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## Uniform Commercial Code Section 2-403(2): The Authority of a Bailee to Convey Title

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to define the term, probably due to the confusion it would create among real property interests. Undoubtedly, the fact that a security interest may exist in fixtures independently of real estate interest or where it might not have before the Code will ease a problem the courts seem to have had formerly: adapting their practical definitions to the equities of the case. However, until it can be observed which way the courts will be inclined to rule, the seller or chattel mortgagee is advised to file twice to be safe. Most Code commentators, including Professor Coogan of Harvard,<sup>77</sup> agree that prudence seems to require dual filing with the chattel records as well as the real estate records. In Florida the additional cost amounts to approximately two dollars.<sup>78</sup> Such additional cost may be a small price to pay for avoiding litigation.

PRESTON O. COCKEY, JR.

UNIFORM COMMERCIAL CODE SECTION 2-403 (2) :  
THE AUTHORITY OF A BAILEE TO CONVEY TITLE

Subsection 2-403 (2) of the Uniform Commercial Code provides:<sup>1</sup>

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.

The effect of this provision is illustrated by the following commercial transaction: *O* delivers his watch to a jewelry store for repair, with specific instructions not to sell it. Nevertheless, the store sells it to an innocent purchaser *P*, without the consent or knowledge of *O*. Prior to the adoption of the Uniform Commercial Code, *O* could recover possession of the watch from *P*. However, under section 2-403 (2), *O* may be barred from asserting superior title to the goods. Thus, section 2-403 (2) provides more protection for the buyer in the ordinary course of business than he enjoyed prior to the adoption of the Uniform Commercial Code. This commentary will examine in detail the effect of section 2-403 (2) on a bailee's ability to convey title.

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77. Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1341 (1962); Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788, 796 (1964).

78. FLA. STAT. §28.24 (1967).

1. FLA. STAT. §672.2-403 (2) (1967).

ABILITY OF A BAILEE TO TRANSFER TITLE PRIOR TO THE  
UNIFORM COMMERCIAL CODE

At common law it was well established that a bailee could not convey better title to bailed goods than he had.<sup>2</sup> Mere possession of one's goods by a bailee would not estop the bailor from recovering them from a subsequent innocent party who relied upon such possession as apparent ownership.<sup>3</sup> The failure of the courts to protect a buyer in this situation, even though he may have purchased for value and without notice of the bailor's title, was premised upon the rationale that mere possession of personalty was only prima facie evidence of ownership.<sup>4</sup> Therefore, an owner could entrust his goods to a bailee to be inspected for future sale and still regain possession from an innocent purchaser.<sup>5</sup> Likewise, the owner of chattels who transferred possession of his goods for a special purpose, such as repair<sup>6</sup> or lease to a third party,<sup>7</sup> without also having conferred authority to sell, generally could regain possession from a third party who purchased from the bailee.<sup>8</sup> If an owner entrusted his goods to one who habitually sold such items with authority to exhibit them and obtain offers from potential purchasers, a subsequent innocent purchaser was often not protected if the owner provided that no sale was to occur prior to his approval.<sup>9</sup>

## ESTOPPEL

Although mere possession of goods by a bailee would not prevent the owner from asserting superior title if they were sold to an innocent purchaser, additional conduct by the owner could create an opposite result.<sup>10</sup> A bailee could, by some act of the owner, be clothed with "indicia of ownership,"<sup>11</sup> which justified the purchaser's reliance upon his ability to sell. In the event the bailee was clothed with such authority, the owner was estopped to deny the bailee's ability to convey good title to the goods. For example, one who voluntarily entrusted a bailee with possession of a properly endorsed title certificate had clothed him with authority to sell.<sup>12</sup> Likewise, a bailee

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2. *Dicks v. Colonial Fin. Corp.*, 85 So. 2d 874 (Fla. 1956); *Joel Strickland Enterprises, Inc. v. Atlantic Discount Co.*, 137 So. 2d 627 (1st D.C.A. Fla. 1962).

3. *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953); *Glass v. Continental Guar. Corp.*, 81 Fla. 687, 88 So. 876 (1921).

