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U.C.C. Section 2-403: A Reform in Need of Reform

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NOTES

U.C.C. SECTION 2-403: A REFORM IN NEED OF REFORM

The classic common law triangle occurred whenever *O* (an innocent chattel owner) yielded up possession to *A* (a wrongdoer), who then sold the property to *B* (an innocent purchaser).¹ *A*, of course, always disappeared, leaving *O* and *B* each insisting on his good faith and each demanding that the other bear the loss. How the common law dealt with the respective parties differed according to the nature of the original transaction. At one end of the spectrum, *A* always acquired good, transferable title to the goods if he had given value. At the other extreme, *A* acquired no title and could transfer none to a subsequent purchaser if he had stolen the goods from *O*. Between these two extremes the common law developed a series of bewildering rules and exceptions, ostensibly based on *O*'s intent in the original transaction.

These intermediate cases spawned a confusing body of law. For example, if *A* obtained possession and title from *O* through fraudulent impersonation, although *A* had no right to retain possession or title as against *O*, *A* was granted the power at common law to transfer good title to *B*. Conversely, *A* received no title and could transfer none if he obtained possession of the goods in exchange for a bad check. *B*'s claim of good title also depended on whether *O*'s voluntary relinquishment of possession was induced by impersonation in a face-to-face transaction, by mail, by a fraudulent agent, or by fraud recognized as larcenous under the criminal law. Additionally, if *O* voluntarily entrusted goods to *A* as his agent or employee and misled the public into believing that *A* owned the goods, then the law estopped *O* from denying *B*'s title to the goods as a good faith purchaser for value who relied on *O*'s acts of misrepresentation.

Because they were based on *O*'s supposed intent, these rules governing the transfer of title in the intermediate cases produced a

1. This Note refers to the parties involved as original owner, wrongdoer, and purchaser. An original owner or owner is the individual who held title to the chattel initially. A wrongdoer is the party who acquired possession of the chattel through the perpetration of some fraudulent or otherwise wrongful act. A purchaser is the transferee who obtained possession of the goods from the wrongdoer.

perplexing and arbitrary array of results from *B*'s perspective. In 1952, the drafters of the Uniform Commercial Code inserted section 2-403² into this confusing intermediate area. Although in retrospect their purpose is not entirely clear, it probably was limited to clarifying only a few specific cases that were troublesome under the common law, rather than to treat the entire intermediate area.

Section 2-403 directly addresses two situations that were troublesome under prior law. Questions of voidable title fall within section 2-403(1); the entrusting situation is governed by section 2-403(2). The Code, however, fails to explore either situation in depth; therefore, serious problems remain. For example, the Code neglects to define voidable title, although the syntax of section 2-403(1) impliedly rejects the common law definition.³ In addition, the language of section 2-403 can be read by courts either as endorsing drastic and far-reaching change in the existing law or as preserving the status quo. The comments to the section provide little guidance for interpretation.⁴ More importantly, the language governing entrustments is so broad that it covers some voidable title problems, thus further obscuring the intent of the drafters.

This Note attempts to clarify the existing law and to provide a focus for the future law of transfer of title by examining the roots and analyzing the content of section 2-403. Ways to reach results that are most in accord with the general policies of the Uniform Commercial Code also are suggested.

COMMON LAW HISTORY

General Background

The common law of transfer of title was governed for many years by the general rule that no one could convey better title than he himself had.⁵ This maxim is reflected in a broad range of transfer-

2. See text accompanying notes 153, 159, 176 & 179 *infra*.

3. See notes 160-64 *infra* & accompanying text.

4. The drafters explained their purpose in changing § 2-403 as "[t]o gather together a series of prior uniform statutory provisions and the case-law thereunder and to state a unified and simplified policy on good faith purchase of goods." U.C.C. § 2-403, Comment.

5. This concept is rooted firmly in classical Roman law, which provided for absolute ownership limited only by the very narrow exception of the bona fide possessor with a titulus (title). W. BUCKLAND & A. McNAIR, *ROMAN LAW AND COMMON LAW* 67-68 (2d ed. 1965). A mere bailee could never transfer indefeasible ownership. *Id.* at 130. In addition, the requirement of a strict ceremony of traditio (delivery), *id.* at 110-12, and the rule that ownership would not pass until

of-title cases in which courts looked to the owner's intent and the circumstances surrounding his initial loss of possession to resolve the controversy.⁶ When a case involved theft, for example, and thus the original owner clearly did not intend to transfer possession, courts held that the thief never acquired the power to transfer any more than a void title.⁷ This result furthered the policy of protecting the property rights of "true" owners by ensuring that no subsequent

the buyer both had accepted delivery and paid the full purchase price, *F. DEZULUETA, THE ROMAN LAW OF SALES* 52-53 (1945), further protected the interests of the original owner.

Conversely, the French Civil Code, although chiefly based on Roman law, rejects the wholesale protection of the original owner in favor of the purchaser. Discarding the ownership-title dichotomy, it adopts instead the rule that "[i]n matters of personality, possession is equivalent to title." C. Civ. art. 2279 (Fr.). In an apparent attempt to pacify disgruntled owners, French law permits the original owner of a lost or stolen chattel to bring an action for recovery against the possessor within three years of the loss or theft. *Id.* This provision, however, is virtually nullified by the protection bestowed on purchasers who buy at a "fair or at a market or at a public sale, or from a merchant selling similar things." *Id.* art. 2280. The original owner can regain possession of the chattel from such a purchaser only by reimbursing the purchase price to the possessor. *Id.*

Although intellectually tantalizing, most speculation as to the rationale behind the radically different approaches to the philosophy of title in Roman and French law has proved fruitless. See generally Swartz, *The Bona Fide Purchaser Revisited: A Comparative Inquiry*, 42 B.U.L. REV. 403 (1962); Note, *The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code*, 72 YALE L.J. 1205, 1207-09 (1963).

6. See, e.g., *Hickey v. McDonald Bros.*, 151 Ala. 497, 44 So. 201 (1907) (intent to transfer title to impersonator); *John N. Sims & Sons v. Bolton*, 138 Ga. 73, 74 S.E. 770 (1912) (no intent to transfer title until cash payment received); *Alexander v. Swackhamer*, 105 Ind. 81, 4 N.E. 433 (1886) (no intent to pass title to a pretended agent); *Perkins v. Anderson*, 65 Iowa 398, 21 N.W. 696 (1884) (intent to transfer title to impersonator); *Newberry v. Norfolk & S. Ry.*, 133 N.C. 45, 45 S.E. 356 (1903) (no intent to transfer title to impersonator operating through the mails); *Barker v. Dinsmore*, 72 Pa. 427 (1872) (no intent to transfer to a pretended agent).

In cases such as these, in which the owner sued to recover goods from the third-party purchaser, the courts generally presumed that, for one reason or another, the owner did not intend to pass title. In contrast, in cases in which the goods were destroyed or lost and the owner sued to recover the price of the goods from the transferee, the courts generally found that the owner intended title to pass immediately. The common law placed the risk of loss on the individual who held title to the goods; therefore, the courts, in effect, brazenly manipulated the supposed owner-intent analysis in determining the passage of title according to whether the goods were destroyed in order to grant absolute protection to the original owner. Note, *The "Cash Sale" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly*, 62 YALE L.J. 101, 104-05 & n.24 (1952) [hereinafter cited as *The "Cash Sale" Presumption*]. See generally R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 9.2 (3d ed. 1975).

7. E.g., *Boulden v. Gough*, 20 Del. (4 Penne.) 48, 54 A. 693 (Super. Ct. 1902) (tenant stole wheat and sold to good faith purchaser); *Tuttle v. White*, 46 Mich. 485, 9 N.W. 528 (1881) (thief cut down logs and sold them to a good faith purchaser); *Godwin v. Taenzer*, 122 Tenn. 101, 119 S.W. 1133 (1909) (thief sold stolen timber to a good faith purchaser); *Turnbow v. Beckstead*, 25 Utah 468, 71 P. 1062 (1903) (lessee sold leased sheep to a good faith purchaser).

transferee took good title from a thief.⁸ It also upheld the common law policy that he who made the wrong possible should bear the loss.⁹ Pursuant to this policy, a good faith purchaser was required to ascertain the validity of his transferor's title before accepting possession of the chattel on the assumption that any dereliction of this duty enabled the wrongful transfer to take place. This rule protected the owner's rights and forced the purchaser to bear the full cost of his failure to discover the truth.¹⁰

Although in theory the duties imposed to effectuate these policies were justifiable, in practice they often led to inequitable results. In *Hessen v. Iowa Automobile Mutual Insurance Co.*,¹¹ for example, the plaintiff purchased an automobile from a dealer and insured it against theft. When the car was stolen from the plaintiff and he attempted to recover the insurance proceeds, the company refused to pay.¹² The company argued that Hessen acquired neither a good title nor an insurable interest from the dealer because the automobile had been stolen from its original owner.¹³ Meanwhile, the car dealer went out of business.¹⁴ In a decision ostensibly based on the policies of protecting the rightful owner and deterring negligence on the part of the vendee, the Supreme Court of Iowa held that a good faith purchaser of a stolen automobile obtained no title and, thus, no insurable interest.¹⁵

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

9. The rule is stated more eloquently in BROOM'S LEGAL MAXIMS 463 (9th ed. 1911): "Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." This rule has been criticized frequently as allowing excessive judicial discretion. *E.g.*, Warren, *Cutting off Claims of Ownership under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469, 482 (1963).

10. See, *e.g.*, *Levi v. Booth*, 58 Md. 305, 315 (1882), in which the court warned, "If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweller's establishment to be repaired, or cloth to a clothing establishment to be made into garments." See also W. STORY, SALES OF PERSONAL PROPERTY 155-56 (1847).

11. 195 Iowa 141, 190 N.W. 150 (1922).

12. *Id.* at 142, 190 N.W. at 151.

13. *Id.*; see A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 164 (2d ed. 1969), for an interesting discussion of the initial whereabouts of the automobile in dispute.

14. A. CASNER & W. LEACH, *supra* note 13, at 165.

15. 195 Iowa at 142, 190 N.W. at 151. The requirement that an insured have and retain an insurable interest in the thing insured is designed to satisfy several objectives. First, it guarantees that insurance companies will not violate local gambling statutes. *Id.* Second, the requirement gives the insured a reason to take care of the property, thus reducing the chance of insurance fraud. Finally, it provides the insurance company with a worthwhile right of

Arguably, this decision did not enhance significantly the protection of the original owner's interests. The dispute involved only an insured's right to recover from his insurer; it did not concern the owner's title at all. Thus, Hessen's rights and immunities in relation to those of the true owner were not at issue, and the policy of protecting the original owner's interests was irrelevant. At worst, the court's decision impaired the interests of original owners by discouraging purchasers from insuring cars if, as can be argued, owners could recover more easily from good faith purchasers who insured the property they purchased against theft.¹⁶ The court more sensibly might have examined the interest the purchaser clearly had in protecting his possession of the automobile against subsequent theft.

The court also failed in its second goal, to deter negligent conduct on the part of the vendee on the principle that "[i]t is the duty of a vendee to determine whether he is securing good title to the thing purchased, and if title fails and loss ensues, the purchaser must look to his vendor."¹⁷ In many respects, this policy, as applied in *Hessen*, led to an unjust result. First, Hessen, who could neither read nor write English,¹⁸ was less able to protect himself than the insurance company, which presumably had records of automobile serial numbers and reports of stolen vehicles.¹⁹ Second, by purchasing the car from a commercial dealer, the plaintiff took all the precautions a reasonable buyer could to assure his good title and ownership.²⁰ In

subrogation to any claims of the insured. A. CASNER & W. LEACH, *supra* note 13, at 163 n.2. See generally PFEIFFER, PERSPECTIVES ON INSURANCE (1974).

16. See A. CASNER & W. LEACH, *supra* note 13, at 163 n.2.

17. 195 Iowa at 143, 190 N.W. at 152. But see *Creseort Chevrolet Co. v. Lewis*, 230 Iowa 1074, 300 N.W. 260 (1941) (owner who sold car to dealer and delivered possession and title estopped as against good faith purchaser). Justice Story expressed the more typical attitude of the courts toward the good faith purchaser: "[H]is loss is often the result of his negligence and want of scrutiny." W. STORY, *supra* note 10, at 156. But see *Goddard Grocer Co. v. Freedman*, 127 S.W.2d 759 (Mo. Ct. App. 1939). See generally L. VOLD, HANDBOOK OF THE LAW OF SALES § 30 (2d ed. 1959); 17 U. BUFFALO L. REV. 865 (1968).

18. A. CASNER & W. LEACH, *supra* note 13, at 165.

19. *Id.* at 165-66. Professors Casner and Leach relate that automobile manufacturers provide lists of serial numbers, engine numbers, and corresponding manufacturing dates to any interested party, including insurance companies, which regularly check these lists to see if the insured property is described correctly. The authors also hint at fraudulent collusion between Hessen's vendor, the car dealer, and the insurance company. *Id.* If not fraudulent, the insurance company's actions were sufficiently negligent to have raised an estoppel.

