

THE ORIGIN, EARLY HISTORY, AND LATER DEVELOPMENT OF BILLS OF EXCHANGE AND CERTAIN OTHER NEGOTIABLE INSTRUMENTS.¹

It is proposed in this and the succeeding article to sketch in brief outline the origin and historical development of bills of exchange and other negotiable instruments, particularly as relating to the functions of acceptance and indorsement; and also historically to deal with certain liabilities of the parties to such instruments.

As the main subject of this article is so nearly connected with representative money, some slight reference may be made to a few of the early media of exchange. Before coinage was instituted in the seventh century B.C., either by Pheidon, king of Argos, or by the Lydians,^{1a} the principal media of exchange consisted of cattle and skins,^{1b} and in later times of cubes or strips of precious or other metals, which varied in value according to weight. The early monetary system was both cumbersome and unsafe, notwithstanding the advent of coinage: particularly when any large amount had to be transmitted from one place to another. Therefore, even in very early times the great advantage of a system of representative money had made itself apparent, and the ingenuity of the ancients was exercised in devising such a system. As we shall see later, whilst trade instruments were well known in ancient times, skins were perhaps the earliest form of representative money;² and we find that probably as early as in the eleventh century B.C., certain lengths of silk and cloth were accepted as currency in China.³ "Leather money" also made its appearance in the far East long before the Christian Era; also in Carthage.⁴ In China this "money" consisted of small pieces of leather or parchment, varying in size according to the value represented, stamped with an official seal and sometimes also bearing the signature of an official or officials. Marco Polo, the Venetian traveller, who resided at the Court of Kublai Khan from 1275-1284, writing of his travels in China,⁵ refers to the practice he found existing there of using the inner bark of the mulberry tree for the manufacture of representative money, which was treated as currency, not only by the inhabitants of the territories over which the Khan ruled, but by foreigners trading in those territories. The Carthaginian leather money appears to have differed from the Chinese, in that it was not official, but consisted of a promise, inscribed on leather or parchment,

to pay the bearer so much metal on demand; and this, bearing the seal of any reputable merchant, passed as currency.

That negotiable securities and various kinds of credit instruments were commonly in use amongst the Eastern people long before the Christian Era seems certain.

Mr. Spencer Brodhurst, in his excellent article on "The Merchants of the Staple,"⁶ suggests that certain Assyrian tablets in the British Museum may be specimens of early promissory notes. This suggestion cannot be disregarded, when it is borne in mind that the Assyrians were a Semitic race, to whom credit instruments were certainly known.⁷

Sir John Lubbock, referring to Assyrian contract tablets,^{7a} speaks of "obligations payable to a third person" and "drafts drawn upon one place payable in another," and gives a copy of an Assyrian draft of the sixth century B.C. (selected from the work of M. Lenormant). This draft consists of an acknowledgment of the receipt of the purchase price of the draft, a statement of the name of the purchaser, and an undertaking to pay a stated sum to a certain person on a certain date. This document is witnessed, and closely approximates the contract of "cambium" which appears in Europe in the twelfth century and to which we shall refer later; and Sir John Lubbock states^{7b} that "these Assyrian drafts were negotiable," but did not admit of indorsement. The fact that they did not admit of indorsement will be readily understood, when we remember that these tablets were made of clay, upon which when soft the contract was inscribed by the aid of a stylus; after which the tablet would be hardened by baking. In this way, of course, the tablet did not admit of anything being added. Therefore, in order to make the instrument transferable from hand to hand, the name of the payee was left in blank.^{7c} Sir John Lubbock also speaks of letters of credit having been in use before the institution of coinage—i.e. before the seventh century B.C.^{7d}

The Babylonians were great traders and bankers; and from the thousands of tablets which are available and have been examined by scholars it is evident that contract in its multiform application was highly developed amongst the Babylonians even in very early times. Sales, leases, loans of all kinds, mortgages of both real and personal property (especially antichretic pledges, or, as we should call them, "Welsh mortgages,"⁸), exchanges of property, formation of partnerships, partitions, were all of common occurrence; and the Code of Hammurabi (c. 2100 B.C.) made elaborate provisions regarding the

manner in which these transactions should be carried out. Some notice must be taken of this wonderful Code, which was written in clear, simple language, so that all might read and understand it.^{8a} Writers have vied with each other in eulogizing it, styling the Code "one of the most important documents in the history of the world,"^{8b} "one of the most remarkable historical monuments that has ever been recovered from the buried cities of the ancient world,"^{8c} etc.; and it is correctly styled a Code in the modern acceptance of that term, in that it was compiled almost wholly from old Sumerian and Akkadian laws which had long been in force in Babylonia.^{8d} The laws which the Hammurabi legislation codified, therefore, were merely those which had been law for many hundreds of years previous to such codification,^{8e} and these laws so promulgated regulated the affairs of the then known civilized world. Many writers see in the Code the basis of the later Mosaic law; but more recent writers are inclined to doubt this, accounting for the similarities in style and substance by the fact that in ancient times conditions of existence were much the same throughout the civilized world, and would call for similar treatment wherever laws were promulgated. In Babylon there was also a complete system of judicature and pleading; and the law relating to agency and partnership was remarkably advanced and "modern" in its incidents.⁹ The conception of negotiability was ever present, and nearly every business transaction was required to be evidenced by a document. Anything capable of being the subject of ownership was negotiable, whether it were land, a debt, or anything else having a value. Debts and other choses in action were freely assignable; and we are told, that "any formal acknowledgment of indebtedness could be treated like a negotiable bill;"¹⁰ and further that "trade was facilitated because the promises" (i.e., the promises by debtors to pay the prices of purchases in ordinary market transactions) "circulated as cash."¹¹

A great authority on the period¹² shows that the practice of transmitting money by means of a banker's draft was adopted, and that bonds for the payment of money were negotiable at the time we speak of. The freedom and ease with which any kind of property could be dealt with in ancient Babylonia is one of the outstanding features of the law of those times. The giving of bills and notes in satisfaction of debts was common, and those bills and notes might either be payable on demand or at some future date mentioned in the instrument.¹³ Having regard to the tortuous path by which, as we shall later see, the conception of negotiability and assignability of

choses in action were received into our law, and the erroneous presumption of modernity of such conceptions, it is interesting to note that they were an essential part of the commercial law of Babylonia five thousand years ago.

