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CAVEAT EMPTOR AND THE JUDICIAL PROCESS

There are many issues in the law whose solution has an essentially economic cost.¹ There is one issue in particular, however, of immense and most important economic effect, which has been decided and re-decided, but which, strangely enough, the courts seem never to have considered on the merits of its economic relations and effects. The conventionalized form in which this issue appears is the case where *A* intrusts *B* with the possession and enjoyment of a chattel and *C*, knowing nothing of *A* or his legal interest, buys that chattel from *B*, for value, in honest belief that *B* is the owner thereof with untrammelled right to sell.

In the event that *B* has absconded with the money, is it wiser economic policy to protect *A*, who trusted that *B* would not sell what he had no authority to sell, or to protect *C* who likewise trusted that *B* would not sell unless he had authority to sell? In other words, ought one to be permitted *safely*, if honestly, to *intrust* possession of goods to others; or should one have power *safely*, if honestly, to *buy* goods from those in possession. As an economic problem the matter seems clearly open to argument. In some countries the law looks to the protection of the innocent purchaser. But as a matter of Anglo-American law the issue has been consistently and persistently decided in favor of the intruster of possession, adversely to him who relies on possession.

The precedents of this decision reach so far back into history—to the Year Books, at least—that judicial change in modern generations might hardly be expected even were it economically desirable. The interesting thing about it all, however, is that, practically speaking, nowhere in the course of these important economic decisions do the opinions show any suggestion that an economic issue, or any sort of pragmatic policy, might be involved in the question.

¹ See the addresses of Herman Oliphant and Robert L. Hale before the Academy of Political Science. (1923) 10 Proceedings of the Academy of Political Science 323 and 356.

Like so much of the economic content of the common law, the original decisions which truly involved the issue were probably intuitive expressions of a common attitude and belief. They must have met and satisfied the needs of the time and place. Possibly, so definite was the common attitude that any explanation of the decision would have seemed superfluous. Possibly, also, modern adherence to the rule still represents a wise economic policy as well as conventional legal philosophy, although the legislative changes hereafter referred to may indicate otherwise. But the judicial methods of meeting the persistently recurring issue sometimes suggest rather that the judges had in mind Christian's comment on Blackstone, that "precedents and rules must be followed even when they are flatly absurd and unjust, if they are agreeable to ancient principles."

One who seeks to learn *why* the rule is what it is, is reminded forcefully of Mr. Justice Clark's specious but stinging remark, quoting another writer, that in search for a reason for decision and rule, we are "bandied from COKE to CROKE, from FLOWDEN to the Year Books, from thence to the Dome Books, from *Ignotum* to *ignotius*, in the inverse ratio of philosophy and reason; still at the end of every weary excursion arriving at some barren source of pedantry and quibble."²

For example, one finds in a digest or encyclopedia the statement that one who buys from another in possession of goods is not protected by his good faith from recovery of the goods by the real owner,³ even though the latter had himself given the possession to the fraudulent seller. *McNeil v. The Tenth National Bank*⁴ is cited as authority. It is *not* authority so far as its decision goes, for it does protect the innocent purchaser, because of the particular circumstances. But as a matter of *dictum* it states the general principle of protecting the titleholder, without any explanation, merely basing the statement on the authority of *Ballard v. Burgett*⁵ and *Covill v Hill*.⁶

If one turns hopefully to those authorities for explanation, this is what he finds: *Ballard v. Burgett* was a case where Burgett had bought a yoke of oxen from one France and had paid France for them. France was in possession of the oxen and there was nothing to warn Burgett against buying them. Later it appeared that Ballard, the original owner, had put France in possession under a contract of sale which

² See Clark, *Some Myths of the Law* (1914) 13 Mich. Law Rev. 26, 28.

³ The term "owner", or "title-holder", as here used is obviously question-begging and not precise. It is not misleading, however, and seems justified for the sake of brevity, and by the similar usage of the courts.

⁴ (1871) 46 N. Y. 325.

⁵ (1869) 40 N. Y. 314.

⁶ (N. Y. 1847) 4 Denio 323.

provided that the oxen were to remain the property of Ballard until paid for. As France had never paid Ballard, the court allowed Ballard to take them away from the innocent Burgett. The decision thus clearly supports the rule, but the court gives no reason whatever except that Ballard had "title." It cites as authority *Herring v. Hoppock*,⁷ *Bigelow v. Huntley*,⁸ *Hart v. Carpenter*⁹ and *Sargent v. Metcalf*.¹⁰

Being thus passed on to these authorities for explanation, one finds that *Herring v. Hoppock* does not involve the question at all. There was no purchaser from the possessor in that case. The third party claimant was only an attaching creditor who had not paid out any money on the faith of the possession. There is not even a dictum on the point sought after. *Bigelow v. Huntley* reveals exactly the same thing. Neither of these cases was properly cited as authority. *Hart v. Carpenter*, however, did involve the purchase of a cow from a farmer who was in possession of her. This possession was under an agreement, quite undiscoverable by the buyer, that "title" should remain in the original owner until certain payments should be made. The court forced the innocent buyer to give up his purchase, without refund of the purchase money. But the only reason suggested by the court was that the buyer was not justified in supposing that one owned a cow merely because he had the care, custody, and possession of it. It does not appear clearly whether the court meant that the buyer was not justified as a matter of common business practice, or merely that he was not "legally" justified. At any rate, there was no discussion of the matter as an economic question at all. For authority this court cites *Forbes v. Marsh*.¹¹ This case, like *Herring v. Hoppock*, *supra*, concerned only an attaching creditor, and neither throws light on the subject nor cites other authority involving the rights of bona fide purchasers for value.

The citation of *Sargent v. Metcalf* as 5 Gray 506 is erroneous, but probably refers to the case at page 306. This case does hold that the innocent purchaser is not protected, but it gives no explanation whatever. It is based wholly on the fact that a prior court had so decided and cites only *Coggill v. Hartford & New Haven R. R.*¹² This latter case is the first which even purports to discuss the question on its merits. An argument was urged, on behalf of the purchaser, to the effect that "as possession is *prima facie* evidence of title, it would furnish fraudulent parties with the means of defrauding honest purchasers.

⁷ (1857) 15 N. Y. 409.

⁸ (1836) 8 Vt. 151.

⁹ (1856) 24 Conn. 427.

¹⁰ (Mass. 1856) 5 Gray 306.

¹¹ (1843) 15 Conn. 384.

¹² (Mass. 1854) 3 Gray 545.

to intrust them with the apparent ownership of property, while the real title is allowed to remain in a third party, who can reclaim it at pleasure." The court's answer to this quite logical utilitarian argument is short and effective, and *absolutely unresponsive*, to wit: It is "without any foundation in principle or authority." The "rule," says the court, is otherwise because it always has been otherwise, not because it ought to be otherwise. In support of its conclusion the court cites the second edition of Long on *Sales*, *Copland v. Bosquet*,¹³ *D'Wolf v. Babbett*,¹⁴ *Lueys v. Bundy*,¹⁵ *Porter v. Pettengill*,¹⁶ *Herring v. Willard*,¹⁷ *Barrett v. Pritchard*,¹⁸ and *Dresser Manuf. Co. v. Waterston*.¹⁹

This mass of authority looks fruitful, but its production in fact is slight. *Copland v. Bosquet*, *D'Wolf v. Babbett*, *Barrett v. Pritchard*, and *Dresser Manuf. Co. v. Waterston* do involve the question and each decides against the defrauded purchaser. But not one of them suggests any reason, save that the rule has always been so, and none cites any earlier authority. In neither *Luey v. Bundy* nor *Porter v. Pettengill* was the question involved. Neither case refers to it nor carries the search further. Only *Herring v. Willard*, therefore, is left.

