**LOUISIANA STATE LAW INSTITUTE**

**MEETING OF THE COUNCIL**

**March 18, 2022**

**Friday, March 18, 2022**

**Persons Present:**

Babington, J. Bert
Breard, L. Kent
Crigler, James C., Jr.
Crigler, John D.
Cromwell, L. David
Curry, Kevin C.
Davidson, James J., III
Davrados, Nikolaos A.
Dyess, Desiree Duhon
Forrester, William R., Jr.
Freel, Angelique D.
Hawthorne, George "Trippe"
Hayes, Thomas M., III
Hogan, Lila Tritico
Holdridge, Guy
Janke, Benjamin West
Knighten, Arlene D.
Lampert, Loren M.
Lee, Amy Allums
Lovett, John A.
Mengis, Joseph W.
Philips, Harry "Skip", Jr.
Pirtle, Amy
Price, Donald W.
Riviere, Christopher H.
Saloom, Douglas J.
Stephenson, Gail S.
Talley, Susan G.
Tate, George J.
Tew, Robert S.
Title, Peter S.
Tucker, Zelda W.
Ventulan, Josef
Waller, Mallory C.
Weems, Charles S., III
White, H. Aubrey, III
Woodruff-White, Lisa
Ziober, John David

President Thomas M. Hayes, III called the March Council meeting to order at 10:00 a.m. on Friday, March 18, 2022 at the Lod Cook Alumni Center in Baton Rouge. After asking the Council members to briefly introduce themselves and making a few administrative announcements concerning remote meetings and the possibility of holding an annual banquet in the fall, the President called on Mr. Charles S. Weems, III, Reporter of the Constitutional Laws Committee, to begin his presentation of materials.

**Constitutional Laws Committee**

Mr. Weems began his presentation by reminding the Council that this was the Constitutional Laws Committee's fourth biennial report concerning statutes that have been declared unconstitutional by final and definitive judgment pursuant to Acts 2014, No. 598 and R.S. 24:204(A)(10). The Reporter noted that the 2022 report was divided into three categories: (1) provisions that are new and were not included in previous reports, (2) provisions that were included in previous reports and have not been addressed by the legislature, and (3) provisions that were included in previous reports and have been addressed by the legislature, which have been attached as an appendix. Mr. Weems also reminded the Council that the Committee's recommendations vary in form and include suggested amendments and repeals, requests for further study, and directions concerning the printing of provisions or of explanatory notes. With that introduction, the Reporter asked the Council to turn to the first category – provisions that were not included in previous reports – on page 1 of the materials.

The Reporter explained that Children's Code Article 305(B)(2)(j) had been declared unconstitutional in *State in Interest of D.T.* because this provision conflicts with Article V, Section 19 of the Constitution of Louisiana, which provides the list of offenses for which the legislature can provide that a juvenile can be tried as an adult and does not include aggravated battery committed with a firearm. As a result, the Committee's recommendation on page 3 of the materials is that the legislature either repeal Children's Code Article 305(B)(2)(j) or propose an amendment to Article V, Section 19 of the Constitution to include "aggravated battery with a firearm" in the relevant list of offenses. A motion was made and seconded to adopt the Committee's recommendation as presented, and the motion passed with no objection.

Turning to page 4 of the materials, Mr. Weems explained that R.S. 40:1321(J) and R.S. 15:542.1.4(C) had been declared unconstitutional in *State v. Hill* because R.S. 40:1321(J) requires persons registered as sex offenders to obtain special identification cards that include the words "sex offender" in capital letters that are orange in color, and the Louisiana Supreme Court held that this requirement is not the least restrictive means of advancing the state's interest in identifying individuals as sex offenders. Instead, the Supreme Court reasoned that the state's interest could be accomplished by requiring the identification card to contain some sort of symbol, code, or letter designation, and therefore the Committee's recommendation to the legislature is that R.S. 40:1321(J) be amended to comply with the Supreme Court's decision in *State v. Hill.* A motion was made and seconded to adopt the Committee's recommendation as presented, and the motion passed with no objection.

Next, the Council considered R.S. 45:1163, on page 6 of the materials, and the Louisiana Supreme Court's holding in *Cajun Electric Power Cooperative v. Louisiana Public Service Commission* that this provision is unconstitutional to the extent that it is inconsistent with Article IV, Section 21(B) of the Constitution of Louisiana. This provision of the Constitution explicitly grants authority over all public utilities to the Public Service Commission and prevents the legislature from enacting restrictions concerning electric cooperatives, which were defined as public utilities at the time the Constitution was adopted. As a result, the Committee recommends that a validity note be added with respect to R.S. 45:1163 explaining the Supreme Court's holding. A motion was made and seconded to adopt the Committee's recommendation as presented, and the motion passed with no objection.