So far as Egypt is concerned, it is difficult to say how far the Early Egyptians were familiar with trade instruments. We have very little knowledge of Egyptian law, either in the abstract or in the concrete. The Egyptians, it is believed, codified their laws; but, if so, no law relating to commercial matters appears to have come down to us.^{13a} The Egyptians were not a race of merchants as were the people of Babylonia; but the later ascendancy of Babylon and trading with the Phoenicians may have had the effect later of introducing Babylonian and Phoenician ideas and customs concerning commercial matters; but it is uncertain how far these affected things such as trade instruments.

The Phoenicians, another Semitic race, were great navigators, travellers, and merchants, and also carried on a large business as money lenders and changers. During their wanderings throughout the then known world in connection with trade, it is likely that they did much to propagate the use of negotiable instruments many centuries B.C., particularly in the East. They certainly struck and used a coinage of their own in the fifth century B.C. and onwards, and it is unlikely that such experienced traders as they were would be ignorant of the means of settling trade debts adopted in the countries in which they travelled.

Apparently the Chinese were the first to invent letters of credit, exchequer bonds, and bank notes;¹⁴ and in 807 A.D. treasury bonds, termed "fey tsien," payable on demand and passing from hand to hand as currency, were issued by the imperial government to merchants in exchange for the deposit of specie, which bonds were payable on demand in the chief towns, and were much resorted to by merchants and others for transporting large sums to distant parts.¹⁵ It further appears that at the end of the tenth century an association of trading firms was formed for the purpose of issuing "kiao-tse," which were ordinary bills of exchange repayable by stipulated instalments on dates specified in the instruments. When the affairs of the association became too involved to continue, it was wound up by government decree; but as the system of bills of exchange had been so greatly favoured and used by the people, the government itself, in 1023 A.D., established a bank for the issue of such instruments, and forbade private firms from engaging in the business.¹⁶

Previous to this the government had issued certain bonds, called "pien-tsing," or "convenient money," which were payable on demand and issued in exchange for deposits with the government of various quantities of metal, tea, salt, etc. These were repayable in kind, the number of the bonds issued depending upon the total amount of metal, tea, etc., deposited with the government; and in the case of commodities such as tea, salt, etc., there was a time limit within which the bonds must be converted.¹⁷ At about this time there also appeared in China bills known as "kwan-tsze," which were used in paying army contracts, and also ordinary promissory notes, which were called "tsing-ti."¹⁸ All of these were negotiable as currency.

Coming to a consideration of early Rabbinical law and custom, we have already touched upon the powerful influence which the Semitic peoples exercised in regard to the laws of the East in ancient times and particularly to the laws of Babylonia. When this is borne in mind, it will be observed that there is authority for attributing negotiable instruments to a Semitic origin in very early times. At a later date, we find that in the Book of Tobias (written in either Persia, Egypt, or Palestine in the third or fourth century B.C.)^{18a} unequivocal reference to a credit instrument is made. Thinking he is about to die, Tobias (the writer is quoting from the Douay Bible of 1609) informs his son that he (Tobias) had lent ten talents of silver "when thou wast yet a child" to one Gabelus of Rages, "a City of the Medes," and that he has a note of hand of Gabelus. He bids his son go to Gabelus, collect the money from him, and restore to him the note of hand. (Ch. IV., v. 21.) This the son agrees to do (Ch. V., v. 1), but asks his father what token he must give Gabelus, as the latter does not know the son who, on his side, does not know Gabelus. (Ch. V., v. 2.) The father repeats that he has a note of hand of Gabelus, which, when the son shows it to him, Gabelus will immediately pay. (Ch. V., v. 3.) The good offices of Raphael having been enlisted for the purpose, Raphael went to Rages, found Gabelus, gave him his note of hand, and "received all the money." (Ch. IX., vv. 3 and 6.)

In briefly citing the passages outlined above, in support of his contention that modern credit instruments originated in Rabbinical law, Sombart¹⁹ further cites the Talmud, Baba Batra, 172, in which mention is made of the production in a Rabbinical court of an instrument which, if it do not actually correspond to a modern credit instrument, is certainly an acknowledgment of debt, which apparently entitled the holder to sue upon it. Talmudic writings also

contain statements to the effect that if a man sign an instrument in the presence of a witness acknowledging that he has borrowed a certain sum of money from a person (presumably indicated in the instrument) *anyone* who produces the note to the borrower may collect it; and in general a perusal of Rabbinical laws most certainly discloses the fact that the principle of impersonal credit relationship as distinguished from "obligation" was recognized in Jewish law,^{19a} and that credit instruments, particularly notes of hand, were in common use amongst the Jewish people, and incidents arising from relations between the parties to such instruments receive detailed treatment in such laws.

It is probable that exchange instruments of some kind were in use amongst the Greeks and Romans.²⁰ In support of this, Sir John Lubbock²¹ refers to the extensive banking which was carried on in Greece, and mentions that the Greeks made use of letters of credit and bottomry bonds, invented a form of indorsement and introduced banking into Italy;²² and he instances the drawings by Iceratus in Athens of a bill of exchange on his father in Pontus, which was guaranteed by Paison (an early Greek banker), and then bought by Stratocles.²³ Passing notice may also be taken, perhaps, of Cicero's letter to Atticus²⁴ in which, referring to his son's contemplated visit to Athens, Cicero desires to know whether the son can have his money requirements attended to at Athens by getting drafts *exchanged* there, or whether he must take the money with him.

" . . . seq quaero quod illi opus erit, Athenis *permutarine* possit an ipse ferendum sit . . . "

Note the word "*permutarine*." It must be borne in mind, however, that the idea of an obligation under an instrument to a person not named in such instrument was quite foreign to Roman jurisprudence, so that the principle of negotiability as we understand it to-day would be quite unknown to Roman law; and, indeed, as we shall see, it is only in modern times that it has been accepted in English law.

In the fifth century, A.D., traces of the use of credit instruments in Europe become obliterated; and having regard to the turbulence and chaos of the succeeding centuries perhaps this is not to be wondered at.

