

*'According to the law of merchants and the custom of the city of London': Burton v. Davy (1436) and the negotiability of credit instruments in medieval England*

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#### AUTHOR FINAL VERSION

The plea between John Burton (at least nominally) and Elias Davy heard before the London Mayor's Court in 1436 is one of the most frequently-cited later medieval legal cases, if not perhaps the best understood. In short, Davy had failed to honour a letter of payment for £30 made out to Burton but it was John Walden, the bearer of the letter, who seems to have brought suit (albeit in Burton's name).<sup>1</sup> The case has therefore been seen as precocious evidence for the negotiability of credit instruments under the 'law merchant' during the Middle Ages. This paper will first establish the wider significance of the case for our understanding of legal and economic development as well as how English merchants in the fifteenth century used credit in practice, a topic on which Professor Bolton has made a substantial contribution. It will then introduce the two main surviving sources for the case, which differ in significant ways. The bulk of the paper will reconstruct the chronology of events inside and outside court, highlighting points of legal and economic importance as they arise. Finally, it will briefly consider how this detailed reading of *Burton vs Davy* may contribute to both the debates among legal and economic historians about the early history of negotiability and among medieval historians over the role of credit, including whether credit could expand to mitigate the shortage of coin during the fifteenth century 'bullion famines'.

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<sup>1</sup> Thus the case is referred to as *Burton v Davy* rather than *Walden v Davy*.

Perhaps the best place to start is by defining what a negotiable instrument is and why it matters. The Bills of Exchange Act 1882 defines it as ‘an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer’.<sup>2</sup> Similar conditions are set out by article 3 of the American Uniform Commercial Code.<sup>3</sup> In addition, the modern law of negotiable instruments involves three further characteristic features: they are transferable and the transferee can sue on them in his own name; transfer for value (consideration) is presumed; and a transferee, who takes one of these instruments in good faith and for value, becomes the holder in due course and is free from many of the defences that the payer could raise against the original creditor.<sup>4</sup> Today, the rights of the holder in due course are seen as essential for the extensive circulation of negotiable instruments but, as James Rogers has pointed out, this is a relatively recent development. Earlier writers on the law of bills of exchange, such as Joseph Chitty (1799) and John Barnard Byles (1829), only discuss the first two defining aspects of negotiable instruments.<sup>5</sup>

Since it was edited by Hubert Hall in 1932, *Burton v Davy* has been cited as the earliest firm evidence for the negotiability of credit instruments during the Middle Ages. In 1938, Frederick Beutel saw in it ‘the complete development of the negotiable bill of exchange’.<sup>6</sup> While J. Milnes Holden was more cautious, he still thought the judgment was ‘truly remarkable: the bearer’s right to sue was clearly recognised’.<sup>7</sup> More recently, Rogers has argued that *Burton v Davy* falls short of modern negotiability in a number of ways: the

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<sup>2</sup> <http://legislation.data.gov.uk/ukpga/Vict/45-46/61/data.htm> <accessed 15 January 2015>

<sup>3</sup> <http://www.law.cornell.edu/ucc/3/> <accessed 15 January 2015>

<sup>4</sup> W.R. Holdsworth, *A History of English Law* (17 vols, London, 1903-66), V, pp.113-4.

<sup>5</sup> J.S. Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge, 1995), pp.1-11.

<sup>6</sup> F.K. Beutel, ‘The Development of Negotiable Instruments in Early English Law’, *Harvard Law Review*, 51 (1938), pp.830-1.

