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BILLS AND NOTES—HOLDERS IN DUE COURSE—RECEIPT OF STOLEN INSTRUMENTS—In the course of employment by defendant, X handled large amounts of cash. To facilitate this work, plaintiff gave X access to its banking house,

enabling X to steal \$5,000 in paper currency. X used the money to repay a shortage in his accounts with defendant, placing the money in the treasury of defendant as a credit to himself and obtaining a receipt from defendant's cashier. Defendant had no knowledge of the theft. Plaintiff sued for the money, claiming defendant was unjustly enriched by the acts of X and had no right to the money. Defendant contended that the pre-existing indebtedness constituted value and that it was a holder in due course with full title to the \$5,000. *Held*: plaintiff is entitled to recovery; the defendant did not part with value. One judge dissented on the basis that the antecedent debt constituted value, enabling the transferee to become a holder in due course. *Stone & Webster Engineering Corp. v. Hamilton Nat. Bank*, (6th Cir. 1952) 199 F. (2d) 127.

Ordinarily a person cannot acquire title to property through theft or robbery, but where money is involved, the rule is modified.¹ Possession vests title in the holder receiving currency in good faith and on a valid consideration.² Similarly, the Uniform Negotiable Instruments Law provides that a holder in due course of a bearer instrument takes the instrument free and clear of defects of title.³ The reason for both rules is that otherwise commercial channels would be clogged because of the unwillingness of people to accept negotiable paper were there to be possible future suits for conversion. All courts agree that in order to take title as a bona fide holder, the transferee must give value, but whether a book credit entry alone constitutes value is a matter of general disagreement.⁴ The problem most often arises in banking situations, the majority view being that the mere entry itself does not constitute value;⁵ a small but cogent minority hold otherwise.⁶ In the former jurisdictions there are various points of view for ascertaining value.⁷ But in any case, where all of the deposit has been withdrawn and there is no credit balance, the general rule is that there is a purchase for value.⁸ The Uniform Law specifically states that an ". . . antecedent or pre-existing debt constitutes value . . ."⁹ and this was the claim of the de-

¹ State ex rel. Sorenson v. Nebraska State Savings Bank, 127 Neb. 262, 255 N.W. 52 (1934), noted in 33 MICH. L. REV. 630 (1935).

² National City Bank of N.Y. v. Continental National Bank & Trust Co. of Salt Lake City, (10th Cir. 1936) 83 F. (2d) 134.

³ Section 57: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." Gruntal v. National Surety Co., 254 N.Y. 468, 173 N.E. 682 (1930).

⁴ 6 A.L.R. 252 (1920); 24 A.L.R. 901 (1923); 60 A.L.R. 241 (1929); 80 A.L.R. 1064 (1932).

⁵ Thompson v. Sioux Falls National Bank, 150 U.S. 231, 14 S.Ct. 94 (1893); Republic National Bank of St. Louis v. Bobo, 227 Mich. 6, 198 N.W. 176 (1924).

⁶ Blacher v. National Bank of Baltimore, 151 Md. 514, 135 A. 383 (1926), noted in 26 MICH. L. REV. 209 (1927).

⁷ First Nat. Bank v. Court, 183 Wis. 203, 197 N.W. 798 (1924), using first-in-first-out basis; Ashley & Rumelin v. Brady, 41 Idaho 160, 238 P. 314 (1925), using net balance basis. See also case collections in note 4 supra.

⁸ Union Electric Steel Co. v. Imperial Bank, (3d Cir. 1923) 286 F. 857; Central Sav. & Trust Bank v. Wachman, 221 Mich. 512, 191 N.W. 5 (1922).