We can find no trace at all of any such instruments in England in Anglo-Saxon times; no mention of any such is made in the Anglo-Saxon laws and ordinances which are still extant, and, indeed, some authorities hold that it is highly probable that credit as the Eastern

peoples understood, and we understand, that term was unknown in England until the Norman period.²⁵

Brunner, the great historian and authority on the early law of the peoples of Western Europe, is responsible for much of our knowledge of the early European laws affecting negotiable instruments. Jenks, citing Brunner and other sources and authorities,²⁶ refers to continental documents of various kinds of the eighth, ninth, and tenth centuries which contain alternative clauses, illustrating the use to which the principle of representation was put in general conveyancing on the continent in the eighth and succeeding centuries.²⁷

The principle of representation, of which we find traces on the Continent of Europe as far back as the eighth century,²⁸ and which was in force in England in the thirteenth century, may briefly be stated as follows:—Whilst neither early English nor early Continental law would admit of an actual sale of a chose in action, yet it was conceded that a person might appoint someone to act as his attorney or representative to receive on behalf of the appointor the money or thing to which the appointor was entitled; and such attorney or representative might sue in his own name. It is further possible that defences available against the original creditor were not available against such an attorney or representative.²⁹ When suing on the instrument the appointee was required to produce the instrument and give evidence of his appointment.³⁰

In particular, one group of clauses which Brunner³¹ calls "*Inhaberklauseln*" and divides into two kinds, alternative and pure ("*reine*"), enlarge the principle practically to the extent of making the obligation general instead of to a particular individual. The alternative *Inhaberklausel* contains such a clause as "*tibi aut eidem homini qui hunc scriptum pro manibus abuerit*," and dates from the ninth century; whilst the clause in the pure kind reads, "*ad hominem apud quem iste scriptus paruerit*," and appears in the latter part of the tenth century. These documents were sometimes written in Latin and sometimes in the vernacular.³² No proof of the title of the transferee of these *inhaber* clauses was apparently required except the production of the document,³³ and Holdsworth³⁴ treats the position of the producer of one of these documents as exactly corresponding to that of the bearer of a negotiable instrument in modern times. By the end of the fourteenth century, however, through the influence of the continental lawyers who practised Roman law, the position of the bearer of such an instrument had been reduced to that of little more than the agent of the creditor, and

the free negotiability of the instrument had been restricted accordingly.³⁵

The clauses referred to above were not restricted to any particular kind of document, but were used wherever the likelihood arose that they might be resorted to; and they were the germs from which was evolved in Europe (as distinguished from the East) the great doctrine of negotiability with all its remarkable consequences. These clauses were introduced into England by the Florentines in the thirteenth century, and incorporated by them in instruments of exchange.

Before passing along to consider the form which early bills of exchange took, it may be well for us to have some regard to one of the principal causes of the increase in the use in England of bills of exchange—i.e., the legislation of the fourteenth and fifteenth centuries—and to glance at a few of the many statutes which were passed in those centuries with a view to preventing the exportation out of England of the coin of the realm. It will be borne in mind that in the centuries referred to, the coinage on the Continent of Europe was greatly debased, and that persons resident in Europe outside of England were actively engaged in manufacturing counterfeit English money; and it was therefore the aim of the English Crown to prevent its own good coin from being exported from the country in exchange for the foreign debased coinage or even foreign goods or for any other purpose.³⁶ It would appear that priests were the chief offenders in this regard; and a statute of 1335³⁷ provides against counterfeit money being brought into the realm,³⁸ and also against any "religious man" or any other carrying out of the realm any sterling, silver, silver plate, or vessel of gold, without a special license.³⁹ A statute of 1379⁴⁰ prohibits the giving of English benefices to aliens and the sending of money to them either by "letters of exchange" or by any other means. The Act of 1335 also provided⁴¹ for the setting up of tables of exchange at Dover and such other places as might be appointed by the King and his Council "to make exchange," whilst the Statute of the Staple⁴² provided that merchants both native and foreign might bring gold or silver in money or bullion to the royal exchanges, where they would be paid in the new English coinage according to the value of the money or metal exchanged; and there was a provision that all the money which foreign merchants should bring into England should be "put in writing" by the King's officials, to the intent that no merchant should carry out of the country more money than he brought into it.

In 1390 a statute was passed⁴³ requiring that every foreign merchant who sent English money out of the country should enter into a bond in the Chancery to buy within three months thereafter English staple goods to the value of the sum so sent out of the country; and in 1409 another statute was passed⁴⁴ emphasizing the need for the enforcement of the Act of 1390 and requiring the Chancellor to send to the Treasury particulars of the exchanges in respect of which the bonds given under the provisions of the Act of 1390 were filed in the Chancery, and power was given to the Treasurer and the Barons of the Exchequer to deal with recalcitrant merchants in respect of such bonds. In 1477 a very important and elaborate statute respecting money and coinage generally was passed,⁴⁵ supplementing the Statute of Money of 1335, and other statutes affecting the coinage and foreign exchange. This Act was largely aimed against the importation into England of debased coin from Ireland or elsewhere, and made elaborate provisions for the prevention of such importation, the maintenance of the standard of gold and silver plate and the coinage of the country, the hall-marking of precious metals, and the prevention of the export of English money. A statute passed in 1423⁴⁶ confirmed a previous statute enacted in 1415⁴⁷ (which required merchants to obtain the king's license before sending English staple goods out of the country), specified the conditions under which gold and silver might lawfully be sent out of the realm, and ordained that foreign merchants should not carry any gold out of the country. The statute of 1477 (*supra*) referred to the Act of 1423, recited that gold and silver had been carried out of the realm as ordinary merchandise, contrary to the statute, enacted prohibitions against the export of English coin or gold or silver without the king's license, and ordained that an infraction of the statute in this regard was to be deemed a felony. Foreign merchants and aliens had been required by a statute passed in 1403^{47a} to sell the goods which they brought with them within three months after their entering England, to spend all the money which they received in the realm upon English commodities, and to give sureties for the fulfilment of these requirements upon landing in England. The Act of 1477 (*supra*) also referred to violations of these provisions, and required that thereafter the foreign merchants or aliens should, before leaving the country, produce written acknowledgments signed by the persons receiving it proving the employment of the money so realized in the realm, as required by the Act of 1403. The Act of 1477 was subsequently confirmed.⁴⁸ A statute passed in 1487⁴⁹ provided that the business of exchange (which by this time had

become a regular business and is referred to in the caption to the Act as "dry exchange") should only be carried on by those whom the king should license for that purpose; that "chevisance" (i.e., money-lending) and usury was to be "extirpate," and that all brokers of such bargains were to be set in the pillory, put to open shame, imprisoned for six months, and were to pay twenty pounds! This and other kindred acts, however, proved a failure, and were repealed in 1545 by the Usury Act,⁵⁰ which legalized the taking of interest, but regulated the rate to be charged in certain transactions. It is interesting to note that Malynes, writing in 1622, says that the "dry exchange" referred to above was carried on by means of bills of exchange.⁵¹ The nature of the kind of instrument which Malynes had in mind will be referred to later.⁵²

