



LOUISIANA STATE LAW INSTITUTE

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April 5, 2023

Senator Patrick Page Cortez
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

RE: SENATE CONCURRENT RESOLUTION NO. 42 OF THE 2016 REGULAR SESSION

Dear Mr. President and Mr. Speaker:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to possessory actions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Guy Holdridge".

Guy Holdridge
Director

GH/pc

Enclosure

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.gov

Secretary of State. Mr. R. Kyle Ardoin
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**LOUISIANA STATE LAW INSTITUTE
POSSESSORY ACTIONS COMMITTEE**

**REPORT TO THE LEGISLATURE IN RESPONSE TO
SCR NO. 42 OF THE 2016 REGULAR SESSION**

Relative to the applicability of the possessory action

Prepared for the
Louisiana Legislature on

April 5, 2023

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE
POSSESSORY ACTIONS COMMITTEE**

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SENATE CONCURRENT RESOLUTION NO. 42

BY SENATOR MORRISH

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study and make recommendations regarding the applicability of "possessory action", as provided in the Louisiana Code of Civil Procedure Articles 3655 through 3662, relative to claims of possession by an individual of another person's land even though that landowner has occupied the land undisturbed for many years.

WHEREAS, the law regarding "possessory action" has received minimal changes since it was enacted; and

WHEREAS, Code of Civil Procedure Article 3660(A) states, "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, whether in good or bad faith, or even as a usurper."; and

WHEREAS, the clause "whether in good or bad faith, or even as a usurper" is often unfair to landowners because of its abuse in practical application.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study and make recommendations regarding the applicability of "possessory action", as provided in the Louisiana Code of Civil Procedure Articles 3655 through 3663, to claims of possession by an individual of another person's land even though that landowner has occupied the land undisturbed for many years.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall submit a written report of its findings, together with any proposed legislation, to the Legislature of Louisiana no later than February 1, 2017.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the Director of the Louisiana State Law Institute.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

April 5, 2023

To: Senator Patrick Page Cortez
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

**REPORT TO THE LOUISIANA LEGISLATURE
IN RESPONSE TO SCR NO. 42 OF THE 2016 REGULAR SESSION**

Senate Concurrent Resolution No. 42 of the 2016 Regular Session requested the Louisiana State Law Institute "to study and make recommendations regarding the applicability of 'possessory action', as provided in the Louisiana Code of Civil Procedure Articles 3655 through 3663, to claims of possession by an individual of another person's land even though that landowner has occupied the land undisturbed for many years." Observing that the Code of Civil Procedure makes the possessory action available to any person in possession of immovable property "whether in good or bad faith, or even as a usurper," the resolution expressed a concern that the quoted language of the article might be unfair to landowners because of abuse in its practical application.

In response to this resolution, the Possessory Actions Committee of the Law Institute was constituted and charged with the responsibility of performing the necessary study and preparing the report requested by the resolution along with any recommended legislation. This report will (i) review the substantive property law concepts that underpin the possessory and petitory actions, including the distinction between possession and ownership; (ii) outline the actions that are available under present law to protect possession and ownership; and (iii) explain the Law Institute's recommendations for change in the law to prevent possible abuse, to reform the rule prohibiting cumulation of the possessory and petitory actions, to conform the procedural law to changes previously made to the substantive property law found in the Civil Code, and to improve wording of the law in instances where it had led to misinterpretation and misunderstanding.

POSSESSION AND OWNERSHIP

Possession Distinguished from Ownership

A full understanding of the possessory action and its purposes requires an appreciation of the distinction between possession and ownership under Louisiana property law. Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing, entitling the owner to use, enjoy, and dispose of the thing within the limits and under the conditions established

by law.¹ By contrast, possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name.² Possession is a matter of fact, but the *right to possess* exists under the law in favor of a person who has possessed a thing for over a year.³ To acquire possession, one must intend to possess as owner and must take corporeal possession, which is defined as the exercise of physical acts of use, detention, or enjoyment over a thing.⁴ Thus, the necessary predicate for the commencement of possession of a thing is corporeal possession coupled with the intent to possess as owner.⁵ Once acquired, possession can be retained by the intent to possess as owner even if the possessor ceases to possess corporeally. This is defined in the law as civil possession.⁶

Acquisition of Ownership through Possession

Though possession and ownership of a thing differ, the former may lead to the latter if exercised for a sufficiently long period of time. This mode of acquiring ownership is known as acquisitive prescription.⁷ In Louisiana, ownership of an immovable may be acquired through the acquisitive prescription of either ten years or thirty years,⁸ but the requirements of each differ. For the acquisitive prescription of ten years, the possessor must have held possession of the immovable for ten years, and the possessor must have been in good faith at the time of commencement of the possession⁹ and must hold just title, that is, a juridical act, such as a sale, exchange, or donation, sufficient to transfer ownership.¹⁰ That act must be written, valid in form, and filed for registry in the conveyance records.¹¹

Good faith is presumed, but the presumption can be rebutted on proof that the possessor knew or should have known that he is not the owner of the thing he possesses.¹² A possessor is in good faith when he reasonably believes, in light of objective considerations, that he is the owner of the thing he possesses.¹³ For purposes of acquisitive prescription of ten years, it suffices if the possessor is in good faith at the time he enters into possession of the immovable; his subsequent bad faith will not defeat his ability to acquire ownership through acquisitive prescription of ten years.¹⁴

Ownership of an immovable may also be acquired by possession for thirty years, without the need of either just title or possession in good faith.¹⁵

¹ Civil Code Article 477.

² Civil Code Article 3421.

³ Civil Code Article 3422.

⁴ Civil Code Articles 3424 and 3425.

⁵ Civil Code Article 3424.

⁶ Civil Code Article 3431.

⁷ Civil Code Article 3446.

⁸ Different prescriptive periods apply for the acquisition of a movable. *See* Civil Code Articles 3489 through 3491.

⁹ Civil Code Article 3482.

¹⁰ Civil Code Article 3483.

¹¹ Civil Code Articles 3475, 3482, and 3483.

¹² Civil Code Article 3481.

¹³ Civil Code Article 3480.

¹⁴ Civil Code Article 3482.

¹⁵ Civil Code Article 3486.

To acquire by the acquisitive prescription of either ten or thirty years, the possessor must have either corporeal possession or civil possession preceded by corporeal possession. The possession must be continuous for the required period of time, uninterrupted, peaceable, public, and unequivocal.¹⁶ Possession that is discontinuous has no legal effect.¹⁷

ACTIONS AVAILABLE TO PROTECT OWNERSHIP AND THE RIGHT OF POSSESSION

The substantive law of Louisiana, contained in the Civil Code, establishes the basic framework for the protection of rights of ownership and possession of an immovable. The Civil Code provides that the owner of a thing is entitled to recover it from anyone who possesses or obtains it without right and to obtain judgment recognizing his ownership.¹⁸ One who claims the ownership of an immovable against another person who is in possession must prove that the claimant has acquired ownership from a previous owner or by acquisitive prescription. If neither party is in possession, the claimant need only prove a better title.¹⁹ When the titles of the parties are traced to a common author, this common author is presumed to be the previous owner.²⁰ A possessor is considered provisionally as the owner of the thing he possesses until the right of the true owner is established.²¹

The Code of Civil Procedure, which implements and to some extent replicates these substantive rules, provides for a number of different actions in which either the right to possess or the right of ownership may be recognized, as outlined below. These actions are known generally as *real* actions. The real actions provided by the Code of Civil Procedure are available for the protection of ownership and possession of *immovables* only.²²

Possessory and Jactitory Actions

The possessory action is one brought by the possessor of immovable property to be maintained in his possession of the property when he has been disturbed or to be restored to possession when he has been evicted.²³ In the possessory action, ownership of the immovable property is *not* at issue, and for that reason evidence of ownership is not admitted except for the purpose of proving possession or the extent or duration of possession.²⁴

¹⁶ Civil Code Article 3476.

¹⁷ Civil Code Articles 3435 and 3476

¹⁸ Civil Code Article 526.

