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RESCISSION OF BARGAINS MADE ON SUNDAY

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In the great majority of the American states the transaction of business on Sunday is wholly or in large part forbidden, the penalties for violation of the prohibition being generally a small fine, at least for the first offense.[1] These statutes do not as a rule specifically provide what effect if any they shall have in the way of making Sunday transactions void or unenforceable as between the parties.[2] American courts have with few exceptions, and perhaps naturally enough in view of the English decisions, applied the general notions developed in our legal system with reference to the effects of illegal bargains in general.[3] This has had interesting, and, to the layman at least, somewhat startling results. A typical example is the case of *Thompson v. Williams*.[4] The seller sued the buyer in assumpsit for the price of two cows, sold and delivered to the defendant on Sunday, to be paid for later. Some time after the delivery of the cows the seller had taken the cows from the

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[1] "The prohibition of certain employments or undertakings on Sunday is statutory. Aside from such statutes, contracts are not invalidated because made or to be performed on that day. Statutes have, however, generally been passed prohibiting certain transactions on Sunday. These statutes go back for their original to an English statute enacted in 1677.

"The terms of modern American statutes vary. . . .

"Statutes in most States forbid all contracts and sales not of necessity or charity, but are not always so wide.

"A statute forbidding secular labor and business does indeed make all sales and contracts to sell, as well as other bargains, illegal; but if, as in the early English statute, only business within a person's 'ordinary calling' is forbidden, a contract or sale which is outside of such calling is not forbidden. So in some States only public sales and publicly offering to sell are forbidden. And still other statutes are directed merely against labor. The more common form of statute, however, prohibits all contracts and sales not of necessity or charity." —RESTATEMENT, CONTRACTS (1932), p. 1039, hereinafter referred to merely as "RESTATEMENT."

[2] The statement in the Special Note on p. 1040 of the RESTATEMENT that "the law as to the effect of a transaction entered into on Sunday is wholly statutory" is doubtless an inadvertence. The Introductory Note on the preceding page rather clearly indicates that the statutes in question prescribe only the penal, not the civil, consequences of Sunday bargains.

[3] Note the wide definition of "illegal" in Section 512 of the RESTATEMENT: "A bargain is illegal within the meaning of the Restatement of this Subject if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy." §§598 *et seq.* of the RESTATEMENT give a general summary of the law as to the effects of illegal bargains in general. Note that the Sunday law bargains differ from all others in that the only illegality is in the making of the bargain, not in the acts to be done.

[4] 58 N. H. 248 (1878).

buyer because of his refusal to pay for them. The buyer then sued the seller in an action of trespass and, in spite of the fact that the buyer had never paid for the cows, recovered and collected a judgment for their value, the jury fixing the damages at the contract price agreed upon when the illegal bargain was made. It was held that even though the buyer had in the trespass action claimed title to the cows, the seller could not recover in the assumpsit action.

To a layman this outcome is rather astonishing. Both parties were equally guilty of violating the Sunday law; the offense was a minor one, usually punishable by a small fine. As a result of the decision, one of the equally guilty parties is in effect fined, in addition to the criminal penalty, an amount equal to the value of the cows, and, what is worse from the layman's point of view, the other law-breaker is allowed to profit to that extent at the expense of his fellow law-breaker. This is of course true of the illegality cases generally, the only difference being that in some of them the acts if done constitute more serious crimes.[5] The layman's astonishment increases when he is told that the result would be the same if the chattel were worth $1,000, or if land were sold (conveyance made and possession delivered) in return for a promise to pay $5,000 later: the purchaser could keep the property without paying for it.[6] How, he will ask, can so extraordinary a result be defended? As we all know, the answer of the lawyer will be that in so far as the Sunday bargain is "executed," the "law will leave the parties

[5] There is strangely little criticism on the part of the legal profession generally of a rule which, the present writer has found, almost universally provokes vigorous criticism from laymen. The most outspoken criticism by a legal writer is that expressed by Professor Wigmore:

"But the whole notion is radically wrong in principle and produces extreme injustice. If A. owes B. $5,000, why should he not pay it, whether B. has violated a statute or not? Where the issue is as to the rights of two litigants, it is unscientific to impose a penalty incidentally by depriving one of the litigants of his admitted right. It is unjust, also, for two reasons: First, one guilty party suffers, while another of equal guilt is rewarded; secondly, the penalty is usually utterly disproportionate to the offense. If there is one part of criminal jurisprudence which needs even more careful attention than it now receives, it is the apportionment of penalty to offense. Yet the doctrine now under consideration requires, with monstrous injustice and blind haphazard, that the plaintiff shall be mulcted in the amount of his right, whatever that may be. Take for example, the case of Cambuioso v. Maffet, 2 Wash. C. C. 98, Fed. Cas. No. 2,330, in which plaintiff and defendant were joint owners of a vessel. To avoid paying the tax on alien owners the vessel was registered in the name of the defendant. For this illegality the plaintiff is denied the help of the courts in making the defendant account for the vessel's profits. In this way, and in a hundred similar ways, a fine of thousands of dollars may be imposed for petty violations of the law. One cannot imagine why we have so long allowed such an unworthy principle to remain." John H. Wigmore, discussing the general doctrine under consideration, in Note (1891) 25 AM. L. REV., 712.

[6] See illustrations 1 and 2 from the RESTATEMENT, reprinted in the text below p. 169.

where their illegal transaction left them."[7] The following passage from the opinion of Smith, J., in *Thompson v. Williams*,[8] is typical:

> "The defendant is not estopped by the judgment in the trespass suit from setting up the Sunday law as a defense. The maxim, 'in pari delicto,' etc., was not established for the benefit of one party or of the other. The law does not leave the weaker at the mercy of the stronger, nor give the vendor a remedy by allowing him to retake the property illegally sold. *It leaves the parties where their illegal contract left them;* when executed, it will not assist the party who has parted with his money or property to recover it back; when executory, it will not compel performance. It would not leave the parties where their illegal contract left them, if it did not maintain the title acquired by the contract. Williams was in possession of the cows, as of his own property, by the assent of Thompson. When the latter retook them, Williams was enabled to maintain trespass, because Thompson could not be heard to controvert his title."

After quoting this passage with approval, Keener in his well known work on Quasi-Contracts accounts for the result as follows:

> "Probably no better illustration can be found in our law of the importance of distinguishing between a right in rem and a right in personam than is afforded by the case of *Thompson v. Williams*. The plaintiff in the action of trespass succeeded because, having acquired a title by the purchase of property, the source of his title was immaterial. The vendor, by interfering with the possession of the vendee, to whom the title had passed, was a tortfeasor, as any stranger would have been in similar circumstances. But when the vendor sought to recover in assumpsit against the vendee for the value of the property sold, he was seeking the aid of the court to reduce a chose in action into possession, and to acquire as a result of such reduction a right in rem."[9]

Apparently this reasoning seems quite conclusive both to judges and to theoretical writers like Keener; the result seems to be thought of as more or less inevitable, especially if one keeps in mind the essential nature of rights *in rem* as distinguished from rights *in personam*. As already indicated, the great majority of American courts that have passed upon the question have agreed in reaching this result. It has now received the approval of the learned Reporter who has prepared the

[7] "Leave both parties as it finds them" is the phrase in the RESTATEMENT, p. 1040.
[8] 58 N. H. 248, 249 (1878).
[9] KEENER, QUASI CONTRACTS (1893) 271, n. 1.

Restatement of the Law of Contracts recently published by the American Law Institute. Without any discussion of their relative merits the minority view—for there is a minority view—has been rejected, and the majority view recommended as preferable.[10] Presumably Professor Williston and his able advisers would defend this choice on the simple ground that where the authorities are overwhelmingly on one side the Institute is bound to state the law that way.[11] Be this as it may, the acceptance of the majority view by the Institute without comment or dissent by the learned Reporter or his advisers, or indeed by any member of the Institute when the section in question was presented at the annual meeting, seems worthy of comment. If, as the present writer believes, the reasoning upon which the majority view is based will not withstand critical analysis, and if that view is indefensible from a social point of view, it would be unfortunate if the Restatement were to be adopted blindly by courts in states in which the question may be an open one. Precisely that is likely to happen if the Restatement, backed as it is by the quasi-official prestige of the Institute, has the influence in bringing about the uniformity of decision which its sponsors hope for. The matter is thus of some practical importance at this time. The present writer has long been convinced that the supposedly logical and convincing reasoning used to support the majority view is, when closely examined, not at all conclusive. Indeed, it is based upon both the careless use of ambiguous language and a failure to analyze carefully certain fundamental legal concepts. It is, therefore, proposed in the present paper to undertake a reëxamination of the matter. This is done in the hope that if it can be shown that the minority view is at least equally "logical," the way will be opened for a more careful discussion of the whole matter of the effects of illegal contracts from the point of view of the social utility of the results reached under the prevailing and the minority view. Another and perhaps more important purpose of the present paper is to call renewed attention to the need for a critical reexamination of some of our fundamental legal conceptions,[12] a need which has in more recent days been somewhat lost sight of in the controversies aroused by the call for a more "realistic" jurisprudence.[13]

[10] See the text of RESTATEMENT, §538, reprinted below.

[11] But see the action of the Institute in connection with one section of the RESTATEMENT OF THE CONFLICT OF LAWS: THE AMERICAN LAW INSTITUTE: PROCEEDINGS (1931) Vol. IX, pp. 144-153.

