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HOOPER V. HERO LANDS COMPANY

Christopher B. Ortte*

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Keywords: boundary, cumulation, interruption, land, ownership, petitory action, possessory action, acquisitive prescription, property, real action

“And this is one of the major questions of our lives: how we keep boundaries, what permission we have to cross boundaries, and how we do so.”

– A.B. Yehoshua

INTRODUCTION

The boundary is a concept ancient to human civilization, applicable to both the tangible and intangible aspects of our lives. Internally we deliberate moral or spiritual boundaries, while externally we struggle amongst one another to establish geographical boundaries. Especially throughout the development of Western Civilization and democracy, in the least, boundaries have become an essential characteristic of the westerner’s individual freedoms. Albeit a doctrine of criminal law, take for example the Castle Doctrine,¹ which,

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1. See *Castle Doctrine*, BLACK’S LAW DICTIONARY 261 (10th ed., West 2014); the Castle Doctrine is defined as, “[a]n exception to the retreat rule allowing the use of deadly force by a person who is protecting his or her home and its

in essence, represents the value we as a society appropriate to personal boundaries.

In the civil law, one may establish the boundary to his land through a boundary action. A boundary action is considered a real action. A person may bring a real action in order to assert rights specifically in, to, or upon immovable property.² There are a number of real actions provided for in Title II of the Louisiana Civil Code, three of which were explored in the case presented herein, *Hooper v. Hero Lands Company*³ (*Hooper II*): petitory, possessory, and boundary actions. Each of the three actions considered in *Hooper II* are distinguishable, however, as we so often find, distinctions are not easily drawn.

Hooper II takes up these real actions, as well as a trespass action,⁴ which is not treated as a real action by the Louisiana Code of Civil Procedure, and considers some age-old disputes in Louisiana jurisprudence, much of which has assumedly been put to rest. However, there appears to have surfaced some slight disparity between circuits—particularly the First and Fourth—which are worth noting.

I. BACKGROUND

In 1860, following the long and controversial litigation over the estate of eccentric miser and real estate spectacular John McDonogh, a particular portion of his vast land-holdings was prepared for subdivision.⁵ The land, known as the Cazelard Plantation,

inhabitants from attack, especially from a trespasser who intends to commit a felony or inflict serious bodily harm.”

2. LA. CODE OF CIV. PROC. art. 422 (2017).

3. *Hooper v. Hero Lands Co.*, 15-0929, p.5 (La. App. 4 Cir. 3/30/16); 216 So.3d 965, 970, *writ denied*, 16-0971 (La. 9/16/16); 206 So.3d 205 (mem) [hereinafter *Hooper II*].

4. Though it bears a resemblance to real actions, in that it concerns entering onto immovable property without permission, no attempt has been made to include, *inter alia*, the action for trespass within Title II. See Melissa Morris Cresson, *The Louisiana Trespass Action: A “Real” Problem*, 56 LA. L. REV. 477, 477 n.5 (1995).

5. See *Executors of McDonogh v. Murdoch*, 56 U.S. 367 (1854).

was inherited by the City of New Orleans from McDonogh and located generally in “down the bayou,” Louisiana,⁶ specifically encompassing lands within Jefferson, Orleans, and Plaquemines parishes.⁷ The land was subdivided into 44 lots, each notably one arpent in size,⁸ or approximately 192 feet wide, and was put up for public auction by New Orleans.⁹ As a result of the auction, Alphonse Camus purchased lots 17-26 and Pierre Cazelar, Jr., purchased lots 27-44.¹⁰ Legal description was made and good title was recorded upon these transactions, of which was eventually passed to the parties in the case before us.¹¹

Detailing the history of the property back nearly 160 years is not mere fluff to draw in the reader’s attention. The fact that the property was divided into arpents is not unsubstantial; indeed the issue in *Hooper II* was born of the lot measurements. Moreover, prior to the public auction in 1860, the City of New Orleans hired Louis Pilie, a surveyor, to comprise a plat of the property.¹² Both plaintiffs and defendants in *Hooper II* relied on the Pilie plat for their property description.¹³

The particular boundary in contention is between lots 26 and 27. In *Hooper I*, the plaintiffs, Patsy and James Hooper (the “Hoopers”), have owned lot 26 since 1992,¹⁴ while the Hero Lands Company

6. “Down the bayou” is a vernacular phrase used liberally by Louisianans when describing a broad area of the state, generally south of Interstate 10 (*e.g.*, when one hails from Houma, Louisiana, one might say, “He’s from down the bayou”).

7. Original Appellee Brief of Defendants Hero Lands Company and Allen Hero, *Hooper v. Hero Lands Co.*, No. 15- 0929, (La. App. 4 Cir. 11/19/15) (appellate brief).

