Vanderbilt Law Review

Volume 9
Issue 5 *Issue 5 - August 1956*

Article 8

8-1956

Creditors' Rights and Security Transactions -- 1956 Tennessee Survey

Paul J. Hartman

CREDITORS' RIGHTS AND SECURITY TRANSACTIONS—1956 TENNESSEE SURVEY

PAUL J. HARTMAN*

RECORDING STATUTES

Possession of Land Under Contract of Sale as Notice to Subsequent Purchaser of the Land: There is a security transaction facet in the ejectment case of *Harris v. Buchignani*,[1] decided by the Tennessee Supreme Court, which should be given some attention. In that case, by clear implication, the court put forth some disturbing doctrine relative to priorities under the Tennessee recording statute. Without specifically mentioning it, the court appears to have disavowed and repudiated the doctrine that possession of property inconsistent with the record title holder is notice to a subsequent deed of trust lender so as to prevent the lender from qualifying as a bona fide purchaser from the makers of the deed of trust. In Tennessee a deed of trust lender is a *purchaser* and *not a creditor*, within the purview of the recording statutes of Tennessee.[2]

In the *Harris* case, Simms and wife, the owners of certain real estate, executed a contract of sale of that real estate to the defendants in this ejectment suit, Martha Harris and her husband. This contract was executed in 1925 but was not recorded. However, the Harris' took possession of the property and occupied it continuously until ousted by the present suit. In 1926, Simms and wife (the owners of the same real estate) executed a deed of trust to the Union Planters Bank & Trust Company as trustee to secure the payment of an indebtedness. This deed of trust was promptly recorded. In 1928, Simms and wife (the owners of the same real estate) executed a warranty deed to Martha Harris, which was duly recorded. Presumably, this deed was executed pursuant to the contract of sale which the Simms' made to the Harris' in 1925. This deed was duly recorded. In 1929, the Trust Company foreclosed its 1926 deed of trust on the property in question, and a trustee's deed was executed to Moore and Buchignani. Subsequently, Moore executed a quitclaim deed conveying his interest in the subject property to Buchignani, the plaintiff. This deed, too, was duly recorded.

The present case is an ejectment suit by the plaintiff, Buchignani,

*Professor of Law, Vanderbilt University; member, Tennessee Bar.

1. 285 S.W.2d 108 (1955). An earlier round of this protracted litigation is the subject of comment in Trautman & Kirby, *Real Property—1954 Tennessee Survey*, 7 VAND. L. REV. 921 (1954).

2. Savings, Building & Loan Ass'n v. McLain, 18 Tenn. App. 292, 76 S.W.2d 650 (E.S. 1934).

against Martha Harris, who was an equitable owner under an unrecorded contract of sale made in 1925 and a holder of the legal title under her recorded deed in 1928, and who continued to occupy the premises from the date of her contract of sale in 1925 until ejected by the present suit. The Supreme Court of Tennessee affirmed a judgment for the plaintiff. It held that the recorded trustee's deed under the foreclosure of the recorded deed of trust, which was executed and recorded subsequent to the unrecorded contract of sale from Simms to Harris, and which deed of trust was recorded prior to the recording of the warranty deed to the purchaser under the contract of sale (Simms to Harris), conveyed good title to the grantee under the trustee's deed. Nothing was said by the court about the effect on plaintiff's title of the possession of the land by the Harris' during the entire period, including the time when the deed of trust was executed and foreclosed. Specifically, nothing is said by the court about the effect on the deed of trust, which is the immediate source of plaintiff's title, of the defendant's possession under contract to purchase when the deed of trust was executed.

The Tennessee recording statute provides that instruments, such as the contract here involved, must "be acknowledged and registered" or they will be "null and void as to existing or subsequent creditors of, or bona fide purchasers from, the makers without notice."[3] True, defendant's (Harris) contract of sale was not recorded until after the execution and recordation of the deed of trust. However, it is most significant to note that an unrecorded instrument is null and void only as to "subsequent creditors of, or bona fide purchasers from, the makers without notice." As previously pointed out, a lender under a deed of trust in Tennessee is in the category of "purchaser," rather than that of "creditor";[4] hence the lender must fall in the category of a bona fide purchaser without notice; otherwise he is not protected by the Tennessee recording statute. In short, under the Tennessee statute unless the lender under a deed of trust can qualify as a "bona fide purchaser . . . without notice," a prior unrecorded instrument is not void as to him. Moreover, Tennessee case law leaves no doubt that a contract or agreement to convey (contract between Simms and Harris) is such an interest as will prevail as against a subsequent purchaser with notice.[5] Hence, under previous Tennessee decisions, plaintiff's title depends upon whether or not he had notice of the defendant's contract of sale with Simms in 1925. The Tennessee case law makes it abundantly clear that notice of a prior interest, which will

3. TENN. CODE ANN. §§ 64-2603, 64-2604 (1956).

4. See note 2 *supra*.

5. Williams v. Title Guaranty & Trust Co., 31 Tenn. App. 128, 212 S.W.2d 897 (E.S. 1948).

be effective to charge a subsequent purchaser with knowledge of its existence, may be either direct information of the prior right or it may consist of information or facts from which actual knowledge may be inferred.[6] By the overwhelming weight of authority, including Tennessee, possession of a person not the record owner is a large source of inquiry notice, and a purchaser takes the land subject to any rights of the occupier that might be disclosed by a reasonable inquiry.[7] Not only had the defendant been in possession of the property for six months before the deed of trust was executed, but during 17 years of her possession she was protected by an injunction enjoining the present plaintiff and others from taking any action to dispossess her or eject her from the property.

