

PAST, PRESENT AND FUTURE NEGOTIABLE INSTRUMENTS IN THE CHANGING WORLD

Much had been written about the negotiable instruments, and more had they been used. Offers in writing, addressed by one person to another, signed, and promising to pay a specified person or bearer a fixed sum in exchange for goods in certain future time.¹ Documents which had been used since the dawn of trade by the merchants of old Europe, and perhaps best specified their own nature in the Bill of Exchange Act 1882. Best specified because of the practical essence of that particular Act of Parliament. The negotiable instruments are, furthermore, viewed as encouraging international trade based on their easily transferrable nature. However, in the 21st century the traditional negotiable instruments could be deemed unsatisfactory for business, unclear and of dubious nature. As computers had taken over the markets in an effort to ease the burden on international trade, negotiable instruments had been viewed as obsolete by many due to their original paper form. Another point of criticism is the fact that the Bill of Exchange Act 1882 had been regulating the usage of negotiable instruments from a time when the use of negotiable instruments could have been deemed as invaluable in trade – which is not the case of today, having the world trade currencies of the US Dollar, Japanese Yen and the European Union's own Euro. The Uniform Commercial Code (of the United States of America) had also been at the scene, however both significant pieces of legislation must now stand the test of the electronic negotiable instruments. And further below it would be explained how exactly does the method of payment of the past fare in the modern times.

As mentioned earlier, the negotiable instruments had existed for a quite while. In their essence, the cheques, the bills of exchange, the promissory notes had been used as a preferred method of payment throughout the centuries. The Venetian merchants had done it in their trade in the Mediterranean, and the British businessmen of the past had used the bills of exchange to pay debts, butchers etcetera, as early as 1663 (as seen in the case of *Edgar v Chut*).²

The main characteristic of the negotiable instruments are the actual way of the transfer. The holder in due course or the bearer is paid the amount owed to on the paper. And thus, the negotiable paper can switch hands numerous times. It is a rapid solution, going across borders, as mentioned in the first paragraph. Also at a times without solid currency and as gold is not one of the safest items of transport, a negotiable instrument could have proven the only choice for a businessman to do his business. And there, lies the negotiability, the fact that the title can pass many hands, improving relations and fulfilling transactions.³

¹ Bills of Exchange Act 1882 s.3 (1)

² 83 Eng. Rep. 1130 (K.B. 1663)

³ A. H. Pruessner The Earliest Traces of Negotiable Instruments *The American Journal of Semitic Languages and Literatures* Vol. 44, No. 2 (Jan., 1928), pp. 88-107 accessed at jstor.org

There is also doctrine of good faith, that all the holder in due course must act bona fide in order for the bill to be cashed, exercised (as per U.C.C. §3-602(b)). As the titles have been passing so many hands and the banks did not had the means to inquire deeply, there have always been the risk of forgery. And as it would be viewed below, the courts had established the criteria for establishing the good faith.

The aspects of the negotiable instruments used in the modern day can be explained in quite a variety of ways. As mentioned earlier in the essay, the Bills of exchange, cheques and promissory notes had been used for centuries, as a currency at a time when a common currency for the most of the European continent was a mirage. In the modern world, the positive aspects of the negotiable instruments are still valued as a weapon of trade, and are as follows:

Easily transferable: The main aspect of the negotiable instruments, in the modern world the transferability of the negotiable instruments is still a reason enough to be in use. If a particular amount of fortune can be circulated rapidly enough, it can boost economy and furthermore strengthen relations. Another reason is in the situation if a holder in due course of a Bill of exchange in a currency such as the Euro, GBP or USD is from a less developed country, with a currency different from the mentioned. In such a situation, it would theoretically give the holder in due course a far better chance of continuing operating in the international scene, as the negotiable instrument would allow him 1) to prove that he had already had the trust of a foreign business, and 2) that he did not go through the change offices (private and banking ones), thus saving time and saving funds, otherwise lost in the change transactions.

Good Faith of the holder in due course. In the case of *Miller v Race*⁴ it was held that a holder in due course who act in good faith can actually use a negotiable paper, regardless if it was stolen. Therefore, as mentioned earlier, a negotiable bill can pass through several sources and relating to the law, it will have to be indorsed. Fagan⁵ argues that the problem could not have been dealt with in the past for the research of the banks and/or the drawer, due to the amount of time it would take for such an investigation, not mention impeding the rate of trade. The courts had already established criteria (in the case of *Price v. Neal*)⁶ that a drawee accepting a negotiable instrument cannot deny the genuisness of the signature. In the case of forged instruments, the precedent securing the drawer from forgery was *Louisa National Bank v. Kentucky National Bank*⁷. It was established that a sufficient inquiry must be made before endorsing the check. And therefore, if such an inquiry had been established to be of necessity in the 1930s, in the 2010s the inquiry can be made swiftly, smoothly, and as such a speed that would prove to be of

⁴ 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758).

