

Tacking of Possession for Acquisitive Prescription

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Comments

TACKING OF POSSESSION FOR ACQUISITIVE PRESCRIPTION

Art. 3493, Louisiana Civil Code of 1870: "The possessor is allowed to make the sum of possession necessary to prescribe, by adding to his own possession that of his author, in whatever manner he may have succeeded him, whether by an universal or particular, a lucrative or an onerous title."

Fortunately, or perhaps unfortunately, as your social philosophy may dictate, the rigorous requirements of our law in regard to the

prescription of immovable property are softened to a considerable extent by this article. Its provisions grant to the possessor the right of adding his possession to that of his author in order to complete the requisite time for acquiring title to immovable property by prescription. Likewise, Article 2235 of the French Civil Code secures this same right and is in all essential respects identical with our provision of law.¹ Thus, it is proper to take advantage of the reservoir of French law and commentaries to gain enlightenment upon the numerous problems which were ushered into our law with the transcription of this provision into the Louisiana Civil Code.²

Perhaps the French, as well as our own redactors, could have procured a more appropriate term than "possession" to depict just what is "tacked," or, as the French say, "joined." It is not merely the civil or corporal detention of an immovable which is transmitted to the possessor, but the sum total of his author's prescriptive rights, one of which is possession.³ The good or bad faith of the possessor in regard to prescription is the decisive consideration as to the time and manner of acquiring.⁴ So too is the possessor's good or bad faith determinative of the extent of his ability to benefit from his author's prescriptive rights.⁵

A very significant word in Article 3493 is "author." It is the possession of his *author*, which, under certain conditions, the possessor is allowed to utilize. This term receives further illumination in Article 3494 and is there defined as one from whom another derives

1. Art. 2235, French Civil Code: "*Pour compléter la prescription, on peut joindre à sa possession celle de son author, de quelque manière qu'on lui ait succédé, soit à titre universel ou particulier, soit à titre lucratif ou onéreux.*"

2. Art. 3493, La. Civil Code of 1870; Art. 3459, La. Civil Code of 1825; and Art. 2235, French Civil Code are the same. Compiled Edition of the Civil Codes of Louisiana, 3 Louisiana Legal Archives (1942) 1916.

3. "Bad faith is a vice which infects the possessor rather than the possession." 32 Laurent, *Principes de Droit Civil* (1878) 380, no 361. It follows likewise that good faith is a quality of the possessor's personality and not of the possession. Thus the term possession does not embody the character of the personality of the possessor. On the other hand prescription does, and Article 3479 of the Louisiana Civil Code of 1870 recognizes this distinction when it enumerates the requisites necessary for the decennial prescription. "To acquire the ownership of immovables . . . four conditions must concur: 1. Good faith on the part of the possessor. . . . 3. Possession"

4. Arts. 3478, 3479, La. Civil Code of 1870.

5. 2 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1897) 553, 554, no 218; 4 Beudant, *Cours de Droit Civil Français* (2 ed. 1934) 853, no 770; 32 Laurent, *op. cit. supra* note 3, at 380, no 361 et seq.; 1 Planiol, *Traité Élémentaire de Droit Civil* (10 ed. 1925) 872, nos 2674, 2676, 2677.

his rights, whether by universal, particular, or any other title.⁶ It is manifest that the existence of some juridical link is an essential ingredient to the successor's ability to acquire his predecessor's prescriptive rights.⁷

The Louisiana Supreme Court has often recognized the necessity of a juridical link as a condition precedent to tacking.⁸ To illustrate this postulate, if *A* possesses corporally a fifty acre tract of land and sells to *B* thirty acres thereof and *B* enters and takes corporal possession of the entire fifty acres, *B* can tack to his own possession only that which *A* transmitted to him—possession of the thirty acres. As to the additional twenty acres, *A* is not *B*'s author because no juridical link exists between them.⁹

Article 3493 contains no separate provision for the universal successor as distinguished from the successor by a particular title. Nevertheless, different considerations present themselves accordingly.¹⁰

THE SUCCESSOR BY UNIVERSAL TITLE

The most important and distinguishing feature of the universal successor is that he does not commence a new possession but merely continues the possession commenced by his predecessor.¹¹ Beudant points out very significantly, "It is not a junction of possessions which takes place, but is rather a continuation of his author's pos-

6. Art. 3494, La. Civil Code of 1870: "By the word author in the preceding article, is understood the person from whom another derives his right, whether by a universal title, as by succession, or by particular title, as by sale, by donation, or any other title, onerous or gratuitous.

