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THE RECLAIMING SELLER UNDER UCC SECTION 2-702  
VS.  
HIS FOUR HORSEMEN OF THE APOCALYPSE

EUGENE M. ANDERSON, JR.\*

When a seller delivers goods to a buyer expecting in exchange an agreed-upon price, but does not receive that price, he quite reasonably expects the legal system to provide redress. An obvious remedy would be to allow the seller to reclaim the goods. In allowing such a remedy, the common law at an early date recognized differences in justifiable expectations and relative equities between the cash seller as opposed to the unsecured credit seller. General rules, varying in substantial measure by jurisdiction, were developed to govern both the seller versus cash-buyer and seller versus credit-buyer relationships. It was further perceived that the equities and expectations of the respective relationships would be subject to those of third parties.<sup>1</sup>

The draftsmen of the Uniform Commercial Code codified the common law rules that had governed these relationships, and their statutory provisions have remained basically unchanged in succeeding official versions with the exception of one substantial change in 1966.<sup>2</sup> In

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1. The common law was carefully reviewed in the case of *Samuels & Co. v. Mahon*, 510 F.2d 139 (5th Cir. 1975). The court there noted that the significance of classifying a sale as a cash or credit transaction was historically important because of the passing of title concept. On a sale for cash, the seller of goods implicitly reserved the title to the goods until payment was made in full. If the buyer defaulted, the seller's action was one in replevin. On the other hand, the buyer obtained full title on a credit sale; if the buyer defaulted, the seller could maintain an action on the price. *Id.* at 144. As to third parties, this was an important distinction because under a cash sale, a defaulting buyer could not pass title and the unpaid seller could reclaim from the otherwise bona fide purchaser. But, if it was a credit sale, then the seller was without relief against the third party because the original buyer had acquired full title. *Id.* at 144. See also 2 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS* § 346A, at 343 (rev. ed. 1948); Corman, *Cash Sales, Worthless Checks and the Bona Fide Purchaser*, 10 VAND. L. REV. 55 (1956); Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954).

2. See Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1285 (1967).

view of the controversy and irreconcilable decisions they have produced, it is doubtful, however, that their immutability is attributable to the clarity of their meaning.<sup>3</sup>

Section 2-702 of the Uniform Commercial Code governs the rights of a reclaiming unsecured credit seller and is, of necessity, the initial starting point of this attempt to ascertain the rights of the credit seller vis-à-vis those of third parties.<sup>4</sup> A cursory examination of section 2-702(2) leads to the conclusion that it is concerned only with a resolution of expectations and equities between the unpaid seller and insolvent buyer or, more specifically, the right of the seller to reclaim from the buyer in certain specific instances.<sup>5</sup> On the other hand, it seems that the principal purpose of section 2-702(3) is to make this right "subject to the rights of three classes of third parties."<sup>6</sup> This statement is followed by an enigmatic cross-reference to section 2-403, and it is generally thought, but by no means universally concluded, that section

3. It is noted by Professor Frank Kennedy in his article, Kennedy, *The Interest of a Reclaiming Seller Under Article 2 of the Code*, 30 BUS. LAW. 833 n.3 (1975), that Judge Braucher in his 1967 article listed 22 references to published articles and comments on the controversy. Kennedy lists 15 additional references, and at least two more articles deserve incorporation. Bjornstad, *Reclamation of Goods by Unsecured Sellers in Bankruptcy Proceedings*, 24 DRAKE L. REV. 357 (1975); Henson, *Reclamation Rights of Sellers Under Section 2-702*, 21 N.Y.L.F. 41 (1975).

4. UNIFORM COMMERCIAL CODE § 2-702 (1962 version) provides in pertinent part:

- (2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
- (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

In 1966, the Permanent Editorial Board recommended the deletion of the words "or lien creditors" from subsection (3) and this was reflected in the Official 1972 version. U.C.C. PERMANENT EDITORIAL BOARD, 1966 OFFICIAL RECOMMENDATIONS FOR AMENDMENT OF THE U.C.C. 1 (1967). In addition to the fifteen states listed in Henson, *Reclamation Rights of Sellers under Section 2-702*, 21 N.Y.L.F. 41 n.2 (1975), two additional states have adopted the provision. IOWA CODE ANN. § 554.2702(3) (Supp. 1976); MISS. CODE ANN. § 75-2-702(3) (1972). The change is controversial, and a discussion of the results under both versions is necessary in view of the number of states which have not yet adopted it. For instance, Texas has adopted the 1972 version of Article 2, but has refused to adopt the § 2-702(3) provision. See TEX. BUS. & COMM. CODE ANN. § 2-702(3) (Tex. UCC 1968). Although the rights of the credit-seller and the cash-seller may in some respects parallel one another, the focus of this article is solely on the rights of the reclaiming, unsecured credit seller as opposed to those of certain classes of third parties.

5. UNIFORM COMMERCIAL CODE § 2-702(2).

6. See *id.* § 2-702(3) (1962 version).

2-702(3) is the beginning of the search for the rights of third parties as opposed to those of reclaiming sellers. Section 2-702(3), therefore, by declaring that the "seller's right . . . is subject to the rights of [1] a buyer in the ordinary course or [2] other good faith purchaser or [3] lien creditor under this [a]rticle"<sup>7</sup> implies a limitation of this reclamation right by the possible intervening rights of the three classes of third parties.

Certainly, there is an interaction of the rights of the reclaiming credit seller with the rights of these three specifically enumerated classes of third parties. A fourth class, the trustee in bankruptcy of the insolvent buyer, sometimes fits within one of the three classifications and should be considered concurrently with the other three. These four classes are the barriers that the unsecured credit seller must overcome in order to reclaim his goods.

It is strongly suggested that the *nature* of the right granted in subsection (2) to the reclaiming seller is determinative of the results of its interaction with those rights of the classes of third parties to which it is subjected by subsection (3) of 2-702. There is no agreement among the cases or the commentators, however, as to the nature of either of these rights. If one is tempted to join Justice Holmes in concluding that "the word 'right' is one of the most deceptive of pitfalls,"<sup>8</sup> then the author sympathizes, but the Code draftsmen did use the word "right" to describe the conflicting powers of the reclaiming seller and third parties. Thus, the nature of the rights of the third parties in subsection (3) of 2-702 must be examined and categorized. This will be done in part one of the discussion. Similarly, the nature of the right of the reclaiming seller in subsection (2) of 2-702 must be analyzed in light of the definitions established in part one. This right and its interaction with the rights of third parties will be the theme of part two.

#### NATURE OF THE RIGHTS OF THIRD PARTIES

A basic tenet of this article is that the interaction between the rights of the enumerated classes of third parties and those of the reclaiming seller can only be understood by examining the nature of each class respectively. This fundamental step is necessary because section 2-702 does not say that the rights of the reclaiming seller are *subordinate* to those of these three classes, but rather *subject to* those rights.<sup>9</sup> The

7. *Id.* § 2-702(3) (1962 version).

8. *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350, 358 (1921).

9. UNIFORM COMMERCIAL CODE § 2-702(3).

draftsmen were certain in their use of "subject to" because in other sections of the Code they specifically used "subordinate to" when that was their intention.<sup>10</sup>

### I. *Buyer in Ordinary Course*

The buyer in ordinary course of business is the first third party class mentioned in section 2-702(3) and the intentions of the statute are manifest. Article 1 definitions are applicable to article 2,<sup>11</sup> and section 1-201(9) defines buyer in ordinary course of business as one "who 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 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."<sup>12</sup> The definition, as the comment to section 1-201(9) points out, was adopted from the Uniform Trust Receipts Act,<sup>13</sup> and cases under that Act are helpful as guides in uncertain situations.<sup>14</sup>

Section 2-403(2) delineates the interaction of the rights of a buyer in ordinary course of business with the rights of one who entrusts goods to a merchant dealer in that kind of goods.<sup>15</sup> Under the rules of this section, the purchaser in ordinary course of business will prevail over the party who does such entrusting. Making a credit sale to a merchant dealer would thus fall within the definition of "entrusting" as set out in

10. *See id.* § 9-301(1). The draftsmen also used the word "priority" freely. *Id.* §§ 9-312, -313.

11. *Id.* § 1-201 (introductory sentence).

12. *Id.* § 1-201(9).

13. *Id.* § 1-201(9), Comment 9.

14. There is authority that the case law concerning the buyer in ordinary course of business under the Uniform Trust Receipts Act is viable under the Code. *General Elec. Credit Corp. v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Ore. 1969). *See also Commercial Discount Co. v. Mehne*, 108 P.2d 735 (Cal. Ct. App. 1940) (if only a small portion of the purchase money was for present value, bona fides of the transaction would be questionable); *Colonial Fin. Co. v. De Benigno*, 7 A.2d 841 (Conn. 1939) (includes not just consumers but retailers, sub-dealers and agents of dealers, and has refused to fractionalize sale allowing buyer in the ordinary course status for entire purchase price even when part goes for the cancellation of a preexisting debt).

15. UNIFORM COMMERCIAL CODE § 2-403(2). Note that the definition of a buyer in ordinary course of business requires that he must do his buying from a person who is in the business of selling goods of that kind. *Id.* § 1-201(9). The operative language of section 2-403(2) is entrusting "to a merchant who deals in goods of that kind." *Id.* § 2-403(2) (emphasis added). The article 2 definition of merchant includes "a person who deals in goods of the kind." *Id.* § 2-104(1). Little seems to be gained by all of this and the references in section 2-403(2) might well have been left out since the buyer in the ordinary course of business by definition must be buying from a person who deals in goods of that kind.

section 2-403(3).<sup>16</sup> No more need be said of the rights of a reclaiming seller as opposed to those of a buyer in ordinary course of business—it is clear that the reclaiming seller will lose.

## II. *The Good Faith Purchaser for Value*

Unlike the precisely defined buyer in ordinary course of business, an intelligible definition of a good faith purchaser cannot be found in the Code. At best, the term can be understood as the product of a combination of three or four different definitions. The most basic of these definitions is the Code's concept of purchase, which is the "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property."<sup>17</sup>

Section 1-201(19) of the Code defines good faith as "honesty in fact."<sup>18</sup> The reference to the good faith purchaser in section 2-702(3) also cross-refers to section 2-403, which introduces the concept that the purchase must be for value. Section 1-201(44) contains an unremarkable definition of value.<sup>19</sup> Since neither the concept of good faith nor the concept of value is a significant departure from pre-Code law, an analysis of the term "purchase" must be undertaken.

