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James S. Rogers

Boston College Law School, james.rogers@bc.edu

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NEGOTIABILITY, PROPERTY, AND IDENTITY*

*James Steven Rogers***

I. A BRIEF HISTORY OF SECURITIES TRANSFERS

The past few decades have seen major changes in securities transfer practices. The litany is by now familiar: the "paper crunch" of the late 1960s, uncertificated securities, the central depository system, book entry federal securities, etc. In large part, the difficulties now facing the law of securities transfer seem to be associated with the transition from paper to electronic representations of investments. It would be easy to conclude that these problems are unprecedented. We seem to face the unnerving prospect that possession of paper embodiments of rights will no longer furnish the fundamental benchmark for adjudication of conflicting claims.

The assumption that securities transfer law has *always* been based on negotiable certificates is, however, quite inaccurate. In fact, the reign of negotiability is a relatively recent, and brief, phase in the long history of investment securities trading. In this paper, I shall attempt to place current problems in perspective, by briefly surveying the history of securities trading and then by examining the theoretical underpinnings of the law of securities transfers.

Investment securities have been traded in impersonal markets for over five hundred years. Shares in the public debt of Italian city-states were traded as early as the fourteenth century.¹ By the beginning of the seventeenth century, a stock market—in very much the modern sense of the term—had developed in Amsterdam. Government debts and shares in the Dutch East India Company were actively traded, and various forms of speculative futures trading were common. Indeed, the seventeenth century Dutch have probably never been surpassed in the madness of their financial speculation, as in the "tulip mania" of the 1630s, or the colorfulness of their terms of derision for such speculation, as in "windhandel," or trading in futures in securities not owned.² By 1688, the crowning evidence of a mature stock market appeared in Amsterdam: a book on how to beat

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** Professor, Boston College Law School.

¹ See F. Braudel, *The Wheels of Commerce* 100-01 (S. Reynolds trans. 1982).

² See generally S. Schama, *The Embarrassment of Riches* 347-71 (1987).

the stock market was published, complete with a catchy title, *Confusion de Confusiones*.³

As in other aspects of commerce and finance, the English soon emulated Dutch practice. A leading historian of British joint-stock companies has remarked that "early in the reign of William III, put and call options, bear sales, and bull accounts were perfectly well known; so that, before the end of the seventeenth century, there was an open and highly organized market at London in stocks and shares of companies."⁴ By 1698, stock price quotes were regularly published in London.⁵ By the beginning of the eighteenth century, the class of stock brokers, or "stock jobbers" as they were commonly termed in London, was sufficiently well-established, but mistrusted, to be the object of public obloquy⁶ and statutory regulation.⁷ So too in America, within a few decades after the Revolution, trading in state and federal government securities was widespread.⁸

Although securities markets are very old, negotiable investment certificates seem to be a rather recent development. From my relatively brief historical research, I have not been able to determine when the practice of issuing paper certificates representing investments in public debts and joint-stock companies developed.⁹ Shares in the pub-

³ J. de la Vega, *Confusion de Confusiones* (1688).

⁴ 1 W. Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720*, at 443 (1912).

⁵ E. Morgan & W. Thomas, *The Stock Exchange, Its History and Functions* 76 (1962).

⁶ See, e.g., D. Defoe, *The Anatomy of Exchange Alley; or, A System of Stock-Jobbing: Proving that scandalous trade, as it is now carried on, to be knavish in its private practice, and treason in its public* (1719).

⁷ An Act to restrain the Number and ill Practice of Brokers and Stock Jobbers, 8 & 9 Will. 3, ch. 32 (1697); An Act to prevent the infamous Practice of Stock-jobbing, 7 Geo. 2, ch. 8 (1734), made perpetual by 10 Geo. 2, ch. 8 (1737).

⁸ J. Davis, *Essays in the Earlier History of American Corporations* 174-212 (1917).

⁹ My best guess is that this was a gradual process, occurring at different times for different forms of investment. In England, for example, some government securities were represented by certificates very early. Exchequer bills, for example, were bearer securities from the time of their first issuance in 1696, see J. Holden, *The History of Negotiable Instruments in English Law* 94-98 (1955), although they were not held to be fully negotiable—in the sense that a bona fide holder took free of claims—until the decision of the King's Bench in *Wookey v. Pole*, 4 Barn & Ald. 1, 106 Eng. Rep. 839 (K.B. 1820), to which Judge Bayley, one of the leading authorities on the law of bills and notes added a vigorous dissent. By contrast, paper certificates for shares in the permanent English public debt are described as a recent innovation, optional to the holder, as late as the nineteenth century. See W. Royle, *The Laws Relating to English and Foreign Funds, Shares, and Securities* 5, 66 (1875). Practice evidently varied considerably with respect to foreign securities traded in London in the mid-nineteenth century. See H. Keyser, *The Law Relating to Transactions on the Stock Exchange* 214 (1850):

Foreign stocks vary in their character according to the mode of transferring the property they represent, and the forms requisite to confer a good title to such property on those who become possessed of them. Some, such as French stock and some of the American stocks, can only be transferred in their respective countries:

lic debt of the city-states of Renaissance Italy were not represented by any paper certificates, but by notation on the books of the state. Transfers were implemented by registration of the transfer on the issuer's books.¹⁰ The Belgian historian, Fernand Braudel, states that trading in shares in the Dutch East India Company in the seventeenth century could be implemented only by notation on the company's books, not by delivery of certificates.¹¹ Yet it is clear that paper representations of some form were involved in seventeenth and eighteenth century securities trading. Contemporary sources commonly classify shares of stock as a form of paper currency,¹² and numerous satirical engravings of the period show some personification of folly scattering paper shares of stock to the eager crowd.¹³

others pass like Bank notes by mere delivery, and thus assume the incidents attached to negotiable instruments in the hands of a bona fide holder.

¹⁰ In some respects, the fourteenth century Florentines had a more sophisticated system of book entry securities than that adopted in the 1977 amendments to U.C.C. Article 8—multiple "pledges" could be recorded on the public debt registration books. I am indebted to Professor Julius Kirschner of the University of Chicago for this bit of investment securities trivia. The results of Professor Kirschner's research on the use of security transfers of interests in the Florentine public debt in the fourteenth century in connection with dower settlements will appear as part of the forthcoming volume of the working group on Courts and the Development of Commercial Law, edited by Prof. Piergiovanni of the University of Genoa, in the Comparative Studies in Continental and Anglo-American Legal History series.

¹¹ F. Braudel, *supra* note 1, at 101-02:

All shares were however nominal, and the Dutch East India Company held the certificates; a buyer could only acquire a share by having his name entered in a special register kept for the purpose. The company had initially thought in this way to prevent speculation (bearer-bonds came later) but speculation could operate without ownership. The speculator was in fact selling something he did not possess and buying something he never would; it was what was known as 'blank' buying. The operation would be settled by a payment one way or the other and the game would go on.

¹² See, e.g., D. Hume, *Of Public Credit* (1752), reprinted in *A Select Collection of Scarce and Valuable Tracts and other Publications on the National Debt and the Sinking Fund* at 279-80 (J.R. McCulloch Ed. 1857):

Public securities are with us become a kind of money, and pass as readily at the current price as gold or silver. . . . No merchant thinks it necessary to keep by him any considerable cash. Bank-stock, or India-bonds, especially the latter, serve all the same purposes; because he can dispose of them, or pledge them to a banker, in a quarter of an hour; and at the same time they are not idle, even when in his scritoire, but bring him in a constant revenue.

Similarly, the article on "Paper Credit" in M. Postlethwayt, *Universal Dictionary of Trade and Commerce* (1751) states that:

Paper Credit signifies, in the general, whatever property is circulated in a state, or transferred from one person to another, by means of any written paper obligations, instead of hard money, or merchandizes, or lands, such as bills of exchange, promissory notes, bonds, mortgages; and some include herein all transfers by stocks.

¹³ See S. Schama, *supra* note 2, at 366-71. The depictions could be far cruder than that, as in an early eighteenth century Dutch portrait reproduced in Schama's book showing a broker eating money and excreting shares of stock. *Id.* at 367.

It is, however, far less clear whether paper representations of investments in the seventeenth or eighteenth century played a role analogous to modern stock certificates. In part, the difficulty is the ambiguity of terms such as "stock" or "shares." In the seventeenth or eighteenth century, as today, such words might refer either to an interest in the enterprise or to the paper representation of that interest.¹⁴ Thus, while it is easy to find references to trading in shares of stocks, it is not clear that these interests were embodied in paper certificates, nor that transfers were implemented by delivery of certificates. Some references suggest that delivery of some form of paper was essential. For example, one passage in the 1734 act regulating stockbrokers refers to "person[s] who shall sell stock to be *delivered* and paid for on a certain day."¹⁵ On the other hand, contemporary descriptions of transfer practices suggest that delivery of certificates may not have been the essential aspect of securities trading. For example, a popular manual entitled "Every Man His Own Broker," first published in 1761, describes the mechanism of transferring shares in the English national debt as follows:

Having agreed with the seller concerning the price, you are then to give him your address, that is your christian and surname, the name of the place you live in, and your title or profession. He being the seller, it is his business to take care of the transfer, and prepare the receipt. In the mean time it will be necessary for you to take care to have the money ready for payment. Those who keep money at their bankers, and are well known on the Exchange, generally give a draft on them for the sum agreed on.

It will be necessary for you to keep in one part of the room, till the transfer is prepared, that you may be at hand when wanted: for if you be not in the way when called upon, the clerk will not wait for you, but will proceed to other business, which may occasion you much delay.

As soon as the transfer is prepared, and your name called, you must go to the clerk who keeps the transfer book, who will shew in what form the seller has transferred the sum agreed for, to you, your heirs, and assigns. It will be necessary for you, the first time you transact business of this nature, to read this form, in order that

¹⁴ See "Actions," in M. Postlethwayt, *supra* note 12:

Action of a Company is an equal part, or portion of stock, of which several joined together make the capital fund, or stock, of a trading company. . . . Action signifies also the bonds, contracts, and acknowledgments, or Stock in general, which the directors of trading companies transfer or deliver to those who have paid their money into the company's cash, and made themselves proprietors. Thus to deliver an action is to expedite in due form the title by which the actionary becomes a proprietor of the action he has taken out.

