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REGISTERED BONDS AND NEGOTIABILITY

THE registered bond has received very little attention from either lawyer or legislator.¹ It has so long been a gilt-edged member of the financial community — though a bit old-fashioned in its “non-negotiability”, and living in somewhat straitened circumstances today — that it has quite generally been taken for granted as a known quantity, something not subject to change. Many members of the unregistered bond family, on the other hand, have, in a series of decisions and with the aid of some legislation, been accorded full negotiability.² So, too, share certificates, though issued in the name of a specified holder, as are registered bonds, and though also not containing the words “order” or “bearer”, have been given many attributes of negotiability, if one may conceive of negotiability as something having a definite number of characteristics.³ But the registered bond, somehow, has been passed by.

¹ The Securities Act of 1933 deals with both registered and unregistered bonds, in common with other types of corporate securities, but excludes government securities. Registration, as provided for under that Act, was designed to give some measure of control over the *issuance* of securities. As treated herein, registration relates to the machinery set up by the issuing company, ordinarily without the aid of legislation, to govern the *transfer* of its securities.

² See Steffen and Russell, *The Negotiability of Corporate Bonds* (1932) 41 YALE L. J. 799.

³ See in this connection the Uniform Stock Transfer Act, drafted by Professor Williston and now in force in some 23 or more states. A leading case under the act is *Turnbull v. Longacre Bank*, 249 N. Y. 159, 163 N. E. 135 (1928), in which a *bona fide* pledgee from a thief was protected as against the former holder. See (1929) 38 YALE L. J. 390; Note (1928) 27 MICH. L. REV. 93.

To the man in the street, this "non-negotiability" of the registered bond is one of its attractive features. And, in a day when defalcation and robbery are much too frequent, anything which serves to safeguard an investor's rights, as non-negotiability is thought to do, is by no means a minor consideration. Yet, although most modern bond issues provide for registration, it is unusual for more than a small part of any issue to be registered.⁴ Just why this is true is not clear, but no doubt it is partly because of the immediate fractional price discount occurring upon registration.⁵ In England, on the other hand, the general practice is to register bonds and debentures, a practice which may in part be accounted for by the larger tax upon bearer issues.⁶ Or, again, it may be due to a difference of habit and temperament, or the existence there of a larger long term investment market. Whether the difference has greater significance is a matter for consideration.

What the man in the street understands by the term "non-negotiable" as applied to bonds, or at times, for that matter, what the courts mean, is not clear. Certain it is, however, that blank assigned registered bonds are bought and sold freely in the financial markets, the instrument, where blank assigned, passing from hand to hand. In this respect registered bonds are treated much as are share certificates, though whether justifiably so, in view of the difference in legal situation, is questionable. Further, also as in the case of share certificates, it is not usual upon each sale or pledge to have the transfer registered on the books of the issuing company or of its transfer agent. Of course, if the purchaser's rights in and to the security are as well assured without transfer as with it, there is little point in going to the additional bother and expense of procuring a book transfer except just before interest

⁴ See MEEKER, *THE WORK OF THE STOCK EXCHANGE* (2d ed. 1930) 25.

⁵ See *id.* at 257. The reason for this is hard to find, though at least two factors involved are, first, the fees to be paid upon transfer or discharge from registration and second, the delay in procuring transfer or discharge from registration. The latter is important, since pending transfer the security is not readily saleable. It is suggested *infra*, p. 760, that a further factor, perhaps not fully taken into account, is the increased hazard involved in dealings with registered paper, due to the uncertainty concerning its status.

⁶ See HEAD, *THE TRANSFER OF STOCKS, SHARES AND OTHER MARKETABLE SECURITIES* (1930) 34: "Bearer debentures are less common than registered, as the stamp duty on the former is 20s. per cent.; on registered debentures the amount is 2s. 6d. per cent."

payments are due. This again, however, is a point to be considered more fully.

It would be plausible, though somewhat premature, to conclude at this point that the registered bond, though not negotiable in the hands of the registered holder, becomes negotiable when indorsed or assigned. That it becomes transferable is clear, but transferability is only one characteristic of a negotiable instrument. Indeed, with the adoption of the real party in interest statutes, it has become a characteristic common to most choses in action, whether negotiable or not.⁷ In fact, though transferability was early an attribute of the negotiable instrument, it does not appear to have been a feature of the first bills of exchange.⁸ And, of course, under the Uniform Negotiable Instruments Law today it is quite clear that a money instrument to be negotiable must satisfy certain fairly arbitrary points of form⁹ — transferability following merely as one of several incidents.

In most respects the terms of a registered bond are identical with those of an unregistered one, so that the problem has to do primarily with the registration provision and its effect. There are several types.¹⁰ In the fully registered bond, issued without interest coupons, principal apparently may be and interest generally is paid to the registered holder by check. Then there is the coupon or bearer bond issued with registration privilege, which may be converted into a registered bond upon presentation, the unmatured coupons being clipped and the name of the registered holder being noted both in the space provided on the back of the bond and on the maker's books. This is perhaps the most common form.

⁷ These statutes served to remove the procedural complications by which the assignee had been forced to sue at law in the name of his assignor. See CLARK, CODE PLEADING (1928) 100 *et seq.* The substantive rights of the assignee had achieved substantial recognition at law, however, at least by the end of the eighteenth century. See Cook, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816; (1917) 30 HARV. L. REV. 449; Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?* (1916) 30 HARV. L. REV. 97, 99. The JUDICATURE ACT, 36 & 37 VICT. c. 66, § 25(6) (1873), completed the transition in England.

⁸ See 2 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) 359 *et seq.*, citing Marbury for the point that "or order" first appeared about 1650.

⁹ NEGOTIABLE INSTRUMENTS LAW §§ 1-10.

¹⁰ See discussion by Vice-Chancellor Pitney in *Benwell and Everitt v. Mayor & City of Newark*, 55 N. J. Eq. 260, 36 Atl. 668 (1897).

After registration it may be transferred on the books of the company as a fully registered bond, though it may generally be again exchanged for a coupon bond upon indorsement and surrender. Lastly, and also quite common, there is the registerable coupon bond, the principal of which in case of registration is made payable to the person registered as owner, the interest, however, continuing to be payable only to the bearer of the coupons, which are not clipped when the registration is perfected.

The technical difficulty is that, whether registered as to principal or as to both principal and interest, the obligation of the issuing company runs only to the registered holder, without addition of "or order" or words to similar effect. The wording in the convertible form of bond appears in the first paragraph, wherein the maker promises to pay the specified sum "to bearer, or if this bond be registered, then to the registered holder hereof". Under the Negotiable Instruments Law the omission is fatal to negotiability, though, of course, before registration the bond may be as fully negotiable as one payable to bearer.¹¹ Moreover, it can be reasoned that since the use of words of negotiability has been well known for many generations it should be expected that the phrase "registered holder or order" would be used if full negotiability were actually intended. But the argument is not as conclusive as it sounds, for it ignores the problem of drafting the provision to provide for negotiability and yet to allow the issuing company to recognize only the registered holder in making payments of principal or interest. Registered holder "or order" might be ambiguous. Yet surely an obstacle of this sort could not long have stood in the way, if there was a real need for order paper.

Still, it would be unsafe to conclude, even at this point, that the registered bond is wholly non-negotiable. Indeed, in the opinion of at least one writer the contrary is true, with the qualification that negotiation takes place at the time of transfer upon the issuing

¹¹ It is well settled that the presence, in bonds otherwise negotiable, of the option to register the bonds does not make them non-negotiable. *Dickerman v. Northern Trust Co.*, 176 U. S. 181 (1900); *Savannah & Memphis R. R. v. Lancaster*, 62 Ala. 555 (1878); *Siebenhauer v. Bank of California*, 211 Cal. 239, 294 Pac. 1062 (1930); *Paepcke v. Paine*, 253 Mich. 636, 235 N. W. 871 (1931); *American Nat. Bank v. American Wood Paper Co.*, 19 R. I. 149, 32 Atl. 305 (1895); *Bank of California v. National City Co.*, 141 Wash. 243, 251 Pac. 561 (1926).

company's books.¹² This is obviously quite a different thing from the general negotiation of order paper by indorsement and delivery in the market place. The one case cited for the proposition, though stronger authority might be found, held merely that a transferee who had procured registration could recover interest in a suit brought in his own name.¹³ Apart from the technical question of whether plaintiff had brought his suit properly there seemed to be no substantial defense, and, as the court said in granting recovery, any other result would be a "fraud on purchasers". This case does not take us very far.

One who seeks to go farther, however, and have the courts grant registered bonds full negotiability apart from statute, has a hard cause. Of course, they could be considered *sui generis*, but this has become difficult since the decision of the New York Court of Appeals in *Manhattan Co. v. Morgan*,¹⁴ in which it was ruled that an interim certificate, calling for delivery of bonds when, as, and if issued and delivered to Morgan & Co., could not be negotiable because it did not meet the requirements of form stated in the Negotiable Instruments Law. And, obviously, bonds and debentures, being payable in money, are much more clearly within the

¹² See 2 MACHEN, MODERN LAW OF CORPORATIONS (1908) § 1743: "A registered bond or debenture is no less negotiable than a bearer bond. The difference is rather in the method of the negotiability. As a bill or note payable to order is negotiable, so is a registered bond or debenture. A transfer by registration is equivalent to a transfer by endorsement of a bill or note. After registration, the company is effectually precluded from raising any equitable defences which would have been available against the transferor." See further, DANIEL, NEGOTIABLE INSTRUMENTS (6th ed. 1914) § 1501b: "It would seem from the few decisions that exist on the subject, that registered bonds are not negotiable; and that they are in fact registered so as to make them transferable in such manner as to exclude equities between the original parties only by registry upon the books of the corporation issuing them."

