

## The Transfer of Ownership of Movables

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### Repository Citation

Tanya Ann Ibieta, *The Transfer of Ownership of Movables*, 47 La. L. Rev. (1987)  
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## THE TRANSFER OF OWNERSHIP OF MOVABLES

In 1979, the Louisiana Legislature enacted the first installment in an overall revision of the Civil Code articles on property. That first enactment concerned the articles on ownership. In 1980, a key article of that segment of the revision, article 520, was repealed. In 1982, the Code articles pertaining to possession and prescription were revised. The purpose of this comment is to determine what effect these changes have had in one particular area of law—the transfer of ownership of movables.

### *Nature of the Problem*

The rules of law governing the transfer of ownership of movables arise out of a conflict between two competing interests: the security of ownership and the security of transaction.<sup>1</sup> This conflict is created by two opposing legal principles. The first is the rule codified in article 2279 of the French Civil Code which states that “la possession vaut titre” (with respect to movables possession is considered equivalent to title).<sup>2</sup> This rule promotes the security of transaction by protecting those who acquire possession of a movable in good faith from one they believe had the ability to transfer its ownership. The opposing principle is the common law rule “nemo dat quod non habet” (no one can transfer a greater right than he himself has). Louisiana Civil Code article 2452 expresses this principle by providing that the sale of a thing belonging to another is null.<sup>3</sup> This rule affords protection to the security of ownership by recognizing the rights of the dispossessed owner in the movable.

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Copyright 1987, by Louisiana Law Review.

1. Franklin, Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase, 6 Tul. L. Rev. 589, 590-91 (1932). The security of acquisition (hereinafter referred to as the security of ownership) protects the original owner who has not voluntarily parted with ownership. The security of transaction protects the commercial transaction through which an innocent third party acquires the thing.

2. French Civil Code (C. Civ. art.) art. 2279 provides:

With reference to movables, possession is considered equivalent to a title. But a person who has lost or who has been robbed of something can bring an action to recover it against any person he finds in possession thereof within three years of the date of the loss or robbery and the latter has his right of action over against the person from whom he received it.

3. La. Civ. Code art. 2452 provides: “The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person.”

See also 2 S. Litvinoff, Obligations § 94, at 163, 165, in 7 Louisiana Civil Law Treatise (1975).

The conflict between these two legal principles arises in situations whereby, for one of several reasons, be it loss, theft, a vice of consent or misplaced confidence,<sup>4</sup> the owner of a movable, *X*, is dispossessed of it by a second person, *Y*, who purports to transfer its ownership to a third person, *Z*. Both *X* and *Z* claim ownership of the movable and seek protection from *Y*'s misconduct. *X* seeks security of ownership; *Z* seeks security of transaction.

### *Louisiana Law Prior to the Revision*

#### *Legislation*

Prior to the revision of the Civil Code in 1979, Louisiana law did not contain a strong statement of the principle "la possession vaut titre." Article 2279<sup>5</sup> of the French Civil Code was not incorporated into the Louisiana Civil Code.<sup>6</sup> On the other hand, article 2452 clearly stated the opposing principle of "nemo dat quod non habet."<sup>7</sup>

Other strong legislative indications favoring the security of ownership prior to the revision were the articles on acquisitive prescription of movables.<sup>8</sup> Article 3506 provided that a possessor of a movable for three years in good faith and by just title would acquire ownership by prescription, unless the thing had been stolen or lost.<sup>9</sup> This article thus protected the dispossessed owner of a thing for three years. If the thing were lost or stolen, article 3509 would apply, which provided for ten-year acquisitive prescription if the possessor lacked the requirements of good faith or just title.<sup>10</sup> The Code gave some protection to the good

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4. In this context, these terms can be defined as follows. *Theft* means to be dispossessed of the thing by another without knowledge or against one's will. A *vice of consent* has the meaning found in Louisiana Civil Code article 1948, which provides: "Consent may be vitiated by error, fraud, or duress"; more specifically, *fraud* in this context means to transfer possession to another through a misrepresentation. *Misplaced confidence* means to transfer possession to someone for safekeeping, who breaches that trust and transfers the movable to a third person.

5. C. Civ. art. 2279.

6. S. Litvinoff, *supra* note 3, § 94, at 163 ("[I]ts [the principle of la possession vaut titre] exclusion seems to have been the result not of inadvertence but of a policy determination by the Louisiana redactors.").

7. *Id.* at 164.

8. Franklin, *supra* note 1, at 603-04.

9. La. Civ. Code art. 3506 (1870) provided: "If a person has possessed in good faith and by a just title, as owner, a movable thing, during three successive years without interruption, he shall acquire the ownership of it by prescription unless the thing was stolen or lost."

