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application of article IV, section 22, there is further indication consistent with the notion that the provisions appear objectionable because of the privilege they conferred to the school district and not because of their function per se. The court pointed out that the substantially identical provisions in the Local Governmental and Governmental Employees Tort Immunity Act³⁵ would not be repugnant to the constitutional proscriptions. The provisions of the suggested legislation are distinguished from the stricken statutes in that the former are uniformly applied to all the municipal and quasi-municipal corporations.

The *Lorton* decision will not be the last in line to rule upon the propriety of procedural considerations affecting liability of quasi-municipal corporations. Collectively, the recent decisions of the Illinois Supreme Court have established a trend toward placing upon governmental agencies, with certain modifications, the same responsibility individuals or business entities have with respect to tort liability. When future comment appears on the remaining statutes, which were enacted to meet the additional responsibilities placed on governmental agencies after the rejection of governmental immunity, it should be borne in mind that the reasons for the traditionally restricted application of the proscription against special legislation also serve to point out that governmental corporations, which cannot always be reasonably expected to operate by the same rules that govern private corporations, have a greater need for notice of claims. The School District Tort Liability Act recognized this. The *Lorton* decision, however, has rejected the school districts' notice provisions and created a void in procedural needs. To fill this void it appears likely that more emphasis will be placed on the future enforcement of the uniform provisions of the Local Governmental and Governmental Employees Tort Immunity Act not only in the school districts but in all municipal and quasi-municipal corporations.

Thomas Puklin

³⁵ ILL. REV. STAT. ch. 85, §§ 8-101 to -103 (1965).

UNIFORM COMMERCIAL CODE—SECURED TRANSACTIONS—
JUDGMENT CREDITOR NOT A “BUYER”
AT EXECUTION SALE

Shawmut National Bank was the assignee of a purchase money security interest in consumer goods perfected automatically under the Uniform Commercial Code (UCC).¹ Neither the secured party nor the assignee, Shawmut, had filed a financing statement. Charles Vera, an attaching judgment creditor

¹ The Uniform Commercial Code, section 9-302(1) provides that purchase money security interests in consumer goods are perfected automatically but filing is required for fixtures and motor vehicles required to be licensed.

of the debtor, levied execution on the collateral² and purchased it at the subsequent execution sale for his own personal, family or household purposes and without knowledge of Shawmut's interest. Vera contended that he was a "buyer" under the terms of section 9-307(2) of the Uniform Commercial Code³ and therefore took free of the unfiled but perfected security interest of Shawmut. The district court found for Vera and Shawmut appealed. A report was dismissed by the appellate division but the Massachusetts Supreme Court overruled the decision holding that Vera was not a "buyer" within the provisions of section 9-307(2) and by way of dictum, that execution purchasers generally could not be "buyers." *National Shawmut Bank of Boston v. Vera*, — Mass. —, 223 N.E.2d 515 (1967).

The conditional sale at common law is a purchase money security interest under the UCC today. Under a conditional sale the vendor retained title to the goods until the payment of the purchase price, hence, as the conditional buyer could not convey a greater interest than he had, a third party could not acquire greater rights than those held by the vendor.⁴ But the UCC departs from the common law concept of title⁵ and allows third parties to defeat the conditional vendor via section 9-307(2). The *Shawmut* case is significant in that it limits this departure to exclude those who buy at execution sales. The purpose of this note is to analyze the rationale of the Massachusetts court in its attempt to balance the equities between the two innocent parties within the scope of the UCC.

The Uniform Commercial Code is by no means clear as to the implications of the term "buyer" as contained within the provisions of section 9-307(2). Although the UCC does not define "buyer," it defines "purchaser" as "one who takes by purchase,"⁶ and the term "purchase" is defined as including: "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other *voluntary* transaction creating an interest in property."⁷

² The collateral involved in the *Shawmut* case was a motor vehicle, but the Massachusetts enactment of the Uniform Commercial Code omits a portion of section 9-302(1) which requires filing for motor vehicles. Thus Massachusetts allows automatic perfection in motor vehicles. MASS. REV. STAT. ch. 106 § 9-302 (1d) (1963).

