

BAUDRY – LACANTINERIE & TISSIER

Prescription

TRAITÉ THÉORIQUE ET PRATIQUE
DE DROIT CIVIL

Vol. XXVIII, Nos. 1–815 (4th ed. 1924)

AUBRY & RAU

Chapter 4. Of the Different Manners in which Actions are
Extinguished or Become Ineffective, and
Especially of Prescription

DROIT CIVIL FRANÇAIS

Vol. XII, §§ 770–776 *bis*
(6th ed. 1958, by Paul Esmein)

JEAN C. CARBONNIER

Notes on Liberative Prescription

50 REVUE TRIMESTRIELLE DE DROIT CIVIL
171–181 (1952)
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and André Ponsard

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FOREWORD

The legislative charter of the Louisiana State Law Institute imposes upon it the responsibility of making available translations of civil law materials and commentaries in the interest of a better understanding of the civil law of this state and the philosophy upon which it is based. With the generous cooperation of the West Publishing Company, the *Civil Law Translations* series is designed to further this objective.

This, the fifth volume in the series, covers the important subject of prescription, both in historical and philosophical perspective and in the light of its later development in the law of France. To present an adequately comprehensive view of the subject of prescription, the following translations have been included:

A. 28 Baudry-Lacantinerie & Tissier, *Traité Théorique et Pratique de Droit Civil, Prescription* (4th ed. 1924) nos. 1-815;

B. 12 Aubry & Rau, *Droit Civil Français, Prescription* (6th ed., 1958, by Paul Esmein) §§ 770-776 bis; and

C. Carbonnier, "Notes on Liberative Prescription," 50 *Revue Trimestrielle de Droit Civil* 171-181 (1952).

There is included also, by way of updating the Baudry-Lacantinerie & Tissier material, over 270 new references to decisions, legislation and doctrine covering the period 1924-1967. The principal source of this material was Dalloz, *Encyclopédie Juridique—Répertoire de Droit Civil*, Volume IV, *Civil Prescription*, §§ 1-554, by Jean Radouant, Professor at the Faculty of Law and Political Science of Strasbourg (1954, Supplement 1967). The updating of the Baudry-Lacantinerie & Tissier volume by means of these materials is counted as particularly significant in view of the fact that modern developments have been largely decisional rather than legislative.

The article by Professor Carbonnier deals with the subject of liberative prescription, a topic underdeveloped in the commentaries because most of the authors "either died or ran out of breath before they got to it." It is based on decisional law, largely post-Baudry. It contains numerous references to recent commentaries and theses, is particularly well written, and the analysis it contains is both interesting and instructive. The high caliber of the Baudry-Lacantinerie & Tissier and Aubry & Rau commentaries is too well known to require embellishment. The former contains what is counted as

FOREWORD

the most elaborate discussion extant of the general subject of prescription. The portions of the Aubry & Rau treatise which are included herein relate also to the subject of liberative prescription.

The materials in this volume have been translated and their updating was performed by Professor Jaro Mayda of the University of Puerto Rico School of Law. Professor Mayda has heretofore translated the Aubry & Rau volume covering obligations, which is Volume II of the *Civil Law Translations* series, the third volume of Planiol's *Traité Élémentaire de Droit Civil*, and Gény's *Méthode d'Interprétation et Sources en Droit Privé Positif*, which was published before the *Translations* series was begun. He has degrees in law from Masaryk University, in his native Czechoslovakia, and the University of Chicago. Rather than undertaking to achieve an improvement in structure and style by the liberal exercise of editorial freedom on the part of the translator, the Institute's choice was in favor of full translation. Civil law terminology has been used throughout.

The Institute acknowledges with special thanks the cooperation editorially of the Institute of Civil Law Studies of the Louisiana State University under the personal supervision of its director, Professor Joseph Dainow.

It deeply regrets the untimely death of Professor Paul Esmein, editor of Volume XII of the sixth edition of the Aubry & Rau treatise. Its warm thanks are gratefully extended to Librairies Techniques and to Professor André Ponsard, who collaborated with Professor Esmein in the preparation of the mentioned volume, for granting to it the right to publish the material translated from the Aubry & Rau treatise, to Jurisprudence Générale Dalloz for authorizing it to extract from the *Encyclopédie Juridique* the decisions rendered since 1924 in order that they might be inserted in this translation, and to Professor Jean C. Carbonnier and *Éditions Sirey* for their kindness in authorizing the publication of an English translation of M. Carbonnier's article in the *Revue Trimestrielle*. The Institute is particularly impressed by these manifestations of generosity and of interest in assisting it to enhance the understanding and appreciation of the civilian legal system.

