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Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code

Stolen and encumbered chattels constitute a significant portion of the goods moving in commerce. In order to protect the original owners of the goods against the claims of bona fide purchasers, the doctrines of "caveat emptor" and "nemo dat quod non habet" developed in the common law and have been carried into the Uniform Sales Act. In this Article Professor Hawkland suggests that the premises underlying these concepts need to be re-examined and that the concepts themselves should be reformulated to more fairly allocate among original owners, dealers, and purchasers the risks arising when stolen or encumbered goods are sold; one inadvertently dealing in this type of goods needs added protection against "bad faith surprise rejections of title." Professor Hawkland concludes that the Uniform Commercial Code's adoption of the concept of "cure" affords the dealer a potent weapon against such "bad faith" claims and constitutes a major stride forward toward fairer and more realistic treatment of this problem.

William D. Hawkland*

INTRODUCTION

In American society where one automobile is stolen every two minutes,¹ where larceny is a multimillion dollar business,² and

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1. In 1960 there were 321,402 automobiles stolen in the United States—179.2 for each 100,000 inhabitants. See 1960 U.S. DEPT OF JUSTICE UNIFORM CRIME REPORTS 33. Since there are 525,600 minutes in a year, the rate of theft is close to three cars every five minutes. In 407 cities with populations over 25,000, the value of the stolen cars amounted to \$138,900,000, but there was a 92.4% recovery of value (\$128,400,000). *Id.* at 88.

2. In 407 cities with populations over 25,000 the value of property stolen and reported in 1960 was \$281,300,000. Of this amount \$147,300,000 or 52.4% was recovered. *Ibid.*

where credit constitutes the backbone of our economy, chattel titles are often clouded, for stolen and encumbered items constitute a significant portion of the goods moving in commerce. Basic correctives, of course, are not readily available, because crime seems endless and we are deeply committed to credit. These conditions apparently being irreversible, commercial law concepts have developed, and are being developed, to fairly allocate and distribute the attendant risks. One such concept, the doctrine of "cure" as applied to correcting an improper tender of title to chattels, is the principal subject matter of this Article. For background purposes this Article will also consider, without detailed elaboration, some of the other commercial law concepts relevant to the general problem.

I. THE COMMON LAW BACKGROUND

At common law credit and crime clouds on titles to chattels presented risks which were largely thrust upon the buyer. In disputes with the "true owner" the buyer was up against strong notions of *caveat emptor* and "protection of property" which were implemented by the maxim *nemo dat quod non habet*. Thus, if goods were stolen from O, the "true owner," sold to D, a dealer, and resold in the marketplace to P, a bona fide purchaser, O could prevail against P by merely reciting the maxim that no one can give a greater interest than he himself has.³ Since the thief got no title to the stolen goods, he could give none to D, who, in turn, could give none to P. Moreover, if P were so stupid or careless as to permit himself to buy stolen goods, the law should not be unduly solicitous of his welfare.

The logic of this approach was unassailable at common law only because its premises were accepted. A different major premise, employing the doctrine of market overt, could have been used to get an opposite result. This doctrine, which prevails in England and has counterparts in many of the civilized countries of the world, protects buyers in the ordinary course of business with respect to purchases made in certain open markets. Though based on conditions never present in America, such as the customs stemming out of the great fairs of the middle ages, the doctrine has the merit of making goods more negotiable and appealing by protecting the integrity of purchases made in the marketplace. On this

3. For a collection of authorities see 77 C.J.S. *Sales* § 291 nn.78-84 (1952). The rule is sometimes formulated in terms of "title to personalty cannot rise higher than its source." See, e.g., *Bauer v. Commercial Credit Co.*, 163 Wash. 210, 216, 300 Pac. 1049, 1051 (1931).

social policy basis it could have been brought into our commercial law, but in spite of persistent and mighty efforts on its behalf by the commercial community, it has never been accepted in any of the jurisdictions of the United States.⁴

Market overt, it would seem, clearly provides a more rational basis than the common-law approach for deciding "ownership

4. Section 22(1) of the *English Sale of Goods Act* provides: "Where goods are sold in market overt according to the usage of the market the buyer acquires a good title to the goods, provided that he buys them in good faith and without notice of any defect or want of title on the part of the seller."

This exception to the general rule that a seller cannot give a better title than he himself has, is usually said to be based on the duty of the original owner to search for and claim the stolen goods in the market place. See Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 COLUM. L. REV. 375 (1908). If this explanation were the real justification of the rule, the concept of market overt would be limited to cases in which the owner had a reasonable opportunity to claim the goods before they were sold, and it would not apply unless he was negligent in asserting his title. These limitations have never been put on the rule; therefore, the reason given for its existence appears to be a mere rationalization, hiding the fact that a social policy decision has been struck that the security of transactions for purchasers of chattels outweighs the security of property for the original owner. Cf. VOLD, SALES 178-79 (2d ed. 1959).

As the text indicates, the doctrine of market overt was never adopted in the United States. The attractiveness of the doctrine, however, is revealed by the great number of cases in which it has been urged, not as a last resort measure but as a principal argument for the bona fide purchaser. Because the doctrine has been uniformly rejected, however, lawyers apparently are now convinced that no court will regard it as an acceptable policy basis for increasing the negotiability of goods. Few appellate courts have been called upon to pass on the doctrine since 1939.

Cases rejecting the doctrine of market overt include the following: *E. I. du Pont de Nemours & Co. v. Laird*, 24 Del. Ch. 152, 8 A.2d 162, *modified*, 24 Del. Ch. 250, 9 A.2d 76 (1939); *Commercial Credit Co. v. Parker*, 101 Fla. 928, 132 So. 640 (1931); *Glass v. Continental Guar. Corp.* 81 Fla. 687, 88 So. 876 (1921); *Singer Sewing Mach. Co. v. Wardlaw*, 29 Ga. App. 626, 116 S.E. 207 (1923); *Fawcett v. Osborn*, 32 Ill. 411 (1863); *Newkirk v. Dalton*, 17 Ill. 413 (1856); *Leslie v. Wm. Kelly Milling Co.*, 109 Kan. 146, 197 Pac. 1094 (1921); *Towne v. Collins*, 14 Mass. 500 (1885); *Dame v. Baldwin*, 8 Mass. 518 (1812); *Roberts v. Dillon*, 3 Daly 50 (N.Y.C.P. 1869); *Lecky v. McDermott*, 8 S. & R. 500 (Pa. 1822); *Easton v. Worthington*, 5 S. & R. 130 (Pa. 1819); *Hardy v. Metzgar*, 2 Yeates 347 (Pa. 1798); *Hasack v. Weaver*, 1 Yeates 478 (Pa. 1795); *Heisley v. Economy Tool Mfg. Co.*, 33 Pa. Super. 218 (1907); *Carmichael v. Buck*, 10 Rich. Law 332 (S.C. Ct. App. 1857); *De Bates v. Searls*, 52 S.D. 603, 219 N.W. 559 (1928); *Sandford v. Wilson*, 2 Willson Civ. Cas. 188 (Tex. Ct. App. 1884); *Griffith v. Fowler*, 18 Vt. 390 (1846); *State Bank v. Johnson*, 104 Wash. 550, 177 Pac. 340 (1918); see *Gulf C. & S.F. Ry. v. Taylor*, 18 Tex. Civ. App. 571, 45 S.W. 749 (Tex. Dist. Ct. 1898).

Only one American court has ever hinted that market overt might apply in some circumstances. See *Heacock v. Walker*, 1 Tyler 338 (Vt. 1802) (market overt only obtains under the Probate Act and is limited to sales upon writs of execution, and of goods found or estrays; these being regulated by statute, public advertisement made, and the sale effected by known officers of the government).

disputes" between O and P. Both have been victimized by a thief, and their ownership equities are equal. In this posture to call O the "true owner" and P "the victim" overlooks P's equal claim to ownership and the fact that O also has been victimized. To make these characterizations and to use the *nemo dat quod non habet* maxim is simply to decide for O without reason.

Nor is the employment of the maxim *caveat emptor* helpful. If P deserves no legal protection because he did not protect himself when he foolishly bought stolen goods from a dealer, what is to be said of O's "foolishness" in permitting his goods to be stolen?

The ownership and conduct equities being even, the balance sensibly could have been tipped in P's favor on the ground that such a decision would free the market and make buying more attractive.⁵ But this decision was not forthcoming at common law, and to this day it has not been forthcoming even in the most advanced commercial states working under the most advanced commercial laws this nation has produced.