The Uniform Sales Act did not attempt an inclusive definition of purchaser such as has been given in the Code. The draftsmen there

16. *Id.* § 2-403(3) states that:

'Entrusting' includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

17. *Id.* § 1-201(32). Note, however, that a "purchaser" is considered to be one who takes by purchase. *Id.* § 1-201(33).

18. *Id.* § 1-201(19). The Uniform Sales Act section 76(2) utilized the common law subjective test of good faith and it was carried forward to UCC section 1-201(19). In the case of merchants, the Code adds the requirement of observance of reasonable commercial standards of fair dealing in the trade. UNIFORM COMMERCIAL CODE § 2-103(1)(b).

19. UNIFORM COMMERCIAL CODE § 1-201(44) provides:

[A] person gives value for rights if he acquires them (a) 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; or (b) as security for or in total or partial satisfaction of a preexisting claim; or (c) by accepting delivery pursuant to a preexisting contract for purchase; or (d) generally, in return for any consideration sufficient to support a simple contract.

The common law concept of value did not include the grant of security for an antecedent debt, the giving of an executory promise, or the satisfaction of an antecedent debt. Under the Uniform Sales Act section 76(1), however, these were all instances of giving value.

were content to merely conclude that "purchase includes taking as a mortgagee or pledgee."<sup>20</sup> This is far different from including "any voluntary transaction creating an interest in property,"<sup>21</sup> by which the draftsmen of the current Code apparently intended the inclusion of any security interest in goods created by contract "which secures payment or performance of an obligation."<sup>22</sup> Nor does it seem necessary that such an interest be perfected.<sup>23</sup> It is this apparent change in the definition of purchaser which has caused the difficulty for reclaiming sellers and bankruptcy trustees alike. This difficulty is increased by the fact that security interests now include "floating liens" making any and, if granted in the security agreement, all after-acquired property of the debtor subject to the creditor's security interest.<sup>24</sup> It is apparent that in order to determine who is a good faith purchaser, the Code definitions of purchase, good faith, and value must be combined. The problem is that the resulting determination is unsatisfactory and uncertain.

The common law well knew a person called a bona fide purchaser. The concept of a bona fide purchaser was developed from his rights which were based on the concept of title. Under the pre-Code law, a bona fide purchaser would take free of the rights of a reclaiming seller if he took from a purchaser who had voidable title or if the original seller were estopped to deny title.<sup>25</sup> He would take *subject to* the rights of the

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20. UNIFORM SALES ACT § 76(1); see Bankruptcy Act § 1(5), 11 U.S.C. § 1(5) (1970).

21. UNIFORM COMMERCIAL CODE § 1-201(32).

22. *Id.* § 1-201(37); see *Jordan v. Butler*, 156 N.W.2d 778, 785 (Neb. 1968); 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 1-201:99(i), at 134 (2d ed. 1970).

23. It is only in article 9 that this distinction between perfected and unperfected security interests is made. See UNIFORM COMMERCIAL CODE §§ 9-201, -301, and -203, Comment 1. *But cf. id.* § 9-113.

24. *Id.* § 9-204, Comment 2. This position will apparently survive attacks by even bankruptcy trustees. See *Grain Merchants, Inc. v. Union Bank & Sav. Co.*, 408 F.2d 209 (7th Cir.), *cert. denied*, 396 U.S. 827 (1969).

25. See note 1 *supra*. In the late 1800's the bona fide purchaser was subordinate to the rights created by a seller's express reservation of ownership (title) in delivered goods under the maxim "no one can transfer greater title than he has." Subsequently there was a great rise in litigation involving cases wherein a seller was defrauded by a purchaser who then attempted to pass title to another who had purchased for value and without knowledge of the fraud committed by his seller. Since in many cases it was perceived that reasonable expectations and equities favored this subsequent bona fide purchaser, the courts developed the theory of voidable title to protect such a purchaser. Under this theory, where the owner of goods voluntarily transferred and delivered possession to a buyer he was found to have intended to confer full title subject to the condition subsequent that he would be paid his price; hence there was a voidable title. If this buyer in turn sold to a bona fide purchaser, however, the condition would be defeated and this second purchaser would receive good title. The voidable title theory originated with the English case of *Parker v. Patrick*, 101 Eng. Rep. 99 (K.B. 1793), and gained favor in the late 1800's. The development of the theory in the United States

reclaiming seller if his transferee did not have title, as in cases of obtaining the goods by a cash sale<sup>26</sup> or by theft.<sup>27</sup> The Uniform Sales Act, thereafter, continued this common law approach.<sup>28</sup>

Because of the different and expanded definition of purchaser (purchase) in the Code, it is not as easy to delimit good faith purchaser in terms of his rights as it was to characterize the bona fide purchaser under the common law. Furthermore, the Code fails to clarify the rights of the good faith purchaser vis-à-vis the reclaiming seller. Again, section 2-702 simply says that the rights of a reclaiming seller are subject to not subordinate to the rights of a good faith purchaser.<sup>29</sup> This in itself is neutral, and the reader is thrown by the cryptic cross-reference to the "rights of a . . . good faith purchaser under this Article (Section 2-403)."<sup>30</sup>

Section 2-403 seems to be the only point at which the rights of a good faith purchaser are defined in article 2. Although this section states that a person with voidable title may transfer good title to a good faith purchaser for value, the concept of voidable title is not defined in the Code. It might be concluded that common law concepts were intended to apply, but such is not the case. Four instances of voidable title are given in section 2-403, all of which expand the theory of voidable title to some extent.<sup>31</sup> It is tempting to treat these as an exclusive enumeration of situations resulting in voidable title, but this is not the intent of

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paralleled that of England. Corman, *Cash Sales, Worthless Checks and the Bona Fide Purchaser*, 10 VAND. L. REV. 55, 56-59 (1956).

26. An exception to the voidable title theory was the cash sale, in which it was agreed that the transaction was to be for cash or in exchange for a check. Until the cash was paid or the check honored no title would pass and no bona fide purchaser could take free unless the original seller was estopped to deny transferring title, as where he placed indicia of ownership in the purchaser. See *Guckeen Farmers Elevator Co. v. Cargill, Inc.*, 130 N.W.2d 69, 73 (Minn. 1964); R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 170, at 515 (1970).

27. See R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 170, at 515 (1970). If possession was not given voluntarily by the original owner as in the case of a theft, no title was intended to pass and a bona fide purchaser took subject to the original party's rights in the goods.

28. UNIFORM SALES ACT § 24.

29. UNIFORM COMMERCIAL CODE § 2-702(3).

30. *Id.*

31. *Id.* § 2-403(1) states:

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

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a 'cash sale,' or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.



the statute, and the results would not, as policy-oriented law, be proper. Rather, it would seem that the good faith purchaser is protected in all cases where goods were delivered to his transferor under a transaction of purchase.<sup>32</sup> Since theft is not a transaction of purchase,<sup>33</sup> the good faith purchaser would not take free of the owner's claim where his transferee is a thief. This seems to be the only instance under section 2-403 in which the good faith purchaser would not take free of the owner's claim.

When read with the definition of purchaser, which courts have held to include lien creditors and secured parties holding "floating liens" (the attachment of a security interest upon after-acquired property),<sup>34</sup> the result is a vastly expanded concept of a good faith purchaser over that of

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32. At this point it is important to distinguish between the two purchasers discussed in section 2-403. The first purchaser (purchaser 1), the insolvent buyer discussed in this article, is the purchaser of the voidable title. Subsection (1) requires that goods be delivered to purchaser 1 with the words, "[w]hen goods have been *delivered* under a transaction of purchase . . ." UNIFORM COMMERCIAL CODE § 2-403(1) (emphasis added). Thus, the broad definition of purchase in section 1-201(32) is not applicable to this purchaser since taking by lien, normally a security interest, is not usually accompanied by delivery of the goods, with the obvious exception of taking a pledge. The rights of those who take by a form of purchase other than where goods are delivered are governed by other articles. *Id.* § 2-403(4). The second purchaser referred to in section 2-403 is the party who purchases from the party with the voidable title (purchaser 1) and receives good title. He will be referred to as purchaser 2 and is the buyer in the ordinary course of business, the good faith purchaser (including the secured party), and the lienor (including the trustee in bankruptcy) discussed in this article. Purchaser 2 may take by any form of purchase including taking a security interest or lien. *Id.* § 2-403, Comment 1. The first sentence of UCC section 2-403(1) states 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 rights only to the extent of the interest purchased." If "limited interest" is read to include a security interest, in addition to a simple fractional interest in the corpus of the goods as in the case of purchaser 1 to whom the goods must be delivered, and "purchaser" is read to include purchaser 2, the effect discussed in comment 1 of section 2-403 is realized where it states that "[t]he basic policy of our law allowing transfer of such title as the transferor has is generally continued and expanded under subsection (1). In this respect the provisions of this section are applicable to a person taking by any form of 'purchase', as defined by this Act." *Id.* § 2-403, Comment 1.

33. Here the good faith purchaser will have purchased from one to whom goods have not been delivered under a transaction of purchase. The thief did not receive the goods under a voluntary transaction mandated by section 1-201(32) and was not a purchaser. It can also be reasoned that there was no delivery in the sense of putting and holding goods at the buyer's disposition required by the Code. See UNIFORM COMMERCIAL CODE § 2-503. See generally 3 R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE U.C.C. § 1.03[4], at 1-17 (1976); 1 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES § 5-1, at 94 (4th ed. 1973).

