

**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.<sup>1</sup> This choice pits security of ownership against the commercial

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<sup>1</sup> 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.<sup>2</sup> The Louisiana Civil Codes of 1808, 1825, and 1870 protected the security of ownership at the expense of security of transaction.<sup>3</sup> Louisiana's 19th century agrarian economy was a partial factor in the redactors' election of security of ownership.<sup>4</sup> 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"<sup>5</sup> which protected the purchaser rather than the true owner.<sup>6</sup> 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.<sup>7</sup> This Anglo-American concept is based on a "title" analysis<sup>8</sup> completely foreign to civilian notions of property and obligations<sup>9</sup> and is "in violation not only of the text of the Code but of the traditional technique of the civil law."<sup>10</sup>

The reception of the common law bona fide purchaser doctrine into Louisiana has been both criticized<sup>11</sup> and rationalized.<sup>12</sup> Over fifty

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

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> Comment, *Transfer of Movables*, *supra* note 3, at 145 n. 1.

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

<sup>7</sup> 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.

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

<sup>9</sup> 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").

<sup>10</sup> Franklin, *supra* note 2, at 604.

<sup>11</sup> 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.

<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> This modernization, however, has not completely solved the conflict between security of ownership and security of transaction.<sup>16</sup> 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.<sup>17</sup> Not all legal systems have reached the same conclusion as to whether security of ownership or security of transaction should be protected.<sup>18</sup> The Romans, from the time of Justinian, adopted an acquisitive prescription approach which favored the dispossessed owner.<sup>19</sup> The French, in arti-

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<sup>13</sup>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.

<sup>14</sup>*Id.* at 612.

<sup>15</sup>The 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).

<sup>16</sup>See *infra* notes 168-171 and accompanying text.

<sup>17</sup>See *supra* notes 1-2 and accompanying text.

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

<sup>19</sup>See 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).<sup>20</sup> 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).<sup>21</sup> "This general rule, however, is riddled with exceptions designed to protect innocent purchasers."<sup>22</sup> These exceptions are known as the bona fide purchaser doctrine.<sup>23</sup> 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.<sup>24</sup> 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"<sup>25</sup> 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");<sup>26</sup> (2) transfers of money and negotiable instruments;<sup>27</sup> (3) sales by a vendor with a voidable title;<sup>28</sup> and (4) instances in which the owner is barred from assert-

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

<sup>20</sup>C. 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.

<sup>21</sup>Comment, *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.

<sup>22</sup>Comment, *Transfer of Movables*, *supra* note 3, at 150.

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

<sup>24</sup>Comment, *Transfer of Movables*, *supra* note 3, at 150.

<sup>25</sup>LITVINOFF, *supra* note 6, at § 87.

<sup>26</sup>Comment, *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.

<sup>27</sup>Comment, *Transfer of Movables*, *supra* note 3, at 152.

<sup>28</sup>*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.<sup>29</sup> The Uniform Commercial Code (UCC) generally mirrors the results obtained at the common law.<sup>30</sup> 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.<sup>31</sup>

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

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<sup>29</sup>*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.

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

<sup>31</sup>U.C.C. § 2-403.

<sup>32</sup>Comment, *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.<sup>33</sup> Both the French and Louisiana Codes provide that the "sale of a thing belonging to another person is null ...."<sup>34</sup> 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.<sup>35</sup> This provision broadly protects security of transaction at the expense of security of ownership<sup>36</sup> and has been called "the most important [article] in the entire code."<sup>37</sup> Although the redactors of the Louisiana Civil Code borrowed heavily from the French Code, they suppressed article 2279<sup>38</sup> 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."<sup>39</sup> 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.<sup>40</sup> This analysis, however, is deceptive. Article 2279 "permeates the entire French Code;"<sup>41</sup> 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*]."<sup>42</sup> At the same time, the Louisiana redactors also included many articles supporting security of ownership.<sup>43</sup>

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<sup>33</sup>LITVINOFF, *supra* note 6, § 94.

<sup>34</sup>C. Civ. art. 1599; LA. CIV. CODE art. 2452.

<sup>35</sup>*See supra* note 20.

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

<sup>37</sup>Franklin, *supra* note 2, at 593.

<sup>38</sup>One 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.

<sup>39</sup>LA. 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.

<sup>40</sup>Comment, *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.

<sup>41</sup>Franklin, *supra* note 2, at 601.

<sup>42</sup>LITVINOFF, *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."<sup>44</sup> 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.<sup>45</sup> 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;<sup>46</sup> (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;<sup>47</sup> (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

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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.

<sup>43</sup>Franklin, *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).

<sup>44</sup>LA. CIV. CODE art. 496 (1870) (revised and recodified at LA. CIV. CODE art. 481).

<sup>45</sup>See generally YIANNOPOULOS, *supra* note 15, § 233-244.

<sup>46</sup>LA. CIV. CODE art. 3506 (1870) (currently codified at LA. CIV. CODE art. 3490).

<sup>47</sup>LA. 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";<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> Furthermore, the redactor's task was to codify the then-existing laws in effect in the territory.<sup>55</sup> It

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<sup>48</sup>LA. CIV. CODE art. 3508 (1870).

<sup>49</sup>LA. 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.

<sup>50</sup>Franklin, *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.

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

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

<sup>53</sup>*Id.*

<sup>54</sup>*Exposé des Motifs*, *supra* note 4.

