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## Resolving Louisiana's Precarious Position on the Sale of Movable Things by Precarious Possessors

Sara Grasch

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# Resolving Louisiana’s Precarious Position on the Sale of Movable Things by Precarious Possessors

*Sara Grasc*\*

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## INTRODUCTION

Suppose A allows B to borrow a ring valued at \$50. B, now a precarious possessor<sup>1</sup> of the ring, sells the ring for \$50 to C, who is

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unaware that B did not own the ring. Louisiana law provides two potential outcomes for this scenario: (1) A retains ownership of the ring, and C is awarded damages from B; or (2) C obtains ownership of the ring, and A is awarded damages from B.<sup>2</sup> At first glance, both solutions appear just and equal, but tensions arise between the possible outcomes when B disappears or becomes insolvent.<sup>3</sup>

Suppose instead that A leases B a piece of heavy equipment valued at \$100,000. B, again a precarious possessor of the heavy equipment, sells the equipment for \$100,000 to C, who is unaware that B did not own the equipment. Further, suppose that B flees after the sale to C and cannot be located. Under Louisiana law, B's disappearance will leave one party without a remedy. If A is awarded ownership of the equipment, then C will not recover damages from B; if C is awarded ownership of the equipment, then A will not recover damages from B. In an attempt to avoid nonrecovery from an absent B, both A and C will seek ownership of the heavy equipment. Thus, the question becomes whether A, the original owner, or C, the good faith purchaser, should be protected under Louisiana law and awarded ownership of the valuable object.<sup>4</sup>

The above situations illustrate a tension between two competing purposes of Louisiana law of sales, namely, the protection of security of

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1. "The exercise of possession over a thing with the permission of or on behalf of the owner or possessor is precarious possession." LA. CIV. CODE ANN. art. 3437 (2021). The class of precarious possessors includes lessees, pledgees, borrowers, mandataries, tutors, curators, and depositaries. A. N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 553 (1991).

2. The two possible solutions are explained as follows:

[I]n general, when a seller has sold a movable thing that the seller did not own and did not have the right to sell, the true owner is not divested of ownership and may recover the thing from the buyer. The buyer, in turn, may have recourse against the seller in the form of an action for damages. . . . The protection of the true owner at the expense of a purchaser from one who did not own the thing sold is not absolute. Exceptions are made to the general rule in order to protect innocent purchasers and to promote the stability of commerce.

MELISSA T. LONEGRASS, SANDI VARNADO & CHRISTOPHER K. ODINET, *SALE, LEASE, AND ADVANCED OBLIGATIONS* 88 (2019).

3. *See generally* La. Lift & Equip., Inc. v. Eizel, 770 So. 2d 859 (La. Ct. App. 2d Cir. 1999).

4. For purposes of this hypothetical, C is a good faith purchaser because he did not know, nor should he have known, that B was not the owner of the equipment. *See* LA. CIV. CODE ANN. art. 523 (2021); *see also* discussion *infra* Section I.D.1.

ownership and the protection of security of transaction.<sup>5</sup> In the above situations, A will assert that there should be security of ownership—that his right of ownership of the ring or equipment is not lost through B’s misdeeds.<sup>6</sup> On the contrary, C will advocate for security of transaction—that he is entitled to the ownership of the ring or equipment created through his transaction with B.<sup>7</sup> The Louisiana legislature must resolve the tension between the competing interests of A and C by setting forth clear circumstances under which one security will be protected at the expense of the other.<sup>8</sup> Plainly stated, the law must choose when to protect A, the original owner, and when to protect C, the good faith purchaser.

Historically, Louisiana law afforded blanket protection to original owners.<sup>9</sup> Louisiana law traditionally barred the sale of goods by a nonowner to any purchaser, regardless of whether that purchaser was in good faith.<sup>10</sup> In response to the Code’s blanket protection of ownership, Louisiana courts began to occasionally award ownership to good faith purchasers instead of the true owners.<sup>11</sup> In doing this, the courts sidestepped the Code’s protection of ownership and instead promoted the security of transaction in certain situations.<sup>12</sup> The courts’ protection of good faith purchasers was achieved through the introduction of common law principles through jurisprudential rules, which was heavily criticized as a “judicial disregard” for Louisiana’s civil law tradition.<sup>13</sup> In response,

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5. DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES § 7:1, in 24 LOUISIANA CIVIL LAW TREATISE (2020).

6. Mitchell Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*, 6 TUL. L. REV. 589, 591 (1932).

7. *Id.*

8. *See generally id.*

9. Lindsay Ellis, *Transfer of Movable by Non-Owners*, 55 TUL. L. REV. 145, 145 (1980).

10. “The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person.” LA. CIV. CODE ANN. art. 2452 (1870).

11. Marie Breaux Stroud, *The Sale of a Movable Belonging to Another: A Code in Search of a Solution*, 4 TUL. EUR. & CIV. L.F. 41, 42 (1988) (citing S. LITVINOFF, OBLIGATIONS § 90–94, in 7 LOUISIANA CIVIL LAW TREATISE (2d ed. 1975)). For an illustration of the Louisiana courts’ protection of transactions, see *Flatte v. Nichols*, 96 So. 2d 477 (La. 1957).

12. Ellis, *supra* note 9, at 145 (citing P. Michael Hebert & James R. Pettaway, *Sales of Another’s Movable – History, Comparative Law, and Bona Fide Purchases*, 29 LA. L. REV. 329, 360 (1969)).

13. For example, one scholar characterized the courts’ actions as follows:

From the point of view of Louisiana, the significance of the judicial disregard of Romanist juridical method, of the judicial reception of crude

the Louisiana legislature modernized the Civil Code in 1979 to adopt the common law principles utilized by the Louisiana courts, forming the civilian-friendly good faith purchaser doctrine in Louisiana.<sup>14</sup> The codal provisions of the Louisiana good faith purchaser doctrine supplied the circumstances in which protection would be shifted from the original owner to the good faith purchaser.<sup>15</sup> However, following the 1981 repeal of the good faith purchaser doctrine's cornerstone provision—Louisiana Civil Code article 520—courts were once again left without a clear method on how to achieve the proper balance between the security of ownership and the security of the transaction in situations involving precarious possessors.<sup>16</sup>

Article 520 of the Louisiana Civil Code once governed the sale of movable things by precarious possessors.<sup>17</sup> Article 520 provided a direct solution for a situation in which B, a precarious possessor of a thing owned by A, sold the thing to C; if C was in good faith and paid fair value for the thing, C was awarded ownership of the thing.<sup>18</sup> However, the Louisiana legislature repealed article 520, leaving a gap in the good faith purchaser doctrine—a gap that has yet to be filled.<sup>19</sup> Thus, Louisiana courts and practitioners have been left without any definite guidance as to the applicable law for sales by precarious possessors.<sup>20</sup> To make matters worse, the Louisiana legislature enacted a provision in the Lease of

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concepts, must be honestly considered. Should there not be a demand for a return to the code and Romanist juridical method? Furthermore, the alternative of draughting a new code to meet modern and American needs, or of repealing the civil code with the view of totally embracing the Anglo-American system, must be envisaged.

Franklin, *supra* note 6, at 612.

14. Act No. 180, 1979 La. Acts 430. The terms “good faith purchaser doctrine” and “bona fide purchaser doctrine” can be used interchangeably. For purposes of this Comment, use will be limited to “good faith purchaser doctrine” for Louisiana law and “bona fide purchaser doctrine” for the Uniform Commercial Code and common law.

15. LONEGRASS ET AL., *supra* note 2, at 88.

16. Stroud, *supra* note 11, at 62.

17. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:3.

18. Article 520 once provided, “A transferee in good faith for fair value acquires the ownership of a corporeal movable, if the transferor, though not owner, has possession with the consent of the owner, as pledgee, lessee, depositary, or other person of similar standing.” LA. CIV. CODE ANN. art. 520 (1979) (repealed 1981).

19. John A. Lovett, *Good Faith in Louisiana Property Law*, 78 LA. L. REV. 1163, 1195 (2018).

20. *Id.*

Movables Act (LMA) that artificially expands the scope of precarious possession, further compounding the confusion surrounding precarious possession in Louisiana.<sup>21</sup>

Between the repeal of Louisiana Civil Code article 520 and the enactment of the LMA, the current state of the law in Louisiana surrounding precarious possession is uncertain, confusing, and out of step with the rest of the country. The law of other U.S. jurisdictions contains definite provisions for the subsequent sale by a precarious possessor and does not contain a complicating provision similar to Louisiana's LMA.<sup>22</sup> Thus, Louisiana law varies significantly from Anglo-American law.<sup>23</sup>

Louisiana's variations, resulting from the repeal of article 520 and the enactment of the LMA, create uncertainty in the law of sales of movables and create problems for transactions in which goods cross state lines, a situation that could involve the laws of multiple states. Because of this uncertainty of law, parties are more likely to resort to litigation rather than settling disputes regarding sales of movables.<sup>24</sup> Although similarities often exist across the common law of the other U.S. jurisdiction, jurisdictions still frequently diverge.<sup>25</sup> However, the adoption of the Uniform Commercial Code (UCC) has significantly aided in preventing these divergences in the jurisdictions choosing to adopt its provisions.<sup>26</sup> Louisiana should follow suit in the area of sales by precarious possessors, and resolution of Louisiana's uncertainty and divergence of law must fall within the hands of its creators—the Louisiana legislature.<sup>27</sup>

First, the Louisiana legislature should repeal the provision of the LMA to dispose of the artificial expansion of precarious possession. Next, the Louisiana legislature should enact new legislation to fill the lingering gap in the good faith purchaser doctrine and clarify the law surrounding subsequent sales by precarious possessors.<sup>28</sup> In drafting a new Civil Code article, the legislature should look to the UCC for guidance. A comparison

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21. The LMA contains a provision, specifically Louisiana Revised Statutes § 9:3310(B), that treats a transfer of ownership as merely a transfer of possession. As such, the LMA demotes a new owner to a precarious possessor. *See* discussion *infra* Part III.

22. LONEGRASS ET AL., *supra* note 2, at 115, 330.

23. *Id.* at 330.

24. Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1129 (2002).

25. *Id.* at 1114.

26. *See generally id.*

27. Spencer C. Sinclair, *The Louisiana Good Faith Purchaser Doctrine: Codified Confusion*, 89 TUL. L. REV. 517, 540 (2014).

28. *See generally id.*

between the Louisiana good faith purchaser doctrine and the UCC bona fide purchaser doctrine reveals a striking, and likely intentional, similarity in the structure, content, and policy behind the complementary provisions. In repealing unnecessary legislation and enacting new legislation, the Louisiana legislature would achieve two major goals of Louisiana law—clarity in the law and uniformity of law across state lines. Although this is not the first comment to address the issue following the repeal of article 520, this Comment will be the first to comprehensively examine the UCC commercial bona fide purchaser doctrine in search of a solution.<sup>29</sup>

Part I of this Comment will provide background information on the evolution of the good faith purchaser doctrine in Louisiana, from the pre-revision law of equitable estoppel to the repeal of Louisiana Civil Code article 520. Part II will illustrate the current gap in the law of sales by precarious possessors following the repeal of article 520 by examining the inadequacy of the potential solutions under current law and the post-repeal Louisiana jurisprudence. Part III will provide an overview of the events leading to Louisiana's enactment of the LMA, further highlighting the issues surrounding precarious possession in Louisiana. Part IV will provide a survey of the UCC bona fide purchaser doctrine in search of a solution. Part V will compare and contrast Louisiana law and the UCC to further highlight the current gap and confusion in Louisiana law. Lastly, Part VI will propose the repeal of the problematic provision of the Louisiana LMA and the drafting of new legislation governing sales by precarious possessors with the goal of promoting the clarity of law and the uniformity of law across state lines.

#### I. HISTORY, POLICY, AND PROVISIONS OF LOUISIANA'S GOOD FAITH PURCHASER DOCTRINE

The law of sales must address the sale of a movable thing by someone other than the true owner of the thing, and the attempted resolution of the resulting conflict pits two competing interests against one another.<sup>30</sup> On the one hand, the law seeks to protect the rights and interests of the owner of a thing, which is often referred to as the security of ownership.<sup>31</sup> The security of ownership is furthered by the law's protection of the wealth,

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29. See generally *id.*; Stroud, *supra* note 11; Tanya Ann Ibieta, *The Transfer of Ownership of Movable*, 47 LA. L. REV. 841 (1987).

30. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:2 (citing Weinberg, *Markets Overt, Voidable Title, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase*, 56 TUL. L. REV. 1 (1981)).

31. *Id.*

value, and assets of owners.<sup>32</sup> Thus, the security of ownership represents the rights and interests of A, the owner of a thing, when B, a precarious possessor of the thing, sells the thing to C, a good faith purchaser.<sup>33</sup> The law attempts to protect A's rights and interests in his assets by recognizing that A's ownership is not lost through B's misconduct.<sup>34</sup>

On the other hand, the law also attempts to protect the rights and interests of the buyer of a thing, which is often referred to as the security of transaction.<sup>35</sup> The security of transaction is promoted by the safeguarding of profitable exchanges, which create new wealth, value, and assets for owners.<sup>36</sup> Thus, the security of transaction represents the rights and interests of C, the good faith purchaser of a thing, when B, a precarious possessor of the thing belonging to A, sells the thing to C.<sup>37</sup> The law attempts to protect C's rights and interests in his new asset by recognizing the validity of the ownership interest that was created in C's transaction with B.<sup>38</sup>

All legal systems must support and promote both the interests of owners of a thing and the interests of purchasers of a thing.<sup>39</sup> In doing so, the law must resolve the conflict that the opposing interests sometimes create by providing rules on when to protect the security of ownership and when to protect the security of transaction.<sup>40</sup> Two historical approaches illustrate methods by which the law might achieve the protection of one security over the other.<sup>41</sup>

#### *A. Protection of Ownership vs. Protection of Transactions: The Historical Approaches*

The common law principle *nemo dat quod non habet*, which means no one can transfer a greater right than he himself has, promotes the security of ownership by recognizing that no one can transfer a right greater than

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32. *Id.*

33. Franklin, *supra* note 6, at 590–91.

34. *Id.*

35. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:2.

36. *Id.*

37. Franklin, *supra* note 6, at 590–91.

38. *Id.*

39. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:2 (noting that the very first article in the Harvard Law Review, James Barr Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887), was dedicated to the topic of sales of a thing belonging to another).

40. *Id.*

41. *See generally* Franklin, *supra* note 6.

the right he or she has in a thing.<sup>42</sup> This principle prohibits the transfer of ownership to a third party by one with less than ownership in the thing, so the dispossessed owner retains ownership.<sup>43</sup> Thus, A, the owner of the thing, will retain ownership even though B, a precarious possessor, sells the thing to C, a good faith purchaser.

On the contrary, the French maxim *en fait de meubles, la possession vaut titre*, which means with respect to movables possession is equivalent to title, promotes the interest in the security of transaction by equating possession of a movable to title.<sup>44</sup> Under this principle, the purchaser may regard the possessor as owner of the thing and as having the ability to transfer that ownership.<sup>45</sup> Thus, C, the good faith purchaser, is awarded ownership in a transaction with B, a precarious possessor of a thing belonging to A.

