SILK PURSE OR SOW'S EAR: WHAT IS A VALUABLE SECURITY?

Peter E. Salvatori*

The term "valuable security"[1] is used in the laws relating to theft and other fraudulent transactions concerning property.[2] The meaning given this expression may in a particular case determine whether an offence has taken place and which offence, or offences, are made out on the facts. The value to be assigned a valuable security, for which the *Criminal Code* also makes provision,[3] will in turn fix the penalty prescribed by law and may also bear upon the exercise of discretion in sentencing the offender.

History

By making provision for valuable securities, the *Criminal Code,* like its predecessors in the United Kingdom, effectively abrogates the Common Law rule that the trespassory taking *animus furandi* of a paper chose in action is not an offence.[4] Historical circumstances fully account for these legislative initiatives. Under the Common Law, offenders convicted of grand larceny (that is, the wrongful taking of property valued at 12 pence or more) faced the grim prospect of capital punishment. Judges and juries alike were loath to mete out this harsh and categorical penalty and employed means to avoid imposing it. Documents evidencing rights of entry to land were first said not be larcenable because they "savoured of the reality", that is, because they were deemed to be annexed to the soil. As real property, of course, they could neither be seized nor carried away. When documents evidencing personal rights of action had been stolen, harsh penalties were avoided through an insistence on the personal nature of the rights concerned; in effect, if a man cannot sell a right, nor transmit it *mortis causa,* nor take it in execution, neither can he be dispossessed of it by fraudulent means.[5] As pieces of paper, these documents were intrinsically

---

* of the Ontario Bar. The author wishes to thank J. Sammy Nadel for having suggested this topic for research.

1. *Criminal Code,* R.S.C. 1970, c. C-34, as am. [hereinafter referred to as the *Code*] provides, in s.2, as follows:
   "valuable security" includes
   (a) an order, exchequer acquittance or other security that entitles or evidences the title of any person
      (i) to a share or interest in a public stock or fund or in any fund of a body corporate, company or society, or
      (ii) to a deposit in a savings bank or other bank,
   (b) a debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money,
   (c) a document of title to lands or goods wherever situated,
   (d) a stamp or writing that secures or evidences title to or an interest in a chattel personal, or that evidences delivery of a chattel personal, and
   (e) a release, receipt, discharge or other instrument evidencing payment of money;
2. See e.g., *Code* ss. 283 *et seq.*, 300, 305, 320, 321, 324, 338.
3. Valuable securities are *deemed* to be valuable property pursuant to the provisions of s.3(3) of the *Code,* which reads as follows:
   For the purposes of this Act, the following rules apply for the purpose of determining the value of a valuable security where value is material, namely,
   (a) where the valuable security is one mentioned in paragraph (a) or (b) of the definition 'valuable security' in section 2, the value is the value of the share, interest, deposit or unpaid money, as the case may be, that is secured by the valuable security;
   (b) where the valuable security is one mentioned in paragraph (c) or (d) of the definition 'valuable security' in section 2, the value is the value of the lands, goods, chattel personal or interest in the chattel personal, as the case may be; and
   (c) Where the valuable security is one mentioned in paragraph (e) of the definition 'valuable security' in section 2, the value is the amount of the money that has been paid.
4. The statutes consolidating the law relating to larceny prior to the enactment of the 1892 *Criminal Code* are 2 Geo. 2, c.25, 7 & 8 Geo. 4, c.29, 9 Geo. 4, c.55, 24 & 25 Vict., c.96 (U.K.) and the Canadian statute 32 & 33 Vict., c.21.
5. The current legislation under discussion is but one of a number of statutes relating to different fields of law aimed at overcoming the undesireable consequences of this historical trend. *See* generally W.S. Holdsworth,' *A History of English Law,* (7th ed. A. Goodhart and H. Hanbury, 1956) at 539-544, [hereinafter referred to as Holdsworth].

worthless and accordingly could not be regarded as valuable property. It followed logically that theft of paper choses was effectively theft of nothing at all: *de minimus non curat lex.*[6]

The purpose of the valuable securities legislation is thus to ensure that certain documents are treated as ordinary chattels personal and are regarded as possessing material value. This ensures that they will be included in those provisions of the criminal law covering the fraudulent acquisition of property. Knowing how to treat valuable securities, however, is of little benefit unless there is agreement concerning what constitutes a valuable security. Unfortunately, judicial discussion of this question reflects non consensus of opinion, particularly with respect to money instruments, the most important of the several classes of documents that are valuable securites.[7]

