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Bad Checks for the Price of Goods

*William E. McCurdy**

A SELLER RECEIVES A CHECK from the buyer for the price of goods. When presented to the bank on which it was drawn, payment is refused. The buyer may, or may not, have had sufficient funds on deposit at the time the check was drawn, but insufficient when refused now although becoming sufficient immediately after the check was presented. Or the buyer may have known or have had reason to know that there would be insufficient funds to meet the check. Or the buyer never had an account at the bank. Or the one obtaining the goods may give a fictitious name and indorse the check with that name. Or he may impersonate another person and the check be a forgery. What property, if any, is transferred to the buyer? May the seller reclaim the goods from creditors of the buyer or even from a bona fide purchaser for value and without notice (including mortgagees and pledgees)? Is the answer in any, or all, of the above situations that if the check is bad no property passes except a wrongful possession? Does the property pass conditionally in reference to the buyer and his general creditors? Does the property pass subject only to avoidance for fraud (if present) on equitable principles?

Transfer of Property in Goods from Seller to Buyer— Development of Unconditional and Conditional

A sale of goods arises or results from an agreement whereby the property¹ in the goods is transferred by seller to buyer for a consideration termed the price.² In the early English law pos-

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¹ By "property" is meant the general property in the goods and not a special property interest (whatever its technical form) such as the interest of a bailee, lessee, or security holder. Uniform Sales Act, § 76(1). The general property may be legal (title) or equitable (beneficial). The special interest may also be legal (title or possession) or equitable (contract lien).

² Uniform Sales Act, § 1(2). In the English Sale of Goods Act, 1893, 56 & 57 Vict. ch. 71, § 1(1) a sale to be within that statute requires "a money consideration called the price." The American Act, § 9(2), provides that "the price may be made payable in any personal property." The primary purpose of the English Act was to codify and make certain for the "mercantile community" the existing common law. Although the American Act, recommended for enactment in 1906 by the Commissioners on Uniform State

(Continued on next page)

session and title to a chattel personal may have been considered synonymous.³ During the 12th and 13th centuries not only was delivery of the goods necessary for their transfer, but also payment of the price in whole or in part, or earnest money given and received. By 1500 it would seem that delivery and payment were not required if the property was transferred by deed, and that delivery was dispensed with, without deed, if price or earnest was paid; later, possibly by the 17th century, if express credit (deferred payment) was agreed. By the 18th century, if no express credit, implication of credit where the price was not paid was sufficient.⁴ Certainly, by the early part of the 19th century neither delivery nor payment was necessary to transfer the property in goods from seller to buyer⁵ although delivery remained important to perfect the sale in respect to a subsequent buyer from, or creditors of, a seller in possession.⁶

Although delivery and payment are not necessary for a sale (transfer of the property), in a fully executed sales transaction three elements are involved: transfer of property, delivery of possession, and payment of price. If all three are to occur simultaneously and concurrently, either by requirement of law or of agreement, the transaction is to be concluded on the spot (a spot

(Continued from preceding page)

Laws, and subsequently enacted in 34 states (including the District of Columbia), was based on the English Act, its primary purpose was to make uniform the law, with few exceptions the existing common law, of the states enacting it. See Report of Commissioners on Uniform State Laws, pp. 15, 22 (1902). See also McCurdy, Some Differences between the English and the American Law of Sale of Goods, 9 J. Comp. Leg. & Int'l. L. 1 (3d ser. 1927); McCurdy, Uniformity and a Proposed Federal Sales Act, 26 Va. L. Rev. 572-582 (1940); Williston, Sales § 1 (Rev. ed. 1948). Thus the price need not be paid, but only payable, that is it may rest in executory promise. See Uniform Commercial Code, § 2-106(1)—a present sale may be accomplished by the making of the contract. Despite a few early English cases to the contrary, due to ambiguous wording, this has long been the general view where the sale of goods section of the statute of frauds has been involved. A barter has also generally been considered a sale both at common law and under statutes of frauds in America. See Williston, *op. cit. supra*, §§ 56, 69. Barter is included in the Uniform Sales Act and the Uniform Commercial Code, but not in the Sale of Goods Act.

³ Maitland, *Seisin of Chattels*, 1 L. Q. Rev. 324 (1885); Ames, *Disseisin of Chattels*, 3 Harv. L. Rev. 23, 313, 337 (1889).

⁴ See Williston, *op. cit. supra*, note 2, §§ 350, 350a for a full discussion.

⁵ *Tarling v. Baxter*, 6 Barn & Cress. 360 (K. B. 1827); *Olyphant v. Baker*, 5 Denio 379 (N. Y. 1848).

⁶ *Knowles v. Horsfall*, 5 B. & A. 134 (1821); *Lanfeair v. Sumner*, 17 Mass. 110 (1821); *Sale of Goods Act*, 1893, § 25(1); *Uniform Sales Act*, §§ 25, 26. But see *Johnson v. Credit Lyonnais*, 3 C. P. D. 32 (1877); *Meade v. Smith*, 16 Conn. 346 (1844).

transaction) and is termed a "cash sale."⁷ If the property has been transferred, but there has been neither delivery nor payment, delivery and payment are in the absence of agreement to the contrary deemed concurrent, and the sale is one in which the seller has a lien (a situation also sometimes termed "cash sale").⁸ If delivery has been made pursuant to a sales agreement but the seller reserves the property in the goods until concurrent final payment, the transaction is a "conditional sale"⁹ (a technical designation since all three of these situations could appropriately be termed "conditional"). If, pursuant to the agreement, transfer of property and delivery of possession have taken place, only payment being deferred, the sale is (in legal terminology) one on "credit"¹⁰ (business terminology often uses the term "credit" to include all types of sales except the first or strict "cash sale"), and is unconditional.

Prior to the 18th century the spot cash transaction was probably the norm.¹¹ By the end of that century and the early 19th century the concepts of title and property and their transfer had been fully separated from possession and delivery, and the norm had become that of deferred delivery or payment or both (lien or credit).¹² Transfer of property between seller and buyer (sale) had come to depend simply on mutual assent, and since frequently no intention in this respect was expressly manifested between the parties, rules for ascertaining intention developed for typical situations.¹³ Thus in the case of an unconditional transaction involving specific goods in a deliverable state the first rule presumed that the parties intended the property to pass to the buyer on the making of the contract although delivery or

⁷ *Bussey v. Barnett*, 9 M. & W. 312 (1842); *Paul v. Reed*, 52 N. H. 136 (1872).

⁸ *Turner v. Benz Bros. & Co.*, 153 Wash. 123, 279 Pac. 398 (1929); *Bishop v. Shillito*, 2 B. & A. 329 (1819). If it is agreed that the buyer may take delivery and pay later (negating lien) and the buyer becomes insolvent, or the time for payment has arrived, before delivery has occurred, payment and delivery become concurrent conditions. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302 (6th Cir. 1895).

⁹ *Harkness v. Russell*, 118 U. S. 663 (1886).

¹⁰ *Stephens-Franklin Motors v. Lambro*, 71 Ariz. 389, 228 P. 2d 267 (1951).

¹¹ *Williston*, *op. cit. supra*, note 2, § 260.