34. *United States v. Wyoming Nat'l Bank*, 505 F.2d 1064 (10th Cir. 1974); *In re Hayward Woolen Co.*, 3 UCC REP. SERV. 1107 (D. Mass. 1967) (referee opinion); *Theodore Hamm Brewing Co. v. First Trust & Sav. Bank*, 242 N.E.2d 911 (Ill. Ct. App. 1968); *Evans Prod. Co. v. Jorgensen*, 421 P.2d 978 (Ore. 1966); see 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 1-201:99(i), at 131 (2d ed. 1970).

the common law bona fide purchaser. The history of the recent Fifth Circuit Court of Appeals case of *Samuels & Co. v. Mahon*<sup>35</sup> illustrates some problems with this approach.

Before the trend toward enlargement of the concept of a good faith purchaser becomes irreversible, it may be advisable to reconsider the policy and reasoning that has led to this expansive interpretation of section 2-403. The basic policy of the draftsmen of article 2 was to make goods in commerce as freely transferable as possible.<sup>36</sup> This is the justification for the protection of the good faith purchaser in all cases except where the original owner failed to transfer voidable title because possession was lost involuntarily and not under a transaction of purchase.

The ultimate implementation of this policy would be to protect all types of purchasers who arguably fall within the Code catchall definition of purchase as a voluntary transaction creating an interest in property. This would encompass secured parties with both perfected and unperfected security interests, as well as "floating liens." To find that holders of unperfected security interests are good faith purchasers under section 2-403 would have the effect of disturbing article 9 priorities in those jurisdictions which have amended section 2-702(3) to delete "lien creditor," presumably with the result that a lien creditor cannot defeat a reclaiming seller. In such a situation, an unperfected secured party would defeat a lien creditor in spite of section 9-301(1)(b), which subordinates an unperfected security interest to a lien creditor.<sup>37</sup>

Most situations in which the reclaiming seller attempts to assert his rights will be commercial in nature. More than likely, insolvent buyers will have at least one creditor who has an article 9 security interest in all of his property by virtue of a "floating lien." The recent *Samuels* decision illustrates how the courts may deal with the equities of the reclaiming seller vis-à-vis such a secured party.<sup>38</sup> The court reasoned that since the secured party had acquired his interest by contract, it was a voluntary transaction.<sup>39</sup> Therefore, he was a good faith purchaser

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35. 526 F.2d 1238 (5th Cir. 1976) (per curiam), *rev'g* 510 F.2d 139 (5th Cir. 1975) (en banc). The problem in *Mahon* was initially before the Fifth Circuit in *Samuels & Co. v. Mahon*, 483 F.2d 557 (5th Cir. 1973), *rev'd sub nom.*, *Mahon v. Stowers*, 416 U.S. 100 (1974).

36. UNIFORM COMMERCIAL CODE § 2-403, Comment 1.

37. *Compare id.* § 2-702(3), with *id.* § 9-301(1)(b).

38. *Samuels & Co. v. Mahon*, 526 F.2d 1238, 1242-43 (5th Cir. 1976) (per curiam).

39. *Id.* at 1242-43.

within the meaning of Code section 2-403 and would prevail over a seller reclaiming under section 2-702.<sup>40</sup>

A security agreement covering after-acquired property is a voluntary contract, but it seems that a security interest obtained only by virtue of the security agreement's broad coverage of after-acquired property is an unconscious purchase and hardly voluntary as to those particular goods.<sup>41</sup> The inequities of allowing a reclaiming seller to be defeated by a secured party who has a "floating lien" and has advanced no new value or by an imperfectly secured party are obvious.

There are several arguments for narrowly construing the word "purchaser" in section 2-403 to include only those who purchase the goods themselves and have the enjoyment interest and the right to possession (*i.e.*, title and not just a security interest in them). The preamble to section 1-201 indicates that the definitions there may not apply if the context otherwise requires,<sup>42</sup> and the scope of article 2 does not include consensual security transactions since they are left to article 9.<sup>43</sup>

That "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value" cannot be doubted because these are the exact words of the Code.<sup>44</sup> It does not necessarily follow, however, that these words mean a person with voidable title has the power to transfer a valid and enforceable security interest to a good faith purchaser for value. It is awkward to speak of title to a security interest since reference to the concept of title usually means the paramount rights of ownership and not merely an interest that secures performance of an obligation.<sup>45</sup> The Code in section 2-401(1) declares that "[a]ny

40. *Id.* at 1247.

41. Judge Braucher has apparently referred to the secured party whose only interest in collateral is that the security interest has attached to it as after-acquired property as an unconscious purchaser. Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435, 458 n.119 (1971).

42. UNIFORM COMMERCIAL CODE § 1-201.

43. *Id.* § 2-102.

44. *Id.* § 2-403(1).

45. *Id.* § 2-401. The preamble to this section reads in part: "Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title." The draftsmen's comments to this section then state that:

This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed. That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the Article is made clear by the preamble of this section.

*Id.* § 2-401, Comment 1. The downgrading of title with the qualification that it is still viable where referred to in other sections creates some difficulties. It injects into the

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."<sup>46</sup> Thus, the Code is obviously recognizing a distinction between title and security interest. As a final indicator that title and security interests are not to be equated, section 2-403(4) requires that one look elsewhere for the rights of secured parties.<sup>47</sup>

On the other hand, the most persuasive reason for not reading the word "purchaser" narrowly is that to do so would deny to secured parties, without discrimination as to date or kind of interest, all protection as good faith purchasers pursuant to section 2-403. A narrow interpretation would force these parties, in a search for their rights, to look to article 9 or supplementary general principles of law as authorized by section 1-103.<sup>48</sup>

In the wake of *In re Kravitz*,<sup>49</sup> a search through article 9 would be at least as confusing and futile as was the search in that article for the rights of a lien creditor. Furthermore, although prior law recognized the superior rights of mortgagees and pledgees of specific property, resort to the general principles of law would also be unavailing since the "floating lien" is largely a Code innovation and pre-Code law does not deal with the "floating lien" in the context of a bona fide purchaser.

The draftsmen of article 2 apparently intended an encompassing approach to the term "purchaser." "Buyer," a defined term, could have been used instead of "purchaser."<sup>50</sup> Moreover, the comments to section

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Code the confusing, amorphous concept of title, sometimes described as a complex bundle of rights, duties, powers and immunities. *Standard Oil Co. v. Clark*, 163 F.2d 917, 930 (2d Cir. 1947); *People v. Walker*, 90 P.2d 854, 855 (Cal. Dist. Ct. App. 1939). It creates the paradox that a secured party under section 2-403 defeats a seller reclaiming under section 2-702. Here the secured party claims a valid security interest given by a buyer with a voidable title, pursuant to a section that allows a party with a voidable title to transfer good title. Prior law, however, distinguished title from a security interest. *Premium Commercial Corp. v. Kasprzycki*, 29 A.2d 610, 614 (Conn. 1942) (outcome depended upon whether the plaintiff had a lien or title).

46. UNIFORM COMMERCIAL CODE § 2-401(1). Similar language may be found in *id.* § 1-201(37) and this would tend to reinforce the proposition that the Code recognizes that title is not the equivalent of a security interest.

47. *Id.* § 2-403(4). Professor Shanker suggests that the presence of the words "lien creditor" in section 2-403(4) may be intended to exclude lien creditor from the purchaser definition. Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 101-02 (1962).

48. UNIFORM COMMERCIAL CODE § 1-103.

49. 278 F.2d 820 (3d Cir. 1960).

50. See UNIFORM COMMERCIAL CODE § 2-103(1)(a) where it states that a buyer is a person "who buys or contracts to buy goods."

2-403 state that the section applies to any form of purchase.<sup>51</sup> "Purchaser," therefore, when read in the context of section 2-403 to mean only the buyer of the goods themselves is too narrow.

A possible solution would be for the courts to exclude from the meaning of the section 2-403 purchaser those secured parties having only an unperfected security interest or whose only interest in the goods as collateral is the interest which attached to the goods as after-acquired property without the securing party's having given *new value*, such as the floating lienor.<sup>52</sup> The context in which the word is used in section 2-403 requires such a reading in order to avoid difficulties raised by the issues of priority and non-voluntary transfer. Thus, an alteration of the meaning of "purchaser" in that section would be justified by the preamble to section 1-201. Further, subordinating the rights of the floating lienor or unperfected secured party to the rights of a reclaiming seller under section 2-702 would parallel the policy subordinating the rights of prior secured parties to the rights of those who obtain purchase money security interests, as reflected in section 9-312,<sup>53</sup> and to the rights of buyers in the ordinary course of business, as reflected in section 9-307.<sup>54</sup>

### III. *The Lien Creditor*

The lien creditor is the last class of third parties whose rights interact with those of the reclaiming seller. This classification has stirred more controversy and created more judicial uncertainty than any other third party class for at least two reasons. First, the trustee in bankruptcy is given the status of a lien creditor as of the date of bankruptcy by virtue of the Bankruptcy Act.<sup>55</sup> His rights, however, are left to state law,<sup>56</sup> of which the Uniform Commercial Code is a notable example. Since the reclaiming seller's rights under section 2-702 are dependent on the buyer's being insolvent, it is hardly surprising that bankruptcy trustees are frequently involved in attendant litigation. Second, section 2-702 is especially obscure as to its meaning with regard to lien creditors. Section 2-702(3) states "[t]he seller's right to reclaim . . . is subject to the rights of . . . a lien creditor under this Article (Section 2-

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51. *Id.* § 2-403, Comment 1.

52. *See* note 41 *supra*.

53. *See* UNIFORM COMMERCIAL CODE § 9-312.

54. *See id.* § 9-307.

55. Bankruptcy Act § 70c, 11 U.S.C. § 110(c) (1970).

56. *See Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603 (1961) (*construing* 11 U.S.C. § 110(c) [1970]).

