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DO SOME OF THE MAJOR POSTULATES OF THE LAW OF BILLS AND NOTES NEED RE-EXAMINATION?

JOSEPH F. FRANCIS*

Once we choose our postulates our destiny is fixed. If we do not like our conclusions we may change our postulates. If our postulates do not cover the facts of experience or become too cumbersome to cover most of the facts, then they must be cast aside for shorter and more descriptive statements if they are to be useful. Such has been the history of science, and if law is to be won from the ranks of emotionalism and the medicine man to the ranks of science the major postulates of the law and its branches must be frequently re-examined with the view to discarding those generalizations that are no longer descriptive of judicial behavior.

It is the thesis of this paper, not only that the law of bills and notes contains many dead and useless postulates but that the major postulates from which most of the broad generalizations of the law of bills and notes flow are out of date and no longer descriptive. I refer to such generalization as, "A negotiable instrument is a substitute for money" and "Like money a negotiable instrument is intended to have a definite value and to be taken almost at sight." The converse of these statements is almost always expressed or implied, i.e., "An

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1Keyser, MATHEMATICAL PHILOSOPHY, A STUDY IN FATE AND FREEDOM (1922)

2"...We may now speak of ideas as constituting a world—the world of ideas. With that world all human beings as human beings have to deal—there is no escape; it is there and only there that foundations are found—foundations for science, foundations for philosophy, foundations for art, foundations for religion, for ethics, for government and education; it is in the world of ideas and only there that human beings as human may find principles or bases for rational theories and rational conduct of life; choices differ but some choice of principles we must make if we are to be really human—if, that is, we are to be rational—and when we have made it, we are at once bound by a destiny of consequences beyond the power of passion or will to control or modify; another election of principles is but the election of another destiny. The world of ideas is, you see, the empire of Fate."


5Infra note 25.

6Chafee, Acceleration Provisions in Time Paper (1919) 32 HARV. L. REV. 747, 749 ff. This citation is given merely as an illustration and like statements will be found in almost any treatise, article, or opinion on bills and notes.
instrument that is not a substitute for money is not negotiable” and “If the instrument does not have a definite value and cannot be safely taken at sight it is not negotiable.” From these postulates flow a series of others generally designated as “formal requisites” for a negotiable instrument, such as, “The instrument must contain words of negotiability; must contain an order or a promise; the order or promise must be unconditional and not accompanied with an order or promise to do something else besides pay money. The instrument must be payable in money with the amount, time, and parties certainly designated,”6 etc. Closely allied to these major assumptions and their corrolaries there are the assumptions, often implicit, that the law of bills and notes is unique in that all bills and notes cases are non-unique as to each other;7 that there is no twilight zone between negotiable and non-negotiable paper;8 that here above all places the social interest of certainty overrides individualized justice from case to case.9 Every objection is silenced with, “Thus sayeth the Law Merchant” or “Thus sayeth the Custom of Merchants.” Then to prove what this oracular Law Merchant says, we are cited to Coke or Mansfield who in turn called in merchants to tell what was the custom of merchants some centuries before.

Due to this attitude, more or less peculiar to the law of bills and notes, the learning of this subject contained in its many postulates has become mummified in the Negotiable Instruments Law. The great reel, “The Romance of the Law Merchant,” has ceased to move as though the operator had come to a scene that pleased him so thoroughly that he insists on locking the crank. Some hand of destiny seems to grasp the crank and the show goes on in spite of the warnings of the management that this is only an illusion and what the spectators really see and should see is the perfect sixteenth century court scene. The writer has for some time begun to wonder if this towering Law Merchant might not possibly be one of Time’s ghosts.