There is, on the one hand, abundant authority for the view that a money instrument, to be a valuable security, must evidence an incorporeal right of property vested in the individual who is fraudulently deprived of it.[8] In the English case of *R.* v. *Danger,*[9] the prosecutor was fraudulently induced to accept a bill of exchange drawn on him and made payable to the accused, who took possession of the instrument. On an indictment containing a count of obtaining a valuable security by false pretences, it was held that the accepted bill could not be characterized as a valuable security. According to the law merchant, every contract on a bill is incomplete and revocable until delivery.[10] As the prosecutor was not bound by his acceptance until the moment he parted with the document and, indeed, the latter did not evidence a right of action vested in the prosecutor, no "property" was said to have passed from his possession or control by reason of the false pretence.[11]

---

6. Regarding the fraudulent acquisition of choses in action and other things not larcenable at common law, see generally 3 Holdworth, at 360-368; C. Turner (ed.) 2 *Russell on Crime,* (12th ed. 1964) at 883-901; J.F. Stephen, 3 *A History of the Criminal Law of England* (1883), at 121-148.

7. A valuable security in the form of a money instrument may be (1) a document the economic value of which can be expressed in money and which evidences a proprietary or participatory interest in a fund, (2) a document which secures money advanced as a loan or which calls for the payment of money, (3) a document which evidences or creates rights of ownership in land or in chattel property, and (4) a document evidencing the payment of money or the retiring of a liability. *See also Theft Act 1968,* 1968, c.60, s.20 (UK). Money instruments may be said to be more important than other valuable securities because they are more widely used and because the great majority of reported cases deal with them. The issue of the validity, enforceability, and regularity of the relevant documents as it bears upon the prosecution of property offences, which is the subject discussed in this article, pertains to all valuable securities and the conclusions arrived at herein may be applied to the class generally.

8. *See R.* v. *Clark* (1810) 168 E.R. 749; *R.* v. *Vyse* (1829), 168 E.R. 1247; *R.* v. *Yates* (1827), 168 E.R. 1229; *R.* v. *Phipoe* (1795), 168 E.R. 438; *R.* v. *Danger* (1857), 169 E.R. 1018; [1857] Dears. & B., 307; 26 L.J.M.C. 185 (Crim. App.); *R.* v. *Scott* (1878), 2 S.C.R. 349; *R.* v. *Leroux* (1928), 50 C.C.C. 52, (Ont S.C. App. Div.)

9. *Supra,* n.8.

10. 7 & 8 Geo. 4, c.29. And *see Bills of Exchange Act,* R.S.C. 1970, c. B-5, s.39.

11. Section 321 of the *Code,* originally s.90 of the statute 24 & 25 Vict., c.96 (U.K.) is the legislative response to the *Danger* decision, according to *R.* v. *Gordon* (1889), 23 Q.B.D. 354, per Lord Coleridge C.J. at 359. However the changes therein introduced are not altogether free from doubt. Obtaining the making, execution, and so forth of a valuable security is logically distinct from the act of acquiring it by fraudulent means. The offence, therefore, does not require that the wrongdoer assume custody of the valuable security and it is complete from the moment the making or execution is fraudulently procured. But the section has been interpreted as implicitly affirming, rather than as abrogating, the rule in *Danger.* Thus, on a charge of obtaining a cheque by false pretences arising on facts materially similar to the situation in *Danger,* the case was dismissed on the grounds that the indictment failed to allege the appropriate offence: *R.* v. *Leroux, supra,* n.8. This decision represents, it is submitted a regression. It fails to consider that the words "or evidences the title . . . to a share or interest" in paragraph (a) of the *Code* definition of valuable security *(See* n.1) were introduced for the purpose of nullifying the rule in *Danger* that "the term 'valuable security' meant a valuable security [that is, an incorporeal right of property] to the person who parted with it on the false pretence. *See* W.J. Tremeear, *The Criminal Code and the law of Criminal Evidence in Canada* (1902) at 11. Indeed, an "order" or cheque cannot "entitle" nor can it "evidence the title" of the payee or holder "to a deposit in a savings bank or other bank" because it does not operate as an assignment of funds in the drawee's or paying agent's position. A cheque, in fact, evidences the title of the drawer to the bank deposit. The *Leroux* case also overlooks the plain fact that the "valuable securities" referred to in s.321 do not represent incorporeal rights of property which may be reduced into possession by compulsory process of law.

