# The Doctrinal Relationship Between the Public Records Doctrine and the Acquisitive Prescription of Immovables in Louisiana: Comparative Insights

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## I. PROLOGUE

Imagine the following tripartite situation in Louisiana. A record title owner transfers property that has already been successfully prescribed by another who never recorded her or his prescriptive right. The record title owner's transferee, however, records, while the prescriber remains unrecorded. Does acquisitive prescription prime the entry situation in the registry? Or should primacy be given to the entry situation in the records? These are important questions. Yet, in Louisiana, the doctrinal relationship between its laws of registry and acquisitive prescription has not been the subject of extensive contemporaneous scholarship. Rather, the indigenous literature confronting this topic can be readily identified. It includes a regularly updated practice handbook[1] and three law review articles of somewhat older vintage.[2] The three authors diagnose without further ado that acquisitive prescription—the mode of acquiring ownership through possession over time—ranks among what they characterize as the

1. PETER S. TITLE, LOUISIANA REAL ESTATE TRANSACTIONS (2020-2021).

2. William V. Redmann, *Louisiana Law of Recordation: Some Principles and Some Problems*, 39 TUL. L. REV. 491 (1964-1965) (Redmann-1); William V. Redmann, *Basic Louisiana Law of Recordation*, 23 ANN. INST. ON MIN. L. 1 (1977) (Redmann-2); Lee Hargrave, *Public Records & Property Rights*, 56 LA. L. REV. 535 (1996).

recognized exceptions to the laws of registry in Louisiana.[3] Jurisprudence with regard to interplays and fissures between both sets of laws in Louisiana has been similarly scant. Thus far, the topical decisions handed down by the Louisiana Supreme Court tend to be demarcational in nature, keeping acquisitive prescription and registration separately within their respective silos. Louisiana's legal community is still waiting for a judgment on point.

In general, jurisdictions across the world differ widely when it comes to calibrating the relationship between the laws of registry and the laws of acquisitive prescription. Foreign literature has for some cases even spoken of dangerous liaisons.[4] After reviewing Louisiana's laws of registry and acquisitive prescription, this Article explores interplays, overlaps and conflicts between both sets of laws through the prism of selected comparator jurisdictions. Finally, the Article assesses the comparative yield to extract lessons for the state of the doctrine in Louisiana.

## II. LAWS OF REGISTRY IN LOUISIANA

Registries have become ubiquitous in modern societies for a wide range of purposes.[5] A registry may generally be defined as a repository of information established by law for certain legally relevant purposes and administered according to certain legal criteria.[6] Because immovables are considered high-value assets that are amenable to significant wealth extraction through circulation and encumbrance, most legal orders around the world have created registries to publish legal interests in real property.[7] However, in practice, recording systems vary considerably in their designs and operations. A jurisdiction will make its policy choice in consonance with what it deems to be in the public interest and against the backdrop of prevailing legal, social, and economic conditions.

### *A. Basic Functions of Recordation*

The response to the fundamental question of how to design the law of registry typically hinges on the functions that a jurisdiction may intend

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3. TITLE, *supra* note 1, at 559-628 (Chpt. 8, §§ 8:1-8:69); Hargrave, *supra* note 2, at 536.

4. Gaëlle Gidrol-Mistral & Thuy Nam Tran Tran, *Publicité des Droits et Prescription Acquisitive: des Liaisons Dangereuses*, 46 REVUE GÉNÉRALE DE DROIT (R.D.G.) 303, 310-11 (2016).

5. Arkadiusz Wudarski, *Das Grundbuch in der Registerwelt*, *in* DAS GRUNDBUCH IM EUROPA DES 21. JAHRHUNDERTS 23-26 (Arkadiusz Wudarski ed. 2016) [GRUNDBUCH].

6. *Id.* at 34-40, 79.

7. *Id.*

for its registry to discharge. There is firstly a protective function, as recordation gives those who acquire interests in realty a means and forum of protection against potentially competing claims that are otherwise not amenable to being detected.[8] In addition, a facilitative function enables parties who plan to acquire a legal interest in realty to investigate the rights asserted by their counterpart.[9]

These two basic functions, however, raise a host of questions a jurisdiction will have to address. How do the law of registry and obligations and property law interact in general? Is registration merely declarative or negative in that it allows the opposability of purported legal rights vis-à-vis third persons. Or, is registration positive or constitutive for the creation or change of legal rights in realty? How does the law of registry resolve conflicting claims—based on the temporal sequence in the recordation of instruments or based on notice, including actual, constructive and imputed knowledge about unrecorded instruments? Is the registry a division of the courts or an organ of the executive? What powers does the recorder enjoy? Is the procedure for indexing person-based or tract-based? Who has access to the registry? Is the registry equipped with sweeping public faith good against the world?

### *B. Louisiana's Public Records Doctrine*

What has come to be known as Louisiana's public records doctrine reposes mainly in the Louisiana Civil Code[10] and, to some extent, in the Louisiana Revised Statutes.[11] In essence, the doctrine declares a written instrument that transfers immovables to be without effect as to third persons, unless it is registered in the appropriate conveyance records.[12] For purposes of the public records doctrine, third persons are those who are not a party to or personally bound by the instrument in question.[13]

By its nature, Louisiana's public records doctrine is negative; it operates to deny the effect of certain rights unless they are recorded.[14] This

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8. Charles Szypszak, *North Carolina Recording Laws: The Ghost of 1985*, 28 N.C. CENT. L.J. 199, 200 (2006).

9. *Id.* at 200.

10. *See* La. Civ. Code arts. 3338-3353 (2005) (general provisions). *See also* La. Civ. Code arts. 517(cl.2)(half-cl.2) (1979, amended 2005) (voluntary transfer of ownership of an immovable), 1839(2) (1984) (transfer of immovable property), 2442 (1993, amended 2005) ((recordation of sale to affect third parties).

11. La. Rev Stat. §§ 44:71 *et seq.* (2005, amended in 2006).

12. La. Civ. Code art. 3338 (2005).

13. La. Civ. Code art. 3343 (2005). *See also* TITLE, *supra* note 1, at 562 (§ 8:1).

14. TITLE, *supra* note 1, at 562 (§ 8:16).

diagnosis has been famously encapsulated by the locution of "what is not recorded is not effective."[15] In practice, the public records doctrine is Janus-headed. It not only protects a subsequent transferee of immovable property against prior unrecorded interests, but also makes that transferee's interest not effective against third parties, unless it is recorded.[16] A transferee of immovable property is therefore well advised to record for his or her own protection. Although the public records doctrine makes no pretense to create or guarantee rights,[17] it is designed to incentivize those who acquire an interest in immovable property to promptly record their interest.[18] By the same token, recordation makes the transfer instrument available for inspection by third parties. Indeed, once the instrument is recorded, those third parties are held in constructive notice of its existence and contents.[19] This makes the public records more informative and reliable,[20] with the practical effect of lowering transaction costs for those who use the public records system.[21] Of course, recordation may always be convenient for other purposes, such as taxation and other matters of public order.

In Louisiana, the clerks of court of the statewide district courts serve as ex officio parish recorders.[22] Recordation in Louisiana is already accomplished when the parish recorder accepts the instrument filed for registry, even though actual inscription may occur at a later date or not at all.[23] Under Louisiana's law of registry, the recorder does not make a substantive determination as to the factual correctness and legal validity of the titles submitted for recordation.[24] Conversely, the law also declares that the recorder does not incur personal liability or liability in his or her official capacity for accepting a document that the law does not authorize to be recorded.[25]

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15. Redmann-1, *supra* note 2, at 492; Redmann-2, s*upra* note 2, at 3.

16. Redmann-1, *supra* note 2, at 492; Redmann-2, *supra* note 2, at 2.

17. TITLE, *supra* note 1, at 578 (§ 8:16); Redmann-1, *supra* note 2, at 495; Redmann-2, *supra* note 2, at 4-5.

18. MARKUS G. PUDER, JOHN A. LOVETT & EVELYN L. WILSON, LOUISIANA PROPERTY LAW – THE CIVIL CODE, CASES AND COMMENTARY 375 (2020).

19. TITLE, *supra* note 1, at 568 (§ 8:8) (distinguishing the Louisiana Supreme Court's limitation of constructive knowledge and imputation for purposes of a rebuttal of good faith in prescription cases).

20. *Id.* at 562 (§ 8.1).

21. PUDER ET AL., *supra* note 18, at 375.

22. TITLE, *supra* note 1, at 562 (§ 8:16).

23. *Id.* at 562, 599, 602 (§§ 8.1, -:45, -:46) (discussing the methods of paper and electronic filing and the insufficiency of not filing with the proper recorder).

24. *Id.* at 577 (§ 8.16).

25. La. Rev. Stat. § 44:78 (2005). *See also* La. Rev. Stat. §§ 13:750, -:750.1 (2004).

The origins of Louisiana's public records doctrine have been somewhat shrouded in mystery. Moreover, its operations reveal not only a connectivity with obligations and property law, but also exhibit a relativity in the tripartite situation of a dual transfer, namely when a transferor transfers the same property twice. Finally, in practice, the high stakes and inherent uncertainties associated with the public records doctrine have given rise to precautionary safeguards such as title examination and title insurance.

1. Lead Case and Origins

The Louisiana Supreme Court's landmark decision in *McDuffie v. Walker*,[26] which was handed down more than a century ago, illustrates the operations of the Louisiana public records doctrine. *McDuffie* involved a common author who sold the same property twice: the plaintiff purchased a tract of land from a person who had previously sold the property to the defendant.[27] But the plaintiff recorded the purchase earlier than the defendant.[28] In such a situation, said the Louisiana Supreme Court, the defendant's unrecorded transfer was "utterly null and void" [29] as to the plaintiff, independent of whether the plaintiff had actual notice of the defendant's claims that were based on a prior transfer of the same property from the common author.[30] According to the Louisiana Supreme Court, the outcome could have only been avoided if the plaintiff had fraudulently induced the defendant not to record.

Literature has offered that Louisiana's public doctrine is not rooted in common law or Napoleonic law.[31] Rather, according to these voices, the public records doctrine was entrenched in Louisiana by *McDuffie*.[32] While this decision certainly embodies a robust articulation of the public records doctrine in the modern era, it is submitted here that Louisiana's public records doctrine actually took its cue from French revolutionary or intermediary law (*droit révolutionaire ou intermédiair*e). This diagnosis springs from the observation that in *McDuffie*, Justice Monroe identified

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26. McDuffie v. Walker, 125 La. 152 (1909). *See also* Redmann-1, *supra* note 2, at 492 (offering that the case most often cited for this proposition is McDuffie v. Walker, 125 La. 152 (1909)). *See also* TITLE, *supra* note 1, at 561, 563-64 (§§ 8:1, 8:3) (providing a synopsis of *McDuffie*)

27. TITLE, *supra* note 1, at 563 (§ 8:3).

28. *Id.*

29. *McDuffie*, 125 La. 163, 164, 165, 167.

30. TITLE, *supra* note 1, at 564 ((§ 8:3).

31. Hargrave, *supra* note 2, at 535 n.1.

32. *McDuffie*, 125 La. 152.

two pieces of Louisiana legislation articulating the principle of opposability: firstly, the Act of March 24, 1810, which he construed as not having been repealed by the arrival of the Civil Code of 1825; and secondly, a statute of March 20, 1827, which he cited for its clarifying language.[33] The Act of March 24, 1810 provided that "no notarial act concerning immovable property has effect against third persons until the same shall have been recorded in the office of the judge of the parish where such immovable is situated."[34] In the statute of March 20, 1827, the legislature subsequently added, in Judge Monroe's words, that "acts of transfer of immovables, not registered agreeably to law, whether passed before a notary or otherwise, should have no effect against third persons but from the day of their being registered."[35]

Louisiana's early legislation with regard to the negative operations of recordation echoes what the revolutionary legislator in France had enacted through the Law of November 1, 1798 (*loi 11 brumaire an VII*). By consecrating the transcription system (*système de transcription*), the law broke in the realm of realty with the lack of publicity favored during the old regime (*Ancien Droit*). Transcription embodied the extrinsic formality of reproducing in the public registry acts translative of ownership.[36] Under the law, the absence of a transcription did not render null and void the underlying transfer agreements.[37] But they could not be opposed against third parties who had contracted with the seller and who had otherwise complied with all applicable requisites established by the law.[38] This approach seems to have built on Pothier's "presumed conveyance," which construed the agreement between the transferor and the transferee to result in the transfer of ownership also in relation to third parties, subject to the caveat that a successful proof of such conveyance would hinge on the presence of an authentic act or a

33. *Id.* at 160.

34. *Id.* (3 Martin's Dig. p. 140).

35. *Id.* (Laws 1827, p. 136).

36. Jean-Philippe Borel, *La transcription hypothécaire des transferts conventionnels de propriété immobilière dans le Code civil*, 92 REV. HIST. DROIT 589, 594 (2014).

37. *Id.* at 594.

38. Loi de 11 brumaire an VII, art. 26(2) («*Les actes translatifs de biens . . . doivent être transcrits sur le registre du bureau de la Conservation des hypothèques dans l'arrondissement duquel les biens sont situés. Jusque là ils ne peuvent être opposés aux tiers qui auraient contractés avec le vendeur et qui se seraient conformés aux dispositions de la présente*»). For the provision, with commentary, see, for example, Julien Dubarry, *Zum Verhältnis zwischen Grundbuchfunktionen und Leitprinzipien des Sachenrechts – Eine Untersuchung am Beispiel des französischen Rechts*, *in* GRUNDBUCH, *supra* note 5, at 619 n.11; Borel, *supra* note 36, at 595 n.36.

private writing of a specific date.[39] Incidentally, the framers of French Code Civil not only opted for a traditional consensualist system in departure from Pothier's idea,[40] but also rejected the principle of transcription for juridical acts translative of ownership.[41] For contemporary France, the current law governing the "relative effect of land registration" (*effet relatif de la publicité foncière*) has been articulated in the Decree of January 4, 1955.[42]

2. Consensualism and Relativity

The denial of opposability under Louisiana's public records doctrine can only be fully appreciated if connected with the legal mechanics governing the transfer of ownership under general obligations and property law.[43] In Louisiana, the agreement between the parties as such not only gives rise to the contract but also accomplishes the transfer of ownership as between the transferor and the transferee.[44] Nothing more is required, unless the parties themselves agree otherwise. For immovable property, the agreement must be in writing to be form-compliant.[45] But exceptionally, even an oral agreement suffices, provided that the property has been delivered and the transferor judicially confesses to the transfer.[46] The transfer of ownership by way of agreement only has been dubbed the principle of mutual consent or consensualism (*consensualisme*).[47] In practice though, it requires significant upfront preparation and security vehicles, such as earnest money, or even a bilateral promise to sell (*avant contrat*). Still, under Louisiana law, registration or any other act of

39. JANWILLEM OOSTERHUIS, SPECIFIC PERFORMANCE IN GERMAN, FRENCH AND DUTCH LAW IN THE NINETEENTH CENTURY – REMEDIES IN AN AGE OF FUNDAMENTAL RIGHTS AND INDUSTRIALISATION 76-77 (2011).

40. *Id.* at 77.

41. For the arc of discussion until the arrival of the Decree of Jan. 4, 1955 in France, see Dubarry, *supra* note 38, at 620-23. *See also* Laurent Pfister, *The Transfer of Real Property in French Legal History: Between the Consensualist Principle and Formalities*, *in* ÜBERTRAGUNG VON IMMOBILIENRECHTEN IM INTERNATIONALEN VERGLEICH 157-91, 189 (Mathias Schmoeckel, ed. 2018) [ÜBERTRAGUNG] (diagnosing that "French law has had regimes in common with other European states [and] despite the doctrinal prominence of consensualism, the temptation of different foreign regimes has often showed itself and influenced to some extent on the elaboration of the system of land registration").

42. *See generally* Rapport de la Commission de Réforme de la Publicité Foncière, Pour une Modernisation de la Publicité Foncière 31 (Nov. 12, 2018).