<sup>7</sup> J.M. Holden, *The History of Negotiable Instruments in English Law* (London, 1955), pp.23-5.

transferee Walden was not able to sue in his own name and the court heard evidence relating to the underlying debt, contrary to the concept of the holder in due course.<sup>8</sup> However, John Munro thought that *Burton v Davy* was still significant as it made the London Mayor's Court the first English court to offer 'full protection of the legal rights of the bearer in a transferable bill'.<sup>9</sup> Likewise, John Baker cited *Burton v Davy* when contrasting the common law courts, before which the bearer of an informal bill could not sue, with the London Mayor's Court.<sup>10</sup> Rogers and Steve Sachs would downgrade its significance yet further, arguing that Walden was more likely to be acting as an attorney or collection agent for Burton than as the bearer of the letter, meaning that *Burton v Davy* is only 'an ambivalent advocate for the rights of the independent holder, providing weak evidence for assignability'.<sup>11</sup>

These seeming arcana are of great significance for economic and legal historians. For a certain brand of legal history, again according to Rogers, 'it is axiomatic that the law of bills and notes evolved in response to a universal mercantile need for freely transferable debt instruments, and that the main theme in the history of the English law of bills was the struggle to get the common law courts to accept the principles of negotiability'.<sup>12</sup> For some economists, the 'law merchant' serves as an early example of the operation of private-order institutions, in contrast to public-order enforcement by the state. As the economists Peter Leeson and Daniel Smith put it, 'international trade first took off under a private international legal system called the *lex mercatoria*, or Law Merchant. It continues to thrive under private

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<sup>8</sup> Rogers, *Early History*, pp.45-51.

<sup>9</sup> J.H.A. Munro, 'English 'Backwardness' and Financial Innovations in Commerce with the Low Countries, 14th to 16th Centuries', in *International Trade in the Low Countries (14th - 16th Centuries)*, ed. P. Stabel, B. Blondé, and A. Greve (Leuven-Apeldoorn), p.145; idem, 'The Medieval Origins of the Financial Revolution: Usury, Rentes, and Negotiability', *Journal of International History*, 25 (2003), pp.551-3 qualifies some of these points but still holds *Burton v. Davy* to be a vital precedent.

<sup>10</sup> J.H. Baker, 'The Law Merchant and the Common Law before 1700', *Cambridge Law Journal*, 38 (1979), pp.305-6.

<sup>11</sup> Rogers, *Early History*, p.47; S.E. Sachs, 'Burying Burton: *Burton v Davy* and the Law of Negotiable Instruments' (2002) available at <http://www.stevesachs.com/papers/burton.pdf> <accessed 15 Jan 2015>.

<sup>12</sup> Rogers, *Early History*, p.10. See also the citations in S.E. Sachs, 'From St Ives to Cyberspace: The Modern Distortion of the Medieval Law Merchant', *American University International Law Journal*, 21 (2006), pp.744-5 n.204.

legal arrangements today'.<sup>13</sup> However, Emily Kadens has dismissed this as 'the myth of the customary law merchant' and Charles Donahue in more forthright terms as 'tendentious and unsupported by any critical work in the primary sources'.<sup>14</sup> The question of the relative importance of private-order and public-order institutions in the Middle Ages remains a matter of more than antiquarian interest today.

The question of the extent to which credit instruments were either *de jure* negotiable or at least transferred *de facto* is equally vital for our understanding of the later medieval English economy. Credit was pervasive at all levels of the medieval economy, from international trade to dealings within villages.<sup>15</sup> A debate of particular relevance to this paper, and one in which the dedicatee of this volume has taken a leading role, has been the potential for credit to compensate for a shortage of specie in the later Middle Ages.<sup>16</sup> The 'monetarist' school of thought argues that the expansion or contraction of credit is bound up with the supply of coined money, especially the silver coins presumed to be most used for daily transactions. If the royal mints are producing new coins, then potential lenders will be more confident about future liquidity and thus more willing to extend credit. If the supply of coined money is contracting, then they will hoard liquidity and be reluctant to extend credit. In the latter case, both the overall money supply and the velocity of circulation will fall, leading to either a fall in economic production or in the price level (deflation). This has obvious

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<sup>13</sup> P. Leeson and D. Smith, 'The Law Merchant and International Trade', available at <http://fee.org/freeman/detail/the-law-merchant-and-international-trade> <accessed 15 January 2105>. Much of this literature draws on H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass. and London, 1983), pp.333-56.