"Thus, in every species of prescription, the possession of the heir may be joined to that of the ancestor, and the possession of the buyer to that of the seller."

7. *Planiol*, op. cit. supra note 5, at 873, no 2678.

8. *Sibley v. Pierson*, 125 La. 478, 51 So. 502 (1909); *Harang v. Golden Ranch Land and Drainage Co.*, 143 La. 982, 79 So. 768 (1918); *McHugh v. Albert Hanson Lumber Co.*, 145 La. 421, 82 So. 392 (1919); *Emmer v. Rector*, 175 La. 82, 143 So. 11 (1932) (affirming both the *Sibley* and *Harang* cases, supra). *Contra*: *Durel v. Tennison*, 31 La. Ann. 538 (1879).

Tacking as relates to acquisitive prescription should be distinguished from that which is allowed in regard to boundaries. *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482 (1924); *Henly v. Kask*, 11 So. (2d) 230 (La. App. 1942).

9. *Sibley v. Pierson*, 125 La. 478, 51 So. 502 (1909).

10. 1 *Baudry-Lacantinerie Précis de Droit Civil* (14 ed. 1926) 715, no 1460; *Laurent*, op. cit. supra note 5, at 376-379, nos 357-360; 12 *Marcadé, Explication du Droit Civil* (7 ed. 1874) 134, no 111; 9 *Pothier, Oeuvres de Pothier* (2 ed. 1861) 361, no 122; 1 *Troplong, Droit Civil* (4 ed. 1857) 606-608, nos 429-431.

11. *Griffon v. Blanc*, 12 La. Ann. 5 (1857) (a very comprehensive treatment of the subject); *Spencer Adm. v. Lewis, Adm.*, 39 La. Ann. 316, 1 So. 671 (1887) (reaffirmed the *Griffon v. Blanc* case, supra). See note 10, supra, for the French commentaries.

session and person."¹² Laurent further describes the transaction as one by which the possession and person of the author is confused with that of the successor.¹³

As far as the universal successor is concerned, it would be more accurate to leave out tacking and its connotations and describe this transaction as a mandatory substitution. Moreover, the universal successor has no choice with reference to his author's prescriptive rights. He is powerless to refuse them or change their character.

The successor acquires something more than his author's prior naked possession. A few hypothetical illustrations may be helpful in order to study the effect of good or bad faith upon the successor's substitution for his author. Two situations may be contemplated: First, the author was in good faith and the successor is a bad faith possessor. Conversely, the author was a bad faith possessor and the successor is in good faith. It is necessary to assume that the possession meets all the requisites for prescription.

In the first hypothet the author could have, if he had lived, prescribed for the immovable in ten years.¹⁴ Although the successor is in bad faith, this does not vitiate his right to acquire by the ten years acquisitive prescription, because he does not commence a new possession, but is merely *substituted* for his author and continues in his personality and possession.¹⁵ The law regards this as one possession. Therefore, under Article 3482 of the Louisiana Civil Code and Article 2269 of the French Code, if the possessor commences in good faith and subsequently becomes a bad faith possessor, his right to acquire by the ten years acquisitive prescription will not be affected.¹⁶

In the second supposition, the author was in bad faith and the successor is of good faith. Again the persons are confused as well as the possessions, and the successor may acquire only by the thirty

