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Lord Mansfield and Negotiable Instruments

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In any system of judge-made law the longevity, education and character of a judge have enhanced significance. The idea of a judge personifies Justice, blinded and impartial, but the law he creates will inevitably be infused with his personality. Where an individual develops an entire system of law, his contribution to legal history can be overwhelming. Lord Mansfield remains a case in point.

A discussion of the law of negotiable instruments[1] is the best way to introduce Lord Mansfield's commercial decisions. His work in this area represents the culmination of centuries of development in the legal theory of negotiability. A brief introduction to that development will illustrate the way in which a specific feature of the law merchant — paper credit — entered common law through an official recognition of mercantile custom. For this reason, some of the decisions of Lord Holt, Chief Justice of the Court of King's Bench 1689-1710, will be included. Holt's judgments testify to the struggle between mercantile practise and common law doctrine, and illustrate the pressures put on the Court of King's Bench by the banking community. Two statutes dealing with negotiable instruments were passed in 1698 and 1704 respectively; these will also be discussed to illustrate the statutory context of Mansfield's work.

It may seem surprising that the central courts had not already formulated a body of negotiable instruments law before Mansfield's appointment to the Bench in 1756. One explanation is the activity of both the Court of Admiralty and local mercantile courts — fair, staple and borough — before the legal centralisation of the 17th century attracted commercial litigation to Westminster.[2] The other is that

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1. I propose to deal with the law of bills and notes in particular. The other types of negotiable instruments, banknotes and cheques for example, were influenced by Mansfield but not completely settled at law until a later period. The place of cheques in the development of negotiable instruments law is discussed in J. Milnes Holden, *The History of Negotiable Instruments in English Law* 204-243 (1955). The issue of banknotes is discussed in the same book at 70-72, 87-93 and 196.

2. Space restricts the inclusion of background information. Although considerable literature exists on the subject of medieval law courts and the development of a "law merchant" apart from common law, the movement from local, summary courts to centralised, common law jurisdiction had special relevance for Lord Mansfield. Due to the expansion and consolidation of common law jurisdiction exemplified by the work of Lord Coke (1552-1634) and increased

merchants themselves did not develop the concept of negotiability until the 17th century; before that time the bill of exchange was simply a means of transferring credit from one person to another. In other words, the bill represented the personal credit of the drawer and did not have integral value of its own. There would have been little need for litigation due to the simplicity of these early bills, since they were not negotiable and the number of persons involved was limited. By the first quarter of the 17th century, however, the custom of merchants accepted both inland and foreign bills of exchange and promissory notes (known as bills obligatory) as negotiable.[3]

Customary usage, enhanced by the proliferation of goldsmith bankers and their semi-negotiable notes, brought pressure to bear on the English legal system. The common law position on transferability contrasted with the situation on the Continent, particularly in France, where notes payable to bearer were transferable by delivery in order to provide a fully negotiable instrument for the mercantile community.[4] Merchants of the early 17th century agitated for the passage of an Act of Parliament to recognise the free transfer of bills obligatory made payable to the payee or bearer, claiming that the discrepancy between common and civil law on this issue was an impediment to commerce.[5] The 100-year interval between the development of fully negotiable instruments in mercantile custom, and their acceptance at law under Mansfield saw the recognition of custom as the basis for liability, at least in part.

Toward the end of the 17th century, the mercantile community turned again to Parliament for solutions. The years since their last lobby for reform had seen both the development and expansion of the banking industry, and the resulting machinery associated with modern banking. Trade was expanding with exploration and the beginnings of Empire[6],

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use of the action of assumpsit, the Court of King's Bench dominated the commercial field by the 18th century. This did not mean local, summary courts disappeared completely; *see* William Hutton, *Courts of Requests* (1806).

3. *Compare* Gerald Malynes, *Lex Mercatoria* (1622) with John Marius, *Advice Concerning Bills of Exchange* (1651).

4. Proving consideration with each transfer was the main problem. For details, see Holden, *supra*, note 1 at 27-29.

5. G. Malynes, *supra*, note 3 at 71. He lamented the difference in attitude between English and Continental courts: "Hitherto things are not rightly understood, as it is to be wished it were, whereby other nations still have an advantage" (at 74). Such legislation was in fact proposed twice in the 17th century. *See* W. Holdsworth, *History of English Law VIII*, 151 (1966).

