SCOTT v. CORKERN: OF PRECEDENT, *JURISPRUDENCE CONSTANTE*, AND THE RELATIONSHIP BETWEEN LOUISIANA COMMERCIAL LAWS AND LOUISIANA PLEDGE JURISPRUDENCE

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I. INTRODUCTION

On rare occasions, analysis of the legal sources on which a decision is based convincingly demonstrates either that there is no sound legal basis for its holding or that an original well-founded basis is no longer valid. The question then arises as to how the decision should be treated by subsequent courts that face the same or similar facts. In the instance of the Louisiana Supreme Court case of *Scott v. Corkern*,[1] a decision interpreting the Civil Code law of pledge, the answer is found in the application of well-established methods of civil-code interpretation and its relationship to the unique civil-law doctrine of *jurisprudence constante*. *Scott* also raises the question of what effect the 1989 legislative displacement of the Civil Code law of pledge by the U.C.C. Article 9 possessory security interest will have on an erroneous decision under the now superseded law of pledge.[2]

II. INTERPRETIVE METHODS

In a pure civilian legal system, legislation and custom are the sole sources of law.[3] Article 1 of the Civil Code teaches that legislation and custom "are contrasted with *persuasive or secondary sources of law, such as jurisprudence* . . . that may guide the court in reaching a

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1. 91 So. 2d 569 (La. 1956).

2. For thoughtful treatment of U.C.C. Article 9, both before and after its 1989 enactment into the Louisiana Commercial Laws, in relation to the Louisiana Civil Code, see generally Thomas A. Harrell, *A Guide to the Provisions of Chapter Nine of Louisiana's Commercial Code*, 50 LA. L. REV. 711 (1990); Harry R. Sachse, *Report to the Louisiana Law Institute on Article Nine of the Uniform Commercial Code*, 41 TUL. L. REV. 505 (1967); Harry Sachse, et al., Comment, *Security Rights in Movables Under the Uniform Commercial Code and Louisiana Law—A Transactional Comparison*, 40 TUL. L. REV. 745, 891, 905-06 (1966) [hereinafter *Security Rights*].

3. LA. CIV. CODE ANN. art. 1 (West 1993); Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727, 743 (1962).

decision in the absence of legislation and custom."[4] Recent decisions by the Louisiana Supreme Court reiterate that a clear and unambiguous statement of positive law is to be applied as written without further interpretation unless the result is absurd or violative of public policy.[5] Nevertheless, jurisprudence necessarily remains an important interpretive reference in our modern civilian jurisdiction. In explaining the role and limit of jurisprudence in a civilian system, Judge Tate expounded:

> The decisions of the courts are not law, but merely persuasive interpretations of it. . . . [T]he precedent is not binding as having established a rule; *it is rather valid insofar as persuasively demonstrating the correct interpretation of the statutory source.*[6]

Some ten years before Judge Tate's enlightened analysis, Colonel John H. Tucker restated the attitude of Louisiana courts towards jurisprudence and common-law *stare decisis*: "Our courts have always followed . . . the essential civilian judicial technique of *never letting today become either the slave of yesterday or the tyrant of tomorrow.*"[7] As one Louisiana United States District Judge warily (and wisely) observed, "in civilian jurisdictions such as Louisiana, it is risky business to rely overly much upon extensions of judicial decisions as stating the applicable law."[8]

Nevertheless, the civil-law doctrine of *jurisprudence constante* also provides a mechanism for maintaining order *in the usual case* by shrouding prior cases with an implied presumption of "precedence," albeit loosely. Discussing and distinguishing jurisprudence constante from positive law, Louisiana Supreme Court Justice Dennis recently stated:

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4. LA. CIV. CODE ANN. art. 1, cmt. (b) (emphasis added).

5. Daigle v. Clemco Indus., 613 So. 2d 619, 624 (La. 1993); Ramirez v. Fair Grounds Corp., 575 So. 2d 811, 813 (La. 1991).

6. Tate, *supra* note 3, at 743-44 (emphasis added).

7. John H. Tucker, *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739, 759 (1955) (emphasis added) (quoting Harriett S. Daggett, et al., *A Reappraisal Appraised: A Brief For the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 23-24 (1937)).

