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Property Rights in Securities:
A Law and Economics Analysis

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Property Rights in Securities:

A Law and Economics Analysis

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1. Introduction

Last 500 years witnesses the rising of western capitalism. Many scholars devoted themselves with great passion in such huge and intriguing subject. At very beginning, the investigations were started at the economic analysis of the society. The theoretical economists tried to measure the economic activities and well-functioning of the society by two notions, so called: *value* and *economy*, which derived from the mathematical notions of ‘quality’, ‘time’ and ‘energy’¹. It is what the theoretical economists done in their masterpieces². Despite these early economists’ intention of avoiding the involvement of human will, the further development of the researches finally introduce the participation of the notion of human will, because of the subjectivity and uncertainty in the measurement of investigation. Hence, the economists started dealing with the relationship between human and nature to dealing with the relationship between the human beings. The introduction of the legal notion at this stage is proper to facilitate the interpretation of the economic activities and well-functioning of the society for the economists. Acquiring from the legal scholars, the relationship of human and nature is a matter of property and the relationship between the human beings is a matter of contract, as Commons indicated in his works:

*“... both legal theory and economic theory, in modern times, have based their explanations first on Newton’s Principle of Mechanism, then on Malthus’ Principle of Scarcity, then on juristic Principles of Common Rules that both limit and enlarge the field for individual wills in a world if mechanical forces and scarcity of resources.”*³

The recognition and expansion of property right, the emerging of the corporation (also commonly called company) and the various forms of transactions consists the three pillars of modern capitalism. The commodities (goods) and legal tenders (money) are the bloods and wheels in the great circulation of wealth in the society⁴. The human will is acting as a driver in the historical streamline to flourish the development of the economy in the society. Meanwhile, the common-law courts played as a prudent judge to recognize those emerging notions and merchant customs, which have created the economic institutions and framework. In other words, the legal infrastructure lays the foundation of western capitalism⁵. The securities with the wide scope to involve the negotiable instruments are the most role in the capitalism other than the invention of corporation, however, its legal evolution and very nature has not clarified and investigated clearly. In general, the form of securities transformed from its very contract form to a property form which will be

¹ John Rogers Commons, *Legal Foundations of Capitalism* (Transaction Publishers 1924) 1.

² These researches usually called as Engineering Economics or Economics with the *Principles of Mechanism*. These economists like Quesnay, Ricardo, Smith, etc., are all dealing with relationship between the human being and nature, which absorbed many methodologies and mechanisms from the scientism. See: Philip Mirowski, *Against Mechanism: Protecting Economics from Science* (Rowman & Littlefield Publishers 1992).

³ Commons, *Legal foundations of capitalism* (n 1) 7.

⁴ Russell R Menard and John J McCusker, ‘The Great Wheel of Circulation’ [1978].

⁵ For the further discussion of the statement See: Richard Theodore Ely and others, *Property and Contract in Their Relations to the Distribution of Wealth* (Macmillan 1914) vol 1. Cpt.1

discussed in the later part of the paper. What's more, the significance of such transformation of nature of securities and legal responses to the dematerialization and immobilization will also be discussed.

2. Economic Explanation of Securities in the Modern Capitalism Infrastructure

2.1 Commodity Tickets and Price Tickets: Economic Category and Legal Rationale

There are various categories for the modern capital market instruments⁶. Most of them have their own legal rationales, like the category of debt & equity market, public & private market, etc., but not all of categories can conclude all types of securities into the sets. The category of money market & capital market is one of finest way for the economists to put all types of securities into the right place. Throughout all textbooks⁷ in finance, this category of money market and capital market, from economists and financial professions' points of view, is concluded by the maturities and liquidity of the securities. However, such category does not well clarify its legal rationale, the deliberation of which is vital to conduct instead of peripheral explanation by most economists and financial professions.

Albeit, John Commons and his predecessors of classical institutional economists have give a solid explanation on aforementioned category by using price tickets and commodity tickets, his comprehensive works are always underestimated and regarded as too descriptive⁸ by new institutional economists, those who mainly dwell on the analysis of transaction cost rather than the very foundation of legal and social norms behind the economy. In this section, I will conduct an economic explanation of the securities in the infrastructure of the modern capitalism with application of the Common's theoretical framework of price tickets and commodity tickets.

Main distinctions between the capital market and money market, from economists and financial professions' perspective, are the time to the maturity and the different pricing logics. Deriving from time to maturity, it is vital to identify that the liquidity of money market instruments is better than those in capital market⁹. The instruments contain highest liquidity are the money like legal tender in most of the countries, hard currency or bullion under Gold/Silver Standard. Lastly, the consensus needed to be reached is that the price, discussed here, are the price paid or cost of certain amount of other goods to acquire a right of ownership, which is the precondition of all the transactions including the

⁶ In this paper, the securities as capital market instruments have a boarder scope which included the negotiable instruments like promissory note and bill of exchange.

⁷ See: Frank J Fabozzi and others, *Foundations of Financial Markets and Institutions* (4 edition, Prentice Hall 2009) 6. Frederic S Mishkin and Stanley Eakins, *Financial Markets and Institutions: Global Edition* (5th edition, Pearson 2006) 219.

⁸ Coase indicated in his works that "Without a theory they had nothing to pass on except a mass of descriptive material waiting for a theory, or a fire." See: Ronald H Coase, 'The New Institutional Economics' [1984] *Z Für Gesamte Staatswiss Institutional Theor Econ* 229, 230.

⁹ Mishkin and Eakins (n 7) 219.

securities¹⁰.

The distinction of two pricing logics is the key to reasoning the economic and legal rationale for the categorization. According to the literature, MacLeod, H. D. is the first scholar identifying the pricing method for capital market instruments and money market instruments systematically. In his book *The Theory and Practice of Banking*, he defined these two pricing methods as follows:

- (1) “By advancing the complete sum, and waiting till the end of the year for the Profit”¹¹ is **Interest**.
- (2) “By retaining the Profit at the time of the advance, and advancing the difference”¹² is **Discount**.

Despite these two ways of calculations, they are led to the same amount of profit if the interest/discount rate are the same, the former one is containing the expectation of profit increased in the instruments which the instruments itself is treated as a commodity to generate or increase the total wealth of the economy and the later one is more like, MacLeod noted that, it is mere cost paid to the bank to get the money paid in advanced at the beginning, which can be regarded as using of credit. However, it is widely applied to to the short-term usage of credit commonly called money market.

To further such distinctions of pricing logics, the types of ownership, incorporated in these instruments, are different. For a money market instrument, the ownership is of a short-term debt, which contained a promise of passing future legal control of money inflows, from the seller to the buyer, through a payment made by the debtors. It is a title to a future money inflows derived from credit which is an incorporeal property¹³. Hence, the money market is for the exchange of ownership of debts¹⁴ instead of the exchange of money¹⁵. For a capital market instrument, the ownership is of the commodity or a promise acting as a commodity with the output generated from it. It is an exchange of the future legal control of physical things for the future money inflows. It is also a title to future money inflows derived from the future profits (for securities is interests)¹⁶ which is an intangible property.

Moreover, following the aforementioned logic of deduction, the notions of commodity tickets and price tickets can be applied to the category of money market and capital market instruments which constructed two types of the system of business.

Commodity tickets are “a title to the ownership of corporeal property” with the real value

¹⁰ The detail discussion of the definition of price can be founded at Fetter and Hadley’s works. See: Frank A Fetter, ‘The Definition of Price’ (1912) 2 Am Econ Rev 783. See also: Arthur Twining Hadley, *Economics: An Account of the Relations between Private Property and Public Welfare* (GP Putnam’s sons 1896) 70,72.

¹¹ Henry Dunning. Macleod, *The Theory and Practice of Banking* (5th Edition, Longmans, Green 1892) 372.

¹² *ibid*.

¹³ The reason why debt or credit as an incorporeal property will be discussed in the section 3.1

¹⁴ Here debt as aforementioned is short-term debt.

¹⁵ This is also one critique made by John Commons that the analogy of naming “money market” by MacLeod cause the confusion of understanding, which Commons called as “talking metaphor” rather than scientific reasoning. See: John R Commons, *Institutional Economics Volume 1* (New edition edition, Transaction Publishers 1989) 428.

¹⁶ Future profits or interest in securities is a intangible property rather than a incorporeal property since it is more like a future purchasing power. Both credit and interests are the expectation future money inflows. Further discussion will be made at Section 3.1

which has been assigned to the commodities or labour¹⁷. The commodity tickets are a recording ticket which is a title to the ownership to avoid passing the physical delivery of ownership. The acquisition of title without the physical delivery facilitated by the legal relation of bailment. the bailment enabled the seller to promise to deliver the value of the things rather than the physical delivery of the thing. Such development made the modern form of the commodity features possible within the legal infrastructure that the commodities with its very nature form acting as speculative futures. However, it seems that the commodity tickets merely have little relevance with the securities like bond, shares etc. The introduction of the assignability¹⁸ finally extend the scope of the commodity tickets from the tangible property to incorporeal and intangible properties like bonds and shares. The bearer form of the securities can be a good example that the title to the underlying property transfer and delivered via the handing over of the certificate which incorporated in such certificate as commodity tickets. Since it is the evidence of transfer of legal title, the commodity tickets are, authorized by the government and recognized by courts, to be an evidence of ownership of certain amount of commodities regardless of the value changes after the transactions. Notably, the way of production of commodity tickets are making profits to increasing the total welfare of the community¹⁹.

Price tickets are Negotiable promises of which nominal value expressed in price of the tickets²⁰. Those promises to pay are used to facilitate the circulation of money in money market, as well as the commodity (especially capital) market, through the depositing and discounting, borrowing and lending promises to pay the prices of either commodities and promises acting as commodities in lawful money in 24 hours and up to 180 days.

At the beginning, the price tickets also benefited from the notion of bailment to clarifying the relationship between the goldsmith (acting as warehouse) and their depositors, the invention of the goldsmith converted such relation of bailment into a debt relation that the depositors became the creditors of the goldsmiths instead of the legal owner of the bullions. Although the common law court prudently refused to recognized such merchant customs at the beginning²¹, this innovative development transferred money from the coins and bullions to bank credit. Such transformation made money to be an incorporeal property as banker's demand-promise and an intangible property as the exchange value²² of such promise at the market. Hence, the price tickets as negotiable promises to be more like money obtained in exchange and it is not a specific thing but the purchasing power to obtain anything. Notably, the way of production of price tickets are not increasing the real wealth of the community but a promise to increase²³.

¹⁷ Commons, *Legal foundations of capitalism* (n 1) 256.

¹⁸ Assignability, included the form of negotiability which is the most complete form of the assignability, will be further discussed in next section.

¹⁹ Commons, *Legal foundations of capitalism* (n 1) 255.

²⁰ *ibid.*

²¹ '*Buller v Crips* (1703) 6 Mod Rep 29, 87 ER 793' [1703] Engl Rep.

²² The notion of exchange value is critically vital in the development of modern capitalism, which has been detailed discussed in section 3.3.

²³ In this case, the price tickets can be used either in a good way that stimulating the real increasing of the total wealth or in a bad way that the increasing the bubble of the real economy.

2.2 Property in Social Context: A Premise to Analysis

Scarcity is treated as a social phenomenon instead of natural fact given that the acquirable resources are limited and the demands of human being are infinite. Such scarcity can be indicated while people attempted to make incompatible resources in their own possession. In this case, a man will influence others who also tried to make their own possession. From the economists' perspective, the modern property right is exclusive rights indicated "*the relationship of one person to another with the respect to a resource or any line of action*"²⁴. Such definition reflects that property right is a means, through which the society can control and coordinate the interdependency of the persons. This is also the rationale to explain why the property is a social institution²⁵. Although there is no clear and complete definition of institution²⁶, the institution can be simply defined as a sets of relationships constrained by orders among the people and it is also in charge of collective action, freedom and expanded to the individual action²⁷.

With the modern notion of property rights, the property constructs the opportunity sets of people through the formal institutions includes the law of property & law of contract in all common law, law of equity and statutes law, as well as the informal institutions like informal practice and culture traditions. With the notion of opportunity sets, the ownership is entitled a person to create cost for anyone else through the influence of his action and to create benefits for himself through use or exchange, which means it is an absolute right against world without any formal consent of anyone else to act such rights.

