundaries regardless of whether the visible boundaries were mutually consented to by the parties—an extension of the *Opdenwyer* doctrine. *Sessum* has been relied upon to perpetuate the jurisprudential departures instituted by *Opdenwyer*.

In *Motty v. Broussard*87 the parties owned lands suited to cattle grazing. In 1920 plaintiff's ancestor in title built a fence upon the high ground of his property. This fence was as much as three hundred feet from the actual property line at one point, and, according to the plaintiff, it was never intended to be on the boundary of his land but merely to keep his pigs from straying too far north. In 1934 the fence fell into disrepair and the plaintiff's and defendant's cattle crossed freely onto each others lands and upon the disputed area. In 1945 the defendant rebuilt the fence in the same place the old fence once stood. The plaintiff admitted that the defendant's action in 1945 should be considered as an act of adverse corporeal possession sufficient to start the thirty-year prescription running. The court of appeal, however, found that the original fence built in 1920 constituted a visible bound, the sine qua non of article 852, and that since vestiges of the fence remained, though in disrepair, from 1934 to 1945, such vestiges constituted a continuation of the defendant's adverse possession despite the fact that the plaintiff's cattle also grazed on the disputed land. The defendant's plea of thirty-year acquisitive prescription was sustained to defeat plaintiff's boundary action.

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85. See dissent in DeBakey v. Prater, 147 So. 734, 737 (La. App. 1st Cir. 1933).
86. 233 La. 444, 96 So.2d 832 (1957).
87. 201 So.2d 293 (La. App. 3d Cir. 1967).
In *Ponder v. Fussell* the defendant in a petitory action had purchased a house in 1950, which according to the titles of the parties, encroached four feet upon the plaintiff's property. The issue involved was whether defendant could tack the possession of his ancestor in title despite the fact that he purchased according to the ideal bounds, and had no juridical link. The court held that the house itself constituted a visible boundary and since the house was over thirty years old, the defendant's plea of thirty-year acquisitive prescription under article 852 defeated the boundary action without the necessity of a juridical link for tacking.89

Perhaps article 852 was extended further in *DeBakey v. Prater* than in any other case. In *DeBakey* the court allowed the defendant to tack the possession of his ancestor in title without a juridical link and also refused plaintiff's plea of interruption of acquisitive prescription by defendant's verbal acknowledgment before the thirty years accrued.91

(2) Article 853

If the boundaries have been erroneously fixed through the judicial method the Code of Civil Procedure provides that the judgment is res judicata and may only be attacked within one year for causes of fraud.92 If the boundary has been fixed extra-judicially and the surveyor has made an error, the injured party may have the error corrected subject to the defense of ten years acquisitive prescription.93 It should be noted that article 853 is not a liberative prescription article and the party in whose favor the error was committed must prove all of the elements of ten-year acquisitive prescription except title transitive of ownership, because the formal survey stands as a substitute for title.94

Upon the first hearing of the *Sessum* case, however, the Su-
preme Court held that where there exists actual, visible bounds which have been placed incorrectly extra-judicially, or fixed by the consent or active acquiescence of the adjacent land owners, an action in either case to rectify an alleged error in the location of the boundary line must be instituted within ten years or it will prescribe under article 853. This loose language has caused subsequent courts to fall into error in two respects. First, the language indicates that the ten-year prescriptive period of article 853 is a liberative prescription. This is, of course, impossible because if the plaintiff loses his right to bring the action to correct incorrectly fixed boundaries, he would, in effect, lose the ownership while the defendant may not have acquired the ownership because he failed to meet some of the requirements of ten-year acquisitive prescription. This would leave the land in question in limbo with no owner. Secondly, the indication that boundaries may be physically marked by the mere consent or active acquiescence of adjacent landowners conflicts with article 83398 which requires a formal survey by experts for judicial or extra-judicial fixing. Also, the prohibition of article 83897 would strike with nullity any fixing of boundaries accomplished with the mere active acquiescence of the adjacent landowner because of the lack of the formal notice contemplated by the article.