8. Clarkco Contractors, Inc. v. Texas E. Gas Pipeline Co., 615 F. Supp. 775, 778 (M.D. La. 1985) (footnote omitted); *compare id. with* Usatorre v. The Victoria, 172 F.2d 434, 438-43 (2d Cir. 1949) (Judge Frank delivers a common-law judge's perspective on how it *appears* civil-law jurisdictions use jurisprudence as a primary source).

> When a series of decisions forms a constant stream of uniform and homogeneous rulings having the same reasoning, the doctrine accords the cases considerable persuasive authority and justifies, without requiring, the court in abstaining from new inquiry because of its faith in the precedents. *Jurisprudence constante* certainly does not represent legislative force in the proper sense, such as we attach to written law or custom; for whenever the legislature expressly rules, it cuts off further inquiry.[9]

As Judge Tate noted in his 1962 article on methods of judicial interpretation, application of *jurisprudence constante* depends on (1) existence of "a series of prior adjudicated cases all in accord" and (2) *de facto* rather than *de jure* recognition.[10] As Justice Dennis noted, the implied presumption provided by *jurisprudence constante* is not required when *de jure* recognition converts jurisprudence into positive law.[11]

However, even under the doctrine of *jurisprudence constante* inferior courts are not bound to follow prior cases.[12] As Justice Dennis noted, "the doctrine accords the cases considerable persuasive authority and *justifies, without requiring*, the court in abstaining from new inquiry."[13] That statement is consistent with the earlier observation by Judge Tate that:

> [A] lower court will refuse to apply a higher court ruling . . . when the [higher court] has itself failed to apply or overlooked some controlling statutory enactment or [its ruling] is based on *unconsidered dictum*.[14]

The *unconsidered dictum* test looks to whether a higher court's prior decision or dictum is based upon thoughtful analysis.[15] If so, it may support the application of *jurisprudence constante*. Although not an

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9. James L. Dennis, *The John M. Tucker, Jr. Lecture in Civil Law: Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993) (citations omitted).

10. Tate, *supra* note 3, at 744.

11. Dennis, *supra* note 9, at 15.

12. Tate, *supra* note 3, at 744-45.

13. Dennis, *supra* note 9, at 15 (emphasis added).

14. Tate, *supra* note 3, at 751 (emphasis added).

15. Jurisich v. Hopson Marine Serv., 619 So. 2d 1111 (La. Ct. App. 1993) (constitutional issues treated as dicta).

express element of the doctrine of *jurisprudence constante*, the dichotomy between *considered* and *unconsidered* dicta is a logical corollary of the doctrine's requirements. This is seen in the test suggested by Judge Tate to determine whether and when a court should follow prior jurisprudence. The decision of whether to follow prior cases is made with reference to several principles: (1) "delity to the institution of an ordered legal system, which . . . demands general stability of legal rules," (2) *probability* that the next court to face the same legal question would arrive at the same answer, *because more likely than not* the earlier court's reasoning was sound; and (3) certainty that frequent re-examination of well-established legal rules is not judicially efficient.[16]

Although professing his personal moral conviction that Louisiana judges should follow higher court decisions, Judge Tate reiterated that:

> [A]ccording to the true civilian [tradition and] philosophy of the function of judicial interpretation, a lower court should render the judgment it thinks is correct and just, regardless of an erroneous prior decision of a higher court.[17]

That conclusion was echoed when Justice Dennis stated "[i]f the previous judge's performance is flawed, that should cause the subsequent court to disregard or give little weight to the precedent case."[18] In sum, Justice Dennis, Judge Tate, Colonel Tucker, and the many sources cited by each, acknowledge the civilian tradition that jurisprudence, although valuable in deciding the majority of cases, is not *ipso facto* controlling law and must yield to reexamination when the rare case squarely challenges a questionable or insupportable rule of jurisprudence. As Justice Dennis concludes: "Even if we can sense intuitively that the previous case was decided justly and in harmony with Civil Code principles, this does not make it valid precedent."[19]

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16. Tate, *supra* note 3, at 747; *see also* J. CUETO-RUA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW 69-71, 74-78 (1981).