¹³ *Strauss v. United Telegram Co.*, 164 Mass. 130, 41 N. E. 57 (1895). Massachusetts had had a general statute since 1852 purporting to put bonds under seal on the same footing with promissory notes, but it did not in terms apply to registered bonds.

¹⁴ 242 N. Y. 38, 150 N. E. 594 (1926). The case is discussed in (1926) 35 YALE L. J. 877, 878, and the Hofstadter Act, subsequently adopted in New York to avoid the results of the case, is analyzed in Note (1930) 40 YALE L. J. 261. This act, as originally adopted, applied only to interim certificates and equipment trust certificates, making them in some measure negotiable, but was later amended to include certain bearer bonds. Registered bonds, however, were not included within the statute.

purview of that act than interim certificates. Moreover, even if the act should be amended, as has been proposed,¹⁵ to make it apply only to instruments of the sort particularly described in the act, that is notes, checks, and bills of exchange, it is not at all clear that the result would be any more favorable to the negotiability of registered bonds. Too many courts have given at least lip service to the dictum that the registered bond is not negotiable, the current of doctrine has become too definitely set, to afford much hope of its recognition as a new instrument at this time — particularly since in all but the registration privilege it is now controlled by the act.¹⁶

THE ENGLISH CASES

A study of the reasons for resorting to registration in the beginning, insofar as they are ascertainable, is not particularly favorable to such a cause. Consider, for example, the British government loans, known as consols, which are not payable at the instance of the holder, though they are redeemable as to principal by the government at its option. At one time these were evidenced by "tallies", which appear to have been transferable by delivery. In the latter part of the eighteenth century or early in the nineteenth, however, the practice of issuing tallies was abandoned. Since then and up to the present time the only significant evidence of the government's obligation on these so-called inscribed shares has been the book record kept by the Bank of England as transfer agent.¹⁷ Probably this practice developed to provide maximum security to the investor — and, incidentally, maximum protection to the transfer agent — since a great deal of precaution can be, and

¹⁵ See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1931) 221. See generally, Turner, *Revision of the Negotiable Instruments Law* (1928) 38 YALE L. J. 25.

¹⁶ That bearer bonds are governed by the Negotiable Instruments Law seems now to be generally admitted. BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) 88. See further Aigler, *Recognition of New Types of Negotiable Instruments* (1924) 24 COL. L. REV. 563.

¹⁷ Interest warrants, called "dividend warrants", issued periodically to registered holders, were held negotiable in 1844, though they were not payable to order or bearer. The case turned upon evidence of custom going back fifty years or more to treat them as being negotiable when the holder had signed a receipt upon the back. *Partridge v. Bank of England*, 13 L. J. Q. B. (N.S.) 281 (1844).

is, taken to ascertain the regularity of a transfer. Such a practice compares favorably with real estate law, stability and security of title being deemed more important than ready transferability.

But even this close identity between the inscribed obligation and the theoretical common-law chose in action, each being wholly lacking in tangible form, did not suffice to deprive the subsequent *bona fide* purchaser of all protection. In *Davis v. The Bank of England*¹⁸ book transfer had been made in reliance on a forged power of attorney. The court, by Best, C. J., ruled, on principles avowedly borrowed from note law, that the person whose name had been forged was still entitled to dividends (interest), as though his indorsement had been forged upon a note, but then went on to say:

“But to prevent as far as we can the alarm which an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him?”¹⁹

Though the court thus recognized the business need, even in the case of government obligations, of noticing the investor, the case does not go far toward recognition of registered instruments as negotiable.

While the government was thus adopting a policy of strict registration — no certificate at all being issued — the business man,

¹⁸ 2 Bing. 393 (1824).

¹⁹ *Id.* at 407–08. The court went on to say: “Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice ever to attempt to look further than the bank books for the title of the person who proposes to transfer to you.” *Id.* at 408.

intent upon financing a rapidly expanding industrial effort, felt impelled to issue instruments of various types to appeal to the investor. Share certificates, which a century earlier had been used in all sorts of ventures, many of which had come to grief, were again being issued in large amounts, this time in somewhat more stable business undertakings.²⁰ Debentures, and debenture stock, so-called, were similarly issued to meet the business need for funds. These obviously were to be more readily transferable than the inscribed government obligations. Indeed, in these years great strides were taken to promote the security and freedom of commercial transactions — at the expense of static ownership. Mansfield had but just taken over the law merchant regarding bills and notes into the common law. Buller in 1793, in the great case of *Lickbarrow v. Mason*²¹ had recognized that the bill of lading could serve to unlock the vast values of goods in transport. Ellenborough in 1812, in the leading case of *Pickering v. Busk*²² had given great impetus to the apparent authority doctrine in agency, to the substantial advantage of trade. The court of King's Bench, by Bayley, J., in the case of *Tarling v. Baxter*,²³ decided in 1827, recognized that the buyer's enjoyment of beneficial ownership need no longer await the more leisurely requirement of actual physical delivery of the goods. And so on.²⁴ But in spite of this quickening of pace, and with less reason than obtained in the case of shares, since voting rights were not involved, it was to become the practice to provide for the registration of debentures.

There do not appear to have been many cases during this time involving registered bonds. In one of the most important, that of *Athenaeum Life Ins. Co. v. Pooley*,²⁵ the subsequent *bona fide* purchaser of debentures had taken them to the company's secre-

²⁰ POWELL, *EVOLUTION OF THE MONEY MARKET* (1915) 152, 178. The Bubble Act was repealed in 1825. 6 GEO. IV, c. 91.

²¹ 6 East 20.

²² 15 East 38.

²³ 6 B. & C. 360. Even though the element of beneficial ownership "enjoyed" here was the risk of loss, the general effect was to push transactions forward to an early conclusion.

²⁴ Even Lord Abinger, C. B., was to serve commercial development, though unwittingly and at the expense of the laborer, by his decision in *Priestley v. Fowler*, 3 M. & W. 1 (1837), establishing the fellow-servant rule, thus relieving business for nearly a century of a very substantial risk.

²⁵ 28 L. J. Ch. (N.S.) 119 (1858).

tary and had them stamped "Athenaeum Life Ass. Soc., registered. F. G. Tomlins, Secretary, Dec. 8, 1854." The defense was that the directors had no authority to issue such bonds and that the issue was fraudulent. At law, judgment was given for the purchaser, since the bonds carried a representation that the shareholders had consented to the transaction and this recital had been relied upon in good faith. But enforcement of the law judgment was enjoined in equity,²⁶ the court, by Bruce, L. J., saying of the purchaser that: "Unfortunately, he has bought what the English law calls 'a chose in action,' and it is too clearly settled to admit of question or argument that a person buying a chose in action, which can only be put in suit in the name of the original holder from whom he buys, must abide the case of the person from whom he buys, in whose name it is put in suit at law."²⁷ This was fair warning that, whatever the expectation of the commercial community, the whole long quarrel over the alienability of choses in action had yet to be gone through with in the case of debentures. It seems probable, however, that registration was thought to provide one way around, since the newly registered holder of a valid bond or share could be and as a practical matter was recognized in his own right.²⁸

In neither this case nor in the *Davis* case, though, would any different result have been reached had the instrument been held negotiable, as that term is now used, for both the defense of forged indorsement and of unauthorized issue is today available against

²⁶ It is to be noticed that the equity court took an extremely conservative, not to say reactionary, position on the authority question. The law court, following the case of *British Royal Bank v. Turquand*, 6 E. & B. 327 (1856), had ruled that the purchaser was not bound at his peril to inquire so closely into the internal corporate machinery of authorization. See STEFFEN, *CASES ON THE LAW OF AGENCY* (1933) § 27, for subsequent cases on the point.

²⁷ 28 L. J. Ch. (N.S.) 119, 124 (1858).

²⁸ The evidence to support this statement is not too convincing, since the suit at law upon the debentures in the *Athenaeum* case was brought in the name of the assignor, notwithstanding the registration. However, had the original debentures been surrendered and new ones issued upon transfer, it would seem that the new holder would certainly be privileged to sue in his own name. Indeed, in the earlier case of *Vertue v. The East Anglian Rys.*, 19 L. J. Ex. (N.S.) 235 (1850), it was held that after transfer of bond and mortgage, registered on the books as provided in 8 & 9 VICT. c. 16, §§ 46, 47 (1845), suit could only be brought in the name of the transferee. And, of course, the registered transferee of shares had long been recognized as the owner entitled to be dealt with in his own name.

all parties.²⁹ The cases are important, particularly the *Athenaeum* case, as showing the judicial tendency to apply chose-in-action law, rather than the law merchant, when dealing with bonds. What the exact source of this judicial antipathy to the transferability of rights and next, to their transferability free of defenses, may have been has never been fully explained. In the case of share certificates, which, though transferable, are still not negotiable in any real sense in England, the power to confer transferability was early regarded as a prerogative of the sovereign, to be granted for a consideration.³⁰ Further, there was doubt whether the assignee should be allowed to assume a position of proprietorship without the consent of the other persons interested and, conversely, whether the transferor should be relieved of responsibility.³¹ These were seemingly substantial reasons not applying particularly to bonds. But whatever the basis for the rule generally, there is no gainsaying its amazing tenacity, a tribute to the reluctance, not to say opposition, which the high priests of procedure have always shown in recognizing substantive needs.³²

That this attitude did not meet business needs was evident in many ways. As early as 1811, when a decision had treated as non-negotiable the bonds of the United Company of Merchants trading to the East Indies,³³ an act of Parliament was obtained to cover the case.³⁴ But, apart from this, instruments, though labelled bonds, debentures, debenture bonds, or debenture stock,³⁵ were

²⁹ NEGOTIABLE INSTRUMENTS LAW § 23.

