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WORKING WITH THE NEW CIVIL CODE PROPERTY SCHEME:
THE 1982 BOOK III REVISION

The original provisions of title XXIII of the Louisiana Civil Code of 1870 are verbose, unclear, and antiquated. Act 187 of 1982¹ is a substantial revision of the codal provisions governing occupancy,² possession, and prescription. The revision streamlines book III by dividing title XXIII into two chapters, one on occupancy and the other on possession, and by dividing title XXIV into four chapters, each of which governs a particular aspect of prescription.³ In terms of language, organization, and legislative technique, the revision is a great step forward from the obscure and poorly organized provisions of the 1870 Code. In terms of substance the revision is also quite successful in restoring the much needed certainty and clarity in the law and in promoting security of titles. However, the revision also introduces some unwelcome and unnecessary confusion. This note reviews the revision, focusing on clarifications and changes in the property law scheme.

Changes in the Law

Error of Law

Article 1846(3) of the Civil Code of 1870⁴ is repealed. Under prior jurisprudence, a possessor whose belief in his ownership was mistaken because of his error of law⁵ was said to be in legal bad faith, despite his subjective good faith.⁶ Such a possessor obviously could not utilize

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1. Effective January 1, 1983.

2. The occupancy provisions, Louisiana Civil Code articles 3412-3420 (revised 1982), will be discussed only to the extent that they relate to the possession and prescription provisions. All subsequent Civil Code citations in both notes and text refer to the newly revised and current provisions, unless otherwise specified.

3. The provisions governing liberative prescription, articles 3528-3555 of the Louisiana Civil Code of 1870, have not been revised and comprise chapter 4. Article 3556 also has not been revised, but it is redesignated as title XXV.

4. LA. CIV. CODE art. 1846(3) (repealed 1982) provides:

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.

.....

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 [illegality] of his title, shall not give him a right to prescribe under it.

5. LA. CIV. CODE art. 1822 provides: "He is under error of law, who is truly informed of the existence of facts, but who draws from them erroneous conclusions of law."

6. See, e.g., *Dinwiddie v. Cox*, 9 So. 2d 68 (La. App. 2d Cir. 1942). The court held that a vendee was in legal bad faith because he assumed that his vendor, who was the sole surviving child of the deceased owner of the land, was the sole heir, without considering whether any of the predeceased children of the deceased owner had left

the short-term acquisitive prescription, for which good faith was a requisite. The application of the concept of error of law to acquisitive prescription was arguably inconsistent with traditional civilian theory⁷ and had been the object of extensive doctrinal criticism:

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 [created by the jurisprudential application of article 1846(3) of the Civil Code of 1870 to acquisitive prescription].⁸

In its proper realm of conventional obligations law, article 1846(3) simply meant "that a vendee [could] not prescribe against his vendor when there [was] a vice in the contract of transfer between them and when the vendee should have been able to determine the vice from the facts he knew at the time of the transaction."⁹ The jurisprudential application of the provision to the articles governing acquisitive prescription resulted in the exclusion of short-term prescription as to parties possessing under error of law. The repeal remedies the problem of application of the provision to property law, while affecting obligations law minimally. Because the action for rescission of agreements of transfer prescribes in ten years,¹⁰ the repeal does not worsen the position of the vendor of an immovable. Although the vendee now can perfect his title in ten years through acquisitive prescription if otherwise in good faith, the vendor, even before the repeal, could not object to the transfer after ten years and, consequently, could not prevent the vendee from acquisitively prescribing in thirty years. The repeal does worsen the position of the vendor of a movable, in that the vendee otherwise in good faith now will

descendants. His error of law was his conclusion that only those children of the deceased who were alive at the time of his death could be forced heirs.

7. "But an acquirer who made an erroneous judgment about the value of the documents produced by his grantor could rely on this error in justifying his good faith, even if he committed an error of law." 2 C. AUBRY & C. RAU, *DROIT CIVIL FRANÇAIS* § 218 (7th ed. Esmein 1961) in J. MAYDA, 2 *CIVIL LAW TRANSLATIONS* 364 (1966) (footnotes omitted). See also 1 M. PLANIOL, *TREATISE ON THE CIVIL LAW* pt. 2, no. 2667 at 580 (12th ed. La. St. L. Inst. trans. 1959).

8. Note, *Good Faith for Purposes of Acquisitive Prescription in Louisiana and France*, 28 LA. L. REV. 662, 671 (1968). See also Hargrave, *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Prescription*, 35 LA. L. REV. 329, 331 (1975); Comment, *The Ten-Year Acquisitive Prescription of Immovables*, 36 LA. L. REV. 1000, 1004 (1976).

9. Note, *supra* note 8, at 667-68.

10. LA. CIV. CODE art. 2221.

acquisitively prescribe in three years,¹¹ effectively reducing the vendor's time to object to the transfer from ten years to three years.¹² The intent behind the repeal of the article is to overrule "legislatively the doctrine of legal bad faith,"¹³ which is consistent with the drafters' effort to provide a predominantly objective test for the presence of good faith.¹⁴ One problem created by the repeal is determining just how far the legislature intended to go. The doctrine of legal bad faith is not limited to the constructive bad faith which, before the repeal, arose from error of law. Because the doctrine is largely jurisprudential, its components are not readily ascertainable, but legal bad faith arguably can include all cases where bad faith is imputed by law to the possessor despite his subjective good faith. The legislature clearly did not intend to overrule the doctrine of legal bad faith to that extent, as evidenced by the highly objective test for the presence of good faith. The confusion is increased by the citation to *Martin v. Schwing Lumber & Shingle Co.*¹⁵ in article 3481, comment (c), where the repeal is discussed. The case is cited for the proposition that "error of law defeats good faith," placing "the acquirer of an immovable . . . in *legal bad faith*," but, in fact, the holding in *Schwing Lumber* was unrelated to error of law, turning instead on principles of the public records doctrine and agency law.¹⁶ That the drafters did not

11. LA. CIV. CODE art. 3490.

12. The repeal should be seen as the manifestation of a policy protecting good faith transferees at the expense of true owners, at least to the extent that the repeal worsens the position of the vendor of movables. The wisdom of this policy is more thoroughly considered in the text, *infra*, notes 32-45 in the discussion of the three-year acquisitive prescription of movables.

13. LA. CIV. CODE art. 3481, comment (c).

14. LA. CIV. CODE art. 3480 provides: "For purposes of acquisitive prescription, a possessor is in good faith when he *reasonably believes, in light of objective considerations*, that he is owner of the thing he possesses." (emphasis added). LA. CIV. CODE art. 3481 provides: "Good faith is presumed. Neither error of fact nor error of law defeats this presumption. This presumption is rebutted on proof that the possessor knows, *or should know*, that he is not owner of the thing he possesses." (emphasis added).