403).<sup>57</sup> If this is meant as a cross-reference to section 2-403 as a source of the rights of a lien creditor, it is futile, for that section merely refers one to other pertinent articles to ascertain the lien creditor's rights.<sup>58</sup>

With this kind of curious draftsmanship, it is hardly surprising that courts and commentators have gone in all directions in analyzing who this lien creditor is and what his rights are. While Professor Kennedy has illustrated the uncertainty of attempting to define "lien,"<sup>59</sup> much less "lien creditor," under the Code, a definition of "lien creditor" may be found in section 9-301(3)<sup>60</sup> and it seems fair to assume that this may be at least a partial definition of the lien creditor referred to in section 2-702(3).<sup>61</sup>

The Permanent Editorial Board felt it could cut through this gordian knot by simply deleting the words "or lien creditor" from section 2-702(3) and it so recommended in 1966.<sup>62</sup> At the time, Professor Braucher, who was chairman of the subcommittee which made the recommendation, traced the history of section 2-702 and concluded that the words "or lien creditor" had somehow slipped into the 1952 Official Draft after that section's text had been approved and that it was "highly probable that it was regarded as an insubstantial editorial change."<sup>63</sup>

57. UNIFORM COMMERCIAL CODE § 2-702(3) (1962 version).

58. *Id.* § 2-403(4). Article 9 contains a definition of lien creditor, but it is concerned primarily with nonconsensual liens. *See id.* § 9-301(3). The article 1 definition does not specifically say "lien creditor," but rather talks in terms of a "security interest." *Id.* § 1-201(37). But by reference to the definition of "purchase," it is clear that the draftsmen intended it to be a lien. *See id.* § 1-201(32). The frustration which anyone attempting to rationalize this maze will experience is well illustrated by the discussion in Kennedy, *The Interest of a Reclaiming Seller Under Article 2 of the Code*, 30 BUS. LAW. 833, 834-36 (1975). Professor Kennedy does conclude that

[i]t is quite clear that Article 9 is not intended to create or deal with the creation of a lien or security interest other than a consensual one. Likewise, Article 9 is not intended to proscribe the priority of any lien or security interest except that of a consensual security interest, either in its relation to another of the same category or in relation to a lien of a different variety.

*Id.* at 835-36. *But see* Countryman, *Code Security Interests in Bankruptcy*, 75 COM. L.J. 269, 271 (1970).

59. *See generally* Kennedy, *The Interest of a Reclaiming Seller Under Article 2 of the Code*, 30 BUS. LAW. 833, 834 (1975).

60. UNIFORM COMMERCIAL CODE § 9-301(3) states that a lien creditor is one who has acquired a lien on the property involved by attachment, levy, or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

61. *But see* *Samuels & Co. v. Mahon*, 526 F.2d 1238 (5th Cir. 1976) (*per curiam*); Countryman, *Code Security Interests in Bankruptcy*, 75 COM. L.J. 269 (1970).

62. U.C.C. PERMANENT EDITORIAL BOARD, 1966 OFFICIAL RECOMMENDATIONS FOR AMENDMENT OF THE UCC 1 (1967).

63. Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1287 (1967).

While proponents of the deletion of "lien creditor" felt this resulted in a complete resolution of the problems insofar as the lien creditor was concerned, others had doubts.<sup>64</sup>

Barring such repeal of the term "lien creditor" from section 2-702(3), perhaps the most logical course is to seek the rights of the lien creditors first within section 2-702(3). This requires some ingenuity, and while at least two commentators have attempted it, apparently no courts have been equal to the task.<sup>65</sup> Professor Countryman has developed his thesis most fully and it is his suggestion that the provision should be read to mean that the seller's rights are subject to the lien of a lien creditor.<sup>66</sup> The only problem with this interpretation is that the Code does not read this way. Section 2-702(3) says that the reclaiming seller's rights are "subject to the rights of a lien creditor" and this does not imply "subordinate to the rights," much less "subject to a lien." Of course, a rather logical argument can be made that the obvious "right" of a lien creditor is a lien, but this does not answer any question as to the content of the right.

64. Compare Ashe, *Reclamation Under UCC—An Exercise in Futility: Defrauded Seller v. Trustee in Bankruptcy*, 43 REF. J. 78 (1969), with Hawkland, *The Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Code to Conform with the Kravitz Case*, 67 COM. L.J. 86, 88 (1962). Professor Shanker in Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 101 (1962) suggested that the "good faith purchaser" of section 2-702(3) may include a "lien creditor," and these doubts received apparent support in the case of *In re Good Deal Supermarkets, Inc.*, 384 F. Supp. 887 (D.N.J. 1974). New Jersey had adopted the 1966 amendment at the time in question, but the trustee won over a reclaiming seller and it is not clear what theory was adopted by the court. Further, Judge Godbold's dissent in *Samuels & Co. v. Mahon*, 510 F.2d 139, 159 (5th Cir. 1975), which was later adopted as the opinion of the court in 526 F.2d 1238, 1247 (1976) (per curiam), stated that "[l]ien creditors are included in the definition 'purchasers.'" The dissent pointed out that the United States Supreme Court did not specifically hold that a trustee in bankruptcy was a good faith purchaser. The Court merely referred to the trial court's holding of that fact and it was the dissent's contention that the majority was incorrect in so characterizing that reference to be a holding of the Court. *Samuels & Co. v. Mahon*, 526 F.2d 1238, 1254-56 (5th Cir. 1976) (per curiam).

65. See generally Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435, 457 (1971); Shanker, *Bankruptcy and Article 2 of the Uniform Commercial Code*, 40 REF. J. 37, 41-42 (1966); Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 98 (1962). Some cases have apparently assumed the superiority of a lien creditor's rights over those of a reclaiming seller. *In re Units, Inc.*, 3 UCC REP. SERV. 46 (D. Conn. 1965) (referee opinion); *In re Eastern Supply Co.*, 1 UCC REP. SERV. 151 (W.D. Pa. 1963), *aff'd per curiam*, 331 F.2d 852 (3d Cir. 1964); *In re Goodson Steel Corp.*, 10 UCC REP. SERV. 387 (S.D. Tex. 1968) (referee opinion); *In re Behring & Behring*, 5 UCC REP. SERV. 600 (N.D. Tex. 1968) (referee opinion).

66. Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435, 457 (1971).

Although Professor Shanker did not detail his views as to what rights he found in section 2-702(3),<sup>67</sup> and although it is plain that he considered the argument to be a separate one, Shanker suggested a possible further source of the lien creditor's rights through section 2-702(3). Noting that the section states the rights of lien creditors are those found "under this Article (Section 2-403)," he suggests that article 2 in its entirety is available to seek the rights of lien creditors.<sup>68</sup> With such a finding, section 2-326 must be examined.<sup>69</sup> The first two subsections of this section deal *inter alia* with the narrow concept of goods delivered on a sale or return basis. Such goods are subject to the claims of the buyer's creditors. It is the third subsection which is of interest here, for Bankruptcy Act terminology suddenly appears; certain types of sales are *deemed* equivalent to sale or return transactions.<sup>70</sup> The conditions of such transactions are typically met by a seller delivering goods to an insolvent buyer when they are delivered to the buyer for sale and the buyer normally deals in goods of this kind under his own name. Professor Kennedy had earlier recognized that the language of subsection 3 of 2-326 could be found to encompass this type of transaction,<sup>71</sup> but he felt that the context of the section ruled out its application to the problem of the seller reclaiming from the insolvent buyer.<sup>72</sup> In view of the contortions required to make any sense of the Code's treatment of the problem, context arguments seem weak. As Professor Shanker pointed out, there must be some purpose for the third subsection of section 2-326 because it handles problems with which many creditors, including lien creditors, are faced.<sup>73</sup>

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67. He does argue persuasively that the cross reference to article 9 by way of UCC section 2-403 does give the definition of lien creditor to be employed in connection with UCC section 2-702(3). Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 98 (1962).

68. *Id.* at 99.

69. See UNIFORM COMMERCIAL CODE § 2-326.

70. *Id.* § 2-326(3). To be "deemed" a sale or return transaction, there must be two elements in the delivery of the subject goods: (1) the goods must be delivered to a person for sale, and (2) the person who receives the goods must maintain a place of business at which he deals in goods of this kind under a name other than the name of the person making the delivery. As Professor Shanker notes, this would probably limit the scope of section 2-326(3) to the sale of inventory items. Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 99-100 (1962).

71. Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518, 551 n.137 (1960).

72. *Id.* at 551.

73. This once again raises the interesting question as to whether the 1966 recom-



While no court seems to have adopted this rationale, the case of *In re Federal's, Inc.*<sup>74</sup> obviously used such reasoning as antecedent to the basis of its opinion. In that case the reclaiming seller made his claim after the bankruptcy of the buyer. In a subsequent dispute the district court affirmed the bankruptcy judge's ruling in favor of the trustee who was asserting his status as a lienor under section 70c of the Bankruptcy Act. Faced with a higher court ruling that the source of the lienor's rights in section 2-702(3) is state law outside of the Code,<sup>75</sup> the judge held that there was no relevant law in Michigan on the point, but that, if faced with the problem, the Michigan Supreme Court would hold that, by analogy to section 2-326(3), the seller had a secret lien which must yield to intervening creditors including the lien creditor bankruptcy trustee.<sup>76</sup>

It can be argued that the reference of section 2-702(3) to section 2-403 was intentional and that section 2-403 does indeed confer rights upon the lien creditor. Section 2-403(1) provides in part that "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value."<sup>77</sup> The definition of purchase includes a lien or any other voluntary transaction creating an interest in property.<sup>78</sup> Value is given when rights are acquired as security for a pre-existing debt.<sup>79</sup> Thus it can be argued that the lien creditor takes by lien when he levies upon the goods and becomes a purchaser within the definition with the value being given by securing his pre-existing judgment debt with the lien.

There are two difficulties, however, with this argument. First, since section 2-403(4) states that "[t]he rights of other purchasers of goods *and* of lien creditors"<sup>80</sup> are to be found in other articles of the Code, it can be argued that the use of the word "and" indicates the rights of lien creditors are to be found elsewhere. Second, it appears from the definition that "purchase" is intended to cover only a voluntary transfer

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mended change has made any significant difference with reference to the bankruptcy trustee, or any other lien creditor for that matter. One must constantly keep in mind that section 2-702 deals with the rights of the reclaiming seller versus the insolvent buyer and only additionally deals with the rights of third parties in such a situation.

74. 402 F. Supp. 1357 (E.D. Mich. 1975).

75. *Mel Golde Shoes, Inc. v. Meinhard Commercial Corp.*, 403 F.2d 658, 660-61 (6th Cir. 1968).

76. *In re Federal's, Inc.*, 402 F. Supp. 1357, 1362 (E.D. Mich. 1975).

