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Good Faith for Purposes of Acquisitive Prescription in Louisiana and France

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more involved with the private law than with the political debate. Under this law arises the question of how to treat those bodies of water classified as arms of the sea, such as Lake Pontchartrain,[41] to which heretofore the rule of accretion has not applied. There is also the question of what effect the new rule has on the French and Spanish land grants confirmed by Congress. It probably will have no effect since it has been held that the nature of such a confirmation is that of a quitclaim deed because title never vested in the United States.[42]

If the rule of *Hughes* is extended to include patents issued after statehood and applied to Louisiana, it would greatly affect Louisiana property law. Such an application would oppose the basic policy of the law which seeks security and stability of titles. The only persons who would gain by such a drastic change in the law are the littoral proprietors, but the result would be a great expense to Louisiana taxpayers. Even though the Court has recently said, "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,"[43] the decision of *Hughes* suggests that the Court views the type of rule found in Louisiana as unfair, and in all probabilities will change it insofar as it relates to federal patents.

P. Michael Hebert

Good Faith for Purposes of Acquisitive Prescription in Louisiana and France

Ten-year acquisitive prescription of immovables in Louisiana is regulated by Civil Code articles 3478-3482. These articles require that the adverse possessor be in good faith. As defined by article 3451, the good faith possessor is he "who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact."[1] Conversely, as defined by

41. Zeller v. Southern Yacht Club, 34 La. Ann. 837 (1882).
42. Beard v. Federy, 70 U.S. (3 Wall.) 478 (1865).
43. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966) (mineral leases).

1. Article 503 defines the bona fide possessor for purposes of determining the ownership of fruits of an immovable. "He is a *bona fide* possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of." This definition is consistent with that of article 3451. The courts have construed the two definitions *in pari materia*. Vance v. Sentell, 178 La. 749, 758, 152 So. 513, 516 (1934).

article 3452, the possessor in bad faith is he "who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective." Article 3481 provides that "good faith is always presumed in matters of prescription; and he who alleges bad faith in the possessor, must prove it."

The Jurisprudence

The jurisprudence in Louisiana has adopted a very conservative attitude toward possessors claiming to be in good faith. This attitude is largely a result of two related factors: First, the courts have held that paragraph 3 of article 1846 precludes good faith in any case in which there is an error of law. A distinction has, therefore, arisen between *moral* and *legal* good faith.

> "The third paragraph of Article 1846 of the Civil Code reads as follows: 'Error of law can never be alleged as a means of acquiring, though it may be invoked as the means of preventing loss or of recovering what has been given or paid under such error. The error, under which a possessor may be as to the legality of his title, shall not give him a right to prescribe under it.'
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> "For over one hundred years the courts of this state when construing the Articles of the Civil Code relative to good faith possessors have accorded to this paragraph the influence it was designed to have. *It has uniformly been held that regardless of the moral good faith of the purchaser, if he purchased and possessed under error of law, he thereby became a possessor in bad faith and prescription was not available to him. It is not sufficient always to characterize a possessor as being in good faith simply because he thinks or believes he is acquiring good title.*"[2] (Emphasis added.)

Second, the courts have held that in many situations a purchaser is under a duty to determine the facts relative to his vendor's title. Doubt on the part of a purchaser concerning the vendor's title has been held to be inconsistent with good faith.[3] If a purchaser is aware of any fact which the court feels should raise doubt about his vendor's title, he will be held under a duty to resolve that doubt—"to pursue every lead and ferret out all the facts to the end that he may not purchase until he has

2. Dinwiddie v. Cox, 9 So.2d 68, 71 (La. App. 2d Cir. 1942).
3. Knight v. Berwick Lumber Co., 130 La. 233, 57 So. 900 (1912).

complete information before him."[4] The courts have therefore greatly limited the circumstances in which a purchaser may successfully claim error of fact.

