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demonstrates either that there is no sound legal basis for its holding or that an original well-founded basis is no longer valid.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law of pledge by the U.C.C. Article 9 possessory security interest will have on an erroneous decision under the now superseded law of pledge.[2]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).

Thus, under the U.C.C. and the common law supplementing it, traditional acceptable third-party holders of the pledge are measured by testing whether their relationship to the debtor is inconsistent with the purpose of possession of the pledged thing by the pledgee. That purpose which underlies the effectiveness of pledge (and the U.C.C. Article 9 possessory security interest) as a security device is notice to third parties of adverse claims to the thing. The closer the apparent relationship is, the less likely it becomes that acceptable possession will be found.

F. Louisiana Law of Possession by Third Persons

Pre-Chapter 9 Louisiana law is generally consistent with U.C.C. case law on the issue of when third-person possession is sufficient to create a valid possessory security interest. Under pre-Chapter 9 law, possession of the pledged object by a third person required an agreement by the parties authorizing possession by a third person for the pledgee.[63] Further, the third person must have had full knowledge of the trust as well as have accepted delivery of the pledged thing.[64] As will be shown below, the delivery by Corkern to Scott's bank is a classic example of an agreed third-party possession. Excepting *Scott*, there are no cases in which a pledged thing is purported to have been held by a third person, absent a finding of an express agreement between the debtor and creditor that the third person would so hold the pledged thing *and* some evidence of knowledge of that agreement by the third person.

In *Red Simpson, Inc. v. Lewis*,[65] a pledge of a note was perfected by delivery to a third person where that third person was a shareholder of the debtor company.[66] The *Red Simpson* court affirmed the propriety of that third-party possession *because* there was an express written "Deed of Trust" executed by the debtors in which the third person possessor "was appointed trustee" and under which he undertook a "fiduciary duty to hold" the pledged thing for the creditor.[67] *Red Simpson* demonstrates a case in which the debtor and creditor *agreed* to the holding of the pledged thing by a third person. Similarly, in *Jacquet v. His Creditors*,[68] by

63. Wells v. Dean, 29 So. 2d 590, 594 (La. 1947).
64. *Id.*
65. 583 So. 2d 918 (La. Ct. App. 1991).
66. *Id.* at 920.
67. *Id.* at 921.
68. 38 La. Ann. 863 (1886).

express agreement the creditor and debtor designated an employee of the debtor to maintain control over certain pledged equipment for the creditor.[69] In *T.A. Gaskin Lumber Co. v. Airline Lumber Co.*,[70] on the other hand, the court found that absence of delivery of the pledged thing to the pledgee "*or to any third party on instruction*" of the pledgee prevented the formation of a valid pledge.[71]

IV. ANALYSIS OF THE PRECEDENTIAL BASIS FOR *SCOTT V. CORKERN*

One must readily admit that the Louisiana Supreme Court could create the *Scott* rebuttable presumption by judicial fiat if it so decided. However, as Justice Dennis notes, exercise of such unsubstantiated power would produce a precedent that is without authority.[72] However, both the presumption and the holding in *Scott* purport to be well-founded in prior jurisprudence. An examination of the jurisprudential sources of *Scott* casts considerable doubt on that premise.

The *Scott* Court cited three cases in support of the newly-created presumption of "precarious possession": *Jacquet v. His Creditors*;[73] *Foote v. Sun Life Assurance Co.*;[74] and *Conger v. City of New Orleans*.[75] However, none of the three cited cases supports the result in *Scott*. In fact, because *Jacquet* and *Foote* rely solely on *Conger*, *Scott* must rise or fall, depending on whether *Conger* was well reasoned. To paraphrase Judge Tate, the *Scott* presumption of precarious possession by the debtor-pledgor had its origin and roots firmly planted in unconsidered *Conger* dictum.

Conger purports to rely upon *Casey v. Cavaroc*,[76] a United States Supreme Court case construing and applying the Louisiana civil law of pledge in a bankruptcy case.[77] However, when the *Conger* dicta is carefully traced to its source in *Casey*, it is seen to be contrary to the

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69. *Accord* Weems v. Delta Moss Co., 33 La. Ann. 973 (1881) (affirming two express trusts established by debtor and creditor to place a pledged thing in possession of third-party employee of debtor).

