CHAPTER II
HISTORICAL DEVELOPMENTS

2.1 Introduction

The early origin of Negotiable Instruments is a subject of speculation among text-writers. In primitive societies, the system of bills of exchange could not, of course, have existed; for firstly, money which it represents did not come into circulation till long after, and secondly, the art of writing was a thing unknown to them. When the system of bartering, by which crude and uncivilised societies carried on their commerce, was found inconvenient, a common medium of exchange and a representative of property of an easily convertible character was found necessary, and thus money came into use. It might have had its humble origin in cowrie shells, brass or copper rings; but when once the utility of money surfaced, it never was lost sight of. With the progress of civilisation, nobler metals displaced the baser ones, and the use of gold and silver as instruments of exchange was found to be generally prevalent in all civilised countries. With facility of communication between countries, and security of peace between nations, commerce of the world grew apace, and one nation after another endeavoured to cast its supremacy. The Phoenicians, Grecians and Carthaginians were more or less the chief commercial nations of the ancient world. The routes along which the vast commerce was carried on were insecure, and merchants carrying specie or coins were robbed of their wealth by roving pirates on sea and marauding robbers on land. Money by itself did not obviate all these difficulties arising from the multiplicity of commercial transactions and in the course of centuries, there came into existence the idea of exchange, whereby letters of credit, generally called bills of exchange, from a merchant in one country, to his debtor, a merchant in another, were issued requiring the debt to be paid to a third person who carried the letter to the place where the debtor resided. A bill of exchange was thus originally an
order to pay a trade-debt, and the system of such bills afforded a convenient and facile way for the payment of debts in one country due to a person in another, without the danger or the burden of carrying money in *specie*.

In its origin, then, a bill of exchange affected the transfer of trade-debts of persons residing in distant countries and when once the advantages of such a course were realised, the system was extended to apply to inland trade debts, and gradually to private debts also. By the scrupulous fulfillment of the obligations arising under such instruments in the early stages of their growth, confidence was begotten, and from that confidence arose the peculiar use to which such instruments are now put. The instruments are now merely instruments of credit readily convertible into money and easily passable from one hand to another. With expanding commerce, the growing demands for money could not be met by mere supply of coins, and these instruments of credit took the function of money which they represented, and thus became, by degrees, articles of traffic. Thus, the negotiable instrument came to be largely employed by merchants as an effective substitute for money. The most striking characteristic of money as distinguished from other species of property is the facility and freedom with which it circulates. Its possession with bearer is conclusive title to those who deal with him in good faith; and one taking it, therefore, in the course of business need look no further than the face of the coin and the possession of the person from whom he receives it. These are qualities which every representative of money must possess in order to answer its purpose effectively; and a negotiable paper does possess them in an eminent degree.

In *Gibson v. Minet*, Eyre, C.B. said that the wit of man cannot devise a thing better calculated for circulation. The value of the wring, the assignable quality of it, and the particular mode of assigning it, are created and determined in the original frame and constitution of the

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2 *Ibid*.
3 (1791) 1 H. Bl. 569.
instruments itself; and the party to whom such a Bill of Exchange is intended, has only to read it, need look no further and has nothing to do with any private history that may belong to it.

Credit is however not only the keystone of modern commerce, but also the ligament of modern industries and enterprises, and so long as credit has these important functions to perform, instruments of credit will also continue to be in use; and the present perhaps complicated, but certainly convenient practice and rules relating to exchange and the instruments effecting such exchange form a necessary part of the knowledge to be acquired by any practical lawyer or a modern businessman.\(^4\)

The law as to bills of exchange and other negotiable securities forms a branch of the general body of the Law Merchant and is comparatively of recent origin. The origin of these instruments can be traced to the usage and custom of merchants and traders which Courts of law have adopted as settled law, in view of the general interests of trade and the convenience of the public. Thus, a general usage, being ascertained and ratified by the decisions of Courts of law, becomes a part of general law of the country which the Courts are bound to recognise. Bills of exchange seem to have been brought into use by the Florentines in the twelfth and the Venetians in the thirteenth century. Though in England, there is reason to believe that bills of exchange were known earlier, their use does not seem to have been general, even as late as 1622. About the close of the sixteenth century, the practice of making bills payable to order and of transferring them by endorsement took its rise. At first, such bills were allowed only between merchants in foreign countries, but were gradually extended to traders in the same country, and finally to all persons, whether traders or not. About this time, the usage among merchants of making promissory notes payable to bearer or to order began to prevail and was more than once even recognised by Courts in England. But in 1703 Lord Holt who was then the Chief Justice of England, opposed this extension of negotiability

\(^4\) Ibid.
and persistently refused to recognise the custom of merchants in the case of promissory notes and the Legislature had to end the unseemly conflict by passing the Statute whereby promissory notes were made capable of being assigned by endorsement.\textsuperscript{5}