17. Tate, *supra* note 3, at 751: see also LA. CODE CIV. PROC. ANN. art. 2164 (West 1993) (providing that "[t]he appellate court shall render any judgment which is just, legal, and proper upon the record on appeal.").

18. Dennis, *supra* note 9, at 15.

19. *Id.* at 16.

In *PPG Industries v. Bean Dredging*,[20] the Louisiana Supreme Court rejected a *per se* rule that precluded recovery against a tort-feasor for negligent interference with contractual relations between the tort victim and a third-party contractor.[21] Acknowledging that Louisiana courts had generally denied recovery of indirect economic losses caused by negligent injury to property that interferes with contractual relations, the court stated that those courts had done so "without analyzing the problem, taking a mechanical approach to the unreasoned conclusion."[22] Rejecting the notion of a *per se* rule, the court held that Louisiana's duty-risk analysis should be used to determine whether on the facts of a particular case, relief should be granted for a claim of this type. The *PPG Industries* court rejected the "mechanical, unreasoned conclusion" that spawned the erroneous *per se* rule.

Further, there is a tradition of inferior Louisiana courts engaging in a reexamination of the underlying rationale of prior jurisprudence, even when the precedent is a Louisiana Supreme Court case.[23] In a recent powerful example of a lower court reexamining and rejecting a Louisiana Supreme Court case and its progeny, Judge Stoker, writing for the Louisiana Third Circuit Court of Appeals, refused to continue to follow the then 134-year-old *Black*[24] rule forbidding recovery for mental anguish caused by injury to a third person.[25] Consistent with the observations by Judge Tate and Justice Dennis, although Judge Stoker was not *required* to reexamine the issue, he also was not prohibited from doing so. After scholarly inquiry into the source of the *Black* rule in light of the controlling rule of law, Civil Code Article 2315,[26] Judge Stoker wrote that "we find that the original policy reasons for a blanket denial of all claims for damages for mental anguish resulting from injury to another are no longer valid."[27] The Louisiana Supreme Court affirmed.[28] One

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20. 447 So. 2d 1058 (La. 1984).

21. *See id.* at 1060 (citing Clarifying Forcum-James Co. v. Duke Transp. Co., 93 So. 2d 228 (La. 1957) for per se rule).

22. *Id.*

23. *See* Tate, *supra* note 3, at 745-46 & nn. 47-52.

24. Black v. Carrollton R.R., 10 La. Ann. 33 (1855), *overruled*, LeJeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990).

25. LeJeune v. Rayne Branch Hos., 539 So. 2d 849, 859-60 (La. Ct. App. 1989), *aff'd*, 556 So. 2d 559 (1990).

26. LA. CIV. CODE ANN. art. 2315 (West 1993).

27. *LeJeune*, 539 So. 2d at 859.

28. LeJeune v. Rayne Branch Hosp., 556 So. 2d 559, 571 (La. 1990).

must assume that Judge Stoker believed, as Judge Tate predicted, "with reasonable certainty that the [Louisiana Supreme Court would] overrule itself when the controlling legislative principle [was] called to its attention"[29] and that the *Black* rule no longer "persuasively demonstrat[ed] the correct interpretation of the statutory source," Article 2315. In light of this introductory background, we turn to examination of the 1956 Louisiana Supreme Court case of *Scott v. Corkern*,[30] concerning the Civil Code law of pledge, and its implications for subsequent Louisiana U.C.C. Chapter 9 possessory security interests.

III. THE RELATIONSHIP BETWEEN THE CIVIL CODE LAW OF PLEDGE AND CHAPTER 9 POSSESSORY SECURITY INTERESTS

A. *Factual Background of* Scott v. Corkern

The facts of *Scott* are simple and revolve around possession of a pledged insurance policy. In the late 1920s, Corkern borrowed money from Scott for medical school tuition.[31] The loans were evidenced by promissory notes. To secure the loans and the promissory notes, Corkern promised to pledge an insurance policy to Scott.[32] By mutual consent of Corkern and Scott, Corkern sent the policy to the insurance company with instructions to make Scott the policy beneficiary. Corkern further instructed the company to deliver the policy, as amended, to a bank which had been instructed to hold the policy for Scott. The insurance company did so.

