Law and Commerce: The Fortunate Crisis of the Eighteenth Century

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ABSTRACT

This article refines a common narrative about eighteenth-century commercial law and its relationship to economic development. It looks at a specific doctrinal strand of English common law – promissory notes – and argues that their recognition by statute without regard to common law’s requirements led to a serious destabilization and a crisis for the legal community. This crisis coincided with the South Sea crash and its aftermath, when promissory notes were most needed by the population at large. However, a fortunate effect of this crisis was that promissory notes went essentially unregulated by the courts, and their use was thereby allowed to proliferate. When Lord Mansfield effected his reforms, this brought mercantile cases back to common law courts and brought certainty to the law (albeit at the cost of common law processes). With these commercial instruments in common use and on certain legal foundation, the financial instruments and networks were in place to allow the process of economic development that eventually became modern capitalism. Therefore, instead of the narrative of the steady development of English institutions to pave the way for industrial and financial capitalism, the story of common law’s development is of institutional failures that happened to be fruitful.

KEYWORDS Law and commerce; Lord Mansfield; promissory notes; economic development; South Sea crisis

I. Introduction

The casual student of the development of English commercial law will have terrible things to say about the rigid and formal courts of the seventeenth century, and words of praise for the innovative and forward-looking courts of the eighteenth. In the seventeenth century, it is said, the law reports show so few commercial cases as to give the ‘improbable’ appearance...
that ‘either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters’. More or less nothing appears to have happened before the celebrated Lord Mansfield took the reins and single-handedly decided to incorporate the magnificent Lex Mercatoria to English law.

As might be expected, the matter is more complex. Firstly, it is well known that the overwhelming majority of English commercial law was in place at the start of the eighteenth century, and secondly, most of that century actually appears to have been a crisis for English commercial law and the legal community on multiple fronts. On the doctrinal side, there was a deep-rooted confusion that made a central aspect of commercial law unpredictable and chaotic. On the practical side, a rival judicial system of commercial arbitration had been put in place in 1698, the governor of the East India Company had publicly complained of the courts’ inability to deal with merchant disputes in 1693 leading to widespread distrust of lawyers among merchants in Britain and in the colonies, the number of cases at an advanced stage was in a decline that culminated in the mid-1700s, and the number of practitioners was in such a catastrophic decline that by the 1720s a number of the Inns of Court were in financial difficulties or full crisis.

However, it is also true to say that Lord Mansfield had a profound impact on making English commercial law what it is today. His chief achievements were not in establishing its doctrines, but in developing its methods and encouraging participation in its processes.

To give substance to these arguments, this article will look at one key doctrinal strand of English commercial law – promissory notes – from 1704, when the Statute of Anne destabilized it, to when Lord Mansfield reformed

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1 T.E. Scrutton ‘General Survey of the History of the Law Merchant’ in Association of American Law Schools, eds., Select Essays in Anglo-American Legal History, Boston, 1909, vol. 3, 7.
2 Ibid. See also William Cranch, ‘Promissory Notes Before and After Lord Holt’ in Select Essays in Anglo-American Legal History, vol. 3, 72-98, 75; R.S.T. Chorley ‘The Conflict of Law and Commerce’, 48 Law Quarterly Review (1932), 51, 51.
3 James M. Holden, The History of Negotiable Instruments, London, 1955, 30; Daniel R. Coquillette, The Civilian Writers of Doctors’ Commons, London, Berlin, 1988, 273.
4 Matthew Dylag, ‘The Negotiability of Promissory Notes and Bills of Exchange in the Time of Chief Justice Holt’, 31(2) Journal of Legal History (2010), 149, 166.
5 T. E. Scrutton, ‘The Work of Commercial Courts’, 1 Cambridge Law Journal (1921), 6, 13.
6 See also Henry Horwitz and James Oldham, ‘John Locke, Lord Mansfield and Arbitration during the Eighteenth Century’, 36(1) The Historical Journal (1993), 137.
7 Josiah Child, A New Discourse of Trade, London, 1693, 113-114.
8 See, e.g. Daniel Defoe The Complete English Tradesman, London, 1727, 344-346.
9 Eben Moglen, Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law, 93 Yale Law Journal (1983), 135, particularly at 140-141.
10 Christopher Brooks, Lawyers, Litigation and English Society since 1450, London, 1998, 32.
11 Ibid., 132.
12 David Lemmings, Gentlemen and Barristers: The Inns of Court and the English Bar 1680-1730, Oxford, 1990, 42-43.
13 An Act for Giving Like Remedy Upon Promissory Notes, as is Now Used Upon Bills of Exchange, and for the Better Payment of Inlands Bills of Exchange, 3 & 4 Ann., c. 9
the law in the 1760s. During this sixty-year period of confusion, the common law courts initially scrambled to resolve doctrinal incoherence and only made matters worse, and then started to sidestep the issue altogether. This meant that merchant cases could not be brought with any confidence of outcome to common law courts, leaving the economic activity promissory notes represented essentially unregulated.14

This period of little or no regulation coincided with a time of political, economic and legal turmoil. Nonetheless, the eighteenth century was also a period of ‘financial revolution’,15 profound change in group enterprise organization,16 and the beginning of the long and gradual process of growth in industrial output that has come to be called the industrial revolution.17 Counter-intuitively, as this article aims to show, this sixty-year period of instability may have had positive consequences that contributed to that process.

During this key period, the money supply shortage and severe exchange network disruption resulting from the South Sea bubble coincided with legal stagnation within doctrines that are crucial to trade and finance, and that were necessary to compensate for these disruptions – promissory notes and bills of exchange. But fortunately, the court’s inability to set the relevant doctrines on a sound footing in turn meant that commercial custom was able to develop for decades without court supervision. Commercial instruments began to be used more and more as credit instruments due to the severely disrupted money supply, before Lord Mansfield cleared the overgrown vines and gleaned the new foundation of English commercial law out of the thicket. This primed the system of trade and finance so that when new forms of group organization and labour techniques emerged, the financial instruments and funding networks necessary for the gradual change from mercantile to industrial capitalism were in place.

II. Choice of Law

In order to mirror changes in legal doctrine against trends of economic development, the investigation must concern an area of the law that connects the two. Therefore, before launching into discussion of eighteenth-century case law, it is perhaps prudent to explain why promissory notes so well

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14 In broadening the analytical horizons of mercantile, financial and economic regulation, the content of the common law is an important and understudied aspect; see Ron Harris, ‘Government and the Economy, 1688-1850’, in Roderick Floud and Paul Johnson, eds., The Cambridge Economic History of Modern Britain, vol. 1: Industrialisation 1700-1860, Cambridge, 2004, 204, 210-211.
15 P.G.M. Dickson’s The Financial Revolution in England, London, 1967, almost perfectly coincides with the doctrinal period in question in this article, starting with the revolution of 1688 and ending with the beginning of the Seven Years’ War in 1756.
16 Ron Harris, Industrialising English Law, Cambridge, 2000.
17 Figure 1 in N. F. R. Crafts and C. K. Harley, ‘Output Growth and the British Industrial Revolution: A Restatement of the Crafts-Harley View’, 45(4) Economic History Review (1992), 703, 712.
exemplify English law’s difficult relationship with commerce at the time. There are essentially three reasons for this: (1) promissory notes held an important position in the merchant community and the so-called Lex Mercatoria; (2) the recognition of these notes had been the subject of great legal controversy in the last decade of the previous century, with louder and louder calls from the merchant community to recognize them that eventually led to a statute having to be passed to this end; and (3) their recognition as a source of obligation (instead of just evidence of a contract) was in deep structural conflict with the common law, and this conflict was exacerbated by the forced adoption of them by statute. Aside from these reasons exemplifying the internal conflict between law and commerce, a fourth reason may be added that promissory notes also played a key role in the major events of economic history of the early to mid-1700s.

Starting with the first reason, it has been pointed out by numerous scholars that bills of exchange and other mercantile documents were perhaps the most important substantive content of the so-called ‘law merchant’. Emily Kadens has argued that ‘law merchant’ was a procedural category and not substantive law, with the exception of bills and notes. Similarly, she has also argued that ‘based on the content of his book, Consuetudo vel lex mercatoria, by law merchant Malynes meant rules concerning weights and measures and the exchange of money, monetary instruments (particularly letters of credit and bills of exchange), (...) (emphasis added)’. The ‘quintessential category of the law merchant’ is bills of exchange, exemplifying the image of ‘universal, merchant-created rules’ that ‘no other aspect of the historical commercial law seems to fit better’. The crisis period in English commercial law in terms of numbers of cases, practitioners and doctrinal coherence starting at the beginning of the eighteenth century coincides with the statutory recognition of promissory notes on the same footing as bills of exchange. Promissory notes and their difficult relationship with the common law’s processes thereby exemplify the uneasy incorporation of merchant custom into the common law during a period of extreme tension between the mercantile community and lawyers.

