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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

ASSIGNMENTS—TORT OF TRESPASS TO REAL PROPERTY—ASSIGNABILITY OF AN ACTION OF TRESPASS QUARE CLAUSUM FREIT—In Citizens National Bank v. Joseph Ksei and Sons Company\(^1\) the plaintiff was the mortgagee of a farm owned by the mortgagor's wife and granddaughter as tenants in common. The defendant, a contractor, had a contract from the state to pave the road adjoining the farm, and, in order to obtain fill for the road, he went upon the land and removed the topsoil. He paid the wife $700 for injury to her share, but the granddaughter, who owned a two-thirds interest, received nothing. Subsequently, the wife and granddaughter assigned any right of action they might have against the present defendant and gave quitclaim deeds to the plaintiff, who brought this suit, (1) in his own right for the impairment of his mortgagee's security, and (2) as assignee of the action for the removal of the topsoil. The plaintiff failed to introduce evidence showing an injury to his mortgagee's security and was properly held to be entitled to mere nominal damages therefor,\(^2\) but the Illinois Supreme Court, with no discussion of the problem of the assignability of tort actions, held that the plaintiff was entitled to actual damages on the action assigned by the granddaughter.

\(^1\) 378 Ill. 428, 38 N.E. (2d) 734 (1942).
\(^2\) Hummer v. R. C. Huffman Construction Co., 63 F. (2d) 372 (1933).
It has been held that a mere conveyance is not sufficient to transfer a cause of action in trespass to realty to the transferee;³ and it would seem, therefore, that if the suit is to be maintained, it must be on the theory that the plaintiff may sue as assignee. Although the plaintiff might have predicated his case on theories of trespass de bonis asportatis, trover, or a waiver of the tort in a suit in quasi-contract, it seems quite clear that he chose to use trespass quare clausum fregit. The Supreme Court says, "We hold that the complaint states a cause of action for damage by trespass to real estate in wrongfully excavating and carrying away topsoil and loam therefrom comparable to the common law action of trespass quare clausum fregit." However, the Illinois law regarding the right to assign a cause of action in trespass to realty appears to be less clear cut than the Supreme Court would indicate by its lack of discussion of the problem. No Illinois Supreme Court case can be found which, other than as dictum, has held that this action is assignable, nor likewise, that it is not.⁴ In the case of Lake Shore Building Company v. City of Chicago,⁵ the specific question is raised and the Illinois Appellate Court says, "The foundation of the right to bring an action of trespass quare clausum fregit is the invasion or the disturbance of the plaintiff's possession. The action is personal and hence unassignable." The court, in that case, cites for its authority cases which are not really in point.⁶

The general rule throughout the United States is that such an action is maintainable,⁷ the theory being that, if there is a survival statute, there is evidence of legislative intent that the action is not personal to the owner of the land at the time of the injury, and the rule is that it is not assignable. This is the rule in Illinois as well as in other jurisdictions. The rule is stated in a number of cases, both from Illinois and elsewhere, and it is generally accepted as the law. The question of assignability is one which has been considered by the courts in a number of cases, and the general rule is that such an action is not assignable.

³ Chicago and Alton R. Co. v. Maher, 91 Ill. 312 (1878), where the court (at p. 315) said: "We are not aware that any court has ever held that a mere trespass to land, giving a right of action, can be assigned by an instrument in writing for the purpose, or by conveying the land. Such a right of action is not appurtenant to the land, nor does it, like a covenant for title, inhere to or run with the land. It, when accrued, is a personal right, and is not transferable." There was no assignment here, but merely a conveyance of the title. See also Faith v. Yocum, 51 Ill. App. 620 (1893), where the court (at p. 621) said: "The right of action for the damages resulting from the trespass was in the owner of the fee at that time and was not assigned by a subsequent conveyance of the land to the appellant."

⁴ For cases holding that a cause of action for trespass to realty is assignable, see North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 49 N.E. 222, 44 L.R.A. 177 (1898), and cases cited therein. This is an action for personal injuries. For cases holding that a cause of action for trespass to realty is not assignable, see Galt v. The Chicago and Northwestern Ry. Co., 157 Ill. 125, 41 N.E. 643 (1895), which does not include an assignment; Norton v. Tuttle, 60 Ill. 130 (1871), concerns the right to assign the right to file a bill in equity; Chicago General Ry. Co. and West and South Towns Street Ry. Co. v. Capek, for the Use of Roeder, 82 Ill. App. 168 (1899), is a case for personal injuries; Chicago and Alton R. Co. v. Maher, 91 Ill. 312 (1878), does not include an assignment.