[12] The assumption made in 1 THE ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 221, that the so-called "Hohfeld analysis" is "less suited to the case law system in America than it might have been to the civil law system on the continent" seems to the present writer quite erroneous. After using it for over twenty years, the present writer still finds the analysis indispensable in the analysis of concrete legal problems such as those dealt with in the present paper.

[13] The present writer confesses to a dislike for the adjective "realistic", at

It will perhaps be well before proceeding further to state the substance of the two opposing views. Probably the best summary of the majority view is that given in the Restatement, as follows:

§538. WHAT BARGAINS MADE OR TO BE PERFORMED ON SUNDAY ARE ILLEGAL.

(1) A bargain, except mutual promises to marry, that is not one of necessity or charity, is illegal if made or, except as stated in Subsection(2), to be performed wholly or in part on Sunday. Promises in such an illegal bargain impose no duty, but a conveyance that would have been effective if made on a secular day is effective even though made on Sunday if the subject matter of the conveyance is delivered or otherwise reduced to possession with the consent of the grantor; and though there is no delivery or reduction to possession, such a conveyance gives a power to the grantee to make an effective conveyance to a bona fide purchaser for value without notice that the prior conveyance was made on Sunday.

(2) When in a contract made on a secular day the day fixed for performance falls on Sunday, and performance on that day is not material to the object of the contract, it is interpreted as requiring performance on the next secular day that is not a holiday, and as so interpreted is not illegal.

The following illustrations are given showing the application of the text to concrete cases:

A conveys and delivers possession of Blackacre to B on Sunday, B promising to pay $5,000 therefor. The bargain is illegal and A cannot recover the price. If possession had not been delivered, B could not compel A to surrender it. If, however, the conveyance did not show on its face that it was made on Sunday, B would have a power to transfer complete ownership to a bona fide purchaser for value.

On Sunday A agrees to sell and B agrees to buy an automobile which is delivered by A to B on that day. B at the same time promises to pay $1,000. The bargain is illegal, and B is under no duty to pay the price. A cannot recover the automobile. If the automobile had not been delivered, B could not enforce a right to it even though there has been assent to an immediate transfer of ownership.

On Sunday A agrees to sell and B agrees to buy an automobile, and on the same day B pays the agreed price. A does not deliver the automobile. B cannot recover it even though there has been assent to an immediate transfer of ownership. Nor can he recover the money paid.

A agrees with B to render services every day during the ensuing month, including Sundays. Performance on Sunday of such services is

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least as applied to his own attitude, which he likes to think of as nothing more than an attempt to bring to bear on the study of legal phenomena what may for want of a better term be called the scientific point of view.

not work of necessity or charity. B promises to pay a lump sum for all the services. A renders the agreed services. The bargain is illegal and A has no right to payment for any portion of the services rendered.

A sells and delivers a horse to B on Sunday, and on A's demand, made on Monday, B refuses to surrender it. A cannot recover the horse or the agreed price for it or its fair value.[15]

The view taken by the minority may best be shown by noting the case of *Winfield v. Dodge,*[16] in which the parties had traded horses on Sunday. The plaintiff became dissatisfied and tried to persuade the defendant to trade back, offering to return the horse he had received from the defendant. The defendant having refused, the plaintiff brought replevin for the horse he had delivered to the defendant. The judgment of the lower court denying recovery was reversed by the Michigan Supreme Court. Graves, J., speaking for the court said:

"The transaction on Sunday passed no title. As a trade it was void . . . the plaintiff was entitled to reclaim his horse against the void negotiation."[17]

In a state which follows this doctrine the litigation between the parties which ended in the decision in *Thompson v. Williams,*[18] discussed above, would of course have terminated differently. When the seller in that case by peaceful means recaptured the two cows, he would have been doing nothing wrongful, and the other party would have failed in the trespass action.

Now that we have the essential features of the two opposing doctrines in mind, we are in a position to examine into their merits, both from the point of view of "logic" and that of social utility. We begin with the logical aspect of the matter.

The usual statement is that the fundamental principle involved is that in the case of "illegal" bargains "the law leaves both parties as it finds them"[19] except where they are not *in pari delicto* or there are other countervailing considerations of public policy.[20] Starting with this pre-

[14] RESTATEMENT, Vol. II, §538.

[15] RESTATEMENT, Vol. II, pp. 1042-1043.

[16] 45 Mich. 355, 7 N. W. 906 (1881).

[17] The court here uses the word "void." Professor Williston very properly points out that if this language is accurate, a valid transfer by the purchaser (before possession is retaken by the seller) to a bona fide purchaser for value could not be made. 3 WILLISTON, CONTRACTS (1920) 2986. At a later point in the present discussion it is shown that the concrete decisions made under the minority view can stand and yet a bona fide purchaser for value be protected. See below, pp. 180-192.

[18] 58 N. H. 248 (1878).

[19] This is the language in the RESTATEMENT, in the Special Note, p. 1040. In Thompson v. Williams, 58 N. H. 248 (1878), the language was: "It [the law] leaves the parties where their illegal contract left them. . . . It would not leave the parties where their illegal contract left them if it did not maintain the title acquired by the contract."

[20] For the exceptions to the general doctrine as to illegal contracts, see WOODWARD, QUASI-CONTRACTS (1913), §136, and RESTATEMENT, §§599-605.

mise, courts as well as writers like Keener and Williston go on to argue in substance, that where the chattel has been delivered by the seller on Sunday with intent to pass title, the buyer has acquired both "title"[21] and "possession," including a right against the seller to a "continuance of his possession,"[22] and that the law will not undo these results. Thus Keener says: "the plaintiff [in *Thompson v. Williams, supra*] having acquired a title [right *in rem*] by the [Sunday] purchase of the property, the source of his title was immaterial."[23]

Keener's only "proof" of the validity of this statement is the assertion that it grows out of the nature of a right *in rem* as distinguished from a right *in personam*.[24] Williston seems to argue that unless it is recognized that the "title" passes to the buyer, bona fide purchasers for value from him cannot be protected.[25] Both of these propositions deserve critical examination.

The first thing which needs our attention is that the statement that "the law leaves the parties as it finds them" is ambiguous and susceptible of more than one meaning. It may mean: (1) the law will do nothing to alter the *physical situation* which the parties have brought about by their own acts *without the aid of the law;* or (2) it will not alter either the physical or the *legal situation* resulting from the acts of the parties. A moment's consideration will disclose that it is the latter meaning which writers like Keener and Williston, as well as courts, actually give to the principle in question.[26] In doing so they pass over without discussion the important and obvious fact that this *legal situation* ("title" and "possession" are now vested in the buyer) is not a result which the parties can produce without the cöoperation of the law. The misleading character of the argument appears when we notice that at the outset we apparently start with two violators of the Sabbath law who have *by their own acts, unaided by the law* brought about certain results, created a certain situation: "the law will leave the parties as it finds them," since both are lawbreakers; neither can call on the law to aid him to undo the results, to alter the situation in question. To account for the results reached by the courts, however, it becomes necessary to interpret the terms "results" and "situation" to include the *legal* results, the *legal*

[21] Professor Williston frequently uses the term "property" in speaking of sales of chattels. This is discussed below.

[22] This "right to a continuance in possession" is of course not a separate and independent right, but merely one incident of "title" or "ownership."

[23] KEENER, *loc. cit. supra* note 9. [24] KEENER, *loc. cit. supra* note 9.

[25] WILLISTON, *loc. cit. supra* note 10. Williston's argument is not entirely clear at this point, his statement being that if the bargain is "absolutely void," a bona fide purchaser for value would not be protected. But, if the present writer does not mistake his meaning, the statement in the text is a fair interpretation of his argument as a whole, as will be more specifically indicated later.

[26] See the language of Smith, J., in Thompson v. Williams, 58 N. H. 248 (1878), quoted above in note 19.

situation, and we are accordingly told that "title" and "possession" have vested in the buyer, so that the transaction is now "executed." Attention is diverted from the plain fact that under the prevailing view it has been decided for some reason or other and without adequate discussion that to the illegal acts of the seller, done on Sunday, the law has attached the legal consequences which it is now refusing to undo.

At the risk of perhaps unnecessary repetition, let us restate the matter as follows: It cannot be denied that without the aid of the law certain physical events have been brought to pass by the parties, so that as a result of their own voluntary but illegal acts their physical relations to the chattel have been changed—formerly it was in the physical custody or control of the seller; now it is in that of the buyer. Is it this physical situation to which reference is made when it is stated that "the law will leave the parties as it finds them"? The form of the statement seems so to suggest, for it speaks as if the law had as yet had nothing to do with the creation of the situation in which it "finds" the parties and which it refuses to change. But if we are to reach the results of the prevailing view it will not do to confine the term "situation" to the physical situation: mere physical custody or control acquired with the assent of the owner does not of necessity confer the rights which accompany either "title" or "possession."[27]

The situation, then, which the law refuses to alter, in which it is claimed it "finds" the parties, is one which the law itself has created by attaching to the unlawful acts the legal consequences in question: title and possession have passed to the buyer.[28] It thus becomes clear that if we are to justify the prevailing doctrines we must examine into the reasons which seem to be given for attaching these legal consequences to the unlawful sale and delivery on Sunday. Why should the law do this on behalf of the buyer, and yet refuse on behalf of the seller to attach the legal consequence of enforceability to the unlawful act of the buyer in promising to pay?

