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INTRODUCTION

Few legal environments in the antebellum period were as ripe as that of Louisiana for the development of commercial law. Commercial practices shaped the development of commercial law, and in principle the law merchant of the United States, (the customs or usages recognized in commercially important centers throughout the country) had received complete recognition in Louisiana in consequence of Louisiana's cession to the Union in 1803.[1] However Louisiana was, and remains, the only "mixed" jurisdiction in the United States, operating under a civil code drawn primarily from Roman, Spanish, and French sources which underpins the whole of the state's legal relationships. Thus as one would expect, the Louisiana Civil Code modified that state's commercial law, influencing such important particulars as the status of contracting parties, the theory of contract, and the security devices regulating debtor-creditor relations. Many argued that this civil law influence was antithetical to the progress of commercial law, with lawyers asserting that even the protections afforded a wife's separate property were anti-commercial because they prohibited the husband from either alienating or securing loans with such property.[2] Nevertheless, as regards secured transactions, civil law institutions were very flexible and permitted optimal utility where the security interests of contract-

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[1] *See* Chaffraix & Agar v. Price, Hine & Tupper, 29 La. Ann. 176 (1877); McDonald v. Millaudon, 5 La. 403, 408 (1833); Barry v. Louisiana Ins. Co., 12 Mart. 493, 497-99 (La. 1822); Talcott v. McKibben, 2 Mart. 298, 304 (La. 1812).

[2] W. SAMPSON, SAMPSON'S DISCOURSE AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS, UPON THE HISTORY OF THE LAW, WITH THE ADDITION OF SEVERAL ESSAYS, TRACTS, AND DOCUMENTS, RELATING TO THE SUBJECT 76 (P. Thompson comp. 1822).

ing parties represented the object at hand.

Commerce in antebellum Louisiana was principally the business of factorage, the practice of commercial agents buying and selling vast quantities of agricultural commodities.[3] In the course of their dealings, factors generated an unusually large quantity of high quality commercial paper which ultimately underwrote Louisiana's system of state charted public banks—a system reputed to be one of the soundest in the United States.[4] It is apparent that this commercial law environment was animated by a psychology which recognized security as the foremost factor in appraising risks. In other words, security was the heart of the commercial transaction, and this commercial environment controlled the evolution of the *civil* law institutions of suretyship, mortgage, and pledge.

Security devices in the antebellum commercial environment played their most significant role in the context of commercial paper. It is difficult to appreciate the monetary realities of this period which produced a medium of exchange grounded in commercial paper in the absence of the federal government as guarantor. Personal security, then, was the essence of antebellum commerce, and credit relations were highly personalized even as respects the nation as a whole. Most important in securing commercial transactions was the personal surety, and a mere accommodation endorsement on a negotiable promissory note sufficed to create a suretyship in favor of a bona fide holder.[5] For example, Baring Brothers' endorsement on a note was enough to insure that note's negotiability anywhere in the Western world, and Baring's reputation as London's first commercial house would be honored even in the wilds of the American frontier.[6] Similarly, Nicholas Biddle was able to prolong the life of his Philadelphia bank many months beyond its actual insolvency by

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[3] *See* Ward v. Brandt, 11 Mart. 331, 423-24. *See generally* H.D. WOODMAN, KING COTTON AND HIS RETAINERS (1968) (describes the cotton factorage business in the South).

[4] *See* G. GREEN, FINANCE AND ECONOMIC DEVELOPMENT IN THE OLD SOUTH: LOUISIANA BANKING, 1808-1861, at 28-32 (1972).

[5] *See* McGuire v. Bosworth, 1 La. Ann. 248 (1846); Gilbert v. Cooper, 4 Rob. 161 (La. 1843); Guidrey v. Vives, 3 Mart. (n.s.) 659 (La. 1825); Cooley v. Lawrence, 4 Mart. 639 (La. 1817).

[6] R. HIDY, THE HOUSE OF BARING IN AMERICAN TRADE AND FINANCE 194-202 (2d ed. 1970).

exploiting his impeccable reputation with European investors.[7]

While security was ultimately a matter of personality, other confirmations of security as the crux of antebellum commercial realities were recognized in the procedural remedies afforded creditors when their debtors defaulted. The availability of executory process where the evidence of indebtedness contained a confession of judgment is an example of a security afforded creditors by means of a procedural remedy.[8] Debtor relief legislation, which was always popular in the western states, usually was couched in procedural devices also, but Louisiana lawmakers showed little inclination to upset confidence in the credit system by availing those who defaulted on their obligations with procedural escapes.[9] This article, however, will concentrate on the substantive devices available to contracting parties in antebellum Louisiana to enhance security, and demonstrate the role of the specie standard in ordinary commercial transactions.

I. SECURITY AND THE CIVIL CODE

A. *Development of the Pledge and Mortgage*

The Louisiana economy in the antebellum period was an important center for national commerce, and one would expect that the very nature of Mississippi River commerce would shape the evolution of Louisiana security devices. New Orleans was a credit center for the entire Mississippi River Valley, in particular for planters in the Deep South who relied upon New Orleans factors and banks to finance the operation of their plantations from year to year. The factors themselves were part of an intricate economic system based on national and international commerce and like the planters, they borrowed heavily through commercial channels to finance their credit. In this system, each party's ability to liquidate cash advances depended on a marketplace freed from uncertainties, whether economic or legal.

In the search for eradication of uncertainty in the commer-

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[7] *See* B. HAMMOND, BANKS AND POLITICS IN AMERICA, 500-13 (1957).

[8] LA. CODE OF PRACTICE art. 732 (1825).

[9] *See, e.g.*, Workman, *Opinion of the Code of Practice*, Louisiana Advertiser, February 9, 1826.

cial lending arena, the most widely used security device in antebellum Louisiana was the pledge, a basic form of security in civil law countries which was virtually indistinguishable from its common law counterpart.[10] The use of the pledge generally was restricted to movable property, a distinction which the Louisiana Civil Code institutionalized and which derived from the evolution of the pledge in the premier civil law jurisdictions of Europe. Thus, the pledge became the logical security device attendant to commercial transactions involving negotiable paper, a recognized category of movable property.[11]

A central problem with the pledge in antebellum commerce as it related to negotiable paper was whether such paper was transferred in the ordinary course of business to liquidate obligations or pledged as collateral security for advances of credit.[12] Such a distinction was often difficult, if not impossible, to draw with precision. In one sense, the pledge secures every obligation existing between a creditor and a debtor in a civil law jurisdiction,[13] but the application of such a broad principle inevitably becomes ambiguous when a succession of creditors claim privileges on a debtor's insufficient assets. A transfer of negotiable paper for a valuable consideration, or in civil law terminology, a cause, theoretically is free of ambiguity, but the very nature of credit transactions obscures every certainty upon which men or business prefer to rely.