Knowledge of defendant's interest in the property, under her contract to purchase, was imputable to the lender under the deed of trust and to the subsequent purchasers under the foreclosure of the deed of trust by virtue of the inquiry notice through defendant's possession; hence, plaintiff's claim to title should accordingly yield.[8]

TRUST RECEIPTS

Right of Finance Company to Repossess Automobile as Against Purchasers from Dealer: Since the last issue of the Tennessee Survey, the courts in Tennessee have had occasion to consider various facets of the Uniform Trust Receipts Act, adopted in Tennessee[9] and thirty other states.[10]

The "trust receipt" as a financing device had its birth in the importing business.[11] For more than half a century Eastern importers have been financing their imports by this device. As worked out at common law the gist of the transaction was that the foreign seller would draw on the importer's banker for the price, attaching order bills of lading covering the merchandise to the draft. The importer's banker would meet the drafts and take title to the bills of lading for security. The banker would then surrender possession of the bills of

6. *Ibid.*

7. Possession of a grantee under his unregistered deed is notice of his right, and such title of the prior grantee under such circumstances is the better title. Davis v. Cross, 82 Tenn. 637 (1885). See Nikas v. United Constr. Co., 34 Tenn. App. 435, 447-48, 239 S.W.2d 41, 46 (W.S. 1950). See 4 AMERICAN LAW OF PROPERTY § 17.12 (Casner ed. 1952) for almost a full page of case citations from many of the states, supporting this proposition.

8. Williams v. Title Guaranty & Trust Co., 31 Tenn. App. 128, 138, 212 S.W.2d 897, 901-02 (E.S. 1948).

9. TENN. CODE ANN. §§ 47-1001 to -1019 (1956).

10. See 9A U.L.A. 171 (Supp. 1955) for a list of states having adopted this Act.

11. These general introductory remarks about the "trust receipt" and the Uniform Trust Receipts Act are based primarily on the commissioners' prefatory note to that Act. 9A U.L.A. 274 (1951). For a discussion of the trust receipt in Tennessee, see Comment, 22 TENN. L. REV. 392, 393 (1952).

lading for some necessary limited purpose such as reshipping or restoring the goods, or to process the goods (roasting coffee, tanning hides, throwing silk). On receiving the bills of lading, the importer would sign a trust receipt, acknowledging that title still remained in the banker, and agreeing to whatever limitation was imposed on the importer's ability to deal with the goods in question.

With the increasing importance of the automobile industry, the finance companies and banks who financed the purchase of automobiles by dealers from manufacturers turned to the trust receipt device to maintain security in the cars in order to cover their advance of the price. At first the courts sustained the validity of this security device, although it was unrecorded. More and more, however, the courts have tended definitely to deny validity of the unrecorded trust receipt as against bona fide purchasers from the dealer, as well as against his creditors. The net result, after much study, was the proposed Uniform Trust Receipts Act; which regulates and validates the trust receipt as a security device when filing requirements are satisfied.

The only recording required by this Act is that of filing with the Secretary of State[12] a statement signed by lender and borrower, giving their addresses, to the effect that they intend to do business on the trust receipt plan with regard to a particular type of goods. There is no filing of the individual trust receipt executed by the finance company and the automobile dealer.

The Act defines the rights and duties of: (1) the financier (entruster); (2) the dealer (trustee); (3) purchasers (including pledgees, mortgagees and transferees in bulk) from the dealer or trustee; (4) creditors (lien creditors and general creditors) of the dealer or trustee.