This leads to the second reason for choosing promissory notes, namely that such notes represent commercial practice that the merchant community had been calling to be recognized in law. It had long been complained by well-known London merchants that English law had simply not kept pace with

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18Here Kadens’ argument is in line with Mary E. Basile et al., Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and Its Afterlife, Cambridge, MA, 1998, 24, 27; and John H. Baker, ‘Law Merchant and the Common Law Before 1700’, 38(2) Cambridge Law Journal (1979), 295, 300-301.
19Emily Kadens, ‘The Medieval Law Merchant: The Tyranny of a Construct’, 7(2) Journal of Legal Analysis (2015), 251, 270-271.
20Emily Kadens, ‘Myth of the Customary Law Merchant’, 90(5) Texas Law Review (2012), 1153, 1172.
21Kadens, ‘Myth of the Customary Law Merchant’, 1174.
22Ibid.
233 & 4 Ann., c. 9.
commercial practice when it came to negotiable instruments. Bills of exchange had been recognized, but promissory notes met with stiff resistance, which the commercial community regarded as a major disadvantage to English trade. Sir Josiah Child had already produced a pamphlet arguing for their adoption in 1668. While this has been interpreted to refer to bills of exchange, given the wording of the pamphlet it seems more likely that the ‘transference of bills for debts’ refers to promissory notes rather than full-fledged exchange transactions. In the cases leading up to their statutory recognition, there is evidence of a developing commercial practice of promissory notes being used by the commercial community, even though their similarity with common law contracts did not allow them to be easily recognized without seriously threatening the integrity of existing law. Eventually, Parliament stepped in and legislated to bring promissory notes on the same footing as bills of exchange.

Thirdly, the commercial practice of using promissory notes as circulating currency exemplifies the structural conflict with common law, as such notes are a close resemblance to contracts with the exception of the requirement of consideration. A promissory note is, ultimately, a written promise to pay a certain amount to a certain person or to whoever has possession of the note, and if such notes are enforceable without any additional requirements the common law of contracts would look very different indeed. Lord Holt, the judge who is usually taken as the personification of this resistance, therefore may have thought that rather than extending the form of pleading on the custom of merchants to promissory note cases, legislation creating negotiability for promissory notes was a more justifiable solution. This is because of the long-established view at the time that ‘the common law (…) is the mother of mercantile law’ and the latter could therefore not contradict the former.

24 See e.g. Clerke v Martin (1702) 2 Ld Raym. 757; Buller v Crips (1703) 6 Mod. 29.
25 Josiah Child Brief Observations Concerning Trade and Interest of Money, London, 1668. The aim of this pamphlet was directly concerned with policymaking; see William Letwin, The Origins of Scientific Economics, London, 2003, 5 (first published in 1963).
26 Letwin, The Origins of Scientific Economics, 7.
27 On the difference between these, see Rogers, The Early History of Bills chs. 5 and 8.
28 Buller v Crips (1703) 6 Mod. 29. 30.
29 Potter v Pearson (1703) 2 Ld Raym. 759.
30 & 4 Ann., c. 9.
31 The same is not true of bills of exchange to the same extent; see Warren Swain, ‘Lawyers, Merchants and the Law of Contract in the Long Eighteenth Century’ in Matthew Dyson and David Ibbetson, eds., Law and Legal Process: Substantive Law and Procedure in English Legal History, Cambridge, 2013, 186, 196-197.
32 For a collection of such views, see Holden, The History of Negotiable Instruments, 80-81.
33 This was the only issue in the cases; see Rogers, The Early History of Bills, 180.
34 Coquillette, The Civilian Writers, 279; see also Daniel R. Coquillette, ‘Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law’, 67 Boston University Law Review (1987), 877, 908.
35 Basile et al., Lex Mercatoria, 27; ch. 9. The origin of the treatise being quoted from is from as early as the late thirteenth century; see ibid., p. 5.
36 Swain, ‘Lawyers, Merchants’, 194.
However, the statute only recognized the legal validity of promissory notes, and did not resolve the structural tension between them and the general law of contract.\(^{37}\) This abrupt change of the law without clear conceptual boundaries created confusion amongst the courts.\(^{38}\) In a sense, therefore, the law of promissory notes between 1704 and 1765 represents a period that the merchant community should have been wary of wishing for and that common lawyers could have predicted.

Taking these aspects together, it is therefore evident that promissory notes represent the ideal test case for an analysis of the relationship between legal doctrine, the legal community’s interest in developing that doctrine to commercially-friendly forms, and the pressures of commercial needs. Promissory notes were a crucial aspect of mercantile practice, their recognition was an important policy goal of the commercial community, and their structure was in inherent conflict with the common law. Promissory notes and the free transferability of obligations on paper played a key role also in the period following the South Sea bubble and the consequent shortage of money supply, which also led to their widespread adoption in society at large.

### III. Doctrinal Development

Prior to the Statute of Anne of 1705,\(^{39}\) the common law position of promissory notes was precarious. Bills of exchange came to be pleaded under the ‘custom of merchants’,\(^{40}\) meaning they could circumvent the need for seal and delivery (required for a formal contract under a deed) and consideration (required for informal contracts) and still be enforced under the action of assumpsit. However, the approach to promissory notes was very different. The written form of a promissory note is very similar to an informal contract without a seal, and if they could be pleaded in assumpsit by simply adducing evidence of the custom of merchants that such notes were enforced and negotiable, it would have ‘turn[ed] a piece of paper, which is in law but evidence of a parol contract, into a specialty’.\(^{41}\) In other words, there was a danger that the English law of contract would have been subsumed into promissory notes, of which there was no prior precedent that could help guide

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\(^{37}\)Ibid., 197.

\(^{38}\)Rogers, The Early History of Bills, 185-186; Dylag, ‘The Negotiability of Promissory Notes’, 166.

\(^{39}\)The year for this statute is commonly given as 1704, even though the third and fourth regnal years of Queen Anne were from 8 March 1704–7 March 1705; and 8 March 1705–7 March 1706, respectively; see Sweet & Maxwell’s Guide to Law Reports and Statutes, 4th ed, London, 1962, 30. We also know that the bill known as ‘An Act for giving like Remedy upon Promissory Notes as is now used upon Bills of Exchange, and for the better Payment of Inland Bills of Exchange’ was still being debated and amended in 1705; see, for example, ‘House of Lords Journal Volume 17: 8 February 1705’, in Journal of the House of Lords: Vol. 17, 1701-1705, London, 1767-1830, 651-653. British History Online http://www.british-history.ac.uk/lords-jrnl/vol17/pp651-653 (Accessed 21 Nov. 2020).

\(^{40}\)See Rogers, The Early History of Bills, 127–130 for a discussion of the development of these pleadings.

\(^{41}\)Buller v Crips (1703) 6 Mod. 29, 29. See also Clerke v Martin (1702) 2 Ld Raym. 757.
their application. It was also not sufficient to argue that they were in fact bills of exchange, as the courts took ‘care that by such a drift the law of England be not changed by making all notes bills of exchange’.\(^{42}\)

Given that both instruments appeared to have been in use at the time,\(^ {43}\) and that both can be used as a method of payment by transfer of debt, this willingness to enforce the negotiability of bills of exchange under the custom of merchants on the basis of commercial needs,\(^ {44}\) while denying such enforceability to promissory notes for the same reason might seem odd or irrational.\(^ {45}\) However, given that an exchange transaction and the bill used to conduct it is much more specific than a simple promise to pay, this reluctance to admit promissory notes under the custom of merchants (which means they are accepted as the origin of an obligation to pay without further evidence of a contract) is not as striking as it might seem.

In the case of a bill of exchange, Merchant A in London’s Lombard Street needs to move money to Merchant B in Lombardia, Italy. This could be because B is A’s agent in Lombardia, or because A has bought something from B, or any other of a multitude of reasons. To effect this transaction, Merchant A goes to a specialist middleman, Banker A, and gives money to him in order to transfer to Merchant B. Banker A draws up a bill (becoming the ‘drawer’ of the bill), whereby he directs Banker B, his representative (the ‘drawee’) who holds money for the drawer in Lombardia, to pay the amount to Merchant B ‘or order’. The bill is delivered to Merchant B, (the ‘payee’), who presents it to the drawee, and the drawee pays the money. Instead of taking out the money from the drawee, the payee could also use the bill to pay a creditor by ‘endorsing’ the bill to that creditor. The creditor-endorsee can then present the bill to the drawee, who (in the normal course of business) accepts it and pays the money.

A promissory note is much simpler. Merchant A, on her way to the market, goes to see Goldsmith G in Lombard Street. Merchant A does not want to carry all her cash, ten pounds, with her for fear of being robbed at the market or simply because ten pounds of sterling silver is much heavier to carry than a piece of paper. So she deposits the silver with the Goldsmith G who has space in his vault, and in return G writes up a note which says ‘I promise to pay Merchant A, or bearer, the sum of £10 sterling’.

