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The Extension of the Voidable Title Principle Under the Code

CHARLES M. WEBER*

INTRODUCTION

In 1793, the Court of the King's Bench in England decided *Parker v. Patrick*.¹ The basic facts of that case present one of the law's perennial triangles. Patrick was induced by fraud to sell and deliver goods. The defrauder pawned the goods with Parker, who acted innocently. Patrick seized the goods from Parker. In the ensuing lawsuit, it was held that Parker was entitled to the goods.

This appears to be the first reported case in which the voidable title principle was applied.² The court itself did not expressly refer to the principle. In fact, as is true very often when common law principles are first brought into being, it is quite certain that the court was not even aware of its creation. The ground on which the court was content to rest its decision was, for reasons which will be discussed later,³ that the defrauder had obtained the goods by fraud and that fraud was not a felony. Despite the court's opinion and the confusion it caused some later

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¹ 5 T. R. 175, 101 Eng. Rep. 99 (K.B. 1793).

² Blackstone, writing in 1765, recognized the general doctrine of estoppel, 3 Blackstone, Commentaries 308 (Lewis' ed. 1897); and discussed the related problem of market overt in some detail, 2 Blackstone, *op. cit. supra.*, at 449-51; but made no reference at all to the voidable title principle.

In *Davis v. Morison*, Lofft 185, 98 Eng. Rep. 601 (K.B. 1773), a defrauded seller was denied the right to recover a plate which the defrauder had sold to an innocent purchaser. The underlying principle is not expressly stated, but it appears to have been estoppel rather than voidable title because the defrauded seller had delivered a receipted bill to the defrauder who had induced the innocent purchaser to buy by showing him this receipted bill.

³ *Infra.* p. 465.

English courts, it eventually became quite clear in England⁴ as well as in this country,⁵ that the rationale of *Parker v. Patrick* is best expressed in the voidable title principle which gives to a person who holds only a voidable title the power to transfer a good and indefeasible title.

⁴ As late as 1835, Lord Denman said, in permitting the owner of goods to recover them from one who had purchased them from the owner's servant, "And if the question of goods fraudulently obtained were before us, I cannot help thinking that the case of *Parker v. Patrick*, [5 T. R. 175, 101 Eng. Rep. 99 (K. B. 1793)] would not bear examination. The *Earl of Bristol v. Wilsmere*, [1 B. & C. 514 (1823)], seems to me to be quite inconsistent with it." *Peer v. Humphrey*, 2 A. & E. 495, 499, 111 Eng. Rep. 191, 193 (K. B. 1835). Actually, the *Earl of Bristol* case was clearly distinguishable from *Parker v. Patrick*, *supra*, because it involved, not a good faith purchaser, but rather, an attaching creditor.

In *Wright v. Lawes*, 4 Esp. 82, 170 Eng. Rep. 649 (N. P. 1801), *Parker v. Patrick*, *supra*, was followed without being mentioned by denying a defrauded vendor the right to recover from the defrauder's vendee. In *Load v. Green*, 15 M. & W. 216, 219, 153 Eng. Rep. 828, 829 (Ex. 1846), Baron Parke said, "The case of *Parker v. Patrick* has been doubted; but I think it may be supported on the ground that the transaction is not absolutely void, except at the option of the seller: he may elect to treat it as a contract, and he must do the contrary before the buyer has acted as if it were such and resold the goods to a third party." And in *White v. Garden*, 10 C. B. 919, 926, 138 Eng. Rep. 364, 367 (C. P. 1851), Justice Cresswell said in protecting a good faith purchaser against the claim of a defrauded seller, "It seems to me that the case of *Parker v. Patrick*, as explained in *Load v. Green* well warrants us in discharging this rule." A similar statement is found in *Stevenson v. Newnham*, 13 C. B. 285, 138 Eng. Rep. 1208 (C. P. 1853).

⁵ American courts appear to have followed *Parker v. Patrick* *supra* note 4, quite consistently. In *Hollingsworth v. Napier*, 3 Cai. 182 (N. Y. Sup. Ct. 1805), a good faith purchaser was protected against the claims of a defrauded owner without any excess reference to *Parker v. Patrick*, *supra* note 4. In *Mansell's Adm'r v. Israel*, 6 Ky. (3 Bibb.) 510, 515 (1814), the Kentucky Court of Appeals reversed a judgment in favor of a defrauded owner and sent the case back for a new trial with the following statement which appears to represent the first, and at the same time, one of the most cogent, analyses of the voidable title principle ever to be made:

The argument against the title of the purchaser (defrauder) in such a case assumes for its basis the position that no right passes by the contract. If the contract ought to be regarded as a mere nullity and void *ab initio*, this position is no doubt correct; but there are certainly strong reasons against regarding it in that light. If it were a mere nullity, the injured party could not by his election affirm it and go for damages. He could not by his subsequent assent, when fully apprised of the fraud and of his rights, ratify it; and the party who had practiced the fraud in procuring such a contract, would not be bound by it; and yet the contrary of these doctrines are generally, if not universally, admitted to be correct. If then the contract is not *ab initio* void; if it is not a nullity in itself, but becomes so only at the election of the injured party, until that election is made the contract is obligatory and passes the title to the person holding under such a contract; consequently a sale in the meantime by such person would transfer the right to the purchaser.

It is interesting that the court did not cite *Parker v. Patrick*, *supra* note 4, or any other case in support of its analysis. In *Somes v. Brewer*, 19 Mass. (2 Pick.) 184 (1824), the court discussed *Parker v. Patrick*, *supra* note 4, at length and relied heavily on it in holding that a bona fide purchaser of real estate acquires a good title from one who acquired it by fraud. In *McKenney v. Dingley*, 4 Me.

(footnote continued on next page)

In 1906, when the National Conference of Commissioners on Uniform State Laws adopted the Uniform Sales Act, the voidable title principle was embodied in section 24, which provides:

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.⁶

A person's title to goods is said to be voidable when he holds a legal title but his transferor has the right to avoid the transfer and reassert title in himself.⁷

Since the voidable title principle empowers a person who holds only a voidable title to transfer a good title, it is, of course, an exception to the general rule that a person lacks the power

(Footnote continued from preceding page)

(Green L.) 172 (1826), the court recognized the voidable title principle but refused to apply it to protect a purchaser who had knowledge of the defect in his vendor's title. In *Mowrey v. Walsh*, 8 Cow, 238 (N.Y. Sup. Ct. 1828), the court discussed and relied on *Parker v. Patrick*, *supra* note 4, in protecting a good faith purchaser of goods from the claim of the defrauded owner. In *Bradbury & Fosters v. Keas*, 28 Ky. (5 J. J. Marsh.) 446 (1831), the Kentucky Court of Appeals recognized the voidable title principle but held it inapplicable because the ultimate purchaser had knowledge of his vendor's fraud. In *Arnett v. Cloudas*, 34 Ky. (4 Dana) 299, 300-01 (1836), in protecting a good faith purchaser against a defrauded seller, the Court of Appeals cited *Parker v. Patrick*, *supra* note 4, but relied most heavily upon its own earlier opinion in *Mansell's Adm'r v. Israel*, *supra*. Approving and extending the analysis it had made in the latter case, the court stated:

But though this election is afforded to vendors, it should be exercised in reasonable time, and so as not to effect the rights of third persons, who may in the mean time become innocent purchasers. When we find the term void used in its broad sense in application to such contracts (between the defrauded owner and the defrauder), it is used so in reference to contests between the vendor and vendee, where the party defrauded has elected to treat them as void. But we find no case, nor have the vigilant researches of the able counsel been able to point us to any good authority, where the vendor has been permitted to make his election of his remedies, after the property has passed into the hands of an innocent purchaser so as to effect [*sic*] his rights.

⁶ The Uniform Sales Act was contained in Ky. Rev. Stat. ch. 361 (1928). It was repealed by Uniform Commercial Code, hereinafter cited as UCC, § 10-102 which became effective July 1, 1960. Ky. Acts 1958, ch. 77. Except for the insertion of the words "for value" § 24 of the Uniform Sales Act is identical with § 23 of the English Sale of Goods Act. 56 and 57 Vict. ch. 71 (1893).

⁷ "Voidable" means valid until avoided. *E.g.*, *Kirkpatrick's Ex'r v. E. Rehkoph Saddlery Co.*, 144 Ky. 129, 137 S.W. 862 (1911); *Donaldson & Co. v. Byrd & Co.*, 16 Ky. L. Rep. 448 (abstract) (Super. Ct. 1894). 1 Williston, Sales § 12 (rev. ed. 1948), hereinafter cited as Williston. The habit of some of the earlier courts of referring to a contract as "void" when in fact it was merely "voidable" was commented upon by the Kentucky Court of Appeals in *Arnett v. Cloudas*, 34 Ky. (4 Dana) 299 (1836).

to transfer a greater interest in goods than he owns.⁸ The general rule is vital to the concept of private property, which is, in turn, one of the cornerstones of our economic society. Therefore, it is understandable that the courts have been cautious about extending the scope of the voidable title principle.

Courts which have been called upon to determine and control the application of the voidable title principle have been required to deal with two basic problems. The first problem has been to place proper limits on the kind of person who is entitled to the protection of the principle. The common law required that he be a bona fide purchaser for value. Inasmuch as the Uniform Sales Act settled the principal questions which had troubled the courts in fixing the requisites of a person who might enjoy the protection of the principle,⁹ this problem has not been a serious one during recent years. It will not be discussed further in this paper. The second problem, confronting courts which have undertaken to develop and control the voidable title principle, has been to determine the types of transactions which give rise

⁸ *Bozeman Mortuary Ass'n v. Fairchild*, 253 Ky. 74, 68 S. W.2d 756 (1934). According to Chancellor Kent, the general principle applicable to personal property in both civil law and common law jurisdictions has been the maxim "Nemo plus juris in alium transferre potest quam ipse habet" (One cannot transfer to another a larger right than he himself has). 2 Kent, Commentaries 324 (13th ed. 1884). There are, in addition to the voidable title principle, a number of other well recognized exceptions to the general rule. For example, an agent lacking ownership, but having either actual or apparent authority, has power to transfer ownership to a third party; a trustee, holding only legal title may have power to transfer the equitable as well as the legal title; a conditional buyer or chattel mortgagor in possession of goods subject to a lien has power to transfer the goods free of the lien if it has not been recorded; any person, even a finder or thief, of a negotiable instrument payable to bearer, has power to transfer a good title to a holder in due course; a person owning no interest in goods has power to transfer ownership if the true owner has conducted himself in such a way as to be estopped to deny either the ownership or the authority of the person making the transfer; a seller of goods who retains possession after title has passed to the buyer has the power to transfer a good title to a third person; and in England, even a finder or thief has power to transfer good title to goods by a sale made in market overt. There are other exceptions, some based on statutes such as automobile registration and factors acts.

⁹ At common law the courts were divided on whether a person could be protected as a bona fide purchaser for value if he had been negligent in failing to ascertain the extent of his vendor's title. The Uniform Sales Act § 76(2), settled this by providing that a thing is done in "good faith" "when it is in fact done honestly, whether it be done negligently or not." The Uniform Commercial Code follows this but adds that "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." UCC § 2-103(1)(b). At common law there also was a question as to what constitutes "value." The Uniform Sales Act § 76(1), settled this by providing that "Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim . . . constitutes value where goods . . . are taken either in satisfaction thereof or as security therefor." The Code defines value in substantially the same way. UCC § 1-201(44).

to a voidable title with the power to transfer a good title. From the start this has been the major problem. It is the principal subject of this paper.

I. LIMITATIONS ON THE KINDS OF TRANSACTIONS FROM WHICH A VOIDABLE TITLE MIGHT ARISE

The Uniform Sales Act did not undertake to define "voidable title." Nor did it offer any guides to help courts determine when a person does or does not acquire a voidable title within the meaning of the voidable title principle. Instead, the Uniform Sales Act left the matter to be determined by the common-law principles of the individual states.¹⁰

Under the Uniform Sales Act¹¹ and, at common law as well, except for cases involving lack of capacity,¹² the voidable title

¹⁰ § 73 of the Uniform Sales Act provides: "In any case not provided for in this act . . . the rules . . . relating . . . to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods."

¹¹ Uniform Sales Act § 24; *Wallace v. Francis*, 103 So.2d 831 (Ala. 1958) (infancy); *Jones v. Caldwell*, 216 Ark. 260, 225 S.W.2d 323 (1949) (infancy); *Universal Credit Co. v. Hibbard*, 273 Ky. 597, 117 S.W.2d 583 (1938) (infancy) (dictum); 1 Williston §§ 348, 568.

