Formative Elements in the Law of Sales: The Eighteenth Century

Professor Friedman points out that, though there was no law of sales as such during the eighteenth century, many of the elements of the commercial law of that period had considerable influence on the law of sales which developed later. He analyzes eighteenth century cases which combined two formerly distinct bodies of law—the common law and the law merchant of foreign trade. He concludes that the commercial law of this period, like in every other period in history, was neither a haphazard nor a purely logical body of law, but was designed to meet the business needs of that period.

Lawrence M. Friedman*

I. THE PROBLEM DEFINED

The nineteenth century and the early twentieth century might well be called the classical age of the law of sales. Within this relatively short period of time, the law of sales, as a "field" of law, had its rise and fall. Before that period, there was obscurity; and today, there is a tendency to merge the field into a greater mass called "commercial law." During the classical age, however, the law of sales stood on its own two feet; it had its own key concepts, its own internal rules. Perhaps the most characteristic, or at least the most striking, feature of the law of sales was the search, so much ridiculed of late, for the point at which "title" passed from seller to buyer. In truth, to the naked eye, nothing in the law of sales seemed as important as "title"; the whole field was treated by some text-writers (and some courts) as a gloss on that concept, with its many ramifications.1 Other concepts played a much smaller role. Possession —

* Assistant Professor of Law, St. Louis University.

1. A very early casebook, 1 Langdell, A Selection of Cases on Sales of Personal Property (1872), is divided into two main sections. The first, 620 pages long, is devoted to the Statute of Frauds. The second, 400 pages long, covers roughly the ground covered by the first few rules of the Uniform Sales Act § 19 [hereinafter cited as U.S.A.]. The Statute of Frauds has largely been eliminated from modern casebooks, but a great deal of space is still devoted to the passage of title.
in the sense of a primitive physical grasp—seemed to have very little relevance. Similarly, payment as such had not achieved central importance. Yet possession (in some form) and payment (in some form) are the battle-fields about which the controversies, in the nature of things, must really turn. No one could care about a "title" in the abstract. Indeed, the title-approach seems to be divorced from the commercial realities which obviously underlie this field of law. As a result, the law of sales strikes the observer as rarefied, formal, even metaphysical. Its reasoning appears as irrelevant to the market-place and counting-house as the rule of perpetuities to efficient usage of farmland. Logic and symmetry are there, but in the twentieth century, these are not commonly accepted goals for a system of law. Consequently, the field of sales has fallen into deep disfavor. In a time of swift economic change, it is condemned as atavistic, anachronistic, sloppy, and vexatious.

Lawyers and scholars were first content with sewing patches in the ancient fabric. However, growing tired of half-measures, they produced a more thoroughgoing overhaul, in the form of the Uniform Commercial Code. Here, in the Article on Sales, "title" is ousted from its palace to be replaced with a homely and reasonable "contract" method of analysis. The aristocracy of outmoded rules is to be replaced by close attention to the needs of the men who do business; merchant's law is to become lawyer's law. It is true that critics have attacked this phase or that of the Code; some have even found fault with its general structure. But few commentators, if any, disagree with its basic premise, that the law of sales is unworkable and unworking, and must be changed.

It is not our purpose here to imply that the criticisms of the law of sales are not well-taken; very probably they are. Nor is it intended

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4. The sole exception seems to be Williston, supra note 3, partly for nostalgic reasons.
to show the defects, such as they are, of the classical law of sales. It is simply intended to explain certain features of that law. Apparently, the emergent law of sales chose to ignore some useful concepts and to magnify some relatively useless ones. How did this happen? Evidently, the law turned its back on business practice. If this is true, why and when did it happen? Some light is shed by a look at the antecedents of the law of sales, as understood in the eighteenth century. In so doing, the relationship between law and business usage must be carefully explored. Were these two areas of life really sealed off from each other? The enthusiasm of the modern reformer sometimes tends to decry law which, in its day, was necessary and fruitful and whose only sin is obsolescence. To some slight extent, this article may serve to clarify the law of that period.

II. THE EIGHTEENTH CENTURY BACKGROUND

The law of sales, as we know it, seems to be one of the newest of the common-law fields of law. Standard texts and casebooks cite few cases decided before the first half of the nineteenth century, and those few are not in the main stream of events. Consequently, it has often been stated that the law of sales began with a rush in the early nineteenth century. This thesis has been most expertly advanced by Professor Llewellyn, who couples it with the notion that the law of sales is farmer's law, since its emphasis on "title" is "a farmer's reference, suited to a farmer's world. . . ." But even a priori, this view, for all its brilliance, is inherently unbelievable. Why should a "farmer's law" spring up suddenly in the midst of the industrial revolution, where there was none before? Moreover, the subtlety and refinement of the law of sales and its alleged extreme conceptualism fit in badly with what one would assume a "farmer's law" to be like. Nor did the judges suddenly become farmer-conscious; they were, in the late eighteenth and early nineteenth centuries, as before, lawyers, middle class to upper class in background, conservative in outlook. Their interests were the interests of lawyers and merchants. They undoubtedly owned land but were hardly "farmers" in the ordinary sense. "Farmers' law," if this implies conceptual primitivity, is certainly not the law of sales. Nor does the litigation of the eighteenth and nineteenth centuries spring from the problems of direct agricultural marketing. We meet with farm products, of course, but only as they

5. The oldest "title" case generally cited in casebooks is Hanson v. Meyer, 6 East 614, 102 Eng. Rep. 1425 (K.B. 1805). However, a few older cases in peripheral areas are sometimes mentioned, such as Grantham v. Hawley, Hob. 132, 80 Eng. Rep. 281 (C.P. 1616), announcing the doctrine of so-called potential possession.

are bound and baled on the docks, or stored in the hulls of ships. Very rarely does the farmer himself—with the exception of the large Jamaican sugar-grower—appear in the English or early American law reports.

In a sense, it is true that the eighteenth century lacked a law of sales as such. There was no substantial mass of law called by that name. Some of the rules which later became black-letter sales law can be traced to the eighteenth century, but they appeared there under different headings. Blackstone devoted a few pages to the subject; it was part of the law of "things." More particularly, his embryonic and somewhat inconsistent treatment came under the general heading of "contracts." The eighteenth century abridgments similarly scattered the law of "sales" among various headings. We might say, then, that nothing existed but isolated rules revolving about the sale-transaction, just as today, we have no common law of "automobiles" but merely a number of rules which concern automobiles—rules which are categorized under older, better-known common law rubrics. Toward the end of the eighteenth century, indeed, judges themselves complained that the commercial law had been mistreated. More precisely, they complained that the evidence in commercial cases was thrown to the jury for consideration as an undifferentiated mass—in short, that custom existed, but not law. There is some truth to such a complaint. We do seem to find only separate, uncoordinated holdings, developed in a more or less ad hoc manner.

A closer look, however, reveals that the law was not quite so haphazard. The scatter effect is caused by the contrapuntal play of at least two distinct sources of law. One source is the old common law (and its tributary statutes). Here we find certain problems, nowadays felt to be "sales" problems, treated with a somewhat different emphasis. Thus Blackstone tells us:

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are

7. 2 BLACKSTONE, Commentaries *447.
8. Neither Viner's nor Bacon's abridgment has any category called "sales" as such. The material is scattered elsewhere—for example, under "property" in 18 VINER, A General Abridgment of Law and Equity commencing at 63 (1743).
9. Justice Buller complained that in the middle of the eighteenth century "we find that in Courts of Law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle." Lickbarrow v. Mason, 2 T.R. 63, 73, 100 Eng. Rep. 35, 40 (K.B. 1787); see also 3 CAMPEBELL, Lives of the Chief Justices of England 300 (1874); 12 HOLDsworth, A History of English Law 282 (1938). The practice may have lingered on somewhat longer in the United States. See, for example, Wood v. Roach, 1 Yeates (Pa.) 177, 2 U.S. (2 Dall.) 180 (1792). It must also be remembered that the "jury" sometimes consisted of a specially convened jury of merchants.
at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made . . . it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest . . . the property of the goods is absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them . . . .'10

And again:

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on . . . And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10 . . . [pounds] and B pay him earnest, or signs a note in writing of the bargain; and afterwards, before . . . delivery . . . or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the contract the property was in the vendee."11

According to Blackstone, a "sale" was not "complete" without one of two things — delivery or payment. However, earnest can be substituted for payment and partial delivery for whole delivery. A purely consensual sale, without formality, is impossible; without one of the prerequisites, the bargain cannot be "struck." By "property," Blackstone could not have meant "title," since he spoke of the "property" in the "price." We shall see later what he did mean. In general, Blackstone seems to have been talking about the necessary foundation (or conditions) for bringing certain kinds of lawsuits. After what formalities could an action for the price be brought? After what formalities could an action for goods be brought?

It is also apparent what kinds of sales transactions Blackstone had in mind. When he spoke of tendering "immediate possession," he must have been referring to face-to-face sales and to hand-to-hand transfers. He could not have been referring to overseas trade. His was the law which dealt with real transfers of things, with goods changing place, and money changing hands on the spot, or at least with some ritualistic substitute. It can hardly be coincidental that these two things — payment and its substitutes and delivery and its substitutes — are precisely the alternative formalities which can exempt an oral sale from the Statute of Frauds."12 The seventeenth

10. 2 BLACKSTONE, COMMENTARIES *447-48.
11. Id. at *448.
12. The history of this formality seems obscure; apparently, in earlier periods the consensual sale was possible. See Simpson, The Place of Slade's Case in the History of Contract, 74 L.Q. Rev. 381, 392 (1958); see also Rabel, The Statute of Frauds and Comparative Legal History, 63 L.Q. Rev. 174, 180 (1947). An anonymous case note in 3 Salk. 61, 91 Eng. Rep. 691, 692 (K.B. 1700) states that "by a bare agreement the bargain may be so far perfected, without any delivery or payment of mon-
section of the Statute of Frauds merely added a third substitute formality for hand-to-hand sales, the memorandum in writing.\textsuperscript{13} Indeed, an early case construed the statute as applying \textit{only} to hand-to-hand transfers;\textsuperscript{14} and this concept remained the law for most of the eighteenth century, although Lord Mansfield refused to apply the statute to auction sales (which, while technically hand-to-hand, were obviously too "commercial" for the common law rules).\textsuperscript{15} Failure to comply with the formalities imposed by the common law and Statute of Frauds prevented enforcement of a sale. And, of course, an unenforceable sale can hardly be dignified with the name of a sale.\textsuperscript{16}

Thus, the common law of the eighteenth century, was not a law of "titles," with rules for ascertaining when "title" passed but consisted of rules for determining when a contract of sale was "complete" enough, or correct enough, for \textit{rights of action} to ripen. Different rights might ripen at different times or under different circumstances. For example, delivery was not an absolute prerequisite to an action for the price; earnest would do.\textsuperscript{17} However, to bind the seller's creditors, delivery was necessary.\textsuperscript{18} Such distinctions, in result if not always in theory, still characterize the law of sales.

Still another characteristic of the common-law element in sales might be noticed here. The Statute of Frauds, as its title indicates, relates to problems of fraud, fictitious claims, and the like. A no-delivery, no-payment sale, in a world of hand-to-hand transactions, is not only hard to prove but is also suspicious. At any rate, such a sale is not usual; it is not regular, and it suggests an attempt to deceive
either the opposite party or creditors. For at least a century, the law had been sensitive to unreal, that is, fraudulent, transfers. A seller in possession was one of very few common-law types of sellers with whom the growing rules of bankruptcy were concerned. And even this was a limited concern. In the eighteenth century bankruptcy acts were for "traders" only; casual sellers of goods were not included. But the problems of insolvency and fraud were universal; and the law's solution, as often, was to insist on adherence to form.

In other, lesser ways, too, the law had reason to examine the formal shape of a sale. For example, in assumpsit, counts for goods "bargained and sold" and "sold and delivered," or both, were commonplace. But if the goods were not really sold, the word was improperly used, and defendant had still one more defense to interpose. During the eighteenth century, the word "sold" does not seem to have been used in a technical modern sense—that is, as distinguished from "contracted to be sold." Still, the word had meaning, and needed defining. Here, as in the other situations, such rules as Blackstone restated were simple, objective, and relatively easy to use.

They were also, no doubt, fairly adequate to meet the needs of a limited area of English commerce. In the domestic sale, between casual sellers, or at a shop, or during market-day, buyer and seller occupy clear-cut roles. Quick turn-over, which merchants are supposed to favor, is not always necessary for this kind of commerce. Broadly stated, the dominant problem is that of fraud. A buyer may resell before payment, which is dishonest. A seller may sell goods he does not own; this too is dishonest. But a merchant, that is, a specialist in buying and selling, is interested in volume and profit rather than in the pedigree of his goods. Therefore, merchants are supposed to favor what we might call the negotiability of goods. A

19. See Tanner v. Barnett, Peake Add. Cas. 98, 170 Eng. Rep. 207 (N.P. 1796). A buyer of wine allowed the wine to remain in the merchant-seller's basement. The sale was attacked as void under the Statute of Frauds and as a fraudulent retention of possession—successfully, as to the latter.


22. The laws applied to anyone seeking "his trade of living by buying and selling," that is, merchants, middlemen, and manufacturers, but not, for example, farmers and inn-keepers, who were not "traders." Cooke, BANKRUPT LAWS 45 (1785). See Friedman and Niemira, The Concept of the "Trader" in Early Bankruptcy Law, 5 St. Louis U.L.J. 283 (1958).

merchant doctrine such as market overt clearly favored a quick flow of goods, with no questions asked. It protected the selling (and the buying) merchant in the great fairs and markets which still remained a feature of domestic commerce in the eighteenth century.\footnote{24}

But the law merchant of market overt was a far cry from the law merchant of foreign trade. For one thing, credit transactions were less significant domestically, although this fact tended to change. The common law could and did tolerate the institution of market overt as a regimented vent for goods; but it could not tolerate its expansion into a general rule. Precisely during the period when the law merchant was being absorbed into the common law,\footnote{25} the doctrine of market overt was being nibbled away at the edges. This tendency had begun earlier but was accentuated in the eighteenth century.\footnote{26} Non-documentary sales were not to be allowed to cut off the rights of a defrauded owner or seller. Apparently the law recognized a separate “class” of sellers, as distinct from the merchants, who after all both buy and sell. To protect this class, rights of owners must be protected regardless of who has possession of the goods. In the common law, a memorandum in writing, or the payment of earnest, could serve as substitutes for delivery (that is, change of possession) in certain cases. However, as it turned out this was not enough. Therefore, as the law developed, in harmony with change in English economic life, conflicting interests appeared, which would have to be bound up by some overriding conceptual network that would be at once both flexible and powerful.

The expanding world of foreign trade was very sharply distinguished from the original simplicity of domestic trade. Legally, its roots were not in the common law sphere, but in that somewhat amorphous body of custom called the law merchant. The shape of foreign business was worlds away from the common law face-to-face dealing. All the parties were merchants; primary concern was not with ultimate buyers and sellers. Typical transactions were not concerned with marketing as much as they were with finance. Sales were documentary; at the crucial period, the goods were locked up on shipboard. Any delivery, during the period of transit, had to be documentary; the common law horror of fraud and retention of possession was meaningless. The dominant fear of merchants was not so much of fraud as of the insolvency of their debtors before payment. Legally, the disputes were between general creditors and particular creditors with respect to goods; and factually, the law had to define and delimit the effects of bills of lading, the position and

\footnote{24} ASHTON, AN ECONOMIC HISTORY OF ENGLAND: THE 18TH CENTURY 63 (1954).
\footnote{26} See notes 155–61 infra and accompanying text.
rights of factors, the power of a consignor to reclaim his goods, and the like.

