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## COMMERCIAL INSTRUMENTS, THE LAW MERCHANT, AND NEGOTIABILITY

BY RALPH W. AIGLER\*

UNTIL recently apparently no serious attempt had been made to make a comprehensive examination into the origins and history of commercial instruments or to explain the special doctrines attached to negotiability. As late as 1893 Professor Jenks<sup>1</sup> pointed out with obvious surprise that "we have as yet [in England] no serious attempt to trace the origin of negotiable instruments."<sup>2</sup> He then proceeded to point out that in Lombard documents of the 7th, 8th, 9th and 10th centuries are to be found instruments out of which probably were evolved the negotiable instruments known to the modern business world.<sup>3</sup>

In 1915 and 1916, in a series of papers Professor Holdsworth published the results of his thorough study of the problem.<sup>4</sup> It is pointed out that:

"Even in modern times the legal consequences of negotiability are exceptions to the ordinary rules of law. In ancient law anything approaching a negotiable instrument was legally impossible, for three reasons. First, ancient systems of law do not allow one

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<sup>1</sup>9 Law Quart. Rev. 70.

<sup>2</sup>In Germany much more had been attempted. *Ibid.* In the United States there had been no general investigations, though Cranch in a note to *Mandeville v. Riddle*, 1 Cranch Rep., appendix, had published the results of a study into the status of promissory notes before the Statute of Anne—3 and 4 Anne, c. 9.

<sup>3</sup>These documents were aimed at evading the strictness of the early law of transfer, and were of two general classes. In the first class the object of the conveyance was "to provide specially for the enforcement of a *right in personam*, on behalf of the grantee, but *through the agency* of a third person." In the second class "an actual transfer of the beneficial right" was contemplated. By the use of these instruments it seems that it became possible to create obligations the correlative rights on which were in a primitive and rather halting way transferable from hand to hand. *Ibid.*

<sup>4</sup>31 Law Quart. Rev. 12, 173, 376; 32 Law Quart. Rev. 20.

man to represent another in litigation before a tribunal. When this prohibition begins to be relaxed, representation is at first an exceptional privilege, and the representative must be formally and solemnly appointed. Secondly, ancient systems of law do not allow a creditor to assign his right to another. That the relation of debtor and creditor was a strictly personal relation is obvious from the strictly personal character of the creditor's remedy—he may even imprison the debtor. Therefore it is only just that the creditor and the creditor alone should be able to enforce his claim. Thirdly, such a transfer, even if otherwise permissible, was impossible, because there could be no transfer of anything without a physical delivery of possession; and how can the right to enforce the payment of a debt be physically transferred?<sup>55</sup>

Documents similar to those above referred to, relied upon by Professor Jenks as showing the practices of the Lombard lawyers in getting around these difficulties, were in common use among the merchants of Europe generally in the thirteenth century, and in England they were known to Bracton under the name of *missibilia*, "while in the fair courts we meet with *scripta obligatoria*, which could be enforced sometimes by the certain attorney or the *nuncius* of the creditor, sometimes by the producer of the document."<sup>56</sup>

The technical conceptions of the Roman and common law, however, led to the circumscribing of the usefulness of these documents both on the continent and in England to such an extent that by the sixteenth century in Europe they had disappeared. But some of their features were to appear in a type of instrument, then long in use at least on the continent, which was to survive,—the bill of exchange. In England one form of these ancient documents, the promise obligatory, apparently continued in use until about the time our modern promissory notes were recognized. Indeed it would seem not improbable that our notes are in English law a lineal descendant of this venerable ancestor. The bill of exchange, it is said, developed as a bit of machinery to give effect to the medieval contract of *cambium*<sup>7</sup> which was concerned with the special case of the exchange of money for money.<sup>8</sup> With the growth of foreign trade the difficulties and dangers of payments multiplied. Naturally those whose business it was to exchange monies were resorted to in this connection. They, in turn, out of the necessities of the situation, particularly the danger involved in transporting valuables,

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<sup>55</sup>1 *Law Quart. Rev.* 13, 14.

<sup>56</sup>*Ibid.*, p. 15.

<sup>7</sup>*Ibid.*, p. 173.

<sup>8</sup>*Ibid.*, p. 24.

were driven to adopt new means or to adapt old agencies to avoid these risks.<sup>9</sup> Out of this no doubt our modern bill of exchange developed.<sup>10</sup> What was almost a necessity in foreign

<sup>9</sup>In *Le Droit des Marches et des Foires*, pp. 557, 558, Professor Huvelin explains the process as follows: "That we may the better understand this system, let us take an example. Genoa has business relations with London and Geneva. Goods have been bought and sold in all these places. From all of them are debts to be recovered. To effect this object is it necessary to resort to the dangerous and costly process of transporting money? The merchants soon discovered the expedient of regulating their business relations by means of letters of exchange payable at the same fair. They stipulated for letters of exchange payable at the fairs of Bar, of Provins, etc. Suppose that a Genoese was obliged to receive a hundred livres from his London correspondent. The latter promised to pay this sum at the fair of Bar, for instance, and remitted to the Genoese the document in which he acknowledged that he owed this sum and promised to pay at a fixed date at the fair of Bar. He then chose in London a banker going to the fair of Bar to whom he gave an authority to pay the debt in his name when it fell due. The Genoese on his side chose at Genoa a banker going to the same fair. Thus the two bankers played the part of nuntii or missi of these two parties. When they came to the fair the one was the bearer of an order to pay, the other of an order to receive payment of the debt.