10. La. Civ. Code art. 3509 (1870) provided: "When the possessor of any movable whatever has possessed it for ten years without interruption, he shall acquire the ownership of it without being obliged to produce a title or to prove that he did not act in bad faith."

faith possessor in article 3507; if the possessor of a stolen or lost thing bought it at a public auction or from a person who usually sold such things, the true owner would be required to reimburse the purchase price before reclaiming the thing.<sup>11</sup> These articles pointed to the conclusion that the legislature intended to protect the security of ownership of movables, but only for specific periods of time following dispossession.<sup>12</sup>

### *Jurisprudence*

In the absence of clear legislative direction, the Louisiana courts sought to balance the conflict between security of ownership and security of transaction. Recognizing that strict adherence to the principle that no one can transfer a greater right than he has would impede commerce and result in harsh consequences for good faith purchasers, the courts developed certain exceptions to the rule, similar to the common law bona fide purchaser doctrine.<sup>13</sup> The requirements for the application of these exceptions were that the purchaser have acquired the thing in good faith, without notice that the seller was not the true owner, and for valuable consideration.<sup>14</sup>

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11. La. Civ. Code art. 3507 (1870) provided: "If, however, the possessor of a thing stolen or lost bought it at public auction or from a person in the habit of selling such things, the owner of the thing can not obtain restitution of it, without returning to the purchaser the price it cost him." The Louisiana Supreme Court held, in *Security Sales Co. v. Blackwell*, 167 La. 667, 120 So. 45 (1928), that articles 3506 and 3507 must be read together and concluded that the possessor could not demand reimbursement until after he had possessed the thing for three years. Otherwise, the possessor claiming reimbursement under article 3507 would be in a better position than the possessor of a thing not lost or stolen under article 3506. See generally Comment, *Sale of Another's Movables—History, Comparative Law, and Bona Fide Purchasers*, 29 La. L. Rev. 329, 345-46 (1969).

12. Nevertheless, although the Louisiana Civil Code contained no direct authority protecting the security of transaction, remnants of the principle of the French article 2279 did in fact exist. Franklin, *supra* note 1, at 601-04. See also S. Litvinoff, *supra* note 3, § 94, at 163-64, and Comment, *supra* note 11, at 342-43. This suggests that the principle embodied in article 2452, that the sale of a thing belonging to another is null, was not to be strictly adhered to.

13. S. Litvinoff, *supra* note 3, § 94, at 164-66. See also *id.* § 87, at 147-49 ("[T]he doctrine known as 'bona fide purchase' . . . was developed upon equitable principles." It was based on exceptions to the basic rule that the buyer of goods obtained no better title than his vendor. "Thus, a vendee who obtains a thing by a vice of consent, such as error, fraud or duress, acquires only a voidable title which the vendor may attack in equity: however, upon a transfer by the vendee to a bona fide purchaser, the voidable title is made good. The preference over the original seller given to the bona fide purchaser for value and without notice is based on the theory that the legal right of the third party cuts off the equity of the original seller." The common law bona fide purchaser doctrine is based on title and not possession.).

14. S. Litvinoff, *supra* note 3, § 87, at 151. The lack of notice requirement would include lack of notice that the seller acquired the movable through a contract voidable for a vice of consent. *Id.*

A study of the jurisprudence reveals two lines of reasoning used by the courts to avoid application of the rule in article 2452 that the sale of a thing belonging to another is absolutely null.<sup>15</sup> Under one approach, the courts utilized the theory under which certain contracts are deemed to be burdened with a relative nullity.<sup>16</sup> This generally involved cases in which title to the movable had passed from the original owner to the intermediate seller, but such title was deemed to be relatively null. Examples include cases in which there existed a vice of consent, such as fraudulent impersonation,<sup>17</sup> and cases involving dishonored checks.<sup>18</sup> The courts determined that, since title had passed, article 2452 did not apply, because the movable did not belong to another. The action to assert a relative nullity could only be brought by the original owner, who could assert it only against his vendee. Therefore, the person who acquired the movable from the original owner could validly pass title to the third party bona fide purchaser, who was protected from the claims of the original owner.

Under the second line of cases, the exception of equitable estoppel<sup>19</sup> was applied in instances where title had not passed, but the owner had turned over possession to another along with some other indicia of ownership.<sup>20</sup> This doctrine is based on the theory "that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time."<sup>21</sup> The owner must have surrendered not only possession to

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15. Comment, *supra* note 11, at 359.

16. La. Civ. Code art. 2031 provides in part: "A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. A contract that is only relatively null may be confirmed." The relative nullity exception is based on title and is similar to the common law bona fide purchaser doctrine.

17. *Freeport & Tampico Fuel Oil Corp. v. Lange*, 157 La. 217, 102 So. 313 (1924); *Port Finance Co. v. Ber*, 45 So. 2d 404 (La. App. Or. 1950).

18. *Jeffrey Motor Co. v. Higgins*, 230 La. 857, 89 So. 2d 369 (1956); *Trumbull Chevrolet Sales Co. v. Maxwell*, 142 So. 2d 805 (La. App. 2d Cir. 1962); *Flatte v. Nichols*, 233 La. 171, 96 So. 2d 477 (1957).

19. S. Litvinoff, *supra* note 3, § 87, at 149:

The owner of a movable held by a purchaser in good faith who bought it from one with neither title nor authority to sell may also be precluded from recovering the thing by the operation of the principle of estoppel. This is so whenever the owner by his words or conduct has expressly or impliedly represented that the one in possession of the thing either is the owner or has authority to sell. Under such circumstances the owner is estopped, or precluded from denying the truth of his representation to a third party who, in good faith and reasonably relying on the representation, purchased the thing.

20. Comment, *supra* note 11, at 359.

21. S. Litvinoff, *supra* note 3, § 87, at 150.

the seller, but must have clothed him with some indicia of ownership or authority to sell the thing, which induced the purchaser's reliance.<sup>22</sup> These cases typically involved a breach of confidence by an agent or fiduciary.<sup>23</sup> The owners were held to have contributed to their own loss by negligence in their dealings, and could not be heard to complain against an innocent purchaser.

