FORMALISM AND THE LAW OF NEGOTIABLE INSTRUMENTS*

GRANT GILMORE**

Since the 1950's a vast amount of time and effort has been devoted to the study of the development of the American legal system during the past two hundred years. This welter of historical writing has produced one proposition, which, so far as I know, had never been heard of before World War II, but which has, with extraordinary speed, become one of the received ideas of the 1970's. That is the proposition that the fifty year period from the Civil War to World War I was one of legal formalism. The adepts of the proposition—no doubt I am one of them—add that our period of formalism was flanked by two periods of what, in current terminology, we may call activism.¹ And most recently the idea has been put forward, and may be gathering a certain amount of support, that we are even now entering a second period of formalism.² Perhaps we are doomed to live through alternating half centuries of activism and formalism. If that is so, then most of you will witness the beginnings of our third period of activism in the double twenties of the next century with, I dare say, the same acute distaste that most members of my generation look on the current revival of formalism.

The historical and jurisprudential speculations which the

---

¹ Karl Llewellyn seems to have been the first to suggest this "periodization" of American legal history, which has now become a commonplace. According to Llewellyn, our pre-Civil War case law had been characterized by a Grand Style which, after the Civil War, lost out to a Formal Style; Llewellyn had convinced himself that the Grand Style had been reemerging during his own professional lifetime. He initially formulated these ideas in a series of Storrs Lectures which he gave at Yale in 1940. The Yale lectures were never published but provided the basic structure for Llewellyn's last major work: K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); see W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); Gilmore, Book Review, 22 Am. J. Comp. Law 812, 816 (1974). For my own use of the Llewellyn thesis, see G. GILMORE, THE AGES OF AMERICAN LAW (1977).

members of my generation have inflicted on the members of your generation have been animated, in large part, by the belief that activism is a good thing and formalism is a bad thing. Necessarily, each generation treasures its own illusions: we are all theologians malgré nous. In our attack on formalism we have given currency to the idea that change in the law occurs only during activist periods. During formalist periods, on the other hand, change is abolished, the hatches are battened down, the ship is hove to, we devote all our energies to maintaining an even keel while we ride out the storm, which will surely abate some day.

Contrariwise, I would like to suggest that change is our only constant—the storm never will abate, the anchors will never hold. The distinction between activism and formalism is a distinction of style, not of substance. Arguably, we become formalists in the law when, in our lifetime, the rate of change—in our technology, in our social and political structure, in our religious and moral beliefs—becomes intolerable. Formalism is a way—perhaps the only way we have—of coping with chaos. It is only when the pace slackens—when the dove returns with the olive branch—that we can forsake the ark and set about building the new Jerusalem or constructing the socialist society or doing whatever it is that we feel like doing when the flood waters, temporarily, subside. I speak, of course, as an aging, unreconstructed activist. All I have in mind to do is to shoot down a few formalists with some of their own ammunition.

The term "formalism" seems to have come into our discourse initially as a simple pejorative—an expression of our distaste for the legal product of the 1870's, the 1880's and the 1890's as well as for the scholars, the judges and the practitioners who contributed to it. As time has gone on, the term has, I think, begun to acquire some precision of outline, some definable meaning—whether it is being used by one of the New Conceptualists or by someone like me.

Everyone—I use the word in a cheerful sense—now agrees that our post Civil War jurisprudence was unique—at least in our own history—in its fanatical devotion to four interrelated principles. These were: the principle of stare decisis; the principle that

3. The attack on the formalism or conceptualism of the preceding period was, of course, the stock in trade of the so-called (or self-styled) legal realists during the 1930's. On the Realist Movement, see W. Twining, supra note 1; Gilmore, Legal Realism: Its Cause and Cure, 70 Yale L.J. 1037 (1961).
issues arising in litigation should be disposed of as questions of law, not as questions of fact; the principle of objective, as opposed to subjective, interpretation of agreements; and the principle that particular cases should be adjudicated in the light of general or unitary theory.

The four principles seem perfectly designed to insure a state of law which will remain stable through an indefinite period of time. The stare decisis principle went hand in hand with the idea that change in the law is the province of the legislature, not the judiciary. The principle that issues should be disposed of as questions of law cemented the control of the courts over the unpredictable vagaries of lay juries. The objectivist approach dispensed with—indeed forbade—inquiry into the facts of individual cases. The unitary theories, which were promptly provided by the new breed of academic scholars, immensely simplified the task of adjudication without factual inquiry and without jury interference. The theories also provided the framework of belief which made it possible to ignore the fact that the law, under the new dispensation, went on changing quite as rapidly as it always had, as it always does, as it always will.

Let us continue in the same cheerful spirit. Everyone agrees not only about what the principles of the new jurisprudence were but on the fact that they represented a sharp break with the American past. Before the Civil War American judges, enthusiastically taking up the legacy of Lord Mansfield, had approached the process of adjudication with a light-hearted disregard for precedent; they adapted, they changed, they innovated—in a word, they legislated. They inquired into the facts of cases with great particularity but also allowed randomly selected juries, taken as the embodiment of the popular will, broad latitude both in determining the

*Intellectual Origins of Torts in America, 86 Yale L.J. 671 (1977).* I do not mean to suggest that the four distinguished scholars whom I have cited agree with me or would agree with each other. Nevertheless, I think it is fair to say that a consensus about the distinguishing characteristics of our post Civil War formalism does emerge from the books and articles cited as well as from much other writing in the past ten years or so. Why what happened should have happened is a quite different question; on that question anything that could be described as a consensus has not yet made its appearance. I comment briefly at a later point on some of the ideas put forward by Professor Horwitz, see text following note 6 *infra,* and Professor White, see text following note 7 *infra.*

5. The statement in the text should be taken as a form of poetic license. No matter how cheerfully we may approach the problem, the current orthodoxy (which I do not share) denies the thesis that our post Civil War jurisprudence was, viewed historically, a mutation or discontinuity. See Danzig, *The Death of Contract and the Life of the Profession: Observations on the Intellectual State of Legal Academia,* 29 Stanford L. Rev. 1125 (1977) (collecting and analyzing reviews in legal periodicals of G. Gilmore, *The Death of Contract* (1974)).
facts of a case and in interpreting the rule of law applicable to the facts. Our developing law of contracts emphasized the subjective intent of contracting parties and took a distinctly pluralistic approach to the many types of transactions which real people in the real world do engage in.