³⁰ POWELL, *op. cit. supra* note 20, at 144.

³¹ *Id.* at 178.

³² But see Arnold, *The Rôle of Substantive Law and Procedure in the Legal Process* (1932) 45 HARV. L. REV. 617.

³³ Glyn v. Baker, 13 East 509 (1811).

³⁴ 51 GEO. III, c. 64 (1811). To similar effect, see *McKenzie v. Montreal & Ottawa Ry.*, 29 U. C. C. P. 333 (1878), construing legislation (35 VICT. c. 12, § 2, O (1872)) as follows: "The bonds or debentures of corporations, made payable to bearer or any person named therein, may be transferred by delivery; and such transfer shall vest the property of such bonds or debentures in the holder thereof, to enable him to maintain an action thereof in his own name". In the court's view, not only could the transferee sue in his own name, but the maker was precluded, because of this legislation, from asserting a defense of failure of consideration available as against the original holder. The latter point was judicial legislation.

³⁵ The term "debenture" is very old and non-technical in meaning, and is today practically synonymous with our word "bond". Debentures are usually issued in series in even denominations, ordinarily by a corporation and under seal,

being drawn to conform rather closely to the form of the promissory note. The winding-up cases in equity took the first important step toward recognition of the relationship. In the case of *In re Blakely Ordnance Co.*³⁶ the debentures were payable to "Blakely and Dent, their executors, administrators, and assigns, or to the bearer hereof" (italics inserted). The court said that though the bearer could not sue at law, still it was evidently the intention of the issuer, apparent from his use of the word bearer, to obligate himself to whatever holder might be in possession of them, and this, necessarily, free of defenses. Wherefore the bank was permitted to prove its claim on the debentures, much as though they were negotiable. The first step, obviating the procedural difficulty in the path of the assignee, was relatively easy, but the second, cutting off the maker's defenses, covered a great deal more ground.

In the following year Lord Cairns, in the case of *In re Natal Investment Co.*,³⁷ had a similar situation before him involving "debentures" which read: "Whereas the Natal Investment Company . . . is indebted to A. Coqui in the sum of £500, now these presents witness, that in consideration of the premises the company hereby declares that the funds, assets, and property of the company shall be subject and liable for the same, and the company hereby undertakes to pay unto the said A. Coqui or to his executors, administrators, or transferees, or to the holder for the time being of this debenture bond, the sum of £500, . . ." (italics inserted). Obviously this instrument showed fully as close a relationship to the common-law deed, at least in its recitals, as to the

though not always, and may be either secured or unsecured. The term "bond" or "debenture bond" caused trouble in the early English cases since it was closely identified with the chose in action (*cf. In re Imperial Land Co. of Marseilles*, L. R. 11 Eq. 478 (1871)) and, indeed, the form, "know all men by these presents", the seal, and in some cases the penal sum in twice the amount of the obligation, showed direct descent, on one line at least, from the common-law deed. The addition of "or bearer", though indicating a crossing with the negotiable instrument, was not always successful in removing this taint. As to what is meant by "stock": "The difference between debentures and debenture stock—apart from the fractional sub-divisibility of the latter—is, that 'a debenture' is the description of an instrument, whereas 'debenture stock' is the description of a debt or sum secured by an instrument." PALMER, COMPANY LAW (13th ed. 1929) 301. Many of the early municipal bonds issued in this country were called "stock", but the term today is used principally in reference to shares.

³⁶ L. R. 3 Ch. App. 154 (1867).

³⁷ L. R. 3 Ch. App. 355 (1868).

merchant's promissory note. It was urged, however, that the provision as to the holder for the time being made the instrument payable to bearer and enforceable in equity by a *bona fide* purchaser. But in Lord Cairns' view, there was nothing "to shew that the *Natal Company* intended to forego or to renounce the ordinary rule, that the assignee of a chose in action must take subject to the equities between the original parties."³⁸

This decision was unpopular. Later in the same year, instruments called debentures made payable "to the order of the said J. C. Hodges, Esq." were held enforceable by the transferee. As said by Wood, L. J., "the authorities go to this, that where there is a distinct promise held out by a company, informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own and say that because the person who makes the order is indebted to them they will not pay."³⁹ And, almost unnoticed, the usual estoppel requirement, that the holder show that he had relied upon the provision in question, was ignored. In a case two years later involving "debenture bonds", so-called, Sir R. Malins, V. C., could say:

"It would be contrary to every principle, and fatal to the existence of such instruments in this and all other companies, if in the hands of every person taking them they were subject to the equities between the company and the original holder; it would be a blow to the mercantile transactions of this country far beyond the value of any protection to be afforded to the members of this company, who, if they were unfortunate, were unfortunate in being betrayed by the persons to whom they committed their interests."⁴⁰

It was only five years after this that the House of Lords, in *Goodwin v. Roberts*,⁴¹ opened wide the category of negotiability to in-

³⁸ *Id.* at 361.

³⁹ *In re General Estates Co., Ex parte City Bank*, L. R. 3 Ch. App. 758, 762 (1868). "The instrument is called on the face of it a debenture, which, so far as it goes, is in favour of its being a deed, and not a promissory note; but when we look at its contents we find that the company thereby undertake to pay to the order of *Hodges*, on the 1st of July, 1867, the sum of £1000, with interest at the rate of £5 per cent. per annum, which, apart from the immaterial substitution of 'undertake' for 'promise,' is the simple and ordinary form of a promissory note." *Ibid.*

⁴⁰ *In re Imperial Land Co. of Marseilles*, L. R. 11 Eq. 478, 490 (1870).

⁴¹ L. R. 10 Ex. 337 (1875). Two years previously it had been held that bearer

clude not only debentures, but script certificates, upon a showing only that they customarily circulated as negotiable instruments.

But the registered instrument was a horse of a somewhat different color; it provided for a special means of transfer upon the books of the company, thus leaving the gate open for a play on legal and equitable title. Moreover, since it was not in terms payable to order or bearer, it could not be said so readily that the "intent" of the maker was in favor of the purchaser. Notwithstanding this, in the case of *In re Hercules Ins. Co.*,⁴² Malin, V. C., decided that a holder, who had procured registration, should not be subject to defenses of the issuing company good as against the original holder. "Upon principle, I am of opinion that what Mr. Brunton did [in giving notice of assignment and requesting registration] is abundantly sufficient to make him the owner of this bond in equity, and to give him the same right against the company as if he held a negotiable security."⁴³ Registration, though designed to protect the investor — and incidentally the issuing company — was thus to be used to cut off defenses. But Malin, V. C., stated the matter rather broadly, though evidently both maker and investor favored cutting off defenses of the issuing company to some extent, for it became usual to employ a condition in the instrument to the effect that principal and interest would be paid "without regard to any equities between the company and the original or any intermediate holder."⁴⁴

The instrument before the court in the *Hercules Ins. Co.* case, payable to "J. S., his executors, administrators and assigns", had not been registered before transfer to the claimant. The transfer,

debentures were not negotiable, the precise issue being whether a *bona fide* purchaser of stolen instruments could enforce payment of them. *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374 (1873).

⁴² L. R. 19 Eq. 302 (1874).

⁴³ *Id.* at 311-12. A similar result had been reached in the earlier case of *Higgs v. Assam Tea Co.*, L. R. 4 Ex. 387 (1869), though there the instruments had been registered and in some cases new certificates had been issued. Perhaps the result could be justified on principles of novation, but it certainly went beyond what had previously been decided as to the assignment of choses in action, for it had been held in *Mangles v. Dixon*, 3 H. L. Cas. 702 (1852), that the debtor might assert defenses, although he had failed to advise the assignee of them upon receiving notice of the assignment.

