eyelets; prohibition on distribution of supplies not produced by itself; prohibi-
tion on acquisitions of shoe machinery or shoe factory supply business or stock
in such business if the transaction involves more than $10,000.00; and non-
exclusive licensing on non-discriminatory reasonable royalty basis. Only time
will show whether the optimism is justified and unfortunately even this will not
be conclusive.

The list of remedies falls short of indicating adequately the details of the
firm's behavior which are proscribed and prescribed. Hence, aside from their
probable effectiveness in restoring competition, the remedies raise the im-
portant and paradoxical issue of detailed regulation of business conduct in enforcing
a law whose main purpose is to avoid government regulation of such conduct.

The critical comments made above should not be taken as representing a
judgment about Professor Kaysen's achievement. For this purpose they would
be quite unfair. The book will in fact be of substantial value to those who wish
to study the problem of monopoly and the method of dealing with it, and to
those who wish to study the shoe machinery industry as an example of this
problem. A tremendous mass of empirical data and argument has been reviewed
and organized in an orderly and useful manner. All the significant issues have
received a proper emphasis.

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The History of Negotiable Instruments in English Law. By J. Milnes Holden.

This small book—according to the preface—was prompted by a suggestion of
Professor Jenks,¹ some sixty years ago, that no serious study of "the origin of
negotiable instruments" in England had ever been done. The law writers, he
said, were disposed to devote only "a page or two of discursive remarks to the
historical side of the subject, as a sort of concession to decency." Of course, one
might protest that case law is itself history; but that would be to quibble, for
it is true that law text writers are concerned mainly with current black letter
law, not origins.

At all events, Holden has tried manfully to write both of "law" and of "his-
tory," or to fill the "gap" between the two, as he puts it. The book, however,
deals mostly with case law, although there is a considerable elaboration of eco-
nomic history, some political history, not a little of statutes, banker's recom-
mandations, the long jurisdictional contest between the courts in England, and
so on. Not much of this is new. In fact, following a suggestion of Holmes, made
just sixty years ago,² casebook editors here have long presented much of Hol-

¹ Jenks, The Early History of Negotiable Instruments, 9 L. Q. Rev. 70 (1893).
² Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).
den's "history" and "law" as daily student fare.³ But Holden has carefully re-read the early cases, as also the works of Marius and Malynes, Holdsworth, Street, Postan and the others, and has tidied up the record with many small corrections.⁴ He gives us a well written and fairly comprehensive account of his findings, and as such it is most welcome.

As befits history, the book proceeds in chronological order. Four main periods are marked out. The first from, say, 1200 to 1601, is disposed of in a scant thirty pages. The second, from 1601 to 1710, which covers the early King's Bench reports and the work of Lord Holt, is dealt with much more fully, as is the third period from 1710 to 1882, which is distinguished by the opinions of Lord Mansfield. In the fourth period, which brings the record down to date following the adoption of the Bills of Exchange Act of 1882, however, there is only incidental reference to case law.

All in all, the reader is given a good introduction to the different types of paper as they came into use, and a sense of their relationship to each other. One would also expect that there would emerge from this an appreciation of the changing role played by such paper in the trade and commerce of the time, such as Powell gives the reader in his study of the money market.⁵ But this does not quite occur; Holden has kept his attention too closely fixed on historical details to give much sense of direction or purpose.

Reference to the chapter on The Origin and Development of Cheques⁶ will illustrate the point. Holden is interested in dates and disputation. He begins by disputing Gilbart's assertion (p. 205) that banking in England started with the London goldsmiths in about 1645. Banking, Holden says, is essentially "the borrowing from some in order to lend to others" (p. 205), and it appears that various scrivenors, including one Humphrey Shalcrosse, were engaged in this sort of banking as early as 1638. Hence, a point is scored. Gilbart was wrong.

He next disputes Dr. Richards, who wrote that in the seventeenth century something in the nature of a check was used by creditors of the Exchequer in authorizing payment of their claims to others (p. 207). This device he thought might have been the inspiration for the check as used by customers of the goldsmiths at least as early as 1670. But it seems Dr. Richards was in error, and so another point is made. By referring to the Act of 1882, Holden points out "that a cheque is merely a special type of bill of exchange"; one drawn on a banker.

