Rights of Remitters and Other Owners Not within the Tenor of Negotiable Instruments

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There is considerable confusion in the law as to the exact rights of persons who find themselves in possession of negotiable instruments for which they have given value, but to which they are not parties. This confusion is due largely to the fact that the law on this subject grew up in widely scattered courts, under different business conditions, and under varying conceptions of the law merchant, which are so well illustrated in the many conflicting decisions in other branches of the law of commercial paper before the passage of the Negotiable Instruments Law. With the exception of section 49, the Negotiable Instruments Law is silent on the rights of these owners who do not meet the formal requirements of a holder.

It is impossible accurately to conceive or to classify all the conditions in which a person may become a bona fide owner of an instrument to which he is not a party, or to imagine the circumstances which might affect his claims against the maker, drawer, indorsers, and sureties on the paper. But in order to thread one's way through the apparently conflicting decisions on this subject, a rough classification is necessary.

There are two general classes of cases dealing with the rights of persons not parties to negotiable instruments, who may acquire an interest either in the negotiable instrument itself or through transactions surrounding the formation and transfer of the paper. The first and most common in number of law suits involved is the group of cases of transferees without endorsement of order instruments, who take them either by assignment or delivery from the payee, or subsequent holders.

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*This article deals only with instruments payable to a named payee; owners of order instruments would, of course, fall within the tenor, and therefore would be classified as holders under the Negotiable Instruments Law, sec. 191.
The second includes the cases of persons who procure the instruments payable to the order of others than themselves directly from the maker or drawer. The most familiar instance of this sort is the remitter who purchases a negotiable instrument payable to his creditor instead of to himself with the intention of remitting funds to pay his obligation. Another is the buyer of an instrument intended for discount with someone else, which, for some reason, failed of discount with the payee named therein.

On the rights of the transferee without endorsement from the payee or subsequent holder, the law is clear.

It has long been settled that a transferee, without indorsement from the payee, has all the rights of the payee against all prior parties, but will not take the instrument free from equities existing against the payee.\(^1\)

As to the rights of the transferee without indorsement from a holder subsequent to the payee, there was some dispute before the Negotiable Instruments Law.\(^2\) But it is now clear under section 40,\(^3\) that such a transferee has the same rights as his transferee. Thus he would be free from equities existing against the payee only if the transferor was a holder in due course, or the transferee of a holder in due course. In addition, the cases under the act give such a transferee without indorsement, legal title,\(^4\) and the right to have the transferor's indorsement by a suit in equity.\(^5\) But he does not become a bona fide holder until the indorsement is received.\(^6\)

In all of these cases the transferee without indorsement stands directly in the position of his transferor, and can acquire no more

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\(^1\) See note 17 L. R. A. (N.S.) 1105 and cases there cited at 1109 and following. See also note 10 L. R. A. (N.S.) at 548.
\(^2\) See notes cited above, also 23 L. R. A. 325, 330.
\(^3\) "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such titles as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement was actually made." For cases under English Bill of Exchange Act see 4 Eng. Rul. Cas. 335.
\(^4\) Sees Chafee's 4th edition of Brannan on Negotiable Instruments 339, and cases there cited.
\(^5\) Ibid., p. 345.
\(^6\) Karsner v. Cooper, (1922) 195 Ky. 8, 241 S. W. 346, 25 A. L. R. 159, and note following on 163. See also Chafee's 4th edition of Brannan on Negotiable Instruments 340, and cases there cited.
rights against prior parties than his transferor. This seems to be sound law and the clear intent of the act.

However, there is one situation where the courts have given the transferee without indorsement greater rights than his transferor. This is the case of the transferee without indorsement from an accommodation payee. It is clear that the payee would have no rights on the instrument against the accommodating maker, and thus if the payee’s transferee receive only the rights of the payee, under section 49, he could not recover on the instrument against the accommodating parties even if he had given value to the payee. Yet it has been held in two cases involving this point, one in Scotland under an identical section of the Bills of Exchange Act, and one in Indiana where a non-negotiable instrument was involved, that the transferee could recover from the accommodating maker.

Although at first thought, it would seem that the transferee, being only in the position of an assignee, could get no better rights than his assignor, it is clear that the original purpose of the maker, in both cases, was to lend his credit to the payee; and this was accomplished when the transferee took the instrument for value. The only thing wanting to complete the right of the transferee was the failure to comply with the formalities of negotiable paper. In the first instance it was the failure to indorse, and in the second the failure to make the instrument negotiable; but in both cases the general purpose was that the accommodation maker lend his credit to the payee. In such cases as these, it is easy for the courts to follow a rule that seems to be very common in the cases of accommodation instruments, and hold that if the original purpose of the transaction has been carried out substantially, and if no hardship to them results, the accommodating parties will be held as if all the details of the arrangement had been complied with. This doctrine is based on the substance rather than the form

7Hood v. Stewart, (1890) 17 Sess. Cases, 4th series, 749, decided under section 31 (4) of Bill of Exchange Act. This case might be explained on the ground that the Scotch law has its origin in Roman and Canon law, which recognized the validity of a contract without consideration, see 4 Eng. Rul. Cas. 316. However, the doctrine has also come into common law through equity.


of the transaction, and its application will become clearer as we examine some of the more difficult cases of non-tenor owners of negotiable paper.

