

Louisiana Law Review

Volume 56 | Number 2

*The Romanist Tradition in Louisiana: Legislation,
Jurisprudence, and Doctrine: A Symposium*
Winter 1996

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Repository Citation

Melissa Morris Cresson, *The Louisiana Trespass Action: A "Real" Problem*, 56 La. L. Rev. (1996)

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COMMENT

The Louisiana Trespass Action: A "Real" Problem

The tort of trespass is the "unlawful physical invasion of the property or possession of another."¹ Thus, in Louisiana, an action for trespass is appropriately based on the concept of fault pursuant to Louisiana Civil Code article 2315.² While the trespass action is delictual in nature, one of its main elements is the determination of ownership or possession of the immovable property in question.³ The trespass action, however, is not included among the "real actions"⁴ of the Louisiana Code of Civil Procedure.⁵ As a result, Louisiana courts adjudicate trespass actions in accordance with the procedural rules for general civil actions and, in doing so, establish their own burdens of proof for the determinations of ownership and possession.⁶ While these adjudications usually lead to equitable results, the courts' methodology leaves much to be desired. Often, the courts fail to articulate the requisite burdens of proof for the determination of possession or ownership. When the courts do articulate the burdens of proof, these burdens are often in conflict with those required by the real actions section of the Louisiana Code of Civil Procedure.⁷

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1. *Phillips v. Town of Many*, 538 So. 2d 745, 746 (La. App. 3d Cir. 1989) (quoting *Patin v. Stockstill*, 287 So. 2d 780 (La. App. 1st Cir. 1975)).

2. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La. Civ. Code art. 2315. See also *Phillips*, 538 So. 2d at 746; *Brown v. Bedsole*, 447 So. 2d 1177 (La. App. 3d Cir.), writ denied, 450 So. 2d 358 (1984).

3. *Harvey v. Havard*, 287 So. 2d 780 (La. 1973); *Brown*, 447 So. 2d at 1181; 1 A.N. Yiannopolous, *Property* § 293, at 566, in 2 Louisiana Civil Law Treatise (1991).

4. La. Code Civ. P. art. 422 provides in part that "[a] real action is one brought to enforce rights in, to, or upon immovable property."

5. *Harvey*, 287 So. 2d at 783; *Brown*, 447 So. 2d at 1180; *Hayward v. Noel*, 225 So. 2d 638 (La. App. 1st Cir. 1969); *East v. Pan American Petroleum Corp.*, 168 So. 2d 426 (La. App. 3d Cir. 1964); *Derbofen v. T.L. James & Co.*, 148 So. 2d 795 (La. App. 4th Cir. 1962); *Fontenot v. Central Louisiana Elec. Co.*, 147 So. 2d 773 (La. App. 3d Cir. 1962). See also La. Code Civ. P. Introduction, Book VII, Title II ("No attempt has been made to include in this Title certain of the fringe actions which bear some resemblance to the real actions, such as the action of trespass, the action to remove a cloud from title, and the action of specific performance.").

6. *Brown*, 447 So. 2d at 1181 (requiring plaintiff to prove only record title when defendant was in possession); *Harvey*, 287 So. 2d at 784 (same); *Hayward*, 225 So. 2d at 640 (analogizing to La. Code Civ. P. art. 3654 and requiring plaintiff to "prove their title").

7. La. Code Civ. P. art. 3653 provides the requisite burden of proof for plaintiffs in petitory actions:

To obtain a judgment recognizing his ownership of immovable property or real right therein, the plaintiff in a petitory action shall: (1) Prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is in possession thereof; or (2) Prove a better title thereto than the defendant, if the court finds that the latter is not in possession thereof.

La. Code Civ. P. art. 3658 provides the burden of proof for plaintiffs in possessory actions:

To maintain the possessory action the possessor must allege and prove that: (1) He had

In addition, the methods of adjudicating the trespass actions are inconsistent with the Louisiana Civil Code articles on possession,⁸ the historical nature of the trespass action,⁹ and the current law of *res judicata*.¹⁰

I. WHAT IS THE PROBLEM?

The tort of trespass is primarily concerned with protecting possessory rights. In Louisiana, however, an out-of-possession person who claims ownership of the immovable property may successfully bring a trespass action against a person with the right to possess, thereby recovering damages from, and injunctions against, the true possessor without the necessity of proving perfect title.¹¹ Courts can thus deprive persons of their possessory rights without considering the protections the Louisiana Code of Civil Procedure affords these possessors.

This apparent injustice is further complicated when one considers the possible litigants in a trespass action. Three categories of plaintiffs may bring trespass actions: "true owners," "title holders," and "possessors." A "true owner" is a person who has "perfect title" such that he can trace his title back to the sovereign or can prove ownership by acquisitive prescription of ten or thirty years.¹² A "record title holder," for the purposes of this comment, is a person who has "some title," but whose title is insufficient to definitively prove he is the true owner. Finally, a "possessor" is a person who has possessed the property for more than a year, such that he has acquired the right to possess.¹³ Excluded from the group of potential plaintiffs is the "mere trespasser" who neither claims ownership nor has the right to possess the land in question.¹⁴

possession of the immovable property or real right therein at the time the disturbance occurred; (2) He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud; (3) The disturbance was one in law or in fact, as defined in Article 3659; and (4) The possessory action was instituted within a year of the disturbance.

8. La. Civ. Code arts. 3421-3444.

9. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13 (1984).