Ms. Scott died on March 1, 1948, and Dr. Corkern died on February 20, 1953. When Dr. Corkern's bank box was opened in his succession proceedings, the "pledged" insurance policy was surprisingly found. Thus, in some unexplained manner, the pledged insurance policy, which had been in the possession of the (escrow agent) bank, came to rest, in Dr. Corkern's safe-deposit box. The only clue as to how the transfer might have occurred was the fact that the bank failed in the 1930s. The Comptroller of Currency supervised the affairs of the bank during its 1930s receivership. On inquiry, the Comptroller could only

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29. Tate, *supra* note 3, at 751.

30. 91 So. 2d 569 (La. 1956).

31. *Id.* at 571.

32. The Supreme Court record in *Scott* contains no express pledge agreement. *Id.* There is, however, an escrow agreement between Scott and Corkern. *Id.*; *see also* LA. CIV. CODE ANN. art. 3158 (written instrument required to prove pledge against third persons).

state that all bank records had been destroyed pursuant to statutory authority in January 1940; the Comptroller had no record of the disposition of the pledged insurance policy. As a result, the mystery of how the pledged policy came to reside in Corkern's bank safe deposit box will likely remain forever unsolved. That mystery, however, was not without legal consequences.

B. The Legal Issue in Scott v. Corkern

Sometime after Dr. Corkern's death in 1953, Scott's heirs sued Corkern's heirs on the vintage-1920 promissory notes. The Scott heirs urged that the pledge of the insurance policy interrupted prescription on Corkern's 1920 promissory notes to Scott. The Corkern heirs predictably interposed an exception of prescription, urging that the loss of the pledged thing by Scott caused the interruptive effect of possession of the pledged thing to cease. The lower court granted the exception of prescription and dismissed Scott's heirs' suit. The court of appeal affirmed. The Louisiana Supreme Court granted certiorari and reversed.

> The *Scott* Court began with the well-established principle that
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> > prescription does not run in favor of the debtor whose debt is secured by a pledge, and that it remains interrupted, as long as the thing pledged is in the possession of the pledgee. . . . [I]t is not the contract or act of pledge that interrupts prescription but rather the detention by the pledgee of the thing pledged, such possession serving as a constant acknowledgement of the debt and hence a constant renunciation of prescription.[33]

The difficulty came when the *Scott* Court had to apply that well-established rule of law to the unusual facts of the case.

The facts showed unequivocally that Scott, the pledgee, had lost possession of the pledged thing and that Corkern, the pledgor, had regained same. Relying on questionable dicta from prior jurisprudence, the *Scott* Court held that the interruptive effect of the pledge could be maintained by possession of the pledged object by the debtor-pledgor. It held that there was a rebuttable presumption that the "possession [by

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33. *Scott*, 91 So. 2d at 572-73 (footnote and citations omitted).

Corkern] was a precarious one in which he was acting as a trustee for the pledgee [Scott]."[34]

Thus, in order to reverse an otherwise apparent correct decision by the lower courts, the *Scott* Court had to create out of whole cloth a wholly new rebuttable presumption of precarious possession. The *Scott* Court then applied its newly-created presumption to the facts of the case and found no evidence of any acts by Corkern that would rebut the newly created presumption. Thus, the *Scott* Court concluded that on these facts the presumption of "precarious possession" was not rebutted. The exception of prescription was overruled.

No subsequently reported Louisiana case has relied solely on *Scott*'s holding on this issue. At least two courts of appeal have refused to follow *Scott*.[35] Further, *Scott* has been soundly criticized, questioned, and distinguished by courts and commentators alike.[36] For the most part, the criticism of *Scott*, merely attacks the wisdom of the holding and decries the possible problems that could arise therefrom. However, as will be shown below, that criticism falls far short of revealing the true depth of *Scott*'s infirmity. This article posits that *Scott v. Corkern* is that rare case where application of the traditional principles of civil-law interpretation should lead a court to conclude that *Scott* is an erroneous higher court decision, which is founded on unconsidered dicta and should be ignored, rejected, and overruled.

C. *Fundamental Basis of the Law of Pledge*

In the 1993 John H. Tucker Memorial Lecture, Justice Dennis recently advocated the nonmechanical methodology of Civil Code interpretation:

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34. *Id.* at 572.