¹⁹ Civil Code Article 531.

²⁰ Civil Code Article 532.

²¹ Civil Code Article 3423.

²² The comments to Civil Code Article 526 indicate that the petitory action provided for in the Code of Civil Procedure is a species of the revendicatory action (or *action en revendication*) recognized by all civil law systems and that the revendicatory action for the recovery of movables is available as an innominate real action. See Civil Code Article 526, comment (b). Article 60 of the former Code of Practice explained that the possessory action could not be used to revendicate movables because "the action in revendication for that species of property [has] nothing in common with the extraordinary privileges secured to the owners of real estate, or of real rights, when they are disturbed in their enjoyment."

²³ Code of Civil Procedure Article 3655.

²⁴ Code of Civil Procedure Article 3661.

Accordingly, in a possessory action, the plaintiff is not required to prove ownership. Instead, the plaintiff must allege and prove that a disturbance in fact or law has occurred, that the plaintiff or his ancestors in title had possession at the time of and for more than one year immediately prior to the disturbance,²⁵ and that the possessory action was instituted within a year after the disturbance. As the resolution itself recognizes, a possessory action is available even to a usurper who is in bad faith, provided that the usurper was in possession for the requisite one-year period prior to the disturbance.²⁶

Historically, the possessory action could not be brought by a precarious possessor, such as a lessee, because a precarious possessor does not possess as owner. This is presently stated in the existing text of Code of Civil Procedure Article 3656. A similar rule was found in the former Code of Practice. Professor Yiannopoulos has cited this rule as being among the indicia of the nature of a lease of an immovable as a mere personal contract rather than a real right.²⁷ He explains that a predial lessee cannot bring the possessory action because he does not possess for himself; rather, he possesses for his lessor.²⁸ Indeed, a predial lessee is not a possessor at all.²⁹ Nevertheless, since 1983, Civil Code Article 3440 has granted lessees and other precarious possessors the right to bring possessory actions against anyone other than the person for whom they possess. For whatever reason, the 1983 legislation did not make a similar change to the articles of the Code of Civil Procedure, which continue to state, or at least strongly imply, that the possessory action is unavailable to a precarious possessor.

If the plaintiff meets the burden of proving the elements of the possessory action as set forth above, he is entitled to judgment recognizing his right to the possession of the immovable and restoring or maintaining him in the possession thereof.³⁰ In addition, he may obtain judgment ordering the defendant to assert any adverse claim of ownership within a delay to be fixed by the court not to exceed sixty days after the date the judgment becomes executory, in default of which the defendant is precluded thereafter from asserting ownership.³¹ This is a vestige of the former jactitory action, which was combined with the possessory action in the promulgation of the Code of Civil Procedure in 1960. The jactitory action originated in Spanish law as a type of action to redress a defamation, forcing the defendant to either desist from the defamation or to assert his title.³² As Professor Yiannopoulos explains, its use by Louisiana courts survived even the Great Repealing Act of 1828. The jactitory action conferred a decided advantage over French procedure, which provides no means for a party in possession to force adjudication of a claim of ownership being made by a party not in possession; the possessory action is available to protect his right to possess, but it does nothing to decide the question of ownership. Thus, under French law, the successful plaintiff is left to await the prescription of his adversary's claims of ownership. With the jactitory action historically used in Louisiana, and since 1960 the possessory action, the

²⁵ Code of Civil Procedure Article 3658. The requirement that the plaintiff have acquired the *right to possess* by having possessed for one year prior to the disturbance does not exist if he has been evicted by force or fraud.

²⁶ Code of Civil Procedure Article 3660.

²⁷ See A. N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law, Part I*, 23 La. L. Rev. 161, 190 (1965).

²⁸ See A. N. Yiannopoulos, *Real Actions in Louisiana and Comparative Law*, 25 La. L. Rev. 589, 637 (1965).

²⁹ *Id.* at 634, n. 240.

³⁰ Code of Civil Procedure Article 3662(A)(1).

³¹ Code of Civil Procedure Article 3662(A)(2).

³² Yiannopoulos, 2 La. Civ. L. Treatise Series: Property §12:33 (5th Ed. 2017).

successful plaintiff has a means of forcing his adversary to make out his claim to ownership or else be barred from doing so later.

Petitory Action

As discussed above, the possessory action is available only to a plaintiff who is in possession of an immovable. In contrast, the petitory action allows a person who is *not* in possession to obtain a judgment recognizing his ownership of the immovable against another who either is in possession or who claims the ownership adversely to the plaintiff.³³ A plaintiff may not bring a petitory action if he is in possession.

The petitory action is available to a person out of possession regardless of whether or not the defendant is in possession of the immovable. However, the issue of whether the defendant is in possession bears directly upon the plaintiff's burden of proof in a petitory action. If the defendant is in possession, the plaintiff must prove that he actually owns the immovable, either by proving that he acquired ownership by a transfer from a previous owner or that he has acquired ownership through acquisitive prescription.³⁴ If the defendant is not in possession, then the plaintiff is entitled to a judgment recognizing his ownership of the immovable if he proves a better title than that of the defendant.³⁵

In light of these rules, it has been said that the plaintiff in a petitory action against a defendant in possession must prove title "good against the world" either by an unbroken chain of transfers from a previous owner or by acquisitive prescription.³⁶ This does not, however, always mean that the plaintiff must prove an unbroken series of transfers back to the sovereign. If the two parties to the action trace their titles to a common author, the common author is presumed to have been the owner, and the plaintiff's proof of an unbroken chain of transfers from that common author will suffice.³⁷ Moreover, irrespective of whether the plaintiff can show an unbroken chain of transfers or can show any transfer at all, he will prevail if he can prove that he has acquired ownership through acquisitive prescription.

This burden of proof must be borne by the plaintiff in a petitory action even if the defendant is a usurper with no title at all. That was the holding of the Louisiana Supreme Court in *Pure Oil Co. v. Skinner*,³⁸ in which the court held that a person out of possession claiming the ownership of immovable property adversely to a person in possession must prove a "valid record title, to show title good against the world without regard to the title of the party in possession," rather than merely a better title. In *Pure Oil*, the plaintiffs failed to carry their burden of proof because of a 16-year break in their chain of title between a patent from the United States in 1858 and the first recorded transfer of the property in 1874 by a person other than the patentee. Justice Summers warned of the consequences of this holding in his dissent:

³³ Code of Civil Procedure Article 3651.

³⁴ Code of Civil Procedure Article 3653(1).

³⁵ Code of Civil Procedure Article 3653(2).

³⁶ Civil Code Article 531, comment (b).

³⁷ Code of Civil Procedure Article 3653; Civil Code Article 532.

³⁸ 294 So. 2d 797 (La. 1974).

To permit a possessor to occupy one's property for more than a year, and then compel the owner to come forth with a complete chain of title, perfect in all respects, to oust the possessor is entirely unsupported by the statutes or decisions of this Court. Such a rule is certain to create many problems seriously impairing stability of titles in this State.³⁹

See also the opinion of the Second Circuit in the same case:

The practical effect of the [decision in *Deselle v. Bonnette*, 251 So. 2d 68 (La. App. 3d Cir. 1971)] would allow a trespasser without semblance of title to take physical possession of another's property and should his possession endure for more than one year before it is discovered, any break in the owner's chain, however ancient, would defeat a petitory action to recover the property. We do not believe this was the intent of the legislature in the adoption of the Code of Civil Procedure.⁴⁰

As can be seen in the Law Institute's recommendation for amendment of Code of Civil Procedure Article 3653 discussed below, the Law Institute believes that a better balance of competing possessory and ownership interests can be achieved than what prevails under the *Pure Oil* holding, particularly in the case of a usurper.

Declaratory Judgment Action

In addition to the petitory action, Code of Civil Procedure Article 3654 contemplates that ownership might be declared in an action for declaratory judgment.⁴¹ If an owner in possession wishes to have his ownership adjudicated against an adverse claimant, this is the action for him to pursue, since his possession precludes him from bringing a petitory action and since a possessory action, which he could bring, does not establish ownership.⁴² When the issue of ownership of immovable property is presented in an action for declaratory judgment, Article 3654 establishes the parties' respective burdens of proof based upon which of them is in possession, essentially tracking the burden of proof that would apply in a petitory action.

