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Sales of Another's Movables - History, Comparative Law, and Bona Fide Purchases

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COMMENTS

SALES OF ANOTHER'S MOVABLES — HISTORY, COMPARATIVE LAW, AND BONA FIDE PURCHASERS

Certain recurring conflicts arise between men that any system of law must seek to resolve. When justice and reason fail to indicate one best solution to such a conflict, different legal systems may well reach different results. Although these different results are often supported in the technical terms or theory of the legal system involved, the actual decision to favor one party over the other in such a situation is basically one of policy.[1] This comment deals with the often arising conflict between one who is owner of a movable and one who has acquired it without the owner's consent. Under some circumstances, justice and reason clearly favor one party and in these situations the different legal systems have no difficulty reaching common results. In other situations, however, the conflict is not so easily resolved and it is then that the policy behind the law will dictate different results.[2]

The Louisiana law governing this conflict between owner and possessor has felt the influence of several legal systems.[3] To understand the current Louisiana law and the role that each of these systems has played in shaping it, it is first helpful to see how each resolved the conflict and the reasons behind that resolution.

COMPARATIVE SYSTEMS

Roman Law

Early in Roman law the Twelve Tables[4] recognized acquisition of ownership by prescription.[5] This obviously tended to

1. *See* Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 591 (1932); Charmont, *The Conflict of Interests Legally Protected in French Civil Law*, translated in 13 ILL. L. REV. 461 (1919).

2. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 106 (La. St. L. Inst. transl. 1966); Note, 6 LA. L. REV. 731, 732 (1946).

3. Frankiln, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV, 589, 604 (1932); Comment, 4 TUL. L. REV. 78 (1930).

4. The Twelve Tables codified existing Roman law about 450 B.C., F. WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW 98 (4th ed. 1920).

5. This acquisitive prescription of immovables or movables was known as *usucapio*. Later, in the Justinian law, this term was used to designate the acquisition of movables only. 2 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD § 646, at 216 (1917). It provided for full, or *quiritary*, ownership. *Id.* § 573, at 150. The prescriptive period required was only one year but special rules suspended the

protect the party in possession. The Roman law did provide a means for the owner of a movable out of possession to establish his ownership if the prescriptive period had not run,[6] but even if the owner was successful in this action it did not guarantee the restitution of his property to him.[7]

By the Classical Period[8] of Roman law the rules for acquisitive prescription of movables were more refined although still based on the principles of the Twelve Tables. It was necessary for one claiming ownership by prescription to establish good faith, just title, and possession of the movable for one year.[9] During this period the basic action available to an owner out of possession to recover his property, both movable and immovable, was the *rei-vindicatio* or revendicatory action.[10] The *per sponsionem* form of this action decided only the question of ownership but the *per formulam petitoriam* form allowed a decree ordering restitution of the property.[11] If the owner could not maintain a *rei-vendicatio* action because he did not have full ownership,[12] or if the one in possession of the property did not claim full ownership, other actions were available.[13] Thus during the Classical Period of Roman law there were means by which the dispossessed owner of a movable was protected, but the complexities of the actions and the short one-year prescriptive period tended to protect the possessor rather than the owner.[14]

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running of time for stolen things. M. KASER, ROMAN PRIVATE LAW 106 (Dannenbring transl. 1965). For a general discussion of what was considered stolen in Roman law, *see* 2 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD § 824, at 377 (1917).

6. This action, called *legis actio sacramento in rem*, was set forth in the Twelve Tables and is described in M. KASER, ROMAN PRIVATE LAW 112 (*Dannenbring transl.* 1965).

7. *Id.* at 113.

8. The Classical Period extended from about the time of Christ to the middle of the third century A.D., H. WOLFF, ROMAN LAW 103 (1951).

9. *See generally* M. KASER, ROMAN PRIVATE LAW 106 (Dannenbring transl. 1965). There it is pointed out that the good faith *(bona fides)* and just title *(iusta causa)* required by Roman law are not identical with the modern meanings for these terms.

10. For a general discussion of real actions at Roman law, *see* 1 A. YIANNOPOULOS, CIVIL LAW OF PROPERTY § 121, at 371 (1966).

11. *Id.* Even here, however, damages were often available as an alternative. M. KASER, ROMAN PRIVATE LAW 115 (Dannenbring transl. 1965).

12. Full, or *quiritarian*, ownership was necessary to bring the action. 1 A. YIANNOPOULOS, CIVIL LAW OF PROPERTY § 121, at 374 (1966).

13. The proper action if the one seeking to recover goods possessed an interest less than full ownership was the *actio Publiciana*. The action available to an owner against one who claimed only a usufruct or similar interest in the property was the *actio negatoria*. M. KASER, ROMAN PRIVATE LAW 117 (Dannenbring transl. 1965).

14. While these actions were available to recover movable property, they probably found their greatest application in cases involving immovables. *Id.*

At the time of Justinian,[15] however, two changes took place that shifted the protection of the law. The acquisitive prescription of a movable[16] continued to require a thing capable of being acquired by prescription, good faith, and a just title, but in addition the period of possession necessary was lengthened from one to three years.[17] If the requirements of good faith or just title were not met the period of possession necessary was thirty years.[18] In addition the Justinian legislation strengthened the revendicatory action so the owner could better pursue his property during the prescriptive period. The action was extended to apply to those who had formerly possessed but then fraudulently parted with the property[19] and the remedy became an enforceable judgment of specific restitution.[20] On the whole the Roman law described by the *Corpus Iuris Civilis* provided a system that protected the dispossessed owner.[21] Some security of transaction was provided, however, for the possessor in good faith and just title who had possessed for three years or for a possessor without these qualities who had possessed for a thirty-year period.

French Law

The oldest rules of French law governing the conflict between owner and possessor seem to originate in the Germanic customs rather than the Roman law.[22] The customs did not allow a real action such as the *rei-vendicatio* of Roman law but they did provide a contractual action against one to whom the owner had entrusted his property.[23] In addition, if the property had been stolen, actions of a penal nature allowed the owner to regain his property even from a third party.[24] Except in this

15. The *Corpus Iuris Civilis* of Justinian was completed between 528 and 534 A.D., H. WOLFF, ROMAN LAW 163 (1951).

16. The term *usucapio* by this time was used exclusively to refer to the acquisitive prescription of movables. 2 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD § 646, at 216 (1917).

17. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 106 n.1 (La. St. L. Inst. transl. 1966); M. KASER, ROMAN PRIVATE LAW 108 (Dannenbring transl. 1965).

18. M. KASER, ROMAN PRIVATE LAW 108 (Dannenbring transl. 1965).

19. *Id.* at 114.

20. 1 A. YIANNOPOULOS, CIVIL LAW OF PROPERTY § 121, at 374 (1966). Even then, however, the owner may have had to settle for damages.

21. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 106 n.1 (La. St. L. Inst. transl. 1966).

22. *Id.*; 1 PLANIOL, CIVIL LAW TREATISE No. 2461 (La. St. L. Inst. transl. 1959).

23. 1 PLANIOL, CIVIL LAW TREATISE No. 2462 (La. St. L. Inst. transl. 1959). This action, however, was only available against the one to whom the property had been entrusted and did not apply to a third party who had acquired from him.

24. *Id.*; 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 107 n.1 (La. St. L. Inst. transl. 1966).

case, however, the early French law did not protect the owner against third persons in possession.

By the fifteenth century the renaissance of Roman law began to influence local French customs[25] and the revendictory action again appeared.[26] Planiol states it appeared as early as the fourteenth century and that by the sixteenth century it was established that an owner could follow his property regardless of how he had lost possession.[27] This rule was adopted by the city customs and particularly by the Custom of Paris which appeared in 1580.[28] A policy of law giving owners such extensive rights, however, soon began to meet opposition in a society that was becoming more commercial. Although most customs stated no prescriptive period for the owner's revendicatory action, French courts began to provide some security of transactions by limiting the period during which the owner could bring the action.[29] Many adopted a limit of three years apparently based on Justinian's rule of three-year acquisitive prescription of movables.[30] In addition, jurists returned to the old view that the action was not available at all against a third party when the owner had voluntarily parted with possession.[31]

Finally, security of sales transactions triumphed completely over security of ownership, and revendication was denied except in cases of lost or stolen goods.[32] This change was reflected by the maxim *"En fait de meubles, la possession vaut titre"* which was codified in Article 2279 of the Code Napoleon.[33] Thus the French law, after initially adopting the Roman view protecting

25. H. WOLFF, ROMAN LAW 183, 193 (1951).

26. 2 AUBREY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 107 n.1 (La. St. L. Inst. transl. 1966).

27. 1 PLANIOL, CIVIL LAW TREATISE No. 2466 (La. St. L. Inst. transl. 1959).

28. *Id.;* 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 107 n.1 (La. St. L. Inst. transl. 1966).

29. 1 PLANIOL, CIVIL LAW TREATISE No. 2468 (La. St. L. Inst. transl. 1959).

30. *Id.*

31. *Id.* No. 2469.

32. *Id.;* 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 106 (La. St. L. Inst. transl. 1966).