15. 228 La. 175, 81 So. 2d 852 (1955) (This case involved an action for partition in kind of certain land, plaintiff and defendant having each obtained an undivided one-half interest therein. Defendant claimed ownership of the entire tract by virtue of good faith acquisitive prescription, but the court rejected this claim, holding that defendant was held to the knowledge of plaintiff's recorded interest because defendant's agents had conducted a title search before defendant entered into possession. Defendant was held to be in legal bad faith. The real issue was whether defendant was bound by what the public records revealed, its attorneys having conducted a title examination but not having informed defendant of any defects. The court held under rules of agency law that defendant was so bound.)

16. The court stated the rule that if "instead of relying on the faith of his vendor's title, [the vendee] 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." 228 La. at 182-83, 81 So. 2d at 854 (footnotes omit-

intend to modify the traditional operation of the public records doctrine is stated in comment (d) to article 3480.¹⁷ This comment should apply with equal force to article 3480's companion provision, article 3481. Concerns over the legislative intent regarding any aspects of the doctrine of legal bad faith not discussed herein should be settled by a textual analysis of article 3481,¹⁸ which specifies only error of law. Because the comments are not legally binding,¹⁹ the text of the article should authoritatively resolve any confusion.

Just Title for Acquisitive Prescription of Immovables

Just title is one of the requisites for the ten-year acquisitive prescription of an immovable. Under the old law, just title was "necessarily a defective title, but one which [purported] to transfer ownership and which [appeared] on its face to be good."²⁰ Additionally, the title had to be "valid in point of form" and "certain" in its description of the property.²¹ One problem under the old law was the confusing merger of the concepts of good faith and just title. Article 3484 (repealed 1982) described just title as "a title which the possessor . . . received from any person whom he *honestly believed* to be the real owner."²² Article 3483²³ clarifies the law on this point by simply describing the attributes of just title without reference to the possessor's beliefs regarding his title. Article 3483 further changes the law by requiring that title be written²⁴ and "filed for registry in the conveyance records of the parish in which the immovable is

ted). As to the public records doctrine generally, see the leading Louisiana case in this area, *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909).

17. LA. CIV. CODE art. 3480, comment (d) states: "This provision does not affect the public records doctrine."

18. See note 14, *supra*.

19. 1982 La. Acts, No. 187, § 6 provides that the "Exposé des motifs, the article headnotes, and the comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act."

20. Dainow, *Civil Code and Related Subjects—Prescription*, 22 LA. L. REV. 326, 328 (1962) (footnotes omitted). See LA. CIV. CODE arts. 3483-3485 (repealed 1982).

21. LA. CIV. CODE art. 3486 (repealed 1982).

22. Emphasis added.

23. LA. CIV. CODE art. 3483 provides: "A just title is a juridical act, such as a sale, exchange, or donation, sufficient to transfer ownership or another real right. The act must be written, valid in form, and filed for registry in the conveyance records of the parish in which the immovable is situated."

24. The new requirement of written title is more in the nature of a *de jure* change than a *de facto* change. Because an unwritten title to an immovable is null unless the parties thereto judicially confess its existence, there are few instances of titles which are not written. See Civil Code article 2440 as to the requirement that the sale of an immovable be in writing unless the verbal sale is judicially confessed. See also *Lemoine v. Lacour*, 213 La. 109, 34 So. 2d 392 (1948).

situated."²⁵ The drafters did not state the policy reasons for the change, but the greater certainty rendered by the new approach is clearly the basis for the change. The possessor's claim to ownership is made a part of the public record, greatly enhancing the accuracy of title examinations by enabling an examiner to determine more fully what rights affect a given tract of land. The comments repeat the frequently stated rule that neither a judgment nor an act of partition can be a just title, because each purports merely to be declarative rather than translativ of rights.²⁶ Arguably, however, an act of partition is translativ of ownership as between the parties to the partition, and it thus could serve as a just title as between the parties or their assignees. Hence, if the partition was not in proportion to each party's interest, the disputed area could be acquired by prescription.²⁷ Of course, a partition has no effect on the rights of third parties. The deed acquired by a purchaser at a sale conducted in conjunction with a partition by licitation is translativ of ownership and therefore can serve as the basis of a ten-year acquisitive prescription.²⁸ A universal successor has no title of his own, instead merely continuing the possession of the deceased²⁹ with all its faults and virtues,³⁰ but a particular legacy can be sufficiently translativ of ownership to constitute just title.³¹ Article 3483 and its comments present a problem in the interpretation of the legislative intent embodied therein. Comment (d) states that prescription "commences to run from the date of filing [of title] for registry rather than from the date of entry into possession." The intended meaning of the comment is uncertain, as illustrated by the following three hypothetical situations: (1) a party enters into possession and later records his title, (2) a party records his title and later enters into possession, and (3)

25. LA. CIV. CODE art. 3483.

26. LA. CIV. CODE. art. 3483, comment (b). See *Little v. Barbe*, 195 La. 1071, 198 So. 368 (1940); *Tyson v. Spearman*, 190 La. 871, 183 So. 201 (1938).

27. The act of partition should be seen as translativ of rights because it is in the nature of an exchange, each co-owner giving his undivided interest in a distinct portion of the commonly owned property in exchange for the other co-owners' undivided interest in another distinct portion of the property. LA. CIV. CODE art. 2660 provides: "*Exchange* is a contract, by which the parties to the contract give to one another, one thing for another, whatever it be, except money; for in that case it would be a sale."

28. See *Pitre v. Peltier*, 122 So. 2d 867 (La. App. 1st Cir. 1960).

29. See LA. CIV. CODE art. 3556(28); *Griffon v. Blanc*, 12 La. Ann. 5 (1857).

30. See G. BAUDRY-LACANTINERIE ET A. TISSIER, *PRESCRIPTION* as contained in 28 G. BAUDRY-LACANTINERIE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* § 658 (4th ed. 1924), in J. MAYDA, 5 *CIVIL LAW TRANSLATIONS* 330 (1972); Comment, *Tacking of Possession for Acquisitive Prescription*, 8 LA. L. REV. 105, 107 (1947).