Thus we have a number of mysteries—or a number of aspects of one mystery—to deal with. Where did the principles of the new jurisprudence come from? Why were they so quickly and so widely accepted? What were they meant to accomplish? What did they accomplish?

Professor Morton Horowitz has proposed an explanation in terms of economic history. With the rise of entrepreneurial capitalism in the wake of the eighteenth century industrial revolution, the law of civil obligations had to be rewritten to reflect the realities of the new market economy. With the enthusiastic help of the legal profession—particularly the judges—eighteenth century rules which had encouraged monopoly and discouraged competition, which had prohibited any invasion of existing property rights, which had protected buyers against sellers under the mediaeval slogan that a sound price warrants a sound article—all these rules were replaced by their opposites. The doctrine of caveat emptor—let the buyer beware—flourished; equities of ownership yielded, both in the law of sales and the law of negotiable instruments, to the doctrine that the good faith purchaser must, at whatever cost, be protected; the doctrine of freedom of contract, which legitimizes the natural tendency of the strong to prey on the weak, became the touchstone of the new age. Professor Horowitz devotes the greater part of his book to a fascinating description of how the transformation took place. He apparently accepts the idea that his great age of activist change (which he evidently deplores) was succeeded by an age of formalist repose. His explanation of formalism, which he discusses only briefly, seems to be that it was designed to consolidate the gains—or, depending on the point of view, losses—of the previous age. The law of civil obligations had, by the 1850's, been rewritten to the satisfaction of the market-place entrepreneurs; the next order of business was to insure that no further change would take place: hence formalism. The difficulty which I find with Professor Horowitz's analysis is that the process of change continued unabated with the result that the ideas which he associates with the new market-oriented law had, by 1900, been stood on their heads or turned inside out.

Professor Edward White, in a provocative discussion of the intellectual origins of the law of torts in the United States, adds another strand to the historiographical web. He stresses the contributions made to our perception of law by an intellectual elite—people he calls glossators. Their articles and books organize the thinking of law students, lawyers and the ordinary run of judges for a generation or more. In Professor White’s version the predominant intellectual inspiration of his glossators during our period of formalism was what used to be called Social Darwinism. The Social Darwinists accepted Darwin’s theory of evolution through natural selection and further assumed that the theory applied not only to the physical universe but to human society. Within this intellectual framework they aimed at formulations which would be both scientific and universal.

I find Professor White’s thesis both entertaining and attractive. We may sum up late nineteenth century tort theory this way: Look out for yourself. And late nineteenth century contract theory this way: Don’t trust anyone. Darwin himself could hardly have done better.

Let me return to my own thesis which is that the principles of formalism, buttressed by scientific or pseudo-scientific theories, did nothing to arrest the rate of change in the law. At most they influenced the style in which the changes were announced in the case reports. I commented earlier that the ideas which Professor Horwitz identifies—I think, correctly—as the keys to the rewritten law of civil obligations had by 1900 been stood on their heads or turned inside out. I will examine only one of these acrobatic contortions—although a comparable demonstration could be made for any of the ideas on his list.

Let us consider, therefore, an area of law which has been re-

---

8. Take, for one example, the displacement of the caveat emptor idea by the intricate network of implied warranties (which got their start not in the consumer context we are familiar with but in a mercantile context). Karl Llewellyn pointed this out nearly half a century ago in an extraordinary article. Llewellyn, On Warranty of Quality, and Society, 36 Colum. L. Rev. 699 (1936); Llewellyn, On Warranty of Quality, and Society: II, 37 Colum. L. Rev. 341 (1937).

The balance of this paper deals with the rise and fall of the good faith purchase idea in negotiable instruments law. The good faith purchase idea also played a notable role in the law of sales of goods. I once attempted to deal with the development of the idea in the context of both negotiable instruments law and sales law. Gilmore, The Commercial Doctrine of Good Faith Purchase, 63 Yale L.J. 1057 (1954). What I now think I missed in that discussion (in both contexts) was that the economic conditions which led to the triumph of the good faith purchaser before 1850 gradually ceased to exist after 1850—with the result that the idea no longer
garded as one in which, a long time ago, form—and formalism—completely triumphed over substance, leaving nothing of any interest to be said. That is the law of negotiable instruments—a subject which has disappeared from the curricula of most forward-looking law schools. My reason for choosing so dreary a subject will, I hope, become apparent as we proceed.

Our law of negotiable instruments dates from the late eighteenth century. Forget about the great international banking houses which appeared in Western Europe with the rebirth of a commercial society at the end of the Dark Ages. Their operations have no more to do with our law than the mediaeval sea codes have anything to do with our law of admiralty. There was a flurry of litigation about promissory notes in England at the end of the seventeenth century, but you can forget about that too. Lord Mansfield and his colleagues in the late eighteenth century were

made much sense. For the negotiable instruments story, see the following discussion.

In the law of sales the key to the rise and subsequent fall of the good faith purchase idea is, I believe, to be found in changing methods of distribution of manufactured goods. During the first half of the century the factor (or sales agent) played a predominant role. The market evidently required that good faith purchasers from fraudulent or insolvent factors be protected against the equities of ownership of the manufacturers (“true owners”) of the goods. In this instance the ingenuity of the courts in working out doctrinal justifications of the result (through the odd concept of “voidable title” in the factor) was supplemented by the industry of the legislatures (in the so-called Factor’s Acts, which are not to be confused with the twentieth century Factor’s Lien Acts). After the Civil War manufacturers gradually turned to distribution of their goods through franchised dealers over whom they were in a position to exercise effective control. The once flourishing institution of factoring was reduced to insignificance. With the disappearance of the factor there was no longer any compelling reason to protect good faith purchasers against outstanding equities of ownership. In the concluding part of this article I comment on the artificial prolongation of the good faith purchase idea in negotiable instruments law in the successive codifications of the Uniform Negotiable Instrument Law (N.I.L.) and Article 3 of the Uniform Commercial Code. The same comment holds true for the successive codifications of sales law. See Uniform Sales Act §§ 23-24, U.C.C. § 2-403.

