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## Precarious Possession

John A. Lovett

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# Precarious Possession

John A. Lovett\*

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## INTRODUCTION

The institution of acquisitive prescription has startling transformative power.<sup>1</sup> A person who commences possession of immovable property in

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\* De Van D. Daggett, Jr. Distinguished Professor, Loyola University New Orleans College of Law. This Article is dedicated to the memory of André van de Walt (1956-2016), the holder of the South African Research Chair in Property Law at Stellenbosch University, South Africa, who invited me to visit his research group and present an early draft of this Article in March 2016. His contribution to property law scholarship across the world is beyond measure. I also wish to thank Hanri Mostert, Cheryl Young, Cornelius van de Merwe, Jacques du Plessis, Hanoch Dagan, Joseph Singer, John Blevins, Nicholas Davrados, Melissa Lonegrass, and Sally Ann Richardson for their encouragements and valuable comments on earlier drafts of this Article. Finally, I gratefully acknowledge the outstanding research assistance of Aimee Chalin and Emily Breaux.

1. As French commentators G. Baudry-Lacantinerie and Albert Tissier once remarked, “Prescription is the transformation of a state of fact in a state of law.” G. BAUDRY-LACANTINERIE & ALBERT TISSIER, *PRESCRIPTION: TRAITE THEORIQUE ET PRACTIQUE DE DROIT CIVIL*, in 5 CIVIL LAW TRANSLATIONS ¶ 275, at 145 (La. St. L. Inst. trans. 1972) (4th ed. 1924).

good faith and with a just title can acquire ownership that is good against the world after just ten years of uninterrupted possession.<sup>2</sup> Even more remarkable is that a possessor who does not commence possession in good faith or who lacks a just title can still acquire ownership of an immovable after 30 years of uninterrupted possession.<sup>3</sup> Finally, a person who merely uses another person's land in a limited manner can acquire a real right in the form of an apparent servitude through either ten or 30 years of quasi-possession.<sup>4</sup>

According to several Louisiana jurists and commentators, the venerable institution of acquisitive prescription in Louisiana is now under threat.<sup>5</sup> The source of that threat is a recent decision of the Louisiana Supreme Court. In *Boudreaux v. Cummings*,<sup>6</sup> the plaintiff, John Boudreaux, and his ancestors-in-title had used a pathway across his neighbor's property since 1948 to gain access to a public road and to transport farm equipment to and from the property.<sup>7</sup> In 2012, Paul Cummings, the new owner of the adjacent land, prevented Boudreaux from using the pathway.<sup>8</sup> Boudreaux sued, claiming that he and his ancestors-in-title had acquired a predial servitude across Cummings's land by virtue of 30 years of uninterrupted quasi-possession.<sup>9</sup> Cummings defended the lawsuit by arguing that Boudreaux's possession did not count for purposes of acquisitive prescription because it had always been "precarious," that is, it had been exercised "with the permission of or on behalf of the owner."<sup>10</sup> Although

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2. LA. CIV. CODE arts. 3473–3476 (2016) (providing for ten-year acquisitive prescription of immovables for a possessor with just title and good faith; providing that possessor need only have good faith at commencement of possession).

3. *Id.* arts. 3486–3488.

4. *Id.* arts. 740, 742.

5. See *Boudreaux v. Cummings*, 167 So. 3d 559, 568 (La. 2015) (Knoll, J., dissenting) (warning that the majority decision in *Boudreaux* "severely jeopardizes the law on acquisitive prescription in this state"); A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 6.36, in LOUISIANA CIVIL LAW TREATISE (4th ed. 2013 & Supp. 2016) (reiterating Justice Knoll's warning and advising that the majority holding in *Boudreaux* "should not be read broadly and should not be read to equate permission with a landowner's awareness and failure to object to a disturbance or eviction"); Andrew M. Cox, *Boudreaux v. Cummings: The Louisiana Supreme Court Presumes Away the Right to Acquire a Servitude of Passage*, 90 TUL. L. REV. 973, 984 (2016) (suggesting that faulty reasoning in *Boudreaux* "looms dangerously over the right to prescribe a servitude of passage").

6. 167 So. 3d 559 (La. 2015).

7. *Id.* at 560.

8. *Id.*

9. *Id.*

10. *Id.* at 561 (quoting LA. CIV. CODE art. 3437 (2011)).

the trial court and a majority of the Louisiana Third Circuit Court of Appeal ruled in favor of Boudreaux, a narrow four-justice majority of the Louisiana Supreme Court disagreed and held that Boudreaux's quasi-possession of the right of way was, in fact, precarious, and thus could not lead to acquisitive prescription.<sup>11</sup>

More particularly, the majority opinion in *Boudreaux* appears to undermine the strong presumption in favor of possessors found in article 3427 of the Civil Code.<sup>12</sup> Relying on commentary interpreting an article from the 1870 Civil Code and its source article in the French Civil Code of 1804,<sup>13</sup> the majority of the Louisiana Supreme Court found that Boudreaux's use of the pathway across his neighbor's property occurred with the "implied or tacit permission" of his original neighbors as a "gesture of neighborly accommodation."<sup>14</sup> Despite the strong presumption in favor of a possessor expressed in article 3427, the majority held that "under the limited circumstances where 'indulgence' and acts of 'good neighborhood' are present," the possessor's acts of possession are presumed to have occurred with the owner's "tacit permission."<sup>15</sup> Thus, as the Court put it, "Cummings'[s] awareness of Boudreaux's use and his allowance thereof marks Boudreaux's use as an authorized use that cannot be characterized as adverse under the circumstances."<sup>16</sup> In apparent recognition of the difficult legal and factual issues the case raised, the majority took the unusual step of stating that its holding in *Boudreaux* was "strictly limited to the facts before us."<sup>17</sup>

Justice Jeannette Knoll authored a blistering dissent in *Boudreaux*. She contends that the majority decision "eviscerates the well-established burden-shifting structure laid out in our Civil Code" by allowing an owner to prevail in an acquisitive prescription case based simply on an assertion of "neighborliness" without having to introduce any evidence that a

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11. *Id.* at 562–64.

12. *See id.* at 566. ("One is presumed to intend to possess as owner unless he began to possess in the name of and for another." LA. CIV. CODE art. 3427 (2016)).

13. A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 139, *in* 4 LOUISIANA CIVIL LAW TREATISE (3d ed. 1997).

14. *Boudreaux*, 167 So. 3d at 562.

15. *Id.* at 563.

16. *Id.* at 564. The majority's reference to the awareness of Cummings is itself confusing because the period of tacit permission would have begun during the ownership of Cummings' predecessor-in-title. As discussed in Part III, Justice Weimer's concurring opinion focuses more extensively—and properly—on the relationship between Boudreaux and Cummings' predecessor-in-title—the Weills. *Boudreaux*, 167 So. 3d at 568–72 (Weimer, J., concurring).

17. *Id.*

claimant's possession is actually precarious.<sup>18</sup> Two other justices joined Justice Knoll in dissent.<sup>19</sup> Penning a lengthy concurring opinion, Justice John Weimer agreed with the majority's disposition of the case but justified his conclusion based on additional facts in the record while also reflecting on the utilitarian and moral values that both support and complicate 30-year "bad faith" acquisitive prescription in Louisiana.<sup>20</sup>

This Article seeks to place the controversy spawned by the majority opinion in *Boudreaux*—and in particular the controversy over precarious possession—in a broader doctrinal framework. At the outset, however, this framework acknowledges that precarious possession has rarely been a problem in cases involving claims of ten-year, good-faith acquisitive prescription. In those cases, although precarious possession could theoretically be asserted as a defense by a landowner, courts primarily focus on whether the claimant actually possessed the land at issue by virtue of a "just title,"<sup>21</sup> or whether the claimant's profession of "good faith" was reasonable in light of objective circumstances.<sup>22</sup> With that caveat in place, this Article takes aim at the problem of precarious possession in the context of bad-faith acquisitive prescription or when bad-faith acquisitive prescription is likely to be asserted after the completion of a possessory action.

To address whether precarious possession is actually undermining the institution of acquisitive prescription, this Article takes a step back and looks at a broad range of precarious possession cases decided in the last 50 years in Louisiana. This broader review reveals that almost all precarious possession disputes fall into one of three different relational contexts. The first involves parties who are more or less strangers to one another. In the second, parties find themselves connected to one another through a contractual relationship or by virtue of some special legal status, typically a co-ownership or family relationship, or some other *sui generis* special relationship. The third context involves parties who are neighbors

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18. *Id.* at 565 (Knoll, J., dissenting).

19. Justice Crichton also authored his own short dissenting opinion in which he contended that the legal presumption to which *Boudreaux* was entitled as a possessor combined with Cummings's failure to present any evidence to rebut that presumption should have mandated affirming the lower court rulings. *Id.* at 572–73 (Crichton, J., dissenting). Justice Hughes dissented for the reasons given by both Justice Knoll and Justice Crichton. *Id.* at 572.

20. *Id.* at 568–72 (Knoll, J. dissenting).

21. Compare *Cantrelle v. Gaude*, 700 So. 2d 523 (La. Ct. App. 1997), with *Barrios v. Panepinto*, 133 So. 3d 36, 38 (La. Ct. App. 2014).

22. See, e.g., *Philips v. Parker*, 483 So. 2d 972 (La. 1986); *Mai v. Floyd*, 951 So. 2d 244 (La. Ct. App. 2006).

and know one another relatively well or who are at least members of the same relatively small or tight-knit community.

In the first two classes of cases, the rules and presumptions located in the Louisiana Civil Code and developed by Louisiana courts tend to operate effectively. With some notable exceptions, these first two kinds of precarious possession cases—stranger cases and contractual or legal status cases—yield relatively predicable results that are consistent with many of the utilitarian and natural rights justifications traditionally offered both to support and limit acquisitive prescription.

Cases involving neighbors and members of close-knit communities, however, tend to create more challenges. In this third category of acquisitive prescription cases, the results appear, just as in *Boudreaux*, more unstable and unpredictable. In these cases, the powerful normative arguments justifying acquisitive prescription conflict sharply with the normative justifications for the limiting effect of precarious possession. To help parties and courts resolve these difficult neighbor and close-knit community cases, Louisiana law needs a more refined approach. First, Louisiana courts must forthrightly acknowledge the long-term, mutually beneficial relationships that are at the heart of these especially difficult cases. Second, Louisiana courts should consider applying a presumption of sharing in these cases.

With this new presumption of sharing, this Article introduces a principle that will honor an important normative value that already underlies much of Louisiana property law and that courts often expressly recognize. The principle is that neighbors should be encouraged, as Judge Weimer himself recognized in *Boudreaux*, to act “as a good neighbor in allowing use of [their] property.”<sup>23</sup> Louisiana law should create incentives for neighbors to form relationships of mutual support and accommodation. It should reward, not punish, neighbors who share their resources with one another. It should respect neighbors who engage in cooperative practices that enable all members of a close-knit community to gain access to the resources they need to flourish as human beings. The presumption of sharing this Article calls for will validate the moral impulse that Louisiana judges often recognize in these kinds of cases. Accordingly, owners who appear to have granted their neighbors consent to possess or access their property would, at the outset of that relationship at least, benefit from a presumption that they are sharing their property with a neighbor who needs it for some limited purpose.

At some point in time, however, typically after a long pattern of continuous activity, possession that began with an implied permission of the

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23. *Boudreaux*, 167 So. 3d at 572.

owner and that was motivated by a normatively attractive desire to share resources can lead non-owners to believe that they have acquired real rights in the property to which they have gained access. The non-owners may begin to organize their affairs in a manner that depends on the continuing access to the neighbor's property. They may make investments in their own property or make improvements in the neighbor's property that are grounded in a reasonable expectation that access will continue. Further, as time passes, the original parties, as well as their heirs, descendants, and successors, may forget the circumstances surrounding the original implied permission that led to the original access or possession. Indeed, possessors might quite reasonably come to believe that they are possessing just as an owner would possess or that they are enjoying another's property in the same manner a servitude holder would enjoy it.

In these situations, possessors should have the ability to rebut the presumption of sharing by introducing evidence to show that the originally permissive nature of the possession has been transformed into possession as owner. Article 3439 of the Civil Code recognizes this necessity in part by providing that "co-owner[s]" can begin to possess adversely by demonstrating "overt and unambiguous acts sufficient to give notice" to their co-owners and by recognizing that "[a]ny other precarious possessor[s]" can begin to possess adversely by giving "actual notice" of their intentions to the owner.<sup>24</sup> In cases involving neighbors and members of close-knit communities, however, in which possession may have occurred for especially long periods of time and memories are likely to have faded, the "actual notice" standard of article 3439 often fails. It fails because it is too rigid and formalistic a tool for courts to use in these complex relational contexts. In response to this inflexibility, this Article proposes to allow a neighbor or close-knit community member to rebut the presumption of sharing in the specific relational context of a neighbor dispute by demonstrating the termination of precarious possession by resorting to a set of indicia of giving or renunciation. Collectively, these indicia provide an outer limit on the presumption of sharing and give courts a set of specific criteria to use in determining when the presumption of sharing has reached its breaking point.<sup>25</sup>

This Article's observation that precarious possession serves as a doctrinal safety valve to reign in or limit bad-faith acquisitive prescription's startling transformative power has a curious common law analogue. In 1983, Professor

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24. LA. CIV. CODE art. 3439 (2016).

25. This Article recognizes that courts should always be cognizant that an "acknowledgment" of another person's property or contractual rights, whether "formal or informal, express or tacit," can interrupt prescription. *See* LA. CIV. CODE art. 3464 cmt. c.

Richard Helmholz published a seminal article regarding the role of subjective intent in American adverse possession law.<sup>26</sup> Helmholz argued that common law courts were consistently rejecting assertions of adverse possession when it appeared that the claimant did not possess the disputed land in good faith.<sup>27</sup> According to Helmholz, this practice of favoring good-faith claimants contradicted hornbook law, which consistently took the position that an adverse possessor's subjective intent was irrelevant as long as the claimants could show that their possession was "hostile," that is, not permissive.<sup>28</sup> Although Helmholz's claim about the powerful *sub-rosa* importance of good faith in adverse possession was challenged by another eminent scholar at the time,<sup>29</sup> the important point for Louisiana is that there is evidence that other U.S. courts are often uncomfortable with the end result of adverse possession or acquisitive prescription, especially when an adverse possessor in bad faith is poised to acquire ownership or a prescriptive servitude.

Part I of this Article briefly traces the historical evolution of acquisitive prescription in civil law with a particular emphasis on the debate over whether bad-faith acquisitive prescription should be permitted to overcome the rights of formal titleholders. This Part also evaluates how French and Louisiana commentators have understood the role of precarious possession as a doctrine limiting acquisitive prescription. Finally, it reviews the solid policy justifications for Louisiana's two-tier good- and bad-faith acquisitive prescription regime.

Part II sets forth a taxonomy of precarious possession cases in Louisiana and shows how Louisiana courts have resolved stranger cases and contractual relationship and legal status cases with relative consistency. This Part concludes by showing that neighbor and close-knit community cases,

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26. R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331 (1983).

27. *Id.* at 339–40.

28. *Id.* at 331–33.

29. Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U.L.Q. 1 (1986). Cunningham contended that most U.S. courts—those not bound by a statute or state supreme court precedent requiring the adverse possessor to have a good-faith belief he was possessing as owner—still adhered to the objective interpretation of the "hostile by claim of right" element and, moreover, that most of the decisions adverse to bad-faith possessors upon which Helmholz relied could be explained on other grounds. *Id.* Although Helmholz and Cunningham continued their debate, the controversy has never been definitively resolved. See R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U.L.Q. 65 (1986); Roger A. Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U.L.Q. 1167 (1986).

however, are especially difficult for Louisiana courts to resolve and tend to produce the most inconsistent results.

Finally, Part III explains why, in the most difficult category of precarious possession cases—those involving neighbors or members of the same close-knit community—Louisiana law would be well served by the introduction of a presumption of sharing and an indicia of renunciation or giving. After explaining this new framework for category three cases and addressing some likely objections, the conclusion of Part III returns to *Boudreaux v. Cummings* and shows how that case might have been resolved in light of this new framework.

## I. UP FROM ROME

### *A. Acquisitive Prescription in the Civil Law Tradition*

Although most of this Article addresses developments in Louisiana precarious possession jurisprudence that have occurred over the last 50 years, it is impossible to assess those developments without some understanding of the Roman, Spanish, and French sources of Louisiana law on acquisitive prescription and precarious possession in particular. This Section emphasizes three crucial points about pre-codification civil law: first, the variability of Roman law over time with respect to the requirements of good faith and just title for acquisitive prescription; second, the dispute in pre-codification French law over the propriety of recognizing bad-faith acquisitive prescription; and third, the acceptance of a Romanist, as opposed to a Canonist, conception of acquisitive prescription when France finally codified its civil law in the Code Napoleon.

#### *1. Roman Law and Pre-Codification French Law*

Louisiana's double-barreled institution of good- and bad-faith acquisitive prescription is derived from French and Spanish law and thus ultimately from Roman law. Roman law on acquisitive prescription was neither static nor simple. From the time of the Twelve Tables to Justinian's compilation, Roman law recognized that possession could lead to acquisition of ownership through either *usucapio* or *prescriptio*. At various time periods during the Roman Empire, Roman law required that the possessor have a title and possess in good faith. At other historical moments, it recognized the possibility that individuals whom Louisiana law might classify as bad-faith

possessors could also acquire ownership.<sup>30</sup> For instance, in the later imperial period, Roman law recognized both the institutions of *longi temporis praescriptio*, that is, long-term prescription, which required just title and good faith,<sup>31</sup> and *longissimi temporis praescriptio*, that is, very long-term prescription, which allowed a possessor who lacked title or good faith to plead 30-year prescription as a defense to an action in revendication.<sup>32</sup> Eventually Justinian's compilation codified a form of long-term prescription that required good faith and 10 to 20 years of possession and made very long-term prescription an affirmative mode of acquisition that required good faith at the commencement of the possession.<sup>33</sup>

The nature of acquisition prescription with respect to immovables in pre-codification French law was no less contested. During the early post-Roman period, some regions of France followed written law, that is, Roman law, on acquisitive prescription, but in other regions customary law resisted the influence of Roman law and preserved idiosyncratic prescription rules.<sup>34</sup> Yet even in areas where Roman law was followed, the difficulty of meeting the requirements of good faith, just title, and 10 to 20 years of possession meant that in practice 30-year prescription, which did not require title, was often the primary means of prescription.<sup>35</sup> In regions where local custom was followed, both the 10-to-20-year and 30-year prescriptions were used.<sup>36</sup>

The regional conflicts over the actual law in practice also mirrored a deeper philosophical debate in France. Advocates of canon law, as Baudry-Lacantinerie and Tissier explain, "generally tried to inject morality and equity into the institution of prescription,"<sup>37</sup> ignored the utilitarian goals of prescription, and tried to limit the institution to one providing merely a

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30. See generally Ernst J. Marais, *Acquisitive Prescription in View of the Property Clause 18–27* (Aug. 5, 2011) (L.L.D. Dissertation, University of Stellenbosch) (discussing Tabula 6.3 of the Twelve Tables); DAVID JOHNSTON, *ROMAN LAW IN CONTEXT* 57 (1999); BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 122–24 (1st ed. 1975); BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶¶ 3–8, at 4–6.

31. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶¶ 8–10, at 6–7; NICHOLAS, *supra* note 30, at 128.

32. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 11, at 7.

33. *Id.*; NICHOLAS, *supra* note 30, at 127.

34. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 16, at 9. Domat also noted the regional diversity of approaches to acquisitive prescription in the pre-codification era. 1 JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* 869, ¶ 2189 (William Strahan trans., Little, Brown & Co. 1853) (1694).

35. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 16, at 9.

36. *Id.*

37. *Id.* at 10.

“presumption of ownership or the discharge of a debt.”<sup>38</sup> In contrast, civil law proponents sought to leave good faith out of 30-year prescription entirely and require it only at the commencement of 10-to-20-year prescription.<sup>39</sup> The state of Spanish law regarding acquisitive prescription was similar to pre-codification French Law in that multiple modes of prescription were recognized,<sup>40</sup> leading in turn to scholastic debates over the ultimate purpose of acquisitive prescription.<sup>41</sup>

The most important point for this Article’s purposes is that the choice between a unitary system, in which only good-faith acquisitive prescription is allowed, and a two-tier system, in which both good- and bad-faith acquisitive prescription are permitted, was clearly apparent to the French jurists on the eve of French codification and thereafter.<sup>42</sup> Moreover, commentators like Baudry-Lacantinerie and Tissier clearly sympathized with the Romanist approach and rejected the canon law view. They regarded a good-faith requirement as an anachronistic relic of a more violent feudal era,<sup>43</sup> one that

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38. *Id.*

39. *Id.* By contrast, canon law insisted that there be good faith throughout the entire period of possession. *Id.*

40. For example, *Las Siete Partidas* acknowledged the existence of both good- and bad-faith acquisitive prescription with respect to immovables. 1 THE LAWS OF LAS SIETE PARTIDAS 382 (L. Moreau Lislet & Henry Carlton trans. 1978) (1820) (providing for 10- and 20-year prescription of “things immoveable and incorporeal” for possessors “in good faith, either by purchase, or exchange or as a donation or legacy, or by any other just title”); *id.* at 384–85 (providing “[i]f a man have continued possession of a thing during thirty years or more, no matter how he obtained it; and no suit be brought against him for it, during the whole of that time, he will acquire it by prescription”).

41. See also JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 142–44 (2006) (discussing work of 17th-century Dutch and Spanish scholars known as the “late scholastics” who, following Aquinas, attempted to rationalize the existence of bad-faith acquisitive prescription).

42. See BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 17, at 7 (noting that within Roman law one could find “the two institutions which we shall again find in the Civil code in the form of acquisitive prescription of immovables: the prescription of ten-to-twenty years with just title and good faith; and the prescription by thirty years”).

43. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 19, at 11.

Although it conforms better with morality, a doctrine requiring good faith in an absolute manner, is a source of difficulty in practice. There was possibly a reason for it during the feudal era when plunder must have been frequent. But under normal conditions it does not seem to be the rule of law which should prevail.

introduced too many “artificial pretexts” and special interest protections into a socially beneficial institution.<sup>44</sup>

2. *French Codification and Subsequent French Commentary  
Justifying Acquisitive Prescription*

The promulgation of the *Code Civil* in 1804 resolved the debate in France over the extent and purposes of acquisitive prescription. Rather than limit acquisitive prescription to good-faith possessors,<sup>45</sup> the *Code Civil* provided a general 30-year acquisitive prescription available to any possessor, regardless of his *bona fides* or *mala fides*.<sup>46</sup> Planiol emphasized that this 30-year acquisitive prescription represented “the general rule in matters of acquisitive prescription,” while the “abridged prescription” of 10 to 20 years was “an exception.”<sup>47</sup> For Baudry-Lacantinerie and Tissier, this broad understanding of acquisitive prescription was an article of faith.<sup>48</sup>

The classic French commentators still revered in Louisiana today generally justified acquisitive prescription in similar terms. To start, all observed that acquisitive prescription is necessary to promote certainty and stability in ownership, particularly when it comes to long-term possessors

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44. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 19, at 10–11.

45. The *Code Civil* did provide a 10-to-20-year prescriptive period for good-faith possessors with just title in article 2265. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2265 (Fr.) (Barrister of the Inner Temple trans. 1824) (1804).

46. *Id.* art. 2262. “All actions, as well real as personal, are prescribed by thirty years, without compelling the party who alleges it to produce a document thereon, or without permitting an objection to be opposed to him derived from bad faith.” *Id.* According to Aubry and Rau, the reference to “bad faith” in the last clause of article 2262, combined with article 690, which provided for acquisitive prescription of apparent and continuous servitudes without just title or good faith, meant that 30-year acquisitive prescription provided not just a defense to a claim for restitution by the “legitimate owner,” but also “a means to acquire ownership.” AUBRY & RAU, 2 CIVIL LAW TRANSLATIONS: DROIT CIVIL FRANCAIS § 216 (Paul Esmein ed., 7th ed. 1966). *See also* C. CIV. art. 690 (Fr.).

47. 1 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW 574 (La. St. L. Inst. trans., 12th ed. 1959) (1939).