4. *Inman v. Rowsey*, 41 So. 2d 655 (Fla. 1949); *Commercial Credit Co. v. Parker*, 101 Fla. 928, 132 So. 640 (1931).

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

6. 2 S. WILLISTON, *THE LAW GOVERNING THE SALE OF GOODS AT COMMON LAW AND THE UNIFORM SALES ACT* §313 (rev. ed. 1948).

7. *Boozer v. Jones*, 169 Ala. 481, 53 So. 1018 (1910).

8. *Mori v. Chicago Nat'l Bank*, 3 Ill. App. 2d 49, 120 N.E.2d 567 (1954).

9. *E.g., California Jewelry Co. v. Provident Loan Ass'n*, 6 Cal. App. 2d 506, 45 P.2d 271 (1935).

10. *Id.*

11. *Forest Inv. Corp. v. Chaplin*, 55 Ill. App. 2d 429, 205 N.E.2d 51 (1965). "Indicia of ownership" refers to a situation in which the owner of goods allows, by an act or omission, another party to appear to be the owner of his goods.

was allowed to transfer valid title to property held for resale, although the owner had wished to retain title for purposes of security until payment of the purchase price.<sup>13</sup> The owner's inaction, as well as his affirmative acts, could estop him from denying the bailee's authority to sell. For example, a cattle owner delivered his herd to a cattle salesman and failed to intervene despite his knowledge that the cattle were being unloaded for sale. As a result he was estopped from denying the innocent purchaser's title.<sup>14</sup>

If certificates of title had been stolen from the owner or obtained through fraud, he was not estopped from asserting ownership against a bona fide purchaser from the thief.<sup>15</sup> At common law, estoppel would not bar one who did not intend, or have reason to believe, that his conduct would be relied upon by others.<sup>16</sup> Therefore, a bailee could not acquire the necessary indicia of ownership by theft or fraud.<sup>17</sup>

Justification for the concept of estoppel, which in effect allows a bailee to transfer better title than he has, is based upon the doctrine that where one of two innocent parties must suffer from the wrongful acts of a third person, the loss must be incurred by the party who created the circumstances that enabled the wrong to be perpetrated.<sup>18</sup> If a buyer, unaware of the owner's interest, purchased goods in reliance upon the bailee's apparent ownership, his claim to the goods was therefore protected.<sup>19</sup>

#### *Factors Acts and the Uniform Sales Act*

The Factors Acts and section 23 of the Uniform Sales Act represented statutory definition of a bailee's ability to convey title. Most Factors Acts allowed the bailee to convey good title to a bona fide purchaser when five conditions were met:<sup>20</sup>

- (1) "goods" must have been
- (2) "entrusted" by their owner
- (3) to a "factor"
- (4) for "purposes of sale or as security for advances to be made or obtained thereon"
- (5) and disposed of in the ordinary course of business.

12. Annot., 151 A.L.R. 692 (1944); *Joel Strickland Enterprises, Inc. v. Atlantic Discount Co.*, 137 So. 2d 627 (1st D.C.A. Fla. 1962).

13. *Commercial Credit Co. v. Parker*, 101 Fla. 928, 132 So. 640 (1931); *Glass v. Continental Guar. Corp.*, 81 Fla. 687, 88 So. 876 (1921).

14. *Meadows v. Hampton Live Stock Comm'n*, 55 Cal. App. 2d 634, 131 P.2d 591 (1942).

15. *Avis Rent-A-Car System, Inc. v. Harrison Motor Co.*, 151 So. 2d 855 (2d D.C.A. Fla. 1963); 28 AM. JUR. 2d *Estoppel and Waiver* §63 (1966).

16. *Powers v. Pacific Diesel Engine Co.*, 206 Cal. 334, 274 P. 512 (1929); *W. C. Early Co. v. Williams*, 135 Tenn. 249, 186 S.W. 102 (1916).

17. *Encino State Bank v. Tenorio*, 28 N.M. 65, 206 P. 698 (1922).

