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BONA FIDE PURCHASE AND THE CURRENCY OF MONEY

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IF a thief steals money from you is it still yours? What if the thief passes it to a friend as a gift? Does it make any difference if the thief spends the money in a shop?

The answer to these questions depends on the "currency" of money, a legal attribute not shared by other kinds of property. A person's title to property is generally derived from the previous owner. When the property is transferred, the title that once vested in him simply passes to the recipient with the result that the recipient cannot acquire a better title than the person from whom he got the property.[1] To take an example, when a thief steals a car he has bare possession of it and the victim remains the owner. A person buying the car from the thief can only get possession of it. This general rule governing the transfer of title to property is summed up in the maxim *nemo dat quod non habet*.

But "currency", as a legal attribute, makes it uncommon for the present owner's title in money to be acquired derivatively in this way. Currency allows the title in money to be renewed whenever the money passes to a person who receives it in good faith and in return for a valuable consideration. The recipient's title is freshly created. It is good against the whole world, which means that the recipient can acquire a better title than the transferor had. So to return to the questions posed above, the shopkeeper would take the legal title to the stolen money received from the thief. In the ordinary course of events the shopkeeper would receive the money in good faith and the goods that he sold would constitute consideration for the money. But the friend who received the money as a gift would not take the legal title because he would not give any consideration in return for it. Provided that the money could be traced to the recipient, the original owner would have a restitutionary action against him for money had and received.[2]

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[1] See generally D. Carey Miller, *The Acquisition and Protection of Ownership* (Cape Town 1986), pp. 117–120; and F.H. Lawson and B. Rudden, *The Law of Property*, 2nd ed., (Oxford 1981), ch. 4.

[2] *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548. Note also that the liability of the friend to make restitution would be reduced to the extent that he altered his position upon receiving the money. See *Lipkin Gorman, ibid.*, 560 *per* Lord Templeman, 580 *per* Lord Goff.

The classic explanation of currency is that of Lord Mansfield in *Miller* v. *Race*.[3] The plaintiff, Miller, was an innkeeper. He changed a Bank of England note in the amount of £21 10s for a customer, paying him the sum in coin. Although Miller did not realise the fact, the note had previously been stolen. Immediately after the theft, the owner had notified the Bank and directed it to stop payment on the note. Miller eventually took the note to the Bank to change it for coin. The clerk, Race, realised that it had been stopped. He refused to pay out the cash and detained the note on behalf of its original owner.

Miller sued Race for conversion. The King's Bench held that he should succeed and awarded damages for the amount of the note. Lord Mansfield said that the legal title to the note and the right to the money due on it were vested in Miller because he received it in good faith and for valuable consideration. The note passed in currency at that point, and this extinguished the original owner's title. Lord Mansfield said:

> It has been quaintly said, "that the reason why money can not [*sic*] be followed is, because it has no earmark:" but this is not true. The true reason is on account of the currency of it: it can not [*sic*] be recovered after it has passed in currency. So, in the case of money stolen, the true owner can not [*sic*] recover it, after it has been paid away fairly and honestly upon a valuable and bona fide consideration.[4]

This article considers the historical background to Lord Mansfield's explanation of currency. It shows how bona fide purchase supplanted the old common law reason for currency, which was a consequence of the maxim "money has no earmark". Bona fide purchase, as the modern rationale of currency, seems to have originated in the practices of bankers and commercial people who wished to promote the free circulation of bills of exchange and promissory notes. The courts of common law and equity gradually absorbed these commercial practices and gave legal force to the rights of bona fide purchasers of bills and notes. When Lord Mansfield explained the currency of money in terms of bona fide purchase he was not declaring a new rule. Rather he was expressing in a refined and principled way a rule which had been evolving in the common law during the previous 60 years. He made explicit the commercial reasons why money should pass as currency and not be governed by the general rule of *nemo dat quod non habet*.

[3] (1758) 1 Burr. 452. For applications of the bona fide purchase explanation of currency, see *Clarke* v. *Shee* (1774) 1 Cowp. 197; *Ilich* v. *R.* (1987) 162 C.L.R. 110, 117 *per* Gibbs C.J., 138–139 *per* Brennan J.; *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548, 572 *per* Lord Goff.

[4] (1758) 1 Burr. 452, 457.

THE "NO EARMARK" EXPLANATION OF CURRENCY

The original explanation for the currency of money followed from the practical difficulty of proving title to coins in another person's possession. Money, it was said, had "no earmark". One coin was practically identical to all others of the same denomination. The maxim was often quoted in actions where the plaintiff sued the defendant for breaching his duties as a bailee of money.[5] When the first actions appear in the reports during the sixteenth century, metallic coin was the only form of money in use so people who wished to save their money were forced to amass hoards of coins.[6] They sometimes deposited the money with a trustworthy person in a bag or strongbox to hold on a bailment. The bailee was bound to keep the money safe and return it specifically. From the practical and legal points of view, the transaction was no different from the bailment of a valuable chattel.

If the bailee failed to return the money the proprietor might have an action in detinue, claiming its specific return or damages for its value. He could also seek damages by suing in case for trover and conversion because the court would readily infer that there must have been a conversion if the bailee could not satisfactorily explain his failure to return the money.[7] In addition to the possibility of the defendant's waging his law, the plaintiff in a detinue action faced formidable problems of proof. None of the coins had distinctive earmarks so the plaintiff would usually find it difficult to establish that it was precisely his money that the defendant detained. Accordingly it was said in the cases: "[Money] cannot be known from other money"; a "certain property" in money could not be ascertained, because "one mans [*sic*] money is not to be known from anothers [*sic*]".[8] The courts held as a consequence that detinue would not lie for money unless it was contained in a bag or box.[9] That was the only way to give a

[5] For examples see *Core's Case* (1537) 1 Dyer 20a; *Banks* v. *Whetston* (1596) Cro. Eliz. 457*; *Draycot* v. *Piot* (1601) Cro. Eliz. 818.