While the rejection by the American courts of the doctrine of market overt, and the policy basis underlying it, injured commerce by thrusting upon P the initial risk of loss caused by the thievery of chattels, this disservice would have been sharply curtailed if the implementing rules had been limited in their coverage to situations in which the goods were stolen by force from O. This limitation, however, was not made by the common-law courts, and cases in which O entrusted goods to a swindler or a faithless agent who in violation of authority sold them through commercial channels to P often resulted in decisions in favor of O and against P.⁶ These decisions followed the same rationale as those involving goods stolen by force, overlooking the fact that the conduct equities, equal in the latter case, are less equal where O has made the rascality possible through his entrustment. Again it could be argued, of course, that P could have prevented the fraud by being more careful in his purchases, but P's "failure" in this regard surely should not rise to the level of O's "failure" in the selection and supervision of his own employees, and the common law can be fairly criticized for not taking this fact into account.

5. See Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954), in which the author argues that the bona fide purchaser is not protected merely because of his praiseworthy character, "but to the end that commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property by one who offers it for sale or to secure a loan."

6. See, e.g., *Levi v. Booth*, 58 Md. 305 (1882); *Smith v. Clews*, 114 N.Y. 190 (1889); *Biggs v. Evans*, [1894] 1 Q.B. 88 (1893). See also Gilmore, *supra* note 5, at 1057-63.

A further extension of protection to O was made when the common-law courts correctly ascertained that security interests are "property interests." While it is undoubtedly true that security agreements create property rights, if O reserves security in goods which are placed in the hands of a dealer for purposes of sale, it is difficult to imagine that the resulting property interest should be protected to the same extent as the property interest O has in chattels stolen by force. Nevertheless, the *caveat emptor* and *nemo dat quod non habet* maxims were available to justify a holding in O's favor and against P where the dealer violated or exceeded his authority.⁷ Indeed, if the security interest creating O's rights was recorded, the doctrine of constructive notice also presented a legal tool which could be used to defeat P.⁸

In spite of these concepts, however, some courts rendered decisions in favor of P, not because of any solicitude for him nor because of a rejection of the standard approach, but because they opposed the use of freewheeling security devices which gave the dealer too much control over supposedly encumbered inventory.⁹ Common-law decisions involving security interests in inventory, therefore, presented dangers to O, the secured lender, as well as to P, and these dangers militated against lending against inventory and against buying from dealers who were so "unsound" that they had to acquire their stock of goods on a credit basis. No credit economy can exist without some available device by which inventory can be safely and legally encumbered in such a way that borrowing dealers are not put at the competitive disadvantage of having to sell their stock in trade "subject to" outstanding security interests, and eventually, as we shall see, there developed in America a fairly satisfactory inventory-security law which protected the secured lender against the borrower's creditors but permitted buyers in the ordinary course of business to take free and clear of the security interest. Pending this development, however, P ran a heavy risk that he would be "stuck with" an encumbrance when he bought from a dealer engaged in inventory financing.

Because these crime and credit risks were largely thrust upon P vis-a-vis O, P's best course of action at common law was to

7. See, e.g., *Utica Trust Co. v. Decker*, 244 N.Y. 340, 155 N.E. 665 (1927). *Contra*, *Fogle v. General Credit, Inc.*, 122 F.2d 45 (D.C. Cir. 1941).

8. See Annot., *Record of Chattel Mortgage on, or Conditional Sale of, Automobile or Other Chattel Put or Left in Hands of Dealer, as Constructive Notice*, 136 A.L.R. 821, 824-30 (1942).

9. See, e.g., *Zartman v. First Nat'l Bank*, 189 N.Y. 267, 82 N.E. 127 (1907); cf. *Benedict v. Ratner*, 268 U.S. 353 (1925).

proceed, not against O in these cases, but against D, the dealer from whom he bought.

At first there was no legal basis short of fraud under which P could proceed against D, for the early common law assumed that the seller did not warrant the title of the goods which he sold, unless he expressly affirmed his title.¹⁰ The law progressed from this point, however, to a point at which courts found that anyone selling goods as his own impliedly affirmed title in himself. Thus, the general doctrine was established that the sale of any chattel carries with it a warranty of title, unless the buyer has some knowledge which should make it clear to him that the seller intends to sell only such interest as he might have.¹¹

This development of warranty law was of considerable help to P in shifting established crime and credit risks to D, but there was a sharp remedial limitation which made it impossible for him to shift the risks of a "clouded" title to D. This limitation was the result of decisions in many states that P's right of action for breach of warranty of title did not arise until his possession had been disturbed.¹² Of course, this did not mean that P had to wait for legal action to be commenced against him:

[T]he vendee is not bound to await legal action against him. If satisfied of the insufficiency of his vendor's title, and that the true owner would recover the property in an action, he may surrender it, and recover its value in an action against his vendor, by affirmatively establishing that the vendor was without title; or the vendee may await the prosecution of an action. If the vendor be notified of the action and required to defend, a judgment, if obtained, would be conclusive as to his want of title; but if not notified, and judgment is obtained, the onus of showing want of title would rest upon the vendee, the same as if surrendered without action.¹³

These remedies were considered by the common law to be sufficiently protective of P's interests, notwithstanding the fact that P had to await the action or threat of action of O before a suit to clear up the title uncertainties could be launched against D. Occasionally O, sometimes for reasons of greed—such as a favorable measure of damages for conversion—sometimes for reasons difficult to ascertain, would delay his action against P with respect to goods over which O had a superior legal claim. Far from bene-

10. See 1 WILLISTON, SALES § 217 (rev. ed. 1948).

11. Eichholz v. Bannister, 17 N.J.L. 708 (Common Pleas 1864).

12. Thompson v. Jacoway, 97 Ark. 508, 134 S.W. 955 (1911); Barnum v. Cochrane, 143 Cal. 642, 77 Pac. 656 (1904); Computing Scales v. Long, 66 S.C. 379, 44 S.E. 963 (1903); Duke v. California Inv. Co., 132 Wash. 23, 231 Pac. 20 (1924). See Linton v. Porter, 31 Ill. 107 (1863).

13. Burt v. Dewey, 40 N.Y. 283 (1869).

fitting P, this course of action usually had the opposite effect of immobilizing him, and his initial reaction usually was a desire to get rid of the goods or the encumbrance. The common-law rule, predicated on the assumption—frequently contrary to fact—that all parties can be counted on to vigorously prosecute their own property rights, did not permit P to accomplish either result. So long as O did not complain, there was no way to clear the encumbrance. Furthermore, this failure to complain prevented P from rescinding the sale or holding D for damages for breach of warranty because there was no disturbance of possession.

An illustration of the injustice of this rule is provided by the case of *Duke v. California Inv. Co.*¹⁴ Eden and Chilberg had a possible interest in some stock which D sold to P. They did not prosecute their claim, possibly relying on a rule of damages which would give them a recovery based on the highest value the stock obtained between the date of the conversion and the date of judgment. P, made uncomfortable by a rule which, in effect, forced him to guarantee that the stock would be sold at its highest point, sought to rescind the purchase because of the defective title. The court denied the rescission:

The only persons who can question or challenge the sale are Eden and Chilberg. One purchasing personal property cannot refuse to pay the purchase price on the ground of failure of title so long as the purchaser is not disturbed in his possession. If there is an absolute failure of title by reason of which the goods are taken from the possession of the purchaser and lost to him, there is an entire failure of consideration constituting a defense to an action for the price; but want of consideration on the ground of failure of title is no defense, so long as the buyer is not disturbed in his possession of the goods, unless the seller was guilty of fraud in relation to the title, in which event actual loss of possession is held not to be essential.¹⁵

It might be thought that this disturbance-of-possession limitation and the vouching-in procedures outlined by *Burt v. Dewey*¹⁶ would sufficiently protect D's interests in breach of warranty of title contest with P. But the common law thought otherwise and gave D the important right to "cure" a defective title. Actually, the doctrine permitting a seller to cure defective titles may have originated in a rule designed to limit the seller, namely the rule of "feeding-the-estoppel." Under this notion, a seller vending goods to which he had no title was estopped to deny the validity of the

14. 132 Wash. 23, 231 Pac. 20 (1924).

15. *Id.* at 25, 231 Pac. at 20-21.

16. See note 13 *supra* and accompanying text.

transfer, and, thus, where the seller subsequently acquired a good title, the buyer was protected by the estoppel.¹⁷

Whatever its origin, the doctrine of cure of defective titles was established at common law, and it permitted the seller to defeat the buyer's breach of warranty of title claim by tendering a good title, which was deemed to relate back through feeding-the-estoppel principles to the date of the initial seller-buyer transaction.

