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Personal Property and Sales

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PERSONAL PROPERTY AND SALES

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The similarity of the subject matter, together with the paucity of cases in each field, has made it advisable to combine the personal property and sales cases in one article. Though the total number of cases falling within these fields was small, the proportion of novel and interesting issues raised was high. This article is an attempt to analyze as well as describe the significant cases decided in this area within the past year.

PERSONAL PROPERTY

Possession: No one who has ever examined the maze of cases listed in the *Decennial Digests* on the topic of illegal possession of intoxicating liquor will seriously dispute the statement that " 'Possession' is one of the vaguest of all vague terms."[1] One of the more bedeviling problems in this area arises when one is charged with illegally possessing liquor where the liquor is found on the defendant's premises, but where, as in *Hicks v. State*,[2] the defendant maintains that he did not know that it was there and offers evidence to prove that he had been absent from the house for a week. The *Hicks* case was further complicated by a statement on the defendant's part that during his absence another man had occupied the house with his wife. In affirming a conviction of the defendant, the Tennessee Supreme Court applied a presumption that everything in a house is in the possession of the "man of the house" and held that the defendant's evidence did not rebut the presumption.

It is difficult to determine the exact ground for the Court's holding. It may be that the Court did not believe that the presumption of possession was rebutted because it did not find that the defendant put in enough evidence to prove his alleged week's absence. If, on the other hand, the Court would have been willing to uphold the presumption of possession even though there had actually been an absence, a very interesting problem of the interrelationship of the concept of possession and the law of crimes is presented.

The statute under which this prosecution was brought makes it a crime "to possess intoxicating liquors . . . whether intended for personal use or otherwise."[3] This section very largely removes criminal *intent* as an element of the crime and punishes the criminal *act*. The

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1. Quoted from Shartel, *Meanings of Possession*, 16 MINN. L. REV. 611 (1932).
2. 250 S.W.2d 559 (Tenn. 1952).
3. TENN. CODE ANN. § 11216 (Williams 1934).

prohibition is directed to the act of possession; no evil intent need accompany this possession at all. It has long been settled that legislatures can remove criminal intent as an element in crimes where the statute is in the interest of the public health, safety or welfare.[4] The statute in question is a typical example of a "public welfare crime."

But is the criminal act of possession sufficiently shown where liquor is found on the premises of one who has been absent from his premises, which have in the interim been occupied by other adults? Surely there is not enough physical control by the accused over the liquor to hold that there is "actual possession" in such a case.[5] If there is to be possession at all here, it must, then, be a species of "constructive possession"; but is there even constructive possession here?

The concept of constructive possession has served a useful purpose in the law of Personal Property. In certain situations to reach a desirable result a finding of possession is necessary; if some of the elements of actual possession are missing, the doctrine of constructive possession may be called into play. A typical example is the situation where a person finds a valuable article hidden on the land of another. In order to find a violation of the landowner's rights the court may have to find that he has possession of the article. If so, constructive possession supplies the solution.[6]

Now, admitting that it is necessary to use constructive possession to reach desirable results in some cases, it seems harsh enough to employ the somewhat tenuous concept of constructive possession to supply the necessary act in a criminal prosecution where the act alone is being punished,[7] without extending the limits of constructive possession to

4. "At common law the fundamental concept of crime included criminal intent, and until the advent of public welfare offenses the courts, in the absence of legislative instructions to the contrary, interpreted statutory crimes as requiring *mens rea* in conformity with the common law. In the cases involving public welfare offenses, however, a new rule of construction was developed, the courts holding that the omission by the legislature of the necessity of intent dispensed with it and that there could be a conviction without a showing that the accused had any unlawful intent." 5 VAND. L. REV. 828 (1952). See, generally, Sayre, *Public Welfare Offenses,* 33 COL. L. REV. 55 (1933).

5. See BROWN, PERSONAL PROPERTY 18-21 (1936).

6. South Staffordshire Water Co. v. Sharman, L.R. [1896] 2 Q.B. 44, is such a case. A typical statement is: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under the land, and, in the absence of better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the things existence. . . . But it seems preferable to say that the *legal possession* rests on a real de facto possession constituted by the occupier's general power and intent to exclude unauthorized interference." (emphasis added) POLLOCK AND WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 41 (1888). The phrase "legal possession" is synonymous with constructive possession.