[6] See E.T. Powell, *Evolution of the Money Market* (London 1915), pp. 31–35. More adventurous investors could lend their surplus cash through scriveners who brokered loans to merchants. See A.V. Judges,"The Origins of English Banking" (1931) 16 *History* (N.S.) 138.

[7] *Isaack* v. *Clark* (1615) 2 Bulst. 306, 310 *per* Dodderidge J., 314 *per* Coke C.J. See also *Davies* v. *Dyos* (1648) Aleyn 91. Bailments of money were an exception to the general rule that a simple failure to return goods on request did not amount to a conversion of them. See generally, A.W.B. Simpson,"The Introduction of the Action on the Case for Conversion" in *Legal Theory and Legal History* (London 1987), pp. 93–95.

[8] *Isaack* v. *Clark* (1615) 2 Bulst. 306, 314 *per* Coke C.J., 308, 310 *per* Dodderidge J.; for similar reasoning see *Core's Case* (1537) 1 Dyer 20a, 22b; *Draycot* v. *Piot* (1601) Cro. Eliz. 818, 819 (in argument); Co. Lit. 285, s. 498; Blackstone, *Commentaries*, vol. 3, 152.

[9] *Core's Case* (1537) 1 Dyer 20a, 22b, which was an action in trover against the exectuors of an agent with whom the plaintiff had deposited a sum of money for him to use in a business transaction. For earlier references to the distinction between money in and out of a bag, see also Pas. 7 Hen. IV, fo. 13, pl. 10 (rejection of argument that the plaintiff could only sue in debt for failure to redeliver money contained in a bag); Hil. 6 Edw. IV, fo. 11, pl. 6 *per* Littleton (detinue

distinct identity to the coins which would otherwise be without earmarks. Specific identification was essential because the defendant had the option of returning the plaintiff's property or paying damages. The assumption underlying these rules seems to have been that the property had to remain identifiable until the trial. Otherwise the defendant could not return it *in specie*, or have it available for the jury to assess its value. This point was explained in *Isaack* v. *Clark*, an action for trover and conversion of a purse containing £22 which had been pledged as security for the return of some casks of wine seized to enforce a judgment debt. Dodderidge J said:

> The thing detained ought to be certain . . . in a detinue of money delivered, if it be out of a bag, the action lyeth not, because that no certain property can then be known, and the ground of this writ, is to recover the thing it self, *in hoc individuo*, if it may be had, and if not, then damages for the same . . . [T]he jury is to finde the value of everything detained, if the thing it self cannot be had again, then the value thereof is to be found.[10]

Conversely, the action for trover would lie for the conversion of money that was not contained in a bag when it was alleged to have been appropriated.[11] The only remedy for the conversion was damages so it did not matter whether the defendant could specifically return the plaintiff's money after it was alleged to have been converted.[12] Indeed the very act that constituted the conversion, as where the defendant spent the money or mixed it with his own, might have caused the plaintiff's money to lose its specific identity.

It may have been the practical difficulty of specifically recovering money in detinue that underlay the early explanations for the currency of money. Title to money generally vested in the person who had it in his possession. Because coins had no earmark which would have allowed them to be specifically identified, it was generally impossible for the original owner of money to prove his title once the money passed into the possession of another person. At that point it would usually become mixed with other coins so that the original owner could not prove his title and recover the money. The money effectively became the property of the new recipient. Title to money passed with

lies for money contained in a bag or a box; otherwise the plaintiff's action was in debt); Mich. 2 Ric. III fo. 15, pl. 39, identified as *Wellys* v. *Robinson*, CP 40/890, m. 128 (dispute over concurrence of remedies in detinue and debt). I am grateful to Professor J.H. Baker for referring me to these Year Book authorities.

[10] *Isaack* v. *Clark* (1615) 2 Bulst. 306, 308 *per* Dodderidge J. See also 2 Bulst., 310 per Haughton J. and *Anon.* (1605) Noy 12.

[11] *Higgs* v. *Holiday* (1600) Cro. Eliz. 746; *Anon.* (1605) Noy 12; *Kinanston* v. *Moor* (1627) Cro. Car. 89.

[12] *Isaack* v. *Clark* (1615) 2 Bulst. 306, 312 *per* Coke C.J.

possession, provided that the coins could not be specifically traced to their original owner.[13]

Direct authorities for so fundamental a principle are rare indeed.[14] The evidential difficulties of proving an action against a recipient would mean that the courts might never have had the opportunity to rule on whether the change of possession altered the property in the money. The cases which refer to the point do so only in passing. The clearest is an obiter dictum of Lee C.J. in *Hartop* v. *Hoare*,[15] decided in 1743. "Property, by the rule of law, does not follow possession, unless in cases where the true owner hath no marks to ascertain his property, as in money". Lee C.J. said he knew of no case where "a disposition made by a mere possessor of goods, hath been held to change the property of the owner, in a case of goods that *have marks whereby they may be known*".[16] It followed that Hoare, who was a banker, was liable for the conversion of two diamond ear-rings which were Hartop's property. Hartop had bailed them to a jeweller for safekeeping. The jeweller wrongfully deposited them with Hoare to secure a loan. The jewels had a distinct identity so Hartop kept his property in them even when they were out of his possession.

As authority for the distinction between property with or without earmarks, Lee C.J. cited *Higgs* v. *Holiday*,[17] a decision of the Exchequer Chamber given in 1600. Higgs was Holiday's factor. He sold some corn on Holiday's behalf but failed to account for the sale proceeds. Holiday sued for trover and conversion of the money. The court held that his action could not succeed because he had no property in the sale proceeds. An action for account would traditionally have

[13] The passing of title in money seems not to have depended entirely on its remaining specifically identifiable. The intention with which the plaintiff transferred the money was also relevant. If the plaintiff deposited money with another, not for safekeeping, but for use in a business transaction, then property would vest in the recipient even if the money remained sealed in a bag: *Anon.* (1572) 3 Leon. 38. But the property might revert to the plaintiff if the depositee did not fulfil the conditions under which he received it. The plaintiff might then have an action in detinue if the fund remained specifically identifiable: *Core's Case* (1537) 1 Dyer 20a, 22a–b *per* Fitzjames C.J.