70. 127 F. Supp. 461 (E.D. La. 1953).

71. *Id.* at 462-63 (emphasis added).

72. Dennis, supra note 9, at 15.

73. 38 La. Ann. 863 (1886).

74. 173 So. 2d 477 (La. Ct. App. 1937).

75. 32 La. Ann. 1250 (1880).

76. 96 U.S. (23 Wall.) 467 (1877).

77. *Id.* at 767.

actual holding in *Casey*. Further, as will be discussed more fully below, *Conger* dicta imported *common-law dicta* from *Casey* without consideration. As an unfortunate result, a common-law principle discussed in *Casey* dicta found its way into modern Louisiana commercial law by way of *Conger* dicta. Then, some seventy years later *Scott*'s uninformed application of the *Conger* unconsidered dicta became what is now known as the *Scott* presumption.

A. Conger v. City of New Orleans

Unlike *Scott*, *Conger* did not involve the question of possession of a pledged object. The *Conger* court noted that the pledgor had sold the pledged object eight years prior to the institution of suit. Neither the pledgee nor the pledgor, nor anyone else involved in *Conger,* possessed the pledged object, precariously or otherwise. The *Conger* court held that there was no pledge and dismissed the suit on an exception of prescription. Thus, *Conger* itself provides no holding which supports the result in *Scott*. However, in dicta, the *Conger* court stated that: the property pledged may be left in the possession of the debtor himself, provided his possession is precarious and clearly for the account of the creditor.[78]

The *Conger* Court supported this statement, with a long string-cite of the cases discussed and analyzed in detail in the Supreme Court opinion in *Casey*. The *Conger* court's lack of review of the cited cases is reflected in the fact that the *Conger* string-cite is a conglomeration of two distinct sets of decidedly different cases: (1) common-law cases related to *Clark v. Iselin*,[79] which affirmed the notion of precarious possession under the common law, and (2) civil-law cases that reject or narrowly constrain that same notion.[80] The former were dicta in *Casey*. The latter were the legal basis for the decision in *Casey*. By combining the *Casey* case authority without distinction, the *Conger* court erroneously imported the *Casey* discussion of the *Clark* common-law holding as the *Conger* dicta.

Then, some 76 years later, the erroneous *Conger* dicta became the erroneous *Scott* holding. Thus, it is clear that *Scott* is absolutely without a sound legal basis and can claim little authority except that

78. *Conger*, 32 La. Ann. at 1252.
79. 88 U.S. (21 Wall.) 960 (1875).
80. *Conger*, 32 La. Ann. at 1252-53.

which might accrue by virtue of its having miraculously escaped correction since 1956. Contrary to sound civilian tradition, Judge Tate's and Colonel Tucker's admonitions, and *jurisprudence constante*, Louisiana courts will have become "the slave of yesterday" to the extent that they follow *Scott*, a creature born in unconsidered dicta.

B. Casey v. Cavaroc, *the Root of the* Conger-Scott *Error*

1. Facts of *Casey*

Charles Cavaroc was president of the New Orleans National Banking Association (the "Bank"), a bank formed under the National Banking Act of 1864.[81] Mr. Cavaroc was also a principal in the unrelated firm of Cavaroc & Son. Cavaroc & Son negotiated an agreement by which the French firm Société de Credit Mobilier (Mobilier) would loan the Bank up to 1,000,000 francs. The Bank agreed to secure the loan by pledge of certain bills and notes (securities). The plan required that the pledged securities be held by Cavaroc & Son, acting through Mr. Cavaroc, as third-party possessor for Mobilier, the creditor.

The dual capacity in which Mr. Cavaroc operated gave rise to an awkward procedure regarding the pledge of the securities. From time to time, Mr. Cavaroc, as president of the debtor-pledgor Bank directed the Bank discount clerk to select those securities to be delivered in pledge to Mr. Cavaroc the third-party possessor for the creditor-pledgee Mobilier. The Bank clerk would select the securities, place them in an envelope, and hand the envelope to Mr. Cavaroc, who at that moment acted as third-party possessor through Cavaroc & Son, for Mobilier. Mr. Cavaroc, acting apparently for both Bank (debtor) and Mobilier (creditor), then handed the envelope to the Bank cashier for safekeeping.