The reason that Article 3654 fixes the burden of proof in a declaratory judgment action on the basis of whether one of the litigants has possession that would allow him to prevail in a possessory action is to prevent a usurper from taking possession of an immovable briefly prior to rendition of judgment for the purpose of imposing upon his adversary the burden of proving title good against the world.⁴³ In other words, if he acquires possession less than a year before suit is

³⁹ 294 So. 2d at 803.

⁴⁰ *Pure Oil Co. v. Skinner*, 284 So. 2d 608, 614 (La. App. 2 Cir. 1974). Criticism of the Supreme Court's opinion in *Pure Oil* can be found in cases such as *Freeman Baptist Church v. Hillen*, 345 So. 2d 74 (La. App. 1 Cir. 1977) and *Baker v. Romero*, 55 So. 3d 1035 (La. App. 3 Cir. 2011).

⁴¹ Declaratory judgment is treated generally in Code of Civil Procedure Articles 1871 through 1883.

⁴² See Yiannopoulos, 2 La. Civ. L. Treatise Series: Property §11:43 (5th Ed. 2017). See also *United Companies Financial Corporation v. Austin*, 618 So. 2d 7 (La. App. 3 Cir. 1993).

⁴³ Code of Civil Procedure Article 3654, comment (e).

filed, he will not have acquired the right to possess and will therefore not be able to force his adversary to prove title good against the world. Instead, the "better title" standard will apply.⁴⁴

The Rule of Non-Cumulation

As mentioned above, ownership is *not* at issue in a possessory action, and for that reason evidence of ownership is not admitted except for the limited purpose of proving possession or the extent or duration of possession.⁴⁵ If a defendant in a possessory action asserts title in himself, he is deemed to have judicially confessed the possession of the plaintiff in the possessory action.⁴⁶ Similarly, the plaintiff in a possessory action is not entitled to cumulate the action with a petitory action, in which ownership is at issue, and if he does so he waives the possessory action.⁴⁷ He is not even allowed to plead the two actions in the alternative.⁴⁸

It might be reasoned that, because Code of Civil Procedure Article 3654 specifically contemplates that in a declaratory judgment action the issue of ownership of the immovable will be adjudicated, it necessarily follows that a declaratory judgment action to establish ownership should also not be cumulated with the possessory action, given that ownership is never at issue in a possessory action. Nevertheless, the jurisprudence appears to allow cumulation of the possessory action with a declaratory judgment action to determine ownership, thereby raising issues of possession and ownership in the same action, even though cumulation with a petitory action would not be permitted. For instance, in *Decatur-St. Louis Combined Equity Properties, Inc. Venture v. Abercrombie*,⁴⁹ the Fourth Circuit reversed the trial court's action in sustaining an exception of improper cumulation, noting that "plaintiff's first action was not a petitory action under C.C.P. 3651 but a declaratory judgment action allowed under C.C.P. 3654."⁵⁰ The rationale for allowing cumulation of a possessory action with a declaratory judgment action, while cumulation with a petitory action is not permitted, seems to be that a petitory action can be brought only by someone who is out of possession, and a person out of possession is clearly not entitled to maintain a possessory action. Thus, the two actions are inherently inconsistent. This is not so with a declaratory judgment action brought by a possessory action plaintiff who claims to be in possession.⁵¹ Nevertheless, just as would occur with the cumulation of the possessory and petitory

⁴⁴ Or, if the defendant has the right to possess, though he has been out of possession for less than one year, then the defendant will benefit from the requirement that the plaintiff prove title good against the world.

⁴⁵ Code of Civil Procedure Article 3661.

⁴⁶ Code of Civil Procedure Article 3657.

⁴⁷ *Id.* However, unlike the defendant who pleads his ownership, the plaintiff in the possessory action by praying for a declaration of ownership does not judicially confess the defendant's possession. See *Harris v. Galloway*, 348 So. 2d 1263 (La. App. 2 Cir. 1977). This was a change in the law made by the adoption of the Code of Civil Procedure in 1960. Previously, the consequence of a plaintiff's cumulation of the possessory and petitory actions was the confession of the defendant's possession. See Code of Civil Procedure Article 3657, comment (c).

⁴⁸ Code of Civil Procedure Article 3657.

⁴⁹ 421 So. 2d 253 (La. App. 4 Cir. 1982).

⁵⁰ *Id.* at 253-54.

⁵¹ See also *Drago v. Full Gospel United Pentecostal Church*, 2011 WL 1167475 (La. App. 1 Cir. 2011); *Lafourche Realty Co., Inc. v. Duard Eymard Co., Inc.*, 638 So. 2d 1138 (La. App. 1 Cir. 1994); *Liner v. Terrebonne Parish Sch. Bd.*, 519 So. 2d 777 (La. App. 1 Cir. 1987), *writ denied*, 521 So. 2d 1173 (La. 1988), *cert. denied*, 488 U.S. 827 (1988). See also *Heirs of John Beckwith LLC v. Sims*, 315 So. 3d 306 (La. App. 4 Cir. 2021). Some of the cases that appear to support cumulation of a possessory action with a declaratory judgment action to determine ownership do so either in dicta or under circumstances where there was ultimately no true cumulation at the time the court of appeal

actions, cumulation of the possessory action with a declaratory judgment action to determine ownership has the undesired effect of introducing the ultimate issue of ownership into an action that is designed to focus only on the preliminary issue of possession.

Assertion of the Possessory Action Against the State

As discussed above, Code of Civil Procedure Article 3662(A)(2) permits the plaintiff in a possessory action to pray for, and when so prayed for authorizes a court to grant, judgment ordering the defendant to assert his claim of ownership in a petitory action to be filed within a period of up to sixty days or else be barred from later asserting claims of ownership to the immovable. *Todd v. State through Department of Natural Resources*⁵² addressed the question of whether this relief, and indeed whether the possessory action itself, is available against the state in view of the constitutional prohibition on the running of prescription against the state.⁵³ According to the Louisiana Supreme Court, though possession can often lead to acquisition of title by prescription, this does not mean that the constitutional prohibition of the running of prescription against the state bars a possessory action against the state. The court rejected the argument that the right to possess that arises after one year of continuous possession is a form of prescription that cannot constitutionally run against the state, noting that the "right to possess" is little more than a shorthand method of saying that one has acquired the right to bring a possessory action through one year of peaceful possession but does not involve the vesting of rights by prescription.⁵⁴ Nevertheless, the court found that the relief allowed under Article 3662(A)(2) *is* a form of prescription. Accordingly, the court held that the Louisiana Constitution bars that particular relief in a possessory action against the state.

GOALS OF THE PROPOSED REVISION

The Law Institute's proposed revision of the Code of Civil Procedure articles on possessory and petitory actions, to be set forth in legislation to be introduced on recommendation of the Law Institute in the 2023 Regular Session of the Legislature, seeks to accomplish the following goals:

considered the issue. In *Comeaux v. Davenport*, 452 So. 2d 818 (La. App. 3 Cir. 1984), the plaintiff's petition was styled as a "Possessory Action and Petition in Suit for Declaratory Judgment". The court found that "[a]lthough plaintiff attempted to cumulate an action for a declaratory judgment with his possessory action, he only prayed for the relief he would be entitled to as a successful litigant in a possessory action" and that "the specific relief which plaintiff prayed for would be inconsistent with a declaratory judgment recognizing his ownership in the disputed tract." *Id.* As a result, the Third Circuit concluded "that plaintiff has filed a possessory action, and nothing more." *Id.* at 820-21. In *Mt. Everett African Methodist Episcopal Church v. Carter*, 705 So. 2d 1179 (La. App. 1 Cir. 1997), the trial court had determined that the defendant was in possession. Because the court of appeal found no error in this determination, it concluded that "whether this action is one for declaratory judgment or a petitory action, plaintiff's burden is to prove that its title is good against the world" and that "it is unnecessary to determine whether this action should be classified as one for declaratory judgment or a petitory action." *Id.* In *Perkins v. Fowler*, 234 So. 3d 96 (La. App. 3 Cir. 2017), the Third Circuit noted that the plaintiff's amended petition "changed the action from one of possession to one for Declaratory Judgment." *Id.* at 100. Accordingly, the Third Circuit found that "the trial court erred in finding the amended petition converted the plaintiffs initial possessory action into a petitory action." *Id.*

⁵² 456 So. 2d 1340 (La. 1983), *amended by* 474 So. 2d 430 (La. 1985).

