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CASH SALES, WORTHLESS CHECKS AND THE BONA FIDE PURCHASER

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The owner of goods or chattels in consummating a sale frequently accepts a check in exchange, only to discover that the check is worthless and that in the brief interval before dishonor the goods have been resold to a bona fide purchaser for value. On ascertaining the whereabouts of the goods, the initial owner seeks to repossess them or recover their reasonable value from the holder. A judicial question as to the relative rights of two innocent parties must therefore be determined.

This legal problem has received the attention of law review commentaries[1] and text writers[2] and has been annotated in detail;[3] nevertheless, the number of appellate cases dealing with the problem has increased, and the problem remains difficult of solution. Varying viewpoints have become even more marked as the proposed Uniform Commercial Code receives attention from the various state legislatures.[4] The problem requires additional consideration, for the solution proposed by the Uniform Commercial Code conflicts with the approach evidenced in a major portion of American decisions; and if the Code is adopted, it will, within this area, result in many reversals.

Attention first will be given to the historical development of the problem within the United States; then to the legal solutions now adopted, as contrasted with the Uniform Commercial Code proposal; finally, for purposes of evaluation, to comparative foreign law and the moral and social factors involved.

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1. Collins, *Title to Goods Paid for with Worthless Check*, 15 So. CALIF. L. REV. 340 (1942); McCullough, *Sales—Payment by Note or Acceptance—Whether Vendor May Recover Goods from Bona Fide Purchaser When Check Given in Payment Is Dishonored*, 20 CHI.-KENT L. REV. 182 (1942); Markley, *Right to Reclaim Delivered Goods in a Cash Sale*, 36 DICK. L. REV. 276 (1932); Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 COLUM. L. REV. 374 (1908); Vold, *Cash Sales*, 14 ST. LOUIS L. REV. 1 (1928), reprinted VOLD, SALES 166-77 (1931); Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies*, 1 HASTINGS L.J. 111 (1950). See also Notes, 28 KY. L.J. 322 (1940); 62 YALE L.J. 101 (1952); Comment, 13 MO. L. REV. 211 (1948); 9 CALIF. L. REV. 78 (1920); 34 IOWA L. REV. 371 (1949); 42 MICH. L. REV. 328 (1943); 13 ORE. L. REV. 177 (1934); 17 TENN. L. REV. 272 (1942); 30 YALE L.J. 198 (1920); 38 YALE L.J. 1154 (1929).

2. BENJAMIN, SALES 327-29 (8th ed. 1950); LLEWELLYN, SALES 708-10 (1930); MECHEM, SALES § 555, at 461 (1901); VOLD, SALES 166-77 (1931); 2 WILLISTON, SALES § 346A (rev. ed. 1948).

3. See Annots., 18 A.L.R.2d 813 (1951); 151 A.L.R. 690 (1944); 54 A.L.R. 526 (1928); 31 A.L.R. 578 (1924); 47 L.R.A. (n.s.) 173 (1914); 29 L.R.A. (n.s.) 709 (1911); 13 L.R.A. (n.s.) 697 (1908); 9 L.R.A. 263 (1890); 7 L.R.A. 442 (1890); 7 Am. Dec. 394 (1879).

4. UNIFORM COMMERCIAL CODE §§ 2-401(b), 2-403(2), 2-403(3). For discussion see text and note 49 *infra*.

NINETEENTH CENTURY BACKGROUND

The use of a worthless check as a means of obtaining sufficient control over a chattel to enable a resale to a bona fide purchaser for value is almost exclusively twentieth century in origin.[5] Tri-party fraudulent purchase schemes flourished during the last century, and hence it is only the use of the check by the intermediate party that is novel to twentieth century appellate decisions. The basis for these later adjudications can be traced back to the nineteenth century.

During the middle of the last century, the issue first arose as to whether the seller-owner could reclaim the goods as against the bona fide purchaser by establishing an express agreement between himself and the intermediate purchaser reserving title until payment was completed. In Massachusetts, it was held that such express reservation was effective not only between the contracting parties but also against the bona fide purchaser. This was merely an expansion of the earlier nineteenth century Massachusetts decisions recognizing the effectiveness of such title reservation clauses as between the *initial* contracting parties.[6] These decisions were not limited to promises to perform immediately following delivery; a number of the contracts provided that the purchaser would furnish notes, some of six months' duration.[7] The Massachusetts court, although clearly recognizing that this strict approach made the ultimate purchaser's title insecure,[8] continued to afford relief to the initial seller primarily to grant the greatest possible effectiveness to enforceable contract provisions.[9]

5. "In 119 of 126 bad check cases examined, the reported facts show no inquiry by the seller. Yet in almost the same number of cases the facts suggest that no account existed or insufficient funds were on deposit when the seller accepted the check." Note, *The "Cash Sale" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly*, 62 YALE L.J. 101, 106 n.33 (1952). *Compare* Note, *The Effect of Accepting a Worthless Check Where the Parties Contemplate a Cash Sale*, 28 KY. L.J. 322, 328 (1940) (few cases substantiate this latter viewpoint).

6. Blanchard v. Child, 73 Mass. (7 Gray) 155 (1856); Sargent v. Metcalf, 71 Mass. (5 Gray) 306 (1855). See also Curme, Dunn & Co. v. Rauh, 100 Ind. 247 (1884); Bradshaw v. Warner, 54 Ind. 58 (1876). For early decisions protecting the bona fide purchaser, see Copland v. Bosquet, 6 Fed. Cas. 513, No. 3212 (C.C.E.D. Pa. 1826); Hussey v. Thornton, 4 Mass. (3 Tyng) 405 (1808) [this case was overruled in Ayer v. Bartlett, 23 Mass. (6 Pick.) 71 (1827)].

7. Armour v. Pecker, 123 Mass. 143 (1877); Hirschorn v. Canney, 98 Mass. 149 (1867) (note); Coggill v. Hartford & N.H.R.R., 69 Mass. (3 Gray) 545 (1855); Dresser Mfg. Co. v. Waterston, 44 Mass. (3 Met.) 9 (1841) (acceptances). See also Harmon v. Goetter, 87 Ala. 325, 6 So. 93 (1889) (promise to deliver check); Jones v. Southern Cooperage Co., 94 Ark. 621, 127 S.W. 704 (1910) (promise to execute mortgage as security); Wilson & Wallace v. Comer, 125 Ga. 500, 54 S.E. 355 (1906) (promise to deliver check); Thomas v. Winters, 12 Ind. 322 (1859) (promise to deliver staves); George W. Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712 (1894).

8. Burbank v. Crooker, 73 Mass. (7 Gray) 158, 159 (1856).

9. "It is the duty of the purchaser to inquire, and see that his vendor has a good title to the property which he undertakes to sell." Coggill v. Hartford & N.H.R.R., 69 Mass. (3 Gray) 545, 550 (1855). "[I]t is well settled [that the purchaser] . . . takes the usual risk of the right of his vendor to sell this

In contrast, the New York court during this same period expressed a desire to protect the bona fide purchaser under similar circumstances, suggesting that the contract title reservation should be effective only between the parties to the original contract.[10] These early New York expressions, however, were *obiter dicta* to the decision,[11] and when the New York court was finally faced with the specific problem in 1869 it declined to follow the earlier interpretations.[12] By the beginning of the third quarter of the last century, it became generally established within the United States that the seller's express reservation of ownership in delivered chattels was effective as against third parties who purchased the goods in good faith without knowledge of the contract reservation. Even in Massachusetts, however, it was necessary that the future conditional performance by the purchaser find specific expression within the sales agreement, the courts refusing to enforce conditions left by the contracting parties to implication or business custom. Thus, failure to specify the time for payment of the price resulted in an absolute delivery.[13]

In a number of nineteenth century litigations the sale and delivery of the chattel to the intermediate purchaser was induced by the purchaser's fraudulent conduct. Included were acquisition of goods by false impersonation,[14] intentional misrepresentation of financial status,[15] promises to perform acts after delivery without intent to perform[16] and the exchange of stolen articles.[17] These fraudulent

property." Burbank v. Crooker, 73 Mass. (7 Gray) 158, 159 (1856). "The defendants would have been in the same legal position as are *bona fide* purchasers of stolen goods." Deshon v. Bigelow, 74 Mass. (8 Gray) 159, 160 (1857).

10. Fleeman v. McKean, 25 Barb. 474 (N.Y. Sup. Ct. 1857); Beavers v. Lane, 6 Duer 232 (N. Y. Super. Ct. 1856); Caldwell v. Bartlett, 3 Duer 341 (N.Y. Super. Ct. 1854) (dictum); Covill v. Hill, 4 Denio 323 (N.Y. 1847) (dictum). A similar attitude was expressed when the purchaser promised to deliver notes in Wait v. Green, 35 Barb. 585 (N.Y. Sup. Ct. 1862); Smith v. Lynes, 5 N.Y. 41 (1851); Haggerty v. Palmer, 6 Johns. Ch. 437 (N.Y. 1822).

11. "[M]any cases both in this and other states [protect the bona fide purchaser], and it is not, I think, questioned by any well considered authority in this country." Wait v. Green, 35 Barb. 585, 589 (N.Y. Sup. Ct. 1862).

12. Ballard v. Burgett, 40 N.Y. 314 (1869) (delivery under contract for future sale).

13. Haskins v. Warren, 115 Mass. 514 (1874); Goodwin v. Boston & L.R.R., 111 Mass. 487 (1873); Scudder v. Bradbury, 106 Mass. 422 (1871).

