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THE ORIGIN, EARLY HISTORY, AND LATER DEVELOPMENT OF BILLS OF EXCHANGE AND CERTAIN OTHER NEGOTIABLE INSTRUMENTS.

(II.)

In the previous article [77] we dealt with our subject down to the time of the introduction of the forerunner of our modern bill of exchange into England, and it is our purpose in this article to continue our inquiry to modern times.

Reference has already been made [78] to the Inhaberklauseln, and the use which the Florentines made of this in their financial transactions in England in the thirteenth century. Suits upon obligations in writing such as are referred to above were frequently brought in the merchants' courts, whilst actions upon promises to pay a creditor or his attorney were also entertained in the Common Law Courts from very early times.

During the thirteenth century the credit instrument was adapted to other uses than merely for purposes of exchange. Brunner [79] furnishes a copy of an interesting instrument, written in Latin and made by a citizen of Marseilles in the year 1247(c.). The instrument was executed at Marseilles and acknowledged a public instrument, as such instruments were then required to be. It contains the acknowledgment of the maker of the instrument that he has received from A. and B., for the purpose of exchange, a certain sum of Pisan money, at Pisa, for which he promises to pay to A. and B. or to C. or D., the partners of A. and B., *or to whomsoever A. and B. shall order,* a specified sum of Turin money at Paris on the date mentioned, and all expenses, damages and losses which they might suffer or incur in enforcing payment of the amount stated after the due date. This appears to have the characteristics of an exchange instrument and the features of a promissory note payable to order; and

the insertion of the phrase "renuncians, &c.," in the body of the instrument may indicate that it was the intention of the parties that the instrument should be construed according to the law merchant.

Loersch and Schröder[80] supply a specimen, having somewhat unique qualities, and illustrating in a remarkable manner the use to which the idea of the credit instrument was being put towards the end of the thirteenth century. The document is written in crude Latin, and was made (apparently by a holder of lands of considerable extent) under seal, at Cologne, and dated on the 26th April (our calendar) 1279. It contains a tremendous flourish in the way of a salutation, being addressed to the maker's "loving friends,"[81] the judges, assessors, city magistrates and to all the citizens of Cologne, and declares that the maker gives and assigns to a person named in the instrument one hundred marks out of certain rents to be paid to the maker on the Feast of St. Martin[82] in the forthcoming winter; and the quintos and absolutos are authorized by the instrument to make payment of the said one hundred marks on the said date. (A quinto was a tenant who was required to pay his landlord *one-fifth* of the value of the products of the land as rent; an absoluto was a free man, a vassal of a lord). Apparently, this is an assignment of a portion of rents, and the authority to the tenants to pay the assignee is worthy of note.

Another example of an instrument of this period is also provided by Loersch and Schröder.[83] This consists in an instrument, rather obscurely worded in Latin, and expressed to be made during the consulship, at Lubeck, of Masters Hermannus and Thidemannus, of Warendorp, and addressed to persons specifically named; and it recites that the makers of the instrument have bought from a stated person certain money, and request the persons to whom the instrument is addressed to pay to whomsoever demands it a certain amount fourteen days after sight. The terms respecting payment, however, are rather precative than imperative.

Whilst copies of credit instruments used in England in the early middle ages are apparently not at hand, yet such instruments throughout Europe were stereotyped, and those in use in England corresponded to those circulating on the Continent. Therefore, if we have before us a specimen of an instrument in use on the Continent during the middle ages, we shall have a safe guide by which to judge the type used in England at that time.

Early in the fourteenth century instruments corresponding in form to our modern bills of exchange appear. Brunner furnishes a specimen [84] of one of these, written in Italian and drawn at Vignone in

1339, in which appears the name of the Acciajuoli, who were famous exchange bankers carrying on a vast business at Florence and elsewhere throughout Europe generally at that time. The instrument contains the then usual invocations of the deity, is addressed to a firm of exchange dealers at Lucca (which was a famous financial and educational centre, then under the dominion of Florence), is payable to a firm in Lucca on a date specified in the instrument, and the exchange transaction out of which the bill arises is set out.

Bills similar in form were in use in England down to the close of the seventeenth century, and even later.

The following translation[85] from the Italian [86] of a bill of the year 1404 will convey to the reader the marked advance towards the form of the modern bill of exchange which by this time had been made in the instrument:

"Francesco de Prato and Company at Barcelona.[87]

"In the Name of God, Amen. The 28th day of April, 1404.

"Pay by this first bill of exchange at usance to Piero Gilberto and Piero Olivo one thousand scutes at ten shillings Barcelona money per scute, which thousand scutes are in exchange with Giovanni Colombo at 22 grossi per scute. Pay on our account, and Christ keep you.

"Antonio Quarti sal. of Bruges."[88]

The bill was one of two similar bills [89] which formed the subject of a suit at Bruges.[90]

It will be noticed how nearly the bill set out above corresponds to the definition of a bill of exchange which appears in section 17 of our Bills of Exchange Act.[91] The order is unconditional. It is in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay at a determinable future date a sum certain in money to the persons mentioned in the instrument. The fact that it contains pious phrases will not affect the validity of the instrument; nor will the statement of the transaction out of which the bill arises.[92] The term "usance" signifies the period at which it was customary for such bills to mature, and the period varied in different localities, although there are writers who state that the term "usance" means one month.[93] Bills were made payable at usance, half-usance, double usance, treble usance, etc., and from the fourteenth century were often drawn in sets of two, three and even four, depending upon the exigencies of the case.

