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## Good Faith in Louisiana Property Law

John A. Lovett

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# Good Faith in Louisiana Property Law

*Dedicated to A.N. Yiannopoulos\**

*John A. Lovett\*\**

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## INTRODUCTION

The concept of good faith is a cornerstone of Louisiana private law. It plays a central role in the law of general and conventional obligations.<sup>1</sup> It

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\* The author dedicates this Article to Professor A.N. Yiannopoulos. His teaching, leadership, and scholarship inspired the author and so many others to learn about Louisiana’s Civil Law tradition, be advocates for that tradition, and work to improve the law. Professor Yiannopoulos made an indelible mark on Louisiana’s legal system and on the lives of countless Louisiana law students, Louisiana lawyers, and jurists across the world. His legacy will endure for generations to come.

\*\* De Van D. Daggett, Jr. Distinguished Professor, Loyola University New Orleans College of Law. The author gratefully acknowledges the helpful comments he received on earlier drafts of this Article from Melissa Lonegrass, Ronald J. Scalise, Jr., the participants in the Property Works in Progress Workshop at Northeastern University Law School, and the Louisiana Legal Scholarship Workshop at Loyola University New Orleans College of Law.

makes crucial appearances in the law of sales.<sup>2</sup> It even affects subjects in the law of persons, such as the civil effects of absolutely null and putative marriages.<sup>3</sup>

But good faith is also a pivotal concept in Louisiana property law. Although it has always been a feature of that law, during an intense burst of law reform activity stretching from 1977 to 1982, the Louisiana Legislature (“Legislature”) updated and extended the concept of good faith in several core areas of property law.<sup>4</sup>

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1. In the context of general and conventional obligations, all obligors and obligees must conduct themselves in accordance with the general duty of good faith. LA. CIV. CODE ANN. arts. 1759, 1770, 1983 (2018). An obligor in good faith who breaches a conventional obligation is liable only for foreseeable damages, but an obligor in bad faith can be liable for unforeseeable damages as long as those damages directly resulted from his failure to perform. *Id.* arts. 1996–97. Other provisions that employ good faith in the law of obligations include Louisiana Civil Code article 1975 (“[O]utput or requirements must be measured in good faith.”); article 2021 (“Dissolution of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.”); article 2028 (“Counterletters can have no effects against third persons in good faith.”); and article 2035 (“Nullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.”). For a detailed meditation on the role of good faith in the law of obligations, see Saul Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645 (1997).

2. Although the Louisiana Civil Code provisions in the chapter on sales do not specifically use the term “good faith” in the text of the articles, revision comments repeatedly distinguish between good faith and bad faith sellers. *See, e.g.*, LA. CIV. CODE ANN. art. 2534 cmt. a (noting that the article “changes the law . . . by extending the prescriptive period for actions in redhibition against a *seller in good faith* from one to four years . . .”) (emphasis added); *id.* art. 2545 cmt. b (describing a manufacturer as being “deemed to be in bad faith” regardless of his actual knowledge of the thing sold); art. 2545 cmt. f (noting that a buyer is not required to give “a bad faith seller or a manufacturer” an opportunity to repair before instituting an action in redhibition); art. 2545 cmt. g (referring to a potential credit a “bad faith seller” can claim for use of thing in an action of redhibition).

3. *Id.* art. 96.

4. Through his leadership role with the Louisiana State Law Institute in the revision of the Louisiana Civil Code and as the most widely cited and influential commentator on Louisiana law, Professor A.N. Yiannopoulos significantly influenced the development of good faith in Louisiana property law. *See generally* Justice Harry T. Lemmon, *A Tribute to Athanasios N. Yiannopoulos*, 73 TUL. L. REV. 1025 (1997); Tyler G. Storms, *Interview with Professor A.N. Yiannopoulos: Louisiana’s Most Influential Jurist in Our Time*, 64 LA. BAR. J., June–July 2016, at 24, 27 n.6 (listing the numerous Law Institute Committees for which Professor Yiannopoulos served as reporter). It is fitting, then, that this Article contributes to the current issue of the *Louisiana Law Review* published in his honor.

This Article addresses the role of good faith in four of those distinct areas: (1) as a prerequisite to the establishment of a predial servitude benefiting the owner of a building that encroaches on the property of a neighbor;<sup>5</sup> (2) as a mediating device allocating the rights of an original owner of a corporeal movable and a subsequent acquirer under the bona fide purchaser doctrine;<sup>6</sup> (3) as a defining characteristic establishing rights and obligations under the law of accession when a person possesses immovable property without a valid title;<sup>7</sup> and (4) as a prerequisite for the acquisition of ownership of, or other real rights in, immovable property by ten-year acquisitive prescription.<sup>8</sup> Although this Article notes the sources of good faith in Louisiana jurisprudence, prior Louisiana civil codes, and European civil codes considered in the revision process, it focuses primarily on how good faith has functioned in the post-revision property law landscape. It does so by examining the text and structure of the good faith provisions in the continuous revised Civil Code and reported judicial decisions that have employed the new or reformulated definitions of good faith.

Within the parameters of property law that are the focus of this Article,<sup>9</sup> an owner of a corporeal thing experiences a loss of property rights in some form or another. In the case of encroaching buildings, the servient estate owner may be forced to relinquish a predial servitude over his immovable property if the encroaching building owner is in good faith.<sup>10</sup> In the case of a lost or stolen corporeal movable, the owner must compensate a subsequent acquirer before the owner can recover possession if the acquirer purchased

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5. LA. CIV. CODE ANN. art. 670.

6. *Id.* arts. 518–25.

7. *Id.* art. 487.

8. *Id.* arts. 3475, 3480–82. The Louisiana Civil Code also provides that a possessor can acquire ownership of or other real rights in a movable through acquisitive prescription after three years of possession with good faith and an act sufficient to transfer ownership, but she must possess for ten years in the absence of good faith or title to acquire ownership by prescription. *Id.* arts. 3489–91. Cases applying these articles are discussed briefly *infra* note 276 and accompanying text.

9. Good faith also plays a quiet but significant role in the shadows of Louisiana's public records doctrine. *See, e.g.,* Longleaf Invs., L.L.C. v. Tolentino, 108 So. 3d 157, 159–61 (La. App. Cir. 2012) (holding that a party who would otherwise be a third party purchaser under Article 3338 of the Civil Code cannot rely on the public records doctrine when there are indications of bad faith and fraud). Consideration of good faith in the public records doctrine, however, is beyond the scope of this Article. For more on this topic, see generally Michael Palestina, Comment, *Of Registry: Louisiana's Revised Public Records Doctrine*, 53 LOY. L. REV. 899 (2007).

10. Art. 670.

the corporeal movable in good faith.<sup>11</sup> In other situations covered by the bona fide purchaser doctrine, the original owner of a corporeal movable thing will lose *all* of his property rights in a corporeal movable he once owned and cannot revendicate the thing if the acquirer takes possession in good faith from a particular kind of intermediary.<sup>12</sup> In accession, the owner of immovable property must sometimes compensate another person who enters his immovable without permission and improves it, derives natural or civil fruits from it, or even depletes it of some of its actual substance, if that other person is a good faith possessor.<sup>13</sup> Finally, under the law of acquisitive prescription, the original owner of an immovable will lose all or a portion of her property rights to another person who has intruded on the owner's sphere of exclusive control if the intruder took possession pursuant to a just title and was in good faith at the time of the intrusion.<sup>14</sup>

In all four of these situations, the Louisiana Civil Code shifts a property law entitlement from the original owner to someone who ordinarily would not be entitled to any legal protection.<sup>15</sup> In each of these instances, the concept of good faith serves as a crucial mediating device, reallocating the rights and obligations of the original owner and the new player who has arrived on the scene either uninvited or through some intermediate transaction.

This Article suggests that the concept of good faith has two components in the context of property law.<sup>16</sup> One component concerns *honesty*. A person

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11. See *id.* arts. 523–24, discussed *infra* Part II.A.

12. This is true in cases involving annullable title, double dealers, and faithless trustees. See *id.* arts. 518, 520 (repealed), 522, 525, discussed *infra* Parts III.B–D.

13. See *id.* arts. 483–89, 496–97, 527–29, discussed *infra* Part IV.

14. This is the case with encroaching building servitudes, art. 670, discussed *infra* Part II, and ten-year acquisitive prescription of immovables. *Id.* arts. 3475, 3480–82, discussed *infra* Part V.

15. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002); John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1 (2005) [hereinafter Lovett, *A Bend in the Road*].

16. Professor Litvinoff likewise suggested that good faith has two components, which he described as “a psychological and an ethical component.” Litvinoff, *supra* note 1, at 1649. “The former,” he said,

would consist of a belief that one is acting according to law, and is designated as a *good faith-belief*. The latter would consist in conducting oneself according to moral standards, and is designated as *good faith-probity*, or *good faith-honesty*, and is germane to ideas of loyalty and respect for the pledged word.

acts in good faith in the property law context when he honestly believes he is the rightful owner of the thing he is possessing or honestly believes that his ownership extends to all the land that his improvements are occupying. Honesty is the fundamental requirement of a good faith actor in property law. If someone knows that he is not the rightful owner of land or of a corporeal movable, that he has no lawful basis upon which to rest his occupation or possession, or that his improvements extend beyond the actual limits of his ownership, he necessarily is a bad faith possessor.

The second component of good faith in Louisiana property law is *carefulness*. A good faith actor in property law is someone who not only honestly believes he is the owner or rightful occupier of the thing at issue, but he also was at least minimally careful when he built an improvement or took possession of a corporeal movable or immovable. Unlike honesty, however, carefulness is a relative criterion. The standard of carefulness varies quite considerably in the four situations studied in this Article. In some instances, the presumption of good faith protects the good faith claimant by only requiring that she not ignore obvious red flags.<sup>17</sup> In other cases, the nature of the marketplace can insulate an acquirer and entitle her to presume a vendor has title unless red flags appear or unusual circumstances should alert her to the need for greater scrutiny of the vendor's ownership.<sup>18</sup> In other cases, the claimant must rely on a written instrument that on its face is translatable of ownership—for instance, a written act of sale, donation, or exchange—and also not be aware of any significant defects in title.<sup>19</sup> Finally, in the context of acquisitive prescription, the claimant's reliance on a written act must also be reasonable in light of all objective circumstances.<sup>20</sup>

In general, then, particularly in the context of encroaching building servitudes and accession, good faith works in a relatively simple—though not simplistic—crystalline, on-and-off manner.<sup>21</sup> In those areas, courts

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*Id.* He also recognized that, often, it is difficult to disentangle these two components of good faith, noting that “both can coexist in a person's conscience” and that sometimes it is “just one thing compounded of two ingredients, or a single coin with two sides.” *Id.* at 1650.

17. See generally LA. CIV. CODE ANN. art. 670, discussed *infra* Part II.

18. See generally *id.* arts. 518, 521–24, discussed *infra* Part III.

19. See generally *id.* art. 487, discussed *infra* Part IV.

20. See generally *id.* art. 3480, discussed *infra* Part V.

21. *Infra* Parts I, III. For the distinction between crystalline rules and muddy standards, see generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). For the utility of mechanistic, on-and-off rules in the linguistic economy of property law, see generally Henry E. Smith, *The Language of Property: Form, Context and Audience*, 55 STAN. L. REV. 1105 (2003). For the author's views on the rules versus standards debate as it plays out in Louisiana, see generally John A.

employ relatively mechanistic tests to determine whether good faith exists, often focusing solely on the claimant's subjective belief that he was the owner of the property involved and his lack of awareness of defects in his title.<sup>22</sup> In those cases, courts seem to employ an intuitive notion of fairness or common morality.<sup>23</sup> In short, they focus primarily on the honesty component of good faith and worry less about carefulness.

In the context of the bona fide purchaser doctrine and ten-year acquisitive prescription regarding immovables, however, courts employ more stylized, complex, and case-specific approaches that consider not only the claimant's subjective belief that he is possessing rightfully but also the transactional and objective reasonableness of that belief.<sup>24</sup> In these cases, honesty remains a prerequisite to good faith status, but carefulness becomes a higher priority and attracts more rigorous judicial scrutiny—even though good faith is still presumed.

When Louisiana courts consider the carefulness of the alleged good faith actor in property law, they also quite frequently ask questions about the relative carelessness of the person who allowed the good faith claimant to come into possession of the thing in dispute.<sup>25</sup> In this sense, evaluation of one party's alleged good faith in property law usually involves, at least to some degree, a relational inquiry. If a court finds someone to be a good faith encroacher, acquirer, purchaser, or possessor, usually the other party was not particularly careful with the thing he owned. The structure of good faith analysis in Louisiana property law thus can be visualized using a simple graph. Carefulness forms the horizontal or x-axis, and honesty forms the vertical or y-axis. On this graph, all four of the examples of good faith analysis studied in this Article—good faith encroachers under Article 670, good faith purchasers of corporeal movables, and good faith possessors for purposes of

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Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923 (2012).

22. See generally *infra* Parts II, IV.

23. See Thomas Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007) (arguing that property as an institution can only function well if most people recognize that property is a moral right and if property rules correspond with common sense notions of morality). Merrill and Smith briefly discuss the subjects of this essay from the common law perspective and note the importance of good faith in adverse possession, the good faith purchaser doctrine, accession, and building encroachments. *Id.* at 1874–79.

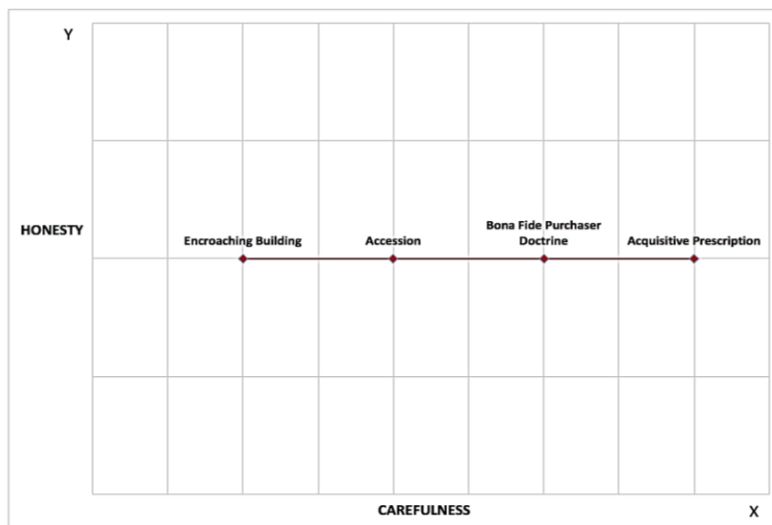
24. See generally *infra* Parts III, V.

25. See cases discussed *infra* notes 90–92 and accompanying text; *William Frantz & Co. v. Fink*, 52 So. 131 (La. 1910) (on rehearing), and *La. Lift & Equip. Co. v. Eizel*, 770 So. 2d 859 (La. Ct. App. 2000), discussed *infra* at notes 152–189 and accompanying text.

accession and acquisitive prescription—are located at the same point along the y-axis, all requiring a foundational level of honesty.

What differentiates the good faith analyses studied here is their placement on the x-axis—that is, the degree of carefulness required. A good faith encroacher under Article 670 must demonstrate only a minimal amount of carefulness—really nothing more than the absence of outright carelessness.<sup>26</sup> A good faith possessor for purposes of accession is located somewhat to the right of the Article 670 encroacher on the x-axis because she must possess in reliance on some act translative of ownership and cannot be aware of any defects in her title, but she generally is not subject to a test of objective reasonableness. In other words, a good faith possessor for purposes of accession must be honest and careful enough that she relied on a written act, but no extra measure of carefulness is required. Close by, but somewhat further along the x-axis, is the good faith acquirer under the bona fide purchaser doctrine, a person who is presumed to be in good faith but might not be rewarded with that status if some special circumstances of her acquisition or purchase should make her aware that her transferor was not the rightful owner. The would-be good faith acquirer under this doctrine often must meet an implied test of objective reasonableness, in which market circumstances can weigh heavily for or against good faith status. Finally, located at the furthest point on the x-axis is the good faith possessor for purposes of acquisitive prescription, a claimant who must rely on an act translative of ownership and whose reliance must be objectively reasonable.

Figure One

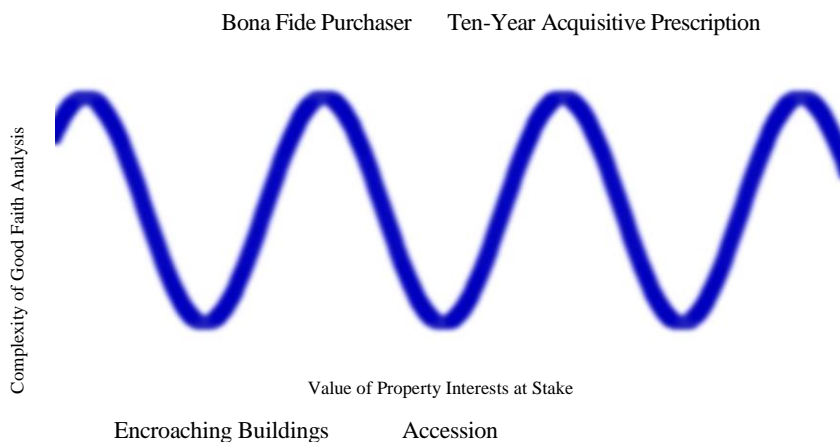


26. LA. CIV. CODE ANN. art. 670 (2018).



Another way to imagine the structure of good faith in Louisiana property law is to visualize a sine wave that oscillates above and below a baseline. When the level of complexity of the good faith analysis is relatively low—that is, when honesty and a very minimal level of carefulness is all that is required—as in the case of encroaching buildings and accession, the curve dips below the baseline. When the level of complexity of the good faith analysis is high—that is, when honesty and either implied or explicit objective reasonableness is required—as in the case of the good faith purchaser doctrine and ten-year prescription of immovables, the curve rises above the baseline.<sup>27</sup> Generally speaking, when the value of the property interest that is subject to entitlement shifting rises, as with the bona fide purchase doctrine and ten-year acquisitive prescription, the complexity and rigor of good faith analysis increases.<sup>28</sup> Conversely, when the property interests at stake are more modest, as with encroaching buildings and accession, the complexity and rigor of the good faith analysis is less demanding and thus dips below the baseline.<sup>29</sup>

Figure Two



27. In a true sine wave, the amplitude of the wave, that is, the distance above and below the base line, is invariable. In Louisiana property law, the complexity and intensity of the good faith analysis will vary from institution to institution.