43. *Id.* at 617.

44. La. Civ. Code art. 517(c.1),(cl.2)(half-cl.1) (1979, amended 2005). For commentary, see, for example, PUDER ET AL., *supra* note 18, at 372-73.

45. La. Civ. Code art. 1839(1)(cl.1) (1984).

46. La. Civ. Code art. 1839(1)(cl.2) (1984).

47. *Id.* at 372.

publicity is not a constitutive requisite for the transfer of ownership to take effect as between the transferor to the transferee.

Through the prism of general obligations and property law another feature of the public records doctrine emerges—its relativity, with two perspectives to distinguish in the tripartite situation of a dual transfer. In the relationship between the transferor (first party) and the earlier transferee (second party) ownership inures at the very moment when the agreement is reached.[48] Yet, the earlier transferee's ownership is not effective vis-à-vis the common author's subsequent transferees (third parties), unless it is made so by recordation.[49] In light of the agreement between the first and the second party and from the perspective of that relationship viewed in isolation, the second party has become owner and any third party would technically transact with a transferor who is no longer owner. But, if the first transferee remains unrecorded and the subsequent transferee records first, that recordation has, now from a tripartite perspective, the effect of disabling the earlier transferee's unrecorded ownership. This relativity feature thus strikes at the frontiers of civilian notions of single ownership.

### 3. Title Examination and Title Insurance

Title examination is the technical term for the factual and legal investigation undertaken by those who seek to ascertain their transferor's title before acquiring interests in realty. The acquirer may task a professional title company with handling the title search and conveyance, including the closing, which is the last meeting of the parties to finalize the details of the acquisition.[50] Significantly, however, only attorneys licensed in Louisiana may give title opinions—written certifications with regard to the merchantability of real estate titles.[51]

In the absence of law or jurisprudence, indices are generally considered not to be a part of the public records for purposes of title

48. PUDER ET AL., *supra* note 18, at 372.

49. *Id.* at 373.

50. Thomas Morse, Übertragung und Eintragung von Grundeigentum in den USA (May 11, 2012), https://www.investment-alternativen.de/ubertragung-und-eintragung-von-grundeigentum-in-den-usa/ (the information researched by the title company finds expression in the warranty deed).

51. *See* La. Rev. Stat. § 37:212(A)(2)(d) (2011) (defining practice of law to include "[c]ertifying or giving opinions, or rendering a title opinion as a basis of any title insurance report or title insurance policy as provided [by law], as it relates to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property").

searches.[52] One appellate court, however, determined that "indexing errors [or omissions]" by the recorder "which led to difficulty in discovering the existence of [an instrument] in the public records" made "the recording to be so indefinite, incomplete, and erroneous that it did not reasonably alert a person examining the title of any claim by those parties."[53] Literature has criticized this determination as out of step with Louisiana's law of registry, which deems recordation to have occurred with the filing of the instrument.[54]

Louisiana practice distinguishes different kinds of indices.[55] Parishes generally maintain grantor-grantee indices, as opposed to tract indices.[56] This type of index is based on the names of the transferors and transferees.[57] In consequence, a grantee will have to sift through his or her grantor's chain of titles, with two alternative methods—either start with the original land patent or colonial grant and work forward to the present grantor, or peel backward from the present grantor to the sovereign. Certain parishes also offer indices arranged by property description.[58]

Louisiana does not have in place a robust cadastre for purposes of parcel management, with its promise of accuracy and precision. In Louisiana, the survey, with a plat or map at its core, informs about the extent and quantity of title. But Louisiana exhibits a patchwork of different survey systems due to the state's colorful historical trajectory.[59] These include the French arpent or long lot division, the Anglo-Saxon metes-and-bounds quilted field pattern and spiderweb road net, the Spanish square sitio or rancho, and the American township-and-range grid, which is also known as the Public Land Survey.[60] Literature has noted that although "all systems are subsumed as irregular systems in the [American] rectangular system, the physical and cultural landscape of Louisiana is still influenced by each of these four systems."[61] Practitioners recommend that indices by property description, when available, should be looked to as

52. TITLE, *supra* note 1, at 608 (§ 8:50).

53. Black Water Marsh, LLC v. Roger C. Ferriss Properties, Inc., 130 So.3d 968, 975-77 (La.App. 3 Cir. 2014).

54. TITLE, *supra* note 1, at 608 (§ 8:50).

55. *Id.* at 607-609 (§§ 8:50, -:51).

56. *Id.* at 607 (§ 8:50).

57. *Id.*

58. TITLE, *supra* note 1, at 607 (§ 8:50).

59. John Whitling Hall, Louisiana Survey Systems: Their Antecedents, Distribution, and Characteristics, LSU Historical Dissertations and Theses (1970).

60. Richard Campanella, *Arpents, Ligas, and Acres: Cultural Fingerprints on Louisiana's Landscape*, LOUISIANA CULTURAL VISTAS 56 (2016).

61. Whitling, *supra* note 59, at x (1970).

backups.[62] They further note that such indices prove not as helpful when the descriptions are based on metes and bounds.[63] Finally, as an additional repository of information, there are suit records, which allow searches for pending litigation[64] and tax assessor's records, which may be based on tract indices and therefore, could prove a valuable place to identify potentially conflicting claims to a property.[65]

As a further safeguard, those interested in acquiring realty frequently take out title insurance[66] to mitigate their risks associated with title searches and opinions.[67] Title insurance allows acquirers to at least secure some form of indemnification when, despite all their efforts, they are evicted by someone who turns out to be the true owner of the property.[68] If lenders are financing the acquisition, title insurance will almost certainly be a hard requirement for obtaining a loan to finance the acquisition of a particular realty. Title insurance generally provides a larger umbrella of protection for an acquirer or lender than a title opinion only, which is restricted to the scope of the public records doctrine.[69] Taking out insurance also seems preferable for situations when the attorney charged with giving title opinion commits errors, because, in such a case, any recovery from the attorney will hinge on proving his or her negligence.[70] But insurance policies may not cover all costs of a purchase, and they may contain exceptions and conditions that could further chip away at the recovery.[71]

### *C. Comparative Perspectives*

Systems of recordation and registration as publicity mechanisms for immovable property are relatively recent phenomena. Such publicity devices were unknown to the Romans who employed ceremonial mechanisms for creating publicly available information about a property's

62. TITLE, *supra* note 1, at 607 (§ 8:50).
63. *Id.*
64. *Id.* at 609 (§ 8:52)
65. For a web-based, searchable database, see, for example, Orleans Parish Assessor's Office, Property Record Search, https://www.qpublic.net/la/orleans/search.html.
66. La. Rev. Stat. § 22:47(9) (2010).
67. Morse, *supra* note 50.
68. Luz M. Martínez Velencoso, *Conflicts of Interest and New Prospects for the Spanish Land Register: A Comparative View*, *in* DAS GRUNDBUCH, *supra* note 5, at 701.
69. TITLE, *supra* note 1, vol. II, at 694 (§ 21:25).
70. *Id.* at 695 (§ 21:25).
71. Velencoso, *supra* note 68, at 701.

changes in ownership.[72] Prior to the rise of modern systems of recordation and registration, those who needed to prove title basically had to go through the cumbersome process of producing the original documents or certified copies thereof.[73] In the modern world of registry at large, publicity mechanisms for immovables generally bifurcate into systems contemplating the recordation of deeds and those contemplating the registration of titles.[74]

1. Recordation of Deeds

Before the arrival of recording systems in the United States, the old common law had declared that, if neither of multiple grantees transacting with the same transferor recorded at all, the first grantee would prevail because, once the conveyance to the first grantee had occurred, the original transferor no longer had good title to the realty.[75] State recording statutes have displaced the common law to encourage actors to record their deeds at their earliest convenience. But the various systems exhibit significantly different approaches to managing possible collisions of interests in the same property. Recording laws in the United States now appear in three guises—notice, race, and race-notice.[76]

In recording systems with "notice" statutes, a subsequent transferee for value and, at the time of the conveyance, without notice of the prior conveyance will win.[77] Notice means not only actual knowledge

72. Juan Javier del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 SAN DIEGO INT'L L.J. 301, 312-13 (2011) (The Romans employed a solemn process for the private conveyance of certain valuable things (*res mancipi*); or, in the alternative, a public declaration and confirmation (*in iure cessio*) before a magistrate official (*praetor*)).

73. Simon A.A. Cooper, *Removing Blemishes as a Function of Registration*, *in* DAS GRUNDBUCH, *supra* note 5, at 132 (offering that (1) proof of title under unregistered conveyancing in England meant either flawlessly by way of the original grant or presumptively when the vendor or their author had exercised acts of ownership for a number of years; and (2) practical means to achieve the proof included the abstract, requisitions and verification).

74. Javier Gómez Gállego, *The Protective Function of the Spanish Land Registry System*, *in* DAS GRUNDBUCH, *supra* note 5, at 351-52.

75. Szypszak, *supra* note 8, at 200. *See also* Mitchell v. Hawley, 83 U.S. (16 Wall.) 544, 550 (1872) (referring to English classics in footnote 4).

76. Szypszak, *supra* note 8, at 201.

77. *See, e.g.*, 27 Vt. Stat. Ann. tit. 27, § 342 (2017) ("A deed of bargain and sale, a mortgage or other conveyance of land in fee simple or for term of life, or a lease for more than one year from the making thereof shall not be effectual to hold such lands against any person but the grantor and his or her heirs, unless the deed or other conveyance is acknowledged and recorded"); Tx. Prop. Code § 13.001 (1989) ("A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law").

but also constructive knowledge, for example, when the prior conveyance could be found because it is already recorded at the time the subsequent transfer occurs.[78] This system, which rewards bona fide grantees, relies the least on the public records. In recording systems with "race" statutes, temporal sequence is the determinative criterion—whoever records first will prevail, independent of whether this person has actual or constructive knowledge of an earlier unrecorded claim.[79] Pursuant to the mantra "first to record, first in right"[80] this type of system incentivizes grantees to record. In American vernacular, Louisiana would rank among the few states with pure race statutes. Finally, under the "race-notice" statutes in use by many jurisdictions in the United States, a subsequent grantee will prevail, if, at the time of the conveyance, the subsequent grantee had no actual or constructive notice of a prior transfer and the subsequent grantee records before the prior grantee.[81] This type of system offers a hybridization of race and notice, with the policy objective to make land records as complete as possible.

All three systems in the United States have been the subject of much criticism. There has been a trend away from race systems because they are viewed as too harsh in their general disregard of knowledge and therefore, have seen corrective intervention through case law.[82] Notice systems,

78. Szypszak, *supra* note 8, at 201.

79. *See, e.g.*, Del. Code tit. 25, § 153 (1953) ("A deed concerning lands or tenements shall have priority from the time that it is recorded in the proper office without respect to the time that it was signed, sealed and delivered."); N.C. Gen. Stat. § 47-18(a) (2005) ("Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined . . . .").

80. Szypszak, *supra* note 8, at 199.

81. *See, e.g.*, Neb. Rev. Stat. § 76-238 (2018) ("Except as otherwise provided . . . . , all deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice. All such instruments are void as to all creditors and subsequent purchasers without notice whose deeds, mortgages, or other instruments are recorded prior to such instruments. However, such instruments are valid between the parties to the instrument."); Mich. Rev. Stat. § 565.29 (1948) ("Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.").

82. Szypszak, *supra* note 8, at 201-02.

whether enriched by a race component or not, however, have been criticized for leading to potential disconnects in terms of publicity.[83]

2. Registration of Titles

In response to the imperfections associated with all three types of recordation systems, a few states in the United States still flank their "regular" system with a separate, parallel, and voluntary register that is typically managed by a court. In this type of immatriculation system for immovable property, the adjudicative registration process culminates with a certification of indefeasibility of title to the land under government imprimatur.[84] Meanwhile, those who have suffered a loss or are deprived of their interest, because the land has been registered in favor of another, are relegated to seeking compensation from a recovery fund that is financed by fees.[85] Under such a system, if a document is not approved, it has no effect.[86] By the same token and in the spirit of a pure race system, it does not matter whether the applicant has notice of another claim.[87] Comparatively speaking, the guarantee of ownership and access to compensation under this type of separate register invokes the design approach taken in "Torrens" jurisdictions. The Torrens system was originally introduced in South Australia in 1857,[88] from where it spread to countries all across the world.[89] After initially finding their way into the United States,[90] however, Torrens laws have been on the decline in most states.[91] Louisiana never enacted a Torrens statute. In the alternative to a Torrens system, title insurance continues to offer the route preferred in

83. *Id.* at 202 (offering two hypothetical scenarios of disconnects: (1) the prior grantee records after the conveyance to the second grantee, who has no notice, but the second grantee, whose conveyance still trumps, does not record; and (2) the second grantee knows about the first grant, and therefore is deemed on notice, but still records first).

84. *See, e.g.*, Haw. Rev. Stat. §§ 501-1 *et seq.* (2014) ("Land Court Registration"); Ga. Code Ann. §§ 44-2-20 *et seq.* (2020) ("The Land Registration Law"). *See also* Ethan Okura, Land Court Vs. Regular System (Sept. 9, 2016), https://okuralaw.com/2016/land-court-vs-regular-system/ (discussing the two different systems for recording ownership of realty in the State of Hawaii).

85. Ethan Okura, *supra* note 84.

86. *Id.*

87. *Id.*

88. 7 So. Austr. Acts of 1857, No. 15 (effective July, 1858).

89. Kenneth G.C. Reid, *Allocating Protections on the Land Register: A Case Study from Scotland*, *in* DAS GRUNDBUCH, *supra* note 5, at 399.

90. BLAIR C. SCHICK & IRVING H. PLOTKIN, TORRENS IN THE UNITED STATES: A LEGAL AND ECONOMIC HISTORY AND ANALYSIS OF AMERICAN LAND-REGISTRATION SYSTEMS (1978).

91. Szypszak, *supra* note 8, at 201 n.6.

American practice.[92] This is due to the lengthy reviews, considerable costs and uncertain outcomes associated with the registration process under a Torrens statute.[93] In contrast to this trend in the United States, jurisdictions throughout the world continue to distinguish between publicity regimes for unregistered land and registered land, most notably Australian territories and states, Canadian provinces, New Zealand, and England.[94] In these jurisdictions, registration embodies the root of title for registered realty, while possession discharges this function for unregistered land.[95]

Literature has not conclusively settled the question with regard to the degree by which the Torrens system itself was influenced by Germany's title registration system.[96] In contrast to Torrens systems, the German land book (*Grundbuch*)[97] has achieved universal registration, with a highly accurate cadastre.[98] Practitioners have noted though that in Germany, title registration occurs in one office and parcel registration in another.[99] The central feature in Germany's land book system (*Grundbuchsystem*) is a real estate balance sheet prepared for each land parcel and condensed from a pile of individual sheets—a title sheet or folio of the register

92. *Id.*

93. Ethan Okura, *supra* note 84.

94. For the Canadian province of Ontario, with its powerhouse Toronto, see, for example, Helge Dedek & Jennifer Anderson, *Landholding and Conveyancing in the Canadian Province of Ontario*, in ÜBERTRAGUNG, *supra* note 41, at 19, 22-23 (reporting that, since the 1990s, there has been "a concerted push" by the government to embrace the younger Land Titles System over the older Registry System, which has resulted in more than 99% of properties in the province now being—on first application or by conversion—in the Land Title System, "with the remainder left in the Registry System because of defects of title and other issues that cannot be readily resolved").

95. *See* Mark Jordan, *Limits to the* Grundbuch *Model for the English Register: The Role of Possession*, *in* DAS GRUNDBUCH, *supra* note 5, at 221-22 (explaining the bifurcation for root of title).

