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## Commercial Law—When Appropriate Why Not Apply the Uniform Commercial Code? *Jordan v. Butler*, 183 Neb. 626, 156 N.W.2d 778 (1968)

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## Casenote

COMMERCIAL LAW—WHEN APPROPRIATE WHY NOT APPLY THE UNIFORM COMMERCIAL CODE? *Jordan v. Butler*, 182 Neb. 626, 156 N.W.2d 778(1968).

### I. INTRODUCTION

*Jordan v. Butler*<sup>1</sup> concerns the right of a defrauded seller to reclaim possession of cattle under the Uniform Commercial Code,<sup>2</sup> and how that right is affected by a security interest in the same cattle.

Austin Jordan, the plaintiff in this case, was an Alabama livestock dealer. On several occasions in the past few years, Jordan sold cattle to either Jack Butler or to Jack Butler's Construction Company in Omaha, Nebraska. In March of 1966, Jordan contracted to sell several hundred head of cattle to Jack Butler. Pursuant to the agreement, Jordan shipped the cattle to Gering, Nebraska, to a feedlot belonging to Duane Butler, a brother of Jack. At the time the cattle were shipped from Alabama, Jordan drew two sight drafts on the Butler Construction Company and mailed them to Jack Butler's bank in Omaha. The seller was notified ten days later by wire that the buyer in Omaha had dishonored both drafts.

Jordan then traveled to Gering, Nebraska, where he made a formal demand for a return of the cattle which he found reposing in Duane Butler's feedlot. His demand having been refused, Jordan filed suit against the Butler brothers claiming title to the cattle. At this time, the District Court for Scottsbluff County issued a restraining order that the cattle not be sold to any other person. Prior to the trial, and in violation of the restraining order, Duane traded the cattle for others of lighter weight and subsequently sold the substituted cattle for cash. The proceeds of the sale were paid into court.

The Nebraska Securities Company claimed a security interest in the cattle and the proceeds of the cattle by virtue of a filed financing statement. The security company, after inspecting the cattle in Duane's feedlot within a few days after they had arrived, had advanced money to Duane Butler on the strength of a bill of sale in favor of Duane signed by Jack's agent.

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<sup>1</sup> 182 Neb. 626, 156 N.W.2d 778 (1968).

<sup>2</sup> Citations are to the NEB. REV. STAT. (U.C.C. 1964) [hereinafter cited as U.C.C.].

The essence of *Jordan v. Butler* concerns a question of priority between the right of the defrauded seller to regain possession of the goods, if indeed such a right exists, and the claim of the secured party who had advanced money on the strength of collateral with no notice that the original seller was as yet unpaid. Based upon a theory of constructive trust, the Nebraska Supreme Court held that the secured party had a first lien on the fund which had been paid into court, with the balance to be applied on the judgment of *Jordan* against both Jack and Duane which had been rendered for the amount of the sale price of the cattle which were sold to Jack.<sup>3</sup>

Since the action was originally brought in equity, the decision of the court is probably correct. The purpose of this article is not to criticize the rationale used by the court, but rather to demonstrate another feasible approach to the problems presented by the factual situation in this case. This proposed solution would rely instead upon the relevant sections of the Uniform Commercial Code as adopted in Nebraska. It is hoped that in future cases which arise with analogous factual circumstances, both the attorneys and the court will take cognizance of these relevant sections of the U.C.C. and place their reliance upon them in order to modernize the thought processes relating to secured transactions and a defrauded sellers' right to reclaim in Nebraska. The merits of the case were both argued and decided wholly apart from the aid of these relevant U.C.C. sections. It is submitted that since we have adopted the U.C.C. in Nebraska, the sound reasoning available under its sections should be implemented in future cases in order to provide a much sounder basis for decision.

## II. HOW THE CASE WAS ARGUED AND DECIDED

Instead of asserting a right to reclaim title to the goods under any of the theories available, especially under U.C.C. sections 2-507 and 2-702, the unpaid seller, *Jordan*, argued that title to the cattle was never divested from him. The court dismissed this contention by quoting from section 2-401 (2) of the U.C.C.

Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller contemplates his performance with reference to the physical delivery of the goods, . . . (b) if the contract requires delivery at destination, title passes on tender there.<sup>4</sup>

Next, *Jordan* argued that upon dishonor of the draft, title to the cattle revested in him by operation of law, citing section 2-401 (4)

<sup>3</sup> 182 Neb. at 638, 156 N.W.2d at 785-86.

<sup>4</sup> *Id.* at 632, 156 N.W.2d at 783, quoting, U.C.C. § 2-401 (2).

of the Code.<sup>5</sup> The court pointed out that this section does provide for a reversion of title but only where there was a rejection or refusal on the part of the buyer to receive or retain the goods, or where there was a justified revocation of acceptance. The section does not provide for a reversion of title merely for the non-payment of the purchase price.

The security company argued that its security interest was paramount to any interest in favor of the original seller because the company had acted in good faith with no knowledge of any conflicting claim against the collateral. Jordan contended that since Duane had no rights in the collateral, he could not have given any interest in the cattle to another, and that therefore the security agreement meant nothing. The court answered these contentions by stating that a mortgagee who acts in good faith with no notice of the unpaid seller, "*stands in the position of an innocent purchaser of the property for value.*"<sup>6</sup> However, a mortgagee who acts in good faith is more than one who merely "stands in the position" of a bona-fide purchaser for value—indeed, a mortgagee acting in good faith is a bona-fide purchaser. Even though the unpaid and defrauded seller does have the right to reclaim title, a good faith purchaser for value can cut off a reclaiming seller's rights, and it is for this reason that the Nebraska Securities Company should prevail over Jordan.

As to the distribution of the proceeds derived from the sale of the substituted cattle, the court stated: "The fund standing in place of the cattle stands in the nature of a constructive trust to be distributed in accordance with the priorities of the parties."<sup>7</sup> Why did the court not refer to section 9-306 (2) which specifically allows the interest of a secured party to continue over to the *proceeds* of an unauthorized sale of the collateral?

### III. ARGUMENTS WHICH COULD HAVE BEEN PRESENTED

#### A. A DEFRAUDED SELLER'S RIGHT TO RECLAIM POSSESSION

A seller who has parted with possession of his goods and has lost his right to stop the goods in transit still has several theories by which he can establish a right to possession.<sup>8</sup> One such theory is

<sup>5</sup> U.C.C. § 2-401(4): "A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a 'sale.'"

<sup>6</sup> 182 Neb. at 626, 156 N.W.2d at 780.

<sup>7</sup> *Id.* at 637, 156 N.W.2d at 785.

<sup>8</sup> See Smith, *Title and the Right to Possession Under the Uniform Commercial Code*, 10 B.C. IND. & COM. L. REV. 39 (1968).

through the enforcement of a security interest. If there is an agreement that the seller retain a security interest in the goods, then upon default the seller can take possession of the goods.<sup>9</sup> If the security interest is perfected under Article Nine,<sup>10</sup> it can be enforced in certain instances by the seller even against a subsequent good faith purchaser.<sup>11</sup> The Nebraska Securities Company did have a valid security interest, but Jordan could have retained what would have been a purchase money security interest, and this would have had priority over the interest of the company if Jordan would have taken the proper steps to file a financing statement and to notify the other security holder, the company, of his intended purchase money security interest prior to delivery.<sup>12</sup> Since Jordan had taken no steps to create or perfect such an interest, the company's interest was paramount.

A second possible theory by which a seller can claim the right to possession is the seller's common law right of replevin. But, in order to maintain this type of action, the seller must retain title, such as where title is retained as security for the payment of the price under a conditional sales transaction. Section 2-401 (1) governs situations where title is retained for security. This section provides that any retention by the seller of the title in the goods shipped to the buyer is limited to a security interest, which means that the interest can be enforced against the purchaser only if the seller takes the steps to perfect under Article Nine.

Many pre-code cases were decided on the basis of the "seller's lien" concept. A person holding a so-called "seller's lien" was often protected against even a good faith purchaser from the buyer.<sup>13</sup> The Uniform Sales Act contained no provision for reclamation by a seller by reason of insolvency or fraud of the buyer. It was generally assumed, however, that a defrauded seller could replevin the goods sold as against the buyer himself, but that insolvency without fraud was not a basis for rescission and replevin.<sup>14</sup> It has been held that an unpaid seller has an action for reclamation on the basis of fraud.<sup>15</sup> Amid some dispute, there is authority that a

<sup>9</sup> U.C.C. § 9-503.