¹² *Ibid.*

¹³ *Lingham v. Eggleston*, 27 Mich. 324 (1873), quoting *Blackburn, Sales*, 120. These Rules for ascertaining intention in typical situations have the effect of presumptions rebuttable by showing contrary intent. *Williston, Sales op. cit. supra*, note 2, §§ 264, 265, 270, 273, 278, 279.

payment or both were postponed.¹⁴ Unless a different intention appears this is the norm of the Sale of Goods Act¹⁵ and of the Uniform Sales Act.¹⁶ However, unless otherwise agreed delivery and payment are concurrent conditions (lien).¹⁷

Nevertheless, a sale may be intended to be conditional other than in the concurrence of delivery and payment.¹⁸ Depending upon the manifested terms of the transaction the parties may intend a true cash sale or a true conditional sale since the right of possession or property, notwithstanding delivery, may be reserved in the seller until certain conditions have been fulfilled.¹⁹ The conditional sale is easily identified since limitations upon delivery must be express.²⁰ Because the true cash sale is no longer the norm and such intention is rarely expressly stated, such a sale is not to be inferred except in the true spot transaction,²¹ typical of which is the sale over the counter in a retail store to a buyer who is not a credit customer.²² In such cases the seller's assent is absent or not definitive until the concurrent conditions have taken place (or until the parties manifest a contrary intent)²³ and the property in the goods has not passed to the buyer—if the buyer takes possession only a wrongful possession has been obtained. Under similar circumstances the same result would follow where property has pre-

¹⁴ *Tarling v. Baxter*, 6 B. & C. 360 (1827); *Dixon v. Yates*, 5 B. & A. 313, 340 (1833); *Olyphant v. Baker*, *supra*, note 5; *Goddard v. Binney*, 115 Mass. 450 (1874).

¹⁵ §§ 17 and 18, Rule 1.

¹⁶ §§ 18 and 19, Rule 1. And see also Uniform Commercial Code, § 2-401.

¹⁷ Sale of Goods Act, § 28; Uniform Sales Act, § 42.

¹⁸ Sale of Goods Act, § 1(2); Uniform Sales Act, § 1(3).

¹⁹ Sale of Goods Act, § 19(1); Uniform Sales Act, § 20(1).

²⁰ *Stephens-Franklin Motors v. Lambro*, 71 Ariz. 389, 228 P. 2d 267 (1951); *Taylor v. Industrial Accident Comm.*, 30 Cal. Rptr. 877 (2d Dist. 1963).

²¹ *Paul v. Reed*, 52 N. H. 136 (1872). Cf. *Bishop v. Shillito*, *supra*, note 8. An auction sale is usually regarded as a lien transaction. *Clark v. Greely*, 62 N. H. 394 (1882); *Harris v. Merlino*, 137 N. J. L. 717, 61 A. 2d 276 (1948).

²² *Bussey v. Barnet*, 9 M. & W. 312 (1842). In *Koman v. Holtgreve*, 207 Md. 85, 113 A. 2d 419 (1955) groceries and meat furnished customers to be paid for later in the week were held to be sales on credit, and not cash sales. See *Williston*, *op. cit. supra*, note 2, §§ 342, 343. But cf. *Stone v. Perry*, 60 Me. 48 (1872) where "terms cash" meant by usage payment within 10 days, and it was held a cash sale. It would seem that if deferred payment had a conditional effect, the transaction would be a conditional sale, or a contractual (equitable) lien. See *Taylor v. Gill Equipment Co.*, 87 Ga. App. 309, 73 S. E. 2d 755 (1952) and *In the Matter of Smithdale Industries, Inc.* (bankrupt), 219 F. Supp. 862 (E. D. Tenn. 1963).

²³ *Williston*, *op. cit. supra*, note 2, §§ 346, 346b; *Williston and Thompson*, *Contracts* § 730 (1937).

viously been transferred to the buyer but delivery and payment are to be concurrent.²⁴ In the one case, the seller's title, and in the other, his legal possessory right (lien)²⁵ would afford protection not only against the buyer and his creditors but also against purchasers from the buyer even though bona fide and for value.²⁶

But if there is an appreciable interval of time, however short, between the buyer's taking possession with the seller's assent and expected payment where the seller is not in control of the goods or equally in control with the buyer, the buyer is presumably obtained with the seller's assent not only possession but also the legal property in the goods. Thus in *Island Trading Co. v. Berg Bros.*,²⁷ it was held that if a seller delivers goods to a buyer who promises to return immediately with cash, a sale by the buyer instead to a bona fide purchaser for value is indefeasible.

Preconceived Intent Not to Pay the Price, and Fraud

The above discussion has assumed the absence of deception on the part of the buyer. A misrepresentation, fraudulent or material, may either induce or preclude mutual assent. In early English law, misrepresentation (as distinguished from duress) was not regarded as invalidating a transaction depending for legal effect upon mutual assent.²⁸ Ultimately the chancellor (later equity courts) would relieve the deceived party, against the law which upheld such unconscionably obtained advantage, by af-

²⁴ Williston, *op. cit. supra*, note 2, § 625a; Williston and Thompson, *op. cit. supra*, note 23, § 728.

²⁵ *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535 (1889); *Bishop v. Shillito*, *supra*, note 8.

²⁶ *Turner v. Benz Bros. & Co.*, 153 Wash. 123, 125, 279 Pac. 398, 399 (1929).

²⁷ 239 N. Y. 229, 146 N. E. 345 (1925).

²⁸ The common-law writ of deceit was apparently confined to frauds on the court. It was later extended to frauds on a person by an action on the case in the nature of deceit. 2 Pollock & Maitland, *History of English Law*, 535-6, (2d ed. 1952). Prior to *Pasley v. Freeman*, 3 T. R. 51 (1789) this action was available only in transactions induced by misrepresentation. That case extended the deceit action beyond transaction between the parties on a theory of aggression, stressing among certain other requirements intent and knowledge of falsity. In England and many American jurisdictions this action has not been extended to honest but negligent misrepresentation. *Heilbut, Symons & Co. v. Buckleton* [1913], A. C. 30. See *Holmes, J.*, dissenting in *Nash v. Minnesota Title & Trust Co.*, 163 Mass. 574, 40 N. E. 1039 (1895). In some it has been so extended. *Aldrich v. Scribner*, 154 Mich. 23, 117 N. W. 581 (1908); *Weston v. Brown*, 82 N. H. 157, 131 Atl. 141 (1925). See Williston & Thompson, *op. cit. supra*, note 23, § 1501.

fording him in personam aid to regain his former position,²⁹ and avoid the transaction. If however the fraudulent party obtaining a legal interest had transferred the interest to a bona fide purchaser for value and without notice, the position of such purchaser was not unconscionable and avoidance of his legal position was not permitted. The equity of a defrauded seller to avoid or rescind would thus be defeated by the legal interest not subject to equity interference.³⁰ A misrepresentation (fraudulent or material)³¹ must however involve a matter of fact.³²

In *Earl of Bristol v. Wilsmore*³³ it was held, where the buyer obtained possession of sheep with an undisclosed preconceived intent never to pay their price, that there "would be such a fraud as would vitiate the sale" and that the seller could maintain the legal possessory action of trover. The result was reached not simply because of the possible influence of the older cash sale norm but because of the undeveloped concept of fraud.³⁴ It was not until the celebrated statement of Bowen, L. J., in *Edgington v. Fitzmaurice*,³⁵ that a state of mind is just as much a fact as a

²⁹ 1 Pollock & Maitland, *History of English Law*, 189 (2d ed. 1952), 2 *id.* at 534-6; Plucknett, *A Concise History of the Common Law* 173, 617 (2d ed. 1936); 3 Pomeroy, *Equity Jurisprudence*, §§ 15-29, 31, 899 (5th ed. 1941); 5 Williston and Thompson, *op. cit. supra*, note 23, § 1525; Williston, *op. cit. supra*, note 2, § 624, 625a, 647. See also Ames, *Purchase for Value without Notice*, 1 Harv. L. Rev. 1 (1887); Schwartz, *The Bona Fide Purchaser Revisited: A Comparative Inquiry*, 42 B. U. L. Rev. 403 (1962).