The securities required frequent access for collection or for payment by exchange. In a short time, Mr. Cavaroc found it cumbersome to procure the notes from the Bank cashier simply to temporarily return them to the Bank discount clerk for collection or renewal and then to return them to the Bank cashier after Mr. Cavaroc received them back from the Bank clerk. As a result, Mr. Cavaroc obtained the securities from the Bank cashier and permanently delivered same to the Bank

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81. The following description of the facts of *Casey* is derived from "Statement by Mr. Justice Bradley," 96 U.S. at 467-73.

discount clerk for his keeping. The securities remained in the sole possession of the Bank discount clerk until the Bank failed. When the Bank failed, Mr. Cavaroc took immediate possession of the envelope of securities and endorsed all unendorsed securities, apparently acting as agent for Cavaroc & Son as agent for Mobilier.

The legal issue in *Casey* was whether Mobilier had an effective pledge so as to give it a priority claim on the securities in the bankruptcy proceeding, a question of state law. Thus, the matter turned on Louisiana law of pledge. The *Casey* Court noted that until the final, desperate affirmative act by Mr. Cavaroc, so far as the public and others with whom the bank dealt could perceive, the Bank (debtor) continued to have possession and control of all the securities in its own right. The securities appeared to be equally liable with the other assets to the claims of all the creditors.[82] The Court noted that the securities "[c]learly . . . were never out of the possession of the officers of the bank and were never out of the bank for a single moment, but were always subject to [the Bank's] disposal in any manner whatever. . . ."[83] The *Casey* Court framed the issue as whether: "there was such a delivery and retention of possession of the collateral securities as to constitute a valid pledge by the law of Louisiana?"[84]

2. *Casey* Distinguishes Common Law of Pledge.

Prior to construing Louisiana and French law of pledge, the Court distinguished *Clark v. Iselin*,[85] a recent earlier pledge decision decided under New York common law. Under then-existing New York common law, when negotiable securities were given as collateral security, the secured party obtained two separate species of real security, a mortgage and a pledge. The mortgage arose because the common law deemed title (ownership) transferred by the giving of collateral security. The pledge arose from the manual delivery of the securities to the pledgee. Because of this odd dual title nature ("odd" to civilians), New York common law held that if the securities were redelivered to the possession of the pledgor to enable him to collect them, legal possession of the pledged property remained in the pledgee

82. *Id.*
83. *Id.* at 476.
84. *Id.*
85. 88 U.S. (21 Wall.) 960 (1875).

by operation of the mortgage. The common law reasoned that because of the prior true transfer of title and ownership, the pledgor's role on retransfer for purposes of collection was that of one "merely acting as [the pledgee's] servant or agent in making them, [and] the character of the security is not affected ... by the debtor having actual possession."[86] Thus, the Court concluded that *under the New York common-law doctrine of double title* in the pledgee, "possession of the securities by the creditor [is] a matter of less importance."[87]

3. *Casey* Construes Civil Law of Pledge.

Having discussed and distinguished the common-law basis of *Clark*, the *Casey* Court turned to the civil law, "which is more particularly our guide in the present case."[88] The Court initially noted that prior to the French Civil Code, under the Old Digest, possession by the debtor was permissible. The Court then noted the strong criticism of that rule by the French civil-law commentator Troplong, who commented regarding possession of a pledged object:

> This possession ought to be certain and not equivocal. If it is ambiguous, if the things pledged have been so placed as to deceive the other creditors, and to lead them to believe that the debtor always continued the possessor, the pledge would be endangered.[89]

The Court then quoted Troplong's explanation of the very narrow circumstances under which the French civil law permitted the pledgee-creditor to place the pledged object in the hands of the pledgor-debtor without the resultant loss of the possession of the pledged object:

> Though the [pledge] be deposited in the creditor's storehouse, it may still need the care of the debtor. Then it is not forbidden to stipulate that he shall continue to attend to it in the interest of the creditor. ... Aside from this, the possession of the creditor is not incompatible with a certain co-operation of the debtor—being for the conservation of the thing—he still being the owner. The creditor does not any the less continue exclusive

86. *Casey*, 96 U.S. at 477.
87. *Id.* (emphasis added).
88. *Id.* at 480.
89. *Id.* at 482.