<sup>10</sup> The rules concerning perfection are found in U.C.C. §§ 9-302 to -305.

<sup>11</sup> U.C.C. §§ 9-201 to -301(1)(c).

<sup>12</sup> U.C.C. §§ 9-203, -312(3).

<sup>13</sup> *McElwee v. Metropolitan Lumber Co.*, 69 F. 302 (6th Cir. 1895).

<sup>14</sup> See 3 S. WILLISTON, *THE LAW GOVERNING SALES OF GOODS* §§ 636-37 (rev. ed. 1948); *RESTATEMENT OF CONTRACTS* §§ 471-76 (1932).

<sup>15</sup> *In re Meiselman*, 105 F.2d 995 (2d Cir. 1939); *Sternberg v. American Snuff Co.*, 69 F.2d 307 (8th Cir. 1934); *Manly v. Ohio Shoe Co.*, 25 F.2d 384 (4th Cir. 1928).

hopelessly insolvent buyer, who received goods on credit, was fraudulent if he knew payment was extremely unlikely and failed to disclose that fact, even though he intended to pay if he could.<sup>16</sup>

Section 2-705 (1)<sup>17</sup> may have some bearing on the Jordan-type case. This section permits a stoppage of goods in transit by the seller, but only when the goods are in the process of delivery and before the buyer has acquired possession. It cannot be understood as providing an independent recovery of goods already in the possession of a buyer. The language "or if for any other reason the seller has a right to withhold or reclaim the goods" indicates only that a seller may stop the delivery of goods in transit or in the possession of a bailee, where the conditions of withholding or recovering from the buyer himself are otherwise satisfied.

Reclamation could conceivably be based also on section 2-703, which permits a seller to "cancel" in the event of certain kinds of default by the buyer, but the definition of "cancellation" in section 2-106 (4) in terms of "termination" seems to limit its effect to discharge of "obligations which are still executory on both sides. . . ."<sup>18</sup>

A seller who delivers goods to his buyer without securing their price in exchange may find himself in serious difficulty. For instance, suppose that goods are delivered on credit to a buyer whom the seller believes is solvent. Since a judgment for the price may be collectable for only a few cents on the dollar, the seller would naturally prefer to recover the goods themselves. Section 2-702 provides the seller with this remedy.<sup>19</sup> Likewise when the sales

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<sup>16</sup> See *California Conserving Co. v. D'Avanzo*, 62 F.2d 528 (2d Cir. 1933).

<sup>17</sup> U.C.C. § 2-705(1) provides: "The seller may stop delivery of goods [sic] in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods."

<sup>18</sup> U.C.C. § 2-106(3). See Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281, 1290 (1967).

<sup>19</sup> U.C.C. §§ 2-702(2), -702(3) (emphasis added): "(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay."

contract requires the buyer to pay on receipt of the goods, should he not pay as agreed, the seller's only meaningful remedy may be whatever right he has to recover the goods. Here again section 2-507(2) makes this remedy available to the seller.<sup>20</sup> Section 2-511(3) provides that "payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment." A seller is, therefore, able to reclaim if he has paid with a check or a draft that is later dishonored.

However, the seller's right to recover goods delivered to an insolvent or defaulting buyer is subject to an important limitation. By obtaining delivery of the goods the buyer secures the power to defeat the seller's right to reach them. Should the buyer resell, the seller's claim will be lost, provided that the subpurchaser is unaware of this claim.<sup>21</sup> Under section 2-403(1),<sup>22</sup> a subpurchaser, by showing that the "goods have been delivered under a transaction of purchase" or that he is a "good faith purchaser for value," makes out his right to take and hold the goods free of the seller's claim.

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(3) *The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this article (section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.* For a good discussion of reclamation under section 2-702, see Smith, *Title and the Right to Possession Under the Uniform Commercial Code*, 10 B.C. IND. & COM. L. REV. 39 (1968). See also Comment, *Section 2-702(2): A Seller's Prima Facie Case and the Obligation of Good Faith*, 10 B.C. IND. & COM. L. REV. 634 (1969).