7. "Constructive possession of prohibted liquor, alone, is not sufficient to justify a conviction. There must be a guilty scienter shown by the evidence, beyond a reasonable doubt." Wilbanks v. State, 28 Ala. App. 456, 185 So. 770, 771 (1939).

encompass a situation where there is as slight a relationship between the object and the accused as that suggested by the *Hicks* case.[8]

Gifts: Rose v. Parker[9] presented, as do most cases concerning gifts which reach the appellate courts, a somewhat complicated fact situation. In 1924 *F* had his bank issue a certificate of stock of that bank to his daughter, *D*, in whose name the certificate was entered on the records of the bank. Nevertheless, *F* retained possession of the certificate, received the dividends and voted the shares by proxy. In 1928 *D* indorsed the certificate, and it was pledged by *F* to his son, *S*, shortly after *D*'s death in 1930. In 1934 *F* died, and the present action was commenced some years later by *D*'s administrator to replevy the stock certificate from the trustees of *F*'s estate. The Court of Appeals reversed the chancellor's decree and held that the stock belonged to *F*'s estate.

Was there an inter vivos gift to *D* of the certificate? The factors favoring an inter vivos gift to *D* were: (1) the stock certificate was entered in *D*'s name on the corporate records, and (2) the dividends from the stock in question were paid to *D*'s sons on several occasions after *F*'s death. The factors against an inter vivos gift were: (1) *F* apparently never relinquished possession of the certificate, (2) *F* treated the stock as his own in that he received the dividends and voted the stock and (3) *F* had no donative intent, as the transfer was merely a fictional one to have the stock assessed in *D*'s name for tax purposes.

The Court's holding that there was no inter vivos gift is well supported by the authorities. The essentials of an inter vivos gift are (1) an intent by the donee to give and (2) a delivery of the subject matter of the gift by the donor to the donee.[10] Neither element seems to be present here. *F*'s oral statement to his sons to the effect that the trans-

8. Judge Gailor dissented, 250 S.W.2d at 561, on the grounds that the presumption of possession was not applicable. He pointed out that the case which laid down the presumption of possession by the "man of the house" in Tennessee, Crocker v. State, 148 Tenn. 106, 251 S.W. 914 (1923), is clearly distinguishable from the *Hicks* case. In the *Crocker* case, both the husband and wife were actually present on the premises. The wife was convicted of possessing the liquor, but the Court reversed on the ground that, where there is no evidence to show that the wife rather than the husband possessed the whiskey, the Court will presume that the liquor was in the possession of the head of the family. In Williamson v. State, 191 Miss. 643, 4 So.2d 220 (1941), the facts were very similar to the *Hicks* case, except that there the defendant had been absent for three weeks and there was no intervention by a third party. The Mississippi court applied the presumption that the husband was in possession of the liquor due to his status as head of the house and affirmed a conviction. As in the *Hicks* case, the *Williamson* decision met with a vigorous dissent. In Dean v. State, 71 Okla. Crim. 253, 110 P.2d 921 (1941), the defendant was convicted of possessing liquor which was found in her home even though she had been absent for sometime before it was found; the court made much of the fact that there were no adults at the house who would be likely to bring liquor into the house.

9. 251 S.W.2d 320 (Tenn. App. E.S. 1952).

10. BROWN, PERSONAL PROPERTY 76 (1936).

fer was only for tax purposes, together with his acts regarding the certificate, indicated that he had no intent to relinquish control of the certificate. Nor under the Tennessee decisions does there seem to have been a delivery here. Though recognizing that the law is different in some states,[11] the Supreme Court in the 1944 case of *Figuers v. Sherrell*[12] held that there was no completed gift where a stockholder turned in a certificate of stock and had the corporation issue and record a new certificate in the name of the alleged donee, but had the new certificate delivered into his own hands and retained possession of it until his death, nothing else being done to show a gift by him.[13]

Even had there been a valid inter vivos gift, the subsequent indorsement by *D* would seem to have transferred title to *F*. The indorsement manifested an intent to transfer, and the delivery was accomplished by reason of *F*'s already having possession of the certificate.