³⁰ This is the historical and analytical explanation in English and American law. Another view was held in some American cases that the bona fide purchaser from a fraudulent person was protected on an estoppel theory. *Barnard v. Campbell*, 55 N. Y. 456 (1873), reargument denied, 58 N. Y. 73 (1874); *Parker v. Baxter*, 86 N. Y. 586 (1881). But see *Casey v. Kastel*, 237 N. Y. 305, 142 N. E. 671 (1932). See also *Van Duzor v. Allen*, 90 Ill. 499 (1878). This view was applied without reference to special facts other than a sale to a fraudulent buyer.

³¹ Avoidance or rescission is generally available for material honest misrepresentation as well as for fraud. 5 Williston and Thompson, *op. cit. supra*, note 23, §§ 1500, 1509; Williston, *op. cit. supra*, note 2, § 624.

³² See Restatement, *Contracts*, §§ 470 (what is misrepresentation), 471 (fraud, including concealment, and in some circumstances non-disclosure), 476 (frauds or non-fraudulent misrepresentation where material renders transaction voidable). See also Williston and Thompson, *op. cit. supra*, note 23, § 1531.

Where consent is precluded (fraud is the factum) rather than induced no transaction results (void). This is the case where one is led to believe that he is entering no transaction or that the supposed transaction is an entirely different one. Restatement, *Contracts*, § 475; 5 Williston and Thompson, *op. cit. supra*, note 23, § 1488; Williston, *op. cit. supra*, note 2, § 625.

³³ 1 B. & C. 514 (1823).

³⁴ See Williston, *op. cit. supra*, note 2, § 637; 5 Williston and Thompson, *op. cit. supra*, note 23, §§ 1496, 1521.

³⁵ 29 Ch. D. 459 (C. A. 1885).

state of digestion, that it became generally accepted that a misrepresentation of intent to perform is a misrepresentation of fact, and thus one so representing may be subject to avoidance or rescission or even to an action of deceit.³⁶

In *White v. Garden*,³⁷ a case presenting the same problem as in *Earl of Bristol v. Wilsmore*,³⁸ it was held that the sale was voidable (not void) and the legal action could not be maintained against a bona fide purchaser for value from the buyer, although it could have been maintained against the buyer and anyone not a bona fide purchaser. The nature of the seller's interest is clearly recognized as equitable; curiously the relief may be in an action at law. Both of these cases may have resulted not only from the traditional disinclination of equity to deal with non-unique chattels personal,³⁹ but also from the expensive and dilatory equity of the time.⁴⁰ Because of limited equity in some of the colonies and early American states, equitable rescission by a seller was available in a law action but only on equitable principles.⁴¹ Later this approach seems to have become general.⁴²

³⁶ In *Gallagher v. Brunel*, 6 Cow. 347 (N. Y. 1826) it was held that an undisclosed intent not to perform is not a misrepresentation of existing fact and that an action of deceit will not lie. The case was later overruled. In *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45 (1896), it was held that an action of deceit would lie for preconceived intent not to pay. Cf. *Burrill v. Stevens*, 73 Me. 395 (1882). See also *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670 (1930)—rescission; *Charpentier v. Oil Co.*, 91 N. H. 38, 13 A. 2d 141 (1940)—deceit; See also *Zimmerman v. U. S.*, 171 F. 2d 790 (5th Cir. 1949); *Robin & Randler Coaches v. Turner* [1947], 2 All E. R. 284. See further, *Restatement, Contracts*, § 473, accord; and Note, 57 Dick. L. Rev. 143 (1953).

In *California Conserving Co. v. D'Avanzo*, 62 F. 2d 528 (2d Cir. 1933) commented on in 46 Harv. L. Rev. 1344, 32 Mich. L. Rev. 407, it was held that extremely doubtful ability to pay is equivalent to an intent not to perform. Non-performance of a contractual promise however is not equivalent to an intent at the time of the contract not to perform. *McComb v. Brewer Lumber Co.*, 184 Mass. 276, 68 N. E. 222 (1903). See also 3 Pomeroy, *Equity Jurisprudence*, § 877d (5th ed. 1941).

³⁷ 10 C. B. 919 (1851).

³⁸ *Supra*, note 33.

³⁹ See *In re Wait* [1927], 1 Ch. 606 (C. A.). See also *McCurdy*, *Sales Transactions* 54-64 (1959).

⁴⁰ See *Dickens*, *Bleak House* (1853) preface and its fictional case of *Jarndyce v. Jarndyce*. See also *Plucknett*, *A Concise History of the Common Law* 188, 189 (2d ed. 1936) for the effect of the Common Law Procedure Act of 1854.

⁴¹ *Rowley v. Bigelow*, 12 Pick. 307 (Mass. 1832) (action will not lie against a bona fide purchaser for value); *Thurston v. Blanchard*, 22 Pick. 18 (Mass. 1839) (action of trover will lie against fraudulent buyer without demand and refusal or offer to return as a condition to bringing action). See further *Wilson*, *Courts of Chancery in the American Colonies*, in *Select Essays in Anglo-American Legal History* 779 (1908); *Fisher*, *The Administration of*

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Bad Checks. Condition or Fraud?

Where the buyer's note is taken by the seller for the price of goods which are concurrently delivered, it is generally held that the transfer of property is unconditional, and the goods can be reclaimed only on equitable principles where there is fraud or material misrepresentation.⁴³ Unless there is an express condition the sale is on credit.⁴⁴ Where, however, the buyer's check is immediately payable and⁴⁵ is taken for goods⁴⁶ contemporane-

(Continued from preceding page)

Equity through Common Law Forms in Pennsylvania, in *Select Essays, supra*, at 810.

⁴² *Mayer v. Thompson*, 128 Miss. 561, 91 So. 275 (1922)—not available against a bona fide purchaser for value; *Elliott v. Federated Fruit & Vegetable Growers*, 108 Cal. App. 412, 291 Pac. 681 (1930)—trover against the buyer. See also Glenn, *Rescission for Fraud in Sale or Purchase of Goods—Quasi Contractual Remedies as Related to Trover and Replevin*, 22 Va. L. Rev. 859 (1936).

⁴³ *Martin v. Green*, 117 Me. 138, 102 Atl. 977 (1918). Where the buyer's note or postdated check is taken for goods antecedently sold and delivered on credit not only would the transfer not be conditional but any fraud relating to the instrument would not make the transfer voidable. Cf. *Wagner Products Co. v. Adams*, 258 S. W. 2d 190 (Tex. Civ. App. 1953), commented on in 32 *Texas L. Rev.* 622 (1954), (postdated check taken in lieu of prior contemporaneous check).