10. La. R.S. 13:4231 (1991). See discussion *infra* text accompanying notes 85-86.

11. *Harvey v. Havard*, 287 So. 2d 780, 782 (La. 1973); *Brown v. Bedsole*, 447 So. 2d 1177, 1181 (La. App. 3d Cir.), *writ denied*, 450 So. 2d 358 (1984). But see 1 Ferdinand F. Stone, *Tort Doctrine* § 214, at 279, in 12 *Louisiana Civil Law Treatise* (1977) (stating that trespass actions are only available to persons with the right to possess); Keeton et al., *supra* note 9, at 77; 6-A A. James Casner, *American Law of Property* § 28.12, at 36 (1954).

12. La. Code Civ. P. art. 3653 (establishing burden of proof for plaintiffs in petitory actions when defendants are in possession); La. Civ. Code art. 3473 (stating that ownership and other real rights in immovables may be acquired by prescription of ten years); La. Civ. Code art. 3486 (providing that ownership and other real rights in immovables may be acquired by the prescription of thirty years without the need of just title or possession in good faith). See also *Deselle v. Bonnette*, 251 So. 2d 68 (La. App. 3d Cir. 1971).

13. La. Civ. Code art. 3421 (defining possession); La. Civ. Code art. 3422 (defining the right to possess).

14. Note that "mere trespassers" may have commenced possession, but have not possessed for more than a year so as to acquire the right to possess as per La. Civ. Code art. 3422.

To further complicate matters, either a true owner or a record title holder may be a possessor. Depending on the circumstances, any of the above-named individuals may also be a defendant in a trespass action. As a result, the particular procedural difficulties are complex, varied, and difficult to conceptualize. For this reason, a series of hypotheticals is useful for envisioning the different situations and identifying their various consequences.

A. Scenario One: True Owner or Record Title Holder v. Possessor

Mr. Arceneaux has been in continuous and open possession of Devil's Swamp, a 200-acre tract of land for twenty-nine years. Recently, Ms. Bourgeois ordered Mr. Arceneaux to vacate the property. Mr. Arceneaux refused, and Ms. Bourgeois instituted a trespass action against him, asserting ownership of the property. Ms. Bourgeois has evidenced some title, but has not yet established herself as the true owner of the property. Based on her allegation of ownership, Ms. Bourgeois can properly institute the trespass action.

When basing a trespass action on a claim of ownership, the courts only require the plaintiff to initially show "record title so long as the defendant shows little or no title at all."¹⁵ This threshold burden is tolerable insofar as it is simply prima facie evidence of establishing the plaintiff's right of action. It is inequitable, however, to allow the mere allegation of ownership to deprive Mr. Arceneaux of his right of possession.

Compare this result to that which would be reached if Ms. Bourgeois filed a real action under the Louisiana Code of Civil Procedure. Since Mr. Arceneaux is clearly in possession, Ms. Bourgeois' proper remedy would be the petitory action.¹⁶ The petitory action requires that the plaintiff must prove "perfect title" to prevail over a defendant who is in possession of the contested property.¹⁷ By styling the suit as one in trespass, Ms. Bourgeois can circumvent this more stringent burden of proof, obtain an injunction, and receive damages by merely proving record title.

Despite this obvious inequity, the courts have refused to alter the existing burdens of proof. Rather, they have unequivocally maintained that "possession is no defense to a trespass action based on the plaintiff's ownership."¹⁸ Since

15. *Brown v. Bedsole*, 447 So. 2d 1177, 1181 (La. App. 3d Cir.), writ denied, 450 So. 2d 358 (1984). See also *Davis v. Crown Zellerbach Corp.*, 351 So. 2d 833 (La. App. 1st Cir. 1977); *Pope v. Daniel*, 195 So. 59, 60 (La. App. 1st Cir. 1940) ("As against a mere trespasser or one who claims no title in himself, the plaintiff is not required to prove a title good against the world in order to recover damages for a trespass on the land.")

16. La. Code Civ. P. art. 3651 states that "[t]he petitory action is one brought by a person who claims ownership, but who is not in possession, of immovable property or of a real right therein, against another who is in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership."

17. La. Code Civ. P. art. 3653 (delineating burdens of proof for plaintiffs in petitory actions).

18. *Harvey v. Havard*, 287 So. 2d 780, 782 (La. 1973); *Brown v. Bedsole*, 447 So. 2d 1177, 1180 (La. App. 3d Cir.), writ denied, 450 So. 2d 358 (1984); *Garrett v. Martin Timber Co.*, 391 So. 2d 928

the trespass action is delictual in nature, the courts submit that the trespass action does not determine real rights. Therefore, the Louisiana Code of Civil Procedure articles on real actions do not apply.¹⁹

When the plaintiff in a trespass action has some title, but is not the true owner, the court's watered-down burden of proof creates a grave injustice. Mr. Arceneaux, who has possessed the property for twenty-nine years, has rights that are good against everyone except the true owner.²⁰ By not requiring Ms. Bourgeois, a mere record title holder, to prove perfect title, the court unjustly deprives Mr. Arceneaux of the rights granted him by the Louisiana Civil Code articles on possession and the correlative protections afforded these rights by the Louisiana Code of Civil Procedure.²¹

B. Scenario Two: Possessor v. True Owner

The next problem arises when a possessor, Mr. Arceneaux, brings a trespass action against the true owner, Ms. Bourgeois. Allowing a party in possession to bring a trespass action against the true owner is the practice in Louisiana and in the common law states.²² The courts generally prohibit the defendant-owner from asserting ownership as a defense. The courts rationalize this prohibition by explaining that title is not an issue; therefore, evidence tending to show ownership may be excluded if the plaintiff makes timely objections.²³

This policy is meant to discourage dispossessed owners from taking matters into their own hands by attempting to regain possession for themselves.²⁴ The

(La. App. 2d Cir. 1980), *writ denied*, 397 So. 2d 804 (1981); *Owens v. Smith*, 541 So. 2d 950, 955 (La. App. 2d Cir. 1989).

