

# Civil Law Property - Tacking Without Juridical Link

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### Repository Citation

Gordon E. Rountree, *Civil Law Property - Tacking Without Juridical Link*, 24 La. L. Rev. (1964)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol24/iss4/12>

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be able to force partition of those interests.<sup>17</sup> Had the court recognized that holding in common referred to elements of ownership, the plaintiff would have been able to partition the entire property since his interest in perfect ownership gave him elements in common with all co-owners including the usufructuary.

It is submitted that Louisiana courts should adopt the element approach to holding in common. Partition is the most logical solution to the intolerable management problems which can arise when perfect owners and usufructuaries, each with equal rights to use the property,<sup>18</sup> cannot agree as to the manner in which the property is to be utilized. Under the element criterion either the perfect ownership or usufructuary could force partition of the usufruct. It is true that under the code provision the same right of partition could not be denied the naked owner even though there is no compelling management consideration. In answer to the countervailing consideration that perfect owners should not be forced to dismember their titles, it may be observed that a perfect owner who desired to avoid the dismemberment of his title resulting from partition of the usufruct and naked ownership alone would be afforded ample protection by his right to reconvene against naked owners and usufructuaries for a partition of the entire property. The French adoption of the element interpretation of holding in common clearly indicates that this approach is available under the Louisiana code provision.<sup>19</sup> It is submitted that the necessity for partition to resolve management conflicts makes it clearly desirable that Louisiana adopt the concept that those who possess the same elements of ownership hold in common.

Charles A. Snyder

#### CIVIL LAW PROPERTY — TACKING WITHOUT JURIDICAL LINK

Plaintiff sought to be declared owner of a 38-acre tract of land by thirty years acquisitive prescription. His father ac-

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17. See notes 9 and 11 *supra*.

18. The perfect owners, through LA. CIVIL CODE art. 491 (1870), and the usufructuary, through *id.* art. 533, have the right to enjoy the full use of the property to the extent of their interest.

19. *But cf. id.* art. 1303. An argument is also possible, though not acceptable to the author, that the provision in *id.* art. 1309—"Thus, usufructuaries of the same estate can institute among themselves the action of partition"—is the only manner in which the usufructuary is able to partition, and thus is a specific rejection of the element criterion.

quired McManor Plantation by sale in 1920 and possessed as owner the now disputed 38 acres adjacent to McManor until his death in 1937. The succession judgment awarded one-third of the plantation to the plaintiff's mother and two-thirds to the surviving eight children. Plaintiff continued his father's possession of the disputed acreage, thus preserving his own and his coheirs' rights. He acquired his coheirs' interests in McManor by sale and donation in 1945 and continued possession of the disputed property. Plaintiff claimed ownership of the entire 38 acres by virtue of tacking his coheirs' interests in his father's possession to his own one-twelfth interest. The plea of prescription, sustained below, was rejected by the court of appeal for lack of juridical link between plaintiff and his coheirs.<sup>1</sup> The Louisiana Supreme Court reversed. *Held*, the general descriptions of the property conveyed in the 1945 transactions were sufficient to permit tacking of possession although the disputed acreage was not mentioned therein, nor included within the specific descriptions of the property conveyed.<sup>2</sup> *Noel v. Jumonville Pipe & Machinery Co.*, 158 So. 2d 179 (La. 1963).

The Civil Code allows the adverse possessor to add the possession of his author in title to his own possession in order to complete the prescriptive period.<sup>3</sup> According to the jurisprudence, the possession of a transferor may be joined to that of his transferee only if the transferor's interest is conveyed by an instrument translatif of title. This joinder of separate possessions is called *tacking*.<sup>4</sup> An heir acquires the succession

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1. *Noel v. Jumonville Pipe & Machinery Co.*, 148 So. 2d 891 (La. App. 1st Cir. 1962).

2. *Id.*, 158 So. 2d 179, 186 (La. 1963): "While the property which forms the subject matter of this suit is not specifically described in any of the transactions hereinabove recited, nevertheless, the property which was intended to be transferred and which was actually transferred and delivered is described as 'a certain sugar plantation known as McManor Plantation, situated in the Parish of Ascension, . . .' which in fact included the property in controversy."