The creation of any social institution depends on the public and ethical choice²⁸, the property as a social institution, its absolute rights against the whole world is sourced from the consensus made by the public²⁹. In this case, the common law is a good judge and indicator of the public will to a certain matter, which is also the method of this paper to investigate the extended scope of property as well as the origin and development of property right in securities. The development of legal infrastructure to facilitate and recognize the customs of businessman will be a good measurement.

As indicated at section 2.1, the nature of securities is a promise whether it is attached to any physical things or not. However, under the context of medieval common law, the primitive notion of property was limited the common law justice to recognize such extension of the scope of property. The attempt of businessman customs to the extension of the scope of property into two stages. Firstly, extending the scope of property from tangible property to the incorporeal property, which is attached to the tangible things

²⁴ Alfred Allan Schmid, *Property, Power, and Public Choice: An Inquiry into Law and Economics* (A Allan Schmid 1987) 5.

²⁵ For detail proof see: A Irving Hallowell, 'The Nature and Function of Property as a Social Institution' (1942) 1 J Leg Pol Soc 115.

²⁶ Schmid (n 23) 5.

²⁷ John R Commons and Kenneth H Parsons, *The Economics of Collective Action*. (Macmillan 1950) 21.

²⁸ Schmid (n 23) 24.

²⁹ In Taylor's expression: "Property is a public fact or it is no fact at all." See: John Francis Adams Taylor, 'The Masks of Society an Inquiry Into the Covenants of Civilization' [1966] 109.

through the enforcement of contract³⁰. The enforcement of contract from the legal aspect is a *chose in action*. Second stage is from the incorporeal property to the intangible property through the creation of transferability of the contract ³¹(or chose in action). Since the essences of the property required both enforceability and alienability of things, the research will be conducted in the development of enforceability and alienability of the securities together with its original forms: promise in next section.

³⁰ John R Commons, 'Law and Economics' (1924) 34 Yale LJ 371, 373.

³¹ *ibid* 378.

3. Development of Legal Infrastructure: From Medieval Times to 1960s

3.1 Enforcement of Contract: Law of Encumbrance and Chose of Action.

In the matter of enforcement of a contract, the investigation can be drawn from both promisor's perspective and promisee's perspective. For a promisor, once the promise has been made, he lost his freedom of choice in this particular issue of behaviour. In other words, the promiser is bounded by a duty or encumbrance of forbearance, avoidance or performance of his promise. The law of encumbrance is about obedience and command, which implicate the juristic or legal relation of promisor of his duty to the promisee. This juristic or legal relation are sanctioned and facilitated by either legal penalties or reward. The promisees can be the beneficiaries in their rights to request a mandatory acts of promisor. The businessman's custom of incorporeal property was based on the promise. Therefore, the law of incorporeal property is also a matter of law of encumbrance. Since the incorporeal property is always the matter of paying back the debt, it is a matter of specific case of law of encumbrance that only positive encumbrance has been made in that case where the duty of performance is mandatory to the promisor. Hence, the development of legal infrastructure of law of positive encumbrance is pivotal for the promisors.

On one hand, the law of positive encumbrance was a matter of law of labour encumbrance which historically defined the the law of master and servant, owner and slave, landlord and serf, principal and agent, employee and employer and the husband and wife, all of which is the civil relationship³² derived from a very primitive notion of physical things³³ to the ownership of invisible encumbrance. On the other hand, the law of investment encumbrance also indicated the same changes from the relationship of landlord and tenant to the creditor and debtor.

The implication of such development on the investment activities are he formal investor's bargain of selling present purchasing power for the future one. This is what happened in early modern business including the notion of bond, shares, bills of exchange and promissory notes.

Thus, the essential for the promisee in the transactions are selling the present purchasing power, accepting and recognizing an expectation or promise of future purchasing power. The promisee get the promisor's credit at the cost of the ownership of his money. While

³² Commons, *Legal foundations of capitalism* (n 1) 237.

³³ In this case, Slaves and serfs is a physical property. However, the relationship of husband and wife is a mere personal relation unattached to any physical concepts. Thus, the expansion of such relations shows the development from primitive notion of labour encumbrance attached to things to the mere personal relation.

accepting and recognizing the expectation and promise of future purchasing power, the promisee should be granted a right to enforce an action by law which is the legal infrastructure to facilitate the contracting activities from the promisee's perspective.

As the right to action in legal notion is a 'chose in action', the enforcement of contract from the promisee's perspective is a matter about the law of 'chose in action'. Although the notion of incorporeal things has been codified and recognized in the Roman Law that the incorporeal things cannot be touched and consisting in a right³⁴, those notion of incorporeal things needed to be constituted step by step in case law, which shows the common recognition as indicated in section 2.2, instead of being taken for granted since there is a huge gap between the roman law and the medieval English common law. Bracton firstly indicated the "actiones" from the incorporeal things in 1200s³⁵ which partly adopted the similar legal notion codified by Justine. According to his distinctions, the "actiones" like the rents, obligations claims or advowsons, are not completely recognized as property for the heir to inherit unless his predecessor put it in court and get a judgement³⁶. It is the primitive notion of the property³⁷ for the medieval common law which separated the "actiones" like annuities and corrodies from normal incorporeal things into the category of 'chose in action'³⁸ which is created by contract in our modern law.

It is no doubt that the 'chose in action' was merely a right to bring action at the beginning. The earliest traceable case in English common law was in Edward III reign, it was firstly titled as "chose qe feaut en accion"³⁹ such right of action was indicated by Fleta as an "actio" which is inalienable together with the "res sacra", "liber homo", etc.⁴⁰ and the inalienability of 'chose in action' became a common law principle⁴¹. The legal scholar Wilkinson has made an insightful definition for the 'chose in action' at this time that "things in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action"⁴² in medieval times.

³⁴ Such as an inheritance, an usufruct or obligations contracted in any way. See: Corpus juris civilis. Institutiones. [from old catalog and Thomas Collett Sandars, *The Institutes of Justinian* (London, New York [etc] Longmans, Green, and co 1922) 103 II.2.

³⁵ "Incorporeales vero res sunt, quae tangi non possunt, ..., sicut haereditas, usus fructus, advocaciones ecclesiarum, obligations et actiones, et hujus modi, ..." See: Henry de Bracton and others, *De legibus et consuetudinibus Angliae Vol.2* (New Haven, Yale university press; London, H Milford, Oxford university press 1915) 47-48 f.10b.

³⁶ Two cases are referred by Bracton. See: Henry de Bracton and others, *De legibus et consuetudinibus Angliae Vol.4* (New Haven, Yale university press; London, H Milford, Oxford university press 1915) 267-68 f.407b.

³⁷ This also can be regarded as primitive realism.

³⁸ William Searle Holdsworth, *A History of English Law Book I-V* (Methuen 1922) vols 1-5 Book 2, 300-301; Book 3, 126-127.

³⁹ Luke Owen Pike Alfred John Horwood, *Year Books of the Reign of King Edward the Third* (Longman 1896)13 Ed.III.

⁴⁰ "Actio autem, res sacra, res coronae, liber homo, ... et portae civitatis, a nullo dari debent, ut valida sit donatio." See: John Selden, *Fleta, seu Commentarius juris Anglicani sic nuncupatus, sub Edwardo rege primo, seu circa annos abhinc 340. ab anonymo conscriptus, ... , nunc primum typis editus. Accedit tractatulus vetus de agendi excipiendique formulis Gallicanus, Fet Assavoir dictus. Subjungitur etiam Joan. Seldeni ad Fletam dissertatio historica* (typis SR 1685) Vol.6, 6, § 2.

⁴¹ The inalienability of chose in action was iterated in the case of federal lord over a villein that "Item dit fuit, que ceo que est en possession de villein come rent grante al villein de que il est seisi, le Seigniore puit happer, mes ceo que demur en accion al villein le Seignior n'avera pas. Come si obligation de dette soit fait al villein, ou covenant ou garrantie fait au villein, de ceo le Seignior n'avera nul avantage." Brooke also call the 'chose in action' as 'chose en action & chose en suspence' See: Robert Brooke and England and Wales, *La Graunde Abridgement, Collect & escrie per le Judge tresreuerend Syr Robert Brooke, Chivalier ...* (R Tottyl 1576) *Chose in Action*, pl.8.

⁴² Harold William Wilkinson, *Personal Property*. (17th Edition, Sweet & Maxwell 1971) 29.

It is necessary to make a division of 'chose in action' into 'chose in action personal' and 'chose in action real' relying on the law of procedure within the sphere of medieval common law⁴³. Since the historical development of 'chose in action' are merged the notion from 'chose in action personal' and 'chose in action real' respectively, the examination will be conducted case by case to discover the formation of general notion of 'chose in action'.

The 'chose in action personal' is mere rights arising from the personal actions. The English Medieval common law⁴⁴ didn't fully accepted the concept that personal actions, derived upon the the notion of 'obligatio', may arise out of the contract or tort, a Roman law notion indicated by Bracton⁴⁵, since many of the personal actions can not be put into the category set by the Roman law⁴⁶. However, it is still clear that the personal actions brought through a contract or a tort is a personal thing. It derived from the agreement between two parties or the defendant's wrong doing to a plaintiff. Hence, these actions were personal matters between two persons and merely these two persons. It is a personal relation.

The 'chose in action real' is the rights derived from the real actions that those rights to get seisin are enforceable through entry or actions. It is rights of entry or action for a disseisee whose estate has been disseised by disseisor.

Finally, in the case *Colonial Bank v. Whitney*, the judge gives a comprehensive definition of 'chose in action' that "chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession."⁴⁷

Both 'chose in action personal' and 'chose in action real' can be enforced by the action of detinue or of trespass. It should be obviously observed that those enforcements of contract and remedy of tort for a holder of 'chose in action' was still in the sphere of law of property as a physical thing with the relevant legal actions to recover those tangible property or coins not the merely enforcement of the contract. Meanwhile, those various remedies for the forcible detention of land or other physical chattels like the "writ of right" and "writ of debt". The origin of "writ of right" as a remedy indicated two important facts. Firstly, the complete remedies of the actions *in rem* were derived from the this remedy that giving the possession instead of property⁴⁸. Those derived remedies confirmed the absolute right of the property right against the whole world which can be applied to not only physical things but also the paper instruments as evidence of the ownership. It is vital foundation for the various securities appeared in the later time.

⁴³ William S Holdsworth, 'The History of the Treatment of "Choses" in Action by the Common Law' (1920) 33 Harv Law Rev 997, 1001.

⁴⁴ John le Breton and others, *Britton: [a treatise on the laws of England]* (London: Printed by the assignes of John Moore, Esquire 1640) I.29.2.

⁴⁵ See Both: *Corpus juris civilis Institutiones* [from old catalog and Sandars (n 33). And Bracton and others (n 34).

⁴⁶ Holdsworth (n 37) vols. 1-5, Book 2, 311-312.

⁴⁷ 'THE COLONIAL BANK APPELLANTS; AND FREDERICK WHINNEY RESPONDENT. - (1886) 11 App.Cas. 426' [1886] ICLR Appeal Cases.

⁴⁸ Frederic William Maitland Frederick Pollock, *The History of English Law Before the Time of Edward I.* (The University press 1898) vol Vol.2, 78.

The significance of “writ of debt” is the legal recognition of paying back certain amount of debt instead of the restore particular coins lent⁴⁹, which indicated the fungibility of the contractual obligation. However, the “writ of debt” still failed to enforce the mere promise, but the bond which is the sealed evidence of the debt not the debtor’s promise⁵⁰.

The modern formation of the simple or parol contract together with the written or unwritten promise needed a transition from the recovery from trespass of either physical damage to the assumpsit as a remedy to the breaches of contract. The ‘writ of assumpsit’⁵¹ consists of two forms⁵²: (1) the special assumpsit where a promise has been expressed or implied⁵³. (2) indebitatus assumpsit which derived from the past debt⁵⁴. This is the completion of establishment of modern form of contract including the enforcement of the promise to facilitate and recognize the businessman’s custom by improvement the legal infrastructure as well as the promise as ‘chose in action’.

3.2 Alienability of the ‘Chose in action’: Legal Barrier and Significance

3.2.1 Inalienability of the ‘chose in action’: Medieval Legal Tradition and Legal Procedure

Before discussing the development of recognition of assignability of ‘chose in action’, it is better to clarify the reason of inalienability of the ‘chose in action’ from the medieval primitive sense.