¹² At common law, it was held that a sale was voidable by an infant even against a bona fide purchaser. *Hill v. Anderson*, 13 Miss. (5 S. & M.) 216 (1845) (slaves); *Downing v. Stone*, 47 Mo. App. 144 (1891) (horse). *Contra*, *Carr v. Clough*, 26 N. H. 280 (1853) (horses).

Also, at common law the sale of property by a lunatic, if voidable at all, usually has been held to be voidable against a bona fide purchaser. *E.g.*, *Harris v. Harris*, 64 Cal. 108, 28 Pac. 63 (1883) (horses); *Warren v. Federal Land Bank*, 157 Ga. 464, 122 S.E. 40 (1924) (land); *Hull v. Louth*, 109 Ind. 315, 10 N.E. 270 (1887) (land); *Hovey v. Hobson*, 53 Me. 451 (1866) (land). *Contra*, *Phillips v. Murphy*, 186 Ky. 763, 218 S.W. 250 (1920) (land); *Goldberg v. McCord*, 251 N.Y. 28, 166 N.E. 793 (1929) (land); *Morris v. Hall*, 89 W. Va. 460, 109 S.E. 493 (1921) (land).

In *Blanchard v. Castille*, 19 La. 362, 39 La. Rep. 223 (1841), the court protected a good faith purchaser, whose vendor had acquired the goods by duress and/or undue influence, relying on their analogy to fraud.

In *Holland v. Swain*, 94 Ill. 154, 156 (1879), the court recognized that the voidable title principle has a broad base when it said in protecting a good faith purchaser of a horse whose vendor had acquired it from plaintiff in a gambling transaction:

When the owner of personal property puts the same into the possession of another with the present intention of parting with his title thereto, and the person thus in possession as owner by the consent of the real owner, sells and delivers the same for a valuable consideration to a bona fide purchaser, whether such original delivery of possession occurred by reason of fraud or of a void contract, or from any other cause, such original owner cannot recover the property from such honest purchaser.

The breadth of the voidable title principle also was recognized in *Campbell v. Brackenridge*, 8 Ind. 471 (1847), in protecting a good faith purchaser whose title had been acquired from one whose title was voidable on the ground of drunkenness.

principle has been applied to protect good faith purchasers without any regard for the specific grounds on which the titles of their vendors have been deemed to be voidable. However, in the overwhelming majority of the cases wherein the voidable title principle has been applied or considered the only possible basis for holding the vendors' titles to be voidable has been fraud.¹³

It is in the treatment of cases which involve fraud that an acute need for the extension of the principle has existed. The need has grown more apparent during recent years as increasing numbers of good faith purchasers from defrauders have been denied protection from the claims of defrauded sellers solely because courts have made tenuous and unsubstantial distinctions among the various types of fraudulent transactions. In most such transactions, the courts have held the defrauder acquires no title at all, not even a voidable title, even though it may be perfectly obvious that the defrauded seller gave possession of the goods to the defrauder with the intention of selling them.

One type of transaction in which most courts have refused to apply the voidable title principle to protect a good faith purchaser from the claims of a defrauded seller has been the "cash sale" transaction.¹⁴ It may take a number of different forms.¹⁵ The substance of the transaction, so far as is relevant here, is that a fraudulent buyer with no intention of paying for the goods induces the seller to deliver goods to him with the expectation of

¹³ See *e.g.*, *Mansell's Adm'r v. Israel*, 6 Ky. (3 Bibb.) 510, 515 (1814); *Arnett v. Cloudas*, 34 Ky. (4 Dana) 299 (1836); *Nashville Grain & Feed Co. v. American Co-op. Ass'n*, 203 Ky. 458, 262 S.W. 634 (1924); *Dudley v. Lovins*, 310 Ky. 491, 220 S.W.2d 978 (1949); *Tichenor v. Hagan*, 12 Ky. L. Rep. 508 (1890) (abstract). See 3 Williston § 623. See generally Williston §§ 346-48, 625, and 650.

¹⁴ The basic idea of a cash sale was found in the Justinian Code which provided that things sold and delivered were not acquired by the buyer unless he had paid the price to the vendor or had secured him in some way. This provision was based on a similar provision in the Law of the Twelve Tables. It has been suggested that the cash sale concept is based on the natural law. Nonetheless, it appears to have been recognized even before the Law of the Twelve Tables that if the seller extended credit to the buyer, the property passed to the buyer immediately upon delivery. See 1 Scott, *The Civil Law*, Title I, Book II, Enactment 41 (1932).

In much the same vein, Blackstone wrote, "If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed." 2 Blackstone, *Commentaries* 447 Lewis' ed. 1897).

Willing to recognize the cash sale concept but unwilling to recognize or create any presumption in its favor, the draftsmen of the Uniform Sales Act § 19 provided in Rule 1 that it is presumed that the title to goods passes when

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receiving payment at once or substantially at once. The defrauder does not pay. Nonetheless, he sells the goods to an innocent third party.¹⁶

In cases of this kind, when the defrauded seller has sued to recover the goods or their value from the defrauder's innocent vendee, the defrauded seller usually has contended that it was understood that the transaction was to be a "cash sale" in the sense that no credit was intended and it was contemplated that title to the goods would not pass to the buyer unless and until the buyer had carried out his promise to pay the price of the goods.¹⁷ The great majority of the courts usually have accepted this contention and have held that the defrauder did not acquire any title, not even a voidable title, and that, consequently, the good faith purchaser was not entitled to the protection of the voidable title principle.¹⁸ It is true that a small minority of the courts have required that little or nothing appear in addition to delivery in order to find that the defrauded seller had waived or otherwise lost his right to insist upon receiving payment as

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the contract is made if the goods are specific and in a deliverable state unless "a different intention appears." Of course, where "a different intention appears," a court may hold a transaction to be a cash sale without being inconsistent with Rule 1.

There are several possible legal consequences of finding that a transaction is a cash sale. For example, it may mean that the risk of loss remains with the seller, or it may mean that the buyer has no right to demand possession of the goods before he pays the price. In the following discussion, the sole concern will be the effect of finding a cash sale on the rights of good faith purchasers from the cash sales vendees.

¹⁵ For example, a cash sale may be found to have occurred where a buyer obtains delivery of goods but fails to carry out his promise to pay cash, *Dillard & Coffin Co. v. Beley Cotton Co.*, 150 Tenn. 195, 263 S.W. 87 (1924); to send the seller a note, *Hirschorn v. Canney*, 98 Mass. 149 (1867); or, to honor drafts attached to a straight bill of lading, *Freeman v. Kraemer*, 63 Minn. 242, 65 N.W. 455 (1895).

¹⁶ *E.g.*, *Moore v. Long*, 250 Ala. 47, 38 So.2d 6 (1947); *Laughlin Motors v. Universal C.I.T. Credit Corp.*, 173 Kan. 600, 251 P.2d 857 (1952); *Gibson v. Moore*, 46 Ky. (7 B. Mon.) 92 (1846); *Coggill v. Hartford*, N.H. R.R., 69 Mass. (3 Gray) 545 (1855); *Hollingsworth v. Napier*, 3 Cai. 182 (N.Y. Sup. Ct. 1905).

¹⁷ *E.g.*, *Home Fire Ins. Co. v. Wray*, 177 Ark. 455, 6 S.W.2d 546 (1928); *Ocean S.S. Co. v. Southern States Naval Stores Co.*, 145 Ga. 798, 89 S.E. 838 (1916); *Flannery v. Harley*, 117 Ga. 483, 43 S.E. 765 (1903); *Commercial Credit Co. v. Interstate Sec. Co.*, 197 S.W.2d 1000 (Mo. St. App. 1946); *Gregory v. Laird*, 212 S.W.2d 193 (Tex. Civ. App. 1948).

¹⁸ *Ibid.* In *Dillard & Coffin Co. v. Beley Cotton Co.*, 150 Tenn. 195, 200, 263 S.W. 87, 88 (1924), the court succinctly stated the analysis usually made by courts following the majority view saying, "Where the sale is for cash on delivery, a delivery is generally considered conditional, and no title vests in the buyer until he has complied with the terms of sale."

a condition to the passage of title.¹⁹ Such courts have protected good faith purchasers. The great majority, however, have refused to find any such waiver and have presumed, instead, that even though a seller delivers goods without obtaining payment, if the parties do not arrange for the extension of credit, they intend to have title pass when the price is paid and not sooner.

Although most courts apply the "cash sale" analysis to defeat good faith purchasers in a variety of non-credit transactions, by far the most frequent of these is the transaction in which the defrauded seller delivers goods to a defrauder who gives a bad check for the amount of the purchase price and sells the goods to an innocent purchaser before the dishonored check is returned to the seller. A small minority of the courts decide in favor of the good faith purchaser in these bad check cases by holding that a voidable title passes to the defrauder at once.²⁰ Apparently their reasoning is that the check itself constitutes payment or that the seller extended credit to the buyer for the period of time it takes the check to clear. The great majority of the courts have decided in favor of the defrauded seller on the ground that the defrauder did not acquire even a voidable title.²¹ The latter courts usually

¹⁹ *E.g.*, Pingleton v. Shepherd, 219 Ark. 473, 242 S.W.2d 971 (1951); Young v. Bradley, 68 Ill. 553 (1873); Jennings v. Gage, 13 Ill. 610 (1852); Lane Lumber & Milling Co. v. Bond, 222 Ky. 539, 1 S.W. 2d 970 (1928); Tichenor v. Hagan, 12 Ky. L. Rep. 508 (Super. Ct. 1890); Hall v. Hinks, 21 Md. 406 (1863). *Cf.*, Kloak Bros. & Co. v. Joseph, 150 Ky. 508, 150 S.W. 651 (1912) (lien of vendee's landlord superior to vendor's claim); Thompson v. Brannin, 94 Ky. 490, 21 S.W. 1057 (1893) (buyer assumed risk of loss after delivery); Willis v. Willis' Adm'r, 36 Ky. (6 Dana) 48 (1837) (buyer assumed risk of loss even before delivery).

The view of the minority of the courts was well expressed in Tichenor v. Hagan, *supra*, wherein the court said, "When a sale, procured by the fraud of the vendee, has been perfected by a delivery of the property, it cannot be set aside by the vendor, to the injury of a *bona fide* purchaser. And this is true in this case, whether the sale was absolute or conditional, as there was an unconditional delivery of the property to the vendee, who kept it in his possession until he sold it for a valuable consideration to one who had no notice of the original vendor's claim."

²⁰ *E.g.*, Sullivan Co. v. Wells, 89 F. Supp. 317 (D. Neb. 1950); Pingleton v. Shepherd, 219 Ark. 473, 242 S.W. 2d 971 (1951); Dresher v. Roy Wilmethe Co., 118 Ind. App. 542, 82 N.E. 2d 260 (1948); Hoham v. Aukerman-Tuesburg Motors, 77 Ind. App. 316, 133 N.E. 507 (1922); Nelson v. Lewis, 143 Kan. 106, 53 P. 2d 813 (1936); Dudley v. Lovins, 310 Ky. 491, 220 S.W.2d 978 (1949) (by implication); Snyder v. Lincoln, 153 Neb. 611, 45 N.W.2d 749 (1951); Sullivan Co. v. Larson, 149 Neb. 97, 30 N.W.2d 460 (1948); Parr v. Helfrich, 108 Neb. 801, 189 N.W. 281 (1922); Homan v. Laboo, 2 Neb. 291 (1873); Harten-Knodel Distrib. Co. v. Harrison, 43 Ohio App. 383, 183 N.E. 294 (1932).

²¹ *E.g.*, Commercial Standard Ins. Co. v. McCollum, 207 F.2d 768 (10th Cir. 1953); DeVries v. Sig Ellingson & Co., 100 F. Supp. 781 (D. Minn. 1951); Barksdale v. Banks, 206 Ala. 569, 90 So. 913 (1921); Johnson Motor Co. v.

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reason that the delivery of a check is merely a means of payment, not payment itself, and that title is not intended to pass until the check has cleared.

A completely different type of case in which good faith purchasers have been refused the protection of the voidable title principle against the claims of defrauded vendors is that in which the defrauded vendor has dealt with an imposter by mail thinking that he is someone else. In these cases, when the defrauded vendor has sought to recover the goods or their value from a good faith purchaser from the impostor, courts have agreed with the contention of the defrauded vendor that no title passed to the impostor because the defrauded vendor did not intend to deal with the impostor but rather intended to sell to the person the latter represented himself to be.²² Consequently, the courts have held that the impostor did not acquire even a voidable title.

