

**THE SALE OF A MOVABLE BELONGING TO ANOTHER:
A CODE IN SEARCH OF A SOLUTION**

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I. INTRODUCTION

The sale of a movable belonging to another requires the law-maker to choose between the interests of the true owner and the interests of the purchaser who acquired the movable without the owner's consent.¹ This choice pits security of ownership against the commercial

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¹ Comment, *Sales of Another's Movables—History, Comparative Law, and Bona Fide Purchasers*, 29 La. L. Rev. 329, (1969) (hereinafter cited as Comment, *Sales of Another's Movables*).

need for security of transaction.² The Louisiana Civil Codes of 1808, 1825, and 1870 protected the security of ownership at the expense of security of transaction.³ Louisiana's 19th century agrarian economy was a partial factor in the redactors' election of security of ownership.⁴ Perhaps in response to the needs of an emerging commercial economy, Louisiana courts did not long adhere to the Code's protection of the owner of a movable against one who acquired it without his consent. Ignoring the clear command of the Code, the courts created a body of "confusing doctrines and inconsistent jurisprudence"⁵ which protected the purchaser rather than the true owner.⁶ The protection of security of transaction, while laudable from a commercial point of view, was accomplished through the introduction of the common law bona fide purchaser doctrine into civilian Louisiana.⁷ This Anglo-American concept is based on a "title" analysis⁸ completely foreign to civilian notions of property and obligations⁹ and is "in violation not only of the text of the Code but of the traditional technique of the civil law."¹⁰

The reception of the common law bona fide purchaser doctrine into Louisiana has been both criticized¹¹ and rationalized.¹² Over fifty

² Id.; Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 Tul. L. Rev. 589, 591 (1932).

³ Comment, *Transfer of Movables by a Non-Owner*, 55 Tul. L. Rev. 145, (1980) (hereinafter cited as Comment, *Transfer of Movables*). See *infra* notes 33-60 and accompanying text for an analysis of the provisions of the 1808 Digest, and 1825 and 1870 Codes.

⁴ LA. CIV. CODE arts. 477-532, *Exposé des Motifs*; Franklin, *supra* note 2, at 601. But cf. Comment, *Sales of Another's Movables*, *supra* note 1, at 343-45 (suggesting that Spanish law in effect in 1808 was the origin of the Code's provisions regarding the sale of a movable belonging to another). See *infra* notes 55-56.

⁵ Comment, *Transfer of Movables*, *supra* note 3, at 145 n. 1.

⁶ See generally S. LITVINOFF, OBLIGATIONS § 90-94 (7 LOUISIANA CIVIL LAW TREATISE 1975).

⁷ Franklin, *supra* note 2, at 604-06; Comment, *Transfer of Movables*, *supra* note 3, at 155-58. While it was theoretically possible to construct a bona fide purchaser doctrine using traditional civilian techniques, no Louisiana court took this approach. LITVINOFF, *supra* note 6, at § 94. See *infra* notes 98-106 and accompanying text.

⁸ Comment, *Sales of Another's Movables*, *supra* note 1, at 337-340.

⁹ See, e.g., *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 162, 46 So. 193, 196 (1908) ("To suppose a sale without a transfer of the property in the thing which forms the object of the sale is simply to suppose an impossibility").

¹⁰ Franklin, *supra* note 2, at 604.

¹¹ The criticism stems from the fundamental breach of the civilian tradition committed in adopting this common law doctrine. Franklin, *supra* note 2, at 609-612.