48. As they put it:

*Acquisitive* prescription is a mode of acquiring ownership as a result of a lawful possession over a certain period of time. Thus if I enter into possession of land belonging to my neighbor and hold it thirty years as if it were mine, the fact of my possession will become a legal title at the end of this period. If the former owner then claims his property, I can plead prescription and he will lose.

BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 25, at 15.

who possess by virtue of some title or conveyance. Such possessors, they noted, would otherwise have to prove a perfect chain of title back to some original grant from the sovereign, a burden that can often be difficult, if not impossible, to meet, whenever they were challenged by a purported record owner relying on a more ancient title or conveyance.<sup>49</sup> From this perspective, acquisitive prescription provides an efficient and fair method for this presumably innocent or good faith, long-term possessor to establish ownership and beat back an apparently predatory claim based on an ancient instrument. It is efficient because the evidence of possession would presumably be more readily accessible than incomplete or old title records. It is also fair, Baudry-Lacantinerie and Tissier suggested, because community acquiescence to the long-term possession must mean that the possessor has some legitimate foundation for the possession.<sup>50</sup> In general, then, acquisitive prescription serves the valuable social purpose of aligning title with long-term possession.

Second, focusing on 30-year acquisitive prescription in particular, Baudry-Lacantinerie and Tissier justified “[the] spoliation of the owner” on the owner’s own “gross negligence” in failing to protect the right and on the likelihood that the owner’s “long silence” will lead the possessor to conclude, with justification, that the owner has “renounced his right.”<sup>51</sup> Planiol similarly justified bad-faith acquisitive prescription by citing the record owner’s “negligence” in failing to perform acts of possession or otherwise protect the title.<sup>52</sup> Further emphasizing the adverse possessor’s perspective and anticipating modern reliance interest theories,<sup>53</sup> Baudry-Lacantinerie and Tissier also justified the transfer of title based on the natural rights of the bad-faith possessor “who through thirty uninterrupted years of work, activity, and, perhaps, worry, has sufficiently expiated the violation of an unclaimed right” and thus deserves some form of “amnesty.”<sup>54</sup>

Finally, Baudry-Lacantinerie and Tissier also justified acquisitive prescription from an even broader, societal perspective by suggesting that the institution preserves social peace and social order. As a safety valve would, acquisitive prescription alleviates the social pressure and temptation for possessors to engage in acts of self-help or even violence that could otherwise result from strict enforcement of property rights

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49. AUBRY & RAU, *supra* note 46, at 320; PLANIOL, *supra* note 47, at 571–72; BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶¶ 27–29, at 16–19.

50. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 27, at 17 (citing Domat).

51. *Id.* § 28, at 17–18.

52. PLANIOL, *supra* note 47, at 571–72.

53. See discussion *infra* at notes 135–37 and accompanying text.

54. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 28, at 18.

existing in paper titles only.<sup>55</sup> Here, Baudry-Lacantinerie and Tissier anticipate a modern strain of property theory that accounts for why, in the United States at least, adverse possession played an important role in resolving social tension on the American frontier in the 19th century.<sup>56</sup> In Baudry-Lacantinerie and Tissier's final utilitarian calculus, the collective benefits favoring "social interest" served by acquisitive prescription clearly outweigh the demoralization costs that the institution might inflict on a few passive record owners.<sup>57</sup>

*B. The Concept of Precarious Possession in Roman and French Law*

The term "precarious possession" also emerged from Roman law. A Roman *precarium* was a specialized contract in which an owner allowed another person to possess or enjoy a thing on the condition that it would be returned at the owner's demand.<sup>58</sup> The notion that precarious possession has its origins in a contractual relationship is an important one, especially in cases involving certain express contractual relationships and even in cases in which the relationship between the parties emerges from an implied or tacit contractual relationship.<sup>59</sup>

For Baudry-Lacantinerie and Tissier, however, the concept of precarious possession in Roman law was still quite narrow: "[I]t qualified the possession of a person who received the thing with the authorization to use it, *but with the duty to return it to the owner at his first request*."<sup>60</sup> Further, the holder *precario* in Roman law "was the possessor of the thing with respect to everyone except the person from whom he obtained it"; that is, the holder's precarious possession was only a relative vice.<sup>61</sup> Other persons holding for another, such as lessees or usufructuaries, whose rights of possession were not freely revocable and who did not owe a duty to return the thing to the owner on demand, would logically not be precarious

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55. *Id.* ¶ 29, at 18–19.

56. See EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS 55–63 (2010); see also discussion *infra* note 134 and accompanying text.

57. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 28, at 17–18.

58. A. N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 552 (1991). See also NICHOLAS, *supra* note 30, at 151 (referring to the status of creditor holding collateral pursuant to a security contract as "*precario*").

59. See *infra* Part II.

60. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 267, at 142 (emphasis added).

61. *Id.*

possessors in this narrow sense.<sup>62</sup> The glossators and canonists, however, are responsible for our current understanding of the term because they broadened the expression “precarious possessor” to refer to “all who possess for another and recognize a higher title.”<sup>63</sup>

The concept of precarious possession was eventually codified in articles 2230 to 2232 and article 2236 of the French Civil Code of 1804,<sup>64</sup> and these articles in turn generated significant academic commentary. Four crucial ideas emerge from that commentary.

### *1. True Possession Equals Detention Supplemented by Animus*

The first idea is commonplace. Possession in the true legal sense—the type of possession necessary for acquisitive prescription, that merits protection through a possessory action, and that generates any of the other derivative benefits of possession—depends on two crucial, but distinct, elements.<sup>65</sup> The person claiming to be a possessor must have physical control of the thing, commonly referred to as “detention” or *corpus*, and the intent to possess as owner—that is, *animus domini*—or, to use the felicitous phrase that Professor Lee Hargrave gave us, the intent to possess “in the manner an owner would possess.”<sup>66</sup> In short, a true possessor must have detention and the intent to possess as if the possessor were the owner or was on the way to becoming an owner.<sup>67</sup> To this day, Louisiana law mirrors this understanding.<sup>68</sup>

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62. *Id.* (“Those holding for another were not considered precarious possessors in Roman law. Their status was defined by other expressions . . .”).

63. *Id.*

64. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2230–2232, 2236 (John H. Crabb, trans., revised ed. 1995) (1804) (Fr.).

65. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 197, at 106 (stating that the definition of possession under article 2228 of the Code Napoleon applies only to those who have “animus domini”—the intent to “hold the thing as owners”—as well as “simple detention”).

66. Lee Hargrave, *Ruminations on the Revision of the Louisiana Law of Acquisitive Prescription and Possession*, 73 TUL. L. REV. 1197, 1215 (1999) [hereinafter *Ruminations*].

67. Baudry-Lacantinerie and Tissier point out that that the definition of possession as “the detention of a thing *by ourselves* or through another person who holds it *in our name*” comes from Pothier. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 194, at 105 (emphasis added). This definition was the foundation for article 2228 of the *Code Civil*. *Id.*

68. Yiannopoulos, *supra* note 58, at 524–26 (noting that current articles 3421 and 3424 of the Louisiana Civil Code must be read *in pari materia* to visualize these two essential elements of possession).

### 2. Precarious Possession Cannot Produce Acquisitive Prescription

The second essential idea depends directly on the first and remains uncontroversial. Precarious possession—possession on behalf of or for another person—can constitute only a form of detention and, therefore, cannot lead to acquisitive prescription on behalf of the precarious possessor.<sup>69</sup> The reason precarious possession suffers from this disability is that the precarious possessor is not possessing as the master of the thing; that is, the precarious possessor is not usurping the prerogative and control of the true owner.<sup>70</sup> To paraphrase the words of contemporary Canadian property law scholar Larissa Katz, the possession of a precarious possessor does not count because it does not challenge the agenda-setting authority of the owner with sufficient rigor or clarity.<sup>71</sup> By contrast, a bad-faith possessor, a “usurper of land” who “knows that the thing belongs to another” and who is not possessing precariously on behalf of or with the permission of an owner, still can, according to Baudry-Lacantinerie and Tissier, possess with “an *animus domini*, for he pretends to be the owner and acts as if he were.”<sup>72</sup>

### 3. Initial Presumption in Favor of Possession as Owner

A third crucial idea to emerge from the French commentators, and in particular from Baudry-Lacantinerie and Tissier, is especially important for this Article’s consideration of recent Louisiana cases. When a dispute arises between a record owner and a possessor–claimant, a court should initially presume that the claimant is possessing with the intent to become owner or possessing in the manner of an owner, unless the possession clearly began in a role that evidences the permissive, non-usurping character of a mere detainer or precarious possessor.<sup>73</sup> The crucial text for

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69. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 198, at 107 (noting that article 2236 of the Code Napoleon provides that precarious possessors can never prescribe, regardless of the length of time of their detention).

70. Baudry-Lacantinerie and Tissier often reiterated this point in vivid terms. *See, e.g., id.* (“[s]imple holding” may give rise to certain rights but does not constitute a “genuine possession”).

71. Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47 (2010).

72. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 265, at 141.

73. *Id.* ¶¶ 270–272, at 143–44.

Baudry-Lacantinerie and Tissier is article 2230 of the *Code Civil*,<sup>74</sup> an article that earned wild praise from the late nineteenth century German jurist Rudolf von Jhering, who considered it one of “the best and most felicitous” in French legislation,<sup>75</sup> and that still serves as a direct analogue and source of current article 3427 of the Louisiana Civil Code.<sup>76</sup>

Baudry-Lacantinerie and Tissier acknowledge that the presumption that a possessor intends to possess as owner—or what they call the “presumption of non-precariousness in favor of all possessors”—can be destroyed by contrary evidence, such as proof of a title that makes the possession precarious,<sup>77</sup> or by a showing that the possession is “equivocal.”<sup>78</sup> They also admit the competing influence of the presumption of continued precarious possession found in article 2231 of the *Code Civil*,<sup>79</sup> the source of current article 3438 of the Louisiana Civil Code. For precarious possession to cease,

74. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2230 (John H. Crabb, trans., revised ed. 1995) (1804) (Fr.) (“One is always presumed to possess for oneself, and as owner, if it is not proved that one commenced to possess for another.”).

75. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 270, at 143. This article was, according to Jhering, “superior to anything the doctrine has produced in our whole century with regard to the distinction between possession and detention.” *Id.* at 143–44.

76. Current article 3427 reproduces the substance of article 3488 of the Louisiana Civil Code of 1870. LA. CIV. CODE art. 3427 cmt. a (2016); *see* LA. CIV. CODE art. 3488 (Benjamin W. Dart. ed. 1947) (1870) (“As to the fact itself of possession, a person is presumed to have possessed as master and owner, unless it appears that the possession began in the name of and for another.”). Article 3488 was based on article 3454 of the Louisiana Civil Code of 1825, which was identical except that the word “owner” read “proprietor.” LA. CIV. CODE art. 3454 (1825). The original codal source in Louisiana, article 39 of the Digest of 1808, read:

A person is presumed to have possessed as master and proprietor, unless it appears that such possession began in the name of and for another, in which case the law supposes that the possession must have been continued for and in the name of said person, unless the contrary be shown.

LA. CIV. CODE art. 3488 (1870) (Benjamin W. Dart ed. 1947) (citing C. CIV. art. 2230 (Fr.) (1804)). Batiza concurred and also cited Article 12, Title XX, Book III of the *Projet du Gouvernement* as a source. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 132 (1971). The revision comments to current article 3427 take the same position. LA. CIV. CODE art. 3427 cmt. c.

77. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 271, at 144.

78. *Id.*

79. To explain this second presumption, Baudry-Lacantinerie and Tissier turn to Bigot-Preamenau who explained that “[a] person who holds for another continues and renews at every instant the possession of the person for whom he holds.” *Id.* ¶ 272, at 144.

the French Civil Code required an “interversion,” some act by the owner or by a third party that changed the status of the possession.<sup>80</sup> Current Louisiana law basically continues this approach, although it allows the precarious possessor somewhat wider scope to terminate the vice of precariousness by communicating new intentions through “overt and unambiguous acts sufficient to give notice” if the precarious possessor is a co-owner or through “actual notice” if the precarious possessor is any other kind of precarious possessor.<sup>81</sup>

#### 4. Limited Juridical Effect of Acts Governed by Article 2232 of Code Civil

The fourth crucial idea to emerge from the *Code Civil* and our French doctrinal sources finds expression in article 2232 of that code: “[a]cts of pure convenience and those of mere tolerance may establish neither possession nor prescription.”<sup>82</sup> This Article refers to two categories of detention *not* exhibited by classic precarious possessors, such as lessees, depositaries, or usufructuaries. Because these acts of detention are too insignificant, too equivocal, or too harmless to be truly adverse to owners, the *Code Civil* implies that true owners must be tolerating such acts and therefore the acts are incapable of leading to acquisitive prescription. This important idea survived as an express rule of the Louisiana Civil Code until 1982,<sup>83</sup> when it was omitted in the most recent revision of the chapters

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80. *Id.* ¶ 273, at 144. See also *id.* ¶ 322, at 170–71 (noting that the “vice of precariousness is in principle *indelible*” in the sense that “the possessor can not eliminate it through his own will,” and thus it can only cease if “the conditions provided by Art. 2238 materialize”); *id.* ¶¶ 328–36, at 173–77 (elaborating on the various means by which precarious possession can be interverted).

81. LA. CIV. CODE arts. 3439, 3478.

82. C. CIV. 2232 (Fr.) (1804), as translated in BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 274, at 145. Another translation of the article states: “Acts of pure license and simple toleration can lay no foundation either for possession or prescription.” C. CIV. art. 2232 (Barrister of the Inner Temple trans., 1804) (Fr.). In French, the article provides: “Les actes de pure faculté et ceux de simple tolérance ne peuvent fonder ni possession ni prescription.” C. CIV. art. 2232 (Fr.).

83. Article 3490 of the Louisiana Civil Code of 1870 provided:

The circumstance of having been in possession by the permission or through the indulgence of another person, gives neither legal possession nor the right of prescribing.

Thus, those who possess precariously, that is, by having prayed the master to let them have the possession, do not deprive him thereof, but, possessing by his consent, they possess for him.

addressing possession and acquisitive prescription. Of course, the Louisiana Supreme Court in *Boudreaux* resurrected this idea when the Court confronted a classic dispute between neighbors rather than a dispute between strangers or between an owner and someone possessing by virtue of a contractual or legal status relationship, such as a lessee or usufructuary.<sup>84</sup>

*a. Pure Facultative Acts*

The first category of ineffective acts referenced in article 2232—acts of pure “convenience,” “license,” or “faculty,” that is, “facultative acts”—needs little discussion because this particular notion did not cross into the Louisiana Civil Code.<sup>85</sup> The only important point about “acts of pure convenience” is that they cannot lead to prescription because the actor is not acting in the manner of a “master” and no outward sign indicates that “two rights [are] in conflict.”<sup>86</sup>

*b. Acts of Simple Tolerance*

The second category of acts referenced by article 2232, acts of simple tolerance, is more important because it resurfaced prominently in *Boudreaux*,<sup>87</sup> and might arise in any other typical neighbor dispute. Examples of acts of simple tolerance noted by Baudry-Lacantinerie and Tissier include entering a

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Article 3456 of the Louisiana Civil Code of 1825 and article 40 of the Digest of 1808 contained identical language, with only slight variation in punctuation.

84. *Boudreaux v. Cummings*, 167 So. 3d 559, 562–63 (La. 2015).

85. According to Baudry-Lacantinerie and Tissier, “facultative acts” can be understood as acts that an owner undertakes on his own property that may affect another owner’s enjoyment of that owner’s property, but that do not lead to the acquisition of any prescriptive rights. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶¶ 277–278, at 146–48. Admittedly, this statement sounds circular, but an example clarifies the idea. Presume owner A makes an opening in a wall that he owns and that happens to be contiguous to an adjacent estate owned by B and presume that the opening exists for 30 years. *Id.* This “facultative” act does not mean that owner A can prevent owner B from erecting a construction or planting a tree that might block the view out of the opening. *Id.* ¶ 277, at 146. A facultative act of this nature, which is “only an exercise of faculties given by the statutes, or a normal exercise of ownership rights,” cannot lead to acquisitive prescription because it does not diminish the rights of another owner, even if the other owner is passive for a long period. *Id.* ¶ 278, at 146. The rule in article 2232 regarding facultative acts can also be understood as a restatement of the principle that negative servitudes cannot be acquired by acquisitive prescription. *Id.* ¶ 278, at 147.

86. *Id.* ¶ 281, at 148.

87. *Boudreaux*, 167 So. 3d at 562–63.

neighbor's land to draw water from a well or to pick mushrooms from a forest.<sup>88</sup> Although these acts represent more of "[an] encroachment" upon or challenge to the owner's right to control the property than acts of pure convenience,<sup>89</sup> they still do not lead to prescription because they do not cause any "appreciable damage to the other" and are not "sufficiently serious to represent a usurpation which should be repressed."<sup>90</sup> More importantly, these acts of simple tolerance are equated with "precarious concession" out of a need to coordinate social interaction.<sup>91</sup> If owners were required to suppress them out of fear that prescription might start to run, "[g]ood neighborly relations would thus be upset."<sup>92</sup> Such acts of "simple toleration" can turn into acts of possession sufficient to lead to prescription if, as suggested in article 2238 of the *Code Civil*, some kind of "interversion in fact" occurs.<sup>93</sup> But, absent such an interversion, the person who engages in acts of mere tolerance is more like a fiduciary with respect to the true owner. To terminate the possessor's precariousness, this kind of possessor must clearly signal an intent to challenge the owner's authority.<sup>94</sup>

### C. Louisiana Commentary After the 1982 Revision of the Civil Code

In 1982, the Louisiana legislature enacted five revised chapters of the Civil Code to address occupancy, possession, and acquisitive prescription.<sup>95</sup> In addition to creating a more systematic and terse statement of this body of

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88. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 282, at 149.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* Baudry-Lacantiner and Tissier also provide this vivid example from French case law: a landowner allows a community to host a harvest festival on his land every year for more than 30 years. *Id.* Despite a plea of prescription, the landowner can stop the festival because the owner simply tolerated the use. *Id.* The community's use of land was in its interest, but also in the landowner's interest because the excrements deposited by animals fertilized his field. *Id.* These principles also reinforced the French Civil Code's prohibition against acquisitive prescription of discontinuous servitudes. *Id.* Acts of quasi-possession that might be sufficient to establish exercise of an existing conventional servitude are not, from the perspective of a landowner, a substantial encroachment because they can also be explained as acts of simple tolerance. *Id.* ¶ 283, at 150.

93. For example, if a non-riparian landowner built exterior works across a riparian neighbor's land to carry water to the non-riparian's own estate for purposes of irrigation, this action might suffice. *Id.* ¶ 2861, at 151.

94. Katz, *supra* note 71, at 67.

95. 1982 La. Acts No. 187 (adopting LA. CIV. CODE arts. 3412–3491).

law, the 1982 revision specifically clarified that the Civil Code rules regarding the attributes, vices, and tacking of possession apply not only in the context of acquisitive prescription, but also to the protection of possession in its own right.<sup>96</sup> In the specific context of precarious possession, the revision succeeded in streamlining and consolidating many articles from the old law<sup>97</sup> and made one substantive change: for the first time, Louisiana law clearly permitted a precarious possessor, “such as a lessee or depositary,” to bring a possessory action “against anyone except the person for whom he possesses.”<sup>98</sup>

Soon after the revision came into effect, commentators began to point out problems. Professor Symeonides, for example, noted that the revised Civil Code articles addressing the means by which precarious possessors can terminate their precariousness create needless confusion.<sup>99</sup> At the same time, Professor Lee Hargrave began to warn that revised articles 3427 and 3438, which contain the two central presumptions governing possession

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96. Symeon Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 LA. L. REV. 69, 70–72 (1983).

97. Under the 1870 Civil Code, articles dealing with precarious possession were found in the chapter on possession in the subsection on ten-year acquisitive prescription and in the subsection on causes preventing acquisitive prescription, but under the revision, they appear primarily in the chapter on possession, LA. CIV. CODE arts. 3428–3429, 3437–2440 (2007), and in the title on prescription, LA. CIV. CODE arts. 3477–2479 (2011). Symeonides, *supra* note 96, at 82 n.33.

98. LA. CIV. CODE art. 3440 (2007). This change effectively overrules article 3656 of the Louisiana Code of Civil Procedure and brings Louisiana up to date with the modern approach taken in France and other civil law jurisdictions. LA. CIV. CODE art. 3440 cmt. b–c (2007). *See also* C. CIV. arts. 2282–2283 (Fr.) (added in 1975). For more commentary and the view that “the granting of the possessory action to the lessee is really a specious gift,” see Symeonides, *supra* note 96, at 91 n.41.

99. Although the new rules set forth in articles 3439 and 3478 of the Civil Code confirmed pre-revision jurisprudence in some ways, Symeonides warned that the revision had created a needless, and perhaps illogical, distinction by allowing co-owners to terminate precarious possession through “overt and unambiguous acts sufficient to give notice,” while all other precarious possessors had to demonstrate “actual notice” of their intent to possess as owners. If any distinction was warranted, he noted, the “less exacting standard” should have been imposed on co-owners because they are less likely to arouse suspicion than other precarious possessors such as lessees. Symeonides, *supra* note 96, at 87 n.38.

and precarious possession, were “circular”<sup>100</sup> and “redundant,”<sup>101</sup> respectively. Missing from the revised Civil Code, Hargrave argued, was a clear statement of what he described as the “core rule,” which he stated in the following terms:

The person alleging the precariousness of another’s possession has the burden of proving that fact. Proof that the possessor possessed for another discharges that burden. Once a precarious possession is established, the burden shifts to the precarious possessor who must then prove that he meets the requirements of Article 3439.<sup>102</sup>

A dozen years later, Hargrave returned to these subjects and suggested that recent judicial decisions threatened to incorporate a requirement that possessors have a subjective belief that they are owners of the property they are possessing to be legitimate possessors.<sup>103</sup> Hargrave disagreed with this approach because the Louisiana Civil Code, just like the *Code Civil*, clearly contemplates that legal possessors can, in fact, be in bad faith; that is, they “can know subjectively [they do] not own the thing.”<sup>104</sup> All that the Civil Code actually requires, according to Hargrave, is that the possessor “must intend to possess in the manner an owner would possess.”<sup>105</sup> In other words, the requirement of an intent to possess as owner must be interpreted objectively, in a manner that focuses not on what is taking place in the mind of the possessor, but rather on the “style of possessing.”<sup>106</sup> When determining a possessor’s intentions, Hargrave

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100. Lee Hargrave, *Presumptions and Burdens of Proof in Louisiana Property Law*, 46 LA. L. REV. 225, 236 (1985) [hereinafter *Presumptions*]. With respect to the presumption found in article 3427 stating that a possessor is presumed to possess as owner “unless he [the possessor] began to possess in the name of and for another,” Hargrave observed that “possession for another is the same thing that should be proved to disprove possessing as owner.” *Id.*

101. *Id.* at 237. The sole purpose of article 3438, Hargrave noted, was to open the door to application of the objective standards found in article 3439 for providing notice to the true owner of a precarious possessor’s newly formed acquisitive intentions. *Id.* at 236. Thus, article 3438 merely restates a rule of substantive law and does not truly provide a new presumption. *Id.*

102. *Presumptions*, *supra* note 100, at 237.

103. *Ruminations*, *supra* note 66.

104. *Id.* at 1215–16.

105. *Id.* at 1215.

106. *Id.* Hargrave located ample statutory authority for his objective approach to the question of intent to possess. In particular, he cited LA. CODE CIV. PROC. art. 3660

contended, a court should look at “circumstances” and “objective acts” to make reasonable inferences<sup>107</sup> and should be careful to employ a “flexible definition of possessing as owner as not to defeat [the] institution” of 30-year acquisitive prescription and “the reliance interests it protects.”<sup>108</sup>

Hargrave’s primary example of the problematic judicial slide into subjectivity was the decision in *Levy v. Germania Plantation*.<sup>109</sup> In this case, the Louisiana First Circuit Court of Appeal held that a possessor, who had physically occupied and used vacant farmland and woodland for more than 60 years but did not know the identity of the land’s true owner and did not pay rent to use the land, was nevertheless a precarious possessor because he realized only that he might have a claim to the land when a land man asked him to execute oil and gas leases.<sup>110</sup> The holding in *Levy*, Hargrave warned, “virtually reads the concept of bad-faith possession out of the code and penalizes a layman for lack of knowledge of legal concepts.”<sup>111</sup> In addition, it also misidentified the crucial question: “The issue was not whether [the possessor–claimant] thought he was owner, but whether he intended to possess as an owner would, that is, for himself rather than for another.”<sup>112</sup> Hargrave’s discussion of *Levy* is now eerily prescient in light of the uncertainty created by *Boudreaux v. Cummings*.<sup>113</sup>

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(1998), stating that a possessor is a person who “possesses for himself, whether in good or bad faith, or even as usurper.” *Ruminations, supra* note 66, at 1216.

