

**Authority of Sale and Privity of Contract:
The Proprietary Basis of the Right to the Proceeds of Sale
at Common Law**

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Introduction

Upon an authorized sale of goods, the owner's ability to recover the price from the buyer can be explained either by his property in the goods or by a contractual relationship. This article deals with the right to recover the price in the context of an historical and theoretical analysis of the right to the proceeds of a sale at common law. It is suggested that property is the basis of this right, rather than a contractual nexus. Part I presents the sale of goods by an agent of an undisclosed principal as a model situation in which the right of the owner is better explained by a property analysis than by means of the contractual relationship. Part II deals with debt both as an old remedy based on property and as a modern substantive legal relation, and shows how it underlies the owner's right to recover the price. Part III analyzes the eighteenth-century factor cases that are said to lay down the doctrine of the undisclosed principal; the discussion is designed to demonstrate the proprietary basis of these cases and to show that they are not governed by a contract analysis. Finally, Part IV presents the right of an owner to the cash proceeds of a sale as a continuation of his right against the buyer. The discussion presents the proprietary basis of the right as an explanation of its scope and limits, and illustrates the different effects of sale by factor, by consignee on "sale or return", and by an agent extending credit to the buyer.

I. The remedy of the undisclosed principal

If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintained upon it, either in the name of

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the person with whom it was *actually* made, or in the name of the person with whom *in point of law* it was made.¹

This is the doctrine of the undisclosed principal.² In addition to the actual contract established between the third party and the agent contracting in his own name, a contractual relationship is said to exist³ between the undisclosed principal and the third party.⁴ The doctrine is clearly inconsistent with fundamental principles of privity, under which only a party to the contractual promise can sue and be sued on it.⁵ As such, it has been criticized as anomalous.⁶ In the words of Holmes, "common sense is opposed to allowing a stranger to my overt acts and to my intentions, a man of whom I have never heard, to set up a contract against me which I had supposed I was making with my personal friend".⁷ It was further indicated by Bowstead that "[e]ven as an exception to the rules of privity of contract the doctrine is unusual, since the *tertius* is not

¹ *Cothay v. Fennel* (1830) 10 B. & C. 671, 109 E.R. 599, 600 (K.B.) *per curiam* [emphasis added].

² It has been said that this doctrine is "unknown to every legal system except that of England and America": Pollock, (1887) 3 L.Q.R. 358, 359. For other legal systems, see in general Müller-Freienfels, *Comparative Aspects of Undisclosed Agency* (1955) 18 M.L.R. 33. For the doctrine of the undisclosed principal in general, see Stoljar, *The Law of Agency* (1961), 203; Bowstead, *Bowstead on Agency* 14th ed. (1976), Reynolds & Davenport (eds.), 256; Powell, *The Law of Agency* 2d ed. (1961), 151.

³ Exceptions exist in certain contracts which either "identify" the agent or else are "personal" to him. See in general Fridman, *The Law of Agency* 4th ed. (1976), 193-96.

⁴ With respect to the doctrine of the third party's election of defendant (the undisclosed principal or the contracting party), see Stoljar, *supra*, note 2, 216-20.

⁵ For privity of contract, see in general Treitel, *The Law of Contract* 4th ed. (1975), 416 *et seq.*; Anson, *Law of Contract* 24th ed. (1975), Guest (ed.), 396 *et seq.*

⁶ See *Keighley, Maxted & Co. v. Durant* [1901] A.C. 240, 261 (H.L.) *per* Lord Lindley; *Armstrong v. Stokes* (1872) L.R. 7 Q.B. 598, 603-4, 610 *per* Blackburn J.; Street, *The Foundations of Legal Liability* (1906), vol. 2, 478; Ames, *Undisclosed Principal — His Rights and Liabilities* (1909) 18 Yale L.J. 443; Goodhart & Hamson, *Undisclosed Principals in Contract* (1932) 4 Cambridge L.J. 320; Holmes, "The History of Agency" in A.A.L.S., *Select Essays in Anglo-American Legal History* (1909), vol. 3, 368 (first published in (1891) 4 Harv. L. Rev. 345) and 390 (first published in (1891) 5 Harv. L. Rev. 1); Pollock, (1898) 14 L.Q.R. 5; Pollock, *supra*, note 2.

Besides "anomalous", the doctrine of the undisclosed principal has been called "unsound", "inconsistent with elementary principle", and even "unjust". See Stoljar, *supra*, note 2, 203, n. 3. A summary of the critique of the doctrine and the explanations suggested appears in Stoljar, *ibid.*, 228-33.

⁷ Holmes, *supra*, note 6, 404.

mentioned, nor indeed contemplated by one of the parties, and furthermore, takes liabilities as well as rights".⁸

Nevertheless, the doctrine has survived this criticism, having served a useful commercial purpose.⁹ Besides protecting the undisclosed principal in the case of his agent's bankruptcy,¹⁰ the doctrine has the effect of accomplishing in one action what otherwise would have taken two. It provides the owner with a direct action against a buyer of his goods who purchased them through an agent contracting in his own name. Reciprocity would then seem to require that the buyer be allowed to sue the undisclosed principal.¹¹ However, an agent contracting in his own name may be paid by the buyer, and then abscond with the proceeds without accounting to his principal. Nevertheless, the defrauded undisclosed principal, under the contract of sale, will remain liable to the buyer for any breach of a warranty given by his agent.¹² In addition, under the law of sale of goods, resale to a third party by a seller or buyer in possession,¹³ although in breach of the original contract of sale, "shall have the same effect as if the person making the delivery or transfer were expressly *authorized* by the owner of the goods to make the same".¹⁴ The defrauded party thus becomes a notional

⁸ Bowstead, *supra*, note 2, 257.

⁹ Bowstead, *ibid.*; Anson, *supra*, note 5, 596; Treitel, *supra*, note 5, 502.

¹⁰ Subject to the reputed ownership rule of *The Bankruptcy Act, 1914*, 45 Geo. V, c. 59, s. 39(c) (U.K.).

¹¹ Mechem, *The Liability of an Undisclosed Principal [Part] I* (1910) 23 Harv. L. Rev. 513. Cf. *Fawkes v. Lamb* (1862) 31 L.J.Q.B. 98, 101 *per* Blackburn J.: a broker cannot sue on a contract made by him on behalf of another, because he cannot be sued on it; "the liabilities of the parties on the contract are . . . reciprocal".

¹² Cf. *Irvine v. Watson* (1879) 5 Q.B.D. 414, 417-18 (undisclosed principal buying through agent remains absolutely liable to seller for price even after giving the money in good faith to his agent). But see Chitty & Denning (eds.), *Smith's Leading Cases* 13th ed. (1929), vol. 2, 366.

¹³ The third party must act in good faith and without notice — *The Factors Act, 1889*, 52-53 Vict., c. 45, ss. 2, 8, 9 (U.K.); *The Sale of Goods Act, 1893*, 56-57 Vict., c. 71, s. 25(1), (2) (U.K.).

¹⁴ *The Factors Act, 1889*, s. 8; *The Sale of Goods Act, 1893*, s. 25(1) [emphasis added]. Cf. definitions of "agency" and "authority", *infra*, note 25. The language of *The Factors Act, 1889*, s. 9 and *The Sale of Goods Act, 1893*, s. 25(2) is different but essentially — subject to the qualifications that emerge from *Newtons of Wembley Ltd v. Williams* [1965] Q.B. 560 (C.A.) — to the same effect: the resale by the buyer "shall have the same effect as if . . . [he] were a *mercantile agent* in possession of the goods . . . with the consent of the owner" [emphasis added]. Cf. U.C.C. § 2-403(2) (1972): "Any entrusting of possession of goods to a merchant . . . gives him *power* to transfer all rights of the entruster to a buyer in ordinary course of business" [emphasis added].

principal of the party in breach. Under the doctrine he, too, may find himself liable to the new buyer for breach of warranty.

In normal commercial arrangements, raising a contractual relationship between an undisclosed principal and a buyer may produce substantial injustice. First, when an agent who maintains a place of business under his own name becomes bankrupt, the principal's intention to recover from the agent's buyers the price of goods bought by them on credit may well be frustrated under the reputed ownership rule of *The Bankruptcy Act, 1914*.¹⁵ While in this case the principal derives no advantage from such a contract, he will nevertheless be held liable for breach of the agent's warranty to the buyer.

Secondly, it is far from universal that a principal will be entitled as against his agent to all the proceeds realized from the sale, or even to a substantial part thereof. An agent may be allowed to retain all the profit made by him over and above an agreed price and yet remain an agent.¹⁶ This extra profit may result from the labour he has put into the goods in his own place of business where the undisclosed principal has no means of control.¹⁷ The application of the doctrine to these circumstances produces the unjust result of making the undisclosed principal liable for the quality of that labour.¹⁸ However, even when the right of the agent to an extra profit stems from reasons other than his labour in the goods, it is still unjust to charge his principal with liability for breach of warranty when the agreed sum remitted to the principal does not represent the gain realized from the false warranty.

In a third situation — secured wholesale financing by means of title retention — “the principal does not enjoy all the gains or suffer the losses of ownership, such as any profit or loss

¹⁵ 4-5 Geo. V, c. 59, s. 39(c) (U.K.). See generally Williams, *Law and Practice in Bankruptcy*, 18th ed. (1968), Hunter & Graham (eds.), 325-26, 380. The “reputed ownership” clause has been omitted from the Canadian statute: see Duncan & Honsberger, *Bankruptcy in Canada* 3d ed. (1961), 299. Cf. U.C.C. § 9-114 (1972) and the Comment thereto, from which it emerges, by operation of U.C.C. § 9-301(1)(b) and the U.S. *Bankruptcy Act* § 70c, 11 U.S.C. §§ 1 *et seq.* (1976), that a consignor-principal who fails to file his interest in the proceeds will lose it in the case of bankruptcy of his agent.

¹⁶ See *Ex p. Bright, In re Smith* (1879) 10 Ch. D. 566, 570 (C.A.) *per* Jessel M.R.; *Ex p. White, Re Nevill* (1871) 6 Ch. App. 397, 405 *per* Mellish L.J. See also *Handy v. C.I.T. Corp.* 197 N.E. 64, 66 (Mass. 1935).

¹⁷ Cf. *Lloyds & Scottish Fin. Ltd v. Williamson* [1965] 1 All E.R. 641 (C.A.); *Ex p. White*, *supra*, note 16.

¹⁸ Cf. *Ex p. White*, *supra*, note 16, 404.

realized upon the sale".¹⁹ Whenever title to stock in trade is retained by a party who finances inventory under a trust receipt,²⁰ a conditional sale contract,²¹ a hire purchase agreement,²² or a consignment intended as security,²³ the sale of the goods by the dealer transfers the title to the buyer.²⁴ Thus, although ostensibly he may act in his own name, the dealer acts on behalf of the financing party, thereby becoming his agent for that purpose.²⁵ The scope of the agency is confined to each instance of transfer of goods and does not extend

¹⁹ *Handy v. C.I.T. Corp.*, *supra*, note 16, 66.