The common-law "cure" of defective titles to chattels was harsh on the buyer in that it did not fully account for his inconvenience and risk. For example, in the celebrated case of *Lee v. Woods*,¹⁸ D sold P a mule encumbered by a chattel mortgage. Neither party was aware of the outstanding lien. Subsequently, a sheriff, acting on behalf of the mortgagee (O), seized the mule in foreclosure but permitted P to keep it as his bailee. Later the mule was delivered by P to the sheriff, and it was sold at the sheriff's foreclosure sale to D. P then sued D for breach of warranty and sought rescission as his relief. As his defense D tendered the mule to P. A lower court decision for P was reversed on the ground that D had effectively cured the defective title. The fact that P was out of possession for 14 days and had held the mule as bailee for a considerable period of time did not tip the balance of the decision in his favor. The court found the mule had been sick, and the value of its loss to P during the 14-day foreclosure period was problematical. But, in any event, it held that rescission could not be permitted in view of the cure.

This concept of "cure," thrust on top of the doctrine conditioning the buyer's remedy of breach of warranty of title on a showing of disturbance of possession, plus the solidly established property rules protecting O, left P in a rather precarious position upon a failure of title to chattels. Being thus denied relief by the courts, he turned to the legislatures, and legislative relief—the second phase of this Article—was soon forthcoming.

II. THE PRESENT: PRE-COMMERCIAL CODE LEGISLATIVE PERIOD

The common-law rules, which largely put the initial risk of title failure on the bona fide purchaser P and gave him little opportunity to shift the risk of clouded titles to D, the dealer from whom he had purchased, were thoroughly overhauled in the late nineteenth and early twentieth centuries. The process of revising these

17. For an explanation of the concept of feeding-the-estoppel and a collection of authorities, see 1 WILLISTON, SALES § 131 (rev. ed. 1948).

18. 161 Ky. 806, 171 S.W. 389 (1914).

rules has not run its course, and the Uniform Commercial Code, now law in over a dozen states, stands by ready, willing and able to scuttle and replace the present statutes which, in their time, scuttled and replaced the common law. Undoubtedly the time will come for the Uniform Commercial Code to be replaced, but for purposes of this Article it represents the future, the steppingstone from the present legislative period to a more perfect set of laws now not even contemplated.

In adjusting the burden of title risks between O, the "true owner," and P, the bona fide purchaser, the present legislative period started with the enactment of the Uniform Sales Act and the non-uniform Factors' Acts. Neither goes so far as market overt, although the Uniform Sales Act was closely patterned after the English Sale of Goods Act which does contain market overt as one of its provisions.¹⁹ Failure to enact market overt, of course, meant that title risks resulting from situations in which goods were stolen by force remained, as at common law, with P, the property interest of O being protected.

Nevertheless, both the Uniform Sales Act and the various Factors' Acts gave considerable help to P in his contest with O where O had entrusted goods to a thief who later sold them through commercial channels to P. The Factors' Acts and portions of the Uniform Sales Act were designed to prevent courts from treating these entrustment situations as if they involved goods stolen by force.

While this change was intended to protect P in entrustment situations, early cases tended to ignore the rectifying purpose of the legislation, and common-law results frequently were preserved. Judicial hostility to the Factors' Acts was especially intense, and the statutes themselves gave hostile courts considerable leeway in limiting their scope of protection. Under the terms of most Factors' Acts, the bona fide purchaser can prevail against O only if five conditions are met: (1) "Goods" must have been (2) "entrusted" by O to a (3) "factor" (4) "for purposes of sale or as security for advances to be made or obtained thereon" and (5) "disposed" of in "the ordinary course of business."²⁰ While O pre-

19. See note 4 *supra* and accompanying text.

20. See, e.g., ME. REV. STAT. ANN. ch. 181, §§ 1-3 (1954); MD. ANN. CODE art. 2, §§ 1-16 (1957); MASS. ANN. LAWS ch. 104 (1954) (now superceded by *Uniform Commercial Code*); N.Y. PERS. PROP. LAW § 43; OHIO REV. CODE ANN. §§ 1311.54-58 (Page 1953) (to be superceded by *Uniform Commercial Code*); PA. STAT. ANN. tit. 6, ch. 2 (1930) (now superceded by *Uniform Commercial Code*); TENN. CODE ANN. §§ 47-1101 to -1104 (1956). For a full collection of citations of statutes enacted prior to 1956, see BOGART & BRITTON, STATUTORY SUPPLEMENT FOR USE WITH CASES ON SALES 118 (3d ed. 1956).

vails if any of the elements is not satisfied, judicial hostility has been implemented usually by narrowly defining "entrustment" or by permitting O to disguise his deals with a factor to appear as something other than "for purposes of sale." In other words, elements (2) and (4) have proved most flaccid.²¹

An illustration of limiting protection by narrowly defining "entrustment" can be found in the case of *H. A. Prentice Co. v. Page*.²² The Prentice Company turned over goods to Gregg, a factor, for purposes of sale. Gregg induced the deal by means of fraudulent representations that he had customers who wished to purchase the property on a conditional sales basis. Gregg immediately pledged the goods to a pawnbroker for his own personal gain. When the fraud was discovered, Gregg was arrested and Prentice brought an action of conversion against the pawnbroker. The pawnbroker defended on the basis of the Factors' Act. The court held for Prentice. It observed that

if the goods have been properly intrusted to an agent for sale, a party afterwards dealing in good faith with the agent will be protected, though the latter may violate his instructions, or conduct himself fraudulently toward his principal in disposing of or dealing with the goods But, however that may be, we do not think that the statute applies when goods or merchandise have been procured, as here, by the agent or factor, to be intrusted to him for delivery, under what purport to be conditional contracts of sale, and in consequence of what, in law, constitutes a larceny of them on his part. In such a case the goods cannot be said to have been intrusted to him for sale in any manner, within any fair meaning of those words. It

21. For some reason, not readily apparent, courts hostile to the factors' act have been less inclined to get desired results by manipulating or adversely construing or defining the other basic elements of the statute. "Goods," for example, from the earliest days has been broadly defined to include all commodities of commerce. See, e.g., *Associates Discount Corp. v. C. E. Fay Co.*, 307 Mass. 577, 30 N.E.2d 876 (1940); *Heyman v. Flewker*, 13 C.B.N.S. 519, 143 Eng. Rep. 205 (1863). *But see Stodart v. Mutual Film Corp.*, 249 Fed. 507 (S.D.N.Y. 1917), in which doubt was expressed as to whether the factors' act covers the purchase of a play from a broker who was entrusted with the manuscript by the author. The court hinted that only the sale of "merchandise"—as contrasted with "incorporeal rights"—was included.

Similarly, the term "factor" has been treated as a broadly inclusive one. If the relationship of principal and agent actually exists, the statute is satisfied, even though the parties do not use the words "factor," "dealer," or "agent." See *New York Security & Trust Co. v. Lipman*, 157 N.Y. 551, 52 N.E. 595 (1899).

Nor have the courts given restrictive meaning to the requirement that persons protected by the statute must be bona fide purchasers. See, e.g., *Associates Discount Corp. v. C. E. Fay Co.*, *supra*.

22. 164 Mass. 276, 41 N.E. 279 (1895).

would be a contradiction in terms to say that goods are intrusted for sale to one who steals them.²³

The parol evidence rule has enabled hostile courts to defeat the Factors' Acts on the ground that the goods were not entrusted "for purposes of sale." The case of *Green v. Wachs*²⁴ is illustrative. Green delivered an emerald to Vollman, a factor, with the expectation that the latter would sell it for him. A written agreement, however, provided that "these goods are sent for your inspection." Vollman delivered the jewel to another factor, Cohen, who, in turn, delivered it to still another factor, Arnow. Arnow sold it to Wachs. The purchase money never reached Vollman or Green. Green, therefore, brought an action to recover the stone from Wachs. The court held for Green. It found that the Green-Vollman memorandum was "clear on its face" and that the parol evidence rule prevented Wachs from contradicting the "inspection" term by showing that the jewelry had been delivered for purposes of sale.

Judicial hostility to Factors' Acts, observable during the early years of the statute, gradually broke down in most places as courts became educated with respect to the social policy underlying this law. Today buyers who purchase from dealers are given considerable immunity from attacks by entrusters.²⁵

Of course, Factors' Acts have not been widely adopted,²⁶ and in most places P must look to the Uniform Sales Act for definitive rules to resolve his contest with O concerning goods-entrusted-to-dealers. Three sections of the act are especially pertinent.

Sec. 23. (Sale by a Person not the Owner.) (1) Subject to the provision 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:

23. *Id.* at 281, 41 N.E. at 280. *Accord*, *Soltau v. Gerdau*, 119 N.Y. 380, 23 N.E. 864 (1890).

24. 254 N.Y. 437, 173 N.E. 575 (1930).

