

A Guide to NEGOTIABLE INSTRUMENTS

Fifth Edition

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CHAPTER 3

THE NEGOTIABLE INSTRUMENT

Having dealt with the rise and growth of the chose in action we turn to negotiable instruments which are merely a narrow class of choses in action.

It is apparent from the second chapter that the difficulties encountered in dealing with choses in action were:

- (1) On each transfer of a chose in action notice had to be given to the party liable.
- (2) Each new owner (transferee or assignee) was subject to any equities affecting the title of previous owners (transferors or assignors).

These two features were sufficient to render certain types of choses in action, as we have seen them, clumsy and undesirable for the growing needs of commercial life. It is not surprising, therefore, to find that, in the case of some choses in action in common use among merchants, these two undesirable features were avoided after a time by simply disregarding them. It was mere usage, but that usage came to be recognised by the Courts, not under Common Law or under Equity, but under what was known as the Law Merchant (*lex mercatoria*)—a third legal code that maintained its separate identity until the 18th Century when it was amalgamated with Common Law—a logical amalgamation since both were based upon customs and usages.

In the case of *Goodwin v. Robarts* (1875), the Law Merchant was well defined as "neither more nor less than the usage of merchants and traders in the different departments of trade, ratified by the decisions of Courts of Law, which, upon such usages being proved before them, have adopted them as settled law." Long before the Judicature Act of 1873

there had arisen the custom among merchants to transfer by simple delivery (or handing over) certain choses in action so that the transferee obtained a complete *legal title without* the requisite notice of the transfer being given to the party liable on the instrument. In addition, provided that the transferee took the instrument in good faith and gave value or some consideration for it to the transferor, he became the full and entire legal owner of the instrument and of all the property it represented, notwithstanding that the previous owner's title was defective or subject to any other equity. Observe the ease of transfer—no memorandum or "transfer form" giving evidence of the transfer; *no notice to the debtor*—mere delivery by the owner (possibly with his indorsement) was sufficient to transfer a full legal title. And particularly observe that the title passed *free from equities* (provided the transferee gave value and acted in good faith).

These two factors are the decisive features of this narrow class of choses in action and stamp such instruments as *negotiable*. From this we can arrive at the following general definition of a negotiable instrument.

A Negotiable Instrument is a chose in action, the full and legal title to which is transferable by mere delivery of the instrument (possibly with the transferor's indorsement) with the result that complete ownership of the instrument and all the property it represents passes free from equities to the transferee, providing the latter takes the instrument in good faith and for value.

Observe—

- (1) A complete transfer is made by mere delivery (or handing over from one person to another), although indorsement by the transferor may be necessary. No notice of the transfer need be given to the party liable.
- (2) A full and legal title passes. This means that the transferee can sue in his own name as possessing all rights to the instrument and to the property that the instrument represents.
- (3) The title passes free from all equities (including defects in title) to any transferee who, in taking the instrument, gives value for it to the transferor and acts throughout in good faith, i.e., honestly and in complete ignorance of any equity affecting the title of the transferor. (Such a transferee is known as a "*bona-fide* transferee for value".)

Example.—A Trustee dishonestly sells some Bearer Bonds and a bill of lading, all belonging to the Trust to B. When this is discovered by the beneficiaries they demand, restoration of the property of the Trust. They are successful with the bill of lading since it is not a negotiable instrument. The Bonds, however, are negotiable. B took them in good faith and for value and consequently he gets a title that is perfect against all the world free from all the equities that attached to the title of the Trustee. The only remedy for the beneficiaries is to sue the latter—for what it is worth. Note that in each case here, the Trustee had a legal title.

Let us suppose in addition then, that the Trustee stole a bearer bill of exchange from his employer and sold that too to B. This document is a negotiable instrument and B, by taking it in good faith and giving value gets a perfect full legal title. Although the transferor is a thief *with no title at all*, yet the transferee, B, gets a perfect title.