6. Space again restricts the amount of background material given. The author's M.A. thesis, Jane D. Samson, *Ex Aequo Et Bono: Lord Mansfield and Commercial Law* (1986) includes discussion of the economic and institutional contexts of Mansfield's work; more is found in J. Brewer, J.S. Plumb, N. McKendrick, *The Birth of a Consumer Society* (1975) and P.G.M. Dickson, *The Financial Revolution in England 1688-1756* (1967).

and the powerful commercial lobby was able to achieve the passage of a statute regulating the legal position of bills of exchange in 1698.[7]

The legislation of 1698 recognised mercantile custom regarding foreign bills, but clearly stated that its purpose was "for the better payment of inland bills of exchange." It indicated that the acceptor of a bill was bound to pay it, and that non-payment was to be formally protested before a notary public and two witnesses. The acceptor of the bill was to receive this protest within 14 days. If all this was done, the defaulter became liable for costs, damages and interest. Further, if a bill was lost or misdirected, the drawer was obliged to reissue the bill only if the drawee gave security to indemnify him should the original be found. It is important that such conditional assignability did not yet extend to promissory notes.

The judgments of Lord Holt, Chief Justice of the Court of King's Bench 1689-1710, were made after the passage of this statute and testify further to the struggle between mercantile practise and common law doctrine. Holt rendered many judgments on commercial matters: of 56 commercial cases heard by him, 23 concerned bills of exchange or promissory notes, a large number which reflected growing pressure placed on the Court of King's Bench by the commercial community.[8] Although Holt did much to clarify commercial issues in his court, his antagonistic attitude toward the City, particularly the banking community, was severe and protracted. This legacy helped shape Mansfield's priorities because he realised that cooperation among merchants, businessmen and his court was vital to his reform work. Holt's decisions also constitute a summary of the state of negotiable instruments law immediately prior to Mansfield's term of office.

Briefly, Holt refused to allow promissory notes, or bills obligatory, to be sued upon, regardless of mercantile custom. He quite rightly realised that notes and bills had been confused in previous judgments, and that notes had benefitted from this confusion by absorbing the negotiable character of inland bills of exchange. In the case *Clerke* v. *Martin* (1702), Holt insisted:

> . . . that the maintaining of these actions upon such notes were innovations upon the rules of the Common Law, and invested in Lombard-Street, which attempted in these matters of bills of exchange, to give law to Westminster Hall.[9]

7. 9 & 10 William and Mary, c 15 (1698).

8. These statistics are taken from *Holt's Reports*. The compiler of these reports is believed to have been Giles Jacob, author of several editions of the 18th century *Law Dictionary*. *Holt's Reports* claims to be a combination of Holt's cases scattered throughout other reports, and is probably the most comprehensive selection available for statistical purposes.

9. Ld. Raym. 757, 92 Engl. Rep. 6.

He added that the practise of declaring upon promissory notes in actions upon the case, on the law merchant, "proceeded from obstinacy and opinionativeness,"[10] and previous judgments made in such cases were bad law.

Holt's objection was not to the recognition of negotiability in promissory notes — that was firmly established — but to declaring upon them in the same manner as bills of exchange. This position brought Holt into direct conflict with the bankers of the City, who had thought the law was settled.

The timely enactment of another statute, 3 & 4 Anne (1704) put an end to the controversy by declaring that "Promissory notes are enacted to be assignable by indorsement; and actions might be maintained thereon, in like sort as was enacted on inland bills of exchange in the year 1698." This could not have been coincidental; Holt's treatment of promissory notes provoked the mercantile community into lobbying once again for government intervention. An increase in business and in the use of negotiable instruments meant an increase in litigation, and it is clear that, before Mansfield's appointment as Chief Justice, the failure of common law to provide speedy, consistent justice on all mercantile contracts had forced Parliament to intervene. Mansfield would confront the task of clarifying the legal status of negotiable instruments and bringing common law into line with statutory requirements.