In *Hewgley v. General Motors Acceptance Corp.*[13] the Tennessee Court of Appeals had to wrestle with a complex and troublesome question of the rights of an alleged purchaser of an automobile from a dealer who held the automobile under a trust receipt. The purchase of automobiles by the dealer from the manufacturer was financed by General Motors Acceptance Corporation (GMAC) which took the dealer's notes and trust receipts, stating that dealer held the automobiles in trust with title remaining in GMAC until the notes were paid. GMAC allowed the dealer to place the automobiles in his salesroom and empowered him to sell them. GMAC replevied one of the automobiles from the dealer, because he had defaulted in his payments. The instant case is a replevin suit against GMAC by an alleged purchaser of this automobile replevied by GMAC. Complainant (purchaser) claimed to be a bona fide purchaser for value without notice

12. UNIFORM TRUST RECEIPTS ACT § 13.
13. 286 S.W.2d 355 (Tenn. App. M.S. 1955).

of GMAC's right to the automobile ("Buyer in the ordinary course of trade"). As such a purchaser, complainant would take free of GMAC's rights. The alleged consideration for the purchase by complainant was a supposed prior credit which complainant had with the dealer, plus complainant's personal check for the balance of the purchase price. Complainant claimed that within an hour or so after he bought the automobile, he returned it to the dealer to be serviced and while in dealer's garage GMAC replevied the automobile. By complainant's own testimony title papers were never delivered to him by the dealer until after the automobile was repossessed by GMAC. GMAC denied that complainant was a bona fide purchaser for value without notice of GMAC's right to the automobile, and further alleged that the so-called sale was a conspiracy between the dealer and complainant to defeat GMAC's rights.

The chancellor who tried complainant's replevin suit held that he had failed to carry the burden of proving that he was a bona fide purchaser of the automobile without notice of GMAC's rights. After a thorough analysis of the evidence of the case, the court of appeals agreed with the chancellor and awarded judgment against complainant for the value of the automobile in question since complainant had sold the automobile when he repossessed it at the beginning of this suit. The court of appeals thought the retention of the automobile by dealer was fraudulent as to dealer's creditors, and that complainant-purchaser had not proved that he was a bona fide purchaser without notice of GMAC's rights.

It would serve no useful purpose to analyse the evidence here. There are, however, some facets of the law of this case that should be given a critical examination. The court's conclusion that the retention of the possession of the automobile by dealer constituted a fraudulent transaction as to GMAC is based on section 26 of the Uniform Sales Act. This section provides, in substance, that where a person having sold goods continues in possession of the goods, and such retention is fraudulent in fact, or is deemed fraudulent under any rule of law, a creditor of the seller may treat the sale as void.[14] In Tennessee a seller's retention of personal property after a sale is prima facie evidence of fraud as to another buyer from the seller, and puts on the buyer the burden of proving the transaction was fair and bona fide.[15] This rule, which makes retention of possession prima facie fraudulent as to *buyers,* the court applied in favor of a *creditor* of the dealer, (GMAC). The court then concluded that since the retention was fraudulent as to creditors it could be attacked successfully by GMAC under section 26 of the Uniform Sales Act as a void transaction.

14. UNIFORM SALES ACT § 26; TENN. CODE ANN. § 47-1226 (1956).
15. See cases cited in the instant opinion, 286 S.W.2d at 358.

Assuming that the court was correct in holding that the retention of possession by the seller is fraudulent as to creditors of seller, as distinguished from *buyers,* nevertheless there is considerable doubt that GMAC comes within the scope of creditors protected by section 26 of the Uniform Sales Act. Glenn, a leading authority in the field of fraudulent conveyances, states that the rule of law incorporated in section 26 of the Uniform Sales Act is based on an estoppel.[16] That is to say, the retention of possession by the seller is fraudulent because it misleads a creditor and works an injury to the creditor. The presently existing creditor may forbear to press his claim against the seller (his debtor) because he sees no change in possession of the article. The case of the subsequent creditor is that he extended credit on the faith of the seller's apparent ownership. As to each class of creditors, then, a misrepresentation works an injury. It therefore follows, concludes Glenn, that one who is fully acquainted with the actual situation from the outset (such as GMAC was) should not be protected by this section of the Uniform Sales Act branding retention of possession by the seller of a sold article as a species of fraudulent conveyance.[17] GMAC was not misled by dealer's possession of the automobile in the case at hand; GMAC had entrusted it to the dealer.

As between the dealer and GMAC, under the Uniform Trust Receipts Act, the trust receipt was valid and enforceable, and as against the dealer, GMAC was entitled to possession of the goods on default.[18] But when GMAC gives dealer the liberty of sale, and a sale is made to a "buyer in the ordinary course of trade"; then the buyer takes free of GMAC's security interest in the automobile, and not even the filing required by the Act will constitute notice of GMAC's security interest so as to defeat the buyer.[19] On this facet of the case the issue appears to be whether complainant (buyer) could qualify as a "buyer in the ordinary course of trade." The Uniform Trust Receipts Act defines "buyer in the ordinary course of trade" as a "person to whom goods are sold and delivered for new value and who acts in good faith and without actual knowledge of any limitation on the trustee's (dealer's)

16. 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 344-49 (1940). The Supreme Court of the United States in construing a Missouri statute of the same type as section 26 of the Uniform Sales Act said: "The object of the statute is to prevent parties from being misled by apparent ownership of property where a real ownership does not exist, but where a secret transfer has been made to another." Allen v. Massey, 84 U.S. (17 Wall.) 351, 354 (1872).