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6N. I. L. §§ 1-11.
7Pound, Interpretations of Legal History (1923) “Every promissory note is like every other.” at 154 and, “There is nothing unique in a bill of exchange.” at 155.
8Chafee, op. cit. supra note 5, at 750: “There must be no twilight zone between negotiable instruments and simple contracts.”
9Neal v. Coburn, 92 Me. 139, 145, 42 Atl. 348 (1898): “Commercial paper has long been governed by special rules which, while designed to insure justice, are also designed to insure the safe use of an indispensable commercial agency. The commercial world needs and seeks for the plain and workable rule rather than for the somewhat uncertain abstract right in each case.” Noticed in Chafee, op. cit. supra note 5, at 750-751.
stalking generation after generation, to be soon shown up as an old fraud holding sway by its very mystery. Suffice it here to suggest that most of the questions that purport to be resolved by the Law Merchant were not within the dreams of the merchants of the sixteenth century. When the writer confesses that he had great difficulty in explaining the cases in the light of the major postulates and keeping his self respect, it is believed that he is making a confession in which most teachers of bills and notes will generally sympathize.

The reader may at this point agree with the implications of this paper and say, "Very true, and if I were to make anew the whole law of bills and notes today I would make it very different but we have to deal with the law as it is and it is now too late to make many desirable changes that might otherwise be made. I might provide that the fact that a promise is conditional should not affect the negotiability of the note if there are words of negotiability, and so on, but I take it that it is too late to consider such questions as open today." It must be admitted that there is some force to this objection, but in view of the fact that we are about to revise our Negotiable Instruments Law and in view of the further fact that in doubtful cases our postulates and especially our major postulates will influence our decisions, it is submitted there is great value in re-examining these postulates apart from the very valuable mental exercise one gets from questioning one's most fundamental convictions that are generally accepted as self-evident.  

Is a bill or a note a substitute for money? In a sense, of course, all credit is a substitute for money. What is generally meant here by substitute for money is the quality of a good medium of payment and exchange. Most commodities from strawberries to gold have this quality to a widely varying extent. What gives money its unique character is its acceptability. Bills and notes have wider degrees of acceptability than do commodities. Most commodities are worth something, many bills and notes are worth nothing. Another reason that bills and notes can never really closely approach money is because of the risk of the so-called "real defenses" which every purchaser assumes. Some bills and notes make fairly good media of exchange and payment, many do not, but nearly all of them are good instruments of credit. Most credit is assignable and more and more of it is becoming negotiable in the sense that the buyer takes free of

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10 Holmes, Collected Papers (1921) 306: "To rest on a formula is a slumber, that prolonged means death." And at 307, "To have doubted one's own first principles is the mark of a civilized man."
equities. It was once thought that some great principle of public policy was violated by the assignment of credit and hence it was not allowed. The considerations of policy have never been clearly defined, however, and much ex post facto reasoning has had to justify the curious.\footnote{That to allow the assignment of choses in action would encourage litigation, is probably an afterthought. Cf. chapter on "The Alienability of choses in Action" Ames, Lectures on Legal History (1913) 211: "A right of action in one person implies a corresponding duty in another to perform an agreement or to make reparation for a tort. That is to say a chose in action always presupposes a personal relation between two individuals. But a personal relation in the very nature of things cannot be assigned."}

Something of the same mystery surrounds the judicial and professorial attitude of today that will not grant the quality of negotiability to instruments of credit where the parties concerned have evidenced such expectations, if some slip has been made in the "Meny, Miny, Mow," or the formal requisites. But when we look less closely from judicial vocal behavior to judicial non-vocal behavior, we find much strange ignoring of the "formal requisites" and stranger rationalizations that would make it appear that the formal requisites are still observed. Somewhat shame-facedly the courts still have an eye on the reasonable expectation of the parties and individual justice from case to case.\footnote{One can hardly come on to a case in bills and notes without finding an illustration. See, for instance, Shemonia v. Verda, 24 Ohio App. 246, 157 N. E. 717 (1927) where the court found the following language to constitute a "promise:" "I borrowed from P. Shemonia, the sum of five hundred dollars with four percent interest. The borrowed money ought to be paid within four months from date." Any text on bills and notes or any annotation of the Negotiable Instruments Law is incorporated here by reference to show the length the courts in fact go to find that the formal requisite in question is found in the instrument. There are surprisingly few instruments, relatively speaking, held non-negotiable because of formal defects even where only a crystal gazer could by the widest flights of imagination see, in any realistic sense, that there is a promise or order that is unconditional and for an amount certain, etc. A complete development of this point from the cases would require a paper to itself.}

Nevertheless, it must be admitted that one of the last strongholds of formalism in our law is still to be found in our law of bills and notes.