General comments on Mansfield's judicial style will introduce his decisions in negotiable instruments law. He was deeply concerned about the reception of his judgments by the merchants of the City, and stressed the need for certainty in commercial law for their benefit. In *Millar* v. *Race*, a suit on banknotes, "Lord Mansfield said he would not wish to have it understood in the City that the court had any doubt upon the point."[11] On another occasion he ordered a retrial because he had "learned since that the people in the City were dissatisfied with the verdict."[12] Sensitivity to the requirements of commerce underscored all of Mansfield's decisions, motivating him to provide practical legal solutions to mercantile problems. Stylistic analysis of a leading negotiable instruments case, *Heylyn* v. *Adamson* (1758)[13] illustrates his pragmatic approach to judgment.

Mansfield prefaced his decision with a statement determining his priorities: "... it must now be determined upon the nature of the

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10. *Id.*
11. 2 Burr. 669, 97 Eng. Rep. 503 (1758).
12. *Lilly* v. *Ewer* (1779), 1 Dougl. 74, 99 Eng. Rep. 178.
13. *Supra*, note 11.

transaction, general convenience, and the authority of deliberate resolutions in Court."[14] He then defined the terms of reference in the case (on a bill of exchange) on the basis of the usages of trade. During his discussion of foreign and inland bills, he concluded that there was no difference except for the inconvenience of distance in the latter, and "All the arguments from law, and the nature of a transaction, are exactly the same in both cases."[15] He continued:

> For, the design of the law of merchants in distinguishing these from all other contracts, by making them assignable, was for the convenience of commerce, that they might pass from hand to hand in the way of trade, in the same manner as if they were specie. Now, to require a demand upon the drawer, will be laying such a clog upon these bills, as will deter every body from taking them.[16]

After reviewing all the leading cases in the matter and commenting on the confusion in reported terminology, he gave judgment according both to the traditional mercantile interpretation of bills of exchange, and to statute. Mansfield's decisions were characterised by concern for the specific needs of commerce, in his own words: "These contracts are to be taken with great latitude: the strict letter of the contract is not to be so much regarded, as the object and intention of it."[17] Mercantile courts had always been practical and swift; Mansfield accordingly concentrated on intentions rather than legal details.[18] Moreover, the "great latitude" of interpretation implied an equitable attitude, and reliance on the natural justice of the situation.

Mansfield's catholic education and knowledge of civilian law influenced his judicial attitude considerably.[19] He knew that until the mid-17th century the Court of Admiralty had been the principal central institution of the Law Merchant and was prepared to accept its rules in his own court where necessary. In the case *Anthon* v. *Fisher* (1782)[20] Lord Mansfield permitted civilian experts to conduct the argument. Since

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14. *Id.*, at 674 and 506.
15. *Id.*, at 675 and 506.
16. *Id.*
17. *Hothan* v. *East India Company* (1779), 1 Dougl. 272, 99 Eng. Rep. 178.
18. *See* note 2, *supra.*
19. Mansfield's education and its influence on his judicial attitude was crucial. In addition to the usual classics-oriented training at Christchurch and Oxford, Mansfield — then William Murray — acquired a diversified legal education by working both in Chancery and in Scottish appeals (he himself was a Scot) to the House of Lords before his election to the House of Commons and appointment as Solicitor General. Throughout his judgments, knowledge of equity, foreign law and jurisprudential theory is evident. Mansfield's education and the intellectual context of his time are explored in Samson, "The Tools of Reform: Mansfield and Natural Law," *supra*, note 6, at 15-33.
20. 3 Dougl. 166, 99 Eng. Rep. 594.

the case involved ransom bills and rules of the law of nations, Mansfield said, "I wish this case to be spoken to by civilians. We can have no light from our own law."[21] He added that he had already investigated the French *Ordinnance de la Marine* himself.