Unfortunately there is but little explicit discussion of the matter; courts and writers usually assume without discussion that title and possession must, or at least did, accompany the seller's delivery of physical custody with intent to pass title to the buyer. As already stated, there

[27] It is hardly necessary to give examples; the most obvious case of physical custody without either "possession" or "title" is that of a servant. Of more importance for the present discussion are cases in which "possession but no title" or "right to continue in possession" accompanies physical custody, as in the case of a bailee at will, or an agent given possession of a chattel with a revocable authority to sell. Both of these have "possession," but neither "title" nor "right to continue in possession" as against the bailor or principal.

[28] Professor Williston is entirely clear on the point that it must first be held that title has passed and possession acquired if the results of the prevailing view are to be reached: See, 2 RESTATEMENT, p. 1040, Special Note.

seem to be two chief reasons given, one offered by Keener, the other by Williston.[29]

Keener's theory is that the difference between the two cases—delivery on the one hand and promise to pay on the other—grows out of the nature of rights *in rem* as distinguished from rights *in personam.* Just what there is about the nature of a right *in rem* which makes the result in question inevitable or "logical" is nowhere explicitly stated. We must therefore examine into this supposedly fundamental distinction between rights *in rem* and those *in personam.*[30] The present writer has on more than one occasion dealt with the possible meanings and ambiguities of these mysterious Latin labels, *in rem* and *in personam,*[31] but never primarily with reference to their use in the classification of rights. At the outset one is tempted to quote Bertrand Russell's remark to the effect that "if there is one thing more than another that a long life has taught me, it is that Latin tags always express falsehoods."[32] Be this as it may, there seems small doubt that these particular Latin terms have done little to promote clarity of thought. Indeed, we would probably be justified in saying that more often than not they are used to conceal careless analysis and loose thinking.[33] If the present writer is not mistaken, that is the case in the matters now under discussion.

Many writers have pointed out that the phrase *in rem* is peculiarly misleading as used in the classification of rights. The first difficulty is that it tends to obscure the plain fact that all rights are against persons, even though they may relate to things.[34] A second is that the use of the singular, "right *in rem,*" rather than the plural, "rights *in rem,*" conceals the complexity of the concept involved and of the legal phenomena to which that concept is supposed to apply. This second difficulty becomes of the greatest importance in determining what may be said to happen when a so-called "right *in rem*" is "transferred," as the discussion will attempt to show.

[29] *Supra,* p. 167.

[30] "The ideas which underlie relations *in rem* (unpolarized relations) and retions *in personam* (polarized relations) constitute one of the most pervasive, fundamental and utilitarian categories of juristic science. Without them we should be in the paleolithic age of jurisprudence." Kocourek, *Polarized and Unpolarized Legal Relations* (1921), 9 KY. L. J. 131.

[31] See the present writer's papers on *The Powers of Courts of Equity* (1915), 15 COL. L. REV. 37, 106, 228; and *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV., 368, 381.

[32] PHILOSOPHY (1929) 101.

[33] See the papers by the present writer referred to in note 31 above, and Hohfeld's paper *Fundamental Legal Conceptions,* II, first printed in (1917) 26 YALE L. J., 710, and reprinted in FUNDAMENTAL LEGAL CONCEPTIONS AND OTHER ESSAYS (1923) 65.

[34] See the discussion by Wesley N. Hohfeld in *Fundamental Legal Conceptions,* II (1917), 26 YALE L. J., 710, 720, reprinted in FUNDAMENTAL LEGAL CONCEPTIONS (1923) 65, 74.

It will not be necessary or helpful to repeat here even the substance of the many discussions of this so-called fundamental classification of rights into those *in rem* and those *in personam*. Some writers have emphasized "indeterminate incidence"[34] as the important thing about rights *in rem*. Others dwell upon the number of persons against whom such a "right" is available.[35] For our present purposes two things may be emphasized. The first, clearly enunciated by Hohfeld in his writings, is the complex character of a so-called right *in rem*.[36] To use a somewhat crude figure of speech, we might say that a right *in rem* is a complex legal "molecule" whose constituent "atoms" are an indefinite number of claims (rights in the strict sense), privileges, powers, and immunities.[37] If we examine carefully the normal case of an owner of land or of a chattel, we find in the first place that the owner has rights (in the narrow sense, *i.e.*, enforceable claims) against A, against B, against C—or, as we say, against all the world[38] that each one of them refrain from dealing with the physical object in certain ways defined more or less clearly in the law of property and torts. Corresponding to these rights (claims) of the owner are the duties of each of these other persons to refrain from the specified conduct.[39] In addition the owner has an equally indefinite number of privileges ("liberties"),[40] powers,[41] and immunities.[42] Each one of these claims, privileges, powers, and immunities is a separate and distinct legal relation and may be separately extinguished.[43]

A second important characteristic of "a right *in rem*," one which is usually overlooked or at least not emphasized, is that the number of legal relations composing the "molecule" is constantly changing: as peo-

[34] Hohfeld, *op. cit. supra* note 34, p. 91.

[35] Hohfeld, *op. cit. supra* note 34, p. 91; Cook, *Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368.

[37] Hohfeld, *op. cit. supra* note 34, p. 91.

[38] This is frequently too broad, as individual persons may have *privileges* to enter under easements, licenses, and the like.

[39] Though referred to by Hohfeld as "correlatives" *right* and *duty* are not separate legal relations. The two words denote a single relation, the right-duty relation, which may be viewed first from the point of view of one party, and then from that of the other. *Cf.* Radin, *Correlation* (1929) 29 COL. L. REV. 901. The discussion in the text is confined to rights *in rem* which relate to physical objects which can be "owned."

[40] For a discussion of the meaning of the privilege-"no-right" relation, see Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16, 32, reprinted in FUNDAMENTAL LEGAL CONCEPTIONS (1923) 23, 38.

[41] For a discussion of the power-liability relation, see the paper by Hohfeld referred to in the preceding note at p. 44, in the reprint at p. 50.

[42] For a discussion of the immunity-disability relation, see the paper by Hohfeld referred to in note 40, at p. 55, in the reprint at p. 60.

[43] *E.g.*, if a landowner grants an easement of way to a neighboring landowner, he thereby extinguishes the claim-duty relationship between himself and the neighbor.

ple die, or become old enough to be legally responsible in tort for injuries to the object in question, etc., claim-duty relationships come to an end or come into existence, as the case may be.[44] Perhaps a better comparison would therefore be to a river, which we usually think of as the same river even though every moment its actual composition is changing: springs feed it, some of the water flows into the sea, evaporates, or otherwise disappears, etc. In the case of a right *in rem* there is, so to speak, a constant "flow" of claims, privileges, powers and immunities, but as they relate to the same physical object we ordinarily think of "the right *in rem*" as unchanged.[45]

Keeping this analysis in mind, let us attempt to answer the question: What happens when "a right *in rem*" ("title" or "ownership") is "transferred"? Obviously our tendency is to think of the "title" or "the right *in rem*" as a sort of existing thing or entity which "passes" or "is transferred" along with the physical object "owned." Consequently we tend to assume that, since "the title" already "exists," ready to be "transferred," all that happens is that the seller without the aid of the law "transfers" it to the buyer. Thinking of it in this way we also tend to assume that in the process of "transfer" the law does not "create" new rights or "destroy" (divest) old ones. All of which is entirely as it should be if we realize—and this is the crux of the matter—that in speaking this way we are using figurative language, a kind of verbal shorthand, useful enough if not taken literally or as expressing the whole truth. Unfortunately all figures of speech are likely to mislead when taken literally, and all shorthand is open to misinterpretation. If we note the figurative character of our language and expand our shorthand we shall be able to free ourselves from the misleading implications of our every-day way of talking.[46]

It will be well to make the matter a bit more concrete, or at least less abstract, by confining our attention for the time being to the transfer of "title" to a chattel[47] by means of an ordinary sale and delivery, using *S* to denote the seller and *B* the buyer. Before the sale—in terms of

[44] A similar statement may be made as to the number of legal privileges, powers and immunities.

[45] What is true of a river is also true though to a lesser degree of any so-called "object," whether it be a glass of water or Cleopatra's Needle: See BRIDGMAN, THE LOGIC OF MODERN PHYSICS (1927) 35: "an object with identity is an abstraction corresponding to nothing in nature"; WHITEHEAD, THE CONCEPT OF NATURE (1926), 166. Compare the discussion of the meaning of "Julius Caesar" in WHITEHEAD, SYMBOLISM: ITS MEANING AND EFFECT (1927) 27.

[46] It is of course unnecessary to be more precise in our analysis of a given concept or bit of shorthand than the nature of our problem demands. Fortunately the ambiguities of our language do not involve us in difficulties most of the time. Compare RITCHIE, SCIENTIFIC METHOD (1923) 33.

[47] "Chattel" here means a movable physical object, as distinguished from immovable objects, "land."

the analysis above outlined—*S* has as against *B* a claim that *B* refrain from taking or injuring the chattel, etc., or, to put the same thing from *B's* point of view, *B* is under a duty to refrain from those acts of interference with the chattel. There are an indefinite number of similar claim-duty relationships between *S* and other persons, *C, D, E,* etc.: "all the world" as we say. Each one of these claim-duty relationships is a separate and distinct relationship, and may be extinguished by *S* without affecting the others, *e.g., S* can give *B* permission to take the chattel; the effect is to extinguish, for the time being at least, *B's* duty. The duties owed *S* by *C, D, E,* etc., remain.