³ UNIFORM COMMERCIAL CODE § 9-307(2): "In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of \$2500 (other than fixtures, see Section 9-313), a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes or his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods."

⁴ *Dorris v. Johnson*, 363 Ill. 236, 2 N.E.2d 74 (1936); *Gould v. Hiram Walker & Sons Inc.*, 142 F.2d 544 (7th Cir. 1944).

⁵ *Drain v. LaGrange State Bank*, 303 Ill. 330, 335, 135 N.E. 780, 782 (1922).

⁶ UNIFORM COMMERCIAL CODE § 1-201(33).

⁷ UNIFORM COMMERCIAL CODE § 1-201(32) (emphasis added).

In the *Shawmut* case the court concluded that as the execution sale is not a voluntary transaction from the standpoint of the debtor, the buyer at an execution sale is not a "purchaser," hence not a "buyer" if the terms are synonymous. In their interpretation, the court construed the clause "or any other voluntary transaction" as modifying the entire section but it can also be read as modifying only the word "gift." There is no case law regarding this construction. However, it must be noted that the debtor is not a party to the transaction in an execution sale, but rather the seller is the sheriff.⁸ If the word "voluntary" is considered from the standpoint of the parties to the transaction, the argument of the *Shawmut* case must necessarily fail.

The Uniform Commercial Code defines "buyer in the ordinary course of business"⁹ and within the section defines the term "buying" stating: "Buying may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt." Whether one may extract the definition of "buying" from the section depends upon whether the sections of the UCC are severable. The UCC provides that provisions or clauses which may be given effect by themselves are severable.¹⁰ The definition of "buying" may be given effect by itself and therefore appears to be severable. Using this definition then, one could easily conclude that an attaching judgment creditor who purchases at his own execution sale is not a "buyer" because he is taking in satisfaction of a money debt.¹¹ Such construction has no effect on the status of stranger purchasers, and this argument could not preclude a stranger-purchaser from coming within the provisions of section 9-307(2). Perhaps this is why the *Shawmut* case did not allude to this line of reasoning.

Writers have not given adequate attention to the full import of section 9-307(2) as most of their energy is spent in the discussion of section 9-307(1), analyzing the term "buyer in the ordinary course of business" which would naturally appear to be a more complex term. Some writers have implied that the "buyer" must purchase from the "consumer-seller" or

⁸ *Coulter v. Blieden*, 104 F.2d 29 (8th Cir. 1939), *cert. denied*, 308 U.S. 583 (1939). *But see Dupriest v. Bennett Bros.*, 61 Ga. App. 704, 7 S.E.2d 293 (1940); *Van Graafieland v. Wright*, 286 Mo. 414, 228 S.W. 465 (1921).

⁹ UNIFORM COMMERCIAL CODE § 1-201(9).

¹⁰ *See* UNIFORM COMMERCIAL CODE § 1-108: "If any provision or clause of this Act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

¹¹ *Chader v. Wilkins*, 226 Iowa 417, 284 N.W. 183 (1939); *Vitale v. Duerbeck*, 338 Mo. 556, 92 S.W.2d 691 (1936).

"debtor" in order to come within the provisions of section 9-307(2).¹² The *Shawmut* case relied heavily on these writings and concluded that since the seller at the execution sale is the sheriff and not the consumer-seller or debtor, execution purchasers, whether attaching judgment creditors or strangers, do not come within the protection of section 9-307(2). There are no cases other than *Shawmut* which have interpreted these writings so strictly.

