University of Michigan Law School

University of Michigan Law School Scholarship Repository

Articles

Faculty Scholarship

1924

Recognition of New Types of Negotiable Instruments

Ralph W. Aigler

University of Michigan Law School

Available at: <https://repository.law.umich.edu/articles/2117>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

Part of the [Accounting Law Commons](#), [Banking and Finance Law Commons](#), [Commercial Law Commons](#), [Legal History Commons](#), and the [Secured Transactions Commons](#)

Recommended Citation

Aigler, Ralph W. "Recognition of New Types of Negotiable Instruments." *Colum. L. Rev.* 24, no. 6 (1924): 563–93.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COLUMBIA LAW REVIEW

VOL. XXIV

JUNE 1924

NO. 6

RECOGNITION OF NEW TYPES OF NEGOTIABLE INSTRUMENTS

The expression "negotiable instrument" is one of variable meaning, and what is meant thereby often can be determined only by the context. After all it is merely a matter of classification, and the term should be used not as of special significance in and of itself but only as indicating certain legal features and consequences not common to commercial instruments generally. Primarily "negotiable" indicates transferability with a certain facility. Of almost equal importance has been the quality of suability by the holder *pro tempore*. Another quality commonly associated with negotiability is the possibility that a transferee may acquire on the instrument better rights than those assertable by his transferor. This quality, however, is not a necessary attribute of negotiability, for while an overdue promissory note is clearly a negotiable instrument a transferee can stand no better, at least so far as rights growing out of the promissory undertaking are concerned, than his transferor. If the transferee in a given controversy is held to have acquired better rights, it is likely, as will appear hereafter, that it is because the document is negotiable. This, however, is not necessarily the explanation.

It may be not without interest to consider how instruments gain the negotiable quality and to trace, sketchily perhaps, the process of recognition. Finally some inquiry may be attempted as to the possible effect of the Uniform Negotiable Instruments Law upon the freedom of growth of commercial paper along these lines.

While the Law Merchant as a body of rules and principles according to which justice was administered in certain types of litigation in certain special courts may fairly be said to have been absorbed¹ by

¹When the common law courts first authoritatively declared their willingness and intention to be governed by the rules and principles of the Law Merchant in settling litigation involving commercial disputes, then it was, it is submitted, that the Law Merchant was absorbed. Whether the content of the

the common law as early as the latter half of the seventeenth century² it must not be assumed that thereafter established and approved customs of merchants ceased to be important factors in determining the legal status of commercial instruments and the rights, duties, etc., of parties in reference thereto. Customs of merchants are and probably will continue to be sources of law, but it is believed that it is unnecessarily cumbersome if not actually misleading to speak of the Law Merchant as something nowadays existing outside the field of our common and statute law.³

The outstanding instrument developed under the Law Merchant to which the qualities of negotiability became attached was of course the bill of exchange. To this perhaps the promissory note may be added. It is, however, a matter of some doubt whether promissory notes as we now know them were not dependent upon legislative action for their status along with bills of exchange.⁴ At any rate there can be no doubt

Law Merchant, application of which was to be made in a particular case, was to be determined by testimony, knowledge of the jurors, judicial notice by the court, or by extra-judicial consultation with merchants would seem to have been immaterial in this matter. Also in this respect it would not seem to be a vital circumstance that only from time to time as occasion arose would a particular rule or doctrine of the Law Merchant be recognized and applied.

²In *Anon.* (1668) Hardres, 485, 486, at the conclusion of the argument, the Chief Baron said: "And it were worth while to enquire, what the course has been among merchants; or to direct an issue for trial of the custom amongst merchants in this case. For although we must take notice in general of the law of merchants; yet all their customs we cannot know but by information." In the same year in *Carter v. Downish*, 1 Show. 127, 130, Pollexfen, C. J., said: "As to that of the law of merchants, I think we are bound to take notice of it." And in *Mogadara v. Holt* (1690), 1 Show. 317, 318, it was laid down that: ".....it is no more than the law of merchants, and that is *jus gentium*, and we are to take notice of it....." See also *Williams v. Williams* (1692) Carth. 269, 270, where it was said that "this custom of merchants concerning bills of exchange is part of the common law, of which the Judges will take notice."

³For example, in *Edelstein v. Schuler & Co.* [1902] 2 K. B. 144, Bigham, J., said (p. 155): "Thus it has been found convenient to treat securities like those in question [debenture bonds] in this action as negotiable, and the courts of law, recognizing the wisdom of the usage, have incorporated it in what is called the law merchant, and have made it part of the common law of the country." It is submitted that when there is the proper showing of the usage with reference to an appropriate instrument it is quite unnecessary to consider that the document is thereby negotiable by an existing law merchant and then to declare that such doctrine of such law merchant is part of the body of the common law. It is the common law which directly and immediately attaches the consequence.

⁴The impatience of Lord Holt with the merchants of Lombard Street as appears from the report of *Clerke v. Martin* (1702) 2 Ld. Raym. 757, and his attitude in that case towards promissory notes which led to the enactment of the Statute of Anne, (1704) St. 3 & 4 Anne, c. 9, are familiar to all. See Aigler, *Commercial Instruments* (1924) 8 Minn. Law Rev. 366 *et seq.* Whether the negotiability of promissory notes rests on the Statute of Anne or whether, on the other hand, that enactment simply restored the rule of the Law Merchant is discussed elsewhere. See Judge Cranch's article in 3 Ames, *Select Essays*, 72, 89-93; Holdsworth, *Origins & Early History of Negotiable Instruments* (1916) 32 Law Q. Rev. 20, 34-37.

that after 1704, promissory notes were on the same footing as bills of exchange.

Bank bills were early recognized as quite unlike ordinary chattel property. A case before Lord Holt, in 1699, involved a bank bill payable to A or bearer; A lost the bill, which was found by a stranger, who transferred it for a valuable consideration to C. The learned Chief Justice is reported as saying: "A may have trover against the stranger who found the bill, for he had no title, though the payment to him would have indemnified the bank; but A cannot maintain trover against C by reason of the course of trade, which creates a property in the assignee or bearer."⁵ A few years later, however, in *Ford v. Hopkins*,⁶ views regarding bank notes quite at variance with the above are attributed to the same judge.⁷ But the case before the court was one of trover for million-lottery tickets, a depositary having wrongfully turned over to the defendant some tickets belonging to the plaintiff. Whatever doubt may thus have been cast upon the status of bank notes was set at rest by the well-known decision of Lord Mansfield in *Miller v. Race*,⁸ where it was held that a good faith purchaser of a stolen bank note acquired a property therein.⁹

The status of Exchequer bills¹⁰ was definitely settled in *Wookey*

⁵ *Anon.*, 1 Salk. 126.

⁶ (1701) 1 Salk. 283.

⁷ "If money is stolen and paid to another, the owner of the money can have no remedy against him that received it; but if bank-notes, Exchequer-notes, or million-tickets, or the like, are stolen or lost, the owner has such an interest or property in them, as to bring an action into whatsoever hands they are come: money or cash is not to be distinguished, but these notes or bills are distinguishable, and cannot be reckoned as cash, and they have distinct marks and numbers on them." See as to this last point *Wookey v. Pole* (1820) 4 B. & Ald. 1, 7.

⁸ (1758) 1 Burr. 452.

⁹ In the course of his opinion Lord Mansfield said: "The case of *Ford and Hopkins* was also cited..... But this must be a very *incorrect* report of that case: it is *impossible* that it can be a true representation of what Ld. Ch. J. Holt said. It represents him as speaking of *Bank-notes*, Exchequer-notes, and *million-lottery tickets*, as like to each other. Now no two things can be more unlike to each other than a *lottery-ticket* and a bank note..... The person who took down this case, certainly misunderstood Lord Ch. J. Holt, or mistook his reasons" etc. See also Lee, C. J., in *Hartop v. Hoare* (1743) 3 Atk. 44, at p. 50. *Accord, Raphael v. Bk. of England* (1855) 17 C. B. 161.

¹⁰ The language of such bills was as follows:

"No. 8333, 12 May, 1817.

"By virtue of an act of parliament quinquagesimo Septimo Geo. 3, Regis, for raising the sum of 24,000,000 by exchequer bills, for the service of the year 1817, this bill entitles or order, to one thousand pounds, with interest after the rate of 2½ d. per centum per diem, payable out of the first aids or supplies to be granted the next session of parliament, and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or at the receipt of exchequer at Westminster after the 5th day of April. Dated at the Exchequer the 12th day of May 1817. If the blank is not filled up, the bill will be payable to bearer.

"Greenville.

"N. B. The cheques must not be cut off."

v. *Pole*,¹¹ where it was held that a defendant who in good faith had purchased the bill in question from a faithless agent of the plaintiff was not liable in trover. Such bills were considered as having the same circulating properties as bank notes and bills of exchange, all of them being representatives of money, as to which it had been laid down as long ago as 1599, in *Higgs v. Holiday*,¹² that "when he [the owner of money] had lost the possession thereof he had lost the property also, because it cannot be known."¹³ While the Act of Parliament under which the bills were issued clearly contemplated that they should be put into circulation the emphasis of the court was placed upon the fact that the instruments by their terms called ultimately for the payment of money to the holder, who might become such either by delivery or by indorsement and delivery, and the further fact that it appeared that they were actually negotiated "in like manner as other bills or notes, though not to the same extent, or among all people generally, but confined chiefly to those who deal in money."¹⁴

In *Maclish v. Ekins*¹⁵ a navy bill payable to A and his assigns was held unlike money, so one who took the bill from an agent of the owner but not pursuant to authority was liable in trover. There is nothing in the report indicating that such bills customarily circulated. The case of *Goldsmyd and Another v. Gaden*¹⁶ is hardly sufficiently well authenticated to upset the *Maclish* case.