The two opposing historical principles have long influenced the laws governing the sale of movable things by non-owners.<sup>46</sup> The interests that these historical principles advance, namely the security of ownership and the security of transaction, reappear throughout the evolution of the law of sales across the world, including in Louisiana.<sup>47</sup> Notably, exceptions have tempered these historical approaches to balance the interest that each

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42. Ibieta, *supra* note 29, at 841.

43. Hebert & Pettaway, *supra* note 12 (citing L. VOLD, *THE LAW OF SALES* § 79, at 401 (2d ed. 1959)).

44. *Id.* at 332 (noting the maxim's codification in article 2279 of the Code Napoleon, which provided, "With reference to movables, possession is considered equivalent to a title." CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2279 (Fr.) (E. Blackwood Wright trans., 1908)). The text of article 2279 now appears unchanged in article 2276 of the French Civil Code. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:2.

45. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:2.

46. *See generally* Franklin, *supra* note 6.

47. *See generally* Hebert & Pettaway, *supra* note 12.

principle promotes with the opposing interest.<sup>48</sup> However, not all legal systems have reached the same balance.<sup>49</sup>

For example, the common law's general rule of *nemo dat quod non habet* protects the security of ownership, but this rule is riddled with exceptions designed to protect the security of transaction.<sup>50</sup> These exceptions, collectively known as the common law bona fide purchaser doctrine, shift protection to purchasers who have purchased in good faith, without notice, and for valuable consideration.<sup>51</sup> However, qualifying as a bona fide purchaser is not enough to negate the common law's general principle; the bona fide purchaser must also fall into a jurisprudentially recognized exception.<sup>52</sup> Founded on equitable principles, these exceptions protect bona fide purchasers in market overt sales, transfers of money and negotiable instruments, sales involving voidable title, and instances of equitable estoppel.<sup>53</sup>

#### *B. Before the 1979 Revision: The Civil Code's Protection of Ownership*

Louisiana's first codification of laws occurred in 1808 when the Louisiana legislature adopted what is colloquially known as the Digest of 1808.<sup>54</sup> Although the redactors borrowed heavily from the French Code, they did not directly incorporate the French maxim of *la possession vaut*

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48. For example:

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. . . . [A] policy as harsh as this on English commercial transactions did not survive long without exceptions.

*Id.* at 337. "The French Code began with the basic rule. . . . 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." *Id.* at 333.

49. Stroud, *supra* note 11, at 43 (citing LITVINOFF, *supra* note 11).

50. Ellis, *supra* note 9, at 150 (citing LITVINOFF, *supra* note 11, at § 87).

51. *Id.* at 150–51 (citing LITVINOFF, *supra* note 11, at § 81).

52. *Id.* at 151.

53. For a full discussion of the common law bona fide purchaser doctrine, see Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

54. *History of the Codes of Louisiana: Civil Code: The Unusual History and Early Development of Louisiana Law*, THE LAW LIBR. OF LA., <https://lasc.libguides.com/c.php?g=254608&p=1697972> [<https://perma.cc/CZ3R-M5JA>] (last updated Jul. 25, 2019).

*titre* into the Digest of 1808.<sup>55</sup> Scholars have attempted to rationalize the redactors' decision. For example, some scholars have theorized that the opposition stemmed from the Spanish law in effect in Louisiana at that time, which opposed the French doctrine.<sup>56</sup> Other scholars have theorized that the economic system in Louisiana at that time did not favor the French principle or that the drafters fundamentally misunderstood the French maxim.<sup>57</sup> Regardless of the explanation, the redactors of the Digest of 1808 chose not to recognize the French approach's broad protection of transactions.<sup>58</sup>

Although the redactors of the Digest of 1808 rejected the French maxim, the underlying principle was adopted in other Louisiana code articles prior to the revision of 1979.<sup>59</sup> In general, Louisiana protected the ownership of movables under article 2452 of the Louisiana Civil Code of 1870, which provided, "The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person."<sup>60</sup> However, Louisiana law shifted protection to the purchasers under particular circumstances.<sup>61</sup> For example, article 1922 of the Louisiana Civil Code of 1870 provided, "[I]f 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 . . . ."<sup>62</sup> Additionally, Louisiana law afforded a purchaser the right of reimbursement—but still not ownership—under articles 3506 and 3507 of the Civil Code of 1870.<sup>63</sup> Under these articles, if a purchaser bought a lost or stolen thing at a public auction or from a merchant customarily selling those things, and the purchaser possessed the thing for three years, the owner could recover the thing only upon reimbursing the purchase price.<sup>64</sup> Although the Louisiana Civil Code contained exceptions to its general protection of ownership, the

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55. Ellis, *supra* note 9, at 155.

56. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:2; Hebert & Pettaway, *supra* note 12, at 343.

57. For a full discussion on the uncertainty surrounding the sources of the Digest of 1808 provisions governing the conflict of possessor and owner, see Hebert & Pettaway, *supra* note 12; Franklin, *supra* note 6.

58. Hebert & Pettaway, *supra* note 12, at 342.

59. Sinclair, *supra* note 27, at 521 (citing 3 LA. STATE LAW INST., COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA pt. II, at 1131 (1942)).

60. Ellis, *supra* note 9, at 156 (quoting LA. CIV. CODE ANN. art. 2452 (1870)).

61. Hebert & Pettaway, *supra* note 12, at 343.

62. LA. CIV. CODE ANN. art. 1922 (1870).

63. *Id.* arts. 3506, 3507.

64. Hebert & Pettaway, *supra* note 12, at 344.

provisions generally favored the security of ownership over the security of transaction.<sup>65</sup>

*C. Before the 1979 Revision: The Judicial Protection of Transactions*

Louisiana courts recognized that the 1870 Civil Code's protection of the original owner would hurt consumers and impede commerce.<sup>66</sup> In response to these concerns, Louisiana courts developed two major jurisprudential exceptions to the general rule of article 2452 to balance the security of ownership with the security of transaction.<sup>67</sup> In doing so, the courts took a similar approach to the common law bona fide purchaser doctrine.<sup>68</sup> In applying these common law principles, the Louisiana courts developed two categories of exceptions to the general rule of article 2452: (1) cases in which title had passed between the original owner and the intermediate seller and (2) cases in which no title had passed but the owner offered possession and some indicia of ownership to the intermediate seller.<sup>69</sup>

Under the first exception, Louisiana courts avoided applying article 2452 when title had passed between the original owner and the

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65. Franklin, *supra* note 6, at 604.

66. Ibieta, *supra* note 29, at 843 (citing LITVINOFF, *supra* note 11, at § 94).

67. *Id.* at 844 (citing Hebert & Pettaway, *supra* note 12, at 359).

68. *Id.* at 843 (citing LITVINOFF, *supra* note 11, at § 94). At common law, the general rule is that no one can transfer a right that he does not have, which protects the security of ownership. Ellis, *supra* note 9, at 150 (citing 2 S. WILLISTON, SALES OF GOODS § 311 (rev. ed. 1948)). However, the general rule is subject to the exceptions of the common law bona fide purchaser doctrine, which shifts protection to security of transaction. *Id.* at 151 (citing LITVINOFF, *supra* note 11, at § 81). The first Louisiana Supreme Court case applying the common law bona fide purchaser doctrine was *Miles v. Oden*, which involved the fraudulent conveyance of slaves. Stroud, *supra* note 11, at 49 (citing *Miles v. Oden*, 8 Mart. (n.s.) 214 (La. 1829)). The *Miles* court relied on *Fletcher v. Peck*, a United States Supreme Court decision, which established the common law bona fide purchaser doctrine as a principle of natural law. *Id.* (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)). The *Miles* decision was limited to the application of Kentucky law, but the Louisiana Supreme Court extended the ruling to Louisiana law in *Thomas v. Mead*, although the decision was legally flawed under the law in effect at that time in that it ignored the Louisiana codal scheme in place and the protection of ownership of slaves under the public records doctrine. *Id.* (citing *Thomas v. Mead*, 8 Mart. (n.s.) 341 (La. 1829)). Be that as it may, those decisions began the systematic adoption of the common law bona fide purchaser doctrine in Louisiana. *Id.* at 50 (citing Hebert & Pettaway, *supra* note 12, at 348).

69. Hebert & Pettaway, *supra* note 12, at 359.

intermediate seller but was deemed to be relatively null.<sup>70</sup> The courts would find that even though the title was relatively null, title had still passed from the original owner to the intermediate seller.<sup>71</sup> Thus, the movable thing no longer belonged to the original owner, and article 2452 would not apply.<sup>72</sup> Instead, the intermediate seller could validly pass this title to a subsequent purchaser, and, as a result, the subsequent purchaser would obtain ownership of the thing.<sup>73</sup> The original owner was left with no action against the subsequent purchaser under article 2452.<sup>74</sup> The original owner was left only with an action claiming relative nullity, which could only be asserted against the intermediate seller.<sup>75</sup> Once ownership was passed to the subsequent purchaser, the purchaser was protected from the claims of the original owner.<sup>76</sup>

The second exception involved cases where the owner turned over possession of the thing and offered some indicia of ownership or authority<sup>77</sup> to the possessor.<sup>78</sup> In these cases, Louisiana courts applied the doctrine of equitable estoppel,<sup>79</sup> holding that the original owner

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70. Ibieta, *supra* note 29, at 844. Some examples included fraudulent impersonation and dishonored checks. *Id.* (first citing Freeport & Tampico Fuel Oil Corp. v. Lange, 102 So. 313 (La. 1924); then citing Port Fin. Co. v. Ber, 45 So. 2d 404 (La. App. Or. 1950); then citing Jeffrey Motor Co. v. Higgins, 230 So. 2d 805 (La. App. 2d Cir. 1962); and then citing Flatte v. Nichols, 96 So. 2d 477 (La. 1957)).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Indicia of ownership or authority included, but was not limited to, title papers, invoices, or statements made in the presence of others. *Id.* at 845 (citing LITVINOFF, *supra* note 11, at § 87).

78. *Id.* at 844 (citing Hebert & Pettaway, *supra* note 12, at 359).

79. The application of equitable estoppel is explained as follows:

The owner of a movable held by a purchaser in good faith who bought it from one with neither title nor authority to sell may also be precluded from recovering the thing by the operation of the principle of estoppel. This is so whenever the owner by his words or conduct has expressly or impliedly represented that the one in possession of the thing either is the owner or has authority to sell. Under such circumstances the owner is estopped, or precluded from denying the truth of his representation to a third party who, in good faith and reasonably relying on the representation, purchased the thing.

*Id.* at 844 n.19 (quoting LITVINOFF, *supra* note 11, at § 87).

negligently contributed to her own loss.<sup>80</sup> The possessor would then be liable to the original owner for a conversion.<sup>81</sup> Because the original owners were negligent, they could not seek recourse against a subsequent purchaser; thus, the subsequent purchaser retained ownership of the thing.<sup>82</sup>

Nevertheless, the Louisiana courts' reliance on the common law bona fide purchaser doctrine in imposing these exceptions was heavily criticized.<sup>83</sup> This infiltration of common law principles via jurisprudence was seen as a fundamental breach of the civilian tradition—"The code written over by the case law, borrowing Anglo-American concepts, under the self-deluding disguise that they are natural law."<sup>84</sup> In response, the Louisiana legislature codified these common law principles in the 1979 Revision of the Louisiana Civil Code.<sup>85</sup>

#### *D. The 1979 Revision of the Louisiana Civil Code: The Good Faith Purchaser Doctrine Today*

In 1979, the Louisiana legislature carried forward and clarified the already-existing codal provisions, while also codifying the jurisprudential exceptions developed by the Louisiana courts.<sup>86</sup> These provisions, collectively known as the good faith purchaser doctrine, are found in Louisiana Civil Code articles 518 and 520 through 525.<sup>87</sup> During the revision, the legislature retained article 2452, which continues to operate as the general rule protecting the security of ownership.<sup>88</sup> Articles 518 and 520–524 effectively operate as either specific applications of or exceptions to article 2452.<sup>89</sup>

##### *1. The General Rule and General Provisions*

Article 2452 was not amended in 1979 but was revised in 1993.<sup>90</sup> This revision, which is still in place today, modernized the language of the

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80. *Id.* at 845.

81. *Id.*

82. *Id.*

83. Franklin, *supra* note 6, at 609–12.

84. *Id.* at 609.

85. Sinclair, *supra* note 27, at 522.

86. *Id.*

87. *Id.* (citing 3 LA. CIV. CODE ANN. exposé des motifs, at 9 (2010)).

88. LA. CIV. CODE ANN. art. 2452 (2021).

89. Sinclair, *supra* note 27, at 522.

90. LA. CIV. CODE ANN. art. 2452 cmt. a (2021).

article but did not change the law.<sup>91</sup> The revision recognized that “[t]he sale of a thing belonging to another may have some effects in certain circumstances,” namely when one of the exceptions codified in the good faith purchaser doctrine applies.<sup>92</sup> The current version of article 2452 provides, “The sale of a thing belonging to another does not convey ownership.”<sup>93</sup>

This general bar on the transfer of ownership by one other than the owner affords protection to the security of ownership; however, the codification of exceptions shifted the weight of protection to the security of transaction by safeguarding good faith purchasers under certain circumstances.<sup>94</sup> It is important to note at the outset that, according to article 525, the circumstances codified as exceptions in the good faith purchaser doctrine do not apply to registered movables.<sup>95</sup> Additionally, the application of any exception to the general bar on the sale of movable things by a person other than the owner requires good faith on the part of a subsequent purchaser.<sup>96</sup> Article 523 creates a presumption that “[a]n acquirer of a corporeal movable is in good faith . . .”; however, that presumption can be rebutted if the acquirer “knows, or should have known, that the transferor was not the owner.”<sup>97</sup>

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91. *Id.*

92. *Id.*

93. *Id.* art. 2452.

94. Sinclair, *supra* note 27, at 525.

95. LA. CIV. CODE ANN. art. 525 (2021). Registered movables include vehicles, mobile homes, and other larger movables. Sinclair, *supra* note 27, at 525. For registered movables, the Vehicle Certificate of Title Law requires the furnishing of a certificate of title for a registered movable to be transferred, but the case law is not consistent. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:9. For example, courts have on occasion ignored the requirement of registration when the state Department of Motor Vehicles was slow in issuing or changing registration. *Id.* (first citing Robinson v. Jackson, 225 So. 2d 846 (La. Ct. App. 2d Cir. 1971); then citing Tarver v. Tarver, 242 So. 2d 374 (La. Ct. App. 2d Cir. 1970); then citing Flatte v. Nichols, 96 So. 2d 477 (La. 1957); and then citing Transp. Equip. Co. v. Dabdoub, 69 So. 2d 640 (La. Ct. App. Orl. 1954)).