⁵ 207 Ill. App. 244 (1917).

⁶ Chicago and Alton R. Co. v. Maher, 91 Ill. 312 (1878), which does not mention an assignment as such; Galt v. Chicago and Northwestern Ry. Co., 157 Ill. 125, 41 N.E. 643 (1895), which is an action for personal injuries.

⁷ For citations of cases from other jurisdictions see 4 Am. Jur., Assignments, § 55; 6 C.J.S., Assignments, § 34; 5 A.L.R. 130.
the extent that no one else can sue for the wrong. Cases have stated that this is the rule in Illinois, but again the statements are only dicta. There is a survival statute in Illinois, and the decision in the principal case could have been predicated on the theory mentioned. The idea that the assignment of an action in trespass throws open the doors to fraud and champerty is gradually dying out and the decision in this case might be commended if it had shown that the court was conscious of the step it was taking. In the face of the other Illinois decisions, however, and in view of the casual treatment given in this case, it is feared that a final settlement of the controversy has not been reached.

J. SAFEBLADE

Descend and Distribution—Surviving Husband or Wife—Effect of Illinois Probate Act on Wife’s Right to Dower Where She Elects to Take in Fee—In Dial v. Dial the Illinois Supreme Court interpreted part of Section 162 of the new Probate Act. Briefly, the facts of the case concerning Section 162 of the statute are as follows: A died intestate and left surviving his widow, B, and his sister, C, an incompetent. B filed a suit for partition against C and claimed a fee title in one-half in each parcel of realty left by A and also a dower interest in the remaining half of the realty in which C took a fee. The Supreme Court, however, decided that since A died in April, 1940, B’s claim must be determined by the new Probate Act, in force January 1, 1940, and therefore B was entitled to one-half the realty in fee but not to any dower interest in the realty which passed to C.

This decision recognizes the change effected in the Illinois law on this point by the Probate Act. Under the prior law, the widow’s rights were governed by the Descent Act, and the Dower Act. The Probate Act repealed both the Dower Act and the Descent Act. Section 1 of the Descent Act provided that in a situation like this, where the intestate left surviving a spouse and a sister, the surviving spouse was entitled to one-half the realty in fee and the sister was entitled to the remaining one-half. The Descent Act made no mention of dower, but by Section 1 of the Dower Act a surviving spouse was entitled to a dower interest in all realty not taken by herself in fee. Thus in Shoot v. Galbreath, where a husband died leaving a spouse and no lineal descendants, the surviving spouse took one-half the realty, and the remaining half passed to collaterals subject to the widow’s dower interest therein.

8 Lasher v. Carey, 182 Ill. App. 147 (1913), concerns the assignment of a judgment; North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 49 N.E. 222, 44 L.R.A. 177 (1898), is an action for personal injuries.
1 38 N.E. (2d) 43, 378 Ill. 276 (1942).
2 Ill. Rev. Stat. 1941, Ch. 3, § 162 par. 3.
3 Ill. Rev. Stat. 1941, Ch. 3, § 162 par. 3.
4 Ill. Rev. Stat. 1939, Ch. 39, § 1 par. 3 (a).
5 Ill. Rev. Stat. 1939, Ch. 41, § 1.
6 Shoot v. Galbreath, 128 Ill. 214, 21 N.E. 217 (1889); Sutton v. Read, 176 Ill. 69, 51 N.E. 801 (1898).
But the Probate Act provides that where an intestate leaves a surviving spouse and a sister, the surviving spouse may take a fee in one-half of each parcel of real estate in which she does not elect to take a dower interest. Section 198 gives the surviving spouse ten months after issuance of letters of administration in which to perfect a right to dower. If that course be not taken, the widow takes only the share in fee which the statute allots her.

Thus it is seen that under the Probate Act a surviving spouse takes either a fee interest or a dower interest but not both.