"But each of these bankers who came to the fair had many payments to make and receive; and the duty to make and the right to receive these payments originated in obligations made in a large number of places. If the bankers of Genoa and London were obliged to pay and receive exactly the same sums from each place the settlement would be very easy, since all the debts would be extinguished by set-off. But it may well be, and this is the most common case, that one of these places owed the other more than it is entitled to receive. Genoa, for instance, may have an adverse balance as against London. Therefore, if we were only considering these two places there would be a considerable debt still owing which would not be extinguished by set-off.

"But these two places are not the only places represented at the fairs. All the places of Western Europe are represented there. Now if Genoa has an adverse balance as against London, it may well have a favourable balance as against Ypres, Paris, or Geneva. Genoa has, therefore, a balance of payments to receive from these places. An unfavourable balance on the one side, a favourable balance on the other, obviously admits of set-off. Genoa can draw on the bankers of Paris, Ypres, or Geneva to pay her London creditors. The sum to be liquidated will be the difference left after all these operations have been carried out. Thus . . . thanks to the principle of set-off, thanks to the practice of making letters of exchange payable at the same fair, the work of making payments will be simplified and shortened. The amount to be paid in money will generally be insignificant."

<sup>10</sup>There are so few really *new* things and ideas that it is of course likely that the bill of exchange used in the middle ages was an adaptation rather than an invention. As to the possible *origins* of bills of exchange, see Holdsworth, in 31 *Law Quart. Rev.* 174-177; Jenks in 9 *Law Quart. Rev.* 85.

"Under the influence of a school of lawyers less enslaved to the classical texts than the Renaissance jurists, and more alive to the interests of commerce, the bill of exchange was permitted to supply the want caused by the disappearance of the negotiable character of their old instruments. And thus, though much younger than these instruments, though originally mere letters without any legal significance, they have, as we have said, become the type and model of the negotiable instruments known to our modern law." 31 *Law Quart. Rev.* 185.

trade eventually became a valuable convenience in inland, domestic transactions.

The likely relationship between the older bills obligatory payable to bearer and our modern promissory notes has already been alluded to.<sup>11</sup> In the roll of the Abbot of Ramsey's court of the fair of S. Ives there is the report of a case in the year 1275 in which one Brun de S. Michel of Bordeaux complained of Walter Troner and Reginald Wreningham of Norwich, "for that the said Walter and Reginald along with . . . by force and unjustly detain and deforce from him £8 of silver out of a sum of £8 10s which they were bound to pay to the said Brun or any on his behalf bearing a certain obligatory writing made," etc.<sup>12</sup> Now this looks remarkably like one of our promissory notes.<sup>13</sup> Of course the case is no authority that the bearer as such could recover thereon, for the complaint was by the payee.

The use of inland bills and promissory notes in England probably grew to large proportions about the middle of the seventeenth century, for it was about this time that the banking business of the goldsmiths developed.<sup>14</sup> The big increase in paper credits

<sup>11</sup>*Supra*, p. 362.

<sup>12</sup>Select Pleas in Manorial Courts, Selden Society.

<sup>13</sup>See Cranch "Promissory notes before and after Lord Holt." 3 Select Essays 72, 79, 80.

<sup>14</sup>"This account," says Anderson, "we have from a scarce and most curious small pamphlet, printed in 1676, entitled 'The mystery of the new-fashioned goldsmiths or bankers discovered, in eight quarto pages,' from which he extracts the following passage: 'Such merchants' servants as still kept their masters' running cash, 'had fallen into a way of clandestinely lending it to the goldsmiths at four pence per cent per diem; who, by these and such like means, were enabled to lend out great quantities of cash to necessitous merchants and others, weekly or monthly, at high interest; and also began to discount the merchants' bills, at the like or a higher rate of interest. That much about this time, they (the goldsmiths or new-fashioned bankers) began to receive the rents of gentlemen's estates remitted to town, and to allow them and others, who put cash into their hands, some interest for it, if it remained a single month in their hands, or even a lesser time. This was a great allurements for people to put their money into their hands, which would bear interest until the day they wanted it; and they could also draw it out by 100£ or 50£ etc., at a time, as they wanted it, with infinitely less trouble than if they had lent it out on either real or personal security. The consequence was, that it quickly brought a great quantity of cash into their hands; so that the chief or greater part of them were now enabled to supply Cromwell with money, in advance on the revenues, as his occasions required, upon great advantage to themselves.'

"After the restoration, King Charles being in want of money, they took ten per cent of him barefacedly; and by private contract on many bills, orders, tallies and debts of that king, they got twenty, sometimes thirty per cent to the great dishonor of the government. This great gain induced the goldsmiths to become more and more lenders to the king; to anticipate all the revenue; to take every grant of parliament into pawn, as soon as it was given; also to outvie each other in buying and taking

would naturally lead to a more general use of instruments of the character of bills and notes.<sup>15</sup>

There is unmistakable evidence that instruments in the general form and content of our promissory notes were in circulation in England during the last half of the seventeenth century.<sup>16</sup> Indeed no particular distinction seems to have been made between inland bills and notes.<sup>17</sup> In *Grant v. Vaughan*<sup>18</sup> Lord Mansfield said that :

“Upon looking into the reports of the cases on this head, in the times of King William the Third and Queen Anne, it is difficult to discover by them, when the question arises upon a bill and when upon a note; for the reporters do not express themselves with sufficient precision, but use the words ‘note’ and ‘bill’ promiscuously.”

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to pawn, bills, orders and tallies; so that in effect all the revenue passed through their hands. And so they went on, till the fatal shutting of the exchequer, in the year 1672. . . .” Quoted by Cranch in 3 Select Essays, 82.

<sup>15</sup>Cranch in 3 Select Essays, 82.

<sup>16</sup>*Shelden v. Hentley*, (1680) 2 Show. 161; *Williams v. Williams*, (1692) Carth. 269; *Hawkins v. Cardy*, (1693) Carth. 466, 1 Salk. 65, 1 Ld. Raym. 360.