¹⁵ 7 Geo. 2, ch. 8, § 6 (1734) (emphasis added).

you may be well acquainted with the nature of the assignment. After this you will be directed to set your name to a form of acceptance of the stock transferred to you, the seller having first set his hand to the transfer. This being done, the clerks witness the printed receipt, which the seller gives you signed by him, and which you must keep as a voucher for the transfer, till you have received one dividend; at least such is the custom, though it is difficult to give any solid reason why it should be so. At any rate, however, the receipt is of no use after receiving the first dividend, when it had better be destroyed than kept. Many people have kept these receipts long after they have sold out the stock, and their ignorant executors on finding them, have supposed they have discovered a mine, which they at last find, to their sorrow, had long before been exhausted. Having paid the sum, and taken the receipt, the whole affair is transacted, and this is the whole of the business the buyer has to attend to. However, be sure to take care to sign the acceptance in the transfer-book, before you pay your money to the seller.¹⁶

It is striking that Mortimer makes no mention of delivery of anything like a certificate representing the shares being transferred. Rather, the papers involved seem to function only as instructions to the clerks maintaining the books. Postlethwayt gives a similar description of the mechanism of trading in Dutch East India shares in Amsterdam.¹⁷ Indeed, as late as the mid-nineteenth century, one finds descriptions suggesting that shares of the English national debt were traded by

¹⁶ T. Mortimer, *Every Man His Own Broker* (1761), as quoted in T. Mortimer, *A General Dictionary of Commerce, Trade, and Manufacturers*, article on "Funds" (1810).

¹⁷ "Actions," in M. Postlethwayt, *supra* note 12:

The method of transferring actions, or stocks, at Amsterdam. When two persons have agreed between themselves, or by the assistance of a broker, upon the price of one or more actions, and they are to be delivered, the seller goes to the East-India house, to make his declaration to the book-keeper, who immediately enters it; and, after having made the seller sign it, causes it also to be subscribed by one of the directors, before whom the seller must likewise declare, by word of mouth, that he has sold it. The transfer being thus registered, and the seller having informed the buyer of it, the latter has a right to go and assure himself farther of it at the East-India house, in case he does not think fit to trust the person with whom he has negotiated: after which he ought to cause the value of the actions transferred to be passed over at the bank to the sellers account, who, when he is certain that the value has been placed to his account, or credit, at the bank, returns to the East-India house, and signs the acquittance, or receipt, at the bottom of the transfer which he has made. As long as this acquittance is not signed, the purchaser cannot dispose of the action transferred, though he has paid for them: but, in case of the seller's refusal to sign such acquittance, after receiving the full value, he may be compelled to do so, only by a petition to the echevins, or aldermen. Each transfer costs three florins and ten stivers, both, for the seal, and to the book-keeper.

book transfers rather than delivery of certificates.¹⁸

Whenever the practice of representing investments by certificates evolved, it is quite clear that the legal attribute of negotiability was a much later development. Indeed, the law governing investment securities seems to have been quite unsettled in the eighteenth and even nineteenth century. As late as 1770—three-quarters of a century after trading in stocks had become common in London—as knowledgeable a judge as Lord Mansfield referred to East India Company stock as “a new species of property, arisen within the compass of a few years.”¹⁹ Legal treatises on investment securities and stock exchange transactions did not appear until the late nineteenth century.²⁰ By that time, paper certificates representing debt and equity investments were commonplace and were traded in well-organized stock exchanges. Yet whether these paper securities could be accorded all the attributes of negotiability remained an unsettled question until well into the present century.²¹ Simple corporate or government bonds could readily be assimilated to promissory notes, and thus held negotiable under

¹⁸ 1 J. McCulloch, *Dictionary of Commerce*, article on “Funds,” at 695 (Philadelphia 1840) (1st Ed. London 1834):

A bargain for the sale of stock, being agreed on, is carried into execution at the Transfer Office, at the Bank, or the South Sea House. For this purpose the seller makes out a note in writing, which contains the name and designation of the seller and purchaser, and the sum and description of the stock to be transferred. He delivers this to the proper clerk; [The letters of the alphabet are placed around the room, and the seller must apply to the clerk who has his station under the initial of his name. In all the offices, there are supervising clerks who join in witnessing the transfer.]; and then fills up a receipt, a printed form of which, with blanks is obtained at the office. The clerk in the mean time examines the seller's accounts, and if he finds him possessed of the stock proposed to be sold, he makes out the transfer. This is signed in the books by the seller, who delivers the receipt to the clerk; and upon the purchaser's signing his acceptance in the book, the clerk signs the receipt as witness. It is then delivered to the purchaser upon payment of the money, and thus the business is completed.

This is a quotation from a book identified in McCulloch only as “Dr. Hamilton's valuable work on the National Debt” which I have been unable to trace. The bracketed passage is a footnote in the original. Similar descriptions are given in W. Royle, *supra* note 9, at 65, and H. Keyser, *supra* note 9, at 107-09.

¹⁹ *Nightingale v. Devisme*, 5 Burr. 2589, 2592, 98 Eng. Rep. 361, 363 (K.B. 1770). Evidently the East India stock was at that time represented by some form of certificate, for in argument one of the lawyers had said, “This stock must be considered as money; like bank bills, or other things which are current as money. It is in all respects the same as money. The mode of transferring it, is only by delivery.” 5 Burr. at 2591, 98 Eng. Rep. at 362. Mansfield, however, rejected the analogy, holding that an action for money had and received would not lie for the stock.

²⁰ See H. Keyser, *supra* note 9; W. Royle, *supra* note 9.

²¹ See Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 Yale L.J. 1057, 1072-76 (1954); Steffan & Russell, *The Negotiability of Corporate Bonds*, 41 Yale L. J. 799, 803 (1932); Note, *The Applicability of the N.I.L. to Bonds*, 25 Colum. L. Rev. 71, 74-75 (1925) (Later citations to this unsigned note list William O. Douglas as its author.).

ordinary principles of the law of bills and notes.²² Yet many of the attributes essential to investment bonds, such as provisions in municipal bonds that they were to be paid only from a specified source of revenue, or provisions in corporate bonds stating that they were subject to the terms of the trust indenture, involved limitations and conditions on the issuer's obligation to pay that were fatal to negotiability under traditional bills and notes law.²³ Similarly, interim investment certificates representing the holder's right to receive bonds from the underwriter proved difficult to fit within negotiable instruments law.²⁴ The problems resulting from the effort to squeeze investment bonds into the ill-fitting clothes of the law of bills and notes were not fully resolved until the enactment of the Uniform Commercial Code.

Stock certificates, of course, could not be treated as bills or notes, since they did not represent promises to pay money. In a sense, this was fortunate since the law of stock certificates could develop independently of bills and notes law. Full-blown negotiability, however, was long in coming. Late nineteenth century authorities routinely describe stock certificates as "quasi-negotiable," noting that unlike bills, notes, or bonds, a stock certificate is only evidence of the underlying right—a "muniment of title."²⁵ This was no mere matter of terminology. In some respects, stock certificates were treated no differently than ordinary goods, as, for example, in the rule that the owner of property who has not entrusted possession to the wrongdoer can re-

²² In the preface to his 1876 bills and notes treatise, J.W. Daniel remarks that one of the principal reasons that he undertook the work was the need to treat questions concerning corporate bonds, which had become prominent since the publication of the preceding generation of bills and notes treaties. J.W. Daniel, *Treatise of the Law of Negotiable Instruments* at vi (1876).

²³ See Steffan & Russell, *supra* note 21; Note, *supra* note 21.

²⁴ In England, this issue provoked one of the classic discussions of the relationship between commercial practice and commercial law. In *Goodwin v. Robarts*, 10 L.R.-Ex. 337 (1875), Chief Judge Cockburn delivered his renowned opinion tracing the history of the law merchant and the adaptation of English law to changing commercial practice. Cockburn held that scrip issued by the underwriters of foreign government bonds was negotiable because it was treated as such in the securities markets. In the United States, the problem was handled less successfully. In 1926, the New York Court of Appeals, in a much criticized opinion by Justice Cardozo, held that under the Negotiable Instruments Law such certificates could not be negotiable. *Manhattan Co. v. Morgan*, 242 N.Y. 38, 150 N.E. 594 (1926). The result in the *Manhattan Co.* case was reversed by the enactment of the Hofstadler Act, N.Y. Pers. Prop. Law art. 8 §§ 260-262 (repealed upon enactment of U.C.C. in 1964).

²⁵ E.g., *Winslow v. Fletcher*, 53 Conn. 390, 395-96, 4 A. 250, 253 (1885):

These rights and duties are in fact and law quite distinguishable from the certificates and the power to transfer those rights and duties. The certificate is evidence that the person therein named possesses those rights and is subject to those duties, but it is not in law the equivalent of those rights and duties. They are muniments of title, but not the title itself; much less the real property.

cover it even from a bona fide purchaser.²⁶ The stock certificate did not really become a complete reification of the shareholder's rights until the Uniform Stock Transfer Act, promulgated in 1910.²⁷

II. NEGOTIABILITY AND THE MARKET

That investment securities were traded for centuries before investment certificates became fully negotiable—in the lawyer's sense of the word—suggests that negotiability should be viewed as but one of many possible regimes of transfer rules for investment securities. Moreover, we should be wary of assuming that negotiability is the natural evolutionary outcome of the development of property transfer rules. That investment securities, and various other forms of property, developed toward negotiability in the nineteenth century suggests only that the negotiability system was well suited to the needs of that era. To conclude from this history that negotiability represents the pinnacle of legal development is to fall victim to the biological fallacy so well described by the English economic historian, M.M. Postan:

In the nineteenth century sociologists and economists regarded their age as biologists regard the homo sapiens, as the culmination of an evolutionary process. To them epochs of history were successive stages in the uninterrupted ascent of mankind from the crude primitivity of pre-history to the complex perfection of their own age.²⁸

History, however, did not stop in the late nineteenth century. Evidence from various aspects of current commercial law suggests that in the twentieth century the general trend of development is away from negotiability.

The traditional argument for negotiability is that the market for investment securities, money, bills and notes, and the like could not function if bona fide purchasers were not given complete assurance that they would take free from any possible adverse claims. Without such protection, the argument goes, a potential purchaser would be

²⁶ See Gilmore, *supra* note 21, at 1072-75.

²⁷ The prefatory comment to the Uniform Stock Transfer Act stated that, "The effect of the Act is to make certificates of stock to the fullest extent possible representative of the shares, and this is in accordance with mercantile usage."

²⁸ Postan, *Credit in Medieval Trade*, 1 *Econ. Hist. Rev.* 234 (1928). The fallacy is quite common in modern legal writing on negotiability. See, e.g., Rasor, *A Critical Look at Secured Transactions Under Revised U.C.C. Article 8*, 14 *Fla. St. U. L. Rev.* 859, 867 (1987) ("History provides yet another reason for making the new [uncertificated] shares negotiable. Most of the negotiable intangible rights now recognized by our legal system were once nonnegotiable, the irresistible attraction of negotiability is apparently in the nature of commercial things.") (footnote omitted).

forced to undertake the difficult, expensive, and perhaps impossible task of investigating the provenance of the item.