D. J. Ryan

FORGERY—FALSE ENTRIES OR RECORDS—WHETHER COMPTROLLER IS GUILTY OF FORGERY FOR EXECUTING FALSE DISBURSEMENT SHEET OVER HIS OWN SIGNATURE FOR PURPOSE OF PROCURING PAYMENT WARRANT—In the recent case of People v. Mau, the defendant therein was the comptroller of a certain municipality. It was his duty when the holder of a special assessment bond presented it for payment to prepare a special assessment disbursement sheet, on the strength of which the other municipal officials would execute a warrant and authorize payment of the amount thus reported as due and payable. The indictment charged the defendant with knowingly issuing a special assessment disbursement sheet which stated that certain bonds had been presented to him for payment and that specified amounts were due thereon when, in fact, the particular bonds had never been presented by anyone, and the name of the purported payee was fictitious. An unknown person presented this unauthorized disbursement sheet to the other officials, who, not knowing it to be unauthorized, paid it. The trial court, upon the defendant's motion, quashed the indictment, charging forgery, on the ground that since the defendant had signed his own name to the disbursement sheet he could not be guilty of that crime. The Illinois Supreme Court, however, reversed the trial court and directed that the motion to quash be overruled on the ground that while the offense might not be the general crime of forgery it fell within the language of the Illinois statute.

According to the common law, forgery is defined as the falsely making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal liability. For one to be guilty of that offense at common law, some "false making" by the defendant was essential. This generally required that the defendant sign another's name to the instrument, consequently it was not enough if the defendant signed

7 Ill. Rev. Stat. 1941, Ch. 3, § 162.
9 Ill. Rev. Stat. 1941, Ch. 3, § 162.
1 379 Ill. 199, 36 N.E. (2d) 235 (1941).
2 Ill. Rev. Stat. 1941, Ch. 38, § 277. The pertinent provisions of the statute under which the defendant was indicted are: "Every person who shall falsely make, alter, forge or counterfeit any record or other authentic matter of a public nature . . . or shall utter, publish, pass or attempt to pass as true and genuine . . . any of the above named false, altered, forged or counterfeited matters . . . knowing the same to be false, altered, forged or counterfeited with intent to prejudice, damage or defraud any . . . body politic . . . shall be deemed guilty of forgery. . . ."
his own name even though he falsely represented thereby that he had authority to act for, and thus bind another. This definition, with variations, has been incorporated in most statutes describing the offense.

The decision in the instant case seems to be based upon two points: first, the meaning to be placed on the words "falsely make" as used in the appropriate statute, and second, the fact that the defendant exceeded his authority in making the false disbursement sheet. On the first point the court adopted the construction that an offender may be guilty of a "false making" of an instrument although he sign and execute it in his own name "if he makes such record or executes such authentic matter, knowing that its contents are false and untrue, and if by so doing he intends to defraud either an individual or the body politic by which he was employed." In other words, the genuine making of an instrument for the purpose of defrauding is forgery. Although there is other authority to substantiate this construction, the great weight of authority seems to adopt a different meaning. The majority of jurisdictions, both under the common law and the statutes follow the rule that the genuine making of an instrument, even though for the purpose of defrauding, as not being enough to constitute the crime of forgery, though perhaps warranting a prosecution for obtaining property by false pretense.

Thus it was said in Goueher v. State that the essence of forgery is the making of a false writing with the intent that it shall be received as the act of another than the person signing it. Another case lays down the rule that the genuineness of an instrument is not dependent upon the truth of its recitals. A California court once said that, when the crime is charged to be the false making of a writing which falsely purports to be the writing of another, the falsity must be in the writing itself—in the manuscript. A false statement of fact in the body of the instrument is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not.

