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Lee Hargrave

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PRESCRIPTION

*Lee Hargrave**

ACQUISITIVE PRESCRIPTION

Act 854 of 1960 (La. R.S. 9:5682) provides that an action by an heir or legatee who has not been recognized in a judgment of possession, against a third person who has acquired the property from or through a person recognized as an heir or legatee of the deceased in the judgment of possession "is prescribed in ten years if the third person or his ancestors in title, singly or collectively, have been in continuous, uninterrupted, peaceable, public and unequivocal possession of the property for such period after the registry of the judgment of possession"

The prescription established by the statute is acquisitive.¹ In *Trahan v. Broussard*² the Louisiana supreme court held that the statute did not require the third person in possession be in good faith—a result which was not mandated by the ambiguous statutory language, was inconsistent with the traditional code requirements of good faith for the shorter ten year prescription, and has been criticized as facilitating fraud.³ *All-State Credit Plan Natchitoches Inc. v. Ratcliff*⁴ reverses that aspect of *Trahan* and holds the statute requires possession in good faith.

Though the statute is ambiguous on the point, its reference to "the third person or his ancestors in title, singly or collectively" being in possession seems to allow a third person to tack onto the time of possession of the heir or legatee from whom he acquires, although the latter cannot himself prescribe. One might argue that the possession of the heir is excluded, but that analysis would put the third person in the same position as under the law existing before the statute,⁵ thus rendering the statute inoperative. Consistent with this reason-

* Associate Professor of Law, Louisiana State University.

1. "Inasmuch as a period of possession is required, the prescription is acquisitive rather than liberative in nature." Pascal, *Civil Code and Related Subject Matter*, 21 LA. L. REV. 53, 64 (1960). See *Trahan v. Broussard*, 251 La. 714, 206 So. 2d 82 (1968); Note, 42 TUL. L. REV. 219 (1967).

2. 251 La. 714, 206 So. 2d 82 (1968).

3. *Id.* at 87 (Sanders, J., concurring in part and dissenting in part); *Trahan v. Broussard*, 196 So. 2d 858, 862 (La. App. 3d Cir. 1967) (Tate, J., dissenting); Pascal, *Civil Code and Related Subject Matter*, 21 LA. L. REV. 53, 64 (1960); Note, 14 LOYOLA L. REV. 429 (1967-68); cf. *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Prescription*, 28 LA. L. REV. 346, 352 (1968).

4. 279 So. 2d 660 (La. 1973).

5. LA. CIV. CODE art. 3478.

ing, the court in *Ratcliff* indicates that such tacking is permissible.⁶

Since the statute is construed *in pari materia* with the Civil Code to reach the conclusion that good faith possession is required, it is consistent to apply the traditional Civil Code tacking principles, including the rule that one in good faith cannot tack onto his ancestor's bad faith possession for purposes of ten year prescription.⁷ In the instant case, since the heir named in the judgment of possession was in bad faith, the third possessor in good faith could not tack onto the heir's time of possession. If the heir had been in good faith, though he himself could not prescribe, the third person, it appears, could tack onto his possession in accruing the ten year good faith prescription of the statute.

Under Louisiana's tacking theory, it is arguable that a possessor in bad faith acquiring from a possessor in good faith can tack onto the ancestor's good faith possession and acquire by ten year prescription.⁸ The rule rests partly on the conceptions, (1) that the first possessor is transferring all of his inchoate prescriptive rights to the second possessor, and (2) that the possessor in good faith could well have prescribed himself by continuing in possession, so that a transfer to another does not seriously worsen the position of the real owner. However, in light of those policy bases the traditional rule may be inapplicable to tacking under the 1960 statute. The heir could not take advantage of the statute's prescription, even if in good faith, and thus has no inchoate prescriptive rights to transfer. Moreover, no matter how long the heir continues in possession, the statute would not allow him to acquire. Thus, to permit his transferee to do so would substantially prejudice the true owner. Further, it may be that the real owner in a close family situation, such as is likely to arise under the statute, might be less likely to have demanded his rights against the ancestor of the third possessor than in the normal non-succession prescription situation. In light of these considerations, it is best not to allow the bad faith third possessor to tack onto the heir's good faith possession. A further problem arises if a third possessor in bad faith desires to tack onto the heir's bad faith time of possession to establish 30-year bad faith prescription. Since the statute refers only to ten year prescription, and is not ambiguous on the point,

6. 279 So. 2d at 667. *But see id.* (Summers, J., dissenting).

7. 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS no. 313 (7th ed. Esmein 1961) in 2 CIVIL LAW TRANSLATIONS at 365 (La. St. L. Inst. transl. 1966) [hereinafter cited as AUBRY & RAU]; Comment, 8 LA. L. REV. 105, 110 (1947).

8. *Devall v. Choppin*, 15 La. 566 (1840); *Liuzza v. Heirs of Nunzio*, 241 So. 2d 277 (La. App. 1st Cir. 1970). The rule is subject to criticism. *See* AUBRY & RAU 365-66 n.40; Comment, 8 LA. L. REV. 105, 111 (1947).

there seems to be no room to construe the statute as also creating a 30-year bad faith prescription. As construed, the statute protects good faith, leaving the bad faith possessor to begin his own prescriptive period from the time he begins possession.

*Thibodeaux v. Quebodeaux*⁹ continues the view of the jurisprudence that the moral good faith of a possessor, at least of one acquainted with the relevant family history involved, is insufficient for good faith prescription if he was under an error of law or had "notice of facts which ought to excite inquiry and which if pursued would lead to knowledge of other facts"¹⁰ that would disclose a defect in title. It would seem that the underlying breadth represented by the presumption of good faith of Civil Code article 3481 and the simple definition of a good faith possessor in article 3451 as one with "just reason to believe himself the master of the thing which he possesses" ought to prevail over the jurisprudential rule. Such a construction is supported by the statement of Aubry and Rau that, "an acquirer who made an erroneous judgment about the value of the documents produced by his grantor could rely on this error in justifying his good faith, even if he committed an error of law."¹¹ This is so even in light of the interpretation given to article 1846 providing that an error of law can not be a means of prescribing, for "[a]ll that article purports to regulate is the rights of parties to a contract. The judicial construction of paragraph 3 causes that paragraph to become a rule about acquisitive prescription in terms of the rights of record owners rather than a rule about acquisitive prescription in terms of the rights of parties in privity."¹²

The 30-year boundary prescription of article 852 was invoked in *Winch v. Veazey*,¹³ but the court rejected the claim on the ground that "there was no visible boundary line between the lands possessed by the parties."¹⁴ The factual finding is supported by evidence that the claimed visible boundary—a line where a ridge stopped and marsh began—was in fact an area 40 to 200 feet wide, depending on weather conditions, and that the area of growth of marsh grass that might have evidenced the line was not unchanging. On other facts, however, a definite natural boundary ought to be sufficient. Artificial boundaries or monuments are not required, as article 826 provides

9. 282 So. 2d 845 (La. App. 3d Cir. 1973).

10. *Id.* at 851.

11. AUBRY & RAU 364.

12. Comment, 28 LA. L. REV. 662, 667 (1968).

13. 282 So. 2d 779 (La. App. 3d Cir. 1973).

14. *Id.* at 783.

that a boundary is "every separation, *natural or artificial*, which marks the confines or line of division of two contiguous estates."¹⁵

15. LA. CIV. CODE art. 826 (emphasis added).