96. Reid, *supra* note 89, at 399 n.15. *See also* Antonio Esposito, Die Entstehung des australischen Grundstücksregisterrechts (Torrenssystem); Eine Rezeption Hamburger Partikularrechts?! (Doctoral Thesis, 2005) (the Torrens system resulted from a reception of Hamburg local law supported by numerous German immigrants and facilitated by the jurist Dr. Ulrich Hübbe); Murray J. Raff, German Real Property Law and the Conclusive Land Title Register (Doctoral Thesis, vol. 1, 1999) (the Torrens system was adopted from the Hanseatic land title registration system); Greg Taylor, *Is the Torrens System German*, 29 J. LEG. HIST. 253, 254 (2008) (the Torrens system was not achieved by a full-fledged legal transplant).

97. For the classic locution formulated by Germany's Federal Supreme Court, see Bundesgerichtshof [BGH], Decision of Mar. 6, 1981, V ZB 18/80, BGHZ 80, 126, 128 ("The registry is the mirror of the private real rights in tracts of land and has the task to provide the most exhaustive and reliable information about the legal relationships that concern the property.").

98. Louis Charlebois, *Creating Land Registration Systems for Developing Countries*, 21 AMICUS CURIAE 8 (Oct. 1999), https://sas-space.sas.ac.uk/3880/1/1437-1660-1-SM.pdf ("the European *Grundbuch* system is virtually indistinguishable in fundamental principles from the Torrens system with one exception: the accuracy of the cadastre").

99. *Id.* (speaking of a "bureaucratic error").

(*Grundbuchblatt*).[100] Recordation in Germany's dualist system discharges three core functions.[101] Recordation is first of all constitutive for the creation, change, or cancellation of rights in realty (*Konstitutivfunktion*).[102] Prior to intabulation in the registry, German law not only requires for a transfer of immovable property a causal transfer agreement (*Grundgeschäft*), but also a conveyance agreement (*Auflassung*), both of which are legally separate (*Trennungsprinzip*) and reciprocally independent (*Abstraktionsprinzip*).[103] Moreover, recordation furnishes a rebuttable presumption that the person in the registry is entitled in accordance with what is recorded (*Vermutungsfunktion*).[104] Finally, recordation protects those who in good faith rely on the truth of what is recorded or what is not recorded for that matter (*Gutglaubensfunktion*).[105] In practice, notaries, which are highly qualified, independent public officers, accompany real estate transactions from cradle to grave through robust and competent ex ante advice and instruction.[106] Notaries in Germany differ considerably from American notaries public in terms of their qualifications and powers.[107] American notaries, who often are not even lawyers, are prohibited from giving legal advice.[108] Their basic function is limited to authenticating documents.[109] Literature has deemed the civilian notary model superior to the insurance solution found in Louisiana and elsewhere in the United States.[110]

Spain has looked to the German model for designing its law of property registration. As a unique feature shoring up the efficacy of

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100. Murray Raff, *Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems*, 30 ADELAIDE L. REV. 245, 250 (2010).

101. For the historical origins and current operations of the registry in Germany, see Bayerisches Staatsministerium der Justiz und für Verbraucherschutz, Über 100 Jahre Grundbuch 19 (2012), https://www.justiz.bayern.de/media/images/behoerden-und-gerichte/ueber_100_jahre_grundbuch.pdf.

102. *Id.*

103. Stefan Hügel, *Das Zusammenspiel von deutschem Grundbuch- und Sachenrecht unter besonderer Berücksichtigung der Tätigkeit des Notars zur Gewährleistung der Grundbuchfunktionen*, *in* DAS GRUNDBUCH, *supra* note 5, at 102. For comparative scholarship, see, for example, Labro Gwenola, *La question du transfert de propriété en droit français et en droit allemande sous l'angle de l'obligation de donner*, at 18-28 (masters thesis, 2011).

104. Hügel, *supra* note 103, at 102.

105. *Id.*

106. *Id.* at 119.

107. Bernhard Schmeilzl, USA Notare sind keine Juristen (June 24, 2019), https://www.cross-channel-lawyers.de/usa-notare-sind-keine-juristen/.

108. *Id.*

109. *Id.*

110. Hügel, *supra* note 103, at 119 (characterizing insurance as a "minus" compared to reliance on notaries).

property registration, Spanish law makes available what it calls "real actions based on the rights inscribed in the registry."[111] This type of real action is a summary proceeding rooted in the presumed validity of the registry and designed to give the registered owner standing to enforce an entry situation against those who do not have sufficient legal title.[112] If either party seeks a substantive determination about the rights in the property, the action for a declaratory judgment under plenary rules remains available.[113]

In the 1990s, Quebec endeavored to reform its laws of registry along the Germanist twin goal of endowing the registry with probative value of and bolstering public confidence in the registry.[114] At its core, the envisaged reform not only proposed to irrefutably presume the existence of published interests in immatriculated immovable property if uncontested for ten years, but also endeavored to give full security to good faith acquirers of published rights in immatriculated immovable property.[115] Ultimately, however, this reform plan cratered[116] and therefore, Quebec has continued to subscribe to a deed registration system.[117] In similarity to Louisiana's public records doctrine, Quebec's law of registry is predicated upon the core missive that unrecorded interests do not trouble third parties.

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111. LH art. 41 («Las acciones reales procedentes de los derechos inscritos podrán ejercitarse a través del juicio verbal regulado en la Ley de Enjuiciamiento Civil, contra quienes, sin título inscrito, se opongan a aquellos derechos o perturben su ejercicio»). For scholarship and commentary see María Victoria Mayor del Hoyo, *La Protección del Titular Registral Mediante La Acción del Artículo 41 de la Ley Hipotecaria en el Sistema Inmobiliario Registral Español*, 7 REVISTA DE DERECHO 137 (2015); Javier Gómez Gálligo, Spanish property registration law, European Land Registry Association (ELRA) (Apr. 23, 2010), https://www.elra.eu/spanish-property-registration-law/ ("registration-based action concerning real estate").

112. Gómez Gálligo, *supra* note 111.

113. *Id.*

114. Madeleine Cantin Cumy, *Les Principaux Éléments de la Révision des Règles de la Prescription*, 30 LES CAHIERS DE DROIT (C. de D.) 611, 622 (1989).

115. Gaëlle Gidrol-Mistral & Thuy Nam Tran Tran, *Publicité des Droits et Prescription Acquisitive: des Liaisons Dangereuses*, 46 REVUE GÉNÉRALE DE DROIT (R.D.G.) 303, 310-11 (2016).

116. François Brochu, *Critique d'une Réforme Cosmétique en Matière de Publicité Foncière*, 105 LA REVUE DU NOTARIAT (R. du N.) 761 (2003).

117. *See generally* Stephan Wolf & Jonas Mangisch, *Das Grundbuch in der Schweiz und seine Prinzipien*, *in* DAS GRUNDBUCH, *supra* note 5, at 731 (describing the deed registration system (*système de transcription*), in counter distinction to: (1) the (no longer followed) system of homologation (*système de l'homologation*), under which the causal transaction was filed for presentment with and engrossment and protocolization by the competent authority, with the right accruing either with the engrossment act, the issuance of a document, or the inscription into a protocol; and (2) the title registration system (*Grundbuchsystem*) under the Civil Code).

## III. LAWS OF ACQUISITIVE PRESCRIPTION IN LOUISIANA

Acquisitive prescription, which offers a person who possesses an immovable for a designated period of time a trajectory to eclipse the record owner balances two seemingly conflicting interests—the protection of the true owner and the transformative effects associated with possession.[118] Despite persistent criticisms of acquisitive prescription as an inherently unfair means that effectively condones blatant land thievery by immoral possessors[119] and essentially transfers property "without compensation . . . from the deserving to the undeserving,"[120] acquisitive prescription has remained a fundamental staple of Louisiana property law.

### *A. Core Rationales for Acquisitive Prescription*

Scholars, practitioners, and policymakers have discussed different rationales relative to the designs and operations of acquisitive prescription laws.[121] The various rationalizations in American scholarship[122] for a legal system to have acquisitive prescription in its quiver include the administrative model, the developmental model, the limitations model, and the personhood model.[123]

Pursuant to the administrative model, acquisitive prescription offers a cure for run-of-the-mill errors in conveyancing, thereby avoiding costly legal controversies and conserving scarce judicial resources.[124] The development model views acquisitive prescription as a path towards redemption for the industrious possessor, who invests in labor and materials to put the property to beneficial use and keep it fit for commercial circulation. Moreover, this model likens the absenteeism of

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118. For a classic elaboration, see GABRIEL BAUDRY-LACANTINERIE & ALBERT TISSIER, 28 TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nos. 27-32, at 16-22 (4th ed., 1924) (transl. La. State Law Institute).

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

120. Beaulane Properties Ltd v. Palmer [2005] 4 All ER 461, at 512, per Deputy High Court Judge Strauss QC.

121. For an insightful world tour, see, Anna-Katharina Kraemer, *Ersitzung als Gebietserwerbstitel im Völkerrecht* 21-38 (Doctoral Diss. 2016) (reviewing Romanist, Germanist, Scandinavian, Russian, Chinese, Islamic, and Indian legal approaches).

122. For a critique of a century of debate among Anglo-American legal scholars about adverse possession at common law, see John A. Lovett, *Disseisin, Doubt and Debate: Adverse Possession Scholarship in the United States (1881-1986)*, 5 TEX. A&M L. REV. 1 (2018).

123. *See* JOSEPH WILLIAM SINGER, PROPERTY 155-62 (2010) (offering a synthesis and critique of the various models). For additional references to the literature, see PUDER ET AL., *supra* note 18, at 571.

124. *Id.* at 569-70.

the record owner to a voluntary abandonment of the rights associated with ownership.[125] Under the limitations model, acquisitive prescription provides finality—a clean slate in response to the various uncertainties associated with the passage of long periods of time.[126] Finally, the personhood model consecrates the psychological attachments and reliance interests that a possessor may have developed over time with regard to the property.[127]

The four models—whether viewed in isolation or in different combinations—may explain particular design features fashioned by a legal system for its acquisitive prescription laws. Economic analysis meanwhile has focused on efficiency trade-offs when jurisdictions determine the length of the applicable limitation periods.[128] In general, shorter duration requirements reduce the transactional uncertainty in transfers of title.[129] Unlike instantaneous prescription and innocent acquisition, however, a property title from a non-owner is not immediately insulated from competing adverse claims. A longer statutory period lowers the prevention and monitoring costs incurred by property owners for purposes of shielding their land from the accrual of acquisitive prescription.[130] Empirical studies have identified property values and population densities as crucial determinants for jurisdictions that endeavor to find their particular sweet spot within the spectrum of length requirements for acquisitive prescription.[131]

### *B. Louisiana's Length-Based Variations*

Louisiana's law governing acquisitive prescription of immovable property branches into ordinary and extraordinary forms. Ordinary prescription of ten years[132] allows for a shorter possession time, but comes at the price of additional requirements the prescriber has to meet. In the larger picture, this abridged form of prescription in Louisiana makes up for the absence of a separate avenue for the immediate acquisition of

125. *Id.* at 570.
126. *Id.* at 570-71.
127. *Id.* at 571.
128. Boudewijn Bouckaert & Ben W.F. Depoorter, *Adverse Possession–Title Systems*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 2:18 (Boudewijn Bouckaert & Gerrit De Gees eds. 2000); Gerard C. Rowe, *Sachenrechtliche Ersiztung aus ökonomischer Sicht*, 75 KRITISCHE VIERTELJAHRESZEITSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [KRITV] 390 (1992).
129. Bouckaert & Depoorter, *supra* note 128, at 22-23 (offering a figure that illustrates the optimum).
130. *Id.* at 22-23.
131. *Id.* at 23-24.
132. La. Civ. Code arts. 3473-3485 (1982).

property based on good faith. In turn, extraordinary prescription of thirty years,[133] with fewer conditions, installs a longer duration requirement. Both forms share the core element of true possession over time[134] of property that is susceptible to being prescribed.[135] Upon accrual, acquisitive prescription retroactively unleashes sweeping and cross-cutting effects good against the world that operate to eclipse record title ownership. The law of acquisitive prescription was significantly revised in Louisiana four decades ago.[136]

1. Ten-Year Prescription

Since the ordinary path cuts the length requirement by twenty years, a prescriber must start possession under just title[137] and in good faith.[138] Both requisites represent separate conditions.[139] But possession without both requisites being in place is not sufficient.[140] The abridged type of prescription is designed to cure conveyancing errors and title defects that can go unnoticed for many years.[141] It protects unsuspecting transferees who have done everything by the book except for not having acquired the property from the true owner.[142] In the wake of the recent reform, both elements have undergone significant overhauls.

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133. *Id.*, arts. 3486-3489 (1982).

134. *See id.*, arts. 3446 (1982) (definition of acquisitive prescription), 3476, 3436, 3436 (1982) (attributes of possession and absence of vices), 3421, 3424-3426, 3431, 3427 (1982) (definition, types and presumption of possession), 3437, 3438, 3477 (1982) (definition of precarious possession, presumption of precariousness, and precarious possessor's inability to prescribe), 3449-3472 (1982) (renunciation, computation, interruption, suspension), 3441-3442 (1982) (tacking).

135. *Id.*, art. 3485 (1982) (all private things except those excluded by legislation). For jurisprudence, see, for example, Band v. Audubon Park Commission, 936 So.2d 841 (La. App. 4 Cir. 2006) (declaring that a private thing owned by a political subdivision of the state could theoretically be subject to acquisitive prescription, but a public thing, such as a public road or a public park, is not). *See also* La. Rev. Stat. § 9:5804 (1926, amended 1950) (explaining how a municipality can prevent the running of acquisitive prescription with respect to any immovable property).

136. Acts 1982, No. 187, § 1, eff. Jan. 1, 1983.

137. La. Civ. Code art. 3483 (1982) (definition of just title).

138. La. Civ. Code arts. 3480-3482 (1982) (definition, presumption and timing of good faith).

139. For the proposition that the legislative revision overruled conflicting streams in the pre-revision jurisprudence, see Palomeque v. Prudhomme, 664 So.2d 88, 92-94 (1995) (when it comes to the purported creation of a predial servitude of light and view through acquisitive prescription of ten years, belief alone, no matter how reasonable, does not create just title).

140. PUDER ET AL., *supra* note 18, at 591.

141. *Id.* at 569.

142. *Id.* at 590.

Firstly, those seeking to acquire ownership in immovable property by ten-year acquisitive prescription must take possession under what Louisiana lawyers call "just title,"[143] which is the civilian analogue to "color of title" in the common law world.[144] Just title stands for a suitable act that would convey ownership, "if it had been executed by the true owner."[145] In the wake of the reforms made in the law of acquisitive prescription,[146] just title now requires the prescriber to clear additional hurdles. The act must not only be "written, valid in form, but also be filed for registry in the conveyance records of the parish in which the immovable property is situated."[147] The filing requisite must be met before prescription can begin to run, even if the good faith possessor has been in possession prior to recordation of the act.[148] Thus, in addition to having initiated possession, the prescriber must have filed so as to start the prescriptive clock.[149] One without the other does not suffice.[150] Recognizing that these innovations raised the bar significantly for prevailing on the shorter prescriptive track, the reform legislator emphasized that it sought to shore up the stability of title and certainty of ownership.[151] But it has been pointed out in the literature that Louisiana's indexing system is based on the names of the transferors and the transferees, rather than a tract identification system; and therefore, it appears more doubtful that a regular search would readily unearth a recordation adverse to the true owner.[152] Moreover, it is noteworthy that in the context of regular, voluntary transfers from a true owner, oral transactions may exceptionally be allowed and furthermore,[153] recordation is not required at all to transfer ownership under the principle of mutual consent.[154] In this sense, the addition of the filing requirement has created a form of abridged prescription previously unknown in Louisiana—one that springs from the public records.

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143. La. Civ. Code art. 3483 (1982).

144. TITLE, *supra* note 1, at 273 (§ 5:20).

145. La. Civ. Code art. 3483 rev. cmt. (b) (1982); O'Brien v. Alcus Lands Partnership Trust, 577 So.2d 1094, 1097 (La.App. 1 Cir. 1991).