28. The good faith transferee under the bona fide purchase doctrine will either be entitled to full reimbursement of the purchase price of the movable in dispute or actually acquire ownership, and the good faith possessor under ten-year acquisitive prescription will acquire ownership or other real rights of the immovable in dispute. *See infra* Parts II, IV.

29. The good faith encroacher will acquire only a predial servitude permitting an encroaching building to remain in place and the good faith possessor in accession will obtain only ownership of civil or natural fruits or various reimbursement rights. *See infra* Parts I, III.

Regardless of how one visualizes the spectrum of good faith analyses required under Louisiana property law, good faith is always present. It functions like the water running in a navigable river or stream. Sometimes the water level runs high. Sometimes it runs low. The surrounding terrain may consist of flat rules of exclusion and contract. But the current of good faith frequently provides courts with a malleable, lubricating, and decision-making tool when property rights are subject to sudden transformations.

Good faith helps courts determine whether a landowner must allow room for an innocent encroacher. It helps courts decide whether an original owner of a lost or stolen movable must pay a subsequent purchaser to reacquire possession or whether an owner of a corporeal movable has entirely lost his right to revendicate a movable from a subsequent transferee. It determines when an owner must reimburse a possessor for his contribution to a thing possessed without the consent of the owner. Finally, and most radically, it signals when a possessor of an immovable can acquire ownership or other real rights with only ten years of continuous possession.

In this Article, these strong currents of good faith are traced in the order in which the relevant titles of the Civil Code were revised.<sup>30</sup> Part I addresses the undefined and relatively simple requirement of good faith in the acquisition of an encroaching building servitude. Part II analyzes the pervasive and more complex decision-making role of good faith in four different scenarios encompassed within Louisiana's version of the bona fide purchaser doctrine applicable to the transfer of ownership of movables. Part III examines the good/bad faith possessor distinction as a rough shorthand, allocative tool in the law of accession as it relates to immovables. Part IV focuses on the contextualizing function of good faith in ten-year acquisitive prescription in relation to immovables. This Article concludes by imagining what Louisiana property would look like if good faith considerations were banished. This final, albeit hypothetical, view reveals that the continuing presence of good faith in Louisiana property law makes the institution of property law more nuanced and ethically responsive to common sense notions of morality and, in particular, the principle that persons who benefit from rules that shift property entitlements should be honest and demonstrate at least a modicum of carefulness when they acquire new things or rights.<sup>31</sup>

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30. By helping to make good faith an explicit, though flexible, prerequisite in the case of encroaching buildings and by building upon prior doctrine, modernizing and further rationalizing the role of good faith in the other three cases, Professor Yiannopoulos deepened the currents of good faith in Louisiana property law.

31. Merrill & Smith, *supra* note 23.

## I. ENCROACHING BUILDINGS: ARTICLE 670

Act 514 of the 1977 Regular Session of the Louisiana Legislature was the second of many sweeping acts revising Louisiana property law in the 1970s.<sup>32</sup> Article 670 of the Civil Code appears in the portion of the act revising the law of “legal servitudes.”<sup>33</sup> It codifies several attempts by Louisiana courts to solve a frequently recurring property law problem—a building constructed by one property owner that encroaches on the property of his neighbor. Article 670 allows for the creation of a predial servitude to permit the encroaching building to remain on the neighbor’s property when

a landowner constructs *in good faith* a building that encroaches on an adjacent estate and the owner of that estate [the servient estate owner] does not complain within a reasonable time after he knew or should have known of the encroachment, or in any event complains only after the construction is substantially completed.<sup>34</sup>

The servitude, however, does not come for free; the owner of the building, the new dominant estate owner, must pay “compensation for the value of the servitude taken and for any other damage that the neighbor has suffered.”<sup>35</sup> Finally, the servitude only comes into existence if a court, exercising its discretion, decides to permit the building to remain.<sup>36</sup>

Although Article 670 makes acquisition of an encroaching building servitude dependent on a showing that the building at issue was constructed “in good faith,” the article does not define the term good faith. Good faith, however, always formed a crucial but problematic part of prior

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32. Act No. 514, 1977 La. Acts 1309 revised the law of predial servitudes in Title IV of Book II of the Civil Code. The previous year, Act No. 103, 1976 La. Acts 321 was enacted to revise the law of personal servitudes, including usufruct, habitation, and right of use, in Title III of Book II of the Civil Code.

33. Legal servitudes, such as the encroaching building servitude arising under Article 670, are “*limitations on ownership established by law for the benefit of the general public or for the benefit of particular persons.*” LA. CIV. CODE ANN. art. 659 (2018) (emphasis added).

34. *Id.* art. 670 (emphasis added).

35. *Id.* The owner of an encroaching building who acquires a predial servitude under Article 670 acquires the servitude for the benefit of his estate, that is, the dominant estate upon which most of the encroaching building exists. Meanwhile the predial servitude burdens the other estate, the encroached upon or servient estate. *See id.* art. 646 (“A predial servitude is a charge on a servient estate for the benefit of a dominant estate.”).

36. Art. 670.

caselaw in which courts often struggled with a gap in the Civil Code of 1870.<sup>37</sup> Article 508 of that code gave restitution-based protection to an evicted possessor who had constructed “plantations, edifices or works” on the land of another person as long as he had “possessed *bona fide*.”<sup>38</sup> Article 503 of the same code, in turn, defined a “bona fide possessor” as someone “who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant.”<sup>39</sup> Two problems arose in applying these two articles to encroaching building disputes. First, Article 508, the source of current Articles 496 and 497 of the Civil Code,<sup>40</sup> actually addressed a different situation—a construction situated *entirely* on another person’s property and not a minor encroachment. Second, because an encroaching building owner would almost never possess a narrow strip of his neighbor’s property occupied by his encroaching building by virtue of a title, an encroaching building owner could never really be a “bona fide possessor.”

To remedy this gap in the law, the drafters of Article 670 drew on two different groups of sources. First, they borrowed from “continental civil codes,”<sup>41</sup> some of which incorporate what law and economics scholars

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37. *Id.* cmt. b.

38. Much like current Louisiana Civil Code article 496, Article 508 of the 1870 Civil Code stated that the record owner could not demolish constructions made by a good faith possessor; instead, he must choose “either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil.” LA. CIV. CODE art. 508 (1870).

39. *Id.* art. 503.

40. LA. CIV. CODE ANN. art. 487 cmt. a (2018).

41. Art. 670 cmt. a. Although the revision comment does not mention which continental civil codes the drafters had in mind, they likely drew on Italian and German, but not French, sources. Article 938 of the Italian Civil Code states:

If a portion of the adjoining land is occupied in good faith in the construction of a building, and the owner of that land does not object within three months of the day on which construction began, the court, taking account of the circumstances, can attribute the ownership of the building and the occupied soil to the builder. The builder is required to pay the owner of the soil double the value of the area occupied, as well as compensation for damages.

Codice Civile [C.c.] [Civil Code] art. 938 (2018) (It.) Paragraph 912 of the Bürgerliches Gesetzbuch (“BGB”) [German Civil Code] reads:

If the owner of the soil in construction of a building has built beyond the border line without intention or gross negligence, the neighbor must suffer the building unless before or right after the overtaking of the borderline he has objected. The neighbor must be compensated with a cash rent.

today call “liability rule” solutions to the problem of encroaching buildings.<sup>42</sup> These continental civil codes allow the encroaching building owner to acquire a property right vis-à-vis the adjoining landowner through the use of a liability rule mechanism, that is, by paying a judicially determined amount of compensation for either a permanent or temporary property right on the adjoining land.<sup>43</sup>

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BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] para. 912 (2018). In contrast, French law denies the encroaching building owner any relief at all in this situation because it considers the encroachment an invasion of the adjoining owner’s property rights and because Article 545 of the French Civil Code only allows a compensated taking of private property for a public, but not a private, use. These translations and insights are taken from UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 137–39, 139 nn.55, 58 (2000).

42. Calabresi & Melamed, *supra* note 15, at 1092. Calabresi and Melamed famously envisioned two mechanisms for the protection of property entitlements. When an entitlement is protected by a “property rule,” it can only be modified, transferred, or terminated through a consensual transaction if the price is determined by the mutual consent of the parties. When a property entitlement is subject to a “liability rule,” however, it can be modified, transferred, or destroyed in exchange for an objectively determined price, that is, a price set by a court. Lovett, *A Bend in the Road*, *supra* note 15, at 9–10. For example, when the state exercises its power of eminent domain and takes a person’s property in exchange for just compensation, the condemnee’s property is protected only by a liability rule. See Lovett, *A Bend in the Road*, *supra* note 15, at 10–16, for a more detailed explanation of the property rule-liability rule paradigm. Article 670 of the Civil Code similarly allows the encroaching building owner to acquire a predial servitude on the adjoining land and the adjoining landowner is compensated by an amount determined objectively by the court. Art. 670.

43. In terms of economic efficiency, Mattei ranks the German solution to the encroaching building problem, along with the English, as the most efficient, followed in descending order by the Italian rule, the United States rule, and the French rule. MATTEI, *supra* note 41, at 140. Thus, by blending the German and Italian solutions in Article 670’s liability rule solution, Professor Yiannopoulos aligned Louisiana with the most advanced civilian legal reasoning, at least according to Mattei. In England, as Mattei explains, “the problem is handled either by means of estoppel or by refusing the injunction despite the fact that good faith does not excuse trespass.” *Id.* at 137. For an insightful discussion of the approach of United States courts to this problem, see THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 57–60 (2d ed. 2012). Merrill and Smith opine that in most United States jurisdictions, if faced with “an unintentional encroachment, only slight damage to the plaintiff’s [adjoining landowner’s] interest, and grave hardship to the defendant if removal of the encroachment were required, most American courts today would probably deny injunctive relief and only award damages.” MERRILL & SMITH, *supra*, at 57. Functionally, this solution is the same as provided in Article 670. Merrill and Smith describe a “person who violates

Second, the drafters acknowledged that in several Louisiana cases, courts had allowed encroaching walls “built in good faith and with the acquiescence of the adjoining landowner” to remain on a neighbor’s property.<sup>44</sup> Article 670, however, does not convey much about what good faith means in this context. For example, it does not instruct whether a property owner must conduct a survey to ascertain the actual boundaries of his property before construction begins. It does not indicate whether good faith is presumed if the construction took place under a previous owner. It does not even explain whether good faith is measured in subjective or objective terms. In short, Article 670 provides no guidance about the degree of carefulness that an Article 670 claimant must demonstrate to qualify as a good faith encroacher. It appears to require nothing more than some base level of honesty and perhaps the absence of utter recklessness.

Happily, though, the vagueness of “good faith” in Article 670 has not proven to be a terrible problem, as judicial decisions handed down after its adoption have filled in a number of these gaps and, perhaps with one notable exception, produced sensible results. In *Bushnell v. Artis*, for instance, the Louisiana Third Circuit Court of Appeal refused to interpret the good faith requirement of Article 670 in light of Article 487, which now defines good faith for purposes of accession and requires possession by virtue of an act translative of ownership.<sup>45</sup> Instead, it found that the claimant satisfied the good faith requirement because she always thought her property line extended to a fence constructed by a neighbor.<sup>46</sup> Further, the court implicitly and quickly determined that the claimant’s belief was not wholly unreasonable—the claimant had no reason to be aware that the neighbor had mistakenly offset the fence from the actual boundary line and the neighbor never complained when the claimant constructed her home in a 15 foot strip of land apparently made available by the misplaced fence.<sup>47</sup> In short, the claimant in *Bushnell* encroached in good faith even

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another’s property rights without knowing that he or she is doing so as a ‘good faith’ violator” and “someone who knowingly violates another’s property rights” as a “‘bad faith’ violator.” MERRILL & SMITH, *supra*, at 58.

44. Art. 670 cmt. c. In *Pokoroy v. Pratt*, 34 So. 706, 707 (La. 1903), the court stressed the acquiescence of the adjoining landowner who sought to have the encroaching wall demolished, without discussing the builder’s good or bad faith. In *Morehead v. Smith*, 225 So. 2d 729, 731, 735 (La. Ct. App. 1969) (on rehearing), the court easily found that the defendant property owner constructed a building with an encroaching wall in good faith because he had acted in accordance with a survey performed by a registered surveyor.

45. *Bushnell v. Artis*, 445 So. 2d 152, 154 (La. Ct. App. 1984).

46. *Id.*

47. *Id.*

though she lacked an act translative of ownership describing the occupied land and never conducted a survey before commencing construction.<sup>48</sup> The court essentially presumed that her encroachment was honest and did not inquire deeply into her carefulness.

In a later case, *Antis v. Miller*, the same appellate court, citing *Bushnell*, reached a similar result but went further in clarifying the relevant factors in an Article 670 good faith analysis.<sup>49</sup> In *Antis*, the court held that the defendant was entitled to an Article 670 servitude with respect to a 3.85-foot strip of land upon which he accidentally built a garage in the absence of a pre-construction survey.<sup>50</sup> The court determined specifically that the defendant was in good faith because (1) he and his ancestors had mowed and otherwise maintained the strip of land in controversy, (2) a row of pine trees had created the impression that the boundary was further away, and (3) the defendant always believed his property extended to the pine trees.<sup>51</sup> Significantly, the court refused to require a survey for good faith encroacher status, observing that “[i]f a prior survey . . . were a requisite for good faith, there would be no need for Article 670” because “if all constructions were preceded by an accurate survey, there would never be an encroachment.”<sup>52</sup> In short, good faith here turns on simple subjective honesty and a modest degree of carefulness in the circumstances.

In *Winingder v. Balmer*, the Louisiana Fourth Circuit Court of Appeal resolved another question when it affirmed the trial court’s implicit finding of good faith on the part of a New Orleans homeowner claiming an Article 670 servitude.<sup>53</sup> In that case, the court held that the claimant satisfied the good faith requirement in light of two significant facts: (1) the encroaching house had been constructed more than 80 years prior to the litigation; and (2) the defendant whose property suffered the encroachment actually knew about the problem at the time she purchased her property.<sup>54</sup> In other words, when the encroachment precedes the claimant’s acquisition of the property, the court will presume the encroachment occurred in good faith

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48. *See id.*

49. *Antis v. Miller*, 524 So. 2d 71 (La. Ct. App. 1988).

50. *Id.* at 76–77. In *Antis*, the defendant became aware that his garage likely encroached on his neighbor’s property after approximately 80% of the construction was complete, at which point he notified his neighbor. *Id.* at 73.

51. *Id.* at 72–73, 76.

52. *Id.* at 76.

53. *Winingder v. Balmer*, 632 So. 2d 408 (La. Ct. App. 1994).

54. *Id.* at 410, 413.

and implicitly charge the servient estate owner with constructive knowledge of the encroachment.<sup>55</sup>

Following *Winingder*, another Louisiana appellate court held that a neighbor who rebuilt an existing boathouse and pier in the same place as a previous owner resulting in a 4.5 foot encroachment across the boundary line was similarly entitled to an Article 670 servitude.<sup>56</sup> The court justified this conclusion by observing that the encroachment pre-dated the servient estate's acquisition of the adjacent lake bottom and by noting that the encroacher was unaware that his structures crossed the boundary line.<sup>57</sup> On the other hand, as the court in *Ensenat v. Edgecombe* observed, a property owner who constructs his encroaching driveway and fence in the midst of a hotly litigated boundary dispute with his neighbor and, moreover, does so while his neighbor is out of town, is barred from any relief under Article 670.<sup>58</sup> As the circumstances in *Ensenat* suggest, a fundamentally dishonest or mischievous claimant will not be considered a good faith encroacher.

Finally, in *Hayes v. Gunn*, the Louisiana Third Circuit Court of Appeal confronted a simple factual scenario that nevertheless divided the court and revealed that Article 670 does not always produce tidy outcomes.<sup>59</sup> In that case, a woman acquired two adjoining lots and then transferred one of the lots to her daughter and son-in-law, the eventual plaintiffs, who built a "covered carport" on the woman's remaining lot because they did not have sufficient room on their own lot.<sup>60</sup> The woman gave her daughter and son-in-law oral permission to construct the carport and use part of her lot as a driveway.<sup>61</sup> Later, a bank acquired the woman's remaining lot, which was then purchased by another person, the defendant Gunn, who demanded the daughter and son-in-law stop using the driveway and remove the carport.<sup>62</sup> In response, the son-in-law filed suit, claiming the acquisition of an Article 670 servitude with respect to the carport and driveway.<sup>63</sup> The trial court rejected the claim of an Article 670 servitude, relying on the public records

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55. The court in *Winingder* also cited *Bushnell* for the proposition that a claimant under Article 670 is "not required to prove that she is a possessor in good faith as defined in Louisiana Civil Code article 487." *Id.* at 413–14.

56. *Atwood v. Hylan*, 685 So. 2d 450, 450–53 (La. Ct. App. 1996).

57. *Id.*

58. *See Ensenat v. Edgecombe*, 677 So. 2d 138, 144 (La. Ct. App. 1996).