Bills and ordinary promissory notes, written in the English language, appear in the early part of the sixteenth century, and in

form they closely follow those in use on the Continent, but are less verbose.[94] Some of the notes contain an acknowledgment of the indebtedness of the maker of the instrument to the payee, or particulars of the transaction which gives rise to the instrument, plus the promise to pay; whilst many of the instruments are payable to the person named in the instrument " or to the brynger of thys byll;"[95] others to a stated person " or to his assigns;[96] and in some of the promissory notes the promissor binds himself, his " ayres, executors and assigns and all my goods,"[97] and they are signed and sealed by the makers. Prof. Holdsworth [98] refers to an instrument under seal, made in 1538 by two merchants, one of London and another of Bruges, whereby they bind themselves to pay £13 to a person named in the instrument or "to his certain attorney, his heirs, executors or assigns, or to the presenter or bearer of this present writing." Bills and notes in a set, protest, re-exchange, appear as common incidents affecting these instruments in the sixteenth century.

We now come to the seventeenth century, which, more than any other in respect to our subject, was of the utmost importance; as in it the instruments with which we are dealing developed most rapidly in use and in having applied to them those principles, chiefly received from the law merchant, but also contributed to by the common law and by equity, which came to form the body of rules regulating the incidents affecting negotiability. In form bills remained substantially the same as in the sixteenth century,[99] and some of the examples at hand show endorsements, such as, " To my loving friend, Master W. C., Merchant, at Amsterdam' Pa."[100] The abbreviation " Pa." stands for the Italian word "pagate," meaning, in English, " pay." This shows the Italian influence over instruments of exchange, which continued to be apparent throughout the seventeenth century and the early part of the eighteenth century.

Towards the close of the fifteenth century, bills of exchange first came to be enforced in the Common Law Courts. These courts and the Court of Admiralty, as we have already intimated [101] began about this date to reach out for a larger jurisdiction and to encroach upon the legal business which up to that time had been done only by the merchants' courts, which, by reason of the corruption of its officials and the encroachments of the common law courts and the Admiralty, began rapidly to decline. It will be interesting, therefore, to consider what procedure at this period must be adopted and principles applied in the common law courts to enforce the rights of the parties to the instruments now under discussion.

First, as to the common law courts.: An action on the covenant

would lie, if the instrument were under seal (as often happened) and the action were between the immediate parties; whilst an action of debt was available, if it were shown that the claim was a liquidated one founded upon a simple contract (express or implied by law) between the parties [102] and that a quid pro quo had been given by the plaintiff to the defendant. In the absence of such quid pro quo, however, recourse must be had to various fictions, and an action of assumpsit resorted to. The action of assumpsit consisted in a claim for damages for breach of a simple contract. If the contract were not express, the law would imply a promise to do that which a party to the action was legally liable to perform;[103] so that if such a liability could be shown, it would be enforced at common law. It will, therefore, be interesting to consider some of the early forms of pleading, and to see how the system was worked out. The earliest forms of declarations apparently available date from the fifteenth and sixteenth centuries, and appear with declarations on the case.[104]

The earliest forms of declarations apparently available date from the fifteenth and sixteenth centuries, and appear with the declarations in actions on the case.[105] They do not aver the custom of merchants respecting the liability of the party sued, but are drawn around the custom by utilizing the actions of assumpsit. The original purchaser of the bill [106] is generally referred to as the attorney, factor and deputy of the plaintiff, and by means largely of fictions (which generally the defendant could not traverse) privity between the parties is established. There is sometimes an averment that on account of the default in honoring the bill, the plaintiff has been unable to pay the amount of it to certain persons to whom he is indebted (named in the declarations and probably fictitious), and has suffered damages accordingly.[107]

Although no specific mention of the law merchant is made in the declaration, yet the allegation that C. was the factor of the plaintiff may have been designed with a view to admitting proof to be given of the custom of merchants respecting the defendant's liability, as the factors of merchants were, like their principals, subject, in the Middle Ages, to the jurisdiction of the merchants' courts, and judged in relation to commercial disputes according to the law merchant.[108]

The acceptor's liability to pay the bill on its due date became a custom of the merchants during the Middle Ages, but it is difficult to state the date when the practice of acceptance became the custom. It is certain, however, that by the time bills of exchange came to be enforced in the common law courts the custom had long been in existence, and the liability of the acceptor to pay the payee the

amount of the bill on its due date was recognized and enforced by the common law courts as early as 1612[109] and the bringing of an action by remote parties against the acceptor was merely a matter of framing pleadings based partly on the incidents of the custom and partly on fictions. The custom respecting the transfer by indorsement, and the liability of the indorser by reason of the indorsement, was established in England by the end of the sixteenth century,[110] and pleadings in actions against the indorser were framed along the same lines as in actions against the acceptor.

The above examples will show the form which actions on bills of exchange took at common law in the sixteenth and at the beginning of the seventeenth centuries. As we shall now see, it became the practice in the seventeenth century to plead that the bill had been delivered, and the defendant was liable, "*secundum usum mercatorum,*" and not to plead the various fictions which formerly appeared in declarations of bills of exchange. The practice of declaring upon the custom of merchants seems to have continued in some cases until the nineteenth century, notwithstanding the passing in 1704 of the Statute of Anne, which we shall notice below.