This raises the issue of judicial notice. Mansfield once said: "I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it."[22] In the marine insurance case *Goss* v. *Withers* (1758)[23] he declared:

> I have taken the trouble to inform myself of the Practise of the Court of Admiralty in England, before any Act of Parliament commanded restitution, or fixed the rate of salvage: and I have talked with Sir George Lee, who has examined the books of the Court of Admiralty....[24]

He recognised the historical significance of Admiralty practise in commercial cases even when it meant stepping outside the common law. In *Lewis* v. *Rucker* (1761) he had "conversed with gentlemen of experience in adjustments,"[25] and in *Glover* v. *Black* (1763) he found "by talking with intelligent persons very conversant in the knowledge and practise of insurance, that they always do mention such interest whenever they mean to insure it."[26] Such liberal use of judicial notice indicated tremendous determination, even daring, as well as recognition of the limited resources of common law on mercantile issues. Throughout Mansfield's decisions, concern for the interests of trade was paramount, balanced by a belief in the potential of common law to uphold those interests. By allowing his court to be informed by the principles of natural justice, the practise and doctrine of other courts, and the customs of merchants themselves, Mansfield realised that potential.

The case of *Heylyn* v. *Adamson* (1758)[27] set the stage for Mansfield's clarification of commercial law by, among other things, addressing terminological confusion in the reported cases. Unfamiliar with the technical vocabulary of commerce (a traditional complaint of merchants), court reporters of the 17th and early 18th centuries had used the terms "bill" and "note" indiscriminately in their accounts. *Lambert* v. *Oakes* (1700)[28] was the example used by Mansfield. It was reported three

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21. Cited in Julius J. Marke (1977), "Lord Mansfield and the Common Law," 197 Vignettes of Legal History.
22. *Goss* v. *Withers*, 2 Burr. 683, 97 Eng. Rep. 511.
23. *Id.*, at 694 and 518.
24. See John Holliday, *Life of William Late Earl of Mansfield* (1797) at ix where he indicated Mansfield and Sir James Marriott, another Admiralty judge, were close friends.
25. 2 Burr. 1167.
26. 3 Burr. 1394.
27. *Supra*, note 11.
28. 1 Ld. Raym. 443, 91 Eng. Rep. 1194, 1 Salk. 127, 100 Eng. Rep. 119, 12 Mod. 244, 88 Eng. Rep. 1293.

times, twice as a case upon a bill of exchange, and once upon a promissory note. Mansfield inherited the resulting confusion. Realising the importance of this case, the court postponed judgment, a rare event during Mansfield's tenure, "in order to settle the point with precision and certainty."[29]

When he gave judgment on the case, Mansfield explained that once a promissory note had been endorsed, increasing the number of parties involved to three, there was little to distinguish it from a bill of exchange.[30] Most of the confusion in terminology was due to the fact that reporters mistook the "drawers" of bills for the "makers" of notes when three persons were involved. Mansfield resolved the problem by distinguishing between bills of exchange that had not been endorsed, and those that had. There were three original parties to a bill, and liability for payment moved from the drawer to the drawee once the drawee agreed to pay the bill. Not only was it inconvenient to seek out the original drawer, it was legally unnecessary. There were two original parties to a promissory note, and Mansfield agreed that at this point the payee had no recourse but to sue the original maker of the note for payment. This was the point that had caused all the confusion: the mixup in terms had led counsel to believe that the payee of a bill also needed to sue the original drawer.

The specific point at issue in *Heylyn* had been whether the plaintiffs had shown due diligence in attempting to obtain payment from the drawer of the bill before bringing a suit against the endorser. Lord Mansfield stated that the law "must now be determined upon the nature of the transaction, general convenience, and the authority of deliberate resolutions in Court."[31] As previously noted, this order of priority was typical of him. First Mansfield showed that the drawer of a bill of exchange was released from liability once the bill was accepted for payment. Bearing in mind the interest of trade, he reminded the court that, even if the drawer could be sued, it would be highly inconvenient in the case of foreign bills. Moreover, the fact that bills of exchange were endorsed and handed on had to absolve earlier parties from responsibility, or the purpose of the instrument would be defeated. There must be complete assignment, or the flow of credit would be interrupted. Mansfield concluded by summing up the proper treatment of both bills of exchange and promissory notes:

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29. 2 Burr. 673, 97 Eng. Rep. 505.
30. *Id.*, at 676 and 507.
31. *Id.*, at 674 and 506.