Superficially, the merchant law of foreign trade does not seem to have undergone much development during the eighteenth century. The forms of business, to the outside eye, varied less; a bill of lading was a bill of lading, whether it listed sugar, woolens, or manufactured knives. Change did take place; but its silhouette was blurred by the comparative scantiness of reported cases during a greater part of the century. It is true that at the end of the period the reports were much more extensive. But the thrust of the prior cases is blunted by the incorrigible trait of lawyers to stultify the meaning of embarrassing precedent. And most specifically, in studying the eighteenth century, we are thrown off the track easily because of the shift in meaning of one simple English word—"property."

We turn first to foreign trade.

A. Foreign Trade Doctrines and the Concept of Property

One of the very few doctrines of modern sales law concededly traceable past the barrier of the 1800's is the so-called right of stoppage in transit. As defined in a modern work, this is the seller's right "while the goods are in transit to resume possession if the buyer is or becomes insolvent." In other words, this is a right to stop delivery of moving goods and reclaim them, if payment has become impossible. The modern commercial statutes preserve this right; but it is probably very rarely used. However, during the eighteenth century, the right was of the highest order of importance.

The earliest case on record which supposedly refers to the right is Wiseman v. Vandeputt, decided in 1690. In that case, stoppage in transit was not mentioned as such. Italian merchants consigned silk to the Bonnells, merchants in London, but before the ship left Leghorn, news came that the Bonnells had failed; and the merchants then "altered the consignment" of the silks to the defendant. The representatives in bankruptcy of the Bonnells claimed the right to the goods. The chancellor, however, stated:

[T]he silks were the proper goods of the two Florentines, and not of the Bonnells... and therefore they having paid no money for the goods, if the Italians could by any means get their goods again into their hands, or prevent their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity.

29. The digest shows almost no cases in recent decades; however, in the nineteenth century, reported cases were fairly common.
31. Ibid.
A number of points about *Wiseman v. Vandeputt* are worthy of remark. First, the case does not indicate any "doctrine" of stoppage in transit; it rests on a somewhat vague and common sense notion of fairness—the sort that might be expected of the merchant community, and that would be persuasive in a court of equity. Second, the case merely allows an unpaid merchant to scramble for his goods as best he can, and says that the law will not discourage him; there is an implication that actual possession is decisive. Third, there is no trace of any concept of "title"; nor is there any mention of a bill of lading; nor is there really any actual "transit," since the ship had not left its dock at the time the buyers failed. *Wiseman v. Vandeputt* is therefore a starting-point for the doctrine of stoppage in transit only in the sense that it provides a citation useful for later attorneys, to buttress what must have been at least an expectation, if not a custom, of merchants—that is, that goods not paid for need not be delivered. This is "equity"; but as the doctrine took flesh to its bones, it moved rather easily over to the law courts, a sign of its mercantile origin. It was soon fortified with a name ("stoppage in transit") and was extended to ships at sea.

Despite the development, however, from a vague notion of "fairness" to a full-fledged "right," stoppage in transit retained the strong imprint of its pedigree; as one court put it, "the goods of one man should not be applied in payment of another man's debts." There is, of course, a strong instinct in law, especially in our period, to become more systematic. The free-for-all aspects of the right to reclaim goods later dissolved. The unpaid shipper got the right to resume possession, instead of merely being protected in possession, if he resumed it on his own. In *D'Aquila v. Lambert*, for example, a consignor was allowed to recover goods in an action against the ship's master, who had refused to deliver to either party.

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32. See Assignees of Burghall v. Howard, 1 Bl. H. 366n., 126 Eng. Rep. 21n. (C.P. 1759), where Lord Mansfield refers to the doctrine as resting "not upon principles of equity only, but the laws of property."

33. Purely "equitable" doctrine would not have been as welcome in the law courts as the "custom of merchants."

34. See *Ex parte Wilkinson* (unreported; Ch. 1755), cited in *D'Aquila v. Lambert*, Amb. 400, 27 Eng. Rep. 267 (Ch. 1761).

35. *D'Aquila v. Lambert*, Amb. 399, 401, 27 Eng. Rep. 266, 267 (Ch. 1761). The quoted sentence shows clearly that in the eighteenth century the right of stoppage in transit was not at first considered to afford a right over another's goods, that is, a right in goods to which title has already passed. See note 100 infra.

36. Amb. 399, 27 Eng. Rep. 266 (Ch. 1761), 2 Eden 75, 28 Eng. Rep. 824 (Ch. 1761). The implication in *Wiseman v. Vandeputt* was that the first party in possession had the right to the goods. Thus, in an action against a ship's master for misdelivery, it should have been a good defense that the cargo was handed over against a bill of lading, no matter who presented it. See Fearon v. Bowers, 1 Bl. H. 364n.,
Before long, however, it became impossible to consider the development of the right of stoppage in transit without casting an eye on that highly important document, the bill of lading. A bill of lading, of course, is a document signed by the ship’s master or other officer, which receipts for the goods, lists them, and promises to deliver to a named person (or to the shipper or his order, or simply to “order”) at the port of destination. During the eighteenth century, travel by sea was still slow. While the goods were at sea, the bill of lading was the handiest documentary evidence of the existence of the cargo. If the goods were to be dealt with at all, the bill of lading was the most convenient document for doing so. That goods were assignable in transit by assignment of the bill of lading seems to have been true much earlier than the eighteenth century. As early as the sixteenth century, bills of lading contained a promise to deliver to a merchant “or to his factor or assignhs. . .” Assignable, however, is not the same as negotiable. Goods at sea could be assigned by other means than by transfer of a bill of lading. In 1540, the Court of Admiralty referred to the assignability of goods afloat by means of a bill of sale as a “laudable ancient & lawfully prescribed custom.” And for certain purposes, the eighteenth-century judges were willing to honor assignments of cargo at sea by bill of

he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price has been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee, or his assignees [in bankruptcy]; and that this was ruled, not upon principles of equity only, but the laws of property.

No mention is made of a bill of lading in D’Aquila v. Lambert, supra note 85, but the sale was almost certainly documentary.

37. II SELECT PLEAS IN THE COURT OF ADMIRALTY 61 (Seldon Society, Marsden ed. 1897). (Emphasis added.) The date is 1554. A seventeenth century bill of lading (“unto Edward Smallwood or to his assigns”) can be found in Burrell 240, 167 Eng. Rep. 554 (Adm. 1650).

38. The custom was that all and every contracte or sale of any shipe goods wares or other merchanydes made or had by any owner or proprietary thereof to any merchante or other person (the same shipe goods wares or merchantizes being . . . within the jurisdiction of the King’s Courte of his Admiraltie . . . and the byer of the same . . . beryng the adventure and peryll thereof . . . and having a byll of sale thereupon made and delyvered to hym by the seller) ys good and valeable and not to be retracted or rescinded but that the said byer . . . aughte and may entre and take possession of the said shipe goods wares or merchantizes so sold and boughte . . . and them take have and enjoy as thyr owne propre goods at theyr retorne ad portum destinatum withoute any further tradicion or delyvery . . . and not withstandyng the clyame title interest or arrest in them made by any credtor or creditor of the said seller.

I SELECT PLEAS IN THE COURT OF ADMIRALTY 98 (Seldon Society, Marsden ed. 1892). The entry is dated 1540.
sale\textsuperscript{39} or other documents.\textsuperscript{40} Originally, then, a bill of lading might not have been technically "negotiable"; it might simply have been an instrument useful for transferring an interest in goods afloat from one person to another. For this purpose, it was clearly superior to any of its substitutes. The bill of lading was simple, explicit, and in universal use. It was standard in form. It was flexible, and could be used for a great variety of purposes (for buying and selling, for security transactions, for effecting insurance, and the like) between various parties (a merchant and his agent, a buyer and a seller, a borrower and a lender). On the other hand, a bill of sale, was not a particularly appropriate document as between a merchant and his factor; in fact, it was not particularly appropriate between anyone but a seller (strictly speaking) and a buyer (strictly speaking), although it had some possible limited uses in mortgaging goods. Furthermore, captains of ships were accustomed to delivering their goods against a bill of lading, and it was easy for the idea to gain acceptance that the transfer of the bill of lading transferred the right to receive the goods. This being so, the bill of lading made an excellent security to be pledged for raising money on floating goods.\textsuperscript{41} Probably the use of the bill of lading as a financing device was fortified by a quite accidental feature. Since the bill was the captain's receipt for the goods, the cargo would not be unloaded until the captain, for his own protection, took up and cancelled one of the outstanding bills of lading. This gave the bill of lading some real substance; a pledgee had a swift and powerful means of realizing on his security. Later, he also had reasonable assurance that no one else could do the same.

A recent study has suggested that certain legal difficulties, centering about the bill of lading, in the eighteenth and nineteenth centuries, were caused by a kind of cultural lag of lawyers. It is claimed that the merchant community was quite clear on the functions of the bill of lading, both as a trading and as a security device. However, when lawyers finally came to recognize that a bill of lading

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\item \textsuperscript{39} Bourne v. Dodson, 1 Atk. 154, 26 Eng. Rep. 100 (Ch. 1740); see \textit{Ex parte} Matthews, 2 Ves. Sen. 272, 26 Eng. Rep. 176 (Ch. 1751). This was so even when the "sale" was really a mortgage, since, as Lord Hardwicke pointed out, it would be very detrimental to trade, as it would deter merchants from lending money, if, notwithstanding they should advance a large sum by way of mortgage, the property is not altered, but subject to mortgagor's creditors under a commission of bankruptcy, unless the ships return before the commission is taken out, and the effects are in the actual possession of mortgagees.
\item \textsuperscript{40} Brown v. Heathcote, 1 Atk. 160, 26 Eng. Rep. 103 (Ch. 1746) (delivery of unendorsed bills of lading and endorsed insurance policies); see also Lempriere v. Pasley, 2 T.R. 485, 100 Eng. Rep. 262 (K.B. 1788) (written document, policy of insurance, and "letters of advice").
\item \textsuperscript{41} "It is the custom of merchants to borrow money upon bills of lading, which have been looked upon as a good security..." Snee v. Prescott, 1 Atk. 245, 246, 26 Eng. Rep. 157, 158 (Ch. 1748) (argument of counsel).
\end{thebibliography}
transfers the "property," they were unable to consider "property" as anything less than a unitary whole. Consequently, they were unable to cope with the bill of lading as a financing device until well into the nineteenth century.42

Unfortunately, there is some anachronism in this theory, although it does soothe the lawyer's instinct for deriding himself. A careful examination of the eighteenth-century cases shows no such unitary view of "property" until the closing years. Nor was it clear, even to the merchants themselves, precisely what the effect of the endorsement and delivery of a bill of lading was, or ought to have been.

The earliest reference in the common-law reports to the assignability of a bill of lading is a cryptic dictum in Evans v. Martell, in 1697.43 [T]he consignee of a bill of lading," said Holt, "has such a property as that he may assign it over."44 In that case,45 Evans, the consignee named in a bill of lading, brought an action against the ship owners when the goods were lost at sea. The defendants showed, by means of invoices, that the goods were not Evans' at all, but belonged to Harvey, the consignor; they claimed Evans was nothing but a factor, and that the action should have been brought by Harvey. The court disagreed; invoices signified nothing, but the

42. Miller, Bills of Lading and Factors in Nineteenth Century English Overseas Trade, 24 U. Cin. L. Rev. 256, 267-68 (1957):

[T]he development of the bill of lading by the merchant and banking community as the central pivot of international trade finance was accomplished with no great difficulty. For the lawyer ... unfamiliar with commercial practice ... this development was not so easy. This is not surprising when one considers that the structure of English life up to the latter part of the eighteenth century was predominantly rural in nature. ... The conceptual nature of legal thinking ... added to these difficulties. Much of the embarrassment ... stemmed from ... inability to see the concept of "property" as anything less than a unitary whole. When "property" in goods was transferred by way of endorsement and delivery of a bill of lading, the judiciary ... had difficulty construing this as anything other than the transference of complete ownership.

To distinguish between the use of the bill of lading as a security instrument and as a trading device ... compelled judges ... to readjust their modes of thought to meet the demands of [the] ... new economic order. For most of them, the process was as slow as it was painful.

This view of the relationship of the judges to the current practice of business shows the influence of the ideas powerfully expressed in Llewellyn, Across Sales on Horseback, 52 Harv. L. Rev. 725 (1939) and elsewhere. Compare McLaughlin, The Evolution of the Ocean Bill of Lading, 35 Yale L.J. 548, 549 (1926): "The development of the bill of lading is a pretty example ... of the manner in which the law, cumbersome and unplastic as it is, eventually bends and gives ground to keep pace with the developments of commerce. ... " See also Negus, The Negotiability of Bills of Lading, 37 L.Q. Rev. 442, 452-55 (1921).

43. 1 Raym. Ld. 272, 91 Eng. Rep. 1078 (K.B. 1697); the name of the case is given in Lord Raymond as Evans v. Marlett but the parallel reports say Evans v. Martell which seems more likely.