The attitude of the courts towards recognition of qualities of negotiability as being attached to documents other than bills and notes,

¹¹ *Supra*, footnote 7.

¹² (1599) Cro. Eliz. 746.

¹³ (Italics the writer's). As to this Best, J., in *Wookey v. Pole*, said: "It is not because the loser cannot know his money again that he cannot recover it from a person who has fairly obtained the possession of it; for if his guineas or shillings had some private marks on them by which he could prove they had been his, he could not get them back from a bona fide holder. The true reason of this rule is, that by the use of money the interchange of all other property is most readily accomplished. To fit it for its purpose the stamp denotes its value, and possession alone must decide to whom it belongs." In *Miller v. Race*, Lord Mansfield was expressing essentially the same idea when he said: "It has been quaintly said, 'that the reason why money cannot be followed is, because it has no ear-mark'; but this is not true. The true reason is, upon the currency of it: it cannot be recovered after it has passed in currency."

¹⁴ Bayley, J., dissented, being of the opinion that the bills were to be classed with other saleable goods and chattels.

See also *Brandao v. Barnett* (1846) 12 Cl. & Fin. 787, in which Exchequer bills were assumed to be negotiable. Lord Halsbury says that such bills were issued first in 1695, "but are now regulated by the Exchequer Bills and Bonds Act, 1866, as amended by the Treasury Bills Act, 1877." He points out further that their place is now to a great extent taken by Treasury bills. See 2 Halsbury, *Laws of England* (1908) 565, 566.

¹⁵ (1753) Sayer 73.

¹⁶ Cited by counsel in argument in *Collins v. Martin* (1797) 1 Bos. & Pul. 648, as having been decided in Chancery, June 13, 1796.

including such instruments as above discussed, is well shown by the opinion of Lord Cranworth in *Dixon v. Bovill*.¹⁷ The action was based upon an "iron note" reading, "I will deliver 1,000 tons No. 1 pig iron, free on board here, when required, after the 10th day of September next, to the party lodging this document with me; f.o.b. (i.e. free on board) in Glasgow," signed by the defendant. This document had been issued to X who sold the iron represented thereby to plaintiffs who paid X and received the "iron note." The Court of Session decided that the plaintiffs having paid X for the iron, the defendant was liable for non-delivery despite the fact that he had not been paid. In the House of Lords this conclusion was affirmed on grounds not necessary to be noticed here, the Lord Chancellor in the only opinion rendered being unmistakably of the opinion that the "note" could not be operative as a negotiable instrument. On the contrary, as an attempt to create a floating right of action in the holder it was invalid.¹⁸

In a series of cases beginning with *Gorgier v. Mievill*,¹⁹ in 1824, it was established in England that instruments issued by foreign governments in financing operations might possess qualities of negotiability. In the case just cited a bond issued by the King of Prussia in which he declared himself and successors bound "to every person who should for the time being be the holder of the bond" for the payment of principal and interest in the manner there pointed out, was wrongfully pledged with the defendant by a bailee of the owner thereof, the plaintiff. In trover the plaintiff contended that the document, being the security of a foreign state, was unlike bank notes, bills of exchange indorsed in blank, and exchequer bills, which constituted a part of the circulating medium of the country, the circulation of which would be materially impeded if they could be followed.²⁰ Abbott C. J. said:

¹⁷ (1856) 3 Macq. H. L. Cas. 1.

¹⁸ "The only cases in which such an action can be sustained are those of bills of exchange and promissory notes. That depends on the law merchant in the case of bills of exchange, and on the stats. 12 Geo. III, c. 72, s. 36 (Scotland), and 3 & 4 Anne c. 9, s. 1, (England), in the case of promissory notes. No evidence was given to show any general mercantile usage affecting such instruments as that now in question..... No authority for such transferable right of action has been adduced in argument, and all principle is against its validity.Bills of exchange have been made an exception for the convenience of trade, but it is an exception not to be extended. The drawer of the bill gives to the indorsee a better title than his own, and this leads, or may lead, to many ill consequences; but mercantile convenience has sanctioned it.....If the convenience of those engaged in trade and commerce requires that scrip notes of this description should be made legal and valid, that must be effected, if at all, by the Legislature; and on any measure being introduced for such an object, it will be for the Houses of Parliament to consider and weigh well the social benefit and evils likely to result from sanctioning the proposed change." As to bills of lading see *Thompson v. Dominy* (1845) 14 M. & W. 403.

¹⁹ 3 B. & C. 45.

²⁰ *Glyn v. Baker* (1811) 13 East 509, was relied on. There it was indicated that India Bonds (issued by The United Company of Merchants of England,

"It (the bond) is, therefore, in its nature precisely analogous to a bank note payable to bearer, or to a bill of exchange indorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it, has power to give title to any person honestly acquiring it. It is distinguishable from the case of *Glyn v. Baker*, because there it did not appear that India bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like exchequer bills."

In *Attorney-General v. Bouwens*²¹ Russian, Danish, and Dutch bonds were likened to bills of exchange and promissory notes, a special verdict having settled that documents such as these had been sold and transferred in England by delivery alone and the bearers thereof had always been deemed to be and dealt with as owners.²² And in *Heseltine v. Siggers*²³ Spanish bonds regarding which a contract of sale had been made were classed with Exchequer bills, bonds, and scrip, which pass by delivery alone. But in *Lang v. Smyth*²⁴ certain obligations called *bordereaux* bearing attached coupons, securities issued by the Neapolitan Government, were considered to be non-negotiable, partly because of the form of the instruments and partly because the jury had returned a finding that the documents did not pass in England from hand to hand like money or bank notes. It was objected that the question was improperly left to the jury. As to this Tindal C. J. said that "even if it had been incumbent on the Judge to decide what was the nature of these instruments, there is nothing on the face of them to lead to the conclusion that they are to be considered as money or negotiable instruments." Continuing he said:

"But the answer to the objection is, that these are not *English* instruments, recognized by the law of England, but *Neapolitan* securities, brought to the notice of the Court for the first time; and, as Judges, we are not allowed to form an opinion on them, unless supplied with evidence as to the law of the country whence they come. Judges have

trading to the East Indies) in which the obligor undertook to pay the specified amount to X, "his executors, &c. (by indorsement hereon)" were not so far negotiable that a bona fide purchaser from the custodian for the owner was free from liability to account. Le Blanc, J., said: "Even if the case went to trial again to inquire into the fact of the negotiability of India bonds, the defendant would never be able to persuade a jury to find that they were negotiable instruments like bills of exchange." See the remedial statute of (1811) St. 51 Geo. 3, c. 64.

²¹ (1838) 4 M. & W. 171.

²² The question arose in a proceeding for probate. *Accord, Attorney-General v. Glendening* (1904) 92 L. T. R. 87 (colonial bonds payable to bearer and containing a charge on property).

²³ (1848) 1 Exch. 856.

²⁴ (1831) 7 Bing. 284.

only taken upon themselves to decide the nature of instruments recognized by the law of this country; as bills of exchange, which pass current by the law merchant; dividend warrants;²⁵ or exchequer bills, the transfer of which is founded on statutes, which a Judge in an *English* court is bound to know."²⁶

The status of the securities of foreign governments was, however, effectively settled in the well known case of *Goodwin v. Roberts*²⁷ which was taken to the House of Lords.²⁸ The case arose out of a wrongful pledging with the defendant by a bailee of the plaintiff of certain scrip by its terms entitling the bearer thereof to receive definitive bonds of the Russian or Austro-Hungarian governments, which scrip at the time of the misappropriation was the property of the plaintiff. The defendant having turned the scrip into money, was sued for the proceeds. It was established that:

"The scrip of loans to foreign governments, entitling the bearers thereof to bonds for the same amount when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and Foreign Stock Exchanges, and through them by the public, for over fifty years. It is and has been the usage.....to buy and sell such scrip and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealing by mere delivery as a negotiable instrument transferable by delivery....."

The argument centered pretty largely on the applicability of the doctrine of *Gorgier v. Mieville* and *Attorney-General v. Bouwens*, *supra*, and both in the Court of Exchequer and the Exchequer Chamber those cases were deemed controlling despite the fact that the instruments in question entitled the bearer not to money but to bonds. The scrip was "substantially and in effect" a "security for money, which, till the bond shall be delivered, stands in the place of that document."²⁹

²⁵ Some doubt as to these was raised by the decision in *Partridge v. Bk. of England* (1846) 9 A. & E. (N. S.) 396. But see *Goodwin v. Roberts* (1875) L. R. 10 Exch. 337, 354, and Bills of Exchange Act (1882) St. 45 & 46 Vict. c. 61, § 97 (3) (d), by which the doubt appears to be dispelled.

²⁶ (Italics the writer's). "It has been urged, that in *Gorgier v. Mieville*, the case of the Prussian bonds, no evidence was given of the foreign law; but evidence was given, that by the usage of merchants in this country, those bonds passed from hand to hand, which usage could scarcely have existed, unless they were negotiable by delivery in Prussia, so that evidence as to the law of Prussia was rendered unnecessary. And the question is, not so much what is the usage in the country whence the instrument comes, as in the country where it is passed." Tindal, C. J., in *Lang v. Smyth*.

²⁷ *Supra*, footnote 25.

²⁸ (1876) L. R. 1 A. C. 476.

²⁹ Per Cockburn, C. J. (p. 352).