> Therefore, before the indorsee of a promissory note brings an action against the indorser, he must shew a demand, or due diligence to get the money from the maker of the note; just as the person to whom the bill of exchange is made payable must shew a demand, or due diligence to get the money from the acceptor, before he brings an action against the drawer.[32]

Certain aspects of negotiability also needed Mansfield's attention, including the issue of mistaken or omitted wording on bills. His judgment in the case *Edie* v. *East India Company* (1761)[33] is characteristically pragmatic, concerned with the intentions of persons involved, and the equitable conclusions to be drawn from those intentions to inform the law.

A bill of exchange had been drawn by Colonel Clive on the East India Company in favour of Mr. Campbell or his order, and Campbell had endorsed the bill to Robert Ogilby with the words "or order" left out of the endorsement. Ogilby then endorsed the bill to the plaintiff and went bankrupt. The question before the court was whether the plaintiff had to bear the loss, or whether Campbell was liable, since he had neglected to include the words "to order."

Mansfield took a drastic but logical step in his resolution of the case. He declared a bill of exchange to be negotiable "in its original creation," not in its wording. He pointed out the fact that interest in bills and notes is transferable to executors or administrators without anything of the sort being noted on the instrument itself. Common sense and the requirements of trade dictated that bills of exchange needed to be fully negotiable in order to serve their purpose, and details of wording were secondary to that purpose. Mansfield knew that the life of an instrument of credit depended on its universal acceptance. Merchants had to be sure their bills or notes would command the same respect everywhere, and that their intentions would receive a higher priority than mistaken wording. In another case, Mansfield summarized his pragmatic approach to commercial law thus:

> In all mercantile transactions the great object should be certainty; and therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon.[34]

He insisted that the law act not as the master of commerce, but as its servant.

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32. *Id.*, at 676-677 and 507.
33. 2 Burr. 1216, 97 Eng. Rep. 796.
34. *Vallejo* v. *Wheeler* (1774), 1 Cowp. 143, 98 Eng. Rep. 1012.

Edie was important for another reason. By it the process of amalgamation between the custom of merchants and the common law reached its conclusion. The Court of King's Bench had allowed the testimony of merchants in order to prove mercantile custom on a particular point ever since *Oaste* v. *Taylor* (1612).[35] The complicated rules of contract law, including the necessity of proving consideration with each new transfer of a bill of exchange, had produced enormously long declarations. In *Oaste*, the plaintiff pleaded the custom of merchants which recognised the free transfer of bills and notes by endorsement, thus avoiding the need to conform to the regular rules of contract. The law merchant had made its entrance into the common law of negotiable instruments. A later case, *Carter* v. *Downish* (1687)[36] established that the custom of merchants bound all those who employed their contracts, whether they were merchants themselves or not. The rules of the law merchant with respect to negotiable instruments did not have to be specifically pleaded. The judgment in *Carter* declared:

> That the custom of merchants is not a particular custom and local, but it is of an universal extent, and is a general law of the land. The pleading here is good; for if an action be brought against an innkeeper on common carrier, it is usual to declare *secundum legem et consuetudinem Angliae*; for it is not a custom confined to a particular place, but it is such which is extensive to all the King's people. The word "*consuetudo*" might have been added, but it imports no more than *"lex,"* for custom itself is law.[37]

What had formerly been a custom restricted to merchants and required to be specifically pleaded was now part of common law, applicable to everyone.

The link with Mansfield's judgment in *Edie* involved the testimony of merchants on mercantile custom. In the original trial, Mansfield had permitted such testimony to contradict the principle that

> . . . the bill of exchange originally made assignable and negotiable, and being in its own nature assignable must continue always so; and that the law will interpret the assignment to be made in the same manner in which the bill is drawn, although the words "or order" be omitted.[38]

Mansfield cited several cases involving foreign bills in which the omission had not restricted negotiability, concluding that he had been mistaken in allowing merchant witnesses to sway the jury. One witness in particular, a cashier of the Bank of England, had testified that his bank usually

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35. Litt. 363, 124 Eng. Rep. 286. For a detailed study of mercantile custom, see Robert W. Aske, *The Law Relating to Custom and the Usages of Trade* (1909).
36. 3 Mod. 226, 87 Eng. Rep. 1602.
37. *Id.*, at 229 and 147.
38. 2 Burr. 1219, 97 Eng. Rep. 799.

