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A GOOD FAITH PURCHASE STUDY: TRUE OWNERS AND THE WAREHOUSE LIEN

John Dolan*

The commercial concept of good faith purchase has been an effective doctrine in the law of property and contract for facilitating changes necessary to a dynamic mercantile system. Today the concept finds itself under attack. Professor Gilmore, whose definitive review of the doctrine twenty-seven years ago¹ has been required reading, now warns that the idea may have outlived its usefulness in some areas.² He and others would, for example, restrict severely its application in the law of "negotiable"³ instruments.⁴

At its elementary level, the good faith purchase doctrine depends on the question of possession. That question, in turn, rests on the commercial value one accords possession and the way one perceives the commercial expectations that arise from it.⁵ Consis-

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1. Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954) [hereinafter cited as Gilmore, *Doctrine of Good Faith Purchase*].

2. The good faith purchase idea also played a notable role in the law of sales of goods. I once attempted to deal with the development of the idea in the context of both negotiable instruments law and sales law. . . . What I now think I missed in that discussion (in both contexts) was that the economic conditions which led to the triumph of the good faith purchaser before 1850 gradually ceased to exist after 1850—with the result that the idea no longer made much sense.

Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 445-46 n.8 (1979) (citation omitted) (emphasis added).

3. Without the doctrine of good faith purchase, negotiable instruments are negotiable in name only. Abolition of the doctrine would deny to the good faith purchaser of commercial paper (the holder in due course) most of the protection that renders the good faith purchaser's position different from that of the holder who does not achieve that status. Compare U.C.C. § 3-305 with § 3-306 (All section references, unless otherwise noted, are to the 1978 version of the Official Uniform Commercial Code [hereinafter "Code"]).

4. See Gilmore, *Formalism and the Law of Negotiable Instruments*, supra note 2; Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375 (1971). Professor Rosenthal, whose article deals primarily with the holder in due course status of depositary banks, makes it quite clear that he does not advocate doing away with the negotiability of checks in all instances. *Id.* at 393-94. Professor Gilmore would go a step further. "The whole 'holder in due course' concept could usefully have been abolished when negotiable instruments law was codified at the end of the nineteenth century." G. GILMORE, *THE DEATH OF CONTRACT* 108 n.18 (1974).

5. In significant measure good faith purchase rests on two notions: first, that a per-

tent, then, with the dissatisfaction that surrounds the doctrine of good faith purchase is the fact that we find controversy surrounding the role of possession in commercial law.⁶

The dissatisfaction and controversy, however, do not signal the demise of good faith purchase. The doctrine itself is a prerogative of the law for fashioning the stuff of the law's correlative doctrine—security of property. That correlative precept teaches that no person may be deprived of property without consent and that a taker receives no greater interest than the transferor enjoyed. As commercial expectations change, the law must use good faith purchase differently, now invoking it, now staying it, and all with an eye to commercial reality. The debate we are witnessing over

son's possession of property sometimes raises reasonable expectations, and second, that we should fashion property and contract law with due regard for those expectations. I will not dwell in this article on the features of human nature that prompt such a regard for possession. Holmes described the property aspect of it colorfully:

It is quite enough, therefore, for the law, that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again.

O. HOLMES, *THE COMMON LAW* 213 (1881). More telling, however, is his suggestion that early procedure favored possession over title. *Id.* at 165. Later law equated possession and title, or nearly so. "Possession is nine-tenths of the law." BLACK'S LAW DICTIONARY 1048 (5th ed. 1979). "*Possession vaut titre.*" (Possession is worth title.) *Id.* See also Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897); Maitland, *The Seisin of Chattels*, 1 LAW Q. REV. 324 (1885). I have considered in another article the role of these expectations in the conveyancing context. See Dolan, *The Uniform Commercial Code and the Concept of Possession in the Marketing and Financing of Goods*, 56 TEXAS L. REV. 1147 (1978). Those who would demote possession from the lofty role it has played historically, then, are undermining the footings of good faith purchase. Refer to note 6 *infra*. It suffices to say here that the success of their criticism, and in some measure it has succeeded and should succeed, depends on their ability to come to grips with what appears to be a fact of human nature.

6. See, e.g., Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1013-14 (1978) (characterizing "the old common law notion that 'possession' of property is of utmost significance in the field now known as secured transactions . . ." as one of Article 9's "most intriguing trouble spots. . ."); Jackson & Kronman, *A Plea for the Financing Buyer*, 85 YALE L.J. 1 (1975) (criticizing the idea that a seller's creditor may reasonably rely on the seller's possession of goods); Phillips, *Flawed Perfection: From Possession to Filing Under Article 9* (pts. I and II), 59 B.U. L. REV. 1, 209 (1979) (a criticism of Code rules that permit a secured party to perfect some security interests by possession rather than public filing and of the ostensible ownership doctrine); Wiseman, *Cash Sellers, Secured Financiers and the Meat Industry: An Analysis of Articles Two and Nine of the Uniform Commercial Code*, 19 B.C. L. REV. 101 (1977) (criticizing the view that a buyer's creditor may reasonably rely on the buyer's possession of goods); cf. Aronstein, Haydock, & Scott, *Article 8 is Ready*, 93 HARV. L. REV. 889 (1980); Coogan, *Security Interests in Investment Securities Under Revised Article 8 of the Uniform Commercial Code*, 92 HARV. L. REV. 1013 (1979) (two articles debating the efficacy of a nonpossessory security interest in negotiable securities).

the roles of good faith purchase and of possession is indispensable to that process.

This article reviews the doctrine of good faith purchase in a narrow and seldom considered context.⁷ The study is revealing in two ways. First, it demonstrates the nature of the doctrine itself as legislatures and courts utilize it to meet commercial exigencies. Second, the study attempts to explain the warehouse lien section of the Uniform Commercial (Code), a provision that harbors a number of technical problems.

I. INTRODUCTION

As a general rule, the significant disputes bailments generate usually fall within the realm of secured transactions law or conveying rules and do not involve the bailee but do involve buyers, sellers, and secured lenders.⁸ Thus we tend to view a dispute involving the lien of the bailee itself under Code section 7-209, a pure question of bailment law, as one of the quaint aspects of personal property.

That view obscures two important points. First, the owner of goods who contests the bailee's lien is often a consumer; and though the relative commercial value of the goods is small, the relative value to the consumer is great. Second, and more important, is the fact that the rules which govern the owner/bailee dispute reflect in microcosm the tensions which dominate commercial law and thereby provide occasion to evaluate the role of personal property law's basic doctrines: security of property and good faith purchase. Moreover, by virtue of the neglect we have accorded these bailment disputes, courts, commercial lawyers, and consumer lawyers have confused the careful pattern that the common law and the legislatures fashioned to balance the competing interests.

This article, then, has two purposes. First, it uses the law of

7. For a treatment of the subject in the broad Code context, see Warren, *Cutting off Claims of Ownership Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469 (1963) [hereinafter cited as Warren, *Cutting Off Claims of Ownership*].

8. This article consciously does not deal with those questions or with the warehouse security interest mentioned in U.C.C. § 7-209. That security interest is subject to the same rules that apply to the warehouse lien, the proper subject of this paper, but is a rare creature of commercial law cases and, one suspects, of bailment practices. The questions of the rights of persons who buy goods subject to bailment or who deal with warehouse receipts are beyond the scope of this article. For a discussion of some of them, see Dolan, *Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7, and 9 of the U.C.C.*, 30 HASTINGS L.J. 1 (1978) [hereinafter cited as Dolan, *Good Faith Purchase*].

bailments as a vehicle to consider the synthesis of property doctrines. In this regard, it is a study of good faith purchase. Second, the article attempts to dispel the confusion recent cases have wrought. The study deals primarily with cases involving warehouse receipts, because most of the disputes arise in the storage rather than the shipment context. The next four parts of the article analyze the statutory language; the pre-Code idea that a warehouse is a pledgee; the cases decided under the Uniform Act, the Code's predecessor; and the curious role of the statute's reference to the paramount rights rule of section 7-503(1). Part VI reviews the cases decided under the Code, and Part VII recapitulates the themes, their technical problems, and their resolution.

The article concludes that the Code's warehouse lien provision creates three good faith purchase shelters for the warehouse in a contest with a nonbailor claimant: first, a pledge rule that cuts off unperfected security interests; second, an estoppel rule that cuts off claims by persons whose conduct clothed the bailor with apparent or implied authority to store; and third, a household goods rule that cuts off all claims when the bailor was in lawful possession.

II. THE STATUTORY LANGUAGE

A. *The Contest*

It is now a well-settled principle with ancient antecedents⁹ that a bailee may hold goods against the bailor's obligation to pay storage charges.¹⁰ The principle recognizes the efficiency of permitting the bailee to "detain" the goods¹¹ against payment and thereby encouraging bailees to provide storage to strangers or others without the cost and delay of credit inquiry.¹² The law of warehouses, carriers, innkeepers, and other bailees reflects the common sense of that rule.

Generally, however, the rule assumes that the bailor is the

9. Ulpian taught that implicit in the lease of warehouse space is an agreement to hypothecate the goods. See *DIGEST* 5.20.2.3.

10. In *Yorke v. Grenaugh*, 92 Eng. Rep. 79 (K.B. 1703), Lord Holt makes it clear that common-law courts had long recognized the lien.

11. At common law, persons asserting a lien could detain the goods but had no right to use or sell them. See, e.g., *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 164-65, 76 N.W. 371, 371-72 (1898) (dictum) (corporation's lien on shareholder's stock); *Thames Iron Works Co. v. Patent Derrick Co.*, 70 Eng. Rep. 676, 677-78 (Ch. 1860) (seller's lien).

12. "The convenience of commerce and natural justice are on the side of liens. . . ." *Green v. Farmer*, 98 Eng. Rep. 154, 158 (K.B. 1768) (Mansfield, J.).

owner or "person entitled"¹³ to the goods; and generally the law has been quick to reject a rule that permits a thief to bail goods and thereby render them subject to a lien which the innocent owner must satisfy.¹⁴ In fact, of course, thieves or other persons without authority from the owner sometimes bail goods and the law must deal with such situations. It does so by invoking two of the law's favorite prerogatives: the conveyancing doctrines of security of property and of good faith purchase.

Security of property, the first principle of an ordered system of property law, teaches that no person may be deprived of property without consent¹⁵ and that transferees may take no better "title" than their transferors enjoy.¹⁶ Under that view thieves who bail goods give the bailee nothing and do not bind the true owners of the goods who, through no fault of their own, now find the goods in the possession of a bailee asserting a lien. As a general rule the common law used security of property in bailment cases to rule in favor of the claimant and against the bailee's lien.¹⁷

There are instances, however, when the security of property precept yields inefficient or unfair results, and in those instances the law has traditionally fashioned good faith purchase exceptions to the security of property principle. These exceptions estop the owner from asserting a prior interest against a person who takes

13. The Code uses the term "person entitled." See U.C.C. § 7-403(1), (4). Sometimes the dispute is not between the true owner and the bailee but between a secured creditor of the true owner and the bailee. Thus we have true owners and secured parties who are "claimants" asserting an interest in the goods prior to the warehouse lien.

14. See 3 N.Y. L. REVISION COMMISSION REP., STUDY OF THE UNIFORM COMMERCIAL CODE 1800, 1817 (1955); 2 N.Y. L. REVISION COMMISSION REP., HEARINGS ON THE UNIFORM COMMERCIAL CODE 708, 777, 786-87 (1954); but cf. *id.* at 731, 796; *Yorke v. Grenaugh*, 92 Eng. Rep. 79 (K.B. 1703) (suggesting that a thief may in some instances impose a lien on goods which the true owner must satisfy).

15. See, e.g., *Fitch v. Newberry*, 1 Doug. 1, 12 (Mich. 1843). For further discussion of the conveyancing rules, see Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U. L. Rev. 811 (1979) [hereinafter cited as Dolan, *U.C.C. Framework*].

16. "Title, like a stream, can rise no higher than its source." *Barthelmess v. Cavalier*, 2 Cal. App. 2d 477, 487, 38 P.2d 484, 490 (1934). The Roman law is in accord: "Nemo plus juris ad alium transferre potest quam ipse habet." *Wheelwright v. Depeyster*, 1 Johns. 471, 479 (N.Y. 1806) (no one can transfer more right to another than he has himself) (BLACK'S LAW DICTIONARY 936 (5th ed. 1979)).

17. See, e.g., *Services Co. v. O'dell*, ___ Pa. 2d ___, 417 A.2d 604 (1980) (garage lien); *Hanch v. Ripley*, 127 Ind. 151, 26 N.E. 70 (1890) (agister's lien); *Jarchow & Sons v. Pickens*, 51 Iowa 381, 1 N.W. 598 (1879) (landlord's lien); *Denison v. Shuler*, 47 Mich. 598, 11 N.W. 402 (1882) (repairman's lien); *McGhee v. Edwards*, 87 Tenn. 506, 11 S.W. 316 (1889) (livery stable's lien).

for value and in good faith. Holders in due course of negotiable instruments,¹⁸ bona fide purchasers of securities,¹⁹ and buyers in ordinary course of goods,²⁰ for example, all benefit from good faith purchase treatment.

The good faith purchase rules operate on one or more normative assumptions. Lord Mansfield held that the holder in due course of a bearer note, for example, defeats the true owner because, by any other rule, trade and commerce would be "incommoded."²¹ Good faith purchasers of goods out of inventory become buyers in ordinary course and defeat one who entrusted the merchant with possession, because commercial lawyers viewed such entrustment as misleading buyers and permitting them to rely, to their detriment, on their sellers' possession.²² Courts have fashioned similar rules for owners whose conduct creates "ostensible" ownership in third parties,²³ and legislatures have estopped owners whose conduct makes it possible for a thief or fraud to mislead an innocent third party.²⁴ There is a measure of moral judgment, then, in the good faith purchase doctrine, which some courts see as an instance of allocating the loss between two "innocent" parties. One court observed that the true owner of goods loses to the good faith purchaser, because "surely it is more just that the burthen should fall on the defendants, who were *guilty* of negligence. . . ."²⁵

Finally, the intent of the true owner may give rise to good

18. U.C.C. § 3-302 defines the term "holder in due course." Section 3-305 posits the good faith purchase benefit for such a holder.

19. U.C.C. § 8-302 defines the term "bona fide purchaser" and describes the protection afforded such a purchaser.

20. U.C.C. § 1-201(9) defines "buyer in ordinary course." Protection for such a buyer occurs in transactions described by §§ 2-403(2), 7-205, and 9-307(1).

21. *Miller v. Race*, 97 Eng. Rep. 398, 401 (K.B. 1758).

22. "Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe." *Pickering v. Busk*, 104 Eng. Rep. 758, 761 (K.B. 1812). At common law *Pickering* was the minority view. See generally 2 S. WILLISTON, *THE LAW GOVERNING THE SALE OF GOODS* § 317 (rev. ed. 1948). The Code, however, adopts the *Pickering* rule. See U.C.C. §§ 2-403(2), 9-307(1).