14. Tourtellott v. Pollard, 74 Me. 418 (1883) (exchanged stolen horse for owner's horse which he then sold to bona fide purchaser); Titcomb v. Wood, 38 Me. 561 (1854) (exchanged stolen silver watch for seller's gold one, then sold gold watch to bona fide purchaser).

15. Rowley v. Bigelow, 29 Mass. (12 Pick.) 307 (1832). See also Jennings v. Gage, 13 Ill. 611 (1852); Curme, Dunn & Co. v. Rauh, 100 Ind. 247 (1884); Clafin v. Cottman, 77 Ind. 58 (1881); Ditson v. Randall, 33 Me. 202 (1851); Keyser v. Harbeck, 3 Duer 373 (N.Y. Super. Ct. 1854).

16. Ross v. Leuci, 194 Misc. 345, 85 N.Y.S.2d 497 (N.Y. City Ct. 1949) (promise to obtain new car using defrauded owner's car as trade in).

17. Perkins v. Anderson, 65 Iowa 398, 21 N.W. 696 (1884); Martin v. Green, 117 Me. 138, 102 Atl. 977 (1918); Phelps v. McQuade, 158 App. Div. 528, 143 N.Y.S. 822 (1st Dep't 1913), *aff'd*, 220 N.Y. 232, 115 N.E. 441 (1917); Mowrey v. Walsh, 8 Cowen 238 (N.Y. Sup. Ct. 1828).

devices were commonly used as part of a scheme to obtain possession and resell the chattel. The defrauder, having acquired control and possession of the chattel, rapidly converted it into cash by sale to a bona fide purchaser for value. The bona fide purchaser was protected from the claim of the original owner, a distinction being made between larceny and obtaining goods by false pretenses.[18] The original owner was found to have *intended* to transfer *absolute* ownership to his purchaser, thereby transferring voidable title upon delivery of possession. With the transaction still effective at the time of resale, the bona fide purchaser acquired "title" as against the original vendor. This differentiation originated in England with the decision of *Parker v. Patrick,* and although its validity was at first questioned it was never expressly overruled;[19] that ruling gained favor in England during the years 1840-50[20] and has now become so well established that the distinction is never questioned. Both the conditional delivery-cash sale concept and the voidable title theory in fraudulent transfers developed concurrently within the United States during the last century.

In England, during this "pre-check" period of the nineteenth century, the idea of affording relief to the initial seller as against the bona fide purchaser was felt to be "a most absurd doctrine."[21] Protection for the ultimate good faith purchaser was based on the premise that failure to preserve the interest of the bona fide purchaser "would endanger the security of commercial transactions, and destroy that confidence upon which, what is called the *usual course of trade* materially rests."[22] When the first tri-party worthless check case arose in England in 1878, the court in *Moyce v. Newington*[23] as a matter of course classified it as merely another sale by fraud with voidable title transferred to the defrauder. Upon resale to the bona fide buyer before the check was dishonored, absolute title passed to the subvendee.[24] Soon to follow were the Factor's Act of 1889[25] and the Sale

18. Parker v. Patrick, 5 T.R. 175, 101 Eng. Rep. 99 (K.B. 1793).

19. "[I]f the question of goods fraudulently obtained were before us, I can not help thinking that the case of *Parker v. Patrick* . . . would not bear examination." Peer v. Humphrey, 2 Ad. & E. 493, 495, 111 Eng. Rep. 191, 193 (K. B. 1835) (Lord Denman). Earl of Bristol v. Wilsmore, 1 B. & C. 514, 107 Eng. Rep. 190 (1823), is also inconsistent with *Parker v. Patrick.*

20. English decisions approving *Parker v. Patrick* during this period include: Sheppard v. Shoolbred, 1 Car. & M. 61, 174 Eng. Rep. 409 (N.P. 1841); Load v. Green, 15 M. & W. 219, 153 Eng. Rep. 828 (Ex. 1846) (bankruptcy-fraud); White v. Garden, 10 C.B. 919, 138 Eng. Rep. 364 (C.P. 1851); Stevenson v. Newham, 13 C.B. 285, 302, 138 Eng. Rep. 1208, 1215 (Ex. 1853).

21. White v. Garden, 10 C.B. 919, 138 Eng. Rep. 364, 366 (C.P. 1851).

22. Root v. French, 13 Wend. 570, 572 (N.Y. Sup. Ct. 1835) (dictum).

23. 4 Q.B.D. 32 (1878). The court relied upon the voidable title concept in false pretense cases but expressed a personal preference for the equitable view previously adopted in New York in *Root v. French, supra* note 22.

24. For early American worthless check cases, see Hide and Leather Nat'l Bank v. West, 20 Ill. App. 61 (1886) (warehouse receipt); Johnson-Brinkhan Co. v. Central Bank, 116 Mo. 558, 22 S.W. 813 (1893) (bill of lading); Comer

of Goods Act in 1893,[26] both specifically protecting the bona fide purchaser.

Similar legislation was not forthcoming in the United States, and before the end of the last century Minnesota decisions involving both a worthless check and a resale to a bona fide buyer held that the initial owner could repossess his chattel.[27] In addition to these decisions, criticism of the early American support of the bona fide purchaser (as expressed in the initial New York decisions) by the American edition of Benjamin's Treatise on Sales,[28] the unequivocal statement by Mechem in his text on Sales that in sales by check the initial seller could regain his goods found in the possession of a bona fide subvendee,[29] and finally, the failure of the American Uniform Sales Act to include a section comparable to section 25 (3) of the model English Sale of Goods Act, combined to encourage the increased application of the cash sale concept in worthless check cases.

Title Concept in Worthless Check Cases

Professor Williston has strongly advocated the adoption in the United States of the voidable title approach as the proper solution of tri-party worthless check cases.[30] This, as has been seen, is the view that developed in England; however, few American decisions have adopted Williston's proposition.[31] Most American decisions have classified the sale involving payment by check as a form of cash sale, with payment upon accepting the check being substantially simultaneous with the delivery of the chattel or goods.[32] Although there are some writers who have argued that if the initial seller has voluntarily released complete possession, control and right of disposition to his purchaser in return for a check, a form of conditional

v. Cunningham, 77 N.Y. 391 (1879) (refused to apply Georgia statute; see notes 66-69 *infra*).

25. English Factors Act, 1889, 52 & 53 Vict., c. 45, § 9. See also 2 Williston, Sales § 319 (rev. ed. 1948).

26. English Sale of Goods Act, 1893 56 & 57 Vict., c. 71, § 25(3).

27. National Bank of Commerce v. Chicago, B & N.R.R., 44 Minn. 224, 46 N.W. 342, 9 L.R.A. 263, 20 Am. St. Rep. 566 (1890); Globe Milling Co. v. Minneapolis Elevator Co., 44 Minn. 153, 46 N.W. 306 (1890). For other early American decisions also applying the "conditional delivery" viewpoint but not involving bona fide purchasers, see Mathews v. Cowan, 59 Ill. 341 (1871); Hall & Robinson v. Missouri Pac. R.R., 50 Mo. App. 179 (1892); Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527 (1877).

28. Benjamin, Sales 327-29 (8th ed. 1950).

29. 1 Mechem, Sales 461-62 n.5 (1901).

30. 2 Williston, Sales § 346A (rev. ed. 1948).

31. Nebraska is one of the few American states that has consistently applied the voidable title concept to worthless check sales. See Sullivan Co. v. Wells, 89 F. Supp. 317 (D. Neb. 1950); Sullivan Co. v. Larson, 140 Neb. 97, 30 N.W.2d 460 (1948), 34 Iowa L. Rev. 371 (1948). See also Standard Inv. Co. v. Town of Snow Hill, 78 F.2d 33 (4th Cir. 1935) (dictum); Keegan v. Kaufman Bros., 68 Cal. App. 2d 197, 156 P.2d 261 (1945) (relying upon Uniform Sales Act § 24, Cal. Civ. Code § 1744 [Deering 1949]).

32. Comment, *Protection of Rights of Bona Fide Purchasers of Personal Property*, 9 Mich. L. Rev. 239, 242 (1911).

sale with credit extended is thereby created, there has not developed acceptance of this position.[33] The acceptance of the check is held to be merely conditional acceptance with absolute title retained in the seller until the check is cashed. This is actually a modern-day extension of the early nineteenth century view that conditional agreements between the initial parties were effective against the purchaser's sub-vendee.[34]

It is uniformly agreed that over-the-counter sales and the self-service store sale are typical true cash sale arrangements. Possession is delivered before payment is demanded, and yet it is understood that absolute title remains in the seller during the short interval necessary before payment can be tendered. The use of the goods during this interval is, however, limited and there is little likelihood that during this brief period the goods will find their way into the hands of a bona fide sub-purchaser. This is to be contrasted with the typical present day worthless check case sale transaction. It is for this very reason that the defrauder uses his worthless check scheme. Exclusive control is extended for a period of time sufficient to consummate a resale.[35]

Intent at the time of the exchange affects the time of passage of title, but within the area of worthless check decisions, the courts must look only to the unilateral intent of the seller as the drawer of the check often intends only to consummate a fraudulent scheme. The seller's intent is rarely expressed, as the typical businessman does not consider the transfer in terms of the legal concept of title.[36] Circumstantial evidence may not serve as a satisfactory means of discovering this hidden intent of the seller, and the fact that the party

33. Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies,* 1 HASTINGS L.J. 111, 114 (1950). Vold at an earlier date recognized the hardship on the ultimate purchaser of the intermediate parties unrestricted control but felt that "wider unfortunate social consequences" outweighed this factor. Vold, *Cash Sales,* 14 ST. LOUIS L. REV. 1, 9 (1928).

