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Seller vs. Secured Party: Searching for an Intangible Something

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This article will discuss the resolution of conflicting claims to goods between an unsecured seller of goods and a creditor of a buyer claiming under an after-acquired property clause. The problem is complicated by the lack of a coherent relationship among the rules of the Uniform Commercial Code[1] relevant to the problem. The U.C.C. has abandoned the concept of title in personal property,[2] but has failed to replace the concept with a comprehensive system that can definitively and convincingly resolve controversies arising out of conflicting claims.

The conceptualizations of the law are slow in building. Once constructed through years, sometimes centuries, of gradual additions, deletions and refinements, they become grand and wondrous examples of the working of the human intellect. One word becomes capable of representing volumes of interrelated ideas, capable of "bringing forth systematic, managable relationships out of what would otherwise be a 'buzzing, blooming confusion.'"[3] Such a concept-word is "title." As applied to personal property, the word represents ideas, relationships, rights and duties developed over at least 600 years of English and American law.[4]

During this lengthy period of development, the concept "title to personal property" became filled to the brim with connotations, denotations and implications which increased its usefulness to the law and lawyers as means of expressing a construct of ideas and relationships. But this very breadth of meaning and use in general made the concept increasingly useless as a tool to solve the specific problems to which it was applied. It

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1. Unless otherwise stated, all citations will be to the 1972 Official Text of the Code. Citations are made to the 1972 Code for convenience only; no differences in effect result from the application of the 1972 version or the 1962 version of the U.C.C.

2. U.C.C. §9-202 states: "Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor." See U.C.C. §2-401 and Helstand, *The Impact of the Uniform Commercial Code on Wisconsin Law*, 1964 WIS. L. REV. 355.

3. W. BISHIN & C. STONE, LAW, LANGUAGE AND ETHICS 186 (1972).

4. *See* definition of "title," OXFORD ENGLISH DICTIONARY.

is ironic that a concept, in becoming broad enough to be abstractly grand, became concretely endangered.

The drafters of the Uniform Commercial Code tucked "title to personal property" safely away in the museum reserved for retired legal concepts[5] and installed in its place a series of new words and phrases. Simple broad problems suitable for the application of broad concepts had been replaced, in the world of sales and security interests in personal property, by specific commercial problems with specific solutions. As the commercial economy grew, subdivided and specialized, the law grew, subdivided and specialized to deal with commercial reality. The concept "title to personal property" also needed to be subdivided and specialized along lines paralleling the use of the concept as applied to the specific situations it was required to serve.

The Uniform Commercial Code contains the results of the subdivision and reorganization of the central concept. The components of the concept make their appearance in a variety of Code sections, scattered throughout several articles, organized apparently to deal with specific commercial problems.[6] The result, however, is less than satisfactory — particularly when these components are called upon to work together to fulfill the function of the parent concept, that of unifying and generalizing the problem of ownership of goods.

The coming-together of the functional components of the title concept is best examined in the situation presented by conflicting claims of ownership between the seller of goods and the buyer's financier, who claims an interest in those goods as a secured party. The U.C.C., by not setting out a comprehensive scheme of ownership in personal property, leaves questions presented by this prototype situation open to varying and contradictory solutions that impair the very uniformity the Code was designed to bring to commercial transactions.[7]

I. THE CASES

Two recent decisions have treated the problem of priority between an

5. *See* Llewellyn, *Through Title to Contract and A Bit Beyond*, 15 N.Y.U. L.Q. 159, 170 (1938), and the discussion of Llewellyn's comments in the text accompanying note 89, *infra*.

6. "Among provisions which specifically declare rights, obligations or remedies without reference to title but which, under pre-Code law, often could be determined only after it had been decided who had title are: (a) sections 402.509 and 402.510 stating which party bears the risk of loss under various circumstances; (b) section 402.501 stating who has an insurable interest in the goods; (c) section 402.709 stating when the seller is entitled to the price; and (d) section 402.716 stating when the buyer is entitled to possession of the goods." Helstand, *The Impact of the Uniform Commercial Code on Wisconsin Law*, 1964 WIS. L. REV. at 362.

7. U.C.C. §1-102 states:

> (2) Underlying purpose and policies of this act are:
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> . . . .
>
> (c) to make uniform the law among the various jurisdictions.

unpaid seller in cash sale and a secured party with an after-acquired property clause: *In re Samuels & Co.*[8] and *International Harvester Credit Corp. v. American National Bank of Jacksonville.*[9]

A. *Samuels*

Samuels grew out of the bankruptcy of a meat-packing firm. The sale of the cattle to Samuels & Co. was pursuant to the Packers and Stockyards Act[10] and U.S. Department of Agriculture regulations.[11] The cattle were sold on a "grade and yield basis," which required that the cattle be slaughtered, chilled and graded before the purchase price was calculated and a check issued to the seller. Thus there was always a period of time between delivery and payment.