The second class of non-tenor owners mentioned above, those who have taken an order instrument for value before delivery to the payee, and before he has acquired any rights thereon, should be sub-divided into two additional classes, the remitter and the substituted creditor after discount has been refused. Unfortunately, the courts and some of the writers on this subject have failed to make this distinction. They have treated all these cases as if they rested on the same ground.10

However, an examination of the facts will show that the case of the remitter who later finds himself, usually through no fault of his own, the owner of a bill or note payable to the order of another person, is quite different from that of the party who buys an instrument payable to another merely for an investment or as a means of lending money. The former is the victim of an unexpected miscarriage of an ordinary business transaction. The latter is a careless investor in an extraordinary piece of negotiable paper which on its face carries a warning to the prudent business man. It should also be noted that the remitter is usually a party to the original transaction which led to the formation of the instrument in question, which was drawn especially for his benefit; while the substituted creditor comes into a transaction which was not begun for his benefit and in the inception of which his interests were never contemplated. These considerations should be given weight in determining the right of the non-tenor owners against the maker, sureties, drawer, acceptor, and irregular indorsers of the instrument involved.

These owners have this much in common, that neither can be a holder of the instrument because neither is "the payee or indorsee of a bill or note . . . . or the bearer thereof." It is clear also that they cannot be termed as holders of a bearer instrument on the ground that the payee is a fictitious person,12 because the

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1. J. 177; Utica Bank v. Ganson, (1833) 10 Wend. (N.Y.) 314. See also 1 Daniels, Negotiable Instruments, sec. 792; Farley National Bank v. Henderson, (1897) 118 Ala. 441, 463, 24 So. 428, 434; Powell v. Waters, (1819) 17 John. (N.Y.) 176. For a similar application of this principle to a surety on a bond, see note, 28 L. R. A. (N.S.) 463.

10See the Rights of a Remitter of a Bill or Note, 20 Col. L. Rev. 749, cases cited on 752. See also 8 C. J. 210, n. 63, 64 and 65 where this is treated as a question of delivery.

11Negotiable Instruments Law, sec. 191.

12Negotiable Instruments Law, secs. 9 (3) and 130. For discussion of cases suggesting this view see note 79, below.
payee in all these cases is a real person and the original intent was that he was to be the party to collect on the instrument. It follows that if they are not holders, they are not parties to the instrument in the sense in which that term is used today. If, then, the rights of the remitter and the substituted creditor are not mentioned in the act, they must be determined by the law merchant.\textsuperscript{13}

Let us examine the rights of the remitter;\textsuperscript{14} first, his claim against the maker or the party intended to be primarily liable on the instrument; and second, his rights against the parties intended to be secondarily liable.

All cases agree that the remitter has a good cause of action against the principal obligor,\textsuperscript{15} and that this action will lie whether the paper is given in exchange for a present consideration such as cash or a loan,\textsuperscript{16} or as a means of satisfying an old debt.\textsuperscript{17}

\textsuperscript{13}Negotiable Instruments Law, sec. 196. "In any case not covered by this act the rules of the law merchant shall govern."

\textsuperscript{14}The term remitter used in its business sense applies to any person who sends money or credit to another, usually through the medium of a bank or commercial credit house. The remittance may be made by negotiable instrument with the remitter acting as purchaser, payee, or indorsee; by transmission of the money in specie; by postal money order, express money orders and bank certificates of deposit in many different forms; by wire; by wireless or in other ways. These transactions create many different relationships from which various legal and equitable rights may arise. Some of these are suggested and discussed in notes, 16 A. L. R. 185, and 33 Yale L. J. 177 where numerous cases are cited. The legal meaning of the term seems to be of ancient origin, and corresponds with the business usage, see Scarlett, Stile of Exchanges; Beawes, Lex Mercatoria; Williams v. Everett, (1811) 14 East 582, 595-6; Munroe v. Bordier, (1849) 8 C. B. 862 side note, and 871. This article, being limited to the subject of bills and notes, discusses only the right of a remitter on a negotiable instrument payable to a person other than himself.


But as to the form of the action and the nature of the remedy, there is a wide diversity of opinion. In the older American cases, all of which are at law, the courts entertained some of the suits in the name of the nominal payee for the benefit of the remitter, possibly on the grounds of implied assignment, while in others the suit is allowed in the name of the remitter himself, the declaration being either in assumpsit on the note or in plain assumpsit with the note put in as evidence. In others, and in the later cases, arising under practice statutes or under the modern codes, some courts have decided these cases on equitable grounds.

The exact theory upon which the remitter recovers from the principal obligor, be he either maker, drawer or acceptor of the instrument, is not easy to determine from the cases. The form of the suit, in the name of the payee on the instrument, would suggest that the theory might be an analogy to an assignment; but an examination of the principles involved will show that the nominal payee never had any rights on the instrument, because it was never delivered to him and he was not a party to the contract. If, then, he had no right, he could pass none by assignment or by indorsement after maturity, as was done in some cases to enable suit to be brought in the name of the remitter.

That the practice of bringing the action in the name of the nominal payee is a mere fiction to force an unusual suit into a familiar form is indicated by the case of Trible v. The Bank of Grenada where the defendants, in an action by a remitter in the name of the nominal payee, offered to prove set-offs against the nominal payee, showing conclusively that the interests of the nominal payee are not involved in cases of this nature.

19 Cross v. Rowe, (1850) 22 N. H. 77; Allen v. Ayers, (1825) 3 Pick. (Mass.) 297; Spurrier v. Briggs, (1861) 17 Ind. 529. In states where statutes allow suit by the real party in interest, it is to be expected that the remitter will sue in his own name; but note the cases where this procedure was followed in New Hampshire and Massachusetts under the old forms of pleading.
These cases might be supported, on some ground of rights arising from the transactions between the parties. As has already been pointed out, the remitter is a party to the negotiations from which the instrument arises, he has furnished the consideration for the contract, and it was contemplated that the proceeds of the instrument when discounted by the payee would be used for his benefit. In the cases where the failure of the payee to accept the instrument is the cause of the remitter's loss and creates the necessity of his action against the principal obligor, the situation is clearly analogous to failure of consideration found in ordinary contractual dealings; and one might expect the remedy to lie in quasi-contract under the category of failure of consideration. The recovery, on this theory, would be measured by the benefit received by the principal obligor and surety.