Our sincerest thanks go again to the West Publishing Company for its cooperation, without which the *Civil Law Translations* series might not have been begun.

J. DENSON SMITH

Professor of Law, Louisiana State University
Director, Louisiana State Law Institute

December, 1971

EXPLANATORY NOTES

I.

There are numerous cryptic citations in the Baudry-Lacantinerie & Tissier commentary, presumably because it was assumed that the reader would be familiar with certain standard treatises. On the other hand, the citing style is frequently pedantic and makes the footnotes longer and thus visually less wieldy. The translator tried to correct this as much as feasible by the following procedures:

1. Treatises on *Prescription* are cited only by author's name (e. g. Pothier, Dunod, Troplong, etc.).

2. Frequently cited other treatises are also identified only by the name of the author(s). They are:

Aubry & Rau	Aubry & Rau, <i>Cours de droit civil français</i> (Ed. 4, 8 vols., 1869–1883; Ed. 5, 12 vols., 1897–1922). Ed. 5 is cited, unless noted otherwise. Sections 200 f. correspond to vol. II; sections 700 f. to vol. VII. Paragraph numbers in brackets have been added for indexing purposes.
Bélime	Bélime, <i>Philosophie du droit</i> (2 vols.).
Bufnoir	Bufnoir, C., <i>Propriété et contrat</i> (1900).
Colmet de Santerre	Demante & Colmet de Santerre, <i>Cours analytique de Code civil</i> (Ed. 2, 9 vols., 1881–1895), vol. VIII (unless noted otherwise).
Duranton	Duranton, A., <i>Cours de droit français</i> (1844).
Guillouard	<i>Traité divers</i> (continuation of the unfinished <i>Cours de Code Napoléon</i> , by Demolombe); volume on <i>Prescription</i> (1896).
Huc	Huc, <i>Commentaire théorique et pratique du Code civil</i> (15 vols., 1892–1903), vol. XIV.
Laurent	Laurent, F., <i>Principes de droit civil français</i> (33 vols., 1869; supplement, 8 vols., 1898–1903), vol. XXXII.
Planiol	Planiol, M., <i>Traité élémentaire de droit civil</i> (Ed. 2, 1900).
Poulain du Parc	Poulain du Parc, <i>Principes du droit français</i> .
Taulier	Taulier, Vol. VII.

EXPLANATORY NOTES

3. There is an occasional discrepancy between the wording of headlines in the text and in the table of contents. This eliminates unnecessary repetitions in the table, where the headlines follow one another, while in the text, with several pages intervening, it is desirable to repeat for the reader's easier orientation.

4. Page numbers in the notes are plain; section numbers are preceded by No. or §, according to the style of the original.

II.

5. As explained in the Foreword, this translation was updated by over 270 new references to decisions, legislation and writers, covering the period 1924-1967. The principal source for this updating was:

Dalloz—*Encyclopédie juridique—Répertoire de droit civil*. Tome IV. V^o Prescription civile, secs. 1-554, pp. 7-47. (By Jean Radouant, Professor at the Faculté de droit et sciences politiques de Strasbourg.) Paris: Jurisprudence Générale Dalloz, 1954 (Suppl. 1967).

This new material is identified by brackets. If contained in a new footnote, the reference in the text is by an asterisk. The source is briefly cited as *Enc. Dal.*, followed by the number of the section.

6. The original is not consistent in identifying articles of the Civil Code as such. Since most of the statutory references are to the French Civil Code, they are cited simply by article number, e. g. Art. 2262. A statutory reference to a source other than the French Civil Code is given in full.

7. The topics in this volume are also dealt with (and referred to in the text) in two previous translations published by the Louisiana State Law Institute, which can be consulted through their respective indices:

Planiol, *Civil Law Treatise* (3 vols. 1959);

Aubry-Rau-Esmein, *Droit Civil Français*, Vol. II: Property (1966).

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(Ed. 6, by Paul Esmein, 1958) Vol.