96. See LA. CIV. CODE ANN. arts. 518, 521, 524 (2021).

97. *Id.* art. 523. If the owner knows that the transferor was not the owner, then there is no good faith. Livestock Producers, Inc. v. Littleton, 748 So. 2d 537, 544–45 (La. Ct. App. 2d Cir. 1999). “But, where actual knowledge is absent, the article imputes knowledge if the purchaser has access to facts which would lead a prudent man to question the ownership of his vendor.” *Id.* at 545 (citing Brown & Root, Inc. v. Se. Equip. Co., Inc., 470 So. 2d 516 (La. Ct. App. 1st Cir. 1985)). “If the acquirer has notice of facts that would put a reasonably prudent man on inquiry, he is under duty to investigate with the view to ascertaining the true situation. If

2. *A Specific Application of the General Rule: Louisiana's Treatment of Lost or Stolen Things*

The articles on lost or stolen things function as a specific application of article 2452. In the case of lost or stolen things, the Louisiana Civil Code awards ownership to the original owner in accordance with article 2452, but the purchaser is allowed a right to reimbursement under certain circumstances.<sup>98</sup> In general, article 521 provides that “[o]ne who has possession of a lost or stolen thing may not transfer its ownership to another.”<sup>99</sup> Thus, if B is in possession of a stolen thing belonging to A and subsequently sells the thing to C, A retains ownership of the thing. Because the thing is stolen, article 521 provides that A will be able to reclaim the thing from C. This rule is an application of the common law principle that no one can transfer a right that he does not have.<sup>100</sup>

However, the subsequent purchaser may be allowed a right to reimbursement before having to abandon possession of the thing.<sup>101</sup> This principle is derived from articles 3506–3507 of the Louisiana Civil Code of 1870.<sup>102</sup> Article 524 first states that “[t]he owner of a lost or stolen movable may recover it from a possessor who bought it in good faith at a public auction or from a merchant customarily selling similar things on reimbursing the purchase price.”<sup>103</sup> Thus, in the scenario described above, C will have a right to reimbursement if either (1) the thing was purchased at public auction or (2) B is a merchant customarily selling similar things. Although A will still have ownership of the thing, the thing will remain in C’s possession until A reimburses the purchase price to C.

An owner will have this right to reclaim stolen goods upon reimbursement of the purchase price unless the thing has been sold by authority of law.<sup>104</sup> Article 524 continues, “The former owner of a lost, stolen, or abandoned movable that has been sold by authority of law may

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he does not do so, he cannot claim that he is a purchaser in good faith.” LA. CIV. CODE ANN. art. 523 cmt. b (2021) (citing *William Frantz & Co. v. Fink*, 52 So. 131 (La. 1910)).

98. *Id.* arts. 521, 524.

99. *Id.* art. 521.

100. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:10.

101. LA. CIV. CODE ANN. art. 524 (2021).

102. Recall that under articles 3506 and 3507 of the Louisiana Civil Code of 1870, a purchaser who bought a lost or stolen thing was not awarded ownership but was allowed a right to reimbursement under certain conditions. *See* discussion *supra* Section I.B.

103. LA. CIV. CODE ANN. art. 524 (2021).

104. *Id.*

not recover it from the purchaser.”<sup>105</sup> Thus, if C purchases a stolen thing at a sheriff sale, then A will not be able to recover the thing from C even upon reimbursement of the purchase price.<sup>106</sup>

*3. The First Exception: Louisiana’s Treatment of Sales Affected with a Vice of Consent*

Article 522 is the first major exception to the general rule of article 2452 and applies in situations where a sale between the original owner and the intermediate seller is affected with a vice of consent.<sup>107</sup> This article is a codification of one of the two lines of jurisprudential exceptions developed by Louisiana courts prior to the 1979 revision.<sup>108</sup> Article 522 provides, “A transferee of a corporeal movable in good faith and for fair value retains the ownership of the thing even though the title of the transferor is annulled on account of a vice of consent.”<sup>109</sup> When the original transfer of title is null as between the original seller and original buyer, the original buyer may validly transfer ownership to a subsequent purchaser in good faith who pays fair value.<sup>110</sup> Thus, if B purchases a thing from A and subsequently sells the thing for value to C, a good faith purchaser, C will be awarded ownership even if the sale between A and B was affected with a vice of consent. The protection of the good faith purchaser shifts the law’s protection to the security of transaction.

Articles 2021, 2028, and 2035 reiterate the rule articulated by article 522. Article 2028 provides, “Any simulation, either absolute or relative, may have effects as to third persons.”<sup>111</sup> Comment (b) to article 2028 states that good faith purchasers “are among the third persons who may avail themselves of a simulation . . . .”<sup>112</sup> Similarly, article 2035 provides, “Nullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.”<sup>113</sup> According to comment

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105. *Id.*

106. *Id.*

107. The vices of consent include error, fraud, and duress. *Id.* art. 1948.

108. Recall that under the jurisprudential exception involving relatively null title, Louisiana courts would find that title had nevertheless passed from the original owner to the intermediate seller and, as a result, the intermediate seller could validly pass title to a subsequent purchaser. *See* discussion *supra* Section I.C.

109. LA. CIV. CODE ANN. art. 522 (2021).

110. *Id.* art. 522 cmt. b.

111. *Id.* art. 2028.

112. *Id.* art. 2028 cmt. b.

113. *Id.* art. 2035.

(a), article 2035 “merely articulates the doctrine[] of bona fide purchase . . . .”<sup>114</sup> Finally, article 2021 provides, “Dissolution of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.”<sup>115</sup> Each of the preceding articles articulates the principle that good faith purchasers in a subsequent sale are protected by the law, even though a claim for unenforceable title may result in the nullification of the initial sale.

#### *4. The Second Exception: Louisiana’s Treatment of the Double-Dealing Seller*

Article 518, another major exception to the general rule of article 2452, governs the rights of parties when the owner of a movable thing sells to one person without delivering the thing and instead sells the thing to a second person.<sup>116</sup> This article is derived from article 1922 of the Louisiana Civil Code of 1870.<sup>117</sup> Article 518 provides that “[t]he transfer of ownership takes place as between the parties by the effect of the agreement and against third persons when the possession of the movable is delivered to the transferee.”<sup>118</sup> When the thing is sold to the first party, ownership is transferred by effect of agreement.<sup>119</sup> However, the transfer of ownership is not effective against third parties until the buyer takes possession of the thing.<sup>120</sup> Article 518 further provides, “When possession has not been delivered, a subsequent transferee to whom possession is delivered acquires ownership provided he is in good faith.”<sup>121</sup> Thus, if A sells a thing to B, who does not take possession of the thing, then A sells the same thing to C, who takes possession of the thing and is in good faith, ownership will be awarded to C. Thus, article 518 functions as an exception to the general

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114. *Id.* art. 2035 cmt. a.

115. *Id.* art. 2021.

116. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:5.

117. Recall that article 1922 of the Louisiana Civil Code of 1870 provided, “[I]f 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 . . . .” See discussion *supra* Section I.B.

118. LA. CIV. CODE ANN. art. 518 (2021).

119. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:4.

120. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:5.

121. LA. CIV. CODE ANN. art. 518 (2021).

rule of article 2452 in the case of a double-dealing seller and protects the security of transaction over the security of ownership.<sup>122</sup>

*5. The Third Exception: Louisiana's Treatment of Sales by Precarious Possessors*

Article 520 was once a key article of the good faith purchaser doctrine and functioned as another major exception to the general rule of article 2452.<sup>123</sup> Prior to its repeal, article 520 provided, "A transferee in good faith for fair value acquires the ownership of a corporeal movable, if the transferor, though not owner, has possession with the consent of the owner, as pledgee, lessee, depositary or other person of similar standing."<sup>124</sup> Under article 520, a third-party purchaser in good faith would obtain ownership of a thing purchased for fair value from a precarious possessor. Thus, if A leased a thing to B, and B subsequently sold the thing to C, who was in good faith and paid fair value, then C would be awarded ownership of the thing.

However, due to heavy criticism from the commercial leasing industry, article 520 was in effect only for a short time.<sup>125</sup> Commercial lessors of heavy equipment were concerned that their leased equipment could "be transferred by the lessee to a purchaser in good faith for fair value to the detriment of the [commercial] lessor-owner . . . ."<sup>126</sup> The commercial lessors' concern was unfounded for two major reasons.<sup>127</sup> First, commercial lessors of registered movables had no reason to worry about the effects of article 520 on their equipment.<sup>128</sup> Article 525 expressly excludes registered movables from the operation of the good faith purchaser doctrine; instead, registered movables are arguably protected by the Vehicle Certificate of Title Law.<sup>129</sup> Second, commercial lessors of

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122. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:5 (citing *Cameron Equip. Co., Inc. v. Stewart & Stevenson Servs., Inc.*, 685 So. 2d 696 (La. Ct. App. 3d Cir. 1996)).

123. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:3.

124. LA. CIV. CODE ANN. art. 520 (1979) (repealed 1981).

125. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:3.

126. Stroud, *supra* note 11, at 60 (citing Yiannopolous, *Memorandum* at 6, La. St. L. Inst. Proc. (Meeting March 6–7, 1981)).

127. *Id.*

128. *Id.*

129. *Id.* "The Vehicle Certificate of Title Law statute suggests that the certificate of title will govern ownership of motor vehicles. However, a long line of jurisprudence suggests otherwise." LONEGRASS ET AL., *supra* note 2, at 116. Many courts have held that the transfer of ownership of a registered movable is not hindered by the failure to issue a certificate of title. *See, e.g., Flatte v. Nichols*,

unregistered movables can take reasonable measures to protect their property interests, including an investigation of the credit and insurance of the lessee, permanently identifying the leased property, or restructuring the agreement as a sale and retaining a security device.<sup>130</sup>

Nevertheless, the efforts of the commercial leasing industry triumphed. The Louisiana legislature first suspended the operation of article 520 in 1980 and then officially repealed the article in 1981.<sup>131</sup> With this repeal, Louisiana sales law was left without an adequate rule for situations involving the sale of movable things by a precarious possessor and has remained this way since.<sup>132</sup> The question that remains unanswered is what rule to apply in determining whether the original owner or the good faith purchaser of a movable thing is awarded ownership of the thing in situations involving precarious possessors.

## II. THE SEARCH FOR A SOLUTION

The repeal of Louisiana Civil Code article 520 in 1981 created confusion in the law of sales of movable things by precarious possessors. Although many potential solutions are present in the remaining civil code articles and jurisprudence, some solutions fail to adequately balance the security of ownership with the security of transaction, while others directly contradict legislative intent. Additionally, Louisiana courts have successfully avoided addressing and solving the issue since the repeal of article 520.

### *A. Searching for a Solution in the Current Law*

One potential solution to fill the gap in the law surrounding the sale of a movable thing by a precarious possessor is to apply article 2452, the general rule.<sup>133</sup> As the sale of a thing by a precarious possessor is the sale of a thing of another, article 2452 would declare that ownership is not conveyed to the third-party purchaser. Although this solution guarantees the protection of original owners, its downfall is that it provides blanket

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96 So. 2d 477 (La. 1957). Unfortunately, few cases have examined the issue since the enactment of Civil Code article 525. See LONEGRASS ET AL., *supra* note 2, at 116.

130. Stroud, *supra* note 11, at 60–61 (citing Yiannopolous, *supra* note 126).

131. Sinclair, *supra* note 27, at 526 (citing S. Con. Res. 172, 6th Leg., Reg. Sess. (La. 1980)).

132. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 7:17.

133. “The sale of a thing belonging to another does not convey ownership.” LA. CIV. CODE ANN. art. 2452 (2021).

protection to the owners at the expense of the third-party purchaser, regardless of whether the purchaser acted in good faith. Applying the general rule of article 2452 when faced when the sale of a precariously possessed thing would ignore the purpose of the good faith purchaser doctrine—a purpose that both Louisiana courts and the Louisiana legislature have acknowledged.

Another potential solution to resolving the determination of who gets the precariously possessed thing—the third-party purchaser in good faith or the original owner—involves the application of the doctrine of estoppel that existed jurisprudentially prior to the 1979 revision of the Civil Code.<sup>134</sup> However, this approach would simply be a step backward in the law of sale of movable things by a precarious possessor, as this solution would require courts to look back to the heavily criticized Louisiana jurisprudence and ignore the Louisiana legislature’s will.

An alternative approach would be to apply articles 521 and 524, which govern the sale of a lost or stolen thing, *a contrario*.<sup>135</sup> If ownership of a lost or stolen thing cannot be transferred under articles 521 and 524, then, *a contrario*, ownership of a thing not classified as lost or stolen can be transferred. However, this approach results in a rule that is analogous to repealed article 520, allowing precarious possessors to transfer ownership to a third person. Because the legislature repealed the article, applying an analogous rule would provide a solution contrary to legislative will.

A final solution is to classify the thing as lost or stolen and apply articles 521 and 524 outright. Although many Louisiana courts have relied upon this solution,<sup>136</sup> as discussed in the next section, articles 521 and 524 are inapplicable to situations in which a precarious possessor has sold a thing that is not lost or stolen. In fact, article 521 provides that “[a] thing is stolen when one has taken possession of it *without the consent of its owner*.”<sup>137</sup> In the situation of precarious possession, the precarious possessor does have the consent of the owner; thus, the precariously possessed thing does not meet the definition of a stolen thing under the plain language of article 521.<sup>138</sup> As explained in more detail below,

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134. See discussion *supra* Section I.C.

135. An argument *a contrario* takes a statutory provision that lays down a rule for x, and one infers from that rule that every non-x is subject to an opposing rule. BORRIS STARCK, *Droit Civil: Introduction*, at 55–57 (J.R. Trahan trans., 2d ed. 1976).

136. See, e.g., *Livestock Producers, Inc. v. Littleton*, 748 So. 2d 537 (La. Ct. App. 2d Cir. 1999); *La. Lift & Equip., Inc. v. Eizel*, 770 So. 2d 859 (La. Ct. App. 2d Cir. 1999).

137. LA. CIV. CODE ANN. art. art. 521 (2021) (emphasis added).

138. Sinclair, *supra* note 27, at 534.

applying the rules set forth in articles 521 and 524 to situations involving precarious possession disregards the intended meaning of those articles.

*B. The Courts: Avoiding the Issue*

When presented with a situation that falls within the gap left by the repeal of article 520, Louisiana courts have failed to take the opportunity to clarify the law surrounding the sale of a thing by a precarious possessor.<sup>139</sup> Interestingly, when faced with the issue, the Louisiana Second Circuit Court of Appeal bypassed the precarious-possessor issue by misclassifying the movable as stolen in two cases: *Livestock Producers, Inc. v. Littleton* and *Louisiana Lift & Equipment, Inc. v. Eizel*.