25. The New York courts, for example, have now overturned the rules of *Green v. Wachs*, 254 N.Y. 437, 173 N.E. 575 (1930), and *Soltau v. Gerdau*, 119 N.Y. 380, 23 N.E. 864 (1890). See *Mann v. R. Simpson & Co.*, 286 N.Y. 450, 36 N.E.2d 658 (1941), in which the court noted that the parol evidence rule does not prevent a showing that the goods were actually entrusted to the factor for purposes of sale, even though the memorandum stated that goods were left for "examination"; *Thompson v. Goldstone*, 171 App. Div. 666, 157 N.Y. Supp. 621 (1916) (overturning *Soltau v. Gerdau*, *supra*).

26. See note 20 *supra*.

(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 special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Sec. 24. (Sale by One Having a Voidable Title.) 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.

Sec. 25. (Sale by Seller in Possession of Goods Already Sold.) Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

It will be observed immediately that these three sections are merely declarative of the common law, and that, unfortunately for P, section 23 continues the maxim of *nemo dat quod non habet*. Section 24, dealing with voidable title, is discussed at greater length subsequently. It, like section 25, which deals with "fraudulent retention" situations, is basically an exemplification of the agency principles of apparent ownership and apparent authority. These sections, in addition to the estoppel provisions of section 23, are P's main weapons in his ownership-of-chattels contests with O, and often provide him with the wherewithal to win the day.

It would be a gross exaggeration, however, to suggest that these weapons have given P a decisive advantage or even tipped the balance of probability of victory in his favor. For the rules, as we have seen, are based on principles of apparent ownership and apparent authority, and, therefore, take into account not only the deception of the buyer, but also whether this deception was caused by O. The mere fact that D, the dealer, is in possession undoubtedly deceives buyers as to his right to sell. But this deception does not adversely affect O, unless he created it. As we have seen, O is said not to "create" it where goods have been stolen from him by force and put into the market place for sale. An entrustment is necessary, and the critical determination under the Uniform Sales Act has become one of describing the circumstances of entrustment which do or do not bind O.

Working without guide lines from the statute, the courts have become badly divided in making this determination.²⁷ The tendency has been to use criminal law concepts to resolve the problem. Thus if O entrusts goods to D under circumstances in which D has committed no crime, courts normally hold the entrustment binding, and the subsequent sale by D to P passes a perfect interest. On the other hand, if D commits a crime in gaining the goods from O, the tendency is to find the "entrustment" not binding, and D then is said to have no power to convey any interest to P. This dichotomy has redounded to O's benefit, for many of the close cases are "criminal" ones in which D has given O a bad check, has deceived O as to his real identity (*i.e.*, impersonation), or has been guilty of fraud punishable as larcenous.²⁸

The personal property security statutes have given P much more protection. Legislation, such as the Uniform Conditional Sales Act, Uniform Trust Receipts Act, and Factors' Lien Acts, has made it crystal clear that if O reserves a security interest in D's inventory, P by purchasing in the ordinary course of business acquires perfect rights against O.²⁹ Except for the security area, however, P's gains at O's expense during the present legislative period have been so insubstantial that P usually feels his best course of action is to avoid litigation with O and to proceed instead against D.

In a proceeding against D, P's rights under the Uniform Sales Act are considerably greater than his common-law rights. Section 13 of the Uniform Sales Act provides:

Sec. 13. (Implied Warranties of Title.) In a contract to sell or a sale, unless a contrary intention appears, there is—

(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;

27. Sometimes the division is found within the courts of a single state. Compare *Phelps v. McQuade*, 220 N.Y. 232, 115 N.E. 441 (1917), with *Amols v. Bernstein*, 214 App. Div. 469, 212 N.Y. Supp. 518 (1925) (discussing *Phelps v. McQuade*, *supra*, but reaching a contrary result).

28. This is the basis upon which the New York courts reconcile *Amols v. Bernstein*, 214 App. Div. 469, 212 N.Y. Supp. 518 (1925), and *Phelps v. McQuade*, 220 N.Y. 232, 115 N.E. 441 (1917).

29. UNIFORM CONDITIONAL SALES ACT § 9 and UNIFORM TRUST RECEIPTS ACT § 9. Factors' Lien statutes, though not uniform in formulation, always prefer the buyer to the lender. See, *e.g.*, MASS. ANN. LAWS, ch. 255, § 43 (1956) (now superceded by *Uniform Commercial Code*).

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law, goods in which a third person has a legal or equitable interest.

Under this section the buyer gets three implied warranties relating to title: the warranty of the seller's right to sell, the warranty of quiet possession and the warranty of freedom from encumbrance. We have seen that the common-law implied warranty of title was remedially conditioned on proof of disturbance of quiet possession. True, if possession were disturbed because of an encumbrance or because D had no right to sell, P had his action. But the gravamen of the action, nevertheless, was the disturbance of possession. Section 13, therefore, can be said to add two new title warranties to that which P received at common law.

Because the Uniform Sales Act also provides rescission as a remedy for breach of any warranty,³⁰ the "beefing up" of the implied warranty of title found in section 13 had the profound effect of enabling P, in most situations, to shift to D the risk of credit and crime clouds on title to chattels. While this development, generally, might be justified, it is deplorable when viewed as a broad-gauged thrust, ignoring actual damages and the adequately assured promise of performance.

The case of *Park Circle Motor Co. v. Willis*³¹ illustrates the point. P, the purchaser and the plaintiff of the action, bought a used car from D, dealer and defendant, for \$3,195 in July, 1950. In March 1951, the car was discovered to have been stolen, and I, an insurance company which had paid \$2,400 to O, the "true owner" from whom the car was stolen and from whom I had taken a transfer of title, took the car away from P. Two days later D bought the car for \$2,401 from I and tendered it to P. P refused the tender, rescinded the contract (D-P) and brought suit against D for the price paid (\$3,195); plus \$63.90, the sales tax paid the state; \$24.25, the cost of title and license tags; and \$122.64, the amount which P had paid for repairs to the car. The decision was for P in the amount claimed.

The case can be criticized for making two fundamental errors. In the first place, assuming a rescission is proper, the damages were not properly assessed. Even if all P's costs can be allocated

30. UNIFORM SALES ACT § 69(1)(d).

31. 201 Md. 104, 94 A.2d 443 (1952).

to the car itself, his expenditures barely exceeded \$3,400. While D received only \$3,195 of this sum, even if one reckons the value-of-the-use of \$3,400 at 6% for the eight months that "D had P's money," the interest comes to no more than \$140. In the meantime "D's automobile" was used by P and was depreciated to the extent of about \$800. If rescission is designed to return the parties to the *status quo ante*, courts should be careful not to automatically equate the value of the use of money with the value of the use of a rapidly depreciating chattel.³²

Second, it is proper to argue that P's real loss was only the denial of the use of the automobile for two days, plus the "mental" and other damages incidental to the repossession. To ignore this argument completely, as the court did, is to ignore the fundamental concept of cure.

Cure assumes that there has been a defective tender of performance, and in this regard, at least, it is to be sharply distinguished from the concepts of "commercial tolerance" and "substantial compliance," which are based on the notion that "almost performing" is as good as "fully performing." Cure promises full compliance after the defective tender, and it is opposed to the idea that the defective tender is either a breach of contract or an anticipatory breach of contract where P can be made whole immediately without risk or inconvenience or where P, seeking to profit from the situation, makes a "surprise" rejection. It is a sensible concept aimed at giving the parties the fruits of their bargain.

But cure as a device to rectify defective tenders has never caught on. Of course, if the person tendering defectively still has some time within the contract to make performance, the possibility of cure exists, unless the initial defective tender amounts to an anticipatory breach.³³ In breach of warranty of title cases this right to cure-before-performance-is-due was important at common law, because, as we have seen, the purchaser had no right to complain until his possession was disturbed. This meant that short of anticipatory repudiation D could cure title to chattels up

32. Generally, however, courts have made this automatic equation. See *Webb v. Marchesi*, 24 Ill. App. 2d 75, 163 N.E.2d 727 (1960); *Nawyn v. Kuchkuda*, 43 N.J. Super. 95, 127 A.2d 897 (App. Div. 1956); *Davis v. Gonzales*, 235 S.W.2d 221 (Tex. Civ. App. 1952); *Argens v. Whitcomb*, 20 Wash. 2d 371, 147 P.2d 501 (1944). *But see* *Barnum v. Cochrane*, 143 Cal. 642, 77 Pac. 656 (1904); *Cantrell v. Sheppard*, 247 S.W.2d 872 (Mo. App. 1952).