On the basic problem it was contended by counsel for the plaintiff that "because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach." After manifestly careful and thorough consideration of the point and the historical development of negotiability and the part played by the law merchant it was concluded in the Exchequer Chamber in a most instructive opinion by Cockburn *C. J.* that just as the quality of negotiability became attached to bills of exchange and promissory notes out of the usages and needs of trade, so even today out of the same considerations the same quality might become annexed to new types of documents. It was considered that the law had not become finally stereotyped and settled as if by some positive and peremptory enactment.³⁰

It is important to notice, because the scope of this decision as an authority will have to be considered later, that in the Exchequer Chamber the conclusion was rested on a broad and fundamental ground, that negotiability has been a product of trade usage and that as new situations and new types of instruments develop, usage, just as in days long gone by, may warrant the court in attaching to such instruments the same quality.

In the House of Lords the decision was affirmed, though an additional ground of decision was advanced. It was the opinion of the Lords that the scrip was in such terms that the plaintiff must be considered as having represented that if it were taken in good faith, and for value, the person so taking would stand to all intents and purposes in the place of the previous holder,—in other words, negotiability by estoppel.³¹ But by putting the case on that ground it is not to be

³⁰ "Usage, adopted by the Courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment?The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such." Thus the Chief Justice avoided a "narrow minded" view which in a much earlier Chief Justice, Lord Holt, led to many uncomplimentary observations.

³¹ *Pickard v. Sears* (1837) 6 A. & E. 469, was cited as exemplifying the doctrine.

understood that the *ratio decidendi* of the Exchequer Chamber was disapproved. On the contrary it was expressly concurred in.³²

Since *Goodwin v. Roberts* the English courts do not appear to have been called upon to determine the standing of securities of foreign governments. It was some time, however, before there seems to have been reached a like quiescent attitude toward some other common securities. Instruments issued by English and foreign companies in carrying out financing operations have caused some very real problems and it is possible that there are some still unsettled.

Two years before *Goodwin v. Roberts* was first decided the Court of Queen's Bench wrestled with *Crouch v. Credit Foncier of England*³³ in which the plaintiff whose claim to certain debenture bonds issued by the defendant, an English company, was derived from or through a thief, sued to recover the amount of the bond, the events upon which the amount thereof was to be due and payable having happened. The debenture in question contained a promise over the defendant's seal to pay a specified sum to the bearer subject to conditions set forth on the back thereof. The former owner of the instrument from whom it had been stolen defended the action, a duplicate having been issued him on his giving an indemnifying bond. The report of the case states that:

"No evidence was given at the trial as to whether similar documents are in practice treated as negotiable, nor was any express admission made as to this point; but from my Brother Bramwell's report we think that we must take it to have been tacitly admitted at the trial that they are so treated, and we must. . . . assume that this admission is correct. As instruments of this kind have only come into use within the last few years, a custom or usage to treat them as negotiable can only have begun recently; but we must, in deciding this case, proceed on the assumption that they have acquired whatever degree of negotiability can be created by any such recent custom of trade."

The court, Blackburn J., writing the opinion, first concluded that the instrument in suit could not be classed as a promissory note, there being conditions limiting or affecting the promise in such way that it could not be said that there was an unconditional, simple promise to pay money, a requisite of a promissory note.³⁴ The cases of *At-*

³² The Lord Chancellor said (p. 490): "But my Lords, I have no hesitation in saying that I also concur in what I understand to have been the *ratio decidendi* of the Courts below in this case itself." See also the opinions of Lords Hatherly and Selbourne.

The doctrine of the case was held not properly applicable to post-office orders in *Fine Art Society v. Union Bk. of London* (1886) L. R. 17 Q. B. D. 705. (1873) L. R. 8 Q. B. 374.

³⁴ It was intimated but not decided that the same result might be reached on the fact that the instrument was under seal.

torney-General v. Bouwens and *Gorgier v. Mieville* were then considered. It was stated by the learned judge that there was no intention to cast any doubt on the doctrine of these decisions, "but we do not think it applicable to an English instrument made in England; and we express no opinion as to what might be the law as to obligations made by subjects abroad, which, by the law of the country where they were made, are negotiable in that country."

The conclusion of the court was that since the power of a holder to create in his transferee better rights than the transferor had and the ability of the holder for the time being to sue on the instrument in his own name were attributes of negotiability, and since under the law of England it is impossible for a party to create by his own act a transferable right of action on a contract,³⁵ and since the "ancient" law merchant did not include a document such as these debenture bonds, they could not rank as negotiable instruments, and the plaintiff must fail. Modern custom, it was considered, might enter into and become under certain conditions, a term of the contract, but it could not determine the status of the instrument. With reference to securities issued abroad it was obviously the opinion of Judge Blackburn that, if the foreign law attached to the contract the feature of transferability and suability by a holder, for the time being the difficulty was avoided, and *Gorgier v. Mieville* and like cases were to be thus explained.

It may be suggested here, parenthetically, that it would seem that the court failed to give due weight to the fact that it was nothing but usage that gave to bills of exchange and probably to promissory notes the qualities of negotiability. When the usage became sufficiently well settled and recognized by the courts it had the force of law, and thus came into the general body of our law. Did usage cease to be a source of law after the common law courts began to apply the rules and principles of the law merchant? Is usage a source of law only when it goes through an intermediate stage, the law merchant?

The difference in the positions of Blackburn, J., in the *Crouch* case and Cockburn, C. J., in the *Goodwin* case is thus fundamental. The latter looked upon custom as a constantly contributing source of law and rather impatiently rejected the suggestion that the law had become stereotyped. The former apparently would require legislative action to enlarge the class of negotiable paper.

In *Goodwin v. Robarts*, after laying down the basic propositions on which the case was decided, Cockburn, C. J., felt called upon to review certain cases relied upon in the argument by the losing side.

³⁵ *Dixon v. Bovill* (1856) 3 Macq. H. L. Cas. 1, and *Thompson v. Dominy*, *supra*, footnote 18, were relied on for this.

Among these cases was *Crouch v. Credit Foncier of England*. After pointing out the decision therein and expressing disagreement with Judge Blackburn's view that only usages recognized by the "ancient law merchant" could determine the negotiable status of an instrument, it was said:

"We think the judgment in *Crouch v. The Credit Foncier* may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form a part of what is called 'the ancient law merchant.'"³⁶

In the House of Lords the only reference to the *Crouch* case is in the opinion of Lord Selborne who said: "The Court of Queen's Bench in deciding that case relied upon the distinction between 'English instruments made by an English company in *England*,' and 'a public debt created by a foreign or colonial government, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder. . . .'"³⁷

That at least two of the judges³⁸ by whom *Goodwin v. Roberts* was decided in the Exchequer Chamber did not consider their decision applicable only to securities of foreign debtors is conclusively shown by *Rumball v. The Metropolitan Bank*,³⁹ where the doctrine of the *Goodwin* case was held applicable to scrip which certified that, after the payment of certain installments, the bearer would be entitled to be registered as the holder of shares in an English banking company.⁴⁰

In *London and County Banking Co. v. London and River Plate Bank*⁴¹ certificates of stock issued by the Pennsylvania Railroad Co. were considered by the Queen's Bench Division (Manisty J.) not to be negotiable despite evidence to the effect that on the Stock Exchange they passed from hand to hand and had been treated there and generally as negotiable instruments. The basis of the decision was the ab-

³⁶ See *Goodwin v. Roberts*, *supra*, footnote 25, at p. 356.

³⁷ *Supra*, footnote 28, at pp. 494, 495.

³⁸ Cockburn and Mellor.

³⁹ (1877) L. R. 2 Q. B. D. 194, followed in *Webb, Hale & Co. v. Water Co.* (1905) 21 T. L. R. 572. But certificates for shares of stock clearly are not negotiable instruments in England. *Colonial Bank v. Cady and Williams* (1890) L. R. 15 A. C. 267.

⁴⁰ There was proof of a general usage among bankers, discounters, money dealers, and the members of the London Stock Exchange of dealing in such documents much the same as in negotiable paper; that among such persons these scrip certificates had been supposed to be negotiable by mere delivery.

Both grounds upon which the *Goodwin* case went were deemed applicable here.

⁴¹ (1887) L. R. 20 Q. B. D. 232.

sence of any language in the certificates indicating that the right of suing might extend beyond one particular individual. The court then refers to the *Crouch* case approvingly and considers it as still good law despite *Goodwin v. Roberts* which is erroneously declared to have gone on the ground of estoppel.⁴² In *Easton v. London Joint Stock Bank*⁴³ some American railway bonds payable to bearer, as well as stock of a Canadian railway company, were involved. It was held that an innocent purchaser was protected under the estoppel theory of the House of Lords in the *Goodwin* case. There being evidence that the bonds were customarily transferred by delivery from hand to hand, Fry, L. J., thought them negotiable instruments in the full sense; but Cotton and Bowen, L. J. J., were dubious.⁴⁴ Several cases of about the same time dealing with American and South American bonds payable to bearer and shown to pass customarily by delivery as negotiable instruments held unmistakably that such bonds were negotiable.⁴⁵

Finally in two cases⁴⁶ decided in 1898 and 1902, litigation in England regarding the standing of securities passing in business circles freely from hand to hand appears to have come at least to a temporary rest. Both cases involved debenture bonds of the same character as those considered in the *Crouch* case. In the earlier of these cases Kennedy, J., in a masterful opinion in which the problem and the authorities are fully examined, upholds the negotiability of such securi-

⁴² The case was appealed, but the point here considered was not involved. *London & County Banking Co. v. London & River Plate Bank* (1888) L. R. 21 Q. B. D. 535.

⁴³ (1886) L. R. 34 Ch. D. 95.