Thus, as of 1979, the general rule was that the sale of a thing belonging to another was null, subject to certain jurisprudentially developed exceptions.

*1979 Revision of Title II—Ownership and 1982 Revision of Title XXIV—Prescription*

Upon recommendation from the Law Institute, the legislature added two new chapters to the Civil Code. Chapter 3, entitled Transfer of Ownership by Agreement, contains articles 517-525, and Chapter 4, entitled Protection of Ownership, includes articles 526-532.<sup>24</sup> The drafters noted that the rule that possession is equivalent to title with respect to movables had been adopted by all modern civil codes and the Uniform Commercial Code (UCC),<sup>25</sup> and was better suited to Louisiana's contemporary commercial economy.<sup>26</sup> The Expose des Motifs to the chapter on transfer of ownership explained that "Articles 518 through 525 . . . establish a significant change in the law in an effort to re-align Louisiana law with modern civil law and the Uniform Commercial Code."<sup>27</sup>

Article 518 establishes the general principle that the ownership of a movable is voluntarily transferred by a contract between the owner

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22. *Id.* at 150. Examples of indicia of ownership include not only possession of the thing, but of documents such as title papers or an invoice, statements made in the presence of others, or some other act creating the appearance of authority to sell. For a discussion of the problems of application of the doctrine of equitable estoppel, see generally S. Litvinoff, *supra* note 3, § 92, at 157-61, and Comment, *supra* note 11, at 355-58.

23. *Conner v. S. L. Hill & Co.*, 6 La. Ann. 7 (1851); *James v. Judice*, 140 So. 2d 169 (La. App. 3d Cir. 1962); *William Frantz & Co. v. Fink*, 125 La. 1013, 52 So. 131 (1910). But see *Holloway v. A. J. Ingersoll Co.*, 133 So. 819 (La. App. 2d Cir. 1931).

24. La. Civ. Code arts. 517-532 (effective Jan. 1, 1980). These articles were part of a wholesale amendment and reenactment of Title II of Book II of the Louisiana Civil Code governing ownership, 1979 La. Acts No. 180. Article 525 states that the provisions of Chapter 3 (articles 517-525) do not apply to movables required by law to be registered in the public records (automobiles). This raises the question as to whether Chapter 4 (article 530 in particular) applies to such movables.

25. La. Civ. Code Ann. arts. 477-532, Expose des Motifs 209, 213 (West 1980) [hereinafter Expose des Motifs]. See French Civ. Code art. 2279; Greek Civ. Code art. 1036; Italian Civ. Code art. 1153; Burgerliches Gesetzbuch (B.G.B) § 932; Uniform Commercial Code § 2-403.

26. Expose des Motifs, *supra* note 25, at 213.

27. *Id.* at 212.

and the transferee.<sup>28</sup> Article 520<sup>29</sup> provided an important exception to article 518. A transferor who was not the owner of the movable, yet who had possession with the consent of the owner, could transfer the ownership of the movable to a transferee in good faith and for fair value. The comments to article 520<sup>30</sup> made it clear that the good faith transferee acquired ownership of the movable, regardless of the owner's negligence or lack of negligence.<sup>31</sup>

Article 521 was designed as a limitation on the scope of article 520 by providing that "one who has possession of a lost or stolen thing may not transfer its ownership to another."<sup>32</sup> A thing is "stolen" for purposes of article 521 only when one has taken possession of it without the owner's consent. This article expressly excludes from the concept of "stolen" a delivery or transfer of ownership of the thing by the owner as a result of fraud. Thus, if a movable is transferred through a vice of consent,<sup>33</sup> it is not to be considered a stolen thing for purposes of article 521. The transferee in that transaction may therefore transfer ownership to a subsequent transferee.

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28. La. Civ. Code art. 518. See also La. Civ. Code art. 518, comment (e) (West 1980) ("Article 518 reiterates the fundamental principle that a movable may be alienated only by the owner or by persons authorized by him or by law."). "By law" refers to the exception established in article 520.

29. La. Civ. Code art. 520 (suspended by La. Senate Concurrent Resolution No. 172, 6th Reg. Sess. (1980), repealed by 1981 La. Acts No. 125) provided: "A transferee in good faith for fair value acquires the ownership of a corporeal movable, if the transferor, though not owner, has possession with the consent of the owner, as pledgee, lessee, depositary or other person of similar standing." Good faith is defined in article 523 as follows: "An acquirer of a corporeal movable is in good faith for purposes of this Chapter unless he knows, or should have known, that the transferor was not the owner."

30. La. Civ. Code art. 520, comment (c) (West 1980) states that "[u]nder Article 520, a good faith acquirer of a corporeal movable for value is protected even if the owner is not charged with negligence in the pursuit of his affairs." This provision goes beyond the doctrine of equitable estoppel in its protection of the good faith purchaser.

31. Note that negligence had been an important consideration in the prior jurisprudence, as explained *id.* at comment (e): "Under the jurisprudence, one who acquires the possession of a corporeal movable by fraud may not transfer ownership to a good faith acquirer for value unless the owner is charged with some negligence." See also S. Litvinoff, *supra* note 3, § 87, at 150 (A finding of negligence in the owner could be found in an imprudent entrusting of the thing or carelessness in selecting an agent.).

32. La. Civ. Code art. 521 provides:

One who has possession of a lost or stolen thing may not transfer its ownership to another. For purposes of this Chapter, a thing is stolen when one has taken possession of it without the consent of its owner. A thing is not stolen when the owner delivers it or transfers its ownership to another as a result of fraud.