In the Canadian case of *R.* v. *Scott,*[12] the accused stole an unstamped and unissued cheque from the makers. The Supreme Court of Canada decided that the instrument was not in the circumstances a thing capable of being the subject of theft.

On the other hand, a different line of authority has led to punishment for those who dishonestly take or obtain false, incomplete, inchoate, and unenforceable instruments,[13] that is, instruments not evidencing rights of action. This may be attributed to a most understandable reluctance to permit a dishonest person to escape punishment, but an additional argument may be advanced in support of these results. The early history of valuable securities is, as we have seen, closely associated with the development of the law relating to choses in action. It is wrong, however, to place disproportionate emphasis upon incorporeal rights of property. An "order" or "warrant", that is, a request or written direction to pay, does not of necessity involve the existence of enforceable rights of action[14] and a bill of exchange is a "bill" and, consequently, a valuable security, regardless of whether it may be sued upon.[15] And surely, if I give a cheque to X intending that he should, as payee, obtain payment from the bank, the document in his possession may, without departing from normal usage, be called "an order . . . for payment of money"[16] possessing a value equal to that of the "unpaid money"[17] even in circumstances where X cannot enforce payment by me, that is, where the document does not evidence a right of action vested in X, for example, where the cheque is given gratuitously or to effect some personal purpose.

Beyond these considerations, it may be argued that the laws designed to convenience trade should not determine the incidence of criminal responsibility for fraud *lucri causa.* Some consideration of the policy underlying a penal statute should temper the introduction of the substantive civil law into criminal proceedings, especially when the borrowed principles effectively determine the result. For example, in *R.* v. *Campbell,*[18] Branca, J. held that a provision in a provincial *Infants Act,* which stipulated that all contracts entered into by an infant are void, should not relieve an infant from criminal responsibility on a charge of obtaining goods by false pretences through the medium of a contract. Thus, if one follows this reasoning, the rule that every contract on a bill is incomplete and revocable until delivery should not give assistance to a thief who has stolen an undelivered order instrument from the maker. In addition, decisions that are based on rules internal to the law of bills and notes tend to lead to an unsatisfactory state of affairs in which materially similar cases are treated differently. In the *Scott*

12. *Supra,* n.8.

13. *See R.* v. *Heath* (1838), 169 E.R. 13; *R.* v. *Metcalf* (1835), 168 E.R. 1333; *R.* v. *Dewitt (1881), 21 N.B.R. 17 (S.C.); R.* v. *Bowerman,* [1891] 1 Q.B.D. 112; *R.* v. *Governor of Brixton Prison, ex parte Stallman,* [1912] 3 K.B.D. 424; *R.* v. *Ransom* (1812) 168 E.R. 776; *R.* v. *West* (1856), 169 E.R. 938 (C.A.); *R.* v. *Pennell,* [1966] 1 C.C.C. 258; 47 C.R. 200 (B.C.C.A.).

14. A warrant is any instrument for the payment of money under which the payer may recover the amount paid from the person making it. *See R.* v. *Vivian* (1884), 1 Car. Kir. 719, per Coleridge J. at 721; 174 E.R. 1005 at 1006.

15. Chalmers' classic definition of a bill of exchange, contained in s.17 of the *Bills of Exchange Act* R.S.C. 1970, c. B-5, does not require that the drawer be exposed to an action on the bill should the drawee fail to comply with the order. Value is always presumed (s.58), but it is not conclusively presumed. *See also Code* s.3(5).

16. Paragraph (b) of the *Code* definition, *supra,* n.1.

17. *See Code* s.3(3)(a), *supra,* n.3.