59. *Hayes v. Gunn*, 115 So. 3d 1141 (La. Ct. App. 2013).

60. *Id.* at 1142.

61. *Id.* at 1142–43.

62. *Id.* at 1143.

63. *Id.*



doctrine.<sup>64</sup> The court of appeal, in a split decision, affirmed, holding that the plaintiff did *not* obtain an Article 670 servitude because he and his wife had constructed the carport with the explicit permission of the original owner.<sup>65</sup>

There are a few problems with this decision. First, it is not clear that Article 670 should have been applicable to a covered carport or driveway as neither structure is obviously a building.<sup>66</sup> Second, although the plaintiff and his wife clearly knew they had no ownership interest on the adjacent lot when they constructed the carport and driveway and lacked any act translative of ownership to the adjoining lot, it is not clear that this fact alone should disqualify them from claiming good faith for purposes of Article 670. Here, the majority decision conflates one of the key requirements of Article 487 of the Civil Code—that a good faith possessor have an act translative of ownership—with Article 670 in its determination that the plaintiff was not entitled to a servitude.<sup>67</sup>

In her astute dissent in *Hayes*, Judge Cooks pointed out that in previous decisions the Third Circuit Court of Appeal had rejected the notion that an Article 670 claimant must possess by an act translative of ownership and further observed that “[t]here is no good faith bright line test solely dependent on an act translative of title when applying Article 670.”<sup>68</sup> Moreover, she noticed that Article 670 contemplates “good faith in fact” and implicates “honesty” or “lawfulness of purpose.”<sup>69</sup> She concluded by arguing that the eventual purchaser in *Hayes* should not have been permitted to rely on the fact that the encroaching party’s interest in the constructions was unrecorded because Article 670 is designed to protect just such interests.<sup>70</sup> After all, she notes, the plaintiff and his wife “are exactly the type of landowners who, in good faith, construct a building that encroaches on the neighboring land to which no objection is

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64. *Id.* at 1144.

65. *Id.* at 1146–47.

66. At best, they might be classified as “other constructions permanently attached to the ground.” LA. CIV. CODE ANN. art. 643 (2018). For examples of such constructions, see *id.* rev. cmt c. This is not the only instance in which Louisiana courts have applied Article 670 to structures that are more accurately characterized as other constructions rather than buildings. See *SGC Land, L.L.C. v. La. Mid-Stream Gas Servs.*, 939 F. Supp. 2d 612, 620 (W.D. La. 2013) (applying Article 670 to a pipeline constructed in good faith); *Mary v. QEP Energy Co.*, 2017 WL 6273739, at \*12 (W.D. La. Dec. 6, 2017) (same).

67. *Hayes*, 115 So. 3d at 1144–47.

68. *Id.* at 1149 (Cooks, J., dissenting).

69. *Id.*

70. *Id.*

timely made.”<sup>71</sup> Admittedly, *Hayes* is an outlier. The claimant in that case built his carport on his neighbor’s property honestly and carefully but was not entitled to an Article 670 servitude. Perhaps the best explanation for the majority decision is that the majority viewed the plaintiff and his wife as precarious possessors and thus not entitled to acquire any property rights in the adjoining property.<sup>72</sup>

All of these decisions applying Article 670 demonstrate that good faith in this context functions in a relatively straightforward, on-and-off manner. Rather than engage in complex, highly stylized determinations as to whether an owner acted reasonably in light of all the transactional circumstances, courts make quick, rough, and ready determinations because they are largely focused on the honesty component of good faith and specifically whether the claimant knew he was encroaching when he started his construction project. It is also true that courts often look at a number of objective facts—the presence of fences or other boundary markers, the degree of intrusion, the age of the encroachment, and the neighbor’s knowledge, for example—to make an assessment about the reasonableness of the encroachment, but in the end, their assessments are not highly complex. Courts also indulge in a generous presumption of good faith when they encounter the frequent problem of long-standing encroachments created by prior owners.

## II. GOOD FAITH PURCHASER DOCTRINE

Good faith has always played an important role in resolving disputes that arise when a person who is not actually the owner of a movable purports to sell the movable to another. The Louisiana Civil Code addresses this subject in Chapter 3 of Title 1 of Book II, entitled “Transfer of Ownership by Agreement.” Article 523 of the Civil Code lies at the heart of that chapter. It states simply and elegantly, “An acquirer of a

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71. *Id.* Judge Cooks also shrewdly pointed out that the defendant was hardly blameworthy in this case—she was “well-informed about the encroachment before purchasing the property and purchased it with full knowledge of its existence,” which suggests that her and the bank’s mutual knowledge of the encroachment likely affected the purchase price for the lot. *Id.* at 1150.

72. See LA. CIV. CODE ANN. art. 3437 (2018). Precarious possession, of course, is the possession of a thing with the permission of or on behalf of the actual owner or another possessor. *Id.* For more on precarious possession and the tendency of Louisiana courts to classify acquisitive prescription claimants as precarious possessors in some circumstances, see John A. Lovett, *Precarious Possession*, 77 LA. L. REV. 617 (2017) [hereinafter Lovett, *Precarious Possession*].

corporeal movable is in good faith for purposes of this Chapter unless he knows, or should have known, that the transferor was not the owner.”<sup>73</sup>

The drafters of this article, new for the Louisiana Civil Code, drew inspiration from a wide range of civilian sources, including the German and Greek Civil Codes.<sup>74</sup> This provision embeds a clear presumption of good faith in its lapidary prose and links good faith to a broad reasonable person standard yet leaves plenty of room for judicial interpretation. Crucially, this article brings both honesty and carefulness into the good faith calculus.

To understand how this conception of good faith functions, one must first consider the purpose of the bona fide purchaser doctrine itself. The doctrine seeks to reconcile two important but often conflicting policy interests.<sup>75</sup> On the one hand, the doctrine must protect security of ownership as embodied in the Civil Code’s famous admonition: “The sale of a thing belonging to another does not convey ownership.”<sup>76</sup> On the other hand, it also must protect security of transactions, as illustrated in Article 2279 of the French Civil Code, which equates possession of movables with ownership of or title to movables.<sup>77</sup> The concept of good faith, it turns out, plays a crucial role in balancing these two competing interests.

As Professor Ugo Mattei points out, every legal system must decide what to do with so-called transfers *a non domino*—“transfers from someone who is not the actual owner of the movable but who has physical possession of it to a third party who *in good faith* relies on him or her being owner.”<sup>78</sup> Such transfers pose “a classic conflict between two innocent parties . . . who claim ownership over the same piece of movable property.”<sup>79</sup> As Mattei explains, two rival paradigms for solving this classic problem have competed over the ages in the Western legal tradition.

One solution, originating in Roman law, gives ownership of the movable to the original owner, regardless of how the intermediary took

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73. LA. CIV. CODE ANN. art. 523.

74. *See id.* cmt. a (acknowledging that this provision was “new” and “based in part on Article 1037 of the Greek Civil Code and Sec. 932(2) of the German Civil Code”).

75. DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES § 7.1, *in* 24 LOUISIANA CIVIL LAW TREATISE (2012); *Se. Equip. Co., Inc. v. Office of State Police*, 437 So. 2d 1184, 1186 (La. Ct. App. 1983) (acknowledging the “competing equities between the true owner and the good faith purchaser who are both innocent victims”).

76. LA. CIV. CODE ANN. art. 245.

77. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2279 (1804) (Fr.) (“In the case of movables, possession is equivalent to a title.”).

78. MATTEI, *supra* note 41, at 106–07 (emphasis added).

79. *Id.* at 107.

possession of the thing, and only considers good faith if the final possessor asserts “usuacapio—[that is,] adverse possession for a long time[.]”<sup>80</sup> In this Romanist view, good faith is relatively unimportant and comes into the picture only after a significant passage of time and overt possession.

The second solution, originating in Germanic customary law, asks how the original owner relinquished possession. If the original owner *voluntarily* relinquishes possession by turning over the movable to someone like a faithless trustee, then the eventual possessor should prevail, regardless of her *bona fides* or *mala fides*, because the person best positioned to prevent the loss is the original owner.<sup>81</sup> Under this German view, however, if the original owner loses possession *involuntarily* because the movable has been lost or stolen, then the original owner will prevail because he lost the property “against his will.”<sup>82</sup> Notice that in this Germanic formulation the original owner’s carefulness or carelessness matters a great deal, and the subsequent acquirer’s honesty or carefulness is immaterial.

According to Mattei, most European legal systems, including notably Germany and Switzerland, worked out a compromise. In essence, these systems followed the Germanic approach—protecting the owner if he loses possession involuntarily but rewarding the eventual transferee if the original owner voluntarily departs with possession.<sup>83</sup> These systems, however, made one crucial qualification: when the original owner *entrusts* the movable to the intermediary, the third-party transferee is protected only if she is in good faith.<sup>84</sup>

After an initial 170-year period that charitably has been described as a “schizophrenic” mélange of first principles favoring security of ownership spliced with numerous codal and jurisprudential exceptions in favor of the good faith purchaser,<sup>85</sup> Louisiana’s contemporary bona fide

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80. *Id.*

81. *Id.* at 107–08.

82. *Id.* at 107.

83. *Id.* at 106–08.

84. *Id.* at 107.

85. Marie Breaux Stroud, *The Sale of a Movable Belonging to Another: A Code in Search of a Solution*, 4 TUL. CIV. L. F. 41, 47 (1988). See *id.* at 43–52, for a concise history of the bona fide purchaser doctrine from 1808 until the 1979 revision. According to several commentators, much of the bona fide purchaser doctrine was introduced into Louisiana by courts borrowing from the common law and calling the borrowing “natural law.” *Id.* at 49. As the inimitable Mitchel Franklin put it: “This is, then, the Louisiana palimpsest: the code written over by the case law, borrowing Anglo-American concepts, under the self-deluding disguise that they are natural law.”

purchaser doctrine illustrates the modern civil law compromise. In fact, the current Louisiana Civil Code heightens the importance of the eventual transferee's good faith by making that characteristic crucial in four distinct situations: (1) in the case of lost or stolen things;<sup>86</sup> (2) in the case of an original owner who is induced by fraud or some other vice of consent to part with a movable;<sup>87</sup> (3) in the case of either a duplicitous or forgetful owner who sells a thing to one person and then turns around and sells the same thing to another person before the first vendee takes possession;<sup>88</sup> and (4) the always difficult case of the owner who entrusts his movable to a person who proves to be an untrustworthy depositary or bailee.<sup>89</sup>

In all four corners of the bona fide purchaser doctrine, two questions recur. First, given that the honesty of a good faith acquirer is generally presumed in this context, what degree of carefulness is required? Second, has the Civil Code or courts provided any useful short cuts for deciding whether a bona fide purchaser claimant was careful enough in his acquisition of a corporeal movable?

#### A. *Lost or Stolen Things*

The first bona fide purchaser problem concerns a lost or stolen movable. Here, two Civil Code articles provide dueling conceptions of the right of the original owner. First, Article 521 states:

One who has possession of a lost or stolen thing may not transfer its ownership to another. For purposes of this Chapter, a thing is stolen when one has taken possession of it without the consent of its owner. A thing is not stolen when the owner delivers it or transfers its ownership to another as a result of fraud.<sup>90</sup>

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Mitchel Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 609 (1932).

86. See LA. CIV. CODE ANN. arts. 521, 524 (2018).

87. See *id.* arts. 521–22. The classic example is a seller who transfers possession of a movable upon receipt of a check that is later dishonored. See, e.g., *Flatte v. Nichols*, 96 So. 2d 477 (La. 1957); *Trumbull Chevrolet Sales Co. v. Maxwell*, 142 So. 2d 805 (La. Ct. App. 1962).

88. See *id.* art. 518.

89. See LA. CIV. CODE art. 520 (1979), repealed by Act. No. 125, § 1, 1981 La. Acts 351. In light of the repeal of Article 520, this situation must now be resolved solely with resort to Louisiana caselaw, particularly, *William Frantz & Co. v. Fink*, 62 So. 131 (La. 1903). See *infra* Part II.D.

90. LA. CIV. CODE ANN. art. 521 (2018).

Putting aside the distinction between theft and fraud for the moment, this article appears to create absolute protection for the owner of the lost or stolen thing because, as Professor Yiannopoulos explains, the original owner “may reclaim it in the hands of the finder or of the thief as well as in the hands of any acquirer who purchased it in good faith for fair value.”<sup>91</sup> Although Professor Yiannopoulos’s statement is undoubtedly true in the case of a good faith acquirer who purchases directly from a thief or finder, the article does not solve the more difficult and common case of an acquirer who purchases from an intermediary who took possession for a thief or finder. For that case, one must turn to Article 524, which states:

The owner of a lost or stolen movable may recover it from a possessor who bought it in good faith at a public auction or from a merchant customarily selling similar things on reimbursing the purchase price. The former owner of a lost, stolen, or abandoned movable that has been sold by authority of law may not recover it from the purchaser.<sup>92</sup>

This article complicates the superficially absolute rule of Article 521 in two crucial respects. First, it eliminates the original owner’s right of revendication if the eventual purchaser acquires the thing at a publicly authorized sale. Second, and more importantly, it significantly limits the original owner’s right of revendication by requiring the owner to pay the purchaser his purchase price if the eventual purchaser acquires the thing at either a public auction or “from a merchant customarily selling similar things,” when the purchaser made such an acquisition in “good faith.”<sup>93</sup> In other words, although the original owner can theoretically regain her movable in the *market ouvert* case,<sup>94</sup> the law guarantees the good faith purchaser restitution in the form of compensation for the value of the movable.

The revision comments to Article 524 instruct that this provision reproduces part of the 1870 Civil Code but overturns prior jurisprudence to avoid the difficulties inherent in applying the law of acquisitive prescription of movables while protecting buyers in common commercial

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91. A.N. YIANNOPOULOS, PROPERTY § 13:9, in 2 LOUISIANA CIVIL LAW TREATISE at 787 (5th ed. 2015).

92. LA. CIV. CODE ANN. art. 524.

93. *Id.*

94. *Market ouvert* (or *ouvert*) sales are those in which goods are offered for sale at a public fair or market or a shop that regularly trades in those goods. Stroud, *supra* note 85, at 44.

transactions.<sup>95</sup> On its face, then, Article 524 appears to tip the scales in favor of the second of the two relatively innocent parties—here, the good faith purchaser—in the interest of protecting everyday commerce.<sup>96</sup>

Unfortunately, only a handful of reported Louisiana decisions have applied the good faith definition articulated in Article 523 in the context of stolen goods, and only two stand out for their contrasting interpretation of the good faith requirement in the context of stolen goods.<sup>97</sup>

First, in *Brown & Root, Inc. v. Southeast Equipment Co.*, the Louisiana First Circuit Court of Appeal held that a purchaser of stolen industrial equipment—a wheeled loader—was in good faith for purposes of Article 524 and thus entitled to reimbursement for its purchase price before it was required to return the loader to its original owner.<sup>98</sup> In that case, when it bought the loader from an equipment dealer in Houston, the purchaser

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95. LA. CIV. CODE ANN. art. 521 rev. cmts. a–b.

96. A fair question to ask is whether Article 524 enables thieves to launder stolen goods through merchants too easily—particularly when those items are not easily traceable through a system of registry. On the other hand, this risk might be a small price to pay for a ready market in second hand goods. To answer these questions, it would be necessary to conduct empirical studies beyond the scope of this Article.

97. In a third decision, *Se. Equip. Co. v. Office of State Police*, 437 So. 2d 1184, 1185–86 (La. Ct. App. 1983), the court applied Article 524, but not Article 523, to hold that the purchaser of a stolen front-end loader was entitled to reimbursement for the \$54,000 purchase price it paid an intermediary before it had to return the loader to the original owner. In that case, according to the majority, the parties effectively stipulated that the purchaser was in good faith, *id.* at 1185 n.1, and thus, the question for the court was whether the purchaser acquired the loader from a “merchant customarily selling similar things” given that it acquired the loader from a heavy equipment sales company that was acting as an agent or consigner on behalf of another person, the suspected thief. *Id.* at 1185–86. The court interpreted Article 524 as only requiring some “dealing” between the good faith purchaser and the merchant customarily selling similar things, and it therefore held that “if such a merchant conducts the sale, [Article] 524 applies, whether the merchant is acting as apparent owner or only as agent for another.” *Id.* at 1186. Put differently, Article 524 applies “not only to direct sales of movables from the merchant’s own inventory, but also consignment sales, . . . where the merchant is acting as an agent on behalf of someone else who purports to be the owner.” *Id.* at 1185. In dissent, Judge Redman argued persuasively that the parties’ stipulation that the purchaser did not know that the loader was not stolen was not a stipulation that the purchaser—Southeast—“was in good faith” and that, in fact, the ease which another prospective purchaser learned that the loader had been stolen suggests that Southeast “should have known” that the transferor was not the owner. *Id.* at 1187 (Redman, J., dissenting) (emphasis omitted).