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

78. *Id.* § 1-201(32).

79. *Id.* § 1-201(44)(b).

80. *Id.* § 2-403(4) (emphasis added).

of property. The lien acquired by the lien creditor upon his levying upon the goods is not a voluntary transfer of property.<sup>81</sup>

On the other hand, it can be argued that section 2-403(4) was not an attempt to exclude lien creditors from section 2-403, but rather was an attempt to indicate that the rights given under section 2-403 are not exclusive or preemptive of the rights under article 9. This argument finds support in the comment which states: "[e]xcept as provided in subsection (1), the rights of purchasers . . . are left to the Articles on Secured Transactions . . . ."<sup>82</sup>

It must be conceded that there are difficulties with the second point that the interest of a lien creditor cannot be equated with the definition of purchase in section 1-201 since the interest is not created by a voluntary transaction, but by operation of law.<sup>83</sup> Although the Code does not specifically define lien and generally uses it in a context of an involuntary or non-consensual interest,<sup>84</sup> must it be assumed that lien as used in the definition of purchase is used in the same involuntary sense even though the context would indicate otherwise? Common law precedents, for whatever their value, only vaguely indicate a positive answer. Generally, it was held that a creditor of the fraudulent buyer was not a bona fide purchaser so as to defeat the reclaiming seller, especially when the credit was extended before the sale,<sup>85</sup> and apparently the same rule was applied against the trustee in bankruptcy.<sup>86</sup>

These concepts formed the rationale of *In re Kravitz*,<sup>87</sup> which is

81. See Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 101-02 (1962); cf. Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435, 458 (1971).

82. UNIFORM COMMERCIAL CODE § 2-403, Comment 4. This idea may have influenced the thinking of the majority in the latest *Samuels* holding. *Samuels & Co. v. Mahon*, 526 F.2d 1238, 1241 n.3 (5th Cir. 1976) (per curiam).

83. Kennedy, *The Interest of a Reclaiming Seller Under Article 2 of the Code*, 30 BUS. LAW. 833, 838-39 (1975). It may be questioned whether the lien here is any less involuntary than the automatic security interest in proceeds under section 9-306.

84. UNIFORM COMMERCIAL CODE 9-301(3) defines lien creditor, while section 9-310 makes it plain that "lien" is used not only in a judicial lien sense but including "a lien . . . given by statute or rule of law . . . ." *Id.* § 9-310.

85. 3 A. SCOTT, *THE LAW OF TRUSTS* §§ 308-309.1, at 313 (2d ed. 1956); see 3 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS* §§ 636-37, at 448-57 (rev. ed. 1948).

86. See generally 4A COLLIER ON BANKRUPTCY ¶ 70.41[1], at 483, 485 (14th ed. 1976).

87. 278 F.2d 820 (3d Cir. 1960).

perhaps the best known case involving the problems raised herein. There the court was faced with a reclaiming seller who fit squarely within the provisions of Code section 2-702 and a trustee in bankruptcy, who claimed the goods as a lien creditor under section 70c of the Bankruptcy Act and whose lien had become effective before the seller had repossessed the goods. The court went from Code section 2-702 to section 2-403 and thence to section 9-301. It concluded that section 9-301 furnished the intended definition of a lien creditor, but not the rights of such a person and that this would have to be determined by the controlling pre-Code state law.<sup>88</sup> Pennsylvania law dictated that where credit was extended to the buyer after the sale, the creditor was a purchaser who would be given protection against a reclaiming seller, so the court concluded that the trustee qualified under the Bankruptcy Act section 70c and therefore prevailed over the reclaiming seller.<sup>89</sup> The same reasoning was followed in *Mel Golde Shoes, Inc. v. Meinhard Commercial Corp.*,<sup>90</sup> by the Court of Appeals for the Sixth Circuit. A different result from *Kravitz* was reached, however, since the applicable pre-Code law of Kentucky allowed a reclaiming seller to prevail over a levying creditor.<sup>91</sup>

Therefore, it would seem that the law has come full circle, and as to the rights of lien creditors, little has changed. This is true regardless of whether section 2-702 makes the reclaiming seller's rights subject to those of a "lien creditor" or whether those words have been deleted from the section.

There are, however, several possible fallacies in this proposition. First, it assumes that the reclaiming seller is the same as the pre-Code reclaiming seller and that he has the same equities. This is not the case. It further assumes that the lien creditor cannot qualify as a Code good faith purchaser as distinct from the pre-Code bona fide purchaser. This assumption may be erroneous, for the good faith purchaser is a new, statutory creature whose composite definition may encompass the lien creditor classification. Finally, this proposition assumes that all bankruptcy courts will feel bound to defer to the Code presumption of fraud on the part of the insolvent buyer, thereby resolving trustee versus reclaiming seller conflicts under Code concepts.

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88. *Id.* at 822.

89. *Id.* at 822-23.

90. 403 F.2d 658 (6th Cir. 1968).

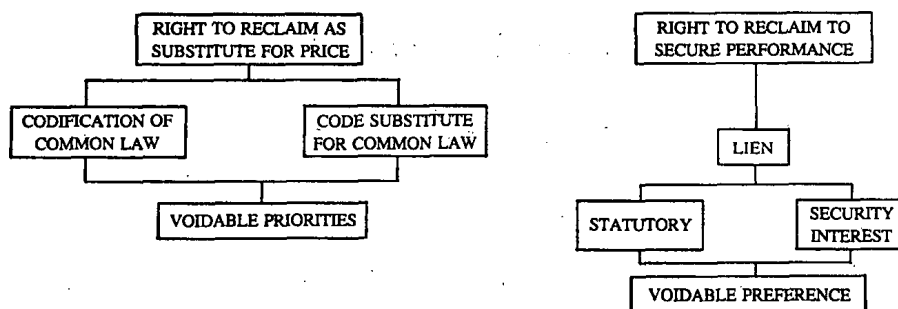
91. *Id.* at 660.

## THE NATURE OF THE SELLER'S RIGHT TO RECLAIM

This section will concern the conflict between the proposition that the seller has the right to reclaim goods as a substitute for their price and the proposition that his right to reclaim is to secure performance. Both propositions will be explored in order to determine which one prevails and the rights of a reclaiming seller that arise from such a determination.

There is some justification for the maxim that those who can, think, and those who cannot, classify. Nevertheless, in light of the complete confusion existing among the cases and the great disagreement between the commentators, some classification must be attempted and it necessarily involves the forcing of concepts into arbitrary slots. An attempt to cross-reference the concepts to different slots will be made in the text; therefore, a schematic has been furnished to aid comprehension:

## SELLER'S RIGHT TO RECLAIM

I. *Right to Reclaim the Goods as a Substitute for the Price*A. *Codification of the Common Law Right to Undo the Transaction*

The first category considered involves the right to undo the transaction when the Code is interpreted as a codification of the common law right to rescind for fraud. There is considerable evidence that the draftsmen of the Code felt that the correct characterization of the nature of the seller's right to reclaim was that it is a right to reclaim the goods as a substitute for the price<sup>92</sup> and should be treated as no more than the codification of the generally accepted pre-Code rule that where fraudulent representations of solvency were made to a deceived seller, he had a right to reclaim his goods from the wrongdoing buyer. This rule allowed a seller to rescind the contract and reclaim identifiable goods

92. UNIFORM COMMERCIAL CODE § 2-702, Comment 2.

upon a showing that the buyer knowingly made a false representation upon which the seller had relied in entering into the contract of sale.<sup>93</sup>

The problem with this approach is that the Code does not contain any language to that effect. It is doubtful that there is a right of rescission under the Code absent actual fraud or mutual mistake.<sup>94</sup> Even assuming that in this peculiar situation the common law right has survived, none of the conditions for its pre-Code exercise are contained in section 2-702(3). All that is necessary is that the buyer receive goods while insolvent and that the seller demand their return within ten days of such receipt unless a misrepresentation of solvency has been made in writing to the seller within three months before the goods are delivered, which extends the time for a demand indefinitely.<sup>95</sup> Apparently, a representation by the buyer, other than the three month written representation clause, or knowledge of the buyer's financial status by the seller is immaterial. Thus, the concepts of deceit and fraud are no longer necessarily present, although in most cases they will be.<sup>96</sup>

#### B. *A Code Substitute for the Common Law Right to Undo the Transaction*

If the reclaiming seller's right under the Code is to undo the transaction but is fashioned out of different cloth than the pre-Code right,

93. *E.g.*, *O'Riely v. Endicott-Johnson Corp.*, 297 F.2d 1, 5 (8th Cir. 1961); *Manly v. Ohio Shoe Co.*, 25 F.2d 384, 385 (4th Cir. 1928); *In re Weissman*, 19 F.2d 769, 771 (2d Cir. 1927); *In re B. & R. Glove Corp.*, 279 F. 372, 378 (2d Cir. 1922); *In re Monson*, 127 F. Supp. 625, 626 (W.D. Ky. 1955).

94. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 8-1, at 248-49 (1972); *see* UNIFORM COMMERCIAL CODE § 2-608, Comment 1. *But cf. id.* § 2-721.

95. UNIFORM COMMERCIAL CODE § 2-702(2). *See* Henson, *Reclamation Rights of Sellers under Section 2-702*, 21 N.Y.L.F. 41 (1975) for a good discussion of the elements of section 2-702(3).

96. Despite the Official Commentator's statement, it is not necessarily true that the section "takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller." UNIFORM COMMERCIAL CODE § 2-702, Comment 2. No doubt the draftsmen were making an attempt to fit the section within that line of bankruptcy cases beginning with *Donaldson v. Farwell*, 93 U.S. 631 (1876). There the Court held that "a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor . . . to disaffirm the contract . . ." *Id.* at 633. They concluded that the bankruptcy trustee stood in the same position as the bankrupt buyer. Some cases have gone so far as to hold that proof of insolvency creates a rebuttable presumption of an intent not to pay. *In re Paper City Mill Supply Co.*, 28 F.2d 115 (D. Mass. 1928); *Fisher v. Shreve, Crump & Low Co.*, 7 F.2d 159, 160 (D. Mass. 1925). But mere failure to disclose does not seem to be enough. *See* Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435, 454 (1971).

there seems no reason to give other than literal interpretation to the Code's provisions dealing with the rights of the three classes of third parties, so long as only state law is concerned. Since it is not always easy to determine what the literal interpretation should be, there is more reason to examine pre-Code analogies than if the seller's right is otherwise characterized.

