

# Louisiana Law Review

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Volume 23 | Number 2

*The Work of the Louisiana Appellate Courts for the*

*1961-1962 Term: A Symposium*

*February 1963*

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## Private Law: Prescription

Alvin B. Rubin

Harry R. Sachse

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### Repository Citation

Alvin B. Rubin and Harry R. Sachse, *Private Law: Prescription*, 23 La. L. Rev. (1963)

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## PRESCRIPTION

*Alvin B. Rubin\** and *Harry R. Sachse\*\**

## ACQUISITIVE

The Civil Code provides that the ownership of immovables is prescribed for by thirty years possession without need of title or good faith.<sup>1</sup> The possession needed for this sort of prescription must be continuous and uninterrupted; it must be public, unequivocal, and under the title of owner.<sup>2</sup> The Civil Code further provides that the possession must begin as corporal possession but, if it has not been interrupted, it can be preserved by external and public signs, announcing the possessor's intention to preserve the possession of the thing, such as the keeping up of roads and levees, and the payment of taxes.<sup>3</sup> However, Article 3503 admonishes that the prescription of thirty years shall be restricted within just limits, and the property acquired shall not extend beyond that which has been actually possessed by the person pleading the prescription.

In *Menefee v. Arkansas-Louisiana Gas Co.*,<sup>4</sup> the defendant in a petitory action attempted to show that it had acquired ownership of the property in question by the prescription of thirty years. The defendant was able to show that for more than thirty years it had paid the taxes on the property and had executed various mortgages, leases, and sales of mineral rights, but was unable to show to the court's satisfaction that it had ever corporally possessed the entire tract of land. Nor was it able to show the bounds of the land which may have been corporally possessed. Under these facts, the Court of Appeal, Second Circuit, affirmed the trial court's decision rejecting the defendant's claim of prescription. Since the commencement of corporal possession of a definite area had not been shown, the provisions of Articles 3501 and 3502 as to the continuation of possession by external and public signs were not applicable.

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\*Special Lecturer in Law, Louisiana State University; member, Baton Rouge Bar.

\*\*Special Lecturer in Law, Louisiana State University; member, Baton Rouge Bar.

1. LA. CIVIL CODE art. 3499 (1870).

2. *Id.* art. 3500.

3. *Id.* art. 3501.

4. 141 So. 2d 58 (La. App. 2d Cir. 1962).

*Airway Homes, Inc. v. Boe*,<sup>5</sup> also involved a petitory action. The defendant attempted to defend his possession by showing thirty years acquisitive prescription. The case is primarily noteworthy for the means employed by the plaintiff to show that the defendant had not possessed the property for thirty years. The plaintiff was able to obtain photographic maps of the area in question made by the United States Corps of Engineers in 1933, 1945, and 1955. The testimony of an expert in photogrammetry showed that, while the property contained a number of structures and improvements in 1955, and some as early as 1945, the 1933 map showed that the property was unimproved. Lawyers have become familiar with the utility of photographic evidence in many fields of the law, and the *Airway Homes, Inc.* case shows its usefulness in matters of acquisitive prescription.

In *Matthews v. Carter*,<sup>6</sup> the defendant in a petitory action lost his plea of thirty years acquisitive prescription on the ground that he had not shown that he had possessed as owner. Clearly, one must possess as owner to acquire property by prescription. This is true of the prescriptions of ten years<sup>7</sup> and thirty years,<sup>8</sup> and of the prescription of movables.<sup>9</sup> It is a general principle of civil law that possession must be as owner or it is merely detention.<sup>10</sup>

Article 3488 of the Civil Code, under the section on the prescription of ten years, provides that a person is presumed to have possessed as master and owner unless it appears that the possession began in the name of and for another. The articles on the prescription of thirty years follow immediately after the articles on ten years prescription, and do not repeat the general principles found in the section of the Code on possession as such,<sup>11</sup> or those stated in the section on ten years prescription. However, Article 3505, in the section on thirty years prescription, provides that:

“All the rules established in the preceding paragraph with regard to the prescription of 10 years are applicable to the

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5. 140 So. 2d 264 (La. App. 4th Cir. 1962).

6. 138 So. 2d 205 (La. App. 2d Cir. 1962).

7. LA. CIVIL CODE art. 3490 (1870).

8. *Id.* art. 3501.

9. *Id.* art. 3506.

10. *Id.* art. 3441. Possession as owner is contrasted with precarious possession or possession for another. For example, a tenant possesses for his landlord; the possessor is the landlord; the tenant is not a possessor, properly speaking.

11. *Id.* arts. 3499-3505.

prescription of 30 years, except in the provisions contained in the present paragraph which are contrary to or incompatible with them."

It could hardly be said that there is anything in the thirty years prescription articles incompatible with the provision in the ten years prescription articles that a person is presumed to have possessed as master and owner, unless it appears that the possession began in the name of and for another.