<sup>20</sup> U.C.C. § 2-507(2): "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due."

U.C.C. § 2-507, Comment 3 provides a cross-reference to § 2-702: "Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's right as against the seller conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here."

<sup>21</sup> U.C.C. §§ 2-702(3), -507(2). See also U.C.C. § 2-507, Comment 3.

<sup>22</sup> U.C.C. § 2-403(1): "A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser [retains] such power. . . ."

In addition, section 2-403(2)<sup>23</sup> might also be applicable since delivery to the buyer would amount to an "entrusting of possession of goods. . . ." If the buyer were a "merchant who deals in goods of that kind," he would secure power to resell the goods free of the seller's claim provided that the said purchaser was a "buyer in [the] ordinary course of business."<sup>24</sup>

Section 2-702 views the purchase of goods by an insolvent, who is ordinarily unable to pay for them in the regular course of business, as fraudulent. The seller has a right to reclaim the goods if he makes a demand upon the buyer for the return of the goods within ten days after they are received by the buyer. However, the insolvent buyer has a power to transfer a good title to a good faith purchaser for value, or to a buyer in the ordinary course of business, or sometimes to a lien creditor,<sup>25</sup> so as to defeat the rights of the seller. The holder of a security interest in the buyer's inventory is a "purchaser" according to *In re Hayward Woolen Co.*,<sup>26</sup> and has rights superior to those of the seller, even though the seller had made demand for the return of the goods within ten days after delivery. Sections 2-507 and 2-702 are usually read together to give an unpaid seller the right to reclaim. In one case the buyer of a group of used cars gave checks to the sellers in full payment. The checks were later rendered uncollectable by the action of the buyer's agent, an automobile auction company to which the cars had been turned over for sales, by stopping payment of checks given by it to the buyer as advances to finance his acquisition of the vehicles. The Kentucky court held that the buyer was "insolvent" within the meaning of sections 2-702 and 2-507(2) until the cars were resold within ten days after the transaction between the buyers and the sellers.<sup>27</sup> The court stated:

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<sup>23</sup> U.C.C. § 2-403(2): "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."

<sup>24</sup> U.C.C. § 1-201(9).

<sup>25</sup> The 1966 amendment to the official U.C.C. deleted "or lien creditor" following "good faith purchaser" in the first sentence of section 2-702(3). Under the result reached in *In re Kravitz*, 278 F.2d 820 (3d Cir. 1960), the right of reclamation granted by this section was almost entirely illusory. See note 31 *infra*. A conforming change was made in paragraph 3 of the Official Comment to Section 2-702. The following jurisdictions have adopted this 1966 Official Text Amendment: Arkansas, California, Connecticut, Illinois, Kansas, Maine, North Dakota, New Jersey, New Mexico, New York, North Carolina, and Wyoming.

<sup>26</sup> 3 U.C.C. Rptr. 1107 (E.D. Mass. 1967).

<sup>27</sup> *Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc.*, 387 S.W.2d 17 (Ky. 1965).

UCC § 2-507(2) provides that when payment for goods is due and demanded on delivery, as between the parties the buyer's right to retain or dispose of the property is "conditional upon his making the payment due." . . . In such circumstances the UCC does not specifically reserve to the seller a right of reclamation. However, Comment 3 to UCC § 2-507 suggests that the seller's rights are the same as provided in UCC § 2-702, relating to sale on credit to an insolvent buyer, and we agree that surely the rights of an unpaid seller under UCC § 2-507(2) must be no less than in the case of a sale falling within the express terms of UCC § 207(2).<sup>28</sup>

There are two Pennsylvania cases,<sup>29</sup> where section 2-507 alone was treated as providing an independent basis for reclamation. In the first case, the court pointed out that the petition for reclamation was filed within ten days; in the second, it was not, but the court held applicable the presumption of section 3-503(2) that thirty days is a reasonable time for presentment of a check. In the latter case, the purchaser of goods on a C.O.D. basis gave the seller a check, which, although deposited with due diligence and although there was sufficient money on deposit, was never paid because of the purchaser's filing of a bankruptcy petition two days later. The court held that the seller had the right to reclaim the goods sold under section 2-507(2) and hence was entitled to recover from the trustee in bankruptcy the value of the goods which the trustee had sold by agreement with the seller.