[14] Note that an analogous principle has recently been articulated in the context of trust law. In *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] 2 W.L.R. 802 Lord Browne-Wilkinson explained at pp. 828–829 that a trust could not come into being unless there was an identifiable fund of property to which it could attach. Since a trust was a form of property holding, the claimant could not assert an equitable interest in property which could not be specifically identified. See also *Re Goldcorp Exchange Ltd.* [1995] 1 A.C. 74, 89–91 *per* Lord Mustill (logical connection between passing of legal property and ascertaintability in the sale of goods).

[15] (1743) 3 Atk. 44 contains the fullest report of the case.

[16] *Ibid.*, 50–51 (emphasis added). Also relevant is *Ford* v. *Hopkins* (1700) 1 Salk. 283, 284 where Holt C.J. drew a broad distinction between the passing of property in chattels with and without earmarks. "If bank-notes, Exchequer-notes, or million-tickets, or the like, are stolen or lost, the owner has such an interest or property in them, as to bring an action into whatsoever hands they are come: money or cash is not to be distinguished, but these notes or bills are distinguishable, and cannot be reckoned as cash, and they have distinct marks and numbers on them." For a discussion of the case and the subsequent qualifications to it, see p. 561 below.

[17] (1600) Cro. Eliz. 746.

lain on these facts because Higgs was a common receiver to Holiday.[18]

The relevant aspect of the case is the court's reason why the money could not have belonged to Holiday: "The property of the money was never in the master, but in the servant; for if a man delivers money to another, the property in the money is in the bailee, *because* it cannot be known".[19] The reason is expressed in causal terms. Money lying loose in a person's possession necessarily belonged to him, because nobody else could identify within it any specific coin which he might have a stronger right to possess. Likewise, in *Bretton* v. *Barnet*[20] the plaintiff sued in debt to recover money paid to the defendant on the understanding that he would repay the amount when the plaintiff required it. It seems that the defendant was not expected to keep the money separate in a bag. Walmseley J. agreed that debt was the correct form of action. According to the report, the judge "took a difference between goods and money: for if a horse be delivered to be redelivered, there the property is not altered, and therefore a detinue lies, for they are goods known: but if money be delivered, it cannot be known, and *therefore* the property is altered, and therefore a debt will lie".[21]

These dicta appear to suppose that the fact of possessing unmarked coins was generally sufficient to vest the property in the possessor, even if the coins might previously have been lost by their original owner or stolen from him. Property and possession tended to be inseparable because in the ordinary course of events it was impossible for the original proprietor to prove his title once the coins were loose in another person's possession. In all likelihood the coins would become mixed with the recipient's money and in that way cease to be specifically identifiable.[22] The lost or stolen coins might in fact have remained unmixed with the defendant's money. But that hypothetical possibility was worthless to the original owner unless he could specifically identify his coins and so challenge the defendant's title to them. The problem was especially acute since the plaintiff, as a party to the litigation, was not a competent witness. Any action which the plaintiff might bring for specific return of the coins would fail for lack of evidence. The consequence was that the defendant's title was good against the whole world because nobody could prove a better right to

[18] The proper form for Holiday's action would traditionally have been in account, followed by a separate action in debt. However it was accepted by the 17th century that a single action of debt could be brought in the circumstances. Holiday probably sued in trover to avoid the procedural disadvantages of debt, such as wager of law. See J.H. Baker, *Introduction to Legal History*, 3rd ed., (London 1990), pp. 412–415.

[19] (1600) Cro. Eliz. 746 *per* Anderson C.J.C.P. (emphasis added). The majority of the court agreed.

[20] (1598) Owen 86.

[21] *Ibid.* (emphasis added).

[22] Presumably the original owner would retain his title to loose coins at least until the finder, thief or bailee mixed them with other money.

the coins than the defendant had through his actual possession of them. The defendant effectively had the property in them because his title was immune to challenge. In the context of the possessory actions for trover or detinue, "property" signified the strongest right to possession. The original owner's right to possession was practically unenforceable once he could no longer identify the coins to which it related.[23]

The principle would also have applied in actions for conversion where the plaintiff's remedy was damages, rather than specific recovery of his coins.[24] Even if the defendant were liable for the conversion, the plaintiff might still lose his property in the coins. For if the defendant spent the money or mixed it with his own—and these must have been the typical acts of conversion—then the coins would cease to be specifically identifiable. Consequently, *after* the conversion the plaintiff's title to the money could no longer be enforced by specific recovery, so property would vest in the person who now had the coins in his possession, whether that was the defendant or some third person to whom he passed the money. The plaintiff would be left with an action in conversion where the award of damages would at least secure him the value of the coins which had been appropriated from him. To found his action the plaintiff would need to have title in the money at the moment of the conversion, but what happened to his property after that point would not matter to him. Provided that the defendant was solvent the plaintiff would be restored to his original position, recovering the value of his money, if not the specific coins which had originally belonged to him.

In consequence, the authorities which have been presented above explained the currency of money in terms of a broad distinction between chattels with and without earmarks.[25] The *nemo dat* rule governed the passing of title in earmarked chattels. A change in the possession of the chattel did not cause the property to pass. The original owner retained his title when a chattel was lost, when it was stolen, or when it was deposited on a bailment. The chattel could be identified and specifically recovered. This was the point of *Hartop* v. *Hoare*[26] where the original owner retained his property in the diamond ear-rings even though they passed through two changes of possession. On the other hand, chattels without earmarks seem to have been an exception to the *nemo dat* rule. Property followed possession because

[23] On the nature of a proprietor's interest in chattels, see generally J.H. Baker, *Introduction to Legal History*, 3rd ed., (London 1990), pp. 439–440.

[24] *E.g. Isaack* v. *Clark* (1615) 2 Bulst. 306, discussed at p. 550 above.