This ambiguity was exacerbated by the procedural burden imposed on businessmen who were parties to a pledge arrangement. Until the decade prior to the Civil War the pledge lacked the flexibility contemplated by commercial imperatives because the Louisiana Civil Code required every pledge to be executed in notarial form. This involved authentication of the pledge before a notary and two witnesses, and a subsequent recording in the mortgage records.[14] Clearly such requisites were a serious inconvenience to commerce, especially when one observes that at that time in common law jurisdictions it was possible to effect by pri-

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[10] LA. CIV. CODE arts. 1825, 3100-20, 3133-53 (1870).
[11] *Id.* art. 3135.
[12] *See* Gray, Macmurdo & Co. v. Lowe, Pattison & Co., 7 La. Ann. 465 (1852).
[13] LA. CIV. CODE art. 3183 (1870).
[14] *Id.* art. 3158; *id.* art. 3125 (1825).

vate act a pledge of any securities attributable to a course of interrelated transactions, such as collateral securities derived from a drawing account between two merchants.[15] Of course, Louisiana merchants entered into pledge agreements, but their activities were somewhat circumscribed by the burdensome notarial form required for a valid pledge. The inconveniences associated with legal requisites for a pledge were greatly mitigated by the factor's privilege, which will be described later.[16]

Merchants, particularly when raising money, certainly were aware of the formal guidelines surrounding the use of the pledge. This concern with form was evident in *Gray, Macmurdo & Co. v. Lowe, Pattison & Co.*,[17] where the issue was whether the plaintiff had acquired the draft sued on in full ownership or as collateral security for the repayment of a loan. The Court outlined the historical inconvenience of the procedural requirements surrounding the pledge when it observed that formerly the Civil Code

> prevented the circulation of negotiable paper, by way of pledge or security, and limited its negotiability to cases of sale or discount, in which the property in the paper was absolutely transferred, unless the forms, required by the code, were observed in the contract. These forms, men of business, in their transactions, had neither time nor inclination to observe, and the consequence was, of necessity a resort to some other legal mode, in which negotiable paper could be made available for the ordinary purposes of trade and exchange. Hence, for the purpose of raising money on a note, which was not to be transferred absolutely, it was sold with a privilege reserved by the owner to redeem it within a certain time.
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> These articles of the code, after having been a most serious incumberance to commerce, were, by common consent, repealed at the last session of the Legislature.[18]

The articles that had been repealed, however, were in force at the time the dispute between the merchant houses of Gray and

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[15] Fletcher v. Morey, 9 F. Cas. 266 (C.C.D. Mass. 1843) (No. 4, 864).

[16] See notes 39-53 *infra* and the accompanying text for a discussion of factors and vendors privileges.

[17] 7 La. Ann. 465 (1852).

[18] *Id.* at 465.

Lowe arose. A third party, also a New Orleans merchant house which had since suspended payments, had received money from the plaintiffs and for this favor had agreed to "sell a certain amount of paper [which paper obligated the defendant], reserving the right of repurchasing this paper at a stipulated price on a given day."[19] This method of raising money in the market place was very typical of the credit facilities New Orleans merchants afforded each other. The redemption period for such "loans" rarely exceeded thirty days, during which time it was possible for the holder of redeemable paper to utilize it to collateralize other unrelated credit transactions. A witness who testified for the plaintiff regarding transactions of this kind noted that he

> did not understand the transaction to be a loan, with the paper left as collateral security. I would not have made a loan on a pledge of the paper as collateral security; on the first transaction with Greenland, Mr. Macmurdo consulted me about the matter, and I told him, that a loan on pledge of paper would not be legal, and that he must have a sale of the paper . . . .[20]

The defendant argued that the plaintiff's claim to the paper was faulty in that it was impossible to determine by which of a series of contracts between the plaintiff and the holder the former had acquired the draft in contention. The Louisiana Supreme Court, however, did not find such reasoning persuasive, observing that to countenance such an argument "would establish a precedent which would operate a check upon a free and fair circulation of negotiable paper, and [would] be an innovation of the law as well as of the usages of trade in that article."[21]

It should be noted that the pledge underpins all forms of security in the Louisiana Civil Code, whether it be the pledge itself, the mortgage, or suretyship. The characteristics which distinguish the security devices relate primarily to the nature of the property burdened with an encumbrance and not to general principles regulating the security acquired by a pledgee. The pledge, as previously noted, is associated with movable property, whereas the mortgage is identified with immovable property.

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[19] *Id.* at 466.
[20] *Id.* at 468.
[21] *Id.* at 472.

Suretyships, on the other hand, effectuate loans of credit by contracting a third party's personal security for the benefit of a creditor. The pledge-like qualities common to all security devices in the Louisiana Civil Code were especially relevant in the antebellum period, a time when sensitivity to general commercial principles and their practical application in everyday commercial transactions was explicit in judicial rulings.[22]

For example, one can observe in this regard the utilization of the mortgage. One of the most creative uses made of the mortgage in antebellum Louisiana—in keeping with the Civil Code's use of security to further commercial transactions—involved financing the capital of the state's several land banks. George D. Green has presented an excellent account of the political and economic environment which fostered this unique innovation in his *Finance and Economic Development in the Old South*,[23] but it is important to notice some of the particulars relative to securities created in connection with financing banking capital. The acts of the legislature incorporating such banks as the Consolidated Association of Planters, the Citizens' Bank, and the Union Bank all contained provisions for financing capital through the instrumentality of bonds secured by mortgages on real estate.[24] A subscriber to capital stock would execute a mortgage on real estate in favor of the bank, resulting in stock subscriptions being financed with loans secured by mortgages on stockholders' real estate. The Act incorporating these banks also provided that mortgages thus received were thereby pledged to the bond holders to secure the redemption of their debentures, thus obviating the necessity of complying with the formalities required by the Civil Code. Every stockholder on depositing and pledging his certificate of stock was "entitled to a credit equal to one-half of the total amount of his stock."[25] The charters of these banks, contemplat-

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[22] *See, e.g.*, Matthews, Finley & Co. v. C.M. Rutherford, 7 La. Ann. 225 (1852).

[23] *See* G. GREEN, *supra* note 4, at 109, 130-31.

[24] An Act to incorporate the subscribers to the consolidated association of planters of Louisiana, 1827 La. Acts, 1st Sess. 96; An Act to incorporate the Subscribers to the Union Bank of Louisiana, 1832 La. Acts, 3d Sess. 42; An Act to incorporate the Citizens' Bank of Louisiana, 1833 La. Acts, 1st Sess. 172.

[25] An Act to Incorporate the Citizens' Bank of Louisiana § 11, 1833 La. Acts, 1st Sess. 172, 180.

ing "loans of money . . . on mortgages, [and] discounts [of commercial paper] on the faith of mortgages," contained one very significant provision which permitted married women to obligate themselves jointly and *in solido* with their husbands "to renounce, cede, mortgage and hypothecate her rights, privileges, or property, as well dotal as of any other nature of kind whatever."[26] This provision constituted a wholesale exception to Louisiana's matrimonial regime law, which at that time segregated the married woman's separate property from the husband's patrimony and prohibited her from binding herself for her husband's debts contracted by him before or during the marriage.[27] Even her dotal property, which was protected to the extent that the husband's creditors could not look to it to satisfy their claims, could be mortgaged, thus augmenting the husband's capacity to borrow. The provision, no doubt, pleased those with a commercial bias who regarded Louisiana's civil law as "too anti-commercial." This represents another legal effort in antebellum Louisiana to lend greater security to commercial transactions under the Civil Code.

B. *Commercial Paper as a Collateral Security*

Against this backdrop of the evolution of the pledge as a legal tool to promote security in commercial dealings one can perceive the significant role played by commercial paper in the commercialization of antebellum Louisiana.

The importance of commercial paper as security was amply elucidated in the early case of *King v. Gayoso*,[28] wherein the Louisiana Supreme Court noted:

> To pledge a note, is, therefore, to make a legitimate use of it. In the usual course of business, notes and bills of exchange are used to pay debts, make purchases or raise money by discount or pledge. He, therefore, who gives a bill or note, authorizes the use of it for any of those purposes, and must know, by such a disposal of it, the payee will enable the endorsee to repel any

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[26] *Id.* § 25, at 190.
[27] LA. CIV. CODE art. 2398 (1870).
[28] 8 Mart. (n.s.) 370 (La. 1829).

