



6-1-1975

Sellers' Right to Reclaim Has Priority over a Perfected Security Interest.

James M. Smith

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Contracts Commons](#), and the [Secured Transactions Commons](#)

Recommended Citation

James M. Smith, *Sellers' Right to Reclaim Has Priority over a Perfected Security Interest.*, 7 ST. MARY'S L.J. (1975).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol7/iss2/14>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

States Supreme Court hands down more explicit guidelines. Whether the upcoming *Fowler* decision will provide these is unlikely, for the North Carolina statute is mandatory, and the procedure in that statute is quite different from that of Texas. The Supreme Court must consider the dangers of totally mandatory statutes and those allowing excessive discretion in sentencing. The question is whether the Court will also consider a middle ground. As Justice Harlan cautioned, all attempts to identify before-the-fact those crimes for which the death penalty should be given have been doomed to failure.⁶²

Kay C. Martinez

**UNIFORM COMMERCIAL CODE—Sales and Secured
Transactions—Sellers' Right to Reclaim Has Priority
Over a Perfected Security Interest**

In re Samuels & Co.,
510 F. 2d 139 (5th Cir. 1975).

Samuels & Co., a Texas meat packer, had been financed by C.I.T. Corporation since 1963. To secure its financing, C.I.T. properly perfected a lien upon Samuels' assets, inventory, and all after-acquired property, including livestock. In 1969, 15 cattle ranchers delivered their cattle to Samuels and were issued checks in payment. Before the checks could be paid, C.I.T., believing itself insecure and apparently aware of the outstanding checks, refused to advance Samuels any further funds. Samuels immediately filed for bankruptcy and the checks were subsequently dishonored. The beef was butchered and sold through the normal course of business and the proceeds placed on deposit with the trustee in bankruptcy. Almost one year later the sellers filed a petition for reclamation. The United States District Court for the Northern District of Texas reversed a referee's finding that the sellers had priority over the creditor which had financed the bankrupt meat packer's purchase of cattle and the sellers appealed. The court of appeals reversed and remanded.¹ The Supreme Court granted certiorari and reversed and remanded the case back to the court of appeals.² Held—*Reversed*. Strict application of the 10 day limitation on the rights of the

62. *McGautha v. California*, 402 U.S. 183, 197 (1971).

1. *In re Samuels & Co.*, 483 F.2d 557 (5th Cir. 1973).

2. *Mahon v. Stowers*, 416 U.S. 100 (1974).

sellers to reclaim is not required. A bankrupt buyer who pays for goods with a check which is subsequently dishonored does not acquire sufficient rights in the goods for a creditor's lien in after-acquired property to attach.³

Before the Uniform Commercial Code was enacted, the right of replevin or reclamation was governed by the concept of title.⁴ According to pre-Code law, payment was a condition precedent to the passage of title in cash sales.⁵ If the buyer managed to obtain possession without payment, the seller had the right to replevy the goods.⁶

Pre-Code title concepts and jurisdictional disparity disappeared with the adoption of the Uniform Commercial Code.⁷ Dispatching the title concept was the first task of the Uniform Commercial Code.⁸ In its place the Code substituted a hierarchy of rights, powers, and immunities.⁹ One example is the right of reclamation.¹⁰

Typically, a dishonored check produces a demand for reclamation. For example, seller A receives a check from buyer B in payment for goods but due to B's insolvency the check is dishonored. The Uniform Commercial Code views the purchase of goods by an insolvent as fraudulent.¹¹ In order to protect A from such fraud the Code provides a right of reclamation.¹² There appear to be two forms of reclamation under the Code, one for credit sales and the other for cash. The credit seller's rights are clear and well defined in section 2.702.¹³ Unfortunately, section 2.702 does not deal with the cash transaction between seller A and buyer B but reclamation in a cash situation has been vaguely construed from section 2.507.¹⁴ If the case of

3. *In re Samuels & Co.*, 510 F.2d 139, 150 (5th Cir. 1975).