19. *Harvey*, 287 So. 2d at 783 (explaining that the trespass action is "not one of the real actions provided by the Code of Civil Procedure"). See also *Brown*, 447 So. 2d at 1180; *Hayward v. Noel*, 225 So. 2d 638 (La. App. 1st Cir. 1969); *East v. Pan American Petroleum Corp.*, 168 So. 2d 426 (La. App. 3d Cir. 1964); *Derbofen v. T.L. James & Co.*, 148 So. 2d 795 (La. App. 4th Cir. 1962); *Fontenot v. Central Louisiana Elec. Co.*, 147 So. 2d 773 (La. App. 3d Cir. 1962).

20. See La. Civ. Code art. 3423 ("[a] possessor is considered provisionally as the owner of the thing he possesses until the right of the true owner is established.").

21. See La. Civ. Code art. 3423 cmt. b ("[A] possessor may . . . be entitled to seek protection by the possessory action; a possessor may acquire the ownership of the thing he possesses by acquisitive prescription; and a possessor is entitled to be reimbursed for certain expenses and to retain the thing until he is reimbursed."). See also La. Code Civ. P. art. 3653 (providing more stringent burden of proof for plaintiffs in petitory actions when defendants are in possession); La. Code Civ. P. art. 3654 (granting judgments in favor of the party, in concursus, declaratory, or similar proceedings, entitled to win a possessory action unless adverse party proves ownership from a previous owner or by acquisitive prescription).

22. *Loeblich v. Garnier*, 113 So. 2d 95, 98 (La. App. 1st Cir. 1959); *Churchill Farms v. Gaudet*, 184 La. 984, 168 So. 123 (1936); *Esmele v. Violet Trapping Co.*, 184 La. 491, 166 So. 477 (1936); *Keeton et al.*, *supra* note 9, at 77. *Roger Bernhardt, Property* 283 (1991).

23. *Harvey v. Havard*, 287 So. 2d 780 (La. 1973); *Loeblich*, 113 So. 2d at 95; *Garrett v. Martin Timber Co.*, 391 So. 2d 928 (La. App. 2d Cir. 1980), *writ denied*, 397 So. 2d 804 (1981).

24. 1 *Fowler V. Harper, The Law of Torts*, § 1.3, at 6 (2d ed. 1986) ("Private vengeance or retaliation for acts of violence constituted a serious threat to order in early English society and the

courts require an out-of-possession owner to file a possessory or petitory action, thereby greatly reducing the possibility of violence.²⁵

Although this is sound policy, the courts could achieve the same results by allowing the owner to assert his ownership in the trespass action, with the caveat that in doing so he will be acknowledging the plaintiff's possession. The acknowledgment of possession will accomplish two things: 1) it will make the defendant-owner liable to the plaintiff in damages for disturbing the plaintiff's rightful possession; and 2) it will place on the defendant-owner the more stringent burden of proving perfect title to establish his ownership. If the defendant is able to prove his title, he must still compensate the plaintiff for the invasion. This penalizes the true owner for attempting to regain possession without the help of the justice system. Additionally, the title dispute will be judicially settled which will eliminate the need for future costly litigation.

C. Scenario Three: Record Title Holder or Possessor v. Mere Trespasser

If Mr. Arceneaux is in possession of the land, but has neither the right to possess nor any title, then Ms. Bourgeois, who has "some title" to at least part of the property, can file a trespass action against Mr. Arceneaux and successfully oust him from the land.

Similarly, if Ms. Bourgeois had no title, but did have the right to possess when Mr. Arceneaux moved onto the land, her right of possession would be superior to the claims of Mr. Arceneaux. Ms. Bourgeois should, therefore, prevail in a trespass action.

In other words, a true owner, a record title holder, or a possessor unquestionably has a right of action against a mere trespasser.²⁶ Regardless of whether the owner or record title holder is in possession of the property, each has a claim to the property superior to that of the trespasser. Analogously, the possessor has a superior claim to the property if the possessor has acquired the right to possess. Even if the trespasser has the requisite intent to possess as owner, he must possess as owner for more than a year to have an effective right.²⁷

prohibitions embodied in the law of trespass had for a principal objective to substitute 'legalized vengeance for private vengeance.'). See also Stone, *supra* note 11, at 278 (stating that "[f]rom earliest times, men, tribes and nations have fought, bled and died to protect their lands and homes against invasion"); Keeton et al., *supra* note 9, at 29 (stating that the trespass action was the remedy for conduct that was "likely to lead to a breach of the peace by provoking immediate retaliation").

25. See La. Code Civ. P. art. 3651 (providing the petitory action as the preferred method of regaining possession of land). See also La. Code Civ. P. art. 3658 (demonstrating inclusion of this policy in possessory action by requiring plaintiffs to prove possession for "more than a year immediately prior to the disturbance, unless evicted by force or fraud") (emphasis added).

