

# Real Actions - The Action to Establish Title - Burden of Proof When Neither Party is in Possession

Patsy Jo McDowell

---

### Repository Citation

Patsy Jo McDowell, *Real Actions - The Action to Establish Title - Burden of Proof When Neither Party is in Possession*, 18 La. L. Rev. (1958)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol18/iss2/14>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

develop the leased tract. It can hardly be denied that in this instance the lessee was aware that it was depleting the reserves underlying the leased tract. Protection from liability could have been achieved by compliance with the obligations of the lease contract. It seems inconsistent with civilian ideas of fault as a basis of recovery to state that the lessee was in need of notice of its transgression.

The practical effect of this decision is to make it incumbent on every lessor not only to seek production data concerning wells on his own land, but to procure the geological information available concerning surrounding tracts of land on which his lessee drills. True, such a burden may exist in any similar situation in which a *third* party leases the adjoining tract. However, it may be noted that in such an instance, it is more than likely that the lessee of the undeveloped tract would be diligent in operating his lease because drainage by a *third* party injures not only his lessor but himself as well. Where, however, the lessee of the undeveloped tract controls both leases, such is not the case, and it seems that the imposition of this burden on the landowner, who is usually in a vastly inferior economic position, is somewhat unreasonable.

*George W. Hardy, III*

REAL ACTIONS — THE ACTION TO ESTABLISH TITLE —  
BURDEN OF PROOF WHEN NEITHER PARTY  
IS IN POSSESSION

Prior to 1908, there were three main real actions<sup>1</sup> in Louisiana law — the petitory, possessory, and jactitory actions. The selection of the proper action depended on the rights asserted by the plaintiff as well as the factual situation. When ownership was at issue and the individual out of possession was asserting his ownership rights against the one in possession, the petitory action lay.<sup>2</sup> When possession was at issue, the possessory or

1. Article 4 of the Louisiana Code of Practice defines a real action as "that which relates to claims made on immovable property, or to the immovable rights to which they are subjected. The object of this action is the ownership or the possession of such property; and they are therefore subdivided into petitory and possessory actions."

Article 41 states: "A real action lies against him who, without having contracted any obligations toward the plaintiff, is nevertheless bound towards him, as possessor of the immovable property of which that plaintiff claims the ownership or the possession, or on which he claims to exercise some immovable right."

2. "The petitory action is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person having

jactitory action lay, depending on the circumstances.<sup>3</sup> The possessory action could be brought by one who had been in possession for more than one year and had been actually, or corporeally, disturbed in his possession.<sup>4</sup> On the other hand, the jactitory action was available to one in possession who had suffered a legal, or fictitious disturbance.<sup>5</sup>

The only situation not covered by one of these three actions was that in which none of the claimants were in possession of the property. Prior to 1908, the petitory and jactitory actions

---

the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it, to which he is entitled." LA. CODE OF PRACTICE, art. 5 (1870).

3. "A possessory action is that by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted." LA. CODE OF PRACTICE art. 6 (1870).

"The possessory action, which is a branch of real actions, may be brought by any possessor of a real estate, or of a real right, who is disturbed either in the possession of the estate or in the enjoyment of the right, against him who causes the disturbance, in order to be maintained in, or restored to the possession, whether he has been evicted or disturbed; provided his possession be accompanied by the qualifications hereafter required." LA. CODE OF PRACTICE art. 46 (1870).

Under French law, CODE DE PROCÉDURE CIVILE arts. 23-27 (1806), from which Louisiana's possessory action is taken, the possessory action was broad enough to embrace a disturbance in fact or a disturbance in law. However, Article 52 of the Louisiana Code of Practice, covering the disturbance in law, was so confusing that it made it impossible to follow French law on the possessory action where there was a disturbance in law. Instead, Louisiana took the jactitory action from Spanish law to cover the situation where there was a disturbance in law. Under Spanish law, the jactitory action lay to prevent defamation of person or property, whether movable or immovable. See *Livingston v. Heerman*, 9 Mart. (O.S.) 656; 713 (La. 1821): "The law, par. 3, tit. 2, l. 46, declares that no person can be compelled to bring suit, except in particular cases, wherein the judge may, by law, oblige him to do it; as when a man publicly says, that another is his slave, etc. in these and like cases, the person injured may petition the judge to oblige the defamer to bring suit, and prove what he has said, or to retract, or to make such reparation as the judge shall deem just; if he refuses to bring the suit, the party aggrieved shall be forever absolved from the charge made against him. This law applies, according to the Spanish authority, to defamation respecting property, as well as person, and that, whether it be movable or immovable: Gregorio Lopez, on the above-cited law, n. 2: *Elizondo Practico Universal*, vol. 2, p. 136." We have limited the Spanish action to protect possession where there is a defamation or disturbance in law of real property.