The N. I. L. § 12 provides that a non-fraudulent post-dated check is not invalid. It generally has the effect of a note. See Brannan, *Negotiable Instruments Law* 230 (Beutel's 6th ed. 1938). See also *Uniform Commercial Code*, 3-114.

⁴⁴ Where a party's negotiable instrument is taken for a pre-existing or contemporaneously created obligation, the instrument may be taken as payment or as conditional payment. In the absence of expressed intention, conditional payment is presumed in all but a few jurisdictions which presume unconditional payment. The negotiable obligation may be taken in lieu of or as an absolute substitution of the antecedent obligation (accord and satisfaction) or in lieu of the simple obligation to pay the price of goods concurrently sold and delivered (merger). If taken as payment, the negotiable obligation is the only right available to the seller, unless he was fraudulently induced to take it. If conditional payment, the original obligation is suspended until dishonor. The debt, however, may be discharged by seller's lack of diligence in collection. See 6 *Williston and Thompson, op. cit. supra*, note 23, §§ 1875 F, 1875 G, 1875 H; 6 *Corbin, Contracts* § 1284 (1962 ed.). The *Uniform Negotiable Instruments Law* contains no provision concerning this matter. It is discussed however in Brannan, *op. cit. supra*, note 43, 895, 1128, in connection with sections 88 and 185 of the N. I. L. See also Daniel, *Negotiable Instruments*, § 1458 (7th ed. 1933); *Wilbank v. James Talcott, Inc.*, 106 Ga. App. 770, 128 S. E. 2d 333 (1962). The *Uniform Commercial Code*, 3-802, contains an express provision.

⁴⁵ An undorsed check of a third person is not presumed to be conditional. *Durant Milling Co. v. Hall*, 284 S. W. 2d 760 (Tex. Civ. App. 1955).

⁴⁶ The seller may refuse the buyer's check for justifiable cause. *Rossville Salvage Corp. v. S. E. Graham Co.*, 319 F. 2d 391 (3d Cir. 1963). If the buyer takes the goods notwithstanding without the seller's assent, such a case would involve the same principle as that in *Bishop v. Shillito, supra*, note 8, and *Ames v. Moir, supra*, note 25. See *Maxherman, Inc. v. Alper*, 210 App. Div. 389, 206 N. Y. S. 233 (1924).

ously delivered without express condition⁴⁷ (when otherwise concurrent passage of title and/or delivery would be intended) and the check is dishonored on due presentment, there are two principal views as to the effect of dishonor upon the transfer of property in the goods.⁴⁸

In *Sullivan Co. v. Larson*⁴⁹ where the buyer's check was returned by the bank marked "insufficient funds" it was held that indefeasible legal title passed to a bona fide purchaser for value from the buyer.⁵⁰ In an earlier Nebraska case, it was held that dishonor of a certified check as a forgery would not as a matter of law affect the title of a bona fide purchaser for value, the court saying: "The essential thing in the passing of title to personal property is that the vendor and the vendee intend that the title shall pass, and not what induced them to have that intention. But one who has been induced by fraud to part with title . . . may rescind the contract and recover back the property while title still remains in the fraudulent vendee, but he cannot recover it when title has passed to a bona fide purchaser for value."⁵¹ And in *Sullivan v. Wells*,⁵² where the buyer's check was returned for insufficient funds, the court considered the real question to be: "Did the seller assent to transfer the ownership in the goods? It can hardly be doubted that he did . . . But where

⁴⁷ *Sykes v. Carmack*, 211 Ark. 288, 202 S. W. 2d 761 (1947); *Pugh v. Camp*, 213 Ark. 282, 210 S. W. 2d 120 (1948); *Ohio Motors, Inc. v. Russell Willis, Inc.*, 193 Tenn. 524, 246 S. W. 2d 962 (1952); *Fisher v. Bullington*, 233 La. 368, 65 So. 2d 880 (1953). See *Hurwitz v. Carpenzano*, 329 Mass. 702, 110 N. E. 2d 367 (1953), 33 B. U. L. Rev. 47 (1953)—check taken on express condition that title was not to pass until check paid, held conditional sale; but *contra*, *Slaton v. Lamb*, 260 Ala. 494, 71 So. 2d 289 (1954); *Johnson Motor Co. v. Sims*, 37 Ala. App. 548, 72 So. 2d 124 (1954).

⁴⁸ The effect of the negotiable instrument as conditional payment has no direct or necessary application to the question of whether transfer of property in goods, for the price of which the negotiable instrument is given, is also conditional. The problems are entirely dissimilar. See *Williston, op. cit. supra*, note 2, § 346a; 3 *Williston & Thompson, op. cit. supra*, note 23, § 732. In *Casey v. Gallagher*, 326 Mass. 746, 96 N. E. 2d 709 (1951) it was held where a check is taken transfer of property is presumably conditional. In Massachusetts, however, a negotiable instrument was presumably payment in respect to an obligation. The difference between obligation and property transfer is not always observed. See *Wilson v. Commercial Finance Co.*, 239 N. C. 349, 79 S. E. 2d 908 (1954); *Carrow v. Weston*, 247 N. C. 735, 102 S. E. 2d 134 (1958); *Wilbank v. James Talcott, Inc.*, 106 Ga. App. 770, 128 S. E. 2d 333 (1942). An assumed analogy may have influenced the conditioned property transfer approach.

⁴⁹ 149 Neb. 97, 30 N. W. 2d 460 (1948).

⁵⁰ See also *Sullivan Co. v. Wells*, 89 F. Supp. 317 (D. Nebr. 1950).

⁵¹ 108 Neb. 801, 803, 189 N. W. 281, 282 (1922).

⁵² *Supra*, note 50.

the seller is induced to part with his property by fraud, the voidable title of the fraudulent buyer becomes an indefeasible title upon a bona fide purchase for value from the fraudulent buyer."⁵³

The second view holds the transfer of property in the goods conditional irrespective of fraud. In *Young v. Harris-Cortner Co.*,⁵⁴ at time of delivery of cotton the buyer gave two checks, payment of which was refused for insufficient funds, the buyer meanwhile having sold the goods to a bona fide purchaser for value. It was held that the seller could replevy the cotton, there being no lack of diligence in presenting the checks for payment, the court saying: "Looking to the intention of the parties, which is the governing principle, we are satisfied that . . . it was contemplated by the parties that the exchange of the cotton for the cash were to be concurrent acts, and an extension of credit . . . was never in the minds of the parties."⁵⁵

In commenting upon this view the court in *Sullivan Co. v. Wells* characterized the approach that a worthless check is no payment as "obviously unsound," the real question being whether the seller assented to the transfer of ownership in the goods, and "it can hardly be doubted that [he] did."⁵⁶

In the absence of express or clearly implied intent of the parties not to transfer ownership, it would seem that the conditional view is indeed unsound. If, as in *Island Trading Co. v. Berg Bros.*⁵⁷ the buyer obtains ownership where delivery was pursuant to his promise to get and bring cash immediately, it

⁵³ *Id.* at 319, citing, Williston, *op. cit. supra*, note 2, § 346a; Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N. W. 260 (1941); and Nebraska cases. See Commercial Credit Co. v. Click, 127 Ore. 130, 271 Pac. 36 (1928); Pettus v. Powers, 185 S. W. 2d 872 (Mo. App. 1945) commented on in 13 Mo. L. Rev. 211 (1948); Winter v. Miller, 183 F. 2d 151 (10th Cir. 1950); Pingleton v. Shepherd, 219 Ark. 473, 242 S. W. 2d 971 (1951) commented on in 3 Hast. L. J. 162 (1952). See also Sykes v. Carmack, 211 Ark. 288, 202 S. W. 2d 761 (1947); Guckeen Farmers Elev. Co. v. South Soo Grain Co., 172 Neb. 426, 109 N. W. 2d 728 (1962); Gen. Credit Corp. v. Bill Olsen's Motor, Inc., 147 Colo. 227, 363 P. 2d 489 (1962); Adams v. Greeson, 300 F. 2d 555 (10th Cir. 1962) (although express); Flate v. Nichols, 233 La. 171, 96 So. 2d 477 (1957); Jeffrey Motor Co. v. Higgins, 230 La. 857, 89 So. 2d 369 (1956).