If this theory were followed, the remitter would be returned the value of the consideration given to the maker or drawer, at the time of making the agreement from which the instrument arose. If he paid cash, he would be entitled to the return of his money, and if an old debt were the consideration, he would be given the value of his former rights. This theory might explain the cases where the failure of the transaction is due to no fault on the part of the remitter and where the cash payment recovered was equal to the face of the instrument. But quasi-contract fails completely to explain those cases where the remitter himself is in default, in that he has not carried out the contract by delivering the instrument to the payee; or those where the instrument was drawn for a consideration other than cash, or for an old obligation of the principal debtor to the remitter. In these cases, the recovery of the face of the note from either the principal or the surety shows that instead of adopting the quasi-contractual remedy, the courts are going forward with the contract. This would be the practice of any bank, and the ordinary business conception of fair dealing, i. e.: if the payee does not collect on the instrument it should be paid to the remitter who has given value for it.

24See Keener, Quasi-Contracts 292.
25For discussion of quasi-contractual recovery where the plaintiff is at fault, see Keener, Quasi-Contracts, Chap. IV, pp. 214-258.
26Spurrier and others v. Briggs, (1861) 17 Ind. 529 where consideration was an old judgment; Sutherland State Bank v. Dial, (1919) 103 Neb. 136, 170 N. W. 666; Cross v. Rowe, (1850) 22 N. H. 77 where consideration was a horse; Trible v. Bank of Grenada, (1844) 10 Miss. 523 where consideration was an old debt and some bank notes.
27For an example of this practice, see Buehler v. Galt, (1889) 35 Ill. App. 225, 226.
This business conception might justify a recovery on the equitable ground of reformation of the bill or note to conform with this secondary intention of the parties. The entire purpose of the contract between the principal obligor and the remitter was a sale of credit to the remitter, and the instrument might as well have been made in his name as in the same of the payee. The principal obligor has been unjustly enriched by the failure of the payee to take the instrument and loses nothing by being required to pay the remitter. Therefore, it is not surprising to find some courts going forward on these equitable grounds to enforce its terms against the principal obligor for the benefit of the remitter. However, this theory fails to explain why in all the cases except two the recovery has been at law, and not in a court of equity.

Some authorities have advanced the theory that the remitter's recovery is at law for money had and received. This explanation would be entirely proper where the recovery is at law for the amount paid; but it also fails to explain the cases where the consideration paid by the remitter was some object of value other than money but where the judgment was on the note for its face value. It should also be noted that in order to recover for money had and received on a contract, the plaintiff would have to prove impossibility of performance, or breach of contract on the part of the defendant.

But there are many cases allowing recovery where no such proof is offered or where the action is on the bill or note itself. Probably the most satisfactory explanation of the rights of the remitter is to be found in the law merchant itself. During the sixteenth and seventeenth centuries when negotiable instruments were first being established in English Common Law, the remitter was regarded as a party to a bill of exchange, and his name actually appeared upon its face. Malynes in his Lex Mer-

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28Spurrier v. Briggs, (1861) 17 Ind. 529; Sutherland State Bank v. Dial, (1919) 103 Neb. 136, 170 N. W. 666, where the courts cite as authority Spreng v. Juni, (1909) 109 Minn. 85, N. W. 1015, 18 Ann. Cas. 222, a case where the payee’s name was inserted by mistake. See also note 28 Yale L. J. 695.


30See cases cited in note 26 above.


32Sutherland State Bank v. Dial, (1919) 103 Neb. 136, 170 N. W. 666; Trible v. Bank of Grenada, (1844) 10 Miss. 523; Cross v. Rowe, (1850) 22 N. H. 77; see Allen v. Ayers, (1825) 3 Pick. (Mass.) 297, 299; and see also Moore’s article in 20 Col. L. Rev. pages 752-753.
Laus Deo: Adj. 20 September 1622 in Amsterdam—100 at 33s 6d
At usance pay this my first Bill of Exchange unto W. M. the sum of one hundred pounds lawful money of England, for value here by me received of D. H. Make him a good payment, and put it to your Account. God keep you.

Subscribed, W. C.

On the backside indorsed, To my loving friend Master G. M. Merchant at London, Pa."

Thirty years later Marius gives examples of other bills current at the time.35

Although few of these bills contain words of negotiability, there is no doubt that they were the common form of bills of exchange of this period and were treated by the merchants as negotiable instruments.36

It is equally clear that the merchants and writers of the period recognized the four-party bill as the common form and the three-party bill, the usual form today, as the exception.37

For mention of this text see 5 Holdsworth, History of English Law, 131-134 and vol. 8, p. 155.

This is of course a foreign bill, which, 2 Street, Foundation of Legal Liability 344, tells us was the only bill at this time known to the custom of merchants. It is taken from the 1656 edition of Malynes page 262. Other similar instruments of this date drawn in England and on the continent are reproduced in full by 8 Holdsworth, History of English Law 152-153.

Marius, Advice Concerning Bills of Exchange, 2d ed., 7 ff. where a number of such bills are set forth in detail, one of which follows:

"Laus Deo, in London this 16th November 1654 for 100 sterling.
At six daies sight pay this my second Bill of Exchange (my first not paid) to Mr. Abraham P or Assignes One hundred Pounds sterling, for value here received of Mr. John D. Make good payment, and put to my account per advice.

Your loving Friend
William M.

To Mr. Francis W.
Merchant dd
in S da Exon."