This case does involve the question, and answers it against the buyer. But, like all the others in point, it offers no explanation and rests content with the citation of only *Strong v. Taylor*,²⁰ *Barrett v. Pritchard* (already discussed), *Fairbank v. Phelps*²¹ and *Dresser Manuf. Co. v. Waterston* (already indicated as barren).

Of this new authority, *Strong v. Taylor* offers nothing, as only the question of a levying creditor was involved, and purchasers' rights were not referred to. In *Fairbank v. Phelps*, if the question is answered at all, no reason is given and no authority cited.²²

Thus the search for explanation along the trail which starts with the digest and through *Ballard v. Burgett* leads one nowhere. Its end is the blank statement of rule, unexplained and unsupported. It is a rule originated without either authority or reason and carried on by authority without reason.

The other trail, opening through *Covill v. Hill*, is much shorter but equally blind. That case merely states it to be the legal rule that

¹³ (C. C. Pa. 1826) 4 Wash. C. C. 588.

¹⁴ (C. C. Mass. 1826) 4 Mason 289.

¹⁵ (1838) 9 N. H. 298.

¹⁶ (1841) 12 N. H. 299.

¹⁷ (N. Y. 1849) 2 Sandf. 418.

¹⁸ (Mass. 1824) 2 Pick. 512.

¹⁹ (Mass. 1841) 3 Metc. 9.

²⁰ (N. Y. 1842) 2 Hill 326.

²¹ (Mass. 1839) 22 Pick. 535.

²² Although a text-book is not generally considered as authority, search of the first edition (1823) of Long on *Sales*—the second edition not being available—reveals nothing on the point either by way of explanation or authority.

the original owner can recover, and cites as authority *Haggerty v. Palmer*²³ and *Pickering v. Busk*.²⁴

The first of these cited authorities, like so many of the others, did not involve the question and makes no comment upon it. The second decision was in fact in favor of the *purchaser*, because of the particular facts in the case, and throws no light on the rule.

Thus the ultimate authority for the rule predicated upon *McNeil v. Bank* turns out to be a few prior decisions which are themselves neither supported by authority nor based upon reason.

This devious and distinctly fruitless search for reason for the rule is typical. Nowhere has the writer found any real consideration of the pragmatic merits.²⁵

²³ (N. Y. 1822) 6 Johns. Ch. 437.

²⁴ (1812) 15 East 38.

²⁵ The decision in *Saltus v. Everett* (N. Y. 1838) 20 Wend. 267, carries the source much further back. Senator Verplanck states the problem, saying, at page 275, "The main question depends upon and involves the general rule that ought to govern, between the conflicting rights of *bona fide* purchasers of personal property, bought without notice of any opposing claim, and those of the original owner divested of the possession or the control of his property by accident, mistake, fraud or misplaced confidence." In answer, however, he quite ignores his use of the word "ought" in stating the issue and merely says, "The universal and fundamental principle of our law of personal property, is, that even the honest purchaser under a defective title, cannot hold out against the true proprietor."

He cites 2 Kent's *Commentaries* (2nd ed. 1832) 324, and *Hoare v. Parker* (1788) 2 T. R. 376. This case is exact authority, but simply says, as its entire opinion, "This point is clearly established, and the law must remain as it is till the legislature thinks fit to provide that the possession of such chattels shall be a proof of ownership." Counsel for the defendant "declared that he could not argue against so established a point." The case cites no authority. The reporter's note, however, refers to "1 Vern. 407; 2 Vern. 691. *Hartop v. Hoare*, 3 Atk. 44. *Cadogan v. Kennett*, Cowp. 432. *Foley v. Burnell*, *Ibid* 435, in the notes, and Bro. Cha. Cas. 286. 25 Hen. VI, 25."

1 Vern. 407 (*Marsden v. Panshall* (1686)) is only indirectly, by a possible analogy, in point, has no discussion and cites no authority. 2 Vern. 691 (*Coles v. Jones* (1715)) merely held that the assignee of a bond takes subject to the equities against the obligee.

Cadogan v. Kennett (1776) 2 Cowp. 432, is not in point and cites no authority. If *Foley v. Burnell* (1779) 2 Cowp. 435, notes, is in point at all, it adds no information. Bro. Ch. Cas. 286 is the same case.

(1447) Y. B. 25 Hen. VI is not available.

Hartop v. Hoare (1743) 3 Atk. 44, is precisely in point. It was therein argued for the buyer and admitted that "to be sure, as it is hard on the plaintiff to have his jewel disposed of dishonestly, so it is hard on the defendants to lose their money; and it was urged for them, as the plaintiff trusted [the dishonest bailee], and the defendants were strangers to him, it was more reasonable the loss should fall on the plaintiff than on the defendants." The court, however, made no pretense of answer to the merits of this argument and merely replied, on the strength of authority, that "the true owner of goods does not lose his property by the sale made by the possessor of them, unless it were in market overt." There is not a word of explanation or of justification in utility. There is, however, much authority, *viz.*, "*Hern v. Nichols*, Salk. 289; 1 Inst. 89; More, 624; Cro. Jac. 68, 69; 35 Hen. 6, fol. 29; Bacon's Treatise Concerning the Use of Law, fol. edit. 80; 15 Hen. VII, 15; 2 Inst. 714; *Hussey v. Jacobs*, Mich. 8 W. 3, B. R. Salk. 344; *Carihew* 367; *Hodges v. Steward* Pasch. 3 W. & M. B. R.

Footnote 25, continued)

Salk. 125, 126; Cro. Eliz. 746; *Ford v. Hopkins*, Salk. 283; *Bank v. Newman* Pasch. 11 W. 3."

All this cited authority looks promising, but it reveals itself in its turn to be as barren of reason as the later cases. *Hern v. Nichols* (1700) 1 Salk. 289, is in point only by analogy and as such really leads to a contrary conclusion, being simply that "for seeing somebody must be a loser by this deceit it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser rather than a stranger." It cites no authority.

1 Coke Inst. 89 (1689) relates only to the liability of a bailee from whom the bailed goods have been taken. More, 624 (*Clifton v. Chancellor* (1600) Moore, K. B. 624) is to the effect that a plea of purchase by the defendant in market overt was subject to a demurrer because it did not aver the character of the shop, "for if the jewels were sold in another shop it would not toll the property of the owner"—a statement in possible point, but only through implication. For this conclusion it gives no reason, and cites only *The Bishop of Worcester's Case*, anno 37 Eliz.

Cro. Jac. 68 (*Taylor v. Chambers* (1605)) seems also in point by implication. The defendant in trover pleaded purchase in market overt. The court held the plea bad as not in fact setting up that defense. Even though the implication in these cases be that bona fide purchase elsewhere is no defense, there is certainly no discussion, and no authority cited.

(1657) Y. B. 35 Hen. VI, f. 29 is in point but adds nothing by way of explanation.

Bacon's *Treatise* (1629) folio 80, is presumably identical with the second edition, page 157. This is a discussion merely of acquisition of property through purchase in market overt. Again its implication is that right of recovery is not otherwise lost to the owner, but again there is no discussion and no authority.

15 Hen. 7, 15, is a miscitation for (1490) Y. B. 5 Hen. VII, 15. The case is squarely in point, but contains no suggestion whatever of the economic merits.

2 Coke Inst. (6th ed. 1681) 714 declares that under certain circumstances even the purchaser in market overt must restore the chattel to the owner from whom it was stolen. "And the old rule, *caveat emptor*, doth hold therein." There is no discussion of the old rule, nor authority.

Hussey v. Jacobs (1700) 1 Salk. 344, is not in point.

Carthew 357, a report of the same case, contains some discussion of the commercial utility of holding that promissory notes do pass free from claims of the maker.

Hodges v. Steward (1691) 1 Salk. 125, is not in point.