⁵⁴ 152 Tenn. 15, 268 S. W. 125 (1925).

⁵⁵ *Id.* at 17, 268 S. W. at 126. The case has been followed in Tennessee. Cowan v. Thompson, 25 Tenn. App. 130, 152 S. W. 2d 1036 (1941), commented on in 17 Tenn. L. Rev. 272 (1942). Cf. Harbert v. Fort Smith Canning Co., 134 Kan. 240, 5 P. 2d 849 (1931)—purchaser from the buyer found not bona fide.

⁵⁶ *Supra*, note 50 at 319.

⁵⁷ 239 N. Y. 229, 146 N. E. 345 (1924).

would seem that the same result would obtain if the buyer upon delivery tells the seller to go get the buyer's cash and the seller agrees to do so. In this respect the check amounts to nothing more. There is usually a longer time interval contemplated. Deferred credit, however short in time, is inherent.⁵⁸

In *Young v. Harris-Cortner Co.*, the court advanced an additional reason: ⁵⁹ "A farmer brings his cotton, tobacco, or wheat to town for sale and sells same, and, as a general rule, is paid by check, although all of such sales are treated as cash transactions. If, in such a case, the purchaser can immediately resell to an innocent party and convey good title, it would follow that vendors would refuse to accept checks and would require the actual money, which would result in great inconvenience and risk to merchants engaged in buying such produce since it would require them to keep on hand large sums of actual cash. This would result in revolutionizing the custom of merchants in such matters." It is doubtful if the use of checks has been curtailed in jurisdictions following the contrary view.⁶⁰ Merchants are not likely to think in terms of protection against remote purchasers but rather, if dubious, upon inquiry and investigation of the buyer's substance and credit.⁶¹

In many cases purporting to follow the presumption of conditional transfer view,⁶² it has been or could have been found

⁵⁸ See *Ward v. Parker*, 151 So. 2d 108 (La. App. 1963).

Where a party's negotiable instrument is taken presumably as conditional payment for an obligation, the obligation is suspended pending payment. It is generally said however that where the instrument is taken for goods (circumstances indicating a cash sale) the transfer of the property is precedently conditional upon the instrument being honored. From this it would follow that whether the check is bad or good the transfer is still conditional. But it is not applied when the check proves good. *Mullen v. Farm Bureau and County Mutual Casualty Co.*, 21 Ill. App. 2d 280, 157 N. E. 2d 679 (1959). See further *Williston, Sales*, § 346a (Rev. ed. 1948).

⁵⁹ *Supra*, note 54 at 18, 268 S. W. at 127.

⁶⁰ A priori assumptions may prove unsound. Cf. *Crownhart, J. in Wick v. Wick*, 192 Wis. 260, 265, 212 N. W. 787 (1927).

⁶¹ See *Amols v. Bernstein*, *infra*, note 106, and *Phillips v. Brooks*, *infra*, note 92.

⁶² This view is often said to represent the weight of case authority. See in accord with this view *Gose v. Brooks*, 229 S. W. 979 (Tex. Civ. App. 1921), commented on in 35 Harv. L. Rev. 212 (1921); *Bustin v. Craven*, 57 N. M. 724, 263 P. 2d 932 (1953); *Flatte v. Kossman Buick Co.*, 265 S. W. 2d 643 (Tex. Civ. App. 1954); *McRae v. Bandy and O'Neal*, 270 Ala. 12, 115 So. 2d 479 (1960).

that the transfer was intended to be unconditional⁶³ or that there was a later waiver of the condition,⁶⁴ or that the seller was estopped.⁶⁵ In some it appeared that the transferee from the buyer was not a bona fide purchaser for value without notice.⁶⁶

In *South San Francisco Packing & Provision Co. v. Jacobsen*,⁶⁷ a check for the price given at time of delivery was refused payment for lack of funds. At the time the check was given the drawer's bank balance was sufficient. Meanwhile the buyer had resold the goods through a "factor" who held the fund which had been realized. It was found that there had been no fraud, but that delivery and payment were to be simultaneous: therefore, as between the parties no title had passed. Thus the seller was entitled to claim the fund over the general creditors.⁶⁸

⁶³ See *Wolfe v. Smith*, 80 Ga. App. 136, 55 S. E. 2d 675 (1949); *Volusia Discount Co. v. Alexander K-F Motors*, 88 So. 2d 302 (Fla. 1956); *Kelsoe v. Grouskay*, 70 Ariz. 152, 217 P. 2d 915 (1950). See also *Commonwealth v. Manooshian*, 326 Mass. 514, 95 N. E. 2d 659 (1950)—check in excess of the price, the seller giving the buyer "change." Cf. *Snyder v. Lincoln*, 156 Neb. 190, 55 N. W. 2d 614 (1952)—acceptance of personal check when contract required cash or certified check.

See also *Casey v. Gallagher*, 326 Mass. 746, 96 N. E. 2d 709 (1951); *Gerbe v. Pike*, 249 S. W. 2d 90 (Tex. Civ. App. 1952); *Stephen Burns, Inc. v. Trantham*, 305 S. W. 2d 66 (Mo. App. 1957); *Hudiburg Chevrolet, Inc. v. Ponce*, 17 Wis. 2d 281, 116 N. W. 2d 252 (1962) (Oklahoma law construed to apply conditional view only when check is for full amount, not for part only); *Valley Stockyards Co. v. Kinsel*, 369 S. W. 2d 19 (Texas 1963).

⁶⁴ *Pohl v. Johnson*, 179 Minn. 398, 229 N. W. 555 (1930) (undue delay in presenting check); *Motres de Mexicali, S. A. v. Bank of America*, 227 F. 2d 643 (9th Cir. 1955) (undue delay in repossessing goods). Cf. *Engstrom v. Benzel*, 191 F. 2d 689 (9th Cir. 1951), commented on in 37 Corn. L. Q. 477 (1952) (where check was ultimately paid).

See *Williston, Sales*, § 346b (Rev. ed. 1948). The Uniform Commercial Code, 3-503(2) has replaced the concept of reasonable time for presentment to a presumed reasonable time of 30 days in respect to drawer of a check and 7 days in respect to an indorser. These times refer to discharge and would not, it would seem, qualify 2-401(1) and 2-511, *infra*, notes 75 and 76.