At the end of the seventeenth century[111] and during the eighteenth and the early part of the nineteenth century, an action on the case upon the bill and the custom of merchants or a general *indebitatus assumpsit* for money received to the plaintiff's use, with the bill as evidence, was also available.

The first reported case on a bill of exchange appears to be *Martin* v. *Boure,*[112] decided in 1602, in the King's Bench, on assumpsit, and a writ of error being brought in the exchequer Chamber. The case is obscurely reported; but the action is apparently by the drawer against the acceptor on the dishonour of the bill by the latter. The declaration is not a model of draftsmanship, but is interesting, in that it contains an allegation that the principal bill of exchange in the case was delivered *secundum usum mercatorum.*

It is instructive to observe how the law merchant gradually became recognized and incorporated into the law of the realm, as this appears from reported cases and legal texts. In an action,[113] decided in 1612, the custom was pleaded and the action founded on the law merchant, without any objection being raised to its binding effect at law; whilst in a case,[114] decided in 1622, the declaration is upon the custom of merchants, and Hobert, C.J., says that "the custome will bind the law," and that "the custome of merchants is part of the common law of this kingdome, of which the Judges ought to take notice; and if any doubt arise to them about there[115] Cus-

tome,[116] they may send for the merchants to know there[117] custome, as they may send for the civilians to know there [118] law." Coke, in 1628, stated in his Institutes,[119] that the law merchant is a part of the common law; and this was accepted and acted upon in many cases decided and reported during the seventeenth century,[120] by the end of which the matter may be considered as finally settled. Until the latter part of the seventeenth century the right to rely upon the law merchant in respect to bills of exchange was restricted to merchants only[121]; but in 1692, Holt, C.J.[122], disposed of this by holding that the mere drawing of a bill would constitute a person a trader within the custom of merchants.[123] Down to 1688, it was apparently necessary to plead the custom specially [124]; but in that year it was held [125] that the court would take notice of the custom without its being specially pleaded,[126] although as late as 1846 [127] counsel argued (unsuccessfully) [128] that the partciular custom relied upon must be specially pleaded.

About the beginning of the seventeenth century inland bills appear in use.[129] Originally (as we have already stated) bills of exchange were restricted to merchants, one of whom was a foreign merchant; but such instruments now came to be in use between resident merchants. It is not always apparent from the early reports whether an inland bill or a promissory note (which latter kind of instrument was anterior in time to inland bills) is being sued upon.[130]

An instrument which has a strong bearing upon the development and use of the promissory note was one conceived in the middles ages by the continental merchants and called a bill obligatory or bill of debt. This instrument was negotiable, and was introduced into England in the sixteenth century. It was to all intents and purposes a verbose promissory note, containing an acknowledgment of indebtedness by the maker to a person named in the bill, particulars of the transaction out of which the bill arose, and a promise by the maker to pay the amount of the indebtedness to the creditor " or the bringer hereof " on a date mentioned in the instrument [131]; and it substantially corresponded to the definition of a promissory note contained in section 176 of our Bills of Exchange Act, namely, "an unconditional promise in writing by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or the bearer."

In order to make such notes easily assignable and to give to them practically the incidents of negotiability, the practice had grown up upon the continent of Europe of drawing these instruments without

inserting the name of a payee until the holder who intended to present the instrument for payment filled in his own name and required payment. The instrument passed by mere delivery.[132] A note to the report of a case [133] which was decided in the time of Henry VIII, reads as follows: " A memorandum that I owe (without naming anyone) ten pounds to be paid at Michaelmas, and subscribing his name, I.S., is a good obligation."

We must now consider at some length a body of persons whose influence in regard to negotiable instruments (particularly promissory notes) and matters of finance can scarcely be overrated: we refer to the goldsmiths.

The English goldsmiths, even in Anglo-Saxon times, had been famous for their work in gold and silver, and they continued so throughout the centuries. In the sixteenth century Henry VIII had permitted the coin of the realm to be debased to such an extent that it was almost impossible to carry on any exchanges upon a regular basis. The goldsmiths turned this condition of affairs to their own advantage. They ceased to be merely engravers and dealers in precious metals, and custodians of their customers' valuables, and began to deal in exchange, and to take care of their customers' money.[134] In the sixteenth and seventeenth centuries, and particularly in the reigns of James I and Charles I, legislation was passed, prohibiting the goldsmiths from dealing in exchange; but the goldsmiths persisted, and were eventually triumphant. The business of exchange was one which the king claimed as exclusively within his prerogative, and could only be carried on by the king himself or by some person or persons appointed by him for that purpose. In 1278 the mint or exchange (cambium) in London was under the management of certain merchants of Lucca, together with Gregory de Rokesle, mayor of London.[135] The appointment of the Lucca merchants may have been due to the fact, either that the king was pecuniarily indebted to the Italians,[136], or that the latter at that date were pre-eminent in money matters and accountancy. This policy of appointing Italians to manage exchange, however, was apparently not pursued in England after the early part of the fourteenth century, as the English by that time had proved themselves capable financiers. Nevertheless, for some time after this in Scotland a Florentine acted as joint keeper of the exchange and master of the mint for all Scotland.[137]

A very large part of the royal monetary business during the middle ages was carried on by means of bills of exchange, and the business of exchange was a most lucrative one, from which the kings

of England, from Henry III to Henry VIII, made huge profits.[138] In 1609, Henry VIII farmed to Thomas Boleyn (Anne Boleyn's father) the right to deal in foreign exchange in England, which was carried on by bills of exchange.[139] Shortly after this, as we have already mentioned, the goldsmiths commenced to carry on the business of dealers in exchange; and despite the appointment from time to time of a king's exchanger, and despite the proclamations issued against them in the sixteenth and seventeenth centuries (and particularly those of James I and Charles I), the goldsmiths continued in the business, eventually secured the greater part of it, and laid the foundations of modern banking.