98. *Brown & Root, Inc. v. Se. Equip. Co.*, 470 So. 2d 516, 518 (La. Ct. App. 1985).

either did not notice or worry about the fact that the manufacturer's original serial number had been gouged out of the loader's metal frame on the front of the vehicle and a fictitious serial number had been glued in its place.<sup>99</sup> The court found these facts insufficiently alarming so as to spur the purchaser to engage in further inquiry as to the purported vendor's ownership, particularly in the absence of any indication that the loader's \$23,000 purchase price loader was unusually low.<sup>100</sup> In *Brown and Root*, the general presumption of good faith embedded in Article 523 may have tipped the balance in favor of the purchaser despite the suspicious conditions of the loader's serial number.<sup>101</sup>

Several years later, in *Livestock Producers, Inc. v. Littleton*, a court found that an intermediary purchaser of 74 cattle from a cattle dealer who was trying to sell the cattle quickly did *not* act in good faith and thus was not entitled to reimbursement when the purchaser later learned that the cattle effectively had been stolen from their actual owner—the defendant Littleton.<sup>102</sup> In this complicated tale of cattle swindling, three salient sets of facts emerged. First, B.L. Littleton, the actual owner, who eventually sought return of the cattle, had previously tagged and marked the cattle with his own Texas registered brand—BL—after he had purchased the cattle from Smith, an apparent owner.<sup>103</sup> Second, the rushed sale of the cattle took place at a cattle auction business run by Ronnie Stratton, doing business as Livestock Producers, Inc. (“LPI”), the final purchaser of the 74 cattle and the party who eventually sought protection under Article 524.<sup>104</sup> Finally, at the time of the rushed intermediate sale, the BL brand, which actually belonged to Littleton, was referenced in the Louisiana brand book as belonging to a Coushatta farmer with no connection to Smith, the person purporting to sell the cows at the auction as owner, or anyone else connected with the cattle.<sup>105</sup> Notably, Smith, the duplicitous

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Livestock Prods., Inc. v. Littleton*, 748 So. 2d 537 (La. Ct. App. 1999).

103. *Id.* at 539. As it turns out, at the time of the first sale from Smith to Littleton, at which Smith represented himself as a one-half co-owner of 200 cows, Smith actually owned none of the cattle. This deceit proved to be immaterial, however, because Smith gave all of the proceeds of the first sale to the actual original first owner, Glasscock. *Id.* Thus, by the time Littleton acquired ownership of the cattle, the first vendor had been paid in full. *Id.* In some sense, Littleton created the entire problem by leaving the cattle in Smith's possession. *Id.*

104. *Id.* at 539, 544.

105. *Id.* at 545.



intermediary who had been put in possession of the cattle pursuant to a paid pasturage agreement, was not a regular customer of the auction.<sup>106</sup>

In these circumstances, the court, distinguishing *Brown & Root*, held that the purchaser, Stratton/LPI, was *not* actually in good faith because, as an auctioneer and regular player in the cattle trade, he should have been immediately suspicious when the brands of the cattle offered for sale appeared to be unconnected to the purported vendor, Smith.<sup>107</sup> As the court noted,

Even though the brand actually belonged to Littleton and was registered in Texas, not only did Stratton fail to check the brand registry in neighboring states, but when the brand did not seem to fit with Smith, he made no further inquiry. Given the freshness of the brand, Stratton should have at least questioned the ownership of the cattle. Smith was pressing for a quick, private sale of the last of the cows from the herd. Stratton moved forward to purchase the cows and immediately resell them for a quick profit.<sup>108</sup>

Here, the court engaged in a finely textured assessment of the reasonableness—of the carefulness—of the purchaser's actions. That assessment takes account of not only the quality of the seller's personal reputation but also the availability of a de facto registry system in the form of the state branding books, an apparent red flag in that registry, the apparently low purchase price for the movables, and the buyer's experience in the marketplace.<sup>109</sup> One commentator has noted that the case could have been conceptualized as a faithless entrustment case because the cows technically were not stolen but rather voluntarily put in Smith's possession by Littleton, and thus, the dispute could have been more neatly solved by application of repealed Article 520. Yet even if *Littleton* had been framed as a faithless entrustment case demanding application of repealed Article 520, good faith would have still been a crucial consideration as that article itself only protects a "transferee in good faith for fair value."<sup>110</sup> In short, the court's conclusion that the third party purchaser seeking protection of Article 524 in *Livestock Producers* did not act in good faith seems entirely sensible. The court's conclusion takes account of many of the relevant facts revealing the third party purchaser's

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106. *Id.* at 540, 545.

107. *Id.* at 545.

108. *Id.*

109. *Id.* at 544–45.

110. LA. CIV. CODE art. 520 (repealed 1981). For discussion of repealed Article 520 and faithless trustees, see *infra* Part II.D.

relative carelessness in the circumstances by noting the many suspicious circumstances surrounding the transaction, the ease of further inquiry, and the purchaser's experience in this particular kind of market.<sup>111</sup>

### *B. Annullable Title*

The next bona fide purchaser problem features an original owner or purported owner who is induced by fraud to relinquish possession of his corporeal movable—the problem of annullable, or voidable, title. Here, recall that Article 521 defines “stolen things” quite narrowly as only *including* things that have been taken away from the owner without his consent while *excluding* things that the owner delivered to another “as a result of fraud.”<sup>112</sup> Two articles define the scope of available remedies to the owner and professed innocent purchaser in this situation.

First, Article 525 instructs that “the provisions of this Chapter do not apply to movables that are required by law to be registered in public records,”<sup>113</sup> such as vehicles, mobile homes, and other movables subject to statutory registration systems.<sup>114</sup> Nevertheless, as the revision comments to this article indicate, Louisiana courts occasionally have looked to the state's good faith purchaser doctrine to solve cases in which parties have failed to comply with these statutory registry regimes.<sup>115</sup>

Perhaps aware that specialized registration systems would not be applicable to all fraudulent sale cases and that courts might look to the good faith purchaser doctrine anyway, the Louisiana Legislature enacted a specific provision for the case of the annullable title. That provision, Article 522, states that “[a] transferee of a corporeal movable in good faith and for fair value retains the ownership of the thing even though the title of the transferor is annulled on account of a vice of consent.”<sup>116</sup>

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111. Indeed, Sinclair acknowledges that the outcome likely would have been the same had the court framed *Livestock Producers* as a faithless entrustment case because even then the purchaser would not have been able to prove good faith. Spencer Sinclair, Comment, *The Louisiana Good Faith Purchaser Doctrine: Codified Confusion*, 89 TUL. L. REV. 517, 533 (2017).

112. LA. CIV. CODE ANN. art. 521 (2018).

113. *Id.* art. 525.

114. Sinclair, *supra* note 111, at 525.

115. Art. 525 rev. cmt. b.

116. *Id.* art. 522. The revision drafters acknowledge Professor Yiannopoulos's influence on this article in their reference to the section of his 1966 treatise in which he argued that in the case of title annullable on account of fraud, the owner should not be able to “reventicate the thing in the hands of the good faith acquirer.” *Id.* cmt b (citing A.N. YIANNPOULOS, CIVIL LAW PROPERTY § 125 (1966)).

The modern caselaw relevant to this corner of the good faith purchaser doctrine, however, is quite sparse. Several decisions stand for the proposition that when there is a conflict between two innocent parties resulting from an initial sale induced by presentation of a subsequently dishonored check by an intermediate purchaser—that is, a classic voidable title—courts examine the equities of the situation to determine which of the parties—the initial vendor or a subsequent transferee—is most responsible for the loss.<sup>117</sup> In short, courts inquire into carefulness but structure that inquiry in a relational manner to determine whose carelessness was most responsible for the potential loss.

Another complexity arises from the fact that the Vehicle Certificate of Title Law appears to prevent a marketable title from being obtained in the absence of compliance with that law.<sup>118</sup> Nevertheless, despite this prohibition, courts in a number of cases have found that an original vendor who relinquished possession of a valuable motor vehicle without assuring that the purchaser's check was actually drawn on sufficient funds is the more careless party, so a third-party good faith purchaser for value is entitled to retain possession of the vehicle.<sup>119</sup> The only instances in which

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117. See, e.g., *Flatte v. Nichols*, 96 So. 2d 477, 480 (La. 1957); *Trumbull Chevrolet Sales Co. v. Maxwell*, 142 So. 2d 805, 806 (La. Ct. App. 1962); *Theriac v. McKeever*, 405 So. 2d 354, 357 (La. Ct. App. 1981).

118. LA. REV. STAT. §§ 32:706–706.1 (2018). Yet courts have also held that the mere failure to comply with the certificate of title law does not void a sale but only prevents title from being marketable, *Theriac*, 405 So. 2d at 356, or renders title “imperfect,” *Flatte*, 85 So. 2d at 479.

119. *Flatte*, 96 So. 2d at 480 (concluding that the third-party purchaser was entitled to retain the vehicle and that the owner-vendor was estopped from recovering the vehicle because (1) the owner-vendor “knew that [its vendee] was a dealer and would resell the automobile” and (2) the owner-vendor gave its vendee possession of the vehicle and clothed the vendee with certain indicia of ownership. All of this occurred “without ascertaining if the check given by [the vendee] was good”); *Trumbull*, 142 So. 2d at 806–07 (affirming the trial court’s finding that “by its delivery of the vehicle in question and the acceptance of a check in payment therefor, [the owner-vendor] completed the necessary formalities of a sale, and, therefore, was solely responsible for laying the basis for the subsequent allegedly fraudulent transactions”); *Theriac*, 405 So. 2d at 357 (holding that when purported owner of truck allowed dealer to obtain possession of truck, along with a signed bill of sale and an endorsed certificate of title, he clothed dealer with all that he needed to execute valid transfer, and thus as between purported owner and innocent third party who purchased vehicle from dealer, the third party had the right to keep the vehicle and did not owe the purported owner the purchase price). It is unclear whether LA. REV. STAT. § 32:706(E), as amended in 1989, reverses any of these decisions. Some commentators note the effect of the entire Vehicle Certificate of

courts have chosen not to protect third-party purchasers in this context involve situations in which the original owner did not actually execute *any* documents that could be characterized as an instrument conveying or certifying title to the fraudulent intermediary, and thus, its actions did not clothe the intermediary with any indicia of ownership.<sup>120</sup> In summary, in the case of annullable title, courts take the eventual transferee's good faith for granted unless they find strong evidence of irregularity, and most of the time courts will focus on the negligence of the original owner who relinquished possession and created the potentially voidable title.<sup>121</sup>

### *C. The Double Sale*

The third bona fide purchaser problem differs from the rest in that the two relatively innocent parties are both transferees from the original owner. In the case of a double sale, the original owner of a corporeal movable sells the same object to one person and then to another person before the first vendee takes possession. Once again, good faith plays a decisive role in allocating rights. Article 518 supplies the rule for this scenario:

The ownership of a movable is voluntarily transferred by a contract between the owner and the transferee that purports to transfer the ownership of the movable. Unless otherwise provided, the transfer of ownership takes place as between the parties by the effect of the agreement and against third persons when the possession of the movable is delivered to the transferee.

*When possession has not been delivered, a subsequent transferee*

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Title Law, LA. REV. STAT. §§ 32:701–749, which generally requires the furnishing of a certificate of title for the valid transfer of a registered vehicle, is unclear as some decisions ignore it when strict compliance with the law's terms would harm an innocent party and the delay in obtaining a valid certificate of title was caused by administrative failure. TOOLEY-KNOBLETT & GRUNING, *supra* note 75, § 7:9.

120. Yorkwood S&L Ass'n v. Charlie Hardison & Sons, Inc., 383 So. 2d 1266, 1267 (La. Ct. App. 1980) (distinguishing *Flatte* on the ground that the original owner—actually a mortgagee—“never entered into an act of sale with the intermediary,” the person who absconded with the eventual transferee's money after a fraudulent sale of a motor home to a third party, and that the most that could be said was that the original owner/mortgagee executed “a pick-up order” for the motor home to be picked up by the intermediary).

121. Stroud, *supra* note 85, at 51–52 (observing that courts' tendencies to focus on the original owner's negligence was common long before the revision of the Civil Code's bona fide purchaser articles took place).

*to whom possession is delivered acquires ownership provided he is in good faith.* Creditors of the transferor may seize the movable while it is still in his possession.<sup>122</sup>

The first paragraph of Article 518 mirrors the publicity principle announced in Article 517 with respect to immovables.<sup>123</sup> The voluntary transfer of a movable becomes effective between the parties at the moment the contract setting the terms for that transfer is perfected, unless the contract provides that ownership will transfer at some other time or after some condition is fulfilled. Delivery—transfer of possession—is not required for ownership of the movable to transfer between the parties. Yet just as recordation is required for the transfer of an immovable to be effective against third parties, possession of a movable must be delivered from the transferor to the transferee for the transfer of the movable to have any effect on third parties.<sup>124</sup>

Good faith entered the framework of Article 518 in the 1984 revision of the law of conventional obligations when the legislature added the article's second paragraph to replace Articles 1922 and 1923 of the 1870 Civil Code.<sup>125</sup> Those articles, like their source articles in even earlier civil codes, articulated the same rules, albeit in more antique and verbose language.<sup>126</sup> These source articles reveal that as far back as 1808, when a

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122. LA. CIV. CODE ANN. art. 518 (2018) (emphasis added).

123. *See id.* art. 517 (providing that, as between the parties, transfer of ownership of an immovable is effective at the moment of the agreement but that “[t]he transfer of ownership . . . is not effective against third persons until the contract is filed for registry in the conveyance records of the parish in which the immovable is located.”).

124. Art. 518.

125. *Id.* rev. cmt. f.

126. Article 1922 of the 1870 Civil Code, derived almost verbatim from Article 1916 of the 1825 Civil Code, provided:

With respect to movable effects, although, by the rule referred to in the two last preceding paragraphs, the consent to transfer vests the ownership of the property in the obligee, yet this effect is strictly confined to the parties until actual delivery of the object. If the vendor, being in possession, should, by a second contract, transfer the ownership of the property to another person, who gets the possession before the first obligee, the last transferee is considered as the owner, provided the contract be made on his part bona fide, and without notice of the former contract.

LA. CIV. CODE art. 1922 (1870). The same general principle appeared in the Digest of 1808 in more concise terms:

vendor tried to sell the same thing twice, the second transferee prevailed over the first transferee and retained ownership as long as the first transferee did not obtain possession and the second transferee was in good faith at the moment his contract was formed.<sup>127</sup> Perhaps because it confirms such a well-established principle in Louisiana law,<sup>128</sup> Article 518(2) rarely has been the subject of reported judicial decisions.<sup>129</sup>

Yet one decision is notable. In *Cameron Equipment Co. v. Stewart & Stevenson Services, Inc.*, the Louisiana Third Circuit Court of Appeal applied Article 518 to the multiple sales of two valuable diesel engines by the same vendor.<sup>130</sup> In June 1987, the original owner, a company known as Petroleum Services, sold two engines to another company called Cameron Equipment.<sup>131</sup> For reasons that are unclear, even though it paid \$73,000 for the engines and some other used oilfield equipment, Cameron Equipment did not take physical possession of the two engines or mark them as its property.<sup>132</sup> Instead, the engines remained in storage at an equipment yard managed by another entity.<sup>133</sup> Two years later, a quick succession of transactions resulted in the same engines being sold by Petroleum Services,

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If the thing that one has engaged to give or to deliver to two persons, be merely movable, he of the two persons who has really been put in possession of it, is preferred and [remains] the owner of it, although his title be posterior in date, *provided* the possession be *bona fide*.

LA. CIV. CODE p. 266, art. 41 (1808). The 1808 provision was itself a practically verbatim transcription of Article 1141 of the Code Napoleon. [CODE CIVIL] [C. CIV.] [CIVIL CODE] art. 1141 (Fr.) (1804).

127. See *supra* note 126.

128. The 1984 revision, which added the second paragraph to Article 518, also clarifies that the second transferee is now protected even if she has not paid for the movable. The new version of the rule unambiguously protects all subsequent transferees who take possession in good faith, not just good faith *purchasers for value*. Compare LA. CIV. CODE ANN. art. 518 (2018), as amended by Act. No. 331, § 2, 1984 La. Acts 718, with LA. CIV. CODE art. 1922 (1870).

129. The only reported decision turning on Article 518, other than *Cameron Equipment*, discussed below, is *LeGardeur Int'l, Inc. v. Ascension Const. Corp.*, 504 So. 2d 587 (La. Ct. App. 1987). That decision, however, merely holds that a lessee cannot, with respect to a lessor who has sequestered two pieces of equipment in conjunction with a suit for unpaid rent, transfer ownership of the movables to a third-party purchaser because the lessee does not have, and therefore cannot deliver, possession of the movables to the third party. *Id.* at 588. *LeGardeur* did not address the question of good faith.

130. *Cameron Equip. Co. v. Stewart & Stevenson Servs., Inc.*, 685 So. 2d 696 (La. Ct. App. 1996).

131. *Id.* at 697.

132. *Id.* at 697–98.

133. *Id.* at 698.

the original vendor, to a third purchaser, which then sold the engines to a fourth purchaser, which in turn sold them to a fifth purchaser.<sup>134</sup> At this point, the commercial drama took a curious turn. Just one day after it brokered the engines to the fifth—and last—purchaser, the fourth purchaser actually picked up the engines from the yard where they had been stored and delivered them to the last purchaser.<sup>135</sup> Coincidentally, just a few hours later, Cameron Equipment, the first purchaser, arrived at the storage yard to pick up its engines, only to discover they were gone.<sup>136</sup>

Not surprisingly, Cameron Equipment sued everyone, including the president and sole shareholder of the original vendor, Petroleum Services.<sup>137</sup> Although Cameron Equipment obtained a judgment against Petroleum Services, the original vendor, for \$50,000—the fair market value of the engines at the time of the second sale—for conversion, the trial court, relying on Article 518, dismissed all of Cameron Equipment's claims against the subsequent, third-party purchasers because it had not taken actual or constructive possession of the engines and thus did not perfect its ownership against the subsequent purchasers, all of whom the trial court determined acted in good faith.<sup>138</sup> The Louisiana Third Circuit Court of Appeal affirmed, specifically rejecting Cameron Equipment's argument that Article 518 was inapplicable merely because the subsequent purchasers each purchased from a vendor who was not in actual possession of the engines at the time of the respective sales.<sup>139</sup> Although the court of appeal did not fully analyze the subsequent purchasers' good faith, the clear implication of its ruling is that a purchaser can be in good faith even when his vendor does not have corporeal possession of the thing sold.