⁵³ Article XII, Section 13 of the Constitution of Louisiana.

⁵⁴ The holding in *Todd* was limited to property held by the state in its private capacity and should not be read to allow the possessory action to be asserted against public things.

1. To reduce the potential for abuse through numerous changes to the rules governing possessory and petitory actions, most notably a narrowing of the circumstances under which a possessor can put his adversary in a petitory action to the burden of proving title good against the world. See proposed changes to Articles 3653 and 3654 and proposed changes to Civil Code Article 531.

2. To modernize the rule on non-cumulation of possessory and petitory actions and to soften the consequences that flow from an improper cumulation or from the assertion of claims of ownership in a possessory action. See proposed changes to Article 3657.

3. To conform the Code of Civil Procedure to previous changes made to the Civil Code that make the possessory action available to precarious possessors. See proposed changes to Articles 3656, 3658, and 3660.

4. To remove a constitutional infirmity in Code of Civil Procedure Article 3662(A)(2) by providing that a judgment in a possessory action against the state cannot order the state to assert its claim of ownership in a petitory action or else be precluded thereafter from asserting ownership later. See proposed changes to Articles 3662.

5. To make certain other technical changes designed to eliminate the inconsistent use of terminology and to state more plainly the meaning of a number of articles governing the possessory and petitory actions in the Code of Civil Procedure. See proposed changes to Articles 3651, 3659, 3661, and 3669.

Reduction of the Potential for Abuse of the Possessory and Petitory Actions

As mentioned above, the possessory action serves the important function of allowing an adjudication of possession while issues of ownership are fully litigated and adjudicated. Nevertheless, the Law Institute recognized that the ease with which a relatively short-term possessor can prevail in a possessory action, when coupled with the burden of proof that is afterward imposed upon other persons claiming ownership in an ensuing petitory action, could lead to abuse by an enterprising possessor. Specifically, existing law could be manipulated to allow a mere squatter with no title at all to defeat, after only one year of possession, the ownership claims of a purported owner who might have been previously in possession for a considerable length of time and whose title to the immovable is nearly, though not completely, perfect. As discussed above, if a person has been in possession for one year, even with no title at all, he acquires the right to possess and will prevail in a possessory action even against the rightful owner. The usurper can even force his adversary to institute a petitory action, in which the person claiming ownership must carry the burden of proving "title good against the world." Thus, if there is any defect in that person's title – no matter how ancient - he will lose the petitory action to the usurper who has been in possession for as little as one year. This is an implication of the holding of the Louisiana Supreme Court in *Pure Oil Co. v. Skinner*,⁵⁵ discussed above.

Although acquisition of the right to possess after only one year, and the ability of the possessor to protect this right to possess in a possessory action, may set the stage for abuse, it is

⁵⁵ 294 So. 2d 797 (La. 1974).

actually the ensuing petitory action in which the consequences of the right to possess play out, for it is in that action that the person believing himself to be the rightful owner must then prove title good against the world. To address the potential for abuse, the Law Institute recommends narrowing substantially the circumstances under which the plaintiff in a petitory action is put to the burden of proving title good against the world. As pointed out above, under present law, that is the burden of proof that applies when the defendant in a petitory action has acquired the right to possess after as little as one year of possession.

The proposed revisions of Code of Civil Procedure Articles 3653 and 3654 as well as Civil Code Article 531 will provide that this burden of proof applies only when one of two circumstances is present:

- (1) When the petitory action defendant has been in possession for one year, *after having commenced possession in good faith and with just title*, or
- (2) When the defendant in the petitory action has been in possession *for a full ten years*, without the necessity of good faith or just title.

In the first of these circumstances, the defendant obviously cannot be a mere usurper; he must have a just title and must have been in good faith at the commencement of his possession. The defendant will thus be a person who is eligible, after the passage of additional time, to acquire title through the ten-year acquisitive prescription. In the latter circumstance, the defendant may not have just title and may even have been in bad faith, but he will nonetheless be well on the road to acquiring a thirty-year prescriptive title. In summary, a mere one year of possession, in the absence of just title and good faith, will no longer entitle the defendant to put the plaintiff to the task of proving title good against the world. Where neither of the two circumstances identified above exists, the victor in the petitory action will be the party who proves better title.

The Law Institute identified other areas for potential abuse as well. For instance, if the whereabouts of the defendant in a possessory action are unknown, he can be served through an attorney appointed by the court.⁵⁶ As part of the relief available to him, the prevailing plaintiff in the possessory action can obtain an order commanding the losing defendant to file a petitory action within sixty days, or such shorter delay as is set by the court, or else be forever barred from claiming ownership later.⁵⁷ But if the defendant in the possessory action appeared only through an attorney appointed by the court, he likely will have no idea of the need to file a petitory action, and the appointed attorney cannot be expected to investigate the facts of ownership and on his own file a separate action to vindicate the interests of a client with whom he may never have communicated. The Law Institute believes that this is another means by which a mere usurper could attempt to wrest ownership from the rightful owner, even if that owner does have perfect title, for if that owner fails to file a petitory action within the delay set by the court, he will be precluded from proving his ownership later.

To address this issue, the proposed revision will eliminate the ability of the prevailing plaintiff in a possessory action to obtain a judgment requiring the losing defendant to file a petitory

⁵⁶ See Code of Civil Procedure Article 5091.

⁵⁷ Code of Civil Procedure Article 3662(A)(3).

action if the losing defendant has appeared in the possessory action only through an attorney appointed by the court. Of course, this does not leave the prevailing plaintiff without an ability to obtain an adjudication of his ownership: he can file his own action to obtain a declaration of his ownership and, depending upon the circumstances, may again be entitled to have the defendant in that declaratory judgment action served through an attorney appointed by the court. The difference is that the prevailing plaintiff cannot convert the absentee defendant's *inaction* under these circumstances into a forfeiture of the defendant's ownership.

Another potential for abuse arises from attempts by a possessor to use the possessory action as a vehicle to claim that the actual owner's title, sometimes recorded years or even decades before the usurper entered into possession, constitutes a "disturbance in law," which is defined by Code of Civil Procedure Article 3659 to include the "continuing existence of record of any instrument which asserts or implies a right of ownership." Even though Article 3658 requires the plaintiff in a possessory action to prove that he or his ancestors in title had possession *at the time of and for more than one year immediately prior to* the disturbance of which he complains, the Law Institute is aware of instances in which a possessor has taken the position that the act of sale in favor of the true owner, though recorded long before the plaintiff's alleged possession began, is a continuing disturbance that becomes actionable once the plaintiff's possession has continued for one year. This turns the possessory action on its head: Under the pretext of merely being maintained in possession, ostensibly without a determination of ownership, the usurper is able to have the true owner's preexisting title declared to be a disturbance in law.

It seems highly doubtful that the existence of record of a preexisting title in favor of the true owner was intended to constitute a "disturbance" giving a usurper the right to invoke a possessory action. While it is true that existing Article 3659 defines a disturbance in law to include the execution, recordation, registry, or continuing existence of record of an instrument that asserts or implies a right of ownership or possession, it is nevertheless also true that the plaintiff in a possessory action must have had possession of the immovable for more than one year immediately prior to the disturbance. If the claimed disturbance is the recordation of an act of sale that was filed for record before the possessor's entry into possession, this would seem to be a burden the possessor could never satisfy.