3. LA. CIVIL CODE art. 3493 (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." Article 3493 is identical with article 2235 of the French Civil Code. 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 1916 (1942); LA. CIVIL CODE art. 3494 (1870).

4. See, e.g., *Stutson v. McGee*, 241 La. 646, 130 So. 2d 403 (1961); *Buckley v. Catlett*, 203 La. 54, 13 So. 2d 384 (1943); *Harang v. Golden Ranch Land & Drainage Co.*, 143 La. 982, 79 So. 768 (1918); *Sibley v. Pierson*, 125 La. 478, 51 So. 502 (1909); *Hadwin v. Sledge*, 116 So. 2d 114 (La. App. 2d Cir. 1959); *Roberson v. Green*, 91 So. 2d 439 (La. App. 2d Cir. 1956); *Courville v. Eckart*, 50 So. 2d 325 (La. App. 1st Cir. 1951); 1 *PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* nos. 2673, 2678 (1959); *Comment*, 8 LA. L. REV. 105-07 (1947).

of the deceased by operation of law.<sup>5</sup> It is clear from the Code and jurisprudence that he merely continues the possession of his ancestor and does not commence a new and separate possession of his own.<sup>6</sup> Therefore, the heir does not tack his independent possession to that of his ancestor, but simply continues the same possession the deceased commenced.<sup>7</sup> When the deceased leaves several heirs, they become owners in indivision<sup>8</sup> and possession by one coproprietor is possession on behalf of all.<sup>9</sup> Well-established jurisprudence supports the proposition that when one possesses beyond the description in his deed but sells only by the deed, the vendee cannot tack his adverse possession to his vendor's for prescriptive purposes because there is no privity of contract or juridical link<sup>10</sup> as to the adversely pos-

5. LA. CIVIL CODE arts. 940, 941 (1870).

6. *Id.* art. 942: "The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession." *Id.* art. 943. See, e.g., *Lee v. Harris*, 209 La. 730, 25 So.2d 448 (1946); *LeBleu v. Hanszen*, 206 La. 53, 18 So.2d 650 (1944); *Spencer, Adm'r v. Lewis, Adm'r*, 39 La. 316, 1 So. 612 (1887); *Griffon v. Blanc*, 12 La. Ann. 5 (1857); *A. M. Edwards Co. v. Dunnington*, 58 So.2d 225 (La. App. 1st Cir. 1952); *Chrichton v. Krouse*, 142 So. 635 (La. App. 2d Cir. 1932); 1 *PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* nos. 2661, 2674 (1959); Comment, 8 LA. L. REV. 105, 107-09 (1947).

7. See note 6 *supra*. Tacking results when two or more separate possessions are joined together to complete the prescriptive period. A possessor by particular title commences a new and separate possession of his own and does not continue the same possession his author in title commenced. LA. CIVIL CODE arts. 3493, 3494 (1870). Article 3493 was article 3459 in the Code of 1825. It is the exact counterpart to article 2235 of the FRENCH CIVIL CODE. 3 *LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 1916* (1942). See, e.g., *Stutson v. McGee*, 241 La. 646, 130 So.2d 403 (1961); *Hadwin v. Sledge*, 116 So.2d 114 (La. App. 2d Cir. 1959); *Roberson v. Green*, 91 So.2d 439 (La. App. 2d Cir. 1956); 1 *PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* nos. 2673, 2678 (1959); Comment, 8 LA. L. REV. 105, 109-12 (1947).

8. LA. CIVIL CODE art. 1292 (1870).

9. Succession of Seals, 243 La. 1056, 150 So.2d 13 (1963); *Lee v. Jones*, 224 La. 231, 69 So.2d 26 (1953); *Sanders de Hart v. Continental Land & Fur Co.*, 205 La. 569, 17 So.2d 827 (1944); *Hill v. Dees*, 188 La. 708, 178 So. 250 (1937); *Liles v. Pitts*, 145 La. 650, 82 So. 735 (1919); *Watkins v. Zeigler*, 147 So.2d 435 (La. App. 2d Cir. 1962); *British American Oil Producing Co. v. Grizzaffi*, 135 So.2d 559 (La. App. 1st Cir. 1961).