Even if a defrauded seller asserting his right to reclaim can satisfy the specific requirements of sections 2-702(2) and 2-507(2), he would not have priority over a prior perfected security interest since section 2-702 provides that the seller's right to reclaim under subsection (2) is subject to the right of a buyer in ordinary course or other good faith purchaser or lien creditor.<sup>30</sup> The law in many states gives certain lien creditors a higher claim than that of a defrauded seller. In view of the "ideal creditor" section of the Bankruptcy Act, a trustee in bankruptcy has the rights of such lien creditor and is entitled to the proceeds from the sale of a seller's goods, even if the credit sale was induced by a positive misrepresentation by the bankrupt as to his solvency.<sup>31</sup> It is because of *In re Kravitz*<sup>32</sup> and similar cases that the 1966 amendments deleting the words "or lien creditor" have been proposed.

<sup>28</sup> *Id.* at 20.

<sup>29</sup> *In re Lindenbaum's Inc.*, 2 U.C.C. Rptr. 495 (E.D. Pa. 1964); *In re Mort Co.*, 208 F. Supp. 309 (E.D. Pa. 1962).

<sup>30</sup> See note 25 *supra*.

<sup>31</sup> *In re Kravitz*, 278 F.2d 820 (3d Cir. 1960); *In re Behring & Behring*, 5 U.C.C. Rptr. 600 (N.D. Tex. 1968). *Contra*, *Pacific Finance Corp. v. Edwards*, 304 F.2d 224 (9th Cir. 1962).

<sup>32</sup> 278 F.2d 820 (3d Cir. 1960).

In order for the plaintiff-seller to avail himself of the protection of section 2-507(2), payment must be "due" and "demanded" upon the delivery of the goods. In *Stumbo v. Paul B. Hult Lumber Co.*,<sup>33</sup> an independent logger had delivered logs to a saw mill without demanding payment. It was the custom and usage in the logging industry for independent loggers selling logs on the open market to sawmills to be paid on the twenty-fifth of each month for logs delivered between the first and the fifteenth of that month, and on the tenth day of each month for logs delivered between the sixteenth and the last day of the preceding month. The court held that on these facts, the loggers were not entitled to recover the goods from the sawmill under section 2-507(2) since payment was neither "due" nor "demanded" on the delivery of the logs.

The ten day provision in section 2-702 is very crucial. If the seller releases the goods to a buyer in return for a check for the purchase price, and the check is dishonored, not because of the buyer's insolvency, but because of insufficient funds, the seller's right to reclaim the goods is waived unless he makes a demand for their return within ten days after delivery of the goods.<sup>34</sup> In *re Helms Veneer Corp*<sup>35</sup> held that since section 2-507 gives the seller the right to reclaim his goods where a check, subsequently dishonored, has been accepted for payment in a cash transaction, the right to reclaim is limited to a ten day period from delivery of the goods as provided in section 2-507 by virtue of its cross-reference to section 2-702. If the right has not been exercised within the time specified, the right is waived. The seller's remedy is then on the instrument as well as for breach of contract, and seller's rights are reduced to those of a general creditor.

It has been held that the seller's right to reclaim goods under section 2-702 of the Code does not require that there be an *actual* taking of possession during the ten day period.<sup>36</sup> Such an interpretation would require vendors to use devious means to gain the actual physical possession of goods within the ten day period, and the very thing section 2-702 is designed to effectuate would be deemed a prerequisite to its invocation. It has been held by one court that a check given by the buyer can be considered a "writing"

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<sup>33</sup> 86 Ore. 1321, 444 P.2d 564 (1968).

<sup>34</sup> *In re Helms Veneer Corp.*, 287 F. Supp. 840 (W.D. Va. 1968).