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\(^{42}\)Carter v Palmer (1700) 12 Mod. 380, 380.

\(^{43}\)See, e.g. Buller v Crips (1703) 6 Mod. 29.

\(^{44}\)Anon. (1691) Holt 296, 297.

\(^{45}\)There are certainly views that this was the case: see Zephaniah Swift, A Digest of the Law of Evidence, in Civil and Criminal Cases: And a Treatise on Bills of Exchange and Promissory Notes, Hartford, 1810, 339; Nathaniel Chipman, Reports and Dissertations, Rutland, 1793, part II, 195; Cranch, ‘Promissory Notes’, 92; Holdsworth History of English Law, vol. 8, 176; Frederick K. Beutel ‘The Development of Negotiable Instruments in Early English Law’, 51(5) Harvard Law Review (1938), 813, 840; Cecil H. S. Fifoot, ‘The Development of the Law of Negotiable Instruments and of the Law of Trusts’, 54 Journal of the Institute of Bankers (1938), 433, 442.
Eventually, this practice of depositing currency or precious metals started to fade out, and promissory notes began to be issued between individuals without deposit requirements. Without anything more, the promissory note looks remarkably like a contract, with the exception of a counter-promise or ‘consideration’ written on the note,\textsuperscript{46} which is what ultimately makes a contract without a seal enforceable in common law. On her way to the market, Merchant A could also come across a creditor, and give him the note in payment. It is this last step, the practice of endorsing bills or transferring notes that makes the two instruments look similar, and this convenience is probably why the merchant community was so eager to have both recognized in law.\textsuperscript{47}

The Statute of Anne brought ‘notes in writing … made and signed by any person … [who] promise[s] to pay to any other person … or their order, or unto bearer, any sum of money mentioned in such a note’ within the ‘custom of merchants’, meaning they ‘shall be assignable or endorseable over, in the same manner as inland bills of exchange’.\textsuperscript{48} While this statute made obligations under promissory notes enforceable in a common law court, it did not resolve the structural tension with informal contracts under the doctrine of consideration.

The resulting doctrinal landscape can only be described as chaotic. Consideration, and with it informal contracts under assumpsit, were under severe threat, and the courts were scrambling to find defensible ways to differentiate between contracts and promissory notes. Furthermore, as the statute put bills and notes on the same footing, the resulting instability began to affect not just the law on promissory notes but also the well-established bills of exchange.

As early as 1709, Holt CJ started the process of developing defensible categorization to rescue consideration from the jaws of the Statute of Anne. In Garnet \textit{v} Clarke,\textsuperscript{49} an action of assumpsit was brought upon a promissory note whereby the defendant promised to pay ‘upon account of his mother’. The objection in the case was that there was ‘no consideration to it’. Holt CJ held that the note was not within the meaning of the Statute of Anne, because ‘the consideration implied in the statute is, that when the party promises upon his own account, it must be presumed he is indebted

\begin{itemize}
\item \textsuperscript{46}For this sense of ‘consideration’, see the classic \textit{Lampleigh \textit{v} Brathwait} (1615) Hob. 105, 106. It was common practice to write ‘for value received’ on the note, but this was known to be a fiction by the judiciary (see \textit{Smith \textit{v} Boheme} (1712) Gilb. 93).
\item \textsuperscript{47}A similar but more detailed explanation of bills of exchange and promissory notes (and their respective differences) as well as relevant historical sources can be found in James Oldham \textit{The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century}, vol. 1, Chapel Hill and London, 1992, 596-598.
\item \textsuperscript{48}3 \& 4 Ann., c. 9. ‘Inland’ bills of exchange were simply bills that were used internally to England.
\item \textsuperscript{49}\textit{Garnet \textit{v} Clarke} (1709) 11 Mod. 226.
\end{itemize}
… [this is not so] where the promise is to pay upon account of a third person’. 50

There are several important points in this short report. Firstly, Holt CJ accepted the argument that there was no consideration for the note, meaning such an argument was still within the structure of the common law and the note is mere evidence of a contract. Secondly, an underlying assumption of this argument is that the effect of the Statute of Anne was only to create the presumption of consideration for (valid) promissory notes, meaning contract law and the doctrine of consideration were left intact (albeit statutorily altered in certain cases). Thirdly, it would appear that notes which are contingent on third party actions are not within the statute, probably because a promise to do something only if some independent third party does something first is not a certain promise to do anything, and therefore does not constitute consideration.

These points were further developed in Smith v Boheme in 1712. 51 Counsel for the plaintiff in error (the defendant in the original case) argued that the note in question (which promised payment of £71 12s. 10d. or to surrender the body of the defendant’s son to debtors’ prison52) was ‘surety for a debt only upon a contingency [and therefore] was not within the statute’. 53 The defendant’s counsel argued that the ‘intent of the act was only to make the note in nature of a specialty, and serve instead of an express consideration’ (emphasis added). If the note is outside the statute, argued the defendant, the mention in the note that the payment was ‘for value received’ was sufficient consideration. Chief Justice Parker stated that ‘it is not laid that he made such a note for value received, which is only a recital of the words of the note…’. Parker CJ also doubted whether ‘the chargeableness by force of the statute is made the consideration’, to which Eyre J stated ‘[t]he statute intended only to make notes for money negotiable for the ease of merchants; suppose a declaration were on indebitatus assumpsit generally [for work and labour done], I question whether it would be good’. 54

There is no clear judgment recorded on the case report (which itself may be telling), but it is clear already that the courts were struggling with fitting consideration and promissory notes together. The conceptual space the court’s analysis retreats to is whether the promise recorded on the note is contingent or not, which has the potential of successfully distinguishing

50Ibid.
51Smith v Boheme (1712) 3 Ld Raym. 63. While the report in Gilb. Cas. 93 gives no year for the decision, 1712 is the probable year of the appeal to the Queen’s Bench, as the original case was brought to the Common Pleas at the end of the tenth regnal year of Queen Anne, and the writ of error sent on 4 June in the eleventh year of Queen Anne (1712) asking for speedy justice; see 3 Ld Raym. 63-65.
52See pleadings in 3 Ld Raym. 67.
53Smith v Boheme (1712), Gilb. Cas. 93.
54Ibid., 95.
promissory notes and informal contracts without destroying the doctrine of consideration.

However, this led to a great deal of doctrinal confusion in its own right. Arguments about the contingency of a note can easily be turned into an inquiry into the creditworthiness of the issuer, or exactly how contingent the payment is. In *Andrews v Franklin* (1716), described only as ‘case upon a promissory note to pay within two months after such a ship is paid off’, the court upheld the clearly contingent note because ‘paying off the ship is a thing of a publick nature, and this is negotiable as a promissory note’. This uncertainty far outlived the conflict of consideration and promissory notes, only receiving decisive answer in the Bills of Exchange Act in 1882. Furthermore, the contingency point also started to affect the law of bills of exchange almost immediately in a highly destabilizing way, as the promissory note cases were beginning to be used as analogies to argue for specific kinds of contingencies.

Returning to the deep structural issue of consideration, the next case exemplifying the confusion is *Brown v Marsh* in 1721 in the Court of Chancery. The defendant had given a note as payment for a share in the Assiento Brass and Copper Mines, an enterprise that had no real existence and was ‘a meer (sic) bubble’. The plaintiff was ‘the Original Undertaker’ of the scheme, who was evidently trying to enforce the note against the defendant. The defendant brought a motion before Lord Chancellor King for an injunction. The key issue was whether evidence of what would now be called total failure of consideration could be given in court to prevent the otherwise valid note from being enforced against the ‘innocent’ defendant.

The case was subject to fierce debate by the judges. Two of the four puisne judges argued that ‘since the Statute made it payable by Virtue of the Note, that the Consideration of the Note was not inquirable, no more than the Consideration of a Bond’. The other two puisne judges argued that notes and bonds were distinguished by the

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55 *Andrews v Franklin* (1716) 1 Stra. 24.
56 Ibid.
57 Ibid. It is unclear what this line means, but it is here interpreted to mean either that the ship was to be paid off from the public purse using tax revenue, or that the ship purchasing venture had so many partners that it would be bound to be paid off.
58 See, e.g., *Josceline v Lassere* (1713) Fort. 281, decided by Parker CJ, requiring that a bill of exchange is unconditional and for a certain sum. This basic proposition came under severe doubt in *Jenney v Herle* (1724) 2 Ld Raym. 1361, where the court reinterpreted *Josceline* to refer to a situation that where the money is paid out of a particular fund. *Smith v Boheme* was actually cited and briefly explained in *Jenney v Herle*. These cases are the origin of centuries of difficult distinctions between contingent notes and notes paid out of particular funds that was only (somewhat) resolved in the Bills of Exchange Act 1882.
59 *Brown v Marsh* (1721) Gilb. 154, 154.
60 Ibid., 154 and 155.
61 Ibid., 154.
Solemnities of contracting, *viz.* the Sealing and Delivery, if there was no Consideration... but the Note was no more than a Simple Contract, and... [the Statute] only makes the Note itself Evidence of the Consideration... Yet it is not conclusive Evidence, but turns the Proof upon the Defendant to show that there was no Consideration given for such a Note...⁶²

Lord Chancellor King agreed with the latter two. In reaching this conclusion, the judges in the case dragged out of retirement the cases of *Clerke v Martin*,⁶³ *Potter v Pearson*,⁶⁴ and *Pearson v Garrett*,⁶⁵ all essentially holding that promissory notes were not within the custom of merchants and *therefore* required consideration as simple contracts – the very position the Statute of Anne was aimed at changing. The court also cited *Hodges v Stewart* from 1691,⁶⁶ a case holding among other things that ‘to order’ creates a valid bill but ‘to bearer’ does not, and that an indebitatus assumpsit does not lie on a bill of exchange without consideration, highlighting a problem of wording that would later have to be resolved by Lord Mansfield.

