NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0668

ISIAH GILLUM, ADMINISTRATOR OF THE SUCCESSIONS OF JOSEPH JONES AND MARY JENKINS JONES

VERSUS

ELLEN CHRISTINE SPURLOCK LEWIS

Judgment Rendered: NOV 0 1 2017

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 2014-15147

Honorable Peter J. Garcia, Judge Presiding

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P. David Carollo **Slidell, LA**	**Counsel for Plaintiff/Appellant,** **Isiah Gillum, Administrator of the Successions of Joseph Jones and Mary Jenkins Jones**
Stephen D. Marx **Metairie, LA**	**Counsel for Defendant/Appellee,** **Ellen Christine Spurlock Lewis**

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

WHIPPLE, C.J.

This matter is before us on appeal by plaintiff, Isiah Gillum, administrator of the successions of Joseph Jones and Mary Jenkins Jones, from an amended judgment of the trial court granting summary judgment in favor of defendant, Ellen Christine Spurlock Lewis, and dismissing plaintiff's claims with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On November 19, 2014, Isiah Gillum, as administrator of the successions of his grandparents, Joseph Jones and Mary Jenkins Jones, filed a "Petition for Petitory Action" contending therein that he was the lawful owner of two acres of land pursuant to an acquisition by his grandfather recorded at COB 64, folio 280 and 281, and Original Document Number of A-7317, in the conveyance records of St. Tammany Parish in 1914. Gillum named Ellen Christine Spurlock Lewis as a defendant and averred that Lewis was also claiming ownership of the property and was building a road on said property.

Lewis filed an answer generally denying Gillum's ownership of the two acres and then subsequently filed a supplemental and amended answer further asserting "defenses and/or affirmative defenses" claiming that she, in fact, owned the two acres claimed by Gillum. Lewis averred that she acquired title to ten acres[1] of land on June 5, 2001, from Charles C. Crumpler, which included the two acres claimed by Gillum (hereinafter the "disputed property"), pursuant to a deed recorded at the St. Tammany Parish Clerk's Office in Instrument No. 1248820. Lewis maintained that she has possessed the property continuously, without interruption, peaceably, publicly and unequivocally since June 5, 2001, through the date of the filing of the instant petition, and that she continues to possess it in good

[1]Although the property acquired by Lewis is legally described as "9.85 acres of land, more or less," it is generally referred to herein and in the proceedings below as "ten acres."

faith and with just title. Alternatively, Lewis contends that if she did not acquire good title to the entire ten acres when she purchased it on June 5, 2001, she acquired ownership of the property by ten years of acquisitive prescription no later than June 5, 2011. She further prayed for judgment in her favor dismissing Gillum's petition and adjudging her to be the owner of the property.

On September 22, 2015, Lewis filed a motion for summary judgment contending that Gillum cannot satisfy his evidentiary burden of proof at trial and that his claim to the disputed property fails where: (1) Lewis has better title to the property; and (2) even if she did not have better title to the property, she has acquired the property through ten years of acquisitive prescription. Lewis prayed that summary judgment be granted and that she be adjudged to be the owner of the property described in her title by ten years of acquisitive prescription.

Following a hearing on November 10, 2015, the trial court took the matter under advisement. On January 11, 2016, the trial court issued written reasons finding that: (1) Lewis and her predecessor in title, Crumpler, each had just title; (2) the presumption of good faith was not rebutted by Gillum; and (3) there was no competent evidence of acts sufficient to interfere with Lewis's peaceful possession under Louisiana law. The trial court further found that Gillum failed to produce factual support in opposition to the motion for summary judgment sufficient to establish that he will be able to satisfy his evidentiary burden at trial and that there was no genuine issue of material fact that Lewis was the owner of the two acres at issue herein. Accordingly, the trial court granted Lewis's motion for summary judgment. A written judgment granting the motion for summary judgment was signed by the trial court on January 29, 2016.

Although Gillum initially appealed from the January 29, 2016 judgment, the appeal was dismissed by this court after a finding that the judgment was not a final appealable judgment over which this court possessed subject matter jurisdiction to

review where the judgment failed to dismiss Gillum's claims against Lewis. Citing our lack of jurisdiction, this court also recalled a show cause order previously issued as to why the appeal should not be dismissed where the judgment failed to describe the immovable property at issue in accordance with LSA-C.C.P. art. 1919.[2] See Gillum v. Lewis, 2016-0581 (La. App. 1st Cir. 2/17/17)(unpublished opinion).