33. La. Civ. Code art. 522 provides: "A transferee of a corporeal movable in good faith and for fair value retains the ownership of the thing even though the title of the transferor is annulled on account of a vice of consent." This provision is a codification of the jurisprudence involving relative nullities. See *supra* note 16 and accompanying text. See also La. Civ. Code art. 1948.

Article 524 modifies article 521. Although one who possesses a lost or stolen thing cannot transfer its ownership, a possessor of a lost or stolen thing who bought it "at a public auction or from a merchant customarily selling similar things" is entitled to reimbursement of the purchase price from the original owner who reclaims the thing.<sup>34</sup>

The articles in Chapter 4 on protection of ownership that are important to the matter under consideration are articles 526 and 530. Article 526 provides for an innominate real action, entitling the owner of a thing "to recover it from anyone who possesses or detains it without right, and to obtain judgment recognizing his ownership and ordering delivery of the thing to him."<sup>35</sup> According to Professor Yiannopoulos, reporter for the revision, article 526 authorizes the dispossessed owner of a movable to bring a revendicatory action against a possessor or detentor in order to have his ownership recognized and to recover the movable.<sup>36</sup>

Article 530 is fundamental to the burden of proof in the revendicatory action. It establishes a presumption of ownership based on possession. The present possessor of the movable is presumed to be the owner. The previous possessor is presumed to have been the owner during the period of his possession. However, the presumption in favor of the present possessor does not avail against the previous possessor if the previous possessor can show that he was dispossessed of the thing as a result of loss or theft.<sup>37</sup>

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34. La. Civ. Code art. 524 provides:

The owner of a lost or stolen movable may recover it from a possessor who bought it in good faith at a public auction or from a merchant customarily selling similar things on reimbursing the purchase price. The former owner of a lost, stolen, or abandoned movable that has been sold by authority of law may not recover it from the purchaser.

The effect of this article is that the original owner must buy back his movable at the merchant's price. If he recovers the thing before the merchant sells it, the reimbursement requirement does not apply.

35. Expose des Motifs, *supra* note 25, at 214. See also La. Civ. Code art. 526, which provides: "The owner of a thing is entitled to recover it from anyone who possesses or detains it without right and to obtain judgment recognizing his ownership and ordering delivery of the thing to him."

36. A. Yiannopoulos, *Property* § 236, at 630, in 2 *Louisiana Civil Law Treatise* (2d ed. 1980).

37. La. Civ. Code art. 530 provides:

The possessor of a corporeal movable is presumed to be its owner. The previous possessor of a corporeal movable is presumed to have been its owner during the period of his possession.

These presumptions do not avail against a previous possessor who was dispossessed as a result of loss or theft.

The significance of this article with respect to the burden of proof in a revendicatory action will be discussed *infra*.



The articles on acquisitive prescription of movables were amended in 1982, thereby effecting a further change in the law.<sup>38</sup> Article 3490 allows one who possesses a movable as owner, in good faith, under an act sufficient to transfer ownership, and without interruption for three years, to acquire ownership by prescription, regardless of whether the movable was lost or stolen.<sup>39</sup> If the possessor lacks good faith or title, he can acquire ownership by possession for ten years.<sup>40</sup> The true owner can vindicate<sup>41</sup> his ownership before the possessor acquires ownership by prescription, subject to the reimbursement provision of article 524.<sup>42</sup>

In summary, several important changes in the law occurred as a result of the revision. Article 520 created a broad exception to the principle of article 2452.<sup>43</sup> Article 530 established a presumption in favor of the present possessor.<sup>44</sup> Article 3490 provided for three-year acquisitive prescription, even against the owner of a lost or stolen movable. These articles embody the shift in legislative policy from protection of the security of ownership to protection of the security of transaction.

#### *1981—Article 520 is Repealed*

Article 520 was the keystone of the revision of the articles relating to the transfer of movables. It marked the most significant change in Louisiana law, by virtue of the broad exception it established to the

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38. La. Civ. Code art. 3490, comment (a) (Supp. 1987).

39. La. Civ. Code art. 3490 provides: "One who has possessed a movable as owner, in good faith, under an act sufficient to transfer ownership, and without interruption for three years, acquires ownership by prescription." By contrast, La. Civ. Code art. 3506 (1870) excepted lost and stolen things from three-year acquisitive prescription. Article 3509 (1870) provided for ten-year acquisitive prescription for stolen things, and acquisition of lost things was governed by article 3422 (1870). Lost things are now governed by article 3419 which states: "One who finds a corporeal movable that has been lost is bound to make a diligent effort to locate its owner or possessor and to return the thing to him. If a diligent effort is made and the owner is not found within three years, the finder acquires ownership." See generally Note, Working With the New Civil Code Property Scheme: The 1982 Book III Revision, 43 La. L. Rev. 1079, 1084-87 (1983).

40. La. Civ. Code art. 3491 provides: "One who has possessed a movable as owner for ten years acquires ownership by prescription. Neither title nor good faith is required for this prescription." This article reproduces article 3509 (1870).

41. See supra notes 35-36 and accompanying text.

42. La. Civ. Code art. 524. See supra notes 8-12 and accompanying text. See generally Symeonides, One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription, 44 La. L. Rev. 69, 127 n.88 (1983) (stating that "The *Blackwell* rule . . . which provided that reimbursement of the purchase price was required only if the thing was recovered after three years from purchase but not before, was legislatively overruled in 1979 by UA 524").