Mr. Weems then asked the Council to turn to R.S. 47:301(10)(c)(i)(aa), on page 9 of the materials, and explained that this provision was held unconstitutional in *Calcasieu Parish School Board Sales & Use Department v. Nelson Industrial Stream Company* because it was amended to provide that purchases of materials that are processed into a byproduct are taxable when this was not previously the case. In other words, the amendment created a new tax on these purchases, but because the legislature failed to obtain the requisite supermajority vote of each house, the amendment was unconstitutionally adopted according to the Supreme Court. The Reporter explained that the Committee's recommendation is that if the legislature wishes to retain this amendment, it should amend and reenact the provision with the necessary two-thirds vote of each house. A motion was made and seconded to adopt the Committee's recommendation as presented, and after a brief discussion, the motion passed with one member abstaining.

Having considered all of the provisions that were included in the first category of the report, the Council then turned to the second category – provisions that were included in previous reports and have not been addressed by the legislature. Mr. Weems explained that a few of the provisions in this category had been updated in light of recent developments and requested that the Council consider these provisions specifically before approving the remainder of this section of the report *in globo.*

The first of the provisions in this category requiring the Council's attention is Article XII, Section 15 of the Constitution of Louisiana, on page 18 of the materials. Mr. Weems explained that the Law Institute's initial recommendation with respect to this provision was for the legislature to direct the Law Institute to add a validity note concerning the United States Supreme Court's decision in *Obergefell v. Hodges* or to submit to the voters a proposal to amend the Constitution to replace "one man and one woman" with "two natural persons." Since this initial recommendation was made, a validity note concerning the *Obergefell* decision was added to this provision as well as to Civil Code Articles 89 and 3520(B), which appear on pages 20 and 22 of the materials. As a result, the Committee has updated its recommendations for each of these provisions, and a motion was made and seconded to adopt the Committee's updated recommendations as presented. After a brief discussion concerning the fact that the Law Institute's alternative recommendations with respect to amending or repealing these provisions to remove the constitutional deficiencies have not yet been followed by the legislature, the motion passed with no objection.

Another Council member then asked the Reporter to turn to the recommendation concerning Article I, Section 10 of the Constitution of Louisiana, on page 13 of the materials, and to clarify the meaning of a direction to the printers to "stop printing" unconstitutionally adopted language. Mr. Weems explained that this provision is unique because what was ultimately presented to the voters was not what the legislature adopted in that certain legislative amendments were not properly incorporated. As a result, this amendment was never properly adopted and should not be printed, and Article I, Section 10 should be restored to its previous version, but this is not being done consistently among all of the printers. Additionally, Article I, Section 10.1 has since been added to the Constitution and contains the correct language, so the unconstitutional amendment to Article 1, Section 10 is no longer necessary.

Following this discussion, the Reporter asked the Council to turn to Code of Civil Procedure Article 3662(A)(2), on page 24 of the materials, and explained that the Committee's recommendation had been reworded slightly to recognize that the Law Institute is currently considering legislation proposed by the Possessory Actions Committee to address the constitutional infirmity recognized in *Todd v. State*. A motion was made and seconded to approve the updated recommendation as presented, and the motion passed with no objection. Finally, Mr. Weems asked the Council to consider R.S. 14:87, on page 35 of the materials, relative to abortion. He explained that the Committee's previous recommendation was to add a validity note concerning the *Sojourner v. Edwards* and *Jackson Women's Health Organization v. Dobbs* opinions, and that at the time of the Committee's last report, the United States Court of Appeals for the Fifth Circuit had failed to uphold the Mississippi legislation that would have triggered Louisiana's fifteen-week abortion ban; however, the United States Supreme Court has since granted certiorari in this case, and the Committee therefore updated its recommendation to include this information. A motion was made and seconded to adopt the Committee's updated recommendation as presented, and the motion passed with no objection.

At this time, Mr. Weems explained that no additional changes had been made to any of the other provisions included in the second category of the report and asked that the Council approve the continued inclusion of these provisions *in globo*. A motion was made and seconded to adopt the Committee's recommendations as presented and previously approved, and the motion passed with no objection. The Reporter then directed the Council's attention to the final category of the report – provisions that were included in previous reports and have been addressed by the legislature – and asked that the Council consider recent developments with respect to five of the provisions included in this category. First, concerning R.S. 9:2948 and Civil Code Article 477(B), on page A-9 of the materials, a note to the legislature had been added explaining that these provisions had been amended and repealed during the 2020 Regular Session as recommended by the Law Institute. A motion was made and seconded to adopt this note to the legislature as presented, and the motion passed with no objection.