⁴⁴ On appeal the House of Lords reversed the decision on the ground that the alleged innocent purchaser really took with notice. (1888) L. R. 13 A. C. 333.

⁴⁵ *London Joint Stock Bank v. Simmons* [1892] A. C. 201; *Venable v. Baring Bros. Co.* [1892] 3 Ch. 527; *Bentinck v. London Joint Stock Bank* [1893] 2 Ch. 120.

In the case first cited Lord Macnaughten said (pp. 224, 225): "Then were these Cédulas negotiable instruments? The Cédulas in question are foreign bonds with coupons attached, payable to bearer. Admittedly they pass from hand to hand on the Stock Exchange, and . . . they are dealt with as negotiable instruments. I do not see on what ground they are to be denied the quality of complete negotiability. *In a matter of this sort it is not, I think, desirable to set up refined distinctions which are not understood or are uniformly and persistently ignored in the daily practice of the Stock Exchange.*" (Italics ours).

In the *Venable* case Kekewich, J., dealing with American railway bonds, said the question before him was whether the bonds were negotiable according to the law merchant, as part of the common law of England, and he distinguished the *Crouch* case on the ground that the instruments there were conditional. He also pointed out that the evidence regarding usage did not need to be limited to the practice in the case of the particular bonds in question; evidence as to the customary dealing with such bonds in general is proper.

⁴⁶ *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658; *Edelstein v. Schuler & Co.*, *supra*, footnote 3.

ties. He concludes that while *Goodwin v. Roberts* did not purport expressly to overrule the *Crouch* case, the ground of decision of the Exchequer Chamber, which was not repudiated but accepted by the House of Lords, was inconsistent with the holding in the *Crouch* case, assuming that there was adequate proof, as there was in the present case, of customary negotiation. And in the later case *Bigham, J.*, not only agreed with *Kennedy, J.*, but held that it was no longer necessary to tender evidence to prove that such debenture bonds were customarily dealt with as negotiable instruments.

It would seem, then, that in order that an instrument may rank as negotiable it must comply with certain requisites (1) as to form and purport, (2) as to actual use.⁴⁷

As to the first, there must be a promissory or directory undertaking which though running to a specified payee may fairly be construed as made also to any holder for the time being.⁴⁸ Suability by such holder for the time being is sometimes an additional requisite,⁴⁹ but in some situations such ability to sue would more properly rank as a consequence of negotiability rather than as a contributing cause. For example, in determining whether a given foreign document is negotiable

⁴⁷ The learned editors of Smith, *Leading Cases* (12th ed. 1915), in vol. 1, p. 535, say: "It may therefore be laid down as a safe rule that, where an instrument is by the custom of trade transferable in this country, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i. e., if it be either not accustomably transferable, or though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*, nor (apart from the question of estoppel) will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt." See *Jones & Co. v. Coventry* [1909] 2 K. B. 1029, 1040 (pension warrant); *Shaw v. Railroad Co.* (1879) 101 U. S. 557, 563 (bill of lading).

It must not be concluded that it necessarily follows that an instrument complying with the requisites mentioned is negotiable. What is meant is that unless the instrument does fall within these requirements it *cannot* be negotiable.

⁴⁸ In *Gorgier v. Mievill* (1824) 3 B. & C. 45, the court distinguished (p. 47) *Glyn v. Baker*, *supra*, footnote 20, the case of the India bonds, as follows: ".....there it did not appear that India bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved on the trial that bonds of this description were negotiated like Exchequer bills." (Italics the writer's). See also *Partridge v. Bk. of England*, *supra*, footnote 25.

⁴⁹ See the preceding two notes; also footnote 53, *infra*.

In *Partridge v. Bk. of England*, *supra*, where the court had to decide whether a dividend warrant which directed payment to a particular individual was a negotiable instrument, it was proved that such warrants had for sixty years customarily passed by delivery and were taken as cash. But it was held (p. 423) that "such a practice cannot alter the law, by which such an instrument does not confer any right of action on an assignee." (Italics the writer's).

in England it would be vital that it appear not only that the promissory language met the test but it would have to appear that by the law of the place of issuance the promisor could be sued directly by a holder. Ordinarily actions for recovery on such instrument would be brought in the country of issuance and if by the law there the promisor could be held to account only to the promisee or to someone claiming in the right of the promisee, it would be rather obviously futile for an English court to classify such instrument as negotiable, at least in the full, normal sense of the term. On the other hand, if the instrument were of English origin and the question of negotiability *vel non* must be determined, the court, in declaring negotiability, impliedly recognizes that thereby a holder *pro tempore* may sue, and thus sets that type of instrument apart from the ordinary promissory undertaking.⁵⁰

As to the second requisite, there must be proof that instruments of the type in question in fact do pass from hand to hand after the fashion of documents admittedly negotiable. Evidence of business men, particularly bankers, brokers, and Exchange men, is of natural importance.⁵¹ Proof of customary circulation in the country of issue would not be sufficient in England,⁵² but proof of such usage in England regarding a foreign document is probably sufficient as to negotiability in the country of its origin.⁵³

As to certain types of negotiable instruments, notably bills and notes, many years of experience have evolved certain special requisites

⁵⁰ This is really the result of the cases recognizing debenture bonds, etc., as negotiable.

⁵¹ After a given type of instrument has been recognized as negotiable a court should not listen to evidence regarding its customary circulation or lack thereof. *Grant v. Vaughan* (1764) 3 Burr. 1516. Nor will evidence be received to show a custom in contradiction of an incident found to have become attached to a negotiable instrument. *Edie v. East India Co.* (1761) 2 Burr. 1216. See also Cockburn, C. J., in *Goodwin v. Roberts*, *supra*, footnote 25, at p. 357.

⁵² *Picker v. London & County Banking Co.* (1887) L. R. 18 Q. B. D. 515.

⁵³ *Ibid.* This would seem to be a reasonable view, for surely a custom of free transfer of foreign securities from hand to hand, like cash, would hardly grow to appreciable proportions if under the law of the country of issuance the debtor could be sued only by the promisee or in his right.

Since negotiability connotes important consequences (1) as between holder and maker, and (2) as between successive holders, it is perhaps arguable that as to the former the negotiable character of an instrument should be determined by the law of the place of issuance while as to the latter the governing law should be that of the place of transfer. So far as the indorser's contract is concerned it may be concluded that he has assumed the obligations of an indorser of a negotiable instrument; that may well be considered a question of the scope of the contract which the law of the place of making should govern. See the problem discussed in (1923) 11 Cal. Law Rev. 114. But granting such conclusion, the character of the instrument so far as the maker or drawer is concerned is left unaffected; as to him the law of the place of issuance should generally control. Whether a purchaser from a thief may acquire good title would seem to be a question as to which the contractual situation has no application.

—for example, the doctrine that a promissory note must contain an unconditional promise. It is noteworthy that the English court has recognized debenture bonds as negotiable, though not unconditional. The English Bills of Exchange Act which applies not to negotiable instruments generally but only to bills of exchange, promissory notes, and checks, does not stand in the way of such recognition of new sorts of instruments as negotiable. As the above review of the English cases clearly shows, it is not even necessary that an instrument to be negotiable must call for the payment of money.

The attitude of the English court, assuming the *Crouch* case is not controlling beyond its facts,⁵⁴ is to be commended. A supposedly conservative Bench has shown a willingness to go along with business practices which presumably are founded in commercial needs. As Lord Macnaughten said in *London Joint Stock Bank v. Simmons*,⁵⁵ "In a matter of this sort it is not, I think, desirable to set up refined distinctions which are not understood or are uniformly and persistently ignored in the daily practice of the Stock Exchange." Lord Holt would have escaped a lot of abuse had he shown more of the same spirit.

It remains to consider the attitude of the American courts.

Bills of exchange, of course including checks, and promissory notes have been as fully recognized as commercial paper by American as by English courts. Trade acceptances, which have become very common, are conceded to be commercial paper, commonly negotiable.⁵⁶ Occasional statutory requirements, as, for example, that the instrument must be payable at a bank, do not affect the general proposition.

United States Treasury notes, not unlike Exchequer bills⁵⁷ in form, were deemed negotiable,⁵⁸ the Acts of Congress authorizing their issue having expressly contemplated that they should be of such character. Government bonds have been likewise considered as negotiable instruments.⁵⁹ National bank notes,⁶⁰ in view of the provisions

⁵⁴ The status of the *Crouch* case, in view of the later cases, has been exhaustively considered by Bosanquet, *The Law Merchant & Transferable Debentures* (1899) 15 Law Q. Rev. 130; also by Palmer, *The Negotiability of Debentures to Bearer*, *ibid.*, p. 245. See also Willis, *Law of Negotiable Securities* (4th ed. 1923) 31 *et seq.*

⁵⁵ *Supra*, footnote 45, at p. 225.

⁵⁶ See *Capital City State Bank v. Swift* (D. C. 1923) 290 Fed. 505, 506. "Trade acceptances are today in more general use than any other form of negotiable instrument, except bank checks."

⁵⁷ See *supra*, footnote 10.

⁵⁸ *Frazer v. D'Inwilliers* (1845) 2 Pa. St. 200; *Vermilye & Co. v. Adams Express Co.* (U. S. 1874) 21 Wall. 138.

⁵⁹ *Texas v. White* (U. S. 1868) 7 Wall. 700; *Morgan v. United States* (1884) 113 U. S. 476, 5 Sup. Ct. 691. In the latter case it was said (p. 499):

of the statute, and Federal Reserve notes⁶¹ are unquestionably negotiable; in truth they are contemplated as part of the circulating medium of the country.

The situation regarding postal money orders is not without interest.