Andrew Macpherson, in his "Annals of Commerce,"[140] issued in 1805, and based upon Anderson's "History of Commerce," published in the eighteenth century, refers to the following facts. For a great number of years previous to 1640, it had been the practice of the London merchants to lodge their money for safe-keeping in the royal mint at the Tower; and in the year mentioned (1640) Charles I. forcibly "borrowed" £200,000 . 0 . 0 from the money so lodged by such merchants. The result was, that the mint lost its credit with the merchants, who withdrew their desposits from the mint, and entrusted the moneys to their servants, until the outbreak of the civil war. The merchants' servants had made a practice of trading with their masters' money, by lending it at interest and discounting other merchants' bills. Some of the money the servants lent to the goldsmiths, who in turn lent it out at a greater rate of interest than they paid the servants. On the outbreak of hostilities in 1642, owing to the uncertainty of events, it became no longer safe for the merchants to entrust their money to their servants, most of whom were called upon to serve either one or other of the factions; and the merchants, therefore, began to deposit their money with the goldsmiths. The goldsmiths also began to receive rents remitted by customers' tenants, and to allow to such customers and to others who deposited money with them interest on the moneys so deposited, the customers being at liberty to withdraw money whenever they required it. On the security of government bills, orders, tallies and debts, Charles II, borrowed money at a great rate of interest from the goldsmiths, who had now become bankers; and this continued until 1672, when Charles II closed the Exchequer and confiscated its funds, without paying those whose money he had purloined. Parliament, however, in 1701 [141] acknowledged as a national debt one-half of the amount so misappropriated. The closing of the Exchequer, combined with the malpractice of certain of the goldsmiths, resulted in the

bankruptcy of a great many of them, the resulting insolvency causing great distress throughout the country, particularly in London.[142]

It was the custom of the goldsmiths to issue acknowledgments in writing, containing a list of the articles lodged with them for safe custody. Similar acknowledgments were issued in respect of sums of money deposited with them by customers, who might withdraw either the whole or any part of the money so deposited, upon production of the writing. If only a part of the money were withdrawn, a memorandum of the amount so withdrawn was endorsed on the writing by the goldsmith, who handed the document back to the customer. Interest on the sums deposited was added from time to time. These latter acknowledgments at first were called "running cash notes,"[143] but later they came to be known generally as goldsmiths' notes, and were treated as currency.[144]

On the continent of Europe banking developed much earlier than in England, the first European bank being the Bank of Venice, established in 1171, which arose out of a forced loan made by certain merchants to the duke Vitale Michel II, whose creditors (the merchants who had made the loan) became incorporated as an exchange banking company, later also carrying on the business of a deposit bank.[145] The Bank of Barcelona, which commenced its corporate existence in 1401, backed by the funds of the City of Barcelona, appears to have been the first European bank using the term in its modern sense. It received money on deposit, lent moneys to customers and others, issued its own notes and generally dealt in exchange and discount. The Bank of Genoa, formed in 1407, the Bank of Naples and the Bank of Bologna, were all proprietary banks, formed under circumstances somewhat similar to those of the Bank of Venice, i.e., forced loans. The year 1609 saw the establishment of the Bank of Amsterdam, by the authorities of that city. This remarkable institution dominated the exchanges of Europe during the seventeenth century, Amsterdam, during the period, being the centre of European commerce. The Bank was a bank of deposit and withdrawal, and issued its notes against the coins of all countries deposited with it, but in the days of its greatest strength it issued such notes only for the amount of the coins actually so deposited. This is important to remember, when contrasting it with those banks which issued notes on their own credit without respect to the amount of coins actually at their disposal. Other important continental banks of the seventeenth century were the Bank of Rotterdam, formed in 1635, and the Bank of Hamburg, formed in 1683.

Bank cheques drawn by customers upon their bank were first

used in the latter part of the seventeenth century. Mr. Powell [146] gives several specimens of early cheques, drawn respectively in the years 1671, 1675 and 1684.

The Bank of England was incorporated in 1694,[147] primarily for the purpose of raising a loan of £1,200,000 for the English government. It was empowered to deal in bullion and make advances on merchandise, and was a bank of issue, i.e., issued its own notes, which were negotiable. In the early years of its existence, the Bank issued its notes under seal. In 1695, William Paterson, who, with Michael Godfrey, was largely responsible for the promotion of the Bank of England, was one of the prime movers in the establishment of the Bank of Scotland, which was also a bank of issue. The Royal Bank of Scotland was formed in 1727, principally for the purpose of conducting the banking business of the government in Scotland, but also for engaging in banking business generally; whilst, in 1783, the Bank of Ireland was incorporated for similar purposes in Ireland.