18. *Eliason v. Wilborn*, 281 U.S. 457 (1930); *American Southern Ins. Co. v. England*, 260 F. Supp. 55 (S.D. W. Va. 1966); *Trumbull Chevrolet Sales Co. v. Seawright*, 134 So. 2d 829 (1st D.C.A. Fla. 1961).

19. *Commercial Credit Co. v. Parker*, 101 Fla. 928, 132 So. 640 (1931).

20. *Hawkland, Curing an Improper Tender of Title to Chattels: Past, Present, and Commercial Code*, 46 MINN. L. REV. 697, 705 (1962).

Respected authority indicates these requirements gave "bailor-oriented" courts considerable leeway in limiting the scope of statutory protection.<sup>21</sup> This hostility was frequently manifested by a restrictive definition of "entrustment," or by a refusal to recognize the entrustment as one "for purposes of sale."<sup>22</sup> Factors Acts were not widely adopted,<sup>23</sup> yet there was little need for such legislation in jurisdictions where courts are ultimately concerned with protecting innocent purchasers, for the same result can be achieved through application of estoppel principles. Similarly, the Uniform Sales Act did little more than codify the doctrine of estoppel regarding the ability of a bailee to transfer title to bailed goods.<sup>24</sup>

Therefore, prior to adoption of the Uniform Commercial Code, a bailee could not convey better title than he possessed unless the owner of the bailed goods was, by his conduct, precluded from denying the bailee's authority to sell.

#### EFFECT OF 2-403 (2) UPON THE AUTHORITY OF A BAILEE TO TRANSFER TITLE TO BAILED GOODS

Subsection 2-403 (2) substantially extends the ability of a bailee to transfer title to bailed goods beyond that previously recognized at common law, under the Factors Act, and under section 23 of the Uniform Sales Act. This extension can be attributed to the fact that a bailee's ability to convey title under section 2-403 (2) does not depend upon conduct of the owner.<sup>25</sup> It has been suggested that 2-403 (2) approaches the English concept of market overt,<sup>26</sup> which enabled a possessor of goods to transfer title to a bona fide purchaser, although the possessor lacked title himself.<sup>27</sup> Although 2-403 (2) may resemble this concept, the Code provision does not adopt it *in toto*, for before 2-403 (2) is applicable there must be:

- (1) an "entrustment" of goods
- (2) to a "merchant who deals in goods of that kind" before the bailee can transfer the entruster's title to
- (3) a "buyer in the ordinary course of business."

21. *Id.*

22. G. BOGERT, W. BRITTON & W. HAWKLAND, *SALES AND SECURITY* 184 (4th ed. 1962).

23. Florida never adopted a Factor's Act. Prior to the adoption of the Uniform Commercial Code, the common law doctrine of estoppel governed these transactions. 14 *FLA. JUR. Factors* §12 (1967).

24. See *UNIFORM SALES ACT* §23. A purchaser of goods could acquire no better title to the goods than the seller had, unless the owner was estopped from denying the seller's authority to sell.

25. W. HAWKLAND, *SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE* 105 (1958).

26. *Id.* Note, *The Good Faith Purchase of Goods and Entrusting to a Merchant under the Uniform Commercial Code: §2-403*, 38 *IND. L.J.* 675, 690 (1963).

27. Florida has explicitly rejected the doctrine of market overt. *Commercial Credit Co. v. Parker*, 101 Fla. 928, 132 So. 640 (1931); *Glass v. Continental Guar. Corp.*, 81 Fla. 687, 88 So. 876 (1921); *R.S. Evans Motors of Jacksonville, Inc. v. Hansen*, 130 So. 2d 297 (2d D.C.A. Fla. 1961).

### ENTRUSTMENT

The phrase "any entrusting of possession" creates considerable uncertainty regarding the delivery of goods to the merchant. Section 2-403 (3) defines entrusting as "any delivery and any acquiescence of possession . . . regardless of any condition expressed between the parties to the delivery . . . and regardless of whether the procurement . . . was larcenous under the criminal law." This definition implies that mere possession of an owner's goods gives the possessor authority to transfer title to a third party provided the goods were delivered to the transferor by the owner.<sup>28</sup> In *Adkins v. Damron*<sup>29</sup> a vegetable display case had been returned to the original seller for repair. It was wrongfully resold to the defendant, and the owner filed suit to recover possession. The court held that under the Uniform Sales Act plaintiff was not estopped to claim superior title by the mere fact he had given the seller possession. However, the court noted that 2-403 (2) would dictate a different result.

