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Antebellum Commercial Law: Common Law Approaches to Secured Transactions

BY TONY FREYER*

Scholars have long argued that legal rules favoring the security and transfer of credit are vital to economic development.[1] Although accepting the essentials of this conclusion, recent research by this author reveals the need to examine those political, institutional, and ideological factors that have interfered with the formulation of economically efficient commercial doctrines.[2] Another author, who argues in a neo-Marxist vein, has focused on the social costs resulting from the commercial law's support of development. This author contends that before 1860, commercial doctrines underwrote the rise of entrepreneurial classes at the expense of vaguely defined noncapitalist classes.[3] The pur-

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[1] *See* J. HOLDEN, THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW (1955); 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 60-154 (1924); 12 *id.* at 524-42; 8 *id.* at 99-300; J. HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970, at 38 (1973); Beutal, *Colonial Sources of the Negotiable Instruments Law of the United States,* 34 ILL. L. REV. 136 (1939-40) [hereinafter cited as *Colonial Sources*]; Beutal, *The Development of State Statutes on Negotiable Paper Prior to the Negotiable Instruments Law,* 40 COLUM. L. REV. 836, 836-45 (1940)]hereinafter cited as *State Statutes*]; Isaacs, *Business Postulates and the Law,* 41 HARV. L. REV. 1014 (1928); Klein, *The Development of Mercantile Instruments of Credit in the United States,* 12 J. ACCT. 321, 321-45, 526-37, 594-607 (1911); Redich, *The Promissory Note as a Financial & Business Instrument in the Anglo-Saxon World: A Historical Sketch,* in 3 REVUE INTERNATIONALE D'HISTOIRE DE LA BANQUE 271 (1970).

This assumption suffused the voluminous work of Joseph Story. His views were summarized in J. STORY, *Progress of Jurisprudence* and *Growth of the Commercial Law,* in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 199, 263 (W. Story ed. Boston 1852).

[2] *See* T. A. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979) [hereinafter cited as FORUMS OF ORDER]; Freyer, *Negotiable Instruments and the Federal Courts in Antebellum American Business,* 1976 BUS. HIST. REV. 435.

[3] *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 211-52 (1977).

pose of this paper is to raise questions concerning whether either efficiency or class provides the most fruitful analytical approach to the study of the commercial law's function in the antebellum economic order. The suggestion put forth is that, at least in the case of rules controlling negotiable and accommodation paper, the law often was not as supportive of economic growth as some scholars have maintained. It also is suggested that *intra*-class rather than *inter*-class conflict most accurately describes the nature of debtor-creditor disputes prior to the Civil War.[4]

Fundamental to the commercial law's system of legally secured rights was the principle of negotiability.[5] The law recognized that certain kinds of commercial contracts—particularly bills of exchange and promissory notes—were negotiable and transferrable like money. The principle of negotiability did not apply to ordinary contracts between two or more parties. As one publication of this era observed, this principle was "an indulgence to commerce; it is a . . . compliment to the utility of a credit system."[6] The "circulation" of "negotiable securities" meant that "payments . . . [could be] made without the carrying of money . . . [and that] payments between the most distant places [became] . . . easy, safe, and certain."[7] Because of the value of negotiable instruments to the commercial system, "in time . . . the common law . . . placed their circulation on grounds of security not otherwise afforded; and, honoring mercantile good faith, made the [mere] possession of . . . [the instrument] a sufficient protection [for recovery]."[8]

By 1800 the basic idea of negotiability was accepted throughout the United States.[9] But during the nineteenth century there

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[4] This thesis grows out of research now in progress on the role of government in early American capitalism.

[5] See Isaacs, *supra* note 1, at 1024-25 for a discussion of the fundamental change the concept of negotiability brought to the world of business.

[6] *Legal Protection of Good Faith*, 1 HUNT'S MERCHANTS' MAG. 230 (1839), *quoted in* FORUMS OF ORDER, *supra* note 2, at 5-8.

[7] *Id.* See FORUMS OF ORDER, *supra* note 2, at 1-18, 36-52 for a general discussion of the same principle.

[8] *Legal Protection of Good Faith*, *supra* note 6, quoted in FORUMS OF ORDER, *supra* note 2, at 5-8.