From the foregoing, it will be seen that the conduct of business transactions by means of the giving of bills of exchange instead of cash payments would be greatly favoured by foreign merchants having dealings with English. The simple expedient of the bill permitted the settlement of debts without the transport of coin, which at the time we speak of was (quite apart from possible violations of the money statutes) fraught with the greatest dangers, amongst which was the risk of loss through the depredations of the gangs of robbers which infested the highways, not to speak of pirates on the high seas.

Until the seventeenth century, practically all disputes affecting credit instruments were disposed of in the staple courts, which administered the law merchant, consisting of the usages and customs of merchants, or, in the sixteenth century and early part of the seventeenth century, by the Court of Admiralty, which had encroached upon the jurisdiction of the staple courts and also administered the law merchant, whilst the Chancery also dealt with certain cases affecting merchants.⁵³ In the Middle Ages the merchant was a privileged person. Disputes concerning his business transactions were not dealt with by the Common Law Courts, but by the Staple Courts, which were held at various ports and fairs throughout the country and on the Continent. In this manner a merchant's affairs were regulated by a uniform set of rules, whether the court were being held in England or on the Continent. The advantage of this is apparent. Moreover, the justice meted out by these courts was so swift, that the theory has been advanced that the reason the courts were referred to as "piepowders" ("pieds poudres") was that a suitor had scarcely time to shake the dust off his feet before his case was decided and justice was done.^{53a} It is conceivable that

had the merchant brought his suit in the Common Law Courts (even assuming that such Courts would have entertained his action in those days), he would have had ample time to shake off all the dust from his feet before justice was meted out! References to suits upon early bills of exchange appear from time to time on the records of the Staple Courts and the Court of Admiralty; but they are very meagre and cannot be regarded in the same light as reports of cases. Indeed, it is not until the beginning of the seventeenth century, when the law merchant is coming to be recognized as a part of the Common Law, that any reports of cases upon credit instruments (using the term "reports" with its modern signification) appear. Before this, however, certain principles concerning negotiability had been developed on the Continent and introduced into England, and these principles, as we have already stated, were administered in the merchants Courts, the Court of Admiralty, and in a measure in the Chancery. It is well to remember, therefore, that important doctrines concerning negotiability came to us through the law merchant, and that these doctrines had been developed some time before their acceptance into the law of the realm.

Especial regard must be had to the great fundamental differences between the rights acquired by one who takes under a mere assignment of a chose in action and one who acquires his interest in a negotiable instrument under the doctrine of negotiability. The progress of the idea that a man might undertake to pay to a stranger, one with whom he had no direct relations, was of slow growth in English law, apart, of course, from the law merchant. Privity of contract was, and still is, very dear to the heart of the English lawyers; and it was not without a struggle that they allowed anything which might possibly be deemed to run counter to it to encroach upon this principle, and then only by the introduction of fictions which made the Common Law so famous. Moreover, the Common Law courts were distinctly opposed to the assignment of choses in action, regarding such a transaction as a means of oppression and of incitement to litigiousness. The common lawyers found no difficulty in dealing with the transfer of chattels capable of formal, actual delivery, nor did they experience any insuperable difficulty in the symbolical delivery of land; but the assignment of a mere right in regard to chattels was almost inconceivable to them, although the Chancery was not averse to recognizing and enforcing such a claim. Indeed the ultimate recognition by the Common Law Courts of the right to assign a chose in action and for the assignee to sue on it, is largely due to the influence of the Chancery, which would

grant relief where the Common Law Courts would not. The Common Law principle against the assigning of choses in action, however, was never invoked against the king, who might always receive or grant a chose in action,⁵⁴ and a grantee of a chose in action from the king might sue in his own name.⁵⁵

At the close of the seventeenth century the right to assign a chose in action had become well recognized in Equity, and the right of the assignee to sue therefor in his own name if an equitable claim and to compel the assignor to lend his name as plaintiff if the claim were one at Common Law was enforced in the Court of Chancery, and it was not necessary that such assignments be in writing.⁵⁶ But it was early made a condition that as the assignor could not confer a better title than he had, the assignee took "subject to all the equities."⁵⁷ Valuable consideration for the assignment appears to have been necessary in the seventeenth century;⁵⁸ but in the eighteenth century this ceased to be an essential to the recognition and enforcement of the assignee's right in Equity, except in the case of a possibility,⁵⁹ or of a man disposing of his wife's choses in action.⁶⁰

The Statute of Frauds (1676) s. 9 recognized assignments of trusts, but the principle of representation in regard to assignments of choses in action in general was retained until late in the nineteenth century, the assignee in the case of a common law chose in action being compelled to sue in the name of the assignor and being regarded in the light of an attorney acting for his principal. The Judicature Act⁶¹ finally disposed of all question in England as to an assignee's right either at law or at equity to sue for a chose in action, and also as to his position as plaintiff in an action to recover such chose in action. This enactment provides that an absolute assignment in writing of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person liable in respect of such debt or chose in action, will be deemed effectual in law, subject to the equities, to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same and the power to give a good discharge therefor, without the concurrence of the assignor; and a power was given to the debtor to interplead in case of conflicting claims to the debt or chose in action.