Samuels was financed by C.I.T. Corporation, which had a perfected security interest in all of Samuels' assets, including all after-acquired property. C.I.T. worked closely with the meat packer and knew that the packer would always have some cattle, alive or slaughtered, that it had not paid for.

From May 12 through May 23, 1969, the plaintiff sellers had delivered cattle to the packer, and checks were subsequently issued to them. On May 23, before these checks had been paid, C.I.T. refused to advance any more funds and Samuels filed bankruptcy. The plaintiff-sellers then filed a petition to reclaim the sold cattle or the proceeds. The bankruptcy referee found for the sellers, but the district court reversed.

A series of reversals followed, with each court coming to a different conclusion. The Fifth Circuit Court of Appeals,[12] reversing the district court, concluded that the Packers and Stockyards Act and the USDA regulations under that Act imposed a fiduciary duty on the buyer to account to the sellers for the proceeds. The Supreme Court reversed[13] and held that the Act did not create such a fiduciary duty and that the case should be decided under the U.C.C. On remand, the Fifth Circuit, in an opinion by Judge Ingraham,[14] again found for the cattle sellers and based its decision on the doctrine of "cash sale," which says that the seller does not part with ownership until paid. The seller has a right to reclaim under U.C.C. §2-702(2),[15] and the failure of the packer to acquire any rights in

8. *In re* Samuels & Co., 526 F.2d 1238 (5th Cir. 1976).
9. International Harvester Cred. Corp. v. American Nat'l Bank, 296 So. 2d 32 (Fla. 1974).
10. Packers and Stockyards Act, 42 Stat. 159, 7 U.S.C.A. §§ 181-231 (1964).
11. 9 C.F.R. pt. 201 (1976).
12. *In re* Samuels & Co., 483 F.2d 557 (5th Cir. 1973).
13. Mahon v. Stowers, 416 U.S. 100 (1974).
14. *In re* Samuels & Co., 510 F.2d 139 (5th Cir. 1975).
15. U.C.C. §2-702(2) states: "Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided

the collateral prohibits the creditor's security interest from attaching. To further buttress its opinion, the majority ruled that the creditor was not a good-faith purchaser.

In a dissenting opinion, Judge Godbold argued in favor of the creditor C.I.T., in part characterizing C.I.T. as a good-faith purchaser for value from one with voidable title (Samuels).[16] Judge Godbold's opinion also rejected the cattle seller's rights under U.C.C. §2-702 and the use of the "cash sale" doctrine. Under article 9 of the U.C.C., he concluded, C.I.T. had a perfected security interest that had defeated the sellers interest. On petition for rehearing, the Fifth Circuit, sitting en banc, reversed the three-judge panel and adopted Judge Godbold's dissent as the decision of the court.[17]

B. *International Harvester*

International Harvester dealt with a conflict between an installment seller of farm machinery and a secured party with an after-acquired property clause covering the debtor-buyer's property. The Florida Supreme Court ruled that the secured party had a valid interest in the farm machinery, but only to the extent of the buyer's equity therein. That portion not yet paid for belonged to the seller and, therefore, the security interest did not attach to it.[18] The court justified its decision on policy grounds: "Our viewpoint regarding a limitation [to the buyer's equity] of the security of the earlier creditor, allows a just result to such a creditor and yet is consistent with constitutional requirements as to the subsequent seller."[19]

II. TITLE IN PERSONAL PROPERTY

Samuels and *International Harvester* are examples of how courts have misapplied the principles of Article 9 to revive common-law principles of title which were purportedly abolished by the drafters of the Code. What the Code failed to do was to replace title with a coherent, comprehensive system of its own that is capable of uniform application.

In order to understand the failings of the U.C.C. regarding a unitary theory of ownership in personal property, one must first examine what was

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in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay."

16. *In re* Samuels & Co., 510 F.2d 139, 154 (5th Cir. 1975). (Godbold, J., dissenting).

17. *In re* Samuels & Co., 526 F.2d 1238 (5th Cir. 1976) (en banc). The Fifth Circuit did not write a new opinion in reversing Judge Ingraham's opinion, but merely reprinted Judge Godbold's dissent. The victory of the secured party has been revised by legislation with the amendment of Texas law to give a priority lien to the cattle sellers. Livestock-Purchase for Slaughter-Method and Time of Payment Act, ch. 276, 3 Tex. Sess. Laws [1975] (Vernon).