[9] For a discussion of the development of the law of negotiable instruments in America before and immediately after the Revolution, see *Colonial Sources*, *supra* note 1; *State*

was much disagreement about how far the principle should be applied instead of certain common-law doctrines that were in varying degrees inimical to the negotiability principle.[10] The common law had always restricted the right of one party to assign his right to sue another. Even though a wide range of assignments were allowed after 1800, the state laws were not in accord on what sorts of assignments constituted transfers of negotiable paper and what sorts were merely ordinary contracts between two or more parties.[11]

The problem of assignment was further complicated by the doctrine of privity of contract. At common law, some promise or consideration must pass between contracting parties before either party acquires a right to sue the other. In transactions of negotiable paper, however, disputes often were not between the drawer and an original party to the contract, but instead involved the rights of a subsequent endorsee. That is, the dispute was not between *A* and *B*, but between *A* and *C*. Under the privity doctrine nothing passed between *A* and *C*, so *C* had no claim against *A*. Actually, the usual case involved a fourth, fifth or still later endorsee, but the question of whether privities should disrupt the secured rights of a bona fide holder of commercial paper directly challenged the principle of negotiability.[12]

Related to the privity of contract issue was the more significant question of whether a subsequent endorsee could acquire a better claim than the original parties to the contract had.[13] Under a standard contract between *A* and *B*, *A* could set up a variety of defenses if sued by *B*. Failure of consideration, fraud, payment, insolvency, usury, and others were defenses that, if proved, blocked *B*'s claim. Under the principle of negotiability, however, a bona fide holder of commercial paper, who received it in the normal course of business for a valuable consideration and who was innocent of any inequity associated with its original making or transfer, possessed an absolute right of recovery "against all

Statutes, *supra* note 1, at 837-43. Only five states had accepted the principle of full negotiability by 1800. M. HORWITZ, *supra* note 3, at 215.

[10] See M. HORWITZ, *supra* note 3, at 215-16 for a discussion of resistance by state courts to the negotiability principle.

[11] *See id.*

[12] *Id.* at 212-13; FORUMS OF ORDER, *supra* note 2, at 37.

[13] M. HORWITZ, *supra* note 3, at 213.

the world." Thus, according to the principle of negotiability, the law sanctioned the idea that the holder of a bill or note had a more secure title than those who first entered into the contract.[14]

Behind these technical considerations were two important and interrelated issues of public policy. The first issue involved the character of the antebellum money supply. A chronic scarcity of capital and a confused currency plagued the nation's economy prior to the Civil War. Commercial paper (including bank notes) constituted during this time the bulk of the republic's medium of exchange.[15] Disputes involving the status of the principle of negotiability ultimately involved questions of how much credit would be allowed as part of the circulating medium. Also implicit in the problem was the issue of whether this medium of exchange should be controlled by private market forces or the public authority of government. Since neither state nor federal government (especially after the demise of the Bank of the United States) were eager to constrict the supply of money, the issue of negotiability was entwined with the influence of private market transactions in the development of the antebellum economic order.

A more subtle problem of currency and credit was the extent to which legal rules might control exchanges once commercial instruments were held to be negotiable. The law could sanction transfers of credit for purposes of paying off obligations, or it could hold that such a transfer had been made in order to secure further advances of credit. Simply stated, these two results seem easily separated. In fact, however, because of the pervasive reliance upon commercial contracts as a principal medium of exchange, and the extraordinary complexity of such contracts, it was often quite difficult to determine whether a contract was made for purposes of liquidating debt or in order to further extend credit.[16] Something of the intricateness of such credit trans-

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[14] *See id.*

[15] For a discussion of the relationship between the money supply and the negotiability principle, see L. FRIEDMAN, A HISTORY OF AMERICAN LAW 235-36 (1972); M. HORWITZ, *supra* note 3, at 218.

[16] I am indebted to Kilbourne, *Antebellum Commercial Law: Civil Law Approaches to Secured Transactions,* 70 KY. L.J. No. 3 (1981-82) for insight into the issue of separating contracts made for purposes of paying off debts from those made for further ex-

actions was suggested in a letter from Samuel Troth, a Philadelphia wholesaler, to a New York wholesale firm: "In case you have drawn on me for the above amount [stated in the letter], then please hand this check [also included with the letter] over to the Brooklyn White Lead Co. . . . to be placed to my credit on their books."[17]