⁴⁴ This and other clauses used in English debentures are discussed in PALMER, COMPANY LAW (13th ed. 1929) 309.

accordingly, could be governed by ordinary note law and the same result reached. Some twenty-five years later, in the case of *In re Goy & Co., Limited*,⁴⁵ a fully registered debenture held by a director in the issuing company was transferred after the company had commenced voluntary winding-up proceedings. The transferee presented the debenture with evidence of his "title and identity" as required and demanded to have the transfer registered. Before actual registration, however, it was discovered that the registered holder was in default to his company for some £300 and this was claimed as a set-off. It was ruled by Stirling, J., that the offset was not available. "The company has for a valuable consideration renounced any right it would otherwise have had to object to transfers on the ground of equities subsisting between the company and the transferor; and, under circumstances such as exist in the present case, mere delay seems immaterial."⁴⁶

This was quite different from holding the instrument negotiable, though again an identical result was reached. In the subsequent case of *In re Palmer's Decoration & Furnishing Co.*⁴⁷ involving similar facts, the transferee had given notice of his interest in the debentures but had not demanded registration. It appeared that the transferor and registered holder had defrauded the company. This was allowed as a defense, in spite of the *In re Goy & Co.* decision, the court saying:

"The object of the conditions as here expressed is that, if the transferee becomes the registered holder of the debentures, the company is precluded as from the date of registration from setting up as against the transferee any rights it may have possessed as against the original holder; but that does not mean that the transferor or the transferee is given the right to insist on the registration of the transfer so as to exclude the company's equities or rights. There may be a form of debenture which excludes in favor of a transferee the company's rights against the transferor although registration of the transfer has not yet taken place; but a debenture in the form before me is only a protection to the transferee when he has got upon the register."⁴⁸

⁴⁵ [1900] 2 Ch. 149.

⁴⁶ *Id.* at 155.

⁴⁷ [1904] 2 Ch. 743. See also *In re Smith & Co.*, [1901] 1 Ir. 73.

⁴⁸ *Id.* at 749.

The clause, though carrying assurances to the investor, thus actually served as a limitation upon his rights. There was no discussion of negotiability.

Looked at from the viewpoint of the issuing company, that is, where it is sought to safeguard the maker in making payments, a similar trend is apparent. In the *In re Natal Investment Co.* case the company had used a proviso that, "the payment of the said sum of £500, or other amount due upon this debenture bond to the person presenting the same, shall be a good and sufficient discharge to the company from any claim or demand in respect thereof", thus permitting the company to pay with approximately the same safety as though the instrument were fully negotiable.⁴⁹ The provision in the *Palmer's Decoration and Furnishing Co.* case, on the other hand, read: "and the receipt of the registered holder for such principal moneys or interest shall be a good discharge to the company therefor", nothing being said as to whether the debenture instrument need or need not be surrendered. Moreover, at least so the debenture said, the company was not "bound to enter in the register notice of any trust or to recognize any right in any other person save as herein provided". It would seem from this that the instrument, in the case of the registered debenture, is a matter of diminishing consequence—a far cry from full negotiability.

This no doubt overstates the case, for quite obviously it is contemplated that the certificate may be dealt with by the registered holder, though it is usually provided that "no transfer shall be valid unless made in the company's books by the registered owner". In one of the early cases involving transfer of registerable, but not registered, American bonds which had been wrongfully pledged with the defendant, the court had this to say about

⁴⁹ Under the Negotiable Instruments Law § 88, the maker in paying an instrument is substantially as well safeguarded as the holder is in purchasing it. Of the debenture provision in question Lord Cairns said: "That proviso, however, is not a proviso for the benefit of either the assignee or the holder of the debenture; it is a proviso for the benefit of the company itself, in order to absolve the company from the burden of having to look into the title of any person who might present the debenture to them for payment. It does not oblige them to pay to any person who presents the debenture, it merely absolves them from subsequent liability if they do, in point of fact, pay to a person who presents the debenture." L. R. 3 Ch. App. 355, 361-62 (1868).

such a provision: "Now that looks as if they were not transferable without such an entry in the books. But in my opinion that is not so until after there has been an entry of the name in the books; but after that there must be a transfer in the way pointed out."⁵⁰ The bonds being payable to bearer or left blank with a provision for payment to the legal holder and assigned in blank, it was held that the *bona fide* purchaser should be protected. But even when registered it is apparent that the registered owner can assign the certificate and the company must, if it is otherwise in order, register the transfer upon its books.⁵¹ Moreover, the courts have been quick to make use of estoppel and apparent authority concepts, even to expand them, in order to protect the *bona fide* transferee in this situation.⁵² The provision as to book transfer goes only so far as necessary to protect the company.

THE AMERICAN CASES

This brief survey discloses enough uncertainty, no doubt, to justify Chalmers in not including bonds and debentures in the Bills of Exchange Act; his purpose was one of codification.⁵³ Moreover, in view of the *Goodwin v. Robarts* decision, there was no crying need for such legislation in the case of ordinary bearer bonds. But that decision may be said to represent the high point of the movement and, however valid the reasons, the registered instrument never quite scaled the heights; in fact, it seems to have fallen back from the 1875 point. In this country, though one would expect even more diversity of opinion, the course of the decisions as to bearer bonds was much the same as in England.⁵⁴ At the same time the registered bond had probably come nearer to recognition here, when the Negotiable Instruments Law was drafted and crystallized the situation adversely, than any

⁵⁰ *Easton v. London Joint-Stock Bank*, 55 L. T. R. 678, 685 (1886).

⁵¹ That specific performance is a proper remedy, see *Benwell and Everitt v. Mayor & City of Newark*, 55 N. J. Eq. 260, 36 Atl. 668 (1897).

⁵² As to share certificates, blank indorsed, see *Fuller v. Glyn, Mills, Currie & Co.*, [1914] 2 K. B. 168, and cases there cited.

⁵³ CHALMERS, *BILLS OF EXCHANGE* (6th ed. 1903) 316.

⁵⁴ See *Steffen and Russell*, *supra* note 2, at 803, 804.

decision there had taken it. Whether this was due to judicial misunderstanding of the effect of registration or for more substantial reasons is a question. There have not been many cases.

The early holdings had to do, again, with the maker's defenses. They were mostly concerned with the many municipal issues called forth to finance railroads and canals following the panic of 1842-1843. As said by Justice Grier in the first case found dealing with registered bonds, a case involving a suit upon interest coupons on bonds issued by the City of Pittsburgh to a railroad corporation:

"When the mania for railroads again spread over the community — when it was anticipated that every railroad, from any place to another place, or no place, would produce large profits on the investment, would convert villages into cities, and make every city a London, and double and treble the value of land in every county through which they passed, the state being unwilling to involve herself in further debt, and risk a second insolvency, the scheme of city, county, and borough subscriptions was invented and put in practice."⁵⁵

The bonds in question provided that they should be "transferable only on the books of the city" and this, in Justice Grier's opinion, deprived the holder of any "presumption that he is entitled to the interest by mere possession of a coupon".⁵⁶ While the decision may have been intended as a slight help to the community, making it necessary for the holder to obtain a regular assignment and registration, it quite definitely proceeded upon the notion that the bonds were not negotiable.⁵⁷

In two early Virginia cases growing out of the wartime attempt by federal courts to confiscate registered municipal bonds held by "rebels", so-called, a more favorable view was taken. In the first⁵⁸ the court had ordered new instruments to be issued to its receiver, and these, bearing a legend reciting the facts, were sold to the public. The purchaser who bought the bond in question

⁵⁵ *Oelrich v. Pittsburgh*, Fed. Cas. No. 10,442, at 595 (C. C. W. D. Pa. 1859).

⁵⁶ *Id.* at 597.

⁵⁷ See also *Cronin v. Patrick County*, 89 Fed. 79 (C. C. W. D. Va. 1882), for a further example of the same attitude concerning bonds payable to a railroad "or assigns"; being registered they could not be negotiable, or, at least, so the court ruled.

⁵⁸ *DeVoss v. Richmond*, 18 Gratt. 338 (Va. 1868).

surrendered it for a new certificate registered in his name, but the new bond, by mistake, did not bear the notation. This was later sold to the defendant, the instrument being first surrendered and the bond in suit being issued to the defendant in his name. The court refused to cancel the bond on the city's suit, though the confiscation judgment had been declared invalid, since in the court's view either the bonds were negotiable or, at all events, the city was estopped. The court said:

"An assignee for value, who receives a bond from the holder with a power of attorney to transfer it, acquires, under the ordinance, the legal title of the holder before a transfer on the books, subject only to the right of the city to make payment to the registered owner. The new certificate, or the delivery of an old certificate with a power of attorney to transfer it, will cut off all defences which the city might have against any prior holder."⁵⁹

This was an advanced position. In the later case⁶⁰ the court receded so far as to say that the city was not estopped as to the original purchaser under the confiscation proceedings, even although the stock (bonds) was subsequently reissued and registered in his name. The cases are not necessarily in conflict, for defendant here was, in a sense, an immediate party, not a subsequent purchaser, and so would be subject to defenses. Even in the case of subsequent purchasers it seems to be well settled that the person procuring registration is himself responsible for title irregularities in prior unregistered transactions and therefore cannot claim an estoppel as against the issuing company by reason of registration.⁶¹

A later case seemingly even more favorable to negotiability, but possibly not going the whole way, is that of *D'Esterre v. Brooklyn*,⁶² involving an issue of some \$148,000 of municipal bonds put out to provide funds for improvement purposes. The bonds were issued as registered bonds; that is, they bore an indorsement

⁵⁹ *Id.* at 351.

⁶⁰ *Webb v. City Council of Alexandria*, 33 Gratt. 168 (Va. 1880).

⁶¹ *Starkey v. Bank of England*, [1903] A. C. 114. Here a broker procuring transfer on a forged power of attorney was held liable to the transfer agent. See, however, Ames, *Forged Transfers of Stock: Another View* (1904) 17 HARV. L. REV. 543.