Tallies—i.e., order for payment of money issued by the Crown on its revenues—were treated as currency in the seventeenth and eighteenth centuries, and in 1696 the Exchequer Bill was instituted, the first of that kind of instrument being issued by the Crown at the instance of Charles Montague (afterwards Lord Halifax), the head of the Treasury, to meet the exigencies of the recoinage which took place between the years 1696-1699. The form of the first of these instruments consisted substantially in a reference to the statute by virtue of which the bill was issued and a statement that the bill entitled the bearer to a certain sum (a multiple of £5) with interest at the rate of a stated amount per diem payable at the Exchequer on demand. The exchequer bills issued at the beginning of the eighteenth century and thereafter were generally in sums of £100 or upwards, and after reciting the statute by virtue of which they were issued, they contained a statement that the bill entitled the bearer to a certain sum with interest at a stated amount per diem, the bill "to be received in all aids, taxes, loans and payments whatsoever" granted to the Crown, "and to be paid to the bearer by the Governor and Company of the Bank of England" out of any public moneys from time to time coming into their hands. The instrument, ever since the commencement of the eighteenth century, has retained the essential features outlined above, except that, while the early bills were made payable to bearer, in later instruments the payee's name was left in blank and the words "or order" inserted immediately after, and there are also statements to the effect that the bill is to be current, and that if the blank be not filled up the bill will be pay-

able to bearer.[148] It may be observed that in the latter case they pass by delivery; but if the blank be filled in, then they become order instruments, and must be indorsed by the payee before delivery. In later forms interest coupons are also attached.

The statutes which were passed from time to time on the issue of exchequer bills empowered the government to contract with persons who would undertake to circulate and exchange the bills for cash, and the Bank of England was chosen for this purpose, and has remained the bankers of the government ever since; hence the name of the Bank appearing on the bills as the persons who would pay them.

Exchequer bills in denominations of £100, £50, and £20, were successfully issued by the government in 1793 and the following years[149] as a means of relieving the distress then existing amongst merchants, bankers, and traders, the bills issued for that purpose being payable quarterly, and the persons to whom they were issued being required to deposit adequate security of not less than double the sum advanced by means of such exchequer bills. About this time, and for the same purpose, and with a similar successful result, the corporation of the City of Liverpool issued negotiable notes, secured on the assets of the corporation.[150]

From the first issue of these instruments in 1696 they passed as currency in commercial circles, and were received in payment of publice debts; but it was not until 1820[151] that we have a definite pronouncement that an exchequer bill is subject to all the incidents affecting a negotiable instrument. The issue and payment of exchequer bills and bonds are now regulated by the (Imp.) Exchequer Bills and Bonds Act, 1866, 29 and 30 Vic., c. 25, and also the (Imp.) Treasury Bills Act, 1877, 40 Vic., c. 2, (generally cited together as "The Exchequer and Treasury Bills Acts, 1866 and 1877"), and amendments.

Despite the fact of the custom of merchants to treat the promissory note as negotiable and as carrying rights and obligations under the law merchant similar to those affecting bills of exchange, these incidents were not conceded by the courts without demur in some quarters, particularly in one. It had been held in a number of cases decided in the seventeenth century[152] that promissory notes were within the custom of merchants, and also that the holder of a note who came by it honestly might maintain an action on the note in his own name, provided, apparently, the note had been *indorsed* to him, even in the case of a note payable to bearer.[153] But in 1702 the commercial world and the legal profession were startled by the

decision in the case of *Clerke* v. *Martin*,[154] in which it was held by the Exchequer Chamber, that promissory notes were not negotiable instruments within the custom of merchants, and that the plaintiff was not entitled to succeed upon a declaration upon the custom of merchants. The plaintiff (the payee of a promissory note) brought an action against the defendant (the maker of the note), one count being upon a general *indebitatus assumpsit* for money lent to the defendant and another upon the custom of merchants as upon a bill of exchange. The substance of the action appears to have been a loan by the plaintiff to the defendant, for the amount of which the latter gave the former a promissory note, payable to the plaintiff or his order. On the trial, judgment was given for the plaintiff; whereupon the defendant moved in arrest of judgment, on the ground that the note was not a bill of exchange within the custom of merchants, and, therefore, the plaintiff, having declared upon it as such, was wrong; he ought to have declared upon a general *indebitatus assumpsit* for money lent, and used the note as evidence of the indebtedness. Shower's argument on behalf of the plaintiff in the Exchequer Chamber seems to have been feeble, and if Lord Raymond's report is to be relied upon in this respect, out of several cases which he might have cited (including two of Holt, C.J.,[155]) in strong support of his case, he cited only one,[156] and that upon a minor point. The remarks of Holt, C.J., during the course of his judgment have been the subject of considerable comment, mostly adverse. According to Lord Raymond's report, the Chief Justice was *totis viribus* against the action; " and said that this could not be a bill of exchange; that the maintaining of these actions upon such notes was an innovation upon the rules of the common law, and that it amounted to 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[157]; that the continuing to declare upon these notes, upon the custom of merchants, proceeded upon 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." He was " not satisfied " with the judgment of the King's Bench in the case of *Sarsfield* v. *Witherly,* and advised the bringing of a writ of error.