<sup>17</sup>“The plaintiff Thomas Williams, being a goldsmith in Lombard-Street, brought an action on the case against Joseph Williams the projector of the diving engine, and declared upon a note drawn by one John Pullin, by which he promised to pay 12£ 10s. unto the said Joseph Williams on a day certain; and he indorsed the note for value received unto one Daniel Foe, who indorsed it to the plaintiff for like value received. . . .”

“To which it was answered that this custom of merchants concerning bills of exchange is part of the common law, of which the Judges will take notice ex officio, as it was resolved in the case of *Carter v. Downish*, (1668) 1 Show. 127; and therefore ’tis needless to set forth the custom specially in the declaration, for ’tis sufficient to say that such a person secundum usum & consuetudinem mercatorum drew the bill; therefore all the matter in the declaration concerning the special custom was merely surplusage, and the declaration good without it.” *Williams v. Williams*, (1692) Carth. 269.

“The plaintiff brought an action upon the case upon a bill of exchange against the defendant, and declared upon the custom of merchants, which he shewed to be thus; that if any merchant subscribes a bill, by which he promises to pay a sum of money to another man or his order, and afterwards the person to whom the bill was made payable indorses the said bill, for the payment of the whole sum therein contained, or any part thereof, to another man, the first drawer is obliged to pay the sum so indorsed to the person to whom it is indorsed payable; and then the plaintiff shews, that the defendant Cardy, being a merchant, subscribed a bill of 46£ 19s. payable to Blackman or his order; that Blackman indorsed 43£ 4s. of it payable to the plaintiff, etc. The defendant pleaded an insufficient plea. The plaintiff demurred, and the defendant joined in demurrer. And adjudged per totam Curiam, that the declaration is ill. For a man cannot apportion such personal contract, for he cannot make a man liable to two actions, where by the contract he is liable but to one.” *Hawkins v. Cardy*, (1698) Carth. 466, 1 Salk. 65, 1 Ld. Raym. 360.

<sup>18</sup>(1764) 3 Burr. 1525, 1 Wm. Bl. 485.

Lord Holt, who generally had shown a disposition to appreciate the needs of trade and to recognize and apply in the common law courts the established customs of the mercantile world, protested against this confusion of bills and notes, and in a celebrated case in 1702<sup>19</sup> he vigorously rejected any recovery on a promissory note in *assumpsit* based on the custom of merchants.<sup>20</sup> Two years later the same opinion was expressed in an action by the indorsee of a note payable by its terms to the payee or order.<sup>21</sup> A circumstance which appears to have been of considerable weight in his arriving at this view was that the merchants could so easily accomplish the same purpose by adaptation of the bill of exchange.<sup>22</sup>

But this view of Lord Holt was of short life. By an Act of Parliament<sup>23</sup> it was provided:

"That all notes in writing, that after the first day of May, in the year of our Lord, one thousand seven hundred and five,

<sup>19</sup>*Clerke v. Martin*, (1702) 2 Ld. Raym. 757, 1 Salk. 129.

<sup>20</sup>"But Holt, Chief Justice, was *totis viribus* against the action; and said, that this note could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law; and that it amounted to the setting up a new sort of specialty unknown to the common law, and invented in Lombard-Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method, as to declare upon a general *indebitatus assumpsit* for money lent, etc."

The old bill obligatory, referred to above, had been recognized and enforced as a common law obligation, and only recently, in Holt's time, had there been any indication of applying to them the special customs of the merchants. It was his notion, apparently, that these documents should continue according to their earlier course, as common law promissory obligations.

<sup>21</sup>*Buller v. Crips*, (1703) 6 Mod. 29. The Chief Justice said: "I remember when actions upon inland bills of exchange did first begin . . . and the notes in question are only an invention of the goldsmiths in Lombard-Street, who had a mind to make a law to bind all those that did deal with them; . . . and these notes are not in the nature of bills of exchange; for the reason of the custom of bills of exchange is for the expedition of trade, and its safety; and likewise it hinders the exportation of money out of the realm."

<sup>22</sup>"At another day Holt, Chief Justice, declared, that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course; and that they had told him, it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years, and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange. Indeed I agree a bill of exchange may be made between two persons without a third; and if there be such a necessity of dealing that way, why do not dealers use that way which is legal?" *Buller v. Crips*, (1703) 6 Mod. 29.

<sup>23</sup>3 and 4 Anne, c. 9.

shall be made and signed by any person or persons, body politick or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her or them, whereby such person or persons, body politick and corporate, his, her, or their servant or agent, as aforesaid doth or shall promise to pay to any other person or persons, body politick and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons . . . and also every such note . . . shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of the merchants," etc.

Thus in the dispute between Holt and the merchants as to whether the law should follow business or whether, on the contrary, business practices should be adjusted to accord with the law, or at least what Holt insisted was the law, it is evident that, as usual, it was futile for the law to attempt to dam back the rising tide of business.

There may well be differences of opinion as to whether this statute of Anne created a new rule with reference to promissory notes or whether, on the other hand, it merely wiped out an unfortunate and erroneous aberration of Lord Holt.<sup>24</sup> In *Goodwin v. Roberts*<sup>25</sup> Cockburn, Chief Justice, spoke of the conflict between Holt and the merchants as unseemly and of Holt's view as narrow-minded. He said that "the Statute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt."<sup>26</sup>

Whether the statute was merely declaratory or not has been a question of importance practically as well as academically. For example, in *Carnwright v. Gray*<sup>27</sup> the payee in a non-negotiable promissory note claimed to be entitled to judgment thereon after proof of the instrument and its introduction in evidence

<sup>24</sup>Perhaps it was with significance that the preamble of the statute was made to read: "Whereas it hath been held, That notes in writing . . . are not assignable or indorsable over, within the custom of merchants, to any other person," etc. Unless it was the Parliamentary intention to straighten out Lord Holt, why should not the preamble have provided: "Whereas notes in writing . . . are not assignable and indorsable over," etc.? See *Goodwin v. Roberts*, (1875) L. R. 10 Ex. 337, 350.