<sup>14</sup> E. Kadens, 'The Myth of the Customary Law Merchant', *Texas Law Review*, 90 (2012), pp.1153-1206; C. Donahue Jr., 'Medieval and Early Modern *Lex mercatoria*: An Attempt at the *Probatio Diabolica*', *Chicago Journal of International Law*, 5 (2004), p.23.

<sup>15</sup> M.M. Postan, 'Credit in Medieval Trade', in *Medieval Trade and Finance* (Cambridge, 1973). For more recent work on local credit, see C.D. Briggs, *Credit and Village Society in Fourteenth-Century England* (Oxford, 2009); and on an international level, J. L. Bolton and F. Guido-Bruscoli, 'The Borrromei Bank Research Project', in *Money, Markets and Trade in Late Medieval Europe: Essays in Honour of John H.A. Munro*, ed. L. Armstrong and I. Elbl (Leiden: Brill, 2006), pp.460-490.

<sup>16</sup> For the latest salvos, see J.L. Bolton, *Money in the Medieval English Economy, 973-1489* (Manchester, 2012), pp.273-92 and P. Nightingale, 'A Crisis of Credit in the Fifteenth Century, or of Historical Interpretation', *British Numismatic Journal*, 83 (2013).

relevance for the later medieval economy, given the recurrent ‘bullion famines’.<sup>17</sup> On the other hand, it has been argued that, if economic actors are short of coin, they will turn to non-cash based payment mechanisms, including various forms of credit.<sup>18</sup> If credit instruments were negotiable enough to be used as a circulating medium, then this could increase the money supply. If they were not fully negotiable but payments could be made by assigning debts, this could facilitate a greater velocity of circulation. Either of these could mitigate some of the potentially deflationary consequences of the lack of silver in fifteenth-century England. The precise interpretation of *Burton v Davy* has major implications for this debate.

The remainder of this paper will reconstruct the course of events in the case, from the initial issue of the letter of payment in Bruges in December 1435 up to Davy’s appeal to Chancery in February 1437. This account is based on the two surviving sources for *Burton v Davy*.<sup>19</sup> The first of these was occasioned by a royal writ of privilege issued by John Juyn, chief justice of the common pleas, in November 1436. This, together with the city’s reply and the answering royal writ were copied into the City Letter Book K. They were published in 1911 by Reginald Sharpe, albeit in a heavily-abbreviated calendared form that omits much interesting detail.<sup>20</sup> The second, and more detailed, account is the record of the case, including abbreviated versions of the above, sent by the city in response to a writ of *certiorari* from the court of Chancery in February 1437. This was edited by Hubert Hall as a full transcription with facing translation.<sup>21</sup> While generally very good, Hall’s edition has a number of lacunae. These have been supplied from the original document, where they are clearly legible. However, there are some important limitations that need to be noted. First, we

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<sup>17</sup> P.R. Spufford, *Money and Its Use in Medieval Europe* (Cambridge, 1988), pp.339-62.

<sup>18</sup> It was ‘the relative abundance or scarcity of capital at the disposal of an individual merchant that determined the employment of credit in selling and buying’ (Postan, ‘Credit’, p.23).

<sup>19</sup> Unless otherwise specified, all statements about the case refer to these two sources.

<sup>20</sup> *Calendar of Letter Books of the City of London K*, ed. R.R. Sharpe (London, 1911), pp.108-9; London Metropolitan Archives, COL/AD/01/010, ff.163r-163v.