⁶² 90 Fed. 586 (C. C. E. D. N. Y. 1898).

that: "This bond is registered in town treasurer's office, Gravesend", but had been left blank as to the holder. The court held that the *bona fide* purchaser was entitled to registration and could enforce the obligation free of a defense of fraud and failure of consideration good as against the original holder. The court said:

"A negotiable instrument is, by registration, to an extent deprived of its negotiable quality; but this disability is removable by the voluntary transfer by the owner of the instrument to another. Thereupon the town must, upon application, register it in the name of the new holder. The registration of such an instrument does not have the effect of subjecting it to any defenses existing against the persons in whose name it is first registered."⁶³

This, of course, is largely dictum since the bonds were in no proper sense registered, but, at most, merely authenticated.⁶⁴ Viewing the paper as payable to bearer the case is easily sustainable. So, too, it may not be criticized if the original holder had become a holder in due course, for clearly once having attained a holder in due course status, he is not deprived of it by reason of having obtained registration, whether the instrument as so registered should be regarded as negotiable or not.⁶⁵ The case as it stands, however, comes perilously close to full recognition of the registered bond as an instrument payable to order.

Oddly enough there have been few cases involving special conditions designed to state the maker's position. The one case found in which the clause that payment would be made regardless of equities between the company and the original or any intermediate holders was used involved an issue of debentures amounting to £100,000 put out by an English company operating in the United States. The defense to a creditors' action was fraud

⁶³ *Id.* at 591.

⁶⁴ It is usual in issuing bonds under mortgage to have each instrument "authenticated" by the trustee or some other financial institution to show that they are secured by the mortgage. In the case of shares, the transfer agent or a separate bank or trust company, acting as "registrar", certifies similarly that the particular certificate does not constitute an over-issue of stock.

⁶⁵ *Thomas v. De Moss*, 202 N. C. 646, 650, 163 S. E. 759, 761 (1932): "The right to have the bond registered is given to a holder of the bond for his protection, and may be exercised or not in his discretion, without affecting the liability of the maker. One who has acquired the bond as a holder in due course does not forfeit his rights as such holder against the maker by the registration, at his option, of the bond."

and failure of consideration. After referring to the clause in question and considering a number of English authorities the court said: "It is immaterial, therefore, whether the bonds were technically negotiable or not, since this element of negotiability had been specifically contracted in the instrument."⁶⁶ The odd part is that such clauses have not been more widely used in order to appeal to investors,⁶⁷ though no doubt the American investor has not been so wary as his British cousin. On the other hand the practice not to use them may possibly give some clue to the reluctance of the American investor to deal in registered bonds, for obviously, in the present state of the cases, the purchaser's risk is materially increased without them.

When one turns to the equities of ownership a number of cases are found safeguarding the registered holder where a purported transfer has been obtained upon a forged assignment executed in his name.⁶⁸ Indeed, as Justice McLaughlin said relative to instruments called "consols" so transferred, "Being registered they were non-negotiable", a gratuitous remark, "and could not be sold except by direction of the registered owners, . . ." ⁶⁹ So, too, where bonds are released from registry on forged authority and converted into bearer instruments, the registered holder is protected. The reason for this, as Judge Haight stated in such a case is that "The purpose of such registration was to save the owner from loss resulting from larceny or destruction of the bonds. Being registered they could not be sold. If presented to the railway company for payment of the interest or principal by others than the registered owner, payment would be refused."⁷⁰ But these reasons, if valid, apply equally to any unindorsed order paper; such paper also, though fully negotiable, is non-negotiable in the sense meant by Justice McLaughlin. These

⁶⁶ *Morgan Bros. v. Dayton Coal & Iron Co. Ltd.*, 134 Tenn. 228, 254, 183 S. W. 1019, 1025 (1915).

⁶⁷ The evidence that such clauses are not used is purely negative; no reference to them appears in the standard form books. See, *e.g.*, HERR, TRUST MORTGAGE FORMS (1929).

⁶⁸ *Varney v. Curtis*, 213 Mass. 309, 100 N. E. 650 (1913); *Grosfield v. First Nat. Bank*, 73 Mont. 219, 236 Pac. 250 (1925).

⁶⁹ *Chester County G. T. & S. D. Co. v. Securities Co.*, 165 App. Div. 329, 334, 150 N. Y. Supp. 1010, 1014 (1914), *aff'd*, 219 N. Y. 599, 114 N. E. 1062 (1916).

⁷⁰ *Clarkson Home v. Missouri, K. & T. Ry.*, 182 N. Y. 47, 60, 74 N. E. 571, 574 (1905).

cases, therefore, do not contribute much; in fact, with their unqualified assertions that the registered bond is non-negotiable they have served somewhat to confuse the situation.

The practice of dealing in regularly assigned registered bonds, without book transfer, raises the really serious question. In the celebrated case of *Scollans v. Rollins*,⁷¹ which, though decided over thirty years ago, seems to have set bounds to further development in this direction, the plaintiff had put blank assigned registered stock (bonds) of the City of Boston into a sealed envelope, at least so the evidence was construed, and left it with a broker for safe-keeping. The broker subsequently took the bonds out and pledged them with his bank. Upon the broker's default the latter foreclosed its lien and sold the stock to defendant, who thereafter procured a book transfer into his own name. In the first trial the court intimated that, if a custom to deal in registered bonds were shown, the *bona fide* purchaser should prevail. But when the case came up a second time with the custom in question established, the court, Holmes, C. J., dissenting, backed water.⁷² The paper, it was pointed out, was not negotiable and further the plaintiff had not entrusted the "possession" of the bonds, but their "custody" only, to the broker, so that no estoppel could be found to support the transaction. The practice to deal in such paper, if relevant to the issue, was said to be at the purchaser's risk. Here the matter has stood as to blank assigned, lost, and stolen paper, a victory for the security of ownership people as opposed to those interested in the security of transactions.

The *Scollans* case would seem also to include the point that transfer on the books of the company would not improve the position of the purchaser, since in that case the defendant had had the bonds registered in his name. But it clearly need not be construed as carrying so far. There is fairly strong authority to the effect that, had the broker had the bonds registered in the bank's name at the time of the pledge, both it, and clearly the subsequent purchaser, would be protected.⁷³ It would seem that

⁷¹ 173 Mass. 275, 53 N. E. 863 (1899).

⁷² 179 Mass. 346, 60 N. E. 983 (1901).

⁷³ *Brown Lancaster & Co. v. Howard Fire Ins. Co.*, 42 Md. 384 (1875); see *Metropolitan Savings Bank of Baltimore v. Mayor of Baltimore*, 63 Md. 6 (1884).

the purchaser should be equally protected where the wrongdoer obtains registration in his own name and thereafter transfers the bond upon the usual form of blank assignment,⁷⁴ as admittedly the purchaser would be if subsequent to registration a new bearer instrument should be obtained by the wrongdoer and transferred by delivery.⁷⁵ There has been some question whether this result should be grounded on the false representations of the company or whether the company should be liable upon the instrument,⁷⁶ its recourse over in either case being against the person procuring the wrongful registration.⁷⁷ But from the purchaser's viewpoint he has obtained a new instrument, freed from the maker's defenses growing out of prior transactions, and, it is submitted, of prior equities of ownership. While the original holder should lose nothing by the transaction, at least where his indorsement has been forged, neither should the purchaser after registration be put to the necessity of proof in tort in order to have recovery.⁷⁸

Reynolds v. Title Guarantee & Trust Co.,⁷⁹ a recent New York case involving supposedly lost bonds, clarifies the situation somewhat in that state. The registered holder had assigned the bonds in question to his brokers as collateral. Thereafter, upon false representation that they were lost, he had new bonds, marked duplicate, issued to plaintiff, who took in good faith and for value. When the facts were discovered, the defendant transfer agent,

⁷⁴ *Gottberg v. United States Nat. Bank*, 131 N. Y. 595, 30 N. E. 41 (1892).

⁷⁵ *Cooper v. Illinois Cent. R. R.*, 38 App. Div. 22, 57 N. Y. Supp. 925 (1899).

⁷⁶ The decisions on the point at common law in the case of share certificates are reviewed in *Rand v. Hercules Powder Co.*, 129 Misc. 891, 223 N. Y. Supp. 383 (1927), the court coming to the conclusion that the company must recognize both the original holder and the transferee as shareholders. The shares in question, blank assigned, had been stolen and transferred on the company's books to *bona fide* purchasers. The case for bonds would seem to be even simpler.

⁷⁷ That it has such recourse, see, e.g., *Clarkson Home v. Missouri, K. & T. Ry.*, 182 N. Y. 47, 74 N. E. 571 (1905).

⁷⁸ The current practice of keeping a record of successive registrations on the back of the original instrument makes this position difficult to maintain as a technical matter. Perhaps it was inaugurated for that purpose, as well as for reasons of economy. The difficulty is that since but one bond, that is one instrument, is used, it may be asked, how could there be two persons entitled to recover upon it? But the difference, it is submitted, is technical only and should not constitute a material distinction. Whether both holders should be permitted to share in the security for the instrument, if any, presents a much more difficult problem.