Next, the Reporter directed the Council's attention to R.S. 14:47 through 49, beginning on page A-25 of the materials, and informed members that notes to the legislature had been added with respect to each of these provisions explaining that they had been repealed during the 2021 Regular Session. A motion was made and seconded to adopt these notes to the legislature as presented, and the motion passed with no objection. Finally, the Council turned to R.S. 14:122, on page A-29 of the materials, and Mr. Weems explained that a note to the legislature had previously been included concerning the amendment of this provision during the 2019 Regular Session, the intent of which was to remedy the constitutional deficiency by using narrowing language held to be acceptable in other jurisdictions. The Reporter informed the Council that this note to the legislature had been updated to include that the constitutionality of this amendment had not yet been ruled upon by the courts and that no further recommendation with respect to this provision was being made by the Law Institute at this time. A motion was made and seconded to adopt the updated note to the legislature as presented, and the motion passed with no objection.

The Reporter then explained that no other changes had been made to the notes to the legislature included throughout the appendix, and a motion was made and seconded to adopt these provisions as presented and previously approved. The motion

passed with no objection, and there being no additional business on behalf of the Constitutional Laws Committee, Mr. Weems concluded his presentation. The President then called on Judge Guy Holdridge to present materials on behalf of the Code of Civil Procedure Committee.

**Code of Civil Procedure Committee**

Judge Holdridge began his presentation by reminding the Council that it had previously approved revisions to the articles of the Code of Civil Procedure and Code of Criminal Procedure with respect to recusal. After reviewing the revisions that had been made with respect to district courts, the judges of parish and city courts expressed that they would like the ability to deny a motion that fails to set forth a ground for recusal without the appointment of another judge or a hearing, and the time limitation with respect to ruling on recusal motions should also apply to these judges as well. Judge Holdridge explained that proposed revisions to Article 4862 to accomplish these objectives appear on page 1 of the materials, and the Council discussed a few technical changes, such as changing "parish court or city court judge" to "judge of a parish or city court" on line 3 and adding "under Article 151" after "recusal" on line 20. A motion was then made and seconded to adopt the proposed changes to Article 4862 as amended, and the motion passed without objection. The adopted proposal reads as follows:

**Article 4862. Motion to recuse**

A. When a written motion is made to recuse a judge of a parish ~~court~~ or city court ~~judge~~ or a justice of the peace, not later than seven days after the judge or justice of the peace receives the motion from the clerk of court, the judge or justice of the peace shall either recuse himself, or the motion to recuse shall be tried in the manner provided by Article 4863.

B. If the motion to recuse fails to set forth a ground for recusal under Article 151, the judge or justice of the peace may deny the motion without the appointment of another judge or a hearing but shall provide written reasons for the denial.

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(a) A new time limitation has been added to Paragraph A of this Article to require the judge or justice of the peace who is the subject of the motion to recuse to act within seven days after receiving the motion from the clerk of court.

(b) Paragraph B of this Article is similar to Article 154 in that it allows a judge of a parish or city court or a justice of the peace to deny a motion to recuse that fails to set forth a ground for recusal under Article 151 without a hearing or the appointment of another judge or justice of the peace, but the judge or justice of the peace must give written reasons for the denial.

Judge Holdridge then concluded his presentation, and the President called on Mr. L. David Cromwell, Reporter of the Possessory Actions Committee, to begin his presentation of materials.

**Possessory Actions Committee**

Mr. Cromwell began his presentation by informing the Council that this project arose out of a legislative resolution, Senate Concurrent Resolution No. 42 of the 2016 Regular Session, that asked the Law Institute to study the provisions of the Code of Civil Procedure pertaining to possessory actions. Specifically, the resolution expresses concern with respect to how the possessory action operates, particularly when it applies unfairly to landowners who have been in possession for a long time, and Mr. Cromwell explained that the issues involved also relate to petitory actions under the Code of Civil Procedure. The Reporter then provided the Council with an introduction to the issues that have been considered by the Committee, beginning first with the notion that possession

and ownership are distinct concepts, but that possession can lead to ownership of immovable property after 30 years or after 10 years when in good faith and with just title.

Mr. Cromwell then explained the various real actions that are available to protect ownership and possession, including the possessory action, which protects someone who has acquired the right to possess after possessing for one year and does not involve issues of ownership; the jactitory action, which was eliminated in 1960 but was derived from Spanish law to permit the winner of the possessory action to require the loser to assert his claims of ownership within 60 days or thereafter be precluded from doing so; and the petitory action, which involves claims of ownership by a person who is not in possession but also sets forth very cumbersome rules regarding burden of proof. For example, a petitory action plaintiff is not in possession, but if the defendant is in possession, then the plaintiff must prove title good against the world, meaning record perfect title dating back to the sovereign or the acquisition of ownership via acquisitive prescription; if the defendant is not in possession, then the plaintiff must prove better title. These rules concerning the burden of proof applicable in a petitory action are also complicated by the court's ruling in the *Pure Oil v. Skinner* case requiring the plaintiff to bear his burden of proving title good against the world even if the defendant is a usurper with no title at all. Mr. Cromwell explained that this essentially creates acquisitive prescription of one year, a result that the Committee has attempted to remedy in its proposed revisions.