<sup>55</sup>See 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.<sup>56</sup> In any event, the first cases squarely ignoring the Code's protection of the owner were rendered in 1829.<sup>57</sup> By the 1870's the courts were routinely protecting the purchaser of a movable acquired without the owner's consent<sup>58</sup> on a variety of theories borrowed from the common law.<sup>59</sup> The doctrine was introduced to Louisiana under the guise of natural law.<sup>60</sup> 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.<sup>61</sup> In 1829, the Louisiana Supreme Court held in *Miles v. Oden*<sup>62</sup> that "a bona fide purchaser is not affected by fraud in his vendor, who has a legal title to the property sold."<sup>63</sup> The *Miles* court relied on the earlier pronouncements of the United States Supreme Court which, in *Fletcher v. Peck*<sup>64</sup>, raised the common law bona fide purchaser doctrine to the level of a principle of natural law.<sup>65</sup> The *Miles* decision was limited in application to the law "under which this transaction took place,"<sup>66</sup> namely, the law of Kentucky. Nonetheless, in *Thomas v. Mead*,<sup>67</sup> the same Court applied the same rule in the same year to a case involving

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

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

<sup>58</sup>*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).

<sup>59</sup>*See infra* notes 71-85 and accompanying text.

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

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

<sup>62</sup>8 Mart. (N.S.) 214 (La. 1829).

<sup>63</sup>*Id.* at 227 (citation omitted).

<sup>64</sup>10 U.S. (6 Cranch) 87 (1810).

<sup>65</sup>*Franklin*, *supra* note 2, at 605.

<sup>66</sup>8 Mart. (N.S.) at 217.

<sup>67</sup>8 Mart. (N.S.) 341 (La. 1829).

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

### *The Doctrine Solidifies*

Louisiana courts routinely relied on common law authorities,<sup>71</sup> cases,<sup>72</sup> and analysis<sup>73</sup> 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,<sup>74</sup> Louisiana courts reached results consistent with, and based upon, the common law distinction between "void" and "voidable" title.<sup>75</sup> "When title passed, the courts protected the bona fide purchaser."<sup>76</sup>

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

<sup>68</sup>This 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.

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

<sup>70</sup>Franklin, *supra* note 2, at 605.

<sup>71</sup>See, 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)).

<sup>72</sup>See, 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).

<sup>73</sup>See *infra* notes 74-85 and accompanying text.

<sup>74</sup>See, 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).

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

<sup>76</sup>Comment, *Transfer of Movables*, *supra* note 3, at 155.

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

<sup>78</sup>*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.<sup>79</sup> While transfer of possession alone was insufficient to support a plea of estoppel,<sup>80</sup> transfer of possession with indicia of ownership<sup>81</sup> or apparent authority to sell<sup>82</sup> would estop the owner from asserting his rights against a bona fide purchaser.<sup>83</sup> Louisiana courts also seemed to adopt the market overt<sup>84</sup> 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.<sup>85</sup>

The common thread of analysis running throughout these cases is negligence.<sup>86</sup> 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,<sup>87</sup> or with the authority to sell,<sup>88</sup> or in not taking adequate measures to protect his in-

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

<sup>79</sup>James 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.

<sup>80</sup>See, e.g., Holloway, 133 So. at 822.

<sup>81</sup>See, 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.

<sup>82</sup>See, 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).

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

<sup>84</sup>See *supra* note 26 and accompanying text.

<sup>85</sup>See, 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).

<sup>86</sup>LITVINOFF, *supra* note 6, § 94 at 165.

<sup>87</sup>E.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).

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

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

The one area in which the common law and Louisiana jurisprudence diverged involved sales of movables obtained with bad checks.<sup>91</sup> Early Louisiana cases classified such transactions as theft;<sup>92</sup> however, this approach was repudiated<sup>93</sup> and such cases are now treated as credit sales in which title passes.<sup>94</sup> Because "title" passes from the owner to the transferee-vendor, the bona fide purchaser is protected.<sup>95</sup> 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.<sup>96</sup>

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."<sup>97</sup> 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

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<sup>89</sup>*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).

<sup>90</sup>*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).

<sup>91</sup>*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).

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

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

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

<sup>95</sup>LITVINOFF, *supra* note 6, § 93.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* § 94, at 164.

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

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.<sup>99</sup> 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.<sup>100</sup>

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."<sup>101</sup>

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

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<sup>98</sup>*Id.*

<sup>99</sup>*Id.* at 165.

<sup>100</sup>*Id.* at 165-66.

<sup>101</sup>*Id.* at 168.

vendor."<sup>102</sup> Once the relative degrees of fault are established, Professor Litvinoff suggests the following method for resolving the conflict. If both are at fault, then the bona fide purchaser should be protected under the Roman maxim *melior est conditio possidentis* (the law favors the one in possession). If the owner alone is at fault, then the bona fide purchaser should be protected. If the purchaser alone was negligent, then the owner should be protected.<sup>103</sup>

Professor Litvinoff has presented a compelling analysis for rationalizing the Louisiana jurisprudence in civilian terms;<sup>104</sup> however, to date, no court has taken this bait. Perhaps no civilian jurist could, in good faith, accept Professor Litvinoff's scheme while confronted with a Code which protects security of ownership over security of transaction.<sup>105</sup> It must be admitted that the maxim *melior est conditio possidentis* conflicts with the Code's protection of security of ownership.<sup>106</sup> To this extent, while Professor Litvinoff's analysis makes sense in the broad context of civilian systems in general, it must fail in the narrower context of the Louisiana Civil Code.

While there was nothing wrong with the results reached by Louisiana courts in resolving the conflict between an owner and a bona fide purchaser, their methodology was offensive to our civilian system.<sup>107</sup> The common law bona fide purchaser doctrine was introduced into Louisiana at the expense of, and despite, the codal scheme seemingly mandated by article 1 of the Civil Code.<sup>108</sup> In retrospect, it is amazing that the very simple need to protect security of commerce could cause so much damage to our civilian system. The obvious path for the

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<sup>102</sup>*Id.* at 167.