¹² See, e.g., LITVINOFF, *supra* note 6, § 94. See also Comment, *Sales of Another's Movables*, *supra* note 1, at 359-60.

years ago, Mitchell Franklin offered a scathing critique of the development of this common law creature in the face of a civil code.¹³ Franklin offered three solutions:

- (1) returning to the Code;
- (2) drafting a new Code to meet modern needs; or
- (3) repealing the Code and adopting the common law.¹⁴

Louisiana courts never returned to a proper codal analysis of the issue, nor was the civil law scuttled for a wholesale adoption of the common law. Rather, by positive legislative act, Louisiana has chosen to modernize the existing Code.¹⁵ This modernization, however, has not completely solved the conflict between security of ownership and security of transaction.¹⁶ This article will review the status of the bona fide purchaser doctrine since the revision of the property and obligations articles of the Code. It is also a plea for a civilian solution to the conflict between the true owner of a movable and one who acquires it without his consent.

II. LOUISIANA CIVIL CODE 1808-1870: AN ORGANIC ANALYSIS

The conflict between an owner and a purchaser raised by the sale of a movable belonging to another requires a policy choice.¹⁷ Not all legal systems have reached the same conclusion as to whether security of ownership or security of transaction should be protected.¹⁸ The Romans, from the time of Justinian, adopted an acquisitive prescription approach which favored the dispossessed owner.¹⁹ The French, in arti-

¹³"This is, then, the Louisiana palimpsest: the code written over by the case law, borrowing Anglo-American concepts, under the self-deluding disguise that they are natural law." Franklin, *supra* note 2, at 609.

¹⁴*Id.* at 612.

¹⁵The Louisiana legislature created the Louisiana State Law Institute "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs...." 1938 La. Acts, No. 166 § 4. See generally YIANNPOULOS, PROPERTY § 6 (2 LOUISIANA CIVIL LAW TREATISE 2d ed. 1980).

¹⁶See *infra* notes 168-171 and accompanying text.

¹⁷See *supra* notes 1-2 and accompanying text.

¹⁸See generally LITVINOFF, *supra* note 6; YIANNPOULOS, *supra* note 15, § 231-38. See also Comment, *Transfer of Movables*, *supra* note 3, at 146-55.

¹⁹See Comment, *Sales of Another's Movables*, *supra* note 1, at 329-331. The owner at Roman law had three actions for the recovery of the movable: *vindicatio*

cle 2279 of the Code Napoleon, opted to protect security of transaction with the rule "En fait de meubles, la possession vaut titre" (with regard to movables, possession is equivalent to title).²⁰ At common law, security of ownership is protected under the general principle *nemo dat quod non habet* (no man can transfer a greater right than he himself possesses).²¹ "This general rule, however, is riddled with exceptions designed to protect innocent purchasers."²² These exceptions are known as the bona fide purchaser doctrine.²³ The bona fide purchaser is defined as the party who purchased the movable in good faith for valuable consideration without notice that the vendor was not the owner.²⁴ Once the purchaser's bona fide status was determined, he was protected by several exceptions to the *nemo dat quod non habet* rule. These exceptions were "developed upon equitable principles"²⁵ and protected the bona fide purchaser in: (1) market overt sales ("sale of goods at a fair, market, or shop that regularly deals in such goods");²⁶ (2) transfers of money and negotiable instruments;²⁷ (3) sales by a vendor with a voidable title;²⁸ and (4) instances in which the owner is barred from assert-

(revendication); *condictio* (quasi-contractual recovery); and *actio furti* (delictually based recovery). Comment, *Transfer of Movables*, *supra* note 3, at 146.

²⁰C. Civ. art. 2279. For a detailed discussion of the operation and theoretical basis of French article 2279, see YIANNOPOULOS, *supra* note 15, § 231, and LITVINOFF, *supra* note 6, § 86.

²¹Comment, *Sales of Another's Movables*, *supra* note 1, at 337-38. For a more detailed discussion of the common law doctrine, see LITVINOFF, *supra* note 6, at § 87; Comment, *Transfer of Movables*, *supra* note 3, at 150.

²²Comment, *Transfer of Movables*, *supra* note 3, at 150.

²³*Id.* at 150-51. See also LITVINOFF, *supra* note 6, § 87.

²⁴Comment, *Transfer of Movables*, *supra* note 3, at 150.