²⁰ For the domestic trust receipt in the U.S. as a title retention security device, see generally Gilmore, *Security Interests in Personal Property* (1965), vol. 1, 86-127. Regarding the dealer ("trustee") under that arrangement as an agent of the banker ("entruster"), see, e.g., *Handy v. C.I.T. Corp.*, *supra*, note 16; *International Trust Co. v. Webster Nat'l Bank* 154 N.E. 330 (Mass. 1926); *Foreign Trade Banking Corp. v. Gerseta Corp.* 142 N.E. 607 (N.Y. 1923). See also Glenn, *Fraudulent Conveyances and Preferences* rev. ed. (1940), vol. 2, 960-63; Gilmore, *Chattel Security II: The Trust Receipt* (1948) 57 Yale L.J. 761, 764; Skilton, *Cars for Sale: Some Comments on the Wholesale Financing of Automobiles* [1957] Wis. L. Rev. 352, 404-5. Cf. McGowan, *Trust Receipts* (1947), 76, n. 54. The trust receipt arrangement is governed now in the U.S. by U.C.C. § 9-102(2) (1972). Cf. the trust receipt in English law where it is seen as an integral part of a pledge transaction. Following the advance of money against a bill of lading, the bill of lading is released to the debtor under a trust receipt. In general, and for the borrower as an agent of the lender in selling the goods under the trust receipt, see *North Western Bank Ltd v. Poynter* [1895] A.C. 56 (H.L.); *Official Assignee of Madras v. Mercantile Bank of India Ltd* [1935] A.C. 53 (P.C.); *Lloyd's Bank Ltd v. Bank of America Nat'l Trust* [1938] 2 K.B. 147 (C.A.); *In re David Allester Ltd* [1922] 2 Ch. 211 (C.A.).

²¹ See *Aluminium Indus. Vaassen B.V. v. Romalpa Alum. Ltd* [1976] 1 W.L.R. 676, 690 (C.A.). Cf. *Commercial Sec. Ltd v. Johnson* [1931] 1 D.L.R. 861, 863 (B.C.C.A.).

²² Cf. Goode, *Some Problems of Hire-Purchase Law* (1962) 112 L.J. 35; Goode & Gower, "Is Article 9 of the Uniform Commercial Code Exportable?" in Ziegel & Foster (eds.), *Aspects of Comparative Commercial Law* (1969), 298, 312-13.

²³ Consignment intended as security is a consignment arrangement under which the consignee-agent bears the risk of non-sale. Cf. the definition of "security interest" in U.C.C. § 1-201(37) (1972); Goode & Gower, *supra*, note 22, 313-14. This is a security device rather than a true consignment. Cf. in general Henson, *Handbook on Secured Transactions Under the Uniform Commercial Code* (1973), 31-33.

²⁴ But see Ziegel, *The Legal Problems of Wholesale Financing of Durable Goods in Canada* (1963) 41 Can. Bar Rev. 54, 96-107.

²⁵ Note the following definition of "agency" in *Restatement of the Law of Agency* § 1(1) (1958): "Agency is the relationship which results from the manifestation of consent by one person to another that *the other shall act on his behalf* and subject to his control, and consent by the other so to act" [emphasis added]. See also the definition of "authority" in § 7: "the power

to the operation of the dealer's business in general. Therefore, it does not result in interference by the financing party in the operation of the dealer's business.²⁶ Yet, under the doctrine, the financing party will be held liable under the contract of sale between the dealer and the buyer.²⁷

The injustice of the doctrine lies in the fact that one who was not a contracting party may be held liable on the contract beyond his actual gain from it. Insofar as a contractual relationship is the only basis for the right to the proceeds of a sale, the claimant of this right must found his claim upon contract. Once considered a party to a contract, the undisclosed principal becomes liable for any breach of its terms. However, the assumption that the right to the proceeds of sale is grounded in a contractual relationship is erroneous. "Sale" is not only a contract; it is also a *conveyance*.²⁸ There is no conceptual obstacle in viewing the agent as both the principal under the contract²⁹ and the agent of the undisclosed principal in the conveyance of the latter's title to the buyer.³⁰ Indeed, there is some authority upholding contracts made by an agent which result in direct passage of property from the principal to the third party without giving rise to a contractual nexus between them.³¹ The principal's remedy is

of the agent to affect the *legal relations* of the principal" [emphasis added]. As for the "control" required under §1(1); note that a contract between principal and agent that control will not be exercised does not change the character of the relationship as agency. Cf. *Restatement*, §14, comment (b); *Weiner v. Harris* [1910] 1 K.B. 285 (C.A.).

²⁶ Notwithstanding the fear expressed to the contrary by Ziegel, *supra*, note 24, 105. Cf. *T.D. Dowing Co. v. Shawmut Corp.* 139 N.E. 525 (Mass. 1923), annotated (1924) 27 A.L.R. 1526. This case was wrongly criticized by Glenn, *supra*, note 20, 962-63.

²⁷ In the U.S., this result has been avoided by specific statutory provisions. See *Uniform Trust Receipts Act* §12, superseded by U.C.C. §9-317 (1972) (secured party not liable on contracts of his debtor).

²⁸ See, e.g., Salmond, *Jurisprudence* 12th ed. (1966), Fitzgerald (ed.), 339-40; Benjamin, *Benjamin's Sale of Goods* (1974), Guest (ed.), §21.

²⁹ The agent in such a case also personally warrants that "he has a right to sell the goods" under s. 12, *The Sale of Goods Act, 1893*. The section does not require that the contracting party undertake that the title transferred will be *his* title.

³⁰ Cf. *supra*, note 25 and accompanying text.

³¹ *Ireland v. Livingston* (1872) L.R. 5 H.L. 395, 408-9 *per* Blackburn J.; *Robinson v. Mollett* (1875) L.R. 7 H.L. 802, 809-10 *per* Blackburn J.; *Cassaboglou v. Gibb* (1883) 11 Q.B.D. 797, 806 *per* Fry J.; *Teheran-Europe Co. v. S.T. Belton (Tractors) Ltd* [1968] 1 Lloyd's Rep. 211, 216 *per* Donaldson J., *aff'd* in part [1968] 2 Q.B. 545 (C.A.); *Bolus & Co. v. Inglis* [1924] N.Z.L.R. 164, 174 *per* Salmond J. See in general Hill, *The Commission Merchant at Common Law* (1968) 31 M.L.R. 623.

based on the transfer of property and not on the contract. Its limitations are therefore governed by principles of unjust enrichment, rather than by those of the law of contract. The actual gain of the undisclosed principal thus becomes the upper limit of his liability, and the injustice and conceptual difficulty associated with the doctrine are avoided.

II. Right to collect the proceeds of sale: the debt relationship

The premise that the seller's claim for the price of goods rests on the proprietary right in the goods, rather than on any contractual promise of the buyer, has a long history in English law. One of the early common law writs for enforcement of what we would now call "contract" was the writ of debt.³² This writ was frequently used to demand the price of goods sold.³³ Under the old action of debt, in the absence of a deed,³⁴ the plaintiff's action was not dependent on the defendant's promise to pay,³⁵ rather, the defendant's duty to pay arose from his receipt of a benefit from the plaintiff.³⁶ In other words, it was the delivery of a *res* — a *quid pro quo* — which perfected the transaction and gave rise to the liability of the debtor.³⁷ As such, the transaction underlying a debt was "real",³⁸ and the recovery of the

³² Fifoot, *History and Sources of the Common Law* (1949), 220; Levontin, *Debt and Contract in the Common Law* (1966) 1 Israel L. Rev. 60, 60-64. For the old writ of debt, see also Ames, "Debt" in *Lectures on Legal History and Miscellaneous Legal Essays* (1913), 88; Simpson, *A History of the Common Law of Contract* (1975), 53-199.

³³ Fifoot, *supra*, note 32, 222; Levontin, *supra*, note 32, 65. See in general Milson, *Sale of Goods in the Fifteenth Century* (1961) 77 L.Q.R. 257.

³⁴ When the plaintiff relied on an obligation contained in a deed he sued [trans.] "in Debt on an obligation, for the obligation is a contract in itself": *Anon.* (1384) Bellewe 111, 72 E.R. 47. In other words, liability was generated by the obligation: see Fifoot, *supra*, note 32, 223-25.

³⁵ The promise was essential to fix the liquidated sum: see Denning, *Quantum Meruit and the Statute of Frauds* (1925) 41 L.Q.R. 79, 82.

³⁶ The action was then called "debt on a contract": Fifoot, *supra*, note 32. But note that "contract" in this context is not "promise" but rather the underlying "real" transaction. Hereafter in this part (unless specified otherwise), "debt" will denote "debt on a contract" in this special sense, rather than "debt on an obligation" as explained *supra*, note 34.

³⁷ For the doctrine of *quid pro quo* and its exceptions in early English law, see Levontin, *supra*, note 32, 65, n. 27; Fifoot, *supra*, note 32, 226 *et seq.* For the idea that the requirement of a *quid pro quo* in the action of debt (and hence the liability of the debtor) expressed a relief for unjust enrichment, see Dawson, *Unjust Enrichment* (1951), 9.

³⁸ Fifoot, *supra*, note 32, 225-27; Levontin, *supra*, note 32, 65.

creditor is grounded upon the fact that what is being claimed is the *res* previously handed over.³⁹

[While] obviously ... the purchase money paid for the goods never belonged to the seller ... [n]evertheless, in contemplation of law what the debtor owes is "representative" of what he has received, and it is as if he were called upon to give up the very same thing.⁴⁰

If liability is established by the passing of the *res* from the plaintiff to the defendant,⁴¹ then, where an undisclosed principal buys or sells through an agent, it would not matter who promised to pay the price of the goods to whom. What is important in both instances is who has acquired the property from whom.^{41a} The existence or non-existence of a promissory nexus between the defendant and the plaintiff is wholly immaterial.⁴²

By way of illustration, early English cases of debt in tripartite relationships will be examined. These cases deal with transactions by monks and married women, and by servants and business agents, on behalf of another.

As early as the fourteenth century, it was held that a monk's purchase of wool for the use of his house of religion gave rise to a debt of the Abbot of the House towards the seller, even though the promise to pay had been given to the seller by the monk personally.⁴³ The defendant argued that the plaintiff-seller had "counted

³⁹ In that respect debt was "very much like a claim in detinue": Denning, *supra*, note 35, 82. But *cf. Mortymer v. Mortymer* (1292) 20 & 21 Ed. I 188 (R.S.) (married woman who "could not bind herself" did not "owe" ("debet") and was therefore not liable in debt). The proposition either refers to the promise as an essential ingredient of the action in Debt so as to fix the liquidated sum (*supra*, note 35) or accepts the incapacity to contract of a married woman as founded on her proprietary disabilities: *infra*, note 57, and accompanying text.

⁴⁰ Levontin, *supra*, note 32, 68-69.

