Private Law: Prescription

Frederick W. Ellis
The court of appeal sustained the chattel mortgage by interpreting the Bulk Sales Law definition of “transfer” as one in which the transferee has actually received the property (or obtains the proceeds of its sale). The Supreme Court reversed, apparently applying the “plain meaning” rule of statutory interpretation that the statute specifically includes a mortgage within its definition of transfers covered by this legislation, and it is in the very nature of a mortgage as a security device that the property remains in the possession of the mortgagor.

Although the Supreme Court decision was made by a divided court (4 to 3), it would seem that the majority’s interpretation of the original legislative intent of the statute is probably correct because the court of appeal’s qualification of transfer would read the word “mortgage” out of the definition entirely. On the other hand, neither can it be said that the original legislative intent was to include a chattel mortgage on a stock of merchandise because this was not authorized until 1948. It can hardly be stated with absolute assurance just what the legislature did intend when the word “mortgage” was originally included in the definition of “transfers” under the Bulk Sales Act. Under the circumstances, the plain meaning of the statute is not displaced by any more sophisticated interpretation.

It has already been noted that “Louisiana’s position is unique. The Bulk Sales Act found in Article 6 of the Uniform Commercial Code is expressly made inapplicable to security transactions in our sister states.”

The basic policy issues, as illustrated in the facts of the case being discussed, call for serious and careful legislative reconsideration.

PRESCRIPTION

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Acquisitive

In Zeringue v. Blouin, possession of a part was deemed possession of the whole of contiguous lands described in the deed of a good faith possessor, although no part of the land...
claimed by ten-year prescription had ever been actually possessed. The limitation upon articles 3437 and 3498, recognized by language in Sessions v. Tensaw River Planting Co., was rejected as inconsistent with the later decision in Leader Realty Co. v. Taylor. In Sessions, the Supreme Court had stated:

"[T]he land of which a part must have been possessed in order that the principle should come into play is the land sought to be acquired by prescription, and not some other land. The idea is that if the owner sees anyone in possession of any part of his land he is 'put on notice. But an owner is not thus put on notice, and prescription cannot run against him, unless someone is in possession of some part of his land."

This writer agrees with the result of Zeringue because of its extreme facts, which gave notice considerations a hollow ring. But it seems erroneous to conclude that the Sessions view should not be applied in any case where notice considerations are meaningful.

The Leader opinion did not consider the Sessions case. The transcript in Leader shows that there was no possible factual basis for considering the Sessions exception to the general rule.

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2. La. Civil Code art. 3437 (1870): It is not necessary that a person wishing to take possession of an estate should pass over every part of it; it is sufficient if he enters on and occupies a part of the land, provided it be with the intention of possessing all that is included within the boundaries.

3. Id. art. 3498: "When a person has a title and possession conformably to it, he is presumed to possess according to the title and to the full extent of its limits."

4. 142 La. 399, 76 So. 816 (1917).

5. 147 La. 256, 84 So. 648 (1920). Actually, this case stands for no more than the general rule about possession of a part, and is not inconsistent with Sessions.

6. 142 La. 399, 401, 76 So. 816 (1917). The notion that the deed of the possessor would constructively furnish such notice was rejected in Sessions because even if recorded, registry is for the benefit of those who wish to contract and was never designed as a means of ousting the owner, who should not have to concern himself with claims others are recording. See, e.g., Moore Planting Co. v. Morgan's La. & Tex. R.R. & Steamship Co., 126 La. 840, 880, 53 So. 22, 35 (1910). A fortiori, if the deed is not recorded, constructive notice by the deed alone seems clearly impossible.

7. In Leader, there was clear corporeal possession of a front portion not in dispute, but the opinion reflected no information about whether the rear triangle claimed by prescription had ever been corporeally possessed. The court stated that the question was whether the description in the defendant's deeds sufficiently identified the disputed triangle. Having resolved that issue favorably to the defendant, the court applied articles 3437 and 3498 to hold that the ten-year prescription was perfected on the rear triangle, stating the possession of a part rule and noting the contiguity of the rear tract with the unquestionably well-possessed and undisputed front tract.

8. The rear triangular part and front portion were surveyed for the defendant in 1904, and the surveyor testified the disputed triangular portion
To use a general rule without discussing whether there was evidence to warrant an exception does not destroy the exception.