The reason why assumpsit did not lie without consideration was, of course, that bills were pleaded on the custom of merchant, not as a normal contract. The whole point of this form of pleading was that the consideration or lack thereof for the bill of exchange was not questionable in court, only the existence of the custom itself. The fact that consideration of a bill could not be questioned because it ‘would tend to destroy trade which is carried on every where by bills of exchange’ had already been decided in 1697.⁶⁷ By drawing these cases into debate, the Court of Chancery brought bills of exchange into the already chaotic conflict of consideration and promissory notes.

*Brown v Marsh* realized the worst fears of Lord Holt. On the one hand, if consideration of a promissory note cannot be inquired into, such notes (in form almost identical to contracts) are nothing short of bonds but without the necessary formality requirements. On the other, if consideration can be inquired into, the notes are not really negotiable as it is always open to the issuer of the note to dispute that they gave the note away in exchange for something valuable.

This case and the doctrinal line it represents appear to have been completely abandoned by the judicial community. There does not appear to be so much as a single reference to the decision in subsequent cases, let alone an explanation or resolution of its central conflict. What appears to have

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⁶²Ibid., 154-155.
⁶³*Clerke v Martin* (1702) 2 Ld Raym. 757.
⁶⁴*Potter v Pearson* (1703) 2 Ld Raym. 759.
⁶⁵*Pearson v Garrett* (1693) 4 Mod. 242.
⁶⁶*Hodges v Stewart* (1691) 1 Salk. 125.
⁶⁷Anon. (1697) 1 Comyns 43.
happened instead is that courts began to emphasize the conditionality of notes and bills, even revisiting cases like *Pearson v Garrett*.  
What is striking is how few cases there are altogether on this issue in the following decades. The bill of exchange case of *Jenney v Herle* was decided in 1724, but rather than clarifying the contingency point it added more confusion by distinguishing payment out of a particular fund and payment in the event of contingencies by radically reinterpreting *Josceline v Lassere* (1713). The promissory note case of *Smith v Boheme* (1712) was also interpreted to be about contingencies, even though the arguments were explicitly about consideration and its presence or absence in such cases.  
The only case that includes some discussion of the relevant issue is *Morris v Lee* in 1725, where the court resolved whether a promise to ‘be accountable’ to the plaintiff or order could constitute a promissory note. In holding that no specific wording was necessary, the courts noted that a promise to account does not entail a debt until a breach of trust has occurred. However, the defendant was clearly indebted, as the note had been ‘for value received’ – in other words, there had been consideration for the note and the note is evidence of a debt, though the court does not go as far as to say the word. The next major case, after almost two decades of silence on an issue that demanded resolution, retreated from making a judgment on this point.  
In *Barnesly v Baldwn* (1741) a negotiable note was once again made contingent on marriage. This time, however, the defendant had been given a gold watch in consideration for his promise. Confronted with arguments on inconsistent cases such as *Andrews v Franklin* (where a promissory note contingent on a ship being paid off was valid) and *Jocelyn v Lassere* (where a bill of exchange was not valid because its payment depended on a contingency), Lee CJ first noted that the law on bills and notes must be the same on this issue after the Statute of Anne. He also noted that ‘the plaintiff has another remedy upon a note of this sort than by declaring upon the statute; but then he must prove a valuable consideration, which he need not do upon the statute’ (emphasis added). However, instead of relying on these musings, the Lee CJ actually decided the case by saying it was not a valid note because the underlying transaction was not ‘trading’, and thereby could not be within the custom of merchants. Since the purpose of the statute was ‘the encouragement of trade (...) therefore notes respecting trade only are within it’.  

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68The lack of contemporaneous consideration was precisely the issue in such contingent notes; see *Pearson v Garrett* (1693) 4 Mod. 242, 244.  
69*Morris v Lee* (1725) 2 Ld Raym. 1396. The most accurate report appears to be *Morice v Lee* (1725) 8 Mod. 362 (giving the date of hearing as Easter term 11 Geo. I).  
70*Barnesly v Baldwn* (1741) 7 Mod. 415.  
71Ibid., 418.  
72Ibid.  
73Ibid., 419.
By now, in the effort to avoid the looming decision that would either destroy consideration (and with it all contracts not under a seal) or promissory notes, the judicial development of bills and notes had become chaotic. The law after Barnesly v Baldwyn appeared to be that a bill or note is only enforceable as between merchants but also clearly in other contexts, that it could not be conditional unless the contingency it referred to was either very remote or concerned the paying off of a ship, that it could not be from a particular fund (which was possibly the same thing as contingencies), that it had to refer to payment to the payee or ‘to order’, but not ‘to bearer’, and that consideration was either implied by the statute and could be questioned by contrary evidence, or it could not. It took three major decisions to clear this up (at least to an acceptable level of certainty): Edie v East India Company (1761), Grant v Vaughan (1764), and Pillans v Van Mierop (1765).

In Edie, an originally negotiable bill was endorsed without including the words ‘to order’. Initially at trial, Lord Mansfield allowed evidence of a merchant custom to be adduced that this restricted the negotiability of the bill. At a motion for retrial, his Lordship (together with the other judges) agreed that he should not have done so, as the common law was settled and ‘no particular usage shall be admitted to weigh against it; this would send everything to sea again’.

In Grant, a bill was made payable to the ship ‘Fortune’, or bearer. Again, Lord Mansfield tried the case before a special jury of merchants, and left it to them as to whether ‘such draughts, payable to bearer, were usually negotiated from hand to hand’. Upon a retrial, Lord Mansfield again stated that ‘I ought not to have left it on the footing of the usage, it being a question of law only, whether such bills are or are not negotiable: and this question, perhaps, the jury understood to be left to them …’. In other words, according to Lord Mansfield, ‘to bearer’ unquestionably denoted a negotiable instrument.

Finally, in Pillans v Van Mierop the question of consideration for commercial instruments finally came to be tested with far-reaching consequences. White, a merchant in Ireland, wished to transfer money to Clifford. White asked the plaintiffs, merchants at Rotterdam, to draw up a bill of exchange for £800 (payable to Clifford). White offered to reimburse the plaintiffs by giving them credit with the defendants. The plaintiffs paid the money to Clifford, and then wrote to the defendants to ask whether they would accept the £800 bill upon credit of White. The defendants

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74Edie v East India Company (1761) 2 Burr. 1216; 1 Black. W 295.
751 Black. W 295, 298.
76Grant v Vaughan (1764) 1 Black. W 485.
77Ibid., 487.
78Pillans v Van Mierop (1765) 3 Burr. 1663.
promised to honour the bill, but White became bankrupt before the bills were enforced. The defendant refused to pay, and the plaintiff sued.

The defendants argued (at a motion for a retrial instigated by the Attorney-General) that the letter whereby they agreed to honour the plaintiff’s bills was *nudum pactum*, meaning there was no consideration. This is because the letter they wrote was only a promise to honour the bill, and a ‘bill cannot be accepted before it is drawn’. Lord Mansfield broadened this to an issue of consideration in general, and asked counsel whether ‘any case could be found, where the undertaking holden to be a *nudum pactum* was in writing’, to which counsel replied that ‘it was anciently doubted “whether a written acceptance of a bill of exchange was binding, for want of consideration”’. Lord Mansfield, after first noting that ‘[t]his is a matter of great consequence to trade and commerce, in every light’, argued that this is a question of law, and as the ‘law merchant’ is the same thing as the common law, no evidence of merchant custom can be admitted. He then stated that ‘nudum pactum does not exist, in the usage and law of merchants’ and that ‘the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds etc. there was no objection to the want of consideration. … In commercial cases amongst merchants, the want of consideration is not an objection’. Wilmot J argued that *nudum pactum* comes from civil law, citing Vinnius to argue that the function of consideration was simply to put ‘people upon attention and reflection’, Grotius and Pufendorf to argue that this was a general principle of justice (which would make it part of the common law), and Bracton to show that the same principle has been brought to English law. The fact that the promise was in writing in this case therefore meant that it did not require consideration.