4. A. SQUILLANTE & J. FONSECA, 3 WILLISTON ON SALES § 23-2, at 323-24 (4th ed. 1974). The location of title was the common law and the pre-Code standard for settling a myriad of property disputes. R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 125, at 373 (1970).

5. *Sprague Canning Mach. Co. v. Fuller*, 158 F. 588, 591 (5th Cir. 1908).

6. *Harkness v. Russell*, 118 U.S. 663, 668 (1886); *Harbert v. Fort Smith Canning Co. v. Fuller*, 5 P.2d 849, 851 (Kan. 1931).

7. The Texas version of the Uniform Commercial Code is enumerated in the Texas Business & Commerce Code.

8. TEX. BUS. & COMM. CODE ANN. § 2.401 (1968). Article II of the Uniform Commercial Code deals with the sale of goods and the rights and remedies created by such a sale. *Id.* §§ 2.101-2.725; Helstad, *The Impact of the Uniform Commercial Code on Wisconsin Law*, 1964 WIS. L. REV. 355, 363.

9. *Park County Implement Co. v. Craig*, 397 P.2d 800, 803 (Wyo. 1964), quoting WYO. STAT. ANN. § 34-2-401 (1962).

10. TEX. BUS. & COMM. CODE ANN. §§ 2.507, 2.702 (1968).

11. *Id.* § 2.702, comment 2. This rule developed from pre-Code law. *In re Meiselman*, 105 F.2d 995, 998 (2d Cir. 1939).

12. TEX. BUS. & COMM. CODE ANN. § 2.507 (1968).

13. *Id.* § 2.702. Section 2.702 deals with transactions based on credit and the right of reclamation as set out in that section is subject to the following limitations: the buyer must be insolvent; the right must be exercised within 10 days of the receipt of the goods by the buyer; and is subject to the rights of a good faith purchaser.

14. *Id.* § 2.507. "Where payment is due and demanded on delivery to the buyer

A v. B involved financially solvent parties there would be no problem because seller A would be entitled to reassert dominion over the goods any time after the check was dishonored.¹⁵ B, however, is insolvent and section 2.507 does not expressly provide for A's right to reclaim. Comment three to section 2.507 does suggest such a right.¹⁶ Comment three also proposes that the provisions of section 2.702 in regard to a 10 day limitation and to the rights of a good faith purchaser should apply here as well. Therefore, A may reclaim his goods from the insolvent B but only within 10 days.

If C, a bona fide purchaser, enters the picture, the case of A v. B becomes more complicated. Under section 2.403 good title can be transferred to a bona fide purchaser by a holder of voidable title.¹⁷ Hypothetically, buyer B did receive voidable title upon purchase.¹⁸ When B's check is dishonored seller A could void B's title and reclaim the goods.¹⁹ This power to void title is lost, however, once the goods are transferred to a bona fide purchaser.²⁰ Even if A attempts to reclaim within the 10 day limitation, his efforts are futile against the superior title of a bona fide purchaser.²¹

Once B obtains an interest in the goods he can use them as collateral for an article IX security interest.²² B can obtain a loan from C, a secured party,

of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due." *Id.* § 2.507. This rule developed from pre-Code law. *Neal v. Boggan*, 11 So. 809, 810 (Ala. 1892); *French v. Lewis*, 67 A. 45, 46 (Pa. 1907).

15. J. WHITE & R. SUMMERS, *THE UNIFORM COMMERCIAL CODE* 98 (1972); *Kinyon, Outline of Buyer-Seller Rights and Remedies in Default and Breach Situations Under the U.C.C.*, 53 MINN. L.R. 729, 731 (1969).

16. TEX. BUS. & COMM. CODE ANN. § 2.507, comment 3 (1968) provides:

Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's right as against the seller conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchaser sections of this Article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.