2.2. \textit{Advent of Promissory Notes}

Promissory note is an offspring of western business world. After the decline of barter system of economy, commercial transactions by use of currency came into being. With the advancement of business and industry, it has become inevitable to have credit transactions. In that process it further became inevitable to have a document in token of credit transactions with an understanding to return the amount borrowed at a later point of time. Common people also used to borrow money to meet their requirements and in that process promissory note became more popular.\textsuperscript{6}

With the increasing use of promissory notes, disputes regarding the same also started proliferating day-by-day. Under those circumstances, the British regime introduced a separate and distinct Act for promissory notes. The said legislation labelled as the Negotiable Instruments Act came into force for the first time in India in 1881. The British Rulers considered cheques as well as bills of exchange also as negotiable instruments along with promissory notes.\textsuperscript{7}

There is no specific law in ancient India regarding negotiable instruments. Nothing was mentioned in ancient law books of Hindus and Muslims about negotiable instruments. When ever a dispute arose regarding a negotiable instrument like hundi, Courts used to apply conventions and customary law prevailing among the merchant community of those respective communities. In those circumstances, the British colonial government enacted Negotiable instrument Act in 1881. From the beginning, promissory notes are common even among

\textsuperscript{5} (1875) L.R. 10 Ex. 337.  
\textsuperscript{7} \textit{Ibid.}
middle class and ordinary people. Middle class people use to borrow money from their friends, relatives or money lenders by executing a promissory note, to meet their immediate or urgent domestic needs or requirements. With the advancement of chit fund and Banking transactions, promissory notes are becoming more popular. Chit Fund companies, commercial Banks and other various business establishments are taking promissory notes from their customers, in some cases as security and in some cases as collateral security while lending money or advancing loans. It is a fact that in most cases people used to execute a promissory note while borrowing money. But promissory note can be executed even without borrowing money. In some cases a person may be liable to pay same amount to another person even though he did not borrow any amount from such person. He may execute a document in favor of that person promising to pay that amount to him after some time. Such a document is called a promissory note. That means a promissory note need not be in token of borrowing. It is something more than that. Promissory note is a combination of two words “Promise” and “note”. ‘Promise’ implies an understanding or agreement to pay where as ‘Note’ implies written document. If these two words are clubbed together, it is easy to understand the real meaning and concept of the word ‘promissory note’ and in that process, it can be said that promissory note is a document executed by one person promising to pay the amount mentioned there in after some time to the person mentioned there in.8

But every document agreeing or promising to pay an ascertained amount is not a promissory note. That apart from promise to pay there must be certain distinct features to make a document a promissory note. If these special features are absent in a document, it cannot be considered as promissory note. It may be an agreement or receipt or bond or something else. Most of the promissory notes being used in trade and commerce come under the purview of Negotiable Instruments

8 Ibid.
Act. But, there are certain other promissory notes which do not come under the ambit of this Act.\(^9\)

There is no rule that promissory note should be written only on paper. Technically speaking, promissory note can be executed even on a cloth or on paper or any material or substance that can be used as substitute for paper. The main object behind this principle is that promissory note should be in a visible form. Now-a-days, printed promissory notes are available in the market with necessary blank spaces which can be filled up as per specific requirements. Most of the chit fund companies, banks and other financial institution and money lenders are using printed promissory notes with necessary blanks pertaining to names of parties, date, amount, rate of interest etc.\(^10\)

The basic feature of a promissory note is that it should be in writing and also signed or thumb impression by the maker. The amount mentioned in the promissory note should be paid in the form of money only, it should be kept in mind that even if promissory note was executed in connection with the sale or purchase of any article or property, the repayment should not be in the form of goods or property but by way of money lone. The amount payable by the executant of the promissory note should be specifically and clearly mentioned in the promissory note. It will be mentioned in the promissory note that the amount mentioned there in will be paid along with certain rate of interest. Another important feature for a promissory note is that there cannot be any condition or conditions regarding the payment of amount mentioned in the promissory note, in most of promissory notes, these words will be absent. It has to be understood that ‘Unconditional undertaking to pay’ means payable on demand.\(^11\)

However in some cases a time duration may be fixed for payment of the amount mentioned in the promissory note. If a promissory note is executed under a condition of some future incident which is

\(^9\) Id. at 11.
\(^10\) Ibid.
\(^11\) Id. at 12.
uncertain to happen, it will be considered as conditional payment and such an instrument will not be considered as a promissory note. However, it has to be borne in mind that a promissory note with a condition regarding the future incident that is uncertain to happen is still a promissory under Indian Stamp Act.\textsuperscript{12}

2.3 Historical Development in Respect of Bill of Exchange

Bill of exchange, is a form of negotiable instrument, the history of which, is though somewhat obscure. Bills of exchange were probably invented by Florentine Jews. They were well known in England in the middle ages, though there is no reported decision on a bill of exchange before the year 1603. At first, use thereof seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not. The foundations of modern English law were laid by Lord Mansfield with the aid of juries of London Merchants. No better tribunal of commerce could have been devised. Subsequent judicial decisions have developed and systematized the principles thus laid down.\textsuperscript{13}