There are mainly two reasons for the medieval common law to recognize the alienability of the ‘chose in action’ from the path dependency perspective.

The first barrier is the notion of property as tangible things. The notion of tangible things is original from the man’s coping with the physical nature and possessing it. Therefore, the primitive common law tradition could not ideate the notion of property without the physical possession. As mentioned in section 2.2, the notion of property is a intangible relation relying on the recognition of the general public⁵⁵ and the promise from the authorities⁵⁶, a person can regard his right as incorporeal property which has been proved

⁴⁹ Edward Jenks, *A Short History of English Law: From the Earliest Times to the End of the Year 1911* (Little, Brown 1913) 57–59.

⁵⁰ *ibid* 135,136,510.

⁵¹ For detail of the history of assumpsit see: James Barr Ames, ‘The History of Assumpsit. I. Express Assumpsit’ [1888] *Harv Law Rev* 1. & James Barr Ames, ‘The History of Assumpsit. II. Implied Assumpsit’ [1888] *Harv Law Rev* 53.

⁵² Lord Chancellor Mackay of Clashfern and Martha Spurrier of Middle Temple, *Halsbury’s Laws of England* (LexisNexis 2008) vrs 404. Writ of assumpsit.

⁵³ It is firstly indicated in the case *Andrew v Boughy* (1552) that the plea mentioned the concept of promise been made by using the example of horse. See ‘*Andrew v Boughy* in B. R. (1552) 73 ER 160’ [1552] *Engl Rep*, 160–62 note 23.

⁵⁴ Slade’s case (1602) indicated that : “An action on the case of an indebitatus assumpsit lies well; for every debt implies a promise, and is a good consideration in fact to found an action upon. But for a debt by simple contract due by testator no assumpsit lies against the executors.” See: ‘Slade’s Case (1602) 4 Co Rep 91a, Moore KB 667’ [1602] *Engl Rep*.

⁵⁵ The common law court recognition.

⁵⁶ The statutes law legislation.

in section 3.1. However, the physical possession means man's physical control over things that the incorporeal property can not be possessed from this primitive perspective. The invention of 'writ in debt' promoted the physical handling of the symbolized physical objects as the representative of the things which cannot be physical handled. Hence, the invention of paper instrument as the evidence of the title facilitated the 'chose in action' is a compromise to fulfil the requirement of the law of possession to overcome the barrier set by the primitive notion of possession of tangible property⁵⁷.

The second barrier is the primitive notion of promises or derived 'chose in action personal' as personal relation. Either implied or express promise are the foundations of the society. Many scholars developed their researches from the premise that the society generated from the contract of its participants. Such social contract was not completed at the beginning and waiting for the afterwards interpretations by forthcoming participants. It is like Greer stated that "custom that writes out slowly from generation to generation the term of the social compact."⁵⁸ If an individual has entered in a collective community, he made an implied promise that he wouldn't violate the custom in this community. At an early stage of the primitive society, if a man has violated his express or implied promise (violation of law), there will be an enforced collective responsibility to the members of the same group and children of wrongdoer. It is the root of blood feud, hereditary serfdom and the primitive communism along with the primitive notion of collective responsibility⁵⁹.

The recognition of the promises between two equal persons depending on the legal recognition of the equal and liberty of contracting/promising and the individual's responsibility to the promise. Such recognition means the enforcement of the authorities will not have the binding power to order the successors of whom made the promise nor the successor of whom benefited from such promise. Hence, the inalienability of the promises and its consequences end the blood feud or hereditary personal relations constitutes the slavery and serfdom. the evolution of the law of equality and liberty of individuals, which is also the law of inalienability and non-survivorship of rights (including the chose in action), from the primitive law which allowed such things is the merit of the notion of equality and social justice⁶⁰. In the case of *The Marquis of Winchester*, the merit of the development was iterated by excluding the mere right of action out the the scope of hereditament⁶¹. We shall observe such barrier is not set for 'chose in action' but for the purpose of social justice⁶². Hence, the possible way of alienability of the 'chose in action'

⁵⁷ The legal tradition of realism in the law of possession still affects the modern time legal infrastructure. One of the example in this issue is occurred in the dematerialization of the bearer securities which will be mainly discussed in section 4.

⁵⁸ FA Greer, 'Custom in the Common Law' (1893) 9 LQ Rev 153.

⁵⁹ Commons, *Legal foundations of capitalism* (n 1) 249.

⁶⁰ In the *Lampet's* case, the judge said "It was observed the great wisdom and policy of the sages and founders of our law, who have provided that no possibilities, right, title nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, **of great oppression of people**, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." See: (1603) 10 Rep. 48a Reprinted at John Farquhar Fraser John Henry Thomas, *The Reports of Sir Edward Coke, Knt.: In Thirteen Parts* (J Butterworth and Son 1826) 328-341.

⁶¹ The Attorney mentioned that "for it would be very vexatious and inconvenient that the estates of purchasers and others, after many descents and long possession, would be impeached at the king's suit, by such general words, against the reason and rule of common law." See: '*The Marquis of Winchester's Case* - (1638) 79 ER 1035' [1638] Engl Rep.

⁶² The case of *Bishop of Lincoln v. Wolferstan* indicated such tradition that the banning of the granting an advowson is for

is to respect such historical root first.

From the procedure of the law perspective, the issues of maintenance and champerty were the two major concerns for preventing the 'chose in action' from the assignment. The legal interpretation of the assignment of 'chose in action' for the assignee is merely the entitlement to sue in the assignor's name in the medieval common law context⁶³. On the issue of champerty⁶⁴, the concern of the assignability of the 'chose in action' that the 'chose in action' has been assigned to a person, who has power to influence the impartiality of the judgement or any illegitimate pressure to the disseisor. The late Roman law has the same legal tradition but different treatment to the concern of the champerty. In the late Roman law, the assignment of 'chose in action' was permitted but it is prohibited that the assignment took place while the assignee was more powerful than the assigner⁶⁵. Till the modern era, the common law lawyer still prudently treated the free assignment of the 'chose in action' from this perspective⁶⁶.

On the issue of maintenance⁶⁷, it was firstly distinguished as 'maintenance in the country'. The offence so called *manutentio ruralis* has the same legal origin with champerty⁶⁸. After hundred years practice, the stat.32 Hen.VIII.c.9⁶⁹ reiterated the inconveniences coming from the maintenance, 'buying of title' and 'pretenced titles'⁷⁰. It admitted and enacted that all the previous law against the maintenance, champerty and embracery should stay in force and in execution. Moreover, it strictly prohibited that no one should buy, sell or exchange any pretended rights or titles in lands and treatments⁷¹, which made the person can not sell the things he didn't own⁷². Notably, the construction of stat. 32 Hen.VIII.c.9 was facilitated by the case *Partridge v. Strange*⁷³.

the public utility not because of it being 'chose in action'. See: *Bishop of Lincoln and Whitehead v Wolferstan* - (1764) 96 ER 284 [1764] Engl Rep.

⁶³ Sir Frederick Pollock and Sir Percy Henry Winfield, *Principles of Contract* (Stevens 1950) 701.

⁶⁴ Champerty has put into statutes law as a criminal offence in 3 Ed.I, cc.25 See: John Reeves, *History of the English Law: From the Time of the Saxons, to the End of the Reign of Philip and Mary [1558]* (London: printed for Reed and Hunter 1814) vol II.

⁶⁵ Theodosius and others, *Code Théodosien I-XV, code Justinien, constitutions Sirmondiennes* (Les Éditions du Cerf 2009)4.35.22.

⁶⁶ In the case *Defries v. Milne* (1913), Farwell, L.J., stated that "I think it would be exceedingly bad policy to allow a person to sell rights of action for tort which he did not care to rub the risk of enforcing himself; as for example to allow a liquidator to put such rights up for auction and sell them to some one who might buy for a small sum of money the chance of recovering a larger sum or possibly of blackmailing." See: *DEFRIES v MILNE [1912 D 109] - [1913] 1 Ch 98 ICLR: Chancery Division (us COURT OF APPEAL 1912).110-111*

⁶⁷ Brook pointed out "Et sic vide que chose in action poet ester assigne oustre pur loyal cause, come iust det, mez nemy pur maintenance." See: Brooke and England and Wales (n 40)140 b.

⁶⁸ Edward Coke and others, *The First Part of the Institutes of the Laws of England, Or, A Commentary upon Littleton: Not the Name of the Author Only, but of the Law Itself* (Philadelphia: Robert H Small 1853) vol II, 368 b.

⁶⁹ John Reeves, *History of the English Law: From the Time of the Saxons, to the End of the Reign of Philip and Mary [1558]* (London: printed for Reed and Hunter 1814) vol IV, 219.

⁷⁰ pretended title means the pretended rights of persons not being in possession.

⁷¹ Reeves (n 67) 291.

⁷² The statutes pointed out "if any such bargain, sale, promise, covenant, or grant, be made, and the seller has not himself nor his ancestors been in possession of the same, or of the reversion or remainder, or taken the rents or profits, for one whole year next before sale, . . . and half to the person who sues for it." See: *ibid*.

⁷³ *Partridge v Strange and Others* (1552) 73 ER 159 [1552] Engl Rep.

3.2.2 Assignment of Securities as 'choses in action'

The investigation of the assignability of 'choses in action' can be mainly divided into two parts. The first part is the growth trend of assignability based on the original notion of 'choses in action' since medieval common law. The second part is the evolution of the notion 'choses in action' since early 16th century and the recognition of various financial innovations as 'choses in action' together with its assignability.

The assignment of the 'choses in action real' as mere rights to action firstly arose from the union of marriage. In the case of *Powes v. Marshall*, the judges, Twisden and Windham, held the opinion that the husband can take the proprietary action of detinue alone for things that his wife owned before the marriage, and as such action was relied on law of tort to convert things, both husband and wife should join in suits if there was an action of trover⁷⁴. The idea behind this case, as the starting point of the proprietary aspect⁷⁵ of the action of trover, was further developed by the judge Hyde and Keeling in the case *Blackborn v. Greaves* that such action can be brought by either of the spouse which is a dissent from the Twisdon and Windham. When the Lord Coke and his colleagues at his time thought the assignment of any 'choses in action real' was 'repugnant to every honest feeling of the human heart'⁷⁶ from the ground against 'maintenance in the country' for over 200 years against the privilege of the federal lords and the great landowners. Those opposites from the maintenance became hardly found in 17th century due to the decline of the feudalism and the decay of power those landowners diminished the importance of the concern of maintenance, which fully disappeared in 18th century⁷⁷.

Moreover, it is indicated by Brooke that the assignment of 'choses in action real' like the rights of entry or other proprietary actions had more constraints than the 'choses in action' personal⁷⁸. The assignment of the possibility in equity hadn't been recognized until 1719⁷⁹. However, the case *Thomas v. Freeman*⁸⁰ was the first case to question the sufficiency of the aforementioned arguments against the inalienability of the 'choses in action' on the basis of maintenance and evolution that brought the law of equity into consideration which also facilitated the evolution of the notion of 'choses in action' in second part of this section.

Comparing with the common law's punishment after the actions from the law of procedure's respective, the procedure of law of equity can conduct before the action. The intervention is needed from the equity courts' injunction, otherwise the extension from the common law courts will be needed by their writs of mandamus and prohibition. Combined these two legal systems, the modern transition of from the tangible properties

⁷⁴ *Powes & Uxor v. Marshall*. - [1662] Sid. 172/82 E.R. 1038' [1662] Sderfins Kings Bench Div.

⁷⁵ This proprietary aspect of 'choses in action' strengthened the old view of 'choses in action real' in the later development.

⁷⁶ *Master v Miller* - (1792) 145 ER 855' [1792] Engl Rep.

⁷⁷ *Hunt v Bishop* (1853) 22 LJ Ex 337, 8 Exch 675' [1853]. & Great Britain. and Commissioners Appointed to Inquire into the Law of England Respecting Real Property., *Third Report Made to His Majesty by the Commissioners Appointed to Inquire into the Law of England Respecting Real Property*. ([House of Commons?] 1833) 69.

⁷⁸ Brooke and England and Wales (n 40) 305.

⁷⁹ *Wind v Jekyl and Aleone* - (1719) 24 ER 522' [1719] Engl Rep.