43. La. Civ. Code art. 520, comment (a) (West 1980). See supra notes 30-31 and accompanying text.

44. La. Civ. Code art. 530. See supra note 37 and accompanying text.

principle of article 2452 that no one can transfer a greater right than he himself has.<sup>45</sup> It allowed one who did not own a thing to transfer ownership to another.<sup>46</sup> Although article 520 was effective as of January 1980, the legislature suspended its operation during the 1980 Regular Session,<sup>47</sup> and repealed it in 1981.<sup>48</sup> The repeal was in response to the confusion and apprehension generated by the article among Louisiana retailers and equipment leasing companies.<sup>49</sup> Concerned with the ability of lessees to transfer ownership of leased equipment to third parties, representatives of these groups lobbied for the repeal of article 520. In enacting that repeal, the legislature intended to eliminate potential abuse by lessees and others who hold movables for owners; unfortunately, what appeared to be a simple remedy could potentially produce unintended consequences.

#### *Effect of the Repeal of Article 520*

Article 520 codified a rule similar to but broader than the jurisprudential doctrine of equitable estoppel. Unlike equitable estoppel, which is based on the express or implied representation by the owner that the seller has the authority to sell the thing, article 520 was to be applied regardless of the nature of the original owner's actions in relinquishing possession of the thing. Its repeal may be seen as a rejection of the entire estoppel exception, or more probably, a return to the case by case approach to determining the effect of an owner's negligence on the validity of the sale of his property by another.<sup>50</sup> In addition, it is reasonable to conclude that the repeal of article 520 indicates a legislative intention that a person who acquired possession of a movable from a transferor who had possession of such movable with the owner's consent should not acquire ownership. However, the force of such a conclusion is weakened by the failure of the legislature to repeal or amend the other articles of the revision that supported article 520.

In testimony before the Senate Judiciary A Committee, Professor Yiannopoulos characterized the repeal of article 520 as a "half-hearted" repeal of the law.<sup>51</sup> Professor Litvinoff, at that same hearing, testified that "the repeal of article 520 would not extend those persons [retailers

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45. See *supra* note 3 and accompanying text.

46. Article 520 was thus an example of the proverbial exception that (almost) swallowed the rule.

47. La. Senate Concurrent Resolution No. 172, 6th Reg. Sess. (1980).

48. 1981 La. Acts No. 125.

49. Senate Judiciary A Committee Meeting minutes of June 2, 1981 (considering HB 998 to repeal article 520).

50. Unfortunately, there have been no cases involving this particular question since the revision, so the courts have not had a chance to interpret the intent of the legislature.

51. Senate Judiciary A Committee Meeting minutes, *supra* note 49.

and lessors] as much protection as they feel it would."<sup>52</sup> He added that the elimination of article 520 would only deprive Louisiana courts of the guidance it provides.

The problem to which these statements refer is that article 520 was originally passed not as an isolated provision, but as a part of an entire scheme of law; it was meant to be read in *pari materia* with the articles enacted in conjunction with it. The repeal of that single article ignored the rest of that scheme. Article 521 was enacted as an exception to 520. The other articles in the revision and in other parts of the code modified and qualified article 520. How does that scheme work without article 520?

Article 520 was intended mainly to handle the problem of breaches of confidence in instances in which the owner entrusted the thing to a person, as lessee, depositary, pledgee, or other agent, who subsequently sold it to someone else. For example, suppose *A* buys a bicycle from a dealer. *A* then loans his bicycle to *B*, who sells it to *C*. If *C* was in good faith and paid fair value, article 520 would have placed ownership of the bicycle in *C*. In the absence of article 520, there is no positive authority to support the conclusion that *C* keeps the bicycle. The repeal of article 520 implies a legislative intent to deny ownership by *C*. However, article 521 remains in effect, and it states that one who has possession of a lost or stolen thing may not transfer ownership. The negative implication of that proposition is that if the thing is not lost or stolen, the possessor may transfer it. In this hypothetical, the bicycle was not "stolen" for purposes of article 521, because *B* had possession of it with *A*'s consent. Thus, two negative implications emerge. One suggests that *C* is the owner, and the other suggests he is not.

The repeal of article 520 suggests that *A*, the original owner of the bicycle, would be able to recover it. In searching for positive authority to support this result, one might turn to article 2452, which provides that the sale of a thing belonging to another is null.<sup>53</sup> One might also turn to article 526, which states that "[t]he owner of a thing is entitled to recover it from anyone who possesses or detains it without right."<sup>54</sup> By contrast, article 530, which states that "[t]he possessor of a corporeal movable is presumed to be its owner,"<sup>55</sup> gives to *C*, the possessor, rights to the bicycle by virtue of his possession. The continued presence of

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52. *Id.*

53. Arguably, the enactment of article 520 was, in effect, a repeal of article 2452. If so, the question would arise as to whether the repeal of article 520 would revive article 2452.

54. La. Civ. Code art. 526.

55. La. Civ. Code art. 530.

article 530 is what led Professor Yiannopoulos to term the repeal of article 520 "half-hearted."<sup>56</sup>

Article 530's presumption in favor of the current possessor does not avail against the previous possessor, if he can prove that he was dispossessed as a result of theft or loss.<sup>57</sup> However, the facts of the hypothetical indicate that since *A* turned over possession to *B* with consent, the bicycle was not stolen. Or was it?