18. International Harvester Cred. Corp. v. American Nat'l Bank, 296 So. 2d 32 (Fla. 1974).

19. *Id.* at 35.

destroyed by the abolition of the concept of title from the Code. Title was a unity, a coming-together of aspects relating primarily to possession of tangible things. In fact, possession is the root of Anglo-American concepts concerning ownership of personal property.[20] In its purest form, ownership is demonstrated by the capture of a wild animal; the beast, having never been property before, is completely owned by the hunter.[21]

Such a simple concept of ownership or title could serve only the most primitive society, and as society progressed, the ideas of transfer of ownership and division of ownership began to develop.[22] Transfer of ownership was, at first, concerned solely with transfer of possession, or seisin, a term applied to personal as well as real property.[23] Actual physical delivery, as well as the intention to change possession, was essential to a transfer of title.[24] Thus, it was impossible to give a gift of a chattel for an hour at common law, because once a change in possession was completed, it was effective to transfer all ownership.[25]

Separation of ownership from possession became possible as the law evolved, and the individual out of possession could claim a better right than the possessor. "Property" came to describe the relationship between two parties rather than a status against the world at large. The first addition to the concept of title beyond raw possession was the right to possession as against another, such as a bailee. The last development in filling out the attributes of title was the right of property—the right to do such things with one's chattels as one desires, including the right to sell, give, lease or bail the goods.[26]

To summarize, title to personal property was made up on possession, the right to possession and the right of property.[27] The concept-word "title" contained these elements, each of which had to be examined to locate the total ownership in the relevant goods.[28]

The conditional sale,[29] a common pre-Code security device, illustrates the work to which the concept of title was put prior to the adoption of the unitary security device of Article 9. The seller unwilling to depend solely upon the buyer's promise to guarantee payment for the goods, would give

20. For a discussion of the early common-law battle between seisin and possession of chattels and its common-law meaning, see Maitland, *The Seisin of Chattels*, 1 LAW Q. REV. 324 (1885).

21. W. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 58 (2d ed. 1932).

22. Cochrane v. Moore, [1890] Q.B. 57 (C.A.).

23. See Maitland, *supra* note 20.

24. Cochrane v. Moore, [1890] Q.B. 57 (C.A.).

25. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 208 (1971).

26. *Id. See also* "The Frances," 12 U.S. (8 Cranch) 358 (1814).

27. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1964), defining "title."

28. Booknav v. Clark, 58 Neb. 610, 79 N.W. 159 (1899), stating that exclusive possession is presumptive evidence of ownership.

29. For discussion of the conditional sale, see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE, §22-1 at 755 (1972).

up *possession* while maintaining the *right to possession* until the price was paid in full. The result was a splitting of the right of property between buyer and seller.[30] Courts recognized the usefulness of this device and effectuated it by stating that "title" remained in the seller.[31] The retention of the right to possession of property overcame the fact that seller no longer had either actual possession of the goods or very many, if any, of the rights of property.

The first indicator of ownership, possession, was no longer controlling. Instead, possession raised merely a presumption of ownership, rebuttable by a demonstration that another, the seller, intended to retain the *right* to possession.[32] It is evident in problems involving location of title that mere naked possession becomes secondary to the right to possession. Under the Code, title and the necessity of inquiring into intent is replaced by such legal devices as the unitary security interest,[33] the system of priorities,[34] the right to repossess,[35] the system of risk of loss,[36] and the special property interest.[37]

III. RIGHTS IN THE COLLATERAL

The Code, instead of permitting the seller to retain what at common law was title, limits the seller to retention of a security interest,[38] "which is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless . . . the debtor has rights in the collateral."[39] It is this new concept, "rights in the collateral," which is at the heart of the Code system, and requires the most definitive understanding if the

30. *See* North Idaho Grain Co. v. Callison, 83 Wash. 212, 145 P. 232 (1915).

31. *Id.* at ____, 145 P. at 235.

32. Title to property is presumed from possession absent the showing of intent to the contrary. Smith v. Downing, 6 Ind. 374 (1855); Dunlap v. Savage, 196 Ill. App. 378 (1915); Carr v. King & Tomlinson, 184 Iowa 734, 169 N.W. 133 (1918).

33. The comments to U.C.C. §9-101 state: "This Article sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. It supersedes prior legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor's liens and assignments of accounts receivable."

34. *See* U.C.C. Article 9, pt. 3.

35. U.C.C. §9-503.

36. *See* U.C.C. §§2-509 and 2-510.

