INTRODUCTION

The Fifth Circuit Court of Appeals recently held in the case of *In re Samuels & Co.*¹ that the reclamation right of an unpaid cash seller² defeated the floating lien of an inventory financer.³ The principal reasons given for the holding were that 1) the ten day limitation on reclamation should not be strictly applied,⁴ and 2) the inventory financer could not qualify as a good faith purchaser.⁵ Furthermore, the court held that even if the cash seller's interest were merely an unperfected security interest, the debtor never acquired rights in the goods to which the inventory financer's floating lien could attach.⁶

The Fifth Circuit's decision was unexpected since that court's previous opinion⁷ seemed to concede that the inventory financer had priority if the principles of the Uniform Commercial Code applied.⁸ Shortly before *In re Samuels & Co.* was adjudicated, the Tenth Circuit Court of Appeals in *United States v. Wyoming National Bank*⁹ denied a petition of reclamation by an unpaid cash

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1. 510 F.2d 139 (5th Cir. 1975) [hereinafter cited as *In re Samuels & Co.*]
2. See *Tex. Bus. & Com. Code* §§ 2.507(b) (Cash seller's right to reclaim) and 2.702(b) (Credit seller's right to reclaim) (Vernon 1968).
3. *In re Samuels & Co.* at 143.
4. Id. at 148. See also *Tex. Bus. & Com. Code* § 2.507(b), comment 3 (Vernon 1968).
5. *In re Samuels & Co.* at 151. See *Tex. Bus. & Com. Code* §§ 1.201 (19), 2.103(a) and 2.403(a) (Vernon 1968). Hereinafter all references to the UCC will be to the *Uniform Commercial Code* (1962). Texas follows the official text—however, any material differences will be noted.
6. *In re Samuels & Co.* at 150. See *Uniform Commercial Code* § 9-204 (1962 version), which dictates when a security interest attaches.
8. *In re Samuels & Co.*, 483 F.2d 557, 559-60. Even the per curiam opinion of Mahon v. Stowers, 416 U.S. 100, 105 (1974), interpreted this opinion as granting priority to the inventory financer under the principles of the *Uniform Commercial Code*.
9. 505 F.2d 1064 (10th Cir. 1974). This case is essentially identical to *In re Samuels & Co.* in its basic fact pattern.
seller (feedlot) as against an inventory financer (the bank). Additionally, law review articles dealing with this issue seem to point out that an inventory financer's floating lien is superior to the unpaid cash seller's right to reclaim the goods.\(^{10}\)

This article will analyze the basic points of the majority opinion in conjunction with the vigorous criticisms of the dissent. The points to be discussed are as follows: 1) the majority's revival of the cash sale doctrine, 2) the good faith requirement of Section 2-403 of the Code, 3) the right of reclamation and its attendant ten day statute of limitations and 4) the unpaid cash seller's interest as being merely an unperfected security interest.

THE FACTUAL SETTING

Before proceeding to the technical discussion, the material facts should be summarized. The bankrupt debtor, Samuels & Co., was a Texas meatpacker whose purchases of cattle were being financed by the C.I.T. Corporation. To protect itself, C.I.T. properly perfected a "floating lien"\(^{11}\) on Samuels' inventory. The appellants were farmers who sold cattle to Samuels just prior to Samuels' filing a petition in bankruptcy. The appellants received checks as payment and these were subsequently dishonored as C.I.T. refused to advance any more funds after it learned of Samuels' petition in bankruptcy.\(^{12}\) Almost one year after these cash sales occurred, the appellants filed a petition for reclamation.\(^{13}\)

THE CASH SALE DOCTRINE

Under the common law a cash sale, as opposed to a credit sale, meant that the seller of goods implicitly reserved the incidents of title until payment was made in full.\(^{14}\) As a result, an unpaid