26. See discussion *supra* note 14.

27. La. Civ. Code art. 3422 cmt. b (quoting *Liner v. Louisiana Land & Exploration Co.*, 310 So. 2d 766 (La. 1975) ("[P]hysical control alone, however, does not give rise to possessory protection or to acquisitive prescription. Possessory protection is predicated on acquisition of the right to

Where the defendant has no recognized claim to the property, the court's current approach is acceptable because there is no dispute over possession or ownership. The determination of possession or ownership truly amounts to little more than a "foundation matter"²⁸ or a "burden of proof."²⁹ Thus, the more stringent burdens of proof attached to the adjudication of real rights are unnecessary.

D. Scenario Four: True Owner in Possession v. Record Title Holder

Another quickly resolvable combination of litigants exists when the true owner in possession brings action against someone merely claiming record title. For example, if Mr. Arceneaux is in possession and has perfect title, then he can successfully bring action against Ms. Bourgeois even though she may have record title.

As indicated above, the requisite burdens of proof in all of these trespass actions should depend on which party is in possession, as is the case in real actions. Adoption of burdens of proof in trespass actions analogous to those in the real actions would eliminate the aforementioned problems. The courts, however, have resisted this change, maintaining that the trespass action is not a real action and that no attempt has been made to classify it as such.³⁰ The courts base their arguments on the notion that the trespass action has its foundation in tort while the real actions decide questions of rights in real property.³¹ Much of this confusion, however, stems from a misunderstanding of the nature of the trespass action. It is helpful to examine the historical basis of the trespass action and its modern-day common law application to dispel the courts' concern.

II. HISTORY OF THE TRESPASS ACTION AT COMMON LAW

After the Norman Conquest of the British Isles, the Norman kings sought to maintain law and order by establishing a uniform system of justice.³² They achieved a uniform system of justice by creating certain royal writs that provided specific remedies for specific wrongs. By the thirteenth century, these writs had become rigid and complex, and each had developed its own substantive and procedural law.³³

possess. This right to possess is acquired by one who has been for a year in peaceable and uninterrupted possession of an estate.")).

28. *Brown v. Bedsole*, 447 So. 2d 1177, 1181 (La. App. 3d Cir.), writ denied, 450 So. 2d 358 (1984).

29. *Id.*

30. See *supra* note 5, at 1.

31. *Phillips v. Town of Many*, 538 So. 2d 745, 746 (La. App. 3d Cir. 1989); *Brown v. Bedsole*, 447 So. 2d 1177, 1181 (La. App. 3d Cir.), writ denied, 450 So. 2d 358 (1984).

32. *Harper*, *supra* note 24, at 5.

33. *Harper*, *supra* note 24, at 5.

Within this system, a strong division existed between real writs and personal writs.³⁴ Real writs governed real actions and involved the determination of the "rights of property in, or possession of, a freehold estate."³⁵ Personal writs regulated personal actions³⁶ and involved the determination of personal rights such as contract and tort.

The inherent problem with the real writs was their large number and complexity. The "highest technical skill and learning were requisite to comprehend and define the nature and purposes of the various writs, the distinctions between which were refined, abstruse, and often scarcely perceptible."³⁷ When Parliament refused to alter the impractical real actions, litigants began searching for alternative means to resolve disputes concerning real actions.³⁸

The discovery that some of the issues historically adjudicated by the real actions could be resolved in personal actions seemingly solved the problem.³⁹ The limited number of writs for personal actions made them appealing to litigants and greatly diminished the fear of dismissal for having chosen the wrong writ or for pleading mistakes.⁴⁰ Many parties began rapidly utilizing personal actions, namely the trespass action, as a means of avoiding the procedurally difficult real actions.

Although the trespass action was originally criminal in nature and "directed at serious and forcible breaches of the King's peace,"⁴¹ plaintiffs began to use the action to "identify any tortious conduct on the part of the defendant that would subject him to liability."⁴² Then, as a result of the move away from the real actions, the trespass action became associated with remedying intrusions of real or personal property.⁴³ Soon, the trespass action became the preferred means of resolving minor property disputes.

34. Arthur G. Sedgwick & Frederick S. Wait, *A Treatise on the Trial of Title to Land* § 2, at 2 (2d ed. 1886).

35. *Id.* at 2.

36. Black's Law Dictionary 791 (6th ed. 1990) (defining in personam as a personal action "seeking judgment against a person involving his personal rights and based on jurisdiction of his person, as distinguished from a judgment against property"). See also 3 Thomas A. Street, *Foundations of Legal Liability* 38 (1906).

37. Sedgwick, *supra* note 34, at 2.

38. *Id.* at 5.

39. *Id.* at 5 (explaining that "at least so far as possession was concerned, the results of a real action [could be] attained in a simple action of trespass").

40. *Id.* at 5-6.

41. Keeton et al., *supra* note 9, at 29; see also George E. Woodbine, *The Origins of the Action of Trespass*, 34 *Yale L.J.* 343, 359 (1925).

42. Keeton et al., *supra* note 9, at 67. See also 5 Richard R. Powell & Patrick J. Rohan, *Powell on Real Property* ¶ 706[2], at n.21 (1994).