20. See, e.g., *Kearby v. Western States Sec. Co.*, 31 Ariz. 104, 250 P. 766 (1926) (buyer who purchased car from dealer did all he could to assure title of his vendor and thus prevailed against titleholder); *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953)

penalizing Hessen despite his diligence, the court failed to promote its avowed policy of encouraging vendees to exercise reasonable care in sales transactions. Finally, the court's passing reference to the purchaser's remedy against his vendor was meaningless because the dealer already had gone out of business.²¹

Hence, what at first appeared to be a logical application of a sensible principle ultimately produced an inequitable result that failed to advance the court's stated policies. By mechanically applying the principle of caveat emptor, the court allocated risk in favor of the insurer, despite the insurer's superior ability to protect against and spread the risk of loss. The fact situation in *Hessen*, a variation on the owner-vendee controversy, pitted an innocent consumer against a knowledgeable insurance company. Thus, automatic application of the caveat emptor principle was especially unjust.²² Nonetheless, even in the typical owner-thief-vendee case, such a mechanical disposition is subject to the same criticism as the *Hessen* decision for its failure to consider the relative equities. For example, the typical consumer vendee usually is unable to protect himself either by a careful scrutiny of the thief's purported title or through the purchase of high-cost title insurance. In contrast, the commercial owner often is in a superior position both to protect himself against theft through the use of sophisticated security devices²³ and to spread the risk of loss by incorporating the price of theft insurance into his cost of doing business.²⁴ Of course, not all

(buyer who purchased a diamond ring from jeweler did all he could to assure title of his vendor and thus prevailed against the original owner).

21. A. CASNER & W. LEACH, *supra* note 13, at 165.

22. In fact, other courts in similar situations recognized the injustice of this result and held that the purchaser whose title was good against all the world except the original owner had an insurable interest. See, e.g., *Savarese v. Hartford Fire Ins. Co.*, 1 N.J. Misc. 315, 123 A. 763 (1924); *Barnett v. London Assur. Corp.*, 138 Wash. 673, 245 P. 3 (1926).

23. Swartz, discussing the rights of the good faith purchaser under the laws of several nations, commented,

It is recognized that it is most impractical to expect that a man who knowingly parts with his goods should have to investigate the party with whom he is dealing, but is it more impractical than expecting that the BFP be compelled to investigate the title of his vendor? The latter in this day of rapid circulation and transfer of property is virtually impossible, but there might be some basis for the former in that it would compel the owner of goods to be, at least, a bit more careful to whom he entrusts his goods.

Swartz, *supra* note 5, at 411. See also *The "Cash Sale" Presumption*, *supra* note 6, at 105-06.

24. For a discussion of this argument within the context of the cash-sale bad-check cases,

owners are merchants, and not all vendees are ordinary consumers. This approach, therefore, required considerable analysis of the competing equities. In applying the common law, however, courts generally did not engage in such analysis but simply denied title to any transferee who purchased from a thief, regardless of how unjust the result.²⁵ Typically, they resolved controversies involving a thief-vendor by simply reciting the maxim that no one could transfer better title than he himself had and by applying the principle of caveat emptor to the purchaser.²⁶ This mechanical application of rigid rules to complex and equivocal fact situations led eventually to the series of exceptions, supported by strained analyses, that defined the intermediate areas of the common law of voidable title.

Voidable Title: The Impersonation Cases

The rules and exceptions for impersonation cases formed one portion of this intermediate area. The wrongdoer who obtained possession through fraudulent impersonation sometimes was able to transfer a good title to a good faith purchaser for value. His power to do so depended on a forced analysis of what the original owner intended when he gave up possession; in turn, the owner's intent varied with

see *The "Cash Sale" Presumption*, *supra* note 6, at 107.

25. See note 7 *supra* & accompanying text.

26. See, e.g., *Handley Motor Co. v. Wood*, 237 N.C. 318, 325, 75 S.E.2d 312, 316 (1953) ("Title like a stream cannot rise higher than its source. The general rule is that a seller of personal property without title cannot transfer a better title than he has, unless some principle of estoppel comes into operation.")

This holding followed the same general line as the Uniform Sales Act:

(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this act, however, shall affect:

(a) the provisions of any factors' acts, recording acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any common law or statutory power of sale or the order of a court of competent jurisdiction.

UNIFORM SALES ACT § 23. See generally *R. BROWN*, *supra* note 6, § 9.3, and the cases cited therein; 2 S. WILLISTON, *SALES* § 311 (rev. ed. 1948); see also *Fawcett, Isham & Co. v. Osborn, Adams & Co.*, 32 Ill. 411, 425 (1863) ("The general rule of law, sanctioned by common sense, is that no man can, by his sale, transfer to another the right of ownership in a thing wherein he himself had not the right of property."); *Levi v. Booth*, 58 Md. 305 (1882) (bailee with mere possession could not transfer any title).

the type of impersonation perpetrated by the defrauder.²⁷ In the leading case of *Phelps v. McQuade*,²⁸ the Court of Appeals of New York used the owner-intent analysis to develop the spectrum of rules that determined when a fraudulent impersonator acquired a voidable, as opposed to a void, title.

The plaintiff in *Phelps* relinquished possession of jewelry in reliance on the wrongdoer's fraudulent, face-to-face impersonation of wealthy businessman Baldwin J. Gwynne. Before Phelps realized his mistake, the wrongdoer transferred possession to McQuade, a good faith purchaser for value.²⁹ In resolving the ensuing controversy between the original owner and the subsequent transferee, the court first articulated the rule that if the original owner intended to transfer title to the person with whom he dealt, then title passed regardless of whether the owner was deceived as to the person's identity.³⁰ Applying this rule to the facts, the court reasoned that because the owner dealt personally with the wrongdoer in a face-to-face transaction and, thus, had the opportunity to observe him, the owner fully intended to transfer title to the person standing before him.³¹ Therefore, although Phelps also intended to transfer title to the wealthy Baldwin J. Gwynne, the court decided that his primary intention was to transfer to the person with whom he personally negotiated.³² Hence, the fact that he was deceived was not determinative of his intent, but the *type* of deception practiced was highly relevant to such a finding.³³

27. See L. VOLD, *supra* note 17, § 30. Professor Vold, *id.* at 398 n.6, cites from the Bible for the earliest impersonation case, in which Jacob posed as his brother Esau in a successful attempt to gain both his brother's and his share of their inheritance. See *Genesis* 27:1-35.

28. 220 N.Y. 232, 115 N.E. 441 (1917).

29. *Id.* at 232, 115 N.E. at 441.

30. *Id.* at 235, 115 N.E. at 442. The court phrased the rule as follows:

Where the transaction is a personal one, the seller intends to transfer title to a person of credit, and he supposes the one standing before him to be that person. He is deceived. But in spite of that fact his primary intention is to sell his goods to the person with whom he negotiates.

Id.

31. *Id.*

32. *Id.*; accord, *Dresher v. Roy Wilmetth Co.*, 118 Ind. App. 542, 82 N.E.2d 260 (1948); *Martin v. Green*, 117 Me. 138, 102 A. 977 (1918); *Edmunds v. Merchants' Despatch Transp. Co.*, 135 Mass. 283 (1883).

33. 220 N.Y. 232, 235, 115 N.E. 441, 442 (1917). The court highlighted the importance of the owner's intent in its determination of who held title: "Where the vendor of personal property intends to sell his goods to the person with whom he deals, then title passes, even though he be deceived as to that person's identity or responsibility. Otherwise it does not. It is purely a question of the vendor's intention." *Id.* at 234, 115 N.E. at 442.

The court, however, had difficulty distinguishing earlier decisions involving different types of impersonation that held that the owner did not intend to transfer title to an impersonator. In the early English case of *Cundy v. Lindsay*,³⁴ the wrongdoer, Blenkarn, represented to the plaintiffs by mail that he was Blenkiron & Co. Relying on this false representation and knowing of the good reputation of W. Blenkiron & Sons, the plaintiffs delivered property to the wrongdoer at 37 Wood Street.³⁵ Before they could ascertain that W. Blenkiron & Sons was actually located at 123 Wood Street, Blenkarn sold the property to Cundy, a good faith purchaser for value, and spent the proceeds.³⁶ The court held for the original owner, reasoning that no contract for the sale of goods could exist without a meeting of the minds of the parties to the contract.³⁷ No meeting of the minds occurred because the owner intended to contract with W. Blenkiron & Sons, not Blenkarn.³⁸ No contract existed; therefore, no title ever passed.³⁹

Even though the holdings in *Cundy* and *Phelps* were clearly inconsistent, the court in *Phelps* tried to distinguish the two cases on their facts. If the impersonation was by mail, the owner intended to transfer title to the person whose name appeared on the letter, the court reasoned.⁴⁰ If, however, the impersonation occurred in the course of a face-to-face transaction, the owner intended to deal with the negotiator, even if he was deceived as to the impersonator's identity.⁴¹ In making this distinction the court avoided the question whether it was really so apparent that an owner intended to deal with the person standing in front of him, but did not intend to deal with the person transacting business by mail. The distinction was illogical: if the owner never knew he was being deceived, he could

34. 3 App. Cas. 459 (H.L. 1878).

35. *Id.* at 460.

36. *Id.* Blenkarn later was prosecuted and convicted, leaving the two innocent parties quarreling over who would bear the loss. *Id.*

37. *Id.* at 465.

38. *Id.* at 465-66; *accord*, Moore v. Furstenwerth-UHL Jewelry Co., 17 Ga. App. 669, 87 S.E. 1097 (1916); Newberry v. Norfolk & S. Ry., 133 N.C. 45, 45 S.E. 356 (1903). *See generally* R. BROWN, *supra* note 6, § 9.6; L. VOLD, *supra* note 17, § 30, at 399; 3 S. WILLISTON, *supra* note 26, § 635.

39. 3 App. Cas. at 465-66.

40. 220 N.Y. 232, 235, 115 N.E. 441, 442 (1917). Specifically, the court stated, "Where the transaction is by letter the vendor intends to deal with the person whose name is signed to the letter. He knows no one else. He supposes he is dealing with no one else." *Id.*

41. *Id.*; *see* note 33 *supra* & accompanying text.

not possess the shrewd, discriminating intent attributed to him by the court.⁴² *Phelps*, however, failed to address this problem.

The court in *Phelps* referred to a second class of cases, dealing with impersonation by agents, that also turned on the owner's intent. Typical of these was the earlier case of *Hentz v. Miller*,⁴³ which involved a wrongdoer who falsely represented that he was the broker-agent of two reputable business firms.⁴⁴ His impersonation induced the plaintiffs to deliver two hundred bales of cotton to him, which he promptly sold to the defendant, a good faith purchaser for value.⁴⁵ The court in *Hentz* protected the original owner's interests, reasoning that he intended to transfer title primarily to the principals whom the wrongdoer pretended to represent and only secondarily to the wrongdoer as their agent, whether real or fictitious.⁴⁶

The multifaceted *Phelps* rule, which always relied on the owner's supposed intent, created a narrow exception to the rule that no one could transfer better title than he himself had: a wrongdoer who impersonated a man of credit in a face-to-face transaction acquired the power to transfer a good title to an innocent purchaser for value.⁴⁷ The court referred to this theoretical power, without defin-

42. Warren, *supra* note 9, has written, "[A]s these impersonation cases indicate, sometimes the courts have been trapped in the web of their own logic. *There is no rational basis for protecting a good faith purchaser from a face-to-face impersonator while refusing to protect a good faith purchaser from one who misrepresents by letter.*" *Id.* at 477 (emphasis supplied). See also Note, *The Good Faith Purchase of Goods and "Entrusting" to a Merchant under the Uniform Commercial Code: Section 2-403*, 38 IND. L.J. 675 (1963) [hereinafter cited as *The Good Faith Purchase of Goods*], wherein the author states, "Unless the difference in these two kinds of transactions is based on some mysterious distinction of dealing in person, instead of by correspondence, *the rationale and result in these two cases is inconsistent.*" *Id.* at 679 (emphasis supplied).

43. 94 N.Y. 64 (1883).

44. *Id.* at 65.

45. *Id.* at 66.

46. *Id.* at 71-72. The court in *Hentz* wrote, "It may be, as the appellant insists, that the owner was influenced in the sale to some extent by the financial responsibility of the assumed brokers, but the professed guaranty was only another element of fraud." *Id.* The reasoning of the court in *Phelps* was similar: "There is no intention on the part of the vendor to sell to the pretended agent or representative and no title passes." 220 N.Y. at 235, 115 N.E. at 442; accord, *Smith Premier Typewriter Co. v. Stidger*, 18 Colo. App. 261, 71 P. 400 (1903); *Alexander v. Swackhamer*, 105 Ind. 81, 4 N.E. 433 (1886); *Rogers v. Dutton*, 182 Mass. 187, 65 N.E. 56 (1902); *Windle v. Citizens' Nat'l Bank*, 204 Mo. App. 606, 216 S.W. 1020 (1919); *M. Brothiner & Sons, Inc. v. M. Ullman, Inc.*, 141 Misc. 102, 252 N.Y.S. 244 (Sup. Ct. 1931); *Hamet v. Letcher*, 37 Ohio St. 356 (1881); *Dean v. Yates*, 22 Ohio St. 388 (1872); *Barker v. Dinsmore*, 72 Pa. 427 (1872); *Mayhew v. Mather*, 82 Wis. 355, 52 N.W. 436 (1892). *Contra*, *Hawkins v. Davis*, 67 Tenn. 506 (1875).