The proposition that bills and notes never have been, never can be and never will be a good substitute for money is so obvious that it is incredible.\footnote{Consider, for example, the proposition: A frightened ostrich buries its head in the sand. Is the Proposition true? We observe at once that the proposition is not self-evident, even if we admit that there are such things as self-evident propositions, for, if it were no one would believe it, which many do, but all would know it, which many do not. Cf. Keyser, Thinking about Thinking (1926) 84.} That acceptability is not the test of negotiability in the
law of bills and notes is quickly demonstrated by comparing the note or check of John Doe, an insolvent tramp, to that of the General Motors Corporation. If the John Doe paper is in due form regardless of its acceptibility, it is negotiable; if that of the General Motors is rendered more acceptable by violating the magical form it is non-negotiable. Negotiability is in point of law a matter of form and form alone has little correlation to acceptability. If this is true, then the great major postulate and its converse of the law of bills and notes are not descriptive and being non-descriptive they become positively harmful and confusing, for from them the courts have extracted several corrolaries which they accept as principles or rules with which to decide the cases. Now it is well known that if the major proposition is false, any corrolaries drawn from it must also be false. In so far as courts are actually influenced by these principles and rules, which, no doubt, is very little, so far we are apt to get undesirable results in the cases. It may then be worth our while to look a little more closely at these minor assumptions to see how they work.

Since a negotiable instrument is a substitute for money and like money is intended to have a definite value and to be taken almost at sight, it follows that "it must contain an unconditional promise or order to pay a sum certain in money." Here we have in fact five propositions in one: There must be a promise or order. The promise or order must be to pay. The promise or order must be unconditional. There must be a promise or order to pay a sum certain. This sum certain must be in money. If our major postulate is true we can not quarrel much with these assumptions. A few moments of examination of the cases reveal one or the other of these two conclusions: Either these terms (or rather propositions) have a highly technical (non-normative) meaning; or else, the cases do not support the propositions. If the reader prefers the first conclusion, what is left of the major postulate? How is the layman to know by mere inspection what is a promise, or order, to pay a sum certain in money? How is he to know

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1^N. I. L. §§ 1, 2.

10Would a layman know before the courts so decided that the following are Promises: "Due John Adams $94.91 on demand...", "Due one Huyck or order...", "Good to bearer." "Payable upon the return of this certificate [of deposit]." "On demand...please pay," where there is no drawee. "Borrowed of," "I hereby accept this bill," written on a bill without a drawee or on a sales slip. "Good for $100," "Pay P or order," no drawee. "I. O. U. $100 value received," etc. These and many additional cases are collected in 8 C. J. 115, 16.

Orders: "Credit," "Let the bearer have," "We hereby authorize you to pay," Sheets v. Coast Coal Co., 133 Pac. 433 (Wash. 1913). Contra: Hamilton v. Spottiswood, 4 Ex. 200 (1849), "Mr. B. will much oblige Mr. A. by paying C.
what is unconditional by mere inspection of the instrument? If, on the other hand we accept the conclusion that these terms are to be taken in their normative sense then we must also conclude that the great majority of the cases are wrongly decided. In other words, when we distinguish what the courts do from what they say, there seems to be little logical connection between the major assumption and these minor assumptions.