33. FRENCH CIV. CODE art. 2279 continues: *"Néanmoins celui qui a perdu ou anquel il a été volé une chose peut la revendiquer pendant trois ans, à computer du jour de la perte ou du vol, contre celui dans les mains duquel il la trouve; sauf à celui-ci son recours contre celui duquel il la tient."*

FRENCH CIV. CODE art. 2279 (Wright's transl. 1908): "With reference to movables, possession is considered equivalent to a title. But a person who has lost or who has been robbed of something can bring an action to recover it against any person he finds in possession thereof within three years of the date of the loss or robbery, and the latter has his right of action over against the person from whom he received it."

ownership, was forced to abandon it.[34] The rule finally settled upon was much like the original Germanic law, although it could hardly be said to be based upon it. Rather it evolved from commercial pressures in the seventeenth and eighteenth centuries.[35]

Having adopted this rule, the French had little trouble drafting complementary articles to implement it fully and provide such exceptions to it as justice and reason demanded. The French Code began with the basic rule that "with reference to movables, possession is considered equivalent to title."[36] The exception was then immediately added that if the owner lost the movable or it was stolen from him he had a period of three years during which he could recover it from anyone he found in possession.[37] Even during this three-year period, however, the possessor was protected if he acquired the property "at a fair or market or at a public sale, or from a merchant selling similar articles."[38] Then the original owner could not demand possession thereof except on condition of paying the person in possession the price he paid for it.

The French law distinguishes the situation where the owner has voluntarily parted with possession from the instance where he has been dispossessed involuntarily.[39] In the former case, although the owner retains all actions he may have against the person to whom he surrendered possession,[40] he has no real ac-

34. Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 593 (1932).

35. *Id.;* 1 PLANIOL, CIVIL LAW TREATISE No. 2469 (La. St. L. Inst. transl. 1959).

36. FRENCH CIV. CODE art. 2279. This article has been described as one of the most important provisions of French law by both French and Louisiana writers. 1 PLANIOL, CIVIL LAW TREATISE No. 2459 (La. St. L. Inst. transl. 1959); Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 593 (1932).

37. FRENCH CIV. CODE art. 2280. The Code does point out that the person in possession then has his right to recover from the person from whom he received the property. *Id.* art. 2279.

38. FRENCH CIV. CODE art. 2280 (Wright's transl. 1908). This article also specifies the same rule applies to a lessor who seeks to recover movables taken without his consent and bought under similar circumstances.

39. *See generally* AMOS & WALTON, INTRODUCTION TO FRENCH LAW 112 (2d ed. 1963). In addition, the French law distinguishes some movables where article 2279 does not apply at all: incorporeal movables, movables of the public domain, movables of historical value, ships, river boats over 20 tons, and airplanes. *Id.;* 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 108 (La. St. L. Inst. transl. 1966); 1 PLANIOL, CIVIL LAW TREATISE Nos. 2489, 2490 (La. St. L. Inst. transl. 1959).

40. Actions which the owner could bring include a contract action for restitution or the real action of revendication which would allow the owner to specifically recover his property. AMOS & WALTON, INTRODUCTION TO FRENCH LAW 113 (2d ed. 1963).

tion against a third person who acquired possession in good faith.[41] In the latter case, the owner preserves his right of revendication against the finder or the thief[42] and in addition he has a real action that he can bring within three years[43] against a third party in possession of the thing lost or stolen even if the third party acquired in good faith.[44] The harshness of this rule against an innocent third party is softened by the fact that the term "robbed" is interpreted strictly[45] and the provision of Article 2280 requires reimbursement of the innocent possessor if he acquired the goods at a fair, market, public sale, or from a merchant dealing in such goods.[46]

Although it is clear the French law protects security of sales transactions, French jurists disagree as to the proper theoretical explanation for the rule of Article 2279.[47] Since it is included in Title XX of the Code Napoleon, "Of Prescription," and more particularly in Chapter V, Section 4, headed "Of Various Periods of Prescription," it is argued by some that article 2279 provides for an instantaneous prescription. This explanation is rejected by Planiol[48] and Aubry and Rau,[49] however, as being a contradiction in terms since "acquisition by prescription pre-

41. For a discussion of the good faith requirement implied in French Civil Code article 2279 *see* AMOS & WALTON, INTRODUCTION TO FRENCH LAW 113 (2d ed. 1963); 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 111 (La. St. L. Inst. transl. 1966); 1 PLANIOL, CIVIL LAW TREATISE nº 2479 (La. St. L. Inst. transl. 1959); 1 A. YIANNOPOULOS, CIVIL LAW OF PROPERTY § 127, at 386, 388 (1966).

42. This real action of revendication only expires after 30 years. 2 AUBRY ET RAU, DROIT CIVIL FRANCAIS § 183, at 115 (La. St. L. Inst. transl. 1966). The owner may also have a personal action in tort that prescribes after ten years in the case of indictable theft (a crime) or three years in the case of simple theft (a misdemeanor). AMOS & WALTON, INTRODUCTION TO FRENCH LAW 114 n.l (2d ed. 1963); 1 PLANIOL, CIVIL LAW TREATISE No. 2484 (La. St. L. Inst. transl. 1959).

43. The time is counted from the day of the loss or theft. 1 PLANIOL, CIVIL LAW TREATISE No. 2485 (La. St. L. Inst. transl. 1959).

44. *Id.;* 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 115 (La. St. L. Inst. transl. 1966).

45. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 113 (La. St. L. Inst. transl. 1966); Note, 25 TUL. L. REV. 146, 148 (1950). A strict interpretation naturally brings fewer cases within this exception to the general rule that possession is considered equivalent to title.

46. The possessor himself must have bought it under such circumstances. It is not enough that some intermediate possessor did so. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 116 (La. St. L. Inst. transl. 1966).

47. *See generally* 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 107 n.1 (La. St. L. Inst. transl. 1966); 1 PLANIOL, CIVIL LAW TREATISE nos. 2493-2496 (La. St. L. Inst. transl. 1959); 1 A. YIANNOPOULOS, CIVIL LAW OF PROPERTY § 127, at 388 (1966); Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 594 (1932).

48. 1 PLANIOL, CIVIL LAW TREATISE nº 2494 (La. St. L. Inst. transl. 1959).

49. 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 107 n.1 (La. St. L. Inst. transl. 1966).

supposes a certain period of time has elapsed."[50] Another theory holds that through Article 2279 the law simply creates a special means of acquiring ownership.[51] This explanation is subject to the criticism that it does not explain how the law does this but merely describes the result of the law in operation.[52] The explanation apparently favored by the more prominent French writers[53] is that Article 2279 creates an irrebuttable presumption of ownership in favor of the possessor. Upon closer examination, however, even this explanation appears to be only a rationalization for the result the French codifiers wished to achieve.

Whatever may be its rationale, the end result of the French law today is to favor the possessor of a movable to the exclusion of the dispossessed owner in all but a few situations. These exceptions to the general rule, cases of loss or theft, are merely those where common ideas of justice dictate some protection for the owner and even in these cases the owner's remedy is not absolute. Further, the history of the rule and its incongruity with the French law protecting ownership in immovables indicates it evolved in response to the needs of a commercial society.[54] Its origin can best be found in reasons of policy rather than strict French legal theory.

Spanish Law

The rules on acquisitive prescription of movables now found in the Spanish Civil Code[55] are similar to the rules of Justinian but to say they originated there would be a gross oversimplification. Certainly Roman law was the dominant influence in Spain while Rome governed that peninsula,[56] but following the expulsion of the Romans by the Visigoths new laws and codes were introduced.[57] The same pattern was repeated when the Arabs entered Spain in the eighth century.[58] Since in each case portions of the old laws remained and mixed with the new, Spanish law came to be a complexity of often conflicting and over-

50. *Id.*
51. 1 PLANIOL, CIVIL LAW TREATISE nº 2495 (La. St. L. Inst. transl. 1959).
52. *Id.*
53. *Id.* nº 2496; 2 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 183, at 107 n.3 (La. St. L. Inst. transl. 1966).
54. *See* Charmont, *The Conflict of Interests Legally Protected in French Civil Law*, 13 ILL. L. REV. 461, 467 (1919).
55. *See* SPANISH CIV. CODE arts. 1940, 1941, 1955, 1956.
56. The Roman domination in Spain extended from before the time of Christ until about the year 466 A.D., 1 LAS SIETE PARTIDAS, *Preface by translators* iv (Lislet & Carleton transl. 1820). A historical outline of Spanish law can be found in G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO (1851).
57. G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO 24 (1851).
58. *Id.* at 61.

lapping codes and customs.[59] The leading effort to introduce order into this system was the publication of *Las Siete Partidas* by Alphonso the Learned in 1263.[60] It was not until almost a century later, however, that this code or digest was accepted throughout Spain.[61]

The *Institutes* of Justinian greatly influenced *Las Siete Partidas,* especially the third *partidas* dealing with prescription.[62] When *Las Siete Partidas* was read with other Spanish laws still in effect, the result was to allow an owner to reclaim his property for a period of three years even from a good faith possessor.[63] If the owner had lost his goods, or they were stolen from him, the period was lengthened to thirty years.[64] No exceptions based upon the good faith possessor's mode of acquisition were made.