The significance of this duty to investigate must be understood in relation to two additional doctrines established by the jurisprudence. First, knowledge obtained by an attorney for the benefit of his client is imputed to the client.[5] A mistake by an attorney in evaluating the information at his disposal therefore precludes the possibility of legal good faith on the part of his client. Second, a complete knowledge of the records is imputed to the purchaser who undertakes a title search.[6] Thus, an attorney who limits his title search to a certain number of years may, if there is a defect in title which would be revealed by a thorough search, leave his client in a worse position than if no search had been made, for, as a result of the limited search, the client will lose his claim to good faith.

Since any suit based on ten-year acquisitive prescription necessarily arises long after the purchase in question was made, the practical issue in appraising good faith is whether the purchaser should have doubted his vendor's title from the facts he then knew. The answer of the jurisprudence to this question is not complete because the possible fact situations in this area are innumerable,[7] but the general attitude of the jurisprudence

4. Boyet v. Perryman, 240 La. 339, 352, 123 So.2d 79, 83 (1960); Dinwiddie v. Cox, 9 So.2d 68, 71 (La. App. 2d Cir. 1942). See also Blunson v. Knighton, 140 So. 302, 307 (La. App. 2d Cir. 1932): "One is not a possessor in good faith who has cause to inquire and fails to avail himself of the means and facilities at hand to inform himself of the true facts and yet acted at his peril." This position was specifically adopted in Harrill v. Pitts, 194 La. 123, 142, 193 So. 562, 568 (1940).

5. Martin v. Schwing Lumber & Shingle Co., 228 La. 175, 183, 81 So.2d 852, 854 (1955). In this case the knowledge of a corporation's attorneys was imputed to the corporation. The weight of the cases is decidedly to the effect that error on the part of the lawyer is imputed to the client. See the discussion of title examinations in Johnson, *Good Faith as a Condition of Ten Year Acquisitive Prescription*, 34 TUL. L. REV. 671, 679, 680 (1960), and cases cited nn. 38 and 39 therein. This article cites practically every case ever decided on ten-year prescription. A few cases have indicated that the attorney's failure to discover existing defects may not relegate the client to bad faith. Nethery v. Louisiana Central Lumber Co., 175 La. 753, 144 So. 486 (1932); Savoia v. Capello, 119 So.2d 113 (La. App. 1st Cir. 1960).

6. Martin v. Schwing Lumber & Shingle Co., 228 La. 175, 81 So.2d 852 (1955), quoted in Holley v. Lockett, 126 So.2d 814, 818 (La. App. 2d Cir. 1961): "[A vendee] may purchase without any investigation of title and yet be protected by the prescription of ten years . . . . however if, instead of relying on the faith of his vendor's title, he institutes an investigation into its validity, he is then bound by what the record reveals and cannot claim to be in good faith if the record discloses a defect in the title of his vendor."

7. Land Development Co. v. Schulz, 169 La. 1, 10, 124 So. 125, 128 (1929): "[T]he question of good faith on the part of the person pleading

is clear. The courts often hold that a mere possibility of title defect suggested by the purchaser's deed, the records if they were searched, or the purchaser's private knowledge should have raised a sufficient doubt to require a thorough investigation of all matters relating to the title both within and without the records.

In *Bel v. Manuel*,[8] the deed on which plaintiff relied stated that the vendors were selling " 'All of our individed [sic] interest' in and to [description omitted], it being provided that 'The interest hereby conveyed being the interest inherited by us from our deceased mother, Olive Ortego, wife of Joachim Fontenot, now both deceased.' "[9] The court held that this language "was ample to place a reasonable person on notice that the interest being transferred did not include the entire property."[10] In *Arnold v. Sun Oil Co.*,[11] the court held that a recorded heirship affidavit listing four children of the deceased but stating that the only remaining heirs of the deceased were one child and two grandchildren born to one of the deceased children, contained sufficient information to create a "duty under the law to make a complete and exhaustive investigation to determine whether" more than one of the original four was alive or whether more than one, though dead, had descendants.[12] The court in *Boyet v. Perryman*[13] held that a deed containing a reference to a judgment of possession for a description of the property being conveyed should have put plaintiffs on their guard to make inquiry in the records. The court not only required plaintiffs to turn to the judgment of possession but also fully to investigate the title of the deceased. The court reasoned that plaintiffs should have known that the judgment of possession could place the heirs in possession of only what the deceased actually owned.[14]

