One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription

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1. Articles 3412-3527 of the Louisiana Civil Code of 1870 [hereinafter cited as OA (old articles)] were repealed and replaced by new articles 3412-3491 [hereinafter cited as NA]. Articles 3528-3554 dealt with acquisitive prescription were not revised by Act 187 of 1982. However, after the completion of this writing, articles 3528-3554 were revised by Act 173 of 1983, which becomes effective on January 1, 1984. With few exceptions, this Act is not discussed in this article. Hereinafter, the “new Act” will refer to Act 187 of 1982. The provisions of Act 187 pertaining to occupancy, articles 3412-3420, are also not discussed in this article. Articles of the Civil Code of 1870 which were not affected by Act 187 will be cited as UA (unaffected articles).
sion of the law of property. The express changes brought about by the new Act were not unpredictable to a careful observer of the jurisprudence and are easily identified by a mere reading of the comments. Less easily identifiable are the latent changes that may be implicit in the language of the new law. The purpose of this article is merely to present, rather than to discuss in depth, the express changes and to help identify the latent changes. To this end, this article follows the rather unconventional and space-consuming format of juxtaposing visually the texts of the new and old law. It is hoped that this format will not only prove convenient to the reader, but will also enable him to participate in the search for the latent changes in the new Act.

In terms of organization, the new Act succeeds in arranging the articles in a more logical, systematic and efficient way than the old law. Two organizational changes are worth mentioning in this respect:

2. Book II of the Civil Code regulating the major bulk of the law of property was revised in four installments from 1976 to 1979. If the years of preparatory work are counted, the revision process lasted well over a decade.

3. The adage that the comments are not part of the law is as correct here as it is with any other enactment. Nonetheless, one can hardly overstate their importance in ascertaining—or speculating about—legislative intent and generally in understanding the new Act. The comments are equally important in following the discussion in this article which presupposes close familiarity with the comments. The valuable information contained therein has not been repeated here.


5. To facilitate a more systematic treatment, it was necessary not to follow the order in which the articles appear in either the new or the old law. For technical reasons, this author's observations are confined in the footnotes.

6. Because latent changes are often unintentional, the comments cannot be safely relied upon in identifying all changes. Due to limited insight and wisdom, the same is true about this author's observations. Consequently, identifying all the latent changes may ultimately be the reader's responsibility, and this article aspires simply to facilitate the courts' and the attorneys' job by placing the new and old law side by side.

7. In addition to the internal rearrangement of articles, which may have some substantive implications, see infra notes 8-16 and
(1) The old law defined the attributes or vices of possession and the requirements for transfer and tacking of possession in the chapter on acquisitive prescription rather than in the chapter on possession. The jurisprudence has recognized repeatedly that the same attributes of possession necessary for prescription are also necessary for possession to be accorded possessory protection. Following this logic, the new law regulates exhaustively the attributes of possession in the title on possession and then refers to these articles later in dealing with acquisitive prescription. Similarly, since tacking may be necessary not only in the context of acquisitive prescription but also in the context of the possessory action, the new act regulates transfer and tacking of possession in the title on possession. (2) The old law regulated suspension and interruption of prescription in the section on acquisitive prescription. Yet it was never questioned that liberative prescription, too, was subject to suspension and interruption and under the same conditions as acquisitive prescription. The new Act eliminates this anomaly by placing the provisions on suspension and interruption before the chapters devoted to acquisitive and liberative prescriptions.

In terms of draftsmanship and legislative technique the new Act is also a significant improvement over the verbose, repetitive, and accompanying text, the new Act adopts a more flexible structure by dividing the subject matter into two titles rather than the single title XXIII of the 1870 Code. Occupancy and possession are now regulated in new title XXIII and prescription in the newly created title XXIV. The former title XXIV is now redesignated as title XXV.

8. See OA 3487-3491 and OA 3492-3495, respectively.
10. See NA 3435-3436.
11. See NA 3476, 3488.
12. See infra note 65.
13. See NA 3441-3443. As a result of these rearrangements, the new chapter on possession contains, for the first time, more articles (twenty-four) than the chapter on acquisitive prescription (nineteen). The old law contained thirty-one articles in the chapter on possession and fifty-six articles in the section on acquisitive prescription.
14. See OA 3516-3527.
16. See chapter 2, NA 3462-3472, preceding chapters 3 and 4, dealing respectively with acquisitive and liberative prescription.
often contradictory language of the old law\textsuperscript{17} which was drafted in a style reminiscent of a textbook for first-year law students.\textsuperscript{18} While helpful for law school freshmen, this style was hardly efficient. The concise and more definitive style of the new Act is in accord with modern drafting techniques and is a welcome improvement in this respect. Brevity, of course, is not a virtue in itself. When the new Act eliminates whole provisions of the old law as "unnecessary illustrations"\textsuperscript{19} there is always the possibility that something of the substance of the old law may have been lost too. It is hoped that the juxtaposition of the texts of the new and old law will help the

\begin{enumerate}
\item The old law devoted a total of 116 articles to occupancy, possession and acquisitive prescription. The new Act regulates the same subjects in only eighty articles. For some examples of extremely verbose and/or repetitive provisions, see OA 3431, 3442-3444, 3501-3502, all of which are dealt with in only two articles in the new law, NA 3431-3432; old articles 3493-3495 are dealt with in one article in the new law, NA 3442; old articles 3483-3486 are also dealt with in one article in the new law, NA 3483. Contradictions were also not uncommon in the old law and are identified at appropriate places. \textit{See, e.g., infra} note 18.

\item The scholar Domat was the major source of the provisions on possession and acquisitive prescription in the Louisiana Digest of 1808. According to Batiza, \textit{The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance}, 46 TUL. L. REV. 4, 131-33 (1971), Domat is responsible for twenty of the forty-eight articles of the Digest of 1808 on the matter. While some of these articles were suppressed in the 1825 revision of the Civil Code, most have survived. \textit{See, e.g.,} OA 3432-3435, 3451-3454, 3490, 3493-3495. The 1825 revision actually increased rather than decreased the Code's reliance on French commentators. For instance, OA 3427-3431 and 3436-3450 which were added in the 1825 revision were all derived from French treatises—this time mostly from Pothier—rather than from either the Code Napoleon or the Projet du Gouvernement of 1800. A by-product of this borrowing from multiple sources was an increase in the internal inconsistencies in the Code. One such inconsistency is seen by comparing OA 3449(2), taken from Pothier, with OA 3455-3456 taken from Domat. For a discussion of this issue, see the concurring opinion of Justice Tate in Liner v. Louisiana Land & Exploration Co., 319 So. 2d 766 (La. 1975). Another inconsistency, also attributable to the same source, may be seen by comparing OA 3428 with OA 3430 and OA 3429 with OA 3431. For an example of purely didactic material, see OA 3472-3477, 3484-3485.

\item \textit{See, e.g.,} NA 3412, comment (f); NA 3422, comment (c).
\end{enumerate}
reader distinguish the substantive changes from the mere stylistic changes.

### NEW LAW

#### DEFINITION, ESSENTIAL ELEMENTS AND NATURE OF POSSESSION

**Art. 3421. Possession**

Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name.  

The exercise of a real right, such as a servitude, with the intent to have it as one's own is quasi-possession. The rules governing possession apply by

**Art. 3426. Possession, definition**

*Possession* is the detention or enjoyment of a thing, which we hold or exercise by ourselves, or by another who keeps or exercises it in our name.

**Art. 3432. Possession applicable to corporeal things; quasi possession of incorporeal things**

Possession applies properly

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20. The definition of possession contained in NA 3421 para. 1 is as incomplete as its predecessor, found in OA 3426. What is lacking in both articles is the intent to possess as owner which, according to NA 3424 and OA 3436, is essential for acquiring possession. Without this intent one has only detention, not possession in the proper sense. Thus a lessee is, properly speaking, a "detainer" rather than a possessor, since he lacks the requisite intent to possess for himself. Although the *Exposé des Motifs* recognizes this inconsistency, see *La. Civ. Code* bk. III, tit. XXIII, ch. 2, *Exposé des Motifs* (Supp. 1983), and although earlier drafts took measures to correct it, the final draft chose to preserve the status quo, apparently out of deference to long local tradition. Yet, as it now stands, NA 3421 para. 1 serves no discernible purpose, since physical detention unaccompanied by an intent to possess either for one's self or on behalf of someone else has no legal effect and is not accorded possessory protection. See, *e.g.*, NA 3424, 3428, 3435, 3477; *La. Code Civ. P.* art. 3660. New article 3440, which makes the possessory action available to the precarious possessor, is not an exception to this statement since even a precarious possessor has the intent to possess for another, see NA 3428, whereas the "possessor" (*i.e.*, party in detention) in NA 3421 para. 1 may not have any such intent. The matter could potentially have disturbing consequences since NA 3421 para. 1 purports to give the definition of a term widely used throughout the Civil Code. Fortunately, such problems are avoided by reading NA 3421 para. 1 together with its necessary complements, namely NA 3424 as well as NA 3432-3433.
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analogy to the quasi-possession of incorporeals.\textsuperscript{21}

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only to corporeal things, movable or immovable.

The possession of incorporeal rights, such as servitudes and other rights of that nature, is only a quasi-possession, and is exercised by the species of possession of which these rights are susceptible.

\textbf{Art. 3424. Acquisition of possession}

To acquire possession, one must intend to possess as owner and must take corporeal possession of the thing.\textsuperscript{22}

\textbf{Art. 3436. Essentials of possession}

To be able to acquire possession of property, two distinct things are requisite:

1. The intention of possessing as owner.
2. The corporeal possession of the thing.

\textbf{Art. 3427. Presumption of intent to own the thing}

One is presumed to intend to possess as owner unless he began to possess in the name of and for another.\textsuperscript{23}

\textbf{Art. 3488. Possession presumed to be as owner}

As to the fact itself of possession, a person is presumed to have possessed as master and owner, unless it appears that the possession began in the name of and for another.

\textbf{Art. 3434. Possession linked to ownership; possession implies a right and a fact}

Since the use of ownership is

\textsuperscript{21} The last sentence of the second paragraph of NA 3421 did not exist in its predecessor OA 3432, but was implicit in the very concept of quasi-possession. The jurisprudence had already recognized this principle. See Louisiana Irrigation & Mill Co. v. Pousson, 262 La. 973, 265 So. 2d 756 (1972).

\textsuperscript{22} For the definition of corporeal possession, see NA 3425. For acquisition of possession through others, see NA 3428.

\textsuperscript{23} For possession in the name of another (precarious possession), see NA 3437.
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to have a thing in order to enjoy it and to dispose of it, and that it is only by possession that one can exercise this right, possession is therefore naturally linked to the ownership.

Thus, possession implies a right and a fact; the right to enjoy annexed to the right of ownership, and the fact of the real detention of the thing that is in the hands of the master or of another for him.

Art. 3435. Possession without ownership

Although the possession be naturally linked with the ownership, yet they may subsist separately from each other; for it may happen that the actual possessor is not the true owner.24

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24. Old articles 3434-3435 are typical examples of didactic material that have no place in a modern code. The two articles were derived from Domat, see Batiza, supra note 18, at 131. While they served some purpose in the Digest of 1808, their utility was exhausted soon thereafter with the growth of an indigenous legal profession. The suppression of these two articles by the new Act is justified. Article 481 (enacted by Act 180 of 1979) is roughly parallel to OA 3435 only in emphasizing that possession and ownership are distinct. Article 481 reads as follows: "The ownership and the possession of a thing are distinct. Ownership exists independently of any exercise of it and may not be lost by nonuse. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor." An a contrario reading of UA 481 suggests that possession is lost by nonuse. That inference was confirmed by OA 3444 which provided that civil possession could only last for a maximum of ten years. This is no longer true under NA 3432. Possession cannot be lost by nonuse, but it is lost either by abandonment, NA 3433, or by adverse use by another, NA 3422. See infra notes 59 and 62. Part of the substance of OA 3434 para. 2 is now contained in NA 3422 which is discussed infra note 47.
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**CORPOREAL, CONSTRUCTIVE AND CIVIL POSSESSION**

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<tr>
<th>Art. 3425. Corporeal possession</th>
<th>Art. 3428. Natural possession, definition</th>
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<tr>
<td>Corporeal possession is the exercise of physical acts of use, detention, or enjoyment over a thing.</td>
<td>Natural possession is that by which a man detains a thing corporeally, as by occupying a house, cultivating ground, or retaining a movable possession.</td>
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<tr>
<th>Art. 3426. Constructive possession</th>
<th>Art. 3430. Natural possession as corporeal detention</th>
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<td>One who possesses a part of an immovable by virtue of a title is deemed to have constructive possession within the limits of his title. In the absence of title, one has possession only of the area he actually possesses.</td>
<td>Natural possession is also defined to be the corporeal detention of a thing which we possess as belonging to us, without any title to that possession, or with a title which is void.</td>
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<td>It is not necessary, however, that a person wishing to take possession of an estate should pass over every part of it; it is sufficient if he enters on and occupies a part of the land, provided it be with the intention of possessing all</td>
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25. The suppression of OA 3430 does not result in any substantive change, not only because this article contained a useless and erroneous definition, but also because the article was read out of the Code as early as 1841. See Ellis v. Prevost, 19 La. 251, 254 (1841).

26. Since constructive possession cannot prevail over adverse corporeal possession, it goes without saying that "possession of a part is possession of the whole" only when no one else possesses adversely and corporeally any other part of the same "whole." Similarly, partial dispossession from an immovable corporeally possessed by another cannot serve as dispossession from the whole. Unfortunately, the Louisiana Supreme Court held to the contrary in Board of Comm'rs v. S.D. Hunter Found., 354 So. 2d 156 (La. 1978). Although there is little to suggest that the new Act approves of this erroneous holding, an express disapproval in the comments would be welcome. For criticism
of this aspect of Hunter, see 1 A. YIANNOPOULOS, PROPERTY § 215 in 2 LOUISIANA CIVIL LAW TREATISE 580 n.422 (2d ed. 1980).

The new Act also missed the opportunity to devise new rules regulating conflicts between constructive possessions, and between what one could call “constructive corporeal” and “constructive civil” possession. The following three deliberately simplistic hypotheticals may illustrate the need for such rules.

(1) A and B both have titles describing the same tract of land and enter simultaneously into corporeal possession of the Southwest and Northeast quarters, respectively. To this author's knowledge neither the old nor the new law provides the means of delineating A's and B's possession in the Northwest and Southeast quarters. The French solution of giving preference to the older title sounds plausible but will not work in a case, for instance, where both A and B derive their titles from legacies contained in the same testament. See Roan v. Carter, 427 So. 2d 1337 (La. App. 2d Cir. 1983). Roan also demonstrates that tacking will not solve the problem if both A and B trace their titles to a common author, since his possession is not adverse. Moreover, although concededly a simultaneous entrance into possession is rather unlikely in practice, there remains the problem of cases in which neither A's nor B's date of entrance into possession can be established with certainty.

(2) Same facts as in (1) except that A established corporeal possession of the Southwest quarter and then ceased possessing corporeally without abandoning his possession. B then moved into possession of the Northeast quarter which he still possesses corporeally today. Arguably A should still prevail in the Northwest, the Southeast, and a fortiori the Southwest quarters since his possession which was established constructively and continued civilly could only be ousted by adverse corporeal, not constructive, possession. See Whitley v. Texaco, Inc., 434 So. 2d 96 (La. App. 5th Cir. 1983) (on rehearing); Gilmore v. Schenck, 115 La. 386, 398, 39 So. 40, 44 (La. 1905). However, the counterarguments are equally strong. Otherwise, the effectiveness of constructive possession would be confined to cases where the constructively possessed land has either been abandoned by the previous possessor or has never been possessed—at least since the repeal of the rule providing that civil possession could only last for ten years. See infra note 30.