⁴¹ Under later developments the *res* could also move from a third party (*Harris v. de Bervoir* (1625) Cro. Jac. 688, 79 E.R. 596) or to a third party (*Shandois v. Simson* (1601) Cro. Eliz. 880, 78 E.R. 1104). For contracts for the benefit of third parties under debt, see in general Simpson, *supra*, note 32, 153-60.

^{41a} *Cf. Edgcomb v. Dee* (1670) Vaugh. 89, 101, 124 E.R. 984, 990: "an action of debt ... is an action of property" rather than on "a breach of promise".

⁴² Also in its expansion so as to cover an action to enforce a seller's obligation under an executory contract for sale, the action of debt was based (in theory at least) on viewing the agreement as transferring property, rather than generating enforceable promises: see Fifoot, *supra*, note 32, 227-29.

⁴³ *Randolph v. Abbot of Hailes* (1313-14) Eyre of Kent, 6 & 7 Edw. II (1912) 27 Selden Soc'y 32. An earlier case in *Anon.* (1307) Y.B. 33-35 Ed. I 566 (R.S.). For later medieval cases concerning purchasing by monks, see Simpson, *supra*, note 32, 540, nn. 1 and 2.

a contract made with . . . our monk . . . but not said that we were a party to the contract".⁴⁴ It was countered by the rhetorical question of Bereford C.J.: "If I sent my man to the market and he buy divers goods for my use and have them sent to my lodgings, and I use them, do you not think that I should be answerable?"⁴⁵ Delivery of the wool to the Abbot and its use for the profit of his House were thus held adequate to charge him with the debt created by the sale to the monk.⁴⁶ In other cases, a prior⁴⁷ and an abbot⁴⁸ were charged with their predecessors' debts from the purchase of goods used for the profit of the House. Furthermore, in an action in debt based on a loan of money⁴⁹ to a married woman, the plaintiff-lender did not recover the debt from her husband because he failed to plead "that she received [the money] for her husband's profit".⁵⁰ Indeed, in order to charge the defendant with the debt, the receipt of the property to his use and profit had to be shown.

However, the legal position of a monk and a married woman differed fundamentally from that of a servant, factor or bailiff.⁵¹ A monk could neither make a contract nor possess property in his own right. He was only capable of acting as an agent for his House;⁵² otherwise his contracts were void.⁵³ Even the assumption

⁴⁴ *Ibid.*, 33.

⁴⁵ *Ibid.*

⁴⁶ Note that the promise of the monk in this case was contained in a deed, but the action was not "in Debt on an obligation" (*supra*, note 34) but rather in "Debt on a contract" (*supra*, note 36). The monk's deed was produced only as evidence: *ibid.*, 32, 33. For the production of a deed as evidence of "contract", see *The Prior of Bradstock's Case* (1371) Y.B. 44 Ed. III f. 42 pl. 46, reproduced in Fifoot, *supra*, note 32, 247. Whether this possibility is consistent with *Salman v. Barkyng* (1422) Y.B. 1 Hen. VI (1933) 50 Selden Soc'y 114 (an "obligation" contained in a deed discharges the "contract") is beyond the scope of the present discussion.

⁴⁷ *Parker v. Prior of Blythburgh* (1314) Y.B. 8 Ed. II (1920) 37 Selden Soc'y 131 *per* Bereford C.J.

⁴⁸ *Anon.* (1516) Keil. 180, 72 E.R. 357.

⁴⁹ Loans were familiar causes for actions in Debt: see Levontin, *supra*, note 32, 65; Fifoot, *supra*, note 32, 221.

⁵⁰ *Anon. v. Musket* (1313) Eyre of Kent, 6 & 7 Ed. II 45, 47 (reproduced in Fifoot, *supra*, note 32, 39).

⁵¹ Factors and bailiffs constitute "a fourth species of servants . . . being rather in a superior, a ministerial capacity . . . [but as] servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property": Blackstone, *Commentaries* (1766), vol. 1, 427.

⁵² The designation of the "House" as the principal, while not legally accurate, reflects the present understanding of the true situation: see *infra*, note 54 and accompanying text.

⁵³ See in general Pollock & Maitland, *The History of English Law* 2d ed. (1952), vol. 1, 433-38.

of the abbacy was not tantamount to resumption of personal legal life. An abbot could charge only the house headed by him, and only in this limited non-personal sense could he charge his successor.⁵⁴ A married woman differed from a monk in that she could sue and be sued along with her husband,⁵⁵ and resume ownership in her original property after coverture.⁵⁶ However, during her marriage, she was incapable of contracting except in the name of her husband.⁵⁷ Therefore, a purchase made by a monk or a married woman for the benefit of their respective principals could only confer the property upon the principal himself. Had the principal not been charged with the debt, the transaction would have been null and void. Servants, factors and bailiffs, however, enjoyed full legal capacity and could own property and contract in their own right.⁵⁸ It could therefore be argued that a purchase made by any of them would vest the property in him so that he alone would be chargeable with the debt no matter to whose use and benefit the goods had been bought. Yet, while *possession* in goods delivered by a third party to a servant to the use of his master has always been considered to be possession by the servant,⁵⁹ it has been explicitly held that *purchase* by a servant to the use of the master charges the master:⁶⁰ "[i]f my bailiff buys [goods] to my use, I will be charged and the plaintiff will not [have to] show that the bailiff had authority or that [the goods] came to my use".⁶¹ Thus, purchase by a servant or a bailiff, while potentially distinguishable from purchase by a monk or a married woman, was not treated differently.⁶²

⁵⁴ *Ibid.*, 438.

⁵⁵ *Blaket v. Loveday* (1312) Y.B. 5 Ed. II (1916) 33 Selden Soc'y 211, 212 *per* Bereford C.J.

⁵⁶ Stoljar, *supra*, note 2, 38, n. 58.

⁵⁷ For a discussion of married women's contracts in the medieval common law, see Holdsworth, *A History of English Law* (1923), vol. 3, 528-29.

⁵⁸ Cf. Simpson, *supra*, note 32, 553: "the servant, unlike the married woman or monk ... is not himself by status contractually incompetent [.]"

⁵⁹ Pollock & Wright, *An Essay on Possession in the Common Law* (1888), 191-97. It had not been identified with the possession of the master, as was the case with respect to possession in goods delivered to the servant *by the master*: *infra*, note 87 and accompanying text.

⁶⁰ *Anon.* (1379) Bellewe 59, 72 E.R. 25; *Anon.* (1379) Bellewe 136, 72 E.R. 58. For later cases see Simpson, *supra*, note 32, 553, nn. 1 and 2.

⁶¹ *Anon.* (1379) Bellewe 110, 72 E.R. 47.

⁶² But purchase by a servant to the use of his master could charge the servant with liability in *assumpsit* (based on his promise to the seller), co-existing with the debt of his master: see *infra*, note 100 and accompanying text.

With respect to the position of factors, Ames argued that as between a factor and his principal, title to the goods "was always in the factor".⁶³ In support of this, Ames cited: (1) equity cases dealing with the right of the principal to the proceeds of sale; (2) cases dealing with the receipt of money by an agent from a buyer; (3) a case illustrating the inapplicability of the action in detinue to relations between merchant and factor; and (4) the nature of the action of account.⁶⁴ It is contended that none of these can support Ames's conclusion:

- (1) Inasmuch as the equity cases⁶⁵ suggest that a factor is the owner at law of goods consigned to him for sale, they are inconsistent with the view that the transfer of possession to a servant or an agent does not transfer the property,⁶⁶ and they are therefore not good authority.
- (2) The receipt of money, rather than goods, leads to consequences peculiar to money's nature as a fungible.⁶⁷
- (3) The case which ostensibly establishes the proposition that detinue does not lie between merchant and factor refers on its facts to the "expendable" quality of the goods dealt with and to their character as fungibles.⁶⁸ As such, it applies the known proposition that detinue does not lie for money "not in bags",⁶⁹ and does not support any broader proposition.

⁶³ Ames, "Account" in *Lectures on Legal History*, *supra*, note 32, 116. Ames's views have been adopted by Jackson, *The History of Quasi-Contract in English Law* (1936), 33; and by Goode, *The Right to Trace and Its Impact on Commercial Transactions-I* (1976) 92 L.Q.R. 360, 366.

⁶⁴ *Ibid.*, 116-17. Another ground was mentioned by Ames in a different context: see *infra*, notes 76-80 and accompanying text.

⁶⁵ *Burdett v. Willett* (1708) 2 Vern. 638, 23 E.R. 1017; *Ex p. Dumas* (1754) 2 Ves. 582, 23 E.R. 372; *Ex p. Pease* (1812) 19 Ves. 25, 34 E.R. 428.

⁶⁶ See *infra*, notes 84-88 and accompanying text.

⁶⁷ It gives rise to the establishment of a debtor-creditor relationship between the factor and his principal: see *infra*, Part IV. Both of the above points are discussed in more detail, *infra*, Parts III and IV.

⁶⁸ *Harris v. DeBevoise* (1625) Rolle 440, 81 E.R. 904: "[J]eo n'avera detinue vers un, a que jeo deliver marchandise à vender, quia sont expendable". The remark on this point was *obiter*. Note also that *Harris v. de Bervoir*, *supra*, note 41, is probably the same case; in the latter report the particular remark does not appear. The goods are characterized as fungibles either by nature ("jeo n'avera detinue unque pur chose expendable sur baylement", *ibid.*), or by substitution with money upon the sale thereof.

⁶⁹ See, e.g., *Clark's Case* (1614) Godb. 210, 78 E.R. 128. Cf. *infra*, notes 168 and 169 and accompanying text. An action in detinue affirms the property in the plaintiff: *Bishop v. Viscount Montague* (1601) Cro. Eliz. 824, 78 E.R. 1051. It is therefore unavailable against a bailee of fungibles.

(4) As for the nature of the action of account as applied to the principal-factor relationship, it seems that (notwithstanding Ames) "the person seeking to impose the obligation [to account] . . . must be the owner of the property in respect to which the obligation is sought to be imposed".⁷⁰ While there are some instances where non-owners have been allowed to sue in account,⁷¹ this fact is attributed to the focus of the action on the relations between the parties rather than on their absolute property rights.⁷² This focus has facilitated the expansion of the action to cover the interests of a non-owner whose situation *as between himself and the defendant* is analogous to that of the owner.⁷³ In general, then, Ames's view regarding title to goods held by a factor seems to be erroneous and unsupported by the authorities.⁷⁴

The strongest judicial challenge to the idea that purchase of goods by an agent or servant to the use of his principal or master conveys the property directly to the latter comes from *Hinson v. Burrige*.⁷⁵ The defendant's factor bought two hundred lambs to the defendant's use. The seller sued the defendant in *assumpsit* for the payment due. The defendant argued that he should have been sued in debt, to which all the judges responded that "the use is only a confidence, which does not give property to [the defendant] in law, so that debt does not lie against . . . [him], but action in *assumpsit* as brought".⁷⁶ No precedent is cited in support of that conclusion, nor does it seem that the case has ever been followed. Rather, it appears that shortly after the delivery of that opinion, the view

⁷⁰ Langdell, *A Brief Survey of Equity Jurisdiction* (1889) 2 Harv. L. Rev. 241, 245. See also Belsheim, *The Old Action of Account* (1932) 45 Harv. L. Rev. 466, 473-74.