17. See 1 GLENN, *op. cit. supra* note 16, § 348. If GMAC did come within the protection of section 26 of the Sales Act, then the transaction in question would seem to fall within its condemnation. Where the seller retains possession of an automobile, except for a few hours when the buyer was using it, there is not such a delivery of possession as will prevent a levy by the seller's creditors. Horten v. Colonial Finance Corp., 90 Pa. Super. 460 (1927).

18. UNIFORM TRUST RECEIPTS ACT § 6; TENN. CODE ANN. § 47-1007 (1956).

19. UNIFORM TRUST RECEIPTS ACT § 9(2); TENN. CODE ANN. § 47-1010(2) (1956).

liberty of sale, including one who takes by conditional sale or under a pre-existing mercantile contract with the trustee to buy the goods delivered, or like goods, for cash or on credit."[20] It is to be observed that this Act expressly protects a buyer in a purchase in due course on *credit* against the doctrine that a price as yet unpaid is not value.[21]

In the case at hand the court thought that in order to sustain complainant's claim as a bona fide purchaser, it was necessary for him to allege and prove that he had no notice of GMAC's right not only at the time of his purchase of the car, but also at the time of his actual payment of the consideration for it. The court then concluded that if it could be said that complainant proved the first of these requisites, it certainly cannot be said that he proved the second; for if, after receiving notice of GMAC's claim he could then have stopped payment of his check, he was not a bona fide purchaser. If the court believed complainant, then it appears that he had given value before he received actual notice of GMAC's claim to the automobile. Since the purchase of goods *on credit* constitutes value within the purview of the applicable section of the Uniform Trust Receipts Act, it seems plausible to contend that complainant gave value when he made the contract of sale, applied a $600 credit he had with dealer on the transaction,[22] and gave his personal check for the balance. The giving of a negotiable instrument constitutes giving value within the purview of the Negotiable Instruments Law, on the theory that it is possible for the instrument to get into the hands of a holder in due course.[23] In particular it seems that complainant gave value up to $600. Ostensibly, the court felt that complainant had actual knowledge of GMAC's security interest in the automobile at the time he made the contract of purchase with the dealer, and they could have so held. That would have defeated complainant's claim that he was a purchaser in the ordinary course of trade. The point of time when value actually is given could be become quite crucial in another case.

Right of Finance Company to Assert Lien on Unidentified Receipts from Sale of Auto by Bankrupt Dealer: In Re Harpeth Motors[24] involves the impact of the Bankruptcy Act on the trust receipt. Specifically this case called into question the rights of the entruster (C.I.T. Credit Corporation) to proceeds from cars which the trustee (dealer) had sold without remitting to the entruster. This was a bankruptcy

20. UNIFORM TRUSTS RECEIPTS ACT § 1; TENN. CODE ANN. § 47-1002 (1956).
21. UNIFORM TRUST RECEIPTS ACT § 9(3); TENN. CODE ANN. § 47-1010(3) (1956).
22. *Ibid.* Part of the value consisted of credit for a sum realized from sale of a previous automobile in Colonial Finance Co. v. DeBenigno, 125 Conn. 626, 7 A.2d 841 (1939).
23. Pennoyer v. Dubois State Bank, 35 Wyo. 319, 249 Pac. 795 (1926); see BRITTON, BILLS AND NOTES § 98 (1943).
24. 135 F. Supp. 863 (M.D. Tenn. 1955).

case in which the entruster insisted that it possessed priority by way of a lien over general creditors with respect to proceeds from seven motor vehicles which entruster had placed in the hands of the bankrupt-dealer for sale under duly executed trust receipts. The vehicles had been sold before bankruptcy and the proceeds therefrom could not be identified nor traced. Nevertheless the entruster asserted a prior secured claim against the bankrupt's assets to the extent of these proceeds. Credit Corporation's claim was resisted as a state created priority, which would be invalid under the Bankruptcy Act.

It was conceded that the transactions between the Credit Corporation and the bankrupt with respect to the seven vehicles were trust receipt transactions within the meaning of the Uniform Trust Receipts Act, and that the Credit Corporation as the entruster held duly executed trust receipts covering each of the motor vehicles. Moreover, more than four months prior to the filing of the petition in bankruptcy, Credit Corporation had duly filed with the Secretary of State in Tennessee, in conformity with the Act, the requisite "Statement of Trust Receipt Financing." Admittedly the seven vehicles were sold by bankrupt in the ordinary course of trade, and the proceeds from the sales were received by the bankrupt although they could not be identified among its assets.

The pivotal point of the case is whether section 10 of the Uniform Trust Receipts Act[25] creates a lien upon the dealer's (trustee) assets to secure payment of the Credit Corporation's (entruster) claim for the value of unidentifiable proceeds. So far as is pertinent, section 10 provides:

> [T]he entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows . . . (b) to any proceeds or the value of any proceeds (whether such proceeds are identifiable or not) of the goods, documents or instruments, if said proceeds were received by the trustee within ten (10) days prior to either application for appointment of a receiver of the trustee, or the filing of a petition in bankruptcy or judicial insolvency proceedings by or against the trustee, or demand by the entruster for prompt accounting, and to a priority to the amount of such proceeds or value . . . .