31. See, e.g., *Hibbert v. Mudd*, 272 So. 2d 697 (La. App. 3d Cir. 1972), *rev'd on other grounds*, 294 So. 2d 518 (La. 1974).

a party acquires and records his title while the true owner remains in possession but, nine years later, usurps the owner's possession and himself maintains possession for one year. The third hypothetical is a preposterous but logical extension of the second; however, given the provision in article 3475 that "possession of ten years" is required for the ten-year acquisitive prescription of immovables, it safely can be assumed that the comment was not intended to permit parties to prescribe with less than ten years of possession by the simple act of recording title. The first hypothetical presents the less unthinkable possibility that the comment is intended to mean that the ten-year period of possession runs from the date of recordation as a matter of law, despite an earlier entrance into possession. Such a requirement is a logical consequence of article 3483 and conforms fully with the revision policy of enhancing certainty in immovable property law, but the drafters appear to be using the comments as a vehicle for making law in that the requirement is a substantial change in the law which does not necessarily follow from the text of the article. Article 3483 may require a recordation of title that is reasonably contemporaneous with the entrance into possession or, less likely, it may require no more than recordation at any time before the prescriptive right accrues. If, under the article, just title by definition is a recorded title, the comment is superfluous. A litigant would not be abusing plausibility by suggesting that the inclusion of the matter in a non-binding comment, rather than in the text of the provision, is itself a reflection of legislative intent that it not be law. Regrettably, resolution of the problem must be left to authoritative judicial interpretation or subsequent legislation.

Three-Year Acquisitive Prescription of Movables

Article 3490 specifies the requirements for good faith acquisitive prescription of movables and makes no changes from the old law as to these requirements. The possessor must possess the "movable as owner, in good faith, under an act sufficient to transfer ownership, and without interruption for three years."³² Comment (b) states that the requirement of just title under the article is easily satisfied in that there "is no requirement that the title be written or recorded," which is not surprising given the general lack of laws requiring that acts affecting movables be in writing and recorded. Perhaps more surprising is what the article accomplishes by its silence. The old law treated acquisitive prescription of movables with much the same language as that used in article 3490, but it did not permit the

32. LA. CIV. CODE art. 3490. Compare with note 33, *infra*, as to the requirements for short-term acquisitive prescription under the old law.

possessor to prescribe in three years if "the thing was stolen or lost."³³ The drafters are content with speculation as to the policy behind the change, as evidenced by their complete silence on the subject in the comments. The policy underlying the change probably is one which protects good faith possession at the expense of true ownership: under article 3490, the good faith possessor with just title acquires even a lost or stolen thing in three years, rather than the ten years required under the old law.³⁴ A very similar policy was embodied in Civil Code article 520 (repealed 1981),³⁵ which was proposed by the Louisiana Law Institute and passed by the legislature as part of the 1980 book II property law revision.³⁶ The provision differed from article 3490 only in that it favored the good faith transferee for value over the true owner and resulted in an immediate transfer of ownership. Article 520 became the subject of controversy almost immediately after its passage, resulting in its suspension in 1980³⁷ and its repeal in 1981.³⁸ To the extent that the repeal reflects a legislative change of intent, the wisdom of proposing article 3490 with such a paucity of explanation is questionable.

Assuming the continued vitality of article 3490 as it now reads, it becomes necessary to examine its role in the overall codal scheme governing lost or stolen things. Article 521 of the Louisiana Civil Code³⁹ prohibits the transfer of ownership of a lost or stolen thing by one in possession of the thing. The article provides that for its purposes, a "thing is stolen when one has taken possession of it without the consent of its owner" and "a thing is not stolen when the owner delivers it or transfers its ownership to another as a result

33. LA. CIV. CODE art. 3506 (repealed 1982), the full text of which is as follows: "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."

34. LA. CIV. CODE art. 3509 (repealed 1982) provides: "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." (emphasis added).

35. LA. CIV. CODE art. 520 (repealed by 1981 La. Acts, No. 125, § 1) provides: "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."

36. 1979 La. Acts, No. 180, § 1 (effective Jan. 1, 1980).

37. La. S. Con. Res. No. 172, 6th Reg. Sess. (1980).

38. See note 35, *supra*.

39. 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.

of fraud." When reading this provision together with the now repealed article 520, it becomes apparent that article 521 is intended to apply only to the thief: the possessor could transfer the ownership of the thing to a party in good faith for fair value if he gained possession with the owner's consent (before the repeal of article 520) or if he gained possession of the thing by inducing the owner's consent through fraud, but the possessor could not and still cannot transfer the ownership of the thing if he stole it. The thief, however, can transfer the possession of the thing, and if the act of transfer sufficiently purports to transfer ownership (so as to constitute just title) and the transferee is in good faith, the transferee will acquire the ownership of the thing by prescription in three years if he otherwise meets the requisites of article 3490. If the thing has been lost rather than stolen, the possessor gains ownership in three years through occupancy,⁴⁰ provided he has made a "diligent effort"⁴¹ to find the rightful owner or possessor. Any bad faith possessor of a lost or stolen movable, including a thief, will acquire ownership through prescription after ten years of uninterrupted possession as owner.⁴² The true owner may revindicate his ownership at any time before the possessor acquires ownership,⁴³ subject to an obligation to reimburse the purchase price when the possessor bought the lost or stolen movable in good faith at a public auction or from a merchant who customarily sells similar things.⁴⁴ The

40. LA. CIV. CODE art. 3419 provides: "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."

41. Civil Code article 3419, comment (d) states that a "diligent effort to locate the owner may involve publishing or advertising in newspapers, posting notes, or notifying public authorities."

42. 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."

43. LA. CIV. CODE art. 526 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."

44. 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 owner's right to revindicate the movable and his obligation to reimburse will last for only three years if the purchaser under the first paragraph maintains uninterrupted possession that long, because such a purchaser clearly would meet the requirements for short-term acquisitive prescription as provided by article 3490. Under the old law, the owner would have ten years, because the purchaser could not acquire ownership by prescription in three years. See *supra* notes 33 & 34, and accompanying text.

revindicatory right is lost as to movables sold by authority of law.⁴⁶

Presumption of Intent to Retain Possession

Article 3432⁴⁶ provides a rebuttable presumption that a possessor intends to retain possession. Under the old law, the presumption was rebutted by the possessor's failure "to exercise an actual possession for ten years."⁴⁷ However, as noted in comment (c) to article 3432, this rule was not applied in the jurisprudence when the possession was by virtue of title,⁴⁸ and courts frequently avoided its application by finding an actual possession.⁴⁹ The revision changes the law by eliminating this rule. Rebuttal of the presumption that a possessor intends to retain possession now depends on "clear proof of a contrary intention."⁵⁰ The change addresses the problem that property might enter a state of passive abandonment, that is, abandonment through inaction. In solving the problem, possession has been elevated to a right of much greater significance, now resembling ownership in that it cannot be lost by nonuse.⁵¹ Under the revision, the presumption "continues as long as possession has not been lost to another,"⁵²

45. See the second paragraph of article 524, note 44, *supra*. Under article 525, articles 518-524 do not apply to movables required by law to be registered in the public records. For a thorough discussion of the interplay between articles 518-525 before article 520 was repealed, see Comment, *Transfer of Movables by a Non-Owner*, 55 TUL. L. REV. 145 (1980).