Although the factual situation in the earlier Illinois case of People v. Kramer is exactly the same as in the instant case, the results reached are in direct opposition to each other. In that case, the conviction of a

4 People v. Mau, 377 Ill. 199, 36 N.E. (2d) 235 on p. 239 (1941).
5 Regina v. Ritson, L.R. 1 Cr. Cas. 200 (1869). See also a collection of cases in 41 A.L.R. 247 (1925).
7 113 Neb. 352, 204 N.W. 967 (1925).
8 State v. Ford, 89 Ore. 121, 172 P. 802 (1918).
9 People v. Bendit, 111 Cal. 274, 43 P. 901 (1896).
10 352 Ill. 304, 185 N.E. 590 (1933).
county clerk for forgery of a county order was reversed by the Illinois Supreme Court where the clerk's signature and the County Treasurer's countersignature were genuine, notwithstanding the fact that the drawing of the particular order by the clerk was unauthorized. The court there said that essence of forgery is the false making of a writing with intent that it should be received as the act of another than the person signing it, and forgery cannot be committed by the making of a genuine instrument though the statements made therein are untrue, as the statutes defining forgery applies to the false making of the writing as distinguished from the contents of the instruments itself. It would appear, then, that the Illinois court by upholding the indictment in the instant case has changed from majority to the minority viewpoint as to the question of the meaning to be given the words "falsely make" as used in the Illinois statute.

The second ground relied upon for upholding the indictment in the instant case is that the defendant exceeded his authority by making a disbursement sheet which he was not authorized to make, with the intent to defraud, and, therefore, committed forgery. Support for this view was drawn from the recent case of People v. Kubanek, in which an agent who filled up a signed blank check in an unauthorized fashion was held guilty of forgery. In that case the court concluded that an improper exercise of the authority given the agent was the equivalent of an unauthorized making in the first instance. The earlier Kramer case was distinguished because there was no reliance by the state therein on the agent's improper exercise of his authority. Other cases hold that an improper exercise of authority in "filling in" written instruments is forgery, but there is authority to the contrary. Moreover, the instant case might be said to differ from the Kubanek case in that the instrument there concerned was one which another person had already signed in blank, while here the defendant made the whole instrument.

If, as stated above, the essence of forgery is the making of a false writing with the intent that it shall be received as the act of another person, this decision seems questionable and not in accord with the weight of authority.

D. J. Ryan

SALES — PAYMENT BY NOTE OR ACCEPTANCE — WHETHER VENDOR MAY RECOVER GOODS FROM BONA FIDE PURCHASER WHEN CHECK GIVEN IN PAYMENT IS DISHONORED — In the recent case of Crescent Chevrolet Company v. Lewis, the Supreme Court of Iowa considered a problem about which there has been much conflict of authority for many years, involving the right of the seller of goods, in a "cash sale" transaction, who has received in payment a check which subsequently has been dishonored, to

11 370 Ill. 646, 19 N.E. (2d) 573 (1939), noted in 18 Chicago-Kent Law Review 50.
12 352 Ill. 304, 185 N.E. 590 (1933).
14 Moore v. Commonwealth, 185 S.W. 833. See also 87 A.L.R. 1169.
1 230 Iowa 1074, 300 N.W. 260 (1941).
retake them after they have passed into the hands of an innocent purchaser for value.

In that case, one Lewis, a dealer in automobiles, bought a new car from the plaintiff, Crescent Chevrolet Company, on August 9, 1940, gave a check for the purchase price. He received possession of the car, and an invoice, and immediately thereafter he mortgaged or "floor-planned" the car to the defendant, Securities Acceptance Corporation, which had no notice that the seller had as yet not received payment. The check was presented for payment in the usual course of business, but had not been received by the bank when Lewis died on August 12, 1940. The bank refused to pay the check, assigning the death of Lewis as the reason. At that time his bank balance was only a few dollars. Plaintiff then notified the administratrix of Lewis' estate that it rescinded the sale, and, upon her refusal to return the automobile, instituted a replevin suit against the administratrix and Securities Acceptance Corporation. It was stipulated that Lewis and his estate were insolvent.

Plaintiff contended that this was a cash sale, and, since payment was a condition precedent to the passage of title, it was entitled as an unpaid seller to recover the car. The court held that Lewis, or his personal representative, would not be entitled to the car as against the unpaid seller, since the sale was a cash sale, but that the Securities Acceptance Corporation stood in a different position, since it was a bona fide purchaser for value under its mortgage. The language of the court is as follows:

"Of course, if the parties intended title to pass immediately, such intention will govern. In the case at bar no such intention appears. It is our conclusion this was a cash sale and, as between the parties, title to the car did not pass to Lewis.