Before 1882 the English law was to be found in 17 statutes dealing with isolated points, and about 2600 cases scattered over some 300 volumes of reports. The Bill of Exchange Act, 1882 codifies for the United Kingdom the law relating to bills of exchange, promissory notes and cheques. One peculiar Scottish rule is preserved, but in other respects uniform rules are laid down for England, Scotland and Ireland. Two salient characteristics distinguish negotiable instruments from other engagements to pay money. In the first place, the assignee of a negotiable instrument, to whom it is transferred by endorsement or delivery according to its tenor, can sue there on in his own name and secondly, he holds it by an independent title. If he takes it in good faith and for value, he takes it free from “all equities” that is to all defects of title or grounds of defence which may have attached to it in

\textsuperscript{12} Ibid.
\textsuperscript{13} http\textperiodcentered en.m.wikisource.org, accessed on July 29, 2016.
the hands of any previous party. These characteristic privileges were conferred by the law merchant, which is part of the common law, and are now confirmed by statute. A bill in its origin was a device to avoid the transmission of cash from place to place to settle trade debts. Now a bill of exchange is a substitute for money. It is immaterial whether it is payable in the place where it is drawn or not. It is immaterial whether it is stated to be given for value received or not, for the law itself raises a presumption that it was drawn for value. But though bills are a substitute for cash payment, and though they constitute the commercial currency of the country, they must not be confounded with money. No man is bound to take a bill in payment of debt unless he has agreed to do so. If he does take a bill, the instrument ordinarily operates as conditional and not as absolute payment. If the bill is dishonoured the debt revives. Under the law's of some continental countries, a creditor, as such, is entitled to draw on his debtor for the amount of his debt, but in England the obligation to accept or pay a bill rests solely on actual agreement. A bill of exchange must be in the form of an unconditional order to pay. If an instrument is made payable on a specified contingency, or out of a particular fund, so that its payment is dependent on the continued existence of that fund, it is invalid as a bill, though it may, of course avail as an agreement or equitable assignment. In Scotland it has long been the law that a bill may operate as an assignment of funds, in the hands of the drawee.14

Bill of exchange must be stamped, but the act does not regulate the stamp. It merely saves the operation of the stamp law's, which necessarily vary from time to time according to the fluctuating needs and policy of the exchequer. Under the Stamp Act 1891, bills payable on demand are subject to a fixed stamp duty of one penny, and by the Finance Act 1899, a similar privilege is extended to bills expressed to be payable not more then three days after sight or date. The stamp may be impressed or adhesive. All other bills are liable to an ad valorem duty. Inland bills must be drawn on stamped paper, but foreign bills, of

14 Ibid.
course, can be stamped with adhesive stamps. As a matter of policy, English law does not concern itself with foreign revenue laws. For English purposes therefore, it is immaterial whether a bill drawn abroad is stamped in accordance with the law of its place of origin or not. On arrival in England it has to conform to the English stamp laws.\textsuperscript{15}

A bill of exchange is payable on demand when it is expressed to be payable on demand, or at sight, or on presentation or when notice for payment is expressed. In calculating the maturity of bill’s payable at a future time, three days, called days of grace, must be added to the nominal due date of the bill. For instance, if a bill payable one month after sight is accepted on the 1\textsuperscript{st} of January, it is really payable on the 4\textsuperscript{th} of February, and not on the 1\textsuperscript{st} February as its tenor indicates. On the continent generally days of grace have been abolished as anomalous and misleading. Their abolition has been proposed in England, but it has been opposed on the ground that it would curtail the credit of small traders who are accustomed to bill’s drawn at certain fixed periods of currency. When the last day of grace is a non-business day some complicated rules come in to play. Speaking generally, when the last day of grace falls on Sunday or a common law holiday the bill is payable on the preceding day, but when it falls on a bank holiday the bill is payable on the succeeding day. Complications arise when Sunday is preceded by a bank holiday and to add to the confusion, Christmas day is a bank holiday in Scotland, but a common law holiday in England. When the code was in committee an attempt was made to remove these anomalies, but it was successfully resisted by the bankers on alleged grounds of practical convenience.\textsuperscript{16}

By the acceptance of a bill the drawee becomes the principle debtor on the instrument and the party primarily liable to pay it. The acceptor of a bill “by accepting it engages that he will pay it according to the tenor of his acceptance and is precluded from denying the

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
drawer’s right to draw or the genuineness of his signature. The acceptance may be either general or qualified. As a qualified acceptance is so for a disregard of the drawer’s order, the holder is not obliged to take it, and if he chooses to take it he must give notice to antecedent parties, acting at his own risk if they dissent. The drawer and endorsers of a bill are in the nature of sureties. They engage that the bill shall be duly accepted and paid according to its tenor, and that if it dishonoured by non-acceptance or non-payment, as the case may be, they will compensate the holder provided that the requisite proceedings on dishonour are duly taken. Any endorser who is compelled to pay the bill has the like remedy as the holder against any antecedent party.  