⁷¹ Jackson, *supra*, note 63, 24-26, 32-34. The most typical case arises where A delivers (or bails) goods or money to B to the use of C; title moves directly from A to C (upon delivery from A to B) and if B declines to deliver the goods or money to C, B has been held accountable to A. For Year Book references, see Jackson, *ibid.*, 24-25.

⁷² Stoljar, *supra*, note 2, 211: "[The] property basis of the action [in account] became greatly obscured [I]nstead of [the] proprietary aspect being emphasized, account was said to lie against 'bailiffs, receivers and guardians', a formulation that strongly suggested . . . relationship [.]" Cf. Stephens, *An Agent's Duty to Account* (1975) 28 Current Legal Prob. 39.

⁷³ See, e.g., example in note 71, *supra*.

⁷⁴ It was argued by Belsheim, *supra*, note 70, 475, n. 54, that the cases cited by Ames "are certainly confined to money" and that "it may well be that there was no intention on his part to go any further than that".

⁷⁵ (1594) Moore K.B. 701, 72 E.R. 850.

⁷⁶ *Ibid.*

that purchase of goods to the use of another transfers title directly to him was reaffirmed⁷⁷ and has remained unchallenged in the case law.⁷⁸ The judges in *Hinson v. Burrige* probably sought only to dismiss the procedural objection of the defendant concerning the propriety of the cause of action.⁷⁹ Their decision should be read as meaning that a plaintiff could sue in *assumpsit* in the circumstances of the case. As such, the decision marks another point in the decline of the writ of debt, and its eventual takeover by *assumpsit*.⁸⁰ Therefore, any remark concerning the transfer of property should be disregarded.

Nothing in the early cases, whether dealing with a purchase by a monk, a married woman, a bailiff, or a servant, speaks of an undisclosed principal. While it was possible for the principal in any of these cases to be unnamed, the status of the actual buyer as a monk, a married woman, or a servant could have been known to the seller.⁸¹ Indeed, some of the cases refer to the fact that the servant had been known as the master's servant.⁸² However, the focus of all of them seems to be on the objective fact that the goods were purchased or came to the use of another, and not on the seller's knowledge of the buyer's status.⁸³ It is not clear whether the master's liability in these circumstances arises from the servant's purchase to his use, or from his receipt of the goods being a ratification of his servant's purchase.⁸⁴ Whatever the rationale, it emerges from these cases that the purchase of goods to the use of someone may confer

⁷⁷ See cases cited *infra*, notes 95-98.

⁷⁸ This is not to say that the case did not affect scholarly opinion. See, e.g., Ames, *supra*, note 6, 443, n. 10 and accompanying text; Jackson, *supra*, note 63, 33, n. 2 and accompanying text. See further *infra*, note 130.

⁷⁹ This is also the opinion of Stoljar with respect to that case: *supra*, note 2, 229, n. 48. But note the question mentioned there by Stoljar concerning the attribution of the servant's promise to the debt of the master; this question has never raised any difficulty.

⁸⁰ A summary of that process appears in Levontin, *supra*, note 32, 71-79.

⁸¹ Cf. Stoljar, *supra*, note 2, 204, n. 7.

⁸² E.g., the 1379 cases cited *supra*, note 60.

⁸³ See *supra*, note 61. Cf. cases cited *supra*, notes 45-51. But see Viner's *Abridgment* 2d ed. (1792), vol. XV, 332.

⁸⁴ The ratification theory seems to be supported by St. German's *Doctor and Student*, Second Dialogue (1530), in Plucknett & Barton (eds.), (1974) 91 Selden Society 175, 269, where it is said that "the contract shall not bind his master unless ... it came to the master's use *by his assent*" [emphasis added]. See also (1505) Y.B. 21 Hy VII Mich. pl. 64, as discussed by Holdsworth, *supra*, note 57, 529 (a husband will be charged with a debt arising from a purchase of goods made by his wife to his use only when he knows that the goods have come to his use).

the property directly upon that person. Since liability in debt is a matter of acquisition of legal title, that person will be charged with the debt that arises, even though he has never promised the seller payment.

The converse case — an undisclosed principal claiming the price of goods sold by his agent to a third party — is easier. The transfer of bare possession to a servant or an agent, even when coupled with authority to sell, is “closely analogous to simple bailment”.⁸⁵ A bailee has never been thought to have the *property* in the goods bailed to him but only the *possession*.⁸⁶ A servant has never been regarded as having even the possession in the goods entrusted to him by his master, his “custody” being identified with the master’s possession.⁸⁷ Thus, it was held that “where a merchant beyond sea consigns goods to a factor in *London*, who receives them, the factor in this case being only a servant or agent for the merchant beyond sea, can have no property in such goods”.⁸⁸ In terms of debt theory, it seems quite clear that the buyer would be liable for the price to the merchant, the owner of the goods. As was suggested by Holmes, the doctrine of the undisclosed principal began with debt — it “has no profounder origin than the thought that the defendant, having acquired the plaintiff’s goods by way of purchase, fairly might be held to pay for them”.⁸⁹ Since in debt it is not the promise of the buyer that charges him, the fact that the plaintiff-owner is not the promisee is wholly immaterial.

It should be observed, however, that early in the seventeenth century the action of *indebitatus assumpsit* superseded the action of debt as the common law action for the recovery of a money debt.⁹⁰

⁸⁵ Cf. Belsheim, *supra*, note 70, 473.

⁸⁶ If he altered the nature of the goods, the bailee could be sued by the bailor in detinue and not in case: see Simpson, *The Introduction of the Action on the Case for Conversion* (1959) 75 L.Q.R. 364, 372-74. This also applies when the bailee received the goods for sale: Pollock & Wright, *supra*, note 59, 161-62.

⁸⁷ Pollock & Wright, *supra*, note 59, 138-39; Holmes, *The Common Law* rep. (1946), 226.

⁸⁸ *Godfrey v. Furzo* (1733) 3 P. Wins 185, 24 E.R. 1022, 1023 *per* King L.C. See also *Scott v. Surman* (1742) Willes 400, 125 E.R. 1235, 1237; *Taylor v. Plumer* (1815) 3 M. & S. 562, 105 E.R. 721, 726.

⁸⁹ Holmes, *supra*, note 6, 393, nn. 3 and 4. Holmes viewed the action in that case as “an action of contract” (*ibid.*) but see *infra*, notes 102-105 and accompanying text.

⁹⁰ The landmark case is *Stade’s Case* (1602) 4 Co. Rep. 92b, 94a; 76 E.R. 1074, 1077, holding that “every contract executory imports in itself an *assumpsit*”. See in general Fifoot, *supra*, note 32, 358 *et seq.*; Levontin, *supra*,

In *assumpsit*, the liability of the defendant was based on his promise,⁹¹ and therefore it could be expected that problems of privity would arise.⁹² In enforcing a promise given to his servant, the master had to prove that the promise was "an Assumpsit to the Servant *for the Master*".⁹³ Likewise, it was held that an "Action for breach of . . . Promise ought to be brought against . . . the Master" where the "Promise is made by . . . a Servant *for the . . . Master*".⁹⁴ Yet in dealing with sale of goods, the courts continued to view the vesting of the property in the defendant to whose use the goods had been bought⁹⁵ as the ground for his duty to pay the price.⁹⁶ It was also held that "an Assumpsit by the appointment of the Master of the Servant, shall bind the Master, and is his Assumpsit";⁹⁷ yet this was only meant to bind the master to the *consequences* of his servant's purchase or sale — to provide the ground to charge the master with the *debt* arising from his servant's purchase, or to entitle him to the *debt* created by his servant's sale.⁹⁸ It fell short of

note 32, 74-79; Ames, "Express Assumpsit" in *Lectures on Legal History*, *supra*, note 32, 129, 145-48.

⁹¹ Levontin, *supra*, note 32, 74; Ames, *supra*, note 90, *passim*.

⁹² For the problem of privity in the early days of *assumpsit*, see in general Simpson, *supra*, note 32, 475-85.

⁹³ *Seignior & Wolmer's Case* (1623) Godb. 360, 361, 78 E.R. 212 *per* Dodderidge J. [emphasis added].

⁹⁴ *Anon.* (1646) Style's Practical Register (1707 ed.) 29 [emphasis added].

⁹⁵ See, e.g., *Moore v. Moore* (1611) 1 Bulst. 169, 80 E.R. 859, 860 *per* Yelverton J.: "If I do request one to buy . . . a gelding for me . . . and he buys . . . accordingly . . . before my taking of [it], the property of the gelding is not in him, who bought him to my use, but the property is in me who requested him to buy the gelding for me [.]"

⁹⁶ See, e.g., *Drope v. Theyar* (1625) Poph. 178, 79 E.R. 1274; *Anon.* (1645) Style's Practical Register (1707 ed.) 231 (*cf.* the report of this case in the 1657 ed. at 102). *Cf.* *Boulton v. Arltsden* (1698) 3 Salk. 233, 91 E.R. 797; *Southy v. Wiseman* (1676) 3 Keb. 630, 84 E.R. 920. *Cf.* also *Petties v. Soam* (1601) Gouldsb. 138, 75 E.R. 1049. But *cf.* *Buckley's Case* (1681-1683) 2 Lilly's Practical Register 250, *Viner's Abridgment*, *supra*, note 83, vol. XV, 310 (no. 9) *per* Pemberton C.J. (where a factor buys upon a *general* order (as opposed to an order to buy from a particular supplier), "the Factor is the Debtor, and not the Merchant"). The distinction is erroneous and is probably based on a mistaken analogy with a passage from St. German's *Doctor and Student*, *supra*, note 84, dealing with the liability of a master for the breach of warranty given by his servant.

⁹⁷ *Seignior & Wolmer's Case*, *supra*, note 93.

⁹⁸ For the sentence that follows tells us that "[i]f my Bailly of my Manor buy cattel to flock my grounds, I shall be chargeable in an *Action of Debt*; and if my Bailly sell corn or cattel, I shall have an *Action of Debt* for the money; For whatsoever comes within the compass of the servant's service, I shall be chargeable with, and likewise shall have advantage of the same": *ibid.* [emphasis added].

recognizing a promissory link between the master and the third party.⁹⁹ A promissory nexus with the third party in the context of the sale of goods mattered only when it actually existed with respect to a party against whom debt did *not* lie — a buying servant who “[bound] himself to payment”,¹⁰⁰ or a master who had been “trusted by the trader” and whose buying servant absconded with the goods.¹⁰¹ As between the seller and the master to whose use the goods had been bought, a promissory nexus did not matter; liability was based on the debt arising from the sale.