⁹Section 25. Citrin v. Tansey, 107 N.J.L. 368, 153 A. 523 (1931).

fendant. Nevertheless, the majority said that the defendant parted with nothing and was a mere depositary for the thief. Assuming the equities otherwise equal, the result reached is fair insofar as the employer is not benefiting from the dishonest act of his employee; this idea pervades the majority opinion. However, the reasoning of the dissent that the receipt of a negotiable instrument in payment of, or as a credit on, an antecedent debt constitutes value appears more sound.¹⁰ This is no different from saying that past advances are consideration¹¹ or that where a draft is credited to cover an overdraft, the bank is a holder for value.¹² Yet this allows the defendant to profit from the wrongful acts of its employee. Had there been no shortage, surely there would be little doubt that the plaintiff would be entitled to recovery. A solution to this dilemma is suggested by section 30 of the Uniform Act, which states, "An instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof." The status of a holder in due course can be predicated only on a negotiation. It could be argued that in cases where an employee is attempting to cover a shortage in his employer's account with stolen instruments, there is no negotiation. This would be an exception to the general rule that a bearer instrument is negotiated by delivery.¹³ Such a possibility has been advanced by Professor Aigler¹⁴ on the basis of cases like *Childs & Co. v. Harris Trust & Savings Bank*,¹⁵ where the employee replaced bonds stolen from his employer with bonds purloined from the plaintiff. The court held that the employer was not a holder in due course because there was no negotiation; the fact that it was the employee of the defendant that committed the wrongful acts was a controlling factor. This is a commendable approach in that it is specifically directed toward these special employer-employee situations and is not inconsistent with the ideas of value under the Uniform Law. It puts a somewhat greater burden on the employer, but on the other hand, the thief is his employee and the risk of any loss from unlawful acts should logically rest first upon the employer. Normally, the law of negotiable instruments is thought of as an outgrowth of the law of money; paradoxically, the court applied negotiable instrument law to the currency involved. It may be argued that money is to be treated differently from

¹⁰ There is in addition the view set forth by Ames in "The Doctrine of Price v. Neal," 4 HARV. L. REV. 297 at 309 (1891), that where the equities are equal, the legal title prevails, and in cases of bearer instruments, the legal title is in the person with possession. Therein cited is *London & County Banking Co. v. London & River Plat Bank*, 21 Q.B. 535 (1888). X stole negotiable bonds from the defendant and sold them to plaintiff. Later he fraudulently obtained them again from plaintiff and replaced them in the possession of defendant, who did not learn of the replacement of the bonds until a subsequent date. The court held the defendant a purchaser for value. However, mere reacquisition should not make a person a holder in due course. *Contra: Brown v. Southwestern Farm Mortgage Co.*, 112 Kan. 192, 210 P. 658 (1922).

¹¹ *Midland Savings & Loan Co. v. Donohoo*, 181 Okla. 498, 74 P. (2d) 1147 (1937).

¹² *Bath Nat. Bank v. Ely N. Sonnenstrahl, Inc.*, 249 N.Y. 391, 164 N.E. 327 (1928).

¹³ *Egbert v. Egbert*, 226 Ind. 346, 80 N.E. (2d) 104 (1948).

¹⁴ AIGLER, *CASES ON THE LAW OF BILLS AND NOTES* 520 (1947).

¹⁵ (7th Cir. 1928) 27 F. (2d) 633, cert. den. 278 U.S. 653, 49 S.Ct. 179 (1929).

private negotiable instruments and that mere delivery is negotiation. Nevertheless, the same result might be reached without resorting to the Uniform Act and instead using an unjust enrichment analysis. However, United States paper currency is essentially like any negotiable instrument, both by reason of its purpose and its nature. Certainly it satisfies the requirements of section 1 of the Uniform Act. To treat currency differently would seem inconsistent. Withholding from an innocent employer the benefits of the wrongful acts of his employee should not be effectuated by warping the doctrine of value, whether currency or private negotiable instruments are involved. Crediting an overdrawn account is a common form of business transaction, and its validity as constituting value should not be denied.¹⁶

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¹⁶ Problems of imputation of knowledge do not arise here because in stealing, the employee is acting outside the scope of his agency. Wherever the agent is shown to have been engaged in a private enterprise for the purpose of defrauding the principal or others, the principal is not chargeable with the knowledge of its agent. It is said that it cannot be presumed that the agent will communicate to the principal the facts which would convict the agent of an attempt to deceive and defraud the principal. *Kean v. National City Bank*, (6th Cir. 1923) 294 F. 214 at 219.