(3) Same facts as (2) except that A continues to possess corporeally only the Southwest quarter, whereas B, who had entered into possession of the Northeast quarter subsequent to A, ceased possessing corporeally more than a year thereafter, again without abandoning his possession. The problem is who is entitled to the possession of the Northeast quarter. The odds are clearly in favor of B due to his continuing civil possession, but one wonders whether such possession should prevail over A's current constructive possession. To offer solutions to the above problems is not only beyond the scope of this article but is also outside
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that is included within the boundaries.27

Art. 3498. Extent of possession
When a person has a title and possession conformably to it, he is presumed to possess according to the title and to the full extent of its limits.

Art. 3503. Restriction as to extent of possession
How favorable soever prescription may be, it shall be restricted within just limits. Thus, in the prescription of thirty years, which is acquired without title, it extends only to that which has been actually possessed by the person pleading it.

Art. 3431. Retention of possession; civil possession
Once acquired, possession is retained by the intent to possess as owner even if the possessor ceases to possess corporeally. This is civil possession.

Art. 3429. Civil possession, definition
Possession is civil when a person ceases to reside in the house or on the land which he occupied, or ceases to detain the movable which he possessed, but

the role of this author, since such problems ultimately depend on policy determinations which more appropriately rest with the legislature. 27. The word "boundaries" in OA 3437 has been interpreted by numerous dicta and a few holdings, see, e.g., Souther v. Domingue, 238 So. 2d 264 (La. App. 3d Cir.), writ denied, 256 La. 891, 239 So. 2d 544 (1970), as including natural enclosures, in addition to artificial enclosures or boundaries established by title. Thus, even in the absence of title, corporeal possession of a part of land enclosed by natural boundaries could serve as possession of the whole. Comment (d) to NA 3426 sanctions this phenomenon and considers it a kind of corporeal rather than constructive possession. Because of this, the opening statement of the comment that "[i]n the absence of title, there is no constructive possession" is accurate.
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without intending to abandon the possession. 28

Art. 3431. Civil possession as owner holding by virtue of just title

Civil possession, on the contrary, is defined in this sense, to be the detention of a thing by virtue of a just title, and under the conviction of possessing as owner. 29

Art. 3442. Preservation of an acquired possession by intent only

When a person has once acquired possession of a thing by the corporal detention of it, the intention which he has of possessing, suffices to preserve the possession in him, although he may have ceased to have the thing in actual custody, either himself or by others.

Art. 3432. Presumption of retention of possession

The intent to retain possession is presumed unless there is clear proof of a contrary intention. 30

Art. 3443. Presumed intent to retain possession

This intention of retaining possession is always supposed, where a contrary intention does not appear decidedly; so that,

28. (Emphasis added). The italicized phrase in OA 3429 is not reproduced in NA 3431, but is included in the comments. This is important because the lack of an intent to abandon possession is what distinguishes civil possession from abandonment of possession. See 1 A. YIANNOPOULOS, supra note 26, §§ 211-212.

29. Old article 3431 is suppressed for the same good reasons that OA 3430 is suppressed. See supra note 25.

30. Despite its brevity, NA 3432 incorporates the substance of OA 3443-3444 and possibly OA 3501-3502. The only change consists
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although a person may have abandoned the cultivation of his estate, he shall not therefore be presumed to have abandoned the possession, but shall be presumed on the contrary to have the intention of retaining it, and shall retain it in fact.

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Art. 3444. Retention of possession; loss of possession

To retain the possession of a thing when a man once has it, it is not even necessary that he should have such positive intention; a negative intention suffices, that is, it suffices that the positive intention, which he had in acquiring the possession, shall not have been revoked by a contrary inten-

in deleting the italicized phrase in OA 3444. This means that the (rebuttable) presumption that the possessor intends to retain possession is no longer subject to a maximum duration of ten years. In the absence of proof of contrary intention, such as proof of abandonment, this presumption may last forever. Thus, like ownership, see supra note 24, and unlike real rights less than full ownership, see NA 3448, OA 3529-3530, possession is not lost by nonuse by the possessor, but only by adverse exercise by another or by abandonment. In theoretical terms, this means that possession has been elevated to a higher status (i.e., closer to ownership) in the hierarchy of property rights. (Incidentally, the theoretical dispute as to whether or not possession is a real right has plagued the civilian literature for a long time. The prevailing view, also espoused by the Louisiana Civil Code in OA 3434 para. 2 and NA 3422, is that possession is a state of fact from which stems a bundle of rights.) In practical terms the change means that, if the article applies retroactively, as it probably would, now all land in Louisiana is at least civilly possessed as long as it has been possessed corporeally even once in the remote past. The fact that, as the comments suggest, see NA 3432, comment (c), the italicized phrase in OA 3444 was not squarely applied by Louisiana courts tends to diminish the significance of this change. For additional discussion of the change, see Note, supra note 4, at 1087.
tion; for, so long as this revocation does not take place, the possessor is supposed always to retain his first intention, unless a third person has usurped or taken from him the possession, or he has failed to exercise an actual possession for ten years.31

Art. 3501. Preservation of possession once acquired
The possession necessary for this species of prescription, when it has commenced by the corporal possession of the thing, may, if it has not been interrupted, be preserved by external and public signs, announcing the possessor's intention to preserve the possession of the thing, as the keeping up of roads and levees, the payment of taxes, and other similar acts.

Art. 3502. Vestiges of works or house as preserving possession
A man may even retain the civil possession of an estate, sufficient to prescribe, so long as there remain on it any vestiges of works erected by him, as, for example, the ruins of a house.32

31. (Emphasis added).
32. Old articles 3501-3502 are not reproduced by the new Act, either at this point or among the articles on the thirty-year prescription. Although the comments are silent on the issue, and although the concordance table incorrectly cites NA 3486 as the article replacing OA 3501-3502, there appears to be good reason for suppressing these two articles: If they are taken to mean that one must manifest his intent to retain possession by "public signs . . . as the keeping up of roads and levees, the payment of taxes, and other similar acts"
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Precarious Possession

Art. 3428. Acquisition of possession through another

One may acquire possession of a thing through another who takes it for him and in his name. The person taking possession must intend to do so for another.

Art. 3438. Possession acquired through others

One may acquire possession of a thing, not only by himself, but also through others who received it for him and in his name. But in this case it is necessary that the person receiving the possession should have had intention of receiving for the other.

or by "vestiges of works erected by him," then these articles would be in direct conflict with the very definition of civil possession under NA 3431, OA 3429 and 3442, as the retention of possession by intent alone, without or rather regardless of any physical activity or vestiges thereof. If, on the other hand, OA 3501-3502 are simply examples of how corporeal possession is maintained, then they are superfluous. Either way their deletion from the new Act is entirely justified:

33. The articles of the old law dealing with precarious possession were spread out in three different parts of the Code and were quite repetitive. They could be found in the chapter on possession, OA 3433, 3441, 3445-3446; in the subsection on the ten-year acquisitive prescription, OA 3489-3490; and in the subsection on the causes which prevent acquisitive prescription, OA 3510-3515. The new law is far more concise but still regulates precarious possession in two different parts of the Code, first in the title on possession, NA 3428-3429, 3437-3440, and then in the title on prescription, NA 3477-3479. To facilitate a synoptic treatment of the subject, the two groups of articles are treated together here.

34. When a lessee takes possession of more land than his lessor's title calls for, two questions arise in establishing and interpreting the lessee's intent. The first question is whether the lessee had any intent to possess the extra land for his lessor. The answer uniformly given to this question is that such intent is established not by the lessee's subjective beliefs, but rather objectively by his external acts i.e., farming, etc. See Seven Water Holes Corp. v. Spires, 393 So. 2d 811 (La. App. 2d Cir.), writ denied, 399 So. 2d 610 (La. 1981). The second question is whether the lessee's intention is to possess for himself or for his lessor. The answer is that he is presumed to intend to possess for his lessor. See Cortinas v. Peters, 224 La. 9, 68 So. 2d 739 (1953). When the lessee knowingly takes possession of the extra land his intent will have to be established by appropriate evidence.
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Art. 3430. Juridical persons
A juridical person acquires possession through its representatives.

Art. 3429. Exercise of possession by another
Possession may be exercised by the possessor or by another who holds the thing for him and in his name. Thus, a lessor possesses through his lessee.

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Art. 3439. Possession on behalf of children and insane persons
Children and insane persons, being incapable of exercising a will, cannot acquire by themselves the possession of a thing; but they may acquire, through the medium of their tutor or curator, because the will exercised by the tutors and curators in making the acquisition for such persons supplies the defect of will under which they labor.35

Art. 3440. Possession by corporations
For the same reason corporations may acquire the possession of a thing, through the agency of those who administer their affairs.

Art. 3433. Possession through others
One may possess a thing not only by one's self, but also by other persons. Thus the proprietor of a house or other tenement possesses by his tenant, or by his farmer; the minor, by his tutor; and, in

35. The new Act eliminates OA 3439. Although both the Exposé des Motifs and the comments are silent on the question, the reporter’s comments to earlier drafts explain the reason for suppressing the article: Since “[p]ossession is not a juridical act but factual authority over a thing,” the acquisition of possession should not require capacity to enter into juridical acts. See LOUISIANA STATE LAW INSTITUTE, REVISION OF THE LOUISIANA CIVIL CODE OF 1870, BOOK III, TITLE XXIII, CHAPTER 2, Doc. No. 4-28-0, art. 9, comment (b) (Council Meeting, May 9-10, 1980) [hereinafter cited as REVISION]. Thus, incompetents may take possession of a thing without the intervention of their tutors or curators. There remains, of course, the problem of whether such incompetents possess the requisite intent to possess as owners.
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Art. 3437. Precarious possession

The exercise of possession over a thing with the permission of or on behalf of the owner or possessor is precarious possession.\(^\text{36}\)

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Art. 3445. Obtaining and preserving possession for another

To enable one person to obtain possession for another, it is necessary that he should have such intention in making the acquisition; but in preserving the possession for another, it is not necessary that this intention should continue to exist.

Thus, if a farmer who retains an estate in the name of another, should lose the use of reason; although on this account he would be incapable of exercising a will, and consequently could not retain the possession for and in the name of the person who has leased it to him, yet shall the latter retain the possession.\(^\text{37}\)

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36. Article 3437 is new, but its content is very old. Although the old law used the term precarious possession in only one out of the fifteen articles devoted to the subject, OA 3512, the phenomenon of possessing for another was always known as "precarious possession." See 2 C. Aubry & C. Rau, Droit Civil Français § 180 (7th ed. Esmein 1961) in J. Mayda, 2 Civil Law Translations 92 (1966).

37. The content of the first sentence of OA 3445 is found in NA 3428. The new Act eliminates the rest of OA 3445 probably as an unnecessary illustration. Indeed the principles expressed in NA 3438-3439 seem ample enough to encompass the minor or specific rule of OA 3445. In other words, if the precarious possessor's hostile intent to possess for himself is ineffective in terminating the lessor's possession without actual notice to the lessor, the mere lack of intent to possess on the part of the precarious possessor, e.g., because of insanity, also should not terminate the lessor's possession.
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Art. 3438. Presumption of precariousness

A precarious possessor, such as a lessee or a depositary, is presumed to possess for another although he may intend to possess for himself.\(^5\)

38. The presumption is rebuttable, NA 3438, comment (b). The same was true under the old law, as can be seen by reading together OA 3446 and 3489 ("unless there be proof to the contrary"), both of which are cited by the comments as the sources of NA 3438. A question not clearly answered by the text of the old law was whether the presumption could be rebutted by any contrary proof or only by proof of the kind of acts provided for in OA 3512. In other words, was OA 3512 an illustration of, rather than a restriction on, the general principle of OA 3489? Read literally, OA 3512 required that "the cause of . . . possession [be] changed by the act of a third person," thus excluding by implication cases where the precarious possessor changed the nature of his possession by his own act. The same conclusion is reached by reading OA 3512 together with OA 3514-3515, except perhaps for the last phrase in OA 3515—"or that he has acquired it without title by thirty years' possession." The jurisprudence has taken the view that precarious possessors other than co-owners may change the nature of their possession without "the act of a third person" provided that they manifest to the world and the possessor by overt and unambiguous acts their intent to possess for themselves. See, e.g., Humble v. Dewey, 215 So. 2d 378 (La. App. 3d Cir. 1968). The question of whether co-owners, as well, could convert their precarious possession into possession proper without the act of a third party was not definitively resolved by the jurisprudence because, to this author's knowledge, all litigated cases involved an act of a third person. See, e.g., Towles v. Heirs of Morrison, 428 So. 2d 1029 (La. App. 1st Cir. 1983); Minton v. Whitworth, 393 So. 2d 294 (La. App. 1st Cir. 1980); Dupuis v. Broadhurst, 213 So. 2d 528 (La. App. 3d Cir.), writ denied, 252 La. 967, 215 So. 2d 131 (1968) (co-owner acquired the part that he possessed precariously through a partition with another party).

The new law, NA 3438-3439, 3478, confirms the jurisprudence in many ways but may be changing the law in at least one way. (1)
NEW LAW

Art. 3439. Termination of precarious possession

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

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

OLD LAW

Art. 3489. Possession commenced for another

When a person’s possession commenced for another, it is supposed to continue always under the same title, unless there be proof to the contrary.

The new law confirms the jurisprudence by acknowledging that a distinction ought to be drawn between co-owners and other precarious possessors. See Dunham v. Nixon, 371 So. 2d 1288 (La. App. 3d Cir. 1979); Thomas v. Congregation of St. Sauveur Roman Catholic Church, 308 So. 2d 337 (La. App. 1st Cir. 1975); Succession of Zebriska, 119 La. 1076, 44 So. 893 (1907). (2) It also confirms the jurisprudence which allows precarious possessors who are not co-owners to change the nature of their possession without the act of a third person. See Louisiana Highway Comm’n v. Raxsdale, 12 So. 2d 631 (La. App. 2d Cir. 1943); Succession of Zebriska. (3) The new Act may be changing the law (depending on how one interprets the old law and the jurisprudence) by also allowing co-owners to change the nature of their possession without the act of a third person. See NA 3439 para. 1 and the first sentence of NA 3478 para. 1. The phrasing of the second sentence of NA 3478 para. 1 clearly suggests that “[t]he acquisition and recordation of a title from a person other than a co-owner” is simply one way, but not the only way, in which the co-owner’s possession may be converted from precarious possession to possession as owner. (4) The new Act changes the law by imposing a less exacting burden of proof on co-owners—“overt and unambiguous acts sufficient to give notice”—than it imposes on other precarious possessors—“actual notice to the person on whose behalf he is possessing.” Again, the second sentence of NA 3478 para. 1 (in itself consistent with the jurisprudence; see Towles, 428 So. 2d 1029; Dupuis, 213 So. 2d 528), which gives an example of “an overt and unambiguous act” falling short of actual notice, confirms the view that the new
NEW LAW

Art. 3478. Termination of precarious possession; commencement of prescription

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

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

OLD LAW

Art. 3512. Termination of precarious possession and commencement of prescription

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

law does not require co-owners, as distinguished from other precarious possessors, to give actual notice of their intent to possess for themselves. The question then is why other precarious possessors are required to give actual notice. Despite some contrary dicta, the jurisprudence does not seem to this author to require actual notice. See Thompson’s Succession v. Cyprian, 34 So. 2d 285 (La. App. 1st Cir. 1948); Succession of Zebrika, 119 La. 1076, 44 So. 893.

More importantly, it appears a questionable policy to impose a less exacting standard on co-owners than on other precarious possessors. If any differentiation between co-owners and other precarious possessors was felt necessary, it should be the other way around. Because the adverse activities of a co-owner are less likely to arouse the suspicion of the other co-owners than are the adverse activities of a lessee, it might have been more appropriate to impose on such co-owners the requirement of “actual notice.” See Note, supra note 4, at 1092, for further discussion. One way to resolve the difference, short of legislative correction, is to read “actual notice” as meaning something less (i.e., constructive notice) than what the term usually means.
NEW LAW

Art. 3514. Prescription against one's own title

One cannot prescribe against his own title, in this sense, that he can not change by his own act the nature and the origin of his possession.