As a matter of general principle, the court's ruling in *Cameron Equipment* makes perfect sense. One can easily imagine scenarios in which a vendor offers a movable for sale but the movable is not in the vendor's actual possession—for instance when a vendor has temporarily transferred possession of the thing for sale to a depositary or bailee. In *Cameron Equipment*, perhaps each successive purchaser reasonably assumed that its vendor had left the two engines in the third-party equipment yard under such an arrangement. Nevertheless, it remains somewhat curious that this kind of bailment relationship was presumed to exist three times in a row in quick succession. What if other facts existed that might have put a reasonably prudent purchaser on notice to investigate

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 699–700.

the provenance of the engines offered for sale? Unfortunately, the appellate court opinion never addressed this concern, leaving today's reader with a vague sense of unease. Perhaps the purchasers in *Cameron Equipment* were all honest, but they all may not have been sufficiently careful in the curious circumstances of this transaction.

Maybe the best explanation for the result in *Cameron Equipment* emerges if the inquiry about carefulness is widened to encompass the original purchaser, Cameron Equipment, who certainly could have avoided the entire mess if it had simply taken secure possession of the valuable engines it had purchased—or at least marked them as its property in some easily observable manner—as soon as it bought them. The court's decision to limit Cameron Equipment's remedy to a breach of contract claim against its own corporate vendor feels intuitively just because, after all, its carelessness was the ultimate source of this commercial debacle.<sup>140</sup>

#### *D. The Faithless Pledgee, Lessee, or Depositary*

The last bona fide purchaser scenario—the faithless pledgee, lessee, or depositary—reveals a gap in the Civil Code produced by the much-lamented repeal of Article 520 in 1981, just two years after the Louisiana Legislature adopted the revised chapter on Transfer of Ownership by Agreement.<sup>141</sup> Many commentators argue that the repeal of this article has left the bona fide purchaser doctrine in shambles because this single article formed the foundation upon which the entire superstructure of the Civil Code revision of the bona fide purchaser doctrine rested.<sup>142</sup> The author of this Article remains more sanguine than many of his Louisiana colleagues.

Repealed Article 520 provided that “[a] transferee in good faith for fair value acquires the ownership of a corporeal movable, if the transferor, though not the owner, has possession with the consent of the owner, as

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140. Addressing Cameron Equipment's claim to pierce the corporate veil and hold the president and sole shareholder of Petroleum Services liable, the court of appeal accurately observed that the plaintiff's claim was better described as one for “breach of warranty by the seller” and then noted that the plaintiff failed to prove any of the elements of fraud necessary to justify piercing the corporate veil. *Id.* at 701.

141. The Louisiana Legislature, in fact, first suspended the article in 1980, S. Con. Res. 172, Reg. Sess. (La. 1980), and delivered the decisive blow the following year. Act. No. 125, § 1, 1981 La. Acts 351.

142. Sinclair, *supra* note 111, at 518, 523; Stroud, *supra* note 85, at 60–63; Tanya Ann Ibieta, Comment, *The Transfer of Ownership of Movables*, 47 LA. L. REV. 841, 848–53 (1987).



pledgee, lessee, or depositary, or other person of similar standing.”<sup>143</sup> One commentator suggests Article 520 was intended to codify a rule “similar to but broader than the jurisprudential doctrine of equitable estoppel.”<sup>144</sup> Another commentator explains that the article was intended to provide a broad exception to the general rule of Article 518—“that only an owner or someone authorized by him may transfer ownership in a movable”—whenever there has been a transfer by a mere possessor, rather than the original owner.<sup>145</sup> A third commentator argues that this article, a significant exception to the rule that one cannot convey ownership of property that belongs to another, “represented an unequivocal policy shift to protect the stability of seemingly valid transactions over the rights of owners.”<sup>146</sup> In their treatise on the law of sales, Professors Gruning and Tooley-KnobleTT describe Article 520 as the “key article in the chapter” and suggest that it “picked up where Article 2279 of the French Code left off, articulating the concept of possession as indicative of ownership of movables, but with greater clarity.”<sup>147</sup> Why then was such a wondrously drafted and well-intentioned article repealed? Why has it not been replaced?

The story that has been told time and again in Louisiana involves two powerful commercial interest groups who did not like Article 520 and convinced the Legislature to repeal the provision. First, the equipment leasing industry worried that untrustworthy lessees would be able to transfer ownership of valuable leased equipment to good faith purchasers for value too easily and the equipment lessors would be left only with claims against judgement-proof lessees.<sup>148</sup> Second, chattel mortgage

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143. LA. CIV. CODE art. 520 (repealed 1981).

144. Ibieta, *supra* note 142, at 849. Ibieta argues that pre-revision jurisprudence tended to use two different rationales to avoid application of the harsh rule of Article 2452 that the sale of a thing belonging to another is null. One line of reasoning relied on the theory that a transfer from the original owner to an intermediary often was only a relative nullity, the action to assert a relative nullity could be asserted only by the original owner, and in the absence of such an action, title had passed to the intermediary, thus bypassing application of Article 2452. *Id.* at 844. The other rationale involved application of equitable estoppel principles and a finding that an original owner had often clothed the intermediary with sufficient indicia of ownership to induce the third party to rely on his apparent authority to sell the movable under consideration, thus preventing the original owner from revindicating the movable. *Id.* at 844–45.

145. Stroud, *supra* note 85, at 55–56.

146. Sinclair, *supra* note 111, at 523.

147. TOOLEY-KNOBLETT & GRUNING, *supra* note 75, § 7.3, at 330.

148. *Id.*; Sinclair, *supra* note 111, at 526 (pointing to apprehension among retailers and equipment leasing companies).

holders who financed the sales of motor vehicles and other valuable movables, along with equipment lenders, worried about the security of their collateral.<sup>149</sup> Critics of the repeal of Article 520 have argued that these concerns were overblown. Lessors of unregistered movables could have protected their interests by performing more careful credit examinations of their lessees, by permanently marking their leased property, or by acquiring security interests in the leased movables.<sup>150</sup> Chattel mortgage holders, at least those who had perfected their mortgages, were also not really at risk because they enjoyed an enforceable preference against any purported good faith purchaser.<sup>151</sup>

Although these critics no doubt correctly point out the legal remedies equipment lessors and chattel mortgage holders held at their disposal, the fears of the equipment lessors in particular cannot be dismissed as entirely insignificant. It stands to reason that if equipment lessors had continued to feel threatened by Article 520, they might have invested more time and money examining their lessees' creditworthiness or obtaining security interests, which might well have raised the cost of leasing equipment and, in turn, raised the cost of construction activities across the state. Of course, these empirical assumptions are not easily testable.

In any event, given that the Louisiana Legislature repealed Article 520 and has yet to replace it, Louisiana courts must turn to existing caselaw and general principles to resolve cases involving faithless pledgees, lessees, or depositaries. Two decisions, 90 years apart, suggest how Louisiana courts are likely to muddle their way through, relying, as they must, on good faith.

*William Frantz & Co. v. Fink* presents a case of the faithless depositary straight from central casting.<sup>152</sup> The plaintiff, William Frantz & Co. ("Frantz"), a firm that operated a large jewelry store in New Orleans, gave a man named Moss, an artisan who made, repaired, and occasionally traded in jewelry, possession of two pairs of diamond earrings on consignment.<sup>153</sup> Moss claimed he had some customers who might be

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149. Quoting Professor Yiannopoulos, Stroud notes that some of the chief proponents of repeal were firms that held chattel mortgages on automobiles and other movable property who worried that their collateral "could be transferred by the lessee to a purchaser in good faith for fair value to the detriment of the lessor-owner or holder of a chattel mortgage." Stroud, *supra* note 85, at 55 (quoting Memorandum from A.N. Yiannopoulos, to the Louisiana State Law Institute, at 6 (Meeting March 6–7, 1981)).

150. *Id.* at 60.

151. *Id.*

152. *William Frantz & Co. v. Fink*, 52 So. 131 (La. 1910) (on rehearing).

153. *Id.* at 137.

interested in buying the earrings, so Frantz let Moss take them on the condition that Moss return them or pay a price for them, a price low enough that Moss presumably could make a profit for his sales efforts.<sup>154</sup> Moss, however, transferred both pairs of earrings to other individuals who did not know that the earrings actually belonged to Frantz and had only been consigned to Moss.<sup>155</sup>

The first transferee, a pawnbroker named Fink, purchased one pair of earrings from Moss for \$300, a price considerably less than the one Frantz actually had set.<sup>156</sup> Moss transferred the other pair of earrings to another pawnbroker named Koritzky by the way of pledge.<sup>157</sup> The trouble began when Fink, the initial transferee from Moss, gave Moss 171 loose diamonds to set in a pin or broach.<sup>158</sup> Moss worked Fink's 171 diamonds into a pin, but Moss pledged the pin and diamonds to yet another pawnbroker, Keil.<sup>159</sup> When Fink returned to reclaim his diamonds, Moss revealed that he had pledged the diamonds and the pin to Keil and then, with admirable chutzpah, told Fink that he could have the second pair of earrings pledged at Koritzky's shop if Fink redeemed them and also redeemed the pin and diamonds at Keil's shop.<sup>160</sup> At this point, Fink made a fateful decision. Rather than call the police, Fink agreed to Moss's scheme and redeemed the second set of diamond earrings that had been previously pledged to Koritzky, presumably after also paying to get his 171 diamonds back from Keil.<sup>161</sup>

After Frantz, the original owner, inquired about its diamond earrings, Moss told a suspicious story about how two armed men had robbed him at his shop.<sup>162</sup> At this point, Moss was arrested and finally revealed the entire story of the earrings.<sup>163</sup> Frantz sued Moss and sued Fink for return of both pairs of the diamond earrings.<sup>164</sup> In defense, Fink sought to keep both pairs of earrings, arguing that Frantz had sold them to Moss as common law "sale and return" transactions by which Moss could convey good title to Fink.<sup>165</sup>

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154. *Id.*

155. *Id.*

156. *Id.* Frantz had set the price at \$502. *Id.*

157. *Id.* at 136.

158. *Id.* at 137.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 138.

On rehearing, the Louisiana Supreme Court, through a typically learned and Solomonic opinion authored by Justice Oliver Provosty, held that estoppel barred Frantz from recovering the first set of earrings but not the second.<sup>166</sup> Provosty observed that Frantz's initial actions—transferring possession to Moss and also consenting that Moss, “a vender of jewelry[,] exhibit the jewels as part of his stock of goods”—were sufficient to clothe Moss, the consignee, with sufficient indicia of ownership to convey title.<sup>167</sup> Consequently, Frantz was thus estopped from denying Fink's title with respect to the first pair of earrings. In other words, at the time of the first transfer of earrings from Moss to Fink, the court found there were no facts that should have put Fink on notice that Moss was anything but their owner, and, therefore, “Fink, knowing [Moss] to be a trader in jewels, was justified in buying from him,” and “acquired a good title to the first pair of earrings.”<sup>168</sup>

The court held, however, that Fink could not assert equitable estoppel with respect to the second pair of earrings because by the time he acquired these from Moss, Fink had plenty of reasons to doubt Moss's purported status as owner.<sup>169</sup> Indeed Moss's actions with respect to Fink's 171 loose diamonds should have opened his eyes to the likelihood that Moss was “a confessed embezzler.”<sup>170</sup> Accordingly, the court held that although Fink could keep the first set of earrings, he must return the second set to Frantz.<sup>171</sup>

*William Franks and Co. v. Fink* represents a rhapsody on the good faith themes of honesty and carefulness. Justice Provosty essentially found that Frantz bore some responsibility for its relative carelessness by entrusting valuable diamond earrings to Moss, but he also concluded that Fink's own utter carelessness condemned him to lose ownership of the second pair of earrings because by the time he gained possession of them, he had no excuse in ignoring Moss's dishonesty.

Interestingly, if a case involving similar facts were to arise today and if, for the sake of argument, Article 520 remained part of the Civil Code, the outcome might not have been all that different. To prevail under Article 520, Fink still would have to prove he was a “transferee in good faith for fair value.”<sup>172</sup> Assuming he paid fair value, Fink's good faith would be determined by asking, pursuant to Article 523, whether he knew or should

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166. *Id.* at 138–39.

167. *Id.* at 138.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 139.

172. LA. CIV. CODE art. 520 (repealed 1981).

have known that Moss was not the owner of the earrings. One suspects the change of circumstances between the first earring transaction and the second likely would be sufficient to transform Moss from, in Justice Provosty's words, "a merchant or trader having valuable goods for sale" into a "diamond setter who had pledged the goods of his employer and stood under the necessity of confessing his crime because of his inability to redeem the pledge."<sup>173</sup> In short, the change in circumstances would still transform Fink from good faith purchaser to "willing victim."<sup>174</sup>

In *Louisiana Lift & Equipment Co. v. Eizel*, a Louisiana court solved another faithless intermediary case by relying on the general concept of good faith.<sup>175</sup> In that case, Eizel wanted to purchase a new forklift from Louisiana Lift but lacked sufficient credit.<sup>176</sup> To work around this problem, Eizel and Louisiana Lift entered into a rent-to-own contract—technically, a "Rental Purchase Transaction Agreement"—pursuant to which Eizel would make 36 monthly payments and then become owner of the forklift.<sup>177</sup> Despite a clause in the lease prohibiting the lessee-purchaser from selling the forklift during the lease, and after making only 11 payments, Eizel sold the forklift to a third party, Creamer Furniture/Creamer Brothers, Inc. ("Creamer").<sup>178</sup>

When Louisiana Lift sued to recover the forklift from Creamer, the trial court ruled in favor of the original owner, Louisiana Lift, ordering Creamer to return the forklift or pay Louisiana Lift its fair market value.<sup>179</sup> The court of appeal, however, reversed, holding that the third party, Creamer, was a good faith purchaser pursuant to Article 524 of the Louisiana Civil Code—the article addressing the rights of good faith acquirers of lost or stolen things—because at the time Creamer purchased the forklift there was no evidence it belonged to Louisiana Lift.<sup>180</sup> Consequently, Louisiana Lift could regain possession of the forklift only if it paid Creamer its purchase price—\$9,000.<sup>181</sup> Distinguishing *Brown & Root*,<sup>182</sup> the court of appeal characterized Creamer as a good faith acquirer for several reasons: (1) there were no decals or other markings on the

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173. *William Frantz & Co.*, 52 So. at 138.

174. *Id.* at 139.

175. *La. Lift & Equip. Co. v. Eizel*, 770 So. 2d 859, 859 (La. Ct. App. 2000).

176. *Id.* at 861.

177. *Id.*

178. *Id.*

179. *Id.* at 862.

180. *Id.* at 865–66.

181. *Id.*

182. *Brown and Root, Inc. v. Se. Equip. Co.*, 470 So. 2d 515, 515 (La. Ct. App. 1985).

forklift indicating Louisiana Lift's ownership; (2) no liens had been filed with respect to the forklift, and Creamer claimed it had checked for liens; (3) Eizel's business appeared legitimate at the time he sold the forklifts to Creamer; and (4) the mere fact that Eizel was liquidating his business did not put Creamer on inquiry notice under Article 523.<sup>183</sup>

No doubt one can point to flaws in the court's analysis in *Louisiana Lift*. First, even assuming Article 524 was applicable despite the absence of a real act of theft, the court failed to ask whether Eizel was a merchant customarily selling similar goods so as to warrant Creamer's claim to good faith purchaser status. Further, as Judge Caraway pointed out in his dissent, the mere fact that Article 520 had been repealed did not somehow transform Eizel, the lessee, into a thief such that Article 524 properly applied in this case.<sup>184</sup> In addition, § 1-203 of Chapter 9 of Louisiana's version of the Uniform Commercial Code might have solved this case had the court bothered to apply it.<sup>185</sup> Finally, this case would have been more neatly solved by Article 520 because then Creamer would surely have been protected as a good faith purchaser for value from a lessee.<sup>186</sup>

On the other hand, at least the court in *Louisiana Lift* did not try to resolve the case by relying on the principle of Article 2452 that "[t]he sale of a thing belonging to another does not convey ownership."<sup>187</sup> Moreover, the court also answered the fundamentally appropriate questions—questions that would have been relevant under almost any framework. After all, the court determined that the third-party purchaser, Creamer, acted honestly and with a reasonable degree of carefulness when it

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183. *La. Lift*, 770 So. 2d at 866.

184. *Id.* at 868 (Caraway, J., dissenting). It appears that Judge Caraway would have resolved this dispute by holding that Louisiana Lift actually sold the forklift to Eizel as a credit sale, and thus, Eizel could convey good title to Creamer. Louisiana Lift's proper remedy, which it failed to use, would have been to protect its interest in the financed lease by filing a UCC financing statement in the forklift. *Id.* Thus, he would have reached substantively more or less the same result but by different means.

185. TOOLEY-KNOBLETT & GRUNING, *supra* note 75, § 4.21, at 184–86.

186. *La. Lift*, 770 So. 2d at 867–68 (Caraway, J., dissenting); Sinclair, *supra* note 111, at 534–35.

187. LA. CIV. CODE ANN. art. 2452 (2018). Judge Caraway contended that one valid alternative would have been to “revert back to Article 2452, which would have provided full protection to the dispossessed owner.” Sinclair, *supra* note 111, at 535. Such an approach, Sinclair contends, would “cast the law backward to a long-outmoded rule,” precisely the opposite of what the legislature intended when it undertook its revision of the bona fide purchaser doctrine in light of modern jurisprudence that favors weighing the equities and determining which party was the lease cost avoider. Sinclair, *supra* note 111, at 535.

purchased the forklift.<sup>188</sup> It also found that the lessor, Louisiana Lift, failed to take some reasonable measures—marking its equipment and filing liens, for example—that could have prevented any loss from occurring.<sup>189</sup>

In sum, in cases of faithless pledgees, lessees, and depositaries, even in the absence of Article 520, courts appear to revert to their default good faith analysis. Sometimes they use the common law language of estoppel as their guidepost. Sometimes they borrow other tools in the bona fide purchaser doctrine tool kit, even if those tools are not a perfect fit. But they always inquire about the honesty and carefulness of the good faith purchaser claimant and often widen their inquiry to investigate the potential carelessness of the original owner who put its movable in the hands of another person.