²⁵LITVINOFF, *supra* note 6, at § 87.

²⁶Comment, *Transfer of Movables*, *supra* note 3, at 151. These common law exceptions are more fully discussed in LITVINOFF, *supra* note 6, § 87. See also Comment, *Sales of Another's Movables*, *supra* note 1, at 338-39.

²⁷Comment, *Transfer of Movables*, *supra* note 3, at 152.

²⁸*Id.*:

Generally, a vendee who obtains property by fraud acquires a merely voidable title which only the vendor may attack. However, if the thing is sold to a purchaser in good faith for fair value, before the vendor has voided the title of the vendee, the purchaser is considered to have valid title. This rule protects the good faith acquirer when the seller has obtained the thing from the original owner by fraud.

Id. (citations omitted).

ing his title under the principle of equitable estoppel.²⁹ The Uniform Commercial Code (UCC) generally mirrors the results obtained at the common law.³⁰ Section 2-403 of the UCC provides:

- (1) ...[A] person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
 - (a) the transferor was deceived as to the identity of the purchaser, or
 - (b) the delivery was in exchange for a check which is later dishonored, or
 - (c) it was agreed that the transaction was to be a "cash sale," or
 - (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all right of the entruster to a buyer in the ordinary course of business.³¹

Thus, the UCC promotes the security of transaction by codifying the many exceptions of the bona fide purchaser doctrine.³²

²⁹*Id.* at 153.

For the owner to be estopped, he must have clothed the seller with some indicium of ownership or authority to sell the thing. Indicia of ownership may include statements made in the presence of others or in documents such as title papers or invoices. Generally, the mere fact that the owner has surrendered possession is not sufficient to preclude his recovery. It is also necessary that the purchaser have relied on the apparent power of the seller to dispose of the goods.

³⁰*Id.* at 153-54. See also LITVINOFF, *supra* note 6, at 88.

³¹U.C.C. § 2-403.

³²Comment, *Transfer of Movables*, *supra* note 3, at 154-155.

Neither the *nemo dat quod non habet* principle nor the French rule *la possession vaut titre* may be read into the Louisiana Civil Code without doing injustice to it as an organic whole.³³ Both the French and Louisiana Codes provide that the "sale of a thing belonging to another person is null"³⁴ The French Code, however, as noted above, establishes a broad exception to the rule in article 2279: with regard to movables, possession is equivalent to title.³⁵ This provision broadly protects security of transaction at the expense of security of ownership³⁶ and has been called "the most important [article] in the entire code."³⁷ Although the redactors of the Louisiana Civil Code borrowed heavily from the French Code, they suppressed article 2279³⁸ and, in its place, the Digest of 1808 provided "[i]f a man has had public and notorious possession of a movable thing, during three years ... the property becomes vested in the possessor, unless the thing has been stolen."³⁹ At first blush, it seems that Louisiana opted for protection of security of ownership subject to a three year acquisitive prescription running in favor of the purchaser of a movable belonging to another.⁴⁰ This analysis, however, is deceptive. Article 2279 "permeates the entire French Code;"⁴¹ in adopting other provisions of the French code, the redactors "took from the Code Napoleon a series of articles whose provisions obviously were based on the nonreceived principle [*la possession vaut titre*]."⁴² At the same time, the Louisiana redactors also included many articles supporting security of ownership.⁴³

³³LITVINOFF, *supra* note 6, § 94.

³⁴C. Civ. art. 1599; LA. CIV. CODE art. 2452.

³⁵*See supra* note 20.

³⁶*See* YIANNOPOULOS, *supra* note 15, § 231; Franklin, *supra* note 2, at 593, 597-98.

³⁷Franklin, *supra* note 2, at 593.

³⁸One theory is that French article 2279 was suppressed as being contrary to the Spanish law in effect at the time of the 1808 redaction. *See* Comment, *Sales of Another's Movables*, *supra* note 1, at 342-45. This theory has been questioned. *See* LITVINOFF, *supra* note 6, § 90 n. 78. The prevailing view is that the policy choice in favor of security of ownership was necessitated by Louisiana's agricultural economy. *Exposé des Motifs*, *supra* note 4.