A person who is not the holder of a bill, but who backs it with his signature, thereby incurs the liability of an endorser to a holder in due course. An endorser may be express term either restrict or charge his ordinary liability as stated above. Prima facie every signature to a bill is presumed to have been given for valuable consideration. But sometime this is not the case. For friendship, or other reasons, a man may be willing to lend his name and credit to another in a bill transaction. Hence arise what are called accommodation bills. Ordinarily the acceptor gives his acceptance to accommodate the drawer. But occasionally both drawer and acceptor sign to accommodate the payee, or even a person who is not a party to the bill at all. The criterion of an accommodation bill is the fact that the principal debtor according to the instrument has lent his name and is in substance a surety for some one else. The holder for value of an accommodation bill may enforce it exactly as if it was an ordinary bill, for that is the presumable intention of the parties. But if the bill is dishonoured the law takes cognizance of true relations of the parties, and many of the rules relating to principal and surety come into play. Suppose a bill is accepted for the accommodation of the drawer. It is the drawer’s duty to provide the acceptor with funds to meet the bill at

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17 Ibid.
maturity. If he fails to do so, he cannot rely on the defence that the bill was not duty presented for payment or that he did not receive due notice of dishonour. If the holder, with notice of the real state of the facts, agrees to give time to the drawer to pay, he may thereby discharge the acceptor.\textsuperscript{18}

The holder of a bill has some special rights and duties. The holder is the mercantile owner of the bill, however in order to establish his ownership he must show a mercantile title. The bill must be negotiated to him, that means it must be transferred to him according to the forms prescribed by mercantile law. If the bill is payable to order, he must not only get possession of the bill, but he must also get a valid endorsement of the previous holder. If the bill is payable to bearer it is transferable by mere delivery. But to get the full advantages of mercantile ownership the holder must be a “holder in due course” that is to say, he must make out three business conditions. Firstly, he must have given value or he should press forth his claim through some holder who has given value. Secondly, when he takes the bill, it must be regular on the face of it. The bill must not be overdue or known to be dishonoured. An overdue bill, or a bill which has been dishonoured, is still negotiable, but in a restricted sense. Thirdly, he must take the bill bonafidely without notice of any defect in the title of the transferor, as, for instance, that the bill or acceptance had been obtained by fraud, coercion or for an illegal consideration. If he satisfies these three conditions he obtains an indefeasible title and can enforce the bill against all parties there to.\textsuperscript{19}

A person who claims through a forged signature has no title himself, and cannot give a title to any one else. Two exceptions to this general rule require to be noted. First, a banker who in the ordinary course of business pays a demand draft held under a forged endorsement is protected. Secondly, if a bill be issued with material blanks in it, any person in possession of it has prima facie authority to

\textsuperscript{18} \textit{Ibid.}
\textsuperscript{19} \textit{Supra} Note 6, at 14.
fill them up, and if the instrument when complete gets into the hands of
a holder in due course the presumption becomes absolute. As between
the immediate parties the transaction may amount to forgery, but the
holder in due course is protected. The holder of a bill has special
duties which he must fulfill in order to preserve his rights against the
drawers and endorsers. They are not absolute duties, they are duties to
use reasonable diligence. When a bill is payable after sight,
presentment for acceptance is necessary in order to fix the maturity of
the bill. Accordingly the bill must be presented for acceptance within a
reasonable time. When a bill is payable on demand it must be
presented for payment within a reasonable time. When it is payable at a
future time it must be presented on the day that it is due. If the bill is
dishonoured the holder must notify promptly the fact of dishonour to
any drawer and endorser he wishes to charge. If, for example, the
holder only gives notice of dishonour to the last endorser, he could not
sue the drawer unless the last endorser or some other party liable has
duly sent notice to the drawer when a foreign bill is dishonoured the
holder must cause it to be protested by a notary public. The bill must
be noted for protest on the day of its dishonour. If this be duly done,
the protest, i.e. the formal notarial certificate attesting the dishonour,
can be drawn up at anytime as of the date of the noting. A dishonoured
inland bill may be noted, and the holder can recover the expenses of
noting but no legal consequences in practice, however, noting is
usually accepted as showing that a bill has been duly attach thereto,
presented and has been dishonoured. Sometimes the drawer or endorser
has reason to expect that the bill may be dishonoured sometimes the
drawer or endorser has reason to expect that the bill may be dishonour
by the drawee. In that case he may insert the name of a “referee in case
of need “but whether he does so or not, when a bill has been duly noted
for protest, any parson may, with the consent of the holder, intervene
for the honour of any party liable on the bill. If the bill has been
dishonoured by non acceptance it may be accepted for honour supra
protest. If it has been dishonoured by non-payment it may be paid
supra protest. When a bill is thus paid and the proper formalities are complied with, the person who pays becomes invested with the rights and duties of the holder so far as regards the party for whose honour he has paid the bill, and all parties antecedent to him. \(^\text{20}\)