Of eleven forms given by Marius ten are clearly four party paper, in one the remitter has the bill made payable to himself, three contain the phrase "or order," and three have indorsements on them. One of the bills set forth with indorsements which the author says make it negotiable, see page 10, is a bill payable to a named payee "or assigns" and by him indorsed to order or assigns.

One hundred years later after the negotiable instrument had been well established in the common law we find an author stating the custom as follows:

"There are ordinarily four persons requisite in making Exchange, besides the broker, viz. two at the place where the money is taken up and two where it is payable; as 1st the Deliveror, Giver, Remitter or Negotiator, being the Person who delivers the Money—2ndly the Taker or Drawer, who receives the Money by way of Exchange—3rdly, the party who is to pay the Money in Virtue of the Bill drawn on him, commonly called the Acceptant—4thly, the person to whom the Bill is made payable and who is to receive it, called the Possessor or Holder of it."

And, although today the remitter's name no longer appears on the instrument, the custom of purchasing drafts or other credit instruments payable to the order of a third person has continued down to the present, and is still a common practice among business men all over the world.

It is also clear that the merchants of the sixteenth and seventeenth centuries not only regarded the remitter as a formal party to the bill, but also conceived that he had substantial rights and duties on the instrument. Marius tells us that he was master of the bill till paid and could stop payment. If the bill was dishonored he was entitled to immediate notice of protest and the bill was returned to him in order that he could recover from the drawer. But if a bill payable some time after sight was refused acceptance but had not yet been refused payment, it was returned to the remitter who got security from the drawer, and then tried to collect it on maturity from the drawee. If at maturity the

[38] Beawes, Lex Mercatoria 428.
[41] Malynes, Lex Mercatoria 270; Marius, Advice Concerning Bills of Exchange 35; Scarlett, Stile of Exchanges 27 xxv, 94 xvi, 301 xiv, 304 xxv, 346, case 9 (1); Beawes, Lex Mercatoria 433 (24), 435 (40), 538 (68).
[42] Scarlett, Stile of Exchanges 91 viii suggesting a possible cause of action by the remitter against the payee.
drawee refused payment, the remitter had his remedy against the drawer for the bill, costs of protest, exchange, and re-exchange.\footnote{Scarlett, Stile of Exchanges 91 viii, 94 xvi, Beawes, Lex Mercatoria 348 (70).}

That the merchants regarded this right as a recovery on the bill itself is shown by a passage in Malynes.\footnote{Lex Mercatoria (1656), Chap. viii, page 270.} Here, after explaining at length the process of reciprocal and double exchange, where one merchant, AB, exchanges his bill drawn upon Venice for a bill drawn by another merchant, CD, upon a party in Antwerp and payable to a third party there, the author says that if the bill drawn by CD is returned protested to AB, the latter recovers its face value together with expenses from the drawer, although he paid no cash for the bill. Malynes himself points out that this is a recovery on the bill.

It was also settled custom of merchants that the remitter was required to produce the bill or give security to the drawer,\footnote{Scarclett, Stile of Exchanges 94 xvi. This is also the law today. Goeske v. Taylor, (1923) 205 App. Div. 429, 199 N. Y. S. 577; Gellert v. Bank of California, (1923) 107 Or. 162, 214 Pac. 377. Marius, Advice Concerning Bill of Exchange 35 (Reproduced in 8 Holdsworth, History of English Law 158, n. 1); 4 Comyn's Digest 244.} and payment by the drawer to the remitter discharged the drawer from further liability to all parties.\footnote{For a more complete account of the history of bills of exchange see 2 Street, Foundation of Legal Liability, Chap. xxxii, and 8 Holdsworth, viii, 113-177; 1 Cranch (U.S.) 368, 2 L. Ed. 368.} The rules and customs of the merchants in dealing with bills of exchange were slow to find their way into the common law due to the fact that the merchants had their own courts, and experience had taught them the hostility of the old common law to the types of contracts involved in bills of exchange.\footnote{Some of the reporters class the earlier action as being on the case. This, however, is not significant for our purposes, because at this time assumpsit and case were not yet clearly distinguished.} It is probably due to this hostility to negotiability that we find that the earliest cases involving bills of exchange are suits by remitters. Since the remitter and the drawer were parties to a contract involving the exchange of money it was possible to state their rights as conceived by the law merchant in the form of an action of assumpsit.\footnote{At f. 10a. This plea is set out in 1 Cranch (U.S.) 375; 2 L. Ed. 374; 2 Street, Foundation of Legal Liability 343.}

Thus we find one of the earliest pleas of this nature set forth in Rastell's Entries\footnote{Scarlett, Stile of Exchanges 94 xvi, Beawes, Lex Mercatoria 348 (70).} published in 1566. This declaration, founded...
in assumpsit, states that A (the remitter) paid B (the drawer) a sum of money on a promise that B would procure G (the drawee) to pay S (the payee) a like amount in certain installments at the merchants' fair. G had not paid S, wherefore A's credit was injured with G and S. Although the bill itself is not mentioned, authorities agree that it was an action by a remitter against a drawer.\textsuperscript{50} Again in 1595, Rastell reports another case\textsuperscript{51} in which a remitter, JL, sues a drawer, E, setting forth that the money paid to the drawer was to be paid by JB to BL "according to the custom of merchants by way of exchange," and shortly after 1620, in the case of Monsey \textit{v.} Travers,\textsuperscript{62} we have an example of a re-