<sup>25</sup>(1875) L. R. 10 Ex. 337, 350.

<sup>26</sup>*Ibid.*, p. 350. So too was the opinion of Judge Cranch. 3 Select Essays 89-93. Holdsworth is inclined to view Holt's attitude somewhat more charitably. 32 Law Quart. Rev. 34-37.

<sup>27</sup>(1891) 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 A. S. R. 424.

without showing any consideration. On the basis of a New York statute the provisions of which were in substance those of the Statute of Anne it was held that the plaintiff should recover. The statute of that state was later repealed, and thereafter there arose another case<sup>28</sup> presenting the same question decided in the *Carnwright Case*. It was then held that the statutory provision on which the earlier case had been decided was essential to the conclusion there reached and accordingly that the plaintiff in the later case could not recover without proof of consideration.<sup>29</sup>

Checks are simply bills of exchange in which the drawee is a banker. They are payable on demand. Where the drawer and drawee both are bankers the common practice is to speak of the instrument as a "draft."<sup>30</sup>

In the middle ages most of the disputes involving commercial questions were litigated in special courts. Problems regarding shipping were handled by courts of the seaport towns. Their jurisdiction gradually yielded to the admiralty.<sup>31</sup> The non-maritime courts dealing with these questions "were either (1) the courts of Fairs and Boroughs, or (2) the courts of the staple."<sup>32</sup> The existence of courts in connection with fairs and markets in continental Europe as early as the ninth century is established. In England early Norman grants of the privilege to hold a market or fair gave express authority to hold a court in connection therewith, and as early as the twelfth century the grant of such jurisdiction in connection with the fair seems to have been implied. These courts which came to be known as piepowder courts because of the character of the litigants,<sup>33</sup> sat in effect

<sup>28</sup>*Kinsella v. Lockwood*, (1913) 79 Misc. 619, 140 N. Y. S. 513.

<sup>29</sup>This decision, to be sure, was by an inferior court, and if the view suggested above that the Statute of Anne simply restored the rule which prevailed prior to *Clerke v. Martin*, (1702) 2 Ld. Raym. 757, 1 Salk. 129, it ought not to prevail.

See also *Mandeville v. Riddle*, (1803) 1 Cranch (U.S.) 290, 2 L. Ed. 112, which led to the essay by Judge Cranch cited above.

<sup>30</sup>There are of course, many other types of commercial paper, unnecessary to notice at this time. As to them, there will be more later on. The recognition of new types of commercial paper is an interesting story by itself.

<sup>31</sup>Holdsworth, *Hist. of Eng. Law*, 530-535.

<sup>32</sup>*Ibid.*, p. 535.

<sup>33</sup>"The term 'piepowder' ('piepoudres,' 'pede pulverosi') was not, however, applied to this tribunal, as Sir Edward Coke and various other older writers believed, because justice was administered as speedily as the dust could fall or be removed from the feet of the litigants, but because the court was frequented by chapmen with dusty feet, who wandered from mart to mart." Professor Gross in *Introduction to Select Cases on the Law Merchant*, published in volume 1 *Selden Society*, p. XIII.

continuously during the fair, and pride apparently was taken in the expedition of the proceedings and relief. While in the earliest days of these courts it is likely that decisions were arrived at without much reference to any established rules, it would be only natural that as time went on more and more there should develop a body of principles according to which justice would be administered in these tribunals. These principles and the customs recognized in such proceedings make up the Law Merchant of the period. The nature and scope of the rights and obligations of parties in connection with the documents above discussed were largely determined by this Law Merchant.<sup>34</sup>

As the jurisdiction of the King's Courts was extended, and the procedure and remedies therein became more expeditious and efficacious, to which the development of the action of *assumpsit* largely contributed,<sup>35</sup> the practice of resorting to these local commercial courts gradually diminished.<sup>36</sup> The first case in the reports of the King's Courts involving a bill of exchange apparently is one of the year 1602.<sup>37</sup>

The Law Merchant was deemed a distinct body of law not to be confused with the common law. In 1353, in the statute of the Staple<sup>38</sup> are to be found frequent references to the Law Merchant then obviously looked upon as a body of law applicable to particular classes of people or under special circumstances. Chapter 21 provided that the mayor of the staple should have "knowledge of the law merchant," while chapter 8 provided "that all merchants coming to the staple shall be ruled by the law merchant, of all things touching the staple, *and not by the common law of the land*, nor by the usage of cities, boroughs, or other towns." And among the "divers laws within the realm of England" Coke included "*Lex Mercatoria*."<sup>39</sup> Not only was the

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<sup>34</sup>The origin, development, organization, and operation of these commercial courts is most interestingly told by Professor Gross. Introduction to Select Cases on the Law Merchant, 1 Selden Society, pp. XIII-XXXV. See also 1 Holdsworth, Hist. of Eng. Law, chap. VII.

Mr. Ewart objects to speaking of the law merchant as a body of Law. 3 Col. L. Rev. 135.

<sup>35</sup>Holdsworth in 32 Law Quart. Rev. 20.