<sup>35</sup> *Id.*

<sup>36</sup> *Metropolitan Distributors v. Eastern Supply Co.*, 21 Pa. D. & C.2d 128 (C.P. Allegheny County 1959). The U.C.C. does not provide a rule for computing time by days.

within the meaning of section 2-702(2), so that the ten day limitation does not apply.<sup>37</sup>

#### B. THE VALIDITY OF THE SECURITY COMPANY'S SECURITY AGREEMENT

The court would appear to be correct in holding that the title to the cattle passed to the buyer upon delivery of the cattle, and that Jack Butler was able to convey at least a voidable title to his brother, Duane, under section 2-403(1). Even though Duane might not have qualified as a good faith purchaser since he may have been a party to the fraud,<sup>38</sup> he too had at least a voidable title and was able to create a valid security interest in a third party such as the security company which qualified as a good faith purchaser for value. Even if Duane had not had title, a security interest may be given as to goods which are not the property of the debtor.<sup>39</sup>

In order for the company to secure an interest in the cattle delivered by Jordan to Duane, there must be an agreement that it attach, that value be given, and that the debtor, Duane, has rights in the collateral.<sup>40</sup> The first two conditions are clearly satisfied. On the issue of whether the debtor has rights in the collateral, we look to the earlier provision of the Code, section 1-201(37), which states that the retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer is limited in effect to a reservation of a security interest. In the present case there was

<sup>37</sup> *Theo. Hamm Brewing Co. v. First Trust & Savings Bank*, 103 Ill. App. 2d 190, 242 N.E.2d 911 (1968). For a contrary interpretation of the holdings of this case, see Comment, *Section 2-702(2): A Seller's Prima Facie Case and the Obligation of Good Faith*, 10 B.C. IND. & COM. L. REV. 634, 645 (1969).

<sup>38</sup> "Duane and Licht both testify and Jack admits that Jack received the \$17,000 which originated from the loan made by the Securities Company to Duane. . . . Jack was unable to show with any certainty that he ever received the \$3,000 in cash. . . . The testimony that the \$3,000 was given to Nedbalek for cattle does not appear consistent under the circumstances. The stories of paying out items of \$3,000 and \$3,250 in cash at casual meetings on the street and the differences in the testimony of Jack, Duane and Licht lead us to the conclusion that the two cash payments were never made and that the testimony to the contrary was false. . . . After a consideration of all the facts and circumstances, including the testimony proven to be false and that which is so incredible as to be beyond belief, we can come to no other conclusion than that the transaction reeks with fraud. . . ." *Jordan v. Butler*, 182 Neb. 626, 634-36, 156 N.W.2d 778, 784-85 (1968).

<sup>39</sup> U.C.C. §§ 9-105(1)(d), -112. See also *Mauch v. First National Bank of Prague*, 4 U.C.C. Rptr. 831 (1967), which involved the validity of a secured party's interest in cattle which were actually owned by the debtor's brother.

<sup>40</sup> U.C.C. § 9-204(1).

delivery of the cattle to Duane. Duane acquired possession of the cattle which were delivered pursuant to an agreement of sale. Under these circumstances, Duane had "rights" in the collateral, and therefore, the company's security interest was able to attach to the cattle at the moment they were delivered to Duane.<sup>41</sup> The "perfection" of the company's interest was not in issue, however, but it had taken "all the applicable steps required for perfection. . . ."<sup>42</sup>

The court found it necessary to resort to a "constructive trust" theory in holding that the company's interest continued in the cattle which had been substituted for the original collateral and in the proceeds derived from the sale of the substituted cattle. The same result could have been reached under section 9-306(2):

[A] security interest continues in collateral notwithstanding sale . . . by the debtor unless his action was authorized by the secured party . . . and also continues in any identifiable proceeds. . . .<sup>43</sup>

The court could easily have found that the substituted cattle and the proceeds derived from the sale of the substituted cattle were "identifiable proceeds" of the sale of the original collateral.

It may be true that the company's interest in the proceeds would have become unperfected after the sale because it did not perfect an interest in those proceeds within ten days as required by section 9-306(3),<sup>44</sup> assuming that the original security agree-

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<sup>41</sup> Professor Gilmore believes that a debtor who has a "special property interest" in goods pursuant to § 2-501 has a "right" in such goods as collateral. 1 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 11.5 (1965).

<sup>42</sup> U.C.C. § 9-303. Perfection by filing is covered in § 9-401(1). Section 9-402 deals with the formal requisites to the financing statement and also requires a description of the collateral.