[25] See the reasoning quoted from *Hartop* v. *Hoare* (1743) 3 Atk. 44, *Ford* v. *Hopkins* (1700) 1 Salk. 283 and *Bretton* v. *Barnet* (1598) Owen 86 at pp. 551–552 above.

[26] (1743) 3 Atk. 44; likewise the owner of a horse lent on bailment kept his property in it: *Bretton* v. *Barnet* (1598) Owen 86 *per* Walmseley J.

the dispossessed owner could not identify the chattel in the hands of any other person who might eventually have received it. Hence the dicta in *Higgs* v. *Holiday* and *Bretton* v. *Barnet* explained the passing of title to money as the consequence of the plaintiff's difficulty in identifying his money when it was out of his possession. "[I]f a man delivers money to another, the property in the money is in the bailee, because it cannot be known".[27] "[I]f money be delivered, it cannot be known, and *therefore* the property is altered".[28] Money was the paradigm of a chattel with no earmarks. The possession of a person who received lost or stolen money was good against the whole world. The recipient effectively had property in the money. The original proprietor would only retain his title if the money had been kept in a bag. For the money could then be specifically identified, and the title of the person who possessed it was open to challenge.[29]

From a modern point of view the no earmark rationale may seem a primitive way to explain the currency of money. It was grounded on the assumption that the plaintiff was trying to identify specific coins and recover possession of them. It treated the money as if it were a physical chattel, and made no allowance for its special function as a medium of exchange. But this is to judge with hindsight. For the mass of people wealth was represented by physical assets—whether as land, livestock or valuable plate. Even coins derived their value from the gold or silver of which they were made. It must have been difficult to conceive of their value separate from the chattel that embodied it. The fact that money was deposited on a bailment for safekeeping must have strengthened the view that it was essentially a chattel. But however primitive the assumptions underlying the rule may seem, the "no earmark" rationale must have been highly effective in facilitating the free circulation of money. Transactions would proceed readily because a seller would not have to inquire into the title of the buyer who tendered money in payment. Once the money was loose in the seller's possession nobody could challenge his title to it, by claiming that the money was in fact lost or stolen.

The Development of Paper Money

So long as coins were the only form of money in use, the traditional "no earmark" rationale was adequate to ensure its currency. A legal problem only emerged when in the 1640s a number of London

[27] (1600) Cro. Eliz. 746 *per* Anderson C.J.C.P. (emphasis added).
[28] (1598) Owen 86 *per* Walmseley J. (emphasis added).
[29] Note however that property in earmarked money would still pass if the plaintiff intended that the defendant should take title so that he could trade with the money on the plaintiff's behalf. See *Anon.* (1572) Leon. 38.

goldsmiths began to issue paper money.[30] As will be explained,[31] the earliest monetary instruments were handwritten and they recorded the name of the original payee to whom the bank issued them. It became practically possible for the original owner of a lost or stolen note to identify it in the hands of the person who received it. If these instruments were to pass as currency in the same way that coins did, a different explanation of their currency would have to be found.

According to traditional accounts, the issue of paper money was linked to the uncertainty caused by the outbreak of the Civil War in 1642.[32] Fearful of preserving their accumulated wealth, people began to deposit their plate and surplus coin in the possession of London goldsmiths. In the earliest years paper money instruments were essentially receipts which recorded the plate or coin deposited into the goldsmiths' safekeeping. It was expected that the goldsmiths would hold the property as bailees and that the specific deposit would be returned to the customers. The receipt proved the depositors' right to redeem their money or valuables. Money was held on a bailment in the same way as other deposits. The transaction emphasised the physical identity of the money as coins, rather than its character as a fungible medium of exchange.

The legal character of the money deposit gradually changed. The goldsmiths began to treat the customers' coins as their own property. They advanced the reserves of coin to other customers as interest bearing loans.[33] Coins, even of the same denomination, varied greatly in weight so the goldsmiths would sift out and melt those with a high metal content. Great profits could be made by exporting bullion when the metallic value of coins exceeded their face value as a medium of exchange.[34] Having used their customers' money in this way, the goldsmiths repaid the customers a sum equivalent to amount that they originally deposited. The consequence was that the money deposit lost its character as a bailment. Property in the money was taken to have passed to the goldsmiths who became debtors to their customers for the amount of the deposit. Their obligation was to repay a sum equivalent to the depositors' money, not to return the very coins they

[30] On the origins of paper money in England, see generally W.R. Bisschop, *The Rise of the London Money Market* (London 1910), pp. 38–68; J.K. Horsefield, "The Beginnings of Paper Money in England" (1977) 6 *Journal of European Economic History* 117; R.D. Richards, "The Evolution of Paper Money in England" (1927) 41 *Quarterly Journal of Economics* 361, *The Early History of Banking in England* (London 1958), ch. 2.

[31] See p. 556 below.

[32] See Bisschop (1910), pp. 43–44; and E.T. Powell, *The Evolution of the Money Market 1385–1915* (London 1915), pp. 57–58.

[33] The transition of the goldsmiths from bailees to debtors is described in Powell (1915), pp. 57–68. For the goldsmiths' use of their customers' deposits to lend at interest, see the anonymous pamphlet "The Mystery of the New Fashioned Goldsmiths" (1676), reprinted as an appendix to J. Martin, *"The Grasshopper" in Lombard Street* (London 1892).