As a part of his "right *in rem*" *S* has, *inter alia,* also the legal *power* (legal ability) by doing certain physical acts to "transfer the title" to *B,* or to *C,* etc. Once more expanding our shorthand, we find that what happens in this so-called "transfer of title," is that the law attaches to these "acts of transfer" the legal consequences, among others, that the indefinite number of claim-duty relationships existing between *S* and *B, S* and *C, S* and *D,* etc., are now extinguished or "divested," and—what is of more importance for present purposes—a similar, also indefinite, number of new claim-duty relationships are created by the law in favor of *B* as against *S, C, D, E,* etc.[48]

If this analysis[49] is accepted, it appears clear that when we speak with accuracy we are not entitled to say that an "existing right *in rem*" has merely been "transferred" to *B.* What we should say is that *S's* rights *in rem* have been destroyed or "divested," and new and similar rights *in rem* created by the law on behalf of *B.* As will be pointed out more in detail later, *B's* new "rights *in rem*" may or may not be substantially similar to those which *S* formerly had; in some cases they are more extensive in scope, and in others less.[50] It should be emphasized that even when the new "right" is substantially similar in scope to the old, it ought not in any accurate sense to be regarded as the "same" right which has merely "passed" from one person to another.[51]

[48] Or, stating it the other way around, a similar and indefinite number of new duties toward B have been imposed by the law upon S, C, D, etc.

[49] The analysis in the text, while sufficient for present purposes, is incomplete, as it does not deal with the divesting of S's privileges against B of using, destroying, etc., the object, and the investing of B as against S with similar privileges; or with the power and immunity aspects of the "molecule."

[50] Where an owner in fee simple of land conveys it to A for life, remainder to B for life, remainder to C in fee, three new legal "molecules," *i.e.,* complex aggregates of legal relationships, are created, no one of which is coextensive with the "fee simple."

[51] Professor Beale in his fragmentary TREATISE ON CONFLICT OF LAWS (1916), §139 *et seq.* distinguishes between what he calls a "static right" and the dynamic rights which protect the static right. He regards the title to property as a static right, which exists and is transferred from one person to another. Space is lacking in which to analyze this conception. It has been briefly discussed by Hohfeld, in the paper referred to in note 33 above at p. 725, in the reprint at p. 78.

Coming now to the case of the sale and delivery on Sunday: it happens that *B*, the buyer, is, equally with the seller, a violator of the Sunday law. Is it not pertinent to ask, how comes it that the law which refuses to create on behalf of *S* a single enforceable claim (a right [claim] *in personam*) against *B*, because it is unwilling to aid a law-breaker, nevertheless is willing to create on behalf of *B*, also a law-breaker, not only a valid claim against *S*, thereby imposing on the latter a duty to *B* to refrain from taking the chattel, but also a vast and indefinite number of other claims against *C*, *D*, *E*, etc?[52] Must we not conclude that the law is straining at a gnat and swallowing a camel?

To sum up the argument to this point: we have seen that the "title" cannot "pass" to *B* by means of the acts of the parties alone. If title passes, it must be because the law steps in and not only divests *S*'s "right *in rem*" (complex aggregate of claims, privileges, powers, and immunities) but also creates on behalf of *B*, the other law-breaker, a similar "right" (complex aggregate of legal relations). The law therefore first creates the situation in which it "finds" the parties and which it refuses to alter. To do this is inconsistent with the theory that the law will not come to the aid of either of the law-breakers. Careful analysis thus reveals that there is nothing about the nature of a right *in rem* which leads to the prevailing doctrine; quite the opposite is the case. The reason offered by Keener is therefore seen to be entirely inadquate to support his conclusion.

This brings us to the other idea which seems to underlie the arguments of some writers, to the effect that since bona fide purchasers for value from the Sunday buyer acquire a title free from claims by the seller or persons claiming under him, it must be that the buyer himself had title. This amounts to saying that unless it is recognized that title passes to the buyer, it will be impossible to protect the bona fide purchaser.[53] The issue thus raised is a fundamental one and requires for its solution much careful analysis. Interestingly enough, it turns out upon examination to be connected with the classification of "rights" into

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To the present writer it seems based in part upon what is commonly called the "hypostatization" of an abstraction, and in part upon a confusion between factual interest and its legal protection.

[52] Also an indefinite number of privileges, powers, and immunities.

[53] It is difficult to find this argument explicitly stated in clear language in connection with the Sunday law cases. It seems to underlie Professor Williston's argument in §1702 of his work on Contracts and §666 of that on Sales. As pointed out below, it becomes explicit in his discussion of the cases in which goods are obtained by fraud (See §1370 of his CONTRACTS and §567 of his SALES), especially when that discussion is read in connection with, *e.g.*, §311 of his work on Sales, quoted from below, p. 183, and which opens with the sentence: "It is a fundamental doctrine of the law of property that no one can give what he has not."

those *in rem* and those *in personam*. It begins apparently by assuming that title, being a right *in rem*, is a sort of indivisible whole. If one has it, he can pass it on; if not, he cannot.[54] If it does pass, it may nevertheless be that in some cases—*e.g.*, where a transfer is induced by fraud —there is an "equity" or "equitable right" to a "rescission," *i.e.*, a "reconveyance" of the "title." This "equity," the argument seems to run, is a mere right *in personam*, and so is "cut off" if the holder of the "title" transfers it to a bona fide purchaser for value.[55] In the case of land, we are told, this is clear: the execution and delivery of the deed pass the "title"; the grantee is "owner"; the grantor's only right, if he has any, is a claim (right *in personam*) enforceable only in equity; what he "owns" is not the land but the "obligation" of the "constructive trustee."[56] The holders of this theory are however compelled to recognize that in the case of chattels an action at law is allowed the transferor by means of which in a proper case—*e.g.*, where goods are obtained by fraud—he can "rescind" the "transfer" and so (they tell us) "regain" the "title" and possession. This they explain as an anomaly in procedure only: the action at law takes the place of a bill in equity. In

[54] "One who *has a title*, which in his hands is voidable or subject to a right of rescission by another, may transfer *a title* to a purchaser for value without notice, free from the possibility of avoidance or rescission; but one who *has no title* at all can transfer none, and that a buyer from him pays value in good faith without notice makes no difference." WILLISTON, SALES (1924) §311. And in the note the learned author quotes from the opinion in Saltus v. Everett, 20, Wend. 267, 32 Am. Dec. 541 (N. Y. 1838), in which the maxim that "no one can transfer a better title than he himself has" is treated as a correct statement of the law. To be noted is that this treatment of "title" is entirely compatible with recognizing that there may be more than one type of "title" or "ownership," such as "full ownership," "bare legal title," "title by way of security," etc. As to this, see below, p. 187.

[55] "I take pleasure in believing that for centuries, not only has it been characteristic of the rights enforced by equity that they are directed primarily against one person [*i.e.*, are rights *in personam*], and secondarily against those who stand in no better position (that is, donees or purchasers with notice); but that this way of working out most of the legal problems with which equity has to deal is valuable and should not be given up. If this is true, it follows as a natural and necessary consequence of the essential characteristics of personal rights [rights *in personam*], that a right which is valid against one person or set of persons [*i.e.*, a "personal" right or right *in personam*] is ineffective when *title to the property* gets into the hands of another person." Williston, *The Word "Equitable" and Its Application to Assignment of Choses in Action* (1918) 31 HAR. L. REV., 822.

[56] "A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee; for an obligation is as truly the subject matter of property as any physical *res*. . . . The owner of a house or a horse enjoys the fruits of ownership without the aid of any other person. The only way in which the owner of an obligation can realize his ownership is by compelling performance by the obligor. Hence, in the one case, the owner is said to have a right *in rem*, and in the other, a right *in personam*." Ames, *Purchase for Value Without Notice* (1887) 1 HARV. L. REV. 1, 9.

spite of this, we are told, the "title" is in the "transferee" until "rescission."[57]

According to this theory, then, bona fide purchasers for value are protected only when they have accepted a transfer from one who had "title"; since bona fide purchasers for value from Sunday buyers are protected, it must follow that these buyers acquired "title" under the Sunday "conveyances." The first thing to be noted is that this theory proves too much: since by hypothesis title has passed to the Sunday buyer, and the seller (as he is a law-breaker) has no "equity" or "equitable right" (right *in personam*) to rescission, either at law or in equity, it is difficult to see why it does not logically follow that any transferee of the buyer is protected, whether a bona fide purchaser or not.[58]

The theory in question, however, suffers from more fundamental infirmities. In the first place, it ignores the complex character of a so-called right *in rem* or "title," and so fails to recognize adequately that in many cases it is of small utility, if any, to say that "title" or "ownership" is vested in one or the other of two competing parties.[59] In the second place, it relies in the last analysis upon that inadequate theory of the relations of common law and equity current in the last generation which apparently had its origin in the erroneous doctrine that since equity acts only *in personam* all equitable rights are necessarily *in personam*.[60]

[57] "The typical case of protection of an innocent purchaser is the case where the defendant has bought a legal title from a fraudulent trustee or vendee. (Pilcher v. Rawlins, 7 Ch. 259). No distinction is to be made between the purchaser of land and the purchaser of a chattel. . . . In truth the fraudulent vendee who gets the title to a chattel is a constructive trustee, and the action of trover against him presents the anomaly of a bill in equity in a court of common law." Ames, *Purchaser for Value without Notice* (1887), 1 HARV. L. REV., 1, 4. Dean Ames then goes on to discuss legal property rights as being *in rem* and fundamentally different from the right *in personam* of the *cestui que trust,* and speaks of "the purchaser of a title who holds it subject to an equity."