23. See, e.g., *Silver v. Robert's Garage, Inc.*, 240 Mass. 571, 574, 134 N.E. 610, 611-12 (1922) (silence in the face of seller's assertion of ownership estops the owner); *Nixon v. Brown*, 57 N.H. 34, 36 (1876) (delivery of horse with bill of sale estops owner).

24. See, e.g., U.C.C. § 2-403(1) (voidable title rule which permits a fraudulent party to convey good title); §§ 3-405(1), 3-406, 4-406 (rules of commercial paper which favor a purchaser over a true owner whose conduct permitted theft or fraud).

25. *White v. Garden*, 138 Eng. Rep. 364, 367 (C.P. 1851) (voidable title case) (emphasis added); cf. U.C.C. § 2-403(1) (the Code's voidable title rule).

faith purchase results. Under the early formulation of the doctrine of voidable title,²⁶ a true owner who conveyed property to a fraudulent buyer could avoid the conveyance only so long as the fraud had not reconveyed to a good faith purchaser.²⁷ The rule found exceptions, however, in cases where the owner intended to deal not with the fraudulent party but with someone else.²⁸ The Code appears to reject the "intent" rationale.²⁹

The contest, then, between the nonbailor owner of bailed goods and the bailee is but one of many between the law's famous two innocent parties: the true owner on the one hand and the good faith purchaser on the other. Furthermore, it is often not the true owner, but a secured party, claiming through the true owner, who wrestles with the warehouse lien.³⁰

This article analyzes that contest in terms of good faith purchase history. The analysis and the language of the statutes suggests that the legislatures have commanded a balancing approach between security of property and good faith purchase. The recent cases, however, display an unawareness of both the legislative command and the common law's historical treatment of the dispute.

B. Section 7-209

Today these bailment disputes arise primarily in the storage setting. The sources of the law governing the dispute are statutory,³¹ but the statute invokes common-law principles.

26. Voidable title is a good faith purchase doctrine, which has long been the target of criticism. See, e.g., Gilmore, *supra* note 1, at 1059; Warren, *Cutting Off Claims of Ownership*, *supra* note 7, at 475. The Code adopts the voidable title doctrine in § 2-403(1).

27. See, e.g., *Mowrey v. Walsh*, 8 Cow. 238 (N.Y. Sup. Ct. 1828).

28. See, e.g., *Cundy v. Lindsay*, 3 App. Cas. 459, 465-66 (H.L. 1878).

29. See U.C.C. § 2-403(1)(a).

30. Article 9 defers to Article 7 for purposes of determining the relative priority of a security interest and a warehouse lien. Generally, Article 9 renders a possessory lien for services prior to an earlier perfected security interest. U.C.C. § 9-310. That rule, however, does not operate if the statute creating the lien provides otherwise. *Id.* Thus Article 9 sends us to Article 7. Ironically, Article 7, by virtue of the pledge rule of § 7-209(3), incorporates the priority rules of Article 9. Refer to notes 84-113 *infra* and accompanying text.

31. Much of the textual discussion applies to liens arising out of shipments as well as those arising out of storage. The statutes are the Federal Bills of Lading Act (Pomerene Act), 49 U.S.C. §§ 81-124 (1976), and Article 7 of the Uniform Commercial Code. The former governs shipments of goods on common carriers unless the shipment is entirely intrastate. 49 U.S.C. § 81 (1976); U.C.C. § 7-103. Section 105 of the Act defines the federal lien rule. For shipments entirely intrastate, U.C.C. § 7-307 governs.

Section 7-209(3) ostensibly defines only two rules which afford the warehouse good faith purchase treatment against the true owner.³² The first arises when the person entitled "so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid. . . ."³³ That rule does not apply, however, against a person with "paramount rights" under section 7-503.³⁴ That exception, we shall see, carries important implications—enough to constitute a separate rule of good faith purchase. The second defined rule, which has not been adopted by most jurisdictions, applies when "the depositor was the legal possessor of . . . [household] . . . goods at the time of deposit."³⁵ In short, section 7-209(3), the good faith purchase rule of the warehouse lien section, has three components: a pledge rule, which we will see comes from the prior uniform statute; an exception, which incorporates the notion of paramount rights; and a household goods rule. Study of these components reveals many of the features of good faith purchase law. The study begins with a review of the common-law cases.

Before we turn to those cases, however, it is necessary to raise three questions. First, what does the lien section mean when it gives the warehouse the rights of a pledgee? Cases construing the Uniform Warehouse Receipts Act, the source of the pledge language, reveal that the intent of the section is to give the warehouse the priority of a perfected secured party under Article 9.³⁶

The second question relates to the household goods rule of

32. U.C.C. § 7-209(3) provides:

(a) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under Section 7-503.

(b) A warehouseman's lien on household goods for charges and expenses in relation to the goods under subsection (1) is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings and personal effects used by the depositor in a dwelling.

33. U.C.C. § 7-209(3)(a). "[The] circumstances must be such that a pledge by the depositor to a good faith purchaser for value would have been valid." *Id.*, Comment 3.

34. "A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them. . . ." U.C.C. § 7-503(1).

35. U.C.C. § 7-209(3)(b).

36. Refer to notes 84-113 *infra*.

subsection 7-209(3)(b). That rule permits a warehouse to enforce its lien against the true owner of household goods so long as the bailor was in lawful possession of them. Do good faith purchase considerations justify this extension of the lien beyond the traditional bounds of good faith purchase? Analysis suggests that this rule has the effect of assisting the sheriff in forcible detainer cases, though there is other justification for the rule. Such a reading is significant especially in those jurisdictions which have not adopted subsection 3(b).³⁷ In those jurisdictions there may be good faith purchase grounds, though this article questions them,³⁸ to challenge the lien in consumer cases where constitutional challenges³⁹ have failed.

Third, what is the purpose of the Code's reference to the paramount rights rule of section 7-503? Section 7-209(3) first posits the rule that the lien is good against the owner if a pledge would be good against the owner. It cautions, however, that the lien is never good against a person with paramount rights. A review of the pre-Code cases and the drafting history of the lien section and reference to the good faith purchase exceptions which the Code itself carves out of the paramount rights rule⁴⁰ indicate that the reference incorporates those exceptions and thereby gives the warehouse rights broader than those available under the "pledge"

37. In 1966 the Permanent Editorial Board of the Uniform Commercial Code adopted subsection (3)(b) as an amendment to § 7-209. 2A UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE § 7-209(3)(b) (1977). The amendment consisted of a provision California included in its original version of § 7-209(3). *Id.* After the Board sponsored the amendment and as of June 1, 1980, twelve more jurisdictions adopted it: Arkansas, Georgia, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, New Mexico, North Dakota, Oklahoma, and Wyoming. *Id.* (Supp. 1980). In addition, Idaho, North Carolina, and Virginia adopted the amendment in modified form. *Id.* Oregon fashioned a rule which authorized the legal possessor of any goods, not just household furnishings, to store those goods with the warehouse. OR. REV. STAT. § 77.2090(3) (1979). The Texas rule is unique and appears to render the lien superior to a prior *security* interest with some limitations. See TEX. BUS. & COM. CODE ANN. § 7-209(c) (Tex. UCC) (Vernon 1968).

38. Refer to text accompanying notes 114-30 *infra*.

39. Refer to note 130 *infra*.

40. One loses paramount rights in the goods if that person

(a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this Article (Section 7-403) or with power of disposition under this Act (Sections 2-403 and 9-307) or other statute or rule of law . . . [or] . . .

(b) acquiesced in the procurement by the bailor or his nominee of any document of title.

U.C.C. § 7-503(1).

language.⁴¹

Section B of Part IV considers cases under the Uniform Act and considers the meaning of the "pledge" language of section 7-209(3)(a). Section C addresses the second question, the provocative case of the evicting constable. Part V considers the reference in section 7-209(3)(a) to the paramount rights rule, the third question. These inquiries, however, must abide a review of the common-law rule.

III. COMMON-LAW CASES

Because security of property is the first principle of property law, all good faith purchase doctrine consists of exceptions to the first principle. Each inquiry begins with that principle, and the party who wishes to upset the security of property result must effect an exception. If the bailee who desires to assert a lien against a remote true owner fails to establish the exception, the true owner prevails without more. The common-law history of disputes between bailees and true owners is the history of those efforts.

The leading case is *Yorke v. Grenaugh*.⁴² There Lord Holt observed that an innkeeper, because he was obliged by law to accept a guest's horse, could enforce the lien against the true owner, even though the traveler may have been a thief.⁴³

The case is remarkable first of all in that it constitutes a significant departure from the first rule of property law—the security of property doctrine. That doctrine attempts to frustrate the lawless taker. It exposes the thief's transferee to the claim of the true owner and thereby encourages transferees to inquire about title—an inquiry the thief cannot satisfy. In fact, the first corollary of security of property doctrine is the rule that "a thief cannot give good title."⁴⁴ *Yorke*, by favoring the bailee, departs from those se-

41. Refer to text accompanying notes 163-94 *infra*.

42. 92 Eng. Rep. 79 (K.B. 1703).

43. Although Lord Holt spoke for the majority when he posited the rule of the *Yorke* case, he dissented from the holding in favor of the innkeeper on the grounds that the innkeeper failed to prove that the traveler was the innkeeper's guest and, therefore, failed to show that he was bound to take the horse. *Id.* at 80.

44. Thieves, in fact, are not purchasers; and only a scoundrel would "steal anything and call it purchase." W. SHAKESPEARE, HENRY V, ACT 3, SC. 3. Purchase is, of course, a voluntary transfer. See U.C.C. § 1-201 (33). In the Middle Ages, English law imposed on purchasers the burden of showing that they did not take from a thief. Failure to satisfy that burden left them "in peril." 2 H. BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 427 (S. Thorne trans. 1968). Thus the practice arose of purchasing in public at fairs and markets,

curity of property principles.

There are, of course, analogues to the *Yorke* rule in the law of paper. As we have seen, it is well settled that good faith purchasers of negotiable instruments, documents, and securities in bearer form will defeat the true owner even though the purchaser takes from a thief. These rules, codified in the paper articles of the Code,⁴⁵ reflect the perceived need, questioned by some, for celerity in the commerce of such items. To put paper purchasers on title inquiry, traditional thinking concludes, will retard the transfer of that paper to a degree that the law regards as inefficient.⁴⁶ Similarly, in *Yorke* the court held explicitly that the innkeeper without knowledge of the true owner's claim is not obliged to question the title of his guest.⁴⁷

The *Yorke* opinion, moreover, makes it clear that the court rests its decision to dispense with the bailee's duty to inquire into title on the fact that the innkeeper is obliged to accept a traveler and baggage.⁴⁸ Lord Holt broke with the majority in *Yorke* because he felt the innkeeper had failed to show that the bailor of the horse was a guest of the inn.⁴⁹ Absent such a showing, Holt felt, the innkeeper was not obliged to take the horse and, therefore, lost the benefit of the rule. Similarly, in *King v. Richards*,⁵⁰ an early American case, the Supreme Court of Pennsylvania noted that the rule of *Yorke* applies only to those bailees under a duty to accept the goods.⁵¹ Bailment law fashioned a similar rule for common carriers who faced the same duty.⁵² It is significant that the general

before witnesses. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 81-82 (4th ed. 1936).

45. Refer to notes 18-20 *supra*.

46. See, e.g., *Peacock v. Rhodes*, 99 Eng. Rep. 402, 403 (K.B. 1781); *Miller v. Race*, 97 Eng. Rep. 398, 401-02 (K.B. 1758); see generally Beutel, *The Development of Negotiable Instruments in Early English Law*, 51 HARV. L. REV. 813 (1938).

47. *Accord*, *Johnson v. Hill*, 171 Eng. Rep. 812 (K.B. 1822).

48. See also *Grinnell v. Cook*, 3 Hill 485 (N.Y. 1842). In the 17th century the law regarded innkeepers much as modern law regards public utilities. Innkeepers could not refuse lodging to a traveler and their prices were subject to review. See *Newton v. Trigg*, 89 Eng. Rep. 474, 566 (K.B. 1692).

49. *Yorke v. Grenough*, 92 Eng. Rep. 79, 80 (K.B. 1703).

50. 6 Whart. 418 (Pa. 1841).

51. *Id.* at 422-23 (dictum).

52. The American common-law rule protected the connecting carrier. See RESTATEMENT OF SECURITY § 61(b) (1941). The American cases, however, refused protection to the initial carrier, indicating that the carrier had no duty to accept goods from a party who had no authority to ship them. E.g., *Robinson v. Baker*, 59 Mass. (5 Cush.) 137, 144-45 (1849); *Corinth Engine & Boiler Works v. Mississippi Cent. R.R.*, 95 Miss. 817, 824, 49 So. 261, 262 (1909). The courts concluded that the initial carrier would just have to collect payment in

bailment rule reflects security of property notions and renders the lien subject to claims. *Yorke* and its progeny, then, are good faith purchase exceptions to the general rule.

The *Yorke* rule balances the policy against making theft easy with the need to promote lodging for travelers⁵³ and storage for goods and appears to rest on notions of economic efficiency. If innkeepers did not enjoy good faith purchase protection, they would store goods at their peril and would be forced to insist on payment in advance or to raise prices. Advance payment, however, is an inefficient solution, because the travelers may not know how long they will stay, and the parties cannot compute the storage charges. The bailor will either overpay or underpay—both of which are less efficient than giving the bailee a lien. Inefficiency theoretically increases costs which increase prices; and increased prices are contrary to an essential objective of the market system.⁵⁴

The clarity of these early cases, however, suffers at the hands of other decisions. In *Wright v. Snell*,⁵⁵ the bailee attempted to assert a *general* lien against goods it held for a customer who owed the bailee for services rendered in connection with other goods.⁵⁶

advance. *E.g.*, *Hudson Motor Car Co. v. Erie R.R.*, 109 N.J.L. 431, 433, 162 A. 604, 605 (1932); *Vaughan v. Providence & Worc. R.R.*, 13 R.I. 578, 579 (1882). *See also* N.Y. L. REVISION COMMISSION REP., REPORT AND APPENDICES RELATING TO THE UNIFORM COMMERCIAL CODE 444 (1956). The English rule appears to have been different at the time of Lord Holt. *Id.*; *Yorke v. Grenagh*, 92 Eng. Rep. 79, 80 (K.B. 1703); *cf.* *Hayden v. Wabash Ry.*, 269 Ill. App. 356, 180 N.E. 795 (1933); *Metzger v. Columbia Terminals Co.*, 227 Mo. App. 135, 50 S.W.2d 680 (1932); *Hudson Motor Car Co. v. Erie R.R.*, 109 N.J.L. 431, 162 A. 604 (1932) (cases holding that chattel mortgage defeats carrier's lien under Federal Bills of Lading Act); *see also* U.C.C. § 7-307(2) (creating a lien good against the true owner of goods "which the carrier was required by law to receive. . .").