Basically, these same rules were retained in 1889 when a new Civil Code was promulgated in Spain to supersede the existing mass of laws.[65] Article 464 of that Code appears to establish a new rule by stating that "the possession of personal property acquired in good faith is equivalent to a title thereto,"[66] but this is immediately qualified by adding that if the owner "has lost personal property or has been unlawfully deprived of it" he may recover it "from any person possessing it."[67] The good faith possessor is protected only to the extent that if he purchased the property "in good faith at a public sale" the owner must reimburse him the price he paid.[68] In addition, Article 464 must be read with other articles which provide that open possession,[69] in good faith and with a just title,[70] confers ownership by prescription only after three years.[71] In the absence of

59. 1 LAS SIETE PARTIDAS, *Preface by translators* vi (Lislet & Carleton transl. 1820).
60. *Id.* at vii; G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO 69, 74 (1851).
61. G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO 74 (1851).
62. *Id.* at 70, 71; 1 LAS SIETE PARTIDAS, *Preface by translators* vii (Lislet & Carleton transl. 1820); Comment, 4 TUL. L. REV. 78, 83 (1930).
63. ASSO Y DEL RIO, INSTITUTES OF THE CIVIL LAW OF SPAIN 108 (Johnston transl. 1825); 2 LAS SIETE PARTIDAS L. 19, tit. 5, p. 5 (Lislet & Carleton transl. 1820); G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO arts. 1365, at 288, and 1374, at 290 (1851).
64. G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO art. 1378, at 291 (1851).
65. F. FISHER, THE CIVIL CODE OF SPAIN WITH PHILIPPINE NOTES, *Preface* vi (4th ed. 1930).
66. *Id.* art. 464.
67. *Id.*
68. *Id.*
69. *Id.* art. 1941.
70. *Id.* art. 1940.
71. *Id.* art. 1955.

these qualities a six-year period is required,[72] with the exception that a thief or robber cannot acquire by prescription until the penal and civil liabilities for his crime have also been barred by prescription.[73] Therefore the Spanish law today remains consistent to its Roman tradition as expressed in *Las Siete Partidas* and protects security of ownership rather than commercial transactions.

Common Law

Just as the codifications of Roman, French, and Spanish law stated general maxims and then qualified their application with exceptions that the codifiers felt justified, so the body of case law in England established first a general rule and then exceptions to it. The courts founded their exceptions upon equitable principles, the most important of which deal with fraudulent conveyances and equitable estoppel. Since these exceptions were tailored on a case by case basis,[74] however, the equities of different factual situations led to more exceptions and often to artificial distinctions between situations.

The basic rule of the English common law in dealing with the conflict between a good faith possessor of goods and their original owner was that the buyer of goods obtained no better title than the seller himself possessed.[75] Thus generally one who purchased from a thief, even if he did so in good faith, could not prevail against the true owner.[76] Just as similar rules in the French city customs did not long prevail, however, a policy as harsh as this on English commercial transactions did not survive long without exceptions.

The exceptions in English law arose to protect purchasers who were genuine innocent parties.[77] Since the law was faced with a conflict between two parties, the owner and the purchaser, either of whom in other circumstances would have an interest the law would protect, it was imperative that the purchaser be truly in good faith if he was to prevail at all.[78] Those

72. *Id.*
73. *Id.* art. 1956.
74. *See generally* P. JAMES, INTRODUCTION TO ENGLISH LAW 10 (3d ed. 1955).
75. N. ROTWEIN & C. PHILLIPS, PERSONAL PROPERTY § 55, at 46 (1949); 2 S. WILLISTON, SALES OF GOODS § 310, at 240 (rev. ed. 1948); 77 C.J.S. *Sales* § 291, at 1099 (1952).
76. N. ROTWEIN & C. PHILLIPS, PERSONAL PROPERTY § 55, at 46 (1949); Comment, 32 YALE L.J. 497 (1923).
77. L. VOLD, THE LAW OF SALES § 79, at 401 (2d ed. 1959).
78. *See generally* 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 745, at 19 (5th ed. 1941).

purchasers who were in good faith came to be grouped under the title "bona fide purchasers" and certain requirements evolved which a purchaser had to meet to fall within that group.

The rule most often stated was that in order for one to qualify as a bona fide purchaser he must have purchased in good faith, without notice, and for a valuable consideration.[79] Thus one who acquired as a gift,[80] or at a grossly inadequate price,[81] or with notice that the seller was not the true owner[82] could not qualify as a bona fide purchaser. Even if one did qualify as a bona fide purchaser, however, that alone did not exempt him from the general common law rule that the buyer of goods obtained no better title than the seller possessed.[83]

The first exception to the general rule arose in connection with goods purchased at certain chartered county fairs or markets.[84] These were called "market overt"[85] and the common-law principle became that a bona fide purchaser in market overt obtained valid title even as against the original owner.[86] Later this exception was extended to include sales in the cities made by shops that regularly dealt in such goods.[87] The need for security of commercial transactions obviously influenced the courts in creating this exception.[88] Such fairs or chartered markets never became common in the United States, however, and although America had its share of shopkeepers, the American common-

79. *Id.*

80. Beeson v. Byars, 187 Ark. 966, 63 S.W.2d 540 (1933); Kohn v. Burke, 294 Pa. 282, 144 A. 75 (1928).

81. Tinnin v. Brown, 98 Miss. 378, 53 So. 780 (1910); Strong v. Strong, 128 Tex. 470, 98 S.W.2d 346 (1936).

82. Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 So. 773 (1887); Craig Brokerage Co. v. Joseph A. Goddard Co., 92 Ind. App. 234, 175 N.E. 19 (1931). *But cf.* Dudley v. Lovins, 310 Ky. 491, 220 S.W.2d 978 (1949); Russell Willis, Inc. v. Page, 213 S.C. 156, 48 S.E.2d 627 (1948).

83. 2 S. WILLISTON, SALES OF GOODS § 311, at 241 (rev. ed. 1948); 77 C.J.S. *Sales* § 291, at 1099 (1952).

84. 2 S. WILLISTON, SALES OF GOODS § 347, at 347 (rev. ed. 1948).

85. BLACK, LAW DICTIONARY 1122 (4th ed. 1951): "Market Overt. In English law, an open and public market. The market-place or spot of ground set apart by custom for the sale of particular goods is, in the country, the only market overt; but in London every shop in which goods are exposed publicly to sale is market overt, for such things only as the owner professes to trade in."

86. 2 S. WILLISTON, SALES OF GOODS § 347, at 347 (rev. ed. 1948); 46 AM. JUR. *Sales* § 462, at 625 (1943).

87. See note 86 *supra;* BLACK, LAW DICTIONARY 1122 (4th ed. 1951). Note the similarity between the situations embraced by the common law doctrine of market overt and the words of FRENCH CIV. CODE art. 2280 (Wright's transl. 1908): "[A] fair or market or at a public sale, or from a merchant selling similar articles...."

88. L. VOLD, THE LAW OF SALES § 78, at 392 (2d ed. 1959).

law jurisdictions never adopted the English doctrine of market overt.[89]

Other exceptions to the general rule that even a bona fide purchaser acquires no better title than his vendor arose in England and were accepted by the American courts.[90] If the object of the sale was negotiable itself, as in the case of money or bank notes, overriding considerations of negotiability precluded the application of the general rule.[91]

Another exception also accepted in American common law jurisdictions arose when the seller obtained goods from the original owner by fraud. Generally, if the seller obtained property by fraud he received not a void title but a voidable one.[92] Thus if the seller sold to the bona fide purchaser before the owner voided this title the bona fide purchaser received a valid title and would prevail against the owner.[93] Although this principle seems logical enough, rather technical distinctions arose as the courts applied it to factual situations.[94] If the seller obtained merely the possession of the property by fraud he had no title at all and thus the owner would prevail against the bona fide vendee.[95] If he obtained title to the goods by fraud, as in a case where he fraudulently induced the owner to sell the goods to him by misrepresentation or impersonation, he obtained a voidable title and the bona fide purchaser would prevail.[96] Traditionally a distinction was made at common law between fraudulent sales made face to face and sales made at a distance.[97] In the former case, title passed because of the fictional intent imputed by the court to the seller to vest title in the person physically before him. In the latter case, no title passed because there was an in-

89. *Id.;* Note, 27 MICH. L. REV. 218 (1929); 77 C.J.S. *Sales* § 293, at 1100 (1952).

90. *See generally* 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 735, at 3 (5th ed. 1941); N. ROTWEIN & C. PHILLIPS, PERSONAL PROPERTY § 56, at 47 (1949); 2 S. WILLISTON, SALES OF GOODS § 310, at 240 (rev. ed. 1948).

91. N. ROTWEIN & C. PHILLIPS, PERSONAL PROPERTY § 56, at 47 (1949); L. VOLD, THE LAW OF SALES § 78, at 392 (2d ed. 1959).

92. N. ROTWEIN & C. PHILLIPS, PERSONAL PROPERTY § 58, at 48 (1949).

93. *Id.;* 77 C.J.S. *Sales* § 294, at 1101 (1952).

94. These distinctions are criticized in Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 594, 607 (1932).

95. United States v. Barnard, 72 F. Supp. 531 (W.D. Tenn. 1947); Swartz v. White, 80 Utah 150, 13 P.2d 643 (1932).

96. Moore v. Long, 250 Ala. 47, 33 So.2d 6 (1947); Thomas E. Hogan, Inc. v. Berman, 310 Mass. 259, 37 N.E.2d 742 (1941).

97. 3 S. WILLISTON, SALES OF GOODS § 635, at 444 (rev. ed. 1948).

tent to vest title in a certain person but not in the person who actually took possession.[98]

This emphasis upon title also affected cases involving conditional sales.[99] If an owner sold goods and reserved only a security interest, the buyer received title and thus he could pass it on to a bona fide purchaser.[100] If, on the other hand, an owner only conditionally sold goods and reserved the title in himself, he would prevail against a subsequent bona fide purchaser.[101]

Courts of equity in England also found ways to circumvent the traditional common law rule which was often harsh on the innocent purchaser. Their decisions were not based on distinctions between void and voidable title but rather on the equitable principle of estoppel. Thus if the original owner of goods had acted in any way to preclude himself from attacking a bona fide purchaser's title, the bona fide purchaser would prevail.[102] An example of this would be if the original owner had clothed the seller with some indicium of ownership or authority to sell the property in question.[103] Indicium of ownership might be found in some document such as an invoice or in statements made in the presence of others, but merely putting another into possession was generally not held sufficient to deny the owner his property.[104] It was also necessary that he create some apparent power in the seller to dispose of the goods and that the purchaser rely on that power.[105]

As these distinctions were applied to actual cases it was

98. This was the often criticized common law distinction between sales *inter praesentes* and sales *inter absentes*. *See* Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 607 (1932); Note, 23 TUL. L. REV. 420, 421 (1949).