⁷⁹ 240 N. Y. 257, 148 N. E. 514 (1925).

being unable to interplead the parties, elected to recognize the broker's position rather than that of the registered holder of the duplicates. In sustaining this action, Judge Lehman, speaking for a divided court, said:

" Though a corporate bond, payable to the ' registered holder,' and by its terms transferable by the holder only upon the books of the trustee, may not be a negotiable instrument in a strict sense, . . . yet, as this court said of certificates of stock in *New York & N. H. R. R. Co. v. Schuyler* (34 N. Y. 30, 82 [1865]): ' It was never intended to lock up those instruments in the hands of the stockholders named in them — but to give them every practicable facility as the basis of commercial transactions.' Undoubtedly they were intended to pass easily from purchaser to purchaser and by proper indorsement, ownership, as between seller and purchaser, could be transferred. . . . If the mortgagor or trustee may destroy the right of the owner of the original bonds to compel registry of the transfer by a previous transfer on its books, even though made in good faith, but without production of the bonds, the bonds lose that valuable element of facility of circulation created by their form."⁸⁰

Thus, a rather substantial victory for the money market.

The *Reynolds* case should, perhaps, be read in the light of the earlier case of *Zander v. New York Security & Trust Co.* in order to gauge the full advance made by the court. In the *Zander* case plaintiff brought suit on an allegedly lost certificate of deposit according to which defendant had agreed to " repay . . . Zander or her assigns, on return of this certificate, which is assignable only on the books of the company." The question was whether plaintiff could be required to post a bond of indemnity. The court, by Judge Cullen, said:

" Had the first sentence of the certificate terminated with the words ' on return of this certificate ' it might be claimed, not without force, that the certificate was intended to be negotiable. But the words quoted are followed by the provision ' which is assignable only on the books of the company '. We think the clear effect and intent of this provision was to render the instrument non-negotiable and to protect the company in dealing with the holder of the certificate as such holder might appear on the books of the company, without liability to third parties to whom, unknown to the defendant, it might have been transferred."⁸¹

⁸⁰ *Id.* at 262-64, 148 N. E. at 516.

⁸¹ 178 N. Y. 208, 211, 70 N. E. 449, 450 (1904).

Hence there was no necessity for a bond of indemnity. The court said, moreover, that the requirement that share certificates be surrendered as a condition of transfer had no application "to instruments for the payment of money".⁸² By the time of the *Reynolds* case the legal atmosphere had thus changed considerably, the non-negotiable money instrument had emerged, on one more point, as a tangible representative of the issuing company's obligation.⁸³

THE POLICY ARGUMENT

This brief survey, it is believed, practically exhausts the important cases dealing with registered bonds. Only a few issues have been extensively litigated. The question is, can the results reached by the courts in even these few cases be threaded into the bills and notes concept of negotiability? The answer is, no. The maker may by contract cut off his defenses; he may, moreover, stipulate that payment to the certificate holder will discharge the obligation; the doctrine of estoppel or of apparent authority may, in many cases, be used to aid the purchaser as against claims of ownership on the part of prior holders — but these results fall

⁸² *Id.* at 212, 70 N. E. at 451.

⁸³ This gradual recognition of the instrument to the exclusion of the abstract chose in action, or as in fact being the obligation, has gone on in many fields. In the gift cases it now seems clear that the registered holder may irrevocably determine his interest in the bond by delivery, at least where coupled with an informal writing by way of assignment or indorsement, whether or not it is sufficient to meet book transfer requirements. *In re Estate of Stockham*, 193 Iowa 823, 186 N. W. 650 (1922); see *Farrell v. Passaic Water Co.*, 82 N. J. Eq. 97, 88 Atl. 627 (1913); *Heller v. Fabel*, 290 Pa. 43, 138 Atl. 217 (1927). For a theoretical general discussion, see Bruton, *The Requirement of Delivery as Applied to Gifts of Choses in Action* (1930) 39 YALE L. J. 837; Williston, *Gifts of Rights under Contracts in Writing by Delivery of the Writing* (1930) 40 *id.* 1. The same process has been evident in the case of share certificates. See Legis. (1932) 32 COL. L. REV. 894. Only recently the New York court was called upon to decide whether the transferee of share certificates on a forged indorsement could be held liable for conversion of the shares. It was contended that inasmuch as plaintiff was still owner of the abstract thing called a share, defendant's dealings with the paper certificate gave rise to no more than nominal damages. But the court held otherwise. *United States Fid. & Guar. Co. v. Newburger*, 263 N. Y. 16, 188 N. E. 141 (1933). And see *Pierpoint v. Hoyt*, 260 N. Y. 26, 29, 182 N. E. 235, 236 (1932), where in a similar case Crouch, J., said: "For the purpose of redressing such wrongs, the law must and does treat the symbol as though it were the thing symbolized. A conversion of a certificate of stock, whether indorsed or not, is, therefore, a conversion of the stock itself."

short of what should follow were the registered bond to be included in the sacred company of the fully negotiable money instruments. Particularly is this apparent where a registered bond, though accompanied by blank assignment and otherwise in order for transfer, has been sold by a thief or finder. To date no cases have gone so far as to protect the *bona fide* purchaser in such a situation, or indeed, the transfer agent, if transfer or exchange is made at the request of the thief. Failing in this respect, to mention no others, the category must, apparently, be closed to the registered bond. Moreover, the courts are left without any common-law device whereby to carry the case for full negotiability on to a conclusion.⁸⁴

The discussion having thus outrun authority, what has been disclosed concerning the desirability of making registered bonds negotiable? Consider first the matter of the maker's defenses against *bona fide* purchasers. To a considerable extent the companies are indifferent to this matter, for they issue bonds in the alternative, to bearer or to the registered holder, and admittedly if purchased in bearer form by a holder in due course such defenses would not be available. The English companies expressly stipulate, though somewhat guardedly, it must be confessed, against defenses of the sort on their part, and, though the practice has not gained a foothold here, it is doubtful that it would add much to the holder's present position, at least in the case of the larger corporations.⁸⁵ In other words, it would seem that the day when this issue could be raised with propriety has passed; the business organization has come of age and can look out for itself far better than the purchaser of its securities has shown that he is able to. Moreover, with the increasing publicity being required under the Securities Act, it seems probable that the instances

⁸⁴ See Note (1925) 25 COL. L. REV. 209, in which the unsuccessful effort to give attributes of negotiability to conditional sales contracts is discussed.

⁸⁵ This would be true in the usual case where the entire issue is taken by an investment house, operating individually or as a member of a syndicate, for in such a case the investor should hold as a subsequent purchaser. The fact that the definitive bonds may be issued directly by the company to the investor as registered holder, although raising a technical question under the Negotiable Instruments Law as to whether a payee can be a holder in due course, should not be permitted to qualify the purchaser's rights. For a discussion of security marketing methods, see Bates and Douglas, *Secondary Distribution of Securities — Problems Suggested by Kinnen v. Glenny* (1932) 41 YALE L. J. 949.

where a company could, as a matter of fact, have a defence of fraud or failure of consideration will be reduced in number, if not eliminated. While this applies particularly to industrial issues, the case is substantially as strong with respect to municipal issues. On this score at least there is little reason against making the registered bond negotiable.

But when you turn to the payment question, that is, to the matter of what importance the issuing company must attach to the certificate, in making payment, exchange, or transfer, and what to its own records of the ownership, there is more doubt. Two cases are to be considered, one where the registered owner asks payment, the certificate being unaccounted for, and the other where someone other than the registered holder, possibly a thief or finder, presents the certificate assigned in blank for payment or transfer. Brushing aside, as just suggested, the matter of company defenses as a reason for refusing action, the company's principal consideration is to see that whatever action it takes is fully sanctioned — if it pays the principal in full that it may have a discharge, if it transfers the bond that the transfer cannot be attacked. By stipulation, the company need only recognize the registered holder, or so it would appear, but ordinarily it has also agreed to make transfers at the order of the holder.⁸⁶ This latter provision, though probably inserted originally as an assurance to the registered holder,⁸⁷ has been taken to mean that the purchaser by assignment can, as of right, insist upon transfer. As a consequence, even where transfer or exchange is demanded by the registered holder, if the instru-

⁸⁶ In *Shaffer v. Federal Cement Co.*, 225 Fed. 893, 898 (E. D. Pa. 1915), *rev'd*, on other grounds, 229 Fed. 1021 (C. C. A. 3d, 1916), the issuing company had refused to transfer registration into plaintiff's name and, when plaintiff started suit upon the bond in the name of the registered holder, sought to defend on the ground that the registered holder was not the real party in interest. In giving judgment for plaintiff the court said: "The ruling is based on these propositions. The promise of defendant is to pay the interest to the person in whose name the bond is registered. Such person has a right of action to enforce the promise, and is properly made the legal plaintiff in a suit at law. For the protection of defendant the contract provides that legal demand for payment can be made by no one else. The legal right of action is therefore in such person only, and any suit at law must be in his name. The defendant clearly has no right of concern in the beneficial ownership of the bond beyond being protected against the assertion of the equitable rights of unregistered owners. This right of protection affords no justification for defendant's refusal to keep its promises."

⁸⁷ In that the certificate is made more readily saleable.

ment cannot be produced, it is general practice for transfer agents to insist upon indemnity.⁸⁸ Were the instrument to be made fully negotiable the practice would be no different, though a wider range of contingencies would be included in the indemnity.