<sup>36</sup>Contributing to the same end of course was the lessening in importance of the fair as a commercial institution. In Blackstone's time these local courts were "in a manner forgotten." 3 Bl. Comm. 33. A piepowder court, however, continued at least nominally until as recently as 1898. See Professor Gross in Introduction to Select Cases on the Law Merchant, 1 Selden Society, p. XIX.

<sup>37</sup>Martin v. Boure, (1604) Cro. Jac. 6.

<sup>38</sup>27 Edw. III statute 2.

<sup>39</sup>1 Inst. c. 2. He mentions the "common law" as another of these "divers laws."

Law Merchant deemed a body of rules, principles, practices, etc., apart from the common law but at least in early days it was thought of as part of the law of nations.<sup>40</sup>

In the earliest cases, in the common law courts, involving bills of exchange the declarations were framed, most laboriously, so as to state causes of action in *assumpsit*.<sup>41</sup> But during the seventeenth century there developed a much more simple mode of declaring, namely, upon the breach of a duty arising under the "custom of merchants," the action thus becoming a special action on the case rather than an action on the case *on promises*—*assumpsit*—though the action generally was referred to shortly as *assumpsit*. Thus in *Hussey v. Jacob*<sup>42</sup> it is reported simply:

"Assumpsit. The plaintiff declares upon the custom of merchants, by which, if a bill of exchange is drawn upon a person, and he accepts it, he is liable to pay it; that the Lord Chandos had drawn a bill upon the defendant for the payment of 120 pieces of gold, called guineas, to the plaintiff, and the defendant accepted thereof, and afterwards refused payment."

Not only was there this change in view as to the procedural phase, but at the same time, or perhaps a little later, the view, mentioned above, of the law merchant as something quite apart from and outside the common law, was abandoned, and the law merchant came to be considered as a part of the body of the common law. As early as 1622<sup>43</sup> it appears to have been argued that "the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice: and if any doubt arise to them about their custom, they may send for

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See also Malynes, "Lex Mercatoria or Ancient Law Merchant." chap. XIV.

<sup>40</sup>"The law merchant, as it is a part of the law of nature and nations, is universal and one and the same in all countries in the world." Davies in "Concerning Impositions," c. 3 (1656). See also article by Tudsbury in 34 L. Quart. Rev. 392.

<sup>41</sup>See Rastell's Entries, the first edition of which was published in the latter part of the sixteenth century. Some of these early forms are printed in 1 Cranch (U.S.) Appendix 375-377.

<sup>42</sup>(1696) 1 Comyns 4. In the much earlier case of *Oaste v. Taylor*, (1612) Cro. Jac. 306, the plaintiff in *assumpsit* alleged the "custom of London, between merchants trafficking from London into the parts beyond the seas;" that "upon such a merchant's accepting a bill, and subscribing it according to the use of merchants, it hath the force of a promise, to compel him to pay it at the day appointed by the bill." See also *Vanheath v. Turner*, (1622) Winch 24; *Anon.*, Hardres, (1668) 485. In *Clerke v. Martin*, (1702) 2 Ld. Raym. 757, 1 Salk. 129, it is reported that "the plaintiff brought an action upon his case against the defendant upon several promises; one count was upon a general *indebitatus assumpsit* for money lent to the defendant; another count was upon *the custom of merchants*, as upon a bill of exchange."

<sup>43</sup>*Vanheath v. Turner*, (1622) Winch 24.

the merchants to know their custom, as they may send for the civilians to know their law," etc. By 1668 the courts were ready to rule that "this course of accepting bills being a general custom amongst all traders both within and without the realm, and having everywhere that effect, as to make the acceptor subject to pay the contents, *the court must take notice of that custom*: but the custom does not extend so far as to create a *debt*; only makes the acceptor *onerabilis* to pay the money."<sup>44</sup> And by 1698 the recognition of the law merchant as a part of the common law seems completely accepted;<sup>45</sup> though, as indicated above, there may have been occasions when it was necessary to offer proof of the content of the law merchant.<sup>46</sup>

In the earlier cases in the King's courts only merchants were allowed to count upon the custom of merchants.<sup>47</sup> During the latter half of the seventeenth century, however, it was settled that any party to a bill of exchange, whether trader or not, could rely on the law merchant with reference thereto.<sup>48</sup> In *Bromwich v. Loyd*,<sup>49</sup> Chief Justice Treby said,

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<sup>44</sup>Anon., (1668) Hardres, 485. On the conclusion of the argument the Chief Baron had said: ". . . and it were worth while to enquire, what the course has been among merchants; or to direct an issue for trial of the custom amongst merchants in this case. For although we must take notice in general of the law of merchants; yet all their customs we cannot know but by information."

In *Carter v. Downish*, (1668) 1 Show. 127, Pollexfen, C. J. said: "As to the law of merchants, I think we are bound to take notice of it." And in *Mogadara v. Holt*, (1690), 1 Show. 318, it was laid down that "the law of merchants is *ius gentium* and part of the common law, and ought to be judicially noticed when set forth in pleading." See also *Williams v. Williams*, (1693), Carth. 270, where it was said that "the custom of merchants concerning bills of exchange is part of the common law of which the Judges will take notice."

<sup>45</sup>See *Bromwich v. Loyd*, (1696) 2 Lutw. 1582.

In *Brandao v. Barnett*, (1846) 12 Cl. & F. 787, 805, in speaking of the general lien of bankers which rests on the law merchant, Lord Campbell said: "When a general usage has been judicially ascertained and established it becomes a part of the law merchant, which courts of justice are bound to know and recognize. Such has been the invariable understanding and practice in Westminster Hall for a great many years."

<sup>46</sup>Anon., (1668) Hardres 485, cited *supra*, note 44.

The practice of consulting merchants as to the usages of trade was very common during Lord Mansfield's time. See 2 Campbell, *Lives of the Chief Justices*, 407, note.