12. Beudant, op. cit. supra note 5, at 853, no 770.

13. Laurent, op. cit. supra note 5, at 380, no 361.

14. Art. 3478, La. Civil Code of 1870.

15. Aubrey et Rau, op. cit. supra note 5, at 553, no 218; Baudry-Lacantinerie, op. cit. supra note 10, at 715, no 1461; Beudant, op. cit. supra note 5, at 853, no 770; Laurent, op. cit. supra note 5, at 376-379, no 357-360; Marcadé, op. cit. supra note 10, at 135, no 113; Planiol, op. cit. supra note 5, at 872, no 2674; Pothier, op. cit. supra note 10, at 358, nos 112, 122, 361; Troplong, op. cit. supra note 10, at 606, no 429. See *Griffon v. Blanc*, 12 La. Ann. 5 (1857); *Spencer Adm. v. Lewis, Adm.*, 39 La. Ann. 316, 1 So. 671 (1887). The supreme court relied heavily upon Marcadé, supra, in deciding the *Griffon v. Blanc* case, supra.

16. Art. 3482, La. Civil Code of 1870: "It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription." Art. 2269, French Civil Code. "*Il suffit que la bonne foi ait existé au moment de l'acquisition.*"

years prescription in spite of his personal good faith, which the law now ignores.¹⁷ Being one possession which has commenced in bad faith, the subsequent good faith is immaterial.

Simply stated, the universal successor is but a protraction of his author and is powerless to change or reject these prescriptive rights, which were predetermined for him at the moment of his author's acquisition.¹⁸

THE SUCCESSOR BY PARTICULAR TITLE

Accurately speaking, tacking is applicable only to the successor by particular title.¹⁹ It is he who commences a new and distinct possession entirely separate from that of his author.²⁰ To him the law has accorded a privilege under certain circumstances to accept or reject his author's prescriptive rights.²¹ Since this is a new possession, there are now two personalities and two possessions to consider, as well as the good or bad faith of each.

If both are possessors in good faith, the law allows the successor to add his possession to that of his author to acquire the immovable in ten years.²² Likewise, if both are possessors in bad faith, the successor may plead thirty years acquisitive prescription and add his

17. *Griffon v. Blanc*, 12 La. Ann. 5 (1857); *Spencer, Adm. v. Lewis, Adm.*, 39 La. Ann. 316, 1 So. 671 (1887). In the latter case the court said, "It is fully settled that a universal legatee succeeds to the testator's rights with their defects, *succedit in vitia et virtutes*, and is charged with his author's defects, infirmities and bad faith." See note 15, *supra*, for the French commentators.

18. Pothier, *op. cit. supra* note 10, at 361, n° 122. "The Heir succeeds to the obligations of the defunct and the obligation rests on prescription. . . . On the contrary a successor by particular title does not succeed to the person or the obligations."

N° 123. ". . . the successor by particular title is subrogated to all his author's rights in regard to the thing received."

19. Beudant, *op. cit. supra* note 5, at 853, n° 770.

20. Aubry et Rau, *op. cit. supra* note 5, at 554, n° 218; Laurent, *op. cit. supra* note 5, at 380, n° 361; Marcadé, *op. cit. supra* note 10, at 134, n° 111.

21. Pothier, *op. cit. supra* note 10, at 361, n° 122; Troplong, *op. cit. supra* note 10, at 607, n° 431.

22. *Innis v. Miller*, 10 Mart. (O. S.) 289, 13 Am. Dec. 330 (La. 1821); *Kohlman v. Gaudi*, 52 La. Ann. 700, 27 So. 116 (1899) (good faith must exist in the author); *Gauthier v. Cason*, 107 La. 52, 31 So. 386 (1902); *Brewster v. Hewes*, 113 La. 45, 36 So. 883 (1904); *Vance v. Ellerbe*, 150 La. 388, 90 So. 735 (1922); *Barnett v. Botany Bay Lumber Co.*, 172 La. 205, 133 So. 446 (1931) (reaffirmed the *Innis v. Miller case*, *supra*); *Laroux v. Myers*, 144 So. 117 (La. App. 1932); *Buillard v. Davis*, 185 La. 255, 169 So. 78 (1936) (author and successor must both have a title translative of property); Beudant, *op. cit. supra* note 5, at 853, n° 770; Baudry-Lancantinerie, *op. cit. supra* note 10, at 716-717, n° 1462; Laurent, *op. cit. supra* note 5, at 380, n° 361; Marcadé, *op. cit. supra* note 10, at 135, n° 114; Planiol, *op. cit. supra* note 5, at 372, n° 2676; Troplong, *op. cit. supra* note 10, at 607, n° 431.