33. *McBath v. Jones Cotton Co.*, 149 Fed. 383 (6th Cir. 1906); *Whitla v. Moore*, 164 Pa. 451, 30 Atl. 257 (1894); *Emerson Shoe Co. v. Neely*, 99 W. Va. 657, 129 S.E. 718 (1925). For a collection of cases, see Note, 31 COLUM. L. REV. 1005, 1007 nn.11-16 (1931).

to the time P's quiet possession was interrupted. However, cure at a point of time thereafter generally was not recognized.³⁴

This limited right to cure-before-performance-is-due practically vanished in the warranty of title cases after the enactment of the Uniform Sales Act, because this statute reckons the time of performance to be the time when the goods are sold—not when quiet possession is disturbed.³⁵ Cure, of course, can be made between the dates of the contract to sell and the contract of sale,³⁶ but for practical purposes the doctrine lost its usefulness when D could not employ it (with or without money allowance) to rectify title defects appearing after the date of the sale.

Because the cause of action for breach of warranty of title was postponed at common law until P's possession was disturbed, D was able to sell P encumbered goods and cure (clear) the encumbrance by applying the purchase price to the secured debt.³⁷ Where D could clear the encumbrance in this manner before P's final installment on the purchase price fell due, P was in no position to complain, save for the fact that he had been exposed to an unbargained-for risk, namely that D might accept the purchase money and not clear the title. The absence of machinery at common law and under the Uniform Sales Act to give P some adequate assurance that D would perform undoubtedly militated against D's subsequent demands for this kind of right to cure.

Where adequate assurances of performance are forthcoming, however, there would seem to be little objection to permitting D to use P's purchase money to clear encumbrances. But under the Uniform Sales Act the breach of warranty of title action arises at the time the goods are sold, and this has been construed to mean no later than the time of delivery in installment selling situations.³⁸

34. See *McDonnell Motor Hauling Co. v. Morgan Constr. Co.*, 151 Ark. 262, 235 S.W. 998 (1921); *Striza v. First Nat'l Bank*, 97 W. Va. 359, 125 S.E. 150 (1924) (common-law case, but the court did not require disturbance of possession as a prerequisite to the action of breach of warranty of title); *Shores Lumber Co. v. Clancy*, 102 Wis. 235, 78 N.W. 451 (1899) (common-law case, but no disturbance of possession required).

35. See, e.g., *Kwiatkowski v. Hoislbauer*, 13 Ohio App. 202, 205 (1920), where the court asked, "must there be a claim or eviction before the buyer can get redress? . . . The effect of the provision of the Sales Act [§ 13] . . . would seem to give the buyer of chattels the right to proceed immediately, though his possession had not been disturbed." *Accord*, *W. S. Maxwell Co. v. Southern Ore. Gas Corp.*, 158 Ore. 168, 75 P.2d 9 (1938); 1 WILLISTON, SALES § 221 (rev. ed. 1948).

36. See authorities cited note 33 *supra*.

37. See *Maloney v. Houston*, 51 Cal. App. 585, 197 Pac. 661 (Dist. Ct. App. 1921); *Maher v. Wiesman*, 82 Colo. 320, 259 Pac. 1027 (1927); *Weber v. Owens*, 91 Ill. App. 418 (1900); *Courtney v. Gordon*, 74 Mont. 408, 241 Pac. 233 (1925).

38. See *Yattaw v. Onorato*, 66 R.I. 76, 17 A.2d 430 (1941); *Alaska Air-*

Stated differently, this means that D must have good title as of the moment he delivers the goods to P; that he cannot use P's purchase money to obtain good title, even if P is adequately assured that a good title is forthcoming.

*Alaska Airlines v. Molitor*³⁹ is a good illustration of the present approach. A contract was made under which the buyer agreed to purchase an airplane from the seller for \$45,000, payment to be made in 45 monthly installments of \$1,000. The purchase money was to be paid to a bank to be held in escrow and the seller was to put the title to the plane also in escrow. Soon after this agreement had been put into effect, the federal government gave notice of a tax lien against the plane in the amount of \$22,500. The seller ordered the escrow bank to pay off this lien out of the installment payments. This did not satisfy the buyer, and the court held that he was entitled to cancel (rescind). The contract, however, required the seller "to transfer clear title to the property . . . within ninety days following the execution of this agreement," and because of this the decision seems sound. The "anti-cure" attitude of the court, however, is to be deplored; it seems strangely out of place in our credit economy to see the effectuation of such a serious credit limitation.⁴⁰

Naturally the purchaser deserves the protection of an adequate assurance that the seller will give him a good title after the installments are paid and will protect him in his possession in the interim. Some cases permitting the purchaser to rescind, at first blush strongly "anti-cure" in their orientation, may be explained and defended on the ground of absence of adequate assurance of seller's performance. *McDonnell Motor Hauling Co. v. Morgan Constr. Co.*⁴¹ possibly is such a case. The purchaser bought a steam shovel from the seller on a conditional sales contract in which seller warranted good title. The seller had bought the steam shovel from Osgood on conditional sale, and he planned to use the money received from the buyer to pay off the Osgood encumbrance. When the buyer learned of the Osgood lien, he rescinded. The court held the rescission was proper. The court did not dis-

lines v. Molitor, 46 Wash. 2d 882, 285 P.2d 893 (1955); see also *Shores Lumber Co. v. Claney*, 102 Wis. 235, 78 N.W. 451 (1899) (common law, but disturbance of possession not required).

39. 46 Wash. 2d 882, 285 P.2d 893 (1955).

40. Courts have allowed title to real estate to be cured by using part of the purchase price to clear encumbrances. *Jaenke v. Taylor*, 160 La. 109, 106 So. 711 (1926); see *Sandman v. Sheridan*, 201 Ky. L. Rep. 79, 255 S.W. 1033 (Ct. App. 1923).

41. 151 Ark. 262, 235 S.W. 998 (1921).

cuss the point of adequate assurance of performance, indicating possibly that seller never proffered such an assurance.

The failure of the courts to permit sellers to use installment purchase money to pay off outstanding encumbrances on the goods has resulted in less hardship than might be anticipated because of the developing rules of security law which protect the purchaser in the ordinary course of business from claims of a secured lender respecting encumbered inventory.⁴² In effect D can often "cure" his encumbered title by using P's purchase money, for his installment sale of encumbered inventory to P nevertheless gives P a perfect title and should prevent P from claiming a breach of warranty of title.⁴³ D, having performed with respect to P, is subsequently only answerable to O, the secured lender, and doubtless the latter, having given D the right to sell the inventory, is in no position to complain so long as D is not in default with regard to his payments. These payments usually can be made with P's installment money.

This kind of "cure," although actually very prevalent, rests uneasily on a doubtful legal base. The Uniform Sales Act, section 13, does not impose a warranty that the title conveyed shall be good; it imposes an implied warranty on the part of the seller of a right to sell and that the goods "at the time of the sale" are free from charges and encumbrances. Technically these warranties may be breached where a seller sells encumbered goods, even if the purchaser takes free and clear of the encumbrance. Indeed, some cases on the question indicate that the warranty of title is breached in this situation though they limit the buyer's relief to nominal damages and deny him the potent weapon of rescission.⁴⁴ Denying rescission in this context undoubtedly gets a good result, but

42. See materials cited note 29 *supra*.

43. *Reese v. Kapp*, 82 Kan. 304, 108 Pac. 96 (1910); *Webb v. Steiner*, 113 Mo. App. 482, 87 S.W. 618 (1905); see *Kurtz v. Adrian*, 46 S.D. 125, 191 N.W. 188 (1922); *cf. Gatlin-McDonald Chevrolet Co. v. Douzat*, 59 So. 2d 459 (La. Ct. App. 1952). But in *Chase v. Willard*, 67 N.H. 369, 39 Atl. 901 (1892), the court said that where encumbered goods are sold in such a manner that the purchaser takes free and clear of the lien, there may, nevertheless, be a technical breach of warranty of title for which damages, not rescission, is the proper remedy. In *Baranowski v. Linatsis*, 95 N.H. 55, 57 A.2d 155 (1948), the seller with consent of the mortgagee sold an automobile to the buyer. The encumbrance was removed before there was any threat of loss to the buyer, but, nevertheless, he attempted to rescind when he learned of it. The court denied the rescission on the ground that the buyer secured a perfect title. But it observed, "The most which could be proved was a technical breach of warranty from which the plaintiff suffered no damage." *Id.* at 58, 57 A.2d at 157.

44. See note 43 *supra*. See also *Kennedy v. Hasselstrom*, 40 S.D. 61, 166 N.W. 231 (1918).

it, in turn, also rests on a shaky legal base. There is no authority in the Uniform Sales Act, which is fairly explicit on the whole subject, for limiting the remedy of rescission to situations of substantial damages. Perhaps, therefore, the last word on this matter has not been written by the courts.