⁵ Edward T. Fagan, Jr., *Commercial Bad Faith in the Law of Negotiable Instruments*, 25 Fordham L. Rev. 449 (1956). Available at: <http://ir.lawnet.fordham.edu/flr/vol25/iss3/3>

⁶ 3 Burr. 1354, 97 Eng. Rep. 871 (1762).

⁷ 239 Ky. 302, 39 S.W.2d 497 (1931).

insignificant delay of the transaction. And bringing light on security of usage of negotiable instruments.

Mentioned above are the positive aspects that had made the negotiable instruments a handy tool in the arsenal of the merchant. However, in the modern world some negative aspects are carrying for greater threat to the holders, with the faster pace it must be kept in order to be useful rather than obstructing. Some of the major points of criticism include:

Endorsing the bill: In order to pass the bill, the merchant would have to endorse it. However, the transaction could have been made months ago, and the merchant could be held to endorse a bill since a different merchant could have failed, some different merchant who may have even be entirely unknown to him. Taking as an example is the story of one Andrew Jackson⁸, who was trading land in exchange for such a negotiable note in the city of Philadelphia. Furthermore, the former had used the bill of exchange in order to purchase goods and in turn continue trading. However, after returning to its place of origin, Mr. Jackson had discovered that the merchant of Philadelphia had lost his fortune, and thus was forced to pay the debt. In the modern world (since the above example is from 1795) the failure to pay one of the merchants would inevitably lead to a downfall of business. Since there are many hands that the notes pass from, it would lead to a chain reaction, a whirlwind in which it could be difficult to establish the rightful payer, as evidenced in *Tindal v. Brown*⁹ (in which there was a major frustration between the Judges and the jury as in which party must be held liable for the payment). Another point could be added, that if somewhere along the chain the negotiable instrument is halted, it would again block the transactions. And neutralize the actual negotiability of the negotiable bills, as seen in the case of *Lawson v. Weston*.¹⁰ Therefore, Rogers argues¹¹ that partially based on such an example the whole negotiability doctrine is in practice quite fragile. If the unfortunate economical situation of one person leads to a total crumble and legal issues to the merchants, the risks arising from the abuse or even everyday misfortunes on the market seems rather unnecessary. Another point would be the fact that there is the possibility of forgeries, and the most likely legal entity to endorse the bill would be the bank (situation having seen in the U.S. case of *Canajoharie National Bank v. Diefendorf*)¹² – and a crumbling bank under the weight of forged negotiable bills could provide a downfall again to a number of honest merchants.¹³ And surely, with the modern banking system and the ultrafast electronic transactions, the weight of negotiable instruments could be viewed as not as strong as in the past.

⁸ James Steven Rogers, “*The myth of negotiability*” pp308 31 B.C.L. Rev. 265 (1990, <http://lawdigitalcommons.bc.edu/bclr/vol31/iss2/2> p.156

⁹ T.R. 167, 99 Eng. Rep. 1033 (K.B. 1786).

¹⁰ 4 Esp. 56, 170 Eng. Rep. 640 (Nisi Prius 1801).

¹¹ James Steven Rogers, . “*The myth of negotiability*” pp308 31 B.C.L. Rev. 265 (1990, <http://lawdigitalcommons.bc.edu/bclr/vol31/iss2/2>

¹² 123 N.Y. 191, 25 N.E. 402 (IS90). It can be argued that such a situation cannot arise today, however with modern technologies a falsified negotiable bill would still pose a threat and invalidate trust.