47. Professor Brown stated the rule of voidable title as follows:

ing it, as "at least a voidable title."⁴⁸ The result in *Phelps* was very troublesome. The first and most conspicuous source of criticism was the court's attempt to distinguish indistinguishable fact situations, purportedly by giving effect to the owner's intent.⁴⁹ Although the various distinctions were simple to apply, the reasons behind them were obscure.⁵⁰ The obvious conclusion, which the court ignored, was that the owner in all cases intended to transfer title only to a person who could be trusted to give him something of equal value in return. In each case the owner, though deceived as to the identity of the negotiator, intended to transfer title to his property to that negotiator in the hope of making a profit from the transaction. Although courts recognized this aspect only in the mail-fraud cases, arguably in all of the voidable title cases the owner primarily intended to deal with a solvent buyer. This one factor, common to all the cases, should have been the primary focus of any rule founded upon the owner's intent.⁵¹

If the owner of goods is induced by fraud, misrepresentation, or duress to part with title to his property, the vendee nevertheless secures title to the goods in question, though the vendor, on discovery of the fraud or duress, may annul the sale and repossess himself of the goods in question.

R. BROWN, *supra* note 6, § 9.6, at 197. Although fraud accounted for most of the voidable title cases, the concept of voidable title was applied in other situations as well. *E.g.*, *Harris v. Harris*, 64 Cal. 108, 28 P. 63 (1883) (title to horses sold by insane person voidable as against a good faith purchaser); *Campbell v. Brackenridge*, 8 Blackf. 471 (Ind. 1847) (title to goods sold by drunk voidable only until transfer to good faith purchaser); *Hill v. Anderson*, 4 Miss. (5 S. & M.) 216 (1845) (title to slaves sold by infant voidable as against good faith purchaser); *Morris v. Hall*, 89 W. Va. 460, 109 S.E. 493 (1921) (title to land sold by insane person voidable as against good faith purchaser).

48. 220 N.Y. at 234, 115 N.E. at 442.

49. *But cf. The Good Faith Purchase of Goods*, *supra* note 42, in which the author argued that the agency-impersonation cases were distinguishable:

Even though the defrauder takes no title in agency fraud as opposed to voidable title in face to face fraud, the difference in result does not depend on an inconsistent analysis of the owner's intention In agency fraud courts would not seem to have to look at the owner's intention as much as at the desirability of protecting ownership interests.

Id. at 679-80 (footnote omitted).

50. One commentator has referred to the distinctions as "metaphysical." R. BROWN, *supra* note 6, § 9.6, at 200.

51. Some recognition of this aspect of the voidable title cases is found in Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954). Professor Gilmore approved the voidable title principle as an attempted solution to this problem because it "made it possible to throw the risk on the true owner in the typical commercial situation while protecting him in the noncommercial one On the whole voidable title proved a useful concept." *Id.* at 1060.

The second, more subtle flaw in *Phelps* is that the court focused on the owner's intent when it was irrelevant, at least from the viewpoint of the innocent transferee.⁵² The owner's subjective intent could hardly have supplied the innocent purchaser with realistic criteria for judging the legitimacy of the transaction.⁵³ Nevertheless, as a device for furthering the interests of the original owner, the approach might have been justifiable to the extent that it advanced such a policy, but it suffered from two primary weaknesses. First, the court left unclear why, in a controversy involving the competing interests of two equally innocent parties, the original owner's interests were preferred over those of the subsequent transferee.⁵⁴ The court begged the question by favoring the original owner under the guise of protecting property rights; by lending its support to one litigant over another, it in effect determined whose interests constituted legal ownership of the property in dispute.⁵⁵ In each of the cases discussed, the court failed to consider the competing equities involved. Only in *Hentz* did the court acknowledge that both the defrauded original owner and the good faith purchaser were innocent. Nevertheless, it added, "[T]here is no reason, therefore, why the former should be a sufferer rather than the latter."⁵⁶ If the court had reasoned further, it would have concluded, 'nor is there any reason why the latter should be a sufferer rather than the former.' Unfortunately, by blindly applying the owner-intent test, the court ended its analysis before it really began. The second weakness in the justifications for protecting the original owner's interests was its effect on future wrongdoers. To the extent that courts succeeded in

52. One commentator referred to the impersonation cases as "characterized by a shameless manipulation by the courts of what is laughingly referred to as the intent of the parties." Warren, *supra* note 9, at 475 (footnote omitted).

53. *Id.* at 471. Warren adds, "Thus the law scrutinized what the buyer was blind to." *Id.*

54. Compare *Young v. Harris-Cortner Co.*, 152 Tenn. 15, 268 S.W. 125 (1924) (preference for the owner over the good faith purchaser increased the negotiability of goods) with *L. VOLD*, *supra* note 17, § 30, at 176-77 (the voidable title exception, in providing support for the good faith purchaser, enhanced the negotiability of goods).

55. Commentators have recognized for generations that judges, in forcing apparently rigid rules to conform to complex fact patterns, in reality, are choosing the party who will prevail. See generally T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); J. FRANK, *LAW AND THE MODERN MIND* (1930); G. GILMORE, *THE DEATH OF CONTRACT* (1974); Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

56. 94 N.Y. at 71.

protecting the original owner's property interests, they probably discouraged him from spending his own resources to prevent fraud or theft.⁵⁷ In fact, the original owner could recover his property under the owner-intent rule even if he were grossly negligent.⁵⁸ In this respect the doctrine conflicted with, and in some instances defeated, the policy of forcing the person who made the wrong possible to bear the loss. At least theoretically, then, the owner-intent doctrine, instead of deterring, actually may have contributed to the number and success of thefts and deceptions.

The third defect in *Phelps* was its failure to define voidable title. While granting "at least a voidable title"⁵⁹ to a defrauder, the court neither set out what constituted such title nor examined its implications.⁶⁰ This deficiency was not of purely academic interest because the definition itself could provide guidelines for determining when voidable title should be granted. It also could affect significantly the status of both the wrongdoer and the innocent transferee in the interval between the initial fraud and the subsequent sale. To illustrate, if a voidable title were defined as an inferior title, it would be less valuable than a good title. An innocent transferee could never determine whether he was purchasing a less valuable title; therefore, presumably a merchant-transferee⁶¹ would tend to pay

57. The function of commercial law, however, arguably is not the deterrence of criminals but rather the resolution of disputes arising from commercial transactions. 17 U. BUFFALO L. REV. 865, 885 (1968).

58. Under the rule, for example, an owner could leave his automobile parked at the side of the curb, with the keys in the ignition and the engine running. If a wrongdoer passed by at the right moment and appropriated the chattel for later sale to an unsuspecting purchaser, the original owner conceivably could still recover.

59. 220 N.Y. at 234, 115 N.E. at 442.

60. *Id.* Unfortunately, the court in *Phelps* shared with numerous other courts and commentators an inability to formulate a definition. Professor Gilmore described voidable title as "a vague idea, never defined and perhaps incapable of definition, whose greatest virtue, as a principle of growth, may well have been its shapeless imprecision of outline." Gilmore, *supra* note 51, at 1059. The various definitions of voidable title attempted by commentators have been decidedly unsatisfactory. Professor Weber, for example, wrote that "a person's title to goods is said to be voidable when he holds a legal title but his transferor has the right to avoid the transfer and reassert title in himself." Weber, *The Extension of the Voidable Title Principle Under the Code*, 49 KY. L. REV. 437, 439 (1961) (footnote omitted). In 17 U. BUFFALO L. REV. 865 (1968), the author explained, "The voidable title doctrine held [*sic*] that the transaction was only voidable between the owner and the transferor, and once the goods passed to a bona fide purchaser the owner's rights were lost." *Id.* at 869 (footnote omitted). See generally 2 S. WILLISTON, *supra* note 26, §§ 311, 348.

61. For the purposes of this Note, a merchant is a vendor who is able to distribute a loss to consumers through business operations.

less for any given purchase, and a nonmerchant transferee would tend to refrain from making as many purchases. If all purchasers reacted in this way, the effect on commerce could be substantial.

Furthermore, different definitions of voidable title could lead to varying results in a situation involving an extended chain of title. For example, if a wrongdoer transferred to an innocent purchaser who subsequently transferred to a purchaser with notice of the initial wrongdoing, the second purchaser's rights or duties would depend on the definition of voidable title used by the court. If voidable title were defined as merely an inferior title, having less value than good title, it would include no power to cut off the rights of the original owner. Using this definition, the original owner would recover from the second transferee; the voidable title would prevail only if the prospective holder of the title took without notice of the initial wrongdoing.

An alternate definition of voidable title, however, would create a conditional power in the wrongdoer to transfer perfect title to a subsequent good faith purchaser. The power of the original owner to avoid the earlier sale before the wrongdoer sold the goods to a good faith purchaser would operate as a condition subsequent. That condition subsequent, similar to a power to rescind a contract, would allow the owner to extinguish the wrongdoer's power to transfer title if he acted before any transfer to an innocent buyer. Under this definition of voidable title, the result in the example given would change: the knowing second transferee would acquire a perfect title and prevail against the original owner because of the failure of the condition subsequent to occur. Transfer by the wrongdoer to an innocent purchaser would terminate the ability of the original owner to void the wrongdoer's power to transfer perfect title. The innocent transferee thus would acquire perfect title, including the power to transfer his title to others. A well-defined voidable title exception would clarify the rights and duties of each and thereby eliminate the possibility of courts reaching such differing results.

The impersonation cases illustrate the difficulties of designing a rule for resolving controversies between an innocent purchaser and an equally innocent owner. By framing the issues, they provide a useful introduction to the intermediate area of common law voidable title; a comparison of the cash-sale cases with the credit-sale cases further clarifies the complexities of this area of the law.

Voidable Title: The Cash-Sale Doctrine

The cash-sale transaction at common law contemplated the passage of title from the original owner to his vendee at the simultaneous occurrence of two mutually dependent events: the owner's transferral of possession and the vendee's completion of payment.⁶²

62. The requirements for a cash sale varied with the transaction. If, for example, the sale involved goods too bulky for delivery at the same moment as payment, payment and delivery could be merely *substantially* simultaneous. Thus, if the execution of the two covenants was substantially simultaneous, the transaction was considered a cash sale even if payment or delivery was delayed. *E.g.*, *In re Perpall*, 256 F. 758, 760 (2d Cir. 1919) (terms of contract failing to provide expressly that payment be made on delivery, intent of the parties determined whether payment and delivery should be concurrent acts; intent was seen in the custom and usage of the bond trade, which allowed for staggered payment and delivery, but which dictated that title did not pass until both acts were completed). *But cf.* *Smith v. Lynes*, 5 N.Y. 41, 44 (1851) (failure of vendor to demand immediate payment on delivery or to attach some other condition of payment to the exchange indicated a waiver of the condition of cash sale; complete title thus passed to the vendee on delivery of the chattel).

If the accepted trade custom and usage did not include provision for delayed payment in a cash sale, the vendor was confronted with two alternatives when the vendee failed to pay on delivery. He could either demand return of the goods, thus reacquiring possession in addition to his never-relinquished title, or extend credit to the delinquent vendee, thus waiving both his right to substantially simultaneous payment and his right to title. *See, e.g.*, *Engstrom v. Wiley*, 191 F.2d 684 (9th Cir. 1951) (ten-day delay in depositing check for sale of wheat held not a waiver of cash sale because such a delay was common to the wheat farmers of this region); *Kirk v. Madsen*, 240 Iowa 532, 36 N.W.2d 757 (1949) (delay of a few days between default of check and vendor's attempt to regain possession of automobile held not a waiver of cash sale); *Weyerhaeuser Timber Co. v. First Nat'l Bank*, 150 Ore. 172, 43 P.2d 1078 (1935) (no waiver of cash sale despite more than a week's delay in payment; seller's explicit refusal to grant buyer's request for credit entitled to great weight).

The extension of credit could occur immediately if the vendor failed to exercise his rights promptly. *See generally* L. VOLD, *supra* note 17, § 30, at 164-69. This waiver of the right to a cash sale had significant consequences for the owner. *E.g.*, *Meadows v. Hampton Live Stock Comm'n Co.*, 55 Cal. App. 2d 634, 131 P.2d 591 (1942) (seller who delivered cattle to buyer and watched buyer sell cattle before payment was estopped from asserting his title against the subsequent purchaser without notice).

Under most circumstances, however, in which no terms were expressed, the sales were presumed for cash, not on credit, and no title passed until full payment was made. *E.g.*, *Commercial Standard Ins. Co. v. McCollum*, 207 F.2d 768 (10th Cir. 1953) (sale of automobile not completed until vendee's check honored; title did not pass because payment on vendee's check was stopped, which entitled vendor to collect insurance on goods damaged); *Ellis v. Nelson*, 68 Nev. 410, 233 P.2d 1072 (1951) (term *cash sale* construed as requiring payment in full to be tendered before title or possession would be delivered, with no extension of credit); *Dazet v. Landry*, 21 Nev. 291, 30 P. 1064 (1892) (payment required to be tendered at the moment the bid was accepted in an auction sale "for cash", with no extension of credit implied); *Steward & Metler v. Scudder*, 24 N.J.L. 96 (1853) (unless established custom and usage were to the contrary, a cash sale was for money in hand); *Dillard & Coffin Co. v. Beley Cotton Co.*, 150 Tenn. 197, 200, 263 S.W. 87, 88 (1924) ("Where the sale is for cash on delivery, a delivery is generally considered conditional, and no title vests in the buyer until he has

Until both happened, the property interest remained in the owner, and the vendee obtained only a void title. The contract terms or the conduct of the parties determined whether a cash sale was intended.⁶³ If the vendee transferred the property to any subsequent purchaser, that purchaser, or subvendee, acquired void title as well because the vendee could pass no better title than he himself possessed.⁶⁴ In *Gustafson v. Equitable Loan Association*,⁶⁵ for example, a wrongdoer impersonated wealthy businessman Millard H. McDonald and persuaded the plaintiff, a jeweler, to surrender possession of a valuable diamond ring in exchange for the wrongdoer's forged check.⁶⁶ The wrongdoer subsequently pledged the ring to the defendant, a purchaser in good faith, and hastily departed.⁶⁷

In settling the resulting dispute, the court initially noted that "[i]n the absence of evidence indicating that credit is to be given, a sale is presumed to be for cash."⁶⁸ The court reasoned that, because tender of the check did not constitute cash payment, the sale was conditional, and title did not pass until the payor bank honored

complied with the terms of sale."); *Duncan v. Stone*, 45 Vt. 118 (1873) (delivery of property under a contract of conditional sale made the vendee a bailee only); *Bliss v. Arnold*, Leggitt & Lapham, 8 Vt. 252 (1836) (trade custom allowed delayed payment; until payment was made, title remained in the seller); *Tri-County Fin., Inc. v. Miller*, 267 Wis. 174, 65 N.W.2d 39 (1954) (in the absence of a credit agreement between vendor and vendee, title to the property remained in vendor until payment).