17. TEX. BUS. & COMM. CODE ANN. § 2.403(1) (1968) provides:

A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though . . . (2) the delivery was in exchange for a check which is later dishonored, or (3) it was agreed that the transaction was to be a 'cash sale'

18. "Voidable" title is not specifically defined in the Code, therefore the pre-Code definition remains applicable. *Weeks v. Bridgman*, 159 U.S. 541, 547 (1895). "Voidable" transactions are those which are valid and effectual until they are avoided by some act. *Rothberg v. Schmiedeskamp*, 134 N.E.2d 544, 546 (Mass. 1956). The word "voidable" imports a valid act which may be avoided rather than an invalid act which may be confirmed.

19. TEX. BUS. & COMM. CODE ANN. §§ 2.507, 2.702 (1968).

20. *Id.* § 2.403; R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 170, at 514-15 (1970).

21. TEX. BUS. & COMM. CODE ANN. § 2.403 (1968); R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 170, at 514-15 (1970).

22. TEX. BUS. & COMM. CODE ANN. § 9.204 (1968). Article IX of the Uniform

in exchange for the creation of a security interest in the goods sold by A. For C to create this security interest, section 9.204 requires that there be attachment.²³ If B defaults on the security agreement and does not initiate proper repayment then C has several remedies at his disposal: sale of the collateral,²⁴ retention of the collateral,²⁵ or an action for the debt.²⁶

When separate situations involving article II and article IX occur the Code resolves the commercial conflicts smoothly. When a problem develops, however, which causes an overlap of the two articles the result is often a quagmire of legal reasoning. For example, suppose B had created a security agreement in exchange for a loan from C which covered all of B's after-acquired property. Then B obtained property from seller A and paid for it with a worthless check. A, who has never paid, seeks to reclaim from B who has become insolvent. C, on the other hand, asserts that his perfected security interest takes priority over A's right to reclaim and that, additionally, he is a bona fide purchaser. Determining the rights and remedies in this situation is no easy task.

In re Samuels & Co.,²⁷ represents exactly the same situation as this hypothetical. C.I.T. was the secured party that held an after-acquired security interest in Samuels' property. The dispute is between C.I.T. and several unpaid cattle ranchers who sold cattle to Samuels in exchange for a dishonored check. In order to enable the ranchers to recover, the court in *Samuels* was forced to create some unprecedented rulings.

The first and most notable finding in *Samuels* was the extension of the 10 day limit on reclamation to almost a full year.²⁸ Rationalization of this extension was achieved with three points of analysis. The first point was that

Commercial Code deals with secured transactions, the sale of accounts, and the sale of chattel paper. *Id.* §§ 9.101-9.507.

23. *Id.* § 9.204. Attachment of a security interest takes place when (1) there is an agreement that the security interest attach to the collateral, (2) the secured party has given value, and (3) the debtor has obtained sufficient rights in the collateral. *Id.* § 9.204. The agreement to create the security interest can be made long before B ever acquires the goods from A. TEX. BUS. & COMM. CODE ANN. § 1.201(44) (1968) provides that "[a] person gives 'value' for rights if he acquires them . . . (b) as security for or in total or partial satisfaction of a pre-existing claim" "Sufficient rights in the collateral" for attachment is not tested by any concept of title but is determined by the weighing of various ownership rights; primary among them is possession. *James Talcott, Inc. v. Franklin Nat'l Bank*, 194 N.W.2d 775, 780-81 (Minn. 1972). In *First Nat'l Bank v. Smoker*, 11 U.C.C. Rep. 10, 19 (Ind. App. 1972) it was stated that:

[W]hen a debtor acquires possession of collateral under a contract, he has acquired such rights in the collateral as to allow the security interest of his creditor to attach to the collateral, and this is true regardless of who may be deemed to have title to and ownership of such collateral.

24. TEX. BUS. & COMM. CODE ANN. § 9.504 (1968).

25. *Id.* § 9.505(b).

26. *Id.* § 9.501(a).

27. 510 F.2d 139 (5th Cir. 1975).