### III. ACCESSION

The same legislative act that updated Louisiana's bona fide purchaser doctrine also revised the Louisiana Civil Code provisions addressing accession.<sup>190</sup> The law of accession generally serves to bracket disparate resources together in one economic unit typically based on relationships of physical proximity and practical connection between things.<sup>191</sup> Frequently, accession rules produce intuitively comfortable and economically efficient outcomes.<sup>192</sup> For instance, although buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops all can be owned separately from the land to which they are physically connected, Louisiana law presumes that these things form an integrated economic unit with the land unless clear evidence of separate ownership exists.<sup>193</sup> Landowners, the law of accession presumes, will take care to manage these accessory things in efficient ways that

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188. *La. Lift*, 770 So. 2d at 865–66.

189. *Id.* at 866.

190. Act. No. 180, § 1, 1979 La. Acts 431 (enacting both Chapters 2 and 3 of Book II, Title II of the Civil Code, LA. CIV. CODE arts. 483–525).

191. Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEG. ANALYSIS 459, 461 (2009).

192. By assuring that most of the time the accessory thing is awarded to the owner of the principal thing, the law of accession serves, as Merrill tells us, the “internalization function we associate with the institution of property,” that is, by assigning “[the] gains and losses associated with the management of resources” to “the owner of the most prominently connected property,” accession tends to “[assign] resources to those likely to be competent managers of the resource.” *Id.*

193. LA. CIV. CODE ANN. art. 491 (2018).

maximize both their value and the value of the land to which they are connected.<sup>194</sup>

Problems arise in the law of accession, however, when someone other than the owner of the underlying immovable erects buildings or other constructions, plants or harvests crops, cuts standing timber, or removes minerals from the earth, and that person—the active party who produces some value by his engagement with the accessory thing—does not separately own the accessory thing. In other words, sometimes a new accessory thing will appear as a result of the labor, work, or investment of “possessors”—persons who intend to become owners of the land but lack a title either to the immovable or to the new resources they are tasked with bringing into the world.<sup>195</sup>

General principles of unjust enrichment, which tend to circulate just beneath the surface of many specialized rules of accession, could resolve many of these conflicts.<sup>196</sup> But it would be difficult and time consuming to perform a thorough unjust enrichment analysis of the competing rights of the owner and possessor in all of these situations. Further, Louisiana law has cast unjust enrichment as a subsidiary—that is, a not particularly robust—remedy.<sup>197</sup> For these reasons, and as shown in the following discussion as well, Louisiana has embedded within its law of accession a number of short-hand rules to make efficient, rough-cut allocations of the

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194. Merrill, *supra* note 191, at 461.

195. In Louisiana, a true possessor, someone who intends to possess for himself as owner, is distinguished from a precarious possessor, such as a lessee or depositary, who possesses with the permission of or behalf of the owner. Compare *id.* arts. 3421, 3424 (defining possession and elaborating on the prerequisites to the acquisition of possession), with *id.* arts. 3437–38 (defining precarious possession and a presumption of precariousness). For a detailed discussion of the problem of distinguishing between true possession and precarious possession, see Lovett, *Precarious Possession*, *supra* note 72.

196. See, e.g., LA. CIV. CODE ANN. art. 488 cmt. b (stating recovery of expenses by good faith extractors of products is “said to rest on principles of unjust enrichment”); *Id.* art. 498 cmt. e (stating that when “a third person’s or good faith possessors’ rights in constructions, plantings, or works that he may have made on the land of another are lost in case of alienation of land, . . . the third person is relegated to a personal action for reimbursement from the former landowner”).

197. See *id.* art. 2298 (“The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.”). For a detailed account of the limitations or enrichment without cause as a remedy and for an exploration of its general principles, see generally Nicholas Davrados, *Demystifying Enrichment Without Cause*, 78 LA. L. REV. 1223 (2018).



remedial rights that possessors can assert with respect to new resources they have created or produced on another person's immovable.

Although three sets of accession rules relate to immovable property as a general class, only one set employs good faith as a rule of decision.<sup>198</sup> The most general set of rules first declares that the owner of a thing acquires ownership of the civil and natural fruits yielded by that thing.<sup>199</sup> The Civil Code then provides that when fruits are produced by the work of another person, the owner can retain them only if he reimburses the producer of the fruits for his production expenses.<sup>200</sup> This default rule establishes a limited form of restitution for a producer of fruits, regardless of the producer's status as a good or bad faith possessor or even as a precarious possessor.

A second, more complicated set of rules addresses disputes between owners and precarious possessors—persons who make constructions on or plant things on the land of another with the owner's consent—after the initial consent has been removed.<sup>201</sup> This second set of rules, generally applicable to persons like servitude holders or others possessing through a formal or informal license, also does not implicate good faith.<sup>202</sup>

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198. Beyond the three sets of accession rules described in this Article, two other sets of accession rules also exist in Louisiana law. One group of Civil Code articles deals with accession rights along the banks of rivers, lakes, and the seashore, but these articles do not implicate good faith. LA. CIV. CODE ANN. arts. 499–506. Good faith does, however, make a brief appearance, at least in contradistinction to its twin, bad faith, in the context of accession in relation to movables, specifically when a person makes a new thing using materials belonging to another. When the value of the workmanship exceeds the value of the materials, the new thing belongs to the person who made the new thing, but the maker must reimburse the owner of the materials for their value. *Id.* art. 511. However, “[i]f the person who made the new thing was in bad faith, the court may award its ownership to the owner of the materials.” *Id.* art. 512. For a more detailed discussion of accession in relation to comingled movables, see Merrill, *supra* note 191, at 486.

199. LA. CIV. CODE ANN. art. 483 (“In the absence of rights of others, the owner of a thing acquires the ownership of its natural and civil fruits.”). The Louisiana version of the rule of increase is based on the same principle. *Id.* art. 484 (“The young of animals belong to the mother of them.”).

200. *Id.* art. 485 (“When fruits that belong to the owner of a thing by accession are produced by the work of another person, or from seeds sown by him, the owner may retain them on reimbursing such person his expenses.”).

201. *See id.* arts. 493, 495.

202. Lessees used to fall into this category; now, post-termination rights of lessees and lessors to improvements and additions to the leased thing made by the lessee during the lease are governed by Louisiana Civil Code article 2695.

The third set of rules regulates disputes between owners and actual, non-precarious possessors and makes a series of rough-cut allocations based on whether the possessor was in good faith or bad faith.<sup>203</sup> The Civil Code allocates *ownership* of gathered fruits—whether natural or civil—to a good faith possessor who gathered them before being evicted by the owner and also rewards the good faith possessor with reimbursement of expenses for fruits he was unable to gather before eviction.<sup>204</sup> Conversely, the bad faith possessor must return to the owner fruits he gathered before eviction or their value, but he is entitled to reimbursement for his expenses.<sup>205</sup> With respect to products—things like minerals or standing timber whose removal diminishes the substance or value of the land in the intermediate to long term<sup>206</sup>—a good faith possessor can claim reimbursement for expenses incurred in the removal or harvesting of such items, but the bad faith possessor cannot.<sup>207</sup>

Further, when constructions, plantings, or works are made by a possessor in good faith, the owner of the immovable, somewhat surprisingly to law students at least, “may not demand their demolition and removal”,<sup>208</sup> instead, the owner must keep them and reimburse the possessor, at the owner’s option, “either the cost of the materials and of the workmanship, or their current value, or the enhanced value of the immovable.”<sup>209</sup> In contrast, when these same things are made by a bad faith possessor, the owner of the immovable can choose whether to keep them or demand their demolition and removal at the expense of the bad faith possessor.<sup>210</sup> Further, the owner can obtain compensation for any other provable damage.<sup>211</sup> Additionally, if the owner of the immovable elects to keep these things, he does not have to pay the bad faith possessor for inseparable improvements like a pond or a ditch, though he still must

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203. See LA. CIV. CODE ANN. arts. 486, 488, 496–97, 527–29.

204. Art. 486.

205. *Id.*

206. Article 488 defines products as things that are “derived from a thing as a result of diminution of its substance.” LA. CIV. CODE ANN. art. 488; *cf. id.* art. 551 (“Fruits are things that are produced or derived from another thing without diminution of its substance.”). See art. 551 rev. cmt. b (explaining treatment of trees as products, not fruits, but noting that trees on a tree farm can be considered fruits); art. 551 rev. cmt. c (explaining that mineral substances extracted from the ground and proceeds of mineral rights are both treated as products).

207. Art. 488.

208. Art. 496.

209. *Id.*

210. Art. 497.

211. *Id.*

pay the bad faith possessor, at the owner's option, "either the current value of the materials and of the workmanship of the *separable improvements* [for example, a house or a barn] that he has kept or the enhanced value of the immovable."<sup>212</sup>

Finally, after an owner has prevailed on a petitory or revendicatory action, an evicted possessor can still recover necessary expenses incurred for the preservation of the thing and the discharge of public or private burdens,<sup>213</sup> but only a good faith possessor can recover additionally for "useful expenses to the extent they have enhanced the value of the thing."<sup>214</sup> In short, in this crucial third realm of accession, good faith possessors, good faith harvesters, good faith product extractors, and good faith improvers all are treated better than their bad faith counterparts.

In light of this repeated preferential treatment of good faith possessors, then, the law of accession needs a handy, easily understood principle to make these important good-versus-bad-faith distinctions workable. Article 487 of the revised Civil Code provides the rule:

For purposes of accession, a possessor is in good faith when he possesses by virtue of an act translative of ownership and does not know of any defects in his ownership. He ceases to be in good faith when these defects are made known to him or an action is instituted against him by the owner for the recovery of the thing.<sup>215</sup>

Derived with only minor variations from Article 503 of the 1870 Civil Code<sup>216</sup> and its earlier Louisiana and Code Napoleon predecessors,<sup>217</sup> current Article 487 contains three distinctive features.

212. *Id.* (emphasis added).

213. *Id.* art. 527.

214. *Id.* art. 528. Interestingly, any possessor, "whether in good or in bad faith, may retain possession of the thing until he is reimbursed for expenses and improvements which he is entitled to claim." *Id.* art. 529. Perhaps the deep undercurrent of unjust enrichment in accession law explains why all possessors are granted this practical leverage to obtain the restitution they are owed, regardless of their degree of status in the possessory hierarchy.

215. *Id.* art. 487.

216. LA. CIV. CODE art. 503 (1870) ("He is [a] bona fide possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of. He ceases to be a bona fide possessor from the moment these defects are made known to him, or are declared to him by a suit instituted for the recovery of the thing by the owner.").

217. LA. CIV. CODE art. 495 (1825) (same except for punctuation and the word "owner" read "proprietor"); LA. CIV. CODE art. 7, p. 102 (1808) (more or less the same); [CODE CIVIL] [C. CIV.] [CIVIL CODE] art. 550 (1804) (Fr.) ("He is in

First, good faith for purposes of accession requires two components. The possessor must possess by virtue of some act translative of ownership, which, in the case of immovable property, must be either an authentic act or act under private signature.<sup>218</sup> Additionally, the possessor also must be ignorant of any defects in the act.<sup>219</sup> Thus, the possessor *cannot simply believe* that he is the owner simply because he believes his predecessor in title was also the owner, but he must also be unaware that the instrument by which he thinks he acquired ownership is defective.<sup>220</sup>

Unlike the definitions used for purposes of acquisitive prescription or the bona fide purchaser doctrine, however, Article 487's definition does not import a reasonable person standard.<sup>221</sup> Consequently, as long as the possessor possesses by virtue of a facially translative act, and as long as the possessor remains unaware that the act is flawed in some manner or originated from a person who was not actually the owner of all or part of the thing purportedly transferred, a possessor still can be in good faith for purposes of accession even if the possessor's ignorance is objectively unreasonable—even foolish—under the circumstances.<sup>222</sup> The omission of an objective reasonableness standard in Article 487 means that good faith in the context of accession will focus primarily on honesty—and not carefulness—particularly as reflected in the positive requirement of an act

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possession by good faith who possesses, as proprietor, by virtue of a conveyance of the defects of which he is not aware. He ceases to be in possession by good faith from the moment wherein he discovers such defects.”) (Barrister of the Inner Temple trans., 1824).

218. LA. CIV. CODE ANN. art. 1839 (2018).

219. Art. 487 rev. cmt. b.

220. *Id.* A good example of justifiable ignorance of a defect in an act translative of ownership occurred in *Clarke v. Brecheen*, 387 So. 2d 1297 (La. Ct. App. 1980), a case decided soon after the adoption of Article 488 in 1979 but in which the court applied Article 503 of the 1870 Civil Code. In *Clarke*, the court held that a purported donee under an act of donation in which the donor reserved a usufruct was nevertheless a good faith possessor and thus entitled to reimbursement for improvements he made to the property because he never had reason to suspect any defect in the title to the donated property, the act itself was valid in form, and he had “no idea that the reservation of the usufruct rendered the donation an absolute nullity.” *Clarke*, 387 So. 2d at 1302–03.

221. *Compare* Art. 487, with *id.* art. 3480 (“For purposes of acquisitive prescription, a possessor is in good faith when he reasonably believes, in light of objective circumstances, that he is owner of the thing he possesses.”), and *id.* art. 523 (providing that an acquirer of a corporeal movable is in good faith “unless he knows, or should have known, that the transferor was not the owner”).

222. Although not specifically stated in the Civil Code, good faith is also presumed for purposes of accession, just as it is for acquisitive prescription. Art. 487 cmt. e.

translative of ownership and the negative requirement of unawareness of defects.<sup>223</sup>

Finally, in contrast to acquisitive prescription, a possessor's good faith for purposes of accession is temporally contingent; at the very instant that the possessor acquires either actual knowledge—"when these defects are made known to him"—or constructive knowledge of defects—"an action is instituted against him by the owner for the recovery of the thing"—his good faith ceases and the possessor instantaneously is transformed into a bad faith possessor.<sup>224</sup> Accordingly, the rather robust restitution-based benefits that a possessor acquires under the law of accession if he possesses in good faith can disappear immediately when the spell of honest belief is broken, leaving the possessor with the much weaker remedies of a bad faith possessor.<sup>225</sup>

This immediate temporal shift in accessorial remedies makes sense, though, especially in the context of civil and natural fruits, which tend to accumulate over time. A possessor who starts out in good faith but then learns of defects in his title should not be able to benefit from natural and civil fruits that accrue *after* he learns he is not the owner. Article 489, which allows for apportionment of natural and civil fruits, logically builds on this principle that good faith for purposes of accession is temporally contingent.<sup>226</sup>

Louisiana judicial decisions addressing accession claims by possessors generally demonstrate that the relatively straightforward, honesty-focused

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223. In two decisions, however, courts have read objective reasonableness into the good faith accession analysis despite the clear language of Article 487 to the contrary. *See* *Edmundson Bros. P'ship v. Montex Drilling Co.*, 731 So. 2d 1049, 1064 (La. Ct. App. 1999) (stating in the context of accession that "the presumption [of good faith] may be rebutted on proof that the possessor knew *or should have known* that he is not the owner of the thing he possessed") (emphasis added); *Aertker v. Placid Holding Co.*, 2012 WL 4472002, at \*4 (E.D. La. 2012) ("Taken as a whole, these factors indicate to the Court that Placid was in bad faith because it knew, or *reasonably should have known*, that Louisiana Pacific was not the owner of the Aertker land, and, therefore, not authorized to grant the right-of-way.") (emphasis added).

224. *Compare* art. 487, *with* art. 3482 ("It is sufficient that possession has commenced in good faith; subsequent bad faith does not prevent the accrual of prescription of ten years.").

225. The bad faith accessorial possessor is someone who either lacks an act translative of ownership or is aware of defects in her ownership but nevertheless persists in her possession. She is not merely a temporary trespasser but someone who continues to possess the immovable belonging to another *with the intent to become its owner*. *Id.* art. 488 cmt. e (emphasis added).

226. *Id.* art. 489.

rule articulated by Article 487 serves its functional purpose well. Courts make quick and ready determinations about a possessor's good faith and sort with little difficulty the competing claims of the owner of an immovable and a possessor with regard to civil or natural fruits and reimbursement rights connected to improvements.

Consider a recent example, *Lemoine v. Downs*, in which a grandmother claimed that she owned 30 acres of land that her husband had donated many years earlier to her grandson.<sup>227</sup> The grandmother claimed title because at the time of the earlier donation her grandson was an unemancipated minor and her husband had later attempted to revoke the donation and give the property to her.<sup>228</sup> The court eventually held that the grandmother was not the owner of the property because the original donation was only *relatively* null and thus could only be revoked by the grandson, who, of course, later asserted his ownership of the property.<sup>229</sup>

When the grandmother eventually asserted accession claims against her own grandson, the undisputed record owner of the property, the court of appeal made quick work of her claims. It first held that the grandmother was entitled to reimbursement for necessary expenses incurred to cut down a tree and implicitly approved of her right to keep the initial rental income derived from the property.<sup>230</sup> But it also concluded that because the grandmother became a bad faith possessor under Article 487 at the moment that the grandson reconvened to assert his ownership rights, the grandson was entitled to all of the civil fruits produced by the property from the moment of the filing of the reconventional demand, subject to deduction for certain other expenses incurred to preserve the property and a general 15% deduction from the rental income to reward the grandmother for her efforts involved in renting the property.<sup>231</sup> Importantly, the court sorted out these reimbursement and civil fruit apportionment issues in short order, without needing to assess the carefulness component of the grandmother's purported good faith.<sup>232</sup>

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227. *Lemoine v. Downs*, 125 So. 3d 1115, 1117 (La. Ct. App. 2012).