[58] In *Horton v. Buffington,* 105 Mass. 399 (1870) a wagon sold and delivered on Sunday was attached by the defendant, a deputy sheriff, on a writ against the seller, the wagon having in the meantime been sold and delivered to the plaintiff. The trial judge told the jury that if the plaintiff was a bona fide purchaser for value, he acquired a title good as against the attaching creditor of the original seller. Verdict was for the plaintiff. In affirming judgment for the plaintiff the appellate court argued as follows: "It is difficult to see how the original vendor could have reclaimed it [the wagon] on the ground of an illegality in the contract of sale. The law would not aid him to undo what he had done. . . . This disability on his part to reclaim it would avail the party holding it, as a sufficient title. It had ceased to be the original vendor's property, or liable for his debts, and therefore the attachment under which the defendant seeks to justify was wrongful." Note that this argument would protect a donee or mala fide purchaser as well as a bona fide purchaser. Indeed, there is no reference in the opinion to the fact that the plaintiff was a bona fide purchaser.

[59] As pointed out below, Professor Williston himself has in his writings recognized that there may be a "divided ownership." See p. 187 below.

[60] See the quotations from Dean Ames and Professor Williston in notes 54, 55, 56 and 57 above. The matter is discussed in the present writer's articles upon *The Powers of Courts of Equity* (1915) 15 COL. L. REV., 37, 106, and 228.

The concept of title as a sort of indivisible whole, which a person must "have" if he is to "transfer" it, though it may be subject to an "equity," leads some writers who hold the theory to somewhat startling conclusions. Thus Professor Chafee argues that the thief of a negotiable instrument payable to bearer or indorsed in blank has "title," and that this is the reason why bona fide purchasers for value from him are protected. He writes:

> "The legal title to a negotiable instrument throughout its existence belongs to the person to whom the promises run by the the instrument if he has possession, no matter how that possession terms of the instrument if he has possession, no matter how that possession came to him.
>
> "This proposition is extremely important for our problem because if it be sound, the fact that a bona fide purchaser after maturity takes from a wrongdoer, even a defrauder or a thief, will be immaterial to deprive him of protection. He has legal title, and where equities are equal the legal title prevails. On the other hand, if possession by one within the description of the instrument does not always involve legal title, it will be necessary to determine the conditions under which possession does or does not confer legal title upon the bona fide purchaser after maturity.
>
> "The validity of our second main proposition seems plain from the language of negotiable instruments, but it invariably causes uneasiness; because if it be true, a thief has legal title. This is the acid test to which we shall not delay to submit our theory.
>
> "A thief has legal title to a negotiable instrument payable to bearer or indorsed in blank. It is high time to stop being squeamish about this. Other bad men are admitted to have legal title to negotiable instruments, and sometimes to chattels as well,—defrauders, absconding trustees, impersonators. Of course the thief is, like them, subject to the equities of his victim, but like them he does have legal title.
>
> "It is usually assumed that the victim retains legal title after the theft. This cannot be, for the instrument is by its terms payable to bearer and no one who is not a bearer can sue upon it in a court of law. If the thief is bearer but has not legal title, then the legal title has temporarily ceased to exist, for there is no one else to whom the promise runs. Lord Holt put the matter clearly in 1699: 'The course of trade . . . creates a property in the assignee or bearer.' The bona fide purchaser from the thief gets the legal title because it was first in the victim and then in the thief and then in the purchaser, passing with the possession. The title did not

jump over the thief or pass through some mysterious legal subway. The effect of the bona fide purchase is not to create a fresh legal title but to cut off the equities of the victim. . . .

"Various attacks have been launched against the legal title theory. Thus Ewart says, 'Property and possession of bills, as of aught else, are inseparable; otherwise I could never bring trover for bills against my book-keeper.' The reply has been explained already. The plaintiff in trover does not have legal title but recovers on the equitable right to restitution, just like the defrauded seller of goods, whose interest must be only equitable since it can be cut off if the fraudulent buyer sells to a bona fide purchaser for value without notice."[61]

According to this mode of analysis, it would follow that in England where the doctrine of sale in market overt is recognized, a thief who steals a chattel has "title," since he can give an indefeasible title to a bona fide purchaser for value.[62] The way to test the accuracy—perhaps a better word would be utility—of this analysis is to take note of the decisions, *i.e.,* to find out just what claims, privileges, etc., the two parties have with respect to the chattel. On the one hand we find that before the sale in market overt the dispossessed owner has a claim to be restored to possession, enforceable by replevin or detinue. Moreover, if he can succeed in laying his hands on the chattel he commits no wrong against the thief by peaceably retaking it; *i.e.,* he has a legal privilege of recapture.[63] Further, the dispossessed owner can follow the chattel into the hands of third parties, recovering either the chattel itself or its value, except in the one case of a sale in market overt. On the other hand, the thief has as against third persons not claiming under the dispossessed owner all the rights of a possessor, and in addition a legal power by selling in market overt to give an indefeasible title to a bona fide purchaser. This legal power, which seems to Professor Chafee a kind of "mysterious subway" through which the indivisible entity, "title," is "passed" from the original owner to the transferee of the thief without passing through the hands of the latter, is obviously given by the law for reasons of real or supposed public policy.[64] Just why the concept of a legal power to give a good title to an object one does not "own" or have "title" to should be regarded as mysterious, it is diffi-

[61] Chafee, *Rights in Overdue Paper* (1918) 31 HARV. L. REV., 1104, 1112 ff.

[62] Subject of course to the limitation that a transfer back to the thief will result in "reviving" the "title" of the original owner.

[63] That is to say, no action of trespass *de bonis asportatis* will lie against him. There is no intention to discuss here the extent to which he may use force against the person of the thief in recapturing possession.

[64] American jurisdictions have disagreed with the policy of the market overt doctrine, and so rejected it.

cult to understand. The legal universe, so to speak, is full of similar powers. The power of a sheriff to sell chattels on execution and give a good title to the judgment debtor's goods is a most obvious example. The power of a court of equity under modern statutes to vest title by its mere decree without ordering a conveyance by the owner, is another; the power of a common law court in a writ of partition, is still another; and of course all cases in which an agent to sell and convey transfers the principal's property which the agent does not own are other examples. All these and many other situations exemplify the plain fact that legal power to give complete title[65] to objects one does not own frequently exists under our legal system.

To be noted is that this description of the phenomena of judicial decision as they exist is not offered as an explanation of *why* the thief, the sheriff, the court of equity, etc., can give good title; it is no more than a shorthand way of stating that fact. The *why* must be sought in the considerations of social and economic policy which have led courts or legislative bodies, as the case may be, to confer the power in a given group of cases. In this respect, however, the "power" theory does not actually differ from the "title" theory of Professor Chafee: he is able to "deduce" from his "title" theory that the bona fide purchaser for value from the thief is protected, only because a legal power to "transfer" an indefeasible title to such a purchaser is really included as a part of the supposedly indivisible legal atom, "title," which is imputed to the thief.[66]

[65] That is, as large a number of claims, privileges, etc., as our legal system permits to exist.

[66] Note Professor Chafee's own recognition of this when he says:

"Apart from this empirical quality of the power theory, it is possible that it is not essentially at variance with the legal title theory. With the disappearance of the division between law and equity, it is probable that the terminology of legal and equitable titles will gradually disappear, and that in the scientific property law of the future, the present equitable title will be regarded as the true ownership of the thing, while the present legal title will be regarded as a power created by law to deal with the thing and not a property right at all. In short, all legal titles are only powers. Whether the wrongdoer's dominion over a negotiable instrument be called legal title or power is perhaps only a matter of terminology. The vital point upon which I insist is that the limits of his dominion are not determined solely by the ipse dixit of the law, but by the terms of the instrument. By virtue of those terms this dominion over the instrument, call it what you will, passes with the possession of the instrument to any person within its description, after maturity as well as before, regardless of the manner in which that person obtained his possession. The terms of the instrument prevent an arbitrary termination of the 'power' at maturity.

"In other words, so long as the advocates of the 'power' theory recognize that the holder of an overdue negotiable instrument has the same power that a trustee has of cutting off equitable ownership of the res, I need not stop to quarrel with them; but it seems to me more logical and less confusing, so long as the present dual terminology continues in use, to say that both the trustee and the holder to whom the promise runs have a legal title. It is hard to see why if the law

Perhaps the difficulties involved in the point of view under discussion can be brought out more clearly by considering a case on which Professor Williston has expressed his views more clearly than in his discussion of the Sunday law cases, *viz.*, that in which the buyer of chattels obtains them by fraud. Of this situation Professor Williston writes as follows:

"If a buyer obtains by fraud the seller's assent to transfer the ownership of goods, there is no doubt that the buyer gains title thereby."[67]

The note appended to this passage and citing authorities to support it reads in part as follows:

"Thus if the buyer resells the goods to a purchaser for value without notice the latter gets an indefeasible title."[68]

Passages of this kind need of course to be read in the light of the author's own writings, so that they may be given if possible the meaning intended by him. It will therefore be well to reproduce at this point the following passage from the learned author's work on Sales:

> "It is a fundamental doctrine of the law of property that *no one can give that which he has not.* One who *has a title,* which in his hands is voidable or subject to a right of rescission by another, *may transfer a title* to a purchaser for value without notice, free from the possibility of avoidance or rescission; but *one who has no title at all can transfer none,* and that a buyer from him pays value in good faith without notice makes no difference. It is usual to say that bills of exchange and promissory notes form an exception to this rule in that a thief or finder of such an instrument, if payable to bearer or indorsed in blank, can give a good title to a bona fide purchaser for value without notice. Whether the better explanation of this doctrine is that *an exception* is here noted *to the rule that one who has no title can give none,* or whether it is more accurate to say that mere possession of negotiable paper payable to

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can give the thief a power without the consent of his victim, it cannot also give him legal title without consent."