Moreover, none of the other decisions cited in Zeringue as having followed Leader revealed any facts which would have necessitated consideration of the Sessions limitation. At least one other case which distinguished Leader was not mentioned. Under the Zeringue facts the record title claimants could hardly have claimed prejudice by want of notice through actual adverse possession. Those extreme facts make the language of

was cut over timberland. Tr. 171. An old neighbor testified that one of the defendant's ancestors in title had cleared all the timber off the disputed land. Tr. 174. Other witnesses testified as to defendant's old fences running into the disputed back area, e.g., at Tr. 131, 132, 136, and 193, and even that the disputed triangle had had "some portion of it" under old fences. Tr. 141. References are to the transcript pages in the Record of Leader Realty Co. v. Taylor, 147 La. 256, 84 So. 649 (1920).

9. 192 So.2d 838, 844 (La. App. 1st Cir. 1966). Although the numerous decisions there cited all indeed applied the "possession of a part" rule none showed facts to establish that the disputed land had had an absence of actual corporeal adverse possession and some definitely showed the contrary, e.g., Tremont Lumber Co. v. Powers & Critchett Lumber Co., 173 La. 937, 139 So. 12 (1932) (adverse possessor's lessee lived on part of the disputed land); Smith v. Southern Kraft Corp., 202 La. 1019, 13 So.2d 335 (adverse timber cutting on disputed tract). Smith was mistakenly cited in Wilson v. Gulf, Mobile & Ohio R.R., 181 So.2d 406, 411 (La. App. 1st Cir. 1965) (actual possession on disputed part) as having applied the rule where there was no actual possession of the disputed part.

10. Ellington v. Ellis & Dorsett, 2 La. App. 715, 722 (2d Cir. 1925). In Ellington, the disputed land in one parish adjoined lands in a second parish. The entirety of the lands were described together in deeds in the chain of title of the adverse possessor. But his actual acts of possession were confined to the lands in the second parish. His deeds had been recorded only in the second parish and the title out of the sovereign was by different grants, facts which were seized upon to buttress the conclusion that the "possession of a part" rule was inapplicable. It seems that the court in Ellington was actually following without citation the notice principle of Sessions. See note 16 infra.

11. The defendants' author had purchased by an 1895 recorded deed describing two contiguous parcels—front high ground with unquestionably valid title, and the disputed rear swamp land. The front portion had been actually possessed by the defendants or their authors since 1895, but the unusable swamp had not been actually possessed. Defendants or their author had paid taxes and granted numerous recorded mineral leases on all of the property since 1895.

The plaintiffs admitted they had no pretense of ownership at least between 1895 and 1939, when a Zeringue heir discovered and recorded an 1857 land patent to Charles Zeringue. The defendants' author's 1895 deed recited that the vendor had acquired from Charles Zeringue. Although the existence of a deed from Charles Zeringue was not proved, one might attach importance to the 1895 deed's recital, especially when coupled with the fact that no legal claim was asserted until after the discovery of oil more than 60 years later. See Lefitte, Dufilho & Co. v. Godchaux, 35 La. Ann. 1161, 1163 (1883), quoted in the text at note 21 infra. Plaintiffs were unable to show any possession of or physical or civil acts affecting any part of the larger tract their patent covered, or any payment of taxes or attention to the property whatsoever, until the 1939 patent recordation.
the Supreme Court, in denying a writ, especially interesting:
"On the facts found . . . we find no error of law." An analysis of article 3487 suggests that under different facts where notice would be meaningful Sessions should be followed.

Article 3487 provides that the possession necessary to plead ten-year prescription must be "public and unequivocal; a clandestine possession would give no right to prescribe." If not clandestine in the sense of intentionally secret, possession by acts on property other than the property claimed by prescription hardly seems "public and unequivocal" or open and notorious as to the property claimed by prescription and as to its owner. Aubry and Rau state:

"Possession is clandestine, that means not open, if the acts by which it was acquired and continued were not such as to be known on the outside, especially to those persons against whom they are to be claimed. . . . Clandestinity is a purely relative defect which can be subject to claim only by those who could not have known about the possession." (Emphasis added.)

The essence of the Aubry and Rau relative defect approach to the absence of a public or unequivocal character is that owners who are not prejudiced thereby should not be heard to complain. This justifies the Zeringue precedent only if it is limited to cases with similar exceptional facts.