44. Id. at 272, 91 Eng. Rep. at 1078. The parallel reports, cited in note 45 infra, omit this sentence.

"consignment in a bill of loading gives the property." If the bill had stated, "deliver to A for B's account," then B must bring the action. Here, however, plaintiff had an "ownership to maintain an action." If the bill had stated, "deliver to A for B's account," then B must bring the action. Here, however, plaintiff had an "ownership to maintain an action." 46 From this case, we can conclude that in 1697 the bill of lading had a legal significance superior to an invoice, that the consignee named in a bill of lading had "property," and that this "property" could be transferred. But what does "property" mean in this context? Surely it does not mean "title" (abstract, absolute ownership), since concededly the consignee did not "own" the goods but was merely a factor. The report itself gives the answer: property is "ownership to maintain an action." 47

This narrow definition accords well with other contemporary uses of the word; however, taking "property" in its modern sense makes nonsense of much of the commercial law of the eighteenth century. "Property" can of course mean legal title or absolute ownership; but it may mean (especially when unaccompanied by a qualifying adjective) nothing more than a right in chattels sufficient to pursue a particular remedy (or to have a particular remedy pursued against one). 48 This was certainly true at the beginning of the eighteenth century, 49 and it continued to hold true during most of that period. Thus, in the well-known case of Armory v. Delamire, 50 a chimney sweep's boy found a jewel and gave it to a goldsmith's apprentice to be weighed. The apprentice refused to return the jewel, and the boy brought an action in trover. The court laid down the rule that "the finder . . . though he does not . . . acquire an absolute pro-

47. See note 46 supra. In Blakey v. Dinsdale, 2 Cowp. 661, 664, 93 Eng. Rep. 1394, 1296 (K.B. 1777), Lord Mansfield remarked: "No doubt but this corn was the plaintiff's property. He might have brought an action for it against the vendor; for the bargain was completely bound by the earnest."
48. In Hore v. Milner, Peake 58n., 170 Eng. Rep. 78n. (K.B. 1797), defendant agreed to buy potatoes but never took delivery. The seller resold. Lord Kenyon thought that by so doing plaintiff had lost the right to sue for goods bargained and sold since he had "abandoned his right to insist on the defendant taking the goods, he had not considered them as the property of the defendant. . . ." Id. at 59, 170 Eng. Rep. at 78. If "property" meant "title," how could the plaintiff's action affect it? See also Hankey v. Smith, Peake 57n., 170 Eng. Rep. 77n. (K.B. 1796); Adams v. Broughton, 2 Str. 1078, 93 Eng. Rep. 1043 (K.B. 1743).
49. Knight v. Hopper, Holt K.B. 8, 90 Eng. Rep. 902, Skin. 647, 90 Eng. Rep. 290 (K.B. 1697), is deceptive unless "property" is taken in this sense. Muslin was sold, to be "fetched away" piecemeal, and "paid for as taken away." This meant, according to Holt, that "the pieces being marked and sealed, the property is altered immediately, and . . . remained only as a security for the money. . . . [I]f they are not taken away . . . the party may have an action for his money, but may not sell the goods." Holt K.B. 8, 90 Eng. Rep. 902.
50. There is a bare possibility that the meaning of "property" we are here describing reflects a very ancient common-law usage — that of right of action based on possession. This is at least hinted at in 2 Pollock & Maitland, History of English Law 168 (2d ed. 1923); Bordwell, Seisin and Disseisin, 34 Harv. L. Rev. 717, 718–19 (1921); Bordwell, Property in Chattels, 29 Harv. L. Rev. 374 (1915).
property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.” 51 Similarly, the right of a factor in goods over which the factor has the power of sale is referred to as a “legal property.” 52 And, in 1788, an auctioneer was allowed recovery for goods sold and delivered, against a buyer who removed goods without paying. 53 The auctioneer had a “special property.” Yet neither the chimney sweep’s boy, nor the factor, nor the auctioneer, had “title” in the sense of absolute ownership. In another case, a court remarked that the Statute of Frauds “prevented any property from vesting in [plaintiff] . . . so as to enable him to maintain trover,” 54 a very peculiar usage of words, unless we understand “property” in a limited, procedural sense. As late as 1796, traces of this usage remained discernible; Eyre could still remark that “ninety-nine times in an hundred the indorsement of a bill of lading will be conclusive evidence of the alteration of property without ascribing to it the effect of a legal instrument as a bill of sale,” 55 a distinction strange to modern minds. In the eighteenth century, property was “altered”; but in the nineteenth century, title “passed.” The later expression makes us think of a single thing which is transferred from one party to another. The eighteenth century concept makes us think solely of a change in the total bundle of rights; the change may be complete or incomplete, just as an “alteration” can be simple or radical.

Now we can return to Holt’s dictum in Evans v. Martell that the consignee of a bill of lading has a “property” which can be assigned. The statement may mean nothing more than that the holder of the bill has a special right, which may be good for some purposes but not for others. It might transfer absolute ownership; however, it need not. In a normal case the transfer of a bill probably gave the right to demand delivery from the ship’s master. But did the transferee’s right take priority over the shipper’s right to stop in transit? Clearly, that was not implicit in the transfer of “property.” 56 As a matter of

56. Of course it must always be borne in mind that the transferee, in order to enjoy the fullest the rights transferred, must be a bona fide taker for value without notice. As the analogy between bills of lading and negotiable instruments grew in strength, this naturally became more and more explicit. See Wright v. Campbell, 4 Burr. 2046, 98 Eng. Rep. 66, 1 Bl. W. 628, 96 Eng. Rep. 363 (K.B. 1767). In Dick v. Lumsden, Peake 250, 170 Eng. Rep. 146 (N.P. 1793), Thompson shipped beef and pork to his factors, Eustace & Holland, in London, to be sold. Thompson had promised to send along a bill of lading, and did; but the bill was incorrectly en-
fact, the issue was not clearly settled during the major part of the eighteenth century. It is easy to assume, as many legal scholars have done, that by the custom of merchants the bill of lading was more or less negotiable and that a transfer for value in good faith cut off the rights of the shipper. Although we have seen evidence that the endorsement and delivery of a bill of lading transferred rights to the goods, it does not follow that, in merchant custom, these rights were superior to the rights of an unpaid shipper. For one thing, such a "custom" would have conflicted with the right of stoppage in transit, which was certainly part of the psychological expectation of merchants, whether or not they could have formulated it as "law." Was the full negotiability of bills of lading greatly desired by merchants? The answer must be yes, if we consider only those merchants who customarily advanced money on the security of bills of lading. But the foreign houses who shipped the goods, unless they were saints in disguise, would have felt differently about the matter. These "foreign houses" might actually have been English merchants living abroad, who acted as agents for domestic houses, and advanced their own money in the purchase of imported goods. Furthermore, we must not assume that business practice is necessarily a finer-grained substance than law, that it is, by some weird chance, firm, immutable, and infinitely understandable.

On the contrary, both the case law and the evidence we can glean from the cases as to business usage, hint strongly that the transferee of a bill of lading was not thought to have rights superior to an unpaid vendor whose consignee became insolvent. To be sure, the case law was somewhat scanty in the beginning of the century, and consequently difficult to assess. The controversy turns on the meaning, first of all, of Snee v. Prescot.57

57. This seems to be Miller's viewpoint. Miller, supra note 42, at 267.
59. Another possibility is that the two houses might act mutually for each other's account, shipping goods on open credit. During the eighteenth century, these relationships between merchants were apt to be quite fluid. See note 84 infra.
60. 1 Atk. 245, 26 Eng. Rep. 157 (Ch. 1743). The discussion in Miller, supra note 42, at 268–69, is illuminating, but somewhat vitiated by nineteenth-century hindsight. Miller seems anxious to explain the case away, as in fact Buller later did. The same attitude is reflected in 12 Holdsworth, A History of English Law 282, 492 (1938). Buller, arguing before the House of Lords in Lickbarrow v. Mason, 6 East 20n., 102 Eng. Rep. 1191 (H.L. 1793), also stated that Snee v. Prescot, 1 Atk. 245,
In the Snee case, silks were shipped to England from an Italian port. The bill of lading was made out to the shipper's order. The shipper endorsed one bill of lading in blank and sent it forward to his consignee. The consignee assigned the document to a third person, as security for advances. The consignee failed before payment, and the consignor forwarded another bill of lading to an agent who managed to get delivery of the goods. The plaintiffs, transferees of the bill of lading from the consignee (and also the assignees in bankruptcy), claimed the goods. Lord Chancellor Hardwicke held for the defendant, since "while goods remain in the hands of the original proprietor, I see no reason why he should not be said to have a lien upon them til he is paid. ..." This was so despite any argument that might be made about the "property" in the goods, and despite any question of risk of loss. In short, Snee v. Prescot is a strong holding to the effect that the right of stoppage in transitu is powerful enough to override any "property" in the goods which is transferred by the scratch of a pen and the delivery of a bill of lading.

If this seems strange, it is well to remind ourselves of what an eighteenth-century bill of lading looked like. First of all it was, not one document, but a set of documents. Normally, three bills of lading were issued, although occasionally the cases mention sets of four.
of four^{65} or even more.^{66} And each bill of lading in a set was identical. The typical bill was a printed document, with blank spaces for the variable information. It stated on its face how many bills were in the set and that "the one of which . . . bills being accomplish'd," the others would "stand void."^{67} However, this did not mean that one of the bills was the original. Of the three usually issued, the master of the ship kept one, the shipper two. One of the latter two was forwarded to the consignee; the third was retained. Originally, the issuing of bills of lading in sets probably rested on the simple fact that a bill of lading was just as easily lost at sea as a cargo. Nonetheless, if bills were issued to the shipper's order, it was obviously possible for a shipper whose consignee had failed, to endorse his retained bill to an agent in the port of destination, and for that agent to present the bill to the master when the ship docked. The master had no way of knowing which bill to honor; therefore, he would simply release the goods against the first bill presented to him. Then, one of the bills having been "accomplished," the others now "stood void." Therefore, the retained bill gave the consignor a powerful weapon to control goods in transit. It is this business practice which was recognized in *Snee v. Prescot*. What the case really decided, therefore, is simply that nothing in the law barred this business usage; if the consignor was unpaid, and if his consignee failed, the retained bill of lading could be used to procure delivery of the goods. The device was applicable only to a shipper's order bill of lading (or a bill of lading in blank);^{68} a consignee's order bill could not in any event be presented by the shipper (or his

65. In *Lickbarrow v. Mason*, *supra* note 64, four bills of lading were signed, instead of the usual three. Normally the master kept one bill, and the consignor kept one and sent one forward. In *Lickbarrow*, the consignor kept two. A set of four bills was also mentioned in *Curling v. Long*, 1 Bos. & Pul. 634, 126 Eng. Rep. 1104 (K.B. 1797).


67. See *Wilson, Anglo-Dutch Commerce and Finance in the 18th Century* 45 (1941), for an excellent reproduction of a mid-eighteenth-century bill of lading. The bill is in English, and covers goods shipped from Plymouth to Hamburg. The date is August 22, 1745 — only two years after *Snee v. Prescot*, 1 Atk. 245, 26 Eng. Rep. 157 (Ch. 1743). The closing portion of the document reads as follows (written, as contrasted with printed, matter is italicized):

> In witness whereof the Master or Purser of the said Ship hath affirm'd to three Bills of Lading, all of this Tenor and Date; the one of which three Bills being accomplish'd, the other two to stand void. And so God send the good Ship to her desir'd Port in safety. . . .

"Accomplished" of course must have referred to actual delivery of the cargo.

68. In the course of argument before the House of Lords in *Lickbarrow v. Mason* 6 East 20n., 102 Eng. Rep. 1191 (H.L. 1793), Buller criticized Hardwicke for distinguishing between endorsement in blank and "one that was filled up." *Id.* at 20n., 103 Eng. Rep. at 1191. Hardwicke, indeed, does make some such distinction. And in *Brown v. Heathcote*, 1 Atk. 160, 162, 26 Eng. Rep. 103, 105 (Ch. 1746), it appeared again: "Even if there had been an indorsement of the bills of lading, it is not actual assignment, unless the goods were directed to be delivered to the as-
agent) for delivery, since his endorsement had no power to transfer the bill. All of the key eighteenth-century bill of lading cases involve shipper’s order bills of lading. Therefore, we can assume that an unpaid vendor or factor would always ship under a bill of lading to his own order or in blank, so that he could retain a security in the goods.

Bills of lading in sets are still issued in international trade today, although the Uniform Bills of Lading Act forbids the practice in the United States. However, this prohibition would have been futile in the innocent age before the invention of carbon paper. In the days of Snee v. Prescott, where several bills of lading—all representing the same goods and all formally identical—were afloat at one and the same time, it would have been strange indeed, or even meaningless, to hold that the bill of lading was negotiable completely, and transferred the property. That kind of reasoning came later. Snee v. Prescott merely asked the question, as between the two claimants, who had the better right to the goods? And the answer was: the first holder of a bill of lading to get real delivery.

Other mid-eighteenth-century cases confirm the impression received from Snee v. Prescott. In Fearon v. Bowers, twenty butts of olive oil were shipped by Askell, at Malaga, to Hall, at Salisbury.

Signee.” Lord Mansfield himself, we are told, in the unreported case of Savignac v. Cuff (cited in Lickbarrow v. Mason, 2 T.R. 63, 66, 100 Eng. Rep. 35, 37 (K.B. 1787) was inclined to distinguish between “bills of lading endorsed in blank and otherwise; but he afterwards abandoned that ground.” There must therefore have been some sense to the distinction; a “filled up bill” must refer either to a buyer’s order bill, or more likely, to a bill so endorsed as to relinquish the consignor’s control, by requiring the endorsement of the consignee. See Buller’s own opinion in Caldwell v. Ball, 1 T.R. 205, 99 Eng. Rep. 1058 (K.B. 1786). The Caldwell case involved a dispute between the endorsees of bills number one and two. Buller held that the first endorsee had the superior right to the goods, since a shipper armed with a shipper’s order bill has “the absolute control over the goods; and might have unshipped them if he had so pleased. So that they are not like goods consigned to a third person. . . .” Id. at 217, 99 Eng. Rep. at 1060. Even though Buller felt that the first endorsement and delivery passed the “property,” and that there was nothing left for the second endorsee to take; still, there is a hidden inconsistency in the passage quoted. Is it the consignment that consigns or the delivery of the bill of lading? Hardwicke’s very logical answer would have been that the consignment consigns, subject to the shipper’s right of control. This explains the odd passage quoted in note 63 supra. Risk of loss shifts if the consignment is altered, because this has the same effect as use of the retained bill. Control is the important concept.

69. 2 Williston, Sales § 441 (rev. ed. 1948).
70. Uniform Bills of Lading Act § 6.
71. For example, in D’Aquila v. Lambert, Amb. 399, 27 Eng. Rep. 266, 2 Eden 75, 28 Eng. Rep. 824 (Ch. 1761), no mention was made of a bill of lading. But the report in 2 Eden tells us that goods were shipped September 21, 1759, and consigned to Israeli from Leghorn. On November 16, Israeli stopped payment. Plaintiff then “revoked the consignment” and “consigned the goods to his factor.” This probably was accomplished by endorsing the retained bill of lading and sending it to the factor, with instructions. In other words, there are more “bill of lading” cases than meet the eye; they hide in the reports under other disguises.
Three shipper's order bills of lading were signed, with the "usual clause, that one being performed, the other two should be void." Askell sent one bill to the consignee, and another to his agent in England. Both bills had been properly endorsed. Defendant, the ship's captain, delivered the goods to Askell's English agent. The goods had not been paid for. The statement of the case then continues as follows:

Merchants were examined on both sides, and seemed to agree that the indorsement of a bill of lading vests the property; but that the original consignor if not paid . . . had a right by any means that he could to stop their coming to the hands of the consignee . . . It also appeared by the evidence of merchants and captains of ships, that the usage was, where three bills of lading were signed by the captain, and indorsed to different persons, the captain had a right to deliver the goods to whichever he thought proper . . .

Lee, Ch. J., . . . said, that, to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement . . . But . . . [the shipper] had the other bill of lading to be as a curb on Hall [the consignee] who in fact had never paid . . . And . . . according to the usage of trade, the captain was not concerned to examine who had the best right . . . All he had to do was to deliver . . . upon one of the bills of lading. . . .

Of course, Fearon v. Bowers is an action against the captain for wrongful delivery, but the description of the retained bill as a "curb" seems perfectly reasonable. Looking backward, we may probably conclude that we do not have two lines of cases — "stoppage in transit" cases and "transfer of bill of lading" cases — but one line only, in which the mechanism of stoppage was the presentation of the shipper's retained bill, generally endorsed by him to his representative at the ultimate port of call. The first stage of development was the simple "free-for-all" doctrine; the first to get the goods by presenting a bill of lading was allowed to keep them, or, at any rate, that any proper delivery absolved at least the shipper. Later, a simple demand, accompanied by the showing of a bill of lading, was enough to preserve the consignor's right to stoppage in a proper case. This was later followed, even in domestic sales without bills of lading, by the development of what we might call an absolute

73. Ibid. See also quote at note 67 supra.
74. Id. at 365, 126 Eng. Rep. at 214–15. (Emphasis added.)
75. See note 71 supra.
77. See Wright v. Campbell, 4 Burr. 2046, 98 Eng. Rep. 66, 1 Bl. W. 628, 96 Eng. Rep. 368 (K.B. 1767). This case shows the existence of a practice which may partially explain the change in the law. The ship's master asked for (and got) an
right of stoppage when a consignee failed. We shall return to the later development in coming pages.