It is hoped that this short excursion into the realm of assignability at law and in equity will enable the reader the better to appreciate the tremendous innovation which was made in the seventeenth century in respect of transferability of trade instruments, and

its consequences by the absorption of the law merchant into the law of the realm. Through the influence of the law merchant the startling doctrine was introduced, that the transferor of a negotiable instrument might confer a better title than he had, provided that the transferee took under certain conditions and by the mode prescribed by the law merchant. Such conditions and mode, however, were and are absolute, and admitted and admit of no deviation. To get the advantages of acquisition of instruments under the law merchant you must faithfully fulfil the requirements of the law merchant respecting such acquisition; otherwise you will be in no better position than an assignee of an ordinary chose in action, and will take subject to that all-embracing phrase—"the equities." The codification of the laws relating to bills of exchange has, however, greatly simplified the matter of dealing with negotiable instruments, and so far as it is reasonably possible to simplify and clarify the law relating to these instruments, it is submitted that our present Bills of Exchange Act has, with a few exceptions, attained that object.⁶²

The business of money-dealing and a very large part of the trade of Continental Europe in the Middle Ages were in the hands of the Italians, and in the beginning of the thirteenth century they commenced their operations as money dealers in England. They are responsible for the introduction of bills of exchange into that country. These money-dealers not only acted as financiers in papal affairs, but lent money to, and in most respects conducted the money transactions of the kings of England during the Middle Ages. Early forerunners of modern bills of exchange are met with in Italy in the twelfth century, but they do not appear in England until the thirteenth. Bracton appears to be familiar with the instruments; and writing of "delivery," Fo. 41b, speaks of "letters missive" passing to *an uncertain person*. He uses the term "missibilia" when referring to the instruments. It must be remembered that instruments of this nature were at first restricted to dealings between merchants only, one of whom had to be a foreign merchant. What we know as "inland" bills⁶³ are of comparatively modern origin, and it was not until the seventeenth century that bills were resorted to by merchants both of whom were resident and trading in England. The use of bills for settlement of trade transactions was further extended when it was sufficient for one only of the parties to the bill to be a merchant; but the subject of the bill must still have been a trade transaction. (This doctrine of bills being associated with commercial transactions is still retained in French law.^{63a}) It is not until the seventeenth century that the parties to a bill might be persons

not engaged in trade,⁶⁴ or that it was deemed a proper bill if drawn for anything other than for a trade debt. Formerly there must also have been an "exchange" in connection with a bill—i.e., a bill could not be drawn by one citizen of a town or city on another resident or carrying on business in the same place. This distinction is still retained in French law,⁶⁵ but has ceased to operate under ours.

Reference to bills of exchange will be found in many continental codes and ordinances from the thirteenth century onwards, whilst the first specific reference in English legislation to such instruments is found in 3 Richd. II., c. (1379), which we have already remarked upon.

We will now consider the form in which early bills of exchange were drawn.

On the continent of Europe, particularly in Italy, there had been evolved by the money dealers a contract whereby one person agreed with another to deliver money of one country in exchange for money of another, or to transport safely a sum of money to a distant place. The latter rather than any other instrument is probably the forerunner of the modern western bill of exchange. The means adopted to effect the object consisted of the person who agreed to transmit the money (the drawer) giving to the purchaser a letter directed to a person whose address was at the place to which the money was to be transported, requiring the latter (the drawee) to pay to the purchaser or to whomsoever he should nominate for the purpose of receiving the money (the payee) the amount agreed upon, and to charge the drawer therewith. Armed with this letter the presenter waited upon the drawee, and (if the latter were willing) he would pay the presenter the amount of the bill. The drawee might be a merchant or banker who owed the drawer money, or he might have agreed with the drawer to pay (i.e., honour) any bill which the latter drew upon him; or there might have been a mutual arrangement between the drawer and drawee to honour any bills which the one drew upon the other, with a periodical settlement between them. In this manner all risk of actually transporting cash was avoided. The bills in early times were generally made payable at a fair at which it was notorious merchants and bankers would assemble.

The instrument used for the above purpose was known as the contract of "cambium," and it was this which was introduced into England by the Italian bankers.⁶⁶ It is a matter of doubt whether or no its origin can be traced to Eastern influence, for, as we have already seen, the Eastern instruments in many cases had been freely

negotiable several thousand years before the advent of negotiable instruments in Europe, and the early European instruments were not negotiable within the Eastern and the modern European meaning of that term. The only probable source through which such an influence would come would be the Arabic; but Holdsworth hesitates to accept this, on account of the difference between the free and easy negotiability of the Eastern bill, as compared with the restricted negotiability of the western bill.⁶⁷ Nevertheless, primitive Semitic customs form an important part of those observed by certain of the Arabs (particularly the Bedouins), who have made such indelible impressions on the history and customs of Western peoples, particularly in the early Middle Ages;⁶⁸ whilst the Semitic influence on the laws of Babylonia (for instance, on the Code of Hammurabi) is a matter of increasing comment by scholars, as also is the Babylonian influence on Semitic law.⁶⁹ Furthermore, in this respect there is to be considered the powerful Eastern influence brought to bear in Europe, particularly in Italy, through the Roman Emperor, Frederick II., against whom the Church thundered its edicts and excommunications in vain. He was one of those who in the thirteenth century found it most profitable to make Crusades, ostensibly at the behest of the Pope, but in reality for his own advantage. It will be remembered that he was also king of Sicily, and in 1229 assumed the title of "King of Jerusalem," having secured for himself, largely through diplomacy during one of his "crusades," important territory in Palestine. As king of Sicily, which was his favourite place of residence, he also came into personal contact with Greeks, Jews, and Arabs, who formed so large a portion of the population of the island, as well as the Lombards who had settled there in the twelfth century. He spoke all the languages used on the island and was familiar with the laws and customs which were in force there, (each nationality being governed by its own). In the seventh and eighth centuries Sicily had been the subject of invasion by the Saracens, who in the ninth century conquered the island and thereafter occupied it for over two hundred years. The early Phoenician and Carthaginian influences also were still felt. Frederick was eclectic in his religious views, and at his court he surrounded himself not only with Christian devotees, but with Jews and Mohammedans; and through him were introduced into Europe Saracenic influences of the most pronounced kind. In particular, he promoted the use of Arabic numerals and algebra, encouraged the study of Arabic philosophy, wielded a large influence over the destinies of the University of Salerno, a great seat of learning in the Middle Ages, and

in 1224 founded the University of Naples.^{69a} There would appear therefore, to be fair support for the contention that the introduction of bills of exchange into Europe is of Arabic or other Semitic origin. However this may be, one thing is certain: when bills of exchange appear in Europe they have not the negotiability of the ancient trade instruments of the East.