<sup>103</sup>*Id.*

<sup>104</sup>Professor Litvinoff merely justifies the results under the jurisprudence. The actual cases have been decided under common law theories. See *supra* notes 71-85.

<sup>105</sup>See *supra* note 50 and accompanying text.

<sup>106</sup>Since the Louisiana Civil Code has never expressly incorporated the *la possession vaut titre* principle, instead protecting security of ownership, the Code's policy would seem to be the exact opposite of *melior est conditio possidentis*.

<sup>107</sup>*Ber*, 45 So.2d at 408.

<sup>108</sup>"Law is a solemn expression of legislative will." LA. CIV. CODE art. 1 (1870). Further, the common law "title" analysis on which many of the common law exceptions are based is completely foreign to civilian notions of contract and property. Additionally, this common law analysis introduces into Louisiana a division between law and equity — a division banished for 1500 years under traditional civilian methodology. Franklin, *supra* note 2, at 609-10.

elimination of these problems was codal revision. This revision took place in 1979.

#### IV. 1979 PROPERTY REVISION: A RETURN TO CIVILIAN METHODOLOGY

Book II, Title II of the 1870 Civil Code was amended and reenacted by the Louisiana Legislature in 1979.<sup>109</sup> Title II governs ownership in general, and Chapter 3 of this title prescribes the methods of transfer of ownership by agreement.<sup>110</sup> This new legislation "establish[ed] a significant change in the law in an effort to re-align Louisiana law with modern civil law and the Uniform Commercial Code."<sup>111</sup> According to the *Exposé des Motifs* to new chapter 3, this legislative revision provided a codified approach to dealing with the issues raised by the sale of a movable belonging to another:

Under the Louisiana Civil Code of 1870 the ownership of movables [could] be transferred only by the owner or by a person acting under his authority. Transfer of the ownership of a movable by a non-owner acting without the authority of the owner [was] not recognized. This was the policy adopted in 1808 in the light of Louisiana's agricultural economy. Over the years, special legislation and jurisprudence worked certain exceptions, but the principle itself remained unchallenged.... Articles 518 through 525 represent[ed] Louisiana's solution to a compelling contemporary problem in the light of Louisiana's economic life.<sup>112</sup>

The new legislation, designed to protect good faith acquirers by onerous title, protected security of transaction.<sup>113</sup> Article 518, still in force today, establishes the general principle that only an owner or someone authorized by him may transfer ownership in a movable.<sup>114</sup>

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<sup>109</sup>1979 La. Acts 180, § 1.

<sup>110</sup>LA. CIV. CODE arts. 517-525.

<sup>111</sup>*Exposé des Motifs*, *supra* note 4.

<sup>112</sup>*Id.*

<sup>113</sup>LA. CIV. CODE art. 520, comment (b) (Repealed by 1981 La. Acts 125).

<sup>114</sup>LA. CIV. CODE art. 518 provides in pertinent part: The ownership of a movable is voluntarily transferred by a contract *between the owner and the transferee* that purports to transfer the ownership of the movable. Unless otherwise provided, the transfer of ownership takes place as between the parties by the effect of the agreement and against third persons when the possession of the movable is delivered to the transferee. (emphasis added)

Article 520 provided a broad exception to article 518 in the case of a transfer of ownership by a possessor:

A transferee in good faith for fair value acquires the ownership of a corporeal movable, if the transferor, though not owner, has possession with the consent of the owner, as pledgee, lessee, depository, or other person of similar standing.<sup>115</sup>

Article 520 was narrower than the French *la possession vaut titre* as the former only protected a transferee by onerous title while the latter also protects transferees under gratuitous title.<sup>116</sup> A transferee is in good faith "unless he knows, or should have known, that the transferor was not the owner."<sup>117</sup> In effect, this definition of good faith vests the transferee with a presumption of good faith,<sup>118</sup> although he bears the burden of proving fair value.<sup>119</sup>

In contrast, when the transferor had possession without the owner's consent, Article 521 protected the owner over the purchaser: "One who has possession of a lost or stolen thing may not transfer its ownership to another."<sup>120</sup> The definition of theft, adopted from the prior jurisprudence, is equivalent to common law larceny;<sup>121</sup> it does not include situations in which the owner is fraudulently induced to transfer the movable. Fraud and other vices of consent are covered under article 522:

A transferee of a corporeal movable in good faith and for fair value retains the ownership of the thing even though the

<sup>115</sup>LA. CIV. CODE art. 520 (repealed by 1981 La. Acts 125).

<sup>116</sup>*Id.*; comment (b). See also Comment, *Transfer of Movables*, *supra* note 3, at 159.

<sup>117</sup> LA. CIV. CODE art. 523.

<sup>118</sup>Comment, *Transfer of Movables*, *supra* note 3, at 163-64.

<sup>119</sup>*Id.* at 159-60.

<sup>120</sup>LA. CIV. CODE art. 521.

<sup>121</sup>Article 521 states in pertinent part that:

"[A] thing is stolen when one has taken possession of it without the consent of its owner. A thing is not stolen when the owner delivers it or transfers its ownership to another as a result of fraud."