Cro. Eliz. 746 (*Higgs v. Holiday* (1599)) says, in respect to money, "When he had lost the possession thereof, he had lost the property also, because it cannot be known."

Ford v. Hopkins (1700) 1 Salk. 283, held that the plaintiff could recover lottery tickets from a third person as, unlike money or cash, they are distinguishable.

Bank v. Newman (1699) 1 Raym. Ld. 442, is not in point.

The case cited in *Clifton v. Chancellor*, *supra*, as "*The Bishop of Worcester's Case*, anno 37 Eliz.", is the only authority referred to in all the citations relied on in *Hartop v. Hoare*. It is unquestionably *L'Evesque de Worcester's Case* (1595) Moore, K. B. 360. The plaintiff having prosecuted the thief of his goods sought restitution from the defendant, who pleaded that he had bought in market overt. The court decided simply that the place wherein he bought was not a market overt, and the plaintiff could recover as "le ppty n'est alter." The conclusion is obviously derived as a mere matter of course from the fact that the sale was not in market overt; there is no discussion and no reference to authority.

Thus again, at the end of this very weary excursion, one comes to a source utterly barren of what he seeks. The decision in *Hartop v. Hoare*, relied on in the later cases, had plenty of precedents in point, but those precedents themselves offer neither more remote authority nor any reason for the rule. Again the rule merely appears, without authority or reason.

The other reference in *Saltus v. Everett*, namely, 2 Kent's *Commentaries* (2nd ed. 1832) 324, offers nothing more. Chancellor Kent merely says, "But

In beginning a search at the other end and tracing down the right of recovery by the title holder, the writer has found the same absence of any real explanation or expressed justification for the rule. Originally the law afforded the owner of a chattel, using the word owner in a

to return to the history of the law of property, the title to it was gradually strengthened, and acquired great solidity and energy when it came to be understood that no man could be deprived of his property without his consent, and that even the honest purchaser was not safe under a defective title." He cites a number of authorities, but in none of them can the writer find any real reason stated, or any discussion of the merits of the rule, nor any citation of precedent more helpful than those already discussed.

Among many other cases, selected at random in hope of finding something pertinent, the longest discussion the writer has found is in *Heacock v. Walker* (Vt. 1802) 1 Tyler 338. Walker had loaned a horse to Aaron Heacock. Aaron then sold it to Nathaniel Heacock, who paid value and took possession in good faith. In determining the right of property as between Walker and Nathaniel Heacock the court laid down the proposition at page 342, that "the principle of law is, that he who loans property, which is eloiigned by the borrower and sold to a third person, is not by the sale divested of his interest in the property." No authority whatever is cited. The court merely said:

"The converse doctrine would tend to abridge that friendly intercourse among men which ameliorates society; for if the law is, that a man must consider, that every time he loans his horse to a poor neighbor to go to the mill, or to call aid to his wife in the hour of nature's difficulty, that he risks the sale of the property by the borrower, you will consider how far this will tend to restrain those acts of neighborly kindness, which, when exercised by the opulent toward the poor, assume a portion of that charity which is the ornament of christian and social life." (Held also that sale in "market overt" was not possible in Vermont.)

In the distinctly anomalous decision of *Carmichael v. Buck* (S. C. 1857) 10 Rich. L. 332, 335, that court replied to an inferential argument similar to the one in *Heacock v. Walker*, "One obvious answer is, Let the owner employ an honest or a responsible carrier; and another is, Let him take care to show by some suitable means that the carrier is neither the owner nor an agent to sell. "Nor will it do to imagine cases in which the doctrine that may protect the purchaser in this case may be carried to an alarming extent in derogation of the rights of true owners."

In Kelyng, 48, Sir John says that the owner who has prosecuted a thief shall have restitution of his goods notwithstanding the possessor had bought in "market overt" because that "will discourage persons from buying stolen goods, though in market overt; for under that pretense men buy goods there for a small value of persons they have reason to suspect....."

The earlier American cases seem simply to assume the principle of absolute protection of the original owner and have no discussion whatever. Thus *Hosack v. Weaver* (Pa. 1795) 1 Yeates 478, was replevin for a horse purchased in good faith by the defendant in open market from one who had no right to sell. It seems simply to have been assumed that the plaintiff could recover unless the doctrine of sale in "market overt" applied. The only authority was an unreported decision to that effect asserted in an argument by the plaintiff. The court held that there was no custom of sale in "market overt" in Pennsylvania.

Browning v. Magill (Md. 1808) 1 Har. & J. 308 was also for a horse purchased in good faith in the horse market from a regular auctioneer but without authority of the owner. Counsel for the purchaser said, "The question is how far property in the hands of a *bona fide* purchaser shall be protected." His whole argument, however, implies that only a purchase in "market overt" could protect his client. The court affirmed recovery by the plaintiff.

See also, *Dame v. Baldwin* (1812) 8 Mass. 518. No "market overt" in Massachusetts; "therefore" *bona fide* purchaser not protected.

modern sense, no remedy against a third person who had acquired it from the owner's bailee.²⁶ This may have been merely a defect in legal remedies as then developed; or it may have represented an idea that the owner had no "right" to recover from such third person.²⁷ But at any rate, under either theory, he could no more recover from a wrongful successor to the bailee's possession than he could from a possessor in good faith. It was the fact of the third person's possession and not the moral character of that possession which precluded action by the owner. On the other hand, an owner who had involuntarily lost his possession, as by theft, could recover from any succeeding possessor, however remote, and again regardless of the good faith by which the possession might have been acquired by the third person.²⁸ It was the manner in which the owner lost his possession, not the circumstances under which the third person acquired it, which determined the propriety of the owner's recovery.

Eventually, to quote Mr. Holdsworth,²⁹ "from the reign of Edward III onwards the right of the bailor to sue other persons besides the bailee was gradually extended. He was first allowed to sue the bailee's executor; and then any third person who had got possession of the goods and detained them. . . . Thus in the case of voluntary parting of possession, just as in the case of involuntary loss of possession, the rights of the owner came to be recognized."

But here again, in extending the owner's right of recovery, no distinction seems to have been made in respect to third persons who had acquired possession for value and in good faith. It was the "ownership" rather than the character of the possessor that was considered.

²⁶ See 2 Holdsworth, *History of English Law* (2nd ed. 1903) 69-70. "Early law does not trouble itself with complicated theories as to the nature and meaning of ownership and possession. The law therefore does not really trouble itself with questions of ownership and possession. It provides rather a means by which some person, who has had things in his possession and has lost them, may be able to recover them. . . . Hence we find that ownership as such, possession as such, is not protected; what is remedied is an involuntary loss of possession. The practical result is, to use modern terms, that an owner who has involuntarily lost possession can take proceedings to recover his property, and to recover a penalty for the theft, against anyone into whose possession the thing has been traced. But if he has voluntarily parted with possession if, for instance, he has bailed his property to another it is the bailee, and the bailee alone, who can act if the property is lost. In such a case the owner's remedy is against the bailee." (Citing, at page 70, Adams, *Essays in Anglo-Saxon Law* (1876) 198, 199; Pollock & Maitland, *History of English Law* (1895) 34.) "It has never known 'a claim to a specific thing founded on the plaintiff's purely civil right of ownership in an abstract form.'" So also at p. 278 ff. See also 2 Pollock & Maitland, *op. cit.*, 155, 172.

²⁷ See 2 Pollock & Maitland, *op. cit.*, footnote 26, p. 155.

²⁸ *Essays in Anglo-Saxon Law*, *op. cit.*, footnote 26, p. 255 ff. and authorities referred to above.

²⁹ 3 Holdsworth, *op. cit.*, footnote 26, p. 280.

It is a fair assumption, therefore, that if the owner's right of action was predicated on any policy at all, as distinct from mere opportunism, it was the policy of some abstract philosophy, and was in no sense a consideration of what we might now call socio-economic utilities.