> claim of the maker, on the score of want of consideration, concealment, or compensation.[29]

Commercial paper's importance as security was especially conspicuous in the relations of factor and planter, and it may therefore be helpful to describe a series of hypothetical transactions involving the use of commercial paper as security.

The most basic transaction was one where the planter gave the factor a mortgage on his plantation for future endorsements, the mortgage thus securing the factor's endorsements of promissory notes to be made by the planter at a later time.[30] The factor furnished credit to the planter, which usually was accomplished with either a draft on the factor or a promissory note made by the planter and endorsed by the factor. In the latter instance, the factor was treated as an accommodation endorser or surety and hence solidary liability was established with the planter under the rules governing suretyship. The factor either pledged the promissory note or discounted it to secure his own credit.

Between planter and factor, and between factors, it was common to advance credit by means of a promissory note which had no other security than the maker's personal guarantee. The lender gave his paper to the borrower, who negotiated it in the marketplace with or without an endorsement, depending on the credit-worthiness of the maker. It was not uncommon for the planter to assist the factor in obtaining credit by means of a promissory note secured by a mortgage on the plantation, which the factor subsequently negotiated.[31] Negotiability and discounting were controlled largely by the conditions of the marketplace; thus, even impeccable credit would not insure a sale of paper at par value. Thus, it can be seen that the pledge of collaterals was an important alternative to discounting, and in a real sense the pledging of collaterals was equivalent to a loan secured by an obligation.

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[29] *Id.* at 374.

[30] *See* Brander v. Bowman, 16 La. 374 (1840); Bauduc v. His Creditors, 4 La. 247 (1832); Roussel v. Dukeylus Syndics, 4 Mart. 329 (La. 1816), LA. CIV. CODE art. 3292 (1870).

[31] Commissioners of the Merchants Bank v. Etienne Cordeviolle, 4 Rob. 506 (La. 1843); Yard & Blois' Syndics v. Srodes, 9 La. 479 (1836).

The paper market created by these transactions resulted in varied consequences but it is important to note that its ramifications rarely surpassed the personalities identified with evidences of indebtedness. A particular kind of security might flow from beneath the waves of paper daily negotiated in the New Orleans money market, but throughout personal reputation remained the critical focus of this turbulent sea, and it is a mistake to assume that collaterals alone mounted the most prominent tier in this pyramiding structure. One judge of the New Orleans commercial court admonished London's merchants "to make the necessary enquiries before accepting paper drawn by merchants unfamiliar to them."[32] At another extreme, a prominent New Orleans merchant was reluctant to raise a defense of usury, although confronted with a flagrant violation of the state's usury prohibition, for fear of harming his reputation in the financial community:

> In opening the argument on the question of usury, the counsel for [the merchant] Hagan, aware that his plea is usually an odious one in public opinion, and is also scanned with something like disfavor by courts of equity, has defended the reputation of his client, by suggesting that Hagan has never sought to invalidate, as he says he might successfully have done, the claim of the Canal Bank for its full debt of $12,000, and eight per cent interest, and that he has only taken refuge under this plea, at a late period of the trial, to aid himself in resisting a vigorous effort made by his adversary to impose upon him a personal liability for debts amounting, in principal alone to $67,510, and bought by his antagonists for $470. This is a question which concerns the reputation of Hagan, rather than the legal merits of this controversy; but it is perhaps just to say in passing, that the remarks of the counsel with regard to his client's motives and conduct, seem justified by the record.[33]

Thus, it is evident that the antebellum Louisiana legal system reorganized and relied upon emphasis in the commercial world upon the credit reputation of commercial actors. This recognition served to enhance security in the marketplace against the backdrop of a Civil Code often antithetical to the realities of

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[32] Lanfear v. Blossman, 1 La. Ann. 148, 157 (1846).

[33] New Orleans Canal & Banking Co. v. Hagan, 1 La. Ann. 62, 66 (1846).

commercial intercourse. A similar prejudice against availing one's self of legal recourse, which was shared by merchants generally, will be discussed in connection with the specie standard and its relationship with commercial paper.[34]

In this regard, one should emphasize the legal atmosphere surrounding bills of exchange which were an extremely important feature of the New Orleans money market, particularly in financing the credit of factors. Planters not only deposited promissory notes with their factors to enable them to raise money, but also frequently drew bills of exchange payable to third parties who then endorsed them in blank. A factor upon whom such a bill was drawn accepted it before maturity and negotiated it in the money market, frequently receiving another merchant's accommodation paper. The Louisiana Supreme Court observed in *Greenwood v. Lowe & Pattison*[35] that such cross acceptances "for mutual accommodation" were typical in the New Orleans money market, and further noted that:

> To a lawyer, applying to such a case, the technical doctrines which govern in the general the contracts of a bill of exchange, or perhaps to a foreign merchant, the transaction would seem anomalous. For as a general rule, when a bill gets into the hands of the acceptor, the contract is functus officio. But this seeming incongruity is explained by the common course of business in New Orleans, with which every merchant here is familiar, and to which it would be unreasonable for us to shut our eyes, since it has so frequently been illustrated by our records in commercial cases. The planters, as a class, are in constant need of advances; the New Orleans factors as a class, are in as constant need of discounts. Out of this state of things, has arisen the notorious practice of the factor receiving from the planter his bill on the factor, which the latter accepts, and gets discounted in the market, puts the proceeds to the planter's credit, and looks to the promised shipment of his crops to place the acceptor in funds to meet the bill. Acceptances to the amount of many hundreds of thousands of dollars, are thus, we have no doubt, thrown into the New Orleans

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[34] See the text accompanying notes 89-90 *infra* for a further discussion of the prejudice against merchants who brought their commercial disputes into court.

[35] 7 La. Ann. 197 (1852).

bill market annually.[36]

The issue of whether the plaintiff in that case had received the defendant's paper in bad faith via another merchant was so hopelessly intertwined with the factual situation in the money market that the case was remanded for the taking of further evidence and for a new trial by a jury of merchants, as it was "desirable to know what a jury of merchants would think in a matter of this sort, which involves a question of mercantile good faith."[37] The Louisiana Supreme Court thus showed itself as being very sensitive to economic conditions and market realities, indicating an awareness of the pressures which existed "at frequently recurring intervals in the New Orleans money market, and of the precarious character of certain classes of mercantile paper."[38]

C. *Factor's and Vendor's Privileges*

If Louisiana's early legal system was inflexible in the area of security because it refused to allow a pledge of securities resulting from a series of transactions to be effected by private act and without a physical delivery of those securities, the practical effect of the factor's privilege in large measure compensated for this deficiency. In the Louisiana civil law system, a privilege is a right of preference which arises by operation of law. A factor's privilege was reflected in the fact that the factor was completely secure for the advances he had made to a consignor during the course of a year, provided he had in his possession property consigned to him by the consignor, or provided he could show a bill of lading or a letter of advice which indicated that the property had indeed been dispatched to him. This privilege extended to the unpaid price of goods that the factor had sold for the planter on credit and it was applicable to a general balance of account, not being restricted to specific advances made on particular consignments.[39]

A problem developed, however, when the factor's privilege

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[36] *Id.* at 197-98.

[37] *Id.* at 200.

[38] *Id.* at 199.