28. *Id.* at 148.

the purpose of the 10 day rule is to place creditors on notice of the seller's claim so that they, the other creditors, might not prejudice themselves.²⁹ Otherwise, a creditor might extend credit to the insolvent, subsequent to its filing a petition in bankruptcy, on the basis of a misapprehension that the insolvent possesses unencumbered assets. Here, because C.I.T. had an intimate knowledge of Samuels' financial affairs, the court reached the decision that C.I.T. was not prejudiced in any way by the sellers' non-compliance with the 10 day rule.³⁰ The second point was that since the sellers made a good faith effort to comply with the statute, it was deduced that they should be forgiven for their oversight.³¹ Finally, it was asserted that the sellers really had nothing to reclaim because the butchered cattle lost their identity. Accordingly, a strict application of the 10 day requirement was held unnecessary.³²

Close examination of the court's decision reveals that it is based on faulty analyses. The dissenting opinion questioned the first point—the purpose of the 10 day requirement—asserting that notification to third party purchasers is unnecessary for the rights appear to be protected even if the seller complies with the 10 day limit.³³ That is, a secured party can qualify as a bona fide purchaser and defeat the seller's reclamation rights. Thus, the purpose of the 10 day limit must be more than mere notice to third parties. The court's discussion of the good faith efforts of the sellers to comply with the 10 day statute is irrelevant. Simply because the sellers were unaware of the requirements of the Code does not excuse them from following it.³⁴

The final point of analysis was that the sellers had nothing to reclaim, that is, their cattle were butchered beef incapable of being identified.³⁵ There appears to be little reason why the sellers could not have reclaimed this butchered beef. True, the livestock no longer existed but the processed beef certainly did exist. The court eventually allowed the sellers to reclaim the cash proceeds received from the sale of this beef. Therefore, if the cash pro-

29. *Id.* at 147.

30. *Id.* at 147-48, 152. C.I.T. had been financing Samuels for six years. The amount of cash advances made to Samuels was calculated each week after C.I.T. examined the outstanding accounts and the current inventory. From this continuous study of the slaughtering business it was determined that C.I.T. must have been intricately aware of the financial status of Samuels. *Id.* at 147-48, 152. C.I.T. had filed its own petition for reclamation two weeks after the petition for bankruptcy was filed and a hearing was held where there was extensive disclosure of Samuels' financial affairs. While all the outside claims were not particularized, the hearing disclosed many claims against the estate and demonstrated to the parties involved the great likelihood of other claims. *Id.* at 147.

31. *Id.* at 148.

32. *Id.* at 148.

33. *Id.* at 157 (dissenting opinion).

34. To quote Judge Godbold's dissent, "Mistake of law does not constitute excuse of mistake." *Id.* at 157 (dissenting opinion).

35. *Id.* at 148.

ceeds were traceable then the butchered beef must also have been capable of identification.

The decision to extend the 10 day requirement when third party creditors have been notified is an extraordinary development. The entire concept of reclamation for cash sales is actually judicially created. The Code fails to provide a specific provision covering it, referring to reclamation only in comment three to 2.507.³⁶ The task of sorting the law from the scant clues supplied by the Code devolves upon the judiciary.

It has been suggested that a strict compliance with a 10 day limitation is not necessary and that a "reasonable efforts" test should be used instead.³⁷ Strict compliance with the 10 day rule allows too much room for inequity. In situations where it takes more than 10 days for a bank to return a check for insufficient funds the injustice of the 10 day rule is manifest. Nonetheless, case law has usually demanded strict adherence to the 10 day limitation.³⁸ In fact, there are very few cases which have not applied the 10 day limit to a 2.507 reclamation.³⁹

After determining that the sellers fulfilled the requirements for reclamation, Judge Ingraham, speaking for the majority, addressed himself to C.I.T.'s contention that any attempt by the sellers to retain title in the goods merely reserved an unperfected security interest and this unperfected interest was subordinate to the perfected security interest C.I.T. held in Samuels' after-acquired property.⁴⁰ In order to find for the cattle ranchers, the court had to determine that the ranchers' interest was something other than an unperfected purchase money security interest. Otherwise C.I.T.'s perfected security interest would take priority over the sellers' reclamation rights or unperfected security interest.⁴¹

36. 2 R. ANDERSON, *UNIFORM COMMERCIAL CODE* § 2.507:8, 2.507:13 (2d ed. 1971).