[34] See A. Feareryear, *The Pound Sterling*, 2nd ed., by E.V. Morgan, (Oxford 1963), pp. 102–103.

initially received. The new capacity in which the goldsmiths received deposits seems to have become established at least by the Restoration in 1660. By this stage the goldsmiths were dealing in many of the lines of business that we would associate with a banker, as opposed to a mere bailee. As well as making loans, they were paying interest on deposits, and discounting bills and government bonds.[35]

The receipts issued by the goldsmiths reflected the transition from bailee to banker. During the second half of the 17th century the goldsmiths issued promissory notes in which they undertook to pay a sum of money equivalent to the deposit. The goldsmith's obligation was not to return the specific coins originally deposited, since they would almost certainly have lost their specific identity when they were lent to other customers. Notes were made payable to the original depositor or bearer, or to the original depositor or order.[36] For example a goldsmith's bearer note might have been issued in the following form:

> [*Date of customer's deposit*]
> I promise to pay on demand to *JS* [*the name of the customer making the deposit of coin*] or bearer the sum of . . . pounds [*the amount of the deposit*].
> For and on behalf of [*the issuing goldsmith*]
> [*Signature of the goldsmith's clerk*][37]

From this example it is apparent that all goldsmiths' notes would have had a distinct identity. In the early days they were entirely handwritten. They specifically recorded the date of issue and the name of the original depositor. Notes made payable to order would have had a list of endorsements from holder to holder recorded on the back.

The note was a credit instrument, evidencing the debt for the amount of the depositor's balance with the goldsmith. He would present the note and the goldsmith would repay the cash due upon it. The issue of the notes in a form payable to order or to bearer was intended to make the claim on the note transferable from person to person. When a depositor wished to pay a creditor, he could transfer the goldsmith's note, effectively passing to the creditor the right to draw upon the depositor's balance with the goldsmith. The depositor could in this way avoid the inconvenience of withdrawing cash from the goldsmith's shop and then paying it to the creditor. A goldsmith's note made payable to the original depositor or bearer could be transferred to a new holder by simple delivery. To pass a note payable

[35] See Richards (1958), pp. 23–24; Bisschop (1910), pp. 43–49.
[36] See Bisschop (1910), pp. 53–54; Richards (1927), pp. 378–392, (1958), pp. 44ff.
[37] This form is adapted from a note issued by Messrs Child & Co. in 1684, reprinted in Bisschop (1910), p. 57.

to order, the current holder made an endorsement on the back to record the transfer.

A note often circulated through many hands before its eventual recipient presented it at the goldsmith's shop to be cashed. This is because the note was itself a valuable instrument. The right to claim money from the goldsmith was an incident of the holder's property in the note. The consequence was that creditors of the original depositor or merchants who sold goods to him were willing to accept payment in the form of a goldsmith's note rather than metallic coin. They knew that they were entitled, if they so chose, to redeem the note at the goldsmith's for cash, or pass on the note to another person in payment of their own debts.

The broader significance of this change was that the paper which evidenced a right to receive money was eventually treated as a substitute for money. The note became a medium of payment which people regarded as practically equivalent to cash.[38] This phenomenon was not special to goldsmiths' notes. In the seventeenth century bills of exchange were negotiated from person to person so debtors could meet their obligations without the inconvenience of physically handing over cash.[39] The use of bills and notes was just one way in which commercial people and government agencies made increasing use of transferable credit instruments, rather than meet their payment obligations by handing over metallic coin.[40]

The state also took a part in issuing paper money. In 1694 the Bank of England was founded under statute in order to raise credit for loan to the government. Like the goldsmiths, it originally received deposits of metallic coin and issued paper money in various forms.[41] The most important for present purposes were the promissory notes payable to the depositor or bearer. Modern banknotes are descended from these instruments.[42] The Bank also issued sealed bills of exchange. Like the notes, they passed as substitutes for cash, but they were issued

[38] References to this effect appear in the law reports from the late 17th century onwards. See, for example, *Tassell & Lee* v. *Lewis* 1 Ld. Raym. 743, 744, where the custom of the merchants was reported in the following terms: "The notes of goldsmiths . . . are always accounted among merchants as ready cash"; and *Popham* v. *Lady Aylsbury* (1748) Amb. 68, 69 *per* Lord Hardwicke L.C.: "bank notes [are] the same as ready money, otherwise of bonds and other securities; they [are] not cash but only evidence of so much money due"; and *Walmsley* v. *Child* (1749) 1 Ves. 341, 342 in argument: "These [goldsmiths'] notes by constant usage are as cash".

[39] See J.S. Rogers, *Early History of the Law of Bills and Notes* (Cambridge 1995), pp. 109–112. The use of bills as payment media pre-dated the 17th century. Even before the Tudor era it was the practice among merchants to accept "bills obligatory" as means of payment. These instruments were similar to the later bills of exchange, although they were issued under seal.

[40] See, for example, Richards (1927), pp. 364–379 for a description of the transferable debentures and payment orders issued by the Exchequer in the 17th century.

[41] The Bank's different kinds of paper credit are described in W.R. Bisschop, *The Rise of the London Money Market* (London 1910), pp. 84–121.

[42] Bank of England notes are still issued in the form of promissory notes. The bearer may present the notes at the Bank and receive notes of a lower denomination in exchange: see Currency and Banknotes Act 1954, s. 1(4).

in the form of bills drawn on the Bank which were payable to the original depositor or bearer. The founding statute expressly provided that its sealed bills were transferable by endorsement,[43] but seems to have left it to mercantile practice to allow the transfer of the banknotes and the sealed bills payable to bearer.

BONA FIDE PURCHASE AS THE EXPLANATION OF CURRENCY

The commercial community used these paper instruments as if they were equivalent to cash. But according to the traditional common law rationale, they should not have had the attribute of currency because every instrument was distinctively earmarked. They were, as we have seen, written by hand and specifically bore the date of issue and the name of the depositor. For the first time the original owner could identify his lost money in the hands of the person who received it.[44] The recipient's title to the money was open to challenge. The problem could not previously have arisen when money was represented solely by coins, all of which were identical in appearance.

To have applied the *nemo dat* rule to banknotes would have hindered their use as cash substitutes. Unlike coins, their value did not derive from any inherent metallic content, but from the confidence of the community where they circulated. They kept their value through people's collective belief that anyone who received notes could redeem them for metallic coin at the issuing bank. If there was a significant risk that a recipient could not enforce the claim, then the community would become less confident about accepting notes as a mode of payment.[45] Transactions would proceed more slowly if creditors or sellers of goods could not safely assume that the person offering them paper money actually had title to it. It was, moreover, in the banks' own interests to keep their notes circulating for as long as possible. Every note that was presented for payment drained the bank's cash reserves. It was more profitable to the bank to have its reserves of coin lent out at interest, than sitting idle in the cashiers' tills.