43. Keeton et al., *supra* note 9, at 68 n.5 (quoting 1 Street, *supra* note 36, at 25):

When it was once determined that a man could resort to a form of trespass action to settle a matter of disputed title, the character of the trespass upon realty was fixed. Thenceforth the common law, in considering liability for intrusions upon realty, could not undertake to discriminate between the much and the little.

III. COMPARISON WITH THE LOUISIANA ACTIONS

A. *Trespass Action v. Possessory Action*

Due to its foundation in remedying breaches of the peace and the importance of the right of exclusive use of property, the trespass action is primarily concerned with the protection of possession.⁴⁴ Thus, only those persons in actual or constructive possession of property may protect their interest in exclusive use through the trespass action.⁴⁵ The common-law notion of possession is virtually the same as the Louisiana version.⁴⁶ Comparing the two doctrines, however, is difficult since the common law does not make a clear-cut distinction between "possession" and the "right to possess." Possession, by all accounts, is the "detention or enjoyment of a corporeal thing . . . that one holds or exercises by himself or by another who keeps or exercises it in his name."⁴⁷ The *right* to possess is given to one who possesses the thing for over a year⁴⁸ or for an "appreciable period of time."⁴⁹ Although the common law does not use this exact terminology, it does make the distinction in practice.⁵⁰

At common law, a possessor may bring a trespass action after a disturbance of his possession which amounts to an eviction or loss of possession or any lesser interference. By doing so, the plaintiff can obtain damages and an injunction against the trespasser.⁵¹ If the disturbance equals a loss of possession or eviction and the possessor fails to bring suit within the statutorily mandated period of time, he loses the right to possess and his right to bring a trespass action.⁵² If the party is the true owner, then the proper remedy at this point is an action in ejectment.⁵³

The historical common-law trespass action parallels the Louisiana possessory action. The possessory action is brought by a possessor seeking to be maintained

44. Keeton et al., *supra* note 9, at 67.

45. *Id.* at 77. See also Harper, *supra* note 24, at 3; 1 Arthur R. Gaudio, *The American Law of Real Property* § 10.03[6][a] (1991). Note, however, that Louisiana law allows persons to base trespass actions on either possession or ownership. Yiannopoulos, *supra* note 3, at 566.

46. Bernhardt, *supra* note 22, at 44; Harper, *supra* note 24, at 3 ("A person is in possession of land if 1) he is in occupancy with the intent to control it; or 2) if he has been in physical occupancy with such intent and, after he has ceased his occupancy without abandoning the land, no other person has gained occupancy.").

47. La. Civ. Code art. 3421.

48. La. Civ. Code art. 3422.

49. Keeton et al., *supra* note 9, at 77.

50. Harper, *supra* note 24, at 4 (explaining that "one who remains in physical control of property for any appreciable period of time under a color or claim of title thereby acquires what the law recognizes as possession").

51. Bernhardt, *supra* note 22, at 284.

52. Keeton et al., *supra* note 9, at 77. Note the problem with the common-law literature is that it continually repeats that trespass actions are available only to those persons in possession. It actually means that a person who has lost the right to possess can no longer bring a trespass action.

53. *Id.*; see also Harper, *supra* note 24, at 5.

in his possession after a disturbance in fact or in law by the defendant.⁵⁴ As in the common-law trespass action, the plaintiff must prove he had possession of the immovable at the time of the disturbance, and if the possessory action is not instituted within one year of the disturbance, then the plaintiff loses the right to possess.⁵⁵ In order for the plaintiff to lose the right to possess, the defendant's disturbance must amount to an eviction.⁵⁶

B. Ejectment Action v. Petitory Action

As mentioned above, once a common-law plaintiff loses the right to possess, his remedy is an action in ejectment.⁵⁷ Only through this action may the true owner "eject" the wrongful possessor from the land and be restored to possession.⁵⁸ The plaintiff must show that he has the right to possession by "prevail[ing] on the strength of his own title, not upon a weakness in the defendant's title."⁵⁹

The statute of limitations is the main restriction on the plaintiff's ability to bring an ejectment action.⁶⁰ Although the limitation period varies from jurisdiction to jurisdiction, the outcome is the same. The statute of limitations begins to run when the defendant takes possession, and it expires upon the completion of the particular prescriptive period.⁶¹ Failure to bring the ejectment action within the statutory period results in the loss of the true owner's right to eject the adverse possessor.⁶² Although the adverse possessor does not have title *per se*, he is now "immune from any ejectment action" and will be treated as an owner against the world.⁶³

This is substantially similar in form and content to Louisiana's petitory action.⁶⁴ The Louisiana Code of Civil Procedure dictates that only persons

54. La. Code Civ. P. art. 3655:

The possessory action is one brought by the possessor of immovable property or of a real right to be maintained in his possession of the property or enjoyment of the right when he has been disturbed, or to be restored to the possession or enjoyment thereof when he has been evicted.

55. Note that the common law does not contain a magical one-year period, but instead speaks of an "appreciable period of time." Harper, *supra* note 24, at 4; Keeton et al., *supra* note 9, at 77.

56. La. Civ. Code art. 3433: "Possession is lost when the possessor manifests his intention to abandon it or when he is evicted by another by force or usurpation" (emphasis added).

57. See *supra* text accompanying notes 52-53.

58. Bernhardt, *supra* note 22, at 37; Keeton et al., *supra* note 9, at 77. See also Black's Law Dictionary 516 (6th ed. 1990) (defining ejectment as "an action to restore possession of property to the person entitled to it").