Chafee, *Rights in Overdue Paper* (1918) 31 HARV. L. REV. 1104, 1117.

[67] WILLISTON, CONTRACTS (1920) §1370. In the recent article, *Ownership of Goods Shipped Under a Bill of Lading to Seller's Order* (1933) 82 U. OF PA. L. REV., 1, 4, Professor Williston states that in drafting the Sales Act he used "property" to "indicate ownership as between buyer and seller," and confined "title" to "ownership good also against third parties." In referring to the fraudulent buyer's rights in the same article, the learned author says: "The fraudulent buyer acquires *ownership*" (the italics are those of the present writer).

[68] 3 WILLISTON, CONTRACTS (1920) 1370, note 67. The note continues: "So the seller may 'affirm' the sale and sue for the agreed price—a remedy which proceeds on the assumption that title is in the buyer." In terms of the analysis here used, that the seller may affirm and thereby lose all claim to recover the chattel means no more than that the law recognizes a legal power in the seller to confer on the buyer an indefeasible "title" to the goods; there is no need for assuming that this "title" was already vested in the buyer.

bearer or indorsed in blank *carries title with it, as in the case of money,* so that a thief or finder may properly be said to have the legal title to the instrument, though of course his title can be divested by the true owner, need not here be considered."[69]

Of course the learned author recognizes that the defrauded seller has ample remedies at common law to regain the chattel, but these remedies are treated as "nothing more than specific enforcement [at law] of *the obligation* of the fraudulent buyer *to return the title* wrongfully acquired by him."[70] That is to say, the defrauded seller has a personal right (right *in personam*) against the buyer to a "return" of the "title," which right, though equitable in nature, may be "specifically enforced" at law; as it is "equitable," it will be "cut off" if before it is enforced the buyer transfers the "title" to a bona fide purchaser for value without notice of the fraud.[71]

If now the mode of analysis here suggested is adopted, it will be found first of all that two groups of cases must be distinguished, *viz.*, those in which the defrauded seller has received nothing of value from the buyer, and those in which he has received a consideration which he must return, or at least offer to return, as a basis for "rescission." In the first of these, according to the decisions the seller without doing anything else in the way of "rescission": (1) can recover the goods in question in replevin or detinue; (2) can recover their value in an action of trover, treating the original taking as a conversion; (3) may by self-help retake possession of the goods;[72] (4) can recover the goods or their

[69] WILLISTON, SALES (1924) §311. The italics are the present writer's. Query: May a thief or finder of money properly be said to have "title"? Is anything more involved than that usually money cannot be specifically identified, so that it cannot be reclaimed, and a legal power of the thief or finder to give an indefeasible title to a bona fide purchaser? Obviously until the latter is done, the "true owner" can reclaim the money if he can identify it. Of course the thief or finder has against third persons all the rights of any possessor.

[70] WILLISTON, CONTRACTS (1920) §1370. The italics are the present writer's. Note the use of figurative language here, the "title" being referred to as if it were a specific object, which has been "wrongfully acquired" and must be "returned." Possibly useful shorthand, but also misleading, and certainly not to be treated as more than highly figurative.

[71] The following passage shows clearly how the common law remedies of the defrauded seller are thought of as a substitute for a bill in equity for "specific enforcement" of the obligation of the fraudulent buyer to restore the "title."

"If the property in question is land and the buyer has fraudulently acquired a conveyance, the seller must go into equity in order to get a reconveyance, but in the case of goods he *can regain title* to what he has parted with . . . without this procedure." WILLISTON, CONTRACTS (1920) §1370. And in his recent paper referred to in note 67, the learned author speaks of the rights of the defrauded seller to "rescission" as equitable in origin, though now enforceable at law. See also the discussion in the learned author's work on Sales, §650.

[72] As to the remedies of the seller including the privilege of recapture, see: Wheelden v. Lowell, 50 Me. 499 (1862); Smith v. Hale, 158 Mass. 178, 33 N. E. 493 (1893); *In re* Eastgate [1905] 1 K. B. 465; WILLISTON, SALES (1924) §567.

value from any one into whose hands they may come except a bona fide purchaser for value. On the other hand, the fraudulent buyer has all the rights that go with possession, plus a legal power to give a good title to a bona fide purchaser for value. The situation in this simple case, where the seller received no consideration and so need return nothing, is thus precisely comparable to that in the case of stolen money or a stolen negotiable instrument payable to bearer or indorsed in blank.[73]

We are now in a position to see how the conclusion is reached that the thief or finder has "title" in the case of money or negotiable instruments payable to bearer or indorsed in blank. Assumed first of all is the theory that the fraudulent buyer of a chattel acquires "title," which he is under a personal "obligation to return"; that this claim of the seller for restitution of the "title" is merely a right *in personam,* in essential nature "equitable," which can be defeated by a transfer of the "title" to a bona fide purchaser for value. Then it is discovered that in the case of the thief or finder of the money or negotiable instrument payable to bearer the remedies of the original owner are identical with those of the defrauded seller. The conclusion naturally follows that the finder or thief must also have "title."

This "title" theory obviously derives whatever initial plausibility it has from the case of the sale of land induced by fraud, where the seller's remedy is solely in equity. Here the theory which has been and to some extent still is legal orthodoxy is that in the case of a trust, express or constructive, but especially in the case of the latter, the beneficiary is not "owner" of the "trust *res*"; all he has is a personal claim against the trustee, the "ownership" being in the latter.[74] This type of analysis is still found in judicial opinions: all the beneficiary in a so-called constructive trust "owns" is the obligation of the trustee to reconvey.[75] All such theories, as Hohfeld clearly showed[76] and as the

[73] In the more complex situation, in which the seller has received something of value, the common law cases hold that the seller must "rescind" by tendering back what he received before he acquires an enforceable claim to recover the goods. A few of the cases are collected in 3 COOK, CASES ON EQUITY (2d ed. 1932) pp. 90 *et seq.* (As to the rule in Equity, see Comment [1927] 36 YALE L. J. 879). This may be expressed by saying that the defrauded seller has the legal power by tendering what he received to acquire an enforceable claim for a return of the goods. There seems no reason why the privilege of recapture could not be exercised in some cases without a prior "rescission," *e. g.,* if in peacefully retaking his goods the seller were to leave in their place the goods received from the buyer.

[74] See the extracts from the writings of Dean Ames in notes 56 and 57, above. MAITLAND, LECTURES ON EQUITY (1920) pp. 16-18, expresses the same view, as did Dean Stone in Book Review (1912) 12 COL. L. REV. 756.

[75] See Melenky v. Melen, 233 N. Y. 19, 134 N. E. 822 (1922).

[76] In *The Relations between Equity and Law* (1913) 11 MICH. L. REV., 537, reprinted in FUNDAMENTAL LEGAL CONCEPTIONS (1923), 115.

present writer has elsewhere pointed out,[77] are misdescriptions of the phenomena of judicial decision, and lose all plausibility if one turns on them the illumination of a more careful analysis. Here it will be helpful to quote what the present writer said upon another occasion when criticizing the theory under discussion:

> "By mistake of the scrivener ordered to prepare a deed, too much land is described, and the deed is executed and delivered containing the erroneous description. As we all know, under orthodox rules the so-called 'legal title' to the extra land vests in the grantee. There is a 'constructive trust,' enforceable in equity. Langdell, Ames, Maitland, and (if I understood him correctly) Dean Pound, and now Judge Cardozo, tell us that the grantor has no 'estate' in the land; he does not 'own' the land; all he 'owns' is an obligation, a chose in action, *viz.,* the obligation of the trustee to reconvey. So far as he has rights against other persons, we are told that these are rights that these other persons shall refrain from 'interfering' with the 'obligation' of the trustee. Now the way to test such a statement is to examine the relevant legal phenomena—the decisions of the courts—and to find out just what claims, privileges, powers, and immunities the constructive trustee has, and what the beneficiary has. An examination will, I believe, disclose that while 'at law' the constructive trustee has everything, 'in equity' he has in the typical Anglo-American jurisdiction, nothing at all, except a power to give a good title to a *bona fide* purchaser for value. Test it and see. Suppose the 'land' consists of a house and lot. 'At law' the trustee has the privilege to tear the house down. Equity would, however, at the suit of the grantor, the *cestui* of the constructive trust, enjoin the destruction, pending a hearing on an application for reformation, *i.e.,* there is an equitable duty not to destroy. Which is paramount? The equitable duty, as we all know. Again, at law the trustee has the privilege to sell to anyone he pleases; in equity an injunction may be had, there is an equitable duty not to sell. The trustee sells the extra land to a *bona fide* purchaser, or even a *male fide* purchaser. At law the trustee may keep the money; in equity he must give it to the beneficiary. The trustee goes to Europe; a stranger is about to destroy the house. Would Judge Cardozo hesitate to preserve the property—the physical property—not the intangible obligation of the trustee—at the request of the beneficiary? I think not. *Ettinger* v. *Persian Rug Co.* (1894) 142 N. Y. 189;