Miller v. *Race*, which was decided in 1758, was the first case which directly considered the conflict between the "no earmark" rule and the currency of paper money. It may appear surprising that the problem

[43] See s. 29 of the statute 5 & 6 W. & M., c. 20.

[44] The owner could even advertise in the newspapers in the hope that an honest person finding the note would return it, *e.g. Walmsley* v. *Child* (1749) 1 Ves. 341 The owner could also direct the bank to stop payment on the note and the bank could identify the note if the bearer presented it for payment. This happened in *Miller* v. *Race* (1758) 1 Burr. 452.

[45] At least by the mid-eighteenth century the courts seem to have been aware of these considerations. In *Walmsley* v. *Child* (1749) 1 Ves. 341, 344 Lord Hardwicke acknowledged, "[I]t highly concerns the credit of [notes] not to refuse payment" when the holder of a lost note sought to cash it. Counsel for the defendant bank submitted that"the faith and value of notes" depended on the bank honouring all notes presented for payment: *ibid.*, at p. 342.

took so long to emerge. But the "no earmark" explanation of currency seemed mainly to exist in legal theory and it did not change the way merchants and bankers carried on their business. In spite of it, bankers kept issuing notes payable to bearer, and commercial people treated them as cash. If people were aware of any gulf between strict legal theory and actual usage, they seemed unwilling to test it in the courts.[46] Bankers and merchants probably followed their own practices, even if they could not have been enforced in law. They seem to have observed an embryonic rule of bona fide purchase so that people receiving notes in the course of trade or in settlement of debts took the property in them. The rule was not special to banknotes. It originated in the context of bills of exchange and then spread to promissory notes. From there it became accepted as the reason for the currency of all forms of money, even metallic coin.

This commercial usage was subtly absorbed into the general law. It is important to make clear how this happened. It has traditionally been supposed that the common law rules governing negotiable instruments were incorporated from the law merchant. It was thought that the law merchant was an international system of customary rules which governed commercial transactions. The incorporation was supposed to have occurred when the common law judges, notably Lord Mansfield, adopted these customs and gave them the force of legal rules.[47] Professor J.H. Baker and Mr. J.S. Rogers have recently questioned the traditional explanation.[48] They have proposed that the rules governing bills and notes were always part of the common law. Some merchants' practices were observed all through England, but as custom of the realm they already had the status of common law. In their view, the law of bills developed in the common law itself, as the judges responded to the needs of commercial practice.

Whatever its merits as a general theory, the revised view seems an accurate description of the origins of the common law rule of bona fide purchase. There are no signs in the cases described below that the judges were adopting a neatly defined body of customary rules in its entirety. Commercial practices were absorbed, rather than incorporated. The judges accepted the merchants' own reasons for promoting the circulation of bills and notes. The judges did not clearly distinguish

[46] Only two cases were reported before *Miller* v. *Race* where the courts directly considered the title of a transferee of a banknote. See *Walsmley* v. *Child* (1749) 1 Ves. 341, and *Anon.* (1699) 3 Salk. 71. The latter is discussed at p. 560 below.

[47] For traditional accounts of the incorporation of the law merchant governing bills and notes, see W.S. Holdsworth, "The Development of the Law Merchant" in *Select Essays in Anglo-American Legal History* (Cambridge Mass. 1907), vol. 1, pp. 327–331; T.A. Street, *Foundations of Legal Liability* (New York 1906), vol. 2, pp. 348–349.

[48] See J.H. Baker, "The Law Merchant and the Common Law Before 1700" in *The Legal Profession and the Common Law* (London 1986); and J.S. Rogers, *Early History of Bills and Notes* (Cambridge 1995).

between accepting policy reasons and the formulation of legal rules. For instance, the cases referred to the "honest creditor" who accepted bills and notes in payment of a debt, and the merchant who received them "in the course of trade".[49] It must have been the interests of such recipients which the commercial community wished to uphold. From loose policy justifications such as these the courts gradually refined the elements of receipt in good faith and valuable consideration.

A convenient place to start plotting this progressive absorption is an anonymous decision of the Court of Chancery, dated 1697.[50] The payee of a bill of exchange transferred it, probably by endorsement,[51] to the plaintiff. The plaintiff, the endorsee, sued the acceptor for the money due on the bill. The acceptor argued that the bill was invalid from the outset because he, the acceptor, did not receive any value when the drawer drew the bill on him. He contended that the defect in the initial transaction prevented the endorsee from enforcing the bill. Lord Somers rejected this argument. The endorsee could sue because he received the bill as "an honest creditor . . . fairly for the satisfaction of a just debt".[52] He added that a denial of the endorsee's right to sue would "tend to destroy trade which is carried on every where by bills of exchange". Lord Somers's words express a rudimentary formulation of the defence of bona fide purchase. The discharge of the creditor's debt would constitute valuable consideration and the honesty of the creditor refers to his good faith. These were perhaps the loose terms in which the mercantile community would have justified the endorsee's right to claim against the acceptor. Lord Somers recognised that creditors should not be deterred from accepting bills in payment of debts. That might have happened if defects in the initial drawing of the bill affected their right to sue the acceptor.

The rights of a bona fide holder figured again in an anonymous decision given in 1699.[53] It was apparently an action on a sealed Bank of England bill. The original payee delivered it to a new bearer who lost it. A stranger found the bill and transferred it to the defendant "for a valuable consideration". The defendant presented it at the Bank, but rather than receive the money due on it, he got the Bank to issue a new bill payable to himself. The original payee sued the defendant in trover, presumably on the ground that he retained his property

[49] See *Anon.* (1697) 1 Comyns 43 and *Anon.* (1699) 3 Salk. 71, discussed below.