\begin{itemize}
  \item See 2 Street, Foundation of Legal Liability chap. xxxiii, 343-345, 8 Holdsworth, History of English Law 160.
  \item Rastell's Entries 338b, giving reference to Trinity 37 Elizabeth Rolls.
  \item Vidian, The Exact Pleader 66. The declaration follows: "John Monnsey, merchant of London, complains of Edward Travers, merchant of London, (here the pleader sets forth in detail the custom of reciprocal exchange explained by Malynes, see note 44 above). "That whereas the aforesaid J and E on the 9th of June 1620, and long before and continuously afterwards up till now were merchants, residing in London, and whereas the said J on the 9th of June delivered to the said E, at the instance and request of said E, 250£ payable at usance and a half . . . by way of exchange, 430£ 4s. 4d. of Flemish money to one PB, merchant at Middleborough, beyond the seas, or to the bearer of this bill of exchange . . . and whereas the said E, on receipt of the said 250£ . . . directed duplicate bills of exchange to one RS, merchant in Middleborough requesting the said R to pay at usance and a half the first bill, the second not being paid, to the aforesaid PB or bearer, the said 430£ 4s. 4d. at Middleborough, for value received at London from said J, and to put it to his account according to advice (here the pleader recites a second bill in identical terms). "And Whereas the said E on the 9th of June 1620, in consideration of the premises took upon himself and faithfully promised the said J that if the said R should not accept one of the duplicate bills, and should not pay said 430£ 4s. 4d. at usance and a half, whereby the said bill should be protested that he, the said E agreed to pay and content the said J of 250£ English money. "And said J in fact says that the first bill of exchange was presented to said R on the 30th day of July 1620 and R subscribed and accepted it, and furthermore J says that, although often requested . . . R has not paid nor satisfied the said P of 430£ 4s. 4d. whereby said bill was protested. "And furthermore J says that on the 8th of August 1620 he gave notice to E of acceptance and protest, nevertheless E, not heeding his promise and undertaking, refused to pay either 250£ or 430£ 4s. 4d. and has not yet paid or contented the said J. Whereby J suffers loss and brings this suit. "E pleads no assumpsit." The fact that this bill is payable to bearer is of no significance because at this time the expressions "Assignes," "or order," and "or bearer" were not distinguished. See 8 Holdsworth, History of English Law 157, 163.
mitter setting forth his plea alleging the bill and the non-payment and seeking recovery from the drawer in an action of assumpsit.

This declaration, like all the older cases, sets forth a promise on the part of the drawer to repay the remitter's money if the bill is not paid, and the claim is in the alternative either for the return of the money or the payment of the bill. That the promise to return the money to the drawer is a fiction and the real purpose of the action is recovery on the instrument according to the custom of merchants, is shown by the case of Shepard v. Beecher, a suit in Kings Bench about 1632, where the remitter in his declaration against the drawer sets forth the bill, the dishonor, the protest, and the usual promise of repayment; but the jury finds only the existence of the bill, its dishonor and the custom of merchants that the drawer will pay the bill at maturity. This, the author seems to think, is a sufficient allegation and finding of fact to support an action of assumpsit.

Thus we find that at this early date the right of the remitter to recover on the instrument from the drawer, was contemporaneous with the right of the payee to recover from the acceptor. Probably it was through the right of the remitter to recover from the drawer that the payee and endorsees later obtained similar rights.

The failure of later English cases in the seventeenth and eighteenth centuries to mention the rights of the remitter, probably, are due to many causes. In many of these early reports the

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54 Part of the verdict was as follows: "The custom of merchants is that all sums payable at usance are payable one month after date of the bill, and that if the party to whom the bill is directed shall not accept the bill or pay it, that he that subscribed or directed the bill ought to pay the sums delivered to him after the time when the bill becomes due."

55 This is due, of course, to the common-law attitude that only parties directly concerned in the transaction could recover upon a contract. Oste v. Taylor, (1612) Croke James I, 506, 1 Rolls, Ab. 6, the payee recovers from the acceptor on the grounds of his direct promise; Rastell's Entries 338a, citing M-37 Trinity, 38 Elizabeth Rolls, allows payee a recovery against an acceptor; and in Vidian Entries 67 is another plea by a payee against an acceptor.

56 A case in Herne, Pledger 136, citing Trin. 13 Eliz. Rolls, allows a remitter who is also the payee to recover from the drawer, and in Martin v. Boure, (1602) Croke James I, 6, we find a drawer recovering from an acceptor after showing that he has paid the bill to the remitter; Vanheath v. Turner, (1622) Winch 24, seems to be a case of a remitter (who possibly may also be a payee) suing one of the members of the firm of acceptors; and Barnaby v. Rigalt, (1633) Croke Car. 301, may be a similar case; see also 8 Holdsworth, History of English Law 161-164.
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parties to the bills are vaguely stated and, therefore, it is hard to
determine the exact interest of the plaintiff in the instrument.\(^{57}\) Most of these cases are concerned with the details of the adjust-
ment of common and statute law\(^{68}\) to the negotiable instrument, and especially with the development of the rights inter se of
drawers, payees, indorsers and indorsees. The development of
these new rights offered a shorter and more convenient means of
settling obligations on negotiable instruments, and thus the remit-
ter's name gradually disappeared from the instrument itself and
from the litigation. But probably the best explanation of the ab-
scence of suits by remitters lies in the fact that their rights were
so well established in the early law, and in the custom of mer-
chants, that business men and bankers were always willing to pre-
serve their credit by paying the remitter. Thus few cases reached
the higher courts.