There seems little doubt, therefore, that shipping merchants were in the habit of using their retained bills as security devices. If their consignee failed, they could invoke their right of stoppage by presenting the bill themselves, or by endorsing it and sending it on to someone at the port of destination who could intercept the ship at the wharves. A bill of lading might also be endorsed and transferred for a number of other purposes. For example, the retained bill might be negotiated to a resident of London, to be used to "effect an insurance" with one of the London companies. The versatility of the bill of lading is well exemplified by Wright v. Campbell, decided by Lord Mansfield. The case also sheds light on Mansfield's view of the legal effect of a bill of lading. Mansfield's opinion is of unusual interest, since he of all people must be expected to have been sensitive to the custom of merchants. Yet the case hints strongly that he did not believe that bills of lading were negotiable, at least not in the same sense as bills of exchange. The facts were these: F, a London merchant, shipped wheat and beans to Liverpool, under a shipper's order bill of lading. He endorsed one bill to the order of Swanwick, his factor. Swanwick endorsed to Scott, apparently without mention that he was a factor, but giving the impression that he owned and had paid for the goods. F arrived in London and demanded that Scott relinquish any claim he might have in the goods. When Scott refused, F endorsed the retained bill to the defendant. Both Scott and Swanwick failed; plaintiffs were Scott's assignees. The goods arrived and were delivered to the defendant, who indemnified the captain. Lord Mansfield favored the plaintiffs; but a new trial was ordered to ascertain the facts, since the transaction between Swanwick and Scott smacked heavily of fraud. In the course of his opinion, Mansfield stated:

This is clear, that if there is an authority never so general, by indorsement upon a bill of lading, without disclosing that the indorsee is factor, the owner (as between him and the factor) retains a lien, till delivery of the goods, and before they are actually sold and turned into money. . . . But if the goods are bona fide sold by the factor at sea (as they may be, indemnity before delivering the disputed goods. If such a practice were widespread, it would eliminate the necessity for a rule protecting the shipping interests.

78. See Lovat v. Parsons, 1 Cowp. 61, 98 Eng. Rep. 967 (K.B. 1774) (right of stoppage in transit not defeated by bribery of the carrier to turn over the goods). Such a holding, of course, is technically inconsistent with the free-for-all theory. Id. at 62, 98 Eng. Rep. at 968.

79. See note 139 infra and accompanying text.


where no other delivery can be given) it will be good. . . [T]he vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered; and the owner can never dispute with the vendee; because the goods were sold bona fide and by the owner's own authority.\textsuperscript{82}

This statement seems to imply that the bona fide purchaser is protected, in Mansfield's view, not by any magic in the transfer of the bill of lading, but because of the commercial and moral claims of a bona fide purchaser from a factor. It is the authority given to the factor, and not the bill of lading, which does the trick. The owner, we would now say, is estopped from denying the factor's power to pass clear ownership. The vendee would hold the goods by virtue of a "bill of sale." Under this kind of reasoning, there is neither need for nor logic in holding a bill of lading negotiable. The other judges were even clearer on this point: a bill of lading has not the effect of a bill of exchange.\textsuperscript{83}

 Nonetheless, the case is something of a turning-point in the law. Mansfield's reasoning was not restricted to bills of lading, but was peculiarly applicable to them, since overseas shipments to factors invariably used bills, and the practice required their negotiation. It would have been only a short step forward to hold that the endorsement and delivery of a bill of lading per se vests the endorsee with apparent authority to negotiate the bill to a third party and cut off the original shipper's equity. At this stage, for all practical purposes, negotiability has been attained. Mansfield, of course, speaks only of "factors." But there was no clear-cut line, in the eighteenth century, between a "factor" and a "buyer."\textsuperscript{84} Merchants in different ports often acted as factors for each other; and the "factor's" role often included advancing money to the "principal" for goods. Merchants dealt, now on their own account, now for the account of others. The rule for "factors" was thus capable of spread-
ing to cover all merchants. Another point worth mentioning is Mansfield's statement about "delivery." By stressing the fact that a documentary transfer is the best that can be had under the circumstances, Mansfield was giving the transfer of a bill of lading some of the legitimacy of the common-law formal "sale." For all these reasons, later courts could well point to Wright v. Campbell in support of a rule contrary to Snee v. Prescott. But because these destructive tendencies were fairly subtle, and possibly because of commercial practice, the doctrine of Snee v. Prescott seems to have retained some of its force until nearly the end of the century.

The decisive blow to the doctrine of Snee v. Prescott was administered by the great case of Lickbarrow v. Mason. This famous controversy dragged itself out in the courts for over six years; and it ended, apparently, in the overthrow of the rule of Snee v. Prescott. More narrowly stated, Lickbarrow v. Mason succeeded in reversing the older view that the right of stoppage in transit was even superior to the rights of a bona fide transferee of a bill of lading. Partly, Lickbarrow v. Mason represents a real shift in legal direction. But a good deal of its meaning lies in the fact that here most clearly the shift in the meaning of the concept of property was made apparent: the transfer of property to the buyer of a bill of lading became absolute, that is, a virtual transfer of "title."

The facts of the case are somewhat involved, but briefly stated, the dispute was as follows: a cargo of grain was shipped from Holland to Liverpool by T, for the account of F, a firm of merchants at Rotterdam. Four bills of lading were executed. T endorsed two of them in blank and sent them to F; F forwarded the bills of lading to plaintiff, a Liverpool merchant, to be sold for F's account. F drew on plaintiff for the price, which was duly paid. F, who had never paid T, the consignor, failed. T then endorsed the retained fourth bill to the defendants, who succeeded in procuring delivery of the goods. Thus, a fairly clear-cut test of the validity of Snee v. Prescott as a precedent was placed before the court.

85. The chief opinions of this case are found in 2 T.R. 63, 100 Eng. Rep. 35 (K.B. 1787); 1 Bl. H. 357, 126 Eng. Rep. 209 (Ex. 1790); 5 T.R. 683, 101 Eng. Rep. 380 (K.B. 1794). Buller's argument before the House of Lords is reported at 6 East 20n., 102 Eng. Rep. 1191 (H.L. 1793). See also 4 Bro. P.C. 57, 2 Eng. Rep. 39 (H.L. 1793). Thus the litigation was quite protracted. Miller, supra note 42, at 269-72, is very valuable; but it is colored somewhat by the nineteenth-century interpretation of the case, which stressed Buller's opinion exclusively, ignored all the others, and took Buller's view of previous decisions at face value.

86. Miller, supra note 42, at 271, emphasizes the fact that the relationship between F and the plaintiff was "not that of seller and buyer, but that of consignor and consignee." Miller feels that this fact was glossed over by Buller because of Buller's idea that the bill of lading transferred "property." Since the bill of lading was silent concerning the relationship between F and the plaintiff, the relationship was irrelevant. This is true enough, and Buller's analysis finds some support in Wright v. Campbell, 4 Burr. 2046, 95 Eng. Rep. 66 (K.B. 1767). But plaintiff, as Buller himself points
In King’s Bench, sparked by a powerful opinion of Justice Buller, plaintiff was victorious. Snee v. Prescot was distinguished and criticized; the endorsement and delivery of a bill of lading to a bona fide purchaser was ruled to transfer the “property,” so as to blot out the right of stoppage in transit. In the Exchequer Chamber, the decision was reversed. The House of Lords sent the case back for a new trial; but it is not clear whether the effect of this action was to approve of Buller’s view of the law or not; apparently even contemporary opinion was in some doubt. On re-trial, King’s Bench simply reaffirmed its previous opinion, propped up this time by a jury finding as to the “custom of merchants.” No appeal seems to have been taken from this decision; perhaps the litigants, less interested in making legal history than in saving money, settled the case. It can be argued, therefore, that Lickbarrow v. Mason really settled nothing. As a matter of fact, however, Buller’s powerful opinion exerted an enormous influence on later judges and courts.

Exactly what was it that Buller meant to decide? He did not, for example, take up Mansfield’s opening, and defeat the consignor on an “apparent authority” theory; Justice Ashhurst, his colleague on the bench, made more of this. Nor can it really be argued that Buller did no more than accommodate the law to business usage; out, is a financing factor, not a “pure” factor; he is out money just as surely as if he had been a buyer, not to mention the fact that as a factor he has a lien for his general balance. All the judges concurred in treating plaintiff as substantially in the position of a buyer. See note 84 supra.

Possibly in this respect, Buller’s view represented a change in direction since Godfrey v. Furzo, 3 P. Wms. 185, 24 Eng. Rep. 1022 (Ch. 1783). In Godfrey, Lord Chancellor King apparently differentiated between a financing factor and a buyer—the factor did not get “property.” Buller distinguishes the case by pretending that Godfrey involved a “pure” factor, that is, a factor who has not made advances to his principal. This is simply not true, as Buller must have known. Still, Buller must be allowed the privilege, fundamental to judges, of ignoring troublesome precedents.

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89. The report in 4 Bro. P.C. 57, 2 Eng. Rep. 39 (H.L. 1793) gives the distinct impression that Buller’s view was found persuasive in the House of Lords. But this contrasts with the neutral tone of the brief note in 5 T.R. 367, 101 Eng. Rep. 206 (H.L. 1793). And the occasional citations of Lord Loughborough’s opinion in Exchequer Chamber suggest that contemporary lawyers were not entirely sure how to read the oracle of their highest court. See note 117 infra.
92. Justice Ashhurst, concurring with Buller in King’s Bench, was emphatic on this point: The “rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law. . . .” Id. at 71, 100 Eng. Rep. at 39. It is hard not to agree with Ashhurst: how can there be said to be a “custom” as to what the law is? The most that can be said is that the decision in King’s Bench accords with what merchants expect and like, which is not the same thing at all.
we have seen that the business usage was at least ambiguous, if not positively inimical to Buller's point of view. It is true, Buller deliberately set about to clarify the law; he intended to make the law aid business usage, which is not the same thing as conforming the law to such usage. What was needed was, in his view, a set of general principles which could "serve as a guide for the future." The important question, as Buller saw it, was "whether a bill of lading is by law a transfer of the property." Now this was a strange way to isolate the issue. Clearly a bill of lading did transfer some property rights; no one disputed that fact. Furthermore, Buller himself stated that there was another possible basis for his holding— a basis upon which he declined to rest. This was the fact that four bills of lading were issued, instead of the usual three. Plaintiff, on getting two of them, could not, according to Buller, "imagine that the consignor had it in his power to order a delivery to any other person." This was a weak argument, and Buller did well to pass lightly over it. Even more damaging would have been the consequences of such an argument: if two bills would lull the plaintiff into a false security, then it would follow that one bill would put him (and any transferee of the bill) on notice that a bill of lading was outstanding which might be used as a "curb." But this was precisely the line of logic which Buller was at pains to avoid. Concededly, no transferee of a bill of lading took rights superior to an unpaid vendor, if the transferee did not pay value without notice of any infirmities. But against the background of the current practice at that time, the bona fides of buyers and financiers of cargo against bills of lading obviously would not bear too close a look, since, technically, they had (or should have had) notice of the retained bill. Here was a potential trap; and Buller himself, in Salomons v. Nissen, nearly fell through, only one year after his first opinion in King's Bench.

Admittedly, the law prior to Lickbarrow v. Mason was not per-

93. Id. at 73, 100 Eng. Rep. at 40.
94. Id. at 72, 100 Eng. Rep. at 40.
95. The bill, as Buller admitted, must have clearly stated on its face that four were outstanding. This was the practice. Buller theorized that the endorsee might not have read the bill. But an eighteenth-century bill of lading was only a few lines long and could have been read by any literate person in a few seconds. Furthermore, though bills were generally issued in sets of three, sets of four were by no means unknown. See Curling v. Long, 1 Bos. & Pul. 634, 126 Eng. Rep. 1104 (K.B. 1797). In Slubey & Smith v. Heyward, 2 Bl. H. 504, 126 Eng. Rep. 672 (C.P. 1795), five were involved.
96. 2 T.R. 674, 100 Eng. Rep. 363 (K.B. 1788). One bill was turned over to the plaintiff, who paid with acceptances. Snee v. Prescott, 1 Atk. 245, 26 Eng. Rep. 157 (Ch. 1748), was resurrected by the court to protect the vendor, on a showing that plaintiff knew the goods were not paid for. But plaintiff had entered into an explicit agreement with the vendee which allowed Lickbarrow v. Mason, 2 T.R. 63, 100 Eng. Rep. 85 (K.B. 1787), to be distinguished. The day was saved by Cuming...
fect. The buyer of a bill of lading could not be sure of his position. The free-for-all aspects of the doctrine of Snee v. Prescott, although in decline, were imimical to Buller’s grand plan for “general principles.” Perhaps they were imimical as well to the stability of commerce. At least Buller felt so. But in casting about for conceptual help, Buller discarded the slip-shod equitable notions of the law merchant (and equity) and found his solution in the kind of tight logic characteristic of the old common law. He held that the right of the transferee was a legal, not a customary, right; it was property. Thus, before the House of Lords, arguing in behalf of his King’s Bench opinion, Buller cited ancient maxims—bits and snatches from the attic of the common law—to the effect that delivery was not necessary to pass “property,” and the like. He had, however, shifted ground. The “property” of which he was speaking might not yet have been as rigid as the nineteenth-century “title” was supposed to be, but it was certainly a stiffer cloth than we saw in Evans v. Martell. It was, in fact, stiff enough so that the right of stoppage in transit must yield to it. Here, unfortunately, Buller had proved too much. Carried to its logical extreme, the argument based on “property” would deny the right of stoppage in transit altogether, that is, even as between vendor and vendee, since if the bill of lading gave “property,” it gave it all along the line. To save himself, Buller resorted to the common law. Seizing upon some stray dicta, he equated the right of stoppage in transit with the venerable common-law lien:

Neither of them are founded on property; but they necessarily suppose


97. “Before,” Buller complained, “in Courts of Law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and . . . produced no established principles. From that time . . . the great study has been to find some certain general principles, which shall be known to all mankind . . . to serve as a guide for the future.” Lickbarrow v. Mason, 2 T.R. 63, 73, 100 Eng. Rep. 35, 40 (K.B. 1787).

98. See Buller’s argument, discussing Noy’s Maxims, Shepherd’s Touchstone, and other authorities of like vintage, before the House of Lords, in Lickbarrow v. Mason, 6 East 20n.(a), 102 Eng. Rep. 1192, 1193 (1793).

99. The inconsistency has been noticed by Miller, supra note 42, at 272. Buller cites Hunter v. Beal, decided by Lord Mansfield in 1785 (see 3 T.R. 466, 100 Eng. Rep. 680), and remarks that “as between vendor and vendee, the property is not altered till delivery of the goods.” Lickbarrow v. Mason, 2 T.R. 63, 75, 100 Eng. Rep. 35, 41 (K.B. 1787). But before the House of Lords, Buller argued that the consignee had “legal property.”

the property to be in some other person, and not in him who sets up
either of these rights. They are qualified rights, which in given cases
may be exercised over the property of another: and it is a contradiction
in terms to say a man has a lien upon his own goods, or a right to stop
his own goods in transitu. If the goods be his, he has a right to the
possessions of them . . . as he pleases, without the option of any other
person . . . .