As to declaring upon a general *indebitatus assumpsit,* it would appear from the report that the plaintiff did this, in addition to the count upon the custom of merchants; although it does not appear from the report whether or no evidence was given upon the *indebitatus assumpsit* count. In any case, the plaintiff would have been

entitled to have the evidence which was submitted applied to any part of the declaration to which the evidence was applicable.[158] It is the more remarkable, however, that Holt, C.J., should have allowed himself to go to the length he did, in reference to the non-applicability of the custom of merchants to promissory notes and his opinion regarding them, when we bear in mind his holding in the case of *Hill and others* v. *Lewis*,[159] in which he admits that "goldsmiths' bills were governed by the same laws and customs as other bills of exchange," and that the words "or to his order" contained in an instrument would give authority to the plaintiff to assign it by indorsement. Furthermore, in the case of *Williams* v. *Williams*,[160] the Exchequer Chamber had decided that a second indorsee of a promissory note could successfully sue the first (i.e., a remote) indorsee, who was so liable according to the usage and custom of merchants, which was a part of the common law of which the judges would take notice *ex officio*, and the judgment for the plaintiff given in the King's Bench was affirmed.

In the year in which *Clerke* v. *Martin* was decided (1702) and the following year, four cases[161] followed the ruling in that case, which raised a storm of protest.

In 1704, a statute[162] was passed to meet the situation which had arisen in consequence of the decision in *Clerke* v. *Martin*. The feeling of the profession generally and of parliament in reference to the matter may be guaged from the wording of the Act, a recital in which commenced, "Whereas, *it hath been held*" that promissory notes payable to order "were not assignable or indorsable over, within the custom of merchants . . .," etc.; and the statute enacted that all promissory notes payable to a person or his order or bearer[163] were to be "taken and construed" as *payable accordingly*, and were assignable and indorsable over in the same manner as inland bills of exchange, made or drawn according to the custom of merchants, and that the payee might maintain an action on the note against the maker or any of the indorsers as in the case of inland bills of exchange. The Act is intended to be merely declaratory of the law; and the result was that pleaders declared on the statute instead of under the custom of merchants, although in some precedents the latter was still pleaded in addition to the statute, even down to the nineteenth century, probably *ex abundante cautela*.

As regards bank notes, we have already seen that the notes of the goldsmiths (who, after the institution of the Bank of England in 1694, became "private bankers") passed as currency. From the commencement of the issue of the Bank of England notes they were

treated as money. At first they were payable "to or bearer," and were not payable on demand, and bore interest; but in 1698 legislation enabled the Bank to issue notes payable, without interest, to bearer on demand. Lord Mansfield, in 1758,[164] speaking of bank notes, said, "They are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general conduct of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments, as money or cash." In 1820, in the case of *Wookey* v. *Pole*,[165] Best, J.,[166] says, "I conceive that the representative of money, which is made transferable by delivery only, must be subject to the same rules as the money which it represents"; and in the same case, Holroyd, J., says,[167] "It has been long and fully settled, that bank notes or bills, drafts on bankers' bills of exchange or promissory notes, either payable to order and endorsed in blank, or payable to bearer, when taken *bona fides*, and for a valuable consideration, pass by delivery and vest a right in the transferee, without regard to the title or want of title in the person transferring them"; and further, [168] that, "not only money itself may pass, and the right to it may arise by currency alone, but . . . these mercantile instruments which entitle the bearer of them to money, may also pass, and the rights to them may arise in the like manner by currency or delivery."

The development of negotiable instruments which took place during the eighteenth and nineteenth centuries has been discussed at length by many writers; and having dealt with our subject from the earliest times down to the eighteenth century, we shall, therefore, not endeavour in this article to treat of the subject any further. At some future date the writer hopes to explore the fruitful and altogether interesting field of early Canadian credit instruments, and particularly those of Eastern Canada; but the present does not afford either the time or the opportunity for research in that respect.

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[77] The preceding article on this subject appeared in our September issue, pp. 440-459, *supra*.

[78] At pp. 446, 447, *supra*.

[79] Das französische Inhaberpapier, p. 73, cited by Prof. Jenks, 9 L.Q.R. p. 83.

[80] No. 147; cited by Prof. Jenks, 9 L.Q.R. at p. 84.

[81] A mere term of business politeness. It was customary in trade instruments, and also in indorsements on such, down to the beginning of the eighteenth century, to address the

parties thereto as "loving friends." Indeed, in some of these early instruments the terms of politeness are so fervent, that to our modern prosaic minds such terms will appear to border on the ludicrous.

[82] 11th November. The phrase "Martini hiemalis" used in the original signifies "Martinmas in Winter," to distinguish it from the feast of the translation of St. Martin, i.e., 4 July.

[83] No. 196; cited by Prof. Jenks, 9 L.Q.R. at p. 84.

[84] 22 Zeitschrift für Handelsrecht, 8, cited by Prof. Jenks, 9 L.Q.R. at p. 73; Prof. Holdworth, 31 L.Q.R., at p. 176, footnote (n).

[85] See David Macpherson, Vol. 1, "Annals of Commerce" (1805) at p. 615.

[86] The original is also given by the last named writer, *ibid,* as follows:

"Francisco de Prato & Comp. a Barsalona.

Al nome di Dio, Amen, a di xxviii Aprile 1404.