107. *Id.* at 1216.

108. *Id.* at 1217.

109. 395 So. 2d 366 (La. Ct. App. 1981).

110. *Id.* at 371. This admission, the court held, rebutted the “strong presumption under our law” that a possessor intends to possess for himself as owner, even though the claimant was “possessing the property in the same manner as he would have if he had had record title.” *Id.*

111. *Ruminations, supra* note 66, at 1217.

112. *Id.* The court in *Levy* was apparently aware that it was treading on thin ice. Absent the claimant’s candor, the court noted, “his claim was in perfect posture for him to reap the benefits of the presumption which our law grants unto a possessor.” *Levy*, 395 So. 2d at 371. The court in *Levy* also relied in part on *Humble v. Dewey*, a decision that Hargrave called “equally erroneous.” *Ruminations, supra* note 66, at 1217 n.177 (citing *Humble v. Dewey*, 215 So. 2d 278, 382–83 (La. Ct. App. 1968)).

113. 167 So. 3d 559, 565 (La. 2015).

*D. The Virtues of Louisiana's Two-Tier Model of Acquisitive Prescription*

Before moving on to a detailed consideration of *Boudreaux* and other Louisiana jurisprudence addressing the problem of precarious possession, this Article briefly pauses to reflect on the virtues of Louisiana's two-tier institution of acquisitive prescription. These virtues are important to note not only because of Justice Knoll's warning that the majority opinion in *Boudreaux* threatens to undermine the entire institution of acquisitive prescription in Louisiana,<sup>114</sup> but also because adverse possession, acquisitive prescription's common law twin, has been subjected to criticism in some American law reviews<sup>115</sup> and has recently been modified by a few state legislatures.<sup>116</sup>

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114. *Id.*

115. *See, e.g.*, Carol N. Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583 (2010) (contending that adverse possession should be abrogated on fairness and efficiency grounds); Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Acquisitive Prescription*, 100 NW. U. L. REV. 1037 (2006) (arguing that only bad-faith possessors should be allowed to gain title and they should be required to document their intent to acquire ownership through an offer to purchase or by recording or registering notice of their aggressive intentions); Jeffery Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419 (2001) (critiquing many of the traditional rationales offered in support of adverse possession); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994) (arguing that U.S. adverse possession law leads to exploitation and destruction of wild lands and wilderness, and therefore adverse possession should not be applicable to wild lands).

116. *See, e.g.*, COLO. REV. STAT. ANN. § 38-41-101(3)(b)(II) (West 2016) (amended 2008) (allowing adverse possession only if adverse possessors "had a good faith belief [that they] w[ere] the actual owner of the property and the belief was reasonable under the particular circumstances"); N.Y. REAL PROP. ACTS LAW § 501(3) (McKinney 2016) (amended 2008) (requiring adverse possession claimant to show "a reasonable basis for the belief that the property belongs to the adverse possessor"); ALASKA STAT. ANN. § 09.45.052 (West 2016) (amended 2003) (providing that in border cases, adverse possessors can prevail only if they have "a good faith but mistaken belief" that the property lay within the borders of their own land). New York also appears to have drastically curtailed adverse possession in border cases involving encroachments by enacting a conclusive presumption that all occupations of an adjoining property owner's land are "permissive" unless the encroachments involve substantial structures. N.Y. REAL PROP. ACTS LAW § 543. For criticism of these developments, see Joseph W. Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1398 (2013).

First, Louisiana's two-tier structure, in which ownership and other real rights in immovables can be acquired if the claimant proves ten years of continuous possession plus just title and good faith at the commencement of possession, or 30 years of possession with neither just title nor good faith, satisfies the crucial utilitarian ends of a "limitations model" of adverse possession.<sup>117</sup> Just like the French doctrinal commentators whose justifications for acquisitive prescription were outlined in Part I.A.2,<sup>118</sup> many American property scholars have suggested that adverse possession is valuable because it too provides repose, clears title, and promotes certainty for long-term possessors.<sup>119</sup>

Several variations of this limitations justification for adverse possession exist. In one version, adverse possession improves the efficiency and reliability of the judicial process by quickly disposing of claims based on lost, unreliable, or stale titles and potentially unreliable testimony about events in the distant past.<sup>120</sup> Another version of this quieting title rationale focuses on how the institution protects a long-term possessor who possesses by virtue of some title or conveyance and who, when threatened by a person relying on an older instrument or conveyance, would otherwise have to prove a perfect chain of title back to the sovereign.<sup>121</sup> Finally, a third version of the limitations rationale focuses on how adverse possession serves the interests of third parties and the property marketplace in general by providing an efficient and practical alternative to expensive title examinations or title insurance.<sup>122</sup>

Some scholars have criticized the assumptions underlying these limitations rationales by noting the availability of alternative tools for quieting title—in particular marketable title acts and title insurance—and

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117. Sprankling coined the term "limitations model" to describe a cluster of rationales for adverse possession. Sprankling, *supra* note 115, at 819.

118. See discussion *supra* notes 45–57 and accompanying text.

119. Sprankling observed that generally American property law views adverse possession as a "specialized application of the statute of limitations" that simply bars a suit by the disposed landowner to eject the adverse claimant. Sprankling, *supra* note 115, at 818. This dominant view, he claimed, is rooted in the same policies underlying any statute of limitations: "avoiding 'stale claims' and allowing repose." *Id.* at 819. Other scholars have made similar arguments. See Henry Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1112, 1128–30 (1985) (articulating a cluster of rationales that generally relate to the limitations oriented goal of promoting legal certainty by quieting titles).

120. See Merrill, *supra* note 119, at 1128.

121. *Id.*

122. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 155 (1988).

by pointing to the growing reliability of recording systems, land registries, and modern surveying techniques.<sup>123</sup> Nevertheless, the limitations model still has important adherents among common law scholars, particularly those who emphasize its ability to reduce transaction costs and promote efficiency.<sup>124</sup> In a similar fashion, Louisiana's ten-year acquisitive prescription regime promotes legal certainty for good-faith possessors who have relied on a just title to fend off spurious claims based on old titles or brought by short-term possessors who may have seized possession coercively.<sup>125</sup> Louisiana's 30-year acquisitive prescription regime also protects the interests of possessors who, for any number of sometimes understandable reasons, may not be able to prove good faith or just title, but who nevertheless have justifiable reliance interests based on their long-term possession of land.

Second, Louisiana's two-tier structure of acquisitive prescription responds to the moral concerns raised by critics of "bad-faith adverse possession" and by advocates of a narrower "administrative model" of adverse possession who believe these doctrines should be limited to helping or at least favoring reasonable, good-faith possessors who would otherwise be harmed by innocent conveyancing mistakes.<sup>126</sup> Louisiana's system responds

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123. See Fennell, *supra* note 115, at 1063–64 (pointing to marketable title acts and title insurance); Stake, *supra* note 115, at 2441–49 (stressing that marketable title acts are a superior tool for quieting title, arguing that betterment acts can protect innocent encroachers, noting the increasing accuracy and inexpensiveness of surveys, and suggesting that "elimination of adverse possession would lead to even more careful recording of transactions").

124. See Merrill, *supra* note 119, at 1129 (observing that even in an idealized world of universal and perfectly accurate recording systems and indestructible, perfectly measured property boundaries, adverse possession would be still be useful to third parties seeking to engage in property transactions because titles could still be clogged by old, outdated property interests, which would all have to be traced to their current successors before releases could be obtained and that this practice could lead to more exhausting title examinations, more negotiation and payoffs, and more expensive title insurance premiums).

125. See Douglas Nichols, Comment, *The Publician Action*, 69 TUL. L. REV. 217 (1994) (discussing the difficult burden of proof facing a record owner bringing a petitory action against a party in possession created by *Pure Oil v. Skinner*, 294 So. 2d 797 (La. 1974)); see also *Baker v. Romero*, 55 So. 3d 1035 (La. Ct. App. 2011).

126. See Merrill, *supra* note 119, at 1134, 1145–53 (arguing that property law's interest in "punishing or deterring those who engage in purely coercive transfers of property" justifies a change in the law whereby owners who lose title to their land through adverse possession to "bad faith" possessors would have a right to seek just compensation for the value of the land lost at the time the claimant's adverse possession began); Helmholz, *supra* note 26 (arguing that American courts routinely favor good-faith possessors over bad-faith possessors).

to these concerns by giving possessors who can demonstrate both an objectively reasonable belief that they own the land they are possessing and a just title describing all of the property in dispute a substantially shorter prescriptive period to endure before their possession ripens into ownership of other real rights. At the same time, by utilizing a much longer prescriptive period—30 years, an entire generation—for possessors who cannot meet either of these requirements, Louisiana’s system respects the moral objections that acquisitive prescription might transfer title too easily to possessors who either intentionally possess land they know they do not own or at least possess it carelessly.<sup>127</sup> Also noteworthy is that by transferring title to either kind of possessor at the end of the respective prescriptive period without any compensation to the record owner, Louisiana’s system also avoids the complicated and perhaps intractable problem of determining just compensation that a liability rule approach to adverse possession would entail, regardless of whether such an approach applied to only bad-faith acquisitive prescription or to both forms.<sup>128</sup>

Third, just as Planiol and Baudry-Lacantinerie and Tissier observed in France,<sup>129</sup> Louisiana’s acquisitive prescription fulfills the objectives associated with what American scholars call the “development model” of adverse possession.<sup>130</sup> It does so by shifting title from a passive or even a negligent record owner, who has failed to put his property to productive use or to monitor the property, to the industrious or diligent possessor, who

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127. See Fennell, *supra* note 115, at 1048–49 (summarizing the moral disapproval showered on “bad faith possessors”).

128. Richard Epstein made precisely this point in assessing Merrill’s proposal to convert the remedial structure of adverse possession from a universal “property rule” mechanism to a “liability rule” mechanism for bad-faith adverse possessors. Richard Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667, 685–89 (1986). In Epstein’s view, a longer statute of limitations for bad-faith possessors would satisfy moral qualms about allowing adverse possession to benefit land thieves too easily, but it would still serve the instrumental objectives of quieting title and promoting legal certainty. *Id.* at 686–89. Epstein disapproved of Merrill’s liability rule solution to the dilemma of bad-faith adverse possession because liability rules that require courts to determine the objective value of property are “costly to administer and undercut the security of transactions concern that lies at the base of the [adverse possession] rule.” *Id.* at 689.

129. See discussion *supra* notes 51–54 and accompanying text.

130. Sprankling, *supra* note 115, at 816. Sprankling argued that over the course of the 19th and 20th centuries, American courts transformed adverse possession from “a mechanism designed to *protect* the title of the true owner against false claims into a tool designed to *transfer* title to wild lands from the idle true owner to the industrious adverse possessor.” *Id.* at 821.

has taken charge of vacant property and often put it to some higher value use,<sup>131</sup> or has at least “set an agenda” for the property and took pains to make sure that others respect that agenda.<sup>132</sup> Also, just as the French doctrinal writers pointed out a century ago,<sup>133</sup> Louisiana’s two-tier structure of acquisitive prescription still performs the important societal function of aligning actual title with community expectations and assumptions about who deserves to be treated as the owner.<sup>134</sup>

Finally, Louisiana’s two-tier acquisitive prescription regime allows its property law to honor the powerful psychological and emotional attachments that possessors can develop with regard to a thing they possess for a long

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131. See Fennell, *supra* note 115, at 1040 (the “niche goal of adverse possession” is the task of “moving land into the hands of parties who value it much more highly than do the record owners”); Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1113 (2011) (adverse possession promotes efficient development by “encouraging careful contracting, reducing land title conflicts, [and] rewarding productive uses of scarce resources”); Sally Brown Richardson, *Abandonment and Adverse Possession*, 52 HOUSTON L. REV. 1386 (2015) (arguing for relaxation of corporeal possession requirement to allow adverse possessors to obtain title to abandoned property); COOTER & ULEN, *supra* note 122 (justifying adverse possession because, *inter alia*, it specifies “procedures for a productive user to take title from an unproductive one”); Merrill, *supra* note 119, at 1130 (referring to this general cluster of rationales as punishing those who “sleep on their rights” by ignoring their property or otherwise engaging in “poor custodial practices”); GORDLEY, *supra* note 41, at 141 (contending that the most persuasive justification for adverse possession and acquisitive prescription is to transfer title from an absent, passive owner—from “an owner who has not behaved like an owner and has not even checked to see how his land is being used”—to a possessor who is “putting [the land] to use”).

132. See generally Katz, *supra* note 71, at 67–70 (defending adverse possession because it identifies objects that are subject to an agenda-setting vacancy and assures that there is always an individual with “agenda-setting authority” in control of a thing). Similarly, Gordley suggests that the problem solved by adverse possession or acquisitive prescription arises when the record owner “has made no such decision at all” with respect to the property and the owner’s lack of attention “has only muddled titles.” GORDLEY, *supra* note 41, at 144.

133. See discussion *supra* notes 49–56 and accompanying text.

134. PEÑALVER & KATYAL, *supra* note 56, at 55–63 (recounting how the men and women who settled the American frontier, often without the benefit of formal title to the land they settled, came to be treated as heroic or at least strategic adverse possessors who successfully resisted the federal land distribution policies of the United States government in the first half of the 19th century).

period of time,<sup>135</sup> and to the related reliance interests<sup>136</sup> and endowment effect interests<sup>137</sup> that build up in long-term possessors. In short, just as adverse possession does, acquisitive prescription helps to stabilize Louisiana property law, but it also preserves the ability to respond flexibly to discrepancies between long-term possession and paper titles.

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135. Drawing on Kant, Hegel, and probably Bentham, Oliver Wendell Holmes first stated this idea in O.W. HOLMES, JR., *THE COMMON LAW* 207 (1881) (“Possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will.”), and expanded it in O.W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 477 (1897) (“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”). Margaret Radin extended Holmes’s idea with her own theory of “property and personhood.” Margaret Jane Radin, *Time, Possession and Alienation*, 64 *WASH. U.L.Q.* 739, 741 (1986) (asserting that a person’s “claim to an owned object grows stronger as, over time, the holder becomes bound up with the object,” and “[c]onversely, the claim [of a record owner] to an object grows weaker as the will (or personhood) is withdrawn”); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 78–79 (7th ed. 2007) (restating Holmes’s theory with an “economic explanation” cast in terms of Benthamite pleasure and pain).

136. Joseph William Singer, *The Reliance Interest in Property Law*, 40 *STAN. L. REV.* 614, 666–67 (1988); Merrill, *supra* note 119, at 1131 (also identifying “the reliance interest” justification for adverse possession and noting at least three alternative variations). Although he notes that the reliance interest rationale contradicts “the interest of a T[itle] O[wner] and society generally in preserving the integrity of the set of entitlements grounded in law,” *id.* at 1132, Merrill ultimately endorses the rationale by suggesting a fourth version—the reliance interests of third parties who have an interest in being able to assume, without expensive and time-consuming title examinations, that the person who has been in long term possession of property actually has title to the property. *Id.* Merrill calls this the right to rely on the “appearance of title.” *Id.*

137. Jeffery Stake makes a powerful case for the continuing viability of adverse possession by updating Holmes’s “roots” rationale and Radin’s personality theory version through the experimental psychology concept known as “the endowment effect” and its close cousin “loss-aversion” theory. Stake, *supra* note 115. Stake argues that “people become more attached to tangible physical assets than to financial assets and feel a greater sense of loss when deprived of tangible physical objects than when deprived of intangibles that have the same value to a purchaser.” *Id.* at 2463. Stake sums up his argument for an endowment effect understanding of adverse possession by observing that many adverse possession disputes are really contests between two relatively innocent parties and that when forced to choose which party has to bear a loss, adverse possession simply and sensibly “chooses to deprive R[ecord] O[wner] of his financial asset rather than deprive A[dverse] P[ossessor] of her tangible asset.” *Id.* at 2471.

## II. THREE PARADIGMATIC POSSESSION AND ACQUISITIVE PRESCRIPTION DISPUTES: A SOCIAL AND RELATIONAL APPROACH

Multiple property law scholars have suggested that adverse possession and acquisitive prescription disputes should be viewed from perspectives other than traditional doctrinal categories. Thirty years ago, Margaret Radin divided adverse possession cases into three paradigms: “color of title,” “boundaries,” and “squatters” cases.<sup>138</sup> In the first, the possessor holds an “invalid document of title and eventually has to defend against the ‘true owner’ or someone claiming under her.”<sup>139</sup> In a “boundaries” case, “the boundary line observed by neighboring property owners in practice does not correspond with what their documents say,” and eventually one of the neighbors litigates to address the discrepancy.<sup>140</sup> Finally, in a “squatters” case, “aggressive trespassers” take over plots of ground and treat it as their own.<sup>141</sup> Although Radin’s three paradigms hint at the social relationships between the parties, her categories are primarily defined by the structure of legal and moral problems confronting courts in each type of case. Also, Radin generated her paradigms for the limited purpose of demonstrating why her “personality theory” of property explained a statutory or judicial preference for good-faith over bad-faith possessors.<sup>142</sup>

More recently, James Smith has suggested that an emerging body of law under the heading of the “law of neighbors” can be understood more clearly if scholars and courts distinguish between cases in which the parties are absolute strangers to one another and cases in which the parties are friends or enjoy some special relationship with each other.<sup>143</sup> Smith argues that application of a “stranger model” and a “friend model” could help make sense of some of the specialized presumptions and burdens of

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138. Radin, *supra* note 135, at 746.

139. *Id.*

140. *Id.*

141. *Id.* Without any empirical support, Radin asserted that “color of title” and “boundaries” cases were much more common than “squatters” cases. *Id.*

142. *Id.* at 749. In Radin’s view, it is quite natural that courts and legislators would favor mistaken good-faith claimants because they develop bonds more quickly with the land they possess, as they already believe they own it. Following Hegel, however, Radin acknowledged that even squatters or bad-faith possessors can, over time, develop strong psychological bonds of their own with the thing possessed. *Id.*

143. James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 39 GA. J. INT’L & COMP. L. 757, 758–60 (2011).

proof that courts in the United States have developed to deal with problems of permissive use in adverse possession cases.<sup>144</sup>

Building on Radin's and Smith's paradigms, this Article proposes that the Louisiana legal community should view its own body of acquisitive prescription jurisprudence as consisting of three categories of cases. The first category consists of cases in which the parties are in fact strangers to one another. Although the nature of a possessor's claim could grow out of a conveyance error or confusion over a boundary location or could result from a more aggressive assertion of dominion, the most salient characteristic of a "stranger" case is that the parties do not share a preexisting relationship. Although they may own adjacent tracts of land, they are not neighbors in the sense of inhabiting neighboring lots or belonging to the same neighborhood community. In a "stranger" case, the true owner is often an absentee owner who does not live on or near the land and does not regularly use or visit the land in dispute. In these cases, the existing presumptions and burdens of proof found in the Louisiana Civil Code, despite the infirmities noted by Professor Hargrave, work well enough and generally produce consistent or stable results. In a "stranger" case, courts will usually characterize the claimant-possessor as possessing as owner and only rarely as a precarious possessor.

In the second category of cases, the parties are not strangers, but are linked to one another by a preexisting contractual relationship or some special legal status relationship. In these cases, courts classify the possessor-claimant as a precarious possessor at the outset of the possession. The crucial question then becomes when, if ever, the precarious possessor has terminated the precarious possession and begun to possess as owner. Although the results of these contractual and legal status cases are less predictable than "stranger" cases, still the presumptions and burdens of proof provided by Louisiana Civil Code articles 3427, 3438, 3439, and 3478 operate effectively.<sup>145</sup> By using these tools and developing some of their own jurisprudential rules of thumb, Louisiana courts have been able to produce outcomes that are sensitive to the particular contractual or social relationship that initially bound the parties together.

The third category of cases involves true neighbors—persons who actually live near to each other and know one another or at least belong to the same close-knit community. Despite these neighborly ties, the parties

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144. *Id.* at 760–63. For another example of an insightful contextualized approach to understanding conflicts in adverse possession law, see Luke Meier, *A Contextual Approach to Claim of Right in Adverse Possession Cases: On Van Valkenburgh v. Lutz, Bad Faith and Mistaken Boundaries*, 19 LEWIS & CLARK L. REV. 47, 53–54 (2015).

145. LA. CIV. CODE arts. 3427, 3438, 3439, 3478 (2016).

in a neighbor dispute do not have any other preexisting contractual, family, or legal status relationship. When courts confront this third kind of case, the outcomes tend to be more unpredictable. In these cases, significant equitable considerations are in tension with one another. In a neighbor case, the court will often focus as much on the assumptions and expectations that the true owner may have reasonably developed based on the specific nature of the neighbor relationship as on the state of mind and expectations of the claimant–possessor. It is precisely in these cases that the existing framework of presumptions provided by articles 3427 and 3438 of the Louisiana Civil Code proves to be the most inadequate. To remedy this deficiency, Part III of this Article proposes that Louisiana law would be well served by the development of a new presumption of sharing and corresponding indicia of giving or renunciation that could help courts analyze these inherently difficult cases with greater contextual and relational sensitivity.

#### A. Strangers

Louisiana courts are most confident in resolving precarious possession defenses in cases in which the claimant–possessor and record owner are true strangers to one another, that is, when the person asserting possession in a possessory action or acquisitive prescription in some other procedural setting has no relationship at all with the record owner. In some stranger cases, the claimant–possessor is an opportunistic trespasser, a person who observes that a parcel of land is unused, unfenced, and not actively monitored by anyone and begins to engage in active corporeal possession.<sup>146</sup> In some stranger cases, however, claimants may have an honest, though mistaken, belief that they own the land in dispute but cannot prove a just title describing all of the land and thus must rely on 30-year, rather than ten-year, acquisitive prescription.<sup>147</sup> As this Section will show, in most paradigmatic stranger cases, courts

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146. See, e.g., *Liner v. Louisiana Land & Exploration Co.*, 319 So. 2d 766 (La. 1975); *Brunson v. Hemmler*, 989 So. 2d 246 (La. Ct. App. 2008); *Charles Tolmas, Inc. v. Lee*, 903 So. 2d 661 (La. Ct. App. 2005); *Williams v. McEacharn*, 464 So. 2d 20 (La. Ct. App. 1985); *Secret Cove, L.L.C. v. Thomas*, 862 So. 2d. 1010 (La. Ct. App. 2003); *St. John Baptist Church of Phoenix v. Thomas*, 1 So. 3d 618, 622–26 (La. Ct. App. 2008), all discussed *infra* notes 153–88 and accompanying text.

147. Many boundary actions, especially in boundary tacking actions arising under article 794 of the Civil Code, fall into this latter subcategory. See, e.g., *Loutre Land & Timber Co.*, 63 So. 3d 120, 122–26 (La. 2011) (holding that plaintiff timber company was owner of disputed strip of land where both parties had received a title from same succession but plaintiff could rely on boundary tacking to claim ownership via thirty year acquisitive prescription).

apply the foundational presumption set forth in article 3427 of the Louisiana Civil Code—that “[o]ne is presumed to intend to possess as owner unless he began to possess in the name of and for another”—in a robust fashion. In fact, resolution of stranger cases often will turn on other issues, for example, when the claimant’s possession began or whether it was afflicted with any of the other vices of possession.

A claimant–possessor will not always prevail in what at first blush looks like a stranger case. Occasionally, a court will find an apparent stranger–claimant to be a precarious possessor.<sup>148</sup> Sometimes this holding occurs when a court finds that a claimant, at least at the commencement of possession, had a contractual or legal status relationship with the record owner<sup>149</sup> and sometimes when the claimant appeared to possess through the neighborly toleration of the record owner.<sup>150</sup> In other words, courts sometimes reclassify apparent stranger disputes as belonging to one of the other two categories of possession and acquisitive prescription disputes. Finally, in a few stranger cases, courts simply misapply the law. Just as Professor Hargrave warned years ago,<sup>151</sup> courts sometimes make the mistake of classifying claimants as precarious possessors when in fact they are simply straightforward bad-faith possessors who possess as if they were the owner because they are on the road to acquisition of ownership through possession but are not yet the true owners.<sup>152</sup>

### *1. Stranger–Claimant Possessed as Owner*

In the vast majority of reported possession and acquisitive prescription decisions in which the parties are actual strangers to one another, Louisiana courts correctly focus on objective circumstances and routinely find that the claimant–possessor is possessing as owner and not as a precarious

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148. See discussion of cases *infra* notes 189–202 and accompanying text.