Thus, he whose possession is founded on a contract of lease which is adduced, is considered as always possessing by the same title, and can not prescribe by any length of time.

Art. 3515. Prescription beyond Title

The rule, contained in the preceding article, is to be understood in this sense, that a man can not prescribe against an essential part of the contract.

Thus the creditor on an annuity can not prescribe against the right of redemption; but one may prescribe beyond his title.

So also, a person who has a ti-

39. Old article 3514 para. 1 provided that “one cannot prescribe against his title.” This principle sounded more important than it actually was, given the great number of exceptions to which it was subject. To begin with, the Code itself recognizes in at least three instances that one may prescribe beyond his title. See OA 3515 para. 2, UA 760, 794. Secondly, the Code has also recognized that one may prescribe against his title when he acquires and records a second title from a third person. See OA 3512, 3515 para. 3. Thirdly, the jurisprudence has recognized that a person such as a lessee may prescribe against his lease by repudiating it and manifesting by overt and unambiguous acts his intent to possess for himself. See Humble v. Dewey, 215 So. 2d 378 (La. App. 3d Cir. 1968). In view of all these exceptions, the principle of OA 3514 para. 1 was of doubtful validity and the elimination of that language by the new Act is not likely to cause any problem.
Art. 3477. Precarious possessor; inability to prescribe
Acquisitive prescription does not run in favor of a precarious possessor or his universal successor.

Art. 3490. Precarious possession
The circumstance of having been in possession by the permission or through the indulgence of another person, gives neither legal possession nor the right of prescribing.

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

Art. 3510. Precarious possessors, inability to prescribe
Those who possess for others and not in their own name, can not prescribe, whatever may be the time of their possession.

Thus, farmers, tenants, depositaries, usufructuaries and all those generally who hold by a precarious tenure and in the name of the owner, can not prescribe on the thing thus held.

Art. 3511. Heirs of precarious possessors, inability to prescribe
The heirs of the persons holding under the tenures mentioned in the preceding article, can not prescribe any more than those from whom they hold such thing.
NEW LAW

Art. 3479. Particular successor of precarious possessor

A particular successor of a precarious possessor who takes possession under an act translatative of ownership possesses for himself, and prescription runs in his favor from the commencement of his possession. 40

Art. 3440. Protection of precarious possession

Where there is a disturbance of possession, the possessory action is available to a precarious possessor, such as a lessee or a depositary, against anyone except the person for whom he possesses. 41

OLD LAW

Art. 3513. Transferees of precarious possessors, right to prescribe

Those to whom tenants, depositaries and such other persons having only a precarious possession, have conveyed the same by a title capable of transferring the ownership of property, may prescribe for the same.

Art. 3441. Possession for another; precarious possessor's inability to acquire legal possession

Those who possess, not for themselves, but in the name of another, as farmers, depositaries and others who acknowledge an owner, can not acquire the legal possession, because, at the commencement of their possession, they had not the intention of possession for themselves but for another.

40. New article 3479 reproduces without substantive change the content of OA 3513 but clarifies two matters that were inartfully expressed in the old article. (1) By substituting the word “ownership” for the word “same,” see OA 3513, NA 3479 makes it abundantly clear that the article is meant to apply only to cases where the precarious possessor conveyed the property itself, not just his right in the property. See NA 3479, comments (b), (d). (2) By using the phrase “prescription runs in his favor from the commencement of his possession” (emphasis added), NA 3479 also makes it clear that the transferee of the precarious possessor may not tack the possession of his transferor. See NA 3479, comment (c).

41. Because the precarious possessor did not have “legal possession” under the old law, see OA 3441, he was not entitled to the possessory action. (However, at least one Louisiana decision gave him
POSSESSION AND PRESCRIPTION

NEW LAW

Louisiana Code of Civil Procedure

Art. 3656 [para. 1]. Same; parties; venue
A plaintiff in a possessory action shall be one who possesses for himself. A person entitled to the use or usufruct of immovable property, and one who owns a real right therein, possesses for himself. A predial lessee possesses for and in the name of his lessor, and not for himself.

injunctive relief under La. Code Civ. P. art. 3663(2). See Indian Bayou Hunting Club, Inc. v. Taylor, 261 So. 2d 669 (La. App. 3d Cir. 1972). This principle is expressly stated in LA. CODE CIV. P. art. 3656, which requires that the plaintiff in a possessory action be "one who possesses for himself." While under that article a usufructuary or a person having a predial servitude "possesses for himself," he does so only with regard to the servitude (quasi-possession). With regard to the land itself, he is possessing precariously for the naked owner or for the owner of the servient estate. The servitude owner could bring a possessory action in his own name against someone interfering with his quasi-possession of the servitude but not against someone disturbing his precarious possession of the rest of the land. By the same token, a lessee could not bring a possessory action against a usurper of his precarious possession but would instead have to call his lessor in warranty.

To avoid this duplication of effort, the new Act changes the law by making the possessory action available to a precarious possessor against anyone except the person for whom he possesses. The judgment rendered in such a possessory action will not be res judicata against the person on whose behalf the precarious possessor possesses, unless the latter was made a party to the proceeding. The comments say that NA 3440 does not purport to modify in any way UA 2704 and that in cases falling under the article "the lessee is bound to call the lessor in warranty." (Emphasis added). This statement may well mean that the granting of the possessory action to the lessee is really a specious gift, since UA 2704 applies to all cases in which the person with whom the lessee is feuding claims "a right to the thing leased" and thus is to be distinguished from a mere trespasser.
NEW LAW

OLD LAW

OTHER ATTRIBUTES OR VICES OF POSSESSION

Art. 3487. Attributes of possession for ten-year prescription

To enable one to plead the prescription treated of in this paragraph, it is necessary that the possession be distinguished by the following incidents:

1. That the possessor shall have held the thing in fact and in right, as owner; when, however, it is only necessary to complete a possession already begun, the civil possession shall suffice, provided it has been preceded by the corporal possession.

2. That the possession shall have been continuous and uninterrupted, peaceable, public and unequivocal; a clandestine possession would give no right to prescribe; but he who possesses by virtue of a title can not be considered as a clandestine possessor, for his title leads to the supposition that the possession commenced in good faith, and that is sufficient to enable him to plead prescription.

42. Although the old law defined the attributes of possession only for purposes of prescription, there was never any question that those same attributes were necessary in order for possession to have any other legal effect, including the protection of the possessory action. See Liner v. Louisiana Land & Exploration Co., 319 So. 2d 766 (La. 1975). Following this line of thinking, the new law defines all the attributes of possession in the title dealing with possession and then refers to those same attributes as being necessary for prescription. See NA 3476, 3488.

43. See NA 3424 for the corresponding requirement under the new law.

44. See NA 3431 for the corresponding requirement under the new law.
NEW LAW

Art. 3436. Violent, clandestine, discontinuous, and equivocal possession

Possession is violent when it is acquired or maintained by violent acts. When the violence ceases, the possession ceases to be violent.

Possession is clandestine when it is not open or public, discontinuous when it is not exercised at regular intervals, and equivocal when there is ambiguity as to the intent of the possessor to own the thing.⁴⁶

OLD LAW

Art. 3491. Possession by violence

A possession by violence, not being legal, does not confer the right of prescribing.⁴⁵ That right only commences when the violence has ceased.

RIGHTS OF POSSESSORS; PROTECTION OF POSSESSION

Art. 3434 [para. 2]. Possession linked to ownership; possession implies a right and a fact

. . . .

Thus, possession implies a right and a fact; the right to enjoy annexed to the right of ownership,

⁴⁵. Under the old law, it was arguable that a possession that began peacefully but was later maintained by violence was not violent. "Possession is marred by violence . . . if it was acquired and continued by acts accompanied by physical or psychological violence." 2 C. AUBRY & C. RAU, supra note 36, § 180, at 98 (emphasis added). "If the possession originates peacefully, it does not become defective if troubles . . . are caused by third persons." Id. at 98 n.32; cf. 1 M. PLANIOL, CIVIL LAW TREATISE pt. 2, no. 2278 (12th ed. La. St. L. Inst. trans. 1959). The above excerpts from the translations of Aubry and Rau were quoted with approval by the Louisiana Supreme Court in Liner, 319 So. 2d at 776. Although the comments are silent on the issue, NA 3436 brings a change in the law when it states that "[p]ossession is violent when it is acquired or maintained by violent acts." (Emphasis added).

⁴⁶. For a good recent example of equivocal possession, see City of New Orleans v. New Orleans Canal, Inc., 412 So. 2d 975 (La. 1982).
and the fact of the real detention of the thing that is in the hands of the master or of another for him.

Art. 3422. Nature of possession; right to possess
Possession is a matter of fact; nevertheless, one who has possessed a thing for over a year acquires the right to possess it.\

Art. 3450. Rights of possessors
Although possession results frequently from a fact, and not from right, it nevertheless confers on the possessor certain rights with regard to the thing possessed, some of which are peculiar to the possessor in good faith, and the others are common to all possessors.

47. The term "right to possess" is a new term of art signifying the right of a possessor to be protected by the possessory action. This right comes into existence the moment a possessor who meets all the other qualifications completes one year of possession. At that same moment, the previous possessor who has been out of possession for one year loses his right to possess. See Justice Tate's concurrence in the denial of rehearing in Liner, 319 So. 2d at 779. The new term does not entail a substantive change in the law. Cf. OA 3453(2), 3455, LA. CODE Civ. P. art. 3658(2).

In some cases, however, possessory protection is accorded a possessor who has not yet completed one full year of possession, such as when he was evicted by force or fraud. See LA. CODE Civ. P. art. 3658(2). Similarly, a possessor's right to the fruits, UA 486, his right to remove improvements made on the land of another or to be reimbursed for them, UA 496-497, and his right to be reimbursed for useful or necessary expenses, UA 527, 529, do not depend on the length of his possession but rather on his good or bad faith.

48. The good or bad faith of the possessor is relevant only for purposes of accession and acquisitive prescription. See UA 486, 497; NA 3475, 3490. Good or bad faith is immaterial for purposes of the possessory action. See the italicized language in LA. CODE Civ. P. art. 3660, infra text accompanying note 58. Accordingly, the new law deletes any reference to good or bad faith in NA 3422.
NEW LAW

Art. 3423. Rights of possessors
A possessor is considered provisionally as owner of the thing he possess until the right of the true owner is established.

Art. 529 Right of retention
The 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.

Art. 3444. Possessory action
Possession of immovables is protected by the possessory action, as provided in Articles

OLD LAW

Art. 3454. Rights common to all possessors
Rights, which are common to all possessors in good or bad faith, are that:

1. They are considered provisionally as owners of the thing which they possess, so long as it is not reclaimed by the true owner or person entitled to reclaim it, and, even after such reclamation, until the right of the person making it is established.

3. Such a possessor may, by prescription, acquire the ownership of the thing which he thus possesses, after a certain time, which is established by law according as he has possessed in good or bad faith.

4. Such a possessor has the right, in case of eviction from the thing reclaimed, to retain it until he is reimbursed the expenses he is entitled to claim.

2. Every person who has possessed an estate for a year, or enjoys peaceably and without interruption a real right, and is

49. The substance of this paragraph is incorporated into NA 3446, 3475, 3486, 3490-3491.

50. The substance of this paragraph was already incorporated into UA 529 as enacted by Act 180 of 1979.

NEW LAW

3655 through 3671 of the Code of Civil Procedure.\textsuperscript{52}

Possession of movables is protected by the rules of the Code of Civil Procedure that govern civil actions.\textsuperscript{53}

OLD LAW

disturbed in it, has an action against the disturber, either to be maintained in his possession, or to be restored to it, in case of eviction, whether by force or otherwise.\textsuperscript{54}

Art. 3455. Possessory action

The action which a possessor for one year has against a person disturbing his possession, to be maintained in it or restored to it, as is said in the preceding article, shall be decided before pronouncing on the question of ownership, and the real owner shall not be allowed to repel it by endeavoring to prove his right.\textsuperscript{55}

Art. 3456. Prescription of possessory action

But this, which is called the possessory action, must be commenced by the possessor within a year, reckoning from the time

\textsuperscript{52} The Code of Civil Procedure duplicated the articles of the Civil Code of 1870 dealing with the possessory action. See, e.g., OA 3454(2), 3455-3456. Rather than maintaining this duplication, the new Act correctly deletes those articles and refers expressly to the Code of Civil Procedure. No substantive change results.

\textsuperscript{53} The paragraph is a new provision but does not change the law. It was placed in the article in order to make clear that, although not governed by LA. CODE CIV. P. arts. 3658-3671 which are applicable only to immovables, the possession of movables is also protected by an innominate civil action. See NA 3444, comment (b).

\textsuperscript{54} The substance of the paragraph is incorporated into NA 3422 and 3444, and LA. CODE CIV. P. arts. 3655 and 3658.

\textsuperscript{55} The substance of the article can be found in LA. CODE CIV. P. arts. 3657-3658 and 3661.
NEW LAW

OLD LAW

when he was disturbed;\textsuperscript{56} for if he leaves the person evicting him in possession for one year, without complaint, he shall lose his possession, whatever apparent right he may have had to it,\textsuperscript{57} and shall be driven to his action for the ownership of the property.

**Louisiana Code of Civil Procedure**

**Art. 3658. Same; requisites**

To maintain the possessory action the possessor must allege and prove that:

1. He had possession of the immovable property or real right therein at the time the disturbance occurred;
2. He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud;
3. The disturbance was one in fact or in law, as defined in Article 3659; and
4. The possessory action was instituted within a year of the disturbance.

**Louisiana Code of Civil Procedure**

**Art. 3660 [para. 1]. Same; possession**

A person is in possession of immovable property or of a real right therein, within the intendment of the articles of this Chapter, when he has the corporeal possession thereof, or civil possession thereof preceded by corporeal possession by him or his ancestors in title, and possesses for himself, \textit{whether in good or bad faith}, or even as a usurper...\textsuperscript{58}

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\textsuperscript{56} The substance of the clause can be found in \textit{LA. CODE CIV. P. art. 3658(4)}.  
\textsuperscript{57} The substance of the clause is reproduced in \textit{NA 3434}.  
\textsuperscript{58} (Emphasis added).
NEW LAW  OLD LAW

LOSS OF POSSESSION; LOSS OF THE RIGHT TO POSSESS; INTERRUPTION OF POSSESSION; INTERRUPTION OF PRESCRIPTION

Art. 3447. Loss of possession
Possession of a thing may be lost either with or without the consent of the possessor.

Art. 3448. Loss with consent of possessor
Possession is lost with the consent of the possessor:

59. The distinction between loss of possession and loss of the right to possess was implicit in the old law. Compare OA 3448, 3449(1) with OA 3449(2), 3454(2). This distinction was articulated by the Louisiana Supreme Court in Liner, 319 So. 2d at 774-76 and is now codified in NA 3433-3434. A possessor who is evicted loses his possession at the moment of the eviction, but does not lose his right to possess until one year after the eviction (and only if in the meantime he did not recover it or did not file a possessory action). At this latter point the usurper will acquire the right to possess. In order to be entitled to the possessory action, the plaintiff must show uninterrupted possession "for more than a year immediately prior to the disturbance." LA. CODE CIV. P. art. 3658(2). Possession is uninterrupted when the possessor did not lose the right to possess although he might have lost possession. Thus in a possessory action for a disturbance which occurred on January 1, 1983, the plaintiff must show that he did not lose the right to possess during the year 1982. He will be able to do so even if he was evicted for a period of less than twelve months during 1982, or even if he was evicted for more than a year before 1982 but recovered possession on January 2, 1982 and held it until January 1, 1983. See Liner, 319 So. 2d at 779 (Tate, J., concurring). Thus, "interruption of possession" becomes another term of art synonymous with "loss of the right to possess." Except for cases of abandonment (see the first sentence of NA 3434, infra note 62) possession is interrupted for purposes of the possessory action, NA 3434, as well as for purposes of prescription, NA 3465, only when the right to possess is lost.