18. [1968] 1 C.C.C. 104 (B.C.C.A.), at 108-117).

case, Henry, J. implies in an *obiter* observation that differences in the rules relating to the enforceability of order and of bearer instruments mean that theft from the drawer is possible in the case of the latter, but not in the case of the former type of document.[19] This result encourages the suspicion that the exercise of criminal sanctions is here proceeding on the basis of fortuitous circumstances instead of upon a firm and rational footing. Furthermore, the tendency to restrict money instruments to negotiables in circulation for value perhaps unduly limits, in number and in kind, the transactions subject to judicial scrutiny and penal sanctions. For example, dishonest dealings in respect of contracts of guarantee,[20] policies of insurance,[21] and debt instruments issued and guaranteed by government[22] have gone unpunished because money is not payable upon these contracts irrespective of any contingency, or because the documents are not, in any commercially significant way, transferable from hand to hand. The assimilation of the broader class of money instruments to negotiables, moreover, discourages discussion of other matters, such as whether an ordinary, simple contract by which a person is bound to pay a sum of money may be described as "a security for money or for payment of money."[23]

If these objections to the traditional view, which equates money instruments with rights in action, are well founded, what is needed is a satisfactory definition of valuable security, one which will lead rationally to the conclusion that persons stealing or fraudulently obtaining all manner of money instruments from the maker, donee, or holder for value, as the case may be, must be treated in similar fashion. Such a definition, it is submitted, begins with the view that the expression "valuable security" designates a document unique to the criminal law, possessing a broader reference than the paper chattels of the law merchant, with which valuable securities may of course continue to correspond in a given case.

An Empirical Approach

The essential feature of a valuable security is that value may be given for it. Even in cases where the document, let us say a negotiable instrument in circulation for value, clearly evidences a chose, custody of it confers no right in itself upon the wrongdoer to hold, transfer, negotiate, enforce payment or to deal with it in any way. No property (other than the document itself) is therefore acquired by the wrongdoer stealing or fraudulently obtaining it, as in all cases the right remains vested in he who might lawfully exercise it. Moreover, the true owner may demand from the maker a replacement for a lost, destroyed, or misappropriated negotiable instrument.[24]

Bearing in mind that the paper is, but for the *Code,* of insignificant value, what has the wrongdoer stolen or obtained? He has obtained the means by which to defraud someone of property equivalent in value to the property or economic benefit to which the valuable security relates. A docu-

19. *Supra* n.8 at 362.
20. *See R.* v. *Stafford* (1932), 39 Rev. de Jur. 263, but *see R.* v. *Aria* (1883), 4 N.S.W.L.R. 341 (S.C.).
21. *See R.* v. *Tatlock,* 46 L.J.M.C. 7, per Cockburn C.J. at 11.
22. *See R.* v. *Lanauze* (1847), 2 Cox C.C. 362 (W.B.), per Crampton J. at 374.
23. For discussion of these matters see text *infra,* n.39-50.
24. *Bills of Exchange Act, supra* n.10, s.156.

ment, whether false or genuine, inchoate or fully binding, complete or incomplete, must be employed in the course of a further fraud in order to realize its promise of gain.

For these reasons, an empirical approach to defining valuable security is perhaps most satisfactory. These documents belonging to the classes established in the *Code* definition are valuable securities not because they import incorporeal rights of property, but because in the hands of a wrongdoer they expose the public, or the individual to whose property or economic interests they specifically relate, to the risk of economic loss.

This line of reasoning would seem to be implicit in the cases in which inchoate, incomplete, or otherwise unenforceable documents were treated as valuable securities. In *R.* v. *Ransom,*[25] for example, paid and reissuable banker's notes not in circulation for value were regarded as promissory notes to pay and valuable securities under a statute aimed at discouraging theft from the mails by postal office employees.[26] LeBlanc, J., delivering the opinion of the Court, made the following remarks:

> The notes, in point of form, were strictly promissory notes, they remain uncancelled on the face of them, and as against the makers of them, the banking house at Tamworth, they were valid and obligatory, so that into whose ever hands they might come, for valuable consideration, they would be productive and available against the makers of them.[27]

Firstly, it should be noted that the regularity of the instruments in point of form is stressed. Secondly, their essential characteristic is said to be that they expose the makers to the risk of economic loss rather than that they constituted valuable property at the time they were fraudulently misappropriated. Indeed, as retired instruments, they did not evidence incorporeal rights of property while in the makers' or wrongdoer's possession. They were treated, therefore, as valuable property because of the possibility or risk that they might be transferred to a *bona fide* holder for value in whose hands they would be available against the makers, precipitating the economic loss.

A recent Canadian case belonging to this general category is *R.* v. *Pennell,*[28] in which the British Columbia Court of Appeal held that stolen traveller's cheques which had not been countersigned by the owner and which were blank as to the payee were valuable securities possessing a deemed value equal to that of the money which had been paid for them. As the deemed value of money instruments is "unpaid money," rather than money

25. *Supra,* n.13.