The argument shows a commendable mastery of legal logic; it is
not, however, really applicable, at least when considered historically.
The right of stoppage in transit is not, like the lien, a pos-
sessory right or, better phrased, a right to retain possession. It is
a right to resume possession. Goods released by a common-law lien-
holder could not be stopped in the hands of a carrier. Further-
more, a common-law lien was a right to hold on to goods; no power
of sale went with it. But a shipper stopping in transit had abso-
late control over the subsequent disposition of the goods.

It is interesting to note that even Buller’s line of reasoning did
not really go to make a bill of lading negotiable. On the contrary,
if a bill of lading were really negotiable, there would be no need
to equate the right of stoppage with a lien. Negotiable instruments
have the characteristic that equities may be interposed at will be-
tween original parties; only bona fide third parties may cut them
off. Thus, there would be no question of the right of the shipper
to stop, as between himself and his consignee.

What Buller had done was to erect a complex, highly technical
card-house of concepts, where before there was relative simplicity,
evén naivété. But it was all done in the name of business conven-
ience. Here the hair-splitting comes, not from the common-law conser-
vatives, trussed up in year-book and precedent, but from
the forward-lookers, the reformers of the law. Buller saw no way
out. Otherwise, no one would be safe in “buying, or in lending
money upon goods at sea.” The goods would be “locked up.”

If the goods are in all cases to be liable to the original owner for the
price, what is there to be bought? There is nothing but the chance of
the market. . . . The great advantage which this country possesses over
most if not all other parts of the known world, in point of foreign trade,
consists in the extent of credit given on exports, and the ready advances
made on imports.

101. Buller’s argument before the House of Lords in Lickbarrow v. Mason, 6 East
102. This was later held in the case of a lien-holder who sent goods back to an own-
Wilcox, 1 Amb. 255, 27 Eng. Rep. 168 (Ch. 1755) and Buller’s own remarks in the
House of Lords, 6 East 20n.(a), 102 Eng. Rep. 1192. Of course the maritime lien,
which is nonpossessory, is a better analogy.
104. 6 East 20n., 102 Eng. Rep. 1191 (H.L. 1793). Also, Buller reminded us of the
supposed plight of an importing merchant who was drawn on for the value of the goods.
For the protection and furtherance of these interests, Buller was sure the transferee of a bill of lading needed the "property."

The power and persuasiveness of Buller's reasoning in *Lickbarrow v. Mason* have tended to obscure Lord Loughborough's very interesting opinion in the Exchequer Chamber. Unlike Buller, Lord Loughborough seems to have held to an older conception of "property." "Property" to him might have meant a limited right; more than one person could have property in the same goods at the same time. This seems clear from his remark that "by the delivery on board, the ship-master acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods. . . ." Loughborough's view was that the endorsement of a bill of lading was "simply a direction of the delivery of the goods." The endorsee got nothing more than a "right to receive the goods and to discharge the ship-master." A bill of lading was not a negotiable instrument like a bill of exchange; the form was not standardized, and the information on the face of the bill often expressed a "false account and risk." Mere possession of a bill of lading could not give title to the goods, any more than mere pos-

How could he protect himself against loss? He must insure, and unless the bill of lading gave him "property," Buller argued, he could not. But, as Buller must have known, this reasoning was fallacious. It is true that the possibility of procuring insurance for someone else's account, an old custom, see Holdsworth, *The Early History of the Contract of Insurance*, 17 Colum. L. Rev. 85, 96-97 (1917), was curtailed somewhat by the Insurance Act, 1746, 19 Geo. 2, ch. 37, which forbade the procuring of insurance "Interest or no Interest, or without further proof or Interest than the Policy," with certain exceptions. Nevertheless, the importing merchant certainly had a sufficient insurable interest under eighteenth-century marine insurance law. For examples of the kind of policy the statute struck down, compare *Le Cras v. Hughes*, 3 Doug. 81, 99 Eng. Rep. 549 (K.B. 1782) *with* Lowry v. Bourdieu, 2 Doug. 468, 99 Eng. Rep. 299 (K.B. 1780). "Double assurance" was not illegal; and the holder of the bill of lading was allowed to insure even though the consignor's resident correspondent had already done so, in *Godin v. London Assur. Co.*, 1 Bl. W. 103, 96 Eng. Rep. 58 (K.B. 1758).

In the second place, under the older view of "property," there was no question that the endorsee of the bill of lading had "property," no matter how *Lickbarrow v. Mason* might have been decided. See note 116 infra.


106. *Id.* at 359, 126 Eng. Rep at 211.

107. Note that very often, in the eighteenth century, this was literally true—a merchant endorsed a bill of lading to his resident agent in the port of destination, not as a sale or a pledge, but simply to enable the agent to insure the goods, or collect the goods, or the like.

108. Again, this was literally true. Snee's counsel in *Snee v. Prescot* argued that "it is the custom of merchants at Leghorn, to send bills here filled up [so as] . . . to conceal the names of the persons to whom the goods are sent, that the publick may not know the persons in England, with whom such houses deal, or to whom the property belongs." *Snee v. Prescot*, 1 Atk. 245, 246, 26 Eng. Rep. 157, 158 (Ch. 1748). And as early as *Evans v. Martell*, 1 Ld. Raym. 271, 91 Eng. Rep. 1078 (K.B. 1697), English courts had held that a named consignee of the bill of lading had "property" sufficient to obtain delivery of the goods, even though the invoice showed that the named consignee had no actual ownership rights in the goods.
session of the goods themselves. As Buller later (before the House of Lords) brought in common-law precedents to show that a sale could be consummated without delivery, so Lord Loughborough used common-law materials to show that delivery, or transfer of possession, was not enough to cut off an original owner's rights. To divest an owner of his "title" (Loughborough uses the word), some legally sufficient act must take place; none could be found in the facts of *Lickbarrow v. Mason*. And whatever the juridical doubts, commercial necessity—an oracle which Loughborough read differently from Buller—demanded the protection of the original owner:

And unless there was a clear established general usage to place the assignment of a bill of lading upon the same footing as the indorsement of a bill of exchange, that country which should first adopt such a law would lose its credit with the rest of the commercial world; for the immediate consequence would be to prefer the interest of the resident factors and their creditors to the fair claim of the foreign consignor. It would not be much less pernicious to its internal commerce; for every case of this nature is founded in a breach of confidence, always attended with a suspicion of collusion, and leads to a dangerous and false credit at the hazard and expense of the fair trader.

And again:

The greater part of the consignments from the West Indies, and all countries where the balance of trade is in favour of England, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expense of insurance, freight, duties are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt.

Here, however, the force of Loughborough's arguments had been blurred by the development of commerce, both foreign and domestic, during the century. Even in internal trade, breach of

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109. Here Loughborough cited Hartop v. Hoare, 3 Atk. 44, 26 Eng. Rep. 828 (K.B. 1743). A jewel in a sealed bag was left with a jeweler for safekeeping. The jeweler, a man of dubious morals, broke open the bag and pawned the jewel, purporting to be the real owner. Chief Justice Lee, felt that nothing had occurred to "devest" Hartop of his ownership rights. The case does not support Loughborough's argument; it simply begs the question. Is such a case as *Lickbarrow* to be governed by the rules applicable to simple bailees in domestic cases? What is interesting, however, is the fact that the principle of *Hartop v. Hoare* later (in the nineteenth century) under the "title" system did expand greatly into the commercial field.


111. Loughborough did cite, however, Fearon v. Bowers, 1 Bl. H. 364n(a), 126 Eng. Rep. 214 (C.P. 1753) and Snee v. Prescott, 1 Atk. 245, 26 Eng. Rep. 157 (Ch. 1743), which were in fact apt precedents.


113. Id. at 368, 126 Eng. Rep. at 216. Loughborough remarked that the "same law," that is, the doctrine of *Snee v. Prescott*, obtained in other countries, mentioning the ruling of a Dutch court. Id. at 365, 126 Eng. Rep. at 213-14.
confidence" with a "suspicion of collusion" was not the only danger present; bankruptcy and the possibility of a "shilling-in-a-pound" dividend was a more acute peril. We can disregard Loughborough's arguments in terrorem (and Buller's, too, for that matter); business has a way of thriving, despite legal difficulties, by accommodating itself to the given state of law. Furthermore, Loughborough's argument is weak, since at the time Lickbarrow v. Mason was litigated, merchants could no longer be neatly classified into two groups, foreign shippers and English consignees. Trade was carried on between Englishman and Englishman, foreigner and foreigner, Englishman and foreigner. The "foreigner" might be a resident of London, the Englishman a resident of Brazil. English commercial colonies were abroad, and colonies of foreigners were settled in the major English trade-towns; of course, many of them eventually became naturalized. Likewise, we must recall the spectacular growth of the English "plantations" in the New World and elsewhere. The line between foreign and domestic trade was bound to weaken with the Empire's growth. There grew up, during the century, a vast trade technically between Englishmen only, but with the distances, customs, and some of the problems of foreign trade.

For all that may be said in praise of Loughborough's opinion, apparently the merchant community and the lawyers were more impressed by the soundness of Buller's. We may infer from this a true, if gradual, shift in the psychological expectation of mer-

114. See Clapham, A Concise Economic History of Britain from the Earliest Times to 1750 280 (1949).

115. Of course the American Revolution altered the picture somewhat. Throughout the century, however, the West Indies were generally more highly regarded than the American states, especially the northern colonies, which produced little besides timber, that England wanted to import. In 1770, the northern colonies imported from the mother country ten times as much as they exported. The southern colonies, which grew tobacco and cotton, attained a more even balance. However, the West Indies exported far more to England than they imported. Their produce, such as sugar, was needed in England, while their plantation economies did not absorb English finished goods in nearly so great an amount. See the table reprinted in Bogart & Kemmerer, An Economic History of the American People 126 (rev. ed. 1942). Many eighteenth-century commercial cases arose out of the West Indies trade. Jamaican sugar figures in Caldwell v. Ball, 1 T.R. 205, 99 Eng. Rep. 1053 (K.B. 1786) and Hibbert v. Carter, 1 T.R. 745, 99 Eng. Rep. 1355 (K.B. 1787). In form, of course, the West Indies trade — and the Irish trade — was identical with "foreign" trade, that is, trade conducted overseas, with the use of documents. During the course of the century, the reported cases show the growing importance of "empire" trade.

For obvious reasons, the eighteenth-century commercial cases dealt almost exclusively with imports. Export cases were rare; they would normally have been litigated in foreign forums. An exception, however, was such a case as Salomons v. Nissen, 2 T.R. 674, 100 Eng. Rep. 365 (K.B. 1788). Lead, shipped from England to France, never left its port. Luckily or unluckily, bad weather drove the vessel back to England, the consignee failed, and the consignor had the goods (by chance) back in his grasp. But this is rare. Furthermore, in the export trade the transaction was more likely to be fully consummated before the ship left England. See Miller, Bills of Lading and Factors in Nineteenth Century English Overseas Trade, 24 U. Chi. L. Rev. 259-57 (1957).
chants. Apparently Loughborough’s opinion was quickly forgotten, while Buller’s was constantly cited, treated as settled law, and eventually turned into a classic. And this despite the fact that technically it is hard to say which court’s holding is more “binding.”

Although Buller’s reasoning, after a decent interval, became accepted law, it raised problems of its own. These problems were inevitable, considering the formalistic chain of concepts he forged. Each link showed subsequent strain. The strict use of the “property” concept made it difficult to distinguish between a “sale” of goods by means of transfer of a bill of lading, and a financing transaction (pledge of the bill). This difficulty persisted for almost a century and was heightened by a distinction previously made by the law. Paterson v. Tash had set down the rule that a factor, even with power of sale, had no power to pledge his principal’s goods for his own debt. It was difficult for judges to see why a factor de-

116. The change must have been gradual; traces of Snee v. Prescot remained alive for a considerable time. Thus, though Hibbert v. Carter, 1 T.R. 745, 99 Eng. Rep. 1355 (K.B. 1787), was decided by the same judges as Lickbarrow, and only a very short while before, it contained language hard to reconcile with Lickbarrow. Hibbert was an action on an insurance policy; the defense was that the insured had no interest in the cargo. K, the shipper, was indebted to D, and negotiated to him his retained shipper’s order bill of lading. Plaintiff was the consignee of the goods. At first, Buller wished to nonsuit the plaintiff, since the “whole property” must be in D; but later the court changed its mind “on an affidavit stating the particular transaction between the parties”; K had “no intention whatever of passing the whole property . . . [H]is intention [was] . . . no more than to bind the consignment of the goods in England. . . .” Id. at 747, 99 Eng. Rep. at 1356. The stress on “intent” seemed to foresee the nineteenth-century system. But see Miller, supra note 115, at 272. But what does “bind the consignment of the goods to England” mean? It can only refer to the control over the goods, by means of the retained bill. What D got, in short, were the consignor’s rights under Snee v. Prescot. On the insurance point, of course, the result was sensible and consistent with eighteenth-century law; yet Buller deliberately ignored it in Lickbarrow v. Mason. See note 104 supra.

117. Le Blanc, counsel for plaintiffs in Slubey & Smith v. Heyward, 2 Bl. H. 504, 126 Eng. Rep. 672 (K.B. 1795) cited Loughborough, and argued that his opinion was still in force. It was mentioned also in Newsome v. Thornton, 6 East 17, 42-43, 102 Eng. Rep. 1189, 1203 (K.B. 1805) (Lawrence, J.). But compared to the myriad citations of Buller’s opinion, these were rare indeed.


When a custom has once been found to be a custom of merchants, it becomes by that finding the law of the land. This doctrine was acted upon by Lord Kenyon in the case of Hunter v. Buring . . . who refused to hear any evidence respecting the negotiability of a bill of lading, it having been already admitted upon record in the special verdict in Lickbarrow v. Mason.


119. See note 89 supra.


barred from pledging goods physically should be allowed to do the same thing by means of a bill of lading. In cases such as Lickbarrow v. Mason, one way out was to treat a financing factor as "virtually" a buyer. Yet the difficulty was not solely due to defects in legal reasoning, but was a consequence of the serious problems raised by the fusion of the law of foreign trade with domestic law. Paterson v. Tash was a highly appropriate decision—if the underlying fact-situation was that of a sales agent who crept surreptitiously into a pawn-broker's shop. The importing factor-buyer, who had advanced considerable money to his foreign correspondent, was in a totally different situation. Buller no doubt expected that by giving the factor-buyer "property," his rights would be adequately protected; yet the initial rigidity of the reasoning hamstrung the law; and the possibility that the importer might go bankrupt, with the goods unsold and traceable, had to be reckoned with. But, notwithstanding the problems created, the decision in Lickbarrow v. Mason may be taken to have settled at least two points: First, that the rights of at least some bona fide transferees of a bill of lading were superior to the consignor's right to stop, despite the retained bill. Second, that a bill of lading, at least in some sense, partook of the nature of negotiability and could be used to transfer absolute ownership of goods at sea. Furthermore, of the highest importance was the way in which these results were reached, that is, by mixing merchant custom with materials from the common law, and by an increased rigidity of the "property" concept.