refused to discount bills for a third party unless "or order" was specified. Lord Mansfield decided that "the jury have found directly contrary to the settled law," and that a new trial must be ordered:

> For the custom of merchants is part of the law of England: and the law of England being already fully settled on this point, no evidence in contradiction to it ought to have been admitted; nor can any finding of a jury alter it.[39]

This cutting off of testimony regarding issues already dealt with served to give consistency to the law of negotiable instruments, and as Mansfield frequently noted, consistency was the essence of commercial law. The custom of merchants, formerly invoked as part of the law of the realm in relevant cases and often in the face of common law rules, was now forming precedents of its own. It is notable that Mansfield, conscious as he was of the interests of trade, did not accept professional testimony without question; his purpose was to make the law consistent, and this sometimes required him to treat such testimony with caution.

Two related cases resolved the problems presented by instruments made payable to payee or bearer, or to bearer alone. Merchants themselves had been reluctant to accept such bill or notes, and common law had refused to recognise them.[40] Yet it is clear from the works of Malynes and Marius, and from the introduction of Bank of England notes in 1694, that bearer bills were popular.[41] Mansfield, always interested in the advancement of trade, realised that the prejudice against bearer bills was retarding the development of a potentially important form of paper credit. The two leading cases involved are *Miller* v. *Race* (1758)[42] and *Grant* v. *Vaughan* (1764).[43] Although *Grant* is the later case, it deals with the general principles and will be analysed first.

The defendant Vaughan, a London merchant, drew an inland bill on his banker to pay a certain amount to the master of the ship *Fortune*, or to bearer. The shipmaster, Bicknell, lost the bill and it was found by an unidentified person who used it to buy tea at the shop of Grant, the plaintiff. In the meantime Vaughan had stopped payment on the bill after hearing of its loss. Grant accordingly sued Vaughan for payment of the note. A special jury of merchants found for Vaughan since bills of

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39. *Id.*, at 1226 and 802.
40. It was felt that "this custom to pay the bearer was too general," *Horton* v. *Coggs* (1689), 3 Lev. 299, 83 Eng. Rep. 698). *See also Nicholson* v. *Sedgwick* (1698), 1 Ld. Raym. 180, 100 Eng. Rep. 1016.
41. The Bank of England sidestepped the problem of the negotiability of notes in favour of bearer by ensuring that all their notes were under seal. Contracts under seal had always been respected at law. *See: Ways and Means Act*, s. 29 (1694).
42. 1 Burr. 452, 97 Eng. Rep. 398.
43. 3 Burr. 1516, 97 Eng. Rep. 957.

exchange drawn to bearer were unknown (whereas promissory notes drawn to payee or bearer were quite common). The present case was an appeal to the whole court. Mansfield stated at the outset that the type of instrument at issue was irrelevant, since the statute 3 & 4 Anne had placed both bills of exchange and promissory notes on an equal footing before the law, and had also recognised the validity of notes made out to payee or bearer. Therefore the findings of the jury as to the custom of making the bills of exchange payable to bearer did not influence the law regarding their validity:

> It is enough for the plaintiff that this note was negotiable. The bearer must prevail against the drawer in some mode of action; having come by it fairly and honestly. Since the Act the fair holder of a note payable to bearer may, by the express words of the Act, maintain an action against the drawer: otherwise, the Act would not put promissory notes upon the same foot with inland bills of exchange, as it professes to do .... And the interests of commerce require this determination.[44]

Mansfield noted once again the confusion of terminology in the Reports when precedents were sought, but maintained that 3 & 4 Anne had placed all negotiable instruments in the same position. The finder of a bearer bill had to be able to sue upon it or:

> there might be no relief at all. And it can never be supposed reasonable or legal, that the banker should have it left in his discretion or choice, to pay the money to one or the other as his fancy or inclination should lead him.[45]

This is important. By establishing the claim of any finder who cashed a bearer bill in good faith and for value, Mansfield was taking a step beyond the old practise of transfer by endorsement. Clearly, the drawer of a bill could not anticipate the identity of the "bearer" included on his bill, and therefore endorsement could not be made to him. The only method of transfer available for a bearer was delivery — the physical finding and presentation of the note — and at last English commercial law officially accepted the mercantile community's need for a freely negotiable form of paper credit.