In reply to an inquiry from the Postmaster-General it was the advice of the Attorney-General, in 1872, that the remitter cannot, after the order has come into the hands of the payee therein, by any direction to the office at which the order is payable, stop payment thereof. In the course of the opinion the status of such instruments issued pursuant to Congressional direction is considered. It is pointed out that the statute was apparently taken largely from the English legislation, but with some important variations or omissions. The opinion is expressed that the money order is, "to a certain extent, a negotiable instrument." The order, under its terms, may be indorsed once, and the indorsee may secure a new order by application to the Postmaster-General. "It would seem, therefore, to be the intention of Congress to give these orders in many respects the character of ordinary negotiable instruments, in order that full credit may be given to them, and, consequently that their use be greatly extended."⁶²

Not many cases seem to have reached the courts. In *United States v. Stockgrowers' Nat. Bank*⁶³ a dishonest postmaster had drawn money orders, payable at an office at some distance, to the defendant. These orders were sent by the postmaster under a fictitious name to the defendant bank which collected the amounts thereof from the Government and placed the proceeds to the credit of the fictitious party who in the person of the postmaster withdrew most of the fund. In an action by the United States to recover the amount thus disbursed on the wrongful acts of the postmaster it was contended, *inter alia*, on behalf of the bank that, as settled by *Cooke v. United States*, "when the government descends from its position as sovereign and deals in negotiable paper, it subjects itself to the ordinary rules controlling negotiable paper the same as any individual." Judge Brewer observed as follows (p. 914):

"The acts of Congress, under which these and similar bonds of the United States were authorized and issued, do not in terms attach to them the legal quality of negotiable securities; but they are such in form and fact, and obviously for the purpose of giving them the highest credit and the widest and most unfettered currency, by passing by delivery with a title unimpeachable in the hands of bona fide purchasers for value."

⁶¹ U. S. Comp. Stat. (1916) § 9723.

Certificates of deposit issued by banks clearly may be negotiable instruments. *Nelson v. Citizens Bank* (1920) 191 App. Div. 19, 180 N. Y. Supp. 747; *White v. Wadhams* (1918) 204 Mich. 381, 170 N. W. 60.

⁶² *Ibid.* § 9799.

⁶³ See (1872), 14 Opinions of Atty's-Gen. 119, 121.

⁶⁴ (C. C. 1887) 30 Fed. 912.

"But these post-office orders are not negotiable paper; they are orders drawn by one postmaster upon another, payable to a particular person not named in the order itself, unknown save as to the particular parties to the transaction—the two postmasters and the party who obtains them—so that the protection which the rules applicable to negotiable paper would lay around many transactions do not avail the defendant in this case."

The case of *United States v. Bolognesi* is reported three times, twice on rulings on demurrers in the Circuit Court and finally in the Circuit Court of Appeals on a writ of error to review a judgment of the lower court.⁶⁵ The litigation arose out of the fraudulent drawing of money orders by one Marone, a banker and post-office clerk, payable to the defendants, without having received payment therefor and without the applications required by law. The defendants, having paid Marone the full value of such orders in good faith and without knowledge of the fraud, resisted the Government's claim of reimbursement. It was held that post-office money orders "are not negotiable instruments subject to the defenses permitted by the law merchant to bona fide holders for value. They stand in marked contrast to notes or similar obligations which the government might issue to obtain money for its own use and upon which it might incur all the responsibilities of a private person."⁶⁶

If post-office money orders, then, are to be considered negotiable, it must be only in a very limited sense. Transferability by indorsement and delivery, though restricted, points toward negotiability, but all in all it would seem to be misleading and productive of unwarranted inferences to apply to them the term "negotiable instrument."⁶⁷

⁶⁴ (1875) 91 U. S. 389.

⁶⁵ (C. C. 1908) 164 Fed. 159; (C. C. 1909) 169 Fed. 1013; (C. C. A. 1911) 189 Fed. 335.

⁶⁶ It was pointed out that the money order system was established and operated in the exercise of "a governmental power for the public benefit," and that, therefore, the principles government commercial transactions between individuals had no applications. Noyes, C. J., said (p. 337):

"Moreover, the restrictions and limitations which the postal laws and regulations place upon money orders are inconsistent with the character of negotiable instruments. Thus:

(1) The cashing of a money order cannot, under ordinary circumstances, be made in advance of the receipt of the corresponding advice. Postal Laws and Regulations § 1002.

(2) More than one indorsement of a money order invalidates it, Id. § 1007.

(3) After an order has once been paid by whomsoever presented, the department will not be further liable. Id. § 1009.

(4) Payment of orders will be withheld under a variety of circumstances."

In England postal money orders had been held non-negotiable instruments. *Fine Art Society v. Union Bk. of London*, *supra*, footnote 32.

⁶⁷ The orders being issued in the exercise of a governmental power for the public benefit there would seem to be no assumption of liabilities by the

State bonds payable to bearer have been repeatedly held to be negotiable instruments.⁶⁸ No doubt the same view would be taken if the instruments were payable "to order," but no bonds in such form have come to the attention of the writer. While one of the qualities of a negotiable instrument is that it circulates freely, in a fashion like money, and while it is fully established that states may issue negotiable documents, it is important that the state shall not issue paper purporting to be too much like money. Under the Federal Constitution states are forbidden to emit bills of credit, and occasionally it has been a matter of some difficulty to distinguish between the emission of such "bills of credit" and negotiable instruments.⁶⁹

State, county, and other municipal bonds, though now fully recognized as negotiable, apparently went through a period of struggle for recognition as such. Speaking of county bonds in *Mercer County v. Hackett*,⁷⁰ Mr. Justice Grier said:

"This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the

Government. The position of the Government in this respect may be roughly likened to the position of a municipality in its operation of a fire or police department.

Money orders issued by express companies, on the other hand, if in form permitting such classification, should be ranked with instruments admittedly negotiable.

⁶⁸ *Ehrlich v. Jennings* (1907) 78 S. C. 269, 58 N. E. 922; *Tucker v. Bank* (1877) 58 N. H. 83; *Griffith v. Burden* (1872) 35 Iowa 138; *Bond Debt Cases* (1879) 12 S. C. 200; see *State of Illinois v. Delafield* (N. Y. 1840) 8 Paige 526, 533, *aff'd* (N. Y. 1841) 26 Wend. 192; see S. C. (N. Y. 1841) 2 Hill 159, 172; *Branch v. Commissioners of Sinking Fund* (1885) 80 Va. 427 (*semble*). See also *Railroad Companies v. Schutte* (1880) 103 U. S. 118.

⁶⁹ *Craig v. Missouri* (U. S. 1830) 4 Pet. 410; *Briscoe v. Bk. of the Commonwealth of Kentucky* (U. S. 1837) 11 Pet. 257; *Poindexter v. Greenhow* (1884) 114 U. S. 270, 5 Sup. Ct. 903; *Houston & Texas Central Rd. v. Texas* (1899) 177 U. S. 66, 20 Sup. Ct. 545.

⁷⁰ See (U. S. 1863) 1 Wall. 83, 95.

payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer."⁷¹

A seal attached to a promissory note or bill of exchange executed by a natural person was at common law almost uniformly deemed to withdraw the instrument from the class of negotiable paper; it was a bond or specialty, a well known common law obligation antedating the application by the common law courts of the rules and principles of the law merchant and, therefore, ranked as such.⁷² The Negotiable Instruments Law provides that the "validity and negotiable character of an instrument are not affected by the fact" that "it bears a seal."⁷³ But corporate seals, whether of public or private corporations, had been well-nigh universally held to have no effect upon negotiability.⁷⁴

⁷¹It is pointed out by the court that such securities had been treated as negotiable not only by the Supreme Court as in *White v. Vermont & Massachusetts Rd.* (U. S. 1858) 21 How. 575, but by nearly every state in the Union. *Diamond v. Lawrence County* (1860) 37 Pa. St. 353, is cited as a single decision to the contrary. See the many cases cited in 28 Cyc. 1610.

The fact that provision is made by the legislation authorizing the bond issue for a sinking fund to retire the bonds does not make them payable out of a particular fund, hence non-negotiable. *Commissioners v. Bank* (1911) 157 N. C. 191, 72 S. E. 996.

⁷²Many cases are cited in 8 C. J. 110.

In *Porter v. McCollum* (1854) 15 Ga. 528, it was held, quite independently of statute, that a sealed promissory note payable to bearer was negotiable. The decision was based upon usage of trade, and the court points out that such result was appropriate despite the fact that at the time of the Statute of Anne, upon which the court assumes the status of promissory notes in this respect depends, the custom may have been the other way; that statute did not cast the law into a mold according to the practice then prevalent.

Speaking of coupon bonds payable to bearer executed by an individual it has been said: "But since bonds in this form have entered so largely into the financial and business transactions of the country a more enlarged rule than that supposed previously to be applicable has been adopted for their disposition, and the protection of persons receiving them in good faith and for value. It is not necessary therefore, in disposing of this case, to examine those authorities in detail, for the rule has now become settled that bonds of this description and issued in this manner, intended to pass from hand to hand, containing appropriate words for the expression of that intention, are to be regarded as commercial paper." See *Fairbanks v. Sargent* (N. Y. 1886) 39 Hun 588, 593.

⁷³N. I. L. § 6 (4). Since this Act is law in all the states but Georgia and it has already been held in that state that the seal does not prevent negotiability, the question of the seal, so far as the problem of status of the instrument as negotiable is concerned, is no longer of importance.

⁷⁴*Chase National Bank v. Faurot* (1896) 149 N. Y. 532, 44 N. E. 164, in which many cases bearing on the subject are examined.