37. U.C.C. §2-501(1).

38. U.C.C. §2-401. Before the 1956 version, the Code limited the seller's retention of title to a security interest after identification of the goods to the contract. This was changed because of criticisms of the New York Law Revision Commission. If it had been retained, the seller would have had a perfected security agreement by virture of possession. Because it would be a purchase-money security interest, it would have priority over a security interest in inventory. U.C.C. §9-314(4). But if a creditor had lent money specifically for a down payment, both purchase-money interests could attach at the same time. A similar simultaneous perfection happened in Framingham UAW Cred. Union, Inc. v. Dick Russell Pontiac, Inc., 41 Mass. App. 146, 7 U.C.C. Rep. Serv. 252 (1969).

39. U.C.C. §9-203(1)(c).

interest of predictability and uniformity are to be served. However, since the concept is undefined in the Code and "best left to the courts,"[40] it is not surprising that the types of inquiries and resolutions the court have developed resemble the same inquiries and resolutions made under the "intent title" scheme of the common law.

The use of the phrase "rights in the collateral" as a necessary condition to attachment avoids the use of "title," but little else.[41] The debtor can grant a security interest without having legal title to the collateral.[42] Analysis of the case law construing what is "rights in the collateral" demonstrates that the Code's goal "to simplify, clarify, and modernize the law governing commercial transactions" has not been realized.

The courts have interpreted "rights in the collateral" in various ways. The cases may be classified by two recurring situations, both centering upon who has possession of the goods. In the first, the buyer has possession; in the second, possession is in either the seller or some third party.

It has been held that where the goods are in possession of the buyer during negotiations for sale to him, he has no rights in the collateral to which a security interest could attach.[43] In *Cain v. Country Club Delicatessen,*[44] the court determined that the debtor had no rights in the goods before the signing of a contract for sale, and therefore the goods were not collateral to which a security interest could attach. Thus, the debtor did not have possession of "collateral" until the contract was signed. The question presented in cases such as these is at what time did the debtor receive possession of the collateral and thereby start the ten-day period for filing a purchase-money security interest.[45]

One commentator points out the tautology here:

> One difficulty with this problem is that the Code uses the phrase "rights in the collateral," rather than rights in some property. The Code phrase is somewhat tautological, if by "collateral" one means "property subject to a security interest [§9-105(1)(c)]." If the property is "collateral" it must be subject to a security interest-and whether it is or [is] not so subject is the question we are attempting to answer.[46]

The court's holding in *Cain* that possession alone does not equal "rights in the collateral" is contradicted by *Fuentes v. Shevin*[47] and *North Georgia*

40. "Reasons for 1972 change," UNIFORM COMMERCIAL CODE (1972).

41. 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §11.5 (1965) [hereinafter cited as GILMORE].

42. *Id.*

43. Brodie Hotel Supply, Inc. v. United States, 431 F.2d 1316 (9th Cir. 1970); *In re* Board of Trustees of Sanitary Hosp. Ass'n, 49 Mich. App. 106, 211 N.W. 2d 61 (1973); Cain v. Country Club Delicatessen, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

44. 25 Conn. Supp. 327, 203 A.2d 441 (1964).

45. *Id. See* also U.C.C. §9-312(4).

46. 1 BENDER'S U.C.C. SERV. §4.06 (1976).

47. 407 U.S. 67 (1972).

Finishing, Inc. v. Di-Chem, Inc.,[48] which hold that possession is a constitutionally protected right. If possession alone cannot be taken away without due process, it would seem that the one possessing an item would have rights in the collateral in a constitutional sense, if not under the U.C.C. The no-rights-in-the-collateral cases—even when the debtor is in physical possession—do not express the only view held by the courts. One case has held that in a bailee situation where the true owner was estopped to deny the bailee's title, the bailee had rights in the collateral.[49] However, when there are no elements of estoppel, a bailee does not have those rights in the collateral necessary for a security interest to attach.[50]

Both *Samuels* and *International Harvester* concerned situations in which items allegedly subject to a security interest were in the possession of a buyer under a contract of sale. The courts have generally held that a buyer has rights in the collateral in this situation,[51] but four cases, including *International Harvester,* have held otherwise.[52]

If the seller installed the goods held by the buyer, the courts are split over whether the time to perfect a purchase money security interest dates from the time of possession or from the time of completion of the installation. The courts use a *Cain*-type analysis in ruling that the debtor does not possess collateral until he has rights in it.[53]

Physical possession alone does not determine who has rights in the collateral; instead, the courts focus on an interest akin to the common-law rights in the property. When the debtor has relinquished physical possession to a field warehouse, the debtor is held to have retained sufficient rights to which a security interest might attach.[54]

The rights retained by the bailor in a bailment situation are similar to the field warehouse situation. The bailor retains all rights to the property and only parts with a "possessory interest for a limited purpose to the

48. 419 U.S. 601 (1975).