46. LA. CIV. CODE art. 3432 provides: "The intent to retain possession is presumed unless there is clear proof of a contrary intention."

47. LA. CIV. CODE art. 3444 (repealed 1982) provides:

To retain the possession of a thing when a man once has it, it is not even necessary that he should have such positive intention; a negative intention suffices, that is, it suffices that the positive intention, which he had in acquiring the possession, shall not have been revoked by a contrary intention; for, so long as this revocation does not take place, the possessor is supposed always to retain his first intention, unless a third person has usurped or taken from him the possession, or he has failed to exercise an actual possession for ten years.

(emphasis added).

48. See *Manson Realty Co. v. Plaisance*, 196 So. 2d 555 (La. App. 4th Cir. 1967).

49. See, e.g., *Womack v. Walsh*, 255 La. 217, 230 So. 2d 83 (1969) (defendant's claim in the possessory action that plaintiffs' possession had been interrupted by a lack of actual possession for over ten years was rejected by the court, which held that the existence of a fence around the disputed tract, a clearing of underbrush by a bulldozer from a portion of the tract, the planting and regular mowing of grass on that portion, and the filling in of a well thereon together satisfied the requirements of article 3444).

50. LA. CIV. CODE art. 3432.

51. LA. CIV. CODE art. 481 provides in pertinent part: "Ownership exists independently of any exercise of it and may not be lost by nonuse." For an additional illustration of the enhancement of possession rendered by the revision, see the discussion of the three-year acquisitive prescription of movables, in text at notes 32-45, *supra*.

52. LA. CIV. CODE art. 3432, comment (c).

thereby eliminating the problem of determining how long ago a possessor's inaction began and if more recent acts are sufficient to constitute a subsequent "actual possession." Thus, one consequence of the change is that possession can be more easily established by the possessor and identified by other interested parties. Possession is lost to another under article 3433 by the possessor's manifestation of an intent to abandon possession⁵³ or by an eviction of the possessor by another by force or usurpation. Possession also may be transferred to another through tacking, but the transfer is considered to be a continuation of the transferor's possession rather than a loss of his possession to the transferee.⁵⁴

Possessory Action

Prior Louisiana law had adopted the position that a "plaintiff in a possessory action [is] one who [possesses] for himself."⁵⁵ A precarious possessor was consequently prevented from independently seeking this remedy for a disturbance of his precarious possession, because by definition, a precarious possessor was one who possessed for another.⁵⁶ The problem with the old approach was that it left the precarious possessor without this highly effective remedy for disturbances unless

53. LA. CIV. CODE art. 3433, comment (c) states that what "constitutes abandonment is a question to be determined in the light of all the circumstances. Abandonment is predicated on a manifestation of intent to abandon, which may be established in the light of objective criteria." Although at first glance this approach may appear to allow the old problems (relating to inaction) to reenter through the side door, as inaction itself may manifest an intent to abandon, the revision requires more than the old law did. The presumption now stands absent an eviction or an *objectively cognizable* manifestation of the possessor's intent to abandon possession. For cases adjudicating the issue of inaction as a manifestation of intent to abandon possession, see *Norton v. Addie*, 337 So. 2d 432 (La. 1976) (In this possessory action, defendant claimed that plaintiff had manifested an intent to abandon possession. The claim was based on plaintiff's unwillingness to cut timber in the disputed tract and defendant's testimony that plaintiff, in conversation, had disclaimed any right in the tract or intent to possess it. The court rejected defendant's contention, holding that plaintiff's unwillingness to cut timber merely manifested his uncertainty as to the status of the property and that plaintiff's exercise of exclusive grazing privileges on the tract and maintenance of enclosures argued against an intent to abandon.); *Coyle v. Burton*, 3 La. App. 34 (2d Cir. 1925) (Plaintiffs' author in title, upon discovering that her title had allowed her more land than she was apparently entitled to under the public records, allowed the original fence evidencing the mistaken land boundaries to deteriorate and built a new fence on the proper line. The author in title then made no objections to the neighbor's acts of possession up to the new fence. The court held that these actions manifested her intent to abandon possession.)

54. LA. CIV. CODE art. 3442.

55. LA. CODE CIV. P. art. 3656.

56. LA. CIV. CODE art. 3437 provides: "The exercise of possession over a thing with the permission of or on behalf of the owner or possessor is precarious possession."

the party for whom he possessed could be convinced to bring the action.⁵⁷ Civil Code article 3440 changes the law by allowing the precarious possessor to bring the possessory action against anyone but the party for whom he possesses.⁵⁸ The judgment in such an action "is not *res judicata vis-a-vis* the person for whom he possesses, unless the latter has been made a party to the proceedings."⁵⁹ This change brings Louisiana into accord with other civil law jurisdictions.⁶⁰

Renunciation of Prescription

Renunciation of prescription is a unilateral act which does not require acceptance to be effective.⁶¹ Renunciation is possible only after prescription has accrued,⁶² and, as stated in comment (c) to article 3449, "[i]t is to be distinguished from an *acknowledgement* of a right or obligation, which is made prior to the accrual of prescription and which wipes out the time that has run prior to the acknowledgement." Article 3450 recognizes both tacit and express renunciation, but as to immovables, it changes the law by requiring that a renunciation of acquisitive prescription "be express and in writing."⁶³ The provision

57. This statement is true in theory, but it was somewhat less than accurate in practice. Comment (b) to Civil Code article 3440 states that "according to certain Louisiana decisions, a precarious possessor [might] obtain injunctive relief against trespassers or other persons who [disturbed] his possession by application of article 3663(2) of the Louisiana Code of Civil Procedure." See *Indian Bayou Hunting Club, Inc. v. Taylor*, 261 So. 2d 669 (La. App. 3d Cir. 1972). However, other decisions held that the precarious possessor sought injunctive relief through Code of Civil Procedure art. 3601, which imposes the burden of showing irreparable injury on plaintiff. See *Caney Hunting Club, Inc. v. Tolbert*, 294 So. 2d 894 (La. App. 2d Cir. 1974).

58. LA. CIV. CODE art. 3440 provides: "Where there is a disturbance of possession, the possessory action is available to a precarious possessor, such as a lessee or depositary, against anyone except the person for whom he possesses." Comment (e) states that the provision in no way modifies LA. CIV. CODE art. 2704, which provides:

If the persons by whom those acts of disturbance have been committed, pretend to have a right to the thing leased, or if the lessee is cited to appear before a court of justice to answer to the complaint of the person thus claiming the whole or part of the thing leased, or claiming some servitude on the same, he shall call the lessor in warranty, and shall be dismissed from the suit if he wishes it, by naming the person under whose rights he possesses.