The general rule of law is that when a man purchases property from another, his title to the property will be no better than that held by the person who sold the goods to him. If a man innocently buys from a thief then he will have no right to retain the goods since the thief has no right to them. If he buys from a person whose title is subject to equities then his title is no better and is subject to the same equities. But with the Negotiable Instrument we can see we are outside the general rule of law. Here, a *bona-fide* transferee for value can get a perfect title free from equities even though the transferor's title is subject to equities—or further, even if the transferor was say a thief with no title at all.

Today, bills of exchange (including cheques), promissory notes, dividend warrants, bearer bonds, bearer scrip, debentures payable to bearer, share warrants to bearer and Treasury Bills are negotiable instruments. On the other hand, some documents of title to money or security for *money* such as postal orders, *money* orders, share certificates, insurance policies and debentures, and documents of title to *goods*, such as bills of lading, dock warrants, warehouse warrants, are not negotiable. The only way of finding if a certain document of value is negotiable is to see whether all the three features of negotiability (see p. 15) are found in the instrument itself or in its use. If any one is missing then the document is not negotiable. For example, a share certificate is not negotiable because feature number one is not apparent. A share certificate is not transferable by mere delivery or indorsement and delivery. A form of

transfer is needed to evidence the change of ownership, and notification of the transfer has to be given to the Company concerned (*i.e.*, the party liable) by sending the transfer for registration.

Again, although a bill of lading (a document of title to goods) is freely transferable by delivery (with indorsement) like negotiable instruments, it is nevertheless not negotiable. This is because mercantile usage has decided that the title to goods cannot in normal circumstances pass free from any equities that affected the title of a previous owner, and a person who buys a bill of lading from a thief will be compelled to restore the bill of lading to the true owner and all the goods it represents.

So far, we have used the words " assign " and " transfer as though they were synonymous. This is not quite true. Though they both represent a change of ownership of an instrument of value there is a difference in the method used in each case. When referring to documents of title we should use the word " transferable " only when we mean that the document is freely transferable by delivery (or indorsement and delivery), like the negotiable instrument, without notice being given to the party liable. In this way, a bill of lading is transferable. The word " assignable ", however, implies a change of ownership by the completion of a separate document evidencing the transfer and giving notice to the party liable. Thus, a share certificate is not, strictly speaking, transferable but assignable, since the title to the shares does not pass to the new owner by mere delivery of the certificate but by the completion of a separate transfer form which is registered at the company's office. This registration acts as notice to the party liable—the Company is the party liable since it has accepted money for the shares and is responsible to the shareholder. Other examples of assignable documents are life policies, debentures, etc.

Why is it that in the development of commerce some instruments have come to be recognised as negotiable and possessing the three main characteristics given above, whilst others have remained either only transferable or only assignable? In almost every case the answer can be found in mercantile usage. The goldsmith's receipt for money lodged with him (the forebear of the present bank note) came to be transferred freely by mere delivery although at first, doubtlessly, notice of the transfer was given to the goldsmith. These receipts became the " currency " of commerce and to have insisted on notice of transfer each time would have put a brake on commerce. Thus it became customary to dispense with notice, and at the same time it became customary to treat the goldsmith's receipt as entirely free from the interests of third parties, etc. (*i.e.*, free from equities) otherwise their utility would have been

drastically curtailed. In like manner, other instruments took upon themselves all the features of negotiability. In the event of any legal dispute, the Court's decisions have been guided by mercantile customs and the Courts have upheld such customs. The Law Merchant was not a code of mercantile laws laid down in the very beginnings of commerce but a legal recognition of the usages of trade that had already become permanent features of English commercial life.

In some very isolated cases, Statute Law (Acts of Parliament) has pronounced a certain instrument negotiable, though generally after established usage (e.g., the negotiability of a bill of exchange had been generally recognised long before 1882, but in that year the Bills of Exchange Act gave statutory recognition to that negotiability).