Bailments: Two basic principles of the law of bailments were reiterated in cases decided during the Survey period. *Dickson v. Blacker*[14] raised the problem of the duty of care required of a bailee. In that case, the bailor left his automobile with a parking lot operator, whose employee took the car out and wrecked it. The Court in holding the bailee liable for his employee's negligence repeated the familiar rule that, where the bailment is for the mutual benefit of the parties, the bailee is bound to exercise ordinary care.[15] Therefore, as he is not an insurer of the property, if the automobile were damaged by a third party over which the bailee had no control, no liability would accrue

11. The Court in Figuers v. Sherrell, 181 Tenn. 87, 178 S.W.2d 629, 152 A.L.R. 420 (1944), cited the following cases as sustaining the view that there may be a completed gift where a stock certificate is issued in the name of another but the holder of the old certificate retains possession of it: Chicago Title & Trust Co. v. Ward, 332 Ill. 126, 163 N.E. 319 (1928); Reed v. Roberts, 85 Pa. 84 (1877); Phillips v. Plastridge, 107 Vt. 267, 179 Atl. 157, 99 A.L.R. 1074 (1935). "Generally, there is a complete gift of corporate stock where . . . a certificate is issued in the first instance in the name of the donee, although the certificate so issued is retained by the donor or the corporation, and not delivered to the donee." Moore v. Van Tassell, 58 Wyo. 121, 126 P.2d 9, 12 (1942), citing 24 AM. JUR., *Gifts* 771-72 (1939). For a list of recent cases to this effect, see Note, 152 A.L.R. 427 (1944).

12. 181 Tenn. 87, 178 S.W.2d 629 (1944).

13. *Cf.* Coffey v. Comm'r, 141 F.2d 204 (5th Cir. 1944); Biehl v. Biehl, 263 Ky. 710, 93 S.W.2d 836 (1936). *But cf.* Chandler v. Roddy, 163 Tenn. 338, 43 S.W.2d 397 (1931), where the Court found a completed gift even though the donor retained possession of the certificate.

14. 253 S.W.2d 728 (Tenn. 1952). The agency problem in this case is taken up in the Master and Servant section of the Agency article in this Survey.

15. This rule has found support in a number of Tennessee decisions, among them are: Dodge v. Nashville, C. & St. L. Ry., 142 Tenn. 20, 215 S.W. 274, 7 A.L.R. 1229 (1919); Swift & Co. v. Memphis Cold Storage Warehouse Co., 128 Tenn. 82, 158 S.W. 480 (1913); Kelton v. Taylor, 79 Tenn. 264 (1883); Old Hickory Parking Corp. v. Alloway, 26 Tenn. App. 683, 177 S.W.2d 23 (M.S. 1944) (a parking lot case).

to the bailee.[16] Some of the older Tennessee cases[17] and an occasional modern one[18] have phrased the test of standard of care in mutual benefit bailment situations somewhat differently. A 1947 Court of Appeals decision said: "The care required of bailees in a case of this kind is that which men of ordinary prudence exercise under similar circumstances with respect to their own property or the property of others placed in their custody."[19] Does the reference to the care men give their own property increase the standard of care to one greater than ordinary care? It is improbable that the Tennessee courts have intended it to do so. Doubtless this variation on the rule is more referable to an attempt on the part of the Court to explain what ordinary care means than to an effort to dispose of it as the legal standard.[20]

The liability of a bailor to a third party injured by the negligence of the bailee was before the Court in *English v. Stevens*.[21] There the owner of a truck tractor loaned this bulky vehicle, without the trailer, to his brother to drive to a family reunion. The plaintiff was injured in a collision caused by the bailee's negligence. A substantial verdict against the bailor was reversed in the Court of Appeals on the well-established ground that the negligence of the bailee is not imputed to the bailor.[22] If the bailor is to be held, his liability must rest on his own negligence. Thus if the bailor had entrusted a vehicle to a driver known to be incompetent[23] or if the vehicle itself was so defective as to be likely to injure third parties and the bailor knew of this or should have know of it,[24] his liability would have been established. Since the driver was an experienced truck operator and since the tractor was not dangerously unsuited to being operated without a trailer, no negligence on the bailor's part was present.

Liens: A conflict of laws problem occupied the Court in *Nelson-Collins-Nash, Inc. v. Associates Discount Corp.*[25] There Daniels pur-

16. *But cf.* Hilton v. Wagner, 10 Tenn. App. 173 (E.S. 1928). The Court in the *Dickson* case indicated that the *Hilton* decision should be strictly limited to the facts involved.

17. Yeatman v. Hart, 25 Tenn. 375 (1845); Angus v. Dickerson, 19 Tenn. 459 (1838).

18. Fields v. Gordon, 30 Tenn. App. 110, 203 S.W.2d 934 (W.S. 1947).

19. *Id.* at 117, 203 S.W.2d at 938.