The word "cambium" has been received into our language, retaining its original meaning of "exchange;" and from it we have derived other words, "cambist," one who deals in bills of exchange; "cambism" or "cambistry," the theory and practice of exchange, and "cambio," a bill of exchange, or place of exchange.⁷⁰

Jenks⁷¹ gives copies of two of these early contracts of cambium,⁷² one drawn in 1339 and the other in 1404. These are written in Italian and appear to be bills regularly sold by money dealers in one city and drawn upon another firm in another city, directing the latter to pay the amount indicated and to charge the same to the drawer's account. The bill also acknowledges upon the face of it the amount paid by the purchaser for the draft, the document is signed by the drawer, and the names of the payee and drawee appear in the instrument, together with the name of another person whom Malynes refers to as the remitter or purchaser of the bill, but whom Jenks⁷³ regards as a presenter, or recipient on behalf of the payee. Note the similarity between this instrument and the Assyrian draft of the sixth century B.C., referred to by Sir John Lubbock and mentioned on page 441, *supra*.

That the continental courts of law in the fifteenth century recognized and enforced the rights of parties to such instruments is clearly shown by the case of *Spinula v. Camby*, reported by Brunner⁷⁴ and cited by Jenks.⁷⁵ A. and B. at Avignon sold to C. a bill for a certain sum. The instrument was drawn on D. and payable at Bruges to E and F. D. paid E. the amount of the bill on its presentation by E. at Bruges, but E. managed to get the bill protested for "nonpayment" and returned to Avignon with the protest, the result being that A. and B. were compelled to pay the amount of the bill to C. D's. rights in respect to the bill had passed to O., who had formally assigned his interest in the instrument to S., who sued E. for the amount which D. had paid the latter. After referring the matter to two merchants for advice, the Court dismissed the claim of S., on the technical ground that a chose in action was not assignable.

This case has many modern incidents. Shorn of the medieval verbiage with which such instruments were clothed, and setting aside for the moment a consideration of the fourth party—i.e., the pre-

sender or remitter—the bill corresponds to a Canadian non-negotiable bill prior to the passing of the first Canadian Bills of Exchange Act in 1890.⁷⁶ The incidents of presentation by a payee and payment by the drawee are exemplified, and “protest” appears an ordinary incident affecting bills of exchange in the fifteenth century. Not only is the right of recourse by a payee or purchaser of a bill against the drawer recognized, but also the right of a drawee (or an acceptor) to recover back money paid to a person not entitled to it. The objection to the assignment of a chose in action exhibited by the English Common Law Courts is also shown, and the reference of the matter by the Court to experts in trade usage (i.e., the merchants) for advice is a right exercisable by our judges to-day in certain cases.

We have now brought our subject down to the time of the introduction of the forerunner of our modern bill of exchange into England; and in our next article we shall continue our enquiry into the history and development of the instruments with which we are dealing down to modern times.

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(To be continued.)

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¹ In writing this and the succeeding article the following, amongst other, authorities have been consulted:—

Histories of English Law: 2 Pollock & Maitland, 2nd ed. 225-7; Jenks, 128-9. Writers on Antiquities: E. J. Simcox, “Primitive Civilizations,” (1894), Volumes 1 and 2; C. H. W. Johns, M.A., D.D., Litt.D., “The Relations between the Laws of Babylonia and the Laws of the Hebrew Peoples,” (1917) 2nd ed.; “The Cambridge Ancient History,” (1924), Vols. 1 and 2. On the Monetary System: Wehrner Sombart, “The Jews and Modern Capitalism.” General Legal Texts: Street, Foundations of Legal Liability, Vol. 2, Part 3, ch. 31 to 40, 324-417; Cranch, Vol. I, U.S.A., Sup. Ct. Repts., App., 367-465. Special Articles: W. S. Holdsworth, “Origins and Early History of Negotiable Instruments,” (1915) 31 L.Q.R. 12, 173, 376; (1916) 32 L.Q.R. 20; reprinted in Vol. 8 of “A History of English Law,” by W. S. Holdsworth, 113-176; Edwards Jenks, “Early History of Negotiable Instruments,” (1893), 9 L.Q.R. 70; Vol. 3, Essays

in Anglo-American Legal History. 51 et seq.; B.E.S. Brodhurst, “The Merchants of the Staple,” 17 L.Q.R. (1901), 56 et seq.; vol. 3 Essays in Anglo-American Legal History, 18 et seq.; Sir John Lubbock, A History of Money, in the “Nineteenth Century,” (1879), November, 789-808; “General Survey of the History of the Law Merchant,” by Thomas Edward Scrutton Vol. 3, Essays in Anglo-American Legal History, 7 et seq.; F. M. Burdick, “What is the Law Merchant?” Columbia Law Review, Vol. II, (1902), 470-485, reprinted. Essays in Anglo-American Legal History. Vol. 3. 34 et seq.

^{1a} Authorities differ on this point. A crude kind of early coinage may have been in use in China in 2250 B.C.; but this is very doubtful. See article, “A History of Money,” in the “Nineteenth Century,” (1879) Nov., 789-808, by Sir John Lubbock, particularly at p. 794.

^{1b} Beaver skins were used as a medium of exchange in the Hudson's Bay territories down to recent times.

² Sir William Ridgeway, "Origin of Currency and Weight Standards", (1892), 11-30, and Harold G. Moulton's adaptation in "Money and Banking", 56 et seq. See also "A History of Money", in the "Nineteenth Century", (1879), Nov., at p. 789, by Sir John Lubbock.

³ Ibid. E. J. Simcox, Vol. 2, "Primitive Civilizations: Ownership in China", p. 59. "Sound Currency", VI. (1889), 33-47, adaptation by Harold G. Moulton, in "Money and Banking", p. 69.

⁴ "An Essay on Western Civilization in its economic aspects (Ancient Times)", (1902), by W. Cunningham, p. 144. "The Theory of Credit," by H. D. MacLeod, M.A. (1889) Vol. I, at p. 8.