Pagate per questa prima di camb. à usanza a Piero Gilberto è Piero Olivo scuti mille à sold x Barselonesi per scuto; i quali scuti mille sono per cambio che con Giovanni Colombo a grossi xxii d.g. scuto: & pag. a nostro conto, & Christo vi guardi.

Antonio Quarti sal de Bruggias."

[87] During the Middle Ages and down to the end of the fifteenth century Barcelona was one of the greatest financial and industrial centres of Europe.

[88] Bruges, the capital of West Flanders, dominated the exchange market of Europe in the fourteenth and at the beginning of the fifteenth century.

[89] For the sister bill to that given in the text see Brunner, 22 Zeitschrift für Handelsrecht, 7. Prof. Jenks gives a copy of it in 9 L.Q.R. at p. 70. It is substantially the same as that given in footnote 86, *supra,* except that the payees are Piero Gilberto and Piero di Scorpo.

[90] See an account of the transaction out of which these bills arose and the suit which ensued, David Macpherson, 1 Annals of Commerce, at p. 615.

[91] R.S.C., 1906, c. 119.

[92] *Ibid,* s. 17, s.s. 3(b).

[93] See West, Symboleography, Merchants' Affairs, 660; cited as authority for the latter construction by T. A. Street, 2 Foundations of Legal Liability, at p. 356, footnote 2.

[94] See specimens given by Prof. Holdsworth, 31 L.Q.R. 377, 378, 379.

[95] *Ibid.*

[96] Prof. Holdsworth, 31 L.Q.R. at p. 378.

[97] *Ibid.*

[98] 31 L.Q.R. at p. 378.

[99] See the forms given in "Lex Mercatoria," 270, written by Richard Malynes, in 1622, and West's Symboleography, 660, and cited in Vol. 2, Street's Foundations of Legal Liability, at p. 356, footnote 5, and p. 357, footnote 7.

[100] *Ibid.*

[101] *Supra,* pp. 449, 450.

[102] Stephen on Pleading, 7th ed., p. 11.

[103] *Ibid.*

[104] The action of *assumpsit* had its origin in the action of "trespass on the case," although in later times it came to be connected with actions arising *ex contractu.* Stephen on Pleading, 7th edn., p. 13.

[105] Rastell's Entries, 10a, published in 1568. Judge Cranch in his exhaustive annotations of *Dunlop* v. *Silver,* 1 U.S.R., at p. 375 *et seq,* gives the complete contents of this and other declarations of the period. See also Vol. 2, Street's Foundations of Legal Liability, at p. 343, footnote (1).

[106] There were then usually four parties to a bill: (1) the remitter or purchaser, (2) the drawer, (3) the drawee, (4) the payee.

[107] See Rastell's Entries, 10a, given by Judge Cranch, *supra,* at p. 375, and 2. Street's Foundations of Legal Liability, at p. 343, footnote (1).

[108] W. Mitchell, "An Essay on the Early History of the Law Merchant," at p. 83; citing Lattes, p. 103, notes 10 and 11, and Goldschmidt, pp. 249, 250.

[109] *Oaste* v. *Taylor,* Cro. Jac. 306.

[110] Werner Sombart, in "The Jews and Modern Capitalism," at p. 65, says that bills transferable by indorsement were made illegal in Venice by a law of December, 1593.

[111] *Hodges* v. *Steward,* (1682) 2 Mod. 36; *Bromwich* v. *Lloyd,* (1696), 2 Lutw. 1582.

[112] Cro. Jac. 6.

[113] *Oaste* v. *Taylor,* Cro. Jac. 306.

[114] *Vanheath* v. *Turner*, Winch 24, 25.

[115] *Sic.*

[116] *Sic.*

[117] *Sic.*

[118] *Sic.*

[119] 3-2 Inst. 58.

[120] Eaglechild's Case (1631), Hetley 167; *Woodward* v. *Rowe* (1666), 2 Keb. 105; Anonymous (1668), Hardres 485, at 486; *Carter* v. *Downish* (1688), 1 Show. K.B. 129; *Mogadara* v. *Holt* (1690), 1 Show. K.B. 317; *Williams* v. *Williams* (1692), Carthew 269; *Hodges* v. *Steward* (1692), 12 Mod. 36, at 37; *Bromwich* v. *Lloyd* (1696), 2 Lutw. 1582; *Pinkney* v. *Hall* (1696), 1 Ld. Raym. 175; and *Hawkins* v. *Cardy* (1698), 1 Ld. Raym. 360.

[121] Eaglechild's Case, *supra.*

[122] In *Hodges* v. *Steward, supra,* at p. 37.

[123] See also *Pinkney* v. *Hall, supra.*

[124] Anoymous (1668), Hardres 485 at p. 486.

[125] *Carter* v. *Downish, supra.*

pra; Bromwich v. *Lloyd, supra,* and *Pinkney* v. *Hall, supra.*

[127] *Brandao* v. *Barnett and others,* 12 Cl. & F. 787.

[128] *Ibid,* at pp. 793, 794.

[129] *Edgar* v. *Chute* (1663), 1 Keb. 592, 636, an action by a payee against the drawer appears to be the first reported case on an inland bill.

[130] Lord Mansfield refers to this in *Grant* v. *Vaughan,* 3 Burr. 1525.