A bill of exchange is the most cosmopolitan of all contracts. It may be drawn in one country, payable in another, and endorsed on its journey to its destination in two or three more. The laws of all these countries may differ. A man must be expected to know and follow the law of the place where he conducts his business, but no man can be expected to know the laws of every country through which a bill may travel. For safety of transmission from country to country bills are often made out in sets. The set usually consists of three counter parts, each part being numbered and containing a reference to the other parts. The whole set then constitutes one bill, and the drawee must be careful only to accept one part, otherwise if different accepted parts get into the hands of different holders, he may be liable to pay the bill twice. Foreign bills circulating through different countries have given rise to many intricate questions of law. But the subject is perhaps one of diminishing importance, as in many trades the system of “cable transfers” is superseding the use of bills of exchange. \(^\text{21}\)

In fundamental principles there is general agreement between the laws of all commercial nations regarding negotiable instruments. The law respecting negotiable instruments may be truly declared, in the language of Cicero, to be in a great measure not the law of a single country only, but of the whole commercial world. *Non erit lex alia Romae, alia Athenis, alia nunc alia posthac, sed et apud omnes gentes et omni tempore, una eademque lex obtinebit* (Swift v. Tyson, 16 Petersi) but in matters of detail each nation has impressed its individuality on its own system the English law has been summarized above. Perhaps its special characteristics may be best brought out by comparing it with the French code and noting some salient divergences.

\(^{20}\) *Supra* Note 14.
\(^{21}\) *Encyclopaedia Britannica 1911/Bill of Exchange/Wikisource.*
English law has been developed gradually by judicial decision founded on custom. French law was codified in the 17th century by the “ordonnance de 1673.” The existing “code de commerce” amplifies, out substantially adopts the provision of the “ordonnance” the growth of French law was thus arrested at an early period of its development. The result is instructive.  

Common prototypes of bills of exchanges and promissory notes originated in China. Here, in the 8th century during the reign of the Tang Dynasty they used special instruments called feitsyan for the safe transfer of money, over long distances. Later such document for money transfer used by Arab merchants, who had used the prototypes of bills of exchange — sulfadja and hawala in 10-13th centuries, then such prototypes were used by Italian merchants in the 12th century. In Italy in 13-15th centuries bill of exchange and promissory note obtained their main features and further phases of development have been associated with France (16-18th centuries, where the endorsement had appeared) and Germany (19th century, formalization of Exchange law). In England and later in the U.S. Exchange law was different from continental Europe because of different legal systems.  

In the commonwealth almost all Jurisdictions have codified the law relating to negotiable instruments in a Bills of Exchange Act 1882 in the UK, Bills of Exchange Act. 1908 in New Zealand. The Negotiable Instrument Act 1881 in India and the Bills of Exchange Act 1914 in Mauritius. The Bills of Exchange Act Additionally most commonwealth Jurisdictions have separate cheques Acts providing for additional protections for bankers collecting unendorsed or irregularly endorsed cheques, providing that cheques that are crossed and marked ‘not negotiable’ or similar are not transferable, and providing for electronic presentation of cheques in inter-bank cheque clearing system.  

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22 Ibid.  
23 Ibid.  
24 Ibid.
2.4 Historical Development in Respect of a Cheque

2.4.1 Origin of the word ‘Cheque’ in England

According to J.W. Gilbert the word Cheque is derived from the French ‘Eches’ meaning Chess. The Chequers placed at the doors of public houses were intended to represent Chess-boards, and originally denoted that the game of Chess was played in those houses. Similar tables were employed in reckoning money, and hence came the expression ‘to check an account’; and the Government office where the public accounts were kept, was called the ‘Exchequer’. There is also another explanation. It is said that the word ‘Cheque’ arose from the consecutive numbers which were placed upon the official forms to act as a check or means of verification.25

Similarly Dr. Bett says this word cheque is the same as ‘check’ and appears to have been at first applied to the counterfoil which keeps a tally of the amount. This spelling was kept up till comparatively late period down to and including the 12th edition of Byles on Bills. It is interesting to note that Dr. Bett is of opinion that cheque or exchequer are all words derived from the game of chess and go back to the Persian word for a King and that the principal piece has given its name to the game itself. In this way he says that Cheques do not seem to have been introduced in England till the seventeenth century; for, it is really then that the business of banking was undertaken by goldsmiths in England, who borrowed the practice from Holland and from the money-dealers of Florence who flourished as early as the thirteenth century.26

2.4.2 Origin of Banking

One view is that the London goldsmiths were the first bankers in England. They received money from their customers on condition to pay its equivalent when called upon to do so. When a customer wished to make payment to a third party, it was customary to write an order addressed to his banker to pay the sum required and these notes or

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orders were the earlier forms of cheque currency. The cheque or “drawn note” as it was called and which was used by the customers of the goldsmith banker.\textsuperscript{27}