146. Acts 1982, *supra* note 136.

147. La. Civ. Code art. 3483, 3483 rev. cmts. (c)&(d) (1982).

148. La. Civ. Code art. 3483 rev. cmt. (d) (1982).

149. But see Symeon Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 LA. L. REV. 69, 116 (1993) (a later recordation in tacking cases should be deemed to operate retroactively).

150. Hargrave, *supra* note 2, at 558 (Editor's Note).

151. La. Civ. Code art. 3483 rev. cmt. (d) (1982).

152. Hargrave, *supra* note 2, at 558.

153. La. Civ. Code art. 1839(1)(cl.2) (1984).

154. La. Civ. Code art. 517(cl.1)(cl.2, half-clause 1) (1979, 2006).

Secondly, those seeking to acquire ownership in immovable property by ten-year acquisitive prescription must commence their possession in good faith.[155] In the course of the reform of the law governing acquisitive prescription,[156] the legislature reshaped the element of good faith in several important ways. Under the new law, good faith is defined under a combination standard. In addition to subjectively believing in having become the true owner of the thing under possession, the prescriber must do so not only in his or her mind, but also reasonably when viewed through the prism of objective considerations.[157] Failing either prong would destroy good faith. Thus, if the prescriber actually knew at the time of commencing possession that he or she was not the owner, then there is no need to proceed to the second prong of the definition. Because good faith is presumed,[158] the person opposing acquisitive prescription bears the burden of proof to rebut.[159] As revised,[160] the law now declares that "[n]either error of fact nor error of law defeats this presumption"[161] and specifically requires for a successful rebuttal "proof that the possessor knows, or should know, that he is not owner of the thing he possesses."[162] An error of fact, for example, would relate to whether the transferor was married, and an error of law would accrue from a lack of knowledge as to the absence of one spouse's power to transfer community property. The presence of either type of error no longer overcomes the presumption of good faith as long as the error is not unreasonable.

2. Thirty-Year Prescription

Under the extraordinary prescription track, a person may acquire ownership of immovable property through thirty years of uninterrupted possession alone, unconnected to any color of title or state of mind.[163] This

155. *Id.*, art. 3482 (1982) (codifying "mala fides superveniens non nocet").

156. Acts 1982, *supra* note 136.

157. La. Civ. Code art. 3480 (1982). *See also id.* rev. cmt (b) (1982) (emphasizing that (1) Article 487, which defines good faith for purposes of accession was not affected by the reform; (2) "good faith and just title are separate ideas, whereas for purposes of accession the two ideas are blended"); rev. cmt. (c) (1982) (declaring that the law was changed from a purely subjective standard through the addition of an objective prong to honor prevailing jurisprudence).

158. La. Civ. Code art. 3481(cl.1) (1982).

159. La. Civ. Code art. 3481 rev. cmt. (b) (1982).

160. Acts 1982, No. 187, § 1, eff. Jan. 1, 1983.

161. La. Civ. Code art. 3481(cl.2) (1982).

162. La. Civ. Code art. 3481(cl.3) (1982).

163. La. Civ. Code art. 3486 (1982). For the precursor provisions in the Digest of 1808, see La. Civ. Code arts. 65-66, p. 486 (1808). *See also* PUDER ET AL., *supra* note 18, at 576 (observing that "many of the earliest cases decided by the Louisiana Supreme Court involved assertions of

type of prescription may thus be possibly in play either when a prescriber takes possession under just title but is in bad faith, or when the prescriber takes possession without any semblance of title.[164] This is significant because the fiction of constructive possession, under which possession of only a portion of a tract of land described in a deed is deemed possession of the whole,[165] only arises under the first alternative.[166] It means that bad faith prescribers could extend the spatial extent of their possession to the full limits of their title, even though their title may be defective.[167] In the absence of title, however, constructive is conceptually out of play[168] and the prescriber must show the space that has actually been possessed[169]—either inch-by-inch or within natural or artificial enclosures.[170]

3. Boundary Prescription

Compared to prescription in accordance with the general framework, this special type of prescription exhibits important differences for tacking,[171] a common law term[172] used in Louisiana to describe the cumulation of possession time for the author and the successor. Under the general rules, particular successors are spatially restricted to the confines of their particular title for purposes of cumulating their time of possession adverse to the true owner with the possession of their author.[173] Boundary tacking [174] permits a possessor who has been possessing more land than

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thirty-year acquisitive prescription regarding land granted to early settlers by the French and Spanish colonial governments prior to the cession of the Louisiana territory to the United States").

164. TITLE, *supra* note 1, at 276 (§ 5:26).

165. La. Civ. Code art. 3426 (1982);

166. TITLE, *supra* note 1, at 276 (§ 5:26).

167. La. Civ. Code art. 3426 rev. cmt. (c) (1982); La. Civ. Code art. 3488 rev. cmt. (c) (1982).

168. *Id.* art. 3487 re. cmt. (b) (1982).

169. *Id.* art. 3487 (1982).

170. Saunders v. Hollis, 17 So.3d 482, 484 (La. App. 3 Cir. 2009); TITLE, *supra* note 1, at 276-77 (§ 5:27); La. Civ. Code art. 3426 rev. cmt. (d). See also City of New Orleans v. New Orleans ("'Enclosed' does not necessarily mean 'fenced in,' but does require . . . natural or artificial marks . . . sufficient to give definite notice to the public . . . of the extent of the possession, to identify fully the property possessed, and to fix with certainty the boundaries . . . thereof.").

171. La. Civ. Code art. 3442 (1982). *See also* TITLE, *supra* note 1, at 269 (§§ 5:11, 5:12); PUDER ET AL., *supra* note 18, at 614-15.

172. *See, e.g.*, Adolph Kanneberg, *Adverse Possession*, 15 MARQ. L. REV. 132 (1931) (tacking defined as joining of successive possessions); Jennings v. White, 139 N.C. 23, 51 S.E. 799 (1905) (lead case in North Carolina). *See also* Civ. Code (Col.) art. 778 (2000) (*añadir*); Civ. Code (Fra.) art. 2265 (*joindre*); Civ. Code (Bra.) art. 1207 (2002) (*unir*).

173. La. Civ. Code arts. 3442 (1982) (tacking), 3441 (1982) (transfer of possession), 3506(28) (2004) (particular successor, such as a buyer, donnee or particular legatee).

174. La. Civil Code art. 794 (1977) (determination of ownership according to prescription). For background, along with examples, see PUDER ET AL., *supra* note 18, at 625-27.

the title describes, to tack[175] the possession time to that of his or her authors so as to achieve the thirty-year possession time. If both the ancestors and the particular successor possessed within the same visible bounds, the boundary shifts with the expiry of thirty years.[176] Boundary tacking permits tacking beyond title and up to visible boundaries, thereby creating an exception to the tacking requirement of strict privity of title for particular successors—a juridical link that has to describe all the property claimed by acquisitive prescription.[177] Finally, successful boundary prescription results in full ownership. This effect is distinct from cases in which a court may install a legal servitude for building encroachments by one neighbor on another neighbor's land upon payment of compensation for the value of the servitude and for any other damages the neighbor has suffered.[178]

4. Three-Year Blighted Property Prescription

Louisiana has enacted a detailed prescription framework for certain blighted properties.[179] The prescriptive period of three years is short, but a host of regulatory requirements attach. In general, properties must be located in municipalities of at least 300,000 inhabitants, which in practical terms restricts the eligibility of this type of prescription to New Orleans.[180] Moreover, properties must have been declared or certified as blighted after an administrative hearing.[181] The prescriber does not need just title or good faith,[182] but must file, in the conveyance records of the parish where the immovable is located, an affidavit, along with other required documentation, of his or her intentions to take up corporeal possession no later than sixty days from the date of filing.[183] In light of the complexities posed by the rules, relatively few prescribers have taken advantage of this

175. La. Civ. Code art. 3442 (1982). *See also* TITLE, *supra* note 1, at 269 (§§ 5:11, 5:12); PUDER ET AL., *supra* note 18, at 614-15.

176. La. Civ. Code art. 794 (1977).

177. *See* PUDER ET AL., *supra* note 18, at 626-27 (providing two didactic examples, with land fenced in by possessor in excess of what title declares).

178. La. Civ. Code art. 670 (1977).

179. *See* La. Rev. Stat. § 9:5633 (2001, amended 2003, 2006, and 2011); Ferrari v. Nola Renewal Group, LLC, 194 So.3d 1246 (La. App. 4 Cir. 2016).

180. La. Rev. Stat. § 9:5633(A)(1); TITLE, *supra* note 1, at 286 (§ 5:40). *But see* La. Rev. Stat. § 9:5633.1 (2018) ("incorporated municipality that is under a home rule charter, having a population between six thousand six hundred fifty and seven thousand six hundred fifty").

181. La. Rev. Stat. § 9:5633(A)(1).

182. La. Rev. Stat. § 9:5633(A).

183. La. Rev. Stat. § 9:5633(A)(2)(a).

prescription route.[184] Moreover, the potential penalties associated with a successful real action brought by the owner have acted as a deterrent.[185]

### *C. Comparative Perspectives*

The origins of acquisitive prescription remain somewhat shrouded in the fog of millennia past, reaching as far back as Babylonian law.[186] Acquisitive prescription is not only ubiquitous in civil law jurisdictions claiming Roman law lineage.[187] In the world of the Common Law, acquisitive prescription is generally known under the moniker of adverse possession,[188] or "squatter's rights" in colloquial vernacular.[189] As a unique

184. PUDER ET AL., *supra* note 18, at 590.

185. Moledoux v. Skipper, 104 So.3d 585, 590, 590-92 (La. App. 4 Cir. 2012), *writ denied*, 108 So.3d 85 (La. 2012) (holding that: (1) the trial court cannot bypass Section 5633(E)(4) of the statute, in contents and process, for purposes of evaluating expenditures for reimbursable items from the statutory list; (2) under Section 5633(D) the incumbent prescriber is shielded from tortious liability for the demolition of improvements on or after the date of his or her corporeal possession; and (3) Section 5633(E)(1) contemplates reimbursement for attorney fees.)

186. For an archaic prescription rule offered in Law 30 of Hammurabi's Code see, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 47 (Charles F. Kent & Frank K. Sanders eds., 1904), https://oll.libertyfund.org/title/hammurabi-babylonian-and-assyrian-laws-contracts-and-letters#lf1510_label_776 ("§ 30. If such an official [levy-master] has neglected the care of his field, garden, or house, and let them go to waste, and if another has taken his field, garden, or house, in his absence, and carried on the duty for three years, if the absentee has returned and would cultivate his field, garden, or house, it shall not be given him; he who has taken it and carried on the duty connected with it shall continue to do so.").

187. *See generally* THOMAS GLYN WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 243 (2017). For the antecedents of acquisitive prescription in Roman law, see Aroa Ropero Casado, La Adquisición de Inmuebles Mediante Usucapión: Derecho Roman y Regulación Actual (Graduation Thesis, 2014/15) (distinguishing three phases in the development of prescription law: (1) the archaic and pre-classical era; (2) the classical era; and (3) and the era of Justinian). *See also* Max Radin, *Fundamental Concepts of the Roman Law*, 13 CAL. L. REV. 207, 221-22 (1925) (the amalgamation of *praescriptio* and *usucapio* in Roman law gave rise to modern civilian designs of acquisitive prescription).

188. Axel Teisen, *Adverse Possession—Prescription*, 3 AM. BAR ASS'N J. 126 (1917); Charles P. Sherman, *Acquisitive Prescription—Its Existing World-Wide Uniformity*, 21 YALE L.J. 147, (1911). For the origins of acquisitive prescription in disseisin at election, the consolidation and formalization of limitation periods for the recovery of land under English law in the 17th Century, and the purportedly first appearance of the term in English case law, see William B. Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. & ST. B.J. 53 (1960) (Taylor ex dem. Atkyns v. Horde, 1 Burr. 60 (KB 1757)); Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918).

189. For the terms "preemption" and "homesteading," which have also been discussed under the rubric of squatter's rights, but are conceptually different from acquisitive prescription and adverse possession, see, for example, S. Lyle Johnson, *Fight for the Pre-Emption Law of 1841*, 4 ARK. ACAD. SCI. J. 165 (1951) ("Pre-emption was a policy . . . , which would allow men who settled on public land before it was opened to sale to purchase it at a minimum price without competitive bidding."); Trina Williams Shanks, *The Homestead Act: A Major Asset-Building Policy in American History*, *in* INCLUSION IN THE AMERICAN DREAM: ASSETS, POVERTY AND PUBLIC

feature of English law, there is no transfer of estate from the one being dispossessed to the one dispossessing.[190] Rather, the act of taking possession results in an independent possessory freehold title, which becomes effective once competing claims have been extinguished.[191] At their core, the laws governing acquisitive prescription, or adverse possession, share the requisites of true possession and passage of time. In practice, however, statutory requisites and judicial postures across jurisdictions differ widely with regard to the general architecture of the law, the adverse possessor's state of mind required for a successful claim and the availability of prescription based on registration.

1. General Architecture

The way a jurisdiction organizes its law of acquisitive prescription is frequently connected to how the required time of possession is calibrated. Contemporary versions of length requirements generally range from three years in the western portions of the United States[192] to sixty years for Crown land in certain jurisdictions that belong to the Commonwealth.[193] Beyond these preset timeframes, ancient prescription from time immemorial (*urminnes hävd* in Sweden and *alders tid* in Norway) has offered a uniquely Nordic vehicle for the legal recognition of rights attained by indigenous communities in the wake of having made historical use of land over considerable amounts of time. Sweden has meanwhile suppressed *urminnes hävd* of ninety years or longer.[194] But rights vested before the comprehensive overhaul of Swedish land legislation have remained in place[195] and under litigation.[196]

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POLICY 20, 23 (Michael Sherradan, ed. 2005) ("The [Homestead Act of 1862] provided that heads of household, military veterans, and those over 21 years of age were entitled to 160 acres of unappropriated land as long as they had not borne arms against the U.S. government.").

190. Jordan, *supra* note 95, at 226.

191. *Id.* ("It is perfectly possible for there to be multiple concurrent estates over the same piece of land, and indeed the concept of relativity of titles has been one of the singularly defining characteristics of English land law.").

192. *See, e.g.*, Tex. Prac. & Rem. Code § 16.024 (1985) ("A person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues.").

193. *See, e.g.*, Limitation Act 2010, § 21(1)(a) (2021) (New Zealand); Real Property Limitations Act, R.S.O. 1990, c L.15, § 3(1) (2009) (Ontario, Canada).

194. Äldre Jordabalken (ÄJB) [Older Code on Land and Cadastral Legislation] Chpt. 15 § 1 (1734 års lag).

195. Lag om införande av nya jordabalken [Act on Implementing the new Land Code] §§ 1, 6 (1970:995) (Jan. 1, 1972 as effective date for new rules), https://perma.cc/ZJ62-Z58T.