The perdurability of the credo that negotiability is essential to marketability is one of the more intriguing phenomena in the sociology of modern Anglo-American law. In reality, there is little evidence to support the conventional wisdom that negotiability is essential to marketability. The market for investment securities is probably the setting in modern commerce and finance that approaches most closely the paradigm of negotiability theory—an impersonal market for widely traded financial instruments. Yet as Professor Mooney has shown,²⁹ in the modern world where securities are generally held in fungible bulks by financial intermediaries, securities purchasers rarely attain bona fide purchaser status within the meaning of the relevant article 8 provisions. Security of title is provided not by the legal doctrine of negotiability, but by reliance on the trust- and credit-worthiness of financial intermediaries, backed up by governmental regulatory and insurance systems. Yet even in the simple world where investors keep their elaborately engraved stock certificates in their safe-deposit boxes or under their mattresses, the conventional wisdom about the importance of negotiability is belied by reality. As I have argued elsewhere,³⁰ negotiability is not the mechanism for providing security of title to purchasers of investment securities who obtain possession of certificates. For securities in registered form, a purchaser can qualify as a bona fide purchaser who takes free from adverse claims only if she takes through an authorized indorsement.³¹ If the indorsement is forged or otherwise ineffective, the purchaser of investment securities is in the same position as the purchaser of any form of nonnegotiable property: she takes only such title as her transferor had. The legal doctrine that protects purchasers of investment securities is not negotiability, but the rule that once the old certificate has been surrendered and a new certificate has been issued in the name of the purchaser, the owner's claim against the purchaser is cut off and transformed into a claim against the issuer for wrongful transfer.³² Negotiability operates as advertised only in connection with investment securities in bearer form; yet these are an endangered species on the sure route to extinction. Treasury securities have not been issued in bearer form, or indeed in any certificated form, since the 1970s. The death sentence for corporate bearer securi-

²⁹ Mooney, *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 *Cardozo L. Rev.* 305 (1990).

³⁰ Rogers, *Negotiability as a System of Title Recognition*, 48 *Ohio St. L.J.* 197 (1987).

³¹ U.C.C. §§ 8-302(1)(a), 8-308, 8-311(a) (1977).

³² *Id.* §§ 8-311(b), 8-404.

ties was pronounced, in the roundabout fashion typical of the influence of sovereign authority on modern life, when the Internal Revenue Code was amended to deny the deduction for interest paid on long-term debt security issued in bearer rather than registered form.³³

The demise of negotiability in the world of investment securities nicely illustrates the various causes that are gradually but surely leading to the extinction of the doctrine in all of its applications. First, negotiability doctrine rests on the assumption that the best way to transfer abstract rights is to embody them in pieces of paper and then physically deliver the papers from person to person. As the volume and velocity of trading increases, the requirement of physical delivery becomes an intolerable burden; once we pass from paper to electronic recording of financial relationships, delivery becomes a metaphysical absurdity.

Second, it is by no means obvious that protecting purchasers facilitates the operation of the market. For every purchaser who is protected by negotiability doctrine there is an owner who is harmed. While I have neither the training nor inclination to endeavor a quasi-mathematical demonstration, a simple seat-of-the-pants observation will suffice. I never carry very much cash in the seat of my pants precisely because I know that if I lose it, it's gone. Indeed, one of the reasons that the Treasury ceased issuing securities in certificated bearer form seems to have been a concern that their negotiability—which necessarily means vulnerability to theft—diminished rather than enhanced their attractiveness as investment vehicles.³⁴

Third, there is the phenomenon that may, in the end, finally seal the fate of negotiability for any form of investment or financial instrument. Any instrument that can be transferred by mere delivery is an instrument that can be transferred without any paper trail. The taxman and the policeman do not like that, and eventually they will prevail. It is no accident that cocaine deals are the only large dollar transactions in commerce that are settled in cash, nor that U.S. currency is no longer printed in large denominations.

Reality proves equally oblivious to theory if we turn to other forms of property, starting with simple chattels. To continue with amateur sociology of law, I am always intrigued, though no longer surprised, to find that after several years of legal education, about two-thirds to three-quarters of my commercial law students begin the

³³ 26 U.S.C. § 163(f) (1988).

³⁴ See Coogan, Article 9—An Agenda for the Next Decade, 87 Yale L.J. 1012, 1037-38 (1978).

class convinced that a bona fide purchaser of goods, particularly one who purchases from an ordinary dealer, takes free of any adverse claim.³⁵ The explanation invariably offered is that if the bona fide purchaser were not protected, then no one would feel secure in purchasing goods and the market could not operate.³⁶

The phenomenon that people do buy things even though they are not legally protected against adverse claims could well be the starting point for volumes of theoretical writing about the relationship between law and human behavior. I will content myself with only a few paragraphs. The explanation that is both most and least obvious is that Murphy's Law is not really true: most of the time things don't go wrong. Most goods sold in stores are not stolen. Even if they were, the true owner probably could not or would not bother to track them down to the ultimate purchaser if for no other reason than that most goods are quickly consumed. It would be a foolish waste of time and effort for buyers in ordinary market transactions to investigate the provenance of products, and that would be true no matter what the rules were on stolen goods. The reason this is not obvious is probably that the lawyer's job is to worry about what might happen if things do go wrong, and to study the outcomes of the cases where something did go wrong and was litigated. Tunnel vision is the occupational hazard of lawyers, for our entire universe is the fortunately miniscule subset of transactions that have gone awry.

One might, of course, pare down the assumptions of the instrumentalist argument into a more modest and thus more plausible claim that sometimes it is worthwhile to worry about the rules on ownership rights. Yet even admitting that to be true, it is still hard to find evidence for the argument that protecting bona fide purchasers is essential to the market. The rules on stolen goods vary significantly among different legal systems. Civil law systems tend to provide greater protection to purchasers of stolen goods than do common law systems, but it would require an impressive bit of blind faith in instrumentalist

³⁵ I suspect that many of them leave my class with that conviction unshaken. That would be even more powerful evidence of the allure of the myth that protection of bona fide purchasers is essential to the market were it not for the availability of a simpler explanation having to do with the effectiveness of my teaching.

³⁶ My hunch is that the students reach this erroneous conclusion by doing exactly what their legal education tells them to do, synthesize particulars into general rules. Having encountered a variety of statutory and decisional rules permitting bona fide purchasers to take free from particular kinds of claims, e.g., unrecorded real estate interests, claims to rescind voluntary transfers, etc., students naturally move from these instances to a general rule that a bona fide purchaser takes free of all adverse claims. The erroneous induction is facilitated by the heavy emphasis on instrumental justification that characterizes much modern legal discourse.

creed to suppose that the rules on stolen goods have caused a significant difference in the economic development of, say, England and France. Quirks of history are probably a far more powerful explanatory tool for the variation in legal rules than theories about the impact of law on the market. Indeed, one need not engage in comparative legal studies to see this. There is a vestige in English law of the ancient market overt exception to the rule of *nemo dat quod non habet*: any sale from a shop within the City in London is treated as a sale in the "market overt" so that a good faith purchaser takes free of adverse claims.³⁷ Yet it seems unlikely that this is known beyond commercial law trivia circles, nor that there is any significant difference in marketing practices or pricing between the City and Westminster. One sometimes hears London described as a den of thieves, but I rather doubt that the market overt rules have anything to do with that.

There is, though, at least one line of trade that exhibits all of the characteristics that would seem to make the instrumentalist argument for bona fide purchaser protection most plausible—art and antiques. The items last indefinitely, have astonishingly high value per unit, are bought and sold frequently, and are frequently stolen. Yet under Anglo-American law, owners of stolen art objects can and regularly do recover them from collectors and dealers who purchased them in entire good faith. To be sure, participants in the art market worry about stolen goods, and may take some measures, proportionate to the stakes, to investigate. The operative mechanism of protection, however, is exactly the same as in the securities business. People choose their dealers carefully so that they will be likely to have solvent defendants for contractual claims when their property rights fail.

The law of documents of title provides another useful perspective on the role of negotiability in modern commerce. The bill of lading developed in the era when it seemed obvious that it was quicker to send a piece of paper through banking channels than to transport bulk cargo by ship halfway around the world. This is no longer the case today. For example, it has become a common occurrence for an oil tanker to arrive at its destination long before the documents. As the speed of transportation increases, negotiable bills of lading become both superfluous and bothersome. In many forms of transport the solution is simply to dispense with negotiable bills of lading. Bills of lading never became commercially significant in the air freight business, and commentators on ocean shipping now commonly advocate

³⁷ See P.S. Atiyah, *The Sale of Goods* 288-89 (7th ed. 1985).

use of nonnegotiable waybills.³⁸

The expedient of jettisoning documents of title altogether in favor of simple contracts of carriage such as the nonnegotiable waybill is not, however, feasible for goods that may be bought and sold many times while still in transit or storage. One of the principal functions historically served by warehouse receipts and bills of lading was to provide a system for transferring interests in bulk goods where delivery of possession was not feasible. Unfortunately, the solution of issuing negotiable documents of title which serve as symbolic tokens of the goods is becoming dysfunctional for many of the same reasons that led to the *de facto* extinction of the stock certificate.

The parallels between the securities and shipping businesses are indeed striking. In shipping, as in securities, the first level of response has been to create contractual band-aids as short-term solutions to the problems that arise when commercial practice runs ahead of commercial law. The shipping business has developed a new commercial instrument, the "letter of indemnity," in order to get around the problem created by the negotiability of bills of lading. In order to obtain possession of the oil upon arrival at its destination, a buyer who has not yet received the bill of lading gives the shipper an indemnity to protect the shipper against liability for misdelivery if someone else later shows up with the original bill of lading.³⁹ In shipping, as in securities, it appears that the long-term solution will be a somewhat cumbersome compromise between electronic reality and paper-based law. In the mid-1980s, Chase Manhattan Bank proposed the development of a system that would do to the bill of lading what the Depository Trust Company system has done for stock certificates—

³⁸ See generally Tetley, *Waybills: The Modern Contract of Carriage of Goods by Sea* (pts. 1 & 2), 14 J. Mar. L. & Com. 465 (1983), 15 J. Mar. L. & Com. 41 (1984); Lloyd, *The Bill of Lading: Do We Really Need It?*, Lloyd's Mar. & Com. L. Q. 47 (Feb. 1989). The literature on modern shipping is very refreshing to a negotiability skeptic such as I, for negotiability is portrayed as a problem, not an advantage:

The waybill, not being a document of title, and therefore not having to be an original, can be reproduced and thus has the advantage of speedy electronic transmission; the waybill's lack of negotiability also makes it a safe document which can be handled easily and without fear of theft or loss.

. . . .

The most distinctive characteristic of a waybill is its nonnegotiability. This is its strength and its *raison d'être*, but it causes problems when goods are sold in transit, especially when they are sold more than once. Since there is no document which can be endorsed, ownership is difficult to transfer and then prove. On the other hand, its nonnegotiability avoids a considerable amount of fraud.

Tetley, *supra*, 14 J. Mar. L. & Com. at 466, 15 J. Mar. L. & Com. at 60.