Commercial transactions such as Troth's were translated into legal disputes over the principle of negotiability. A plethora of social and institutional factors inhibited an easy resolution of these disputes. A salient feature of antebellum business was the merchant's reliance on reputation and personal trust. Although the predecessor of Dunn and Bradstreet began operation in 1841, credit reporting was neither well received nor generally relied upon until after the Civil War.[18] This uncertain status of credit reporting, combined with the relative slowness of communications, created problems with a system in which credit standing depended almost entirely upon personal connections. The continuous threat and recurring reality of bankruptcy increased the stresses upon the system. Finally, mercantile rivalry among trading centers generated suspicion, which further undermined dependency upon an individual's reputation.[19]

A whole range of institutional factors also fostered uncertainty in the legal rules governing commercial contracts. Merchants often distrusted common law courts and juries because it was believed that they did not adequately understand the intricacies of commercial transactions.[20] For this reason mercantile interests often favored equity tribunals. Even here, however, businessmen found reason for complaint because legislatures regularly altered equity's jurisdiction over commercial litigation.[21] But no doubt the most important source of confusion was debtor-relief laws.

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tending credit. *See also* Fletcher v. Morey, 9 F. Cas. 266 (C.D.D. Mass. 1843) (No. 4,864).

[17] Letter from Samuel Troth to Grinnell Minturn & Co. (Apr. 21, 1843), *quoted in* G. PORTER & H. LIVESAY, MERCHANTS AND MANUFACTURERS 32 (1971).

[18] Rather, the merchants of a particular trade would often cooperate among themselves to maintain a flow of credit information. *See id.* at 31-32, 74.

[19] *See generally* FORUMS OF ORDER, *supra* note 2, at 1-52.

[20] *See id.* at 40-41.

[21] See *id.* at 20-22 for a discussion of American equity jurisdiction in the early 19th century.

Various business and other socio-economic groups favored such laws from time to time, especially after economic panics.[22] The frequency of change in these laws and their remarkable procedural complexity, however, inhibited the fashioning of clear doctrines.[23]

Finally, ideological tensions between mercantile and agricultural businessmen complicated the formulation of doctrines governing commercial contracts. A Georgian, one Benjamin F. Porter, articulated this tension plainly: "We have had occasion, very often of late," said Porter, "to observe with much concern, that a deep-rooted prejudice is entertained by the agriculturalists against the mercantile class. Among the former, indeed, is to be found a general distrust of commercial men."[24] The reasons for this, Porter continued, were not hard to find. Merchants "are regarded as sharpers, whose lives are spent in acquiring a knowledge of arts by which to deceive the producer;—as men who live alone upon that class;—who exist not by labor, but by swindling and ingenuity;—as drones of society, consuming the results of the toil of others, and yielding nothing whatever to the community in which they live."[25]

These and other factors shaped the law's uneven response to accommodation loans, a particularly vital (and intricate) form of commercial credit. Joseph Story explained accommodations in his *Commentaries on Bills of Exchange* in 1843. A bill was "often" drawn for the "mere private accommodation" of an en-

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[22] Following the panic of 1819, for example, Kentucky's newly elected General Assembly passed several bold statutes designed to protect debtors. Stay laws were passed which denied creditors recovery on debts for up to 2 years after they became due. They also made the generally depreciated notes of Kentucky banks the sole legal tender for payment of debts. *See* A. STICKLES, THE CRITICAL COURT STRUGGLE IN KENTUCKY, 1819-1829, at 15-28 (1929).

[23] A major reason for the great complexity of debtor-creditor laws from state-to-state was that "[i]n general, states sought to discriminate against non-residents, especially out-of-state creditors who had in-state debtors. State legislatures at times even went to such extremes as closing the courts to prevent adjudication of debtor-creditor controversies . . .[or] even passing private acts to overturn court decisions." FORUMS OF ORDER, *supra* note 2, at 11.

[24] Porter, *Commerce and the Prejudice Against It*, 19 HUNT'S MERCHANTS' MAG. 392-93 (1848). For a fuller discussion of the ideological dimensions see T. FREYER, HARMONY AND DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 1-43 (1981).