In addition to these real actions, the Reporter also noted the availability of an action for a declaratory judgment to determine ownership, and he explained that the same rules concerning petitory actions should apply in these types of actions as well, but one exception to this appears to be with respect to the rule of non-cumulation. Mr. Cromwell noted that because ownership is not at issue in a possessory action, the possessory and petitory actions are not permitted to be cumulated, and there are serious consequences in the event that this is done; however, these consequences do not appear to apply with respect to actions for declaratory judgments, and courts seem to be permitting these actions to be cumulated with possessory actions without issue. The Reporter then noted that revisions concerning the rule of non-cumulation would not be discussed today, but that a policy decision may be sought from the Council with respect to this issue.

With that introduction, the Reporter asked the Council to turn to Article 3655, on page 17 of the materials, and explained that this change to allow precarious possessors to bring possessory actions against anyone other than the person for whom they possess was made in the Civil Code in 1983 but not in the Code of Civil Procedure. The Director asked whether Comments would accompany this proposed legislation, and the Reporter answered in the affirmative and also noted that a report in response to the resolution would be submitted to the legislature. A motion was then made and seconded to adopt the proposed language on line 3 of page 17 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

**Article 3655. Possessory action**

> The possessory action is one brought by the possessor <u>or precarious possessor</u> of immovable property or of a real right therein 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.

Next, the Council turned to Article 3656, on page 18 of the materials, and the Reporter explained that the revisions to Paragraph A are intended to accomplish the same goal of allowing precarious possessors to bring possessory actions against anyone other than the person for whom they are possessing. One Council member questioned the second sentence of this provision, which states that a usufructuary possesses for himself, and expressed concern that someone could use this statement as a means of arguing that a usufructuary can possess against the naked owner for purposes of acquisitive prescription. The Council then discussed whether to rephrase this sentence to provide that a usufructuary has the right to bring a possessory action rather than stating that a usufructuary possesses for himself, or whether to combine the first and second

sentences of Paragraph A, and the Reporter agreed to consult his Committee with respect to this issue. Mr. Cromwell then explained that the revisions to the third sentence of Paragraph A are intended to overrule *Harper v. Willis*, 383 So. 2d 1299, and a motion was made and seconded to adopt the revisions to Article 3656 as presented. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 3656. Same; parties; venue**

A. A ~~plaintiff in a~~ possessory action ~~shall~~ may be brought by one who possesses for himself. A person entitled to the use or usufruct of immovable property, and one who owns a real right therein, possesses for himself. A ~~predial lessee~~ possessory action may also be brought by a precarious possessor against anyone except the person for whom he possesses ~~for and in the name of his lessor, and not for himself~~.

* * *

The Reporter next directed the Council's attention to Article 3658, on page 20 of the materials. He explained that this provision sets forth what must be proven by the plaintiff in a possessory action and noted that the concept of precarious possession should be included here as well. One member of both the Committee and the Council questioned how this revision relates to the purpose of the resolution, and Mr. Cromwell responded that the resolution asks the Law Institute to study the possessory action generally, and the Committee would be remiss if it did not recommend changes to remedy the inconsistencies between the procedural and substantive law. After additional discussion about whether "the plaintiff" or "a party" is more accurate, as well as the fact that changes to conform with legislative drafting conventions, such as replacing "must" with "shall" on line 3 and eliminating the semicolons at the end of each line, would be needed, a motion was made and seconded to adopt the proposed revisions to Article 3658 with these minor technical changes. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 3658. Same; requisites**

To maintain the possessory action the ~~possessor must~~ plaintiff shall allege and prove ~~that~~ all of the following:

(1) He had possession or precarious possession of the immovable property or real right therein at the time the disturbance occurred~~;~~.

(2) He and his ancestors in title, or the person for whom he possesses precariously and that person's 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 fact or in law, as defined in Article 3659~~; and~~.

(4) The possessory action was instituted within a year of the disturbance.

The Council then turned to Article 3660, on page 23 of the materials, and a motion was quickly made and seconded to adopt the proposed revisions to this provision as presented. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 3660. Same; possession**

A. A person is in possession of immovable property or of a real right therein, within the intendment of the articles of this Chapter, when he has the corporeal possession thereof, or civil possession thereof preceded by corporeal possession by him or his ancestors in title, and possesses for

himself or precariously for another, whether in good or bad faith, or even as a usurper.

B. Subject to the provisions of Articles 3656 and 3664, a person who claims the ownership of immovable property or of a real right therein possesses through his lessee, through another who occupies the property or enjoys the right under an agreement with him or his lessee, or through a person who has the use or usufruct thereof to which his right of ownership is subject.