³⁹ See Hawkland, *Documentary Transactions: New Solutions to Old Problems*, 18 U.C.C. L.J. 291, 304-06 (1986).

immobilize and fictionalize them. Under the Chase Manhattan "SeaDocs" system, the carrier would issue a bill of lading which would be sent directly to Chase Manhattan. Trading of the cargo in transit would then be implemented electronically by entries on Chase Manhattan's "books."⁴⁰ The bill of lading would serve about the same function as the jumbo certificates in the DTC system—virtually none. The papers exist only to permit a system of transfers by electronic entries on the records of financial institutions to coexist with a legal regime that insists that possession of pieces of paper is terribly important.

III. PROPERTY AND IDENTITY

A. *Commingled Fungible Goods*

Rather than asking whether investment securities should be or must be negotiable, perhaps we would do better to examine more carefully the question to which negotiability is an answer. The principle of negotiability is an aspect of the general topic of property transfer rules. The basic question is whether someone who purchases an item of property takes it free from or subject to prior adverse claims. Any question of that form contains an implicit, but significant assumption: that there is an "it," and that this "it" now claimed by the purchaser is the same thing that used to belong to someone else. Thus, the negotiability principle, or indeed any rule about transfer of property, presupposes a theory of identity of objects. We cannot talk about "my thing" and "your thing" unless we can distinguish "same thing" from "different thing." In the setting of modern securities practices, this is not idle metaphysical speculation. Rather, as Mooney has pointed out, one of the most important attributes of modern securities practice is that securities are typically held in fungible bulks on the books of financial intermediaries. It is not at all clear what it means to talk about my IBM stock versus your IBM stock, if the only stock in question is held as part of a fungible bulk.

We can explore implications of fungibility—in isolation from puzzlements about negotiability—by examining the rules of property applied to fungible nonnegotiable property such as goods. The starting point is a delightfully named body of law, "confusion of goods."⁴¹

For the most commercially significant class of cases—grain or

⁴⁰ See *id.* at 306-10; Merges & Reynolds, *Toward a Computerized System for Negotiating Ocean Bills of Lading*, 6 J. Law & Comm. 23 (1986). I have been told that the "SeaDocs" system has not yet caught on. No doubt something like it will eventually become operational.

⁴¹ See generally R.A. Brown, *The Law of Personal Property* §§ 6.8 - 6.14 (3d ed. 1975).

other fungible commodities stored in elevators, tank farms, and the like—the common law rules on confusion are now codified in section 7-207 of the U.C.C.:

(1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.

(2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated.

Thus, Article 7 adopts more or less the same approach as the Article 8 "proportionate ownership" rule for securities held in fungible bulk.⁴²

Treating all of the original owners of confused goods as tenants in common, however, resolves only the easiest of the problems that may arise. The harder question is what to do about disputes between the original owners and those who claim through the bailee who holds the commingled mass. The common law rules on confusion treat these questions by exactly the same property rules that would apply if there had been no confusion. Under the basic *nemo dat* principle, one who derived title from the bailee who commingled the goods could acquire no better title than the bailee had. Thus, unless the owners authorized transfers of the property or were otherwise estopped from asserting their claims, someone who bought all or a part of the commingled mass from the bailee, or who obtained a lien or security interest for a debt of the bailee, would take subject to the original owners' claims as tenants in common.⁴³

Article 7 does make some changes in the common law property rules on these questions. Suppose that after the goods have been stored and commingled, the warehouseman makes an unauthorized sale or pledge and the transferee receives a warehouse receipt evidencing her interest. At common law, the transferee would take subject to the ownership claims of the bailors as tenants in common. Under the second sentence of section 7-207(2), however, the transferee would be entitled to a proportionate share if she obtained a negotiable warehouse receipt under circumstances that entitled her to treatment as

⁴² U.C.C. § 8-313(2).

⁴³ See R.A. Brown, *supra* note 41, § 6.14.

Article 7's clumsily named version of holder in due course, a "holder to whom a negotiable document of title has been duly negotiated." It is, however, worth noting that this is not an instance of a general rule that holders of negotiable documents always trump other claimants.⁴⁴ The holder of the document would not take free from the claims of the original bailors, but would only share with them pro rata. Moreover, the original bailors of the commingled goods would be entitled to proportionate ownership shares regardless of whether they obtained negotiable receipts. Section 7-207(2) speaks only of "persons entitled" to the commingled goods, and the cases indicate that bailors holding no special documentation would qualify.⁴⁵

The rules of section 7-207(2) are interesting as an example of the blurring of property rules that comes with loss of discrete identity. The first step—that the owner-bailors of the commingled goods are treated as owners in common—is little more than a rule of necessity. If it is physically impossible to identify each person's property, then there is not much else to do except divide up what is left. The next step—that any holder of a negotiable document covering the goods is also entitled to a share—is somewhat more interesting. The common law of confusion deviated from ordinary property rules only to the extent compelled by practical necessity. All who bailed goods to the dishonest or unfortunate bailee would be treated equally, because it makes no sense to ask whose grain was still left in the elevator. Yet in a dispute between the bailors and a pledgee, the common law would say that the bailors obviously prevail because the grain in the elevator was theirs at the time the bailee purported to pledge it. Section 7-207(2), by contrast, shows that once we drop "mine and thine" thinking in one setting, it is hard to see why we should apply it in another. If it makes no sense to resolve disputes among the bailors by asking whose grain is whose, why should a dispute between the owners and the pledgee be resolved by asking whether the grain was theirs or hers? The bailors and any transferees from the bailee are all in the same soup—or gruel. They trusted the bailee's assurance that he had enough grain to meet all his commitments. Why, then, not treat them all the same?⁴⁶

⁴⁴ The case would be treated quite differently if the goods had not been commingled fungibles. If someone stored identifiable goods and the warehouseman sold or pledged them, the transferee would get no special rights by virtue of obtaining a negotiable document.

⁴⁵ *Midland Bean Co. v. Farmers State Bank*, 37 Colo. App. 452, 552 P.2d 317 (1976); *In re Fairfield Elevators*, 14 U.C.C. Rep. Serv. 96 (Bankr. S.D. Iowa 1973).

⁴⁶ Article 7, however, does not quite go the distance of saying that all those harmed by the shortfall should be treated equally. The cases interpreting § 7-207(2) exclude holders of non-negotiable documents from participation in the proportionate sharing. See *Midland Bean Co.*

B. *Change of Species*

The commingling of fungible commodities is probably the most common setting in which property transfer rules must take account of the loss of the distinct identity of items of property. Yet in some respects an even more interesting question is whether there are other sorts of transformations of property which so seriously compromise our concepts of physical identity that it becomes impossible to say that the thing now claimed by one person was once owned by another. Suppose that Oswald and Tom each own a 1928 Ford Model T. Tom then steals Oswald's. Each morning, Tom flips a coin to decide which car to drive. One day, he drives one of the flivvers off a cliff. Tom then sells the remaining car to Barney and disappears. Can Oswald get the remaining Model T back from Barney? The answer depends on which car was crashed and which was sold. If Tom crashed Oswald's car, then Oswald is left with a worthless cause of action against Tom, and Barney keeps his car. If Tom crashed his own car, then Oswald gets his car back from Barney, and Barney is left with a worthless cause of action against Tom. The really interesting question is what would happen if before crashing one car and selling the other, Tom had disassembled both cars, mixed all the pieces together, and then reassembled two cars from the pile. Although the hypothetical is technically a question of the law of confusion, it may be better to begin with a related subject, sometimes referred to as the law of accession and specification.⁴⁷

Suppose that the thief, Tom, had not owned a car, but simply stole Oswald's car and sold it to Barney. Suppose further that before selling the car to Barney, Tom had painted it green. Clearly the repainting job would not alter Oswald's rights, and he could recover the car from Barney. The change in color has not changed Oswald's ownership of the car. It's the same car, just a different color.⁴⁸ There are, of course, scads of cases about cars that have been stolen, repaired, and reclaimed. Most of the disputes, however, seem to be about whether the stuff that has been added has become part of the

v. *Farmers State Bank*, 37 Colo. App. 452, 552 P.2d 317 (1976); *In re Fairfield Elevators*, 14 U.C.C. Rep. Serv. 96 (Bankr. S.D. Iowa 1973). Moreover, at least one class of claimant fares better. Under § 7-205 a buyer in the ordinary course from a bailee who is also in the business of selling takes the goods free if the buyer takes delivery.

⁴⁷ Confusion refers to cases where goods of one person have been mixed with those of another. Accession refers to cases where one person's goods are added to another's such that title passes to the owner of the whole. Specification refers to cases where goods are so significantly changed that title is lost because the goods can no longer be regarded as the same thing.

⁴⁸ By contrast, the repainting has significantly changed rights to the paint. By virtue of being attached to the car, the paint becomes part of the car so that Oswald would acquire title to the paint by accession.

car so that it goes to the owner who reclaims the car.⁴⁹ The more interesting point for purposes of this article is whether there comes a point when the car has been so changed that it no longer can be identified as the same car, and the original owner's claim evaporates.

The starting point for considering that question is the Institutes of Justinian:

When a man makes a new object out of materials belonging to another, the question usually arises, to which of them, by natural reason, does this new object belong—to the man who made it, or to the owner of the materials? For instance, one man may make wine, or oil, or corn, out of another man's grapes, olives, or sheaves; or a vessel out of his gold, silver, or bronze; or mead of his wine and honey; or a plaster or eyesalve out of his drugs; or cloth out of his wool; or a ship, a chest, or a chair out of his timber. After many controversies between the Sabinians and Proculians, the law has now been settled as follows, in accordance with the view of those who followed a middle course between the opinions of the two schools. If the new object can be reduced to the materials of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material—bronze, silver, or gold—of which it is made: but it is impossible to reconvert wine into grapes, oil into olives or corn into sheaves, or even mead into the wine and honey of which it was compounded.⁵⁰

According to Blackstone, English law followed Roman law on this point, permitting the owner of the goods to recover them in their altered state, unless the alterations were so great that "the thing itself, by such operation, was changed into a different species."⁵¹ The tough question, of course, is what counts as a change of species.

The above-quoted passage from the Institutes seems to treat this as a question of reversibility: the owner of silver bullion can recover the teapot made from it because the teapot could be melted down into the original bullion, but the owner of the grapes cannot recover the wine. That rule, however, would cut off the owner's claims in a very broad range of cases, and Anglo-American law seems to have taken a somewhat different approach. In a late fifteenth century English case, the owner of leather was allowed to recover shoes that had been made from the leather. The year book report suggests that the judges saw the issue not as whether the materials could be reconstituted from the

⁴⁹ See Annotation, Accession to Motor Vehicle, 43 A.L.R.2d 813 (1955).

⁵⁰ Inst. Just. 2.1.25 (J.B. Moyle trans. 5th ed. 1913).