In the second case the serious risk to the transfer agent lies in the uncertainty concerning the holder's position. Although the signature of the registered holder may have been duly executed, the certificate may none the less have been transferred without authority, as in *Scollans v. Rollins* or, indeed, have been stolen from the registered holder. Nor is it always possible, waiving for the moment the impracticability of so doing in the case of each transaction, to refer the matter back to the record holder for approval — too much time may have elapsed, the record holder may have died or left the community, or, though he assigned and sold the certificate, his purchaser or some subsequent person difficult to find may have been the defrauded party. By making the instrument negotiable, assuming a properly executed indorsement,⁸⁹ the transfer agent could deal with the holder in far greater confidence than now. As a procedural matter, moreover, the holder's case being on the same footing as that of any other holder of money

⁸⁸ The most striking illustration of this is the situation with respect to lost registered Liberty Loan bonds. The Secretary of the Treasury has ruled that: "Registered bonds assigned in blank, or bearing assignments for exchange for coupon bonds which do not restrict delivery, are in effect payable to bearer and lack the protection of registration, since title thereto may pass by delivery without further assignment. . . . The Treasury Department can accordingly grant no relief on account of the loss or theft of bonds or notes so assigned, and will not enter caveats against their transfer, exchange, or payment, if reported lost or stolen." 34 OPS. ATT'Y GEN. 262, 264 (1924). Although perhaps it may be doubted that a treasury ruling can make blank assigned registered bonds generally negotiable, as these rulings in effect purport to do, they have been favorably passed upon by both Attorneys General Stone and Mitchell in sustaining the Treasury Department's refusal to issue duplicate bonds where blank assigned registered bonds have been reported lost. This goes even farther, at least in terms, than the New York court did in the Reynolds case, note 70, *supra*.

⁸⁹ It is usual for the transfer agent to require a guaranty of signatures to cover this risk but the exact scope of such a guaranty, or of the obligation of a witness to a signature, is shrouded in considerable doubt. See generally *Second Nat. Bank v. Curtis*, 2 App. Div. 508, 37 N. Y. Supp. 1028 (1896), *aff'd*, 153 N. Y. 681, 48 N. E. 1107 (1897); *Bank of England v. Cutler*, [1908] 2 K. B. 208. In the case of *Clarkson Home v. Missouri K. & T. Ry.*, 182 N. Y. 47, 74 N. E. 571 (1905), the court was of the opinion that the signature guarantee, as applied to the signature of a corporate officer, covered not only the *genuineness* of the signature but the *authority* of the signing officer as well.

paper, should be simplified. The result would be a definite advantage to the investor, likewise, in that it should be possible to save much time now required in passing ordinary transfers.

But what of the element of safety to the investor, the factor most often advanced as the reason for registration. On the face of it this gain to the transfer agent, as to the *bona fide* purchaser, would seem necessarily to have come at the expense of the registered holder. But, at best, that would be so only in the cases of loss or theft of blank assigned paper, and, as a matter of cold business fact, there is little reason for affording protection to the registered holder in such situation; if he intends to hold the paper it should not be left blank assigned, if he intends to sell it, it can be assigned specially. As to the purchaser of blank assigned paper, the case is as broad as it is long, he stands to gain by the elimination of risk upon purchase and if he sees fit to retain the paper in that condition he assumes as great a risk in so doing. But it must be noted that in his case also it is readily possible, by completing the assignment to self or to a named person, again to obtain as complete protection against loss or theft as if the paper had been fully registered in his name in the first place. Particularly is this true, if, as suggested above, the issuing company should not be permitted to make payment, transfer, or exchange, except at its peril, unless the certificate presented is duly indorsed or assigned.

It is fair to point out also that the present practice, though affording a high degree of protection in theory, actually functions very badly, and will continue to function badly so long as the great majority of holders refuse to register their paper. The investor is advised on all sides to keep his security in bearer form, a comment on the cumbersomeness of the registration machinery, and, assuming a heavy risk, he does so. Why so simple a solution as that of treating the registered bond as payable to order and negotiable was not long ago adopted leaves one puzzled and doubting the validity of the suggestion. But to account for the present situation, one sees rather plainly that the issuing companies, in doubt as to the status of their paper, whether negotiable or not, have sought first fully to protect themselves at all costs,⁹⁰ and only

⁹⁰ A glaring example is that of *Manhattan Co. v. Morgan*, 242 N. Y. 38, 150 N. E. 59 (1926), where interim certificates were issued to bearer—in order to appeal to the investor—but subject to a provision which, upon close reading, indi-

incidentally to consider the social implications of their practice. So far as the large investors are concerned — and they are the only ones who use the registration privilege to any considerable extent — the present system has been reasonably satisfactory, for, with closely guarded channels of distribution, the risk to the purchaser of registered paper pending book transfer is greatly reduced. The pressure on the part of investors generally for a negotiable security coupled with reasonable protection to the holder, which in the case of shares resulted in the Stock Transfer Act, appears never to have become outspoken in the case of bonds. On the one hand, to afford security, is the registered instrument and on the other, to meet the desire for negotiability, is the bearer bond. But whatever the explanation, at least it can be said that the present system in practice is far from being either the safest or the most convenient to investors generally.

In a few states, notably in New York since 1870, there have been statutes designed to provide a measure of safety to the holder of bearer bonds, particularly where no provision has been made in the issue for registration.⁹¹ The device, possibly borrowed from the English practice of crossing checks not negotiable, consists in the holder writing a statement across the face of his bond to the effect that “this is my property” and signing it. Thereupon the instrument, according to the statute, becomes “non-negotiable” and “the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor’s place of residence.” Nothing could be much simpler. Perhaps the scheme was too simple, for it appears never to have been used to any considerable extent. Despite its sixty-odd years’ existence there have been no New York decisions construing it,⁹²

cated only “that the undersigned *may* treat the bearer of this certificate . . . as the absolute owner.” In the particular case the “undersigned” chose *not* to treat the bearer as owner and, the instrument being held not negotiable, he could not be required so to do.

⁹¹ N. Y. NEGOTIABLE INSTRUMENTS LAW (1917) § 332; see also KAN. REV. STAT. ANN. (1923) c. 52-1801.

⁹² One of the few cases dealing with the statute is that of Prudential Investment Co. v. National Reserve Life Ins. Co., 137 Kan. 659, 21 Pac.(2d) 373 (1933), in which it was sought to hold the person using such an indorsement on municipal

even on so important a matter as whether the instrument again acquires negotiability when indorsed by the holder. The stock exchange, on its part, has long ruled that instruments so marked do not constitute a good delivery.⁹³ But while this experiment cannot be called exactly successful,⁹⁴ it does bear testimony to the main point that the present registered or bearer instrument alternative has not been wholly satisfactory to the investor.

If the registered bond is to be regarded as payable to order, however, it is evident that the operative effect of registration must have close analysis. It would seemingly have become little more than a formality. As a matter of fact, the situations where the company should be entitled to rely solely on its records are few. In the matter of notices, as, for example, of redemption or concerning default, or in the matter of voting rights, the record should undoubtedly prevail, it always being possible, subject to reasonable limitations, for the holder to have the register show his ownership. So, too, with respect to interest payments, where the bond is registered as to interest, the record title should no doubt control. The chief question, therefore, concerns the registration of principal, and here, as suggested earlier, it would seem that no transfer, exchange, or payment should be made upon the record title only, thus recognizing the dealing in the market with the certificate as having become of controlling significance. Indeed, this result has already been reached by the Michigan court in a recent decision involving share certificates,⁹⁵ and no reason is apparent

bonds liable upon default of the city. The Kansas provision, like that in New York, had been adopted as a part of the Negotiable Instruments Law, and it was argued that the indorser's liability should be governed accordingly. The court held that the two acts must be interpreted separately and denied recovery. See further *Langdon v. Baxter Nat. Bank*, 57 Vt. 1 (1885), where such an indorsement of ownership, in the absence of statute, was held not to affect negotiability but to carry notice to subsequent holders.

⁹³ Such an instrument must be "sold specifically as an 'endorsed bond.'" *N. Y. Stock Exchange*, Rule 57. See MEEKER, *THE WORK OF THE STOCK EXCHANGE* (1930) 658.

⁹⁴ One cannot help but get the impression that there was perhaps some hostility on the part of financial houses to the whole scheme of the statute, if intended to be widely used. In the narrow zone where it has been employed, as where an insurance company deposits bearer bonds with a state commission, the additional bother entailed by the clause has no doubt been well offset by the increased protection obtained.

⁹⁵ *Bay City Bank v. St. Louis Motor Sales Co.*, 255 Mich. 261, 238 N. W. 241

why one should be more solicitous of the registered holder — or of the issuing company — in the case of bonds.

Although registration, as thus qualified, is but a shadow of its former self, the net result of so limiting it should be the gradual elimination of the bond issued to bearer. Whether the time-hallowed and delightful custom of coupon clipping would go too is perhaps a question, but the protection afforded by the registered instrument, when coupled with the convenience of the negotiable order instrument, should force its general adoption. Moreover, registration, as so conditioned, would itself be a strong point in favor of widespread use of the registered instrument, if for no other reason than that notices might be brought quickly to the attention of the security-holder, a matter of considerable moment to the small investor. But the principal advantage would lie in the availability of efficient machinery, whereby transfer or exchange could be had at any time, in a sense as a clearance of prior transactions. This should prove an extremely important safeguard, if not a necessity, in view of the long time that bonds are customarily outstanding.