Next, the Council considered Civil Code Article 3440, on page 34 of the materials, and the Reporter explained that this provision sets forth the substantive law that corresponds to the precarious possessor issue that the Council had been considering. This provision also provides two examples of precarious possessors, lessees and depositaries, but the issue is that the possessory action is available only with respect to immovable property, yet the contract of deposit is applicable only to movable property. Mr. Cromwell explained that his Committee had referred this issue to the Law Institute's Property Committee for review and that the Property Committee agreed that "or a depositary" should be removed from this provision. After discussing whether another example should be provided, as well as the fact that this language would also need to be removed from the Comment to Civil Code Article 3440, a motion was made and seconded to adopt the proposed revisions as presented. The motion passed with no objection, and the adopted proposal reads as follows:

**Civil Code Article 3440. Protection of precarious possession**

Where there is a disturbance of possession, the possessory action is available to a precarious possessor, such as a lessee ~~or a depositary~~, against anyone except the person for whom he possesses.

Next, Mr. Cromwell asked the Council to turn to Article 3659, on page 21 of the materials, which sets forth the definitions of disturbances in fact and in law. After introducing these concepts, the Reporter explained that one area for potential abuse in this Article is the fact that the continuing existence of record of an instrument is a disturbance in law, but this should not be permitted to be used against the owner of the property with respect to something that occurred before the owner commenced possession. Rather, the intent of this provision is to protect an owner who purchases a house that he has lived in and been in possession of every day for 25 years who then chooses to refinance the mortgage and finds something that looks like a claim of title to the house in the records from 3 years ago about which he had no idea. If this rule did not exist, the owner of the house would be out of luck because it had been more than a year since the disturbance was filed, but because the instrument continues to exist of record, the owner is protected and is entitled to complain about the disturbance. If, however, a usurper acquires the right to possess, that person should not be able to use the continuing existence of the owner's title as the basis for a disturbance. Mr. Cromwell explained that Paragraph C had been redrafted to address this issue as well as to clarify a few other points, and that the only changes made to Paragraphs A and B were to replace "which" with "that."

After this explanation, a motion was made and seconded to adopt the proposed changes to Article 3659 on page 21 of the materials. Several Council members provided hypotheticals and asked how the revisions to Paragraph C would apply based on whether something was recorded before or after a piece of immovable property was purchased, as well as how the ability to tack to the possession of your ancestors in title would affect the outcome. Members of the Council also discussed the remedy available if the plaintiff wins a possessory action – the plaintiff will be maintained in possession of the property, but what happens to the disturbance in law? Can these old deeds be removed from the conveyance records? After this discussion, a vote was taken on the motion to adopt the proposed revisions to Article 3659 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

**Article 3659. Same; disturbance in fact and in law defined**

A. Disturbances of possession ~~which~~ that give rise to the possessory action are of two kinds: disturbance in fact and disturbance in law.

B. A disturbance in fact is an eviction, or any other physical act ~~which~~ that prevents the possessor of immovable property or of a real right therein from enjoying his possession quietly, or ~~which~~ that throws any obstacle in the way of that enjoyment.

C. A disturbance in law is the occurrence or existence of any of the following adversely to the possessor of immovable property or a real right therein:

(1) The execution, recordation, or registry, ~~or continuing existence of record~~ after the possessor or his ancestors in title acquired the right to possess, of any instrument ~~which~~ that asserts or implies a right of ownership or right to the possession of the immovable property or ~~of~~ a real right therein.~~, or any~~

(2) The continuing existence of record of any instrument that asserts or implies a right of ownership or right to the possession of the immovable property or a real right therein, unless the instrument was recorded before the possessor and his ancestors in title commenced possession.

(3) Any other claim or pretension of ownership or right to the possession ~~thereof~~ of the immovable property or a real right therein, whether written or oral, except when asserted in an action or proceeding~~, adversely to the possessor of such property or right~~.

After breaking for lunch, the Council reconvened to consider Article 3661, on page 24 of the materials. The Reporter explained that this provision sets forth the limited circumstances under which evidence of title can be admitted in a possessory action, and after one Council member noted that several technical changes were necessary to conform with legislative drafting conventions, a motion was made and seconded to adopt the proposed revisions to Article 3661 as amended. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 3661. Same; title not at issue; limited admissibility of evidence of title**

A. In the possessory action, the ownership or title of the parties to the immovable property or real right therein is not at issue.

B. No evidence of ownership or title to the immovable property or real right therein shall be admitted except to prove any of the following:

(1) The possession thereof by a party as owner~~;~~.

(2) The extent of the possession thereof by a party and his ancestors in title~~; or~~.

(3) The length of time in which a party and his ancestors in title have had possession thereof.