⁵¹ 2 W. Blackstone, Commentaries 404 (1766).

finished object, but whether the materials could clearly be traced into the object:

And as to the case of grain taken and malt made of it, the party cannot retake it, because the grain cannot be known. And so of pennies or groats, when another piece is made of them, this cannot be taken—because one penny cannot be distinguished from another. So also is it if one take a piece and from it make pennies at the mint, the party cannot take the pennies, because they cannot be known one from the other. And so of all similar cases.⁵²

That rule, however, would allow the owner to retake the finished goods in virtually any case, no matter how great the transformation, as in the hypothetical of the grapes made into wine, or in the many nineteenth century American cases in which owners of trees prevailed against people who had wrongfully, though often by mistake, cut the trees and milled them into lumber products.⁵³

Given the difficulty of deciding what counts as a change of species as an abstract question of logic or metaphysics, it is hardly surprising that courts have sought other grounds for decision.⁵⁴ As in so many other areas of the law, there is great appeal in rules that appear to decide the cases against the wrongdoer. The leading American decision taking this approach, *Silisbury v. McCoon*,⁵⁵ came out of the actual occurrence of the grapes into wine hypothetical, suitably adapted to American conditions. A creditor levied on whisky distilled from grain that belonged to the debtor but had, in some fashion not well explained in the case, come into the wrongful possession of the distiller. The distiller argued that regardless of whether his possession of the grain was wrongful, the grain was just gone. The whisky was a new species. The creditor, however, had offered to prove that the distiller knew perfectly well that the grain belonged to someone else, so that in this case the conscious wrongdoer himself was contending that his wrongful act cut off the owner's claim. This was too much for a majority of the New York Court of Appeals, who ruled that a conscious wrongdoer could not acquire property in the goods by any change no matter how dramatic or extensive. The

⁵² Y.B., 5 Hen. 7, fo. 16, pl. 6, as quoted in *Silisbury v. McCoon*, 4 Denio 332, 335-36 (N.Y. Sup. Ct. 1847), rev'd, 3 N.Y. 379 (1850).

⁵³ See, e.g., *Eaton v. Langley*, 65 Ark. 448, 47 S.W. 123 (1898); *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332 (1877).

⁵⁴ Perhaps the most important factor in the modern decisions is the comparison of the value of the goods before and after the alteration. See R.A. Brown, *supra* note 41, § 6.2. The leading case on this aspect of the problem is *Wetherbee v. Green*, 22 Mich. 311 (1871), holding that the owner of standing timber worth twenty-five dollars could not replevy barrel hoops worth nearly seven hundred dollars.

⁵⁵ 3 N.Y. 379 (1850).

change of species rule would apply, so the court said, only in cases of transformations made by persons who innocently held another's property.

Distinguishing between the innocent and guilty, however, only evades the issue when the dispute is between two innocents. Suppose, for example, that the whisky in *Silbury* had been sold to a bona fide purchaser. Under the general rule that a purchaser acquires only such rights as his transferor had, the purchaser's title would depend on the distiller's. Thus, under the rule applied in *Silbury*, the owner of the grain would prevail against the purchaser if the distiller had been a conscious wrongdoer, but would lose if the distiller had been acting under a mistake as to ownership of the grain. A similar approach has been followed in many of the decisions on confusion of goods. It is commonly said that if a conscious wrongdoer takes another's goods and commingles them with his own, the wrongdoer forfeits his claim to his own property, and the victimized owner can take the entire commingled mass.⁵⁶ Applied to my hypothetical of the two cars, that would mean that if Tom disassembled the cars and then reassembled two cars from the pile of pieces, Oswald might be able to assert a claim to both cars. If so, the car that Tom sold to Barney would be treated as Oswald's so that Oswald could recover it from Barney.

The irony of this outcome becomes apparent when we compare it to the hypothetical of the unmixed cars, one of which, chosen at random, was destroyed. There is no question in any of these cases that Tom is a bad fellow. He ought to have his knuckles rapped, and either be rehabilitated or drawn and quartered depending on the mores of the time. That, however, tells us nothing about whether Oswald or Barney should suffer the loss. There really is no terribly compelling ethical basis, or at least none arising out of the equities of the particular case, for choosing between Oswald and Barney. The outcome depends solely on the coin toss that controlled which car Tom would drive the day he crashed. That may seem arbitrary, but nobody said life was going to be fair. It's a terrible shame that some people's cars get destroyed and other people's cars don't, but that's just the way it is. Or, more to the point, that's what it means to say that this is *my car* and that is *your car*.

Therein lies the real lesson to be drawn from the hypotheticals. If we are going to have rules of mine and thine, then we must acknowledge that there will be plenty of cases where outcomes turn on

⁵⁶ See R.A. Brown, *supra* note 41, § 6.11.

rules or conventions of physics rather than ethics. The result in the unmixed car hypothetical depends entirely on the physical identity of the car that was destroyed; yet I doubt that any of us would say that the loss should be divided equally between Oswald and Barney simply because the choice of which car to destroy was made by flipping a coin. The choice was arbitrary, but it was a choice about whether Oswald's car or Tom's car would be destroyed. If we accept the implications of physical identity in the unmixed car case, then we cannot so easily evade the problem in the mixed car hypothetical where, by hypothesis, we are foreclosed from the only way that we have of deciding whether Oswald gets back a car or is left with a worthless cause of action.

Returning to the simpler class of cases where goods are not commingled but are significantly altered, there may be more wisdom than is commonly thought in the seemingly crude rule that whether the owner of the grapes, leather, or grain can recover the wine, shoes, or whisky depends on whether "it's the same thing." The North Carolina Supreme Court put the point nicely in deciding that the owner of trees could not recover a canoe made from them:

The property is changed by a change made in its species or substantial form This doctrine is not based on the idea that a trespasser . . . can lawfully transfer the property in timber from the owner to himself by changing it into some more valuable species; but on the idea that the trespasser by so doing destroys the original article, as if he had burned it, and is responsible to the owner, as if he had burned it⁵⁷

Perhaps that should be the answer in the mixed car hypothetical as well. By disassembling Oswald's car and mixing the pieces, Tom destroyed the separate physical identity of the two cars, and thereby eliminated the only justification for allowing Oswald a property right to the remaining car rather than simply a right of compensation from Tom. Deontology follows ontology.

C. Equity Tracing Rules

Another setting in which to explore the relationship between property and identity is the law of tracing. Suppose that our malefactor Tom, who owns no car of his own, steals Oswald's car. Obviously Oswald can recover the car from Tom. Suppose that Tom becomes insolvent. Can Oswald recover the car from the estate, or is Oswald left only with a claim for compensation to be paid pro rata from the assets of the estate, including the car? The other creditors would, of

⁵⁷ *Potter v. Mardre*, 74 N.C. 36, 40 (1876).

course, prefer to have the car treated as an asset of the estate, but it seems obvious that this would be unfair. Tom's creditors have no right to have their debts paid from somebody else's property. It's still Tom's car and he can get it back by replevin.

Suppose, though, that before disappearing from the scene, Tom had swapped the stolen car for a boat. Oswald can, of course, recover his car from the person who swapped the boat, or anyone else into whose hands the car comes. That, however is not the topic of present concern. Let us simply suppose that both the car and the person who swapped the boat for the car have vanished without a trace. The question is whether Oswald can assert a claim to the boat, or the boat becomes an asset of the estate and Oswald is just another creditor.

By a curious mixture of remedial law and trust doctrine, it has become well-settled that Oswald can assert an equitable claim to the boat, or indeed to any property that he can identify as the traceable product of his original car, no matter how many swaps or other changes there may have been. In the setting of express trusts, the courts of equity developed fairly complex rules that permit trust beneficiaries to assert their beneficial interest against property that the trustee had improperly acquired with trust funds. All that was needed to turn these trust rules into a generally applicable remedial device against thieves or others who wrongfully acquired property was to treat the converter as a constructive trustee of the stolen property and then apply the tracing rules as if the thief had held the property under an express trust.⁵⁸

The key to Oswald's success is whether he can "trace" the property, that is, he must make a specific factual showing that Tom swapped Oswald's car for the boat, that boat for the painting, and so forth. Oswald's claim to preferred treatment over Tom's other creditors is not based on any general principle that victims of theft have a higher claim than other creditors. If Tom had destroyed Oswald's car rather than swapping it for a boat, Oswald's claim against Tom's estate would be no different from that of a voluntary unsecured creditor. Rather, Oswald's claim to the boat seems to be based on the same

⁵⁸ The leading American case allowing constructive trust relief against a converter is *Newton v. Porter*, 69 N.Y. 133 (1877). General authorities state categorically that the constructive trust remedy is available "whether or not there is a fiduciary relationship between the claimant and the wrongdoer." Restatement of Restitution § 202 comment b (1937). Pleadings, however, apparently do not always feel confident about that point, leading to such odd allegations as that the responsibilities of a janitor who stole money from a bank were "to sweep the bank's offices, to arrange and care for the furniture therein, and, while in the discharge of his said duties, to watch over, guard, and preserve, to the extent of his ability, all property of the bank, including moneys, notes, and papers." *Nebraska Nat'l Bank v. Johnson*, 51 Neb. 546, 548, 71 N.W. 294, 295 (1897).

principle that permits Oswald to reclaim his own car from the thief's estate rather than having only a claim for its value. Just as Tom's other creditors have no legitimate claim to have their debts satisfied from Oswald's car, so they have no legitimate claim to have their debts satisfied from the boat that Tom obtained by swapping the car.⁵⁹

Professor Oesterle has suggested that the tracing rules rest on a crude concept of causation. The reason that Oswald can recover the boat, and that Tom's other creditors have no just claim to the boat, is that the boat would not have been there but for Tom's theft of Oswald's car.⁶⁰ Oesterle argues quite persuasively that the causal argument is untenable. Oesterle makes the point by a series of hypotheticals much like the stolen car cases considered herein.⁶¹ Suppose, for example, that Tom stole two cars, one from Oswald and one from Mary. Tom sold Mary's car, using the proceeds to pay his living expenses, and he swapped Oswald's car for the boat. Standard tracing rules would give the boat to Oswald and leave Mary with a mere unsecured claim for the value of her car. Yet, argues Oesterle, how can one say that the theft of Oswald's car, rather than Mary's, caused the boat to be there when the curtain fell. One could just as easily say that the theft of Mary's car was the causal key, for if Tom had not stolen Mary's car, he would have been forced to sell Oswald's car to pay his living expenses. Accordingly, Oesterle argues that preferring Oswald over Mary is unjustifiable.