⁶⁵ *Crescent Chevrolet Co. v. Lewis*, *supra*, note 53; *Commercial Finance Corp. v. Burke*, 173 Ore. 341, 145 P. 2d 473 (1944); *Plummer v. Kingsley*, 190 Ore. 378, 226 P. 2d 297 (1951) (Washington); *Watson Bros. Realty Co. v. Associates Discount Corp.*, 246 Iowa 483, 66 N. W. 2d 384 (1955). See also *Central Nat. Bank v. Rich*, 256 N. C. 324, 123 S. E. 2d 811 (1962); *McKee v. Peterson*, 29 Cal. Repr. 742 (1st Dist. 1963).

⁶⁶ *Davidson v. Conner*, 254 Ala. 38, 46 So. 2d 832 (1950); *Holt Motors, Inc. v. Casto*, 136 W. Va. 284, 67 S. E. 2d 432 (1951); *Commercial Credit Corp. v. McGriff*, 66 So. 2d 52 (Fla. 1953). Cf. *South Seattle Auto Auction, Inc. v. LeRoy Ladd, et al. Ltd.*, 230 Ore. 350, 370 P. 2d 630 (1962).

⁶⁷ 183 Cal. 131, 190 Pac. 628 (1920), commented on in 9 Calif. L. Rev. 78 (1920), 91 Cent. L. J. 260 (1920), 30 Yale L. J. 198 (1920).

⁶⁸ In *McKee v. Peterson*, *supra*, note 65, it was held that a seller delivering a bill of sale and an automobile title certificate to the buyer was estopped

(Continued on next page)

It has been frequently said in the cases where bona fide purchasers are not involved, that the property transfer is conditional between the parties.⁶⁹ In some cases it has been intimated and in a few held that the condition would not affect a bona fide purchaser without notice.⁷⁰ It would seem, generally, that the "conditional-between-the-parties" formula is not so limited.⁷¹

In *Blount v. Bainbridge*,⁷² it was held that while transfer of property is conditional between the parties the seller is estopped from reclaiming the goods from a bona fide purchaser for value without notice, delivery to the buyer being sufficient "external indicia" of the buyer's right to sell.⁷³ An automobile

(Continued from preceding page)

from reclaiming the automobile from a bona fide purchaser for value. Although the property transfer is said to be conditional between seller and buyer, a bona fide purchaser would not prevail over the seller absent estoppel. California cases were elaborately reviewed. See *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, 28 P. 2d 915 (1930).

⁶⁹ See *Weddington v. Boshammer*, 237 N. C. 556, 75 S. E. 2d 530 (1953) (funds deposited after seller "rescinded"); *Hickerson v. Con Frazier Buick Co.*, 264 S. W. 2d 29 (1953); *Commercial Standard Ins. Co. v. McCollum*, 207 F. 2d 768 (10th Cir. 1953) (New Mexico).

⁷⁰ See *Parker v. First Citizens Bank & Trust Co.*, 229 N. C. 527, 50 S. E. 2d 304 (1948) where it appeared that the buyer had died before the dishonored check was presented and it was held that the deceased buyer's "agent" lacked authority to resell. See also *Crescent Chevrolet Co. v. Lewis*, *supra*, note 53.

⁷¹ *Supra*, note 68.

⁷² 79 Ga. App. 99, 53 S. E. 2d 122 (1949).

⁷³ The court regarded the result reached as settled by the Georgia cases quoting from *Capital Automobile Co. v. Ward*, 54 Ga. App. 873, 875, 189 S. E. 713, 714 (1936), where it was said "It has been many times stated, and from practical necessity in the transaction of business should be adhered to, that possession of personal chattels, by virtue of which such person has been given dominion and control over the property as if it were his own, carries with it the presumption of ownership and consequent right of disposition of such chattel." This was regarded in that case as a special application of Georgia Code § 37-113 (estoppel). Code § 96-207 was also considered applicable (divesting—where one gives another evidence and indicia of right to dispose).

Code § 37-113 provided: "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear loss." See *Smith v. Norman Motors*, 84 Ga. App. 86, 65 S. E. 2d 699 (1951); *Gouldman-Taber Pontiac, Inc. v. Thomas*, 96 Ga. App. 279, 99 S. E. 2d 711 (1957); *Cook Motor Co. of Panama City, Inc. v. Richardson*, 103 Ga. App. 129, 118 S. E. 2d 502 (1961). See also *Peoples Loan & Finance Corp. of Rome v. McBurnette*, 100 Ga. App. 4, 110 S. E. 2d 32 (1959) (not a check case). In many of the Georgia cases the seller had delivered to a buyer who was a dealer, or had given him a bill of sale, or title certificate.

In *McRae v. Bandy & O'Neal*, 270 Ala. 12, 115 So. 2d 479 (1960) it was held that Georgia law operated only in Georgia in an automobile sale, but a later sale by the buyer in Alabama was governed by Alabama law which did not protect a bona fide purchaser.

had been sold at auction to a dealer. The court held that the condition applies only between the parties. The result is indistinguishable from the view of a sale being voidable for fraud (indeed the court so characterized it), except that even in the absence of fraud a buyer's transferee who was not bona fide would not prevail.

The view that the property transfer is conditional only as between seller and buyer would protect the seller against the buyer and his general creditors, which the approach of unconditional credit transfer would not do in the absence of fraud. This result can be supported on a theory of equitable lien.⁷⁴

Effect of Sales Acts

The Uniform Commercial Code provides that any reservation of title in goods "delivered to the buyer is limited in effect to a reservation of a security interest"⁷⁵ and that payment by check (subject to the provisions of Section 3-802) is "conditional and is defeated as between the parties by dishonor of the check on due presentment."⁷⁶

Neither the Sale of Goods Act nor the Uniform Sales Act has express provisions concerning the effect of accepting a check for the price. Provisions that a sale may be absolute or conditional⁷⁷ and that the seller may by the terms of the contract reserve the right of possession or property notwithstanding delivery⁷⁸ have been referred to above.⁷⁹ Both statutes provide that in the case of specific goods the property passes according to the intention of the parties⁸⁰ and they enact rules for ascertaining intention "unless a different intention appears" [setting forth typical situations]. These rules developed as presumptions at common law, and were carried into the statutes as such;⁸¹ but some courts have applied these rules only after attempting

⁷⁴ Cf. *Engstrom v. Benzel*, 191 F. 2d 689 (9th Cir. 1951); 37 Corn. L. Q. 477 (1952) and see *supra*, note 22. See also *McCurdy*, *Sales Transactions* 181-185 (1959).

⁷⁵ § 2-401(1). § 3-802 deals with effect on obligation.

⁷⁶ § 2-511.

⁷⁷ § 1.

⁷⁸ § 20.

⁷⁹ *Supra*, text at notes 19 and 20.

⁸⁰ Sale of Goods Act, § 17; Uniform Sales Act, § 18.