53. According to the traditional rationale, the law required innkeepers and other bailees to accept all comers as long as there was room, because the bailee had chosen a "public calling." *See* *Lane v. Cotton*, 91 Eng. Rep. 1332, 1336 (K.B. 1701). There is another explanation for the rule, however. "One adversely inclined might say that it was one of many signs that the law was administered in the interest of the upper classes." O. HOLMES, *THE COMMON LAW* 203 (1881).

54. Early decisions, however, were not hidebound to this good faith purchase rule. An innkeeper, for example, who admittedly did "to a gentle and necessary degree" remove the coat from the back of a nonpaying diner, failed to convince a horror-stricken bench that the law should carry good faith purchase to the point to protecting such conduct: "[I]f the innkeeper take the coat off his back, and that prove to be an insufficient pledge, he may go on and strip him naked; and that would apply either to a male or to a female. That consequence is so utterly absurd, that it cannot be intertained for a moment." *Sunbolf v. Alford*, 150 Eng. Rep. 1135, 1136, 1138 (Ex. 1838).

55. 106 Eng. Rep. 1219 (K.B. 1822). *Wright* involved a shipment of goods consigned to the bailee's debtor.

56. Bailment law distinguishes the bailee's general lien, which permits bailees to hold

The court rejected the claim.⁵⁷ It could have done so on the grounds that a good faith purchase rule in favor of the *specific* lien goes far enough to encourage bailees to accept goods and that there was no policy reason to enforce the *general* lien against the true owner. It is unfortunate that the *Wright* opinion did not make the distinction between the general and the specific lien. Rather, it emphasized the fact that the bailee's debtor/customer had no interest in the goods and that the true owner did. Such an ownership distinction, of course, exists in all of these cases. It is the existence of a true owner other than the bailee which gives rise to the dispute, and the *Wright* court's rationale is, therefore, of little help. The *Wright* case, however, does not stand alone.

Two early New York cases⁵⁸ follow similar reasoning. They rejected the bailee's lien claim on the grounds that the bailor, a conditional buyer, had not satisfied the condition of the sale; that the conditional seller still held title to the goods; and, therefore, that the lien was not good against the seller.⁵⁹ Thus the New York courts adopted a security of property approach without balancing that policy against good faith purchase considerations.

Two Michigan cases reflect the same tendency in one case and a divergent view in another. In *Fitch v. Newberry*,⁶⁰ a bill of lading case, the Michigan Supreme Court ruled that a carrier must accept goods only if the bailor is authorized to ship them.⁶¹ Because the bailee took the goods from someone lacking that authority, the court refused to enforce the lien against the true owner.⁶² The *Fitch* court purports to distinguish *Yorke* on the authority question.⁶³ Yet it is difficult to conceive of a clearer rejection of *Yorke*. Under the *Yorke* rule bailees may dispense with title inquiry; under *Fitch* they must pursue it. In fact the *Fitch* opinion is replete with security of property language.⁶⁴ The weakness in *Fitch*

goods against all debts from the customer to the bailee, and the specific lien, which permits them to hold goods only against charges relating to those goods. See U.C.C. § 7-209(1); RESTATEMENT OF SECURITY § 60 (1941). Refer to text accompanying notes 141-62 *infra*.

57. 106 Eng. Rep. at 1221.

58. *Collman v. Collins*, 2 Hall 569 (N.Y. Super. 1829); *Van Buskirk v. Purinton*, 2 Hall 561 (N.Y. Super. 1829).

59. See *Collman v. Collins*, 2 Hall at 575-78; *Van Buskirk v. Purinton*, 2 Hall at 565.

60. 1 Doug. 1 (Mich. 1843).

61. *Id.* at 10-11.

62. *Id.* at 18.

63. *Id.* at 8-9.

64. *E.g.*, "No man can be deprived of his property without his own consent." *Id.* at 12.

is not its decision to reject good faith purchase doctrine, however; it is the failure to consider it. *Fitch*, nonetheless, is probably a majority view in bill of lading cases.⁶⁵

Ironically, the second Michigan case ignores security of property for good faith purchase in the extreme. In *R.L. Polk & Co. v. Melenbacker*,⁶⁶ the Michigan Court enforced the bailee's lien because the owner of the goods entrusted them to the bailor.⁶⁷ The common law has long recognized that entrustment alone is not enough to invoke good faith purchase doctrine. Possession is only one indication of ownership.⁶⁸ Delivery, however, accompanied by documentary evidence of ownership tips the scales in favor of good faith purchase;⁶⁹ delivery to a person who sells goods of the kind, especially at the location where the goods are delivered,⁷⁰ prompts courts to bend the security of property rule in favor of the good faith purchaser.⁷¹ Thus, the *Melenbacker* opinion stretches good faith purchase doctrine to its limits despite the earlier Michigan case, *Fitch*, which opted for strict security of property.

The common-law cases, then, are inconsistent. On the one hand we see them choosing good faith purchase, on the other, security of property. It is disconcerting to note, furthermore, that the American cases tend to apply one of these two competing doctrines as if the one they choosè were the only choice. In the New York cases, the court invoked security of property as if such a result were preordained. Similarly, the Michigan cases invoke first one rule and then the other without explaining the apparent inconsistency.

There is a simple enough explanation for this behavior: the courts do not recognize the owner/bailee dispute as a security of property/good faith purchase contest. That failure prevents the courts from considering the policies that the two doctrines serve.

65. Refer to note 52 *supra*.

66. 136 Mich. 611, 99 N.W. 867 (1904).

67. *Id.* at 614, 99 N.W. at 868.

68. See, e.g., *Fawcett v. Osborne*, 32 Ill. 411, 425 (1863); *Farrell v. Harlem Terminal Storage Warehouse Co.*, 70 Misc. 565, 567, 127 N.Y.S. 306, 308 (App. Term 1911); *Leitch v. Sanford Motor Truck Co.*, 279 Pa. 160, 163, 123 A. 658, 660 (1924); *S. Jacobs & Sons v. North Kensington Storage Co.*, 81 Pa. Super. Ct. 140, 144 (1923).

69. E.g., *Nixon v. Brown*, 57 N.H. 34, 34 (1876).

70. See, e.g., *Heath v. Stoddard*, 91 Me. 499, 504, 40 A. 547, 549 (1898); *Saylor Chevrolet Co. v. Ellis*, 336 S.W.2d 798 (Tex. Civ. App.—Eastland 1960, no writ); *Pickering v. Busk*, 104 Eng. Rep. 758, 760-61 (K.B. 1812).

71. See generally 2 S. WILLISTON, *supra* note 22, § 317.

The issues in these disputes are the same as in any owner/purchaser dispute, and the courts should approach them in the same way: the courts should decide whether it is fairer or more efficient to allocate the loss to the true owner or to the bailee. To say simply that the true owner wins because no person may be deprived of property without consent is to miss the point entirely, just as it misses the point to say that the bailee's lien is good against the whole world. Rather, the result should turn on those facts which courts long ago identified as relevant in true owner/good faith purchase disputes—facts which bear on the relative culpability of the owner and the bailee or on the economic efficiency of allocating responsibility to one party rather than the other.

In *Yorke*, Lord Holt would have denied the lien to a bailee who had no duty to accept the chattel for storage.⁷² He struck a balance between security of property and good faith purchase. By rejecting good faith purchase protection for a bailee who is not under a duty to store, Holt supported security of property. By invoking the protection for a bailee who is under a duty to store, he made an economic point. Had he insisted on security of property, as the Michigan court did in *Fitch*,⁷³ bailees would act at their peril. They could accept goods from a bailor without authority or they could investigate the bailor's authority. Either decision would prove costly. The bailee who accepts goods from a bailor who is not authorized to store them loses its lien. The bailee who investigates the authority of its bailors increases the cost of its services. Ultimately, in a free market the customers of the industry will bear that cost. Thus a security of property rule in *Yorke* would have protected true owners at the expense of all who travel and store goods, and the court's decision in favor of the lien was a decision to allocate the cost to true owners whose stolen goods the bailee stored.

There are two justifications for this result. First, the bailee in *Yorke* had stored a horse.⁷⁴ Thus the owner benefitted from the

72. 92 Eng. Rep. at 80.

73. 1 Doug. at 18.

74. In the 16th century, the law fashioned a unique set of rules to protect the true owners of horses. Horses, for example, did not come within the broad good faith purchase rule of market overt. See *An Act Against the Buying of Stolen Horses*, 1555, 2 Phil. & M. —, .7, §§ 1-8; *An Act to Avoid Horse Stealing*, 1589, 31 Eliz. 1, C.12, § 105. Rather, the law tended to protect the true owner. See generally 2 W. BLACKSTONE, COMMENTARIES *450-51. The result in *Yorke* is all the more significant, then, in light of medieval England's concern for protecting a true owner's interest in his horse. For other early rules which protect true

storage, since the bailee kept the horse from the elements and fed it.⁷⁵ Yet the court did not rest its decision on that consideration. The *Yorke* court relied on precedent which involved a carrier's lien for shipping goods.⁷⁶ In the carrier setting, of course, the carriage of the goods may cause the owner to suffer expense and would justify a different rule if the court were resting the rule on an unjust enrichment bottom. Lord Holt's analogy to the carrier case suggests strongly that the owner's benefit from the storage did not prompt the decision.⁷⁷

The second justification for the *Yorke* result is that a true owner and not the general public should bear the cost of storing goods when the bailor lacks authority. That justification in turn reflects either or both of the traditional rationales of good faith purchase law: (1) that the true owner is more culpable for letting the bailor get the goods than the bailee is for storing them without title inquiry, or (2) that the true owner can prevent the losses at less expense than the bailee can prevent them.⁷⁸ The *Melenbacher* case, by permitting the bailee to assert a lien against a true owner who entrusts, may have assumed that such entrustment should always estop the owner. In *Melenbacher* the bailor was the employee of the owner and the court could have argued that the bailor had implied or apparent authority to store the goods. That sort of analysis finds limited support in bailment cases.⁷⁹ The tone of *Melenbacher*, however, suggests a different rationale, namely, that

owners of horses, refer to note 44 *supra*.

75. 92 Eng. Rep. at 80.

76. *Id.*

77. The *Fitch* court, which confronted a carriage situation and which implicitly rejected *Yorke*, noted the distinction between storage and carriage as they affect the enrichment of the owner but expressly declined to use that distinction as a rationale for its decision. See *Fitch v. Newberry*, 1 Doug. 1, 9 (Mich. 1843).

78. Economists point out, of course, that these two rationales may really be one. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* 179-81 (2d ed. 1977). While that view is persuasive, the courts have tended to distinguish the two, and this article continues that historic and, in this case at least, harmless distinction. Advocates, of course, will always make both arguments, for while they may not know economics, they do know human nature; and the cases demonstrate that more courts are moved by the culpability rationale than by the efficiency rationale.

79. See *Farrell v. Harlem Terminal Storage Warehouse Co.*, 70 Misc. 565, 127 N.Y.S. 306 (App. Term. 1911); *Knoxville Outfitting Co. v. Knoxville Fireproof Storage Co.*, 160 Tenn. 203, 22 S.W.2d 354 (1929); but see *Finnigan v. Hadley*, 286 Mass. 345, 190 N.E. 528 (1934); *Zahner Mfg. Co. v. Harnish*, 224 Mo. App. 870, 24 S.W.2d 641 (1930) (infring authority). Cf. U.C.C. § 7-503(1)(a), (b) (invoking an implied and apparent authority rule and an estoppel rule). A discussion of the implications of § 7-503(1)(a) and (b) is found at the text accompanying notes 163-94 *infra*.

an owner who entrusts is either more culpable than the bailee or better able to avoid the loss efficiently than the bailee, so that the loss should fall on the entrusting owner. This second reading of *Melenbacker* finds support not in the cases but in the Code's resolution of two disputes between owners and bailees.⁸⁰ *Melenbacker*, though in conflict with *Yorke*, expresses a view that survives.

Yorke and *Melenbacker*, moreover, even though they strike the balance at different points, stand within the bounds of good faith purchase tradition. The cases which reject them tend to ignore those bounds, not because the courts strike the balance in a manner different from that of *Yorke* and *Melenbacker* but because those courts resort to property maxims without regard for the competing policies and thereby fail to find any balance.

The salient feature of this study of good faith purchase in bailment law is that the Code adopts the pattern of the better reasoned common-law cases. Thus, the established rule commands the balancing of security of property policy against good faith purchase policy. Some cases, however, tend to select one of the two doctrines without proper regard for the other. The pattern is less easy to discern in the Code than in the pre-Code cases, yet analysis clearly demonstrates that the pattern is there.

IV. THE UNIFORM ACT

A. *The Statute*

Section 28(b) of the Uniform Warehouse Receipts Act⁸¹ provides that the lien of a warehouse shall be good against a third party if the bailor "has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid."

The language of this section, then, is the model on which Code drafters based section 7-209(3)(a).⁸² The choice of similar language

80. See U.C.C. § 7-209(3)(b) (the household goods rule), § 7-307(2) (the carrier rule).

81. The Uniform Warehouse Receipts Act was promulgated by its sponsors in 1906 and was adopted by all the states and various other American jurisdictions. See 3 UNIFORM LAWS ANNOTATED vii, 9 (1959 & Supp. 1968).

82. A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it

in the Code is significant for two reasons. First, the language is unmistakably good faith purchase in nature; that is, it incorporates the long commercial-law tradition of balancing security of property policy against good faith purchase policy. By reference to the "pledge," the Uniform Act refuses to limit the inquiry to bailment disputes but views the contest between the owner and the bailee as but one more conflict between true owner and good faith purchaser. Second, because the language of section 28(b) of the Uniform Act serves as a model for section 7-209(3)(a), cases construing the Act serve as precedent for disputes arising under the Code.⁸³

Proper understanding of the modern statute governing the warehouse lien, then, begins with analysis of pre-Code cases construing the Uniform Act.

B. *The Warehouse as Pledgee (Cases under the Uniform Act)*

It is clear from the history of the lien concept that the common law viewed the lienor as a creditor. Blackstone, speaking of the landlord's lien and the tax collector's lien, notes: "And so if a landlord distreins goods for rent, or a parish officer for taxes, these for a time are only a *pledge* in the hands of the distraintors. . . ."⁸⁴ He also observed that "goods distreined for rent, or other cause of distress . . . are in the nature of a pledge. . . ."⁸⁵ The Roman law seems to have used the same analogy.⁸⁶ The Uniform Act accepted the pledge theory when it rendered the warehouse lien effective against a true owner against whom a pledge of the goods would be valid. The implications, then, are clear: the rights of the warehouse are analogous to the rights of a secured creditor, and the cases which construe the Uniform Act generally support that implication by invoking creditor analogies.

There is a second and stronger implication in the Act's use of the term pledge, and that is that the act does not itself create good

under Section 7-503.