20. Both of the two most used legal encyclopedias define ordinary care as that care which an ordinary prudent man would exercise in caring for his own property. 6 AM. JUR., *Bailments* § 249 (Rev. ed. 1950); 8 C.J.S., *Bailments* § 27 (1938).

21. 249 S.W.2d 908 (Tenn. App. M.S. 1952). See the discussion of this case in subsection (1) of part I, section A of the Torts article.

22. "Neither negligence nor, in this jurisdiction, contributory negligence of the bailee or his servants is imputable to the bailor." Siegrist Bakery Co. v. Smith, 162 Tenn. 253, 259, 36 S.W.2d 80, 81 (1931). See also cases cited in notes 23 and 24 *infra*. *See* East Tennessee & Western North Carolina Motor Transp. Co. v. Brooks, 173 Tenn. 542, 548, 121 S.W.2d 559, 561 (1938).

23. V. L. Nicholson Const. Co. v. Lane, 177 Tenn. 440, 150 S.W.2d 1069 (1941) (truck entrusted to driver with a known affinity to liquor).

24. Vaughn v. Millington, 160 Tenn. 197, 22 S.W.2d 226 (1929).

25. 249 S.W.2d 902 (Tenn. 1952).

chased under a conditional sale contract an automobile from the plaintiff company's assignor in Georgia, where the contract was recorded as required by Georgia law. Daniels then took the auto into Tennessee without the knowledge or consent of the plaintiff and incurred a substantial bill with the defendant company for repairs on the automobile. When the defendant retained the property in assertion of its common law artisan's lien, the plaintiff sued in replevin and recovered. This was affirmed by the Supreme Court on the ground that the prior recorded Georgia conditional sale prevailed over the subsequently acquired Tennessee artisan's lien.

This case represents but another step in an orderly progression of Tennessee decisions which over the last 40 years have uniformly given wide recognition to recorded foreign chattel security contracts. Foreign chattel mortgages have been held to prevail over Tennessee innocent purchasers,[26] subsequent mortgagees[27] and attaching creditors[28] where the foreign mortgagee gave no consent to the removal of the property to this State. These decisions were predicated upon the "rule of comity between the states" which the Court also referred to as the "rule of interstate courtesy."[29]

Should the same rule apply where a foreign chattel mortgagee is contending for priority over a Tennessee holder of a common law artisan's lien as applies where the local claimant is a bona fide purchaser or creditor? These last-mentioned parties have lost money or valuable claims if their claim is not preferred, but the mechanic does more than this, for his labors preserve or improve the security itself. Could it not be said that by allowing the chattel mortgagor to have possession the mortgagee has impliedly consented to having those repairs made which are necessary to maintain and preserve his security? Although the common law lienor appears to have a stronger case than the other parties mentioned, the Tennessee Court in the 1950 case of *Taylor v. Liddon-White Truck Co.*[30] rejected the "increased value" theory for differentiating between lienors and the other parties and held that the foreign mortgagee also prevailed over a Tennessee artisan's lien.[31]

Thus by 1950 the Tennessee authorities had established that a prior

26. Newsum v. Hoffman, 124 Tenn. 369, 137 S.W. 490 (1911).
27. Hamblen Motor Co. v. Miller & Harle, 150 Tenn. 602, 266 S.W. 99 (1924).
28. Bankers' Finance Corp. v. Locke & Massey Motor Co., 170 Tenn. 28, 91 S.W.2d 297 (1936). This case apparently overrules Snyder v. Yates, 112 Tenn. 309, 79 S.W. 796 (1903).
29. "It seems a churlish and ungracious course, if not an example of improvident judgment, to hold out against the generous comity of the many States which recognize the rule of interstate courtesy upon this subject." Newsum v. Hoffman, 124 Tenn. 369, 374-75, 137 S.W. 490, 492 (1911).
30. 191 Tenn. 336, 233 S.W.2d 52 (1950).
31. In reaching a result contrary to the *Taylor* case, Willys Overland Co. v. Evans, 104 Kan. 632, 180 Pac. 235 (1919), attaches some weight to the increased value theory.