[50] (1697) 1 Comyns 43.

[51] It seems likely that the bill was payable to order because otherwise it could not have been validly transferred. The common law did not recognise at that stage the right of a transferee to sue on a bill payable to bearer: *Hodges* v. *Steward* (1691) 1 Salk. 125.

[52] (1697) 1 Comyns 43. For similar language, see *Hussey* v. *Jacob* (1696) 1 Comyns 4 where a bill given as security to pay a gambling debt was held to be void for infringing s. 3 of the statute 16 Car. 2, c. 7. Holt C.J. suggested obiter that the bill could still have been enforced by a third person if the payee endorsed it to him "for the satisfaction of a just debt".

[53] The most comprehensive report is (1699) 3 Salk. 71.

when he lost the bill.[54] The King's Bench held the defendant not liable. A new property was created in him when he received the bill. It ousted the property of the original owner and entitled him to claim the money due on the bill. The report summarises Holt C.J.'s reasons: "[The plaintiff] may have trover against the finder, for he had no title . . . but not against [the defendant] because of the consideration, which, by the course of trade, creates a property in the assignee or bearer".[55] The report says nothing about the bill being earmarked and how this could have affected the passing of property. Inferences from silence can never be reliable, but Holt C.J. must have accepted that bills of exchange were a special kind of earmarked property to which the *nemo dat* rule did not apply. He seemed mindful of the commercial advantages of allowing the bill to pass as currency. He said that it would disrupt "the course of trade" if a seller found that he did not have property in the bill he received as payment for goods.

It was doubtful at the start of the eighteenth century if bona fide purchase also applied to promissory notes and banknotes. In *Ford* v. *Hopkins*[56] the plaintiff left some lottery tickets in a goldsmith's possession, and without authorisation the goldsmith handed them to the defendant. The King's Bench held that the defendant was liable in trover. Significant for our purposes is the obiter dictum of Holt C.J. which compared lottery tickets with other kinds of instrument: "[I]f *bank-notes*, Exchequer-notes, or million-tickets, or the like, are stolen or lost, the owner has such an interest or property in them, as to bring an action into whatsoever hands they are come: money or cash is not to be distinguished, but these notes or bills are distinguishable, and cannot be reckoned as cash, and they have distinct marks and numbers on them".[57] Holt C.J. was expressing the traditional distinction between property with and without earmarks. Banknotes were earmarked instruments so they could not have the attribute of currency. It made no difference that they had practically the same function as metallic coins. This seems odd at first sight, considering that in *Anon.* (1699) he held that the Bank of England bill passed into currency when the bearer received it as a bona fide purchaser.[58]

Ford v. *Hopkins* is probably an instance of Holt C.J.'s attempts to uphold the legal distinction between promissory notes and bills of exchange. The commercial community treated them as practically

[54] The case has one puzzling feature. The plaintiff was not the person who actually lost the bill. The original payee of the bill brought the trover action. The reports say only that the plaintiff "gave" the bill to person who lost it. Perhaps he did not transfer the property in the bill to this other person but only deposited it in his possession.

[55] (1699) 3 Salk. 71.

[56] (1700) 1 Salk. 283.

[57] *Ibid.*, at p. 284 (emphasis added).

[58] (1699) 3 Salk. 71.

identical but Holt C.J. would not sanction this in law.[59] Moreover it was still doubtful if promissory notes were valid at all. In *Clerke* v. *Martin*,[60] Holt C.J. held that the payee of a note payable to order could not enforce it at common law. Notes payable to bearer could not be enforced either.[61] Against this background, it is hardly surprising that Holt C.J. did not recognise the currency of banknotes. They were at best evidence of the underlying transaction in which the depositor lent money to the bank. The depositor could enforce the debt by suing in assumpsit but the note itself did not create an actionable claim.

The distinction between the currency of bills and notes did not survive long into the eighteenth century. In *Hartop* v. *Hoare*[62] Lee C.J. questioned whether Holt C.J.'s dictum in *Ford* v. *Hopkins*[63] was good law. He acknowledged that banknotes were earmarked property. But because they were "considered as cash", he thought that a person who received a lost note for a valuable consideration would take the property in it. It seemed self-evident to him that a lost banknote could not be recovered from a bona fide purchaser.

The extension of bona fide purchase to notes may have resulted indirectly from the Promissory Notes Act 1704.[64] The main purpose of the statute was to make promissory notes payable to order and to bearer valid in law. It effectively overruled *Clerke* v. *Martin*.[65] It applied to promissory notes all the rules which made inland bills of exchange negotiable. Any person to whom a note payable to order or bearer was transferred might "maintain his . . . action for such sum of money" promised in the note "in like manner as in cases of inland bills of exchange".[66] In consequence, title in lost or stolen banknotes would pass to bona fide purchasers in the same way that it was already recognised that title to bills of exchange would pass to bona fide purchasers.[67] They were earmarked chattels but the rule of bona fide

[59] See for example *Clerke* v. *Martin* (1702) 2 Ld. Raym. 757, 758; *Buller* v. *Cripps* (1703) 6 Mod. 29, 30. For differing interpretations of Lord Holt's reluctance to make promissory notes negotiable, see W. Cranch, "Promissory Notes Before and After Lord Holt" an essay first published in 1804 and reprinted in *Select Essays in Anglo-American Legal History* (Cambridge, Mass. 1907), vol. 3, p. 72ff.; and J.S. Rogers, *Early History of the Law of Bills and Notes* (Cambridge 1995), pp. 177–186.

[60] (1702) 2 Ld. Raym. 757.

[61] *Horton* v. *Coggs* (1689) 3 Lev. 299 (transferee for valuable consideration of a goldsmith's note payable to bearer could not sue the maker on it). See also *Nicholson* v. *Sedgwick* (1698) 1 Ld. Raym. 180.

[62] (1743) 3 Atk. 44, 50–51. See also *Walmsley* v. *Child* (1749) 1 Ves. 341, 344 *per* Lord Hardwicke L.C.: a person who received lost banknotes "for a valuable consideration" could claim on them against the issuing bank.