The notion, so frequently expressed, that it was not until the time of Lord Mansfield that the law merchant became incorporated with the common law would seem to be erroneous. The absorption apparently was nearly a century before Mansfield became a judge. The mode of handling this problem on the trial did change during the time of Mansfield, and, of course, great advance was made in working out the relations and duties of parties to commercial paper. See further, Mitchell, *Law Merchant*, 77.

<sup>47</sup>*Eaglechilde's Case*, (1631) Hetley, 167.

<sup>48</sup>*Woodward v. Rowe*, (1666) 2 Keb. 105, 132.

<sup>49</sup>In 1698.

“that bills of exchange at first were extended only to merchant strangers, trading with English merchants; and afterwards, to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, *and of late, to all persons, trading or not.*”

With the recognition of the rules and principles of the law merchant by the common law as part of its working materials and the tremendous growth in trade during the eighteenth and nineteenth centuries reported decisions involving commercial paper multiplied. In 1878, when Chalmers published the first edition of his Digest of the Law of Bills, Notes, and Checks, he found the law “contained in some 2500 cases and 17 statutory enactments,” the cases, however, being “comparatively few and unimportant until the time of Lord Mansfield.”<sup>50</sup> This Digest was the basis of the English Bills of Exchange Act of 1882<sup>51</sup> of which Chalmers was the draughtsman.

The Bills of Exchange Act was the first codification of any branch of the common law to find its way into the statute books. It marks an epoch in the law of commercial paper, for under it the law of bills, checks, and notes is to be determined not in the usual way, by an examination of decided cases, but by resort to the Act.<sup>52</sup>

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<sup>50</sup>Chalmers, Bills of Exchange, 8th Ed., xli.

<sup>51</sup>45 and 46 Vict., c. 61.

<sup>52</sup>In *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, 144, 60 L. J. 2 B. 145, 64 L. T. 335, 55 J. P. 676, 39 W. R. 657, 7 T. L. R. 333, Lord Herschell said: “I think the proper course is, in the first instance, to examine the language of the statute, and ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding, such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code.”

In 1895, the Conference of Commissioners on Uniformity of Laws, then meeting in Detroit, initiated a movement which culminated in a proposed act codifying the law of negotiable instruments. This proposed legislation became a law in New York, May 19, 1897, and since then has been enacted in all of the states with the single exception of Georgia. It has been adopted also in Alaska, Hawaii, and the District of Columbia.

The object of the act obviously was not primarily codification but uniformity in the law of commercial paper throughout the various states. Codification was a necessary means to this desired end. Since it is only *negotiable* paper that is apt to circulate to any considerable extent it was quite to be expected that the act should be one "Relating to Negotiable Instruments." Non-negotiable documents, whether deriving their properties from the law merchant or from the common law are left unaffected.<sup>53</sup>

It is vitally important that it be appreciated that commercial paper,<sup>54</sup> of which bills of exchange and promissory notes are the earliest and most common, is of two types, (a) negotiable, (b) non-negotiable. Whether the document is one or the other depends largely on its form.<sup>55</sup> While a non-negotiable commercial instrument lacks the special qualities attaching to negotiability, at the same time it must be observed that its properties are not necessarily the same as those of the ordinary common law contractual obligation.<sup>56</sup>

In the foregoing there has been sketched a brief review of the origin and development of bills and notes and of the relationship between the common law and the law merchant. It remains to consider briefly the quality of *negotiability*.

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<sup>53</sup>Windsor Cement Co. v. Thompson, (1913) 86 Conn. 511, 86 Atl. 1; Johnson v. Lassiter, (1911) 155 N. C. 47, 71 S. E. 23; Reynolds v. Vint, (1914) 73 Ore. 528, 144 Pac. 526; Westberg v. Chicago Lumber & Coal Co., (1903) 117 Wis. 589, 94 N. W. 572.

<sup>54</sup>Dean Ames (2 Cases on Bills and Notes, 872) uses the expression "commercial specialties." As the law has developed, there is a danger in the use of the word "specialty," for it may be understood as indicating that, as in the case of the common law specialty—an instrument under seal—the matter of consideration is immaterial. What was probably Dean Ames' view on this matter has not been accepted. Lord Holt thought of instruments suable on the custom of merchants as truly specialties. (See Cramlington v. Evans, (1689-90) 1 Show. 5, Holt K. B. 108, 2 Vent. 30), and it was his unwillingness to give promissory notes this same status that accounted in part, at least, for his determined stand in Clerke v. Martin, (1702) 2 Ld. Raym. 757, 1 Salk. 129. That a promissory note, even under the Statute of Anne, is not to be treated as a "specialty" see Brown v. Marsh, (1721) Gilb. Eq. 154.

<sup>55</sup>See *infra*.

<sup>56</sup>See Professor Goodrich in 5 Iowa L. Bull. 65.

The chief aspects of negotiability are in reference (a) to the mode of transfer, (b) to the possible acquisition by the transferee of better rights on the instrument than held by the transferor, and (c) to the ability of the holder for the time being to maintain suit thereon in his own name.<sup>57</sup> The acquisition by bills and notes of these qualities of negotiability was accomplished during the seventeenth and eighteenth centuries.

However it may have been on the continent it seems clear that in England, in 1622, bills of exchange were not transferable. In that year Malynes published his often cited *Lex Mercatoria*, from which may be gained much useful information regarding the commercial practices of that period.