37. R. NORDSTROM, *THE HANDBOOK OF THE LAW OF SALES* § 166, at 503 (1970).

38. *In re Mort*, 208 F. Supp. 309 (E.D. Pa. 1962) is a leading case where goods delivered by the seller were paid for by check. The check was dishonored and the seller was allowed to reclaim the proceeds derived from the sale of the goods. The seller, however, reclaimed from the trustee in bankruptcy within ten days. *Id.* at 310. *In re Helms Veneer Corp.*, 287 F. Supp. 840 (W.D. Va. 1968) involved a dispute where the ten day limitation was not observed by the seller when an insolvent buyer paid for logs with a worthless check. The court specifically held that after ten days the right of reclamation is waived. *Id.* at 846. This appears to be the majority rule. *In re Colacci's of America, Inc.*, 490 F.2d 1118, 1121 (10th Cir. 1974); *Stumbo v. Paul B. Hult Lumber Co.*, 444 P.2d 564, 571 (Ore. 1968).

39. *In re Lindenbaum's Inc.*, 2 U.C.C. Rep. 495, 497 (E.D. Pa. 1964). Employing a rather novel approach, the court used the § 3.503(2) definition for a reasonable time allowed for presentment of a check. The seller was given 30 days to reclaim. *Id.* at 497.

40. *In re Samuels & Co.*, 510 F.2d 139, 148-49 (5th Cir. 1975).

41. The seller's right to reclamation is inferior to a perfected security interest in goods subject to an after acquired property clause. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 519 F.2d 354, 359 (Colo. 1974). See generally Hogan, *The Mar-*

C.I.T.'s contention was based on 2.401(a) which states: "Any retention or reservation by the seller of the title [property] in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."⁴² The court rejected this contention and held that 2.401(a) dealt solely with credit.⁴³ Otherwise the cash seller would be forced to comply with article IX security provisions. Such compliance was thought to be unreasonable as the time needed to fulfill article IX filing and perfection procedures is far greater than the time required to cash a check.⁴⁴

The court, in finding that 2.401(a) is inapplicable to cash transactions, appears to be in conflict with the weight of authority. The language of 2.401 states, "any retention by the seller." The word "any" does not imply that the statute is not applicable to cash sales.⁴⁵ Further substantiation comes from article I which states: "The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 2.401) is limited in effect to a reservation of a 'security interest.'"⁴⁶ Cases have consistently applied 2.401(a) to cash sales.⁴⁷ Judge Godbold in his dissenting opinion states that there are no cases suggesting that 2.401 applies only to credit sales.⁴⁸ If the majority is correct, section 2.401 would merely be definitional, for a credit sale is but a sales transaction in which the seller reserves a security interest.

The next proposition presented by the court to enable the cattle ranchers to prevail was the suggestion that C.I.T.'s security interest might never have attached and, thus, C.I.T. had no interest at all in the beef.⁴⁹ This contention is based on the 9.203 requirements for enforceability of a security agree-

riage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety, 38 B.U.L. REV. 571, 580 (1958); Note, *Selected Priority Problems in Securing Financing Under the Uniform Commercial Code*, 68 YALE L.J. 751, 758 (1959).

42. TEX. BUS. & COMM. CODE ANN. § 2.401(a) (1968).

43. *In re Samuels & Co.*, 510 F.2d 139, 149 (6th Cir. 1975).

44. In an inventory situation, to assure priority, a purchase money security interest must be perfected when the buyer takes possession and all other secured parties must be notified. TEX. BUS. & COMM. CODE ANN. § 9.312(c)(1), (2) (1968); Hogan, *Unperfected Security Interests and the "Floating Lien"*, 44 TEXAS L. REV. 713, 720-21 (1966).