4. LA. CODE OF PRACTICE art. 49 (1870) sets forth the essentials necessary to bring the possessory action. While the article requires the real and actual possession of the property when the disturbance occurs, our courts have not interpreted the article literally in requiring an actual possession. They have held that civil possession is sufficient, provided it has been preceded by actual physical possession. See *Ciaccio v. Hartman*, 170 La. 949, 129 So. 540 (1930); *Industrial Lumber Co. v. Farque*, 162 La. 793, 111 So. 166 (1927); *Chamberlain v. Abadie*, 48 La. Ann. 587, 19 So. 574 (1896); *Searles v. Costillo*, 12 La. Ann. 203 (1857); *Ellis v. Prevost*, 19 La. 251 (1841). See also *Albert Hanson Lumber Co. v. Baldwin Lumber Co.*, 126 La. 347, 52 So. 537 (1910), and cases cited therein.

5. See *Bell v. Saunders*, 139 La. 1037, 72 So. 727 (1916); *Dalton v. Wickliffe*, 35 La. Ann. 355 (1883); *Short v. Trustees*, 11 La. Ann. 174 (1856); *Millaudon v. McDonough*, 18 La. 102 (1841); *Livingston v. Heerman*, 9 Mart. (O.S.) 656 (La. 1821).

were relied upon in these circumstances,<sup>6</sup> but neither proved satisfactory.<sup>7</sup> If plaintiff brought the petitory action, he had the burden of proving a valid title.<sup>8</sup> He would lose his case if he could not prove his valid title, even though his title was better than that of his opponent and even though neither of them was in possession. Often, to avoid bearing the burden of proof, plaintiff would bring the jactitory action.<sup>9</sup> If defendant neglected timely to challenge plaintiff's possession but challenged plaintiff's claim, defendant would then bear the burden of proving that his was a valid title.<sup>10</sup> Like the plaintiff in the petitory action, defendant in the jactitory action would lose his case if he could not prove a valid title, even though his title was better than that of his opponent.

Act 38 of 1908 obviously was passed in an attempt to alleviate the inequities existing in this situation and in order to resolve the hiatus existing in the law.<sup>11</sup> The act, now Louisiana Revised Statutes 13:5062, provides:

---

6. *Poland v. Dreyfous*, 48 La. Ann. 83, 18 So. 906 (1896); *Remick v. Lang*, 47 La. Ann. 914, 17 So. 461 (1895); *McConnell v. Ory*, 46 La. Ann. 564, 15 So. 424 (1894); *Dalton v. Wickliffe*, 35 La. Ann. 355 (1883); *Griffon v. Blanc*, 12 La. Ann. 5 (1857); *Short v. Trustees*, 11 La. Ann. 174 (1856); *Millaudon v. McDonough*, 18 La. 102 (1841); *Livingston v. Heerman*, 9 Mart.(O.S.) 656 (La. 1821).

7. What constitutes adequate possession is a substantive question which varies with each type of land according to its usage. *Ciaccio v. Hartman*, 170 La. 949, 129 So. 540 (1930); *Albert Hanson Lumber Co. v. Baldwin Lumber Co.*, 126 La. 347, 52 So. 537 (1910); *Chamberlain v. Abadie*, 48 La. Ann. 587, 19 So. 574 (1896); *Ellis v. Prevost*, 19 La. 251 (1841). Where the issue of possession was tenuous, the plaintiff could obtain a tactical advantage in choosing his action. If the defendant neglected to challenge plaintiff on the issue of possession or simply bore the burden of proof by virtue of the nature of the action, the plaintiff would have obtained an advantage without the court's ever having been called upon to decide the issue of possession.

8. LA. CODE OF PRACTICE art. 44 (1870) states: "The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand." In *Rowson v. Barbe*, 51 La. Ann. 347, 350, 25 So. 139, 140 (1899), the court stated: "It is a principle of law, so familiar as to have become trite, that a plaintiff in a petitory action must recover upon the strength of his own title, not upon the weakness of that of his adversary."

9. A vivid example of this is seen in *Griffon v. Blanc*, 12 La. Ann. 5 (1857), where the plaintiff tried to escape bearing the burden of proof by bringing the action in jactitation. In deciding the question as to who would bear the burden of proof, the court stated: "[W]here the defendant is himself actually in possession, the plaintiff cannot be permitted to change his position with the form of action and escape the burden imposed upon him by Art. 44 of the Code of Practice. In order to recover and turn his adversary out of possession, he must establish his title." *Id.* at 6.

10. See *Remick v. Lang*, 47 La. Ann. 914, 17 So. 461 (1895); *Dalton v. Wickliffe*, 35 La. Ann. 355 (1883); *Short v. Trustees*, 11 La. Ann. 174 (1856); *Livingston v. Heerman*, 9 Mart.(O.S.) 656 (La. 1821).