[39] Gray, Durrive & Co. v. Bledsoe, 13 La. 489 (1839); LA. CIV. CODE art. 3247 (1870); LA. CIV. CODE art. 3214 (1825).

and the vendor's privilege on movables arose simultaneously and encumbered the same consignment of goods. Competing privileges were likely to arise when a merchant was in failing circumstances, had possession of property consigned to him by a planter or other merchant, and had drawn bills of exchange on a third party, thus effectuating a sale of the consigned property. In the latter transaction, often the buyer was a commission merchant, entitled to a factor's privilege on all acceptances made on account of the consignor-merchant. The consignor was deemed to have lost control over the property upon remittance of the bill of lading to the consignee, but often the only evidence of a transfer of ownership was a warehouse receipt. Frequently, too, bills of lading were attached to bills of exchange and brokered in the New Orleans money market, thus substantially increasing the likelihood of their being sold to innocent third parties buying on the faith of the collaterals. But, such transactions appear to have contained few if any pitfalls, because "[a]ccording to the course of trade [in New Orleans], the bill of exchange drawn on a particular shipment, accompanied by the bill of lading, usually represents the price of property sold, or the means of re-imbursement of the price to some party."[40]

Generally, Louisiana courts in the antebellum period resolved this dilemma by recognizing that it was more equitable that a vendor who delivered possession of his property to a vendee without being paid for it "should suffer by the acts of the vendee, than that a third person who made advances upon the faith of the vendee's possession should lose by it."[41] This judicial posture was evident in *Lee & Ritchie v. Galbraith*,[42] where the plaintiff argued effectively that the "lien" of the consignee did not exist, because the merchandise had not been consigned to the intervenors for sale, and that the vendor's privilege of the plaintiff was still in force, since the defendant-vendee still had possession of the goods. The intervenors had, however, made advances on the goods in the vendee's possession and certainly seemed to satisfy most of the criteria for entitlement to a factor's privilege,

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[40] Fetter v. Field, 1 La. Ann. 80, 82-83 (1846).

[41] *See* Lee & Ritchie v. Galbraith, 5 La. Ann. 343, 349 (1850).

[42] *Id.*

except that the transaction more or less resembled a sale.

In addition, the plaintiff relied upon the Civil Code pledge provisions by arguing that the intervenor also was not a pledgee, although he held warehouse receipts for the property, because "the act required by article 3125" had not been executed.[43] To support this position, he cited *Erwin v. Torrey*,[44] a case which involved a conflict of privileges between a vendor and a factor who had made advances, and the plaintiff further noted that in *Fetter v. Field*[45] "the fact of possession, and the change of possession according to the usual course of business" was decisive in determining whether the vendor's or the factor's privilege would prevail.[46] Counsel for the defendant-intervenor, however, presented an excellent brief which argued for recognition of commercial realities:

> On what principle, then, of commercial law or of public policy, can it be held that the defendants should, on this account, forfeit their privilege on the property? The object of the law in conceding a privilege to commission merchants for their advances, is to facilitate commercial transactions, by enabling the holders of property to obtain money upon it in advance of the sale, and thus wait a favorable market.
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> It will not be denied that it is altogether repugnant to this system to incumber commercial transactions with the formalities of the contract of pledge, as required by the code. It is true that the system has not been fully recognized and uniformly upheld by the courts of this State. In some instances it has been marred and impaired by the application of the provisions of the code to cases, to which it is believed they were never intended to apply, and where such application has produced nothing but mischief and confusion. In other instances, the inconvenience and evil consequences of such an infringement of the commercial law, as recognised by all other States, were so obvious and glaring that even the positive enactments of the code were made to yield to the "customs of merchants." The

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[43] *Id.* at 343-46 (arguments of counsel).

[44] 8 Mart. 90 (La. 1820), *cited by counsel* in 5 La. Ann. at 344.

[45] 1 La. Ann. 80 (1846), *cited by counsel* in 5 La. Ann. at 344.

[46] 1 La. Ann. at 84, *quoted by counsel* in 5 La. Ann. at 344.

> result has been that our commercial system, if we may be said to have a commercial system, is deformed and incongruous. But in recent cases the courts have evidently sought to restore our jurisprudence to a conformity with the Commercial Code of the other States. The present case presents another opportunity to decide whether commercial contracts in this State shall be decided according to the Commercial Law, which has been so often held to be in force, or shall continue subject to the doubts and perplexities of conflicting systems of jurisprudence.[47]

The Louisiana Supreme Court took a rather restrictive view of commercial realities and held that the plaintiff-vendor's delivery of the property to the vendee had been injudicious.[48] Therefore, the intervenors' claim was proclaimed the superior one and the Court thereby struck a blow for legal recognition of commercial realities. At the same time, it seems likely that, but for the transfer of the warehouse receipts to the intervenor, the vendor's privilege would have prevailed; nevertheless, neither conclusion resulted in a uniform rule to what was essentially a practical dilemma in the context of commercial realities.

The court's decision was bound to introduce a new consideration, premised upon caution, in business transactions between buyers and sellers in the marketplace. A variety of rules were developed to match transfer of possession with commercial realities, and it is significant that possession alone became the critical factor in analyzing commercial transactions. This point is particularly important because, under Louisiana's law of sale, transfer of ownership takes place at the moment the parties agree to the sale and a physical transfer of possession is not necessary to invest the vendee with ownership.[49] Thus, the position of a third party dealing with the vendee is strengthened considerably in relation to the original vendor. Nevertheless, in the case of *Campbell v. Penn*,[50] possession was deemed to be the controlling criterion and hinged in this instance on whether a transfer between vendor and vendee was recorded on the black book of the cotton

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[47] 5 La. Ann. at 346-47 (arguments of counsel).
[48] *Id.* at 349.
[49] LA. CIV. CODE. *art. 2456 (1870).*
[50] *7 La. Ann. 371 (1852).*

press where the goods had been placed by a broker for trans-shipment.[51] This result was reached despite the fact that there was no want "of good faith in these transactions, on the part of either the plaintiff or intervenors. One or the other . . . [had to] suffer, by the frauds of an unfaithful cotton speculator."[52] The dissenting justice wrote most convincingly that the plaintiffs had advanced money to the fraudulent speculator "upon the faith of the property, of which he had substantially the apparent control," and that therefore the vendee had "for purposes of commerce" actual possession of the property.[53] It is worth noting that, although the Louisiana Supreme Court reached a result of effecting a division of the cotton between vendor and consignor, more appropriate to the wisdom of Solomon than the exigencies of commerce, a strong tendency to protect good faith third parties was still discernible, especially where the vendor failed to appreciate a usage of commerce, such as in the case of cotton where a transfer of possession was required to be placed on the black book of the cotton presses.

II. THE SPECIE STANDARD AND COMMERCIAL PAPER: THEIR IMPORT FOR THE CIVIL CODE PROVISIONS ON MONIED OBLIGATIONS

Most historians concerned with the operation of the specie standard in the nineteenth century have focused on the area of banking. While banking was an important index of monetary stability, as evidenced by bank charters which specifically provided for convertibility of notes into specie, it is important to recognize that bank notes served simply as a buttress for a monetary system grounded upon commerce. Bank notes merely supplemented the money supply and, like bills of exchange and promissory notes, were a type of commercial paper.[54]

To understand the monetary system in the last century, one must realize that the federal government regulated that system,

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[51] *Id.* at 373.

[52] *Id.* at 372.

[53] *Id.* at 376 (Slidell, J., dissenting).