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the prescription of 10 years is always a question of fact to be determined by the circumstances of the particular case." It has been definitely established that quit claims and deeds without warranty may serve as the basis for ten year prescription—though they show the doubt at least of the vendor about the title. The court in Waterman v. Tidewater Associated Oil Co., 213 La. 588, 603 n.2, 35 So.2d 225, 231 n.2 (1948), admitted the lack of uniformity of the prior jurisprudence but concluded that the matter was no longer open to question. As to when tax sales or judicial sales may be the basis of just title see Comment, *Just Title in Prescription of Immovables*, 15 TUL. L. REV. 436 (1941).

8. 234 La. 135, 99 So.2d 58 (1958).
9. *Id.* at 138, 99 So.2d at 60.
10. *Id.* at 142, 99 So.2d at 61.
11. 218 La. 50, 48 So.2d 369 (1950).
12. *Id.* at 66-67, 48 So.2d at 374-75.
13. 240 La. 339, 123 So.2d 79 (1960).
14. *Id.* at 352, 123 So.2d at 83.

The reasoning in this case is particularly questionable. In the sense that a vendee, like an heir, can receive only the title his predecessor owned, a judgment of possession is no different from an ordinary sale. If a court requires a possessor to check his vendor's title because the possessor could not receive more than the predecessor owned, it will have to require checking of every title.

The preclusion of good faith when there has been error of law is integrally related to the stringency of the judicial requirement that an investigation be made. If it were not for this preclusion, a purchaser could simply claim that because he did not draw all the legal implications from the facts he knew, no doubt about his vendor's title was raised in his estimation which would place him under any duty to investigate. This relation between the preclusion of good faith under error of law and the consequent limitation of the situations in which error of fact can be claimed is shown particularly by *Juneau v. Laborde*[15] and *Dinwiddie v. Cox*.[16] In *Juneau*, a purchaser, well informed of the family history of his vendor's immediate predecessor in title, knew that the predecessor's wife had died and that there were children of the marriage. The purchaser was held to be in bad faith since he was bound by the legal conclusion that these children might have had an interest in the property. In *Dinwiddie*, a purchaser was held to be in bad faith because he knew his vendor, who was selling inherited property, was not an only child. Though the purchaser knew that his vendor had no living brother or sister, he was held to the legal conclusion that there might be issue of the deceased heirs who would inherit in their parent's stead.[17] Rather than permitting the purchaser to accept his vendor's assertion of full ownership, the court, as in *Juneau*, required a thorough investigation.

An Analysis of Article 1846

The heart of the ten-year good faith prescription problem in Louisiana is the judicial construction of paragraph 3 of article 1846.[18] As stated previously, the courts have held that the pro-

15. 219 La. 921, 54 So.2d 325 (1951).
16. 9 So.2d 68 (La. App. 2d Cir. 1942).
17. *Id.* at 72.
18. Art. 1846: "Error in law, as well as error in fact, invalidates a contract, where such error is its only or principal cause, subject to the following modifications and restrictions:
"1. Although the party may have been ignorant of his right, yet if the contract, made under such error, fulfilled any such natural obligation

hibition against alleging error of law to support acquisition means that good faith cannot be alleged in order to acquire under ten-year prescription in cases when that good faith is based on error of law. This judicial construction extends article 1846 beyond its proper sphere. All that the article purports to regulate is the rights of parties to a contract. The judicial construction of paragraph 3 causes that paragraph to become a rule about acquisitive prescription in terms of the rights of record owners rather than a rule about acquisitive prescription in terms of the rights of parties in privity. If this were the proper construction, it is strange indeed that the paragraph was not placed in the section of the Code regulating prescription but rather was placed in a section of the Code regulating contracts. None of the other paragraphs of the article could possibly be construed to affect and preserve the rights of parties not in privity. There is no reason to believe paragraph 3 should be so construed. Admittedly, the paragraph is something of an anomaly among the other paragraphs of the article. The article sets out the general rule that contracts may be invalidated because of error of law. The paragraphs, except paragraph 3, state exceptions to this rule and give circumstances in which contracts may not be invalidated though made under error of law. Paragraph 3 provides instead that a contract may be *confirmed* by the party under error of law if confirming that contract would allow him to prescribe under it. The paragraph simply means that a vendee may not prescribe against his vendor when there is a vice in the contract of transfer between them and when the vendee

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as might from its nature induce a presumption that it was made in consequence of the obligation, and not from error of right, then such error shall not be alleged to avoid the contract. Thus, the natural obligation to perform the will of the donor, prevents the donee from reclaiming legacies or gifts he has paid under a testament void only for want of form.