Another situation wherein deception as to the identity of the defrauder occurs and has been held that he does not acquire even a voidable title, is that in which the defrauder pretends to act as an agent for some named principal. In holding that the defrauder in this type of transaction acquires no title at all, the courts usually have reasoned that the defrauded vendor intended to transfer ownership to the person he assumed to be principal and not to the defrauder.²³ This reasoning is very similar to that adopted where the transaction involves imposture-by-mail.

Finally, the special nature of the fraud practiced has been the

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Sims, 37 Ala. App. 548, 72 So. 2d 124 (1954); Pugh v. Camp, 213 Ark. 282, 210 S.W. 2d 120 (1948); Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 Pac. 915 (1930); Chafin v. Cox, 39 Ga. App. 301, 147 S.E. 154 (1929); Fisher v. Bullington, 223 La. 368, 65 So.2d 880 (1953); Bustin v. Craven, 57 N.M. 724, 263 P. 2d 392 (1953); Morehouse v. Keyport Auto Sales Co., 118 N.J. Eq. 368, 179 Atl. 279 (1935); Handley Motor Co. v. Wood, 238 N.C. 468, 78 S.E. 2d 391 (1953); Johnson v. Iankovetz, 57 Ore. 24, 102 Pac. 799 (1909); Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S.W. 125 (1924).

²² Newberry v. Norfolk & So. R.R., 135 N.C. 45, 45 S.E. 356 (1903); Moody v. Blake, 117 Mass. 23 (1875) (*semble*); Cundy v. Lindsay, [1878], 3 A. C. 459. Cf. Moore v. Furstenwerth-UHL Jewelry Co., 17 Ga. App. 669, 87 S.E. 1097 (1916).

²³ *E.g.*, Smith Premier Typewriter Co. v. Stidger, 18 Colo. App. 261, 71 Pac. 400 (1903); Alexander v. Swackhamer, 105 Ind. 81, 4 N.E. 433 (1885); McGeever v. American Nat'l Red Cross, 330 Mass. 239, 112 N.E. 2d 788 (1953); Hentz v. Miller, 94 N.Y. 64 (1883); Wyckoff v. Vicary, 75 Hun 409 (N.Y. Sup. Ct. 1894); Hamet v. Letcher, 37 Ohio St. 356 (1881); Dean v. Yates, 22 Ohio St. 388 (1872); Barker v. Dinsmore, 72 Pa. 427 (1872); Gose v. Brooks, 229 S.W. 979 (Tex. Civ. App. 1921) (*semble*); Petty v. Borg, 106 Utah 524, 150 P.2d 776 (1944); Mayhew v. Mather, 82 Wis. 355, 52 N.W. 436 (1892). *Contra*, Hawkins v. Davis, 67 Tenn. 506 (1875).

basis for denying the protection of the voidable title principle to good faith purchasers from defrauders in cases, happily few in number, wherein the courts have concluded that the defrauder obtained the goods by a type of fraud deemed to be larcenous.²⁴

Although for purposes of simplicity and analysis it has been convenient to describe separately the various special types of fraud which have been held to prevent the passage of even a voidable title to a defrauder, it appears that defrauders rarely have felt concerned about such matters. Consequently, it is not unusual for a single fraudulent transaction to involve not only one, but two or more of these special types of fraud. For example, a defrauder may deal in some type of cash sale transaction by means of some type of impersonation and in the process may commit some type of crime.²⁵ In a case of this kind, a good faith purchaser who is not defeated on the theory that his vendor obtained the goods by larceny runs the risk that he may nonetheless be defeated because of the nature of the impersonation or because the transaction involved a cash sale. It seems likely that the thought of running this gantlet has persuaded many a good faith purchaser to accept an unfair settlement or to abandon altogether his claim to the goods.

The soundness of applying the voidable title principle to protect good faith purchasers if the fraud does not fall into any of the described special categories can be deduced from the fact that such application of the principle appears not to have been questioned for more than a century. It would seem that, as a matter of abstract justice, the equity of an owner of goods, who is induced by one type of fraud to deliver them to a defrauder with the intention of selling them, is no higher than the equity

²⁴ Knapp v. Lyman, 44 Cal. App. 283, 186 Pac. 385 (1919); Port Fin. Co. v. Ber, 45 So. 2d 404 (La. Ct. App. 1950); Damis v. Barcia, 266 App. Div. 698, 40 N.Y.S. 2d 107 (1943); Amols v. Bernstein, 214 App. Div. 469, 212 N. Y. Supp. 518 (1925); Andrew v. Dieterich, 14 Wend. 31 (N. Y. Sup. Ct. 1835); Richardson v. Seattle-First Nat'l Bank, 38 Wash. 2d 314, 229 P. 2d 341 (1951). *Contra, e.g.*, Scaife & Co. v. Stovall, 67 Ala. 237 (1880); Bell v. Cafferty, 21 Ind. 411 (1863); Dudley v. Lovins, 310 Ky. 491, 220 S.W. 2d 978 (1949) (by implication); Cochran v. Stewart, 21 Minn. 435 (1875); Goddard Grocer Co. v. Freedman, 127 S.W. 2d 759 (Mo. Ct. of App. 1939); I-Land Auto Sales Inc. v. Valle, 12 Misc. 1091, 175 N.Y.S. 2d 732 (Mun. Ct. 1958).

²⁵ *E.g.*, Barksdale v. Banks, 206 Ala. 569, 90 So. 913 (1921); Dresher v. Roy Wilmeth Co., 118 Ind. App. 542, 82 N.E. 2d 260 (1948); Dudley v. Lovins, 310 Ky. 491, 220 S.W. 2d 978 (1949); McGeever v. American Nat'l Red Cross, 330 Mass. 239, 112 N.E. 2d 788 (1953); Windle v. Citizen's Nat'l Bank, 216 S.W. 1020 (Mo. Ct. App. 1919); Brotchner & Sons, Inc. v. M. Ullman, Inc., 141 Misc. 102, 252 N.Y. Supp. 244 (Sup. Ct. 1931).

of an owner who is induced to do so by some other type of fraud. Certainly the equity of a good faith purchaser from the defrauder is the same in all such cases. One reasonably may question, therefore, the soundness of denying the protection of the voidable title principle to good faith purchasers in some such cases merely because their vendors happened to have acquired the goods by one type of fraud rather than another.²⁶ It is from this vantage point that the Code treatment of the voidable title principle will be considered.

II. CODE TREATMENT OF THE VOIDABLE TITLE PRINCIPLE

A. *Prior To 1957*

When work began on the Uniform Commercial Code, the holdings of the courts in the cases previously described must have been clearly understood by its draftsmen. Judging by the different kinds of treatment which these cases have been accorded by the various drafts and editions of the Code, it seems quite certain that its draftsmen have given them a considerable amount of careful thought and attention.²⁷

The 1952 Official Draft was the first edition of the Code to be adopted by any state and it was adopted by only one state, Pennsylvania.²⁸ That draft set forth the voidable title principle in subsection (1) of section 2-403 in a single sentence which stated, "A person with voidable title has power to transfer a good title to a good faith purchaser for value." This seemed to be substantially the same statement of the principle which had appeared in the Uniform Sales Act almost fifty years earlier,

²⁶ Perhaps the reader observed when cash sales were being discussed that it is quite possible for a cash sale buyer to obtain goods and fail to pay for them without being guilty of fraud. Eliminating the element of his vendor's fraud, however, would seem only to strengthen the position of the good faith purchaser, for if a cash sale defrauder should acquire the power to transfer a good title, a fortiori, so should a cash sale purchaser who has not committed fraud.

²⁷ For example, consider the various kinds of treatment accorded the voidable title principle and closely related matters in §58 of the Uniform Revised Sales Act (which was intended tentatively to become a part of the UCC; § 2-405 of the 1949 Edition of the UCC; §§2-401 and 2-403 of the Spring 1951 Official Draft; and §§2-401 and 2-403 of the Final Text Edition of November 1951. For a discussion of the background and history of the Code, see generally Braucher, "The Legislative History of the Uniform Commercial Code," 58 Colum. L. Rev. 798 (1958). For a discussion of the background and history of the Code in Kentucky, see generally, Young, "Scope, Purposes, and Functions of the Uniform Commercial Code," 48 Ky. L. J. 191 (1960).

²⁸ UCC, Pa. Stat. Ann. tit. 12A (1954). The 1952 Official Draft is usually referred to as the "1952 Draft." Hereinafter it will be so designated.

except that it was more concise. In addition, section 2-401 (1) (b) of the 1952 Draft provided that, "[N]o agreement that a contract for sale is a 'cash sale' alters the effects of identification or impairs the rights of good faith purchasers from the buyer." This obviously was an attempt to deal with the "cash sale" transaction, which for many years had been the major obstacle barring good faith purchasers from the protection of the voidable title principle. That is as far as the Code went in 1952.

After making an extensive study of the various provisions of the 1952 Draft of the Code, the New York Law Revision Commission, in its 1956 Report to the Legislature, stated that it did not recommend legislative action on the Code at that time.²⁹ In support of this major conclusion it furnished an appendix which contained detailed comments, criticisms, and conclusions regarding various portions of the 1952 Draft.³⁰ One of the changes recommended by the Commission was that there be added to subsection (1) of section 2-403 the following provision:

When a transferor has a right to recover goods from a transferee, the transferee's title shall be deemed to be voidable rather than void if the transferor delivered the goods to the transferee pursuant to a transaction intended by the transferor to transfer ownership of the goods. This rule includes but is not limited to cases where

- (a) the transferor is deceived as to the identity of the transferee, or
- (b) the transferor delivers the goods in exchange for a check which is not collected because of insufficient funds, or
- (c) the delivery of the goods is procured through fraud punishable as larcenous under the criminal law.³¹

At first glance, this recommended provision appears to extend the protection of the voidable title principle to good faith purchasers in all of the cases where the courts previously have

²⁹ Report of the Law Revision Commission Relating to the Uniform Commercial Code, N.Y. Leg. Doc. 65 at 15 (1956).

³⁰ Report of the Law Revision Commission Relating to the Uniform Commercial Code, Appendix IV (Excerpts from the Proceedings of the Commission), N.Y. Leg. Doc. 65 at 355-485 (1956).

³¹ *Id.* at 383. Hereinafter it will be referred to as the "recommended provision." The recommendation was, of course, an implied criticism of §2-403 as it appeared in the 1952 Draft. Inasmuch as the Commission did not recommend the adoption of the Code, its comments and recommendations regarding specific provisions of the Code must have been intended not so much for the benefit of the New York Legislature as for the benefit of those responsible for revising the Code.

denied such protection by distinguishing types of fraud which resulted in the transfer of a voidable title from types of fraud which resulted in the transfer of absolutely no title. There will be occasion later to consider whether this impression is sound.

B. *The 1957 and 1958 Editions of the Code*

Within a few months after the New York Revision Commission Report was made public, the Code Editorial Board recommended the adoption of a number of amendments, most of which were aimed at meeting the criticisms contained in the report.³² As the result, the Code was amended and published under the title "1957 Official Text."³³ A year later the Code was again amended and published, this time under the title "1958 Official Text."³⁴ The 1958 Text is exactly the same as the 1957 Text in its treatment of all of the matters which are discussed in this paper.

Subsection (1) of section 2-403 of the 1957 and 1958 editions deals with the voidable title principle and its peripheral problems in three sentences. The first sentence, so far as it is relevant to the present discussion, merely confirms the fact that there are some situations wherein a person may have the power to transfer a greater interest in goods than he owns.³⁵ The second sentence

³² 1956 Recommendations of the Editorial Board for the Uniform Commercial Code (1957).

³³ The 1957 Official Text is commonly referred to as the "1957 Edition."

³⁴ The 1958 Official Text is commonly referred to as the "1958 Edition." In fact, its foreword states: "To avoid any confusion we are publishing this edition and labeling it the '1958 Official Edition.'" However, the title page and cover designate it the "1958 Official Text."