9. The law of admiralty, as we know it, is strictly a nineteenth century creation which was worked out by the courts as steam replaced sail and ship values dramatically increased. See G. Gilmore and C. Black, The Law of Admiralty Ch. I. (2d ed. 1975). Most negotiable instruments treatises lead off with a brief, flowery introduction in which the reader is asked to believe that the practices of the thirteenth century bankers in Western Europe are still, in some unexplained fashion, immensely relevant in the twentieth century. After the introduction, author and reader alike forget about the thirteenth century, so that no great harm is done.

10. In Clerke v. Martin, 92 Eng. Rep. 6, 6-7 (K.B. 1702) and in Buller v. Crips, 6 Modern Rep. 30, 30-31 (Q.B. 1704), Holt, C.J., vigorously denied that notes (“an invention of the Goldsmiths in Lombard-Street”) were entitled to be treated in the same way as mercantile bills of exchange. Parliament, however, in the so-called Statute of Anne (1704) put notes on the same legal footing as bills.
faced with radically new problems for which they devised radically new solutions.

The radically new problems all stemmed from the industrial revolution and the vastly increased number of commercial transactions which it spawned. When goods were shipped, they had to be paid for. The idea that the payments could be made in metallic currency, chronically in short supply, was ludicrous. The primitive banking system could not cope with the situation: the bank check which—a hundred years later—became the universal payment device was unknown. In effect the merchants and the bankers invented their own paper currency. The form which they used was an old one: the so-called bill of exchange which was an order issued by one person (the drawer) to a second person (the drawee) directing the drawee to pay a specified sum of money at a specified time to a third person (the holder).11 Frequently these bills, drawn by sellers on buyers, represented the purchase price of goods sold. In a more sophisticated and somewhat later variant a mercantile banking house issued what came to be called a letter of credit to a customer. The letter authorized the customer to draw on the bankers for the purchase price of goods which he intended to buy: Through the first half of the nineteenth century Yankees trading out of Boston, armed with their letters of credit which were frequently issued by English houses, roamed the Far East assembling their precious and fabulously profitable cargoes of silks and teas and spices, paying for them with drafts on London.12 For half

11. According to R. Steffen, Cases on Commercial and Investment Paper 1 (3rd ed. 1964), the first reported common law case dealing with a bill of exchange was Martin v. Boure, 79 Eng. Rep. 6 (K.B. 1803). The form of the bill is, in substance, the same now that it was over three hundred years ago. The modern check is, in form, a bill of exchange drawn on a bank, payable on demand. For the current statutory definitions, see U.C.C. § 3-104.

12. In the nineteenth-century credits described in the text the letter was issued to the bank's customer who, within the limit of his authorization, drew drafts on the bank which he negotiated to the various sellers from whom he bought goods. In this century, in the bank credits which are issued in connection with international sales transactions, the letter is issued for the account of the bank's customer (the buyer) directly to the seller, who then draws his own drafts on the issuing bank. I do not know when or why this shift in usage occurred. For the current statutory definition of letters of credit, see U.C.C. § 5-103. For information on the issuance of American credits by English houses during the first half of the nineteenth century, I am indebted to an unpublished paper by J. Bruce Boisture, prepared in 1976 for a seminar at the Yale Law School. The 1837 insolvency of one of the English houses, Wiggin & Co., precipitated litigation in this country. See generally Russell v. Wiggin, 21 F. Cas. 68 (C.C.D. Mass. 1842) (a magisterial opinion by Justice Story on circuit). Story included a lengthy discussion of letters of credit in his 1843 treatise on bills of exchange, quoting liberally from his Russell v. Wiggin opinion, J. Story, Bills of Exchange § 462 (1843) as well as a briefer discussion in his 1845 treatise on promissory notes, J. Story, Promissory Notes § 482 (1845). On the Story treatises, see text accompanying note 24 infra.
a century these bills or drafts were an indispensable supplement to the official currencies and were indeed used as currency: the bills which showed up in litigation had, as the case reports tell us, passed from hand to hand in a long series of transactions.\textsuperscript{13} And a draft on a ranking London house was a much safer as well as a much more convenient thing to have than a bag-full of clipped Ma-
ria Theresa dollars. These bills moved in a world-wide market, typically ending up in the possession of people who knew nothing about the transaction which had given rise to the bill, had no way of finding out anything about the transaction and, in any case, had not the slightest interest in it.

Against that background, the courts, English and American, put together, in not much more than half a century, the law of neg-
otiable instruments almost exactly as we know it today. Indeed anyone who has mastered the current American formulation of the subject in Article 3 of the Uniform Commercial Code will have a startling sense of \textit{déjà vu}—I suppose this is \textit{déjà vu} in reverse—if he then goes back to the mid-nineteenth century treatises: time seems to have been suspended, nothing has changed, the late twentieth century law of negotiable instruments is still a law for clipper ships and their exotic cargoes from the Indies. The \textit{déjà-vu} is false, a sort of floating mirage—but I will return to that later.

In putting together their law of negotiable instruments, the courts assumed that the new mercantile currency was a good thing whose use should be encouraged. Two quite simple ideas became the foundation pieces for the whole structure. One was the good faith purchase idea. The stranger who purchased the bill in the market was entitled to do so without inquiry into the facts of the underlying transaction or of previous transfers of the bill and without being affected by them: if he bought the bill for value, in good faith and in the ordinary course of business, he held it free both of

\begin{footnote}{\textsuperscript{13}} Thus, for example, in Peacock v. Rhodes, 99 Eng. Rep. 402, 402 (K.B. 1781), one of the landmark cases on the indorsement mechanism, we are told that: “William Ingham, to whom the bill was payable, indorsed it; John Daltry received it from him, and indorsed it; Joseph Fisher received it from John Daltry; and it was stolen from Joseph Fisher at York (without any indorsement or transfer by him) . . . before the plaintiff took it in payment . . . .” For a somewhat later example, see Robertson v. Kensington, 128 Eng. Rep. 238, 239 (Ex. 1811) in which the bill, after having been conditionally indorsed by the payee, went through several hands, finally being discounted by the Bank of England, to which it was paid at maturity. Under the developing case law all indorsements had to be written on the back of the instrument. Evidently many bills were transferred so many times that no space was left for further indorsements. The odd practice grew up of making the further indorsements on a piece of paper (called an allonge) which was physically attached to the original bill. In an excess of antiquarian zeal the craftsmen of U.C.C. Article 3 have preserved the use of the allonge. See U.C.C. § 3-202(2) and the accompanying comment.\end{footnote}
underlying contract defenses and of outstanding equities of ownership. The other idea which, the first time you run into it, sounds like nonsense—the legal mind at its worst—was even more basic to the structure and indeed was what gave the completed edifice its pure and almost unearthly beauty. That was the idea that the piece of paper on which the bill was written or printed should be treated as if it—the piece of paper—was itself the claim or debt which it evidenced. This idea came to be known as the doctrine of merger—the debt was merged in the instrument. At one stroke it drastically simplified the law of negotiable instruments, to the benefit of both purchasers and the people required to pay the instruments. Under merger theory the only way of transferring the debt represented by the bill was by physical delivery of the bill itself to the transferee. The courts also worked out an elaborate set of rules on when the transferor was required to endorse, as well as deliver, the bill and on what liabilities to subsequent parties he assumed by endorsing. When these formalities—delivery and endorsement—had been accomplished—but not until then—the transfer became a negotiation and the transferee a holder. Only the holder—the person physically in possession of the bill under a