60. The new law does not officially recognize this didactic distinction, but abandonment remains an instance in which possession is lost with the possessor's consent. See NA 3433.
NEW LAW

1. When he transfers this possession to another with the intention to divest himself of it. 61

2. When he does some act, which manifests his intention of abandoning possession, as when a man throws into the street furniture, or clothes, of which he no longer chooses to make use. 62

OLD LAW

61. This provision is not reproduced in the new law under the heading “loss of possession” “because a transfer of possession is not a loss of possession. It is true that the possessor ceases to possess, but his possession is continued by the transferee who benefits by tacking.” NA 3433, comment (b). The statement is certainly correct and, coupled with NA 3441 which states in affirmative terms that “[p]ossession is transferable,” may have some implications as to the continuing vitality of Bartlett v. Calhoun, 412 So. 2d 597 (La. 1982), discussed infra notes 65, 70.

62. The content of the paragraph, without the illustrations, is reproduced in NA 3433. Unlike eviction, upon abandonment the resulting loss of possession, NA 3433, coincides in time with the loss of the right to possess (see the first sentence of NA 3434), and possession is interrupted immediately. See NA 3434 para. 2. This means that, even before the lapse of a year from the abandonment, the abandoning possessor cannot bring the possessory action against a person who had taken possession in the meantime, even though the latter has not as yet himself acquired the right to possess. It also means that if the abandoning possessor somehow regains possession within the year, he begins a new possession. Obviously then, the abandoning possessor is treated much less favorably than the evicted possessor, who does not lose the right to possess and whose possession is not interrupted unless he stays out of possession for a full year. See the second sentence of NA 3434.

Abandonment also interrupts prescription. Although OA 3517 was silent on the issue, there was never any question that prescription was interrupted by abandonment. See NA 3465 comment (b). The only question is whether, like possession, prescription, too, is interrupted immediately upon abandonment. It would seem so at least by parity of reasoning, and the comments agree by stating that “[w]hen a possessor abandons possession . . . acquisitive prescription is interrupted upon the loss of possession.” NA 3465, comment (c) (emphasis
NEW LAW

Art. 3433. Loss of possession
Possession is lost when the possessor manifests his intention to abandon it or when he is evicted by another by force or usurpation.

Art. 3434. Loss of the right to possess
The right to possess is lost upon abandonment of possession. In case of eviction, the right to possess is lost if the possessor does not recover possession within a year of the eviction.

When the right to possess is lost, possession is interrupted.

OLD LAW

Art. 3449. Loss without consent of possessor
A possessor of an estate loses the possession against his consent:
1. When another expels him from it, whether by force in driving him away, or by usurping possession during his absence, and preventing him from re-entering.
2. When the possessor of an estate allows it to be usurped and held for a year, without, during that time, having done any act of possession, or interfered with the usurper's possession.

Art. 3456. Prescription of possessory action
But this, which is called the possessory action, must be commenced by the possessor within a year, reckoning from the time when he was disturbed; for if he added). However, there is reason to doubt whether the language of NA 3465 is precise enough to support this otherwise correct idea. Unlike either its counterpart provision, NA 3434 ("in case of eviction"), or OA 3517 ("when the possessor is deprived"), the language of the second paragraph of NA 3465 is broad enough to encompass cases where the loss of possession results from abandonment. To rectify the problem, one would have to either rephrase the second paragraph of NA 3465 in more narrow terms or, better yet, eliminate the paragraph altogether and reword the first paragraph as follows: "Acquisitive prescription is interrupted when the right of possession is lost," or "acquisitive prescription is interrupted when possession is interrupted."

63. As Liner, 319 So. 2d 766, made clear, section (1) of OA 3449 addressed loss of possession, as distinguished from the loss of the right to possess addressed in section (2) of the same article and also in OA 3456 and 3517. The substance of OA 3449(1) is now incorporated in NA 3433. The substance of OA 3449(2) and 3456 is now incorporated in NA 3434. The substance of OA 3517 reappears in NA 3465.
NEW LAW

Art. 3465. interruption of acquisitive prescription

Acquisitive prescription is interrupted when possession is lost.

The interruption is considered never to have occurred if the possessor recovers possession within one year or if he recovers possession later by virtue of an action brought within the year.64

OLD LAW

leaves the person evicting him in possession for one year, without complaint, he shall lose his possession, whatever apparent right he may have had to it, and shall be driven to his action for the ownership of the property.

Art. 3517. Natural interruption by physical deprivation

A natural interruption is said to take place when the possessor is deprived of the possession of the thing during more than a year, either by the ancient proprietor or even by a third person.

TRANSFER OF POSSESSION: TACKING OF POSSESSION65

Art. 3441. Transfer of possession

Possession is transferable by

Art. 3448 [§ 1]. Loss with consent of possessor

64. Although it sounds self-evident, the phrase "or if he recovers later by virtue of an action brought within the year" should also appear in NA 3434.

65. Tacking of possession may be necessary either for purposes of the possessory action or for purposes of acquisitive prescription. Accordingly, the new law treats both kinds of tacking together in a single article, NA 3442.

(1) For purposes of the possessory action, a person will need tacking if he has been in corporeal possession for less than a year or if he has only civil possession of his own, whether for more or less than a year. In the first situation, tacking of his possession to that of his ancestor in title will make up the one year of possession (right to possess) which is necessary for the possessory action. See LA. CODE Civ. P. art. 3658(2). In the second situation, tacking will enable the possessor to obtain the benefit of his ancestor's corporeal possession in order to meet the requirement that "possession must be corporeal at the beginning." This latter kind of tacking was recognized in Ellis
v. Prevost, 19 La. 251 (1841) and has been codified in LA. CODE CIV. P. art. 3660, see italicized language infra text accompanying note 69. The new law does not disturb the holding of Ellis.

(2) For purposes of acquisitive prescription, tacking will be employed in a number of situations as shown in the following illustrations. G indicates a possessor in good faith; B indicates a possessor in bad faith; the person second in line is a successor by particular title of the person first in line; the number in parenthesis indicates the year each person entered into possession.


In all of the above situations, a different kind of tacking may also be involved: if the person second in line had only civil possession, he will be permitted to tack his ancestor’s corporeal possession in order to meet the requirement that “possession . . . be corporeal at the beginning.” Ellis held so only in the context of a possessory action, but the permissibility of this kind of tacking in the context of prescription has never been questioned. Although Bartlett did not involve this issue, the opinion contained broad enough language to be construed as disallowing this kind of tacking. The reason given by Bartlett for overruling Devall was that, unlike a universal successor, a successor by particular title “must have all the statutory characteristics and conditions required for the completion of prescription” in order to benefit from tacking. If applied literally, this language would amount to the overruling of Ellis by implication. The only assurance of the continuing vitality of the Ellis rule is its incorporation into LA. CODE CIV. P. art. 3660. However, the narrow wording of article 3660 is in terms of possession for purposes of a possessory action rather than for purposes of prescription. The possibility thereby exists that a possessor who has civil but not corporeal possession will not be allowed to tack the corporeal possession of his ancestor in title since, under Bartlett, he does not have “all the statutory characteristics and conditions required for . . . prescription.” Fortunately, however, this language was dictum and should not overrule established jurisprudence.

Bartlett was decided shortly after the final draft of what is now Act 187 of 1982 was approved by the Louisiana State Law Institute and, therefore, the Institute did not have the opportunity to express an opinion on Bartlett. Similarly, although theoretically the legislature
### NEW LAW

universal title or by particular title.66

### OLD LAW

Possession is lost with the consent of the possessor;

1. When he transfers this possession to another with the intention to divest himself of it.

### Art. 3442. Tacking of possession

The possession of the transferor is tacked to that of the transferee if there has been no interruption of possession.67

### Art. 3493. Addition of possession by author of title; tacking

The possessor is allowed to make the sum of possession necessary to prescribe, by adding to his own possession that of his author, in whatever manner he may have succeeded him, whether by an universal or particular, a lucrative or an onerous title.

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is presumed to be aware of the judicial interpretations of legislation under revision, it is doubtful whether Bartlett was actually brought to the attention of the legislators. Nevertheless, the critics of Bartlett may find support in both the text of the new law and the accompanying comments. Although the new law takes no position on Bartlett's holding (namely that a bad faith possessor cannot tack the possession of his good faith predecessor for purposes of the ten-year prescription, see infra note 70), the new law does contain a mild repudiation of Bartlett's dictum that a possessor must have "all the statutory characteristics" in order to benefit from tacking. By phrasing NA 3441 in more categorical terms than OA 3448(1), the new law reinforces the argument of Bartlett's critics that whenever there is a transfer of possession, the transferee acquires all of the transferor's rights or inchoate rights and, therefore, has "all the statutory characteristics." The comments also contain language to that effect. See NA 3424, comment (c); NA 3433, comment (b); NA 3442, comment (b). For a thorough discussion of Bartlett criticizing its departure from established practice, see Note, A Restricted Application of Civil Code Article 3482: Bartlett v. Calhoun, 43 LA. L. REV. 1221 (1983).

66. The substance of the article was implicit in OA 3448 and 3493-3496. For the difference between NA 3441 and OA 3448, see supra note 61. For the possible impact of NA 3441 on Bartlett, see supra note 65; infra note 70.

67. Despite its brevity, NA 3442 purports to incorporate the substance of OA 3493-3496. It succeeds for the most part by using broader, more technical language and through its comments. For in-
Art. 3494. Author, definition
By the word author in the preceding article, is understood the person from whom another derives his right, whether by a universal title, as by succession, or by particular title, as by sale, by donation, or any other title, onerous or gratuitous.
Thus, in every species of prescription, the possession of the heir may be joined to that of the ancestor, and the possession of the buyer to that of the seller.

Art. 3495. Tacking of possessions, continuity required
But to enjoy this advantage, the different possessions must have succeeded each other without interval or interruption.

Art. 3496. Continuity of possessions in case of succession
We do not consider as an interval between two possessions, that which takes place between

stance, the term "transferor," although not as broad as the word "author," is more meaningful and is broad enough to encompass a seller, a donor, or a testator. While the term cannot, in the abstract, encompass a predecessor who died intestate, it does so in context, i.e., when read together with NA 3441. The word "transferor" also conveys the idea, which was also implicit in the word "author," that there must be a "juridical link," i.e., a transfer between the two possessions. The only cases in which tacking is permitted in the absence of a "juridical link" are the cases falling under UA 794. Similarly, the word "interruption" has the technical meaning assigned to it earlier by NA 3434 para. 2, thus rendering OA 3495 unnecessary. Yet, one cannot be sure that compressing four articles into a single sentence will not result in losing some of the substance of the old law. Fortunately, the comments fill much of the vacuum.
the decease of the testator and the acceptance of the succession by the heir; the possession of the deceased being considered in law as continued in the person of his heir.\textsuperscript{68} 

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\textbf{NEW LAW} & \textbf{OLD LAW} \\
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\textbf{Louisiana Code of Civil Procedure}

\textbf{Art. 3660 [para. 1]. Same; possession}

A person is in possession of immovable property or of a real right therein, within the intendment of the articles of this Chapter, when he has the corporeal possession thereof, or civil possession thereof preceded by corporeal possession by him \textit{or his ancestors in title}, and possesses for himself, whether in good or bad faith, or even as a usurper.\textsuperscript{69}

\textbf{Art. 3443. Presumption of \textit{continuity of possession}}

One who proves that he had possession at different times is presumed to have possessed during the intermediate period.

\textbf{Art. 3492. Present and former \textit{possession, presumption of interim possession}}

The actual possessor, when he proves that he has formerly been in possession, shall be presumed also to have been in possession in the intermediate time.

\textsuperscript{68} The deletion of the article by the new Act does not entail a change in the law because the content of OA 3496 is found in other articles of the Civil Code pertaining to successions. \textit{See} UA 942-948. In fact, because of these articles, one should not, properly speaking, use the term "tacking" in cases of succession by universal title; in such cases, there is only one possession which is continued by the heirs rather than two possessions which need to be joined. \textit{See} the express language of UA 942, 943 para. 1, 945. For particular legatees, see NA 3441, comment (b).

\textsuperscript{69} \textit{(Emphasis added). Only the pertinent part of the article is provided.}
NEW LAW

Art. 3482. Good faith at commencement of possession
It is sufficient that possession has commenced in good faith; subsequent bad faith does not prevent the accrual of prescription of ten years.29

OLD LAW

Art. 3482. Good faith at commencement of possession sufficient
It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription.

70. Old article 3482 (its successor coincidentally bears the same number), was at the center of the dispute between the majority and the minority opinions in Bartlett v. Calhoun, 412 So. 2d 597 (La. 1982). The case involved the question of whether a bad faith possessor could tack the possession of her good faith predecessor to her own possession for the purposes of ten-year acquisitive prescription. Since Devall v. Chopin, 15 La. 566 (1840), Louisiana has been alone among civilian systems in allowing this kind of tacking. Devall relied on an obscure French commentator, Troplong, who represented a small minority in French doctrinal opinion. Overruling this “erroneous” jurisprudence, Bartlett realigned Louisiana with French law and the law of all systems sharing the Romanist tradition. Yet, neither this realignment, nor the stature of Planiol on which Bartlett so heavily relied, nor the inherent equity of the result in Bartlett, should be sufficient to justify the overruling of jurisprudence spanning 142 years, especially in the area of property law, unless accompanied by a thorough analysis of the policies militating in favor of one or the other solution and by a weighing of the interests that may be affected by such overruling. It is beyond the scope of this article to attempt such analysis here, but the reader is referred to a thorough discussion of Bartlett in Note, A Restricted Application of Civil Code Article 3482: Bartlett v. Calhoun, 43 La. L. Rev. 1221 (1983).

According to the majority in Bartlett, OA 3482 contemplates “one possession,” i.e., a possession by one person or by that person and his universal successors but not by his particular successors. When the article is read in isolation, the statement is certainly correct, but when the article is read together with the articles that allow transfer and tacking, the answer is not as simple. The crucial question then becomes: exactly what does the good faith possessor transfer to his bad faith transferee? He certainly transfers the “fact” of possession and its concomitant advantages, including the right to possess. See supra note 65. Does he—or should he be allowed to—transfer the inchoate rights generated by his good faith, i.e., the expectation that in due time he will become owner? The economic dynamics of a sale
Ten-Year Prescription of Immovables

Art. 3473. Prescription of immovables
The ownership of immovables is acquired by a longer or shorter time, accordingly as the possessor has been in good or bad faith, as laid down in the following paragraph.

certainly do not preclude and usually contemplate such a transfer. Whether the legal system should also recognize this fact may ultimately be a “moral” question. There is much to be said for the idea that the shorter prescription should be reserved for the protection of only those who at the beginning of their possession, i.e., at the time that they suffered the economic loss, were justifiably unaware of the defects in their acquisition. Yet, at some point, other factors ought to enter into the picture, such as the consideration that prescription does not only reward the possessor but is also designed to discourage the prolonged inertia of the record owner. Perhaps, with regard to the record owner, it should not make any difference whether his land was possessed adversely for ten years by one good faith possessor or by two possessors (the second of whom was in bad faith), so long as he (the record owner) was not in possession for ten years.