[54] *See* R. TIMBERLAKE, THE ORIGINS OF CENTRAL BANKING IN THE UNITED STATES 31, 187 (1978).

for the most part, only when necessary to finance the exigencies of government in times of war. Generally, control of the monetary system was in private hands and the composition of the money supply was reflected in traditional instruments of commerce. Thus, as might be expected the monetary system appears to have been fairly susceptible to commercial pressures, and the fact that commercial paper constituted such a large part of the money supply resulted in a certain symbiotic relationship between money and commerce.[55]

In the context of our analysis of the legal responses to the Civil Code's structure in the areas of commercial security, we will consider the operation of the specie standard relative to commercial paper and the significance of specie convertibility for the Louisiana Civil Code articles on monied obligations. In particular, Article 1935, which appears to limit damages to legal interest where there has been a delay in the performance of an obligation to pay money,[56] will be placed in its historical context to reflect a contemporary monetary system that responded to currency fluctuations and changes in the course of trade, both internationally and between regions of the United States. Thus, it will be shown that a vast area of consequential damages, which resulted from monetary dislocations, remained outside the Civil Code's regulatory scheme. Legislative efforts to control consequential damages which flowed from the monetary environment, were few and always futile in their attempts to alleviate hardships.

A. *Money and Credit*

In antebellum Louisiana, the money supply was composed of gold and silver coins, governmental obligations, and, most importantly, commercial paper, *i.e.*, bills of exchange, promissory notes, checks, drafts, and bank notes. The most familiar form of commercial paper in everyday transactions were bank notes, which had much the same appearance of a present day federal reserve note. Issues of state chartered institutions were by law

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[55] *Id.*

[56] LA. CIV. CODE art. 1935 (1870).

convertible into specie on demand, and the presence of a convertibility provision in most bank charters indicated contemporary acknowledgement of the specie standard's subsuming influence in the monetary system.[57] The role of bank notes in the monetary system has been thoroughly documented by banking historians,[58] but for the purpose of our study it is important to remember that bank notes merely represented another kind of commercial paper.

Banking historians have appreciated the role of the Second Bank of the United States in stabilizing exchanges within the United States and in providing a medium of exchange that approximated a uniform national currency. The extent to which this institution represented a hybrid of banking functions, whether central or commercial in their character, should suggest that, while the Second Bank was the largest bank in the antebellum period, it was not deserving of the denomination "Central Bank."[59] Nicholas Biddle, after all, prided himself on associating the Bank's vast discounting operations with the commercial paper market,[60] but after the demise of the Second Bank, note circulations throughout the country were largely localized, rarely passing between regions except to perform a clearinghouse function.[61]

The only form of commercial paper which circulated between regions of the United States in the antebellum period was the bill of exchange. This most important instrument of commercial credit was not only the sustenance of commercial banking but was also a key stabilizing influence in the monetary system. The strength of New Orleans banks, for example, in the antebellum period has been associated with the huge volume of trade acceptances generated by commerce passing through the port, and bank-note issues themselves were tied to the banking system's discounting of bills of exchange.

This vital role of bills of exchange was especially accented in

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[57] *See* R. TIMBERLAKE, *supra* note 54, at 14-16, 90-91, 132.

[58] *See id.* for an example of documentation of the role of bank notes in the 19th century monetary system.

[59] *See id.* at 212-13.

[60] *See id.* at 30-32.

[61] *See generally id.* at 40-41.

the commercial lending arena. The commercial banking system, which comprised most of the Louisiana banking industry in the antebellum period, could facilitate short-term loans of credit but not long-term loans. Even six months was considered a lengthy period for a loan of credit via a bill of exchange, although the system did permit some flexibility in the form of redrafts. Long-term loans secured by mortgages on real estate, as they exist today, were practically non-existent, except where such loans were negotiated through private channels.[62] The importance of personal credit for financing business ventures has yet to be fully appreciated. Similarly, merit will be found in the supposition that the absence of a uniform, stable currency in the last century contributed to the difficulty of financing long-term loans through the banking system.

B. *Damages on Protested Bills of Exchange*

The failure of the drawee of a bill to accept or pay the bill at maturity resulted in the holder's protesting the instrument and demanding payment either from an immediate endorser or from the drawer. The particulars governing acceptance and payment, a formal protest in notarial form, and whether the drawee had to proceed against his immediate endorser or might choose instead to sue the maker were governed by a complex structure of legal rules which varied from jurisdiction to jurisdiction. Much valuable information concerning the conditions of antebellum commerce may be discovered by mastering specialized rules, such as the ones controlling notice of protest, but the purpose of our study is to elucidate an historical perception that all forms of commercical paper derived their index of value from the specie standard.

This perception is evident when one considers that the par of exchange utilized in international transactions was affected by "any discrepancy between the actual weight or fineness of the coins, or of the bullion for which the substitutes used in their

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[62] *See generally* G. GREEN, *supra* note 4, at 29-30, 66-67, 115-16.

place [would] . . . exchange, . . . [and] by any sudden increase or diminution of the bills drawn in one country upon another."[63] The cost of conveying bullion from one country to another formed the limit within which trade imbalances might fluctuate, and the value of a bill of exchange purchased in the money market for remittance purposes likewise reflected monetary fluctuations. Thus, we can see that par value formed the center of oscillations created by trade imbalances, with species costs determining, in theory, the outermost limits of such fluctuations.[64]

Damages on protested bills of exchange were made to depend, not only on the course of trade between countries or between regions in the United States, but also on currency fluctuations. Justice Story was emphatic about this point in his seminal treatise on bills of exchange, observing that the principal sum was ascertained by "its true or par value at the place of acceptance or payment," so that any fluctuations in the relative value of currencies would be compensated for when determining the extent of damages.[65] In this regard, damages were determined by the rate of re-exchange, *i.e.*, the cost of a bill drawn in the country where the acceptance was to have been made on a country where either a drawer or an endorser resided. The re-exchange value contemplated the costs to the holder commensurate with losses resulting from damage to his credit resulting from his reliance on the protested bill, his issuance of paper against it, and his inability to honor such obligations as they matured. There was no burden on the holder to prove actual losses: re-exchange in theory precluded any possibility of the holder suffering any loss by permitting him to draw on the endorser or drawer for the true value of the protested bill without regard to the costs of negotiating such a bill in the marketplace. The holder, then, was entitled to draw on the endorser or drawer for the par value of the protested bill, but the costs of negotiating such a bill depended on the par of exchange (equalization of monetary units of value), the course of exchange (stability and fluctuations in trade be-

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[63] J.R. MCCULLOCH, 1 A DICTIONARY, PRACTICAL, THEORETICAL, AND HISTORICAL, OF COMMERCE AND COMMERCIAL NAVIGATION 657 (H. Vethake ed. 1853).

[64] *Id.*

[65] J. STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND §§ 30-31 (1843).

tween countries), and the credit-worthiness of drawer or endorser.[66] With regard to credit-worthiness, certainly there were instances when a drawer's credit was so impeccable that a third party came forward and payed the protested bill for his honor. There are indications that, when a third party paid for the honor of the endorser, the endorser still was entitled to claim from the drawer damages that were attributable to trade fluctuations and monetary depreciations. The allowance of such damages was premised on the sound argument that the endorser's credit resources, which might otherwise have been employed in profitable pursuits, had been used in the drawer's behalf.[67]

It may perhaps be difficult to comprehend the justice of a system which meted out exorbitant financial penalties to drawers and endorsers of dishonored bills of exchange. However, it is important to reflect on the tenuous character of antebellum credit resources and remember that commercial credit was a prerogative of the wealthy. It is important as well that the credit system of the last century lacked the multifarious dimensions of a consumer oriented society. In that light, credit was too precious not to deserve every safeguard, and most certainly antebellum businessmen first examined the security interests guarding their transactions and then assayed the risks involved in their enterprises.