At the time this is being written, eleven states—Pennsylvania, Massachusetts, Kentucky, Connecticut, New Hampshire, Rhode Island, Wyoming, Arkansas, New Mexico, Ohio, and Oregon, in that order—have adopted the UCC. Pennsylvania was the only state to adopt the 1952 Official Draft. Massachusetts adopted the 1957 Official Text in 1957. Kentucky did the same the following year. Since then, Arkansas, Connecticut, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, and Wyoming have adopted the 1958 Official Text. Massachusetts and Pennsylvania have done likewise. The Kentucky legislature will not meet again until 1962. It is expected that amendments will be offered to bring the Kentucky Code into line with the 1958 Edition at that time. It is expected that the Code will be introduced into the legislatures of the following states in 1961: California, Illinois, Maine, Missouri, Montana, New Jersey, North Dakota, Oklahoma, Washington, and Wisconsin. In addition, lawyers and legislators in many other states are giving the Code serious consideration. See generally, Report of the Commercial Code Committee (August 1960); 1961 UCC Bulletin No. 5 (December 1960), and Mid-Winter 1961 Report of the Commercial Code Committee (February 1961). For an analysis of the effects of the UCC generally on existing Kentucky law see Research Publication No. 49, Legislative Research Commission, Commonwealth of Kentucky (1957).

³⁵ "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."

is the statement of the voidable title principle already referred to as appearing in the 1952 Draft.³⁶ As mentioned previously, this is substantially the same statement of the principle as is contained in the Uniform Sales Act.

Whatever significant change is effected in the treatment of the voidable title principle and the problem of its possible extension is based on the third sentence of subsection (1) which states:

When goods have been delivered under a transaction of purchase the purchaser has such power [*i.e.*, power to transfer a good title to a good faith purchaser for value] 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.

Even a hasty reading renders it quite obvious that the draftsmen of this provision of the Code deliberately avoided adopting most of the wording found in the recommended provision, contained in the 1956 Report of the New York Law Revision Commission, which was intended to be a treatment of the voidable title principle and its peripheral problems. Yet it seems to be equally obvious, if one judges solely from the wording of the Code provision, that its draftsmen intended to treat substantially the same problems which had been in the minds of the draftsmen of the recommended provision contained in the Report of the Law Revision Commission. That is to say, it seems clear that the draftsmen of subsection (1) of section 2-403 of the Code intended to treat not only the "cash sale" transaction, which already had been treated in the 1952 Draft of the Code, but also the other kinds of transactions in which courts had held that a defrauded seller who delivered goods to a defrauder with the idea of selling them did not transfer even a voidable title.

³⁶ "A person with voidable title has power to transfer a good title to a good faith purchaser for value."

III. HOW MUCH HAS THE VOIDABLE TITLE PRINCIPLE ACTUALLY BEEN EXTENDED BY THE CODE?

Assuming that it was the intention of those who framed the last sentence of subsection (1) of section 2-403 to change the result in the several classes of cases wherein good faith purchasers had been denied protection solely because of the special nature of the fraud practiced by their vendors, consideration will next be given to the question of how effective the provision may be in extending the protection of the voidable title principle to such cases.

A. "Cash Sale"

Since the "cash sale" transaction not only lies at the heart of a large proportion of these cases but also serves best the need for the simplest possible analysis, it will be considered first. There hardly can be any doubt that the "cash sale" impediment to the protection of a good faith purchaser from the claims of a defrauded owner have been removed by subsection (1). To make certain that this conclusion is sound, consider a typical cash sale transaction in the light of subsection (1). Assume that a fraudulent buyer communicates with a seller and they agree that the seller will deliver described goods to the buyer's place of business and that the buyer will pay the seller as soon as the goods have been delivered. When the goods arrive, the buyer induces the seller to leave the goods with him and assures the seller that he will pay for the goods in cash later that same day. Nothing is said by either party regarding the passage of title. The defrauder does not make the payment as he promised. Instead, he promptly sells and delivers the goods to a good faith purchaser for value.

Assuming that the outcome of the case is not governed by the Code, the great majority of the courts would protect the defrauded seller and permit him to retake his goods from the good faith purchaser for value on the theory that the parties contemplated that no title would pass until and unless the required payment was made.³⁷ This is so even though the parties made no reference to the passing of "title."³⁸

The Code provides that "when goods have been delivered under a transaction of purchase . . .," the purchaser acquires power to transfer a good title to a good faith purchaser for value even

³⁷ See cases cited note 18, *supra*.

³⁸ *Ibid*.

though "it was agreed that the transaction was to be a 'cash sale.'"³⁹

Clearly, under subsection (1) the defrauded owner is to get no special advantage merely because he convinces the court that a "cash sale" was intended. This is true even though it was expressly agreed that the transaction was to be a cash sale. On the other hand, regardless of the nature of the cash sale, it does not appear that the good faith purchaser is entitled to any protection on the basis of subsection (1) unless the defrauded owner delivered the goods under a "transaction of purchase."

The Code does not define "transaction of purchase." However, it does define the term "purchase" in these words, "Purchase" includes taking by *sale*, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction *creating an interest in property*."⁴⁰

It should not be presumed too quickly that a "cash sale" transaction falls within this provision. It would be merely begging the question to assume that a "cash sale" is a "sale", which the Code states "consists in the passing of title from the seller to the buyer for a price. . . ."⁴¹ Consequently, it becomes necessary to find some other basis for concluding that a "cash sale" is a transaction creating an interest in property.

The key to the problem is found in subsection (1) of section 2-401 (not 2-403) which provides that "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."⁴² This clearly implies that even where the parties expressly agree on a "cash sale," immediately upon the delivery of the goods the buyer acquires an "interest in property." Hence the transaction between the defrauder and the defrauded seller is a "transaction of purchase" and the defrauder acquires the power to transfer a good title to a good faith purchaser for value.⁴³

³⁹ UCC §2-403(1). Also, comment 2 to UCC §2-403 refers to "the abolition of the old law of 'cash sale' by subsection (1) (c)."

⁴⁰ UCC § 1-201(32) (Emphasis added).

⁴¹ UCC §2-106(1).

⁴² UCC §2-401(1). In addition to precluding a seller from asserting that his vendee's title is void, allowing the seller to retain only a security interest has the effect of requiring him to have the buyer sign a security agreement in order to be entitled to assert his interest against third parties. UCC §9-203(1).

⁴³ This result has long been favored by Professor Williston. 2 Williston § 343.

Referring to the most troublesome type of cash sale, the cash sale by "bad check," section 2-403 (1), provides that "when goods have been delivered under a transaction of purchase" the purchaser "has power to transfer a good title to a good faith purchaser for value" even though "the delivery was in exchange for a check which is later dishonored. . . ." ⁴⁴ Except for this specific treatment, everything that has been said regarding cash sales in general applies fully to cash sales by "bad check." The Code provides in effect that even though the parties agree and intend that the ownership of the goods shall not pass to the buyer unless and until the check clears, the interest retained by the seller in a check transaction is limited to a security interest. Consequently, like other types of cash sale transactions, the cash sale by bad check is a transaction "creating an interest in property" and therefore a "transaction of purchase." It follows that the "bad check" defrauder, like any other type of cash sale defrauder, has power to transfer a good title to a good faith purchaser. ⁴⁵

In the last sentence of subsection (1) of section 2-403 had gone no further than to extend the protection of the voidable title principle to purchasers in good faith from defrauders who obtain goods in one of the various types of cash sales, it would have amounted to little more than a detailed restatement of the treatment of the problem contained in the 1952 Draft of the Code. ⁴⁶ It did not stop there, however.

B. *Deception As To The Identity Of The Purchaser*

As previously seen, the more recent editions of the Code provide that "when goods have been delivered under a transaction of purchase" the purchaser "has power to transfer a good title to a good faith purchaser for value" even though "the transferor was deceived as to the identity of the purchaser. . . ." ⁴⁷ As plain as this statement may seem at first reading, its full meaning may not be free from doubt for many years to come. Nothing less than a detailed explanation can fairly demonstrate the nature of this uncertainty.

⁴⁴ UCC §2-403(1) (b).

⁴⁵ This result also is in harmony with Professor Williston's view. 2 Williston §346a.

⁴⁶ "[N]o agreement that a contract for sale is a 'cash sale' . . . impairs the rights of good faith purchasers from the buyer." UCC §2-401(1) (b), 1952 Draft.

⁴⁷ UCC §2-403(1) (a).

Basically, two questions are raised by this provision. The first is whether it extends the protection of the voidable title principle to a good faith purchaser from a defrauder who had obtained the goods by representing that he was someone else in a transaction carried out by mail. The second is whether it extends protection to a good faith purchaser from a defrauder who had obtained the goods by falsely representing that he acted as agent for an identified principal. The first question will be considered first.

1. IS PROTECTION EXTENDED TO A PURCHASER FROM A DEFRAUDER WHOSE IMPOSTURE WAS BY MAIL?

It usually has been held that where the parties have dealt face-to-face and the defrauder impersonates someone else, the dominant intent of the seller is to transfer the goods to the person appearing before him and that, as the result, a voidable title passes to the defrauder.⁴⁸ Consequently, if the defrauding impostor obtains goods in a face-to-face transaction and sells them to a good faith purchaser, the latter is protected against the claims of the defrauded party.⁴⁹ By contrast, as was mentioned earlier, courts have refused to give the protection of the voidable title principle to a good faith purchaser whose vendor had acquired the goods by a fraudulent impersonation-by-mail.⁵⁰ The courts have reasoned that where the impersonation is practiced by mail the defrauded party does not intend to deal with the defrauder,

⁴⁸ *E.g.*, *Short & Walls Lumber Co. v. Blome*, 45 Del. (6 Terry) 397, 75 A.2d 234 (1950); *Dresher v. Roy Wilmeth Co.*, 118 Ind. App. 542, 82 N.E.2d 260 (1948); *Perkins v. Anderson*, 65 Iowa 398, 21 N.W. 696 (1884); *Dudley v. Lovins*, 310 Ky. 491, 220 S.W.2d 978 (1949); *Martin v. Green*, 117 Me. 138, 102 Atl. 977 (1918); *Edmunds v. Merchants' Despatch Transp. Co.*, 135 Mass. 283 (1883); *Phelps v. McQuade*, 220 N.Y. 232, 115 N.E. 441 (1917). *Cf.* *King's Norton Metal Co. v. Eldridge, Merrett & Co.*, 14 T. L. R. 98 (1897), wherein it was held a defrauder acquired a voidable title where he was doing business as Hallam & Co., which was true, and also represented on his stationery that the company operated a large factory, which was not true.

In *Windle v. Citizens' Nat'l Bank*, 204 Mo. App. 606, 216 S.W. 1020 (1919), a seller defrauded in a face-to-face transaction was permitted to recover from a good faith purchaser from the defrauder, but the case might have been explained on the basis of its being a bad check cash sale.

Professor Vold in his learned work on *Sales*, 398 n. 6 (2d ed. 1959) cites the familiar example of imposture found in the Biblical account of how Jacob impersonated Esau in deceitfully obtaining his father Isaac's blessing which controlled their inheritance. See *Genesis* 27:1-35.

⁴⁹ See cases cited note 48 *supra*.

⁵⁰ See note 22 *supra*. Although there appear to be no cases on the point, *Restatement, Contracts* § 65 (1932), seems to imply that transactions over the telephone would have the same legal consequences as transactions face-to-face.

but rather with the person the defrauded party pretends to be, and hence no contract arises and there is no transfer of ownership of the goods.

Although this distinction has great appeal for those who enjoy analysis, it appears to be lacking in substance and has been criticized. It seems to be precisely the type of distinction the draftsmen of the Code wished to eliminate. Does subsection (1) eliminate this distinction? There are two basically different lines of reasoning which might be pursued in seeking the answer to this question and each would lead to a different result. In theory, at least, each might rest its conclusion on "the intention of the legislature."⁵¹

a. *Reasoning Supporting Conclusion That No Change Is Effected*

One line of reasoning approaches the question on the premise that no change could occur unless required by the language of the Code itself.⁵² It insists that no change is effected unless an

⁵¹ "In the United States and elsewhere in the common law system judges commonly state as postulates of the process of statutory interpretation (a) that its objective is to discover and give effect to the intention of the legislature (b) that it is exclusively a judicial function; and (c) that it does not include lawmaking. . . ." Read, MacDonald, & Fordham, *Legislation* 976 (1959). To use this approach in interpreting the Code, it may be necessary to assume that the legislature intended whatever the Code draftsmen intended.

⁵² A court choosing to approach the question in this way could find substantial support for doing so.

"The intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt and express plainly, clearly and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact." *Wishnek v. Gulla*, 114 N.E. 2d 914, 915 (Ohio 1953).

"Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of §1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history when the statutory language is clear." *Ex parte Collet*, 337 U. S. 55, 61 (1949).

"If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of different meaning. . . . [T]he language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." *Caminetti v. United States*, 242 U. S. 470, 490 (1917).