The words "continuing existence of record" in Article 3659 serve the purpose of permitting a possessor to bring a possessory action when he suffers a disturbance in law arising from the recordation of an adverse instrument, even if the instrument has been of record for more than one year. In effect, the one-year prescription under Article 3658(4) does not begin to run so long as the instrument is of record. Thus, an owner or possessor of an immovable is not put to the task of continually examining the public records for fear that an adverse instrument of which he is unaware may remain of record for a year, thereby precluding him from challenging it in a possessory action.

The proposed revision addresses this situation by limiting the instances in which the "continuing existence of record" of an adverse instrument is actionable. Under the revision, to constitute an actionable disturbance in law, the instrument in question must have been recorded *after* the possessory action plaintiff commenced possession. This preserves the applicability of

the continuing-existence-of-record rule in the sphere in which it was intended to operate while reducing the potential for abuse by an enterprising plaintiff.

Relaxation of the Consequences of a Violation of the Rule of Non-Cumulation

As explained above, the Code of Civil Procedure contemplates a two-step process to adjudicate issues of possession separately from issues of ownership: A person disturbed in his possession of an immovable, whether or not he is the actual owner, institutes a possessory action against the person who caused the disturbance, and, after the issue of possession is determined in the possessory action, the loser files a petitory action to vindicate his claims of ownership, which presumably would be more complicated and potentially difficult to determine than mere issues of possession. To avoid circumvention of this two-step process, there is a strict rule of non-cumulation, which both prohibits the plaintiff from cumulating the possessory action with the petitory action and at the same time prohibits the defendant in a possessory action from claiming ownership. In fact, the law presently imposes substantial consequences for a violation of the rule of non-cumulation. If the plaintiff cumulates the possessory and petitory actions, the result is that the possessory action abates, and only the petitory action will proceed. For a defendant who pleads ownership in response to a possessory action, the consequences are even more severe, for a defendant who does so judicially confesses that the plaintiff is in possession and thereby converts the action into a petitory action, in which he becomes the plaintiff and takes upon himself the burden of proving title good against the world against a party in possession.

Because of the complexity of these rules, and the unfortunate consequences that can result from a misunderstanding of them, many practitioners endeavor seemingly at all costs to avoid the use of either the possessory or petitory actions, opting instead for a declaratory judgment action to determine ownership or a trespass action sounding in tort. As discussed above, there is apparently no bar to cumulation of the possessory action with these other alternative actions.

The Law Institute considered whether the non-cumulation rule should be totally abrogated, with the result that either party could cumulate against an adverse claimant whatever actions he may have, whether to protect possession or to obtain an adjudication of ownership. After studied consideration of the issue, however, the Law Institute concluded that the non-cumulation rule, which has a long history in French and Louisiana law, promotes the worthwhile goal of providing a means for a possessor to obtain a preliminary determination of the right to possess an immovable while its ownership is being adjudicated. Permitting cumulation in a single action would not only risk confusion of the distinct issues of possession and ownership but would also prevent the court from adjudicating the presumably easier issue of possession while the ownership action is fully litigated. Having the possessory action determined first allows parties to obtain a judicial determination of who should be entitled to the possession of the contested immovable during the course of litigation over its ownership. Moreover, in most cases, a determination of possession is essential to a determination of the burden of proof that will apply in an action to determine ownership. Thus, the proposed revision retains the rule of non-cumulation found in Code of Civil Procedure Article 3657 and indeed expands the rule to prohibit cumulation of the possessory action with any action to determine ownership.

Nevertheless, the Law Institute felt that the consequences of an improper cumulation are presently too severe. Prior to the adoption of the 1960 Code of Civil Procedure, a plaintiff who cumulated the petitory and possessory action not only caused the possessory action to abate, as under current law, but he judicially confessed the possession of the defendant in the possessory action. As the official revision comments to the Code of Civil Procedure indicate, this was viewed as too harsh a penalty, and the plaintiff's confession of the defendant's possession was eliminated.⁵⁸ Where it is the defendant who inappropriately raises the issue of ownership in defense of a possessory action, however, the consequence under current law remains that the defendant judicially confesses the plaintiff's possession, thereby assuming the burden of proving title good against the world in a petitory action. Just as in 1960 this consequence was viewed as too harsh from the standpoint of the plaintiff, the Law Institute believes that it is likewise too harsh a penalty for the defendant. Therefore, the proposed revision significantly softens the consequences for both parties when they raise issues of ownership in a possessory action in violation of the non-cumulation rule of Code of Civil Procedure Article 3657.

Under the proposed revision, an improper cumulation will no longer automatically cause the plaintiff's possessory action to abate. Instead, the defendant will have the right to object to the improper cumulation by filing a dilatory exception of improper cumulation of actions. In the absence of a timely exception, the objection will be waived, and both actions can proceed. When the objection of improper cumulation is raised by a timely exception, the court will proceed under Code of Civil Procedure Articles 464 and 465, as it would in any other case involving an improper cumulation. Specifically, the court can direct the plaintiff to choose which of the two cumulated actions he wishes to pursue or, alternatively, the court can order separate trials of the two actions.

From the defendant's perspective, the revision eliminates the confession of judgment that results under present law when the defendant raises issues of ownership within the possessory action. If the defendant does so, those allegations of ownership will be limited to their proper sphere, that is, to consideration of the narrow issues where ownership is properly considered in a possessory action under Code of Civil Procedure Article 3661(B).⁵⁹ The revision specifically provides that the defendant in a possessory action cannot reconvene claiming ownership. If he were to attempt to do so, the plaintiff in the possessory action could obtain a dismissal of those claims.⁶⁰

If, while a possessory action is pending, either the plaintiff or defendant files a *separate suit* to obtain an adjudication of ownership, the consequences under current law will continue to apply. If the plaintiff does so, the possessory action will abate. If, on the other hand, it is the defendant who files a separate suit seeking a determination of ownership while the possessory action is pending, the defendant will thereby judicially confess the plaintiff's possession.

Recognition of the Availability of the Possessory Action to Precarious Possessors

⁵⁸ See Code of Civil Procedure Article 3657, comment (c).

⁵⁹ These are to prove: (i) possession by a party as owner; (ii) the extent of the possession by a party and his ancestors in title; and (iii) the length of time in which a party and his ancestors in title have had possession.

⁶⁰ Because a reconventional demand claiming ownership will be specifically prohibited in a possessory action, the revision also proposes an amendment to Code of Civil Procedure Article 1061(B) to provide in the express text of that article that such a claim is not a compulsory reconventional demand.

As discussed earlier in this report, Civil Code Article 3440 has since 1983 granted lessees and other precarious possessors the right to bring possessory actions against anyone other than the persons for whom they possess. Nevertheless, corresponding changes were not made to the Code of Civil Procedure, which continues to provide that the possessory action cannot be brought by a precarious possessor, such as a lessee.⁶¹ To eliminate this conflict in the law, the proposed revision includes amendments to Code of Civil Procedure Articles 3655, 3656, 3658, and 3660 to recognize that the possessory action is available to precarious possessors.

Removal of the Constitutional Infirmary in Code of Civil Procedure Article 3662(A)(2)

As discussed above, the Louisiana Supreme Court in *Todd v. State through Department of Natural Resources*⁶² held that the relief allowed under Article 3662(A)(2) is a form of prescription that is barred by the Louisiana Constitution in a possessory action against the state. To remove this constitutional infirmity, the Law Institute recommends an amendment to Code of Civil Procedure Article 3662 providing that the relief otherwise allowed under Article 3662(A)(2) is not available in an action against the state.

Other Technical Changes

As discussed at the beginning of this report, possession is a matter of fact, but the *right to possess* arises from possession for over a year.⁶³ Although Code of Civil Procedure Article 3660 defines "possession" as possession in fact, rather than the right to possess, several articles of the Code of Civil Procedure, including Article 3651, use the term "in possession" where the right to possess, rather than factual possession, is intended. The proposed revision of Article 3651 will clarify that a petitory action is brought by one who does not have the right to possess, rather than by someone who is "not in possession." Similar changes are recommended elsewhere where the word "possession" is used with a meaning other than that given in Article 3660.⁶⁴

Minor technical changes are also proposed to Code of Civil Procedure Articles 3659, 3661, and 3669.