> possessor of the thing. The debtor is none the less dispossessed of it.[90]

The *Casey* Court then reviewed the French civil-law jurisprudential examples given by Troplong and concluded that:

> Troplong deduces, from these and other cases, the general conclusion that, whenever the assistance of the debtor is necessary to the better accomplishment of the object of the pledge, it ought to be permitted, provided always that it does not disturb the possession of the creditor in any respect.[91]

Turning to Dalloz, another French commentator, the *Casey* Court quoted: "It is evident that if the pledge of movables could, without a delivery, have effect in regard to third persons, it would be a source of great frauds and deceptions. When the debtor is obliged to surrender possession he cannot deceive third parties dealing with him."[92] From these sources, the *Casey* Court concluded that:

> [I]t seems to be evident, in the French law at least, the text of which, in this regard, is the same as that of Louisiana, a delivery by the owner of securities by way of pledge, followed by a return thereof to him, for the purpose of enabling him to collect them and apply the money to his own use . . . and to appear as the owner and possessor thereof in his dealings with others (the title of the securities not being transferred to the creditor), is not such delivery of possession as is necessary to establish the privilege due to a pledge as to third persons. It would be contrary to the very letter of the law to allow such a transaction to have that effect.[93]

After examining Louisiana case law, the *Casey* Court concluded that Louisiana law was the same on this issue. Having made this exposition on French and Louisiana civil law, the *Casey* Court held that possession by Mr. Cavaroc, the President of the Bank as agent for the debtor-pledgor *and* as a principal of Cavaroc & Son as agent for Mobilier, the pledgee, did not meet the requirements of Louisiana law.

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90. *Id.* at 483 (emphasis added).
91. *Id.* at 484 (emphasis added).
92. *Id.*
93. *Id.* at 484-85.

The *Casey* Court concluded that: "The pledgee lacks possession in itself or in a third person agreed to by the pledgee and pledgor."[94]

C. Scott *and* Conger *are Contrary to the Holding in* Casey

Casey's meticulous contrast of New York common law and French and Louisiana civil law, and its exposition of the civil law's narrow limits for permissible debtor-pledgor "possession" (i.e. only when necessary for the preservation or conservation of the thing), illuminates the heart of the issue in *Scott*. *Possession of the pledged thing by Corkern was not "necessary to the better accomplishment of the object of the pledge."* In fact, it could have been "a source of great frauds and deceptions." The *Casey* court concluded that under Louisiana law, the debtor's possession of the object of the pledge will not invalidate the pledge provided that the possession by the debtor was necessary for the preservation or conservation of the thing pledged.

D. *The Other Two Cases Cited in* Scott *Rely Solely upon* Conger *Dicta*

1. *Jacquet v. His Creditors*

In *Jacquet*, the pledged object, manufacturing machinery located on the debtor-pledgor's premises, was placed in the possession of an employee of the debtor-pledgor, a third person to the contract of pledge. The employee of the debtor-pledgor acknowledged that he was "accepting the trust" of the pledge *as agent of the pledgee*. With the consent of the pledgee and the pledgee's agent, the debtor-pledgor (Jacquet) used the pledged machinery in his business under control and operation of the creditor's designated agent.[95] The employee (creditor-agent), and not Jacquet (the debtor-pledgor), retained control over and access to the pledged object. Thus, the circumstances of *Jacquet* conformed to the traditional requirements of an agreement between the pledgor and pledgee that a third person would take possession of the pledged thing. *Jacquet* involved no unexplained possession by the debtor as was the case in *Scott*.

Nevertheless, in dicta *only*, and without considered analysis, the *Jacquet* court gratuitously repeated the misleading *Conger* dicta: the

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94. *Id.* at 491.
95. *Accord Casey*, 96 U.S. at 491.

property pledged may be left in the possession of the debtor himself, provided his possession is precarious and clearly for the account of the creditor.[96] However, in *Jacquet*, the debtor-pledgor neither retained nor regained possession of the pledged object. *Jacquet*, in fact, did not involve a debtor-possessor at all. Thus, neither the facts nor holding in *Jacquet* support the holding in *Scott*.