49. Avco Delta Corp. Can. v. United States, 459 F.2d 436 (7th Cir. 1972).

50. Chrysler Corp. v. Adamatic, Inc., 59 Wis. 2d 219, 208 N.W.2d 97 (1973).

51. Evans Prods. Co. v. Jorgenson, 245 Ore. 362, 421 P.2d 978 (1966); First Nat'l Bank v. Smoker, 286 N.E.2d 203 (Ind. Ct. App. 1972); Galleon Indus., Inc. v. Lewyn Mach. Co., 50 Ala. App. 334, 279 So. 2d 137 (1973); Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank, 32 Colo. App. 235, 511 P.2d 912 (1973), *aff'd,* 184 Colo. 166, 519 P.2d 354 (1974); Herington Livestock Auction Co. v. Vershoor, 179 N.W.2d 491 (Iowa, 1970); James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972); North Platte State Bank v. Production Cred. Ass'n, 189 Neb. 44, 200 N.W.2d 1 (1972); United States v. Wyoming Bank, 505 F.2d 1064 (10th Cir. 1974).

52. International Harvester Cred. Corp. v. American Nat'l Bank, 296 So.2d 32 (Fla. 1974); Gicinto v. Credit Thrift of America, No. 3, Inc., 219 Kan. 766, 549 P.2d 870 (1976); Lonoke Prod. Cred. Ass'n. v. Bohannon, 238 Ark. 206, 379 S.W.2d 17 (1964); Zions First Nat'l Bank v. First Sec. Bank, N.A., 534 P.2d 900 (Utah 1975).

53. *In re* Automated Bookbinding, 471 F.2d 546 (4th Cir. 1972) (date of possession); *In re* Ultraprecision Indus., Inc., 503 F.2d 414 (9th Cir. 1974) (date of completion).

54. Douglas-Guardian Whse. Corp. v. Esslair Endsley Co., 10 U.C.C. REP. SERV. 176 (W.D. Mich. 1971).

bailee."[55] Thus the debtor still has "legal," though not physical, possession of the property and retains rights in the collateral to which a security interest could attach; the bailee has no such right.[56]

The court in *In re Pelletier*,[57] determining the validity of a filing, had to decide where the debtor lived when the security interest attached.The court said that the gravamen of the problem was determining when the debtor had rights in the collateral. The answer was found in Article 2. It was determined that the debtor had rights at the time of the signing of the contract for purchase by the buyer-debtor because of the various rights given the buyer at that time. A review of these holdings and other similar cases[58] hardly clarifies the law governing commercial transactions. Analysis shows that rights in the collateral may be nothing more than the courts' saying, "We know rights in the collateral when we see it."[59]

Once the debtor is found to have rights in the collateral, the question arises as to what rights of the debtor the secured party's interest attaches. Does the secured party's interest attach only to those rights that the debtor has or to an interest in all property in the goods in question? *International Harvester* held that although there was an attachment, the security interest attached only to the debtor's equity (that portion he had paid for) and not to all of the property rights in the collateral.[60] In so doing, the court in *International Harvester* resorted to the pre-Code common law, which held that a seller relinquishes his title to property only to the extent that the buyer has paid for it.[61] Under such a rule, the debtor had rights in the collateral equal only to his equity, and could convey only those rights to a secured party. Judge Godbold's opinion in *Samuels* holds to the contrary in that the buyer, once he has rights in the collateral, can convey all the property interest, not just his equity, to the secured party.[62]

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55. Chrysler Corp. v. Adamatic, Inc., 59 Wis. 2d 219, ____, 208 N.W.2d 97, 105 (1973).

56. *Id.*

57. 5 U.C.C. REP. SERV. 327 (Ref. Bkcy. D. Me. 1968).

58. Other situations:

If goods are placed for sale with the debtor, the courts have split. *See, e.g.*, Sussen Rubber Co. v. Hertz, 19 Ohio App. 2d 1, 249 N.E.2d 45 (1969) (debtor has rights); *contra*, Texas State Bank v. Foremost Ins. Co., 447 S.W.2d 652 (Ct. Civ. App. Tex. 1972), Lonoke Prod. Cred. Ass'n v. Bohannon, 238 Ark. 208, 379 S.W.2d 17 (1964). The 1972 version of U.C.C. §9-114 provides that a consignor's interest is subordinate to that of an inventory secured party if he does not file and give notification to the secured party.