U.C.C. § 7-209(3)(a).

83. Section 7-209(3) "continues the rule under the prior uniform statutory provision. . . ." U.C.C. § 7-209, Comment 3; cf. *General Elec. Credit Corp. v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958, 963 (D. Or. 1969) (cases which construe the Uniform Trust Receipts Act are relevant in construing Code language drawn from that Act, absent plain contrary intent).

84. 2 W. BLACKSTONE, COMMENTARIES *452 (emphasis added).

85. *Id.* at *396.

86. See DIGEST 5.20.2.3.

faith purchase rules but incorporates such rules from the law of pledge. Again, the pre-Code cases tend to support that view.

In *Smith's Transfer & Storage Co. v. Reliable Stores Corp.*,⁸⁷ the court refused to subordinate the interest of a conditional seller to the lien of a warehouse in which the buyer stored the goods. First the court noted that the seller did not consent to the storage and, therefore, the buyer could not subordinate the seller's interest without "statutory"⁸⁸ authority to the contrary. Such language clearly implies that the court did not view the Uniform Act itself as authority. The same court made the point more clearly in a subsequent case⁸⁹ which also involved a conditional seller. There the court noted that the conditional seller failed to comply with the filing and acknowledgement requirements of the Conditional Sales Act. That failure distinguished the second case from the *Smith* case and led the court to rule that a pledge by the buyer would have bound the seller and accordingly that the warehouse lien prevailed.⁹⁰

To some extent, however, other authority equivocates. One line of New Jersey cases, a majority view it would seem, accepts the analysis offered here,⁹¹ but two New Jersey opinions⁹² reject the pledge analogy, holding that a warehouse is not a pledgee and therefore does not benefit from the Conditional Sales Act's provision⁹³ rendering an unfiled seller's interest subordinate to that of a purchaser.

Those latter two cases appear to be aberrational. Authority from other jurisdictions accepts the pledge analogy and renders the lien paramount to the interest of the chattel mortgagee⁹⁴ who fails

87. 58 F.2d 511 (D.C. Cir. 1932).

88. *Id.* at 512.

89. *Fidelity Storage Co. v. Reliable Store Corp.*, 69 F.2d 569 (D.C. Cir. 1934).

90. *Id.* at 569-70.

91. See *Famous Furniture Co. v. J. Fishman & Son*, 22 N.J. Misc. 368, 370, 29 A.2d 235, 236 (Clifton County Ct. 1944); *Albert Lifson & Sons v. Williams*, 10 N.J. Misc. 982, 984, 162 A. 129, 131 (Monmouth County Dist. Ct. 1931); cf. *Bloomington Bros. v. Cook*, 8 N.J. Misc. 824, 827, 152 A. 666, 668 (Bergen County Dist. Ct. 1930) (accepting the theory advanced by the text but deciding against the warehouse because the conditional seller filed its contract).

92. *Jersey Security Co. v. Lottimer*, 20 N.J. Misc. 432, 434, 28 A.2d 623, 625 (Hudson County Dist. Ct. 1942); *Banker's Capitol Furniture Co. v. Hall*, 11 N.J. Misc. 13, 15, 163 A. 556, 557 (Monmouth County Dist. Ct. 1932).

93. See UNIFORM CONDITIONAL SALES ACT § 5.

94. *Buckley-Newhall Co. v. Bangs*, 130 Misc. 293, 224 N.Y.S. 71 (Mun. Ct. 1927). Significantly, in *Buckley-Newhall* there were two chattel mortgages, one filed and one not. The court enforced the lien against the unfiled mortgage but not against the one that was

to comply with the appropriate statute. This other authority is consistent, moreover, with the broader line of authority which renders the warehouse lien subordinate to conditional sellers and chattel mortgagees who do comply with the perfection requirements of the various statutes⁹⁵ and with those cases which hold that the warehouse loses to the unfiled conditional vendor if a state's Conditional Sales Act does not require filing.⁹⁶ The pledgee defeats a prior secured party only if that prior party has not observed the technical requirements of the appropriate statute and thereby failed to perfect its security interest. It is significant, furthermore, that even though the New Jersey line of cases favors creditors over the warehouse, it does so by reference to the law of creditors, that is, it accepts the notion that the Uniform Act does not fashion its own priority rules but defers to creditor priority rules under other statutes.

1. *The Rationale.* At this point several observations are in order. First, we see from the cases that in these disputes the parties contesting with the warehouses are persons who may think of themselves as true owners, such as sellers who retain title under the Conditional Sales Act, but whom the law regards as creditors.⁹⁷ With some exception, courts then view the dispute as one for applying the creditor priority rules. On occasion, however, courts have failed to perceive the claimant as a creditor.⁹⁸ In *Leitch v.*

properly filed; cf. *Zahner Mfg. Co. v. Harnish*, 224 Mo. App. 870, 24 S.W.2d 641 (1930) (chattel mortgagee may authorize the storage, but absent that authority, the mortgage defeats the warehouse lien).

95. See *Buckley-Newhall Co. v. Bangs*, 130 Misc. 293, 224 N.Y.S. 71 (Mun. Ct. 1927); *Ludwig Baumann & Co. v. Roth*, 67 Misc. 458, 123 N.Y.S. 191 (App. Term. 1910); *Holmes v. Klein*, 59 S.W.2d 171 (Tex. Civ. App.—Amarillo 1933, writ dismissed); *First Nat'l Bank v. White Dulaney Co.*, 121 Wash. 386, 209 P. 861 (1922) (dictum).

96. *Dade Nat'l Bank v. University Transfer & Storage, Inc.*, 151 So. 2d 868 (Fla. Dist. Ct. App. 1963); *Haverty Furniture Co. v. Kennelly Moving & Storage Co.*, 19 Fla. Supp. 88 (Duval County Ct. 1962); *Sterchi Bros. Stores v. Weaver*, 163 Tenn. 499, 43 S.W.2d 489 (1931); *Knoxville Outfitting Co. v. Knoxville Fireproof Storage Co.*, 160 Tenn. 203, 22 S.W.2d 354 (1929).

97. The Code accepts the metamorphosis. Section 2-401(1) stipulates that "[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."

98. The *Leitch* and *Jacobs* cases discussed in the text are not atypical. I have discussed elsewhere the unfortunate tendency of courts to neglect this distinction between one who is an owner and one who is a secured party. See generally Dolan, *U.C.C. Framework*, *supra* note 15. As cases in that article demonstrate, jurists still have difficulty with the distinction. *Id.* at 847-52. Not all jurists have difficulty with it, however. See, e.g., *Putterbaugh v. Fournier (In re Happy Jack's Restaurant, Inc.)*, 29 U.C.C. REP. SERV. 653, 657-59 (D. Me. 1980).

Sanford Motor Truck Co.,⁹⁹ for example, a truck manufacturer under "bailment lease" delivered trucks to a dealer who "gave"¹⁰⁰ one of them to his bank as collateral. The bank, in turn, stored the truck with a warehouse that asserted its lien against the manufacturer. The court, however, favored the manufacturer and rejected the warehouse's argument that delivery to the dealer should estop the manufacturer.

The error in *Leitch* stems from the failure to perceive the manufacturer not as an owner but as a creditor and the delivery arrangement not as a "bailment lease" but as a disguised conditional sale or chattel mortgage.

Given a true lease, of course, courts may well regard the claimant as an owner. In *Jacobs v. North Kensington Storage Co.*,¹⁰¹ for instance, the claimant leased a player piano to the bailor who stored it with the defendant warehouse. The court ruled in favor of the lessor/owner, holding that "mere possession"¹⁰² by the bailor was insufficient to make the lien good against the warehouse. That conclusion may be justifiable from a good faith purchase standpoint, but only if the claimant is indeed a lessor. If the lease is a disguised credit sale, then the claimant is a creditor,¹⁰³ and priority over the lien depends upon perfection.

The second observation to make after review of cases under the Uniform Act relates to good faith purchase itself. We have seen that some cases are true to the apparent intent of the statute; others are not.¹⁰⁴ To what extent do good faith purchase considerations support the cases?

By and large good faith purchase analysis supports the cases which follow the apparent intent of the statute, but the analysis suggests a new rationale for good faith purchase. The traditional paths of good faith purchase inquiry are culpability and economic efficiency. Under the first we determine which of the two parties (the bailor's creditor or the warehouse) is more culpable for the loss. We could say, for example, that a conditional seller who fails to file the sales contract is blameworthy for hiding the interest and

99. 279 Pa. 160, 123 A. 658 (1924).

100. *Id.* at 162, 123 A. at 659.

101. 81 Pa. Super. Ct. 140 (1923).

102. *Id.* at 144.

103. The Code explicitly accepts the idea that a lease-purchase which in reality is a credit arrangement merits treatment as a security agreement subject to the Secured Transactions Article. See U.C.C. §§ 1-201(37), 9-102(1)(a).

104. Refer to notes 87-102 *supra* and accompanying text.

preventing the warehouse from finding it. On the other hand, if the conditional seller files and the warehouse fails to find the filing, the warehouse is blameworthy.¹⁰⁵

Both of these arguments fair poorly, however, by efficiency standards. The fact is that warehouses do not look for filings,¹⁰⁶ and to reward them when the bailors' creditors fail to file and penalize them when the creditors do is to examine the conduct of the creditor and ignore the conduct of the warehouse. Why is a creditor who fails to file any more blameworthy than a warehouse which fails to search, and why should the creditor who fails to file always lose and the warehouse which fails to search win or lose depending on the conduct of the creditor? The culpability rationale, then, makes sense only if warehouses search, which they never do.

At first blush the economic efficiency route is no more convincing. It is true that it costs less for the creditor to file than for the warehouse to determine ownership, but a rule which favors the filing creditor and disfavors the nonfiling creditor also indulges in the fiction that the warehouses search for filings. It rewards an act which costs less than warehouse title searches would cost if there were no filing, but it is still a useless act. Warehouses do not search. The warehouse will store the goods (and thereby ensure in some cases that somebody suffers a loss) whether the creditor files or not. Thus, under this economic approach and the culpability approach, we must resort to fictions in order to complete the equation.

There remains, however, a modified economic analysis which justifies invoking good faith purchase protection when the creditor fails to perfect. Perfection rules provide a clear benchmark for separating those cases in which the warehouse wins from those in which the creditor wins, and, more importantly, they protect the integrity of the filing system by promoting perfection, that is, by encouraging creditors to perfect. Even though bailees do not search

105. Some courts seem to adopt this rationale in holding that the filing is constructive notice to the warehouse. See *Ludwig Baumann & Co. v. Roth*, 67 Misc. 458, 460, 123 N.Y.S. 191, 192 (Sup. Ct. 1910); cf. *Holloway v. Merchants' Transfer Co.*, 294 S.W. 989, 990 (Tex. Civ. App.—Austin 1927, no writ) (warehouse should search the records if it knows the bailor is not the true owner).

106. It is absurd to expect the warehouse to check for filings. The cost would be prohibitive. The law created a fiction when it treated the warehouse as a pledgee, but the law should not slavishly follow that fiction and assume that the warehouse behaves as a pledgee behaves. *But cf.* RESTATEMENT OF SECURITY § 76, Comment a (1941) (suggests that the recording statutes assure a warehouse that it can learn of prior interests).

for filings, other creditors do, and the law is properly concerned with the filing system. Thus the cases which resort to creditor priority rules satisfy the good faith purchase test. They promote a socially desirable end—an efficient filing system.

Those cases, furthermore, that fail to perceive correctly the nature of the claimant and confuse lessors with creditors cannot pursue the good faith purchase inquiry properly. If we accept the thesis of this article that good faith purchase doctrine is essentially efficiency analysis, proper understanding of the roles the parties play is indispensable to that analysis.

In the *Leitch* case, for example, the characterization of the manufacturer's act determines the result. The court's acceptance of the manufacturer's delivery of trucks to the dealer as a "bailment lease" promotes security of property treatment. As we have seen, the law tends to protect a person who "merely" delivers goods. Owners should feel free to leave their goods with a third person without fear of being deprived of their title, which cannot pass from them without their consent.¹⁰⁷ Yet when we view the conduct of truck manufacturers in the full commercial context, we recognize the heavy commercial cost of invoking such a rule. If the truck manufacturers may deliver goods to dealers and may defeat good faith creditors of the dealers, such creditors will compute the cost of such losses into the price they charge for such credit. If, on the other hand, we characterize the manufacturers as creditors of the dealers and invoke the perfection rules against them, they will compute the cost of perfecting their interests in their prices. In either event, of course, the consumer will pay the cost, but in the latter, common sense tells us that the cost will be less. It costs less to file than it costs to guard against unfiled interests.

2. *Consumers.* The same analysis applies to the *Jacobs* case. If the lease of the player piano was a disguised credit sale, we must decide whether the seller should observe the customary filing rules. The Code concludes that it need not.¹⁰⁸ Why do we have one rule for truck manufacturers and another for piano retailers? The answer lies in the commercial realities of consumer financing. Because the creditor/seller of consumer goods need not file, it will

107. Note, however, that the Code does not accept such a security of property argument when the true owner entrusts to one in the business of selling goods of the kind. See U.C.C. § 2-403(2).

108. The code excuses a purchase money seller of consumer goods from the filing requirements of Article 9. See U.C.C. § 9-302(1)(d).

defeat most purchasers. Section 9-306(2) provides that the security interest follows the goods into the hands of a purchaser. Will those purchasers not have to compute the cost of losses from such hidden security interests and will such costs not exceed the costs of requiring the creditor to file? The Code concludes that with two exceptions the answer is no. First, owners of consumer goods generally do not sell them, except perhaps to a neighbor. They may give them away; they may store them; they may grant a lender a security interest in them, though such security interests are commercially insignificant.

If they give the goods away, the donees take subject to the security interest.¹⁰⁹ There is no valid commercial reason to protect the donees. They do not "lose" anything in the commercial sense if they have to return the gift. If the consumers sell the goods to neighbors, however, the neighbors would lose in the commercial sense if they take subject to the security interest. The Code, therefore, protects the neighbors by rendering the sale free of the unfiled security interest.¹¹⁰ In this instance the cost of filing is arguably less than the potential cost to the buyer. In the third example, where the consumer stores the goods, the household goods rule of section 7-209(3)(b) protects the warehouse. Here the Code concludes that the commercial benefit of ready access to the warehouse exceeds the cost of subjecting the seller to the warehouse lien.

On the other hand, the Code does not look with favor on the practice of granting non-purchase-money security interests in consumer goods. Creditors taking such an interest will not defeat the purchase-money lender who enjoys a secret lien.¹¹¹ In general the Code does not view non-purchase-money security interests in consumer goods as an important source of credit¹¹² and is, therefore,

109. See U.C.C. § 9-306(2).

110. In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods. U.C.C. § 9-307(2).

111. The purchase-money seller of consumer goods, of course, perfects without filing. U.C.C. § 9-302(1)(d). The later, non-purchase-money lender must file. *Id.* § 9-302(1). The filing, however, postdates the perfection of the seller's unfiled security interest. Thus under the general priority rule, the seller enjoys priority. See *id.* § 9-312(5)(a).