The UCC is supplemented by all existing bodies of law except insofar as they are explicitly displaced by the Code.¹³ The *Shawmut* court argued that since the defendant would not have taken free of the vendor's interest prior to the enactment of the UCC,¹⁴ and since the Code is by no means clear as to the construction of "buyer," pre-Code law should apply. But the common law title theory of conditional sales (the underlying basis of the analogy) is expressly displaced by the Uniform Commercial Code¹⁵ and section 9-307(2) in particular is a complete departure from the pre-Code law.¹⁶ Therefore, there is no sound basis for resorting to the common law. In addition, the real issue is whether an execution purchaser should be subordinate to other good faith purchasers. This issue is not well served with a discussion of the common law title theory. If common law is to be referred to at all, the status of the execution purchaser should be the subject of the court's inquiry and

¹² See Coogan, *Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 848 (1959), where it is stated: "[O]ne who buys consumer goods from another consumer for his own personal . . . use without knowledge of a perfected security interest takes the goods free of such interest unless the secured party had previously filed [a financing statement] . . ." (emphasis added); MASS. BANKERS ASSN., BANKERS MANUAL 140 (1963), where it is said: "A purchase money security interest in consumer goods need not be filed at all, if the secured party is willing to take a chance that his security interest may be lost if his debtor sells to someone who buys for personal use without knowledge of the security interest" (emphasis added). But see BANKER'S MANUAL, *supra* at 865: "Since holders of purchase-money security interests in certain consumer goods are not required to file to perfect their security interests, a subsequent purchaser from the possessor of such collateral has no means of learning of the prior security interest" (emphasis added). See also Vernon, *Priorities, the Uniform Commercial Code and Consumer Financing,* 4 B.C. IND. & COM. L. REV. 531, where it was said: "A purchase-money security interest in consumer goods which is perfected but unfiled is subject to being defeated by a good faith consumer buyer of the goods from a consumer-seller."

¹³ UNIFORM COMMERCIAL CODE § 1-103: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

¹⁴ *Marsh v. S.M.S. Co.*, 289 Mass. 302, 306, 194 N.E. 97, 99 (1935), where the title theory of the conditional sale was the underlying theory.

¹⁵ UNIFORM COMMERCIAL CODE § 9-202: "Each provision of this Article with regard to rights—obligations and remedies applies whether title to collateral is in the secured party or in the debtor." See generally the Official Comments to the above section.

¹⁶ *Supra* note 5.

not the title theory. On this count, the purchaser at an execution sale at common law was a bona fide purchaser if he purchased for a valuable consideration, and without notice, actual or constructive;¹⁷ there was no distinction between the judgment creditor and a stranger purchaser.¹⁸ An execution purchaser who was a bona fide purchaser took free of secret liens, unrecorded conveyances, and even vendor's liens.¹⁹ So it would appear that even if the court supplemented section 9-307(2) with the common law they could not have logically subordinated the execution purchaser to other good faith purchasers.

"The purpose of the filing requirements of the Uniform Commercial Code, like the recording requirements generally, is obviously to protect subsequent creditors who might not have extended credit had they known of the existing security interest."²⁰ Where the secured party perfects his interest automatically and does not take the precaution of filing a financing statement, subsequent creditors as well as execution purchasers have no means by which to discover the prior interest and are thereby prejudiced. This is by no means wholly inconsistent with the underlying philosophy of the UCC. The Code expressly subordinates junior lien creditors to unfiled but perfected security interests,²¹ and the judgment creditor becomes a lien creditor upon the issuance of the writ.²² In line with this underlying policy of subordinating the lien creditor, it is untenable that the drafters intended that this subordinate lien creditor could simply levy execution and improve his position via section 9-307(2) by purchasing at his own execution sale. This is one of the strongest arguments on behalf of the plaintiff. Nevertheless the *Shawmut* court alluded only briefly to this line of reasoning. Again, this argument does not affect the status of stranger purchasers at the execution sale and this undoubtedly, was the cause of the court's cursory treatment.

