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"Issuance" and the Dog and the Bone: Motion, Volition and Legal Existence of Unissued Commercial Paper

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I. Introduction

A. Preface

Man invented the wheel about five thousand years ago.[1] Although the first vehicles were little more than sleds with two solid wheels attached, they relieved man of the burden of having to drag objects from place to place.[2]

The desire to move surely was related to a desire to create[3] objects and to "have" or possess them.[4] What man at first possessed by barter, dragging one chattel to exchange for another,[5] he later bought with money. Buying, after all, is the "symbolic act which amounts to creating the object"[6]; and because money could buy what man desired, very early in man's development it became synonymous with power.[7]

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1. Early examples were found in a region between Lake Van in Eastern Asia Minor and Lake Urmia in Northern Iran. This indicates that wheeled vehicles emerged more than five thousand years ago. D. WALLECHINSKY & I. WALLACE, THE PEOPLE'S ALMANAC 916 (1975) (hereinafter cited as WALLACHINSKY).

2. *Id. See also infra* note 35 concerning the "drag" (move) connotation in the word "draw."

3. *See* Jean-Paul Sartre's treatment of skiing, sliding, swimming and bike-riding J. SARTRE, BEING AND NOTHINGNESS, AN ESSAY ON PHENOMENOLOGICAL ONOTOLOGY (H.E. Barnes translation) 582-86 (1956) (hereinafter cited as SARTRE).

4. "In so far as possession is a continuous creation, I apprehend the possessed object as founded by me in its being." *Id.* at 592.

5. "Where *A* delivers a chattel to *B* in exchange for another chattel the transaction is a barter . . . ." G.L. CLARK, SUMMARY OF AMERICAN LAW 300 (1960 reprint) (hereinafter cited as CLARK).

6. " . . . [T]o buy an object is a symbolic act which amounts to creating the object. That is why money is synonymous with power; not only because it is in fact capable of procuring for us what we desire, but especially because it represents the effectiveness of my desire as such." SARTRE, *supra* note 3, at 590.

7. *Id.*

The advantages of money,[8] including its anonymity and quintessential degree of transferability and acceptability, as legal tender[9] for all debts have, however, always been offset by concurrent "dragging problems" — there is a high degree of risk in carrying money. If stolen or lost, it is usually gone forever. In addition, logistical burdens in "dragging" large amounts of currency from one place to another are tremendous.[10] To overcome these "dragging problems,"[11] negotiable[12] instruments,[13] as substitutes for money, came into existence very early in man's history. The first known[14] negotiable in-

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8. "Money" is defined in U.C.C. § 1-201(24) (1983) and is *specifically excluded* from the purview of Article Three of the Uniform Commercial Code ("Code"). U.C.C. § 3-103(1) (1983). *See also infra* notes 9 and 75.

On the Island of Yap in the Pacific, larger denominations of money stand twelve feet high and weigh over a ton. Cut in the shape of millstones with a hole in the center, smaller pieces of change are trundled around by means of wooden axles. The large money is displayed outside the houses of original owners. Title is transferred by an inscription on the stone itself, and possession is not essential to ownership. "One family traded for years on the hidden value of a huge wheel that had sunk into the sea while being transported from a Palau stone quarry 400 miles away." W. IVERSON, O THE TIMES! O THE MANNERS! (1965) reprinted in WALLECHINSKY, *supra* note 1, at 1353.

9. "The most recent law dealing with legal tender is Section 102 of the Coinage Act of 1965, 31 U.S.C. § 392 (reenacting a similar provision in effect since 1933), which provides: 'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations), regardless of when coined or issued, shall be legal tender for all debts, public and private, public changes (sic.), taxes, duties, and dues.' " DEPARTMENT OF THE TREASURY, FACTS ABOUT UNITED STATES MONEY 27 (U.S. Government Printing Office) (hereinafter FACTS ABOUT MONEY).

10. *See supra* note 2. For example, the present form of United States currency, first issued in July, 1929, is over ninety-nine percent Federal Reserve notes issued in denominations of $1, $5, $10, $20, $50, and $100. FACTS ABOUT MONEY, *supra* note 9, at 8, 22. Paper currency in denominations of $500, $1,000, $5,000 and $10,000 were discontinued in 1969. *Id.*

> Federal Reserve notes are obligations of the United States and are a first lien on the assets of the issuing Federal Reserve bank. In addition they are secured by a pledge of collateral equal to the face value of the notes. This collateral must consist of the following assets, alone or in any combination: (1) gold certificates, (2) Special Drawing Right certificates, (3) United States Government securities, and (4) "eligible paper" as described by statutes. As required by the Act of May 31, 1878, the amount of United States notes outstanding is maintained at $322,539,016 (sic).

Id. at 9. A finished note measures about 2.61 inches by 6.14 inches, and its thickness is .0043 inches. *Id.* at 22.

11. A million notes (*see supra* note 9) weigh about two thousand pounds or "slightly more than four hundred ninety notes per pound. New notes stack two hundred thirty-three to an inch, not compressed, and occupy approximately forty-two cubic feet of space, with moderate pressure." *Id. See also infra* note 35.

12. *See infra* note 14 and text accompanying notes 80-135 regarding elements of negotiability.

13. *Id.*

14. The first known negotiable instrument dates back to about the time of King Hammurabi's reign and is a bearer note reading, "5 shekels of silver, at the usual rate of interest, loaned by the Temple of Shamash and by I. Company, to Idin and his wife, are payable with interest on sight of the payors at the market-place to the bearer of this instrument." J. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 69 (Library ed. 1936), citing the German translation in M. SCHOOR, URKUNDEN DES ALTABABYLONISCHE ZIVIL-UND PROZESSRECHTS (No. 58) 88 (1913). Query whether the Code's new "promise" requirements would in any way cloud the "negotiability" of this magnificent ancient writing? *See infra* note 98. Draftsmen warn that obligations expressed in the form of " 'Due Currier & Barker seventeen

strument dates back to within a relatively short time after the first evidence of existence of the wheel, about B.C. 2,250-2,100 around the time of King Hammurabi's reign.[15]

B. Assignments: Sales of Debts

Over one hundred years ago, one perceptive economist observed that the discovery which most deeply affected the fortunes of the human race was made by the man who first discovered that debts are salable commodities.[16] A sale by a creditor to a third party[17] may be achieved via "assignment,"[18] in which the third party assignee receives the creditor's right to collect the debt. The assignee's legal right to collect depends upon the universal principle that "the assignee stands in the shoes of the assignor."[19] What the assignee normally buys is no less, but no more, than the assignor possessed. That the assignee "stands in the shoes of the assignor"[20] connotes that the assignee is in no better or no worse position to collect than his assignor. If the debtor has a defense against the assignor, he can normally assert it in an action brought by the assignee against the debtor. In other words, the obligation is subject to the same conditions as if there had been no assignment.[21]

The following is an axiomatic example: *D* contracts to buy

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dollars and fourteen cents, value received' and 'I borrowed from P. Shemonia the sum of five hundred dollars with four per cent interest; the borrowed money ought to be paid within four months from the above date,' " fall short of negotiability. *See* Official Comment 2 to U.C.C. § 3-102 (1983). Although "I undertake" is clearly the equivalent of "I promise" [Official Comment 5 to U.C.C. § 3-104 (1983)], "in doubtful cases the decision should be against negotiability." *Id. See also* E. A. FARNSWORTH, REQUISITES OF NEGOTIABILITY, CASES AND MATERIALS ON COMMERCIAL PAPER 72-76 (2d ed. 1976) (hereinafter cited as FARNSWORTH).

15. *Id.*

16. E. A. FARNSWORTH, CONTRACTS 748 (1982) (hereinafter cited as FARNSWORTH), *citing* 1 H. MACLEOD, PRINCIPLES OF ECONOMICAL PHILOSOPHY 481 (2d ed. 1872): "If we were asked—Who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer—The man who first discovered that a Debt is a Saleable Commodity."

17. *See* U.C.C. § 1-201(29) (1983) for a definition of "party" as distinct from "third party."

18. Assignments were not initially accepted as legal and did not gain popularity until about the nineteenth century. This was, of course, an anomaly because so much had for centuries been accomplished through use of negotiable instruments. *See* J. DAWSON, W. HARVEY & S. HENDERSON, CASES AND COMMENT ON CONTRACTS 907-50 (4th ed. 1982). American colonies "received the English law of assignments as part of the common law." FARNSWORTH, *supra* note 16, at 751. "Assignment" refers to a present transfer of a contract right to an assignee; it is also sometimes used to refer to a writing evidencing the transfer. *Id.* at 753-54.

19. FARNSWORTH, *supra* note 16 at 780-81, *citing* James Talcott, Inc. v. H. Corenzwit & Co., 76 N.J. 305, 387 A.2d 350 (1978) ("The Code has continued the common law view that an assignee of a chose in action, such as a receivable, stands in the shoes of the assignor.").

20. FARNSWORTH, *supra* note 16 at 780-81, *see also* RESTATEMENT (SECOND) OF CONTRACTS § 336(1) (1981).

21. FARNSWORTH, *supra* note 16 at 781, *citing* Wilson v. Pearce, 57 Wash. 2d 44, 335 P.2d 154 (1960).

$1,000 worth of sweaters from supplier *S*, promising to pay *S* in sixty days for the goods. Assume *S* sells and assigns the right to collect the $1,000 to *A*, his assignee, who pays *S* $750. Two months later, if *D* fails to pay, *A* sues *D*. If *D* raises the defenses that *S* never delivered the goods, that they were nonconforming to his contract with *S*, or some other legal defense,[22] judgment would ordinarily be for *D*.[23] *A* would be left with a claim against *S* for breach of his warranty that he assigned a valid claim and that he did nothing to interfere with *A*'s right to collect the $1,000 from *D*.[24] *S* does not warrant that *D* will be solvent and able to pay — that is one of the risks *A* assumes. But *S* does warrant that *A* will be able to get a judgment against *D* in the amount of $1,000.[25] What bears noting is that in the case of an assignment, *D*'s claims and defenses are preserved and may be asserted against *A*, even though *A* is a third party bona fide purchaser for value without notice of *D*'s defenses and had no connection with the original underlying transaction.[26]

C. Good Faith Purchasers of Commercial Paper

The process by which commercial paper[27] comes into existence and is transmitted through commerce involves an even more sophisticated concept than the fertile notion that debts are salable commodities. It has been theorized that if man's individual well-being and the well-being of society are "determined by the volume of exchanges going on in the whole society,"[28] the ultimate concept of negotiabil-

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22. These defenses include: failure or lack of consideration, failure to satisfy a statute of frauds, voidability for misrepresentation or fraud in the inducement (*see, e.g.*, Wilson v. Pearce, *supra* note 21), lack of the obligor's capacity (such as infancy or incompetency), mistake, duress, unenforceability on grounds of public policy (*see* E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW 679-82 (3d ed. 1984) (hereinafter cited as MURPHY & SPEIDEL) and RESTATEMENT (SECOND) OF CONTRACTS § 193 (1981) and any defense arising as a result of alleged breaches occurring during performance of the contract. *See* FARNSWORTH, *supra* note 16, at 781-86, which includes a treatment of "waiver of defense clauses" in consumer and nonconsumer transactions. *See also infra* note 23.

23. As to "waiver of defense" clauses and their validity, see MURPHY AND SPEIDEL, *supra* note 22 at 1268-73; FARNSWORTH, *supra* note 16, at 781-86. *See also* U.C.C. § 9-206 (1983) regarding validity of waiver of defense clauses in contracts and leases of nonconsumer goods; Bankers Trust Co. v. Litton Systems, Inc., 599 F.2d 488 (2d Cir. 1979); and, criticizing this decision, Driscoll, *Bribery as a "Real" Defense Against a Holder in Due Course*, 19 VAL. U. L. REV. 397 (1985) (hereinafter cited as Driscoll); RESTATEMENT (SECOND) OF CONTRACTS § 178, Illustration 12 and § 193 (1981). *See also infra* note 49.

24. The warranties of an assignor are set forth in the RESTATEMENT (SECOND) OF CONTRACTS § 333 (1981). *See also* an excellent treatment of the subject of the assignor's liability to his assignee, including problems between successive assignees, in MURPHY & SPEIDEL, *supra* note 22, at 1268-80.

25. RESTATEMENT (SECOND) OF CONTRACTS § 333(2) (1981).

26. *See, e.g.*, Lonsdale v. Chesterfield, 99 Wash. 2d 353, 662 P.2d 385 (1983).

27. Concerning "commercial paper," see *infra* text accompanying notes 49-61.

28. MURPHY & SPEIDEL, *supra* note 22, at 1269, *citing* SCHERMAN, THE PROMISES MEN LIVE BY 393 (1938).

ity involves "the triumph of the good faith purchaser."[29] If an assignor transfers via assignment all that he has, negotiation of commercial paper does more — it allows a transferee a possibility of attaining greater rights than his transferor had.

The process regulating circulation of commercial paper is based upon a strict meritocracy cast system. If a special writing, known as a "negotiable instrument,"[30] comes into existence via a particular process, known as "issue,"[31] and passes into commerce via a particular process, known as "negotiation,"[32] to a particular person, known as a "holder,"[33] the holder acquires valuable rights against the maker[34] or drawer[35] of the instrument.[36] Furthermore, if a holder

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29. "The emergence in our legal system of the concept of negotiability has been of inestimable value in facilitating commercial transactions. It is an important part of 'the triumph of the good faith purchase,' aptly characterized as 'one of the most dramatic episodes in our legal history.' " Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954)." MURPHY & SPEIDEL, *supra* note 22, at 1269.

30. *Supra* note 12.

31. *See infra* text accompanying notes 136-53.

32. *See infra* text accompanying notes 206-09.

33. To be a "holder in due course," a person must at least be a "holder" as defined in U.C.C. § 1-201(20) (1983). Not only must he have physical possession of the instrument, but it must also have been properly "issued" or "negotiated" to him. U.C.C. § 3-102(1)(a) (1983) defines "issue" and U.C.C. § 3-202 (1983) defines "negotiation." *See infra* text accompanying notes 136-53 and 206-09. Order paper [*see* U.C.C. § 3-110 (1983)] delivered to a transferee cannot be further negotiated or enforced without indorsement. Indorsements of various types are important throughout Article Three and are treated in U.C.C. § 3-202 (1983) through § 3-206 (1983). Without such an indorsement, the transferee is a mere contract assignee, standing in the shoes of his assignor. *See supra* text accompanying notes 16-26. The transferee has a specifically enforceable right to an unqualified indorsement of his transferor under U.C.C. § 3-201 (1983). Until he obtains it, he cannot be a "holder" and is chargeable with any intervening "notice" of a defense or claim prior to receiving the indorsement. *Accord* Bank of Cyprus v. Jones, Q.B., February 24, 1984 (12th para. of decision), *quoting* Whistler v. Foster, 14 Common Bench (N.S.) 248, 43 Eng. Rep. 441 (1863). *Cf.* Bowling Green, *infra* note 172. Upon receiving an indorsement, a transferee achieves "holder" status, obtains U.C.C. § 3-301 (1983) rights and also may be able to attain "holder in due course" status if he can meet all the stringent requirements of U.C.C. § 3-302 (1983) (text set forth at *infra* note 37. *See also infra* notes 47-49 and text accompanying notes 190 and 206-09.