8. *See Arpent*, BLACK’S LAW DICTIONARY, *supra* note 1; an arpent is 192 feet.

9. *Hooper II*, 216 So.3d at 969.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 973.

14. *Hooper v. Hero Lands Co.*, 13-0576 (La. App. 4 Cir. 12/11/13); 128 So. 3d 691, 692 [hereinafter *Hooper I*]. Important to note for purposes of prescription, Hooper acquired lot 26 in 1992, in good faith and just title, from Burmaster Land & Development Co., who was also in good faith possession of lot 26 since 1974. *Hooper II*, 216 So.3d at 969.

(“Hero”), owns lots 27-35.¹⁵ The lots are situated laterally west to east, with lot 26 being the most westerly.¹⁶ Just as the Pilie plat described each lot to be the same width, according to the titles, each lot is 192 feet wide.¹⁷ Therefore, the total width of lots 26-35 would be 1,920 feet. However, it turns out the distance is 2,040.77 feet—a surplus of 120.77 feet.¹⁸ Therein lies the controversy. Additionally, on the eastern side of lot 26 there existed a fence, which was maintained and considered by the Hoopers to be the boundary line between lots 26 and 27.¹⁹

In 2012, Hero authorized the local government to dig a thirty-five foot drainage canal on the western boundary of lot 27.²⁰ When plotting the drainage canal, the government’s surveyor used the lot titles, which mathematically caused the canal to overlap across the boundary between lots 26 and 27. With the disparity unbeknownst to Hero and the government, preparations to dig the drainage canal commenced which resulted in a trespass onto the Hoopers’ property.²¹ As a result, the Hoopers filed suit claiming trespass and asserting a possessory and boundary action, along with a request for injunctive relief.²²

The trial court granted temporary injunctive relief to the Hoopers, enjoining the government from continuing to dig the canal.²³ Nevertheless, the government adopted a resolution to expropriate the property and continue the project, allegedly without notice to the Hoopers.²⁴ The resolution to expropriate the land introduces a fold in the case considered in *Hooper I*,²⁵ but not in *Hooper II*.

15. *Hooper II*, 216 So.3d at 968.

16. *Id.* at 969.

17. *Id.*

18. *Id.* at 968.

19. Hooper’s Third Amended Petition at 2-3.

20. *Hooper I*, 128 So.3d at 693.

21. *Hooper II*, 216 So.3d at 968.

22. *Id.*

23. *Hooper I*, 128 So.3d at 693.

24. *Id.*

25. *Id.* at 692.

Presented to the court were a number of arguments asserting the Hoopers' rights to the entire surplus 120.77 feet, of which they claimed was encompassed within the fence line.²⁶ Hooper asserted ownership of the surplus by "Possession Within Title," arguing that the 120.77 foot strip of land "constituted the 'more than one arpent'" as provided in the title description, "one arpent more or less."²⁷ Additionally, the Hooper's provided evidence of corporeal possession.²⁸ Furthermore, by tacking possession to their ancestors-in-title,²⁹ the Hooper's asserted ownership by acquisitive prescription of ten-years and thirty-years.³⁰ Thus, the Hoopers asserted ownership by possession, title, and prescription.³¹ Finally, the Hooper's prayed for the court to establish the boundary line.³²

II. DECISION OF THE COURT

The court in *Hooper II* addressed the following issues:

- Whether the Hoopers had improperly cumulated their possessory action with a petitory action;³³
- Whether the Hoopers had acquired ownership to the surplus 120.77 feet of property: (1) by title;³⁴ (2) by ten-year acquisitive prescription;³⁵ and (3) by thirty-year acquisitive prescription;³⁶
- Whether the trial court properly fixed the boundary.³⁷

26. Hooper's Third Amended Petition at 2-3.

27. *Id.*

28. *Id.* at 2-3.

29. The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession. LA. CIV. CODE art. 3442 (2017).

30. Hooper's Third Amended Petition at 2, para 5.

31. *Hooper II*, 216 So.3d at 970.

32. Hooper's Third Amended Petition at 21.

33. *Hooper II*, 216 So.3d at 970.

34. *Id.* at 971-72.

35. *Id.* at 972.

36. *Id.* at 972-73.

37. *Id.* at 973-74.