149. See, e.g., *Harper v. Willis*, 383 So. 2d 1299, 1301 (La. Ct. App. 1980) (observing that landowner’s caretaker “gave plaintiff-appellant permission to run his cattle on the land without payment of rent by Harper if Harper would look after the property, keep the fire out and the brush down,” thus effectively classifying the possessor as an implied licensee or agent of the record owner and thus not a true possessor because of his quasi-contractual relationship).

150. *Buckley v. Dumond*, 156 So. 784, 788 & 790 (La. Ct. App. 1934) (finding that neighboring claimant “did not have ‘the intention of possessing as owner’” and his trapping was a “mere toleration on the part of the plaintiff”), discussed *infra* notes 189–90 and accompanying text.

151. *Ruminations*, *supra* note 66, at 1217.

152. See, e.g., *Levy v. Germania Plantation, Inc.*, 395 So. 2d 366, 371 (La. Ct. App. 1981); *McCoy v. Toms*, 384 So. 2d 518, 519–22 (La. Ct. App. 1980), both discussed *infra* notes 198–202 and accompanying text.

possessor. A classic example of this approach is *Liner v. Louisiana Land and Exploration Co.*,<sup>153</sup> the 1975 Louisiana Supreme Court decision that serves as the foundation for our modern understanding of the concept of the “right to possess” and the requirements for bringing a possessory action. Although Justice Albert Tate’s rich doctrinal explanation in *Liner* of why a possessor’s “right to possess” is not lost as the result of a mere disturbance-in-fact during the year preceding the assertion of a possessory action is often considered the case’s focal point,<sup>154</sup> the case also represents a classic example of the unfolding of adverse possession. In particular, recall that the record owner in *Liner*, the Louisiana Land & Exploration Company (“LL&E”), failed to demonstrate any plausible claim that the possession of Liner or his ancestors-in-possession was precarious.<sup>155</sup> In fact, despite an earlier case involving nearby swampland in which the claimant was characterized as a precarious possessor,<sup>156</sup> the Supreme Court in *Liner* held that the Liner family possessed as owners, not as precarious possessors.<sup>157</sup> The reasons behind this holding were several.

Despite holding no record title to the swampy, roughly 3,000 by 7,000 foot tract of marshland in dispute, which was adjacent to a tract the Liners did own by title, Liner and his ancestors engaged in numerous acts of possession that revealed “the quality of his [and their] possession was that of owner.”<sup>158</sup> These acts included: occupation of houses prior to 1909; occupation of a camp for three or four months every year during trapping season for 56 years; annual farming, cattle raising, and trapping; erecting fences and later maintaining boundaries with the use of stakes and markers; the mysterious act of “burning the marsh”; granting a gas company a pipeline right of way; Oliver’s appropriation of a ditch that LL&E had constructed on its claimed boundary line so that he could provide a fresh water source for his own cattle;<sup>159</sup> and, of course, the famous battle of the stakes, which helped Oliver preserve his right to possess during the crucial year preceding his filing of the possessory

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153. *Liner v. Louisiana Land & Exploration Co.*, 319 So. 2d 766 (La. 1975).

154. *Id.* at 779–83 (Tate, J., concurring).

155. Plainly, LL&E made such an assertion because the majority opinion went out of its way to hold that “the quality of his [Liner’s] possession was that of owner. . . . It was neither precarious, clandestine, violent nor ambiguous.” *Id.* at 774.

156. *Buckley v. Dumond*, 156 So. 784 (La. Ct. App. 1934), discussed *infra* notes 189–90 and accompanying text.

157. *Liner*, 319 So. 2d at 769.

158. *Id.* at 774.

159. *Id.* at 769–70.

action.<sup>160</sup> In light of these actions, Justice Dixon could sum up the nature of the Liner family's possession in these terms: "the quality of his possession was that of owner. It extended to visible boundaries. It was neither precarious, clandestine, violent, nor ambiguous."<sup>161</sup>

Nowhere in the record was there any indication of a real neighbor relationship between the Liners and the record owners. Although they owned neighboring tracts of land, they were, for all intents and purposes, strangers to each other—that is, until LL&E appeared in the year before the filing of the possessory action and began challenging Liner's boundaries.

Although Justice Dixon's opinion in *Liner* cited *Buckley v. Dumond*,<sup>162</sup> a case in which the possession of two claimants to neighboring swampland similar to the land in dispute in *Liner* was characterized as precarious, Dixon did not bother to distinguish that case in any detail.<sup>163</sup> A quick review reveals why. First, the claimants' activities and improvements in *Buckley* were more transitory than in *Liner*.<sup>164</sup> Second, the record owner in *Buckley* maintained his presence on the land in dispute through the actions of a hunting and trapping lessee.<sup>165</sup> The active presence of this lessee, who posted the property with signs forbidding entrance and actively tried to keep intruders away, suggests that the court in *Buckley* visualized the parties as two neighbors, with the defendant-claimant engaged in trapping through the "mere tolerance" of the record owner plaintiffs.<sup>166</sup> By contrast, the acts of possession exhibited by the Liners seem to epitomize the kind of revolutionary challenge to the agenda-setting authority of the true owner that some scholars say is essential for real adverse possession or acquisitive prescription to prevail.<sup>167</sup>

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160. *Id.* at 773–74. The Court also noted the Liner family's reliance on the land as its primary source of income and the important fact that other trappers in the community recognized the Liners' boundaries. *Id.* at 770.

161. *Id.* at 774.

162. *Buckley v. Dumond*, 156 So. 784 (La. Ct. App. 1934).

163. Justice Dixon merely stated that "[u]nlike the defendants in *Buckley v. Dumond*, which involved neighboring swampland, the Liner family possessed as owners." *Liner*, 319 So. 2d at 769 (citing *Buckley*, 154 So. 784).

164. In *Buckley*, the claimant only trapped and grazed cattle. His improvements consisted of only a small ditch to facilitate trapping activities and a camp that served as temporary shelter for hunting and trapping. *Id.* at 788–90.

165. *Id.* at 788–90.

166. *Id.*

167. Katz, *supra* note 71, at 63–79; BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 282, at 149 (acts of the possessor must be "sufficiently serious to represent a usurpation which should be repressed").

After *Liner*, in a series of stranger cases decided over the last three decades, Louisiana appellate courts have repeatedly held that long-term possessors in fact possessed with the intent to own, even though record owners attempted to discredit their possession as being merely precarious. The courts often reached this conclusion because of the lack of any meaningful relationship between the possessor and record owner; that is, because the parties were strangers. In one case, the appellate court reversed a trial court finding that the possession was precarious in a dispute in which the parties owned adjoining tracts of land but did not know each other.<sup>168</sup> In that decision, the court described article 3427 as creating a “strong legal presumption” that a possessor possesses as owner, a presumption that the hearsay testimony of a deceased possessor’s alleged declaration against interest almost 20 years before the litigation could not rebut, especially when the claimant’s possession was “established by the lengthy use of the property.”<sup>169</sup> In another case, the appellate court affirmed a trial court ruling that the adverse possessors established 30-year acquisitive prescription against a corporation that had purchased the land in dispute situated on the bank of a navigational canal from a record owner who had ignored the claimants’ extensive use of the land as a commercial campsite.<sup>170</sup> There, citing article 3427, the court observed that a possessor’s intent to possess as owner “may be inferred from all of the surrounding facts and circumstances”<sup>171</sup> and concluded, in the absence of any relationship between the parties, that the claimants acted as the sole owner of the land in dispute.<sup>172</sup> In yet another case, a claimant church established acquisitive prescription against a handful of descendants of the original record owners who had purchased the land for the benefit of the church.<sup>173</sup> The claimant church defeated the allegation of precarious possession made by the record owners’ descendants by pointing to its 100-year history of allowing families to live on the property and otherwise acting as if it were the owner for purposes of dealing with third parties, the State of Louisiana, and local government.<sup>174</sup> In other words, even if the adverse possessor and record owner initially enjoyed a close relationship, when that relationship disintegrates such that the actual parties to the dispute are strangers, precarious possession does not constitute a meaningful defense.

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168. *Williams v. McEacharn*, 464 So. 2d 20, 22–24 (La. Ct. App. 1985).

169. *Id.* at 24.

170. *Secret Cove, L.L.C. v. Thomas*, 862 So. 2d 1010 (La. Ct. App. 2003).

171. *Id.* at 1015.

172. *Id.* at 1020.

173. *St. John Baptist Church of Phoenix v. Thomas*, 1 So. 3d 618, 622–26 (La. Ct. App. 2008).

174. *Id.* at 622.

In one particularly clear example of this *jurisprudence constante*,<sup>175</sup> the case of *Brunson v. Hemler*,<sup>176</sup> the adverse possessors established ownership of 60 acres of rural land by proving that they and their ancestors possessed the land in dispute since at least 1936 by planting crops, raising cattle, fencing and enclosing the land, and regularly clearing the woods.<sup>177</sup> The record owners—a private trust and two universities—had much less significant contact with the land. Indeed, only one of the defendants could testify about ever visiting the land, a visit that had reportedly occurred 43 years before the litigation.<sup>178</sup> Citing two other decisions,<sup>179</sup> the record owners asserted that the claimants were precarious possessors who must provide “some kind of direct or dual notice” before acquisitive prescription could begin.<sup>180</sup> Rejecting this plea, the court of appeal held that “the testimony yields no indication that Plaintiffs and their ancestors-in-title occupied and used the disputed property in any capacity other than as owners”<sup>181</sup> and concluded that the presumption of article 3427 that a possessor intends to possess as owner was “not rebutted.”<sup>182</sup> In *Brunson*, the court refused to muddy the waters of the plaintiffs’ acquisitive prescription claim with precarious possession because the parties were, in short, utter strangers to one another.

Finally, *Charles Tolmas, Inc. v. Lee*<sup>183</sup> presents a striking example of a successful urban squatter who laid claim to a vacant lot next door to his business, eventually acquired most of it by 30-year acquisitive prescription and, along the way, overcame the allegation made by the undisputed record owner that his possession was tolerated as a neighborly accommodation.<sup>184</sup> In *Tolmas*, the trial court ruled that the claimant’s

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175. *Jurisprudence constante* refers to the practice of Louisiana courts giving deference, but not being blindly subservient to, a series of prior judicial decisions by the same or a higher-level court. Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 LA. L. REV. 1369, 1372 (1988).

176. *Brunson v. Hemler*, 989 So. 2d 246 (La. Ct. App. 2008).

177. *Id.* at 249–51.

178. *Id.* at 251.

179. *See* *Humble v. Dewey*, 215 So. 2d 378 (La. Ct. App. 1968), discussed *infra* at notes 310–23 and accompanying text; *Harper v. Willis*, 383 So. 2d 1299 (La. Ct. App. 1980), discussed *infra* at notes 191–97 and accompanying text.

180. *Brunson*, 989 So. 2d at 251.

181. *Id.*

182. *Id.*

183. 903 So. 2d 661 (La. Ct. App. 2005).

184. The record owner, Charles Tolmas, Inc., sued in 1998 seeking a judicial declaration that the defendant, Calvin Lee—and after his death, his estate—had no ownership interest in a vacant parcel situated on Metairie Road, a well-

possession of the vacant lot had been open, continuous, unequivocal, and uninterrupted for 47 years and therefore that the claimant acquired ownership of most of the lot by acquisitive prescription.<sup>185</sup> The court of appeal affirmed, rejecting the record owner's arguments that the claimant had not sufficiently enclosed the property and "that [the Tolmas family] knew the area was being used for parking by the Lees, but they did not complain because they were trying to be neighborly."<sup>186</sup> Responding to the latter contention of precarious possession, the court emphasized the open and public nature of the claimant's possession and, just as important, the record owner's awareness of and passivity toward the claimant's use of the land.<sup>187</sup>

Although it did not cite article 3427 of the Louisiana Civil Code, the court in *Tolmas* clearly ruled as if the burden of proving precariousness rested with the record owner, and the court was thus unwilling to give much credence to the record owner's *ex post* claim that it had merely been tolerating the claimant's use as a neighborly accommodation.<sup>188</sup> The court's lack of sympathy for the precariousness defense can be explained by the lack of any real neighborly relationship between the parties. Although their lots may have been adjacent to one another, the two families involved in the conflict—the Lees and the Tolmas—were not neighbors in the traditional sense. On the busy commercial corridor of Metairie Road in suburban New Orleans, the two families in this case essentially ignored each other until the record owner instituted its lawsuit in 1998, by which time, the court found, acquisitive prescription had run. In sum, just like many of the other stranger cases, *Tolmas* demonstrates that when parties in a possession or acquisitive prescription suit are actually nothing more than strangers to one another, an allegation of precarious possession by the record owner is unlikely to prevail.

## 2. *Stranger–Claimant as Precarious Possessor*

Occasionally a court will classify a person who appears to be a classic stranger–claimant as a precarious possessor. This classification typically

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traversed commercial corridor in the suburbs of New Orleans. *Id.* at 662. Lee operated a dry-cleaning business on a lot next door to the vacant Tolmas lot that he owned and on which he had constructed a building in 1951. *Id.* In 1951, Lee's customers and employees began using a triangular shaped area on the Tolmas lot to park their vehicles. *Id.*

185. *Id.* at 664.

186. *Id.* at 665.

187. *Id.*

188. *Id.*

happens because the court views the case as falling into one of the other paradigm possession or acquisitive prescription categories. In other instances, a court will simply give undue weight to an inadvertent testimonial admission. In *Buckley v. Dumond*,<sup>189</sup> the court of appeal held that claimants who trapped animals, grazed cattle, and built a few minor and temporary improvements on undeveloped swampland were really possessing with the mere tolerance of the record owner, who had leased the land in dispute to another trapper who actively monitored the land.<sup>190</sup> In a sense, the court in *Buckley* viewed the parties as neighbors and members of the same close-knit community, rather than as strangers.

In another well-known decision that arguably involves strangers, *Harper v. Willis*,<sup>191</sup> the claimant in a possessory action, Harper, physically possessed three lots that were part of a failed subdivision development on the outskirts of Alexandria, Louisiana for more than 30 years by grazing cattle on the land.<sup>192</sup> Although Harper's physical occupation of the land began around 1939, sometime thereafter a caretaker of the property for a purported owner reportedly gave Harper permission to run cattle on the land rent-free "if Harper would look after the property, keep the fire out and brush down."<sup>193</sup> After the caretaker abandoned his duties, Harper "took over the property in 1947."<sup>194</sup> The only other contact between Harper and a record owner occurred in 1960 when Harper wrote a letter to an apparent record owner offering to buy one of the lots in dispute.<sup>195</sup>

Based on these facts and a review of his deposition testimony, the court concluded that Harper lacked the requisite intent to possess as owner sufficient for a possessory action.<sup>196</sup> Relying heavily on *Buckley*, the court repeatedly emphasized that Harper's own candid testimony, in which he admitted, for example, that he never intended to "take" the property or "beat anybody out of anything," proved that he lacked the intent to possess as owner, despite considerable objective evidence that he was acting in the

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189. 156 So. 784 (La. Ct. App. 1934) (showing that *Buckley* brought a similar suit against Theriot, and the two cases were consolidated).

190. *Id.* at 788–90.

191. *Harper v. Willis*, 383 So. 2d 1299 (La. Ct. App. 1980).

192. *Id.* at 1301–02. Harper testified that although a fence did not surround the three lots in dispute, there was a fence around the entire two sections of land that constituted the larger "Old Pecan Orchard Subdivision." *Id.* Harper apparently had acquired many of the other lots in the subdivision in the period between the commencement of his physical possession and the time of the litigation. *Id.* at 1301.

193. *Id.* at 1301.

194. *Id.*

195. *Id.* at 1302.

196. *Id.* at 1302–07.

manner of an owner. Perhaps the best way to understand *Harper*, then, is to acknowledge that the caretaker's purported grant of permission to Harper, vague and uncertain as it was, created a contractual relationship between Harper and the record owner—that of principal and agent—placing this case in this Article's second category of possession and acquisitive prescription disputes.<sup>197</sup>

Finally, sometimes a court will simply make a poor judgment in what otherwise appears to be a classic stranger case. In *Levy v. Germania Plantation*,<sup>198</sup> the decision that Professor Hargrave worried might read bad-faith acquisitive prescription out of the Civil Code, the court characterized a claimant as a precarious possessor based solely on one naïve cross-examination statement even though the claimant was completely unaware of the identity of the true owner of the land in dispute.<sup>199</sup> In *Levy*, both the trial and appellate courts admitted that but for this ill-advised but candid statement, the claimant would have prevailed under the normal presumptions of the Civil Code because from an objective viewpoint, his acts of possession were consistent with those of someone possessing as if he had record title.<sup>200</sup> In another arguably sui generis stranger case, *McCoy v. Toms*,<sup>201</sup> the court of appeal appears simply to have latched onto precarious possession like a *deus ex machina* to solve a difficult quandary, even though the claimant, from an objective standpoint, appeared to have no relationship whatsoever with the record owner that would logically lead to his classification as a precarious possessor.<sup>202</sup>

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197. After all, as the Civil Code teaches, “[a] mandate is a *contract* by which a person, the principal, confers authority on another person, the mandatory, to transact one or more affairs for the principal.” LA. CIV. CODE art. 2989 (2016) (emphasis added).

198. 395 So. 2d 366 (La. Ct. App. 1981).

199. *Id.* at 371 (noting that on three different occasions the claimant stated that “while he was possessing the property in the same manner as he would have if he had had record title, he did not consider himself as owner until he was approached for an oil, gas and mineral lease some three years ago”).

200. *Id.*

201. 384 So. 2d 518 (La. Ct. App. 1980).

202. In *McCoy*, all the parties believed that the two and one half acre tract in dispute was owned by the State of Louisiana because it appeared to form part of the bed of Lake Bisteneau. *Id.* at 519. The trial court ruled that the claimant–possessor lacked the intent to possess as owner and, paradoxically, was in “legal bad faith,” permitting the record owner to elect whether to keep the extensive improvements that the claimant–possessor had erected on the land and pay him for the materials and workmanship or require the possessor to remove the improvements. *Id.* at 519–20. The court of appeal affirmed both of these inconsistent rulings, noting only that everyone believed the property in dispute

Despite these occasionally aberrant decisions, in almost all true stranger cases, courts will characterize a claimant–possessor as possessing as owner or at least in the manner of an owner. The success of the claimant’s possessory action or acquisitive prescription claim thus turns, as it should, on other factors.

### *B. Contractual and Legal Status Relationships*

The second general category of possession and acquisitive prescription cases involves a claimant–possessor and a record owner who have some contractual relationship with one another or share some clearly defined legal status relationship, for example, as co-owners, family members, or some other *sui generis* legal status.<sup>203</sup> Regardless of the particular source of the relationship, however, courts generally characterize the claimant as a precarious possessor at the outset of the claimed period of corporeal possession.<sup>204</sup> In these cases, the outcome will usually turn on whether the precarious possessor has provided “actual notice to the person on whose behalf he is possessing that he intends to possess for himself,” or whether, in the special case of co-owners, “he demonstrates by overt and unambiguous acts sufficient to give notice to his co-owner that he intends to possess the property for himself.”<sup>205</sup>

Courts routinely favor record owners in many contractual situations, especially in cases involving lessors and lessees, principals and agents, and vendors and vendees. However, in cases involving non-contractual relationships, the rulings are somewhat less predictable. In the context of co-ownership in particular, courts have developed specialized rules and presumptions that allow active, in-possession co-owners to terminate precarious possession and assert acquisitive prescription against passive, out-of-possession co-owners in some situations. In these cases, courts will often guard against abuse by co-owners, especially when the passive co-owner is a vulnerable family member. In family disputes that do not involve co-ownership and in other *sui generis* relationships, precarious possession is a status that remains difficult to dislodge.

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was owned by the state and that the “important fact is that the defendant and his predecessors never intended to claim ownership or possess as owners.” *Id.* at 522.

203. Baudry-Lacantinerie and Tissier enumerated the many diverse contractual and quasi-contractual relationships that can give rise to precarious possession beyond those specifically mentioned in article 2236 of the French Civil Code. For their lengthy list and discussion see BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶¶ 303–309, at 161–65.

204. See generally cases discussed *infra* notes 206–21 and accompanying text.

205. LA. CIV. CODE art. 3478 (2016); see also *id.* art. 3439.

### 1. Contractual Relationships

The clearest examples of contractual relationships giving rise to strong presumptions of precariousness arise when the claimant and record owner share a nominate contractual relationship, for example, that of lessee and lessor, agent and principal, real right holder and owner, or vendee and vendor. In almost all of these cases, the claimant must demonstrate by clear and unequivocal evidence that his possession has changed character and become adverse to the record owner, a burden that the claimant usually cannot meet.

#### a. Lessees and Lessors

In most contractual settings, claimant–possessors will be hard-pressed to establish they have been possessing non-precariously, that is, in the manner an owner would possess and for their own benefit. Article 3438 of the Louisiana Civil Code, which instructs that precarious possessors are presumed to continue to possess for another although the possessors may have privately intended to possess for themselves, specifically lists a lessee as a precarious possessor.<sup>206</sup> Consequently, when a lessee attempts to assert acquisitive prescription or otherwise protect a possessory interest vis-à-vis a lessor–record owner, the lessee will usually fail because courts are quick to characterize the lessee as a precarious possessor. This tendency was true in the 19th century,<sup>207</sup> and it has remained true over the last 25 years.<sup>208</sup>

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206. LA. CIV. CODE art. 3438 (2007).

207. *Jackson v. Jones*, 14 La. Ann. 230 (La. 1859) (stating that purchasers of a 50-year lease could not change the nature of their tenure for purposes of acquiring ownership by ten-year acquisitive prescription); *Calmes v. Duplantier*, 14 La. Ann. 814 (La. 1859) (stating that decedent’s widow could not gain ownership of slaves through ten-year acquisitive prescription because “her husband held them by the contract of hire, and not by title as proprietor”).

208. *Linder Oil Co. v. LaBoKay Corp.*, 556 So. 2d 899, 902 (La. Ct. App. 1990) (showing that claimant who asserted that his ancestor-in-title acquired ownership through farming activities could not establish prescription because farming took place with permission of the record owner’s predecessor-in-title through an agricultural lease and thus was precarious); *see also Comeaux v. Davenport*, 452 So. 2d 818, 821–22 (La. Ct. App. 1984) (holding that invalid lease did not render possession precarious when lease was signed by only one of two co-owners as lessors, and the court had serious misgivings that the illiterate lessee–possessor’s consent was validly given).

*b. Agents and Principals*

A similar pattern emerges when a possessor–claimant begins possession as an agent for a principal who happens to be the record owner of the immovable property in dispute. In an 1878 decision involving changed identities, illegitimate children, and an emancipated former slave, the Louisiana Supreme Court held that mere agents “cannot acquire a legal possession, because it cannot be presumed that they had the intention of possessing for themselves, and even if they did entertain that dishonest intention, their possession continues to be that of the person for whom they originally took it.”<sup>209</sup> In *Cortinas v. Peters*,<sup>210</sup> the Louisiana Supreme Court similarly held that a would-be seller of five lots in New Orleans could not establish the validity of his title by establishing that his predecessor-in-title had acquired ownership by 30-year acquisitive prescription. That claim failed, the Court held, because the predecessor had possessed the property only as agent for a bank, which itself had acquired title to the property many years earlier.<sup>211</sup> In the exceptional case, a court may hold that an apparent agent is not a precarious possessor, but only if the scope of the agency relationship does not include the property in dispute.<sup>212</sup>

*c. Servitude Holders and Servient Estate Owners, Usufructuaries and Naked Owners*

The person entitled to enforce a predial servitude or a usufructuary engages in quasi-possession of the servitude or usufruct at issue with either the express contractual permission or implied permission of the servient estate holder or the naked owner. Accordingly, courts have found that these kinds of possessor–claimants cannot acquire ownership of land subject to the servitude or usufruct by acquisitive prescription without

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209. *Neel v. Hibard*, 30 La. Ann. 808, 809 (La. 1878) (stating that the plaintiff was unable to claim “legal and peaceable possession” of a lot and improvements in the City of New Orleans).