recorded foreign chattel mortgage was to be preferred over local subsequent mortgagees, bona fide purchasers, creditors and even common law lien holders, at least where the chattel was taken into Tennessee without the knowledge or consent of the mortgagee. This left as the only extension necessary to attain the result reached by the Court in the *Nelson-Collins-Nash* case the application of this body of doctrine to foreign recorded conditional sales. Since no reason of policy or precedent would seem to require a distinction between chattel mortgages and conditional sales — in this respect, at least — the Court with a minimum of discussion willingly made the extension. Although wherever one of two innocent parties must suffer the result can never be an entirely satisfactory one, still, in furthering the security of credit transactions by protecting the holder of a recorded security interest, this trend of decisions in Tennessee would seem to represent the better social policy.[32]

Fixtures: A question not heretofore resolved in this jurisdiction arose in *Julian Engineering Co. v. R. J. & C. W. Fletcher, Inc.*[33] In this case, a pre-fabricated smokehouse had been sold to the defendant on conditional sale. The defendant went into default, and the conditional vendor sued in detinue to retake possession. One of the defendant's principal contentions on appeal was that the smokehouse had lost its character as personal property and, therefore, its liability to be repossessed as such. The Supreme Court, after finding no Tennessee authority directly in point, briefly disposed of the defendant's argument in holding that the smokehouse was removable and that the plaintiff could retake possession.

It seems clear that, as between the original parties, the conditional vendor's right to remove a chattel affixed to the realty will be given effect where the conditional vendor and vendee expressly agree to a right of removal in case of default.[34] But nothing was said in the *Julian* case about an express right of removal, and the Court apparently treated it as a case where there was none. To cover this situation, the Court adopted the rule that, where articles are sold under a conditional sale, an agreement reserving the right to removal is implied. Although not enough facts are given to evaluate the case fully — such as a more complete description of the nature of the smokehouse in question — this holding seems in accord with the view prevailing in other jurisdictions.[35]

32. For text discussions generally commending this view see, GOODRICH, CONFLICT OF LAWS §§ 156-58 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 393-99 (2d ed. 1951). *Contra:* Universal Credit Co. v. Marks, 164 Md. 130, 163 Atl. 810 (1933), 81 U. OF PA. L. REV. 767 (1933).

33. 253 S.W.2d 743 (Tenn. 1953).

34. 5 AMERICAN LAW OF PROPERTY 47-48 (Casner ed. 1952).

35. Commereial Finance Co. v. Brooksville Hotel Co., 98 Fla. 410, 123 So. 814 (1929); Schellenberg v. Detroit Heating & Lighting Co., 130 Mich. 439, 90 N.W.

SALES

Sales by Sample: In *Grainer v. Nashville Corrugated Box Co.*,[36] the buyer needed 2500 cartons suitable for shipping a like number of advertising displays. After some negotiations with the seller, the buyer received from the seller a sample carton which the buyer inspected and approved before giving his order for the entire lot of boxes. Although the cartons conformed to the sample, they proved unfit for carrying the displays. The seller sued the buyer for the unpaid balance due on the boxes, and the buyer sued the seller for breach of contract. The Court of Appeals affirmed the lower court's action in giving judgment for the seller and dismissing the buyer's action.

Normally we think of the seller's obligations to the buyer in a sale by sample as being satisfied whenever the seller delivers to the buyer goods conforming to that sample.[37] One exception to this rule arises where the seller is a dealer in the goods concerned and the goods are unmerchantable because of a defect which was not apparent to the buyer in his inspection of the sample. In such a case, the seller may be liable for breach of implied warranty of merchantability even when the goods did conform to the sample.[38]

The interesting question which is suggested by the *Grainer* case is whether there should not be another exception to this rule based on the implied warranty of fitness for a particular purpose. Section 7208 says: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment . . . there is an implied warranty that the goods shall be fit for such purpose."[39] Now suppose a buyer tells a seller that he needs a number of a certain type of boxes for a certain purpose and the buyer relies on the seller's skill or judgment in selecting goods to fit this specified need. The seller then makes up a sample and shows it to the buyer, who inspects the box and approves it. Later, when the order has been delivered and is in use, the buyer finds that, although the boxes are exactly like the sample, have no patent defects and may be perfectly fit for carrying some kinds of merchandise, still because of a latent defect they fail to hold up in carrying the merchandise for which they were chosen or made. Should the seller be held for breach of the im-

47 (1902); New York Invest. & Improv. Co. v. Cosgrove, 47 App. Div. 35, 62 N.Y. Supp. 372 (1st Dep't 1900), *aff'd*, 167 N.Y. 601, 60 N.E. 1117 (1901). See also 22 AM. JUR., *Fixtures* § 20 (1938); 36 C.J.S., *Fixtures* § 14 (1943).