If not restricted to its extreme facts, the effect of Zeringue would apparently make it important that an owner exercise actual possession on at least part of his property to avoid the risk that his land might be included in the deeds of contiguous owners whose actual possession of contiguous lands would either go unnoticed or not excite alarm. Such a result seems contrary

12. 250 La. 100, 194 So.2d 98 (1967).
13. Public and unequivocal concepts of art. 3487 were apparently derived from CODE CIVIL art. 2229, and under French law, it is immaterial whether clandestine possession was intentionally secret. This would be material only to good faith problems, as article 3487 suggests. 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS—PROPERTY (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 180(2) (1966).
15. 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS—PROPERTY (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 180(2) (1966).
16. See Ellington v. Ellis & Dorsett, 2 La. App. 715, 721 (2d Cir. 1925): "One having a perfect title should not be obliged to take actual possession to guard against the danger of losing it by a hostile possession merely constructive of which he could have no knowledge except by reading the deeds of everybody in the neighborhood to see whether his land was included in
to article 496, which clearly negates any notion that an owner must possess to maintain ownership. The owner is not less the owner because he fails to perform acts of ownership; it is only where the owner permits a third person to remain in possession that he risks loss of ownership by prescription. To permit connotes either knowledge of the adverse possession to be permitted; or, at the very least, neglect in not discovering or ejecting the possessor. By this analysis, Zeringue might be technically justified as a case of neglect. This view would render article 3498 and Zeringue consistent with articles 496 and 3487; preserve the general requirement of reasonable notice recognized in cases where it was meaningful; and produce a just result for neglect cases consistent with the long-held view that

"The genius of our law does not favor the claims of those who have long slept on their rights and who, after years of inertia, conveying an assurance of acquiescence in a given state of things, suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid of the courts for relief, under the effect of a newly discovered technical error in some ancient transaction or settlement."

Further ground for flexible handling of the Zeringue precedent lies in the fact that article 3498 only creates a rebuttable presumption that actual possession of a part extends to the limits of lands described in a deed. It is submitted that an owner should normally be permitted to rebut this often fictitious one or not." Actual possession by a true owner of a part of a contiguous estate would of course result in constructive possession of the whole and would defeat any prescriptive claim based on merely constructive possession claimed by an adverse possessor by reason of the same rule. Comment, 12 Tul. L. Rev. 608, 615 (1938) and authorities there cited.

17. This is not to say that an owner may totally neglect his property without risk to his title, when another is in possession.
18. LA. CIVIL CODE art. 496 (1870).
20. Sessions v. Tensaw River Planting Co., 142 La. 399, 76 So. 816 (1917);
23. I.e., where there are facts contrary to the Zeringue facts. Perhaps an owner who has never had corporeal possession can yet show he has visited his property or patrolled it infrequently; paid taxes, frequently entered into business transactions, or exercised other civil acts regarding the property; or perhaps he can show that the land was usable and accessible and he or his representative were so situated that neighbors would have been apt to report adverse possession. Such circumstances ought to form a basis for contending that the absence of any actual possession of any part of the land claimed by prescription was so seriously unfair to the owner as to warrant not applying the presumption. If an owner, so prejudiced by the absence of actual possession, is held to have been divested of ownership by application
tional presumption by showing that there were no acts sufficient to put an owner on notice of the adverse possession, i.e., no actual possession of any part of the land claimed by prescription.

The need for certainty in title transactions has caused a "public policy of the State that land titles shall remain stable so that property will always be transferable in commerce." This policy might justify total rejection of the Zeringue opinion, rather than mere confinement to its facts, to avoid factual analysis that might sometimes cloud titles in marginal cases, if it were not for positive law and equitable reasons discussed above, which at least partially balance the interest in certainty of titles. However, it seems very clear that the alternative of greatly extending Zeringue to less extreme facts would definitely play havoc with certainty of titles, and greatly increase the economic cost and delays of title work.

The Second Circuit Court of Appeal decided Smith v. Burks contemporaneously with the Zeringue decision of the First Circuit. Although the opinion was unclear on whether the description of a deed was employed to assert the possession of a part rule, it appears that the court took a basically contrary position to Zeringue's rationale by holding that there was no actual possession of a disputed small parcel merely by reason of actual possession of undisputed portions of a larger tract which included the parcel.

In Downs v. McNeal, the record owner's corporeal possession of a part and his resultant constructive possession of the of articles 3437 and 3498, this writer would wonder about the contract clause constitutionality of such an application of the articles, a question beyond the scope of this writer's present research.