"However, Securities Acceptance Corporation, as a bona fide purchaser for value under its mortgage, is in a different situation from Lewis. It was obvious that Lewis, an automobile dealer, was buying the car for the purpose of resale. That he would also mortgage or floor-plan it was a reasonable possibility. Notwithstanding these considerations plaintiff delivered possession of the automobile to Lewis, together with the invoice. Securities Acceptance Corporation being thereby led to believe Lewis had title to the car, made the loan to him upon it.

"Although, as between the parties, title does not pass upon delivery of check in a cash sale transaction, the authorities so holding usually recognize or assume that the doctrine does not apply to a bona fide purchaser for value."2

It is undoubtedly the weight of authority, when the sale is a cash sale, that payment is a condition of the passing of title, and when the buyer gives a check or draft for the purchase price, it constitutes only conditional payment, and as between the parties, title does not pass until the check or draft is paid.3 Of course, the check may have been accepted

2 Ibid. at p. 262 of 300 N.W.
3 Barksdale v. Banks, 206 Ala. 569, 90 So. 913 (1921); Harmon v. Goetter, 87 Ala. 325, 6 So. 93 (1889); Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 P. 915
as absolute payment, and then, even as between the parties, the title will be held to have passed since this was the intention of the parties. However, the real problem arises, as in the instant case, when the rights of third parties are involved, and there is considerable conflict in the decisions as to the rights of a subsequent purchaser from the buyer who has given a worthless check in payment of the goods.

The position of the subsequent purchaser will, of course, vary greatly with the factual situation. A subsequent purchaser from a buyer who does not have indicia of title, will not be protected, and in general


5 Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941).

something more than mere possession and control is necessary. In *Young v. Harris-Cortner Company*, it was said: "We have been unable to find a single decision which holds that, where there is no other fact or circumstance that might mislead further than the fact of possession, a purchaser of the goods would be protected against the true owner."

Of course, if the subsequent buyer has notice of the equity of the seller, he cannot claim greater rights. And if he has knowledge of facts which should put him on inquiry as to the position of the one from whom he buys the goods, he cannot claim protection as a bona fide purchaser. In *Crocker State Bank v. White*, the question whether a bank taking a chattel mortgage upon property of a debtor knew that this property had been paid for by a check which was then at its bank, and had not been paid, and which it subsequently refused to pay, was held to be a question for the jury, and a decision against the bank upon this point was sustained upon appeal.

In *Mott v. Nelson*, it was held that "circumstances" should have put the subsequent purchaser on inquiry. Here the plaintiff was given a worthless check in payment for a secondhand automobile, which he delivered to the buyer, together with a bill of sale. The car, which was in excellent condition, was thereafter offered for sale to the defendant at about one-half the value of a new car by a man whose reputation was known to him to be that of a person who procured automobiles in a fraudulent manner. The court commented, "... if he is to be considered an innocent purchaser, he is entirely too innocent to be in the secondhand automobile business."

In *C. M. Keys Commission Company v. Beatty*, it appeared that the course of business between the buyer of cattle and the person to whom he consigned the cattle was that the former should draw on the latter for the purchase price, describing in the draft the cattle for which 738 (1934); Levi v. Booth, 56 Md. 305, 42 Am. Rep. 332 (1882); Globe Milling Co. v. Minneapolis Elevator Co., 44 Minn. 153, 46 N.W. 306 (1890); National Bank of Commerce v. Chicago, B. & N. R. Co., 44 Minn. 224, 46 N.W. 342, 20 Am. St. Rep. 566, 9 L.R.A. 263 (1890); Gustafson v. Equitable Loan Ass'n, 186 Minn. 236, 243 N.W. 106 (1932); Quality Shingle Co. v. Old Oregon Lumber & Shingle Co., 110 Wash. 60, 187 P. 705 (1920).


8 152 Tenn. 15, 268 S.W. 125, 54 A.L.R. 516 (1924).

9 152 Tenn. 15, 268 S.W. 125, at p. 128, 54 A.L.R. 516, at p. 522.


12 226 S.W. 972 (Mo. App., 1920).

13 96 Okla. 117, 220 P. 617 (1923).