#### *The Concept of Theft—Articles 521 and 530*

The discussion in the previous section raises the question of whether article 521 and article 530 are consistent in their conceptions of theft. Article 521 contemplates theft as a taking of possession of a thing without the consent of the owner.<sup>58</sup> The comments point out that this approach is in accord with the narrow definition applied in continental legal systems, where theft is defined as a misappropriation or taking without the consent of the owner. It does not include embezzlement or situations where the owner delivers or transfers possession out of fraud or artifice.<sup>59</sup>

The first paragraph of Article 530 establishes two presumptions: first, that the present possessor is the owner; second, that the previous possessor was the owner during his possession. The second paragraph provides that the presumption in favor of the present possessor will not avail against a previous possessor who "was dispossessed as a result of loss or theft."<sup>60</sup>

The application of article 521's definition of a "stolen" thing is expressly limited, by the phrase "for purposes of this Chapter," to articles 517 through 525, which pertain to transfer of ownership.<sup>61</sup> However, no legislative direction as to the definition or application of "theft" is provided in article 530. Of course, at the time of the drafting of the revision, it was unnecessary for the concept of theft in article 521 to be explicitly applied to article 530, because unless the previous possessor could prove that the movable was taken without his consent, title would have passed under the operation of article 520. The question becomes whether the legislature's purpose in repealing article 520 would best be served by applying the narrow concept of theft contained in article 521

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56. See text accompanying *supra* note 49.

57. La. Civ. Code art. 530.

58. La. Civ. Code art. 521 provides: "For purposes of this Chapter, a thing is stolen when one has taken possession of it without the consent of its owner. A thing is not stolen when the owner delivers it or transfers its ownership to another as a result of fraud."

59. La. Civ. Code art. 521, comment (b) (West 1980).

60. La. Civ. Code art. 530.

61. La. Civ. Code art. 521.

to cases involving article 530, or whether a broader definition would lead to more just results.

The importance of deciding on a consistent concept of theft can be illustrated with reference to the hypothetical described earlier. In order for *A*, who loaned his bicycle to *B*, to recover it from *C*, who bought it in good faith from *B*, *A* must overcome the presumption that *C*, the present possessor, is the owner. Article 530 enables *A* to do this if he can prove that he was the previous possessor and that he was dispossessed through loss or theft.

If "theft" in article 530 is limited to the concept used in article 521, then *A* has not been dispossessed as a result of theft; the bicycle, having been loaned to *B*, has not been "stolen." Therefore, the presumption that *C* is the owner will operate against *A*. *A* would then have to shoulder the burden of proving his ownership by the ordinary means.<sup>62</sup>

On the other hand, if "theft" in article 530 is interpreted more broadly, so that it includes *B*'s breach of *A*'s confidence, *A* would then be able to overcome the presumption in favor of the current possessor *C*. *A* could rely on the presumption of previous possession to prove his ownership. The more difficult burden of proof would then be shifted to the current possessor.

The comments to article 521 reveal an intention that the narrow definition of theft be applied beyond Chapter Three. Comment (b) states that, in continental legal systems, theft is narrowly defined to mean a taking without the consent of the owner:

*For civil law purposes, and particularly for the purpose of Article 521, the definition of theft is much more limited than the criminal law definition . . . . The broad definition of theft for the purposes of criminal prosecution does not alter the provisions of the Civil Code of Louisiana and other statutes relating to sales and transfer of title.*<sup>63</sup>

Clearly, this comment contemplates that theft receive a narrow interpretation for all civil law purposes, and not just for purposes of Chapter Three. In addition, since the broadly stated purpose of the revision was to bring Louisiana law in line with other civil law systems and the Uniform Commercial Code,<sup>64</sup> which also give theft this narrow meaning, there is support for the view that theft as used in article 530 was intended to have the narrow meaning provided for in article 521.

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62. A. Yiannopoulos, *supra* note 36, § 239, at 635 (Ordinarily, plaintiff would have to prove that he acquired the movable by transfer from a previous owner, accession, or acquisitive prescription.).

63. La. Civ. Code art. 521, comment (b) (West 1980) (emphasis added).

64. U.C.C. § 2-403 (1977).

Nevertheless, by its express terms article 521 prohibits reliance on its definition of theft in situations not involving application of those articles contained in Chapter Three. Furthermore, the policy behind the repeal of article 520, that is, to promote the security of ownership, certainly would be advanced by the application of a broad definition of theft in article 530, rather than by resort to the narrow definition of article 521.

*Article 530—Possession, Presumptions, and Burden of Proof*

In order to appreciate how article 530 operates, it is necessary to examine it in relation to the general articles on possession found in Chapter 2 of Title XXIII.<sup>65</sup> Article 3421 defines possession as "the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps it in his name."<sup>66</sup> Article 3422 distinguishes possession, as a matter of fact, from the right to possess, which is acquired after one year of factual possession.<sup>67</sup> The comments to article 3422 state that physical, factual possession alone does not give rise to possessory protection, but that possessory protection is predicated on acquisition of the right to possess.<sup>68</sup> Article 3423 provides that a possessor is treated as the owner of the thing until the right of the true owner is established.<sup>69</sup>

Although the principles stated in articles 3422 and 3423 are applicable to both movables and immovables,<sup>70</sup> there is no nominate action provided by the Code of Civil Procedure to protect possession of movables. Nonetheless, one seeking recovery of a movable can bring a revendicatory action authorized by article 526.<sup>71</sup> How does article 530 fit into this system of protecting possession?