In *Livestock Producers, Inc. v. Littleton*, B.L. Littleton purchased 200 pregnant cows from Danny Smith for \$150,000.<sup>140</sup> Shortly after the purchase, Littleton re-branded the cows with his “B.L.” symbol and placed ear tags on the cows.<sup>141</sup> The cows were originally set to be delivered to Littleton in November, but they began calving early.<sup>142</sup> Accordingly, Littleton and Smith entered into an agreement to extend pasturing of the cows by Smith until February in exchange for Littleton’s payment of an additional \$11,000.<sup>143</sup> However, Smith began experiencing financial issues and sold 126 of Littleton’s cows to Livestock Producers, Inc. (LPI), an auction company.<sup>144</sup> Thereafter, LPI’s manager, Ronnie Stratton, purchased the remaining 74 cows from Smith.<sup>145</sup> LPI reimbursed Stratton for the 74 cows, so that LPI could claim ownership of all 200 cows.<sup>146</sup>

When Littleton became aware of the sale of his cows, he contacted the police, and a criminal investigation ensued.<sup>147</sup> LPI filed a petition to be declared owner of the cows.<sup>148</sup> Littleton filed a cross-claim, asserting that he was the owner of the cows.<sup>149</sup> The Second Circuit held that the cows

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139. See generally *Livestock Producers, Inc.*, 748 So. 2d 537.; *La. Lift & Equip., Inc.*, 770 So. 2d 859.

140. *Livestock Producers*, 748 So. 2d at 539.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 540.

147. *Id.* at 539–40.

148. *Id.* at 540.

149. *Id.*

were stolen and applied Louisiana Civil Code article 524.<sup>150</sup> As a result, Littleton was declared the owner of the cows.<sup>151</sup> The Second Circuit further found that LPI was not in good faith under Louisiana Civil Code article 523 and that consequently Littleton was not required to reimburse LPI to recover the stolen cows under article 524.<sup>152</sup>

However, the Second Circuit's analysis was flawed. The Second Circuit began its analysis by misclassifying the cows as stolen.<sup>153</sup> Article 521 defines a thing as stolen when it is taken without the owner's consent.<sup>154</sup> Smith had possession of the cows with Littleton's consent through the agreement extending pasturing of the cows.<sup>155</sup> Thus, through the agreement, which was essentially a contract of deposit, Smith was actually a precarious possessor of the cows.<sup>156</sup> The court avoided addressing the issue of precarious possession by misclassifying the cows as stolen.<sup>157</sup>

Similarly, in *Louisiana Lift & Equipment, Inc. v. Eizel*, the Second Circuit classified a thing sold by a precarious possessor as stolen in order to avoid resolving the precarious possessor issue.<sup>158</sup> Robert Eizel entered into a rent-to-own agreement with Louisiana Lift & Equipment, Inc. for a new forklift.<sup>159</sup> Eizel defaulted on his monthly payments and sold the forklift to Robert Creamer for \$9,000.<sup>160</sup> After finding out about the transaction, Louisiana Lift filed an action against Creamer seeking the return or value of the forklift.<sup>161</sup> In classifying the forklift as stolen and

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150. *Id.* at 544. Recall that article 524 provides, "The owner of a lost or stolen movable may recover it from a possessor who bought it in good faith at a public auction or from a merchant customarily selling similar things on reimbursing the purchase price." LA. CIV. CODE ANN. art. 524 (2021). Recall that article 523 provides, "An acquirer of a corporeal movable is in good faith for purposes of this Chapter unless he knows, or should have known, that the transferor was not the owner." *Id.* art. 523.

151. *Livestock Producers*, 748 So. 2d at 544.

152. *Id.* at 549.

153. "This case involves the sale of stolen cattle." *Id.* at 539.

154. LA. CIV. CODE ANN. art. 521 (2021).

155. *Livestock Producers*, 748 So. 2d at 539.

156. Sinclair, *supra* note 27, at 532 ("The Louisiana rancher was essentially serving as a depositary for Littleton because Littleton paid him to retain possession of the cows until they were ready to be transferred.").

157. *Id.* at 533.

158. *La. Lift & Equip., Inc. v. Eizel*, 770 So. 2d 859, 861 (La. Ct. App. 2d Cir. 1999).

159. *Id.* at 861.

160. *Id.*

161. *Id.* at 862.

determining that Creamer, the purchaser, was in good faith, the Second Circuit concluded that Louisiana Lift was the owner of the forklift and could reclaim the forklift under the condition that Louisiana Lift first reimburse Creamer.<sup>162</sup>

In his dissenting opinion, Judge Caraway noted that articles 521 and 524 were never intended to apply in the *Louisiana Lift* situation and pointed out that this situation would have been governed by former article 520.<sup>163</sup> He noted that the repeal of article 520 did not make the sale of Louisiana Lift's property a theft under article 521.<sup>164</sup> Judge Caraway argued for either (1) total protection of Louisiana Lift under article 2452 or (2) protection of the innocent purchaser resulting from the failure of Louisiana Lift to perfect its security interest under Chapter 9 if the transaction qualified as a financed lease.<sup>165</sup>

Nevertheless, the court once again avoided the precarious-possessor issue and applied article 524 to a situation where the thing sold was not stolen.<sup>166</sup> Louisiana Lift voluntarily gave possession to Eizel through the rent-to-own agreement.<sup>167</sup> Because Louisiana Lift consented to Eizel's possession of the forklift through the agreement, the forklift did not meet the definition of a stolen thing under article 521.<sup>168</sup>

The two cases discussed above would have fallen under repealed article 520. Had the legislature not repealed Louisiana Civil Code article 520, the result of *Livestock Producers* would have remained the same, but the court would have used a proper analysis in reaching that same conclusion.<sup>169</sup> The agreement to extend Smith's pasturing of the cows was essentially a contract of deposit, thereby making Smith a precarious possessor of Littleton's cows.<sup>170</sup> Recall that repealed article 520 once provided, "A transferee in good faith for fair value acquires ownership of a corporeal movable, if the transferor, though not owner, has possession with the consent of the owner, as pledgee, lessee, depositary or other

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162. *Id.* at 865–66.

163. *Id.* at 868 (Caraway, J., dissenting).

164. *Id.* (Caraway, J., dissenting).

165. *Id.* (Caraway, J., dissenting). Judge Caraway's proposition that Louisiana Lift perfect a security interest under Chapter 9 is discussed later in this Comment. See discussion *infra* Part III.

166. Sinclair, *supra* note 27, at 534 (citing *La. Lift & Equip.*, 770 So. 2d at 861).

167. *La. Lift & Equip.*, 770 So. 2d at 861.

168. Sinclair, *supra* note 27, at 534.

169. *Id.*

170. *Id.*

person of similar standing.”<sup>171</sup> The court in *Livestock Producers* held that the subsequent purchasers were not in good faith, which is a basic requirement for the application of the exceptions under the good faith purchaser doctrine.<sup>172</sup> Thus, repealed article 520 would have been inapplicable and would not have allowed for a transfer of ownership to the subsequent purchasers in this case.<sup>173</sup> Instead, the general rule of article 2452<sup>174</sup> would have applied and would have awarded retention of ownership to Littleton. Therefore, the result in *Livestock Producers* under the application of repealed article 520 would have remained the same as the court’s ultimate result, but the court would have used the proper analysis.<sup>175</sup>

On the contrary, the outcome of *Louisiana Lift* would have been different under a repealed article 520 approach.<sup>176</sup> Louisiana Lift voluntarily relinquished possession of its forklift to Eizel through a lease agreement.<sup>177</sup> Eizel, a precarious possessor of the forklift, transferred the forklift to Creamer, who was in good faith.<sup>178</sup> Under repealed article 520, Creamer’s good faith would result in an award of ownership of the forklift to him, leaving Louisiana Lift with no ability to recover the property from Creamer, even upon reimbursement of the purchase price.<sup>179</sup> Thus, if the legislature had not repealed article 520, its application in *Louisiana Lift* would have altered the outcome of the case.<sup>180</sup>

### C. A Necessary Legislative Solution

The repeal of Louisiana Civil Code article 520 resulted in a gap in Louisiana law for the sale of a movable thing by a precarious possessor. In the absence of an adequate solution in the current Louisiana Civil Code articles and given Louisiana courts’ unwillingness to properly address the

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171. LA. CIV. CODE ANN. art. 520 (1979) (repealed 1981).

172. Sinclair, *supra* note 27, at 534.

173. *Id.*

174. Recall that article 2452 provides, “The sale of a thing belonging to another does not convey ownership.” LA. CIV. CODE ANN. art. 2452 (2021).

175. Sinclair, *supra* note 27, at 534.

176. *Id.*

177. *Id.*

178. *Id.*

179. Reclaiming the forklift upon reimbursement is a remedy allowed only under article 524 for lost or stolen things. *Id.*

180. *Id.* This conclusion is accurate when assuming that the lease in question was in fact a true lease, as the majority seemed to conclude. However, it may be more accurate to say that the transaction would have been governed by the LMA, as is discussed later in this Comment. See discussion *infra* Section III.D.1.

issue, the Louisiana legislature must enact a new provision that provides a rule for the sale of movable things by precarious possessors. On at least two occasions, Louisiana courts have misapplied the law. In *Livestock Producers*, the court misapplied the law but reached a just result. However, in *Louisiana Lift*, the court misapplied the law and reached an unjust result. The legislature's enactment of a new provision of law will ensure that in cases involving the sale of movable things by precarious possessors, courts are able to consistently reach just results using a proper legal analysis.

### III. A COMPLICATING FACTOR: THE LOUISIANA LEASE OF MOVABLES ACT

Before the Louisiana legislature can properly enact a new provision, it must consider the Louisiana Lease of Movable Act (LMA), which only complicates matters further. In particular, a provision of law in the LMA artificially expands the realm of precarious possession into the world of conditional sales. This arises in a situation where, for example, A sells a thing to B, and the parties stipulate that A will retain ownership of the thing until B pays all or part of the price. Under the common law, such a sale is referred to as a *conditional sale*.<sup>181</sup> Louisiana's treatment of conditional sales has evolved significantly over time, especially following the enactment of two major statutory regimes: Chapter 9 of the Louisiana Commercial Code and the LMA.<sup>182</sup>

Historically, conditional sales were disfavored by Louisiana courts.<sup>183</sup> In the above scenario, Louisiana courts would have held that A did not retain ownership of the thing that he sold conditionally to B; instead, B obtained ownership at the time of the sale.<sup>184</sup> The adoption of Chapter 9, which took effect in 1990, did not change the result that Louisiana courts would have reached prior to its adoption on the question of ownership.<sup>185</sup> Under Chapter 9, the seller, A, obtains an additional right but still does not retain ownership in the thing.<sup>186</sup> And B, the purchaser, remains the party who obtains ownership after the sale.<sup>187</sup>

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181. See LONEGRASS ET AL., *supra* note 2, at 320.

182. *Id.* at 324.

183. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:18.

184. *Id.*; see generally *Barber Asphalt Pav. Co. v. St. Louis Cypress Co.*, 46 So. 193 (La. 1908).

185. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:19; see LA. REV. STAT. § 10:1-201(b)(35) (2021).

186. LA. REV. STAT. § 10:1-201(b)(35) (2021).

187. *Id.*

However, one provision in the LMA functions as an exception to the stance taken by the courts and Chapter 9.<sup>188</sup> Louisiana Revised Statutes § 9:3310(B) provides that in certain situations, A will retain ownership of the thing, even though a sale has occurred.<sup>189</sup> In this sale, B will not be seen as an owner of the thing but rather as a precarious possessor, because B has possession of it with the permission of the owner, A. In effect, § 3310(B) expands the scope of precarious possession to a sale in which ownership has transferred under Louisiana law.

*A. Louisiana's Pre-UCC Approach to Conditional Sales*

Prior to Louisiana's adoption of Chapter 9, Louisiana courts disfavored the conditional sale of movables.<sup>190</sup> For example, in *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, Barber Asphalt agreed to sell a steam shovel to Hoyt.<sup>191</sup> Hoyt agreed to pay a total of \$1,200 divided into four equal installments, and the parties' agreement stipulated that the seller would remain the owner of the steam shovel until Hoyt paid all four installments.<sup>192</sup> After paying only the first of four installments, Hoyt sold the steam shovel to St. Louis Cypress Co.<sup>193</sup> Barber Asphalt subsequently sued St. Louis, claiming that it still owned the steam shovel.<sup>194</sup> Barber Asphalt argued that the sale was conditional on payment of the full price by Hoyt, so ownership never passed to Hoyt; therefore, Hoyt had no legal right to sell the steam shovel to St. Louis.<sup>195</sup>

The Louisiana Supreme Court rejected Barber Asphalt's theory as a legal impossibility.<sup>196</sup> The Court reasoned that payment of the price could not be a condition precedent to the existence of a sale; rather, the sale is viewed as a condition precedent to the price.<sup>197</sup> The Court further reasoned that the agreement was a "lopsided" contract, because the buyer was bound unconditionally to pay the price, but the seller was only bound to transfer ownership conditionally.<sup>198</sup> Thus, the Court characterized the agreement

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188. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:20.

189. LA. REV. STAT. ANN. § 9:3310(B) (2021).

190. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:18.

191. *Barber Asphalt Pav. Co. v. St. Louis Cypress Co.*, 46 So. 193, 193 (La. 1908).

192. *Id.*

193. *Id.*

194. *Id.* at 194.

195. *Id.*

196. *Id.*

197. *Id.* at 197.

198. *Id.* at 199.

as an unconditional sale and held that ownership of the steam shovel had passed to Hoyt.<sup>199</sup> After *Barber Asphalt*, Louisiana courts consistently held that when the real nature of an agreement reveals that it is a conditional sale, ownership is transferred upon the consent of the parties as to the thing and the price, and the parties' intent to delay the transfer of ownership is wholly disregarded.<sup>200</sup>

Although the *Barber Asphalt* rule remains, two legislative developments further impacted the conditional sale of movables in Louisiana: the adoption of UCC Article 9 and the enactment of the LMA.<sup>201</sup> Although the LMA occurred first in time, one cannot understand its key effect on the conditional sale of movables without first understanding UCC Article 9's contribution.

### *B. Louisiana's Adoption of UCC Article 9*

On January 1, 1990, Chapter 9 of Louisiana's Commercial Code took effect, serving as an important development in the conditional sales of movables through the creation and regulation of security interests.<sup>202</sup> A security interest is "an interest in personal property or fixtures, created by contract, which secures payment or performance of an obligation."<sup>203</sup> A secured party's security interest is protected when that interest attaches to the collateral, the movable subject to the security interest.<sup>204</sup> Chapter 9 provides in pertinent part, "The retention or reservation of title by a seller of goods notwithstanding perfection of the sale is limited in effect to a reservation of a 'security interest.'"<sup>205</sup> In essence, the seller of goods retains only a security interest in the goods, while the purchaser of the goods obtains title to the goods.<sup>206</sup> Thus, both Chapter 9 and *Barber*

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199. *Id.*

200. LONEGRASS ET AL., *supra* note 2, at 324; *see, e.g.*, Succession of Dunham, 408 So. 2d 888 (La. 1981).

201. *Id.* While more than two legislative enactments impact the conditional sales of movables, these two particular enactments are the most relevant to this Comment.

202. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:19.

203. LA. REV. STAT. § 10:1-201(b)(35) (2021).

204. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:19. "Attachment . . . requires that 'value be given,' that there be a security agreement . . . and that the debtor have 'rights in the collateral or the power to transfer rights in the collateral to a secured party.'" *Id.* (citing LA. REV. STAT. ANN. §§ 10:9-203(b), 10:9-203(b)(1), 10:9-201(a), 10:9-102(a)(73), 10:9-203(b)(2) (2021)).