14 42 Okla. 721, 142 P. 1102 (1914).
it was drawn. Where a draft of this character, drawn for cattle, was dishonored by the drawee, who, however, had received the cattle prior to the presentation of the draft, he was held to be liable to the seller for the purchase price of the cattle, notwithstanding that he was not indebted to the drawer at the time the draft was presented. The theory was that he was chargeable with knowledge of the identity of these cattle.

But in Hoham v. Aukerman-Tuesburg Motors the buyer of a secondhand automobile from one who had given a forged check therefor did not examine the bill of sale and made no inquiries of the seller as to where he got the car, beyond a general inquiry, to which the seller replied he did not know the name of the man from whom he bought the car. Nevertheless he was held to be a bona fide purchaser for value without notice, and held to have a better right than the original seller who had been defrauded.

This phase of the problem was considered in the instant case, and it was there held that the fact that the invoice (delivered by plaintiff to Lewis and used by him in securing the loan) recited that the full price had been paid by check was not sufficient to put Securities Acceptance Corporation on inquiry as to the ownership of the car.

However, when such factors are not controlling, and when the subsequent purchaser has paid value and had no notice of the defects of the prior transaction, there is still much conflict in the cases as to the right of the seller to recover against him.

One group of cases is illustrated by Johnson v. Iankovetz, an Oregon case. There the court assumed that the subsequent purchaser had paid value and had no notice of the fraud practiced in giving the check. Nevertheless, it held that where a sale was for cash, and payment was made by a check on a bank in which the purchaser had neither funds nor credit, and delivery of the goods was made with the understanding that the check represented cash, no title passed, the check being dishonored upon presentation for payment, and that the goods might be reclaimed from the subsequent purchaser.

In Charleston & Western Carolina Railway Company v. Pope & Fleming, it was held that title did not pass as to a subsequent purchaser of cotton for value without notice, where the cotton was sold by the producer for cash, and a check received for the purchase price was not paid upon presentation.

The theory in this group of cases appears to be that since, on a cash sale, the possession of the buyer who has given a check in payment is merely conditional, it is not of such character that he can vest a purchaser from him with title. The general doctrine appears to have been

15 77 Ind. App. 316, 133 N.E. 507 (1922).
16 Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941).
18 122 Ga. 577, 50 S.E. 374 (1905).
followed in a number of cases, and this view has been considered the majority rule.

But the balance seems now to be swinging the other way, and more and more of the recent and well-considered cases seem to hold in favor of a bona fide purchaser, where the original seller has given the buyer who paid by check possession of the goods and some indicia of title, in keeping with those cases which have been viewed as representing the minority rule.

Moreover, some of the cases which were formerly cited in support of the so-called weight of authority, have been distinguished by the more recent opinions. In *Hoven v. Leedham*, a Minnesota case, it was held that although a sale of chattels was for cash, and payment was made by a draft which was dishonored when presented, the seller had no right to the property as against the consignee of the property who had no notice of any right in the original seller, and three earlier Minnesota cases, which had often been referred to as supporting the contrary doctrine, were distinguished by the court as applicable only to a state of facts where the transaction had not proceeded far enough so that the original seller could be estopped to assert his rights against a subsequent purchaser.


153 Minn. 95, 189 N.W. 601 (1922).

In the course of its opinion in that case,25 the court said: "In the case at bar there was an unconditional contract to sell specific property in a deliverable state. . . . Subsequently the seller delivered the property to a carrier for transportation for the buyer. He did not retain the bill of lading or have it issued in his name, or attach it to a draft for the amount to be paid and forward it, together with the draft, for the acceptance or payment of the draft prior to the delivery of the property. He exchanged his possession of the property for the buyer's draft upon the commission merchant to whom the property was consigned for sale. When the draft was dishonored, he had only the rights of an unpaid seller in the property after surrendering possession to the buyer."26

This is not a new view. In Comer v. Cunningham,27 decided in 1879, where a check given as payment for a quantity of cotton sold for cash was dishonored upon being presented for payment, the title was held to have passed as to a subsequent bona fide assignee of a bill of lading28 of the cotton, which bill the maker of the check had issued to him after receiving the cotton, the assignee having paid value and being without notice. The court held that as between the parties, the question of title passing or delivery being conditional was a question of intention and the question of intention was one of fact. "But after actual delivery, although as between the parties to the sale such delivery be conditional, a bona fide purchaser from the vendee obtains perfect title."29