Although the remitter's rights were seldom litigated during the
seventeenth and eighteenth centuries, we have a number of in-
stances showing that common law courts continued to regard him
as having legal rights on the instrument. As late as 1785 we find
a text writer\(^{69}\) stating that there are generally four parties to a bill
of exchange and that payment to the remitter discharges the in-
strument. In cases where the drawer's bankruptcy has prevented
payment to the remitter, although various ingenious theories of
equity and trust have been urged upon the courts, they have uni-
formly held that, in absence of fraud, the remitter of a bill has
only a legal right to prove the instrument and come in on a par
with the other creditors.\(^{60}\)

In light of these facts it is not surprising that the courts in

\(^{57}\) For examples of this type of reporting see Edkar v. Chut, (1665) 1 Keb. 592; Hards Case, (1697) 1 Salkeld 23; Barnaby v. Rigalt, (1633) Croke Car. 301; Jacomo de Brett v. Lawrence, (1672) 2 Keb. 770; Brough v. Parkings, (1704) 6 Mod. 80, 1 Salk. 130, 3 Salk. 69, 2 Raym. 992; Jackson v. Pigott, (1699) 1 Salk. 127, 1 Raym. 364.

\(^{58}\) The promissory note was the first form known to continental
merchants but did not achieve negotiability in English law till the
Statute of Ann, in 1704. For further account of the history of
negotiable notes see texts cited in note 47 above.

\(^{59}\) Comyn, Digest of Laws of England 239, 244.

\(^{60}\) In re Melbourne Bank Limited, Ferguson's Case, (1897) 23
Victoria Law Reports 78; ex parte Denton Hat Factory Co., Ltd., (1897) 23 Victoria Law Reports 87; Re Watson & Co., (1904) Ex
1897) 91 Fed. 920. For a further discussion of the rights created in
this and similar situations see Notes in 2 L. R. A. (N.S.) 83, 10
The United States during the nineteenth century allowed a remitter to recover in a suit at law on the bill.61

The theory that the remitter has legal rights on the instrument also offers a satisfactory explanation of the recent cases which arose shortly after the world war due to the sudden interruption of business by hostilities. In these cases, due to depreciation of European currency, it became important to discover at what time the remitter's rights arose, and whether his recovery was to be measured in foreign or domestic currency. Some of the decisions have treated the transaction between the remitter and the drawer as a "sale of credit."62 Under this theory the remitter has two remedies. If the bank has committed a complete breach of contract in not arranging for acceptance by the foreign drawee he may rescind and recover his money;63 but if the bank has carried out its part of the contract by arranging for the acceptance, the remitter is allowed to recover the value of the draft at time of presentment and refusal, plus the usual damages.64 This simply amounts to allowing the remitter a recovery on the instrument in all cases except in complete failure of performance on the part of the drawer, where a rescission and recovery from the drawer would be allowed; and is a proper extension of the remitter's rights against the drawer or maker to correspond with those of the modern payee.

In cases where the co-makers, sureties or irregular indorsers were parties to the transaction with the remitter and knew the purpose for which the instrument was drawn, the rights of the remitter to recover from them should rest on the same ground as that by which he recovers from the principal obligor. The forms of action and the theory upon which the cases are tried will be found to vary in the same manner as do those against the principal obligor.65

61See cases cited in note 32 above.
62See Foreign Trade Banking Corporation v. Cosmopolitan Trust Co., (1922) 240 Mass. 413, 414, 134 N. E. 403, where part of the checks in suit by the remitter against the drawer were payable to a third party. See also Legniti v. Mechanics and Merchants Nat. Bank, (1921) 230 N. Y. 413, 130 N. E. 597, introductory remarks by the court.
In cases where the co-maker sureties are not parties to the transaction with the remitter but sign the instrument at the request of the principal obligor, a different situation arises. Since the instrument is made payable to a named payee, it might be argued that the surety never intended to become liable to the remitter, is not a party to any contract with him, and therefore, it is a diversion of the paper to allow anybody except the payee and those holding under him to recover. Following this view, it has been held in Massachusetts that the surety co-maker was not liable unless he know the exact purpose of the note. But there are a number of cases in other states in which the courts have held the surety liable even though he did not know the exact purpose of the instrument, arguing that the general purpose of the instrument was to raise money for the benefit of the obligor, that this was accomplished without harm to the surety, and therefore he should be held liable to the remitter. These cases clearly give the remitter all the rights of the nominal payee against the drawer or co-maker surety and are another illustration of the remitter's right on the instrument itself. They are also a further extension of the principle mentioned above, that, although the original agreement is not exactly carried out, an accommodating party will be liable if the instrument is not diverted from the general purpose intended, and so long as the variation does not harm the accommodating party.

This seems too clear for argument that since the remitter's rights rest on the fact that he gave consideration for a bona fide transaction and is the real party to the bill, any person in the position of a remitter who is a borrower of the paper, who has it for his own accommodation, or who has procured the instrument by fraud, would have no rights against any of the parties thereon.

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65 See cases cited in note 15, 16, 17, 18 and 19 above. It might be argued that the Statute of Frauds would prevent recovery by the remitter against the other parties to the instrument; but the fact that this theory never has been raised indicates that the courts have taken the view that the only question involved is a suit on the instrument before them, which clearly satisfies the requirements of the statute so far as a memorandum in writing is concerned.
67 Utica Bank v. Garrison, (1833) 10 Wend. (N.Y.) 314; Planters and Merchants Bank v. Blair, (1843) 4 Ala. 613; and see also Cross v. Rowe, (1850) 22 N. H. 77. The New York case appears to arise from a non-negotiable note, and, therefore, is a very strong case against releasing the surety.
68 See note 9 and cases there cited.
69 A complete discussion of this principle appears below.
70 See Moore's article 20 Col. L. Rev. 749, 752-3.
It is also clear that an ordinary assignee of the remitter would take only the remitter’s rights, and would be subject to the same defences as he." But an assignee for value of an accommodated remitter might be able to recover on the same grounds as does an assignee of an accommodated payee;" and since the remitter has a legal right in the instrument, one would expect him to have power to negotiate it. Thus an innocent payee taking the paper for value from a remitter would be deemed a holder in due course.