63. *E.g.*, *Winter v. Miller*, 183 F.2d 151 (10th Cir. 1950) (intent of parties was guiding factor in determining who held title; literal terms of contract could be supplemented by a practical construction of the contract's provisions that conformed to the parties' conduct); *Kirkpatrick v. Chrysler Sales Corp.*, 127 Kan. 724, 275 P. 155 (1929) (conduct of the parties to a contract, even if at variance with explicit contract provisions, may indicate the parties' intent and thus determine whether the sale passed the property interest).

64. *E.g.*, *Cowdrey v. Vandenburg*, 101 U.S. 572 (1879) (the purchaser of nonnegotiable demand instrument from person other than the original owner took only such rights as the original owner transferred); *Cutts v. Guild*, 57 N.Y. 229 (1874) (assignee took his interest subject to the equities between the original parties); *Handley Motor Co. v. Wood*, 237 N.C. 318, 75 S.E.2d 312 (1953) (transfer of automobile to vendee in exchange for check that was later dishonored did not transfer title; therefore, sale by vendee to a good faith purchaser did not vest good title because a possessor without title could not transfer title).

65. 186 Minn. 236, 243 N.W. 106 (1932).

66. *Id.* at 237, 243 N.W. at 107.

67. *Id.*

68. *Id.* at 238, 243 N.W. at 107; *accord*, *Home Fire Ins. Co. v. Wray*, 177 Ark. 455, 6 S.W.2d 546 (1928); *John N. Sims & Sons v. Bolton*, 138 Ga. 73, 74 S.E. 770 (1912); *Flannery v. Harley*, 117 Ga. 483, 43 S.E. 765 (1903); *Commercial Credit Co. v. Interstate Sec. Co.*, 197 S.W.2d 1000 (Mo. Ct. App. 1946); *Weyerhaeuser Timber Co. v. First Nat'l Bank*, 150 Ore. 172, 43 P.2d 1078 (1935). See generally *The "Cash Sale" Presumption*, *supra* note 6.

the check.⁶⁹ Furthermore, because the check was forged, title never vested in either the wrongdoer or the subsequent purchaser.⁷⁰ The court casually dismissed the argument that the wrongdoer, by impersonating a man of credit, acquired a voidable title to the ring.⁷¹ Without attempting to distinguish the impersonation cases the court merely reiterated that, because the owner intended this to be a cash sale and the wrongdoer had not completed payment, no title, voidable or otherwise, ever passed.⁷² *Gustafson* thus limited significantly the protection extended good faith purchasers by the impersonation cases.

Gustafson typified several important aspects of the cash-sale doctrine. First, the opinion adhered rigidly to the common law presumption that, unless otherwise stated, the parties intended their transaction to be for cash.⁷³ Historically, the existence of a non-credit, cash-and-carry economy justified this presumption of buyer and seller expectations.⁷⁴ Even after open credit became commonplace, however, and the presumption thus lost its credence,⁷⁵ it retained vitality, developing into another device for arbitrary judicial protection of the original owner's property interests.⁷⁶

Gustafson was also representative of cash-sale cases in that it dealt with a bad check. Although the cash-sale doctrine appeared

69. 186 Minn. at 238, 243 N.W. at 107; *accord*, *Slaton v. Lamb*, 260 Ala. 494, 71 So. 2d 289 (1954); *Davidson v. Conner*, 254 Ala. 38, 46 So. 2d 832 (1950); *Publicker Commercial Alcohol Co. v. Harger*, 129 Conn. 655, 31 A.2d 27 (1943).

70. 186 Minn. at 238, 243 N.W. at 107. The court stated, "The diamond in Madden's hands was stolen property, and he had no title thereto. The transaction also constituted forgery at common law. This was a felony. . . . Title to property obtained through common-law crime does not pass to the vendee or pledgee." *Id.* (citations omitted).

71. *Id.*

72. *Id.* Professor Weber characterized the cash-sale doctrine as one limitation on the types of transactions in which voidable title was seen as arising. *Weber, supra* note 60, at 442, 444. One author claimed that many courts recently have abandoned this limitation. 17 U. BUFFALO L. REV. 865, 870 (1968) and the cases cited therein.

73. *See The Good Faith Purchase of Goods, supra* note 42, at 685.

74. *Id.*

75. *Id.* *See also The "Cash Sale" Presumption, supra* note 6, at 105 ("[S]eller recovery of goods from bona fide third parties is no longer supported by sound commercial policy.").

76. For a vivid illustration of judicial determination to protect the original owner, see *The "Cash Sale" Presumption, supra* note 6. The author compared the cases in which the courts protected the owner from risk of loss due to the destruction of goods while in the hands of a subsequent purchaser with the cases in which the courts protected the owner from risk of loss due to a subsequent transfer of the goods by a wrongdoer to a good faith purchaser. In the first group of cases the courts held that title passed; in the second group the courts held that title did not transfer. *Id.* at 104-05 & n.24. *See also* note 6 *supra* & accompanying text.

in several different forms,⁷⁷ the overwhelming majority of such cases involved payment by a check that subsequently was dishonored.⁷⁸ The majority of courts confronted with bad-check cases held that the exchange of a check for property did not constitute final payment, but was simply a *means* of obtaining payment. Hence, title to the property did not pass to a subsequent good faith purchaser unless and until the check given by the prior vendee was honored.⁷⁹ Some courts and commentators have indicated that this application of the cash-sale doctrine increased the negotiability of goods by reducing the risk to the seller of accepting payment by check. Arguably, however, the convenience of checks contributed more significantly to their prevalent use for sales in a modern economy than did the rule granting the seller the right of repossession if he was victimized by a bad check.⁸⁰

The third aspect of the decision that was typical of cash-sale cases was its adherence to a generally accepted common law rule: a wrongdoer who obtained possession of goods through an act regarded as larcenous under the criminal law acquired no title to the goods and could transfer none to a subsequent good faith purchaser for value.⁸¹ Although easily stated, the rule defied uniform applica-

77. Courts found cash sales in almost any transaction in which the buyer induced the seller to deliver goods but failed to remit payment. *E.g.*, *Curme, Dunn & Co. v. Rauhs*, 100 Ind. 247 (1884) (failure to remit cash); *Hirschorn v. Canney*, 98 Mass. 149 (1867) (payment by note); *Freeman v. Kraemer*, 63 Minn. 242, 65 N.W. 455 (1895) (payment by draft).

78. Weber, *supra* note 60, at 444.

79. *E.g.*, *Slaton v. Lamb*, 260 Ala. 494, 71 So. 2d 289 (1954); *Barksdale v. Banks*, 206 Ala. 569, 90 So. 913 (1921); *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, 284 P. 915 (1930); *Publicker Commercial Alcohol Co. v. Harger*, 129 Conn. 655, 31 A.2d 27 (1943); *Handley Motor Co. v. Wood*, 238 N.C. 468, 78 S.E.2d 391 (1953). *Contra*, *Dresher v. Roy Wilmeth Co.*, 118 Ind. App. 542, 82 N.E.2d 260 (1948); *Nelson v. Lewis*, 143 Kan. 106, 53 P.2d 813 (1936); *Sullivan Co. v. Larson*, 149 Neb. 97, 30 N.W.2d 460 (1948).

80. The author of *The "Cash Sale" Presumption*, *supra* note 6, stated, "[T]he threat of bad check losses should not necessarily outweigh the seller's interest in the speed and convenience of check transactions." *Id.* at 105 (footnote omitted).

81. 186 Minn. at 238, 243 N.W. at 107; see note 70 *supra* & accompanying text. *But see* *Parker v. Patrick*, 101 Eng. Rep. 99 (K.B. 1793), in which a wrongdoer obtained goods from Patrick "by false pretences" and then pawned them to Parker. After Patrick regained the goods, Parker sued to recover them. Although Patrick defended on the ground that the wrongdoer acquired the goods through felonious fraud, the court held for Parker. The court stated briefly, "This is distinguishable from the case of felony; for there by a positive statute the owner, in case he prosecutes the offender to conviction, is entitled to restitution: but that does not extend to this case, where the goods were obtained from the defendant by a fraud." *Id.* (footnote omitted). Professor Weber characterizes this decision as "the first reported case in which the voidable title principle was applied." Weber, *supra* note 60, at 437 (footnote

tion because of varying definitions of larcenous fraud in different jurisdictions. Whereas some jurisdictions defined larcenous fraud in common law terms,⁸² others used the definitions in their state's criminal codes.⁸³ One court even found "trickery, artifice, and deception" to be conduct sufficiently larcenous to preclude the transfer of a voidable title.⁸⁴

Supporters of the larcenous-fraud rule rationalized that an owner, when a victim of a crime, however defined, should not be required to bear the resulting loss.⁸⁵ This argument suffered from several flaws. First, the rule was applied imprecisely and inconsistently among and even within jurisdictions⁸⁶ because the courts could not decide definitively what conduct was so villainous as to trigger protection of the original owner. They condemned some types of fraud as sufficiently scandalous to constitute larceny,⁸⁷ yet forgave other fraudulent activities as mere trickery.⁸⁸ The varying treatment given the several types of fraud by the courts produced results so inconsistent that even owners could not predict with certainty when their interests would be protected.⁸⁹ The second problem with the rule

omitted). For an interesting discussion of the decision and its relationship to both the voidable title principle and the rule against transfer of title through the use of larcenous fraud, see *id.* at 637-38, 465-66.

82. *E.g.*, *Amols v. Bernstein*, 214 App. Div. 469, 212 N.Y.S. 518 (1925).

83. *E.g.*, *Beckwith v. Galice Mines Co.*, 50 Ore. 542, 93 P. 453 (1908).

84. *Panhandle Pipe & Supply Co. v. S.W. Pressey & Son*, 125 Colo. 355, 357, 243 P.2d 756, 759 (1952).

85. *The Good Faith Purchase of Goods*, *supra* note 42, at 688.

86. For a discussion of the unsteady development and vacillating application of the larcenous-fraud concept in the law of sales in New York, see *Weber*, *supra* note 60, at 468 n.90.

87. *E.g.*, *Gustafson v. Equitable Loan Ass'n*, 186 Minn. 236, 243 N.W. 106 (1932) (forgery); *Amols v. Bernstein*, 214 App. Div. 469, 212 N.Y.S. 518 (1925) (forgery).

88. *E.g.*, *Phelps v. McQuade*, 220 N.Y. 232, 115 N.E. 441 (1917). In *Phelps* the Court of Appeals of New York distinguished the lower court's holding:

The learned Appellate Division rested their opinion upon the definition of common-law larceny, holding that where such larceny had been committed the thief acquired no title by his crime; where it had not, at least a voidable title passed. We agree with that statement of the law. But we should prefer to define the rule in another form. Where the vendor of personal property intends to sell his goods to the person with whom he deals, then title passes, even though he be deceived as to that person's identity or responsibility. Otherwise it does not.

It is purely a question of the vendor's intention.

Id. at 234, 115 N.E. at 442.

89. *Compare Gustafson*, in which an impostor who induced the original owner to relinquish possession of a diamond in exchange for a forged check was unable to transfer a good title,

was that in protecting the original owner, aggrieved initially by the crime, courts ignored the rights of the good faith purchaser, also victimized by the wrongdoer.⁹⁰ Once again, when required to choose between two equally innocent parties, courts failed to articulate a well-reasoned rationale for favoring one over the other. The third mistake in adding a larcenous-fraud limitation to the occasions when voidable title would be granted lay in its irrelevance to a property dispute in a commercial setting. Whereas the criminal law existed to deter and punish offenders,⁹¹ this portion of the commercial law served to resolve disputes that arose between innocent owners and equally guiltless purchasers.⁹² No sound policy justified using criminal law in the context of commercial law.

The fourth point *Gustafson* had in common with other cash-sale cases was that its result was based on the theory that the original owner did not *intend* to transfer title until the bank honored the vendee's check.⁹³ No compelling reason was offered, however, to justify this reliance on the purely subjective intent of the owner.⁹⁴ In the typical bad-check case, the owner could have protected himself in one of several ways: by contacting the vendee's bank to determine whether the vendee had adequate funds on deposit to cover the check; by retaining possession of the goods until the check was

with *Phelps*, in which an impostor who obtained jewelry on credit obtained a voidable title and thereafter transferred a good title to a good faith purchaser.

90. See generally Vold, *Worthless Check Cash Sales*, "Substantially Simultaneous" and *Conflicting Analogies*, 1 HASTINGS L.J. 111 (1950).