112. For additional evidence of the Code's antipathy toward non-purchase-money security interests in consumer goods, see U.C.C. § 9-204(2), which interdicts attachment of a security interest in most after-acquired consumer goods and which is an exception to the

willing to let such secured transactions bear the cost of losses caused by a rule favoring the earlier unfiled purchase-money interest.¹¹³

This brief sally into the Code rules relating to consumer goods demonstrates again the commercial law's facility with good faith purchase, which the Code uses or withholds as a means of supporting or inhibiting commercial practices. The analysis also demonstrates the context in which the household goods rule of section 7-209(3)(b) operates. Reference to that context is essential to an understanding of the household goods rule itself.

C. *The Evicting Constable*

There are a number of cases under the Uniform Act which relate to forcible detainer actions—an area that still provides a source for litigation. The setting generally begins with an action by the owner of real estate against a defaulting tenant. When the owner obtains a judgment granting it possession of the premises, it customarily obtains a writ of restitution, which directs a court officer to remove the tenants and their goods from the premises.¹¹⁴ If the tenants are absent or contumacious, the sheriff will store the goods rather than discard them or leave them in the street. Later the tenant will claim them, and the warehouse will assert its lien. The statutes of some jurisdictions anticipated the tenant's argument that the lien is not good against the nonconsenting owner,¹¹⁵ but most jurisdictions left the matter to the courts. One court found the authority to store the goods implicit in the tenant's leav-

general Code rule favoring the use of after-acquired property as collateral. *See id.* § 9-204(1), (2).

113. Some might be tempted to see these consumer goods rules as efforts at consumer protection against overreaching creditors. Non-purchase-money security interests have sometimes arisen out of "sharp" lender practices. *Cf. Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (court held unconscionable the extensive use of cross collateralization by retail seller). The more accurate view, however, would seem to be that which characterizes these Code rules as neutral in the consumer protection struggle. As Professor White has pointed out, a rule against the lender may increase the cost of credit. *See White, The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 Wis. L. Rev. 513-26. More persuasive, then, than the notion of consumer protection, is the idea that the Code views protection of non-purchase-money security interests in consumer goods as sufficiently unimportant to require the purchase-money lender to file.

114. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.5744 (West Supp. 1980).

115. *E.g.*, MASS. ANN. LAWS ch. 239, § 4 (Michie/Law. Co-op 1974); N.C. GEN. STAT. § 25-7-2093(c) (Supp. 1979). Refer to note 211 *infra*.

ing them after defaulting on the lease.¹¹⁶ A second case, however, suggested that because the warehouse knows the bailor is not the true owner, the warehouse should at least search for filings.¹¹⁷ A third case, *Smith v. Kathrens Moving & Storage Co.*,¹¹⁸ denied the lien when an attaching creditor caused the sheriff to store goods but thereafter failed to file the necessary attachment bond, while a fourth, *Treasurer and Receiver General v. Tremont Storage Warehouse, Inc.*,¹¹⁹ enforced the warehouse lien against the owner of goods who was not the judgment debtor.

In short, these cases decided under the Uniform Act¹²⁰ display a marked degree of confusion. In the *Smith* case, for example, the court looked closely at the language of the Act and concluded that it did not embrace situations in which the sheriff bailed goods pursuant to a writ of restitution.¹²¹ That conclusion is reasonable enough, but it reflects the traditional reluctance of courts to fashion a rule to fill the hiatus in the statute. Given good faith purchase analysis, it is difficult to support the *Smith* result. If the legislature, as the Missouri legislature did, permits attachment of goods, that is, permits the creditor to deprive the owner of possession without posting a bond, the *Smith* decision makes little sense. The warehouse lien should stand or fall regardless of whether the creditor makes the bond or not, for the existence of that bond does not render the conduct of the warehouse (or the true owner) any less or more culpable and does not bear on efficiency analysis. The problem in *Smith* was that the legislature permitted attachment without bond. Certainly, in such cases the debtor should be able to recover any losses from the creditor, but to put the cost of storage on the warehouse will only increase the cost of storing goods in all instances, because the warehouse will be forced to compute the risk cost into its price. The public ultimately will bear the cost under the *Smith* rule for mistakes of the judgment creditor.

*Holloway v. Merchants' Transfer Co.*¹²² displays similar confusion. In *Holloway* the court fashioned a rule requiring the warehouse to search for filings when a court official stored goods pursu-

116. *Finnigan v. Hadley*, 286 Mass. 345, 347-48, 190 N.E. 528, 529 (1934).

117. *Holloway v. Merchants' Transfer Co.*, 294 S.W. 989, 990 (Tex. Civ. App.—Austin 1927, no writ).

118. 236 Mo. App. 921, 163 S.W.2d 128 (1942).

119. 296 Mass. 531, 6 N.E.2d 838 (1937).

120. UNIFORM WAREHOUSE RECEIPTS ACT.

121. 236 Mo. App. at 929, 163 S.W.2d at 131-32.

122. 294 S.W. 989 (Tex. Civ. App.—Austin 1927, no writ).

ant to a judgment in a forcible detainer action. The *Holloway* decision follows the general rule that the warehouse must search, and we might accept its results on the grounds that the increase in storage costs it mandates are offset by the savings realized by the judicial efficiency it fosters. The *Holloway* opinion, however, suggests a different rationale. First, the judgment in forcible detainer was entered against both the chattel mortgagee and the chattel mortgagor. The creditor could hardly argue that it was blameless or that it was costlier for it to protect itself than it was for the warehouse to determine ownership. Second, and more important, is the tone of the opinion which supports a reading that would disfavor the warehouse lien even when the claimant has no interest of record. The *Holloway* case implies that it is the duty of the warehouse to inquire when a public official stores goods which obviously belong to a third party.¹²³

More persuasive is *Finnigan v. Hadley*,¹²⁴ which infers authority to store from the tenant's conduct. By leaving the goods after defaulting on a lease which authorized the lessor to remove the tenant in case of default, the tenant, who also did not leave notice of his whereabouts, impliedly authorized the lessor to store the goods.¹²⁵ Any other decision in *Finnigan*, of course, would have left the creditor without any remedy unless he was willing to pay to store the tenant's goods or run the risk of the conversion liability that the tenant would surely assert if the lessor moved the goods to the sidewalk.

These attachment and forcible detainer cases, then, display the confusion one would expect when courts confront an area of undeveloped theory. In such situations we inevitably find ad hoc jurisprudence with its attendant inconsistencies. Good faith purchase analysis provides the theoretical tether. It suggests that good faith purchase treatment for the warehouse yields a more efficient and fairer rule.

This discussion of the forcible detainer cases reveals one further and significant implication. The official version of the Code has breached the theoretical lacuna of the Uniform Act. Under the Uniform Act, as we have seen, the courts were at sea. The court officer's conduct of storing goods did not fit the "pledge" paradigm

123. *Id.* at 990.

124. 286 Mass. 345, 190 N.E. 528 (1934).

125. *Id.* at 348, 190 N.E. at 529.

of the Act, and inconsistent lines of authority resulted. Under section 7-209(3)(b) of the Code, however, the constable has the authority to store *household* goods; the warehouse lien will survive, and warehouses will accept such goods at lower prices than those the Uniform Act's confusion would yield.¹²⁶

Thus, two obvious questions remain: do constables have authority if the goods are not household goods, and, more significantly, do they have such authority in the many jurisdictions that have not adopted section 7-209(3)(b)? The good faith purchase analysis offered here suggests that the answer to both questions should be yes. Courts should be willing to extend the rule in the interest of commercial efficiency. As cases under the Uniform Act and the Code itself indicate,¹²⁷ however, many courts do not accept that analysis. In such courts lawyers for true owners should therefore raise the question whether the lien is good against the defaulting tenant. It is curious, however, that at a time when advocates for the poor are challenging such liens,¹²⁸ they have ignored this argument (despite its history of partial success) in favor of arguments challenging the constitutionality of the Code's lien provisions,¹²⁹ a challenge which faces obstacles far more formidable than good faith purchase theory.¹³⁰

126. A warehouseman's lien on household goods for charges and expenses in relation to the goods under subsection (1) is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" means furniture, furnishings and personal effects used by the depositor in a dwelling.

U.C.C. § 7-209(3)(b).

127. See *Nikolas v. Patrick*, 51 Mich. App. 561, 215 N.W.2d 715 (1974); *Cordle v. Lincoln Moving & Storage, Inc.*, 10 U.C.C. REP. SERV. 1204 (Neb. Dist. Ct. 1976); *Disch v. Raven Transfer & Storage Co.*, 17 Wash. App. 73, 561 P.2d 1097 (1977). These cases are discussed in text accompanying notes 195-216 *infra*.

128. See *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Cox Bakeries of N.D., Inc. v. Timm Moving & Storage, Inc.*, 554 F.2d 356 (8th Cir. 1977); *Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976); *Wegwart v. Eagle Movers, Inc.*, 441 F. Supp. 872 (E.D. Wis. 1977); *Svensden v. Smith's Moving & Trucking Co.*, 29 U.C.C. REP. SERV. 609 (N.Y. App. Div. 1980).

129. The challenge, of course, is directed not at § 7-209(3) but at § 7-210, which permits the warehouse to satisfy the lien by selling the goods. Refer to note 128 *supra*.

130. It is not the subject of this article to speculate on the reasons for that apparent oversight, but an analogous and even more significant phenomenon in the practice of commercial law bears mention. For some time now, consumer advocates have been challenging repossession and resale practices permitted secured lenders under provisions in Article 9 that parallel the warehouse lien provisions of Article 7. Compare U.C.C. §§ 7-209, -210 with §§ 9-503, -504. Those challenges were nearly always unsuccessful. See, e.g., *Gibbs v. Titelman*, 502 F.2d 1107 (3d Cir. 1974), *cert. denied*, 419 U.S. 1039 (1974); *Brantley v.*

D. Additional Considerations

There remain a number of cases which were decided under the Uniform Act and which reflect concerns not evident in the cases discussed thus far. These cases serve to define the boundaries of good faith purchase.

1. *The Thief Rule.* There has always been a limit on the doctrine of good faith purchase to the effect that a thief cannot pass good title, even to a bona fide purchaser.¹³¹ There are, of course, exceptions to that rule for property to which the law affords the highest degree of negotiability.¹³² Goods do not fall into any of those exceptions, and the cases which hold that the warehouse lien does not extend to goods stolen from their owner are true to that general rule.¹³³ Thus, when a husband steals into the home of his

Union Bank & Trust Co., 498 F.2d 365 (5th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974); Bowman v. Chrysler Credit Corp., 496 F.2d 1322 (5th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); Bichel Optical Labs., Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973); Giglio v. Bank of Del., 307 A.2d 816 (Del. Ch. 1973); Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973); Brown v. United States Nat'l Bank, 265 Or. 234, 509 P.2d 442 (1973); Sandoval v. American Nat'l Bank, 517 P.2d 188 (Wyo. 1973).

The significant point is that in many of these cases the plaintiff could have pursued a nonconstitutional argument with some likelihood of success. Section 9-503 permits repossession by the secured lender only by proceeding "without breach of the peace." Now that the bloom is off the constitutional rose, advocates for debtors may resort to this provision, which has enjoyed a modicum of success. *See, e.g.,* Walker v. Walthall, 121 Ariz. 121, 588 P.2d 863 (1978) (presence of uniformed deputy during repossession constitutes breach of the peace); Deavers v. Standridge, 144 Ga. App. 673, 242 S.E.2d 331 (1978) (abusive language is breach of the peace); Morris v. First Nat'l Bank, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970) (repossession over debtor's representative's objections is breach of the peace); Harris v. Cantwell, 47 Or. App. 211, 614 P.2d 124 (1980) (verbal altercation between debtor and police officer who was assisting in the repossession raises a question of fact whether there was a breach of the peace); Stone Mach. Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970) (presence of uniformed sheriff is breach of the peace).

131. Thus, for example, a thief may not give good title to a purchaser of a negotiable document of title even if the holder takes by due negotiation. *See* U.C.C. § 7-503, Comment 1; *see generally* 2 S. WILLISTON, *supra* note 22, § 311. Refer to notes 44 and 74 *supra*.

132. *See, e.g.,* U.C.C. §§ 3-202(1), 7-501(1), 8-302(1) (Code rules which permit negotiation by delivery).

133. It is significant that some commercial lawyers read the 1952 version of the Code as making the warehouse lien good against a true owner even if the bailor was a thief. *See* N.Y.L. REVISION COMMISSION REP., REPORT AND APPENDICES RELATING TO THE UNIFORM COMMERCIAL CODE 708, 731, 759, 777, 786-87, 796 (1956); 3 N.Y. L. REVISION COMMISSION REP., STUDY OF THE UNIFORM COMMERCIAL CODE 1800 (1955). The comment disputed such a reading. *See* U.C.C. § 7-209(3) & Comment 2 (1952 version).

estranged wife and removes and stores furniture which she claims, the warehouse may not assert a lien against the goods.¹³⁴ This denial of good faith purchase treatment has its roots in the security of property principle that no person may be deprived of property and that the policy against rewarding theft outweighs the policy of fostering commercial activity. Significantly, however, both the common law¹³⁵ and the Code¹³⁶ give the bailee a lien against the owner of stolen goods where the law imposes a duty on that bailee to accept the goods.¹³⁷

2. *Entrustment.* Difficulty arises when the owner does not lose the goods to a thief but delivers them to one who exceeds his authority and bails the goods. Generally the common law held that mere entrustment by the owner and possession by the bailor was not enough.¹³⁸ Good faith purchase inquiry is the process of determining what in addition to entrustment is necessary to cut off the owner's interest.¹³⁹ Does, for example, the delivery of goods to a warehouse authorize the warehouse to rebail the goods? As it does in the forcible detainer cases, the "pledge" paradigm of the Uniform Act fails here. Warehouses and constables are not in the business of pledging goods and their conduct does not fit the pledge model well. Good faith purchase considerations support a rule, however, which facilitates storage by the constable and also support a rule which facilitates restorage by a warehouse.

The latter situation arises, presumably, when the first warehouse is running out of space or going out of business. In either event it seems commercially reasonable to expect the first warehouse to notify the bailor before rebailing the goods, or it seems commercially reasonable for the second warehouse when con-

134. *Young v. Colyear*, 54 Cal. App. 232, 201 P. 623 (1921).

135. *See, e.g., Yorke v. Grenaugh*, 92 Eng. Rep. 79, 80 (K.B. 1703). Refer to text accompanying notes 42-54 *supra*.

136. *See* U.C.C. § 7-307(2).