³ Steffen, Cases on Commercial and Investment Paper (1939).
⁴ Few escape criticism: Judge Henry, p. 8; Beutel, pp. 15, 25, 65; Street, pp. 28, 44, 46, 63, 75; Cranch, pp. 28, 82; Holdsworth, pp. 51, 56, 99; Fifoot, pp. 57, 60, 81, 217; Clapham, p. 93; Dr. Richards, p. 207; Gilbart, p. 205; Chorley, p. 213.
⁵ Powell, Evolution of the Money Market (1915). The work is not cited by Holden.
⁶ This is the English spelling, which appears to have been adopted (if not invented) by Gilbart in 1828 (p. 209). Previously the word check had been in general use, and as the author says: "To this day, Americans use the spelling check, though Canadians have adopted the new spelling" (p. 209). And, "to this day," we also use "draft" more often than "bill of exchange," following in that regard—with some simplification—the early English practice to use "draught." See Grant v. Vaughan, 3 Burr. 1516 (1764).
payable on demand. “Thus, in searching for the origin of the cheque system, there is no need to look any further than this” (p. 208).

Whatever else one may think of this, it contributes very little to an understanding of the “cheque system.” The revolutionary fact about banking, as practiced by the London goldsmiths, was that they made loans of their credit greatly in excess of the moneys received on deposit (or borrowed). At first they paid out their own notes on such loans, but as Lord Chorley has pointed out, the “cheque” became an important “supplement to the bankers’ notes” in the eighteenth century. In fact, he wrote that it “came into existence” then. That is to say, the banker had discovered that he could loan his credit in excess of the cash on hand quite as effectively by giving the borrower a deposit credit, subject to check, as by paying out notes. It has been this expansive quality of the system—restrained in this country by the reserve machinery—which has given the check its great significance as a sort of “deposit currency.” In this sense Lord Chorley was right when he wrote that the check came into “existence” in the eighteenth century.10

Even on the law side, the reader may well have misgivings. Holden is persuaded that Lord Holt’s work has not had proper recognition, and sets out to put the record straight. It was “the genius of Holt, C. J.,” he says, “which made the period, 1601–1710, the most vital in the history of negotiable instruments” (p. 30). In fact, “it was Holt who laid the foundation, without which Mansfield’s work would have been impossible” (p. 30). But, while it is true that many important cases came up during Holt’s time, it is not so clear that he contributed much. The affirmative case rests largely on Holt’s brief opinion in 1699, holding that a purchaser from the finder of a bearer “bank bill” could not be held liable

7 The fact, of course, is that there were very few cases early dealing with checks as such. In this country, in fact, there was serious doubt whether a check was so much like a bill of exchange that a delay in presentment would work a complete discharge of the drawer. And the rule here, as in England, is now to the contrary. Also, while the court in Robson v. Bennett, 2 Taunt. 388 (C.P., 1810), regarded a “marked” check as in the nature of an accepted bill, Holden does not mention the case or discuss why the certified check never came into use in England.

8 It was this, in fact, which caused the outcry in 1676 by the writer of the pamphlet, “The Mystery of the New fashioned Goldsmiths or Bankers.” Yet Holden, so far from showing any appreciation of the matter, says the writer of the tract should be treated with “reserve”: “His object was to expose the goldsmiths’ business as pernicious” (p. 212).


10 Holden misses the point and, taking Chorley’s statement literally, says the opinion must “be rejected.” He sets out three checks, the earliest of which is dated 16 February 1659, to make his point. Even so, the older system, by which debtor and creditor presented themselves at the office of the goldsmith to effect payment, continued for some time. See Ward v. Evans, 2 Ld. Raym. 928 (K.B., 1703).

in trover by the loser.\textsuperscript{12} Holt’s reasoning—or instinct—was sure and simple; the case had to be decided that way “by reason of the course of trade, which creates a property in the assignee or bearer.”\textsuperscript{13} Thus, for the first time in the case of a bill,\textsuperscript{14} as Holden puts it, “a chariot\textsuperscript{15} had been driven through the hitherto impregnable lines of the common law maxim \textit{nemo dat quod non habet}” (p. 64).