⁸¹ Sale of Goods Act, § 18; Uniform Sales Act, § 19.

to find intention independently.⁸² Although statutory treatment of the effect of a check is lacking,⁸³ consideration of the sections, taken together, shows that the cash sale is not considered the norm. Nevertheless in *Young v. Harris-Cortner Co.*, where the sale was by a farmer to a cotton broker the court after quoting sections 18(1) and (2) and 19(1) of the Uniform Sales Act said: "Upon principle we are unable to distinguish the instant case from that of a sale made over the counter where the seller was induced to accept a check as cash . . . the title not passing until the condition (the payment of the check) is complied with . . ." ⁸⁴ Cases arising under the Sales Act have not always fully considered its effect.⁸⁵ Some, however, have held that no change has been made in the common law.⁸⁶ In *Winter v. Miller*,⁸⁷ it was held that § 19 Rule 1 was contrary to the previous conditional view. Both the English and American Acts enact the general common law that a buyer from a seller who is not the owner acquires no better title than the seller had unless the owner is estopped or has given the seller actual or apparent authority,⁸⁸ but that a buyer in good faith, for value, and without notice from a seller having an unavoided voidable title acquires a good title.⁸⁹

The Sale of Goods Act re-enacted⁹⁰ a provision of the Factors Act of 1889⁹¹ to the effect that where a buyer obtains possession with the consent of the seller, any subsequent sale or other

⁸² See e.g. *Automatic Time Table Advertising Co. v. Automatic Time Table Co.*, 208 Mass. 252, 94 N. E. 462 (1911); *Handley Motor Co., Inc. v. Wood*, 237 N. C. 318, 75 S. E. 2d 312 (1953).

⁸³ *Supra*, note 77, 78, 80 and 81.

⁸⁴ *Supra*, note 54 at 17, 268 S. W. at 126.

⁸⁵ E.g. *Handley Motor Co., Inc. v. Wood*, 237 N. C. 318, 75 S. E. 2d 312 (1953); see also *Handley Motor Co. v. Wood*, 238 N. C. 468, 78 S. E. 2d 391 (1953) where the court refers to §§ 18 and 23 of the Sales Act but makes no mention of § 19. The conditional transfer view was thought to follow from the two sections considered.

⁸⁶ Such decisions are usually those following the full conditional or conditional-between-the-parties views. *Edwards v. Central Motor Co.*, 38 Tenn. App. 577, 277 S. W. 2d 413 (1955); *Keegan v. Lenzie*, 171 Ore. 194, 135 P. 2d 717 (1943), commented on in 42 Mich. L. Rev. 328 (1943); *Crescent Chevrolet Co. v. Lewis*, *supra*, note 53.

⁸⁷ 183 F. 2d 151 (10th Cir. 1950).

⁸⁸ Sale of Goods Act, § 21; Uniform Sales Act, § 23.

⁸⁹ Sale of Goods Act, § 23; Uniform Sales Act, § 24.

⁹⁰ § 25(2).

⁹¹ 52 & 53 Vict. ch. 45, § 9. This provision limits the operation of a true conditional sale. See McCurdy, *Sales Transactions* 483 (1959).

disposition by the buyer to a purchaser in good faith and for value shall have the same effect as though the seller had expressly authorized such sale or disposition. In *Phillips v. Brooks, Ltd.*,⁹² a buyer of jewelry in a retail store fraudulently gave the seller a worthless check and then pawned the jewelry to a bona fide lender. It was held that the lender received a good title against the jeweler. The possible conditional effect of the check was not even mentioned. There is no provision in the Uniform Sales Act corresponding to § 25(2) of the English statute.⁹³

Impersonation and Criminal Conduct of the Buyer

There remains to be considered the effect of impersonation or criminal conduct.

Impersonation has been regarded as a question of parties as well as of fraud. In a transaction face to face the intent is said to be to deal with the person present and not with the one impersonated, the motive being to deal with the latter.⁹⁴ The seller's assent is induced by fraud, the impersonating buyer obtaining a voidable title.⁹⁵ There would be however a lack of mutual assent for want of parties if a person obtains goods by fraudulently representing himself as an agent instead of buyer.⁹⁶ Face to face impersonation would not affect any of the views taken as to the conditional effect of a bad check given by the impersonator, unless the impersonation was considered criminal and the criminal conduct was thought to qualify the voidable

⁹² [1919] 2 K. B. 243.

⁹³ See Uniform Commercial Code, 2-401(1) and 2-511(3), *supra*, notes 75, 76.

⁹⁴ See Williston, Sales § 635 (Rev. ed. 1948) and 5 Williston and Thompson, Contracts § 1517 (1937) where it is said that the "primary" intent is to deal with the person present, there being a double intent, both of which cannot operate.

⁹⁵ *Edmunds v. Merchants' Dispatch Transportation Co.*, 135 Mass. 283 (1883); *Martin v. Green*, 117 Me. 138, 102 Atl. 977 (1918); *Phelps v. McQuade*, 220 N. Y. 232, 115 N. E. 441 (1917); *Phillips v. Brooks, Ltd.*, *supra*, note 92.

⁹⁶ *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805 (1886); *Chiplock v. Stewart Motor Co.*, 91 A. 2d 851 (D. C. 1952); *Hardman v. Booth*, 1 H. & C. 803 (1863). Cf. *Stoddard v. Ham*, 129 Mass. 383 (1880); *Russell Willis, Inc. v. Page*, 213 S. C. 156, 48 S. E. 2d 627 (1948), commented on in 23 Tul. L. Rev. 420 (1949). Cf. *Rhode v. Ray Waits Motors, Inc.*, 223 S. C. 160, 74 S. E. 2d 823 (1953); *Exeter Mfg. Co. v. Glass-Craft Boats, Inc.*, 103 N. H. 385, 173 A. 2d 791 (1962).

title view.⁹⁷ If the transaction is not face to face but by correspondence, the intent is said to be to deal with the supposed writer, the motive being the receipt of a letter written by the impersonator.⁹⁸ Thus there would be lack of mutual assent and the buyer would obtain no title, and could not pass a good title to a bona fide purchaser.⁹⁹ If such imposter sent a check supposedly of the impersonated person, the result would follow regardless of the view taken of either the conditional or criminal effect of a check. Except in the agency case, defect of parties seems logically weak. The question of parties alone would rarely be material. Both types of impersonation are usually concerned with obtaining false credit. It may be more difficult to detect impersonation at a distance, and the seller may require more protection. For this reason, irrespective of the effect of a check, the distinction between the types of impersonation may be persuasive.

Statutes may include in the term "larceny" other related offenses, such as embezzlement and obtaining property by false pretenses. At common law larceny required a taking from the possession of another without his consent and with intent to steal. Larceny was subsequently extended to larceny by trick (possession obtained by trick) and by breaking bulk (by bailee) from which embezzlement is probably derived. It was not extended to cases where title was obtained by trick or fraud, but this came to be dealt with by statute as obtaining goods by false pretenses.¹⁰⁰ All these related offenses may be broadly termed theft. At common law it was axiomatic that a thief could not pass a good title even to a bona fide purchaser for value, since a common-law thief obtained only wrongful possession.¹⁰¹

⁹⁷ Even if impersonation is distinguished from assumption of a fictitious name. See *Dresden v. Roy Wilmett Co.*, 118 Ind. App. 542, 82 N. E. 2d 260 (1948).

The N. I. L. distinguishes use of a fictitious name from impersonation: § 9(3)—impersonation; §§ 61, 82(2), 114(2), 115(1), 130—fictitious persons. See also Uniform Commercial Code, 3-401, 404, 405.

⁹⁸ See Williston, *Sales, op. cit. supra*, note 94, § 635 and 5 Williston and Thompson, *op. cit. supra*, n. 94, § 1517, where it is said that, although there is a double intent, the "primary" intent is to deal with the supposed writer.