Thus, there should be no difficulty in determining that a buyer in the ordinary course should defeat the reclaiming seller. Generally, the same may be said for the good faith purchaser. It is clear that the holder of an article 9 security interest may qualify as a good faith purchaser.<sup>97</sup> Should he, however, be deemed such when his only interest in the property sought to be reclaimed is a security interest by virtue of an after-acquired property clause in a security agreement which antedates the delivery of the goods by the seller? It has already been suggested that such an unconscious purchaser is not a good faith purchaser for value and should not defeat a reclaiming seller.<sup>98</sup> It is also possible that such a secured party could be met with the argument that he has not given the kind of value required in the concept of a good faith purchaser for value. In a situation involving purely state law, however, section 9-108 may allow the secured party to prevail because of the legislative definition of "new value" in that section.<sup>99</sup> However, unless this argument or the unconscious purchaser argument is allowed, there will be relatively few successful reclaiming sellers because it is likely that there will be a "floating lienor" in a commercial situation in which finances have obviously become so precarious.

### C. *Voidable Priorities*

In those states which have not adopted the 1966 amendment to section 2-702(3), if the "lien creditor" can be defined and his rights found, then he too should prevail over the reclaiming seller. The bankruptcy trustee, acting under section 70c of the Bankruptcy Act,<sup>100</sup> should also prevail under these provisions, but he has another argument available as well. Although it is not a preference, since with an undoing of the sale it is concluded that there is not a transfer<sup>101</sup> as is

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97. See text accompanying note 22 *supra*.

98. See text accompanying notes 41 and 42 *supra*.

99. See UNIFORM COMMERCIAL CODE § 9-108.

100. Bankruptcy Act § 70c, 11 U.S.C. 110(c) (1970).

101. See 3 COLLIER ON BANKRUPTCY ¶ 60.18, at 841-45 (14th ed. 1975). Judge Braucher, however, seems to suggest that there may be a transfer when the seller exercises reclamation rights, but another requirement for a preference fails—that the creditor

required by section 60a of the Bankruptcy Act,<sup>102</sup> a reclamation provision, such as section 2-702(3), looks a great deal like a state created priority which is invalid under section 64 of the Bankruptcy Act.<sup>103</sup>

In summary, the seller can reclaim the goods only in the event the buyer is insolvent. In all other situations where he has delivered, he must rely on an action for the price—he is totally unsecured unless he has taken a consensual security interest.<sup>104</sup>

## II. *Right to Reclaim the Goods to Secure Performance (Payment) or Lien*

If the same right to undo the transaction as was present before the passage of the Code no longer exists, just what is the nature of the seller's right in section 2-702? A right in or charge on property to secure a performance (payment) is almost a classic definition of a lien;<sup>105</sup> consequently, the character of the nature of the seller's right has perplexed many a court and commentator.<sup>106</sup>

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obtain a greater percentage of his debt than some other creditor of the same class. Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1295 (1967).

102. Bankruptcy Act § 60a, 11 U.S.C. § 96(a) (1970).

103. Bankruptcy Act § 64, 11 U.S.C. § 104 (1970). Prior to 1938, persons who by state law were entitled to priority were entitled to a priority under the Bankruptcy Act. 3A COLLIER ON BANKRUPTCY ¶ 64.01[2], at 2047-49 (14th ed. 1975). After the 1938 amendment, only a state statutory landlord's lien was given any priority. Bankruptcy Act § 64a(5), 11 U.S.C. § 104(a)(5) (1970). The committee report stated uncategorically "[a]ll state priorities have been deleted except in the case of a landlord . . . ." H.R. REP. NO. 1409, 75th Cong., 1st Sess. 15 (1937). If the reclamation right is a priority, it must fail because Congress has made no allowance for it. See *In re Federal's, Inc.*, 402 F. Supp. 1357, 1367-68 (E.D. Mich. 1975); Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1295 (1967); Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435, 444 (1971); King, *Reclamation Petition Granted: In Defense of the Defrauded Seller*, 44 REF. J. 81 (1970). *Contra*, *Telemart Enterprises, Inc. v. Holzman*, 524 F.2d 761 (9th Cir. 1975), cert. denied, — U.S. —, 96 S. Ct. 1466 (1976) (holding right to reclaim a priority); *Mel Golde Shoes, Inc. v. Meinhard Commercial Corp.*, 403 F.2d 658, 660-61 (6th Cir. 1968).

104. UNIFORM COMMERCIAL CODE § 2-709.

105. 51 AM. JUR. 2d *Liens* § 1 (1970).

106. See, e.g., *Samuels & Co. v. Mahon*, 526 F.2d 1238 (5th Cir. 1976) (per curiam); *In re Federal's, Inc.*, 402 F. Supp. 1357, 1367 (E.D. Mich. 1975); *In re Good Deal Supermarkets, Inc.*, 384 F. Supp. 887, 888 (D.N.J. 1974). Although all the commentators have not agreed, they have recognized, either happily or otherwise, that the legal effect of section 2-702 might be to create a lien. Bjornstad, *Reclamation of Goods by Unsecured Sellers in Bankruptcy Proceedings*, 24 DRAKE L. REV. 357, 366 (1975); Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1294 (1967); Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435, 444 (1971); Kennedy, *The Interest of a Reclaiming Seller Under Article 2 of the Code*, 30 BUS. LAW. 833, 840-41 (1975); King, *Reclamation Petition Granted: In Defense of the Defrauded Seller*, 44 REF. J. 81, 82 (1970).

If a seller's Code-based reclamation right is a lien, then it must be either a statutory or consensual lien. Regardless of the classification applied, if the seller's right to reclaim is a lien, it is a secret lien and the arguments discussed earlier are applicable and, if adopted, would defeat the seller in a contest with creditors of the buyer. Such creditors would include the bankruptcy trustee regardless of whether the legislature had or had not adopted the 1966 official amendment to section 2-702(3) deleting the "or a lien creditor" language.<sup>107</sup>

#### A. Statutory Lien

If the seller's right to reclaim is a statutory lien, then the rights of the other parties indicated by section 2-702(3) are superior to the extent previously discussed in this article. In other words, there is no reason not to give effect to declared state policy regardless of the characterization of the seller's right so long as only state law is involved.<sup>108</sup>

The reclaiming seller should, however, lose to the bankruptcy trustee claiming the goods on behalf of the bankrupt buyer's estate. Section 67c(1)(A) of the Bankruptcy Act<sup>109</sup> provides that the trustee can avoid or preserve a lien created by statute<sup>110</sup> and which is first effective on the insolvency of the bankrupt. While a technically logical argument can be made that the event which creates the lien is the delivery of the goods, such an argument deserves the fate given to it in the *Federal's* case.<sup>111</sup> There the court stated that "realistically viewed", the right to

107. See generally UNIFORM COMMERCIAL CODE § 2-702(3) (1966 version); text accompanying notes 70-74 *supra*.

108. The state rights of these parties was thoroughly discussed in the first section of this article. The *statutory* lien classification has a separate significance only in bankruptcy.

109. Bankruptcy Act § 67c(1)(A), 11 U.S.C. § 107(c)(1)A (1970).

110. The Bankruptcy Act § 1(29a), 11 U.S.C. § 1(29a) (1970) defines "statutory lien" for bankruptcy purposes. See *In re Trahan*, 283 F. Supp. 620 (W.D. La.), *aff'd*, 402 F.2d 796 (5th Cir. 1968), *cert. denied*, 394 U.S. 930 (1969). Here the district court, in an exhaustive opinion, considered the effect of what is known as the "vendor's privilege" under Louisiana Civil Law. The "privilege" was available to allow a non-paid seller to reclaim goods from the defaulting buyer. The Court stated:

[T]he Louisiana Civil Law system provides security devices to certain classes of persons which, in the common law might be called *liens*. The vendor's privilege cannot be excluded from the definitional coverage under Section 1(29a) [of the Bankruptcy Act defining statutory lien] merely because Article 3227 [of the La. Civ. Code] uses the word "privilege" instead of "lien" . . . .

*In re Trahan*, 283 F. Supp. 620, 623 (W.D. La.), *aff'd*, 402 F.2d 796 (5th Cir. 1968), *cert. denied*, 394 U.S. 930 (1969). Is this what the UCC drafters attempted to do in section 2-702? The Court concluded the privilege was a statutory lien. See also *In re J.R. Nieves & Co.*, 446 F.2d 188 (1st Cir. 1971).

111. *In re Federal's, Inc.*, 402 F. Supp. 1357 (E.D. Mich. 1975). Although the court



reclaim under section 2-702(2) is a statutory lien which attaches only upon the insolvency of the debtor and is, therefore, invalid as to the trustee or receiver in bankruptcy by virtue of section 67c(1)(A)."<sup>112</sup>

If the seller's reclamation right is considered to be a statutory lien, then a second ground exists for invalidating that right against the trustee *qua* such a lien. Section 67c(1)(B) of the Bankruptcy Act provides generally that a statutory lien which is not perfected or enforceable against a bona fide purchaser at the date of bankruptcy is not enforceable against the trustee.<sup>113</sup> While section 67c(1)(B) is not a model of clarity,<sup>114</sup> the First Circuit Court of Appeals in *In re J.R. Nieves & Co.*,<sup>115</sup> construed a civil law seller's privilege similar in purpose to section 2-702 of the Code and found, after assuming that it was a statutory lien, that it fell before the trustee under the provisions of the subsection.<sup>116</sup> The trial court had concluded that the reclamation right given by the Puerto Rican Civil Code was a lien, but that it was not invalid against bona fide purchasers.<sup>117</sup> The First Circuit reversed, finding that the inquiry under the Bankruptcy Act is "whether the lien is so perfected that, in the absence of bankruptcy, a subsequent bona fide purchaser would acquire no rights to the goods . . . [and] whether that lien is strong enough to prevent [such] a subsequent bona fide purchaser from [so] taking."<sup>118</sup> The court concluded that the seller's reclamation lien would not be good against a bona fide purchaser and, therefore, was not good against a trustee. It is submitted that if Code section 2-702 does create a statutory lien, it is subject to the rights of a good faith purchaser under section 2-403, and by the same reasoning applied by the First Circuit Court of Appeals here to the civil law seller's right of reclamation, a trustee of the buyer should prevail.<sup>119</sup>

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partially relied on section 2-326(3), it found that section 2-702 also creates a statutory lien as a separate reason for its decision. *Id.* at 1367.