³⁹LA. CIV. CODE bk. III, tit. XX, at art. 75 (1808) (codified at LA. CIV. CODE arts. 3472 (1825) and 3506 (1870), and revised at LA. CIV. CODE art. 3490.

⁴⁰Comment, *Sales of Another's Movables*, *supra* note 1, at 345; *See generally*, Comment, *Transfer of Movables*, *supra* note 3, at 155-58. *See infra* notes 46-49.

⁴¹Franklin, *supra* note 2, at 601.

⁴²LITVINOFF, *supra* note 6, § 90. For example, article 1922 of the 1870 Code provided in part:

Despite the schizophrenic nature of the principles on which it was based, the Louisiana Civil Code did have a scheme for dealing with the problem of the sale of movables belonging to another. Possession and ownership under old article 496 were distinct so that ownership was lost only if the owner permitted it "to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription."⁴⁴ Ownership of movables was protected, and the owner could recover his property in the hands of a third person by virtue of a number of real actions.⁴⁵ The owner's right of recovery was, however, subject to the following modifications: (1) after three years possession, a good faith possessor with just title acquired ownership by virtue of acquisitive prescription, unless the thing was lost or stolen;⁴⁶ (2) if a lost or stolen movable was purchased at public auction or from a merchant customarily selling such things and possessed for three years, the owner could recover the movable only upon reimbursing the purchase price;⁴⁷ (3) the owner lost all rights of recovery, even if willing to pay the purchase price, "against a person who has purchased stray animals which have been sold in conformity with the regulations of police, or

If the vendor, being in possession, should, by a second contract, transfer the ownership of the property to another person, who gets the possession before the first obligee, the last transferee is considered as the owner, provided the contract be made on his part *bona fide*, and without notice of the former contract.

See also LA. CIV. CODE arts. 2643 (protecting the first of several assignees giving notice to the debtor) and 3227 (the vendor's privilege lasts only so long as the movable "still remains in the possession of the purchaser"). Each of these articles supposes the existence of the *la possession vaut titre* principle since the security of transaction rather than the rights of ownership is protected.

For a full discussion of articles supporting the protection of security of transaction, see Franklin, *supra* note 2, at 601-04.

⁴³Franklin, *supra* note 2, at 601-04. For example, LA. CIV. CODE art. 3142 (1870) provides that a debtor may give in pledge any property which he owns, but if his ownership may be divested or is subject to encumbrance, "he can not confer on the creditor, by the pledge, any further right than he had himself." See also LA. CIV. CODE art. 2138 (discussed *infra* at notes 181-183).

⁴⁴LA. CIV. CODE art. 496 (1870) (revised and recodified at LA. CIV. CODE art. 481).

⁴⁵See generally YIANNOPOULOS, *supra* note 15, § 233-244.

⁴⁶LA. CIV. CODE art. 3506 (1870) (currently codified at LA. CIV. CODE art. 3490).

⁴⁷LA. CIV. CODE art. 3507 (1870); *Securities Sales Co. v. Blackwell*, 167 La. 667, 120 So. 45 (1929) (interpreting articles 3506 and 3507 together to mean that the owner's obligation to repay the purchase price did not arise until after the three years defined in article 3506 had run). The *Blackwell* analysis has been criticized. See LITVINOFF, *supra* note 6, at § 83. *Blackwell* has been legislatively overruled in the 1979 property revision. See LA. CIV. CODE art. 524; LA. CIV. CODE art 525, comment (b).

other movable objects lost or abandoned which are sold by authority of law";⁴⁸ and finally, (4) the owner of a lost or stolen movable could not recover it if the possessor acquired ownership by virtue of ten years acquisitive prescription.⁴⁹