The negative case rests on the furor which Holt caused, only two or three years later, when in \textit{Clerke v. Martin},\textsuperscript{16} he refused emphatically to allow a payee to declare upon an order note, as being within the custom of merchants. A year later, in \textit{Bullet v. Crips},\textsuperscript{17} he refused to allow an indorsee to do so. Here, surely, Holt got right out of his chariot again.

The report in \textit{Clerke v. Martin} states:

Holt Chief Justice was \textit{totis viribus} against the action; and said, that this note could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law; and that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard-Street, which attempted in these matters of bills of exchange to give laws to Westminster-hall.\textsuperscript{18}

In \textit{Bullet v. Crips}, although Holt had spoken with two of the most famous merchants in London “to be informed of the mighty ill consequences that it was pretended would ensue” if the action was not allowed,\textsuperscript{19} he saw no reason to change his view.

Lord Holt did succeed in one thing, for Parliament shortly after—contrary to Holt’s rulings—proceeded to put notes on much the same footing as bills of

\textsuperscript{12} Anon., 1 Salk. 126 (K.B., 1699).
\textsuperscript{13} Ibid.
\textsuperscript{14} Probably the instrument was not a bill of exchange at all, but a bank note. Consult Lord Mansfield’s opinion in \textit{Miller v. Race}, 1 Burr. 452 (K.B., 1758). Bills were seldom made payable to bearer at this time, while the contrary was true of notes.
\textsuperscript{15} Holden also puts Lord Somers in the “chariot” with Holt; but Somers had done something quite different in Anon., 1 Comyns 43 (K.B., 1697), the authority cited by Holden (p. 64). It was there decided that a person taking a bill in satisfaction of a pre-existing debt was to have his remedy against the drawer in spite of a failure of consideration. It had long before been held that a purchaser for a valuable consideration would be given such rights. chat v. Edgar, 1 Keble 636 (1663).
\textsuperscript{16} 2 Ld. Raym. 757, 758 (K.B., 1702).
\textsuperscript{17} 6 Mod. 29 (Q.B., 1703).
\textsuperscript{18} Clerke v. Martin, 2 Ld. Raym. 757, 758 (K.B., 1702). I rather like Holt’s independence, however unjustical it may be. There is an even better example of his attitude in Ward v. Evans, 2 Ld. Raym. 928 (K.B., 1702). In holding that a bank note given in satisfaction of a debt is only conditional payment, Holt said: “But then I am of opinion, and always was (notwithstanding the noise and cry, that it is the use of Lombard street, as if the contrary opinion would blow up Lombard-street) that the acceptance of such a note is not actual payment.” Ibid., at 930. Holt agreed, however, that a third party note taken in purchase of goods may be payment, thus fastening upon the law a troubling distinction with no substance. E.g., Hamilton v. R. S. Dickson & Co., 85 F.2d 107 (C.A.2d, 1936). Yet Holden hails it as a “principle of lasting importance which was wisely settled by Holt . . .” (p. 85).
\textsuperscript{19} Holden says blandly: “There is no doubt that Holt’s practice of consulting the merchants enabled him to develop the rules of mercantile law on sound lines” (p. 79).
exchange. Holden makes a brave effort to answer Holt’s many critics by saying he was bound to reach the results he did because of certain precedents (p. 80 et seq.). The argument would carry more conviction if Holt himself had indicated that he felt bound in that way. It seems more accurate to say that Holt was confused. He had never got the point clear in his thinking that suits between immediate parties are to be distinguished from suits between a subsequent holder and a prior maker or acceptor. Therefore, to make sure that failure of consideration would be a defense in the first, as it should be, he heatedly denied that a note could come within the custom of merchants. Next, when faced with the remote party case, as he was in Buller v. Crips, he obstinately stuck by his guns, although the difference was fully argued before him. These are not the marks of a truly great judge.