35. Powers v. Motors Sec. Co., 168 So. 2d 922, 925 (La. Ct. App. 1964); Kreppin v. Demarest, 120 So. 2d 301, 303 (La. Ct. App. 1960).

36. Red Simpson, Inc. v. Lewis, 583 So. 2d 918, 920 (La. Ct. App. 1991) (holding of *Scott* has not been without criticism); New Iberia Nat'l Bank v. Teeter Mobile Home Sales, Inc., 300 So. 2d 635, 639-40 (La. Ct. App. 1974); Kreppin v. Demarest, 120 So. 2d 301, 303 (La. Ct. App. 1960); Joseph Dainow, *Security Devices*, 18 LA. L. REV. 49, 50-51 (1957) (decision in *Scott* "is a move in the wrong direction"); Ralph Slovenko, *Of Pledge*, 33 TUL. L. REV. 59, 74 (1958) (position is without support); *Security Rights*, *supra* note 2, at 906; *cf.* Valerie Seal Meiners, Comment, *Formal Requirements of Pledge Under Louisiana Civil Code Article 3158 and Related Articles*, 48 LA. L. REV. 129, 139 (1987) ("*Scott* does not represent a move in any direction, but rather a honing in on, and a fine tuning of, certain aspects of the general premise under the analysis here.")

> The function of every legal concept is to delimit contradictory or competing interests.[37] [T]he interests that are protected and adjusted by the legal concept ... [are] all of the interests of life that compete with one another.[38]

The nonmechanical approach requires a court as a part of the decisional process to determine and to take cognizance of the *entire* community of interests that are intended to be protected by the controlling rule of law.[39] The ancient regime of pledge has just such a well-established community of interests, one which the *Scott* Court failed to recognize.

Pledge is one of the oldest security devices known to any system of law.[40] Although a person's patrimony is the common pledge of all creditors, a pledge of a movable and perfection of that pledge by delivery of the thing gave the pledgee a superior right over all other creditors to the pledged thing if the debtor defaulted on the primary obligation. Under Roman law, the *creditor's* fist held above the pledged thing symbolized the contract of pledge.[41] The fist over pledged object symbolically underscored and emphasized the reality of the pledgee-creditor's undisputed dominion and control over the pledged object by virtue of physical possession. Physical possession of the pledged thing gave unmistakable notice to the world of the pledgee's interest. Conversely, it also demonstrated the pledgor-debtor's complete dispossession of the pledged thing. Reflecting the fist-over-pledge ideal, civil-law and common-law courts have continually recognized *the* inviolate rule of pledge: the pledgee-creditor must retain possession of the pledged thing to avail himself of the privilege arising from possession. The long-recognized community of interests in pledge comprise the debtor-pledgor, the creditor-pledgee, and other third persons who, but for the pledge, might otherwise rely on the apparent absence of claims thereto.

Louisiana courts have also long held that possession of the pledged thing, and *not* the contract of pledge, interrupts prescription. The courts reason that the possession of the pledged thing acts as a constant

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37. Dennis, *supra* note 9, at 9.
38. *Id.*
39. *Id.*
40. Slovenko, *supra* note 40, at 61 (citing LEE, THE ELEMENTS OF ROMAN LAW 295 (1956)).
41. In the civil law, both the pledged property and the nominate contract are commonly referred to as the *pledge*. Slovenko, *supra* note 40, at 61-62 & n.10.

acknowledgment of the principal obligation.[42] Then, in *Scott*, the Louisiana Supreme Court held that where a pledgor-debtor was found to be in possession of the pledged thing, he is rebuttably presumed to possess "precariously" or "pro hac vice" for the creditor.[43] Because "pledgee-creditor possession" is "maintained" by this rebuttable presumption, the interruption of prescription on the underlying principal obligation continues although the pledgee-creditor has, in fact, lost possession of the pledged thing. The *Scott* presumption effectively abrogated the fundamental notion of dispossession of the pledgor-debtor as a necessary element of pledge. Before examining the underlying defect in *Scott* in more detail, a discussion of the continuing implications of the decision under the Louisiana U.C.C. demonstrates why *Scott* is more than mere academic esoterica.

