CHAPTER – ONE
INTRODUCTION

I. NEGOTIABLE INSTRUMENT

The law relating to negotiable instruments is not the law of one country or of one nation, it is the law of the commercial world in general, for, it consists of “certain principles of equity and usages of trade which general convenience and commonsense of justice had established to regulate the dealing of merchants and mariners in all the commercial countries of the civilised world.” Even now the laws of several countries in Europe are, at least so far as general principles are concerned, similar in many respects. Of course, on questions of detail, different countries have solved the various problems in different ways, but the essentials are the same, and this similarity of law is a pre-requisite for the vast international transactions that are carried on among the different countries.¹

A negotiable instrument is in more than one sense a ‘thing’. In understanding what is meant by a ‘thing’ in law, we must on the one hand avoid the metaphysical niceties about the conception of ‘thing’, and on the other, the peculiar conception of the word in England, as in the phrases, ‘things in possession’ and ‘things in action’. In jurisprudence, a ‘thing’ denotes an object of rights. In that sense every instrument is a ‘thing’, but in so far as the paper on which it is written is concerned. It is not only in that sense is a negotiable instrument a ‘thing’ also in the sense that it is a physical embodiment of rights. A person lawfully getting possession of such an instrument acquires title to it, and the same cannot be said of other instruments. Again, it represents money and possesses all the characteristics of money which it represents. For example, it is not tainted by any defect or fraud in the source from which it flows, so long as its acquisition is bonafide and for value. It also passes by delivery like cash,

¹ The Negotiable Instrument Act- Bhashya & Adiga, 13th Ed. p. 1
and the person in possession of the instrument can sue on it in his own name. It also possesses the characteristics of a contract for it embodies either an order or a promise to pay money. The capacity of the parties to it, the liability of persons on it and the discharge of such liabilities are regulated mostly by rules belonging to the domain of contracts. It is also regarded as a chattel; and being so, it has been held that the transfer of such instruments should be regulated by the law of the place where the transfer takes place.

The term ‘Negotiable’ is one of classification and does not of necessity imply anything more than that the paper possesses the negotiable quality. Generally speaking, it applies to any written statement given as security, usually for the payment of money, which may be transferred by endorsement or delivery, vesting in the party to whom it is transferred or delivered a legal title on which he can support a suit in his name. The term signifies that the note or paper writing to which, it is applied possesses the requisites of negotiability. A negotiable instrument is one, therefore, which when transferred by delivery or by endorsement and delivery, passes to the transferee a good title to payment according to its tenor and irrespective of the title of the transferor, provided he is bona fide holder for value without notice of any defect attaching to the instrument or in the title of the transferor, in other words the principle nemo dat quod non habit does not apply.

II. HISTORICAL DEVELOPMENTS

The early origin of Negotiable Instruments is a matter 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 was not invented 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

\[2\] 10 C.J.S.423 Negotiable Instrument Act- 1
of an easily convertible character was found necessary, and 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 was found, 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 is now to be found generally current 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 struggled for 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 incumbrance of carrying money in specie.³

In its origin, then, a bill of exchange effected 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 fulfilment 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

³ ibid at pp. 2-3
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,

“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 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.”

For the present, however, credit is not only the keystone of modern commerce, but also the sinews 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

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4 ibid at p. 3
5 (1791) 1 H. Bl. 569
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.\(^6\)

The origin and history of negotiable instruments was well traced by Lord Chief Justice Cockburn in *Goodwin v. Roberts*,\(^7\) of which the summary is given below:

“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

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\(^6\) ibid pp. 3-4.

\(^7\) (1875) L.R. 10 Ex. 337, Holden: History of Negotiable Instruments in English Law
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 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 of 3 and 4, Anne c. 9, whereby promissory notes were made capable of being assigned by endorsement.”