The fascinating thing about Oesterle's argument is that it works just as well against allowing someone to recover his own property. Suppose that Tom simply stole the two cars, sold Mary's for living expenses, and kept Oswald's. Why should Oswald be able to recover the car and Mary be left with a worthless cause of action? Can't Mary contend that the only reason that Oswald's car is still there is that Tom stole Mary's car, and so did not have to sell Oswald's? The answer must be that although Mary's causal argument is perfectly plausible, it has nothing to do with why Oswald gets his car back. The reason Oswald gets his car back is that it's *his car*. The reason

⁵⁹ This is presumably the thought captured in Judge Swan's well-known quip that the basis for the tracing remedy in express trust cases is that "the fiduciary's creditors have accepted the risk of his solvency, while his cestuis have accepted only the risk of his honesty." *In re Kountze Bros.*, 79 F.2d 98, 102 (2d Cir. 1935), cert. denied, 296 U.S. 640 (1935). The oddity is that the only occasion for application of tracing rules is to save the cestuis from consequences of the fiduciary's dishonesty—the risk they are said to have assumed.

⁶⁰ Oesterle, *Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in U.C.C. § 9-306*, 68 Cornell L. Rev. 172 (1983).

⁶¹ To give credit where due, I should turn that sentence around and acknowledge that Oesterle's article first put me in mind of the hypotheticals discussed herein and some of their implications.

that *his car* is still there and *her car* is gone is that life is not fair, but it's still *his car*.⁶² These thoughts suggest that if there is to be any sound basis for the tracing rules, we must look not to causal chains between the original property and the traceable product, but to some argument closer to an assertion that the traceable product should be treated as the *same thing* as the original property. Thus, the equity tracing rules might be seen as analogous to the rules on accession, specification, and confusion. That perspective has particularly interesting implications for the most important application of the tracing rules, the commingled account situation.

Suppose that Tom steals \$100 in cash from Oswald and deposits it in a bank account containing \$500 of Tom's own money. Thereafter, Tom makes various withdrawals and deposits of his own funds. By the time Oswald discovers the theft, Tom has become insolvent leaving \$300 in the bank account and thousands of dollars of other unpaid debts. Can Oswald recover \$100 from the account, or is he treated only as a creditor with a \$100 claim to share in the pro rata distribution of Tom's assets? Under the standard "lowest intermediary balance" tracing rules, Oswald will be able to claim \$100 of the money in the account, provided that the account balance never dropped below \$100.

In crude form, the commingled account tracing rules are based on presumptions about the intent of the wrongdoer. In the leading case, *In re Hallett's Estate*,⁶³ a fiduciary had deposited trust funds in his personal account and then made withdrawals, leaving an account balance in excess of the amount of trust funds deposited in the account. Sir George Jessel, Master of the Rolls, ruled that the beneficiary could assert a claim to the remaining funds on the grounds that the fiduciary must be presumed to have intended to withdraw his own funds, as he had a right to do, rather than wrongfully withdrawing the beneficiary's funds.⁶⁴ Of course, if the withdrawals continue to

⁶² I posed this question to Professor Oesterle in a letter shortly after publication of his article. His answer was about the same as mine:

If tracing the right to possession (or title) is artificially created, the plaintiff never had the item requested in specie; in your case the right of replevin is based on the plaintiff's one-time, rightful possession of the item. Rightly or wrongly, we distinguish between the two cases, just ask a poor bloke who has paid fair value for stolen property.

Letter from Dale Oesterle to author (Oct. 3, 1983).

⁶³ 13 Ch. D. 696 (1879).

⁶⁴ Jessel expressed the point as follows:

Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. . . . Wherever it can be done rightfully, he is not allowed

the point that the account balance drops below the amount of trust assets deposited in it, one cannot avoid the conclusion that the fiduciary has withdrawn and dissipated trust funds. At that point the issue is whether subsequent deposits of the fiduciary's own funds are treated as restoring the amount of the trust funds or whether the beneficiary's claim is limited to the lowest balance. The general rule is that deposits of the fiduciary's own funds are not treated as restoring the beneficiary's claim, at least in the absence of specific evidence that the fiduciary so intended.⁶⁵

As the commingled fund tracing rules developed, they became increasingly difficult to explain on any coherent theory of presumed intent. Suppose that Tom stole \$100 from Oswald and deposited it in an account containing \$100 of Tom's own money. Thereafter, Tom withdrew \$100 and bought stock, leaving \$100 in the account. The issue, as posed by the standard tracing rules, is whether Tom's money went to the stock, or was left in the account. The presumption of rightful withdrawal, applied literally, could produce a rather odd result in this situation. If we say that Tom tried to act as honestly as his means permitted, then we assume that he first withdrew his own funds, leaving Oswald's \$100 in the account. Thus, Oswald would have no claim to the stock, and, if the remaining \$100 in the account is later withdrawn and dissipated, Oswald is left with no traceable claim. Most of the cases, however, follow the English decision in *In re Oatway*,⁶⁶ holding that Oswald has a claim to any valuable assets

to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes (£)100, is it tolerable for anybody to allege that what he drew out was the first (£)100, the trust money, and that he misappropriated it, and left his own (£)100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own (£)100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers?

Id. at 727-28.

⁶⁵ Restatement of Restitution § 212 (1937). Perhaps the thought is that once the line of clear dishonesty has been crossed, the fiduciary's honor is irredeemably spoiled.

⁶⁶ 2 Ch. 356 (1903).

purchased from the commingled fund, even if they were acquired at a time when sufficient funds remained in the account to satisfy the owner's claim. That, however, means that we really cannot answer the question of whose money went where until we learn what happened to the stock and the remaining funds in the account. If the account balance was dissipated and the stock remains valuable, the tracing rules say that Tom's money went to the stock. On the other hand, if the stock became valueless and the other \$100 remained in the account, the standard rules say that Tom's money stayed in the account. In other words, we'll decide whose money went where only after we find out what happened to the stock and the account.

In reaction against the peculiarities of the standard explanations, an alternative theory is set out in the Restatement of Restitution, attempting to explain the commingled fund tracing rules without any artificial presumptions about intent. Indeed, the Restatement theory seeks to avoid entirely any talk about whose money is whose. The Restatement approach has two components. The first part, which has substantial support in the cases, avoids the peculiarities of presumed intent by regarding Oswald's claim not as an assertion of equitable ownership of some component of the commingled fund and its products, but as an equitable lien securing Oswald's right to reimbursement.⁶⁷ When Oswald's \$100 was commingled in the account with Tom's own \$100, what really happened is that Oswald's funds and Tom's funds combined to produce a new asset, the \$200 claim against the bank. Tom has a right to repayment of his \$100 that contributed to the creation of that asset, and it makes perfect sense to say that he is entitled to a lien on the asset as security for reimbursement. If the asset is later divided or transformed, all of the component parts remain subject to the lien. Thus, without any talk about presumed intent or whose money went where, we can reach a result consistent with the cases: Oswald has a right to recover his \$100 from the commingled fund, or from any assets purchased from it.

The more difficult question arises if it turns out that some asset purchased from the commingled fund has significantly appreciated in value. There is some dispute in the tracing literature about whether someone who can trace into an appreciated asset should be entitled to take the entire asset, even if its value exceeds the amount of the original loss.⁶⁸ That, however, is rarely the issue. Rather, the real cases are ones in which most of the stolen funds have been dissipated but some part can be traced into an asset which has appreciated to some

⁶⁷ Restatement of Restitution §§ 209, 210(1), 211 (1937).

⁶⁸ See 1 G.E. Palmer, *The Law of Restitution* §§ 2.14-.15 (1978).

extent, though not to the extent of the owner's loss. Suppose for example that Tom had stolen \$1000 from Oswald, lost \$900 at the race track, and then deposited the remaining \$100 in the account along with Tom's own \$100. Tom then withdraws \$100, buys stock, and dissipates the rest of the funds in the account. If the stock is now worth \$500, can Oswald claim it, or is he left with at most an equitable lien securing his claim for reimbursement of the \$100 of his money that went into the account from which the stock was purchased?

Professor Palmer has pointed out that the cases frequently give Oswald a claim to the entire amount of the stock in such situations. One would apply the "whose money went where" rules to determine whether Oswald can trace into the stock; and, if he can, the stock will be held in constructive trust for Oswald.⁶⁹ The Restatement takes a different approach, summarized epigrammatically by Austin Wakeman Scott, the Reporter for this section of the Restatement: "[the owner] should be entitled to a part of the whole but should not be allowed to take the whole of a part."⁷⁰ Expressed less cleverly—but more understandably—the thought is that if Oswald wants to assert a claim of equitable ownership, rather than simply an equitable lien, he has to acknowledge that the account was originally composed partly of his money and partly of money to which he had no claim. Thus, when Oswald's \$100 was commingled in the account with Tom's \$100, each owned a fifty percent share of the combined asset. Accordingly, if funds are withdrawn for the purchase of stock or other assets, those assets would also be owned by Oswald and Tom in equal shares. Thus, the Restatement expresses the commingled fund rules as follows:

- (1) Where a person wrongfully mingles money of another with money of his own and with the mingled fund acquires property, the other is entitled to an equitable lien upon the property to secure his claim for reimbursement. (2) If the wrongdoer knew that he was acting wrongfully, the other is entitled at his option to a share of the property in such proportion as his money bore to the whole amount of the fund.⁷¹

Palmer has pointed out that although this formulation works fine in simple cases of the sort given as illustrations in the comments to section 210, it is extremely difficult to determine how the "in such proportion as his money bore to the whole amount of the fund"

⁶⁹ *Id.* §§ 2.16-17.

⁷⁰ A. Scott and W. Fletcher, *The Law of Trusts*, § 517.2, at 631 (4th ed. 1989).

⁷¹ Restatement of Restitution § 210(1)-(2) (1937).

formula is supposed to apply in more complex cases.⁷² Suppose that Tom originally stole \$10,000 from Oswald, but lost \$9,000 of it at the race track. Tom then opened a bank account and deposited the remaining \$1000. Each week thereafter, Tom deposited \$100 of his own wages in the account, and withdrew \$100 from the account for living expenses. Thus, the account balance fluctuated from \$1000 to \$1100, but never dropped below \$1000. After some weeks, months, or years, Tom withdrew \$1000 from the account and bought stock. The stock has now appreciated in value to \$5000. If Oswald wants to assert a claim under Restatement section 210(b) to take a proportionate share of the stock, what is the proportion? One possibility is that all of the amounts of Tom's own money that went into the account are added up and compared to the amount of Oswald's money that went into the account. That calculation, however, is not really accurate, for it ignores the withdrawals. After Tom made his first \$100 deposit, the proportionate share of the \$1100 account under Restatement section 210(b) would be 10/11ths. But at that point, Tom withdrew \$100 and dissipated it. Thus, the amount of the remaining \$1000 account balance equitably owned by Oswald would be 10/11ths of \$1000, or \$909. Then, Tom added \$100 of his own money bringing the account balance back up to \$1100. The amount of Oswald's money that went into that \$1100 account was \$909, so that Oswald's proportionate share at that point dropped to 909/1100, or about 83 percent. With each withdrawal and deposit, Oswald's proportionate share would change. Assuming the amount of each week's withdrawal and deposit remains \$100, Oswald's proportionate share would drop as follows:

Number of Weeks	Proportionate Share
1	91%
2	83%
3	75%
4	68%
5	62%
6	56%
7	51%
8	47%
9	42%
10	39%

Of course, in any real case, the calculation would be much more complicated, since the amount of the withdrawals and deposits would vary, and would be unlikely to occur at regular weekly intervals.