In none of the cases cited by Mr. Holdsworth was the hardship upon an innocent third person, or the utilitarian aspect of the question in any form, directly or indirectly considered. It may at least be suspected, therefore, that these courts assumed, without any particular thought upon the matter, that the original owner had a moral right to repossession of the goods, and concerned themselves only with the question whether he could enforce that right by the existing forms of procedure.

As has already been said, this assumption is true also of the modern decisions; we find, as indicated previously, an entire absence of comment on the intrinsic merits of the situation. The decision is invariably put upon the abstract principle of "title." The person in possession, says the court, had no title; having no title he could give none to the innocent buyer; the buyer, having received no title, has none; the original owner still has his title, therefore the original owner can recover possession from the innocent buyer. Q.E.D. As an abstract, logical proposition it is impeccable—*unless* there is a *non-sequitur* or two in the conclusions.

Does it truly follow that because the original owner still has "title" he has a legal right to recover from the innocent buyer? Would he, indeed, *have* "title" and *be* "owner" if the courts denied him the right to recover? It is this conventional conclusion that he does have such a right, that he is still the legal owner, that goes undiscussed. The law concedes him such right, apparently, not because socio-economic justice requires it, but because, since the evolution of appropriate pleadings, it has always been the custom of courts so to do. The rule that one who has not parted with his "title" can recover possession from an innocent purchaser is now thoroughly settled; but it is quite obvious that neither the origin nor the perpetuation of the rule indicates any conscious relation of it to social interests and needs.

This total dissociation of the legal rule from the practical realities is again demonstrated by the fact that where the person in possession does have "title" the one relying upon that title is protected, even though this possessor's "title" was voidable, and he, the buyer, had in truth relied only upon the fact of possession. The purely observable conditions, the objective merits, are identical in the two types of cases. In each the original owner has intentionally parted with possession; in each the third person has in good faith relied upon the possession of the

intermediary, has believed him to be owner and has given value for a supposedly absolute title; in each the third person has acquired actual possession; in each the intermediary has deceived both the parties; in each the other party has a remedy against the intermediary—yet the third party's legal right in the chattel depends upon the adventitious circumstance of whether the law considers the intermediary to have had no "title" or to have had a voidable title.³⁰ The explanation of the difference can not be economic, it must be legalistic.

But although the basic rule itself might have been so thoroughly established by ancient precedents that it was "not in the breast of any subsequent judge to alter or vary from it" whatever might be his private sentiments as to its wisdom, nevertheless there have been many occasions when "distinction" would have permitted effective departure. But in these cases again, where the decision was not truly one of precedent, but rather one of choice of policy, there is complete absence of any expressed sense of the economic merits. (Be it repeated, the writer is not disapproving the economic result, but merely commenting on the interesting process of the decisions.)

Counsel have tried, for instance, to make use of the principle of equitable estoppel, contending that an owner, by putting another in possession creates in that other the appearance of ownership and should be "estopped" to deny the truth of that appearance to the detriment and at the expense of one who has honestly relied upon it. The general doctrine of estoppel is recognized by courts of law, and they do ordinarily refuse recovery to an owner who has unreasonably misled an innocent buyer by creating appearance of ownership in that buyer's vendor.³¹ But in every case known to the writer in which the real owner has been held to be thus estopped, he has done something more to create appearance of ownership than merely to put the other in possession. He has, for instance, delayed an unreasonable time after the sale before asserting his title against the innocent purchaser, or he has knowingly allowed the possessor to use the chattel for the very purpose of leading others to suppose him owner. The attempts to ex-

³⁰ *Truxton v. Fait & Slagel Co.* (Del. 1899) 1 Pennewill 483, "Until the contract is rescinded or avoided, the title or property in the goods is in the buyer, and he may sell or dispose of them to a *bona fide* purchaser for value, and thus vest in him a good, indefeasible, and irrevocable title to the property." *Hoham v. Aukerman-Tuesburg Motor* (1922) 77 Ind. App. 316, 133 N. E. 507; *Schloss v. Estey* (1897) 114 Mich. 429, 74 N. W. 264; *Wilk v. Key, Simmons & Co.* (1897) 117 Ala. 285, 23 So. 6; *Callin v. Warren* (1885) 16 Ill. App. 418.

³¹ *Leavitt v. Fairbanks* (1899) 92 Me. 521, 43 Atl. 115; *Grace v. McKissack* (1873) 29 Ala. 163; *O'Connor v. Clark* (1895) 170 Pa. 318, 32 Atl. 1029; *Johnston v. Milwaukee & Wyoming Investment Co.* (1895) 46 Neb. 480, 64 N. W. 1100.

tend it to the type of case under discussion have found no favor with the courts.³²

In view of the cases cited above, this cannot be because the courts reject estoppel as such. It must be, therefore, because they do consider that to invest one merely with possession and use of a chattel does not improperly clothe him with the appearance of ownership; or, what is to the same effect, though a different theory, that a wrongful seller's mere possession does not justify the buyer in supposing him to be owner.

But after all, a court which was inclined to protect the innocent purchaser *could* quite properly declare that unexplained, unsuspecting possession *is* an appearance of ownership and that one who creates such an appearance must take the risk of its misleading others. Such a conclusion, though concededly not consistent with precedent, would actually not be strained. It is at least debatable whether there is any more characteristic hall-mark of ownership than possession. In other words, whether properly to treat physical possession as indicative or not indicative of ownership depends not on anything inherent in possession, but altogether on policy. Yet in rejecting this theory that the real owner is estopped because of his having entrusted possession to the fraudulent seller, the courts seem never to have considered the merits of the policy as such, or else to have assumed that the policy of protecting the original owner is so unquestionably the best as to need no express consideration.

Precisely the same unquestioning assumption that the policy of protecting the legal owner is sound (or the utter disregard of whether or no it is sound as a matter of economic policy) appears in answer to another attack upon the rule. Argument on behalf of the defrauded purchaser has often been based on the so-called rule that "when one of two innocent parties must suffer through the fraud of a third, he shall bear the loss who enabled the fraud to be perpetrated." There is plenty of declaratory authority for this "rule" as an abstract proposition. The obvious difficulty is in applying it. When *A* has trusted *B* not to sell goods which do not belong to him, and *C* also has trusted *B* not to sell goods which do not belong to him, whose fault is it if *B* betrays the trust of each? The "rule" is such that *both A* and *B* can stand firmly upon it in argument. As a rule for decision it is utterly worthless in

³² But *Carmichael v. Buck*, *supra*, footnote 25, does leave to the jury the question of whether the intermediary's possession under the circumstances was such as would lead a third person to believe him owner, in which case, the court held, the true owner would be estopped as a matter of law from recovery. See also *Jenkins v. Thenet* (La. 1844) 9 Rob. *34; *Hoare v. Parker*, *supra*, footnote 25.

such a case. But the courts which recognize the "rule" itself have consistently held the fault to be *C's*. The statement in *Velsian v. Lewis*³³ is characteristic. "It is the buyer's own fault," says the court, "if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by the operation of law. Every person is bound at his peril to ascertain in whom the real title to property is vested, and however much diligence he may exert to that end he must abide by the consequences of any mistake." But the court *might* have said, on the other hand, that good sound pragmatic policy requires the *owner* to trust at his own peril to the honesty of a bailee and that such confidence does "by operation of law" divest the owner of his title in favor of a defrauded third person. In other words the court was content really to disregard policy, and in fact to decide simply according to precedent.

Another attempt to restrict or repudiate the general doctrine that he who relies on possession must suffer, rather than he who intrusts it, is by way of eliminating certain types of property from the operation of the rule. Promissory notes, for instance, and bills of exchange are more or less outside its operation; and this exception is admitted to have been originated as a matter of policy in adopting the Law Merchant.