10. LA. CIVIL CODE arts. 3493, 3494 (1870). Louisiana jurisprudence adopted the following definition of *privity* from 1 R.C.L. 718 (1914): "Privity denotes merely a succession of relationships to the same thing, whether created by deeds or by other act, or by operation of law. If one by agreement surrenders his possession to another, and the acts of the parties are such that the two possessions actually connect, the latter commencing at or before the former ends, leaving no interval for the constructive possession of the true owner to intervene, such two possessions are blended into one. . . ." In *Stutson v. McGee*, 241 La. 646, 659, 130 So.2d 403, 407 (1961), while interpreting the application of the above quoted definition in the *Harang* and *Rector* cases, the court said: "As we read this definition in connection with the observations of the Court in the mentioned two cases, as well as with the authorities therein cited, it is clear to us

sessed property.<sup>11</sup> Furthermore, the courts hold that when the general and particular description in a deed conflict, the particular description prevails.<sup>12</sup>

In the instant case, the Supreme Court speaks in terms of plaintiff tacking his possession to his father's adverse possession.<sup>13</sup> The term tacking supposes two or more separate pos-

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that the reference to 'other act' . . . was intended to mean 'other instrument', such as an act of donation (as opposed to a deed), not merely to the 'actions' of parties." *E.g.*, *Emmer v. Rector*, 175 La. 82, 143 So. 11 (1932); *Harang v. Golden Ranch Land & Drainage Co.*, 143 La. 982, 79 So. 768 (1918); *Richey v. Hill*, 84 So. 2d 291 (La. App. 2d Cir. 1955); *Merritt v. Smith*, 35 So. 2d 817 (La. App. 2d Cir. 1948); *Ford v. Ford*, 34 So. 2d 301 (La. App. 1st Cir. 1948).

11. LA. CIVIL CODE arts. 3493, 3494, 3500 (1870). See *Stutson v. McGee*, 241 La. 646, 130 So. 2d 403 (1961); *Thurman v. Hogg*, 225 La. 263, 72 So. 2d 500 (1954); *Buckley v. Catlett*, 203 La. 54, 13 So. 2d 384 (1943); *Emmer v. Rector*, 175 La. 82, 143 So. 11 (1932); *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482 (1924); 1 R.C.L. 720 (1914) is quoted in *Harang v. Golden Ranch Land & Drainage Co.*, 143 La. 982, 1019, 79 So. 768, 780 (1918): "Several successive possessions cannot be tacked for the purpose of showing a continuous adverse possession, where there is no privity of estate or connection of title between the several occupants." In the landmark case of *Sibley v. Pierson*, 125 La. 478, 514, 51 So. 502, 514 (1910) the court held: "[A]nd such vendee cannot, for the purpose of aiding himself in the acquisition by prescription of property not included in his title, add his vendor's possession to his own, there being no privity between him and his vendor in that respect." *Prevost's Heirs v. Johnson*, 9 Mart. (O.S.) 170 (La. 1820); *Hadwin v. Sledge*, 116 So. 2d 114 (La. App. 2d Cir. 1959); *Isacks v. Deutsch*, 114 So. 2d 746 (La. App. 1st Cir. 1959). In *Roberson v. Green*, 91 So. 2d 439, 447 (La. App. 2d Cir. 1956) the court said: "There was no privity of estate nor of contract between the Bettells and their predecessors in title inasmuch as the deeds of conveyance, . . . specifically described the property conveyed and did not include a description of any portion of the disputed tract." A factual situation quite similar to the instant case is found in *Finley v. Morgan*, 80 So. 2d 196, 198 (La. App. 2d Cir. 1955), in which the court said: "Inasmuch as in defendant's deeds to the adjoining property no reference is made to the property possessed beyond such instruments, there is no privity of contract between plaintiff and his vendors." *Richey v. Hill*, 84 So. 2d 291 (La. App. 2d Cir. 1955); *Sattler v. Pellichino*, 71 So. 2d 689 (La. App. 1st Cir. 1954); *Courvelle v. Eckart*, 50 So. 2d 325 (La. App. 1st Cir. 1951); *Lee Lumber Co. v. Melcher*, 43 So. 2d 632 (La. App. 2d Cir. 1950); *Beam v. Dudding*, 43 So. 2d 73 (La. App. 1st Cir. 1949); *Merritt v. Smith*, 35 So. 2d 817 (La. App. 2d Cir. 1948); *Ford v. Ford*, 34 So. 2d 301 (La. App. 1st Cir. 1948); *Blades v. Zinsel*, 130 So. 199 (La. App. 1st Cir. 1930); *Broussard v. Broussard*, 8 La. App. 635 (1st Cir. 1928); *McEvoy v. Porbes*, 1 Orl. App. 56 (La. App. Orl. Cir. 1903); 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 2673, 2678 (1959); *The Work of the Louisiana Supreme Court for the 1960-1961 Term—Prescription*, 22 LA. L. REV. 326, 329 (1962); Comment, 8 LA. L. REV. 105, 107 (1947).