"The cardinal rule in construing statutes is, if possible, to ascertain the meaning of the Legislature from the language used, and if that be plain, clear, and unambiguous, resort to collateral rules of construction is unnecessary." *Mills v. City of Barbourville*, 273 Ky. 490, 491, 117 S.W.2d 187, 188 (1938).

"We conceive it to be our duty to accord the words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Dept. of Revenue v. Greyhound Corp.*, 321 S.W. 2d 60, 61 (Ky. 1959).

See generally, Read, MacDonald, & Fordham, *Legislation* (1959); Jones, "The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Statutes," 25 Wash. U. L. Q. 2 (1939).

imposture-by-mail transaction is a "transaction of purchase," because subsection (1) purports to deal only with transactions falling within this category. It contends that to be a "transaction of purchase" it must fall within the Code definition of "purchase" and so must constitute a "sale" or a transaction "creating an interest in property."⁵³

A person following this line of reasoning points out that it would merely beg the question to conclude that the transaction is a "sale" which, under the Code, "consists in the passing of title from the seller to the buyer for a price."⁵⁴ He would deny that a transaction involving imposture-by-mail creates an interest in property, reminding his listener that in determining that a "cash sale" transaction creates an interest in property reliance was placed on the Code provision which states that any retention or reservation by the *seller* of title in goods delivered to the buyer is limited to a security interest.⁵⁵ He would point out that the Code defines "seller" as a person who *sells* or *contracts to sell*.⁵⁶ Again he would say that it would beg the question to assume that the person defrauded by imposture-by-mail "sells" the goods. Here he would cite cases to show not only that the victim of imposture-by-mail does not contract to sell but also that no contract of any kind comes into existence because the defrauded party does not intend to deal with the impostor.⁵⁷ He would explain that in this respect the imposture-by-mail transaction is quite different from the typical "cash sale" transaction for in the latter the parties clearly do intend to deal with each other and the goods are delivered under a contract of some kind. Finally, he would contend that since nothing in the Code indicates that a person transfers an interest in property to a person with whom he has no intention of dealing, it must be inferred that an impostor-by-mail does not acquire the goods in a "transaction of purchase" and hence does not acquire the power to transfer a good title to a good faith purchaser.

⁵³ UCC §1-201(32).

⁵⁴ UCC §2-106(1).

⁵⁵ UCC §2-401(1).

⁵⁶ UCC §2-103(2).

⁵⁷ *Newberry v. Norfolk & So. R.R.*, 135 N.C. 45, 45 S.E. 356 (1903); *Moody v. Blake*, 117 Mass. 23 (1875) (*semble*); *Cundy v. Lindsay*, [1878], 3 A.C. 459. Cf. *Moore v. Furstenwerth-Uhl Jewelry Co.*, 17 Ga. App. 669, 87 S.E. 1097 (1916).

In brief, those who contend that the Code effects no change in cases wherein it has been held that an impostor-by-mail lacks power to transfer a good title start by seeking the intention of the legislature in a literal reading of the statute and proceed to their ultimate conclusion by assuming that a court is not free to disregard or distort the Code's own definition of the terms it uses.⁵⁸

b. *Reasoning Supporting View That Change Is Effected*

The second line of reasoning leads to the opposite conclusion. It would seek the intention of the legislature not so much in what the Code itself states as in extrinsic factors.⁵⁹ Support for

⁵⁸ "The Legislature does have power to prescribe legal definitions of its own language, and it may be conceded that when a legislative act embodies a definition, it is binding on the courts." *State v. Parsons*, 206 Iowa 390, 396, 220 N.W. 328, 331 (1928). *Accord*, *Western Union v. Lenroot*, 323 U.S. 490 (1945).

⁵⁹ A court choosing to approach the question in this way could find more than ample support for doing so.

"[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.).

"It is true that the statute literally says what the department contends, but the courts will not give a strict literal construction to a statute where to do so would lead to an absurd or unreasonable conclusion." *Kentucky v. Wilkins*, 320 S.W. 2d 125, 126 (Ky. 1959).

"The primary evidence of legislative intent is in the language of the statute. It is that language which states the rule by which those who read it must govern their conduct. If that language is ambiguous or unreasonable or absurd in its effect, they are, by virtue of that very fact, put on notice to look further for its construction." *Safeway Stores v. Arnall*, 196 F.2d 510, 513 (Emer. Ct. App. 1952).

"[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908) (Holmes, J.).

"The intention of the Legislature in enacting a law must be the controlling factor in its construction and interpretation . . . and where there is doubt as to the meaning of such laws the courts may look to 'the historical setting surrounding its enactment; the public policy of the state; the condition of its laws; the habits and manners of its people; and all other prior and contemporaneous facts and circumstances that throw intelligent light on the intention of the law making body.'" *Schultz v. Ohio County*, 226 Ky. 633, 637, 11 S.W.2d 702, 704 (1928).

Among the intrinsic factors which may be considered when a court is called upon to construe a Code provision are the relevant comments. Unfortunately, it is extremely difficult to assess the weight to be given to the comments and it is not unlikely that the courts will disagree widely on this question. § 1-102(3)(f) of the 1952 Draft provided that "The Comments of the National Conference of Commissioners on Uniform Laws and the American Law Institute may be consulted in the construction and application of this Act but if text and comment conflict, text controls." § 1-102(3)(g) of the same Draft continued: "Prior drafts of text and comments may not be used to ascertain legislative intent." Although this specific legislative provision for the use of draftsmen's comments

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this approach is found in the Code provision which requires that the Code "shall be liberally construed and applied to promote its underlying purposes and policies . . . [which are, among others], to simplify, clarify, and modernize the law governing commercial transactions" and "to make uniform the law among the various jurisdictions."⁶⁰

Those contending that a change has been effected would say that it would most certainly "simplify and clarify" the law to put into one category all of the types of transactions by which a defrauder obtains goods by deception as to his identity. Also it surely would "modernize" the law to equate face-to-face transactions with transactions carried out by mail, telephone, teletype, or any other means by which an impostor may practice his special type of fraud.

Turning to the words of subsection (1) of section 2-403 they would insist that its purpose clearly is to protect the good faith purchaser who buys from an impostor regardless of the nature of the imposture by which the defrauder acquired the

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was new, courts often have given weight to such comments, even in the absence of statutory provision. The New York Law Revision Commission Legislative Document No. 65(B)(1955), 30-40, contains an interesting discussion of the problems presented by clauses (f) and (g), *supra*. The 1956 Recommendations of the Editorial Board for the UCC at page 3 supported deletion of these two clauses by the explanation that "paragraph (3)(f) was deleted because the old comments were clearly out of date and it was not known when new ones could be prepared; and paragraph (3)(g) was deleted because the changes from the text enacted in Pennsylvania in 1953 are clearly legitimate legislative history." The 1957 and 1958 Editions of the Code conformed with the recommendations of the Editorial Board by deleting ¶¶ (3)(f) and (g). Nonetheless, the introductory comment to the 1958 Edition says, "To aid in uniform construction, these comments set forth the purpose of various provisions of this act to promote uniformity, to aid in viewing the act as an integrated whole, and to safeguard against misconstruction."

⁶⁰ UCC §1-102(1)(2). It appears to be settled that a legislature may properly direct the courts how a statute shall be construed with respect to future cases, *State v. Matthes*, 210 Iowa 178, 230 N.W. 522 (1930).

Answering the argument that a Kentucky statute changing the common law must be strictly construed, Chief Judge Ford of the Federal District Court of the Eastern District of Kentucky said:

Without questioning the common law rule of strict construction which formerly prevailed in Kentucky and still prevails in many states, it seems to have no application in this case for the reason that the rule was abrogated by Section 446.080 of Kentucky Revised Statutes, formerly sections 459-460, Kentucky Statutes, which provides: "(1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intention of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state. . . ." *Scott v. Curd*, 101 F. Supp. 396, 397 (E. D. Ky. 1951).

goods. Conceding that this purpose is not spelled out in so many words, they would ask what other possible reason there could be for stating clause (a) (the transferor was deceived as to the identity of the purchaser) without any qualification as to the kind of deception as to identity. They would argue that if it had been the purpose of subsection (1) merely to continue the prevailing law with respect to deception as to identity there would have been no need to refer expressly to such deception.⁶¹

That the framers of the Code were not sympathetic with the idea of defeating an innocent third party merely because his vendor had practiced fraud by mail rather than face-to-face also might be inferred from the Code treatment of the impostor problem in its relation to commercial paper. In the absence of the Code, courts have tended to hold that an impostor obtaining negotiable order paper in a face-to-face transaction has power to endorse and negotiate it even though it is made out in the name of the person he pretended to be.⁶² In this way courts have given protection to a later innocent purchaser against the claim that he is not a holder because the paper lacks a required indorsement. By contrast, courts have tended to hold that the impostor lacks power to endorse and negotiate such paper effectively if he obtained it through impersonation-by-mail.⁶³ The Code unequivocally eliminates this distinction by providing that "[A]n endorsement by any person in the name of a named payee is effective

⁶¹ The 1952 Draft of the Code which immediately preceded the 1957 Edition contained no express reference to this type of transaction.

"When changes have been introduced by amendment, it is not to be assumed that they are without design." *Stamford v. Stamford*, 107 Conn. 596, 606, 141 Atl. 891, 895 (1928). *Accord*: *Kelly v. Dewey*, 111 Conn. 280, 149 Atl. 840 (1930); *Blackburn v. Maxwell Co.*, 305 S.W. 2d 112, 115 (Ky. 1957).

⁶² *E.g.*, impostors dealing face-to-face were held to have power to transfer good title in *Montgomery Garage Co. v. Manufacturers Liab. Ins. Co.*, 94 N.J.L. 152, 109 Atl. 296 (1920); *McHenry v. Old Citizens Nat'l Bank*, 85 Ohio St. 203, 97 N.E. 395 (1911).

⁶³ *E.g.*, impostors-by-mail were held not to have power to transfer a good title to negotiable paper in *American Sur. Co. v. Empire Trust Co.*, 262 N.Y. 181, 186 N.E. 436 (1933); *Mercantile Nat'l Bank v. Silverman*, 210 N.Y. 567, 104 N.E. 1134 (1914); *Palm v. Watt*, 14 Hun 317 (N.Y. App. Div. 1876).

The tendency to distinguish imposture-by-mail from imposture face-to-face is not, however, nearly so pronounced in cases involving negotiable paper as in cases involving the sale of goods. Although the courts have talked in terms of "intent" in all of these classes of cases, there appears to have been a greater reluctance to protect those who are induced to deliver negotiable paper by imposture-by-mail than those who are induced to deliver goods by the same means. See generally, Law Revision Commission Study of Uniform Commercial Code (Article 3—Commercial Paper), N.Y. Leg. Doc. 65(D) at 238-42 (1955) and Leary, "Commercial Paper—Some Aspects of Article 3 of the Uniform Commercial Code," 48 Ky. L. J. 198, 222 (1960).

tive if (a) an impostor *by use of the mails or otherwise* has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee. . . ."⁶⁴ Persons contending that a change has been effected as to sales of goods would argue that there appears to be no special reason for maintaining the distinction between imposture face-to-face and by mail where the transaction involves goods rather than commercial paper. It is likely, they would say, that if the question had been raised squarely, the draftsmen of subsection (1) of section 2-403 would have eliminated the distinction with respect to transactions involving goods just as it had been eliminated in transactions involving commercial paper.⁶⁵

If the conclusion is accepted that protection is extended to the purchaser from an impostor-by-mail because this conclusion would promote the general purposes and policies of the Code, and because it is supported by the implication of subsection (1), and is analogous to the treatment of the problem in the Code provision dealing with commercial paper, it seems nonetheless to be logically unacceptable unless a transaction wherein an impostor obtains goods by practicing his imposture-by-mail is a "transaction of purchase" under section 2-403.

Apparently there are two separate paths by which one might reach the conclusion that an impersonation-by-mail transaction can be a "transaction of purchase" without need for distorting the express language of the Code.

The first path would recognize the Code definition of "purchase" as a transaction which "includes taking by sale . . . or any

⁶⁴ UCC §3-405(1)(a) (Emphasis added). Comment 2 to UCC §3-405 states: Subsection (1)(a) is new. It rejects decisions which distinguish between face-to-face imposture and imposture by mail and hold that where the parties deal by mail the dominant intent of the drawer is to deal with the name rather than with the person so that the resulting instrument may be negotiated only by indorsement of the payee whose name has been taken in vain. The result of the distinction has been under some prior law, to throw the loss in the mail imposture forward to a subsequent holder. . . . Since the maker or drawer believes the two to be one and the same, the two intentions cannot be separated, and the "dominant intent" is a fiction. The position here taken is that the loss, regardless of the type of fraud which the particular impostor has committed should fall upon the maker or drawer.