205. LA. REV. STAT. § 10:1-201(b)(35) (2021).

206. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:19.

*Asphalt* regard the buyer as the owner, but Chapter 9 goes beyond *Barber Asphalt* by converting the seller's attempted retention of title to a security interest in the thing.<sup>207</sup>

Sellers have frequently attempted to evade this rule by disguising a conditional sale as a lease with an option to purchase so that the seller may retain ownership of the goods.<sup>208</sup> In this situation, the agreement is often designated as a lease, but the true nature of the agreement is a sale that creates a security interest, or a conditional sale.<sup>209</sup> Sellers hope that the classification of the agreement as a lease will allow for the retention of ownership as a "lessor" until the "lessee" exercises his option to purchase the thing at the end of the lease.<sup>210</sup> However, a proper Chapter 9 analysis requires that the true nature of the agreement be evaluated, rather than the designation provided by the parties.<sup>211</sup>

Chapter 9 distinguishes between a true lease and a disguised conditional sale, regardless of how the parties classify the transaction, by looking to the facts of each case.<sup>212</sup> When a transaction designated as a lease is found to create a security interest, the transaction is deemed a conditional sale and is subject to the laws of Chapter 9.<sup>213</sup> As a result, the seller, who was regarded as the "lessor" in the transaction, does not retain ownership of the thing.<sup>214</sup> However, if the agreement designated as a lease by the parties is a true lease and not a disguised conditional sale, then

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207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. LA. REV. STAT. ANN. § 10:1-203 (2021). If the lessee's obligation "is not subject to termination by the lessee" and one of four factors are present, then the lease creates a security interest. *Id.* The four factors "are indicia of true ownership by the lessee." *Id.* The four factors include:

- (1) the original term of the lease is equal to or greater than the remaining economic life of the goods;
- (2) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become owner of the goods;
- (3) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease; or
- (4) the lease has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease.

*Id.*

213. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:19.

214. LA. REV. STAT. § 10:1-201(b)(35) (2021).

Chapter 9 does not apply.<sup>215</sup> In that scenario, the lessor retains ownership of the movable.<sup>216</sup>

Under Chapter 9, Louisiana law is in line with that of the American common law.<sup>217</sup> Thus, Louisiana's treatment of conditional sales disguised as leases under Chapter 9 is the same as the treatment in the other 49 states.<sup>218</sup> However, the Louisiana LMA departs significantly from the law of conditional sales in the other states.<sup>219</sup> In fact, Louisiana law warns that "consideration of whether a transaction in the form of a lease of movable property creates a lease or a security interest must take into account the Lease of Movables Act."<sup>220</sup> The LMA contains one significant provision that alters the ownership rules under Chapter 9 for disguised conditional sales.<sup>221</sup>

### *C. The Louisiana Lease of Movables Act Explained*

The Louisiana legislature enacted the LMA in 1985 to regulate the rights and remedies surrounding the leases of corporeal movables in Louisiana.<sup>222</sup> The LMA provisions contain different rules for true leases and financed leases.<sup>223</sup> A financed lease under the LMA is a transaction in

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215. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:19.

216. *Id.*

217. LONEGRASS ET AL., *supra* note 2, at 330.

218. *Id.*

219. *Id.*

220. LA. REV. STAT. ANN. § 10:1-203, cmt. (2021).

221. LONEGRASS ET AL., *supra* note 2, at 330.

222. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:20.

223. The enactment of the LMA predated Chapter 9. *Id.* The LMA's criteria for determining whether a lease was a true lease or a financed lease was modified upon Louisiana's enactment of UCC Chapter 9. *Id.* Thus, transactions before January 1, 1990, the effective date of Chapter 9, are governed by a different set of rules to determine whether a lease is a true lease or a financed lease *Id.* Prior to the enactment of the UCC, the LMA set forth two requirements for the determination: (1) the lessee is bound by the agreement

to pay total compensation over the base lease term which is substantially equivalent to or which exceeds the initial value of the leased property . . . and (2) at the termination of the lease, the "lessee is obligated to become, or has the option of becoming, the owner of the leased property . . . for no additional consideration or for nominal consideration."

LA. REV. STAT. § 9:3312(a) (2021). If both criteria are satisfied, the agreement would create a financed lease and not a true lease. *Id.* Although the pre-Chapter 9 provisions are similar to the Chapter 9 provisions, the courts have greater

the form of a lease that qualifies as a conditional sale under Chapter 9.<sup>224</sup> Thus, if the transaction is a disguised conditional sale under Chapter 9, then the transaction is also a financed lease under the LMA.<sup>225</sup>

The LMA contains a significant provision for a properly perfected<sup>226</sup> financed lease in Louisiana Revised Statutes § 9:3310(B), providing that the “lessor” of such a lease retains ownership of the “leased” thing until the “lessee” completes the performance necessary for the transfer of ownership.<sup>227</sup> Thus, under the LMA, lessors of properly perfected lease agreements retain both the security interest in and the ownership of the leased thing.<sup>228</sup> This result functions as an exception to Louisiana’s conditional sales jurisprudence and Chapter 9.<sup>229</sup> While ownership is not retained by the lessor under Louisiana jurisprudence and Chapter 9 as a general rule, the LMA provides that if the lessor perfects his security interest, the lessor retains ownership of the thing.<sup>230</sup>

Notably, a financed lease is not a lease at all. A financed lease under the LMA is really just a conditional sale that was disguised as a lease by the parties.<sup>231</sup> The term is a Louisiana anachronism not used by the other

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flexibility under the current version of Chapter 9. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:20.

224. A financed lease does not include all conditional sales of movables. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:20. Conditional sales of movables not structured as leases are not governed by the LMA, although they are governed by Chapter 9. *Id.*

225. LA. REV. STAT. ANN. § 10:1-203 (2021).

226. A lessor may properly perfect a security interest by filing a financing statement. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:20 (citing LA. REV. STAT. ANN. § 10:9-310(a) (2021)). For the Louisiana provisions on perfection, see LA. REV. STAT. ANN. § 10:9-308 to 10:9-316.

227. The relevant provision provides:

Notwithstanding the fact that a financed lease creates a security interest under Chapter 9 of the Louisiana Commercial Laws, the lessor under a properly perfected financed lease shall retain full legal and equitable title and ownership in and to the leased equipment until such time as the lessee exercises his option or complies with his obligation to purchase the leased equipment from the lessor as provided under the lease agreement. The provisions of this Chapter shall further not affect present taxation of financed leases.

LA. REV. STAT. ANN. § 9:3310(B) (2021).

228. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:20 (citing Automotive Leasing Specialists, L.L.C. v. Little, 392 B.R. 222, 236 (W.D. La. 2008)).

229. *Id.*

230. *Id.*

231. See LA. REV. STAT. ANN. § 10:1-203 (2021).

49 states.<sup>232</sup> Additionally, Louisiana is the only state in which a seller of goods can retain ownership of the thing under a disguised conditional sale.<sup>233</sup> Other U.S. jurisdictions apply the rule under Article 9 of the UCC, providing that the seller retains only a security interest in the thing—never ownership.<sup>234</sup>

#### *D. Chapter 9 and the LMA Applied*

Although the Louisiana Supreme Court has not yet decided on the impact of Chapter 9 and the LMA upon the conditional sale of movables, many of Louisiana's lower courts have considered the issue of a conditional sale disguised as a lease.<sup>235</sup> Many times, Louisiana courts have rendered decisions that have become subject to scholarly criticism.<sup>236</sup>

##### *1. True Lease vs. Conditional Sale: Courts Bypassing the Determination Altogether*

On occasion, Louisiana courts have simply bypassed the fundamental determination of whether a lease is a true lease or a conditional sale.<sup>237</sup> For example, the majority in *Louisiana Lift* bypassed this fundamental determination in reaching its holding.<sup>238</sup> Recall that Louisiana Lift and Eizel entered into a rent-to-own agreement for a forklift, and Eizel sold the forklift to Creamer after defaulting on the monthly payments.<sup>239</sup> The majority opinion treated the forklift as stolen and ordered that the forklift be returned to Louisiana Lift on the condition that Louisiana Lift reimburse Creamer for the purchase price.<sup>240</sup>

The majority in *Louisiana Lift* never actually classified the transaction as either a true lease or a conditional sale.<sup>241</sup> In fact, the majority declared that it was unnecessary to consider whether Chapter 9 was applicable to the situation at hand.<sup>242</sup> However, Judge Caraway's dissenting opinion

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232. LONEGRASS ET AL., *supra* note 2, at 330.

233. *Id.*

234. *Id.*

235. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:21.

236. *Id.*

237. *Id.*

238. *Id.* (citing *La. Lift & Equip., Inc. v. Eizel*, 770 So. 2d 859 (La. Ct. App. 2d Cir. 2000)).

239. *La. Lift & Equip.*, 770 So. 2d at 861.

240. *Id.* at 865–66.

241. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:21.

242. *La. Lift & Equip.*, 770 So. 2d at 868.

noted that the majority should have explored whether Creamer was entitled to protection from Louisiana Lift's failure to perfect a security interest in the forklift.<sup>243</sup> Although the majority avoided the classification issue, the majority appears to have treated the contract as a true lease.<sup>244</sup> Notably though, the transaction may have qualified as a conditional sale subject to Chapter 9.<sup>245</sup> Thus, instead of the protection afforded to Louisiana Lift upon reimbursement of the purchase price, a conditional-sale analysis under Chapter 9 might have protected Creamer by awarding him full ownership under Chapter 9 and the LMA—a result contrary to the holding of the court.<sup>246</sup> The court bypassed the fundamental determination of whether the agreement at issue was a true lease or a financed lease.

*2. True Lease vs. Conditional Sale: The Courts Bypassing a Chapter 9 Analysis*

Even when courts address the true lease and financed lease determination, some courts have struggled with the Chapter 9 and LMA analysis.<sup>247</sup> For example, in *Hewitt v. Safeway Insurance Co.*, Brent Brevelle struck a pickup truck driven by Melissa Dauzat as she was exiting a parking lot.<sup>248</sup> Debra Hewitt had allowed Dauzat to run an errand in the pickup truck when the accident occurred.<sup>249</sup> Hewitt's daughter was a passenger in the vehicle at the time of the accident.<sup>250</sup> Hewitt filed suit against Brevelle and his liability insurer.<sup>251</sup> Hewitt later added State Farm Mutual Automobile Insurance Company as an additional defendant, asserting that State Farm provided liability coverage for the pickup truck.<sup>252</sup> State Farm argued that it did not.<sup>253</sup>

The pickup truck involved in the accident was insured by State Farm in the name of Catherine Bordelon, who was the owner and record title

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243. *Id.* (Caraway, J., dissenting).

244. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:21.

245. *Id.* (citing LA. REV. STAT. ANN. § 10:1-203 (2021)). Because the court failed to offer justification for the classification of the agreement as a true lease, further facts would be needed to suggest a proper classification analysis.

246. *Id.*

247. *Id.*

248. *Hewitt v. Safeway Ins. Co. of La.*, 787 So. 2d 1182, 1184 (La. Ct. App. 3d Cir. 2001).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

holder at the time of the accident.<sup>254</sup> However, Bordelon and Hewitt had entered into a Lease Purchase agreement prior to the accident.<sup>255</sup> The agreement provided that Bordelon would lease the pickup truck to Hewitt for 60 months at a monthly rental price.<sup>256</sup> State Farm had denied insurance coverage for the accident on the basis that the Lease Purchase agreement was a conditional sale that transferred ownership to Hewitt, and thus, the agreement invalidated the insurance policy issued to Bordelon.<sup>257</sup> The Third Circuit Court of Appeal agreed with the insurer and held that the agreement was a conditional sale.<sup>258</sup>

However, in reaching its holding, the majority never mentioned Chapter 9.<sup>259</sup> The court acknowledged Louisiana Revised Statutes § 9:3310(B) but dismissed the section's application outright.<sup>260</sup> In a dissenting opinion, Judge Saunders disagreed with the majority's analysis; he determined that the agreement was a disguised sale and that the contract was a properly perfected financed lease governed by § 3310(B).<sup>261</sup>

The majority should have applied Chapter 9 in reaching its finding that the agreement was a conditional sale.<sup>262</sup> Although Judge Saunders properly found that the agreement was a conditional sale, he erroneously found that the agreement was a properly perfected financed lease.<sup>263</sup> Proper perfection requires that a financing statement be filed, but there was no such indication in the case.<sup>264</sup> Ultimately, the court applied an improper analysis of Chapter 9 and the LMA.<sup>265</sup>

### *3. True Lease vs. Conditional Sale: A Proper Legal Analysis but a Source of Disputes*

Even when the courts apply a proper analysis, the accuracy of their application of Chapter 9 and LMA principles is still sometimes questionable.<sup>266</sup> In *Automotive Leasing Specialists, L.L.C. v. Little*, Ida

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254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 1187.

259. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:21.

260. *Id.*

261. *Hewitt*, 787 So. 2d at 1189 (Saunders, J., dissenting).

262. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:21.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

Little entered into a “Motor Vehicle Lease Agreement” with Automotive Leasing Specialists, L.L.C. (ALS).<sup>267</sup> The agreement established a lease term and monthly payment for the vehicle.<sup>268</sup> Little filed a voluntary petition under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Louisiana.<sup>269</sup> In response, ALS filed an objection to the Chapter 13 plan on grounds that Little incorrectly identified the agreement as a conditional sale, rather than a true lease, so she should not have listed it as an asset.<sup>270</sup> The bankruptcy court held that the lease satisfied the criteria of a disguised sale under Chapter 9 of the Louisiana Commercial Code and that it was properly listed in the bankruptcy proceedings as an asset owned by Little.<sup>271</sup>

The district court affirmed the bankruptcy court’s holding.<sup>272</sup> Both holdings have been criticized by scholars, who note that the issue turned on the interpretation of the clause “all other amounts then due under this Lease.”<sup>273</sup> If the clause meant all remaining lease payments, then the lease was properly found to be a disguised sale; if the clause referred only to the amount owed at the time of early termination, then the lease should have been found to be a true lease.<sup>274</sup> Thus, although the court’s legal analysis was correct, its interpretation of the clause is questionable.<sup>275</sup>

*E. The Practical Effect of the LMA: Louisiana Revised Statutes § 9:3310(B)*

Louisiana Revised Statutes § 9:3310(B) allows the “lessor” of a properly perfected financed lease to retain ownership of the “leased” thing pending payment of the price by the “lessee.”<sup>276</sup> Thus, if A leases a thing to B under a properly perfected financed lease, then A will retain ownership, rather than ownership being transferred to B. Recall that a

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267. *Auto. Leasing Specialists, L.L.C. v. Little*, 392 B.R. 222, 224 (W.D. La. 2008).

268. *Id.*

269. *Id.* at 224–25. A Chapter 13 bankruptcy allows the debtor to preserve existing assets while granting creditors recovery from future income. *See Foster v. Heitkamp*, 670 F. 2d 478, 483 (5th Cir. 1982).