91. *Gregg v. Georgia*, 428 U.S. 153, 183-87 (1976).

92. 17 U. BUFFALO L. REV. 865, 885 (1968).

93. 186 Minn. at 238, 243 N.W. at 107.

94. One commentator criticized this result as allowing the intent of the vendor and vendee in the prior transaction to determine the property interest of the subsequent good faith purchaser, who was not a party to the earlier bargain. Levin, *The Intention Fallacy in the Construction of Title Retaining Contracts*, 24 MICH. L. REV. 130, 137 (1925). A more appropriate endeavor might be to judge the rights of the third party by looking to his role in the tripartite transactional scheme, instead of concentrating on the intent of the two parties to the original transaction. See also 29 YALE L.J. 346 (1920), in which the author wrote,

As between seller and buyer, intent may perhaps properly be made a crucial operative fact (though even here such a test presents embarrassing difficulties, as in the matter of mistake); but when the question is, whether a *bona fide* subvendee for value is to be protected against the vendor, the problem becomes wholly one of policy: under what states of fact are we going to protect such a purchaser? The seller's intent, of one kind or another . . . may properly be one of these operative facts; but surely it is not the only one, nor always the most important

Id. at 347 n.14.

honored; by requiring payment by certified check; or by demanding cash if the vendee appeared to be untrustworthy.⁹⁵ The subsequent good faith purchaser, in contrast, had no similar means of reducing liability by determining the validity of the prospective transferor's title. No amount of diligence could have enabled the purchaser to ascertain, with any reasonable certainty, either the method by which his transferor obtained the goods from the original owner or the intent of the original owner at the time of the prior transaction. These realities of the marketplace demonstrated the absurdity of allocating risk of loss on the basis of the subjective intent of the individual who was better equipped to prevent and to bear the loss.⁹⁶

In contrast to the more typical cash-sale transaction, a credit sale occurred if the owner waived his right to immediate payment, either before or after he transferred possession of the goods.⁹⁷ By delivering possession and extending credit to the vendee in a credit sale, the original owner enabled the vendee to transfer possession and ownership to a subsequent good faith purchaser for value. The owner thus transferred to the wrongdoer a form of voidable title, which operated as a condition subsequent; it cut off the owner's right to title in the property on transfer by the wrongdoer to a subpurchaser.⁹⁸

The inequities of the cash-sale doctrine, combined with an intensifying judicial desire to protect those who purchased in good faith within the context of a modern economy, caused later courts to struggle to find exceptions to the cash-sale rule.⁹⁹ They used these exceptions to bring commercial disputes within the credit-sale anal-

95. For an informative discussion of the varied protections available to the original owner, see *The "Cash Sale" Presumption*, *supra* note 6, at 105-06.

96. *Id.*

97. *E.g.*, *Lehman v. People's Furniture Co.*, 42 Okla. 761, 142 P. 986 (1914) (seller's failure to exercise his right to reclaim goods in possession of buyer was excusable only if buyer had deceived seller into not acting; lack of deception by buyer resulted in seller's delay being regarded as an extension of credit).

98. *E.g.*, *Ryder v. Cooley*, 58 Conn. 367, 20 A. 470 (1890) (if seller sold the trade, stock, and goodwill of his business on credit, subsequent purchaser from vendee did not need to assume the obligation of payment under the agreement between the two original parties); *Bell v. Cafferty*, 21 Ind. 411 (1863) (if a person sold personal property in exchange for promissory notes that the vendee knew were forged, the sale was not rendered absolutely void by the fraud, but only voidable; the good faith purchaser, buying and obtaining possession before the contract was rescinded, acquired a perfect title against the original seller).

99. *See, e.g.*, *Capital Automobile Co. v. Ward*, 54 Ga. App. 873, 189 S.E. 713 (1936) (acceptance of worthless check by owner in return for invoice, even though marked "Paid by two checks," estopped owner from protesting that no title passed to innocent buyer because prior transaction was cash sale).

ysis in order to protect good faith purchasers. State legislatures aided the courts in this endeavor by enacting filing and recording statutes to afford at least minimal protection to good faith purchasers of valuable, mobile goods. Courts implemented these statutes by treating the original transaction as a conditional sale, but imposing a duty on the owner to record.¹⁰⁰ If the owner failed to record, he was estopped from invoking the protection of the cash-sale doctrine.¹⁰¹ Additionally, some courts, reinterpreting the supposed intent of the original owner, concluded that he meant to transfer, at least to a merchant, the right to resell in exchange for a check.¹⁰² This exception was particularly compelling and, hence, applied most often if the vendee was a merchant who enjoyed a reputation in the community as a dealer in goods of the kind in dispute.¹⁰³ In addition, if the original owner clothed the vendee with indicia of ownership by delivering some evidence of title in the goods as well as possession, the courts held that the owner was estopped from claiming that a cash sale was contemplated.¹⁰⁴ Some courts found that the owner waived his right to cash payment—that is, extended credit—by not

100. *Contra*, Johnson-Brinkhan Co. v. Central Bank, 116 Mo. 558, 22 S.W. 813 (1893) (recording statutes held not applicable unless the seller has extended credit).

101. *E.g.*, Hall v. Le Croy, 79 Ga. App. 676, 54 S.E.2d 468 (1949) (rights of innocent third-party purchasers were governed by the law of conditional sales; failure of vendor to reduce sale to writing and record estopped vendor from protesting and prevented his recovery).

102. *E.g.*, Keegan v. Kaufman Bros., 68 Cal. App. 2d 197, 156 P.2d 261 (1945) (vendor also estopped from protesting no title passed in exchange for worthless check because he stood by and watched sheep sold by merchant).

103. When the owner sold goods, most often automobiles, to a dealer in goods of that kind, the easiest way for him to restrict his vendee's ability to resell the goods was by eliminating the vendee's ability to present himself to innocent purchasers as the titleholder. This condition was not met, however, if the owner gave the vendee certificate of title to the goods. *E.g.*, Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067 (1926) (owner who delivered automobile along with indorsed certificate of registration to dealer estopped from asserting title against innocent purchaser); Ross v. Leuci, 194 Misc. 345, 85 N.Y.S.2d 497 (1949) (owner who delivered automobile, indorsed statement of transfer, and certificate of title to dealer engaged in selling cars estopped from claiming title against innocent purchaser who justifiably relied). For further discussion of common law estoppel and entrustment provisions, see notes 109-28 *infra* & accompanying text.

104. *E.g.*, Dresher v. Roy Wilmethe Co., 118 Ind. App. 542, 82 N.E.2d 260 (1948) (dealer intended to sell to vendee after face-to-face encounter; owner estopped because he placed certificate of title as well as possession in vendee's custody in exchange for a check was later dishonored, thereby enabling vendee to present himself to innocent purchasers as holding title). *But see* Pearl v. Interstate Sec. Co., 217 S.W.2d 302 (Mo. Ct. App. 1949) (owner not estopped although he gave vendee bill of sale and certificate of title because subsequent purchaser did not rely on titles, which were only seen after sale was made). *See also* note 109-28 *infra* & accompanying text for further discussion of common law estoppel and entrustment.

vigorously demanding immediate payment, while allowing the vendee to retain possession for a prolonged time.¹⁰⁵ Finally, the courts sometimes simply determined that the owner intended to engage in a credit transaction, thereby extending voidable title protection to a good faith purchaser.¹⁰⁶

These diverse methods for protecting the good faith purchaser created an unusual pattern of decisions. From these exceptions emerged an unwritten rule that if the original transaction occurred in a noncommercial setting, the owner would prevail; in contrast, if the initial transaction transpired in a commercial context, the innocent purchaser acquired title, and the owner bore the loss.¹⁰⁷ Although commentators have offered policy reasons for this dichotomy,¹⁰⁸ courts never expressly admitted that the presence of a commercial buyer influenced their decisions. This unstated commercial factor simply added to the confusion of the owner-intent analysis, the cash-sale doctrine, the impersonation cases, and the criminal law larceny rule. Thus, on the eve of the drafting of the commercial code, the common law doctrine of voidable title was fractured and variable.

Estoppel

In addition to the voidable title concept, good faith purchasers often could claim the protection of the doctrine of estoppel. Estoppel was firmly rooted in the maxim, "Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."¹⁰⁹ The common law imposed a duty on the purchaser to inquire into the title of his vendor;¹¹⁰ therefore, the mere voluntary delivery of possession to a

105. *E.g.*, *Lehman v. People's Furniture Co.*, 42 Okla. 761, 142 P. 986 (1914) (seller's attempts to collect payment for six months and failure to rescind caused title to pass to buyer). *But see* *People's State Bank v. Brown*, 80 Kan. 520, 103 P. 102 (1909) (failure of seller to make early presentment of check did not prevent him from recovering from good faith purchaser).

106. *E.g.*, *Smith v. Norman Motors Co.*, 84 Ga. App. 186, 65 S.E.2d 699 (1951) (seller's treatment of the default by buyer on check as a debt held to constitute an extension of credit).

107. *Gilmore*, *supra* note 51, at 1061, and the cases cited therein.

108. *See generally* *Coleman, Cash Sales, Worthless Checks, and the Bona Fide Purchaser*, 10 VAND. L. REV. 55 (1956); *Vold*, *supra* note 90; *The "Cash Sale" Presumption*, *supra* note 6.

109. *BROOM'S LEGAL MAXIMS* 463 (9th ed. 1911). *See also* *O'Connor's Adm'rx v. Clark*, 170 Pa. 318, 320, 32 A. 1029, 1030 (1895).

110. *See* notes 9-10 *supra* & accompanying text.

wrongdoer alone did not estop the original owner from claiming title as against a subsequent good faith purchaser.¹¹¹ Estoppel required two additional elements. First, the original owner, either explicitly or implicitly, must have given the wrongdoer indicia of ownership sufficient to mislead the public into believing that the goods belonged to the wrongdoer.¹¹² Second, the good faith purchaser must have relied to his detriment on these misrepresentations of ownership.¹¹³

The early case of *O'Connor's Administratrix v. Clark*¹¹⁴ illustrates the application of this principle. The plaintiff's decedent directed George Tracy to paint the words "George Tracy, Piano Mover" on the side of a wagon owned by the plaintiff's decedent, in an attempt to deceive the public into believing that Tracy owned the wagon. The defendant, acting in good faith and relying on Tracy's apparent authority to sell, purchased the wagon for a valuable consideration. The court held that if a new jury found these facts to be true, then the defendant should prevail.¹¹⁵ It indicated that actions such as these would warrant a finding by the jury that the owner "actually intended to deceive" the public.¹¹⁶

Although in principle estoppel provided some relief to good faith purchasers, in practice those who sought its protection labored under a very difficult burden of proof.¹¹⁷ Except in unusually flagrant cases, courts hesitated to find that an owner clothed a wrong-

111. *E.g.*, *Royle v. Worcester Buick Co.*, 243 Mass. 143, 137 N.E. 531 (1922) (delivery of automobile and undorsed certificate of title did not estop owner); *Bustin v. Craven*, 57 N.M. 724, 263 P.2d 392 (1952) (delivery alone not enough to estop vendor); *Hardley Motor Co. v. Wood*, 237 N.C. 318, 75 S.E.2d 312 (1953) (owner not estopped who delivered possession of automobile only). *But see* *Heath v. Stoddard*, 91 Me. 499, 40 A. 547 (1898) (dicta that delivery alone might be enough to estop vendor; vendor estopped because his vendee was dealer in goods of that kind and an apparent agent of owner). *See generally* R. Brown, *supra* note 6, § 9.7.

112. *E.g.*, *Dresher v. Roy Wilmet Co.*, 118 Ind. App. 542, 82 N.E.2d 260 (1948) (turning over certificate of title to wrongdoer); *Silver v. Robert's Garage, Inc.*, 240 Mass. 571, 134 N.E. 610 (1922) (watching while wrongdoer sold property).

113. *E.g.*, *J.L. McLure Motor Co. v. McClain*, 34 Ala. App. 614, 42 So. 2d 266 (1949) (buyer relied on bill of sale and tag receipt); *Keegan v. Kaufman Bros.*, 68 Cal. App. 2d 197, 156 P.2d 261 (1945) (purchaser sorted lambs he bought from wrongdoer while original owner stood by); *Dudley v. Lovins*, 310 Ky. 491, 220 S.W.2d 978 (1949) (purchaser shown bill of sale).

114. 170 Pa. 318, 32 A. 1029 (1895).

115. *Id.* at 320, 32 A. at 1030.

116. *Id.*

117. *See* 17 U. BUFFALO L. REV. 865, 872 (1968), in which the author listed as elements that usually aided the purchaser "whether the transferor is a dealer in those goods, prior dealings between the transferor and purchaser, and trade practices."

doer with indicia of title.¹¹⁸ Once again, the result usually depended on the subjective intent of the original owner, as gleaned by the court from his outward behavior. Therefore, although the owner's gross negligence or laches usually sufficed to raise an estoppel, his simple negligence was not sufficient.¹¹⁹ Moreover, the purchaser could not always rely on even the strongest indicia of ownership to estop the owner if the owner relinquished possession involuntarily. In such instances, for example, as a sheriff's sale, the good faith purchaser lost, even though the purchaser's reliance was completely reasonable.¹²⁰ Hence, because the outcome turned on factors outside the knowledge of the purchaser under both the estoppel and voidable title principles, the good faith purchaser seemed able to prevail only through luck or clairvoyance.