In fact, as a substantive legal relation (as opposed to a mere form of action or remedy), debt survived even the abolition of the forms of action in the nineteenth century.¹⁰² As such, debt has been “a conceptual bridge between property and obligation, between rights real and rights personal, between conveyance and contract, between choses in possession and choses in action”.¹⁰³ He who owns a debt is entitled “to the debt itself” rather than to damages for the breach of promise.¹⁰⁴ Thus *indebitatus assumpsit* has been an action on the *debt* arising from the executed contract. The requisite “promise” has been attributed to the receipt of the *res* from the plaintiff, rather than to the actual promise of the defendant to pay for it.¹⁰⁵ This proprietary basis of an action for the price of goods sold is reaffirmed by cases wherein the plaintiff, being an auctioneer¹⁰⁶ or a broker¹⁰⁷ for the seller, was allowed, by virtue of his

⁹⁹ For another view, see Stoljar, *supra*, note 2, 40 and 66.

¹⁰⁰ *Alford v. Eglisfield* (1564) 2 Dyer 230b, 73 E.R. 509. In such a case, the servant is charged with “an action on the case . . . upon an *assumpsit*”: *ibid.* His liability is concurrent with the master’s liability in debt: Simpson, *supra*, note 32, 555. On the other hand, if the servant “by express words” does not “bind himself to payment”, he “is not chargeable at all”: *Good-baylie’s Case* (1608) 2 Dyer 230b n., 73 E.R. 509.

¹⁰¹ *Aishcome v. Le Hundred de Spelholme* (1686) Holt K.B. 460, 90 E.R. 1153. Otherwise, “[i]f the master never had any previous dealing with a tradesman, but the tradesman’s dealings have all been with the servant . . . the master shall not be charged”: *Boulton v. Arlson*, *supra*, note 96, 234, n. (a).

¹⁰² Levontin, *supra*, note 32, 79-80.

¹⁰³ *Ibid.*, 61.

¹⁰⁴ *Ibid.*, 90-91. For a summary of the legal advantages of owning a debt, see *ibid.*, 90-97.

¹⁰⁵ See, e.g., Fifoot, *supra*, note 32, 400-1; Denning, *supra*, note 35, 82-84 [emphasis added]. See also Jackson, *supra*, note 63, 42.

¹⁰⁶ See, e.g., *Williams v. Millington* (1788) 1 Hy Bl. 81, 126 E.R. 49; *Benton v. Campbell, Parker & Co.* [1925] 2 K.B. 410; *Chelmsford Auctions Ltd v. Poole* [1973] Q.B. 542.

¹⁰⁷ See, e.g., *Atkyns v. Amber* (1796) 2 Esp. 493, 170 E.R. 431. Cf. *Fawkes v. Lamb*, *supra*, note 11, and *Fairlie v. Fenton* (1870) L.R. 5 Ex. 169 (in the absence of property in goods, broker could not sue buyer).

special property or lien in the goods, to recover the price from the buyer even as against his disclosed principal.¹⁰⁸ While "[i]n such a case the contract of sale . . . is made with the principal only" and the agent "does not sue for the price by virtue of the contract of sale",¹⁰⁹ "[t]he sale is of him who has the property in the things sold,"¹¹⁰ and "[a] proprietor . . . is entitled to receive the price of his own goods".¹¹¹ It is the agent's "special property and his lien"¹¹² that suffice to support his action.

It can be seen that the controlling principle is that "the *debt* [of the buyer] is due to the owner of the goods only".¹¹³ In the case of an undisclosed principal who sells through an agent, the debt is neither assigned¹¹⁴ nor transmitted¹¹⁵ to the principal but rather belongs to him from its inception; in bringing an action upon the contract, he sues on the debt arising therefrom and originally owed to him.¹¹⁶

Indeed, the theory that "[i]n a contract of undisclosed agency the consideration moves from the undisclosed principal to the third party" to create a contractual relation between them¹¹⁷ does not convey the true picture. Being unknown to the promisor, the undisclosed principal is not the promisee from whom consideration

¹⁰⁸ Cf. *Drinkwater v. Goodwin* (1775) 1 Cowp. 251, 98 E.R. 1070 (factor allowed to collect for own use price of goods sold by him by virtue of his lien in the goods).

¹⁰⁹ *Benton v. Campbell*, *supra*, note 106, 416.

¹¹⁰ *Atkyns v. Amber*, *supra*, note 107, 432 (argument of plaintiff adopted by Eyre C.J.).

¹¹¹ *Baring v. Corrie* (1818) 2 B. & Ald. 137, 145, 106 E.R. 317, 320.

¹¹² *Benton v. Campbell*, *supra*, note 106, 416.

¹¹³ *Houghton v. Matthews* (1803) 3 Bos. & P. 485, 489, 127 E.R. 263, 266 *per* Chambre J. [emphasis added].

¹¹⁴ For the view that "[t]he doctrine of the undisclosed principal is perhaps best considered as a primitive and highly restricted form of assignment", see Goodhart & Hamson, *supra*, note 6, 352.

¹¹⁵ For a characterization of the doctrine of the undisclosed principal as "transmissions of rights", see Stoljar, *supra*, note 2, 332.

¹¹⁶ Thus, an undisclosed principal who takes from his agent a promissory note made by the third party buyer to the agent's order does not qualify as a holder in due course. The negotiation does not *transfer*, but *perfects* a pre-existing interest. See *Bills of Exchange Act, 1882*, 45-46 Vict., c. 61, ss. 29(1) and 31(1) (U.K.). Cf. *Sisemore & Kierbow Co. v. Nicholas* 149 Pa. 376, 27 A. 2d 473 (Super. Ct 1942) and cases cited at (1955) 44 A.L.R. 2d 157.

¹¹⁷ For this view, see Müller-Freienfels, *The Undisclosed Principal* (1953) 16 M.L.R. 299, 301-12. The citation in the text is taken from page 306.

must move.¹¹⁸ He who has owned the *res* is entitled to the debt, and that is the essence of the right to the proceeds of a sale.

III. The eighteenth-century factor cases:

privity of contract or property right in the proceeds?

The first known contest between a merchant and his factor's creditor over the proceeds of goods sold by the factor before bankruptcy was won in a common law court by the creditor. According to a short note to *Burdett v. Willett*,¹¹⁹ Holt C.J., "after consideration"¹²⁰ maintained the creditor's action at law. Holmes thought this decision strange, as "a factor in those days always was spoken of a servant, and . . . Lord Holt was familiar with the identification of servant and master".¹²¹ Furthermore, Lord Holt must have been familiar with the rule of law that goods in the possession of a factor are nonetheless the property of the merchant.¹²² Lord Holt may have regarded both rules as irrelevant; his decision can then be viewed as standing for the proposition that an undisclosed principal is not a party to the contract for sale of his goods and consequently cannot recover the price from the buyer. Nothing in the report, however, supports the conclusion that the principal was in fact undisclosed to the third party. If he were undisclosed, the decision would be inconsistent with *Garrat v. Cullum*¹²³ (decided shortly after *Burdett v. Willett*), which held for the merchant. Since Lord Holt was involved in both cases,¹²⁴ the inconsistency between them seems inexplicable. Whatever the possible explanation, Lord

¹¹⁸ For the promisee as a party to the consideration, see in general Treitel, *supra*, note 5, 419. The consideration (in the form of a reciprocal 'contractual' undertaking) can easily be seen as moving from the agent. Cf. *supra*, note 29 and accompanying text (selling agent); *supra*, note 105 and accompanying text (buying agent). For the major distinction between 'benefit' in debt (i.e., *quid pro quo*) and consideration, see Fifoot, *supra*, note 32, 400.

¹¹⁹ *Supra*, note 65, 1018, n. 2. The report itself is of the Chancery Court decision.

¹²⁰ *Ibid.* The note makes it clear that the owner was a party to the proceedings at law.

¹²¹ Holmes, *supra*, note 6, 394.

¹²² See, e.g., *L'Apostre v. Le Plaistrier* (1708) 2 Eq. Cas. Abr. 113, 22 E.R. 96; 1 P. Wms 314, 318, 24 E.R. 404, 406; *Anon.* (1708) 1 Salk. 289, 91 E.R. 256; Buller, *Introduction to the Law of Trial at Nisi Prius* (1806), 35 (hereinafter cited as Bull. N.P.).

¹²³ Bull. N.P., *supra*, note 122, 42. See *infra*, notes 138-146 and accompanying text.

¹²⁴ Lord Holt's part in the case of *Garrat v. Cullum* is mentioned in the decision of Willes L.C.J. in *Scott v. Surman*, *supra*, note 88, 1238.

Holt's decision in the *Willett* case went unnoticed.¹²⁵ As the decision is not fully reported,¹²⁶ it is impossible to find the rationale behind it.

Following the decision at law, the merchant in *Burdett v. Willett* submitted a bill in equity wherein he applied for an injunction to restrain the buyers from paying the money to the creditor.¹²⁷ Holding for the merchant, the court disposed of the issue in one sentence: "The factor is in nature of a trustee only; and although he has the right at law, yet he is in equity but a trustee".¹²⁸ Insofar as the owner in *Burdett v. Willett* succeeded by virtue of his property right, the decision manifests the concept of tracing — following the right in the goods into their proceeds. However, the court's underlying assumption that legal title to the goods was in the factor is erroneous.¹²⁹ Since the merchant retained legal title, his relationship with the factor was not that of *cestui que trust* and trustee;¹³⁰ thus the rationale behind the decision seems to fall apart. While there is some modern support for the view that equity will aid in tracing a legal title,¹³¹ this view is neither overwhelmingly accepted¹³² nor consistent with the letter of *Burdett v. Willett*.¹³³

Nonetheless, the Lord Chancellor's decision in *Burdett v. Willett* should not be dismissed. Although technically incorrect, it was understood as a landmark case in the expansion of equity jurisdiction

¹²⁵ Holmes suggested that Lord Holt might be "the father of the ... doctrine" of the undisclosed principal: *supra*, note 6, 394.

¹²⁶ The only source of information as to the proceedings at law is the laconic note referred to *supra*, note 119.

¹²⁷ See *supra*, note 119.

¹²⁸ *Ibid.* Cf. the two other cases cited *supra*, note 65. Three years later, the Chancery Court in *Whitecomb v. Jacob* (1711) 1 Salk. 160, 91 E.R. 149, followed *Burdett v. Willett* and extended its principle to cover goods bought by the factor prior to bankruptcy out of proceeds of previous sales of the merchant's goods.

¹²⁹ See, e.g., Pearce, *A Tracing Paper* (1976) 40 Conv. (n.s.) 277, 280; cf. *supra*, notes 81-88 and accompanying text.

¹³⁰ But cf. *Lees v. Nuttal* (1829) 1 Russ. & M. 53, 39 E.R. 21; *aff'd* (1834) 2 My. & K. 819, 39 E.R. 1157 (C.A.) (buying agent for undisclosed principal a trustee). See also Ames, *supra*, note 6; for criticisms of Ames, see Seavey, *The Rationale of Agency* (1920) 29 Yale L.J. 859, 879; Stoljar, *supra*, note 2, 230.