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11. Although the Uniform Commercial Code does not refer to after acquired clauses as "floating liens," this term will be used in this casenote since it is widely recognized by commentators and practitioners alike.
12. These sales are properly designated as cash sales rather than credit sales. In re Samuels & Co. at 146.
13. Id. at 147.
14. For an excellent summary of the common law cash sale doctrine, see L. Vold, LAW OF SALES, §§ 62-66 (1st ed. 1931). At common law, the majority rule was that if the parties did not intend title to pass until payment, then the unpaid cash seller would prevail over the subsequent purchasers, even good faith subpurchasers. The minority rule, followed in England and in a few states, notably Nebraska, was that where there was an intent to transfer ownership immediately, it was far more likely that a good faith purchaser could prevail over the unpaid cash seller. See L. Vold, LAW OF SALES, supra. See also Parr v. Helfrich, 108 Neb. 801, 189 N.W. 281 (1922), which held that bad check cases are voidable sales procured by fraud and
cash seller could reclaim the goods from sub-purchasers because the original buyer was incapable of passing "good" title to third parties. The key issue under the common law was whether a cash sale or a credit sale had been intended. The concept of title was the sine qua non of the cash sale doctrine.

The Fifth Circuit correctly concluded that the sales of cattle by the appellants were cash sales. However, the court seems to be reviving the common law cash sale doctrine right along with this designation. Despite reciting the fact that the Code has reduced the significance of title, Judge Ingraham proceeds to emphasize the buyer's limited interest in goods prior to payment in a cash sale. After citing the two Code sections which deal specifically with cash sales, Judge Ingraham declares that "... these two provisions strongly suggest that the underlying philosophy of the common law cash sale doctrine has been embodied here." Furthermore the majority ignores Section 2-403(1) of the Code by declaring that C.I.T.'s interest is only co-extensive with Samuels interest in the cattle. Since Samuels did not pay, Samuels had no interest in the cattle, and thus C.I.T. could not have any interest in them. This conclusion sounds like the litany of the cash sale doctrine, even though prior case law left no doubt that all that remained of this doctrine was embodied in Section 2-507(2).

that once the goods are transferred to a good faith purchaser for value the sale could not be avoided. For more recent applications of the minority rule in Nebraska, see Sullivan Co. v. Wells, 89 F. Supp. 317 (D. Neb. 1950); Sullivan Co. v. Larson, 149 Neb. 97, 30 N.W.2d 460 (1948).

16. Id.
17. Id.
18. In re Samuels & Co. at 146.
19. Id.
20. Id.
21. Id. at 145-46.
22. See UNIFORM COMMERCIAL CODE § 2-507(2) (1962 version) which deals with the buyer's right as against the seller to return or dispose of the goods. This right is conditioned on the seller's receipt of payment. UNIFORM COMMERCIAL CODE 2-511(3) restates this principle by stating:

This article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way.

Id.
23. In re Samuels & Co. at 146.
24. Id. at 151.
25. Id. See text infra on the issue of C.I.T.'s status as a bona fide purchaser.
The common law cash sale doctrine allowed reclamation from third parties, even good faith purchasers. However, the Code expressly modified the unpaid cash seller’s remedies. This modification, which gives the buyer the power to alienate property in a cash sale situation and is embodied by Section 2-403(1)(c), was completely ignored by the majority. The majority’s conclusion is even more unreasonable since the Code grants a mere bailee/merchant the power to transfer all rights of the bailor/entruster to a buyer in the ordinary course of business.


28. In re Samuels & Co. at 151. The opinion states:

Under § 2.403 of the Code, the buyer of goods from a seller is vested with a limited interest that it can convey to a good faith purchaser and thus create in the purchaser a greater right to the goods than the buyer itself had. This is possible even when the buyer obtains the goods as a result of giving a check that is later dishonored or when the purchase was made for cash. (Emphasis added).

Yet, despite their own statement, the court in the next paragraph concluded as follows:

With regret to C.I.T.’s status as a purchaser, . . . C.I.T. does not have an interest in the cattle because its rights in the collateral are derivative of its debtor’s rights in it. When Samuels failed to pay for the cattle, its rights in the cattle terminated and thus did C.I.T.’s.

Id. The dissent, by Judge Godbold, recognized the majority’s confusion of “right” and “power.” At 154, the dissent states:

The Code expressly recognizes the power of the defaulting buyer to transfer good title to such a purchaser even though the transfer is wrongful as against the seller. The buyer is granted the power to transfer good title despite the fact that under § 2.507 he lacks the right to do so.

Id. See also UNIFORM COMMERCIAL CODE §§ 2-403, 2-507(2) (1962 version).