Entrusting

If the good faith purchaser lost under both the voidable title and estoppel principles, he was doomed to fail under the common law of entrusting as well. Essentially, the entrusting doctrine provided that an owner who delivered goods to a merchant in goods of that kind, without placing any effective restrictions on the merchant's ability to resell, would not be permitted to complain if the merchant transferred the goods and title to a subsequent good faith purchaser.¹²¹ When an entrustment was found, courts presumed that the owner intended "to transfer at least one element of title, the right to resell."¹²² Lord Ellenborough first enunciated the rationale underlying this principle in 1812 in well-known dicta:

118. See generally *The Good Faith Purchase of Goods*, *supra* note 42, at 688-90.

119. See 17 U. BUFFALO L. REV. 865, 872 (1968) and the cases cited therein.

120. *E.g.*, Griffith v. Fowler, 18 Vt. 390 (1846). But cf. Pickard v. Sears, 6 Adm. & Eccl. 469, —, 112 Eng. Rep. 179, 181 (K.B. 1837) (seller, "in standing by and giving a kind of sanction to the execution," caused buyer at sheriff's sale to rely on his conduct and thus was estopped to complain).

121. Lord Ellenborough first stated the concept of entrusting as follows:

If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, *it must be intended that the commodity was sent thither for the purpose of sale*. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way, and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe.

Pickering v. Busk, 15 East 38, 43, 104 Eng. Rep. 758, 760-61 (K.B. 1812) (emphasis supplied).

122. *The "Cash Sale" Presumption*, *supra* note 6, at 103 (footnote omitted).

*Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority It is clear that [a broker] may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not.*¹²³

The entrustment principle, then, derived not only from the authority aspect of estoppel, but also from the court's new-found recognition of both the innocent purchaser's position in the tripartite transaction and the significance of transfer of title to the general commercial scheme.

In England the entrusting concept was embodied to some degree in the law of the market overt,¹²⁴ which protected those who purchased in the ordinary course of business from recognized dealers.¹²⁵ Courts in the United States, on the other hand, rejected the market overt or entrusting principle outright,¹²⁶ although they used it beneficially to some extent to define indicia of title in estoppel cases.¹²⁷

123. 15 East at 43, 104 Eng. Rep. at 760 (emphasis supplied).

124. The Sale of Goods Act, 1893, 56 Vict., c. 71, § 22 (1893) provided that "[w]here goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller." Blackstone explained the law as follows:

But property may also in some cases be transferred by sale, though the vendor has none at all in the goods, for it is expedient, that the buyer, by taking proper precautions, may be secure of his purchase, otherwise commerce would soon end. Hence the rule of law is, that all sales and contracts of things vendible in fairs or markets *overt*, that is, open, shall not only be good between the parties, but also binding on all those, who have any right to property therein.

2 W. BLACKSTONE, COMMENTARIES 372 (Browne's ed. 1897).

125. Blackstone offered the following definition and explanation of market overt: Market *overt* in this country is only held on special days, provided by charter or prescription for particular towns, but in London, everyday, except Sunday, is market-day, and every store in which goods are publicly exposed for sale, is market *overt*, for such things only as the owner professes to trade in.

Id.

126. *E.g.*, *Ventress v. Smith*, 35 U.S. (10 Pet.) 161, 176 (1836); *Griffith v. Fowler*, 18 Vt. 390, 393 (1846).

127. *See, e.g.*, *Dresher v. Roy Wilmeth Co.*, 118 Ind. App. 542, 82 N.E.2d 260 (1948). *See also* notes 103 & 104 *supra* & accompanying text.

For the most part, however, American courts adhered to the maxim that mere possession by a dealer in such goods provided no assurance of title on which a good faith purchaser justifiably might rely.¹²⁸ Nonetheless, to the extent that the courts applied the entrusting principle, however begrudgingly, it lent some logic to an otherwise irrational area of the law.¹²⁹

STATUTORY BACKGROUND

The Uniform Sales Act

The first statute to preempt part of this intermediate area of the common law was the 1906 Uniform Sales Act.¹³⁰ It codified a substantial portion of the common law of voidable title, providing in section 24 that a seller with a voidable title could transfer a good title to a good faith purchaser.¹³¹ Significantly, however, the Act failed to define voidable title, leaving the common law as controlling and sanctioning the illogical distinctions embodied in the impersonation cases.¹³²

At least arguably, section 19 of the Act changed the common law cash-sale presumption; absent an agreement, the Act presumed that the parties intended title to pass at the time they contracted for sale, whether for cash or credit.¹³³ Unfortunately, however, sec-

128. Cf. *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953) (lapse of time, usage of trade, and past similar transactions between parties in addition to entrustment to dealer held sufficient to estop owner from claiming title as against good faith purchaser for value).

129. The entrusting concept was later incorporated in the Uniform Commercial Code. U.C.C. § 2-403(2)-(3). Professor Brown contends that this section essentially codifies Lord Ellenborough's famous dicta quoted *supra* in notes 121 & 123 & accompanying text. R. BROWN, *supra* note 6, § 9.7, at 204.

130. The Act was approved in 1906 by the National Conference of Commissioners on Uniform State Laws.

131. Section 24 of the Act provided:

Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

UNIFORM SALES ACT § 24.

132. Section 73 of the Act stated:

In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to . . . the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Id.

133. Section 19, Rule 1, of the Act specified:

tion 42, concerning the duties of the contracting parties, provided, "Unless otherwise agreed, the delivery of the goods and the payment of the price are concurrent conditions."¹³⁴ By misapplying section 42 and ignoring section 19, some courts reinstated the common law cash-sale presumption.¹³⁵ In addition, section 23 of the Act codified the common law of transfer of title: the purchaser's failure to gain any title from a thief, estoppel of a transferor by his own conduct, and the loss of title by an owner in an entrusting situation.¹³⁶ Thus, except for a moderately successful attempt to modify that part of the common law relating to cash sales, the Uniform Sales Act left the intermediate area of the common law unchanged.

Legislative History of U.C.C. § 2-403

The Uniform Commercial Code then intervened into the transfer-of-title morass created by the common law and continued by the Uniform Sales Act. Although the drafters failed to specify their goals for section 2-403, they expressed the overall purpose of the Code in section 1-102. Section 1-102 indicates, in part, an intent "(1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties;

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Id. (emphasis supplied).

134. *Id.* § 42. Section 42 provided further:

[T]hat is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Id.

135. See *The "Cash Sale" Presumption*, *supra* note 6, at 101-03. The author added that "such an interpretation of the Act is absurd." *Id.* and the cases cited therein. See also L. VOLD, *supra* note 17, § 30, at 162 (interpreting § 19 to have changed the common law cash-sale presumption).

136. Section 23 provided in part:

(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, *unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.*

UNIFORM SALES ACT § 23 (emphasis supplied). The Act did not specify under what circumstances the owner was precluded; thus, it must be assumed that both the common law of estoppel and of entrusting retained validity. See notes 26 & 132 *supra*.

[and] (3) to make uniform the law among the various jurisdictions.”¹³⁷ This provision comprises a part of the actual law; therefore, its dictates are of primary significance, and section 2-403 must be interpreted pursuant to the express goals stated in section 1-102. Section 1-102, however, states only a broad statutory purpose that fails to resolve the ambiguities of section 2-403. Thus, secondary materials and other parts of the Code must supply the basis for any interpretation of the legislators’ intent. Useful sources include early drafts of the section, the New York Law Revision Commission’s suggested revisions, the Code comments, and analogous Code provisions.

The 1952 version was the first draft of the Code enacted by a state legislature.¹³⁸ It contained a section 2-403(1) dealing with voidable title, which restated substantially the Uniform Sales Act’s section 23.¹³⁹ The provision read, “A person with voidable title has power to transfer a good title to a good faith purchaser for value.”¹⁴⁰ Like the Uniform Sales Act, it failed to define voidable title and thus codified the common law. In addition, although section 2-401(1)(b) provided that “no agreement that a contract for sale is a ‘cash sale’ alters the effect of identification or impairs the rights of good faith purchasers from the buyer,”¹⁴¹ section 2-403 failed to address the cash-sale issue at all. Both of these omissions from section 2-403 evidently troubled the New York Law Revision Commission, whose members recommended in 1956 that the Code be shelved until further revision.¹⁴² The Commission proposed a supplemental section, which provided:

When a transferor has a right to recover goods from a transferee, the transferee’s title shall be deemed to be voidable rather

137. U.C.C. § 1-102. Comment 1 to this section provides further:

The Act should be construed in accordance with its underlying purposes and policies. *The text of each section should be read in light of the purpose and policy of the rule or principle in question*, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

Id. (emphasis supplied).

138. PA. STAT. ANN. tit. 12A (Purdon 1954).

139. See note 136 *supra* & accompanying text.

140. U.C.C. § 2-403(1) (1952).

141. *Id.*

142. REPORT OF THE NEW YORK LAW REVISION COMMISSION RELATING TO THE UNIFORM COMMERCIAL CODE, Appendix IV (Excerpts from the Proceedings of the Commission), at 355-485 (1956).

than void if the transferor delivered the goods to the transferee pursuant to a transaction *intended by the transferor to transfer ownership in the goods*. This rule includes but is not limited to cases where

(a) the transferor is deceived as to the identity of the transferee, or

(b) the transferor delivers the goods in exchange for a check which is not collected because of insufficient funds;

(c) the delivery of the goods is procured through fraud punishable as larcenous under the criminal law.¹⁴³

According to the Commission, the recommended provision was intended "to deal with the question whether the buyer has 'voidable title,' . . . in certain cases, including the case where seller has a right to recover goods paid for by a check which is not paid."¹⁴⁴

This commendable suggestion represents the only recorded attempt to define statutorily the voidable title concept. Unfortunately, it suffered from at least one fatal imperfection. Contrary to the expressed intent of Karl N. Llewellyn, the chief reporter for the Code, and others involved in the drafting process, the recommendation once again attempted to make the transfer of title dependent on the presumed intent of the original owner.¹⁴⁵ Although they rejected the proposed revision, the Code drafters did incorporate several of its most significant features into the current section 2-403. In addition, the Commission's extended deliberations precipitated a significant policy statement by Llewellyn on the result intended by the codification of voidable title. Referring to the fear that rights of purchasers would be preferred under the Code over those of prior owners, Llewellyn acknowledged that preference in his testimony: "The choice is hard, and it gives little satisfaction, either way; but the Code's choice fits more comfortably into the whole body of our commercial law."¹⁴⁶ Llewellyn's statement and the proposed revision itself represent the only legislative history available from the Commission's hearings on section 2-403.

143. *Id.* at 383.

144. *Id.*

145. Many commentators judge harshly this practice of basing important property rights and duties on a concept of title that is in turn rooted in the presumed and often nonexistent intent of the original owner. *E.g.*, Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U.L. REV. 159 (1938).

146. REPORT OF THE NEW YORK LAW REVISION COMMISSION RELATING TO THE UNIFORM COMMERCIAL CODE 123 (1954).

The comments promulgated by the National Conference of Commissioners on Uniform State Laws, which follow each provision in the current version of the Code, provide a second source of legislative intent. These comments "set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction."¹⁴⁷ It is unclear, however, whether the comments serve as authority for interpreting legislative intent. To begin with, most jurisdictions chose not to enact the comments as part of their statutory law. In addition, at least one commentator characterized the comments as inaccurate and outdated.¹⁴⁸ Certainly, if the language of a particular Code section conflicts with its accompanying comment, the comment must yield, and the text controls.¹⁴⁹ The official comments to section 2-403 offer only vague notions of policy and purpose and thus provide few useful guidelines for judicial application of section 2-403.

The final secondary source of legislative intent is analogies to Code provisions that treat similar problems successfully. Analogous provisions are important because they reflect trends in legislative thinking that often affect judicial attitudes toward similar problems. Fortunately, a counterpart provision to section 2-403 is available in section 3-405, which deals with the transfer of commercial paper.¹⁵⁰ To the extent that the sale of goods resembles the transfer

147. U.C.C. at XV.

148. Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 809 (1958) (quoting ALI & NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 3 (1957)).

149. Section 1-102 of the 1952 version stated that "[t]he Comments . . . may be consulted . . . but if text and comment conflict, text controls." U.C.C. § 1-102(3)(f) (1952 version). This language was deleted before the 1957 version was published because "the old comments were clearly out of date." *Id.* Comment.

150. Section 3-405 provides:

(1) An indorsement by any person in the name of a named payee is effective if

(a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or

(b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall alter the criminal or civil liability of the person so indorsing.

U.C.C. § 3-405.

of commercial paper, comment 2 to section 3-405 furnishes a provocative blueprint for eliminating the illogical distinctions that comprise the concept of voidable title. The comment provides:

Subsection (1)(a) is new. It rejects decisions which distinguish between face-to-face imposture and imposture by mail and hold that where the parties deal by mail the dominant intent of the drawer is to deal with the name rather than with the person so that the resulting instrument may be negotiated only by indorsement of the payee whose name has been taken in vain. The result of the distinction has been under some prior law, to throw the loss in the mail imposture forward to a subsequent holder or to the drawee. Since the maker or drawer believes the two to be one and the same, the two intentions cannot be separated, and the "dominant intent" is a fiction. The position here taken is that the loss, regardless of the type of fraud which the particular impostor has committed, should fall upon the maker or drawer.¹⁵¹

The usefulness of this analogy in reflecting legislative intent in enacting 2-403 depends on the similarity of transactions in goods and commercial paper. If the two situations are almost parallel, the elimination of distinctions in one strongly suggests a similar result in the other.¹⁵² All these interpretive aids, however, only provide insight into how to apply section 2-403 to the extent that they are reflected in the syntax of the section. Therefore, each source of legislative intent must be evaluated in light of the express language of the Code, which serves as the foundation for the rights and duties now extant in the intermediate area.