When we seek a realistic description of what the courts are in fact doing, we see that they are declaring many conditional notes and bills to be negotiable. Why not? Suppose Oklahoma declared that conditionality of a bill or note does not affect its negotiability, what would be the alarming results that would flow from such legislation? Or suppose “I.O.U.’s” or promises to pay in commodities not money were held to be negotiable, what calamitous results would follow? It is here, of course, assumed that the parties to the transaction had reasonable expectations of these being treated as

or order,” etc. See Norton, Bills and Notes (4th ed. 1914) for additional citations.

To pay: “I promise to account to P. or order,” Morris v. Lee, 1 Strange, 629 (K. B. 1725); “I promise to settle with P. or order,” Barker v. Seaman, 61 N. Y. 648 (1875); “Credit A. or order in cash,” Allen v. Sea etc. Co., 9 C. B. 574 (1870).

A sum certain: A provision requiring a higher rate of interest after maturity, or a provision requiring interest on interest, or a discount of interest or principal if paid before maturity. Cases collected in 2 A. L. R. 139. Provisions requiring the maker to pay taxes, assessments, and insurance on property securing the note. See cases collected in 45 A. L. R. 1074.


16A note payable on December 1st, of one year or a year later if the crop on certain land fell “below eight bushels per acre,” “At my convenience, upon this expressed condition: that I am to be the sole judge of such convenience and time of payment,” “when ship F. arrives,” “On demand,” “At sight,” “In the course of the strawberry season now coming on,” “If there is not enough realized by good management in one year, to have more time to pay,” “Upon the death of A,” “As per contract,” notes with a great variety of acceleration provisions on the happening of certain events. See Norton, op. cit. supra note 15, at 43ff and Chaee, op. cit. supra note 5, at 753ff. Also Aigler, Conditional Order or Promise (1928) 26 Mich. L. Rev. 471.

17N. I. L. § 4 provides for three distinct types of conditional (as to time) bills and notes.

18I. O. U.’s have at times been held negotiable. See many cases collected in 8 C. J. 116n.

negotiable, as, by so expressly designating. The implication here suggested is that not only would there be no bad results but that this would be a sensible way to decide such cases. To the objection that these instruments would have an uncertain and speculative value it is suggested that this is true of most negotiable paper. After all is said and done the chief factors of uncertainty are the solvency, honesty, and business ingenuity of the parties primarily liable. These vary as humanity varies in these qualities, and this never has been misunderstood by business men. This requires inquiry off the face of the instrument. In the face of frequent utterances to the contrary it is submitted that of all branches of our law, certainty in bills and notes is a delusion. If it is answered that this is true but paper would be more certain and hence have a wider circulation if the promise is unconditional, etc., we have what appears to be, at first sight, a very pertinent reply. Is there any social interest in making credit circulate beyond that dictated by its economic worth? Bonds would circulate more freely if they were not subject to call. Is this sufficient reason to hold such bearer bonds non-negotiable? If circulation is desirable, as normal circulation is, why not protect and encourage normal circulation by holding this class of paper negotiable when such is the reasonable expectation of the parties? A conditional note is not worth as much as an unconditional one but it may be worth more than no note at all. If circulation is a good thing why not encourage the circulation of both conditional and unconditional notes, notes payable in foreign money as well as those payable in credit, trade or commodities, when all the parties to them treat them as negotiable? Just as it was once fallaciously supposed that a person could not limit his liability by expressed agreement of the other parties,²⁹ it is still assumed, fallaciously it is submitted, that a person cannot increase his liability by waiving certain defenses by expressed agreement.²¹ The former has resulted in thinking too exclusively in the form of Corporations and the latter by thinking too exclusively in the form of the Law Merchant. There is an analogous mystery abiding in both of these terms.

When the writer was a boy and lived in the Willamette Valley it was the almost universal custom for hop growers to issue little paste-

board "hop checks" on which was printed, "Good for One Box of Hops." One of these checks was issued to the hop-picker for each box of hops picked. This check did not entitle the picker to a box of hops as the check seems to indicate but to fifty cents for the picking of a box of hops. During the season, these checks almost replaced money as a medium of exchange and were quite universally accepted there as fifty cent pieces. By custom all the parties concerned treated these as negotiable. Although the writer has been unable to find a case in point he is tempted to venture a guess that a court would have held these negotiable if a case had arisen, the N.I.L. to the contrary notwithstanding. They met a real business need and the reasonable expectation of all the parties concerned was clear. They were not as good as money but if they had not been freely accepted in payment for groceries, etc., hop-picking would have been seriously interfered with. Considerable credit re-arrangements would have been made necessary.