⁶⁵ Of course, it might not be unreasonable to infer that since the draftsmen of the Code dealt with the matter expressly in treating commercial paper, they would have done the same in treating the sale of goods if they had wished to eliminate the distinction.

other voluntary transaction *creating an interest in property.*"⁶⁶ To establish that the defrauder acquires an "interest in property" from an impersonation-by-mail transaction, reliance might be placed on a line of cases which hold that one in possession of goods is entitled to bring an action of trover even though the possession is wrongful and in defiance of the right of the true owner.⁶⁷ It might be reasoned that the right to bring an action in trover is an "interest in property." But the difficulty with this line of reasoning is that it proves too much. If the draftsmen of section 2-403 had intended that every bailment should be deemed a "transaction of purchase" and that every "bailee" or other person in possession of goods should have the power to transfer a good title to a good faith purchaser for value, there certainly would have been no reason for them to include as subsection (2) of the same section the much discussed "entruster provision" which gives similar power to bailees only in strictly limited circumstances.⁶⁸ Therefore, this line of reasoning appears to be untenable.

The second, and perhaps more persuasive, line of reasoning would ignore the definition of "purchase" contained in the Code. One possible basis for doing so could be the assumption that, since the definition of "purchase" contained in the recent editions of the Code is exactly the same as it was in the 1952 Draft and was not amended to conform to the needs of the amended section 2-403 (1), the draftsmen of the amended section 2-403 (1) might not have had their attention directed to the definition. Another possible justification for ignoring the Code definition of "purchase" might be found in the fact that the section of the Code which defines "purchase," and also forty-five other terms, qualifies all of the definitions by the phrase, "unless the context otherwise requires."⁶⁹ Those contending that a change has been effected

⁶⁶ UCC §1-201(32) (Emphasis added).

⁶⁷ *E.g.*, *Cook v. Patterson*, 35 Ala. 102 (1859); *Anderson v. Gouldberg*, 51 Minn. 294, 53 N.W. 636 (1892); *Wheeler v. Lawson*, 103 N.Y. 40, 8 N.E. 360 (1886); *Duncan v. Spear*, 11 Wend. 54 (N.Y. Sup. Ct. 1833). *Contra*, *Stephenson v. Little*, 10 Mich. 433 (1862); *Turley v. Tucker*, 6 Mo. 583 (1840); *Barwick v. Barwick*, 33 N.C. 80 (1850); *Rexroth v. Coon*, 15 R.I. 35, 23 Atl. 37 (1885). See generally, *Prosser, Torts* § 15 (1955); *Note*, 22 Minn. L. Rev. 863 (1938).

⁶⁸ "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." UCC §2-403(2). For a discussion of the entruster provision, see generally, *Whiteside*, "Uniform Commercial Code—Major Changes in Sales Law," 49 Ky. L. J. 165, 186-88 (1961).

⁶⁹ UCC §1-201.

so as to protect the purchaser from an impostor-by-mail can be expected to assert that this leaves the court free to assign to the term "transaction of purchase" any meaning appropriate to the context in which it is used.⁷⁰ Doubtless they would contend that, apart from the definition contained in the Code, it is natural, proper and completely consistent with the context of subsection (1) to consider an impersonation-by-mail transaction just as much a "transaction of purchase" as is a transaction in which the impersonation is carried out face-to-face.⁷¹ If this "non-technical" concept of "transaction of purchase" is accepted, a defrauder who practices his impersonation by mail acquires the power to transfer a good title to a good faith purchaser just as clearly as does the defrauder who deals with his victim face-to-face.

2. IS PROTECTION EXTENDED TO A PURCHASER FROM A PRETENDED AGENT?

Contentions have been considered on both sides of the question whether protection was extended to a good faith purchaser from an impostor-by-mail by the provision that "when goods have been delivered under a transaction of purchase" the purchaser "has power to transfer a good title to a good faith purchaser" even though "the transferor was deceived as to the identity of the purchaser." Discussion will now be directed to the second question raised by the provision; namely, whether it extends protection to a good faith purchaser from a defrauder who obtained the goods by falsely representing that he acted as agent for some identified principal. In this latter type of situation, the defrauded party thinks that the named principal is the purchaser when in fact the purchaser, if there be one, is the defrauder himself. As stated earlier, in the absence of the Code the courts have held

⁷⁰ "Unless the context otherwise requires" seems likely to mean different things to different courts. The risk in giving it too liberal construction is obvious. "Doubtless some courts have deliberately ignored their liberal construction statutes, preferring rather to hold to strict construction than to have to apply the new doctrine in all cases. . . ." Hall, "Strict or Liberal Construction of Penal Statutes," 48 Harv. L. Rev. 748, 762 (1935).

⁷¹ The established meaning of words sometimes has been disregarded in order to reach a result which appears to have been intended by the legislature. *E.g.*, *Baker v. Jacobs*, 64 Vt. 197 (1891) ("victuals or drink" comprehends "cigars"). Sometimes the established meaning is disregarded in order to avoid absurd results. *E.g.*, *Nashville & Ky. Ry. v. Davis*, 78 S.W. 1050 (Sup. Ct. Tenn. 1902) ("animal" does not include "goose").

that the defrauder posing as agent does not acquire the power to transfer a good title to a good faith purchaser for value.⁷²

Here, just as where the defrauder practices impersonation-by-mail, there are two lines of reasoning, each leading to an opposite result. Here, as in the imposture-by-mail case, if "transaction of purchase" is limited to transactions which create an interest in property in the usual sense of the word, the defrauder does not acquire the power to transfer a good title under section 2-403 (1). Here, too, the opposite conclusion might be reached by disregarding the definition of "purchase" contained in the Code. To establish that subsection (1) effects a change in the result to be reached in cases which have denied protection to good faith purchasers from pretended agents, however, it is necessary to meet two arguments which cannot possibly apply in contending that no change has been made in the impostor-by-mail cases.

The first is that the "deception" in these defrauder-pretending-to-be-an-agent cases relates not to the "*identity* of the *purchaser*" as expressed in clause (a) of subsection (1) but rather to the *authority* of the *agent*. Those contending that a change has been effected probably would reply that in the defrauder-pretending-to-be-an-agent cases it is basic that the defrauder is *not* an *agent*. They would answer further, perhaps, that a defrauder-pretending-to-be-an-agent is just as clearly a "purchaser" as is an impostor-by-mail because in both cases the courts heretofore have held that no sale is effected, in both cases the defrauded party delivers the goods thinking that he is selling them, and in both cases the defrauder is the only person who possibly could be deemed to be the purchaser.

The second argument which must be met by those who contend that a change is effected in the pretended agent cases rests on section 3-405 (1) (a) which deals with the transfer of commercial paper rather than with the sale of goods.⁷³ As mentioned earlier, this section expressly extends protection to the transferee of an impostor-by-mail, even though the paper is made payable to the person the impostor purports to be, rather than to the

⁷² Cases cited note 23 *supra*.

⁷³ UCC §3-405(1) provides: "An indorsement by any person in the name of a named payee is effective if (a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee. . . ."

impostor. Those contending no change has been effected first assume that this section does not extend protection to a transferee of commercial paper from a defrauder who obtained the paper by purporting to act as agent for the person named as payee.⁷⁴ From this, it is argued that if the question had been raised with the draftsmen of subsection (1) of section 2-403 the same distinction would have been made so that even conceding that they did favor the purchaser of goods from an impostor-by-mail, they would have denied protection to a transferee of a defrauder-purporting-to-be-agent. Those who contend that a change has been effected would probably distinguish the situation, however, as there is special justification for protecting the defrauded person who gives a pretended agent commercial paper *payable* to the *alleged principal*. The defrauded party in that case takes affirmative action to protect himself by making the paper payable, not to the defrauder, but to the alleged principal, whereas a defrauded party who delivers *goods* to a defrauder pretending-to-be-agent has no such equity in his favor.⁷⁵

C. *Fraud Deemed To Be Larcenous*

As mentioned earlier, the protection of the voidable title principle sometimes has been withheld from an innocent purchaser for no other reason than that his vendor had obtained the goods by a type of fraud which happened to be considered larcenous under the criminal law rather than by a type of fraud which was not.⁷⁶ Although such cases have been relatively few in number, they have caused a great deal of confusion among lawyers and much wasteful discussion by the many courts which have refused to follow them.⁷⁷ In some of these cases the defeat

⁷⁴ This assumption is supported by comment 2 to UCC § 3-405 which states: "Impostor' refers to impersonation, and does not extend to a false representation that the party is the authorized agent of the payee. The maker or drawer who takes the precaution of making the instrument payable to the principal is entitled to have his indorsement."

⁷⁵ The concluding sentence in comment 2 to UCC §3-405, *supra* note 74, appears to recognize the special equity in favor of a maker or drawer of commercial paper naming the principal as payee.

⁷⁶ Cases cited note 24 *supra*.

⁷⁷ *E.g.*, Scaife & Co. v. Stovall, 67 Ala. 237 (1880); Yates v. Russell, 20 Ariz. 338 (1919); Bell v. Cafferty, 21 Ind. 411 (1863); Fisher v. Bullington, 223 La. 368, 65 So.2d 880 (1953); Rowley v. Bigelow, 29 Mass. (12 Pick.) 307 (1832); Cochran v. Stewart, 21 Minn. 435 (1875); Loeffel v. Pohlmann,

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of the good faith purchaser has been ascribed to statute.⁷⁸ In others it has been based on spurious common law principles.⁷⁹

It will be recalled that in the case of *Parker v. Patrick*,⁸⁰ referred to at the outset of this paper as the first reported case in which the voidable title principle had been applied, the court supported its holding in favor of the good faith purchaser by the brief statement that the defrauder had obtained the goods by fraud and that fraud was not a felony. The only reason the court felt it necessary to mention the criminal law in that case was the fact that the defrauded seller had seized possession of the goods from the good faith purchaser under a writ of restitution, relying on the Statute 21 Henry VIII ch. 11.⁸¹ That statute provided that if the goods were taken from a person by a felony, and the injured party procured the conviction of the wrongdoer by indictment, the injured party would be entitled to a writ of resti-

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47 Mo. App. 574 (1891); *Hunter v. Moore*, 276 S.W.2d 754 (Tenn. Ct. App. 1954).

Some idea of the types of the difficulties which may arise when the law of sales is blended with the law of crimes can be gleaned from the opinion in *Whitehorn Bros. v. Davison*, [1911] 1 K.B. 463. In this case, the defrauder obtained jewelry on a sale or return contract. The court decided the case in favor of the good faith purchaser on the ground that the defrauder obtained a voidable title because the defrauded party intended to transfer ownership to him. Lord Justice Buckley supported this rather obvious conclusion by a detailed opinion which included the following analysis:

Suppose the facts are that the owner of the goods, being induced thereto by a trick intends, not to pass the property in them, but to confer on the person to whom he gives possession a power to pass the property; under which (head) does that case fall? Prima facie, it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences, where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property.

Most courts find it wholly unnecessary to discuss the criminal law in deciding cases involving the application of the voidable title principle. *E.g.*, *Dudley v. Lovins*, 310 Ky. 491, 220 S.W.2d 978 (1949) (impostor gave forged check).

⁷⁸ *Port Fin. Co. v. Ber*, 45 So. 2d 404 (La. Ct. App. 1950); *Andrew v. Dieterich*, 14 Wend. 31 (N.Y. Sup. Ct. 1835); *Beckwith v. Galice Mines Co.*, 50 Ore. 542, 93 Pac. 453 (1908); *Richardson v. Seattle First Nat'l Bank*, 38 Wash.2d 314, 229 P.2d 341 (1951). *Contra*: *Scaife v. Stovall*, 67 Ala. 237 (1880); *Jeffrey Motor Co. v. Higgins*, 230 La. 857, 89 So.2d 369 (1956); *Fisher v. Bullington*, 223 La. 368, 65 So.2d 880 (1953).

⁷⁹ *Knapp v. Lyman*, 44 Cal. App. 283, 186 Pac. 385 (1919); *Damis v. Barcia*, 266 App. Div. 698, 40 N.Y.S.2d 107 (1943); *Amols v. Bernstein*, 214 App. Div. 469, 212 N.Y. Supp. 518 (1925).