59. Bernhardt, *supra* note 22, at 37. See also Yiannopoulos, *supra* note 3, at 513-14.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. La. Civ. Code P. art. 3651: "The petitory action is one brought by a person who claims the ownership, but who is *not in possession*, of immovable property or of a real right therein, against

without the right to possess may bring a petitory action.⁶⁵ If the plaintiff in a petitory action fails to prove perfect title, then the defendant is maintained in possession and can acquire title by acquisitive prescription of ten or thirty years. Furthermore, failure of the true owner to file the action within ten or thirty years of the dispossession can result in the adverse possessor acquiring title by acquisitive prescription.⁶⁶

C. Results of the Comparison

This comparison illustrates that even though the Louisiana legislature and courts strive to keep the trespass action separate and distinct from the so-called "real actions," there is not much historical basis for the distinction. The principal justification offered for the continuation of this dichotomy is that the trespass action is founded in tort.⁶⁷ Even though the trespass action is conceptually a tort action, the principal determination is that of possession or ownership.⁶⁸

As established above, the "burden of vindicating property rights" was placed upon the trespass action because of the rigidity and severity of the real actions.⁶⁹ So, in the usual trespass case, the important issue was not whether the defendant entered the plaintiff's property, but whether he had a right to do so. The important question was the disputed title, and "any technical invasion would serve as the basis of litigation to settle it."⁷⁰ The Louisiana courts, however, have stubbornly insisted that the issues of possession or ownership in trespass actions are "foundation matter[s] . . . [and] burden[s] of proof . . . and [are] not considered in the context of real actions."⁷¹

When a case involves only a mere trespasser who claims neither possession nor ownership, the courts' explanation suffices since the determination of the plaintiff's possession or ownership is, in fact, no more than a "foundation matter."⁷² Because the ownership or possession of the land is not disputed, the court need not apply the burdens of proof applicable to the real actions.

another who is in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership" (emphasis added).

65. *Id.*

66. La. Civ. Code art. 481 (stating that "[o]wnership exists independently of any exercise of it and may not be lost by nonuse; [however], [o]wnership is lost when acquisitive prescription accrues in favor of an adverse possessor"); La. Civ. Code art. 3473 (discussing acquisitive prescription of ten years); La. Civ. Code art. 3486 (defining acquisitive prescription of thirty years).

67. *Brown v. Bedsole*, 447 So. 2d 1177, 1180 (La. App. 3d Cir.), *writ denied*, 450 So. 2d 358 (1984) (stating that the action for damages for trespass was "clearly an action in tort"); *Phillips v. Town of Many*, 538 So. 2d 745, 747 (La. App. 3d Cir. 1989) (explaining that "the tort of trespass is not one of the real actions covered by the Code of Civil Procedure" (emphasis added)).

68. See discussion *supra* text accompanying note 3, at 1.

69. *Keeton et al.*, *supra* note 9, at 68.

70. *Id.*

71. *Brown*, 447 So. 2d at 1181. See also *Harvey v. Havard*, 287 So. 2d 780, 783 (La. 1973); *Owens v. Smith*, 541 So. 2d 950, 954-55 (La. App. 2d Cir. 1989).

72. *Brown*, 447 So. 2d at 1182.

It is when the defendant stakes a claim to the property in question, be it as record title holder or possessor, that the issues of possession and ownership are no longer simply "foundation matter[s]."⁷³ Rather, the courts are determining the real rights of the parties in light of all the competing claims.

Since this determination is vital to the outcome of the trespass action, it falls under the doctrine of res judicata. The common law courts' willingness to decide issues of possession and ownership in trespass actions was due in part to the common law's broad construction of the doctrine of res judicata. Now that Louisiana has also adopted a broader doctrine of res judicata, Louisiana courts must rethink the role of the trespass action in the adjudication of real rights.

IV. RES JUDICATA

A. In General

The doctrine of res judicata provides that "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, or facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."⁷⁴ The doctrine is primarily concerned with finalizing litigation and furthering the following policies: (a) establishing and fixing the rights of individuals; (b) avoiding the harassment of the parties that results from repetitious litigation; (c) using the judicial system effectively; and (d) preserving the prestige of the courts by avoiding inconsistent judgments.⁷⁵

The doctrine mandates that all causes of action arising out of the same transaction or occurrence as the main action shall be litigated in the same suit.⁷⁶ Accordingly, all causes of action pleaded or litigated in the suit or all causes of action which *could* have been pleaded,⁷⁷ will be res judicata between the parties.⁷⁸

Before the 1991 revision, Louisiana had a much narrower version of res judicata⁷⁹ which provided for "cause" preclusion,⁸⁰ but did not embrace the

73. *Id.* at 1181.

74. Warren Freedman, *Res Judicata and Collateral Estoppel* 1 (1988).

75. *Id.* at 12.

76. *Id.* at 15.

77. *Id.* at 15.

78. *Id.* at 12 (explaining that "identity of the parties is "an essential element of res judicata because only parties and their privies are bound by a prior adjudication of the claim or cause of action"). *Id.* at 22 (explaining that issue preclusion is also known as collateral estoppel and is "an aspect of res judicata or even a corollary to the rule of res judicata").