[25] Porter, *supra* note 24, at 392-93.

dorser "without receiving any value therefore," said Story.[26] Or the bill was accepted for the "mere accommodation and use" of the maker or endorser "without having any funds of either on his hands," or, he continued, on the "other hand the maker or endorser . . . often acts as a mere formal instrument, solely for the benefit and accommodation of the . . . acceptor."[27] In the eyes of the law, these accommodation contracts did not represent bona fide transactions because no "valuable consideration" passed between parties. Because these contracts represented no transfer of value, but were still used in bolstering a merchant's credit standing, they posed legal problems. What were the rights of a holder of a bill or note that was originally drawn as an accommodation? Were they the same as those of a holder of a bill drawn for a bona fide business transaction? Another complex question involved accommodations and insolvency. What should the law do if a bill or note, drawn as an accommodation, was endorsed to a third person before or after the original drawer became insolvent? Should the innocent third party be able to recover on the contract?[28]

Legal commentators were unable to agree on such questions. A digest of commercial doctrine controlling bills and notes gave an explanation for diversity of decision in Pennsylvania. Granting legal protection to accommodation paper "might not suit the extensive and complicated trade of a large commercial city, [but] it is well adapted to the limited transactions of a country bank."[29] Another explanation was rooted in a general distrust of credit and "soft money" of all kinds. A critic writing in 1839 forcefully stated this point of view: "CREDIT, CREDIT,—with very little regard to the means of paying,—often ruinous to both parties, is the fatal bane of commercial prosperity, of commercial honor and honesty. The transactions of business are little more than fictions."[30]

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[26] J. STORY, COMMENTARIES ON BILLS OF EXCHANGE 17 (3d ed. Boston 1853).

[27] *Id.* at 17-18.

[28] *See* FORUMS OF ORDER, *supra* note 2, at 9-10, 37-41.

[29] A DIGEST OF THE LAWS OF PENNSYLVANIA . . . RELATIVE TO BANKS 129 (Harrisburg 1854).

[30] Hopkinson, *Lecture on Commercial Integrity*, 1 HUNT'S MERCHANTS' MAG. 375 (1839).

The unsettled legal standing of accommodation loans was a factor in disputes about the principle of negotiability. A significant instance of the connection between the two issues involved bills or notes received in payment of pre-existing debts. Many commercial contracts were drawn to pay debts that were due because of some previous transaction. In such cases, the contract was not drawn to cover a new business deal, but solely to provide payment for the pre-existing debt. Did such bills or notes meet the requirements of negotiability? Were they received in the ordinary course of trade, and for valuable consideration?[31] Many state courts acknowledged that the debt itself represented something of value, and that paper received in payment for pre-existing debts had been transferred in the regular course of business.[32] Other state courts refused to accept this rule, and some states included cases upholding both views in their local law.[33]

Intricacies of business practice further complicated the question of the negotiability of bills received in payment of pre-existing debts. It was common, as noted already, for businessmen to make accommodation loans to those with whom they dealt, loans

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[31] FORUMS OF ORDER, *supra* note 2, at 38.

[32] *See, e.g.*, Fenouille v. Hamilton, 35 Ala. 319 (1859); Bank of Mobile v. Hall, 6 Ala. 639 (1844); Exchange Nat'l Bank v. Coe, 127 S.W. 453 (Ark. 1910); Bertrand v. Barkman, 13 Ark. 150 (1852); Brush v. Scribner, 11 Conn. 388 (1836); Homes v. Smyth, 16 Me. 177 (1839); Rosmond v. Graham, 54 Minn. 323 (1893); Becker v. Sandusky City Bank, 1 Minn. 311 (1856); Grant v. Kidwell, 30 Mo. 455 (1860); Goodman v. Simonds, 19 Mo. 106 (1853); Cook v. Helms, 5 Wis. 107 (1856); Atchison v. Davidson, 2 Pin. 48 (Wis. 1847).

[33] Compare Payne v. Cutler, 13 Wend. 605 (N.Y. 1834), Ontario Bank v. Worthington, 12 Wend. 593 (N.Y. 1834) and Rosa v. Brotherson, 10 Wend. 85 (N.Y. Sup. Ct. 1833) with Bank of Sandusky v. Scoville, 24 Wend. 115 (N.Y. Sup. Ct. 1840) and Bank of Salina v. Babcock, 21 Wend. 499 (N.Y. Sup. Ct. 1839) for examples of conflicting cases in New York. Compare Riley & Van Amringe v. Johnson, 8 Ohio 526 (1838) with Carlisle v. Wishart, 11 Ohio 173 (1842) for oscillation on this point in Ohio.