D. *Continuing Implications of* Scott *under Chapter 9*

With the displacement of the Civil Code law of pledge by Chapter 9 of Louisiana Commercial Laws,[44] one might conclude that *Scott* is but a mere ghost destined to do no harm. If such be true, then, except for pre-Chapter 9 contracts of pledge,[45] the troubling implications of *Scott* need not raise any concerns except to remind us of the ever-present possibility of jurisprudential aberrations. For reasons discussed below, the unexpected and problematic *Scott* presumption may, in fact, rise from its apparent legislative death to haunt Chapter 9 possessory security interests.[46]

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42. Scott v. Corkern, 91 So. 2d 569, 573 & n.4 (La. 1956) (collecting authorities).

43. *Id.* at 573.

44. LA. REV. STAT. ANN. 10:9-101 (codified as amended at 1988 La. Acts No. 528. 1989 La. Acts No. 12, § 1, 1st Ex. Sess. amended § 4 of 1988 La. Acts No. 528).

45. 1989 La. Acts No. 135, § 10 provides that:

> All . . . pledges . . . entered into prior to the January 1, 1990, and all rights, duties and interests flowing therefrom shall remain in full force and effect, and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law applicable thereto in the absence of Chapter 9 of Louisiana Commercial Laws. Furthermore, to provide flexibility during the transition period . . . security agreements under pre-Chapter 9 law, entered into prior to January 1, 1990, may be perfected by filing under previously effective Louisiana law at any time prior to February 1, 1990.

46. 1989 La. Acts. No. 135, § 11 provides that "Chapter 9 of the Louisiana Commercial Laws is a general statute intended as a unified coverage of its subject matter, and no part of it shall be deemed impliedly repealed by subsequent legislation if such construction can reasonably be avoided."

E. *Chapter 9 Possessory Security Interests and Limits on Third-Party Possessors*

The term "possession" is not defined in the U.C.C.[47] In other jurisdictions, when the question arises whether under particular circumstances possession is sufficient to create an Article 9 possessory security interest, courts have looked to the state law of pledge. It is well settled that the law of pledge as it existed prior to the enactment of the U.C.C. is supplementary to Chapter 9.[48] In the case of the Louisiana enactment of Chapter 9, to the extent *Scott* informs the pre-U.C.C. Louisiana law definition of possession, it may also inform the Chapter 9 definition of possession in similar factual circumstances. Thus, it may only be a matter of time before a Louisiana court must struggle with the question of whether and how to fit *Scott* into Louisiana's new "uniform" commercial law. That is, unless *Scott* is rejected.

The fundamental principles of the law of pledge are reflected in Article 9 of the Uniform Commercial Code. U.C.C. Article 9-305 provides, in relevant part, for the creation of a possessory security interest that is the successor to the common-law pledge: "A security interest . . . [in some cases] may be perfected by the secured party's taking possession of the collateral. . . ."[49] Article 9-305 codifies the common law of pledge and relies on the common law for interpretation.[50] As Professor William D. Hawkland explains, the community of interests for the rules of perfection of a possessory security interest and pledge are identical:

> Actual physical possession by the secured party should put the debtor's creditors and potential purchasers of the collateral on notice that the secured party may have an interest in the collateral. . . . [I]f the debtor can still in some way take possession of the collateral from the secured party, even though it may be very difficult, the secured party will not have possession which will result in a perfected [pledge].[51]

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47. 8 WILLIAM D. HAWKLAND, ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-305:03, at 1049 (1986).

48. U.C.C. §§ 1-103, 9-305 cmt. 1, 2 (1994).

49. U.C.C. § 9-305.

50. *Id.* cmt. 1.