CONCLUSION

Senate Concurrent Resolution No. 42 of the 2016 Regular Session requested that the Law Institute study and make recommendations regarding the possessory action as provided in Code of Civil Procedure Articles 3655 through 3663. After thorough study, the Law Institute concluded that several changes to the Code of Civil Procedure articles on possessory and petitory actions, as well as corresponding changes to related provisions of the Civil Code, should be made to prevent abuse of the right of possession, particularly in the instance of a squatter without any claim of title, as a means of defeating the rights of an owner whose title, while certainly better than that of the possessor, cannot meet the rigorous standard of being shown to be good against the world.

⁶¹ See Code of Civil Procedure Articles 3655 and 3656.

⁶² 456 So. 2d 1340 (1983), *amended by* 474 So. 2d 430 (La. 1985).

⁶³ Civil Code Articles 3422 and 3434.

⁶⁴ See proposed changes to Code of Civil Procedure Articles 3653 and 3659.

Additional changes are warranted to reform the rule prohibiting cumulation of the possessory and petitory actions, to conform procedural law to changes previously made to substantive law, and to improve the wording of provisions that have led to misinterpretation and misunderstanding. The Law Institute's recommendations, which are attached below, were submitted to the Legislature for introduction during the 2023 Regular Session.

2023 Regular Session

HOUSE BILL NO.

BY REPRESENTATIVE PRESSLY

(On Recommendation of the Louisiana State Law Institute)

PROPERTY/IMMOVABLE: Provides relative to actions to determine ownership or possession

1 AN ACT
2 To amend and reenact Civil Code Articles 531 and 3440 and Code of Civil Procedure Articles
3 1061, 3651, 3653, 3654, 3655, 3656(A), 3657, 3658, 3659, 3660, 3661, 3662, and 3669,
4 relative to actions to determine ownership or possession; to provide with respect to petitory
5 actions, possessory actions, actions for declaratory judgments to determine ownership, and
6 similar proceedings; to provide for proof of ownership of immovables; to provide with
7 respect to precarious possession; to provide for reconventional demands; to provide with
8 respect to cumulation of actions; to provide with respect to disturbances in fact and in law;
9 to provide with respect to possession and admissibility of title; to provide for relief and
10 appeals; and to provide for related matters.

11 Be it enacted by the Legislature of Louisiana:

12 Section 1. Civil Code Articles 531 and 3440 are hereby amended and reenacted to read as
13 follows:

14 Art. 531. Proof of ownership of immovable

CODING: Words in ~~struck-through~~ type are deletions from existing law; words underscored are additions.

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

7 Revision Comments – 2023

8 (a) The 2023 revision of this Article changes substantially the burden of proof
9 imposed upon a person claiming the ownership of an immovable against another who is in
10 possession. Prior to the revision, this Article provided that in such cases, the claimant's
11 burden of proof was to prove that he had acquired ownership from a prior owner or by
12 acquisitive prescription. This burden of proof, which has often been characterized as the
13 requirement of proving "title good against the world," applied even when the defendant
14 was a usurper who had no title at all. See Pure Oil Co. v. Skinner, 294 So. 2d 797 (La.
15 1974). Application of that rule could lead to obvious inequities by allowing a usurper who
16 was in possession for only one year to prevail against a party who might have been in
17 possession for many years previously under a title that suffered from only minor defects.
18 See Pure Oil Co. v. Skinner, 294 So. 2d 797, 799 (La. 1974) (Summers, J., dissenting).

19
20 (b) The 2023 revision narrows the circumstances in which the person claiming
21 ownership must prove that he acquired ownership from a prior owner or by acquisitive
22 prescription. As revised, the Article provides that this onerous burden of proof applies
23 only when the defendant has been in possession for one year after having commenced
24 possession in good faith and with just title or when the defendant has been in possession
25 for ten years, regardless of whether in good faith or with just title. Where neither of these
26 circumstances applies, the burden imposed upon the claimant is merely to prove a better
27 title than that of the defendant.

28
29 (c) The good faith and just title mentioned in this Article are identical to the good
30 faith and just title necessary to start the running of the acquisitive prescription of ten years
31 under Article 3475. "Good faith" is used in this Article with the meaning given in Articles
32 3480 and 3481. By the express wording of this Article, the defendant's good faith is
33 measured only at the commencement of his possession. This is analogous to the rule that
34 applies under Article 3482 for purposes of the accrual of the acquisitive prescription of ten
35 years.

1 (d) The 2023 revision does not change the rule that a common author in title is
2 presumed to be the previous owner. See Article 532; Weaver v. Hailey, 416 So. 2d 311
3 (La. App. 3 Cir. 1982). The presumption is rebuttable. See Article 532, comment (b).

4 * * *

5 Art. 3440. Protection of precarious possession

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

9 Section 2. Code of Civil Procedure Articles 1061, 3651, 3653, 3654, 3655, 3656(A), 3657,
10 3658, 3659, 3660, 3661, 3662, and 3669 are hereby amended and reenacted to read as follows:

11 Art. 1061. Actions pleaded in reconventional demand; compulsory

12 A. The defendant in the principal action may assert in a reconventional demand
13 any causes of action ~~which he~~ that the defendant may have against the plaintiff in the
14 principal action, even if these two parties are domiciled in the same parish and regardless
15 of connexity between the principal and reconventional demands.

16 B. ~~The defendant in the principal action~~ Except as otherwise provided in Article
17 3657, and except in an action for divorce under Civil Code Article 102 or 103 or in an
18 action under Civil Code Article 186, the defendant in the principal action shall assert in a
19 reconventional demand all causes of action that ~~he~~ the defendant may have against the
20 plaintiff that arise out of the transaction or occurrence that is the subject matter of the
21 principal action.

22 * * *

1 Art. 3651. Petitory action

2 The petitory action is one brought by a person who claims the ownership of, but
3 ~~who is not in possession~~ does not have the right to possess, of immovable property or of a
4 real right therein, against another who is in possession or who claims the ownership thereof
5 adversely, to obtain judgment recognizing the plaintiff's ownership.

6 Comments – 2023

7 According to the Civil Code, possession is a matter of fact, but the right to possess
8 arises from possession for over a year and, once acquired, is lost if the possessor is evicted
9 and does not recover possession within one year of the eviction. Civil Code Articles 3422
10 and 3434. For purposes of this Chapter, Code of Civil Procedure Article 3660 defines
11 "possession" as possession in fact, rather than the right to possess, but this Article, among
12 others, used the term "in possession" where the right to possess, rather than factual
13 possession, was intended. The 2023 revision of this Article clarifies that a petitory action
14 is brought by one who does not have the right to possess. A person who still has the right
15 to possess even though he might have lost actual possession within the past year should
16 bring a possessory action against the person who evicted him, rather than a petitory action
17 under this Article.

18 * * *

19 Art. 3653. Same; proof of title; immovable

20 A. To obtain a judgment recognizing his ownership of immovable property or real
21 right therein, the plaintiff in a petitory action shall:

22 (1) Prove that he has acquired ownership from a previous owner or by acquisitive
23 prescription, if the court finds that the defendant is has been in possession ~~thereof; or for~~
24 one year after having commenced possession in good faith and with just title or that the
25 defendant has been in possession for ten years.

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

1 See, e.g., Griffin v. Daigle, 769 So. 2d 720 (La. App. 1 Cir. 2000) (explaining that the
2 words "in possession" as formerly used in this Article required that the defendant have had
3 corporeal possession for at least one year or civil possession for the same period of time
4 preceded by corporeal possession). This inconsistency in terminology was eliminated in
5 the 2023 revision.

6 Art. 3654. Proof of title in action for declaratory judgment, concursus, expropriation, or
7 similar proceeding

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

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

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

1 Comments – 2023

2 The 2023 revisions to this Article are intended to conform the burden of proof in a
3 declaratory judgment action or other proceeding in which ownership is at issue to the
4 burden of proof that applies under revised Article 3653 in a petitory action. As with a
5 petitory action, if one party has been in possession for one year after having commenced
6 possession in good faith and with just title or has been in possession for ten years, even in
7 the absence of good faith or just title, that party will prevail, unless the adverse party proves
8 that he acquired ownership from a prior owner or by acquisitive prescription.