predecessor's possession to his own to complete the period.²³ Apparently there is no objection to tacking in these instances because both the author and the successor have the requisites for the prescription which the latter pleads.²⁴

If the author is a possessor in bad faith and the successor is in good faith, the successor would not be prevented from acquiring title to the immovable by possession in his own right for ten years.²⁵ Unlike the universal successor, he commences a new possession and is not substituted for his author.²⁶ The law does accord him the benefit of utilizing his author's possession, but only for the thirty year prescription.²⁷ The rationale of the commentators is that the successor is subrogated to the bad faith prescriptive rights of his author, and his own rights as a possessor in good faith would, of course, include the lesser advantages for the thirty years prescription.²⁸ Again, it must be assumed that each of the two possessors met all the other requirements for the prescription which is being pleaded.²⁹

Conversely, if the author was a possessor in good faith and the successor is in bad faith, the French view is that the successor should be permitted to plead only the thirty years prescription because his possession in bad faith cannot be remedied by his author's possession in good faith.³⁰ Although the successor cannot avail himself of his author's good faith, he may nevertheless tack to the extent necessary for the thirty year period.³¹ His author's good faith prescriptive rights being more favorable in the eyes of the law would include the lesser qualities for the bad faith prescription.³²

23. *Cognevich v. Blazio*, 159 La. 1035, 106 So. 556 (1925); *Johnson v. Congregation Daughters of the Cross*, 162 La. 657, 110 So. 894 (1926); *Emmer v. Rector*, 175 La. 82, 143 So. 11 (1932). See *Moullierre v. Coco*, 116 La. 845, 41 So. 113, 115 (1906). See note 22, *supra*, for the supporting commentators.

24. *Beudant*, *op. cit. supra* note 5, at 853, no 770; *Baudry-Lacantinerie*, *op. cit. supra* note 10, at 716-717, no 1462.

25. Art. 3478, La. Civil Code of 1870.

26. See note 20, *supra*.

27. Presumably the supreme court would follow this concept though no case in point nor any dictum expressly to that effect could be found by your author. Cf. *Laurent*, *op. cit. supra* note 5, at 375, no 356; *Marcadé*, *op. cit. supra* note 10, at 135, no 114; *Planiol*, *op. cit. supra* note 5, at 872, no 2677.

28. *Ibid.*

29. See note 24, *supra*.

30. *Aubrey et Rau*, *op. cit. supra* note 5, at 554, no 218; *Baudry-Lacantinerie*, *op. cit. supra* note 10, at 716-717, no 1462; *Laurent*, *op. cit. supra* note 5, at 380, no 361; *Marcadé*, *op. cit. supra* note 10, at 135, no 114; *Planiol*, *op. cit. supra* note 5, at 872, no 2677. *Contra*: the entire Louisiana jurisprudence as will be seen; also *Troplong*, *op. cit. supra* note 10, at 612, no 432. Our jurisprudence is in accord with *Troplong* and allows the bad faith possessor the benefit of their authors' good faith to acquire by the decennial prescription.

31. *Ibid.*

32. *Planiol*, *op. cit. supra* note 5, at 872, no 2677.