III. HISTORICAL DEVELOPMENT IN RESPECT OF PROMISSORY NOTE

Promissory note is a creation of Western Business world. After the decline of Barter System of economy, business transactions with the currency came into existence with the advancement of business and industry, it has became inevitable to have credit transactions. In that process it has become inevitable to have a document in token of credit transactions with an understanding to repay the amount borrowed at a later point of time. It may be the beginning of promissory note. Common people also used to borrow money to meet their requirements and in that process promissory note became more popular.

With the increasing popularity of promissory notes, disputes regarding promissory notes are also increasing day-by-day. Under those circumstances, then the British Colonial Rulers introduced a separate Act for promissory notes. The said act is called Negotiable Instruments Act. This Act came into force for the first time in India in the year 1881. The British Rulers considered cheques and Bills of Exchange also as Negotiable instruments along with promissory notes. In ancient India, “Hundies” were most popular. Hundi is also a kind of negotiable instrument. Under some circumstances, Hundi is also used as bills of exchange. Negotiable Instruments Act does not recognize “Hundi” as a negotiable instrument. 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 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.

But every document agreeing or promising to pay certain amount is not a promissory note. That apart from promise to pay there must be certain special features
to make document a promissory note. If these special features are not present 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 in use come under the
purview of negotiable Instruments Act. But, there are certain other promissory notes
which do not come under the purview of Negotiable Instruments Act. The India stamp
Act also defines a promissory notes, which are not promissory notes under the
Negotiable Instruments Act will also be considered as promissory notes. Promissory
notes can be classified into two categories. They are (a) Promissory notes under
Negotiable Instruments Act, (b) Promissory notes under the Indian stamp Act.

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 blanks. 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,
amount, rate of interest etc. Those blanks will be filled in while executing a
promissory note.

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.

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.

A combined reading of sections 4, 19 and 21 makes it clear that a promissory note where no time limit is mentioned for the payment of amount mentioned there in, and a promissory note payable at right and on presentment will be considered as promissory note.

The above explanation mainly relates to promissory notes where no time limit is fixed for the payment of the amount mentioned therein. But in some cases a time limit may be fixed for payment of the amount mentioned in the promissory note. If a promissory note is executed with the condition regarding the future incident which is uncertain to happen, it will be considered as conditional payment and such a promissory note shall not be considered as a promissory note. However, it has to be kept 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. The concept of ‘Un -conditional undertaking to pay’ shall be understood by making a combined study of section 4 and second paragraph of section 5 of Negotiable Instruments Act.

IV. HISTORICAL DEVELOPMENT IN RESPECT OF BILL OF EXCHANGE

Bill of exchange, a form of negotiable instrument, defined below, the history of which, though somewhat obscure, was ably summed up by lord chief justice Cockburn in his judgment. 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, there use 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. But for some time after they had come into general employment, bills were always alleged in legal proceedings to be drawn SECUNDUM USUM ET CONSUETUDINEM MERCATORUM. 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.

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 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. Sir John Comyn’s digest in the early part of the 18th Century defines Bill of Exchange, “A bill of exchange is when a man takes money in one country or city upon exchange, and draws a bill where by he directs another person in another country or city to pay so much to A, or order, for value received of B, and subscribes it. Comyns’ definition illustrates the original theory of a bill of exchange. 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 given 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 an unconditional order to pay. If an instrument is made payable on a 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 and section 53 of the act preserves this rule.

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 bill’s must be drawn on stamped paper, but foreign bills, of 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.

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 1st of January, it is really payable on the 4th of February, and not on the 1st 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 is 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.

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 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 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.