The federal district court held that section 10 of the Act created a lien upon trustee's (dealer) assets to secure payment of the value of the proceeds from the sale although the proceeds could not be identified nor traced. Consequently, Credit Corporation was given a preferred position over general creditors by reason of its lien security.[26] This preferential treatment would not have been allowed

25. TENN. CODE ANN. § 47-1011 (1956).

26. Credit Corporation's security claim was disallowed as to certain of the

had Credit Corporation's claim been considered a state created priority in the distribution of dealer's assets, which the court pointed out. The Bankruptcy Act (section 67(c)) does respect and preserve certain state created liens, although they result in giving the lien creditor a preferred status with respect to general creditors of the bankrupt.[27]

In the *Harpeth Motors* case the court apparently is breaking new ground. No other case on this point has been found, and this opinion is an excellent one in support of the conclusion that the priority given the entruster over general creditors is a lien. However, before concluding that the entruster's position as a preferred lien creditor is impregnable, there is another stile that must be crossed. In 1952 Congress made a major overhaul of section 67(c) of the Bankruptcy Act, which governs the position given by the Act to state liens.

Section 67(c)(1) now provides that if a statutory lien is asserted against personal property for taxes or debts, and if the lien has not been enforced by sale before the filing of the bankruptcy petition, and if the lien is not accompanied by possession, it is subordinated to priority claims for administrative expenses and wages.[28] But much more sweeping in its condemnatory terms is section 67(c)(2)[29] by which Congress endeavored to invalidate as against the trustee in bankruptcy, so-called statutory "liens" which amounted merely to state priorities relabeled "liens."[30] This last provision of the Bankruptcy Act invalidates as against the trustee in bankruptcy statutory liens for debts owing to any person created or recognized by state law, on personal property not accompanied by possession, levy, sequestration, or distraint.[31]

The question immediately arises whether Credit Corporation's lien given by virtue of the trust receipts statute is a "statutory lien" within the invalidating provisions of section 67(c)(2) of the Bankruptcy Act.

---

vehicles because there had not been a timely demand for an accounting as required by the Uniform Trust Receipts Act.

27. 30 STAT. 564 (1898), as amended, 11 U.S.C.A. § 107(b) (1953).

28. 30 STAT. 564 (1898), as amended, 11 U.S.C.A. § 107(c) (1953). This section, as amended by the Act of 1952, provides in part: "Where not enforced by sale before the filing of a petition initiating a proceeding under this title, and except where the estate of the bankrupt is solvent: (1) though valid against the trustee under subdivision (b) of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this title . . . ."

29. 30 STAT. 564 (1898), as amended, 11 U.S.C.A. § 107(c) (1953).

30. See 4 COLLIER, BANKRUPTCY § 67.20(5) (14th ed., Supp. 1955).

31. "(2) the provisions of subdivision (b) of this section to the contrary notwithstanding, statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property, shall not be valid against the trustee . . . ." 66 STAT. 428 (1952), 11 U.S.C.A. § 107(c) (1953).

No case law expressly passing on this issue has been found. Apparently the point was not raised in *Harpeth Motors,* although by implication the court would seem to decide that Credit Corporation's lien is not of the "statutory" variety condemned by the Bankruptcy Act. Unfortunately, the leading authorities in the field are divided on the question whether the lien arising under a trust receipt is within the purview of "statutory liens." The editors of Collier on *Bankruptcy* express the view that the lien of a trust receipt is contractual rather than statutory, even though without the statute the agreement of the parties would not effectively create a lien under nonbankruptcy law.[32] Professor Hanna, on the other hand, suggests that the trust receipts lien may be considered "statutory."[33]

It would have been most helpful for the court to have made an express holding on this point in *Harpeth Motors.*

Prior to the 1950 amendment of the Bankruptcy Act[34] with respect to preferences, the trust receipt security device was open to attack by the trustee in bankruptcy on the ground that it constituted a preference within the purview of section 60 (a) of that Act.[35] Since that amendment, however, the trust receipt is no longer considered a preference.[36]

BANKRUPTCY

The rights of the Trustee in Bankruptcy under a trust receipt executed by a bankrupt automobile dealer have been treated in the immediately preceding discussion.