In response, the parties jointly moved that the trial court amend the January 29, 2016 judgment and cure the defects therein. On March 2, 2017, the trial court signed an amended judgment, which contained a description of the disputed immovable property, granted Lewis's motion for summary judgment declaring her to be the owner of the disputed property, and dismissed Gillum's claims with prejudice.

Gillum now appeals from the amended judgment, contending that the trial court erred in finding that Lewis proved she had better title to the property and in granting summary judgment in her favor and dismissing his claims with prejudice.

Summary Judgment

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. All Crane Rental of Georgia, Inc. v. Vincent, 2010-0116 (La. App. 1st Cir. 9/10/10), 47 So. 3d 1024, 1027, writ denied, 2010-2227 (La. 11/19/10), 49 So. 3d 387. A court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law."

[2]Louisiana Code of Civil Procedure article 1919 provides, in part, that "[a]ll final judgments which affect title to immovable property shall describe the immovable property affected with particularity."

LSA-C.C.P. art. 966(B)(2).[3] Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. However, if the moving party will not bear the burden of proof on the issue at trial, he need only demonstrate an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Then, the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. LSA-C.C.P. art. 966(C)(2). If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. See McCorkle v. Gravois, 2013-2009 (La. App. 1st Cir. 6/6/14), 152 So. 3d 944, 947, writ denied, 2014-2179 (La. 12/8/14), 153 So. 3d 446.

When the motion for summary judgment is supported as provided above, the opposing party cannot rest on the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B).

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. McCorkle v. Gravois, 152 So. 3d at 947. A trial court cannot make credibility decisions on a motion for summary judgment. Pennison v. Carrol, 2014-1098 (La. App. 1st Cir.

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[3]Louisiana Code of Civil Procedure article 966 was amended and reenacted by La. Acts 2015, No. 422, § 1, with an effective date of January 1, 2016. The amended version of article 966 does not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act; therefore, we refer to the former version of the article as applicable in this case. See La Acts 2015, No. 422, §§ 2 and 3.

4/24/15), 167 So. 3d 1065, 1071, writ denied, 2015-1214 (La. 9/25/15), 178 So. 3d 568."

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Boudreaux v. Vankerkhove, 2007-2555 (La. App. 1st Cir. 8/11/08), 993 So. 2d 725, 729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law. All Crane Rental of Georgia, Inc. v. Vincent, 47 So. 3d at 1027.

DISCUSSION

The petitory action is one brought by a person who claims the ownership, but who is not in possession, of immovable property, against another who is in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership.[4] LSA-C.C.P. art. 3651. To obtain a judgment recognizing ownership of immovable property or real right therein, the

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[4]In his petition for petitory action, Gillum contends that he "is the true and lawful owner" of the disputed property and further contends that he "is in possession of the above described immovable property." At the outset, we note that the ownership and the possession of a thing are distinct. Ownership exists independently of any exercise of possession and may not be lost by nonuse. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor. LSA-C.C. art. 481. As set forth above, a petitiory action is one brought by a person who claims the ownership, but **who is not in possession**, of immovable property. LSA-C.C.P. art. 3651.

The Louisiana Supreme Court has emphasized the distinction between real actions for possession and ownership, explaining that a possessory action protects possession and a petitory action protects ownership. See Todd v. State, through the Department of Natural Resources, 474 So. 2d 430, 432-433 (La. 1985). The rights and burden of proof attendant to a possessory action are distinct and unique from those in a petitory action. Hooper v. Hero Lands Company, 2015-0929 (La. App. 4th Cir. 3/30/16), 216 So. 3d 965, 971, writ denied, 2016-0971 (La. 9/16/16), 206 So. 3d 205. A plaintiff may not cumulate the petitory and possessory actions in the same suit or plead them in the alternative. When he does so, he waives the possessory action. LSA-C.C.P. art. 3657. These rules are intended to keep the trial of the issues of possession and ownership as separate as possible. See LSA-C.C.P. art. 3657, Official Revision Comment (a). It is essential for the maintaining of the petitory action that the plaintiff not be in possession of the disputed immovable or real right in it. If plaintiff is in possession, he may obtain a judgment recognizing his ownership or real right by an action for declaratory judgment. Yiannopoulis, Louisiana Civil Law Treatise, Property § 11:7 at 602-603 (5th ed. 2015). Thus, to the extent that any possessory claims are asserted in Gillum's petitory action, they are considered waived in these proceedings.