<sup>43</sup> U.C.C. § 9-306(2). In view of § 9-306, it could be said that the transferee of the collateral would take free of the security interest and be safe against repossession or an action for conversion, but that a right to proceeds would survive. See U.C.C. § 9-307(1) which allows a buyer in the ordinary course of business to take free of a security interest created by his vendor despite knowledge of that interest. For a detailed treatment of the "proceeds" problem, see Gillombardo, *The Treatment of Uniform Commercial Proceeds in Bankruptcy: A Proposed Redraft of Section 9-306*, 38 U. CIN. L. REV. 1 (1969).

<sup>44</sup> U.C.C. § 9-306(3): "The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless (a) a filed financing statement covering the original collateral also covers proceeds; or (b) the security interest in the proceeds is perfected before the expiration of the ten day period."

ment did not cover proceeds. But even an unperfected security interest would have prevailed over the claim of the seller who had already been cut off because the company is able to qualify as a "good faith purchaser for value" within the meaning of section 2-702 (3).<sup>45</sup>

The basis on which the court ordered judgment against both Duane and Jack is not clear. Duane was not a purchaser from Jordan, but apparently the judgment against him is based upon the court's finding that Duane was a party to some sort of fraud<sup>46</sup> against the seller. The dissenting Justices were of the view that this issue was not properly before the court.

#### IV. CONCLUSION

The decision announced by the court in *Jordan* cites only two U.C.C. provisions: section 2-401, which deals with title to goods, and section 2-403, the voidable title statute. The plaintiff claimed title to the cattle as the basis of his action, but he failed to mention sections 2-507 and 2-702 which deal specifically with an unpaid seller's right to reclaim goods within a limited period of time. Even had the plaintiff argued correctly, the security company was capable of taking priority over Jordan, because the former is able to qualify as a good faith purchaser and could therefore come in ahead of the unpaid seller's right of reclamation as provided by section 2-702. Although the company had argued in its brief<sup>47</sup> that its security

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<sup>45</sup> The term "purchaser" is broad enough to include a secured party. U.C.C. §§ 1-201(32), -201(33). See note 26 *supra*.

<sup>46</sup> "Duane testifies that the 198 cattle on hand at the time of trial were the cattle delivered to him by Jordan the previous March. This evidence is conclusively established as wholly false. The cattle delivered by Jordan were sold to Blalock and delivered in Colorado as instructed by Blalock. Duane bought the 198 head of 400-pound heifers and substituted them for the cattle bought from Jordan. It is evident that Duane substituted the light cattle for the heavier cattle in order that he could convert the difference in value into cash to the extent of \$11,299.74, which he did. The substituted cattle were purchased to satisfy the lien of the Security Company which appeared necessary to avoid criminal prosecution for selling and moving the Jordan cattle without the consent of the lienor. His fear that Jordan's institution of suit might have resulted in the taking of his whole interest in the cattle for payment of his liabilities seems to have motivated the unlawful sale of the Jordan cattle in violation of the district court injunction. It is evident also that Duane did not feel that his claim that he was a good faith purchaser for value was free of his own doubt to the extent that he could safely rely on it." 182 Neb. at 636, 156 N.W.2d at 784-85. See also note 38 *supra*.

<sup>47</sup> Brief for Appellant, Nebraska Securities Company, at 24, 26, *Jordan v. Butler*, 182 Neb. 626, 156, N.W.2d 778 (1968).

interest in the cattle extended to the proceeds derived from the sale of the cattle under the "proceeds" provision of the U.C.C., section 9-306, the court resorted to "constructive trust" rationale to resolve the issue in favor of the secured party.

*Jordan v. Butler* was a case which should have been decided under the Uniform Commercial Code. The citing of U.C.C. provisions in the briefs from both sides was numerous, but neither party actually cited the relevant sections. Jordan should have argued his Code rights of reclamation of goods when the buyer defaults, as it was the clearest way of presenting whatever case he had. Nebraska Securities Company should have been able to demonstrate its status as a "purchaser" and therefore been able to prevail over even an unpaid seller. The court could have at least mentioned the "proceeds" section of the Code as it had been argued by counsel for the security company. The certainty and predictability of the Code, as it is being interpreted by the many cases that are decided in this area, should certainly form a stronger basis on which attorneys can rely than do the nebulous, ambiguous, and hard-to-prove theories such as were argued in this case.

*Kenneth C. Fritzler II '70*

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