The presumptions of article 530 provide a means of proving ownership in a revendicatory action. Such presumptions are necessary in the absence of a system of public recordation of title to movables. The first sentence of paragraph 1 of article 530 presumes that the current possessor is the owner. When a previous possessor (the plaintiff) brings a revendicatory action seeking recovery of a movable from the current

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65. La. Civ. Code arts. 3421-3444 (effective Jan. 1, 1983).

66. La. Civ. Code art. 3421. See also article 3424 which provides: "To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing."

67. La. Civ. Code art. 3422 provides: "Possession is a matter of fact; nevertheless, one who has possessed a thing for over a year acquires the right to possess it."

68. La. Civ. Code art. 3422, comment (b) (Supp. 1987).

69. La. Civ. Code art. 3423 provides: "A possessor is considered provisionally as owner of the thing he possesses until the right of the true owner is established."

70. See comment (c) to La. Civ. Code art. 3423 (Supp. 1987).

71. La. Civ. Code art. 526; A. Yiannopoulos, *supra* note 36, § 236, at 630.

possessor (the defendant), the plaintiff has the burden of proving his ownership.<sup>72</sup> Ordinarily the plaintiff must satisfy this burden by showing that he acquired the movable by a transfer from a previous owner, by accession, or by acquisitive prescription.<sup>73</sup> However, in situations where the plaintiff can show he was deprived of lawful possession through loss or theft, the presumption in favor of the present possessor does not avail against him, and he may prove his ownership through the presumption that the previous possessor was owner. The burden of proof of ownership is then shifted to the defendant.

Article 530 stops short of providing exactly what the defendant must prove in order to rebut the presumption that the previous possessor is the owner, and commentators disagree. Professor Hargrave argues that the current possessor must prove his ownership. He suggests several ways to do this, such as occupancy, acquisitive prescription, rules of apparent agency and estoppel, and several special statutes, as well as derivative title from another who had acquired ownership by such means.<sup>74</sup> He raises the question of whether the current possessor should be able to rebut the presumption that the previous possessor is owner by showing that the previous possessor cannot establish title either. He concludes that, practically, any effort to rebut the presumption by such means would be futile, and that the current possessor can only prevail against the previous possessor by proving his own title.<sup>75</sup>

Professor Yiannopoulos takes the position that "the defendant, in order to be allowed to retain the movable, must prove that the plaintiff was never its owner, or, if he was, he lost his ownership."<sup>76</sup> Additionally, he asserts that "[t]he revendicatory action will fail if the defendant has acquired the ownership of the movable by acquisitive prescription, by accession, [or] by transfer from the true owner."<sup>77</sup> He recognizes the possibility that the current possessor may be able to show that the previous possessor never did own the thing, i.e., that he had found it and had not yet acquired by occupancy, or that he had acquired it from a thief and had not yet acquired it by prescription. Such a showing, according to Professor Yiannopoulos, would allow the defendant to retain the movable.

There is nothing in article 530 to preclude the current possessor from rebutting the presumption in favor of the previous possessor in this way. In fact, it is the same means the previous possessor used to

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72. A. Yiannopoulos, *supra* note 36, § 239, at 635.

73. *Id.*

74. Hargrave, *Presumptions and Burdens of Proof in Louisiana Property Law*, 46 *La. L. Rev.* 225, 231-32 (1985).

75. *Id.*

76. A. Yiannopoulos, *supra* note 36, § 239, at 636.

77. *Id.* § 240, at 637.

rebut the presumption in favor of the current possessor, by showing that he could not be the owner. Does such a showing in effect revive the presumption that the current possessor is the owner? A logical conclusion is that the rebuttal of both presumptions, by showing that neither party in fact has acquired ownership, would leave article 530 ineffective to prove ownership.

An example may help to clarify the foregoing. Suppose that *A* buys a bicycle from *X*, who has stolen it from a bicycle store. *A* believed in good faith that *X* owned the bicycle, but he has no way to prove it because *X* is now gone. *A* has possessed the bicycle for two and one-half years. Then *B* steals the bicycle from *A* and sells it to *C*, who buys it in good faith. Under article 530, *C* is presumed to be the owner. If *A* rebuts that presumption by showing that the bicycle was stolen from him, *A* is now presumed to be the owner. Can *C* rebut this presumption by showing that *A* never owned the bicycle because he bought it from a thief and has not yet acquired it by prescription? If so, both of the presumptions of article 530 would be rebutted, neither party would be presumed to be the owner, and it would become necessary to resort to a "better title"<sup>78</sup> approach to resolve the dispute.

Professor Hargrave argues that:

[S]uch an approach is difficult without a title registration system such as that employed for immovables. Because it is difficult to prove title to movables, possession becomes more important, and necessary, as a means of settling such disputes. It is, in effect, the better title. For that reason, the presumption here [in article 530] should work to let the previous possessor prevail unless the later possessor rebuts it by coming forward and proving ownership.<sup>79</sup>

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78. Hargrave, *supra* note 76, at 232. Cf. La. Code Civ. P. art. 3653, which provides: To obtain a judgment recognizing his ownership of immovable property or real right therein, the plaintiff in a petitory action shall:

(1) Prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is 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.