The holder of a bill has special rights and special duties. He is the mercantile owner of the bill, but in order to establish his ownership he must show a mercantile title. The bill must be negotiated to him, that is to say, 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 obtain the endorsement of the previous holder. If the bill is payable to bearer it is transferable by mere delivery. A bill is payable to bearer which is expressed to be so payable, or on which the only or last endorsement is an endorsement in blank. If a man lawfully obtains possession of a bill payable to order without the necessary endorsement, he may obtain some common law rights in respect Brown & Co. of it, but he is not the mercantile owner, and he is not technically the holder or bearer. But to get the full advantages of
mercantile ownership the holder must be a “holder in due course” that is to say, he must satisfy three business conditions. First, he must have given value, or claim through some holder who has given value. Secondly, when he takes the bill, it must be regular on the face of it. In particular, 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. The transferee cannot acquire a better title then the party from whom he took it had. Thirdly, he must take the bill honestly and without notice of any defect in the title of the transferor, as, for instance, that the bill or acceptance had been obtained by fraud, or threats or for an illegal consideration. If he satisfies these condition he obtains an indefeasible title and can enforce the bill against all parties there to. The act substitutes the expression “holder in due course “for the somewhat cumbrous older expression, “bona fide holder for value without notice”. The statutory term has the advantage of being positive instead of negative. The French equivalent “tiers porteur de bonne foi “is expressive. Forgery, of course, stands on a different footing from a mere defect of title. A forged signature, as a general rule, is a nullity.

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 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 a payable on demand it must be presented for payment within a reasonable time. When it is payable at a future time it must the 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.

Normally a bill is discharged by payment in due course, that is to say, by payment by the drawee or acceptor to the holder at or after maturity. But it may also be discharged in other ways, as for example by coincidence of right and liability, voluntary renunciation, cancellation, or material alteration.
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. Provision for this conflict of laws is made by section 72, which lays down rules for determining by what law the right and duties of the various parties are to be measured and regulated. Speaking broadly, these rules follow the maxim locus regit actum.

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.

A reference to Marius ‘treatise on bills of exchange, published about 1670, or Beawes,’ lex Mercatoria, published about 1740, shows that the law, or rather the practice, as to bills of exchange was even then fairly well defined comparing the practice of that time with the law as it now stands, it will be seen that it has been modified in some important respects. For the most part, where English law differs from French law, the latter is in strict accordance with the rules laid down by Beawes. The fact is that, when Beawes wrote, the law or practice of both nations on this subject was nearly uniform. But English law as gone on growing while French law has stood still.

In fundamental principles there is general agreement between the laws of all commercial nations regarding negotiable instruments. As Mr. justice story, the great
American foreign lawyer says: “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. 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.

The ancient Romans are believed to have used an early form of cheque known as praescriptiones in the first century BC. During the 3rd century AD, banks in Persia and other territories in the Persian Empire 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 Harun al-Rashid (9th century). In the 9th century, a Muslim businessman 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. 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.

V. HISTORICAL DEVELOPMENT IN RESPECT OF A CHEQUE

A) Origin of the word ‘Cheque’ in England

It is very difficult to trace out the origin of cheque. There is no definite view regarding the original of the cheque. The different thinkers have different views relating to its origin. The origin of word Cheque is obscure.

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.”

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

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8 M.S.Parthasarathy – Cheque in law and practice at pp. 1-2
9 Bhashyam and Adiga- The Negotiable Instrument 13rh Ed. p.5
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.

In Holden’s History of Negotiable Instruments in English law a cheque dated 14.08.1675 is described at page 210 and is worded:\[^10\]:

Mr. Thomas,

I desire you to pay unto Mr. Samuell Howard or order upon receipt hereof the sum of nine pounds thirteen shillings and six pence and place it to the account of

14\(^{th}\) August, 1675

Yours Servant

£ 9:13:6

EDMOND WARLOPP

On the reverse of the instrument is the payee’s endorsement worded thus:

Received in full of this Bill the sum of nine pounds thirteen shillings and six pence.

Samuell Howard.

It will be noticed that the form of the instrument is very similar to that of a modern cheque, even though the language employed is somewhat different: modern customers do not sign themselves ‘Your servant’ when writing to their bank managers.