⁸⁰ *Thomas v Freeman* - (1706) 23 ER 967' [1706] Engl Rep.

to incorporeal and intangible properties has been realized⁸¹ and the new rights can be quickly recognized and protections over new definition of properties can be achieved through the injunctions from the equity courts⁸². The law of equity deals more efficiently with on the intangible value by directly issuing its command which creating uses and trusts in the modern capitalism.

Therefore, the complete liberation of the modern notion of assignability of the 'choses in action real' wasn't realized until the late 19th century. The alienation of the right of the owner, who is out of the possession of his property (de facto 'choses in action real'), has been preinstalled in the case of *Coben v. Mitchell*⁸³ and finally recognized in *Dawson v. Great Northern and City Railway*⁸⁴ by referring the case of *Dickinson v. Burrell*⁸⁵.

On the case of 'choses in action personal', firstly, it is always an issue related to the personal nature which constituted the rationale for the early common law's prohibition of its assignment. To better investigate assignment of these contractual rights, the recognition of transfer of the debt can be regarded as the recognition of assignability of the contractual rights ('choses in action personal')⁸⁶. The earliest attempt of the merchant to bypass the prohibition set by the common law to assign their debt was achieved by the assignor A should appoint the assignee B as his attorney to sue for that amount of debt and they would stipulate that the assignee B would keep that amount of money after the suit⁸⁷, if the right to ascertain a money has been assigned from A to B. This method has been recognized as merchant custom in the 15th century as de facto assignment of debt by the common law court⁸⁸. With the trend of reinforcing the maintenance⁸⁹, the common law court prudentially gave choses in action with a conditional alienability that the assignee and the assignor should show some common interest to avoid that assignment being attacked on the ground of maintenance⁹⁰. Two controversial reports of the same case of *Penson v. Hickbed* are good examples to show the opposite opinions within the common law Justices on the issue of free assignment of the debt. The Justice of the case held the

⁸¹ Commons, *Legal foundations of capitalism* (n 1) 234.

⁸² George Tucker Bispham and Joseph D. McCoy, *The Principles of Equity* (8th edn, Banks law publishing 1909) 9.

⁸³ *COHEN v. MITCHELL* - (1890) 25 Q.B.D. 262 [1890] ICLR KingsQueens Bench Div.

⁸⁴ *DAWSON v. GREAT NORTHERN AND CITY RAILWAY COMPANY* - [1905] 1 K.B. 260 [1904] ICLR KingsQueens Bench Div.

⁸⁵ The Dawson's Case referred the case of *Dickinson v. Burrell* as "an assignment of property is valid, even although that property may be incapable of been recovered with one litigation and the equitable interest in the case shall be recognized." The custom of the conveyance of 'choses in action real' has been recognized and codified by Judicature Act 1873 c.66. s.25. (this act has recognized assignability of the choses in action which will further discussed in later part of this section). See: *DICKINSON v. BURRELL* - (1866) L.R. 1 Eq. 337 [1866] ICLR Equity Cases. & '[R]Supreme Court of Judicature Act 1873 (1873 c 66)' [no date] UK Parliam Acts s.25.

⁸⁶ In the case of *Gerard v. Lewis*, Willes indicated "the rule against assigning a 'choses in action' stood in the way of an actual transfer of the debt." See: *GERARD v. LEWIS* - (1867) L.R. 2 C.P. 305 [1867] ICLR Common Pleas.

⁸⁷ Prisot, C, J pointed out that "Si on soit ebdette a moy et livre a moy un obligation en satisfaction de cest det, en que un auter est tenu a luy, jeo suirai action en le nom cesty que fuit endette a moy." See: Great Britain and Robert Brooke (eds), *Les Reports Des Cases En Les Ans Des Roys Edward V., Richard III., Henrie VII., & Henrie VIII: Touts Qui Par Cy Devant Ont Este Publies... Qui Referrent Les Cases a L'abbeement de Brook* (Printed by George Sawbridge, William Rawlins, and Samuel Roycroft, assigns of Richard and Edward Atkins 1679) Y. B. 15 Hen. VII, HII., pl.3.

⁸⁸ Ames said in *Disseisin of Chattels* that "in this way the practical advantage of a transfer was secured without any sacrifice of the principle of the inalienability of 'choses in action'." See: James Fitzjames Stephen and others, *Select Essays in Anglo-American Legal History* (Boston : Little 1907) vol III, 584 (inl. n.2).

⁸⁹ Supra note 67.

⁹⁰ See: Charles Harold Williams and Selden Society (eds), *Year Books of Henry VI. 1 Henry VI, A.D. 1422* (The publications of the Selden Society v. 50, Quaritch 1933) Y. B. 34 Hen. MIch., pl. 15. & Supra note. 87.

opinion that any assignment of debt together with the letter to entitle assignee the power acting as attorney to sue it would be void only in the case of champerty. There are two causes to allege the reason for bad consideration. The Justice held that the consideration was not well alleged for the first cause⁹¹. The Justice didn't think the buying of bills is maintenance⁹². However, the Justice Leo had the different opinion on the first cause. He held the opinion that the first cause was valid⁹³. Meanwhile, he also admitted that there was a rule to enable the assignee sue in the assignor's name⁹⁴ that the debt should be assigned to meet the lawful causes like by the way of satisfaction, which also indicated in the *South and Marsh's* case⁹⁵ in the same year. Hence the completion of the conditional assignment of the 'chose in action personal' has been finished in the reign of Elizabeth I.

According to the aforementioned development, we shall still be aware that the assignment of the chose in action personal or any other contractual rights, which are the promises or contracts made by two equal and free parties voluntarily⁹⁶, are void without opposite party's consent to such assignment. Once the relation is still the personal relation arising from the personal confidence rather than a property relation originated from transfer of physical things or evidence, the argument for the inalienability of such 'chose in action personal' will still be valid under the norm of common law. Hence, rather than struggling to make full assignability of the 'chose in action' under the common law, the circumvent of borrowing the new notion of property from the law of equity will be more efficient. From the law of equity, the property is more like a real right against the world instead of the common law's notion. The circumvent of the legal practice is making some contractual rights⁹⁷ into property rather than making all 'chose in action' assignable.

The start of the trend was indicated by the case of *Warmstrey v. Tanfield* in 1628⁹⁸ which recognized the assignment of the future possibility under a trust relationship in equity⁹⁹ and highlighted the creation of the notion of equitable assignment of the legal 'chose in action'. This is the admission of the validity of assignment of chose in action under equity without showing the special relation between the assignee and assignor as Judicature Act 1873 stated¹⁰⁰. Moreover, such assignment can be completed in two ways. Firstly, the assignment can be conducted by the way of contract which two parties' valuable

⁹¹ The First cause is "it is not alleged for what the money contained in the bills was due, nor to whom; and it may be they were bills made to the defendant himself, or due to him, and so no consideration." See: *Penson v Hickbed* (1589) 78 ER 427 Cro.Eliza. 170 [1589] Case Overv32 ELIZ. Hil. 427.

⁹² The justice's arguments are "for it is usual among merchants to make exchange of money of bills of debt, *et e contra*. And Gadwy said it is not maintenance to assign a debt with a letter of attorney to sue for it, except it be assigned to be recovered, and the party to have part of it." Ibid.

⁹³ In Leo's comment, such assignment was bad since there was no signal that any debt was due. See: *Penson v Hickbed* (1589) 78 ER 427 4. Leo. 99 [1589] Case Overv.

⁹⁴ It was de facto the assignment of the chose in action personal.

⁹⁵ *South and Marsh's Case* - (1589) 74 ER 654 [1589] Engl Rep.

⁹⁶ *Supra*, note 60

⁹⁷ Since the notion of 'chose in action' may changed through the development of legal infrastructure. Here using the contractual right to distinguishing with the modern notion of 'chose in action'.

⁹⁸ *Warmstrey v Tanfield* (1628) 1 Eq Cas Abr 46, 1 Rep Ch 29 [1628] Court Chancery Rep.

⁹⁹ This revolutionary case has shaken norm set by the common law that the trust (chose in action) can not be assigned. The Coke's commentary summarized as "... had a trust, yet could not be assigned the same over the plaintiff, because it was a matter in privity between them, and was in nature of a chose in action." See: Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (E and R Brooke 1797) Cap.8 85.

¹⁰⁰ '[R]Supreme Court of Judicature Act 1873 (1873 c 66)' (n 83) s.25 (6).

consideration is needed to enable the contract to be enforced¹⁰¹. Therefore, the enforcement of a contract is a premise for the assignment of ‘choses in action’¹⁰². Another way to enable such assignment without any valuable consideration is making the assignor as a trustee of assignee thus the common interest has been involved through a trusteeship¹⁰³. In this case, the problem of assignability of the securities will become the problem of the legal identification of securities as ‘choses in action’.

With aid of the notion of ‘writ in debt’, the notion of ‘choses in action’ has been extended from the right to bring action to document of evidence of right¹⁰⁴. The ‘choses in action’ was treated as *bona et catalla*¹⁰⁵ in *Calye’s case*¹⁰⁶. Therefore, various of financial innovations under the modern category of securities has been regarded as the ‘choses in action through the de facto legal recognition by case law and statutes law. The bond was de facto said to be a ‘choses in action’ as hereditament¹⁰⁷ in 1534¹⁰⁸. The charters and evidences relating to the freehold or inheritance, obligations¹⁰⁹, and other deeds and specialities are categories as ‘choses in action’ in 1584¹¹⁰. The *Calye’s case* made it possible that the various of commercial documents from the financial innovations are treated as choses in action since late 16th century. In the case of *Master v. Miller*, the modern scope of negotiable instruments¹¹¹ has been treated as ‘choses in action’ in 1792¹¹². The policy of insurance is a ‘choses in action’¹¹³ by recognizing the right to receive a sum of money as ‘choses in action’. The bill of lading was regarded as a choses in action in 1786¹¹⁴.

However, the recognition of the shares and stocks as ‘choses in action’ and their assignability are more complicated compared to other ‘choses in action’. Shares and stocks

¹⁰¹ *Wright v. Wright* 1 Ves. Sen. 409’ (1750) 1 Ves Rep 409, 412.

¹⁰² For the development of legal infrastructure to enforce a contract, full details can be founded in previous section 3.1.

¹⁰³ *Wright v Wright* 1 Ves Sen 409’ (n 99).

¹⁰⁴ *Supra*, note 46.

¹⁰⁵ In English legal terminology, “goods and chattels”

¹⁰⁶ *Calye’s Case* - (1583) 77 ER 520’ [1583] Engl Rep.

¹⁰⁷ From the early medieval common law notion of ‘choses in action’, any ‘choses personal’ as hereditaments were taken away from the category of ‘choses in action’. See: *Supra*, note 37. Therefore, it can be a proof as the aforementioned evolution of ‘choses in action’ in the development of legal infrastructure.

¹⁰⁸ In the case of *Knolle’s case*, a series of rendering rent had been devised to a stranger and the Chief Justice Baldwin recognized that the stranger’s heir or executors had the right to have these rents. Hence, the series of expectable future cash flow from the land rent can be de facto regarded as a bond and the devise and inheritance of the bond differed from the existing customs that the inalienability of the debt. The courts finally hold the opinion that the rents were a chattel and de facto recognized the bond as a ‘choses in action’ as hereditaments. However, the Chief Justice at that time failed to recur the precedence that the right to a rent was things could be assigned in the reign of Edward IV. See: *Knolles’ Case* - (1534) 73 ER 13’ [1534] Engl Rep. and N Neilson and Selden Society, *Year books of Edward IV*. (Quaritch 1931) 84.

¹⁰⁹ The case *Chanel v. Robotham* recognized precedent made by *Calye’s Case* that the parchment and wax of a bond was a ‘choses in action’ as *bona et catalla* and the statement is quoted as “although it was objected, that the parchment and wax are *bona & catalla*, and may pass by that name; yet for as much as the debt included and wrote upon it is the principal, the words of the grant ought to comprehend the name of the principal.” See: *Chanel v Robotham* - (1605) 80 ER 48’ [1605] Engl Rep.

¹¹⁰ The *Calye’s case* indicated that “although they do not of their proper nature extend to charter and evidences concerning freehold or inheritance, or obligations or other deeds or specialities, being things in action.” See: *Calye’s Case* - (1583) 77 ER 520’ (n 104).

¹¹¹ The detail of the negotiability of these credit instruments will be discussed in section 3.2.3.