36. 255 S.2d 701 (Tenn. App. M.S. 1952).

37. "As a general rule all the buyer is entitled to, in case of a sale or contract to sell by sample, is that the goods shall be like the sample." 1 WILLISTON, SALES 678-79 (Rev. ed. 1948). For a Tennessee case on implied warranties in sales by sample, see Elbinger Shoe Co. v. Thomas, 1 Tenn. App. 161 (M.S. 1925).

38. This is the situation covered by TENN. CODE ANN. § 7209(c) (Williams 1934).

39. TENN. CODE ANN. § 7208(1) (Williams 1934).

plied warranty that the boxes be suitable for the particular purpose for which they were intended?

If there had been no sample involved in this hypothetical case, it seems clear that the seller would be liable under section 7208. Why should the addition of a sample change the seller's liability if the buyer would be unable to tell whether the sample was defective or not? Williston contends that in the hypothetical case stated there should be liability on the seller's part for a breach of warranty of fitness for a particular purpose even though the goods conformed to the sample.[40] It is impossible to tell whether the facts of the *Grainer* case are identical to the hypothetical stated above. The opinion does seem to treat the case as turning on an implied warranty of fitness,[41] but it is difficult to tell exactly why the Court found no breach of this warranty. If the case is like the hypothetical, the decision reached by the Court of Appeals is open to criticism. On the other hand, the Court may have believed that there was no reliance on the seller's skill or judgment in selecting the boxes or that whatever defects were present were patent and should have been discovered by the buyer. If this was the case, the holding was a sound one.

Implied Warranties of Fitness and Merchantability: An interesting example of the interrelationship of the implied warranty of fitness for a particular purpose[42] and the implied warranty of merchantability[43] is found in *Kohn v. Ball*,[44] where the plaintiff purchased from the defendant an automobile which proved to be defective by reason of the fact that water leaked into the car and damaged the interior. The plaintiff's recovery against the dealer on the basis of breach of an implied warranty of quality was sustained by the Court of Appeals.

The defendant's principal contention seems to have been that there are no implied warranties of quality when an article is sold under its patent or trade name. The Court agreed that this is true with regard to the implied warranty of fitness for a particular purpose. Subsec-

40. "Also, though ordinarily in a contract or sale by sample there can be no warranty of fitness for a particular purpose, yet if the buyer relies on the seller's skill and judgment and the seller furnishes a sample the unfitness of which is not apparent on inspection there should be such a warranty." 1 WILLISTON, SALES 680 (Rev. ed. 1948).

41. The Court quoted from two cases which were concerned with implied warranties of fitness for a particular purpose. Goad v. Johnson, 53 Tenn. 340 (1871), and LeSueur v. Franklin Limestone Co., 14 Tenn. App. 67 (M.S. 1931). Neither case is directly in point, and the *Goad* case is of doubtful validity after the passage of TENN. CODE ANN. § 7208 (Williams 1934).

42. TENN. CODE ANN. § 7208(1) (Williams 1934). For the wording of this subsection see the quoted portion in the section on Sales by Sample, *supra*.

43. TENN. CODE ANN. § 7208(2) (Williams 1934) provides: "Where the goods are bought by description from a seller who deals in goods of that description . . . there is an implied warranty that the goods shall be of merchantable quality."

44. 254 S.W.2d 755 (Tenn. App. W.S. 1952).

tion (4) of section 7208 is direct authority on this question.[45] But the Court went ahead to hold that there was an implied warranty of merchantability present in this case which was not excluded by the fact that the purchaser ordered the article by a trade name. This holding seems proper and desirable. It may be true that, when one requests an article by its trade name, this is some indication that the purchaser does not rely on the skill or judgment of the seller in choosing the goods; hence, the warranty of fitness under subsection (1) should normally not apply. However, the warranty of merchantability under subsection (2) does not rest on the buyer's reliance on the skill or judgment of the seller in selecting the goods to be purchased; consequently, whether the purchaser ordered by a trade name should be irrelevant.[46] This appears to be the first Tennessee case considering the point directly.