14. The “good faith purchaser” was rechristened “holder in due course” in the English Bills of Exchange Act of 1882, the American codifying statute (the N.I.L.) took over the English terminology. The reference in the text to the requirement that the purchaser take “in the ordinary course of business” makes an oblique reference to a nineteenth century controversy of which we still occasionally hear echoes. In the 1820's the English courts concluded that the “good faith” required of purchasers was to be measured by an “objective” (or ordinary course of business) standard. See Gill v. Cubitt, 107 Eng. Rep. 806, 806 (K.B. 1824). Somewhat later, both in England and the United States, the “objective” standard was replaced by a “subjective” standard, Gill v. Cubitt having been overruled in Goodman v. Harvey, 111 Eng. Rep. 1011, 1013 (K.B. 1836). See Goodman v. Simonds, 61 U.S. 343, 371 (1857). During the N.I.L. period the conventional wisdom was that the statute codified the subjective standard. Drafts of U.C.C. Article 3 through 1952, however, contained provisions designed to reintroduce the objective (ordinary course of business) standard. These provisions sparked a bitter controversy and were deleted from subsequent drafts. For an excellent discussion, see Littlefield, Good Faith Purchase of Commercial Paper: The Failure of the Subjective Test, 39 S. Cal. L. Rev. 48 (1966). Professor Littlefield concludes that: “The myth that the good faith test is a subjective one is just that—a myth.” Id. at 77. As the reference in the text indicates, I agree with Professor Littlefield.

15. The merger idea, whose principal incidents are explained in the following passage of the text, seems to have emerged gradually from the early case law. That is, the courts did not start with a theory from which certain necessary consequences were deduced. Only after the courts had worked out the rules for transfer and payment was it possible to construct a theory to explain the rules. Subsequently the merger idea was automatically applied to new types of commercial paper—bills of lading, warehouse receipts, share certificates, bonds—which acquired some or all of the attributes of negotiability later in the nineteenth century. On these developments and the merger idea, see Gilmore, The Commercial Doctrine of Good Faith Purchase, 63 Yale L.J. 1057 (1954).
proper chain of endorsements—was entitled to demand payment of the bill from the party required to pay it; only payment to such a holder discharged the bill as well as the underlying obligation. Merger theory was also of immense importance from the point of view of the paying party: not only did he know whom he was supposed to pay—the holder—but, under another aspect of the theory, he was entitled to pay (and get his discharge) even if he knew, to state an extreme case, that the holder he paid had acquired the bill by fraud or trickery from a previous holder. Parties with claims adverse to the holder were required to fight their own battles; they could not involve the payor by serving notice on him not to pay.16

I referred to merger theory as a drastic simplification of the law. The simplification point can be best illustrated by a brief reference to the companion body of law relating to the assignment of intangible claims not evidenced by negotiable instruments—claims which the common law oddly called choses in action.17 The common law of assignment, in which merger theory never got a toehold, struggled unsuccessfully for a hundred and fifty years with the problem created by successive (and necessarily fraudulent) assignments of the same chose in action by the same assignor to different assignees. It never became clear which of the assignees won—there were half a dozen different rules of uncertain application.18 The situation of the obligor was even worse:

16. The text accurately states the pre-N.I.L. common law rule. During the N.I.L. period the issue became confused as the result of what appears to have been a clear drafting error in N.I.L. § 88 (Payment in Due Course). Matters are set nearly right in U.C.C. § 3-808 which returns in substance to the common law rule. For an excellent analysis of materials, see R. Steffen, supra note 11, at 560.

17. The original common-law usage seems to have distinguished between "chooses in possession" (i.e., tangible chattels) and "choses in action" (i.e., intangible claims, as to which the claimants could recover only by bringing an action).

18. The so-called English rule protected the assignee who first notified the debtor of the assignment to him. The New York rule protected the assignee whose assignment was first in time. The Massachusetts rule, which was also followed in the federal courts and was adopted in the Restatement of Contracts § 173, was a first in time rule subject to several important exceptions. These were the three principal rules but there were also local variants and in many states there was no way of knowing what the rule was. See 1 G. Gilmore, Security Interests in Personal Property § 8.6 (1965); 2 G. Gilmore, supra, at § 25.6.

But why was it that "merger theory never got a toehold" in common law theories of assignment? The merger idea first showed up in negotiable instruments law and was subsequently applied "automatically," see note 15 supra, to other types of paper as they came into the market. Until well into this century the only state in which there was a commercially significant amount of financing on the security of choses in action (or "contract rights" or "receivables") was New York (where such an arrangement appeared as early as the 1870's or 1880's in the textile industry). The "New York rule" of priority stated in the preceding paragraph may, not implausibly, be taken as the equivalent of a rule derived from merger theory: at least the New York assignee knew where he stood, provided only that no other assignee was
confronted with conflicting claims, he had to decide, at his peril, whom to pay; if in good faith he paid the wrong claimant, he was still liable to the rightful claimant. (That was one reason why, over a long period, contract obligors attempted, by no-assignment clauses in the contracts, to prohibit assignments of money claims against them.)\(^{19}\) When the assignment of receivables became big business—but that was not until the 1930's—the common law of assignment, which had never succeeded in answering these questions, collapsed in ruins and was replaced by statutory formulations which did answer them.\(^{20}\) On the other hand, in negotiable instruments law, under merger theory, the questions never had to be answered for the excellent reason that they could never be asked: there was only one person in the world who had rights on a negotiable instrument and the payor could pay him (and get discharged) though the heavens fell. You will by now, I trust, have begun to appreciate the beauty of the construct: the elegant solution of apparently intractable problems does have aesthetic appeal.