In the past, many cases of dispute over instruments of title have been brought before the Courts. It can be imagined that if the ownership of a certain instrument was under contention, then the Court's decision might easily have depended on whether the instrument was negotiable or not. If the holder of the instrument could prove it was negotiable then he could defeat, for example, anyone claiming to have an equitable interest in it. The Courts have had the task of deciding from time to time whether a variety of individual documents were in the negotiable class or not, and from their decisions it has been possible to get the negotiable instrument more sharply defined and the position generally clarified. From these decisions, three requirements have appeared.

(1) No instrument can be called negotiable even though it belongs to a class of instruments considered negotiable if it bears evidence on its face to destroy or negative its negotiability, (e.g., although cheques are recognised as negotiable, a cheque that has been marked "not negotiable" obviously cannot be a negotiable instrument).

(2) It is not sufficient that a certain individual instrument be accepted with all the characteristics of negotiability by the parties concerned—it must belong to a class of instruments considered negotiable in mercantile usage. Attempts have at times been made to get certain documents of title to *goods* acknowledged as negotiable, but they have failed. Why? Because mercantile usage has considered negotiable only those documents that constitute a promise or obligation to pay money or deliver securities for *money*.

(3) Mercantile usage is essential. There must exist a mercantile custom to treat the instrument, or the class of instrument to which

it belongs, as negotiable. Although the custom can be traced over two or three centuries in most cases, an old origin is not absolutely essential, nor is the usage bound to be an English one.

Having found what instruments are negotiable and what rights can accrue to anyone becoming the owner of such an instrument, we must bear in mind that these rights do not automatically obtain unless certain requirements are fulfilled. We have already observed two requirements, *viz.*:

(1) The transfer must be for value (*i.e.*, the transferee must give something of value or render some service in exchange for the instrument, and not merely take it as a gift).

(2) The transferee must be *bona-fide*, *i.e.*, act in good faith.

Besides these, the instrument itself must be:

(3) Complete and regular on the face of it.

(4) In a deliverable state.

If these four requirements are not fulfilled, the transferee may find that some or all of the powers usually accruing to the holder of a negotiable instrument are lost, and his title to the instrument incomplete, affected by equities or entirely non-existing. These four requirements deserve further investigation.

The transfer must be for value.—This is self-explanatory. The transferee must give some value, goods, money or services generally, to the transferor as the consideration for the transfer. But observe that the value or consideration could quite effectively be a promise to deliver the value as and when the transferee required it (*e.g.*, a man deposits bearer bonds at a bank as security for a loan. The bank obtains a complete legal title to the bonds immediately although the value required has not yet passed, the agreement to the loan being considered sufficient consideration). Again, particularly concerning bank notes, cheques and bills of exchange, the value will be acknowledged although it may have been given in the past: (*e.g.*, I order a ton of coal but delay payment until the month-end when I send a cheque. Although the coal was delivered some time before and not in anticipation of the actual individual cheque, the merchant, in accepting the cheque as payment for the coal, has undoubtedly given value for it). The same provision is found in section

27 of the Bills of Exchange Act, 1882, which states " valuable consideration may be constituted by ... any antecedent debt or liability."

But it does not follow that no title can be obtained to a negotiable instrument if value has not been given, when, for example, the instrument is transferred as a gift. The instrument would still be negotiable but the transferee might not have the advantages of all the features of a negotiable instrument. His title would be complete and perfect only if the person from whom he received the instrument had a complete and perfect title. But if the transferor's title was subject to equities then the negotiable instrument, transferred as a gift, would not pass free from those equities.