34. One creating a "note" (*see* U.C.C. § 3-104(2)(d) (1983) definition) is denominated a "maker," a party primarily liable on the instrument. *See* U.C.C. § 3-413 (1983). "Maker" is not defined in the Code.

35. One drawing a draft (*see* U.C.C. § 3-104(2)(a) (1983) definition) or check (*see* U.C.C. § 3-104(2)(b) (1983) definition) is denominated a "drawer." A drawer is secondarily liable on the instrument. *See* U.C.C. § 3-102(1)(d) (1983) and § 3-413(2) (1983). "Drawer" is not defined in the Code. "Draw," however, is a plot fertile with seeds of many different fruits. It has twenty-three definitions in one single-volume dictionary: W. MORRIS (ed.), THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 397 (1978) (hereinafter cited as MORRIS), and twenty-eight in THE WEBSTER'S NEW ENCYCLOPEDIA DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 553-54 (1977), where the synonyms include: "drag, haul, pull, pluck, tug, delineate, derive. *Draw* expresses the idea of putting a body in motion from behind oneself or toward one's self; to *drag* is to slowly *draw* something heavy or to *draw* that which makes resistance; to *haul* is to *drag* with sustained effort. We *draw* a cart; we *drag* a body along the ground; we *haul* a vessel to . . . shore. To *pull* signifies only an effort to *draw* without the idea of motion; horses *pull* very long sometimes before they can *draw* a heavily laden cart . . . ." (*See also supra* text accompanying notes 2 and 10). The definition of "drawer" has five connotations, the third of which is "*one who draws a bill of exchange, or an order for the payment of money.*" *Id.* at 554. Note that a "check" is a draft if it is an order. U.C.C. § 3-104(2)(a), (b) (1983). *See also infra* note 97.

can establish that he has attained the highest status, known as a "holder in due course,"[37] his rights[38] are qualitatively different from a mere contract assignee[39] or even a "holder."[40] A holder in due course may collect on an instrument free from all claims[41] and from most garden variety defenses,[42] known as "personal" defenses,[43] of any party[44] to the instrument with whom he has not dealt[45] except certain exceptionally potent defenses, known as "real" defenses.[46]

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36. *See supra* note 15.

37. U.C.C. § 3-302 (1983) in part provides:

> (1) a holder in due course is a holder who takes the instrument
> (a) for value; and(b) in good faith; and(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

U.C.C. § 3-302(1) (1983). Taking for "value" is the subject of section 3-303 (1983); what constitutes "notice" is the subject of section 3-304 (1983); and "good faith" carries its section 1-201 (1983) definition of "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19) (1983). For a discussion of the "checkered career" of "good faith" in commercial paper, *see* FARNSWORTH *supra* note 14, at 55-57.

38. "Rights" is defined in Article One as including "remedies." *See* U.C.C. § 1-201(36), (34) (1983).

39. *See* text accompanying notes 17-26.

40. *See supra* note 33.

41. Section 3-305, entitled *Rights of a Holder in Due Course* provides:

> To the extent that a holder is a holder in due course he takes the instrument free from (1) all claims to it on the part of any person; and(2) all defenses of any party to the instrument with whom the holder has not dealt except
> (a) infancy, to the extent that it is a defense to a simple contract; and(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and(d) discharge in insolvency proceedings; and(e) any other discharge of which the holder has notice when he takes the instrument.

See also supra notes 33, 37 and *infra* notes 43, 45 and 49.

42. *See* U.C.C. § 3-305(2) (1983) *supra* note 41.

43. Some of the "personal" defenses are set froth in section 3-306. The term "defenses" as employed in section 3-306(b) does not include set-offs. Bank of Wyandotte v. Woodrow, 394 F. Supp. 550 (W.D. Mo. 1975). "Personal" defenses are all those which are not "real" defenses. The "real" defenses are set forth in section 3-305(2)(a)-(e). *See supra* note 41 for text of section 3-305. The terms "real" and "personal" defenses are pre-Code in origin and are not used in the Code. Still, the terms are commonly employed to differentiate between those defenses which will be cut off ("personal" defenses) in an action by one who has proved his holder in due course status, and those which are so potent as to be good ("real" defenses) against even a holder in due course.

44. *Supra* note 17.

45. Section 3-305 frees a holder in due course from all defenses except "real" defenses, but only as to any party to the instrument with whom he "*has not dealt.*" U.C.C. § 3-305(2) (1983). *See, e.g.*, Hall v. Westmoreland, Hall & Bryan, 123 Ga. App. 809, 182 S.E.2d 539 (1971); Casanova Club v. Bisharat, 189 Conn. 591, 458 A.2d 1 (1983); Standard Finance Co., Ltd. v. Ellis, 3 Hawaii App. 614, 657 P.2d 1056 (1983); K-Ross Bldg. Supply Center, Inc. v. Winnipesaukee Chalets, Inc., 121 N.H. 575, 432 A.2d 8 (1983); Canam Hambro Systems, Inc. v. Horbach, 33 Wash. App. 452, 655 P.2d 1182 (1982). By negative implication, the holder in due course does not take free of the "personal" defenses of any party with whom he has dealt. However, for section 3-418 purposes, ("finality of payment") there is no such requirement of non-dealing. J. WHITE AND R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 524 (1972) (hereinafter cited as WHITE & SUMMERS).

46. *See supra* notes 43 and 45.

The underlying rationale of the holder in due course[47] doctrine in the United States is presently embodied in Article Three of the Uniform Commercial Code,[48] the law of commercial paper.[49] Its philosophy perpetuates ancient Hammurabian concepts,[50] clarified and refined in all their basic operational concepts by English case law before the mid-1700's.[51]

As one of Lord Mansfield's seminal decisions[52] instructs, commercial paper passes through commerce not like goods or salable commodities such as debts, but like currency.[53] Although we adhere to the general principle that no one can transfer a better title than he himself has "*Nemo dat quod non habet*,"[54] the law of commercial paper allows conveyance of a good title by one with an imperfect or voidable title or, in some cases, even by one with no title. Commercial paper, like currency, passes through commerce with such speed that it raises the doctrine of good faith purchase to its *ne plus ultra* level — it allows one with void or no title to pass a perfectly good title. Like a person who takes currency, a holder in due course of commercial paper is the "emperor"[55] of good faith purchasers because he may receive good title from a chain of title containing a thief in one of its links.[56]

A British judge[57] recently concluded that the more a wise man learns about the law of commercial paper, the more he realizes how

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47. *See supra* notes 33 and 37, and *infra* note 49.

48. The Uniform Commercial Code ("Code"), U.C.C. §§ 1-102-11-108 (1983), comprises the Uniform Statutory Commercial Law in most jurisdictions.

49. There are three ways of attaining holder in due course rights: (1) the holder of an instrument fulfills the requirements set forth in section 3-302 (*supra* note 37); (2) an eligible transferee may be "sheltered" if he takes from a holder in due course [section 3-201 (1983)]; or (3) assignees of certain buyers or lessees of nonconsumer goods who have waived defenses in case of an assignment (*supra* note 23) may attain the rights of a holder in due course under the specific conditions set forth in section 9-206 provided such assignee took for value, in good faith and without notice of a claim or defense. *See* U.C.C. § 9-206 (1983); Bankers Trust v. Litton, *supra* note 23; Driscoll, *supra* note 23, at 409-11, 423, 438; J. I. Case Credit Corp. v. Skjoldal, 296 N.W.2d 514 (S.D. 1980); Westinghouse Credit Corp. v. Chapman, 129 Ga. App. 830, 201 S.E.2d 686 (1973); Washington Bank & Trust Co. v. Landis Corp., 112 Ill. App. 3d 182, 445 N.E.2d 430 (1983).

50. *See supra* note 12.

51. W. BRITTON, BILLS AND NOTES 9 (2d ed. 1961).

52. Miller v. Race, 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758).

53. *Id.*

54. Whistler v. Foster, *supra* note 33, at 257-58, 43 Eng. Rep. at 444-45.

55. WHITE & SUMMERS, *supra* note 45, at 456.

56. *Id.* The holder in due course is accorded this protection not because of his "praiseworthy character" (*Bankers Trust*, *supra* note 33, at 494, *citing* GILMORE, *supra* note 29) but to facilitate all commercial transactions and encourage and insure the swift and unfettered negotiability of instruments in commerce. The holder in due course doctrine keeps "oil in the wheels of commerce." WHITE & SUMMERS, *supra* note 45, at 457. Without it "those wheels would grind to a quick halt." *Id.*

57. Judge Leggatt, in *Bank of Cyprus*, *supra* note 33, opined, "The more knowledge that a wise man acquires about the law relating to bills of exchange, the more keenly does he recognize the deficiencies in his learning on that subject."

little he knows.[58] The lack of knowledge about negotiable instruments is rife not only among businessmen but also among lawyers and the courts. It is not that business and professional people rarely have contacts with commercial paper. The situation is quite the opposite. On a recent average business day in the United States, over one hundred million checks valued at over $50 billion were written.[59] Additionally, millions of dollars are issued daily in the form of instruments other than checks and millions more are passed by assignments of contracts and leases of non-consumer goods which confer upon their assignees[60] the rights of holders in due course.[61] These instruments and transactions explode into commerce daily in numbers representing astronomical dollar amounts. Still, they are taken for granted in the same way that preoccupied automobile operators drive without conscious concern for possible traffic hazards.

II. Scope of Article; Overview; References and Methodology

A. Scope

Like cars, negotiable instruments are widely used by nearly everyone in the world and are very much taken for granted. This article attempts to show that the issuance of commercial paper is both an intricate and technical process posing questions of enormous import.

In examining the "issuance"[62] process, the article probes to find how and why the absence of proper issuance impacts upon subsequent events in the instrument's life and upon the parties' risks, rights and liabilities. It illustrates how proper "issue,"[63] the key to existence of an instrument, its subsequent negotiation,[64] and its status and rights under Article Three of the Uniform Commercial Code (Code), is surprisingly omitted from explicit coverage in the Code.

To separate "issue" problems from other complications, the article focuses on only one instrument, i.e., a check payable to order taken prior to issuance by the named payee and negotiated to a holder in due course. A check taken by a third party prior to issuance on which the payee's indorsement is forged is discussed first only for purposes of contrast.

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58. *Id.*
59. H. REILING, G. THOMPSON, G. BRADY & F. MACCHIAROLA, BUSINESS LAW TEXT AND CASES 393 (1981).
60. *See* U.C.C. § 9-206 (1983) and *supra* note 49.
61. *Supra* note 60.
62. *Supra* note 31.
63. *Id.*
64. *See supra* notes 14 and 32.

B. *Overview*

If commercial paper statutes are analogous to a driver education course, "issue" cases involve only turning an ignition key. How to turn the key is a problem involving split-second timing which sparks Article Three's engine components into motion. But what happens if the ignition key is stolen and the course is skillfully followed by someone with no rights to the car?

Even more so than questions involving "conversion,"[65] "issue"[66] questions at best only "hover on the periphery"[67] of Article Three. Its provisions, if mechanically applied, make for a thief's haven. It may be easier and safer to steal via cash substitutes than it is to take cash.

Taking a single instrument,[68] a check,[69] as an example, this article uses a kaleidoscope method — a series of changing phases and hypotheticals — to demonstrate how selected events occurring before "issue" affect an instrument's subsequent negotiation history and alter parties' rights as to the instrument.

The article takes an unequivocal position on the long-debated question of whether a thief can be a holder. It concludes with an attempt to perceive Article Three title/possession conflicts in terms of patterns and currents which carry negotiable instruments throughout the commercial world.

C. *References*

The law of negotiable instruments in the United States, known as the law of commercial paper, is embodied largely in Article Three of the Code. Parts of Articles One and Four and section 9-206 also concern commercial paper.

All fifty states and the District of Columbia and Virgin Islands have adopted the Code, although Louisiana has adopted only Articles One, Three, Four, Five, Seven and Eight.[70] The Code has been applied in bankruptcy proceedings[71] and "is generally considered to be the federal law of commerce."[72]

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65. *See* U.C.C. § 3-419 (1983).
66. *Supra* note 31.
67. *See* WHITE AND SUMMERS *supra* note 45, at 500.
68. *Supra* note 14.
69. A "check" is a draft on a bank and payable on demand. *See* U.C.C. § 3-104(2)(b) (1983). "Draft" is defined in section 3-104(2)(a); "bank" is defined in section 1-201(4); and instruments "payable on demand" include those payable at sight or on presentation and those in which no time for payment is stated. U.C.C. § 3-108 (1983). *See also* section 3-104(1)(d) and *supra* note 35.
70. U.C.C. 1978 Official Text with Comments, Table 1, XLIII, n.3.
71. In re United Thrift Stores, 363 F.2d 11, 14 (3d Cir. 1966).
72. In re Quantum, 397 F. Supp. 329, 336, n.2. (D.C. Virgin Islands D. St. Croix 1975), *aff'd* 534 F.2d 532 (3rd Cir. 1976) *cert. denied*, 429 U.S. 827 (1976), *citing* In re

III. "Instrument" Defined

A. Underlying Philosophy

Merchants who first took commercial paper as cash substitutes needed laws assuring them that the instruments they were accepting would be treated like currency. Instruments had to be freely negotiable and readily salable and transferable through commerce without a need for investigating the why's and wherefore's of any "underlying transaction."

The checker at a supermarket does not inquire of a customer, "Where did you get this $20 bill, and did you fully perform as you promised in exchange for it?" Similarly, the law maintains that a purchaser of an instrument should not have to look beyond the face of an instrument to make sure it is negotiable[73] before taking it instead of cash. Except in the most extraordinary circumstances, one purchasing an instrument in the normal course of his activities should not have to concern himself with the why's and wherefore's of the instrument.