In the third period, 1710–1882, Holden joins with the others in attacking Mansfield’s views on consideration (p. 134 et seq.) particularly as stated in Pillans v. Van Mierop. Mansfield there said: “In commercial cases amongst merchants, the want of consideration is not an objection.” While Holden appears to be sympathetic to this idea, he too sees no way around the ancient dictum of the House of Lords in Rann v. Hughes that: “All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol,” and, in the latter case, “a consideration must be proved.” It would take too long to show that, on the facts before Mansfield in the Van Mierop case, the notions of consideration worked out in ordinary two-party situations should have little application. His decision was clearly right. Not “consideration,” but “the course of trade,” may be the controlling factor. Perhaps there are more than two kinds of contracts.

But enough has been said to give the flavor of Holden’s book. In the concluding chapters he departs from history to take up a number of suggestions for the future. These are mainly concerned with crossed checks and the possibility of giving the paying bankers still further protection from losses due to forged or unauthorized indorsements. Fortunately, the latter is of only academic interest here as American bankers have done quite well carrying such risks as an insurable cost of doing business. Holden does discuss one point, though, which is disquieting, for he suggests that the bill of exchange is at last on the way out and, worse, that nothing much can be done about it. Partly this is due to the fact

20 3 & 4 Anne, c. 9, § 1 (1704).
21 Holden says: “Holt C.J. was not to be persuaded to make such a fine and illogical distinction” (p. 79). But, some years after the Statute of Anne the distinction was made clear, and it is in no sense illogical. Brown v. Marsh, Gilb. Rep. 154 (1721).
22 This is fairly apparent from Holt’s denial that a note is a “specialty.” Holden effectively refutes those critics who have said that Holt regarded a bill of exchange as a specialty (p. 62).
23 3 Burr. 1663 (K.B., 1765).
24 7 T.R. 351 n.(a) (K.B., 1778).
25 Holden has made no effort to look at American law or practice. He does not mention that a new Uniform Commercial Code has been drawn up on this country.
that business organizations have been getting so much larger, but it is also be-
cause other ways of financing have become more comfortable. It would surely
be too bad to lose the bill, considering what great expenditures of mental effort
have gone into its making.

Roscoe Steffen*

Law in Economy and Society. By Max Weber. Edited with an Introduction and
Annotations by Max Rheinstein. Translation by Edward Shils and Max
$6.00.

Max Weber's Sociology of Law (which is the core of the book in hand) is
without question the deepest and richest job which has appeared in that exciting
field.

As I look back on these words I am troubled because they are meant to say
much (e.g., "deep" and "rich") but they in fact say so little ("deepest" and
"richest" as against what?). Let me try to squeeze the net meaning into this:
To get, as a man-of-law, to or toward where, as a man-of-law, you want to get,
calls for thought not only about your own problem coming up next Tuesday,
but also it calls vigorously for thought about what human experience has dug
up about how problems of this kind have been handled on a multitude of other
Tuesdays or Wednesdays. The results of that kind of thinking men commonly
call "theory." Such theory, when put into words, guides and smooths practice,
and is in turn constantly re-checked and re-informed by practice and by any
newly emerging practical problems. In almost all fields such theory has first
been ignored or scorned by the practical expert (say, the seaman up to the fif-
teenth century, the American farmer of the nineteenth century, the factory pro-
duction man until the arrival of Ford and Taylor and industrial engineering,
and especially the American practicing lawyer from 1880 until today). But
every time the sustained quest for such theory has taken hold on any large scale
the results have been amazingly fertile. The question is: Why not also in the
law? Can we not, in that most vital and practical of areas, substitute such
things as celestial navigation for expert coast watching and the hunches of the
man who is just "born to it" or who has just gotten it "by experience?" Do we
not need, in the work of law as well as in that of corn-growing, to try to find
some hybrid product of greater yield, greater toughness against risks, and,
above all, one which is more readily and reliably available to any lawyer and
to any of his clients? Who can with reason say that law alone, among the an-
cient human crafts, is impervious to infiltration of improvement by way of such
a quest for "theory?"

It is against such a background that Max Weber wrote this book, from about
1909 to 1913. "Theory" in the legal field had already drifted in Germany, as it