C. *Legislation Respecting Rates for Damages*

Attempts were made throughout the antebellum period to limit the scope of damages on bills of exchange protested for nonpayment. Every state, including Louisiana, adopted laws specifying a percentage of the bill's true value as liquidated damages in lieu of re-exchange. It is difficult to imagine how such laws, which varied among jurisdictions within the United States, effectuated desirable outcomes if the parties to bills of exchange had to assay yet another factor in computing the costs of credit. These early attempts to soften the harsh effects of the specie standard in

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[66] *Id.*

[67] *See* Bank of the United States v. United States, 43 U.S. (2 How.) 711, 737-38 (1844).

commerce resulted from and were sensitive to the hardships caused by monetary inflexibility; yet, specie was an essential element for securing credit and it seems naive to suppose that legislative specification of damages successfully ameliorated the impact of fluctuations in the course of exchanges, whether between regions in the United States or in international commerce.

Furthermore, the legislators completely failed to appreciate the realities of bank-note depreciations and their connection with the marketplace. The stability of bank-note issues in the nation's commercial cities was grounded in the traffic in bills of exchange; thus, fluctuations in the course of trade affected a bill's redemption in current funds and in the most exaggerated circumstances hastened redemption in specie. Given the scarcity of specie in a panic environment, bills, too were also likely to depreciate in value, thereby imposing an additional hardship for the drawer who was legally bound to reimburse the holder of the protested bill in specie or its equivalency in current bank notes.

Louisiana's first law dealing with bills protested for non-payment was enacted in 1805, during the territorial period. That legislation distinguished between a bill drawn or endorsed in Louisiana upon a person in a foreign country and one which was drawn on a person in another state. In the case of the former, damages were fixed at twenty percent "and so in proportion for any greater or less sum, in the same specie as the said bill or bills were drawn, or current money of their territory, equivalent to that which was first paid by the drawer or endorser."[68] Apparently, the legislation contemplated depreciating currencies that were particularly aggravated in the foreign trade.

When bills drawn or endorsed upon persons elsewhere in the United States had been duly protested for non-payment, they were subject to a ten percent charge for damages, but no mention was made of equalizing currencies, an omission for which a plausible explanation suggests itself. Bills drawn in dollars and payable in the United States were redeemable in gold and silver; similarly, specie also protected bills which were payable in the currency of a banking institution, because banking charters con-

[68] An Act Concerning Bills of Exchange and for other purposes, 1804 Acts of the Territory of Orleans, 1st Sess. 96.

trolled note issues with convertibility provisions. The Louisiana legislation, then, contemplated damages as compensation for fluctuations in the course of trade. Currency depréciations affected all types of commercial paper, but it is fairly easy to discern that the specie standard was perceived as the ultimate security for the immutability of contracts.

Legislative solutions for economic exigencies seem always to be localized and at best suppressive of the most egregious features of eroding fortune, and this maxim was certainly true regarding damages or protested bills of exchange. Louisiana's legislation on damages was revised in 1838, no doubt in response to the pernicious effects of the 1837 panic which had its origins in the Anglo-American trade. The panic severely damaged the credit of all major houses on both sides of the Atlantic and left in its wake a voluminous number of bills drawn on England which were protested for non-payment.[69] Political realities demanded some form of relief for Louisiana's men of business, who daily confronted the realities of falling prices, local bank-note depreciations, and vanished credit. In response to this situation, damages on foreign and domestic bills were reduced by half, to ten percent and five percent respectively. The matter of depreciating currencies, whether foreign or domestic, was addressed specifically, and it is indicative of the times that the legislature deemed it proper to provide for varying *domestic* rates of exchange, a provision absent from earlier legislation.

> Sect. 3. [I]f the contents of such bill be expressed in the money of account of the United States, the amount of the principal and of the damages herein allowed for the non-acceptance or non-payment shall be ascertained and determined, without any reference to the rate of exchange existing between this State and the place on which such bill shall have been drawn at the time of the demand on payment or notice of non-acceptance or non-payment.
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> Sect. 4. [I]f the contents of such bill be expressed in the money of account or currency of any foreign country, then the principal as well as the damages payable thereon, shall be ascertained and determined by the rate of exchange, but when-

[69] A survey of the Commercial Court records reveals that approximately 80% of the cases tried involved dishonored evidences of indebtedness.

ever the value of such foreign coin is fixed by the laws of the United States then the value thus fixed shall prevail.[70]

While the Louisiana legislature and other state legislatures sought local solutions to this problem, chambers of commerce throughout the country often asked Congress during the antebellum period to enact a law establishing uniform rates of damages for bills drawn and payable in the United States. Congressional reluctance to proceed in this manner can only be understood by putting aside the seasonal trade variations between regions, the ostensible reason for such a regulation, and focusing on the subject of damages and the implications for the monetary system of a law fixing uniform rates of damages. A law regulating damages would have required the federal government to substantiate a paper currency suitable for the conduct of commercial affairs. An integral part of damages was the costs of currency fluctuations, and some kind of uniform medium of exchange in which commercial men could invest their resources and receive value was essential. One memorial noted that among Congress' powers, which seemed to substantially involve the right of legislating uniform damages, was the power to coin money and regulate its value.[71] Early in the nation's history, Alexander Hamilton had observed that dealing in bills was "literally a branch or form of the commerce in money between distant states and nations."[72] There appears, however, to have been much distrust of attempts to regulate the money supply, and certainly the war waged between the proponents of the Second Bank and Andrew Jackson only aggravated that distrust, especially for a national banking system capable of supporting a uniform medium of exchange. The central banking functions which the Second Bank had performed indeed paled against the background of its commercial banking functions, which constituted its chief operation in the American economy,[73] and the supposition that the Second Bank regularized exchanges and provided a fairly uniform na-

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[70] An Act to regulate the damages on protested Bills of Exchange, 1837 La. Acts, 2d. Sess. 44.

[71] H.R. REP. No. 135, 19th Cong., 1st Sess 7 (1826).

[72] *Id.*

[73] *See* B. HAMMOND, *supra* note 7, at 300-12.

tional currency in the form of non-depreciating bank notes must be modified in light of the memorials addressed to Congress specifically requesting legislation to regularize rates for damages on bills protested for non-payment.

D. *The Louisiana Judiciary's Response To Depreciating Currencies*

The extent to which Louisiana courts honored the specie standard in fixing the value of monied obligations is not clear, primarily because the instances are few where litigation elucidated at all a particular sensitivity to value and the specie standard. For example, an extreme position appears to be the one taken by one judge of the New Orleans commercial court who, when confronted with a determination of value in Louisiana currency of a contract negotiated in depreciated Mississippi bank notes, responded by establishing a scale of depreciation.[74] Most of the cases reported from the state Supreme Court which have any bearing on the subject involve Mississippi contracts, but they are not particularly enlightening relative to the specie standard because the bank notes of that state were wholly depreciated. Representative in this regard was the decision of *Wilson v. Lambeth*,[75] where the state Supreme Court merely affirmed without comment a lower court decision that the defendants had the burden of proving a depreciation in New Orleans notes at the maturity of a bill of exchange payable in current city notes. The plaintiffs argued that at the maturity of the bill and the time of the suit the notes were "at par and equivalent to specie."[76] There is a forceful inference that had the defendants proved a currency depreciation at the bill's maturity the difference would have inured to their benefit, and "[t]hey would [have been] entitled to judgment for the depreciated value at maturity, payable in the currency of the present day."[77]

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[74] Oliver v. Gwin (Commercial Court Records, New Orleans Public Library) (New Orleans Comm. Ct. 1840), *rev'd*, 17 La. 28 (1841), *reproduced in part in* R. KILBOURNE, LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD 200-02 (1980).