Thus, the Louisiana Civil Code contained a method for dealing with the problem of the sale of a movable belonging to another. The conclusion is inescapable that the codal scheme protected the owner at the expense of the good faith acquirer.⁵⁰ It is equally inescapable that such protection of the security of ownership at the expense of security of transaction is unworkable in a commercial society.⁵¹ The common law could not long hold to its absolute protection of ownership under the *nemo dat quod non habet* principle, and thus developed the bona fide purchaser doctrine.⁵² Nor could Louisiana courts long hold to the Code's protection of ownership, choosing instead to embrace the common law bona fide purchaser solution - even though inconsistent with the civilian tradition.

III. LOUISIANA JURISPRUDENCE: ADOPTION OF A COMMON LAW BONA FIDE PURCHASER DOCTRINE

While the common law was relatively flexible in addressing the needs of commerce, security of transaction did not come easily to Louisiana.⁵³ The direct approach would have been to codify the principle. In light of the circumstances surrounding the redaction of the Digest of 1808, it is perhaps understandable that security of ownership was selected over security of transaction. Louisiana at that time did not have a highly developed commercial economy.⁵⁴ Furthermore, the redactor's task was to codify the then-existing laws in effect in the territory.⁵⁵ It

⁴⁸LA. CIV. CODE art. 3508 (1870).

⁴⁹LA. CIV. CODE art. 3509 (1870). Acquisitive prescription under this article required ten years uninterrupted possession without any need to prove good faith or just title.

⁵⁰Franklin, *supra* note 2, at 604; Comment, *Sales of Another's Movables*, *supra* note 1, at 345; Comment, *Transfer of Movables*, *supra* note 3, at 155.

⁵¹*Exposé des Motifs*, *supra* note 4; LITVINOFF, *supra* note 6, at § 94.

⁵²LITVINOFF, *supra* note 6, at § 87,94; Comment, *Transfer of Movables*, *supra* note 3, at 155.

⁵³*Id.*

⁵⁴*Exposé des Motifs*, *supra* note 4.

⁵⁵See generally YIANNOPOULOS, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in *Louisiana's Legal Heritage* 90-93 (E. Haas ed. 1983).

has been suggested by at least one commentator that security of ownership was mandated by the law in effect at the time of redaction.⁵⁶ In any event, the first cases squarely ignoring the Code's protection of the owner were rendered in 1829.⁵⁷ By the 1870's the courts were routinely protecting the purchaser of a movable acquired without the owner's consent⁵⁸ on a variety of theories borrowed from the common law.⁵⁹ The doctrine was introduced to Louisiana under the guise of natural law.⁶⁰ Despite the progressive jurisprudence which arose in response to the state's emerging commercial society, the Louisiana legislature perpetuated the Digest's protection of ownership when it recodified the old principle in 1870.

Sources of the Bona Fide Purchaser Doctrine in Louisiana

The first Louisiana case applying the common law bona fide purchaser doctrine involved the fraudulent conveyance of slaves.⁶¹ In 1829, the Louisiana Supreme Court held in *Miles v. Oden*⁶² that "a bona fide purchaser is not affected by fraud in his vendor, who has a legal title to the property sold."⁶³ The *Miles* court relied on the earlier pronouncements of the United States Supreme Court which, in *Fletcher v. Peck*⁶⁴, raised the common law bona fide purchaser doctrine to the level of a principle of natural law.⁶⁵ The *Miles* decision was limited in application to the law "under which this transaction took place,"⁶⁶ namely, the law of Kentucky. Nonetheless, in *Thomas v. Mead*,⁶⁷ the same Court applied the same rule in the same year to a case involving

⁵⁶*Sales of Another's Movables*, *supra* note 1, at 343-44. *See supra* note 38.

⁵⁷*Miles v. Oden*, 8 Mart. (N.S.) 214 (La. 1829); *Thomas v. Mead*, 8 Mart. (N.S.) 341 (La. 1829).