34. See notes 9-13 *supra.*

35. 2 WILLISTON, SALES 335 (rev. ed. 1948) (distinguishing terms "cash sale" and "terms cash").

36. "Does it not follow as a simple proposition that the intention of the two original parties cannot govern the rights of the third party who was not party to that intention." Levin, *The Intention Fallacy in the Construction of Title Retaining Contracts,* 24 MICH. L. REV. 130, 137 (1925); "[I]n most cases the parties do not at the time [of exchange] think in detail about this technical matter at all, either one way or the other." Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies,"* 1 HASTINGS L.J. 111, 115 (1950); "How can one reasonably infer that the parties do not intend to pass title. . . ." Note, *The "Cash Sale" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly,* 62 YALE L.J. 101, 103 (1952); "The seller's intent, of one kind or another . . . may properly be one of these operative facts; but surely it is not the only one, nor always the most important. . . ." Comment, 29 YALE L.J. 346, 347 n.14 (1920); "[Courts] choose the consequence they deem desirable and assume an intent that will produce the consequence." 42 MICH. L. REV. 328, 329 (1943); "He had a double intention, one primary, and one secondary." 13 ORE. L. REV. 177, 178 (1934).

from whom the seller accepted the worthless check was a *stranger* has been held by American courts to constitute sufficient evidence to show both an intent to reserve title and an intent to extend credit.[37] When the same basic fact is used by courts to establish opposing views of the seller's intent as to passage of title, then its value must be questioned.

A number of decisions base the reservation of title on a *presumption* that the exchange of goods for check indicates a cash sale. This presumption has been used against the bona fide buyer in worthless check cases,[38] although criticized as unrealistic[39] and in conflict with the presumption created by the Uniform Sales Act when delivery of the goods precedes payment.[40] Credit has been held not to have been extended even in cases where unlimited control as purchaser has been permitted for as long as ten days before the check was cashed.[41] Even staunch advocates of the cash sale concept in worthless check cases admit the direct analogy to payment by note, where it is admitted that "manifestly credit is extended and the property passes."[42]

American courts frequently expound the view that in worthless check cases title does not pass because the exchange of check and chattel were conditional. The conditional nature of the transaction, however, is created by contract and as such should be effective only

37. Casey v. Gallagher, 326 Mass. 746, 96 N.E.2d 709 (1951) (favoring the buyer); Goddard Grocery Co. v. Freedman, 127 S.W.2d 759 (Mo. Ct. App. 1939) (favoring the bona fide purchaser); Wright v. Mississippi Valley Trust Co., 144 Mo. App. 640, 129 S.W. 407, 408 (1910) (favoring the seller); Johnson v. Iankovetz, 57 Ore. 24, 102 Pac. 799, 29 L.R.A. (n.s.) 709 (1909) (favoring the original seller); Nicewarner v. Alston, 228 S.W.2d 872 (Tex. Civ. App. 1950) (favoring the buyer). See also Note, *Sales: Worthless Check Cash Sales,* 3 HASTINGS L.J. 162, 164 (1952).

38. "There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is to the contrary." De Vries v. Sig Ellingson & Co., 100 F. Supp. 781, 784 (D. Minn. 1951); "[A] check is not payment of a debt unless by *express contract* it is so received . . . there arises no presumption that a creditor takes a check in absolute payment from the mere fact that he accepts it from his debtor, in fact the presumption is just the contrary." Hickerson v. Con Frazier Buick Co., 264 S.W.2d 29, 33 (Mo. Ct. App. 1953). See also Peoples State Bank v. Brown, 80 Kan. 520, 103 Pac. 102, 23 L.R.A. (n.s.) 824 (1909); Hall & Robinson v. Missouri Pac. R.R., 50 Mo. App. 179 (1892); Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527 (1877).

39. "[A] 'cash sale' presumption appears wholly unrealistic when a merchant is the buyer. . . ." Note, *The "Cash Sale" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly,* 62 YALE L.J. 101, 103 (1952).

40. *Cf.* Maffei v. Ginocchio, 299 Ill. 254, 132 N.E. 518 (1921); American Ry. Express Co. v. Ready, 232 Mich. 624, 206 N.W. 344 (1925) (applying UNIFORM SALES ACT § 19).

41. Engstrom v. Wiley, 191 F.2d 684 (9th Cir. 1951); Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S.W. 125 (1924); Keegan v. Lenzie, 171 Ore. 194, 135 P.2d 717 (1943). See also Engstrom v. Benzel, 191 F.2d 689 (9th Cir. 1951); Morehouse v. Keyport Auto Sales Co., 118 N.J. Eq. 368, 179 Atl. 279 (Ch. 1935). BLACK, LAW DICTIONARY 475 (3d ed. 1933), includes within the definition of credit "Time allowed to the buyer of goods by the seller, in which to make payment for them."

42. "Is payment by check in such cases conditional in any different sense than in cases of payment by note where manifestly credit is extended and the property passes?" Vold, *Cash Sales,* 14 ST. LOUIS L. REV. 1, 9 (1928).

between the initial contracting parties and third parties who are subject to the contract. To hold, as the courts generally do, that as the agreement is conditional, title does not pass, is to confuse contract and title concepts.[43] The fact that the check may have been conditionally accepted preserves a security lien in favor of the seller but does not necessarily reserve title to the goods as against the sub-vendee.[44] This conditional acceptance concept applied in tri-party worthless check sales is a derivation of the law of negotiable paper where the creditor has recourse to the original obligation when the note is dishonored at maturity.[45] The seller in worthless check transactions has the same recourse against his immediate purchaser upon the underlying obligation; however, this should not afford him a right against the goods acquired by a bona fide sub-purchaser.

APPLICATION OF EQUITABLE ESTOPPEL DOCTRINE

Until this point, attention has been directed to situations involving the transfer of *bare* possession of the chattel in exchange for the worthless check. The problem has, therefore, been one decided *at law* through the joint application of contract and property title concepts. Since it is, of course, possible for the seller to estop himself from setting up his title as against the bona fide purchaser, attention is now turned to the nature of the acts sufficient to create such an estoppel.

Bare Possession: There are a few decisions allowing the bona fide purchaser to retain the chattel as against the initial seller without relying upon the voidable title concept in cash sales or involving a transfer of indicia of ownership and reliance by the ultimate purchaser. In the greater number of cases within this area, however, the drawer of the check was a commercial dealer purchasing for resale, with this fact known to the original owner at the time he accepted the check and delivered the chattel.[46] Section 2-403 (2) of the proposed Uniform Commercial Code proposes to protect the buyer in ordinary course of business when possession of the goods are *entrusted* to a merchant who deals in goods of that kind.[47] A few of these intermedi-

43. For example of confusion of contract and title concepts see reasoning in National Bank of Commerce v. Chicago, B. & N.R.R., 44 Minn. 224, 46 N.W. 342 (1890).

44. Collins, *Title To Goods Paid For With Worthless Check*, 15 So. CALIF. L. REV. 340, 345, 347 (1942).

45. Vold, *supra* note 42, at 8.

46. Blount v. Bainbridge, 79 Ga. App. 99, 53 S.E.2d 122 (1949), 12 GA. B.J. 73; Keegan v. Kaufman Bros., 69 Cal. App. 2d. 197, 156 P.2d 261 (1945) (power to dispose); Meadows v. Hampton Live Stock Comm'n Co., 55 Cal. App. 2d 634, 131 P.2d 591 (1942) (power to dispose). *Contra*, Slaton v. Lamb, 260 Ala. 494, 71 So. 2d 289 (1954) (written agreement reserving title); Bustin v. Craven, 57 N.M. 724, 263 P.2d 392 (1953) (temporary use of automobile); Handley Motor Co. v. Wood, 237 N.C. 318, 75 S.E.2d 312 (1953); Keegan v. Lenzie, 171 Ore. 194, 135 P.2d 717 (1943) (sheep, five days unrestricted control).

47. "Any entrusting of possession of goods to a merchant who deals in goods

ate dealer cases have been decided upon the basis of *waiver* of the cash sale; others through the application of the doctrine of equitable estoppel.[48] Knowledge of the dealer status is not always controlling, however, as the nature of the commodity involved affects some of these rulings. Transfer of an automobile to a known dealer may be contrasted with the transfer of commodities such as cotton or cattle. In the latter cases, emphasis is often placed upon knowledge of the dealer's status, while in the former the retention of the title certificate is emphasized.[49] These cases involving transfer of bare possession lend themselves to Vold's classification of cases "blindly groping in the judicial materials for a further substantial distinction not as yet clearly articulated by the courts."[50] Knowledge by the seller that his buyer will have unlimited control over the goods during the interval before the check is presented for collection is not generally sufficient to keep the worthless check loss from falling upon the ultimate purchaser, but the combination of such fact with the realization that the immediate purchaser is a dealer buying for resale often shifts the risk of worthless check loss to the original owner.[51]

Bill of Sale: Considerable variance among American decisions is also apparent in this category. Again, the transfer of automobiles to known dealers is frequently involved.[52] Part of this divergence of opinion results from differing standards of the right of reliance by the ultimate purchaser upon the initial owner's bill of sale. Georgia rulings have held that the notation on the bill of sale, "Paid by

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of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." UNIFORM COMMERCIAL CODE § 2-403(2). See Comments, 22 TENN. L. REV. 785 (1953), 1952 WIS. L. REV. 209. For similar effect under Wisconsin consignment statute, see WIS. STAT. § 241.26 (1955).