210. 68 So. 2d 739 (La. 1953).

211. *Id.* at 741.

212. *Wm. T. Burton Indus., Inc. v. McDonald*, 346 So. 2d 1333, 1335–37 (La. Ct. App. 1977) (holding that a man who worked as a timber cruiser–agent for a timber company was not a precarious possessor and could acquire land through 30-year acquisitive prescription because he did not know that the company owned the 40 acres in dispute, did not ask or receive permission to use, and never leased the land in dispute, and claimant and his father cultivated and completely enclosed the land in dispute along with other land they owned for many years).

providing particularly explicit notice of their intent to possess as owner. In a classic 1910 decision, the Louisiana Supreme Court held that the holder of a servitude of right of way could not acquire ownership of land subject to the servitude through ten-year acquisitive prescription by relying solely on registry of a title from a third person.<sup>213</sup> Quoting extensively from French sources, Justice Provosty explained that to notify the actual owner of the change of status, a servitude holder or usufructuary must “indicate by some outward acts of possession his intention to hold no longer under the old title but under the new” and that “these acts must be of an unusually pronounced character.”<sup>214</sup> In short, this kind of precarious possessor must, in Provosty’s words, “so conduct himself as to let the owner know that a new order of things has begun.”<sup>215</sup> In a 1964 decision, the Louisiana Fourth Circuit Court of Appeal observed that because a usufructuary is a precarious possessor, the usufructuary generally cannot assert acquisitive prescription against a naked owner.<sup>216</sup> More recent appellate court decisions have reached similar conclusions, rejecting claims of acquisitive prescription in cases involving both predial servitudes<sup>217</sup> and usufructs.<sup>218</sup>

*d. Vendors and Vendees*

When an owner sells immovable property but the vendee, for some reason, does not immediately take corporeal possession of the property

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213. *John T. Moore Planting Co. v. Morgan’s La. & T.R. & S.S. Co.*, 53 So. 22, 34 (La. 1910).

214. *Id.* at 35.

215. *Id.*

216. *Succession of Heckert*, 160 So. 2d 375, 380–81 (La. Ct. App. 1964) (citing Leonard Oppenheim, *The Usufruct of the Surviving Spouse*, 18 TUL. L. REV. 181, 217 (1943)). In *Succession of Heckert*, the court never reached the question of whether the former usufructuary took any action that would have constituted notice of an intent to possess as owner. *Id.* at 381. Indeed, as the usufruct at issue only lasted for approximately one year because the usufructuary remarried, and the case was litigated approximately 24 years later, it was inevitable that the usufructuary’s possession would have been characterized as precarious. *Id.* at 376–77.

217. *Grieshaber Family Props. v. Impatiens, Inc.* 63 So. 3d 189, 197 (La. Ct. App. 2011) (concluding that the holder of a written servitude of view prohibiting construction on a disputed commercial lot in New Orleans was a precarious possessor and could not assert acquisitive prescription against the servient-estate owner absent acts that would have been sufficient to put the latter on notice of an intent to possess as owner).

218. *Hooper v. Hooper*, 941 So. 2d 726, 731 (La. Ct. App. 2006), *see* discussion *infra* notes 226–28 and accompanying text.

sold and the vendor remains in possession, courts routinely characterize the vendor as a precarious possessor who cannot bring a possessory action or assert acquisitive prescription unless the vendee has received clear notice that precarious possession has ended. After the Louisiana Supreme Court's classic exposition of this rule in *Frost Lumber Industries v. Harrison*,<sup>219</sup> Louisiana courts have frequently followed its example<sup>220</sup> and even extended it to other analogous contexts, including partitions.<sup>221</sup>

## 2. Co-Ownership Disputes: Context Matters

When two or more persons own a thing in indivision in Louisiana, each of the co-owners has a right to use the thing according to its

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219. 41 So. 2d 674, 675–676 (La. 1949). This case involved a partition action, and the Louisiana Supreme Court held that the widow of a man who had purchased an 80-acre tract of land in 1901 could not intervene and assert acquisition of title by acquisitive prescription because her possession was precarious in two respects. *Id.* First, in 1913, the widow sold her undivided one-half interest in the land to the ancestor-in-title of the lumber company that eventually brought the partition action. *Id.* As a vendor who retains physical possession of the property sold, she was presumed to possess precariously for her vendee and could not terminate that precariousness until she apprised the vendee of her change in status. *Id.* Second, Harrison also possessed a one-half undivided interest in the tract as usufructuary. *Id.* As a result, although she was entitled to remain in possession of the entire tract until she was divested by the partition initiated by her vendee, the “quality” of her physical possession was converted from its duality of owner and usufructuary to that of “merely usufructuary.” *Id.*

220. *Maddox v. Vanlangendonck*, 334 So. 2d 739, 743 (La. Ct. App. 1976) (holding that a person possessing under a bond for deed contract is a precarious possessor); *James Harvey Ramsey Estate, Inc. v. Pace*, 467 So. 2d 1202, 1208 (La. Ct. App. 1985) (holding that the heirs of a vendor who held possession of a five acre tract of land could not assert a possessory action against the vendee's son and heir because the vendor's heirs were bound by the warranty obligation in the original warranty deed and subsequent correction deed and noting that “[h]eirs of a vendor-warrantor of peaceful possession to a vendee, accepting the succession, are not in a situation of third-party usurpers or bad faith possessors adverse to their ancestor's vendee”).

221. *Feazel v. Howard*, 511 So. 2d 1306, 1308 (La. Ct. App. 1987) (applying the principle of *Frost Lumber* to a dispute among co-heirs who acquired neighboring tracts of land by virtue of a partition and analogizing possession exercised by one co-heir over land of another co-heir to that of a vendor retaining possession for the vendee, ultimately concluding that “retention of possession by a former co-owner makes him the presumed precarious possessor for the other former co-owner who by virtue of the partition has become owner in full of a specified parcel”).

destination and cannot prevent the other co-owners from making use of it, unless a use and management agreement otherwise restricts the use of the thing by the co-owners.<sup>222</sup> Because of this fundamental rule of co-ownership, co-owners in possession are presumed to be possessing for themselves with respect to their own undivided interest and on behalf of the other co-owners, and, therefore, their possession is deemed to be precarious with respect to fellow co-owners.<sup>223</sup>

Building on this foundational principle, articles 3439 and 3478 of the Louisiana Civil Code provide specialized rules for termination of precarious possession by co-owners. In the context of possession alone, article 3439 instructs that “[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.”<sup>224</sup> In the specific context of acquisitive prescription, article 3478 reiterates that a co-owner “may commence to prescribe” by meeting the same notice standard of “overt and unambiguous acts,” but this article adds by way of illustrative example that “[t]he acquisition and recordation of a title from a person other than a co-owner may mark the commencement of prescription.”<sup>225</sup>

Given the frequency with which co-ownership arises in Louisiana as the result of inter-family donations, succession, divorce and the termination of community property regimes, as well as through intentional acquisitions by two unrelated persons, that a rich body of case law has developed involving precarious possession and co-ownership is no surprise. Although courts might be expected to favor precarious possession defenses asserted by out-of-possession co-owners overwhelmingly, the case law has in fact yielded mixed results.

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222. LA. CIV. CODE arts. 801–802 (2016).

223. *Ruminations*, *supra* note 66, at 1221; *Hendrick v. Lee*, 471 So. 2d 904, 908 (La. Ct. App. 1985).

224. LA. CIV. CODE art. 3439.

225. *Id.* art. 3478. Hargrave explains that this additional language in article 3478 was intended to codify the rule in *Dupuis v. Broadhurst*. 213 So. 2d 528, 529–32 (La. Ct. App. 1968) (holding that when one apparent co-owner transfers his undivided interest to another and that transfer is executed and recorded, this act gives adequate notice to other alleged co-owners out of possession that the transferee co-owner intends to possess for himself as owner). Hargrave, however, was doubtful that the indexing system for property records would allow a co-owner out of possession to detect recordation of a title from another person. *Ruminations*, *supra* note 66, at 1222.

a. *Co-Owners Who Remain Precarious Possessors*

In many cases, courts do hold, as might be expected, that co-owners in possession of immovable property possess precariously for their fellow co-owners and cannot prove they gave sufficient notice of their intent to possess on their own behalf. Sometimes, as in *Hooper v. Hooper*,<sup>226</sup> a case in which the appellate court rejected an assertion of 30-year acquisitive prescription by one brother against the estate of his mentally incompetent brother regarding a one-sixteenth ownership interest in family property, the result can be easily explained. In *Hooper*, not only did the appellate court note blatant defects in the purported title from another person upon which the claimant relied to found his claim of voluntary transfer of ownership,<sup>227</sup> it expressed a strong conviction that the claimant could not possibly have given adequate notice of his intent to possess as owner to the out-of-possession co-owner because of the latter's vulnerability.<sup>228</sup>

In another recent decision,<sup>229</sup> the same appellate court, citing *Hooper*, rejected an acquisitive prescription claim in a boundary dispute because one of the claimant's four siblings failed to execute a partition deed resulting from his parents' succession and because neither that sibling's estate nor any of his descendants were given adequate notice of the partition.<sup>230</sup> In particular, the court found that the claimant could not tack his possession to that of his parents to satisfy the prescriptive time period because of the precarious nature of his possession vis-à-vis one deceased sibling and the absence of any overt and unambiguous act that could give notice to his deceased sibling's estate or descendants.<sup>231</sup>

More recently, in *Cockerham v. Cockerham*,<sup>232</sup> a court similarly determined that 30-year acquisitive prescription did not start to run because an invalid 1963 deed from a third person to the claimant's father

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226. 941 So. 2d 726 (La. Ct. App. 2006).

227. The court found that the deed, which the brothers' mother signed and purportedly transferred the one-sixteenth ownership interest to the claimant while allowing the incompetent brother to retain a usufruct, failed to transfer ownership. *Id.* at 730.

228. In light of his brother's mental incompetence, the court concluded that the claimant could only satisfy the "overt and unambiguous acts" requirement by giving actual notice to his brother's legal representative, a feat not possible until many years later when a representative was finally appointed and qualified. *Id.* at 731.

229. *Graham v. Bernheimer*, 6 So. 3d 343 (La. Ct. App. 2009).

230. *Id.* at 344–46.

231. *Id.* at 347.

232. 16 So. 3d 1264 (La. Ct. App. 2009).

did not constitute notice to the claimant's co-owners.<sup>233</sup> Not only was the deed authored by a person who did not have any actual or future interest in the property to convey, but no other acts of possession followed that could have given the other co-owners notice of the claimant's intent to possess the property in dispute as the sole owner.<sup>234</sup> Finally, in *Andras v. Thibodeaux*,<sup>235</sup> another partition case involving multiple co-owners who inherited property from a common ancestor, the appellate court held that multiple acts of possession of the intervenor claimants—including fencing, building houses and other structures, raising animals, cutting and planting trees—still failed to place the other co-owners on notice of an intent to possess as exclusive owners, particularly in the absence of any title or document translative of ownership.<sup>236</sup> In all of these cases, courts treated the general presumption that a precarious possessor continues to possess for or on behalf of his fellow co-owners in a robust fashion.

*b. Co-Owners Who Terminate Precarious Possession*

Despite these decisions hostile to acquisitive prescription claims asserted by co-owners, sometimes a co-owner can establish 30-year acquisitive prescription vis-à-vis another co-owner. The common denominator in this alternative line of decisions is the combination of a recorded instrument, whether executed by a third party or another co-owner, that is either translative or declarative of ownership, and substantial acts of possession that are capable of providing reasonable notice that possessing co-owners intend to possess for their own interest. In addition, strong equitable factors, such as the length of time of the claimant's sole possession, investment in the property by the claimant, and extreme neglect on the part of the out-of-possession co-owner all weigh in the claimant's favor.

The Louisiana Supreme Court decision in *Succession of Seals*<sup>237</sup> is the foundational modern decision establishing this line of authority. In that case, the succession of Stokes Seals sued to be placed in possession of a

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233. *Id.* at 1269–70.

234. *Id.* at 1270. In *Cockerham*, the other co-owners also acted as if the property belonged to all of them. *Id.* at 1271.

235. 157 So. 3d 767 (La. Ct. App. 2014).

236. *Id.* at 768–71. *See also* *Headrick v. Lee*, 471 So. 2d 904, 907–09 (La. Ct. App. 2d 1985) (holding that brother and his heirs who farmed property for 75 years, paid all the property taxes, and did not share proceeds with other co-owners did not terminate precarious possession because acts of occupancy and use, “without more,” are insufficient to constitute notice of adverse possession to co-owners).

237. *Succession of Seals*, 150 So. 2d 13 (La. 1963).

60-acre tract of land based on 10- and 30-year acquisitive prescription.<sup>238</sup> The defendants, Stokes's collateral relatives, denied that he owned the land exclusively and claimed that they, too, had possessed the land because they inherited undivided interests from Stokes's uncle, Henry Seals.<sup>239</sup> Stokes apparently had some reason to think he owned the land exclusively because Henry Seals's widow had purportedly transferred ownership of the land to Stokes in 1913.<sup>240</sup> That transfer was found to be invalid, however, because the land was actually separate property that Henry had acquired before his marriage and, thus, Henry's widow could not convey it to Stokes.<sup>241</sup> Consequently, after Henry's death, when the land was placed in Henry's succession, Stokes became one of several co-heirs who acquired undivided interests in the land.<sup>242</sup>

Soon after the apparent but invalid transfer of ownership in 1913, Stokes began to engage with the land. First, he paid off two mortgages burdening the property.<sup>243</sup> Then, treating the property as his home, he built houses, fenced the land, and made other improvements.<sup>244</sup> He also farmed the land, sold timber, granted mineral leases, paid property taxes, and sold portions of the property.<sup>245</sup> In contrast, the defendants displayed little, if any, interest in the disputed land except when they occasionally needed a place to live and "did some improving for their own comfort."<sup>246</sup> Further, while Stokes took care of the defendants' mother, charged some of his co-heirs rent, allowed others to live on the land for short times rent-free, and granted other "favors," his actions, the Court observed, were "purely beneficial" as he "manifested no intention of abandoning his adverse possession."<sup>247</sup> In short, the Court actually viewed the defendants' acts of possession as precarious vis-à-vis Stokes, not the other way around.<sup>248</sup> Commenting on the defendants' long-standing indifference to the land until they learned of its potential mineral exploitation value, the Court observed,

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238. *Id.* at 14.

239. *Id.*

240. *Id.* at 17.

241. *Id.* at 17, 19.

242. *Id.* at 14–18.

243. *Id.* at 17.

244. *Id.* at 18.

245. *Id.* at 17.

246. *Id.* at 18.

247. *Id.* at 21. *See also* *Towles v. Heirs of Morrison*, 428 So. 3d 1029, 1032 (La. Ct. App. 1983) (quoting same passage from *Seals*).

248. *Seals*, 150 So. 2d at 21 (noting that "[t]hese heirs never asserted any real claim to the sixty acres herein involved until they were ruled into court").

The genius of our law does not favor the claims of those who have long slept on their rights and who, after years of inertia, conveying an assurance of acquiescence in a given state of things, suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid of the courts for relief, under the effect of a newly discovered technical error in some ancient transaction or settlement.<sup>249</sup>

In the end, the Louisiana Supreme Court in *Seals* held that Stokes acquired ownership of the disputed land by 30-year acquisitive prescription, affirming the trial court's findings that his possession "was that of owner and was hostile to that of defendants for a period of thirty years."<sup>250</sup>

*Seals* proved to be influential because it established the principle that co-owners or co-heirs could terminate precarious possession and begin to prescribe in their own right if they could show some written, recorded instrument that appeared to convey or declare title or ownership, even if that instrument was invalid, as long as additional acts of possession occurred after the recording of the instrument.<sup>251</sup> Following *Seals*, a number of reported decisions applied its basic teaching and held that co-owners acquired ownership by 30-year acquisitive prescription on the basis of a variety of recorded instruments and additional acts of possession. The recorded instruments that have been found to suffice include a simulated sale,<sup>252</sup> acts of partition,<sup>253</sup> and even a prohibited donation *omnium*

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249. *Id.* at 21 (quoting *Lafitte, Dufilho & Co. v. Godchaux*, 35 La. Ann. 1161, 1163–64 (1883)).

250. *Id.* at 21–22.

251. *Id.* at 17–21. Justice McCaleb's concurring opinion in *Seals* cemented this understanding as he emphasized that Stokes Seals' acquisitive prescription claim was well founded precisely because he "went into possession of the property not as a co-heir or co-owner but as a sole owner thereof under a title translative of the property notwithstanding that the title under which he acquired was not a good prescriptive title." *Id.* at 22.

252. *Detraz v. Pere*, 183 So. 2d 401, 402–03 (La. Ct. App. 1966) (holding that a 1926 deed later claimed to have been a simulation combined with acts of cultivation and enclosure was sufficient to start 30-year acquisitive prescription).

253. *Dupuis v. Broadhurst*, 213 So. 2d 525, 531–32, 531 n.1 (La. Ct. App. 1968) (on rehearing) (holding that the claimant's ancestor-in-title began to prescribe in his own interest by virtue of two instruments, a partition deed and a cash deed, each purporting to convey a one-half interest in title, along with acts of farming and fencing); *see also Minton v. Whitworth*, 393 So. 2d 294, 297 (La. Ct. App. 1980) (holding that an act of partition executed by all the co-owners constituted notice to co-owners that subsequent possession was adverse and hostile to the common interest).

*bonorum*.<sup>254</sup> A 1983 decision, in which the recorded instruments included several 19th-century succession sales and a 1904 act of partition, also pointed out that no requirement exists that the co-owners who opposed the claim of acquisitive prescription have actually participated in the transactions leading to the recordation of title.<sup>255</sup> The only kind of recorded instruments that do not reliably serve this purpose are tax sale adjudications and redemptions.<sup>256</sup>

Finally, in *Franks Petroleum Inc. v. Babineaux*,<sup>257</sup> a well-known decision from 1984, the court resolved a dispute between two sets of co-owners who were descendants of two brothers over the right to receive mineral and royalty interests by determining that one group had acquired “full title” to the underlying properties by acquisitive prescription.<sup>258</sup> The controversy arose because in the late 1800s or early 1900s, when one brother sold his interest in the property to the other, the deed was lost or destroyed and not recorded.<sup>259</sup> In the late 1930s, the widow and descendants of the vendor executed a series of quitclaim deeds reciting these facts and transferring whatever interest they had in the property to the vendee’s descendants.<sup>260</sup> The vendee and his heirs also exercised possession of the land in dispute from as early as 1900 by living on the property, farming it, growing timber and making timber sales, selling sand and gravel, and surveying and marking boundaries.<sup>261</sup> In contrast, the vendor’s heirs did not exercise any physical possession.<sup>262</sup> The recorded instrument that started the clock running for

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254. *Givens v. Givens*, 273 So. 2d 863, 868 (La. Ct. App. 1973) (holding that recordation of a prohibited donation *omnium bonorum* along with 40 years of substantial open and public possession was sufficient to commence acquisitive prescription).

255. *Towles v. Heirs of Morrison*, 428 So. 2d 1029, 1032 (La. Ct. App. 1983) (“The recordation of a deed translative of title is the important factor in giving notice of hostile and adverse possession to the co-owners. . . . These cases made no requirement that co-owners participate in the transaction.”). In *Towles*, the subsequent acts of possession, commenced 40 years after the partition deed, included granting timber deeds, mineral leases and hunting leases; maintaining property lines; and posting signs. *Id.* at 1031–32.

256. *See, e.g., Boase v. Edmonson*, 471 So. 2d 847, 851 (La. Ct. App. 1985) (holding that redemption of property within redemptive period was for benefit of all co-owners and thus did not trigger running of acquisitive prescription). *See also* Symeon Symeonides, *Property, Developments in Business Law, 1984–85*, 46 LA. L. REV. 655, 684–85 (1986) (discussing *Boase* and other tax sale decisions).

257. 446 So. 2d 862 (La. Ct. App. 1984).

258. *Id.* at 864.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

acquisitive prescription, according to the court, was a 1937 *ex parte* judgment of possession in the succession of the vendee brother and his wife that listed their heirs as the owners of the property in dispute.<sup>263</sup>

In ruling for the possessor-claimants, the court of appeal noted that recently enacted articles 3439 and 3478 of the Civil Code did not change the law and cited many of the decisions referenced above for the general proposition that possession by one co-owner is generally considered as being exercised on behalf of all co-owners, except,

[W]here a co-owner possesses under a recorded instrument apparently conveying title (even though the purported conveyance is invalid), the recorded instrument, together with the acts of possession, constitutes notice to other co-owners and the possession is then regarded as hostile to the interests of the other co-owners, rebutting the presumption that possession is for the benefit of all co-owners.<sup>264</sup>

The court also noted that the language in article 3478 referring to the “acquisition and recordation of a title from a person other than a co-owner” merely illustrates the kind of act that can suffice to start acquisitive prescription running and is not exclusive.<sup>265</sup> Thus, the *ex parte* judgment of possession sending the vendee heirs into possession of the “whole interest” in the subject property was “an act of notice to the other record co-owners of the intended adverse possession of [the vendee’s] heirs.”<sup>266</sup> Yet it was most likely the totality of the evidence—the many acts of possession, the quitclaim deeds attesting to the prevailing heirs’ apparently honest belief that they were possessing the property as owners, *and* the judgment of possession—that accounts for the court’s conclusion that the vendee brother’s heirs deserved title by acquisitive prescription.

Considered together, these co-ownership decisions illustrate how Louisiana courts already engage in highly relationship-specific evaluations of parties’ experiences and expectations regarding property subject to acquisitive prescription claims. Although the fairness of giving any weight to recorded instruments of which a passive co-owner may be unaware is debatable,<sup>267</sup> clearly the courts look at these instruments and the subsequent acts of possession in the context of the particular family or personal

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263. *Id.* at 865.

264. *Id.* at 865–66.

265. *Id.* at 866.

266. *Id.*

267. *Ruminations*, *supra* note 66, at 1222.

relationships that have formed and carefully evaluate the demands and expectations those relationships might reasonably have generated.

### 3. *Other Family Matters: Sticky Precarious Possession*

Some precarious possession cases involve disputes among relatives and family members who are not co-owners. In several reported decisions in this sub-category, courts characterized claimants as precarious possessors who could not establish possessory rights or acquisitive prescription because either the possessor's status as a permissive possessor was apparent from the outset based on the nature of the family relationship or the claimants did not clearly communicate an intent to possess as owner. In *Falgoust v. Innes*,<sup>268</sup> for example, the court held that a man who had been given permission by his mother-in-law to erect a building and operate a garage and filling station on her land was a precarious possessor.<sup>269</sup> As a result, when he was eventually evicted from the land upon the dissolution of the man's marriage to the landowner's daughter, the court held that he was not entitled to any restitution for the improvements as a good-faith possessor because he was "not a possessor at all."<sup>270</sup> In a sense, the claimant in *Falgoust* was characterized as a mere licensee—and thus as a precarious possessor—based on the familial relationship he temporarily enjoyed with his mother-in-law.

In *Hammond v. Averett*,<sup>271</sup> a possessory action, the court found that the claimants of a 20-acre fenced tract of land that had belonged to their uncle were also mere precarious possessors.<sup>272</sup> Even though they had cared for their uncle for many years, notified the uncle's children, who were presumably their cousins, when their uncle's health failed, gardened and raised cattle on the tract after the uncle's death, and even paid the ad valorem property taxes after losing contact with the uncle's children, the court held that the claimants were "mere users" of the land because they had not done enough to put the record owners on notice of their intent to become owners.<sup>273</sup> Paradoxically, the claimants' strong sense of familial

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268. 163 So. 429 (La. Ct. App. 1935).

269. *Id.* at 429.

270. *Id.* at 430. As the court explained, "[t]he best that can be said for the defendant is that he had been given the right to erect his garage on the plaintiff's property and to keep it there for a reasonable period of time." *Id.*

271. *Hammond v. Averett*, 415 So. 2d 226 (La. Ct. App. 1982).