Attorneys have tried likewise to withdraw stock-certificates from under the operation of the rule, as a matter of policy, and to have them included within the exception so as to protect the purchaser. They have had some seeming success, though very little; but again, in rejecting the contention that the buyer should be protected in these cases, courts have foregone argument as to comparative utility, and have seemed content to rest on the purely logical syllogism of legal title.³⁴

³³ (1888) 15 Ore. 539, 16 Pac. 631.

³⁴ The lawful possession of stock has been held to give the possessor power to vest title in an innocent buyer. *Pennsylvania R. R. Co.'s Appeal* (1878) 86 Pa. 80; *Russell v. American Bell Telephone Co.* (1901) 180 Mass. 467, 62 N. E. 751 (in view of custom); *Burton's Appeal* (1880) 93 Pa. 214; *Walker v. Detroit Transit Ry. Co.* (1882) 47 Mich. 338, 11 N. W. 187. This latter case was apparently based on estoppel—the possession of the certificates, indorsed in blank, being held an appearance of ownership. That in general this exception to the basic rule is conceived of as estoppel, possession of stock certificates being treated as truer appearance of title than possession of other goods, is also indicated by the fact that the exception holds good only when the possession has been entrusted by the owner. *Knox v. Eden Musee Co.* (1896) 148 N. Y. 441, 42 N. E. 988; see *Scollans v. Rollins* (1901) 179 Mass. 346, 354, 60 N. E. 983 (dissenting opinion).

There is a marked, though not practically important exception to the common law protection of the trustful and defrauded owner, whereby purchasers in "market overt" are protected. By this exception, if the innocent purchaser bought the goods in open market, he was protected against the real owner, even though they had been stolen from the real owner and the latter had done nothing whatever to mislead the buyer. The exception was taken over from the rules of the Courts Merchant.³⁵

The reason for taking it over was possibly utilitarian, but the only reason stated by common law courts for this exception to their general rule had nothing to do with any policy of protecting innocent buyers; it was that, in cases of sale in market overt, the real owner does not need protection, because he can himself see that the chattel is for sale in the open market before anyone else is misled into buying it.³⁶ As this "reason" is quite inapplicable to modern conditions, if it ever was sound, the whole tendency of the courts has been so to limit the doctrine as to make it as innocuous and as narrow an exception to the general rule as possible.³⁷

The reason, however, for treating possession of stock certificates as greater evidence of title must in reality be founded in public policy rather than in some inherent characteristic of stock certificated. But in *Scollans v. Rollins*, this indicating quality was expressly ascribed to custom; and public policy was not openly considered, if at all.

In regard to bills of lading there is the same sort of scant and dubious authority that the innocent buyer of a bill is protected to a greater extent than is the buyer of other chattels. *Willingham's Sons v. McGuffin* (1916) 18 Ga. App. 658, 90 N. E. 356; *Pollard v. Reardon* (C. C. A. 1st Circ. 1895) 65 Fed. 848, a discussion undoubtedly affected by the collateral rule as to seller's retention of possession; *Miller v. Brovanski* (1889) 130 Pa. 372. In *Commercial Bank v. Armsby Co.* (1904) 120 Ga. 74, 47 S. E. 589, the protection was given because of the seller's apparent authority to sell arising out of other circumstances than mere possession. In *Munroe v. Philadelphia Warehouse Co.* (C. C. Pa. 1896) 75 Fed. 545, a state statute undoubtedly had much to do with the decision. *Bank of Bristol v. B. & O. R. Co.* (1904) 99 Md. 661, 59 Atl. 134, can be discounted as an exception respecting bills of lading because Maryland is one of the few states in which innocent buyers of other chattels are more or less protected by common law. See, on this latter point, *Lincoln v. Quynn* (1887) 68 Md. 299, 11 Atl. 248.

Nowhere does one find any discussion of the economic merits of the general rule or of the alleged exception in respect to bills of lading.

³⁵ See J. G. Pease, *Sale in Market Overt* (1908) 8 Columbia Law Rev. 375. In a decision by the Fair Court of Wye (1332) 1 *Select Cases on the Law Merchant* 110 (1908) 23 Selden Society Publications 110, the opinion suggests no reason whatever for the decision.

³⁶ Hence, "if plate be stolen and sold openly in a scrivener's shop on the market-day.....this sale should not change the property, but the party should have restitution; for a scrivener's shop is not a market-overt for plate; for none would search there for such a thing." *The Case of Market-overt* (1596) 5 Coke 83b.

³⁷ *Clayton v. Le Roy*, (1911) 104 L. T. R. 419; *Moyce v. Newington* (1878) L. R. 4 Q. B. D. 32; but cf. *Ganley v. Ledwidge* (1876) 1. R. 10 C. L. 33; *Prior of Dunstable's Case* (1433) Y. B. 11 Hen. VI pl. 2, f. 19; *Harris v. Shaw* (1836) Hardw. (2nd ed.) 349.

It can hardly be contended that judicial neglect to comment on, or even to notice, the merits of their rule of protection to the "legal owner" is due to the fact that its merit is so obvious as to need no comment. On the contrary, that it is not indisputably the best public policy is indicated by the existence of quite the opposite rule in several other jurisdictions. Under the French law, for example, one who entrusts another with possession gives him the equivalent of title so far as purchasers for value in good faith are concerned.³⁸ Even if the original owner has lost possession through theft, or otherwise involuntarily, "If the person in actual possession of the thing stolen or lost has bought it at a fair or at a market or at a public sale, or from a merchant who sells such things, the original owner can compel its return only by repaying to the possessor the sum which it cost him."³⁹ The German Civil Code of 1896⁴⁰ provides that "an alienation under § 929 (which is by way of sale) makes the acquirer also owner even if the thing did not belong to the transferor, unless he is in bad faith..."

Whether this rule of protecting the deceived buyer is or is not sound economic policy may be a matter of dispute. The point here important, however, is that it does differ from the rule of the English common law and, more particularly, that this difference is ascribed to economic policy. "The true justification for the rule was commercial expediency; it was that the vindication of movables, as Bourjon writes 'would be prejudicial to the public welfare since no one with respect to a movable exacts a title which shall be at the same time justificative and translative of property and in this respect everyone confides in and is content with possession.'"⁴¹ These same economic facts exist also in England and America; that is to say, it is an economic fact that business custom relies very commonly on possession as indicating a right to sell.

Even the British law of India protects the buyer to this extent, that "No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases: *Exception 1.*

³⁸ "En fait de meubles, la possession vaut titre." French Code § 2279.

As to the earlier French law, see Pothier, *Traité du Droit de Propriété* (1772) Pt. I, c. II, § IV, Art. II, "Personne ne peut transférer à un autre plus de droit dans une chose qu'il n'y en a lui-même." See also § VII, Pt. II, c. I, Art. I, § 3; *Traité de la Possession* (1772) Ch. II. As to the liability of an innocent purchaser to the "owner" for conversion, see the *Traité de Contrat de Vente* (1781) Pt. II, c. IV, § 276.

³⁹ French Code § 2280.

⁴⁰ § 932. § 935 is as follows, "The acquisition of ownership by reason of §§ 932, 934 does not occur, if the thing is stolen from the owner, or has been lost, or has disappeared."

⁴¹ 2 Pound, *Readings in Roman Law* (1906) 181. This work cites other jurisdictions, following the same rule.