Although not necessary to the decision, another point raised by the Court merits some attention. The Court stated that besides the reason mentioned above there was another ground for holding that there was no warranty of fitness for a particular purpose involved in purchasing the automobile. This was because the only purpose known to the seller for which the car was to be used was for "business and pleasure." This was held too general a use to fall within the "particular purpose" clause of subsection (1). The Tennessee Court would, therefore, seem to require the purpose for which an article is bought to be a narrow or specific one for the warranty of fitness to apply. There is support for the Tennessee view,[47] but Williston[48] and a number of cases[49] allow the particular purpose of subsection (1) to be very broad and general.

Estoppel: The somewhat complicated facts in *Gill for Use and Benefit of Rawdon v. Paschal*[50] were that Gill, the plaintiff, purchased an auto from Evans Chevrolet Company in Ohio and took title in the name

45. TENN. CODE ANN. § 7208(4) (Williams 1934) states: "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

46. "If the buyer requests exactly described goods . . . it does not preclude an obligation on the part of the seller to furnish merchantable goods of that description. . . ." 1 WILLISTON, SALES 610 (Rev. ed. 1948).

47. A square holding supporting the Tennessee view is State *ex rel.* Jones Stores Co. v. Shain, 352 Mo. 630, 179 S.W.2d 19 (1944), where the court held that there is no implied warranty that a blouse is fit for ordinary wear.

48. In 1 WILLISTON, SALES § 235 (Rev. ed. 1948), the author expresses the view that the warranty of fitness for a particular purpose may be the equivalent of merchantability. That is, the "particular purpose" may be so broad as to include the obvious, general purpose for which the article is intended.

49. American Tank Co. v. Revert Oil Co., 108 Kan. 690, 196 Pac. 1111 (1921) (extensive quote on the subject in question, 196 Pac. at 1112); Crawford v. Abbott Auto. Co., 117 La. 59, 101 So. 871 (1924); Harvey v. Buick Motor Co., 177 S.W. 774 (Mo. App. 1915); Zirpola v. Adam Hat Stores, 122 N.J.L. 21, 4 A.2d 73 (1939).

50. 248 S.W.2d 325 (Tenn. App. M.S. 1951).

of Rawdon. Then Gill sold the car at a dealers' auction in Louisville to Devers, who paid with a bad check. Gill turned over to Devers the invoice showing that Rawdon had purchased from Evans Chevrolet. Devers apparently also received a bill of sale from the auction company. The car then was sold to Padgett and passed on to the defendant. The Court of Appeals affirmed the lower court's ruling of a directed verdict for the defendant in the plaintiff's conversion action.

It is settled in Tennessee that, where a seller in a cash sale delivers possession of goods, unaccompanied by any documentary indicia of title, to a buyer, no title passes to the buyer when he gives payment in a worthless check.[51] Consequently, the seller can assert his title against an innocent purchaser from the buyer. The rationale is that the passage of title depends on the intention of the parties and that the seller would usually not intend title to pass until the check clears.[52] Where, however, the seller entrusts the purchaser who gives a bad check with possession plus indicia of title, the Tennessee cases evidently abandon any inquiry into the intent of the parties and hold for the innocent purchaser on the grounds of estoppel.[53] In a 1950 decision reaching this result,[54] the seller deliberately withheld the bill of sale until the check should clear, thus indicating that he did not intend to pass title until clearance. But the seller did give the buyer possession of a carbon copy of an order blank which showed little more than what the price of the car was supposed to be. The Court held this order blank to be "a clear indicia of ownership."[55]

In the *Gill* case, no mention was made of the importance of the bill of sale, but the Court seemed to rely on the invoice showing that Rawdon had purchased from Evans Chevrolet as indicium of title in holding the seller to be estopped from recovering. This decision and the 1950 case noted above seem to lay down an extremely lax rule with regard to what are sufficient indicia of title to estop a seller receiving a bad check as against a subsequent bona fide purchaser.[56]

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51. John S. Hale & Co., Inc. v. Beley Cotton Co. & Union & Planters Bank & Trust Co., 154 Tenn. 689, 290 S.W. 994 (1927); Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S.W. 125 (1924). 2 WILLISTON, SALES § 346a (Rev. ed. 1948) contains a thorough discussion of this rule. The author describes it as the majority rule but criticizes it vigorously.

52. 2 WILLISTON, SALES § 346a (Rev. ed. 1948).