⁷² G.E. Palmer, *supra* note 68, § 2.17.

Palmer, who posed an example even less complex than this, threw up his hands at the Restatement's formulation, remarking that "No court has engaged in such computations, or is likely to do so."⁷³ Rather, the courts would probably follow the lowest intermediate balance rule, regarding the deposits and withdrawals as nothing more than addition and subtraction of Tom's own money, leaving the \$1000 of Oswald's money in the account throughout the period. Thus, the \$1000 used to buy the stock was Oswald's money, and Oswald can assert a constructive trust on the entirety of the stock, taking it at its \$5000 appreciated value.

One way of describing the commingled account tracing rules is to regard them as mathematical algorithms corresponding to differing physical descriptions of what happens when money is combined with other money in an account. As applied to relatively simple cases, the standard rules treat the situation as if oil and water had been combined in a container. The owner's stolen money sinks to the bottom like water, and the thief's own money floats atop like oil. Withdrawals are siphoned from the top, so that the thief's own oil must be exhausted before any of the owner's water is drawn off. Yet, once some of the owner's water has been drawn off, no later deposit of the thief's oil can replenish the missing water. The new oil will simply float on top of the diminished quantity of water.

The aptness of the oil and water metaphor shows how absurd the standard tracing rules are. The rules assume away the very problem they are supposed to solve. The problem is how to treat cases where various sources of funds have been commingled and cannot be separated. The tracing rules simply pretend that the commingling did not occur and treat the cases as if the stolen money retained its separate existence. The appropriate physical analog is not water and oil, but completely soluble liquids. Suppose, for example, that Tom steals a bottle of gin and then periodically pours an ounce out of the bottle, replacing it with an ounce of pure water.⁷⁴ No amount of pretending is going to keep the gin and water separate. The amount of gin in the solution will diminish with each withdrawal and dilution. Indeed, the percentage of gin in the mixture will diminish according to exactly the same formula suggested by the Restatement's "proportionate part" tracing formula. Thus, the Restatement rule, which seems so odd at first blush, turns out to be a perfectly accurate algorithm for the ac-

⁷³ Id.

⁷⁴ Cf. *Richardson v. Atkinson*, 1 Strange 576, 93 Eng. Rep. 710 (nisi prius 1723) ("The drawing out part of the vessel, and filling it up with water, was a conversion of all the liquor . . .").

tual problem of deciding how much of the owner's stolen money is "still in" the account.⁷⁵

Perhaps an even more interesting way of looking at the water and gin metaphor is to ask whether the liquid in the bottle is still gin after a few rounds have been poured out and replaced with water. The answer, of course, depends on our definition of "gin." We might regard that as a very profound metaphysical question, but for present purposes the best approach is a simple, practical one. Could you, without embarrassment, serve a guest a gimlet made with the contents of the bottle? Or, if you prefer a somewhat less rigorous test, would you bother drinking it yourself after a hard day? The most important point of the metaphor is that there is no hard-and-fast line. After a few dilutions, it may still make sense to regard the liquid as gin, but before very long one has no choice but to acknowledge that it's just not gin any more.⁷⁶ It might still be good for something else, but you can't make a decent gimlet with it.

Before discussing the commingled account rules, I suggested that the tracing rules in general cannot be based on causal notions, but must rest on some form of assertion that the traceable product can aptly be described as the "same thing" as the original property. As we saw, the only good reason for saying that the owner of a stolen car gets back his car, while the owner of a car that was stolen and crashed gets only a worthless cause of action, is that in one case the thief still has the same car while in the other case that car is gone. So too, the only good reason for saying that someone whose money was stolen and deposited in an account gets back some portion of the account would be that it makes sense to regard the account balance, or some part of it, as still being the "same thing" as the owner's money which was commingled in the account. If we take that question seriously, we end up not with the elegant precision of the lowest intermediate balance rule, but with the complexity of the Restatement proportion-

⁷⁵ The Restatement applies the proportionate part formula only where the owner seeks a constructive trust rather than an equitable lien. Thus in the hypothetical where Tom deposited \$1000 of Oswald's money and then added and withdrew \$100 each week, the Restatement would allow Oswald an equitable lien on the account for \$1000. Restatement of Restitution §§ 211, 212 (1937). The proportionate part formula would apply only if Oswald sought to enforce a constructive trust on the account or assets purchased from it. *Id.* at §§ 210(2), 211(2), 212 comment b. If, however, tracing rules can be justified only on the basis of conventions about identity, then the proportionate part formulation should apply to the equitable lien remedy as well.

⁷⁶ But cf. *State v. Certain Intoxicating Liquor*, 76 Iowa 243, 245, 41 N.W. 6 (1888) ("[T]he statute provides that alcohol is an intoxicant whenever and however used as a beverage; and no matter how it may be diluted or disguised, it so remains, simply because the statute so declares. The liquor in question contained alcohol, and therefore it, as a matter of law, was intoxicating.").

ate part rule or a very imprecise sense that one can trace into a commingled account only if there haven't been "too many" subsequent transactions.

For purposes of this paper, it is not particularly important how one would set up the equity tracing rules were one to start from scratch. Rather, the important thing about the tracing rules is what they reveal about the relationship between legal concepts of property and nonlegal intuitions about physical identity. The commingled fund tracing rules are perhaps the most elaborate and detailed attempt anywhere in our legal system to retain the normative consequences of mine versus thine even though the objects of these property concepts have irretrievably lost their identifiable thingness. As we have seen, the results are not impressive.

IV. WHY IS MONEY NEGOTIABLE?

In the preceding section, we have been looking at the least "negotiable" form of property, ordinary goods, and asking whether property talk must yield with loss of discrete identity. Now, let us turn to the most "negotiable" form of property, money, and ask whether the rules governing competing claims are related to questions of identity.

Aside from complexities such as the commingled fund problems, the rules governing competing claims to money are about as simple as can be. Anyone who takes money in good faith and for value takes it free of all adverse claims. The usual explanation for the rule is that it would impede the utility of money if a good faith taker were subject to remote claims, for then people would be less willing to accept money as payment without making inquiries about its provenance. Stated in such starkly instrumentalist terms, the argument seems rather implausible. One suspects that people's inclination to accept money has a great deal more to do with the upside potential than the downside risks. People do, in fact, routinely accept paper money without any investigation even though receipt of the paper might turn out not to give one entitlement to that many dollars. I never examine the bills offered to me in change to see whether they might be counterfeit, and I doubt that I am atypical in this respect. Yet I suspect that the odds are at least as great that I might get stuck with a counterfeit bill as that I might get stuck with stolen money if the legal rule were that the true owner of money could recover it from a bona fide purchaser. I suspect that the explanation for the negotiability of money lies not in whether a different rule would really affect behavior, but in the fact that there is something inappropriate about the whole concept of ownership of specific items of money.

In teaching commercial law, I have often begun the discussion of the concepts of negotiability and holder in due course by asking a student to produce a coin from her wallet. I then ask to see the coin, examine it carefully and announce that I have discovered on the basis of careful examination of minute scratch marks that this is the very same coin that I lost several days before and accordingly it is mine. The response, tellingly, is always laughter. Someone, and I cannot now recall who, once said that the core of all humor is the dislocation of concepts. I suspect that the students' laughter at my claim of "true ownership" of the coin reflects an intuitive realization that the concept of true owner is simply inapt in the case of money.⁷⁷

In the famous case of *Miller v. Race*,⁷⁸ Lord Mansfield based the holding that one can acquire good title to a stolen negotiable instrument on the fact that the instrument in question, a Bank of England note, functioned as money. In the critical passage of the opinion, Mansfield offered the following explanation of the principle that one who loses money to a thief cannot recover it from one into whose hands it falls:

It is a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said, "that the reason why money cannot be followed is, because it has no ear-mark:" but this is not true. The true reason is, upon account of the currency of it: it can not be recovered after it has passed in currency. So, in the case of money stolen, the true owner can not recover it, after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but before money has passed in currency, an action may be brought for the money itself.⁷⁹

It is not entirely clear what Mansfield meant by his dismissal of the "money has no ear-mark" notion. Perhaps he was taking the suggestion as an assertion of empirical fact, and hence thought of the suggested basis of the rule as a direct application of the law of confusion of goods. If so, he was entirely correct, for the principle of the "negotiability" of money is in some respects a distinct step beyond the law of confusion of goods. Title to goods is lost by confusion only if it is physically impossible to identify one's own property and distinguish it

⁷⁷ To be precise, I should qualify my thesis that ownership concepts are inapplicable to money, insofar as the owner of money can recover it from the thief or from someone who did not take it in good faith and for value. See Shupack, *Cashier's Checks, Certified Checks, and True Cash Equivalence*, 6 *Cardozo L. Rev.* 467, 476-78 (1985). The essential point remains despite qualifications, for a notion of identity which evaporates as soon as the thing passes from the original wrongdoer is but a vestige of our basic concepts of property.

⁷⁸ 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758).

⁷⁹ *Id.* at 457, 97 Eng. Rep. at 401.

from the commingled mass. By contrast, a claim to stolen money is cut off even though it is possible to identify a specific coin or bill.

On the other hand, it is far from clear what Mansfield had in mind by his suggestion that the "true reason" of the principle of the negotiability of money is "upon account of the currency of it." One thing is clear: later glosses to the contrary notwithstanding, Mansfield emphatically did not mean that the rule was based on the fact that money is an item which frequently passes from person to person. Indeed, the whole point of Mansfield's opinion was the refutation of the argument of counsel that the rules for bank notes should be the same as those for other sorts of frequently transferred property. As Mansfield puts it: "[t]he whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts."⁸⁰ To be sure, in later years some of these forms of property, e.g., securities, became "negotiable," but at Mansfield's time they were not, even though securities had been traded in an impersonal market in London for at least a century before Mansfield's era. Thus the concept of "currency" used by Mansfield must have been something different from transferability—something distinctive to money.