To deny the seller the right to cure an encumbered title by use of the purchaser's installment money has adverse credit implications and seems unjustified where there is an adequate assurance of performance, but it does not result in as much hardship for the seller as that which is caused by decisions arbitrarily denying his right to cure "clouded" (technically imperfect) titles. Frequently an imperfect title can be easily corrected with little or no risk or inconvenience to the buyer. Cure is traditionally denied in these cases on the ground that a breach of warranty occurs if the seller does not have a good title at the time of the sale and this justifies a rescission by the buyer.⁴⁵ In *Yattaw v. Onorato*,⁴⁶ for example, a dealer acquired a used car as a trade-in, ignorant of the fact that a security interest in it was held by G. The car, thereafter, was sold by the dealer to P. P used the car for three weeks, discovered G's possible interest in it, and rescinded. G did not threaten P's possession, and the dealer was able to pay off G's claim immediately. The court refused to consider the breach as cured; it permitted the rescission with the observation that the warranty of title was breached at the time of the sale, entitling P to take certain arbitrary actions, one of which was rescission.

The fact that the seller has expended considerable funds in getting ready to perform does not influence the courts to permit him to cure a defective tender of title to chattels.⁴⁷ Moreover, the breach of warranty of title, triggering the rescission, does not have to be substantial. Cure is denied even where the breach is a minor one, which could be easily corrected.⁴⁸ In *Striza v. First*

45. *Yattaw v. Onorato*, 66 R.I. 76, 17 A.2d 430 (1941); cf. *McDonnell Motor Hauling Co. v. Morgan Constr. Co.*, 151 Ark. 262, 235 S.W. 998 (1921); *Striza v. First Nat'l Bank*, 97 W. Va. 359, 125 S.E. 150 (1924); *Shores Lumber Co. v. Claney*, 102 Wis. 235, 78 N.W. 451 (1899).

46. 66 R.I. 76, 17 A.2d 430 (1941).

47. In *Shores Lumber Co. v. Claney*, 102 Wis. 235, 78 N.W. 451 (1899), a common-law case using law which later became part of the *Uniform Sales Act*, the court said that breach of warranty of title allows rescission no matter what the vendor had done in preparation for the sale. The facts indicated that the vendor, pursuant to the sales contract, had transported lumber at considerable expense before the rescission occurred. See also the cases cited in note 45 *supra*.

48. *Hollywood Plays v. Columbia Pictures Corp.*, 299 N.Y. 61, 85 N.E. 2d 865 (1949); *Yattaw v. Onorato*, 66 R.I. 76, 17 A.2d 430 (1941); *Striza*

Nat'l Bank,⁴⁹ for example, cure was denied and rescission was permitted under the following circumstances. The seller had contracted to sell his restaurant and its supplies to the buyer, who made a \$500 down payment. Grocery supplies were not a major item of the sale. Shortly before the title was to be transferred, an executing creditor of the seller levied against the grocery supplies. The purchaser immediately rescinded, and the court permitted the remedy in spite of an offer by the seller to purchase back the groceries at the judgment sale and to adequately assure such course of action by "pledging" the down payment to this purpose. The court said that the seller did not have title to the property on the day the sale was to be consummated, and this allows the buyer to decline to complete the contract and recover back any money which he has paid on it.

Some courts, however, have repudiated the rule that any breach of warranty justifies rescission-with-no-right-to-cure, by refusing to find a breach in cases in which one technically may exist,⁵⁰ by refusing to permit rescission although a breach is found,⁵¹ or, rarely, by permitting the seller to cure.⁵²

The first of these correctives smacks of the common-law condition precedent of disturbance of possession as a prerequisite to the purchaser's right to bring an action for breach of warranty of title, although the principle is now usually stated in terms of burden

v. First Nat'l Bank, 97 W. Va. 359, 125 S.E. 150 (1924); cf. Alberti v. Jubb, 204 Cal. 325, 267 Pac. 1035 (1928).

49. 97 W. Va. 359, 125 S.E. 150 (1924).

50. Compare *Loew's Inc. v. Wolff*, 101 F. Supp. 981 (S.D. Cal. 1951), with *Hollywood Plays, Inc. v. Columbia Pictures Corp.*, 299 N.Y. 61, 85 N.E.2d 865 (1949). See *Hale v. Cochrane*, 24 Colo. App. 528, 135 Pac. 980 (1913), in which a brand inspector questioned the buyer's title to cattle and the buyer used the occasion to rescind the sale.

The record discloses that after Hale had purchased the cattle, and before they could be disposed of on the Denver markets, there had been a slump in prices. It is this fact, we are constrained to believe, rather than the action of the brand inspector complained of, which moved [Hale] . . . to stop payment on the draft.

Id. at 530-31, 135 Pac. at 981. The court held that Hale was not entitled to rescind because someone "without any apparent authority so to do, merely questions his title." *Id.* at 530, 135 Pac. at 981.

51. *Baranowski v. Linatsis*, 95 N.H. 55, 57 A.2d 155 (1948).

52. *Castille v. Champ Auto Sales*, 92 So. 2d 131 (La. Ct. App. 1957); see *Gordon v. Cleveland Sawmill & Lumber Co.*, 123 Mich. 430, 82 N.W. 230 (1900); cf. *Becker Roofing Co. v. Carroll*, 37 Ala. App. 385, 69 So. 2d 295 (1953) (warranty of quality). In *Sandman v. Sheridan*, 201 Ky. L. Rep. 79, 255 S.W. 1033 (Ct. App. 1923), the buyer gave the seller eight days to clear title to real estate and fixtures. It took seller ten or eleven days to clear and buyer refused to go through with the deal. Judgment for buyer was reversed. The court said every case turns on its own facts as to what constitutes a reasonable time to cure.

of proof. *Loew's Inc. v. Wolff*⁵³ illustrates this approach. In that case there was a possibility that the title conveyed was clouded by an outstanding claim, but the validity of this claim had not been tested. The purchaser's attempt to rescind was defeated. The court said:

But mere dispute about the title, or the contingency of future loss, does not warrant a rescission, and, where the buyer returns the goods, and refuses to pay the purchase money, it is incumbent on him to show that there is a valid adverse claim, from which loss to him would inevitably occur.⁵⁴

This first corrective, of course, is factually limited to the situation in which baseless or almost baseless claims are made. "If the title is so clouded by apparent defects, either in the record or by proof outside of the record, that prudent men, knowing the facts, would hesitate to take it," the warranty is breached, and the buyer may rescind without giving the seller the right to cure.⁵⁵

The second corrective is more effective from the seller's point of view. However, as we have seen, it rests on an uneasy legal base, since the Uniform Sales Act does not distinguish between minor and major breaches as sufficient to trigger a rescission action. Nevertheless, some courts have made the distinction,⁵⁶ and this fact must be considered in any total evaluation of the problem.

The third corrective, cure, has also been used to protect the seller against "surprise" rejections on the part of the buyer. Of the three correctives, cure seems to offer the most hope; the doctrine does not offend the Uniform Sales Act, and it results in substantial justice to all parties by giving them the fruits of their bargain. *Castille v. Champ Auto Sales*⁵⁷ illustrates this approach. The seller sold to the buyer a used truck and failed to furnish a marketable title, because the certificate of title was in the name of a third person. If the buyer had complained, the seller could have easily corrected the title deficiency. But the buyer would not cooperate in this way, and he sought to avoid the transaction on

53. 101 F. Supp. 981 (S.D. Cal. 1951).

54. *Id.* at 988.

55. *Hollywood Plays, Inc. v. Columbia Pictures Corp.*, 299 N.Y. 61, 65, 85 N.E.2d 865, 866 (1949); see *Marin v. Francisca Reyes, Inc.*, 147 Misc. 136, 262 N.Y. Supp. 577 (Sup. Ct. 1931), *aff'd*, 238 App. Div. 779, 262 N.Y. Supp. 579, *aff'd*, 263 N.Y. 550, 189 N.E. 692 (1933); *cf.* *People's State Bank v. Monsey Oil Co.*, 297 S.W. 885, *aff'd*, 11 S.W.2d 507 (Tex. Com. App. 1928); *Hale v. Cochrane*, 24 Colo. App. 528, 135 Pac. 980 (1913).

56. See, *e.g.*, *Baranowski v. Linatsis*, 95 N.H. 55, 57 A.2d 155 (1948).

57. 92 So. 2d 131 (La. Ct. App. 1957).

the ground of the title failure. The seller offered to correct the title, but the buyer declined. The court refused the rescission:

From the testimony in the record it is clear that the obtaining of a corrected certificate of title is a relatively easy matter. . . . [O]ur impression from the record as a whole [is] that had the plaintiff been more cooperative in the matter, and not so content to rely upon what he believed to be his rights, the matter of the certificate of title and license plates could very simply have been worked out. Consequently, we do not believe that the sale should be annulled because of the title question.⁵⁸

Although other courts have hinted that the right to cure exists,⁵⁹ the *Castille* case represents a departure from the general rule.⁶⁰ Of course the parties may work out their own "cure" remedy,⁶¹ but if they do not, the courts usually will not order it.