272. *Id.* at 227.

273. *Id.* When a real estate agent engaged by the uncle's heirs visited the property a few years before the possessory action, the claimants complained of

responsibility to their uncle did not advance and may have even undermined their claim of acquisitive prescription.

In the two most difficult cases in this sub-category involving relatives who lived nearby to one another, the courts focused more on the neighborliness of the parties rather than their family status in ruling against the claimants. In the first, *Succession of Kemp v. Robertson*,<sup>274</sup> the court held that a claimant known as “Aunt Mae” did not acquire ownership of a 300-acre tract of land through acquisitive prescription because witnesses—business associates, employees, and relatives of the record owner—testified that the claimant acknowledged the record owner’s ownership and once asked the record owner for assistance in building a boat ramp and cutting some trees on the disputed property.<sup>275</sup> In reaching this decision, the court discounted a long history of corporeal possession and public assertions of a claim to the land stretching as far back as the 1920s when the claimant and her family returned to the place of her 1882 birth and began living and taking care of the property in dispute.<sup>276</sup> In *Succession of Kemp*, the evidence of an apparent acknowledgment might have simply overwhelmed the other strong evidence of the claimant’s intent to possess as owner.

Finally, in *Armstrong v. Armstrong*,<sup>277</sup> another possessory action, plaintiffs claimed to have possessed 19 acres of bottomland adversely to record owners who happened to be their co-heirs.<sup>278</sup> In essence, the plaintiffs, one group of heirs of a common ancestor, Stephen Armstrong, asserted legal possession of the land against another group of heirs, Douglas Armstrong and his heirs, who had acquired undisputed title to 47 acres of Stephen Armstrong’s original 140-acre tract of land.<sup>279</sup> No fences or other obstacles separated defendants’ bottomland from the balance of

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the heirs’ lack of appreciation, but failed to contact them directly or declare by their actions that they had changed their intent and were possessing as owners. *Id.*

274. 316 So. 2d 919 (La. Ct. App. 1975), *writ denied*, 316 So. 2d 906 (La. 1975).

275. *Id.* at 924–25 (noting testimony that Aunt Mae did not complain when the record owner, Kemp, conducted timber operations on the disputed land, which was known as the “Kemp Tract”; Kemp frequently visited the land; and Kemp allowed his aunt to stay on the land as its caretaker “by sufferance” because he felt sorry for her).

276. *Id.* at 923. The court of appeal hedged its conclusion by observing that even if Aunt Mae’s possession was exclusive, her possession was interrupted by timber harvesting in 1933, thus precluding 30 years of continuous possession. *Id.* at 925.

277. 493 So. 2d 253 (La. Ct. App. 1986).

278. *Id.* at 254–55.

279. *Id.*

the estate, which the plaintiffs owned along with Douglas as co-heir.<sup>280</sup> Although the plaintiffs had corporeally possessed the 19 acres in dispute, the court found that the defendants never abandoned or renounced their interests in the land, and moreover, that the plaintiffs' acts of detention never excluded the defendants from their possession.<sup>281</sup> In fact, the court held that the defendants, who continued to pay taxes on property, were entitled to a presumption that they continued to retain their intent to possess as owners.<sup>282</sup> Ultimately, the court in *Armstrong* found that the plaintiffs could not show any acts that would "bring home" to the defendants the fact that they intended to take the land in dispute for themselves.<sup>283</sup> The strong familial and neighborly relationship between the parties, who were technically co-owners of land adjacent to the land in dispute, was thus decisive.<sup>284</sup> Just before quoting extensively from Baudry-Lacantinerie and Tissier, the court indeed characterized plaintiffs' possession as precarious because it took place "with Defendants' permission or tolerance."<sup>285</sup> In this sense, *Armstrong* might even be characterized as a dispute between neighbors rather than family members and thus could fall into the third category of paradigmatic precarious possession cases.<sup>286</sup>

#### 4. *Sui Generis Legal Status Relationships*

Occasionally, the parties in a title dispute over land have some special legal status relationship that does not fall into any of the other categories described above. Sometimes, as in *Thomas v. Congregation of St. Saveur Roman Catholic Church*,<sup>287</sup> the relationship is between an institution and natural persons who serve that institution. In *Thomas*, the father of the

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280. *Id.*

281. *Id.*

282. *Id.* at 257–58.

283. *Id.* at 258.

284. As the court noted,

The circumstances of co-heirship and ownership of adjoining property, the fact that the family resided as neighbors on apparently good terms until this controversy arose, and the use of the bottom land in common, are all relevant evidence in the case and are required to be considered in the evaluation of the possessory action of the parties.

*Id.* at 259.

285. *Id.*

286. For discussion of that category see *infra* Part II.C. See also *infra* notes 299–392 and accompanying text.

287. *Thomas v. Congregation of St. Sauveur Roman Cath. Church*, 308 So. 2d 337 (La. Ct. App. 1975).

claimant–possessors had for many years served as sexton of a church, the record owner of the property in dispute.<sup>288</sup> The court held that his numerous acts of possession were tolerated at the sufferance of the church in return for his service as sexton and thus he did not possess “as owner.”<sup>289</sup>

In *Memorial Hall Museum, Inc. v. University of New Orleans Foundation*,<sup>290</sup> the unusual relationship was between two different non-profit institutions. In *Memorial Hall*, a non-profit corporation that operated a museum housing Confederate artifacts claimed ownership of a building that had originally been constructed as an “annex” to a building owned by a non-profit library association.<sup>291</sup> The court ruled in favor of the successor to the non-profit library association, the University of New Orleans, holding that the lengthy possession and occupation of the “annex” by the plaintiff and its predecessor-in-interest was precarious because in a 1931 speech the president of the library association stated that he was only putting the plaintiff’s predecessor into “possession” of the annex “for the ‘use’ of [that organization].”<sup>292</sup> Numerous other statements and acts confirmed that the plaintiff’s predecessor recognized the library association as owner, and the plaintiff’s predecessor failed to notify the library association when it did assert ownership of the building.<sup>293</sup>

Finally, precarious possession can even become an issue when the object of a dispute is a movable whose possession has been exchanged under a voluntary arrangement between parties exploring a business transaction. In *SongByrd, Inc. v. Bearsville Records, Inc.*,<sup>294</sup> Albert Grossman, a famous New York music impresario had been given possession of several master tapes made by a well-known New Orleans musician—Henry Roeland Byrd, also known as “Professor Longhair”—for demonstration purposes only.<sup>295</sup> The United States Court of Appeal for the Fifth Circuit thus held that Grossman’s estate could not assert liberative prescription to defend against the revindictory action brought by the musician’s successor-in-interest and could not assert acquisitive prescription unless it could show that Grossman or his estate had

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288. *Id.* at 338.

289. *Id.* at 339–41. In *Thomas*, a local parish priest testified that he specifically gave the claimants’ father and mother permission to continue living in a house on the church property when asked. *Id.* at 341.

290. *Mem’l Hall Museum, Inc. v. Univ. of New Orleans Found.*, 847 So. 2d 625 (La. Ct. App. 2003).

291. *Id.* at 627.

292. *Id.*

293. *Id.* at 627–28.

294. 104 F.3d 773 (5th Cir. 1997).

295. *Id.* at 775.

terminated precarious possession by giving Byrd, his heirs, or his successor-in-interest actual notice of an intent to keep the tapes as owner.<sup>296</sup> Just like *Falgoust v. Inness*,<sup>297</sup> *SongByrd* was essentially a case involving a claimant–possessor whose possession was characterized as precarious because it began through an implied and informal license.

In these special legal status cases, courts instinctively use a relational approach to determine whether the claimant was possessing precariously. Because the parties began dealing with the property at issue in a particular familial, institutional, or quasi-contractual relationship that involved some kind of sharing or mutual accommodation, courts analyze both parties' expectations in the context of that relationship and seem to demand strong proof that the cooperative or quasi-contractual nature of the relationship with respect to the property at issue has ended and that the claimant has communicated a new kind of interest in the property.<sup>298</sup> As the final category of possession and acquisitive prescription cases discussed in Part II.C shows, courts would be wise to follow this relational approach even more self-consciously.

### *C. Neighbors and Members of Close-Knit Communities*

Neighbors and members of a close-knit community can be wonderful friends. They can lend support to each other in times of trouble. They can provide each other with camaraderie and entertainment. They can work together as partners in community projects. However, neighbors and community members can also become embroiled in bitter conflict. In particular, when one neighbor uses another neighbor's property and that use is tolerated or ignored for a long time, the first neighbor may believe

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296. *Id.* at 781. After the Fifth Circuit remanded the case, the federal district court in Louisiana transferred the matter to the Northern District of New York. Applying New York law, the New York federal district court dismissed the action, holding that *SongByrd*'s claims were barred by New York's three-year statute of limitations for a conversion action. *Id.* In 2000, the Second Circuit affirmed. *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000).

297. 163 So. 429 (La. Ct. App. 1935), discussed *supra* notes 268–70 and accompanying text.

298. In another *sui generis* case involving movables, *Matter of Succession of Hutchinson*, the court of appeal held that a surviving spouse's claim to have acquired ownership of an antique breakfront and several paintings that had been the separate property of her late husband by ten-year acquisitive prescription failed because she possessed the movables in the matrimonial home jointly with her late husband, "such joint possession was precarious," and she never took any steps to change the quality of her possession after her husband died. 2014 WL 1778270, at \*4–5 (La. Ct. App. May 1, 2014).

that she has acquired a property right while the other may believe that nothing has changed. Indeed, that is exactly the kind of dispute that surfaced in *Boudreaux v. Cummings*.<sup>299</sup> In these inherently difficult cases, courts will be tempted to draw on murky concepts emerging from older French sources, such as acts of “pure convenience” and “mere tolerance,” regardless of their codal pedigree.<sup>300</sup> Further, as the conflicting opinions in *Boudreaux* amply demonstrate, resolution of these cases may create even more uncertainty for Louisiana property law.

As a general matter, courts in this kind of case frequently classify a possessor–claimant as a precarious possessor, despite a long history of corporeal possession.<sup>301</sup> Occasionally, though, neighbor claimants prove that they always possessed in their own right or at least began to possess in their own right at some moment in time and thus succeed in acquiring ownership or predial servitudes in immovable property by acquisitive prescription.<sup>302</sup> Although the number of recent cases that fall into the neighbor and close-knit community category is not large, several distinct jurisprudential patterns emerge.

### *1. Neighbors as Precarious Possessors Through Acknowledgment or Agreement*

In one line of decisions involving acquisitive prescription claims and possessory actions asserted by one neighbor against another, courts have classified claimants as precarious possessors based on evidence of some acknowledgement or agreement that the claimant’s possession was permissive at the outset.<sup>303</sup> In these cases, although the parties may be neighbors with one

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299. *Boudreaux v. Cummings*, 167 So. 3d 559 (La. 2015).

300. For discussion of the sources of these concepts see *supra* notes 82–94 and accompanying text.

301. See *Humble v. Dewey*, 215 So. 2d 378 (La. Ct. App. 1968); *Verret v. Norwood*, 311 So. 2d 86 (La. Ct. App. 1975); *Delacroix v. Dean*, 901 So. 2d 1188 (La. Ct. App. 2005); *Delacroix v. Perez*, 794 So. 2d 862 (La. Ct. App. 2000). These cases are discussed *infra* notes 310–53 and accompanying text.

302. See *Blanda v. Rivers*, 210 So. 2d 161 (La. Ct. App. 1968); *Merchant v. Acadia-Vermillion Irrigation Co., Inc.*, 311 So. 2d 86 (La. Ct. App. 1975); *Dutile v. Aymond*, 338 So. 2d 350 (La. Ct. App. 1976), *writ denied*, 340 So. 2d 998 (La. 1977); *Succession of Kemp v. Robertson*, 316 So. 2d 919 (La. Ct. App. 1975), *writ denied*, 316 So. 2d 906 (La. 1975); *Collins v. Quinn*, 366 So. 2d 209 (La. Ct. App. 1978). These cases are discussed *infra* notes 354–92 and accompanying text.

303. See *Briggs v. Pellerin*, 428 So. 2d 1087, 1089 (La. Ct. App. 1983) (holding that claimant’s possession was at the sufferance of record owner based on hearsay testimony of a non-party witness, corroborated by other witnesses, regarding a conversation between the claimant’s ancestor-in-title and the record

another, the presence of an acknowledgement or agreement between the parties suggests these cases may be more properly classified as contractual disputes in which courts commonly use the presumption of article 3438 to find that claimants are precarious possessors.<sup>304</sup> Moreover, the evidence of acknowledgement in these cases could support a finding that even though prescription might have begun to run, the claimants' recognition of the other party's ownership rights nevertheless "interrupted" it.<sup>305</sup>

## 2. *Neighbors as Precarious Possessors Through Inference*

More tellingly, in another series of neighbor decisions, courts classified possessor-claimants as precarious possessors based, not on an informal acknowledgement or agreement, but rather on a cluster of more ambiguous facts and judicial intuitions, including community testimony indicating the likelihood of permissive use;<sup>306</sup> a landowner's practice of allowing general community access to the land in dispute;<sup>307</sup> inferences by the court about the likely intentions of the parties;<sup>308</sup> and doubts that the claimant's acts of possession gave sufficient notice of a claim to the record owner.<sup>309</sup> On occasion, courts have even invented alternative presumptions to reach a desired outcome.<sup>310</sup>

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owner in which both acknowledged they knew a fence was not on the property line but agreed to let it remain in place); *Dutile v. Aymond*, 338 So. 2d 350 (La. Ct. App. 1976), *writ denied*, 340 So. 2d 998 (La. 1977) (dismissing possessory action based on clear evidence that claimant's ancestor-in-title possessed through acquiescence of record owner and told the record owner's lessee that he had put fence partially on the record owner's land and promised to remove it when requested); *Succession of Kemp v. Robertson*, 316 So. 2d 919 (La. Ct. App. 1975), *writ denied*, 316 So. 2d 906 (La. 1975) (claimant did not acquire ownership through acquisitive prescription because several witnesses testified that the claimant acknowledged the record owner's ownership and once asked the record owner for assistance in building a boat ramp and cutting some trees on the disputed property).

304. See discussion *supra* Part II.B.1.

305. LA. CIV. CODE art. 3464 (2007).

306. *Humble*, 215 So. 2d at 381; *Verret*, 311 So. 2d 86.

307. *Delacroix Corp. v. Dean*, 901 So. 2d 1188, 1191 (La. Ct. App. 2005); *Blanda*, 210 So. 2d 161.

308. *Humble*, 215 So. 2d at 382; *Delacroix Corp. v. Perez*, 794 So. 2d 862 (La. Ct. App. 2000).

309. *Verret*, 311 So. 2d 86; *Perez*, 794 So. 2d 862.

310. *Humble*, 215 So. 2d at 382.

In *Humble v. Dewey*,<sup>311</sup> the claimant was a small-town grocery store owner who had begun raising crops and pasturing animals to feed his family on a six-acre tract of land across the road from the two-acre tract of land that he owned and had inhabited since 1932.<sup>312</sup> Although the claimant stated that he never asked anyone for permission to use the disputed land and claimed not to know initially who owned it, one of the record owners told the claimant he could have the land in compensation for debts he owed the claimant at his grocery store.<sup>313</sup> The conflict between the claimant and the record owners did not surface until 1962, when the record owners authorized a prospective purchaser to inspect the disputed land and the claimant denied entry.<sup>314</sup> Although the claimant and record owners did not own adjacent properties, only a public road separated their properties.<sup>315</sup> More important was that the parties were quite familiar with each other through family and community relationships.<sup>316</sup>

In holding that the claimant was, in fact, a precarious possessor and thus did not acquire ownership through acquisitive prescription, the court in *Humble* acknowledged the claimant's reliance on the general rule that a possessor is presumed to possess as owner under article 3488 of the 1870 Civil Code.<sup>317</sup> Yet the court appears to turn that traditional presumption on its head by declaring:

[O]rdinarily the intent to possess as owner should not be inferred unless the actions of the possessor or the surrounding facts and circumstances are sufficient to reasonably apprise the public, and the record title owner of the property, of the fact that the possessor has the positive intent to possess as owner.<sup>318</sup>

With this curious framework in place, the court of appeal found that the claimant's acts of cultivating and raising animals on the land were insufficient to establish an intent to possess as owner.<sup>319</sup> Indeed, the court

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311. *Id.*

312. *Id.*

313. *Id.* at 380.

314. *Id.* at 381.

315. *Id.* at 380.

316. *Id.* at 381. The claimant, Dewey, and the father of one of the record owners were "good friends," and the claimant's daughter was the other record owner's "best friend." *Id.*

317. *Id.* at 382.

318. *Id.*

319. The court described the claimants' acts of possession in great detail. *Id.* at 380. Yet after stating its inverted presumption requiring a claimant to show facts and circumstances demonstrating his "positive intent to possess as owner,"

declared its confidence that the claimant had no intention of remaining on the land indefinitely and had “occupied the land, therefore, merely by the suffrage of the owner.”<sup>320</sup>

Perhaps aware that it was breaking new ground, the court in *Humble* also justified its holding, much like the majority opinion in *Boudreaux*, by noting the general burden of proof placed on a party claiming acquisitive prescription and emphasizing that the claimant’s “own testimony, considered with the surrounding facts and circumstances,” rebutted and overcame the core presumption that a possessor is presumed to possess as “master and owner.”<sup>321</sup> Make no mistake: the court’s reasoning in *Humble* is unclear and contradictory, thus justifying Professor Hargrave’s curt criticism.<sup>322</sup> Yet one way to explain the court’s conclusion is that perhaps the court of appeal sensed that the claimant’s acts of possession did not challenge the record owners’ claims radically enough, particularly given that the parties were so familiar with each other and the community itself seemed to believe that the claimant was possessing with the permission of the record owners.<sup>323</sup>

As the rise in oil and gas prices led to increased mineral exploitation and competition for land in South Louisiana, eight years after *Humble*, the court in *Verret v. Norwood*<sup>324</sup> relied primarily on testimony regarding community custom about neighborly sharing to reject the plaintiffs’ claim of 30-year acquisitive prescription in an action to remove a cloud on title.<sup>325</sup> The initial problem for the plaintiffs, the possessor–claimants, in *Verret* was that their ancestor-in-title, the original record owner of the 160 acres of Atchafalaya Basin marshland in dispute who had received a patent from the State in 1888, had lost title to the defendants’ ancestors-in-title

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*id.* at 382, the court seemed to revert back to the traditional presumption in favor of the claimant–possessor by stating “[w]e agree with defendant that the fact that we went into possession of the subject property created a presumption that he possessed it as owner. This presumption is subject to rebuttal, however, and we think the defendant’s own testimony, considered with the surrounding facts and circumstances, rebuts and overcomes that presumption.” *Id.* at 382–83.

320. *Id.*

321. *Id.* (quoting LA. CIV. CODE art. 3488 (1870)).

322. *Ruminations, supra* note 66, at 1217 n.177 (calling the decision in *Humble* “equally erroneous”).

323. *Humble*, 215 So. 2d at 381 (observing testimony of a community witness who knew both parties well that she and her sister “assumed that their father had ‘let Mr. Dewey use the land,’ and that nothing had occurred which caused them to question Dewey’s motives until 1962” and noting that the trial court judge reached the same conclusion about community views).

324. *Verret v. Norwood*, 311 So. 2d 86 (La. Ct. App. 1975).

325. *Id.*

as the result of a 1906 tax sale.<sup>326</sup> The primary act of possession that the plaintiffs relied on to substantiate their claim of acquisitive prescription was a 1913 timber harvest of the merchantable cypress on the land authorized by their ancestor-in-title.<sup>327</sup> The defendants' ancestors-in-title had also demonstrated little interest in the land, having failed to pay property taxes in 1909, which in turn caused the land to be adjudicated to the state until the defendants redeemed the land in 1965 after finally paying all the taxes in arrears.<sup>328</sup>

Ultimately, the court in *Verret* rejected the plaintiffs' acquisitive prescription claim for two reasons. First, their ancestor's initial act of corporeal possession, although significant in 1913, was never repeated or followed by any other significant acts of possession.<sup>329</sup> Second, ample testimony by both the plaintiffs' witnesses and other members of the local community who inhabited, hunted, and trapped in the Atchafalaya Basin, established that the land there was generally regarded as a kind of commons where boundaries and ownership rights were generally ignored.<sup>330</sup> As the court noted,

It was established that in the Basin it was not uncommon for timber to be removed without the owner's permission. Hunting, fishing, trapping, and other such acts were not established to have been made as owner. Instead those acts were consistent with the community's understanding that all property in the Basin was available for use without regard to ownership.<sup>331</sup>

In other words, because the entire community acted as if "ownership was irrelevant,"<sup>332</sup> and because the plaintiffs' acts were consistent with this community norm of access, the court concluded that the plaintiffs and their ancestor-in-title never truly had the requisite intent to possess as owner and thus were precarious possessors, even though the record owner had largely ignored the property for more than 50 years.<sup>333</sup>

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326. *Id.* at 88–89.

327. *Id.* at 93.

328. *Id.* at 89.

329. *Id.* at 94.

330. For example, one of the *Verret*'s own witnesses testified, "it was a friendly community and you didn't ask permission from anyone to use property in the Basin . . . when they hunted, they just went to the best place and hunted." *Id.* at 94.

331. *Id.* at 94–95.

332. *Id.* at 94.

333. *Id.* at 94–95.

In a difficult neighbor case like *Verret*, in which neither the claimant nor the record owner has demonstrated much commitment to the land and the land itself has generally been available for use by anyone in the community, precarious possession can thus serve as a convenient tool for courts to solve an otherwise insoluble dilemma. In another unusual neighbor case, 25 years later, the court similarly held that even in the absence of an informal agreement between neighbors, when a landowner allows a broad segment of the local community to use its land for designated purposes, a claimant who also uses the land for the same general purposes can likewise be characterized as a precarious possessor.<sup>334</sup>

Finally, in *Delacroix Corp. v. Perez*,<sup>335</sup> an unusually interesting neighbor case, the court ruled that Chalin Perez, the President of Plaquemines Parish,<sup>336</sup> and a corporation he owned—Stella Lands, Inc.—could not acquire ownership of 294 acres of disputed land in that parish because he and his corporation were precarious possessors. The controversy originated in a purported misunderstanding by Perez regarding the eastern boundary of a riparian tract he owned fronting on the east bank of the Mississippi River.<sup>337</sup> Perez reportedly believed that his title, which on its face extended to the “Forty Arpent Line,” extended all the way to the “Forty Arpent Canal.”<sup>338</sup> In other words, he thought the Forty Arpent Line and the Forty Arpent Canal were coterminous. In fact, they were not coterminous, and Delacroix Corporation, an entity that had acquired and maintained control of almost 110,000 acres of land in Plaquemines Parish, owned the intervening land in dispute.<sup>339</sup> Perez began using the land in dispute for cattle grazing and

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334. *Delacroix Corp. v. Dean*, 901 So. 2d 1188, 1191 (La. Ct. App. 2005) (holding that landowner who claimed title to a private canal on his neighbor’s property by, *inter alia*, 30-year acquisitive prescription was a precarious possessor until he applied for a construction permit on a portion of the canal he had filled in; before then his only acts of possession were the mooring of elevated boats and other maritime activities granted to the community at large by the canal owner).

335. *Delacroix Corp. v. Perez*, 794 So. 2d 862 (La. Ct. App. 2000).

336. Chalin Perez is one of the two sons of Leander Perez. “Judge” Leander Perez was the notorious political boss of Plaquemines Parish for almost 50 years. See Glen Jeansonne, *Leander Perez: A Southern Demagogue and Reformer*, in VIII THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY 495 (Edward F. Haas ed., 2001) (describing Perez as “something of a social reformer, a political figure of national stature, one of the most ardent segregationists in the South, and an oil tycoon worth millions of dollars”).

337. *Perez*, 794 So. 2d at 864.

338. *Id.* at 865.