48. Intent to pass title: Gerber v. Pike, 249 S.W.2d 90 (Tex. Civ. App. 1952); McAdow Motor Co. v. Luckett, 131 S.W.2d 267 (Tex. Civ. App. 1939); Parma v. First Nat'l Bank, 37 S.W.2d 274 (Tex. Civ. App. 1931). The Texas decisions may be applying voidable title theory. Estoppel: Meadows v. Hampton Live Stock Comm'n Co., 55 Cal. App. 2d 634, 131 P.2d 591 (1942) (cotton); Heaston v. Martinez, 3 Utah 2d 259, 282 P.2d 833 (1955), 54 MICH. L. REV. 290, 4 UTAH L. REV. 554. See also Capital Automobile Co. v. Ward, 54 Ga. App. 873, 189 S.E. 713 (1936); Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941) (possession plus bill of sale turned over to known auto dealer as purchaser).

49. Automobile cases where certificate of title retention emphasized rather than knowledge that purchaser was automobile dealer: *Compare* Kirk v. Madsen, 240 Iowa 532, 36 N.W.2d 757 (1949); Morehouse v. Keyport Auto Sales Co., 118 N.J. Eq. 368, 179 A. 279 (Ch. 1935); Deahl v. Thomas, 224 S.W.2d 293 (Tex. Civ. App. 1949), with Parma v. First Nat'l Bank 37 S.W.2d 274 (Tex. Civ. App. 1931).

50. Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" And Conflicting Analogies,* 1 HASTINGS L.J. 111, 123 (1950).

51. For similar reasoning, see Capital Automobile Co. v. Ward, 54 Ga. App. 873, 189 S.E. 713 (1936) (however bill of sale also transferred and purchaser told seller that she would not have fund in bank until Monday).

52. Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941) (chattel mortgage, drawer of check died before presented); Gill v. Paschal, 35 Tenn. App. 458, 248 S.W.2d 325 (M.S.1951) (invoice); McAdow Motor Co. v. Luckett, 131 S.W.2d 267 (Tex. Civ. App. 1939).

check," will not preclude the sub-vendee from acquiring the chattel as a bona fide purchaser.[53] This is in contrast with decisions from several other jurisdictions which place more importance upon the check notation.[54] Little comment is found as to the extent of inquiry demanded by the courts of the ultimate purchaser when he discovers a "paid by check" notation upon the original bill of sale.

Certificate of Title: Commencing with the basic fact that a large number of the tri-party worthless check transactions involve a scheme to defraud, it is understandable that in recent years the appellate litigation should have become almost exclusively involved with the sale of automobiles. Their ready access of market, mobility, customary rapid resale, especially by used car dealers, and the simple fact that since 1950 more than five million vehicles have been sold annually[55] all combine to encourage the rapid shift in commodities.

Application of equitable estoppel to worthless check cases consequently finds its greatest application in the transfer of automobile certificates of title.[56] It has become accepted commercial practice for automobile dealers to retain the title certificate, attach it to the purchaser's check to be delivered when the check has been cleared and the seller receives payment.[57] This procedure, however, is not fool proof, for a number of states do not require presentation of a properly executed transfer of title certificate before issuance of a

53. *Compare* Wolfe v. Smith, 80 Ga. App. 136, 55 S.E.2d 675 (1949) (applying Alabama law); Capital Automobile Co. v. Ward, 54 Ga. App. 873, 189 S.E. 713 (1936); Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941), *with* Nimmons v. Ballentine Motors, 92 Ga. App. 566, 88 S.E.2d 748 (1955).

54. *Compare* Knapp v. Lyman, 44 Cal. App. 283, 186 Pac. 385 (1919) (no reliance on seller's bill of sale); Edwards v. Central Motor Co., 277 S.W.2d 413 (Tenn. App. M.S. 1954), *aff'd*, 277 S.W.2d 417 (Tenn. 1955) (sub-vendee did not see carbon copy of original vendor's bill of sale but relied upon intermediate seller's bill of sale), *with* Wallich v. Sandlovich, 111 Neb. 318, 196 N.W. 317 (1923); Jackson v. Waller, 190 Tenn. 588, 230 S.W.2d 1013 (1950) (also involved carbon copy of order blank but emphasis placed upon original seller's negligence).

55. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 551 (76th ed. 1955); Comment, 54 MICH. L. REV. 680 (1956).

56. J. L. McClure Motor Co. v. McClain, 34 Ala. App. 614, 42 So. 2d 266 (1949); Kelsoe v. Grouskay, 70 Ariz. 152, 217 P.2d 915 (1950); Dresher v. Roy Wilmeth Co., 118 Ind. App. 542, 82 N.E.2d 260 (1948); Watson Bros. Realty Co. v. Associates Discount Corp., 246 Iowa 483, 66 N.W.2d 384 (1954) (mortgagee); Pettus v. Powers, 185 S.W.2d 872 (Mo. App. 1945); Valley Loan Service v. Neal, 205 Okla. 94, 235 P.2d 932 (1951) (mortgagee); Plummer v. Kingsley, 190 Ore. 378, 226 P.2d 297 (1951); Pool v. George, 30 Tenn. App. 608, 209 S.W.2d 55 (E.S. 1947); Mills v. Clark, 257 S.W.2d 746 (Tex. Civ. App. 1953); Parker v. First Citizens Bank & Trust Co., 229 N.C. 527, 50 S.E.2d 304 (1948) (dictum).

57. Felts v. Sugg, 167 Kan. 488, 207 P.2d 460 (1949); Hub City Motors, Inc. v. Brock, 71 So. 2d 700 (La. App. 1954); Fisher v. Bullington, 50 So. 2d 91 (La. App. 1951); Wilson v. Commercial Finance Co., 239 N.C. 349, 79 S.E.2d 908 (1954) (applying Virginia law to a chattel mortgage); Handley Motor Co. v. Wood, 238 N.C. 468, 78 S.E.2d 391 (1953) (applying Pennsylvania law); Ohio Motors, Inc. v. Russel Willis, Inc. 193 Tenn. 524, 246 S.W.2d 962 (1952).

certificate of registration in the name of the applicant. In these "non-title" states, evidence of ownership of the automobile by means of bill of sale is sufficient basis for the issuance of the registration certificate. The drawer of a worthless check, purchasing the car in a "title certificate" state and obtaining a bill of sale, can secure a valid registration certificate in a non-title state and use same to acquire from the original state a certificate of title showing him to be the present owner of the automobile. With his new certificate, he is in position to resell to a bona fide purchaser for value.[58] Numerous states have now enacted legislation preventing the application of waiver or estoppel in favor of a transferee if he fails to obtain the certificate of title.[59] The Missouri statute has been applied at the appellate level in several instances as a means of protecting the original owner.[60] In other non-statutory jurisdictions similar results have been reached by strict interpretation of the definition of bona fide purchaser against the sub-vendee.[61]

The doctrine of laches has of recent date received only limited application in the tri-party worthless check area, and there is little uniformity among decisions regarding times for its proper use. Failure to verify the validity of a certified check by means of a telephone call justified the application of laches, but failure of ranchmen in mountain

58. Shockley v. Hill, 91 Colo. 451, 15 P.2d 623 (1932) (Illinois to Oklahoma); Inman v. Rowsey, 41 So. 2d 655 (Fla. 1949) (California to Georgia to Florida); Woods v. Thompson, 159 Fla. 112, 31 So. 2d 62 (1947) (Texas to Florida); Equitable Credit & Discount Co. v. Murray, 79 Ga. App. 795, 54 S.E.2d 650 (1949) (Georgia to Pennsylvania—forged check); Rocco v. Server, 89 Ind. App. 457, 165 N.E. 335 (1929) (California to Indiana); Seward v. Evrard, 240 Mo. App. 893, 222 S.W.2d 509 (1949) (Missouri-Arkansas-Missouri); Hunter v. Moore, 38 Tenn. App. 533, 276 S.W.2d 754 (E.S. 1954) (equitable estoppel or voidable title theory? The Tennessee court uses words "legal title transferred"). See Dobbins v. Martin Buick Co., 216 Ark. 861, 227 S.W.2d 620 (1950) (factually similar to *Seward v. Evrard, supra,* but refusing to follow the Missouri decision).

59. FLA. STAT. ANN. § 319.22(1) (Supp. 1955); IDAHO CODE ANN. § 49-404 (1948); IOWA CODE ANN. § 321.45 (Supp. 1955); MO. REV. STAT. § 301.90 (1949); NEB. REV. STAT. § 60-105 (Supp. 1955); OHIO REV. CODE ANN. § 4505.04 (Baldwin Supp. 1955); S. D. CODE § 44.0202 (Supp. 1952). See also 7 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 4356 (1950); Comments, 54 MICH. L. REV. 680 (1956); 1951 WASH. U.L.Q. 539.

60. Robinson v. Poole, 232 S.W.2d 807 (Mo. App. 1950) (defrauder never returned to complete assignment on new title certificate); Seward v. Evrard, 240 Mo. App. 893, 222 S.W.2d 509 (1949); Anderson v. Arnold-Strong Motor Co., 229 Mo. App. 1170, 88 S.W.2d 419 (1935).