⁵ "Travels of Marco Polo", ed. Sir Henry Yule, 423-426. See also "A History of Money", supra, at p. 791, where mention is also made of the existence in China in 1252 of paper or cotton money. Sir Wm. Blackstone, 2 B. Com. 467, refers to the introduction of the use of "paper credit" in the Mogul Empire in China in 1236.

⁶ 17 L.Q.R. (1901), at p. 58; Vol. 3, "Essays in Anglo-American Legal History," at p. 18.

⁷ See later as to Semitic influence in regard to credit instruments.

^{7a} "A History of Money", Nineteenth Century, (1879), Nov., at p. 793.

^{7b} Ibid.

^{7c} Ibid.

^{7d} Ibid.

⁸ For an interesting historical discussion of this instrument, see E. J. Simcox, "Primitive Civilizations", Vol. 2, 416, et seq. App. C.

^{8a} See article in "The Times", Apl. 14, 1903, and C. F. Lehmann, on "Hammurabi's Code", Nineteenth Century, 1903, 1035-1040.

^{8b} "The Cambridge Ancient History," Vol. I, p. 105.

^{8c} See article in "The Times", Apl. 14, 1903, p. 10.

^{8d} "The Cambridge Anc. History", Vol. I, 105 and 492; C. F. Lehmann, in the "Nineteenth Century", 1903, at p. 1036; also the article of C. H. W. Johns, in Vol. 3 of Ency. Brit., 115 et seq., "Babylonian Law."

^{8e} Ibid., and "The Cambridge Ancient History," Vol. I, at p. 461.

⁹ See generally, E. J. Simcox, "Primitive Civilizations," (supra), Vol. I,

348, et seq., and C. H. W. Johns, "The Relations between the Laws of Babylonia and the Laws of the Hebrew Peoples", (1917), 2nd ed. 4 et seq.

¹⁰ E. J. Simcox, "Primitive Civilization", (supra) Vol. I, p. 321, based upon the researches of Revillout (Brothers) and Oppert.

¹¹ Ibid, p. 350.

¹² C. H. W. Johns, M.A., Litt. D., writing in the Ency. Brit., Vol. 3, on "Babylonian Law."

¹³ "Primitive Civilizations," (supra) Vol. I, p. 353.

^{13a} As to this, see "The Cambridge Ancient History," Vol. 2, 210-215.

¹⁴ See E. J. Simcox, "Primitive Civilizations. Ownership in China", (supra), Vol. 2, ch. 13, 155 et seq., at p. 156, and Sir John Lubbock, "A History of Money," (supra), at pp. 789, 791 and 792, who fixes 119 B.C. as the date on which first appeared the earliest form of bank note in China, but gives 800 A.D. as the date on which true bank notes were invented in that country.

¹⁵ E. J. Simcox, "Primitive Civilizations", (supra), Vol. 2, at p. 163; and Sir John Lubbock, "A History of Money," (supra), at p. 790. The latter translates "fey tsien" as "flying money."

¹⁶ E. J. Simcox, "Primitive Civilizations", (supra), Vol. 2, at p. 193, and Sir John Lubbock in "A History of Money," (supra) at pp. 790, 791.

¹⁷ E. J. Simcox, "Primitive Civilizations, Ownership in China", (supra), Vol. 2, ch. 13, p. 194.

¹⁸ Ibid, p. 196.

^{18a} Vol. 26, Ency Brit., p. 1041.

¹⁹ "The Jews and Modern Capitalism," p. 73.

^{19a} As to this, see Werner Sombart, "The Jews and Modern Capitalism", 78-80.

²⁰ Harold G. Moulton, in "Principles of Money and Banking", at p. 31, speaks of "abundant proof that these instruments" (i.e. promissory notes and bills of exchange) "were well developed among the Greeks and Romans"; but he does not detail the proof.

²¹ "A History of Money", Nineteenth Century, (1879), Nov. at pp. 796-7.

²² Ibid., at p. 799.

²³ Ibid., at p. 797.

²⁴ Cic. ad Att. 12. 24; to which Sir

John Lubbock also refers, "A History of Money", (supra), at p. 799.

²⁵ For example, see Pollock & Maitland, "A History of English Law," Vol. 2, at p. 185.

²⁶ 9 L.Q.R., 78 et seq.

²⁷ They are taken principally from a collection of ecclesiastical documents of the seventh to the tenth centuries, inclusive, styled "Memorie e Documenti per servire all'istoria del Ducato de Lucca," and from another called "Codex Cavensis", containing copies of deeds deposited in the Cluniac Monastery at La Cava, near Salerno. 9 L.Q.R. 77.

²⁸ Jenks, 9 L.Q.R. 78 et seq.

²⁹ Holdsworth, "Origins and Early History of Negotiable Instruments," (1915) 31 L.Q.R. at p. 16. It is submitted that the words "original debtor" in the nineteenth line of the page cited should read "original creditor."

³⁰ Pollock & Maitland, "A History of Eng. Law," Vol. 2, p. 227.

³¹ Zeitschrift, xxii, 505-510. Jenks, 9 L.Q.R. 78 et seq.

³² Jenks, 9 L.Q.R. 79.

³³ Ibid, and p. 83.

³⁴ "Origins and Early History of Negotiable Instruments," (1915) 31 L.Q.R. at p. 20 et seq.

³⁵ Ibid.

³⁶ The Statute of Money, 9 Edw. III., st. 2 (1355). The Statute of the Staple, 27 Edw. III., st. 2, ch. 14 (1353).

³⁷ The Statute of Money, supra.

³⁸ Chs. 2, 9, 10 and 11.

³⁹ Ibid. ch. 1.

⁴⁰ 3 R. 2, ch. 3.

⁴¹ Ch. 7.

⁴² 27 Edw. III., st. 2, ch. 14 (1353).

⁴³ 14 R. 2, ch. 2.

⁴⁴ 11 Hy. 4, ch. 8.

⁴⁵ 17 Edw. 4, ch. 1.

⁴⁶ 2 Hy. 6, ch. 6.

⁴⁷ 9 Hy. 5, ch. 6.

^{47a} 5 Hy. 4, ch. 9.