It has been suggested that the owner must be aware of the merchant's status as "a dealer in goods of that kind" before there can be an entrustment under 2-403 (2).<sup>30</sup> This contention is based upon the concept that the entrustment provision is but an extension of the principle of estoppel, and that an owner cannot be said to have conferred the indicia of ownership upon a merchant unless he knows that he has transferred possession to a "dealer."<sup>31</sup> Although this interpretation has some support,<sup>32</sup> the premise upon which it is founded is questionable. Under subsection 2-403 (2), the ability of a merchant to convey title to entrusted goods does not depend upon his being clothed with authority to sell.<sup>33</sup> Courts reluctant to place an absolute burden of risk on the entruster might take such an approach; however, this position would seem to go far beyond the acceptable bounds of statutory construction in light of the explicit language of 2-403 (2).<sup>34</sup> The intent of the owner seems relevant only to the extent that he intentionally delivered the goods to one who is later discovered to be a merchant.<sup>35</sup> Consequently, if the trustee had a garage at which the owner delivered his automobile for repair and also, unknown to the owner, had a used car lot in a different location, the trustee would be able to convey title to the automobile by merely placing it on his lot.

The definition of "entrusting" under 2-403 (2) seems sufficiently inclusive to encompass those situations in which goods are delivered to dealers by

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28. Hawklund, *supra* note 20, at 720.

29. 324 S.W.2d 489 (Ky. 1959).

30. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168, 281 N.Y.S.2d 400, 404 (N.Y. City Civ. Ct. 1967).

31. *Id.*

32. R. BRAUCHER, *DOCUMENTS OF TITLE UNDER THE UNIFORM COMMERCIAL CODE* 66 (1958).

33. W. HAWKLAND, *supra* note 25.

34. Note, *supra* note 27, at 692.

35. Warren, *Cutting Off Claims of Ownership under the Uniform Commercial Code*, 30 U. CHI. L. REV. 469, 474 (1963); Note, *The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code*, 72 YALE L.J. 1205, 1211 (1963).

parties who retain a security interest in them. However, subsection 9-307 (1) apparently withdraws this situation from the scope of 2-403 (2) protection,<sup>36</sup> and in parallel fashion specifically allows a buyer in the ordinary course of business to receive title free of perfected security interests, even if he knows of their existence. For example, in *Sterling Acceptance Co. v. Grimes*<sup>37</sup> a buyer in the ordinary course of business purchased a new automobile on which a security interest had been given by the dealer. The buyer received clear title although the interest was perfected and he knew the terms of the security agreement. The analogous protection afforded by subsection 9-307 (1) reinforces the general principles of 2-403 (2) regarding the ability of a merchant to transfer valid title.<sup>38</sup>

Although the entrustment provision of 2-403 (2) significantly extends a merchant's ability to transfer title to bailed goods, it retains the common law principle that title to stolen goods remains in the owner.<sup>39</sup> The requirements of "delivery" and "acquiescence"<sup>40</sup> on behalf of the entruster preclude any possibility that a merchant could convey good title to goods that he had stolen.<sup>41</sup> Likewise, the merchant who receives possession of stolen goods cannot transfer valid title to a buyer in the ordinary course of business, for 2-403 (2) provides that the merchant may transfer only the "rights of the entruster."<sup>42</sup> Therefore, 2-403 (2) does not prevent an owner from recovering possession of stolen goods from an innocent purchaser.

#### *Merchant Who Deals in Goods of That Kind*

Under the Uniform Commercial Code a "merchant" is defined as:<sup>43</sup>

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

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36. Subsection 9-307 (1) provides that "a buyer in the ordinary course of business (subsection (9) of section 1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected, and even though the buyer knows of its existence."