Legal scholars are more apt, in general, to find conceptual difficulties insurmountable than are judges. The latter tend to reach decisions dictated by common sense, by whatever path necessary. Still, the structure Buller built proved the occasion for much subsequent soul-searching and distinguishing. Haille v. Smith exemplifies the problems well. Here goods were consigned to a merchant house; the bill of lading, however, was forwarded as collateral security to a banking firm having the same partners as the merchant house. Unfortunately, the consignor failed before the ship had even left the home port of Liverpool. The cargo was redelivered to the assignees in bankruptcy of the consignor. Plaintiffs, holders of the bill of lading, were successful in their claim. But the court was

123. But even after Lickbarrow, the retained bill was used to exercise the right of stoppage where no bona fide purchaser intervened. See, e.g., Holst v. Pownal, 1 Esp. 240, 170 Eng. Rep. 343 (N.P. 1794). The bill was apparently sent as a matter of course to the resident agent of the consignor in case of necessity. See Walley v. Montgomery, 3 East 585, 102 Eng. Rep. 721 (K.B. 1803), and the arguments of counsel for defendant in Slubey & Smith v. Heyward, 2 Bl. H. 504, 126 Eng. Rep. 672 (K.B. 1795).
much troubled by the risk-of-loss question: if "property" had passed from the consignor to the holders of the bill of lading, who would have borne the risk of loss if the goods had been lost at sea? And suppose the consignees rather than the consignors had failed? Chief Justice Eyre toyed with a complicated "trust" concept, though, in fact, the solution to these hypothetical questions should have been rather easy. The right of stoppage in transit, after all, did not depend on "property"; neither did the question of risk-of-loss, necessarily. The shift in the concept of "property" merely meant that Eyre had qualms he would otherwise not have had.\textsuperscript{125}

In groping for a key, Eyre at one point urged that courts should "expound the doctrine of transfer very largely upon the agreement of the parties. . . ."\textsuperscript{126} In the nineteenth century, of course, this solution became dominant;\textsuperscript{127} what could be more convenient than a system of loaded rules, with the intention of the parties as a safety-valve, if needed? And since \textit{Lickbarrow v. Mason} had analyzed the respective interests of the possible parties—buyers, sellers, factors, financiers—in a manner awkward within the old framework, of necessity the judges were forced to direct their attention to the building of a new system. This system would incorporate the actual results of eighteenth-century cases \textit{but} in a scheme turning fundamentally about the stricter definition of "property," or, as it came more usually to be termed, of "title."

Meanwhile, we turn to the domestic law, and examine the ways in which the merchant-rules reacted upon it.

\textbf{B. Domestic Trade and the Law Merchant}

A kind of synthesis of common law and business practice was accomplished in the law of foreign trade, as we have seen most clearly in \textit{Lickbarrow v. Mason}. The same synthesis took place in the law of domestic trade. Most noticeably, the doctrine of stoppage in transit, which arose in foreign trade, found the home soil equally

\textsuperscript{125} Compare Atkins v. Barwick, 1 Str. 165, 93 Eng. Rep. 450 (K.B. 1719), where an analogous problem arose in a domestic sale without a bill of lading. A recipient of goods sent them back out again to defendant, because of scruples over the recipient's impending bankruptcy. Despite the fact that defendant had no knowledge of the attempted return of the goods, the "property" was "altered" in his favor because the delivery was "with consideration." The difference in treatment of the two cases is explainable largely because (a) the concept of "property" shifted meaning in the intervening years; and (b) land cases were habitually treated somewhat differently from sea cases.

For an American case of about the same period as \textit{Haille}, dealing with a rather similar problem, see Wood v. Roach, 1 Yeates 177, 2 Dall. 180 (Pa. 1792).


congenial. This is not surprising, since domestic trade was undergoing a revolution no less drastic than the expansion of foreign trade—perhaps even more drastic. A number of factors contributed to this development. The rise of industry in northern England produced an increase in trade from, for example, Liverpool to London. Population also increased throughout the century.\textsuperscript{128} By the end of the century, smokestacks and steam engines had already begun to darken the English landscape. Most of the immense internal traffic was carried by water—along the rivers, and on the canals which were being built. Of special importance was the coastal traffic skimming along the shoreline. Roads were generally poor, and land-carriage was expensive, although, to be sure, there was great improvement during the century.\textsuperscript{129} Obviously, like the "foreign" trade with the plantations, the coastal traffic was not technically "foreign"; but it was sea-traffic nonetheless, and shared many of the problems of foreign trade. Therefore, the ease of legal analogy between foreign and domestic trade is not surprising. Simultaneously, the decline in the special courts (such as the Court of Admiralty), and the partial transfer of merchant cases to the common-law tribunals made the king's judicial personnel more familiar with the problems and doctrines of the law merchant; a kind of "reception" took place.\textsuperscript{130} The fusion of merchant law and common law worked by Mansfield and others is justly famous. The time, of course, was ripe; and the judges were ready and willing. The decisions involving foreign trade were handy materials which could be applied to the growing volume of domestic commercial cases. Of course, there were significant differences in business practice between foreign trade proper and even the domestic water trade. For one thing, the bill of lading, though in frequent use in coastal waters, was by no means universal.\textsuperscript{131} But in the final analysis,


\textsuperscript{129} Regarding the improvement in internal transport during this century, see Hammond & Hammond, The Rise of Modern Industry, ch. V, (1947). But sea commerce was still much superior. Adam Smith thought that "six or eight men . . . by the help of water-carriage, can carry and bring back in the same time the same quantity of goods between London and Edinburgh as fifty broad-wheeled waggons, attended by a hundred men, and drawn by four hundred horses." 1 Smith, The Wealth of Nations 28 (1776).

\textsuperscript{130} Sutherland, The Law Merchant in England in the Seventeenth and Eighteenth Centuries, 17 Royal Historical Society Transactions 149 passim (4th Ser. 1934).

\textsuperscript{131} Kinloch v. Craig, 3 T.R. 783, 100 Eng. Rep. 858 (K.B. 1790), is instructive. The trade described (liquor) was between a Scottish dealer and his London factors. The goods traveled by water.

Oftentimes no bills of lading were sent with these cargoes, and, when sent, were not in general indorsed to any person, though the cargoes were thereby made deliverable to John Steine or his assigns. From 1783 . . . to 1788 . . . out of
the similarities outweighed the differences. Therefore, it is no surprise that the right of stoppage in transit moved swiftly into home waters. Perhaps it might even be accurate to state that no distinction ever was made between foreign trade and domestic trade in this regard. As the domestic water-cases came up, they were simply treated in the same manner as overseas cases. Yet the fact remains that the right of stoppage was foreign in origin and equitable in tone. Furthermore, while the foreign cases may have depended on the custom of the retained bill of lading, no such universal custom could have underpinned the domestic cases. This is even clearer concerning carriage by land. No bill of lading was ever issued by common carriers on land, but the right of stoppage was soon applied here too. At first, in an excessive exuberance, the rule was that a land consignor might “stop” so long as the goods had not actually come into the “corporal touch” of the consignees. The notion of a “corporal touch” shows clearly the influence of overseas trade. As we have seen, the right of stoppage originally meant something little better than a free-for-all, with the “first clear hand” on the goods remaining victorious. Strictly speaking, the idea of a “corporal touch” was very inappropriate on dry land. Goods in transit were not locked up in the wooden prison of a ship afloat; and during their travels, the goods were bound to encounter many “touches.” In land cases, therefore, the courts soon receded from the doctrine of “corporal touch.” The problem of a “warehouseman’s touch” was then faced. These and other “gray” areas were explored and marked out. In brief, it was soon held that a direction to stop, timely given, was sufficient to invoke the right, so

84 consignments of cargoes only 10 were sent with bill of lading regularly indorsed.

Id. at 784, 100 Eng. Rep. at 858. In Sweet v. Pym, 1 East 4, 102 Eng. Rep. 2 (K.B. 1800), a fuller, upon hearing that his principal was in financial difficulty, went to the trouble of intercepting the ship on which cloth was being sent back to London, and made the master execute a bill of lading. These, of course, are not “sales” transactions; nonetheless, in the “foreign” trade, bills of lading would almost certainly have been executed anyway.

132. The transition, if there was one, might have been simplest in such a case as Burghall v. Howard, 1 Bl. H. 366n.(a), 128 Eng. Rep. 215 (N.P. 1759) (domestic water shipment, but with bill of lading).


137. See note 142 infra.
long as delivery had not been consummated.\textsuperscript{138} A parallel development took place in the overseas cases.\textsuperscript{139} At any event, by the end of the eighteenth century, it had been clearly established that the right of stoppage\textsuperscript{140} applied to domestic sales transactions of all kinds.\textsuperscript{141}

The protection thereby afforded an English merchant proved to be very attractive. The volume of case law became correspondingly heavy. Difficult questions arose, of course, as to the precise point at which the transit ended,\textsuperscript{142} but the courts "leaned much in favour of the power of the consignor to stop his goods . . . [since this was a] leaning to the furtherance of justice."\textsuperscript{143} Internal transportation being so slow, and the danger of bankruptcy so great, the right was by now


\textsuperscript{139} The development in overseas cases, of course, was obscured by the problem of multiple bills of lading. The mechanism of invoking the right of stoppage thus consisted, at least at first, of endorsing the retained bill to an agent at the port of destination. The practice of indemnifying the master and litigating the issue of who has the ultimate right to the goods, seems to imply a real (if not a theoretical) shift in the rule for overseas cases. See note \textsuperscript{77} supra.

\textsuperscript{140} Lord Chancellor Hardwicke's opinion in Snee v. Prescot, 1 Atk. 245, 26 Eng. Rep. 157 (Ch. 1743), seemed to suggest that the right of stoppage in transit, in domestic land-transactions, was as old as the corresponding right in overseas cases, or at least almost so. Hardwicke stated:

I admit the case . . . of inland dealers in England, that if goods are delivered to a carrier or hoyman . . . and . . . are lost by the carrier or hoyman, the consignee can only bring the action, which shews the property to be in him . . . .

But suppose such goods are actually delivered to a carrier . . . and while the carrier is upon the road . . . the consignor hears his consignee is bankrupt . . . and countermands the delivery, and gets them back into his own possession.

Again . . no action of trover would lie . . because the goods, while they were in transitu, might be so countermanded.

\textit{Id.} at 248-49, 26 Eng. Rep. at 159. But this seems to be dictum only, since there does not appear to be any precedent for the right of stoppage in transit in a land case. Perhaps Lord Hardwicke was referring to "delivery" in a technical sense.

\textsuperscript{141} Lovat v. Parsons, 1 Cowp. 61, 98 Eng. Rep. 967 (K.B. 1774) (indigo transported by wagon); Ellis v. Hunt, 3 T.R. 464, 100 Eng. Rep. 679 (K.B. 1789) (files ordered from Sheffield manufacturers, to be delivered to buyer in London by means of "Royle's waggon").


as essential for the land consignor as for the merchant overseas. Available records show a tremendous increase in the number of business failures over the course of the eighteenth century; in 1732 there were 164 such failures, in 1793 there were 1256. The latter year was exceptional, but the general trend was nonetheless sharply upward.\footnote{144}{See Ashton, An Economic History of England: The 18th Century 254 (1955).} This increase, of course, was not entirely an unhealthy sign. Trade had expanded greatly. The normal quantum of business failures was apt to be pyramided by the financial interdependence of the merchant community, the shortage of actual hand-to-hand money (as opposed to credit),\footnote{145}{Ashton, op. cit. supra note 144, at 173.} and perhaps also by the nature of the law of bankruptcy, which allowed swift, sudden, secret "acts" of bankruptcy.\footnote{146}{See generally 2 Blackstone, Commentaries on the Laws of England 933–46 (Lewis ed. 1902). For an interesting account of the earlier antecedents of the bankruptcy laws, see Treiman, Escaping the Creditor in the Middle Ages, 43 L.Q. Rev. 230 (1927).} The right of stoppage in transit protected the merchant who might otherwise be caught in a chain-reaction of failures. It also gave a grace-period to a manufacturer or seller who transported goods to buyers or merchant-agents in London or other cities. The sympathy of the courts is fairly clear from the results of the cases. Part payment did not destroy the right, nor did the fact that the carrier was the buyer's choice, or that the buyer had a special arrangement with the carrier.\footnote{147}{Hodgson v. Loy, 7 T.R. 440, 101 Eng. Rep. 1065 (K.B. 1797). The rule in overseas cases, as might be expected, was somewhat different at first, and more "neutral." Thus, if the shipment were made on a ship owned or chartered by the buyer (consignee), the right of stoppage in transit did not survive. Bohtlinck v. Schneider, 3 Esp. 58, 170 Eng. Rep. 537 (N.P. 1799); Bohtlingk [sic] v. Inglis, 3 East 381, 102 Eng. Rep. 643 (K.B. 1806).} If anything, the seller had a more perfect right domestically than was allowed in overseas trade. The favor of the judges was matched by the audacity of lawyers, who attempted to push the doctrine as far as it would go—and further. In 1797, counsel tried to apply the right to a remittance of money but did not succeed.\footnote{148}{Smith v. Bowles, 2 Esp. 578, 170 Eng. Rep. 461 (N.P. 1797).} Still, stoppage in transit showed its vitality by analogical growth. In the beginning of the nineteenth century, stoppage was occupying some of the ground later to be inhabited by the so-called seller's lien—that is, it was invoked successfully in sales transactions which strictly speaking had no "transit" in them at all.\footnote{149}{Owenson v. Morse, 7 T.R. 64, 101 Eng. Rep. 856 (K.B. 1798) (plate in the hands of an engraver is "in transit") (Lord Kenyon, C.J.).} In Withers v. Lyss, decided by Chief Justice Gibb in 1815, the right to stop in transit was invoked by name to protect a seller of resin which never budged from its warehouse.\footnote{150}{Withers v. Lyss, 4 Camp. 237, 171 Eng. Rep. 76 (N.P. 1815).} Yet all this time the right belonged only to sellers or those in the posi-
tion of sellers. An ordinary bailee, even when armed with a lien, did not have its protection past the moment of shipment. Furthermore, as in the foreign trade cases, much confusion remained as to the precise relationship between the right of stoppage in transit and "property." This confusion, in part caused by Lickbarrow v. Mason, clouded the air for a number of years. The language of some of the cases clearly shows the after-effects.

While the right of stoppage grew luxuriantly, another law merchant doctrine, market overt, shriveled away. This, however, is only superficially a paradox. Though market overt had roots in the law merchant, the kind of business typified by the medieval fair and market place was losing its relative importance. The natural tendency of the common law to protect an original owner or seller and to safeguard his rights from persons committing fraud, gained dominance over the antiquated freedom of the open market. Among other things the industrial revolution meant the increasing impersonalization of business. Problems of financial treachery were of course acute in overseas trade just as they were in the home islands. Nonetheless, the overseas merchants formed a tight little clique, often interconnected by blood or marriage. The paramount fear of the merchants in foreign trade was of the onset of bankruptcy, which might strike suddenly. The same paramount fear was characteristic of domestic distance-sales, which came more and more to resemble foreign trade in law and practice. But fraud, on the other hand, was and remained the chief "bugaboo" of the stationary sale. The ancient market overt provided a convenient vent for stolen or misappropriated goods. Before the beginning of the eighteenth century, market overt had broken out of its narrow boundaries and had been greatly

151. Sweet v. Pyne, 1 East 4, 102 Eng. Rep. 2 (K.B. 1800). In Kinloch v. Craig, 3 T.R. 783, 787, 100 Eng. Rep. 858, 859 (K.B. 1790), Eyre stated that "the right of stopping in transitu was out of the question; that never occurring but as between vendor and vendee." Significantly, whatever relaxation of this rule there was, applied to factors only. See note 84 supra.

