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The Position of the Bona Fide Purchaser of Personal Property under the Uniform Commercial Code

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be expanded so as to be quite liberal toward the buyer it is also modified by refusing to permit recovery to the buyer unless he can show that the loss could not have reasonably been prevented on his part by covering. The section as a whole seems indispensable to provide adequate relief to both the buyer and the seller, and to offer them maximum protection against the injustice arising out of complicated present-day market conditions.

In attempting to codify any commercial law writers have a difficult task. If a tendency is made to use over-specific terminology the adopted commercial law will soon be antiquated by changing business situations. On the other hand, if the writers generalize, much too broad an interpretation will be left up to the courts.³⁶ The drafters of the UCC have attempted to attain the middle road between the two above situations. This policy, however, has drawn fire from the critics, who contend that the drafters have not carried the simplicity to a desirable point, and that it still retains many of the abstract words and phrases of the Uniform Sales Act. Yet it would seem that over-simplification would result in exacting remedies from which obvious injustice would arise.

While the code is by no means an ideal solution to all of the problems surrounding the buyer where there has been a breach by the seller, it offers him a greater variety of remedies from which he can choose to place himself in a position nearer to the one in which he would have been had the contract not been breached. In view of the economic changes brought about by our advancing civilization, the UCC, if adopted, will render an improvement over the existing law of North Dakota which furnishes remedies to a buyer.

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THE POSITION OF THE BONA FIDE PURCHASER OF PERSONAL PROPERTY UNDER THE UNIFORM COMMERCIAL CODE. — The proposed Uniform Commercial Code, in dealing with bona fide purchasers of personal property, has basically retained the law as it exists under the laws of North Dakota and the Uniform Sales Act. The North Dakota code states that where goods are sold by a person not the owner thereof, 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; an exception is made where the

36. 57 Yale L.J. 1360 (1948).

owner of the goods, by his conduct, is precluded from denying the seller's authority to sell.¹ Thus a bona fide purchaser of personal property taken tortiously or wrongfully, as the trespass or theft, does not acquire a title good against the true owner.²

The coincident UCC section states that a purchaser of goods acquires all title which his transferor has or has power to transfer, but where goods are put in the hands of a merchant who deals in goods of that kind, the merchant can transfer good title to a buyer "in the ordinary course of business."³ Thus the only change in the present law would be the removal of the estoppel prerequisite in order to permit a buyer to be classified as a bona fide purchaser where he purchases "in the ordinary course of business."⁴ At present under the Sales Act, the mere possession of goods by a person who habitually deals in such goods is not sufficient to defeat the owner's claim against a good faith purchaser of the goods.⁵ For example, under present law one who innocently purchased a diamond from a jeweler in whose care it had been placed for the purpose of appraisal would acquire no better title to the stone than that possessed by the jeweler.⁶ This protection of the owner's title is given as against the contentions that estoppel is present, or that apparent authority or an agency relationship give the wrongful vendor authority to sell.⁷

Conversely, under the UCC, since the jeweler would be acting in the usual course of business the sale would be held valid as passing title to an innocent purchaser for value. In taking this point of view the UCC has apparently codified the common law rule expressed in the early case of *Pickering v. Busk*:⁸ "If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to to sell, it must be intended that the commodity was sent thither for the purpose of sale."

By definition under the UCC the rules protecting one who buys goods in the ordinary course of business are not applicable to one who buys from a pawnbroker, or a person buying from a farmer.⁹ Likewise, buying in "the ordinary course of business"

1. N.D. Rev. Code § 51-0124 (1) (1943).

2. See, e.g., *Seigal v. Warrick*, 214 S.W.2d 883 (Tex. Civ. App. 1948) (corn entrusted to agent who sold to innocent purchaser).

3. U.C.C. § 2-403 (1) (2).

4. U.C.C. § 1-201 (9).

5. *Moore v. Long*, 250 Ala. 47, 33 So.2d 6 (1947); cf. *Barthelmess v. Cavalier*, 2 Cal. App.2d 477, 38 P.2d. 484 (1934); *Levi v. Booth*, 58 Md. 305 (1882).

6. *Green v. Wachs*, 254 N.Y. 437, 173 N.E. 575 (1930).

7. For a discussion on this point see 2 Williston, Sales § 313 (Rev. ed. 1948).

8. 15 East 38, 13 Eng. Rep. 364 (1812).