Since negotiable instruments are "part of the currency"[74] and "are subject to the same rules as money,"[75] the preliminary question in the law of commercial paper is whether the paper purchased qualifies as a "negotiable instrument."[76] If it does not, there is no possibility of acquiring the rights of a "holder"[77] under Article Three and, *a fortiori*, no possibility[78] of acquiring the even greater rights of a holder in due course.[79]

B. Elements of Negotiability

"Instrument," as employed in Article Three, means "negotiable instrument."[80] The negotiability of a writing is controlled by unusually stringent requirements set forth in Article Three.[81] All of a party's[82] rights under the law of commercial paper may vanish if it is found that the "instrument"[83] which he sues on is not a negotiable

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King-Porter Co., 446 F.2d 722, 732 (5th Cir. 1971). *Cf.* Federal Deposit Ins. Corp. v. Kucera Builders, Inc., 503 F. Supp. 967 (N.D. Ga. 1980).

73. *Supra* note 12.
74. *Whistler*, *supra* note 33, at 257-58, 43 Eng. Rep. at 444-45.
75. *Id.* Article Three, however, does not apply to money. Commonwealth v. Saville, 353 Mass. 458, 233 N.E.2d 9 (1968); *see also supra* notes 8 and 9 regarding "money."
76. *But see supra* note 49 regarding section 9-206 of the Code.
77. *See supra* notes 33, 37.
78. *But see supra* note 49 regarding section 9-206 of the Code.
79. *Id.*
80. U.C.C. § 3-102(1)(e) (1983).
81. U.C.C. § 3-104(1) (1983); *see infra* notes 130-135 and accompanying text.
82. *Supra* note 17.
83. *Supra* note 80.

instrument.[84] At best, he may be relegated to the rights of a contract assignee,[85] taking subject to claims and defenses of prior parties.[86]

Not only is there no presumption of negotiability, there is a presumption against it,[87] and scholars agree with Code draftsmen that "questionable paper" should be denied negotiable status.[88] The rationale may be that there is similarly no presumption that a writing is currency or legal tender.[89] If a $10 bill is absolutely perfect, with the single exception that Alexander Hamilton's[90] left eye looks as if it may have a cinder in it because Mr. Hamilton is squinting slightly, the note will not be "liberally construed" by anyone to constitute a good $10 bill.[91] By analogy, unless all requirements of section 3-104(1) are met, an instrument will not be treated as "negotiable," and a party holding it will not acquire rights under Article Three.[92]

Section 3-104 may be viewed as containing nine elements, all of which must be present before an instrument is accorded the status of a "negotiable instrument." If any one element is missing, the writing[93] is not "negotiable." These elements are that the instrument: (1) must be in writing;[94] (2) must be signed[95] by the maker[96] or drawer;[97] (3) must contain a promise[98] or order[99] which is(4) unconditional;[100] (5) must specify a sum certain[101] payable (6) in

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84. *But see supra* note 49 and section 9-206 of the Code concerning attainment of holder in due course rights by certain assignees of buyers or lessees of nonconsumer goods.

85. *See supra* text accompanying notes 17-26.

86. *Id.*

87. *E.g.*, Jefferson v. Mitchell Select Furniture Co., 56 Ala. App. 259, 321 So. 2d 216 (1975). *See also* last paragraph of *supra* note 14.

88. WHITE & SUMMERS *supra* note 45, at 465. Moreover, the Code draftsmen specifically have so stated. *See* last paragraph of *supra* note 14.

89. *See supra* note 9 as to legal tender.

90. Only deceased persons' portraits may be used. 31 USC § 413 (1959).

91. The best way to detect a counterfeit is to compare it with a genuine bill and "look for clarity in the portrait." FACTS ABOUT MONEY, *supra* note 9, at 13. The mold is hand-cut with "gravers" in pieces of soft steel by specially trained engravers. "To become a skilled picture engraver requires a ten year apprenticeship; to become a skilled letter engraver requires a seven year apprenticeship." *Id.* at 10.

92. *But see supra* note 49.

93. "Writing" is defined in U.C.C. § 1-201(46). *See also* U.C.C. § 3-104(1) (1983).

94. U.C.C. § 1-201(46) (1983).

95. "Signed" is defined in U.C.C. § 1-201(39). *See also* U.C.C. § 3-104(1)(a) (1983) and, as to signatures, U.C.C. § 3-401-407 (1983). The signature on the instrument is made by use of any name, word or mark used in lieu of a written signature. If unsigned, the writing is not a negotiable instrument, U.C.C. § 3-104(1)(a) (1983), and the preparer incurs no liability on it. "No person is liable on an instrument unless his signature appears thereon." U.C.C. § 3-401(1). *See also* QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST §§ 3-109 - 3-111 (Supp. 1984) (hereinafter cited as QUINN).

96. U.C.C. § 3-104(1)(a) (1983) and *supra* note 34.

97. U.C.C. § 3-104(1)(a) (1983) and *supra* note 35.

98. *See* U.C.C. §§ 3-102(1)(c), 3-104(1)(b), 3-105, 3-118(e) (1983) and *supra* note 14.

99. *See* U.C.C. § 3-102(1)(b), 3-104(1)(b), 3-105 (1983) and *supra* note 35.

100. *Supra* notes 98 and 99.

101. U.C.C. § 3-104(1)(b) (1983). "Sum certain" is separately covered in section 3-106.

money;[102] (7) be payable on demand[103] or at a definite time;[104] (8) must be payable to order[105] or to bearer;[106] and (9) must contain no other promise, order, obligation or power given by the maker or drawer, except as authorized by Article Three.[107]

Before plunging into underlying statutory references and the body of caselaw interpreting these various elements of negotiability, it is well to keep two broad concepts in mind. *First*, an instrument ordinarily is given in payment for some obligation. Unless otherwise agreed,[108] where an instrument is taken for an underlying obligation[109] should the instrument be dishonored, an action may be maintained on either the instrument or the obligation,[110] further, the obligation to pay is suspended[111] until the instrument is due or, if it is a demand instrument,[112] until presentment of the instrument.[113]

Second, by specific Code provision,[114] the law of commercial paper is supplemented by broad general principles of law and equity,[115] including legal principles relating to capacity to contract, agency, fraud, misrepresentation, estoppel, duress, coercion, mistake, bankruptcy and other "validating or invalidating" causes.[116] As the Offi-

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See Branch Banking & Trust Co. v. Creasy, 301 N.C. 76, 269 S.E.2d 117 (1980) (guaranty agreement providing aggregate amount of principal "shall not exceed the sum of $36,000" not a sum certain). *Cf.* Circle v. Jim Walter Homes, Inc., 535 F.2d 583 (10th Cir. 1976).

102. U.C.C. § 3-104(1)(b) (1983). *See also* U.C.C. § 3-107 (1983) and *supra* note 8 regarding "money." Foreign money is neither receivable nor redeemable by the United States (FACTS ABOUT MONEY *supra* note 9, at 26), but a promise or order to pay a sum stated in a foreign currency is for a sum certain in money and thus is "negotiable." U.C.C. § 3-107(2) (1983).

103. U.C.C. § 3-104(1)(c) (1983); *see also* U.C.C. §§ 3-108 and 3-122 (1983).

104. U.C.C. § 3-104(1)(c) (1983); *see also* U.C.C. §§ 3-109, 3-114 and 3-122 (1983); PP Inc. v. McGuire, 509 F. Supp. 1079 (D.N.J. 1981).

105. U.C.C. § 3-104(1)(d) (1983); *see also* U.C.C. §§ 3-102(1)(b), 3-110, 3-116 and 3-805 (1983).

106. U.C.C. § 3-104(1)(d) (1983); *ee also*U.C.C. §§ 3-111 and 3-805 (1983); Branch Banking & Trust Co. v. Creasy, *supra* note 101 (guaranty agreement not payable to order or bearer not a negotiable instrument); *see also* Shepard Mall State Bank v. Johnson, 603 P.2d 1115 (Okla. 1979).

107. U.C.C. § 3-104(1)(b) (1983); *see also* U.C.C. §§ 3-102(1)(c), 3-102(1)(b), 3-112, 3-119 (1983).

108. U.C.C. § 3-802(1) (1983). *See also In re* Mort Co., 208 F. Supp. 309 (E.D. Pa. 1962); *In re* Helms Veneer Corp., 287 F. Supp. 840 (W.D. Va. 1968).

109. U.C.C. § 3-802(1) (1983).

110. U.C.C. § 3-802(1)(b) (1983).

111. *Id.*

112. *Id.* Section § 3-108 of the Code states that instruments payable on demand include those payable at sight or presentation as well as instruments in which no time for payment is stated. Master Homecraft Co. v. Zimmerman, 222 A.2d 440 (Pa. 1966). *See also supra* note 69 as to a "check."

113. U.C.C. § 3-802(1)(b) (1983).

114. *See supra* text accompanying note 79-61.

115. U.C.C. § 1-103 (1983). *See, e.g.*, First National Bank of Denver v. Ulibarri, 38 Colo. App. 428, 557 P.2d 1221 (1976) (bank estopped from recovering for overdraft where it had advised customer that a check payable to customer's order had cleared and customer released diamond ring relying on the representation).

116. U.C.C. § 1-103 (1983).

cial Comments to section 1-103 elaborate,[117] the Code is structured so that a canvas, woven of the entire body of common law and general civil and criminal statutes,[118] decisions and public policy,[119] whether or not anything has been said about it before,[120] overlays and supplements all Code statutory provisions. The breadth of coverage of this huge canvas is so extensive that it encompasses "any factor which at any time or in any manner renders or helps to render valid"[121] or invalid "any right or transaction."[122]

The Code specifies that Article Three does not apply to money,[123] documents of title,[124] or investment securities[125] and that its provisions are subject to the mandates of Articles Four (Bank Deposits and Collections) and Nine (Secured Transactions).[126] Moreover, unless the context dictates otherwise,[127] all Article Three statutes encompass and include the entire panoply of terms which are defined in the "general definitions" section of Article One.[128] Section 1-201 definitions are crucial both to philosophical and mechanical aspects of "issuance," "negotiation" and rights of parties in the stream of commerce who deal with instruments. Most important, Article One defines the pivotal term "holder" which is used in over half[129] the sections of Article Three.

Section 3-105 aids in the determination of whether an instru-

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117. U.C.C. § 1-103 Official Comments 1 and 3 (1983).

118. *See, e.g.*, FARNSWORTH, *supra* note 16, at 325-68; Driscoll, *supra* note 23, at 411-18; Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267 (1966); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 780-99 (2d ed. 1977); J. CALAMARI & J. PERILLO, CASES AND PROBLEMS ON CONTRACTS 961-1017 (1978); Murphy & Speidel, *supra* note 22, at 673-82, 712-20, 1156-63; *infra* note 119.

119. *Id.* These policies are of "such great variety" that they fill a "volume in Corbin's treatise and more than a volume in Williston's." FARNSWORTH, *supra* note 16, at 332. "As early as 1886, a large volume appeared on the subject. E. GREENHOOD, DOCTRINE OF PUBLIC POLICY (1886)." *Id. See also*, Pope Manufacturing Co. v. Gormully, 144 U.S. 224, 233-34 (1892) and contrast with Crichfield v. Bermudez Paving Co., 174 Ill. 466, 51 N.E. 552 (1898); Holland v. Sheehan, 108 Minn. 362, 367, 122 N.W. 1, 3 (1909); Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679 (1935); RESTATEMENT OF CONTRACTS § 512 (1932); RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 193 (1972); *see also supra* notes 118 and 166 *infra*.

120. Anaconda Federal Credit Union No. 4401 v. West, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971); *Pope*, *supra* note 119.

121. U.C.C. § 1-103 Official Comment 1 (1983).

122. *Id. See also* U.C.C. § 1-103 Official Comments 2 and 3 (1983).

123. *See supra* note 8; Commonwealth v. Saville, 353 Mass. 458, 233 N.E.2d 9 (1968).

124. U.C.C. § 3-103(1) (1983). Documents of title come within the purview of Article Seven.

125. *Id.* Investment securities come within the purview of Article Eight.

126. U.C.C. § 3-103(2) (1983).

127. U.C.C. § 1-201 (1983).

128. *See, e.g.*, U.C.C. § 1-201 and "acceleration," in U.C.C. § 1-208.

129. "Holder," defined in Section 1-201(2) of the Code, is used, *e.g.*, in U.C.C. §§ 3-117, 3-118, 3-119, 3-201, 3-202, 3-204(3), 3-206, 3-207(2), 3-208, 3-301, 3-302, 3-303, 3-305, 3-306, 3-307(3), 3-406, 3-407, 3-408, 3-410(3), 3-411, 3-412, 3-413(2), 3-414(1), 3-415(3), 3-416, 3-417, 3-418, 3-501, 3-502(1), 3-504, 3-506(1), 3-507, 3-508, 3-602, 3-603, 3-604, 3-605, 3-606, 3-801, 3-805.

ment is "negotiable"[130] and whether the nine required elements[131] set forth in Section 3-104 are satisfied by codifying when a promise or order is "unconditional".[132] Seventeen sections, running from Section 3-106 through Section 3-122, together with Section 3-805,[133] concern themselves in one aspect or another with the substantive and technical requirements of negotiability in Section 3-104.

A prerequisite to any study of issuance, negotiation and the rights of parties under Article Three is a preliminary determination that the writing in question is an "instrument"[134] for Article Three purposes, i.e., that the writing fulfills the necessary requirements of a "negotiable instrument."[135]

IV. "Issue" Defined

A. Underlying Philosophy

Once it is determined that an "instrument"[136] constitutes a "negotiable instrument,"[137] the concept of "issuance" comes into play.