The following cases have construed "rights:" L & Y Co. v. Asch. 267 Md. 251, 297 A.2d 285 (1972) ruled invalid a chattel mortgage executed after the debtor had granted a deed of trust, the debtor had no interest to convey to the secured party. Swift & Co. v. Jamestown Nat'l Bank, 426 F.2d 1099 (8th Cir. 1970), concluded that an agent who buys goods for his principal cannot convey a security interest in the goods.

59. *Cf.* Jacobellis v. Ohio, 378 U.S. 184 (1964). Note also the similarity to the question of intention.

60. International Harvester Cred. Corp. v. American Nat'l Bank, 296 So. 2d 32 (Fla. 1974).

61. *See* Recent Cases, 26 CASE W. RES. L. REV. 708 (1976).

62. 526 F.2d 1238 (5th Cir. 1976) (en banc).

IV. VOIDABLE TITLE UNDER THE U.C.C.

The extent of Samuel's rights in the cattle could easily have been determined under U.C.C. §2-401, which permits a seller to retain only a security interest in goods delivered.[63] If the seller could retain a security interest, then the debtor had to have, by implication, all the other rights in the collateral.[64] This may be convoluted logic, but perhaps it is simpler than Judge Godbold's voidable-title analysis by way of §2-403.

Judge Godbold determined that the voidable-title rules of the Code provided the answer. His opinion relies on §2-403(1), which states that one with a voidable title can pass good title to a good-faith purchaser for value. Since a secured party is a purchaser and since a pre-existing claim is value, a secured party with an after-acquired-property clause gets good title. This analysis, although applied in several other cases,[65] is faulty in several respects.

Historically, the voidable-title concept grew up as a relaxation of the stricter common law. "The initial common-law position was that equities of ownership are to be protected at all costs: an owner may never be deprived of his property rights without his consent."[66] This position required that one had either good or void title: One with good title could convey good title; one with void title, nothing. The voidable-title rule provided an escape from the problems caused by this strict dichotomy: "[I]f *B* gets possession of *A's* goods by fraud, even though he has no rights versus *A*, he may transfer good title to a good faith purchaser."[67]

The use of the voidable-title concept to decide the outcome of the war between the seller and the buyer's creditor leads to problems. The U.C.C. rejects title as an analytical tool. Part 2-400 was not intended to be the logical foundation for the ability of the party secured by after-acquired property to take prior to the seller, but rather to answer any questions left over.[68] This intention to relegate "title" to the museum reserved for retired

63. See note 38, *supra*.

64. Evans Prods. Co. v. Jorgenson, 245 Ore. 362, 421 P2d 978 (1966).

65. First Citizen's Bank & Trust Co. v. Academic Archives, Inc., 10 N.C. App. 619, 179 S.E.2d 850 (1971); Jordan v. Butler, 182 Neb. 626, 156 N.W.2d 778 (1968); Swets Motor Sales, Inc. v. Pruisner, 236 N.W.2d 299 (Iowa 1975).

66. Gilmore, *The Commercial Doctrine of Good Faith Purchaser*, 63 Yale L.J. 1057 (1954).

67. *Id.*

68. U.C.C. §2-401 comment 1 states: "This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed. That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the Article is made clear by the preamble of this section. This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of 'public' regulations depends upon a 'sale' or upon location of 'title' without further definition. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a 'sale' is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the 'private' law."

legal concepts was manifested as early as 1938 by Karl Llewellyn: "I do not suggest the elimination of the Title concept. It has its uses. But it should be made to serve merely as the general residuary clause. It should not give forth the norm for decision."[69] Judge Godbold's opinion, which makes title "the norm for decision," is contrary to the intention of the Code's chief drafter.

The drafting history of the Code shows that §2-403, the voidable-title section, was not part of the 1950 Code, but was added in 1951.[70] There is no indication in the comments that the drafters thought they were answering the key question of priorities between the seller and the secured party. Basing an analysis on "voidable title" is at best treacherous. Undefined in the Code, the term has never had a clear meaning. Gilmore says that the concept was and is "a vague idea, never defined and perhaps incapable of definition."[71]

Even if the concept of voidable title is an acceptable basis for decision, the required finding that the secured party is a "good faith purchaser for value" stretches the doctrine of good-faith purchaser almost beyond recognition. The concept of the good-faith purchaser has as its purpose the protection of a buyer of goods who has no knowledge that the seller obtained the goods from the original owner by trick or fraud or without paying for them.[72]

Judge Godbold's opinion stretches the concept far beyond its intended purpose by affording protection to a secured party with an after-acquired property clause even though that party had knowledge the debtor-buyer obtained the collateral without paying for it. Moreover, there is no estoppel arising from the buyer's possession of the property. The secured party gave value to the buyer before the buyer took delivery of the collateral; perhaps even before it existed. Although a tracing of the Code definitions leads to Judge Godbold's conclusion, his application of voidable title is outside its traditional use and justification.[73]

V. "CASH SALE" AND "VOIDABLE TITLE"

While Judge Godbold based his opinion on the doctrine of voidable title, Judge Ingraham's opinion was based on the common-law doctrine of "cash sale."[74] U.C.C. §2-403(1)(c) purports to abolish the doctrine of the cash

69. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. 159, 170 (1938).