339. *Id.* at 864–65.

crawfishing at some point after he acquired his riparian tract in the early 1950s.<sup>340</sup>

Delacroix did not file suit to stop Perez from using and occupying the disputed lands until 1993.<sup>341</sup> In 1994, Perez and Stella Lands filed their own possessory action.<sup>342</sup> After the actions were consolidated and the trial court ruled that Perez and Stella Lands acquired ownership of the disputed land by 30-year acquisitive prescription,<sup>343</sup> the Louisiana Fourth Circuit Court of Appeal reversed, agreeing with Delacroix's argument that Perez's possession of the disputed land was precarious.<sup>344</sup> For the court, a June 1993 letter written by Perez, himself a lawyer, just six months before the litigation began, provided the most important evidence of the precarious nature of Perez's possession.<sup>345</sup> In that letter, Perez first acknowledged that a portion of a crayfish pond he had constructed was located on Delacroix's property, but denied that Delacroix owned the remainder of the land on which the pond was built.<sup>346</sup> Second, he offered to enter into a "long term lease with a minimal rental to satisfy your concern of adverse possession," despite professing insufficient information to determine the exact boundary line between his and the Delacroix property.<sup>347</sup> Finally, his letter stated: "except that subject to the above paragraph, it was not my intention to adversely possess land owned by the Delacroix Corporation."<sup>348</sup>

One might reasonably interpret this letter as an amicable attempt to settle a difficult boundary dispute. The court, however, treated it as practically conclusive evidence of a formal acknowledgement that Perez "did not intend to claim ownership of property to which Delacroix held the title."<sup>349</sup> Yet the court also bootstrapped its finding of precarious possession by referring to other evidence and testimony that tended to show that Delacroix was intimidated by Perez's power in the parish and

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340. *Id.* at 864.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 866. One member of the five-judge panel of the Louisiana Fourth Circuit Court of Appeal that decided the case voted to affirm and wrote a lengthy dissent setting forth his analysis. *Id.* at 871–78 (Byrnes, J., dissenting).

345. *Id.* at 867 (majority opinion).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* In addition, Perez attempted in 1980 to have Delacroix provide some written affirmation that it owned at least part of the land on which the crayfish pond had been constructed to head off an IRS investigation into whether Perez, as parish president, had used parish equipment for construction of the pond. *Id.* at 870.

therefore, its acquiescence to Perez's use of the land in dispute was understandable.<sup>350</sup>

Although it acknowledged that Perez did appear to have “unbridled use of the subject property”<sup>351</sup> and thus in many ways acted as the agenda-setter for the property, the court found that Perez never truly interfered with Delacroix's ability to exercise its rights and fulfill its obligations of ownership, including granting mineral leases, granting seismic rights of way, permitting two oil wells to be drilled on the property—though both wells proved to be dry—and paying the property taxes throughout the period at issue.<sup>352</sup> In the end, the court found that “by failing to overtly challenge Delacroix's use of the subject property, Perez in effect lulled Delacroix into a false sense of security that Perez was operating within the terms of the oral agreement between the parties.”<sup>353</sup> Although this ultimate conclusion is certainly defensible, unfortunately the decision, as in the other difficult neighbor cases discussed above, did not provide any kind of structured framework to analyze future precarious possession disputes.

### 3. *Neighbors Who Possess as Owners*

Although most cases involving neighbors or members of the same close-knit community result in findings that possessor-claimants are precarious possessors, at least four reported decisions in this category have culminated with determinations that possessor-claimants were possessing with the intent to own. In *Blanda v. Rivers*,<sup>354</sup> the plaintiff and defendants owned adjoining properties on Esplanade Avenue in New Orleans.<sup>355</sup> The plaintiff, Blanda, sued to force the defendants, the Rivers, to remove water, gas, and sewer pipes and gas flues in the party wall separating their two properties that extended onto Blanda's side of the party wall and beyond into the air space over his property.<sup>356</sup> The Rivers claimed that they had acquired a continuous and apparent servitude as a result of the continuous

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350. The court noted that Delacroix's president testified that she and her mother had given Perez permission to use the land in dispute because they were “intimidated by Perez's position of power in parish government.” *Id.* at 868. Other evidence tended to confirm this intentional accommodation. *Id.*

351. *Id.* at 869. Perez erected gates on two canals that bisected the dispute land, built duck blinds and deer stands, and at one point even evicted a person whom Delacroix had invited onto the property to go hunting. *Id.*

352. *Id.* at 869.

353. *Id.* at 869–70.

354. 210 So. 2d 161 (La. Ct. App. 1968).

355. *Id.*

356. *Id.* at 162.

presence of these installations through ten-year acquisitive prescription under article 765 of the 1870 Civil Code.<sup>357</sup>

The Rivers made the installations in 1951, 17 years before the litigation ensued.<sup>358</sup> Blanda's predecessor-in-title, Landry, apparently gave the Rivers permission to install the pipes on his side of the party wall when the Rivers renovated their building to create apartments.<sup>359</sup> Landry and the Rivers did not execute any writing to document their agreement, nor did they reach any understanding relating to the establishment of a predial servitude.<sup>360</sup> Indeed, as the court noted, "[t]here was no discussion of their legal rights and, at least as far as Mr. Landry was concerned, there was no evidence that he had any other intent except to be a good neighbor and not to interfere with, nor object to, the Rivers' installation of the plumbing facilities."<sup>361</sup> At the time of the installation, Landry was unaware of his ownership interest in the party wall.<sup>362</sup> In fact, although he knew the pipes "protruded *over* his property and that he gave his permission," Landry learned that he owned half of the wall only when he was negotiating the sale of his property to Blanda in 1965, shortly before Blanda filed the lawsuit.<sup>363</sup>

Affirming the trial court, the Louisiana Fourth Circuit Court of Appeal held that the Rivers had, in fact, acquired a servitude by acquisitive prescription.<sup>364</sup> In this context, the court initially rejected Blanda's contention that the Rivers were precarious possessors merely because of Landry's acquiescence in the installation of the encroaching pipes and his subsequent assistance in repairing them in rather obscure terms.<sup>365</sup> However, when it addressed the essential element of adverse possession in acquisitive prescription generally,<sup>366</sup> the court observed more sharply that "the enjoyment of the right in favor of Rivers' estate was no less

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357. *Id.* at 162–63. The party wall formed part of the Rivers' building, but did not abut Blanda's building. *Id.* at 163.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. Before reaching the precarious possession argument asserted by Blanda, the court first found that there was no serious dispute that the claimed servitude was both continuous and apparent and thus subject to either 10-year prescription under Civil Code article 765 or 30-year prescription under Civil Code article 3504. *Id.*

365. *Id.* at 166 ("At no time did Rivers possess or enjoy the right of servitude for or in the name of Landry, but always for the exclusive benefit of his estate . . .").

366. *Id.*

adverse merely because Landry did not object.”<sup>367</sup> This observation is crucial because the court can be understood to mean that implied permission should not be read into a record owner’s acquiescence or passivity without some more tangible evidence that the possessor began possession with the intent to possess for or with the permission of the owner.

Indeed, the court in *Blanda* seemed to believe that the plaintiff’s predecessor, Landry, bore the burden of stopping prescription from accruing. “At any time before the expiration of ten years,” it noted, “Landry could have protested and stopped the running of prescription, just as was done by the plaintiff Blanda with regard to the rear most flue installed in 1965.”<sup>368</sup> In sum, *Blanda* represents a robust application of the Civil Code principle that a possessor is presumed to intend to possess as owner in the context of a neighbor dispute concerning acquisitive prescription of a predial servitude in contrast to the relatively weak application employed by the Louisiana Supreme Court majority in *Boudreaux v. Cummings*.<sup>369</sup>

In *Merchant v. Acadia-Vermillion Irrigation Co. Inc.*,<sup>370</sup> the plaintiffs owned a tract of land in Vermillion Parish bordered on two sides by property owned by the defendants—two corporations, one of which was a canal company.<sup>371</sup> Until 1981, the defendants’ property had been used as part of a canal system for irrigation of crops, but in that year the canals were filled in, and plans were made to subdivide the property in anticipation of residential development.<sup>372</sup> The plaintiffs asserted that they had acquired ownership of the disputed land formerly covered by the canals by 30-year acquisitive prescription based on the fact their predecessors-in-title and their own tenants had farmed and grazed cattle on the land in dispute up to the edge of the former canal levees for more than 60 years.<sup>373</sup> The only factual conflict concerned whether fences enclosed the disputed land and what the community understood about the nature of the plaintiffs’ possession.<sup>374</sup>

Relying heavily on *Verret v. Norwood*,<sup>375</sup> the defendants argued on appeal that the plaintiffs’ possession was precarious because it was

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367. *Id.* at 166–67.

368. *Id.* at 167.

369. *Boudreaux v. Cummings*, 167 So. 3d 559, 563–64 (La. 2015).

370. 476 So. 2d 1014 (La. Ct. App. 1985).

371. *Id.*

372. *Id.* at 1015.

373. *Id.*

374. *Id.* at 1015–16.

375. 311 So. 2d 86 (La. Ct. App. 1975), *writ denied*, 313 So. 2d 842 (La. 1975) (characterizing claimant’s possession as precarious because of the community

“common knowledge in the community” that the canal company defendant and its predecessor allowed the owners of contiguous tracts to use their land.<sup>376</sup> This argument failed to persuade the court of appeal, however, because in *Merchant* the only witnesses who attested to this alleged policy of sufferance were the company’s own employees,<sup>377</sup> and moreover, the company did not prove that the plaintiffs were even aware of the policy.<sup>378</sup> Indeed, buttressing this last point, the court in *Merchant* distinguished several decisions in which courts classified neighbor claimants as precarious possessors based on evidence of an acknowledgement or agreement that the claimant’s possession was permissive at the outset.<sup>379</sup> By contrast, in *Merchant*, the record owner failed not only to show that the possessor–claimants ever realized they were possessing with the sufferance of the record owner, but it also did not prove that the claimants had requested the record owner’s permission to use the disputed land or that the canal company had specifically granted them such permission.<sup>380</sup> As the court summarized in *Merchant*, “an owner’s mere knowledge that someone is possessing adverse to his ownership does not prevent the running of acquisitive prescription.”<sup>381</sup> In contrast to *Boudreaux*, the court in *Merchant* squarely placed the burden of proof on the record owner to rebut the presumption under Article 3427 of the Civil Code that a possessor was possessing as owner. In other words, record owners cannot rest on their belief that they are tolerating an adjoining property owner’s use of their property as a matter of neighborly convenience and then, only after acquisitive prescription has been alleged, assert that the neighbor’s possession was merely precarious.

Two more decisions in the neighbor context also show that neither uncertainty about the location of a boundary nor even actual knowledge that a fence extends beyond an actual boundary can necessarily render a

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perception that land in the Atchafalaya Basin was generally available for use by all), discussed *supra* at notes 324–33 and accompanying text.

376. *Id.*

377. *Merchant*, 476 So. 2d at 1016.

378. *Id.*

379. *Id.* at 1016–17 (distinguishing *Briggs v. Pellerin*, 428 So. 2d 1087 (La. Ct. App. 1983); *Dutile v. Aymond*, 338 So. 2d 350 (La. Ct. App. 1976), *writ denied*, 340 So. 2d 998 (La. 1977); *Succession of Kemp v. Robertson*, 316 So. 2d 919 (La. Ct. App. 1975), *writ denied*, 316 So. 2d 906 (La. 1975); *Collins v. Quinn*, 366 So. 2d 209 (La. Ct. App. 1978)). As the court noted in *Merchant*, in all of these decisions, “the possessor knew that he was possessing with the sufferance of the owner, and there was, in effect, an agreement, between the owner and the possessor recognizing that the possessor’s possession was only with the sufferance of the owner.” *Merchant*, 476 So. 2d at 1016–17.

380. *Id.* at 1017.

381. *Id.*

claimant's possession precarious. In *Nugent v. Franks*,<sup>382</sup> the court held that claimants acquired ownership of 17 acres of rural land by tacking their possession to that of a predecessor in interest.<sup>383</sup> Although the defendants argued that this predecessor possessed precariously because his cousin and neighbor allowed him to use a portion of her land as an accommodation, the court of appeal rejected this characterization. It did so by relying on the presumption that a possessor intends to possess as owner and by pointing to evidence that the predecessor "exercised acts of corporeal possession of the property [in dispute] consistent with ownership of the type of property involved,"<sup>384</sup> that is, in the same manner as the cousin and neighbor used her own land.

Finally, in *Livingston v. Unopened Succession of Dixon*,<sup>385</sup> the court held that a claimant had acquired ownership of a strip of land located along the border of his neighbor's property through 30-year acquisitive prescription and rejected the record owner's precarious possession counterargument.<sup>386</sup> Although the facts were generally unremarkable, the court found that the mere fact that the possessor-claimant was aware that his fence encroached on his neighbor's property—and even acknowledged that the fenced boundary line was incorrect—did not mean that he intended to possess for anyone but himself as owner.<sup>387</sup> In addition, the court stressed that numerous members of the community at large who were familiar with the property testified that the fence was recognized as the claimant's boundary.<sup>388</sup>

The decisions that fall into this crucial, third category of possession and acquisitive prescription disputes appear to be contradictory. In some instances, courts focus on the intrusiveness and extent of the claimant's acts of possession.<sup>389</sup> In other instances, courts focus on the degree to which the claimants had made investments in their own property depending on the neighbor's acquiescence and the record owner's awareness of this reliance.<sup>390</sup> In still other cases, courts appear to be

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382. 471 So. 2d 816, 823–25 (La. Ct. App. 1985).

383. *Id.*

384. *Id.* at 824. In *Nugent*, the defendants failed to prove a clear chain of title to the land in dispute that was good against the world in their own petitory action. *Id.* at 820–23. In this sense, the property in dispute was literally up for grabs.

385. 589 So. 2d 598 (La. Ct. App. 1991).

386. *Id.* at 599–600.

387. *Id.* at 603.

388. *Id.* at 604.

389. See *Humble v. Dewey*, 215 So. 2d 378 (La. Ct. App. 1968) (relatively modest physical intrusion); *Verret v. Norwood*, 311 So. 2d 86 (La. Ct. App. 1975) (same); *Delacroix Corp. v. Perez*, 794 So. 2d 862 (La. Ct. App. 2000) (same).

390. *Blanda v. Rivers*, 210 So. 2d 161 (La. Ct. App. 1968).

influenced by the degree of community recognition of the claimant's acts of possession as an indication of either toleration or a shift of ownership.<sup>391</sup> Finally, in several cases, courts dwell on the extent to which record owners communicated their policy of neighborly accommodation to the claimant and whether the claimant recognized that accommodation.<sup>392</sup> What Louisiana law clearly needs now is a normatively attractive presumption that aligns with courts' predilection to encourage neighborly cooperation and a more coherent analytical framework to establish the limits of that presumption and to help resolve the difficult claims that arise in disputes involving neighbors and members of the same close-knit community.

### III. THE FUTURE OF PRECARIOUS POSSESSION

Many Louisiana lawyers and jurists must now be wondering what to make of the three judicial opinions that emerged from the Louisiana Supreme Court decision in *Boudreaux*, particularly in light of the majority opinion's statement that "[o]ur holding today is strictly limited to the facts before us."<sup>393</sup> On the one hand, courts might follow the majority opinion and begin to ignore what up until now had been, at least according to Justice Knoll (and also Professor Hargrave), the Civil Code's relatively well-understood burden-shifting structure regarding possession.<sup>394</sup> In that event, courts may well accept assertions of tacit permission summarily, without demanding much proof of such permission and without taking into account the specific relational context of an acquisitive prescription claim or possessory action.<sup>395</sup> The defense of precarious possession could then

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391. Compare *Verret*, 311 So. 2d 86 (community recognition of land in dispute as commons), with *Merchant v. Acadia-Vermillion Irrigation Co., Inc.*, 476 So. 2d 1014 (La. Ct. App. 1985) (community recognition of claimant's use of land bounded by canals).

392. Compare *Merchant*, 476 So. 2d 1014 (no communication of policy of sufferance), with *Briggs v. Pellerin*, 428 So. 2d 1087, 1089 (La. Ct. App. 1983); *Dutile v. Aymond*, 338 So. 2d 350 (La. Ct. App. 1976), *writ denied*, 340 So. 2d 998 (La. 1977); *Succession of Kemp v. Robertson*, 316 So. 2d 919 (La. Ct. App. 1975), *writ denied*, 316 So. 2d 906 (La. 1975), discussed *supra* note 303 and accompanying text.

393. *Boudreaux v. Cummings*, 167 So. 3d 559, 564 (La. 2015).

394. *Id.* at 565–66 (Knoll, J. dissenting). Justice Knoll's understanding is synonymous with Professor Hargrave's statement of the "core rule" regarding presumptions and burdens of proof in questions of precarious possession. *Presumptions*, *supra* note 100, at 237, discussed *supra* note 102 and accompanying text.

395. For example, in *Scrantz v. Smith*, the court of appeal relied on *Boudreaux* to classify a claimant seeking to acquire a predial servitude by acquisitive prescription as a precarious possessor based on the owners' "simple tolerance" of

end up swallowing the general principle that possessors are presumed to possess as owners, especially in the context of acquisition of servitudes by neighbors.<sup>396</sup> If courts follow this path, Justice Knoll may well be right that *Boudreaux* “severely jeopardizes the law on acquisitive prescription in this state.”<sup>397</sup>

On the other hand, this unfortunate outcome could be avoided if lawyers, judges, and jurists treat *Boudreaux* as a cause for reflection and as an occasion to begin a new conversation about acquisitive prescription and precarious possession in Louisiana. As this Article explains, even though Justice Knoll and Justice Weimer each reached a different conclusion about the ultimate issue in *Boudreaux*, both of their opinions model a relational approach to the kind of complex factual dispute that can arise in a paradigmatic neighbor or close-knit community case. But before turning to a detailed reconsideration of *Boudreaux*, this Article offers new jurisprudential tools that could help Louisiana courts make sense of the most difficult precarious possession cases they are likely to confront.

#### *A. New Jurisprudential Tools to Analyze Neighbor and Close-Knit Community Cases*

Louisiana courts have generally applied the traditional presumptions of possession and precarious possession in cases that fall into the stranger and contractual or legal status categories in a consistent and principled manner. As Part II.A demonstrates, when confronted with a stranger case, courts are hesitant to find that an adverse-possession claimant is a precarious possessor as long as it is clear the possessor and record owner have had little or no relationship with each other over the years. In these situations, the baseline presumption provided by article 3427 of the Civil Code—that a possessor is presumed to possess as owner—is usually applied vigorously unless clear evidence demonstrates that the claimant’s possession began with the permission of or on behalf of another person.

Conversely, as Part II.B shows, courts confronted with cases that clearly fall into the second paradigm—cases in which the parties have a contractual or legal status relationship with each other—are appropriately attentive to the likelihood that the possessor began to possess precariously.

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claimant’s use of a right of way for running cattle and thus placed the burden of proof on the claimant to prove notice of his intent to possess as owner. 177 So. 3d 130, 134 (La. Ct. App. 2015).

396. See Cox, *supra* note 5, at 983 (noting that the broad use of a presumption of tacit permission by the majority opinion in *Boudreaux* “leaves little room in the law for any acquisitive prescription of a right of passage”).

397. *Boudreaux*, 167 So. 3d at 568.

In these cases, the presumption of article 3438—that precarious possessors are presumed to continue possess on behalf of another even though they may intend to possess for themselves—serves as the foundational presumption. As our jurisprudence teaches, however, application of article 3438 does not mean that a record owner will always prevail in such a case. Sometimes, particularly in the context of acquisitive prescription claims involving co-owners, a claimant will be able to “[demonstrate] by overt and unambiguous acts sufficient to give notice to his co-owner that he intends to possess the property for himself” so that acquisitive prescription can begin to run.<sup>398</sup> In general, though, Louisiana courts do not need new rules to handle cases falling into either of the first two categories discussed in Part II. Rather, they simply must continue to demonstrate sensitivity to the distinct relational contexts that these kinds of cases present.

In true neighbor or close-knit community cases, however, the jurisprudential authority is less clear, and as the cases discussed in Part II.C demonstrate, courts are much more likely to struggle. Further, when the nature of the right claimed is a predial servitude, courts will often have difficulty distinguishing quasi-possession that has been adverse from simple toleration granted by a record owner, especially when the record owner asserts that he has tacitly permitted the claimant to use his property in the spirit of being a good neighbor. Yet, as in *Boudreaux*, when a possessor-claimant has used his neighbor’s property for a long period of time and appears to have organized his relationship to his own land or to his community in reliance on continued access to or use of the record owner’s land, strong equitable justifications weigh in favor of recognizing his claim as well.

### *1. The Presumption of Sharing*

Given the difficulty of cases falling into the third category of possession and acquisitive prescription disputes, Louisiana should consider developing an additional presumption—a presumption of sharing that would apply specifically at the outset of a relationship between a possessor and record owner who are practicing, inhabiting, engaged neighbors or members of the same close-knit community. Stated simply, this presumption would provide that when one neighbor uses a fellow neighbor’s property or when a member of a close-knit community uses another community member’s property, that use takes place with the implied permission of the owner. This presumption could be adopted as a jurisprudential rule by Louisiana courts, or it could be expressed in a new Civil Code article. In either format, it would provide a

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398. LA. CIV. CODE art. 3479 (2016).

useful complement to the two existing presumptions found in articles 3427 and 3438 of the Civil Code by aligning judicial decision-making with the fundamental values that inform property law and by enhancing the predictability of judicial decision-making in this area.

One justification for a new presumption of sharing can be found in the scholarship of Gregory Alexander and Eduardo Peñalver, who have written powerful pieces about how property law can be understood as an institution that serves the goal of promoting human flourishing.<sup>399</sup> For Alexander and Peñalver, property law is not solely a utilitarian machine designed to produce economic efficiency and wealth maximization, although these are among the many desirable, incommensurable values that property law can and should promote.<sup>400</sup> Drawing on Aristotle, Aquinas, and other philosophers working in the Aristotelian tradition, Alexander and Peñalver argue that because humans are essentially social beings who thrive only through and because of their relationships with other people and through human community, property law must also be understood as serving social values.<sup>401</sup> Property law should thus facilitate the development of human capabilities that are necessary for individuals to be able to choose and pursue their own projects from a meaningful set of options while also helping to sustain families, friendships, and communities—the very social networks that make human flourishing possible.<sup>402</sup>

One particular aspect of Alexander and Peñalver’s “human flourishing” theory of property law that is directly relevant to precarious possession is their insight that an individual must have some property to develop and practice one of the essential Aristotelian ethical virtues—what might be called “the virtue of sharing.”<sup>403</sup> Describing why Aristotle believed that

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399. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) [hereinafter *The Social-Obligation Norm*]; Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009) [hereinafter *Land Virtues*]; Eduardo M. Peñalver, *Property as Entrance* 91 VA. L. REV. 1889 (2005) [hereinafter *Property as Entrance*]; GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 80–101 (2012) [hereinafter PROPERTY THEORY]; Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2008) [hereinafter *Properties of Community*].

400. *The Social-Obligation Norm*, *supra* note 399, at 750–51. See generally *Land Virtues*, *supra* note 399.

401. *Properties of Community*, *supra* note 399, at 134–45; PROPERTY THEORY, *supra* note 399, at 83–97.

402. PROPERTY THEORY, *supra* note 399, at 90–92.

403. *Id.* at 80–82. For a discussion of other “land virtues,” including the virtues of “industry,” “justice,” and “humility,” see *Land Virtues*, *supra* note 399, at

private ownership must form a crucial part of any property system, Alexander and Peñalver observe,

Another reason [Aristotle] gives in favor of private property is that it promotes friendship. Aristotle's thinking here seems to be that through proper education individuals will learn that property, though privately owned, is to be shared with friends. Relatedly, private ownership facilitates the exercise of such virtues as generosity and moderation. His point here ties in with the one just raised. Aristotle means to say that the possibility of generosity depends upon the existence of some degree of private rights. Generosity presupposes a voluntary act of sharing, so that the owner must willingly transfer to someone else the power to use and enjoy the resource. And her own act can only be voluntary and therefore praiseworthy, if she was entitled not to share.<sup>404</sup>

This insight explains why article 2232 of the French Civil Code declared that acts of "mere toleration" cannot lead to prescription and why Louisiana courts have been hesitant in neighbor cases like *Boudreaux* to allow a possessor-claimant to acquire ownership or real rights whenever owners make plausible arguments that they merely consented to the claimant's use or possession in a spirit of neighborly cooperation. Louisiana courts intuitively recognize the importance of encouraging neighbors and members of the same community to share their property with each other to build the bonds of friendship and reciprocity that make community possible.