See also LA. CIV. CODE art. 521, comment (b) ("In continental legal systems, theft is narrowly defined to mean misappropriation or taking of a corporeal movable, without the consent of its owner, by one who intends to make it his own.... This is the same as larceny in common law jurisdictions."); *Jeffery Motor Co. v. Higgins*, 89 So. 2d 369 (La. 1956).



title of the transferor is annulled on account of a vice of consent.<sup>122</sup>

Article 522 accords with the results reached under the prior jurisprudence in the bad check and fraudulent conveyance cases.<sup>123</sup> The owner of a lost or stolen movable may recover it from even a good faith transferee any time prior to the lapse of ten years, the period necessary to obtain an ownership of movables by acquisitive prescription.<sup>124</sup> Under article 524, however, if the transferee in good faith buys the lost or stolen movable "at a public auction or from a merchant customarily selling similar things," the owner may recover the movable only upon reimbursing the purchase price.<sup>125</sup> The same rule bars former owners from recovering lost, stolen, or abandoned movables sold by authority of law.<sup>126</sup> These provisions are generally in accord with the prior law, although under Louisiana jurisprudence,<sup>127</sup> the owner's obligation to reimburse the purchase price only arose after the three year acquisitive prescription period of article 3506 of the 1870 Code had run.<sup>128</sup>

The regime established by articles 518 through 524 does not apply to "movables that are required by law to be registered in public records."<sup>129</sup> Thus, automobiles, ships, and airplanes are excluded from the 1979 revision.<sup>130</sup> Resolution of the conflict between an owner and a

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<sup>122</sup>LA. CIV. CODE art. 522.

<sup>123</sup>Comment, *Transfer of Movables*, *supra* note 3, at 162; LA. CIV. CODE art. 522. comment (e). *See supra* notes 91-96 and accompanying text.

<sup>124</sup>LA. CIV. CODE art. 524 comment (b). *See* LA. CIV. CODE art. 3491 (providing for ten year acquisitive prescription of movables without title or good faith).

<sup>125</sup>LA. CIV. CODE art. 524 comment (b).

<sup>126</sup>LA. CIV. CODE art. 524.

<sup>127</sup>*See* Securities Sales Co. v. Blackwell, *supra* note 47.

<sup>128</sup>*See supra* note 47 and accompanying text. *See also* LA. CIV. CODE art. 3490 (reenacting the substance of former La. Civil Code articles 3506 and 3509 (1870)).

<sup>129</sup>LA. CIV. CODE art. 525.

<sup>130</sup>*See* LA. CIV. CODE art. 520 comment (b) (repealed by 1981 Acts 125) and art. 525 comment (b). *But see* Sherman v. State Farm Mutual Automobile Insurance Co., 413 So.2d 646 (La. App. 1st Cir. 1982) (sale of motor vehicle governed by Civil Code article, relating to sale of movables, not affected by noncompliance with Vehicle Title Law), *writ den.* 413 So. 2d 644; Scott v. Continental Insurance Co., 259 So. 2d 391, 394 (2d Cir. 1972) ("Titles to motor vehicles, though imperfect may be transferred between parties in accordance with the provisions of the Civil Code . . . even though there has been no compliance with the Vehicle Certificate of Title Law.")

bona fide purchaser of a registered movable is thus left to the courts or to the legislature by special provision.<sup>131</sup>

Article 526 of the 1979 revision specifically recognized the dispossessed owner's right to recover his property in the hands of third persons: "The owner of a thing is entitled to recover it from anyone who possesses or detains it without right and to obtain judgment recognizing his ownership and ordering delivery of the thing to him."<sup>132</sup> In actions involving the recovery of a movable, the present possessor would be presumed to be its owner.<sup>133</sup> Article 530 provides:

The possessor of a corporeal movable is presumed to be its owner. The previous possessor of a corporeal movable is presumed to have been its owner during the period of his possession.

These presumptions do not avail against a previous possessor who was dispossessed as a result of loss or theft.<sup>134</sup>

Article 530 is "necessary for the proper function of Articles 520-525 dealing with the acquisition of the ownership of movables by a possessor in good faith for fair value."<sup>135</sup> The article 530 presumptions were designed to work with the other provisions of the 1979 revision in the following manner: the owner's "revendicatory action [under article 526] will fail if the defendant has acquired ownership of the movable by acquisitive prescription, accession, transfer from the true owner, or a transfer from a non-owner in accordance with article 520 through 524."<sup>136</sup> In accord with continental law, the article 530 presumption in favor of the present possessor "is generally rebutted where the claimant proves that the possession of his adversary is precarious, equivocal, clandestine, or the result of fraud."<sup>137</sup> Finally, if the claimant was a previous possessor who was "dispossessed as a result of loss or theft, the presumptions of article 530 (1) do not apply."<sup>138</sup>

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<sup>131</sup>Comment, *Transfer of Movables*, *supra* note 3, at 164.

<sup>132</sup>LA. CIV. CODE art. 526.

<sup>133</sup>LA. CIV. CODE art. 530.

<sup>134</sup>*Id.*; See generally Comment, *Transfer of Movables*, *supra* note 3, at 165-66.

<sup>135</sup>*Exposé des Motifs*, *supra* note 4.

<sup>136</sup>Comment, *Transfer of Movables*, *supra* note 3, at 165-66.

<sup>137</sup>Comments to LA. CIV. CODE art. 530 (citing YIANNOPOULOS, *supra* note 15, at § 127).

<sup>138</sup>*Transfer of Movables*, *supra* note 3, at 165; LA. CIV. CODE art. 530.

The results under the 1979 revision may be summarized as follows:

A. The third party purchaser would be protected over the original owner when:

- (1) the transferor gained possession of the movable with the owner's consent (even if by fraud or another vice);
- (2) the transferee acquired the movable in good faith; and
- (3) he purchased the movable for fair value.<sup>139</sup>

The purchaser would retain ownership even if the transferor's title was voidable by the original owner because of a vice of consent.<sup>140</sup> If, on the other hand, the vendor's title was voidable and the purchaser was in bad faith or did not pay fair value, then the owner would be able to recover the movable.<sup>141</sup>

B. When a movable is lost or stolen, a transferor has no power to vest the purchaser with ownership.<sup>142</sup> Thus, an owner may recover a lost or stolen movable from even a good faith purchaser. However, this right has a price: if the purchaser bought the lost or stolen movable at public auction or from a merchant customarily selling such goods, the owner must reimburse the purchaser.<sup>143</sup>

C. The owner has no right to recover a lost or stolen movable when it is sold by authority of law<sup>144</sup> or when another possesses it for ten years.<sup>145</sup>

Louisiana courts struggled for 150 years with the problems raised by the sale of a movable belonging to another. Due to economic progress, codal emphasis on the security of ownership became unacceptable. The courts' method of substituting security of transaction was unconvincing. With the 1979 revision, the Louisiana legislature at

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<sup>139</sup>See *supra* notes 114-19 and accompanying text.