¹¹² “the bill is evidence of right of action.” See: *Master v Miller* - (1792) 145 ER 855’ (n 74).

¹¹³ The judgement made by Jessel stated that “In my opinion it is clear beyond all argument that a policy of assurance is a ‘thing in action.’” See: *Ex Parte IBBETSON*. In *Re MOORE*. - (1878) 8 Ch.D. 519’ [1878] ICLR Chancery Div, 520.

¹¹⁴ “...gets one of them by a legal title from the owner...has a right to the consignment.” See: *Caldwell and Others against Ball* - (1786) 99 ER 1053’ [1786] Engl Rep.

came with the notion of the public fund since 1500s. From 1500s to 1600s, the granting annuities from the crown became the vehicle of funding, which was either with a certain maturity or perpetual, and were guaranteed by the public revenues. It was de facto treated as 'chose in action' through regarding the stealing of a series of shares and stocks a felony by terming them as 'chose in action' in 1729¹¹⁵. The earliest case law recognizing those specific government securities as chose in action was *Snellgrove v. Baily* in 1744¹¹⁶ and public funds have been recognized as 'chose in action' through the test of execution under common law by Lord Thurlow¹¹⁷ which also followed by the Lord Blackburn¹¹⁸. Yet the problem had aroused from this classification due to the traits of 'chose in action'. During the development of 'chose in action', the notion of reduction into possession is an important notion by executing the right to get possession of tangible property or a certain amount of money. Since the share and stocks of a joint stock company or perpetual public fund have no way to be reduced into possession¹¹⁹ unless the governmental authorities could like to redeem or repurchase it¹²⁰. This barrier opposing the shares and stocks as 'chose in action' has been overcome by the legal recognition that the perfection of reduction into possession of shares and stocks is transferring these stocks or shares into his name. In the case of *R. v. Capper*, the Lord Chief Baron recognized all shares and stocks as 'chose in action' by using analogy, which comparing with other recognized 'chose in action'¹²¹.

Notably, stocks and shares treated as 'chose in action' enabled assignment of stock and shares in equity. However, they are also granted a special treatment to make it not only in equity but also under common law court. For example, the assignability of granting annuities by crown was smoothly achieved under a writ of fieri facias¹²². The establishment of public fund was authorized by the statute law in William III era and their assignability was also granted through a legislation intervention¹²³. Such transaction of stocks in these fund is not only permitted in equity but also recognized by the common law court¹²⁴.

¹¹⁵ Stat.2 Geo.II, c.5 referred by Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press 1888) 233.

¹¹⁶ *Snellgrove v Baily* - (1744) 26 ER 924' [1744] Engl Rep.

¹¹⁷ *Dundas v Dutens* - (1790) 30 ER 109' [1790] Engl Rep.

¹¹⁸ 'THE COLONIAL BANK APPELLANTS; AND FREDERICK WHINNEY RESPONDENT' - (1886) 11 AppCas 426' (n 47).

¹¹⁹ A right of husband to exercise the rights of his wife in the common law until being abandoned in the modern era.

¹²⁰ *Wildman v. Wildman* (1803) 9 Ves 174, 32 ER 568' (1803) 9 Engl Rep 174.

¹²¹ "It is thus settled that a bond, and stock have no locality any more than other choses in action, except for the purpose of probate and administration; and therefore as the words here are *bona & catalla felonum* they do not pass stock, which I consider is a chose in action, or in the nature of a chose in action." See: '*R v Capper, Re Bowler* (1817) 5 Price 217, 146 ER 587' [1817] English Report. 266. And followed by 'THE SOCIÉTÉ GÉNÉRALE DE PARIS AND G. COLLADON APPELLANTS; AND JANET WALKER AND OTHERS RESPONDENTS.' - (1885) 11 App.Cas. 20' [1885] ICLR Appeal Cases. For the recognition of shares in joint stock company as 'chose in action'. See: '*Humble v Mitchell* (1839) 11 Ad & El 205, 2 Ry & Can Cas 70' [1839] 208.

¹²² *Mary York against Twine* - (1605) 79 ER 67' [1605] Engl Rep.

¹²³ England and Wales. and others, *Stat.4 Wil.&M. c.3: An Act for Granting an Aid to Their Majesties of the Sum of Sixteen Hundred Fifty One Thousand Seven Hundred and Two Pounds Eighteen Shillings, towards the Carrying on a Vigorous War against France.* (Printed by Charles Bill, and the executrix of Thomas Newcomb, deceas'd; printers to the King and Queens most Excellent Majesties 1692). & 9 Will III c.44 East India Company Act 1697 cited in Great Britain., *East India Acts: A Collection of Acts of Parliament Dealing with the East India Company, 1692-1747* (1697).

¹²⁴ "A transfer of stock or shares is effected by an assignment by the boldor and an acceptance by the transferee; the only function of the Bank of England or of the company is to see that the transfer is properly registered in their books." See: '*Davis v Bank of England* - [1824-34] All ER Rep 630' [1824] ER Repr.

In the case of *Bank of England v. Lunn*, the court pointed out that "if he can, upon his title to the stock, to be applied as

In the issue of joint trading stock company, the situation has been much more complicated. Despite they were created by the royal charter or letter patent¹²⁵ and the transferability of their shares were enabled immediately¹²⁶. However, such legal intervention were doubtful under the common law for almost two centuries¹²⁷ till such transaction had been recognized by the court in case of *Walburn v. Ingilby* in 1833¹²⁸.

Moreover, the incapability of the shares and stocks to physical delivery derived from the reduction into possession made the shares and stocks into a very special category of 'choses in action' which called 'mere choses in action'¹²⁹. Due to the special treatment to overcome the reduction into possession¹³⁰ and reputed ownership during the bankruptcy¹³¹, the shares and stocks were property of special kind¹³². The assignment of the shares and stocks needed to inform the company to vest it under the name of assignee and followed by the modern notion of abstraction and independence of assignment. It is also indicated why the shares and stocks in the modern capital market are in the registered form.

In general, the assignment of the 'choses in action' can not be completed without the perfection of law of equity to circumvent the constraints set by the common law customs and we shall also observe that the assignment of the 'choses in action' is the transfer of the equitable rights rather than the assignment of the choses in possession by physical delivery¹³³.

3.2.3 Advanced Form of Alienability: Negotiability of Securities

In this section, the legal origin of the negotiability under the western legal context and the legal recognition of the negotiability in some securities including the legal tender will be discussed. Before discussing these two major issues, the distinction between the assignability and negotiability will be provided first.

The distinction of the assignability and negotiability can be indicated by their different

the other property, there is no equity." See: *The Governor and Company of the Bank of England v Lunn* - (1809) 33 ER 870' [1809] Engl Rep.

¹²⁵ "relieving holders of stocks in the East India Company... , from liability to being made bankrupt as trader." See: England and Wales. and others, *Stat. 13&14 Cha.II, c.24: An Act Declaratory Concerning Bankrupts*. (Printed by John Bill and Christopher Barker 1662).

¹²⁶ These stocks are regarded as real estate. See: *Stat. 5&6 Will. & M. c.20: Bank of England Act 1694* (UK Parliament Act no date) s.33.

¹²⁷ Nathaniel Lindley Lindley and Walter B (Walter Barry) Lindley, *A Treatise on the Law of Companies, Considered as a Branch of the Law of Partnership* (London, Sweet and Maxwell, limited 1902) vol I, 3.

¹²⁸ *Walburn v Ingilby* - (1833) 39 ER 604' [1833] Engl Rep.

¹²⁹ *Humble v Mitchell* (1839) 11 Ad & El 205, 2 Ry & Can Cas 70' (n 119) 208.

¹³⁰ *Supra*, note 117.

¹³¹ John Greenwood, *An Analytical Digest of the Cases Published in the New Series of the Law Journal Reports: And in All the Reports of Decisions in the Courts of Common Law and Equity, in the Ecclesiastical and Admiralty Courts, by the House of Lords, the Privy Council and Election Committees of the House of Commons, at Nisi Prius, and in the Court of Review in Bankruptcy: From Michaelmas Term 1831, to Trinity Term 1835, Inclusive* (EB Ince 1838) 75.

¹³² "things of value" See: *Tempest and Another v Kilner* - (1845) 135 ER 960' [1845] Engl Rep, 143.

¹³³ it has been concluded by The Law of Property Act 1925 that the 'choses in action' is a intangible property and its assignment can be achieved in equity. See: 'Law of Property Act 1925 (1925 c 20)' 1925 UK Parliam Acts s.136.

treatment of a tort suit in a theft case. If merchant A had been stolen a securities instrument by thief B. The thief B thereafter sold this securities instruments to merchant C who was in good faith. If such securities instrument is only with assignability rather than the negotiability, it is illegal for the thief B to transfer the full title of the instrument due to the assignment of such 'choses in action' was only transfer the equitable rights and the merchant C was liable for the liens upon such securities instrument. However, if such securities instrument is negotiable, the thief will acquire the unbelievable legal power to transfer better title than he owned to merchant C and merchant C can get the complete title to such negotiable securities instruments without any obligation to prove such title. Moreover, the merchant A's title has been destroyed when the merchant C acquired such title¹³⁴. In general, the modern notion of the negotiability contained following three major characteristics: (1) the title has been incorporated with the paper document which the holder of the document does not need to prove his title thus the bona fide transferee can acquire a good even if the transferor had defective title or no title. (2) the consideration is presumed in the effective transaction. (3) the transfer of the instruments can be by delivery in the bearer form or by endorsements and delivery in an order form.¹³⁵ Moreover, since the major negotiable securities appeared from international commercial practice¹³⁶ in the western Europe including the city states of northern Italy, the investigation of such legal origins will be extended to the legal custom in these area instead of English law.

Similar to the treatment in aforementioned medieval English common law, the modern scope of the negotiable instrument also firstly been categorized as 'choses in action', which de facto extended the scope of property¹³⁷. Meanwhile, the two reasons for non-transferability of the 'choses in action' in Europe were the prohibition of representation¹³⁸ and the prohibition of the formal and corporeal transfer of the 'choses in action'¹³⁹. The solution to these two barriers are the potential pathway to the development of negotiability in the modern notion of negotiable instruments.

The earliest traceable solution to the negotiability can be founded in the Lombard legal documents¹⁴⁰ in early medieval age¹⁴¹. The lawyers of Lombardy circumvented the existing barriers by two sets of clauses as expedients. The first set of clauses are aimed to solve the difficulties of representation. The procedure of such expedient is using conveyances to provide enforcement of a personal right¹⁴² through a third person agency on the grantee's behalf and a document will be produce in which the debtor would make a promise on his

¹³⁴ The distinction has aroused in the case *Hall v. Dean* on the issue of money (legal tender) which could be analogized to the characteristic of negotiability in the English common law tradition. See: '*Hall v Dean* (1600) Cro Eliz 841, Owen 131' [1600] Ct KB.

¹³⁵ WS Holdsworth, 'Origins and Early History of Negotiable Instruments I' (1915) 31 LQ Rev 12, 12.

¹³⁶ i.e. Bill of Exchange, promissory note, letter of exchange and bank note, etc.

¹³⁷ Edward Jenks, 'On the Early History of Negotiable Instruments' (1893) 9 LQ Rev 70, 76.

¹³⁸ Similar to the concern of champerty.

¹³⁹ This is mainly an issue of symbolization of 'choses in action' by using the paper document as its evidence.

¹⁴⁰ The two available sources for the law of Lombardy Kingdom are the *Memorie e documenti per servire all'istoria del Ducato di Lucca* and *Codex diplomaticus cavensis*. See: *Memorie e documenti per servire all'istoria del Ducato di Lucca: Memorie e documenti per servire all'istoria del ducato di Lucca*. 5.2 (Francesco Bertini 1837). And Mauro Schiani Michele Morcaldi, *Codex diplomaticus cavensis: nunc primum in lucem editus curantibus dd ...* (H Hoepli 1877) vol i-x.

¹⁴¹ From 7th century to 10th century.