79. *Sliman v. McBee*, 311 So. 2d 248 (La. 1975) (explaining that the civilian concept of res judicata is much narrower than the common law version). *See also* *Theodore v. Bank of New Orleans & Trust Co.*, 365 So. 2d 29 (La. App. 4th Cir. 1978); *Symeon C. Symeonides, Ruminations on Real Actions*, 51 La. L. Rev. 493, 520 (1991).

80. Louisiana courts only sustained exceptions of res judicata when the "parties, the 'cause,' and

facet of *res judicata*, known as issue preclusion.⁸¹ A plaintiff was only barred from seeking the same relief based on the same "cause" or same grounds. Even then, however, the courts recognized a broader interpretation of *res judicata* in cases involving issues of ownership of real property.⁸²

Under the new version of *res judicata* adopted in 1991, the doctrine of issue preclusion unquestionably operates in all litigation in Louisiana unless the litigation falls under one of the narrow exceptions to the general rule set forth in Louisiana Revised Statutes 13:4232.⁸³ The general rule is that "a judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment."⁸⁴

Although under the old law the courts did give a broader interpretation of *res judicata* in cases involving immovable property, they did not extend it to judgments rendered in trespass actions. Only one court specifically addressed this issue. In *White v. White*,⁸⁵ the Louisiana Court of Appeal for the First Circuit held that a judgment rendered in a trespass action did not bar a petitory action later filed by the losing party. The court noted that *res judicata* is "stricti juris" and, as such, the "suit in trespass [could not] be converted into a petitory action."⁸⁶ The court further explained that the inquiry into the title in the

the things demanded [were] identical." *First Guaranty Bank v. Durham*, 409 So. 2d 380, 382 (La. App. 4th Cir. 1982). See also *Welch v. Crown Zellerbach Corp.*, 359 So. 2d 154 (La. 1978); *Mitchell v. Bertolla*, 340 So. 2d 287 (La. 1976).

81. La. R.S. 13:4231 cmt. b (1991) (stating that La. R.S. 13:4231 "changes the law by adopting the principle of issue preclusion"). See also *Symeonides*, *supra* note 79, at 520.

82. In such actions both plaintiff and defendant in the first suit must present all claims that they have to establish their title or be precluded from asserting theories that might have been asserted in the first action This exception to the narrow interpretation of *res judicata* is predicated upon the necessity of protecting and insuring stability and security of title, preventing undue hardship or fraud with respect to third party purchasers, and obviating unnecessary successive litigation.

Ward v. Pennington, 523 So. 2d 1286, 1292 (La. 1988). See also *Sylvester v. Qualls*, 520 So. 2d 1030 (La. App. 3d Cir. 1987); *Gibbs v. Gahagan Land & Timber Co.*, 520 So. 2d 1035 (La. App. 3d Cir. 1987); *White v. White*, 233 So. 2d 289 (La. App. 1st Cir. 1970).

83. La. R.S. 13:4232 (1991):

A. A judgment does not bar another action by the plaintiff: (1) When exceptional circumstances justify relief from the *res judicata* effect of the judgment; (2) When the judgment dismissed the first action without prejudice; or, (3) When the judgment reserved the right of the plaintiff to bring another action.

B. In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an action for contributions to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R.S. 9:2801, the judgment has the effect of *res judicata* only as to causes of action actually adjudicated.

84. La. R.S. 13:4231 (1991).

85. 233 So. 2d 289 (La. App. 1st Cir. 1970).

86. *Id.* at 295.

trespass action was "an incidental matter to the main action and was done solely for the *procedural necessity* of determining whether or not [the defendant] was a trespasser and liable as such."⁸⁷ Thus, despite the broader interpretation espoused for actions involving immovable property, the court excluded the trespass action from this category by insisting that the determination of possession or ownership in the trespass action was merely a "procedural necessity."

B. Effect of the New Law of Res Judicata on the Trespass Action

This erroneous classification must yield under the new law which mandates that any actually litigated issue essential to the judgment is res judicata to later actions involving the same issue. The determination of possession or ownership of the parties is usually an actually litigated issue in a trespass action and is clearly essential to the judgment.⁸⁸ As a result, the parties are required by the new law to assert whatever claims they have to the property in dispute, and Louisiana courts can no longer claim that the determination of possession or ownership is merely a "burden of proof."

Consequently, a plaintiff, whether a true owner or a record title holder, who brings a trespass action on the basis of ownership, must litigate all claims to that property existing between the plaintiff and defendant. Likewise, the defendant seemingly cannot make a general denial of the trespass and later file a possessory action or a petitory action asserting his claim to the property. For this reason, it is entirely inequitable for the courts to hold that possession is no defense to trespass. Since this is the defendant's only chance to assert his possessory rights, the courts should be forced to give the defendant the benefit of possession in the present action. Although the defendant's right to possess will not ultimately defeat the true owner's claim to the land, it should exempt the defendant from liability for trespassory damages and increase the plaintiff's burden of proof.

Similarly, if a plaintiff brings a trespass action on the basis of possession, the defendant is obliged to assert any and all defenses, including ownership, that he may have against the plaintiff's claim. Such a requirement would serve the twin aims of the doctrine of res judicata, namely certainty and judicial efficiency.⁸⁹ This change could be accomplished while keeping the determinations of possession and ownership distinct by implementing a plan similar to that

87. *Id.* (emphasis added).