<sup>140</sup>LA. CIV. CODE art. 522. See also, *supra*, notes 122-23 and accompanying text.

<sup>141</sup>See LA. CIV. CODE arts. 3462 and 3490-3491. But see articles 3221, et seq. (articles on possession and right to possess).

<sup>142</sup>See LA. CIV. CODE art. 521, *supra* note 121.

<sup>143</sup>See text accompanying notes 124-26, *supra* (owner must reimburse purchase price to recover movable); see also article 3490 (owner's right to recover against a good faith purchaser of an auctioned or merchandized movable is limited to three years).

<sup>144</sup>LA. CIV. CODE art. 524.

<sup>145</sup>LA. CIV. CODE art. 3491.

tempted to end this jurisprudential rulemaking by codifying a civilian approach to the bona fide purchaser problem. Soon alarmed by what it had done, the legislature eviscerated the new codal scheme by repealing article 520.

## V. REPEAL OF ARTICLE 520: AN END TO A RATIONAL APPROACH

Article 520, arguably the cornerstone of the 1979 revision, never went into effect; it was suspended in 1980<sup>146</sup> and repealed in 1981.<sup>147</sup> Those in favor of repealing the provision argued that "[m]any commercial lenders and lessors of movables now have knowledge of Article 520 and want the 'old law' to remain in effect."<sup>148</sup> The proponents of repeal apparently labored under the assumption that automobiles and property subject to chattel mortgages could "be transferred by the lessee to a purchaser in good faith for fair value to the detriment of the lessor-owner or holder of a chattel mortgage."<sup>149</sup>

These arguments against article 520 were mistaken for several reasons. First, every chattel mortgagee who complies with the provisions of the Louisiana Chattel Mortgage Law<sup>150</sup> has a legal preference and a right to follow the mortgaged movable in the hands of a transferee;<sup>151</sup> commercial lenders holding chattel mortgages thus would be unaffected by article 520. Second, commercial lessors of registered movables are protected by the Title Certificate Law<sup>152</sup> since article 525 specifically exempts registered movables from the operation of article 520.<sup>153</sup> Third, "the lessor of the unregistered movables may take mea-

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<sup>146</sup>S. Con. Res. 172, 1980 La. Sess. Law Serv. 2056.

<sup>147</sup>1981 La. Acts 125, § 1.

<sup>148</sup>Bussoff, *Position Paper in Favor of Repealing Current Civil Code Articles 520, 523, and 525* at 6, La. St. L. Inst. Proc. (Meeting March 6-7, 1981).

<sup>149</sup>Yiannopoulos, *Memorandum* at 6, La. St. L. Inst. Proc. (Meeting March 6-7, 1981).

<sup>150</sup>La. R. S. 9 § 5351-5366.

<sup>151</sup>La. R. S. 9 § 5354 provides in part:

Except as hereinafter provided, every such mortgage or security interest shall be effective as against third persons from the time of filing in the proper offices, and the filing shall be notice to all parties of the existence of the mortgage or security interest, which shall be superior in rank to any privilege or preference arising subsequently thereto.

<sup>152</sup>La. R. S. 32 § 706; see *supra* text accompanying notes 129-31.

<sup>153</sup>Ellis, *Memorandum* at 10, La. St. L. Inst. Proc. 10 (Meeting March 6-7, 1981).

tures to protect his interest such as investigation of the credit of the lessee and insurance."<sup>154</sup> It is also submitted that lessors may protect their property interests by taking such common sense steps as permanently identifying the leased property<sup>155</sup> or obtaining additional security devices such as contracts of surety from the lessees.<sup>156</sup> Fourth, the "old law" was self-contradicting; the 1870 Code established one scheme for dealing with the sale of a movable by a non-owner<sup>157</sup> while the courts fashioned another with result-oriented decisions based on common law principles.<sup>158</sup> This jurisprudence was criticized for reaching "inconsistent and conflicting results"<sup>159</sup> and for misapplying the common law doctrine, thus "adding to the general confusion of law on the subject."<sup>160</sup>

It is also submitted that those opposed to implementing article 520, instead preferring the "old law," made a near-sighted decision which conflicts with traditional "principles utilized in other civilian systems."<sup>161</sup> The 1979 revision offered a rational, comprehensive, and consistent method for dealing with the sale of movables belonging to another.<sup>162</sup> No commentator writing on the 1979 revision found grounds to criticize the regime established in articles 520 through 525.<sup>163</sup> The revision did not drastically alter the results reached by the prior jurisprudence;<sup>164</sup> it only made these results certain through codification.<sup>165</sup> It also offered a civilian approach, rather than misapplication of common law doctrine. Given the consistency of the 1979 revision and the myriad means available to businessmen for protecting their in-

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<sup>154</sup>Yiannopoulos, *Memorandum* at 6, La. St. L. Inst. Proc. (Meeting March 6-7, 1981).

<sup>155</sup>Identification permanently affixed to a movable should rebut the presumption of good faith under article 523 as long as it provides a third party with sufficient notice to raise in his mind doubt as to the transferor's ownership. See LA. CIV. CODE art. 521-23.

<sup>156</sup>Contracts of surety may be used to guarantee obligations other than money debts. See LA. CIV. CODE art. 3035 and LA. CIV. CODE art. 3036.