One other objection is anticipated at this point, namely, "It is not desirable that all credit should be considered negotiable. We must then have two classes of instruments, negotiable and non-negotiable. Negotiable paper should clearly carry its character on its face and for this purpose it is highly desirable that we have some formal distinguishing features. There should be no twilight zone between negotiable paper and non-negotiable paper. It is better to disappoint some of the reasonable expectations of the parties of doubtful paper for the sake of keeping the character of negotiable paper clear and unmistakable." This sounds familiar but is it more than that? Any teacher of bills and notes well knows that there are tremendous twilight zones in bills and notes, that every doubtful case is a unique case, and that for every formal requisite you have a twilight zone. Then the fewer the formal requisites the less uncertainty. Every time a pigeon-hole is created uncertainty is added whether in bills or notes or any other subject of the law. Pigeon-holes are often necessary to differentiate different legal consequences on operative facts that require different treatment, but it is difficult to see why some dozen formal requirements should be necessary today to distinguish negotiable paper from non-negotiable paper. It is doubted, for instance, if there is any good reason today why the promise or order may not be accompanied with a promise or order to do something else besides pay money. The same objection may be made to most of the other formal requisites. Some form; no doubt, is necessary but why not stop with "writing" and some form of "words of negotiability?" If such were the law and business accepted it as such, it is
difficult to perceive any great evil consequences. On the other hand the writer suggests that there would be more certainty in business transactions, that credit would be more liquid, and that the reasonable business expectations of men would not be so frequently disappointed as they are under our present system.

This question is sure to rise: "If law follows custom and not custom the law, why have not the needs of business and business custom forced upon the law this simpler and better form of negotiable paper?" To a certain extent it is true that law follows custom and that the law is made for business and not business for the law. Is it not also true that the law to a considerable extent determines custom by sanctioning and rejecting certain customs? Business practice is frequently, by an old custom, converted into law and the power of the law has been so strong that business has accepted the custom with all its attendant evils as a matter of course. More frequently business has demanded a change of custom long before it could get the attention of the law makers. When the law is then changed business rushes to the new custom and it soon becomes well known in the business world. It is possible that this contains a partial answer to the question why business has not forced out of use the formal requisites of a negotiable bill or note.

If bills and notes were really a substitute for money, not only would risks of insolvency and risks of real defenses have to be greatly decreased and standardized, but the form of the paper would have to be such that a prospective purchaser could readily calculate the present worth of the paper. To do this he must be certain when he is to be paid, how much, the present market value of money, and what interest his paper bears. That is, he must be certain as to when he is to be paid as well as to whether he is to be paid. There must be no contingencies or fluctuations inconsistent with money. Disregarding risks of solvency and risks of real defenses for the moment, what classes of current commercial paper would we have to rule out under this standard? Interest-bearing "on demand" paper is of uncertain value and it is impossible to figure its present worth for it may be paid off at any time, and the advantage of investment due to a higher rate of interest on the note or bond over the current market value of money lost. The same thing is true of paper payable "on or before" a certain date; likewise, paper construed to be payable within a reasonable time; so also, paper payable on an event certain to

\[22\] In so far as the courts have only given lip-service to the major postulates and formal requisites of bills and notes and have declared many instruments that do not conform to the formal requisites to be negotiable, business has had its way.
happen but uncertain when. While paper containing options in the holder in respect to acceleration of maturity, discount before maturity, etc., should be held negotiable, conditional indorsements and conditional acceptances would have to be disallowed. Such, of course, is not the law, and the attempt to cling to the postulates of bills and notes and yet justify and explain the decisions on the subject is one of the most curious chapters in the history of our law. The writer has known a few teachers of the subject to declare that the great body of decisions indicated above are wrong. It is submitted that an equally tenable explanation is that the postulates are wrong.