The new Act does not take a position on Bartlett. The arguments for or against Bartlett are the same under the new law as they were under the old. If anything, the new Act contains an indirect disapproval which can be discerned from the phrasing of NA 3441 and the comments. See supra notes 61, 65 and the reservations expressed therein. In any event, that the new Act, at the least, does not confirm Bartlett should prove satisfactory to its critics. By not openly taking sides on the issue, the new Act reserves to the court the opportunity to rethink this multifaceted problem and possibly reverse Bartlett or confine it to its own peculiar facts. Bartlett was peculiar in that the person seeking to tack the possession of her good faith transferor had previously sold the land to her transferor and was allegedly in bad faith at the time of both her purchases. These facts alone, plus the possibility of abuse inherent in them, may justify Bartlett more convincingly than any of the technicalities contained in the majority opinion. Although the opinion was phrased in broader terms than were necessary, a future court may find it advisable to confine the holding to cases involving such “double acquisitions.”
NEW LAW

Art. 3473. Prescription of ten years
Ownership and other real rights in immovables may be acquired by the prescription of ten years.

Art. 3474. Incompetents
This prescription runs against Absentees and incompetents, including minors and interdicts.\(^71\)

OLD LAW

Art. 3474. Immovables, possessor in good faith with just title
Immovables are prescribed for by ten years, when the possessor has been in good faith and held by a just title during that time.

Art. 3478. Immovables, possession in good faith with just title; accrual of prescription against incapables
He who acquires an immovable in good faith and by just title prescribes for it in ten years. This prescription shall run against interdicts, absentees and all others now excepted by law; and as to minors this prescription shall accrue and apply in nineteen years from the date of the birth of said minor; provided that this prescription once it has begun to run against a party shall not be interrupted in favor of any minor heirs of said party.

\(^71\) New article 3474 changes the law with regard to minors on the ground that "[m]inors should occupy the same position as other incompetents." NA 3474, comment (b). The impact of the change can be seen in the following illustration: P has been in uninterrupted possession of a tract of land since 1970 by virtue of a just title and in good faith. In 1970, M, the true owner of the land, was a five-year-old minor. Under the last sentence of OA 3478 P could not prescribe until 1984, i.e., when M would become nineteen years old. Under NA 3474, P prescribed in 1980. For further discussion of the treatment of minors by the new law, see infra notes 110-11. Applying NA 3474 retroactively entails serious constitutional problems which can be resolved only by giving M an additional "reasonable period" (perhaps a year from the enactment of the new law) within which to protect his rights. See Reichenphader v. Allstate Ins. Co., 418 So. 2d 648 (La. 1982); Lot v. Haley, 370 So. 2d 521 (La. 1979); see also Hargrave, Developments in the Law: Louisiana Constitutional Law, 1980-1981, 42 LA. L. REV. 596, 601 (1982).
NEW LAW

Art. 3475. Requisites
The requisites for the acquisitive prescription of ten years are: possession of ten years, good faith, just title, and a thing susceptible of acquisition by prescription.

Art. 3476. Attributes of possession
The possessor must have corporeal possession, or civil possession preceded by corporeal possession, to acquire a thing by prescription.

The possession must be continuous, uninterrupted, peaceable, public, and unequivocal. 72

OLD LAW

Art. 3479. Conditions necessary for good faith prescription
To acquire the ownership of immovables by the species of prescription which forms the subject of the present paragraph, four conditions must concur:
1. Good faith on the part of the possessor.
2. A title which shall be legal, and sufficient to transfer the property.
3. Possession during the time required by law, which possession must be accompanied by the incidents hereafter required.
4. And finally an object which may be acquired by prescription.

Art. 3487. Attributes of possession for ten-year prescription
To enable one to plead the prescription treated of in this paragraph, it is necessary that the possession be distinguished by the following incidents:
1. That the possessor shall have held the thing in fact and in right, as owner; when, however, it is only necessary to complete a possession already begun, the civil possession shall suffice, provided

72. Although much more concise than its predecessor, NA 3476 incorporates, with only one exception (see infra note 73), the substance of OA 3487. This is possible because all of the attributes of possession have already been defined in detail in the title dealing with possession. See NA 3435-3436. The same is true for many other articles which appeared in this section of the old Code. See, e.g., OA 3488-3496, 3498 (all of which now appear in one form or another in the title on possession; see NA 3476 comment (h)).
NEW LAW

it has been preceded by the corporeal possession.

2. That the possession shall have been continuous and uninterrupted, peaceable, public and unequivocal; a clandestine possession would give no right to prescribe; but he who possesses by virtue of a title can not be considered as a clandestine possessor, for his title leads to the supposition that the possession commenced in good faith, and that is sufficient to enable him to plead prescription.

OLD LAW

TEN-YEAR PRESCRIPTION: THE GOOD FAITH REQUIREMENT

Art. 3480. Good faith, definition
The good faith, spoken of in the preceding article, is defined in the chapter which treats of possession.

Art. 3480. Good faith
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.\(^7\)

Art. 3451. Possessor in good faith, definition
The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact;

73. This was a totally incorrect “supposition” and it has been suppressed for good reason. The fact that someone possesses by virtue of title neither guarantees nor implies his good faith. It never did. The statement that one who possesses by virtue of title cannot be considered a clandestine possessor is a useful principle which is preserved in the comments. See NA 3476 comment (g).

74. Comment (a) to NA 3480 states that the article “changes the law,” but it is unclear how, or to what extent, it does so. From a comparison of the article with its predecessor, OA 3451, and a careful reading of the comments, two changes emerge: (1) Good faith and just title are disassociated and (2) good faith is to be determined on the
POSSESSION AND PRESCRIPTION

NEW LAW

as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which, in fact, belongs to another.

OLD LAW

basis of completely objective criteria. Even under OA 3451, there should have been no question that the existence of good faith was to be determined in the light of objective considerations—"just reason to believe." However, in dealing with the requirement of just title, OA 3484 used the words "honestly believed," thus injecting a subjective element into the determination of good faith, while also confusing the two analytically distinct requirements of just title and good faith.

The new law clarifies both issues by segregating the question of just title from that of good faith and by declaring in categorical terms that good faith is to be determined "in light of objective considerations," NA 3480. In so doing, the new law overrules a small minority of old cases that attributed too much significance to the possessor's subjective beliefs in determining good faith. See NA 3480, comment (a). The movement toward more objective criteria which is reflected in the new Act, coupled with the abolition of the doctrine of "error of law," see infra note 75, may have more far-reaching ramifications than one might initially suspect. According to the comments, see NA 3480, comment (d); NA 3481, comment (e), the revision "does not affect the public records doctrine." This is true in the sense that the new Act does not purport to affect directly the public records doctrine. However, through its emphasis on "reasonable" and "objective" criteria, the Act has probably opened the door for a reconsideration of the public records doctrine, as well as of some other related jurisprudential rules.

The first such rule, not technically part of the public records doctrine, is the rule providing that the presumption of good faith is not affected by the buyer's failure to conduct a title search "unless he knew of facts sufficient to excite inquiry." See Attaway v. Culpepper, 386 So. 2d 674 (La. App. 3d Cir. 1980). Whatever justification might have existed for such a rule in nineteenth century rural Louisiana, the rule makes little sense today, when title searches are (or should be) standard practice in ordinary onerous transactions. An objective, reasonable person doctrine would seem to dictate a reversal of the old rule, so that the presumption of good faith would now depend on whether or not the possessor's failure to conduct a title search is reasonable. In ordinary onerous acquisitions the failure to conduct a title search ought to be seriously considered by the court, unless
NEW LAW

Art. 3452. Possessor in bad faith, definition
The possessor in bad faith is he who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective.

Art. 3481. Presumption of good faith
Good faith is presumed.
Neither error of fact nor error of

OLD LAW

Art. 3452. Possessor in bad faith, definition
The possessor in bad faith is he who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective.

Art. 3481. Presumption of good faith; burden of proving bad faith
Good faith is always pre-

the possessor shows facts and circumstances justifying his otherwise imprudent behavior, e.g., a bond of confidence between seller and buyer deriving from family relationships or long friendship, the seller's long and notorious possession, etc.

With regard to the public records doctrine proper, the extent of or the need for change will depend on how one defines the doctrine under the old law. If, as the comments assume, the doctrine means that one who conducts a title search "is charged with the knowledge that a reasonable person would acquire from the public records... [and that] the presumption of good faith may be rebutted," NA 3481 comment (e) (emphasis added), no change will be necessary. If, however, the doctrine means that the person who undertakes a title search is charged with knowledge of any defect in the seller's chain of title which is contained in the records, regardless of whether such defect would be discoverable by a reasonably thorough search, then changes will be necessary in order for the doctrine to conform to the reasonable person standard.

Finally, the related jurisprudential rule which imputes to the buyer the constructive knowledge received by the title examiner or the attorney through the operation of the public records doctrine may also have to be reconsidered. See Martin v. Schwing Lumber & Shingle Co., 228 La. 175, 81 So. 2d 852 (1955). The authority behind the rule is not as solid as is commonly assumed, and the law of agency may aid in preventing the operation of the rule in all those cases where it can be shown that the title examiner is not a true agent of the buyer, but is instead either an independent contractor or the agent of the finance company.
NEW LAW

law defeats this presumption. This presumption is rebutted on proof that the possessor knows, or should know, that he is not owner of the thing he possesses.

OLD LAW

sumed in matters of prescription; and he who alleges bad faith in the possessor, must prove it.

Art. 1846 [§ 3]. Invalidity of contract for errors of law, exceptions

Error in law, as well as error in fact, invalidates a contract, where such error is its only or

75. The second sentence of NA 3481 abrogates OA 1846(3), and thus eliminates the foundation of the jurisprudential rule that one who buys under error of law cannot be in good faith. See Dinwiddie v. Cox, 9 So. 2d 68 (La. App. 2d Cir. 1942). Although the change is commendable, its impact cannot be easily determined. What NA 3481 means in the abstract is that error of law does not necessarily defeat the presumption of good faith. The presumption is rebutted only if—regardless of or despite an error of law—the possessor knew or should have known that he was buying from a nonowner. How this article will work in practice may well be a matter of speculation. One could predict that the jurisprudence will eventually differentiate between errors of law which are excusable and which do not destroy the presumption of good faith and errors of law which are inexcusable and which do destroy the presumption of good faith (one is not blind who does not want to see). The determination of whether a particular error of law falls within one or the other category will have to be made "in light of objective considerations." Under this scheme the old terms "moral good faith" and "legal bad faith" are entirely dispensable. One is either in good faith or in bad faith. This is apparently the meaning of comment (c) to NA 3481, which provides that the article "overrules legislatively the doctrine of legal bad faith." What may create some confusion is the erroneous citation in the same comment of Martin v. Schwing Lumber & Shingle Co., 228 La. 175, 81 So. 2d 852 (1955), as an error-of-law case which is intended to be overruled. Martin is instead a case of bad faith imputed to the possessor through the operation of the public records doctrine and, as such, is an example of the kind of bad faith that was sometimes also referred to as "legal" bad faith. This kind of "legal" bad faith, in the sense of bad faith imputed by law to a person despite his subjective good faith, is not overruled but is rather enhanced by the new law's emphasis on objective considerations.
NEW LAW

principal cause, subject to the following modifications and restrictions:

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

OLD LAW

Art. 3482. Good faith at commencement of prescription

It is sufficient that possession has commenced in good faith; subsequent bad faith does not prevent the accrual of prescription of ten years. 76

Art. 3482. Good faith at commencement of possession sufficient

It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription.

76. For purposes of prescription, good faith and just title are analytically distinct requirements, though both must be met in order to enable the possessor to prescribe in ten years. Thus a possessor may be technically in good faith even though he possesses under a putative title, i.e., no title at all, the defects of which he is not aware of. Such a possessor will, of course, not be able to prescribe by the ten-year prescription. On the other hand, this same possessor cannot be in good faith for purposes of accession, since under the law of accession good faith depends on the existence of a just title. See UA 487. Thus, through the two different definitions of good faith in UA 487 and NA 3480, the law ensures that a person who under UA 487 qualifies as a good faith possessor for accession purposes will also be able eventually to prescribe by the ten-year prescription. This symmetry of treatment seems to be the only reason for the two different definitions of good faith. "If it were otherwise, one would be allowed to retain fruits but he could not acquire the ownership of the thing in . . . ten years." UA 487, comment (c). This author does not find the reasoning behind this scheme to be very compelling. It is not clear, for instance, why a person who, as a result of an honest mistake, builds
on the land of his neighbor and who cannot prescribe because he lacks title should also be treated as a bad faith possessor for purposes of accession, with all the harsh consequences imposed on him by UA 497. (UA 670 corrects this inequity only in part). Yet, individual preferences aside, it must be recognized that this has always been the scheme of the Civil Code.

The amendment of OA 3483-3486 by NA 3483, which now requires that in order to qualify as a just title for purposes of prescription the juridical act must be in writing and recorded, raises a new question: Do these new requirements (writing and recordation) apply to the just title referred to in UA 487? The principles of intertemporal law suggest a negative answer on the ground that a given legal rule must be interpreted against the background of the law existing at the time of the rule's enactment and not later. Since, at the time of the enactment of UA 487 in 1979 (or of the former article 503 of the Civil Code of 1870 and its predecessor of the Civil Code of 1825), OA 3483-3486 did not require recordation, such requirement ought not to be imposed unless it is established that the legislative intent behind NA 3483 is to define just title for all purposes, including accession. Although no such intent can be gathered from the comments to NA 3483, the comments under UA 487 seem to supply that intent by seeking to ensure unity of treatment of possessors by the law of accession and prescription. The symmetry of the system will be disturbed unless UA 487 is interpreted in light of NA 3483. In practice this means that in order for someone to qualify as a good faith possessor of an immovable, one has to have a recorded act translativ of ownership. This result is required by the established scheme of the Civil Code. Whether the result is sound functionally depends on the soundness of the scheme itself, and this author for one is not prepared to defend it. If one accepts the view that the underlying basis of UA 486-489, 496-497, and 527-528 is the general principle of unjust enrichment, that ought to be a sufficient reason to differentiate accession from prescription.

Finally, another basic difference between good faith for purposes of prescription and for purposes of accession is that while subsequent bad faith does not prevent the accrual of prescription, see NA 3482, OA 3482, subsequent bad faith affects the possessor's rights to the fruits and other improvements he may be entitled to claim under the law of accession. Thus, a possessor accounts to the owner differently during the period of his good faith possession than during the period of his subsequent bad faith possession. See UA 486, 496-497, 527-528. Of course, this makes a difference only when the possessor is unable for some reason to complete his prescription, because if he does so, he acquires ownership of the thing retroactively to the beginning of his possession.
NEW LAW

Art. 487.
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.7

OLD LAW

Art. 503.
He is 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.

TEN-YEAR PRESCRIPTION: THE REQUIREMENT OF JUST TITLE

Art. 3483. Just title
A just title is a juridical act, such as a sale, exchange, or donation, sufficient to transfer ownership or another real right. The act must be written, valid in form, and filed for registry in the conveyance records of the parish in which the immovable is situated.8

Art. 3483. Just title, definition
To be able to acquire by the species of prescription mentioned in this paragraph, a legal and transferable title of ownership in the possessor is necessary; this is what is called in law a just title.

78. New article 3483 reproduces in condensed form most of the substance of OA 3483-3486 with two substantive changes, i.e., the title must be in writing and must be recorded. The old law required that in order to serve as just title the juridical act had to be “valid in point of form,” OA 3486(1), which for immovables meant that, at the least, the act had to be in writing. However, under UA 2275 and 2440-2441 a “verbal sale . . . shall be valid against the vendor . . . who confesses it when interrogated under oath.” UA 2275. It was not clear whether such a sale could qualify as just title. New article 3483 clarifies the question (or changes the law) by requiring the sale to be in writing. The old law also did not require recordation on the theory that the owner is put on notice by something much more notorious than recordation, i.e., the possessor’s adverse and open possession. New article 3483 changes the law by requiring recordation. The change is made “in the interest of certainty of ownership,” NA 3483, comment (d), which probably should be understood as “the
certainty of the title examiner." It does not seem likely that the purpose of the new requirement is to put the record owner on notice about adverse claims to his land, because an owner is not required to check the public records at regular intervals, and when he does so he is not likely to discover the adverse recordation unless he has information leading to the adverse possessor. But see supra note 38. Be that as it may, by making the ten-year prescription unavailable to possessors with unrecorded title, record owners are protected indirectly, and perhaps this is what the new law intends to accomplish. In any event, since statistically the vast majority of titles are both written and recorded, the new law is not likely to cause a major upheaval in that respect. What may cause problems is a statement in comment (d) to NA 3483 which provides that "prescription commences to run from the date of filing for registry rather than from the date of entry into possession." This statement entails a change in the law going beyond the letter and perhaps the spirit of NA 3483. See generally Note, supra note 4, at 1082. The ramifications of this change are shown in the following illustrations.