In the instant case, there was no testimony to indicate that the defendant was a tenant, or possessed by the knowing sufferance of another. The court determined that the defendant did not possess as owner, stating:

"In view of the undisputed fact that he had no title to any of the property prior to 1925, he could only have occupied it by the permission and sufferance of the then record owner . . . ."<sup>12</sup>

Whenever the thirty years prescription is at issue, the person urging it will have no title. This statement of the court virtually declares a presumption that the possessor does not possess as owner whenever the prescription of thirty years is invoked. The court justifies this conclusion by a statement from *Corpus Juris Secundum* to the effect that in a claim of adverse possession every presumption is against the claimant, and the claimant must prove that he possessed as owner. The court made no reference to Articles 3488 or 3505 of the Louisiana Civil Code which appear to establish the opposite presumption. It is unfortunate to see *Corpus Juris Secundum*, an unofficial compilation of the laws of no particular jurisdiction, substituted for the clear language of the Louisiana Civil Code.

Fortunately, the decision was not unanimous. Judge Gladney dissented on the ground that it had been shown that the defendant's possession of the land in dispute began immediately after his purchase of a contiguous tract which indicated that the possession of both tracts was begun and continued in the capacity of owner. This conclusion seems correct in light of Articles 3488 and 3505 of the Code.

The Louisiana jurisprudence has long held that, as a general rule, owners in indivision cannot acquire by prescription the

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12. *Matthews v. Carter*, 138 So.2d 205, 208 (La. App. 2d Cir. 1962).

rights of their co-owners to property held in common. There is a well-established exception to this rule where the possessing co-owner gives notice to the other owner or owners that he intends to possess contrary to them. It has also been established in the Louisiana jurisprudence that, when property held in common is lost at a tax sale and redeemed by one of the co-owners, the redemption is presumed to be for the benefit of all the co-owners. These principles are ably discussed by Judge Landry of the First Circuit in *British American Oil Producing Co. v. Grizzaffi*.<sup>13</sup> Because of the careful presentation of the law and the extensive citations, this opinion should be useful to anyone concerned with these issues.

With regard to the problem of *Matthews v. Carter*, discussed above, it should be noted that the presumption of possession as owner is not applicable where co-owners are involved. A reason for this, often stated by the courts, is that each co-owner has a right to possession of the property and, therefore, the normal acts of possession indicate only usage of the co-ownership rather than an adverse possession of the unowned interest. As pointed out by the opinion on rehearing in the *British American Oil Producing Co.* case, this conclusion is fortified by the provisions of Article 3489<sup>14</sup> to the effect that when a person's possession is commenced for another it is supposed (that is to say presumed) to continue always under the same title, unless there be proof to the contrary.

#### LIBERATIVE

In a suit for damages for malicious prosecution, based on allegations contained in pleadings filed in a judicial proceeding, liberative prescription obviously should not begin to run until the prior suit has been terminated. Not until that time has it been determined in the prior suit whether or not the allegations were in fact true.<sup>15</sup> Where the suit is for damages for both libel and malicious prosecution, the same rule has been applied to

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13. 135 So.2d 559 (La. App. 1st Cir. 1962).

14. *Id.* at 569. There is an error in the publication of the per curiam opinion. Article 3489 is paraphrased, but the numerical reference is to Article 3481. The paraphrasing and the context make it clear that Article 3489 was intended.

15. This is based on the rule that a cause of action for malicious prosecution does not accrue until termination of the prosecution. See *Howard v. Coyle*, 163 La. 257, 111 So. 697 (1927). The basic rule is modified by the Code of Civil Procedure article to permit assertion of a claim for malicious prosecution as a reconventional demand.

both claims,<sup>16</sup> and was again applied in *Giordano v. Tullier*,<sup>17</sup> by the Court of Appeal for the Fourth Circuit. The court indicated that no distinction had been made by the jurisprudence between claims for libel and those for malicious prosecution, and therefore were the suit for defamatory remarks contained in a legal pleading alone, liberative prescription would begin only on final termination of that suit.<sup>18</sup>

*Reserve Insurance Co. v. Fabre*<sup>19</sup> should serve as a reminder to the insurance bar that a collision insurer does not become subrogated to the rights of its insured until it has made payment to the insured. In the case under discussion, the insured's automobile was damaged while being driven by a third party. A dispute arose, resulting in a suit by the insured against the insurance company. The driver of the car was made a third party defendant. This suit was eventually dismissed on an exception to the jurisdiction. Prior to the dismissal, but more than one year after the date of the accident, the insurance company paid its insured and brought a separate suit against the driver of the car. The driver filed a plea of prescription on the ground that the insurance company's right of action against him did not arise until it had paid its insured and become subrogated to the insured's right, and that the insured's rights against him had prescribed prior to the payment and subrogation. The lower court held for the insurance company, evidently on the grounds that filing the third party action interrupted prescription. The court of appeal reversed, holding that the insurance company had no right of action against the third party until it had paid its insured, and, therefore, the third party petition did not serve to interrupt prescription.

The Court of Appeal for the Second Circuit held that liberative prescription against a claim for workmen's compensation for occupational disease does not begin to run until the employee has knowledge of the connection between his disease and his employment. Not until that time does the disease manifest itself within the meaning of the statute.<sup>20</sup>

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16. *Carnes v. Atkins Brothers*, 123 La. 26, 48 So. 572 (1909).

17. 139 So.2d 15 (La. App. 4th Cir. 1962).

18. That was the conclusion of the court in *Manuel v. Deshotels*, 160 La. 652, 107 So. 478 (1926).

19. 140 So.2d 438 (La. App. 1st Cir. 1962).

20. *Ludlam v. International Paper Co.*, 139 So.2d 67 (La. App. 2d Cir. 1962). See also section on *Workmen's Compensation*, p. 357 *infra*.