61. *Sufficient evidence to put ultimate purchaser on inquiry:* Mossler Acceptance Co. v. Johnson, 109 F. Supp. 157 (W.D. Ark. 1952); Wills v. Shepherd, 241 Mo. App. 102, 231 S.W.2d 843 (1950) (certificate indicates wife's interest); Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S.W. 125 (1924) (warehouse receipts indicated that cotton warehoused in company's name several days before company purchased warehouse receipts). *Sub-vendee did not rely upon original owner's document of title: Compare* McGeever v. American Nat'l Red Cross, 330 Mass. 239, 112 N.E.2d 788 (1953), *with* Watson Bros. Realty Co. v. Associates Discount Corp., 246 Iowa 483, 66 N.W.2d 384 (1954). *Finding of actual knowledge by sub-vendee:* Davidson v. Conner, 254 Ala. 38, 46 So. 2d 832 (1950); Johnson-Brinkham Comm'n Co. v. Missouri Pac. R.R. 72 Mo. App. 437 (1897).

territory for five days to attempt to collect a non-certified check was held not to be a proper case for use of the doctrine.[62]

Acceptance of a check and release of goods for the limited purpose of weighing and measuring will not, of course, create grounds for estoppel when the goods are sold to a bona fide purchaser;[63] conversely, the release of negotiable bills of lading or warehouse receipts with delivery of the purchased goods precludes the initial owner from repossessing same from the sub-vendee when the check presented in exchange for the goods is shown to be worthless.[64]

Conditional Sale Classification: Worthless check transfers are sometimes classified as a form of conditional sale. States applying the cash sale doctrine to worthless checks interpret the exchange of check and goods as conditional, but not to the extent that the conditional sale statutes of the jurisdiction in question are held to be applicable. These statutes are generally held to apply principally to installment sale financing in which the vendor intends to extend credit. This is to be contrasted with a conditional delivery under a cash sale agreement. A few states, by refusing to apply the cash sale doctrine to worthless check cases and holding that the transaction is within the scope of the local conditional sale statute, protect the bona fide purchaser. Sellers, in accepting a check covering payment for goods, do not comply with recording provisions of typical conditional sales statutes; they are unlikely to comply inasmuch as the period of time involved is only that reasonably necessary for collection of the check. Resultant confusion is exemplified by decisions from Georgia and Massachusetts. In Georgia worthless check transactions are generally classified as a form of conditional sale within the scope of the Georgia conditional sales statute. The seller's failure to reduce his contract to writing and properly record has therefore been held sufficient grounds for precluding his recovery of the chattel from the sub-vendee.[65] However, in Georgia there is also a statute enacted in 1884 and still effective which was passed to protect the sales of Georgia planters and commission merchants.[66] Title to prod-

62. Goddard Grocer Co. v. Freedman, 127 S.W.2d 759 (Mo. App. 1939) (certified check); Keegan v. Lenzie, 171 Ore. 194, 135 P.2d 717 (1943).

63. Hart v. Boston & M.R.R., 72 N.H. 410, 56 Atl. 920 (1903); Baltimore & O.S.W. Ry. v. Good, 82 Ohio St. 278, 92 N.E. 435 (1910); 2 WILLISTON, SALES § 346 (rev. ed. 1948).

64. Hide and Leather Nat'l Bank v. West, 20 Ill. App. 61 (1886); Kemper Grain Co. v. Harbour, 89 Kan. 824, 133 Pac. 565 (1913); Hoven v. Leedham, 153 Minn. 95, 189 N.W. 601 (1922) (bill of lading and draft); Ammon v. Gamble-Robinson Comm'n Co., 111 Minn. 452, 127 N.W. 448 (1910) (warehouse receipts); Freeman v. Kraemer, 63 Minn. 242, 65 N.W. 455 (1895) (bill of lading and draft); Johnson-Brinkham Co. v. Central Bank, 116 Mo. 558, 22 S.W. 813 (1893) (bill of lading-check) (dictum).

65. GA. CODE ANN. § 67-1401 (1937). See also Savannah Cotton Press Ass'n v. McIntyre, 92 Ga. 166, 17 S.E. 1023 (1893).

66. *"Title to certain article not to pass until paid for:*—Cotton, corn, rice, crude turpentine, spirits turpentine, rosin, pitch, tar or other product sold

ucts within the category of this statute does not transfer until cash is received. In contrast the sale of products not within the purview of the statute has been affected by the interpretation of the Georgia conditional sales statute and the application of the doctrine of equitable estoppel.[67] A Georgia seller of chairs or cheese who takes a worthless check today loses his chattel to the bona fide sub-vendee,[68] while the seller of cotton, peaches, pecans, wheat or turpentine has been held to prevail.[69]

In Massachusetts, it is generally maintained that the cash sale concept applies to worthless checks, with numerous decisions holding that the original seller's title does not pass to either the immediate vendee or a bona fide sub-vendee until payment is received. However, in drafting the sales agreement, an attempt was made to include expressly this viewpoint within the language of the contract. The sales contract included the statement: "Title will not pass until payment in full, and if payment is made by check title will not pass until the check is paid."[70] This clause was held by the court to show intent to make the agreement conditional and as such came within the scope of the Massachusetts Conditional Sales statutes with which, of course, there had been no compliance.[71]

Statutes have been enacted in a number of states imparting the equitable maxim that when one of two innocent persons must suffer from the act of a third, he by whose power (or negligence) it happened must be the sufferer. These statutes have on occasion been used in worthless check cases, usually favoring the bona fide purchaser.[72]

by planters and commission merchants, on cash sale, shall not be considered as the property of the buyer until fully paid for, although it may have been delivered to the buyer. . . ." GA. CODE ANN. § 96-110 (1937).

67. Capital Automobile Co. v. Ward, 54 Ga. App. 873, 189 S.E. 713 (1936) (estoppel based on delivery of bill of sale).

68. Brumby Chair Co. v. City of Columbus, 46 Ga. App. 163, 167 S.E. 221 (1932) (chairs); Morris & Co. v. Walker Bros. Co., 29 Ga. App. 476(2), 116 S.E. 201 (1923) (cheese, check not involved).

69. *Cotton:* Stanton v. Bank, 183 Ga. 489, 188 S.E. 702 (1936); Anchor Duck Mills v. Harp, 40 Ga. App. 563, 150 S.E. 572 (1929) (worthless check); Graham v. John Flannery Co., 32 Ga. App. 713, 124 S.E. 729 (1924); Skinner v. Hillis, 25 Ga. App. 711, 104 S.E. 508 (1920); Flanner v. Harley, 117 Ga. 483, 43 S.E. 765 (1903); Savannah Cotton Press Ass'n v. McIntyre, 92 Ga. 166, 17 S.E. 1023 (1893). See Comer v. Cunningham, 77 N.Y. 391, 33 Am. Rep. 626 (1870) (refusing to apply Georgia statute). *Peaches:* Bank v. Brooks, 33 Ga. App. 84, 125 S.E. 600 (1924). *Pecans:* Blocker v. State, 58 Ga. App. 560, 199 S.E. 444 (1938). *Wheat:* ALCO Feed Mills v. Hollis, 184 Ga. 594, 192 S.E. 184 (1937). *Spirits of Turpentine:* Ocean S.S. Co. v. Southern States Naval Stores Co., 145 Ga. 798, 89 S.E. 838 (1916).

70. Hurwitz v. Carpenzano, 110 N.E.2d 367 (Mass. 1953); Note, 33 B.U.L. REV. 417 (1953).

71. "[T]he express reiteration of the controlling rule results in a complete change in the nature of the sale. . . . It is expected that successive cases will either explain the true basis of this decision or at least limit it to its facts." MASS. ANN. LAWS c. 255, § 13A (1956). See Note, 33 B.U.L. REV. 417, 420 (1953).

72. See CAL. CIV. CODE § 3543 (Deering 1949); Meadows v. Hampton Live Stock Comm'n Co., 55 Cal. App. 2d 634, 131 P.2d 591 (1942).

The application of the maxim to worthless check transactions has been criticized by Vold,[73] who asserts that it was through the trust of both innocent parties that the intermediate party was able to defraud. A greater criticism of the maxim is its ommission and failure to weigh the degree of fault or duty which should be placed upon the parties.

FALSE PRETENSES AND FORGERY

When the intermediate party obtains the goods by means of false pretenses or forged check, the American courts uniformly hold that the voidable title concept is applicable; and thus the third party-bona fide purchaser obtains title against the original vendor. This, of course, is in contrast with decisions involving sale in exchange for worthless check. This distinction is based primarily upon the necessary elements to establish the *criminal* action of obtaining money by false pretenses; namely, (1) false representation; (2) reliance; (3) intent to defraud; (4) actual injury.[74] The difficulty in carrying this distinction over into civil actions involving worthless checks receives marked emphasis within the area where the intermediate party couples a worthless check with a false representation. Thus, the typical case in which the intermediate party without funds in the bank, or sometimes without even an open account, presents a worthless check at the time he receives the seller's goods, has been distinguished from similar cases where at the time the check is proffered the statement is made that he has plenty of funds "but does not carry it around with him,"[75] or that "this check is good."[76] Recognition that the check was used merely as scheme to obtain the property has led to classification in a few cases of the transaction as fraudulent with resultant transfer of voidable title, although there was neither false impersonation nor express misrepresentation at the time of exchange.[77]

When a check is *forged* the initial seller is sometimes allowed a ruling of conditional delivery; the same result has also been achieved by holding the forgery to be a form of theft or common law larceny. Again, some forgeries have been classified as a form of obtaining money by false pretenses and the bona fide purchaser has been protected under a voidable title basis.[78] Similar divergency is noted when

73. Vold, *Worthless Check Cash Sales "Substantially Simultaneous" and Conflicting Analogies*, 1 HASTINGS L. REV. 111 (1950).