70. The 1950 version of U.C.C. §2-403(1) stated: "A purchaser of goods acquires all title which his tranferor has or has power to transfer but a purchaser of a limited interest acquires rights only to the extent of the interest purchased and as between the parties any purchase is subject to its own terms."

71. Gilmore, *Commercial Doctrine of the Good Faith Purchaser*, 63 YALE L.J. 1057 (1954).

72. *Id.*

73. See note 27, *supra*.

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

sale: "When goods have been delivered under a transaction of purchase the purchaser has such power [to transfer a good title to a good-faith purchaser for value] even though . . . it was agreed that the transaction was to be 'cash sale'." This doctrine held that the seller had a paramount interest in the goods upon a check's dishonor because the check was the equivalent of cash. The extent of the doctrine in the common law has been debated. Gilmore says that the cash-sale doctrine had limited viability under the common law.[75] A student note published subsequently in the *Yale Law Journal* disagreed with Gilmore, stating that the cash sale doctirne was used in several cases.[76] Professor Peters writes, "The pre-Code cases in theory protected the seller in these instances. The effect of the cash sale was said to be that the buyer got no title, and hence could pass none."[77] The student note argues for a consideration of the owner's intent and asks these questions: "What kind of risk did the owner voluntarily take in dealing with his chattel? What kind of benefit did he hope to gain? Was the participation of a stranger to the original transaction a necessary element in the owner's calculation of the possibilities of gain."[78]

Judge Ingraham resurrected the cash-sale doctrine some twenty years after Gilmore pronounced its death[79] by employing the seller's right to reclaim under §2-702,[80] the duty of the buyer to pay at delivery, §2-507,[81] the conditional nature of payment by check, §2-511,[82] and the method of payment provided by the "grade and yield" system.[83] Once resurrected, it died again at the hands of the Fifth Circuit in *Samuels*.[84] Other cases have construed U.C.C. §2-403 to mean what it says—the cash-sale doctrine is no longer with us.[85]

VI. U.C.C. §2-401 Reservation of Title as a Security Interest

As has been seen, there are problems in using the title rules of the U.C.C. On one hand, Llewelyn and the U.C.C. say that title is immaterial;[86] on

75. Gilmore, *Commercial Doctrine of the Good Faith Purchaser*, 63 YALE L.J. 1057 (1954).

76. Comment, 72 YALE L.J. 1205 (1963).

77. Peters, *Remedies for Breach of Contracts Relating to The Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199 (1963). See Kirk v. Madsen, 240 Iowa 532, 36 N.W.2d 757 (1949). But the doctrine of cash sale was rarely applied against a really innocent purchaser; an exceptional case in Weyerhauser Timber Co. v. First Nat'l Bank, 150 Ore. 172, 38 P.2d 48 (1933), *modified*, 150 Ore. 172, 43 P.2d 1078 (1935).

78. Comment, 72 YALE L.J. 1205, 1216 (1963).

79. Gilmore, *The Commercial Doctrine of Good Faith Purchaser*, 63 YALE L.J. 1057 (1954).

80. *In re* Samuels & Co., 510 F.2d 139 (5th Cir. 1975). *See also* U.C.C. §2-702.

81. U.C.C. §2-507.

82. U.C.C. §2-511.

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

84. 526 F.2d 1238 (5th Cir. 1976).

85. *See* the cases cited in note 65, *supra*.

86. See U.C.C. §9-202, the sections cited in note 6, *supra*, and Llewellyn, *supra* note 69.

the other hand, the Code gives title rules that have been used to determine the issue of priorities of various claims to the goods. Section 2-401(1) states "[A]ny retention or reservation by the seller of the title [property] in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."[87]

International Harvester refused to apply §2-401(1). This interpretation allowed the court to say that the sellers never gave up title to the property or their interests in it, and thus the debtor never acquired any rights that could be conveyed to the secured party. Judge Ingraham's opinion stated that the rule on the seller's retention of title in §2-401 does not apply to cash sales.[88]

Both *International Harvester* and Judge Ingraham's opinion destroy the Code system of priority between seller and creditor. This reasoning has been rejected by the Fifth Circuit and by most courts deciding the issue. Treating the seller and secured party of the buyer just as two secured parties, however, leads to interesting problems of priority.