137. *See id.*

138. *E.g., Farrell v. Harlem Terminal Storage Warehouse Co.*, 70 Misc. 565, 127 N.Y.S. 306 (App. Term 1911).

139. Sometimes entrustment itself is sufficient if the owner knows that the trustee will require a bailee's services, and if those services enhance the value of the goods. In England the courts fashioned a common-law rule in favor of the garageman's lien by inferring the authority of a hire purchaser who would need to have taxicabs serviced. *See Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K.B. 307 (C.A.). In the United States, the matter was generally governed by statute, but Professor Williston characterized the theory as one of ostensible ownership, not implied authority. 1 S. WILLISTON & G. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 277, at 804 (rev. ed. 1936).

fronted with this situation to notify the owner. To require the two warehouses to wait for directions, however, is not commercially realistic. Often persons store goods because they are travelling or will be in distant places. Often bailors do not respond to requests for instructions. The cost of holding goods in the first warehouse until all persons respond would be significant. There is, furthermore, little benefit to the owner in such a rule. Presumably the identity of the warehouse makes little difference to the owner. General contract principles give the owner a cause of action against the first warehouse if the move increases the owner's charges. That cause of action should be enough protection. Certainly, there is inconvenience and perhaps expense to the bailor whose goods are rebailed, but that inconvenience and expense cannot outweigh the general inconvenience and expense to the industry and its customers of a rule which inhibits rebailment. In short, commercial exigencies and the difficulties of obtaining the owners' consent suggest that good faith purchase should sanction the second bailment. The cases, however, fail to pursue the good faith purchase analysis and hold against the second bailee.¹⁴⁰

We see that the thief rule limits application of good faith purchase in the face of historic commitment to the notion that a thief cannot deprive the owner of title. In the entrustment situations, we sometimes apply the rule, sometimes not; that is, we analyze the situation and exercise good faith purchase as a prerogative. There remains a third feature of the bailment contest that merits discussion.

3. *The Special-General Lien Distinction.* At common law¹⁴¹ and by statute¹⁴² the warehouse enjoys both a special and a general lien. The special lien protects the warehouse with respect to charges that relate to the goods stored. The general lien protects

140. See *Nikolas v. Patrick*, 51 Mich. App. 561, 215 N.W.2d 715 (1974) (a case decided under the Code); *Farrell v. Harlem Terminal Storage Warehouse Co.*, 70 Misc. 565, 127 N.Y.S. 306 (App. Term 1911). Cf. U.C.C. § 7-206 (permitting a warehouse to terminate the storage contract but making no provision for rebailment).

141. See generally J. KENT, COMMENTARIES *634.

142. Section 7-209(1) describes the special lien, and then adds:

If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman.

U.C.C. § 7-209(1).

the warehouse with respect to charges arising out of the storage of other goods.

In disputes between the true owner and the warehouse, courts have tended to treat the two liens differently.¹⁴³ In *Chemical National Bank v. New York Dock Co.*,¹⁴⁴ for example, the bank took documents of title when it honored a letter of credit. It then asked its customer, the buyer of the goods, for reimbursement. The buyer being unable to pay, the bank entrusted the goods to the buyer with instructions to store and sell them for the bank's account. The buyer stored them with a warehouse. Upon the buyer's bankruptcy the warehouse claimed a lien on the goods to cover not only the cost of their storage but also the storage costs for other goods; that is, the warehouse asserted a general lien.¹⁴⁵

The court rejected the general lien argument by noting that the bank was the owner¹⁴⁶ of the goods,¹⁴⁷ that the buyer had no authority to pledge them, and, therefore, that the Uniform Act did not give the warehouse a lien good against the "owner."¹⁴⁸ Significantly, however, the bank and the court assumed that the special lien was good, and that the bank must pay storage charges relating to the goods in dispute. Similarly, *In re Taub*¹⁴⁹ involved a bank which asserted an interest in goods for which its bankrupt customer failed to pay. In *Taub*, however, the warehouse issued the receipts directly to the bank, and the court held that since the warehouse was aware of the bank's interest, the warehouse could not assert a general lien against the goods.¹⁵⁰

Good faith purchase analysis supports both the *Chemical National Bank* and *Taub* results. In neither instance is there any jus-

143. For a general discussion of general liens and evidence of the common law's reluctance to enforce them, see Lord Mansfield's opinion in *Green v. Farmer*, 98 Eng. Rep. 154 (K.B. 1768). Kent noted that general liens "are looked at with jealousy, because they encroach upon the common law and destroy the equal distribution of the debtor's estate among his creditors." 2 J. KENT, COMMENTARIES *636.

144. 203 A.D. 108, 196 N.Y.S. 414 (1922), *aff'd per curiam*, 236 N.Y. 560, 142 N.E. 283 (1923).

145. *Id.*

146. *Id.* at 112, 196 N.Y.S. at 418.

147. Under the Code it is more accurate to characterize the issuer of a letter of credit who takes documents of title as a secured party rather than an owner. See U.C.C. §§ 9-102(1)(a), -202; *but cf.* U.C.C. § 7-502(1)(b) (which gives the bank "title" to the goods); *Hendries, Inc. v. American Express Co.*, 35 A.D.2d 412, 316 N.Y.S.2d 554 (1970) (the bank, having title to the goods, defeats a purported buyer in ordinary course).

148. 203 A.D. at 112, 196 N.Y.S. at 418.

149. 7 F.2d 447 (2d Cir. 1925).

150. *Id.* at 451.

tification for ruling for the warehouse. Neither fairness nor economic consideration dictates such a result. The fact is that while a warehouse may reasonably rely on the bailor's possession of goods in accepting them for storage, and therefore extend value, the value extended in such reliance relates only to the goods stored.¹⁵¹ Considerations of fairness support the warehouse only to the extent of its special lien.

Economic considerations support the same conclusion. The cost to the warehouse in taking the goods does not exceed the storage charges, and by protecting the special lien, the courts protect the warehouse against that cost. To protect its general lien would be to give the warehouse a windfall. By the same token, while we are willing to allocate to the owner the cost of the unauthorized storage of the *owner's* goods, it makes no sense to allocate to the owner charges arising out of the storage of other goods, especially when such allocation would afford the warehouse a windfall. The cost imbalance would be too great if we extend good faith protection to the general lien.¹⁵²

This analysis poses questions in interpreting the Code's lien provisions. The bill of lading rule clearly accepts the cost analysis by limiting the lien to charges "subsequent to the date of . . . receipt of the goods. . . ."¹⁵³ There remains room, of course, for the possibility that a carrier will argue that the Code only interdicts application of a general lien when it relates to charges incurred *before* storage of the goods. That distinction makes good faith purchase sense if carriers generally rely on one shipment as security for charges out of a later shipment. There is no evidence of such reliance,¹⁵⁴ and it is probably safe to conclude that the Code rightly abolishes the general lien for carriers.¹⁵⁵

151. The text assumes that the warehouse does not release goods stored earlier in reliance on the bailor's possession and storage of goods subject to a third party's claim. As the negative implication in the text suggests, in the event of such a release, good faith purchase analysis might support the general lien claim. A better rule would require the warehouse to take a security interest in the bailed goods to cover the debt arising out of other storage. Such a security interest would qualify for good faith purchase treatment only if the warehouse obtains a signed security agreement. See U.C.C. § 7-209(2) & Comment 2.

152. Lord Mansfield would agree. See *Green v. Farmer*, 98 Eng. Rep. 154 (K.B. 1768).

153. U.C.C. § 7-307(1).

154. "[S]ince carriers do not commonly claim a lien for charges in relation to other goods . . . provisions for a general lien . . . are omitted." U.C.C. § 7-307, Comment.

155. *But cf.* U.C.C. § 7-105 (the omission from the special provisions in Article 7 for carriers of a corresponding provision in the special provisions for warehouses "does not imply that a corresponding rule of law is not applicable"). The comment suggests, however,

The Code, however, does not abolish the general lien for the warehouse. Section 7-209(1) clearly contemplates it,¹⁵⁶ and the language of section 7-209(3) makes no distinction between the special and general lien when defining the good faith purchase protection for the warehouse against the true owner.¹⁵⁷ Thus, the warehouse lien section harbors problems for the view of this article that, absent the bailee's reliance and detriment, general liens do not merit good faith purchase treatment. In fact, under closer analysis those implications fade. Subsection 7-209(3)(a) makes no distinction between special and general liens, but the section itself does not make a good faith purchase rule. Rather, as the Uniform Act did, subsection 7-209(3)(a) incorporates the law of pledge. The law of pledge, moreover, is malleable. It responds to good faith purchase concerns, and there is no reason that courts construing the Code could not limit the pledge rule as the *Chemical National Bank and Taub* courts did. In those cases the courts held in effect that the owners "so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid . . .",¹⁵⁸ but they would protect the warehouse only to the extent of its special lien.¹⁵⁹ As to the general lien, the courts refused to invoke a good faith purchase result. The apparent inconsistency stems from the good faith purchase analysis described earlier¹⁶⁰ and stands on the fact that to give the warehouse a general lien is to give the warehouse a windfall. The value the warehouse advances by storing the goods thus serves a discrete purpose: it is value for the special lien but not the general.¹⁶¹

that § 7-105 refers to the possibility of a carrier's taking a security interest, not a general lien. *Id.*, Comment.

156. Refer to note 142 *supra*.

157. Refer to note 82 *supra*.

158. U.C.C. § 7-209(3)(a).

159. It is questionable that the law of pledge would favor the warehouse in the *Chemical National Bank and Taub* cases. Under the Code the claimant in both cases held a perfected security interest in the goods stored. In *Chemical* the bank took a trust receipt from the bailor. If the bank filed, its security interest was perfected, and unless the facts supported and the court accepted an agency or estoppel theory, the law of "pledge" would favor the perfected secured party over the later pledgee. Similarly, the claimant in *Taub* held a nonnegotiable warehouse receipt issued in its name and was, therefore, perfected. *Cf.* U.C.C. § 9-304(3) (a secured party may perfect a security interest in goods held by a bailee who issued a nonnegotiable receipt for them by having the receipt issue in the name of the secured party). The results would be the same under the Code as under "pledge" rules. The Code gives a perfected secured party priority over a later pledgee. *See id.* § 9-312(5)(a).

160. Refer to notes 151-52 *supra* and accompanying text.

161. It is a general principle of good faith purchase doctrine that courts will not men-

To summarize, we see in these three good faith purchase situations two in which the good faith purchase shelter does not apply and one in which it does. In the first, we deny shelter to one who takes from a thief not because good faith purchase analysis dictates the result but because the policy against theft overrides good faith purchase. In the first instance we resort to security of property and hold that a "stream can rise no higher than its source."¹⁶² In the second we measure the cost of a security of property rule and the cost to the buyer of storage in a strange warehouse against the exigencies of the situation and decide on good faith purchase. We find entrustment alone sufficient in the double bailment cases, because it is more efficient there to protect the warehouse when its bailor is itself a commercial bailee. In the third case, that of the general lien, we use the good faith purchase test again and, finding no reason to favor the warehouse which does not give value in reliance, deny good faith purchase.

This discussion of the limits of good faith purchase treatment of the warehouse lien completes the general analysis and permits us to move now to discussion of the section 7-503 reference in the lien section and to an evaluation of cases decided under the Code.

V. THE ROLE OF SECTION 7-503

The Code's plan for balancing the true owner's interest against the warehouse lien does not end with the reference in section 7-209(3)(a) to the pledge rule of the Uniform Act, for the section also warns that the lien "is not effective against a person as to whom the document confers no rights in the goods covered by it under Section 7-503."¹⁶³ That reference carries heavy implications. It suggests that a whole range of good faith purchase considerations not included in case law under the Uniform Act should be included

sure value: a buyer who takes for value in good faith generally need not justify the price paid in order to benefit from the shelter of good faith purchase. It is the general principle that the buyer takes the whole bargain even though the price may not be commercially reasonable, although an unreasonably low price may indicate bad faith. See, e.g., *Hollis v. Chamberlin*, 243 Ark. 201, 419 S.W.2d 116 (1967) (low purchase price suggests bad faith). See generally U.C.C. § 1-201 (44) (definition of "value"). The view advanced here that the courts should treat the special and general liens differently is consistent with the traditional approach to value as a feature of good faith purchase law. So long as we treat the special and general liens as discrete, it is compatible with traditional good faith purchase teachings to afford shelter for one lien and not for the other.

162. *Barthelmess v. Cavalier*, 2 Cal. App. 2d 477, 487, 38 P.2d 484, 490 (1934).

163. U.C.C. § 7-209(3)(a).

under the Code rule. In fact, that reference to section 7-503 broadens good faith shelter for the warehouse considerably and is a significant departure from the rule of the Uniform Act as defined by pre-Code cases. This conclusion, however, is not readily apparent. It depends upon careful analysis of section 7-503, and it rests on the premises that any other reading would render the reference redundant and that such a conclusion serves commercial needs.

Section 7-503(1) defines a necessary corollary of the security of property doctrine¹⁶⁴—the paramount rights rule. Analysis of that rule begins with section 7-502, which stipulates that one who takes a negotiable document of title by due negotiation takes title to the document, title to the goods covered by the instrument, and rights arising out of agency and estoppel.¹⁶⁵ In short, section 7-502 gives virtually everything to the qualified holder of a negotiable document of title. The section, however, provides that its rule is “[s]ubject to the following section . . . ,”¹⁶⁶ that is, subject to the paramount rights rule itself.

The parties who enjoy paramount rights under section 7-503(1) are true owners and secured parties who claim that a person without authorization bailed the goods and caused a negotiable receipt to come into the hands of a qualified holder. For example, a thief, who cannot at common law give good title to a purchaser of goods, may not avoid the thrust of the common-law rule by bailing the goods. Even though the bailee gives the thief a negotiable document and even though the thief then negotiates that document to a qualified holder, the holder loses to the true owner whose rights are paramount under section 7-503(1).¹⁶⁷

The analogy between the paramount rights provision and the lien provision of section 7-209(3) is perfect: the person with paramount rights contests with the qualified holder just as the claimant contests with the warehouse. We know, however, that the claimant is also a true owner or secured party. Thus the person with paramount rights *is* the claimant. Why, then, does the Code make ref-

164. Refer to note 34 *supra*.

165. Note that agency and estoppel are tools in § 7-503 for enhancing the good faith purchase protection of the qualified holder. Section 7-209 uses the same principles of agency and estoppel, as the text explains, to enhance the good faith purchase protection of the warehouse. Agency and estoppel have long been instruments of good faith purchase outside the bailment area.

166. U.C.C. § 7-502(1).

167. “A thief of the goods cannot indeed by shipping or storing them to his own order acquire power to transfer them to a good faith purchaser.” U.C.C. § 7-503, Comment 1.

erence to the paramount rights rule which balances the interests of true owner and qualified holder? Why can the Uniform Act language and its pledge rule which balance the interests of true owner and pledgee not supply sufficient direction?