[75] 4 La. Ann. 351 (1849).

[76] *Id.* at 351.

[77] *Id.*

More pertinent, perhaps, is the earlier decision of *Meeks v. Davis*,[78] which permitted the holder of an accepted draft payable in the notes of a particular bank to recover the value of the notes at the date of protest. The defendant had tendered the amount in the notes of the bank subsequent to protest which were "at the time a discount of from sixty to seventy per cent."[79] Again, the implication is that had the notes been depreciated on the date of protest, the holder of the draft could have received no compensation for an erosion of the notes' par value.

Nevertheless, the Louisiana Supreme Court showed some willingness to avoid the most preposterous results of enforcement of various Mississippi debtor relief statutes. For instance, in the case of *Roberts* ex rel. *Trustees of the Bank of the United States v. Stark*,[80] litigation centered on an 1840 Mississippi statute which prohibited the banks of that state from negotiating evidences of indebtedness in commerce where the debtors of those banks had received their bank notes. The legislation practically eliminated the negotiability of commercial paper in Mississippi and, as the plaintiff's petition noted, the law probably was in contravention of the federal constitutional prohibition on a state's passing a law impairing the obligation of a contract. The plaintiff's petition further noted:

> The object of the act of 1840, was to enable the debtors of the banks, under all circumstances, to pay their debts in the notes of the banks.
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> . . . .
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> It cannot be doubted that a tender of either specie or notes, at the maturity of the notes, would have been a good tender. In the *default* of the debtor, perhaps the only remedy of the creditor, in the State of Mississippi, would be an action for damages to be determined, and the value of the bank note in specie, at the maturity of the notes.[81]

In reviewing the decisions of Mississippi courts relative to the statute's meaning, the Louisiana Supreme Court had occasion to

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[78] 3 Rob. 326 (La. 1842).
[79] *Id.* at 327.
[80] 3 La. Ann. 71 (1848).
[81] *Id.* at 71-72 (emphasis added).

quote from an opinion by the chief justice of that state's highest tribunal:

> Bank paper [in Mississippi] was then very much depreciated and the country was full of this depreciated currency, and it [the legislation] was designed to secure to debtors the right to pay the banks in their own notes. By allowing them to transfer their notes, debtors would have been compelled to pay the endorsees in the constitutional currency.[82]

The Louisiana Supreme Court managed to avoid the task of applying the statute, however, holding that the consideration given by the plaintiff for the notes was lawful and adequate.

The Mississippi statute received some further elucidation in the case of *Roberts v. Wilkinson*.[83] In that case, the Louisiana Supreme Court seems to have adopted the position that, once a debtor was in default on an obligation, he owed the price, not the value, of current bank notes, "unless he shall have given the creditor the benefit" of an equivalent to the price.[84] All of the obligations sued on in these cases involved commercial paper made payable in the "current" funds or notes of particular banks or banks in a city or region, thus presenting an obvious difficulty for Louisiana courts in countervailing the tenor of contracts and substituting the specie standard. Where bills were drawn payable in dollars with no other description, parties likely settled in specie or its equivalent in currency. Furthermore, some debtors, even Mississippi ones, felt obliged to redeem their obligations in specie or its equivalency in current bank notes, regardless of the tenor of their evidences of indebtedness, in order to preserve their credit rating.[85]

The earliest case before the Louisiana Supreme Court having any bearing on the subject of depreciating currencies appears to be *Veeche v. Grayson*,[86] and it is significant that the court was called upon to recognize a Kentucky custom, or usage of trade,

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[82] *Id.* at 74 (quoting President of Planters Bank of Mississippi v. Sharp, 7 Miss. (4 S.&M.) 1, 5-6 (1844)).

[83] 5 La. Ann. 369 (1850).

[84] *Id.* at 378.

[85] *See* Oliver v. Gwin (Commercial Court Records, New Orleans Public Library), *reproduced in part in* R. KILBOURNE, *supra* note 74, at 200-02.

[86] 1 Mart. (n.s.) 133 (La. 1823).

that made "the notes or contracts of individuals, there made [in Kentucky] to pay money," payable in the notes of the Bank of Kentucky.[87] The Louisiana Supreme Court evidently was anxious to avoid the consequences of forcing creditors to accept tenders of depreciated currency. The defendant-debtor offered to prove "that before, at, and ever since the execution of the note, the currency and medium of exchange in Kentucky, where it was executed, consisted of notes of the Bank of Kentucky and its branches, . . . unless the contract expressly provide[d] for payment in specie; that the note sued upon, had no such provision."[88]

When the defendant tendered notes of the Bank of Kentucky, the plaintiff had refused to accept. Implicit in the Supreme Court's approval of the district judge's refusal to allow the defendant to prove that such a custom prevailed in Kentucky was a recognition that the note sued upon was a negotiable instrument, although the payee had never negotiated it. The Court looked to the federal constitution, noting that:

> [B]y the constitution . . . Congress has power to coin money and regulate the value of foreign coins—art. I, sec. 8. It is therefore to their act we are to recur, in order to ascertain the value of the American or Spanish dollar. Parol evidence, therefore, was properly rejected to establish, that the party, who bound himself to pay nine hundred and seventy-two dollars, intended to promise to pay less than his expressions manifest, when tested by the law of the land. We therefore conclude, the court did not err in rejecting parol testimony, in this respect.[89]

The dearth of Louisiana cases in this area suggests that New Orleans merchants were reluctant to avail themselves of bank note depreciations, reflecting a keen sensitivity to the personality component of credit relations. The circumspection of the Louis-

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[87] *Id.* at 134. The Kentucky legislature subsequently passed a statute that recognized this "custom", which precipitated the case of Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825), where Chief Justice Marshall enunciated the doctrine of state versus dynamic conformity to state rules of procedure in the federal district courts. *See* R. KILBOURNE, *supra* note 74, at 16-21.

[88] 1 Mart. (n.s.) at 135.

[89] *Id.* at 137.

iana Supreme Court in recognizing contrary laws of a foreign jurisdiction, whether customary or legislatively posited, is apparent when such laws tended to avail debtors of advantageous depreciations in the value of obligations generally. As the Louisiana High Court observed in 1815:

> The federal compact provided that the legislature of no state should retain the power of making any thing but gold and silver a tender in the discharge of debts, in order to avert in future the mischiefs resulting from laws imparing the obligation of a contract to pay gold and silver, by reducing it to an obligation to pay paper.[90]

E. *Specie and the Civil Code Regulation of Monied Obligations*

The supposition that the specie standard subsumed all forms of commercial paper in the antebellum period follows from a close analysis of the exceptions, formed by judges and lawmakers, which tended to ameliorate the harshness of convertibility. The legislation regulating damages on bills of exchange protested for non-payment forms an exception to the general commercial jurisprudence that endorser and drawer were responsible for all consequential damages occasioned by a bill's being protested for non-payment and in particular for damage to the drawer's credit. The few cases which address the problem of depreciating currencies likewise seem to form exceptions for the sake of ameliorating hardships.

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[90] Johnson v. Duncan, 3 Mart. 531, 541 (1815). The court further observed:

> Yet the *remedy* was not commensurate with the evil; the healing process was therefore continued, in order to prevent the passage of laws impairing the obligation of a contract to pay to-day, by reducing it to an obligation to pay on a distant day, or days or indeed any attempt at a legislative interference between parties to a contract, by favoring either party, to the injury of the other; and it was provided that no state should pass any law impairing the obligations of contracts. If the restriction from making anything but gold and silver a tender in the payment of debts, had not preceded that from passing any law impairing the obligation of contracts, there might be some, though very little, ground to say, that the latter clause would have been satisfied by restraining the passage of laws authorising the payment of one thing instead of another.