25. An attorney examining title from the public records by name indices or without benefit of an abstract prepared from a well-kept tract index would never discover recorded intrusive deeds. Examination of contiguous tracts, where any of the contiguous lands were not actually possessed, would be ineffective because there would be no way of knowing whether deeds to lands contiguous to the contiguous lands had overlapping mistaken descriptions or whether there were unrecorded intrusive deeds. Even in areas where abstract companies maintain good tract indices, description mistakes or uncertainty, and survey complications, would be magnified. If the attorney excepted this problem from his opinion, title insurance policies would normally except the problem. In many areas, it is often difficult to perfect curative possession information on the tract under examination; to have to perfect possession, information on numerous tracts to approve title to a single tract would often be a practical impossibility.

26. 192 So.2d 919 (La. App. 2d Cir. 1966).
27. 193 So.2d 843 (La. App. 3d Cir. 1967).
remainder of a disputed parcel was correctly held to control over the purely constructive possession of the plaintiff, who held a merely just title to the disputed parcel. The plaintiff's title described six contiguous acres: two he had valid title to and actually possessed; the other four were unsuccessfully claimed on the basis of ten-year prescription.

Trahan v. Broussard divided the Third Circuit Court of Appeal and the Supreme Court on the issue of whether R.S. 9:5682 required that the third person's possession be in good faith. The court of appeal majority held that the prescription was liberative and therefore did not require good faith, because the language of the statute barred an action and did not relate to the acquisition of ownership. Judge Tate, in dissent, reasoned that the prescription effectively divests ownership by another's possession and was acquisitive. He stated it should require good faith possession, both to prevent fraud and because the legislation was an apparent response to jurisprudence holding that judgments of possession were not "just titles." Further, the dissenter stated that even liberative prescription can require good faith.

The Supreme Court majority held that the third person acquires title and the prescription is therefore acquisitive; but affirmed the judgment on the principal ground that the legislature would have stated good faith as a requirement if good faith was required.

The Supreme Court dissent reasoned that laws in pari materia must be construed together. Since the statute was in response to jurisprudence refusing to treat judgments of possession as transitive of property, it was intended to merely make ordinary ten-year prescription principles applicable where third persons were involved.

The problem was whether the statute required good faith possession. More basically, the problem posed a need to balance two potentially conflicting interests: protection of inheritance rights, especially against possible fraud or abuse of succession

28. 196 So.2d 858 (La. App. 3d Cir. 1967).
29. 206 So.2d 82 (La. 1968).
30. LA. R.S. 9:5682 (Supp. 1966), La. Acts 1960, No. 584, provides, in essence, that an action by an unrecognized heir or legatee to assert any right in property of a deceased against a third person other than one recognized as an heir or legatee in a judgment of possession is prescribed in ten years, if the third person or his ancestors in title, singly or collectively, have been in possession for such period after the registry of the judgment.
procedure; versus stabilization of titles, through affording greater prescriptive benefits where third persons rely upon succession judgments.

The apparent primary purpose of the statute is to serve the latter interest, because it plainly gave substantial prescriptive effect to such judgments and was apparently in response to jurisprudence which had disserved that interest. However, the statute did not ignore protection of inheritance rights from abuses, else the prescription would not have been limited to actions against third persons. So proper respect for legislative intent would give weight to both interests, but as to conflicts generally tip the scales in favor of title stability.

Therefore, it was correct to refuse to require good faith. To "plug in" this new prescription to old arbitrary good faith prescription rules would substantially defeat its principal purpose. Good faith rules would make it highly unlikely that a third person could benefit from the prescription if he relied upon a succession judgment. It would be even more difficult to find that the false heirs placed in possession by an erroneous judgment were in good faith, if this were a relevant problem.

The absence of a legal good faith requirement should not mean a total absence of protection against all radical succession judgment irregularities. The theory of absolute nullities (or void or radical nullities) ought to be employed to give limited protection to inheritance rights and institutions without unduly sacrificing stability of titles. By the theory urged, if a judgment were an absolute nullity, it would be legally nonexistent and render the statute inapplicable unless the third person had no

31. See authorities cited in the court of appeal dissent, 196 So.2d 858, 865 (La. App. 3d Cir. 1967), with which the Supreme Court majority and dissent apparently agreed, except as to the significance of the fact that the legislation was in response to this jurisprudence.