<sup>157</sup>See *supra* notes 44-49 and accompanying text.

<sup>158</sup>See *supra* notes 61-73 and accompanying text.

<sup>159</sup>Ellis, *Memorandum* at 8, La. St. L. Inst. Proc. (Meeting March 6-7, 1981).

<sup>160</sup>*Id.* See also Comment, *Sales of Another's Movables* *supra* note 1, at 360.

<sup>161</sup>Ellis, *Memorandum* at 10, La. St. L. Inst. Proc. (Meeting March 6-7, 1981).

<sup>162</sup>See *supra* notes 139-45 and accompanying text.

<sup>163</sup>See, e.g., Comment, *Transfer of Movables*, *supra* note 3.

<sup>164</sup>Ellis, *Memorandum* at 6-7, La. St. L. Inst. Proc., *supra* note 161.

<sup>165</sup>*Id.* at 8.

terests,<sup>166</sup> it can be concluded that the new law imposed no greater risks to lenders or lessors than the old.<sup>167</sup>

Article 520 was the key to solving conflicts between owners and bona fide possessors since it established the general principle on which articles 522 and 530 were based. The repeal of article 520 leaves real doubt as to the continued validity of a Code-based bona fide purchaser doctrine. With the repeal of article 520 there are three classes of cases for which there is no specific Code provision:

- (1) the sale of a movable obtained through a confidential relationship;
- (2) the sale of a movable by a transferor who had possession of the movable with the owner's consent; and
- (3) the sale of a movable where the transferor had possession by virtue of the owner's negligence.<sup>168</sup>

Faced with one of these situations, a court could choose one of several solutions. One possible approach would be to assume that repeal of article 520, as the latest expression of legislative will, implies that security of ownership must be protected at the expense of protecting bona fide purchasers.<sup>169</sup> Another approach would be to apply the possessor-is-owner presumption of article 530 in order to continue, as commerce requires, the judicial protection of bona fide purchasers.<sup>170</sup> To date no

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<sup>166</sup>See *supra* notes 150-56 and accompanying text.

<sup>167</sup>See generally, Ellis, *Memorandum* at 10, La. St. L. Inst. Proc. (Meeting March 6-7, 1981).

<sup>168</sup>See *supra* notes 74-90 and accompanying text. Lost or stolen movables and movables obtained through vices of consent are governed by the specific rules of articles 521 and 522 respectively. These articles were not repealed.

<sup>169</sup>LA. CIV. CODE arts. 1, 13. The protection of the bona fide purchaser in the Louisiana case law was a judge-made exception to the general rule of article 2452 ("The sale of a thing belonging to another person is null...."). The decisions in favor of the bona fide purchaser were premised upon a policy choice to protect security of transaction over security of ownership. To the extent that the repeal of article 520 represents a repudiation of the protection of security of transaction, the premise of the decisions in favor of the bona fide purchaser has been undercut.

<sup>170</sup>LA. CIV. CODE art 530 provides in part that "[T]he possessor of a corporeal movable is presumed to be its owner." It was intended that article 530 be complementary to articles 520 through 524. However, article 530 could be used as an evidentiary presumption and thus be expanded beyond its original purpose to serve as a basis for a bona fide purchaser exception to the general rule that the sale of a thing belonging to another is null.

court has squarely faced the problem of protecting security of transaction in light of the repeal of article 520.<sup>171</sup>

The repeal of article 520 was not, however, the last word on whether security of ownership or security of transaction would prevail under the Code. Recent developments in the continuing revision of the Code cast doubt on the wisdom of the repeal of article 520.

## VI. 1984 OBLIGATIONS REVISION: SECURITY OF TRANSACTION AND BONA FIDE PURCHASER REVIVED

In 1984, the Louisiana legislature amended and reenacted the portions of Book III of the 1870 Civil Code covering Obligations in General and Conventional Obligations.<sup>172</sup> It is reasonable to expect that the 1984 obligations revision will have significant impact on the problem of a sale of a movable belonging to another since "[r]eal rights in movables ... are traditionally protected in civil law jurisdictions by rules of the law of property as well as by rules of the law of obligations."<sup>173</sup> "These classifications are not rigorously logical abstractions but merely working generalizations devised for the purpose of convenience of understanding and regulation."<sup>174</sup> While the law of obligations may give rise to property rights, "these property rights are often subject to special rules rather than the general law of property which may apply to them only subsidiarily and in the absence of specific regulation."<sup>175</sup> Because of this interplay, uniformity in result and philosophy between the laws of property and obligations is desirable.

The obligations revision primarily affects the sale of movables belonging to another in two areas: the extinction of obligations dis-

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<sup>171</sup>See e.g. *Southeast Equipment Co. v. Office of State Police Troop B*, 437 So.2d 1184 (La. App. 4th Cir. 1983) (involving stolen heavy equipment but recognizing the primacy of the need to protect security of transaction); *Haddad v. Tolbert*, 426 So.2d 328, 330 (La. App. 2nd Cir. 1983) (court denied damages to an owner who recovers stolen equipment from a bona fide purchaser under Article 2452, which "provides for recovery of damages by an innocent purchaser against the seller of a thing belonging to another, not for recovery of damages by the owner of the property against the innocent purchaser," without any discussion of articles 521-524).

<sup>172</sup>1984 La. Acts. 331, § 1.

<sup>173</sup>YIANNOPOULOS, *supra* note 15, at § 230.

<sup>174</sup>*Id.* at § 2.

<sup>175</sup>*Id.*

cussed in Title III, Chapter 6,<sup>176</sup> and the nullity of contracts covered by Title IV, Chapter 2.<sup>177</sup> These sections promote security of transaction over security of ownership and significantly affect the resolution of conflicts between owners and bona fide purchasers of movables.