The key to Mansfield's concept of "currency" may well lie in a different interpretation of the "money has no ear-mark" notion. The suggestion need not be taken quite as literally as Mansfield seems to have done. To be sure, a specific physical object used as money may be identifiable, but that is not the same thing as saying that money is identifiable. The physical object, whether a scrap of paper, a piece of shiny metal, or a string of beads, functions as money only because we have decided to treat it as something other than a mere physical object.⁸¹

Monetary theory and practice has long distinguished between the

⁸⁰ *Id.*

⁸¹ Two cases decided by the Massachusetts Supreme Judicial Court illustrate the point rather nicely. In *Chapman v. Cole*, 78 Mass. (12 Gray) 141 (1858), a privately minted gold token from the gold rush days of mid-nineteenth century California had found its way to Massachusetts. When the rightful owner of the piece brought an action to recover it from one into whose hands it passed, the court was confronted with the issue of whether the coin was money, such that the taker prevailed, or just a chattel, such that the rightful owner would prevail. Displaying the ordinary attitude of proper Yankees to the bizarre practices of Californians, the court ruled that the fact that people in California treated it as money didn't make it so. A century later, in the well-known case of *Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358 (1962), the Massachusetts court ruled that the drawer of a group of checks could not maintain an action of conversion against a bank which had cashed them over forged indorsements, for in the hands of the drawer the checks did not represent valuable property: "the value of [the drawer's] rights was limited to the physical paper on which they were written." *Id.* at 8, 184 N.E.2d at 362.

physical objects used as monetary tokens and money in the sense of an agreed standard of value. The distinction is perhaps most clear for units of "money of account" which do not correspond to any actual coin in circulation. The pound, for example, has been the standard of money of account in England since Anglo-Saxon times, although no coin corresponding to a pound was issued until Henry VII's gold sovereigns in 1489. Similarly, the guinea has survived as a unit of account—perhaps only to baffle foreigners—long after the disappearance of the coin first minted in 1663 from gold imported by the African Company's trade with Guinea.⁸² The distinction between token and unit is, however, even more basic than the difference between units that do and do not correspond to coins in circulation. As soon as coins came to be accepted by tale and not by weight, money had become an abstraction, not a physical item. Indeed, for most of history the preeminent concern of those involved in monetary affairs has been to exploit or prevent the exploitation of the difference between the coin and the unit: princes debase the coin, moneychangers clip and cull, and everyone wrings their hands as they do the same.

Thus, when we talk about whether this is my dollar or your dollar, or whether I have ten dollars and you have five dollars, we are not talking about objects—not even objects of symbolic rather than inherent value. Rather, we are talking about abstract units of account. As present-day developments in electronic funds transfer systems are making abundantly clear, there is nothing essential about having physical objects which represent units of money. We might just as well have a clerk who stands before a large blackboard on which all of our names are written and beside which appear tally marks representing the number of dollars each of us then has. As transactions in goods or services are made, we would report them to the clerk who would erase the appropriate number of tally marks from the buyer's ledger and add the appropriate number to the seller's ledger.

Now let us suppose that Tom sneaks up to the blackboard one night and erases four marks from Oswald's ledger and adds them to his ledger. Numerous further transactions might occur in all the accounts before Oswald realizes that his ledger is four marks short. Tom buys a pair of shoes from Cobbler for four dollars and the clerk duly erases four marks from Tom's ledger and adds four marks to Cobbler's ledger; Cobbler buys leather from Tanner for four dollars and the clerk erases four marks from Cobbler's ledger and adds four to Tanner's ledger, etc. Suppose that Oswald is somehow able to reconstruct the entire chain of transactions and demonstrate in some

⁸² See A. Feavearyear, *The Pound Sterling* 1-2, 46, 97-98 (2d ed. 1963).

fashion that Barney's ledger is the present resting place of the misdirected four tally marks. Oswald confronts Barney and asserts that he is the "true owner" of four of the tally marks now on Barney's ledger on the blackboard. Barney's only appropriate response would be bewilderment. To be sure, he might sympathize with Oswald's plight, he might suggest various schemes for recompense—most likely against the blackboard clerk—and it is even vaguely possible that he might be persuaded by some odd sort of fruit of the poisonous tree argument to agree to compensate Oswald. But one thing that Barney cannot do, at least without completely abandoning any semblance of conformity to ordinary language and concepts of property, is to agree with Oswald's contention that Oswald is the "true owner" of four of the tally marks on Barney's ledger.

Perhaps, then, both Mansfield and his unnamed interlocutor were correct. Whether money "has an ear-mark" depends on whether we take "money" to mean money of account or its physical tokens. The tangible objects used as representations of money may be identifiable, but their moneyness, or "currency" to use Mansfield's phrase, lies in the fact that we have agreed to use them as counters in a social practice in which the concept of ownership of individual units makes utterly no sense.

To tie this discussion to the earlier consideration of confusion of goods and the equity tracing rules, one reason that it makes no sense for Oswald to assert that he owns the tally marks on Barney's ledger is that it makes no sense to say that the marks on Barney's ledger are *the same marks* as those that were once on Oswald's ledger. The difference between money and goods is that, as applied to goods, we have trouble with concepts of individual identity only in aberrant cases, such as the hypotheticals about grain distilled into whisky or two cars reassembled from a mixture of their parts. With respect to money, by contrast, it may never make any sense to ask whether this is the same dollar that was once elsewhere. The tally marks in the blackboard hypothetical are no more appropriate objects of property talk than is the number four or the letter Z.

V. CONCLUSION: ARE SECURITIES EVER TRANSFERRED?

To return to the starting point, how should we think about those everyday transactions in which Jones sells, and Smith buys, 100 shares of IBM stock? In the modern securities market, it is difficult to see how most such transactions can be described, other than by arbitrary stipulation, as a sale of Jones's 100 shares to Smith. When all the clearing transactions have been completed, Jones's account with

her broker shows 100 fewer shares of IBM stock, Smith's account with her broker shows 100 more shares of IBM stock, and neither of them really cares what sort of accounting entries have been made on accounts among brokerages to make the end result come out right.

Even in the simple world of a sale of certificated securities effectuated by delivery of an indorsed stock certificate from seller to buyer, it is far from clear that the transaction can appropriately be regarded as the transfer from Jones to Smith of the "same thing." As has been noted, the way that a buyer of securities in such transactions obtains assurance of good title is by surrendering the certificate to the issuer or transfer agent for registration of transfer and issuance of a new certificate in the name of the buyer. If Smith has done that, does it really make any sense to say that Smith now owns the same 100 shares of IBM stock that Jones used to own? Before the transaction, Jones had a right against the issuer to a certain package of rights of participation in the control, ownership, and earnings of the enterprise. After the transaction, Jones no longer had that entitlement against the issuer, but Smith did have an economically equivalent entitlement. To be sure, the "sale" from Jones to Smith was the efficient cause of the change from the pretransaction situation where Jones was the holder of 100 shares to the post transaction situation where Smith was the holder of 100 shares. Yet the main lesson to be drawn from our examination of the law of goods is that ownership cannot be reduced to causation. The bizarre results produced by the equity tracing rules stand as a warning to anyone who would say that Jones's 100 shares must be regarded as the same shares formerly owned by Smith merely because Smith would not have 100 shares but for his dealings with Jones.

In the end, then, the problem with the present structure of the law of securities transfers may be that the concept of transferring items of property just does not fit. It is entirely unnecessary to describe the result of the Jones-Smith transaction as a "transfer" to Smith of the same 100 shares that Jones formerly owned. A far more accurate description would be to say that the Jones-Smith transaction was the efficient cause of the extinguishment of Jones's rights against the issuer and creation of a new package of rights in favor of Smith. That the two packages of rights are economically equivalent does not mean that they are the same. Indeed, it makes no more sense to say that the 100 shares Smith now owns are the same ones that Jones used to own than it does to say that the four tally marks on Barney's ledger in the blackboard hypothetical are the same tally marks that formerly were on Oswald's ledger.

The significance of abandoning the property transfer conceptual structure becomes apparant when we consider the resolution of problems left by the intervention of scalawags, thieves, and insolvents. Suppose that Tom steals Jones's stock certificate, forges his indorsement and sells the stock to Smith, who succeeds in getting the issuer to register the transfer. Under present law, the result is that Smith is entitled to be treated as owner of 100 shares and Jones has a cause of action against the issuer for wrongful registration.⁸³ Jones's remedy for that wrong is to have 100 shares reissued in his name. Asking who got Smith's 100 shares is unnecessary and unhelpful. If one must ask such a question, the best answer is something like the answer that the North Carolina Supreme Court gave in 1876 when asked what happened to the owner's tree when it was wrongfully cut and made into a canoe: "[t]he trespasser by so doing destroys the original article, as if he had burned it, and is responsible to the owner, as if he had burned it."⁸⁴

The only meaning that we can give to an assertion that someone "owns 100 shares of IBM stock" is that the person has a right against the issuer or someone else to be treated as the beneficiary of an undivided 100/x millionth's interest in the equity of IBM, or to be compensated for the value thereof. There is nothing inappropriate about describing that as a property right, and for some purposes it may be useful to do so. Yet we should not delude ourselves into thinking that the rules on transfers of property rights in identifiable physical objects can provide self-evident answers to the difficult problems that arise when the person against whom one has a right to be treated as a beneficiary of an undivided interest in the equity of IBM is unable to satisfy all such claims. The concepts of transfers of physical property are stretched to the limit even when applied to a simple case of sale of stock from one person to another. It is hardly surprising that the limits are passed when we confront the complex problems presented by the insolvency of a securities firm.

The common assumption that money and investment securities have to be negotiable may contain an important germ of truth, but it is a very different truth than usually assumed. The point is not that because money and securities are the kinds of objects which are frequently transferred from person to person, good faith takers must be protected against prior claims. Rather, the point is that money or securities are not objects that are transferred from person to person at all. The lawyers and judges who devised the law of paper money and

⁸³ U.C.C. § 8-311 (1977).

⁸⁴ *Potter v. Mardre*, 74 N.C. 36, 40-41 (1876).

securities centuries ago may well have understood this far better than we do today. In an 1817 decision, Justice Story provided as succinct an explanation as one could want of the theory of transfer of the archetypal negotiable instrument, a bank note payable to bearer:

A note payable to bearer, is often said to be assignable by delivery; but in the correct language there is no assignment in the case. It passes by mere delivery; and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person, who shall become the bearer. It is, therefore, payable to any and every person, who successively holds the note bona fide, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer.⁸⁵

What negotiability does is enable us to use physical objects as tokens of abstract rights without applying the legal concepts that ordinarily govern rights in physical objects. Saying that one takes the token free from prior adverse claims to "it," really means that one takes the abstract right, and that what may once have happened to the physical token is irrelevant. It would, then, be ironic to attempt to preserve the concept of negotiability once we dispense with the physical tokens.

⁸⁵ *Bullard v. Bell*, 4 F. Cas. 624, 627 (C.C.D.N.H. 1817) (No. 2,121). Essentially the same thought can be found as early as the late seventeenth century. In one of the earliest English cases on a note payable to bearer, the court's explanation of the basis of the bearer's right was that "when a merchant promises to pay to 'the bearer' of the note, any one that brings the note shall be paid." *Shelden v. Hentley*, 2 Show. 160, 89 Eng. Rep. 860 (K.B. 1681).