Yates J instead argued that ‘the acceptance of a bill of exchange is an obligation to pay it: the end of their institution, their currency, requires that it should be so’. As, according to Yates J, a promise to accept was the same as acceptance, the defendants, by the custom of merchants, became liable. Finally, Aston J argued that the consideration of a bill can only be given in evidence in cases of ‘turpitude or illegality’.

Although these judgments differ from each other, they each have the potential to completely change the law of contracts in English common

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79Ibid., 1668.
80Ibid., 1669.
81Ibid.
82Ibid.
83Pillans v Van Mierop (1765) 3 Burr. 1663, 1670-71.
84Ibid., 1674.
85Ibid.
86Ibid. 1675.
law. The issue of consideration and its specific meaning has still not been resolved, but for the purposes of this article its complete denial in the law of bills and notes at least stabilized those instruments to the extent that the rest could be ironed out in the courts, resolving the deadlock of complete uncertainty that had prevented cases from coming to court for resolution previously. After Pillans, as far as consideration and mercantile cases were concerned, the merchants could rely on circulating notes as creating enforceable obligations without costly inquiries in court about the circumstances of their first issue.

After these three cases the position was that (1) bearer notes were negotiable; (2) the Statute of Anne created a presumption of consideration that could only be inquired into in very exceptional cases (such as gambling contracts), (3) *nudum pactum* did not apply to mercantile law, and (4) evidence of conflicting merchant custom could not be adduced where the law was settled, or possibly at all. It is important to recognize that these are all novel propositions. *Grant v Vaughan*, in deciding that bearer notes were negotiable, went against a wealth of authority; the presumption of consideration had been highly contested in previous cases; *nudum pactum* was part of the common law and mercantile law could not contradict it (as well as the fact that failure of consideration had been argued in numerous mercantile cases); and admitting merchant custom where the common law was already settled was precisely how bills of exchange came to be enforced through assumpsit in the first place. It is sometimes said that Lord Holt ‘wholly ignore[d] approved mercantile custom’, and that Lord Mansfield was the founder of English commercial law, but in actual fact it would appear to be the opposite – it was Lord Holt who put in place the key tenets of negotiability according to the custom of merchants, and Lord Mansfield who argued for ignoring such custom.

Lord Mansfield’s methods were drastic departures from existing doctrine and even the common law method. It is curious, therefore, that he is regarded as English commercial law’s founding father. However, looking at these decisions and their methodological departure from the normal common law process in the broader context of eighteenth-century economic history, a new perspective emerges on these apparent narrowly doctrinal developments.

### IV. Economic Context

The early eighteenth century was an economically turbulent time. The revolution of 1688 was precarious and a Jacobite restoration was a real possibility.

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87 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.
88 See Dylag, *The Negotiability of Promissory Notes*, 169-171.
89 Holdsworth, *History of English Law*, vol. 8, 176.
90 *Lickbarrow v Mason* (1787) 2 TR 63, 73.
The revolution had been followed by the Nine Years’ War and the War of Spanish Succession that put English public finance under severe strain. From an English standpoint, this finally culminated in the Treaty of Utrecht in 1713 that guaranteed the revolution settlement and by which France agreed to withdraw support from the Jacobites (in exile since 1688).

With the political order now more secure, the government in England was keen to restructure the heavy debts it had incurred to prosecute these wars. In 1719, the French public debt was converted into stock in the Company of the West (known as the Mississippi Company) according to the economist John Law’s designs. The influence of Law’s system in France was of paramount importance in the South Sea bubble, as capital started to flow through the exchange networks between the two countries. The move was mimicked by the South Sea Company in England, which offered its own equity in exchange for public debt. After a counter-proposal and bidding war between the South Sea Company and the Bank of England, the South Sea Company won the right to exchange all outstanding government long annuities, short annuities and redeemable debts for its own shares. The scheme did not set a nominal share price, which meant that the higher the share price went, the more debt a single share would ‘buy’. Following a number of moves designed to inflate the share price, it shot up from £130 in February 1720 to £1050 (forward price including dividend) in June, and back to £170 by mid-October in what has since been called the South Sea bubble.

The bubble had been fuelled by promissory notes, which if issued by a bank without taking a deposit of the corresponding asset can be converted to a credit instrument, and collapsed when the Bank of England demanded the promissory notes of the Sword Blade Company to be redeemed in specie or in Bank of England notes. The Sword Blade Company, initially a company that literally made sword blades, had become the private bank of the South Sea Company through its issuing of promissory notes, until its collapse in September 1720 when ‘everything was in such confusion, as to the
pecuniaries in Change Alley\textsuperscript{102} and South Sea …. [T]he directors are curst, the
top adventurers broke, four goldsmiths walked off, Walpole and Town-
shend\textsuperscript{103} sent for … and every man with a face as long as a Godolphin’s.\textsuperscript{104}

Interestingly from the point of view of this article, on a national level the
South Sea crash was mostly a crisis in money supply. Land sales and
prices,\textsuperscript{105} trade,\textsuperscript{106} and the number of bankruptcies remained mostly
unaffected.\textsuperscript{107} The effects were much more significant in the personal for-
tunes of the Commons and Lords, where three-quarters of members held
South Sea stock,\textsuperscript{108} going some way to explain the political will to tackle
the South Sea disaster and the publicity the matter attracted. From the
point of view of long-term economic developments, the overall impact
may in fact have been positive, as the subsequent South Sea Annuities
were the first perpetual government debt annuities issued to individuals.\textsuperscript{109}
This innovation in government financial instruments would go on to
‘[prove] its worth in each war for the next two centuries’.\textsuperscript{110} The role of
transferable public debt and its liquidity backing in this period generally
play an important part in the development of financial capitalism,\textsuperscript{111}
although from the legal doctrinal standpoint, the common law’s inherent
emphasis on individual parties tended to make individual claims primary.\textsuperscript{112}

In terms of actual society-wide effects, however, the panic was particularly
felt in exchange transactions. The bubbles affecting France, England, the
Netherlands and Portugal in 1719–21 were all part of the same historical
process with clear linkages between the financial networks,\textsuperscript{113} and capital
and personnel flow from one market to another.\textsuperscript{114} In 1720, the Mississippi
Company had also failed in France, and insurance bubbles burst in Amster-
dam and Germany,\textsuperscript{115} which meant that the system of international
exchange networks was in crisis,\textsuperscript{116} and ‘ready money’ was in short supply.

\textsuperscript{102}Where many of the stockbrokers and bankers had their offices, including the Sword Blade Company
on Birchin Lane just adjacent.

\textsuperscript{103}Who would form the next government.

\textsuperscript{104}Matthew Prior to Lord Harley, 22 Sept. 1720, in Historical Manuscripts Commission \textit{Calendar of the
Manuscripts of the Marquis of Bath}, Hereford, 1908, vol. III, 489-490. ‘A Godolphin’ refers either to
the line of earls, or the horses they famously bred. See also L. G. Wickham Legg, \textit{Matthew Prior: A
Study of His Public Career and Correspondence}, Cambridge, 1921, 268.

\textsuperscript{105}At least after a quick boom and bust cycle, see Hoppit, ‘South Sea Myths’, 151 and the sources therein.

\textsuperscript{106}Ibid., 152 and the sources therein. See also J. D. Marshal, ed., \textit{The Autobiography of William Stout of
Lancaster: 1665–1752}, Manchester, 1967, 180; noting how the crash had not affected trading.

\textsuperscript{107}Hoppit, ‘South Sea Myths’, 153 and the sources therein.

\textsuperscript{108}Dickson, \textit{Financial Revolution}, 107-108.

\textsuperscript{109}Neal, \textit{Rise of Financial Capitalism}, 90.

\textsuperscript{110}Ibid., 117.

\textsuperscript{111}Christine Desan, \textit{Making Money}, Oxford, 2014, 290.

\textsuperscript{112}Ibid., 293-294.

\textsuperscript{113}Neal, \textit{The Rise of Financial Capitalism}, 63 et seq.

\textsuperscript{114}Ibid., 67–69 for the Paris – London example.

\textsuperscript{115}Hoppit, ‘South Sea Myths’, 157.

\textsuperscript{116}Eric S. Schubert, ‘Innovations, Debts, and Bubbles: International Integration of Financial Markets in
Europe, 1688-1720’, 48(2) \textit{Journal of Economic History} (1988), 299, 303.
In a time of a shortage of money, promissory notes are of key importance.\textsuperscript{117} In fact, it is well known that the use of bills and notes became so common that in the second half of the century it was said that ‘[t]here is scarce any person either gentleman, tradesman, or farmer, but what must, at some times, have occasion for bills of exchange’,\textsuperscript{118} a statement which again is likely to refer to transferring debts on paper rather than full exchange transactions. The same phenomenon is well documented in post-revolutionary America\textsuperscript{119} leading to bitter court battles about the recognition of promissory notes.\textsuperscript{120} When these events are read next to the doctrinal record explained above, a major point of interest emerges.