196. For the famous "Taxed Mountains Case" (*Skattefjällsmålet*), see Supreme Court Decision No. DT2. Case No. 324/76, *in* THE SÁMI NATIONAL MINORITY IN SWEDEN 155 (Birgitta

a. Tiered Designs

Statutory periods may be diminished when elements other than bare possession are present. Louisiana, which does not have in place a vehicle for the voluntary transfer of immovable property based on good faith alone, has traditionally mirrored the Romanist bifurcation between ordinary and extraordinary prescription. This distinction is based on whether the prescriber has initiated possession under just title and in good faith. Similarly, in France and Spain, good faith and title are central to a prescriber's winning a considerable reduction of the applicable length requirement.[197] Unlike Louisiana's post-revision law, however, abridged prescription in France and Spain does not require that the title must be recorded to be just.[198]

Similarly, in most American states, limitation periods are reduced when the adverse possessor brings additional elements to the table. Typically, these include being in good faith, having "color of title" and paying taxes. Wisconsin's adverse possession regime, for example, distinguishes three situations. Under its bare possession statute, twenty years are required to win ownership when adverse possession is not founded on a recorded instrument.[199] Adverse possession of realty beyond, but under color of, title carries a duration requirement of ten years,[200] which is reduced to seven years if the adverse possessor has paid all real estate taxes.[201] Color of title accrues from the existence of a written instrument, but, unlike just title in Louisiana, recordation is not necessarily required. Washington expressly adds the element of good faith to its color of title statute.[202] In New York, good faith considerations are wrapped into the locution of claim and color of title.[203] Georgia declares that the possession invoked to be the foundation of prescriptive title cannot have

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Jahreskog, ed. 1982). *See also* Elin Hofberg, *Sweden: Supreme Court Recognizes Sami Indigenous Group's Exclusive Right to Confer Hunting and Fishing Rights in Sami Area*, Glob. Leg. Monitor (Feb. 14, 2020), https://www.loc.gov/law/foreign-news/article/sweden-supreme-court-recognizes-sami-indigenous-groups-exclusive-right-to-confer-hunting-and-fishing-rights-in-sami-area/.

197. CODE CIVIL (C. CIV. FRA) art. 2272 (2008); CÓDIGO CIVIL ESPAÑOL [C. CIV. ESP] arts. 1940, 1957, 1959 (2021).

198. C. CIV. FRA art. 2273 (2008) (title that is null for lack of form insufficient); C. CIV. ESP arts. 1953 (2021) (title must be real and valid), 1954 (2021) (element of just title must be proven; not presumed)

199. Wisc. Stat. § 893.25 (1979, 1981, 1997).

200. *Id.* § 893.26 (1997).

201. *Id.* § 893.27 (1979).

202. Wash. Rev. Code Ann. §§ 7.28.070 (2005).

203. N.Y. Real Prop. Act. & Proc. L. § 501(3) (2008) ("[a] claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor").

originated in fraud.[204] In California, the payment of all taxes levied and assessed for the property during the entire limitation period of five years is indispensable for a successful claim of adverse possession.[205] Other states admit tax payments as evidence of the adverse possessor's intent.

b. Unitary Designs

In contrast, the Spanish community of Catalonia and the Canadian Province of Quebec do not tier their length requirements. Catalonia, which requires bare possession of twenty years, independent of good faith and title, has retained a singular period,[206] in line with the Visigoth roots of Catalan law.[207] Quebec's law of acquisitive prescription, which imposes a comparatively short duration requirement of ten years for immovable property, abandons the Romanist couplet of just title and good faith, but adds the requirement of a judicial application by the prescriber to have the accrual of acquisitive prescription recognized by the court.[208] The Supreme Court of Canada has meanwhile addressed the significance of such judicial recognition.[209] According to a majority of the justices, the judgment obtained in the wake of the application is merely a procedural formality that is declarative of a pre-existing right of ownership already granted through the completion of acquisitive prescription, rather than being a requisite that is constitutive or right-granting.[210] The dissent, however, declared that acquisitive prescription on behalf of the prescriber, who has met the length requirement, is in

204. Ga. Code Ann. § 44-5-161(a)(2) (2020). *See also* Kelley v. Randolph*,* 295 Ga. 721, 722 (2014) ("[n]o prescription runs in favor of one who took possession of land knowing that it did not belong to him").

205. Cal. Civ. Proc. Code § 325(b) (2010).

206. CODI CIVIL DE CATALUNYA [C. CIV. CAT] arts. 531-24, 531-27 (2006) (duration requirement of twenty years, independent of title and good faith). For pre-revision law, see COMPILACIÓ DEL DRET CIVIL ESPECIAL DE CATALUNYA [CDCC CAT] art. 344 (1960) (unitary limitation requirement of thirty years, with no further requirements). *See also* Joan Manel Abril Campoy, *La Prescripció en el Dret Civil de Catalunya: La Normativa Catalana Només és Aplicable Quan Hi Ha una Regulació Pròpia de la Pretensió que Prescriu?*, 2 REVISTA PER L'ANÀLISI DE DRET [INDRET] 1 (2011), https://indret.com/wp-content/themes/indret/pdf/817_cat.pdf (offering scholarly analysis).

207. *See generally* Josep M. Mas I Solench, *The Historical Development of Catalan Law*, 26 CATALÒNIA 21 (1991), https://core.ac.uk/download/pdf/39082487.pdf.

208. Qc. Civ. Code art. 2918 (1991) (English version) ("A person who has for 10 years possessed an immovable as its owner may acquire the ownership of it only upon a judicial application."); C. Civ. Qc. Art. 2918 (1991) (French version) («Celui qui, pendant 10 ans, a possédé un immeuble à titre de propriétaire ne peut en acquérir la propriété qu'à la suite d'une demande en justice»).

209. Ostiguy v. Allie, 2017 S.C.R. 402.

210. *Id.* at 438-41, ¶¶ 80-86 (J. Gascon).

substance conditioned on the prescriber having sought and obtained a judgment recognizing the acquisition of the prescriptive right.[211]

2. Prescriber's State of Mind

In Louisiana, the intent to possess as owner (animus), which operates as the decisive prong of distinguishing true possession from mere detention, exhibits moral neutrality. All that is required of the prescriber is to behave like an owner or someone intent on becoming owner. A prescriber can be in bad faith and still have animus, as long as some claim to the property is made. Thus, the prescriber's positive knowledge of not being its rightful owner does not preclude the animus required for true possession. Conversely, when the prescriber's state of mind is predicated on the belief of rightfully being owner, such good faith automatically reflects proper animus. By construing the psychological element of animus neutrally, Louisiana law has been able to readily add morality considerations for purposes of bifurcating its prescription regime into ordinary and extraordinary forms.

Still, the proposition that the moral quality of a prescriber's state of mind, even if established by law, can still be eroded by judicial evaluation in pursuit of a policy to support the operations of acquisitive prescription as an institution of property law has been bolstered by a recent resolution from the Constitutional Court of the Russian Federation.[212] In Russia, good faith has been codified in positive law as a statutory requisite within the unitary design of its acquisitive prescription laws.[213] The Constitutional Court, however, ruled that a buyer's understanding of not having acquired the ownership of the realty in question, which would normally destroy good faith as it is traditionally understood, did not prevent him from acquiring the right of ownership by way of acquisitive prescription.[214]

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211. *Id.* at 445, ¶¶ 102-03 & 451-66, ¶¶ 124-58 (J. Côté).

212. Постановление Конституционного Суда Российской Федерации N 48-П «По делу о проверке конституционности пункта 1 статьи 234 Гражданского кодекса Российской Федерации в связи с жалобой гражданина В.В.Волкова» [Resolution of the Constitutional Court of the Russian Federation N 48-P "In the case of reviewing the constitutionality of the first paragraph of article 234 of the Civil Code of the Russian Federation on the complaint of citizen V.V. Volkov"], Nov., 26, 2020, at ¶ 1 (operative part of the judgment). For the proposition that the decision's ostensible erosion of good faith would return the law of acquisitive prescription to where it stood in Imperial Russia, see Markus G. Puder & Anton D. Rudokvas, *Acquisitive Prescription of Artwork and Other High-Value Movables: A Comparative Case Study of Litigation and Legislation in Louisiana, Germany and Russia*, __ AM. J. COMP. L. __ (2022).

213. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [Civil Code RF] art. 234.

214. Resolution N 48-P, *supra* note 212.

Louisiana's sister states have witnessed their own lively discussion about the role of the adverse possessor's subjective intent beyond objectively giving "the record owner a cause of action in ejectment against him for the period defined by the statute of limitations[.]"[215] In the context of disputes over boundaries, two jurisprudential rules for the relationship between the adverse possessor's state of mind and the hostility element of adverse possession have been crystalized by the courts. Although the discussions in the courts purport to help assessing whether the adverse possession under scrutiny is sufficiently hostile, both rules are permeated by considerations of good faith and bad faith.[216] Under the older Maine Rule,[217] a subjective inquiry focuses on the adverse possessor's state of mind for purposes of ascertaining sufficient hostility. Accordingly, a merely erroneous or purely ignorant belief short of full awareness by the adverse possessor as to true boundary line is deemed to be insufficiently hostile, because it is assumed that the adverse possessor would not have occupied the excess had the true situation been known. In essence, under this approach, the adverse possessor must therefore exhibit the mindset of a squatter or trespasser to meet the hostility attribute. The newer Connecticut Rule,[218] which is followed by the majority of courts and similar to Louisiana's inquiry, subjects the adverse possessor's acts of possession to a factual evaluation as to whether they embody some claim of title. Accordingly, the intent to take another's land is deemed irrelevant as long as adverse possessor acts to exclude all others from possession.[219]

Finally, in some of Louisiana's sister states, the debate about the adverse possessor's state of mind has reared its head also in the context of doing equity. Case law coming from California has engrafted equitable doctrines of unclean hands, estoppel, and fair play to thwart the accrual of adverse possession on behalf of a prescriber who has technically met all applicable requisites.[220] Such judicial maneuvering may be criticized as being at odds with the origins of adverse possession in squatter's rights

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

216. *Id.* at 331-58 (offering a scholarly discussion of his survey of 850 cases handed down from the 1960s through the 1980s).

217. Preble v. Maine Central Railroad Co., 85 Me. 260 (1893), Lincoln v. Edgecomb, 31 Me. 345 (1850).

218. French v. Pearce, 8 Conn. 439 (1831).

219. MacDonough-Webster Lodge No.26 v. Wells, 175 Vt. 382, 394 (2003).

220. *Id.* Karl E. Geier & W. Scott Shepard, *"Good" Bad Faith vs. "Bad" Bad Faith: Equitable Principles and the Doctrines of Adverse Possession and Prescription*, 24 REAL ESTATE NEWSALERT 1, 2-4 (Partial reprint, 2014) (discussing Aguayo v. Amaro, 213 Cal. App. 4th 1102, 153 Cal. Rptr. 3d 52 (2d Dist. 2013)).

and the arguably inequitable conduct giving rise to adverse possession in the first place.[221] Practitioners have observed that the case law seems to distinguish between the act of trespass and wrongful occupancy that is part and parcel of the adverse possession claim and then, separately, something deceitful other than this act,[222] but directly related to the adverse possession claim, that calls for the deployment of corrective equity.[223]

3. Registry Prescription

The availability of registry prescription (*usucapio secundum tabulas*) is designed to make a previously incorrect entry situation in the land register match the real situation on the ground in favor of the registered prescriber. In contrast, extra-tabular prescription (*usucapio contra tabulas*) overwhelms the entry situation in the land register. Louisiana's addition of a recordation requirement for a title to be "just" within the abridged track of acquisitive prescription now effectively connotes registry prescription. In this sense, Louisiana's post-reform approach is similar to the type of registry prescription made available in Spain, which carries a length requirement of ten years and establishes a series of rebuttable presumptions in favor of a prescriber inscribed in the registry.[224] These pertain not only to the requisite possession, but also to the elements of just title and good faith.[225] For the purpose of acquisitive prescription in favor of the inscribed title holder, inscription shall be deemed just title.[226] The scope and sweep of this presumption, however, has been debated in doctrine and jurisprudence. According to Spain's Supreme Tribunal, the inscription only leads to a presumption of facial validity and veracity, but does not operate to heal fatal vices; and the presence of such vices may cause the inscription to be declared null and void or canceled.[227] In

221. *Id.* at 4-5.

222. *Id.* at 4 (diagnosing that in *Aguayo*, the prescriber recorded a wild deed to engineer a diversion of the tax bill away from the record owner and to her so she could pay the taxes as required by California's adverse possession laws).

223. *Id.* at 9.

224. Ley Hipotecaria (LH) [Mortgage Act] art. 35 (2019) («A los efectos de la prescripción adquisitiva en favor del titular inscrito, será justo título la inscripción, y se presumirá que aquél ha poseído pública, pacífica, ininterrumpidamente y de buena fe durante el tiempo de vigencia del asiento y de los de sus antecesores de quienes traiga causa»).

225. *Id.*

226. *Id.*

227. *See, e.g.*, Sentencia Tribunal Supremo (Pleno), Judgment of July 11, 2012, 454/2012 («La inscripción por tanto, sirve de refuerzo de una possible usucapión extraregistral, pero de ninguna forma suple o convalida la ausencia o los vicios que puedan presentarse en la configuración de los presupuestos objetivos de la usucapión»).

consequence, the prescriber could under this line of reasoning only use the inscription to reinforce a claim of extraordinary prescription outside all considerations of registry. Similarly, Louisiana practice considers the presence of absolute nullities fatal to the element of just title.[228]

Germany's robust version of registry prescription (*Buchersitzung* or *Tabularersitzung*) accrues through registration and possession for thirty years independent of good faith and other criteria.[229] The eclipsed real owner does not only lose all claims of revendication and registry correction, but is also cut off from claims for damages and unjustified enrichment. Indeed, Germany's Federal Supreme Court has shored up the durability of prescription over post-accrual challenges rooted in the law of unjustified enrichment.[230] According to the court, the completion of acquisitive prescription implies its own cause and therefore, forecloses any unjustified enrichment claims against the successful prescriber.[231] In contrast to Germany and Spain, registry prescription in Sweden exhibits two variants. If based on bare registration, twenty years of possession are required.[232] But if the prescriber possesses based on a transfer and good faith, the requisite possession time is reduced to ten years.[233]

## IV. INTERPLAYS BETWEEN ACQUISITIVE PRESCRIPTION AND THE PUBLICATION OF RIGHTS IN LOUISIANA

When it comes to connecting the laws of acquisitive prescription and the laws of registry, the Louisiana Supreme Court's major jurisprudential pronouncements arrived in the wake of the overhaul of prescription law four decades ago. In general, jurisprudence appears to keep both sets of laws in their respective silos.

### *A. Silo Jurisprudence*

In *Phillips v. Parker*,[234] a case brought in the immediate aftermath of the revisions made to the element of good faith, the Louisiana Supreme Court clarified the effect of title examinations on the element of good faith when title blemishes are reflected in the public records. More recently, in

228. La. Civ. Code art 3483 rev. cmt. (c) (1982).
229. BÜRGERLICHES GESETZBUCH (BGB) § 900.
230. Bundesgerichtshof (BGH), Judgment of Jan. 22, 2016, V ZR 27/14, BGHZ 208, 316.
231. For background and discussion, see Puder & Rudokvas, *supra* note 221.
232. Nya Jordabalken (NJB) [New Land Code] Chpt. 16 § 1(1) (1970:994, 2006:928).
233. NJB Chpt. 16 § 1(1) (1970:994, 2006:928).
234. Phillips v. Parker, 483 So.2d 972 (La. 1986).

*Loutre Land and Timber Co. v. Roberts*,[235] the Louisiana Supreme Court addressed the question of whether the public records doctrine could rise to negate the operations of boundary prescription.