Title III, Chapter 6, establishes the rule that obligations may be extinguished by performance.<sup>178</sup> An obligation to give is satisfied by the transfer of the object of the obligation.<sup>179</sup> Article 1856 refines this rule by providing that "An obligation that may be extinguished by the transfer of a thing is not extinguished unless the thing has been validly transferred to the obligee of performance."<sup>180</sup> Due to the requirement that the thing be "validly transferred," article 1856 on its face may not appear to protect security of transaction over security of ownership. However, when this article is compared with former article 2138, the provision it replaces, the policy change in favor of security of transaction becomes clear. Article 2138 of the 1870 Code provided:

If the debtor [gives] a thing in payment of his obligation, which he has no right to deliver, it does not discharge his obligation, and the owner of the thing given may reclaim it in the hands of the creditor, unless the obligation has been discharged by the payment of money, or the delivery of some of those things which are consumed in the use, and the creditor has used them; in which cases neither the money nor the things consumed can be reclaimed, and the payment will be good.<sup>181</sup>

While security of ownership was protected by old article 2138,<sup>182</sup> new article 1856 promotes security of transaction.<sup>183</sup> The comments to article 1856 make it clear that the law was changed in order to align the

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<sup>176</sup>LA. CIV. CODE arts. 1854-1863.

<sup>177</sup>*Id.*, arts. 2029-2035.

<sup>178</sup>*Id.*, art. 1854.

<sup>179</sup>*Id.*, art. 1860.

<sup>180</sup>*Id.*, art. 1856.

<sup>181</sup>LA. CIV. CODE art. 2138.

<sup>182</sup>Franklin, *supra* note 2, at 602. Article 2138 of the 1870 Code explicitly recognized the owner's right to recover his property in the hands of a bona fide purchaser and thus protected ownership at the expense of the need for security of transaction.

<sup>183</sup>Under new article 1856, an obligation to give may be extinguished by delivery of an object belonging to another even if it was obtained from the owner through a vice of consent. LA. CIV. CODE art. 1856 comment (b). This provision protects security of transaction at the expense of the original owner.



obligations rules with the the 1979 property revision.<sup>184</sup> Thus, under new article 1856, the transfer of a movable to a purchaser is valid when the transferor performs his obligation to give even if the transferor's acquisition of the thing from its original owner was relatively invalid.<sup>185</sup>

The most far-reaching change affecting the sale of a movable belonging to another is contained in the articles pertaining to nullity of contracts. The 1984 revision retains the general principle that "[a] contract is null when the requirements for its formation have not been met,"<sup>186</sup> but creates a broad exception in article 2035:

Nullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.

If the contract involves immovable property, the principles of recordation apply.<sup>187</sup>

The comments to the article state that it is "new, but does not change the law" because it "merely articulates the doctrines of bona fide purchase and the sanctity of the public records."<sup>188</sup> The comments specifically state that article 2035 "reflects the public policy in favor of security of transactions."<sup>189</sup> Thus a person in good faith who acquires rights in movables under an onerous title is protected "from the effects of the nullity of any related contract between different persons."<sup>190</sup> Under article 2035, the bona fide purchaser of a movable obtained from the owner through error, fraud, or duress is protected from the effects of the relative nullity of the original transaction.<sup>191</sup> Thus article 1856 is but a specific application of the general principle protecting third parties from the effects of nullity.<sup>192</sup>

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<sup>184</sup>LA. CIV. CODE art. 1856 comments (a), (b), (c).

<sup>185</sup>*Id.*, comments (b), (c).

<sup>186</sup>LA. CIV. CODE art. 2029.

<sup>187</sup>*Id.*, art. 2035.

<sup>188</sup>*Id.*, comment (a).

<sup>189</sup> *Id.*, comment (b).

<sup>190</sup>*Id.*

<sup>191</sup>Such contracts are relatively null and therefore fall within the scope of article 2035. *See* LA. CIV. CODE art. 2031.

<sup>192</sup>Article 1856 is a specific application of article 2035's general principle that a third person should be protected from the nullity of a contract to which he is not a party. Article 1856 protects the third party by providing that the obligation to give is extinguished and the obligee becomes owner even though the transferor conveyed property which was obtained from the original owner through a vice of consent.

Article 2035's protection of the bona fide purchaser must be viewed as a broad exception to the general rule of article 2452, "The sale of a thing belonging to another person is null ... ." <sup>193</sup> This point is clearly illustrated in situations involving sales of stolen things. Such sales are null because they lack an essential element, an object which may be sold. <sup>194</sup> Since article 2035 intends two contracts - a relatively null yet valid transfer preceding an onerous contract - article 2452 is limited to occasions when the "thing belonging to another" has not been alienated by a valid transfer. <sup>195</sup> Yet, until article 2035 is construed to narrow article 2452, the three cases left without a codal solution by the repeal of article 520 <sup>196</sup> will remain in limbo, caught between the two provisions and waiting for judicial recognition of a civilian bona fide purchaser doctrine.

Given article 2035's broad protection of bona fide purchasers from the effects of nullity, the redactor's statement that the article "merely articulates" the doctrine seems questionable. Rather, the article does far more. It would seem that article 2035, like the now repealed article 520, provides a codal basis for a Louisiana civilian bona fide purchaser doctrine. First, judicial adoption of a bona fide purchaser doctrine, while required by commerce, ignored the 1870 code's emphasis on the security of ownership despite the admonition of article 1: "Law is a solemn expression of legislative will." <sup>197</sup> Through the 1984 revision, the legislature converted the jurisprudential doctrine into positive law. Second, the results of the bona fide purchaser doctrine as construed by Louisiana courts frequently turned on the relative negligence of the owner and the bona fide purchaser. <sup>198</sup> Under the revision, the

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<sup>193</sup>LA. CIV. CODE art. 2452. See *supra* notes 34-39 and accompanying text.