Next, the Council turned to Article 3662, on page 25 of the materials, to consider the relief that may be granted to a plaintiff who wins the possessory action. The Reporter first explained that Subparagraph (A)(2), which sets forth the jactitory relief discussed earlier in the presentation, previously provided that the delay shall not exceed 60 days, but the Committee felt as though this delay should be set at 60 days rather than a lesser period of time. Mr. Cromwell also explained that two exceptions had been added with respect to the availability of this relief against certain defendants – the first was that this

relief cannot be awarded against the state, because under *State v. Todd*, this is a type of prescription, which cannot run against the state; and the second was that this relief cannot be awarded against an absentee defendant who appeared only through an attorney appointed to represent him under Article 5091. The Reporter noted that the Committee had discussed that it would be unfair to expect this attorney to have access to the facts and documentation necessary to set forth an absentee defendant's claims of ownership, especially within 60 days, and that the plaintiff is not without recourse since he can always file an action for declaratory judgment to establish ownership. A motion was then made and seconded to adopt the changes to Article 3662 as presented, and the motion passed without objection. The adopted proposal reads as follows:

**Article 3662. Same; relief which may be granted successful plaintiff in judgment; appeal**

A. A judgment rendered for the plaintiff in a possessory action shall:

(1) Recognize his right to the possession of the immovable property or real right therein, and restore him to possession thereof if he has been evicted, or maintain him in possession thereof if the disturbance has not been an eviction;

(2) Order the defendant to assert his adverse claim of ownership of the immovable property or real right therein in a petitory action to be filed within ~~a delay to be fixed by the court not to exceed~~ sixty days after the date the judgment becomes executory, or be precluded thereafter from asserting the ownership thereof, if the plaintiff has prayed for such relief and such relief is not precluded by Paragraph B of this Article; and

(3) Award him the damages to which he is entitled and for which he has prayed ~~for~~.

B. A judgment in a possessory action shall not grant the relief described in Subparagraph (A)(2) of this Article against the state or against a defendant who appeared in the action only through an attorney appointed to represent him under Article 5091.

C. A suspensive appeal from the judgment rendered in a possessory action may be taken within the delay provided in Article 2123, and a devolutive appeal may be taken from such judgment only within thirty days of the applicable date provided in Article 2087(A).

Mr. Cromwell then directed the Council's attention to Article 3651, on page 10 of the materials, and explained that the change from "not in possession" to "does not have the right to possess" was not intended to be substantive in nature, but rather was made with a view toward eliminating ambiguity and confusion. He explained to the Council that the phrase "in possession" was used inconsistently throughout these provisions, sometimes meaning a party has mere factual possession and other times meaning a party has acquired the right to possess, meaning the party has been in possession for at least one year. As a result, the Committee sought to clarify the language by using "in possession" or "has the right to possess" as appropriate throughout these articles. The Reporter also noted that "in possession" was retained on line 5 because there the provision is speaking of the defendant, who may or may not be in possession. A motion was made and seconded to adopt Article 3651 as presented, at which time a great deal of discussion ensued with respect to the distinction between being in possession and having the right to possess. The Council discussed several hypotheticals to illustrate the circumstances under which it is appropriate to bring a possessory action vs. a petitory action, and the Reporter clarified that if you have been disturbed in your possession but still have the right to possess, you should bring a possessory action rather than waiting to file a petitory action because if the defendant in the petitory action is in possession, you will have to prove title good against the world, which you may not be able to do even if you are the true owner of the property.

One Council member then expressed that in his view, parties are more likely to file a declaratory judgment action to establish ownership than a petitory action because they will not be required to judicially admit that they are not in possession of the property. The Council discussed that these actions are virtually indistinguishable, at which time another Council member questioned whether the Committee had considered eliminating the petitory action altogether. Mr. Cromwell responded that although the Committee had generally discussed the possibility of creating a single innominate real action to address issues concerning possession and ownership, nothing serious or concrete had been proposed. At this time, another Council member referenced the availability of yet another action, the boundary action, when the property at issue is adjacent and questioned whether the same restrictions and burdens of proof would apply in that context. Ultimately, a vote was taken on the motion to adopt the proposed changes to Article 3651, on page 10 of the materials, as presented, and the motion passed with no objection. The adopted proposal reads as follows:

**Article 3651. Petitory action**

> The petitory action is one brought by a person who claims the ownership of, but who ~~is not in possession~~ does not have the right to possess, ~~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.