"Issue" is defined in Article Three as the first delivery of an instrument to a holder or remitter.[138] The essence of "issuance" is "delivery," a term defined in Section 1-201.[139] With respect to instruments, it means "voluntary transfer of possession."[140] "Voluntary,"[141] in turn, is not defined in the Code but connotes a transfer arising from free will.[142] Unless the instrument, after being signed,[143]

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130. *See supra* text accompanying notes 94-107.
131. *Id.*
132. U.C.C. § 3-105(1) & (2) (1983).
133. U.C.C. § 3-805 (1983) is entitled "Instruments Not Payable to Order or to Bearer."
134. "Instrument" means "negotiable instrument." U.C.C. § 3-102(1)(3) (1983).
135. U.C.C. § 3-104 (1983).
136. U.C.C. § 3-102(1)(e) (1983).
137. *Id.*
138. U.C.C. § 3-102(1)(a) (1983).
139. U.C.C. § 1-201(14) (1983).
140. *Id.* Lamb v. Opelika Prod. Credit Assoc., 367 So.2d 957 (Ala. 1979); Miller v. Merchants Bank, 138 Vt. 235, 415 A.21d 196 (1980); McKirgan v. American Hospital Supply Corp., 37 Md. App. 85, 375 A.2d 591 (1977) (judgment for defendant drawer of dishonored check not produced in court).
141. MORRIS, *supra* note 35, at 1436, sets forth a definition of "voluntary" which provides:

> 1. Arising from one's own free will; acting on one's own initiative . . . . 2. Acting or serving in a specified capacity willingly and without constraint or guarantee of reward. 3. Normally controlled by or subject to individual volition. 4. Capable of exercising will; volitional. 5. Proceeding from impulse; spontaneous. 6. *Law.* a. Acting or performed without external persuasion or compulsion; b. Without legal obligation, payment, or valuable consideration; *a voluntary conveyance*; c. Not accidental; intentional . . . . Middle English, from Latin *voluntarius*, from *voluntas*, will, free will, from *velle* (present stem *vol-*), to wish.

142. *Wel-*, *see supra* note 141, is defined as "to wish, will." 1. Germanic *wel-* in Old English *wel*, well ("according to one's wish") . . . .
143. *Supra* note 95.

is "issued," meaning voluntarily[144] delivered[145] to a "holder"[146] or "remitter,"[147] there will be fundamental problems for the party claiming rights under the instrument and for the maker or drawer of the instrument.

As for the payee, assume, for example, that a maker or drawer tells payee *P*, "I have made out this instrument to you; it is yours, but I'll keep it for you." The instrument has not been "issued,"[148] and the payee, without possession of the instrument, is unable to acquire Article Three rights. While possession is thought by laymen to be "nine-tenths of the law," possession may loosely be expressed to be at least "99 and 9/10ths" of the law of commercial paper. Thus, *P* apparently has the same monumental problems with this instrument as he would have if a donor showed him a $100 bill and promised him, "This $100 bill is yours, but I'll keep it for you." Even if the donor gave *P* a letter with a photocopy[149] of the particular $100 bill attached, *P* would be unsuccessful in his attempt to show that he had a right to title and possession of the $100 bill if it passed into commerce[150] and turned up in a cash register of a department store.

In the same way, "issuance" of an instrument necessarily involves transfer of physical possession[151] of an instrument to a holder or remitter. Neither Article Three nor any other Code provision offers an answer to the question of constructive delivery.[152] Finding an

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144. *See supra* notes 141, 142.

145. *Supra* note 139 and *infra* notes 151, 152.

146. *Supra* note 33.

147. "Remitter" and "remit" are not defined in the UCC. To "remit" is to send. Morris, *supra* note 35 at 1100. "Remitter" is one that remits (id) and connotes a person through whom the instrument is sent. *See, e.g.*, Tonelli v. Chase Manhattan Bank, 41 N.Y.2d 667, 363 N.E.2d 564, 394 N.Y.S.2d 858 (1977) (drawee bank liable for improper exchange of customer's check for its own check entrusted to dishonest remitter).

148. *Supra* note 138.

149. The Government restricts copying of currency. It may be copied only in black and white and must be less than ¾ or more than 1-½ times the size of the genuine obligation. Illustrations must appear in books, articles, journals, newspapers or albums, and "no individual fascimiles" are permitted. FACTS ABOUT MONEY *supra* note 9, at 28.

150. *See, e.g.*, Miller v. Race *supra* note 52.

151. ". . .[P]ossession and property should always be stable, except when the proprietor consents to bestow them on some other person. This rule can have no ill consequence." D. HUME, A TREATISE OF HUMAN NATURE (L. Selby-Bigge ed. 1888), *reprinted in* G. CHRISTIE, JURISPRUDENCE 428 (1973) (hereinafter cited as CHRISTIE). Hume concluded that when the state begins its existence, each man starts out with whatever he "possessed" in the so-called state of nature, however fortuitous this "possession" might be. Justice "is then only concerned with how men protect their initial stock of possessions." *Id.* at 10. John Locke points out that "possessions" are so important that although a general can condemn a soldier to death for deserting his post, he cannot "dispose of one farthing of that soldier's estate, or seize one jot" of the soldier's possessions. 5 J. LOCKE, WORKS Chapt. XI § 139 (1823), *reprinted in* CHRISTIE, *supra* at 381-82.

152. As to "constructive delivery," Hume writes:

> Thus the giving the keys of a granary is understood to be the delivery of the corn contain'd in it. The giving of stone and earth represents the delivery of a mannor. This is a kind of superstitious practice in civil laws, and in the laws of nature, resembling the *Roman Catholic* superstitions in religion. As the *Roman*

appropriate answer requires exploration of general law controlling property, agency, gifts, estates, domestic relations, contracts and other areas of law.[153]

B. The Dog and the Bone

After considering the "voluntariness"[154] of transfers of possession,[155] one must still confront the law of torts, crimes, sales, contracts, personal property, bailments, and nearly every other area of law.

The concept of voluntary transfers of possession is one of the richest mysteries[156] of all law and nature, since it relates to every living creature's awareness of what belongs to him. It is probably less related to "greed" or "pride of ownership" than one might assume. An animal in the wild hunts for food and when it kills its prey, it reduces its catch to possession. Because the animal uses its skill and conquers the prey, the catch belongs to it.[157] The hunter guards its prey just as man guards his property.

The notion of an awareness of a right to possession seems most basic when viewed as part of the living creature's connection to the world around him. Possessions are often intertwined with "love" which perhaps originates with self-preservation and is tied to perpetuation of species. When a puppy is born, the mother knows that it "belongs" to her. If the puppy is lost, she frantically looks for it because she has lost what is "hers." The puppy is her responsibility until it matures enough to achieve its own independence.[158] As the

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> *Catholics* represent the inconceivable mysteries of the *Christian* religion, and render them more present to the mind, by a taper, or habit, or grimace, which is suppos'd to resemble them; so lawyers and moralists have run into like inventions for the same reason, and have endeavour'd by those means to satisfy themselves concerning the transference of property by consent.

CHRISTIE, *supra* noted 151 at 429. It has been held that there is no issuance without a holder; that negotiable instruments have no vitality until delivered; and that there is no "constructive possession" of an instrument. Rex Smith Propoane, Inc. v. National Bank of Commerce, 372 F. Supp. 499 (N.D. Tex. 1974).

153. *See, e.g.*, Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108 (S.D.N.Y. 1978), *remanded* 607 F.2d 1994 (2d Cir. 1979).

154. *See supra* note 144.

155. *Supra* notes 151, 152.

156. "The most beautiful experience we can have is the mysterious. It is the fundamental emotion which stands at the cradle of true art and true science." Albert Einstein, 84 FORUM AND CENTURY 194, *reprinted in* EINSTEIN, IDEAS AND OPINIONS 22 (MCMLIV).

157. The same is true for man's hunting of wild animals. So long as they remain wild, wild animals are not the subject of property, "either of the state or of the owner of the land upon which the animal lives. They become property by being captured, dead or alive. Mere pursuit is not enough, though inflicting a mortal wound probably is." CLARK, *supra* note 5, at 163.

158. The mother knows she does not "own" her offspring in the same way she owns an inanimate object. She will wean him and give him up when nature tells her he is ready to be on his own. People often act in a similar manner. "The word 'person' thus involves two movements, of separation and of union." P. TOURNIER, THE NAMING OF PERSONS 5 (1975). "Par-

puppy grows up, it begins to sense which objects are "his" to eat, use or consume.[159]

To bring this concept of possession half a step down to a more quotidian plane, namely the level of objects, one can notice that even as a very young creature, a puppy knows that when it is "given" a bone, the bone belongs to it. Very early in its life, the puppy starts to understand the difference between being given a bone and *taking* or helping himself to that same bone from a plate on a table.[160] Giving a bone to a puppy is a voluntary transfer of possession of an object constituting delivery to the puppy and makes the bone the puppy's property to have, eat or hold. The puppy knows that taking a bone without permission risks punishment. There is all the difference in the world because of a miniscule but vastly comprehensive gesture occurring in a second's worth of time — the giving, holding out or proffering of voluntary transfer of possession. The puppy does not learn this distinction from man. Dog and man share this comprehension, having learned it as the law of nature.

There are, then, only two basic ways of obtaining possession of property: lawfully receiving it or unlawfully "taking"[161] it. The lawful end of the possession spectrum includes property earned, bought, inherited, exchanged, obtained by adverse possession,[162] accession[163] or finding.[164] The unlawful end of the spectrum includes property acquired by theft, larceny, conversion, deceit, coercion, extortion, misrepresentation or bribery.[165] It also includes various other crimes, torts, schemes, devices or arrangements contrary to "public policy"[166] and not treated as an approved means of acquisition because of occlusions or flaws within the process of delivering transfer of possession.

Between these two extremes of the spectrum lie immense

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ents are charged by God with responsibility for the care and maintenance of children and their power only extends to the extent necessary to discharge this obligation. Once the son reaches the point where he can govern himself through his own reason, he is as free as his father." CHRISTIE, *supra* note 151, at 362, paraphrasing J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 3 (T. Peardon ed. 1952).

159. "It should be noted that the word 'consume' holds the double meaning of an appropriative destruction and an alimentary enjoyment. To consume is to annihilate and it is to eat; it is to destroy by incorporating into oneself." SARTRE; *supra* note 3, at 593.

160. This comprehension is inherent in his behavior and comes from his ancestors who "owned" what they hunted down. *See supra* note 157 and accompanying text.

161. An exception arises when territories are taken by invading armies in war.

162. *See* CLARK, *supra* note 5, at 162-65.

163. *Id.* at 164.

164. *Id.* at 163.

165. Driscoll, *The Illegality of Bribery: Its Roots Essence and Universality*, 14 CAP. U. L. REV. 1 (1984); Driscoll, *supra* note 23 on bribery as a "real defense"; and for a discussion of a principal's right to recover a bribe paid to his agent, see RESTATEMENT (SECOND) OF AGENCY § 388 Comments *a* and *b* (1958).

166. *See supra* note 119. Even under Roman law, "you could not enforce a contract which was against 'public policy.' " R. WORMSER, THE STORY OF THE LAW 135 (1962).

stretches of legal territories shadowed by grey clouds. "Issuance," in the law of commercial paper is an almost limitless topic because it relates to "first delivery" and involves the *raison d'etre* for the instrument and the substance or "underlying transaction." Was the instrument actually delivered? To whom? In what form was it prepared prior to delivery? Was issuance induced by fraud or duress? What kind of fraud or duress? Was the preparer of the instrument incompetent? How incompetent? Was he an infant? Was the obligation legal? Was the payee "real" or "fictitious"? The possible factual and legal questions one might pose are as infinite in number as the sum total of all the reasons why any person might want to proffer payment of money to another and all the special and particular ways in which that payment might be exacted. Code commentators have noted that, as between a drawer or maker and one claiming under an instrument as a party who dealt with the drawer, the underlying transaction may awaken:

> . . . all claims for rescission . . . whether based in incapacity, fraud, duress, mistake, illegality, breach of trust or duty or any other reason. It includes claims based on conditional delivery or delivery for a special purpose. It includes claims of legal title, lien, constructive trust or other equity against the instrument or its proceeds.[167]

V. "Issue": Application and Selected Examples

It is helpful to consider as an example a writing which fulfills the requirements of negotiability[168] and to assume a drawer writes out the following check:

March 20, 1985

Pay to the
order of Paul Pace $10,000.00

Ten Thousand and 00/100 * * * * * * * * * * * DOLLARS

STATEBANK
919 Third Avenue
New York, N.Y. 1022

(Signed) David Drew

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167. *See* U.C.C. § 3-306 Official Comment 5 (1983).
168. *See supra* notes 93-107 and accompanying text.

Assume further that the instrument is prepared and signed[169] by Drew, the drawer, on March 20, 1985.[170] Drew keeps the instrument in his possession, waiting to meet Paul Pace and to exchange the check for an original Matisse pencil sketch. At that moment, the instrument is not yet "issued." The following examples are offered to illustrate the issuance process.

Example A. Instrument Issued and Paid in Due Course

Assume all goes well. Payee Pace arrives, delivers the Matisse sketch to Drew who "issues" the instrument, i.e., voluntarily transfers it to Pace. Since the instrument is order paper,[171] it requires an indorsement of the payee.[172] Assume Pace indorses in blank,[173] thereby changing[174] the instrument to bearer paper.[175] Assume further that Pace deposits the check in that form into his checking account with *B* Bank. *B* credits Pace with $10,000 and is paid by Statebank which honors[176] the instrument, debits Drew's account with $10,000 and returns the check stamped "Paid" to Drew with his monthly bank statement. Drew will keep the cancelled check as evidence that he paid Pace for the picture and as proof that he is discharged on the underlying obligation.

Most checks pass in this way smoothly through commerce. But what happens if the process of "issuance" never occurs or is improper or incomplete?

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169. *See supra* note 95.

170. If it is not, we open the door to U.C.C. § 3-114 (1983) concerning the date, antedating and postdating. QUINN, *supra* note 95 at §§ 3-11-13, *citing* Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977) and Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980).

171. *See* U.C.C. § 3-110 (1983) and *infra* note 172.

172. *See* U.C.C. § 3-202(1) (1983). A depository bank may supply a missing indorsement. U.C.C. § 4-205 (1983) Nida v. Michael, 34 Mich. App. 290, 191 N.W.2d 151 (1971). Note, however, that where the bank had taken unindorsed *notes* as collateral, it was not a holder and never attained holder in due course status. Security Pac. Nat'l Bank v. Chess, 58 Cal. App. 3d 555, 129 Cal. Rep. 852 (1976). *Cf.* the notorious *Bowling Green* case, Bowling Green, Inc. v. State St. Bank & Trust Co., 425 F.2d 81 (1st Cir. 1970) where the court reasoned, in conflict with most recognized authorities on the subject, that since a transferee has all the rights of a transferor (U.C.C. § 3-201), if the transferor was technically a "holder," (*see supra* note 33), the transferor would get those rights.

173. *See* U.C.C. § 3-204 (1983) and *supra* note 172.

174. "An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed." U.C.C. § 3-204(2) (1983). In contrast, a special indorsement specifies the person to whom or to whose order the instrument becomes payable. *See* U.C.C. § 3-204(1) (1983). This would perpetuate the order nature of the paper and require an ensuing indorsement by the special indorsee.

175. Bearer paper is defined in U.C.C. § 3-111. It may be negotiated by delivery alone. U.C.C. § 3-202(1) (1983).

176. "Honor" is defined in U.C.C. § 1-201(21).