A widely held but mistaken idea is that the value given must be adequate. This is not so. If you hand me your gold watch and I give you a penny for it, I give value for the watch, no matter how inadequate the value may appear. There is one proviso; the value must be apparent and not illusory. Let us take an example. Bank of England notes, being promissory notes, are fully negotiable. So a person who takes them in good faith and for value gets a full and complete title to them, free from equities, in spite of the fact that the transferor has stolen them. Now if a very shifty-eyed vagabond offered me a £5 Bank of England note for five pence and I was foolish enough to accept the offer, my title to the note would be very difficult to establish, obviously. But why? Because I had not given value? No ! The law does *not* require *adequate value* and would recognise the five pence that I gave, as value. Why then would it be difficult for me to establish my title? Because I should find it almost impossible to prove I had acted in good faith, since the very circumstances should have made me suspect the note to be stolen property. Thus we turn to Good Faith.

Good faith.—No hard and fast rule can be laid down on this aspect. Whether a man acts in good faith or not is entirely a question of the facts of the individual case. Should dispute over the ownership of a negotiable instrument come to the Courts, then the case will be judged on its merits or demerits as far as the good faith of the party or parties involved is concerned. However, from past legal decisions the following overriding principle emerges.

To prove his good faith, a transferee of a negotiable instrument must be able to show that he acted honestly and had no knowledge of any defect in the title of the transferor of the instrument or any suspicion thereof. This does *not* mean that a man acts in bad faith merely because you or I or any normally intelligent person, in similar circumstances, would have " smelt a rat " and have doubted whether the transferor was in fact the true owner of the instrument. A man may act carelessly or display

little intelligence in not becoming aware of the transferor's defective title or not even becoming a little suspicious; nevertheless, if it is shown that he did *not* become aware of the defect, that his suspicions were *not* aroused and that he did *not* deliberately blind himself to any suspicious fact, then his good faith will not be held in doubt. To put it briefly, we can say that the question of negligence does not concern good faith. Incidentally, section 90 of the Bills of Exchange Act, 1882, repeats the same point:

"A thing is deemed to be done in good faith within the meaning of this Act where it is in fact done honestly, whether it is done negligently or not."

Complete and regular on the face of it.—No instrument is negotiable in the full sense of the word unless it appears complete in every essential feature. For instance, a cheque is capable of being a negotiable instrument, but a cheque without the name of the payee, or one with no amount filled in is not negotiable, but is what the Bills of Exchange Act, 1882, calls an inchoate (incomplete) instrument. Suppose a cheque is drawn by Smith leaving the name of the payee blank and Smith sends the cheque to Jones who subsequently transfers it to Brown. Brown may give value for the cheque and act in complete good faith, but he cannot be certain of a perfect title (as he could had the cheque been fully negotiable). Should the title of Jones be subject to equities, Brown will be similarly affected. The transferee may be authorised to complete it, but even if he does complete it within the scope of the authority, the instrument cannot be recognised as negotiable *whilst in his hands* because he did not *receive* it complete and regular on the face of it. The subject of inchoate instruments is examined further under section 20 of the Bills of Exchange Act, 1882.

Deliverable state.—In our study of the growth of the negotiable instrument, we found that one of its essential characteristics was its ease of transfer, *viz.*, by delivery or indorsement and delivery. We found that the transferor merely handed the instrument to the transferee (of course, it could be delivered just as effectively by post or any other agent). But we observed that delivery may have to be completed by the transferor's indorsement. When, then, is mere delivery sufficient and when must that indorsement accompany it ?

A negotiable instrument must indicate the person(s) to whom it is payable or in whose favour it is written (*i.e.*, to whom the property in will the instrument belongs). Some negotiable instruments state that the

money belongs to the *bearer* of the instrument; there will be instructions in the instrument, addressed to the party who has to pay, instructing him to hand the money (or security for money) to the bearer of the document. In this case, the instrument is said to be drawn in favour of (and therefore payable to) the *bearer*. This is true even if the instructions to pay or deliver indicate a certain person by name with the additional words " or bearer." For example, a cheque payable to " John Smith or bearer " is as much a " bearer " instrument as one payable merely to " bearer." Any negotiable instrument that is at the outset payable to bearer will always be in a deliverable state. Smith, in the example, could transfer the instrument to Brown by merely handing it to him (as he would with a pound note for example).