152. Lord Kenyon's dictum in Wright v. Lawes, 4 Esp. 82, 85, 170 Eng. Rep. 649, 650 (N.P. 1801), that "to confer a property on the consignee, a corporal touch was necessary," is a good example of confusion. Perhaps one cause of the trouble is the relatively new problem of applying bankruptcy rules to land contracts. There is an interesting line of cases in which an honorable but insolvent consignee attempted to call off purchases made on the eve of bankruptcy. Compare Salte v. Field, 5 T.R. 211, 101 Eng. Rep. 119 (K.B. 1793), with Smith v. Field, 5 T.R. 402, 191 Eng. Rep. 225 (K.B. 1793). Under a later analysis, the question might be whether the transit was ended. In these cases, we find the archaic question of whether the contract was "completed" or "perfected." See, e.g., Barnes v. Freeland, 6 T.R. 80, 87, 101 Eng. Rep. 447, 450 (K.B. 1794) (Grose, J.).

Here too it might have been asked whether the consignee's action was a "preference." But in a sense, every exercise of the right of stoppage is a "preference." But in a sense, every exercise of the right of stoppage is a "preference."

153. Asirron, op. cit supra note 144, at 63.

154. For an example from the Portuguese trade of the middle eighteenth century, see SUTHERLAND, A LONDON MERCHANT 1682-1774, 24-25 (1933).
extended; every shop in London, for example, was a "market overt." But the doctrine had passed its prime many years before. By the late sixteenth century, the common law lawyers seemed ready to strangle this merchant's concept with learning. In the eighteenth century, there was a further tendency to shrink the scope of market overt. One device used was a statute which provided that an original owner could reclaim his goods, if he prosecuted or gave evidence against the person responsible for his loss and secured a conviction. This was primarily a law-enforcement device, and the original statute was silent as to its application to market overt. Judicially, however, this ancient doctrine was extended to market overt. Nevertheless, though committees were formed in the eighteenth century by manufacturing interests to encourage prosecutions under the statute, owners' rights were still basically dependent on the vicissitudes of the criminal law. Furthermore, an action of trover lay only against the party actually in possession after the conviction. The possessor could escape liability by conveying away the goods at any time before the action was brought. And the act was held to apply only to felonious taking of the goods and not to fraudulent misapplication. In general, the problem of disappearing goods, in a complex society, was too vast to be solved by such half-measures. A social problem of this kind cannot be solved by the formulation of legal rules, but the law is expected at least to cooperate in the solution.

Theoretically, the growth of internal trade, that is, the spilling-over of sales transactions from the narrow confines of ancient fairs and markets, might have stimulated a corresponding rise in the use of market overt. To do so would have given goods the benefit of a kind of negotiability. But this was insupportable. Property, it was felt, had to be better protected. To take one example, prior to the mature factory age, manufacturers, particularly in the textile industries, "put

157. 21 Hen. VIII c. 11 (1529).
158. See Anonymous, 12 Mod. 521, 88 Eng. Rep. 1492 (K.B. 1701); Pease, The Change of the Property in Goods by Sale in Market Overt, 8 Colum. L. Rev. 375, 381 (1908). Probably the intent of the statute was nothing more than to extend an already existing legal doctrine to the case of an owner who merely gives evidence against the thief. Statutes from the sixteenth century did, however, narrow the protection of market overt rules as they applied to stolen horses; 1555, 2 & 3 Phil. & M., c. 7; 1589, 31 Eliz. 1, c. 12; and this fossil is still preserved in England in the Sale of Goods Act, 1883, 56 & 57 Vict., c. 71, § 22(2). See also Jones, The Position and Rights of a Bona Fide Purchaser for Value of Goods Improperly Obtained 33-49 (1921).
161. This was apparently the main thrust of Parker v. Patrick, 5 T.R. 175, 101 Eng. Rep. 99 (K.B. 1793). Otherwise, the case would be difficult to fit into eighteenth century patterns.
out" materials to many individual workers, scattered throughout the
country-side, or in the villages. The goods were often of high market
value, and the owners retained very little physical control over them.
Embezzlement was, in this context, an enormous problem. The goods
had a way of shrinking, disappearing, or finding their way into the
hands of a pawnbroker.\textsuperscript{162} This is a special case, but the general case
is equally cogent. As the movement of goods from raw materials to
market became more complex, goods passed through more and more
hands; the possibilities of light fingers or unethical hands at various
stations on the way increased beyond the power of the owner to con-
trol.\textsuperscript{163} The statement of Chancellor Kent, although made in reference
to the United States, was also applicable to the situation in England,
and indicates clearly the judges' point of view:

\begin{quote}
[W]hen notions of property were slight, a \textit{bona fide} purchase of stolen
goods, gave a good title against the original owner; but \ldots  in the pro-
gress of society, property acquired such stability and energy, as to affect
the subject wherever found, and to exclude even an honest purchaser,
when the title of his vendor was discovered to be defective. It was also
a principle in the English common law, that a sale out of \textit{market-overt}
did not change the property against the rightful owner, and the custom
of the city of London, which forms an exception to the general rule,
has always \ldots  restricted by the courts with unusual jealousy
and vigilance.\textsuperscript{164}
\end{quote}

Kent's language suggests a definite awareness of how the concept of
property had shifted during the eighteenth century. It had gained,
as Kent put it, "stability" and "energy." The eighteenth century, of
course, was an age in which the doctrine that "property" must be pro-

\textsuperscript{162} Ashton, \textit{op. cit. supra} note 128, at 208–10. And see the very interesting tract,
\textit{An Apology for the Business of Pawn-Broking, By a Pawn-Broker}, in \textit{A SELECT COL-
LECTION OF SCARCE AND VALUABLE ECONOMICAL TRACTS} 105 (McCulloch 1859),
especially where the author answers the objection that pawn-broking is "found to give
encouragement to various mechanics, to pawn other peoples' goods; such as tailors,
manhua-makers \ldots  and journeymen workmen their master's goods, which they have
to manufacture." \textit{Id.} at 146. This the author admits to be a weighty objection, but
counts that the owner has a remedy to recover his goods, unlike "market-overt."

\textsuperscript{163} But see Parker v. Patrick, 5 T.R. 175, 101 Eng. Rep. 99 (K.B. 1793). The anonymous
author suggests as one remedy that workers be paid more promptly. This would have
been difficult, however, in the eighteenth century, when ready money was scarce. Some
relief was accorded to the pawn-brokers by statute. See, e.g., 24 Geo. 3 c. 42 (1784);
30 Geo. 2, c. 24 (1757), which forbade the pawning of goods without the permission
of the owner and punished the knowing receipt of goods intrusted "to wash, scour,
iron, mend or make up."

\textsuperscript{164} The many regulatory acts of the eighteenth century, such as the Act of 29
Geo. 3 c. 26 (1789) licensing hawkers and peddlers, suggest how deeply Parliament
worried about the problem — and also how ineffective the statutes it passed must have
been. The system of customs and the close regulation of imports and exports militated
against any extension of market-overt ideas — the "no-questions-asked" mentality. This
was during the same century that Parliament forbade by statute the offering of rewards
for lost goods, no-questions-asked. 25 Geo. 2 c. 36 (1752).

\textsuperscript{164} Wheelwright v. Depeyster, 1 Johns. R. 471, 480 (N.Y. 1806). This was echoed
tected at all costs became dominant. And this philosophic notion must have been influential, in certain subtle ways in the law courts too. The same force is revealed in the rise of copyrights and patents, the growth of a doctrine of "insurable interest" in insurance law, and no doubt in many other portions of the decisional and statutory law as well.

But while the common law and Parliament struggled to give property rights "stability" and "energy" as against light fingers and giddy heads, the foreign trade demanded with equal force the protection of the interests of the merchant-factor. A compromise was in order. On the one hand, a pure bailee, with no authority to sell goods, was allowed to pass no "title," except insofar as the dying law of market overt remained in effect. On the other hand, the factor retained the benefit of the merchant rules of foreign trade. Thus the factor had a lien for his general balance on all goods in his possession; a dyer of cloth, for example, did not. If a factor sold goods as his own, his merchant buyer could set off debts owed by the factor, against any demand later made by the principal. And "factor" meant merchant, by and large. A judicious use of "estoppel" and "apparent authority" allowed these two somewhat inconsistent lines of precedent to be treated as one. The full systematization, within a "title" framework, came to flower of course only in the nineteenth century.

Different treatment was demanded by the problem of risk of loss.


165. See generally Larkin, Property in the Eighteenth Century, with Special Reference to England and Locke (1930). Of course, to equate such philosophic notions of "absolute property rights" with the kind of "property" rights discussed in this Article, in one sense, is to make a bad pun. But more deeply, there must be a connection between the protection of "property" (in general), and the protection of "property" (in particular), as evidenced by such things as the decline in the doctrine of market overt. This guess is reinforced by the fact that the eighteenth-century "property" rules later hardened into a fairly subtle seller-biased system.

Ironically, both laissez faire theories stressing "property" rights, and the elaborate mercantile regulation of the eighteenth century, tend to be suspicious of any market-overt system of law — but for different reasons. Economic liberals would view market-overt as a device to cheat owners of their "property" rights, and encourage embezzlement; mercantilists would perceive it in a loophole in rules against smuggling and the like.


170. This is not to deny that difficulties were posed by the direction the law had taken. The experimenting with the problem of the factor, evidenced by the early nineteenth-century Factors' Acts, see Miller, Bills of Lading and Factors in Nineteenth Century English Overseas Trade, 24 U. Can. L. Rev. 256, 282 (1897), shows one source of trouble. The problems, however, should not be glibly explained as due solely to the stubbornness of judges. There was a delicate balance to be reached, about which reasonable men differed.
Risk of loss is most acute in distance contracts—whether domestic or foreign. It has little or nothing to do with bankruptcy, fraud, and the like. Nor is it concerned with “fault”; one of two innocent parties is bound to suffer when goods, in the shadowy area between clear ownerships, are accidentally destroyed.

For reasons not entirely clear, risk-of-loss cases are very rare in the eighteenth century. Of course, goods at sea were generally insured, and marine insurance, as is well known, developed at a far more rapid pace than its land analogues. And the question of “insurable interest” was less serious; this concept developed slowly during the century. Still, some great merchants never insured at all, and while common carriers became, in the famous words of Mansfield, “insurers” during the period, not all hazards were “insured” against—acts of God and the public enemy (there were many of these) presented cases of potential loss. In hand-to-hand sales, risk generally followed possession, and little trouble could arise.

Whatever the cause, at the beginning of the eighteenth century, fact-situations with risk-of-loss features tended to be posed as procedural questions. Who, as between consignor and consignee, had the right to invoke the liability of carrier or underwriter? In foreign trade, this is the problem of Evans v. Martell. Notice that in Evans v. Martell it was irrelevant whether or not the goods were insured, or if they were insured, who insured them. The case is concerned solely with the “right face in the courtroom.” The decision turned, as noted, on the primitive meaning of “property.” A consignee (unless a “mere” factor and so labelled on the bill of lading) had enough “property” to use the ship’s owners. Later, Snee v. Prescot hinted that the consignee’s right was exclusive. At least one case showed a more permissive attitude, suggesting that either party might have the action. Strictly speaking, under the old view of “property,” either party should have been entitled to bring suit; but this somewhat hap-

171. The title of Park’s famous treatise is significant: A System of the Law of Marine Insurances, with Three Chapters on Bottomry; on Insurances on Lives; and on Insurances Against Fire (London & Philadelphia ed. 1789). Park cited only two cases involving fire insurance. Id. at 502.

172. See Vance, Early History of Insurance Law, 8 Colum. L. Rev. 1, 16 (1908).

173. See Sutherland, op. cit. supra note 154, at 43.


177. See text following note 44 supra.

178. See Lord Hardwicke’s statement quoted in note 140 supra.

hazard view could not long be sustained; considering the shift in the meaning of "property," strictness was inevitable. The right to sue must eventually belong to the one who has "property." By the end of the century, this could be only one person at a time; and that person had to be the consignee. Lord Kenyon, for one, could not allow the argument that "the right of property on which this action is founded is to fluctuate, according to the choice of the consignor or consignee; and that consequently either of them may, at his pleasure, maintain an action against the carrier. . . ." This new stiffness, though still basically procedural, also had consequences for the substantive law. If the sole right to sue was in the consignee, then in all fairness the consignee should bear the loss if the suit failed or was barred for some reason. There is, of course, a slight non sequitur here. Still, the groundwork was laid for the nineteenth-century risk-of-loss system, which turned the consignee's procedural advantage into a substantive disadvantage for buyers.

Overlapping the line of cases just discussed are the cases which expound the rule that "delivery to the carrier is delivery to the buyer." This gnomic phrase still has legal relevance today. It is used to prove that a consignee has "property" during transit, and that therefore he should bear the risk of loss at that time. This rule has its roots in the eighteenth century or earlier. The rule was perhaps first used to fix the point of "delivery" where "delivery" was a legally relevant consideration. One obvious example was the action for goods sold and delivered. At first, "delivery" coincided with shipment more or less in accord with realities. The courts asked such questions as: for whose account were goods ordered, or, was the consignee a principal

180. Dawes v. Peck, 8 T.R. 330, 332, 101 Eng. Rep. 1417, 1418 (K.B. 1799) prior proceedings, 3 Esp. 12, 170 Eng. Rep. 521 (N.P. 1759). This was a purely domestic land transaction. Goods were sent by "Peck's waggon" from Warwickshire. Lord Kenyon felt that the consignor had no right to bring the action; "the consignor, by the delivery [to the carrier] . . . had fixed the consignee with the goods; and that no property resided in him; that that disabled him from bringing the action for the loss of the goods . . . that loss must fall on . . . the consignee, who might certainly maintain an action. . . ." Id. at 14, 170 Eng. Rep. at 522.

181. In Godfrey v. Furzo, 3 P. Wins. 185, 186, 24 Eng. Rep. 1022 (Ch. 1733), counsel stated that on delivery of the goods to the master of the ship beyond sea . . . the property immediately became vested in the merchant in London, who was to run the risk of the voyage . . . [like] the case of a tradesman in London [transporting goods to a country tradesman] . . . in which case, though the country trader does not appoint or name the carrier, who afterwards embezzles the goods, the trader in the country must stand to the loss. . . . Nothing in the opinion of Lord Chancellor King refutes this argument.

The statement in Godfrey v. Furzo resembles that in the Uniform Sales Act; however, whereas in the nineteenth century risk followed "property," it would be more accurate to say that in the eighteenth century property tended to follow risk. See note 38 supra.

182. See text accompanying note 23 supra.
or a factor? Unfortunately, these were not easy questions to answer in terms of eighteenth-century business. Later the question whether "delivery" legally occurred at shipping point or destination may have depended on who paid the freight. Carried to its logical extreme, this would mean the holder of the bill of lading, in ocean trade, took "delivery," since a bill of lading, normally worded, bound the master to deliver to A or order, either A or order paying freight. This was logically untenable, and suggests a land-locked origin for the rule. As it developed, the rule tended to become nothing more than an alternate way of phrasing the case-decisions on right of action for loss of goods. It was certainly not meant to apply to the right of stoppage in transit, although literally understood, it would, since "delivery" puts an end to the right. "Delivery" to the carrier was delivery to the buyer only for other purposes. The phrase thus aims toward a risk of loss rule, which is its present status; as such, it is pro-seller in its bias. Again, it remained for the nineteenth century to decide that "title" passed on delivery of goods to the carrier.