270. *Auto. Leasing Specialists*, 392 B.R. at 225.

271. *Id.*

272. *Id.* at 236.

273. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:21.

274. *Id.*

275. *Id.* (citing Teresa Davidson, Barry Graynor, Ruthanne Hammett, Edwin Huddleson, Robert Ihne, & Stephen Whelan, *Survey—Uniform Commercial Code: 2008 Development-Leases*, 64 BUS. LAW. 1187, 1188 (2009)).

276. LA. REV. STAT. ANN. § 9:3310(B) (2021).

financed lease is not a lease at all; a financed lease is a conditional sale that is disguised as a lease.<sup>277</sup> The situation at hand is akin to that of a precarious possessor. B does not have ownership in the thing, because ownership is retained by A. Instead, B has possession of the thing with the permission of the owner, A, under the lease. The result is a provision of law that artificially expands the scope of precarious possession to a situation in which a sale has occurred. In sum, this provision demotes someone who should be regarded as the owner of a thing to a precarious possessor.

As illustrated by *Louisiana Lift, Hewitt, and Automotive Leasing*, Louisiana courts have struggled to nail down the interaction between Chapter 9 and the LMA.<sup>278</sup> The Louisiana Supreme Court has not ruled on the effect of the two statutory schemes on the conditional sale of movables.<sup>279</sup> Thus, in response to the artificial expansion of precarious possession and the confusion surrounding this area of law, the Louisiana legislature must take action.

#### IV. SURVEY OF THE COMMERCIAL BONA FIDE PURCHASER DOCTRINE

Before the 1979 revision of the Louisiana Civil Code, Louisiana courts looked to the common law bona fide purchaser doctrine for guidance when developing exceptions to Louisiana Civil Code article 2452, Louisiana's general prohibition on the sale of a thing belonging to another.<sup>280</sup> However, the reception of common law principles through the courts, rather than through the Code, was heavily criticized by scholars as a fundamental breach of Louisiana's civilian tradition.<sup>281</sup> In response, the Louisiana legislature codified the common law exceptions in the 1979 revision of the Louisiana Civil Code, collectively known as the good faith purchaser doctrine.<sup>282</sup> In the process, the Louisiana legislature sought to "re-align Louisiana Law with modern civil law and the Uniform Commercial Code."<sup>283</sup> However, since the subsequent repeal of Louisiana Civil Code article 520 and the introduction of the LMA, Louisiana law has diverged from the UCC. As a result, Louisiana law is not only unclear but is also different from the other U.S. jurisdictions.

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277. *Id.* § 10:1-203.

278. TOOLEY-KNOBLETT & GRUNING, *supra* note 5, at § 4:21.

279. *Id.*

280. Ibieta, *supra* note 29, at 843 (citing LITVINOFF, *supra* note 11, at § 94).

281. Franklin, *supra* note 6, at 609-12.

282. Sinclair, *supra* note 27, at 522.

283. Act No. 180, 1979 La. Acts 430.

The Louisiana legislature should resolve Louisiana's divergence.<sup>284</sup> First, uncertainty of the law in a state makes parties more likely to resort to litigation.<sup>285</sup> Second, in the sale of goods crossing state lines, a dispute may theoretically involve the law of all U.S. jurisdictions, a situation nearly impossible to prepare for.<sup>286</sup> Under the common law, the rules of jurisdictions will often diverge.<sup>287</sup> However, the adoption of the UCC has aided both in the certainty of law and in reducing the divergence in the U.S. jurisdictions choosing to adopt its provisions.<sup>288</sup> Thus, the Louisiana legislature should look to the body of law that has already solved the two outstanding issues present in Louisiana law—the UCC.

*A. The Commercial Bona Fide Purchaser Doctrine*

In an effort to officially realign Louisiana law with the common law and the UCC, the Louisiana legislature should embrace the commercial principles when bridging the lingering gap in Louisiana law since the repeal of Louisiana Civil Code article 520. UCC § 2-403 formulates the commercial bona fide purchaser doctrine, which UCC § 2A-305 extends to leases.<sup>289</sup>

Section 2-403 of the UCC governs situations in which a third party purchases goods from a seller who is less than the full owner of the goods.<sup>290</sup> Section 2-403 begins with its general rule—known as the “shelter rule”—which codifies the common law principle *nemo dat quod non habet* and promotes the security of ownership.<sup>291</sup> The shelter rule is extended to sales of lost or stolen things, which is known as the void-title rule.<sup>292</sup> Additional rules in § 2-403 provide exceptions to the shelter rule: the voidable title and the entrustment rules.<sup>293</sup> When an exception applies, protection is shifted from the security of ownership to the security of

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284. Sinclair, *supra* note 27, at 540.

285. Rasmussen, *supra* note 24, at 1129.

286. *Id.* at 1114.

287. *Id.*

288. *See generally id.*

289. 77A C.J.S. *Sales* § 401 (2021); THOMAS M. QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 2A-305[A][7] (rev. 2d ed. 2020).

290. QUINN, *supra* note 289, at § 2-403[A][1].

291. Stroud, *supra* note 11, at 44–45 (citing Hebert & Pettaway, *supra* note 12, at 153–54).

292. QUINN, *supra* note 289, at § 2-403[A][6].

293. 77A C.J.S. *Sales* § 401 (2021).

transaction.<sup>294</sup> Nevertheless, the exceptions do not apply when the goods are stolen.<sup>295</sup>

Section 2A-305 of the UCC extends the commercial bona fide purchaser doctrine of § 2-403 to lease agreements.<sup>296</sup> Section 2A-305 governs situations in which possession of goods has been transferred to a lessee who subsequently sells<sup>297</sup> the goods to a third-party purchaser.<sup>298</sup> Nearly identical in structure to § 2-403, § 2A-305 extends the shelter rule, the voidable title rule, and the entrustment doctrine to the field of lease.<sup>299</sup> Once again, the exceptions to the shelter rule do not apply when the goods are stolen.<sup>300</sup>

### 1. *The UCC Shelter Rule*

The shelter rule functions as the general rule and provides that a third-party purchaser obtains no greater rights than the rights that the seller had to give.<sup>301</sup> Subsection 2-403(1) provides that “a purchaser of goods acquires all title which his transferor had or had the power to transfer . . . .”<sup>302</sup> A seller with less than full ownership cannot convey full ownership of the goods; therefore, the shelter rule protects the security of ownership.<sup>303</sup>

The principle of § 2-403(1)’s shelter rule is extended to the field of lease in § 2A-305(1), which provides, in pertinent part, that “a buyer . . . from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer . . . .”<sup>304</sup> Thus, as a general rule, the lessee of the goods can only transfer the interest that he or she has in the

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294. Stroud, *supra* note 11, at 44–45 (citing Hebert & Pettaway, *supra* note 12, at 154–55).

295. QUINN, *supra* note 289, at § 2-403[A][6].

296. QUINN, *supra* note 289, at § 2A-305[A][7].

297. UCC § 2A-305 also governs subsequent leasing of the goods by the original lessor. For purposes of this Comment, discussion will be limited to the subsequent sale of goods by the original lessee.

298. QUINN, *supra* note 289, at § 2A-305[A][1].

299. QUINN, *supra* note 289, at § 2A-305[A][7].

300. 4C DAVID FRISCH, *Commentary*, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2A-305:23 (3d. ed. 2019).

301. QUINN, *supra* note 289, at § 2-403[A][2].

302. U.C.C. § 2-403(1) (AM. L. INST. & UNIF. L. COMM’N 2021).

303. Stroud, *supra* note 11, at 44–45 (citing Hebert & Pettaway, *supra* note 12, at 153–54).

304. U.C.C. § 2A-305(1) (AM. L. INST. & UNIF. L. COMM’N 2021).

lease.<sup>305</sup> UCC § 2A-305(1) clarifies that the protection of the security of ownership under § 2-403(1) extends into the field of lease.<sup>306</sup>

### 2. *The Void-Title Rule*

It is important to note that the provisions of UCC § 2-403 are not applicable to stolen things.<sup>307</sup> In the case of lost or stolen goods, the traditional common law rule, that the original owner's rights are not affected by subsequent sales, applies.<sup>308</sup> This common law rule, also known as the void-title rule, is not changed by the UCC.<sup>309</sup> A subsequent purchaser of stolen goods does not obtain title to the goods and does not have a right to the possession of the goods against the rightful owner.<sup>310</sup> A bona fide purchaser's ownership interest in and right to possession over lost and stolen goods is never enforceable against the original owner of the goods.<sup>311</sup>

Like the provisions of § 2-403, the provisions of § 2A-305 are not applicable to stolen goods.<sup>312</sup> Under this void-title rule, thieves and subsequent transferors do not acquire any interest in stolen goods.<sup>313</sup> The true owner may always reclaim the goods from a subsequent purchaser, and the UCC does not alter that rule.<sup>314</sup>

### 3. *The Voidable-Title Rule*

The general voidable-title rule is an exception to the basic shelter rule in situations where the seller's title is voidable.<sup>315</sup> The sale to a good faith

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305. FRISCH, *supra* note 300, at § 2A-305:5 (citing U.C.C. § 2A-305(1) (AM. L. INST. & UNIF. L. COMM'N 2021)).

306. QUINN, *supra* note 289, at § 2A-305[A][7].

307. QUINN, *supra* note 289, at § 2-403[A][6].

308. *Id.*

309. *Id.*

310. 77A C.J.S. *Sales* § 400 (2020).

311. *Id.*

312. FRISCH, *supra* note 300, at § 2A-305:23.

313. *Id.*

314. *Id.*

315. QUINN, *supra* note 289, at § 2-403[A][3]. The law uses the concept of voidable title to single out certain types of wrongdoing, and because the wrongdoer's title is voidable, the goods are recoverable by the true owner while in possession of the wrongdoer. *Id.* However, once the voidable title falls in the hands of the third-party purchaser, the title ceases to be voidable and is made good. *Id.*

purchaser<sup>316</sup> for value<sup>317</sup> cures the defect in a seller's voidable title and makes the title good in the hands of the purchaser.<sup>318</sup> Once the title is transferred to the third-party purchaser, the true owner can no longer recover the goods because ownership of the goods has been transferred to the third party.<sup>319</sup> This rule promotes finality in commercial transactions by protecting the title of a purchaser who acquires property for valuable consideration and is without notice that the seller lacks valid and transferrable title.<sup>320</sup> The voidable-title rule applies to four specific scenarios: the imposters situation, the hot checks situation, the cash-sale situation, and the larceny situation.<sup>321</sup> The general voidable-leasehold rule in § 2A-305(1) is analogous to the general voidable-title rule of § 2-403(1)

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316. The UCC defines a purchaser as “a person that takes by purchase.” U.C.C. § 1-201(b)(30) (AM. L. INST. & UNIF. L. COMM’N 2021). A purchase is defined as “taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property.” *Id.* § 1-201(b)(29). Good faith is defined as “honest in fact and the observance of reasonable commercial standards of fair dealing.” *Id.* § 1-201(b)(20). Thus, “a ‘good faith purchaser’ is one who, by an honest contract or agreement, purchases property or acquires an interest therein, without knowledge, or means of knowledge sufficient to charge him or her with knowledge, of any infirmity in the title of the seller.” 77A C.J.S. *Sales* § 402 (2020).

317. The UCC defines value as follows:

[A] person gives ‘value’ for rights if the person acquires them: (1) in return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; (2) as security for, or in total or partial satisfaction of, a pre-existing claim; (3) by accepting delivery under a pre-existing contract for purchase; or (4) in return for any consideration sufficient to support a simple contract.

U.C.C. § 1-204 (AM. L. INST. & UNIF. L. COMM’N 2021).

318. 77A C.J.S. *Sales* § 401 (2020).

319. QUINN, *supra* note 289, at § 2-403[A][3].

320. 77A C.J.S. *Sales* § 401 (2020).

321. QUINN, *supra* note 289, at § 2-403[A][4]. Title is voidable under the imposters situation when “the transferor was deceived as to the identity of the purchaser.” U.C.C. § 2-403(1)(a) (AM. L. INST. & UNIF. L. COMM’N 2021). Title is voidable under the hot checks situation when “the delivery was in exchange for a check which is later dishonored.” *Id.* § 2-403(1)(b). Title is voidable under the cash-sale situation when “it was agreed that the transaction was to be a ‘cash sale.’” *Id.* § 2-403(1)(c). Title is voidable under the larceny situation when “the delivery was procured through fraud punishable as larcenous under the criminal law.” *Id.* § 2-403(1)(d).

but focuses on the transfer of a leasehold interest rather than on the transfer of title.<sup>322</sup>

#### 4. *The Entrustment Doctrine*

The entrustment doctrine of § 2-403(2) provides another exception to the shelter rule. Under the entrustment doctrine, “[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entruster to a buyer in the ordinary course of business.”<sup>323</sup> Three requirements must be met before the entrustment doctrine will apply: (1) there must be an entrustment of goods, (2) the entrustment must be to a “merchant who deals in goods of that kind,” and (3) the purchaser must qualify as “a buyer in the ordinary course of business.”<sup>324</sup> If the three requirements are met, the rights of the entruster are transferred to the third-party purchaser.<sup>325</sup>

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322. § 2A-305(1) provides an exception to the shelter rule in situations where the leasehold of the lessee exists but is flawed in some manner. QUINN, *supra* note 289, at § 2A-305[A][3]. Section 2A-305(1) provides in part, “A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value . . .” U.C.C. § 2A-305(1) (AM. L. INST. & UNIF. L. COMM’N 2021). This rule affords the third-party purchaser “good” leasehold that was voidable as between the original lessor and lessee. QUINN, *supra* note 289, at § 2A-305[A][3]). While the general voidable-leasehold rule does not define voidable leasehold interest, § 2A-305(1) singles out three situations of voidable leasehold interest, also known as the special voidable-title rule. QUINN, *supra* note 289, at § 2A-305[A][4]. “The lessee under an existing lease has the power to transfer a goods leasehold interest notwithstanding the fact that ‘the lessor was deceived as to the identity of the lessee.’” U.C.C. § 2A-305(1)(a) (AM. L. INST. & UNIF. L. COMM’N 2021). “The lessee under an existing lease has the power to transfer a goods leasehold interest notwithstanding the fact that ‘the delivery was in exchange for a check which is later dishonored.’” QUINN, *supra* note 289, at § 2A-305(1)(b). “The lessee under an existing lease has the power to transfer a goods leasehold interest notwithstanding the fact that ‘the delivery was procured through fraud punishable as larcenous under the criminal law.’” QUINN, *supra* note 289, at § 2A-305(1)(c).

323. U.C.C. § 2-403(2) (AM. L. INST. & UNIF. L. COMM’N 2021). The entrustment doctrine involves three parties: (1) the owner of the goods who entrusts the goods; (2) the seller of the goods who was entrusted with the goods; and (3) the third-party purchaser of the goods. QUINN, *supra* note 289, at § 2-403[A][9].