THE CURRENT CODE DEFINITION OF VOIDABLE TITLE (CASE I)

The first part of section 2-403(1) provides that "[a] purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased."¹⁵³ This sentence, in both the 1952 and the current versions of the Code, restates the common law maxim that even a good faith purchaser from one who obtains goods by theft acquires no rights in the goods superior to

151. *Id.* Comment 2.

152. *Contra*, *Miller v. Race*, 1 Burr 452, 96 Eng. Rep. 1151 (K.B. 1758), in which Lord Mansfield argued, "[B]ut the fallacy lies in comparing the note to things substantially different: it is [not] goods."

153. U.C.C. § 2-403(1).

those of the original owner.¹⁵⁴ In addition, the provision allows a purchaser to acquire all the interest that his transferor "had power to transfer." This phrase indicates that, as against anyone other than the original owner, the good faith purchaser from a thief retains only a limited possessory interest, which is all his transferor had. More importantly, the language suggests the existence of exceptions to the general rule. For example, if the court decides that the original owner is estopped from asserting his rights as against a good faith purchaser, it also in effect determines that the wrongdoer at least at one point had the power to transfer a good title to that good faith purchaser.

Although the first sentence does not mention the estoppel principle explicitly, such an interpretation is reasonable in light of several sources of legislative intent. First, as early as 1955, the New York Law Revision Commission reached a similar conclusion as to the syntax of the 1952 provision.¹⁵⁵ Second, the comments to section 2-403 state its purpose as "[t]o gather together a series of prior uniform statutory provisions and the case-law thereunder and to state a unified and simplified policy on good faith purchase of goods."¹⁵⁶ Among these uniform statutes was section 23 of the Uniform Sales Act, which dealt with estoppel. Third, the first clause of section 2-403, like its remaining portions, should be interpreted according to the expressed purpose of the drafters. As stated earlier, that purpose is reflected in Karl Llewellyn's admission that the Code defended purchasers against prior owners.¹⁵⁷ The New York Law Revision Commission also observed that "[t]he principal thrust of the section is towards strengthening the rights of purchasers as against prior owners."¹⁵⁸

The second part of section 2-403(1) provides:

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

154. See R. BROWN, *supra* note 6.

155. 1 REPORT OF THE NEW YORK LAW REVISION COMMISSION RELATING TO THE UNIFORM COMMERCIAL CODE 455 (1955).

156. U.C.C. § 2-403, Comment.

157. See text accompanying note 146 *supra*.

158. 1 REPORT OF THE NEW YORK LAW REVISION COMMISSION RELATING TO THE UNIFORM COMMERCIAL CODE 454 (1955).

- (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.¹⁵⁹

Although they rejected the New York Law Revision Commission's proposed revision,¹⁶⁰ which defined voidable title, the drafters conspicuously failed to adopt any other definition. Instead, the second part of section 2-403(1) simply mirrors the common law consequence that one who obtains a voidable title acquires a vague, undefined power to transfer a better title than he has, without specifying under what circumstances a purchaser acquires a voidable title. Courts and commentators, however, should resist fiercely any effort to fill this void with the common law principles of voidable title. Section 2-403, in attempting drastic changes in the statement of the common law in the intermediate area, impliedly rejects any resort to the common law definitions of voidable title. Sentence three of section 2-403(1) sets out four circumstances under which a purchaser who does not acquire voidable title can still transfer better title than he has. The grammatical structure of this sentence denotes four exceptions to the general rule in addition to the voidable title exceptions. Consequently, the third sentence in effect defines what circumstances *do not* convey voidable title, but which do confer upon a wrongdoer a power akin to voidable title. Section 2-403, then, yields the same result for these four subdivisions as for the voidable-title case: the power to transfer a good title to a good faith purchaser for value. The first of the four subsections grants such power to a purchaser even though the transferor is deceived as to his identity. Most commentators have concluded from all the sources of legislative intent that the drafters promulgated this clause solely to eliminate the meaningless distinctions in the impersonation area of common law voidable title.¹⁶¹ Many of the situations governed by the four subsections, however, would not be affected if the Code definition of

159. U.C.C. § 2-403(1).

160. Weber, *supra* note 60, at 450.

161. *E.g.*, *The Good Faith Purchase of Goods*, *supra* note 42, at 682-83.

"purchase" as any transfer creating an interest in property¹⁶² is read strictly. For example, a sale to one who impersonates by mail creates no interest in property and, hence, no purchase occurs. Read in this manner, this subsection arguably does not change the result that obtained under the common law. If, on the other hand, giving a broad reading to "purchase", a mere possessory interest satisfied the Code definition, then this subsection would eliminate the common law distinctions between face-to-face fraudulent impersonation and that carried out by mail. Even read this broadly, however, the Code still would maintain the distinction between these two types of impersonation and the pretended-agent cases because this subsection only confers the power to transfer a good title if the transferor is deceived as to the identity of the purchaser, not the purchaser's principal.

The dilemma over how to read the Code definition of "purchase" is inescapable. If a strict reading is given to the word, the changes wrought by section 2-403(1) are eliminated, and the common law survives. The overall Code purpose clearly was to reform the common law in this area. On the other hand, a broad reading of purchase to include the delivery of a mere possessory interest would substantially revise the common law of voidable title, as intended, but would leave section 2-403(2), the entrusting provision, contributing nothing to the section; one should not presume that legislators intend to create superfluous provisions.

The best explanation seems to be that in adding the four exceptions to section 2-403(1), the drafters forgot to revise the definition of "purchase", thus in effect negating their own additions. Several other factors indicate that the draftsmen desired to expand rather than to merely maintain the protection offered good faith purchasers. First, this interpretation is consistent with the Code's general policy of promoting uniformity in the laws of the various states. Second, in rejecting the New York Law Revision Commission's recommended addition, the drafters evinced a distaste for the use of the owner's intent as the guiding factor in transfer-of-title cases. To reinstate the impersonation distinctions would directly contradict this preference. Third, as stated earlier, the fact that the drafters did not revise the definition of "purchase" when they amended

162. Section 1-201 defines a purchase as follows: "'Purchase' includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction *creating an interest in property.*" U.C.C. § 1-201(32) (emphasis supplied).

section 2-403(1)¹⁶³ indicates that the inconsistency resulted from oversight rather than design. Fourth, by retaining substantially intact the three subdivisions in the New York Law Revision Commission's suggested change, the Code drafters showed their desire to adopt the Commission's rationale and abolish the impersonation distinctions. Fifth, the adoption of section 3-405 on the transfer of commercial paper demonstrated a trend toward greater transferability of title and indicated the contempt felt by the drafters toward distinctions of this sort. Finally, comment 1 to section 2-403 makes explicit the Code's policy of offering even further protection to the good faith purchaser: "The basic policy of our law allowing transfer of such title as the transferor has is generally *continued and expanded under subsection (1).*"¹⁶⁴

In addition to the first subsection's protection of the innocent purchaser in impersonation cases, the other subsections further protect the purchaser when he is unable to ascertain whether his transferor took possession under a cash-sale agreement, in exchange for a bad check, or in contravention of the law of criminal fraud. These provisions also suffer if a strict reading is given to the Code definition of "purchase", but such a reading should be rejected, as stated earlier, because it would defeat legislative intent and render all four subsections superfluous.

Assuming that section 2-403 does protect the good faith purchaser who acquires possession under these subsections, the main question remains under what circumstances a transferee acquires a voidable title under the Code. The subsections designate those situations that no longer constitute voidable title; previously these same transactions defined the common law area of voidable title. Thus, paradoxically, the exceptions swallowed the rule, and section 2-403 voided the previous situations of voidable title without explaining what, if anything, gives rise to voidable title under the Code.

Application of Section 2-403(1) (Case I) by the Courts

According to one commentator, section 2-403(1) provides its own methodology for resolving disputes that arise in what was formerly a voidable title context.¹⁶⁵ The court initially determines whether a

163. Compare U.C.C. § 1-201 (1978) with *id.* § 1-201 (1952).

164. U.C.C. § 2-403, Comment 1 (emphasis supplied).

165. 17 U. BUFFALO L. REV. 865, 874-75 (1968).

transferee qualifies as a good faith purchaser for value.¹⁶⁶ Next, it decides whether the transferor possesses the power to transfer a good title. This methodology further requires a judicial statement of meaningful standards for ascertaining the types of factual situations in which voidable title is granted; unfortunately, not all courts promulgate such guidelines.¹⁶⁷ A study of 114 cases dealing with section 2-403 decided since 1960¹⁶⁸ is convincing evidence that litigants, students, advocates, and perhaps even judges would benefit enormously if such a methodology were mandated by statute. Only three of fifty-four reported cases applying section 2-403(1)'s voidable title concept since 1960¹⁶⁹ attempted to define, even superficially, the principle employed in the decisions.¹⁷⁰ In the overwhelming majority of cases, the judges merely recited the facts, quoted from the Code, and then announced the winner. This lack of analysis in the many decisions applying section 2-403 makes any detailed discussion of the cases impossible. This Note, therefore, merely catalogues the results and discusses a few of the more provocative decisions.

Not surprisingly, courts have held uniformly that, pursuant to section 2-403(1), a thief still can transfer nothing more than a void title.¹⁷¹ Due to the Code's elimination of common law voidable title,

166. Section 1-201 provides the following definitions: "(19) 'Good Faith' means honesty in fact in the conduct or transaction concerned; . . . (33) 'Purchaser' means a person who takes by purchase; . . . (44) 'Value' . . . [A] person gives 'value' for rights if he acquires them . . . (d) generally, in return for any consideration sufficient to support a simple contract."

167. 17 U. BUFFALO L. REV. 865, 875 (1968).

168. The study included all cases purporting to apply § 2-403 that were listed in the U.C.C. Reporter Service.

169. Only 54 out of 114 cases dealt with the § 2-403(1) voidable title principle. The rest concerned the entrusting provision in § 2-403(2).

170. *E.g.*, *Schrier v. Home Indemnity Co.*, 273 A.2d 248, 250, 8 U.C.C. Rep. 688, 691 (D.C. Ct. App. 1971) ("In the context of the commercial code, however, the principle of voidable title refers to persons who have been entrusted with the possession of the goods they sell by consignors, creditors with unrecorded security interests, and certain other kinds of bailors."); *Stratton v. Sale Barn, Inc.*, 28 Agric. Dec. 677 (1969) ("Complainant as a defrauded seller retained an equitable right of rescission which it could exercise against anyone but a bona fide purchaser for value without notice."); *Lane v. Honeycutt*, 14 N.C. App. 436, —, 188 S.E.2d 604, 605 (1972) ("2-403 . . . now allows the vendee in such a transaction to transfer a good title to a 'good faith purchaser for value,' but the court found that the defendant-buyer did not fit that definition).

171. *E.g.*, *Schrier v. Home Indemnity Co.*, 273 A.2d 248, 250 (D.C. Ct. App. 1971) (a possessor of stolen goods, no matter how innocently acquired, can never transfer good title); *Lieber v. Mohawk Arms, Inc.*, 206 Misc. 2d 206, 208, 314 N.Y.S.2d 510, 512 (App. Div. 1970) ("The defendant, despite its good faith, has no title since its possession is derived from a thief."); *P.R. Autos, Inc. v. Truelson Motors, Inc.*, —, N.Y.S.2d —, 6 U.C.C. Rep. 672,

courts are not bound and therefore could extend protection to good faith purchasers, even to those buying from thieves. Instead, they have reverted to the old policy of protecting the original owner. In *McDonald's Chevrolet, Inc. v. Johnson*,¹⁷² for example, W.A. Andres leased a mobile home for a thirteen-day rental period to an individual who later attained the status of a wrongdoer. At the end of the lease period, the wrongdoer sold the home to McDonald, a dealer in mobile homes, who purchased in good faith and who subsequently transferred possession to Johnson, a nonmerchant good faith purchaser for value. After the original owner regained possession of his property, this dispute ensued.¹⁷³ Without defining voidable title and without considering the possible relevance of the section 2-403(2) entrusting provision, the court merely quoted from the Code and awarded the value of the home to Johnson because McDonald has breached his warranty of good title. McDonald did not get good or even voidable title from the wrongdoer and thus could transfer none to Johnson. The court reasoned that the wrongdoer obtained an undefined voidable title when he first leased the mobile home, but his voidable title expired with the thirteen-day rental period, after which he could not transfer any title.¹⁷⁴

Lack of analysis was only one of several major flaws in this decision. Without defining voidable title, the court determined quite readily that voidable title becomes void immediately on the expiration of a thirteen-day rental period. Failing to consider either the intent of the legislators or the equities of the parties before it, the court read the first sentence of section 2-403(1) without examining its relation to the whole scheme of the Code.

Thus, even under the Code, common law estoppel provisions have continued to serve as a judicial safety valve for protecting good faith purchasers who fail to meet the requirements of any of the statutorily created voidable title exceptions.¹⁷⁵ Significantly, however, courts have failed to design any new voidable title situations to

673 (Sup. Ct. 1969) ("The owner of the car did nothing to give voidable title to the thief or any later purchaser.").

172. ____ Ind. App. ____, 376 N.E.2d 106 (1978).