The rights of the substituted creditor on an instrument after the payee has refused to discount it, have raised many questions on which the courts have expressed a wide divergence of opinions. All courts will agree that the substituted creditor can hold the principal obligor for the face-value of the instrument;" but there is the same divergence of opinion on the proper form of action and theory of recovery as is found in the cases dealing with the rights of the remitter, some courts allowing the substituted creditor to use his own name, while others allow recovery in the name of a nominal payee with or without his consent.

The cases allowing recovery in the name of the payee would suggest some doctrine of implied assignment; but this is even more

72 See notes 9 and 69.
73 Howard National Bank v. Wilson et al., (1923) 96 Vt. 438, 120 Atl. 889; Munroe v. Border, (1849) 8 C. B. 862; Campbell, Cases on Bills and Notes 437. See also Moore’s Article in 20 Col. L. Rev. 749; but see contra view in article by A. M. Hamilton, 24 Juridical Rev. 41, and for a complete discussion of possibility of payee being holder in due course see Chafee’s Edition of Brannon.
untenable than in the case of the remitter, because the payee not only has no rights to assign, but has definitely refused to accept any interest in the instrument.

Any quasi-contractual recovery would also fail, due to the fact that there is no failure of consideration, or variation of the original agreement so far as it affects the purchaser and the principal obligor. As explained above, the substituted creditor can not be a party to the instrument, and can claim no rights on the paper itself. This is well established by the case of *First National Bank of Centralia v. Henry Strang*77 where the maker of a note made payable to a bank turned it over to his agent to be discounted at the payee bank. The bank refusing discount, the agent sold the note to another. It was held that the purchaser could not recover from the maker of the note either for himself or in the payee’s name, because the note was void for want of delivery. Even though this can be partially explained on grounds of agency, it shows clearly that the substituted creditor can get no rights on the note itself. What claims he may have against the principal obligor must arise out of the contract between them at the time of the sale. The instrument, in so far as it affects the suit, is simply evidence of a new contract between the principal obligor and the substituted creditor, made at the time of the sale, by which the creditor lends money to the principal obligor according to the terms of a note payable to another, which is placed in the hands of the creditor as evidence of the contract.

Some courts have gone so far as to say that the instrument is made payable to the substituted creditor in the name of the payee;78 a useful fiction in so far as it deals with the obligation of the principal obligor, because his contract with the substituted creditor is almost always co-extensive with that set forth in the instrument, but a very dangerous fiction when dealing with the surety’s obligation, as we shall see, because it substitutes the formal instrument for the actual agreement and consent of the parties. Others have suggested by way of dicta that this is a case of fictitious payee coming under section 9 of the act;79 but it seems a sufficient answer to this argument that no cases have been found

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77(1874) 72 Ill. 559.
78Rhyan Adm. et al. v. Dunnigan, (1881) 76 Ind. 178; Bank of Newbury v. Rand, (1859) 38 N. H. 166; see also Cross v. Rowe, (1850) 22 N. H. 77, 85.
which were tried exclusively on this theory. As suggested above, this is a misapplication of a doctrine of fictitious payee.

If, then, the rights of the substituted creditor against the principal obligor arise solely from the contract made at the time the instrument is purchased, it follows that his rights against the parties secondarily liable on the original instrument, will be determined by the extent to which the facts show that they have become parties to this transaction.

An examination of the cases shows a number of different situations which affect the liability of the co-maker surety:

1. Where the surety consents to the extra-tenor transfer,
   a. The surety's consent is known to the substituted creditor,
   b. The surety's consent is not known to the substituted creditor.

2. The instrument is made simply for the general purpose of raising money and the subject of extra-tenor transfer is not contemplated at the time it is drawn.

3. Where the surety objects to the extra-tenor transfer,
   a. Objection is known to the substituted creditor,
   b. Instrument is made for a special purpose only, but the purpose is not known to the substituted creditor.

Where the surety has consented to the sale of the instrument, and this consent is affirmatively shown, it seems clear that he should be held to the terms of the note as he has signed it. If the substituted creditor knew of this consent, it is an ordinary contract of suretyship evidenced by the instrument which states the terms of the agreement between the parties, neglecting only to put the substituted creditor's name in place of the nominal payee's. If the surety consented to the extra-tenor sale and the substituted creditor did not know of the consent, it could still be held that the surety had conferred upon his principal the power to bind him to the creditor, and the note would be sufficient evidence of the contract to bind him when the contract had been properly executed.

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80Hayden v. Thayer, (1862) 5 Allen (Mass.) 162.
81It might be objected, also, in these cases that the Statute of Frauds would prevent recovery by the purchaser against the surety; but the point has not been raised, probably due to the fact that in most cases the surety is a joint maker, or that the courts have mistakenly regarded the cases as dealing with negotiable instruments, and therefore within the exception of the law merchant that the instrument is sufficient memorandum to bind the parties thereto.
82Starret v. Barber, (1841) 20 Me. 457; Rhyan, Adm. v. Dunnigan, (1881) 76 Ind. 178.
It seems equally clear on the third set of facts mentioned above, where the surety has objected to the extra-tenor sale of the instrument, that he should not be held liable to the substituted creditor. The cases are all in accord with this view where the objection to the transfer is known to the substituted creditor at the time of the sale, or where the limitation of use of the instrument is apparent on its face. Where the surety has an agreement with the principal obligor at the formation of the instrument that it is to be discounted with the payee only, or otherwise restricting the use of the paper, it also seems clear that he should not be bound when the principal obligor transfers it to an innocent purchaser contrary to the agreement. However, there is a case in Vermont holding that even in these circumstances, after the payee had refused to discount the note, made for the purpose of raising money for the benefit of the principal obligor, the purchaser for value without notice of the restrictive agreement might hold the surety co-maker. Although the payee refused to allow his name to be used, the case was decided on the ground of implied assignment of the nominal payee's rights to the purchaser, the court assuming that the paper itself gave rights to the nominal payee, which could be transferred to the purchaser by the fiction of assignment. It is submitted that this case is wrong, because the note, never having been delivered, had no inception as a contract. The nominal payee acquired no rights, and therefore none could be transferred to the purchaser. The note, at the time it came to the purchaser, was simply a joint offer on the part of the principal maker and his surety to be bound to the payee. The payee had refused the offer; all these facts were apparent from the face of the paper itself; and the purchaser should have been put on his guard. He could acquire no rights against the surety through the instrument because none existed, and, although the principal obligor could bind himself, he had no power to bind the surety because the agreement between them expressly prohibited it. For these reasons the substituted creditor, on these facts, should not be allowed to hold the surety and the large majority of cases are in accord with this view.