1. The Good Faith Presumption and Clouds on Title Not Unearthed by Title Examinations

*Phillips* involved a contested overlap of boundaries that resulted from a stretch of land having been sold twice by the original owner and common author to different transferees with competing claims to the property.[236] The plaintiff brought a boundary action, suing as record title owner under a prior deed from the common author that was obtained and recorded by the plaintiff's immediate ancestor.[237] In their defense, the defendants answered with acquisitive prescription in good faith under their subsequently recorded deed.[238] Prior to purchasing the property inclusive of the disputed stretch, the prescriber had obtained a survey and a title opinion on advice of counsel.[239] But the attorney performing the title search and examination did not catch the overlap created by the dueling deeds—either by missing the prior conveyance in its entirety or by failing to compare the measurements in the description of the earlier deed with the survey for the property intended for purchase.[240] The attorney therefore expressed the erroneous opinion that the original transferor and common author had good and valid title at the time of the second conveyance.[241]

Addressing the question of whether the purported prescriber was in good faith, the trial court applied the pre-revision framework holding possessors in "legal bad faith" in the wake of title examinations that were carried out, but did not unearth errors of fact.[242] The court used a theory of dual imputation, in similarity to the knowledge a principal is deemed to have acquired based on the activities of an agent. Accordingly, the examiner's constructive knowledge was imputed to counsel and counsel's deficient knowledge was then imputed on to the client.[243] Although agreeing that the old rule of "legal bad faith" was legislatively repealed and therefore, no longer equipped to defeat acquisitive prescription, the

235. Loutre Land and Timber Co. v. Roberts, 63 So.3d 120 (La. 2011).
236. *Phillips*, 483 So.2d at 972.
237. *Id.* at 973-74.
238. *Id.* at 974
239. *Id.*
240. *Id.* at n.2.
241. *Id.* at 974.
242. *Id.*
243. *Id.* at 978, n.12-13.

appellate court affirmed.[244] It decided that, when a title search was actually conducted, the transferee would be charged constructively with the knowledge of what a proper search would have revealed.[245]

In a seminal opinion authored by Justice Lemmon, the Louisiana Supreme Court held that under the revised law of acquisitive prescription, the record owner failed to rebut the presumption of good faith in favor of the prescriber.[246] In the first portion of the judgment, which is written in the fashion of a treatise and entitled "The Public Records Doctrine,"[247] Justice Lemmon declared that the public records doctrine was all about the effectiveness of rights against third parties when recorded, independent of whatever knowledge those parties may have otherwise.[248] According to Justice Lemmon, the law of registry and the theory of reasonable belief under the law acquisitive prescription had to be separated.[249] Moreover, any theory of constructive knowledge transported via the intermediary of a title examiner had absolutely no basis in Louisiana's public records doctrine.[250] The significance of the public records doctrine, observed Justice Lemmon, was confined to making the first recorded sale effective vis-à-vis third parties.[251] As the public records doctrine was designed to protect third parties against unrecorded interests,[252] this simply meant for the case at hand that the recordation by the subsequent transferee as a third party came too late for purposes of acquiring perfect title and therefore, only acquisitive prescription could eclipse the first transferee's record title.[253]

In the second portion of the judgment, which is permeated by large picture policy perspectives and entitled "Title Examination and the Good Faith Possessor,"[254] Justice Lemmon offered that theories of constructive knowledge and imputation in the context of the presumption-rebuttal mechanic for the requisite of good faith, would penalize those who conducted a title search, while favoring those who take none.[255] According to Justice Lemmon, a purchaser of realty in Louisiana was not technically

244. *Id.* at 974.
245. *Id.* at 974-75.
246. *Id.* at 979.
247. *Id.* at 975-76.
248. *Id.* at 975.
249. *Id.* at 975.
250. *Id.*
251. *Id.* at 976.
252. *Id.*
253. *Id.*
254. *Id.* at 976-79.
255. *Id.* at 977.

required to search the public records; yet, good policy would of course want to incentivize prudent transferees who take the affirmative step to conduct title examinations.[256] Also, a theory of constructive notice and imputation of knowledge preclusive of good faith would virtually write ordinary prescription out of the law.[257] Therefore, the revision was purposeful in that a rebuttal of the good faith presumption could no longer rely on these theories.[258] After having explicated the new legal framework, Justice Lemmon then scrutinized the particular facts of the case at bar to probe whether the prescriber's erroneous belief was reasonable or whether suspicious instances were present that should have triggered further inquiry.[259] As to the circumstances surrounding transaction, the prescriber's original transferor, who was physically present on the property, made declarations that were signaling his ownership.[260] Moreover, the prescriber not only consulted an attorney, but additionally, on advice of counsel, a survey and a title examination were conducted.[261] Also, the overlap was relatively small and, arguably, amenable to being easily missed, especially since the records themselves were not in a good condition.[262] Therefore, the good faith presumption was not overcome by the record owner.[263] In consequence, Justice Lemmon sustained the plea of acquisitive prescription.[264]

The *Phillips* decision effectively ended the uncertainties associated with the confusing picture painted by the pre-revision jurisprudence. Yet, the revision comments, which, in practice, carry much persuasive doctrinal weight in Louisiana,[265] continue to sound signals that appear somewhat mixed.[266] Literature has not only welcomed the decision and its

256. *Id.*
257. *Id.*
258. *Id.* at 978.
259. *Id.*
260. *Id.* at 979.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. For this proposition, see, for example, Melissa T. Lonegrass, *Taking the Comments More Seriously*, 92 TUL. L. REV. 265, 267 (2017) ("while legislative comments are not law in an official sense, comments have far more significance and influence than the conventional wisdom dares to admit").
266. *See* La. Civ. Code art. 3480 rev. cmt. (d) (1982) ((1) a purchaser or transferee of immovable property in Louisiana is not required to search the public records nor is such a person "charged with constructive knowledge" of what they would have found if they had undertaken a search of the public records; and (2) at the same time, a purchaser or transferee "who knows facts sufficient to excite inquiry" is "bound exceptionally to search the public records and is charged with the knowledge that a reasonable person would acquire from the public records"); La. Civ.

totality analysis,[267] but also argued that the failure of conducting a title examination should weigh against a prescriber who relies on the presumption of good faith;[268] and, conversely, if conducted, a title examination should reinforce the presumption.[269] Some twenty-five years after *Phillips*, the Louisiana Supreme Court's *Loutre* decision[270] returned to the relationship between the law of registry and prescription law, this time in a case involving assertions of boundary prescription.

### 2. Shifting Boundaries without Separate Analysis under Public Records Doctrine

The quagmire in *Loutre*, which involved the difficult question as to whether the law of registry operates to negate prescription law, was precipitated in the wake of a sequential conveyance, in relatively short order, of arguably the same land by one landowner to two different parties.[271] This land had been possessed by the prior landowner for more than thirty years, in excess of what they had acquired by their recorded deed.[272] The plaintiff's "full warranty deed" ("act of sale"), which was recorded earlier,[273] but did not specifically describe the disputed land, purported to convey "all rights of prescription, whether acquisitive or liberative, to which said vendor may be entitled."[274] In the lawsuit to have their boundary fixed inclusive of the disputed land, the plaintiff alleged that they owned the land due to successful prescription[275] that had been

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Code art. 3481 rev. cmt. (e) (1982) ((1) "an acquirer of immovable property is not bound to search the public records unless he knows facts sufficient to excite inquiry" and then "the acquirer is charged with the knowledge that a reasonable person would acquire from the public records, and the presumption of good faith may be rebutted"; and (2) "[t]he same is true when an acquirer voluntarily undertakes to search the public records: he is also charged with the knowledge that a reasonable person would acquire from the public records, and the presumption of good faith may be rebutted").

267. Symeon Symeonides, *Error of Law and Error of Fact in Acquisitive Prescription*, 47 LA. L. REV. 429, 440-41 (1986) (The possessors' actual good or bad faith should be determined not by artificial fictions, but rather by evaluating, on a case by case basis, all of the surrounding circumstances, including the condition of the public records, the thoroughness of the particular title search, the competence and reputation of the title examiner, the type of title defect involved, the possibility of it being missed, and other similar factors. This is essentially the Supreme Court's approach in *Phillips* . . . .").

268. *Id.* at 439.

269. Symeonides, *supra* note 267, at 441. *See also Phillips*, 483 So.2d at 977 n.7.

270. *Loutre*, 63 So.3d at 120.

271. *Id.* at 121-22.

272. *Id.* at 122.

273. *Id.*

274. *Id.*

275. *Id.* at 123.

achieved by tacking their possession to that of their ancestor. Since the defendant's "quitclaim deed" was recorded later than the plaintiff's deed,[276] the defendant needed to argue that, under Louisiana's public records doctrine, the full warranty deed did not convey the disputed acres and therefore, the defendant's quitclaim deed from the original landowner could accomplish the transfer of ownership of the disputed land to him.[277]

The case caused considerable dissensions in the courts. After the trial court had decided in favor of the plaintiff, the court of appeal reversed and remanded to have the boundaries fixed according to the surveys of the parties.[278] The court of appeal conducted the analysis outside the purview of boundary prescription.[279] At the outset, the court of appeal observed that the prior landowner's successful prescription gave them the right to sell the land.[280] Asserting that the two deeds represented separate transfers of differently described realty, the court of appeal found that the defendant's subsequent quitclaim deed contained a specific description of the disputed land, but that the plaintiff's warranty deed did not.[281] Significantly then, the defendant, as a third party, was protected under Louisiana's public records doctrine from unrecorded interests, since the earlier deed was not inclusive of the disputed land.[282] Therefore, said the court of appeal, the defendant's deed was superior to the plaintiff's deed.[283] Chiding the majority for having "woven a bizarre and unprecedented theory based on the public records doctrine," the dissenting judge countered that as the property had already been conveyed to plaintiff, there was nothing to quitclaim to the defendants.[284]

The Louisiana Supreme Court disagreed,[285] declaring that the special tacking rule of possession under the law of boundary prescription also conveyed ownership when prescription had already run its course.[286] According to the Louisiana Supreme Court, this rule, which contemplates possession beyond title up to a visible boundary, did not require a tailored

276. *Id.* at 122.
277. *Id.* at 122-23.
278. Loutre Land and Timber Company v. Roberts, 47 So.3d 478 (La.App. 2 Cir. 2010).
279. *Loutre*, 63 So.3d at 123.
280. *Loutre*, 47 So.3d at 483.
281. *Id.* at 485-86.
282. *Id.* at 489-90.
283. *Id.* at 490.
284. *Loutre* (J. Moore, dissenting), 47 So.3d at 492-93.
285. *Loutre*, 63 So.3d at 120.
286. Taylor v. Dumas, 115 So.3d 755 (La.App. 2 Cir. 2013 (writ denied, 125 La. 3d 423 (La. 2013); TITLE, *supra* note 1, at 282 (§ 5:36).

title as to the disputed land in order to convey prescriptive rights.[287] Significantly, the Louisiana Supreme Court explained that, in cases governed by boundary tacking, a separate analysis under Louisiana's public records doctrine was not required, and thus, the inquiry had to end.[288] Finally, the Louisiana Supreme Court noted that the earlier full warranty deed contained language declaring that the seller's transfer also included "all rights of prescription whether acquisitive or liberative."[289] In practice, it may therefore be advisable to consider including such language in acts of sale, even though the Louisiana Supreme Court did not seem to have delved further into its legal significance.[290]

3. Interim Diagnosis

*Phillips* and *Loutre* continue to be considered canon in Louisiana. In *Phillips*, the Louisiana Supreme Court walled off the theory of good faith prescription from the law of registry. But it was the effect of the preliminary skirmish—the sequence in recordation favoring the record title owner—that pushed the case into a controversy that was resolved by acquisitive prescription and won by the prescriber. *Loutre* declared, though a double negative, that the law of registry does not operate to negate the law of boundary prescription, which, said the court, also serves as a conveyance mechanism for ownership.

A case that could be invoked as a foray into the broader topic of possible exceptions to the public records doctrine more generally is *Jackson v. D'Aubin*.[291] In *Jackson*, the Louisiana Supreme Court confirmed that certain interests arising by operation of law—here, the vesting of title to property of a testamentary trust—do not require recordation to be effective vis-à-vis third parties, but then turned around to decide the case based on the accrual of statutory prescription in favor of the third party.[292] The case featured property left by the deceased settlor to co-trustees in testamentary trust, with his heirs designated as beneficiaries.[293] After the decedent's death, his heirs obtained and recorded a judgment of possession that recognized them as full owners, omitting any reference to the testamentary trust.[294] The United States subsequently

287. *Loutre*, 63 So.3d at 126.
288. *Id.*
289. *Id.*
290. TITLE, *supra* note 1, at 282 (§ 5:36).
291. Jackson v. D'Aubin, 338 So.2d 575 (La. 1976).
292. *Id.*
293. *Id.* at 579.
294. *Id.*

seized the interest of one of the heirs and sold it at a tax sale to a third-party purchaser who went into possession for more than ten years.[295] More than twelve years after the original judgment of possession had been signed, it was amended, this time recognizing the trusts and sending the trustees into possession of the property in trust.[296] In the ensuing lawsuit over the proceeds from a partition sale of the property, the trustees and the third-party purchaser advanced competing claims to the proceeds.[297] The third-party purchaser asserted that he had acquired the interest without any strings attached, because the trust instrument was never recorded, and therefore, without any effect vis-à-vis third persons.[298] Contrariwise, the trustees argued that recordation was immaterial, as the trust interest arose by way of inheritance and hence, by operation of law—one of several recognized exceptions to the law of registry.[299]

On original hearing, the Louisiana Supreme Court deployed the full sweep of Louisiana's public records doctrine when deciding that no trust existed from the perspective of the third-party tax purchaser.[300] According to the Louisiana Supreme Court, the mandatory recordation language in the Trust Code took precedence over any doctrinal exceptions linked to rights arising by operation of law.[301] On rehearing, however, the Louisiana Supreme Court first held that, contrary to its holding on original hearing, the trustees were correct in that non-recordation did not disable their rights with regard to their interest in the trust property.[302] Nevertheless, despite piercing the operations of Louisiana's public records doctrine in the first portion of the judgment, the Louisiana Supreme Court decided the case in favor of the third-party purchaser.[303] In support of this outcome, the Louisiana Supreme Court relied on a prescription statute that afforded protection to a third person who acquires property from or through a recognized, but not necessarily true, successor to the deceased.[304] Pursuant to the statute, an action by an unrecognized successor who asserted an interest in the property left by the deceased would be barred, once the third person had acquisitively prescribed the property through possession, with

295. *Id.*
296. *Id.*
297. *Id.* at 579-80.
298. *Id.* at 580.
299. *Jackson*, 338 So.2d at 580. *See also* TITLE, *supra* note 1, at 588 (§ 8:33).
300. *Jackson*, 338 So.2d at 577-78 (referring to the recordation requirement in the law of trust under La. Rev. Stat. § 9:2092 (1964)).
301. *Id.* at 578.
302. *Id.* at 580.
303. *Id.* at 581.
304. *Id.* (invoking La. Rev. Stat. § 9:5682 in the version of when it was enacted in 1960).

all the statutory attributes, for a period of ten years, in person or by way of tacking, as measured from the time of the registration of the judgment of possession in the appropriate conveyance records.[305] The Louisiana Supreme Court explained the conferral of this benefit, which is normally associated with the abridged version of acquisitive prescription, by way of a clever jurisprudential maneuver that not only morphed the nature of a judgment of possession from declarative to translative, but also engrafted the element of good faith on the part of the recognized successor, albeit only for purposes of the statute.[306] In this light, the Louisiana Supreme Court concluded that, because all applicable elements of the prescription statute were satisfied, the third-party tax purchaser had successfully prescribed the interest acquired through the tax sale.[307] As an aperçu, the legislature has meanwhile amended the statute to explicitly change the prescription from acquisitive to liberative.[308]

In sum, the Louisiana Supreme Court's decision in *Jackson* adds important clarifications when it comes to exceptions to Louisiana's public records doctrine in a case that was ultimately resolved through statutory prescription. But it does not squarely answer the question of whether, and if so why, acquisitive prescription operates to prime the publication of rights. In this light, important insights may be gained from looking to foreign regulatory models for resolving potential collisions between the laws of acquisitive prescription and the laws of registry.

### *B. Comparative Perspectives*

The common denominator shared by acquisitive prescription and the laws of registry is the element of publicity.[309] For purposes of acquisitive prescription, the notice function is achieved by the externalized physicality of possession. A communicative function also accrues from what is recorded in the registry. Conflict scenarios between acquisitive prescription and the registry may be captured by a spectrum predicated

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305. La. Rev. Stat. § 9:5682 (1960, amended in 1975).

306. *Id.* (referring to the Louisiana Supreme Court's decision in All-State Credit Plan Natchitoches, Inc. v. Ratliff, 279 So. 2d 660 (La. 1973)).

307. *Id.* at 582-83.