⁵⁸*See, e.g.*, *Conner v. S.L. Hill & Co.*, 6 La. Ann. 7 (La. 1851) (Plaintiff entrusting son to sell corn must bear loss where son hired agent who sold corn to innocent purchaser and absconded with the proceeds); *Fullerton v. Kennedy*, 6 La. Ann. 312 (La. 1851) (innocent third party purchaser protected where person entrusted to invest money for another absconds).

⁵⁹*See infra* notes 71-85 and accompanying text.

⁶⁰*Franklin*, *supra* note 2, at 609. *See infra* notes 64-65 and accompanying text.

⁶¹*Miles v. Oden*, 8 Mart. (N.S.) 214 (La. 1829).

⁶²8 Mart. (N.S.) 214 (La. 1829).

⁶³*Id.* at 227 (citation omitted).

⁶⁴10 U.S. (6 Cranch) 87 (1810).

⁶⁵*Franklin*, *supra* note 2, at 605.

⁶⁶8 Mart. (N.S.) at 217.

⁶⁷8 Mart. (N.S.) 341 (La. 1829).

the fraudulent conveyance of slaves under a Louisiana sales contract.⁶⁸ From 1829 on, Louisiana courts began a systematic adoption of the common law bona fide purchaser doctrine,⁶⁹ and thereby caused a "complete collapse of the system set by the Code."⁷⁰

The Doctrine Solidifies

Louisiana courts routinely relied on common law authorities,⁷¹ cases,⁷² and analysis⁷³ in resolving the conflict between the owner of a movable and the third party possessor who acquired it without the owner's consent. In cases involving the sales of movables acquired by fraud,⁷⁴ Louisiana courts reached results consistent with, and based upon, the common law distinction between "void" and "voidable" title.⁷⁵ "When title passed, the courts protected the bona fide purchaser."⁷⁶

Where no title passed, the original owner was allowed to recover the movable.⁷⁷ Where the breach of a confidential relationship was involved,⁷⁸ Louisiana courts adopted the equitable estoppel analysis of the

⁶⁸This decision is doubly wrong in that it ignores the codal scheme regarding the sale of a thing by a non-owner and the fact that slaves were protected under the public record doctrine.

⁶⁹See Comment, *Sales of Another's Movables*, *supra* note 1, at 348.

⁷⁰Franklin, *supra* note 2, at 605.

⁷¹See, e.g., *Freeport & Tampico Fuel Corp. v. Lange*, 157 La. 217, 102 So. 313 (1924) (relying on WILLISTON ON SALES § 635, at 1599 (2d ed. 1948)).

⁷²See, e.g., *Freeport & Tampico Fuel Corp. v. Lange*, 102 So. 313,315 (1924) (Colorado, Massachusetts, New York cases cited); *Wm. Frantz & Co. v. Fink*, 125 La. 1013, 52 So. 131, 134-35 (1910) (relying on New York, Maine, Illinois, even English cases).

⁷³See *infra* notes 74-85 and accompanying text.

⁷⁴See, e.g., *Freeport & Tampico Fuel Corp. v. Lange*, 102 So. 313 (1924), (owner of scrap iron allowed to recover property from third party on basis of fraud in prior sale); *Port Finance Co. v. Ber*, 45 So. 2d 404 (La. App. Orl. 1950) (new car dealer allowed to recover vehicle sold to imposter of individual with good credit who purported to sell auto to used car dealer for half-price one day later). *But see* *Jeffrey Motor Company v. Higgins*, 89 So. 2d 369,371 (La. 1956) (*Held*: acceptance of check from vendee with insufficient funds sufficient transfer of title to protect third party purchaser).

⁷⁵Comment, *Transfer of Movables*, *supra* note 3, at 155; LITVINOFF, *supra* note 6, § 91.

⁷⁶Comment, *Transfer of Movables*, *supra* note 3, at 155.

⁷⁷This was the result of the *Freeport* and *Ber* cases. See *supra* note 74.