37. 194 Pa. Super. 503, 168 A.2d 600 (1961).

38. In *Weisel v. McBride*, 191 Pa. Super. 411, 156 A.2d 613 (1959), the plaintiff purchased and received an automobile and applied for a certificate of title. However, the seller mortgaged the car five days later, and the security interest was noted upon the plaintiff's certificate of title. Subsequently, the plaintiff sought to obtain an unencumbered title certificate. The appellate court reversed the lower court's dismissal of the complaint and found that sections 2-403 and 9-307 were applicable.

39. See, e.g., 28 AM. JUR. 2d *Estoppel and Waiver* §64 (1966).

40. UNIFORM COMMERCIAL CODE §2-403 (3).

41. Dusenberg, *Title: Risk of Loss and Third Parties*, 30 Mo. L. REV. 191, 207 n.63 (1965).

42. Hawkland, *supra* note 20, at 721.

43. UNIFORM COMMERCIAL CODE §2-104 (1).

This definition has been clarified by the draftsmen, as they indicate the professional status of the merchant may be based upon specialized knowledge of the goods or business practices involved in the particular transaction.<sup>44</sup> Liberal application of this definition would classify almost every businessman as a merchant.<sup>45</sup> However, judicial construction of section 2-104(1) defining "merchant," indicates that an individual must do more than merely "hold himself out" as a merchant in order to qualify for that status for purposes of section 2-403(2).<sup>46</sup> Rather, "it would appear to be essential that the actual vocational status of the merchant be established. . . ."<sup>47</sup>

Unfortunately, the elasticity of 2-104(1) has created a vague standard that has been criticized considerably.<sup>48</sup> However, this uncertainty is not acute in the context of 2-403(2). As noted, a bailee can convey title to bailed goods under the auspices of 2-403(2) only if he is a merchant who "deals in goods of that kind." This language effectively limits the scope of the "merchant" criteria under 2-104(1) in the fashion indicated by *Atlas Auto Rental v. Weisberg*.<sup>49</sup> In addition, it necessitates determination of what the draftsmen meant by "deals in goods of that kind." The Code does not specifically state whether "deals in" include parties who rent, repair, or store goods as well as those who sell goods of that kind. It seems that exclusive reference was made to "sellers" when the drafters spoke of a person who "deals in" since their comments indicate that subsections 2-403(2)-(4) were intended to protect buyers in the ordinary course of business who purchase from the inventory<sup>50</sup> of one who "sells goods of that kind."<sup>51</sup> Judicial authority also indicates that for purposes of 2-403(2) a "merchant" must be in the business of "selling" goods of that kind before there can be a valid transfer to a buyer in the ordinary course of business.<sup>52</sup> This requirement does not mean that one must, as his sole business, sell goods of the kind entrusted. Rather, if he has several businesses, at least one must be selling such goods. In *Linwood*

44. UNIFORM COMMERCIAL CODE §2-104(1), Comment 2.

45. *Id.*

46. In *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168, 281 N.Y.S.2d 400 (N.Y. City Civ. Ct. 1967), an automobile rental concern that occasionally sold its used automobiles allowed one Schwartzman to take a car for a "test run." Rather than returning it, Schwartzman sold to a third party. Even though Schwartzman had distributed invoices describing himself as a dealer in "wholesale autos," the court concluded he was not a "merchant," and therefore could not convey title under 2-403(2).

47. *Id.* at 404.

48. Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 431 (1950).

49. 54 Misc. 2d 168, 281 N.Y.S.2d 400 (N.Y. City Civ. Ct. 1967).

50. UNIFORM COMMERCIAL CODE §2-403, Comment 2, Note, *supra* note 26, at 691; Note, *supra* note 35, at 1206.

51. UNIFORM COMMERCIAL CODE §1-201(9).

52. In *Independent News Co. v. Williams*, 293 F.2d 510 (3d Cir. 1961) it was stated that a wholesaler in the business of selling comics was a "merchant" for purposes of 2-403(2). However, the court did not specifically limit "merchants" to those who sold. A subsequent decision, *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168, 281 N.Y.S.2d 400 (N.Y. City Civ. Ct. 1967), stated that the entrustment must be to one in the business of selling goods of that kind before §2-403(2) becomes applicable.