WHAT TO DO

Such is the case, both on the authorities and as a matter of policy. It remains to consider what steps need next to be taken. Some two years or more ago the writers recommended to the committee of the Conference of Commissioners on Uniform State Laws engaged in drafting amendments to the Negotiable Instruments Law that it consider bringing the registered bond within the purview of that act,⁹⁶ as bonds generally are now conceded to be. Only three small changes in the statute were suggested: first, to amend Section 8 so that an instrument payable to a registered holder would be deemed payable to order; next, to amend Section

(1931), discussed in (1932) 41 YALE L. J. 918. The court decided that under the Uniform Stock Transfer Act, where officers and directors engaged in winding up a corporation distribute assets to a registered holder without insisting that he produce his certificate, they should be personally liable to a pledgee of the certificate, although no notice of the latter's interest in the shares had been given.

⁹⁶ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1931) 248 *et seq.* The amendments originally suggested were in some cases not too happily reworded by the draftsman, Professor Karl N. Llewellyn.

31 making an assignment accompanying a bond, though not written on the back of the paper, an indorsement; and, lastly, to add a clause amplifying Section 38 so that an indorsement in the form of an assignment would be treated as a qualified indorsement, as is the similar assignment in the case of share certificates. Possibly the case was presented too cryptically, or possibly notions of the supposed dissimilarity of bonds, and particularly of registered bonds, to other money paper had become too crystallized, for the draftsman adopted only the third suggestion, although the committee approved the general object sought to be accomplished. Moreover, in the most recent draft, even this amendment has been reversed as applied to assignments written upon the instrument, so that in such case the usual obligation of an indorser would apply.⁹⁷ Obviously this would be unsatisfactory in the case of registered bonds, which at times are transferred by assignment written on the back of the instrument.

At the Grand Rapids meeting of the Conference in August, 1933, considerable opposition developed regarding the whole project of amending the Negotiable Instruments Law⁹⁸ and the program of amendments was referred back to the committee with the suggestion that it consider whether its amendments, or certain of

⁹⁷ The difficulty on this point grows out of the long-standing conflict as to the meaning of words of assignment on the back of a negotiable money instrument, whether they constitute a general indorsement or are merely a common-law assignment. It would seem that neither position is all right nor all wrong; such a writing should serve to make the indorsee-assignee a holder, so that he may qualify as a holder in due course in a proper case, but at the same time it should carry no obligation on the part of the assignor-indorser other than the usual warranties upon transfer, thus giving the effect to the words generally understood in business and commercial circles for many generations. A few courts have reached this result where the assignment was of the holder's rights to the instrument as distinguished from a writing purporting to assign the instrument. See, *e.g.*, *Hammond Lumber Co. v. Kearsley*, 36 Cal. App. 431, 172 Pac. 404 (1918); *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847 (1906). The difference, though, is too fine to be preserved as a distinction. Certainly this is true in the case of investment paper, for no one understands that the indorser-assignor of a corporate or municipal bond, any more than one who assigns his rights in and to such paper, undertakes to pay the instrument if the maker defaults. So also with the many types of investment paper issued as notes, such as Gold Notes, Serial Notes and so on. The amendment as proposed would make the law on this point harmonious in the case of all forms of money paper.

⁹⁸ This attitude has been strongly urged by Professor Beutel. See BRANNAN'S *NEGOTIABLE INSTRUMENTS LAW* (5th ed. 1932) 1124.

them at least, could not be incorporated into a supplementary bill. In this posture of affairs, the amendments heretofore suggested, whether technically adequate or not, should perhaps not be urged again. At the same time a short bill dealing exclusively with bonds, both registered and unregistered, and with debentures, equipment trust certificates, and similar investment paper payable in money, would seem well within the purposes of the Conference, for indeed several of the committee's proposed amendments were designed to make the act more hospitable to such instruments.⁹⁹ Such a bill could have place in the act much as the separate chapters relating to Bills of Exchange and to Promissory Notes and Checks are now included within it.

No doubt there will be question in some quarters as to the desirability of tying investment paper even so closely to the Negotiable Instruments Law. A careful canvass of the situation, however, indicates that a great many of the rules worked out in that act are fully as applicable to bonds as to notes and bills; in fact, many of them are already more or less taken for granted by the commercial community. But it is equally clear that the matter of book transfer, that is, registration and its effect, is foreign to the act. In this respect the registered money instrument has much in common with the share certificate; indeed, most of the problems concerning share transfers apply equally to bond transfers and are generally so regarded. But it requires only a casual reading of the Uniform Stock Transfer Act to show that that act would not lend itself readily to a group of amendments designed to make it include registered money instruments. The simplest, and, it is believed, the most desirable course is that suggested, to bring all

⁹⁹ For example, it is proposed to amend § 3 to permit bonds to be drawn to include conditions in the interest of holders as a group, to permit payment of government securities to be restricted to specified sources of revenue and to sanction instruments issued by unincorporated associations, although their payment is limited to the particular assets of the business. Section 4 would be amended to authorize acceleration clauses, § 5 to permit the use in the bond of agreements to do something in addition to the payment of money, where apparently intended as security, and § 6 to clear up the uncertainty as to what constitutes money and what may be permitted as a medium of payment. See *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS* (1933). It may be noted that these amendments would not sanction the equipment trust certificate or similar instruments, which equally should be made negotiable, nor satisfactorily deal with the coupon. And, clearly, the registered bond or note would be given no encouragement whatever by any amendment yet proposed.

such instruments within the Negotiable Instruments Law by a separate act, making only such special rules as are necessary in view of the peculiarities of investment paper.

It is beyond the scope of this paper to discuss the provisions of such a bill, but one point to be considered should be mentioned. That is the idea, advanced above,¹⁰⁰ that transfer and exchange by the issuing company, or its transfer agent, should be analogized to payment of the money instrument. If the analogy holds true, as appears to be the case, the position of the transfer agent would in many respects be recognized as similar to that of a drawee bank. This should work both to the advantage of the holder, in that his rights in and to the security upon transfer could be more readily determined, and likewise to the advantage of the transfer agent, in that the effect of a regular transfer, as constituting a discharge or not, could be more definitely gauged. In this connection it may be noted that the position of the transfer agent having transferred blank indorsed share certificates at the request of a finder or a thief is far from being comfortable, even today under the Uniform Stock Transfer Act. That act was designed principally for the protection of purchasers and pledgees. By putting payment, including transfer and exchange, on a similar footing with *bona fide* purchase, as is done in the Negotiable Instruments Law, the situation can be materially clarified in the case of registered bonds.

FINALLY

The proposal to confer negotiability on the registered bond has the virtue of fitting easily into present commercial institutions, no change in the form of the bond, nor any writing upon it, being required. It has been part of the genius of Professor Williston, perhaps more than of anyone else in commercial law during recent years, to build on existing practices and customs to accomplish his ends. Finding the order bill of lading and the straight bill in current use, he made the first negotiable and the second non-negotiable in the Uniform Sales Act. The share certificate, likewise, was made negotiable and in effect an obligation or interest running to the order of the registered holder, again without change in the form of the instrument in use, in fact almost without defini-

¹⁰⁰ See pp. 767-68, *supra*.

tion.¹⁰¹ It seems not only equally feasible but equally desirable to regard the present registered bond as an instrument issued to order and negotiable.

That such a result will come in time, by one means or another, is scarcely open to question, if one takes a long view of the development of money paper generally. A century ago there was outspoken opposition to the limited liability company, but today, not only are its shares freed of the claims of company creditors, which is limited liability, but defenses between the company and the share-holder and equities of ownership between holders, as well, are cut away, which, broadly speaking, is negotiability. The two, limited liability and negotiability, thus closely related, are prime legal contributions to a *laissez-faire* economy. They have assisted, perhaps more than is fully appreciated, in bringing almost the entire wealth of the nation to the market place. Possibly the time has come to call a halt, while the full social implications of this movement may be explored¹⁰² and new objectives determined upon. Something of a case can be made against negotiability. Even so, the action here urged need not be delayed; giving negotiability to the registered bond merely serves to correct one of the few remaining minor salients upon the line, a manoeuvre useful in any case to consolidate the present position.

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¹⁰¹ UNIFORM STOCK TRANSFER ACT § 22. "‘Certificate’ means a certificate of stock in a corporation organized under the laws of this State or of another State whose laws are consistent with this Act." The sections of the Negotiable Instruments Law defining what constitutes a negotiable money instrument are much more detailed than this.

¹⁰² It must not be thought that this steady trend toward a greater mobility of capital has come without misgivings. But the doubt has ordinarily not come from a consideration of economic consequences. Even so recently as 1896, Andrews, C. J., speaking of the non-negotiability of share certificates, said: "It may, perhaps, be doubted, taking into consideration the interest of investors as well as dealers, whether it would be wise to remove the protection which the true owner of a stock certificate now has against accident, theft or robbery. The system of registry of negotiable bonds, which prevails to a considerable extent, . . . seems to indicate a tendency to restrict rather than to extend the range of negotiable instruments." *Knox v. Eden Musee Americain Co.*, 148 N. Y. 441, 457, 42 N. E. 988, 993.