[^10]: ibid at p. 5
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 orders were the earlier forms of cheque currency. The cheque or “dream note” as it was called and which was used by the customers of the goldsmith banker

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{11}

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.\textsuperscript{12}

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.\textsuperscript{13}

\textbf{B) 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, Malasiya etc. were set up\textsuperscript{14}. The well developed financial system can be traced from Kautilya’s (Chanakya) Arthasastra. It has been described in it, “All undertaking depend upon finance. Hence, foremost attention shall be paid to the treasury.”\textsuperscript{15}

\textit{i) Indigenous Banking –}

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.,\textsuperscript{16} no information is available regarding

\textsuperscript{11} Bhashyam and Adiga- The Negotiable Instrument 13\textsuperscript{th} Ed. p.5
\textsuperscript{12} M.S.Paarthasarathy’s Cheques in Law and Practice p.2
\textsuperscript{13} ibid p.1
\textsuperscript{14} Unique Quintessence of General Studies 15\textsuperscript{th} Ed. 1994 at p. 5.1
\textsuperscript{15} Kautilya’s Arthasastra, Book –II Chapter-8
\textsuperscript{16} Macdonnell and Keith, Vedic Index of Names and Subjects Vol. I p. 109
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. 17

Usury was practised but was held in contempt. From the laws of Manu, it
appears that money lending and allied problems had assumed considerable
importance, and that deposit banking in some form had come into existence by the
second or third century of the Christian era. Kautilya’s Arthasastra laid down 15 to 60
per cent as the maximum legal rates of interest per annum on secured and unsecured
loans respectively, but permitted a maximum of 240 per cent if the risk was specially
heavy. 18

**ii) Hundi –**

There is no legal definition either statutory or otherwise of a hundi, though
such documents are in common use. Hundis are of several kinds the chief being
Shahjogi Hundi Jokhmi Hundi, Namjag Hundi.

In fact, the word ‘hundi’, a generic term used to denote instruments of
exchange in vernacular, is derived from the Sanskrit root ‘hund’ meaning ‘to collect’
and well express the purpose to which such instruments were utilised in their origin. 19

Hundis or indigenous bills of exchange came into use from the 12th century, and it
appears from the writing of a few Muslim historians, European travellers, State

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17 Panandikal- Banking in India at p. 1.
18 Combridge History of India, Vol-I p. 218 & Panandikal’s Banking in India at p.1
19 Bhashyam and Adiga- The Negotiable Instrument at p.5
records and the *Ain-i-Akbari* that both under the early Muslim and Mogul rulers in India indigenous bankers played a prominent part in lending money, financing internal and foreign trade with cash or bills, and giving financial assistance to rulers during periods of stress. No exact information is available regarding the rates of interest charged by them, but it appears from the evidence that is available, that they were higher than those prescribed in *Kautilya’s Arthashastra*.

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 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.

During the Mogul rule the issue of various of metallic money in different parts of the country gave the indigenous bankers great opportunities for developing the very profitable business of money-changing and the most important among them were appointed mint officers, revenue collectors, bankers and money-changers to Government in various parts of the Empire. Many of them wielded great influence in the country, and those among them who came to be known as *Jagat Seths* (world bankers) in the 17th and 18th centuries 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 deposits regularly from the public and paying interest on them and those who made savings either horded them, or lent them to friend and neighbours. The reason seems to be that many of them combined trade with banking business; this combination reduced the stability of their banking business, and produced an unfavourable reaction upon banking development in India.

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20 Panandikal’s Banking in India at pp.1-2.
21 Bhashyam and Adiga- The Negotiable Instrument at p.5
The English trader who came to India in 17th 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 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.  

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 fulfil 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. 

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22 ibid p. 2  
23 Jain, Indigenous Banking in India pp. 20-23
iii) **Chittis** –

Documents known as “barati chittis “and “Samachari chittis “which are in use among Indian merchants for carrying on transactions in which money passes from hand to hand , are liable to stamps duty in the same manner as Hundis as bill of exchange.