(1) On January 1, 1984, B in good faith acquires a just title from A (also a good faith possessor) and enters into corporeal possession on the same date. Unless he records his title, B will never be able to prescribe by the ten-year prescription, but only by the thirty-year prescription. Until the thirty-year prescription accrues, B will be vulnerable to a petitory action by the true owner. Since B will be lacking one of the "new" elements of the ten-year prescription, he will presumably not be able to tack A's possession for the purpose of the ten-year prescription. See discussion of Bartlett, 412 So. 2d 597, supra notes 65, 70.

(2) Same facts as above, except that B records his title on January 3, 1985. According to comment (d) of NA 3483, B will begin prescribing on that date rather than on the date he entered into possession, January 1, 1984. Again, since the one year of possession without recordation (here the year 1984) does not count for purposes of the ten-year prescription, B will presumably not be able to tack A's possession, and thus B will not prescribe until January 3, 1995. (In a strange way the year 1984 represents an interruption of prescription even though there is no interruption of possession, a seemingly anomalous phenomenon). A better solution might be to state that prescription does not commence running until B records his title, but that when he does, prescription includes retroactively the time B possessed without recordation.

(3) Same dates as above, but the facts are reversed. B records his title on January 1, 1984, but does not enter into corporeal possession until January 3, 1985. Provided that nobody possessed adversely to B during the entire period of January 1, 1984 to January 3, 1985,
NEW LAW

Art. 3484. Title from person believed to be owner

By the term *just title* in cases of prescription, we do not understand that which the possessor may have derived from the true owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person whom he *honestly believed* to be the real owner, provided the title were such as to transfer the ownership of the property.

Art. 3485. Title of nature to transfer ownership

And in this case, by the phrase *transfer the ownership of the property*, we understand not such a title, as shall have really transfer-

OLD LAW

B will begin prescribing on January 1, 1984 and will also be able to tack A's possession. However, if B was dispossessed during the entire period of January 1, 1984 to January 3, 1985, his prior recordation will not help, since recordation without possession does not count towards prescription. In such event, B will start prescribing on the date he enters into possession, January 3, 1985. Tacking will again be precluded.

To be sure, neither the rule requiring recordation of the just title nor the "rule" that prescription does not commence until recordation should be applied retroactively to persons who *completed* the ten-year prescription before the effective date of Act 187, January 1, 1983. On the other hand, the new rules could presumably be applied (retroactively?) to persons who began but *did not complete* their prescription before January 1, 1983, on the theory that, until prescription accrues, the possessor does not have a vested property right but only expectations or inchoate rights which can be curtailed by new legislation without any constitutional problems.

79. (Emphasis added). The italicized language pertains to the good faith requirement rather than to just title. For the reasons this language is not included in the new law, see *supra* note 74.
NEW LAW

red the ownership of the property, but a title which by its nature, would have been sufficient to transfer the ownership of the property, provided it had been derived from the real owners, such as a sale, exchange, legacy or donation.

Thus, prescription could not be acquired under a title resulting from a lease or loan, because these contracts do not transfer the ownership of the property.

Art. 3486. Additional requisites of title

It is necessary besides:

1. That the title be valid in point of form; for if the possession commenced by a title void in that respect, it can not serve as a foundation for prescription.

2. That the title be certain; thus, every possessor, who can not fix exactly the origin of his possession, can not prescribe.

3. That the title be proved; for as it consists in a fact, it is not presumed, and every man who founds his title on a written instrument must produce it, or prove the contents, if it be lost.80

Art. 3484. Transfer of undivided part of an immovable

A just title to an undivided interest in an immovable is such only as to the interest transferred.81

80. Sections (2) and (3) of OA 3486 are not reproduced in the new law as self-evident. NA 3483, comment (e).

81. New article 3484 is new, but it does not change the law. The...
**NEW LAW**

Art. 3485. Things susceptible of prescription

All private things are susceptible of prescription unless prescription is excluded by legislation.

**OLD LAW**

Art. 3497. Things susceptible of alienation

The last condition required for prescription is, that the thing, which is the object of it, be susceptible by its nature of alienation, and the alienation of which is not prohibited by law.

**LOUISIANA REVISED STATUTES 9:5630:**

**ACTIONS BY UNRECOGNIZED HEIRS**

**LA. R.S. 9:5630. Actions by unrecognized successor against third persons**

A. An action by a person who is a successor of a deceased person, and who has not been recognized as such in the judgment of possession rendered by a court of competent jurisdiction, to assert an interest in an immovable formerly owned by the deceased,

**LA. R.S. 9:5682. Actions by unrecognized heirs or legatees against third persons**

A. An action by a person who is an heir or legatee of a deceased person, and who has not been recognized as such in the judgment of possession rendered in the succession of the deceased by a court of competent jurisdiction.

Comments to NA 3484 contain useful illustrations of the operation of the article. They can be summarized as follows.

1. A, the owner of a 1/3 undivided share in Blackacre, transfers his 1/3 share to B. B becomes owner of the 1/3, but does not have a just title to the other 2/3.

2. Same facts, except that A sells the whole of Blackacre to B. Now B is owner of the 1/3 and has just title to the other 2/3.

3. X, who does not have any rights to Blackacre, transfers an undivided 1/4 of Blackacre to Z. Z has a just title to the 1/4 but no just title to the other 3/4.

82. Although the new Act does not address this subject, it is dealt with here because of its obvious relevance to acquisitive prescription. LA. R.S. 9:5682 was first enacted in 1960 and was amended for the first time in 1975. See under OLD LAW in text. In 1981, it was drastically revised and renumbered by Act 721. See under NEW LAW in text. The only amendment made by Act 37 of 1982, was the substitution of "acquisitive" for "liberative" in subsection (B) of LA. R.S. 9:5630. In addition to semantical changes, the new law, i.e., 1981 La. Acts,
against a third person who has acquired an interest in the immovable by onerous title from a person recognized as an heir or legatee of the deceased in the judgment of possession, or his successors, is prescribed in two years from the date of the finality of the judgment of possession.

B. This section establishes an acquisitive prescription, and shall be applied both retrospectively and prospectively.

No. 721, § 1; 1982 La. Acts, No. 37, made the following substantive changes:

1. It reduced prescription from ten to two years;
2. It limited the scope of the prescription from “any property” to immovables only—this limitation became necessary because of the reduction of prescription from ten to two years;
3. It made prescription unavailable to those defendants who acquired from the heirs by a gratuitous rather than an onerous title;
4. It eliminated the requirement that the defendant be in “continuous, uninterrupted, peaceable, public possession of the property”;
5. It changed the characterization of the prescription from liberative to acquisitive. Until 1981, the prescription of LA. R.S. 9:5630 was expressly declared to be liberative, which was a conceptual anomaly, since this was the only liberative prescription which required some activity (possession) by the debtor (the “third person” who acquired from the recognized heirs). The 1981 elimination of the requirement of possession resolved the conceptual problem, but not a more serious practical one: If the “third person” who bought from the recognized heirs was dispossessed by a squatter (unrelated to the recognized or the unrecognized heirs) for more than a year, the “third person” could not bring the petitory action against the squatter. The liberative prescription of LA. R.S. 9:5630 protected the plaintiff against the unrecognized heirs and those in privity with them but did not vest in him ownership good against the world. In order to resolve the impasse, Act 37 of 1982 amended LA. R.S. 9:5630, so that the prescription is now acquisitive. The old conceptual anomaly is now revived in a different form: This is the only acquisitive prescription which (in addition to being painfully short) does not require possession.
NEW LAW

and prospectively; however, any person whose rights would be adversely affected by this Section shall have one year from September 11, 1981 within which to assert the action described in Subsection A of this Section and if no such action is instituted within that time, such claim shall be forever barred.

C. “Third person” means a person other than one recognized as an heir or legatee of the deceased in the judgment of possession.

LA. R.S. 9:5631. Minors, interdicts and posthumous children

The prescription herein provided shall accrue against all persons including minors, interdicts, and posthumous children.

OLD LAW

peaceable, public, and unequivocal possession of the property for such period after the registry of the judgment of possession in the conveyance records of the parish where the property is situated, irrespective of the good faith or bad faith of the third person’s ancestors in title, including the heir or legatee of the deceased recognized as such in the judgment of possession.

B. This Section establishes a liberative prescription, and shall be applied both retrospectively and prospectively; provided, however, that an action by any person against whom the period of liberative prescription herein provided would otherwise already have accrued except for the provisions of this Section, must be brought within one year from and after August 1, 1975.

C. As used herein, “third person” means a person other than one recognized as an heir or legatee of the deceased in the judgment of possession.

LA. R.S. 9:5683. Minors

The prescription provided herein shall accrue against a minor either as provided in R.S. 9:5682, or in nineteen years from the date of his birth, whichever is longer and shall accrue against an interdict as provided in R.S. 9:5682; but once the prescription provided in R.S. 9:5682 has commenced to run against an adult, it is not interrupted by the minority of any of his heirs on his death.
NEW LAW

OLD LAW

**La. R.S. 9:5684. Retroactive application**

This act shall apply retroactively, but any person whose rights would otherwise be prescribed hereunder has a period of six months from the effective date hereof to assert such rights judicially.

**Thirty-Year Prescription of Immovables**

*Art. 3486. Immovables; prescription of thirty years*

Ownership and other real rights in immovables may be acquired by the prescription of thirty years without the need of just title or possession in good faith.

*Art. 3475. Immovables, possessor without title or good faith*

Immovables are prescribed for by thirty years without any title on the part of the possessor, or whether he be in good faith or not.

*Art. 3499. Immovables, possession without title or good faith*

The ownership of immovables is prescribed for by thirty years without any need of title or possession in good faith.

*Art. 3500. Attributes of possession for thirty-year prescription*

The possession on which this prescription is founded must be continuous and uninterrupted during all the time; it must be public and unequivocal, and under the title of owner. 83

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83. The substance of OA 3500 is reproduced in NA 3435, 3476.
Art. 3487. Restriction as to extent of possession
For purposes of acquisitive prescription without title, possession extends only to that which has been actually possessed.

Art. 3501. Preservation of possession once acquired
The possession necessary for this species of prescription, when it has commenced by the corporal possession of the thing, may, if it has not been interrupted, be preserved by external and public signs, announcing the possessor's intention to preserve the possession of the thing, as the keeping up of roads and levees, the payment of taxes, and other similar acts.84

Art. 3502. Vestiges of works or house as preserving possession
A man may even retain the civil possession of an estate, sufficient to prescribe, so long as there remain on it any vestiges of works erected by him, as, for example, the ruins of a house.

Art. 3503. Restriction as to extent of possession
How favorable soever prescription may be, it shall be restricted within just limits. Thus, in the prescription of thirty years, which is acquired without title, it extends only to that which has been actually possessed by the person pleading it.

84. Old articles 3501-3502 reappear partially in NA 3431-3432. They are discussed supra note 30.
NEW LAW

Art. 3488. Applicability of rules governing prescription of ten years
The rules governing acquisitive prescription of ten years apply to the prescription of thirty years to the extent that their application is compatible with the prescription of thirty years.

OLD LAW

Art. 3505. Applicability of rules governing ten-year prescription
All the rules established in the preceding paragraph with regard to the prescription of ten years, are applicable to the prescription of thirty years, except in the provisions contained in the present paragraph, which are contrary to or incompatible with them.

MOVABLES: ACQUISITIVE PRESCRIPTION; REVENDICATION OF LOST OR STOLEN THINGS

Art. 3489. Movables; acquisitive prescription
Ownership and other real rights in movables may be acquired either by the prescription of three years or by the prescription of ten years.

Art. 3490. Prescription of three years
One who has possessed a movable as owner, in good faith, under an act sufficient to transfer ownership, and without interruption for three years, acquired ownership by prescription.

Art. 3476. Movables
The ownership of movables is prescribed for after the lapse of three years.85

Art. 3506. Movables, possession in good faith with just title; stolen or lost things excepted
If a person has possessed in good faith and by a just title, as owner, a movable thing, during three successive years without interruption, he shall acquire the ownership of it by prescription unless the thing was stolen or lost.86

85. The article was obviously incomplete. It was supplemented by OA 3509 providing for ten-year prescription.
86. (Emphasis added). Lost or stolen things may now be acquired by the three-year prescription since the italicized language in OA 3506 is missing from NA 3490. To be sure, the thief himself may not prescribe by the shorter prescription since he is in bad faith, but his transferee may prescribe by the shorter prescription if in good faith.
NEW LAW

Art. 3491. Prescription of ten years
One who has possessed a movable as owner for ten years acquires ownership by prescription. Neither title nor good faith is required for this prescription.

Art. 521. Lost or stolen thing
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.87

Art. 524. Recovery of lost or stolen things
The owner of a lost or stolen movable may recover it from a possessor who bought it in good

OLD LAW

Art. 3509. Movables, possession without title or good faith
When the possessor of any movable whatever has possessed it for ten years without interruption, he shall acquire the ownership of it without being obliged to produce title or to prove that he did not act in bad faith.

Similarly, the finder of a lost movable acquires its ownership by occupancy in three years upon compliance with the requirements of NA 3419 ("diligent effort," etc.), but his good faith transforee may acquire by the three-year prescription without having to comply with NA 3419.

The change comes as a surprise, especially since only a year earlier the legislature had repealed the short-lived but milder and much sounder Civil Code article 520. Article 520 allowed a nonowner entrusted with possession of a movable by the owner to convey ownership of the thing to a transforee in good faith and for fair value. Article 520 was milder than NA 3490 in the sense that it excluded lost or stolen things, see UA 521, but was harsher on the owner in the sense that it vested immediate ownership in the transforee. See Note, supra note 4, at 1084.

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<th>NEW LAW</th>
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<td>faith at a public auction or from a merchant customarily selling similar things on reimbursing the purchase price.**</td>
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<td>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.</td>
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88. Added by 1979 La. Acts, No. 180, § 1. The combined reading of NA 3490-3491 and UA 524 and 526 produces the following results: As a general rule, the true owner may revendicate the thing in the hands of any possessor, see UA 526, who has not yet acquired ownership by prescription, NA 3490-3491, or occupancy, NA 3419, without reimbursing the purchase price. However, in one situation the owner's right to recover the thing is conditioned on his ability and willingness to reimburse to the defendant the purchase price. UA 524, 529. This happens when all the following requirements are met: (1) the thing was stolen (theft is defined by UA 521 in more narrow terms than in criminal law) and (2) the thing was subsequently bought by the defendant: (a) in good faith and (b) "at a public auction or from a merchant customarily selling similar things." UA 524. If one of the above requirements is missing, the owner may recover the thing without reimbursing the purchase price at any time before the accrual of the three-year or ten-year prescription, as the case may be. Revendication is altogether excluded when the thing is "sold by authority of law." UA 524 para. 2; see Note, supra note 4, at 1084.