Before banking in modern sense of the word originated in England the Goldsmiths exercised many of the functions of bankers and some of the oldest existing private banks in England are the direct descendents of these Goldsmiths. They received money on deposit from their customers subject to the obligation to repay an equivalent sum, when called upon to do so. They paid interests on deposits. They discounted bills of exchange and various types of Treasury Exchequer money orders; they bought and sold bullion; they circulated their own bank notes and they changed the coins of other countries for English coins and so on. From about the middle of the seventeenth century, the depositor would address to his goldsmith a short letter of request authorizing the payment to his creditor of the sum due. They would take this authority to the goldsmith’s “shop” and there receive the sum in specie. Before long, the merchant debtor drew his “bill” or “note” in favour of his creditor “or order” or in favour of him “or bearer”, and the goldsmith duly honoured it upon presentation. The accounts of those merchants, which nowadays would be called “current accounts”, were usually known as “running cashes”, and they became popular. By 1677 there were fifty-eight goldsmiths in London, who kept “running cashes”, thirty-eight of whom lived in Lombard Street. Furthermore, there is clear evidence that the goldsmiths employed the funds left with them by making loans to others. Thus, they made loans to Cromwell and also to merchants who were the goldsmiths performed the basic functions of modern bankers by accepting sums at interest by making loans and by providing their customers with facilities for making payments to third parties.\textsuperscript{28}

The ancient Romans are believed to have used an early form of cheque known as \textit{praescriptiones} in the first century BC. During the 3\textsuperscript{rd} century AD, banks in Persia and other territories in the Persian Empire

\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid.
under the Sassanid Empire issued letters of credit known as sakks. Muslims are known to have used the cheque or sakks system since the times of harunal Rashid (9th century). In the 9th century, a Muslim business man could cash an early form of the cheque in china drawn on sources in Baghdad, a tradition that was significantly strengthened in the 13th and 14th centuries, during the Mongol Empire. Indeed, fragments found in the Cairo Geniza indicate that in the 12th century cheques remarkably similar to our own were in use, only smaller to save costs on the paper they contain a sum to be paid and then the order 'may so and so pay the bearer such and such an amount'. The date and name of the issuer are also apparent.29

Between 1118 and 1307, it is believed the knights Templar introduced a cheque system for pilgrims travelling to the holy land or across Europe. The pilgrims would deposit funds at one chapter house, then withdraw it from another chapter at their destination by showing a drafts of their claim. These drafts would be written in a very complicated code only the templars could decipher.30

The word ‘Cheque’ or ‘check’ as it was spelt at first did not come into use until the eighteenth century. The modern spelling of the word was adopted about the middle of the nineteenth century. The 1827 edition of Joseph Chitty’s work on Bills of Exchange used the old spelling ‘check’. The following year J.W. Gilbert published his ‘Practical Treatise on Banking’. He used the modern spelling ‘Cheque’, and he explained that he had adopted that spelling because it was free from ambiguity.31

Further, the cheques are the daily companion of most bank men from the first moment they timidly enter the bank’s portals until the last evening when they lay down their pens and retire leaving a glorious record of their achievements to serve as a beacon light for the juniors who follow them.32

29 Supra Note 16.
30 Ibid.
32 Ibid.
2.5 Emergence of Law Relating to Negotiable Instruments in India

Although the high mountains ranges have separated India from the rest of Asia, yet this separation did not prevent intercourse with the countries of world. Similarly, the long sea coast of India facilitated the growth of maritime trade and large numbers of harbour were established thorough which trade relations with Rome, China, Malaysia etc. were set up. The well developed financial system can be traced to Kautilya’s (Chanakya) Arthasastra. It has been described in it, “All undertaking depend upon finance. Hence, foremost attention shall be paid to the treasury.”

Indigenous banking is an age old tradition in India. Although evidence regarding the existence of money lending operations in India is found in the literature of the Vedic times, i.e. 2000 to 1400 B.C., no information is available regarding their pursuit, as a profession by a section of the community, till 5000 B.C. From this time onwards, India possessed a system of banking, which admirably fulfilled her needs and proved very beneficial to her, although its methods were different from those of modern Western Banking. The literature of the Buddhist period supplies ample evidence of the existence of Srethis, or bankers, in all the important trade centres and of their widespread influence in the life of the community. Their chief activity was to lend money to traders, to merchant-adventures who went to foreign countries, to explorers who marched through forests to discover valuable materials, and to kings who were in financial difficulties due to war or other reasons, against the pledge of movable or immovable property or personal surety.

In India, there is reason to believe that instrument of exchange were in use from early times and we find that papers representing money were introduced into the country by one of the Muhammadan sovereigns of Delhi in the early part of the fourteenth century, the idea

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33 Unique Quintessence of General Studies, at 5.1 (1994).
34 Kautilya’s Arthasastra, Book –II Chapter-8.
36 Panandikal, Banking in India, at 1 (2005).
having been borrowed from China; and it is the accepted theory of the western savants, that in China a complete system of paper currency and banking had been developed as early as the tenth century and it is not improbable that such an idea filtered into India sometime later.\(^{37}\)