When any person is, by consent of the owner in possession of any goods, or of any bill of lading, . . . he may transfer the ownership of the goods of which he is so in possession . . . to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary: provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods. . . ."⁴²

Even the English courts of equity in *refusing* to protect the *cestui que trust* as against bona fide purchasers for value from the trustee did so, it is said, on a principle "which runs through the whole fabric of modern law:—an effort to ensure security in commercial transactions and acquisitions by imposing certain responsibilities on owners of property with respect to that property as a price of legal protection to their interests in it. . . . *Caveat emptor* is being modified by the change in social conditions into *caveat dominus*. Let the owner take care in the selection and supervision of his agent; let him watch the conduct of his trustee, at the risk of losing his property rights through their [his?] wrongdoing, if the transaction they [he?] carry through is with a *bona fide* purchaser. The owner, at least in the case of commodities, is in better position to assume this risk than the purchaser. . . ."⁴³

We have the fact, then, that the common law courts persistently cling to a practice which other political bodies, even the courts of equity, to some extent, have rejected as pragmatically unsound and economically undesirable.

At once the obvious query arises: Why do the law courts so doggedly adhere to their rule? Is it because, unlike those other legislators, they deem the doctrine economically sound and desirable? Or is it because they feel simply "that precedents and rules must be followed, unless flatly absurd or unjust" and that the rule having once been "solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from?"

Either reason is possible, so far as actual judicial practice is concerned. Neither reason can be positively demonstrated. The latter reason—the principle that precedent is ineluctable, the doctrine of *stare decisis*,—is greatly honored in preachment. It has also been unquestionably the real reason for many decisions. "I am bound," said Lord Tenderden, "to state the law as I have received it from my

⁴² (1872) The Indian Contract Act § 108.

⁴³ Huston, *The Enforcement of Decrees in Equity* (1915) 127-128.

predecessors. I cannot propose to you a different rule from what I find adopted by those who have filled my situation before me."⁴⁴ Lord Kenyon, too, felt helpless, saying, "The justice of this case is certainly with the defendant in error; but we must not transgress the legal limits of the law, in order to decide according to conscience and equity."⁴⁵

Hence it is quite possible that the courts have adhered to their rule of protecting the "legal owner" wholly because of their transcendent respect for precedent.

On the other hand, there is copious authority for judicial departure from precedent when economic desirability so requires. The books are replete with this sort of thing: "The evils and injustice arising from the use and abuse of opinion evidence in relation to handwriting are so grave, that *we feel compelled to depart from our own precedents* to some extent and *to establish further safeguards* for the protection of the public."⁴⁶

⁴⁴ See *Rex v. Gutch* (1829) Moody & M. 433, 437.

⁴⁵ *Carlos v. Fancourt* (1794) 5 T. R. 482. See also *Edie v. East India Co.* (1760) 1 Wm. Bl. 295; *Hughes v. D., G. H. & M. Ry.* (1887) 65 Mich. 10, 31 N. W. 603; *Marshall v. Mellon* (1897) 179 Pa. 371, 36 Atl. 201; *People v. Williams* (1868) 35 Cal. 671.

Somewhat beside the point, but interesting, is *Reg. v. Reed* (1854) 6 Cox C. C. 284, in which Baron Parke, treating the case as *de novo*, came to a decision which he changed when the mislaid report of a precedent was discovered.

⁴⁶ See *Hoag v. Wright* (1903) 174 N. Y. 36, 44, 66 N. E. 579 (italics the writer's). See also, *Keane v. Hoare* (1918) 119 L. T. R. 618; Waite, *Public Policy and Personal Opinion* (1921) 19 Mich. Law Rev. 265.

Another illustration of more gradual, but none the less real departure is found in the law of sales itself. Without going into detail, the doctrine of a seller's liability for breach of warranty originated in the idea of deceit by the seller in making false statements concerning the goods. But actual representations of fact were necessary to make the seller liable. See Ames, *History of Assumpsit* (1888) 2 Harvard Law Rev. 2, 8; *Freeman v. Baker* (1833) 5 Car. & P. 475; *Pickering v. Dowson* (1813) 4 Taunt. 779; *Taylor v. Bullen* (1850) 5 Ex. 779.

The theory also developed that a representation of fact concerning a chattel sold carried an implied promise to make good if it should prove untrue, and that an action of assumpsit could be brought for breach of this promise. *Stuart v. Wilkins* (1778) 1 Douglas 18.

But in this theory also there must have been either a real representation of fact by the seller, or a concealment of defects. The latter was treated either as a fraud or as a real representation that there were no defects and an undertaking to make good if there should be any. Note to *Stuart v. Wilkins*, *supra*.

The idea of an intent on the seller's part to be liable, where there was no fraud, was interwoven with both theories. *Chandler v. Lopus* (1603) Cro. Jac. 4, as discussed by Mr. Ames, *op. cit.*, 9; *De Sewhanberg v. Buchanan* (1833) 5 Car. & P. 343; *Borrekens v. Bevan* (Pa. 1831) 3 Rawle 23; *Wetherill v. Neilson* (1853) 20 Pa. 448; *Coats v. Hord* (1915) 29 Cal. App. 115; *Henson v. King* (N. C. 1856) 3 Jones 419; *Hargous v. Stone* (1851) 5 N. Y. 73; *Lichtenstein v. Rabolinsky* (1904) 98 App. Div. 516, 90 N. Y. Supp. 247, *aff'd* (1906) 184 N. Y. 520, 76 N. E. 1099.

The practice developed of recognizing representations of fact as *implied* in fact by the circumstances, to which the courts would attach an implied promise to make good. But even this practice was confined to the cases in which there was some reason for the seller to know the truth or falsity of the representa-

Even courts which feel obliged to honor precedent with lip service do notoriously evade it in action by "distinctions." They could easily have followed this method in protecting the innocent buyer, had they really desired to protect him. It seems a fair inference, if not an unavoidable conclusion, therefore, that the common law courts have felt that there was really no utilitarian need for changing the strict legalistic rule of *caveat emptor*. But, be it noted, while this *might* be the reason for their refusal to change, the courts have not so stated it as the reason for their decisions, nor, naturally, have they stated any economic facts from which they might have drawn a pragmatic conclusion. We cannot be sure therefore just why they adhere to the rule.

However, although these common law decisions do not unavoidably compel the conclusion that courts do predicate the rule of *caveat emptor* on some modern social utility, there is another type of decision which does either compel that conclusion, or else reveals rather startling judicial method. Possibly it does both. These decisions are the ones involving the interpretation and application of statutes relating to the common law.

The legislature of Pennsylvania, for instance, declared that "warehouse receipts, given for any goods . . . , or bills of lading, . . . shall be

tion implied by his making of the sale, and more reason for him to know it than for the buyer to know it. In other words, a real implication of representation was essential. *Jones v. Just* (1868) L. R. 3 Q. B. 197; *Bragg v. Morrill* (1877) 49 Vt. 45; *Zielinski v. Potter* (1917) 195 Mich. 90, 161 N. W. 851, sale by a farmer to a butcher of animal to be slaughtered; *National Cotton Oil Co. v. Young* (1905) 74 Ark. 144, 85 S. W. 92; *Swank v. Battaglia* (1917) 84 Ore. 159, 164 Pac. 705; *White v. Oakes* (1896) 88 Me. 367. Even this was a considerable departure from the original idea that there must be either fraud or a representation in fact, and an equal departure from the idea that the seller must either have been at fault or have really intended to assume a liability. But at least, since it depended upon a superior knowledge on the part of the seller, it had some relation, however slight, to a real representation by him.

In *Chapman v. Roggenkamp* (1913) 182 Ill. App. 117, however, the seller was a retailer of groceries. He sold a can of peas which he had bought from a responsible manufacturer. The can contained some deleterious substance by which the purchaser was made sick. He then sued the seller on the theory of breach of "implied warranty" that the peas were wholesome. The defendant, the retailer, was not himself guilty of any fault; there was neither fraud nor negligence on his part. He had made no representations whatever as to the condition of the peas. He in fact knew no more about the contents of the can than the buyer himself knew. Nevertheless the court held that he was liable to the buyer on the ground that he had "impliedly warranted" the condition of the contents of the can.