45. One argument in the court's favor could center on the introductory words to 2.401. "Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply . . ." It could be argued that 2.507 covers situations where the seller reserves title other than a security interest. Thus, the subsequent sentence in 2.401, limiting reservation of title to a security interest, would become inapplicable to 2.507.

46. TEX. BUS. & COMM. CODE ANN. § 1.201(37) (1968).

47. *E.g.*, *English v. Ford*, 95 Cal. Rptr. 501, 506 (Dist. Ct. App. 1972); *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 519 P.2d 354, 359 (Colo. 1974); *First Nat'l Bank v. Smoker*, 11 U.C.C. Rep. 10, 20-22 (Ind. Ct. App. 1972); *Evans Prods. v. Jorgensen*, 421 P.2d 978, 981 (Ore. 1966).

48. *In re Samuels & Co.*, 510 F.2d 139, 158 (5th Cir. 1975) (dissenting opinion).

49. *Id.* at 150.

ment.⁵⁰ One such requirement is that the debtor possess rights in the collateral before any security interest can attach.⁵¹ The court's discussion of this point is not very convincing. The opinion states that less than absolute ownership has been deemed a sufficient right in the property to which a lien in after-acquired property can attach.⁵² It also admitted that Samuels had possession of the cattle and had the right to slaughter and butcher. This indicates sufficient rights existed in the collateral for attachment of the C.I.T. security interest.

The final justification for granting the cattle ranchers reclamation is that since the Code provides that the rights of the creditor stem from the debtor obtaining rights in the collateral, then the creditor's rights are derived from and are no greater than those of the debtor.⁵³ Purportedly, when Samuels failed to pay, the contractual relationship came to an end. Samuels and C.I.T. then had no right to dispose of the merchandise. This holding runs in direct opposition to C.I.T.'s contention that it was a good faith purchaser.⁵⁴

If C.I.T. were a good faith purchaser it could have obtained good title from a defaulting cash buyer.⁵⁵ C.I.T.'s interest would have remained after Samuels' rights had vanished with its dishonored check. To qualify as a good faith purchaser, C.I.T. must first be a purchaser under the Code. The Code states: "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property."⁵⁶ A purchaser is anyone who takes by purchase.⁵⁷ This definition is broad enough to include a secured party.⁵⁸ Since a secured party acquires his interest by contract,⁵⁹ and a contract is a voluntary transaction under 1.201(32),⁶⁰ then a secured party is a purchaser within the Code.

50. TEX. BUS. & COMM. CODE ANN. §§ 9.203, 9.204 (1968).

51. *Id.* §§ 9.203, 9.204.

52. *In re Samuels & Co.*, 510 F.2d 139, 150 (5th Cir. 1975).

53. J. WHITE AND R. SUMMERS, THE UNIFORM COMMERCIAL CODE § 23-4, at 795 (1972).

54. *In re Samuels & Co.*, 510 F.2d 139, 144 (5th Cir. 1975).

55. Physical delivery of goods to transferor-purchaser by the true owner sufficiently empowers that transferor-purchaser to transfer good title to a good faith purchaser even though delivery was in exchange for a check which was later dishonored. *E.g.*, *Marshall v. Universal C.I.T. Credit Corp.*, 175 S.E.2d 84, 85 (Ga. Ct. App. 1970); *Lane v. Honeycutt*, 188 S.E.2d 604, 605 (N.C. Ct. App.), *cert. denied*, 190 S.E.2d 466 (N.C. 1972); *Sandlin v. First Nat'l Bank*, 253 N.E.2d 313, 315 (Ohio Ct. App. 1969); *Hudiburg Chevrolet, Inc. v. Ponce*, 116 N.W.2d 252, 255-56 (Wis. 1962); A. SQUILLANTE & J. FONESCA, 3 WILLISTON ON SALES § 23-13, at 370 (4th ed. 1974).