plaintiff in a petitory action shall: (1) prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is in possession thereof; or (2) prove a better title thereto than the defendant, if the court finds that the latter is not in possession thereof. LSA-C.C.P. art. 3653; LSA-C.C. art. 531; Griffin v. Daigle, 99-1942 (La. App. 1st Cir. 9/22/00), 769 So. 2d 720, 724-725, writ denied, 2000-3406 (La. 2/2/01), 784 So. 2d 648. Therefore, the first issue that must be determined in a petitory action is the question of current possession. Mt. Everett African Methodist Episcopal Church v. Carter, 96-2591 (La. App. 1st Cir. 12/29/97), 705 So. 2d 1179, 1181. The defendant's possession, or lack of it, determines the burden of proof imposed on the plaintiff. See LSA-C.C.P. art. 3651, Official Revision Comments (a); Joffrion v. Scioneaux, 506 So. 2d 512, 513-514 (La. App. 1st Cir. 1986), writ denied, 505 So. 2d 1132 (La. 1987). When the titles of the parties are traced to a common author, he is presumed to be the previous owner. LSA-C.C.P. art. 3653; LSA-C.C. art. 532.

With reference to the merits of her motion for summary judgment, Lewis contends that Gillum's claim to the disputed property fails for at least two reasons: (1) Lewis had better title to the disputed property; and (2) even if she did not, she has acquired the disputed property by ten years of acquisitive prescription.

Lewis contends that she and Gillum's grandparents share a common ancestor-in-title, Nelson Fields. Lewis further contends that in 1902, Fields sold the ten acres containing the disputed property to her ancestor-in-title, Harry Johnson, and it was subsequently sold numerous times, most recently to Lewis from Crumpler.[5] Lewis further contends that in 1914, Fields sold the disputed

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[5]The parties do not dispute that on June 5, 2001, Lewis acquired ten acres of immovable property from Crumpler in a "Credit Sale." The immovable property is located in the southwest quarter of St. Tammany Parish Section 24, Township 8 South, Range 14 East, and is described as follows:

> A CERTAIN PARCEL OF LAND, together with all the buildings and improvements thereon and all the rights, ways, privileges, servitudes, advantages

property (two of the ten acres) to Gillum's grandfather, Joe Jones, after it had already been sold to her predecessor-in-title, Harry Johnson.[6]

Lewis therefore concludes that she has better title to the disputed property not only because her predecessor-in-title, Harry Johnson, acquired the disputed property twelve years before Joe Jones acquired it, but because Joe Jones never acquired good title to the disputed property where Fields did not own the disputed property at the time he purportedly sold it to Joe Jones as he had already sold it to Harry Johnson twelve years earlier.

Alternatively, Lewis contends that even if she did not have better title to the disputed property, she began possessing it for ten-year acquisitive prescription purposes in 2001, thirteen years before the instant lawsuit was filed. Lewis further contends that she could have tacked her possession onto Crumpler's possession

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> and appurtenances, thereunto belonging or in anywise appertaining, situated in the Parish of St. Tammany, State of Louisiana, being more fully described as follows, to wit:
>
> From the southeast corner of the southwest quarter of the northwest quarter of said section, township and range, also the point of beginning, thence south 00 degrees 15 minutes west 289.56 to a point; thence North 85 degrees 27 minutes 30 seconds West 128.31 feet to a point, thence south 13 degrees, 14 minutes West 51.84 feet to a point; thence South 89 degrees 30 minutes west 1178.42 feet to a point; thence North 00 degrees 15 minutes East 328.66 feet to a point; thence north 89 degrees, 30 minutes east 653.3 feet to a point; thence north 87 degrees 30 minutes east 653.3 feet to a point; thence north 87 degrees 59 minutes 54 seconds east 198.24 feet to a point; thence south 89 degrees 51 minutes 37 seconds East 466.59 feet to the Point of Beginning.
>
> Containing in all 9.85 acres of land, more or less.

This same property description was used in the act of sale by which Crumpler acquired the property from Citizens Bank and Trust Company in 1992; when Citizens Bank and Trust Company previously acquired the property in 1992 from Yvonne Cameron Saucier and John L. Saucier after it was subject to seizure and sale by the sheriff; and in the act of sale by which the Sauciers had acquired the property from Saucier Construction Company, Inc. in 1984.

[6]The parties further do not dispute that on December 29, 1914, Fields sold the disputed property (which two acres are located within the northeastern portion of the ten acres described above) to Joe Jones in an act of sale, which he described as follows:

> 2 acres of land in the West half of the South West quarter of section twenty-four in Township eight, South Range 14, East of St. Helena Meridian being a part of a homestead granted said Nelson Fields. The said two acres are bounded on the North by Geans Calvin's lands and on the East, West, and South by land belonging to Nelson Fields.

and achieved ten years of possession for acquisitive prescription in 2002, ten years after Crumpler purchased the property.