51. HAWKLAND, *supra* note 47, § 9-305:03, at 1049.

Describing the bounds of third-party possession which may perfect a creditor's claimed possessory security interest, official comment 2 to Article 9-305 precludes the possibility of debtor or debtor-controlled possession: "[I]t is of course clear, however, that *the debtor* or a person controlled by him *cannot qualify as such an agent [to possess the pledged object] for the secured party.*"[52] Elaborating on the official comment, Professor Hawkland observed:

> Clearly, a secured creditor cannot argue that a debtor possesses the property on his behalf . . . and the secured party also cannot argue that a person controlled by the debtor possesses the property on his behalf . . . *[T]he closer the relationship between the agent and the debtor, the harder it will be for the secured party to argue that the third party is his agent, rather than that of the debtor.*[53]

The official comments to U.C.C. Article 9 are generally treated as persuasive interpretive sources. However, the enactment of Louisiana Chapter 9 did not include the official comments to Uniform Commercial Code Article 9. Rather, the Louisiana Legislature instructed the Louisiana State Law Institute to draft comments for Louisiana's variation on Uniform Commercial Code Article 9.[54] Those Louisiana comments have not yet been published. The official comments which appear in the West Edition of the Louisiana Revised Statutes are the 1972 Uniform Commercial Code Comments and do not reflect any Louisiana variations. Nor do those comments consider the differences introduced by the civil law of pledge operating as supplementary law to Chapter 9. Nevertheless, a sampling of non-Louisiana U.C.C. case law illustrates how the interests and concerns are balanced when a secured creditor claims his security interest rights through possession by a third person.

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52. U.C.C. § 9-305 cmt. 2 (emphasis added).
53. HAWKLAND, *supra* note 47, § 9-305:03, at 1049-50 (1986) (emphasis added).
54. 1988 La. Acts No. 528, § 3 provides:

> The Louisiana State Law Institute is hereby requested and authorized to prepare comments and explanatory notes following each provision of Section 1 of this Act [Chapter 9]. These comments shall not be enactments of the legislature, shall not be law, and may be included only as explanatory language when printed in the official edition of the Louisiana Revised Statutes of 1950.

In *Transportation Equipment Co. v. Guaranty State Bank*,[55] the United States Court of Appeals for the Tenth Circuit rejected a claim of perfected security interest, concluding that the mere presence of the creditor (or his employees) on the debtor's premises where the collateral was located did not constitute possession.[56] In another case, a court held that where the debtor could at any time and without a key obtain access to the safe-deposit box containing the object in question, no perfection of the possessory security interest occurred.[57] In *Heinecke Instruments, Inc. v. Republic Corp.*,[58] the United States Court of Appeals for the Ninth Circuit rejected the argument that Heinecke, an issuer of stock, could serve as a bailee-possessor for a creditor to whom unissued stock had been pledged as collateral security for a loan to the president of Heinecke.[59] In so doing, the Ninth Circuit reasoned that the corporation's "relationship was too close to its former president, the debtor, to provide effective notice to third persons of its agency status." The court concluded that absent such notice, no possessory security interest could be created under U.C.C. 9-305 because of the virtual inseparability of the debtor and the stock issuer-possessor.[60]

As recently as 1990, courts construing the U.C.C. have looked to the common law of pledge to determine whether possession is sufficient to create an Article 9 possessory security interest. In *In re Funding Systems Asset Management Corp.*,[61] the court held that the common law required such notice as would prevent the pledgor from misleading a potential subsequent lender into believing that the pledgor is free to pledge the same property again. The *Funding Systems* court looked to whether it was the practice among lenders to loan on the basis of possession of the pledged object by the debtor. If not, then possession of the pledge by the debtor would be fatal to a claim of possession sufficient to establish a possessory security interest.[62]

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55. 518 F.2d 377 (10th Cir. 1975).

56. *Compare id.* at 381 *with* Jacquet v. His Heirs, 38 La. Ann. 863 (1886).

57. *In re* Bailk, 16 U.C.C. Rep. 519 (Bankr. W.D. Mich. 1974).

58. 543 F.2d 700 (9th Cir. 1976).

59. *Id.* at 702-03.

60. *But see In re* Milam, 4 B.R. 621 (Bankr. M.D. Ga. 1980) (holding that the corporation was the agent of the debtor for a pledge involving stock certificates).

61. 11 U.C.C. Rep. 2d 205 (Bankr. W.D. Pa. 1990).

62. *Accord In re* ICS Cybernetics, Inc., 17 U.C.C. Rep. 2d (Bankr. N.D.N.Y. 1989), *aff'd*, 123 B.R. 480 (N.D.N.Y. 1990).