The notion of "better title" is very difficult conceptually. It arises when both parties in a petitory action are out of possession, but claim the property through an act translative of title. Title is not to be considered equivalent to ownership. "Better title" contemplates that, although neither party can prove record ownership, one has a better claim than the other. For a discussion of the notion of better title and the problems of this approach, see *Pure Oil Co. v. Skinner*, 294 So. 2d 797 (La. 1974); *Kelso v. Lange*, 421 So. 2d 973 (La. App. 3d Cir. 1982); *Deselle v. Bonnette*, 251 So. 2d 68 (La. App. 3d Cir. 1971).

79. Hargrave, *supra* note 76, at 232-33.



This is a reasonable solution but not an altogether satisfactory one. With both possessors claiming title through a thief, they are really in the same position, and if the previous possessor can rebut the presumption of the current possessor's ownership by showing that he never did own it, the current possessor should be able to rebut the previous possessor's presumption of ownership in the same way. The inequity of not allowing this is demonstrated by the following modification to the hypothetical. Suppose that *A* acquired the bicycle from a thief and possessed it for one week, when it was stolen from him and sold to *C*, who has possessed the bicycle for over two years. Now, after all that time, *A* seeks to recover the bicycle from *C*. If *C* must prove ownership, he will lose and *A* will get the bicycle.

If two people claim the ownership of a movable, neither of whom can prove it is his, who should get to keep it, the one who has it now or the one who had it first? The presumptions of article 530 provide a workable solution in most instances, because it will be a rare case when the current possessor will be able to show how the previous possessor acquired it or that he was never owner. In the exceptional case, however, article 530 does not deal with the basic rights of possessors. One solution may be derived from Professor Hargrave's statement that "possession becomes more important, and necessary, as a means of settling such disputes."<sup>80</sup> If neither party can prove his ownership by means of the presumptions in article 530, the articles on possession can provide the solution.

The Code recognizes that the possession of movables ought to be protected. Article 3444 provides that "[p]ossession of movables is protected by the rules of the Code of Civil Procedure that govern civil actions."<sup>81</sup> The comments state that "there is no nominate action for the protection of the possession of movables. A possessor of movables who has been disturbed in his possession, however, may bring a civil action for recovery of possession."<sup>82</sup> Article 3422 states that possession is a matter of fact, but that one who possesses a thing for over a year acquires the right to possess it. The comments add that "[p]ossessory protection is predicated on acquisition of the right to possess. This right to possess is acquired by one who has been for a year in peaceable and uninterrupted possession . . . ."<sup>83</sup> There is nothing in the Code which says that the right to possess only applies to immovables.

In the possessory action<sup>84</sup> for immovables, the plaintiff who seeks to have his possession restored must prove that he has acquired the

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80. *Id.*

81. La. Civ. Code art. 3444.

82. La. Civ. Code art. 3444, comment (b) (Supp. 1987).

83. La. Civ. Code art. 3422, comment (b) (Supp. 1987).

84. La. Code Civ. P. arts. 3655, 3658.

right to possess in order to maintain the action. This procedural rule is merely an expression of the substantive rules of possession in the Civil Code. The absence of procedural implementation in regard to movables should not preclude application of the same substantive rules.

The possession articles, in order to provide some security to possession, favor the person who possessed the thing for at least one year. These articles would provide a more equitable means to settle disputes in which the current possessor can show that the previous possessor was never the lawful owner, even though the current possessor cannot prove title in himself either. In such instances, the party who has acquired the right to possess under article 3422 should prevail. Thus, if the present possessor has possessed the thing for a year, he should be allowed to retain possession. If the previous possessor had the thing for a year, he should be allowed to recover possession. If neither party has possessed for a year, the thing should remain with the current possessor, because the previous possessor has an insufficient interest in the thing to warrant interference with the current possession.

### *Conclusion*

In the absence of post-revision jurisprudence for guidance, one must look to the interests sought to be protected by the legislature in the revision. In 1979 the legislature made a significant policy shift which sought to protect the security of transaction at the expense of the security of ownership. By repealing article 520 in 1981, the legislature took a large step backward from that shift in policy, reflecting a concern for the security of ownership.

Consistent with this concern, article 521 should be amended to provide for a broad concept of theft that includes delivery to another as a result of fraud and breach of confidence.<sup>85</sup> An exception could be made in the case where the original owner is charged with negligence in the pursuit of his affairs, assuming the continued validity of the jurisprudence on equitable estoppel. Consistency would also dictate that the same concept of theft be applied to article 530, to allow a non-

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85. A transfer of ownership as a result of fraud, where the owner intends to transfer title, is to be distinguished from delivery as a result of fraud. A transfer of ownership as a result of fraud, which is a vice of consent, results in a transfer of a relatively null title to the defrauder, who can transfer good title to a transferee in good faith under article 522. If the owner merely delivers the thing to the defrauder (for example, if he delivers it to one misrepresenting himself as a depositary), and he has no intention of transferring title, article 522 does not apply. Breach of confidence is distinguished in that the person to whom the thing is delivered is really a depositary (no misrepresentation), but he sells the thing in violation of the deposit agreement.

negligent original owner dispossessed by fraud to rebut the presumption that the current possessor is owner.

Article 530 should be interpreted as a method of proving ownership over and above possession. Where both presumptions can be rebutted by proof that neither party is the actual owner, however, principles of possession should apply. Such an interpretation protects the person who has possessed a thing for a long period of time, short of acquisitive prescription, regardless of whether he is the current or the previous possessor. This solution strikes a balance between the security of ownership and the security of transaction, and thus would be consistent with the policy currently in operation in Louisiana law.

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