9. U.C.C. § 1-201 (9).

does not include a transfer in bulk or the obtaining of security in satisfaction of a money debt.¹⁰

A second basic change made by the Code is in its treatment of the problem of a buyer who gives a bad check in payment for goods. The North Dakota Supreme Court has not dealt with this problem under our present statutes. However, other states which have adopted the Uniform Sales Act have held that the check is conditional payment and no title passes from seller to buyer. Consequently, no title can pass from the buyer to a good faith purchaser.¹¹ The courts employ the fiction that the sale is for cash and since the dishonor of the check precludes payment of the money, no title passes.¹² The UCC alters this rule by providing that no agreement that a contract for sale is a "cash sale" alters the effects of identification of goods to the contract or impairs the rights of good faith purchasers for value.¹³ This provision of the Code is apparently designed to eliminate the problems surrounding the "cash sale" theory and to afford additional protection to bona fide purchasers for value.

Summarizing, it can be seen that under the Sales Act where a check is given in payment for goods no title passes until the check is honored. The Code takes the opposite view, stating that title passes immediately, although the title may be voidable. The holder of the voidable title can then pass on a good title to a good faith purchaser for value,¹⁴ for a reasonable time after acquisition or until the title has been avoided.¹⁵

Another section of the Code¹⁶ makes a check conditional payment as between the parties to the instrument. Therefore the check would be defeated by dishonor on presentment. Apparently this provision would make the vendee liable to the vendor for the value of the goods instead of to the bona fide purchaser, but its remedy

10. See note 9, *supra*.

11. *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, 284 Pac. 915 (1930); *National Bank of Commerce v. Chicago B&N, R. Co.*, 44 Minn. 224, 46 N.W. 342 (1890); *John S. Hale Co. v. Beley*, 154 Tenn. 689, 290 S.W. 994 (1927).

12. For criticism of this view see 2 Williston, *Sales* § 346 (a) (Rev. ed. 1948).

13. U.C.C. § 2-401 (1) (b).

14. U.C.C. § 2-403 (1).

15. *Ava Hardware Co. v. Christensen*, 122 S.W.2d 92 (Mo. App. 1938); *Parr v. Helfrich*, 108 Neb. 801, 189 N.W. 281 (1922).

16. U.C.C. § 2-511 (3).

would seem to offer very little consolation, since makers of worthless checks are traditionally insolvent.

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THE TREATMENT OF WARRANTY PROBLEMS ARISING FROM THE SALE OF GOODS UNDER THE UNIFORM COMMERCIAL CODE. — Among the many areas of the law in which the Uniform Commercial Code will work substantial changes must be listed those sections of it which deal with the problems arising from warranties. It has long been recognized that the provisions of the Uniform Sales Act regulating these questions are in need of adjustment and overhaul.¹ In general, the Uniform Commercial Code undertakes this difficult task with effectiveness and insight, and a comparison of its provisions with the present law of North Dakota will indicate at once how much improvement has been made.

I.

The first major provision of the Uniform Commercial Code dealing with warranties is §2-313, which undertakes to prescribe the situations in which express warranties of quality or otherwise will be read into a contract of sale. Section 2-313 introduces two significant changes in existing law. Under this section, for instance, "any description of the goods which is made a basis of the bargain creates an express warranty that goods shall conform. . ." This broadens the Uniform Sales Act, which provides that an express warranty is created only if the "natural tendency . . . is to induce the buyer to purchase."² Another change would be effected in regard to a sale by sample and description; the UCC provides that such a sale creates an express warranty that the whole of the goods shall conform thereto, while the North Dakota Code provides that an implied warranty is thereby created.³ The purpose of the latter change could well be to make the warranty effective despite a possible disclaimer clause elsewhere in the contract.

Two significant modifications of existing law would also be

1. See Note, 26 N.D. Bar Briefs 173 (1950).

2. N.D. Rev. Code § 51-0113 (1943). See also *Nielson v. Hermanson*, 109 Utah 180, 166 P.2d 536 (1946); *Teter v. Schultz*, 110 Ind. App. 541, 39 N.E.2d 802 (1942); *Letnz v. Omar Baking Co.*, 125 Neb. 861, 252 N.W. 410 (1934); *Glaspey v. Wool Grower's Service Corp.*, 151 Wash. 683, 277 Pac. 70 (1929).³

3. N.D. Rev. Code § 51-0115 (7) (1943).