On the issue of the Hoopers' improper cumulation of a petitory and possessory action, the court reversed the trial court, ruling the Hoopers improperly cumulated, "demonstrated by [the Hoopers'] assertions of ownership by title and by prescription, and their request to fix the boundary line."³⁸ Thus, according to the court, the Hoopers waived their possessory action. However, as discussed *supra*, the Hooper's petition made no mention of the action being petitory, as well, cumulation of a boundary action with either a petitory or possessory should not be considered improper—article 3657 of the Louisiana Code of Civil Procedure overtly does not prohibit such cumulation.³⁹

With regard to the Hoopers' attempt to show ownership by title—a petitory action—the court found the addition of "more or less" to an arpent was not sufficient to show better title than Hero.⁴⁰ Next, albeit the Hoopers had sufficient ten-year corporeal possession, the court found the description on the deed to their tract insufficient to show the just title necessary to achieve ten-year acquisitive prescription.⁴¹ Further, the court noted that because the Hooper's immediate ancestor-in-title, Burmaster Land & Development Company ("Burmaster"), leased lot 26 for the years leading up to the Hoopers' purchase, Burmaster was a precarious possessor.⁴² To acquire by thirty-year acquisitive prescription, one must have adverse corporeal possession; therefore, because Burmaster did not acquire ownership to lot 26 until December 31, 1989, adverse possession did not begin until January 1, 1990—not soon enough for the Hoopers to acquire via thirty-year prescription.⁴³

Despite the Hoopers' argument that apportionment "foreign" to Louisiana law, the court affirmed the trial court order, finding "as a matter of law, [utilizing] equal apportionment among the ten lots [to

38. *Id.* at 970.

39. *See* LA. CODE OF CIV. PROC. art. 3657 (2017).

40. *Hooper II*, 216 So.3d at 971.

41. *Id.*

42. *Id.* at 972.

43. *Id.*

fix the boundary] was the correct method to divide the disputed property.”⁴⁴ Nonetheless, the court realized that neither judgment had provided for a particularized description of the property as required by Louisiana Civil Code of Procedure article 1919 and, therefore, remanded with instruction to provide an accurate legal property description.⁴⁵

III. COMMENTARY

Possession and ownership are separate things, which require separate legal actions to determine: petitory and possessory. Article 3657 of the Louisiana Code of Civil Procedure prohibits the cumulation or alternative pleading of petitory and possessory actions, the penalty of such cumulation being the abatement of the possessory action. The intent is to encourage the determination of the possession prior to institution of a petitory action.⁴⁶ It follows common sense as a petitory action assumes the petitioner has only better title to and no possession of the property.

Hooper II made holdings that it was improper to cumulate a petitory action and an acquisitive prescription action, as well a boundary action cannot be cumulated with a possessory action.

Primarily to note, Louisiana Civil Code of Procedure article 3657 expressly states, “[t]he plaintiff may not cumulate the *petitory* and the *possessory* action.”⁴⁷ It makes no prohibition, nor even mention, of a cumulation of a boundary action with either a petitory or a possessory action, nor does it consider acquisitive prescription.

Hooper II notes that a ruling on the Hoopers’ claim of ownership by acquisitive prescription, albeit consistent with a possessory action, would “necessarily be a determination of ownership.”⁴⁸ As such, the court reasoned the Hoopers cumulated a petitory action

44. *Id.* at 973.

45. *Id.* at 973-974.

46. LA. CODE OF CIV. PROC. art. 3657 (comment (a) (2017)).

47. *Id.* at art. 3657 (2017).

48. *Hooper II*, 216 So.3d at 970.

with a possessory action, waiving their possessory action. However, as it turned out, the question was not so much whether the Hoopers were in possession, but to what extent did they possess; the boundary had to be determined.

Boundaries are not necessarily fixed judicially, but may also be fixed extrajudicially, through agreement by parties. In the instance judicial fixing is necessary, the boundary action must be brought by: an owner of the contiguous tract of land; one who is in possession as owner; or one who has a real right in the property (*i.e.*, a usufruct or mineral lease).⁴⁹

Notwithstanding the possibility that the Hoopers failed to even bring a petitory action (to which the court was seemingly aware⁵⁰), it is disputable the court was correct to assert that the Hoopers improperly cumulated a petitory action by claiming ownership by title and requesting to fix the boundary line.⁵¹ Petitory and boundary actions may be cumulated because, *inter alia*, they both seek to establish ownership.⁵² However, to boot, the court claimed improper cumulation took place when the Hoopers asserted ownership by title and acquisitive prescription.⁵³ Within the same paragraph the court contradicts itself, stating that a claim of acquisitive prescription “may suggest to a casual reader that [it] is consistent with a possessory action . . . but . . . would necessarily be a determination of ownership.”⁵⁴

If a boundary action can be cumulated with a petitory action because they both assert ownership, and holding an action by acquisitive prescription is a determination of ownership, then why not may a petitory action and acquisitive prescription claim be cumulated? At any rate, the Hooper’s possession was more or less a non-issue;

49. LA. CIV. CODE art. 786 (2017).

50. *Hooper II*, 216 So.3d at 968 (“In addition to the trespass action, the Hoopers asserted a possessory action and a boundary action . . .”).