The Council then turned to Article 3653, on page 12 of the materials, and the Reporter explained that this provision deals with the heart of the matter in that it sets forth the burden of proof that the plaintiff must satisfy in a petitory action depending upon whether the defendant is or is not in possession. Mr. Cromwell reminded the Council that under existing law, if the defendant in the petitory action is in possession, the plaintiff must prove title good against the world, meaning record perfect title dating back to the sovereign or ownership acquired via acquisitive prescription, which is an extremely difficult burden to satisfy and is commonly referred to as "the devil's proof." He also explained that if the defendant in the petitory action is not in possession, the plaintiff will bear the much more reasonable burden of proving better title, and if both parties can trace their title back to the common author, the person with the more ancient title from the common author will prevail. The Reporter then informed the Council of the pitfalls of requiring the devil's proof under existing law – if you own a fishing camp but have been gone and a usurper has come onto your property and stayed for one year, you have now lost the right to possess and must file a petitory action, but because the usurper defendant is in possession, you will have to prove title good against the world; if you cannot satisfy that burden of proof, the defendant will win the petitory action after having only possessed the property for one year.

Mr. Cromwell then explained that the Committee felt as though this was too harsh a burden, and it considered a Tulane Law Review article written by Doug Nichols entitled "The Publician Action," wherein the author suggests that someone who is on their way to acquiring ownership of the property via acquisitive prescription should prevail over a usurper who has no title at all. The Reporter noted that Mr. Nichols' proposal appears on page 14 of the materials but that the Committee felt that this language was too strong, instead deciding to focus on the defendant's possession to determine which burden of proof would apply. In other words, the "devil's proof" of proving title good against the world or by acquisitive prescription will apply if the defendant has acquired the right to possess after having commenced possession in good faith and with just title or if the defendant has been in possession for 10 years; in all other cases, the burden of proving better title will apply.

A motion was then made and seconded to adopt Article 3653, on page 12 of the materials, and a great deal of discussion ensued with respect to forcible disturbances, evictions, contracts of occupancy, and trespass. One member of both the Committee and the Council expressed his preference for the publician action approach, and another member of both the Committee and the Council reiterated that the Committee's draft is a vast improvement over what appears in existing law, which permits the plaintiff in the petitory action to be submitted to the devil's proof after the defendant has possessed for

only a year with no requirement of good faith or just title. Other Council members agreed with the Committee's approach, noting that it appeared to be a balanced and fair compromise and agreeing with the idea that something more should be required of the defendant before the plaintiff is required to prove title good against the world. After one Council member questioned whether the Committee had considered extending the time period for acquiring the right to possess from one year to some greater time period, and another Council member clarified that the defendant is able to take advantage of tacking when fulfilling the 10-year time period, a vote was taken on the motion to adopt the changes to Article 3653 as presented. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 3653. Same; proof of title; immovable**

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~~ has been in possession ~~thereof; or~~ for one year after having commenced possession in good faith and with just title or that the defendant has been in possession for ten years.

(2) Prove a better title thereto than the defendant, ~~if the court finds that the latter is not in possession thereof~~ in all other cases.

When the titles of the parties are traced to a common author, he is presumed to be the previous owner.

Next, Mr. Cromwell directed the Council's attention to Article 3654, on page 16 of the materials, and explained that this provision now states that the burden of proof that would be applicable in a petitory action will apply in an action for declaratory judgment, concursus, expropriation, or another similar proceeding. After a brief discussion, a motion was made and seconded to adopt the proposed changes to Article 3654 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

**Article 3654. Proof of title in action for declaratory judgment, concursus, expropriation, or similar proceeding**

When the issue of ownership of immovable property or of a real right therein is presented in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding, or the issue of the ownership of funds deposited in the registry of the court and which belong to the owner of the immovable property or of the real right therein is so presented, the court shall render judgment ~~in favor of the party~~ as follows:

(1) ~~Who~~ If the party who would be entitled to the possession of the immovable property or real right therein in a possessory action has been in possession for one year after having commenced possession in good faith and with just title or has been in possession for ten years, the court shall render judgment in favor of that party, unless the adverse party proves that he ~~has acquired ownership from a previous owner or by acquisitive prescription; or~~ would be entitled to a judgment recognizing his ownership in a petitory action under Article 3653(1).

(2) ~~Who~~ In all other cases, the court shall render judgment in favor of the party who proves better title to the immovable property or real right therein~~, when neither party would be entitled to the possession of the immovable property or real right therein in a possessory action~~.

The Council then turned to Article 3669, on page 30 of the materials, and the Reporter noted that this is the only provision in a series of articles dealing with mineral law issues that needs to be amended. Mr. Cromwell explained that the current article, the

drafting of which is a bit convoluted, had been revised to simply provide that the applicable burden of proof is better title. A motion was made and seconded to adopt the provision as presented, and after one Council member asked for clarification as to whether the concept of "better title" is used elsewhere and is defined in the jurisprudence, the motion passed with no objection. The adopted proposal reads as follows:

> **Article 3669. Possessory action unavailable between owner of mineral servitude and owner of dependent mineral royalty**
>
> In the event of a dispute between the owner of a mineral servitude and the owner of a mineral royalty burdening or alleged to burden the servitude in question, the possessory action is unavailable to either party, and the only available real action is the petitory action. The burden of proof on the plaintiff in such an action is ~~that which must be borne by the plaintiff in a petitory action when neither party is in possession~~ to prove a better title than that of the defendant.