¹³¹ See, e.g., Pearce, *supra*, note 129; Oakley, *The Prerequisites of an Equitable Tracing Claim* (1975) 28 Current Legal Prob. 64.

¹³² See, e.g., Maudsley, *Proprietary Remedies for the Recovery of Money* (1959) 75 L.Q.R. 234 (criticism of the rule that equity will trace only separate equitable title).

¹³³ See *supra*, note 128 and accompanying text.

into fiduciary relationships analogous to those created by trust.¹³⁴ Though an agent "is not a trustee . . . he is *quasi* a trustee for that particular transaction for which he is engaged and therefore in these cases the Court of Equity has assumed jurisdiction".¹³⁵ Accordingly it is almost unanimously accepted¹³⁶ that even if equity does not aid in the tracing of legal rights, those equitable proprietary remedies that are available to trust beneficiaries are also available to principals whose property is in the control of another.¹³⁷

*Garrat v. Cullum*¹³⁸ was an action for money had and received¹³⁹ by a merchant against his factor's assignees in bankruptcy for the price of goods paid to the assignees by a buyer on credit. This was the first case in which the fact that the principal was unknown to the third party was explicitly noted. It differed from *Burdett v. Willett* as the money had already been paid by the buyer to the assignees by the time the action was taken. The report tells us the following:

A, living in *Ireland* employed B. in *London* to sell goods for him. B. sold them to J.S. (A. not knowing to whom they are sold, and J.S. not knowing whose property they were). B. became a bankrupt, and J.S. paid the money to his assignees. A. shall recover it from them. It was agreed that a payment by J.S. to B. was a discharge for him against the principal A. *yet the debt was not in law to B. but to the person whose goods were sold and therefore* was not assigned to the defendants under the general assignment of all their debts, but *remained due to A.* as it was before; and it being paid to the defendant, who had no right to it, but under a mistake, that payment must be understood in law to be for the use of him to whom it was due.¹⁴⁰

It was argued by Holmes that the case had been decided on the basis of identification of agent and principal. Thus he opined that "[s]o far as Lord Holt is concerned . . . in *Garrat v. Cullum* the agent was a factor, . . . a factor in those days always was spoken of as a servant, and . . . Lord Holt was familiar with the identifica-

¹³⁴ Dowrick, *The Relationship of Principal and Agent* (1954) 17 M.L.R. 24, 28-32.

¹³⁵ *Foley v. Hill* (1848) 2 H.L.C. 28, 35-36, 9 E.R. 1002 *per* Lord Cottenham L.C.

¹³⁶ The qualified exception refers to the controversial case of *Lister v. Stubbs* (1890) 45 Ch. D. 1.

¹³⁷ See Bowstead, *supra*, note 2, 342. See also Waters, *The Constructive Trust* (1964), 229 *et seq.*

¹³⁸ *Supra*, note 123.

¹³⁹ The nature of the claim as an action for money had and received emerges from the report itself and is mentioned specifically by Willes L.C.J., *supra*, note 88, 1238.

¹⁴⁰ *Supra*, note 123 [emphasis added].

tion of servant and master".¹⁴¹ However, inasmuch as "identification" means that "within the scope of agency, principle [*sic*] and agent are one",¹⁴² Holmes's explanation is not convincing. In a contract made by an agent of an undisclosed principal, a contractual relationship exists between the agent himself and the third party;¹⁴³ the former cannot be characterized as "but [an] Instrument".¹⁴⁴ Indeed, Holmes's view that the doctrine of the undisclosed principal "would seem to follow very easily from the identification of agent and principal"¹⁴⁵ is not supported by the authorities. It is submitted that *Garrat v. Cullum* stands for the proposition that the property of A in the goods entitled him to payment, irrespective of the contractual arrangement.¹⁴⁶

*Scott v. Surman*¹⁴⁷ contains an extensive discussion of the proprietary rights of the merchant in the case of his factor's bankruptcy. This was an action on the case for money had and received between a foreign merchant and his factor's assignees in bankruptcy. Willes L.C.J. held that the merchant was entitled to prevail: "The general rule is that if a man receive *money which ought to be paid to another* or to apply to a particular purpose to which he does not apply it, this action will lie as for money had and received [.]"¹⁴⁸ The money ought to have been paid to the merchant, rather than to the factor, as the goods were to be considered as the merchant's: "because they remain in specie, and so may be distinguished from the rest of the bankrupt's estate".¹⁴⁹ The principle laid down is thus that "*the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished; and so long as it remains a debt, it is equally distinguishable*".¹⁵⁰

There is nothing in the foregoing factor cases to suggest the existence of a contract between the buyer and the merchant; therefore they cannot be taken to lay down the doctrine of the undis-

¹⁴¹ Holmes, *supra*, note 6, 394. Note Holmes's suggestion that the doctrine of the undisclosed principal began with debt: *supra*, note 89 and accompanying text.

¹⁴² Holmes, *supra*, note 6, 368.

¹⁴³ See, e.g., *Joseph v. Knox* (1813) 3 Camp. 320, 321, 170 E.R. 1397. Cf. *supra*, notes 1-4 and accompanying text.

¹⁴⁴ As was the servant promising "for ... the Master": *Anon.*, *supra*, note 96,

¹⁴⁵ Holmes, *supra*, note 6, 390.

¹⁴⁶ *Supra*, text accompanying note 140, especially where emphasized.

¹⁴⁷ *Supra*, note 88. Probably *Scott v. Salmon*, referred to in *Bull N.P.*, *supra*, note 122, 43, is the same case.

¹⁴⁸ *Ibid.*, 1238 [emphasis added].

¹⁴⁹ *Ibid.*, 1237.

¹⁵⁰ *Ibid.*, 1237-8 [emphasis added].

closed principal.¹⁵¹ At the same time, their proprietary basis¹⁵² can be supported on analogy with contemporaneous cases dealing with a customer's property right to identified proceeds of bills of exchange remitted to a banker for collection.¹⁵³ Furthermore, had *Scott v. Surman* been governed by a contract analysis, the decision should have gone the other way. The case involved a foreign merchant; in such cases, it had been accepted that privity is established between the domestic third party and the factor.¹⁵⁴ Also, the actual proceeds (that is to say, the debt arising from the sale) consisted of two promissory notes,¹⁵⁵ and in such cases, "whether or not . . . [the principal] can sue depends on whether he is the payee, or a holder of the bill, in accordance with the general law".¹⁵⁶ Thus, had the issue in *Scott v. Surman* turned on in whom the promise to pay had vested, the factor (or his representatives) would have prevailed.¹⁵⁷

IV. The limits of the proprietary right

It would appear to follow from the preceding discussion that money received by a factor in discharge of debts from the sale of goods will be the merchant's money.¹⁵⁸ Indeed, this was the position of the House of Lords in *Foley v. Hill*:

[G]oods held by a factor for sale . . . remain the goods of the owner or principal until the sale takes place, and *the moment the money is re-*

¹⁵¹ But see *Street, supra*, note 6, 478; *Holmes, supra*, note 6, 391; *Stoljar, supra*, note 2, 204; *Bowstead, supra*, note 2, 256.

¹⁵² Note, however, the opinion of Professor Goode that "the common law is concerned not with ownership as such, but with right to possession", and that the meaning of "follow" in the common law indicates the principal's right "to treat whoever is or has been in possession of the proceeds as under a personal duty to account to him for them": Goode, *supra*, note 63, 368-71. In light of the foregoing analysis, this view is unconvincing.

¹⁵³ Explicit analogy appears in *Zinck v. Walker* (1777) 2 Wm Bl. 1154, 96 E.R. 681. See also *Ex p. Dumas* (1754) 1 Atk. 232, 26 E.R. 149; *Hollingworth v. Tooke* (1795) 2 Hy Bl. 501, 126 E.R. 670; *Ex p. Sayers* (1800) 5 Ves. 169, 31 E.R. 528; *Ex p. Rowton* (1811) 17 Ves. 426, 34 E.R. 165; *Ex p. Pease, supra*, note 65. Other cases are cited by *Bowstead, supra*, note 2, 366, nn. 15-16; 367, n. 17. Note also the explicit analogy to which the notes to the reports of the factor cases (except for *Garrat v. Cullum*) refer.

¹⁵⁴ See *Gonzales v. Sladen* (1702) Bull N.P., *supra*, note 122, 130 and *Hudson, Agents for Foreign Principals* (1966) 29 M.L.R. 353.

¹⁵⁵ *Supra*, note 88, 1235.

¹⁵⁶ *Bowstead, supra*, note 2, 268. See also *Restatement of the Law, Agency* (1933), 295; *Ames, supra*, note 6, 446; *Mechem, supra*, note 11, 519.

¹⁵⁷ Cf. *Seavey, Handbook of the Law of Agency* (1964), § 136B.

¹⁵⁸ Cf. U.C.C. § 9-306(1), (3).

ceived the money remains the property of the principal ... [A]n agent ... obtains no interest himself in the subject matter beyond his remuneration.¹⁶⁹

In another case, money paid by a third party to a servant in discharge of a debt owed to the master was regarded by Lord Holt as the property of the master: "[I]f the payment [of the third party] was a good discharge [of his debt to the master], it is reason it should be ... [the master's] money".¹⁶⁰ However, in *Holiday v. Hicks*, where "the defendant, being a servant and factor to the plaintiff, sold ... his master's corn for £ 25 and, receiving it, converted it to his own use",¹⁶¹ the court held, though with hesitation,¹⁶² that the factor was not liable to his master in trover, since "[t]he property of the money was never in the master, but in the servant".¹⁶³ Likewise, judicial recognition of the merchant's entitlement to debts created by the sale of his goods by a factor was accompanied by the denial of the merchant's right to the money paid by the buyers to the factor prior to the factor's bankruptcy: "[i]f the factor have the money it shall be looked upon as the factor's estate".¹⁶⁴

Reconciliation of these two lines of cases can be founded on Langdell's view that a factor who sells his principal's goods has a "right to appropriate ... [the money received by him in payment thereof] to his own use, making himself a debtor to the ... [principal] to the same amount".¹⁶⁵ In other words, although money received by the factor from the buyers is the merchant's property, unless the factor is required to remit or keep separate the actual coins or bills,¹⁶⁶ a "constructive" bailment of the money occurs

¹⁵⁹ *Supra*, note 135.

¹⁶⁰ *Anon.*, *supra*, note 122; *Bull. N.P.*, *supra*, note 122, 35. See *infra*, note 166.

¹⁶¹ (1597) Cro. Eliz. 638, 78 E.R. 878.

¹⁶² "The case was moved again" as reported in *Holiday v. Hicks* (1598) Cro. Eliz. 661, 78 E.R. 900, where "all the Court resolved for the plaintiff". Then "[e]rror was brought and assigned in the point of law".

¹⁶³ *Higgs v. Holiday* (1599) Cro. Eliz. 746, 78 E.R. 978.

¹⁶⁴ *Whitecomb v. Jacob*, *supra*, note 128. See also *Scott v. Surman*, *supra*, note 88, 1237, 1238.