At least one recent commentator suggests that the relaxation in the possession requirement of pledge in cases such as *Jacquet* was a judicial accommodation to developing commercial needs in a civil-law world that did not yet have chattel mortgages or security interests.[97] After enactment of the Chattel Mortgage Act in 1912, and prior to the recent advent of Chapter 9, an arrangement similar to that in *Jacquet* would have been perfected under the Chattel Mortgage Act. However, *Jacquet* predated either of those more well-known means of security.

2. *Foote v. Sun Life Assurance Co.*

Foote, the second case cited by the *Scott* court, involved delivery of an *already-pledged* insurance policy to a third person insurer, whereby the insurer became a "second" pledgee. The express purpose of the delivery, as agreed by the pledgor and pledgee prior to the transfer, was to avoid forfeiture of the insurance policy for nonpayment of premiums (and thus, to avoid destruction of the pledged object in the hands of the pledgee). Thus, in *Foote*, the intentional transfer to the third person insurer was one arising out of a consensual agreement between the creditor-pledgee and debtor-pledgor or as performance of the pledgee's Article 3167 obligation to avoid loss of the pledged thing in his hands. The *Foote* court held that possession by the third person insurer (the second) pledgee also operated in favor of the original pledgee. Thus, *Foote*, like *Jacquet* conformed to existing jurisprudential requirements for pledgor and pledgee consent to a transfer of the pledged thing to a third person.

Nevertheless, and once again by way of gratuitous dicta, the *Foote* court canted the *Conger* dicta regarding precarious possession by the debtor, as had the *Jacquet* court. *Foote*, like *Jacquet*, did not involve possession, precarious or otherwise, by the debtor-pledgor. Thus, as is

96. *Conger*, 32 La. Ann. at 1252.
97. *Security Rights*, *supra* note 2, at 906.

true for *Conger* and *Jacquet*, neither the facts nor holding in *Foote* offers any support for the result in *Scott*.

V. APPLICATION OF INTERPRETATIONAL PRINCIPLES TO *SCOTT*

A. *Judge Tate's Principles of Interpretation*

Given *Scott's* questionable lineage, and virtually nonexistent codal and jurisprudential bases, a Louisiana court employing the guiding principles urged by Judge Tate would be fulfilling its role in the civilian system by reexamining and testing the validity of *Scott*.

As Judge Tate observed, there is a general rule of reason that frequent reexamination of well-established legal rules is not an economical use of judicial resources. *Scott* raises no serious issues of stability of legal rules. In light of the immediate, constant, and unabated questioning and criticism of *Scott*, one can not easily describe *Scott* as well-established. Nor would one classify *Scott* as representative of a stable legal rule. Nevertheless, *Scott* purportedly continues to express a rule of law, and, thus, poses a constant risk of mischief. As discussed earlier, the adoption of Chapter 9 has generally resulted in the replacement of the Civil Code contract of pledge with the U.C.C. possessory security interest. However, the absence of a Chapter 9 definition of "possession" gives rise to an argument that *Scott* is applicable to inform the new law. Thus, rejection of *Scott* would assure that its insupportable rule of precarious possession would have no prospective operation. Further, rejection of the rule would increase the stability of the legal system and commercial transactions by assuring conformity between Louisiana's enactment of Chapter 9 and U.C.C. Article 9.

With respect to Judge Tate's second test, it seems unlikely that a court, after examining the history, doctrinal writings, and jurisprudence of the civil law of pledge, would arrive at the same answer as the *Scott* Court. To the contrary, the erroneous dicta propagated from *Casey* to *Conger* to *Scott* would be recognized for what it is: *unconsidered common law dicta incompatible with the civil law.* Thus, by Judge Tate's test, *Scott* is a prime candidate for reexamination in light of controlling legislative principles. Moreover, owing to the demonstrated lack of *considered* analysis of the purported jurisprudential underpinnings of *Scott* by any Louisiana court, the court that so elects to do so will be

undertaking in reality an *examination* of *Scott*, rather than a *reexamination*.

Nor would overruling *Scott* seriously affect commercial transactions or settled expectations. Perhaps most indicative of the status of the *Scott* "rule" is the fact that no serious and knowledgeable commercial creditor plans his affairs in dependence on the effectiveness of a "precarious pledge" in the hands of the debtor. However, leaving *Scott* uncorrected risks tainting Chapter 9 interpretation in similar circumstances.