173. *Id.* at ____, 376 N.E.2d at 107-08.

174. *Id.* at ____, 376 N.E.2d at 109-10.

175. See, e.g., *Tumber v. Automation Design & Mfg. Corp.*, 130 N.J. Super. 5, 324 A.2d 602 (1974) (good faith buyer won, but entrusting provisions gave way to common law of estoppel because seller did not qualify as a merchant who dealt in goods of the kind in question).

replace the common law cases absorbed by the third sentence in section 2-403; nor have they confronted the impersonation issue, thus leaving a major ambiguity in the Code unresolved.

THE CURRENT CODE ENTRUSTING PROVISION (CASE II)

Section 2-403(2) sets out the entrusting provisions of the Code: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."¹⁷⁶ This part of the Code adopts substantially Lord Ellenborough's statement of the entrusting concept, quoted previously.¹⁷⁷ The all-inclusive "[a]ny" of this provision indicates that in a case involving both an entrusting and a commercial transaction,¹⁷⁸ this provision supersedes not only the common law voidable title exception, but also all other parts of section 2-403. Nonetheless, the buyer's right to protection of the potentially good title he gains in a commercial transaction is limited in at least three ways by section 2-403's entrusting provisions.

First, the entrusting of possession must meet the definition in section 2-403(3):

"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.¹⁷⁹

Thus, any voluntary transfer of possession by the original owner, regardless of his intent, is an entrusting; it includes, but is not limited to, any "purchase" as defined by section 1-201(33).¹⁸⁰ Therefore, no transfer of title, voidable or otherwise, is required. For example, although a bailment does not qualify as a purchase under the Code, it does constitute an entrusting within the reach of section 2-403(3). Once a voluntary transfer of possession occurs, the original

176. U.C.C. § 2-403(2).

177. See notes 121 & 123 *supra* & accompanying text.

178. For the purposes of this paper, a commercial transaction is one in which the seller is a merchant dealing in goods of the kind that the buyer seeks to acquire.

179. U.C.C. § 2-403(3).

180. See note 162 *supra*.

owner must acquiesce in the merchant's continuing retention of possession. Unfortunately, the Code's failure to define acquiescence creates an ambiguity. For example, it is not clear whether a mere letter of disapproval to the merchant in possession cuts off the merchant's power to transfer the rights of the entruster pursuant to section 2-403(2).¹⁸¹ Clearly, however, the entruster's right to reclaim the property before a subsequent purchase occurs acts as an implicit limit on the merchant-entrustee's power to transfer all of the rights of the entruster. Absent exercise by the owner of this right to reclaim, however, the merchant-entrustee enjoys a variant of voidable title, even though he may have no interest or title of his own in the goods.

The second limit on the buyer's protection under 2-403(2) is that his title depends on whether the entruster possesses a good title to begin with. Unlike the voidable title portions of section 2-403, this provisions grants the merchant the power to transfer only the rights of the entruster. Therefore, if a thief entrusts goods, the merchant can transfer only the void title of the thief-entruster. On the other hand, if an entruster possesses the power to transfer a good title to a good faith purchaser for value, the merchant to whom he entrusts can transfer that power, but not good title itself because that power represents all the rights the entruster has in the property.

Third, the shield afforded the buyer's property rights also is limited by his own status: unless he qualifies as a buyer in the ordinary course of business, he does not receive the protection of section 2-403(2).¹⁸² Such a buyer approximates the good faith purchaser because both must transact in good faith and give value for what they receive. Nevertheless, they differ significantly in several respects. For example, pursuant to section 1-201(9), a pawnbroker never

181. Such a letter does not constitute a conditional agreement between the parties because it occurs long after the entrusting takes place.

182. Section 1-201(9) defines the term as follows:

"Buyer in ordinary course of business" means a person 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* "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but *does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt*.

U.C.C. § 1-201(9) (emphasis supplied).

qualifies as a buyer in the ordinary course of business,¹⁸³ even if he purchases in good faith and for value. In addition, a purchaser who receives goods in satisfaction of a prior obligation can be a good faith purchaser under 2-403(1), but not a buyer under 2-403(2). Although the section 1-201(44) definition of "value" includes the settlement of antecedent debts,¹⁸⁴ the definition of buying in section 1-201(9) does not encompass receiving goods as security for or in satisfaction of a money debt.¹⁸⁵

THE DIFFERING TREATMENT OF CASE I AND CASE II

Possible Policy Considerations

The drafters' decision to differentiate between noncommercial voidable title transactions (Case I) and commercial entrusting transactions (Case II) is not explained in the Code's comments. Nevertheless, a study of the common law background and general purposes of the Code suggests several possible policy considerations underlying this differing treatment.

The common law experience demonstrates the need for clarity so that each innocent party, understanding the rule involved and its consequences, can modify his conduct accordingly. If, for example, the original owner knows that he always bears the risk of theft, fraud, or other conversion, he can modify his conduct taking precautions to prevent such events, by questioning more diligently the trustworthiness of those to whom he transfers possession of his goods, or, if he operates a business, insuring against the expected loss by raising the price of his merchandise to compensate. Conversely, if the purchaser knows that he always bears the loss, he can alter his behavior by purchasing fewer goods in order to retain the funds necessary to compensate himself in the event of a loss, by inquiring more carefully into the title of his transferor, or, if he is a merchant, he can cover the risk by increasing the price of his products when he resells. If, on the other hand, the rule differentiates according to the setting of the purchase by providing that one who purchases in a commercial transaction always acquires a good title, the purchaser need only restrict his purchases to commercial deals

183. See note 182 *supra*.

184. U.C.C. § 1-201(44)(b).

185. See note 182 *supra*.

in order to protect himself.

Other policy considerations also may have influenced the drafters. The differentiation between Case I and Case II may derive from the Code's general policy of discriminating between merchants and nonmerchants. As they did with warranty, risk of loss, and good faith, the drafters of the Code perhaps intended to place a heavy burden on a merchant, whether owner or purchaser, who involved himself in a tripartite sales transaction to the detriment of a consumer. This policy, in turn, may be rooted in a desire to shift the burden of loss to that party, either the owner or the purchaser, who is better able to spread the risk. Additionally, the Code was designed as an instrument for resolving commercial disputes, partly through fostering the free flow of goods, which may explain why the owner is given more protection in noncommercial voidable title transactions than in commercial entrusting sales. Finally, the fact that the third sentence of section 2-403(1) was not added until many years after the adoption of the entrusting provision may indicate a belated attempt by the drafters to remove the impersonation distinctions, at least from the commercial context.

Achieving Code Policies

To assess the Code's effectiveness in achieving the preceding policy considerations, four factual variations are set forth. All four variations are posed first in the context of a Case I noncommercial sale, in which the policy of facilitating the free flow of commerce plays no role, and then in the context of a Case II commercial transaction.

In the first hypothetical a merchant-owner transfers to a nonmerchant-wrongdoer, who in turn transfers to a merchant-purchaser. Assuming section 2-403 standards are met, the merchant-purchaser acquires a good title. This outcome satisfies only the first policy consideration: both the merchant-owner and the merchant-purchaser can fashion their conduct according to a fixed, certain outcome. Nonetheless, because both parties are merchants, the result does not carry out the policy of forcing the merchant to bear the risk so as to shift the burden to the party better able to insure against loss. Moreover, if the nonmerchant-wrongdoer obtains possession of the goods through an impersonation by mail and the court applies a strict reading of section 2-403(1), the merchant-owner wins, an outcome that fails to satisfy any of the policy consid-

erations. The same results obtain if both the original owner and the good faith purchaser are consumers, the second hypothetical case.

Under the third setting a nonmerchant-owner transfers to a nonmerchant-wrongdoer, who transfers to a merchant-purchaser. Assuming once again that the initial deal meets the requirements of section 2-403(1), the merchant-purchaser wins, a result that carries out the certainty policy. Unfortunately, the outcome does not further the policy of forcing the merchant-litigant to bear the risk. In addition, if the court reintroduces the impersonation distinctions based on the owner's intent, even the certainty policy fails. Clearly, then, in a noncommercial transaction such as this third hypothetical, satisfaction of a maximum number of policy considerations requires the court to consider the competing equities and award title to the nonmerchant original owner.

Fortunately, in the fourth and final hypothetical, section 2-403 satisfies all but one of its policy objectives without the need for excessive judicial discretion. In the fourth scenerio a merchant-owner transfers to a nonmerchant-wrongdoer, who then sells to a nonmerchant-purchaser. Under a liberal reading of section 2-403, the consumer-purchaser obtains title. This result correctly places the risk of loss on the merchant-owner, an outcome both parties can anticipate with certainty. But a strict reading of section 2-403(1) when an impersonating agent or an impersonation by mail is involved leads to a result that negates all of the policy objectives: the merchant-owner recovers from the nonmerchant purchaser.

Some generalizations about section 2-403(1) are possible from the foregoing analysis. First, to the extent that the impersonation distinctions have survived, section 2-403 fails to satisfy any of the listed policies. If the drafters intended to eliminate these distinctions, they should amend the section. Until they clarify this issue, the transfer-of-title area remains disconcertingly confused. Second, because section 2-403(1) was designed to deal with noncommercial transactions,¹⁸⁶ it should provide for judicial consideration of com-

186. Warren, *supra* note 9, at 477-78. The author comments,

Professor Gilmore suggests that the voidable title-no title distinction developed as a means of protecting buyers in commercial situations. If he is correct, it is irony indeed that the role left to the voidable title concept by the Code appears to be virtually restricted to noncommercial situations. This results from the fact that *the entrusting provisions of section 2-403(2) and (3) have swallowed up the commercial voidable title cases where the voidable title holder is a merchant*

peting equities, such as whether either or both of the litigants are merchants and which party is better able to spread the risk. Finally, although section 2-403(1) presumably covers only noncommercial voidable title controversies, a litigant who fails to meet the strict entrusting provision requirements of section 2-403(2) may succeed in having the court apply the section 2-403(1) voidable title theory to his commercial transaction. For example, a pawnbroker who buys in good faith from a merchant can argue that although he does not qualify as a part 2 buyer in the ordinary course of business, he satisfies the standards for a good faith purchaser for value applicable to part 1. Hence, he might recover under the section 2-403 voidable title provision meant for noncommercial transactions, even though he is expressly precluded from recovering under the entrusting provisions of that same section. Similarly, a purchaser who pays by cancelling a preexisting debt, denied recovery under the entrusting provision, may prevail using the voidable title clause. The drafters should explain which provision governs each situation to avoid the confusion and uncertainty of these apparent loopholes.

Case II, the commercial entrusting provision, also benefits from an analysis of the outcome of each of the four hypotheticals. Every case that qualifies under the entrusting clause involves a merchant middleman; therefore, the policy of fostering the free flow of commerce is highly relevant in each of the following discussions. Conversely, the policy of eliminating the impersonation distinctions is irrelevant because this provision applies to "[a]ny" entrusting of possession, however induced.

The result in the first hypothetical, involving a merchant-owner and a merchant-purchaser, satisfies the same policy objectives as the outcome of the second hypothetical, in which both the original owner and the subsequent purchaser qualify as nonmerchant-consumers. In both situations the purchaser, whether a merchant or a consumer, prevails, thereby furthering the policy of certainty as well as the goal of facilitating commercial activity. The policy of forcing the merchant to bear the risk is inapplicable to either hypo-

and the good faith purchaser is a buyer in ordinary course of business. Thus the voidable title provisions of section 2-403(1) will be determinative only in cases where the voidable title holder was not a merchant or the buyer was not a buyer in ordinary course of business.

Id. (emphasis supplied) (footnote omitted).

thetical because in each the disputants enjoy the same status, be it merchant or nonmerchant.

In the third hypothetical, in which a nonmerchant-entruster transfers to a merchant-wrongdoer, who then transfers to a merchant-purchaser, the purchaser again prevails. This outcome satisfies not only the policy of predictability, but also that of fostering trade, because the purchaser need not restrict his purchases to retain funds to insure against loss. To the extent that society favors the objective of facilitating commerce over that of forcing the merchant to bear the risk of loss, this result satisfies public desires. The wishes of the people, however, presumably are embodied in the intent of their legislators; therefore, lawmakers should state explicitly which policy they favor. Unfortunately, little evidence exists of legislative preference for any particular policy.

The fourth factual variation typifies the everyday realities of the modern commercial setting.¹⁸⁷ This hypothetical has a merchant-owner entrusting goods to a merchant-wrongdoer, who then foists them off on an unsuspecting consumer-purchaser. The purchaser wins, and, once again, prevails in commercial transactions. The result also encourages trade and places the burden of loss on the party better able to insure against it. In sum, this hypothetical fits most closely the section 2-403 scheme. Here, in reality as well as in theory, the entrusting provision promotes all the policy objectives.

CONCLUSION

As applied in the final hypothetical, section 2-403 reflects the realities of the marketplace and vindicates its drafters. Unfortunately, not all of the intermediate-area contröversies fit so neatly into either the entrusting or the voidable title framework. The theft cases, for example, represent an important recurring flaw in the voidable title concept. In addition, uniform application of section 2-403 is impossible due to major, patent ambiguities that increase the uncertainty as to which policies the drafters intended to implement. The judiciary's inconsistent application of section 2-403 to complicated fact situations, with little or no attempt at analysis, only increases the confusion. In the final analysis, section 2-403

187. In 88% of the cases studied, the original owner was a merchant, a university, or the United States Government.

needs drastic and far-reaching revision following precise enunciation of carefully considered policy objectives.

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