Adopting a presumption of sharing will thus encourage courts to reveal more fully the likely bases of their decision-making in these difficult neighbor cases. In neighbor cases, judges would no longer feel the need to manipulate the existing presumptions in the Civil Code to find a way of stating an important normative value that they likely bring to bear in most neighbor cases already. In short, adoption of a presumption of sharing would promote another important systemic virtue—the virtue of judicial transparency.

A final reason to adopt a presumption of sharing is that the presumption would enable courts to visualize neighbor and close-knit community cases not only from the point of view of the possessor, which is the focus of Louisiana's two existing presumptions, but also from the point of view of the record owner. In other words, this new presumption

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876–86. Peñalver also asserts that property owners sometimes have an obligation to share their "surplus" property with others. *Id.* at 880.

404. PROPERTY THEORY, *supra* note 399, at 83–84.

would help judges and lawyers become more fully conscious of what this Article contends. They already do so subconsciously in these cases—approaching these disputes in their full relational complexity. Unlike the existing codal presumptions that are focused solely on the state of mind of the claimant–possessor, the presumption of sharing directs courts and lawyers to consider equally the state of mind of the other party, the neighbor who contends that she was merely practicing the Aristotelian virtues of friendship and sharing. By openly directing courts’ attention to the true owner’s perspective, the new presumption would thus bring to the surface the kind of analysis that courts appear inclined to engage in regardless, as the *Boudreaux* case itself demonstrates so clearly.

## 2. *Indicia of Giving or Renunciation*

Any useful presumption in law should be capable of being rebutted. This capability is certainly true for the presumption of sharing. Louisiana must recognize, therefore, that at any point during the existence of a long-term relationship between two neighbors or members of the same close-knit community, the presumption of sharing could be overcome by clear signs that the parties have reached a new equilibrium, a new explicit or implicit understanding about the property at issue. To determine whether the presumption of sharing has been overcome, courts should be directed to employ several specific factual criteria. These criteria, which should be called “indicia of giving or renunciation,” could be spelled out in a new Civil Code article or articulated jurisprudentially. Either way, they would serve to channel judicial discretion in difficult neighbor and close-community cases in a useful manner.<sup>405</sup>

The underlying assumption in this scenario is that property relationships are not static. The reasonable expectations and assumptions of parties in a long-term property relationship can and do evolve. At some point, the presumption that a neighbor is sharing her property with another neighbor to whom she has granted some kind of access evaporates, especially when it becomes obvious that the passive neighbor has actually

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405. The Louisiana Civil Code already contains several articles that provide a list of factual criteria to channel judicial discretion in cases that inherently require the exercise of such discretion. *See, e.g.*, LA. CIV. CODE art. 134 (2016) (listing factors for courts to consider in determining the best interest of the child in child-custody disputes); *id.* arts. 3515, 3537, 3542 (listing policies and case-specific factors to be considered in various conflict of laws disputes). *See generally* John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923 (2012) (discussing control and channeling of judicial discretion throughout Louisiana private law).

given away, renounced, or abandoned all or a portion of her property or her right to exclude others from that property.

In some ways, this reasoning may sound like a restatement of the “negligent owner” rationale for adverse possession and acquisitive prescription noted earlier.<sup>406</sup> This Article’s intention, however, is not to encourage courts to make simplistic or conclusory statements about a record owner’s passivity. Instead, courts should focus on the way in which the neighbor relationship between the possessor–claimant and the record owner is transformed. After all, as Baudry-Lacantinerie and Tissier remarked, acquisitive prescription is a legal institution that has startling transformative power.<sup>407</sup> Courts should therefore be asking if and how property relationships potentially affected by acquisitive prescription have themselves been transformed.

With these factors in mind, this Article offers the following indicia of giving or renunciation: (1) the physical extent and intrusiveness of the claimant’s use or corporeal possession of the record owner’s property;<sup>408</sup> (2) any investments or improvements made by the claimant to the record owner’s property in reliance on an implicit promise of continuing access to or use of the record owner’s property;<sup>409</sup> (3) any changes made by the claimant to other property the claimant owns or to the claimant’s other life projects, economic or otherwise, made in reliance on continued access to or use of the record owner’s property;<sup>410</sup> (4) the degree to which the record owner’s own actions have signaled an intention to maintain agenda-setting authority for the property or, conversely, whether those actions or non-actions have signaled a de facto abandonment or renunciation of the property;<sup>411</sup> (5) community perceptions regarding the rights of the parties

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406. See discussion *supra* notes 51–54, 131–34 and accompanying text.

407. BAUDRY-LACANTINERIE & TISSIER, *supra* note 1, ¶ 275, at 145.

408. See *Delacroix Corp. v. Perez*, 794 So. 2d 862 (La. Ct. App. 2000) (containing a relatively modest physical intrusion); *Verret v. Norwood*, 311 So. 2d 86 (La. Ct. App. 1975) (finding a relatively modest physical intrusion), *cert. denied*, 311 So. 2d 842 (finding the lower court’s decision correct); *Humble v. Dewey*, 215 So. 2d 378 (La. Ct. App. 1968) (finding a relatively modest physical intrusion).

409. See, e.g., *Boudreaux v. Cummings*, 167 So. 3d 559, 567 (Knoll, J. dissenting) (discussing Boudreaux’s work on gates and maintenance of right of way).

410. See, e.g., *Blanda v. Rivers*, 210 So. 2d 161 (La. Ct. App. 1968); *Boudreaux*, 167 So. 3d at 567 (La. 2015) (Knoll, J., dissenting).

411. Compare *Perez*, 794 So. 2d 862, 869 (discussing continuing acts of possession exhibited by record owner to justify finding of precariousness), with *Blanda*, 210 So. 2d at 166–67 (noting record owner’s acquiescence to claimant’s encroachments in common wall in support of finding of acquisitive prescription).

with respect to the property involved;<sup>412</sup> (6) the length of time beyond the 30-year prescriptive period the claimant has used or possessed the record owner's property;<sup>413</sup> and (7) the existence or absence of any acknowledgements by the possessor–claimant of the record owner's authority.<sup>414</sup>

A potential objection is that these criteria are too subjective and vest too much discretion in judges in neighbor and close-knit community cases involving precarious possession. Yet the work that Louisiana courts must do to resolve precarious possession defenses in these cases is already subjective, as the three divergent opinions in *Boudreaux*<sup>415</sup> and the inconsistent results in other neighbor disputes reveal.<sup>416</sup> Reasonable judges will always bring their own moral and normative perspectives to bear on these kinds of cases. If courts were to acknowledge the presumption of sharing explicitly and then focus their analysis on whether that presumption has been rebutted with regard to the indicia of giving or renunciation, the results of neighbor or close-knit community cases would actually become more consistent and predictable. At a minimum, courts would be more likely to give full attention to the specific relational facts that these criteria implicate when they address precarious possession in the neighbor and close-knit community context.<sup>417</sup>

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412. Compare *Verret*, 311 So. 2d at 94 (characterizing claimant's possession as precarious because of the community perception that land in the Atchafalaya Basin was generally available for use by all), *cert. denied*, 313 So. 2d 842 (La. 1975) (finding the lower court's decision correct), with *Livingston v. Unopened Succession of Dixon*, 589 So. 2d 598, 603 (La. Ct. App. 1991) (discussing no community verification of policy of sufferance and community recognition of claimants' fence as boundary).

413. See, e.g., *Boudreaux*, 167 So. 3d at 567 (noting 60 years of uninterrupted use).

414. Compare *Merchant v. Acadia-Vermillion Irrigation Co., Inc.*, 476 So. 2d 1014, 1017 (La. Ct. App. 1985) (discussing no communication of policy of sufferance), with *Perez*, 794 So. 2d at 868–70 (discussing claimant's acknowledgment of owner's title), and *Briggs v. Pellerin*, 428 So. 2d 1087, 1089 (La. Ct. App. 1983); *Dutile v. Aymond*, 338 So. 2d 350 (La. Ct. App. 1976), *cert. denied*, 340 So. 2d 998 (La. 1977); *Succession of Kemp v. Robertson*, 316 So. 2d 919 (La. Ct. App. 1975), *cert. denied*, 316 So. 2d 906 (La. 1975).

415. *Boudreaux*, 167 So. 2d 559. For more discussion of the majority, dissenting and concurring opinions see *infra* notes 418–38 and accompanying text.

416. See discussion in Part II.C, *supra* notes 299–392 and accompanying text.

417. The rebuttable presumption of sharing and the indicia of giving and renunciation may prove useful in some special relationship cases as well, particularly those involving co-ownership and other family relationships.

### B. Reconsidering Boudreaux

With the preceding new analytical framework in place, this Article now reconsiders the dilemma presented by the difficult factual dispute in *Boudreaux*. First, this Section analyzes the three contrasting opinions that emerged in *Boudreaux*. It then demonstrates how the new jurisprudential tools offered—the presumption of sharing and the indicia of giving or renunciation—could be used to resolve the same factual dispute.

#### 1. The Boudreaux Opinions

The majority opinion authored by Justice Clark is not especially instructive and, as others have noted, is rather problematic.<sup>418</sup> The majority opinion holds that the plaintiff, John Boudreaux, was merely a precarious possessor of the right of way that crossed the property of defendant Paul Cummings by resurrecting the concept of tacit or implied permission from article 3490 of the 1870 Civil Code.<sup>419</sup> In its crucial passage, the majority opinion states that “Cummings’[s] awareness of Boudreaux’s use and his allowance thereof marks Boudreaux’s use as an authorized use that cannot be characterized as adverse under the circumstances.”<sup>420</sup> In effect, the majority opinion suggests that if record owners assert their awareness and permission of the claimant’s use of their land, even if record owners never communicate their toleration or permission to the claimant, the claimant then bears the burden of proving that he is not a precarious possessor.<sup>421</sup> Just as problematic is that the majority opinion never explains how to determine when the owner has actually tolerated the user’s activities or, conversely, has simply been negligent, uninterested, or failed to set or maintain an agenda for the property.

The only gesture in this direction given by the majority opinion is to underline a few words from Professor Yiannopoulos’s treatise: acts of toleration must not be considered as acts of adverse possession otherwise “landowners would be compelled to object to innocent and occasional

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418. See generally Cox, *supra* note 5.

419. *Boudreaux*, 167 So. 3d at 562–66.

420. *Id.* at 564.

421. The majority opinion bases this surprisingly broad view of implied or tacit permission on a few brief passages of commentary explaining the sources of article 3490 of the 1870 Code and reminding us that the 1982 revision did not change the law of possession and acquisitive prescription. *Id.* at 562–63 (first quoting A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 139, in 4 LOUISIANA CIVIL LAW TREATISE (3d ed. 1997), and then quoting Symeonides, *supra* note 96, at 81).

invasions.”<sup>422</sup> This Article respectfully suggests that the long-standing acts of use that took place in *Boudreaux*—60 years of uninterrupted use of a neighbor’s land to regularly access a public road and to transport heavy farm equipment, significant efforts to maintain the right of way, and finally significant efforts to erect, move, and maintain a gate—represent more than “an innocent and occasional invasion.”<sup>423</sup> Although these actions might indeed reflect an agreement between the parties, to characterize them as merely an innocent and occasional invasion seems to miss the mark.

Justice Knoll’s dissenting opinion is more helpful. First, it reminds Louisiana jurists of what, up until *Boudreaux* at least, had been the conventional understanding of how the general burden of proof regarding acquisitive prescription and the two presumptions of possession found in articles 3427 and 3438 worked together to order questions of proof.<sup>424</sup> Second, in addition to noting the relative paucity of facts supporting Cummings’s assertion of precariousness, Justice Knoll explores with considerable care several facts that reveal how important Boudreaux’s use of the right of way across the Weill–Cummings property was to him and the projects of his family over the years. For instance, in addition to noting that Boudreaux mowed and generally maintained the portion of the Weill–Cummings tract allegedly subject to the servitude, she observes that

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422. *Id.* at 563 (quoting A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 139, in 4 LOUISIANA CIVIL LAW TREATISE (3d ed. 1997)).

423. *Id.* at 560–61 (describing acts of possession); *id.* at 567–68 (same) (Knoll, J., dissenting).

424. *Id.* at 565–67. To summarize succinctly, a person like Boudreaux who claims to have acquired rights by acquisitive prescription carries a general burden to prove all the elements of his claim, including the requisite years of possession. Article 3427, however, helps the possessor meet this burden through the presumption that a possessor is presumed to possess with the intent to own unless “it is shown” by the person opposing the claim of possession, here Cummings, that the claimant’s possession was “begun for another” or was begun “with the permission of or behalf of the owner.” *Id.* at 565–66. Only when the opponent—usually the record owner, but perhaps another person—affirmatively makes this showing does the presumption of continuing precarious possession under article 3438 arise. This second-order presumption, in turn, requires presumptive precarious possessors to show that their precarious possession has terminated under either article 3439 or 3478. In positive terms, all of these requirements mean “the presumption of ownership does arise, *absent a showing* that the possession was begun for another.” *Id.* at 566. For a brief but authoritative endorsement of Justice Knoll’s position see YIANNOPOULOS, *supra* note 5, § 6.36. *See also Presumptions*, *supra* note 100, at 237 (stating same sequence of presumptions even more succinctly).

witnesses testified Boudreaux used the passage continuously for various purposes, including hauling farm equipment, making visits to the doctor, going to vote, and running errands.<sup>425</sup>

Further, Knoll reports that Boudreaux employed another individual to mow the right of way for him in exchange for permission to keep mowing equipment on Boudreaux's property and how Boudreaux told this same individual that the strip of land has "been a right of way for a hundred years, that they've been using [it] since, you know, since their family owned the property."<sup>426</sup> Knoll also observes the intensity of Boudreaux's public commitment to the continuing viability of the claimed servitude, as evidenced by his participation in public meetings at which a road construction project was being discussed that could have negatively affected his use of the right of way.<sup>427</sup>

In essence, Justice Knoll's opinion reveals the extent to which Boudreaux's reliance on the right of way, though prosaic to some, was actually central to his ability to flourish as a member of his local community. Not only did he use the right of way to facilitate his neighborly relationship with the Weills, but this use directly enhanced his ability to participate in the economic and civic life of his community.<sup>428</sup> Boudreaux's 60 years of continuous, uninterrupted use of the right of way was not, at least in Justice Knoll's eyes, a mere "innocent or occasional invasion[]"<sup>429</sup> of his neighbor's property. It was essential to his well-being and to his civic membership in the community. In a sense, Justice Knoll's opinion illustrates the kind of analysis that would be called for if Louisiana courts were to recognize a presumption of sharing and were required to examine whether that presumption was overcome through the lens of indicia of giving and renunciation.

Justice Weimer's concurring opinion also deserves praise in many respects. For one, his opinion focuses from the outset on the problematic relational nature of the conflict—what he calls "this vexatious dispute between neighbors."<sup>430</sup> At first, he suggests that "[b]oth explicit permission and tacit permission deriving from acts of 'good neighborhood' by an owner *can defeat* the claim of someone who contends

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425. *Boudreaux*, 167 So. 3d at 567.

426. *Id.*

427. *Id.*

428. *Id.* at 567 (referring to Boudreaux's use of the right of way to vote and his participation in public meeting about road construction that might affect his access to right of way).

429. *Id.* at 563 (quoting A.N. YIANNPOULOS, *PREDIAL SERVITUDES* § 139, *in* 4 *LOUISIANA CIVIL LAW TREATISE* (3d ed. 1997)).

430. *Id.* at 568.

he benefits from adverse possession so as to acquire a servitude of passage upon the owner's property."<sup>431</sup> But he is also careful not to subscribe to the majority's broad view that a mere assertion of tacit permission by a record owner immediately places the burden of proof on the claimant to prove that his possession is not precarious. Indeed, his concurring opinion may be understood, in this Article's view, as an attempt to convince his fellow justices and other Louisiana jurists that in this particular neighborhood relationship it was the record owner, Cummings, who had successfully rebutted the traditional presumption that the possessor, Boudreaux, was possessing as owner. In other words, Justice Weimer's opinion is, in fact, already consonant with the kind of analysis that would take place using a presumption of sharing and indicia of giving and renunciation, except that he was required by the existing law to put the burden of proof on Cummings, rather than Boudreaux.

To Justice Weimer, the facts of this case reveal a deeply collaborative relationship of trust between Boudreaux and his initial neighbor, the Weill family, that can most accurately be described as resulting in permissive use of the right of way by Boudreaux. The most salient facts for Justice Weimer relate to the placement of the gate in 1969.<sup>432</sup> He correctly points out that at the time this episode transpired, the Louisiana Civil Code did not allow a discontinuous apparent servitude to be acquired by prescription.<sup>433</sup> Consequently, Boudreaux's cooperation with the Weills in relocating the gate cannot be explained by suggesting that Boudreaux was merely complying with the requirement imposed by Article 748 of the Civil Code on servitude holders to cooperate with servient estate owners who seek to relocate a servitude to lessen its inconvenience.<sup>434</sup> Because Boudreaux could not have even begun to acquire a servitude of passage by acquisitive prescription in 1969, the duty imposed on servitude holders to cooperate with servient estate owners in servitude relocation is simply immaterial.<sup>435</sup>

Just as important is Justice Weimer's finding that "the collaborative nature of the gate placement, its construction, and its later use to be direct and relevant evidence that Mr. Boudreaux used the passageway with 'permission' as required by La. C.C. art. 3437, regardless of whether that evidence was adduced on direct or cross examination."<sup>436</sup> Indeed, it is this "evidence of neighborly acts on the part of the successive property

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431. *Id.* (emphasis added).

432. *Id.* at 568–69.

433. *Id.* at 569 (discussing LA. CIV. CODE art. 740 (2008)).

434. *Id.* at 568–69 (discussing LA. CIV. CODE art. 748 (2008)).

435. *Id.* at 569.

436. *Id.*

owners” that convinced Justice Weimer that Cummings had rebutted “the presumption that might otherwise arise from the fact of Mr. Boudreaux’s possession.”<sup>437</sup> This Article interprets these statements to mean that Justice Weimer still adheres to the traditional burden-shifting scheme established by articles 3427 and 3438 of the Civil Code that Justice Knoll articulated so clearly in her dissent.<sup>438</sup> The rest of Justice Weimer’s concurrence observes other salient facts that support his conclusion that the relationship between Boudreaux and the Weills was essentially one of neighborly collaboration in which the Weills consciously allowed Boudreaux, his family, his tenants, and his workers to use the right of way, and Boudreaux demonstrated his appreciation in a number reciprocal gestures.<sup>439</sup>

Justice Weimer’s opinion is also noteworthy because it is the only opinion in the case that links its conclusion to any policy rationales for bad-faith acquisitive prescription. Quoting Planiol,<sup>440</sup> Weimer suggests that bad-faith acquisitive prescription is primarily justified when a record owner has been “guilty of negligence.”<sup>441</sup> This suggestion is revealing because Weimer does not see the Weills or Cummings as having been guilty of negligence. To the contrary, they were merely acting as good neighbors in letting Boudreaux use the right of way and engaging in a long-term collaborative relationship to maintain that right of way. Although Weimer might have explored some of other important rationales offered by civil law commentators and U.S. property law scholars justifying adverse possession and acquisitive prescription,<sup>442</sup> his opinion remains far more satisfying than the majority opinion. Furthermore, his opinion certainly earns sympathy for its endorsement of the importance of moral values in property law.<sup>443</sup>

Reasonable jurists can disagree about the correct outcome of a difficult neighbor case involving an assertion of acquisitive prescription based on more than 60 years of uninterrupted use of a rural right of way on one hand

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437. *Id.*

438. *Id.* at 565–67, discussed *supra* note 424 and accompanying text.

439. *Id.* at 569–571 (noting that Boudreaux admitted that he used the passageway to bring farm equipment to the Weill property to assist the Weills with their rice harvest, that some agricultural workers—the Duhon boys—used the passageway to harvest rice on both properties, and that the Weills used the passageway and gate to visit Boudreaux and his wife for coffee on occasion).

440. *Id.* at 570–71 (quoting PLANIOL, *supra* note 47, § 3645, at 571–72).

441. *Id.* at 571.

442. See discussion *supra* notes 49–56, 115–37 and accompanying text.

443. *Boudreaux*, 167 So. 3d at 571 (“Our venerable Civil Code generally encourages moral conduct and deters immoral conduct.”). The Court lists several examples of Civil Code rules that punish conduct many would consider immoral. *Id.*

and a plausible precarious-possession defense on the other. However, both Justice Knoll's dissent and Justice Weimer's concurrence each in their own way begin to demonstrate how precarious possession must be approached in a deeply contextualized manner that is sensitive to the actual relationships between the parties.

## 2. *Resolving Boudreaux with New Jurisprudential Tools*

If another court were to examine the facts presented in *Boudreaux* in light of the rebuttable presumption of sharing and the indicia of giving or renunciation introduced above, an even more satisfactory solution might be possible. The court would first recognize that initially the relationship between Boudreaux and the record owners would be governed by the presumption of sharing. Yet facts relating to the parties' on-going relationship might also reveal that over time the presumption had been rebutted. For instance, Boudreaux's extensive use of the right of way to move heavy equipment across the Weill–Boudreaux farm could weigh in favor of rebuttal under criteria (1). The work that Boudreaux performed to maintain and relocate the right of way and the work that Boudreaux performed on the gate could weigh in favor of rebuttal under either criteria (2) or (3). The fact that Boudreaux used the right of way not just to move farm equipment but to access a public road and to reach the nearest town where his community life was based could weigh in favor of rebuttal under criteria (3) as well. The absence of any clear signals by the Weills or Cummings that they were maintaining their agenda-setting authority, other than the Weills' request to relocate the gate, could also point to rebuttal under criteria (4). Any facts pertaining to community perceptions about Boudreaux's rights to use the path across the Weill–Cummings property could have been interpreted under criteria (5). Finally, the 60-year history of uninterrupted use of the right of way could itself weigh in favor of rebuttal under criteria (6). In the end, a decision using this kind of analysis might well have persuaded the Louisiana Supreme Court to affirm a finding that Boudreaux had obtained a servitude of passage by acquisitive prescription even though the Weills initially benefitted from a presumption of sharing.<sup>444</sup>

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444. To take another example, these tools might also help explain a result like that reached in *Delacroix Corp. v. Perez*, 794 So. 2d 862 (La. Ct. App. 2000). There, the limited use of the Delacroix land by Perez for cattle grazing and crayfishing would have been relatively insignificant facts under criteria (1). The fact that Perez only partially constructed a crawfish pond on the Delacroix land would have been equally inconsequential under criteria (2). The complete absence of any changes to his own property or to his own life projects and the absence of

## CONCLUSION

Controversial decisions like *Boudreaux v. Cummings* can cause dismay and confusion in a legal community, but they can also start useful conversations. This Article has attempted to begin one of those conversations. Rather than merely complain about the confusing statements that emerged from the majority opinion in *Boudreaux*, this Article has attempted to reconstruct the law of precarious possession from the ground up.

This Article has shown how Louisiana's two-tier system of good- and bad-faith acquisitive prescription emerged from Roman law and pre-codification French and Spanish law. It has shown how French commentators interpreted their codified version of that law and, in particular, how they approached the problem of precarious possession with caution, careful to respect the traditional presumption that a possessor intends to possess as owner but aware that in disputes between neighbors who share a long-term relationship of cooperation there may be instances in which use or access results from simple tolerance. It has also shown why Louisiana's two-tier system of acquisitive prescription is a valuable institution that should not be torn apart by overly broad application of the concept of precarious possession to claims of 30-year acquisitive prescription in particular.

In addition, this Article has reviewed a significant body of Louisiana case law to demonstrate that when courts confront stranger and contractual and legal status relationship cases, Louisiana case law generally reaches defensible and consistent outcomes that make sense of Louisiana's traditional presumptions and burdens of proof regarding possession. Yet, when they approach the most difficult category of possession and acquisitive prescription cases—those involving true neighbors or members of the same close-knit community—courts face acute challenges and often produce inconsistent results. To resolve this kind of case with greater sensitivity to the virtue of property sharing and to the specific relational context of these disputes, Louisiana property law would benefit from the adoption of a presumption of sharing and concomitant indicia of giving and renunciation.

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testimony about community perceptions about a change in title would have also not have availed his rebuttal assertion under criteria (3) and (5). Finally, Delacroix's continued agenda-setting actions with respect to the land in dispute, along with Perez's admissions in his lease letter, would have weighed against rebuttal under criteria (4) and (7).