Next, the Council considered Civil Code Article 531, on page 33 of the materials, and the Reporter explained that this is the corresponding provision of the substantive law and that changes had been made to the applicable burden of proof consistent with those that had been made in the Code of Civil Procedure. A motion was made and seconded to adopt Civil Code Article 531 as presented, and the motion passed without objection. The adopted proposal reads as follows:

> **Civil Code Article 531. Proof of ownership of immovable**
>
> One ~~who claims~~ claiming the ownership of an immovable against another ~~in possession~~ who has been in possession of the immovable for one year after having commenced possession in good faith and with just title or who has been in possession of the immovable for ten years must prove that he has acquired ownership from a previous owner or by acquisitive prescription. ~~If neither party is in possession~~ In all other cases, he need only prove a better title.

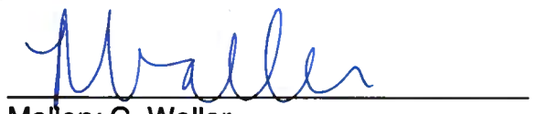
Finally, Mr. Cromwell asked the Council to turn to Article 3657, on page 19 of the materials, to engage in a policy discussion concerning the rule of non-cumulation. The Reporter explained that the Committee had discussed this issue at several of its most recent meetings, and that although some members were in favor of retaining the rule of non-cumulation and others were in favor of eliminating this rule, everyone agreed that the draconian consequences applicable to improper cumulation need to be relaxed. The Reporter also explained that there were several other considerations at issue, such as whether rules concerning res judicata will apply and whether issues pertaining to possession and ownership give rise to separate causes of action or arise out of the same transaction or occurrence, as well as whether there should be some sort of mechanism that allows either party or the judge to force the issue of possession to be determined first. Mr. Cromwell noted that the idea with respect to non-cumulation is that possession is easier to determine than ownership, so the court has the issue of possession resolved while it considers the more difficult and complicated issue of ownership. One member of both the Committee and the Council then expressed that it would be helpful to hear the Council's thoughts with respect to this issue, as this will provide the Committee with some direction as to whether to retain or eliminate the rule of non-cumulation.

At this time, the Director questioned whether the amendments concerning the applicable burden of proof in a petitory action make the rule of non-cumulation more palatable, since the issue of whether the defendant is in possession will not necessarily cause the plaintiff to lose the case. Mr. Cromwell noted that the Committee agreed that if the rule of non-cumulation were retained, an action for declaratory judgment establishing ownership should be treated the same as a petitory action and should not be cumulated with a possessory action. One Council member then expressed her preference for retaining the rule of non-cumulation, particularly if some of the penalties that apply under existing law would be reduced, because she likes the idea of determining possession first since those issues also permeate the petitory action. Another Council member expressed

that in his view, the rule of non-cumulation reduces litigation, and he would be worried about litigants throwing "the kitchen sink" in their pleadings if this rule were to be eliminated. Yet another Council member expressed that in her view, the rule of non-cumulation should be eliminated because having two separate trials on issues that are so intertwined does not make sense, and the applicable rules under existing law create "gotchas" and traps for the unwary. The Council also discussed the possibility that if issues concerning possession and ownership were raised in the same proceeding, perhaps the judge's opinion would be influenced because the judge would be inclined to rule in favor of the owner of the property even if that person were not in possession of the property.

One member of both the Committee and the Council expressed that possession and ownership are distinct concepts, and that the possessory and petitory actions are inherently inconsistent because the possessory action is brought by someone who is in possession while the petitory action is brought by someone who admits that he is not in possession. The member questioned what it would look like if these two very inconsistent claims were brought in the same proceeding, but he also reiterated that if the rule of non-cumulation were retained, the applicable consequences under existing law are too harsh and need to be relaxed. Other Council members agreed that the petitory action and action for declaratory judgment establishing ownership should be treated the same regardless, but they continued to debate the threshold issue of whether the rule of non-cumulation should be retained or eliminated. Some members of the Council spoke in favor of allowing cumulation, noting that perhaps decisions could be rendered more quickly and judges should be trusted to decide issues of possession and ownership in the same trial, while other Council members suggested procedural alternatives, such as having staggered evidentiary hearings or allowing cumulation but requiring the claims to be raised in separate trials, the judgments of which would be final and immediately appealable. A motion was then made and seconded to make the policy decision to eliminate the rule of non-cumulation, and after additional discussion on both sides of the argument, the motion failed to pass by a vote of 11 in favor and 14 in opposition.

At this time, Mr. Cromwell concluded his presentation, and the March 2022 Council meeting was adjourned.



Mallory C. Waller