In support of her motion, Lewis attached: (1) a diagram of the property; (2) an 1898 Homestead Certificate to Fields from the U.S. Government; (3) a 1902 sale of ten acres from Fields to Harry Johnson; (4) an 1899 acquisition of property by John Dawes from the U.S. Government which includes the northeast quarter of the southwest quarter of Section 2; (5) Edward Haas's deposition excerpts; (6) a 1914 act of sale from Fields to Joe Jones (Gillum's grandfather); (7) a credit sale of the ten acres dated June 5, 2001, from Crumpler to Lewis; (8) a survey of the ten acres acquired by Lewis; (9) a September 22, 1992 act of cash sale of the ten acres from Citizens Bank & Trust Company to Crumpler; (10) a 1992 Sheriff's deed of the ten acres (via writ of seizure and sale from John Saucier) to Citizen's Bank and Trust; (11) a February 16, 1984 sale of the ten acres from Saucier Construction Company to John Saucier; (12) the deposition of Gillum; (13) the affidavit of Lewis; and (14) the affidavit of John Saucier.

Gillum opposed the motion for summary judgment, contending that, as to Lewis's claims to better title, a 1951 tax sale from Edward S. Spiro to John J. Harper, her predecessors-in-title, was defective where it conveyed the entire ten acres to Harper when there were no unpaid taxes due on three of the ten acres in the Eastern thirty percent acquired from Johnson's heirs. In particular, Gillum contends that two of the three acres in the name of Joe Jones were subject to the homestead exemption, and therefore no property taxes were due and owed. As such, Gillum contends that the defective 1951 tax sale could have only conveyed seven of the ten acres to Harper, and that those seven acres were the extent of any property that could have eventually been conveyed to or acquired by Lewis.

Gillum further opposed Lewis's claims of possession by acquisitive prescription contending that Lewis could not have possibly been possessing "in

good faith" where she "was well advised/warned early on of the Jones' family" claims to the disputed property "in the eastern thirty percent of the ten acres that she claims to own" during litigation concerning the property with Edward N. Haas in 2004. Gillum further contends that the Jones heirs further pointed out their ownership of the disputed property to Lewis via a certified letter dated November 15, 2009, from Gillum to her then attorney of record, Jaclyn Hill.

In support of his opposition, Gillum attached: (1) the "affidavit" of Edward N. Haas and Isiah Gillum;[7] (2) a survey of the disputed property prepared by J.V. Burkes and Associates; (3) an April 16, 2009 survey prepared by Land Surveying, Inc.; (4) an assessment roll for the Parish of St. Tammany showing the 1950 tax assessments of Joe Jones, Sr. and Joe Jones, Jr.; (5) a survey of the disputed property prepared by J.V. Burkes and Associates with indicating lines; (6) photographs of the property; (7) a map of Honey Island Timber Company's three acres leased to Lewis; and (8) a certified letter dated November 15, 2009, from Gillum to Lewis's attorney, Ms. Jaclyn Hill.

In response to Gillum's argument, Lewis filed a reply memorandum contending that the entire ten acres was sold at a valid tax sale (due to the then owner's failure to pay taxes on the ten acres) in 1951, and fifty years and many transactions later, to Lewis. Lewis contends that as a result of the property being sold twice by Fields, it was subject to two tax assessments: one on the ten acres in the name of Harry Johnson; and one on the two acres in the name of Joe Jones. Notwithstanding, Lewis contends that Gillum's grandparents never had good title to begin with where Fields sold the entire ten acres to Lewis's predecessor-in-title twelve years earlier. Lewis further contended that Gillum's grandparents could have, however, attempted to establish ownership of the disputed property through

[7]Both Gillum and Haas signed what purports to be a joint affidavit containing a signature line for a notary public, but the document was not signed by a notary or notarized.

acquisitive prescription but never did, and instead abandoned the property in 1992. In support, Lewis attached a copy of the 1951 tax sale of the ten acres seized by the Sheriff of St. Tammany Parish from Edward S. Spiro and sold to John J. Harper.

On review of the evidence offered herein, we note that Lewis attached the 1902 sale of the ten acres containing the disputed property from Nelson Fields to Harry Johnson, her predecessor in title. She further offered a copy of the 1914 sale of the disputed property from Nelson Fields to Gillum's grandfather, Joe Jones. Because their common ancestor in title had already sold the ten acres containing the disputed property in 1902 to Johnson, he did not own the disputed property to sell to Joe Jones in 1914. See LSA-C.C. art. 2452 (The sale of a thing belonging to another does not convey ownership.).