"From what has been said it appears that when Malynes wrote, bills of exchange were not, generally speaking, transferable in England by indorsement or delivery, either as a matter of custom or of the law. On the continent a clumsy substitute for this quality had been found in the practice of transferring before delivery."<sup>58</sup>

During the next thirty years, however, it became the practice to insert words of negotiability such as "or assigns" or "or order," and transfers were accomplished by indorsement.<sup>59</sup> By 1691 this

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<sup>57</sup>It has been rightly pointed out that these qualities are not possessed necessarily only by negotiable instruments. See Ewart in 16 L. Quart. Rev. 135. He says (p. 140) "The truth is that 'negotiable' has an original and an acquired significance. Originally it meant transferable; but afterwards it was used to designate the *effects* of transfer, namely, that the transferee (1) took free from equities, and (2) could sue in his own name." The suggestion is then made that choses in action (arising out of contract) should be classified as (a) ambulatory, (b) non-ambulatory. But there is danger in such terminology, in view of the use of the term "ambulatory" in connection with wills.

The significance of a very few words or even a mere signature in certain positions on the instrument is perhaps another special quality of negotiable paper.

<sup>58</sup>2 Street, *Foundations of Legal Liability*, 359.

<sup>59</sup>See Marius, *Advice*, 2nd Ed. 14, 18. The general nature of exchange and the sanction and effectiveness of bills are delightfully set forth by this writer: "Exchange is by some held to be the most mysterious part of the art of merchandising and traffick, being grounded upon custom and experience; and the necessity and commodiousness of Exchanges is seen, in that it hath found a general allowance in all countries time out of mind, and yet is maintained with the general consent of all, for it prevents the danger and adventure of carriage of monies from one city or country to another.

"And this is done only by two or three lines written on a small piece of paper, termed, A Bill of Exchange; which is so noble and excellent, that though it cannot properly (as I conceive) be called a specialty, because it wanteth those formalities which by the common law of England are thereunto required, as seal, and delivery, and witnesses: Yet it is equivalent thereto, if not beyond, or exceeding any specialty or bond, in its punctuality and precise payment, carrying with it a commanding power though directed from the servant to the master; for if by him accepted,

was looked upon as well settled, and bills payable to a payee "or bearer" were distinguished from those payable to "order" or to "assigns."<sup>60</sup>

By the Statute of Anne, above referred to, it was provided that promissory notes payable to a person or his order "or unto bearer" should be construed as due and payable to any such person or persons "to whom the same is made payable."

The statute provided further that "every such note payable to any person or persons, body politick and corporate, his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants." It was a matter of construction as to which of the following instruments were meant to be covered: those payable (a) "to A," (b) "to A or order," (c) "to A or bearer." That type (b) should be included seemed quite clear; that instruments payable to bearer, (c), should be indorsable over was not so clear, but it seems to have been taken for granted that the statute applied to them also. In 1764, in the case of *Grant v. Vaughan*,<sup>61</sup> it was ruled by Lord Mansfield that on a bill of

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it concerneth him every whit as much to see it be paid with honor at the time, as the servant can desire, or the party to whom it is payable can expect, in regard the acceptor's credit lieth at stake; And if he fail of payment at the precise day, presently there will issue forth a protest, which may tell tales, and soon make a dilemma in his commerce, for he must not expect to continue his credit long that doth not pay his accepted bills at the time appointed, and besides his own, his servant or friend, the drawer's credit will also be wounded; besides the charges which are incident thereunto, and unavoidable payment of principal and charges at the end, if the party or parties are able, for both acceptor and drawer are bound until payment, as shall be more particularly shewed in this ensuing treatise: Thus much in general, for I love not to spend more words than need, or to tell a large story to little or no purpose." Marius pp. 1, 2.

<sup>60</sup>In *Hodges v. Steward*, (1691) 1 Salk. 125, it is reported that the following point was resolved: "A difference was taken between a bill payable to J.S. or bearer, and J.S. or order; for a bill payable to J.S. or bearer is not assignable by the contract so as to enable the indorsee to bring an action, if the drawer refuse to pay, because there is no such authority given to the party by the first contract, and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise. But when the bill is payable to J.S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action." Cf. *Hinton's Case*, (1682) 2 Show. 236. See also *Nicholson v. Sedgwick*, (1697) 1 Ld. Raym. 180, 181, 3 Salk. 67, where it is said that "where it is payable to the party or bearer, if the bearer be allowed to bring the action in his own name, it may be very inconvenient; for then anyone who finds the note by accident, may bring the action. And though this last has been frequently attempted, it has never yet prevailed." It had already been decided that a plaintiff as bearer of a promissory note payable to A or bearer could not sue thereon in his own name. *Horton v. Coggs*, (1690) 3 Lev. 299.

<sup>61</sup>(1764) 3 Burr. 1516.

exchange payable to bearer an action might be maintained by the bearer in his own name, emphasis being placed on the fact that by the Statute of Anne bills and notes had been put upon the same footing.<sup>62</sup> Still less reason did there seem to be to apply the provisions of the statute to a note payable "to A" simply, but in *Burchell v. Slocock*<sup>63</sup> it was decided that a note payable "to W" was within the statute.<sup>64</sup> However this meant merely that such notes were *promissory notes* in the true sense and suable as bills of exchange were, not that they were *negotiable*.<sup>65</sup> The English Bills of Exchange Act of 1882 provides that "a bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."<sup>66</sup> This applies also to notes.<sup>67</sup>

While these instruments were acquiring gradually those qualities of negotiability or transferability by indorsement or, in some instances, by delivery, and suability in the name of the holder for the time being, whether the original promisee or a transferee,

<sup>62</sup>The case was a strong one on its facts for the allowance of the action, the bill being drawn payable "to Ship Fortune or bearer."

Holdsworth points out that more than forty years earlier the bearer had been allowed to sue in France. 32 Law Quart. Rev. 25.