83 Weyman v. Perry, (1894) 42 S. C. 415, 20 S. E. 287; Rabb v. Seidel, (1923) 250 S. W. 420. See also Battle v. Cushman, (Tex. Civ. App. 1896) 33 S. W. 1037; Benjamin v. Rogers, (1891) 126 N. Y. 60, 26 N. E. 970, where this principle was applied even though the note was payable to bearer.

The second set of facts mentioned above, where the instrument was made simply for the purpose of raising money for the benefit of the principal obligor with no further restrictions, except that it was drawn to the order of the payee, has given the courts the most trouble. On these conditions well reasoned cases can be found holding that a substituted creditor after the nominal payee has refused to discount the instrument cannot recover from the surety, and an equal number may be found holding that he can.

The cases holding that, on these facts, the substituted creditor has no rights against the co-maker surety seem to rest on better grounds. As has already been pointed out, there is no contract between the surety and the nominal payee; the instrument never had a legal inception because delivery was not accepted by the payee. Therefore, the payee has no rights and nothing to transfer to the substituted creditor. It is clear that the substituted creditor can not claim through the payee. Whatever claim he may have arises from the transaction with the principal obligor, and any rights he may have against the surety must also arise from that transaction. Some of the cases have held that no rights against the surety could arise because it would be a variation of risk. But variation of risk cannot apply because, as yet, the surety is under no contract obligation.

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88Boody v. Bartlett, (1861) 42 N. H. 559; Rogge v. Cassidy, (1888) 10 Ky. L. Rep. 396, 13 S. W. 716; Clinton Bank of Columbus v. Ayers, (1847) 16 Ohio 283; see also Knox County Bank v. Lloyd, (1868) 18 Ohio St. 353, where it was held no recovery would lie under these facts even when the nominal payee later discounted the bill for the substituted creditor. See also 1 Brandt, Suretyship and Guaranty, 2nd ed., p. 167, sec. 115.


88Granite Bank v. Ellis, (1857) 43 Me. 367; Manufacturers Bank v. Cole, (1855) 39 Me. 188.
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Whatever rights the substituted creditor has must be based on the power given by the surety to the principal, and since no such power was actually given, it seems that the surety could not be bound unless there were facts which showed such power was intended, and that the substituted creditor relied upon those facts. The only facts which the substituted creditor has on this point are those on the note itself, and a strict application of the doctrines of suretyship ought to result in a holding that since the instrument was made payable to the order of the payee, it is notice to the substituted creditor that the principal has no actual power to bind the surety.90

The reasoning supporting the substituted creditor's recovery from the surety is that the principal obligor, in the absence of any agreement on the point, has a power to bind the surety, which arises from the facts and circumstances surrounding the transaction. All of the cases holding the surety liable lay emphasis on the fact that the general purpose of the agreement between the principal and surety was to raise money, and the fact that the instrument was made payable to the order of a particular person is of secondary importance. So long as the main purpose, i.e., to raise money, is achieved, and there is no loss to the surety beyond that which he would have suffered under the original contract, there is no reason why he should not be held.

It will be seen that this is a further extension of the doctrine of liability of parties on accommodation paper mentioned above.91 Although it is harmless enough in the case of the assignee of the accommodated payee, it becomes dangerous when carried to the extent indicated here, because it is not always easy for the court to say the surety may or may not have been injured by the diversion of the paper.

A sounder explanation of these cases, probably, can be found in the fact that at the time the doctrine arose, business men of the rural communities had not yet become familiar with the distinction between order and bearer instruments; and it was the custom for them to purchase paper which rural banks, owing to the shortage of funds, were unable to discount. It was properly held in Commercial Bank of Natchez v. Claiborne,92 that it was error to exclude evidence of such a custom. Many other early cases have

91See notes 9 and 68.
92(1840) 6 Miss. 301.
statements which indicate that at one time it was common practice for business men to take such paper, discounting it later when the banks were in funds. If this was actually the recognized practice, these cases holding that the extra-tenor purchaser may hold the co-maker surety may be explained on the grounds that the courts are applying the local law merchant. Whatever may have been the situation in the early nineteenth century, it is clear that no such business practice exists today, and for this reason one would expect to see this line of cases gradually dying out.

The rights of the substituted creditor against the irregular indorser are on the same grounds as his rights against the co-maker surety. And it is equally clear that the assignee of the substituted creditor would stand in the same position as the substituted creditor himself.

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95 See Starret v. Barber, (1841) 20 Me. 457.

96 Rogers v. Sipley, (1871) 35 N. J. L. 86; and Ward v. The Northern Bank of Ky., (1853) 14 B. Mon. (Ky.) 351.