12. LA. CIVIL CODE art. 1945 (1870). In *Snelling v. Adair*, 196 La. 624, 635, 199 So. 782, 785 (1941), the court quoted from 72 A.L.R. 410 (1931) and said: "It is the general rule that: 'Where a particular and a general description in a deed conflict, and are repugnant to each other, the particular will prevail unless the intent of the parties is otherwise manifested on the face of the instrument.'" See *Iselin v. C. W. Hunter Co.*, 173 F.2d 388 (5th Cir. 1949); *Arab Corp. v. Bruce*, 142 F.2d 604 (5th Cir. 1944); *Bender v. Chew*, 129 La. 849, 56 So. 1023 (1911); *Sabatier v. Bowie Lumber Co.*, 129 La. 658, 56 So. 628 (1911); *Fortier v. Soniat*, 143 So. 2d 91 (La. App. 4th Cir. 1962); *Properties, Inc. v. Beckman*, 77 So. 2d 161 (La. App. 1st Cir. 1955).

13. 158 So. 2d at 184: "From the above law and jurisprudence, we are impelled to conclude that 'privity' existed between Robert E. Noel and his children

sessions which are joined together to complete the prescriptive period.<sup>14</sup> Since the heir simply continues the *same* possession the deceased commenced,<sup>15</sup> it would seem that the term tacking should not be utilized to describe this continuance of possession, but should be reserved for situations in which two or more separate possessions exist.<sup>16</sup>

More significantly, plaintiff was allowed to tack his coheirs' possessory interests to his own. Although the disputed acreage was not included in the specific descriptions of the 1945 conveyances, nor mentioned in the general descriptions, the court construed the deeds so to include the 38 acres in the general descriptions of the property transferred.<sup>17</sup> If, as appears to be the case, the conveyances did not purport to transfer an interest in the disputed property, there should be no tacking since there was no juridical link between the transferors and the trans-

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with respect to the possession of the disputed property, and they were entitled to *join their possession* to that of their *ancestor*." (Emphasis added.) Reference to the father as *ancestor* in the preceding passage leads one to believe the court is again referring to the father as *ancestor* in its statement, *id.* at 186: "Frank S. Noel is entitled to *tack* his possession to that of his *ancestors* and authors in title." (Emphasis added.) The dissent, *id.* at 188, refers to plaintiff's inheritance of possession from his father as follows: "[A]nd, by *tacking* his father's possession to his own . . ." (Emphasis added.)

14. LA. CIVIL CODE art. 3493 (1870). See, *e.g.*, Stutson v. McGee, 241 La. 646, 130 So. 2d 403 (1961); Hadwin v. Sledge, 116 So. 2d 114 (La. App. 2d Cir. 1959); Roberson v. Green, 91 So. 2d 439 (La. App. 2d Cir. 1956); 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 2673, 2678 (1959); Comment, 8 LA. L. REV. 105, 109-12 (1947).