"2. A contract, made for the purpose of avoiding litigation, can not be rescinded for error of law.

"3. Error of law can never be alleged as the means of acquiring, though it may be invoked as the means of preventing loss or of recovering what has been given or paid under such error. The error, under which a possessor may be as to the legality of his title, shall not give him a right to prescribe under it.

"4. A judicial confession of a debt shall not be avoided by an allegation of error of law, though it may be by showing an error of fact.

"5. A promise or contract, that destroys a prescriptive right, shall not be avoided by an allegation that the party was ignorant or in an error with regard to the law of prescription.

"6. If a party has an exception, that destroys the natural as well as the perfect obligation, and, through error of law, makes a promise or contract that destroys such exception, he may avail himself of such error; but if the exception destroys only the perfect, but not the natural obligation, error of law shall not avail to restore the exception."

should have been able to determine the vice from the facts he knew at the time of the transaction.

To the limited extent of the requirements of just title set out by articles 3484-3486, the rights of third parties—record owners—are affected, however, by the contractual relation between the possessor and his vendor. Article 3485 defines just title as a "title which by its nature, would have been sufficient to transfer the ownership of the property, provided it had been derived from the real owners, such as a sale, exchange, legacy, or donation." Assuming that this provision means that any defect preventing transfer of ownership from vendor to possessor is sufficient to defeat just title, article 1846, since it prevents a vendee from acquiring ownership from his vendor by alleging error of law, would extend the meaning of just title. For example, a purchaser could not base his prescription against a third party on just title if he bought from a minor, knowing the minor's age, but being under error of law as to his incapacity. This would follow regardless of whether information about the minor's age appeared in the title instrument for, despite its absence, there would remain a defect in the title by which the purchaser had acquired. A preferable construction of article 3485 is, however, that its purpose is only to require that the title be of the sort which transfers ownership ("a sale, exchange, legacy, or donation" as opposed, for instance, to a lease or partition) and that the article has no application to other defects preventing transfer of ownership[19] such as, perhaps, the minority of the vendor. Under this construction, the provisions of article 1846 preventing acquisitive prescription by a possessor against his own vendor in the case of a vice of title due to error of law would, of course, have no effect on just title under article 3485.[20]

19. This view is consistent with the jurisprudence. Though most of the cases involving just title have construed article 3486 (relating to defects of form) rather than article 3485, the policy of the jurisprudence to decide the matter of just title solely on the basis of what appears on the face of the title instrument is clear. See Comment, *Just Title in the Prescription of Immovables*, 15 TUL. L. REV. 436 (1941). See Pattison v. Maloney, 38 La. Ann. 885 (1886); Clayton v. Rickerson, 160 La. 771, 107 So. 569 (1926).

20. In an unpublished *Memorandum Concerning Good Faith Prescription*, Professor A. N. Yiannopoulos has presented a very similar view. He too argues that paragraph 3 of article 1846 has nothing to do with good faith and that, if it is to affect acquisitive prescription at all, the effect should be in its regulation of just title. He points out that the French text of paragraph 3 reads *vice de son titre* for the English "legality of his title" and that the phrase *vice do son titre* immediately suggests a regulation of just title, not good faith.

The French Sources and the Intentions of the Redactors

The redactors of the Louisiana Civil Code state that article 1846 was derived from the treatises of Pothier and Domat.[21] Pothier, in his *Traité de la prescription*, makes a very broad statement concerning error of law which seems to support the position of the Louisiana jurisprudence.