⁸⁰ 5 T.R. 175, 101 Eng. Rep. 99 (K.B. 1793).

⁸¹ 21 Hen. VIII, ch. 11 (1549).

tution.⁸² Patrick, the defrauded party, had brought about the conviction of the defrauder on the grounds of obtaining goods by false pretenses, but the court held this offense not to be a felony and so denied the defrauded party the advantage of the statute. None of the states except Virginia have ever adopted the Statute 21 Henry VIII ch. 11.⁸³ Since the only reason the court in *Parker v. Patrick* had found it necessary to refer to the nature of the crime was to determine the applicability of the statute, it was reasonable to expect that, except in Virginia, the distinction which the court had made between conduct which was mere fraud and conduct which amounted to a felony should have no substantial effect on the law of sales on this side of the Atlantic.

However, when *Mowrey v. Walsh*,⁸⁴ one of the first American cases to follow *Parker v. Patrick*, was decided in 1828, the attorney for the good faith purchaser agreed with the contention of the attorney for the defrauded seller that if the goods had been obtained feloniously, the defrauder acquired no title at all and therefore lacked power to transfer any title.⁸⁵ Under these circumstances, the court felt it necessary to focus attention on the law of larceny, the type of felony alleged to have been committed. In holding that the defrauder had not committed larceny by inducing the plaintiff to sell and deliver the goods by means of a false letter of credit and in holding that the defrauder's vendee had acquired a good title, the court relied almost entirely on the fact that the defrauded seller intended to transfer to the defrauder,

⁸² A detailed discussion of the genesis and purposes of the statute is not possible here. It can be traced back at least to the thirteenth century when a party whose goods had been stolen was required to bring about the conviction of the thief in a proceeding appeal of felony in order to be entitled to a writ restoring the goods to him. By the Statute 17 Ed. II ch. 16, if he delayed and the king obtained a conviction proceeding by indictment, the crown acquired the right to all goods possessed by the felon, including the stolen goods. When the appeal of felony fell into disuse, victims of felonies needed encouragement to co-operate with the crown in bringing about the conviction of the felons by indictment. The Statute 21 Hen. VIII ch. 11 was enacted to provide this encouragement. See generally, Plucknett, *A Concise History of the Common Law* (5th ed. 1956). In *Pettingill v. Rideout*, 6 N.H. 454, 456 (1833), the court said: "[W]e are very well satisfied that the people of this state want no additional stimulants to prosecute offenders. Rogues are almost the only game our people have to pursue, and they are by no means backward in that chase." This appears to be the dominant view in this country.

⁸³ 2 Kent, *Commentaries* 324 n. c (13th ed. 1884).

⁸⁴ 8 Cow. 238 (N.Y. Sup. Ct. 1828).

⁸⁵ *Id.* at 240.

not only possession of the goods, but also their ownership.⁸⁶ This was sufficient to distinguish it from the earlier cases wherein defrauders had been held to have committed larceny.

Most later courts, when considering the application of the voidable title principle, have rightly refused to become involved in a discussion of the law of larceny.⁸⁷ Some few courts have permitted themselves to become so involved and have been willing to reason from the proposition that a defrauder cannot obtain a voidable title by means of larceny.⁸⁸ The results of the cases, however, have not been affected at all by the faulty analysis when the courts have recognized and adopted that segment of the law of larceny which holds that there can be no larceny if the seller delivered the goods with the intention of transferring ownership, as well as possession, following *Mowrey v. Walsh*. Ordinarily no harm can be done by such analysis because the intention of the seller is the test normally applied under the general law of sales when the issue is whether title has passed with the delivery of goods.⁸⁹

On the other hand, some later courts, in purporting to apply the larceny test, appear to have inverted the reasoning by focusing attention on the defrauder's wrongful intent and the conduct by which he induced the seller to deliver the goods, and have

⁸⁶ The court said:

Larceny is defined, by East, to be the wrongful, or fraudulent taking or carrying away by any person, of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, *without the consent of the owner*. 2 East's P.C. 553. It is, therefore, important, in cases of delivery of possession by the owner, to inquire whether he intended to part with the *possession* or with the *property*; for, if the latter, by whatever fraudulent means he was induced to give the credit, it cannot be felony. . . . When the property is intended to be transferred, no larceny is committed however great may be the fraud. . . . *Id.* at 241. (Emphasis added.)

⁸⁷ See, e.g., *Dudley v. Lovins*, 310 Ky. 491, 220 S.W. 2d 978 (1949) (impostor gave forged check).

⁸⁸ See, e.g., *Scaife & Co. v. Stovall*, 67 Ala. 237 (1880); *Bell v. Cafferty*, 21 Ind. 411 (1863); *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307 (1832); *Cochran v. Stewart* 21 Minn. 435 (1875); *I-Land Auto Sales, Inc. v. Valle*, 175 N.Y.S.2d 732 (Mun. Ct. 1953); *Beckwith v. Galice Mines Co.*, 50 Ore. 542, 93 Pac. 453 (1908); *Hunter v. Moore*, 276 S.W. 2d 754 (Tenn. Ct. App. 1954); *Linn v. Reid*, 114 Wash. 609, 196 Pac. 13 (1921); *Williams v. Given*, 47 Va. (6 Gratt.) 268 (1849).

⁸⁹ Uniform Sales Act §§ 18-19; 2 Williston §261. Although the principle is usually stated to refer to the intention of the parties, rather than of the seller alone, in cases of the kind under consideration it may be taken for granted that the defrauder intends to acquire the property.

concluded that the defrauder acquired no title, even though it was quite clear that the defrauded seller had intended to transfer ownership of the goods.⁹⁰ Other courts have defeated good faith

⁹⁰ Knapp v. Lyman, 44 Cal. App. 283, 186 Pac. 385 (1919); Damis v. Barcia, 266 App. Div. 698, 40 N.Y.S. 2d 107 (1943); Amols v. Bernstein, 214 App. Div. 469, 212 N.Y. Supp. 518 (1925); Hoffman v. Alpern, 193 Misc. 695, 85 N.Y.S. 2d 561 (N.Y. City Ct. 1948) (*semble*).

A sketch of the New York cases furnishes an interesting commentary on the common law system and its attempt to adhere to precedent and at the same time reflects some of the confusion which is bred by introducing criminal law concepts into the law of sales.

In Mowrey v. Walsh, 8 Cow. 238 (N.Y. Sup. Ct. 1828), the court, relying on the attorney-adversary method of finding and developing the law, went to England for a precedent and a criminal law analysis which had been based on a statute never adopted in New York, when it might have gone to Kentucky for a much sounder analysis. See Parker v. Patrick, 5 T.R. 175, 101 Eng. Rep. 99 (K.B. 1793), and Mansell's Adm'r v. Israel, 6 Ky. (3 Bibb.) 510 (1814). In Andrew v. Dieterich, 14 Wend. 31 (N.Y. Sup. Ct. 1835), the court extended the earlier error by applying a statutory definition of larceny which had no reasonable relation to the law of sales but was based instead on the nature of the criminal penalty. In Wyckoff v. Vicary, 75 Hun 409 (N.Y. Sup. Ct. 1894), the court had an opportunity to apply the larceny test to protect a defrauded owner but protected him instead without any reference to the criminal law. In Phelps v. McQuade, 220 N.Y. 232, 115 N.E. 441 (1917), the Appellate Division, apparently relying on the attorney-adversary system embraced the larceny test but held for the good faith purchaser by finding no larceny had occurred. On appeal, the Court of Appeals showed that it recognized the unsoundness of the larceny test, but it lost its opportunity to repudiate the doctrine altogether, apparently out of consideration for the feelings of the Appellate Division, by saying:

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

While the statement may have been effective to assuage the feelings of the lower court, it apparently was not effective to guide its action for when Amols v. Bernstein, 214 App. Div. 469, 212 N.Y. Supp. 518 (1925), came to the Appellate Division a few years later in a case where the vendor's intent clearly was to transfer ownership to the defrauder, the Appellate Division disregarded the Court of Appeals' analysis except for the diplomatic dicta and held for the defrauded seller by finding common law larceny by equating fraud and trickery to larceny by trick and by relying almost entirely on the defrauder's "*animus furandi*" while disregarding the intention of the seller. More recently, in Damis v. Barcia, 266 App. Div. 698, 40 N.Y.S. 2d 107 (1943), the Appellate Division, reaffirmed its support of the larceny test and its disregard for the *vendor's intent* when it followed Amols v. Bernstein, *supra*, and held for the defrauded seller in a case wherein the defrauder had given forged checks. The presiding justice, wishing to favor the good faith purchaser, but feeling bound to follow Amols v. Bernstein, *supra*, on the law, sought to distinguish the two cases on the facts on the ground that "no checks were given as the documents were post-dated." The uncertainty continues and is likely to continue for, as recently as 1958, in I-Land Auto Sales, Inc. v. Valle, 175 N.Y.S. 2d 732 (Mun. Ct. 1958), a New York lower court held in favor of a good faith purchaser by citing Phelps v. McQuade, *supra*, and completely ignoring Amols v. Bernstein, *supra*, which, had it been followed, might have led to the opposite result.

purchasers because, rightfully or wrongfully, they have felt bound to accept a statutory definition of larceny in applying the rule that larceny prevents the passage of title.⁹¹

Will the good faith purchaser be shielded from defeat in cases of this kind by the subsection (1) provision that when goods have been delivered under a transaction of purchase, the purchaser has power to transfer a good title to a good faith purchaser for value even though "the delivery was procured through fraud punishable as larcenous under the criminal law"?⁹² Here, just as is true in cases involving deception as to the identity of the purchaser, there are two principal lines of reasoning. One seeks the intention of the legislature almost entirely in the words of the Code, and the other emphasizes evidence extrinsic to the Code itself.

Those contending that no change has been effected again would rely heavily on the fact that subsection (1) of section 2-403 does not purport to effect any change except in cases where the good faith purchaser's vendor acquired the goods in a "transaction of purchase" which, in effect, would require that there be either a "sale" or a transaction "creating an interest in property."⁹³ Again they would point out that it would be merely begging the question to assume that the transaction constitutes a "sale" which by definition requires the transfer of property to the buyer.⁹⁴ Then they would argue cogently that a transaction by which goods are obtained by fraud deemed to be larcenous is not a transaction "creating an interest in property" because the courts which have decided against good faith purchasers in such

⁹¹ *Port Fin. Co. v. Ber*, 45 So. 2d (La. Ct. App. 1950); *Andrew v. Dieterich*, 14 Wend. 31 (N.Y. Sup. Ct. 1835); *Richardson v. Seattle First Nat'l Bank*, 38 Wash. 2d 314, 229 P. 2d 341 (1951).

In the *Richardson* case, it appears that the court had little choice in the face of two closely related statutory provisions, one defining larceny so as to include obtaining property by false pretenses and the other providing that any property obtained by larceny could be recovered by the defrauded owner, even from a good faith purchaser.

The Code provides that, with exceptions not relevant here, "all acts or parts of acts inconsistent with this Act are repealed." UCC §10-103. Accordingly, if it is assumed that UCC §2-403(1) extends protection to good faith purchasers from defrauders by larceny in states which have denied protection in such cases without relying on any statute, it also must be assumed that it assures such protection in states which hitherto have denied such protection on the basis of a statutory definition of larceny.

⁹² UCC §2-403(1)(d).

⁹³ UCC §1-201(32).

⁹⁴ UCC §2-106(1).

cases have held, and would be free to continue to hold, that such transactions are void and do not create any such interest.⁹⁵

Those contending that a change in these cases would be effected by subsection (1) once again start by insisting that such change is necessary to help carry out the Code's underlying purposes of simplifying, clarifying, and modernizing the law and, especially, of making the law more uniform.⁹⁶ They would reason further that expressly mentioning transactions in which "the delivery was procured through fraud punishable as larcenous under the criminal law" can have no real purpose except to bring about a change in the law in states whose courts heretofore have held that such transactions could not create even a voidable title in the defrauder.⁹⁷ To place any other construction on it, they would contend, would render the clause purposeless and, therefore, unreasonable.⁹⁸ Also, they would claim support from a comment which states, in discussing the policy of the Code with respect to the injection of the law of larceny into the law of sales in another connection,⁹⁹ "It is also freed from any technicalities depending on the extended law of larceny; such extension of the concept of theft to include trick, particular types of fraud, and the like, is for the purpose of helping in the conviction of the offender; it has no proper application to the longstanding policy of civil protection of buyers from persons guilty of such trick or fraud."¹⁰⁰ Finally, those contending that a change has been effected in these cases would answer the argument that such transactions are not "transactions of purchase" as required by subsection (1) by insisting that the Code definition does not apply here because, to use the introductory words of the section setting forth the definition, "the context otherwise requires."¹⁰¹

A kind of over-all argument in favor of the conclusion that all of the changes considered have been effected might be based

⁹⁵See notes 90 and 91 *supra*.