[77] See the paper printed in FIVE LECTURES ON LEGAL TOPICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1928) 337, 351 *et seq.*

Amparo Mining Co. v. *Fidelity Trust Co.* (1909) 75 N. J. Eq. 555; *Kelly* v. *Larkin & Carter L. R.* (1910) 2 Ir. 550 (K. B.) Run clear through the whole list—and at almost every point the common law rights of the trustee are nullified by the existence of paramount equitable rights of the beneficiary—except at one point —both courts agree that the trustee has a power (but, note well, not the privilege) to give a good title to a *bona fide* purchaser for value. It is sometimes said that the constructive trustee is under an equitable duty to hold or to exercise his common law rights for the beneficiary. Equitable duty *not to destroy* or *not to sell* is not and *cannot be a duty to exercise the common law privilege to destroy or sell for the benefit of the cestui.* Such a statement is not only meaningless but logically contradictory."[78]

As previously indicated, writers who treat "title" as something one either has or has not, though it may be subject to an equitable right *in personam,* a so-called "equity," nevertheless actually do recognize different types of "title" or "ownership," and thereby necessarily recognize that a divided "ownership" of objects may exist. There is, for example, the usual full ownership "title"; there is the "legal title" of the constructive trustee, which is subject to an "equity"; etc. If one reads the Sales Act, he finds at once that it recognizes that a title may be held "merely for purposes of security."[79] And the learned draftsman of that act has pointed out in a recent article that while "the idea that title is always the same and always carries with it identical consequences is instinctive with many lawyers," it is "easy to demonstrate the contrary."[80] In discussing the matter he goes on to say:

"The conception of divided ownership was doubtless almost entirely the creation of courts of equity derived from their compulsion of owners to deal with their ownership according to good conscience. But this desirable and convenient conception has been taken over into the law in many cases and remedies at law are often adequate to achieve results originally reached only in equity. Illustrations might be multiplied. A fraudulent buyer of a chattel acquires ownership but the defrauded seller need not now seek rescission in equity, but may sue for conversion. Nevertheless, following the equitable doctrine, courts of law protect an innocent purchaser for value from the fraudulent buyer."[81]

[78] *Ibid.,* 356.
[79] UNIFORM SALES ACT §20.
[80] Williston, *Ownership of Goods Shipped under a Bill of Lading to Seller's Order* (1933), 82 U. OF PA. L. REV., 1, 3.
[81] *Ibid.*

However, in discussing the type of analysis advocated in the present article he says:

> "It has been pointed out that 'title' is something variable in different cases, since its possessors do not always have the same legal relations to other persons. This is doubtless a sound juristic conception, but it is practically impossible always to state specifically what rights, powers, privileges and immunities an owner has in a particular case. For one reason, the intrinsic difficulty and complication of such a mode of statement render it impossible of universal application. Lawyers must have some shorter mode of expression. Furthermore, the lengthened statement requires at the outset a knowledge of all these rights, powers, privileges and immunities. This is impossible. Those who suggest it fail to take into account the way the law has grown, and apparently is growing, namely, by first determining the attribute of ownership or title and then deducing consequences therefrom. It is at least possible, however, without imposing too elaborate terminology on a practical profession, to distinguish from full ownership not only the bare title that an ordinary trustee has, but a title held merely for purposes of security."[82]

With much that the learned writer says there can be no disagreement. It is impossible to talk or write without using verbal shorthand, and nothing in the present paper should be construed as asserting the contrary. No one, for example, would advocate doing away with such shorthand expressions as "ownership" and "possession"; these are as useful for lawyers as, *e.g.,* terms like "carbon dioxide" and "sodium chloride" are for chemists. But we must be careful not to misinterpret or misuse our shorthand. If chemists were, *e.g.,* to use "carbon dioxide" now for one combination of molecules and now for another, or without finding out just what it did stand for, the situation would be more or less comparable to many uses by legal writers of their terms "ownership," "title," and similar expressions.[83]

Moreover, it seems to the present writer doubtful whether in fact "the law has grown and apparently is growing, by first determining the attribute of ownership or title and then deducing consequences therefrom." Is this not to confuse the *ex post facto reasoning* of judicial opinions with the real reasons which led to those decisions? To be

[82] *Ibid.,* note 8.

[83] Note how in the passage quoted in the text dealing with "divided ownership" the learned author nevertheless a few lines farther on states that "a fraudulent buyer of a chattel *acquires ownership.*"

kept in mind are two things: (1) one can deduce a conclusion applicable to the world of fact only when one knows the meaning of the terms used in his premises;[84] (2) the conclusion, so far as it is nothing but a purely logical deduction, merely makes explicit what is implicitly stated by the premises.[85] Consequently, if a case presented to a court is "new," *i.e.,* raises the question whether in the particular case before it a given legal relation (claim, privilege, power, or immunity) is to be recognized for the first time, the court cannot solve its problem intelligently unless it realizes that "to determine the attribute of ownership or title" will be to determine whether the given specific relation in question is to be recognized or not. The assertion of the "attribute of ownership or title" is thus in truth nothing more than a recognition of a result already reached on other, though not always consciously recognized, grounds, rather than a reason for that result.[86]

We may make the foregoing somewhat abstract discussion more concrete by noting the difficulties produced by first attributing title or ownership without knowing when we do so just what legal relations we mean to denote, and then trying to "deduce" the answer to a specific problem. An excellent example is given by Professor Williston himself in the paper from which we have quoted. It grows out of the wording of Sec. 20 of the Sales Act, which reads:

> "Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer under the contract."

[84] Note the wording of this statement: "conclusion applicable to the world of fact." One can of course "deduce" from the "statements" that "all x's are y's" and "all y's are z's" the conclusion that "all x's are z's," but until a meaning is given to x, y, and z the "statements" have no meaning and cannot be applied to a factual situation.

[85] The statement in the text is not intended to deny the utility of "logic." Rules of logic are indispensable guides in the consistent use of language, and enable us in a complicated chain of reasoning to discover perhaps for the first time just what our premises do assert.

[86] The matter here so briefly dealt with relates to such fundamental problems as the nature of "logic" and of general principles and rules. The present writer is aware that the statements in the text are so brief as to be susceptible of serious misinterpretation. All that can be hoped is that they will suggest a point of view which has been discussed to some extent in other places and which it is planned to develop more fully elsewhere. The interested reader may consult ERIC BELL, THE SEARCH FOR TRUTH (1934). The following passage is particularly relevant to the discussion in the text: "Any theory which is fabricated by mathe-

This section of the Act has given rise to differences of opinion as to the scope of the "rights" (claims, privileges, powers, and immunities) of the seller and buyer, respectively. The "seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer under the contract," *i.e.*, is "a title held merely for purposes of security." If the present writer understands Professor Williston, having "determined the attribute of ownership or title," we ought now to be ready to "deduce the consequences therefrom." Suppose we ask: Is the risk of loss upon the buyer in such a case? The point here made is, that unless we know just what legal relations we intend shall constitute this particular legal molecule—to recur to the figure of speech used at an earlier point—we cannot by mere logic "deduce" an answer. This Professor Williston himself recognizes, for he says: "In neither Act[87] can the section when taken alone be completely effective, since it does not itself provide . . . what is the legal effect of the seller's property being only for the purpose of securing performance by the buyer under the contract." Precisely so; and if it were so to provide, it could do so only by stating just what legal relations do make up this "title held merely for purposes of security."[88] As Professor Williston goes on to point out, Sec. 22 of the Sales Act expressly provides that the "risk of loss shall" be on the buyer where the seller's "title" is of this kind.

If we ask next whether the seller on tendering the bill of lading is entitled to recover the full price, once more we find no answer can be "deduced" by logic from the mere attribution of "security title" to the seller. This also Professor Williston recognizes in the article under discussion, although he expresses the view that all the provisions of the Act taken together ought to lead courts to one conclusion rather than another.[89]

To the present writer it seems that the actual basis for the decisions which in such cases place the risk of loss on the buyer and also allow the seller to recover the full purchase price on tender of the bill of lading is a simple one, *viz.*, that in view of the degree of control vested in the buyer by such a transaction—he has a legal power by tendering

matical reasoning (or other strict deductive reasoning) from scientific (or other) hypotheses, and which produces anything more than elaborate tautologies from those hypotheses, has simply blundered brilliantly, and has produced two rabbits from a hat which contained only one rabbit."

[87] §20 of the UNIFORM SALES ACT is identical with §40 of the UNIFORM BILLS OF LADING ACT.

[88] This may be done by appropriate shorthand, without using the precise terminology of claims, powers, etc. An example is §22 of the UNIFORM SALES ACT dealing with the risk of loss.

[89] See his argument on p. 10 of *Ownership of Goods Shipped Under a Bill of Lading to Seller's Order* (1933) 82 U. OF PA. L. REV. 1, referred to in note 80.

the price to acquire "full ownership" of the goods[90]—it is only fair that these other legal incidents should be attached.[91]

Before leaving this part of the discussion, it should be noted that even for a practical profession it is hardly adequate to stop with "distinguishing from full ownership" only two other categories, *viz.*, "the bare title that a trustee has" and "a title held merely for purposes of security." The "title" of a trustee under an express trust is often a different combination of legal relations from that in a "constructive trust"; and the "security title" of the mortgagee differs in many respects from that of the seller of a chattel under a conditional sale, and both from that of the vendor of land before conveyance.