> "My opinion, founded on error of law, that another has transferred an immovable to me is not a just opinion, and, as a result, it does not have the quality of good faith necessary for prescription."[22]

Domat's discussion, on the other hand, does not lend itself to such a broad interpretation. At the section of his treatise to which the redactors refer, he speaks of error of law in terms of its effect on specific contracts—just as our article does.[23] Discussing when contracts may or may not be avoided because of error of law, he writes:

> "If by error or ignorance of law a person is prejudiced and this situation cannot be remedied without prejudicing the rights of another, this error will change nothing to the prejudice of the other."[24]

Domat gives no example of the operation of this principle upon acquisitive prescription. Since, however, he sets forth the principle in a section treating of the rights of parties to a contract, it is doubtful that he expected it to affect good faith and so to preserve the rights of parties not in privity. Though Pothier's statement of the principle is broad enough to be so construed, the example he gives of its operation indicates that he too was thinking of the rights of the immediate parties to a given contract.

> "Take, for example, a case in which your agent, to whom you have given procuration to administer your goods, believes by error of law that this procuration gave him the right to sell your immovables, and in which, by virtue of this procuration, your agent does sell an immovable to another who was under the same error. This acquirer cannot acquire by prescription because his opinion that the property had been

21. 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 241 (1937).
22. 9 POTHIER, OEUVRES 328 (2d ed. 1861) (transl. by author).
23. 1 J. DOMAT, OEUVRES 386 (*Nouvelle* ed. 1828).
24. *Id.* (transl. by author).

> transferred to him was founded on error of law and so was not a just opinion and did not therefore partake of that quality of good faith necessary for prescription."[25]

Pothier apparently believed that error of law precludes good faith. Nevertheless, the example which he gives of the application of his principle indicates that he had not considered the application beyond its regulation of the relationship between a given vendee and his vendor. Whatever Pothier's opinion, the French jurisprudence and more recent commentators have rejected it because they found it inconsistent with the spirit of the articles on prescription,[26] especially the presumption of good faith. A purchaser in France can prescribe even against his own vendor when he purchased under error of law as to the validity of the title between them.[27] The views of Pothier and Domat, have, to a certain extent, been perpetuated in our Code by article 1846, which in the French Civil Code is significantly absent. However, we in Louisiana should not feel bound by the broadest possible construction of paragraph 3 of the article when those from whom our redactors derived the principle apparently did not foresee its broadest application but rather viewed it as regulating the rights of parties to a contract of transfer.

Not only is article 1846 without a counterpart in the French Civil Code, but articles 3451 and 3484 have no counterparts in the French Civil Code. Article 3451, defining good faith, requires only that the possessor have just reason to "believe himself the master of the thing he possesses." The article further states that this just reason is present when "a possessor buys a thing which he supposes to belong to the person selling it to him, but which in fact, belongs to another." Though article 3484 relates to just title, it too reflects the spirit of the legislation with regard to good faith. It provides that a just title must be a title which the possessor received from a "person whom he honestly believed to be the real owner." It is hard to believe that these articles placing such emphasis upon honest belief, *i.e.*, moral good faith, were written with the intention that a distinction between legal and moral good faith should eventually deny the independent sufficiency of this honest belief.

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25. 9 POTHIER, OEUVRES 328 (2d ed. 1861) (transl. by author).

26. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 218 (1966).

27. *Id.* But due to article 1846(3), a Louisiana purchaser could not prescribe against his vendor in such a case. This is the only difference which article 1846(3) should be held to create between Louisiana and French law.

The Policy Issues and the Administrative Question

The ten-year prescription is designed to protect from eviction one who has possessed an immovable for ten years and who for just reason believed at the time of the commencement of possession that he was the master of the thing possessed. The prescription is also designed to quiet titles and keep property in commerce. Both purposes are defeated by the distinction between moral and legal good faith and the resulting conservatism of the jurisprudence. A great many of the cases involving ten-year prescription arise when oil has been discovered on certain property. The presence of oil makes it monetarily feasible to make a careful search of the records and to determine passage of title for generations. Then, frequently, a person who was unaware of having any title to the given tract of land is contacted for a lease and the litigation begins.