In *Dinsmore v. Duncan* (1874) 57 N. Y. 573, the rule regarding private obligations between individuals was declared to be inapplicable to the case of public securities like those issued by the government, intended to seek for a market "throughout the civilized world." As to such securities the seal is used not to restrain negotiability, but rather to stamp the documents as genuine.

The English cases, heretofore referred to, show that corporate instruments under seal might be negotiable. In *Crouch v. Credit Foncier*, Blackburn, J., cast some doubt upon the soundness of such statement as applied to securities issued by private corporations, but the decision was on another ground. The negotiability of such corporate bonds was deemed fully established as long ago

Perhaps it has been sufficiently indicated by the foregoing that bonds of private corporations containing appropriate words of negotiability are recognized as negotiable instruments.⁷⁵ The view is declared to rest "upon the faith that such bonds are expressly designed to be thus circulated, and to be sold in the stock market like public securities, and that they are universally so used."⁷⁶

Interest coupons containing language amounting to an undertaking to pay a designated sum at a specified time to bearer or to order are independently negotiable.⁷⁷ But an interest *warrant*⁷⁸ may stand otherwise.⁷⁹

as *White v. Vermont & Massachusetts Rd.*, *supra*, footnote 71. In that case Mr. Justice Nelson said (p. 577): "As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think the usage and practice of the companies themselves, and of the capitalists and business men of the country, dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question....."

Indeed, without conceding to them the quality of negotiability, much of the value of these securities in the market, and as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day, would be impaired."

⁷⁵ A leading case in which bearer coupon bonds issued by a private corporation were regarded as negotiable so that a good faith purchaser from a thief was protected is *Murray v. Lardner* (U. S. 1864) 2 Wall. 110. See also *Pratt v. Higginson* (1918) 230 Mass. 256, 119 N. E. 661, 1 A. L. R. 714.

⁷⁶ See *Morris Canal & Banking Co. v. Lewis* (1858) 12 N. J. Eq. 323, 329. See also *White v. Vermont & Massachusetts Rd.*, *supra*, footnote 71.

⁷⁷ *Evertson v. National Bank of Newport* (1876) 66 N. Y. 14; *Mercer County v. Hacket* (U. S. 1863) 1 Wall. 83; *Haven v. Grand Junction Rd. & Depot Co.* (1871) 109 Mass. 88; *Hamilton v. Public Service Co.* (1921) 88 W. Va. 573, 107 S. E. 401.

⁷⁸ The interest warrant involved in *Evertson v. Bank*, *supra*, was as follows: "\$35 Interest Warrant for Thirty-five Dollars \$35 upon bond No. of the Danville, Urbana, Bloomington and Pekin Railroad Company. Payable in gold coin at the office of the Farmers' Loan and Trust Company in the city of New York, April 1, 1871.

"W. J. Ermentrout,
"Secretary."

⁷⁹ Such was the conclusion in the *Evertson* case. The court (Allen, J.,) said (p. 19):

".....The instruments are not, upon their face, negotiable; they are not payable to any person by name, or his order, or to the bearer, or to the order of a fictitious person. In all the cases to which reference has already been made, the coupons contained distinct promises to pay the bearer the sums named therein at a time and place specified. They were perfect negotiable instruments, independent of the bond from which they had been severed, and were not only negotiable within the statutes upon that subject and the Law Merchant, but were intended by the parties to be negotiable."

It was further pointed out that "There is no usage or custom proved that would give these warrants a negotiable character, even if custom and usage so recent as one applicable to these instruments would be, could change their legal effect."

The same result was reached in *Jackson v. Y. & C. Rd.* (1858) 48 Me. 147; *Crosby v. New London & C. Rd.* (1857) 26 Conn. 121; the warrants or coupons containing mere promises to pay, but designating no payee and containing no words of negotiability. In the former case evidence as to usage offered to show negotiability was rejected.

County⁸⁰ and other municipal⁸¹ warrants commonly used in conducting the current and ordinary business of the corporation and as a means of anticipating its revenues, though in form negotiable instruments, have been held to lack at least one of the common attributes of negotiability, that of a bona fide purchaser taking free of equities. In truth the true situation would seem to be that these documents in their usual form are negotiable instruments, for it appears to be conceded that they pass from hand to hand by delivery and that the transferee may demand payment or sue thereon in his own name;⁸² for reasons of public policy, however, there has not been extended to these instruments the common effect of bona fide purchase. It is not an uncommon assumption that the possibility of purchase free of defenses is a necessary attribute of negotiability, whereas it seems to be a fact that such quality was one of later acquisition, worked out by the courts of common law some time after they began to apply the rules of the law merchant.⁸³ The case of a past due promissory note is, as stated above, a sufficient example: quite properly it is called a negotiable instrument, but a purchaser stands no better than his transferor, at least as to equities of defense.⁸⁴

It is an interesting distinction which is drawn between such warrants, on the one side, and bonds, etc., on the other. As pointed

See also the case of dividend warrants. *Partridge v. Bk. of England*, *supra*, footnote 25.

Smith v. County of Clark (1873) 54 Mo. 58, appears *contra*. See also *McCoy v. Washington Co.* (U. S. C. C. 1862) 3 Wall. Jr. 381.

⁸⁰ *Wall v. County of Monroe* (1880) 103 U. S. 74; *Cardozo v. Fawcett*, (Minn. 1924) 196 N. W. 809.

⁸¹ *Mayor v. Ray* (U. S. 1873) 19 Wall. 468. Many other cases are cited in 2 Dillon, *Municipal Corporations* (5th ed. 1911) § 856.

In *Mayor v. Ray* Mr. Justice Bradley said (p. 477):

"....But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied."

⁸² See language of Mr. Justice Field in *Wall v. County of Monroe*, *supra*, footnote 80.

⁸³ In *Wall v. County of Monroe*, it is said (p. 77):

"The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held by a *bona fide* purchaser, evidence of their invalidity or defences available against the original payee would be excluded." (Italics ours, except "*bona fide*.")

⁸⁴ See the excellent discussion of the position of a bona fide purchaser of an overdue negotiable instrument by Chafee, *Rights in Overdue Paper* (1918) 31 Harvard Law Rev. 1104.

out above, municipal bonds and coupons are fully recognized not only as negotiable but as having the additional quality growing out of bona fide purchase. As to the latter type of document the government may lose through the negligence of its officers. As stated by Chief Justice Waite: "If it [the government] comes down from its position, of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."⁸⁵ One cannot but wonder whether there is not as much coming down from the position of sovereignty in the issuance of warrants as in the execution of bonds. Of course as a practical proposition the dangers in bond issues are probably not so great because, being more infrequent and in larger amounts, there are more safeguards against fraud and carelessness. Warrants, on the other hand, are put out more or less as a matter of daily routine probably frequently by mere clerks.

Somewhat similar reasons would perhaps be sufficient to reach a like result in the case of receivers' certificates. Being issued by court order, really by an officer representing the court, there would seem to be sufficient reason for denying a bona fide purchaser the usual freedom from equities of defenses accorded a good faith purchaser of a negotiable instrument. There are, however, other reasons, ordinarily present, leading to the conclusion that the certificates are not properly to be considered as negotiable. They are payable only out of a fund, being in effect evidences of pro rata shares therein, and no one assumes any promissory obligations. Besides they normally bear on their face evidence that they are issued pursuant to a court order which may well be inconsistent with the claims of a holder in due course.⁸⁶

Quite independently of statute, stock certificates and bills of lading acquired a facility in transfer not unlike that enjoyed by negotiable instruments; also certain qualities, particularly in the way of bona fide purchase, ordinarily found in negotiable paper. A bill of lading being merely representative of goods, with of course contractual undertakings with reference thereto, and a stock certificate being merely evidence

⁸⁵ See *Cooke v. United States* (1875) 91 U. S. 389, 398.

⁸⁶ *Turner v. P. & S. R. R.* (1880) 95 Ill. 134; *McCurdy v. Bowes* (1883) 88 Ind. 583; *Bk. of Montreal v. C. C. & W. R. R.* (1878) 48 Iowa 518. In *McCurdy v. Bowes* it was held that a holder of a certificate who signed his name on the back in connection with an attempted transfer was not liable even as an indorser of a non-negotiable promissory note.

In *McCarthy v. Crawford* (1909) 238 Ill. 38, 86 N. E. 450, a receiver's certificate of indebtedness, which by its terms indicated an expectation that it would be assigned, was placed by its owner into the hands of a broker with the assignment and power of attorney signed in blank, and the broker fraudulently sold the certificate to a good faith purchaser. It was held that the common view regarding transfers of certificates of stock under like conditions was applicable and the purchaser was protected.

of a certain share in the corporate property, such instruments clearly are not "negotiable instruments" in the narrower and commonly accepted sense. The latter are fundamentally either orders or promises for the payment of money. Stock certificates and bills of lading have been frequently referred to as *quasi-negotiable*.⁸⁷

It must be remembered that "negotiable instrument" is merely a name given to certain types of documents as to which it has been determined that certain qualities or attributes exist. Whether a given instrument is of that type depends on a variety of considerations, largely historical and practical. Aside from a statutory provision probably no definition of requisites as to form or content could be made, and, as has been heretofore shown, new types may from time to time be added. For the present purpose it may perhaps be safely asserted that to be a negotiable instrument in the true sense the paper must either be a promise or an order to pay *money*, or that in effect.⁸⁸ Of course it is not meant that any document which contains a promise or order in effect to pay money is a negotiable instrument; what is meant is that unless there is that feature about the instrument it is not in the full and true sense negotiable.