This network of rules had been put together by 1850—and, as I said, remains today exactly as it was then. My suggestion was that the whole thing was a sensitive and intuitive judicial response to the phenomenon of mercantile bills of exchange used as currency and circulating in a world-wide market. Now suppose that, after 1850, these bills were no longer used as currency, no longer circulated in a market and indeed disappeared. If nothing more was involved, we would expect the pre-1850 law of negotiable instruments to dry up and disappear—just as the no doubt beautifully organized law of sea-shells dried up and disappeared after wampum ceased to be currency. Suppose further, however, that the pre-1850 negotiable instruments rules turned out to be exactly what a powerful group of entrepreneurs wanted in connection with

---

19. See 1 G. Gilmore, supra note 18, at §§ 7.6-7.12.

20. The immediate cause for the enactment of the accounts receivable statutes of the 1940's was the Supreme Court's decision in Corn Exchange National Bank and Trust Co. v. Klauder, 318 U.S. 434 (1943). Even without Klauder the statutes would, no doubt, have come along about when they did; the common law confusion had become intolerable. All the statutes adopted the New York rule, see note 18 supra, with or without a filing requirement. See 1 G. Gilmore, supra note 18, at § 8.7. U.C.C. Article 9 also adopts the New York rule with a filing requirement.
novel types of transactions in which they were planning to engage—transactions which, however legitimate and desirable they might be, had nothing to do with instruments circulating in a market. At that point we would, I dare say, expect a certain amount of conflict and tension in the law as the courts sorted out the problem of which of the old rules could reasonably be applied to the novel transactions and which could not. Which on the whole is roughly what happened in negotiable instruments law from 1850 to 1900—when a new factor was unexpectedly introduced into the equation by a codification of which I shall have something to say presently.

It is a lecturer's prerogative—indeed his duty—vastly to oversimplify long and complex historical developments. Continuing in that vein, it is indeed true that mercantile bills began to disappear after 1850 and had, for all practical purposes, passed out of use by the early part of this century. The vital functions which they had served for nearly a century were rendered obsolete by currency reforms and by the modern uses of bank credit. Sellers still occasionally drew drafts for the purchase price of goods on their buyers or, in international trade, on banks which had issued letters of credit, but the drafts no longer circulated. Such drafts might be discounted by the bank which regularly handled the seller's business but they were no longer purchased by strangers in anything that resembled a market.

The banks, however, presently began to experiment with the novel idea of lending money to poor people. The idea paid off, no doubt beyond the wildest hopes of its inventors—a fact attested to by the appearance, around the turn of the century, of the small loan and sales finance companies. But these later specialists in consumer finance were merely gathering in the harvest which resulted from the banks' earlier labors.

The bankers who did the pioneering work in this tricky field were, reasonably enough, apprehensive. They used promissory notes. The note was a form which had been around a long time. In the eighteenth century the banks had issued their own notes, payable to bearer, which passed from hand to hand and, like the mercantile paper of the same period, greatly helped to alleviate the currency shortage. But the promissory note had never amounted to much as a member of the negotiable instruments family; it had

21. It may also be a lecturer's prerogative (if not his duty) to present his oversimplifications without the burden of complete documentation. The statements which follow in the text are true or false or somewhere in between. I believe that they are largely true but it would take a multi-volume treatise to prove (or pretend to prove) the point.

22. See note 10 supra.
been a sort of poor relation of the bill of exchange. Now, as the bill went into its long decline, the note, for the first time, became the head of the family. However, the apprehensiveness of the bankers in dealing with their new clients translated itself into a series of clauses which were added to the skeletonic form of the eighteenth century bank notes. There is, after all, a difference between a note payable by a bank and a note payable to a bank. The makers of the new notes would in all probability default: the banks put in a confession of judgment clause along with a provision for attorneys' fees—the so-called cognovit note. A poor person's naked promise to pay is not worth much: the banks put in clauses on the borrower's duty to post collateral and the bank's right to realize on it after default. A poor person may have rich relatives and friends: the banks had them sign the notes as sureties. From the 1870's on there was a great contract controversy about the problem of anticipatory breach: that is, if one party to a contract repudiates his obligation before the time scheduled for performance, can the other party bring suit immediately or must he wait until the scheduled time? The anticipatory breach idea—that the suit can be brought immediately—triumphed but, by an odd quirk, was held not to apply to promissory notes: the banks put in acceleration clauses.23 Thus the spare and trim eighteenth century note put on weight and by 1900 had grown to monstrous size.

So far we have been talking about the form of the new notes. The next point is how they were used. They were not meant to circulate and in general did not circulate. They were meant to stay in the vault of the payee bank gathering interest until maturity or until the bank made an earlier demand for payment under the acceleration clause. Through the nineteenth century and during the early part of this century the smaller banks, to maintain their liquidity, sometimes had to sell—rediscout, in bankers' jargon—their paper to larger central banks. Thus the notes were, on occasion, negotiated—but only to other banks.

Now—were these new notes negotiable instruments? The an-

23. The triumph of the anticipatory breach idea dated from Roehm v. Horst, 178 U.S. 1 (1900)—one of the last cases in which the Supreme Court successfully carried out its Swift v. Tyson, 16 Pet. 1 (1842) function of declaring the general commercial law. However, the proposition that the anticipatory breach idea did not apply to money instruments had been conceded throughout the controversy even by its staunchest proponents. Thus, long before 1900, the banks had begun protecting themselves by incorporating acceleration clauses in their promissory note forms. Instead of time notes with acceleration clauses the banks could have used notes payable on demand. There were technical reasons, relating to the discharge of indorsers for failure to make timely presentment, which made the time notes preferable from the banks' point of view.
swer is obvious: of course not. But, if you were a judge, how would you go about explaining why they were not? The answer to that question would vary, I suggest, depending on whether you were a judge in an activist period or a judge in a formulist period.