¹⁴² Right in personam in Brunner's description. See: *Zeitschrift Fur Das Gesamte Handelsrecht.vol.22* (Levin Goldschmidt 1877).

performance to not only the original creditor but also anyone who produce such documents as the creditor's agency¹⁴³. Such expedient is achieved by two clauses named by Brunner as *Exactionsklausel* and *Stellvertretungsklausel*¹⁴⁴. The former clauses ensure the right of the grantee will be enforced by a third person agency after the circumstances they mentioned in the charter¹⁴⁵ and the later clauses ensure such enforcement in another way which the performance shall be complied to the creditor¹⁴⁶. Second set of clauses are aimed to tackle the issue of the transfer of incorporeal rights. The procedure of such expedient is to constitute a de facto transfer of beneficial rights through producing a documents in which the debtor would make a promise of his liable performance either to the original creditor and the producer, or to the producer of the document only. Such set of the clauses are named by Brunner as *Inhaberklauseln* which mainly divided by two sub-clauses as *alternative* and *pure*. The former one is the clause as its name the alternation that either original creditor or the producer of the document can enforce such rights¹⁴⁷. The later one is the producer of the document can solely enforce the right given that the original creditor assumed not enforcing his right¹⁴⁸. Notably, there is vital indication derived from the *inhaberklauseln* that the producer of the document does not needed to prove his title while enforcing the right. It can be regarded as a clause in flavour of the creditor's transferee.

The merchant in the western Europe showed their great interest in such documents and these clauses kept their influence in Germany, Italy and England. The legal record in Germany has indicated the influence of these two clauses. For the first clauses, in the Stadtbuch of Stralsunder, there is an interest accounting record shown the similar words as previous mentioned *Stellvertretungsklausel*¹⁴⁹. Jenks also indicated the *Inhaberklauseln*¹⁵⁰ by referring Gareis's quotation¹⁵¹ from early 13th century. In a city of northern Italy also there are various of statutes and ordinances related to the negotiable instruments and its early form medieval contract *Cambium*¹⁵². The rare evidence to reflect the impact of aforementioned clauses are the Statuto Di Bologna del 1454 which showed influence of first set of clauses¹⁵³. The early English law also reflected such trends through referring it in Bracton¹⁵⁴. Despite the fact that these clauses had provided a possible solution to

¹⁴³ Henri Brunner, 'Titres Au Porteur Francais Du Moyen-Age, Les' (1886) 10 Nouv Rev Hist Droit Francais Etranger 11, 31.

¹⁴⁴ Various similar cases can be found in *Codex diplomaticus cavensis*. See: Michele Morcaldi (n 138) vol. i, n11. Mauro Schiani Michele Morcaldi, *Codex diplomaticus cavensis: nunc primum in lucem editus curantibus dd ...* (H Hoepli 1877) vol ii, n 11,221,225,242.

¹⁴⁵ "per se aut per illum hominem cui ipse hanc cartulam dedit and exigendum." See: Heinrich Brunner, *Zur Rechtsgeschichte Der Römischen Und Germanischen Urkunde* (Weidmann 1880) vol 1, 86.

¹⁴⁶ "vel cui istum breve in manu paruerit in vice nostra." See: *ibid*.

¹⁴⁷ the clauses of alternative *Inhaberklauseln* drafted in two forms as "tibi aut eidem homini qui hunc scriptum pro minibus abuerit" or "mihi seu ad hominem illum, apud quem brebem iste in manu paruerit." Former one see: *Memorie e documenti per servire all'istoria del Ducato di Lucca* (n 138) vol.ii n 825. Later one see: Michele Morcaldi (n 142) vol. ii, n 213.

¹⁴⁸ "quos dabunt praedicto Radolfo vel alicui de concivibus nostris qui presentem literam presentavit coram nobis." See: Hugo Loersch and Richard Schröder, *Urkunden Zur Geschichte Des Deutschen Rechtes, Für Dem Gebrach Bei Vorlesungen Und Übungen* (A Marcus 1881) n 159.

¹⁴⁹ "sui ipse hanc cartulam dedit ad exigendum." See: *Zeitschrift Fur Das Gesamte Handelsrecht.vol.23* (Levin Goldschmidt 1877) 228.

¹⁵⁰ Jenks (n 47) 79.

¹⁵¹ *Zeitschrift Fur Das Gesamte Handelsrecht.vol.21* (Levin Goldschmidt 1877) 372.

¹⁵² In Italian "Combiatori"

¹⁵³ Statuto di Bologna del 1454 xliii, § 3 See: Georg. Friedrich von Martens, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrecht ein Beitrage zur Geschichte des Handels des Mittelalters* (Joh Christ Dieterich 1797) vol ii, 57.

¹⁵⁴ It had been called as *missibilia*. See: Bracton and others (n 34) f. 41b.

circumvent the primitive legal notion, its crude and unformed nature still required further development of legal legislation and business practice to facilitate the further evolution of the negotiable instruments.

The origins of modern notion of negotiable instruments like bill of exchange should be tracing the documents with the similar philosophy. The philosophy of the negotiable instruments are the fulfilment of the business practice requirement of the making the promise of freeman into something like as money as possible, in the case of bill of exchange is using the promise of future purchasing power to exchange the current money¹⁵⁵, which can be regarded as the barter of same genus of different forms. According to the development of medieval business practice, the earliest documents embedded such philosophy are the alternative form of innominate contract *Permutatio*, called *Cambium*. It is a contract of exchange the money in a Place A with the money in Place B¹⁵⁶, which is a de facto transport a money from one place to another in a narrow sense¹⁵⁷. In the 13th century, the legal authorities in northern Italy had made their own statutes to recognize the enforceability of such private contract document has same enforceable power as public documents respectively. The Statuto di Roma 1363 provided as good example of the enforcement of the private contract¹⁵⁸ with respect to the ancient statutes of Rome Legal Merchants¹⁵⁹. Such recognitions of the enforceability can be also founded in Vallassina in 1343¹⁶⁰, Intra in 1393¹⁶¹, Piacenza in 1391¹⁶², etc.

At the same time, the development of aforementioned *Cambium* has been indicated by the legislation as bill of exchange¹⁶³ firstly in Statuto di Perugia in 1342¹⁶⁴ and later followed by Forlì, Piacenza, Verona, Bologna, Bergamo and Persaro, etc in 300 years¹⁶⁵. However, till the Statuto di Piacenza in 1391¹⁶⁶, there is still nothing said about the

¹⁵⁵ Commons, *Legal foundations of capitalism* (n 1) 250.

¹⁵⁶ “hoc tanum interesse inter cambium et permutationem quod haec propria sit specie ad speciem, illud autem speciei.” See: Iohannes Marquardus, *Tractatus politico-juridicus de jure mercatorum et commerciorum singulari* (1662) ii.12,22.

¹⁵⁷ Detail research of the verities of the form of *Cambium* can be founded in Holdsworth article which indicated the vital role of *Cambium* in the development of Bill of Exchange. See: Holdsworth, ‘Origins and Early History of Negotiable Instruments I’ (n 133) 24–29.

¹⁵⁸ In the Statute 1363, there is a section titled “de executione apodixarum scriptarum manu propria.” See: Francesco Schupfer, *Il Diritto Delle Obbligazioni in Italia: Nell’età Del Risorgimento* (fratelli Bocca 1921) vol 3 i, 125.

¹⁵⁹ “statuimus et ordinamus quod eodem modo et forma servetur in apodixis scriptis manu debitori qua recognita seu per ipsum scriptorem seu per testes executioni mandetur ut supra narratur.” See: Giuseppe Gatti, *Statuti dei mercanti di Roma* (Arnaldo Forni 1980) 132.

¹⁶⁰ GIULIANO SCARSELLI, ‘Sulla Necessità Di Ampliare L’ambito Dei Titoli Esecutivi Nonché L’accesso All’esecuzione Forzata’ [2012] *Giusto Proc Civ*, n 48.

¹⁶¹ *ibid* n 50.

¹⁶² *ibid* 51.

¹⁶³ In Italian “la lettera di cambio”

¹⁶⁴ “Statuimo e ordenamo che quegnunque persona fosse tenuta dare ad alcuno alcuna quantitate de pecunia, e avesse overo averà per scripta de cambiadore che deveto aggia pagato aprovata per gl’auditore del cambio, cioè la scripta del cambiadore, aggia forza de refudanza e de stromento confessionato piubeco, legetemamente facto e confecto entra gle credetore e devetore, si che per vera e legetema refudanza de piubeco estrumento confessionato e de refudanza sia avuta la dieta scripta del cambiadore.” See: Perugia. and Giustiniano Degli Azzi Vitelleschi, *Statuti di Perugia dell’anno 1342* (E Loescher & C) 295.

¹⁶⁵ SCARSELLI (n 158) 12 n 55-60.

¹⁶⁶ “Statuimus quod si aliquis mercator vel campsor dixerit coram potestate vel eius iudice de aliquo cive Forlivii quod sibi debeat dare denarios usque ad quantitatem centum solidorum ravennatum inclusive prò panno ... potestas et eius iudex teneatur facere iurare creditorem et debitorem de veritate dicenda et in causa procedere summarie, simpliciter et de plano, strepitu et figura iudicii prorsus exclusis” See: Georg Friedrich von Martens (n 151) 18.

negotiability in bill of exchange¹⁶⁷. Meanwhile the notion of the bill of exchange in France was mentioned by the Ordinance of Louis XI in 1462 as *lectres de change*¹⁶⁸. The earliest statutes on Europe Continent admitting the transferability of bill of exchange (letter of exchange at that time) was the Ordinance issued by magistrates of Barcelona in 1384 through accepting the endorsement on the documents¹⁶⁹. However, in the civil law country, such as France had observed a phenomenon that the formal clauses in favour of the creditor's transferee seems disappeared in the 15th and 16th century due to the ignoring the distinctions between two relevant clauses¹⁷⁰ during the conception the civil law. It was finally solved by the civil law tradition by an Ordinance issued in the 1673¹⁷¹ to indicate that endorsement and order of the bond¹⁷² containing the *Inhaberklause* emerged in Lübeck¹⁷³ in 15th century and the bearer with a bearer form of the negotiable instrument were not enabled to bring action until the 1721¹⁷⁴.

The development of negotiable instruments is more complicated due to the English common law custom. It is also the very important part of the modern legal infrastructure due to the great influence of the Anglo-American legal tradition on the modern business world. For the brevity's sake¹⁷⁵, such development of the negotiable instrument can be divided into the recognition of the bill of exchange and the recognition of promissory note.

The earliest case in England recognizing the negotiability of the bill of exchange is the case of *Martin v. Boure*, it is a matter of the foreign bill of exchange, of which the negotiability was affirmed due to its importance in the international trade in 1601¹⁷⁶. For the inland bill of exchange in England, the three aforementioned characteristics¹⁷⁷ of negotiability should be identified case by case.

Firstly, the recognition of the characteristic that the title has been incorporated with the paper document, which the holder of the document does not need to prove his title thus the bona fide transferee can acquire a good even if the transferor had defective title or no title, stalled by the unclear defining feature of the rights of bearers. In the case of the bill of exchange as bearer instruments, the bearer can hardly be regarded as the attorney or the nominee of the grantor nor as the assignor in the equitable assignment of the 'choses in action', it ought to be treated as taking the full title from the grantor in which there

¹⁶⁷ Jenks (n 135) 71.

¹⁶⁸ François-André Isambert and others, *Recueil général des anciennes lois françaises depuis l'an 420 jusqu'à la Révolution française...* Tome XXVII, Tome XXVII, (Belin-Leprieur ; Plon frères 1827) vol x, 451-456.

¹⁶⁹ Georg Friedrich von Martens (n 151) 107.

¹⁷⁰ "on n'y vit plus qu'un mandat" and "vel cui mandaveris" See: Louis Debray and Louis Debray, 'De la représentation en justice par le cognitor : droit romain ; La clause à ordre : droit français' (V Giard & E Brière 1892) 36.

¹⁷¹ Isambert and others (n 166) xix,100.

¹⁷² It was later developed into the modern form of negotiable instruments in the European continent. For detail of the illustration see: Jenks (n 135) 80–85.

¹⁷³ Loersch and Schröder (n 146) n 317.

¹⁷⁴ WS Holdsworth, 'Origins and Early History of Negotiable Instruments IV' (1916) 32 LQ Rev 20, 25.

¹⁷⁵ For detail of the discussion of the development and origin of the negotiable instrument in England see: WS Holdsworth, 'Origins and Early History of Negotiable Instruments III' (1915) 31 LQ Rev 376. And Holdsworth, 'Origins and Early History of Negotiable Instruments IV' (n 172).