Scott has yet to achieve any recognition of affirmation in Louisiana jurisprudence. A number of cases cite *Scott*, but none relies on *Scott* in its respective holding, reflecting the general unease with the rule.[98] The absence of reliance, coupled with the extensive criticism of *Scott*, and the desire to avoid prospective taint of Chapter 9 provide ample bases upon which a Louisiana court would be properly justified in reconsidering and disregarding *Scott*. When Judge Stoker rejected the (truly) well-established rule of *Black v. Carrollton R.R.*,[99] he did so despite more than 130 years of cases expressly relying on *Black* and Louisiana Supreme Court writ denials from those cases. By comparison to *LeJeune*, *Scott* is a mere pup of thirty-years vintage. Further, unlike the *Black* rule which *LeJeune* rejected, *Scott* has yet to achieve even a grudging affirmation much less such venerability that would make it immune from reasoned reconsideration.

In short, *Scott* is not *jurisprudence constante*. One simply can not demonstrate a series of subsequently adjudicated cases (or as this author believes, even one case) *all in accord* with the holding of *Scott* regarding precarious possession by a debtor-pledgee. In fact, except for a single distinguishable case involving apparent debtor-pledgor fraud in the acquisition of possession of the pledged object,[100] there does not appear to be a single case in which the decision turned on the *Scott* rule of precarious possession by the debtor-pledgor. Except for *Bishop*, the *Scott* rule has not been applied in any other debtor-possessor pledgor case. *Scott* has not achieved *de facto* or *de jure* recognition. Thus, *Scott* is not

98. *See supra* note 2.

99. 10 La. Ann. 33 (1855).

100. Central Bank v. Bishop, 353 So. 2d 1109 (La. Ct. App. 1978). *Scott* was, in fact, unnecessary given the apparent fraudulent act by the mortgagor in that case (unauthorized repossession of the mortgage note). *See* LA. CIV. CODE ANN. art. 3173.

invulnerable to challenge under the doctrine of jurisprudence constante, and should not be considered as binding on any Louisiana Court. Further, not only is it clear that *Scott* did not accurately reflect the very limited doctrine of precarious possession under the civil law, it is also clear that *Scott* does not represent the state of the law of pledge on the issue of precarious possession as reflected in the general law of pledge, as that law has been transformed and integrated into the Uniform Commercial Code.

B. Justice Dennis's Nonmechanistic Interpretive Methodology

Article 3162 of the Civil Code provides that: "In no case does this privilege subsist on the pledge, except when the thing pledged . . . has been actually put *and remained in the possession of the creditor*, or of a third person agreed on by the parties."

Two observations may be made regarding Article 3162. First, with respect to the Article 3162 requirement that the creditor maintain possession of the pledged thing, Article 3162 is clear and unambiguous.[101] Applying the interpretive technique employed in *Ramirez* or *Daigle*, the application of Louisiana Civil Code Article 9 requires that the *Scott* court make a two-fold inquiry (assuming prior delivery of the pledged thing, a matter not at issue in *Scott*): (1) has the creditor maintained possession of the pledged thing or (2) has a third person agreed on by the parties maintained possession of the pledged thing. The answer to each of these inquiries is an undoubtable "no." Nevertheless, Article 9 provides a "safe harbor" where the literal application of Article 3162 would "lead to absurd consequences." The only consequence of the application of Article 3162 to the facts of *Scott* is to cause Scott's claim to have prescribed, a loss of a property right belonging to Scott. Although one might categorize this result as unfair, it is not absurd. Nothing in the facts of *Scott* suggest that Corkern played any role in the return of the pledged thing to him. Nothing in the facts of the case suggest that Scott exercised even rudimentary diligence in protecting her valuable property right. Thus, as the Louisiana Supreme Court did in *Ramirez* and in *Daigle*, a court should apply Article 3162 *as written* to the facts of *Scott*. That application shows that neither Scott, the creditor, nor the third person agreed on by the parties maintained

101. See discussion of *Ramirez* and *Daigle* in text accompanying note 5, *supra*.

possession of the pledged thing. Thus, the consequences outlined in Article 3162 should have been enforced.