It is possible to trace the influence of both Lord Hardwicke and Lord Holt in Mansfield's keen perception of the importance of bearer bills for commerce. Mansfield referred to the judgment of Hardwicke in the case *Walmesley* v. *Child* (1749)[46] in Chancery, in which the Lord Chancellor maintained that "no dispute ought to be made with the bearer of a cashnote, who comes fairly by it; for the sake of commerce, to which the

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44. *Id.*, at 1522 and 960.
45. *Id.*, at 1523 and 961.
46. Mansfield's description of the case is the only report extant.

discrediting such notes might be very detrimental."[47] Mansfield, then William Murray, was working in Chancery at the time and his admiration for Hardwicke, combined with his concern for the increase of commerce, must have ensured that this case made an impression on him. An earlier anonymous case heard by Lord Holt in 1699 addressed the same issue.[48] The judgment recognised the claim of a *bona fide* holder of a bill for value "by reason of the course of trade, which creates a property in the assignee or bearer."[49]

Grant requires one more comment. It is clear that, in this case, Mansfield felt no conflict with statutory law, using it to uphold mercantile acceptance of bearer bills over the sworn practise of the Bank of England. However, even in certain areas of marine insurance law where Mansfield profoundly disagreed with the dictates of Parliament, he consistently upheld the statutes without hesitation.[50] Perhaps he felt that a consistent cooperation at all levels would be the only way to forge for England the system of commercial law she so badly needed.

The outcome of *Grant* v. *Vaughan* was a new trial, and Mansfield noted that in his opinion, Bicknell should be held liable for Grant's loss, since he was the original payee and the amount of money specified in the bill had been effectively transferred to him upon the drawing of it.

Miller v. *Race*, although an earlier case, applied the same principles to a more specialised and far newer type of negotiable instrument, the bank note.[51] It was an action of trover for a bank note, payable to William Finney or bearer, which had been stolen from the mail and cashed for value by the plaintiff in the course of his business. Miller had no idea the note had been stolen. When Finney discovered the theft he ordered payment to be stopped on the note, and the plaintiff was unable to cash the note. The defendant, a cashier of the bank, also refused to redeliver the note to the plaintiff and therefore was sued in trover.

The present case was an appeal to the whole court, and Lord Mansfield believed the issue to be so important that he postponed judgment in order to look into all the cases. Concerned about his reputation for certainty with the London merchants, he added that "at the same time . . . I would not wish to have it understood in the City that the Court had any doubt about the point."[52] Moreover, when he delivered his judgment he made it clear that he had based his decision "upon the

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47. Cited in 3 Burr. 1525, 97 Eng. Rep. 961.
48. 1 Salk. 126, 3 Salk. 71, 1 Ld. Raym. 738.
49. *Id.*
50. *See* Samson, "Mansfield and Marine Insurance," *supra*, note 6 at 125-157.
51. *See* note 1, *supra.*
52. 1 Burr. 457, 97 Eng. Rep. 401.

general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination."[53]

During the first hearing of the case, the special jury had found that "in the common and known course of trade, bank notes are paid by and received of the holder or possessor of them, as cash; and that in the usual way of negotiating bank notes, they pass from one person to another as cash, by delivery only ..."[54] There could be no question that the bearer of a bank note made payable to bearer, if he received the note in good faith and for value, should be able to cash it. Mansfield referred to the Chancery case *Walmsley* v. *Child* in this judgment also, concluding:

> A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.[55]

The history of an instrument could not affect the title of a *bona fide* holder.