Kent, in his COMMENTARIES ON AMERICAN LAW 81-82 (13th ed. 1884), supported the negotiability of bills received for antecedent debts and accommodations; but an anonymous writer in HUNT'S MERCHANTS' MAG. denied the negotiability of such commercial contracts and said that this was the case in the majority of states. *Legal Protection of Good Faith*, 1 HUNT'S MERCHANTS' MAG. 231 (1839). A remarkable survey of the law in each state in 1822 is found in 3 W. GRIFFITH, ANNUAL LAW REGISTER OF THE UNITED STATES 22, 24, 48, 78-79, 118, 142-43, 224-25, 227, 264, 268-69, 362, 365, 403-04, 424, 445, 447, 468, 518-19, 521 (Burlington 1822); 4 *id.* at 587, 627-28, 670-71, 696-97, 796, 801, 864, 866, 943, 946, 1006, 1008, 1065, 1071, 1141, 1144, 1300. This work supports the view that there was no agreement between the states on many aspects of negotiable instruments law.

which were made solely to bolster the credit of the person receiving the loan. The merchants mutually understood that these accommodation loans represented no real business transaction. A common example of this was the frequent practice of banks and merchants to extend the date of payment of a pre-existing debt without collateral. An accommodation of this sort was made through the use of a bill or note. The instrument would be given as a security for the renewal of the debt, even though the paper itself represented nothing of value. In other instances, however, the paper represented a guarantee to pay the debt after its renewal at some future date.[34]

The practice of renewing due dates either through accommodations or through real commercial transactions was extremely common, and, because of their widespread use and their close similarity to instruments simply received in payment of pre-existing debts, judges had great difficulty in separating bona fide transactions from accommodations. Because of these complications, many courts in the United States refused to extend the principle of negotiability to any paper involving pre-existing debts. Other courts, however, seeking as broad a circulation of commercial paper as possible, upheld the opposite rule. And again, some states included both doctrines in their local law.[35]

Accommodations affected the status of negotiability in other ways. As noted earlier, accommodation paper was often endorsed to third parties who had no knowledge of the conditions of the original loan agreement. In such cases, determining the status of these innocent subsequent endorsees was not only crucial to their interests alone, but was also important to the general principle of negotiability. If subsequent endorsees were left uncertain about recovery on a bill or note because it might have involved an accommodation, they might increasingly become wary of endorsing any commercial paper since it was virtually impossible at times to distinguish between "real" transactions and unsecured loans. As with the confusion surrounding pre-existing debts, such an outcome would limit the transferability and circu-

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[34] FORUMS OF ORDER, *supra* note 2, at 38. *See also* J. STORY, *supra* note 1, at 17.

[35] FORUMS OF ORDER, *supra* note 2, at 38. See notes 29 and 30 *supra* for cases and authorities illustrating these conflicts.

lation of negotiable instruments.[36]

This problem was exacerbated because of business practices that used accommodations for purposes that were either fraudulent or verged on fraud. In many cases courts wrestled with the question of whether an innocent subsequent endorsee of such paper possessed an absolute right of recovery, even though the original parties to the contract had no collateral themselves. This was an extremely difficult problem, one in which there was a complete lack of agreement from state to state. Under the old common law, adhered to by some states, the innocent subsequent endorsee had no bona fide right in such cases, whereas, under other principles of mercantile law his right of recovery was absolute. Some states followed the mercantile rule, while others had precedents upholding both doctrines.[37] Failure to establish clear rules on this subject served to retard the formulation of a uniform principle of negotiability throughout the nation.[38]

Conditions in commercially important New York reflected the status of the commercial law in many states. Jurisdictional disputes between equity and common law courts, which led to periodic restructuring of the judicial system between 1816 and 1839, no doubt contributed to a lack of clarity in the law concerning the negotiability of bills received in payment of pre-existing debts. In 1821 in *Bay v. Coddington*,[39] James Kent, Chancellor of New York's equity jurisdiction, refused to extend the negotiability principle to certain forms of commercial accommodations involving fraud. In doing so, however, he *did* indirectly admit that bills received in payment of pre-existing debts were negotiable.[40]

Perhaps because of Kent's oblique recognition of pre-existing debts having value, later New York judges in the common-law courts misread *Bay v. Coddington* and decided that bills held for antecedent debts did not guarantee their holders an absolute right of recovery. In 1837, the reporter of the New York decision

[36] FORUMS OF ORDER, *supra* note 2, at 38-39.

[37] FORUMS OF ORDER, *supra* note 2, at 39.

[38] See notes 25-26 *supra* for authorities illustrating the lack of a uniform principle of negotiability.

[39] 5 Johns. Ch. 54, *aff'd*, 20 Johns. Rep. 637 (N.Y. 1822).