As a further indication that Article 3162 should be literally applied, Article 3173, a law *in pari materia* with Article 3162, specifically provides for the case where the debtor actively repossesses the pledged thing without the creditor's consent. In that specific case, "The debtor . . . commits a sort of theft."[102] An article could have been included in this title of the Civil Code to include a presumption that anytime a debtor comes into possession of the pledged thing without the permission of the creditor, precarious possession by the debtor is presumed. To do so, however, would have broadened the possible restrictions on free alienation of movables in the possession of their owner. Such a presumption, as does the *Scott* presumption, would place every creditor-pledgee at risk of a prior pledge on the pledged thing for which there is neither public record or any other type of notice. Further, codification of a "secret" pledge would be inimical to the basic premise of pledge that has made it the premier security device of choice for movables for several thousands of years—dispossession of the owner-pledgor.

Second, in the language of Justice Dennis's "non-mechanistic" interpretive approach, there is a community of interests protected by the rule of law in Article 3162. Article 3162 is in derogation of the common right provided by Article 3183:

> The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful cause of preference.[103]

As such, Article 3162 must be construed and applied with reference to the broader common right belonging to *all* creditors from which it derogates. By virtue of a properly maintained pledge, the pledgee-creditor is lawfully made secure regarding the performance of the obligation secured by the pledge. The debtor obtains the counter performance of the pledgee by voluntarily acquiescing in the temporary dispossession, but not loss of ownership, of his movable, the pledged thing. Finally, other third persons who might desire to execute on the movable in satisfaction of an

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102. LA. CIV. CODE ANN. art. 3173.
103. *Id.* art. 3183.

obligation owed by the pledgor to them or who might otherwise be willing to accept the thing as security for the same pledgor's performance of another obligation are protected from undisclosed superior claims on the thing because the pledgor is dispossessed. Thus, the Article 3162 rule requiring possession of the pledged thing by the pledgee or an agreed third-party agent, a rule in derogation of broader, common rights, brings within the ambit of its protection the interests of the pledgor, the pledgee, and the important community of interests of other potential pledgees and common creditors of the pledgor.

Viewed in light of the full community of interest, the holding in *Scott* protected only one of those interests, that of the pledgee. Further, the *Scott* court afforded that protection in derogation of Corkern's right to have his property free of unlawful impediments and the right of Corkern's common creditors to the common pledge on his unburdened property.

VI. CONCLUSION

The rationale and touchstone for the three thousand year-old prohibition against pledgor-debtor possession of the pledged thing is simple but critical to the success of the concept of pledge. The physical dispossession of the pledged thing from the pledgor assures that a third-party lender will not be misled or fail to be placed on notice of another creditor's potential interest in the collateral. The *Scott* rebuttable presumption of a "precarious, pro hac vice debtor-possessor" cannot be squared with the underlying fundamental precept of pledge under the civil law. Further, *Scott* may continue to trouble pledge as it has evolved into the U.C.C. Article 9 possessory security interest when Louisiana courts look to state law for guidance on the definition of "possession." In contrast, literal application of Article 3162 promotes the full community of interests that underlay the requirements of Article 3162 and the notion of pledge and leads to no absurd consequences. The only remaining question is, when the opportunity to end *Scott*'s thirty-seven-year reign of error will be presented.

APPENDIX

Application or discussion of the doctrine of *jurisprudence constante* may be found in *Firmin v. Denham Springs Floor Coverings, Inc.*,[104] *Citizen's Finance Service Discount v. Hollier*,[105] *City of New Orleans v. Treen*,[106] *PPG Industries, Inc. v. Bean Dredging Corp.*,[107] *McClendon v. Dept. of Corrections*,[108] *Penche v. Ketchum*,[109] *Eubanks v. Brasseal*, [110] *Gulf Oil Corp. v. v. State Mineral Board*,[111] *Holland v. Buckley*,[112] *Jagers v. Royal Indem. Co.*,[113] *State v. Placid Oil Co.*,[114] *Johnson v. St. Paul Mercury Ins. Co.*, [115] *Grant v. Touro Infirmary*,[116]

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104. 595 So. 2d 1664, 1172 n.1 (La. Ct. App. 1991) ("The rule that the issue of prescription cannot be considered if raised only in brief on appeal has acquired the status of *jurisprudence constante*, having been followed by Louisiana courts since at least 1854.").