324. QUINN, *supra* note 289, at § 2-403[A][9][c].

325. 77A C.J.S. *Sales* § 406 (2020).

First, for an entrustment of goods to occur, there must be “any delivery and any acquiescence in retention of possession . . . .”<sup>326</sup> Although the UCC does not define possession, courts look to the dealer’s appearance of control over the goods.<sup>327</sup> If the appearance of control is present, then an entrustment has occurred.<sup>328</sup>

Second, the entrusted seller must qualify as a “merchant who deals in goods of that kind.”<sup>329</sup> The UCC defines a merchant as

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.<sup>330</sup>

Even if the entrusted seller qualifies as a merchant, the UCC also requires that the merchant be “one who deals in goods of that kind.”<sup>331</sup> Thus, § 2-403(2) concerns a narrower class of merchants based on appearances, from whom the third-party purchaser has the highest expectation to receive good title.<sup>332</sup>

Third, the third-party purchaser, or the buyer of the entrusted goods, must be a “buyer in ordinary course of business.”<sup>333</sup> A buyer in the ordinary course of business is defined as “a person who [is] in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party . . . .”<sup>334</sup> The question of whether a third-party purchaser qualifies as a good faith purchaser is a mixed question of law and fact.<sup>335</sup> Usually, a person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices.<sup>336</sup> Thus, if (1) there was an

326. U.C.C. § 2-403(3) (AM. L. INST. & UNIF. L. COMM’N 2021).

327. JAMES J. WHITE & ROBERT S. SUMMERS, *WHITE AND SUMMERS’ UNIFORM COMMERCIAL CODE* § 3-12 (5th ed. 2008).

328. *Id.*

329. QUINN, *supra* note 289, at § 2-403[A][9][b].

330. U.C.C. § 2-104(1) (AM. L. INST. & UNIF. L. COMM’N 2021).

331. QUINN, *supra* note 289, at § 2-403[A][9][b].

332. WHITE & SUMMERS, *supra* note 327.

333. QUINN, *supra* note 289, at § 2-403[A][9][c].

334. U.C.C. § 1-201(9) (AM. L. INST. & UNIF. L. COMM’N 2021).

335. WHITE & SUMMERS, *supra* note 327.

336. 77A C.J.S. *Sales* § 408 (2020).

entrustment of goods, (2) the entrusted seller is a merchant who deals in goods of that kind, and (3) the third-party purchaser is a buyer in the ordinary course of business, then the purchaser receives all of the rights in the thing sold.<sup>337</sup>

The entrustment doctrine exception from § 2-403(2) is made applicable to lease agreements under § 2A-305(2).<sup>338</sup> This doctrine as applied to the field of lease has three basic components: (1) the goods must have been entrusted by the lessor, (2) the lessee must be a merchant who deals in goods of that kind, and (3) the buyer must qualify as a buyer in the ordinary course of business.<sup>339</sup> If all three requirements are met, the buyer in the ordinary course of business obtains all of the lessor and lessee's rights to the goods and takes them free of the existing lease contract.<sup>340</sup> Thus, the entrustment doctrine permits the lessee to transfer a right greater than the right he had in the goods.<sup>341</sup>

#### *B. Application of the UCC's Entrustment Doctrine*

The application of the UCC entrustment doctrine is clearly illustrated in *Farmers Livestock Exchange of Bismarck, Inc. v. Ulmer*, a North Dakota Supreme Court case.<sup>342</sup> North Dakota Century Code § 41-02-48(2) provides, "Any 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 ordinary course of business."<sup>343</sup> This provision of North Dakota law is identical to UCC § 2-403(2).

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337. QUINN, *supra* note 289, at § 2-403[A][5].

338. *Id.* § 2A-305[A][5].

339. *Id.* The drafters indicate that § 2A-305 is modeled on the entrustment rules in the article on sales, § 2-403, so the definitions of "entrustment" and "merchant who deals in goods of that kind" are also applicable to leases. *Id.* For a discussion of definitions of these terms, *see* discussion *supra* Section IV.A.4. However, the definition of "buyer in the ordinary course" differs slightly. FRISCH, *supra* note 300, at § 2A-305:4. Section 2A-103(1)(a) provides, "'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him [or her] is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker." U.C.C. § 2A-103(1)(a) (AM. L. INST. & UNIF. L. COMM'N 2021).

340. FRISCH, *supra* note 300, at § 2A-305:27.

341. *Id.*

342. *Farmers Livestock Exch. of Bismarck, Inc. v. Ulmer*, 393 N.W.2d 65 (N.D. 1986).

343. *Id.* at 67-68.

In *Ulmer*, David Bernhardt purchased 53 cows from the Farmers Livestock Exchange of Bismarck, 48 of which were purchased on the condition that Bernhardt would pay for them after delivery.<sup>344</sup> Bernhardt subsequently shipped the cattle to Ashley Livestock Exchange to satisfy a debt owed by Bernhardt to Ashley Livestock.<sup>345</sup> Ashley Livestock subsequently sold the 53 cows, and the proceeds were applied to Bernhardt's account.<sup>346</sup> Farmers Livestock commenced an action against Ashley Livestock for the proceeds from the sale of the 48 cows that had not yet been paid for.<sup>347</sup> The district court determined that the entrustment doctrine was applicable to the action and afforded Ashley Livestock good title to the cows.<sup>348</sup> The Supreme Court of North Dakota disagreed, finding that Ashley Livestock did not qualify as a buyer in the ordinary course of business because Ashley Livestock gave no new value for the cows.<sup>349</sup> Instead, according to the court, the result of the transaction between Ashley Livestock and Bernhardt was the satisfaction of an antecedent debt.<sup>350</sup> Thus, even though Ashley Livestock was in good faith, the entrustment doctrine did not afford Ashley Livestock ownership of the cows.<sup>351</sup>

#### V. A COMPARATIVE ANALYSIS OF LOUISIANA LAW AND THE UNIFORM COMMERCIAL CODE

The similarity between Louisiana's good faith purchaser doctrine and the UCC bona fide purchaser doctrine in structure, content, and policy reveals the significant gap left after the repeal of Louisiana Civil Code article 520. The general rule and the voidable-title, stolen-goods, and double-dealing-seller exceptions are all present and function similarly in the Louisiana and UCC doctrines. However, the UCC's entrustment doctrine highlights the gap in Louisiana law surrounding the subsequent sale of a thing by a precarious possessor. Although the commercial bona fide purchaser doctrine functions as a complete set of rules governing all

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344. *Id.* at 66.

345. *Id.* at 67.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 69–70.

350. *Id.* at 70.

351. *Id.* The court concluded that although the entrustment doctrine was not applicable to the instant action, the provisions of the UCC could be supplemented with principles of equity. *Id.* The court ultimately held that Farmers Livestock must bear the loss. *Id.* at 71.

situations in the sale of movable things by a non-owner and balances the security of transaction with the security of ownership, Louisiana's good faith purchaser doctrine remains incomplete, as there is no codal provision covering the precarious-possessor situation.

*A. LA vs. UCC: The General Rules*

The Louisiana good faith purchaser doctrine and the UCC bona fide purchaser doctrine function as exceptions to a general rule. Under the UCC, the general rule is found in the shelter rule of § 2-403(1), which provides that “a purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires the rights only to the extent of the interest purchased.”<sup>352</sup> Under Louisiana law, the general rule is found in Louisiana Civil Code article 2452 and provides, “The sale of a thing belonging to another does not convey ownership.”<sup>353</sup> Thus, under both Louisiana law and the UCC, the general rule provides that a person without full ownership in the thing cannot transfer ownership of the thing.

The general rules found in article 2452 of the Louisiana Civil Code and in the UCC shelter rule promote the security of ownership by barring the transfer of ownership by someone who is not the true owner of the thing. These provisions apply the common law principle *nemo dat quod non habet*, but the numerous exceptions to this general rule attempt to balance the security of ownership with the security of transaction by limiting the general rule in certain situations.

*B. LA vs. UCC: Stolen Goods*

Notably, both Louisiana's good faith purchaser doctrine and the UCC bona fide purchaser doctrine apply the same general rules to stolen goods. The UCC provisions follow the common law rule that the owner's rights in lost or stolen goods are not severed by subsequent sales.<sup>354</sup> Thus, the buyer always loses when the item purchased is a stolen good.<sup>355</sup> Similarly, article 521 of the Louisiana Civil Code provides that “[o]ne who has possession of a lost or stolen thing may not transfer its ownership to another.”<sup>356</sup> Unlike the UCC, Louisiana law does allow for the purchaser to have a right to reimbursement before having to relinquish possession of

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352. U.C.C. § 2-403(1) (AM. L. INST. & UNIF. L. COMM'N 2021).

353. LA. CIV. CODE ANN. art. 2452 (2021).

354. QUINN, *supra* note 289, at § 2-403[A][6].

355. *Id.* § 2-403[A][6].

356. LA. CIV. CODE ANN. art. 521 (2021).

the thing back to the original owner.<sup>357</sup> In that way, Louisiana is slightly more protective of transactions in the case of stolen goods.

*C. LA vs. UCC: Voidable-Title Rule or Vice of Consent*

The general rules under Louisiana law and the UCC are both subject to a voidable-title exception. Under the UCC, the voidable-title rule of § 2-403(1) provides that “a person with voidable title has power to transfer a good title to a good faith purchaser for value.”<sup>358</sup> Similarly, under Louisiana law, Civil Code article 522 provides that “[a] transferee of a corporeal movable in good faith and for fair value retains the ownership of the thing even though the title of the transferor is annulled on account of a vice of consent.”<sup>359</sup> Louisiana Civil Code article 522 accords with UCC § 2-403(1) in that a person having a corporeal movable under annulable title may validly transfer ownership to an acquirer in good faith.<sup>360</sup> However, UCC § 2-403(1) allows for a transfer of good title to an intermediate seller in good faith, while Louisiana allows title to be transferred to a person either in good or bad faith.<sup>361</sup> Nevertheless, recovery of the movable by the owner is still limited to when the subsequent purchaser was in bad faith; the owner may not recover the movable from an acquirer in good faith under both Louisiana law and the UCC.<sup>362</sup> The voidable-title exception under the UCC and the vice-of-consent exception under Louisiana law function as limitations to the general rule, thereby promoting the security in transactions.

*D. LA vs. UCC: The Double-Dealing Seller*

While Louisiana Civil Code article 518 provides a specific provision for the case of the double-dealing seller, the UCC’s analogous approach lies within its entrustment doctrine of § 2-403(2). Louisiana Civil Code article 518 provides that “[w]hen possession has not been delivered, a subsequent transferee to whom possession is delivered acquires ownership provided he is in good faith.”<sup>363</sup> Thus, if a seller purports to sell a thing to two purchasers, ownership is awarded to the first purchaser, but the purchaser that is the first to take possession of the goods obtains ownership

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357. *Id.* art 524.

358. U.C.C. § 2-403(1) (AM. L. INST. & UNIF. L. COMM’N 2021).

359. LA. CIV. CODE ANN. art. 522 (2021).

360. *Id.* cmt. d.

361. *Id.*

362. *Id.*

363. LA. CIV. CODE ANN. art. 518 (2021).

that is effective against third parties. Under the UCC, an entrustment includes not only delivery but “any acquiescence in retention of possession.”<sup>364</sup> When the first buyer leaves the thing with the seller post-sale, an entrustment has occurred where the first buyer is the entruster and the seller is entrusted with the goods. Because an entrustment has occurred, UCC § 2-403(2) applies and 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 ordinary course of business.”<sup>365</sup> If the seller qualifies as a merchant who deals in goods of that kind and the second purchaser qualifies as a buyer in the ordinary course of business, then the second purchaser will prevail and receive ownership of the thing.<sup>366</sup> Although the application of the UCC approach is more limited than the Louisiana approach,<sup>367</sup> both the UCC and Louisiana law provide a similar solution to the double-dealing-seller scenario.

*E. LA vs. UCC: Precarious Possession*

As the previous subsections illustrate, the Civil Code’s good faith purchaser doctrine and the UCC bona fide purchaser doctrine share many parallel provisions; however, Louisiana lacks a rule similar to all situations falling under the UCC’s entrustment doctrine. Under the UCC, § 2-403(2) provides that “[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entruster to a buyer in the ordinary course of business.”<sup>368</sup> However, Louisiana has no equivalent provision in its Civil Code, a result of the lobbying efforts of the commercial leasing industry. The repeal of Louisiana Civil Code article 520 left a significant gap in the law concerning situations in which a nonowner in possession of movable property with the consent of the owner sells it to a third-party purchaser. The Louisiana legislature should enact new legislation governing the sale of a movable thing by a precarious possessor so that Louisiana will have a complete set of rules in its good faith purchaser doctrine mirroring the commercial bona fide purchaser doctrine.

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364. U.C.C. § 2-403(3) (AM. L. INST. & UNIF. L. COMM’N 2021).

365. *Id.* § 2-403(2).

366. *See* discussion *supra* Section III.A.4.

367. The UCC is more restrictive than the Louisiana approach in article 518 because UCC § 2-403(2) is limited to situations where the entrusted is a merchant who deals in goods of that kind and a buyer who qualifies as a buyer in ordinary course of business.

368. U.C.C. § 2-403(2) (AM. L. INST. & UNIF. L. COMM’N 2021).

The UCC's entrustment doctrine promotes security in transactions by protecting the innocent buyer who believes that the merchant has legal title to the goods.<sup>369</sup> The entruster is in possession of the goods, so the buyer may therefore assume that the entruster has title to the goods and the authority to transfer that title.<sup>370</sup> The entrustment doctrine places the risk of loss on true owners who knowingly take the chance of delivering their goods to a person dealing in goods of the kind.<sup>371</sup> Thus, the rule is designed to incentivize owners to carefully select to whom they entrust their property and to facilitate the free flow of goods based on a buyer's reasonable expectation that a merchant in possession of the goods also has title to them.<sup>372</sup> However, Louisiana law does not contain a provision similar to the UCC's entrustment doctrine in the context of precarious possession. Although the Louisiana courts have options for striking the proper balance, the balance between the security of ownership and the security of transaction cannot be struck consistently unless another provision governing the sale of a movable thing by a precarious possessor is enacted.

*F. LA vs. UCC: Conditional Sales*

As discussed previously, Louisiana has adopted UCC Article 9; therefore, Louisiana's provisions of Chapter 9 are identical to that of the other U.S. jurisdictions.<sup>373</sup> Recall that leases may raise problems under UCC Article 9, due to the possibility that a lease agreement may be a disguised conditional sale or a sale subject to a security interest. UCC § 1-201(35) provides the definition for a security interest as "an interest in personal property or fixtures which secured payment or performance of an obligation."<sup>374</sup> According to § 1-201(35), "Whether a lease is intended as a security interest is to be determined by the facts of each case."<sup>375</sup> If a lease is actually a disguised conditional sale, "[t]he retention or reservation of title by a seller of goods . . . is limited in effect to a reservation of a security interest."<sup>376</sup> Thus, if a seller attempts to disguise a sale conditional on payment of the price as a lease, UCC Article 9 provides that he does

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369. 77A C.J.S. *Sales* § 405 (2020).