As it happens, we know how an activist judge who witnessed the pre-Civil War beginnings of this shift from circulating bills to non-circulating notes and checks analyzed the situation. During the last fifteen years of his life Justice Joseph Story used the time left over from his duties on the Supreme Court, on circuit and at the Harvard Law School to write a dozen large treatises. In the 1840's he got around to negotiable instruments. In 1843 he published a treatise on bills of exchange. In 1845, the year of his death, he published a treatise on promissory notes. In his prefaces he explained why he had decided to write two treatises instead of one. It had been customary, he said, to lump bills and notes together as one and the same thing. However, he explained in the promissory notes preface: "[T]here are many peculiar doctrines and principles belonging to each, and many diversities in the application of those doctrines and principles to the business and exigencies of commercial life." What he had in mind in that somewhat obscure passage becomes clearer, I think, in his discussion of checks. Now, if negotiability is purely a matter of form, nothing could be more negotiable than a check, which is simply a bill of exchange drawn on a bank, payable on demand. However, Story chose to take up checks not in the bills of exchange book (where as a matter of form they obviously belonged) but in the promissory notes book, noting in the preface that he had included a discussion of both guaranties and checks which were "becoming daily more use and significance in commercial dealings." As to checks, he had this to say: "Theoretically, indeed, it may be said, that checks are not usually intended for circulation, but to enable the holder immediately to demand and receive the money stated therein, and therefore negotiability is not of their essence, but, at most, merely an optional quality." That is to say: the law of negotiable instruments reflects the market; if instruments, whatever their form, do not circulate in a market, the negotiability idea becomes irrelevant. It was to be another hundred years before another generation of activist judges saw the point as

26. Id. at x.
27. Id. at 663.
clearly as Story had seen it (at this point, no doubt, my own activist bias is showing).\textsuperscript{28}

The point of our discussion is not, however, Story's uncanny powers of observation but how the succeeding generation of formalist judges, which had to deal in real life—that is, as a focus of litigation—with the problem which Story had, almost miraculously, perceived in embryo, managed the task. The moral of the story is that, when a cat is to be skinned, there is always a formalist, as well as an activist, way of doing the job. The only difference is that the formalist techniques of cat-skinning are more complicated. But, as I said earlier, the distinction between activism and formalism is one of style, not substance.

Chief Justice Gibson of Pennsylvania, who belonged to Story's generation, provided what later came to be the principal formalist technique for holding the new notes nonnegotiable. The note in an early case captioned \textit{Overton v. Tyler}\textsuperscript{29} contained both a confession of judgment clause and a clause in which the maker waived his right to have his property appraised before it could be sold on execution. These clauses, said Gibson, made the note nonnegotiable since, as he put it, "a negotiable bill or note is a courier without luggage."\textsuperscript{30} The odd thing about \textit{Overton v. Tyler} is that the holding was in favor not, as you might suppose, of the maker but of the holder: the case is a useful reminder of the often forgotten fact that negotiability was not a one-way street and that the rules gave obligors a significant degree of protection.\textsuperscript{31} However that may be, Gibson's striking phrase became the ritual citation in the many later cases which passed adversely on the negotiability of the new notes.\textsuperscript{32} The formalists were skinning their cat very nicely indeed.

\textsuperscript{28} See the discussion of the post-1940 case law holding consumer financiers subject to underlying contract defenses between buyer and dealer, note 39 infra. Before 1940 "formalist" courts had been reaching the same result on "formalist" grounds. \textit{Id.}

\textsuperscript{29} 3 Pa. 346 (1846).

\textsuperscript{30} \textit{Id.} at 347.

\textsuperscript{31} In \textit{Overton v. Tyler}, 3 Pa. 346 (1846) the holder had, after the entry of judgment by confession, caused execution to be levied on the judgment on the day following the maturity of the note. If the note had been negotiable, the levy of execution would have been premature and consequently invalid since the maker of a negotiable note was entitled to three days of "grace" after the expressed maturity date before payment could be demanded. Since the note was held to be nonnegotiable, the maker did not get the days of grace and the execution was good. \textit{Id.} at 348.

\textsuperscript{32} Professor Steffen comments: "Clauses of all sorts were developed and written on the face of the paper, until notes grew to three and four times their 'natural' size. There were clauses dealing with costs of collection, waivers, payment of taxes, confession of judgment, reservation of title, deposit and sale of collateral, acceleration of maturity, and so on, and yet the paper demanded to be recognized as fully negotiable. But the courts, for their part, were slow to give consent; such clauses, when written into an instrument, violated the essential certainties of the
If the process had been allowed to run its course, the law of negotiable instruments would in all probability have, by the early part of this century, become a sort of ghostly echo from the past, of interest only to antiquarians.

That process was interrupted by the apparent accident of codification. We instinctively think of codification as a noble experiment: radical in its inspiration, reformist in its aims, rational in its methods. I have come to think that the truth about a successful codification—successful, that is, in getting itself enacted—is apt to be a good deal less noble than my three R's would suggest. It can be a way of destroying regional autonomy when a strong centralized government comes to power—which accounts for the nineteenth century codifications in France and Germany. Or it can be a way of imposing the law of an occupying power on a conquered country—which accounts for the British Codes for India or, on a lower level, the Field Codes in California.\(^{33}\) Or it can be a way of turning the clock back when what the courts are doing becomes distasteful to some powerful, well-organized group which has ac-

---

\(^{33}\) Whether or not it is proper to describe California as "conquered", it had at all events been "liberated" from Mexican rule and an urgent question of law reform became how to get rid of the Spanish law which had long been in force. The Field Codes had been prepared in the 1850's for enactment in New York, but had failed there. They proved to be exactly what was needed in California. On the enactment of the California Civil Code of 1872 and its subsequent history, see Harrison, The First Half-Century of the California Civil Code, 10 Calif. L. Rev. 185 (1922); Van Alstyne, The California Civil Code, 6 Cal. Civ. Code 1 (West 1954).
cess to the legislature—which accounts, I suggest, for the Negotiable Instruments Law of 1896, universally nicknamed the N.I.L., not to mention the Uniform Commercial Code.34

I do not know whether the banks drafted the N.I.L. The truth is that no one knows anything about the drafting of the N.I.L.: it was carried out almost in secret.35 Dean Ames of Harvard, who was the leading academic authority on negotiable instruments law, never even heard of the project until the N.I.L. had been enacted in several states. When he heard about it and read the statute, he was outraged and said so, at some length, in the Harvard Law Review.36 What we do know is that the N.I.L. was promulgated under the highly respectable auspices of the American Bar Association, was almost immediately enacted throughout the country—even in Louisiana—and gave the banks everything they could possibly have desired.