<sup>63</sup>(1728) 2 Ld. Raym. 1545. The liberality of the courts in these questions rather fortifies the view that the statute was needed only to set Lord Holt straight. The language of the statute alone surely did not warrant the conclusions ostensibly based thereon.

<sup>64</sup>*Moore v. Paine*, (1736) Lee, Temp. Hardwicke, 288, *acc.* There is American authority to the same point, *Goshen, etc., Turnpike Road Co. v. Hurtin*, (1812) 9 Johns. (N.Y.) 217; *Leidy v. Tammany*, (1840) 9 Watts (Pa.) 353.

<sup>65</sup>The statements to the contrary by Holdsworth (31 Law Quart. Rev. 385, n 8, 32 *Ibid.* 34) and by Street (2 Foundations of Legal Liability 387) would seem to be unwarranted. *Burchell v. Slocock*, (1728) 2 Ld. Raym. 1545, is the only authority cited by Holdsworth. The only point decided in that case was that under the Statute of Anne an action on the case on a promissory note could be maintained by the administrator of the payee, the promise running in terms only to the deceased. The additional cases referred to by Street are either of the same character or were actions by an indorsee against the indorser on an attempted indorsement. The case of *Smith v. Kendall*, (1794) 6 Durn. & E. 123, is also cited by Street in this connection. There the court decided that the maker of a promissory note payable simply to the payee was entitled to three days of grace. But it is unsafe to assume that days of grace was an attribute of *negotiable* instruments and not of commercial paper within the custom of merchants generally. On the contrary when Marius wrote his *Advice* the three day period was apparently well known (p. 52) though negotiability was then at most a new idea.

<sup>66</sup>Sec. 8(4). Chalmers says that this provision alters the then existing English rule, being an adoption of the Scottish view. *Bills of Exchange*, 8th Ed., 28.

<sup>67</sup>Sec. 89. The Uniform Negotiable Instruments Law contains no such provisions.

there was slowly emerging also that other perhaps even more important feature of transferability free of equities—the possibility of a transferee getting better rights on the instrument than his transferor had. Lord Holt was distinctly of the opinion that the transferee of a bill of exchange might occupy a position with reference to a recovery thereon against the acceptor better than his transferor,<sup>68</sup> the notion evidently being that the rights of the transferee against the acceptor or other party were not merely derivative through the transferor. A subsequent holder of a bill might also have recourse against the one indorsing the bill to him even though the indorser for some reason could not hold those ahead of him. The theory which led to this result was that each indorsement might be considered as amounting to the drawing of a new bill.<sup>69</sup> But only with the recognition of the free transferability of bearer instruments and the rights of mere bearers thereof did there come a full appreciation of this quality of negotiability. In *Shelden v. Hentley*,<sup>70</sup> where the action was on a note under seal wherein the defendant had promised to pay a specified sum to the bearer, the court said:

“Suppose a bond were now made to the Lord Mayor of London, and the party seals it, and after this man’s mayoralty is out, he delivers the bond to the subsequent mayor, this is good; *traditio facit chartam loqui*; and by the delivery he expounds the person before meant; as when a merchant promises to pay to “*the bearer*” of the note, *anyone that brings the note shall be paid.*”

The bearer cannot be treated “as an attorney or representative, or as taking by mere assignment an estate that had been vested in another,” but as one “taking his title directly from the grantor,” so that the claim of the transferee is upon a promise in essence made *to him*.<sup>71</sup> The position of a bearer as indicated in *Shelden v. Hentley* was for a time rejected, as pointed out above; but with

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<sup>68</sup>In *Hussey v. Jacob*, (1697) 1 Comyns 4, an action on a bill of exchange by the payee against the acceptor, the defendant pleaded that the bill had been drawn by one who had lost the amount thereof to the plaintiff in gaming. It was held that a demurrer to such plea should be overruled. Lord Holt, however, said “that his opinion was, that if such a note was given to the winner or order, and the winner indorsed it to a stranger for a just debt, and the person upon whom the bill was drawn, accepts it in the hands of the stranger, the acceptor would be liable.”

<sup>69</sup>“Every indorsement is a new bill and implies a warranty by the indorser that the money shall be paid.” *Williams v. Field*, (1694) 3 Salk. 68. Even though the drawer’s signature was a forgery, on this theory the indorser was liable. *Lambert v. Pack*, (1700) 1 Salk. 127.

<sup>70</sup>(1681) 2 Show. 160.

<sup>71</sup>2 Street, Foundations of Legal Liability 371.

the developments following the enactment of the Statute of Anne the way was cleared for a full recognition of the feature of negotiable instruments now under examination. During the latter half of the eighteenth century the law on this subject was pretty definitely worked out.<sup>72</sup> Negotiable instruments acquired much the same circulable character as money.<sup>73</sup>

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<sup>72</sup>The leading case, of course, is *Miller v. Race*, (1758) 1 Burr. 452, which involved a stolen bank-note which had come into the plaintiff's hand, for value, in the usual course of trade, and without notice or knowledge on his part as to any infirmity. In the course of his opinion, the action being trover, Lord Mansfield said: "It has been quaintly said, 'that the reason why money cannot be followed is, because it has no ear-mark:' but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency. . . ."

"Apply this to the case of a bank-note. An action may lie against the finder, it is true: (and it is not at all denied) but not after it has been paid away in currency," etc.

In *Peacock v. Rhodes*, (1781) 2 Dougl. 633, the same view as to the rights of the innocent purchaser was applied in the case of a stolen bill of exchange.

<sup>73</sup>In the introduction to the third edition of his *Bills of Exchange* Chalmers says:

" . . . English law has been developed piecemeal by judicial decision founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the banking or currency theory, as opposed to the French or mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit," etc.