88. Note that in actions based on the plaintiff's right to possess, possession is an issue actually litigated. In actions based on the plaintiff's assertion of ownership, ownership is an issue actually litigated where the defendant claims the right to possess or asserts some title. If, however, the defendant in such an action is a mere trespasser, then, perhaps, neither ownership nor possession are at issue.

89. See La. R.S. 13:4231 cmt. a (1991) (explaining that the prior Louisiana interpretation of res judicata was "too narrow to fully implement the purpose of res judicata which is to foster judicial efficiency and also to protect the defendant from multiple lawsuits").

of the possessory action. The Louisiana Code of Civil Procedure should allow the defendant in a trespass action to file a petitory action in reconvention or even order him to do so within a time delay set by the court.⁹⁰ The law of *res judicata* may mandate this result.⁹¹

V. CONCLUSION

Louisiana courts can no longer deny that trespass actions determine questions of possession or ownership in the same manner as real actions. Theoretically, there may be a difference between the manner in which real rights are determined in trespass actions and possessory or petitory actions. However, since a party may collect damages and obtain an injunction in a possessory⁹² or petitory action⁹³ as well as in a trespass action, the relevancy of this distinction comes into question. The distinction is only a question of which comes first: the award of damages and the injunction or the determination of possession or ownership.

In the trespass action, the predominant claim is for the recovery of damages for interference with the exclusive right of ownership or possession. However, before the court may award damages or grant an injunction in a trespass action, it must determine the rights of the parties to the property. Conversely, in a possessory or petitory action, the primary claim is for the determination of ownership or possessory rights, and the award of damages or the injunction is only incidental. Since in both actions the court determines the real rights of the parties⁹⁴ and may grant an injunction and an award of damages, there is no significant reason for treating the two actions differently. Simply relying on the "nature" of the action is not sufficient.

This author advocates a solution to this problem that will implement a methodology similar to that used in the real actions of the Louisiana Code of Civil Procedure without changing the basic structure of the current trespass

90. Cf. La. Code Civ. P. art. 3662 (requiring court to order defendant to assert claim of ownership in petitory action within delay set by court when issuing judgment in favor of plaintiff in a possessory action).

91. See La. Code Civ. P. art. 1061 which provides that "[t]he defendant in the principal action, except in a divorce under Civil Code Article 102 or 103, shall assert in a reconventional demand all causes of action that he may have against the plaintiff that arise out of the transaction or occurrence that is the subject matter of the principal action." Comment (b) to this article explains that "if the defendant has a cause of action arising out of the subject matter of the plaintiff's action, then the defense of *res judicata* will prevent relitigation of issues common to both causes of action *except as otherwise provided by law*" (emphasis added). See *infra* note 95.

92. La. Code Civ. P. art. 3662 (providing relief for plaintiffs in possessory actions).

93. No article or statute is exactly on point, but some courts have awarded damages to plaintiffs in petitory actions. See, e.g., *Casey v. Abraham & Son*, 113 La. 581, 37 So. 484 (1904); *Willis v. Dep't of Culture*, 535 So. 2d 1162 (La. App. 2d Cir. 1988).

94. See discussion *supra* text accompanying notes 69-73. In trespass actions, courts claim the determination of possession or ownership is only a "burden of proof" or a "foundation matter." Because of the new expanded law of *res judicata*, however, their decisions determine real rights.

action. In cases where the trespass claim is based on the ownership of the plaintiff, the plaintiff's initial burden of proof should be to prove record title. This is sufficient to insure the plaintiff's prima facie right to the action. Then, the court should determine whether the defendant is in possession. If he is not, the plaintiff's showing of record title is sufficient to win so long as the defendant is only a mere trespasser. Similarly, if the defendant has some title, but is not in possession, the party with the better title should prevail. If, however, the defendant is found to be in possession, the burden should shift back to the plaintiff to prove perfect title.

If the trespass claim is based on the possession of the plaintiff, then the plaintiff's initial burden of proof should be to prove possession with the right to possess. If the plaintiff carries this burden, then the defendant will be liable for damages for his disturbance regardless of any assertion to title he may make. For the sake of judicial efficiency, the court should then allow the defendant to file a petitory action in reconvention or even order him to do so within a time delay set by the court.⁹⁵

Implementing these changes would remedy the inequity that exists under the current system. Such changes do not amount to a radical deviation from present practice and, accordingly, would not perplex either judges or lawyers. Finally, these changes would be consistent with the historical nature of the trespass action; the protection of possessory rights afforded by the Louisiana Civil Code and the Louisiana Code of Civil Procedure; and the amended version of *res judicata*.

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95. By its terms, the provisions of La. R.S. 4231 apply "[e]xcept as otherwise provided by law." Utilizing this language, it has been argued that *res judicata* does not require parties to bring possessory and petitory actions in the same proceeding since La. Code Civ. P. art. 3657 dealing with real actions prohibits this. Maintaining this dichotomy is questionable, however, if furthering the policies of *res judicata*, namely judicial efficiency and protection of litigants, is the goal. As one renowned author has commented, perhaps "[i]t is time . . . to reconsider whether the rigid separation of the possessory and petitory actions by the Code of Civil Procedure has outlasted its usefulness . . . [since] 'keep[ing] the trial of the issues of possession and ownership as separate as possible' . . . is hardly conducive to a speedy and efficient resolution of real property disputes." Symeon C. Symeonides, *Developments in the Law, 1984-85, Property*, 46 La. L. Rev. 655, 668-69 (1986).