112. *Id.* at 1367. The court concluded that: "Thus, as § 2-702 operates within the context of bankruptcy, it must be viewed as essentially the type of device with which Congress was concerned when § 67c(1)(A) was enacted." *Id.* at 1368. *Contra*, *Telemart Enterprises, Inc. v. Holzman*, 524 F.2d 761 (9th Cir. 1975), *cert. denied*, — U.S. —, 96 S. Ct. 1466 (1976); *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 519 P.2d 354 (Colo. 1974).

113. Bankruptcy Act § 67c(1)(B), 11 U.S.C. § 107(c)(1)(B) (1970).

114. See Marsh, *Triumph or Tragedy? The Bankruptcy Amendments of 1966*, 42 WASH. L. REV. 681, 721-23 (1967).

115. 446 F.2d 188 (1st Cir. 1971).

116. *Id.* at 190.

117. *Id.* at 190, *citing In re Trahan*, 283 F. Supp. 620 (W.D. La. 1968).

118. *In re J.R. Nieves & Co.*, 446 F.2d 188, 191 (1st Cir. 1971).

119. *Id.* at 191. The principal difficulty expressed by the First Circuit was that to perfect his rights under civil law a "bona fide purchaser" must take possession. There

### B. *Security Interest*

If one concedes that the nature of the seller's reclamation right is to secure performance (payment), then it must also be conceded that the right fits the definition that a "[s]ecurity interest' means an interest in personal property . . . which secures payment or performance of an obligation."<sup>120</sup> Objections to characterizing the right as a security interest may be made, however, on the ground that it is not denominated a security interest as, for example, is done in Code sections 2-401 and 2-505.<sup>121</sup> But this argument is weakened by comment 1 to section 9-113 where rights "similar to the rights of a secured party"<sup>122</sup> are characterized as security interests within article 9 except as limited by section 9-113, and the comment goes on to refer to sections 2-506, -703, -705, -706, -707, and -711. Of the six sections, only section 2-711 specifically characterizes the interest granted as a security interest.<sup>123</sup> It has sometimes been thought that the failure to enumerate section 2-702 should exclude it, but if it fits the definition the comment can not do so.<sup>124</sup>

If the seller's reclamation right is a security interest, it is a security interest arising under article 2 and is made subject to article 9 by section 9-113 with the exceptions noted therein. In *Guy Martin Buick, Inc. v.*

would seem to be no such difficulty in the section 1-201(32) definition of purchase. Moreover, as the court points out, section 1(5) of the Bankruptcy Act, 11 U.S.C. § 1(5) (1970) contains a definition of bona fide purchaser which includes a pledge or encumbrance. *In re J.R. Nieves & Co.*, 446 F.2d 188, 192 (1st Cir. 1971). The court dealt with the very difficult provisions of section 67c(1)(B) wherein the lienor is given certain rights to perfect subsequent to bankruptcy. It concluded that:

The solution is to limit . . . the provisos to those state liens in which the laws creating them provide specifically for perfection against bona fide purchasers by recording, seizure, or other means of actual or constructive notice. . . . Since [the particular section of the Puerto Rican Code creating the seller's right of reclamation] . . . by its own terms does not provide protection against bona fide purchasers, we hold it is not perfectable after bankruptcy and therefore is not valid against the trustee.

*Id.* at 193-94. The same must surely be said of the seller's right under sections 2-702 and 2-403.

120. UNIFORM COMMERCIAL CODE § 1-201(37); see *Samuels & Co. v. Mahon*, 526 F.2d 1238, 1247 (5th Cir. 1976) (per curiam); Kennedy, *The Interest of a Reclaiming Seller Under Article 2 of the Code*, 30 BUS. LAW. 833, 837 (1975); Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 102-05 (1962).

121. See UNIFORM COMMERCIAL CODE §§ 2-401(2), 2-505(2).

122. *Id.* § 9-113, Comment 1.

123. *Id.* § 2-711(3).

124. See Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 102-05 (1962).

*Colorado Springs National Bank*,<sup>125</sup> the Colorado court addressed the issue of whether the reclaiming seller's right was a security interest. Although the seller was a cash seller, the court apparently analogized its right to that of a credit seller.<sup>126</sup> The case involved a seller of automobiles who was found to have a right to reclaim against its buyer. Before reclamation, the buyer granted a bank a security interest in the automobiles. Before the bank perfected the security interest, the seller repossessed the automobiles and claimed it had a security interest by virtue of its reclaiming seller's right and that such interest had been perfected by repossession prior to the bank's perfection of its article 9 security interest. If this argument had been successful, then the seller would have presumably triumphed by use of sections 9-113 and 9-312. The court concluded that the seller's right was not a security interest, but was merely a right to undo the transaction<sup>127</sup> and that nothing in article 2 indicated such a right was superior to an unperfected security interest, so the bank prevailed.<sup>128</sup> In the *Samuel's* case,<sup>129</sup> on the other hand, the reclaiming seller was held to have had an unperfected security interest and the Fifth Circuit concluded that it too must fail as against a perfected article 9 security interest.<sup>130</sup> Of course, if the seller's interest is an unperfected security interest, then a mechanical reading of the Code will dictate that he will lose to a trustee in bankruptcy.<sup>131</sup> A very good argument can be made, however, that if the reclaiming seller's right is a security interest, it is automatically perfected.<sup>132</sup> Section 9-113 is entitled "Security Interests Arising Under Article on Sales" and provides:

A security interest arising solely under the Article on Sales (Article 2) is subject to the provisions of this Article except that to the extent that and so long as the debtor does not have or does not *lawfully obtain possession* of the goods

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125. 519 P.2d 354 (Colo. 1974).

126. *Id.* at 359.

127. *Id.* at 359-60.

128. Apparently the bank was allowed to succeed as a good faith purchaser.

129. *Samuels & Co. v. Mahon*, 526 F.2d 1238 (5th Cir. 1976) (per curiam).

130. *Id.* at 1247.

131. Where section 2-702(3) has not been amended, it states that the reclaiming seller's right is subject to a lien creditor's rights and cross-refers to § 2-403 which in turn cross-refers to article 9. UNIFORM COMMERCIAL CODE § 2-702(3) (1962 version). Section 9-301(3) defines lien creditor to include the bankruptcy trustee and section 9-301(1) subordinates an unperfected security interest to that of a lien creditor. *See id.* §§ 9-301(1), (3). The same result could be obtained by comparing § 70c of the Bankruptcy Act, 11 U.S.C. § 110(c) (1970), with section 9-301.

132. *See Henson, Reclamation Rights of Sellers Under Section 2-702*, 21 N.Y.L.F. 41, 49-50 (1975); *Shanker, A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 WESTERN RES. L. REV. 93, 102-05 (1962).

- (a) no security agreement is necessary to make the security interest enforceable; and
- (b) no filing is required to perfect the security interest; and
- (c) the rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2).<sup>133</sup>

If there has been actual fraud on the part of the buyer-debtor or if the provision for a presumption of fraud found in comment 2 to section 2-702 correctly states the law other than when a bankruptcy trustee is involved,<sup>134</sup> then it is not difficult to find that the buyer-debtor has not lawfully obtained possession of the goods. If so, no filing is necessary to perfect.<sup>135</sup> If this reasoning is sound, the reclaiming seller will defeat the trustee in bankruptcy as a lien creditor,<sup>136</sup> but he will still lose to a buyer in the ordinary course<sup>137</sup> and to a buyer with an after-acquired property clause in his security agreement.<sup>138</sup>

### C. Voidable Preference

Professor Williston, at an early date, recognized that a seller exercising his reclamation rights under section 2-702 within four months of the bankruptcy of the buyer might be found to have obtained a preferential transfer that could be voided by the trustee of the buyer's estate.<sup>139</sup> A

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133. UNIFORM COMMERCIAL CODE § 9-113 (emphasis added).

134. Absent federal supremacy considerations in bankruptcy matters, there is nothing inherently conflicting in the acceptance of the official comment's "presumption of fraud" and considering the right created by section 2-702 as a security interest. *See id.* § 2-702, Comment 2.

135. Of course, absent a written misrepresentation, the right to reclaim will last only 10 days. *Id.* § 2-702(2). It is interesting to note that this is *exactly the same* grace period allowed a non-inventory purchase money secured party to perfect and maintain priority. While it is doubtful that the reclaiming seller's right should be characterized as a purchase money security interest (because it simply does not meet the conditions of Section 9-107), the similarities of function and the identical time periods allowed permit the argument that the credit seller's reclamation right should be characterized as a security interest. *Compare id.* § 2-702(2), with *id.* § 9-107.

136. *Id.* § 9-301(1)(b) by implication indicates a prior perfected security interest defeats a lien creditor. Of course, this does not consider whether the presumption of fraud would stand in the bankruptcy proceeding.

137. *See id.* §§ 2-403, 9-307(1).

138. This would be true as a result of the application of section 9-312(5) dealing with priorities between secured parties, since the article 9 secured party would have filed first. It would be equally true through the effect of section 2-403 in that priority would be given to good faith purchasers over reclaiming sellers. This latter statement is correct unless there is acceptance of the argument made in the conclusion of this paper that the article 9 secured party, whose sole interest in the goods is by an after-acquired property clause, would not be a good faith purchaser unless he gives new value after the goods come into possession of the buyer-debtor.