**iv) Drafts and Demand drafts** -

A written order by the first party, called the drawer, instructing a second party, called the drawee (such as a banks ), to pay a third party, called the payee An order to pay a sum certain in money, signed by a drawer, payable on demand or at a definite time , and to order or bearer :

An unconditional order drawn by drawer or drawee to the order of the payee, same as a bill of exchange.

A demand draft by one branch of bank on another branch of the same bank in the form of a bill of exchange payable on demand to a third party is a bill of exchange within the meaning of section 2 (2) of the Indian Stamps Act, and is exempt from stamp duty by virtue of Finance Act 5th of 1927 24

The name of the person to whom the amount mentioned in the promissory note is payable should be specifically and clearly mentioned in the promissory note. Regarding promissory note, promise to pay the amount mentioned in the promissory note is most important when compared with the mentioning of reasons or circumstances for executing a promissory note. There is no specific proforma is given in the Negotiable Instruments Act or in any other Act. A promissory note will be written in any form basing upon the circumstances under which it was written. But, a promissory note should contain all the essential features in corporated in section 4 of the Negotiable Instruments Act.

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24 Stamp Act (inre:), AIR 1928 Cal 566:1151 C-177:56 Cal 233.
The main object of the Negotiable Instruments Act is to legalize the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. The purpose of the act was to present an orderly and authoritative statement of leading rules of law relating to the negotiable instruments. To achieve the objective of the Act, the legislature thought it proper to make provision in the Act for conferring certain privileges to the mercantile instruments contemplated under it and provide special procedure in case the obligation under the instrument was not discharged.

A Negotiable Instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time. According to the Negotiable Instruments Act, 1881 in India there are just three types of negotiable instruments i.e. promissory note, Bill of exchange and cheque. Cheque also includes Demand Draft.

More specifically, it is a document contemplated by a contract, which (1) warrants the payment of money, the promise of or order for conveyance of which is unconditional. (2) specifies or describes the payee, who is designated on and memorialized by the instrument; and (3) is capable of change through transfer by valid negotiation of the instrument.

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 — suftadja and hawala in 10-13th centuries, then such prototypes had used by Italian merchants in the 12th century. In Italy in 13-15th centuries bill of exchange and promissory note obtain their main features and further phases of its 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.

VI METHODOLOGY

The present study is based on the secondary data which has been collected through Internet and other various sources i.e. Company Law Journals, Banking Law Journals, Secretary Journals and various Newspapers viz. Financial Express, Economic Times, Business India etc. Efforts have been made to update every aspect with the help of relevant cases in order to bring good response.

VII CONCLUDING REMARKS

In India, prior to the enforcement of the present Negotiable Instrument Act, English Acts and Statutes dealing with this subject were in force. The frequent use of negotiable instruments in personal as well as business transaction in India was also not a totally new practice during the British regime. The reason was that since olden days, the use of such instruments like Hundies, was prevalent in India. In Mughal period too, there was same position. When British regime established in India three fold system in this regard was enforced and Muslims were governed by their respective personal law. The Europeans were governed for that purpose by English laws, whenever there was any conflict between personal laws, i.e. Hindu Law or Muslim law with English Bill of Exchange and there was no proof of any specific
usage, the English law had to prevail. Thereafter, various English Acts and statutes were enforced in India to deal with the matters relating to negotiable instruments. Those acts and Statues were enforced in India to deal with the matters relating to negotiable instruments. Those Acts and statues were English Bill of Exchange Act. The law reliant to promissory notes [Statutes of William III, C, 17 and 3 and 4 Ann(8)] and Governor General in Council Act (Act V of 1866). In 1866 Law Commission drafted a Bill of regulating the use and transactions through Negotiable instruments. On the basis of it Indian Negotiable Instruments Act, 1881 (Act No. XXVI of 1881) was passed and enforced in the whole territory of India except the state of Jammu and Kashmir. This Act was mainly based on the principles laid down in English Law merchant. The main object of this Act was to do away with the inconsistencies existing prior to its enforcement especially with regard to applicability of law of Negotiation to persons belonging to different communities.