Now other documents, such as bills of lading and stock certificates, may be determined to have some qualities the same or very much like those found in negotiable instruments, and so long as the implications are understood there is no harm in calling them at least *quasi-negotiable*. Needless to say, however, there are dangers, as there inevitably will be when epithets play a part in reasoning.

In *Shaw v. Railroad Company*⁸⁹ it was decided that a good faith purchaser of goods represented by a bill of lading stood no better regarding ownership of the goods than did his transferor. This conclusion was reached despite a statutory provision that bills of lading "shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes." It was the opinion of the court that the legislative use of the word "negotiable" was in its primary sense, referring to transferability and the mode thereof.⁹⁰ In the Uniform Bill of Ladings Act, however, it has been

⁸⁷ See 2 Cook on *Corporations* (8th ed. 1923) §412 and cases therein cited. Voting trust stock certificates may have the same semi-negotiable quality. *Union Trust Co. v. Oliver* (1915) 214 N. Y. 517, 108 N. E. 809.

⁸⁸ *Goodwin v. Roberts*, *supra*, footnotes 25 and 28; *Rumball v. Metropolitan Bank* (1877) L. R. 2 Q. B. D. 194; *Webb, Hale & Co. v. Water Co.*, *supra*, footnote 39.

⁸⁹ *Supra*, footnote 47.

⁹⁰ ".....What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name.

provided with careful precision that such instruments shall have qualities quite like those ordinarily recognized as pertaining to negotiable instruments proper.⁹¹ Provisions quite similar to those in the statute regarding bills of lading are found in the Warehouse Receipts Act and the Stock Transfer Act.

In a rather broad sense of the term, then, bills of lading, warehouse receipts, and stock certificates, at least in certain states, might not inappropriately be called negotiable instruments. It is believed, however, that it would tend toward clarity of thought and avoidance of error if it were said rather that such documents have come to have certain of the attributes ordinarily found in negotiable instruments, leaving the name to apply to the money paper.⁹²

It must be evident from the discussion thus far that both in England and the United States a variety of types of instruments have been recognized as having the qualities of negotiability and may in the narrower sense of the word be denominated "negotiable." Bills of exchange were of course the earliest; promissory notes soon followed; and beginning with *Gorgier v. Mieville* a variety of other documents commonly used in business or financing operation have been added to the list. Usage and occasionally a statute have been the basis of these additions. The American cases on the whole seem to have paid perhaps less attention to offered proofs of usage.⁹³

To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term 'negotiable' expresses, at least primarily, this mode and effect of a transfer." (See pp. 562, 563).

See also *Atchison & Topeka Ry. v. Harold* (1915) 241 U. S. 371, 36 Sup. Ct. 665.

⁹¹The nature of the provisions of the Act and its effectiveness are manifested by such a case as *Roland M. Baker Co. v. Brown* (1913) 214 Mass. 196, 100 N. E. 1025. As to the status of bills of lading in England in this respect see 26 Halsbury, *Laws of England* (1911) 167, 168.

⁹²If it be assumed that the uniform statutes regarding bills of lading, warehouse receipts, and stock transfers, are in force in Georgia, what would be the result regarding these if that state were to enact the N. I. L. in its usual terms, there being no express provision either repealing or saving the existing legislation? Should it be said that the requirements for a *negotiable instrument* had in effect impliedly repealed the statutes referred to? It is believed that no such holding would be announced. Would it not be held that bills of lading, etc., are not negotiable instruments, properly speaking, but merely have been given some of the qualities normally found in instruments truly negotiable?

⁹³In England, as pointed out above, it had been held, on the basis of the prevalent usage, that corporate bonds should rank as negotiable paper despite the presence of features as to conditions and lack of certainty, ordinarily destructive of negotiability. Thus was shown the length to which the courts would go in following the practices and needs of business. Whether the

With reference to possible future additions to the group of negotiable instruments the problem for an American court is quite unlike that before the English judges. The English Bills of Exchange Act is limited by its terms to bills of exchange, promissory notes, and checks. It is entirely possible for an English court to give free scope to usage in the development of new types of instruments entitled perhaps finally to classification as negotiable. On the other hand the Uniform Negotiable Instruments Law is a statute "Relating to Negotiable Instruments," and by section 1 it is provided in the broadest terms that "An instrument to be negotiable must conform to the following requirements," etc. As to a document not a bill, note, or check, an English court is today free to give effect to usage of business men and the needs of commerce. But in an American court in a state where the Uniform Act is in force, it is at least arguable that the question must be settled by asking whether the requisites as set forth in the statute are present.

The statute has done a highly desirable service in the direction of uniformity, and that was its announced purpose. Codification was a means of attaining uniformity. Only time will tell whether the stereotyping effects of codification seriously detract from the admitted advantages in the way of uniformity.

A striking case is that of *The Crocker National Bank v. Byrne & McDonnell*²⁴ in which the defendant in good faith had bought corporate bonds, secured by mortgage, from the plaintiff's assistant cashier, the bonds being the property of the plaintiff and sold to raise money for the personal benefit of the assistant cashier. The action, which was in essence conversion, was defended on the ground that the bonds were negotiable instruments, hence the good faith purchaser should be protected though taking from a thief. The evidence established that bonds such as those in controversy were generally considered and treated in the business world as negotiable instruments, ownership therein passing from holder to holder by delivery. In the lower court

American courts were prepared to go quite so far is perhaps not wholly clear. The attitude of the Supreme Court was indicated in *Parsons v. Jackson* (1878) 99 U. S. 434, where it was said (pp. 439, 440): "The uncertainty of the amount payable,.....is of itself a defect which deprives these instruments of the character of negotiability. As they stand, they amount to a promise to pay so many pounds, or so many dollars,—without saying which. One of the first rules in regard to negotiable paper is that the amount to be paid must be certain, and not be made to depend on a contingency."

McClelland v. Norfolk Southern R. R. (1888) 110 N. Y. 469, 18 N. E. 237; see *Chouteau v. Allen* (1879) 70 Mo. 290, 339.

The situation under the Uniform Negotiable Instruments Law will be adverted to later.

²⁴ (1918) 178 Cal. 329, 173 Pac. 752.

judgment was for the defendant.⁹⁵ On appeal the attempt of the lower court to distinguish a line of earlier cases was rejected and it was held that since the bonds failed to comply with the Code requirements for negotiable instruments they should not rank as such, evidence of general usage and practice treating them as negotiable to the contrary notwithstanding. Although it was not the N. I. L. according to which the status of the bonds was tested, the provisions of the Code involved were quite like those found in the Uniform Act.

If this case had arisen in England, even since the Bills of Exchange Act, there would have been no difficulty in reaching the opposite result. But in California the legal status of such bonds could be brought into line with common understanding and accepted practice only by legislative action,⁹⁶ and the same situation might well arise in any state, in view of the general adoption of the N. I. L.

⁹⁵ To reach this conclusion the court had to distinguish a line of cases culminating in *Kohn v. Sacramento Electric, Gas & Ry.* (1914) 168 Cal. 1, 141 Pac. 626. In that case the obligor of certain bonds secured by mortgage defended a claim upon the bonds by a bona fide purchaser on the ground that the bonds had been stolen. By Civil Code §§ 3088, 3093, it was provided that an instrument to be negotiable must not be payable upon a contingency not certain of fulfillment and must not contain any other contract, and the bonds in suit read with the mortgage, as it was held they should, failed to comply with these provisions. It was found, however, "that at all times mentioned herein, the bonds and coupons thereto attached, of the kind issued.....are and were treated and dealt in as negotiable instruments by the mercantile world generally and more particularly by bankers and bond buyers and such is and has, at all times been the usage of the mercantile world in California; that it was the intent of [the obligor] that the bonds and coupons should be negotiable; that said corporation always so considered them; and that respondents had each acted with reliance upon the representations contained in the bonds and coupons and upon the said usage of the mercantile world." The Supreme Court of California concluded that in the face of the statutory requirements the usage, however clearly established, could not prevail nor the status of the bonds as negotiable instruments be established.

In the *Crocker National Bank* case the lower court felt perforce bound by the *Kohn* decision to the effect that the bonds, *as against the obligor*, could not be negotiable, but concluded that *as between successive holders* it was free to give effect to the established usage. In (1918) 6 Cal. Law Rev. 444, Professor Kidd quite rightly refers to this distinction of the trial court as "an attempt to whittle away an unfortunate precedent by confining it to its exact facts...." That the precedent was unfortunate would probably be agreed, but it may be questioned whether the California court in the *Kohn* case was not driven by the statute to its regrettable decision. Perhaps the blame should attach to the legislature rather than to the court.

Cf. *Pitman v. Walker* (1922) 187 Cal. 667, 203 Pac. 739.

⁹⁶ The *Kohn* case was decided in June 1914. In April 1915, there was approved an amendment to Civil Code § 3088 as follows: "*provided however, that bonds payable to bearer shall be negotiable, notwithstanding any condition contained therein or in the mortgage, deed of trust or other instrument securing the same.*"

This seems to be going to the opposite extreme. So far as § 3088 is concerned any condition may be incorporated in a *bearer* bond without impairing its negotiability. Since 1915, however, California has enacted the Uniform Negotiable Instruments Law.

The view of the California court again found application in *American Nat. Bank v. A. G. Sommerville, Inc.*,⁹⁷ involving the ability of a promisor under contracts for the purchase of automobiles to rely on certain defenses as against a bona fide purchaser of the rights of the promisee. The contracts which contained acknowledgment of the receipt of the automobiles, title to which was declared to be reserved to vendor until full payment of the purchase price, provided further:

"As a part of this contract of conditional sale, it is further agreed that in the event the first party shall in good faith assign and transfer this contract, and the moneys payable thereunder, to a third party, then the second party shall be precluded from in any manner attacking the validity of this contract on the ground of fraud, duress, mistake, want of consideration, or upon any other ground, and all moneys payable under this contract by the party of the second part shall be paid to such assignee or holder without recoupment, set-off or counterclaim of any sort whatsoever."