Id. at 541-42 (emphasis added).

The import of these reflections for article 1935 of the Louisiana Civil Code should be apparent. That legislation dates from the 1825 revision which was enacted in contemplation of a commercial code, the projet of which was abandoned by the legislature in 1826. The corresponding article in the 1808 Digest was very different, allowing an exception where "particular rules of commerce and suretyship govern the case."[91] Significantly, the articles in the Commercial Code Projet regulating damages on bills of exchange protested for non-payment are similar to the act adopted by the legislature in 1806; thus, article 1935 was subject to an exception for commercial contracts that was embodied in the Commercial Code Projet. The failure of the legislature to adopt the Commercial Code Projet caused the courts to develop exceptions for commercial contracts where an inflexible provision of the Civil Code would have constituted a burden on interstate commerce.[92] And, in any event, the 1806 statute, subject to a revision in 1838, remained a legislatively posited exception to article 1935 throughout the antebellum period.

That article 1935 contemplated pure interest on money contracts is apparent; otherwise, the legislation of palliatives to curb most pernicious effects of the specie standard are inexplicable. Perhaps limiting damages on bills of exchange protested for nonpayment and permitting debtors to benefit from depreciating currencies achieved some measure of justice in an economy where a depression of value could be ascribed to all forms of wealth. Besides, the incurrence of long-term obligations was a practical impossibility. In an economic environment like the present one, where a depreciating national currency accompanies stability and even appreciation in other forms of wealth such as real estate, the justice of allowing the value of obligations negotiated decades ago to plummet to nothing needs to be questioned. Some indexing of relative values may be in order, and, in any event, article 1935 is not an obstacle to rectifying the worst abuses of an inflationary economy insofar as it was never intended to cope with a currency that fluctuates in value.

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[91] LA. CIV. CODE art. 1935 (1870). For an explanation of why the Louisiana Legislature failed to act on the Commercial Code Projet, see R. KILBOURNE, *supra* note 74, at 1-70.

[92] *See, e.g.*, Wagner v. Kenner, 2 Rob. 120 (La. 1842).

CONCLUSION

The singular character of Louisiana's system of commercial law vis-à-vis the Civil Code was reinforced substantially by both legislative and judicial recognition of custom and commercial realities as a source of law. Custom contributed immeasurably to the resolution of latent inconsistencies between two distinct systems of private law whose convergencies and divergencies constituted an essential quality of Louisiana's antebellum jurisprudential heritage. The contractural character of commercial paper in this context carries a particular significance because negotiability was grounded in the custom of merchants. As one Supreme Court justice wrote in 1821:

> We would look in vain, in the laws of Spain, for the principles that are to direct us in the transfer of bank paper. Great Britain and the United States are, perhaps, the only countries in which it forms the greatest part of the circulation medium, and in which questions, like that now under consideration, present themselves.
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> Since the establishment of banks in Louisiana, their notes have circulated like the specie which they represent, as generally and freely as in Great Britain and the United States; and this has insensibly introduced so much of the laws, usage, or practice of those countries, as is necessary to regulate the mode in which the affairs of these institutions are transacted, and the circulation and transfer of their notes; perhaps, rendered obsolete so much of our former laws as is absolutely inconsistent therewith.[93]

Bills of exchange and promissory notes had been negotiated since the foundation of the colony of Louisiana in the eighteenth century. What the justice was referring to was an expanding facility for such paper that might emanate from a variety of sources not exclusively mercantile in origins. Later he would write that:

> The circulation of [promissory] notes would be much checked and embarrassed, if it were believed to be the duty of any person, who receives one, to inquire into the fairness of the transaction in which it originated wherever the signature of a sub-

[93] Louisiana Bank v. Bank United States, 9 Mart. 398, 400-01 (1821).

> scribing witness or of a notary afforded the opportunity of doing so.
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> . . . .
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> Since the establishment of banks in this state, vendors have often found, in the negotiable paper of vendees, a very easy and speedy mode of receiving the price of property sold on a credit. The latter, no doubt, found therein some diminution in the price which would not have been yielded, if the former had not thereby been enabled to receive their money, before payment was effected by the latter.[94]

With regard to negotiability it is especially important to a characterization of commercial transactions as essentially security oriented in the antebellum period to see the holder-in-due-course doctrine as a security or enhancement for a bill or note. Freeing holders of existing equities between maker and drawee was an incentive to negotiate such paper, just as a particular endorser's signature enhanced the credit value of a bill or note. To view negotiability in a strictly legal context, however, may obscure important economic dimensions, such as the role of commercial paper as a monetary supplement. Liquid wealth always is more vulnerable to economic adversity, and in the antebellum period the absence of a governmentally supported medium of exchange in which to invest no doubt hindered the growth of the liquidity so essential to commercial expansion. Even the most liquid capitalist was probably illiquid a good part of the time and, in consequence, very vulnerable when economic conditions suddenly eroded the value of his commercial paper holdings; hence, specie supported a very pragmatic psychology.[95] It is difficult, therefore, to see negotiability as a judicial or legislative enterprise accomplished at the expense of society as a whole.[96]

Public antipathy for negotiable paper was largely a matter of intraclass tensions, because most people in antebellum America rarely had an opportunity to discount a promissory note or draw a bill of exchange.[97] In Louisiana, opposition to the status quo

[94] Fusilier v. Bonin, 12 Mart. 235, 238-41 (1822).

[95] *See generally* J. CLARK, NEW ORLEANS 1718-1812: AN ECONOMIC HISTORY (1970).

[96] For a contrary view, see M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 212-26 (1977).

[97] *See id.*

usually came from those who objected to the credit-allocation processes of the regional economy, *i.e.*, that New Orleans factors monopolized the credit of banks.[98] It is difficult to equate credit with social or economic injustice at any time in history, and certainly the exigencies of the antebellum period tended not so much to affect the cost of credit as its availability.

Nothing in Louisiana's legal history even suggests that the negotiability concept was ever questioned with regard to either bills of exchange or promissory notes. The earliest statute in the territorial period was enacted in 1804, and begins as follows: "Sec. 3. And be it further enacted, That upon all bills of exchange, and promissory notes made negotiable by law, or by usages and customs of merchants in this territory . . . ."[99] The Louisiana Supreme Court on one occasion elevated all endorsers to the status of sureties, which certainly enhanced a holder's security, since he could totally disregard the chain of title and proceed against his most solvent endorser and collect the whole debt.[100]

Louisiana judges certainly were sensitive to the need for money substitutes, the often deplorable condition of local bank notes, and the limited credit facilities which could be afforded the very best business investment, *i.e.*, the commercial transaction. They seem never to have questioned whether commercial paper was a necessary evil, and one judge actually deplored the federal government's failure to come to terms with the issue of what constituted legal tender.[101] Given the overall monetary insufficiencies of the time, the work of the Louisiana judiciary represents a major contribution to economy and savings that benefited the whole community.

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[98] *See* G. GREEN, *supra* note 4, at 28-32.

[99] An Act Concerning Bills of Exchange and for other purposes, 1804 Acts of the Territory of Orleans, 1st Sess. 96.

[100] Wiggin v. Flower, 5 Rob. 406 (La. 1843).

[101] Hatch v. City Bank, 1 Rob. 470, 470-82 (New Orleans, La. Comm. Ct. 1842) (reprinted as preface to appellate court decision).