But the wording of the instrument may order payment to a certain person, e.g., a cheque payable to " John Smith " or one payable to " John Smith or order." Smith, in this case, can transfer the cheque to his friend Brown so that it will then be payable to Brown, but to make delivery complete, he must indorse the cheque "John Smith." The indorsement of John Smith which facilitates the transfer can be in the form of either :—

(a) the mere signature of John Smith

or

(b) his signature, together with the words " pay William Brown."

The simple indorsement of (a) is called an indorsement in blank whereas that in (b) is known as a special indorsement. More will be said later of these indorsements in section 2 of the Bills of Exchange Act 1882. Meanwhile we should note that in both cases the indorsement *puts the instrument in a deliverable state*, with the effect that in (a) it is in a deliverable state for transfer to anyone and in (b) in a deliverable state for transfer *only to William Brown*. Therefore at this early stage of our study it should already be clear that an indorsement in blank of an instrument not payable to bearer does in fact convert such an instrument into just such a bearer instrument.

One can see then that the indorsement in one form or the other is essential, and should it be missing, then Brown's position will not be as secure as it would be normally with a negotiable instrument. If the title of Smith is subject to equities then Brown's title also will be subject to the same equities. Even if there are no equities, Brown's title is still unsatisfactory, since if he has to take action in Court to enforce payment, he cannot do so in his own name (*i.e.*, he cannot sue in his own name).

He would require Smith to initiate proceedings for him in Smith's name. In fact, he would have no legal title at all, but merely an equitable one. But with it would be the right to demand the indorsement of Smith. The *legal* title passes only when delivery is made, and here, delivery without the indorsement is not a delivery recognised by Common Law or the Law Merchant. Further, the right to demand the indorsement is, with most negotiable instruments only an equitable right, although with regard to bills of exchange (including cheques) the right to obtain this indorsement is now a legal one by virtue of section 31 (4) of the Bills of Exchange Act, 1882.

It should be observed, however, that the indorsement need not necessarily be made at the time of delivery; it can be done before or after delivery. For example, if I have a cheque for £10 payable to me and you give me £10 for it only to find when I have gone that I have omitted to indorse it, you can at any time later secure my indorsement and delivery will be complete. But supposing that before you found me again to obtain the indorsement, you learned that my title to the cheque was defective since I had obtained the cheque by fraud, then your title would be defective as mine had been, since you could not be a *bona-fide* transferee (*i.e.*, you would have become aware of the defect or equity prior to the completion of the transfer).

The word " negotiable."—On page 17 the difference between the words " transfer " and " assign " was explained and we saw that a transferable instrument (not necessarily a negotiable instrument) is one that can pass from one owner to another merely by delivery or indorsement and delivery. Such is the case with a bill of lading which is transferable, but, because it cannot be transferred free from existing equities, is not negotiable.

A negotiable instrument is consequently in a narrow class of transferable instruments, since in addition to being transferable by delivery, it also passes free from existing equities to a *bona-fide* transferee for value. Frequently, however, it will be found that some writers use the word " negotiate " when they mean " transfer for value by delivery." Thus they may say that a certain instrument was *negotiated* by Smith to Brown in spite of the fact that such an instrument is not negotiable—obviously they mean " transferred by delivery for value." A good example of this will be met later in this book on the subject of " Conditional Orders." (See page 181). The Cheques Act, 1957, includes the sentence, " The foregoing provisions of this Act do not make negotiable any instrument which, apart from them, is not negotiable "—and here it may well be that the person who drafted the Act meant

" *transferable* " and not " negotiable."

It is common, therefore, to see the word " negotiable loosely used merely to denote " transferable by delivery," but always remember that the essence of the word " negotiable is the *power to transfer free from equities*.