In Barker v. Houssiere Latreille Oil Co.98 the Supreme Court, prior to the Sessum decision, held that the defendant could not rely upon the ten-year prescription of article 853 to defeat the boundary action where he erroneously built a multi-story building eighteen inches upon the plaintiff's land more than ten years before the action was brought because the plaintiff did not actively acquiesce in the defendant's action. In Frederick v. Bru-
land,99 an early Supreme Court case, the court said that where

96. La. Civil Code art. 833 (1870): "Whether the limits be fixed judicially or extra judicially, it must be done by a sworn surveyor of this State, who shall be bound to make a proces verbal of his work in the presence of two witnesses, called for the purpose, who shall sign the proces verbal with him, or mention shall be made therein of the causes which prevented them from signing."

97. Id. art. 838: "It is forbidden to every owner of lands to fix the limits between him and his adjoining neighbors, without giving them notice to be present; and, without this formality, every such proceeding is null and will produce no effect against his neighbors, who, besides, have their action for damages against him, if they have suffered any injury thereby."

98. 160 La. 52, 106 So. 672 (1925).

99. Frederick v. Brulard, 6 La. Ann. 382 (1851). But cf. Morris v. Pruatsman, 7 La. App. 404 (1st Cir. 1928). The court held the building of a fence dividing the alley way was a fixing of boundary by consent and a plea of prescription of 10 years was properly maintained.
the parties mutually fixed their boundaries without a formal survey, article 853 could not be used to defeat the boundary action because a mistake in running a division fence neither conferred nor destroyed title and could not serve as a basis for ten-year acquisitive prescription.

(3) Estoppel

Difficulty in determining the rights of the parties is also encountered where it can be shown that one or both of the parties never intended to purchase the land described in his title. In Selfe v. Travis brothers with adjoining estates mistakenly built houses on one brother's estate. To correct the situation they had an unrecorded, informal survey made which projected a skew line between the two houses thus reforming the boundary lines called for in their deeds. The brothers subsequently each agreed to sell the tracts to plaintiff and defendant according to the informal survey. In the procès verbal of the sales, however, the estates were described without reference to the new division. The court held the plaintiff was estopped from bringing the boundary action and the deeds were reformed.

CONCLUSION

To determine the location of boundaries between two tracts it is important first to see that the land involved has been severed from the public domain. Secondly, the rules of surveying must be applied to identify the land conveyed in each pertinent transaction.

In Louisiana parties may have their limits determined judicially or extra-judicially, but the actual marking on the ground must be done by a sworn surveyor to produce any legal effects, other than prescriptive. The vehicle by which parties have their limits determined is the boundary action. The basic premise of the boundary action is that the limits must be fixed in accordance with the titles of the parties. Under the new Code of Civil Procedure questions of validity of title, formerly only justiciable in a petitory action, may be determined in a boundary action. Although the boundary action is, as a general rule, imprescriptible article 853 provides that if the boundary has been fixed with the use of a formal survey, and an error was committed, the party in whose favor the error operated may utilize the survey

100. 29 So.2d 786 (La. App. 2d Cir. 1947).
and procès verbal as a basis for ten-year acquisitive prescription. Also, article 852 provides that the rules under the section on fixing limits will be primed by the thirty-year acquisitive prescription article of the Civil Code. The courts now use article 852 as a means of avoiding the former jurisprudence and have said that article 852 applies to the situation where visible bounds have existed for over thirty years. In such cases the requirement of a juridical link to tack successive possessions is abandoned.

Modern courts, under the reasoning that men earn their livelihood in the field, not in the courthouse, have eased the former, rigid requirements of acquisitive prescription. This is evidenced by abandonment of the requirement of juridical link if a visible bound exists for thirty years. Also, as regards boundaries not designated by visible markings, the court in Noel v. Jumonville Pipe & Machinery Co.\(^{101}\) without expressly repealing the juridical link requirement, allowed the defendant to tack possession without a link on the theory that it was the intention of the vendor to transfer all he possessed. Noel seems to foretell the death of the juridical link doctrine in Louisiana.

Carl E. Heck