26. 7 Geo. 3, c.50 (U.K.).

27. *Supra,* n.13 at 779.

28. *Supra,* n.13.

29. In *R.* v. *Hart* (1883), 172 E.R. 1166, the accused obtained by false pretences the prosecutor's acceptances upon 6s. bill stamps which he afterwards converted into bills of exchange for £500 each. As the instruments did not show the amounts for which they were to be made payable when the accused took possession of them, they were held not to be valuable securities. In *R.* v. *Bowerman, Supra,* n.13, however, a case factually on all fours with *Hart,* with the exception that the amounts were inserted at the time the instruments were handed over to the accused, the documents were treated as valuable securities for the payment of money. In *R.* v. *Governor of Brixton Prison, ex parte Stallman, Supra,* n.13, an ex-tradition proceeding, the accused's fraudulent acquisition of acceptances written across blank bill forms was a sufficient basis upon which to make out a *prima facie* case of obtaining money under false pretences. The instruments, however, did bear the amount of 80,000 marks as the sum payable. In these cases the wrongdoer, of course, could not enforce payment by the acceptor. The possibility that the instruments might find their way into the hands of a holder in due course (the risk), engaging the acceptor's liability to pay the face amount (the economic loss), led to the conclusion that they were valuable securities.

which has been paid, the better view is that value refers to the maker's (Thomas A. Cook & Sons) liability to pay instead of the owner's disbursements in purchasing the cheques. In any event, the theory espoused here would allow incomplete instruments to be regarded as valuable securities provided that they possess sufficient particularity to engender a risk of economic loss. Again, this idea would seem intuitively to have been respected in the case law, in which execution of the instrument by the person principally liable upon it, together with the inclusion of the amount for which it is expressed to be payable, has been held to make it a valuable security, money, or valuable property.[29]

Assuming that risk of economic loss when in the hands of a wrongdoer is an identifiable characteristic of a valuable security, it remains to consider whether an empirical approach is also compatible with the wording of the *Code* provision deeming money instruments to be valuable property. According to section 3(3)(a), the value of a money instrument is "the value of the . . . unpaid money . . . that is secured by the valuable security." The economic benefit to which a false, inchoate, or incomplete instrument relates may be described as "unpaid money," and the phrase "that is secured by the valuable security" can be taken to mean "secured to the lawful holder or wrongdoer in possession thereof" as the case may be. On this view, the proper, legal significance of the word "secure", as in "collateral security", is discarded in favour of a broader interpretation. It is, however, a commonplace of statutory construction that the *Criminal Code* is an original enactment, the terms of which are to be given their ordinary meaning in preference to the refinements and technicalities of the legal vocabulary.[30] Moreover, if the money instruments under discussion need not evidence rights in action it would seem unreasonable to require that they should confer real rights in a thing by way of collateral security. "Real securities" are in any event valuable securities since they are writings that secure or evidence title to, or an interest in, a chattel personal.[31]

Value is established, then, with regard to the manner in which the document empirically evidences and relates to an economic amount. Valuable securities, pieces of paper of no intrinsic worth, are thus converted into things valuable in themselves. The agency of the document in this process is limited to evincing in its observable form the physical characteristics necessary to induce, authorize, or permit the conversion. Provided they are complete and regular in appearance, or may be fraudulently completed to resemble the genuine trading article, incomplete, inchoate, false, and otherwise unenforceable instruments may be said to possess the attributes which make of valuable securities valuable property.

A word should be said, however, concerning the case of forged money instruments because their status as valuable securities has been considered by the Supreme Court of Canada in the important case *R.* v. *Smith.*[32] In *Smith,* the accused forged a very large cheque on a limited company's bank account. Charged with theft of a valuable security possessing an alleged deemed value equivalent to the face amount of the cheque, the accused was

30. *See R.* v. *Hemmingway* (1955), 112 C.C.C. 321 (S.C.C.), per Estey J., at 333-335.