V. Combining Economic History and Doctrinal Records

The potentially devastating \textit{Brown v Marsh} (a case in fact dealing with a promissory note given in payment for shares in a company that was a ‘meer bubble’) was decided just after the South Sea bubble in 1721, followed by decades of unusual silence on the conceptual foundation of such notes. \textit{Jenney v Herle}, a bill of exchange case in 1724, sidestepped the central issue of consideration at the cost of introducing confusion in the contingency point, \textit{Morris v Lee} from 1725 inadvertently revealed that the issue had not yet been resolved, and the judges in \textit{Barnesly v Baldwyn} in 1741 refused meaningful discussion altogether. It seems reasonable to postulate that the severe disruption of exchange networks and shortage of money supply resulting from the 1720 crash meant that judges were not eager to rock the paper skiff the developing trade and financial system now found itself sailing in by overhauling the conceptual basis not just of promissory notes, but also bills of exchange which had been drawn in by analogy, and all contracts not under seal.

It also seems likely that cases were simply no longer being brought because of the chaotic unpredictability of the law. While it is true to say that where the law is secure and predictable, cases need not be brought to court (or at least all the way to trial), it should be borne in mind that where the law is totally unpredictable there are similar disincentives to

\begin{itemize}
  \item \textsuperscript{117}On the relationship between money and promissory notes, see J.S. Waterman, ‘Promissory Note as a Substitute for Money’, 14(4) Minnesota Law Review (1930), 313.
  \item \textsuperscript{118}George Crooke, \textit{The Merchant, Tradesman and Farmer’s Director}, London, 1778, iii.
  \item \textsuperscript{119}See Morton J. Horwitz, \textit{The Transformation of American Law}, Cambridge, MA, 1977, 215.
  \item \textsuperscript{120}This debate spread over many key commercial jurisdictions, including Massachusetts: \textit{Russell v Oakes}, Quincy 48 (1763); \textit{Tuttle v Willington}, Quincy 335 (1772); and Virginia and DC: \textit{Parker v Kennedy}, 1 Bay 403 (1795); \textit{Dunlop v Silver}, 1 DC (1 Cranch) 27 (1801); and even made it to the US Supreme Court several times: Mandeville and Jameson v Joseph Riddle and Co, 5 US 290 (1803); \textit{Swift v Tyson}, 41 US 1 (1842); \textit{Withers v Greene}, 50 US 213 (1849). Many leading American judges also wrote extrajudicially on the topic; see Chipman, \textit{Reports and Dissertations}, 195; William Cranch, ‘Appendix, Note A’ in \textit{Reports of Cases Argued and Adjudged in the Supreme Court of the United States}, Philadelphia, 1804, vol. 1, 367-461; reprinted with significant omissions as ‘Promissory Notes’; \textit{Swift, A Digest}.\end{itemize}
investing business assets on extremely uncertain outcomes. In such circumstances the disputes will still arise, but they will find new avenues for cost-effective resolution. There is evidence of this phenomenon in the period in question. There was a clear increase of commercial cases in Chancery, a dramatic fall in litigation in the Common Pleas and King’s Bench, as well as increasing practice and professionalization of commercial arbitration.

Where common law development becomes self-contradictory, one would expect equity courts to see a higher case load and practitioners to start to migrate to Chancery practice for a more secure income. This is precisely what happened, and clearly one of the underlying issues was the uncertainty attached to contracts and commercial instruments at the time. While allowing for extremely sparse data, it can reliably be said that the general case load for the Court of Chancery was relatively high in 1709/10 and 1734/35, before dropping significantly in 1759/60.\textsuperscript{121} It is also the case that the ‘sharpest proportional increase across [the two centuries from 1627 to 1818] was in business cases’,\textsuperscript{122} although of course this is a long enough time period to allow for the general development of English commerce. However, this also corresponded with a growth in membership of Lincoln’s Inn, uniquely among the four surviving Inns which were suffering the impacts of demographic changes in the period.\textsuperscript{123} Lincoln’s Inn is closely linked with Chancery practice, particularly around and immediately after the period of doctrinal confusion in the common law courts. By contrast, the dominant Inner and Middle Temple (as well as the by then less dominant Gray’s Inn) waned throughout the Georgian period.\textsuperscript{124} Lincoln’s Inn also had the highest number of transfers of practising barristers from other Inns in the relevant period, and boasted many of the leaders at the Bar from the 1720s onwards.\textsuperscript{125}

There is also anecdotal evidence of the reasons for the increased case load and exceptional growth rate of Chancery practitioners that supports the thesis in this article. One explanation is offered by Lord Hardwicke, in a letter to Lord Kames in 1759 commenting on matters that have necessitated ‘the increase of business in the Courts of equity’, who remarked that ‘[n]ew discoveries and inventions in commerce have given birth to new species of contracts; and these have been followed by new contrivances to break and elude them, for which the ancient simplicity of the common law had adapted no remedies’ (emphases added).\textsuperscript{126} It seems, therefore, that not

\textsuperscript{121}Henry Horwitz and Patrick Polden, ‘Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth Centuries?’, \textit{35(1) Journal of British Studies} (1996), 31.
\textsuperscript{122}Ibid., 35.
\textsuperscript{123}David Lemmings, \textit{Professors of the Law}, Oxford, 2000, 64.
\textsuperscript{124}Ibid.
\textsuperscript{125}Ibid.
\textsuperscript{126}P.C. Yorke, \textit{The Life and Correspondence of Philip Yorke, Earl of Hardwicke, Lord High Chancellor of Great Britain}, Cambridge, 1913, vol. II, 554-555.
only were lawyers aware of the problem, but that they had started to bring these cases into Chancery.

In this time there is also a notable fall in litigation at the Common Pleas and King’s Bench, and the numbers available for arbitration proceedings support the view that mercantile lawyers were looking for other avenues for dispute resolution to solve their clients’ legal problems. In the common law courts there was a devastating decrease in cases brought to advance stages starting in the 1690s, culminating in the 1720s and only starting to increase after the 1760s when the three key cases of Lord Mansfield were decided.127 Similarly, the legal profession itself went through a period of crisis, with the number of lawyers and the financial fortunes of the Inns of Court and Chancery in rapid decline in the 1720s.128 By contrast, the number of practitioners began to revive and ‘increase rapidly in the 1780s and 1790s’,129 after the period of confusion had been resolved in the 1760s.

Though the available data set is scarcer there also appears to be a corresponding increase in cases brought to arbitration in the relevant period. Data gathered by Oldham and Horwitz show a sharp increase in 1735 in rulings on arbitration cases made to the common law courts between the laws of 1715 and 1755.130 There is also a marked increase in the numbers in 1775 and 1785,131 but these are explicable by Lord Mansfield’s activism in encouraging arbitration and the general revival of cases coming before the courts.132 At the same time, the process began to be more formalized and the arbitrators were more likely to be legal professionals.133

This increase in arbitration is also reflected in the professional publications of the time. A lawyers’ practical guide on arbitration was published in 1731, with concrete advice on how to run arbitration proceedings.134 Commenting on this crisis period, Blackstone, writing in 1768, stated that ‘experience [has] shown the great use of these peaceable and domestic tribunals, especially in settling matters of account and other mercantile transactions, which are difficult and almost impossible to be adjudged on at trial at law’.135

127 Brooks, Lawyers, Litigation and English Society, 31, figure 3.3.
128 Ibid., 132; Lemmings, Gentlemen and Barristers, 42-43.
129 Brooks, Lawyers, Litigation and English Society, 136.
130 Horwitz and Oldham, ‘John Locke, Lord Mansfield and Arbitration’, 145.
131 Ibid., 147.
132 Ibid., 150. Oldham in Mansfield Manuscripts, 152 notes ‘over three hundred cases in Lord Mansfield’s trial notes that were referred to arbitration in lieu of a jury verdict’, although these were spread out over a long period of time. The Mansfield manuscripts are, of course, only a fraction of the original collection of notes Lord Mansfield kept, most of them being destroyed when a mob broke into his house during the Gordon Riots.
133 Horwitz and Oldham, ‘John Locke, Lord Mansfield and Arbitration’, 150.
134 Matthew Bacon, The Compleat Arbitrator, 3rd ed., London, 1770, originally published in 1731.
135 William Blackstone, Commentaries on the Laws of England, Oxford, 1768, 17.
All this is telling of a concern among merchants that common law courts could not effectively adjudicate their disputes. Furthermore, the fact that this deep doctrinal confusion coincided with a crisis of exchange networks and money supply meant that the stakes could simply have been too high for any more confusion to be introduced into the law. The needs of the merchant and finance communities had diverged from those of the legal profession, which was starting to fracture commercial legal practice and threaten the legal profession’s role as England’s primary dispute resolution community.