¹⁷⁶ *Martin v Boure* (1601) Cro Jac 6, 79 ER 5 [1601] Engl Rep.

¹⁷⁷ Supra, note 133

should only be the direct contract between bearer and grantor¹⁷⁸. Such opinion has been clearly stated by the justice in the case of *Crawley v. Crowther* in 1702¹⁷⁹.

Secondly, that the consideration is presumed in the effective transaction is recognized by the Lex Mercatoria through the recognition of the necessity of receiving values which can be used to examine the validity of the bill of exchange¹⁸⁰.

Finally, on the issue of the mode of transfer, the case *Hodges v. Steward* has indicated that the bill of exchange can be transferred by endorsement and delivery once such bill was payable to the bearer or order to pay to the grantee¹⁸¹ and such endorsement is acted in a manner of the transfer of rights¹⁸² in 1693. The mode of transfer has been completed by the case of *William v. Field* that every endorsement created a new bill for the grantee to have the right to bring actions to get money paid in 1693¹⁸³. The cases illustrated above are the legal recognition of the negotiability of both inland and foreign bill of exchange in English legal custom.

As stated above, the English common law system spent the whole 17th century to recognize the mercantile custom of bill of exchange. In the late 17th century, the English lawyers tried to use the analogy method to persuade the court to admit the legitimacy and negotiability of promissory notes. In the case of *Shelden v Hentley*, the bearer is allowed to bring action on a sealed note while an anverment of the payment has been made to the bearer of such note in 1681¹⁸⁴. However, such attempts were not successful due to Holt's opposing the recognition of promissory notes. In the case of *Buller v. Crips*, Holt took the promissory note as the invention of Goldsmith in London who had the intention to make a legal recognition of their binding all documents they dealt with, which would lead to a carrying any liens through the note. Those note in Holt's opinion are that those notes from legal perspective are the "evidence of parol contract" into a specialty and he questioned whether the granter of notes can transfer a better right to the nominee¹⁸⁵. Through the argument he made in *Ckerke v. Martin* that notes payable to others are not bill of exchange which made the notes non-negotiable¹⁸⁶. Therefore, such Holt's insistence has been

¹⁷⁸ Thomas Atkins Street, *The Foundations of Legal Liability: History and Theory of English Contract Law* (Edward Thompson Co 1906) vol ii, 370–71.

¹⁷⁹ '*Crawley v Crowther* - (1702) 22 ER 1194' [1702] Engl Rep.

¹⁸⁰ Wyndham Beawes and Thomas Mortimer, *Lex Mercatoria Rediviva, Or, A Complete Code of Commercial Law: Being a General Guide to All Men in Business ... : With an Account of Our Mercantile Companies, Our Colonies and Factories Abroad, Our Commercial Treaties with Foreign Powers, the Duty of Consuls, and of the Laws Concerning Aliens, Naturalization, and Denization: To Which is Added a Sketch of the Present State of the Commerce of the Whole World ...* (J Rice 1761) 74.

¹⁸¹ '*Hodges v Steward* - (1693) 91 ER 696' [1693] Engl Rep.

¹⁸² The argument in the *Hodge v. Steward's* Case opposed what Holt said in the *Steward v. Hodge's* Case that "A bill of exchange is made to A. B. or bearer, A. B. indorses it, and the indorsee brought an action; and upon a demurrer, adjudged that it did not lie; for it cannot be indorsed, it not being made to A. B. or order, and the bearer cannot have an action upon a bill of exchange; for he has no interest as bearer; but it being paid to the bearer, it is sufficient payment to discharge the party who pays it; but it does not give the bearer such an interest that he can maintain an action." See: '*Steward v Hodges* - (1692) 90 ER 962' [1692] Engl Rep.

¹⁸³ "every indorsement is a new bill and implies a warren by the indorser that the money shall be paid." See: '*Williams v Field* - (1693) 91 ER 696' [1693] Engl Rep.

¹⁸⁴ "a bearer allowed to sue on a note under seal promising to pay the bearer who delivered the note." See: '*Shelden v Hentley* (1681) 2 Show 160, 89 ER 860' [1681] Engl Rep.

¹⁸⁵ '*Buller v Crips* (1703) 6 Mod Rep 29, 87 ER 793' (n 21).

¹⁸⁶ '*Clerke v Martin* - (1702) 92 ER 6' [1702] Engl Rep.

reversed by the legislation intervention from the parliament in 1705 which gave remedy upon promissory notes¹⁸⁷. Finally, the case of *Grant v. Vaughan* can be regarded as the case to finish the 200-year development of negotiable instrument and construct the modern form of negotiability in 1764¹⁸⁸.

3.3 Modern Notion of Property: Significance of Property Right in Securities

As indicated in section 3.1 and 3.2, the clear transformation from the primitive notion of property to the modern notion of property has taken place. In the tradition of Anglo-American private law, the property refers rights in the nature of ownership and the property rights request the alienability and enforceability of such right against the third party. Therefore, the alienability and enforceability of the aforementioned 'choses in action' de facto constituted the elements of the property rights, which leads to the extension of the 'choses in action' as property. Meanwhile, some primitive notion of the property still has its influence on the presentation of modern property rights. In the case of *Blackstone v. Miller*, the justice reiterated the norms inherited from property law based on the possession that if a thing can not be physically handled yet that such physical handling can be achieved and recognized by law through symbolizing it on another physical things¹⁸⁹ which can be handled¹⁹⁰.

Firstly, the significance of property rights in securities is the extension of the scope of property from merely tangible things to the incorporeal and intangible things. The extension of the scope of property facilitated a very important change in the definition of property which has been firstly recognized by American justice in the case of *Chicago, M. & St. PR Co. v. Minnesota* in the late 19th century. Justice Field firstly approved the definition of property as exchange value of property¹⁹¹. Such transformation led to the changed treatment of the property which is liberated the property from the physical and tangible objects to something intangible like the rights to against others. Therefore, the extension of the scope of the property rights to incorporeal and intangible things has indicated as Ely summarized, that the essence of property is in the relation among persons arising out of their relation over things¹⁹². On one hand, the property can be still regarded as the physical objects as it used to be. On the other hand, the property became a bundle of rights derived from the expected activities including the acquiring, using and exchanging such things based on their ownership. This is the essence of the property as exchange value of property which takes the property as marketable assets.

Such process, from the law and economists' point of view, is the legal authorities turned their attention from the use-value of the property, which has been incorporated into the

¹⁸⁷ England and Wales., 3&4 Anne. c.9,1705: *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*. (Printed by Charles Bill, and the executrix of Thomas Newcomb, deceas'd] ; 1704).

¹⁸⁸ *Grant v Vaughan* - (1764) 97 ER 957 [1764] Engl Rep.

¹⁸⁹ In the case of securities, as mentioned above, is usually a paper documents achieved by a writ of debt.

¹⁹⁰ *Blackstone v Miller* 188 189 (us Supreme Court 1903).

¹⁹¹ *Chicago, M & St PR Co v Minnesota* 134 418, 458 (us Supreme Court 1890).

¹⁹² Ely and others (n 5) 96.

internal economy of the household in the process of producing and consuming of the means of production, to the exchange-value of the property which is the incorporeal and behavioural market-value obtaining the expectation in the exchange of means of production in the market while selling them. The distinction of use-value and exchange-value is that the former one is increasing the total wealth of the society through increasing the quantity of use-value from the increasing production supply capacity and the later one is increasing the total wealth of the society by the bargaining power to increase or maintain the exchange-value via intervening the supply and demand scale. The relationship between the increasing production supply capacity and the increasing of the use-value can be easily proved by the intuition even in the primitive society. However, the later one is the merit of the development of the modern capitalism which utilizes and allocate the capital to its most efficient use.

Following example is used to prove the linkage between the bargaining power and the increasing of the total wealth of the society under the context of game theory.

A and B lived in a small village. A have a stamp book. The utility of possessing and using such book is £500. B is keen on collecting the stamps and he just received £1000 from his grandma. A decided to buy the stamp book from B. The utility of possessing and using such book to B is £800. Since there is difference between the buyer and seller's utility, there are possibility of bargaining. The presumptions of the transaction are if the transactions are voluntary, A will agree to sell if B bids over £500. B will agree to buy if quote from X is under £800. Therefore, the transaction price will between £500-800.

Under the transactions of game theory, moving economic goods¹⁹³ from A to B will create £300 in value, which using terms in economics are cooperative surplus. However, the process of the bargaining is the distribution the the cooperative surplus will not change the value of cooperative surplus. The only factor will influence the surplus is the break of the bargaining which means they can't reach an agreement.

The value of cooperative solution can be calculated without given a exact transaction price. Supposing they make an agreement that distribute £X of the surplus to A, the value of cooperative solution will be

$$800 + [1000 - (500 + X)] + (500 + X) = £1800.$$

(the value of the stamp books by B) (the remaining money kept by B) (the money made from the transaction)

The value of non-cooperative solution will be the value of stamp book by A and the money kept by B which in total is the 500+1000=£1500. The net surplus between the cooperative and non-cooperative solution is £300. The intuition we can learn from this example are the action of bargaining increase the total wealth of the society.

While using the analogy to the circulation of capital, we can observe that the free

¹⁹³ From the legal perspective private property.

circulation of capital increases the total wealth of the society, which is partly the second significance of the property rights insecurities. The property rights in the securities enabled the capital holders to utilize their capital regarding to their risk endurance. The enforcement of the modern form of contract together with the property rights in securities building the trust among the creditor and debtor and provide the real right for the investor to claim back their money. Secondly, the property rights in the securities¹⁹⁴ has enabled the circulation of such paper documents. The capitalist and the institution of capitalism can hardly survive if the interest rate at a 15% or 30% level per year. If the securities can circulate, to achieve the same amount of economic effect, the interest rate would be as lower as 5% with multiple time of the circulation. Hence, the free circulation of securities enable the whole capitalist societies operated in the relatively low cost of capital to achieve an optimized development in the past 300 years.

The third significance of the property rights in securities are entitled the owner an exclusive power to exercise his rights over the property and these rights will be prevented the third person's disturbance and torts via various laws and remedies. Hence, the property rights in the securities compared to the contractual rights against person have a stronger power to protect the rights of the investor or creditors. The forth significance of the property rights in securities are the recognition of the ownership of the shares in the corporates. Therefore, it is the premise of the internalization of the social cost which is also the incentive effects to increase the total welfare of the society¹⁹⁵.

¹⁹⁴ These securities used to be the contract or the promise indicated the personal creditor and debtor relations.

¹⁹⁵ This is the theoretical foundation of Coase's natural of the firm which related to the key of his transactional cost.

4. Dematerialization & Immobilization of Modern Securities in Capital Markets: Legal Responses to Adapt the Changes¹⁹⁶

4.1 Legal Aspect of Dematerialization and Immobilization

The trends of dematerialization and immobilization of the securities are proposed by Lybrand Report after the event of ‘paper crunch’ happened in 1960s¹⁹⁷. The campaign of dematerialization has been introduced to the capital market as the response remedy to the crisis¹⁹⁸. The essential of the dematerialization replaced paper documents with the electronic record system. Meanwhile, the essential of the immobilization is the creation of the Central Securities Depository, which led to the elimination of the circulation of paper securities. These two trends are the ultimate solution to the concern of ‘paper crunch’ in most of the counties.

The concept of the dematerialization indicates the process of turning traditional registered securities with the paper certificate as evidence of the title into the securities merely registered in books, which are usually an electronic system, kept by the issuer or the agency on behalf of the issuer rather than issuing any paper certificate. In the case of registered securities, above transformation is about the procedure change. However, the attempt of dematerialization of securities in bearer form fundamentally shook the legal nature of the bearer securities as well as the well-functioning legal infrastructure of the negotiability developed in last 500 years. If the bearer securities have been dematerialized, the bearer instruments will become an intangible property. As indicated in the section 3, the bearer securities is the paper documents incorporated title within such documents as the symbol to facilitated the requirement of negotiability via handing over or delivery of the documents, which is the comprise of the primitive notion of law of possession. Hence, the process of the dematerialization, the bearer securities will be invalid due to the absence of the paper document of title. This is the most vital proprietary problem caused by the bearer instrument caused by the dematerialization of bearer securities.