31. See paragraph (d) *supra,* n.1.

32. [1962] S.C.R. 215; 131 C.C.C. 403; C.R. 384.

convicted at trial and this result was affirmed on appeal. A further appeal to the Supreme Court of Canada was allowed, however. Fauteux, J., delivering the unanimous opinion of the Court, ruled that "the interest a person may have in protecting himself from the use of a document forged by and in the possession of another is neither property nor 'special property or interest' in the forged document."[33] The Court's decision is not that the forged cheque is not a valuable security. Fauteux, J. merely reasons that risk is, by itself, an improper basis upon which to find a "special property or interest." Simply, this means that it is not enough for the prosecution to prove that a document is a valuable security deemed by the *Code* to possess value. It is also necessary to establish that it has formed the subject matter of the alleged offence.[34]

Some Problem Areas

Discharge of Mortgage

Before concluding this discussion of valuable securities, it would be well to examine briefly a few problem areas. In the recent case of *R. v. Ares*,[35] the accused fraudulently induced his creditors to grant discharges of mortgages. He was accordingly charged with having defrauded his victims of a valuable security, contrary to section 338(1). It would seem that the Crown's evidence was directed at the mortgage interests surrendered by the creditors rather than at the discharges actually obtained by the accused. Faced with the prospect of having to permit a dishonest man to go unpunished, the Court took issue with the trial judge's "restrictive" interpretation of the expression valuable security as signifying a paper chattel, which was accordingly enlarged to include a right of action viewed as a thing separate from the document that evidences its existence.[36]

One is tempted to speculate that this novel position would not have been adopted but for the difficulty of otherwise proceeding on the basis of the *Code* section relied upon, the Crown's evidence as called, and the wording of the indictment, which on previous occasions had required amendment. It is submitted that the subject matter of the offence, viewed as an incorporeal right (a mortgage interest), is properly described as "property" instead of as "valuable security." In the alternative, taking the subject matter to be a valuable security imports of necessity the view that the relevant document was a discharge and not a mortgage and that possession of it for the limited purpose of execution, together with its manual transmission to the accused or his agent, sufficed to constitute the offence. If the latter course is followed, the wording of the relevant portion of the *Code* defin-

33. *Id.*, at 223; 131 C.C.C. at 409; 36 C.R. at 390-391. And *see Code* s. 283.

34. The case of forged valuable securities is somewhat anomalous. As in the case of any chattel personal, ownership of valuable securities turns on the notion of lawful possession (including the right to possess). The forger's custody of a forged cheque, as it is for an unlawful purpose, cannot qualify as possession. It follows that although a forged cheque may be designated a valuable security and be deemed to possess value, it is not, in the forger's hands, the "property" of an "owner". Parenthetically, this means that the forger, *qua* forger, cannot be victimized by a fraudulent acquisition otherwise punishable under the criminal law. But a forged cheque may be acquired by an innocent holder for value, for whom it is a valuable security possessing a deemed value equal to the "unpaid money", or face amount, and constituting property capable of forming the subject matter of an offence. On one view, all forged valuable securities (of any class of document) may be regarded as "instrument(s) evidencing the payment of money", see paragraph (e), *supra*, n.1. This would mean, however, that they could not be regarded as valuable securities until such time as value had been given for them.

35. [1972] C.A. 601.

36. *Id.*, per Montgomery, J.A. at 603, and per Lajoie, J.A. at 603-04.

tion of valuable security is significant. Paragraph (d) speaks of "release, receipt, discharge, *or other instrument* evidencing the payment of money."[37]

For these reasons, it is submitted that a valuable security is indeed a document.

Securities

It hardly seems necessary to raise the question whether documents which may be bought with money, such as participatory shares in public corporations, share warrants, bonds, annuities, and other debt instruments issued and guaranteed by government, frequently somewhat loosely referred to as "securities", are "valuable securities." The *Code* refers to such documents as a "security that entitles or evidences the title of any person (i) to a share or interest in a public stock or fund or in any fund of a body corporate, company, or society."[38]

In *R.* v. *Lanauze*,[39] however, similar wording in an Irish statute[40] was held by Crampton, J. not to include government stock or annuities. His *ratio* turns, as he acknowledged,[41] upon the proposition that "securities for money" are not valuable securities. The introductory provisions of the *Act* in question, however, provide that a "Security whatsoever, for Money . . . shall throughout this Act be deemed *for every purpose* to be included under and denoted by the Words 'valuable Security' ".[42] In addition, his Lordship's stipulation that a valuable security should be a "document or security transferable from hand to hand — a document capable of being the subject of larceny or embezzlement"[43] is an outright tautology because the very purpose of the legislation is to provide that the fraudulent acquisition of valuable securities should be punishable. Equally remarkable is his apparent indifference to the statutory direction that a "Share or Interest . . . in any Public Stock or Fund" is a valuable security.[44] Accordingly, "securities" in the less technical sense, that is, things which may be bought with money, are valuable securities.