On the trial, the contract purchaser in defending an action by a bona fide transferee of the vendor for the sum agreed to be paid, offered to prove that no cars had been delivered. This evidence was rejected. On appeal it was ruled that the offered evidence should have been received. In a brief filed by *amicus curiae* it was urged that the lower court should be sustained because "large sums of money are now invested by banks and other financial institutions in this state in automobile paper similar to that here involved"; and because "a very material element of inducement to engage in this business is the safety afforded, or as was thought to have been afforded, by the particular provisions here in question, without which provisions, regarded as quite essential in the transaction of this particular business, the continuance of the same would certainly be less attractive." This argument was rejected as being in essence the same point urged upon the court in the *Kohn* case,⁹⁸ and it was held that custom was ineffective to attach to an instrument the qualities of negotiability if the requirements of the statute were not present.⁹⁹ It was pointed out, however, that on the new trial it would be open to the plaintiff to establish, if the evidence warranted, that the statement in the contract, above quoted, was intended and taken as a representation on which an estoppel *in pais*

⁹⁷ (Cal. 1923) 216 Pac. 376.

⁹⁸ *Supra*, footnote 95.

⁹⁹ It is questionable on the case as reported whether such custom could be taken as established. The brief of *amicus curiae* made the point, but whether there was proof in the record to support the statement does not definitely appear. The position of the court in effect was,—admitting such to be the fact, the conclusion does not follow.

might be grounded, and that thus indirectly, or by another road, the result contended for might be attained.¹⁰⁰

In floating large bond or note issues the practice of issuing so-called interim certificates pending the preparation of the definitive bonds or notes is common and well-known. These certificates are normally issued by a trustee and provide in substance that there shall be delivered to the bearer the specified documents when, if, and as issued. Tremendous sums of invested money are represented by these certificates, and in commercial transactions they pass freely from hand to hand much as would the bonds or notes themselves. They cannot, however, rank as negotiable instruments under the Uniform Negotiable Instruments Law, if for no other reason, because they do not call for the payment of money.¹⁰¹ A bona fide purchaser, then, from one with a defective title could not claim protection as in the normal case of a holder in due course of a negotiable instrument. How far the doctrine of estoppel, at least as against the issuing party, may go towards accomplishing the same result is not as yet clearly determined by the cases.

In one of the cases cited¹⁰² the court said:

"While these instruments are not negotiable instruments, yet they approximate to them, and in some respects the same rules apply. By these instruments the signers thereof certify that the bearer is entitled to a certain bond upon the surrender of the certificate. They are assignable by delivery, being to bearer. This is a notification to all persons interested that whoever in good faith buys the certificate and presents it to the signers in accordance with its terms, is entitled to receive the bond."¹⁰³

As observed above in connection with the California cases involving the corporate bonds, the English courts could, even under the Bills of Exchange Act, approach this problem untrammelled by the specific

¹⁰⁰ The doctrines of estoppel and of bona fide purchase as cutting off defenses, etc., travel paths frequently close together. Fundamentally social and economic considerations determine whether the claimed result shall follow. In these days of dizzy effort to market automobiles can one feel sure that any worthwhile interest is served by artificially bolstering up the marketability of the so-called automobile paper?

On the matter of representation, cf. *Hudson Trust Co. v. American Linseed Co.* (1920) 190 App. Div. 289, 180 N. Y. Supp. 17.

¹⁰¹ *Babcock v. National Surety Co.* (1919) 106 Misc. 149, 175 N. Y. Supp. 432; *President etc. of Manhattan Co. v. Morgan* (1922) 199 App. Div. 767, 192 N. Y. Supp. 239; *Bowie v. National City Bk. of Seattle* (1922) 122 Wash. 269, 210 Pac. 498; *Hearne v. Gillette* (1922) 151 La. 79, 89 So. 23. See also *Strickland v. National Salt Co.* (1911) 79 N. J. Eq. 182, 81 Atl. 828.

¹⁰² *President etc. of Manhattan Co. v. Morgan*, *supra*, footnote 101.

¹⁰³ (See p. 70). The court cites *Hudson Trust Company v. American Linseed Co.*, *supra*, footnote 100, where the question involved certificates of stock fraudulently issued by an employee of the corporation ultimately taken in good faith and for value.

and rigid requirements for negotiable instruments as set forth by statute. The famous case of *Goodwin v. Roberts*¹⁰⁴ involved scrip by its terms entitling the bearer to receive definitive bonds, essentially the same sort of instrument as those referred to above as interim certificates or receipts. Without a doubt it would be possible to produce in an American court evidence regarding the usage of trade and the practices of bankers and business men generally concerning these documents fully as convincing as that on which the English court acted.

While by the application of the doctrine of estoppel by representation or contract, or some other principle, a result may be reached in some cases which accords with the understanding of business men and the needs of the commercial world, the process is cumbersome and only partially productive of a desirable result.¹⁰⁵ Professor Moore has pointed out¹⁰⁶ that

"The motive for the imposition of the duty upon the maker to the holder in due course at the moment of the transfer of the writing to the latter is roughly the desire of a commercial state to stimulate commerce by making more liquid and available as cash, instruments of credit usually accepted in commercial transactions."¹⁰⁷

It would seem to admit of little doubt that these interim documents present a case for the imposition of the duty perhaps fully as strong as do bills and notes proper, and if it were not the specific requirements of the Uniform Act there is at least a fair chance that American courts would reach the same result as that attained by the courts of England.

For purposes of this discussion there are, generally speaking, three types of documents: (1) money instruments such as bills and notes, (2) property instruments like bills of lading, warehouse receipts, etc., and (3) an intermediate class, of which the familiar interim receipt is an example, which, while not directly calling for the payment of money, does indirectly amount to that, and is treated in business circles as such. That the statute governs the first class cannot be

¹⁰⁴ *Supra*, footnote 25.

¹⁰⁵ See (1924) 33 Yale Law Journ. 302 *et seq.*; 2 Machen, *Modern Law of Corporations* (1908) § 1732.

In *Hudson Trust Co. v. American Linseed Co.*, *supra*, where an employee intrusted with signed certificates of stock fraudulently disposed of a number, it was pointed out that such cases as *Knox v. Eden Musee Co.* (1896) 148 N. Y. 441, 42 N. E. 988, stood on a different footing because there the certificates were *stolen*. See also *Babcock v. National Surety Co.*, *supra*, footnote 101.

¹⁰⁶ See (1917) 17 Columbia Law Rev. 617, 618.

¹⁰⁷ Unfortunately courts are disposed to reach results only by the application of more or less generally accepted formulae; the tendency is to reach a goal only when a *path* appears to lead thereto.

doubted. While no authority directly in point is known to the writer, it is believed that the Negotiable Instruments Law would not be deemed to prevent the application to a bill of lading of those attributes of negotiability determined by decision or declared by statute to be properly applicable thereto. As suggested above, the enactment of the Uniform Act in Georgia to-day would not, it is submitted, repeal by implication the Uniform Bills of Lading Act and other legislation of like character, assuming such statutes to be a part of the law of that state.¹⁰⁸ As to the third class of instruments such judicial opinion as has been expressed unfortunately appears to be to the effect that the statute applies. Perhaps this conclusion is inescapable, which it would be if the language of section 1 (2), that an instrument to be negotiable "must contain an unconditional promise or order to pay a sum certain in money," is to be taken as laying down a broad, sweeping, all inclusive requirement. If, however, it were to be concluded that property documents, like bills of lading, are not covered, then why should not the door be open also for exclusion of the intermediate class calling for something other than *money*? If the language of section 1 (2), above quoted, were to be construed as indicating the type of paper intended to be covered by the statute rather than as a sweeping requirement for all documents enjoying at least some of the common features of negotiability, the way would be clear, and it might be considered that outside the statute there may be a constant, gradually developing custom or law of merchants which courts are free to recognize and apply.¹⁰⁹

The Uniform Negotiable Instruments Law no doubt has accomplished desirable results in many respects. Many of its provisions have been criticised, and in some directions amendments are desirable. But the chief objection to the Act is believed to be in its stereotyping effect, a tendency, inevitably, of all codification.¹¹⁰ The framers of the

¹⁰⁸ See *supra*, footnote 92. In *Strickland v. National Salt Co.*, *supra*, footnote 101, Swayze, J., said: "We are not to be understood, however, as holding that no instrument can hereafter acquire the elements of negotiability unless it answers the requirements of the statute."

¹⁰⁹ Even this of course would go only part way toward the freedom of action possible in England; but documents such as the common interim trust receipts calling for delivery of bonds, notes, etc. and not for the payment of money ought, if possible, to be recognized as having the negotiable status generally attributed them in business practice.

It may be suggested that section 196 providing that "In any case not provided for in this act the rules of the law merchant shall govern," may leave the way clear for recognition of new types of negotiable paper. But if the legislative language is to be taken, as above suggested, as laying down full and general requisites for negotiability, then it can hardly be said that any case along this line is not "provided for."

¹¹⁰ See (1918) 6 Cal. Law Rev. 444 *et seq.*

American legislation did well to use as much of the English Act as they did, but they would have produced a much better piece of work if they had adhered to the scope of the English Act instead of trying to cover the whole field of possible negotiable instruments.

RALPH W. AIGLER

UNIVERSITY OF MICHIGAN
LAW SCHOOL