15. See note 6 *supra*.

16. In Griffon v. Blanc, 12 La. Ann. 5 (1857) the court, in reference to the successor's position, quoted from Marcadé: "[I]n spite of their personal good faith, they are possessors in bad faith, if their author was in bad faith, and vice versa. They have no new title." Planiol says: "If the deceased being in good faith, had a right to prescribe in from ten to twenty years, his heir may complete the prescriptive period within this delay, although he personally was in bad faith. On the contrary, if the deceased, being in bad faith, could not prescribe except by thirty years, his heir will be in the same position even if he personally is in good faith." 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 2674 (1959); Comment, 8 LA. L. REV. 107-09 (1947). In other words, if the ancestor dies as a bad faith possessor, his heir cannot prescribe in ten years, even though he is a good faith possessor. He *continues* the same possession the deceased commenced and must wait thirty years. *Tacking* supposes a new and separate possession from that of one's predecessor. If *tacking* were used to describe the *continuance* of possession by the heir, a fortiori, the heir as a good faith possessor *could* prescribe in ten years even though his ancestor would have been forced to wait thirty years. This would seem to be an incorrect result.

17. 158 So. 2d at 186: "While the property which forms the subject matter of this suit is not specifically described in any of the transactions hereinabove recited, nevertheless, the property which was intended to be transferred and which was actually transferred and delivered is described as 'A certain sugar plantation known as McManor plantation, situated in the Parish of Ascension, . . .' which in fact included the property in controversy."

ferree.<sup>18</sup> It was well settled prior to the instant case that regardless of the vendor's interest in the adjacent property, whether it be perfect ownership or merely adverse possession, the vendee could acquire the vendor's rights to the property unless the terms of the deed included such property.<sup>19</sup> Even if the disputed acreage could be said to have been included within the general description, "McManor Plantation," it seems there still should be no tacking for when general and particular descriptions in a deed conflict, it is well established that the particular description prevails.<sup>20</sup> It would seem to follow that had the court adhered to the code provisions and jurisprudence,<sup>21</sup> it would have held that the 1945 transactions had no effect on the disposition of the disputed acreage. If this conclusion had been reached, it appears that the plaintiff's interest in the adverse possession of the disputed property would not have exceeded the undivided one-twelfth interest which he inherited from his father; and he, at best, would have been declared owner of only this undivided one-twelfth interest in the property by thirty-years acquisitive prescription.<sup>22</sup>

It is submitted that the *Jumonville* decision is not in accord with the code provisions or jurisprudence of this state. For tacking, the jurisprudence requires a deed translative of title which purports to convey the transferor's interest in the adversely possessed property to the transferee. It would seem that if the deed does not include an adequate description of the property allegedly tacked, it should at least include some reference to or mention of the property in question. It appears that the deeds relied upon in the instant case did not include the adversely possessed property; if so, it is doubtful that these deeds were translative of title and that tacking could occur.

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18. See note 11 *supra*.

19. LA. CIVIL CODE arts. 3493, 1945 (1870). See, e.g., *Stutson v. McGee*, 241 La. 646, 130 So. 2d 403 (1961); *Richardson & Bass v. Board of Levee Commissioners of the Orleans Levee District*, 226 La. 761, 77 So. 2d 32 (1954); *Pierce v. Hunter*, 202 La. 900, 13 So. 2d 259 (1943). In *Snelling v. Adair*, 196 La. 624, 640, 199 So. 782, 787 (1941) the court said: "It is the settled jurisprudence of this state that a deed, in order to be translative of title to real estate, must contain such a description as to properly identify the property." *Hunter v. Forrest*, 195 La. 973, 197 So. 649 (1940); *Bendernagel v. Foret*, 145 La. 115, 81 So. 869 (1919).

20. See note 12 *supra*.

21. See note 11 *supra*.

22. LA. CODE OF CIVIL PROCEDURE art. 3652 (1960) in part says: "A petitory action may be brought by a person who claims the ownership of only an undivided interest in the immovable property or real right."