There are three possible answers to these questions. The first is to argue that the reference to section 7-503 constitutes an exception to the rule of the Uniform Act and thus narrows the good faith purchase shelter; the second is to say that the reference is redundant and leaves the rule alone; the third is to say, as this article does, that the reference incorporates additional good faith purchase rules and thereby broadens the good faith purchase shelter.

A. *The Exception Theory*

The syntax of subsection 7-209(3)(a) supports the exception theory. "[B]ut is not effective . . . against a person with paramount rights . . ." is an infelicitous selection of words to convey any other meaning.¹⁶⁸ Closer analysis, however, overcomes the "plain" meaning the syntax suggests. The fact is that the person described in the reference, the person with paramount rights, defeats the lien under the rule of the Uniform Act. As we have seen from the discussion of the language of the Uniform Act and the cases construing it, both true owners and secured parties (the very people who constitute persons with paramount rights) will defeat the warehouse lien, unless they entrust the bailor with possession of the goods in a fashion that a pledge by the bailor would be valid. The exception theory forces us to the absurd conclusion that the first clause of subsection 7-209(3)(a) creates a good faith purchase rule and the second destroys it: "the lien is good against true owners and secured parties unless they entrust so that a pledge would be valid, but the lien is not good against true owners

168. The official comment supports the exception reading but assumes, perhaps incorrectly, that the language of the Uniform Act is sufficient to bring notions of agency into the lien section. "The warehouseman may be protected because of the actual, implied or apparent authority of the depositor, because of a Factor's Act, or because of other circumstances which would protect a bona fide pledgee, unless those circumstances are denied effect under § 7-503." U.C.C. § 7-209, Comment 3. It is difficult to see how § 7-503 could deny effect to facts which trigger the exceptions to the section's paramount rights rule. It is also significant that the comment refers to Factor's Acts and "other circumstances" in describing the operation of the exceptions to the paramount rights rule. See *id.* § 7-503, Comment 1. Most significant is the evident belief of the drafters that the lien section gives the warehouse the benefit of agency rules, as this article contends.

and secured parties." This reading, furthermore, defies the common sense of good faith purchase, for it destroys the good faith purchase shelter entirely. In other words, although the exception theory is consistent with a "plain meaning" approach, it is inconsistent with the historical meaning of the Uniform Act language and inconsistent with the long tradition of according good faith purchase protection in at least some instances. We must, therefore, reject the exception theory, however superficially plausible it may be.

B. *The Redundancy Theory*

The second reading of subsection 7-209(3)(a) ignores the reference to the paramount rights rule. This view notes that after deferring to the paramount rights rule, section 7-503(1) then creates significant exceptions to it. Those exceptions generally include an idea basic to good faith purchase doctrine: if the bailor had express or implied authority from the claimant or if the claimant should be estopped to assert an interest, then the good faith purchaser prevails.¹⁶⁹ These exceptions derive from notions of agency and estoppel, and this reading concludes that the agency and estoppel exceptions of section 7-503's paramount rights rule are coterminous with the pledge rule of the Uniform Act.

There is evidence to support the view that the drafters of the Uniform Act intended to incorporate notions of agency and estoppel into the good faith purchase rule they defined with their "pledge" language.¹⁷⁰ Note that they frame the rule in terms of pledges that would be "valid".¹⁷¹ That terminology strongly suggests that the authority of the bailor is at issue, and questions of authority are questions of agency. It is difficult, moreover, to distinguish between a principal who impliedly authorizes storage from a principal who is estopped from asserting its agent's lack of authority. Implied authority and estoppel in this context are close

169. See U.C.C. § 7-503(1)(a), (b).

170. Professor Williston and Barry Mohun drafted the Uniform Act in 1906. See Mohun, *The Effect of the Uniform Warehouse Receipts Act*, 13 COLUM. L. REV. 202 (1913) (largely silent on the meaning of the pledge language in § 28(b)); see also 4 S. WILLISTON & G. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 1058, at 2945 (rev. ed. 1936) (author cites some of the cases discussed in this article but otherwise sheds no light on the meaning of § 28(b)).

171. UNIFORM WAREHOUSE RECEIPTS ACT § 28(b).

cousins. It is fair to conclude, as some authorities do,¹⁷² that the pledge rule of the Uniform Act not only incorporates creditor-priority rules but also incorporates the rules of implied and apparent authority and of estoppel. Although that view is persuasive, there is case law explicitly rejecting it,¹⁷³ a number of cases which ignore it,¹⁷⁴ and an indication that Code drafters did not think the Uniform Act did the job.¹⁷⁵

In addition, the view does not explain the Code drafters' decision to leave in the lien section the reference to section 7-503 when its good faith purchase rule is coterminous with that of the Uniform Act. In other words, this view leads to the conclusion that the reference to section 7-503's paramount rights rule was a drafting oversight and is redundant.¹⁷⁶

This second theory does overcome the notion, however, that the reference to the paramount rights rule would destroy the good faith purchase compromise of the Uniform Act, as the exception theory does, but the reference would not add anything to the rule of the Uniform Act. Again, this second reading views the reference as meaningless surplus.

C. *The Extension Theory*

That second reading then confronts two objections. First, it does not make sense for the drafters of the Code to lift language

172. See T. QUINN, *UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST 7-29* (1978); R. RIEGERT & R. BRAUCHER, *DOCUMENTS OF TITLE § 4.2* (1978) [hereinafter cited as RIEGERT & BRAUCHER].

173. Refer to note 178 *infra*.

174. Rejection of the notion that the Uniform Act incorporated agency and estoppel principles is evident in the fact that the cases virtually never invoke the concepts, even though such concepts would have significance. In the double bailment cases, refer to notes 138-40 *supra* and accompanying text, courts could have invoked implied authority theory to justify rebailment. Similarly, in the evicting constable cases, refer to notes 114-30 *supra* and accompanying text, the courts could have argued that a tenant against whom a court has entered judgment for possession of premises and whose goods are subject to a writ commanding their removal is estopped from denying that authority. As the discussion of the double bailment and evicting constable cases demonstrates, however, a majority of the courts fail to invoke these concepts.

175. The drafters acknowledged that courts would sometimes find an implied consent, "but the drafters felt that such holdings were based on fictions" which might be avoided. See U.C.C. § 7-209, Comment 2 (1952 version). More often than not, courts were unwilling to find implied consent in bailment cases. Refer to notes 17 and 174 *supra*.

176. Professor Riegert and Justice Braucher suggest that the reference to § 7-503 applies only to the warehouse security interest and not to the warehouse lien. RIEGERT & BRAUCHER, *supra* note 172, at 64-65.

from the Uniform Act and add a new clause, when they intended to fashion a restatement of the Uniform Act. The second objection lies in the error of assuming that the pledge rule of the Uniform Act and the exceptions to the paramount rights rule are coterminous. It is true that both rules support good faith purchase shields, but the scope of the rules differs. As we have seen, courts construed the Uniform Act to protect the good faith purchase warehouse from unperfected secured parties. They gave the warehouse the rights of a pledgor, a perfected secured party. Courts generally did not use concepts of apparent or actual authority or estoppel under the Uniform Act but used notions of perfection and nonperfection to achieve good faith purchase results. At common law, of course, courts did invoke agency and estoppel reasoning to fashion good faith purchase rules, and the exceptions in section 7-503(1) to the paramount rights rule are a codification of those efforts. Those efforts, however, were generally confined to the sales context¹⁷⁷ and did not extend to the bailee's lien,¹⁷⁸ especially after adoption of the Uniform Act.¹⁷⁹

Under those agency and estoppel rules a true owner and a perfected secured party may lose to the good faith purchaser.¹⁸⁰ It is well settled, for example, that a secured party who leaves goods with a merchant in the business of selling goods of the kind will lose to a good faith purchaser.¹⁸¹ By the same token, a secured party who leaves goods with a person in the business of storing and transferring¹⁸² them by document may be estopped from asserting

177. See generally R. BROWN, *THE LAW OF PERSONAL PROPERTY* 202-06 (Raushenbush ed. 1978); L. VOLD, *HANDBOOK OF THE LAW OF SALES* 393-96 (2d ed. 1959).

178. Generally, the bailor was a pledgee only if the bailment was authorized.

We see no occasion for a discussion of the question of the implied authority of the conditional vendee herein to store these goods so as to bind the conditional vendor for the warehouseman's charges. He would have no such authority under the statute unless he likewise had implied authority to pledge the goods and the latter proposition cannot be maintained.

Knoxville Outfitting Co. v. Knoxville Fireproof Storage Co., 160 Tenn. 203, 206, 22 S.W.2d 354, 355 (1929) (emphasis added). See generally *RESTATEMENT OF SECURITY* § 75 (1941). Refer to note 16 *supra*.

179. Refer to note 174 *supra*.

180. See, e.g., U.C.C. § 7-503(1), Comment 1.

181. Such a good faith purchaser is a buyer in ordinary course, see U.C.C. § 1-201(9), and falls within the good faith purchase protection of § 9-307(1).

182. The rules of Article 7 protect the qualified holder even though the holder may not "buy", and a later lender may defeat a prior lender under the interpretation offered by the text. Compare U.C.C. § 7-501 (definition of the "qualified holder") with U.C.C. § 1-201(9) (definition of a buyer in ordinary course); see generally, Dolan, *Good Faith*

his interest against a qualified holder.¹⁸³ Under the third reading of subsection 7-209(3)(a) advanced here, the reference to the paramount rights rule completes the analogy between the lien section that protects the warehouse and the paramount rights rule whose exceptions protect the qualified holder. This reading holds that the secured party who leaves goods with a person in the business of storing them loses not only to the qualified holder but also to the warehouse.

The drafting history of the lien section supports this third reading. The 1952 draft of section 7-209(3) differs markedly from the version ultimately adopted. The early version consisted of three rules. The first made the lien effective against the true owner "unless the warehouseman had notice that the bailor lacked authority. . . ."¹⁸⁴ The second made the warehouse's *security interest* ineffective against a person with paramount rights,¹⁸⁵ and the third rendered the *security interest* subject to the rules of Article 9.¹⁸⁶ In short, the 1952 draft adopted a good faith purchase rule for *liens* as strong as any; arguably strong enough, in fact, to apply to the thief situation and to render the lien good against an owner who lost goods to a thief.¹⁸⁷ The true owner could defeat the warehouse's *security interest* but not its lien. The breadth of this good faith purchase treatment of warehouses provoked criticism,¹⁸⁸ and the drafters recast the section as it appears today.¹⁸⁹

Comparison of the 1952 draft and the official version reveals the pattern of the drafters' concerns. The basic question relates to the contest between claimants (true owners and their secured creditors) on the one hand and warehouses on the other. The 1952

Purchase, supra note 8.

183. See U.C.C. § 7-503(1), Comment 1.

184. U.C.C. § 7-209(3) (1952 version).

185. *Id.*

186. The 1952 version provided:

A warehouseman's lien for charges and expenses under subsection (1) is effective against the bailor or any person entitled to the goods unless the warehouseman had notice that the bailor lacked authority to subject the goods to such charges and expenses but a security interest under subsection (2) is not effective against a person as to whom the document confers no right in the goods covered by it under Section 7-503, and any security interest reserved by the warehouseman is governed by the Article on Secured Transactions (Article 9).

Id.

187. The drafters of the 1952 version, however, argued that the rule of that draft extended only against owners who entrusted. See U.C.C. § 7-209, Comment 2 (1952 version).

188. Refer to note 133 *supra*.

189. See U.C.C. § 7-209(3) (1958 version).

draft favored the warehouse (unless it knew of the claimant's interest) in all *lien* cases. It favored the warehouse in *security interest* cases, however, only if the claimant did not have paramount rights. We know, however, that section 7-503(1) gives all claimants paramount rights,¹⁹⁰ and being unwilling to accept the absurd conclusion that the drafters intended the claimant to defeat the security interest in all cases, we must conclude that the drafters intended to incorporate the paramount rights rule's agency and estoppel exceptions.

By the same token we must conclude that when the drafters revised the lien section and provided that both the warehouse lien and the warehouse security interest would not be effective against the person with paramount rights, the drafters intended to incorporate the agency and estoppel rules in a fashion which the Uniform Act's pledge rule had failed to achieve.

It is significant, moreover, that the good faith pledgee rule rests on the idea that a prior secured party loses to a later secured party because the prior party failed to observe the perfection rules and because protection for such party weakens the perfection system.¹⁹¹ The agency and estoppel rules rest on a different premise. They assume that commercial law should satisfy reasonable commercial expectations and that it is both fair and efficient to penalize a true owner or secured party who introduces goods into commerce, thereby arousing expectations, and then seeks to disappoint those expectations by pulling the goods back out. Arguably, Code drafters, desiring to effect a broad rule, referred to section 7-503 and thereby incorporated its agency and estoppel features. The other readings of the lien section do not withstand analysis.

By bringing agency and estoppel theory into the bailment setting, this reading of subsection 7-209(3)(a) satisfies the efficiency rationale of good faith purchase. Generally, a secured party and an owner are in a better position to protect themselves from unauthorized sales or storage than a buyer or warehouse is to search the title. A secured party may itself hold the goods to prevent the debtor from storing them.¹⁹² If it is not practical for the secured party to hold the goods, it may use a field warehouse arrange-

190. Refer to notes 163-67 *supra* and accompanying text.

191. Refer to notes 84-113 *supra* and accompanying text.

192. Such possession by the secured party also perfects the security interest without filing. See U.C.C. § 9-305.

ment¹⁹³ to control the debtor's access to the goods. It is a fact, of course, that such activity by the secured party involves expense,¹⁹⁴ but the legislature has decided that lenders and true owners must bear that expense or the risks and costs inherent in not bearing it.

VI. THE CODE CASES

This discussion completes the analysis of section 7-209 as it bears on the contest between a true owner and the warehouse. The section employs two references—one to the Uniform Act and one to the paramount rights rule. Both of those references carry heavy good faith purchase freight. The former cuts off the rights of a secured party who fails to perfect its security interest; the latter cuts off the rights of a true owner or secured party who authorizes (expressly or impliedly) the storage or who is estopped from denying the bailor's authority.

This analysis reflects the Code drafters' assumptions that commercial lawyers dealing with the warehouse lien would be conversant with cases construing the Uniform Act and with the paramount rights rule of section 7-503 and the good faith purchase exceptions to it. Those are significant and perhaps unwarranted assumptions for, as the cases reveal, courts seem largely unaware of the meaning of the Uniform Act language and do not seem to understand the reference to section 7-503 or even the section's operation.¹⁹⁵ Review of the cases also indicates that courts are unmindful of the good faith purchase implications which permeate the inquiry.

The first case is *Republic of Austria v. H.G. Ollendorff, Inc.*¹⁹⁶ There the plaintiff had loaned a painting to the University of California as part of an exhibit. While the university held the painting, a third party asserted an ownership interest in it. Pending the resolution of the ownership dispute, the university stored the paint-

193. For a discussion of field warehousing, see J. WHITE & R. SUMMERS, HANDBOOK ON THE UNIFORM COMMERCIAL CODE 823-27 (2d ed. 1980).