99. N. ROTWEIN & C. PHILLIPS, PERSONAL PROPERTY § 59, at 49 (1949); 2 S. WILLISTON, SALES OF GOODS § 324, at 265 (rev. ed. 1948).

100. Wooten v. Carrollton Acceptance Co., 103 Fla. 237, 137 So. 390 (1931); Freemen v. Kraemer, 63 Minn. 242, 65 N.W. 455 (1895).

101. Weinstein v. Freyer, 93 Ala. 257, 9 So. 285 (1891); Bousquet v. Mack Motor Truck Co., 269 Mass. 200, 168 N.E. 800 (1929). In England and most American states, however, this general rule has now been modified by recording statutes. 2 S. WILLISTON, SALES OF GOODS § 327, at 276 (rev. ed. 1948).

102. M. BIGELOW, TREATISE ON THE LAW OF ESTOPPEL 607 (6th ed. 1913); 2 S. WILLISTON, SALES OF GOODS § 312, at 242 (rev. ed. 1948). This is apparently based on the equitable maxim: "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss." L. VOLD, THE LAW OF SALES § 30, at 117 (2d ed. 1959).

103. J. L. McClure Motor Co. v. McClain, 34 Ala. App. 614, 42 So.2d 266 (1949) (owner allowed seller to have automobile title papers); Lasser v. Philadelphia Nat'l Bank, 321 Pa. 189, 183 A.2d 791 (1936) (seller displayed owner's property with owner's consent).

104. 2 S. WILLISTON, SALE OF GOODS § 313, at 244 (rev. ed. 1948), and cases there cited.

105. N. ROTWEIN & C. PHILLIPS, PERSONAL PROPERTY § 57, at 47 (1949).

inevitable that different courts would decide upon different rules in almost identical factual situations.[106] In addition, these exceptions to the general rule became so numerous that it was often difficult to remember they were just exceptions. Some writers have even referred to the "bona fide purchaser doctrine" as stating a rule of common law and treated as exceptions to that rule the cases in which the original owner prevailed over the bona fide purchaser.[107] The entire area presented many difficult problems for the American common-law courts but many of the most difficult ones were rendered moot by the adoption of the Uniform Commercial Code in those states.

The Uniform Commercial Code

Uniform Commercial Code Section 2-403 provides in Subsection one:

"(A) person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

"(a) the transferor was deceived as to the identity of the purchaser, or

"(b) the delivery was in exchange for a check which is later dishonored, or

"(c) it was agreed that the transaction was to be a "cash sale," or

"(d) the delivery was procured through fraud punishable as larcenous under the criminal law."[108]

Subsection two provides that "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business."[109]

Subsection one greatly simplifies the problem of a court faced with a case where possession was secured by fraud, a bad check, or similar means. In keeping with the Uniform Commercial Code objective of promoting security in business transactions, the good faith purchaser for value is protected in these cases. Be-

106. 2 S. WILLISTON, SALES OF GOODS § 324, at 265, § 325, at 269 (rev. ed. 1948) (different rules applied to conditional sales); L. VOLD, THE LAW OF SALES § 30, at 172 (2d ed. 1959) (different rules applied to bad check sales).

107. Note, 23 TUL. L. REV. 420, 421 (1949).

108. UNIFORM COMMERCIAL CODE § 2-403(1).

109. *Id.* § 2-403(2).

cause subsection one is limited to cases of purchase where there is at least a voidable title, however, the rule remains unchanged that one who purchases from a thief is not protected against the claim of the true owner.

Subsection two covers many situations the courts formerly disposed of on principles of equitable estoppel. Subsection two goes further, however, and extends the estoppel doctrine to "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind."[110] Thus it appears, for example, that if one entrusts a family heirloom with a jeweler for repair and the jeweler customarily sells jewelry, the owner will be denied the right of asserting his ownership against a bona fide purchaser for value. The rule is obviously drawn to protect commercial transactions, but it is also rigid and unflexible. Courts operating under the Uniform Commercial Code no longer have the opportunity to weigh the relative equities of particular cases, but instead must apply the hard and fast rule. Whether the courts will in the future apply it faithfully is an unanswered question.

THE LOUISIANA LAW

Sources

The sources of the Louisiana Civil Code provisions governing the conflict between possessor and owner are an anomaly. The pertinent Civil Code articles are found in sections dealing with the contract of sale and the acquisitive prescription of property. In both of these areas the Louisiana law borrowed heavily from the French Code yet on this issue the French influence is conspicuous in its absence. The crucial article in the French Code, Article 2279, provides that "[w]ith reference to movables, possession is considered equivalent to a title." This was not followed in the Louisiana codification. Instead the Digest of 1808 provided that "[i]f a man has had a public and notorious possession of a movable thing, during three years, . . . the property becomes vested in the possessor, unless the thing has been stolen."[111] Since it is inconceivable the redactors of the Louisiana law could have overlooked the French article, the logical conclusion must be that they considered the French view and rejected it. If this is true, their decision could hardly be considered other than one of basic policy. They were not bound by theory as they were drafting a new code, and, in fact, the French Code which was their

110. *Id.*

111. La. Civ. Code bk. 111, tit. 20, ch. 3, § 3, art. 75, at 488 (1808) (now LA. CIV. CODE art. 3506).

model[112] dictated a contrary result. It is interesting to note, however, that while they rejected the maxim of Code Napoleon Article 2279, the influence of that article can still be found in other Louisiana code articles copied from the French.[113] Louisiana Civil Code Article 1922,[114] for example, was taken from the French Code and assumes the presence of Article 2279. Similarly the failure to recognize a chattel mortgage in Louisiana until modern times can be traced to French jurisprudence which in turn was based on Article 2279.[115]

If the redactors of the Digest of 1808 considered and rejected the French doctrine, upon what then did they base the Louisiana law? It may be that the Louisiana Code articles were based upon the ideas found in the customs of the French cities, especially the Custom of Paris.[116] This view is strengthened by the fact that the redactors of the Louisiana Code must have been familiar with the French doctrinal writers and their commentaries on these customs.[117]

The more likely explanation of the Louisiana Code articles, however, is that they were based on the Spanish law in effect in Louisiana when the Digest of 1808 was compiled.[118] The primary provisions of that law dealing with property were found in *Las Siete Partidas*.[119] The Louisiana codifiers were familiar with this and in determining a basic policy question such as the conflict between security of ownership and security of transaction it is not surprising they looked to and adopted the law then

112. The generally accepted view is that the Louisiana jurists had available a copy of the French Civil Code as adopted in 1804 rather than just a projet of it. J. Dainow, *The Louisiana Civil Law*, in CIVIL CODE OF LOUISIANA xiii, xx (2d ed. Dainow 1961).

113. Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 601 (1932).

114. LA. CIV. CODE art. 1922: "With respect to movable effects, although, by the rule referred to in the two last preceding articles, the consent to transfer vests the ownership of the property in the obligee, yet this effect is strictly confined to the parties until actual delivery of the object. If the vendor, being in possession, should, by a second contract, transfer the ownership of the property to another person, who gets the possession before the first obligee, the last transferee is considered as the owner, provided the contract be made on his part *bona fide*, and without notice of the former contract." *Cf.* FRENCH CIV. CODE art. 1141.

115. *See* Daggett, *The Chattel Mortgage in Louisiana*, 16 TEXAS L. REV. 162 (1938).

116. Comment, 4 TUL. L. REV. 78, 81 (1930).

117. *Id.* at 81, 83 n.19.

118. *Id.* at 80, 82; Note, 4 TUL. L. REV. 146 (1930). *See* 1 LAS SIETE PARTIDAS, *Preface by translators* xviii (Lislet & Carleton transl. 1820) as to the force of the Spanish laws in Louisiana at the time.

119. The importance of *Las Siete Partidas* to the early Louisiana jurists is emphasized in 1 LAS SIETE PARTIDAS, *Preface by translators* (Lislet & Carleton transl. 1820). The full title of this translation is *The Laws of Las Siete Partidas, Which are Still in Force in the State of Louisiana.*

in effect. *Las Siete Partidas*[120] definitely implied the owner could recover his goods and specified the remedies available to an innocent purchaser. It also provided that movables could be acquired by prescription,[121] but this was qualified by a provision which specified that the possessor acquired ownership only after three years uninterrupted good faith possession with just title.[122] It declared further that after three years the original owner could no longer recover his goods unless they were stolen, lost, or taken from him by violence.[123] In these cases the owner could recover within thirty years.[124] The similarity between the provisions of Spanish law and Article 3506 of the Louisiana Code can readily be seen. Both provide that a possessor acquires ownership only after three years and then only if he meets certain requirements and the goods in question were not lost or stolen.