The eighteenth century, of course, knew no such clear-cut use for the rule. As far as the domestic market was concerned, the rule was still concerned with fairly objective factors. In Vale v. Bayle, the vendee ordered goods, specifically directing that they not be sent by way of Bristol (the sea route), but by "land carriage." As it happened, only one land-carrier was available for the route. The goods were lost, and the vendor brought an action for goods sold and delivered. The risk, Lord Mansfield felt, was properly on the buyer. It was much as "if the defendant had mentioned the Birmingham carrier particularly by name; for there being but one carrier, the plaintiff had no choice . . . ." He then added: "If a vendor take upon himself actually to deliver the goods to the vendee, he stands to all risques; but if the vendee order a particular mode of conveyance, the vendor is excused." Clearly, we have no modern "risk of loss" case here; fur-

184. See Davis v. James, 5 Burr. 2650, 98 Eng. Rep. 407 (K.B. 1770), an action brought by a consignor against a common carrier where Lord Mansfield said: "The vesting of the property may differ according to the circumstances of cases: but it does not enter into the present question. This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him. Therefore the action is properly brought . . . ." Id. at 2650–81, 98 Eng. Rep. at 408. See Moore v. Wilson, 1 T.R. 659, 99 Eng. Rep. 1806 (K.B. 1787).
186. Fragano v. Long, 4 B. & C. 219, 107 Eng. Rep. 1040 (K.B. 1825), is the "leading" case, although somewhat transitional in tone. Fragano was not a pure risk-of-loss case but an action against a shipowner who disputed plaintiff's right to bring the suit.
188. Id. at 296, 98 Eng. Rep. at 1095; Buller, Nisi Parus 36 (6th ed. 1793). See Assignees of Burghall v. Howard, 1 Bl. H. 365n., 126 Eng. Rep. 215 (1759), where it was assumed, in an overseas case, that if no particular ship is named, the shipper bears
thermore, the qualifications spelled out by Mansfield are far from the developed nineteenth-century system, where the vendee usually bore the risk. But it is also clear how little manipulation would be later required to turn *Vale v. Bayle* into a true risk of loss case. All that was needed was to make the case turn on “title,” to presume the passage of title at the point of delivery to the carrier (since that was a “delivery to the buyer”) and to eliminate the “Mansfieldian” qualifications.\(^8\) Even the later exception to the rule, that is, that a deviation in the prescribed mode of shipment shifts the risk back to the vendor,\(^9\) is foreshadowed in the eighteenth century—indeed, as early as *Snee v. Prescott*.\(^{10}\)

Still other eighteenth century decisions are of interest in showing the pedigree of nineteenth century rules of “title.” Thus *Payne v. Cave*\(^{102}\) is the source of the modern doctrine that title passes to auctioned goods when the goods are “knocked down” to the buyer.\(^9\) But in *Payne v. Cave* the issue was not framed in terms of considerations of “title.” The question was approached from the standpoint of mutuality of assent in contract. Such assent, said the court, was “signified on the part of the seller by knocking down the hammer . . . .”\(^{104}\) Similarly, the seller’s right to have an action for the price depended, in the nineteenth century, on whether “title” had passed. But the risk. This and *Vale v. Bayle* clashed somewhat with the argument of counsel in *Godfrey v. Furzo*, note 181 supra, and it seems likely that here too there has been a fusion of two lines of cases, though the evidence is fragmentary. Delivery to a common carrier was delivery of risk to the buyer first and foremost in land cases, only secondarily in overseas cases. In this respect too, merchant custom lost out to the common law.

In *Vale v. Bayle*, Buller argued (as counsel for defendant) that there was no “delivery.” The plaintiff might have countermanded the goods (that is, stopped in transit) and consequently the goods were not the defendant’s “property.” Mansfield, anticipating Buller’s own opinion subsequently in *Lickbarrow v. Mason*, replied that the “vendor before actual possession by the vendee has a lien . . . . But that has no relation to a transaction, as this is, between vendor and vendee.”

189. In result, if not in language, the modern rule appears as early as *Goom v. Jackson*, 5 Esp. 112, 170 Eng. Rep. 756 (N.P. 1803).
191. “It has been objected, that . . . it was [the consignee’s] . . . risque only. But suppose any damage had happened to these goods during the voyage, and in transit there had been an alteration of the consignment, the loss clearly must have been borne by the consignor.” *Snee v. Prescott*, 1 Atk. 245, 249–50, 26 Eng. Rep. 157, 160 (Ch. 1743) (Lord Hardwicke).
193. U.S.A. § 21(2) speaks of the sale as “complete” when the hammer falls. The cases, however, speak of the passage of “title.” E.g., *Stanhope State Bank v. Peterson*, 205 Iowa 578, 218 N.W. 263 (1928).
same results were often reached even earlier than the eighteenth century by using other rationales. In *Knight v. Hopper,*\(^{195}\) decided in 1697, one hundred pieces of muslin were sold, at forty shillings per piece. The pieces were to be taken away ten at a time, and paid for as they were carried off. Holt remarked that:

> The pieces being marked and sealed, the property is altered immediately, and . . . they remained only as a security for the money. . . . [I]f they are not taken away upon request in a reasonable time, the party may have an action for his money, but may not sell the goods.\(^{196}\)

The term “property,” of course, is used in its archaic sense. But all that we need do is substitute “title” for “property” and the seller’s lien for “security for the money,” and ignore the phrase about “request,” and we have the modern law.\(^{197}\) These differences are substantial and conceal a great deal of later development, but it is clear on what basis the nineteenth-century system was erected. *Knight v. Hopper,* of course, is concerned only with the question of when the contract is “complete” and the property “altered” for the sake of bringing a specific kind of action. The insistence on a “request” means that we are still in the domain of contract, and not yet in that of “sale.” One hundred years later, Lord Kenyon refused a seller’s claim for goods “sold”; the buyer had never claimed his purchase and the seller found another buyer. In Lord Kenyon’s view the plaintiff-seller had “abandoned his right to insist on the defendant[‘s] taking the goods, he had not considered them as the property of the defendant, or the contract as complete . . . .”\(^{198}\) Here the “sale” concept of property and the contractual approach were mentioned in the same breath, as it were. The latter, in Kenyon’s case, still prevailed. But this was almost the end of the line; Lord Kenyon still looked for a “request” and emphasized procedural etiquette, but the signs of the new field of law—half common law, half law merchant—were clearly visible. The “property” concept had tightened in meaning while expanding in coverage.\(^{199}\) Another example of this movement, already alluded to, was the shift in construction of the Statute of Frauds. In *Towers v. Osborne,*\(^{200}\) decided early in the eighteenth century, the seventeenth section of the statute was held not to apply to anything but “contracts for the actual sale of goods, where the buyer is immediately

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196. Ibid.
197. But a seller in possession may now, in a proper case, sell the goods to realize on his lien. U.S.A. § 60; D’Aprile v. Turner-Looker Co., 239 N.Y. 427, 147 N.E. 15 (1925).
199. See Chaplin v. Rogers, 1 East 191, 102 Eng. Rep. 75 (K.B. 1800), for example, where the old concept of “delivery” is expanded out of recognition for “ponderous” goods.
answerable, without time given him by special agreement, and the
seller is to deliver the goods immediately."

Consequently, the statute was no defense where the defendant "bespoke a chariot, and when it
was made refused to take it . . . ." This is certainly a narrow view
of the statute. But the court was thinking only of hand-to-hand sales.
If no money changed hands, and no goods changed hands, the sale
might be void as to creditors of the seller. The statute made it void
as to buyers as well. Within its narrow area, the statute insisted on
formality; perhaps it itself was a source of formality. Where delivery
was not possible on the spot, where "property" could not be "altered"
immediately, the statute had no part to play. This explains the case
of the chariot, and the view expressed in Towers v. Osborne persisted
until late in the century. When it was finally repudiated in Ron-
deau v. Wyatt, Lord Loughborough made the interesting remark
that the statute was not merely an anti-perjury act; "another object
was to lay down a clear and positive rule to determine when the con-
tract of sale should be complete." Whether or not Lord Lough-
borough's idea is historically correct, the learned judge, in overturn-
ing the old line of cases, must have implied that a contract could be
"complete" without formality, that is, that there might be such a thing
as a consensual sale. Towers v. Osborne was distinguished half-
heartedly on the grounds that something remained to be done to
the goods. Both of these ideas—the idea of the consensual sale, and
the idea that a sale is not "complete" until the work on the goods is
completed—later became, of course, pillars of the nineteenth-
century system of "titles."

CONCLUSION

We have seen that the eighteenth century, when dealing with com-
mercial cases, arrived at an amalgamation of the two chief strains in
its history—the common law and the law merchant of foreign trade.

201. Ibid.

Alexander v. Comber, 1 Bl. H. 20, 126 Eng. Rep. 13 (C.P. 1788). In ruling that
the Statute of Frauds did not apply to auction sales, Lord Mansfield emphasized that
the goods were immediately deliverable, thus distinguishing Towers v. Osborne.
Simon v. Metivier, 1 Bl. W. 599, 96 Eng. Rep. 347 (K.B. 1766) also reported sub

203. 2 Bl. H. 63, 126 Eng. Rep. 430 (C.P. 1792), followed by Cooper v. Elston,


205. "Where there is a contract to sell specific goods and the seller is bound to
do something to the goods, for the purpose of putting them into a deliverable state,
the property does not pass until such things be done." U.S.A. § 19(2); see also Sale
or Goods Act 1893, 56 & 57 Vict., c. 71, § 18(2). The important early cases include
Rugg v. Minett, 11 East 310, 103 Eng. Rep. 985 (K.B. 1809); Hinde v. Whitehouse,
7 East 558, 103 Eng. Rep. 216 (K.B. 1806); Hanson v. Meyer, 6 East 614, 102
We have also noted the shift in the meaning of “property,” from a procedural-formal stage, to something in the nature of an absolute right. At the end of the century, however, the fusion of the two historical strains was still not quite complete, and the fabric of rules appeared disorderly and haphazard.

This situation was not of long duration. The dawn of the nineteenth century brought a rapid series of “leading cases,” and the unitary system of sales law based on the concept of “title” was hammered out. All earlier rules were recast (in so far as they were to be retained) in terms of the passage of title. In Tarling v. Baxter,206 the consensual sale came into its own; risk of loss passed, along with “title,” to a hapless buyer of a haystack which had not been moved from its spot, and which had not been paid for. This case, while not the earliest of the “leading” cases of the nineteenth century,207 is perhaps the most cogent, and the most typical. Within the new system, every advantage was to be given to the seller. “Title,” for risk purposes, was to pass as early as possible. The financial needs of the seller were to be served, however, by a variety of devices, of which the seller’s lien and the right of stoppage in transit were among the most important.208

The contrast between the two centuries is worth stressing once again. The eighteenth century was much concerned with fair play, with regulating the commercial law according to the reasonable psychological expectations of merchants, as far as foreign trade was concerned. The old formal system was preserved for domestic trade, to avoid the horrors of fraud. The new century had different aims. To all appearances, its law was uniform. “Title” was located in such a way as to favor the seller, of course, but masked by the veneer of reason and the “intention of the parties.” That neither logic nor the intention of the parties was basic to the new system is proved beyond a doubt by the number of ancient rules retained because their results were acceptable under the new standards, and which were simply recast in new terms. Within the new system, the old mercantile principles remained but were definitely circumscribed. Market overt lived on, a meaningless fossil; semi-negotiable documents of title were allowed to occupy their own special niche, either conforming to the general rules of “title,” or being granted the dispensation of “excep-

207. See cases cited note 205 supra.
No doubt, this system was felt to be more suitable to a society which valued the producer of goods more highly than the consumer, handler, or financier of goods.

In the United States—where English law was closely observed, copied, and adapted—these tendencies were, if anything, accentuated. In the early history of the new republic, foreign trade played a dominant role; the United States faced the sea and depended on ocean commerce. But as the frontier extended westward, domestic trade became more and more important. Ocean commerce, although it never completely lost its importance, was subordinated to commerce via roads, canals, and most significantly, railroads. The bill of lading, in a superb example of legal adaptability, became a railroad document. The shape of the country shaped in turn the behavior of the law of sales.

This law was a seller's law. Market overt, although it may have existed in the colonies, was brusquely snuffed out in the new republic. It took hard cash or some definite act to strip an owner of his financial rights. This was all to the benefit of the manufacturing interests; later, by convenient coincidence, the same doctrines proved useful for farmer-sellers. New concepts—for example, the conditional sale—were evolved to help provide security for sellers. Within its tight logical skeleton, the law achieved, however, a great deal of factual subtlety. By and large, the judges were men of intelligence, and they were willing to mold the given law to suit the needs, as they saw them, of the national economy. The details are beyond the scope of this Article. This was, however, the classical period; it was brilliant—but brief. It is already over. Even the Sale of Goods Act, in England, and its American step-child, the Uniform Sales Act, are already, in a sense, post-classical. As the industrial society became more complex, and as social and political streams changed direction, the law of sales found itself overburdened. The law of warranties, developed with an eye to canny traders dealing on a par with each other, sagged under the weight of an army of naive consumers, who had the vote. The seller's security interests, originally subtle and flexible, by the end of the nineteenth century could be criticized with some justice as primitive. Weapons designed for the use of merchant-financiers were poorly adapted to the needs of the installment seller of automobiles, pianos, and washing-machines. Courts and legislatures made clever adjustments; these were sufficient for a while, but then no

210. Ventress v. Smith, 85 U.S. (10 Pet.) 161 (1876); Wheelwright v. Depeyster, 1 Johns. 471 (N.Y. 1806); Lecky v. McDermott, 8 Serg. & R. 500 (Pa. 1822); Hosack v. Weaver, 1 Yeates 478 (Pa. 1795). But it is entirely possible, if not probable, that such an institution was thought to exist during the colonial period.
longer. At the other end of the spectrum, the old factor's law no longer served well the needs of the larger banks. Here, too, change was inevitable. Psychologically, also, the climate of business underwent a shift in the twentieth century. Conscience re-entered the picture, a desire for fairness and the balancing of interests; the buyer was now a voter, and *caveat emptor* as obsolete as "let them eat cake." The businessman might be annoyed with the law—the consumer, perhaps, enraged with it. In the purely commercial world, the line between buyer and seller blurred in the new highly complicated industrial society. Large corporations bought and sold in vast, but roughly equal, quantities and had equal claims on the law. The sum of these dissatisfactions (after a period of patchwork legislation) finally culminated in the movement for the Uniform Commercial Code. The Code is one of the most interesting legal phenomena of our day. It is curiously atavistic in its resurrection of market-overt concepts, its rough-hewn equity, its emphasis on the custom of businessmen and the rules of the game. The wheel has turned full circle. The litigating group of merchants of the eighteenth century, a one-class group and hence effectively classless, gave way first to the sharp class-stratified law of the nineteenth century; and this in turn has, or will, give way to the world of the Uniform Commercial Code—classless in the main, solicitous of each class in detail.

Thus seen, the history of Anglo-American commercial law, in its sales branch, is neither the haphazard nor purely logical nor purely conservative thing it is variously described as. On the contrary, at each stage, the law is seen meeting face to face the problems of business usage and policy posed by the times. Observed from a broader view, the history of the law of sales can be divided into three periods, which correspond very roughly to the three centuries of its effective life. Each period shows separate tendencies, follows separate rules; but each responds to the commercial and social context into which it is set; each prepares the way for the next. In this Article, we have attempted to show some of the significance of the first—and most obscure—of the three periods. That done, the significance of the later two becomes to that extent, it is hoped, more clear.