9 Art. 3655. Possessory action

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

14 Comments – 2023

15 The 2023 revision of this Article recognizes and complements a previous
16 amendment to the Civil Code granting a precarious possessor, such as a lessee, the right to
17 bring a possessory action against anyone other than the person for whom the precarious
18 possessor possesses. See Civil Code Article 3440.

19 Art. 3656. Same; parties; venue

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

25 * * *

26 Comments – 2023

27 (a) The 2023 revision of this Article recognizes and complements a previous

1 amendment to the Civil Code granting a precarious possessor, such as a lessee, the right to
2 bring a possessory action against anyone other than the person for whom the precarious
3 possessor possesses. See Civil Code Article 3440.
4

5 (b) The statement in this Article that a usufructuary possesses for himself means
6 that the usufructuary has standing to bring a possessory action and does not imply that a
7 usufructuary can prescribe against the naked owner without taking the steps required to
8 terminate precarious possession under Civil Code Articles 3439 and 3478.

9 Art. 3657. Same; cumulation with petitory action ~~prohibited~~ or declaratory judgment
10 action; conversion into or separate petitory action by defendant reconventional demand or
11 separate suit asserting ownership or title

12 A. The plaintiff ~~may~~ shall not cumulate the possessory action with either the
13 petitory and the possessory actions in the same suit or plead them in the alternative, and
14 when he does so he waives the possessory action or a declaratory judgment action to
15 determine ownership. If the plaintiff brings does so, the possessory action, and without
16 dismissing it and prior to judgment therein institutes the petitory action, the possessory
17 action is abated does not abate, but the defendant may object to the cumulation by asserting
18 a dilatory exception. If, before executory judgment in the possessory action, the plaintiff
19 institutes the petitory action or a declaratory judgment action in a separate suit, the
20 possessory action abates.

21 B. When, ~~except as provided in Article 3661(1)-(3),~~ the defendant in a possessory
22 action asserts title in himself, in the alternative or otherwise, ~~he~~ the defendant does not
23 thereby converts the suit convert the possessory action into a petitory action, and judicially
24 confesses or judicially confess the possession of the plaintiff in the possessory action, but

1 the defendant's assertions of title shall be considered in defense of the possessory action
2 only for the purposes stated in Article 3661(B)(1) through (3).

3 C. Unless the plaintiff in the possessory action seeks an adjudication of his
4 ownership, the defendant shall not file a reconventional demand asserting a petitory action
5 or declaratory judgment action to determine ownership. If, before executory judgment in a
6 possessory action, the defendant therein institutes a petitory action or a declaratory
7 judgment action to determine ownership in a separate suit he files against the plaintiff in
8 the possessory action, the ~~plaintiff~~ defendant in the ~~petitory~~ possessory action judicially
9 confesses the possession of the ~~defendant therein~~ plaintiff in the possessory action.

10 Comments – 2023

11 (a) The 2023 amendment of this Article preserves the rule of noncumulation of the
12 possessory and petitory actions and expands the rule to prohibit cumulation of the
13 possessory action with a declaratory judgment action to determine ownership. At the same
14 time, the amendment lessens the consequences for the plaintiff of an improper cumulation
15 and eliminates the judicial confession of the plaintiff's possession that previously arose
16 from the defendant's assertions of title in a possessory action.
17

18 (b) Prior to the 2023 amendment of this Article, if the plaintiff cumulated the
19 possessory action with the petitory action, the possessory action simply abated. Under the
20 revised Article, when the plaintiff cumulates the possessory action with a petitory action
21 or with a declaratory judgment action to determine ownership, the possessory action does
22 not abate, but the defendant has the right to object to the improper cumulation by filing a
23 dilatory exception. See Article 926(A)(7). Upon sustaining the exception, the court may
24 order separate trials or may order the plaintiff to elect which action he desires to pursue, as
25 provided in Articles 464 and 465. If not raised through a timely dilatory exception, the
26 objection of improper cumulation is waived. See Article 926(B).
27

28 (c) If, rather than cumulating the possessory action with a petitory or declaratory
29 judgment action, the plaintiff in the possessory action files a separate action to determine
30 ownership while the possessory action is pending, the possessory action abates, but the
31 plaintiff by doing so makes no confession of the defendant's possession.
32

33 (d) Prior to the 2023 revision, the consequences for a defendant who asserted title

1 in himself in response to a possessory action were grave. Not only did his assertions of
2 title convert the possessory action into a petitory action in which he became the plaintiff,
3 but they also constituted a judicial confession of the other party's possession, thus
4 triggering the onerous burden under Article 3653 of proving title good against the world.
5 This harsh penalty has been removed. The defendant's assertions of title in a possessory
6 action no longer convert the action into a petitory action or constitute a judicial confession
7 of the plaintiff's possession; however, the defendant's assertions of title are considered in
8 defense of the possessory action only for the limited purposes specified in Article
9 3661(B)(1) through (3). Thus, the defendant cannot divert the focus of a possessory action
10 from the issue of possession to the often more complicated issue of ownership through the
11 simple expedient of injecting issues of ownership in his pleadings.
12

13 (e) Unless the plaintiff in a possessory action has sought an adjudication of his
14 ownership, the defendant is not permitted to assert a claim of ownership by reconvention.
15 If the defendant asserts ownership by instituting a separate suit before judgment in the
16 possessory action becomes executory, he judicially confesses the possession of the plaintiff
17 in the possessory action. This judicial confession does not arise, however, if it is the
18 plaintiff in the possessory action who institutes the separate suit to determine ownership
19 while the possessory action is pending and the defendant reconvenes in that separate suit
20 to assert his own claim of ownership.

21 Art. 3658. Same; requisites

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

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

26 (2) ~~He~~ The plaintiff and his ancestors in title, or the person for whom the plaintiff
27 possesses precariously and that person's ancestors in title, had such possession quietly and
28 without interruption for more than a year immediately prior to the disturbance, unless
29 evicted by force or fraud;

30 (3) The disturbance was one in fact or in law, as defined in Article 3659; ~~and~~.

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

The 2023 amendments to this Article recognize that a precarious possessor may bring a possessory action. The precarious possessor himself need not have exercised his precarious possession for a full year prior to the disturbance; it suffices if the person for whom he possesses precariously, or that person's ancestors in title, have had possession for a year.

Art. 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.

1 Lumber Co., Inc. v. Lemoine, 381 So. 2d 915 (La. App. 3 Cir. 1980). See also Ree Corp.
2 v. Shaffer, 260 So. 2d 307, 313 (La. 1972) (Tate, J., concurring).

3 Art. 3660. Same; possession

4 A. A person is in possession of immovable property or of a real right therein, within
5 the intendment of the articles of this Chapter, when ~~he~~ the person has the corporeal
6 possession thereof, or civil possession thereof preceded by corporeal possession by him or
7 his ancestors in title, and possesses for himself or precariously for another, whether in good
8 or bad faith, or even as a usurper.

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

14 Comments – 2023

15 The 2023 amendment of this Article retains the rule that, for purposes of this
16 Chapter, "possession" means possession in fact, rather than the right to possess, except
17 where the right to possess is expressly stated. Consistent with the changes made to Articles
18 3655, 3656, and 3658, the amended Article recognizes that precarious possession for
19 another person constitutes possession for purposes of this Chapter.

20 Art. 3661. Same; title not at issue; limited admissibility of evidence of title

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

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

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

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

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

5 Comments – 2023

6 The 2023 amendment to this Article clarifies that a person is entitled to use
7 evidence of ownership for purposes of proving not only the extent of his own possession,
8 but also the extent of possession of his ancestors in title. See Civil Code Article 3442.