Dischargeability of Judgment for Bankrupt's Liability for Personal Injuries Caused by Reckless Driving: The recurring question of when an automobile accident claim is barred by a bankruptcy discharge was presented to the Tennessee Supreme Court in *Henderson v. Freshour.*[37] While a discharge in bankruptcy is a defense to certain kinds of liabilities of the bankrupt, it has no effect upon others. One of the types of claims against the bankrupt that is not dischargeable is that of a willful and malicious injury to the person or property of another.[38] In the *Henderson* case the court was faced

32. 4 COLLIER, BANKRUPTCY § 67.20(2) (14th ed., Supp. 1955).
33. Hanna, *Preferences as Affected by Section 60c and Section 67b of the Bankruptcy Law,* 25 WASH. L. REV. 1, 13-14 (1950).
34. 64 STAT. 24 (1950), 11 U.S.C.A. § 96 (Supp. 1955).
35. *In re* Harvey Distributing Co., 88 F. Supp. 466 (E.D. Va. 1950).
36. Coin Machine Acceptance Corp. v. O'Donnell, 192 F.2d 773 (4th Cir. 1951).
37. 287 S.W.2d 929 (Tenn. 1956).
38. The discharge releases the bankrupt from all of his provable debts which were duly scheduled in time for proof and allowance or which were held by creditors with notice or actual knowledge of the bankruptcy proceedings. Section 14 of the Bankruptcy Act, 30 STAT. 550 (1898), as amended, 11 U.S.C.A. § 32 (1953), authorizes a general discharge, while section 17(a) of the Act, 30 STAT. 550 (1898), as amended, 11 U.S.C.A. § 35 (1953), expressly reserves from the operation of the discharge debts not affected by the dis-

with the question whether a judgment for injuries sustained in an automobile collision was discharged by the bankruptcy of the tort feasor. The declaration in the tort action had alleged that the defendant (bankrupt), while driving his automobile at an excessive rate of speed and under the influence of intoxicants, ran a red light and struck the car in which plaintiff-claimant was riding. The declaration further charged that the negligence of the defendant "was so gross as to constitute a wanton and willful disregard" of plaintiff's rights. Plaintiff asked for and was awarded both compensatory and punitive damages. Defendant had pleaded guilty to a charge of driving while intoxicated.

The Tennessee Supreme Court affirmed the lower court's finding that the allegations of the declaration and the proof showed a willful and malicious injury to plaintiff's person; hence the judgment was not discharged by defendant's subsequent bankruptcy. As the court quite properly points out, the question of whether a judgment is dischargeable by bankruptcy must be decided from the record in the case in which the judgment was obtained.[39]

Prior to the *Henderson* case, Tennessee seemed committed to the view that a claim based on the negligence of the bankrupt-motorist—even gross negligence—does not constitute such a willful and malicious injury as to be nondischargeable.[40] The *Seward* case,[41] cited in the *Henderson* opinion, ostensibly further committed Tennessee to a very liberal stand toward the bankrupt-motorist. The *Seward* judgment was based on a declaration that alleged that the bankrupt "willfully," "wantonly," "recklessly," and "deliberately" drove his automobile to the left of the center of the highway and crashed headlong into plaintiff-claimant, while defendant was under the influence of intoxicants. Based on his declaration, the *Seward* claimant was awarded both punitive and compensatory damages. Nevertheless, the court was not satisfied that the injury was willful and malicious; and hence the claim was declared to be barred by the bankruptcy discharge.

No doubt the striking similarity of the *Seward* record and the *Hen-*

---

charge and lists several kinds of claims that are not barred by the discharge. Among the claims not discharged are those for willful and malicious injuries to persons and property. For a much more extensive discussion of claims barred by bankruptcy discharge, with particular emphasis on automobile accident claims and unscheduled claims, see Hartman, *Creditors' Rights —1953 Tennessee Survey*, 6 VAND. L. REV. 1049, 1059 (1953). An abbreviated treatment of the various facets of the dischargeability of automobile accident claims is given in the present discussion because of this extended earlier discussion of the pertinent aspects of the subject.

39. See, *e.g.*, 1 COLLIER, BANKRUPTCY § 17.17 (14th ed. 1940); 8 REMINGTON, BANKRUPTCY 196 (6th ed. 1955). For a recent case adopting this view, see *In re* Carncross, 114 F. Supp. 119 (W.D.N.Y. 1953), criticized in 11 WASH. & LEE L. REV. 176 (1954).

40. See Seward v. Gatlin, 193 Tenn. 299, 246 S.W.2d 21 (1952); Marbry v. Cain, 180 Tenn. 500, 176 S.W.2d 813 (1944); 1 COLLIER, BANKRUPTCY § 17.17 (14th ed. 1940).

41. Seward v. Gatlin, 193 Tenn. 299, 246 S.W.2d 21 (1952).

derson record is apparent, although the results of the two cases are diametrically opposite. In the writer's opinion, the *Henderson* case saps the vitality of the *Seward* rationale.[42] In so doing, the court reaches a result that not only is in line with much respectable authority denying a discharge where the bankrupt-motorist is guilty of recklessness,[43] but also a result that is more consonant with the purpose and objectives of the discharge feature of the Bankruptcy Act.[44] The *Henderson* decision serves an urgent public need for protection against the increasingly alarming menace of recklessness on the highways.[45]

A good many states have found a partially effective way to prevent negligent drivers from obtaining financial safety through a bankruptcy discharge. Statutes have been enacted giving authority to revoke driving permits until tort judgments are paid, and providing that a discharge in bankruptcy shall not relieve the judgment debtor from the revocation. The Supreme Court of the United States has upheld such a statute providing for the suspension of the license of the operator of an automobile because of an unsatisfied judgment against the operator arising from motor car operation by a discharged bankrupt, even though the bankruptcy petition was filed after the judgment.[46] The statute was sustained over the objection that it was in contravention of the Bankruptcy Act. States may now revoke driving permits until tort judgments are paid, without fear of such laws being struck down as a contravention of the Bankruptcy Act.