⁴⁸ 3 Hy. 7, ch. 8 (1486), 7 Edw. 6, ch. 6 (1553).

⁴⁹ 3 Hy. 7, ch. 5.

⁵⁰ 37 Hy. 8, ch. 9.

⁵¹ Bewes Lex Mercatoria, Pt. 3, ch. 1, at p. 261; Jenks "A Short History of England," p. 129.

⁵² It corresponded to the continental contract of "cambium", for a discussion of which instrument see Holdsworth, "Origins and Early History of

Negotiable Instruments," (1915) 31 L.Q.R. at p. 24 et seq.

⁵³ F. M. Burdick, "What is the Law Merchant?" Essays in Anglo-American Legal History, Vol. 3, at p. 43 et seq.

⁵⁴ Coke, Inst. Pt. 4, ch. 40, fol. 272. F. M. Burdick, "What is the Law Merchant?" Essays in A-A.L.H., Vol. 3, pp. 35 and 36. The correct etymology of the term is given in N.E.D., Vol. VII, p. 839, sub tit., "Piepowder."

⁵⁵ Hargr. & Butler's Note to Co. Litt. 232b.

⁵⁶ Breverton's Case, (1537) 1 Dyer, 30b, pl. 208.

⁵⁷ *Fashion v. Atwood* (1679), 2 Ch. Cas. 6, 38 (1688), 22 E.R. 819, 835; *Mitchell v. Eades* (1700) Pre. Cha. 125, 24 E.R. 60; *Peters v. Soame* (1701) 2 Vern. 438, and cases there cited; *Baldwin v. Billingsley* (1705) 2 Vern. 539; Note No. 2 to *Thomas v. Freeman* (1706) 2 Vern. 563; *Crouch v. Martin* et al (1707) 2 Vern. 595; *Squib v. Wyn* (1717) 1 P. W. 378 at p. 381; *Row v. Dawson* (1749) 1 Ves. Sen. 332; *Whitfield v. Fausset* (1750) 1 Ves. Sen. 387 at p. 391, 27 E.R. 1097 at p. 1100. See also Jenks, "A Short History of English Law," at p. 302; *Townshend v. Windham* (1750), 2 Ves. Sen. 1, 28 E. R. 1.

⁵⁷ *Ashcomb's Case* (1674) 1 Ch. Ca. 232, 22 E. R. 776; *Cole v. Jones* (1715) 2 Vern. 692; *Jewson v. Moulson* (1742) 1 Atk. 417 at p. 419.

⁵⁸ *Earl of Suffolk v. Greenvil* (1631) Nelson 15, 21 E.R. 778. See also Jenks, "A Short Hist. of Eng. Law," at p. 302.

⁵⁹ *Whitfield v. Fausset* (1750) 1 Ves. Sen. 387 at p. 391, 27 E.R. 1097 at p. 1100.

⁶⁰ *Squib v. Wyn* (1717) 1 P.W. 378, n. 2 at p. 381 (4th ed. 1787); *Danby v. Bates* (1741) 1 Atk. 207 at p. 208.

⁶¹ 1873 (Imp.), 36 and 37 Vic. cap. 66, sec. 25 (6).

⁶² Dean Falconbridge of Osgoode Hall deals with some of these exceptions in 42 C.L.T. 26 (1922).

⁶³ R.S.C. (1906) ch. 119, sec. 25, s-s. 1 (a) and (b) and s-s. 3

^{63a} Chalmers, Bills of Exchange, 8th. ed. (1919), p. liii (Introduction to 3rd. ed.).

⁶⁴ See judgment of Treby, C.J., in *Bromwich v. Lloyd* (1696) 2 Lutw. 1585 (1718 ed., p. 667, English translation) and 125 E.R. 870 (in the origi-

nal). The latter is the better report of the case.

⁶⁵ Chalmers, 8th ed. (1919), p. liv. (Introduction to 3rd. ed.); Falconbridge, "Banking and Bills of Exchange," 3rd. ed. (1924), at p. 8; McLaren on Bills, Notes and Cheques, 1916 ed., p. 42.

⁶⁶ See "Origins and Early History of Negotiable Instruments," by W. S. Holdsworth (1915), 31 L.Q.R. 12, 173, 376 and 32 L.Q.R. 20 (1916). Jenks, "Early History of Negotiable Instruments," 9 L.Q.R. 70.

⁶⁷ 31 L.Q.R. 174-5.

⁶⁸ It is related that many of the doughty crusaders, for instance, found it much more profitable to enter into trade and other alliances with the Saracens than to make war.

⁶⁹ See as to this, "The Relations between the Laws of Babylonia and the Laws of the Hebrew Peoples," by C. H. W. Johns (1917), 2nd. ed., particularly p. vi et seq. of the Preface, Lecture ii., 16 et seq. and Lecture iii., 52 et seq.

^{69a} See further as to this, the articles in the Ency. Brit., Vol. 2, 46 et seq. "Frederick II.," by A. W. Holland,

and Vol. 25, 23 et seq., "Sicily," by E. A. Freeman and T. Ashby, and authorities there cited.

⁷⁰ Oxf. Dic. Vol. ii., p. 47; the Century Dic. and Ency., Vol. i., p. 775. And see also as to "Cambist," 9 Corp. Jur. 1120 and Wharton's Law Lexicon, 13th. ed., p. 137.

⁷¹ "Early History of Negotiable Instruments," 9 L.Q.R. 73.

⁷² Selected from 22 Zeitschrift für Handelsrecht, 8, 7 Brunner.

Street, "Foundations of Legal Liability," Vol. ii., ch. 32 at p. 338, n., cites the same examples and W. S. Holdsworth, in "Origins and Early History of Negotiable Instruments," 31 L.Q.R. at p. 176 gives the 1339 example.

⁷³ 9 L.Q.R. 74.

⁷⁴ 22 Zeitschrift für Handelsrecht, 22-24. See also Street, Foundations of Legal Liability", Vol. ii., ch. 32, 341-2; W. S. Holdsworth, "Origins and Early History of Negotiable Instruments," 31 L.Q.R. at p. 181, n. 1.

⁷⁵ 9 L.Q.R. 75.

⁷⁶ McLaren on Bills of Exchange and Promissory Notes, 5th ed. (1916) at p. 63.