The decision obviously is a mere playing with words. There was no warranty in the original and previously accepted connotation of that term. There was no fault on the seller's part, nor could there be even a reasonable pretense of a representation and implied undertaking to make it good by him. It was an unprecedented imposition of liability on him, but a liability imposed for pragmatic reasons of public good. "Public safety demands," said the court "that . . . there should be an implied warranty." So also *Ward, v. Great Atlantic & Pacific Tea Co.* (1918) 231 Mass. 90, 120 N. E. 225.

negotiable, and may be transferred, by endorsement and delivery of said receipt, or bill of lading; and any person to whom the said receipt, or bill of lading, may be so transferred, shall be deemed and taken to be the owner of the goods, wares and merchandize therein specified, so as to give security and validity to any lien created on the same. . . ."⁴⁷

Missouri later enacted a statute providing that "all bills of lading, . . . shall be and are hereby made negotiable by written endorsement thereon, and delivery in the same manner as bills of exchange and promissory notes, . . . and any and all persons to whom the same may be so transferred, shall be deemed and held to be the owner of such goods, . . . so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, . . ."⁴⁸

So far as the writer can ascertain there is nothing whatever in the contemporary records of these legislatures to cast any light upon their purpose in enacting the statutes. Their intent appears to be determinable only by means of the usual rules of statutory construction and through consideration of the conditions possibly affected by the statutes.

A case arose under these statutes in *Shaw v. Railroad Co.*⁴⁹ The facts were that the Merchants' National Bank was the owner (pledgee) of certain cotton represented by a bill of lading. This bill, properly indorsed in blank was presented to one Kuhn for his acceptance of an attached draft. Kuhn accepted the draft but, without the knowledge of the bank, kept the bill of lading and attached a duplicate in its place. This bill of lading he sold to Miller, who sold it to Shaw, who eventually got possession of the goods represented by it. Miller, it appeared, had reason to know of the bank's rights at the time he bought the bill, and Shaw did not in fact see the bill nor rely on it. The court, however, chose more or less to ignore Miller's lack of good faith and passed upon the meaning and effect of the statutes. It held that the legislatures did not intend to make bills of lading negotiable, as bills of exchange and promissory notes are, in the sense that one in possession is deemed owner to the extent of protecting a bona fide purchaser or pledger before maturity. The acts were construed as merely making bills of lading assignable.

It cannot be demonstrated that this narrow interpretation of legislative intent was *wrong*. But it is clear that the statutes might, most reasonably, have been construed as working a much greater change in the common law rule, if the court had thought a change desirable.

⁴⁷ *Italics the writer's.* Pa., Laws 1867, N. 1280, § 1. Act of Sept. 24, 1866, No. 1280.

⁴⁸ *Italics the writer's.* Mo., Laws 1869, p. 91, §§ 1, 2; Stat. (1872) c. 19. Both acts provided that bills on which were stamped the words "not negotiable" should be exempt from the provisions of the act.

⁴⁹ (1879) 101 U. S. 557.

The statutes provided that bills of lading should be "negotiable." This is a term of somewhat indefinite meaning, but it is often used and, if convention makes propriety, is properly used to connote the capacity of passing free from equities and infirmities in title. "In a strictly commercial classification, and as the term is technically used it ("negotiable") applies only to those instruments which, like bills of exchange, not only carry the legal title with them by indorsement, or delivery, but carry as well, when transferred before maturity, the right of the transferee to demand the full amounts which their faces call for."⁵⁰ The legislatures might quite properly and reasonably, therefore, have used the word in this sense and have intended to protect the purchaser of a bill of lading to this extent.

Furthermore, by the law as it already stood, the transferee by indorsement and delivery of a bill of lading acquired *title* to the goods, if the parties so intended and the seller was capable of passing it.⁵¹ And by the law of Missouri, as it already stood, the indorsee of a bill of lading could maintain an action of assumpsit in his own name against the carrier.⁵² In other words, a bill of lading was already negotiable in the narrower sense. Therefore, if the legislatures meant anything at all by making bills of lading "negotiable"—other than merely to declare the already settled law—they meant more than the court credited them with meaning.⁵³

In thus restricting practically to a nullity a statute apparently intended to protect the misled buyer, the court was not bound by any theory of precedent nor by any rule of *stare decisis*. It deliberately rejected a legitimate opportunity to discard the old rule. The conclusion is irresistible that the court thought the old rule more desirable. Yet in the whole opinion there is not one word as to the economic merits of either the old rule or of the proffered change.

⁵⁰ 1 Daniel, *Negotiable Instruments* (6th ed. 1913) 3, citing authority.

⁵¹ *Lickbarrow v. Mason* (1787) 2 T. R. 63; (1790) 1 H. Bl. 257; *Barber v. Myerstein* (1870) L. R. 4 H. L. 317; *Horr v. Barker* (1857) 8 Cal. 610; *Wilkes v. Ferris* (N. Y. 1810) 5 Johns. 335; *Allen, Bethune & Co. v. Maury & Co.* (1880) 66 Ala. 10; *Burton v. Curyea* (1866) 40 Ill. 320.

⁵² Mo. Comp. Laws (1855) 1217, § 1. "Every action must be prosecuted in the name of the real party in interest. . . ." *Smith v. Schibel* (1853) 19 Mo. 140; *Van Doren v. Relfe* (1855) 20 Mo. 455.

This may have been true by the law of Pennsylvania also. *Reed v. Ingraham* (Pa. 1799) 2 Yeates 487; *Leidy v. Tammany* (Pa. 1840) 9 Watts 353. There must be Pennsylvania decisions on the point, but the writer has thus far failed to discover them.

⁵³ That they did, in fact, intend more is indicated by the fact that Maryland had already, by express words, made such bills negotiable in the broader sense, *Tiedeman v. Knox* (1880) 53 Md. 612, and both Missouri and Pennsylvania, after the court's narrow construction, made them "negotiable" by such words as left no doubt of intent to protect the innocent purchaser. Mo., Laws 1917, p. 564; Pa., Laws 1911, p. 838.

There are many other instances in which the courts have rejected rather than taken advantage of opportunity offered by the legislature to modify the common law rule.

The English Factors' Acts, for example, began with a preamble that "Whereas it has been found that the Law as it now stands, relating to goods shipped in the names of persons who are not the actual proprietors thereof, and to the deposit or pledge of goods, affords great facility to fraud, produces frequent litigation, and proves in its effects highly injurious to the interests of commerce in general, be it therefore enacted. . . ."⁵⁴

The Act of (1826) 6 Geo. IV, c.94, pursuant to this preamble, provided that "any person or persons intrusted with and in possession of any bill of lading. . . or order for delivery of goods shall be deemed and taken to be the true owner or owners of the goods. . . ."

Thereafter, one Jenkyns acquired the right to a certain lot of beans together with a written order directing the captain of the transporting vessel to deliver the beans to the bearer of such order.⁵⁵ Jenkyns then sold these beans to Thomas and gave him the delivery order. Thomas was therefore obviously a "person intrusted with and in possession of. . . an order for delivery of goods." Thomas in turn pledged the beans to Osborne for present value and gave him the delivery order. Thomas failed to pay for the beans and Jenkyns claimed them from the captain of the vessel. The captain, however, delivered them to Osborne, who held the order, and Jenkyns brought suit against Osborne in trover. Osborne, note, had loaned money to Thomas in good faith on the strength of the latter's possession of the delivery order. In section one of the statute, which dealt with possession of goods themselves, the words were "any person or persons intrusted, for the purpose of consignment or sale, with any goods. . . ." But in section two, which dealt with possession of documents, the words "for the purpose of consignment or sale" were omitted and it read "any person or persons *intrusted with and in possession of any bill of lading. . . or order for delivery of goods* shall be deemed and taken to be the true owner," etc. (writer's italics).