29. UNIFORM COMMERCIAL CODE 2-403(2) (1962 version). See also Corman, Cash Sales, Worthless Checks and the Bona Fide Purchaser, 10 Vand. L. Rev. 55 (1956). Corman states:

If the owner of a chattel, delivering bare possession for limited bailment purposes to a dealer . . . with power to transfer all of the entruster’s rights in the chattel to a buyer in the ordinary course of business, certainly the owner delivering possession for purposes of consummating a cash sale, must confer equal power of transfer upon accepting a check for the purchase price.

Id. at 70.
A party's security interest can qualify him as a purchaser for value.30 However, in order for a transferee to prevail, the Code requires another element to be satisfied: i.e., good faith.31 Besides concluding that C.I.T. did not qualify as a purchaser,32 the majority felt that C.I.T. could not claim that it acted in good faith.33

The Code only requires that a purchaser act honestly in fact and that it observe commercially reasonable standards of fair dealing.34 The majority felt that "[i]mplicit in the term 'good faith' is the requirement that C.I.T. take its interest in the cattle without notice of the outstanding claims of others."35 Due to C.I.T.'s special relationship with Samuels, the court found that C.I.T. had to know that its refusal to advance more funds would leave some sellers holding bad checks.36 Therefore, the majority concluded that C.I.T. was not a good faith purchaser without notice.37 The dissent felt that notice or knowledge was irrelevant under the Code.38 In addition, the dissent stated that "[t]he Code's good faith provision requires 'honesty in fact', ... it hardly requires a secured party

30. See UNIFORM COMMERCIAL CODE §§ 1-201(32), 1-201(44) (1962 version).
31. For Article Two purposes, good faith means not only acting honestly in fact, but it also means that a merchant must observe reasonable commercial standards of fair dealing. UNIFORM COMMERCIAL CODE §§ 2-403 (1) (1962 version); see also UNIFORM COMMERCIAL CODE §§ 1-201(19), 2-103 (1)(b) (1962 version).
32. In re Samuels & Co. at 151-52.
33. Id.
34. UNIFORM COMMERCIAL CODE §§ 1-201(19), 2-103(1)(b) (1962 version).
35. In re Samuels & Co. at 151. But see Comment, Good Faith Obligation in the Uniform Commercial Code; Problems in Determining Its Meaning and Evaluating Its Effect, 7 VAL. U.L. REV. 389, 392 (1973) which reports that the trend is to treat honesty-in-fact as merely requiring absence of moral dishonesty.
36. In re Samuels & Co. at 152. See UNIFORM COMMERCIAL CODE § 1-201 (25) (c) (1962 version) which states that one has notice of a fact when he has reason to know that it exists.
37. In re Samuels & Co. at 152.
38. Id. at 156. The dissent stated that the Code did not expressly or impliedly include lack of knowledge of third party interests as an element of the definition of good faith. "The detailed definition of the Article's counterpart of the common law BFP requires only honesty in fact, reasonable commercial behavior, fair dealing." The dissent continued by emphasizing that C.I.T.'s decision to refuse additional funding on the eve of Samuels' filing bankruptcy was fair, honest and clearly reasonable. The seller's losses were not C.I.T.'s fault since they had the means to protect their interests. Id.
to continue financing a doomed business enterprise."39 Furthermore, the dissent emphasized that C.I.T. never violated an obligatory future advance clause by refusing to advance additional funds nor did C.I.T. ever act in bad faith in its dealing with the meatpacker.40

It would seem that the dissent is correct at least as to the after-acquired property situation. If good faith is equivalent to knowledge or notice, then under the majority's analysis all secured parties with floating liens act in bad faith once bankruptcy occurs, since all such secured parties would have reason to know that some cash sellers would be left unpaid upon their refusal to advance additional funds. Therefore, under the majority opinion an inventory financier could never refuse to advance more funds and still retain its priority; in other words, the majority seems to be saying that a credit institution must advance funds even when it is imprudent to do so. This interpretation by the majority is clearly contrary to prior commentary by courts and scholars alike.41