Example B. Theft by Third Party[177]

Assume that prior to Pace's arrival, W, a windowcleaner working at Drew's home, sees the check on Drew's desk and takes it on March 20, 1985 together with Drew's college ring and a $5 bill. *W* has in his possession an instrument, goods and United States currency.

1. Cash.—If *W* were caught before he disposed of the items he would certainly be required to return the items to Drew. None of these items were voluntarily transferred to *W* by Drew, their owner. The owner has good title; *W*, the thief, has void title.

Since the law of commercial paper is primarily concerned with the rights of third parties, namely bona fide purchasers for value without notice ("B.F.P.'s"), what happens if these items are transferred to good faith purchasers?[178] If thief *W* uses the cash and it flows into commerce, Drew will be unable to get the $5 bill back from a bona fide purchaser for value[179] even though *W* had void title to the cash.[180] Currency passes through commerce in such a manner that even though a thief is one of the links in a chain of title, a bona fide purchaser for value obtains good title.[181]

2. Goods.—If *W*[182] sold the ring, even to a B.F.P.[183] without notice of the theft, the B.F.P. would have no title against Drew because *W*'s title was void.[184]

It is true that the Code provides that one with voidable title to goods[185] may pass good title to a B.F.P.—better title than the voidable title he himself had. But here *W* did not have a voidable title but

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177. *See supra* note 17.

178. *See* definitions of "good faith" and "buyer in the ordinary course of business." U.C.C. § 1-201(19) and (9) (1983).

179. Except for U.C.C. Article Three and Four purposes, "value" takes its U.C.C. § 1-201 definition. *See* U.C.C. § 1-201(44) (1983).

180. Miller v. Race, *supra* note 52.

181. *Id.*

182. *W* here is not a "merchant", so the example is beyond the purview of U.C.C. § 1-201(9). *See infra* note 185.

183. *See* Miller v. Race, *supra* note 52.

184. As for a buyer's liability in conversion, *see* WHITE AND SUMMERS, *supra* note 45 at 499.

185. "A person with voidable title has power to transfer a good title to a good faith purchaser for value." U.C.C. § 2-403(1) (1983). Parker v. Patrick, 5 T. R. 175 (1793), cited as authority for the New York Court of Appeals holding in Mowrey v. Walsh, 8 Cow. 238 (1828), is the seminal case on this point. *See also* Godfrey v. Gilsdorf, 86 Nev. 714, 476 P.2d 3 (1970); FARNSWORTH, *supra* note 14 at 15-40 regarding conflicting claims of title to goods. In a contract for sale of goods, there is a warranty by the seller that the title conveyed is good and his transfer rightful. U.C.C. § 2-312 (1983). A seller's warranty of title is so ancient that it is was codified by Hammurabi. This oldest code provides: "If any one buys a male or female slave, and a third party claim it, the seller is liable for the claim." CODE HAMMURABI, B.C. 2250, (a Winckler trans. in *Die Gesetze Hamurabis*). *See also infra* note 225.

only the "void" title of a thief. He cannot pass a better title to the goods than the title he possessed. This distinction between goods and currency was clearly laid down in 1758 by Lord Mansfield in *Miller v. Race.*[186]

3. Checks Payable to Order. (a) Thief's Rights.—Since *W* stole the check, he has only void title. But as to the unissued check payable to Pace's order,[187] is *W* a "holder"[188] or, at least, a "bearer"?[189] "Holder" under the Code means one in possession of an instrument "drawn, issued, indorsed to him or his order or to bearer or in blank."[190] *W* is not a holder because the instrument is not drawn to him, nor is it issued or indorsed to him or to his order or in blank. A "bearer" is one in possession of an instrument issued to bearer or indorsed in blank.[191] *W* is not a bearer because the check has not been issued or indorsed in blank.

One of the greatest advantages of using an instrument as a substitute for money lies in its safety. A maker or drawer in paying an obligation can create an instrument which runs only to a specified payee and no one else. This affords protection to both the preparer of the instrument and the specified payee. If order paper[192] is stolen prior to issuance, the maker or drawer can stop payment[193] of the instrument. He will not lose the money and probably will not have to pay again as long as the order paper is stolen by someone other than the designated payee.[194] If a check prepared as order paper is stolen by a third party prior to issuance, the drawee bank may not pay it. Payment to one other than the payee would breach the drawee's contract under which it engaged to safeguard the customer's money by honoring only instructions from the drawer and paying only in those amounts and to those payees designated by him.[195]

(b) Subsequent Parties' Rights.—Although all holders are bear-

186. *Supra* note 52. *See also* Tonelli v. Chase Manhatten Bank, 41 N.Y.2d 667, 363 N.E.2d 564, 394 N.Y.S.2d 858 (1977).

187. *See supra* note 105 concerning "order paper."

188. *See supra* notes 33, 37 & 41. Every negotiable instrument "is presumed to have been issued for consideration," so that even in the hands of the original payee, the instrument brings enormous advantages of pleading and proof. *See* FARNSWORTH, *supra* note 14, at 107, *citing* U.C.C. §§ 3-408, 3-307(2) and Kinyon, *Actions on Commercial Paper: Holder's Procedural Advantages Under Article Three*, 65 MICH. L. REV. 1441 (1967).

189. "Bearer" is defined in U.C.C. § 1-201(5).

190. *See* U.C.C. § 1-201(20) (1983).

191. *Supra* note 189.

192. *Supra* note 105.

193. *See* U.C.C. § 4-403 (1983) concerning a customer's right to stop payment.

194. As to this problem, *see infra* "Example C" in text at page 25.

195. Regarding bank-customer relationships, *see infra* notes 212-16 and accompanying text.

ers,[196] if windowcleaner *W* steals a check payable to Pace's order prior to its issuance, *W* is neither a "bearer" nor a "holder." If *W* indorses[197] the name "Paul Pace" on the back[198] and gives it to *X* in repayment of a past due loan,[199] is *X* a "holder"[200] of the instrument or, if not, at least a "bearer"?[201] In an action by *X* against Drew, should the instrument be dishonored?

Since *X* is not in possession of an instrument "drawn, issued or indorsed to him or his order or to bearer or in blank," he is not a "holder." He cannot attain the status of "holder" because the payee's indorsement is forged.[202] There is a break in the chain of title occasioned by *W*'s theft and his unauthorized signing of Pace's name. Since section 3-202(2) permits indorsement only "by or on behalf of" a holder and *W* was not a holder, *X* cannot be a holder.[203] The instrument was never *negotiated*[204] to *X*. A holder is one born only of a full and proper "negotiation" process which has as its essence "delivery."[205]

A party can become a "holder" as a result of a first delivery known as "issue"[206] or any subsequent complete delivery constituting "negotiation." Negotiation connotes any post-issue delivery to a holder and requires voluntary transfer of possession[207] together with any indorsement[208] required by the form of the instrument when negotiated. Though "issue" means first delivery or first voluntary transfer to a holder or remitter, negotiation means the next delivery of an instrument in such form that the transferee attains "holder" status.

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196. Delivery of possession of the instrument is a prerequisite to holder status. *See* U.C.C. §§ 1-201(20) and 3-202 (1983) and *supra* notes 33, 140.

197. "Indorse" and "indorsement" are not U.C.C. defined terms, although indorsements are crucial throughout Article Three and are treated at length in Part two of Article Three. *See* U.C.C. §§ 3-201(1) & (3); 3-202; 3-203; 3-204; 3-205; 3-206; 3-208; 4-205 (1983) and *supra* note 172. One may read part of U.C.C. § 3-202(2) as containing the thread of a definition of "indorsement" insofar as it provides, "*An indorsement must be written by or on behalf of the holder* . . . ." (emphasis added). This thread, when pulled, will unravel Article Three provisions most satisfactorily to result in absence of "holder" and "holder in due course" status by one taking an instrument with a forged payee's indorsement.

198. The indorsement here would be ineffective (*see supra* note 197), since it was not made by or on behalf of the holder. Were it valid, it would change order paper to bearer paper. U.C.C. § 3-204(2) (1983).

199. Newman would have given "value" under section 3-303(2) of the Code.

200. *See supra* note 188.

201. *See supra* note 189.

202. *See supra* note 197.

203. ". . . [N]o one in the chain of title which begins with the theft of an order instrument can attain the status of holder and consequently claim to be a holder in due course." WHITE AND SUMMERS, *supra* note 45, at 497 n.7.

204. U.C.C. § 3-202 (1983).

205. *See supra* notes 138-60 and accompanying text.

206. *Id.*

207. *Id.*

208. *See supra* note 197; Chemical Bank of Rochester v. Haskell, 51 N.Y.2d 85, 411 N.E.2d 1339, 432 N.Y.S.2d 478 (1980).

Section 3-202 provides: Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery.[209] Since *X* took this order instrument from *W*, who stole it prior to issue without payee Pace's indorsement, *X* cannot be a "holder" and hence cannot attain holder in due course status. *X* is not a "bearer" because he is not in possession of an instrument "payable to bearer or indorsed in blank."[210] Again, the purported "indorsement" is ineffective because it was not made by a holder.[211]

If the instrument, with a forged payee's indorsement made by *W*, were honored by Statebank, Drew would be entitled to have his account recredited. The bank converted[212] money belonging to Drew when it debited his account $10,000. An instrument is converted when it is paid on a forged indorsement.[213] Under both the Code and pre-Code law, the drawee bank is liable if it honors an instrument having a forged payee's indorsement.[214] The drawee bank's liability is based upon its contract with its customer. The bank is not a bailee; rather, it is a debtor, and the customer is its creditor.[215] The

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209. U.C.C. § 3-202(1) (1983).

210. U.C.C. § 3-111 defines payable to bearer; indorsed in blank "specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed." U.C.C. § 3-204(2) (1983).

211. *See supra* note 197; Tonnelli v. Chase Manhattan Bank, 41 N.Y.2d 667, 363 N.E.2d 564, 394 N.Y.S.2d 858 (1977).

212. Merrill Lynch, Pierce, Fenner & Smith v. Chemical Bank, 57 N.Y.2d 439, 442 N.E.2d 1253, 456 N.Y.S.2d 742 (1982); WHITE AND SUMMERS, *supra* note 45, at 499-509. Conversion liability, although not so labelled by name, appears as early as the Code of Hammurabi. Two of its sections provide:

> 112. If any one be on a journey and instrust silver, gold, precious stones, or any movable property to another, and wish to recover it from him; if the latter do not bring all of the property to the appointed place, but appropriate it to his own use, then shall this man, who did not bring the property to hand it over be convicted, and he shall pay fivefold for all that had been intrusted to him.121. If any one store corn for safe keeping in another person's house, and any harm happen to the court in storage, or if the owner of the house open the granary and take some of the corn, or if especially he deny that the corn was stored in his house: then the owner of the corn shall claim his corn before God [on oath], and the owner of the house shall pay its owner for all of the corn that he took.

CODE HAMMURABI, *supra* note 185.

213. *Merrill Lynch*, *supra* note 212. *See*, however, *infra* note 216 as to contrary principles in civil law countries.

214. U.C.C. §§ 3-419(1)(c) and 4-401 (1983); Tonelli v. Chase Manhattan Bank, 41 N.Y.2d 667, 363 N.E.2d 564, 304 N.Y.S.2d 858 (1978); WHITE AND SUMMERS, *supra* note 45. at 499-509, 551. But see *infra* note 216 as to foreign law.

215. WHITE AND SUMMERS, *supra* note 45 at 551, *citing* pre-Code and post-Code authorities to the same effect. Private banking existed in the fourteenth Century in Venice but did not begin in England until the Seventeenth Century when goldsmiths of London's Lombard Street branched out into the business of holding customers' deposits and then lending them to others—making them "true bankers" rather than moneylenders who lend "their own capital." FARNSWORTH, *supra* note 14, at 42-43. Current English authors state, "The relationship between a banker and a customer is that of debtor and creditor and is not fiduciary.

bank has no obligation to keep its customer's money segregated. But the bank's agreement is to pay out only in accordance with its customer's orders and only to the people and in the amounts the customer directs. If drawees refused to undertake this basic responsibility, there would be no checking business. Except for when a customer's negligence causes the loss,[216] every bank is under a contractual duty to determine at its peril the genuineness of indorsements.

In the above example, the customer never issued the instrument because the check payable to Pace's order was stolen prior to issuance. Drew, of course, is not discharged from any obligation he owes to Pace. If Pace delivers the Matisse to Drew, he is entitled to payment of $10,000. Drew must pay twice if the stolen instrument is honored on *W*'s forged indorsement by Statebank. Hence, Drew can insist that Statebank recredit his account with $10,000.[217]

This situation must be contrasted with the result if the instrument had been issued to Pace and then stolen from him. In that case, we would enter a different world of "upstream and downstream[218] plaintiffs," dreamt of and described by Professors White and Summers.[219] If Drew issued the instrument to Pace in exchange for the sketch and the instrument was then stolen prior to indorsement, Pace might turn to Drew for payment. Drew's liability to Pace is discharged only to the extent of his payment to a *holder*.[220] If the

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Where a customer deposits money in a bank, this money is under the control of the banker and is not held by the banker in the form of a trust . . . ." K. SMITH AND D. KEENAN, ENGLISH LAW 452 (7th ed. 1983) (hereinafter cited as SMITH AND KEENAN).

216. *Cf. Merrill Lynch*, *supra* note 212; see also WHITE AND SUMMERS *supra* note 45, at 552-600; Wormhoudt Lumber Co. v. Union Bank & Trust Co., 231 Iowa 928, 2 N.W.2d 267 (1942). Under English law, the same principle is true for forged payee's indorsements. "A forgery will not pass a good title to the bill. A forged signature is in effect no signature at all and cannot pass any title." SMITH AND KEENAN *supra* note 215, at 443. In France, if a check bearing a forged drawer's signature is paid by the drawee, the loss falls on the drawer." Farnsworth, *The Check in France and the United States*, 36 TUL. L. REV. 245 (1962). Moreover, in most other civil law countries, under the Uniform Codes on Bills of Exchange and Checks drafted in Geneva over fifty years ago, a holder may get a good title even where order paper is stolen and the payee's signature is forged if he takes through a chain of uninterrupted indorsements in good faith and without gross negligence; the drawee is bound to examine only external regularities. Kessler, *Forged Indorsements*, 47 YALE L.J. 863 (1938).

217. U.C.C. § 4-401; *Tonelli*, *supra* note 147; WHITE AND SUMMERS, *supra* notes 45 and 212. *Cf. supra* note 216 concerning civil law.

218. As to "streams," the word "currency" from Medieval Latin *currentia*, a flowing, is the same in both money and movement of currents of rivers. MORRIS, *supra* note 35, at 324 under "currency." It coursed down to us from Old French *corant*, the present participle of *courre*, to run, from Latin *currere*. *Id.* Its heart, in turn, is motion coming from *kers*, to run, which in suffixed form is the Latin *carrus*, a two-wheeled wagon from which we also get a bounty of words, notably "chariot," "carry," and "car." *Id.* at 1522. As to river banks or banks of streams and banks which hold money, they too come from the same root "bheg." *Id.* at 104-05. This in Old High German was *banc* which meant bench or money-changer's table. *Id.* at 1508.

219. WHITE AND SUMMERS, *supra* note 45, at 492-518.

220. U.C.C. § 3-603 and Official Comment 5 (1983).

check is honored by Statebank and Drew's account is debited, Pace may claim that Drew's underlying obligation was never discharged and might sue Drew for $10,000. But would Pace be successful?[221] One can peruse a wealth of legal resources for a solution to this problem.[222] But post-issuance problems lie beyond the scope of this discussion. This article focuses only on pre-issue and non-issue problems.

Example C. Theft by Named Payee

When Pace arrives, Drew examines the Matisse sketch, has second thoughts and asks for "a few days" to think about the purchase. Pace agrees but before he leaves with the sketch, Pace steals the check made out to him from a desk drawer.[223]

1. Thief's Rights.—If payee Pace stole this instrument payable to his order, Drew could recover it from him since Pace has no title. Anyone not holding in due course takes subject to the defense that he acquired the instrument by theft.[224] As Code commentators have noted, this firm principle—founded upon a universal abhorence of thefts and thieves—"is based on the policy which refuses to aid a proved thief to recover, and refuses to aid him indirectly by permitting his transferee to recover unless the transferee is a holder in due course."[225] Whether Pace, having stolen order paper naming him as payee, is a "holder"[226] is a much more challenging question.[227]

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221. *See* U.C.C. § 3-802 (1983). Suppose Pace puts the unindorsed check in his nighttable drawer, leaves for Europe and finds it missing when he returns. Meanwhile, drawee has paid it. Does payee have a good cause of action against drawer? True, drawer can recover from drawee, but must he pay payee first? Once drawee has paid, payee no longer has a valid claim against drawer but must go against drawee. *See* WHITE AND SUMMERS, *supra* note 45 at 497 n.7.

222. *See, e.g.*, WHITE AND SUMMERS, *supra* note 45, Chapter 15.

223. "Desk drawer" here, again meaning "to pull," comes from the same word as "drawer," one who "draws" or pulls an instrument. *See supra* note 35.

224. U.C.C. § 3-306(d) (1983).

225. U.C.C. § 3-306, Official Comment 5 (1983). As to lost or stolen goods thereafter purchased bona fide under English, French, Dutch, Swiss and German law, *see "Explanatory Report on Draft Uniform Law on the Protection of Bona Fide Purchaser of Corporeal Movables"* (UNIDROIT 1968), FARNSWORTH, *supra* note 14, at 31-33. *See also supra* notes 151 and 184-85. For the past twenty years, the United States has participated fully in international efforts to unify and harmonize private law. The Code, more than the law of any other country, has been viewed as the most modern commercial code in the world. Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505, 517 (1985).

226. *Supra* notes 33, 188. As to conversion, *see supra* note 212.

227. *E.g.*, "If an instrument is payable to bearer, either because it was issued that way and continued its life as a bearer instrument ('pay to the order of Cash') or because it was indorsed in blank by a holder ('Joe Jones'), the possessor of the instrument will be a holder . . . ." WHITE AND SUMMERS, *supra* note 45, at 459. "The thief in possession of bearer paper probably satisfies the requirements of 1-201(20); in any event his indorsement in unnecessary to confer holder status on his transferee." *Id.* at 415 n.54. "Even without delivery, a finder or a thief of a bearer instrument is always a holder." C. WEBER, COMMERCIAL PAPER IN A NUTSHELL 103 (3d ed. 1982). "If the check, is bearer paper . . . [a]lthough thief is not a holder

The words "theft" and "stealing" have been held to be synonymous.[228] Both are popular terms for larceny, except that "theft" is broader[229] and may encompass deprivations of another's property not covered by a particular statute. The term "steal" is generic; apart from any statutory definitions, it means the taking of property of another or the taking or appropriating of property without right or leave and with intent to make use of it wrongfully.[230] One who causes another to steal for him is guilty of larceny.[231] Note that at the moment Pace *takes* the instrument, he commits only a theft of a *writing* owned by Drew, not a theft of funds via a forged indorsement.[232]

One merely in possession of stolen property may violate criminal statutes, since an inference[233] arises from the fact of possession which is sufficient to constitute prima facie proof that the possessor is the thief.[234]

Even acquiring *lost property* without taking reasonable measures to return it to the owner may constitute criminal conduct.[235] Though successful criminal prosecutions against acquirers of lost property are rare, the possessor of a lost check[236] cannot maintain a civil action to collect on the check.[237] If the instrument prepared by Drew were left at Pace's office instead of in Drew's desk drawer, payee Pace would be unable to attain "holder" status, and in a civil

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(the check was not delivered to him by the Payee), the next person to whom thief delivers . . . may be a holder in due course." *Id.* at 366. "Delivery is necessary to transfer title to the instrument, to constitute any person a holder and to impose liability upon signers of the instrument." *Id.* at 84.

228. Ludwig v. Pacific Fire Ins. Co., 123 Misc. 189, 204 N.Y.S. 465 (1924).

229. *Id.*

230. People v. Neiss, 92 Misc. 2d 839, 401 N.Y.S.2d 422 (1978).

231. People v. Negrin, 24 Misc.2d 181, 201 N.Y.S.2d 59 (1960).

232. The essence of larceny is a taking against the will of the owner. The Queen v. Prince, Court for Crown Cases Reserved, 1 L.R.-Cr. Cas. Res. 150 (1868) (where wife forged her husband's signature to get all his money from his bank and left him for defendant Prince to whom she gave some of the money, Prince's conviction for larceny was not sustained, although he might be liable to the owner in trespass). In 1833 in England, a wife was improperly convicted for stealing money from her husband's locked box to pay her former husband's debts, because a married woman could not then be convicted of taking her husband's property. Rex v. Willis, 1 Moody 375, 168 Eng. Rep. 1309 (1833). Today, one spouse can be guilty of larceny of the other's property. Fugate v. Commonwealth, 308 Ky. 815, 215 S.W.2d 1004 (1948); Regina v. Kenny, 13 Cox C.C. 397 (1877); Whitson v. State, 65 Ariz. 395, 181 P.2d 822 (1947); People v. Swaim, 80 Cal. 46, 22 P. 67 (1889); State v. Herndon, 158 Fla. 115, 27 So.2d 833 (1946).

233. People v. Shurn, 69 A.D.2d 64, 418 N.Y.S.2d 445 (1979), but the inference is fluid and requires consideration of all circumstances. People v. Sim, 53 A.D.2d 992, 386 N.Y.S.2d 114 (1976), *aff'd* 44 N.Y.2d 758, 376 N.E.2d 1331, 405 N.Y.S.2d 686 (1978).

234. *Shurn, supra* note 233.

235. *See, e.g.*, N.Y. Penal Law § 155.05(2)(b) (McKinney 1975).

236. *See* U.C.C. § 3-804 (1983) concerning an owner's actions on lost, destroyed or stolen instruments.

237. *Infra* note 257.

action, Pace is barred on public policy grounds[238] from enforcing payment in his own name.[239]

If payee Pace is a thief, can he be a "holder" of the stolen instrument? It is axiomatic under Article Three that both "issue"[240] and "negotiation"[241] require "delivery"[242] by voluntary[243] transfer of possession.[244] Unless the preparer delivers, there is no first delivery and thus no first holder, since the unissued instrument is unexecuted.[245]

On a dark night a firefly may, for an instant, look just like a star. In this illusion, several perception errors occur simultaneously. If where and how a person sees an object "depends on the input from almost every joint in the body,"[246] then what that person makes of those perceptions depends on much more and seems peculiarly a province of the law. The law of commercial paper is no exception.

Section 1-201's "holder" definition—a person in possession of an instrument drawn, issued or indorsed to him or his order or to bearer or in blank[247]—may, like a firefly, create a "holder" illusion. But when the definition is linked to Article Three's "issue" and "negotiation" definitions,[248] as it must be, it again becomes clear that the essence of "holder" is volition. Section 3-202 states that, "Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery."[249]

The Official Comments to a later section add, "Negotiation under this Article always includes delivery. (Section 3-202, and see Section 1-201(14)). Acquisition of possession by a thief can therefore never be negotiation under this section. But delivery by the thief to another person may be."[250]

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238. Pope Manufacturing Co. v. Gormully, 144 U.S. 224 (1892); FARNSWORTH, *supra* note 16, at 330-63; Driscoll, *supra* note 23, at 412-28.

239. Pope Manufacturing Co. v. Gormully, 144 U.S. 224 (1892); FARNSWORTH, *supra* note 16, at 330-63; Driscoll, *supra* note 23, at 412-28; Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 674 (1935); McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 166 N.E.2d 494, 199 N.Y.S.2d 483 (1960) (defense to suit for accounting based on legal commissions agreement that contract was performed in a manner offensive to public policy against commercial bribery); *infra* notes 257-58.

240. *Supra* notes 138-67.

241. U.C.C. § 3-202 (1983).

242. *Supra* notes 139-53 and accompanying text.

243. *Supra* notes 141-42.

244. *Supra* note 151.

245. *Infra* note 305.

246. Nobel Prize winner Roger Sperry, professor of psychobiology, *quoted in* 16 SMITHSONIAN 101 (April 1985).

247. U.C.C. § 1-201(20) (1985); *see also supra* notes 33 and 129.

248. *Supra* notes 138-67; U.C.C. § 3-202(1) (1983).

249. U.C.C. § 3-202(1) (1983).

250. U.C.C. § 3-207, Official Comment 3 (1983).

Before giving "value,"[251] payee Pace can at most become a "holder," and this possibility is dependent upon Drew's leave. Since this is his highest post-issue status, what impetus does Article Three give any payee to await delivery? None, because by stealing a thief attains the same rights. To permit any thief to steal and thereby become a "holder" of what he takes engenders violence and larceny. Moreover, theft of the instrument itself, being criminal in nature, is not an act capable of ratification—even by the preparer of the instrument.[252]

A thief lacks "holder" status whether he steals before or after issuance and regardless of whether the writing is order or bearer paper. "Holding," even not in due course, brings with it enormous advantages of pleading and proof.[253] The Code specifically accords a "holder" the right to negotiate an instrument further into commerce,[254] to discharge[255] it and to enforce it in his own name.[256]

As for a thief's right to enforce payment in his own name, no court will lend its aid to one seeking to take advantage of his own wrong or to acquire property by his own crime.[257] Under doctrines much older than even the first laws of England, a known thief can not enforce the instrument in an American court.[258] Naked possession of issued currency, bearer paper or unissued order paper showing a thief as payee gives the thief *power* to transfer the paper, but he has no Article Three right as a holder to do so. *After a transfer to a good faith purchaser*, a thief may be deemed to have possessed

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251. *Supra* note 37.

252. Although under section 3-404 a forgery may be "ratified," what is meant is that it may be "adopted" and, if that is done, "ratified" merely indicates retroactivity; criminal liability is not relieved. U.C.C. § 3-404 Official Comment 2 (1983). In New York a private owner cannot forgive the crime of larceny. N.Y. Penal Law § 215.45 (McKinney 1975). He may agree to take restitution but not on any express or implied promise to refrain from initiating a criminal prosecution. *Id.* For a discussion of the nonratifiable nature of criminal acts generally, *see* Driscoll, *supra* note 23, at 424-27.

253. *Supra* notes 187-88. A "holder" can collect on the instrument. Once signatures are admitted or established, he need only produce the instrument, and he can recover on it unless the defendant establishes a defense. U.C.C. § 3-307(3) (1983).

254. U.C.C. § 3-301 (1983).

255. *Id.* U.C.C. §§ 3-603, 3-601, 3-605 (1983). It becomes crucial to know who "holders" are. WHITE AND SUMMERS, *supra* note 45, at 444. One taking overdue paper would not be a holder in due course but would be a "holder." *See* discussion, *Id.* at 443-54.

256. U.C.C. § 3-301 (1983).

257. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340, 12 Am. St. Rep. 819 (1889) sets forth:

> No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries and have nowhere been superseded by statutes.

Id. at 115 N.Y. 511-12.

258. The maxims have been found in the Ulpian Digest, appearing as *nemo ex delicto meliorem suam conditionem facere potest.* Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Form of Legal Literature*, 48 U. CHI. L. REV. 632, 645 (1981).

a power to transfer. This determination exists only to assure there are no legal "stop" signs in commerce to impede the motion of paper. Since *Miller v. Race*,[259] the *raison d'etre* of that policy is the protection not of thieves, but of those holding in due course.[260]

An unissued instrument whether bearer or order paper in the hands of a thief is most succinctly treated as nondrawn, nonpossessed and hence only a shadow of an "instrument."[261] That places the thief outside the purview of the section 1-201 "holder" definition. The Code's approach in no way impairs the free motion of paper in commerce and leaves Article Three both in synchrony with ancient concepts of law and respectable as a practical commercial code.

2. Drawers' and Subsequent Parties' Rights.—If a check is stolen prior to issuance, what are drawer Drew's rights? It has been held[262] that a drawer has no "valuable" rights" in an instrument because he has no right to present it to a drawee for payment—he has no rights other than the right to the physical paper on which the check is written. Accordingly, the drawer is relegated to an action against his own non-depository bank. The underlying rationale is that a depository bank[263] is too far removed from events surrounding "issue" and would thus be handicapped in marshalling those facts necessary to successfully defend a conversion suit on the ground of drawer negligence.[264] Citing *Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co.*[265] with approval, scholars White and Summers explain, "[i]f the drawer's negligence is the central issue in most such cases, it makes sense to require the drawee to be the defendant."[266]

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259. *Supra* note 52.

260. So close is a "holder" to possible holder in due course status that section 30(2) of England's Bills of Exchange Act reads:

> Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Ladup Ltd. v. Shaikh (Nadeem) (1983), 1 Q.B. 225 (1982), 3 W.L.R. 172 at 178c.

261. *See* text corresponding to notes 73-135, *supra*.

262. Stone & Webster Engineering Corporation v. First Nat'l Bank & Trust Company of Greenfield, 345 Mass. 1, 184 N.E.2d 358 (1962).

263. "Depository bank" means the first bank to which an item is transferred for collection even though it is also the payor bank. U.C.C. § 4-105(a) (1983). "Payor bank" means a bank by which an item is payable as drawn or accepted. U.C.C. §4-105(b) (1983). In these examples, Statebank is referred to as the drawee or drawee bank but would also be a "payor bank."

264. *See* U.C.C. §§ 4-406(5) and 3-406 (1983); WHITE AND SUMMERS, *supra* note 45, at 501.

265. *Supra* note 262.

266. *Supra* note 264.

In our example, there is no cause of action against Statebank if the payee steals the instrument and the indorsement is not forged. What other rights, then, does a preparer of unissued order paper have?[267] Even though the apparent drawer[268] has no right to present[269] the apparent instrument[270] to drawee[271] for payment if it is apparently payable[272] to a third party's apparent order[273] the drawer has, in addition to the naked right to physical possession of the writing, other axiomatic and inherent rights. First, even though he has lost possession of the writing, he has the right to stop payment. This statutory right[274] gives some[275] security, but the security is limited to

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267. "The claimant who has lost possession of an instrument so payable or indorsed that another may become a holder has lost his rights on the instrument, which by its terms no longer runs to him." U.C.C. § 3-306, Official Comment 5 (1983).

268. Query whether the drawer of an unissued instrument is a "drawer," since "draw" and "drawer" connotes some motion? *Supra* note 35. A check is a draft if it is an "order." U.C.C. § 3-104(1)(a) and (b) (1983). An "order" is a direction to pay. U.C.C. § 3-102(1)(a) (1983). Again, there is connoted a *movement* (relationship outside oneself). It is a physical impossibility to give an "authoritative indication" to pay (*see* definition of "direction," MORRIS, *supra* note 35) before volition has congealed and been manifested by some overt act, moving the instrument out of one' own possession by a first delivery issue. It seems more realistic to regard the unissued instrument as not an "instrument" at all because it does not *move* away from the preparer and therefore does not contain a promise or order to pay to anyone. That is why, in contrast, we refer to the issued instrument as "*running*" to the payee. An unissued instrument cannot run. Picture the writing still connected to the stub and untorn from the checkbook. Is it "drawn"? There is judicial opinion to the effect that signature alone does not constitute "execution" of an instrument which remains a "nullity" and not "made" until it is delivered. *See* cases cited at 11 AM. JR. 2d 297, 298-99 (1963). An instrument "has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties." *Id.* at 298. This concept was codified in *Negotiable Instruments Law* Sec. 16 and was true under common law and the Code. *Id.* But in the Code, the concept is woven or absorbed into the texture of, rather than clearly enunciated in, Article Three.

269. *See* section 3-504 of the Code which provides for how presentment is made.

270. *See supra* note 268.

271. *Id.*

272. *Id.*

273. *Id.*

274. U.C.C. § 4-403 (1983). What happens, however, if a third party induces the preparer by fraud to issue to a payee and preparer discovers the fraud, stops his check and is sued by payee? In Watson v. Russell, 3 B. & S. 34 (1862), *aff'd* 5 B. & S. 968 (1864), it was said:

> If *A* by means of a false pretence, or a promise or condition which he does not fulfill, procures *B* to give him a note or cheque or acceptance in favour of *C*, to whom he pays it, and who receives it bona fide, for value, *B* remains liable on his acceptance. His acceptance imports value and liability prima facie, and he can only relieve himself from his promise to pay *C* by shewing that *C* is not holder for value or that he received the instrument with notice, or not bona fide.

Quoting Hasan v. Willson, 1 Lloyd's Rep. 431 (1977). In *Hasan*, plaintiff payee never met drawer in connection with sale of some four hundred tons of gold coins for $445,750,000; although plaintiff had no actual notice of the fraud, it was found that he wilfully abstained from making inquiries and that drawer was not liable in suit brought after payment was countermanded. However, under English law, a payee cannot be a holder in due course. *Id. Cf.* U.C.C. § 3-302(2) (1983).

275. *See* FARNSWORTH, *supra* note 14, at 63-68 regarding stop payment orders and clauses which disclaim bank liability, despite section 4-103(1); Dinerman v. National Bank of North America, 89 Misc. 2d 164, 390 N.Y.S.2d 1002 (Sup. Ct. 1977) (burden of proving actual loss is on customer; if money was owed by him anyway, bank's payment after the stop

six-month blocks of time.[276] Moreover, the right is worth no more than a post-theft barndoor lock if exercised after the instrument is paid[277] or accepted.[278] In that case, victim Drew has lost not only possession of his writing but also use of his money and probably the face amount of the instrument.

Assume Drew leaves his home and goes to work without knowledge that Pace stole the writing from his desk. If Pace negotiates—indorses and delivers—to a holder in due course, the holder in due course takes free of Drew's title claim to the instrument and any defense of nondelivery.[279] Once the paper falls into the hands of a holder in due course, the unissued, nonexistent instrument may become Drew's obligation to pay.

The small slip of paper in the form of a negotiable instrument may be as good as gold and even more dangerous to keep. It has been held that the preparer of such an unissued negotiable instrument "must care for it as much as he would his paper money."[280] But that characterization can be an understatement; if Drew leaves $10,000 in cash in his desk or at Pace's office and Pace disappears with the money, Drew can call the police department to seek assistance. If he tells the story about his "unissued" check, the police response undoubtedly would be that it is a "civil matter" and that he should consult legal counsel. If the stop order is received after the instrument is either accepted by or paid to a holder in due course, Drew is relegated to his cause of action against thief Pace. Of course, Drew in this example never received the Matisse, but failure of consideration is a personal defense[281] not good against a holder in due course. If "rights" to possession of an instrument are in any way related to possible risks of its loss, Drew's "rights" are substantial; his Article Three or other practical legal remedies trifling.

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order is of "no harm" to customer); U.C.C. § 4-403(3) (1983).

276. If the stop order is oral, it is effective for fourteen days; if it is written, then for six months unless renewed in writing. *See* U.C.C. § 4-403(2) (1983).

277. *See* U.C.C. § 4-403(1) (1983) (the stop order must give the bank a reasonable opportunity to act), U.C.C. § 4-213 (1983) and FARNSWORTH, *supra* note 14, at 215-88 as to "payment" and "final payment" problems; Georgia R. R. Bank & Trust Co. v. First Nat'l Bank, 229 S.E.2d 482 (Ga. App. 1976), *aff'd* 238 Ga. 693, 235 S.E.2d 1 (1977) ($25,000 check mistakenly under-encoded and treated as "$2,500"); David Graubert, Inc. v. Bank Leumi Trust Co., 48 N.Y.2d 554, 399 N.E.2d 930, 423 N.Y.S.2d 899 (1979) (agreement modifying midnight deadline as to dishonored, represented check); *see also* First Nat'l Bank v. Nunn, ___ Mont. ___, 628 P.2d 1110 (Mont. 1981); West Side Bank v. Marine Nat'l Exchange Bank, 37 Wis.2d 661, 155 N.W.2d 587 (1968); Kane v. American Nat'l Bank, 21 Ill. App.3d 1046, 316 N.E.2d 177 (1974).

278. Certification of a check is acceptance and, if procured by a holder (rather than the drawer), the drawer and all prior indorsers are discharged. *See* U.C.C. § 3-411(1) and § 3-413(3) (1983).

279. U.C.C. § 3-305(1), § 3-306(a) and § 3-306, Official Comment 2 (1983).

280. City of New Port Richey v. Fidelity & Deposit Co., 105 F.2d 348, 350 (5th Cir. 1939).

281. U.C.C. § 3-306(c) (1983).

In addition to the right to stop payment, if the writing leaves his possession prior to issuance, Drew also loses his right to tear up or destroy the instrument. His right to destroy is the neatest, most complete means of self-help available to Drew. It is a more immediate and more conclusive right than the right to stop payment.

The right to destroy is valuable not only to the drawer but also to commerce and the courts. It allows one who prepared a writing to prevent nightmarish consequences like theft by a denominated payee, and it affords *any* preparer of an unissued writing in the form of a negotiable instrument the most swift, efficient and complete way to correct an error on his part. Perhaps the error consisted of making out the check to a wrong party;[282] misspelling a payee's name;[283] omitting one of two or more joint payees;[284] failing to properly indicate drawing in a representative capacity;[285] writing the instrument in an inept or sloppy manner which facilitates an alteration costly to the drawer;[286] inserting an incorrect date;[287] supplying a wrong amount;[288] making out an instrument for an obligation which was previously satisfied;[289] discovering fraud after preparation of the instrument;[290] executing the instrument under duress;[291] preparing the instrument for an illegal transaction[292] before deciding to abandon the crime;[293] learning of the right to refuse to repay a usurious loan;[294] preparing the instrument while intoxicated;[295] preparing the

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282. *See* U.C.C. §§ 3-110, 3-111 and 3-117 (1983). In all examples given in the text as reasons why a preparer might want to destroy rather than issue, it must be noted that there are dramatic consequences (and concurrent perils) involved not only if the instrument gets to a holder in due course but also from failing to destroy the instrument. *See supra* note 187-88.

283. *Id.*; U.C.C. § 3-203 (1983).

284. *Id.*; U.C.C. § 3-116 (1983).

285. If signed in a representative capacity, the preparer risks incurring personal liability for a principal's obligation. *See* U.C.C. § 3-403 (1983).

286. *See supra* notes 187-88; U.C.C. §§ 3-406, 3-407 (1983).

287. U.C.C. §§ 3-109, 3-108, 3-114 (1983) and note 282, *supra.*

288. *See* U.C.C. § 3-118 and note 282, *supra.*

289. U.C.C. §§ 3-408, 3-306(c), 3-307(2) (1983); note 282, *supra.*

290. Garden variety fraud in the inducement (deceit as to the nature of the *transaction* in contrast to the nature of the *instrument*) is not a real defense and is useless against one holding in due course. U.C.C. § 3-305(2)(c) (1983); *supra* note 282.

291. U.C.C. § 3-305(2)(b) (1983); *supra* note 242; Odorizzi v. Bloomfield School District, 246 Cal. App.2d 123, 54 Cal. Rptr. 533 (1966) ("duress" as contrasted with undue influence; determining when persuasion overflows its "normal banks" and becomes "oppressive flood waters").

292. *Id.*; For a discussion of what is "illegally void" for section 3-305 purposes, *see* Driscoll, *supra* note 23; *Bankers Trust, supra* note 23.

293. *Id.* The turning back is paramount, not the initial wrongful intentions. Aikman v. City of Wheeling, 120 W. Va. 46, 195 S.E. 667 (1938) (check proffered on condition that payee suppress criminal prosecution).

294. *See supra* notes 282 and 292. The whole area of "illegality," including "usury" under section 3-305, is left to local law and policy. If the obligation under local law is merely voidable (as in most cases it will be) rather than void, once the instrument falls into the hands of the holder in due course, it blossoms into an obligation to pay. *See* U.C.C. § 3-305, Official Comment 6 (1983).

295. *See supra* note 291. Only such incapacity as renders the underlying obligation void

instrument while in a "manicky" state;[296] or discovering that a faithless employee furnished a "fictitious payee."[297] The possible reasons why a drawer might want to destroy an instrument are almost as varied as the reasons why he might want to issue. Because of a deep-rooted legal aversion to "Indian giving," the right to destroy cannot be exercised post-issuance. One old case held that getting an instrument back and destroying it does not reinvest title to the instrument in the preparer.[298]

In example C above, if Drew destroyed the instrument instead of putting it in his desk drawer, there would be no legal problems to solve. The right to destroy is one of the most basic and valuable property rights known to man.[299] It is what makes a dog happy about receiving a bone; he can legally consume it, i.e., eat and destroy it, because it is his. A man can opt to deliver a bone or to discard or destroy it. If he leaves it unguarded and a dog surreptitiously takes it, the man will smile, realizing he has only himself to blame. He assumed that risk in keeping the bone. Retention can sometimes be negligence *per se*.

Along with his loss of possession of the instrument, Drew may also lose his right to change his mind. Where, for example, Drew prepares an instrument to tender as a gift but the payee steals it prior to issuance, the instrument in the hands of a holder in due course becomes a binding obligation to give a gift.[300] Again, failure of consideration is not a valid defense against a holder in due course.[301]

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is a "real" (*supra* note 43) defense. *Compare* Ortelere v. Teachers' Retirement Bd., 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362, (1960) (involuntional melancholia); J.P. DAWSON, W.B. HARVEY AND S.D. HENDERSON, CASES AND COMMENT ON CONTRACTS 487-511 (4th ed. 1982). These cases involve contracts, not instruments. In Estate of Lucas v. Whiteley, 550 S.W.2d 767 (Tex. Civ. App. 1977), a Texas law rendering the incompetent's instrument voidable only did not assist the holder of a $120,000 note of an adjudicated incompetent executed through his attorney with whom the holder had *dealt*. *See supra* note 45.

296. Faber v. Sweet Style Manufacturing Corp., 40 Misc. 2d 212, 242 N.Y.S.2d 763 (Sup. Ct. 1963) (no "irrationality" or other abnormality except manic speed sufficed to grant rescission of a *contract* on grounds of psychosis). *See also supra* note 295.

297. *See* U.C.C. § 3-405(1)(b) (1983).

298. Novak v. Reeson, 110 Neb. 229, 193 N.W. 348 (1923) (Morrison, C.J., dissenting) (notes made out to maker's daughters given to son to hold; that maker later burned the notes did not invalidate the completed irrevocable gift); State v. Cohen, 196 Minn. 39, 263 N.W. 922 (1935) (woman guilty of larceny for taking back a coat she had left with furrier without paying for its repairs).

299. "Destruction realizes appropriation perhaps more keenly than creation does, for the object destroyed is no longer there to show itself impenetrable . . . . In making use of my bicycle I use it up—wear it out; that is, continuous appropriative creation is marked by a partial destruction." SARTRE, *supra* note 3, at 593. "Actually the *gift* is a primitive form of destruction." *Id.* By giving it away, I constitute the object as absent. "But the craze to destroy which is at the bottom of generosity is nothing else than a craze to possess." *Id.* at 594.

300. *But see* text corresponding to note 298, *supra*.