*Harverstores, Inc. v. Cannon*<sup>53</sup> a motor freight carrier, that was also in the business of selling collapsible silos, was not precluded from conveying title to silos that had been entrusted for purposes of transportation. Therefore, it can be surmised that one who is solely in the business of storing goods or operating a combination rent-all-repair business could not transfer title to a chattel entrusted to him by its owner under 2-403 (2).

The phrase "goods of that kind" leaves considerable uncertainty regarding the similarity between the entruster's goods and those within the dealer's inventory. The Code defines "goods" as:<sup>54</sup>

[A]ll things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. "Goods" also includes the unborn young of animals and growing crops of other identified things attached to realty as described in the section on goods to be severed from realty. . . .

For purposes of 2-403 (2) a merchant cannot pass title to goods unless they are "existing and identified" as required by section 2-105 (2). However, even this requirement fails to eliminate the inherent uncertainty in "goods of that kind." For example, must the merchant's goods and those entrusted be both new or both used under 2-403 (2)? The only hint the Code provides is that the buyer in ordinary course of business be a purchaser in "good faith."<sup>55</sup> Thus, a buyer might have difficulty establishing "good faith" if it became apparent that the merchant dealt exclusively in either new or used goods. It has been suggested that such distinctions should be made, and that courts will probably resolve this difficulty by resorting to a "substantially similar" criteria.<sup>56</sup> Thus, this question would become one for the trier of fact. Perhaps the distinction between new and used should not be made, however, for it is hard to imagine a new chattel, such as an automobile or wrist watch, being substantially different from a used one. Judicial interpretation reinforces this contention. In *Independent News Co. v. Williams*,<sup>57</sup> the court refused to differentiate between new and coverless comic books stating that the vendor's "regular business is dealing with comics, and as such he is a merchant who deals in goods of that kind."<sup>58</sup>

Therefore, the effect of the phrase "merchant who deals in goods of that kind" is to limit the number of bailees who can convey title to bailed goods under 2-403 (2). In the event a nonqualifying entrustment is made, pre-Code law will be applicable<sup>59</sup> and mere possession will not allow the bailee to convey title.

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53. 427 Pa. 434, 295 A.2d 377 (1967). This decision was remanded to a lower court to determine if the vendee possessed the requisite good faith to be a buyer in the ordinary course of business. Inherent in the decision was the carrier's status as a "merchant" under 2-403 (2).

54. UNIFORM COMMERCIAL CODE §2-105 (1).

55. UNIFORM COMMERCIAL CODE §1-201 (9).

56. Note, *supra* note 26, at 691.

57. 293 F.2d 510 (3d Cir. 1961).

58. *Id.* 59. See UNIFORM COMMERCIAL CODE §2-403, Comment 1.

*Buyer in the Ordinary Course of Business*

The Uniform Commercial Code defines a "buyer" in the ordinary course of business" as:<sup>60</sup>

[A] person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker.

"Buying," according to the Code, may be for cash, exchange of other property, or on secured or unsecured credit.<sup>61</sup> As previously mentioned, a purchaser must "buy" from one in the business of selling "goods of that kind." Quality distinctions between the goods entrusted and the seller's inventory could negate the buyer's "good faith" in extreme cases. Under normal circumstances, however, a third party would be justified in purchasing from a merchant who normally deals in goods of the general type purchased.<sup>62</sup>

In addition, the goods purchased must be in the seller's inventory at the time of sale in order for the purchaser to enjoy the protection of 2-403 (2).<sup>63</sup> "Inventory" evidently refers to goods that are present at the merchant's place of business, rather than items that he usually carries but that are not in stock at the time of sale. This interpretation is based upon the Code's requirement that the goods be in the merchant's possession in order for there to be a 2-403 (2) entrustment. However, it has been held that prior to the sale the purchaser need not know of the seller's possession of the goods as long as they are, in fact, within the merchant's inventory.<sup>64</sup> This rationale is consistent with the intent of the draftsmen to facilitate the marketability of goods, for if actual knowledge of the seller's possession were a prerequisite to becoming a "buyer in the ordinary course of business," each purchaser would have to assume the onerous burden of verifying the presence of the goods in the seller's inventory prior to sale. The requirement that the sale be from existing inventory would probably invalidate a sale of entrusted goods located at the seller's home or warehouse, for such a transaction might not be a purchase in the ordinary course of business.<sup>65</sup> Such a requirement seems

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60. UNIFORM COMMERCIAL CODE §1-201 (9).