228. *Id.*

229. *Id.* The grandson's ownership of the underlying land and improvements actually was resolved in prior litigation. *Lemoine v. Downs*, 58 So. 3d 659 (La. Ct. App. 2011).

230. *Lemoine*, 125 So. 3d at 1118–19.

231. *Id.* at 1119.

232. *Id.* The court's efficient, rough cut analysis of good faith for purposes of accession contrasts sharply with its more nuanced examination of the grandmother's purported good faith in her ten-year acquisitive prescription claim in prior litigation. *Lemoine*, 58 So. 3d at 662–63 (holding that the grandmother could not be in good faith for purposes of prescription because she was a witness

Other accession decisions display a similar allocative efficiency. In one recent case, the court found that the operator of an oil and gas production unit possessed certain land within the unit without the consent of the landowner.<sup>233</sup> As a result, the operator owed to the land owner the proceeds of the oil and gas production attributable to those lands.<sup>234</sup> Crucially, because the operator did not possess by virtue of an act translative of ownership in its favor, the court also concluded that the operator possessed in bad faith under Article 487 and therefore could not claim reimbursement for any of the expenses of production under Article 488.<sup>235</sup>

In other cases involving mineral production, the crucial determination of whether a produce who turns out to be a mere possessor and not a rightful mineral lease or servitude holder can claim production expenses again turns on the relatively mechanistic application of Article 487, even though strictly speaking a mineral lease or servitude only creates real rights and is not an act translative of ownership.<sup>236</sup> In these cases, the courts often hold that a producer/operator ceases to be in good faith under Articles 487 and 488 at the moment an action is instituted against it,<sup>237</sup> or

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to her husband's purported revocation, the revocation was unilateral, and the donation itself was irrevocable and finding also that the purported revocation could not constitute a just title because it was an act declarative—not translative—of rights of ownership).

233. *Caldwell Lands, Inc. v. Cedyco Corp.*, 980 So. 2d 827, 830 (La. Ct. App. 2008) (on rehearing).

234. *Id.* at 828.

235. *Id.* (reversing the previous decision finding an operator to be a good faith possessor under Article 487 based on determination that record did not contain an act translative of ownership in favor of operator).

236. Article 3483 of the Civil Code defines a “just title” for purposes of acquisitive prescription as a juridical act “sufficient to transfer ownership or another real right,” whereas Article 487 uses the more limited language of “an act translative of ownership.” *Compare* LA. CIV. CODE ANN. art. 3483 (2018), *with id.* art. 487. In some of the cases discussed in this section, courts miss this distinction between acts translative of ownership and acts establishing real rights. In one case, for example, the court asks whether an operator owns or “does not own a lease.” *Caldwell*, 980 So.2d at 829. In another, the court inquired into whether the claimants knew of “the defects in their ownership of the lease.” *Edmundson Bros. P’ship v. Montex Drilling Co.*, 731 So. 2d 1049, 1064 (La. Ct. App. 1999).

237. *See, e.g., Lamson Petroleum Corp. v. Hallwood Petroleum, Inc.*, 823 So. 3d 431, 437 (La. Ct. App 2002) (holding that second oil company was not a good faith possessor after first oil company filed its lawsuit regarding ownership dispute over property and thus was not entitled to recover production expenses

when some other event transpires, such as the transmission of a demand letter or expiration of a lease, which clearly signals that a possessor no longer has a legal right to remain on the underlying immovable property.<sup>238</sup> Further, the mere misconception of a possessor that he might have a valid claim to the property is clearly insufficient to establish good faith for purposes of accession if the possessor lacks a title valid in form and relies instead on pure parole evidence.<sup>239</sup>

Courts have also quickly dispatched accessorial reimbursement claims asserted under the accession articles with the observation that claimants who possess an immovable pursuant to a lease or sub-lease can never be a good faith possessor because they do not possess by virtue of an act translative of ownership; at most they are consensual, precarious possessors whose accession-based remedies lie under other provisions of the Civil Code dealing with these kinds of improvers,<sup>240</sup> or specifically with lessees.<sup>241</sup> The logic and fairness of those articles, questioned by some commentators, is beyond the scope of this Article.<sup>242</sup>

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incurred after the filing of the suit), *affirmed after remand*, Lamson Petroleum Corp. v. Hallwood Petroleum, Inc., 843 So. 2d 424, 426 (La. Ct. App. 2002); *Edmundson Bros.*, 731 So. 2d at 1064–65 (La. Ct. App. 1999) (holding that mineral lessees were bad faith possessors under Article 487 from the moment mineral lessor filed suit to cancel lease for failure to develop property); *Ruth v. Buwe*, 168 So. 2d 776, 779 (La. 1936) (holding that defendants were bad faith possessors under Article 503 (1870) from the moment a petitory action was filed against them).

238. *Wood v. Axis Energy Corp.*, 899 So. 2d 138, 147 (La. Ct. App. 2005) (holding that continued production under oil and gas lease was in bad faith as of the date that the lessors made first written demand for release of the lease for failure to produce in paying quantities and thus interest holder became responsible for production expenses thereafter under Articles 487 and 488); *Edmundson Bros.*, 731 So. 2d at 1064–65 (holding that mineral lessees were bad faith possessors after lease expired under Article 487 and they were not entitled to Article 488 production expenses because they should have known that lease would expire 90 days after production ceased).

239. *Ruth*, 168 So. 2d at 778.

240. *See V&S Planting Co. v. Red River Waterway Comm'n*, 472 So. 2d 331, 336 (La. Ct. App. 1985) (referring to LA. CIV. CODE arts. 493, 493.1, 493.2, and 495).

241. LA. CIV. CODE ANN. art. 2695 (providing detailed default rules for rights and obligations of parties to a lease, upon its termination, with regard to attachments, additions, or other improvements to the leased thing).

242. For criticism of the entire secondary accession rights regime in the Civil Code, including especially Articles 493 and 495, see Symeon Symeonides, *Developments in the Law, Property*, 47 LA. L. REV. 429, 451 (1986). For a defense of those articles, see JOHN A. LOVETT ET AL., *LOUISIANA PROPERTY LAW, THE CIVIL CODE, CASES AND COMMENTARY* 310–21 (2014).



In summary, the quick and handy categorization tool represented by Article 487's definition of good faith greatly enhances the utility in solving myriad resource allocation problems arising when a principal thing yields an accessory thing through the work of someone other than the owner of the principal thing or when some accessory object is placed on land belonging to another. A good faith possessor must possess by virtue of some act translative of ownership and must subjectively believe that she actually was the owner of the principal thing she possessed. But by keeping the good faith accession inquiry limited to these two relatively simple factual determinations, generally eschewing complex and contextualized evaluations of carefulness, and cutting off good faith at the moment defects in title become readily known to the possessor, the revised Civil Code generally has preserved the efficiency of Louisiana's accession regime, even as the demands placed upon it in an era of extensive mineral and timber exploitation have increased.<sup>243</sup>

#### IV. ACQUISITIVE PRESCRIPTION WITH RESPECT TO IMMOVABLES

In 1982, the Louisiana Legislature turned its attention to the last major source of good faith in Louisiana property law examined in this Article—ten-year acquisitive prescription with respect to immovables.<sup>244</sup> As argued elsewhere,<sup>245</sup> the preservation of a two-tiered, French-inspired model for acquisitive prescription of immovable property represents one of the most important features of Louisiana's property law system. Under that system, a possessor with good faith and just title can acquire ownership or other real rights in an immovable in just ten years,<sup>246</sup> whereas a possessor without either good faith or just title must possess continuously for 30 years to acquire ownership or other real rights by acquisitive prescription.<sup>247</sup> Although a detailed examination of how all the requisites of ten-year acquisitive prescription function is beyond the scope of this Article, five crucial characteristics mark prescriptive good faith in Louisiana law.

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243. Louisiana's timber piracy statute provides for heavy penalties to be assessed against a person who unlawfully cuts or removes trees belonging to another person but provides some relief for a good faith violator of the statute. LA. REV. STAT. § 3:4278.1(C)–(E) (2018). For commentary, see Mirais M. Holden, *Timber Piracy, Statutory Interpretation and Legislative Intent: The Louisiana Supreme Court's Decision in Sullivan v. Wallace*, 21 SAN JOAQUIN AG. L. REV. 103 (2012).

244. Act No. 187, § 1, 1982 La. Acts 518.

245. Lovett, *Precarious Possession*, *supra* note 72, at 624–45.

246. LA. CIV. CODE ANN. arts. 3473, 3475.

247. *Id.* art. 3486.

First, good faith for purposes of ten-year acquisitive prescription is distinct from and yet must be accompanied by just title.<sup>248</sup> Second, beginning decisively with the revision of the Civil Code in 1982 and the adoption of revised Articles 3480 and 3481, Louisiana law requires not only that a possessor asserting ten-year acquisitive prescription *subjectively believe* he is the owner of the thing he is possessing; it also requires that this belief be *objectively reasonable* under the circumstances.<sup>249</sup> This means that good faith for purposes of acquisitive prescription of an immovable has two explicit components: a subjective and an objective one.<sup>250</sup> As discussed below, the focus on objective reasonableness is particularly important because it requires courts to give much more attention to an acquisitive prescription claimant's carefulness at the time he commenced his possession rather than make a simpler determination about the claimant's subjective honesty.

Third, under the Louisiana Civil Code, good faith is still presumed for purposes of acquisitive prescription,<sup>251</sup> although recent judicial decisions have cast doubt on the viability of other presumptions related to possession and prescription.<sup>252</sup> Fourth, in tandem with the move toward an objective

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248. As the revision comments note, "for purposes of prescription, good faith and just title are separate ideas, whereas for purposes of accession, the two ideas are blended." *Id.* art. 3480 cmt. b. The same is true with respect to three-year acquisitive prescription with respect to movables. *Id.* art. 3490. But as the revision comments to Article 3490 note, the requirement of just title is easily satisfied because for the transfer of movables there is no requirement that title be written or recorded. Art. 3490 cmt. b.

249. Art. 3480 ("For purposes of acquisitive prescription, a possessor is in good faith when he reasonably believes, in light of objective considerations, that he is owner of the thing he possesses."); *id.* art. 3481 ("Good faith is presumed . . . This presumption is rebutted on proof that the possessor knows, or should know, that he is not the owner of the thing he possesses."). This clarification must count as one of the more significant improvements in the law of acquisitive prescription accomplished by the Louisiana State Law Institute under the leadership of Professor Yiannopoulos. The provisions of the 1870 Civil Code that were replaced were didactic and vague. *See* LA. CIV. CODE arts. 3451–52 (1870).

250. Art. 3480 cmt. c (emphasizing that the revised article rejects previous jurisprudence holding that good faith only required subjective belief of the possessor that he owned the thing and importing objective reasonableness test into good faith analysis).

251. Art. 3481. The first sentence of Article 3481 merely restates the same numbered article of the 1870 Civil Code. *Id.* cmt. a.

252. *See* Boudreaux v. Cummings, 167 So. 3d 559 (La. 2015) (holding that one neighbor who engages in acts of quasi-possession on a road or path crossing his neighbor's property is presumed to be possessing with the implied consent or

conception of good faith, the 1982 revision clarified that neither error of law nor error of fact defeats the presumption of good faith.<sup>253</sup> Of course, errors in judgment about the applicable law and misunderstandings of fact might, in combination with other objective facts, provide a basis for a record owner to rebut a prescription claimant's presumed good faith.

Finally, unlike with accession, good faith for purposes of acquisitive prescription, though measured immediately, remains temporally boundless.<sup>254</sup> If a prescription claimant has an objectively reasonable belief that he is the owner at the commencement of his possession, the Civil Code explicitly provides that "subsequent bad faith does not prevent the accrual of prescription of ten years."<sup>255</sup> Consequently, good faith status, once acquired by the prescription claimant, continues to benefit the possessor even when the veil of subjective belief in his ownership has been shattered by events or becomes objectively untenable.<sup>256</sup>

Several important themes have emerged from post-1982 revision caselaw applying these principles. First, Louisiana courts have regularly held that a ten-year acquisitive prescription claimant can prevail and prove his good faith relying in part on the presumption of good faith stated in Article 3482 even though he never conducted a title examination prior to taking possession of the subject immovable.<sup>257</sup> On the one hand, this

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acquiescence of the neighbor, and thus, his quasi-possession is presumed to be precarious), discussed at length in Lovett, *Precarious Possession*, *supra* note 72.

253. Art. 3481. The revision comments elaborate on this point, noting that revised Article 3481 "overrules legislatively the doctrine of legal bad faith," that is, the notion that an error of law could defeat good faith. Art. 3481 cmt. c. For detailed discussion of this change, see Symeonides, *supra* note 242.

254. LA. CIV. CODE ANN. art. 3482.

255. *Id.* As the revision comments note, this rule is widespread in civil law systems. *Id.* cmt. b.

256. The major exception to this rule occurs in the context of tacking, in which the Louisiana Supreme Court has held that a ten-year acquisitive prescription claimant seeking to cumulate his possession with that of a predecessor by particular title must prove that both he and his predecessor commenced their respective possessions in good faith. *Bartlett v. Calhoun*, 412 So. 2d 587 (La. 1982), discussed in John A. Lovett, *Tacking in a Mixed Jurisdiction*, in *ESSAYS IN HONOUR OF GEORGE GRETTON* 162–76 (Andrew Steven ed., 2017).

257. *Cantrelle v. Gaude*, 700 So. 2d 523, 528–29 (La. Ct. App. 1997) (holding that prescription claimants were in good faith even though no title examination was made either by claimants or their predecessor, the mother and mother-in-law of the claimants, and predecessor acquired property by quitclaim deed); *Mai v. Floyd*, 951 So. 2d 244, 247 (La. Ct. App. 2006) (finding that claimant was in good faith, explicitly noting that "the fact that no parties, prior to [subsequent prospective purchaser], conducted a title examination, which would have revealed

interpretation should not be surprising because one of the revision comments to Article 3480 explicitly stated that “an acquirer of immovable property is not charged with constructive knowledge of the public records, nor is he bound to search the public records in order to ascertain ownership.”<sup>258</sup>

On the other hand, the resilience of this position is somewhat surprising given the ubiquity of title examination in contemporary conveyancing practice, the frequency with which title insurance is obtained in connection with the acquisition and financing of real estate transactions, and calls by prominent commentators for a change in the law to make the presence of a title examination, if not an outright requirement, at least a significant factor weighing in favor of good faith.<sup>259</sup> Perhaps one explanation for Louisiana courts’ refusal to make title examination an explicit requirement for good faith in the context of acquisitive prescription can be found in related areas of the law. For instance, there is a jurisprudential rule that a buyer asserting the warranty against eviction against a seller of immovable property is not required to conduct a title examination either.<sup>260</sup> Alternatively, the leniency of Louisiana courts on this point may just reflect a practical understanding that in many parts of the state real estate transactions still regularly occur without the benefit of title examinations.

The second important theme does not concern the failure to conduct a title examination but concerns the consequences of having performed one. In the landmark case *Phillips v. Parker*, the Louisiana Supreme Court held that the Louisiana public records doctrine has no bearing on the analysis of whether a ten-year prescription claimant is in good faith.<sup>261</sup> That holding

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the 1986 tax sale, does not create bad faith,” but also noting that the claimant testified that he and his transferor visited tax assessor’s office prior to claimant’s purchase of property and “[were] told no taxes were due prior to his purchase”); *Ponder v. Jenkins*, 468 So. 2d 1275, 1278 (La. Ct. App. 1985) (observing that “[a] purchaser will not be charged with bad faith because a title examination, if made, would have disclosed defects in the seller’s title” and holding claimant was thus in good faith, despite lack of title examination, in the absence of any other evidence challenging presumed good faith).

258. LA. CIV. CODE ANN. art. 3480 cmt. d.

259. Symeonides, *supra* note 242, at 439–41.

260. See *Richmond v. Zapata Dev. Corp.*, 350 So. 2d 875, 978 (La. 1977) (“Because the registry laws are only intended as notice to third parties and have no application whatever between parties to a contract, a vendee is under no obligation to search the record in order to ascertain what his vendor has sold and what it has not, and the vendor is entitled, as between himself and his vendor, to rely upon the deed as written.”).

261. *Phillips v. Parker*, 483 So. 2d 972, 976 (La. 1986) (“The law of registry is not involved in any way with the theory of acquisitive prescription that a party who

meant that the mere availability of relevant information in the public records revealing a conflicting claim or interest does not, without other available indicia of a potential title defect, destroy good faith.

Just as important, the court in *Phillips* also established that when an acquirer of immovable property does conduct a title examination, that action does not impart constructive knowledge of every fact ascertainable in the public records so as to destroy the claimant's good faith.<sup>262</sup> As a result, the prescription claimants in that case, the Parkers, prevailed on their ten-year acquisitive prescription defense in a boundary action even though they had conducted a title examination prior to the transaction by which they acquired their property.<sup>263</sup> As Justice Lemmon's majority opinion explained, a rule imparting constructive knowledge to claimants like the Parkers, who had hired an attorney and reasonably relied on that attorney's analysis of a survey and a title abstract, would have been not only grossly unfair to the Parkers<sup>264</sup> but potentially disastrous for Louisiana property law.<sup>265</sup>

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reasonably believed he was acquiring valid title should be deemed to have a valid title after a certain period of possession in which the owner failed to object.”).