SECTION 2-507(2) AND THE TEN DAY LIMITATION ON RECLAMATION

Section 2-507(2) of the Code is the basis for the cash seller's reclamation right. However, as previously noted, it is subject to the rights of a good faith purchaser.42 Furthermore, the cash seller's reclamation right may also be subject to a lien creditor's rights.43

The majority opinion was concerned with the practicality of reclaiming the cattle as they had become unidentifiable after they were processed.44 Since an earlier attempt at reclamation would

39. Id. at 155.
40. Id.
44. In re Samuels & Co. at 44. The court stated that the assertion of the right to reclaim the cattle would have been a futile act since the
have been futile\textsuperscript{45} and because C.I.T.'s own reclamation petition fulfilled the underlying purpose of comment 3, Section 2-507,\textsuperscript{46} the majority felt that strict application of the ten day statute of limitations would be unreasonable.\textsuperscript{47}

As the dissent stated, the Code does not expressly give the cash seller the right to reclaim goods; rather, ". . . the courts have read a reclamation right into the Code."\textsuperscript{48} Despite the fulfillment of the underlying purpose of Section 2-507(2), comment 3's express and absolute ten day limitation has apparently always been followed by the courts.\textsuperscript{49} Here, the reclamation petition was filed more than one year after the sale.\textsuperscript{50} Even if the reclamation petition had been filed within ten days of delivery, prior Texas case law had inferred that the unpaid cash seller's reclamation right was cut off by an intervening bankruptcy filing.\textsuperscript{51}

**RESERVATION OF TITLE AND THE PURCHASE MONEY SECURITY INTEREST**

The bulk of this article has concentrated upon Article Two and C.I.T.'s good faith purchaser theory. The second theory advanced by C.I.T. to support its claimed priority was that the unpaid cash sellers merely retained unperfected security interests which were

cattle became fungible goods. However, this very decision dealt with a right to reclaim the proceeds from the sale of the cattle to the extent of the amount of the dishonored checks. If the later procedure, i.e., reclaiming the proceeds, is practical when exercised over a year later, why is such a procedure not practical if exercised within ten days? The farmer does not want his cattle back; he would prefer the money.

\textsuperscript{45} Id.

\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} Id. at 156.

\textsuperscript{49} Id. at 157. See, e.g., In re Calacci's of America, Inc., 490 F.2d 1118 (10th Cir. 1974); In re Bar-Wood, Inc., 15 UCC REP. SERV. 828 (S.D. Fla. 1974); In re Kirk Kabinets, Inc., 15 UCC REP. SERV. 746 (M.D. Ga. 1974); In re Fairfield Elevator, 14 UCC REP. SERV. 96 (S.D. Ia. 1973); In re Helms Veneer Corp., 287 F. Supp. 840 (W.D. Va. 1968); Stumbo v. Paul B. Hult Lumber Co., 251 Ore. 20, 444 P.2d 564 (1968). Another issue raised by the dissent is whether a right to reclaim proceeds is authorized since UCC §§ 2-507, 2-702 speaks only in terms of reclaiming goods. See In re Samuels & Co. at 157.

\textsuperscript{50} In re Samuels & Co. at 157.

\textsuperscript{51} Besides being defected by good faith purchasers, it was not altogether clear, before this case, whether a reclamation right would survive a filing of bankruptcy in Texas. Dicta from two district court cases indicates that the filing of the bankruptcy petition might cut off the seller's right to reclaim. See In re Behring & Behring, 5 UCC REP. SERV. 600, 607 (N.D. Tex. 1968); In re Goodson Steel Corp., 10 UCC REP. SERV. 387, 391 (S.D. Tex. 1968).
defeated by C.I.T.'s properly perfected security interest. The majority also rejected this argument; it reasoned that Section 2-401(1) only pertained to credit seller's attempts to retain title. They reasoned that it was impractical and unreasonable to hold that a cash seller must perfect an alleged security interest due to the limited time sequence involved in cash sales. The court stated that the rationale for limiting a seller's interest to an unperfected security interest simply does not apply to a cash sale since the risk the cash seller undertakes is not similar in scope to the risk undertaken by a credit seller. Therefore, the court felt that the cash seller could not have an unperfected security interest under Article Two. The majority went on to state that even if the cash seller's interest was an unperfected security interest, it was still superior because C.I.T.'s perfected security interest never attached to the collateral. The rationale was that C.I.T.'s security interest could never attach to the cattle because its debtor had never acquired any rights in the cattle. Moreover, the majority declared that even if C.I.T.'s security interest could attach to the collateral, this attachment was conditioned upon Samuels' checks being honored. When Samuels' rights terminated, C.I.T.'s lienholder's rights were likewise terminated.