Moreover, we find no merit in Gillum's argument that Lewis could not possibly have good title to the disputed property where the 1951 tax sale was defective in that it translated the entire ten acres of property to her predecessors-in-title where the disputed property in his grandfather's name was subject to the homestead exemption and should not have been subject to the tax sale. A copy of the 1951 tax sale submitted by Lewis identifies the same ten acres in the southwest quarter of St. Tammany Parish Section 24, Township 8 South, Range 14 East, as follows:

> 10 acres being the North 10 acrs [sic] of N.W. 1/4 of S.W. 1/4 in Sec. 24-8-14.
>
> Situated in Ward 8/R, Parish of St. Tammany, Louisiana, the same having been seized for the payment of taxes due by Edward S. Spiro as owner thereof according to the tableau and assessment roll for the year 1950, at which sale John J. Harper, being the last and highest bidder, the said property was adjudicated to the said bidder, his heirs and assigns, for the sum of Fourteen Dollars and 41/100 Dollars[.]

The documentation concerning the tax sale clearly shows, and the parties do not dispute, that the entire ten acres, including the two acres claimed by Gillum, were sold at auction by the Sheriff of St. Tammany Parish due to the failure of the

then owner, Edward S. Spiro, to pay the taxes due on the entire ten acres of property. Where Gillum's grandfather did not have good title to the property and Gillum failed to show or establish ownership through acquisitive prescription, we find that Gillum's claims that the tax sale was defective because his grandfather was purportedly entitled to claim the homestead exemption and did not owe any taxes on the disputed property do not create a material issue of fact as to the validity of the 1951 tax sale of the entire ten acres.

To the extent that Gillum challenges Lewis' alternative claims of acquisitive prescription by ten years, we note that LSA-C.C. art. 3482 requires that possession commence in good faith.[8] Although Gillum contends that Lewis was made aware of his competing ownership claims during the Haas litigation in 2004 and through his 2009 letter to her then counsel of record, any knowledge she gained through these actions was subsequent to her acquisition of the property in 2001. Accordingly, we reject Gillum's contention that Lewis's possession, at the time she acquired the property in 2001, commenced in bad faith.

Thus, on review we find Lewis established that she has better title than Gillum, and that Gillum has failed to produce any factual support in opposition to the motion for summary judgment to establish that he will be able to establish better title or otherwise satisfy his evidentiary burden at trial so as to prevail in his petitory action. Accordingly, we find no error in the trial court's grant of Lewis' motion for summary judgment and dismissal of Gillum's petitory action.

Finally, we note that the amended judgment declares that "Lewis is the owner of the two acres at issue." Although Lewis did not file a reconventional demand herein, Lewis asserted claims of ownership by title and/or ten years acquisitive prescription in her answer and amended and supplemental answer.

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[8]Louisiana Civil Code article 3482 provides as follows: "It is sufficient that possession has commenced in good faith; subsequent bad faith does not prevent the accrual of prescription of ten years."

Thus, to the extent that the trial court ultimately adjudged Lewis the owner of the two acres in dispute herein, we find no error. Cf. Davidge v. Magliolo, 353 So. 2d 289, 291-292 (La. App. 1st Cir. 1977), writ denied, 354 So. 2d 1385 (La. 1978)(where this court agreed with the court's holding in Montgomery v. Breaux, 297 So. 2d 185, 187 (La. 1974), that a defendant in a petitory action may not utilize a peremptory exception of prescription as a means of asserting ownership by acquisitive prescription, but held that where defendant's answer asserts ownership and sets forth acquisition and possession sufficient to support a plea of ten years acquisitive prescription, a defendant in a *possessory action* becomes a plaintiff by virtue of their conversion of the initial possessory action into a petitory action); see also and compare Weaver v. Hailey, 416 So. 2d 311, 318 (La. App. 3rd Cir.), writ not considered, 420, So. 2d 159 (La. 1982)(where the court, recognizing there was a problem as to whether it could recognize defendants' ownership, held that under LSA-C.C.P. art. 862,[9] defendants in a *petitory action* who filed an answer alleging ownership by ten years acquisitive prescription and praying for dismissal of plaintiff's suit, but failed to file a reconventional demand, could be recognized as owners of the disputed property if they were able to prove ownership.

CONCLUSION

For the above and foregoing reasons, the March 2, 2017 judgment of the trial court is hereby affirmed. Costs of this appeal are assessed to the plaintiff/appellant, Isiah Gillum, administrator of the successions of Joseph Jones and Mary Jenkins Jones.

AFFIRMED.

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[9]Louisiana Code of Civil Procedure article 862 provides that "a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief."