spectively by corrective action. But it is almost never possible for the wrongdoer to take steps which will relate back to the wrongful act and render it legal.[17]

Torts—Conversion—Directed Verdict for Broker Innocently Consummating Sale of Fraudulently Acquired Goods Reversed—[Iowa].—The plaintiff, a livestock dealer, transferred fifteen cattle to a buyer who fraudulently misrepresented his identity in a face to face transaction and gave a worthless check in payment. The fraudulent buyer immediately shipped the cattle to the defendant, a commission broker operating under the Packers and Stockyards Act of 1921.[1] Before the plaintiff had taken any action, the defendant sold the cattle to a third party and paid the proceeds of the sale, less expenses and commission, to the fraudulent buyer. After the check was returned unpaid, the plaintiff instituted this action for damages against the defendant broker for conversion of the cattle. The trial court directed a verdict for the defendant. On appeal to the Iowa Supreme Court, *held*, the directed verdict is reversed and the case remanded, four justices dissenting. A subsequent petition for rehearing was denied. *Birmingham v. Rice Bros.*[2]

The stringent rule that a person who, however innocently, exercises dominion over another's property is absolutely liable for conversion[3] has been mitigated for bona fide purchasers in many instances, ostensibly in the interests of an unhampered flow of commerce. Thus, purchasers for value of stolen or fraudulently acquired negotiable instruments who take without notice acquire good title.[4] Purchasers of chattels and non-negotiable instruments are protected where the seller obtained his title by fraud[5] or was clothed by the owner with apparent authority to sell.[6] In the instant case, had the defendant broker purchased and resold the cattle rather than acted as agent, he would not have been

[17] There are exceptions. For example, contracts void because made by a corporation which has not complied with a statute prohibiting foreign corporations from maintaining suits until certified, may be validated by a later compliance with the statutory requirements. M. S. Cohn Gravel Co. v. Terry, 135 Okla. 275, 275 Pac. 1048 (1928).

[1] 42 Stat. 159 (1921), 7 U.S.C.A. § 181 (1921).

[2] 26 N.W. 2d 39 (Iowa, 1947).

[3] Pease v. Smith, 61 N.Y. 477 (1875); Rest., Torts § 229 (1934); Harper, Torts § 30 (1933).

[4] Negotiable Instruments Law, § 16; note 10 infra.

[5] Williston, Sales § 348 (2d ed. 1924).

[6] Uniform Sales Act § 23; Williston, Sales § 312 (2d ed. 1924). Goods sold in London's market overt cannot be reclaimed from a buyer for value without notice. Case of Market-Overt, 5 Coke 83b, 3 Fraser's Notes 167 (1583–1608); Hill v. Smith, 4 Taunt. 520 (1812). The continental systems are even more indulgent in favor of purchasers; title may in many cases be passed by one in possession without other claim to ownership. Schuster, Principles of the German Civil Law, 390–99 (1907).

liable for conversion because the fraudulent party had obtained a title which, though voidable, was capable of being conveyed to a bona fide purchaser.[7]

The courts have been reluctant to extend a comparable degree of protection to innocent agents of fraudulent parties. Mr. Justice Blackburn contended in *Hollins v. Fowler*[8] that an agent or broker is liable to the owner for conversion if he is instrumental in transferring custody of a chattel with the knowledge that his principal purports to pass title to such chattel. The influence of his dictum, though not generally acknowledged, is apparent in the decisions of the American Courts.[9]

The law of negotiable instruments furnishes the leading exception to this strict doctrine of absolute liability for conversion by the agent. The common-law protection for innocent purchasers of stock certificates and bonds endorsed in blank[10] and the more comprehensive immunity for bona fide purchasers

[7] Whether the fraudulent dealer obtains a title by his fraud depends upon whether or not the owner intended to pass the title to him. Williston, Sales § 346, 346a (2d ed. 1924). In a face to face transaction, as in the instant case, the general rule is that the seller intends to pass the title primarily to the physical person before him and only incidentally to the name he uses and that the primary intent is determinative. Ibid., at § 635. But in a face to face transaction, if the sale is for cash and payment is by check, it has been held that the seller's presumed intent is that the title not pass until the check is honored even though the possession is passed. Thus, if the check is dishonored, the seller may assert his title against an innocent purchaser without notice. Nat'l Bank of Commerce v. Chicago, B. & N. R.R. Co., 44 Minn. 224, 46 N.W. 560 (1890); Johnson-Brinkman Commission v. Central Bank, 116 Mo. 558, 22 S.W. 813 (1893); Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N.W. 260 (1941). The payment by check exception has been vigorously attacked as follows: "Where the goods are put into the buyer's hands without more, it can hardly be doubted that the seller means to allow him to deal with them as his own; to resell them immediately if he feels inclined." Williston, Sales § 346a (2d ed. 1924). Later cases have followed Professor Williston's argument: Kemper Grain Co. v. Harbour, 89 Kan. 824, 133 Pac. 565 (1913); Kent v. Wright, 175 P. 2d 802 (Okla., 1946).

[8] L.R. 7 H.L. 757 (1875). Justice Blackburn thought that as an innocent broker the defendant was a converter. Justice Brett opposed this view strongly. One other justice agreed with Brett. The seven other justices who presented arguments to the House of Lords based their contentions on the assumption that the defendant was not a broker, as the jury found, but rather a purchaser liable for conversion. The decision of the Lords treated the defendant as a purchaser, but in their dictum they agreed with Blackburn that even if they were brokers, they were liable for conversion. See Warren, Trover and Conversion, An Essay, 83–85 (1936). It is noteworthy that one point of controversy in the case was whether the liability for conversion is as strictly applicable to innocent brokers as innocent purchasers, while today the problem is whether the law should be as lenient with brokers as it is with purchasers.

[9] Rice v. Yocum, 155 Pa. 538, 26 Atl. 698 (1893); Semple v. Morganstern, 97 Conn. 402, 116 Atl. 906 (1922); Rest., Agency § 349 (1933); Rest., Torts § 233 (1934); Mechem, Agency § 2583 (2d ed. 1914); Delaney v. Wallis, L.R. 14 Ireland 31 (Ex. Div., 1883), where an innocent salesmaster in market overt was held liable for selling stolen goods. See note 20 infra. The innocent agent buying for a bona fide purchaser, contrary to an agent selling for the fraudulent party, has the same protection as his principal in buying an encumbered title. Hollins v. Fowler, L.R. 7 H.L. 757, 764 (1875). Whether the agent's principal is the fraudulent seller or the bona fide purchaser may be difficult to determine. There seems to be no particular reason why a stockbroker, for example, is any more the agent for the seller than for the buyer.

[10] Under the common law if an owner entrusted bonds payable to bearer, stock certificates, or money to another's possession, the owner was estopped from denying the title of a purchaser for value without notice from the possessor because the owner had "clothed the rascal

under the negotiable instruments statutes[11] have been extended to innocent brokers and agents in the majority of jurisdictions where the situation has arisen.[12] The United States Supreme Court, in upholding a decision finding a broker a holder in due course under the Illinois Negotiable Instruments Law, maintained that "The Negotiable Instrument Law must be interpreted in view of the intended end—here, the free circulation of negotiable paper. . . ."[13] The state supreme courts endorsing a similar view have generally applied the arguments for protecting bona fide purchasers of negotiable instruments to innocent agents.[14]

Furthermore, the New York Court of Appeals has refused to hold a broker liable for conversion because he was "a mere conduit between seller and purchaser."[15] Thus, this court does not limit its protection of brokers to the basic policy enunciated in the negotiable instrument statutes. The "mere conduit" rationale should be equally applicable to brokers not only of negotiable instruments, but to brokers of chattels and non-negotiable instruments as well if they serve as mere conduits between seller and purchaser.

The few decisions holding agents or brokers dealing with fraudulently acquired or stolen chattels blameless in an action for conversion are usually justified on the grounds that 1) the agent serves as a mere conduit between seller or purchaser,[16] or 2) the agent serves as a public utility whose relationship to the principal has become impersonal in the interests of an unobstructed commerce.[17] The public utility rationale has usually appeared as obiter dicta in

---

with the indicia of ownership." McNeil v. Tenth Nat'l Bank, 46 N.Y. 325 (1867). A common law minority view also protected buyers of stolen negotiable instruments. Worchester County Bank v. Dorchester & Milton Bank, 10 Cush. (Mass.) 488 (1852); Shipley v. Carroll, 45 Ill. 285 (1867).

[11] Negotiable Instruments Law § 16.

[12] Graham v. White-Phillips Co., 296 U.S. 27 (1935); Spooner v. Holms, 102 Mass. 503 (1869); Pratt v. Higginson, 230 Mass. 256, 119 N.E. 661 (1918); Gruntal v. United States Fidelity & Guaranty Co., 254 N.Y. 468, 173 N.E. 682 (1930); First Nat'l Bank of Blairstown v. Goldberg, 340 Pa. 337, 17 A. 2d 377 (1941); Rest., Agency § 349, comment g (1933); Rest., Torts § 233, subsection 4 (1934). Contra: Kimball v. Billings, 55 Me. 147 (1867), distinguished in a later case on the ground that the agent still had the proceeds or equal security when sued. Smith v. Harlow, 64 Me. 510, 516 (1874).

[13] Graham v. White-Phillips Co., 296 U.S. 27 (1935), noted in 45 Yale L. J. 539 (1936).

[14] Pratt v. Higginson, 230 Mass. 256, 119 N.E. 661 (1918); First Nat'l Bank of Blairstown v. Goldberg, 340 Pa. 337, 17 A. 2d 377 (1941).

[15] Gruntal v. United States Fidelity and Guarantee Co., 254 N.Y. 468, 474–75, 173 N.E. 682, 684 (1930). "A broker is a mere conduit between seller and purchaser. The harshness of such a rule [liability for innocent conversion] has been recognized by the courts in repudiating his liability. Public policy does not demand the extension of liability for innocent acts to such a case."

[16] Greenway v. Fisher, 1 Car. & P. 190 (1824); Abernathy v. Wheeler, 92 Ky. 320, 17 S.W. 858 (1891); Nanson v. Jacob, 93 Mo. 311, 6 S.W. 246 (1887); Cresswell v. Leftridge, 194 S.W. 2d 48 (Mo. 1946).

[17] Greenway v. Fisher, 1 Car. & P. 190 (1824), holding a packer and shipper for the converting principal not liable because he was exercising a public employment and was a mere

cases of public carriers concerned only with the transfer of possession, not the title negotiations.[18] But several courts have extended immunity on the public utility grounds to public warehousemen and commission brokers who had transferred title as well as possession.[19]

The principal obstruction to extending immunity from liability for conversion to innocent agents as freely as to bona fide purchasers appears to take the form of that ancient maxim of agency law that "an agent stands in the shoes of his principal."[20] Although the fraudulent party may have the power of conveying good title to purchasers, such fraudulent person is none the less a converter. And inasmuch as the agent "stands in the shoes of his principal" he too becomes a converter.

It should be apparent that many modern agency relationships do not justify this conceptual reasoning. This oft-quoted maxim of agency was evolved during an era of commercial transactions which featured a close personal relationship between agents and principals. These personal agency relationships have in great part given way with the growth of impersonal public agencies. In these new situations the traditional rules of agency have become obsolete to some extent.[21] The few exceptions extending immunity from conversion liability to innocent agents are generally predicated on this changing position of the agent in the modern commercial society.

The argument for excepting the broker from liability in the present case is

---

trade conduit. Justice Brett in his opinion in Hollins v. Fowler argued that in spite of the public employment reference, the true ground for the decision in Greenway v. Fisher was that the agent had only possession of the goods, and ". . . . his asportation was made without consideration of the question of whose property the goods were." 7 Q. B. 616, 629 (1872). Rooch v. Turk, 9 Hersk. (Tenn.) 708 (1871); Blackwell v. Laird, 236 Mo. 1217, 163 S.W. 2d 91 (1942); Leuthold v. Fairchild, 35 Minn. 99, 28 N.W. 218 (1886), later distinguished as applying to the special case of banks handling only the representative documents and not the goods themselves in Johnson v. Martin, 87 Minn. 370, 92 N.W. 221 (1902).

[18] Switzler v. Northern Pac. Ry., 45 Wash. 221, 88 Pac. 137 (1907); Shellnut v. Central of Ga. Ry., 131 Ga. 404, 62 S.E. 294 (1908); Hall v. Cumberland Pipe Line Co., 193 Ky. 728, 237 S.W. 405 (1922). The agent must both negotiate the transaction which purports to transfer a property interest and transfer the possession of the chattel in consummation thereof to make him liable for a conversion. Rest., Torts § 233, subsections 2, 3 (1934); Rest., Agency § 349, comment d (1933); Moore, Carriers 283–84 (2d ed. 1914).

[19] Rooch v. Turk, 9 Hersk. (Tenn.) 708 (1871); Abernathy v. Wheeler, 92 Ky. 320, 17 S.W. 858 (1891); Blackwell v. Laird, 236 Mo. 1217, 163 S.W. 2d 91 (1942).

[20] In refusing a petition for rehearing the court directed that the following be deleted from the opinion as originally handed down: "If the principal is bound by constructive notice . . . . the factor is also bound thereby. . . . . The test of the liability of a factor . . . . is the liability of his principal." Birmingham v. Rice Bros., 26 N.W. 2d 39 (Iowa, 1947). The "like principal like agent" rationale did not appear in the earliest agency conversion cases. Stephens v. Elwall 4 M. & S. 259, 105 Eng. Reprint 1830 (1815). The use of this concept in later decisions suggests that its purpose was to prevent the extension of purchaser protection to agents. Hoffman v. Carow, 22 Wend. 285 (N.Y. 1839); Delaney v. Wallis, L.R. 14 Ireland 31 (Ex. Div. 1883) where a salesmaster in market overt was held liable for innocently selling stolen property.

[21] Steffen, Cases on Agency, 1 (1933).

twofold. First, this commission broker is of the class of agents in the commercial society that has, in attaining a public utility status, outgrown the traditional agency rules of liability. Secondly, the agent in this situation is in a position analogous to that of a bona fide purchaser in that commercial channels could become ensnarled if the confirmation of transactions were to await a complete investigation of the owner's title. Therefore, the agent should be similarly protected. Underlying both of these arguments is the basic practical consideration as to who shall bear the ultimate risk or loss, considering the relative commercial positions involved.

The division of opinion in the Iowa Supreme Court apparently stems from the different views taken by the majority and minority in appraising the broker's commercial status. The majority did not recognize a sufficient distinction in this agent's position to justify the court's exempting him from the agent's traditional liability.[22] The minority, on the other hand, although agreeing with the majority that on traditional agency principles the defendant was liable, maintained that in this case the agent had acquired the status of a public utility and therefore should be accorded a different treatment from that applied to ordinary agents. The dissenting opinion finds reinforcement for its contention in the Packers and Stockyards Act of 1921,[23] which requires market agencies to furnish their services without discrimination. The dissenting judges infer from this Act that Congress recognized the change of "the status of these agencies from that of ordinary factors to that of public utilities." They further contend that burdening the agent with liability for conversion in this case is not only unreasonable considering the agent's commercial status, but would unnecessarily obstruct the agent in the performance of his statutory duty.[24]

Although the immunity for innocent public agents as well as for bona fide purchasers is usually placed on the grounds that the flow of commerce will be freed, it is unlikely that strict liability for conversion has a material effect upon the flow of commerce.[25] The great majority of large public agents undoubtedly assume the risk rather than retard any possible consummation of the transactions. The less sophisticated considerations of the comparative equities involved offer a more realistic basis for the exceptions. The owner (though presumed to be as free from negligence as the innocent buyer) in most cases appears more to "blame," for he has initiated the chain of events leading to the loss by his posi-

[22] Birmingham v. Rice Bros., 26 N.W. 2d 39 (Iowa, 1947), following the weight of authority as to stockyards agents. See also First Nat'l Bank of Pipestone v. Simon, 67 S.D. 514, 275 N.W. 347 (1937); Mason City Production Credit Co. v. Sig Ellingson & Co., 205 Minn. 537, 286 N.W. 713 (1939), cert. den., 308 U.S. 599 (1939). Contra: Blackwell v. Laird, 236 Mo. 1217, 163 S.W. 2d 91 (1942).

[23] Note 1 supra.

[24] Birmingham v. Rice Bros., 26 N.W. 2d 39, 46 (Iowa, 1947).

[25] Commenting on Hollins v. Fowler, Professor Warren says, "We doubt if any cotton brokers were deterred by the decision from going on with their business." Warren, Trover and Conversion, an Essay, 95 (1936).

tive action in placing the fraudulent party in a position to perpetrate the deed. Furthermore, the owner seems to be in a more advantageous position to protect the goods.[26] These considerations apply as logically in cases involving impersonal agents as in those involving bona fide purchasers. In addition it would seem that the agent's compensation would not make title investigation economically practical.

The commercial wisdom of expanding the protection for agents has not gone unchallenged. It has been pointed out that if brokers are held liable to the owner for selling encumbered securities and goods, they will examine the title carefully and thereby afford a good deal of protection to owners of negotiable instruments. It is contended that the resulting delay in transactions due to such a requirement is minimal on the whole since almost all honest sellers have such familiar relations with brokers that it would be unnecessary to check their titles.[27] A realistic survey of agents, commission brokers, and factors in the commercial society of today would seem to indicate otherwise. Non-discriminatory statutes, such as the Packers and Stockyard Act, have further decreased personal relations between agents and principals. Furthermore, making the broker liable in order to increase his vigilance may serve to lessen the owner's incentive to be vigilant in many situations where placing the duty on the owner would be more fruitful in preventing the loss.

From the standpoint of sound commercial policy a more convincing argument for placing the burden of the risk of these losses on the agencies is that they are in a relatively better position than the owners to insure against the loss and account for the insurance as a cost item in determining fees and commissions. The brokers can thus assume a cost determining and allocation of risk function that, in most cases, cannot be undertaken by sellers with a high degree of certainty because of the smaller number of transactions usually involved.[28]

Zoning—Municipal Rezoning Amendment Invalidated—"Best Use" Test Adopted by State Supreme Court—[Illinois].—In 1941 the plaintiff, seeking an industrial site, purchased part of a fifty-three acre vacant tract of land, originally zoned in 1923 for manufacturing use. This purchase is shown as A on the accompanying diagram. In 1923 the tract was occupied by two brick-manufacturing companies. This use was later abandoned. Facing the tract on bordering

[26] Cowen v. Pressprich, 117 N.Y. Misc. 663 (1922) illustrates such a situation. Judge Lehman's dissent was adopted by the Appellate Division in reversing the decision holding the defendant liable for conversion. 194 N.Y. Supp. 926 (1922).

[27] Warren, Trover and Conversion, an Essay, 95 (1936); Warren, Margin Customers, 129 (1941). Professor Warren also argues that it is not sensible to hold the negotiable instrument broker not liable for conversion while the chattel agent is held liable for conversion. The chattel owner as a result is given a remedy against both buyer and agent while the negotiable instrument owner is left with a claim against no one but the thief. Ibid. at 132, 133.

[28] See Douglas, Vicarious Liability and Administration of Risk, 38 Yale L. J. 584, 720 (1929).