51. *Id.* at 970.

52. A. N. Yiannopoulos, 2 LOUISIANA CIVIL LAW TREATISE, PROPERTY § 11:31 (5th ed., West 2016).

53. *Hooper II*, 216 So.3d at 970.

54. *Id.*

whether they possessed within their title was not argued, but rather what their title encompassed. Thus, *Hooper II* made its inference that the Hoopers were bringing a petitory action.⁵⁵ It would appear then, that one cannot claim ownership through acquisitive prescription without improperly cumulating a petitory action and possessory action, as establishing possession is necessary for acquisitive prescription, which is a determination of ownership. Presumably there has been a mischaracterization of what constitutes a petitory action and/or possessory action.

The First Circuit previously took up the same issues in *Kadair v. Hampton*,⁵⁶ and perhaps made a bit more sense of the relationship between boundary, petitory, and possessory actions, and ownership by acquisitive prescription. First, *Hooper II*'s statement, “[b]ecause a judgment in a boundary action necessarily involves a preliminary determination of *ownership*, it arguably cannot be cumulated with a possessory action,”⁵⁷ is arguably incorrect. Both the Civil Code and the Code of Civil Procedure provide that a boundary action may be used to determine ownership, as opposed to requiring a preliminary determination of ownership.⁵⁸ *Hooper II* cites *Kadair* as authority holding that “proof of ownership is a necessary prerequisite to establishing [a] boundary.”⁵⁹ However, this was taken from a narrow context in *Kadair*. Second, jurisprudence extensively supports that the type of possession necessary to establish ownership by acquisitive prescription is identical to the type of possession necessary to maintain a possessory action.⁶⁰ Thus—in contrast to *Hooper II*'s

55. See *Hooper II* at 971: “Importantly, for our purposes, the Hoopers asserted that the surplus property had been conveyed to them by title, as evidence by the phrase ‘one arpent more or less’ . . . effectively claim[ing] *ownership* of the property by title.”

56. *Kadair v. Hampton*, 13-1171 (La. App. 1 Cir. 7/10/14); 146 So.3d 694, writ denied, 14-1709 (La. 11/7/14); 152 So.3d 177 (mem).

57. *Hooper II*, 216 So.3d at 970.

58. See LA. CIV. CODE arts. 792, 794 (2017); LA. CIV. CODE OF PROC. art. 3693 (2017).

59. *Hooper II*, 216 So.3d at 970.

60. *Kadair*, 146 So.3d at 703.

contention that asserting ownership by title and acquisitive prescription is an improper cumulation⁶¹—not only should a boundary action be “cumulatable” with a possessory action, in the case of acquisitive prescription, they are mutually inclusive.

Upon review of the Hoopers’ petition, they argued to have had “possession within title,” which on its face seems to create an improper cumulation, though as abovementioned, the Hoopers had not expressly asserted a petitory action.⁶² Perhaps, regardless of whether it is permissible to assert ownership by acquisitive prescription and by title, had the Hoopers claimed that they were owners of the one arpent by good title, but also owners, separately, of the surplus through acquisitive prescription; then they may have avoided issues of improper cumulation altogether. However, by arguing that their title—per the language “more or less” than one arpent—conveyed to them the surplus, but that nonetheless they had possessed the surplus for thirty-years through ancestors-in-title, the Hoopers did precisely what the Louisiana Code of Civil Procedure article 3657 prohibits—plead in the alternative—and subjected themselves to a court’s inferences.

CONCLUSION

Hooper II seemed to lose sight of the ultimate goal of the action—to fix a boundary—and provided debatable, largely unnecessary dicta on the relationships between petitory, possessory, boundary, and acquisitive prescription actions. However, despite difficulties navigating through the analysis of boundary, petitory, and possessory actions, *Hooper II* seemed to reach a result that more or less satisfies some principles of equity. Eventually, it was determined that the boundary be fixed according to principles of equal apportionment, despite there being a “dearth of guidance” within Louisiana’s jurisprudence on the matter, and remanded instructing the trial

61. LA. CIV. CODE art. 786 (2017).

62. See *Hooper II*, 216 So.3d at 268, 970; Yiannopoulos, *supra* note 52, at § 11:31.

court delineate a boundary with proper property description pursuant to Louisiana Code of Civil Procedure article 1919. Seeing the glass half-full, the Hoopers may have lost a potential bit of land, but it was nonetheless established they own more than one arpent, granting them a piece of the surplus pie.⁶³

63. *Hooper II*, 216 So.3d at 973.