⁷⁸*Wm. Frantz & Co. v. Fink*, 125 La. 1013, 52 So. 131 (1910). (wholesaler had dealt with retailer on other occasions); *Conner v. S.L. Hill & Co.*, 6 La. Ann. 7 (1851). *But see* *Holloway v. A.J. Ingersoll Co.*, 133 So. 819 (La. App. 2d Cir. 1931) (court explicitly rejected plea of estoppel by defendant whose agent received delivery

common law bona fide purchaser doctrine.⁷⁹ While transfer of possession alone was insufficient to support a plea of estoppel,⁸⁰ transfer of possession with indicia of ownership⁸¹ or apparent authority to sell⁸² would estop the owner from asserting his rights against a bona fide purchaser.⁸³ Louisiana courts also seemed to adopt the market overt⁸⁴ analysis of the common law so that a bona fide purchaser of movables from a merchant customarily selling such goods was protected against the claims of the original owner.⁸⁵

The common thread of analysis running throughout these cases is negligence.⁸⁶ In each instance in which the bona fide purchaser was protected, the original owner could be charged with some negligence, either in clothing the vendor with the indicia of ownership,⁸⁷ or with the authority to sell,⁸⁸ or in not taking adequate measures to protect his in-

of cotton for storage, not purchase, even though receipt of sale was issued to apparent agent of plaintiff, who was himself present).

⁷⁹James v. Judice, 140 So.2d 169, 172 (La. App. 3d Cir. 1962) ("[A] principal who clothes his agent with the *apparent* power to act for him may be *estopped* under some circumstances from setting aside the acts of the agent which are within his apparent authority, although beyond the actual powers delegated to him."). See LITVINOFF, *supra* note 6 § 92. See also Comment, *Transfer of Movables, supra* note 3, at 156.

⁸⁰See, e.g., Holloway, 133 So. at 822.

⁸¹See, e.g., Conner, 6 La. Ann. 7. The Connor Court, quoting the case of Moore v. Lambeth, 5 La. Ann. 73 (1850), stated:

[A]n owner may be estopped from reclaiming his property from a subsequent *bona fide* purchaser, by having voluntarily placed in the hands of another the *indicia* of ownership, and exhibited him to the world, as a person having power to dispose of it; and however certain his intentions not to part with his ownership, he would not be heard against an honest purchaser who had acted upon the confidence thus imprudently reposed.

Conner, 6 La. Ann. at 8.

⁸²See, e.g., James v. Judice, 140 So.2d 169 (father delivered his minor son's automobile without certificate of title to a used car dealer with the understanding that the dealer could sell the car and keep a commission).

⁸³LITVINOFF, *supra* note 6, § 92; *Sales of Another's Movables, supra* note 1, at 355-58.

⁸⁴See *supra* note 26 and accompanying text.

⁸⁵See, e.g., Wm. Frantz, 52 So. 131, and James v. Judice, 140 So.2d 169 (both involving sales by merchants customarily selling the type of goods claimed by the original owner. Frantz involved jewelry, while James involved used automobile).

⁸⁶LITVINOFF, *supra* note 6, § 94 at 165.

⁸⁷E.g., Connor, 6 La. Ann. 7 (plaintiff's son acting as plaintiff's agent stated that the vendor had authority to sell the goods involved).

⁸⁸E.g., James v. Judice, 140 So.2d 169 (vendor given authority to sell the automobile).

terests.⁸⁹ When no negligence could be attributed to the original owner he was protected by Louisiana courts.⁹⁰

The one area in which the common law and Louisiana jurisprudence diverged involved sales of movables obtained with bad checks.⁹¹ Early Louisiana cases classified such transactions as theft;⁹² however, this approach was repudiated⁹³ and such cases are now treated as credit sales in which title passes.⁹⁴ Because "title" passes from the owner to the transferee-vendor, the bona fide purchaser is protected.⁹⁵ At common law, the owner is protected in bad check cases because such sales are treated as conditional sales, with no title passing until the check is honored.⁹⁶

Ignoring the Code's protection of security of ownership, "Louisiana courts endeavor[ed] to protect the bona fide purchaser when possible, out of a realistic appreciation of the needs of commerce."⁹⁷ This protection of the bona fide purchaser was achieved at the expense of Louisiana's civilian methodology.