56. TEX. BUS. & COMM. CODE ANN. § 1.201(32) (1968).

57. *Id.* § 1.201(33).

58. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 519 P.2d 354, 358 (Colo. 1974). "In our view, the definition of 'purchase' and 'purchaser,' as set forth in the Colorado Uniform Commercial Code, are sufficiently broad to encompass a lender who takes a security interest in goods as security for its loan." *Id.* at 358.

59. TEX. BUS. & COMM. CODE ANN. § 9.102(b) (1968).

60. R. NORDSTROM, HANDBOOK OF THE LAW OF SALES §§ 168, 169 at 509 (1970).

The second major requirement for bona fide purchaser status is good faith. Honesty in fact is the generalized definition of good faith which pertains to the whole Code.⁶¹ In addition to this minimum standard of good faith article II has an even more specialized requirement. Article II requires observance of reasonable commercial standards of fair dealing.⁶² The court in *Samuels* maintained that C.I.T. did not act in good faith by reasoning that had an intimate knowledge of Samuels' affairs and must have known that outstanding checks would be dishonored when credit to Samuels was stopped.⁶³ The bad faith finding rests on the issue of whether knowledge of outstanding claims destroys good faith. While the common law bona fide purchaser and several provisions of the Code require lack of knowledge of outside claims,⁶⁴ article II's definition does not expressly or impliedly contain lack of knowledge of third part claims as an element.⁶⁵

The majority cites two cases for the proposition that notice of outstanding claims destroys good faith. The case of *Fidelity & Casualty Co. v. Key Biscayne Bank*⁶⁶ concerns stock certificates under an article VIII good faith definition, not an article II definition. The *Greater Louisville Auto Auction v. Ogle Buick Inc.*⁶⁷ case does not deal with a purchaser but an agent of the buyer, therefore bona fide purchaser status is immediately ruled out. Furthermore, the court in *Greater Louisville* found a conscious design on the part of the agent to deceive the buyer into going through with the sale and then withholding the proceeds. In *Samuels* there was no such finding of a conscious design. In this regard, it appears that the court's authority does not support its finding.

It is apparent that *Samuels* is an example of a court bending the law to fit a fact situation to do what is "fair." In so doing *Samuels* has arrived at some startling conclusions. It is extremely doubtful that the court's ruling on the inapplicability of 2.401 to cash sales will gather many disciples. Likewise, the holding that article II good faith requires lack of knowledge of third party claims will probably not receive much acceptance. The 10 day limitation, however, is another matter. Due to the possible inequities that can arise from a strict adherence to this limitation, it would seem probable that future

The voluntary requirement in the definition of a purchaser explains why a lien creditor or a trustee in bankruptcy could not prevail over the seller as they cannot be good faith purchasers. Liens are not voluntary transactions. They are applied by the creditor or the trustee in bankruptcy without the debtor's consent. *Id.* § 168 at 509.

61. TEX. BUS. & COMM. CODE ANN. § 1.201(19), § 1.201, comment 19 (1968).

62. *Atlas Auto Rental Corp. v. Weisberg*, 281 N.Y.S.2d 400, 404 (Civ. Ct. 1967); TEX. BUS. & COMM. CODE ANN. § 2.103(a)(2) (1968).

63. *In re Samuels & Co.*, 510 F.2d 139, 151 (5th Cir. 1975).

64. TEX. BUS. & COMM. CODE ANN. §§ 3.302, 6.110, 8.301, 8.302, 9.301(a)(2) (1968).

65. *Id.* § 2.103(a)(2).

66. 501 F.2d 1322, 1326 (5th Cir. 1974).

67. 387 S.W.2d 17, 21 (Ky. 1965).

1975]

CASE NOTES

471

decisions will follow the equitable trend initiated by *Samuels*. By finding that the sellers maintained the right to reclaim after approximately one year, the concept of a strict 10 day waiver has certainly been weakened. Whether this will endure after subsequent decisions remains to be seen.

James M. Smith