53. Jackson v. Waller, 190 Tenn. 588, 230 S.W.2d 1013 (1950); Pool v. George, 30 Tenn. App. 608, 209 S.W. 55 (E.S. 1947). In the *Pool* case, a bill of sale was the indicium of title. The *Jackson* case said: "It is not a question as to the intention of the [seller] but what he did to clothe another with apparent title so that an innocent person might be entrapped." 190 Tenn. at 591, 230 S.W.2d at 1014.

54. Jackson v. Waller, *supra* note 53.

55. 190 Tenn. at 591, 230 S.W.2d at 1014.

56. The Tennessee Motor Vehicle Title and Registration Law of 1951, TENN. CODE ANN. §§ 5538.101 *et seq.* (Williams Supp. 1952), should affect this result with regard to those vehicles coming under the Act. *Id.* § 5538.148.

Statute of Frauds: Section 7197[57] provides that no contract for the sale of goods of over $500 is enforceable unless one of three things is present: (1) acceptance and receipt of the goods on the part of the buyer, (2) something given in earnest to bind the bargain or in part payment or (3) a memorandum of the contract signed by the party to be charged therewith. One of the issues of *Buice v. Scruggs Equipment Co.*[58] was whether the equitable doctrine of part performance applies to a sale of goods to supply yet a fourth method of taking a case out of the statute of frauds. In the *Buice* case, the defendant orally promised that, in exchange for the plaintiff's remaining with a corporation and performing certain services, the defendant would sell the plaintiff 300 shares of stock at substantially less than the market value. The defendant refused to perform, and, upon being sued for breach of contract, raised the statute of frauds. The Supreme Court reversed the lower court's ruling which had sustained the defendant's demurrer.

Although the doctrine of part performance has long been rejected in Tennessee with regard to land contracts,[59] this is the second Tennessee case applying it to contracts for the sale of goods.[60] Neither decision gives any cogent reason for placing this unusually liberal interpretation on the doctrine of part performance with regard to chattels in a jurisdiction which has denied any validity to the doctrine in its almost universally accepted setting of land contracts. Neither of the recognized authorities on contracts recognizes part performance as an independent ground for avoiding the statute in sale of goods cases.[61] Both would require that the performance be a part of the price bargained for, thus falling under the statutory exception of part payment. The result in the *Buice* case would be the same whether the doctrine of part performance or the part payment clause is relied on. Clearly the price for the stock was the plaintiff's services.

It is generally said that the doctrine of part performance is a purely equitable creature, unrecognized at law; consequently, it is not available to sustain an action at law based on a contract within the statute of frauds.[62] Yet the first Tennessee case applying the doctrine to a contract action commenced in the circuit court.[63] The *Buice* case, although brought in chancery, was again for breach of contract, an ac-

57. TENN. CODE ANN. § 7197 (Williams 1934).
58. 250 S.W.2d 44 (Tenn. 1952). For a discussion of the other issues of the case, see the *Ultra Vires* Contracts section of the Business Associations article in this Survey and 22 TENN. L. REV. 963 (1953).
59. Goodloe v. Goodloe, 116 Tenn. 252, 92 S.W. 767 (1906); Crippen v. Bearden, 24 Tenn. 129 (1844); Patton v. McClure, 8 Tenn. 333 (1828).
60. The first was Ashley and Gibbs v. Aven Preston, 162 Tenn. 540, 39 S.W.2d 279 (1931).
61. 2 CORBIN, CONTRACTS 670-71 (1950); 1 WILLISTON, SALES § 125 (Rev. ed. 1948).
62. See the many cases supporting this proposition cited in Note, 59 A.L.R. 1305 (1929).
63. Ashley and Gibbs v. Aven Preston, 162 Tenn. 540, 39 S.W.2d 279 (1931).

tion which is historically legal by jurisdiction over which chancery has been given statutory concurrent jurisdiction.[64] This factor, together with Tennessee's traditional animosity to part performance, might well commend the view of the authorities mentioned above — that these cases should be decided on the basis of one of the statutory exceptions, either part payment or acceptance and receipt.

64. TENN. CODE ANN. § 10377 (Williams 1934). McElroy v. Ludlum, 32 N.J. Eq. 828 (1880), was a suit brought in chancery to enforce what the court considered in substance an action to enforce a legal demand. The court held that the doctrine of part performance could not be used for the reason that it would not validate a contract at law. "The dictum that part performance will make valid a contract invalid by the statute of frauds, is exclusively the creature of equity, and applies only to contracts relating to lands, and does not extend to contracts relating to other matters." *Id.* at 832-33.