VI. Lord Mansfield’s Solutions

It is this broken trust that Lord Mansfield set out to repair, with a campaign of public judicial statements of the weight given by the King’s Bench to commercial concerns, coupled with a process of reform by any means necessary. There were essentially three parts to his approach: firstly, when in his early judicial career commercial custom could not fix the problem, as it had with Holt, he banned it from his court; secondly, he repeatedly signalled in open court that he was willing to depart from existing doctrine and decide cases on a proto-utilitarian basis according to the needs of the commercial community; and thirdly, he radically altered the common law method by openly attacking established doctrines, reinterpreting difficult cases and even wresting control of the fact-finding process from the jury when it suited him. The seemingly contradictory process of empowering himself to effect radical judicial interventionism in order to create commercial certainty in the law deserves theoretical elaboration.

In 1765, Blackstone started publishing his Commentaries, apparently intended for a readership that was far more general than one might appreciate in hindsight.136 In his third volume (published in 1768), he remarked that:

people are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated cases for contradictory. They bring us the examples of arbitrary governments … ; and unreasonably require the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people … .137

The complex feature of English law Blackstone was attempting to explain was that the common law, despite (or indeed because of) its central method, had a kind of stability that Blackstone specifically linked to liberal individuality and commercial practice. The common law is not left to the whims of a king or even the government of the day, but develops gradually and with long conceptual roots that confine decisions. This is the process at work in the cases

136 Paul Langford, A Polite and Commercial People: England 1727-1783, Oxford, 1992, 2.
137 Thomas P. Gallanis, ed., Blackstone’s Commentaries, originally published 1765, Oxford, 2016, Book 3, 215 (original page numbers 325-326).
decided by Lord Holt (e.g. Buller v Crips and Clerke v Martin) where he restricted the application of promissory notes because they would disrupt the conceptual landscape of contract law and bills of exchange.

What both the judicial and historical record show is that the abrupt and momentous change in this conceptual landscape through the Statute of Anne to include promissory notes without dealing with the underlying structural issue of the common law led to a period of immense confusion and severe destabilization in precisely the doctrines that were most important for trade and finance. This coincides with a dramatic drop in the number of cases and a corresponding stagnation in the development of the relevant doctrines. This is potentially a vicious cycle: the more confusing the doctrine is, the fewer cases come to court, which results in fewer opportunities to clear up the doctrine. Had this process continued, English commercial law could have dried up and withered away.

One of Lord Mansfield’s central tasks was, therefore, to signal to the commercial community that their needs would be taken into account by the court and thereby attract commercial cases. In this, he was following the example set by Lord Holt. From the early eighteenth century onwards, there was a growing prominence in the argument for commercial certainty or the needs of the commercial community in the courts.138 Already in 1698, Lord Chief Justice Holt had rejected an argument that a plaintiff seeking to rely on a bill of exchange, having adduced evidence of a notarized protest for non-payment, should ‘prove this instrument or at least give some account [of] how he came by it’, by stating that such practice ‘would destroy commerce and publick transactions of this nature’.139 He had similarly argued that consideration of a bill could not be questioned because it ‘would tend to destroy trade which is carried on every where by bills of exchange’ in 1697.140

Lord Mansfield took this argument to new heights, using ‘the purpose of commerce’ to justify transferability of bank notes,141 the avoidance of a ‘clog’ on the ‘convenience of commerce’ to justify putting foreign and inland bills on the same footing,142 and ‘making The Rules of Law and the Ground upon which they are established certain and notorious’ to justify case management decisions to bring a case that he had already decided in Assizes to the King’s Bench to be identically decided again.143 The same justification was, of course, present in his attempt to destroy the requirement of consideration

138See, e.g., Morice v Lee (1725) 8 Mod. 362, 363 (in arguments); Rawlinson v Stone (1746) 3 Wils. KB 1, 3 (in arguments) and 4 (judgment).
139Anon. (1698) Holt 296, 297.
140Anon. (1697) 1 Comyns 43.
141Miller v Race (1758) 1 Burr. 452, 459.
142Heylyn v Adamson (1758) 2 Burr. 669, 675.
143Luke v Lyde (1759) 2 Burr. 882, 887. If the central purpose of a common law judge is to decide the case between the parties, this is quite a radical step.
in *Pillans v Van Mierop*,\(^{144}\) and in his later career Lord Mansfield repeatedly stated that his explicit goal was ‘certainty [in all mercantile transactions]’,\(^{145}\) that ‘all questions of mercantile law be fully settled and ascertained’,\(^{146}\) and to ‘bring all questions upon mercantile transactions to a certainty. … when a case is made, the profession know the result, the merchants know the result’.\(^{147}\) His Lordship also repeatedly stated the proto-utilitarian argument\(^ {148}\) that such certainty was more important than ‘which way the decision is’,\(^{149}\) or ‘doing right’.\(^{150}\) For the highest-ranking common law judge in the land at that time, these are extraordinary admissions of departure from the common law process.

Astonishingly, in the decades that Lord Mansfield was the Chief Justice of the King’s Bench, the argument that a decision one way or another was good for the commercial community, as opposed to a solution to the dispute between the parties in court that was conceptually coherent with the principles developed in previous cases, was not only *valid*, but *preferred*. With this, Lord Mansfield was consciously signalling to the commercial community that the common law courts were open for business, and that he was going to clear up the law. This is the process by which Lord Mansfield was able to ignore or reinterpret central case law in the way shown above, because the ‘greater good of the commercial community’ was used as an overriding norm that could negate individual conceptual confines. Where Lord Holt had decided cases according to the overriding importance of legal coherence, Lord Mansfield decided cases according to the societal needs of stimulating trade and providing a stable legal platform for merchants and financiers, in order to turn the tide on the legal community’s losing of its monopoly over conceptual incoherence. Drastic times called for drastic measures.

The next step in ensuring the stability of the common law was to shut out conflicting normative content, in this case commercial custom. It seems clear from the triptych of Lord Mansfield’s cases above and the surprise he expressed at the merchant juries who reached unexpected conclusions that during the lull period in litigation, when commercial cases testing the conceptual boundaries of bills and notes were not being brought to the common law courts, mercantile practices would have developed further from when Lord Holt had last brought them to court in the early 1700s.

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\(^{144}\) *Pillans v Van Mierop* (1765) 3 Burr. 1663, 1669.
\(^{145}\) *Vallego v Wheeler* (1774) 1 Cowp. 143, 153.
\(^{146}\) *Buller v Harrison* (1777) 2 Cowp. 565, 567.
\(^{147}\) *Hankey v Jones* (1778) 2 Cowp. 745, 750.
\(^{148}\) This seems apt in more ways than one, as Jeremy Bentham would frequently sit in court to listen to the judgments of Lord Mansfield, whom he regarded as his great hero and inspiration: see Holdsworth, *History of English Law*, vol. 12, 554-555; quoting Bentham’s letters.
\(^{149}\) *Buller v Harrison* (1777) 2 Cowp. 565, 567.
\(^{150}\) *Hankey v Jones* (1778) 2 Cowp. 745, 750.
Certainly in the 1720s, there was still a system of merchant courts attached to fairs and markets. In 1724, Daniel Defoe described the enormous Stourbridge Fair as having a ‘court of justice [that was] always open, and held every day in a shed built on purpose for the fair … determin[ing] matters in a summary way, as is practiced in those we call pyepowder courts in other places …’. In these courts mercantile disputes were decided on customary norms, and this process of adjudication would have forced merchants to articulate and develop their customs.

Lord Holt had reformed rigid common law processes to suit commercial needs by bringing in commercial custom through the use of special juries. When Lord Mansfield attempted to follow the same process in the 1750s, he found to his surprise more than once that mercantile custom was not as certain as he had hoped. When this process produced a result he did not like, he simply overruled the merchant witnesses (and his own previous judgment) on appeal, and started the process of gradually withdrawing from commercial custom, eventually moving to ban the admission of witnesses to prove the law merchant altogether.

Until this point, merchant custom had been proven as a fact (like all outside law is under English common law), which meant that it was decided by the jury. After Mansfield, it was a question of law left for the judge, a process whose underappreciated reform is probably the most significant contribution of Lord Mansfield to the development of English commercial law. But he signalled that he was willing to go much further, changing clear questions of fact into questions of law. In his later career he somewhat legendarily ordered a new trial three times in a case where the jury repeatedly held that a plaintiff had not failed to act within a ‘reasonable time’ to present a note for payment, after he had forcibly directed them each time of the ‘convenience and certainty’ that were the ‘objects of mercantile cases’. He eventually decided, in a different case, that ‘reasonable time’ was a question of law and not to be left to the jury at all ‘for the sake of certainty’, which is of ‘utmost importance in mercantile transactions.’

