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PRESCRIPTION

Winston R. Day*

ACQUISITIVE PRESCRIPTION

Boundary Prescription

Since there is no question that "title prescription may be pled in boundary actions, and boundary prescriptions in title suits,"¹ it becomes all the more important to establish the appropriate relationship between the Civil Code articles concerning boundaries and those pertaining to prescription. Although the proper interpretation of article 853 has plagued Louisiana courts for a number of years, the Third Circuit Court of Appeal in *Prather v. Valien*² declined an opportunity to re-examine the conflicting jurisprudence and reached a proper conclusion on narrow grounds. Some of the language used by the court in the decision, however, implies that an informal agreement establishing a visible but incorrect boundary between adjoining landowners may result in acquisition of part of the area by one of the owners. By its terms, article 853 provides that boundaries incorrectly established by a *surveyor* may not be rectified after ten years if the parties are present or twenty years if absent. A series of Louisiana cases,³ however, has suggested that "active acquiescence" in an incorrect visible boundary by an adjacent landowner may result in loss of ownership. In *Prather*, the court found an absence of such acquiescence and seemed to place a stringent burden upon what would be necessary to establish it. Although the case was correctly decided, it is unfortunate that the court felt compelled, in light of the jurisprudence, to negate the possibility of active acquiescence.

Although the doctrine of boundary acquiescence is well established in many common law jurisdictions,⁴ it is based on the conceptual nature of adverse possession in the common law as a statute of limitation on actions for recovery of land⁵ and does not seem supported by the theory or language of the Louisiana Civil Code. Article 853 creates a very narrow exception to the general rules of acquisitive prescription by allowing one to acquire a

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1. *Ledoux v. Waterbury*, 292 So. 2d 485, 487 (La. 1974).

2. 327 So. 2d 130 (La. App. 3d Cir. 1976).

3. *See, e.g.*, *Huval v. Dupuis*, 302 So. 2d 636 (La. App. 3d Cir. 1974) and cases cited therein.

4. *See, for example*, the extended discussion in *Boyle v. D-X Sunray Oil Co.*, 191 F. Supp. 263 (N.D. Iowa 1961) and cases cited therein.

5. 3 AMERICAN LAW OF PROPERTY § 15.1-.5 (Casner ed. 1952).

portion of adjoining property in less than thirty years without the necessity of showing good faith or just title. Under the scheme of article 853, the *survey* is a reasonable substitute for these elements. Since the article involves a mode of acquiring immovable property, it should be strictly interpreted, and the broad interpretation suggested by the cases creates an additional method of acquisition of an immovable *dehors* the public record, but without the usual requirements of prescription. Furthermore, the cases have failed to examine the effect of the 1968 amendment to article 833. Although the article previously limited the extra-judicial fixing of boundaries to those licensed to survey, it was amended in 1968 to provide that:

Any written agreement, heretofore or hereafter made, which designates or delimits all or part of a boundary between two or more estates is binding upon all parties thereto who are *sui juris*, their heirs, successors and assigns, to the same extent as any other written agreement affecting immovable property.

Although the proper interpretation of the amendment raises interesting questions,⁶ it certainly seems to create the exclusive method of delimiting boundaries by agreement and in the absence of a surveyor. Any other mode of acquiring immovables by the passage of time should be accompanied by the rigorous requirements of ordinary prescription.

Servitudes—Acquisition by Prescription

In the landmark decision of *Nash v. Whitten*,⁷ the Louisiana Supreme Court re-examined the inconsistent jurisprudence pertaining to the classification of servitudes as continuous or discontinuous. Since the decision is treated fully by Professor Yiannopoulos elsewhere in this symposium,⁸ the writer will refrain from discussion except to express support for Justice Tate's forceful argument that "functional and practical values" should always be an important factor in interpreting the Louisiana Civil Code. Civilian principles and methodology will be strengthened by continuous

6. For example, does the phrase "to the same extent as any other written agreement affecting immovable property" mean that the agreement must be recorded to affect subsequent purchasers? See LA. R.S. 9:2721 (1950). An additional question could be raised as to whether a written agreement which incorrectly delimits the boundary is immediately unassailable or precludes rectification only after the accrual of liberative prescription of ten years. Certainly it appears that the intent of the amendment was to make such agreements immediately binding and acquisitive prescription and article 853 would be immaterial.

7. 326 So. 2d 856 (La. 1976).

8. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Property*, 37 LA. L. REV. 317, 327-28 (1977).

cognizance that the Civil Code must serve contemporary *Louisiana* society with its unique historical and cultural heritage. The requirement that a servitude be continuous in order to be the subject of acquisitive prescription serves a very limited purpose and Civil Code article 727 is certainly susceptible to differing interpretations.⁹ In such an event it is entirely appropriate to adopt that interpretation most functional for our legal system regardless of the views of French commentators.

LIBERATIVE PRESCRIPTION

Redhibitory Actions

Although several cases during the past term dealt correctly with the problem of prescription on redhibitory actions, the decision in *Weaver v. Fleetwood Homes of Mississippi, Inc.*¹⁰ contains troublesome language that may well cause future problems. More than a year after a sale, suit was brought against both the vendor and manufacturer to rescind the sale of mobile homes alleged to contain numerous defects. In rejecting the manufacturer's claim of prescription, the court stated broadly that the one year prescriptive period provided by Civil Code article 2534¹¹ never commenced to run against the manufacturer who failed to declare to the purchaser the defects in the product, since the manufacturer was presumed to have knowledge of such defects. The court's acceptance of the notion that the manufacturer¹² as well as the vendor may be sued under article 2534 is to be commended. Further, the decision reached a correct result, since the court might have rejected the manufacturer's prescription plea as it did that of the vendor on the basis that neither vendor nor manufacturer had abandoned attempts to repair. However, the suggestion that prescription may never commence to run against a manufacturer because of his presumed knowledge of the defect is unfortunate and could lead to further difficulty in determining the precise nature of redhibitory rights vis-à-vis manufacturers and vendors. Civil Code articles 2545 and 2546 provide that in the special

9. See Yiannopoulos, *Predial Servitudes; General Principles: Louisiana and Comparative Law*, 29 LA. L. REV. 1 (1968).

10. 327 So. 2d 172 (La. App. 3d Cir. 1976).

11. LA. CIV. CODE art. 2534 provides:

The redhibitory action must be instituted within a year, at the farthest, commencing from the date of the sale.

This limitation does not apply where the seller had knowledge of the vice and neglected to declare it to the purchaser.

12. For a full treatment of the conceptual nature of the purchaser's right, see Professor Litvinoff's discussion in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Sales*, 35 LA. L. REV. 310 (1975).

case in which the seller knows the defect and fails to disclose, prescription commences upon *discovery* of the vice,¹³ and the facts of *Weaver* clearly indicate such discovery.

The most interesting aspect of the *Weaver* case is the very fact that the court viewed the prescriptive pleas of the vendor and manufacturer as separate and distinct items. Since the suit was clearly brought in contract rather than tort, the court's treatment suggests that the responsibility of the vendor and manufacturer are not based on identical grounds in such an event. If, as suggested by Professor Litvinoff,¹⁴ the purchaser's redhibitory rights against the manufacturer are based on a notion of subrogation of the purchaser to the rights of his vendor, a number of interesting problems of prescription will be encountered in the future. It can be readily seen, for example, that where a purchaser discovers a defect more than a year after a sale, prescription may have run against the vendor, but not against the manufacturer who is charged with knowledge of the defects because of *spondet peritiam artis*.¹⁵ Such a result would be consistent with the decision of *Breaux v. Winnebago Industries, Inc.*,¹⁶ in which the court differentiated the position of vendor and that of the manufacturer as far as responsibility for damages is concerned. A further problem will arise concerning the identity of the discoverer needed to commence prescription. If the intervening vendor discovers the defect more than a year before suit is brought against the manufacturer will the purchaser's rights be lost, or will discovery by the *purchaser* be required?¹⁷ Furthermore, it is not unlikely that following discovery of a vice by a purchaser, the vendor will make considerable effort to repair, perhaps extending beyond a year. Will the purchaser's rights against the *manufacturer* have prescribed? It would seem that in each case subrogation principles would limit the purchaser to the rights of his vendor and those rights may well have been lost by prescription.

13. Several cases during the past term correctly applied these articles. *See, e.g.*, *Christy-Ann-Lea, Inc. v. Charter Homes of Louisiana, Inc.*, 327 So. 2d 569 (La. App. 4th Cir. 1976).

14. *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Sales*, 35 LA. L. REV. 310 (1975).

15. *Id.* at 312, n.13.

16. 282 So. 2d 763 (La. App. 1st Cir. 1973).

17. To require that the *purchaser* discover the defect for prescription to commence would have the effect of prolonging the manufacturer's exposure each time the product is sold.