262. *Id.* at 977–78. As the court noted, imputed knowledge is a completely different matter. If the Parkers' title examiner or attorney had discovered the defect in their vendor's title and had disclosed it to them, or even if they had discovered the defect and failed to disclose it to them, they would be bound by that information and their good faith would have evaporated. *Id.* at 978.

263. *Id.* at 978–79. In *Phillips*, the Parkers had built a fence that encroached on their neighbor's property in reliance on the property description found in their deed, but, as it turned out, the Parkers' property description was erroneously drawn because the plaintiff, Phillips, actually owned the additional strip of land that was mistakenly included in the Parkers' deed. *Id.* at 973–74, 979.

264. *Id.* at 979. The mistake made by the Parker's attorney in *Phillips* was, indeed, easy to make. The Parkers' advising attorney or the underlying title examiner hired by the attorney either failed to find an August 1955 deed conveying a lot from a common author to the Phillips' predecessors in interest, the McCullers, which had been recorded just a few months prior to the Parkers' acquisition of their lot in an exchange which itself cured a previous conveyancing error, or they failed to compare the measurements in the McCullers' property description with the survey of the property that the Parkers' intended to purchase. *Id.* at 974 n.2.

265. As every Louisiana property law student should learn, a contrary ruling would have made ten-year acquisitive prescription unavailable for any claimant who had conducted a title examination because all prior conflicting interests of a record owner are, by definition, recorded. *Id.* at 977. Meanwhile, ten-year acquisitive prescription would have remained within reach for possessors who never bothered to conduct a title examination in the first place, thus “penalizing a purchaser who employs a title examiner and rewarding one who doesn't.” *Id.* Remarkably, the intermediate appellate court in *Phillips* had reached precisely such

By clarifying the impact of title examination in relation to good faith, however, the Louisiana Supreme Court in *Phillips* avoided massive confusion and demoralization costs and obviated the need for legislative action to save the institution of ten-year acquisitive prescription from unintended destruction. In short, the decision in *Phillips* protected reasonably careful purchasers and acquirers of immovable property and removed any incentive to act with intentional carelessness.

The third important theme of Louisiana courts interpreting the good faith requirement for ten-year acquisitive prescription after the 1982 revision concerns the wide scope of relevant good faith inquiries and the resulting wide variability of outcomes in reported decisions. In rejecting a per se rule requiring title examinations but signaling that such an examination and the knowledge gained from one can be “factors” in a good faith analysis,<sup>266</sup> the Supreme Court in *Phillips* made clear that the 1982 revision requires “a consideration of all of the factors of the particular case relevant to the definition of good faith . . . .”<sup>267</sup> Picking up on this notion, Professor, and later Dean, Symeonides sought to give some specificity to the factors that might be included in such a contingent, ad hoc approach when he recommended that

[t]he possessor’s actual good or bad faith should be determined, not by artificial fictions, but rather by evaluating, on a case by case basis, all of the surrounding circumstances, including the condition of the public records, the thoroughness of the particular title search, the competence and reputation of the title examiner, the type of title defect involved, the possibility of it being missed, and other similar factors.<sup>268</sup>

In subsequent cases, Louisiana courts accepted the invitation jointly extended by *Phillips* and Symeonides and have considered a wide spectrum of personal, geographic, and transactional facts and circumstances in making good faith determinations in the context of ten-year prescription claims.

In some cases, courts use the tools of Articles 3480, 3481, and 3482 to reject claims of ten-year prescription claimants, usually focusing on the objective unreasonableness of the claimant’s belief and on evidence of

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a perverse result. *Id.* at 974–75 (explaining *Phillips v. Parker*, 469 So. 2d 1102 (La. Ct. App. 1985)).

266. *Id.* at 977 n.7.

267. *Id.* at 977.

268. Symeonides, *supra* note 242, at 440–41. In his view, this ad hoc approach was “essentially the supreme court’s approach in *Phillips*.” *Id.*

subjective disbelief. In one instance, a court held that the third wife of a deceased Louisiana man did not possess four Jefferson Parish lots that her husband purportedly transferred to her in good faith because at the time of those transfers she knew or should have known that her husband was, in fact, still legally married to his Mississippi common law wife and thus did not have the authority to transfer the property without her consent.<sup>269</sup> In another case, a court held that the possessors of a portion of a lot adjacent to the Shreve Island Cut Off in Caddo Parish were not good faith possessors because they had long harbored doubts about the extent of their ownership of the land, and the majority of the land at issue was covered by a lake produced by a dramatic avulsive event that took place on the Red River in 1930.<sup>270</sup>

But in other cases, ten-year prescription claimants prevail, often with an assist from the powerful presumption of good faith. In one case, a court held that the succession of a family that had possessed some De Soto Parish residential property for more than ten years had proved good faith based on a voluminous body of evidence all tending to reinforce the conclusion that the family members reasonably believed they owned the property in question.<sup>271</sup> That evidence included two deeds purporting to transfer the property, photographs, utility payments, tax assessments, homestead exemption records, home improvement contracts, and even a deceased parent's death certificate.<sup>272</sup> Finally, in a recent decision, the Louisiana Fifth Circuit affirmed a civil jury's determination that the second wife of a successful New Orleans businessman was in good faith when her husband purported to transfer to her his deceased first wife's 50% interest in the valuable home he had acquired as community property with his first wife.<sup>273</sup> There, the court found good faith despite testimony indicating not only some possibility of subjective knowledge of her

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269. *In re Succession of Hendrix*, 990 So. 2d 742, 749–50 (La. Ct. App. 2008). Facts of particular relevance included the claimant's false statements on the acts of transfer that she was the transferor's wife when, in fact, the couple was not yet married; the claimant's knowledge of the previous common law wife and a son born of the common law marriage; and the claimant's knowledge that the son had written his father expressing an interest in meeting him. *Id.* at 750.

270. *Hamel's Farm, L.L.C. v. Muslow*, 988 So. 2d 882, 894 (La. Ct. App. 2008). Avulsion generally refers to a sudden action of a river or stream that carries away an identifiable piece of riparian land and attaches it to other riparian lands on the same or opposite side of the river or stream. LA. CIV. CODE ANN. art. 502 (2018); YIANNOPOULOS, *supra* note 91, § 4:15, at 172.

271. *Heirs of Morris v. Simpson*, 987 So. 2d 659, 669 (La. Ct. App. 2008).

272. *Id.*

273. *Legardeur v. Coleman*, 131 So. 3d 1305, 1042–44 (La. Ct. App. 2013).

stepchildren's interest in the former community property asset but also some unusual family circumstances that might have caused a reasonable acquirer to have doubts about her husband's authority to make such a transfer.<sup>274</sup>

Of course, in many other intriguing decisions Louisiana courts have evaluated the factors relevant to good faith in the context of ten-year acquisitive prescription and reached generally defensible conclusions.<sup>275</sup> A similar kind of analysis takes place when courts examine claims of

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274. In *Legardeur*, the jury apparently credited the wife's testimony that (1) she always believed her husband wanted her to have the house; (2) her husband had transferred the house to her as a gift; and (3) no one informed her of the 50% interest of her husband's children from his previous marriage. *Id.* at 1043. The jury apparently discounted the stepchildren's testimony about a family meeting at the subject home at which they allegedly informed the second wife of their 50% interest in the home prior to their father's transfer. *Id.* The court of appeal refused to overturn the jury's credibility determination under a manifest error standard of review. *Id.* at 1044. After her husband's death, the second wife eventually sold the house for \$1,150,000, and as a result of her successful ten-year acquisitive prescription defense, she kept all of the proceeds. *Id.* at 1039.

275. See, e.g., *City of Shreveport v. Noel Estate, Inc.*, 941 So. 2d 66, 80–81 (La. Ct. App. 2006) (finding claimant was in good faith in light of opponent's failure to introduce any evidence to demonstrate knowledge of defects in 1972 deed other than vague and unsupported allegations that consideration paid was inadequate; non-warranty deed to possessor was insufficient to preclude good faith); *Cockerham v. Cockerham*, 16 So. 3d 1264, 1268 (La. Ct. App. 2009) (finding claimant to be in bad faith because the 1963 cash deed to predecessor upon which claimant relied did not reflect how transferor acquired the interests of multiple co-owners he purported to convey, there was no other evidence suggesting transferor had anything to convey, and transferee, having received a 3/24 interest ten years earlier, should have known transferor did not own the property he was attempting to convey); *Lallande v. Verret*, 21 So. 3d 444, 446–47 (La. Ct. App. 2009) (affirming trial court finding that claimant who acquired property via sheriff's sale was in good faith; information supplied by foreclosing bank included plat listing triangular portion of lot as part of lot being sold); *Lemoine v. Downs*, 58 So. 3d 659, 662–63 (La. Ct. App. 2011) (holding husband's attempt to revoke unilaterally the donation of immovable property to his minor son was an insufficient basis for wife's assertion of good faith; the fact that the wife witnessed attempted revocation only revealed she was aware of original donation, which was only a relative nullity and only subject to challenge by son); *EOG Res., Inc. v. Hopkins*, 131 So. 3d 72, 84 (La. Ct. App. 2013) (affirming trial court finding that claimant commenced possession in good faith based on warranty deeds but also affirming trial court finding that claimant did show exclusive possession for ten years in light of discredited testimony regarding fence).



three-year acquisitive prescription with respect to valuable movables.<sup>276</sup> What remains universally distinctive about all of these decisions, however, is the relatively microscopic level of analysis and the focus on objective reasonableness in light of all relevant circumstances. When the stakes are high, as they are in claims of ten-year acquisitive prescription with respect to immovables,<sup>277</sup> the courts engage in relatively rigorous scrutiny, carefully searching for evidence of actual honesty and reasonable carefulness in the circumstances, even though possessors presumptively possess in good faith.

#### CONCLUSION: PROPERTY LAW WITHOUT GOOD FAITH

To fully appreciate the importance of good faith in Louisiana property law, it is useful to consider what Louisiana property law would look like if good faith were banished from all of the areas just examined. In general, property law might gain something in terms of certainty and predictability, but those gains would likely be outweighed by other social costs, particularly as property disputes would produce increasingly binary outcomes and parties likely would over-invest in risk-reduction measures to guard against unhappy results. In addition, the role of lawyers in property law could well diminish while other professionals and even computer programs might become more important.<sup>278</sup>

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276. See *Succession of Wagner*, 993 So. 2d 709, 722–23 (La. Ct. App. 2008) (affirming trial court finding that son failed to prove good faith in claim of three-year acquisitive prescription with respect to \$450,000 worth of gold coins based on detailed analysis of son’s knowledge that coins were purchased with check drawn on community checking account and his attempt to conceal his father’s donation of coins to him without mother’s consent); *Succession of Moore*, 737 So. 2d 749, 754–55 (La. Ct. App. 1998) (holding that nephew was a bad faith possessor of family heirlooms because nephew took heirlooms after his aunt, suffering from senility, was placed in nursing home and therefore nephew could acquire ownership only by ten-year acquisitive prescription for movables).

277. Of course, in some boundary disputes the amount of immovable property claimed by ten-year acquisitive prescription may be relatively small, but because ownership shifts without any requirement of compensation, the stakes of these cases are still high, at least as compared to encroaching building and accession cases. In some boundary disputes, though, the amount of immovable property in dispute can be quite large. See *Loutre Land & Timber Co. v. Roberts*, 63 So. 3d 120 (La. 2011) (applying boundary tacking to resolve dispute over 15 acre tract).

278. As Hanoch Dagan has reminded the Author, this development should be irrelevant to the objective legal reformer or theorist, but certainly lawyers and at least some law professors would regret it.

Consider the subject of encroaching building servitudes. It is hard to imagine how this relatively new legal institution would survive in the absence of a good faith requirement. If the institution fell, property owners who mistakenly constructed buildings on their neighbors' property or acquired such buildings would probably be faced with the choice of either tearing down the encroaching part of the buildings, paying exorbitantly to acquire small strips of land, or trying to prove 30-year acquisitive prescription if the encroachments were old enough.<sup>279</sup> Perhaps surveyors, aided by GPS technology, would benefit prospectively as property owners learned to take greater care when starting construction projects, but the role of lawyers in sorting out these problems would diminish over time.

It is also hard to see how the bona fide purchaser doctrine would continue to function as currently designed without good faith as the crucial rule of decision in these kinds of disputes. If good faith was suppressed as the key analytical factor, Louisiana would need some other rule or standard to help courts decide whether to protect the security of title of an original owner of a corporeal movable or protect the interests of an eventual transferee. In the absence of such a rule or standard, the legal system would have to choose one of the two positions to favor in disputes of this nature. And indeed, if Louisiana chose to protect only one of these positions with a clear rule, that choice would likely increase social costs—more wasteful investment in security measures for original owners or much more investment in examining the provenance of vendors' claims of ownership for third-party purchasers of movables. Insurance costs on both sides of the equation might well rise in response. By adopting a good faith analysis that favors the eventual transferee, especially when that transferee acquires the movable in a relatively normal market transaction, Louisiana has, in effect, created a rule-like standard that smooths market transactions yet leaves open the possibility for a true owner to protect his security of title when unusual circumstances should have made the transferee suspicious.

If Louisiana did not distinguish between good and bad faith possessors in accession, the accession regime likely would rely on either over/under-inclusive unjust enrichment remedies, if such remedies could even be asserted. If the law did not allow the relatively quick and ready good-versus-bad-faith determinations in this area, Louisiana most likely would revert to the least common denominator and treat all possessors in the

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279. Ten-year acquisitive prescription would be out of the question in most of these cases because claimants would lack a just title describing the encroached upon ground. Thirty-year prescription claims would likely be bogged down in difficult disputes over whether the initial encroachment was precarious or adverse. If possession was adverse, boundary tacking under Louisiana Civil Code article 794 would be the crucial ground of dispute.

same manner as current bad faith possessors. Hence, possessors of land would be limited to claims for production expenses in connection with production of fruits,<sup>280</sup> barred from any restitutionary remedy in cases of extraction of products,<sup>281</sup> and relegated to claims for reimbursement in connection with major improvements only when owners elected to keep inseparable improvements that added value to the underlying immovable while exposing them to liability if the owner did not want an improvement to remain on the immovable.<sup>282</sup> Moreover, in this monochromatic accession regime, accession disputes essentially would turn into accounting challenges and would involve little or no legal judgment. Lawyers would hand over the reins to accountants and appraisers.

Finally, and most dramatically of all, if Louisiana eliminated the consideration of good faith from acquisitive prescription, it would face a difficult choice. If it wanted to preserve a shorter acquisitive prescription period for purposes of clearing title in cases involving innocent conveyancing mistakes, it likely would have to establish a number of other specific criteria for a claimant to satisfy. Those criteria might be objective, but they could lead to over/under-inclusive results. Alternatively, if Louisiana chose to settle on just one time period for all claims of acquisitive prescription, Louisiana would have to select between a ten-year—or perhaps an even shorter—prescriptive period, the long 30-year period currently used for possessors in bad faith or without just title, or perhaps split the difference and set the prescriptive period at some middling duration. If a short period was employed, Louisiana might reward bad faith possessors too easily and too quickly, thus eliminating incentives for parties engaged in real estate transactions to take reasonable precautions and act carefully.<sup>283</sup>

On the other hand, if a lengthy period was chosen, innocent conveyancing mistakes would be much more difficult to repair. Title examination would become even more important but also would become more costly and time-consuming because the consequences of a mistake

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280. LA. CIV. CODE ANN. art. 486 (2018).

281. *Id.* art. 488.

282. *Id.* art. 497.

283. Two prominent property law scholars have made a similar point, arguing that from a property law design perspective, affording good faith possessors ownership after a shorter period and bad faith possessors ownership after a longer period makes sense in terms of efficiency and reduction of demoralization costs. Richard Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 684–89 (1986); Robert C. Ellickson, *Possession and Perpetuities: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L. Q. 723, 725–34 (1986).

would be much higher. Assuming a longer time period was employed, acquisitive prescription could still fix ancient mistakes and could continue to align very long-term possessory facts on the ground with record title but only if recent developments with regard to precarious possession in this area does not otherwise erode the transformative power of acquisitive prescription more generally.<sup>284</sup> Again, the role of the property litigator in this area would shrink while the role of the title examiner and title abstractor would grow in importance. This course is not without precedent in mixed jurisdictions,<sup>285</sup> but it would be a significant departure for Louisiana law.

This concluding sketch is admittedly speculative. Although property law without good faith might become more predictable and more certain in some respects, perhaps other unimaginable uncertainties—those problematic “unknown unknowns”—would soon appear.<sup>286</sup> As the preceding discussion makes clear, this author prefers a property law system in which good faith plays an important role—at least in the four areas discussed above. The meandering and oscillating currents of good faith in the revised Civil Code give Louisiana’s property law system several great advantages—a penchant for flexible, contextualized decision making; a responsiveness to ethical norms; and a strong regard for the interests of others—all qualities that tend to lend stability to the system in the long run.

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284. Lovett, *Precairous Possession*, *supra* note 72.

285. In Scotland, by contrast, positive—that is, acquisitive—prescription of real rights in immovable property is possible after a period of continuous possession—10 years to acquire ownership and 20 years to acquire a servitude—if the possession is based on an ostensible registered title, but good faith is not required. Prescription and Limitation (Scotland) Act 1973, §§ 1–3, *discussed in* GEORGE L. GRETTON & ANDREW J.M. STEVEN, *PROPERTY TRUSTS AND SUCCESSION* ¶ 6.14 (3d ed. 2017).

286. *See News Transcript of News Briefing with Secretary of Defense Donald H. Rumsfeld*, DEPT. OF DEFENSE, <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636> (last visited Apr. 4, 2018) (quoting Secretary Rumsfeld as saying, “Reports that say that something hasn’t happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don’t know we don’t know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.”) [<https://perma.cc/U49S-FKAF>].