139. *See Williston, The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 585 (1950).

preference under the Bankruptcy Act is a transfer made or suffered by the bankrupt of his non-exempt property for or on account of an antecedent debt within four months of bankruptcy. It must have been made for the benefit of a creditor while the debtor was insolvent thus enabling the creditor to obtain a greater percentage of his debt than some other creditor of the same class, and it must have occurred when the creditor had reasonable cause to believe the debtor to be insolvent at the time of the transfer.<sup>140</sup> Finally, the transfer is deemed to have taken place when no lien could become superior to the rights of the transferee.<sup>141</sup> A cursory reading suggests that this definition of a preferential transfer describes exactly the reclaiming seller. This view has been summarily dismissed, however, on the assumption that a Code reclaiming seller is the same legal creation as the pre-Code creature.<sup>142</sup> The theory as to pre-Code reclamation was, again, that the most the buyer received was a voidable title and that in the case of fraud the transaction was simply undone and there was no transfer when the seller repossessed. The theory was not unique to the problem of a reclaiming seller,<sup>143</sup> but this is not the situation today under the Code. There need be no actual fraud on the part of the buyer, and even actual knowledge of insolvency on the part of the seller is irrelevant. Moreover, from a technical standpoint, Code section 2-401(2) makes it plain that title passes to the buyer upon delivery of the goods unless otherwise explicitly agreed.<sup>144</sup>

While there are policy arguments as to whether the concept of a voidable preference should be applied to the reclaiming seller,<sup>145</sup> this is

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140. Bankruptcy Act §§ 60a(1), b, 11 U.S.C. §§ 96(a)(1), (b) (1970); see J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 24-4, at 872 (1972).

141. Bankruptcy Act § 60a(2), 11 U.S.C. § 96(a)(2) (1970).

142. 3 COLLIER ON BANKRUPTCY ¶ 60.51A[8], at 1050.19 (14th ed. 1975); see Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518, 555 (1960).

143. See 3 COLLIER ON BANKRUPTCY ¶ 60.18, at 841-45 (14th ed. 1975).

144. A question may arise as to whether the reclaiming seller's right is subject to defeat by a lien "obtainable by legal or equitable proceedings on a simple contract." Bankruptcy Act § 60a(4), 11 U.S.C. § 96(a)(4) (1970). The answer is plainly "yes" where the 1966 Amendment deletion of "lien creditor" in Section 2-702(3) has not been adopted. Even in those states which have adopted the amendment, the definition of purchase in section 1-201(32) may be broad enough to include a non-consensual lien. If the seller repossesses before bankruptcy, so long as the repossession takes place within the four month period, it is voidable; if no repossession has occurred, the perfection against the trustee is deemed to have taken place immediately prior to bankruptcy. Bankruptcy Act § 60a(2), 11 U.S.C. § 96(a)(2) (1970).

145. Bjornstad, *Reclamation of Goods by Unsecured Sellers in Bankruptcy Proceedings*, 24 DRAKE L. REV. 357, 365 (1975).

not the question. The Code's draftsmen and those who would profit by the policies they espouse cannot have it both ways. Having been drawn as a technical statute designed in many cases to defeat the general creditor and his representative the trustee,<sup>146</sup> the Code must be tested by the words of the Bankruptcy Act.<sup>147</sup>

#### CONCLUSION

It seems reasonably safe to predict that the courts will continue to read section 2-702(3) of the Code as if it said that the rights of the reclaiming credit seller are *subordinate* to the rights of the buyer in the ordinary course, the good faith purchaser, and, where not repealed by the legislature, the lien creditor. A clear understanding of the identity of the buyer in the ordinary course is established by the Code.<sup>148</sup> The identity of the latter two, however, is more uncertain and the cases, as previously indicated, will probably remain in conflict.

The bankruptcy trustee is a third party who may prevail over the reclaiming seller. He is given the status of a lien creditor by the Bankruptcy Act, section 70c<sup>149</sup> and is so defined by the Code.<sup>150</sup> He may well have the power to defeat the reclaiming seller under either section 64 of the Bankruptcy Act,<sup>151</sup> as a state law established priority, or as a statutory lien under section 67.<sup>152</sup> On occasion he may be able to utilize the preference avoiding powers of section 60<sup>153</sup> or his right to avoid a transfer that is avoidable under state law by a creditor having a provable claim.<sup>154</sup>

Assuming the trustee is successful, he may still run afoul of a secured party holding a security interest covering the after-acquired property of the debtor. There seems little reason for such a secured party to receive such a windfall to the exclusion of other creditors.<sup>155</sup> A possible

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146. See UNIFORM COMMERCIAL CODE § 9-108.

147. It is interesting to note that the draftsmen of the Official Comments concede the reclamation right is preferential. Comment 3 to section 2-702 states "the right . . . to reclaim goods under this section constitutes preferential treatment as against the buyer's other creditors . . ." *Id.* § 2-702, Comment 3. Of course this is not necessarily *voidable* preferential treatment.

148. *Id.* § 1-201(g).

149. Bankruptcy Act § 70c, 11 U.S.C. § 110(c) (1970).

150. UNIFORM COMMERCIAL CODE § 9-301(3).

151. 11 U.S.C. § 104 (1970).

152. Bankruptcy Act § 67c(1)(A), 11 U.S.C. § 107(c)(1)(A) (1970).

153. See *id.* § 60, 11 U.S.C. § 96 (1970).

154. See *id.* § 70e(1), 11 U.S.C. § 110(e)(1) (1970).

155. It was just such an injustice which troubled the court in *Samuels & Co. v. Mahon*, 510 F.2d 139 (5th Cir. 1975), *rev'd*, 526 F.2d 1238 (5th Cir. 1976) (per

solution to this problem lies in a strict construction of who is a "good faith purchaser." Conceding that one who takes a security interest in good faith and for value is such a purchaser, it does not seem especially difficult to say that the value given must be *new value*.<sup>156</sup> This would result in the secured party having to make advances or additional advances subsequent to the insolvent buyer's receipt of the goods and in reliance on his possession of them.<sup>157</sup> Thus, absent other parties with superior rights, the reclaiming seller would prevail.

If there is a bankruptcy trustee with such superior rights, as there may well be, this result does not seem particularly unjust.<sup>158</sup> As has been pointed out, the policy in bankruptcy made evident by the Congress is one of increasing hostility to secret liens or reservations of rights and disguised priorities.<sup>159</sup> No state policy or, perhaps more accurately,

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curiam). This problem caused the dissenting judge to state that "[m]y brothers have not concealed that their orientation in the case before us is to somehow reach a result in favor of the sellers . . . because it seems the "fair" thing to do. . . . Doing what seems fair is heady stuff." 510 F.2d at 154. The dissent was adopted by the court as the majority opinion. 526 F.2d at 1242.

156. See text accompanying note 41 *supra*.

157. See generally Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435 (1971). While one may disagree with the result, the Florida Supreme Court did far more to achieve equity between a non-perfected purchase money security interest holder and a prior perfected secured party whose claim to the collateral was based on an after-acquired property clause. In *International Harvester Credit Corp. v. American Nat'l Bank*, 296 So. 2d 32, 35 (Fla. 1974), the court concluded that the prior perfected secured party would have priority over the non-perfected purchase money secured party, but only to the extent of the debtor's equity in the collateral.

158. Professor Hawkland has stated that "[i]n a credit economy, such as ours, sellers are expected to assume the risk that their buyers will remain solvent long enough to make payment." Hawkland, *The Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Commercial Code to Conform to the Kravitz Case*, 67 COM. L.J. 86 (1962).

159. Common law liens and priorities, as have been discussed here, in a debtor's estate, were affected little by the Bankruptcy Act as passed in 1898. See 3A COLLIER ON BANKRUPTCY ¶ 64.01[2.1], at 2047 (14th ed. 1975); 4 *id.* ¶ 67.20[1], at 208.1. Since that time numerous amendments have evidenced Congressional antipathy towards both state created priorities and statutory liens. See generally Kennedy, *The Interest of a Reclaiming Seller Under Article 2 of the Code*, 30 BUS. LAW. 833, 843-44 (1975). The amendments of 1950 to section 60 of the Act state "[t]he recognition of equitable liens where available means of perfecting legal liens have not been employed is hereby declared to be contrary to the policy of this section" and rendered such liens voidable as preferences. Bankruptcy Act § 60a(6), 11 U.S.C. § 96(a)(6) (1970). See generally 3 COLLIER ON BANKRUPTCY ¶ 60.50, at 1031 (14th ed. 1975). In 1938, and again in 1966, amendments restricted the efficacy given statutory liens and it has been stated that:

Notwithstanding the long established bankruptcy principle that valid liens should be enforceable in their entirety as against general, unsecured creditors and those entitled to priority, the realization developed that state created statutory liens, like state priorities, to the extent they are recognized in bankruptcy run counter to the

policy thought wise by the drafters of the UCC can override the provisions of the Bankruptcy Act as a matter of constitutional law.<sup>160</sup> Moreover, a court which concludes that the seller's Code reclamation right is not subject to defeat by the bankruptcy trustee could still limit such a right, as a matter of federal bankruptcy law, to pre-Code reclamation rights (*i.e.*, where the equities favor the seller as in the case of actual fraud on the buyer's part). There seems to be no logical reason why the "equities," the kind of fraud which will permit a seller to exercise his state given right of reclamation against a bankruptcy trustee, should not be a determination of federal law.<sup>161</sup> This would have the effect, insofar as the trustee is concerned, of returning the situation to pre-Code status which may well be the best solution.

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underlying objective of equitable distribution of the debtor's assets among all his creditors.

4 *id.* ¶ 67.20, at 223.

160. U.S. CONST., art. VI, cl. 2; *id.* art. 1, § 8, cl. 18. As early as 1901 the Supreme Court stated that the power of the Congress to legislate national bankruptcy laws which supersede state legislation in proper exercise of the Constitutional mandate is unlimited. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902).

161. It must be admitted that the determination of the degree of fraud on the part of the buyer necessary to be shown by the reclaiming seller to overcome the trustee was held to be a matter of state law. *In re Federal's, Inc.*, 402 F. Supp. 1357, 1364 (E.D. Mich. 1975); 4A COLLIER ON BANKRUPTCY ¶ 70.41, at 483 (14th ed. 1976). *But see* Countryman, *Buyers and Sellers of Goods in Bankruptcy*, 1 N. MEX. L. REV. 435, 454 (1971).