59. LA. CIV. CODE art. 3440, comment (d). See also LA. CIV. CODE art. 2286.

60. See A. YIANNOPOULOS, PROPERTY §§ 204-206 in 2 LOUISIANA CIVIL LAW TREATISE 545 (1980).

61. See 28 G. BAUDRY-LACANTINERIE, *supra* note 30, § 83 at 49; M. PLANIOL, *supra* note 7, no. 2712 at 601.

62. LA. CIV. CODE art. 3449.

63. LA. CIV. CODE art. 3450 provides that "[r]enunciation may be express or tacit. Tacit renunciation results from circumstances that give rise to a presumption that the advantages of prescription have been abandoned. Nevertheless, with respect to immovables, renunciation of acquisitive prescription must be express and in writing."

does not expressly require recordation of such a written renunciation, but recordation does seem to be an implicit requirement. The comment to article 3450 states that the change is made "in the interest of security of titles." It is hard to imagine how security of titles could be promoted by requiring an express and written renunciation without recordation. The Civil Code requires recordation of all "sales, contracts and judgements affecting immovable property"⁶⁴ at peril of nullity as to third persons. The same is true of mortgages.⁶⁵ The law of registry as to immovables is so pervasive in Louisiana that recordation may have been an underlying assumption by the drafters when they required a written renunciation, but the lack of clarity on this point will have to be resolved by the courts or the legislature. From a purely theoretical standpoint, it certainly can be argued that because renunciation "is a declaratory, not a translative act,"⁶⁶ recordation is unnecessary, but the argument is based on overly abstract considerations and fails to recognize that although the "renunciation of a prescription is not an alienation, it resembles it very much."⁶⁷ In fact, the effect of a renunciation of prescription is so similar to an alienation that capacity to alienate is required.⁶⁸ These considerations, as well as the change's stated purpose of promoting security of titles, argue strongly for a requirement of recordation.

Even so, the very wisdom of requiring a written renunciation as to immovables is subject to doubt. To the extent that permitting any renunciation has the purpose of aiding true ownership (and it is hard to imagine any other purpose), the requirement of a written renunciation would seem to make it that much less likely that a party benefitting from a prescriptive right will renounce it. Nevertheless, the legislature has made a policy determination to promote security of titles over ease of obtaining renunciation. The impact of this policy is lessened by the absence of an express requirement of recordation.

Article 3451 requires a party renouncing prescription to have capacity to alienate, and article 3453 gives parties with an interest in the acquisition of a thing or in the extinction of a claim the right to plead prescription as to it despite the renunciation.

64. LA. CIV. CODE art. 2266. See the leading case in this area, *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909).

65. See LA. CIV. CODE art. 3342.

66. 28 G. BAUDRY-LACANTINERIE, *supra* note 30, § 83 at 49. Baudry-Lacantinerie and Tissier also state that renunciation "represents merely the recognition of the right of another person. The party renouncing an acquired prescription does not alienate; he fails to acquire. . . . If an immovable is involved, renunciation does not represent an alienation which can be recorded." *Id.* § 82.

67. *Id.* § 86 at 51.

68. LA. CIV. CODE art. 3451.

Suspension of Prescription as to Persons Lacking Capacity

Article 3468 preserves the approach under the old law of suspending prescription "against minors and interdicts unless exception is established by legislation," even though exceptions have almost destroyed the rule. The scheme is preserved because of provisions present "in the Civil Code and in the Revised Statutes that may be interpreted to suspend prescription as to minors and interdicts."⁶⁹ The wisdom of preserving the old scheme is questionable. The determinations of which prescriptions are suspended have been made in piecemeal fashion, resulting in a legal patchwork which lacks logic and internal consistency. The controlling criteria for suspension should be based on the particular characteristics of the various prescriptions and the policies underlying each.

Article 3474 changes the law by establishing yet another exception: the ten-year acquisitive prescription of immovables now "runs against absentees and incompetents, including minors and interdicts." Under the old law, the prescription ran against minors and interdicts but only accrued against minors one year after the attainment of the majority.⁷⁰ The reason for the change is stated in comment (b) to article 3474: "minors should occupy the same position as other incompetents." The revision makes no such change as to the three-year or ten-year acquisitive prescription of movables;⁷¹ these prescriptions

69. LA. CIV. CODE art. 3468, comment (b). Article 3451 of the Civil Code (repealed 1982) provides that the

prescriptions mentioned in [article 3540, which governs the five-year liberative prescription as to actions on negotiable and nonnegotiable bills and notes], those provided in [articles 3534-3539, which govern the general liberative prescriptions of one and three years], and those of thirty years, whether acquisitive or liberative, shall run against minors and interdicted persons, reserving, however, recourse against their tutors or curators. These prescriptions shall also run against persons residing out of the state.

Article 763 provides that the prescription of nonuse as to servitudes runs against minors and other incompetents, and LA. R.S. 9:5805 (1950) likewise provides that the prescription of nonuse as to mineral servitudes (LA. MIN. CODE: LA. R.S. 31:27(1) (Supp. 1975)) runs against minors and interdicts. The five-year prescription on actions to set aside sheriff's deeds, which is provided by La. R.S. 9:5642 (1950), is suspended for minors and interdicts. Finally, the two-year prescription of Civil Code article 3543 is extended to five years for minors and interdicts.

70. LA. CIV. CODE art. 3478 (repealed 1982) provides:

He who acquires an immovable in good faith and by just title prescribes for it in ten years. This prescription shall run against interdicts, absentees and all others now excepted by law; and as to minors this prescription shall accrue and apply in nineteen years from the date of the birth of said minor; provided that this prescription once it has begun to run against a party shall not be interrupted in favor of any minor heirs of said party.

71. LA. CIV. CODE arts. 3490 & 3491.

are suspended for minors as well as interdicts. Additionally, the general liberative prescription of ten years governed by article 3544 is still suspended as to minors and interdicts.