And in Cochran v. Stewart,30 a Minnesota case decided in 1894, it was said: "Where a thing is sold for cash, but a check is accepted for the purchase money, and a delivery of the thing is made on the implied condition that the check will be paid on presentation, there are cases which hold that the vendor will not be estopped as against a subvendee, by the fact that he gave a written acknowledgment of the payment of the purchase money; but we apprehend no case can be found which so holds where the vendor gave an absolute bill of sale or assignment of the property, and the subvendee for value purchased on the faith of these muniments of title."31

Johnson-Brinkman Commission Company v. Central Bank of Kansas City32 has been considered as supporting the contrary view, but while the court paid lip-service to the doctrine that the buyer at a cash sale who gave a worthless check got no title and could pass none to a subpurchaser, it nevertheless protected the bona fide purchaser by holding that the original seller had been guilty of laches in allowing the buyer to be in possession and have a bill of lading representing the goods.

25 Hoven v. Leedham, 153 Minn. 95, 189 N.W. 601 (1922).
26 Ibid., at p. 603.
28 Of course, if this had been a negotiable bill of lading, the case might have turned on that point alone.
30 57 Minn. 499, 59 N.W. 543 (1894).
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In Goddard Grocer Company v. Freedman, the sale was a cash sale, but payment was by forged certified check. The court stated that, as the rule, a seller can reclaim the goods if payment is not made, even from a bona fide purchaser, unless guilty of such conduct as would estop him from so doing, and then held that by delivering possession of the goods and marking the invoices paid he was estopped.

Young v. Harris-Cortner Company has been cited in support of the view that the seller can recover from a bona fide purchaser, but the case is not in fact authority for that proposition. It was expressly said therein:

“Numerous circumstances might arise where the seller would be estopped, as for example, where, at the time of the exchange of the goods for the check, the vendor gives to the vendee an absolute bill of sale or assignment of the property upon the strength of which an innocent purchaser acquires same.”

The present trend seems therefore to be that the seller cannot recover goods, paid for by check subsequently dishonored, from a subsequent purchaser when the facts are such as to make the subsequent purchaser a bona fide purchaser for value without notice. And the general feeling at the present time can be expressed in the language of the court in Standard Inv. Co. v. Town of Snow Hill, N. C.: “... there is some conflict in the decisions as to the right of the seller of goods, who has received in payment a check which subsequently has been dishonored, to retake them after they have passed into the hands of an innocent purchaser for value, the better rule being that they may not be retaken from such innocent holder. ...”

C. C. McCULLOUGH

WILLS—SPECIFIC, DEMONSTRATIVE, AND GENERAL DEVISES AND BEQUESTS—WHETHER LEGACY TO BE PAID OUT OF PROCEEDS OF MORTGAGE IS SPECIFIC OR DEMONSTRATIVE — The Illinois Supreme Court, by its decision in the recent case of Lenzen v. Miller, definitely recognized demonstrative legacies for the first time, thus bringing Illinois in line with the great majority of jurisdictions in the United States. Furthermore, the Illinois court’s definition and application of that type of legacy is consistent with the generally accepted view on the construction of the type of legacy known as demonstrative.