194. One suspects that the expense of field warehousing and uneasiness stemming from its esoteric connotations have left this commercial device unused in many settings where it would be efficient. What is worse, creditors who fail to use it then argue that the law should protect them from purchasers. See, e.g., *Chrysler Corp. v. Adamatic, Inc.*, 59 Wis. 2d 219, 240, 208 N.W.2d 97, 107 (1973) (arguments of the commercial finance industry).

195. Confusion over § 7-503 arises not only in the warehouse lien context but also in connection with cases arising under the paramount rights rule itself. See generally Dolan, *Good Faith Purchase*, supra note 8.

196. 7 U.C.C. REP. SERV. 535 (N.Y. County Sup. Ct. 1970).

ing. Subsequently, the third party relinquished his claim, and the plaintiff brought a replevin action against the defendant warehouse that claimed a lien. The court rejected the lien argument in a terse holding that the plaintiff was neither the bailor nor "a person subject to the lien."¹⁹⁷

The opinion does not tell us much, but the facts indicate that the plaintiff may very well be a person subject to the lien. If, for example, the plaintiff knew of the third party's claim or if in the course of preparing or moving the exhibit the university might have to store the painting, it would be proper to hold that the plaintiff impliedly authorized the storage. In that event, of course, section 7-209 would make the lien good against the true owner/plaintiff.

Such a holding, moreover, comports well with good faith purchase analysis. If the university's conduct in storing the painting was reasonable, there are good policy reasons to make the plaintiff pay. First, any other rule forces the warehouse to charge for the uncertainty such a rule creates. If the Austrian government wants to foster good will by lending its paintings, it ought to pay for storage when a bailee reasonably concludes that it is necessary to store one of the paintings and is unable or unwilling to pay for that storage. The owner, not the warehouse, should bear the burden of collecting from the university. Some may not find this argument convincing, but surely the language of the statute and the good faith purchase policy it serves commands an inquiry, whatever the outcome. It is not enough, then, to discuss the lien claim without that inquiry.

*Nikolas v. Patrick*¹⁹⁸ is the first of several double bailment cases. In *Nikolas* the plaintiff stored furniture with a warehouse that subsequently terminated its operations. Upon termination the warehouse rebailed the goods with the defendant who was asserting a lien in the face of the plaintiff's replevin action.

The defendant argued that by referring to the paramount rights rule of section 7-503, the lien provision (section 7-209) carried the negative implication that if the first warehouse had actual or implied authority to restore the goods, the lien would be good against the true owner.¹⁹⁹ In short, the defendant made the same

197. *Id.* at 536.

198. 51 Mich. App. 561, 215 N.W.2d 715 (1974).

199. *Id.* at 565-66, 215 N.W.2d at 718.

argument this article makes.

The court rejected the defendant's reading of section 7-209, holding that such an interpretation of the reference to section 7-503 would render the Uniform Act language redundant. The court concluded the defendant's reading must be wrong.²⁰⁰ The court, however, did not say what the reference meant. It simply ruled against the lien. It noted that Michigan had not adopted the household goods rule and inferred from that fact an intent on the part of the legislature not to promote the very position advanced by the warehouse.²⁰¹

Nikolas makes two mistakes. First, contrary to its own aversion to redundancy, it falls into the redundancy reading of section 7-209 and thereby reads out of the section language the legislature put in it. Second, it follows the "poor beacon"²⁰² of legislative silence in concluding that the legislature did not want a result ordained by the section without the amendment.

The *Nikolas* court cites *Ollendorff* with approval, and both cases stand as authority for reading the lien section without any good faith purchase considerations. Just as that reading smacked of inefficiency in *Ollendorff*, so does it in *Nikolas*. What difference does it make to the true owner whether X Warehouse holds the goods or Y Warehouse holds them, and why should the law provide that the owner must pay X for that storage but need not pay Y for it? What is a warehouse to do if it desires to terminate operations but is unable to find all of its customers? Certainly it should rebail the goods absent instructions. Yet the rule of *Nikolas* makes that

200. *Id.* at 565-66, 215 N.W.2d at 718.

201. *Id.* at 565-66, 215 N.W.2d at 718.

202. "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969). Even though Congress has remained silent by not adopting the Code for commercial transactions governed by federal law, the Supreme Court has ruled that federal courts should use the Code for disputes so governed. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In some cases the courts have read amendments to the Code as clarification of rather than change in the law. See *Kahn v. Capital Bank*, 29 U.C.C. REP. SERV. 289 (Fla. Dist. Ct. App. 1980); *Domain Indus. v. First Security Bank*, 230 N.W.2d 165, 168 (Iowa 1975). Often the "reasons for change" prepared by the Article 9 Review Committee, which fashioned the 1972 amendments to Article 9, explicitly declare that such amendments are made to clarify the rules or to remove uncertainties. See, e.g., PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE REVIEW COMMITTEE FOR ART. 9 OF THE UNIFORM COMMERCIAL CODE, FINAL REP. 25, 35, 58, 63, 195 (1971). The conclusion, then, that because a legislature has not adopted an amendment, *a priori* the legislature does not approve of the amendment's rule, is not warranted. It is especially unwarranted in construing the Code where many amendments are simply efforts at clarification.

rebailment problematical, because it fashions a rule which ensures that the second warehouse will have trouble getting paid. *Nikolas*, nonetheless, is the leading case.

In *Disch v. Raven Transfer & Storage Co.*,²⁰³ a Washington court followed *Nikolas* in holding that the legislature's failure to adopt the household goods rule signaled a desire to restrict the scope of the lien. In *Disch* the plaintiff leased a furnished house to a tenant who stored the goods. The court reviewed the language of section 7-209 carefully. It concluded that the reference to the Uniform Act means that the "pledge" rules of Article 9 apply²⁰⁴ and that the reference to section 7-503 incorporates the agency and estoppel provisions of that section. The court ruled, however, that neither of those good faith purchase provisions applied.²⁰⁵

The *Disch* case, then, differs markedly from *Ollendorff* and *Nikolas*, even though it cites *Nikolas* with apparent approval. *Disch* implicitly accepts the two-step approach to section 7-209 advocated here and, what is more, the *Disch* facts do not support a good faith purchase result. It is one thing to say that a warehouse has implied authority to rebail goods; it is another to say that the lessee of a furnished house has implied authority to bail goods. *Disch* approaches the theft situation—that boundary beyond which good faith purchase may not extend. *Disch* demonstrates, furthermore, the reach of the household goods rule, for had the Washington legislature adopted the household goods amendment of subsection 7-209(3)(b), the warehouse would have prevailed even though it loses under traditional good faith purchase analysis.

Less satisfactory than *Disch* is a Tennessee court's handling of a classic warehouse lien dispute in *K Furniture Co. v. Sanders Transfer & Storage Co.*²⁰⁶ In *K Furniture* the parties stipulated that Price purchased furniture from the plaintiff, who retained a perfected security interest. Price then stored the goods, and the warehouse asserted its lien against the secured party. Clearly, the Uniform Act language, as courts have construed it, does not help the warehouse. Under Article 9, Price does not have the power to

203. 17 Wash. App. 73, 561 P.2d 1097 (1977).

204. *Id.* at 76, 561 P.2d at 1099.

205. The court refused to apply the "pledge" rules of Article 9, because, it held, the bailor had no interest in the goods. *Id.* at 76-77, 561 P.2d at 1099-1100. Under § 9-203, there can be no pledge unless the pledgor has an interest in the collateral pledged. The court did not explain the reason it refused to invoke the agency or estoppel rules of § 7-503, but the facts support a rule denying an agency or estoppel result. *Id.* at 74, 561 P.2d at 1098.

206. 532 S.W.2d 910 (Tenn. 1975).

make a pledge which will defeat a *perfected* security interest.²⁰⁷ It is a strained interpretation of the facts, moreover, to say that the secured seller impliedly authorized the storage or that it acquiesced in the storage. Thus, the second good faith purchase rule of section 7-209 does not help the warehouse.²⁰⁸

K Furniture, then, demonstrates the hiatus the household goods rule amendment is designed to breach. In the noncommercial setting it is difficult to find facts supporting the authority or estoppel bases for invoking good faith purchase. The warehouse will lose to the claimant unless the claimant is an unperfected secured party. Given this hiatus in good faith protection, the warehouse may be reluctant to accept household goods and theoretically will pass the cost of the risk that hiatus creates on to its customer. The 1966 amendment to section 7-209, by creating a third good faith purchase rule for household goods, is designed to eliminate that reluctance and reduce that cost.²⁰⁹

The final case involves the evicting constable. *Cordle v. Lincoln Moving & Storage, Inc.*²¹⁰ follows the now familiar pattern. Owners of the household goods left them in a leased apartment and failed to pay the rent. The landlord obtained a writ of restitution, and the constable removed the goods to the defendant warehouse. Relying on the *Ollendorff* and *Nikolas* cases, the court held that the constable had no authority to store the goods²¹¹ and, therefore, that the lien was not good against the true owners. The court noted that had Nebraska adopted the 1966 amendment the result might be different.²¹² It would be different because the amendment requires only that the bailor of household goods be the

207. Under the general priority rule a pledge subsequent to a perfected security interest is subordinate to that interest. See U.C.C. § 9-312(5)(a).

208. The *K Furniture* court concluded that there were no facts to support application of the agency or estoppel rules of § 7-503. By implication, the court accepted the notion that the reference to § 7-503 incorporates those rules. Strangely, the *K Furniture* court cites *Nikolas* in support of its reading of the reference. 532 S.W.2d at 912.

209. "The purpose of the exception is to permit the warehouseman to accept household goods for storage in sole reliance on the value of the goods themselves, especially in situations of family emergency." U.C.C. § 7-209, Comment 3.

210. 19 U.C.C. REP. SERV. 1204 (Neb. Dist. Ct. 1976).

211. *But cf.* *Wegwart v. Eagle Movers, Inc.*, 441 F. Supp. 872 (E.D. Wis. 1977) (a Code case; the court found express authority to store in the Wisconsin forcible detainer statute); refer to note 115 *supra*; *cf.* *Bentinck v. Menotti*, 97 Cal. App. 412, 275 P. 850 (1929); *J.L. Case Plow Works v. Union Iron Works*, 56 Mo. App. 1 (1894) (an attaching officer is authorized by statute to store goods and incur warehouse charges).

212. 19 U.C.C. REP. SERV. at 1205.

"legal possessor"²¹³ of them.

The *Cordle* court, however, may have overlooked an opportunity to apply the agency and estoppel rules incorporated into the lien section by the reference to section 7-503. Certainly the owner of goods who leaves them in leased premises ought to pay for their storage after a writ of restitution issues. That writ stems from a judicial determination made in accordance with due process that the owner of the goods is not entitled to leave them at the leased premises.²¹⁴ It is in nobody's interest to leave such goods on the sidewalk.²¹⁵ Good faith purchase analysis suggests that courts should infer the authority to store or should estop the true owner from denying that authority in the evicting constable cases.²¹⁶

VII. RECAPITULATION

A. Section 7-209(3)

This study consists of two themes. One deals with a narrow provision in the Documents of Title Article. The analysis reflects three good faith purchase rules in that provision. The first is that which incorporates the language of the Uniform Act. It makes the warehouse lien effective against any person who "so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid. . . ."²¹⁷ That language has the effect of giving the warehouse the rights of an Article 9 secured party who perfected a security interest by possession on the date of the bailment and specifically permits the

213. U.C.C. § 7-209(3)(b).

214. This analysis of *Cordle* exposes the fallacious suggestion in *Nikolas* that the failure of the legislature to adopt the 1966 amendments indicates an intent to inhibit the agency and estoppel argument raised in that case. Refer to text accompanying note 158 *supra*. The "legal possessor" rule of § 7-209(3)(b) operates in a different context from that in which the agency and estoppel rule operates. Thus, even if the legislature's failure to adopt the amendment reflects animus toward the legal possessor rule, that failure need not indicate animus toward agency and estoppel notions.

215. It was raining at the time the constable in *Cordle* executed the writ. 19 U.C.C. REP. SERV. at 1205.

216. It will not do to ignore the fact that the rule advocated by the text may deprive poor persons of their household possessions. *See, e.g.,* *Flagg Bros. v. Brooks*, 436 U.S. 149, 166 (1978) (Marshall, J., dissenting). An enlightened and affluent society cannot let the poor go without basic necessities. However, only those who apply tortured logic will leap from that premise to the conclusion that the warehouse industry and its customers ought to bear the cost of that social requisite. The *Cordle* holding mandates that illogical conclusion.

217. U.C.C. § 7-209(3)(a).

warehouse to defeat prior unperfected security interests in the goods.

The second good faith purchase rule arises out of the inartful reference to the paramount rights rule and provides that the lien shall not be good "against a person as to whom the document confers no right in the goods covered by it under section 7-503."²¹⁸ This reference invokes the agency and estoppel exceptions of the paramount rights provision. Thus if the court decides that a true owner of goods or a party with a security interest in them actually or impliedly authorized their bailment or acquiesced in their bailment, the lien should be good against that owner or secured party.

The third good faith purchase rule, adopted in only fifteen jurisdictions,²¹⁹ appears in subsection 3(b) and renders the lien effective against the true owner of household goods if the bailor was the legal possessor of them. This third rule has special significance in evicting constable cases where it mandates a result for the warehouse.

B. *Good Faith Purchase*

The second and more subtle theme of this piece has broader import. The melodies of property law are contrapuntal. At times security of property and security of purchase compete with each other for the ear of the law. At those times courts and legislatures must harmonize them. While that harmony is not the product of vogue or trend, these doctrines are prerogatives, not ideologies. We invoke them to satisfy the demands of what this generation calls "efficiency" and what earlier generations called "fairness" or "culpability." Security of property remains the first melody, and good faith purchase the second. As Professor Rosenthal tells us, we must decide who *needs* the benefit of good faith purchase before we invoke it.²²⁰ That decision requires thoughtful evaluation of commer-

218. *Id.*

219. Refer to note 37 *supra*.

220. It would be a mistake to read Professor Gilmore's article and Professor Rosenthal's article as attacks on good faith purchase *per se*. See Gilmore, *Formalism and the Law of Negotiable Instruments*, *supra* note 2; Rosenthal, *Negotiability—Who Needs It?*, *supra* note 4. Those articles actually use good faith purchase inquiry. They consider the fairness and efficiency of protecting a purchaser. They conclude that fairness and efficiency do not support that protection in some instances, and they urge, therefore, that the law withhold it in those instances. Professor Rosenthal's question is not rhetorical. His thesis is that only those who need good faith purchase protection should get it.

cial facts. Unless that evaluation supports application of good faith purchase, we must fall back to the first principle, security of property, and rule against the purchaser.