Conversion of Precarious Possession into Legal Possession

Precarious possession is "[t]he exercise of possession over a thing with the permission of or on behalf of the owner or possessor."⁷² Comment (b) to article 3437 of the Civil Code states that by definition, the "precarious possessor . . . does *not* intend to own the thing he detains." As provided by article 3424, the intention to own the thing possessed is one of the prerequisites for the acquisition of a true possession.⁷³ When the intent is absent, the resulting precarious possession "is not simply defective possession; it excludes any concept of possession."⁷⁴ In order for the precarious possession to be converted into a true possession, however, it is not sufficient that the precarious possessor merely changes his intent, because article 3438 provides a presumption that "[a] precarious possessor, such as a lessee or depositary, . . . [possesses] for another although he may intend to possess for himself." The precarious possessor, therefore, must change his intent and rebut the presumption.⁷⁵ Articles 3439 and 3478⁷⁶ use

72. LA. CIV. CODE art. 3437.

73. LA. CIV. CODE art. 3424 provides: "To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing."

74. 2 C. AUBRY & C. RAU, *supra* note 7, § 180, at 94. See also Comment, *Elementary Considerations in the Commencement of Prescription on Immovable Property*, 12 TUL. L. REV. 608, 616 (1938), wherein the author states that "[a]lthough a claimant of land by the prescription of ten or thirty years may have exercised the requisite amount of actual, physical or corporeal possession, prescription in his favor will not commence running unless he has had the intention of possessing as owner."

75. LA. CIV. CODE art. 3438, comment (b) states that the "presumption is rebuttable."

76. LA. CIV. CODE art. 3439:

A co-owner, or his universal successor, commences to possess for himself when he demonstrates this intent by overt and unambiguous acts sufficient to give notice to his co-owner.

Any other precarious possessor, or his universal successor, commences to possess for himself when he gives actual notice of this intent to the person on whose behalf he is possessing.

LA. CIV. CODE art. 3478:

A co-owner, or his universal successor, may commence to prescribe when he demonstrates by overt and unambiguous acts sufficient to give notice to his co-owner that he intends to possess the property for himself. The acquisition and recordation of a title from a person other than a co-owner thus may mark the commencement of prescription.

Any other precarious possessor, or his universal successor, may commence to prescribe when he gives actual notice to the person on whose behalf he is possessing that he intends to possess for himself.

nearly identical wording in providing what is required to rebut the presumption and convert the precarious possession into a true possession.

The drafters state that the provisions render no change in the law, but it is submitted that a substantial change has been rendered. The two articles divide precarious possessors into two classes: (1) co-owners and their universal successors, and (2) all other precarious possessors and their universal successors. The articles change the law⁷⁷ by applying a different burden to each class for rebuttal of the presumption of precarious possession. The co-owner is held to a standard of "overt and unambiguous acts sufficient to give notice to his co-owner" of his changed intent, but all other precarious possessors are held to a higher standard requiring that "actual notice" of the changed intent be given to the person on whose behalf the precarious possessor is possessing. The old law did not require actual notice from any precarious possessors.⁷⁸ Surprisingly, the drafters seem to admit the change in an offhanded way when stating in comment (b) to article 3478 that "Louisiana courts have interpreted [article 3512 (repealed 1982)] expansively and have held that a precarious possessor may change the nature of his possession by his own overt and unambiguous acts that are sufficient to give notice to the owner." Stating the standard in terms of acts sufficient to give notice to the owner indicates an objective requirement, whereas stating the standard to be actual notice indicates a requirement that the owner's subjective awareness of the changed intent be established. In an attempt to determine the legislative intent behind the language of articles 3439 and 3478, one should proceed as the legislators did, under the premise that the provisions really do not change the law. Logic supports a determination that the apparent change in the law was not in fact rendered, because

77. LA. CIV. CODE art. 3512 (repealed 1982) provides:

Notwithstanding what is said in the two preceding articles, precarious possessors and their heirs may prescribe when the cause of their possession is changed by the act of a third person; as if a farmer, for example, acquires from another the estate which he rented. For if he refuse afterwards to pay the rent, if he declare to the lessor that he will no longer hold the estate under him, but that he chooses to enjoy it as his own, this will be a change of possession by an external act, which shall suffice to give a beginning to the prescription.

78. See note 77, *supra*. See also *Thompson's Succession v. Cyprian*, 34 So. 2d 285, 288 (La. App. 1st Cir. 1948) (the court held that the selling of timber by defendant showed a change of her precarious possession by external act which was sufficient to initiate the prescriptive period); *Thomas v. Congregation of St. Sauveur Roman Catholic Church*, 308 So. 2d 337 (La. App. 1st Cir. 1975) (plaintiffs' claim of ownership through acquisitive prescription was rejected because their ancestors, through whom they claimed, never held themselves out to the public as owners and, consequently, never converted the precarious nature of the possession); Dainow, *Work of the Appellate Courts for the 1972-1973 Term—Prescription*, 34 LA. L. REV. 274, 275 (1974).

if differing standards for termination of precarious possession are to be applied as between co-owners and all other precarious possessors, it is the former that should be subjected to the heavier burden. The co-owner who possesses the property owned in indivision does so with the consent of the other co-owners.⁷⁹ As an owner, his acts hostile to the interests of the other co-owners are less likely to incur suspicion than is the case with other precarious possessors. Having accepted *arguendo* the proposition that "actual notice" does not mean actual, subjective notice, the next step is to examine the relevant cases cited in the comments to the two provisions⁸⁰ in an attempt to discover what "actual notice" might mean to the drafters and the legislators. Unfortunately, the cases are not helpful.⁸¹ The conclusion is inescapable that the legislative intent behind articles 3439 and 3478 is that "actual notice" means exactly what it appears to mean. A textual analysis, considering particularly the juxtaposition of the two standards in each article, confirms this conclusion.

Clarifications and Codifications

Quasi-Possession of Incorporeals

Civil Code article 3421 declares that "[t]he rules governing possession apply by analogy to the quasi-possession of incorporeals," codifying the well-settled jurisprudence to that effect.⁸² While noting that the "differentiation between possession and quasi-possession has mostly

79. *Cf.* *Butler v. Hensley*, 332 So. 2d 315 (La. App. 4th Cir. 1976) (holding that neither co-owner is entitled to possession of the property exclusive of the other).

80. LA. CIV. CODE art. 3439, comment (b) states that according to well-settled Louisiana jurisprudence, "a precarious possessor commences to possess for himself when he gives notice and manifests his intention to possess as owner by overt and unambiguous acts." LA. CIV. CODE art. 3478, comment (b), states that Louisiana courts interpreting former article 3512 "have held that a precarious possessor may change the nature of his possession by his own overt and unambiguous acts that are sufficient to give notice to the owner." The two comments each cite the same three cases in support of these very different propositions. See note 81, *infra*.