¹⁶⁵ Langdell, *supra*, note 70, 245 [emphasis added]. Another aspect of Langdell's view — the inapplicability of the action in account in these circumstances — is convincingly criticized in Jackson, *supra*, note 63, 33. Langdell overemphasized the proprietary basis of account and tended to overlook the action's focus on the parties' relationship. Cf. *supra*, notes 70-73 and accompanying text.

¹⁶⁶ Indeed, the actual case before Lord Holt (*supra*, note 160) did not involve an ordinary business relationship between a merchant and a factor, but rather that between a son with a general authority to receive money and his father. In such a case it is reasonable to assume that the son was required to remit the very coins and bills received.

instantly.¹⁶⁷ The bailee, having "liberty by the bailment to make an exchange of the . . . [money given to him]"¹⁶⁸ becomes its owner. As such, he is not subject to an action in detinue but rather incurs liability to the bailor in debt.¹⁶⁹ In fact, notwithstanding the categorical statement of the court in *Higgs v. Holiday* that the property "was never in the master",¹⁷⁰ the latter is actually regarded there as having lost the property, thereby becoming a creditor of his factor.¹⁷¹

It is in this sense that Lord Haldane's statement that money can be followed in the common law "only so long as the relation of debtor and creditor has not superseded the right in rem"¹⁷² should be understood. Unfortunately, while acknowledging that money in the common law "could be followed . . . provided it could be earmarked or traced into assets acquired with it",¹⁷³ Lord Haldane added an "unguarded observation"¹⁷⁴ to the effect that the common law "gave no remedy when the money had been paid by the wrongdoer into his account with his banker, who simply owed him a debt".¹⁷⁵ In so stating, Lord Haldane missed the point of his own statement. Debts under bank accounts created with followed money

¹⁶⁷ The expression "bailment of money" is somewhat misleading; the "bailment" has nothing to do with custody but rather denotes the delivery of a sum of money to be applied to a certain purpose: see Jackson, *supra*, note 63, 24.

¹⁶⁸ *Core's Case* (1537) 1 Dyer 20a, 22a, 73 E.R. 42, 46.

¹⁶⁹ This is true "although . . . the money be sealed up in a bag": *Anon.* (1619) 3 Leon 38, 74 E.R. 526 (money sealed in a bag given to the bailee to be used by him to purchase goods for the bailor). Money sealed up in a bag would be otherwise the subject of an action in detinue "to recover the thing it self": *Sir George Walgrave's Case* (1687) Noy 12, 74 E.R. 983. An earlier case is *Anon.* (1389) Y.B. 13 Ed. III 244 (R.S.). Cf. *Earl of Lincoln v. Topcliff* (1597) Cro. Eliz. 644, 78 E.R. 883 (receipt of money acknowledged by the defendant in a bill "ensealed"). See also *Bretton v. Barnet* (1599) Owen 86, 74 E.R. 918. Earlier Year Book citations appear in: Jackson, *supra*, note 63, 25, n. 2; and Ames, *supra*, note 63, 120, nn. 1 and 4. The observation of the court in *Higgs v. Holiday* that the bailor "can maintain accmpt [account] only" (*supra*, note 163, 978) is therefore incorrect.

¹⁷⁰ *Supra*, note 163, 978 [emphasis added].

¹⁷¹ "But here the plaintiff's declaration is not good . . . and when he had lost the possession thereof he had lost the property also, because it cannot be known": *ibid.* [emphasis added]. Of course on the facts of the case, "loss of possession" by the plaintiff is more conceptual than real: *supra*, note 161 and accompanying text.

¹⁷² *Sinclair v. Brougham* [1914] A.C. 398, 419 (H.L.). Cf. also *In re Hallett's Estate* (1880) 13 Ch. D. 696, 723-24 per Thesiger L.J.

¹⁷³ *Ibid.*, 420.

¹⁷⁴ Cf. Goode, *supra*, note 63, 391.

¹⁷⁵ *Supra*, note 172, 420.

are as traceable as any other asset acquired with followed money. The debtor-creditor relationship that supersedes the right *in rem* and brings the right to follow to its end is not that between the banker and the factor, but rather that between the factor and the owner.¹⁷⁶

The debtor-creditor relationship between the factor and the owner of goods does not supersede the owner's right *in rem* unless this relationship relates to the proceeds themselves or to the subject matter of the transaction producing them. Thus a conditional sales contract, a hire purchase agreement, a consignment intended as security, a domestic trust receipt, or an advance of money against a bill of lading creates a debtor-creditor relationship between the parties. Property in the goods subject to the agreement, however, remains in the hands of the creditor. In selling the goods to third party buyers with the authority of the creditor-owner, the debtor acts as the latter's agent,¹⁷⁷ and debts created in this way belong to the creditor-owner.¹⁷⁸ Indeed, the debt of the debtor-agent under the original transaction is discharged with the satisfaction of the debts created by the sale to the third party buyers. Not relating to the sale itself and conceptually distinct from it,¹⁷⁹ the debtor-creditor relationship under the original transaction does not supersede the creditor-owner's right *in rem*.¹⁸⁰

When the debtor-creditor relationship does relate to the transaction producing the proceeds, it is important to see at what point in time this relation has superseded the right *in rem* so as to bring

¹⁷⁶ A bank customer has no right to follow "his" money as against the bank. "Money, when paid into a bank, ceases altogether to be the money of the principal (see *Parker v. Marchant*, 1 Phillips 760); it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it": *Foley v. Hill*, *supra*, note 135, 36. (Cf. *Arab Bank v. Barclays Bank* [1954] A.C. 495 (H.L.)) However, if the deposited money belongs to another, that other will be able to follow it into the bank's hands.

¹⁷⁷ See in general *supra*, notes 20-25 and accompanying text. See also *Lloyd's Bank, Ltd v. Bank of America Nat'l Trust*, *supra*, note 20.

¹⁷⁸ Cf. also the treatment of the mortgagee's right in the proceeds of the mortgaged property upon the sale thereof by the mortgagor. "Although the [mortgagor] does not sell as an agent for the . . . [mortgagee], he does not sell free of the . . . [mortgagee's] claim to the proceeds. There is an analogy with the case where goods are consigned to a factor to be sold by him and reduced to money": *Re Canadian Western Millwork Ltd, Flintoft v. Royal Bank of Canada* (1965) 47 D.L.R. (2d) 141, 145 (S.C.C.) *per* Judson J.

¹⁷⁹ Cf. *In re David Allester Ltd*, *supra*, note 20.

¹⁸⁰ Cf. in general Goode, *The Right To Trace and Its Impact on Commercial Transactions-II* (1976) 92 L.Q.R. 528, 547-52.

to its end the common law right to follow. Where goods are delivered to another for sale to a third party, it is important to distinguish between sale by a factor and resale by a consignee on "sale or return". Neither intermediary acquires the property in the goods upon taking delivery. However, a sale by a factor transfers the property from the owner directly to the buyer; a sale by the consignee on "sale or return" is an act adopting *his* purchase of the goods from the consignor¹⁸¹ so that his buyer acquires the property from *him*, rather than from the consignor.¹⁸² While the factor becomes the debtor of the consignor only in the wake of his receiving payment from the buyer,¹⁸³ the consignee on "sale or return" becomes indebted to the consignor upon acquiring and passing the property at the moment of resale. Thus, while a sale by a factor creates one debt between the principal and the buyer, a sale by a consignee on "sale or return" creates two: a debt of the consignee to the consignor is instantly followed by a debt of the buyer to the consignee. As a result, upon the bankruptcy of a consignee on "sale or return", following sales made by him, the debts of the buyers will be collected for the benefit of all the creditors, and the consignor will not be allowed to follow the proceeds created by the sales.¹⁸⁴ The consignor's right *in rem* will have been superseded by the debtor-creditor relationship created at the time of the sale of the goods.

In determining the point in time at which the debtor-creditor relationship supersedes the right *in rem*, it should be realized that the cases of the factor and the consignee on "sale or return" are not mutually exclusive. This may shed light on the controversial decision of the jury in *Scrimshire v. Alderton*.¹⁸⁵ The facts in this case are somewhat different from those in the factor cases previously considered. The factor in this case, for higher commission,

¹⁸¹ Within the meaning of s. 18, rule 4(a) of *The Sale of Goods Act, 1893*, 56-57 Vict., c. 71 (U.K.).

¹⁸² If, due to the terms thereof, the disposition by the consignee on "sale or return" falls short of being an act adopting the transaction, and hence does not convey title of the consignor to the consignee, good title will not vest in the third party. As it does not involve a "mercantile agent", the transaction with the third party will not be governed by *The Factors Act, 1889*, 52-53 Vict., c. 45 (U.K.). See *Weiner v. Harris*, *supra*, note 25; *R. v. Eaton* (1966) 50 Cr. App. Rep. 189. In general with respect to "sale or return" and the distinction between it and sale by a factor, see Benjamin, *supra*, note 28, §§ 41, 43, 49, 202 *et seq.*, 324 *et seq.*

¹⁸³ *Supra*, notes 165-171 and accompanying text.

¹⁸⁴ See, e.g., *Ex p. White*, *supra*, note 16.

¹⁸⁵ (1743) 2 Stra. 1182, 93 E.R. 1114.

took from the principal "the risque of the debts"¹⁸⁶ arising from his credit sales. The buyer defied the principal's request for direct payment and the principal brought an action against him.¹⁸⁷

This was the first reported case dealing with what was later to be known as a *del credere* factor,¹⁸⁸ as well as the first direct contest between the merchant and a *buyer* with respect to the proceeds of the sale.¹⁸⁹ Chief Justice Lee "was of opinion that this new method had not deprived the [merchant] of his remedy against the buyer . . . And therefore he directed the jury in favour of the [merchant]".¹⁹⁰ The jury found for the buyer, even after a third consideration. A new trial was moved for, in which Chief Justice Lee declared "that a factor's sale does by the *general rule of law* create a contract between the owner and buyer".¹⁹¹ Nonetheless, the jury found again for the buyer. Asked for their reason, the jurors said "that they thought from the circumstances *no credit was given as between the owner and buyer, and that the latter was answerable to the factor only, and he only to the owner*".¹⁹²

There are conflicting views as to the propriety of the jury's decision. Buller J. suggested that "where the factor sells the goods at his own risk; (i.e. is answerable to the owner for the price, though it be never paid) . . . he is the debtor to the owner, and not

¹⁸⁶ *Ibid.*

¹⁸⁷ There is a controversy with respect to the nature of this action. Holmes suggests that it was an action of debt: *supra*, note 6, 392. Buller J. deals with the case in the context of *indebitatus assumpsit* for goods sold and delivered: *Bull. N.P.*, *supra*, note 122, 130.

¹⁸⁸ For this fact, see Chorley, *Del Credere* (1929) 45 L.Q.R. 221, 222. The report of the case did not use the term "del credere"; the first case to use it was *Grove v. Dubois* (1786) 1 T.R. 112, 99 E.R. 1002 (see Chorley, *ibid.*, 221). For commission *del credere* in general, see Chorley, *ibid.*, *passim*.