[63] (1699) 3 Salk. 71.

[64] 3 & 4 Anne, c. 9.

[65] (1702) 2 Ld. Raym. 758.

[66] 3 & 4 Anne c. 9, s. 1.

[67] Hence *Anon.* (1699) 3 Salk. 71 also become authority for the rights of the bona fide purchaser of a lost or stolen bank note. Also relevant was the obiter dictum in *Hussey* v. *Jacob* (1696) 1 Comyns 4, 6. According to Holt C.J., the transferee to whom a void bill of exchange was endorsed

purchase governed the passing of property in them, not the strict rule of *nemo dat quod non habet*.

Miller v. *Race*

With this background established, the significance of *Miller* v. *Race*[68] becomes apparent. The case did not create the rule of bona fide purchase; still less did it "incorporate" the rule directly from mercantile custom. When Lord Mansfield spoke of the currency of money and how the true owner could not recover stolen money once it was "paid away fairly and honestly upon a valuable and bona fide consideration",[69] he was refining the elements of a rule which had taken shape over the previous sixty years. As was true of his contributions in other areas of the commercial law, Lord Mansfield's skill lay in the clear formulation of existing principles and in his grasp of the practical reasons on which they were founded. It is apparent from the tone of Lord Mansfield's judgment that the rule of bona fide purchase was already well established. He thought that any suggestion that banknotes were governed by the *nemo dat* rule because they were earmarked was hopelessly outdated. He dismissively referred to the "no earmark" maxim as "quaint".[70] He delivered a fully reasoned judgment, not because he was declaring new law, but because he wanted to avoid any doubts in the commercial community about the rights of bona fide purchasers.[71]

Two points stand out in Lord Mansfield's judgment. First he gave priority to the commercial functions of money as a medium of exchange, not to its attributes as a chattel. "[Banknotes] are not goods, not securities, nor documents for debts . . . but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money".[72] Because banknotes were functionally identical to coins they too should have the attribute of currency. He rejected the "no earmark" maxim as the real reason why money could not be followed. If money was no longer to be considered as a kind of chattel, the rules for passing of property should not depend on its physical appearance and the possibility of the owner recovering posssession of it. In consequence he made bona fide purchase the reason for the currency of coins as well as banknotes. Traditionally coins passed as currency

in payment of "a just debt" could sue the acceptor upon it. The transferee was not affected by the invalidity of the original transaction which the bill evidenced.

68 (1758) 1 Burr. 452.

69 *Ibid.*, at p. 457.

70 *Ibid.*

71 *Ibid.*, at pp. 456–457.

72 *Ibid.*, at p. 457.

because they had no earmark. The result of *Miller* v. *Race* was to extend bona fide purchase from its origins in the special rules governing negotiable instruments, so that it explained the currency of all kinds of property that circulated as money.

The other important point was the commercial justification for the bona fide purchase rule. He was concerned, as usual, that the common law should not hamper trade and commerce. The "general course of business", said Lord Mansfield,"would be much incommoded"[73] if the recipient of a lost note did not have a valid claim against the issuing bank, or if he were liable to the original owner. He did not elaborate. He was perhaps alluding to the inconvenience that would be caused if transactions which appeared to be closed had to be reopened because a creditor later found that he was liable to return a banknote which had been stolen from its original owner. The assurance of getting title by bona fide purchase would mean that the creditor would not have to investigate whether the payer actually had title to the money that he tendered in payment. The same consideration explains why the courts have been reluctant to introduce a rigorous standard of constructive notice into transactions between commercial parties. If money and goods are to circulate readily in the market—as the pace of the modern economy demands that they must—then transactions cannot be impeded because a recipient needs to make detailed inquiries into the title of a person tendering money or goods.[74]

Bona fide purchase now underlies the currency of all forms of money—coins, banknotes and purely abstract sums represented as bank balances. It is a common law rule, historically distinct from the much wider equitable defence of bona fide purchase for value without notice. The common law rule only applies to money. A person who acquires the legal title to any kind of property in good faith for valuable consideration and without notice takes it clear of any equitable rights. The rationale of the defence is that a bona fide purchaser has an untainted conscience so he ought not to be bound by equities affecting the property he received.[75] In the context of negotiable instruments, the common law rule of bona fide purchase has been codified in the Bills of Exchange Act 1882. The rights of the holder in due course of a bill are the statutory descendant from it.[76]

[73] *Ibid.*

[74] See for example *Manchester Trust* v. *Furness* [1895] 2 Q.B. 539, 545 *per* Lindley L.J.: "In dealing with estates in land title is everything, and can be leisurely investigated; in commerical transactions possession is everything, and there is no time to investigate title."

[75] *Ashburner's Principles of Equity*, 2nd ed., by D. Browne (London 1933), pp. 38–39, 50.

[76] Section 29 of the Bills of Exchange Act 1882 defines the holder in due course as one who takes a bill (a) before it is due and (b) in good faith and for value without notice of any defect in the title of the person who negotiated it. By s. 89(1) the same definition applies to promissory notes.

Conclusion

Currency is a special legal attribute which allows a recipient of money to take a fresh legal title which is good against the whole world. Money passes into currency in this way when it is received by a bona fide purchaser for valuable consideration. At this point the title of any previous owner of the money from whom it may have been stolen is extinguished. It helps money to circulate readily in the economy in that it reduces the need for recipients to make detailed inquiries into the title of people who tender money in payment of debts or to buy goods.

The rule of bona fide purchase originated in the practices of merchants and bankers in the late seventeenth and eighteenth centuries. The common law progressively absorbed these practices, refined them and gave them the status of legal rules. Lord Mansfield's decision in *Miller* v. *Race* was the final point in this process. It confirmed that bona fide purchase was the rationale for the currency of all kinds of money. The decision put an end to the old common law rule that coins had the attribute of currency because they had "no earmark" by which their original owner could specifically identify them.