⁹⁹ *Cundy v. Lindsay*, 3 A. C. 459 (1879). The same distinctions are usually made in transactions other than sales of goods, particularly in negotiable instruments. See 34 Harv. L. Rev. 76, 84 (1920).

¹⁰⁰ Plucknett, *A Concise History of the Common Law* 396, 398-99 (2d ed. 1936).

¹⁰¹ In early common law a sale in market overt of stolen goods passed indefeasible title to a bona fide purchaser. This doctrine is enacted in the
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The English Larceny Act, including related offenses in the term larceny, has been construed as observing the above distinctions.¹⁰² In *Phillips v. Brooks, Ltd.*,¹⁰³ where an imposter—a “fraudulent person” claiming to be another—purchased a ring in a jewelry store and gave a check signing the name of the supposed buyer as maker, the matter of criminality was not mentioned, the court holding that the “swindler” had obtained property so as to “entitle him” to give a good title to a bona fide pledgee.

Under another type statute a different result has been reached. In *Richardson v. Seattle-First National Bank*,¹⁰⁴ an applicable statute included in larceny the obtaining of goods by impersonation and provided that goods so obtained should be returned to the true owner.¹⁰⁵

In *Amols v. Bernstein*,¹⁰⁶ however, it was held more broadly that criminal conduct would make a transfer to a bona fide pledgee defeasible. It appeared that a face to face imposter pretending to be another person of good credit obtained from a jeweler a ring for \$900 giving another ring in trade and a check for the balance (\$500) signing the check with the name of the supposed buyer. The ring given in trade had been similarly obtained elsewhere. The court, distinguishing *Phelps v. McQuade*,¹⁰⁷ placed its decision on the reasoning of common-law

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Sale of Goods Act, § 22. However, by § 24 notwithstanding market overt the owner is restored to his property after the thief has been prosecuted to conviction. Market overt did not obtain in the United States. Williston, *op. cit. supra*, note 94, § 347. § 24 of the English Act expressly provides that where the goods are obtained by fraud or other wrongful means not amounting to larceny a criminal conviction does not affect the title of a bona fide purchaser.

¹⁰² *Folkes v. King* [1923], 1 K. B. 282 (C. A.); *Heap v. Motorists' Advisory Agency, Ltd.* [1923], 1 K. B. 577; *Lowther v. Harris* [1927], 1 K. B. 393. Cf. *Lake v. Simmons* [1927], A. C. 487, and *Pearson v. Rose & Young, Ltd.* [1951], 1 K. B. 275 (C. A.).

¹⁰³ *Supra*, note 92.

¹⁰⁴ 38 Wash. 2d 314, 229 P. 2d 347 (1951), commented on in 27 Wash. L. Rev. 66 (1952).

¹⁰⁵ Cf. *Linn v. Reid*, 114 Wash. 609, 196 Pac. 13 (1921) where it was held that if a buyer obtains goods by giving in exchange other goods which he had stolen, the transfer of the goods so obtained to a bona fide purchaser would be indefeasible. The applicable statute defined larceny as including obtaining goods by false pretenses.

¹⁰⁶ 214 App. Div. 469, 212 N. Y. S. 518 (1925), commented on in 26 Col. L. Rev. 636 (1926), 11 Corn. L. Q. 422 (1926), 39 Harv. L. Rev. 904 (1926), 74 U. Pa. L. Rev. 749 (1926).

¹⁰⁷ *Supra*, note 95 (impersonation, no check involved).

larceny (apparently larceny by trick)¹⁰⁸ and common-law-forgery (a felony).¹⁰⁹ It is to be noted that the buyer's conduct would amount to larceny by trick only if the full conditional property view of the effect of the check were held, in which case criminality would add nothing.¹¹⁰ The relevance of forgery is not apparent;¹¹¹ it would seem to add nothing to the effect of impersonation so far as the question of transfer of the property is concerned.¹¹²

¹⁰⁸ Relying on *Shipply v. People*, 86 N. Y. 375 (1881).

¹⁰⁹ In *Damis v. Barcia*, 266 App. Div. 698, 40 N. Y. S. 2d 107 (1943) *Amols v. Bernstein* was followed, one justice dissenting. In *Stanton Motor Corp. v. Rosetti*, 11 App. Div. 2d 296, 203 N. Y. S. 2d 273 (1960) it appeared that the dishonored check was genuine. The bona fide purchaser was protected, the court reasoning on the authority of *Phelps v. McQuade* that the distinction between void and voidable still maintains for criminal law purposes notwithstanding that larceny and false pretenses are combined in the statute, and saying "If *Damis v. Barcia* and *Amols v. Bernstein* are deemed to hold otherwise we decline to follow them." See also *I-Land Auto Sales v. Valle*, 12 Misc. 2d 1091, 175 N. Y. S. 2d 732 (Mun. Ct., Queens Co., 1958).

In *McElroy v. Williams Bros. Motors, Inc.*, 104 Ga. App. 435, 121 S. E. 2d 917 (1962) it appeared that a buyer in Florida traded in a stolen automobile, signing the owner's name to register the transfer. It was held that a bona fide purchaser was not protected. No Florida cases were referred to but the Florida statute provided: "A person who, with intent to deprive or defraud the true owner of his property or the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: (a) takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing . . . steals such property and is guilty of larceny."—Fla. Stat. Ann. § 811.021 quoted by the court.

The Georgia Code, 26-2602 provides: "Simple theft or larceny is the wrongful and fraudulent taking and carrying away . . . of the personal goods of another with intent to steal the same"; and 26-2603 provides: "Larceny of any automobile shall be a felony." In *Hewitt v. Malone*, 105 Ga. App. 281, 124 S. E. 2d 501 (1962) where a fictitious name and a "forged" check were involved it was held that a bona fide purchaser would not be protected, relying upon Code 26-2602-2603. Compare *Blount v. Bainbridge*, 79 Ga. App. 99, 122 S. E. 2d 122 (1949).

¹¹⁰ *Snyder v. Lincoln*, 150 Neb. 580, 35 N. W. 2d 483 (1948); 153 Neb. 611, 45 N. W. 2d 749 (1951); *Flatte v. Nichols*, 233 La. 171, 96 So. 2d 477 (1957).

¹¹¹ *Martin v. Green*, 117 Me. 138, 102 Atl. 977 (1918). In *Cowan v. Thompson*, 25 Tenn. App. 130, 152 S. W. 2d 1036 (1941), commented on in 17 Tenn. L. Rev. 272 (1942) it was said that a forged check is stronger than a merely worthless check. Tennessee has held the full conditional view where a worthless check is given for the price. See *supra*, text at note 55. The forged instrument is void in respect to the person whose name was forged. See N. I. L. § 23. See also Uniform Commercial Code, 8-202, 205.

¹¹² See further on the topic of bad checks for the price of goods: *Collins, Title to Goods paid for by Worthless Check*, 15 So. Cal. L. Rev. 340 (1940); *Vold, Worthless Check Cash Sales—"Substantially Simultaneous" and Conflicting Analogies*—1 *Hast. L. J.* 112 (1950); *Cowan, Cash Sales, Worthless Checks, and the Bona Fide Purchaser*, 10 *Vand. L. Rev.* 55 (1956); *Comment, Worthless Checks in Cash Sales: Rights of the Bona Fide Purchaser*, 24 *Albany L. Rev.* 195 (1960).