Having departed from the French law to adopt the principle now found in Louisiana Civil Code Article 3506, the Louisiana codifiers quickly returned to the French Code and copied Article 76 of the Digest of 1808[125] almost verbatim from Code Napoleon Article 2280. These articles provide that even if the property were lost or stolen, if the possessor acquired it at a public market, fair, auction, or from one dealing in such goods, the original owner cannot recover his property without reimbursing the possessor the price he had paid. It is not unreasonable to suppose that the Louisiana redactors, having settled on a principle in Article 3506, which was harsh to possessors in good faith, were willing to relax that strict rule and afford the possessor some degree of protection if he had purchased in certain open markets.[126]

Although neither the Code Napoleon nor the Digest of 1808 dealt further with the subject, the code revision of 1825 added two articles to the Louisiana law. Article 3474 of that Code[127] created an exception to the general rule of security of ownership by protecting the purchaser of stray animals or lost mov-

120. 2 LAS SIETE PARTIDAS L. 19, tit. 5, p. 5 (Lislet & Carleton transl. 1820).
121. 1 LAS SIETE PARTIDAS L. 4, tit. 29, p. 3 (Lislet & Carleton transl. 1820).
122. 1 LAS SIETE PARTIDAS L. 9, tit. 29, p. 3 (Lislet & Carleton transl. 1820).
123. *Id.*
124. 1 LAS SIETE PARTIDAS L. 21, tit. 29, p. 3 (Lislet & Carleton transl. 1820).
125. La. Civ. Code bk. III, tit. 20, ch. 3, § 3, art. 76, at 488 (1808) (now LA. CIV. CODE art. 3507).
126. By copying the wording of the French provision so closely, however, the Louisiana redactors created a problem in interpreting the Louisiana articles. See text at note 135 *infra*.
127. Now LA. CIV. CODE art. 3508.

ables which had been sold by authority of law. Article 3475[128] protected security of transactions after ten years in all cases by providing that uninterrupted possession for that period was sufficient to acquire ownership even without good faith or just title. The addition of these articles can be logically explained as concessions to the need for security of transactions which was beginning to be felt in Louisiana even then.[129]

Although the source of the Louisiana law in this area is not certain, it seems that after considering and rejecting the French policy the redactors of 1808 codified the existing Spanish law in Louisiana which protected security of ownership. This was tempered somewhat by the adoption of Article 2280 of the Code Napoleon and modified further in 1825 to offer some protection to transactions. The decision of 1808 not to accept the French view that "possession is considered equivalent to a title" was basically one of policy and it is the foundation upon which the present code structure rests.

The Present Louisiana Code Structure

The Louisiana Civil Code definitely protects security of ownership at the expense of security of transactions. Article 2452 states that "[t]he sale of a thing belonging to another person is null" and implies the true owner can recover his property by specifying that an innocent buyer would then have a claim for damages against the seller. Article 496 makes it clear that the possession of a thing and the ownership of it are distinct so that an owner does not part with ownership by merely parting with possession of his property unless it is for a period sufficient to allow the possessor to acquire ownership by prescription. Article 3506 provides that the period of possession necessary to acquire ownership of movables is at least three years. To acquire in this period certain requirements must be met: the possessor must have possessed "in good faith and by a just title, as owner, . . . during three successive years without interruption"[130] and the property must not have been lost or stolen from the original owner. If any of these requirements are not met, Article 3509 provides that ten years possession is needed to acquire ownership.

Article 3507, while not affecting the rule of Article 3509 that

128. Now *id.* art. 3509.

129. No doubt French commentators writing on the Code Napoleon also exerted an influence. *See* Dainow, *The Louisiana Civil Law*, in CIVIL CODE OF LOUISIANA xxiii (2d ed. Dainow 1961).

130. LA. CIV. CODE art. 3506.

ownership of lost or stolen movables is acquired only after ten years, does provide that in the event the possessor of such property bought it "at public auction or from a person in the habit of selling such things,"[131] the true owner must reimburse the possessor the price he paid in order to reclaim it. From the words of Article 3507[132] it would seem that the duty to reimburse arises and protects the purchaser as soon as he acquires the property. This is the view given to the corresponding Article 2280[133] in France.[134] In France, however, Article 2280 must be read with Article 2279[135] and the two together provide that possession of lost or stolen movables is not considered equivalent to title but the owner can reclaim them only if he reimburses the possessor.[136] Louisiana, however, did not adopt the maxim of Code Napoleon Article 2279 but rather provided the three-year prescriptive period of Article 3506. If Article 3507 were interpreted as giving rise to an immediate right to reimbursement in Louisiana as it does in France, therefore, the possessor who bought lost or stolen goods at an auction or from a person in the habit of selling such goods would be in a better position than a possessor who bought goods not lost or stolen under similar circumstances.[137] This incongruity results from the Louisiana codifiers adopting Article 2280 of the French Code while rejecting Article 2279 upon which it depends. The Louisiana Supreme Court, to avoid this unintended result, rule that the provisions of Article 3506 must be considered as part of Article 3507; therefore the right of the possessor to demand reimbursement does not arise until after he has had possession for three years.[138] While this interpretation of Article 3507 is inconsistent with its source, it is necessary to prevent inconsistency within the Louisiana Code itself.[139]

131. *Id.* art. 3507.

132. *Id.*: "If, however, the possessor of a thing stolen or lost bought it at public auction or from a person in the habit of selling such things, the owner of the things can not obtain restitution of it, without returning to the purchaser the price it cost him."

133. FRENCH CIV. CODE art. 2280.

134. 1 PLANIOL, CIVIL LAW TREATISE nº 2486 (La. St. L. Inst. transl. 1959); 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS § 183, at 115 (La. St. L. Inst. transl. 1966); Comment, 4 TUL. L. REV. 78, 79 (1930).

135. FRENCH CIV. CODE art. 2279.

136. 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS § 183, at 115 (La. St. L. Inst. transl. 1966); 1 PLANIOL, CIVIL LAW TREATISE nº 2486 (La. St. L. Inst. transl. 1959).

137. Comment, 4 TUL. L. REV. 78, 84 (1930). *See also* Security Sales Co. v. Blackwell, 167 La. 667, 120 So. 45 (1928).

138. Security Sales Co. v. Blackwell, 167 La. 667, 120 So. 45 (1928), citing with approval Campbell v. Nichols, 11 Rob. 16 (La. 1845) and Davis v. Hampton, 4 Mart.(N.S.) 288 (La. 1826).

139. See note 138 *supra*. *See also* Comment, 4 TUL. L. REV. 78, 84 (1930).

Finally, the Louisiana Code still provides as it did in 1825 that purchasers of stray animals or lost movables sold by authority of law will be protected in their possession even against the true owner.[140] The need for security of judicial sales justifies this rule today just as it did in 1825.

Modern Legislation

In addition to the Louisiana Civil Code articles, there has been recent legislation protecting the security of commercial transactions and the good faith purchaser from liens that may have been placed upon movables by the original owner. Louisiana Revised Statutes 32:710 provides:

> "[H]olders of chattel mortgages on motor vehicles, chattels, property or merchandise of any nature or kind who expressly or impliedly consent to such chattels being placed on sale by the owner thereof in the State of Louisiana in the usual course of business shall be precluded from asserting the said mortgage or the lien created by it against bona fide retail purchasers in actual good faith of said motor vehicles, chattels, merchandise or property."

Holders of the mortgages are deemed to have impliedly consented whenever the mortgagor is a wholesaler, retailer, or dealer duly licensed to sell the type of chattel or merchandise covered by the mortgage.[141] In protecting the security of transaction in such cases the legislature has placed a greater burden on the lending institutions by forcing them to rely on personal surety contracts and to make more frequent inventory inspections.

There is other recent legislation which would seem to affect the conflict between original owner and good faith purchaser in cases involving motor vehicles but the Louisiana courts have ruled otherwise. Louisiana Revised Statute 32:705 provides:

> "[No] person shall sell a vehicle without delivery to the purchaser thereof, whether such purchaser be a dealer or otherwise, a certificate of title issued under this Chapter in the name of the seller with such signed endorsement of sale and assignment thereon as may be necessary to show title in the purchaser. . . ."

Revised Statute 32:706 further provides:

140. LA. CIV. CODE art. 3508.
141. *Cf.* LA. R.S. 9:5354 (1950) for the rule as to all chattel mortgages.

> "[No] person buying a vehicle from the owner thereof, whether such owner be a dealer or otherwise, hereafter shall acquire a marketable title in or to said vehicle until the purchaser shall have obtained a certificate of title to said vehicle. . . ."

With the adoption of this legislation it was argued that it changed the provisions of the Civil Code on completion of a sale. The jurisprudence answered this contention by stating that the motor vehicle legislation did not make the sale of a motor vehicle void if the transfer was not executed in conformity with the statute, but simply caused the title to be imperfect until the certificate was acquired.[142] Thus the failure to comply with the provisions of Revised Statutes 32:705 and 706 does not prevent the passage of title nor does it preclude the bona fide purchaser from prevailing.