Negotiability by estoppel.—On page 19 it will be observed that an instrument cannot be recognised as negotiable unless it belongs to a certain class of negotiable instrument. That remains correct. But it is possible for a non-negotiable instrument to be treated temporarily as negotiable in a certain transaction and for the benefit of certain parties. An example will make this clear.

Brown is the owner of certain bonds worth £1,000 that are assignable instruments but not recognised as negotiable. He borrows £500 from a moneylender and delivers the bonds as security, leading the moneylender to believe that the bonds are negotiable; (his reason for misleading the moneylender was no doubt because negotiable bonds are first-class security whereas non-negotiable bonds without deeds of transfer might not have been acceptable security to the moneylender). Some time later, the moneylender obtains an overdraft from his bank for £1,000 and deposits Brown's bonds as security. When Brown eventually comes to repay the moneylender and demands return of his bonds he finds that the moneylender has disappeared. He turns to the bank and points out that when the bonds were transferred to the moneylender, he had an equity in the bonds to the extent of £500, *i.e.*, the moneylender's interest in the bonds was only to the extent of the loan of £500, the remaining £500 being Brown's own interest which the moneylender had no authority to transfer to the bank. He claims his " share " of £500 from the bank on the grounds that as the bonds are not negotiable, the title of the bank to the bonds is subject to equities, in this case subject to his equity of £500. According to the strict general interpretation of the law, his claim appears to be sound. But it does not seem right that Brown should wrongly lead the moneylender to believe the bonds negotiable to obtain a loan that he could not otherwise have obtained and then later deny their negotiability when it suits him—to put it bluntly, he cannot have it both ways. The Court will say that by his previous actions, he will not be allowed to plead that the bonds are not negotiable, *i.e.*, he will be " estopped from denying their negotiability." For the purposes of the two transactions involved the bonds will be treated as negotiable, and consequently, the bank be able to retain the bonds free from the equity of Brown. This does not mean that the bonds from thenceforward will be considered negotiable. The bank's title will be upheld, but there-

afterwards the bonds must be regarded as non-negotiable.

The term " negotiable by estoppel," is not considered to be a good description, however, since the bonds do not become generally negotiable but merely acquire the qualities of negotiability during a certain transaction.

Rights of a holder to sue on a negotiable instrument.—A *bona fide* holder for value (in the Bills of Exchange Act he is called a " holder in due course ") can, if necessary, sue every person who signed the instrument prior to him. This is known as a *right of recourse* and arises if the party primarily liable on the instrument fails to meet his obligation. The more parties there are to such an instrument the more likelihood there will be for the owner of the instrument to obtain what is due to him.

Exceptions :-

- (1) Infants and enemy nationals during wartime, etc., cannot be sued since they are incapable of being the subject of a legal action.
- (2) A dividend may be claimed from a Trustee in bankruptcy but a bankrupt cannot be sued personally.
- (3) A party can avoid the liability on the instrument to future holders by adding the words " *sans recours* " or " *without recourse to me* " to his signature.
- (4) A person whose signature has been forged cannot be sued since he has not signed the instrument. But if he leads others to accept the forgery as his genuine signature then he may be liable as though he had actually signed: in legal terms he will be " estopped from denying the forgery."

Quasi-negotiable instruments.—There are certain chows in action which, though not fully negotiable, possess some of the characteristics of a negotiable instrument and are called quasi-negotiable. Under this heading are found Bills of Lading, Dock Warrants, Warehouse Warrants, American Share Certificates and I.O.U.'s.

Bills of lading.—A bill of lading is a document of title to goods and is used extensively in foreign trade. It operates also as a contract for the carriage of goods from one port to another and is issued by the master of a ship. Its main importance however lies in its value as a document of title.