32. See Dinwiddie v. Cox, 9 So.2d 68 (La. App. 2d Cir. 1942), regarding the very strong duty to ascertain all heirship facts, and make correct legal conclusions, once an investigation is undertaken. Since a judgment of possession is only prima facie valid (La. Code of Civ. P. art. 2004 (1960)), it could not alone be relied upon, but rather to look to it might only trigger a duty to ascertain all the true facts. See Juneau v. Laborde, 219 La. 921, 54 So.2d 325 (1951); Work of the Louisiana Supreme Court for the 1951-1952 Term—Prescription, 13 La. L. Rev. 262, 264 (1953).

33. Because they would have had an attorney who should normally investigate heirship for the succession. See Martin v. Schwing Lumber & Shingle Co., 228 La. 175, 81 So.2d 852 (1955).

34. The letter of the statute suggests that a third person purchasing more than ten years after registry of the judgment could tack onto the possession of his false heir-vendor.
actual notice of the defects or the defects were not apparent on the face of the judgment. This limited protection would not interfere with policy favoring stability of titles to promote the legitimate transfer of property in commerce, since a legitimate purchaser would have no duty to investigate beyond the face of the judgment of possession, in order to be protected by the prescription. Further protection of inheritance rights ought to be afforded by examining whether the third person relying upon the statute is a straw man for a false heir named in the illegal judgment.

_Cason v. Oglesby_ is subject to possible future misinterpretation. In a petitory action, the defendant pleaded a visible boundary and possession for more than thirty years, without clear specification as to the type of prescription pleaded. The trial court ruled that prescription had not been properly pleaded nor proved “under the pertinent articles.” The court of appeal considered the prescription plea as apparently abandoned on appeal, noting a stipulation that plaintiff was the “record owner” and that the only error specified on appeal was alleged error in employing as a basis for judgment an ex parte plat of survey. The court concluded that the allegation that the suit had been converted into a boundary action was the only remaining issue, and ruled against defendant because she had not asked for a fixing of boundaries.

Although the facts and legal rationale are not clearly stated, it seems the court was convinced that article 852 and general thirty-year prescription claims had been abandoned. This being the case, the opinion should not be construed as implying that article 852 boundary prescription can only be raised in a boundary action. Other recent decisions have followed established jurisprudence to the contrary.

The court's reinforcement of its conclusion that the prescriptive claims had been abandoned by pointing to the “record owner” stipulation seems questionable. Ownership based upon prescription is not necessarily reflected on the public records.

35. See, e.g., _Giddens v. Mobley_, 37 La. Ann. 417 (1885); _Callahan v. Authement_, 99 So.2d 531 (La. App. 1st Cir. 1957). A defect on the face of an instrument gives notice, so absence of notice of the defect is what protects third persons. Therefore, actual knowledge of the defect should remove this protection.

36. 188 So.2d 718 (La. App. 2d Cir. 1966), _writ refused_, 249 La. 842, 191 So.2d 642 (1966).

One comes away from a reading of other recent article 852 boundary prescription cases, which do not merit discussion for lack of new or important legal questions, with the feeling that if there is conflicting testimony it can be very difficult to convince a court that a long-standing fence has not been in place more than thirty years.

\textbf{Liberative}

In \textit{Freestate Industrial Development Co. v. T. & H., Inc.}\textsuperscript{38} it was held that a cause of action for damages based upon an alleged interference with natural drainage by altering its flow is a cause of action resulting from an abuse of a servitude owed by the plaintiff's estate to the defendant's estate, under article 660. Therefore, it was held that the ten-year prescriptive period applied and not the one-year period for offenses or quasi-offenses. The court's reasoning is logical, but if this result is compelled by the Code, one might question the wisdom of the wise redactors of the Code. The problem of ascertaining facts and causation of damages ten years after the act might often pose terrific evidence and proof problems. Although one year may be too short a period, something less than ten years seems in order, which raises the question of a need for Code revision.

\textbf{MINERAL RIGHTS}

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\textbf{MINERAL SERVITUDES}

\textit{Prescription—Effect of Operations under Community Lease}

The case of \textit{Hall v. LeMay}\textsuperscript{1} involved one of those increasingly troublesome situations in which co-owners of property entered into a partition and attempted to reserve mineral rights in indivision. During the life of the mineral rights so reserved, the various land and mineral owners entered into a lease under which production was achieved. The well site, however, was not on that portion of the partitioned estate involved in the litigation. Thus, it was contended by the owner of the tract in question that the act of partition had created separate mineral servitudes on each of the lots resulting from the partition, that there had

\textsuperscript{38} 188 So.2d 746 (La. App. 2d Cir. 1966)

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\textsuperscript{1} 191 So.2d 720 (La. App. 2d Cir. 1966).