[40] *Id.* at 56-57. *See also* Warren v. Lynch, 5 Johns. Ch. 239 (N.Y. Ch. 1810).

Smith v. Van Loan[41] (which followed a true reading of Kent's decision), acknowledged that the question was unsettled but noted that the "weight of authority favored affording the rights of a bona fide holder to those holding bills received for pre-existing debts."[42] Soon the New York Supreme Court upheld the same principle in two banking cases.[43] The doctrine remained in dispute, however, until the twentieth century.[44]

Federal courts also dealt with the issues of pre-existing debt and accommodation paper. In the famous case of *Swift v. Tyson*,[45] the technical question involved the negotiability of a bill received in payment of a pre-existing debt, which was colored with possible frauds in its original making. Upholding the principle of negotiability. Justice Story, writing for a unanimous Court, declared that "general commercial law" governed such questions.[46] Later scholarship concerning this controversial principle has obscured the extent to which *Swift* was essentially a commercial law decision involving the security of certain forms of mercantile credit. Although the point had not been argued by counsel, Story introduced into his opinion the rule that bills received as collateral securities for previous loans were negotiable (like those received in payment of actual antecedent debts).[47] This extension of the negotiability principle to a form of accommodation paper was a novel enough judgment that it was resisted by Justice John Catron in a concurring opinion (he did not, however, disagree with the rest of the Story opinion).[48]

In the years to come, the *Swift* decision had a mixed impact on the nation's commercial law. Ohio,[49] New Jersey,[50] North

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[41] 16 Wend. 659 (N.Y. 1837).

[42] *Id.* at 59 n.*a.*

[43] Bank of Salina v. Babcock, 21 Wend. 499; Bank of Sandusky v. Scovill, 24 Wend. 115.

[44] *See* Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 881-83 n.23 (1930-31).

[45] 41 U.S. (16 Pet.) 1 (1842). See FORUMS OF ORDER, *supra* note 2, at 53-98 and T. FREYER, *supra* note 22, at 1-100 for in-depth and revisionist treatments of the *Swift* case.

[46] 41 U.S. (16 Pet.) at 19.

[47] *Id.* at 19-20. See note 55 *infra* for cases rejecting this dicta.

[48] Swift v. Tyson, 41 U.S. (16 Pet.) at 23 (Catron, J., concurring).

[49] Carlisle v. Wishart, 11 Ohio at 191-92.

[50] Allaire v. Harshorne, 21 N.J.L. 665 (1847).

Carolina,[51] Michigan,[52] Alabama[53] and other states[54] accepted Story's opinion insofar as it applied to pre-existing debts; these states did not, however, generally accept the extension of negotiability to include collateral securities.[55] New York, in the well-known decision of *Stalker v. McDonald*[56] was the only state to flatly deny the validity of *Swift*. Ironically, James Kent disapproved of this case, asserting that Story's decision established the "plainer and better doctrine."[57] By the 1850's, legal commentators proclaimed *Swift* as a "leading commercial case."[58] In federal courts it was used (and abused) to establish a fairly uniform body of commercial rules. But because in most instances federal judges could not control state courts, the impact of the *Swift* doctrine on local law was, at least until the end of the century, problematic.[59]

Applying the *Swift* doctrine, federal judges probably aided those business interests who came within the federal courts' jurisdiction (particularly wholesalers engaged in interstate trade). But throughout the antebellum era most commercial activity was either local or regional, and most of the disputes arising from such activity were governed by local law. In many cases—as with rules governing negotiability and accommodation in New York—this law was not settled. Various social, institutional, and ideological factors often undermined the formulation of clear principles controlling commercial obligations. The unsettled state of local law and the force of factors contributing to this condition, cast doubt on the validity of characterizing the law's function in economic development as entirely supportive. This

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[51] Reddick v. Jones, 28 N.C. (6 Ired.) 86 (1845).

[52] Bostwick v. Dodge, 1 Doug. 413 (Mich. 1844).

[53] Bank of Mobile v. Hall, 6 Ala. 639.

[54] *See* Bertrand v. Barkman, 13 Ark. 150; Blanchard v. Stevens, 57 Mass. (3 Cush.) 162 (1849); Stevenson v. Heyland, 11 Minn. 198 (1866); Atchison v. Davidson, 2 Pin. 48.