301. *Supra* note 187-88. Official Comment 3 to U.C.C. § 3-305 says a holder in due course takes free from all defenses, including nondelivery; but the Comment does not employ

Drew can argue that it is absolutely a legal and philosophical impossibility for there to be a "holder" or a "holder in due course" of an instrument which was never issued;[302] that no one can acquire any rights on an unissued instrument, since no "instrument" exists until delivery occurs; that there can be no "instrument" without a promise or order to pay and that there is no such thing as a mute or implied Article Three promise or order; and that an unissued "instrument" is ambulatory like the will of a living testator before his death because the instrument can be destroyed or revoked prior to issuance. Drew can cite the line of cases[303] which hold that delivery must include an intent to pass title,[304] and he can emphasize that many cases hold that an instrument is not deemed "executed"[305] until it is delivered. He can argue that "issue" necessitates movement. He can claim that because he never caused the instrument to *move* and it was merely taken against his will or was found among his possessions,[306] it is only an "apparent instrument," not a legally valid one.

Drew can also raise a constitutional issue. Does the Code deprive Drew of property without due process of law? No, said one court,[307] applying previous negotiable instruments law. While delivery is required to put an instrument "in force," when the paper:

> is found complete on its face in the hands of one not its maker it is to be regarded as delivered unless the contrary is shown, but . . . in the hands of a holder in due course no enquiry is to be made into delivery, but the right of the holder is to be held indefeasible by a want of delivery. This is a regulation of the consequences of fully executing such a paper and *by any means* suffering it to come into the hands of a holder in due course. [The statutes direct the courts] to forbear enquiry into the fact of de-

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the Code term "issue."

302. *Supra* notes 139-52 and corresponding text. Allegations of the "issue" of drafts or checks, without more, connotes delivery. Insurance Co. of North America v. Knight, 8 Ill. App. 3d 412, 291 N.E.2d 40 (1972).

303. *E.g.*, Leverett v. Wanings, 97 Ga. App. 811, 104 S.E.2d 686; W.H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945).

304. *See* cases cited at 11 AM. JUR. 2d *Bills and Notes* 297 (1963).

305. "The necessity for delivery of a bill or note depends upon the common law, the law merchant, and the NIL or the Uniform Commercial Code—Commercial Paper." 11 AM. JUR. 2d *Bills and Notes* 297, 298 (1963). The instrument "has no legal inception or valid existence as such until it has been delivered" *Id.* (citations omitted). The word "execution" includes delivery. In Re Herr's Estate's, 16 Ill. App. 2d 534, 148 N.E.2d 815 (1958). An Indiana court stretched delivery further into time and space by providing that the place where value was given is determinative of the place of execution. W.H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945); *see* U.C.C. § 3-303 (1983), discussing "value."

306. Shriver v. Danby, 12 Del. 390, 113 A. 612 (1921) (testator's note found among his effects some eight or nine years after his death ineffective for want of delivery); In re Martens' Estate, 226 Iowa 162, 283 N.W. 885 (1939) (daughter of decedent found sealed envelope in her mother's safe with note payable to her order; note invalid for want of delivery).

307. *New Port Richey*, 105 F.2d at 351.

> livery when it appears the completed instrument has come to a holder in due course.[308]

Thus, the donor of a gift must be careful lest he lose the right to change his mind.[309] Significantly, there is a case on all-fours with the problem posited in Example C above in which the payee admitted in open court having stolen the instrument. In *Sapiro v. Rutledge*[310] an aged maker of a $6,000 negotiable note[311] married the payee. Three weeks later, feeling ill, he prepared the note, making it payable on his death.[312] He showed it to his wife who watched him put it into a tin box in his safe. The parties were later divorced. At the divorce trial, the wife testified about the details surrounding preparation of the note and admitted that she secretly took it from the box about five months after it was signed because she was afraid that her husband would destroy it. In a subsequent action on the note by the wife's lawyer, the court, after admitting a transcript of the wife's testimony in the divorce case, held:

> The note was obtained by the payee surreptitiously and against the will of the maker, and . . . there never was any intentional delivery of the note by the maker . . . . The only material question remaining is: Was the plaintiff a holder in due course? If the plaintiff was the holder in due course, he was entitled to recover . . . notwithstanding the defect of title of the payee.[313]

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308. *Id.* (emphasis added). The "conclusive presumption" of delivery language in Negotiable Instruments Law Section sixteen was omitted from the Code as unnecessary in view of the wording of U.C.C. § 3-306 "which places the full burden of establishing the defense of nondelivery" on the defendant when he lacks rights of a holder in due course. *See* U.C.C. § 3-306 Official Comment 4 (1983). This cuts off the defense of nondelivery to a holder in due course. *See* U.C.C. § 3-305 Official Comment 3 (1983).

309. *New Port Richey*, 105 F.2d at 350. *New Port Richey* continues:

> We do not regard as important the conflicting decisions made prior to the Negotiable Instruments Law touching liability on instruments stolen before delivery (*see* 8 AM. JUR. *Bills and Notes* § 620 (1963) and cases cited). Cases decided under the Negotiable Instruments Law tending to support our conclusions are collected in Angus v. Downs, 85 Wash. 75, 147 P. 630, L.R.A. 1915E, 351, and note in L.R.A. 1915E, 355. *See also* Rainier v. LaRue, 83 Ind. App. 28, 147 N.E. 312; Massachusetts Nat'[l] Bank v. Snow, 187 Mass. 159, 72 N.E. 959; Ensign v. Forrest, 251 Mass. 296, 146 N.E. 655; Gruntal v. United States F. & G. Co., 254 N.Y. 468, 173 N.E. 682, 73 A.L.R. 1337.

Id. at 350-51.

310. 190 Iowa 1032, 181 N.W. 257 (1921).

311. Notes were not accepted as negotiable instruments until the 1704 Statue of Anne gave them the same negotiable qualities as drafts. FARNSWORTH, *supra* note 14, at 44, 107.

312. Negotiable Instruments Law Section 4(3) recognized such instruments as negotiable. Keeler v. Niles, 103 Neb. 465, 172 N.W. 363 (1919). They will not work under U.C.C. § 3-109(2); but an acceleration clause (*e.g.*, "payable January 3, 2070 or upon my death, whichever sooner occurs") and postdated checks (in one case dated fifteen years ahead; *see* Smith v. Gentilotti, 371 Mass. 839, 359 N.E.2d 953 (1977)) have been successfully used under the Code. QUINN, *supra* note 95, at S3-8.

313. 190 Iowa at ____, 181 N.W. at 257.

The lawyer, however, never proved "that he paid anything for the note; nor that he had no notice of defenses; nor that he knew nothing of the circumstances under which the note was received."[314] The trial court's directed verdict for the defendant was unanimously affirmed, but only because the lawyer failed to prove holder in due course status, not because of the instrument's nonissuance.

In Example C, what if Drew arranged to give the writing to Pace when he arrived with the sketch but changed his mind upon viewing it? Even if the parties had entered into an oral bilateral contract, Drew could change his mind, destroy his check and, if sued on the underlying agreement, plead the Article Two statute of frauds[315] as an affirmative defense. If the payee stole the writing and negotiated it further into commerce, the writing might, because of its negotiability, fall into the hands of a holder in due course. By losing possession of the instrument, Drew would thereby lose his right to destroy and to plead unenforceability of a contract. The possible unhappy scenarios for a nonissuing preparer of an apparent instrument become Proustian in magnitude.

In *Miller v. Race*,[316] the bearer note was properly issued and thereafter stolen; hence, no "issuance" question was involved. Furthermore, when Lord Mansfield laid down the principle that instruments pass through commerce not like goods but like currency, he meant *issued* instruments and *issued* currency.[317] Similarly, when the law speaks to implementing the "intentions of a testator "in will construction cases, it means the intentions of a deceased testator, not the intentions of a living testator as expressed in an apparent will. When Article Three uses the word "instrument," it speaks to issued, not unissued, instruments — just as "currency" means issued, not unissued, money.

There is little doubt, for example, that if the United States prepared currency which underwent inspection and then was readied for delivery[318] and forty thugs surprised security at the mint and stole packets of notes ready for delivery to banks, the United States could recover these notes from the thieves. If the thieves used some of these notes which passed to good faith purchasers for value, the United States could get the notes back from the purchasers by taking the position that the notes were never issued and are not "cur-

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314. *Id.*
315. U.C.C. § 2-201 (1983).
316. *Supra* note 52.
317. *Supra* note 305.
318. It is "manually steel-banded and wrapped in packages for delivery," each currency package containing forty banks of one hundred notes each and weighing about eight pounds; or sometimes notes in units of one hundred are delivered from the machine for packaging prior to delivery to banks. FACTS ABOUT MONEY, *supra* note 9, at 12.

rency" until they are voluntarily delivered to banks as first holders.[319] The currency could undoubtedly be confiscated as if it were counterfeit,[320] and the good faith purchasers would be relegated to go after the transferors.

A person may say he "has" or "owns" money, but only the prospective issuer—the United States—has a right, even after its issuance, to destroy[321] currency.[322] A holder may destroy an instrument, and a preparer has the same right, but once a holder has voluntarily delivered, he cannot repossess and destroy.[323]

A preparer of an instrument has three choices: to issue, to destroy, or to retain. If he elects to retain, whether his conduct is labelled laches, estoppel, or Article Three impermissible ambivalence, unless there is a forged payee indorsement, a holder in due course will get the same rights on the instrument as if it was issued.

It seems, then, that the process of negotiation to a holder in due course generates into the atmosphere an electrical-like charge or legal synapse. In this current, as long as there is no forged indorsement, unissued paper crosses from nothingness into being. Title to the writing flashes from preparer to holder in due course by instantaneous adverse possession. The instrument simultaneously materializes, matures and cuts off all personal defenses of any party with whom the holder in due course has not dealt.[324] Having pulsated

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319. When member banks of the Federal Reserve System need money:
> They authorize the Federal Reserve bank to charge their reserve accounts and ship the currency. Usually, nonmember banks procure their currency through a correspondent member bank located in the same city as the Federal Reserve Bank, or by arrangement whereby the currency is shipped direct to the nonmember bank with the reserve account of the correspondent bank being charged for the shipment. To obtain Federal Reserve notes, a Federal Reserve bank applies to the Federal Reserve agent, a representative of the Board of Governors of the Federal Reserve System, who is located at the Reserve bank and who maintains a stock of unissued notes. In applying for notes, the bank must pledge with the agent the required collateral . . . .

Id. at 24. Regarding the collateral, *see supra* note 10. Delivery to one of the Federal Reserve banks is the "first delivery" or "issue" as used in the Code, however, Article Three does not apply to money. Commonwealth v. Saville, 353 Mass. 458, 233 N.E.2d 9 (1968).

320. If stolen and permitted to move in commerce without the prescribed collateral backup (*see supra* note 10), the general welfare and economy could be adversely affected. However, the Bureau of Printing and Engraving, Department of the Treasury, was unable to opine "without researching" the point as to whether the United States could recover unissued currency from good faith purchasers. Telephone interview with Bill Cobert, Esq., Legal Department, Bureau of Printing and Engraving, Dept. of the Treasury, April 11, 1985.

321. Incineration or pulverization is used until it is "reduced to an unidentifiable residue so that no recovery of the notes and of the distinctive paper on which they are imprinted" is possible. FACTS ABOUT MONEY, *supra* note 9, at 24. There are over two billion one dollar bills in circulation which normally last only eighteen months, and before being destroyed, all money goes through a careful verification and counting "special internal control process." *Id.*

322. Pieces of mutilated currency which are not clearly more than one-half of the original note will not be exchanged unless the Treasury is satisfied that the missing portions have been totally destroyed. No relief is granted for totally destroyed paper currency. *Id.* at 25-26.

323. *Supra* note 298.

324. *Supra* note 45.

over the line between appearance and reality, the instrument becomes enforceable. The holder in due course thus may[325] collect on an unissued instrument just as if it were issued.

VI. Conclusion

Under Article Three, where possession reigns as pope, title most frequently is a mere communicant. Justice and reason seem to huddle on steps outside the Code among thieves. Article Three's highest doctrinal commandment is and must be: Thou Shalt Not Fetter the Free Motion of Instruments in Commerce.

The existence of this strange meritocracy within concurrent legal worldviews at first glance seems an antithesis within a thesis. Article Three and the rights and risks which it appears to confer upon holders, owners, thieves, good faith purchasers and banks must and do peacefully co-exist with the rest of our laws and values. How?

The unissued instrument negotiated without forged indorsement when in the hands of a holder in due course becomes what it is not and is not what it is.[326]

The philosophy of the Code is that if instruments are to function as cash substitutes, the law must create and maintain arteries through which they will pass. The more movable the property, the more possession forces title out of the pilot's seat. One who holds voidable title to land may pass no better title than he himself has. *Nemo dat quod non habet.*[327] One who possesses voidable title to goods may pass a better title than he himself has to a bona fide purchaser for value.[328] Since commercial paper "flies" through commerce at much greater velocity than goods, when a holder in due course takes, even "issue" questions are left behind in the wake of the instrument's motion.

As one English court held in 1856, "One who has signed but not delivered a completed instrument is liable on it to an innocent purchaser though it should be lost or stolen from him.[329]

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325. The most difficult hurdle to overcome, as in all Article Three cases, is proof of holder in due course status. *See, e.g.*, Sapiro *supra* note 310. The elements of U.C.C. § 3-302 "are but doors which open onto breath-taking vistas of complex statutory and decisional law." WHITE AND SUMMERS, *supra* note 45, at 458.

326. SARTRE, *supra* note 3, at 70.

327. *Supra* notes 16-28, 54.

328. *Supra* note 224.

329. A.W. ROGERS, FALCONBRIDGE ON BANKING AND BILLS OF EXCHANGE 523 (7th ed. 1969), *citing* Ingham v. Primrose (1856) 7 C.B.N.S. 82, 85, 141 E.R. 745. "[N]on obstante the disapproval—directed rather to another point—expressed by Brett L.J. in Baxendale v. Bennett (1878), 3 Q.B.D. 525 at 532; *cf.* Swan v. North British Australasian Co. (1863), 2 H. & C. 175, at p. 184, 159 E.R. 73 . . . ." *Id.* As to "incohate bills," today's British authors state, "Thus if *A* signs a cheque form and does not complete it and it is stolen from his desk

The Code embodies the same approach. To a preparer of an instrument in negotiable form, Article Three mandates, "Issue your paper or destroy it; otherwise, despite lack of your volition, stand ready to pay a holder in due course."

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and filled in, *A* is under no liability to anyone on his signature, not even to a holder in due course, because he did not deliver it in order that it might be converted into a bill." K. SMITH AND D. KENNAN, ENGLISH LAW 448 (7th ed. 1982). *Compare* the provisions of U.C.C. § 3-115 regarding incomplete instruments.