CHATTEL MORTGAGES

Right of Chattel Mortgagee to Take Possession of Article Covered

42. The *Seward* case was criticized in Hartman, *Creditor's Rights—1953 Tennessee Survey*, 6 VAND. L. REV. 1049, 1059-60 (1953), which suggested that the court might well have followed the reasoning and approach now employed in the *Henderson* case.

43. Harrison v. Donnelly, 153 F.2d 588 (8th Cir. 1946); *In re* Greene, 87 F.2d 951 (7th Cir. 1937); *In re* Dutkiewicz, 27 F.2d 334 (W.D.N.Y. 1928); Fitzgerald v. Herzer, 78 Cal. App. 2d 127, 177 P.2d 364 (1947); Tharp v. Breitowich, 323 Ill. App. 261, 55 N.E.2d 392 (1944), *cert. denied*, 323 U.S. 801 (1945); Reell v. Central Illinois Elec. & Gas Co., 317 Ill. App. 106, 45 N.E.2d 500 (1942); Rosen v. Shingleur, 47 So. 2d 141 (La. App. 1950); McClure v. Steele, 326 Mich. 286, 40 N.W.2d 153 (1949); Wegiel v. Hogan, 28 N.J. Super. 144, 100 A.2d 349 (1953); Greenfield v. Tucillo, 265 App. Div. 343, 38 N.Y.S.2d 758 (1st Dep't 1942); Doty v. Rogers, 213 S.C. 361, 49 S.E.2d 594 (1948); Saueressig v. Jung, 246 Wis. 82, 16 N.W.2d 417 (1944).

44. The purpose of the Bankruptcy Act, as stated by the most authoritive tribunal on the subject, is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." Williams v. U.S. Fidelity and Guaranty Co., 236 U.S. 549, 554-55 (1915). It seems pertinent to inquire, as did a Louisiana court, whether the Bankruptcy Act was ever intended to shield drunken, speed maniacs from the consequences of their indifference and utter disregard for the safety of others. Rosen v. Shingleur, 47 So. 2d 141 (La. App. 1950).

45. 11 WASH. & LEE L. REV. 176 (1954).

46. Reitz v. Mealey, 314 U.S. 33 (1941).

by Mortgage, Sell at Non-Judicial Sale, and Take Deficiency Judgment: The Tennessee Supreme Court had before it the problem of the right of a chattel mortgagee to repossess the mortgaged property, sell it, and then take a deficiency judgment in the case of *Third Nat'l Bank v. Olive.*[47] In placing a chattel mortgage on his trailer truck refrigerator unit, the mortgagor agreed in the mortgage document to permit the mortgagee to take possession of the chattel without legal process should the mortgagor default on his obligation. The document further authorized the mortgagee to sell at public or private sale. There was a default; the mortgagee did take possession without further consent of the mortgagor and without legal process; there was a non-judicial foreclosure and sale of the mortgaged chattel; and the mortgagee sued the mortgagor for the deficiency. The court of appeals reversed a trial court judgment for the plaintiff and gave judgment for the defendant-mortgagor on the ground that the chattel mortgagor could not, prior to a default by him, waive or consent to the mortgagee's taking possession of the property in case of default. In reversing the court of appeals and affirming the trial court deficiency judgment for the plaintiff-mortgagee, the Supreme Court thought that the court of appeals erroneously applied the doctrines of conditional sales to chattel mortgages in holding that the taking of possession of the trailer and sale were void. The Supreme Court thought that the conditional sale and chattel mortgage were so basically different that different rules applied to the chattel mortgage. A Tennessee statute regulates the foreclosure of conditional sales,[48] but there is no such statute applicable to chattel mortgages. Hence, the parties forge their own terms, by contract, relative to the foreclosure of chattel mortgages.