III. COMMERCIAL CODE

Section 2-403 of the Uniform Commercial Code gathers together in one place and modifies to a considerable extent the rules distributing credit and crime losses between O, the "true owner," and P, the bona fide purchaser of inventory. As might be expected, the modifications are designed to give P greater protection than was accorded him at common law, or under the Uniform Sales Act and Factors' Acts. The section provides:

Section 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

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

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

58. *Id.* at 135-36.

59. See cases cited note 52 *supra*.

60. See cases cited note 45 *supra*.

61. See *Sandman v. Sheridan*, 201 Ky. L. Rep. 79, 255 S.W. 1033 (Ct. App. 1923), discussed in note 52 *supra*; see also *Courtney v. Gordon*, 74 Mont. 408, 241 Pac. 233 (1925).

(2) 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.

(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.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

Subsection 2-403(1) continues the basic policy of American law of giving the purchaser "all title which his transferor had or had power to transfer." This subsection carries forward the agency doctrines of apparent authority and apparent ownership which have been P's main weapons under the Uniform Sales Act in his title contests with O. Since section 1-103 of the Uniform Commercial Code provides for the application of supplementary general principles of law to sales transactions unless displaced by the particular provisions of appropriate sections, all rights acquired under the Factors' Acts are also continued.

The latter portion of subsection 2-403(1) does more than merely continue the aspects of present law giving protection to good faith purchasers. It defines the "voidable title" concept in such a way that P is greatly advantaged vis-a-vis his former situation. The "voidable title" concept is one which recognizes the power of a person with a "voidable title," as distinguished from a "void title," to transfer a good title to a bona fide purchaser for value. It is based on the equitable doctrine that a bona fide purchaser cuts off the right to rescind. Thus, where goods have been delivered by O to D under circumstances which give D the title but permit O to rescind (*e.g.*, fraud), O's right of rescission is destroyed by D's sale of the goods to a bona fide purchaser. On the other hand, if the goods were delivered by O to D under circumstances which did not give D the title but left O the complete owner (*e.g.*, larceny by trick), the subsequent sale by D to P would not cut off O, for O's interest is not a mere right of rescission but complete ownership. In other words, in this situation D's interest is said to be "void," not merely "voidable."⁶²

At common law and under the Uniform Sales Act, the voidable

62. For a discussion of the voidable title doctrine and a collection of cases arising thereunder, see 2 WILLISTON, SALES § 348 (rev. ed. 1948); see generally *id.* §§ 310-47.

title doctrine was a weak and uncertain weapon in P's arsenal because of the possibility of finding the initial transaction (O-D) void rather than voidable.⁶³ Subsection 2-403(1) makes the weapon more formidable by characterizing as voidable many "deliveries" which were regarded as void at common law and under the Uniform Sales Act. For example, under subsection 2-403(1) a delivery is voidable even though procured through fraud punishable as larcenous under the criminal law.⁶⁴ Deliveries in exchange for "bad checks"⁶⁵ or predicated on a deception as to the identity of the purchaser⁶⁶ or in response to a technical cash sale contract⁶⁷ all create voidable interests under the subsection.

This important step forward in the protection of purchasers is nevertheless overshadowed in importance by subsections 2-403(2) and (3) of the Uniform Commercial Code. Subsection 2-403(2) provides that "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 the ordinary course of business." The subsection greatly adds to the protection given by Factors' Acts. As we have seen, Factors' Acts usually provide that if a person entrusts goods to a factor for *purposes of sale*, a power is created in the factor to transfer a good title to a purchaser for value in the ordinary course of business. Under subsection 2-403(2) an owner's loss of title does not depend on his having conferred on the merchant any authority to sell the goods. His entrustment of goods to a merchant who deals in goods of that kind alone gives the merchant the power to transfer all the rights of the entruster to a buyer in the ordinary course of business. Under this rule if an owner leaves his watch for repairs with a jeweler who also is in the business of selling watches, a sale by the jeweler to a buyer in the ordinary course of business would pass good title to the latter.

63. For example, *compare* Phelps v. McQuade, 220 N.Y. 232, 115 N.E. 441 (1917) (fraudulent impersonation made sale voidable), *with* Amols v. Bernstein, 214 App. Div. 469, 212 N.Y. Supp. 518 (1925) (citing Phelps v. McQuade, *supra*, as authoritative, the court nevertheless found that a fraudulent impersonation made the sale void).

64. This would reverse cases like Amols v. Bernstein, 214 App. Div. 469, 212 N.Y. Supp. 518 (1925).

65. This would reverse cases like Gustafson v. Equitable Loan Ass'n, 186 Minn. 236, 243 N.W. 106 (1932), and Sullivan Co. v. Larson, 149 Neb. 97, 30 N.W.2d 460 (1948).

66. This would reverse both Amols v. Bernstein, 214 App. Div. 469, 212 N.Y. Supp. 518 (1925), and Gustafson v. Equitable Loan Ass'n, 186 Minn. 236, 243 N.W. 106 (1932).

67. This would reverse cases like Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 Pac. 915 (1930).

Subsection 2-403(3) broadly defines "entrusting" to include 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.

This definition encompasses the fraudulent retention of title cases and is broad enough to catch those situations in which goods are delivered to dealers by one who reserves a security interest in them. Section 9-307(1), explicitly covering this security problem, reinforces this rule by providing that a sale of encumbered inventory by the dealer to a buyer in the ordinary course of business results in a transfer to the buyer of all the rights of the entruster (secured party-owner).⁶⁸

While the rules of these sections recognize the commercial desirability of increasing the marketability of goods, a recognition which is implemented by giving P greater rights vis-a-vis O, it is immediately apparent that the Uniform Commercial Code does not adopt market overt and does not confer power on a thief, or a successor to a thief, to cut off the rights of a person deprived of his property by a forceful taking. Therefore, crime clouds on title to chattels will continue to present cases in which P, helpless against O, must look to D, the dealer, for ultimate relief.

In this quest breach of warranty of title will continue to provide P with the means. We have seen under the Uniform Sales Act that the purchaser is protected by three implied warranties of title: (1) An implied warranty that the seller had a right to sell the goods; (2) an implied warranty that the buyer should enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale; and (3) an implied warranty that the goods should be free of encumbrances in favor of a third person, not declared or known to the buyer before or at the time when the contract or sale is made. Section 2-312 of the Uniform Commercial Code substantially restates these title warranties with one significant change. The change involves an addition which extends the warranty of title to include clouds resulting from claims by third persons by way of infringement. This addition, set out in subsection 2-312(3), imposes a duty on the seller to make certain that no claim of infringement will cloud or mar the buyer's title, unless

68. For a fuller discussion of § 2-403, see HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE 104-07 (A.L.R. rev. ed. 1958).

the circumstances at the time of contracting place the risk of such claim upon the buyer.⁶⁹

The remedies given to P under the Uniform Commercial Code also parallel those of the Uniform Sales Act, although rescission is called "revocation of acceptance"⁷⁰ and has an important limitation which will be considered at a later point.

In spite of this substantive and procedural similarity, decisions like *Yattaw v. Onorato*,⁷¹ which abuse the warranty of title and the remedy of rescission and result in excessive protection for P, are rejected by the Uniform Commercial Code. The rejection is based squarely on the concept of "cure."

Section 2-508 of the Uniform Commercial Code provides:

Section 2-508. Cure by Seller of Improper Tender or Delivery; Replacement.

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

Subsection 2-508(1) continues the now-prevalent notion that a seller who has made a nonconforming tender of title should be permitted to make a conforming tender within the contract time.⁷² The subsection, however, is additionally useful in that it would seem to prevent a buyer from treating the first nonconforming tender as an anticipatory repudiation, provided the seller quickly notifies the buyer of his intention to perform. Of course, the nonconforming tender may make the buyer feel insecure, or even convince him that D will not be able to give a good title within the contract time. Clearly P needs protection against the possibility that D's performance will not be forthcoming. At common law and under the Uniform Sales Act this protection was given through the use of the doctrine of anticipatory repudiation. In this situation the doctrine provided that once a party had been given reason to believe that the seller's performance would not be forth-

69. For a discussion of § 2-312, see HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE 38-41 (A.L.R. rev. ed. 1958).

70. UNIFORM COMMERCIAL CODE § 2-608.

71. 66 R.I. 76, 17 A.2d 430 (1941). See text accompanying note 46 *supra*.

72. See cases cited note 33 *supra*.

coming it would be an undue hardship on him to be obligated to continue his own performance, and, therefore, he was excused. Since subsection 2-508(1) takes away P's right to claim an anticipatory repudiation as a concomitant of D's right to cure, some other doctrine adequately protecting P but not adversely affecting D's right to cure had to be devised. This device is called "right to adequate assurance of performance" and it is set out in section 2-609:

Section 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

Under this provision P is given the right to require adequate assurance that D will be able to give him good title within the contract time, and this makes it feasible to permit D, upon such an adequate assurance, to cure a defective tender of title.