What the banks wanted, we may assume, was to have the classical or pre-1850 bill of exchange rules made applicable not only to notes (whatever the notes contained) but to checks (since a good many American courts had heeded Story's admonition that checks, although they might look like bills of exchange, really were not).37 All that the N.I.L. did and with a liberal hand.

35. Crystal, Codification and the Rise of the Restatement Movement, 54 Wash. L. Rev. 239 (1979) collects information about the late nineteenth century codification movement which led to the N.I.L. After Professor Crystal's research it remains true that no one knows anything about the drafting of the statute.
37. For example, one of the rules that had developed in bills of exchange law was that a bill did not operate as an assignment (from drawer to holder) of funds of the drawer's in the drawee's possession; consequently the holder could not sue the drawee for refusal to accept or pay the bill, even though the refusal was wrongful and in breach of contract. See, e.g., Luff v. Pope, 5 Hill 413, 416 (Sup. Ct. N.Y. 1843). When the question arose in litigation whether the no-assignment rule applied to checks, the courts split. In Illinois, for example, the court decided that a check did operate as an assignment, with the result that a checkholder could sue the bank for wrongful dishonor (and that the drawer could not stop payment after having delivered the check). See Munn v. Burch, 25 Ill. 21, 26 (1860); Ridgely National Bank v. Patten & Hamilton, 109 Ill. 479, 486 (1884) (quoting Story's statement, cited in the text accompanying note 27 supra, that, with respect to checks, "negotiability is not of their essence, but, at most, merely an optional quality"). The "Illinois Rule" was followed in a number of other states, mostly in the Midwest. See J. Daniel, supra.
By rights this should be the end of the story since all this happened at the height of the formalist period, one of the tenets of formalism having been legislative supremacy and judicial subservience. The truth is that the N.I.L. judges went right on doing what they had been doing in the pre-statutory period: holding the notes nonnegotiable. The only difference was that now the judges had to rationalize their holdings in the light of the N.I.L. provisions, which they did by resorting to techniques of statutory construction which at times achieved the level of fantasy. I do not know why the judges did this. There is no reason to believe that the judges of 1900, any more than their predecessors or successors, were revolutionaries or hated banks or even hated the finance companies which were beginning to appear in the case reports. They were, of course, lawyers and our thesis is that formalist lawyers and activist lawyers—even after they become judges—behave in much the same way.

The early N.I.L. case law is notable for the apparently insane literalness with which the courts took the statute apart. That is, I am sure, one of the things which gave the field such a bad name. The opinions, taken at face value, read like formalism gone mad. The student shudders and passes on to something more rewarding. For example: the N.I.L. contained a provision which, fairly read, validated the use of any kind of acceleration clause; the courts, by a prodigy of construction, extracted the meaning that almost any form of acceleration clause was fatal to negotiability.38 (The bank-


38. The essential source for the N.I.L. case law is Brannan, The Negotiable Instruments Law Annotated (1902). There have been several subsequent editions of this treatise prepared, after Brannan’s death, first by Zechariah Chafee, Jr. and later by Frederick Beutel. The book takes the N.I.L. section by section and digests the cases; the several editors occasionally contributed critical essays on one subject or another. Professor Chafee instituted the practice of indicating his disagreement with what Professor Brannan had written. Professor Beutel carried on the tradition, frequently disagreeing with both his predecessors. Thus, in the discussion of § 54 a hypothetical case was stated: according to Brannan the plaintiff recovered $200, according to Chafee the plaintiff recovered $150, and according to Beutel the plaintiff recovered $133.33.

With respect to the statement in the text, § 1 provided (inter alia) that to be negotiable an instrument must be “payable on demand, or at a fixed or determinable future time . . . .” Section 4 provided that “An instrument is payable at a determinable future time within the meaning of this act, which is expressed to be payable . . . (2) or before a fixed or determinable time specified therein.” The “or before” language in § 4(2), rationally construed, seems to validate any form of acceleration clause. It is true that the apparent meaning of § 4(2) was clouded by the presence in § 2(3) of a provision which expressly authorized acceleration “upon default in payment of any installment or of interest.” Thus it could be argued that the only type of acceleration clause which was permissible was the one referred to in § 2(3) and that § 4(2) had nothing to do with the matter. Most courts, however,
ers, who have a nice eye for the distinction between form and substance, went on using the acceleration clauses anyway.) The courts also discovered a way of holding that notes given by consumers to dealers and then negotiated—using that term loosely—to finance companies were nonnegotiable. The notes were executed in connection with conditional sales contracts and, if only for bookkeeping purposes, the notes had to refer to the contracts. That, said the courts, praying in aid a N.I.L. provision which apparently validated the cross-reference, was fatal: a negotiable instrument must not only be a courier without luggage, it must stand on its own feet.39 I spare you further examples of a list which could, I

assumed that § 4(2) did apply to acceleration clauses (other than the § 2(3) clause). There were indeed cases which held that negotiability was not impaired by any form of acceleration clause. The point is that there was at least an equal number of cases which went the other way, so that the validity of clauses which gave the holder the option to accelerate at will or “when he deems himself insecure” became extremely doubtful in much of the country.

On the general attitude of the courts toward the N.I.L., see Brannan, supra note 32, at 1099 which included a discussion of proposed amendments to the statute. It also included a passage captioned “Hostile Interpretation, Ignoring Established Rules of Statutory Construction.” Id. at 1110-14. The editor, however, remained opposed to enactment of the amendments and seemed to think that the courts could in time be persuaded to adopt a less “hostile” attitude.