If questions of substantive normative content are left to a jury, the law is unpredictable and not a closed system of principles and analysis. At the same time, allowing pleadings on the custom of merchants had allowed the common law to keep abreast of commercial developments and reform its sales law. The theoretical resolution that mercantile custom is part of the common law but that common law is superior allows the common law

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151 Daniel Defoe A Tour thro’ the Whole Island of Great Britain, 6th ed., London, 1762, 89, 94. This section was originally published in 1724.
152 Grant v Vaughan (1764) 1 Black. W 485.
153 Edie v East India Company (1761) 2 Burr. 1216; 1 Black. W 295.
154 Pillans v Van Mierop (1765) 3 Burr. 1663, 1669.
155 Medcalf v Hall (1782) 3 Doug. KB 113, 113 and 115.
156 Tindal v Brown (1786) 1 Term Rep. 167, 168.
system to receive novel normative content but then prevents conflicting rules from entering into the closed system. Whether or not the law was in fact settled in all the cases where Lord Mansfield claimed is a different question, but the principle and method must be correct. However, in highly fact-specific questions like whether a note was redeemed in a ‘reasonable time’, that depend on things like the distance between the recipient of the note and the issuer, modes of transport available, physical condition of the recipient, etc., Lord Mansfield appears to have taken a sledgehammer to the integrity of the common law method to achieve utilitarian ends.

This is the great paradox of Lord Mansfield’s work; that he simultaneously rode roughshod over the common law method by ignoring precedent, methods of fact-finding and even conceptual confines, but that he did so to stimulate trade and create commercial certainty. While his doctrinal rulings were sometimes drastic and potentially destabilizing, his greatest commercial reform was in his insight that normative content could not be left to the jury, and in appealing to the higher-order norm of a greater societal good of commercial certainty in making decisive choices between competing strands of case law.

In light of the above exposition of the internal tensions of the common law and the coinciding financial turmoil caused by the South Sea crash, Lord Mansfield’s work in reforming English commercial law can be seen as a response to the tripartite crises of the common law, legal profession and the developing system of finance. That being so, it is now time to make some concluding remarks about how this period of legal and economic confusion, and the following period of commercial amicability of the common law courts, sowed the seeds of modern capitalism that later took root in England.

VII. Conclusion: Legal and Economic Development

The relationship between institutional and economic development is not straightforward. Any historian will realize that an event as complex as the gradual process of industrialization\footnote{Crafts and Harley, ‘Output Growth’.} and the birth of modern finance is going to involve a web of multiple causes, and some of the causal relationships that form part of this network are not direct. In this regard, there is no better summary of the problem of fitting legal institutional history and economic development together than Hoppit’s:

A key limitation of such approaches is their teleological nature, extracting certain features from the past which are held to lead to those later conditions requiring explanation and emphasis, commonly liberty, representative government and secure property rights. … Institutions, moreover, are considered (and

\footnote{Crafts and Harley, ‘Output Growth’.}
measured) mainly in terms of functional relationship to modern economic criteria, not to ideas, culture and politics. Such selectivity makes the approach markedly ahistorical. (emphasis added.)

It is therefore important to be clear on the qualified claim made in this article. It is not that the common law courts of the early and mid-1700s created the modern financial and industrial capitalism. Rather, this article highlights a chain that traces one limited, albeit causally significant element in the creation of modern capitalism as follows: (1) the Statute of Anne inadvertently destabilized the law that is most pertinent to trade, namely contracts and bills of exchange, by adding the uncategorized new form of promissory note; (2) this destabilization got worse and worse in the common law courts, until it was so catastrophic as to finally make all guns on the doctrinal battlefield fall into complete and decades-long silence concerning the central conflict and make merchants seek other avenues for dispute resolution; (3) the flashpoint of this doctrinal destabilization coincided with the South Sea bubble, which was above all a crisis in money supply and exchange networks; (4) these forms of economic activity are precisely where bills of exchange and promissory notes are most needed; (5) this meant that usage of these instruments became more and more common to the extent that practically everyone was using them by the late 1700s, even as, or perhaps partly because, the legal foundation of these instruments remained undefined and the usage thereby went mostly unregulated by the common law courts; (6) this period of unregulated usage came to an end as Lord Mansfield managed to restore the merchant community’s trust in the common law and heavy-handedly pruned and trimmed the relevant doctrines until they were sufficiently certain for the profession to know, their merchant clients to be advised of, and courts to develop further with their now secure and growing commercial caseload.

All this taken together meant that the use of financial instruments first became common and then legally certain, and merchant cases started flooding into the common law courts that had a new and streamlined process of handling them. This created a positive feedback loop, whereby commercial law was developed to the point that merchants could rely on legal professionals’ predictions (and thereby better negotiate amicable settlements), lawyers could confidently bring cases to court knowing what the relevant issues in dispute are and the closed system of principles that governs them, and courts could suggest arbitration in clearer cases (as Lord Mansfield was so fond of doing) to cut down on the time a commercial

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158 Julian Hoppit, ‘Political Power and British Economic Life, 1650-1870’, in Roderick Floud, Jane Humphries and Paul Johnson, eds., The Cambridge Economic History of Modern Britain, 1700-1870, vol. 1, 2nd ed., Cambridge, 2014, 344, 347-348.

159 Brooks, Lawyers, Litigation and English Society, 31, figure 3.3.
decision took. The period of chaos in the money market had also acclimatized society at large to the use of commercial instruments, which meant that the efficiency gains these instruments brought to the market became widespread. When their legal basis was secure enough, and the courts’ commercial caseload high enough to allow for effective common law development, England was primed for industrialization and the birth of modern capitalism.

In the words of Ron Harris, summarizing one view of institutional economic and legal history:

The political and legal institutions of Britain, notably parliament, the common law and the constitution, created the preconditions for the functioning of the market. The state created institutions that defined and protected property and lowered transaction costs. These included tradable government bonds, bills of exchange, insurance schemes, joint stock companies, patent law and contract law … these institutional innovations facilitated the development of overseas trade, capital markets and technological innovations, and the rest followed.\textsuperscript{160}

However, as the example of promissory notes shows, this process was not always as intentional or narratively clear as one might imagine. The Statute of Anne and the judgments in both the King’s Bench and Chancery represent a horrific failure of Parliament and the judiciary to develop commercially friendly but conceptually defensible law that could be depended on for needs of the commercial community. Be that as it may, this failure in legal development in fact led to a short period of unregulated and exponentially growing use of commercial instruments, as disputes were not being brought to the courts. It can only be speculated what would have happened if the common law courts had continued to regulate commercial instruments through the analytical tool of consideration and successfully incorporated promissory notes and bills of exchange within its structural network, but it seems unlikely that they would have attained such prominence. The eighteenth-century crisis period was therefore fortunate in many respects, as it popularized the use of instruments that could later be used for levying credit and conducting business on an industrial scale, and also redefined the relationship between commercial custom and the common law.

Lord Mansfield’s staking a claim to law merchant as not a matter of evidence of commercial custom but as law belonging to the custodianship of the legal profession in the mid-1700s started a trend that led to a much greater degree of commercial certainty in English common law. Ironically, almost exactly a century after Lord Holt had made similar statements in court,

\textsuperscript{160}Ron Harris, ‘Government and the Economy, 1688-1850’, in Roderick Floud and Paul Johnson, eds., \textit{The Cambridge Economic History of Modern Britain, vol. 1: Industrialisation 1700-1860}, Cambridge, 2004, 204, 205.
the legal community had rallied behind Lord Mansfield’s approach and it was remarked that merchants

suppose that all their crude and new-fangled fashions and devices immediately become the law of the land: a notion which, perhaps, has been too much encouraged by the courts. Merchants ought to take their law from the courts, not the courts from merchants, and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress.161

But Lord Mansfield went much further. In solving these problems, it is well documented that Lord Mansfield resorted to importing Roman law principles into English law (such as in his effort to resolve the issue of consideration) and even introduced ‘commercial certainty’ as the proto-utilitarian overriding argument that he frequently used to reform or outright disregard existing doctrines. This completed the mix of mercantile custom, common law process, civilian influence and recourse to the needs of the commercial community that has since been moulded into the dominant commercial law in the modern world. This, it is argued in this article, was a response to the desperate situation of English commercial law in the first half of the eighteenth century, without which English commercial law may not have developed as it did. Although a few shields were shattered in the process, as Roman-minded lawyers might have said at the time: It’s come to the triarii.162

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161Edward Christian, Notes to Blackstone’s Commentaries, Dublin, 1797, 525; and Edward Christian, ed., in W. Blackstone Commentaries on the Laws of England, London, first published 1765, 1800, vol. 1, 75.

162A common Roman expression for a close call or an extreme situation. The triarii were the last line of defence in the Roman battle formation before the Marian reforms of 107 BC, consisting of the oldest and most veteran troops known for their capability of turning almost certain defeats into victories. See Philip Matyszak, Greece against Rome: The Fall of the Hellenistic Kingdoms 250–31 BC, Barnsley, 2020, 110.