It is beyond the scope of this paper²³ to consider the postulates with respect to negotiation and with respect to "holder in due course" but it is here suggested that a little examination will find several postulates here also that need serious reconsideration, especially with respect to what constitutes "value," "good faith," and "notice."

Since the time of the Law Merchant, since the time of Coke, or even since the time of Lord Mansfield, the postulates of business have undergone a development that almost amounts to a complete revolution.²⁴ Time was when the seller was the little fellow and the buyer was the big fellow who was regarded with all the suspicion of a money lender. The seller must be protected and the buyer must take care. Little significance was attached to intangible property and of the tangible property little protection was thrown around "exchange value," as distinguished from the "use value." "Security of property" in this very narrow sense, was the great major postulate of business as well as that of the law. From this flow the postulates of various rules of law, as, caveat emptor, no man can be deprived of his property without his consent, no man can pass a better title than he himself had, and many others of like tenor. An innocent buyer from a thief, borrower, pledgee, or bailee for a special purpose not only lost what he bought but was liable in an action for conversion.

Today the seller is the big fellow to be watched and the buyer is the little fellow to be protected. The importance of intangible property greatly exceeds that of the tangible. It is seen that "security of property" has little meaning if there is not also security of the exchange value of property and hence, "security of transaction" and the protection of all varieties of intangible property is the order of the day. Choses in action have become freely assignable and several varieties of these have become negotiable. The protection given the

²³And only a few of the formal requisites could be considered.
²⁴Isaacs, Business Postulates and the Law (1928) 41 Harv. L. Rev. 1014, 1020.
purchaser today as compared to a few decades ago is well illustrated in the recent developments in the "apparent authority" doctrine in agency, in the tendency to take illegal contracts out of the field of self help, and especially in the development of the doctrine of ultra vires in corporations, and in the public registration of documents of title. So legislation establishing various commissions to regulate trade, transportation, sale of securities, etc., shows the shifted emphasis on the protection of the buyer. The first great step in the recognition and protection of intangible property and the protection of the buyer in our law was made when the principle of negotiability was first applied to bills and then to notes. This was a great radical step forward in a rural age. There necessarily followed much justifying, limiting and defining of negotiability which, improperly accepted, resulted in a mummification of the law of bills and notes from which it has never revived. An opinion on bills and notes often gives the impression that it is timeless. Like a circus, when you have seen one of them you have seen them all. Lord Mansfield might well be taken as the author of nearly any opinion from his day to almost the last opinion of the supreme court on a question involving the negotiability of commercial paper. About as much may be said with reference to many text books on the subject. They nearly all contain the familiar but meaningless phrases, as, "the currency of the thing", "substitute for money", "money likeness", "Custom of Merchants", "according to the Law Merchant", "highly special legal consequences of negotiability", "a courier without luggage", "acceptable at sight", etc., etc. Here at last we have a beautiful, still picture in the law, almost a realization of the ideal of certainty made secure by codification a set-form opinion for all possible cases. Is there not still too much variation in the opinions? Does it not remain now for the Commissioners on Uniform Laws to write a model-form opinion to be followed by all courts in all bills and notes cases, allowing a blank line or two at the end for local color? At least such is often the impression one gets when reading many opinions, law review articles, or text books on negotiable instruments.

The subject badly needs a new language, new postulates, and a new approach.

These rationalizations have been raised to major postulates; as such, they never were sound but in a day when credit was neither assignable nor negotiable, they did suggest analogies that gave the illusion that the law as to assignability of choses in action was not being changed. In this respect they once served a useful purpose. Some will insist that these postulates were true in the time of Coke and Mansfield in that they represented the best then known from then available data—with this we do not quarrel.