74. Comment, *Injury As an Element in Criminal Fraud*, 23 U. CHI. L. REV. 509 (1956) (discussing the last of these elements).

75. Commonwealth v. Delvin, 141 Mass. 423, 6 N.E. 64 (1886).

76. Pingleton v. Shepherd, 219 Ark. 473, 242 S.W.2d 971 (1951).

77. Smith v. Autocar Sales & Service Co., 107 Ind. App. 244, 20 N.E.2d 188 (1939) ("Evidence disclosed that he had only $1.19 on deposit at time the check was issued.")

78. *Negligence:* Chiplock v. Steuart Motor Co., 91 A.2d 851 (App. D.C. 1952); Dudley v. Lovins, 310 Ky. 491, 220 S.W.2d 978, 980 (1949) ("Bona fide pur-

the false representation relates to a matter other than the validity of the check. Thus, the use of a fictitious name together with a forged check did not affect the original seller's right to recover his goods from the ultimate purchaser; however, in Minnesota the decision was based on application of the cash sale concept to checks, while in New York the decisions rested upon a finding of common law larceny.[79] In contrast with both of the above jurisdictions, Kentucky has held that a voidable title was transferred to the first vendee and thus the bona fide purchaser from the first vendee could retain the chattel.[80] False impersonation at the time the check is drawn has been held in Oklahoma to be a form of obtaining money by false pretenses,[81] while a Washington ruling relied upon a hundred year old statute to classify it as larceny.[82]

The Uniform Commercial Code

The present judicial tendency is to protect the original seller in tri-party worthless check decisions, alleviating the harshness of this approach in the individual case by a varying application of the equitable estoppel doctrine. This approach must certainly change with the adoption of the proposed Uniform Commercial Code as greater emphasis within this area is placed upon protection of the interest of the good faith purchaser. Section 2-401(1)(b) provides "no agreement that a contract for sale is a 'cash sale' alters the effects of identification or impairs the rights of good faith purchasers from the buyer." The effect of this section as well as that of section 2-403(3) will radically alter a large number of worthless check judicial decisions in the United States.[83]

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chasers are favorites of the law, and they should only be required to pay for another's *negligence* or mistake when they . . . take unfair advantage."); Russell Willis, Inc. v. Page, 213 S.C. 156, 48 S.E.2d 627 (1948). *Larceny or theft:* Port Finance Co. v. Ber, 45 So. 2d 404 (La. App. 1950), 25 Tul. L. Rev. 146 (1950). *Compare* La. Civ. Code Ann. art. 3506 (Dart 1945), which provides for a three year prescription of ownership as to movable property except that which was stolen or lost, *with* article 2279 of the French Civil Code which does not require the three year delay to protect the bona fide purchaser unless the property was lost or stolen. See text and notes 101-03 *infra*. See also Damis v. Barcia, 266 App. Div. 698, 40 N.Y.S.2d 107 (3rd Dep't 1943) (dissent based upon Phelps v. McQuade, 220 N.Y. 232, 115 N.E. 441 [1917]).

79. Gustafson v. Equitable Loan Ass'n, 186 Minn. 236, 243 N.W. 106 (1932); Danis v. Barcia, 266 App. Div. 698, 40 N.Y.S.2d 107 (3rd Dep't 1943). Contrast the early Minnesota decision of Cocran v. Steward, 21 Minn. 435 (1875).

80. Dudley v. Lovins, 310 Ky. 491, 220 S.W.2d 978 (1949). See also Phillips v. Brooks, Ltd., [1919] 2 K.B. 243.

81. Thompson v. Connecticut Fire Ins. Co., 203 Okla. 530, 223 P.2d 757 (1950).

82. Richardson v. Seattle-First Nat'l Bank, 38 Wash. 2d 314, 229 P.2d 341 (1951).

83. "[Section 2-403(3)] abolishes numerous decisions that one who obtains delivery of goods by means of a 'bad' check has no power to pass title to a bona fide purchaser." Hawkland, Sales and Bulk Sales Under the Uniform Commercial Code 106 (1955). This Uniform Commercial Code section is also discussed in Honnold, Cases and Materials of the Law of Sales and Sales Financing 316 (1954); Note, 30 Ore. L. Rev. 330, 351 (1951); 22 Tenn. L. Rev. 785, 810 (1953).

The protection afforded by the Uniform Commercial Code is not, however, limited to cash sale transactions, but under section 2-403(2) includes "any entrusting of possession of goods to a person who deals in goods of that kind. . . ." The extension under section 2-401(1)(b) is mild in comparison with the sweeping innovation introduced under section 2-403(2). If the owner of a chattel, delivering bare possession for limited bailment purposes to a dealer in goods of that kind legally vests the 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.

There has been little adverse comment regarding the change to be effected in cash sale transactions by adoption of sections 2-401(1)(b) and 2-403(3),[84] as most criticism has been leveled at the more drastic change proposed under section 2-403(2). The effect upon tri-party worthless check cases is not to be minimized, nevertheless, as it will effect a reversal of presently established decisions in most American jurisdictions.

COMPARATIVE LAW

Due to the present conflict between existing law in the United States with its emphasis upon the cash sale concept, and the Uniform Commercial Code proposals, consideration should be given to comparative solutions on related issues in several foreign systems of jurisprudence.

Roman Law: There is dispute as to whether the obligation of the immediate buyer to pay for the delivered goods affected the passage of title between the *initial* contracting parties. References as early as the Twelve Tables[85] indicate that the purchaser did not acquire ownership of the property until the price was paid or a surety or pledge given. This view, however, may have developed in the late classical or post-classical period of Roman Law as the result of importation from Greek law. The rule as expressed within the Twelve Tables should be interpreted as merely stating that within the action of *mancipatio* no liability for defect of title could be established un-

84. Attention has been called by Professor Hall to the use of "good faith purchasers from the buyer" in section 2-401(1)(b) and "buyer in the ordinary course of business" in section 2-403(2). "[This area] should be nailed down by the Code . . . . If there is any virtue in uniformity, here is a place for it to be exercised." Hall, *Article 2—Sales—"From Status to Contract"?*, 1952 WIS. L. REV. 209, 219.

It has also been suggested that the scope of section 2-403(2) (3) "will to some extent be regulated by the judicial construction of the term 'entrusting'." Texas Legislative Council, *Analysis of Article 2 of the Uniform Commercial Code* 146 (1953). But note the explicit language defining "entrusting" within section 2-403(3).

85. TABLE VI, LAW III; DIGEST 18.1.53; 1 SCOTT, THE CIVIL LAW 68 (1932).

less it first be shown that the purchase price had been paid.[86] There is no trace of the rule expressed in the Twelve Tables as applying to *mancipatio* in classical texts, and only to the action of *traditio* in the post classical era.[87]

There are references in the Institutes of Gaius[88] and Justinian[89] as well as the Justinian Digest,[90] stating that the purchase *contract* can be consummated without payment of the purchase price. What may seem to be a conflict between these statements and the Twelve Tables may perhaps be reconciled by the fact that these chronologically later statements are limited to contract rights and do not apply to the question of title, and also that they apply only to the contract that did not require a formal writing.[91]

The Institutes of Justinian state that if the seller delivers possession, or if the seller is made secure through surety or pledge, or "if the party who sold the article *trusted* the purchaser,"[92] then title to the goods will pass. A similar expression is found in the Digest to the effect that the seller's title will not pass without payment or security "unless he rely upon the *good faith* of the purchaser without security."[93] These statements indicate that the seller may be held to have transferred title by delivery if he misjudges the good faith of his purchaser, trusting to receipt of immediate payment from him.

It was possible in Roman Law for the vendor to provide within the sales agreement that if the purchase money were not paid at an appointed time the property would not be considered as sold, but in the event the purchaser failed to comply with such provision it was necessary for the seller to elect to disaffirm.[94] There is conflict today as to whether this right of avoidance is effective in rem or is merely a personal right between the immediate contracting parties. Buckland characterizes this as a "vexed question."[95] Succeeding statements within the Code of Justinian, both given by Emperor Severus Alexander, seem to be in conflict.[96] Buckland asserts the better view to

86. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 137 (1925).
87. *Id.* at 122. See also BUCKLAND, A TEXT BOOK OF ROMAN LAW 231, 240 (1921).
88. GAIUS 3.1.39.
89. INSTITUTES 3.23.pr.
90. DIGEST 18.1.2.1.
91. "It is necessary, however, to understand that these rules are only applicable to purchases and sales which are made without writing . . . ." INSTITUTES 3.23.pr.
92. INSTITUTES 2.1.41. See also 1 SHERMAN, PRINCIPLES AND RULES, ROMAN READINGS IN ROMAN LAW 155 (1933).
93. DIGEST 18.1.19; 5 SCOTT, THE CIVIL LAW 8 (1932).
94. "[T]he latter clause is understood to mean if the vendor wishes that it should not be sold, because this provision is made for his benefit . . . ." DIGEST 18.3.2 (Pomponius on Sabinus Book XXXV).
95. BUCKLAND, A TEXT BOOK OF ROMAN LAW 493 (1921).
96. "If anyone should sell an estate on condition that if the balance of the purchase money was not paid within a certain time the property would revert to him, as he did not deliver possession under a precarious title, he cannot

be that rescission had no effect in rem even under Justinian.[97] The Justinian Digest, however, indicates that the sub-purchaser "can be deprived of his *property* by legal process." It is this section that the eminent, seventh century French jurist Domat relies upon as the basis of early French law protecting the original vendor.[98] Buckland's interpretation of the Digest finds considerable support in the fact that the Digest also states that the goods cannot be repossessed by the initial owner from the ultimate purchaser when the original transfer was induced either by fraud[99] or by theft.[100]

French Law: The brilliant Jean Domat mentioned above, in his treatise regarding the application of Roman law to French jurisprudence, commented that "it is natural that one should have power to sell a thing of which he is not master; and the sale subsists till the true owner makes his right appear, and dissolves the sale."[101] This comment, based upon a provision in the Justinian Digest, reveals that French law during this early period protected the original owner. Commencing with the Napoleonic Code, however, French law altered,

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bring an action to recover the land, but he can bring one on account of the sale." CODE 4.54.3.