Here, then, was not only a real opportunity to depart from the common law rule and to protect Osborne, the innocent pledgee, but also the usual rules of statutory construction positively required an interpretation that would protect him. Again, however, the court rejected the opportunity and followed their old rule, merely saying, "the act appears to us intended only to apply to persons intrusted with such

⁵⁴ (1824) St. 4 Geo. IV c. 83.

⁵⁵ *Jenkyns v. Osborne* (1844) 7 Man. & Gr. 678.

documents as factors or agents. Thomas was in possession of the document, in this case, not as the agent of another but in his own right."⁵⁶

There is no insistence in this article that these cases should have been decided other than as they were. It is possible, though to the writer not probable, that the legislatures intended their enactments to have no more effect than the courts gave to them. It is also possible that in restricting the statutes to less than the enactors may have intended, the courts were imposing a wiser and economically sounder rule. This, however, is matter for controversy extraneous to the purpose of this writing.

The point here insisted upon is simply that the courts *could* have rendered different decisions without doing the least violence to reasonable construction of the statutes and without perverting the reasonably possible intent of the enactors.

Since, then, neither the doctrine of *stare decisis* nor the form of the statutes compelled so close an adherence to the rule of the common law, one must conclude that the courts believed that public policy made the common law rule preferable to any change—or else that they acted in disregard of public policy.

If the latter were the case,—if, being free to consider the best interest of society, the courts nevertheless ignored that interest, then they followed a judicial process which has only to show its anachronistic head in the open to be shot at from every side.

The possibility that they were so moved to their decisions is what raises the point of this discussion. Did the courts thus restrict the effect of the statutes, and have they adhered so strictly to the doctrine of *caveat emptor*, because they believe it to be economically sound policy to do so; or were their decisions simply dialectic, legalistic conclusions from certain pre-assumed and formal propositions?

As suggestive that they may possibly have followed this latter process, there is, to be sure, a "rule" that statutes in derogation of

⁵⁶ In *Hazard v. Fiske* (N. Y. 1879) 18 Hun. 277, it appeared that one Nims was the owner of grain then covered by a bill of lading. Nims pledged this bill of lading to Hazard. Later he fraudulently got possession of the grain itself and shipped it to New York, consigned to Fiske. Fiske, as consignee, loaned Nims money on the strength of the consignment. A statute specifically provided that "every person in whose name any merchandise shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon, 1. for any money advanced. . . ." N. Y., Laws 1830, c. 179, § 1. Fiske was unquestionably a person in whose name merchandise was shipped and as consignee thereof had advanced money thereon. Nevertheless the court held that he had no lien upon the goods. In respect to this statute also, there seem to be no collateral legislative records from which the legislative intent could be inferred.

the common law must be strictly construed.⁵⁷ But that idea unpleasantly connotes a smug judicial satisfaction with the laws of their own formulation. It suggests that "the wisdom of the judges and sages of the law have always suppressed new and subtle inventions in derogation of the common law."⁵⁸ One does not readily accept so invidious an explanation.

A much more acceptable reason for the general rule of restrictive interpretation is that suggested in Dwaris' *Statutes*, namely, that the common law is the perfection of reason and whatsoever contravenes the common law is probably unreasonable. Thus, "it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, . . . the common law will controul it. . . ."⁵⁹

This theory of construction in general may be acceptable enough if it asserts the superiority of the common law as a presumption. It may still be true that "It hath been an antient observation in the laws

(Footnote 56, continued)

The Act of (1842) St. 5 & 6 Vict. c. 39, provided that "any agent who shall thereafter be intrusted with the possession of goods, or of documents of title to goods, shall be deemed and taken to be the owner." In *Fuentes v. Montis* (1863) L. R. 3 C. P. 268, the court held that an agent who had been intrusted for the purpose of sale and who was still in actual possession, but whose authority and right to possession had been revoked, was not an agent intrusted with possession. The restrictive effect of this decision was remedied by a later statute, (1877) St. 40 & 41 Vict. c. 39, specifically providing for protection of a purchaser from an agent remaining in possession after his authority had been revoked. See also *Johnson v. Crédit Lyonnais Co.* (1877) L. R. 3. C. P. D. 32.

The phrase "any agent intrusted" has been so limited by decisions as not to indicate servants, carriers, wharfingers, and other custodians who are not sales agents. *Heyman v. Flewker* (1863) 13 C. B. (N. S.) 519; *Cole v. Northwest Bank* (1875) L. R. 10 C. P. 354. And compare *De Gorter v. Attenborough* (1904) 21 T. L. R. 19, holding that a factor who pledged through a friend was not acting in the ordinary course of his business.

At common law one who purchases in good faith from another in possession of goods is not protected against the title holder, even though the seller was in possession under a conditional sale contract. The Statute of (1889) St. 52 & 53 Vict. c. 45, provided that "where a person, having bought, or agreed to buy, goods obtains with the consent of the seller possession of the goods the delivery or transfer by that person of the goods to any person receiving the same in good faith" shall suffice to protect the latter. Thereafter, one Helby put Brewster into possession of a piano under an agreement whereby Brewster promised a certain sum per month as "rent" for the instrument. Helby agreed that when he should have received by such instalments a certain sum he would transfer the title to Brewster. Brewster pledged the piano with Matthews. In suit for possession by Helby the court held that this was an agreement to sell, but not an agreement to buy, and therefore was not covered by the statute. *Helby v. Matthews* [1894] 2 Q. B. 262. The possibility of any such decision is eliminated in the Uniform Conditional Sales Act.

⁵⁷ *Crayton v. Munger* (1853) 11 Tex. 234; *Bussing v. Bushnell* (N. Y. 1844) 6 Hill 382; *Thursby v. Plant* (1681) 1 Saund. 2356; *Sedgwick, Construction of Statutory Law* (1857) 267.

⁵⁸ Co. Lit. § 485; not stated, however, in regard especially to statutory changes.

⁵⁹ *Dr. Bonham's Case* (1610) 8 Coke Rep. *114, *118. See MacKay, *Parliamentary Sovereignty* (1924) 22 Mich. Law Rev. 215, 222.

of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation."⁶⁰

But when one concedes that a given common law rule is at most only presumptively wiser than the statute which modifies it, does he not thereby unavoidably admit the existence of a pragmatic issue? Does he not recognize that as the superiority of the common law is only a presumption, there may be question as to which rule is the more desirable and that "The changed social, economic and governmental conditions and ideals of the time, as well as the problems which the changes have produced must...logically enter into the consideration, and become influential factors in the settlement of problems of (statutory) construction and interpretation?"⁶¹ Surely no one now, if ever, contends simply that statutes in derogation of the common law *must*, arbitrarily, be narrowly construed.

But if the courts in these particular cases did construe the statutes with an eye toward the economic utility of restricting their effect, the printed opinions give no such indication.

Upon what basis of fact did the courts reach their conclusions of economic utility? Did they have the same knowledge of business conditions as the legislatures, whereby to understand the legislative intent? If the opinions were predicated upon economic fact not revealed by the record, how shall subsequent courts be able to use these decisions as precedents? Were any facts offered for consideration, or did the courts take judicial knowledge of conditions? Were the judges trained to handle economic issues?

It may well be that these modern decisions, like those remote ones in which the rule was originated, intuitively reflect a conventional belief that complete protection of even the negligent intruder is wiser policy than any conflicting protection of the honest buyer. But one who reads the opinions can not avoid the conclusion that an economic problem of the greatest importance, a problem which other countries have solved differently from ourselves, has been persistently treated as though it were merely a matter of formal logic.

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⁶⁰ 1 Bl. *Comm.* *70.

⁶¹ *Mulhall v. Company* (1921) 80 N. H. 194, 115 Atl. 449.