Contracts

Real difficulty, however, lies in determining with precision which contracts are, and which are not, valuable securities. An important question is the extent to which ordinary, simple contracts may be thus characterized. With respect to money instruments the *Code* definition of valuable securities refers both to simple contracts (bills of exchange) and specialties (contracts under seal). In principle, a memorandum of agreement under which the promisor binds himself to pay money is effectively a security for

37. *Supra*, n.1.

38. *See supra* n.1.

39. *Supra*, n.22.

40. 9 Geo. 4, c.55 (U.K.).

41. *Supra*, n.22, at 375.

42. *Supra*, n.40, s.5.

43. *Supra*, n.22, at 374.

44. "Fund" originally meant the taxes and other revenues appropriated for the discharge of the state's liability on borrowed capital. With the expansion of the national debt in England, the expression came to mean the principal amount of the loans themselves. "Public Stock" refers to the funded or bonded indebtedness of governments capable of raising taxes for public purposes.

the payment of money in the promissee's hands. Moreover, a man fraudulently dispossessed of his co-contractant's binding written promise to pay money is deprived of the paper evidence of his right to payment (and consequently exposed to the risk of economic loss) in the same way as is the holder of a negotiable instrument in circulation for value who is similarly victimized.

Some decisions and *obiter* observations in favour of treating simple contracts calling for the payment of money as valuable securities can be found in the jurisprudence. Often overlooked is the fact that, despite Cockburn, C.J.'s strongly worded judgment, the majority in *R.* v. *Tatlock*[45] inclined to the view that policies of marine insurance upon which money was due and payable were properly described as valuable securities. In *R.* v. *John,*[46] Brett, J. says that any memorandum which purports to constitute evidence of an unenforceable agreement under which purports to constitute pay money is a valuable security.[47] In *R.* v. *Lowrie*[48] an ordinary, simple contract would have been regarded as a valuable security had it been established in evidence that money was due on the agreement as the indictment alleged.[49]

Conclusion

To recapitulate briefly, a valuable security is a document falling *ejusdem generis* within one or another of the classes of instruments established in the *Code* definition of valuable securities[50] and which, in the hands of a wrongdoer, exposes any person or the public to the risk of economic loss. The expression includes false, inchoate, incomplete, and otherwise unenforceable instruments complying with statutory directions or customary usage governing the form of a valuable security. An incomplete instrument may be a valuable security if it is sufficiently particular to create a risk of economic loss when in the custody of the wrongdoer, the degree of particularity required for this purpose constituting a question of fact. The value of a valuable security is that of the specific property or economic benefit to which it empirically relates, and its value is material when the document forms the subject matter of a fraudulent acquisition prohibited under the criminal law. For the purpose of prosecuting property offences, ownership of a valuable security depends entirely upon lawful possession, including possession for the limited purpose of making or executing the valuable security.

45. *Supra,* n.21.
46. (1875) 13 Cox C.C. 100.
47. *Id.,* at 107.
48. (1867) 10 Cox. C.C. 388; 36 L.J.M.C. 24 (C.A.).
49. *Id.,* at 392; 36 L.J.M.C. at 27.
50. *See supra* n.7.

As a final comment, the valuable securities provisions could perhaps benefit from a legislative reappraisal. Although adequate in its general outline and internal divisions, there is little to justify the continued presence in the *Code* definition of chattel paper and business entities which long ago passed into obsolescence.[51]

51. An "exchequer acquittance" would appear to be a tally, accountable receipt, or acknowledgement of indebtedness at one time issued by the U.K. Treasury and conditioned so that it should be delivered up upon payment of the money due or deposited. An "order . . . that entitles or evidences the title of any person (ii) to a deposit in a savings bank or another bank" was originally for the whole sum deposited, (8 *Holdsworth*, at 190-191). The "stamp" referred to in paragraph (d), *supra*, n.1, recalls the days when certain contracts and conveyances were in Canada dutiable. Examples of valuable securities formerly requiring stamps are warrants for goods, delivery orders, bills of sale, and conveyances on sale i.e. contracts for the sale of goods. Instruments lacking stamps were without legal effect and could not be introduced into evidence in litigious proceedings.