LOUISIANA JURISPRUDENCE

Historical Development

The first mention of the common-law exceptions in the Louisiana jurisprudence was not in relation to movables, but in cases concerning fraudulent conveyances of slaves, immovable by operation of law.[143] *Miles v. Oden,*[144] concerning a Kentucky contract, cited the rule of *Fletcher v. Peck*[145] "that a bona fide purchaser is not affected by fraud in his vendor, who has a legal title to the property sold."[146] This was a recognition of the common-law rule that a purchaser in good faith for a valuable consideration and without notice of the prior adverse claims is protected against certain suits by the holders of such claims. In this case the bona fide purchaser acquired from one who had title, although fraudulently acquired, and the intervention of the third party bona fide purchaser cut off the rights of the original owner. However, in that case the court recognized the rule only as the law "under which this transaction took place," that is, Kentucky.[147] But later that year the same court apparently applied the rule to a Louisiana sale of slaves.[148] Subsequent decisions continued to recognize the rule.[149]

142. Flatte v. Nichols, 233 La. 171, 96 So.2d 477 (1957).
143. LA. CIV. CODE art. 461 (1825).
144. 8 Mart.(N.S.) 214 (La. 1829).
145. 10 U.S. (6 Cranch) 87 (1810).
146. 8 Mart.(N.S.) 214, 227 (La. 1829).
147. *Id.*
148. Thomas v. Mead, 8 Mart.(N.S.) 341 (La. 1829).
149. Russel v. Favier, 18 La. 585 (1841). Plaintiff delivered a slave under contract of hire to Bruner who sold to defendant in New Orleans. The court held

In the early nineteenth century cases involving transfers of true movables, the Louisiana courts tested the bona fide purchaser's rights according to the standard of the common law exception concerning fraudulent acquisitions,[150] but were reluctant to raise the equitable issue of estoppel. Thus where movables consigned for shipment were sold by the consignee, the original owner was protected because no title passed, but no inquiry was made as to the presence of such indicia of ownership pointing to an estoppel.[151]

The doctrine of equitable estoppel was acknowledged in the case of *Moore v. Lambeth*[152] as having been "frequently recognized in our jurisprudence."[153] The court described the doctrine as the situation where one man who has title stands by and either encourages or does not forbid the purchase by another, in which case he will be precluded from later asserting his ownership. In this case, however, the court found no estoppel. By mid-nineteenth century the courts faced the increasing problem of unauthorized sales and pledges of goods shipped to New Orleans as part of the expanding river commerce. The problem of the conservatism of the Civil Code was reflected by the remarks of one justice in his review of the record of the district court:

> "The learned judge kept the case for a long time under advisement, under the hope, as he states in his opinion, that his researches would lead him to some legal ground on which relief might be extended to the defendants, as he considered it essential to the security of commercial dealings and to the protection of good faith."[154]

In supplying the theory sought by the lower court, the court turned to the common law authorities and found that the original owner allowed a dealer to hold himself out as the ostensible owner and thus allowed third persons to rely on that action. This was the first decision to deprive the original owner of his movable property because of equitable estoppel.[155]

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that no title passed in the Mississippi sale; therefore plaintiff recovered the slave and defendant recovered his purchase price under warranty resulting from the Louisiana sale. Barfield v. Hewlett, 4 La. 118 (1832). Slaves had been delivered under contract of hire to one Harraldson who sold them at public sale. The court said: "It is clear the defendant acquired no title, his vendor having none himself, nor any authority to convey any."

150. *E.g.*, Marks v. Landry, 9 Rob. 525 (La. 1845) (raft of timber).
151. Campbell v. Nichols, 11 Rob. 16 (La. 1845) (carriage).
152. 5 La. Ann. 66 (1850).
153. *Id.* at 74.
154. Fullerton v. Kennedy, 6 La. Ann. 312 (1851).
155. See text accompanying note 102 *supra*.

Whereas this latter case expressly found no agency relationship between the parties, the case of *Conner v. S. L. Hill & Co.*,[156] decided the same year, applied the doctrine of estoppel to the unauthorized act of an agent. In that case the plaintiff sent his son with a flatboat load of corn to New Orleans for sale. The son returned to Tennessee after having represented his helper, Allen, as his partner with authority to sell the corn which he represented as theirs. Allen sold the boat and produce and absconded with the proceeds. Holding for the defendant the court said, "The plaintiff has lost his property by his own imprudence in confiding it to the inexperience of his son without responsibility, and must bear the loss, rather than impose it upon innocent third persons."[157] Citing one of the salve cases,[158] the court pointed out how an owner may be estopped from reclaiming his property from a bona fide purchaser by having voluntarily placed in the hands of another the indicia of ownership and exhibited him as having the power to dispose of it. Although *Conner v. S. L. Hill & Co.* has been declared effectively overruled by one decision,[159] which is distinguishable on the facts, it nevertheless has been cited in the recent jurisprudence.[160]

Also discernible from the history of the jurisprudence are two other general categories of cases: (1) those dealing with the authority of cotton factors to pledge cotton or warehouse receipts,[161] (2) and those dealing with sales of automobiles.[162] Both lines of decisions will be discussed more fully below. By the end of the nineteenth century the courts had recognized that the French doctrine of *possession vaut titre* was not part of our

156. 6 La. Ann. 7 (1851).
157. *Id.* at 8.
158. Moore v. Lambeth, 5 La. Ann. 66 (1850).
159. Holloway v. A. J. Ingersoll Co., 133 So. 819 (La. App. 2d Cir. 1931).
160. In *Conner* the court found enought indicia of ownership and apparent authority to estop the original owner, whereas in the *Holloway* case there was no such evidence. *See* William Frantz & Co. v. Fink, 125 La. 1013, 52 So. 131 (1910); James v. Judice, 140 So.2d 169 (La. App. 3d Cir. 1962).
161. Holton v. Hubbard, 49 La. Ann. 715, 22 So. 338 (1897) (rice); Laland v. His Creditors, 42 La. Ann. 705, 7 So. 895 (1890); Stern Bros. v. Germania Nat'l Bank, 34 La. Ann. 1119 (1882); Young v. Scott, 25 La. Ann. 313 (1873); Tatum v. Wright, Williams & Co., 7 La. Ann. 358 (1852); Leverich v. Richards, 1 La. Ann. 348 (1846). See text accompanying note 195 *infra*.
162. Flatte v. Nichols, 233 La. 171, 96 So.2d 477 (1957); Jeffrey Motor Co. v. Higgins, 230 La. 857, 89 So.2d 369 (1956); Fisher v. Bullington, 223 La. 368, 65 So.2d 880 (1953); Packard Fla. Motors Co. v. Malone, 208 La. 1058, 24 So.2d 75 (1945); Security Sales Co. v. Blackwell, 167 La. 667, 120 So. 45 (1929); Overland Texarkana Co. v. Bickley, 152 La. 622, 94 So. 138 (1922); Trumbull Chevrolet Sales Co. v. Maxwell, 142 So.2d 805 (La. App. 2d Cir. 1962); James v. Judice, 140 So.2d 169 (La. App. 3d Cir. 1962); Hub City

law[163] and that the vacuum must be filled by the exceptions provided by the common law.

Stolen Goods

Where stolen goods have been sold to a bona fide purchaser, the courts are uniform in their application of the general rule that the sale of another's property is a nullity. The only problem which has concerned the courts is that of defining the term stolen. Of particular difficulty is that of the forged or dishonored check. At common law the crimes of theft by fraud and larceny were separate and distinct, the latter requiring a trespass in the taking.[164] With the liberalization of statutory definitions of theft in modern times, the trend has been to include both of these crimes under one general definition of theft.[165] The result was a confusing line of cases in the Louisiana jurisprudence which was not clarified until recent years. In the case of sale of goods stolen by acts amounting to common law larceny, the courts have readily applied the rule of Article 2452 and have protected the original owner where no prescriptive rights were at issue.[166] In the case of theft by fraud the first response of the court was also to protect the original owner, applying both the broad definition of the theft rule and the rule that the bona fide purchaser is not protected when the thing transferred has been stolen.[167] The State Supreme Court finally realized the harshness of such an application of the criminal statute in the case of *Jeffrey Motor Co. v. Higgins*[168] in which it held that the broad definition of theft for purposes of criminal prosecution does not alter the provisions of the Civil Code and other civil statutes relating to sales and the transfer of title. Thus where a bona fide purchaser might otherwise be protected, the fact that his vendor is guilty of theft (by fraud) will not deny him protection.

Common Law Conditional Sales

Related to the problem of theft by fraud is that of the so-

Motors, Inc. v. Brock, 71 So.2d 700 (La. App. 2d Cir. 1954); Port Fin. Co. v. Ber, 45 So.2d 404 (La. App. Orl. Cir. 1950). See text accompanying note 183 *infra*.

163. Holton v. Hubbard, 49 La. Ann. 715, 22 So. 338 (1897).

164. *Cf.* LA. R.S. 14:67 (1950) (comment).

165. *Id.*

166. *E.g.*, Davis v. Hampton, 4 Mart.(N.S.) 288 (1826) (stolen horse); Lynn v. Lafitte, 177 So. 83 (La. App. 2d Cir. 1937) (cotton stolen from fields).

167. Fisher v. Bullington, 223 La. 368, 65 So.2d 880 (1953); Security Sales Co. v. Blackwell, 167 La. 667, 120 So. 45 (1929); Hub City Motors, Inc. v. Brock, 71 So.2d 700 (La. App. 2d Cir. 1954); Port Fin. Co. v. Ber, 45 So.2d 404 (La. App. Orl. Cir. 1950). *See also* Packard Fla. Motors Co. v. Malone, 208 La. 1058, 24 So.2d 75 (1945).

168. 230 La. 857, 89 So.2d 369 (1956).

called common law conditional sales contract. The common law conditional sale is a secured transaction whereby title remains in the vendor until the purchase price is paid even though the vendee is owner for all other purposes.[169] At common law the majority rule was that the bona fide purchaser does not prevail over the conditional vendor because no title passed under the conditional sale.[170] This rule, however, did not deny the applicability of equitable estoppel where other evidence of apparent ownership was present.