<sup>194</sup>LA. CIV. CODE arts. 2029 and LA. CIV. CODE art. 2439. See also LA. CIV. CODE arts. 521, 524, 1856.

<sup>195</sup>LA. CIV. CODE art. 2035 comment (b):

This Article reflects the public policy in favor of security of transactions by protecting the person who acquires rights through a valid onerous contract from the effects of the nullity of any related contract between different persons. However, the parties to either contract may still adjust their rights by means of damages.

<sup>196</sup>See *supra* text accompanying note 168.

<sup>197</sup>LA. CIV. CODE art. 1 (1870). See also text accompanying notes 20-25 and 71-85, *supra*. The judge-made bona fide purchaser doctrine was borrowed from the common law, which protects ownership first, only protecting the bona fide purchaser as an exception to the general rule. See *supra* notes 21-29 and accompanying text.

<sup>198</sup>See *supra* notes 86-90 and accompanying text.

owner's negligence, or lack thereof, is immaterial.<sup>199</sup> Third, the results possible under an expansive reading of article 2035 are compatible with — and arguably the same as — the results sought under the now-repealed article 520.<sup>200</sup>

Even though article 2035 may change the law more than its comments suggest, its results are desirable. For 150 years, Louisiana courts have recognized the commercial need to protect bona fide purchasers and the security of transaction.<sup>201</sup> Article 2035 gives the courts a codified basis for doing so.<sup>202</sup> Also, the security of transaction promoted by Article 2035 parallels other recent developments in the Civil Code.<sup>203</sup> Finally, article 2035 realigns Louisiana's Civil Code with those of most, if not all, of its sister civilian jurisdictions.<sup>204</sup>

## VII. IS THERE A BONA FIDE PURCHASER DOCTRINE FOR LOUISIANA?

If there is to be a bona fide purchaser doctrine in Louisiana, it should meet the following criteria. First, it should be civilian in origin and analysis; that is, it should be found in the Code, either explicitly or implicitly, and not judicially borrowed from the common law. Second, the doctrine should be consistent throughout the Code.

Although article 2035 may be interpreted to codify the bona fide purchaser doctrine, such an interpretation will of necessity either fail to conform with traditional civilian methodology or highlight the Code's inconsistency.<sup>205</sup> If article 2035 is not given the broad interpretation sug-

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<sup>199</sup>The operation of article 2035 is not conditioned on an owner's negligent conduct.

<sup>200</sup>*But see supra* note 196, and accompanying text.

<sup>201</sup>*See supra* notes 56-60 and accompanying text.

<sup>202</sup>*See supra* note 103 and accompanying text.

In assessing Louisiana's judge-made bona fide purchaser doctrine, Professor Litvinoff stated that "[I]f grounds could be found that are both convincing and consistent with the tradition that inspires Louisiana law, the way would be clear for a firm line of decisions in favor of the *bona fide* purchaser." Litvinoff, *supra* note 6, at § 94. It is submitted that the principles behind article 2035 of the 1984 obligations revision establish convincing civilian grounds for a Louisiana bona fide purchaser doctrine.

<sup>203</sup>A public policy which favors security of transaction is also manifest in other areas of the Code (such as the amendments to the forced heir's right of revendication), and article 2035 arguably unifies the Code on this important issue as it concerns real rights of people in movable property.

<sup>204</sup>*See generally* YIANNOPOULOS, *supra* note 15, § 231; LITVINOFF, *supra* note 6, § 94.

<sup>205</sup>*See generally* notes 187-202 and accompanying text.

gested in this article, the three cases left in limbo by the repeal of Article 520<sup>206</sup> must be resolved outside the Code in contravention of our legal heritage. Alternatively, a broad interpretation of article 2035 is difficult to reconcile with the legislative intent that led to the repeal of article 520.

Reintroduction of a revised article 520 would remedy either potential problem. Perhaps the following example would be acceptable:

A transferee in good faith for fair value acquires the ownership of a corporeal movable, if the transferor, though not owner, at the time of transfer, has the indicia of ownership and has possession with the consent of the owner.

This article is consistent with the prior jurisprudence and solves the problem of the cases now caught in the limbo between the 1984 obligations revision and the repeal of article 520 of the 1979 property revision.

The bona fide purchaser of a movable belonging to another implicates both property and obligations law issues. As the Code now stands, property law recognizes and protects the security of ownership while obligations law recognizes and protects the security transaction. In essence, we are no further today than we were nearly 180 years ago, when the redactors of the 1808 Digest enacted a schizophrenic series of articles — some protecting security of ownership and others protecting security of transactions.<sup>207</sup> The inconsistency of the Code prompted our courts to turn to the common law for a solution to the problem of the bona fide purchaser. The result of the adoption of the borrowed common law doctrine was a tangled mass of cases completely detached from the Code and inexplicable under accepted civilian methodology. As we are in the process of refining our Code and preparing it for the next century, now is the time to create a code-based bona fide purchaser doctrine for Louisiana. Let us hope that fifty years from now, scholars will be unable to conceive of the alternative that the Code be aban-

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<sup>206</sup>See *supra* note 168 and accompanying text.

<sup>207</sup>The Louisiana Civil Codes of 1808, 1825, and 1870 contained articles protecting both security of ownership and security of transactions. See *e.g. supra* notes 41-43.

done.<sup>208</sup> One way to prevent this sacrilege is to do the job correctly in the first place.<sup>209</sup>

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<sup>208</sup>See *supra* note 14.

<sup>209</sup>As one writer concluded during the debate following article 520's suspension: "Article 520 should be allowed to stand in order to bring a uniform approach to the subject in accord with civilian principles." Comment, *Transfer of Movables, supra* note 3, at 145 n. 1.