As to this last proposition, the opposite doctrine has developed and has become well settled in Louisiana jurisprudence, even though contrary to the great preponderance of the French doctrinal authorities.³³ In the very early case of *Devall v. Choppin*³⁴ the Louisiana Supreme Court, relying exclusively upon the writings of Troplong, enunciated the proposition that if a successor showed that one of his authors was a possessor in good faith and had all the necessary ingredients for ten year prescription, he could acquire by the ten year good faith prescription even though he as well as an intermediate author possessed in bad faith. The court cited Article 3482 of the Louisiana Civil Code in support of this conclusion. This provision is in all essential respects identical with Article 2269 of the French Civil Code upon which Troplong predicated his philosophy,³⁵ and which has been criticized at great length by Marcadé and Laurent.³⁶

A logical analysis of Troplong's position would seem to indicate that a fallacious conclusion was reached both by him and the Louisiana Supreme Court. Article 3482 allows the possessor who commences his possession in good faith and subsequently becomes a bad faith possessor to retain his rights to the decennial acquisitive prescription.³⁷ As we have previously seen, the successor by particular title *commences* a new possession which is separate and distinct from that of his predecessor, while the universal successor is in effect substituted for his author and retains unaltered his author's prescriptive rights irrespective of his own good or bad faith.³⁸ It would logically follow that there are as many *commencements* of possessions as there are successors by particular title.³⁹ Troplong seeks to consolidate the units of possession and treat them as a whole by a strained interpretation of the code articles and to allow the bad faith possessor the right to acquire in ten years by virtue of his author's good faith.⁴⁰ This conclusion does not follow the logical analysis of the principle since each successor commences a possession for himself on the basis of which he may prescribe without benefit of tack-

33. *Devall v. Choppin*, 15 La. 566 (1840); *Liquidators of Prudential Savings and Homestead Soc. v. Langermann*, 156 La. 76, 100 So. 55 (1924). See *Brewster v. Hewes*, 113 La. 45, 51, 36 So. 883, 885 (1904); *Vance v. Ellerbe*, 150 La. 388, 400, 90 So. 735, 739 (1922); *Wheat v. Baer and Thayer Hardwood Co., Inc.*, 131 So. 307, 310 (La. App. 1930).

34. 15 La. 566 (1840).

35. See note 16, *supra*.

36. Laurent, *op. cit. supra* note 5, at 380, n° 361; Marcadé, *op. cit. supra* note 10, at 139, n° 115.

37. See note 16, *supra*.

38. See note 10, *supra*.

39. See note 36, *supra*.

40. Troplong, *op. cit. supra* note 10, at 612, n° 432.

ing, and the character of his author's possession cannot remedy his bad faith.⁴¹ The law has left to him the prescription of thirty years, and for this purpose he may utilize his author's prescriptive rights.⁴² If the present possessor and each of his authors *commenced* their respective possessions in good faith and each during their possessions became a bad faith possessor, then Article 3482, if properly and generously applied, would allow the successor to total these possessions and prescribe in ten years.⁴³

Despite this logical analysis, justification for the *Devall* doctrine can be found in social philosophy rather than in the confines of logic. The clash of social views is very noticeable in the French commentators. Troplong favors a liberal interpretation of the precepts of prescription, especially with regard to the principle of tacking, whereas his adversaries are conservative, favoring a narrow, logical and restrictive application of the legal principles. The Louisiana Supreme Court has adopted the liberal attitude on the subject of acquisitive prescription. With this in mind, the criticism of the *Devall* doctrine should not be so severe; for the human element has expanded and contracted the limits of the law to accommodate social views.

CONCLUSION

A brief summary of the status of the Louisiana law upon this subject is as follows: First, as a condition precedent to tacking, there must be an author-successor relationship created by some juridical act. Second, if this relationship is established by universal title, the successor will be substituted for his author and the prescriptive rights of the latter will determine the successor's rights irrespective of the nature of his possession. Third, if the possessor succeeds by a particular title, or any other juridical act, he commences a new and distinct possession; and if the successor pleads the ten years prescription, he may tack only if he can establish as a starting point the essentials of that prescription in one of his authors. Otherwise, if tacking is necessary to prescribe, he can avail himself of his author's rights only for the purpose of thirty years bad faith prescription. The *Devall* doctrine, though questionable in logic, is well settled from a practical viewpoint, and a reversal in that respect is a rather remote possibility.

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41. See note 86, *supra*.

42. *Ibid.*

43. *Ibid.*