[55] Bank of Mobile v. Hall, 6 Ala. at 645-46; Roxborough v. Messick, 6 Ohio St. 676 (1856); Cook v. Helms, 5 Wis. 107. *See* Bramhall v. Beckett, 31 Me. 205 (1850).

[56] 6 Hill 93 (N.Y. 1843).

[57] 3 J. KENT, COMMENTARIES ON AMERICAN LAW 81 n.*b*. (13th ed. 1884).

[58] *See* 1 AMERICAN LEADING CASES 344 (J. Hare & H. Wallace ed. Philadelphia 1851); T. PARSONS, THE ELEMENTS OF MERCANTILE LAW 151 (2d ed. Boston 1862). *See also* T. FREYER, *supra* note 22, at 46-47.

[59] T. FREYER, *supra* note 22, at 45-100 for an analysis of the effect of *Swift*.

suggests that, at least in the crucial area of legally secured credit, the law's impact on development was more equivocal than often thought.[60]

If this conclusion is accurate it raises troubling questions concerning the exact role of the commercial law in the development of the antebellum economic order. More specifically, the view that law often did not facilitate economic development raises issues of the impact of legal rules on the character of the money supply, the proper characterization of debts as liquidated or merely extended, and the relationship between law and class. No attempt can be made here to deal with such issues in depth. It may be possible, however, to outline an approach through the use of manuscript legal records that might eventually place these problems in a new light.[61]

Debtor-creditor litigation at the trial level, insolvency case files, and a record of those jailed for debt provides a rather concrete impression of winners and losers and what was at stake in commercial disputes arising prior to the Civil War. A sheriff's "Goal Calendar" for West Chester Pennsylvania revealed valuable information about seventy-nine individuals incarcerated because of failure to pay their debts during 1813-1816. This record suggested something of the character of debt in a typical local commercial center. Persons were imprisoned for debts ranging from sixty-two and one-half cents to seventy dollars. The average debt was $17.00, but nearly half of these debts were $8.00 or less. The average length of incarceration was ten days, but nearly half of those jailed were released after one to five days. One man escaped and thirteen others were granted their freedom under provisions of the state's insolvency law. The rest of those imprisoned, however, left jail after their debts were paid by themselves, a business associate or family relative, or because their creditors provided for release (presumably because the debt was paid).[62]

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[60] Evidence supporting this argument is developed in Freyer, *Eminent Domain, Localism, and Economic Development in Antebellum America*, REGIONAL ECONOMIC HISTORY RESEARCH CENTER WORKING PAPERS 1-32 (1980).

[61] The following manuscript material is a small sample of extensive research carried on while in residence at the Regional Economic History Research Center, Eleutherian Mills-Hagley Foundation, Wilmington, Delaware during 1979 as a Postdoctoral Fellow.

[62] GOAL CALENDAR, SHERIFF, WEST CHESTER COUNTY, 1813-1816 (presently located in West Chester Historical Society).

The case files of insolvents in the federal district courts of the District of Columbia and Maryland from 1800 to 1850 provide further relative information about debtors. Although the amount of debt was greater than that of the West Chester group, there was a similar pattern in that relatively small debts made up the total. A merchant's total indebtedness was $15,908, but the individual amounts ranged from $20.00 to $700.00. More typical were the debts of: a shipbuilder whose debts ran from $42.00 to $250.00, totaling $3,475; an actor whose average debt was $5.00, totaling $683.00; and a contractor "on the public works" whose debts ranged between $5.00 and $50.00, totaling $496.00. A shoe salesman, several blacksmiths, and clerks, and a dealer in china, glass, and Queen's ware were further representative of these insolvents and the character of their debts.[63]

From this evidence emerges the profile of a typical debtor-creditor relationship. The average businessman's capital was composed of an aggregate of relatively small loans spread around numerous creditors. Usually, each creditor was, in turn, the debtor of someone else. This entwining of many relatively modest debts and credits made it rather difficult to determine whether at any given point in time a businessman was solvent. The short duration of imprisonments for debt in West Chester suggested that businessmen often went to jail, to, in effect, extend the length of time they had to cover their obligations. The frequency with which friends, relatives and even one's creditors released jailed debtors suggested that the overlapping network of debts and credits reduced the short-term risk of temporary nonpayment. Of course, in the long run the system was fragile, but such a disadvantage was balanced by the extent to which the system also gave enterprising individuals the means to start business at a relatively low cost. Thus, while a businessman of small means might fail several times, he could eventually establish a stable enterprise.