370. *Id.*

371. *Id.*

372. *Id.*

373. Erwin S. Barbe, Annotation, *Equipment Leases as Security Interests Within Uniform Commercial Code § 1-201(37)*, 76 A.L.R. 3d 11 (2020).

374. U.C.C. § 1-201(35) (AM. L. INST. & UNIF. L. COMM'N 2021).

375. *Id.*

376. *Id.*

not retain ownership of the thing; he is limited to the retention of a security interest.<sup>377</sup>

However, Louisiana departs from this rule in Louisiana Revised Statutes § 9:3310(B) by providing an exception to the rules found in Chapter 9 of Louisiana's Commercial Code. If the seller properly perfects his security interest in the sale disguised as a lease, the seller will retain ownership of the thing pending payment of the price.<sup>378</sup> Louisiana is the only state that that departs from the rule of UCC § 1-201(35).<sup>379</sup>

#### VI. A PROPOSED CIVILIAN APPROACH

The commercial bona fide purchaser doctrine was originally established in UCC § 2-403, and the concepts were then carried into the field of lease in § 2A-305.<sup>380</sup> The commercial bona fide purchaser doctrine can be divided into four basic rules: (1) the shelter rule, (2) the general-voidable-title rule, (3) the special-voidable-title rule, and (4) the entrustment doctrine.<sup>381</sup> The shelter rule is the general rule, providing that a sale by a person with less than ownership in goods cannot convey ownership of the goods to a third person.<sup>382</sup> In affording protection to the true owner of the goods, the shelter rule promotes the interest in the security of ownership.<sup>383</sup> However, the voidable-title rule and the entrustment doctrine are exceptions to the general shelter rule.<sup>384</sup> When the exceptions apply, ownership is afforded to a third-party purchaser in good faith, thereby promoting the security of transaction.<sup>385</sup> The result is a comprehensive set of provisions governing the sale of goods belonging to another that work together to provide a balance between the competing interests.<sup>386</sup>

Louisiana's good faith purchaser doctrine is similar to the UCC bona fide purchaser doctrine, except for one main difference. Louisiana law contains a gap in the law for a situation in which a precarious possessor subsequently sells the thing to a third party. If the Louisiana legislature would enact a provision similar to the UCC's entrustment doctrine,

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377. *Id.*

378. LA. REV. STAT. ANN. § 9:3310(B) (2021).

379. LONEGRASS ET AL., *supra* note 2, at 330.

380. QUINN, *supra* note 289, at § 2A-305[A][7].

381. *Id.* § 2A-305[A][1].

382. *Id.* § 2A-305[A][2].

383. *Id.*

384. *Id.* § 2A-305[A][3].

385. *Id.*

386. *Id.*

Louisiana would also have a comprehensive set of provisions governing the sale of movables belonging to another. This set of provisions would provide a proper balance between the security of ownership and the security of transaction.

While Louisiana has adopted the UCC's treatment of conditional sales under UCC Article 9, Louisiana has departed in a significant way. Louisiana Revised Statutes § 9:3310(B) provides an exception to the UCC rule that a seller in a conditional sale disguised as a lease may retain only a security interest in the thing.<sup>387</sup> Louisiana law provides that if the seller properly perfects the conditional sale, then the seller is allowed to retain ownership of the goods, thereby demoting the purchaser from owner to precarious possessor.<sup>388</sup>

The Louisiana legislature enacted the good faith purchaser doctrine "in an effort to re-align Louisiana law with modern civil law and the Uniform Commercial Code."<sup>389</sup> Thus, two important goals of enacting the doctrine were to promote clarity in the law and uniformity of law across state lines by aligning Louisiana law with the UCC. The good faith purchaser doctrine accomplished these goals until Louisiana Civil Code article 520 was repealed. The repeal of article 520 disposed of a rule complementary to the laws of other 49 states and created confusion as to which of the remaining provisions in Louisiana law covered the sale of movable things by precarious possessors. To re-instill clarity in the law and realign Louisiana law with the laws of the other states, the Louisiana legislature needs to pass new legislation similar to the UCC's entrustment doctrine.

*A. A Necessary First Step: Repeal La. R.S. § 9:3310(B)*

First, the Louisiana legislature needs to repeal Louisiana Revised Statutes § 9:3310(B). This provision of the Louisiana Lease of Movables Act has artificially expanded the concept of precarious possession into disguised conditional sales.<sup>390</sup> Even though Louisiana has adopted Article 9 of the UCC, Louisiana Revised Statutes § 9:3310(B) has caused Louisiana law to depart from the UCC approach in the area of conditional sales.<sup>391</sup> Only once this LMA provision is repealed can Louisiana fully realign its laws surrounding precarious possession with the UCC.

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387. LA. REV. STAT. ANN. § 9:3310(B) (2021).

388. *Id.*

389. Act No. 180, 1979 La. Acts 430.

390. See LA. REV. STAT. ANN. § 9:3310(B) (2021).

391. LONEGRASS ET AL., *supra* note 2, at 330.

*B. A Second Step: New Legislation*

Then, the Louisiana legislature should enact a Civil Code article similar to the UCC's entrustment doctrine in order to fill the gap in Louisiana's law left by the repeal of article 520. This legislation would allow Louisiana law to clarify the confusion currently surrounding the sale of movable things by a precarious possessor, while also promoting uniformity of law across state lines by drawing its principles from the UCC entrustment doctrine. Enacting this rule would complete Louisiana's good faith purchaser doctrine and lead to an ideal balance between the security of transaction and the security of ownership.

In drafting the new Civil Code article, the Louisiana legislature must consider not only the relationship between Louisiana law and the UCC, but also the relationship between the UCC voidable-title rule and the UCC entrustment doctrine. First, the legislature must examine the similarity between the voidable-title and vice-of-consent rules under the UCC and Louisiana law. Next, the legislature should look to the difference in requirements for applications of the UCC voidable-title rule and the UCC entrustment doctrine and consider the policy behind the differences. Finally, the legislature should consider the text of repealed article 520 and use the same policy reasons to justify the adoption of the UCC entrustment doctrine requirements in Louisiana.

The Louisiana legislature should first consider the similarity between the UCC's voidable-title rule and Louisiana's vice-of-consent rule. Recall that Louisiana's rule has two basic requirements: the buyer must (1) act in good faith and (2) pay fair value.<sup>392</sup> The UCC voidable-title rule also has two basic requirements: the buyer must (1) act in good faith and (2) pay value.<sup>393</sup> Thus, Louisiana's requirements are cohesive with the UCC.

Next, the Louisiana legislature should consider the difference in requirements between the UCC voidable-title rule and its entrustment doctrine. Recall that the UCC entrustment doctrine contains different requirements than its voidable-title rule. The requirements under the UCC entrustment doctrine include: (1) the entrusted seller must be a merchant who deals in goods of that kind and (2) the buyer must be a buyer in the ordinary course of business, which requires that the buyer (a) be in good faith, (b) be without knowledge that the sale to him is in violation of the rights of others, and (c) buy in the ordinary course from a merchant in the business of selling goods of that kind.<sup>394</sup> These requirements significantly

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392. LA. CIV. CODE ANN. art. 522 (2021).

393. U.C.C. § 2-403(1) (AM. L. INST. & UNIF. L. COMM'N 2021).

394. *Id.* § 2-403(2).

restrict the operation of the UCC entrustment doctrine to a narrower class of purchasers than those protected by the UCC voidable-title rule. In fact, an Official Comment to the UCC entrustment doctrine provides, "The older loose concept of good faith and wide definition of value combined to create apparent good faith purchasers in many situations in which the result outraged common sense."<sup>395</sup>

A look to the policies underlying the UCC doctrines justifies the more stringent requirements of the UCC entrustment doctrine. The UCC voidable-title rule is resolved in favor of the good faith purchaser when there is *some intent* on part of the original owner to pass title to the subsequent seller.<sup>396</sup> Because the original owner had the intent to pass title, the owner is subsequently limited in reclaiming ownership after title, although voidable, had passed.<sup>397</sup> If the goods are still in the hands of the original buyer, then the original owner would be able to reclaim the goods; however, once the goods passed to a subsequent purchaser in good faith and who paid fair value, the owner would not be able to reclaim the goods from that subsequent purchaser.<sup>398</sup>

In contrast, the UCC entrustment doctrine is applied when there is *no intent* to pass title on the part of the original owner.<sup>399</sup> However, the requirement that the intermediate seller qualify as a merchant dealing in goods of that kind contemplates a risk assumed by the original owner.<sup>400</sup> When the original owner voluntarily delivers goods to a merchant who deals in goods of that kind, he assumes the risk that the merchant might act beyond the scope of his authority and sell the goods to a third party.<sup>401</sup> The risk assumed by the original owner in a UCC entrustment situation is a lower level of culpability on part of the original owner when compared to the intent to pass title contemplated by the UCC voidable-title rule; thus, the class of buyers protected under the UCC entrustment doctrine is limited to buyers in the ordinary course of business.<sup>402</sup>

Recall that repealed Louisiana Civil Code article 520 once provided, "A transferee in good faith and for fair value acquires the ownership of a corporeal movable, if the transferor, though not owner, has possession

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395. *Id.* § 2-403(1) cmt.

396. Richard W. Duesenberg, *Title: Risk of Loss and Third Parties*, 30 MO. L. REV. 191, 206 (1965).

397. *Id.*

398. *Id.*

399. James L. Padgett, *Uniform Commercial Code Section 2-403(1): The Authority of a Bailee to Convey Title*, 21 U. FLA. L. REV. 241, 244 (1968).

400. *Id.*

401. *Id.*

402. *Id.*

with the consent of the owner, as pledgee, lessee, depositary, or other person of similar standing.”<sup>403</sup> Repealed article 520 contained two major requirements: (1) good faith on the part of the purchaser and (2) fair value paid by the purchaser.<sup>404</sup> These old requirements are identical to the requirements of the voidable-title rules of Louisiana and the UCC. However, for the same reasons set forth above, the seller in a precarious-possessor situation is less culpable than the seller in a voidable-title situation. Therefore, Louisiana should opt to protect buyers (1) from a precarious possessor who is a merchant dealing in goods of that kind and (2) only when the buyer qualifies as a buyer in the ordinary course of business.

In drafting this legislation, repealed article 520 is a good place to start. From there, language should be modified, omitted, and added. First, the language “has possession with consent of the owner” is the definition of precarious possession; thus, the language “as pledgee, lessee depositary, or other person of similar standing” is superfluous and can be omitted.<sup>405</sup> Next, the article should include the requirement that the precarious possessor is a merchant dealing in goods of that kind. The article can approach this requirement by adding the language “merchant customarily selling similar things,” as is done in Louisiana Civil Code article 524, to the code article and defining the term in a comment, as is done in article 2601.<sup>406</sup>

Additionally, the article should include the requirement that the buyer qualifies as a buyer in the ordinary course of business. Recall that the entrustment doctrine defines this requirement as a buyer who (a) is in good faith, (b) is without knowledge that the sale to him is in violation of the rights of others, and (c) buys in the ordinary course from a merchant in the

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403. Act No. 180, 1979 La. Acts 430.

404. *Id.*

405. In fact, the Louisiana Civil Code already defines precarious possession. “The exercise of possession over a thing with the permission of or on behalf of the owner or possessor is precarious possession.” LA. CIV. CODE ANN. art. 3437 (2021).

406. Article 2601 provides in part, “Between merchants, however, additional terms become part of the contract unless . . . .” *Id.* art. 2601. Comment (h) to this article provides,

Under this Article, a party to a contract of sale is regarded as a merchant when he habitually manufactures, or buys and sells things of the kind involved in the contract. A merchant, however, may be regarded as a consumer when purchasing things of a kind different from those he manufactures, or buys and sells.

*Id.* art. 2601 cmt. h.

business of selling goods of that kind.<sup>407</sup> Louisiana law defines good faith in Louisiana Civil Code article 523, which provides, “An acquirer of a corporeal movable is in good faith for purposes of this Chapter unless he knows or should have known, that the transferor was not the owner.”<sup>408</sup> Louisiana’s rule is broader than the good faith contemplated by parts (a) and (b) of the UCC’s requirement. The UCC does not deem someone who *should have known* that the transferor was not the owner to be in bad faith; the UCC only takes away status of good faith when the purchaser *did know* that the transferor was not the owner. This new article should comport with the definition of good faith as it currently exists with respect to the other provisions of Louisiana’s good faith purchaser doctrine, rather than adopting a new and differing definition of good faith. Thus, the article should clarify that Louisiana’s definition of good faith is narrower than the UCC by acknowledging this distinction. Finally, the article should incorporate the UCC’s requirement of buying in the ordinary course. The requirement that the buyer purchases in the ordinary course can be approximated according to the UCC’s definition, which has been adopted by the Louisiana legislature in the context of conditional sales.<sup>409</sup>

With all of the above considerations taken into account, the Louisiana legislature should enact the following provision in the Louisiana Civil Code:

A transferee in good faith and for fair value acquires ownership of a corporeal movable if two conditions are met. First, the transferor must be a merchant who has possession with the consent of the owner. Second, the sale must comport with the usual or customary practices in the kind of business in which the transferor is engaged. For purposes of this article, a transferee is not in good faith when he should have known that the transferor was not the owner.

A comment to the article should state, “Under this Article, a party to a contract of sale is regarded as a merchant when he habitually manufactures or buys and sells things of the kind involved in the sale.” Another comment should state, “This Article accords with Section 2-403(2) of the Uniform

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407. QUINN, *supra* note 289, at § 2-403[A][5].

408. LA. CIV. CODE ANN. art. 523 (2021).

409. Recall that the UCC clarifies that “[a] person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices.” U.C.C. § 1-201(9) (AM. L. INST. & UNIF. L. COMM’N 2021).

Commercial Code,” just as the other articles of Louisiana’s good faith purchaser doctrine include references to the UCC.

#### CONCLUSION

The effect of enacting a revised version of Louisiana Civil Code article 520 and repealing Louisiana Revised Statutes § 9:3310(B) is twofold. First, the Louisiana legislature will realign Louisiana with the law of the other U.S. jurisdictions in the sale of movables, thereby promoting stability of commerce across state lines. Second, the Louisiana legislature will simultaneously, albeit surprisingly, bring Louisiana back to its civil law roots: the new legislation would promote the French maxim *en fait de meubles, la possession vaut titre*. Be that as it may, if the Louisiana legislature does not act, Louisiana courts and practitioners will be left with stagnant principles that further evolved at common law and that do not align with Louisiana’s civil law roots.

In the ring hypothetical presented at the outset of this Comment, the question posed was whether A, the actual owner of the ring, or C, the good faith purchaser of the ring, should be protected under the law and awarded ownership of the ring. Under the proposed solution, C would be awarded ownership of the ring only if (1) B was a merchant who customarily sells similar things, (2) C was in good faith and paid fair value, and (3) the sale occurred in the ordinary course of business. If C failed to meet any of these requirements, A would retain the ownership of the ring, and C would be limited to recovering damages from B.