The dissent disagreed with the majority in toto. Section 2-401(1) does not expressly limit reservations of title to credit transactions; it merely speaks in terms of any reservation of title.

52. In re Samuels & Co. at 149-50. See Uniform Commercial Code § 9-312(3) (1962 version) which states the requirements which must be met in order for a purchase money security interest to have priority over a perfected security interest held by an inventory financer, i.e. 1) the purchase money security interest must be perfected before the debtor receives possession, and 2) the inventory financer must receive written notice of the purchase money security interest. The sellers herein did not fulfill either of these conditions. Therefore, the question becomes whether the unpaid cash seller's property interest, as distinct from its reclamation right, is a security interest.

53. In re Samuels & Co. at 149.
54. Id.
55. Id.
56. Id. See also Tex. Bus. & Com. Code § 2.507(b), comment 3 (Vernon 1968).
57. Id. at 150. See Uniform Commercial Code § 9-204(1) (1962 version) which contains three conditions before a security interest can attach: 1) a written security agreement, 2) the debtor must have given value, and 3) the creditor must have had rights in the collateral. The court concluded that the first two conditions were satisfied, however, the third condition was not since Samuels & Co. had no rights vis-à-vis the unpaid farmers. Id.
58. In re Samuels & Co. at 150.
59. Id.
60. Id.
61. Id. at 158.
Evidently, no prior decision has so limited Section 2-401(1). The dissent stated that Samuels' interest, however marginal, was great enough for C.I.T.'s security interest to attach. The overall scheme of Article Nine is continuity of security interests. This requires that once the security interests have attached, the debtor's loss of control, possession or rights in the property are irrelevant. This result was not unfair, the dissent reasoned, since the appellants could have used the Code's provisions dealing with perfection of purchase money security interests.

CONCLUSION

The result reached by the majority is comforting to those who favor the "little guy." However, this decision lessens the certainty and the uniformity of the Code. The majority's refusal to recognize the debtor's power to transfer good title to good faith purchasers was most blatant. However, its recognition of the fact that it would be unreasonable to require a cash seller to follow the provisions of Section 9-312(3) was most commendable. This decision is probably another example of the lingering distaste that courts have for the floating lien. Whether other courts will follow this decision or the decision reached by the Tenth Circuit is questionable.

The solution to the farmers' plight is not found in the judicial bending of the Uniform Commercial Code. Specific legislation should be enacted to cope with the problem. It is in the best


63. In re Samuels & Co. at 158. The author of the case note was also unable to find any judicial precedent for the majority's conclusion.

64. Id. at 159. The dissent may be correct since the Code really does not seem to except the case seller. However, unlike Uniform Commercial Code § 2-403 (1962 version) which grants the debtor the power to transfer property interests to good faith purchasers for value, Uniform Commercial Code § 9-204 (1962 version) addresses itself to the debtor's rights in the collateral. It may be that an inventory-financer's properly perfected security interest will qualify him as a good faith purchaser which is sufficient to defeat a cash seller's reclamation right. Yet, once the cash seller's reclamation right expires, his unexpected security interest may now defeat the inventory financer since under Article Nine the inventory financer's security interest cannot attach unless the debtor has rights in the collateral (not merely a power to transfer title).

65. In re Samuels & Co. at 159.

66. Id. at 159-60.

67. After this case was decided the Texas Legislature enacted the Livestock-Purchase for Slaughter-Method and Time of Payment Act, ch. 276, 3 Tex. Sess. Laws [1975] (Vernon). Until legislation is enacted, to protect the farmer's interest in this type of situation, this writer makes the following suggestions: 1) contact the meatpacker's bank to learn whether or not
interest of the agricultural states to expeditiously draft an amendment to the Code (or separate legislation) to handle the problem. This solution would maintain the Code's integrity and insure its uniformity.

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