308. *See id.* at 581-82 (offering that the case was still governed by the previous version enacted in 1960, because the proceedings had commenced prior to the amendment in 1975). *See also* TITLE, *supra* note 1, at 588 (§ 8:33) (referring to the current provision, at La. Rev Stat. § 9:5630 (1981), as a liberative (not acquisitive) prescription statute).

309. Yaëll Emerich, *Comparative Overview on the Transformative Effect of Acquisitive Prescription and Adverse Possession: Morality, Legitimacy, Justice*, 67 REVUE INTERNATIONALE DE DROIT COMPARÉ (R.I.D.C.) 459, 481 (2015).

upon inverse relationships. Towards one end of the spectrum, the role of acquisitive prescription tends to decrease when registration wields absolute probative force.[310] Contrariwise, when registration is designed merely to comfort rights, acquisitive prescription becomes a more powerful institution.

1. Torrens Systems

Despite guaranteeing the indefeasibility of title for the registered owner, Torrens statutes differ considerably with regard to the admissibility of adverse possession claims. Some jurisdictions impose a rigid bar on the availability of adverse possession. Accordingly, no title can be acquired by prescription or any length of possession and therefore, the title of the registered owner cannot be extinguished by adverse possession. Such Torrens bars can be found in Hawaii[311] and Ontario.[312] Other Torrens jurisdictions admit adverse possession claims pursuant to circumscribed derogations from the mantra of indefeasibility of title for the registered owner.

Tasmania applies its limitations statute to unregistered lands as well as Torrens lands in the same manner and to the same extent.[313] But the registered owner's title will not be extinguished once the statutory period has run; rather, the registered owner will hold the estate in trust for the adverse possessor.[314] On this basis, the adverse possessor may apply to the registrar for an order vesting in him or her the legal estate.[315] In the process of determining whether the application for title anchored in possession will be granted, the registrar will consider all the circumstances of the case as well as the conduct of the parties.[316]

New Zealand and England in turn have infused their systems for admitting adverse possession with significant procedural safeguards. Thus, New Zealand enables a person who has adversely possessed land for a minimum of twenty years to apply for a certificate of title, notwithstanding the registration of another person as owner.[317] The

310. BAUDRY-LACANTINERIE & TISSIER, *supra* note 118, at no. 31.

311. Haw. Rev. Stat. § 501-87 (1955).

312. Land Titles Act, R.S.O. 1990 (Ont), s. 51. For additional detail see Dedek & Anderson, *supra* note 94 at 23-25 (offering that "Land Titles Absolute" and "Land Titles Absolute Plus" protect against claims of adverse possession, while "Land Titles Converted Qualified" do not).

313. Land Titles Act 1980 (Tas), s. 138W(1).

314. *Id.*, s. 138W(2).

315. *Id.*, s. 138W(4).

316. *Id.*, s. 138V.

317. Land Transfer Act 2017 (NZ), s. 155.

application, which is advertised and notified by the registrar to the relevant parties,[318] can be defeated by those who lodge a caveat and establish better title.[319] If the application, however, is successful, a previous record of title will be cancelled and a new record of title registered in the name of the applicant will be created.[320] Comparable processes are in place for Victoria and Western Australia[321] as well as South Australia and Queensland.[322] New South Wales requires that possessory applications can only be made for a "whole parcel of land."[323]

Similar to Torrens jurisdictions that allow limited derogations from the indefeasibility of registered titles, England has also kept the door ajar to allow adverse possession despite the formalized entry situation for registered land.[324] This comes at the price of a complex web of rules. At the outset, any adverse possessor may apply for registration as owner of registered land upon objectively having possessed the estate in question for ten years on the date of the application,[325] unless the adverse possessor was prevented from doing so through eviction within the six months preceding the application.[326] Once the adverse possessor has filed the application, the registrar is triggered into notifying the registered owner and certain others.[327] If the registered owner objects, the adverse possessor is blocked,[328] unless the owner was estopped from objecting,[329] or the adverse possessor was entitled to be registered on other grounds,[330] or the exact boundary line was fuzzy and the applicant reasonably believed owning the excess.[331] But even outside these three exceptions, if the adverse possession continues for an additional period of two years, the adverse possessor may still succeed,[332] unless the registered owner has initiated proceedings for possession and the lawsuit is either pending or

318. *Id.*, s. 161.
319. *Id.*, ss. 162-167.
320. *Id.*, ss. 168-69.
321. Transfer of Land Act 1958 (Vic), ss. 42(2)(b), 60-62; Transfer of Land Act 1893 (WA), ss. 68(1A), 222-223.
322. Real Property Act 1886 (SA), ss. 80A-80I; Land Title Act 1994 (QLD), ss. 99-108B.
323. Real Property Act 1900 (NSW), ss. 45D, 45B.
324. *See* Jordan, *supra* note 95, at 231 ("The Land Registration Act 2002 did not abolish the doctrine of adverse possession, but it has certainly emasculated limitation.").
325. Land Registration Act 2002 (UK), Schedule 6 ¶ 1(1).
326. *Id.*, ¶ 1(2).
327. *Id.*, ¶ 2.
328. *Id.*, ¶ 5(1).
329. *Id.*, ¶ 5(2).
330. *Id.*, ¶ 5(3).
331. *Id.*, ¶ 5(4).
332. *Id.*, ¶¶ 6(1), 7.

judgment has been rendered.[333] Upon registration of the applicant as owner, the title held at the time of the application by virtue of adverse possession is extinguished.[334] Finally, the adverse possessor, who does not file, is perpetually under the sword of an action for possession brought by the registered owner at any time, because limitation periods have been disabled for registered lands.[335] In such litigation, the limited defenses available to the adverse possessor are not predicated on possession time or tenure.[336]

2. Land Book Systems

Germany's version of extra-tabular prescription exhibits the design features of a cancellation mechanism for overriding what is recorded in the registry. Through the public summons procedure (*Aufgebotsverfahren*),[337] a possessor who is not in the registry, frequently in the wake of a mistake, seeks a court order excluding the owner.[338] The procedure, which is grounded in possession of thirty years and independent of notions of good faith, distinguishes two entry situations in the land registry. If the owner is registered, the proceedings are only admissible if the owner is either dead or gone missing.[339] But if the owner is not registered or a person who is not the real owner is registered, possession of thirty years by the petitioner suffices.[340] The petitioner who has been successful in obtaining the judgment of exclusion technically acquires the ownership of the property upon being recorded as owner in the land register.[341] If, however, a third party has been registered as owner before the judgment of exclusion arrives or an objection to the accuracy of the land register based on the ownership of a third party has been registered, the judgment is not effective against the third party.[342] In practice, Germany's public summons procedure, which is not styled like acquisitive prescription in its crystalline form, does not occur with frequency.

333. *Id.*, ¶ 6(2).
334. *Id.*, ¶ 9.
335. Jordan, *supra* note 95, at 232.
336. *Id.*
337. BGB § 927 (2008).
338. Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der Freiwilligen Gerichtsbarkeit (FamFG) [Law on Court Procedure in Family Matters and Matters of Noncontentious Jurisdiction] §§ 433-441, 442-445 (2019).
339. BGB GER § 927(1)[cl.3] (2008).
340. *Id.*
341. BGB § 927(2) (2008).
342. BGB § 927(3) (2008).

The Spanish version of extra-tabular prescription, which self identifies as a form of acquisitive prescription, is designed to overwhelm two entry situations in the land registry. Extra-tabular prescription is thus available not only against the registered owner,[343] but also against a registered third-party acquirer in good faith.[344] The jurisprudence of Spain's Supreme Tribunal has significantly strengthened the hand of acquisitive prescription for the second situation. Accordingly, it is no longer necessary to have a title inscribed in the registry to secure acquisitive prescription against a registered third-party acquirer; rather, adverse possession alone suffices for purposes of setting up a successful plea of acquisitive prescription.[345] If the prescription has already run at the time the third party acquires the realty or if the prescription may accrue within one year thereafter, the prescriber will prevail when the third-party acquirer knew or should have known that the property was in the possession of a person other than the transferor[346] or when the third-party acquirer expressly or tacitly consented to such possession within a window of one year after having acquired the property.[347]

3. Declarative Systems

Like Louisiana, Quebec does not have in place positive statutory dispositions for resolving collisions between acquisitive prescription and the laws of registry. Meanwhile, however, the Supreme Court of Canada has spoken. In *Ostiguy v. Allie*,[348] the court found that third parties cannot entirely rely on the entry situation in Quebec's land register because acquisitive prescription operates without regard to the rights published in the registry.[349] The seminal decision offers a particularly instructive case study for Louisiana, because the laws governing the publication of rights in Quebec are so similar to Louisiana's public records doctrine.

In *Ostiguy*[350] the facts reveal a tripartite situation. Between 1994 and 2011, the defendant and her family used one or two parking spaces that

343. LH art. 36(3) (2019).
344. LH arts. 36(1)&(2), 34 (2019).
345. Sentencia Tribunal Supremo (Pleno), Judgment of Jan. 21, 2014, 916/2011 (Article 1949 of the Civil Code must be considered repealed by Article 36(1)&(2) of the Land Register Law).
346. LH art. 36(2)(a) (2019).
347. *Id.* art. 36(2)(b) (2019).
348. *Ostiguy*, 2017 S.C.R. 402.
349. *Id.*
350. *Id.*

were part of the adjacent property.[351] But the defendant never filed an application to obtain judicial recognition of her right that she asserted to have acquired by prescription.[352] In 2011, the plaintiffs bought the neighboring property, including the parking spaces, from the record title owner.[353] After their purchase, the plaintiffs applied for injunctive relief to stop the defendant from continuing to use the parking spaces.[354] In her defense, the defendant countered with the assertion that she had acquisitively prescribed the parking spaces and that her right of ownership took precedence over the title of the plaintiffs that was recorded in the land register.[355] The Superior Court held that the defendant had successfully prescribed one parking space[356] and the Court of Appeal dismissed the appeal.[357]

According to the Supreme Court of Canada, the only remaining legal issue requiring resolution was the question of whether acquisitive prescription could be successfully set up against the new owners who registered their title in the land register before the prescriber had asserted her right in court.[358] The court answered the question in the affirmative.[359] After reviewing the nuts and bolts of the laws of acquisitive prescription and registry in Quebec,[360] the court declared that the distinct roles played by each set of laws had the effect of giving primacy to acquisitive prescription, independent of the entry situation in the land register.[361] Even in the absence of publication, said the court, the acquisition of a property by prescription was opposable against third parties who acquired the property from a registered transferor.[362]

According to the majority of Justices, the role of the registry has remained purely declarative, because the envisaged reform of Quebec's registration law was never carried through.[363] Moreover, considerations of good faith or bad faith had become immaterial for the accrual of

351. *Id.* at 412, ¶ 2 & 413, ¶ 6.
352. *Id.* at 413, ¶ 6.
353. *Id.* at 412, ¶ 2 & 413, ¶ 7.
354. *Id.*
355. *Id.*
356. *Id.* at 412, ¶ 2 & 414, ¶ 8.
357. *Id.* at ¶¶ 4, 10-15 (majority), 16-20 (dissent).
358. *Id.* at 418, ¶¶ 23, 21.
359. *Id.* at 418, ¶ 24.
360. *Id.* at 418-19, ¶¶ 25-28 (acquisitive prescription as means of acquiring ownership through possession with the requisite physical control, intent and attributes) & 420-24, ¶¶ 29-39 (effects of registration limited to allowing for rights to be set up against third parties).
361. *Id.* at 424, ¶ 40.
362. *Id.* at 424-33, ¶¶ 41-65.
363. *Id.* at 426, ¶ 44.

acquisitive prescription under its new unitary design.[364] Also, the situation under litigation was not a case of an acquisition from a common author, with the consequence that the party who records first would prevail, because the defendants had acquired by prescription, not a voluntary transfer of ownership.[365] The majority further offered that the limited role of publicity was confirmed by the statutory canon of consistency—with the scheme of the codification in general and the sweep of acquisitive prescription in particular.[366] Also, even under a theory of apparent rights, appearances purportedly created by the contents of the land register could not prevail over those created by effective possession.[367] Furthermore, the plaintiffs as third-party acquirers were not left without legal recourse, as they could recover their losses from their transferors by proving that the sellers knew of the encroachments by the defendant before the sale and failed to make the disclosure at the purchase.[368] Finally, acquisitive prescription had accrued through effective possession—independent of whether the defendant had made her application for a judicial recognition, a requisite that was merely procedural and declarative, rather than constitutive and substantive.[369]

The dissenting Justices found that the prescriber never made the judicial application to have her right recognized by the court. Therefore, said the dissent, she never completed all the elements required for a successful plea of acquisitive prescription in the first place. According to the dissent, the prerequisite of obtaining a judgment of recognition was right-granting and without retroactive effect.[370] The plaintiffs were therefore first in time and first in rank.[371]

### *C. Extract for Louisiana*

In the wake of Louisiana's reform requiring recordation for a title to be just for purposes of abridged prescription, conflicts appear to be conceptually limited to cases of extra-tabular prescription— extraordinary prescription of thirty years without just title under the general rules[372] and

364. *Id.* at 427, ¶ 49.
365. *Id.* at 428, ¶ 51.
366. *Id.* at 428-30, ¶¶ 52-56.
367. *Id.* at 431, ¶ 60.
368. *Id.* at 431-32, ¶¶ 61-62.
369. *Id.* at 438-39-, ¶ 80.
370. *Id.* at 444-45, ¶¶ 98-103.
371. *Id.* at 445, ¶ 103. & 467, ¶ 160
372. Redmann-2, *supra* note 2, at 11 (just listing "acquisitive prescription without title" as one among other "ownership interests" that do not require recordation); Hargraves, *supra* note 2,

the special case of boundary prescription.[373] Since Louisiana's public records doctrine shares the declarative feature with the registration system found in Quebec, the Supreme Court of Canada's analysis offers a valuable springboard for illuminating the relationship between acquisitive prescription and the publication of rights in Louisiana. According to the court, the consideration militating for giving primacy to acquisitive prescription over the entry situation in the land register boils down to the nature of effective possession.

Under Louisiana law, "[p]ossession is a matter of fact."[374] Although denoting a factual relationship with a thing based on externalized physical activity and psychological intent,[375] possession furnishes immediate rights coupled with a powerful presumption of ownership. In this sense, possession in Louisiana may be deemed nine-tenths of the law[376]—or, as the German equivalent goes, "the law sides with those who are in possession" (*Das Recht steht auf der Seite der Besitzenden*).[377] But possession occurs independent of any instrument of writing. If possession is exercised over an immovable for a period of time that is long enough, acquisitive prescription—whether under general rules or in the form of prescription beyond title—arrives off record[378] and by operation of law.[379] Prescriptive title is founded upon the fact of possession, as opposed to a juridical act or a judicial decision.[380] Unlike with derivative transfers of ownership of immovables, the accrual of acquisitive prescription is "the antithesis of the 'paper title' scheme which hinges on transfer records," and therefore, does not need to be recorded to affect third parties.[381] This is because, once completed, acquisitive prescription is constitutive of rights, while the entry situation in the registry is merely declarative of rights. Consequently, if both come in conflict, it makes sense to allow the right-granting institution of acquisitive prescription to prevail over paper

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at 557 (discussing thirty-year prescription as one of the rights that need not be recorded to affect third persons).

373. Hargraves, *supra* note 2, at 558-59.

374. La. Civ. Code art. 3422 (1982).

375. La. Civ. Code arts. 3421, 3424, 3425 (1982).

376. For a scholarly critique, Carol M. Rose, *The Law is Nine-Tenth of Possession: An Adage Turned on Its Head*, in Law and Economics of Possession 40 (Yun-chien Chang ed. 2015).

377. Collins, German Translation of Possession, https://www.collinsdictionary.com/dictionary/english-german/possession.

378. Hargraves, *supra* note 2, at 559.

379. *Id.* at 557.