Example.—A London Merchant arranges to buy 1,000 crates of oranges from a Spanish exporter. The Spaniard arranges with a shipping company to carry the oranges to London on a certain ship. The master of the ship sailing to London will take the oranges on board and issue a receipt for them. This receipt is intended to be the means of claiming the oranges on arrival in London. It also operates as evidence of an agreement to carry the consignment to London—in short it is a Bill of Lading. The London Merchant pays the Spanish exporter and the latter sends the Bill of Lading to the Londoner by fast mail. The Londoner awaits the arrival of the ship and then claims the oranges by presenting the Bill of Lading which is exchanged for the consignment. But if the Londoner sells the oranges before the ship arrives then all he need do is to indorse the bill of lading and transfer it to the buyer. The latter will then be able to claim the oranges when the ship berths, as before.

We have already observed that because a bill of lading is not a contract to pay money or security for money it cannot be considered negotiable. Therefore, though it passes freely from a transferor to a transferee by delivery it does not pass free from equities, if any exist. If it is obtained by false pretences and subsequently transferred by the fraudulent person to a *bona-fide* transferee for value, the latter cannot take a full legal title to the goods since his title is subject to an equity, *viz.*, the right of the true owner of the instrument to the restoration of his property. A further example. If B is the holder of a bill of lading in which A has a financial interest, then, although B can legally transfer the instrument, the equity held by A will remain attached, and the person who eventually claims the goods will have to satisfy the claims of A. The equity however does not render the bill non-transferable.

One further point of interest. A consignor of goods has the right to stop goods in transit if he hears that the consignee has become insolvent, notwithstanding that the consignee has received the bill of lading bill from the consignor. But if the consignee has transferred the bill of lading to a third party, then the right to stop transit is lost.

Dock Warrants.—To continue our example given under Bill of Lading, let us suppose that the London Merchant claims the oranges. It is quite likely that he will want storage on the dock until he can dispose of them. The keeper of the dock in London, say the Port of London Authority, will store them and issue a receipt called a Dock Warrant. This receipt is a document of title to the goods promising to store them and eventually to deliver them to the person named in the receipt or to anyone to whom the warrant is transferred (by indorsement). But as in the case of

the Bill of Lading, the Dock Warrant is freely transferable but not negotiable. If the merchant sells the oranges by transfer of the Dock Warrant the new owner's title will be subject to any defect in, or any equity affecting, the title of the merchant. Thus the Dock Warrant is not fully negotiable but only quasi-negotiable.

Warehouse Warrants.—These are similar in all respects to Dock Warrants but issued by a keeper of a statutory warehouse, such as the British Railways. Dock Warrants and Warehouse Warrants that we have in mind for our study are those issued by a statutory body duly authorised by law to issue such warrants. A Warehouse Warrant is not the same as a Warehouse-keeper's Receipt. Both act as a document of title to goods but the latter is not transferable by indorsement and delivery. If it does change hands then the transferor would have to provide the transferee with a Delivery Order also, the latter being notice to the Warehouse to hold the goods for the new owner named therein.

American share certificates.—This type of share certificate used extensively in the U.S.A. and Canada is on its face very similar to the English style of share certificate bearing the name of the registered holder in the normal way. But there is one main point of difference. A shareholding in an English company is transferred usually by the use of a separate document of transfer together with the certificate. The transfer is registered with the Registrar of the company and a new certificate obtained in the name of the transferee. It will be remembered that it was because of the necessity for a separate document of transfer that we placed these share certificates in the class of "assignable" documents.

With the American type, however, no separate document of transfer is necessary since this is already printed on the reverse of the certificate. The registered holder, desiring to transfer the shares, simply completes this form of transfer by inserting the name of the transferee and adding his own signature. The transferee will then forward the certificate to the company and exchange it for one in his own name. If, however, the registered holder does not insert the name of the transferee in the transfer form on the reverse but merely appends his signature, any subsequent holder can then insert his name, register the transfer with the Company and become the registered holder of the shares. But until a holder does this, the certificate, thus endorsed in blank, would be transferable by mere delivery like bearer bonds. This ability to transfer by delivery is a characteristic of the negotiable instrument. But the bearer of an American-type share certificate indorsed in blank in this way cannot sue on the instrument in his own name. He must complete the transfer form and register himself as the new owner before this is possible.