⁹⁶UCC §1-102(1)(2).

⁹⁷The 1952 Draft of the Code contained no express reference to this type of transaction.

⁹⁸"When changes have been introduced by amendment, it is not to be assumed that they are without design." *Stamford v. Stamford*, 107 Conn. 596, 606, 141 Atl. 691, 695 (1928). *Accord*, *Kelly v. Dewey*, 111 Conn. 281, 149 Atl. 840 (1930); *Blackburn v. Maxwell Co.*, 305 S.W.2d 112, 115 (Ky. 1957).

⁹⁹*I.e.*, in discussing the effect of the entruster provision and its supporting provision. UCC §2-403(2)(3).

¹⁰⁰Comment 2 to §2-403.

¹⁰¹UCC §1-201.

on the following statement of the reason assigned by the Code Editorial Board for recommending that the third sentence in subsection (1) be included in the 1957 Edition of the Code: "Following the suggestions of the New York Commission, a third sentence was inserted in subsection (1) to clarify the application of the second sentence to four specific cases of voidable title, including the case of the 'cash sale', formerly covered by section 2-401 (1) (b)." ¹⁰² A similar argument may be based on the following statement contained in comment (1) to section 2-403; "In addition, subsection (1) provides specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law."

The thrust of these statements seems clearly in the direction of extending the protection of the voidable title principle to good faith purchasers in situations where, heretofore, it was denied.

It must not be overlooked, however, that neither of these statements is part of the Code itself. And even if they were contained in the Code, they could not obviate the fact that the four clauses setting forth the specific situations referred to are introduced and qualified by the clause, "When goods have been delivered under a *transaction of purchase* the purchaser has such power even though. . . ." ¹⁰³ Also, there is an answer to the argument that the Code definition of "purchase" has no application in dealing with these cases. Those arguing that no change has occurred might themselves be expected to venture into normally forbidden territory and quote from the opening statement of comment (1) to section 2-403 which provides: "The basic policy of our law allowing transfer of such title as the transferor has is generally continued and expanded under subsection (1). In this respect the provisions of the section are applicable to a person taking by any form of 'purchase' as defined in this Act." ¹⁰⁴

The enigmatic nature of the third sentence in subsection (1) of section 2-403 increases when one realizes that although the previously mentioned explanation ¹⁰⁵ of the Editorial Board expressly relates it to the voidable title principle, the third sentence

¹⁰² 1956 Recommendations of the Editorial Board for the Uniform Commercial Code 53 (1957).

¹⁰³ UCC §2-403(1) (Emphasis added).

¹⁰⁴ (Emphasis added).

¹⁰⁵ Note 102 *supra*.

itself evidences an almost deliberate attempt to avoid the use of the term "voidable title," and the same is true of the comments.

IV. WOULD THE PROVISION CONTAINED IN THE NEW YORK LAW REVISION REPORT HAVE BEEN MORE EFFECTIVE?

A person, who recognizes the uncertainty which prevails with respect to the effectiveness of subsection (1) of section 2-403 in extending the application of the voidable title principle, is likely to ask whether the recommended provision contained in the 1956 Report of the New York Law Revision Commission¹⁰⁶ would have been any more effective. The answer appears to be that in some respects it would have been more effective while in others it would have been less.

A. *Cash Sale Transactions*

As the previous discussion has shown, the Code clearly extends protection to a good faith purchaser whose vendor had acquired delivery of the goods as the result of a "cash sale" transaction, without regard to whether it was carried out by means of a check or otherwise.

It will be recalled that the recommended provision contained in the Law Revision Commission Report provides generally that:

When a transferor has a right to recover goods from a transferee, the transferee's title shall be deemed to be voidable rather than void if the transferor delivered the goods to the transferee pursuant to a transaction *intended by the transferor to transfer ownership in the goods*.¹⁰⁷

Despite the seeming comprehensiveness of this provision, it is in fact not sufficiently broad to assure the protection of the voidable title principle to the good faith purchaser from a defrauder who obtained the goods in any kind of cash sale. This is because the provision leaves the defrauded party free to retake his goods if he can show merely that *he did not intend to transfer ownership in the goods until he received payment*. By having the result hinge on the *intent* of the defrauded party, the recommended provision would leave the cash sale transaction in substantially

¹⁰⁶ Law Revision Commission Report Relating to the Uniform Commercial Code, Appendix IV (Excerpts from the Proceedings of the Commission), N.Y. Leg. Doc. 65 at 383 (1956).

¹⁰⁷ *Ibid.*

the same legal status it has had heretofore in the great majority of the courts.¹⁰⁸

This is just as true of cash sales carried out by check as it is of other types of cash sale transactions despite the fact that the recommended provision purports to deal expressly with the "bad check" cash sale by the clause which provides that "This rule includes but is not limited to cases where . . . the transferor delivers the goods *in exchange for* a check which is not collected because of insufficient funds."¹⁰⁹ Under this clause, where a cash sale is carried out through the medium of a check, the key question will continue to be the *intent* of the defrauded party. In the past, there appears to have been complete agreement on the proposition that if the seller did in fact accept a check in exchange for the goods—that is, if he received the check as payment itself—title passed immediately to the defrauder. What has defeated the good faith purchaser in the great majority of the cases wherein his vendor obtained the goods in a cash-sale-by-bad-check transaction has been the fact that the defrauded party was held *not to have intended* to deliver the goods *in exchange for* the check. In other words, the defrauded seller, in these cases has been entitled to retake his goods only if the court concluded that he accepted the check as a *means* of payment; he has not been held to be entitled to retake the goods from a good faith purchaser where it was found that he intended to accept the check as payment itself. Thus, the recommended provision, even when viewed in the light of the special clause leaves the matter precisely where it has been in the great majority of the cases—entirely dependent upon the intention of the seller when he delivers the goods.¹¹⁰

B. *Transactions Other Than Cash Sales*

In the situations wherein the Code appears to leave the rights of the good faith purchaser from a defrauder uncertain and dependent upon the interpretation which a court happens to place on subsection (1) — that is, where the defrauder obtained the

¹⁰⁸ See cases cited note 18 *supra*.

¹⁰⁹ Law Revision Commission Report Relating to the Uniform Commercial Code, Appendix IV (Excerpts from the Proceedings of the Commission), N.Y. Leg. Doc. 65 at 383 (1956). (Emphasis added).

¹¹⁰ See cases cited note 21 *supra*.

goods by imposture-by-mail,¹¹¹ or by pretending to act as agent,¹¹² or by practicing a type of fraud deemed to be larcenous¹¹³ — the recommended provision seems to have been designed to give proper protection to the good faith purchaser.

This is because in each of these cases under the recommended provision there clearly is no need to show that the transaction by which the defrauder obtained the goods was a "transaction of purchase" in the sense of being either a "sale" or a transaction "creating an interest in property." As seen earlier, it might well be argued that a failure to make this showing would prevent a good faith purchaser from obtaining protection under subsection (1) of section 2-403 of the Code. Under the recommended provision it is sufficient, in order to create a voidable title in the defrauder, that the defrauded party delivered the goods to the defrauder "pursuant to a transaction *intended by the transferor to transfer ownership in the goods.*"¹¹⁴ In transactions wherein a defrauder obtains goods by imposture-by-mail, or by pretending to act as agent, or by practicing a type of fraud later held to be larcenous, there is rarely, if ever, any basis for doubting that the defrauded party intends to transfer ownership of the goods when he delivers them to the defrauder. Consequently, under the recommended provision in each of these transactions the defrauder would acquire a voidable title and with it the power to transfer a good title to a good faith purchaser.

CONCLUSION

It seems to be sound to protect a good faith purchaser of goods against the claims of a defrauded prior owner whenever it is found that the latter delivered the goods to the defrauder with the intention of transferring his ownership either immediately or upon the receipt of payment. At least, the draftsmen of the recommended provision contained in the 1956 Report of the New York Law Revision Commission and the draftsmen of subsection (1) of section 2-403 of the recent editions of the Code seem to have desired to extend the protection of the voidable title principle

¹¹¹ See cases cited note 22 *supra*.

¹¹² See cases cited note 23 *supra*.

¹¹³ See cases cited note 24 *supra*.

¹¹⁴ Law Revision Commission Report Relating to the Uniform Commercial Code, Appendix IV (Excerpts from the Proceedings of the Commission, N.Y. Leg. Doc. 65 at 383 (1956). (Emphasis added).

so as to assure protection to the good faith purchaser in such cases.

Despite the apparent intention of its draftsmen, the recommended provision contained in the Law Revision Report would not have assured the protection of the voidable title principle to a good faith purchaser who buys from a defrauder who has obtained the goods in a transaction held to be a cash sale, whether by means of a bad check or otherwise. However, the recommended provision would have given protection to the good faith purchaser who buys from a defrauder who has obtained goods by imposture-by-mail, by pretending to act as agent, or by practicing a type of fraud deemed to be larcenous.

The recent editions of the Code appear to be more effective in some respects but less effective in others than the recommended provision would have been. No doubt, the Code extends the protection of the voidable title principle to the good faith purchaser from a defrauder who obtained the goods in any kind of a cash sale transaction. But whether the Code extends protection to a good faith purchaser whose vendor obtained the goods by imposture practiced by mail, by pretending to be an agent, or by fraud deemed to be larcenous, depends upon the construction the courts choose to place upon subsection (1) of section 2-403.

A court which is content to seek the intention of the legislature almost entirely in a literal reading of the relevant provisions of the Code seems likely to hold that the Code effects no change in the prevailing law in these cases. At the opposite extreme, it seems just as likely that a court which insists on seeking the intention of the legislature, not only in what the Code itself says, but also in the various other clues to legislative intention found outside of the Code proper, will conclude that the Code does assure protection to the good faith purchaser in these cases.

Assuming that the described changes are desirable and that it is one of the underlying purposes of the Code to make uniform the laws among the various jurisdictions,¹¹⁵ it is hardly adequate to have the adoption of the changes hinge in the final analysis upon the attitudes which various courts might take not only with respect to the merits of the changes but also with respect to the role of a judge in dealing with a statute. In the interest of both

¹¹⁵ UCC §1-102(2)(c).

improving the law and moving toward uniformity an amendment to the Code seems to be needed.

One way to remove any doubt that the Code has effected all of the changes desired in extending the voidable title principle would be to embody in the Code the idea which underlies the recommendation contained in the 1956 Report of the New York Law Revision Commission. This is the idea that whenever a person delivers goods as part of a transaction in which he intends to part with ownership his transferee acquires a voidable title and with it the power to transfer a good title. An easy and effective way of doing this appears to be to amend the definition of "purchase"¹¹⁶ now found in the Code by adding "and, where necessary to protect one who later in good faith undertakes to purchase such goods, also any other transaction wherein the owner of goods, or his authorized agent, delivers the goods to another pursuant to a transaction intended by the transferor to transfer ownership of the goods."¹¹⁷ It is submitted that an amendment of this general nature should be adopted so as to give assurance that under the Code the voidable title principle has been extended to its proper limits.¹¹⁸

¹¹⁶ UCC §1-201(32).

¹¹⁷ If such an amendment were made, UCC § 1-201(32) would read: "Purchase' includes taking by sale . . . or any other voluntary transaction creating an interest in property [and, where necessary to protect one who later in good faith undertakes to purchase such goods, also any other transaction wherein the owner of goods, or his authorized agent, delivers the goods to another pursuant to a transaction intended by the transferor to transfer ownership of the goods]."

¹¹⁸ Of course, any statement which may later be adopted to deal with the matters discussed herein, or other matters, is likely to do more harm than good unless properly approved by the Code's Editorial Board. As was stated recently by William A. Schnader, Esq., Chairman of the Commercial Code Committee of the National Conference of Commissioners on Uniform State Laws, "[T]he practice of miscellaneous amendment would rapidly destroy the Code's principal appeal, namely, that when it becomes the law of all of the states, the statutory law regulating commercial transactions will be uniform." Mid-Winter 1961 Report of the Commercial Code Committee at 8 (Feb. 18, 1961). In an effort to prevent unauthorized amendments a special committee has been appointed by Judge Herbert F. Goodrich, Chairman of the Code Editorial Board.