A majority of American jurisdictions also held that a cash sale with payment by check is a conditional sale and that title remained in the vendor until the check cleared the bank.[171] Prior to the adoption of the Uniform Commercial Code many states had taken steps to abrogate the harshness of this rule by requiring recordation of conditional sales contracts in order to protect innocent third party purchasers.[172] Under the UCC the problem is solved by the provision that "a person with voidable title has power to transfer a good title to a good faith purchaser for value . . . even though . . . the delivery was in exchange for a check which is later dishonored."[173] The result achieved under the UCC is the same result that the Louisiana courts have long since recognized.[174]

Louisiana is not faced with the many problems surrounding common law conditional sales because its courts have consistently refused to recognize them under our law. In *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*[175] the court held that a contract which purports to reserve title of a movable in the seller and yet delivers possession to the buyer will be read as though the condition were nonexistent and that title passes to the buyer. Although the court relied on a technical and logical analysis of the basic principles of sales, the true basis for its holding was a policy decision not to permit sales of movables in which the buyer receives possession but not title. The court also pointed out that it would not allow the parties to circumvent the law at that time prohibiting chattel mortgages by the use of an instrument which had practically the same legal effect. But even when the legislature provided legislation allowing the use of the chat-

169. L. VOLD, THE LAW OF SALES § 57 (2d ed. 1959).
170. *Id.* at § 30.
171. *Id.*
172. *Id.* at § 59.
173. UNIFORM COMMERCIAL CODE § 9-302.
174. See text accompanying note 187 *infra*.
175. 121 La. 152, 46 So. 193 (1908).

tel mortgage, the courts retained the old rule as to common law conditional sales, probably because Louisiana had no legislative safeguards concerning their use, namely recordation requirements.[176] Louisiana, however, does allow conditional sales for immovables under its bond for deed legislation which includes the needed safeguards.[177]

In spite of the fact that conditional sale contracts are not recognized when contracted in Louisiana, the courts, through comity, have recognized such sales executed in other states, even against a bona fide purchaser, where the object has been removed to Louisiana without the knowledge or consent of the vendor.[178] Where, however, the removal to Louisiana is with the knowledge or consent of the vendor, the conditional sale is not recognized.[179] Because our neighboring states have adopted the U.C.C., which requires recordation for most conditional sale, contracts, especially automobiles,[180] this rule is even stronger as applied to automobiles sold under a conditional sale.[181]

Fraudulent Acquisitions and Dishonored Checks

At common law, the general rule was that the buyer of goods obtained no better title than the seller himself had. The first exception to this rule is the case of a sale of movables acquired by fraud. In such case the court protected the bona fide purchaser for valuable consideration if title had been in his vendor even though the title was voidable. The acquisition by the bona fide purchaser cut off the right of the original owner to attack the voidable title. One of the earliest cases, other than the slave cases, to apply this rule was *Freeport & Tampico Fuel Corp. v. Lange.*[182] Plaintiff sold to Snider a load of brass and scrap iron, Snider misrepresenting himself as the agent of a reputable dealer. At the same time Snider arranged to sell the same load to the defendant and even arranged for the defendant

176. The reason the French never allowed the chattel mortgage was because of their doctrine of possession vaut titre and the lack of technical recording machinery. See text accompanying note 33 *supra.*

177. LA. R.S. 9:2941 (1950).

178. Finance Security Co. v. Conway, 176 La. 456, 146 So. 22 (1933); Overland Texarkana Co. v. Bickley, 152 La. 622, 94 So. 138 (1922); Universal C.I.T. Credit Corp. v. Victor Motor Co., 33 So.2d 703 (La. App. 1st Cir. 1948); Hinton Co. v. Rouse, 4 La. App. 471 (Orl. Cir. 1926).

179. Fisher v. Bullington, 223 La. 368, 65 So.2d 880 (1953); Finance Security Co. v. Mexic, 188 So. 657 (La. App. Orl. Cir. 1939); American Slicing Machine Co. v. Rothschild & Lyons, 12 La. App. 287, 125 So. 499 (2d. Cir. 1929).

180. UNIFORM COMMERCIAL CODE § 9-302.

181. *See* Pacific Fin. Loans v. Guidry, 69 So.2d 56 (La. App. Orl. Cir. 1953) (foreign chattel mortgage).

182. 157 La. 217, 102 So. 313 (1924).

to pick it up from the plaintiff's place of business in a truck bearing the defendant's name. The court cited common law authority and reasoned that because plaintiff did not intend to vest title in Snider and because the falsely alleged principal did not obtain title, the original owner should prevail. Furthermore the court rejected a plea of equitable estoppel because it found no indicia of ownership other than mere possession.

Another case concerning the problem of fraudulent impersonation was *Port Fin. Co. v. Ber.*[183] Plaintiff, a Lake Charles automobile dealer, sold an automobile to Dupuis, who impersonated a reputable citizen of Marksville, Daugat, and who forged a check in Daugat's name. Defendant, a New Orleans used car dealer, purchased the automobile and made the check payable to Daugat. The court found the defendant in good faith, but nevertheless protected the plaintiff on the theory that the first transaction constituted theft. Under the present jurisprudence the fact that the act was theft under the criminal law has no applicability to the question whether title passed.[184] As an alternative basis for its decision the court held that the original owner should prevail because he did not intend to vest ownership in the flesh and blood of Dupuis. The court cited the common law rule as to fraudulent sales made face to face and then misapplied it. Under the common law rule the bona fide purchaser would prevail because in such a case the fictitious intent of the vendor is to vest title in the person before him.[185]

Another situation involving the issue of whether title has passed is where a check has been given in payment in a cash sale and is later dishonored. At first the courts defined it as theft and protected the original owner under Civil Code Article 2452; but in *Jeffrey Motors Co. v. Higgins,*[186] the court rejected the theft analogy and held that the acceptance of a post-dated draft (by two days) converted the transaction into a credit sale. Later decisions have held that acceptance of a check later dishonored converts a cash sale into a credit sale and that title passes.[187] Although the courts use the term "credit sale," their primary concern is finding that title passes in order to protect the bona fide purchaser for value. By liberalizing the law of sales, the jurisprudence avoided accepting the common law rule

183. 45 So.2d 404 (La. App. Orl. Cir. 1950).
184. See text accompanying note 168 *supra.*
185. See text accompanying note 97 *supra.*
186. 230 La. 857, 89 So.2d 369 (1956).
187. Flatte v. Nichols, 233 La. 171, 96 So.2d 477 (1957); Trumbull Chevrolet Sales Co. v. Maxwell, 142 So.2d 805 (La. App. 2d Cir. 1962.)

that payment by check creates a conditional sale. The UCC has made the same modification based on the same equitable principles.[188]

Estoppel—Agency, Apparent Authority, and Apparent Ownership

The other major exception to the general rule of property that the buyer receives no better title than the seller himself possessed is that of equitable estoppel.[189] Although applied only in rare situations, it offers a handy tool to the court where the equities lie with the bona fide purchaser. Louisiana courts have often displayed tendencies to confuse the doctrine of estoppel with that of fraudulent sales and to misapply the rules peculiar to each.[190]

Many of the Louisiana decisions involve agency relationships which have been breached by the agent. Searching for solutions to these agency problems, Louisiana courts looked outside of the code provisions on mandate and turned to the common law rules of agency, especially those concerning apparent authority. Although Civil Code Article 2985[191] states that a procuration or power of attorney is an act by which one person authorizes another to act "in his name," *Sentell v. Richardson*[192] held that the words "and in his name" are not essential because otherwise there would be no power of an attorney to buy property for an undisclosed principal. Thus where an agent is authorized he has the power to bind his principal by such authorized act even though the principal is undisclosed.

Difficulty arises where the agent acts beyond his authority. Courts use the term "apparent authority" to describe the situation where the principal by his conduct causes a third person to reasonably believe that a particular person has authority to enter into negotiations or to make representations as his agent.[193] The legal writers distinguished between apparent authority and agency by estoppel, pointing out that the latter doctrine applies only where there has been a detrimental reliance by the third person.[194] But the courts often use the terms synonymously or fail to make a clear distinction between them. Another distinc-

188. See text accompanying note 108 *supra*.
189. See text accompanying note 102 *supra*.
190. *E.g.*, Flatte v Nichols, 233 La. 171, 96 So.2d 477 (1957).
191. LA. CIV. CODE art. 2985.
192. 211 La. 288, 29 So.2d 852 (1947).
193. W. SEAVEY, THE LAW OF AGENCY § 8 (1964).
194. *Id.*

tion they often fail to make is that between apparent authority and apparent ownership, the latter of which applies where there is no agency relationship or where the agent having possession of a movable does not act as agent, but as owner. If the owner clothes the agent with such indicia of ownership, or apparent ownership, and a bona fide purchaser relies on it to his detriment, the owner might be estopped from asserting his ownership. If a court finds estoppel based on apparent ownership the fact that the seller is an agent is irrelevant because technically the protection afforded the bona fide purchaser does not arise out of the agency relationship.

As a general rule, an agent given possession of a movable and authority to deal with it has the power to bind the principal by a transaction of the kind authorized, but not otherwise.[195] Thus a factor authorized to sell by a disclosed or undisclosed principal is not, however, authorized to pledge goods entrusted to him.[196] If the movable is put in the possession of a dealer given limited authority to sell, Louisiana courts have held the owner bound by a sale beyond the agent's apparent authority. In *General Finance Co. v. Veith*,[197] plaintiff placed a car in the possession of a dealer, his agent, for sale subject to plaintiff's approval. The dealer sold the car as agent but acted beyond his authority because the sale had not been approved. Holding for the defendant bona fide purchaser, the court found that the agent had apparent authority and that the plaintiff had clothed him with such authority that he was estopped from denying the authority. This decision is in line with the common law authorities.[198]

In *James v. Judice*,[199] defendant's father delivered an automobile to a dealer with the understanding that if the dealer sold it he could take as his commission any amount over $250. The dealer sold the automobile as owner, not as agent, and disappeared. Plaintiff, the buyer, brought suit to have defendant deliver the certificate of title, which his father had withheld with

195. *Id.* at § 66.