Another case, *Peacock* v. *Rhodes* (1781),[56] dealt with a stolen bill of exchange, this time endorsed in blank, in the same way. Mansfield found himself in the agreeable position of being cited twice as a precedent, and found judgement accordingly. His summation included an excellent overview of all the legal issues surrounding a stolen note payable to bearer, or endorsed in blank:

> The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties .... I see no difference between a note indorsed blank and one payable to bearer. They both go by delivery, and possession proves property in both cases.[57]

Emphasis on practical results underscored Mansfield's judicial style. His concern for the advancement of trade, his sensitivity to the needs of merchants, his gifts of organisation and clarity of expression, all brought the development of English negotiable instruments law into accord with the usage of trade. A keen awareness of the importance of universal

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53. *Id.*
54. *Id.*, at 452 and 398.
55. *Id.*, at 459 and 402.
56. 2 Dougl. 633, 99 Eng. Rep. 402.
57. *Id.*, at 636 and 403.

certainty prompted Mansfield to mold the law to commercial needs, rather than force those needs into legal restrictions. No doubt his Scottish background and Chancery experience helped him to know that mercantile custom was consistent throughout Europe and beyond, at least on the issue of negotiable instruments, and that the court he inherited needed firm direction in order to make English commercial law reflect its requirements. Knowing that the records were confused and misleading, he laid down practical, coherent definitions for the guidance of proceedings, insisting that the intentions of the parties to a negotiable instrument be given first priority. Where the law could make a technical objection, as in *Edie* v. *East India Company*, Mansfield let natural justice carry the day. As he said in another negotiable instruments case *Alderson* v. *Temple* (1768):[58]

> . . . I choose to put the case upon that ground; because the most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law), is, to do substantial justice.[59]

In Mansfield's court, merchants found a sympathetic hearing which contrasted sharply with their experience of Lord Holt, and Mansfield found in the muddled reports a task equal to his enthusiasm and talents. There was plenty of scope for both during his career: Mansfield heard 167 cases on bills of exchange and 292 on promissory notes at *Nisi Prius* alone,[60] out of a total of 691 commercial cases. The number of cases on notes is particularly striking and testifies to the popularity of this form of paper credit. Cases on notes increased in number throughout the period of Mansfield's appointment, soaring from seven in the period 1756-1760 to 61 in 1766-1770. The total for the years 1781-1788 was 103 cases, and since Mansfield was often ill during the last two years, that figure might have been higher. Cases on bills of exchange follow the same pattern. It is a compliment to Mansfield that, relative to these increases, the number of cases appealed to the full court declined. Clearly Mansfield's decisions carried weight, and his search for certainty in law and predictability in practise was a successful one.

The number of cases did not only relate to increased trade in negotiable instruments, but also to the reputation of the presiding judge. Sympathetic, equitable, meticulous and articulate, Lord Mansfield was able to make sense of a very confused and uncertain aspect of the law

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58. 4 Burr. 2235, 98 Eng. Rep. 165.
59. *Id.*, at 2239 and 167.
60. *Fifty-Six Judges' Notebooks.* Mansfield's unpublished court notebooks remain the property of the present Earl of Mansfield, who kindly consented to let me examine them.

with an eye to encouraging trade and commerce. He made himself the literal and legal turning-point for the subject. Such a blend of scholarship and pragmatism could not fail to impress, and Mansfield's illumination of the law of negotiable instruments inspired two contemporaries to collect his decisions. Peter Lovelass, a lawyer, produced "a full, clear and familiar explanation of the law upon Bills of Exchange and Promissory Notes" in 1798, the year after Mansfield's death. It began:

> The genius of Lord Mansfield and the numerous suits commenced and prosecuted in the courts of law even within these last 20 years, for determining the properties, nature and effects of paper credit, are indisputably loud calls for a work of this kind.[61]

Another book was published in 1789, Sir John Bayley's *Short Treatise on the Law of Bills of Exchange.*[62] He too assented that Mansfield's achievements in this area of the law should not go unchronicled.

What Mansfield's judgments reveal is the way in which mercantile custom regarding negotiable instruments entered common law, illustrating the interplay of commercial demand and legal procedure. More generally we can observe the influence of personality on lawmaking. It was the force and purpose of Lord Mansfield's character and talents, along with his cultivation of cooperation between law and layman, which made his court a forum for redefinition and reform.

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61. Peter Lovelass, *A Full, Clear and Familiar Explanation of the Law Concerning Bills of Exchange and Promissory Notes*, Preface (1789).

62. Preface: "The many modern determinations upon the law of Bills and Notes, and the importance of an intimate acquaintance with the principles of these determinations, is a sufficient apology for an attempt to collect and methodize them."