During the Mohgul rule the issuance of metallic money in different parts of the country gave the indigenous bankers great opportunity for developing very profitable business of money-changing. The most influential persons were appointed mint officers, revenue collectors, bankers and money-changers in various parts of the Empire. Many of them wielded extra-ordinary influence in the country, and those among them who came to be known as \textit{Jagat Seths} (world bankers) possessed as great a power as the private bankers of any western country. The indigenous bankers, however, could not develop to any extent the system of obtaining credits at regular intervals from the public and paying interest on them and those who made savings either horded the same, or lent them to friends and relatives. The reason which comes to the fore front is that many of them combined trade with banking business; this combination reduced the stability of their banking business, and produced an unwanted reaction upon banking development in India.\(^{38}\)

The English trader who came to India in 17\textsuperscript{th} century could not make much use of the indigenous bankers owing to their ignorance of the latter’s language and owing to the latter’s inexperience of the finance of the former’s trade. Therefore, although the East India Company established connections with these bankers, borrowed funds from them, and for the first few years collected a portion of the land revenue through them, the English agency houses in Calcutta and Bombay began to conduct banking business besides their commercial business. From this time, the business and power of the indigenous bankers began to wane, although the East India Company successfully

\(^{37}\) \textit{Supra} Note 26, at 6.  
\(^{38}\) \textit{Ibid}.
prevented the establishment in India of banking on Western lines for a considerable time, on the ground that the agency houses and the indigenous bankers were more suited to the banking requirements of the country.\textsuperscript{39}

Other causes also operated to bring about the decline of the indigenous bankers. The continuous warfare and chaos that resulted from the breaking down the Mogul Empire seriously checked their activities. Some of them at times unable to fulfill their promises, had to resort to questionable practices, and found their claims not infrequently evaded by their debtors, some of whom were ruling princes. Further, they lost their profitable money changing business from 1835, when a uniform currency was established throughout the country. Moreover, the diversion of trade from old to new routes and the change on basis of India’s trade relations with other countries, that were brought about by the development of railways, steamships, post and telegraph, affected their business adversely. Their decline and gradual expansion of English trade and power in India led the East India Company to abandon its opposition to the establishment of banks on Western lines in India. Consequently, such banks and Government treasuries came to be established, and they accentuated the decline of the indigenous bankers.\textsuperscript{40}

Upon the advent of British rule in India the business activities proliferated to a great extent. Under the escalating trends of trade and commerce, an increasing requirement was felt to substitute the ordinarily used currency with a mode which could be easily converted into cash and could be passed on, negotiated and exchanged repeatedly without any undue hassles or obstructions. The growing demands for money could not be satisfied by simple exchange of coins and the instruments of credit were used in place of money. The negotiable instruments law as prevalent in England was applied by the judicial

\textsuperscript{39} Ibid.
\textsuperscript{40} L.C. Jain, \textit{Indigenous Banking in India}, at 20 (1929).
system in India when any dispute relating to such instruments arose between Europeans.\textsuperscript{41}

It was also there that when the parties were Hindus and Mohammedans, their personal laws were applied. Though neither the law books of Hindus nor those of Mohammedans contain any reference to negotiable instruments or any law dealing with the same as such, the customs prevailing among the merchants of the respective community were recognized by the courts and applied to the transactions among them.\textsuperscript{42}

It was the ever-growing inflation that accentuated the need of compact money and inspired the practice of issuing cheques. However the credibility of a cheque in its earlier days depended largely upon the credibility of the issuer, which was a major impediment in its becoming a dependable mode of payment. Being prone to frauds it attracted the attention of legislature, which realizing the compelling urgent need of an alternative mode of financial transactions sought to make cheques more credible with rules and laws backing it.\textsuperscript{43}

It is common knowledge that the London goldsmiths were the first bankers in England and the system of payment of cash through cheques dates back to the 17th century in which commercial banking was initiated. Written orders were addressed to the bankers by the customers who were known as “Drawn Notes”. It use to be only an ordinary slip of paper containing written order addressed to the banker by his customer to pay on demand the sum specified therein. Generally, it was made payable to the payee only and sometimes to the payee or order or bearer.\textsuperscript{44}

During the eighteenth century there was an increased use of cheque system and the bankers started printing cheques to issue to their customers. Since then there is no substitution replacement of cheque

\textsuperscript{41} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} Id. at 3.
system. The cheque is, in most expensive way used in both developing and the developed economy. In Indian context the cheques are officially issued. During present days due to growth in internet and technological innovation the system of electronic cheques are followed both in India and abroad though there is also prevailing the manual method of cheque system in economy. However, at present, we find that the cheque as well as the cheques in electronic forms have become popular in international trade and are playing an important role in the monetary system of all the countries.\textsuperscript{45}

2.6 \textbf{The Object of Enactment of Sections 138 to 142 of Negotiable Instruments Act}

It is submitted that the legislature in its wisdom had contemplated to bring section 138 in ink on the statute books in order to initiate financial discipline in business transactions. Prior to insertion of section 138 of the Negotiable Instruments Act, a dishonoured cheque left the aggrieved person with the sole remedy of redressal of his legal rights by filing a suit for recovery in the civil court. The object and rationale behind bringing new provisions in the Act was to make the persons dealing in commercial transactions work with a sense of responsibility and for that reason, under the amended provisions of law, lapse on their part to honour their commitment renders the persons liable for criminal prosecution.