[131] Malynes, Lex Mercatoria, 71/2; Molloy (7th edn., London, 1722) at p. 447; see also Vol. 2, Street's Foundations of Legal Liability, at p. 365 *et seq.*

[132] Prof. Holdsworth, in 31 L.Q.R.

[133] Core's Case, Dyer 226.

[134] See a pamphlet, entitled, "Cambium regis, or the office of His Majesty's exchange royal; declaring and justifying His Majesty's rights thereto," which Charles I caused to be published in 1628, on his reviving the office of king's exchanger of gold and silver.

[135] Madox, History of the Exchequer, c. 22, 4; c. 23, 1, cited by David Macpherson, 1 Annals of Commerce, 432.

[136] 1 Annals of Commerce, 432.

[137] *Ibid,* at p. 560.

[138] David Macpherson, 2 Ann. of Com. 35, 36.

[139] Foedera, V. xiii, p. 258, cited by Macpherson, 2 Annals of Commerce, 35, 36.

[140] Vol. 2, pp. 411, 427, 428.

[141] 12 Wm. 3, c. 12.

[142] See the pamphlet, "The mystery of the new fashioned goldsmiths or bankers discovered, in only eight 4to pages," printed and published anonymously in 1676.

[143] Ellis T. Powell, "The Evolution of the Money Market," (1915), at p. 99.

[144] *Tassel and Lee* v. *Lewis* (1695), 1 Ld. Raym. 743. See also *Keene* v. *Beard* (1860), 29 L.J.C.P. 287.

[145] It is believed that the dates in this paragraph are substantially correct.

[146] "The Evolution of the Money Market," at pp. 101, 102.

[147] See 5 W. & M., c. 20.

[148] For specimens of exchequer bills, see the report of *Wookey* v. *Pole,* (1820) 4 B. & Ald. 1, at p. 2, and *Brandao* v. *Barnett,* (1846), 12 Cl. & F. 787.

[149] See 33 Geo. 3, c. 29.

[150] 4 Annals of Commerce, op. cit.

[151] *Wookey* v. *Pole, supra.*

[152] E.g. *Sheldon* v. *Hentley* (1680), 2 Show. 161; *Hill and others* v. *Lewis* ((1693), Holt, C.J.), 1 Salk. 132; *Williams* v. *Williams* (1693), Carth. 269; *Bronwich* v. *Lloyd, supra.* See also the exhaustive examination by Judge Cranch, 1 U.S.R. at pp. 380 to 407, of a great number of other cases.

[153] *Bank of England* v. *Newman* (1697), Carth. 466; 1 Ld. Raym. 360; 1 Salk. 65.

[154] 2 Ld. Raym. 757; 1 Salk. 129.

[155] *Hill and others* v. *Lewis* (1693), 1 Salk. 132, and *Tassel and Lee* v. *Lewis, supra.*

[156] *Sarsfield* v. *Witherly,* 2 Vent. 292.

[157] Somewhat similar sentiments and hostility had been expressed in the Middle Ages by the lawyers on the Continent who practised Roman law concerning the commercial instruments used by the continental merchants. For a discussion on this subject, see Prof. Holdsworth's article in 31 L.Q.R. at p. 21. In *Ward* v. *Evans* (1702), 2 Ld. Raym. 928, Holt, C.J., speaking of the note in question in the action refers to "the noise and cry that it is the use of Lombard Street, as if the contrary opinion

would blow up Lombard Street." The learned Chief Justice appears to have had a dislike of Lombard Street!

[158] See the dictum of Holt., C.J., in *Hill and others* v. *Lewis* (1693), 1 Salk. 132.

[159] (1693), 1 Salk. 132.

[160] (1693) Carth. 269.

[161] (1702) *Potter* v. *Pearson,* 1 Ld. Raym. 759; *Burton* v. *Souter,* 2 Ld. Raym. 774; *Williams* v. *Cutting,* 2 Ld. Raym. 825; Farr, 154; and (1703) *Buller* v. *Crips,* 6 Mod. 29, in which Holt, C.J., says that the notes in question were "only an invention of the goldsmiths in Lombard Street."

[162] 3 & 4 Anne, c. 9.

[163] But the rule that the bearer of a bill of exchange payable to a particular person or bearer could maintain an action in his own personal right was not clearly laid down until 1764. See Lord Mansfield's judgment in *Grant* v. *Vaughan,* 3 Burr. 1516, and Prof. Holdsworth, 32 L.Q.R. 25.

[164] *Miller* v. *Race,* 1 Burr. 452, at p. 457.

[165] *Supra.*

[166] At p. 6.

[167] At p. 9.

[168] At p. 11.

A VERY PALPABLE HIT.—That very distinguished Canadian, Lord Beaverbrook, no doubt realizes that to live in the public eye means possible damage to one's own eye when the missiles of criticism begin to fly. Here is one recently flung at him by the *Saturday Review:*—

"Lord Beaverbrook has made another speech. This time it was to the Old Colony Club and he spoke in confidential vein, telling the story of an anonymous letter-writer who wrote: 'I once met one of Beaverbrook's schoolmates, and I heard that he was not clever. But he has been a lucky speculator. . . .' Modestly, his lordship added that he was not clever as a boy, and is not clever now, but he seems to think the public will discredit it. 'I think that they might make me Prime Minister,' he went on, 'if I could only persuade the public that I am not clever.' Lord Beaverbrook has in his lifetime surely undertaken more formidable tasks of persuasion that this."