105. 432 So. 2d 412, 413 (La. Ct. App. 1983) (A single decision may create *jurisprudence constante* where subsequent legislative action is viewed as endorsing the holding of that case).

106. 421 So. 2d 282 (La. Ct. App. 1982), *rev'd on other grounds*, 431 So. 2d 390 (La. 1983) (collecting cases).

107. 419 So. 2d 23, 25 (La. Ct. App. 1982), *aff'd*, 447 So. 2d 1058 (La. 1984) (jurisprudential doctrine achieves status of *jurisprudence constante* where "no substantial deviation from the doctrine, under the circumstances presented herein, since its . . . adoption.").

108. 357 So. 2d 1218, 1223 (La. Ct. App. 1978) (where case law demonstrated four approaches to prescription or peremption of wrongful death claims, "it is not possible to discern a trend of *jurisprudence constante*.").

109. 314 So. 2d 550 (La. Ct. App. 1975).

110. 310 So. 2d 550, 555 (La. 1975) (Barham, J., concurring) ("In this civilian jurisdiction we do not follow decisional 'law.' Neither *stare decisis* nor *jurisprudence constante*, are in and of themselves *loi* in Louisiana. Jurisprudence may create custom and jurisprudence penned by an astute judge may become doctrine but jurisprudence can only supersede the Code when that jurisprudence has become entrenched as custom and the Code provision has fallen into complete desuetude.").

111. 317 So. 2d 576, 591 (La. 1975) (on rehearing) ("[W]hen it is necessary to overrule a short line of clearly erroneous jurisprudence in order to reinstate the long-standing law and public policy of this State, that course is clearly the one that must be followed.").

112. 287 So. 2d 599, 601 (La. Ct. App. 1973), *rev'd on other grounds*, 305 So. 2d 113 (La. 1974).

113. 276 So. 2d 309, 315 (La. 1973) (Summers, J., dissenting) (73-year line of *lex loci* cases are overruled rejecting dissenter's assertion that "the doctrine of *jurisprudence constante* is the wiser policy, because in most matters it is more important that the rule of law at issue be settled than that it be settled right." See, however, criticism of Justice Summer's dissent in Robert A. Pascal, *The Work of the Louisiana Appellate Courts for the 1972-1973 Term: Private Law*, 34 LA. L. REV. 197, 198-200 (1974).

114. 274 So. 2d 402, 414 (La. Ct. App. 1972), *aff'd in part and amended in part*, 300 So. 2d 154 (La. 1973) ("[P]lea of *stare decisis* is likewise unfounded, inasmuch as Louisiana courts are not bound by the doctrine of *stare decisis*, but there is recognized instead in Louisiana the doctrine of *jurisprudence constante* . . . .").

115. 236 So. 2d 216, 218 (La. 1970).

Lopes v. Sahuque,[117] and *State v. Nash*.[118] Scholarly discussion of the doctrine is found in: JOHN H. MERRYMAN, THE CIVIL LAW TRADITION (1969); Harriett S. Daggett, et al. A Reappraisal Appraised: A Brief For the Civil Law of Louisiana, 12 Tul. L. Rev. 12, 16-17 (1937); Martha E. Kirk, Comment, Retrospective Effect Of An Overruling Decision, 7 La. L. Rev. 133, 134 (1946); Robert A. Pascal, The Work of the Louisiana Appellate Courts for the 1972-1973 Term—A Symposium, Private Law-Previous Decisions and Custom, 34 La. L. Rev. 197, 198-200 (1974); Alvin B. Rubin & Elven E. Ponder, The Ostrich and the Arbitrator: The Use of Precedent in Arbitration of Labor-Management Disputes, 13 La. L. Rev. 208, 214-5 (1953).

116. 223 So. 2d 148, 159 (La. 1969) (Barham, J., dissenting) (case law cannot establish *jurisprudence constante* where positive codal law is contrary).

117. 38 So. 810 (La. 1949) (appellate rule of practice established by constant jurisprudence).

118. 13 So. 734, 735 (La. Ct. App. 1893) (recognition of controlling weight of long-line of jurisprudence in a criminal case).