81. *Succession of Seals*, 243 La. 1056, 150 So. 2d 13 (1963) and *Depuis v. Broadhurst*, 213 So. 2d 528 (La. App. 3d Cir. 1968) are not helpful because both cases involve co-owners. *Thayer v. Waples*, 26 La. Ann. 502 (1874), although involving a precarious possessor who was a lessee rather than a co-owner, sheds even less light on the question of the meaning of "actual notice." The action therein was a suit for damages brought by a lessee in response to his ejection from the leased premises by his lessor. The court's only statement having even a tangential relationship to the issue at hand was that "when a tenant denies the title of his landlord, the relation between them is severed and the right of entry by the landlord is complete." *Id.* at 503. The court never stated that such a denial is a prerequisite to termination of precarious possession, nor should it have as the issue had no bearing on the case.

82. See *Louisiana Irrigation & Mill Co. v. Pousson*, 262 La. 973, 265 So. 2d 756 (1972); *Parkway Dev. Corp. v. City of Shreveport*, 342 So. 2d 151 (La. 1977).

doctrinal significance,"⁸³ Professor Yiannopoulos has explained the analogous applicability of the rules of possession to the concept of quasi-possession as follows:

Strictly speaking, one may not have corporeal possession of a real right because one cannot have physical control of an incorporeal. However, one may exercise a real right by means of material acts or constructions. This form of exercise of a real right corresponds to the corporeal possession of a tract of land. The intent to have a real right as one's own after the cessation of material acts or removal of constructions corresponds to civil possession.⁸⁴

The Code of Civil Procedure expressly accords possessory protection to the quasi-possession of incorporeal immovables.⁸⁵

Possession and the Right to Possess

Civil Code article 3422 distinguishes between the fact of possession and the right to possess by declaring that "[p]ossession is a matter of fact; nevertheless, one who has possessed a thing for over a year acquires the right to possess it."⁸⁶ The right to possess, as distinguished from the fact of possession, is significant for two related reasons: (1) establishment of the right to possess is a prerequisite to the bringing of the possessory action,⁸⁷ and (2) under Civil Code article 3434,⁸⁸ once acquired, the right to possess will be maintained

83. 1 A. YIANNOPOULOS, *supra* note 60, § 211 at 565.

84. *Id.* See also 2 C. AUBRY & C. RAU, *supra* note 7, § 177 at 83. Civil possession may not be adequate to maintain the real right because of the strong policy in Louisiana which disfavors dismemberments of ownership. This policy is reflected in the revision by article 3448, which provides that "[p]rescription of nonuse is a mode of extinction of a real right other than ownership as a result of failure to exercise the right for a period of time." On this point, see A. YIANNOPOULOS, *supra* note 60, § 211 at 566.

85. LA. CODE CIV. P. art. 3656 provides in pertinent part: "A plaintiff in a possessory action shall be one who possesses for himself. A person entitled to the use or usufruct of immovable property, and one who owns a real right therein, possesses for himself." LA. CODE CIV. P. art. 3658 provides in pertinent part: "To maintain the possessory action the possessor must allege and prove that: (1) He had possession of the immovable or real right therein at the time the disturbance occurred"

86. For a thorough discussion of the distinction, with emphasis on the practical consequences and historical development, see *Liner v. Louisiana Land & Exploration Co.*, 319 So.2d 766, 779 (1975) (Tate, J., concurring).

87. LA. CODE CIV. P. art. 3658 provides in pertinent part: "To maintain the possessory action, the possessor must allege and prove that: . . . (2) He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud"

88. LA. CIV. CODE art. 3434 provides: "The right to possess is lost upon abandonment of possession. In case of eviction, the right to possess is lost if the possessor

despite a usurpation of actual possession, unless the holder of the right fails to recover possession within a year of the eviction. The reasoning behind article 3434 is obvious: after possessing adversely for over a full year, the usurper acquires the right to possess and its attendant possessory protection. An abandonment of possession⁸⁹ causes an immediate divestiture of the right under article 3434. The revision *Exposé des Motifs* states that "the right to possess is both assignable and heritable."⁹⁰

Possession without Title

Article 3426 provides that "[o]ne who possesses a part of an immovable by virtue of a title is deemed to have constructive possession within the limits of his title." Comment (b) states that one "may have constructive corporeal or constructive civil possession [and] one may have constructive possession by virtue of a defective title." However, article 3426 also provides that "[i]n the absence of title, one has possession only of the area he actually possesses," codifying jurisprudence to that effect.⁹¹ When the possessor lacks title, the court usually will consider him to be

possessing only that part of the property over which he exercises actual, adverse, corporeal possession. . . . evidenced by an enclosure of some type to definitely fix its limits, or it must be evidenced by some external and public signs sufficient to give notice to the public of the character and extent of the possession.⁹²

Peremption

By virtue of four new provisions,⁹³ the Civil Code finally recognizes the notion of peremption (forfeiture) so long recognized by Louisiana courts.⁹⁴ Like liberative prescription, peremption affects rights in terms

does not recover possession within a year of the eviction. When the right to possess is lost, possession is interrupted."

89. See note 53, *supra*, for jurisprudential illustrations of abandonment of possession.

90. LA. CIV. CODE ANN. bk. III, tits. XXIII & XXIV, *Exposé des Motifs* (West Supp. 1983).

91. See *Louisiana Land Co. v. Blakewood*, 131 La. 539, 59 So. 984 (1912); *Johnson v. La Bokay Corp.*, 326 So. 2d 589 (La. App. 3d Cir. 1976).

92. *Johnson v. La Bokay Corp.*, 326 So. 2d 589, 593 (La. App. 3d Cir. 1976). Comment (d) to Civil Code article 3426 states that absent title, the possessor's actual possession must be "either inch by inch possession (*pedis possessio*) or within enclosures. According to well-settled Louisiana jurisprudence, an enclosure is any natural or artificial boundary."

93. LA. CIV. CODE arts. 3458-3461.

94. See cases cited in note 99, *infra*.

of the passage of time.⁹⁵ Most of the differences between peremption and liberative prescription are stated in article 3461, which provides that "[p]eremption may not be renounced, interrupted, or suspended." Additionally, the court, on its own motion, may supply relevant peremption provisions, even where the litigants fail to plead the issue.⁹⁶ Finally, the effect of peremption is to extinguish the right entirely,⁹⁷ rather than merely to bar the action. Consequently, not even a natural obligation subsists once the peremptive period has expired.⁹⁸

Knowing the differences between peremption and liberative prescription is of limited assistance in determining whether a particular statute provides for a period of peremption or a period of liberative prescription. Comment (c) to article 3458 provides some guidance when stating that the determination "must be made in each case in the light of the purpose of the rule in question and in light of whether the intent behind the rule is to bar action or to limit the duration of a right." The best guidance is to be found both by analogy to those cases in which the court was faced with the problem⁹⁹ and in scholarly discussion.¹⁰⁰ One writer discusses the problem from the court's perspective:

Accordingly, the court has to "make" an answer for new cases, and usually does by examining the language of the pertinent law to see whether it seems to be an ordinary or general limitation and subject to interruption, or whether the text indicates the creation of a right with a fixed duration of existence not subject to any interference with the running of time, and becoming absolutely extinct when the calendar period has elapsed.¹⁰¹

95. LA. CIV. CODE art. 3458 provides: "Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period."

96. LA. CIV. CODE art. 3460 provides: "Peremption may be pleaded or it may be supplied by the court on its own motion at any time prior to final judgement."