If the seller has a security interest, the question becomes merely one of priority between two security interests. The literal language of the Code tells us that the first to perfect wins.[89] The seller, however, has a purchase-money security interest, and he will have priority over the inventory-secured party if he perfects.[90]

Judge Ingraham, however, was concerned with the financier's knowledge of the seller's interest. The Code system of priority is not based on knowledge. By its terms, §9-312 provides that the first to perfect has priority and does not qualify priority on the basis of knowledge.[91] Knowledge of a prior security interest is only relevant in the case of a judicial lien creditor.[92] Even that knowledge requirement was dropped from the Code in the 1972 version.[93] Gilmore, in *Security Interests in Personal Property,* concludes that there is an argument about knowledge, but its role is generally rejected.[94]

This rule appears to create an unjust enrichment. The party secured by after-acquired property takes property for which his debtor never paid. The court in *Internationl Harvester* balked at this result, stating that it might be unconstitutional.[95] Its unconstitutionality, however, would have to be based on substantive due process—a concept that has been repudi-

87. U.C.C. §2-401(1). See note 38, *supra.*
88. *In re* Samuels & Co., 510 F.2d 139 (5th Cir. 1975).
89. U.C.C. §9-312(5)(a).
90. U.C.C. §9-312(4).
91. U.C.C. §9-312(5)(a).
92. U.C.C. §9-301 (1962 version).
93. U.C.C. §9-301.
94. *See* GILMORE, *supra* note 41, at §16.6
95. International Harvester Cred. Corp. v. American Nat'l Bank, 296 So. 2d 32 (Fla. 1974).

ated in modern constitutional law. *City of New Orleans v. Dukes*[96] recently overruled *Morey v. Doud*,[97] the only case since the 1930's holding a statute unconstitutional on substantive due process grounds. Even if the diminution of title to a security interest could be seen as a taking of property, the seller could protect himself by perfecting a purchase-money security interest. This requirement regarding method of perfection must be within the powers of the state—it is more of a regulation of property than a taking. *International Harvester* indicates that some state courts still have not followed the Supreme Court in rejecting substantive due process.[98] It is interesting that the same Florida court upheld self-help repossession, concluding that the deprivation of possession by a private party did not involve state action.[99]

Why a seller should get more protection than a consumer is not evident. The referee's decision,[100] the first Fifth Circuit decision,[101] and Judge Ingraham's opinion,[102] along with *International Harvester*,[103] represent an instinctive feeling of sympathy for the seller. For some reason, never clearly stated in the opinions, the unpaid seller seems more deserving of protection. The party secured by after-acquired property appears as one who is using a novel technical device to cheat the traditional seller out of his property. The Texas legislature must share this feeling, for it has awarded the cattle sellers priority by statute.[104]

The Fifth Circuit reversal saved the after-acquired-property lender. As such it represents part of the triumph of the secured party over all: the bankruptcy trustee, the judicial lien creditor, the seller, and the consumer debtor. Its logical basis, as we have seen, is shaky. Judge Godbold had to go outside Article 9 to a section added as an afterthought in Article 2 to save the secured lender. The problem is that in rejecting title, the U.C.C. does not have a unified theory of ownership of personal property. The replacement of title with "rights in the collateral" does not lead to greater certainty and, as in *International Harvester*, cannot completely prevent a judge from standing the Article 9 priority system on its head. We have found, therefore, that the Code has not solved the problem of locating that intangible something.

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96. ___ U.S. ___, 96 S.Ct. 2513, 49 L. Ed. 2d 511 (1976) (per curiam).

97. 354 U.S. 457 (1957).

98. International Harvester Cred. Corp. v. American Nat'l Bank, 296 So. 2d 32 (Fla. 1974).

99. Northside Motors of Florida, Inc., v. Brinkley, 282 So. 2d 617 (Fla. 1973).

100. The referee's opinion is summarized in *In re* Samuels & Co., 483 F.2d 557, 559 (5th Cir. 1973).

101. 483 F.2d 557.

102. 510 F.2d 139 (5th Cir. 1975).

103. International Harvester Cred. Corp. v. American Nat'l Bank, 296 So. 2d 32 (Fla. 1974).

104. Livestock-Purchase for Slaughter-Method and Time of Payment Act, ch. 276, 3 Tex. Sess. Laws [1975] (Vernon).