Subsection 2-508(2) is the most dramatic and important provision on cure. It assumes that the contract time has passed and that the seller has made a defective tender. In such a case involving a defective tender of title we have seen that the courts at common law and under the Uniform Sales Act generally treat the contract as breached and give the buyer the remedy of rescission if he wants it. This results in an injustice in cases in which the buyer has not been hurt and in which reasonable men acting in good faith would be willing to permit the defect to be corrected. Subsection 2-508(2) seeks to avoid this injustice by giving the seller a right to cure the defective title even though the contract time has passed if the circumstances are such that he had reasonable grounds to believe the buyer would accept the nonconforming tender with or without a money allowance.

The formulation of subsection 2-508(2) was influenced by the fact that most cases falling under it will be "quality" and "quantity" cases, rather than "title" cases. If seller, for example, agreed to deliver 1,000 bags of sugar by July 4th, and through inadvertance delivered only 999 bags by that date, the subsection would permit him to "cure" his defective performance after July 4th by delivering another bag. Irrespective of notions of substantial compliance or *de minimus*, in such a case it would be unthinkable to let the buyer out of the contract, and because the seller had reason to think that the 999 bag tender would be acceptable (with or without money allowance), the subsection permits him to correct the "breach" even though the contract time has passed. The formulation of the rule is completely satisfactory for cases such as this, but it leaves much to be desired in "title" cases. When, for example, does a seller have reason to believe that a buyer would take a defective title, with or without money allowance? It is difficult to think of an exact "title" counterpart to the 999 bags of sugar hypothetical, but if one inquires as to the reasons why the seller has reasonable grounds to believe the 999 bag delivery would be acceptable, with or without money allowance, a satisfactory criterion evolves. The 999 bag delivery does not subject the buyer to any great inconvenience, risk or loss; therefore, a reasonable man in the seller's position would believe that a good faith buyer would accept it. The seller, then, should be able to cure defective titles under subsection 2-508(2) in those cases in which he can do so without subjecting the buyer to any great inconvenience, risk or loss.

Under these criteria, *Castille v. Champ Auto Sales*⁷³ is correct, because the court found that a defective title certificate to an automobile could be rectified easily and without risk of inconvenience to the buyer. The case of *Wilde v. Liedtke*,⁷⁴ which denied the remedy of cure, also seems correct. In that case the buyer returned an automobile to the seller when he discovered the motor number of the car did not correspond with the number listed on the title certificate. The buyer thereafter brought an action to recover the purchase price, and when the case was called four and one half months later, the seller tendered into court a good certificate of title. The court correctly held that the buyer was entitled to a return of his money. While the court did not discuss the point, it seems obvious that the attempted cure came too late. If permitted,

73. 92 So. 2d 131 (La. Ct. App. 1957). See text accompanying note 57 *supra*.

74. 231 S.W.2d 1009 (Tex. Civ. App. 1950).

it would have resulted in serious inconvenience to the buyer.⁷⁵

On the other hand, the case of *Lee v. Woods*,⁷⁶ permitting cure, is clearly wrong under these criteria. In that case Lee sold Woods a mule which was subject to a chattel mortgage, the encumbrance being unknown to either party. Subsequently the mortgagee repossessed the mule. At the foreclosure sale which followed Lee bought the mule. When Woods sued him for breach of warranty of title, Lee tendered the mule. Because of the repossession and foreclosure, Woods was out of possession for at least fourteen days, and he had held the mule as bailee for the mortgagee for a considerable period of time. The court found that Lee's tender of the mule cured the defective title and defeated Wood's action for damages, except as to those suffered during the time he was dispossessed. The trier of fact found that the mule was not in condition to be used during the time it was out of Wood's possession, and, therefore, the buyer was awarded no damages at all. The court in permitting the cure remedy seemed to overlook the inconvenience and risk suffered by the buyer, Woods.

While cases such as these are quite easily resolved under the proposed criteria, resolution of cases like *Park Circle Motor Co. v. Willis* would present some difficulties.⁷⁷ In that case the buyer, after using an automobile for eight months, was permitted to rescind the purchase and recover back his total purchase price plus incidental expenditures when the car was taken from him by a legal successor to the "true owner"—in spite of the fact that the seller immediately thereafter acquired a perfect title to the car and tendered it to the buyer within two days of the time of repossession. Undoubtedly the buyer suffered some inconvenience, risk, and loss, but whether these are great enough to prevent the remedy of cure would be a close question under subsection 2-508 (2) of the Uniform Commercial Code.

It was suggested earlier that one trouble with cases like *Park Circle* lies in permitting the buyer to rescind. The Uniform Commercial Code contains no concept of rescission, but substitutes therefor the remedy of "revocation of acceptance." Section 2-608 permits a buyer to revoke his acceptance only if there has been no

75. See also *Neosho Motor Corp. v. Patterson*, 184 Okla. 540, 88 P.2d 632 (1939), in which the seller promised to cure defective title, but failed to do so for eight months, at which time the chattel was repossessed. When the buyer sued, the seller tendered a good title. The court held that the attempted cure was ineffective.

76. 161 Ky. 806, 171 S.W. 389 (1914). See text accompanying note 18 *supra*.

77. 201 Md. 104, 94 A.2d 443 (1952). See text accompanying note 31 *supra*.

"substantial change in condition of the goods which is not caused by their own defects." This section probably would not permit revocation of acceptance in the *Park Circle* case, and the buyer probably would be relegated by virtue of sections 2-607 and 2-714 to damages resulting from the seller's breach "as determined by any manner which is reasonable." These Code sections do not make it clear whether or not the seller has a right to reduce damages by "cure," but it is believed that familiar mitigation-of-damages principles should make it necessary for the buyer to accept the proffered cure. In this connection it should be remembered that the buyer has available to him under the Uniform Commercial Code machinery to adequately assure the seller's performance and that he can collect incidental and consequential damages proximately resulting from the breach.

There remains to be considered whether the Uniform Commercial Code will permit the seller to use the buyer's purchase money to cure (clear) an encumbered title. Usually the problem will not arise, because, as we have seen under section 9-307, if the secured party has authorized the sale, the buyer in the ordinary course of business takes free and clear of the security interest even though it is "perfected" by recording or otherwise. Where this section is inapplicable, the seller should be permitted to cure if he can do so without causing the buyer undue inconvenience, risk or loss. Normally where the buyer has contracted to pay the price in installments, such as in a conditional sales agreement, it is not inconvenient for him to permit the installment money to be used to discharge an outstanding encumbrance. There is some risk, however, that the seller will not so utilize the funds or that the funds will be insufficient for that purpose. In such a case the buyer can protect himself by utilizing the adequate-assurance-of-performance remedy. The existence of this remedy makes it feasible to employ the doctrine of cure in these cases.

Where the buyer has agreed to pay the price in one installment, he will necessarily be put to some inconvenience and risk if the seller's title is encumbered. The risk can be eliminated by modifying the contract so as to reduce the price to the extent of the encumbrance which, in turn, would be assumed by the buyer.⁷⁸ Elimination of the risk also can be effectuated through an adequate assurance of performance. But the inconvenience remains, and its existence probably should result in a denial of cure in most of these cases.

78. See cases cited note 40 *supra*.

CONCLUSION

The Uniform Commercial Code concept of cure is a triumph, and it undoubtedly will be used to prevent injustices caused by bad-faith, surprise rejections of title to chattels. Since the Code gives the buyer ample warranty protection, cure is a desirable balancing doctrine to prevent impositions upon the seller. Nevertheless, well drafted sales contracts will leave no room for it. If the seller wants protection against a "surprise" rejection of a defective title, the contract should provide the circumstances under which such a title may or may not be corrected without breach. At a very minimum, the preamble ("whereas" clause) should state any factors in the particular transaction which give the seller reasonable grounds to believe that a tender of defective title would be acceptable or correctible. Conversely, if the buyer expects strict performance, the contract should so provide. In this connection it is well to remember that if the strict performance language appears in a form contract, the seller may be able to show that it is at odds with business practices and, therefore, insufficient to give him reasonable grounds to believe that the tender would be unacceptable. The buyer probably can avoid this possibility by having the seller separately initial the portion of the contract in which the strict performance language appears. In such a case even if strict performance is out of line with general trade usage in the particular situation, there is proof that the seller's attention has been directed to the fact that customary practices are not to be used in this connection, and he, therefore, has no reasonable grounds to believe that a defective title would be acceptable or correctible.

An ounce of prevention is still worth a pound of cure—even in these inflationary times.