9 Art. 3662. Same; relief ~~which~~ that may be granted successful plaintiff in judgment; appeal

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

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

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

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

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

1 C. A suspensive appeal from the judgment rendered in a possessory action may be
2 taken within the delay provided in Article 2123, and a devolutive appeal may be taken from
3 ~~such~~ the judgment only within thirty days of the applicable date provided in Article
4 2087(A).

5 Comments – 2023

6 (a) Among the substantive changes made to this Article by the 2023 revision,
7 Subparagraph (A)(2) provides that the delay within which the losing defendant can be
8 ordered to file a petitory action, where that relief was prayed for by the prevailing plaintiff,
9 is fixed in all cases at sixty days. This relief is not available against a defendant who
10 appeared in the action only through an attorney appointed to represent him under Article
11 5091. Nevertheless, the prevailing plaintiff is not without a remedy to obtain a
12 determination of ownership when the defendant has appeared in the possessory action in
13 that manner; the plaintiff can institute his own declaratory judgment action against the
14 defendant and, depending on the circumstances, may be entitled to have an attorney again
15 appointed to defend the absentee defendant in the declaratory judgment action.
16

17 (b) The 2023 revision removes the constitutional infirmity in this Article noted by
18 the Supreme Court in *Todd v. State*, through Dept. of Natural Resources, 456 So. 2d 1340
19 (La. 1983), amended 474 So. 2d 430 (La. 1985), in which the court held that, although a
20 possessory action can be brought against the state, the relief allowed under Subparagraph
21 (A)(2) of this Article is a form of liberative prescription that cannot run against the state
22 under Article XII, Section 13 of the Constitution of Louisiana.
23

24 (c) A judgment rendered in violation of Paragraph B of this Article is subject to
25 annulment under Article 2004.

26 * * *

27 Art. 3669. Possessory action unavailable between owner of mineral servitude and owner
28 of dependent mineral royalty

29 In the event of a dispute between the owner of a mineral servitude and the owner
30 of a mineral royalty burdening or alleged to burden the servitude in question, the possessory
31 action is unavailable to either party, and the only available real action is the petitory

1 action. The burden of proof on the plaintiff in ~~such an~~ the petitory action is ~~that which~~
2 ~~must be borne by the plaintiff in a petitory action when neither party is in possession to~~
3 prove a better title than that of the defendant.

4 Comments – 2023

5 Prior to its revision in 2023, this Article provided that the plaintiff’s burden of proof
6 in a petitory action contemplated by this Article was that which applies when neither party
7 is in possession. Rather than following this indirect approach, the 2023 revision states
8 more plainly and directly what the burden of proof is in such an action: it is to prove a
9 better title.

DIGEST

The digest printed below was prepared by the Louisiana State Law Institute. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

HB _____

2023 Regular Session

Pressly

Abstract: Provides with respect to actions to determine ownership or possession.

Present law (C.C. Art. 531) requires a person claiming ownership of an immovable against another in possession to prove that he acquired ownership from a previous owner or by acquisitive prescription.

Proposed law imposes the burden of proof provided by present law only when the other person has been in possession for one year in good faith and with just title or has been in possession for ten years; otherwise, the burden of proof is better title.

Present law (C.C. Art. 3440) provides that the possessory action is available to a precarious possessor, such as a lessee or a depository.

Proposed law deletes the incorrect reference to depositaries found in present law.

Present law (C.C.P. Art. 1061) requires the defendant in the principal action to reconvene in all causes of action that arise out of the same transaction or occurrence but provides for certain exceptions, such as in actions for divorce or for disavowal.

Proposed law adds to the exceptions provided by present law the filing of a reconventional demand asserting a petitory action or declaratory judgment action to determine ownership under Article 3657.

Present law (C.C.P. Art. 3651) provides that a petitory action is brought by a person who is not in possession of immovable property or a real right therein.

Proposed law changes present law to clarify that a petitory action is brought by a person who does not have the right to possess immovable property or a real right therein.

Present law (C.C.P. Art. 3653) sets forth the burden of proof that must be satisfied by the plaintiff in a petitory action and requires the plaintiff to prove that he acquired ownership from a previous owner or by acquisitive prescription if the defendant is in possession of the immovable.

Proposed law imposes the burden of proof provided by present law only when the defendant has been in possession for one year in good faith and with just title or has been in possession for ten years; otherwise, the plaintiff's burden of proof is better title.

Present law (C.C.P. Art. 3654) provides that the same burden of proof that must be satisfied by the plaintiff in a petitory action also applies to an action for a declaratory judgment or a concursus, expropriation, or similar proceeding.

Proposed law changes present law to impose the burden of proving acquisition of ownership from a previous owner or by acquisitive prescription when the adverse party has been in possession for one year in good faith and with just title or has been in possession for ten years; otherwise, the burden of proof is better title.

Present law (C.C.P. Art. 3655) provides that a possessory action is brought by the possessor of immovable property or a real right therein.

Proposed law adds to present law that a possessory action may also be brought by a precarious possessor.

Present law (C.C.P. Art. 3656(A)) provides that a possessory action shall be brought by one who possesses for himself and specifies that a predial lessee does not possess for himself.

Proposed law changes present law to allow a possessory action to be brought by a precarious possessor, such as a lessee, against anyone except the person for whom the precarious possessor possesses, in accordance with the Civil Code.

Present law (C.C.P. Art. 3657) prohibits the cumulation of possessory and petitory actions and provides that a plaintiff who improperly cumulates these actions or institutes a petitory action waives the possessory action. Present law further provides that a defendant who improperly asserts

title in the possessory action or institutes a petitory action judicially confesses the possession of the plaintiff in the possessory action.

Proposed law expands present law to prohibit cumulation of a possessory action with either a petitory action or a declaratory judgment action to determine ownership.

Proposed law changes the consequence provided by present law for improper cumulation by the plaintiff, instead providing that the defendant may object by asserting a dilatory exception. Proposed law also changes the consequence when the defendant improperly asserts title in the possessory action, instead limiting the defendant's assertions of title to those matters that may be considered in the possessory action under Article 3661.

Proposed law retains the consequence provided by present law when the defendant institutes a separate petitory action or declaratory judgment action to determine ownership, requiring the defendant to judicially confess the possession of the plaintiff. Proposed law also prohibits the defendant from filing a reconventional demand asserting claims of title unless the plaintiff seeks an adjudication of ownership.

Present law (C.C.P. Art. 3658) sets forth the items that must be proven by the plaintiff in a possessory action.

Proposed law retains present law but recognizes that a possessory action may also be brought by a precarious possessor.

Present law (C.C.P. Art. 3659) provides with respect to disturbances in law and in fact.

Proposed law retains present law but clarifies when a disturbance in law must arise in order for the disturbance to form the basis of a possessory action.

Present law (C.C.P. Art. 3660) provides for a definition of "possession" for purposes of this Chapter.

Proposed law retains present law but adds that precarious possession also constitutes possession for purposes of this Chapter.

Present law (C.C.P. Art. 3661) provides that no evidence of ownership or title to immovable property or a real right therein shall be admitted in a possessory action except under certain circumstances, such as to prove the extent of possession by a party.

Proposed law retains present law but adds that evidence of ownership or title may also be admitted to prove the extent of possession by a party's ancestors in title.

Present law (C.C.P. Art. 3662) sets forth the relief that may be granted to a successful plaintiff in

a possessory action, including ordering the defendant to assert his claim of ownership within a delay not to exceed sixty (60) days or be precluded thereafter from doing so.

Proposed law fixes the delay provided by present law at sixty (60) days and also provides that this relief is not available against the state or against a defendant who appeared in the action only through an attorney appointed to represent him under Article 5091.

Present law (C.C.P. Art. 3669) provides that the burden of proof in an action between the owner of a mineral servitude and the owner of a mineral royalty is that which must be borne by the plaintiff in a petitory action when neither party is in possession.

Proposed law clarifies that the applicable burden of proof is to prove better title.

(Amends C.C. Arts. 531 and 3440 and C.C.P. Arts. 1061, 3651, 3653, 3654, 3655, 3656(A), 3657, 3658, 3659, 3660, 3661, 3662, and 3669)