Consequently this type of share certificate is not fully negotiable.

I.O.U.s.—These documents have only the shadow of the characteristics of the negotiable instrument. They contain an admission of debt and with it an *implied* undertaking that payment of the debt will be made sometime, (note—if it was a *written* undertaking to repay at some date, the document would be a promissory note). However, the debt of which the I.O.U. is evidence is assignable under the Law of Property Act, 1925, and, as the I.O.U. would doubtless be handed to the assignee if the debt were assigned, it bears a little resemblance to a transferable or assignable instrument. Consequently, some authorities include the T.O.U. in the category of quasi-negotiable instruments. This, though, is very debatable, since the document itself is merely ancillary to an assignment of the real debt.

(A Guide to NEGOTIABLE INSTRUMENTS Fifth Edition Dudley Richardson pg. 14 – 29)

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PART II THE BILLS OF EXCHANGE ACT, 1882 PRELIMINARY NOTE

In the study of this Act, it should always be remembered that cheques are bills of exchange though all bills of exchange are not necessarily cheques. Except where otherwise stated, the provisions of this Act concerning bills of exchange apply equally to promissory notes.

The bill of exchange was one of the first choses in action to be accepted as negotiable. Its early use was for the settlement of debts

between English and foreign merchants. Prior to the introduction of the bill of exchange, merchants were forced to send gold and silver, risking loss by shipwreck or theft. Between England and France there was considerable trade and gold was continually moving in both directions across the Channel. Yet, if Hood of London owed £500 to Cassais of Paris and Duprez of Paris owed £500 to the same Hood of London, it was absurd for Duprez to ship the gold to Hood for Hood to ship it back to Cassais. By Duprez's paying £500 or its French equivalent to Cassais, both obligations were discharged. It was up to Hood to " marry " the two transactions and he did it by sending instructions through Cassais to Duprez, ordering the latter to pay Cassais, his fellow townsman. These instructions were the forerunner of the bill of exchange. Sometimes the instructions were framed so that payment was ordered to be made on demand or sometimes at a future date. In the latter case, if such instructions had been sent to Paris, Cassais (to whom payment was to be made) on receiving the instructions or bill of exchange would take the bill to Duprez and ascertain if everything was in order. Duprez would confirm that such was the case and probably assure Cassais that payment would be made on the given date, *i.e.*, Duprez would *accept* the liability and sign his acceptance on the bill itself. So Cassais would have presented the bill for " acceptance " and Duprez would have " accepted " the bill. On the due date Cassais would again present the bill, this time for payment, and Duprez would honour his acceptance and pay the bill. Thus, there are three parties to a bill: —

- (1) The party who sent the instructions or " drew the bill called the *drawer*.
- (2) The party who is to receive payment, *viz.*, the *payee*.
- (3) The party ordered to pay or, in other words the party on whom the bill is drawn, *viz.*, the *drawee*.

With the popularity of the cheque has come a decline in the use of other types of bills of exchange, but the same triangular characteristics obtain. Hood is now a merchant with money in his banking account (his bankers owe him the money he has deposited). If he wants to pay a creditor he draws a bill on his bank (a cheque) ordering payment to the creditor and sends the cheque to the creditor who presents it for payment. In just the same way as before, the person making the first move to discharge the existing obligation is the one who owes money and to whom money is owed. Hood owes money to his creditor, but the bank

owes money to Hood. Hood is the drawer, the bank the drawee, and the creditor the payee.

The Act of 1882, therefore, is not merely a piece of legislation concerning bills of exchange that are no longer in popular use, but is also the statute governing a type of bill of exchange, which is today the currency of commerce, viz., the cheque.

(A Guide to NEGOTIABLE INSTRUMENTS Fifth Edition Dudley Richardson pg. 33, 34)