39. In this instance the relevant statutory provisions were § 1(2) (an instrument to be negotiable “must contain an unconditional promise or order to pay a sum certain in money”) and § 3(2) (“An unqualified order or promise to pay is unconditional within the meaning of this act though coupled with . . . (2) a statement of the transaction which gives rise to the instrument.”) See Brannan, supra note 32 at 1099-1104. The cases on notes given in connection with conditional sales contracts like the cases on acceleration clauses went both ways. The point, once again, is that there were enough cases holding that the cross-reference impaired the negotiability of the note (or notes) to make the situation of the finance company (or bank) attempting to recover as a holder in due course over the contract defenses of the maker (buyer) doubtful, to say the least. The lawyers experimented with the idea of dispensing with the note and putting a waiver of defense (or cut-off) clause in the conditional sale contract. Some courts concluded that the waiver of defense clause was an impermissible attempt to create a new type of negotiable instrument outside the N.I.L. See, e.g., American National Bank v. A.G. Sommerville, Inc., 191 Cal. 364, 370, 216 Pac. 376, 378 (1923) (the facts of the case which are ambiguously stated, suggest that this may not have been a consumer transaction). Until 1940 or thereabouts the courts which held consumer paper nonnegotiable did so on the formalistic grounds I have been describing. After 1940 an increasing number of courts began to reach the same result by a quite different route: consumer financiers who regularly financed a dealer’s business were held to take the paper subject to the buyer’s contract defenses for the reason that the financiers were “too close” to their dealers to qualify as holders in due course. Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W. 2d 260 (1940) was one of the first cases to explore this approach and enjoyed a considerable vogue as a “leading case”. For the purpose of my own thesis, the Childs case may be taken as symbolizing the transition from our long period of “formalism” to the new period of “activism”. In the 1970’s the problem of consumer defenses has become the subject-matter of a complicated network of state statutes and federal (FTC) regulations; if the problem had been left to the courts, they would, in all probability, have done a better job than the legislatures
assure you, be extended indefinitely.\textsuperscript{40}

There is a footnote on the academic reaction to the judicial disemboweling of the N.I.L., which was written up at length in the law reviews in the 1920's and 1930's.\textsuperscript{41} The academic reaction was distinctly adverse to what the judges were doing, which becomes interesting when the observation is added that most of the academic negotiable instruments buffs—including Karl Llewellyn—were founding members of the movement which became known as Legal Realism. In Llewellyn's case, his pro-N.I.L. or pro-negotiability stance can be plausibly associated with his lifelong fascination with what he called the Grand Style in pre-Civil War American case law and with his reverence, above all other judges, for Lord Mansfield.\textsuperscript{42} As a general rule, anything—including negotiability—which was good enough for Lord Mansfield was good enough for

\begin{footnotes}
\item[40] Two further examples can be accommodated in footnote. During and after World War I the Federal Reserve Board attempted to popularize the use of short-term bills of exchange (renamed “trade acceptances”) which arose out of sale transactions. The acceptances were made eligible for rediscount by Federal Reserve Banks (which was, at that time, a valuable privilege for the commercial banks which originally discounted them); to be eligible the acceptances had to show on their face that they arose out of the transactions described in the relevant Board Regulation. A number of courts concluded that the statements which were required to comply with the Regulation rendered the acceptances nonnegotiable. See, e.g., First National Bank v. Power Equipment Co., 211 Iowa 153, 154, 233 N.W. 103, 104 (1930). For an excellent note on this episode, see R. Steffen, supra note 11, at 36-37. There were, of course, a number of other reasons why the Federal Reserve Board's curious experiment was doomed to failure. Our second example will be what was, by general consensus, the greatest scandal of the early N.I.L. period. When corporate bonds were issued under an indenture of trust, the bonds (for a number of entirely valid technical reasons) had to be cross-referenced to the indenture for a full statement of the bondholders' rights. The result was that, for a generation, most corporate bonds were nonnegotiable. (There was no way in which share certificates could have been held negotiable under the N.I.L. but that problem was taken care of by the Uniform Stock Transfer Act of 1909). The New York Court of Appeals finally figured out a way of preserving the negotiability of bonds despite the N.I.L. See Enoch v. Brandon, 249 N.Y. 263, —, 164 N.E. 45, 47 (1928). The opinion in Enoch v. Brandon (per Andrews, J.), which is notably disingenuous, met with wide acclaim. For an excellent collection of materials on the N.I.L. bond controversy, see R. Steffen, supra note 11, at 223-43. See also Brannan, supra note 38. The Code deals with bonds and shares in Article 8 (Investment Securities) and, of course, makes them fully negotiable.
\item[41] For an excellent bibliography of the law review literature, see R. Steffen, supra note 11. See particularly his entries under Aigler, Beutel, Britton, Chafee, Llewellyn, Steffen, Turner. (The reader should know that Professor Steffen had in mid-career changed his name from Turner to Steffen. Being of a sardonic turn of mind, he adopted the practice of frequently citing his Turner articles without letting on that he had written them.)
\item[42] On Llewellyn, see note 1 supra. On Lord Mansfield's contribution, see text following note 10 supra.
\end{footnotes}
Llewellyn. That attitude, unfortunately, carried through to the drafting of Article 3 of the Code, which can be described as the N.I.L. doubled in spades or negotiability *in excelsis*.

Article 3 gravely takes up each of the pressure points which developed in the N.I.L. case law and resolves the issue in favor of negotiability. To the extent that its solutions are still relevant to commercial transactions in the real world, it will be ritually disemboved by the courts. Fortunately, the passage of time has made most of the solutions irrelevant. What Article 3 really is in a museum of antiquities—a treasure house crammed full of ancient artifacts whose use and function have long since been forgotten. Another function of codification, we may note, is to preserve the past, like a fly in amber. That does no great harm, so long as we keep in mind the useful lesson that the attempt to abolish change, or to turn the clock back, always fails. The failure is perhaps even more dramatic in the context of the formalist period we have been discussing than in that of the activist period which, we may assume, is like this lecture, at its end.

43. *See generally* U.C.C. § 3-112. On acceleration clauses (discussed at note 38 and accompanying text *supra*), see U.C.C. § 3-109(1) ("An instrument is payable at a definite time if by its terms it is payable . . . (c) at a definite time subject to any acceleration . . ."). On notes given in connection with security agreements (pre-Code conditional sales contracts and the like) (discussed at note 39 and accompanying text *supra*), see U.C.C. § 3-105. The most astonishing feature of Article 3, drafted during the 1940's and 1950's, is that the draftsmen paid not the slightest attention to the rapidly accumulating body of post-1940 case law on consumer notes, see note 39 *supra*.

44. For an example of the draftsmen’s "antiquarian zeal", see note 13 *supra*.