If now we review our somewhat long drawn out argument and summarize our conclusions, we may say:

1. Whether we consider the case of land or that of chattels, the common statement that where a sale has been induced by fraud the buyer has acquired "title" or "ownership" is inadequate and misleading. It would perhaps be nearer the truth to say that the seller retains ownership, subject to the power of the fraudulent buyer to defeat that ownership by a sale and transfer to a bona fide purchaser. In truth neither seller nor buyer is completely "owner." If one chooses to attribute a "voidable title" to the buyer in such cases, perhaps no great harm is done if one realizes just what that phrase means,[92] and that it is rather a description of the legal results reached than a reason for those results.[93]

[90] In WILLISTON, SALES (1924) §284 it is said that the "right of the buyer" where the seller "retains title only for security . . . is in its nature an equitable property right." The important thing seems to be that in all cases of this type the buyer has the legal power by tendering payment of the price to acquire "a right to the goods themselves," *i. e.*, to become full owner, and also a further power to transfer the first power by sale or mortgage.

[91] It is possible that when Professor Williston speaks of "deducing consequences" from the "attribution of ownership or title" he is not using "deduce" in its strict logical sense. See his remarks in *The Effect of One Void Promise in a Bilateral Agreement* (1925) 25 COL. L. REV. 857, 863: "I think it will be found that the rule in question is a logical consequence, or indeed application of the more general rule, if not in a scholastic sense at least in a practical sense."

[92] It would mean one thing in the case where the seller need return nothing, and another where he must at least tender a return of the consideration received before being entitled to recover the goods in replevin.

[93] Note the realistic language of Mr. Justice Stone in the recent cases of Tyson & Brothers v. Banton, 273 U. S. 418, 47, Sup. Ct. 426, 71 L. ed. 718 (1927) and Di Santo v. Commonwealth of Pennsylvania, 273 U. S. 34, 47 Sup. Ct. 267, 71 L. ed. 524 (1927). In the latter, in discussing the "direct" and "indirect" regulation of interstate commerce by the states, he said: "In this case the traditional test of the limit of the state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from authorities, to be of value. In thus making use of the expressions 'direct' and 'indirect' interference with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

2. There is no connection between the "nature" of "rights *in rem*" and the rule recognized in most states that "title" *i.e.*, full ownership, passes to the Sunday buyer.

3. In recognizing that title passes as a result of the Sunday transaction, the law creates on behalf of one of the law-breakers an indefinite number of legal "rights," which it is difficult to reconcile with the refusal to attach any legal consequences whatever to the promise of the buyer to pay the purchase price.

4. It is clear that the law first puts the parties into the legal situation in which it alleges it "finds" them, and then refuses to alter the situation it has itself created, thereby enriching one of the wrongdoers at the expense of the other, and so in effect fining the latter and handing the fine over to the former.

5. To provide for the protection of bona fide purchasers for value from Sunday buyers, if it seems desirable to do so, it is not necessary to do more than attribute to these buyers legal power to give a good title to such purchasers.

6. It is therefore abundantly clear that it is entirely possible to adopt the minority view[94] and yet at the same time to give protection to bona fide purchasers for value, if that seems socially desirable.[95] To be sure, if this were done the general language used in the opinions of courts in states holding the minority view, to the effect that the transaction is "void," would have to be treated as inaccurate: sales and delivery on Sunday does give the rights which go with "possession" and also a legal power to confer a good title upon a bona fide purchaser for value without notice. To limit in this way general language used in opinions is, however, to do nothing more than is done every day by courts trained in the Anglo-American doctrine of *stare decisis:* so far as the language used in judicial opinions covers situations not yet presented for adjudication it is merely *obiter dictum* and subject to revision as "new" situations present themselves.

For states which have not already passed upon the question under

[94] That is, the view that the one who has performed his side of a Sunday bargain is entitled to regain the goods or land, at least if he does so before a transfer to a bona fide purchaser for value.

[95] The present writer does not doubt that the "title" theory has aided courts in reaching the conclusion to protect bona fide purchasers for value. If thought desirable, therefore, it would be possible to reach the results of the minority view by attributing a "voidable title" to the Sunday buyer, precisely comparable to that which the fraudulent buyer is said to get, and to recognize on behalf of the Sunday seller a "right to reconveyance" of this "title," specifically enforceable at law in the case of chattels, just as in the case of the defrauded seller.

There is curiously little discussion on the part of lawyers of the basis for the doctrine of bona fide purchase for value as developed by equity. In this connection worthy of consideration is the criticism of the doctrine expressed by Jenks, *The Legal Estate* (1908) 24 L. Q. Rev. 147.

consideration and which may desire not to follow the majority rule, there are two conceivable lines of action: (1) to adopt the minority view, to the extent of allowing recission of "executed" transactions before property "transferred" has passed into the hands of bona fide purchasers for value, but giving protection to such purchasers if that is regarded as desirable; or (2) to treat Sunday bargains as valid, *i.e.*, as entirely unaffected by the penal statutes in question. This latter solution would confine the effects of the statutes to the criminal penalties provided in them and not extend them by implication beyond their terms. Much can be said for this solution, since the only illegality involved is in the making on Sunday of otherwise lawful bargains. If it be said that this would introduce an "exception" to the "general principles" governing "illegal contracts," it may be pointed out that these "general principles" are already limited by exceptions, and that it would not be difficult to rationalize the result under discussion in terms of one or more of these.[96] So far as the policy of reaching this result is concerned, *e.g.*, if it be argued that we would thereby fail to discourage sufficiently the transaction of business on Sunday, two things may be pointed out: (1) it is more than doubtful whether the prevailing view really does have any appreciable effect upon the conduct of the community, because of the ignorance of practically all laymen of the rule in question; (2) it is better to do the discouraging consciously and directly by increasing the penalties of the criminal law, rather than indirectly and erratically as is the case under the prevailing view.

It is perhaps unlikely, legal traditions being what they are, that an American court would be bold enough to adopt this solution unless directed so to do by statute, even though its prior decisions had not passed upon the collateral civil effects of the Sunday statutes. There remains then the first solution, which, it is contended, is preferable to that reached by the majority. In support of this view two grounds may be urged: (1) it does not reach the erratic and inequitable results of the prevailing view; (2) in all probability it has at least as great a tendency to discourage the making of Sunday bargains as the majority rule. The first point is obvious and so needs no discussion. As to the second: it may well be doubted whether either the majority or the minority rule actually has much influence in the way of discouraging Sunday bargains. It is an obvious fact that while many of our lay brethren know that they may be fined for engaging in business on Sunday, practically none of them are familiar with the rules as to the civil effects of Sunday bargains. If, contrary to fact, we assume laymen to be familiar with the rules in question, the guess may be hazarded that knowledge that the other

[96] See RESTATEMENT §600.

party might, if he repented of his bargain, demand rescission, would do as much towards encouraging people to refrain from entering into such transactions as would knowledge that the majority rule was in force. Note that under the latter rule if the seller at the time he delivers the goods insists upon payment on Sunday, the transaction is completely effective: title has passed to the goods and to the money; the law will leave the parties where it finds them. Moreover, a dishonest person who knew the majority rule might perhaps take advantage of the ignorance of others who did not, by obtaining goods on credit and then refusing to pay for them.[97] All this, of course, is highly speculative; there is no evidence that in fact the decisions we are discussing have had any appreciable effect upon the community in the way of discouraging the making of Sunday bargains.

Reference was made above to the action of the American Law Institute in adopting the majority view, and to one probable argument in favor of that course, *viz.*, that in view of the overwhelming weight of authority, nothing else could have been done. It is therefore worth while to note the action of the Institute in connection with the Restatement of the Conflict of Laws, where it was voted to direct the Reporter on that subject to redraft a section of the Restatement so that instead of following the overwhelming weight of authority on the point in question it would state the rule established by the decisions in a single state.[98] That similar action was not taken in the case under discussion was therefore not due to any real impossibility but simply to the fact that the inequitable character of the law followed in most states has not been brought home to the majority of the legal profession, this in turn being in large part due to a failure to realize the inadequacy of the supposedly logical reasoning used to support the prevailing view.

As Professor Wigmore so vigorously pointed out long ago in the passage previously quoted,[99] the whole doctrine underlying the maxim

[97] Possibly the existence at the time of the making of the bargain of an intention not to pay for the goods would be "fraud" sufficient to allow a recovery of the goods, under the doctrine that a plaintiff who has been induced by "fraud" to part with property is not *"in pari delicto"* with the defendant. See WOODWARD, QUASI-CONTRACTS (1913) §141.

[98] THE AMERICAN LAW INSTITUTE: PROCEEDINGS (1931) Vol. IX, pp. 144-156. The section in question was "referred back to the Reporter and his Advisers for consideration, with an expression of opinion by this body that this should be stated otherwise." There was only one case in a single state contrary to the rule as stated and disapproved by the Institute; two states had changed the law by statute. The Reporter referred to the single case in question as "very well reasoned." (Since the foregoing was written the final text of the Restatement has become available, and apparently the learned Reporter and his advisers felt they could not escape following the weight of authority: see Section 614 (1934) RESTATEMENT OF THE CONFLICT OF LAWS.

[99] In note 5 above.

"In pari delicto potior est conditio defendentis," and not merely its application to Sunday bargains, needs reëxamination. It is hoped that the present discussion will call renewed attention to the necessity for such reëxamination, and that the quasi-official prestige of the Restatement will not prove an insuperable obstacle.