The process of the registered securities has not changed fundamentally, since being intangible does not remove the title and form of ownership of the registered securities, even if they are not in a physical sense. The claims of the securities still belong to the holder of the securities registered on the issuers’ book either maintained by the issuer or issuer’s agency. Such claim is proprietary against the underlying property. Hence, the

¹⁹⁶ This section is the rifacimento mainly based on author’s LITF course essay in 2016.

¹⁹⁷ Sidney M Robbins, *Paper Crisis in the Securities Industry: Causes and Cures: Is the Stock Certificate Necessary?* (Lybrand, Ross Bros & Montgomery 1969) 104–22.

¹⁹⁸ *ibid* 123–36.

process of dematerialization didn't make these registered securities fungible even if these registered securities are standardized. In other words, the holder of such proprietary claims is in the different stance compared to the holder of the monetary claims in a depositor-banker relation. Moreover, the problem of bona fide purchaser, the settlement, clearance and finality problem will arise due to the different manner in transactions comparing to the traditional physical delivery of the documents. All of the transactions of dematerialized securities take place in the electronic system.

The process of immobilization of the securities requires the corporation of all the participants¹⁹⁹ in the markets to store both their and their customers' securities in the CSD in order to achieve the goal of eliminating the circulation of securities certificates. With the idea of immobilization, CSDs plays as the role of central place to deposit all the issued securities and establish book-entry system to substitute the traditional circulation of certificates. In case of bearer securities and negotiable instruments, the dilemma caused by dematerialization can be solved by keep their traditional paper form unchanged at the CSDs level and transfer the titles through a book-entry, which will be discussed in the later part. The legal consequence of CSD is that the securities have been indirectly held by intermediaries, so called intermediated securities and needed a revisit of the traditional legal infrastructure based on the notion of symbolized possession which has been illustrated in section 3.2. Therefore, the property rights problems in the new created system also needed to be investigated.

4.2 Property Rights in Intermediated Securities

As response to the immobilization, it seems to be out of date for the traditional notion of physical possession of the securities. A new norm should be set to facilitate the needs of presenting the property rights in the securities. Hence, the notion of securities entitlement has been created for the depositor against their depositories as the replacement of physical possession of the securities. The notion of securities entitlement is defined as the "rights and property interest of entitlement holder to a financial asset"²⁰⁰ in a indirectly held system under the UCC 8-102 in 1994. In a tiered system, the securities entitlement became the replacement of the paper evidence of the title to the property and how the intermediaries manage the securities entitlements became a vital issue in the property rights in the intermediated securities. In the current business custom, the securities entitlements are expressed in the securities accounts and the transfer of the securities are achieved by the credit and debt on the securities account of different end-investors. From the form of the securities account, it seems to be similar to the bank account. However, these two forms of accounts are different due to the property right in the securities. For the bank account, although the relationship between the depositor and banker were the bailment at the origin, after the emergence of modern banking industry, their relationship became a

¹⁹⁹ These participants are intermediaries and other institutional investors.

²⁰⁰ American Law Institute. and National Conference of Commissioners on Uniform State Laws., *Uniform Commercial Code : Official Text and Comments* (West 2009)8-102.

creditor and debtor relationship and the claim of the bank account holder is the monetary contractual claim, which can be fungible. However, in the case of securities account, If the claim from the entitlement against the higher tier of the system is monetary contractual claim, the property rights in the securities will be eliminated which is the reaction to the past 500 years' efforts to securities as property. Moreover, the consequence of such legal treatment will shake the foundation of the modern capitalism. Hence, the claim must be proprietary claim.

The entitlement of the end-investors can be merely used against intermediaries in the next higher level rather than the the intermediaries in the higher level of system with the notion of compartmentalisation. Meanwhile, the entitlements against the CSD are only held by the intermediaries in one level lower than the CSD level²⁰¹. Hence, no pass-through right arising in the system²⁰².

The legal relationship between the end-investor and higher intermediaries and intermediaries in each adjacent levels should be identified. In the Anglo-American legal system, there are in total two possible relations to achieve the proprietary claim against the former tier in the system. One is bailment and another is trusteeship. Supposing the relationship in the tiered system is bailment, it is easy to find that the interest in securities became the barrier to recognized the validity of the bailment. As mentioned in the previous section, the legal treatment of the interest in securities is categorized them into intangible property, which is incapable to be in physical possession. Due to the restriction of the bailment under the Anglo-American legal tradition, which underlying property of the bailment needed to be tangible, the fact that the interests in securities as intangible assets made that it is not proper to describe the such legal relation as bailment²⁰³. Therefore, the trusteeship became the only and proper explanation of the indicated relation in the system and the securities entitlement can be treated as the beneficial ownership under the legal arrangement of trusteeship.

Since the notion of beneficial ownership and trusteeship is an Anglo-American legal concept and it can't be used as the explanation under the civil law system if they didn't admit the trusteeship, the notion of the *pro rata* co-ownership is the only possible way to explain the securities entitlement. Among almost all the civil law countries in the world, Germany is the only country whose legal system attempted to establish the complete legal framework for the securities entitlement under the civil law system's interpretation of the proprietary right, while the outcome seems not to be convincing after hard effort²⁰⁴. The statute of *Depotgesetz* (DepG)²⁰⁵ firstly allowed the holding of *Sammelverwahrung* (fungible

²⁰¹ Royston Miles Goode, *Legal Problems of Credit and Security* (Sweet & Maxwell 2003)6-08.

²⁰² This is an improvement of the revised version of the UCC to revoke the pass-through rights within the system avoiding the potential conflict of proprietary claims in the system. See: Jan Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law Volume 2: Contract and Movable Property Law* (Bloomsbury Publishing 2013) 615 n. 461.

²⁰³ The Bailee shall be in possession of the bailor's goods. See: *Roufos v Brewster and Brewster* 1971 218 (us 1971).

²⁰⁴ Dalhuisen (n 200) 616.

²⁰⁵ Georg Opitz and Germany., *Gesetz über die verwahrung und anschaffung von wertpapieren (Depotgesetz) vom 4. februar 1937, nebst einem anhang : schrankfachvertrag und verschlossene einlage* (W de Gruyter & Co 1937).

securities), which is the earliest notion of pooled securities in modern German law. *Bürgerliches Gesetzbuch* (BGB) is the main source for proprietary claim of the securities, transfer of the securities and the essential of the form of entitlements. In general, the relation of the securities intermediary and the CSD are a form of custody under a specific contract²⁰⁶. The legal problem under the such civil law system is the unclear ownership structure of the indirectly held system. Since the end-investor in the domestic German law must be and ultimately marked as the the legal owner of the securities in the chain systems among the intermediaries, it is a challenge to complied such requirement under the traditional notions of possession. Hence, the depository, under such context, is merely treated as the holder of the securities for the end-investors²⁰⁷. The possession is depended on an obligatory right under the form of custody with the intermediaries and there is only contractual rights for the end-investors to reach their intermediaries.

Above solution still kept the problem of unclear ownership remained, due to the title of the paper document is not clearly presented and the property rights of securities can not be protected without a manner of possession. Therefore, the analogy of the dematerialized securities with registered securities under the act in 1940²⁰⁸ can be applied to offer a proprietary protection through the separation of holdership and property rights. Therefore, the depositories have merely a right to hold the securities and the end-investors remain their property rights, which enabled themselves under the protection by bringing the proprietary actions. The pass-through rights of the end-investors has been partly eliminated, but still remains in requesting the paper or physical delivery of the securities which can be regarded as the remaining influence of the primitive notion of the possession. This is the weakness of the German civil law under the trends of dematerialization and immobilization of the securities, which finally led the introduction of the notion of beneficial ownership interest to facilitate the growing demand of harmonization in Europe²⁰⁹.

Finally, the maintenance of the securities account is requested that the proprietary claims of the securities can not be fungible which led to the segregation of the end-investors' securities and the brokerages' securities in order to establish a valid trusteeship²¹⁰.

²⁰⁶ *Bürgerliches Gesetzbuch Mit dem Ausführungsgesetz und Einem Ausführlichen Alphabetischen Sachregister*. (1896) Verwahrung, s 688.

²⁰⁷ *ibid* unmittelbarer Allein und Fremdbesitzer, s 825.

²⁰⁸ Georg Opitz, *Depotgesetz, Gesetz über die Verwahrung und Anschaffung von Wertpapieren vom 4. Februar 1937: Nebst einem ausführlichen Anhang: Schrankfächer und Verwahrstücke und zahlreiche Anlagen* (Walter de Gruyter 1955) 647 Sammelverwaltungsverordnung.

²⁰⁹ Dalhuisen (n 200) 617.

²¹⁰ The fungible of the pool of securities will lead to the problem of commingling of the securities and cause the uncertainty of the subject matter of the trusteeship. See: Joanna Benjamin, *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (Oxford University Press, 2000) 23.

4.3 Transfer of the Property Rights in Securities: Clearing, Settlement and Finality

As mentioned in the previous section, the traditional transfer of the bearer securities is handing over the paper-documents where there is no needs for the clearance and settlement. However, while taking the legal consequence of dematerialization and immobilization of securities into consideration, the issues became much more complicated.

After the dematerialization and immobilization, the transfer of property rights in securities can be regarded as an assignment, which is a very traditional form of the right transfer mentioned in 3.2.1. Thus, the notion of the abstraction and independence²¹¹ shall be applied to the transfer of the property rights. The protection of the bona fide purchaser (assignee) in the transaction is also introduced as so-called priority of the transferee. The introduction of these notions is for the well and smooth operation of the tiered system.

The invention of the clearing function of CSD, derived from the concept of clearing, provides an opportunity for the parties to modify the contractual obligation which can support the process of settlement through novation and netting²¹². The function of settlement stands more at the position of purchasers of the property right. With the help of settlement, the CSD transforms the purchaser's personal contractual claim against the vender to the proprietary claim against the whole world which keeps the purchaser away from the credit risk of the vendor.

Within the procedure of the transaction settlement, the credit risk, insolvency risk and the legal risk of the intermediaries needed to be considered. The notion of the finality is created in order to protect the beneficiaries from those risks. Thus, the promotion of the finality can be regarded as the vital part of the protection of the purchaser's property rights in the securities.

Usually the promotion of the finality can be achieved by (1) introduction of the notion of abstraction and independence of transfer (2) opposing for the notion of capacity and intention. (3) protection from the bona fide purchaser and (4) notion of reliance of the transferee who used to own the property rights²¹³.

²¹¹ Dalhuisen (n 200) 419.

²¹² Benjamin (n 208) 23.

²¹³ Dalhuisen (n 200) 622.

5. Conclusion

This dissertation tried to conducted a law and economic analysis of the property rights in the securities. The author firstly offered an economic explanation of the securities in the modern capitalism infrastructure and put it under the classical institutional economics' theoretical framework with the comprehensive illustration of the legal categorization as well as the attempted to distinguish the difference between money market instruments and capital market instruments in section 2.1. In section 2.2, the premise relating to the property has been discussed for better understanding of the later analysis. In the section 3, the author traced the development of the securities as 'chose in action' and the legal recognition of 'chose in action' as property to complete the investigation of the origin of the property rights in the securities via fulfil the assessment of the enforceability and alienability. Moreover, the significance of the securities as property has been indicated (1) the increasing the total wealth of the society through price discovery. (2) increasing the speed of capital circulation and release high interest rate burden for the capitalism society at the beginning. (3) the exclusive power leads incentive effects at micro-level. (4) the recognition of the ownership of the shares in corporates as the premise of the internalization of the corporation, which also have incentive effects to increase the total wealth of the society. In the final section, the legal responses to the dematerialization and immobilization of the securities has been discussed to show the attempt of the legal system to maintain the well-functioning of the economy.

In conclusion, the property as a social institution is the security for the existence of social order and incentive mechanism to flourish the whole society. The participants in it are benefited and regulated by such security. The emergence of property rights in securities as 'chose in action' changed the way of interpretation of the economic society, wealth generation and wealth distribution from primitive notion of use-value of property to the combination of former one with the exchange-value of property as exchangeable assets. During the development of such expansion, the common law is a good indicators of existing social norm & recognition and the law of equity and statutes law are the facilitators of the well-functioning of the whole society by preventing them from the hinders coming from the primitive common law norms, which indicated the intension of philosophy of law is for the well-functioning of society and flourishing social justice & order instead of being dogmatism. The circumvention of existing norms to adapt the new notions is better than the total radical revolution to fragment the integration of legal infrastructure from conservative and prudential purpose.

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