61. *Id.*

62. *Independent News Co. v. Williams*, 293 F.2d 510 (3d Cir. 1961).

63. UNIFORM COMMERCIAL CODE §2-403, Comment 2; *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290, 292 (1965).

64. In *DePaulo v. Williams Chevrolet-Cadillac, Inc.*, 10 Leb. County Legal J. 465, 3 U.C.C. Rptr. 600 (Pa. C.P. 1966), plaintiff paid the purchase price for an automobile that he knew was not in the seller's possession. As a result, the court found the sale to be beyond the ordinary course of business. However, the court stated: "If this seller would have had the Chevrolet in his possession at the time the sale was made even though unknown to the buyer . . . a different result might very well obtain." *Id.* at 605.

65. In *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290, 292 (1965), the court noted that the purchase of an automobile many miles from the seller's place of business militated against the plaintiff's contention that he was a buyer in the ordinary course of business.

less desirable than a factual determination of whether the purchaser exercised "good faith" thereby avoiding the harsh conclusion that one cannot be protected by 2-403 (2) if he purchases goods that are not within the seller's actual inventory.

The requirement that a buyer purchase "without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party"<sup>66</sup> apparently vitiates the requirement that a purchaser act with commercial reasonableness. Obviously, if one possesses actual knowledge that sale to him violates the ownership rights of another he cannot qualify as a buyer in the ordinary course of business.<sup>67</sup> However, judicial interpretation indicates that, absent actual knowledge of a merchant's lack of title, the purchaser becomes a buyer in the ordinary course of business.<sup>68</sup> This approach seems to be unwarranted, for it precludes application of the theory that a buyer may be put on constructive notice of a dealer's lack of title. For example, purchases at grossly inadequate prices, or under other unusual circumstances that would cause the reasonable purchaser to suspect the propriety of the transaction, also seem to negate the required element of "good faith" but may no longer be relevant facts. Recent authority indicates that some courts will continue to hold a purchaser to reasonable commercial knowledge.<sup>69</sup> This practice seems preferable.

As previously mentioned, a purchaser is not precluded from being a buyer in the ordinary course of business if he merely knows that there is an outstanding security interest in the goods that he purchases.<sup>70</sup> Rather, he will take free and clear of the secured lender's interest unless he is also aware that the sale to him is in violation of the secured lender's rights.<sup>71</sup>

In summary, for one to qualify as a buyer in the ordinary course of business under section 2-403 (2), he must purchase from the inventory of one

66. UNIFORM COMMERCIAL CODE §1-201 (9).

67. In *Cash Loan Co. v. Boser*, 34 Wis. 2d 410, 149 N.W.2d 605 (1967), the purchaser of a rotodrill was given notice by representatives of a chattel mortgagee that he would be violating the ownership rights of the mortgagee if he purchased. The court held that even though the seller had possession of the machine, the purchaser could not be considered a buyer in the ordinary course of business due to his knowledge that the sale violates a third party's interest.

68. In *Gricar v. Bairhalter*, 11 Pa. D. & C.2d 723 (Allegheny County C.P. 1957) the owner of a truck left it with a used car dealer, who tortiously sold it to a third party. Although the purchaser did not have actual knowledge of the dealer's lack of title, he somehow agreed to accept the automobile without a certificate of title. The court pointed out that under the Uniform Commercial Code the purchaser would qualify as a buyer in the ordinary course of business since he "knew nothing of plaintiff's interest," however ingenuous he might have been in accepting a car without a certificate of title. *Id.* at 727.