The interests of the record owner must be considered as well, though they are protected in several ways. The courts have required substantial acts of possession on the part of a person seeking to prescribe.[28] The record owner need only inspect his property once every ten years, a long time in our fast moving world. Today, the purchaser who buys without any check of title is the exception. As the complexity of our land law increases, especially in the area of tax sales, error of law rather than error of fact is to become more prevalent. It has been pointed out that a purchaser is now caught between two fires.[29] If he purchases without making a title inspection, he takes his chances. But, if he makes an inspection and fails to discover all relevant facts or makes an error of law, he loses his claim to good faith.

The question of whether a possessor is in good faith is always, at least in part, subjective. But a court cannot read a possessor's mind so it must decide whether the possessor really believes himself "the master of the thing he possesses" on the facts before it. The present policy of refusing to permit a pos-

28. Nixon v. English, 207 La. 906, 22 So.2d 266 (1945); Martel v. Hunt, 195 La. 701, 197 So. 402 (1940). One significant failure in this protection has been created by the holding in Zeringue v. Blouin, 192 So.2d 838 (La. App. 1st Cir. 1967). Under the construction of articles 3437 and 3498 given in this case, a possessor might purchase a tract which was actually divided into several parts, each owned by a different person. If he occupied part of the tract, his constructive possession would extend to the extent of his title. There might be no corporeal possession on the land of a given true owner. See *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Prescription*, p. 326 *infra*.

29. *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Prescription*, 13 LA. L. REV. 262, 265 (1953).

sessor to claim error of law simplifies the court's job considerably because the court does not have to decide whether a possessor made an error of law and consequently believed in his title or knew his title to be defective. Determining the facts a person knows or should know is much easier than determining what conclusions the person actually drew from the facts. Moreover, the policy of requiring the possessor to be aware of any possible defect in title raised by the facts further simplifies and makes objective the area for judicial determination. The courts do not have to determine all that the possessor knew, only that he had knowledge sufficient to raise a possibility of defect.

It is the very fact, however, that courts cannot determine what goes on in a man's mind that makes a presumption of good faith necessary. This presumption of good faith, moreover, is much more consistent with a system permitting error of law, for, as the Louisiana experience indicates, a system which does not permit error of law can establish requirements sufficiently strict and objective that a presumption of good faith becomes no longer meaningful.

If legislative action or judicial reappraisal of article 1846 permitting error of law in ten-year prescription were to occur, the problem of how the courts would determine what goes on in a possessor's mind would become acute. Certain objective standards, hopefully much different from those at present, would have to be developed. A purchaser certainly could not be permitted to claim error of law in flagrant circumstances. For example, he could not be permitted to assert that he thought he had purchased a tract from the true owner when another had previously been recognized by the purchaser and the community at large as owner. Some corrective measures would be needed. The courts now claim to use the standard of a reasonable man in determining whether the known facts should have created a duty to make a thorough investigation.[30] That this standard, coupled with the refusal to allow good faith under error of law, can be very stringent has already been pointed out. The very fact that a purchaser, though he may have known nothing to raise a doubt about his vendor's title, did not make a title search could be argued to be "that want of care which a prudent man usually takes of his business."[31] Consistent with the presumption

30. Boyet v. Perryman, 240 La. 339, 351, 123 So.2d 79, 83 (1960); Tyson v. Spearman, 190 La. 871, 892, 183 So. 201, 208 (1938); Dinwiddie v. Cox, 9 So.2d 68, 72 (La. App. 2d Cir. 1942).

31. LA. CIVIL CODE art. 3556(13) (1870).

of good faith, gross fault[32] on the part of a possessor could be required to preclude good faith. In any event, whether by judicial reappraisal or amendment of the Code, the scope of article 1846 should be limited so as to permit error of law on the part of a possessor seeking to prescribe. There should be no change in the policy of attributing to the client the mistakes of the lawyer since any change in this policy would invite collusion. If the other changes suggested were made, this latter policy would lose a great deal of its importance.