The smooth working of the system of cheques and as matter of fact, of all negotiable instruments, primarily depends upon the honesty and the integrity of the parties thereto. But it was noticed, especially in commercial transactions, that cheques were given merely as a device not only to stall but even to defraud the creditor, the growing practice of either to play for time or to play fast and loose became alarming and deserved the intervention of the legislatures. It cannot be disputed that dishonour of a cheque by the bank may cause incalculable loss, injury or inconvenience to the payee. When dishonour of cheques was

\textsuperscript{45} \textit{Ibid.}
becoming the order of the day, the legislatures could not sit idle as spectators more so when there was already a big clamour in the mercantile community in this regard. If this undesirable element is allowed to continue, it would erode the credibility of cheques as a trustworthy substitute for cash payment. Of course, the civil remedy was open to the payee (and he can still go to the civil court) but a civil suit is generally a long drawn matter and an unscrupulous drawer is able to take various pleas either to kill time or to defeat the genuine claim of the payee. It was also not easy to prosecute the drawer under section 417 or section 420 of the Indian Penal Code in as much as dishonour of a cheque by the bank *per se* is not an offence under the provisions of the Penal Code. So it was not easy to bring home the guilt of the drawer/accused under section 417 or section 420 IPC. Against this backdrop the legislatures decided to provide a fairly effective remedy where a cheque is returned unpaid by the bank for insufficiency of money in the account upon which the cheque was drawn. At the same time the legislatures were quite conscious that the honest drawer should not be dragged to the Court. Accordingly, dishonour of cheques *per se* has not been made an offence. Provision has been made to inform the drawer by a demand notice about the dishonour of the cheque issued by him and demanding payment of the cheque amount. Failure to make payment within fifteen days of the receipt of the said notice has been made an offence punishable under section 138 of the Act. The drawer then is precluded from coming into the court with an excuse that he had no reason to believe when he issued the cheque that it may be dishonoured on presentment.46

For tracing the object and the ingredients under the provisions, in particular, sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as

a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. The Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment, enacted the aforesaid provisions. The remedy available in civil court is a long drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

The Banking Laws prior to the Amending Act 66 of 1988 were amended through the Banking Laws (Amendments) Act, 1985 (Act No.81 of 1985). The various provisions of this Amending Act were brought into force on different dates in between 1985 and 1986. Thereafter it was felt there is need for amending various laws relating to banks and public financial institution and that necessitates some more amendments in the Negotiable Instruments Act, 1881, the Banking Regulations Act, 1949, the Reserve Bank of India Act, 1934, the State Bank of India Act, 1934 the State Bank of India (Subsidiary Banks) Act, 1959, the Industrial Development Bank of India Act, 1954, the Deposit Insurance and Credit Guarantee Corporation Act, 1961, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, the Regional Rural Banks Act, 1976, the Export-Import Bank in India Act, 1981, the National Bank for Agriculture and Rural Development Act, 1981 and the Industrial Reconstruction Bank of India Act, 1984. As a sequel thereof, the Negotiable Instruments Act, 1881 has been amended drastically by Act No.55 of 2002. Some of the major amendments brought about w.e.f. 06.02.2003, are as under:-

- Electronic image of a truncated cheque and a cheque in the

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electronic form have been introduced (Sections 6, 81, 89 and 131);

- Term of punishment has been increased from one year to two years (Section 138);

- Period for issue of notice by the payee to the drawer has been increased from 15 days to 30 days (Section 138);

- Discretion has been given to the court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act (Section 142);

- Procedure has been prescribed for dispensing with preliminary evidence of the complainant and providing for raising of presumption as to dishonour of cheque on mere production of bank's slip or memo (Sections 145 and 146);

- Procedure has been prescribed for servicing of summons to the accused or witness by the Court through speed post or empanelled private couriers (Section 144);

- Summary trial of the cases has been provided with a view to speeding up disposal of cases (Section 143);

- Offences under the Act have been made compoundable (Section 147);

- Those directors who are nominated as directors of a company by virtue of their holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government, or the State Government as the case may be, have been exempted from prosecution under Chapter XVII (Section 141);

- The Magistrates trying an offence under the Act have been given power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees (Section 143);
The Information Technology Act, 2000 has been made applicable to the Negotiable Instruments Act, 1881 in relation to electronic cheques and truncated cheques subject to such modifications and amendments as the Central Government, in consultation with the Reserve Bank of India, considers necessary for carrying out the purposes of the Act, by notification in the Official Gazette; and

Definitions of “bankers' books” and “certified copy” given in the Bankers’ Books Evidence Act, 1891, have been amended.48

These amendments are aimed at early disposal of cases relating to dishonour of cheques, enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee or director from prosecution under the Negotiable Instruments Act, 1881.