196. Lalande v. His Creditors, 42 La. Ann. 705, 7 So. 895 (1890). *Cf.* Maxwell v. W. B. Thompson & Co., 175 La. 252, 143 So. 230 (1932); Holton v. Hubbard, 49 La. Ann. 715, 22 So. 338 (1897). *See* Conant, *The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership*, 47 NEB. L. REV. 687 (1968), for a discussion of the effect of the nineteenth century factors acts designed to treat this problem. *See* LA. R.S. 9:4342, 4343 (1950) for legislation regulating factors dealing with agricultural products.

197. 177 So. 71 (La. App. Orl. Cir. 1937).

198. *Cf.* W. SEAVEY, THE LAW OF AGENCY § 8 (1964). *See* Hammond Fin. Co. v. Carter, 83 So.2d 682 (La. App. 1st Cir. 1955).

199. 140 So.2d 169 (La. App. 3d Cir. 1962).

the intention of delivering it to the dealer when he made the sale. The court held that the dealer was the defendant's agent with both actual and apparent authority, and that he was estopped from setting aside the acts of the agent. Such a result is difficult to understand based on the rules of agency and apparent authority because in this case the agent did not disclose that he was acting as agent. There can be no apparent authority where an agent does not disclose his principal. What really influenced the court was that the dealer had apparent ownership, not apparent authority, upon which the bona fide purchaser relied to his detriment.

Sometimes it is difficult for the court to find a true agency relationship between the parties, as in the case of *William Frantz Co. v. Fink*,[200] where the plaintiff entrusted to Moss the possession of two pair of earrings with the understanding that if Moss could find a buyer he could sell the earrings and keep whatever profit he earned over the fixed price upon payment of that price. If, however, Moss could not find a buyer, he had the option of returning the earrings. The court said that the law of agency could play no part in this case nor did title pass to Moss. It also pointed out how surrendering mere possession of a movable is not of itself sufficient "indicia of ownership" to estop the original owner from asserting his ownership. But in this case Moss was no ordinary individual, he was both an artisan and a merchant of jewelry, and the court held that the surrender by plaintiff of the earrings to such a person was clothing him with sufficient indicium of ownership to estop the plaintiff.

Whether conduct of the owner has been such to give the bona fide purchaser legal justification for believing that the possessor is owner depends upon whether the owner delivered to the possessor some evidence of ownership in addition to possession (indicia of ownership). Usually this evidence must be more than mere possession, but possession itself might be enough indicium of ownership where, as in the *Fink* case, the possessor is a dealer in such things and is authorized to transfer ownership. *Fink* is unusual in that it upheld a plea of estoppel. Other cases decided after it rejected such pleas on weaker facts.[201] In *Holloway v. A. J. Ingersoll*,[202] the plaintiff, a Negro of limited knowledge and experience, was persuaded by Cobb, a grocer, that

200. 125 La. 1013, 52 So. 131 (1910).
201. *Cf.* Freeport & Tampico Fuel Oil Corp. v. Lange, 157 La. 217, 102 So. 313 (1924), discussed at note 180 *supra*.
202. 133 So. 819 (La. App. 2d Cir. 1931).

Cobb could secure a better price for his cotton from a special buyer and that plaintiff should store his cotton in Cobb's warehouse until the buyer arrived. The warehouse was not Cobb's at all, but belonged to the defendant. Plaintiff went with Cobb and was present when Cobb delivered and sold the cotton to defendant in Cobb's name. Cobb later gave to the plaintiff a receipt stating that his cotton had been stored in Cobb's warehouse. The court justifiably rejected the plea of estoppel and applied Civil Code Article 2452.

Recent Decisions

Recent decisions of the courts tend to confuse the doctrine of estoppel with the rules relating to fraudulent acquisitions and conveyances. In *Flatte v. Nichols*,[203] plaintiff, a Texas automobile dealer, sold to Murphy, a Mississippi dealer, an automobile which had no title papers except a receipt for a Texas license, the reason being that the Texas certificate of title had not yet been issued. Plaintiff delivered to Murphy the car and the license receipt and a notarized invoice-bill of sale stating that there were no notes and "conditioned" sale contracts held by plaintiff. In return Murphy gave a bad check. Murphy sold the automobile to defendant in Louisiana, passing to him the invoice received from plaintiff and the muniments of title in Mississippi. The court applied Louisiana law to the Mississippi contract, ignoring arguments that it was a conditional sale, and held that it was a credit sale and that title had passed. It further found that plaintiff had clothed Murphy with every possible indicia of ownership, knowing fully that he was a dealer and would resell the automobile. Because the court found that title had passed it was unnecessary for it to discuss whether plaintiff had clothed Murphy with any indicia of ownership, because such an inquiry relates to whether there is evidence of estoppel. The same is true for *Trumbull Chevrolet Sales Co. v. Maxwell*[204] where the court found a valid sale and then proceeded unnecessarily to use the language of estoppel.

Thus the only recent decision in which a plea of estoppel has been upheld is *James v. Judice*, discussed above. In that case, as in *Fink*, possession was entrusted to a dealer in such things. A dealer was also involved in the first case to uphold a plea of equitable estoppel, *Fullerton v. Kennedy*,[205] decided in the nine-

203. 233 La. 171, 96 So.2d 477 (1957).
204. 142 So.2d 805 (La. App. 2d Cir. 1962).
205. 6 La. Ann. 312 (1851). See text accompanying note 154 *supra*.

teenth century. Only in *Conner v. S. L. Hill and Co.*[206] has the plea of estoppel been upheld where the possession was not by a dealer, but there the possessor was an agent who disclosed his agency to the buyer.

CONCLUSION

From the jurisprudence is discernible two general categories of cases: (1) those in which title has passed, including the bad check cases and the fraudulent impersonation cases, and (2) those in which no title has passed but in which has passed some indicia of ownership other than mere possession.

In the bad check cases, the Louisiana courts have ignored the majority common law rule as to conditional cases and found that title passed under a credit sale. Because title passes, a bona fide purchaser for value is protected against claims by the original owner. By so finding, the courts rule out the applicability of Article 2452 because the movable no longer belongs to "another." But the courts have not cited any legislation as grounds for affirmatively protecting the bona fide purchaser. They have failed to recognize other articles of the Code which contain remnants of the doctrine of *possession vaut titre* and which form a legislative basis for protecting the third party purchaser in the bad check cases. Article 3229[207] gives the seller the right to redeem movables delivered under a sale not made on credit where the price remains unpaid, but only so long as the movable remains in the possession of the purchaser. If the purchaser has sold the movable, the seller loses his right in the thing. This article applies to cash sales in which the price has not been paid. Although the courts have said that the bad check sales are credit sales, the real intent of the parties in such a transaction is to make a cash sale, thereby bringing the bad check sales within the scope of the article. Even though the redactors of the Code omitted the general rule of *possession vaut titre,* it was retained as to sales of movables not on credit in which the price has not been paid. If the courts would apply Article 3229 in the future, the result would be much more consistent with the Code and would avoid unnecessary use of common law terminology.[208]

206. 6 La. Ann. 7 (1851). See text accompanying note 156 *supra.* For a treatment of the problems of apparent authority and apparent ownership from the agency side, *see* Conant, *The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership,* 47 NEB. L. REV. 678 (1968).

207. LA. CIV. CODE art. 3229.

208. *See* A. YIANNOPOULOS, CIVIL LAW OF PROPERTY § 109 n.333 (1966).

In cases involving fraudulent impersonation, our courts have been hesitant to protect the bona fide purchaser. One court went so far as to cite the common law rule as to face to face transactions and then to misapply it. The reason for the misapplication was that the court saw the rule only as a tool of logical analysis and not as a statement of policy merely clothed in the language of intent. The true basis for the rule is that because of his conduct the original owner was less deserving of protection than the bona fide purchaser. The intent language is used to distinguish the situation where the sale is made at a distance and the parties are not dealing face to face. In such a situation the courts have favored the original owner because otherwise sellers would hesitate to deal at a distance and commerce would be adversely affected. Finding a legislative basis for protecting the bona fide purchaser in cases of fraudulent acquisitions would be difficult because of the lack of a general rule that possession equals title. Regardless, the courts seem hesitant to protect the third parties in these cases, thereby making the question more moot than real.

In the cases involving possession with certain indicia of ownership, there is no legislative basis for admitting the doctrine of equitable estoppel. Through jurisprudential evolution Louisiana courts have employed the doctrine of equitable estoppel to protect bona fide purchasers who acquired from dealers who deal in that type of movable. Although the courts have confused the law of agency (apparent authority) with the law of sales (apparent ownership), they have reached the proper result. This result is in line with UCC and also in accordance with the principle of *possession vaut titre.*

What Louisiana courts have done, therefore, is to adopt principles from the common law which protect innocent third parties in particular instances, and by applying these rules achieve the same result as would have resulted under the French law in these instances. The beneficial result of this development is that it allows the courts to be selective in their protection and avoids the harshness of *possession vaut titre* in cases where the original owner has surrendered nothing more than mere possession of his movables. In such cases the original owner rightfully should be protected and has been under our jurisprudence.

P. Michael Hebert and James R. Pettway