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FIRST PART

A

PRESCRIPTION

(Vol. XXVIII of *Traité théorique et pratique
de Droit Civil*)

By

G. Baudry-Lacantinerie
and
Albert Tissier

(4th Edition, 1924. §§ 1-815)

*

PRESCRIPTION

(Book III, Title XX of the [French] Civil Code)¹

Chapter I

HISTORICAL BACKGROUND

1. The reconstruction of the history of prescription presents a number of problems. Many points have not been clarified. In this brief historical summary we can not examine the complex questions concerning study of the rules of prescription in ancient legislations,² nor even under the *Bas-Empire*, [Byzantine period 395 A.D.-1453 A.D.] or in the Middle Ages. We can only trace the origins of our present law, presenting those facts and institutions about which the writers seem to agree. Later in the text we shall encounter a number of special problems which will lead us to study in detail the historical precedents of the provisions of our civil code. It is certain that the field is wide open for legal-historical research. Especially

1. The purpose of this work is to study only the function of prescription in positive private French law. Looked at on a higher and more general level, prescription raises numerous problems which do not concern us here. For instance, the close relations between prescription and the customary laws are well known (see d'Argentré, *Cout. de Bret.*, art. 277; Dunod, 106-107; Troplong, No. 26; Brisson, *Hist. gén. de dr. franç.*, 240; Gény, *Méthode d'interprétation et sources en droit privé positif*, No. 116; Lambert, *La fonction du droit civil comparé*, I, 114, 142. We shall not examine the important fact that in the past possession from times immemorial could be based not only on a title, but even on a statute (see Merlin, *Répert.*, V° Prescription, sec. 2, § 24). We shall also leave aside the close relations between prescription and new legislation: what effects on existing rights follow from a legislative reform; and to what extent must they be respected? Should the parties whose long-held rights are abolished by the new statute be indemnified? These questions arise whenever a profound social reform

eliminates as unjust rights and relations which previous law upheld (see Lasalle, *Théorie systématique des droits acquis* [Fr. transl., 1901]; Andler, *Les origines du socialisme d'Etat en Allemagne* 91 f.). Nor is it our task to deal with prescription in public law or in international law. Even in the domain of private law, we shall generally leave aside the analysis of foreign legislation and the question of the numerous reforms which it would be convenient to adopt from there into French law. On these points we shall make only brief reference where indicated.

2. On the institution of prescription in primitive societies see Stobbe, *Handbuch der deutschen Privatrechts*, II, 181; Kovalewski, *Coutume contemporaine et loi ancienne* 90. On prescription in old Greek and oriental laws, and in ancient Scandinavian, Germanic and Slavic laws, see Dareste, *La prescription en droit civil*, 2 f.; Id., *Bull. des trav. de l'Acad. des sciences mor. et polit.* XLII, 941. On Moslem law see Morand, *Revue algér.* I (1899) 37 f.

canon law and customary laws, as well as our old decisional law, have not thus far been clarified in sufficient depth.

2. Our law of prescription comes largely from Roman law, from which our old law took almost all its rules.³ However, canon law tried to introduce new rules mainly to protect parties in good faith and, with the help of prescription, to prevent unjust enrichment of dishonest holders or debtors. In the last stages, our old law of prescription consisted almost entirely of a combination of the principles of Roman law and the rules of canon law. In the preface to his famous *Traité des prescriptions*, Dunod stated correctly "I have used as a base of my work the rules of the civil and the canon laws. Although it is said that in the regions of customary law only the rules of prescription established by the custom, the ordinances and judicial decisions were recognized, we must admit that these rules are derived from the general principles of civil and canon laws. The customs have only modified and simplified them where civil law has become too subtle and canon law too difficult and onerous."⁴

Section One

ROMAN LAW

§ 1. ACQUISITIVE PRESCRIPTION

3. Roman law has an abundance of texts on prescription. It has been often said that this is one of the best treated subjects in the compilations which have come to us.

It is known that Roman law knew for a long time only *usucapio* which has come to be described by the less fitting terms of acquisitive prescription. *Usucapio* was a mode of acquisition under the civil law.⁵ It went back to the Twelve Tables. The shortness of the prescription periods required by Roman law—one year for movables, two years for immovables—is explained by the fact that at the beginning of Roman history land property was limited and movements of people infrequent. The one and two-year periods were therefore sufficient to detect and prevent usurpation.⁷ The majority of old laws stipulate similarly short prescription periods.

3. Cf. Desjardins, *Nouv. rev. hist.* (1877) 301.

4. Cf. also d'Espinay, *De l'influence du droit canonique sur la législation française* 80 f, 189 f, 270 f.

5. "Usucapione dominia adipiscimur, tam Mancipi rerum quam nec Mancipi.

Usucapio est autem domini deption per continuationem possessionis anni vel biennii; rerum mobilium anni, immobilium biennii." Ulpianus, Reg., XIX, § 8.

7. Troplong, I, 15; Esmein, *Mélanges d'histoire de droit et de critique* 171 f; Dareste (n. 1 above) 4.