¹⁸⁹ See Holmes, *supra*, note 6, 392. *Cf.* Street, *supra*, note 6, 478; Stoljar, *supra*, note 2, 207. The previous factor cases were contests between the merchant and assignees in bankruptcy (or creditors) of the factor.

¹⁹⁰ *Supra*, note 185, 1115.

¹⁹¹ *Ibid.* With respect to the use of the term "contract", note that *indebitatus assumpsit* has been an action on the debt arising from the executed contract; for a situation where debt lies see, e.g., *Shandois v. Simson*, *supra*, note 41. Another eighteenth-century case speaking of the right of a principal of a factor to bring an action against the buyer "upon . . . [the] contract", and yet arguably compatible with a debt relationship, is *Rabone v. Williams* (1785) 7 T.R. 359, 360n., 101 E.R. 1019, 1020n. *per* Lord Mansfield. In debt, "no contract that we can count" means the absence of a "real" transaction: *Anon.* (1368) Y. B. Pasch. 41 Ed. III f. 10 pl. 5 (reproduced in Fifoot, *supra*, note 32, 285). *Cf. supra*, notes 32-42 and accompanying text.

¹⁹² *Ibid.* [emphasis added].

the buyer".¹⁹³ Therefore, according to Buller J., this case is an exception to the principle that a factor's sale generally creates a contract between the owner and the buyer. This is also the opinion of Paley.¹⁹⁴ On the other hand, it was argued by Lord Chorley that the reason mentioned by the jury "was an outrage to legal theory", since it means that a person doing business on the basis of a *del credere* commission is a peculiar form of buyer rather than a peculiar form of agent.¹⁹⁵ Notwithstanding both views, the jury's decision need not make a sale by a *del credere* factor into an act adopting his purchase of the goods from the principal; the sale can be viewed as a sale of the principal's property, thereby creating a debt of the buyer to the principal. This sale is conceptually followed by the extension of credit from the factor to the buyer. The effect of this credit extension is to substitute the debt of the buyer to the principal with a debt of the buyer to the factor, and to cast upon the factor an absolute obligation towards his principal with respect to the price of the goods. The debtor-creditor relationship thus established between the factor and the principal supersedes the latter's right *in rem*, and brings to an end his right to follow the property. In theory, the debt of a consignee on "sale or return" precedes the sale to the ultimate buyer and supersedes the consignor's right *in rem* in the goods just *before* the creation of the proceeds. In contrast, the debt of the agent assuming the risk follows the sale and supersedes the consignor's right *in rem* just *after* the creation of the proceeds. Indeed, whether or not the latter is the proper view of the *del credere* arrangement,¹⁹⁶ the right to follow the proceeds of a sale may end before collection by the consignee, where the owner employs an agent who personally extends credit to the buyer.

It is noteworthy that in dealing with priority contests over proceeds, the draftsmen of the U.S. Uniform Commercial Code viewed the typical consignee-agent as an agent who personally

¹⁹³ Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 7th ed. (1817), 130a.

¹⁹⁴ Paley, *Law of Principal and Agent* 4th ed. (1856), 284-87.

¹⁹⁵ Chorley, *supra*, note 188, 225. See also Müller-Freienfels, *supra*, note 117, 303.

¹⁹⁶ For the controversy with respect to the nature of the *del credere* factor's responsibility (*i.e.*, whether he is *absolutely* liable to repay the principal or only a guarantee of the buyer's solvency), see, *e.g.*, Chorley, *supra*, note 188, *passim*. Under the latter possibility, the debtor-creditor relationship between the factor and the principal would not supersede the latter's right *in rem*.

extends credit to buyers.¹⁹⁷ Thus, they provided that (subject to a contrary agreement) a consignor-principal does not have a right to the proceeds and cannot recover the price of the goods from the buyer; instead, at the moment of sale he becomes the creditor of the consignee-agent.¹⁹⁸ The jury's decision in *Scrimshire v. Alderton*¹⁹⁹ is thus the general rule under the Uniform Commercial Code.

All consignment of goods arrangements, whether with a factor, with a consignee on "sale or return", or with an agent who personally extends credit to a buyer, are subject to this potential loss of the right to follow. The point in time at which the right *in rem* is superseded by a debtor-creditor relationship sets the limit to the consignor's right, and thereby determines the nature of the consignment arrangement.²⁰⁰

Conclusion

The imposition of contractual liability on an undisclosed principal selling through an agent is inconsistent with basic principles of privity of contract. Injustice may result where the undisclosed principal does not receive proceeds realized from the agent's mis-

¹⁹⁷ Under U.C.C. § 2-326(3) (1972), consignment is delivery of goods to a person for sale in his own place of business. "True consignment [under the U.C.C.] is true agency": Duesenberg, *Consignments under the U.C.C.: A Comment on Emerging Principles* (1970) 26 Bus. Law 565, 566 and 575-76.

¹⁹⁸ This emerges from U.C.C. § 9-114 (1972), under which filing with respect to consignment perfects the interest only in the goods themselves, and not in the proceeds. Note also the following comment of the draftsmen: "It is believed that under many true consignments the consignor acquires a claim for an agreed amount against the consignee at the moment of the sale and does not look to the proceeds of the sale ... [T]he Article goes on the assumption that if *consignors intend to claim the proceeds of sale, they will do so by expressly contracting for them* and will perfect their security interests therein". (U.C.C. § 9-114, Official Comment [emphasis added].) Cf. *supra*, note 15.

¹⁹⁹ *Supra*, note 185.

²⁰⁰ The provision of a framework explaining the different effect of a sale by a factor, by a consignee on "sale or return" and by an agent extending credit to the buyer should not be taken to endorse the *usefulness* of its implications. Indeed, insofar as innocent third parties are concerned (whether creditors — notwithstanding *Langley v. Kahnert* (1905) 36 S.C.R. 397 — or purchasers under an unauthorized transaction of the consignee — notwithstanding *Weiner v. Gill* [1906] 2 K.B. 574 (C.A.)), "to the extent that external appearances are the same, a common set of rules should be applied": Ontario Law Reform Commission, *Report on Sale of Goods* (1979), 49. In this context, consider the bringing of consignment agreements "within the registration and priority provisions of the Act": Saskatchewan Law Reform Commission, *Proposals for a Saskatchewan Personal Property Security Act* (1977), 7.

representation or breach of contract. This could happen where an agent defrauds his principal, where an agent goes bankrupt, or where an agent, either under consignment of goods or inventory financing, is entitled to retain the profit of the sale. Nonetheless, in all these situations, the interest of the undisclosed principal in retaining a direct remedy against the buyer is legitimate and deserves legal recognition.

Such a remedy is well established. Recovery of the price of goods is based in the common law on a debt relationship, rather than on breach of promise: it is a proprietary action for the proceeds of sale. This remedy of the undisclosed principal was recognized in cases dealing with the debt relationship. Its enforcement does not entail contractual liability, and thus does not involve the theoretical inconsistency and the injustice associated therewith. One can speculate that the later "contractualization" of the doctrine of the undisclosed principal is attributable to the failure to see that "contract", in the context of debt, is the conveyance rather than the promise.

The fact that authority to sell does not entail a contractual relationship is expressed in the American Uniform Commercial Code: "authority given to the debtor to dispose of . . . collateral does not impose contract . . . liability upon the secured party".²⁰¹ Notwithstanding the opinion of the draftsmen,²⁰² the section expresses a general principle of law and does not reject the application of agency theory to the sale of the collateral by the debtor. Indeed, upon the authorized sale of goods, the proprietor's recovery of the price from the buyer is explained by property in the goods rather than by the existence of a contractual relationship. The disconnection between authority to sell and a contractual relationship with the buyer is one side of the coin whose other side is the proprietary basis of the right to the proceeds of the sale.

The proprietary basis of this right provides a unifying framework applicable to all cases of authorized sale of goods. Its implications are not limited to the removal of the conceptual difficulty and injustice associated with the doctrine of the undisclosed principal. They extend to situations where agency theory or the provisions of *The Factors Act, 1889*²⁰³ are applied to the unauthorized

²⁰¹ U.C.C. § 9-317 (1972). "Debtor" is used here in relation to the secured loan, not in relation to the right to the goods or their proceeds. Cf. *supra*, text accompanying note 177.

²⁰² As expressed in the Official Comment to § 9-317.

²⁰³ 52-53 Vict., c. 45 (U.K.).

sale of one's property, and to the case of secured wholesale financing by means of title retention, whether by trust receipt, conditional sale contract, hire-purchase agreement or consignment intended as security.²⁰⁴

Modern personal property security legislation, such as the *Personal Property Security Act*,²⁰⁵ abolishes the distinctiveness of title retention security devices as a separate category of security interests.²⁰⁶ The framework provided by the proprietary basis of the right to the proceeds is nonetheless broad enough to encompass the secured party's right to the proceeds created by an authorized sale of the collateral.²⁰⁷ Being based on property, the right is not linked to a contractual relationship, notwithstanding the absence of an explicit provision.²⁰⁸ Not being a statutory exception, the content and the limits of the secured party's right are determined by the ordinary rules of tracing.²⁰⁹

Giving the authority to sell to a consignee does not necessarily result in a right to the proceeds created thereby. Rather, the right to follow the proceeds ends when a debtor-creditor relationship supersedes the right *in rem*. This explains the limits of the principal's right to cash proceeds. This, and not the existence or absence of a contractual relationship, is also the key to the different effects of sale by a factor, by a consignee on "sale or return", and by an agent extending credit to the buyer.²¹⁰ The existence or absence of a contractual relationship between the consignor and the third party buyer is neither indication nor foundation of the consignor's right or lack of right to the proceeds; this right is compatible with the existence as well as with the absence of a contractual relationship.

²⁰⁴ See in general, *supra*, notes 12-27 and accompanying text.

²⁰⁵ R.S.O. 1970, c. 344 [hereinafter *PPSA*]. This type of statute, modeled on U.C.C. Article 9, was also adopted in Manitoba [S.M. 1973, c. 5 as am.] and is currently being considered for adoption by other provinces.

²⁰⁶ The *PPSA* applies to "every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, including ... a ... conditional sale": s. 2(a). A "'security interest' means an interest in goods ... that secures payment or performance of an obligation": s. 1(y). The Act deals with all security devices *uniformly*.

²⁰⁷ "Collateral" under the *PPSA* is "property that is subject to a security interest": s. 1(d). The secured party's right to the proceeds of the collateral is provided for in s. 27.

²⁰⁸ See, e.g., *supra*, note 201 and accompanying text.

²⁰⁹ A conclusion which is shared by Catzman & Abel, *Personal Property Security Law in Ontario* (1976), 133.

²¹⁰ See *supra*, notes 181-196 and accompanying text.

Undoubtedly, the right to follow the proceeds of a sale and to recover the price of goods is based, not on the giving of authority to sell nor the existence of a contractual relationship, but on property. It thus is extinguished when the property is lost.