"He cannot avail himself of the condition under which a sale was made, who after the day fixed for the payment of the purchase money has arrived does not choose to bring an action to recover the property, but prefers to bring one to collect the interest on the price." CODE 4.54.4.

97. BUCKLAND, A TEXT BOOK OF ROMAN LAW 494 (1921).

98. "There is no doubt whatever that anyone can sell property belonging to another, for there is a sale and purchase in this case, but the purchaser can be deprived of the property by legal process." DIGEST 18.1.28 (Ulpianus on Sabinus, Book VLI). See also 5 SCOTT, THE CIVIL LAW 9 (1932). For discussion of Domat's application of this section in French law, see text and note 102 *infra*.

99. "If *fraud* is proved to have taken place, the vendor will not have a right to bring an action to recover the property, against the person to whom the purchaser transferred the ownership, but he will be entitled to one for complete restitution from him with whom he made the contract." DIGEST 4.64.10 (Emperors Diocletian and Maximian to Severus). 13 SCOTT, THE CIVIL LAW 101 (1932).

A bona fide possessor, however, who acquired his possession in good faith from a non-owner who had been guilty of fraud would not be able to use the *actio publiciana* to prevail over the defrauded initial vendor. See DIGEST 6.2.12 (Ulpianus on the Edict Book XVI).

100. "An action arising from *theft* can be brought against a son under paternal control, for no one is ever liable to an action of this kind (recovery of stolen property) but the party who committed the theft or his heirs." DIGEST 13.5 (Paulus on Sabinus Book IX).

"If indeed, the *thief* has surrendered them [goods], then there is no doubt that suit for their recovery cannot be brought . . . ." (Emphasis added.) DIGEST 13.8 (Ulpianus on the Edict Book XXVII). See also 4 SCOTT, THE CIVIL LAW 161 (1932).

"We may say that the Roman system did not permit the seller both to have his cake and eat it. If he distrusted the buyer's good faith or solvency, he need not deliver the article until payment was made or else he could protect himself by some form of personal or real security. But he could not even by special provision dispense with such security and still get the benefit of it." RADIN, ROMAN LAW 227 (1927).

101. DOMAT, CIVIL LAW, Title II, 4, 13. Domat based this section on DIGEST, 18.1.28.

and today article 2279 of the French Civil Code provides that when the initial owner voluntarily delivers possession of the chattel to the intermediate transferee (whether through sale or bailment), and the intermediate party parts with possession to a stranger who takes true possession in good faith, then the initial owner is limited to his remedy against his immediate transferee.[102]

Should the intermediate party have acquired his possession of the chattel due to loss or theft from the true owner, and the chattel finds its way into the hands of a good faith purchaser, the initial owner must bring his action for repossession within three years. If the ultimate purchaser acquired the lost or stolen goods at a fair, market, public auction or from a professional dealer in similar objects, then the owner must also reimburse the purchaser to the extent of the price he paid.[103]

Russian Law: Section 60 of the Russian Civil Code provides that "Where a person in good faith has acquired property not directly from the owner, the latter shall have the right to claim his property (section 59) only if such property was lost by the owner or stolen from him. . . ." The purchaser must have acquired the chattel in good faith, but the Russian code merely defines a good faith owner as one who did not know and was not required to know that the person from whom he acquired the property had no right to alienate it. The Russian rule is neither as strict as the Roman *ubi rem meam invenio, ibi vindicto* (reclaim my thing whereever I find it), nor as liberal to the ultimate buyer as the current French position expressed by the maxim, *en fait de membles la possession vaut titre* (where movables are concerned, possession is considered equivalent to title).[104]

German Law: The German Civil Code provides that an alienation by way of sale makes the acquirer also owner, even if the property did not belong to the transferor, unless bad faith is shown.[105]

English Law: Previous attention has been given the English eighteenth and nineteenth century common law development in this area and its influence upon the early American decisions.[106] Today the worthless check-bona fide purchaser problem is limited at the ap-

102. FRENCH CIVIL CODE art. 2279. "A comparison of Article 3506 of the Louisiana Civil Code, which provides for a three year prescription of ownership to movable property except that which was stolen or lost, with the corresponding Article 2279 of the French Civil Code, which does not require a delay of three years to protect the good faith possessor unless the property was lost or stolen, will reveal an intent of the Louisiana Legislature not to follow the French law, but rather to maximize the protection of the original owner." Note, 25 TUL. L. REV. 146, 149 (1950).

103. FRENCH CIVIL CODE art. 2280.

104. R.S.F.S.R. § 60 (Russian Civil Code); see 2 GSOVSKI, SOVIET CIVIL LAW 72, 73 (1949). *Italy:* ITALIAN CODE § 1448, 710; SHERMAN, ROMAN LAW IN THE MODERN WORLD 344, n.38 (1922).

105. GERMAN CIVIL CODE § 932 (1896); Waite, *Caveat Emptor and the Judicial Process*, 25 COLUM. L. REV. 129, 142 (1925).

106. See notes 18-26 *supra.*

pellate level almost exclusively to the transfer of automobiles. However, twentieth century decisions have permitted the bona fide purchaser to prevail over the initial owner. These judgments are based upon either sections 18(1)[107] and 25(2)[108] of the English Sale of Goods Act, or section 9 of the English Factor's Act.[109] None of these decisions placed emphasis upon the fact that a worthless check was involved and the argument that the check being conditional thereby affected the title of the bona fide purchaser has never been proposed. In fact, the contract involved within one of the English rulings included the condition that the ownership of the vehicle would not pass until such time as the proceeds of the check had been credited,[110] and yet the court held that such stipulation had no effect upon the title of the bona fide buyer. Emphasis is placed upon whether the initial owner voluntarily delivers *possession* to the intermediate purchaser, and not upon whether the check is conditional upon completion of a cash sale agreement.

Law of Canada: The present day Canadian view is exemplified by the recent statement in *Henrickson v. Mid-City Motors Ltd.*:[111] "If the transaction between the plaintiff and Paquette [intermediate party] had been a cash deal, that is if Paquette had given the plaintiff a check for $850, the full amount of the purchase price, and then obtained possession of the car, I would have no hesitation in holding that the property in the car as well as possession had passed to Paquette, and that until the transaction was set aside by reason of Paquette's fraud, he was able to convey good title to the car to an innocent purchaser for value."[112] Canadian decisions rely primarily upon section 27(3) of the Canadian Sale of Goods Act and thereby protect the bona fide purchaser.

Comparative Law Summary: With the exception of the Roman law where there is some disagreement, all of the foreign legal systems

107. Dennant v. Skinner, [1948] 2 ALL E.R. 29 (K.B.). English UNIFORM SALE OF GOODS ACT § 18(1) corresponds with UNIFORM SALES ACT § 19(1). The contract in the *Dennant* case specifically provided title would not pass until the check was cashed, but the court held it passed under section 18(1) of the Uniform Sale of Goods Act or that delivery on fall of auction hammer was unconditional. The Uniform Sales Act, section 19(1), is rarely used in worthless check cases. The possible conflict with the Uniform Sales Act, section 42, is reconciled in Note, 62 YALE L.J. 101, 102 (1952).

108. Du Jardin v. Beadman Bros., Ltd., [1952] 2 ALL E.R. 160 (Q.B.). See also Martin v. Whale, 117 L.T.R. 137, 140 (C.A. 1917). "A conditional agreement to buy is an agreement to buy within the Act." ENGLISH FACTOR'S ACT § 9.

109. See note 108 *supra*. The English view is based upon the application of the voidable title doctrine and upon statutory enactment, and has never been founded upon equitable estoppel. See AMES, LECTURES IN LEGAL HISTORY 253, 255, 256 n.3 (1943).

110. Dennant v. Skinner, [1948] 2 ALL E.R. 29 (K.B.).

111. 3 D.L.R. 276 (1951). Decisions from Quebec are excluded due to application of French law.

112. *Id.* at 279. The quotation is obiter dicta, the decision being based upon CANADIAN SALES OF GOODS ACT § 27.

considered have to varying degrees protected the bona fide purchaser when he obtained goods voluntarily delivered by the original owner to the intermediate purchaser as part of a cash sale agreement. Due to the contrast between these views, and those in the United States, together with the fact that the proposed Uniform Commercial Code proposes to shift the American decisions nearer to the approach now adopted in many foreign jurisdictions, it is advisable to consider whether there is moral or social justification for the adoption of one view over the other.