The Civilian Source that Never Was

There is nothing substantively erroneous with Louisiana courts' protection of the bona fide purchaser. In fact, given the need for stability of commerce, such protection is warranted and necessary. As Professor Litvinoff has aptly pointed out, the problem with protecting the bona fide purchaser "is to find convincing reasons. If grounds could be found that are both convincing and consistent with the tradition that inspires

⁸⁹*E.g.*, *Trumbull Chevrolet Sales Co. v. Maxwell*, 142 So.2d 805, 807 (La. App. 2d Cir. 1962) (plaintiff "solely responsible for laying the basis for the subsequent allegedly fraudulent transactions" prohibited from recovering its property).

⁹⁰*E.g.*, *Port Finance Co. v. Ber.*, 45 So.2d 404, 407 (La. App. Or. Cir. 1950) (original owner who "exercised all of the caution that a reasonably prudent man should have exercised under the circumstances prevailing at that time" allowed to recover his property).

⁹¹*E.g.*, *Flatte v. Nichols*, 233 La. 171, 96 So.2d 477 (1957); *Jeffery Motor Co. v. Higgins*, 230 La. 857, 89 So.2d 369 (1956).

⁹²*Port Finance v. Ber.*, 45 So.2d 404 (La. App. Or. Cir. 1950).

⁹³*Jeffery Motor Co. v. Higgins*, 89 So.2d 369, 371 (La. 1956).

⁹⁴*Id.*; see also *Flatte v. Nichols*, 96 So.2d 477. See generally LITVINOFF, *supra* note 6, § 93.

⁹⁵LITVINOFF, *supra* note 6, § 93.

⁹⁶*Id.*

⁹⁷*Id.* § 94, at 164.

Louisiana law, the way would be clear for a firm line of decisions in favor of the bona fide purchaser."⁹⁸

Professor Litvinoff points the way to a civilian basis for a Louisiana bona fide purchaser doctrine. He begins by approving the negligence approach evident in so many Louisiana decisions.⁹⁹ Louisiana courts labored under the impression that in considering negligence they were effectuating the common law equitable estoppel principle. Professor Litvinoff has argued that a civil law basis for the consideration of negligence can be found:

From time immemorial it has been asserted in the civilian tradition that the law will not protect a capable party who fails to act with the prudence, care, and alertness that must be observed in human affairs. When a party claims to have been the victim of a fraud the law will not give him its protection if it is shown that he acted negligently or with blind and unfounded confidence, or that he omitted measures that a reasonable man should have taken to ascertain the existence of certain facts or the truth of representations. When such is the situation, the alleged victim should blame only himself and the law will leave him where he stands.¹⁰⁰

Furthermore, Professor Litvinoff points out that the doctrine of equitable estoppel is not foreign to the civil law. Rather, the results achieved under the equitable estoppel principle have a civilian basis in the Roman maxim *venire contra factum proprium*, meaning "no one was allowed to ignore or deny his own acts or their consequences and claim a right in opposition to them."¹⁰¹

Professor Litvinoff asserts that once a negligence framework is established, the courts must look to the actions of both the original owner and the bona fide purchaser since each "can be suspected of having incurred some negligence: the original owner by accepting the identity of the fraudulent impersonator, or granting his confidence to an undeserving party, or taking a check from a stranger; the bona fide purchaser by relying on appearances and not inquiring into the right of his

⁹⁸*Id.*

⁹⁹*Id.* at 165.

¹⁰⁰*Id.* at 165-66.

¹⁰¹*Id.* at 168.