33 127 S.W. (2d) 759 (Mo. App., 1939).
34 152 Tenn. 15, 268 S.W. 125, 54 A.L.R. 516 (1924).
37 As to the possible effect of the policy embodied in §§ 18 and 19 of the Uniform Sales Act on the attitude of present day courts, see note in 28 Ky. L.J. 322.
1 378 Ill. 170, 37 N.E. (2d) 833 (1941), reversing 309 Ill. App. 617, 33 N.E. (2d) 765 (1941).
2 Collar v. Gaarn, 64 Colo. 160, 171 P. 63 (1918); Penn. Co. for Insurance on Lives and Granting Annuities v. Riley, 89 N. J. Eq. 252, 104 A. 225 (1918); In re Hawgood’s Estate, 37 S.D. 565, 159 N.W. 117 (1916), and a host of others.
3 Maxim v. Maxim, 129 Me. 349, 152 A. 268, 73 A.L.R. 1244 (1930); Shaw v. Shaw,
In the Lenzen case the court had before it the will of Peter Miller, in which he used the following language, "Second, after the payment of such funeral expenses and debts, I give, devise and bequeath to my niece, Mrs. Eva Lenzen of Grays Lake, Ill.: Two Thousand Dollars ($2000.00), said ($2000.00) not to be paid until such time that my Executor hereinafter named realizes the amount on the Mortgage of my farm which matures March 1st, 1927, as I wish this ($2000.00) to be paid to the aforesaid Eva Lenzen out of This Mortgage." Before making his will, Miller had contracted to convey his farm to one Akin who had agreed to make certain annual payments with interest until March 1, 1922, when the balance would be reduced to $7,000. On that date, Miller was to give a deed and Akin was to give back a first mortgage of $7,000, to mature March 1, 1927. Akin paid the interest due on March 1, 1921, and March 1, 1922, but defaulted on the principal payments due on those dates. Miller made his will on March 2, 1921, when the only default was of one day in a principal payment. Because of the defaults, Miller did not make the deed, and the note and mortgage never came into existence. Later Miller recovered possession of the property. So at his death there was not mortgage out of which to pay the bequest to Eva Lenzen.

The court had to decide whether or not the legacy to Mrs. Lenzen had been adeemed by the failure of the fund. In determining this question it resorted to the device of the demonstrative legacy, which it defined as a bequest of a sum of money which is not made as a specific gift but is made payable out of a particular fund belonging to the testator. It went on to say that it partakes of the nature of a general legacy by bequeathing a specified amount and of the characteristic of a specific legacy by pointing out the fund from which the payment is to be made; that, however, it differed from a specific legacy in that if the fund failed, resort might be had to the general assets of the estate. This description of demonstrative legacies is in line with the great weight of American authority.

As to determining what language creates a demonstrative legacy, the court laid down several rules of construction for determining whether the testator intended to give the specified fund or to give the specified sum with the specified fund to stand as security. It said that the inclination of courts is to hold legacies general or demonstrative rather than specific, and that to make a legacy specific the terms employed must clearly require such a construction. This rule of construction is used in many cases and has been discussed in at least one excellent law

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32 Ohio App. 168, 167 N.E. 611 (1928); In re Wilson's Estate, 260 Pa. 407, 103 A. 880, 6 A.L.R. 1349 (1918), to cite only a few of the many.


5 Tifft v. Porter, 8 N.Y. 516 (1853); Maxim v. Maxim, 129 Me. 349, 152 A. 268, 73 A.L.R. 1244 (1930).
review article. It is said to be based on the presumption that the testator intended some benefit to the legatee and that it avoids hardship. The court found that the words quoted above indicated an intent to give the legatee $2,000 at all events.

Does the mention of the mortgage as the fund out of which the legacy was to be paid clearly indicate an intention to create a specific legacy? The court answered in the negative, finding that the reference to the fund was only for payment, more specifically for time of payment, and did not refer to the giving of the sum. The language, therefore, the court found, did not change the general legacy to a specific one.

Another rule of construction adopted by the court, which is well supported by cases in other jurisdictions, is that the intention which courts will carry into effect is that expressed by the language of the will, and that this will be interpreted in the light of the circumstances surrounding the testator of which evidence will be received, but that this will not be permitted to import into the will an intention different from that expressed by its language. Applying this rule the court reasoned that the testator assumed that Akin would meet the payment, which was then only one day in default, and that the mortgage would be executed and would be in existence at his death and would thus be available to pay the legacy. Hence, the court concluded, this was a demonstrative legacy and the fund having failed, it was payable as general legacy.

The attitude of the Illinois court brings to mind the now famous language of Sir Richard Pepper Arden, Master of Rolls, who, speaking in 1799, said, "The court is so desirous of construing it a general legacy, that if there is the least opening to imagine, the testator meant to give a sum of money, and referred to a particular fund only as that, out of which in the first place he meant it to be paid, the legatee will have this advantage: that it shall be considered pecuniary, so as not to have the legacy defeated by the destruction of the security." The Master of the Rolls spoke for a doctrine which had been growing out of a dissatisfaction with the hardships of specific legacies and which was borrowed, at least in part, from the Civil Law. The doctrine, which was not called demonstrative legacy until about 1808, now becomes part of the law of Illinois.

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