MORAL AND SOCIAL POLICY FACTORS

The desire for ease of commercial transferability of personal property has had marked influence upon the decisions within the area of the present problem. Proponents of both the position of the initial vendor and the bona fide purchaser allege that in transactions involving worthless checks their position will do more to encourage the free flow of trade. Those favoring the cash sale concept claim that if the risk of a worthless check were placed upon the original seller he would be reluctant to accept checks and would insist upon cash payment, thereby inconveniencing both buyer and seller in valid transactions.[113] In contrast, Williston suggests that the application of the voidable title concept encourages a non-restricted movement of goods in commerce.[114] The claim has been made that one of the basic reasons that the bona fide purchaser is protected in tri-party *fraudulent* transfer cases is "to prevent a stagnation of property,"[115] and the drafters of the proposed Uniform Commercial Code state that one basis for the proposed change rests upon recognition of "the commercial desirability of increasing the marketability of goods in the open market."[116]

An additional social factor which has had marked influence upon recent American decisions has been a change in the commodity involved, as well as the parties participating in the original transfer. Most late nineteenth and early twentieth century adjudications involved the sale of agricultural commodities sold by the farmer to the commercial merchant. The farmer was frequently subject to losing his livelihood through the exchange of an entire season's crop for a check later found to be worthless. Judicial solicitude for the position of the farmer is exemplified by the nineteenth century Georgia legislative

113. Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analogies*, 1 HASTINGS L.J. 111, 117 n.17; see Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S.W. 125 (1924).

114. 2 WILLISTON, SALES §§ 346, 346A (1948).

115. 2 FOMBLANQUES, EQUITY 413 (1835). See also 3 POMEROY, EQUITY JURISPRUDENCE § 778 (5th ed., Symons 1941).

116. HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE 105 (1955) [discussing § 2-403(2)].

enactment, effective to date, affording protection against the receipt of worthless checks in cash sales.[117] Today, however, if an intermediate purchaser intends to use the worthless check as a scheme to defraud, he finds the automobile more suitable for the accomplishment of his purpose. The position of the parties has also changed in modern times —the seller, rather than the farmer, is often an automobile dealer selling used cars, a position also often held by the intermediate purchaser. This shift is reflected in the Uniform Commercial Code's limitation to "a merchant who deals in goods of that kind."[118]

In determining where the risk of worthless check loss should properly be placed under present fact situations, consideration must be given to the avenues available to both innocent parties to protect themselves.[119] Application of equitable maxims will not furnish an adequate standard.[120] The seller, when presented with a non-certified check on a local bank, can telephone the bank to determine the presence of an account and its solvency. The seller may to a certain extent[121] protect his ownership in an automobile by retaining the certificate of title. Should the check be presented in the name of a firm, the seller can determine if the buyer has proper authority from the firm. Finally, the seller always has the alternative of demanding a certified check, or where time or distance discourages a satisfactory investigation, he may demand cash. The bona fide purchaser of an automobile may demand the vendor's certificate of title and/or bill of sale; but as previously observed, this does not always assure protection. He may also inquire of his vendor the time, place and person from whom the chattel was acquired, but it would be unreasonable to expect the bona fide purchaser to follow up this investigation to determine if there were an outstanding check unless the vendor indicates that the interval since acquisition of the chattel is relatively brief. If the intermediate party has given the worthless check with intent to defraud, the ultimate vendee's inquiry will frequently be useless.[122]

Cook has written that the principles applicable generally to bona fide purchasers are the result of various, sometimes confused, ideas of expedience, justice and supposed logic. As a principle in today's law, it can be defended, if at all, upon grounds of social policy and

117. GA. CODE ANN. § 96-110 (1937). See notes 66-70 *supra* for discussion.
118. UNIFORM COMMERCIAL CODE § 2-403(2). Protection, however, is extended to "any entrusting of possession."
119. Note, *The Cash Sale Presumption in Bad Check Cases, Doctrine and Policy Anomaly,* 62 YALE L.J. 101, 105 (1952).
120. See Vold, *supra* note 113, at 121, discussing the alleged "Janus-Faced," "he who" equitable maxim.
121. See text and note 58 *supra* for discussion of risk involved.
122. Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941) (considering the problem in terms of negligence). *But cf.* Coggill v. Hartford & N.H.R.R. 69 Mass. (3 Gray) 544, 550 (1854) ("It is the duty of the purchaser to inquire, and see that his vendor has a good title to the property which he undertakes to sell.").

business convenience.[123] Ballantine agrees, commenting that, "The doctrine of bona fide purchase cannot be regarded as based upon self-evident principles of natural justice. It is the expression of various more or less clearly perceived notions of expediency, justice and business policy."[124]

Vold, in considering the moral issue specifically applied to the worthless check-bona fide purchaser problem, cites the Ten Commandments of the Bible as justification for both positions. "Thou shall not steal" and "Thou shall not covet . . . anything that is thy neighbor's," favor the seller's position, while "Thou shall not bear false witness against thy neighbor," is a moral basis for affording relief to the good faith purchaser.[125]

There are other authors, particularly among Catholic writers, who agreed with Cook that the principles generally applicable to bona fide purchasers rest on grounds of social policy and expediency. But they also contend that the differentiation between worthless check cases and other types of transactions cannot be justified on moral grounds. As they view the matter the moral right to possess a thing does not pass from the real owner to the purchaser when the purchase is made with a worthless check. From the moral aspect, to purchase something with a worthless check is merely stealing, there being no transfer of ownership. The basic moral principle involved is based upon the Roman legal expression *res clamat domino* (a thing cries out for its owner). The bona fide sub-purchaser possesses a chattel, the moral title to which resides in the first seller. The bona fide purchaser therefore is morally obligated to relinguish actual possession, returning the chattel to the one from whom he purchased it when possible; and demand from him the amount of money paid. If the bona fide purchaser's payment can not be recovered by him from the intermediate defrauder, then he must bear the loss. The real owner can vindicate that which is his own wherever he may find it. If he should discover the chattel in the possession of the bona fide sub-purchaser he may at once reclaim it, and the bona fide purchaser must bear the loss. These principles are applicable to all cases including both transfers induced by worthless checks and by fraud.[126]

The *Mishnah*, interpreting and commenting upon the Five Books of Moses, includes within the division on damages[127] a discussion of

123. Cook, *The Alienability of Choses in Action: A Reply to Professor Williston*, 30 HARV. L. REV. 449, 477 (1917).

124. Ballantine, *Purchase for Value and Estoppel*, 6 MINN. L. REV. 87, 91 (1922).

125. Vold, *supra* note 113, at 124.

126. 2 SUMMA THEOLOGIAE MORALIS § 438 (27th ed., Noldin & Schmitt 1941); 2 SUMMA THEOLOGIAE MORALIS § 299 (3rd ed., Merkelbach 1938). The author desires to express his appreciation for the assistance of Rev. James Orford, S.J. Marquette University, regarding the Catholic moral view on this problem.

127. Danby's English Translation of the *Mishnah*, Fourth Division, Nexikin (Damages) 331-456 (1933).

the rights of innocent purchasers of stolen articles. It is there provided that the article must be returned to the owner, but unless the thief is well-known, the owner must pay to the buyer the amount of money which was given to the thief.[128]

CONCLUSION

The Uniform Commercial Code proposes a change within the area here reviewed, that will guide American decisions in the direction of present European Civil Code countries. This will produce a marked change in the worthless check-bona fide purchaser rulings in a majority of American jurisdictions. Pennsylvania, without a decision to date despite its adoption of the Code, must serve as a bellwether in this regard. Opinions of practising Pennsylvania attorneys, who will be the first to note the change, will deserve serious consideration.[129]

In New York the Law Revision Commission, in temporarily rejecting the proposed Uniform Commercial Code, has not specifically referred to the Code sections under consideration. Their summary report to the New York legislature indicated that although they approve the basic innovation in sales law represented by the treatment of "title" in Article 2, they question some of the provisions redefining the incidents of risk of loss.[130] Although the report generally approves the distinction between "merchants" and others, it doubts the appropriateness of the distinction for some provisions and notes difficulty of application in other cases.[131] The proposed alterations of the New York Law Revision Commission are under study by the Editorial Board of the Uniform Commercial Code,[132] and the effect of the proposed revisions on the cash sale problem will merit close attention.

128. "If a man recognized any of his utensils or books in another's hands and the report had gone forth in the city that such things had been stolen, he that had bought them may swear to him how much he had paid and take [this price from the owner and restore the goods]." MISHNAH, Div. IV, Baba Kamma 10.3.

Rabbi J. L. Kadushin in the CODE OF JEWISH JURISPRUDENCE, part VI, c. 356, § 2, translates § 116 of the Baba Kamma to read "[T]he owner must return to the buyer the money which was given to the thief, *on account of the protection of the business market . . . .*" (Emphasis added.) This indicates the reason for reimbursement was commercial as well as moral.

129. Levy, *Uniform Commercial Code in Operation*, 61 COM. L.J. 91 (1956).

130. *Report of the Law Revision Commission to the Legislature Relating to the Uniform Commercial Code*, Legis. Doc. No. 65(c), p. 42 (1956).

131. *Id.* at 43.

132. Malcolm, *The Uniform Commercial Code: Current Status and Future Prospects*, 10 BUSINESS LAW., Jan. 1955, p. 3.