Automatic perfection is a convenience to the secured party which is not entirely free from risk. The secured party who does not file the financing statement takes the risk of certain "buyers" taking free of the security inter-

¹⁷ Koch v. Wilcoxon, 30 Cal. App. 517, 158 P. 1048 (1916).

¹⁸ City of Sanford v. Ashton, 131 Fla. 759, 179 So. 765 (1938). *Accord*, City Building Corp. v. Farish, 292 F.2d 620, 622 (5th Cir. 1961), where bankruptcy courts agree with these principles. *Contra*, Carnahan v. Yerkes, 87 Ind. 62 (1882).

¹⁹ Maroney v. Boyle, 17 N.Y.S. 275 (1892), *aff'd*, 141 N.Y. 462, 36 N.E. 511 (1894).

²⁰ *In re Konfo Products Corp.*, 247 F. Supp. 229, 234 (E.D. Pa. 1965); Casterline v. G.M.A.C., 195 Pa. Super. 344, 351, 171 A.2d 813, 818 (1961).

²¹ UNIFORM COMMERCIAL CODE § 9-301; *In re Kretzer*, 48 Berks L.J. 121 (1955). *See also* United States v. Sommerville, 211 F. Supp. 843 (1962), *aff'd*, 324 F.2d 712 (1963), *cert. denied*, 376 U.S. 909 (1964). *See generally* Henson, *Priorities under the Uniform Commercial Code*, 41 NOTRE DAME LAW. 425 (1966).

²² Reardon v. Rock Island Plow, 168 F. 654 (7th Cir. 1909), *aff'd*, 222 U.S. 354 (1909).

est within the provisions of section 9-307(2). In counselling the secured party, one must assess the risk of being defeated by such a purchaser, against the economics and efficiency inherent in perfection without filing. In balancing the equities between the two innocent parties one must ask how much risk must the secured party assume in order to enjoy the convenience of automatic perfection. With regard to automatic perfection, the UCC has imposed a maximum limit of \$2,500 on the purchase of farm equipment and thirteen states have limited this further.²³ Three states have imposed a maximum dollar limitation on consumer goods,²⁴ and four states have deleted the provisions of section 9-307(2) entirely.²⁵ These statistics exhibit the tendency of the legislatures to lessen the risk assumed by the secured party as the price for automatic perfection.

The *Shawmut* case intended to minimize the risk of the secured party being defeated by execution purchasers generally. From the foregoing analysis, it is quite apparent that there is no sound basis for excluding stranger purchasers from the protection of section 9-307(2). The defendant execution purchaser was a judgment creditor and not a stranger, therefore the reasoning of the *Shawmut* court is mere dictum with regard to stranger purchasers. It is the writer's hope that such reasoning ultimately remain dictum and that courts in the future will distinguish between these classes of purchasers, and allow stranger purchasers the protection of section 9-307(2).

Paul Episcopo

²³ UCC REP. SERV. (State Correlation, 1967): Colorado, Indiana, Iowa, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, Ohio, Rhode Island, Vermont, Virginia, Wisconsin.

²⁴ UCC REP. SERV. (State Correlation, 1967): Colorado, Maryland, Rhode Island (Maine deleted consumer goods generally).

²⁵ UCC REP. SERV. (State Correlation, 1967): California, Kansas, Oklahoma, Tennessee.

WRONGFUL DEATH—SURVIVAL OF ACTION AFTER DEATH OF SOLE BENEFICIARY

James McDaniel with his wife and daughter died as a result of injuries sustained in a four car collision. A wrongful death action was begun on behalf of Yvonne McDaniel, the infant next of kin of the decedents, seeking damages for their death allegedly caused by the negligent acts of the defendants. Some nine and one-half months after the accident, and while the suit was pending in her behalf as sole beneficiary, Yvonne died from causes unrelated thereto. The trial court granted the defendants' motion dismissing the action on the grounds that the wrongful death action abated upon the