11. See McMAHON, LOUISIANA PRACTICE 256, n. 15.1 (Supp. 1956): "This statute apparently contemplates that the court will weigh the competing claims of ownership of the parties; and that the plaintiff has only the burden of proving a better title than defendant . . . . The reason why such a heavy burden of proving

*"Action to establish title when neither claimant in possession.* In all cases where two or more persons lay claim to land by recorded title and where neither of the claimants are in the actual possession of the land so claimed, either of the claimants may bring suit against one or all the adverse claimants, and for that purpose may join one or more adverse claimants in the same suit as defendants, to have the titles to the land adjudicated upon by the court having jurisdiction of the property. It shall not be necessary for the plaintiff to allege or prove possession in himself or the defendants. This action shall be known as the action to establish title to real estate. The judge shall decide which of the claimants are the owners of the land in dispute, provided such judgment shall in no case be *res judicata* as to persons not made parties to the suit."

Under virtually every system of law, the lawful possessor is entitled to remain in possession until the lawful owner proves his ownership.<sup>12</sup> Thus, *possession* becomes the arbiter of the burden of proof. This is clearly the criterion which governs the imposition of the burden of proof in our petitory, possessory, and jactitory actions. Under these actions, the claimant disturbing one in possession or asserting his ownership rights against one in possession must carry the burden of proof. Under the action to establish title, since neither party is in possession, no necessity exists for the plaintiff to carry the burden of proving a valid title.

The Supreme Court, following the enactment of the 1908 act, took the view that the plaintiff in the action to establish title had

---

a valid title is visited upon the plaintiff in a petitory action is because the defendant admittedly has the legal possession of the property. In the action to establish title admittedly neither party is in possession, and there is not the same necessity for imposing the heavy burden of proof upon plaintiff as in the petitory action."

12. The following statement is made in 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 29 (2d ed. 1899): "In the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that we may almost say that the whole system of our land law was law about seisin and its consequences. Seisin is possession." *Id.* at 49: "In order to give an adequate protection to ownership, it has been found necessary to protect possession. To prove ownership is difficult, to prove possession comparatively easy."

Roman law had maintained that "property or ownership is, roughly, title: possession is, roughly, actual enjoyment . . . . Their absolute distinctness is brought out . . . in the rule which . . . was maintained to the last in Roman law, that where possession was the matter in issue, title was immaterial: the defendant could not set it up in defence. Ownership being thus clearly conceived, the Romans saw no difficulty in proof of it." BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 62 (1952).

only the burden of proving a better title than the defendant in order to win.<sup>13</sup> However, the trend of later cases has been to impose on the plaintiff as great a burden of proof as he would bear in a petitory action, that is, the burden of proving a valid title in himself.<sup>14</sup> The confusion of the action to establish title with the petitory action has beclouded the evident purpose of Act 38 of 1908 — to relieve the claimant of having to bear as great a burden of proof when his adversary is not in possession as when the adversary is in possession of the property in question. Otherwise, if the burden of proof were to remain the same as that required of the plaintiff in a petitory action, it is difficult to see what practical purpose the act has served. Should the court have occasion to re-examine its position regarding this matter, it is suggested that the act be considered in the light of its original purpose.

*Patsy Jo McDowell*

#### TORTS — INJURY WHILE SPORT FISHING — RES IPSA LOQUITUR

Plaintiff was injured by a lure cast by defendant while both parties were fishing from a boat. In a suit against defendant and his liability insurer the plaintiff alleged negligence in specified respects. Defendant denied negligence and pleaded in the alternative that plaintiff had assumed the risks incident to the sport. The testimony of both parties was equally unilluminating. Plaintiff testified that he did not know what had happened, had seen nothing, and defendant testified that he knew only that he had made an overhand cast and, feeling an obstruction, turned to see the hooks lodged in plaintiff's cheek. In denying recovery for negligence, the trial court held that plaintiff had failed to prove his case with the required certainty.<sup>1</sup> On appeal, plaintiff conceded this failure but urged that recovery was nevertheless in order under the doctrine of *res ipsa loquitur*. The court of

---

13. See the expressions of the court in support of this view: *Metcalf v. Green*, 140 La. 950, 74 So. 261 (1916); *Baltimore v. Lucher*, 135 La. 873, 66 So. 253 (1914); *Quaker Realty Co. Praying for Confirmation of Title*, 10 Orl. App. 79 (La. App. 1914). See also *Doiron v. Vacuum Oil Co.*, 164 La. 15, 113 So. 748 (1927); *Ellis v. Louisiana Planting Co.*, 146 La. 652, 83 So. 885 (1920).

14. See *Albritton v. Childers*, 225 La. 900, 74 So.2d 156 (1954); *Stockstill v. Choctaw Towing Corp.*, 224 La. 473, 70 So.2d 93 (1953); *Dugas v. Powell*, 197 La. 409, 1 So.2d 677 (1941).

1. Plaintiff recovered \$154.65, covering medical and hospital expenses due under policy provisions establishing compensation for injury to another resulting from insured's activities.