The French Practice

That a system which permits error of law can work effectively is shown by the French practice. The articles of the French Civil Code relative to ten- and twenty-year acquisitive prescription are very similar to those in our Code: good faith and just title are required.[33] Article 3481 of our Code and article 2268 of the French Code are identical. Both hold that "good faith is always presumed." From essentially the same legislation, absent article 1846, the French jurisprudence has arrived at a very different result. As in Louisiana, the possessor may not doubt the title of his vendor and claim good faith.[34] "But an acquirer who made an erroneous judgment about the value of the documents produced by his grantor can rely on this error in justifying his good faith."[35] Both error of fact and law are considered consistent with good faith.[36] In keeping with article 2268, good faith in France is held to be a question of fact to be decided by the judge in each case, with good faith always presumed.[37] Because purchasers are not under such a strict duty to investigate any possible defect in title and because error of law is permitted, the presumption is meaningful. Moreover, under the

32. *Gross fault* is defined by our code article 3556(13) as that fault "which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud."

33. FRENCH CIVIL CODE arts. 2265-2269.

34. 1 PLANIOL, TRAITÉ ÉLEMENTAIRE DE DROIT CIVIL nº 2667 (12th ed. 1939).

35. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 218 (1966).

36. *Id.* See also 4 DALLOZ, ENCYCLOPÉDIE JURIDIQUE § 41, at 11 (1st ed. 1954), and 31 CARPENTIER ET DU SAINT, RÉPÉRTOIRE GÉNERALE ALPHABÉTIQUE DU DROIT FRANÇAIS § 1543, at 294 (1903). As these sources point out, the older French doctrine and jurisprudence held to the contrary. See 2 DELVINCOURT, COURS DE CODE CIVIL 656 (1834); 21 DURANTON, COURS DE DROIT FRANÇAIS 388 (1837); 2 TROPLONG, DROIT CIVIL EXPLIQUÉ, DE LA PRESCRIPTION §§ 926, 927 (4th ed. 1857); Cass. 14 nov. 1887, S. 1888.1.473. The change occurred about at the turn of the century. BAUDRY LACANTINERIE ET TISSIER, TRAITÉ DE DROIT CIVIL, DE LA PRESCRIPTION § 680 (3d ed. 1905); Douai, 9 feb. 1909, S. 1910.2.44.

37. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 218 (1966).

French jurisprudence, good faith requires only belief in the vendor's title. A purchaser can prescribe against defects (even those of which he is aware) in the immediate transaction with his vendor, provided the defects are not apparent on the face of the instrument and do not render the transaction absolutely null.[38]

Conclusion

The practice of the Louisiana courts in distinguishing between moral and legal good faith is inconsistent with the spirit and structure of the Code, and, while it simplifies the job of the courts, it creates a difference between what the law requires for good faith and what the average man means by good faith. Such a difference between the law and the practice and understanding of the men whose affairs it regulates is not desirable.

M. Hampton Carver

TORTS—CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW—AUTO COLLISIONS IN SMOKE, FOG, AND DUST

Louisiana jurisprudence has consistently found a plaintiff automobile driver contributorily negligent as a matter of law, irrespective of actual fault, if he is involved in a head-on collision while proceeding on the correct side of the road through heavy fog, smoke, or dust. This Note will consider the application of the contributory negligence doctrine under such circumstances.[1]

Castille v. Richard[2] was one of the first decisions in the formulation of this policy. The parties collided head-on in a heavy dust cloud raised by a car that had just overtaken the defendant. The court pointed out that the road was very narrow and that it was difficult for cars to avoid a collision even when visibility was unobscured. It was impossible to tell which of the

38. 1 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL nº 2667 (12th ed. 1939).

1. The same general rule of law is present in cases where a plaintiff, proceeding through heavy smoke, fog, or dust, runs into the rear of a vehicle negligently stopped in the middle of the road. It is not within the scope of this Note, however, to investigate the development of the rule in those situations since it is based on the "assured clear distance" doctrine, which is not the same basis for the rule in the situations discussed above. For an application of the "assured clear distance" rule in rear-end collision cases, see, *e.g.*, Rachal v. Batthazar, 32 So.2d 483 (La. App. 2d Cir. 1947); Giorlando v. Maitrejean, 22 So.2d 584 (La. App. Orl. Cir. 1945).

2. 157 La. 274, 102 So. 398 (1924).