The Blackwell rule, see Securities Sales Co. v. Blackwell, 167 La. 667, 120 So. 45 (1929), which provided that reimbursement of the purchase price was required only if the thing was recovered after three years from the purchase but not before, was legislatively overruled in 1979 by UA 524. The repeal of article 520 by Act 125 of 1981 raised a viable argument that Blackwell was or should be resurrected. The new Act decreases the need for a Blackwell-type rule since lost or stolen things may now be acquired by the three-year prescription and thus cannot be recovered after the lapse of three years. This approach, however, does not cover cases where, because of some reason such as an inability to tack, the prescription accrues more than three years from the loss by or theft from the owner.
NEW LAW

Art. 3419. Lost things
One who finds a corporeal movable that has been lost is bound to make a diligent effort to locate its owner or possessor and to return the thing to him.

If a diligent effort is made and the owner is not found within three years, the finder acquires ownership.

OLD LAW

Art. 3422. Finding lost things
If he, who has found a movable thing that was lost, having caused it to be published in newspapers, and having done all that was possible to find out the true owner, can not learn who he is, he remains master of it till he, who was the proper owner, appears and proves his right; but if it be not claimed within ten years, the thing becomes his property, and he may dispose of it at his will.

GENERAL PRINCIPLES OF PRESCRIPTION

Art. 3445. Kinds of prescription
There are three kinds of prescription: acquisitive prescription, liberative prescription, and prescription of nonuse.

Art. 3457. Prescription; general definition
Prescription is a manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law.

Each of these prescriptions has its special and particular definition.

89. New articles 3445-3472 dealing with the general principles of prescription precede logically and actually the articles on acquisitive prescription. Nevertheless, the order of presentation was reversed in this paper in order to demonstrate more clearly the interdependence between the articles on possession and those on acquisitive prescription.

90. For the prescription of nonuse, which is now set out as a third kind of prescription, see infra note 95. For peremption, see infra note 109.
NEW LAW

Art. 3446. Acquisitive prescription
Acquisitive prescription is a mode of acquiring ownership or other real rights by possession for a period of time.

Art. 3447. Liberative prescription
Liberative prescription is a mode of barring of actions as a result of inaction for a period of time.

OLD LAW

Art. 3458. Acquisitive prescription, definition
The prescription by which the ownership of property is acquired, is a right by which a mere possessor acquires the ownership of a thing which he possesses by the continuance of his possession during the time fixed by law.

Art. 3459. Liberative prescription, definition
The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim.

91. The use of the word “ownership” by OA 3457-3458 might create the impression that real rights other than ownership could not be acquired by prescription. This was, of course, not true since usufruct and apparent servitudes may be acquired by prescription. See UA 544, 742; see also NA 3446, comment (b). New article 3446 is more accurate in using the words “ownership or other real rights.”

92. According to LA. CODE Civ. P. art. 421 an action is “a demand for enforcement of a legal right,” and according to comment (c) to NA 3447 “[i]t is the equivalent of the Roman actio expressed in terms of substantive law.” Upon accrual of prescription, the action is extinguished but there subsists a natural obligation. See UA 1758(3). Compare NA 3448 (prescription of nonuse) with NA 3458 (peremption).

93. It was not true that “every species of action” was barred by liberative prescription. Petitory actions and boundary actions were imprescriptible despite the language of OA 3459 and UA 3548 (in force until January 1, 1984). See UA 481 para. 2; Buckley v. Catlett, 203 La. 54, 13 So. 2d 384 (1943) (petitory action); UA 788 (boundary action). Thus NA 3447 is more accurate in speaking of “actions” rather than “every species of action.” See NA 3447, comment (b), which also explains all the other phraseological differences between that article and OA 3457 and 3459.
Art. 3528. Liberative prescription, release of debtor

The prescription which operates a release from debts, discharges the debtor by the mere silence of the creditor during the time fixed by law, from all actions, real or personal, which might be brought against him.¹⁴

Art. 3448. Prescription of nonuse

Prescription of nonuse is a mode of extinction of a real right other than ownership as a result of failure to exercise the right for a period of time.¹⁵

Art. 3529. Liberative prescription of real rights

This prescription has also the effect of releasing the owner of an estate from every species of real rights, to which the property may have been subject, if the person in possession of the right has not exercised it during the time required by law.

94. Civil Code arts. 3528-3529 were not affected by Act 187 of 1982, but have in the meantime been eliminated by Act 173 of 1983, effective January 1, 1984.

95. The prescription of nonuse is now set out as a third kind of prescription rather than as a species of liberative prescription, as it was under the old law. See UA 3529. This approach does not entail a substantive change in the law. Although the prescription of nonuse partakes of the nature of both the liberative and the acquisitive prescriptions, it is different from both. It is similar to the liberative prescription in the sense that the mere inaction of the holder of the real right (who is analogous to the creditor), without any adverse activity by the person whose thing is burdened with the real right (who is analogous to the debtor), liberates the latter. Yet, it is different from liberative prescription in that the accrual of the prescription of nonuse extinguishes the real right itself, whereas accrual of liberative prescription bars only the remedy. See supra note 92. The prescription of nonuse is also similar to acquisitive prescription in the sense that upon accrual, a real right is lost by one person and acquired by another. Yet, in the prescription of nonuse the right is lost because of the holder's inaction alone, whereas in acquisitive prescription the loss of ownership requires not only the
### NEW LAW

**Art. 3457. Prescription established by legislation only**

There is no prescription other than that established by legislation.

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**Art. 3452. Necessity for pleading prescription**

Prescription must be pleaded. Courts may not supply a plea of prescription.  

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**Art. 3453. Rights of creditors and other interested parties**

Creditors and other persons having an interest in the acquisition of a thing or in the extinction of a claim or of a real right by prescription may plead prescription, even if the person in whose favor prescription has accrued renounces or fails to plead prescription.

### OLD LAW

**Art. 3470. Prescription established only by Code or statute**

There are no other prescriptions than those established by this Code and the statutes of this State now in force.

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**Art. 3463. Necessity for pleading prescription**

Courts can not supply the plea of prescription.

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**Art. 3464. When prescription may be pleaded**

Prescription may be pleaded in every stage of a cause, even on the appeal, but it ought to be pleaded expressly and specially before the final judgment.

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**Art. 3466. Right of creditors and other interested parties to plead prescription**

Creditors and all other persons, who may have an interest in the acquiring of an estate, or the extinguishment of an obligation by prescription, shall have a right to plead it, even in case the person claiming such estate, or bound by such obligation, should renounce such right of prescription.

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owner's inaction but also the possessor's adverse activity. By setting prescription of nonuse aside as a separate kind of prescription, the new law facilitates a better understanding of the function of the prescription of nonuse.

96. Compare NA 3452 with NA 3460 (peremption).

97. The deletion of OA 3464-3465 does not entail any substantive change. The matter is now governed by LA. CODE CIV. P. arts. 928 (para. 2), 929, 931, 2163.
NEW LAW

RENUNCIATION; EXTENSION; ACKNOWLEDGMENT

Art. 3449. Renunciation of prescription
Prescription may be renounced only after it has accrued.

OLD LAW

Art. 3460. Renunciation of prescription
One can not renounce a prescription not yet acquired, but it is lawful to renounce prescription when once acquired.

98. Because NA 3449-3451, 3464 and 3471 are closely interrelated, they are treated together here, although they are located in different sections of the Code.

(1) Renunciation is the abandonment of the debtor's right to avail himself of the protection of prescription when prescription accrues. At the time the obligation is contracted and until prescription accrues, the debtor is peculiarly vulnerable to the pressure of the creditor. In order to protect debtors and to discourage coercive practices by creditors, the law prohibits renunciation before accrual of prescription. When prescription accrues, however, the debtor is no longer vulnerable to the creditor. This is why the law allows the debtor at this point, but not before, to voluntarily renounce prescription and to perform his natural obligation. See NA 3449; OA 3460.

(2) An agreement purporting to lengthen prescription is tantamount to renunciation, the only difference being one of degree. Instead of renouncing prescription altogether, the debtor simply agrees to plead prescription at a later time than he would be allowed to by law. The jurisprudence has recognized the similarity and has declared such agreements invalid. See E.L. Burns Co. v. Cashio, 302 So. 2d 297 (La. 1974). New article 3471 confirms that jurisprudence. For agreements purporting to shorten prescription, see infra note 100.

(3) Acknowledgment is the recognition by the debtor of his obligation to perform. When it takes place before accrual, acknowledgment interrupts prescription, even if not accompanied by a promise to perform. Such a promise is unnecessary since, until prescription accrues, there exists a binding, legal obligation. Acknowledgment prolongs the life of the obligation by the amount of time that has run before the moment acknowledgment takes place. In this sense, it is similar to agreements lengthening prescription (which are prohibited by NA 3471), except that in the latter the extent by which prescription is prolonged is fixed by the agreement itself and may purport to be longer than would be possible with an acknowledgment. The difference may be illustrated by the following two hypotheticals. (a) In a five-
NEW LAW

Art. 3450. Express or tacit renunciation
Renunciation may be express or tacit. Tacit renunciation results from circumstances that give rise to a presumption that the advance

OLD LAW

Art. 3461. Express or tacit renunciation
Such renunciation of prescription is either express or tacit.
A tacit renunciation results from a fact which gives a presumption

year prescription that commenced in 1980, the debtor acknowledges his debt in 1983. Since acknowledgment interrupts prescription, a new five-year prescription will commence in 1983 and will accrue in 1988. The extent by which prescription will be prolonged in this case is three years (1985-88), corresponding to the time that had run before interruption (1980-83). (b) Same facts as above, except that in 1983 the debtor executes a juridical act purporting to prolong prescription so as to make it accrue in 1990. Such a juridical act is invalid under NA 3471, but insofar as it contains an implicit recognition of the debt, it will serve as an acknowledgment which interrupts prescription. The new prescription will again accrue in 1988. The conclusion then is that agreements to lengthen prescription are invalid only insofar as they purport to extend prescription beyond the point to which acknowledgment could extend it. Agreements lengthening prescription short of that point are permitted because, after all, they do not really lengthen prescription. See infra note 100 for agreements shortening prescription.

(4) An acknowledgment that takes place after accrual is of no benefit to the creditor unless accompanied by a new promise to perform. The new promise is necessary in order to revive the legal obligation which was converted into a natural obligation the moment prescription accrued. When accompanied by a promise to perform, the acknowledgment that takes place after accrual is tantamount to a renunciation, which always presupposes such a promise. See Harmon v. Harmon, 308 So. 2d 524 (La. App. 3d Cir. 1975); cf. McPherson v. Roy, 390 So. 2d 543 (La. App. 3d Cir. 1980).

(5) As used in this note, the word "debtor" signifies anyone who benefits from the accrual of prescription. In liberative prescription, this person is the debtor; in acquisitive prescription, he is the possessor; and in the prescription of nonuse, he is the person who has a real right in the thing of another. Similarly, the word "creditor" signifies the person who stands to lose from the accrual of prescription, i.e., respectively the creditor, the owner, and the person whose thing is burdened with the real right of another.
tages of prescription have been abandoned.

Nevertheless, with respect to immovables, renunciation of acquisitive prescription must be express and in writing.  

Art. 3451. Capacity to renounce
To renounce prescription, one must have capacity to alienate.

Art. 3471. Limits of contractual freedom
A juridical act purporting to exclude prescription, to specify a

99. New article 3450 para. 2 changes the law by requiring that, with respect to immovables, renunciation “must be express and in writing.” The change is “in the interest of security of titles,” NA 3450, comment, but probably not in the best interest of the record owner, since it makes renunciation more cumbersome. But cf. UA 626, 772; LA. MIN. CODE: LA. R.S. 31:54-55.

In McPherson v. Roy, 390 So. 2d 543 (La. App. 3d Cir. 1980), the plaintiffs obtained a lease from the defendant’s ancestor which, unknown to plaintiffs, included in part land which they had possessed adversely for more than thirty years. The trial court held that “upon acceptance of the . . . lease . . . and operating thereunder . . . [plaintiffs] effectively waived and abandoned all rights previously acquired in such property.” Id. at 550. The Third Circuit Court of Appeal reversed, finding that, under the circumstances, there was neither express nor tacit renunciation, and holding that “a renunciation of accrued prescription to be effective must be unequivocal and takes place only when the intent to renounce is clear, direct and absolute.” Id. at 551. By requiring renunciation to be “express and in writing,” the new law confirms the McPherson holding, which under the old law was a little overstated. It may be worth mentioning at this point that a lease knowingly accepted by the possessor before the accrual of prescription not only serves as an acknowledgment which interrupts prescription, but also prevents prescription from ever running again by giving the possession a precarious character.
NEW LAW

longer period than that established by law, or to make the requirements of prescription more onerous, is null.

OLD LAW

100. For agreements purporting to lengthen prescription, see supra note 98. With regard to agreements purporting to shorten prescription, the clear implication of NA 3471 is that they are in principle valid. The argument *inclusio unius est exclusio alterius* is clearly applicable here. The fact that Greek Civil Code article 275, which is reproduced in the comments as the source provision of NA 3471, prohibits such agreements simply reinforces the argument that had the redactors wanted to prohibit such agreements they would have said so expressly. From a policy standpoint, agreements shortening prescription—unlike renunciations or agreements lengthening prescription—not only reduce the court’s workload by clearing many claims from the docket at an earlier date, but work to the benefit of the debtor who is usually the weak party. Such agreements, therefore, ought to be in principle valid, unless the law expressly provides otherwise, or unless it turns out that the debtor is in fact the economically strong party. In the latter situation, the agreement should be invalidated if it bears adhesionary characteristics. For an example in which the law expressly prohibits the shortening of prescription to less than one year, see LA. R.S. 22:629(A)(3) (1978) (insurance contracts). It is not a coincidence that in such contracts the creditor (insured) is the economically weak party.

101. In keeping with the spirit of the article, the phrase “to make the requirements of prescription more onerous” must be understood as referring to requirements more onerous to the debtor, not to the creditor. This conclusion is also borne out by a comparison with the source provision, Greek Civil Code article 275.

102. Earlier drafts contained the following sentence after what is now NA 3471: “Nevertheless, a written juridical act expressly suspending the running of prescription for a period of up to six months is valid.” REVISION, BOOK III, TITLES XXIII AND XXIV, DOC. NO. 3-10-2, art. 3471 (Semantics Comm., Mar. 18, 1982) supra note 35; REVISION, BOOK III, TITLE XXIV (NEW), DOC. NO. 2-22-2, art. 3471 (Coordinating Comm., Feb. 27, 1982) supra note 35; see also REVISION, BOOK III, TITLE XXIV (NEW), DOC. NO. 1-29, art. 3471 (Council Meeting, Feb. 19, 1982) supra note 35. The sentence was not included in the text presented to the legislature.
NEW LAW

Art. 3464. Interruption by acknowledgment
Prescription is interrupted when one acknowledges the right of the person against whom he had commenced to prescribe.

OLD LAW

Art. 3520. Interruption by debtor's acknowledgment
Prescription ceases likewise to run whenever the debtor, or possessor, makes acknowledgment of the right of the person whose title they prescribed.

INTERRUPTION OF PRESCRIPTION

Art. 3466. Effect of interruption
If prescription is interrupted, the time that has run is not counted. Prescription commences to run anew from the last day of interruption. 103

Art. 3462. Interruption by filing suit or by service of process
Prescription is interrupted when the owner commences action against the possessor, or when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period. 104

Art. 3615. Methods of interrupting prescription
There are two modes of interrupting prescription; that is, by a natural interruption, or by a legal interruption.

Art. 3518. Legal interruption by filing of suit
A legal interruption takes place, when the possessor has been cited to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not. The provisions of this article likewise apply to actions ex delicto, heretofore or hereafter filed.

103. New article 3466 is new but does not change the law. The difference in effect between interruption and suspension is that in the former, the time that has run before interruption is "wiped out," see NA 3466, comment (b), whereas in suspension the time that has run before suspension is added to the time running after the end of the suspension. Compare NA 3466 with NA 3472.

NEW LAW

Art. 3463. Duration of interruption; abandonment or discontinuance of suit

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

OLD LAW

La. R.S. 9:5801. Interruption of prescription by filing of suit, service of process

All prescriptions affecting the cause of action therein sued upon are interrupted as to all defendants, including minors or interdicts, by the commencement of a civil action in a court of competent jurisdiction and in the proper venue. When the pleading presenting the judicial demand is filed in an incompetent court, or in an improper venue, prescription is interrupted as to the defendant served by the service of process.

105. The first sentence of NA 3463 clarifies the law by providing that during the pendency of the suit, prescription is in a state of continuous interruption rather than suspension as held by some cases. This makes a difference only when the action is dismissed without prejudice. In such event, the period before the filing of the action, as well as the period of the pendency of the action, does not count towards prescription. A new prescription commences to run from the day of dismissal without prejudice. See NA 3463, comment (b) and authorities cited therein. For example, suppose that one month before the accrual of a one-year prescriptive period, P files suit which is dismissed without prejudice two years later. P has another year, not one month, within which to file a new suit. Cf. Garrity v. Cazayoux, 430 So. 2d 1138 (La. App. 1st Cir. 1983).

For a recent discussion of “voluntary dismissal” under the last sentence of NA 3463, see Hebert v. Cournoyer Oldsmobile-Cadillac GMC, 419 So. 2d 878 (La. 1982).
NEW LAW

Art. 3464. Interruption by acknowledgment

Prescription is interrupted when one acknowledges the right of the person against whom he had commenced to prescribe.106

Art. 3465. Interruption of acquisitive prescription

Acquisitive prescription is interrupted when possession is lost. The interruption is considered never to have occurred if the possessor recovers possession within one year or if he recovers possession later by virtue of an action brought within the year.107

OLD LAW

Art. 3519. Abandonment or discontinuance

If the plaintiff in this case, after having made his demand, abandons, voluntarily dismisses, or fails to prosecute it at the trial, the interruption is considered as never having happened.

Art. 3520. Interruption by debtor's acknowledgment

Prescription ceases likewise to run whenever the debtor, or possessor, makes acknowledgment of the right of the person whose title they prescribed.

Art. 3517. Natural interruption by physical deprivation

A natural interruption is said to take place when the possessor is deprived of the possession of the thing during more than a year, either by the ancient proprietor or even by a third person.

SUSPENSION OF PRESCRIPTION

Art. 3472. Effect of suspension

The period of suspension is not counted toward accrual of prescription. Prescription commences to run again upon the termination of the period of suspension.108

106. The article is discussed supra note 98. The comments to NA 3464 contain a useful discussion of acknowledgment and its formalities.
107. The article is discussed supra note 62.
108. The article is new but does not change the law. Compare with interruption, supra note 103.
NEW LAW

Art. 3467. Persons against whom
prescription runs
Prescription runs against all
persons unless exception is
established by legislation.109

Art. 3468. Minors and interdicts
Prescription is suspended
against minors and interdicts
unless exception is established by
legislation.110

OLD LAW

Art. 3521. Persons against whom
prescription suspended
Prescription runs against all
persons, unless they are included
in some exception established by
law.

Art. 3522. Minors and interdicts
Minors and persons under in-
terdiction can not be prescribed
against, except in the cases pro-
vided by law.

109. New article 3467 is identical in content to OA 3521 under
whose regime the jurisprudence had developed, in effect contra legem,
the doctrine of contra non valentem agere non currit prescriptio. See,
e.g., Corsey v. State Dept. of Corrections, 375 So. 2d 1319 (La. 1979).
Under the principles of intertemporal law, the reenactment of NA
3467, and especially the use of the word “legislation” as opposed to
the word “law” in OA 3521, should normally result in abolishing the
previous contra legem jurisprudence. To prevent that from happen-
ing, an earlier draft added a second paragraph to NA 3467 giving
express legislative sanction to the doctrine of contra non valentem
which read: “Liberative prescription is exceptionally suspended when
the filing or prosecution of a suit is prevented by the fraud of the
creditor or is made impossible by extraordinary circumstances totally
beyond the control of the plaintiff, and the accrual of prescription
would result in obvious injustice.” REVISION, BOOK III, TITLE XXIV
(NEW), DOC. NO. 1-29-2, ART. 3467 (COUNCIL MEETING, FEB. 19, 1982), supra
NOTE 35. The council of the Louisiana State Law Institute chose to
eliminate that paragraph and to insert instead a similar statement
in the comments. Comment (d) to NA 3467 provides that the
jurisprudence which adopted the doctrine of contra non valentem “con-
tinues to be relevant.” Although the legislative intent is thus stated
clearly, there remains the analytical problem that comments are not
part of the law.

110. This version of NA 3468 and UA 3541 remain in force until
January 1, 1984. The cross references contained in UA 3541 make
no sense because of the rearrangement of titles and chapters by Act
187. See supra note 6. Before Act 187 was put into effect, the follow-
ing prescriptions ran against minors and interdicts by virtue of UA
3541: the liberative prescriptions of five years, UA 3540; three years,
UA 3538-3539; one year, UA 3534, 3536; and the liberative and
Art. 3541. Running of certain prescriptions against minors, interdicts and absentees

The prescriptions mentioned in the preceding Article, those provided in Paragraphs I and II of Section three of Chapter three of this Title, and those of thirty years, whether acquisitive or liberative, shall run against minors and interdicts under the new law, which changes the law only by adding the ten-year acquisitive prescription for immovables. See supra NA 3474. Additionally, UA 763 and LA. MIN. CODE: LA. R.S. 31:58 provide that the prescription of nonuse of predial and mineral servitudes respectively runs against minors and other incompetents. See also LA. R.S. 9:5631 (1983). Thus, as far as it can be determined, the only general prescriptions of the Civil Code which are still suspended in favor of minors and interdicts and which “justify” the existence of NA 3468 are: (1) the ten-year liberative prescription of UA 3544 and 3546-3547, (2) the three-year and ten-year acquisitive prescription of movables of NA 3490-3491, and (3) the prescription of nonuse of a usufruct or habitation of UA 621 and 631, respectively. For rights of use, the question is open. See UA 645. See also the special provisions of UA 78, 2221 and 2571, and NA 3469 and 3542-3543.

One would search in vain to discover the logic behind this scheme of the Civil Code, not so much because the Code allows so many—numerically and in terms of importance—exceptions to swallow up the “general” principle established by NA 3468 (OA 3522), but also because there are no discernible criteria by which the various prescriptions are classified in the one or the other category. It is not readily understandable, for instance, why the ten-year acquisitive prescription for immovables should run against minors, see NA 3474, and the three-year or ten-year prescription for movables should not; nor why the ten-year liberative prescription of UA 3544 should be suspended but the one-year liberative prescription of UA 3536 should not be suspended. Doubtless, this scheme is the result of historical accident rather than deliberate planning, as evidenced by the piecemeal and impromptu carving of exceptions out of the original general principle. Act 187 did not avail itself of the opportunity to rectify this historical accident and to impose some order on this quite disordered state of affairs.
and interdicted persons, reserving, however, recourse against their tutors or curators.

These prescriptions shall also run against persons residing out of the state.

Art. 3468. Incompetents
Prescription runs against absentees and incompetents, including minors and interdicts, unless exception is established by legislation. 111

Art. 3469. Suspension of prescription
Prescription is suspended as between: the spouses during marriage, parents and children during minority, tutors and minors during tutorship, and curators and interdicts during interdiction. 112

Art. 3523. Husbands and wives
Husbands and wives can not prescribe against each other.

111. On June 24, 1983, after the completion of this article, the legislature enacted Act 173 of 1983 which becomes effective on January 1, 1984. Act 173 eliminates UA 3541 and replaces NA 3468, as revised in 1982, with the new article accompanying this note, thus eliminating the confusion described supra note 110. The former "general" principle with regard to minors and other incompetents is now reversed and streamlined with the truly general principle of NA 3467 applying to all persons. Prescription will now run against minors and other incompetents unless they are expressly exempted by legislation. There remains, of course, the problem of whether the period between June 24, 1983 and January 1, 1984, is long enough to satisfy the "reasonable period" requirement of Lott v. Haley, 370 So. 2d 521 (La. 1979) and Reichenphader v. Allstate Ins. Co., 418 So. 2d 648 (La. 1982). See Hargrave, Developments in the Law: Louisiana Constitutional Law, 1980-1981, 42 LA. L. REV. 596, 601 (1982).

112. New article 3469 "clarifies the law," NA 3469, comment (a), by providing that, in addition to spouses (OA 3523) prescription is suspended between the persons named therein. For a discussion of the policies underlying these suspensions, see Note, supra note 4, at 1098.
NEW LAW

Art. 3470. Prescription during delays for inventory; vacant succession

Prescription runs during the delay the law grants to a successor for making an inventory and for deliberating. Nevertheless, it does not run against a beneficiary successor with respect to his rights against the succession.

Prescription runs against a vacant succession even if an administrator has not been appointed.

Art. 3471. Limits of contractual freedom

A juridical act purporting to exclude prescription, to specify a longer period than that established by law, or to make the requirements of prescription more onerous, is null.113

OLD LAW

Art. 3527. Prescription during delays for inventory and deliberation

It runs likewise during the delay which the law grants for making the inventory and for deliberating.

Art. 3526. Beneficiary heir; vacant succession

Prescription does not run against a beneficiary heir, with respect to the debt due him by the succession.

But it runs against a vacant succession, though no curator has been appointed to such succession.

COMPUTATION OF TIME

Art. 3454. Computation of time

In computing a prescriptive period, the day that marks the commencement of prescription is not counted. Prescription accrues upon the expiration of the last day of the prescriptive period, and if that day is a legal holiday, prescription accrues upon the expiration of the next day that is not a legal holiday.114

Art. 3467. Computation of time by days

The time required for prescription is reckoned by days, and not by hours; it is only acquired after the last day allowed by law has elapsed.

113. The article is discussed supra notes 100-102.
114. Comment (a) to NA 3454 states that the article "is not intended to change the law." (Emphasis added). Whether it does or not depends on how one interprets the old law. It was arguable under
Louisiana Code of Civil Procedure

Art. 5059. Computation of time

In computing a period of time allowed or prescribed by law or by order of court, the date of the act, event, or default after which the period begins to run is not to be included. The last day of the period is to be included, unless it is a legal holiday, in which event the period runs until the end of the next day which is not a legal holiday.

A half-holiday is considered as a legal holiday. A legal holiday is to be included in the computation of a period of time allowed or prescribed, except when:

1. it is expressly excluded;
2. it would otherwise be the last day of the period; or
3. the period is less than seven days.

Art. 3455. Computation of time by months

If the prescriptive period consists of one or more months, prescription accrues upon the expiration of the day of the last month of the period that corresponds with the date of the commencement of prescription, and if there is no corresponding day, prescription accrues upon the expiration of the last day of the period.

Art. 3468. Computation of time by months

In those prescriptions which are acquired by months, the months are reckoned in the order in which they occur in the calendar, from the day when the possession commenced, whatever may be the number of days which each month may contain.

the old law that LA. CODE CIV. P. art. 5059 was not applicable to prescriptions which could be interrupted without resorting to the judicial machinery of the state. Thus, an acknowledgment by the debtor or adverse possessor, or an eviction of the possessor by the true owner, could effectively interrupt prescription even if it occurred on the last day of the prescription and even if the last day was a holiday. See NA 3454, comment (c) ("[p]rescription is completed on the fixed day, even if it be a holiday.") (quoting 1 M. PLANIOL, supra note 45, pt. 2, no. 2657, at 577). However, since there are no cases on point, the issue is now moot.
NEW LAW

Art. 3456. Computation of time by years

If a prescriptive period consists of one or more years, prescription accrues upon the expiration of the day of the last year that corresponds with the date of the commencement of prescription.\textsuperscript{115}

OLD LAW

Art. 3469. Computation of time by years

In such prescriptions as are acquired in one or more years, the time is reckoned according to the years of the calendar which have elapsed during the time of possession required by law.

PEREMPTION\textsuperscript{116}

Art. 3458. Peremption; effect

Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period.

115. New articles 3455-3456 clarify and broaden slightly OA 3468-3469 by making sure that these articles apply to both acquisitive and liberative prescription. Note the word "possession" in OA 3468-3469. See NA 3468, comment (b); NA 3469, comment (b). It is hoped that the following illustrations will clarify even further the operation of NA 3455-3456. (1) A six-month prescription which commenced running on January 31, 1983 will accrue on July 31, 1983. (2) A six-month prescription which commenced running on December 31, 1982 will accrue on June 30, 1983. (3) A six-month prescription which commenced running on August 31, 1982 accrued on February 28, 1983. (4) A five-year prescription which commenced running on February 29, 1980 will accrue on February 28, 1985. In the latter situation NA 3455 applies by analogy. See NA 3456, comment (c).

116. Although not regulated expressly by the Civil Code of 1870, the institution of peremption was recognized by the jurisprudence and articulated with the aid of academic doctrine. See Pounds v. Schori, 377 So. 2d 1195 (La. 1979); Succession of Pizzillo, 223 La. 328, 65 So. 2d 783 (1953); Guillory v. Avoyelles Ry. Co., 104 La. 11, 28 So. 899 (1900); Ashbey v. Ashbey, 41 La. Ann. 102, 5 So. 539 (1889); Dainow, The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Prescription, 29 LA. L. REV. 230 (1969). The new Act codifies that jurisprudence in NA 3458-3461. These articles are self-explanatory and the differences from prescription are obvious.
NEW LAW

Art. 3459. Application of rules of prescription
The provisions on prescription governing computation of time apply to peremption.

Art. 3460. Peremption need not be pleaded
Peremption may be pleaded or it may be supplied by a court on its own motion at any time prior to final judgment.

Art. 3461. Renunciation, interruption, or suspension ineffective
Peremption may not be renounced, interrupted, or suspended.

ONE CONCLUDING NOTE

If the measure of success of a revision is the degree to which it improves on the old law, then Act 187 is an unqualified success. It is a remarkable improvement over the repealed law, both structurally and substantively. The revision eliminates the dry wood that was so prevalent in the old law not just because of its age. It replaces the verbose provisions of the old law with concise and precise articles densely interwoven with each other. It resolves most of the substantive problems that have been plaguing the jurisprudence for so long, while it also codifies some of the best jurisprudential accomplishments. A few problems remain unresolved and some new ones have been created (mostly by the laconic and somewhat elliptical language of the new Act), which this paper has tried to identify. But these problems are not insurmountable. They can be resolved by an intelligent reading of the new Act, a comparison of it with the old law, and a careful reading of the comments. All in all, the Reporter and the redactors must be commended for successfully accomplishing what they set out to do.

This author's reservations pertain to the intended scope and range of the revision as understood by the redactors. It seems that they felt unduly constrained by the confines of the old law. The repeated use by the comments of the adage "it does not change the law" (even when not one hundred percent accurate) is a good indication of the psychological and political climate within which the redactors had to operate, a climate in which everything was to be justified in terms of
the old law and changes were to be kept to a minimum. Indeed it is hard to overstate the importance of stability and continuity in the law of property. However, there comes a point when change and progress must also be accommodated. The Louisiana of the 1980's bears little resemblance to the Louisiana of 1825—or, for that matter, to nineteenth century France—if only because of the oil business and the increase in population and land utilization. In the face of these changes the revision ought to have taken some bolder steps in devising new solutions to old and new problems. The revision could have, also for the same reasons, taken some steps to emancipate Louisiana's law from that of France. There is in Louisiana sufficient accumulation of experience and robust indigenous legal brainpower to permit and support such an emancipation. More importantly, the socioeconomic and legal environment in Louisiana is sufficiently different from that of France to require such an emancipation. This idea may sound iconoclastic, but it cannot, as this author's name may suggest, be attributed to xenophobia.


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*Lapses Dec. 31, 1983

**Effective Jan. 1, 1984
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## LOUISIANA REVISED STATUTES

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