¹³ James Steven Rogers “*The End of Negotiable Instruments: Bringing Payment Systems Law Out of the Past*” 2011 p157 [10.1093/acprof:oso/9780199856220.001.0001](https://doi.org/10.1093/acprof:oso/9780199856220.001.0001)

Precise time of payment: If a bill is payable at a precise time after sight, it is very likely that in the international trade scene to arise a situation in which one date is a national holiday, a bank holiday etcetera. And thus a new problem arises. And as the negotiable instruments are in their essence used and praised to help the rapid business market, the precise time of payment mentioned in some of the cases could in turn slow the transactions down in the wake of establishing when and how to proceed with the method of payment, as viewed in the case of *Brown v. Harraden*.¹⁴

Form: While the traditional paper form of the negotiable instrument had been used for centuries and technically can be still used, the future belongs to the electronic form. Rogers¹⁵ argues that, although the problem with the paper form had been identified in the United States since the 1960s (and partially resolved without dramatic changes to the paper form) this, the negotiable instruments have already surpassed the paper form which had impeded their speed of transferability and the problem of them being lost or stolen, as seen in the case of *Gill v. Cubitt*.¹⁶ The notion of the future paperless nature of the negotiable instrument had been further discussed by Whitaker¹⁷ in his work on Electronic Data Interchange ("EDI") between computers, thus enabling a faster transferability with less fear for security in the cyberspace. A main problem can be viewed as the inception of an electronic platform for negotiable interchange, would lack the system of verification, thus making the negotiable instruments more likely to be abused. However, since banks and online superstores had already dealt with the problem on the local level, it would not be far before a system of electronic signatures, fingerprints (and other form of digital verification, along with the traditional passwords and secret questions) emerge. The actual negotiability stands in the way of the digital negotiable instruments or actually the fear of over usage in the streaming cyberspace.

In the work so far it had been discussed the relevance of the negotiable instruments in the current times. The stance it had been adopted throughout is that they are not relevant. They are not relevant in their paper form; due to the massive registry sizes there must be adopted. If in the 1960s there had been problem with the needed registry buildings to hold the number of negotiable bills¹⁸ constantly growing, in the 2010s it would be unthinkable and unnecessary luggage. That is, because of the inception of the Internet and more prominently, with the new

¹⁴ 4 T.R. 148, 100 Eng. Rep. 943 (K.B. 1791)

¹⁵ James S. Rogers. "An Essay on Horseless Carriages and Paperless Negotiable Instruments: Some Lessons from the Article 8 Revision." *Idaho Law Review* 31, (1995): 689-98.

¹⁶ 3 B. & C. 466, 107 Eng. Rep. 806 (K.B. 1884).

¹⁷ Whittaker D. "LETTERS OF CREDIT AND ELECTRONIC COMMERCE" 1995
31 *Idaho L. Rev.* 699 accessed on lexisnexis

¹⁸ James S. Rogers. "An Essay on Horseless Carriages and Paperless Negotiable Instruments: Some Lessons from the Article 8 Revision." *Idaho Law Review* 31, (1995): 689-98.

technology on digital signatures and far better security measures. Winn¹⁹ argues that Digital technology on cryptography had been established in 1998, and thus in technological sense the transition from paper to electronic negotiable instruments can be made.

Another point on the irrelevance of the traditional form of negotiable instruments can be viewed as the banking sector had progressed in the internet banking, the speed of transactions and the better security banking had provided. If in the traditional negotiable instruments there had been needed the bank to pay the holder in due course or the bearer the promised sum, international banking nowadays could be a reason enough to dismiss the negotiability instruments due in part to the above mentioned negative sides such as the precise time clause and the failure of the merchant to pay. As mentioned before, the negotiability of the negotiable instruments it can turn from a trusted weapon to a deadly menace if abused. Another brick in the wall around negotiable instruments can be viewed as the good faith theory, so that in the internet stream the forgery of the signature can be done fairly accurate, and as such the forgery cases and the holder in due course could lead to businesses actually differing from that method of payment.

And thus in conclusion, the negotiable instruments are surely to still be used. Having been dismissed many times throughout the centuries, they are still in usage. The banks are continuing to make inquires about them and to endorse them, and as seen, efforts are made to transfer the bills of exchange into the electronic world. If something had worked for centuries, it can still be used. However, the disadvantages in the modern age are more than the advantages, and as such, other methods of payment could prevail. After all, centralized banking institutions and globalization, stable world currencies and banks with branches around the world are of better security, and the amounts are transferable more rapidly between accounts (unlike the past). And therefore, the negotiable instruments would still be used, however as a secondary method of payment. The method had worked before, and although not unusable, the times had proven that it is far too disadvantageous to trade today, in a rapidly expanding, globalized world.

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¹⁹ J.K. Winn “*Couriers Without Luggage: Negotiable Instruments and Digital Signatures*” pp 750
<http://www.law.washington.edu/Directory/docs/Winn/Couriers%20without%20Luggage.htm>

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