69. *Humphrey Cadillac & Oldsmobile Co., Inc. v. Sinard*, 85 Ill. App. 2d 64, 229 N.E.2d 365, 4 U.C.C. Rptr. 640 (1967) indicated that if an individual purchased without knowledge or notice of anything unusual about the transaction he would be a buyer in the ordinary course of business. In *Linwood Harverstores, Inc. v. Cannon*, 427 Pa. 434, 235 A.2d 377 (1967) the court stated in regard to a buyer in the ordinary course of business under 2-403 (2) that "Where the vendee knows or has reason to know of his vendor's lack of title or authority to sell, then the original owner ought . . . to be able to recover from the vendee of the convertor." *Id.* at 380.

70. UNIFORM COMMERCIAL CODE §9-307 (1).

71. *Weisel v. McBride Motor Sales*, 191 Pa. Super. 411, 156 A.2d 613 (1959).

who sells goods of the kind entrusted, without constructive or actual knowledge of the ownership rights of a third party. It should also be noted that the definition of a buyer in the ordinary course of business is not synonymous with a bona fide purchaser since it requires a purchase "from a person in the business of selling goods of that kind," by one who lacks knowledge that sale violates third party rights.<sup>72</sup> Therefore, under 2-403 (2) a merchant's ability to convey title is also diminished in the sense that the potential class of purchasers is restricted.

#### CONCLUSION

Section 2-403 (2) is a definite extension of a bailee's authority to convey title, but the protection afforded one who purchases from a bailee may not be so radical as it first appears. For example, the prerequisite of "entrustment" to a merchant who "deals in goods of that kind" must be established before a "buyer in the ordinary course of business" can assert valid title. In addition, although some question has been raised as to who must prove the applicability of 2-403 (2),<sup>73</sup> the purchaser will probably be required to justify his invocation of the statutory provision.<sup>74</sup>

One of the inherent purposes of the Uniform Commercial Code is to encourage the expansion of contemporary business practice.<sup>75</sup> Section 2-403 (2) does not seem to reflect this purpose in regard to retail merchants who alter or repair goods, as well as sell them. For example, it is an established commercial practice to entrust clothes for alteration to the merchant who sold them. Section 2-403 (2) may disrupt such transactions since it authorizes the merchant to resell the goods to a buyer in the ordinary course of business. Despite the Code's recognition of business custom, the desire to increase the marketability of goods has prevailed in section 2-403 (2). As a result, the purchaser in the ordinary course of business has been afforded considerably more protection than he enjoyed prior to the Uniform Commercial Code. Whether this protection will be enforced depends upon the competence, as well as attitude of the judiciary. Courts sympathetic to the property owner can no doubt create legal grounds that deny the innocent purchaser's claim of ownership under 2-403 (2). Certainly, the absolute burden of risk that this section places upon the bailor is an onerous one. More constructively, however, 2-403 (2) will force reasonable owners to employ considerably more discretion in entrusting their goods to merchants who are authorized to divest them of their ownership rights. Even if a bailor's goods are sold to an inno-

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72. UNIFORM COMMERCIAL CODE §1-201 (9).

73. In *Independent News Co. v. Williams*, 293 F.2d 510 (3d Cir. 1961), the burden of proof was apparently thrust upon the plaintiff, who sought to recover possession of his goods.

74. In *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168, 281 N.Y.S.2d 400 (N.Y. City Civ. Ct. 1967), the ultimate buyer was required to demonstrate that he was a "buyer in the ordinary course of business." This requirement seemed to be consistent with the principle that one who invokes a statute must prove its applicability.

75. UNIFORM COMMERCIAL CODE §1-102 (2)b.

cent purchaser, an action in conversion will afford the bailor needed relief, providing the merchant is solvent. Although this remedy may be less desirable than repossession, *caveat emptor* has been a harsh standard that is grossly inconsistent with contemporary innovations designed to facilitate the marketability of goods. Section 2-403 (2) is a progressive attempt to supplement the dearth of protection heretofore afforded innocent purchasers. Hopefully, it will not be emasculated by jurisdictions that are hostile to its obvious intent.

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