Actually, there does not appear to be anything in the Tennessee statute relating the foreclosure of conditional sales which says that the conditional buyer cannot validly consent in advance (in the conditional sales agreement) to the vendor's taking of possession in the event the buyer defaults. In fact, the court of appeals has held that the buyer can validly consent in advance.[49]

The Supreme Court seems to have concluded properly that where the chattel mortgagee takes possession of the mortgaged property in an orderly manner without a breach of the peace, he may do so without legal process and without any further consent of the chattel mortgagor, who gave his consent in the case at hand in the mortgage instrument.[50]

47. 281 S.W.2d 675 (Tenn. 1955).
48. TENN. CODE ANN. §§ 47-1301 to -1313 (1956). For a discussion and comparison of the conditional sale and the chattel mortgage in Tennessee, see Comment, 22 TENN. L. REV. 392, 402-07 (1952).
49. Morrison v. Galyon Motor Co., 16 Tenn. App. 394, 64 S.W.2d 851 (E.S. 1932).
50. 2 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES §§ 705-12 (6th ed. 1933, Supp. 1951).

Likewise, the mortgagee has power to foreclose through a non-judicial sale.[51] Apparently there must be reasonable notice of the time and place of sale both to the debtor-mortgagor and to the public.[52] Although the agreement in the case at hand authorized the mortgagee to sell at a private sale without notice, the validity of that provision of the agreement was not before the court. Apparently, the mortgagee may sell at a private sale only where the mortgage gives the right to sell at public or private sale.[53]

The doctrine that the mortgagee in a real estate mortgage is forbidden to clog the mortgagor's equity of redemption seems to have little application, if any, in the field of chattel mortgages in Tennessee.

Effect of Failure to Specify Mortgaged Crops in the Instrument Where Farm Lies in Two Counties: "A mortgage is void as to property not described therein . . . ."[54] In *Dyersburg Production Credit Ass'n v. McGuire*[55] the Tennessee Court of Appeals was of the opinion that where the mortgagor's farm was in Dyer and Obion Counties and the chattel mortgage covered crops in Dyer County only, the mortgagee could not subject crops in Obion County to his mortgage. In this case the chattel mortgagee sued the mortgagor and two other defendants for the value of cotton and soy beans grown in Obion County allegedly covered by complainant-mortgagee's chattel mortgage. These products had been sold by the mortgagor to the other defendants. In deciding the case for the defendants, the court held that the evidence was not sufficient to establish that complainant's mortgage covered the crops in question. Complainant had further contended that the defendant-purchaser was familiar with the entire farm of the mortgagor and that was sufficient to warrant a holding that the mortgage did cover the crops in question. Of course, that argument carries no weight once the court had decided that the mortgage did not cover any crops in Obion County. As Jones puts it: "A mortgage is void as to property not described therein."[56] Extrinsic evidence may be used to identify a chattel covered by a chattel mortgage, but that evidence cannot be used to contradict or add to the written document.[57] Ex-

51. 1 DURFEE, CASES ON SECURITY 474-75 (1951); 2 JONES, *op. cit. supra* note 50, § 705.
52. 1 DURFEE, CASES ON SECURITY 474 (1951); 2 JONES, *op. cit. supra* note 50, § 708.
53. 1 DURFEE, CASES ON SECURITY 474-75 (1951); 2 JONES, *op. cit. supra* note 50, § 793.
54. 1 JONES, *op. cit. supra* note 50, § 55 (6th ed. 1933, Supp. 1951).
55. 289 S.W.2d 540 (Tenn. App. W.S. 1956).
56. See note 54 *supra*. A mortgage of all the cotton to be raised on a certain field described, does not include cotton grown on another field, even though that is the only cotton on the farm. Darr v. Kempe, 54 Ark. 91, 15 S.W. 14 (1891).
57. 1 JONES, *op. cit. supra* note 54, § 54.

trinsic evidence that would bring the crops in Obion within the scope of the mortgage coverage would add to the written document.

MATERIALMEN'S LIENS

Liens on Railroad Property for Rental of Machinery, and Repairs to the Machinery Used in Improving Railroad Property: In *Harris v. Cincinnati, N.O. & T. Pac. Ry.*[58] the Supreme Court of Tennessee was concerned with the scope of the statutory lien of subcontractors, laborers and materialmen against railroads. A Tennessee statute authorizes a lien on the railroad's property in favor of "Every subcontractor, laborer, materialman, or other person" for claims resulting from work and labor done, or material furnished, or services rendered with reference to such property.[59] The claim consisted of (1) rental of heavy earth-moving equipment used in making improvements on the railroad; and (2) repairs and replacements of parts and machinery used in the performance of the work. In affirming the chancellor, the Supreme Court held that the statute authorized a lien for the claim arising from the rental of the machinery which was used on the railroad construction. However, the claim for repairs and replacement of parts and machinery was not allowed to come within the scope of the lien statute. The gist of the reasoning of the court seems to be that the "use" of the dirt moving equipment was purchased and consumed in the repair of the railroad; hence the lien for the rental of the equipment was proper. But the dirt removing equipment itself was not purchased for use on the railroad; it remained the property of the contractor to be used by him elsewhere in other work; hence the repairs to that equipment were not materials or services rendered with reference to the railroad, and consequently did not come within the purview of the lien statute.

58. 280 S.W.2d 800 (1955).
59. TENN. CODE ANN. § 65-1011 (1956).