380. Redmann-1, *supra* note 2, at 506.

381. Hargraves, *supra* note 2, at 557.

titles.[382] Acquisitive prescription therefore has been included as one of several case groups identified by the literature in the context of recognized exceptions to the public records doctrine for interests that arise by operation of law.[383]

A stiff and rigid application of the public records doctrine would indeed protect the third-party acquirer as transferee of a record title owner, but such mechanic would undo what the prescriber already earned by having complied with the applicable law. In other words, giving the public records doctrine its full sweep would literally and completely purge extraordinary acquisitive prescription and boundary prescription from Louisiana law. In counter distinction to Quebec, Louisiana has not even witnessed a sustained debate about the legal nature and effects of registration. Rather, despite having been moved back and forth between statutory homes in the Civil Code and the Revised Statutes,[384] the registry has retained its purely comforting role, save for arbitering dual sales, when a common author has sold the same property twice. In the absence of a final word from the Louisiana Supreme Court important practical questions arise for prescribers as well as third-party acquirers. What strategies are available to a prescriber who seeks closure without having to wait for a lawsuit by the record title owner so as to respond with the defense of acquisitive prescription? How does a third-party acquirer guard against the specter of unrecorded prescriptive rights based on the fact of possession?

Also, unlike Quebec, Louisiana's prescription law does not include a judicial application made by the prescriber for purposes of having the accrual of extraordinary prescription recognized by the court with the attendant publicity. This has consequences. Although prescriptive title is ownership, practitioners advise that it may not be insurable, because ownership in the wake of acquisitive prescription occurs outside the public records. Moreover, the prescriber's potential transferees may be deterred from transacting against this backdrop. Therefore, a prescriber who cannot

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382. *Id.*

383. For a comprehensive compilation of case groups for the exceptions to the public records doctrine, see TITLE, *supra* note 1, at 577-98 (§§ 8:16-8:45) (persons not entitled to assert non-recordation, interests arising by operation of law, and unrecorded interests having been assumed or acknowledged by third parties). *See also* Redmann-2, *supra* note 2, at 10-11 (speaking of ownership and security interests and listing "acquisitive prescription without title" as one of those ownership interests that do not require recordation).

384. *See Phillips*, 483 So.2d at ("The law of registry is stated primarily in La. R.S. 9:2721 and 9:2756 (formerly La. C.C. Art. 2266). For the current repository of the law of registry, see La. Civ. Code arts. 3338, 3340 , 3441, 3343 (2005).

wait until being sued by the original owner or a third-party acquirer may, out of precaution, be well advised to pursue proactive strategies. These could include seeking a declarative judgment against the record title owner, with ownership in the wake of acquisitive prescription as the right to be declared. Or, in the alternative, the prescriber could execute an affidavit of possession. Both avenues obviously achieve a certain publicity. It remains highly doubtful, however, if the judgment and the affidavit would be deemed amenable to being filed in the conveyance records, as they facially fall short of being instruments creating real rights in immovables.[385] Comparatively speaking, the Spanish position here is quite clear. Possessory titles are simply considered not to be reliable evidence of real rights, and therefore, titles referring to the fact and process of possession outside the records are not susceptible of registration.[386]

Third-party acquirers face a different uncertainty, as the accrual of off-the-record acquisitive prescription may have escaped them. They would therefore acquire from a transferor who no longer is the true owner, experience the full brunt of the rule that "no one can transfer more rights (to another) than they themselves have" (*nemo plus iuris transfere (ad alium) potest quam ipse habet*),[387] and ultimately be subject to a successful petitory action for the recovery of the property[388] brought by the prescriber. In such a situation, transferees will certainly look to their transferor to cut their losses by invoking all applicable warranties against eviction and seeking damages.[389] In light of the uncertainties associated with the primacy of acquisitive prescription over the contents of the registry, title insurance and lawyers' professional liability insurance remain the next best economic vehicles for risk mitigation on all sides. Literature has therefore keenly observed that acquisitive prescription and title insurance may be considered the principal means to fill the gaps in publicity systems that are not equipped with probative power.[390]

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385. La. Civ. Code art. 3338 (2005).

386. Javier Gómez Gállego, *The Protective Function of the Spanish Land Registry System*, *in* DAS GRUNDBUCH, *supra* note 5, at 353; Luz M. Martínez Velencoso, *Conflicts of Interest and New Prospects for the Spanish Land Register: A Comparative View*, *in* DAS GRUNDBUCH, *supra* note 5, at 685.

387. La. Civ. Code art. 517 (1979, 2005) (presupposing that the transferor is the real owner); La. Civ. Code art. 2452 (1995) ("The sale of a thing belonging to another does not convey ownership.").

388. La. Code Civ. Proc. arts 3651-53 (1960, 1981).

389. For the warranties of ownership and against eviction in the law of sales, see La. Civ. Code arts. 2475, 2500, 2506 (1993).

390. François Brochu, *Le Système Torrens et la Publicité Foncière Québécoise*, 47 REVUE DE DROIT DE MCGILL [R.D. McGill] 625, 652 (2002).

## V. PERSPECTIVES FOR THE RELATIONSHIP BETWEEN ACQUISITIVE PRESCRIPTION AND THE PUBLICATION OF RIGHTS IN LOUISIANA

Our comparative canvas has revealed that each comparator jurisdiction has found its own way to calibrate the communicative functions in the relationship between acquisitive prescription and the publication of rights. In their overall posture, common law systems tend to distinguish between registered lands and unregistered lands. Some jurisdictions have significantly curtailed the availability of adverse possession to shore up the indefeasibility of title for registered lands.[391] In a few instances, adverse possession of registered lands is not even possible at all. Counterintuitively, however, in several of these jurisdictions there has been a trend toward reducing limitation periods. Civil law systems exhibit a basic split with regard to the scope of acquisitive prescription and the effects of registration. As a consequence of assigning probative force to the land register, land book systems leave little room for extra-tabular prescription, which may be illustrated by assigning this function to more or less circumscribed cancellation proceedings. In contrast, deed registration systems, which are designed to merely comfort, not attribute rights, leave considerable room for acquisitive prescription to wield primacy over the registry.[392] Absent jurisprudence from the Louisiana Supreme Court to the contrary, this appears to be the legal reality in Louisiana more than five decades after the primacy of acquisitive prescription was diagnosed in the literature, albeit without spawning much scholarly debate in the aftermath.

The status quo in Louisiana is based on the policy decision that there is a public purpose and value in extinguishing title published in the registry. Louisiana's law of acquisitive prescription shifts ownership to the prescriber even without any form of compensation being made available to the formal title holder for his or her loss. This is remarkable because in Louisiana, certain legal servitudes that are installed by legislation[393] or by judicial discretion[394] are coupled with compensation and damages. Yet, in contrast to out-of-state scholarship invoking the perception of unfairness and the destabilization of property rights associated with adverse possession,[395] Louisiana literature has not discussed the eventuality of a

391. Emerich, *supra* note 307, at 483.
392. *Id.* at 481, 485.
393. La. Civ. Code art. 689(1) (1977, 2012).
394. La. Civ. Code art. 670 (1977).
395. *See, e.g.*, Carol N. Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 585 (2010) (calling for the

wholesale suppression of extra-tabular prescription or, as the next best vehicle, the introduction of compensatory payments by the successful prescriber, or the government for that matter, to the formal title holder.

Sweden appears to be the only jurisdiction exceptionally offering a vehicle for compensation, albeit only for circumscribed situations in the context of voluntary transfers of ownership, as opposed to *hävd*.[396] In Louisiana, appellate jurisprudence has considered the lack of compensation available to the record title owner when being eclipsed by acquisitive prescription. In *Crooks v. Department of Natural Resources*[397]—a case raising the question of whether acquisitive prescription can run in favor of the State, as opposed to the situation when the prescriber is a private actor—Louisiana's Third Circuit Court of Appeal answered in the negative. According to a majority of judges, acquisitive prescription by the State was implicitly prohibited because it would amount to an unconstitutional taking without just compensation.[398] In contrast, the dissent argued that there was no constitutional obstacle, because acquisitive prescription was a general rule of law that operated as a constitutionally permitted and fully reasonable statutory restriction on property rights and therefore, not a taking in the constitutional sense.[399] Commentary supportive of the proposition that acquisitive prescription may run in favor of the State has noted that acquisitive prescription serves a useful public policy purpose, as it resolves murky questions of ownership in a landscape where swaths of land are, at least seasonably, under water and where water bodies change their course over time.[400]

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abrogation of adverse possession because of the foundation of adverse possession in wrongdoing and the devastating effects for individual owners); William G. Ackerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession,* 31 LAND & WATER L. REV. 79, 104-05 (1996) (recommending the suppression of adverse possession because it generates uncertainty and conflict).

396. NJB Chpt. 18 §§ 1, 3, 4 (1970:994, 2006:928) (contemplating compensation from the government for the rightful owner when the good faith acquirer acquired from a non-owner and for the third-party acquirer when the transfer suffered from certain uncurable defects).

397. Crooks v. Dep't of Nat. Res., 263 So.3d 540 (La. App 3 Cir. 2018).

398. *Id.* at 556.

399. *Id.* at 573.

400. *See Michael Schimpf, Senior Associate*, The State is No Crook After 30 Years (Nov. 19, 2019), https://lawreview.law.lsu.edu/2019/11/19/the-state-is-no-crook-after-30-years/ (offering that: (1) "acquisitive prescription . . . in favor of the State would clarify ownership over some of the questionably navigable water bodies"; and (2) "the State could then allow public access to the water bodies for the benefit of Louisiana sportsmen and the economy").

The split between the judges on the Third Circuit, which never reached resolution before the Louisiana Supreme Court,[401] connotes the two human rights proceedings before the European Court of Human Rights in a case that arose in the United Kingdom: *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. The United Kingdom*.[402] After the Fourth Chamber of the European Court of Human Rights had ruled that adverse possession in a regime where land was registered violated the protection of property under European human rights law, the case was referred to the Grand Chamber of the European Court of Human Rights at the request of the United Kingdom's Government.[403] The Grand Chamber overturned the previous judgment, holding that the British laws governing limitation periods were rules of general land law in the context of use and ownership as between individuals.[404] Record title owners therefore were not subjected to a "deprivation of possession" as would be required for triggering European human rights law protections, but rather, they were affected by a mere "control of [land] use."[405] Moreover, according to the Grand Chamber, the design and effects of the applicable limitation periods not only pursued a legitimate aim but also struck a fair balance between the general interest and the interest of the individuals concerned.[406] Significantly, the Grand Chamber offered that the requirement of compensation for the situation brought about by a party failing to observe a limitation period would sit uneasily alongside the very concept of limitation periods, which, after all, are all about barring, at some point in time, the uncertainty of litigation.[407] Also, according to the Grand Chamber, the size of the claim could not change the outcome of the case.[408] The Grand Chamber further noted that the subsequent reform of the English land law for registered properties, which inserted new procedural safeguards to the benefit of the registered owner and at the expense of

401. Crooks v. Dep't of Nat. Res., 269 So.3d 691 (La. 2019) (limiting grant of writ to single issue that did not include the question of whether acquisitive prescription can run in favor of the State).

402. J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd v. United Kingdom, Judgment, App. no. 44302/02, (2008) 46 EHRR 45, 23 BHRC 405, [2007] RVR 302, [2007] 41 EG 200 (CS), IHRL 3565 (ECHR 2007), Aug. 30, 2007, European Court of Human Rights [ECHR].

403. *Id.* at ¶ 5, 6, 37-39.

404. *Id.* at ¶ 66.

405. *Id.*

406. *Id.* at ¶ 75.

407. *Id.* at ¶ 79.

408. *Id.* at ¶ 84.

long-term possessors into the system,[409] could not change the assessment of whether the pre-reform law was in conformity with European human rights law.[410]

Yet, the *Pye* decision was not carried by an overwhelming majority of votes.[411] It only arrived because the United Kingdom had vigorously intervened. Moreover, the Grand Chamber advised that the European Court of Human Rights generally has not been in the business to settle disputes of a private nature, because member states enjoy a wide margin of maneuver in this regard.[412] Also, two sets of dissenters disagreed vigorously with the majority. A first group of dissenting judges determined that the legislation did not strike a fair balance between the general interest served by limitation periods and the property rights of registered owners who were required to bear individual and excessive burdens.[413] The judges noted that the absence of compensation was a relevant factor for assessing the proportionality of land use controls. Such lack of a compensatory perspective made the loss of beneficial ownership more serious and called for particularly robust protections.[414] A separate dissent offered that adverse possession of registered land could not serve a general interest and embodied a disproportionate deprivation of possession in violation of European human rights law.[415]

In marked difference to the situation in the *Pye* decision, Louisiana does not have a system for the registration of lands and therefore, a debate about compensation seems even more remote.[416] Moreover, Louisiana's duration requirement of thirty years for extra-tabular prescription is quite long when compared to many other jurisdictions. The element of extended time to vindicate rights and interrupt the running of prescription inures to the benefit of record title owners and their third-party acquirers. Quebec's clever idea of inserting an extra measure of publicity into the law by

409. *Id.* at ¶ 81. For the proposition that the Land Registration Act of 2002 has detached the register from actual use, see Jordan, *supra* note 95, at 237 (discussing as an example the litigation in Parshall v. Hackey [2013] EWCA 240).

410. *Pye*, 46 EHRR 45, at ¶ 81.

411. The Law Reform Commission of Hong Kong, Adverse Possession, at 28, ¶¶ 2.28 & 2.27 (Oct. 2014), https://www.hkreform.gov.hk/en/docs/radversepossession_e.pdf (reporting that, on rehearing, the Grand Chamber decided ten to seven, overturning the Fourth Chamber's decision, which was supported by a vote of four to three).

412. *Pye*, 46 EHRR 45, at ¶ 75.

413. *Id.* at ¶¶ 1-21.

414. *Id.* at ¶ 16.

415. *Id.* at xx-xx.

416. *But see* Emerich, *supra* note 307, at 486-96 (subdividing her discussion of compensation into two parts: (1) the possibility of acquisitive prescription as a form of private expropriation; and (2) the issue of compensating the dispossessed owner).

requiring the prescriber to apply for judicial recognition of the accrual of acquisitive prescription deserves consideration. The question then would be whether to design this requisite as being constitutive or merely declaratory, in the image of what the majority of Canada's Supreme Court determined in *Ostiguy*. Endowing a declaratory judgment with a right-granting nature would significantly clip the wings of extra-tabular prescription, as it has been known for centuries in Louisiana. The advantage of a declarative judicial application, however, would be associated with avoiding the uncertainty of litigation that might arrive at some unknown future point in time, with higher transaction costs for the litigants.

In sum, when planning surgical or wholesale overhauls of time-honored legal institutions, the reform legislator must proceed with caution as it considers foreign regulatory models. This is especially true for what our consideration of comparator jurisdictions has revealed—the legal design and effects of the registry and the legal space available for acquisitive prescription are interconnected. Making changes to the aperture of one will inevitably affect the operations of the other. The lesson for reform endeavors is thus one of admonition—stove-pipe approaches are not convenient. This is especially relevant in Louisiana, with its history of codal fissures generated by the piecemeal reform method and the silos of exclusivity for certain reporters in the Louisiana State Law Institute. In this sense and until we hear from the Louisiana Supreme Court, *hic manebimus optime* ("here we shall stay, most excellently").[417] Sis felix!

417. Titus Livius (Livy), The History of Rome, Book Five (Robert S. Conway & Charles G. Walters eds. 1914), http://www.perseus.tufts.edu/hopper/text?doc=Perseus:abo:phi,0914,0015:55 (Bk. 5, Chpt. 55, Sec. 2). *See also* GIUSEPPE PETRAI, ROAM ANEDDOTICA 13-14 (Edoardo Perino ed. 1895) (explaining that: (1) according to Livy, a centurion named Marcus Furius Camillus implored the Senate not to abandon Rome and flee to nearby Veii in face of the invasion by the Gauls in 390 BCE; and (2) the motto was envisaged for a monument in Quintino Sella's "third Rome" but the monument was never built).