The unstable and shifting status of debtors and creditors influenced whether class conflict was an integral part of commer-

[63] The examples given here result from the author's survey of manuscript records of R621, Maryland Federal Circuit Court, equity and civil case files, Federal District Court for the District of Maryland Bankruptcy Records, and Federal District Court, District of Columbia, Bankruptcy Records, for the period 1800-1850.

cial credit relationships. As the evidence presented here shows, insolvency was a fact of life for both large and small businessmen. Because the pattern of debt was similar for most businessmen, virtually everyone was vulnerable to risks of failure. Given such an economic order, it may be said that debtor-creditor disputes involved *intra*-class rather than *inter*-class confrontation. At stake in these disputes was not a dominant class's control of another weaker class's resources. The issue instead concerned the distribution of scarce financial resources among competing interests belonging to roughly the same class.[64]

What impact did the rules governing negotiability and accommodation have on this business order? Extending the principle of negotiability to bills received in payment of pre-existing debts and as collateral securities gave creditors a stronger legal position than they would have had had their obligations been regulated by privity or other common-law doctrines. In an economy in which negotiable paper provided a large portion of the circulating medium of exchange, an increase in secured credit helped enlarge the money supply. The broadening of negotiability to include accommodations and pre-existing debts also provided incentives to use credit as a basis for further advances of credit rather than merely for the paying off of accounts. The overall impact of commercial law doctrines was to supply large and small businessmen, in both agriculture and commerce, with the means to develop their enterprise.[65]

However, the extent to which law functions solely in support of economic development was clouded in ambiguity. The federal courts (especially after *Swift*) did fashion a fairly uniform doctrine favoring negotiability and accommodation. This uniformity, however, extended only to cases coming within federal jurisdiction. The local law of the states completely lacked consistency of principle in rules controlling debtor-creditor obligations. After 1842, several states followed *Swift* by extending the principle of negotiability to include bills received for pre-existing debts;[66] but

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[64] See note 60 *supra* for a citation to an article containing corroborative evidence on this point.

[65] *See generally* C. GILBERT & H. KROUSS, AMERICAN BUSINESS HISTORY 112-13 (1972); G. PORTER & H. LIVESAY, *supra* note 17, at 29-34; Hammond, *Long and Short Term Credit in Early American Banking*, 49 Q.J. ECON. 87-95 (1934-35).

[66] See notes 49-54 *supra* for the relevant cases from these states.

these states generally did not extend the principle to include collateral securities and certain kinds of accommodation paper.[67] A few states, such as New York, rejected altogether efforts to establish a uniformity of commercial doctrine.[68] Moreover, this pattern of diversity of law from state to state further created barriers increasing the cost of business. Behind these uncertainties were social, institutional, and ideological factors that deterred the kind of unrestrained development so often associated with the antebellum American economy.[69]

This ambiguous impact of law on the economy suggested that the nation's acceptance of industrialization was more gradual than scholars have often maintained. A focus upon the gradualness of the law's response to a changing business order also reveals problems with an analysis based primarily on class. Manuscript legal records show that debtor-creditor disputes usually involved *intra*-class rather than *inter*-class confrontation.[70] These considerations support Roscoe Pound's observation that the "effect of economic change" upon law "is for the most part gradual and slow, no matter what class is affected."[71] This meant, Pound concluded, that entrepreneurial interests often have had as much to complain of for their treatment under the law as they had to welcome.[72] The evidence presented here suggests a need for testing Pound's thesis in a more thorough study of antebellum commercial law.

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[67] See note 55 *supra* for the relevant cases.

[68] See the text accompanying notes 56-57 *supra* for a discussion of New York's rejection of *Swift* in Stalker v. McDonald, 6 Hill 93.

[69] See FORUMS OF ORDER, *supra* note 2, at 19-35; T. FREYER, *supra* note 24, at 1-100 for background on these factors.

[70] See the text accompanying notes 4 and 65 *supra* for further elaboration on this point.

[71] Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 367 (1940). I am indebted to William Hurst for this reference.

[72] *See id.* at 365-85. *See also* T. COCHRAN, BUSINESS IN AMERICAN LIFE: A HISTORY 195 (1972); 1 F. REDLICH, THE MOLDING OF AMERICAN BANKING: MEN AND IDEAS 43-48, 57, 126, 135, 139, 142 (1968); 2 *id.* at 34, 38, 39, 116.