97. LA. CIV. CODE art. 3458. Comment (c) to article 3461 states that "when an action asserting a right subject to peremption has been commenced or served as provided in article 3462, the right has been exercised and so long as the action is pending the lapse of the period of peremption does not extinguish the right."

98. See Dainow, *The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Prescription*, 29 LA. L. REV. 230 (1969).

99. See *Succession of Pizzillo*, 223 La. 328, 65 So. 2d 783 (1953); *Collier v. Marks*, 220 La. 521, 57 So. 2d 43 (1952); *Brister v. Wray-Dickinson Co.*, 183 La. 562, 164 So. 415 (1935); *Guillory v. Avoyelles Ry. Co.*, 104 La. 11, 28 So. 899 (1900).

100. See 28 G. BAUDRY-LACANTINERIE, *supra* note 30, § 38 at 25; Dainow, *The Work of the Supreme Court for the 1952-1953 Term—Prescription*, 14 LA. L. REV. 129 (1953); Dainow, *supra* note 98, at 230; Comment, *Legal Rights and the Passage of Time*, 41 LA. L. REV. 220 (1980).

101. Dainow, *supra* note 98, at 231.

Interruption of Prescription—Filing of Suit or Service of Process

Article 3463¹⁰² clarifies the law regarding interruptions of prescription caused by either the filing of suit in a court of competent jurisdiction and venue or the service of process.¹⁰³ The interruption continues for the entire pendency of the suit.¹⁰⁴ Comment (b) to article 3463 states that the clarification is a response to some Louisiana decisions¹⁰⁵ which had referred to a suspension of prescription during the pendency of the suit.¹⁰⁶ Properly speaking, it is the entire pendency of the suit which interrupts prescription; the filing of the action or the service of process merely marks the time at which the interruption commences.¹⁰⁷

Relational Suspensions of Prescription

Article 3469 suspends prescription "as between: the spouses during marriage, parents and children during minority, tutors and minors during tutelage, and curators and interdicts during interdiction." Comment (c) states that there "is no suspension of prescription vis-a-vis third persons. Thus liberative prescription, acquisitive prescription, and prescription of nonuse may accrue in favor of a third person to

102. LA. CIV. CODE art. 3463 provides:

An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit at trial.

103. LA. CIV. CODE art. 3462 provides:

Prescription is interrupted when the owner commences action against the possessor, or when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period.

104. The consequences of article 3463's provision for continuous interruption are stated in comment (b):

[If] the suit is dismissed with prejudice, the interruption of prescription is immaterial because of res judicata. If the action is successful, the interruption of prescription has produced its effect: plaintiff's right is recognized by the judgment in his favor. However, if an interruption results and the action is dismissed without prejudice, the period during which the action was pending does not count toward the accrual of prescription. The plaintiff then has the full prescriptive period within which to bring a new action.

105. See *Hebert v. Cournoyer Oldsmobile-Cadillac-GMC, Inc.*, 405 So. 2d 359, 361 (La. App. 4th Cir. 1981); *Marshall v. Southern Farm Bureau Casualty Co.*, 204 So. 2d 665, 667 (La. App. 3d Cir. 1967).

106. Compare Civil Code article 3466 (effect of interruption) with article 3472 (effect of suspension) to see the significant consequences of the distinction.

107. See *Borne v. La Terre Co.*, 222 F.2d 453 (5th Cir. 1955); *Levy v. Stelly*, 277 So. 2d 194 (La. App. 4th Cir. 1973).

the prejudice of a spouse, a minor, or an interdict." Article 3469 is a manifestation of the policy which encourages harmony between the members of these four special relationships. As between spouses and as between parents and their children, the provision is made necessary, as a matter of fairness, by procedural bars¹⁰⁸ which prevent those parties from suing each other for any but a very few enumerated causes.¹⁰⁹ The suspensions as between tutors and minors during tutorship and as between curators and interdicts during interdiction reflect the legally unequal positions in which these parties stand in their relationships.¹¹⁰

Conclusion

Act 187 is a more conservative enactment than the revision proposed by the Louisiana State Law Institute.¹¹¹ The revision, by making a determination of what rights affect a particular thing more readily available, prominently reflects a policy both of promoting security of titles and of enhancing certainty in Louisiana's property law scheme. The drafters and legislators did not use the revision as a vehicle for effecting across the board change, which of course would have been highly inappropriate given the need for long-term stability in property law. There undoubtedly will be some argument that the changes which were rendered did violate this need, but, by and large, the revision addresses the demands of a modern society with vastly improved means of communications and transportation. A certain amount of new

108. LA. R.S. 9:291 (Supp. 1979) provides:

Unless judicially separated, spouses may not sue each other except for causes of action arising out of a contract or the provisions of Title VI, Book III of the Civil Code; restitution of separate property; for divorce, separation from bed and board, and causes of action pertaining to the custody of a child or alimony for his support while the spouses are living separate and apart, although not judicially separated.

LA. R.S. 9:571 (Supp. 1960) provides: "The child who is not emancipated cannot sue: (1) Either parent during the continuance of their marriage, when the parents are not judicially separated; or (2) The parent who is entitled to his custody and control, when the marriage of the parents is dissolved, or the parents are judicially separated."

109. See note 108, *supra*, for the enumeration of causes. Only the right of action is affected; the cause of action is preserved and may be sued upon after the relationship terminates (the significance of the suspension of prescription during the relationship is obvious). See *Dumas v. United States Fidelity & Guar. Co.*, 241 La. 1096, 134 So. 2d 45 (1961); *Gremillion v. Caffey*, 71 So. 2d 670 (La. App. 1st Cir. 1954).

110. See LA. CIV. CODE arts. 1785, 2318, 2319.

111. One of the more innovative proposals submitted by the Louisiana State Law Institute but rejected by the legislature would have revised Civil Code article 3471 as follows: "A juridical act purporting to exclude prescription, to specify a longer period than that established by law, or to make the requirements of prescription more onerous, is null. Nevertheless, a written juridical act expressly suspending the running of prescription for a period of up to six months is valid." (emphasis added).

confusion unfortunately has been introduced into the law. However, Louisiana's law of occupancy, possession, and prescription is now more concisely, coherently, and effectively stated.

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