<sup>21</sup> *Select Cases on the Law Merchant*, ed. H. Hall, Selden Society (3 vols, 1908-32), III, pp.117-19; TNA C 244/17/69.

do not know if the chancellor took any further action after receiving the city's response to the *certiorari*; so it is not clear whether the city's handling of the case was accepted or if the matter was summoned into Chancery. Second, in common with most surviving legal records, they are largely procedural and formulaic and do not provide a full recounting of the arguments employed by the parties. In particular, we lack information from Davy's perspective and, crucially, why he refused to pay. Here it is important not to impose our modern concern with negotiability onto Davy – there is no explicit statement in the sources that any alleged transfer between Burton and Walden was ever the point of contention.

The reply to the writ of privilege describes the debt as the result of 'a certain merchants' exchange between the same John Burton and John Audley, factor and attorney of the said Elias, for and in the name of the said Elias, and to his use, previously made at the vill of Bruges in Flanders in the way of merchants'. The record sent to Chancery provides further details. It includes the text of the letter of payment, which will be discussed in detail below, and provides a fuller description of the underlying transaction. It states that Audley had purchased 'cloth, linen and other merchandise' in Bruges 'to the service and use of the said Elias, his master', and that these goods subsequently came into Elias's possession in London. To pay for this, on 10 December 1435, Audley 'took up by way of exchange, as is the common practice of merchants there' the said £30 from Burton 'by the hand of Thomas Hanworth, then Burton's factor'. In return, Audley delivered to Hanworth a letter of payment, 'for security of repayment of the said sum to be made to the said John Burton, or to the bearer of the said letter', on 14 March 1436.

This transaction helps to illustrate some important features of the contemporary economy. Davy was a mercer and citizen of London, resident in Bassishaw ward but also with interests in Croydon.<sup>22</sup> Burton is described as a merchant of Norwich. He may be

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<sup>22</sup> See A.F. Sutton, *The Mercery of London: Trade, Goods and People 1130-1578* (Aldershot, 2005), pp.528-9.



identified with the grocer of the same name, active in that city in the 1450s and 1460s.<sup>23</sup> One point to note is that both Burton and Davy were acting through agents overseas; Audley for Davy and Hanworth for Burton. This reflects the rise (or not) of the sedentary merchant operating through representatives rather than travelling with their goods.<sup>24</sup> The fact that Burton was a grocer and Davy a mercer is also significant as there was a natural symbiosis between the trading activities of the two groups. It is worth quoting Eileen Power's reconstruction of this mutual coincidence of wants *in extenso*:

The Staplers [grocers] had Flemish money in Calais, where they sold, and in the marts, where they collected their debts; they wanted English money in the Cotswolds and London, where they bought. The mercers had English money in London, where they sold, and needed Flemish money at the marts, where they bought. So the Stapler [grocer] on the continent delivered his money to a mercer and received a bill of exchange payable at a future date in London in English money.<sup>25</sup>

The underlying transaction in *Burton v Davy* could be used as a textbook example of this sort of arrangement. It also reveals the ways in which merchants sought to use credit to avoid transporting specie internationally but which could also be employed locally.<sup>26</sup>

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<sup>23</sup> For Burton's civic activities in Norwich, see *An Index to Norwich City Officers 1453-1835*, ed. T. Hawes, Norfolk Record Society 52 (Norwich, 1986). It is unlikely that this John Burton was the London mercer of the same name (d.1460), who seems to have had ties with Wadsworth in Yorkshire (J. Strype, *A Survey of the Cities of London and Westminster* (2 vols, London, 1720), I, Book III p.67. Available online at [http://www.hrionline.ac.uk/strype/TransformServlet?page=book3\\_067](http://www.hrionline.ac.uk/strype/TransformServlet?page=book3_067) <accessed 15 January>).

<sup>24</sup> Spufford, *Money*, pp.251-4.

<sup>25</sup> E.E. Power, 'The Wool Trade in the Fifteenth Century', in *Studies in English Trade in the Fifteenth Century*, ed. E.E. Power and M.M. Postan (London, 1933), p.67. See also P. Nightingale, *A Medieval Mercantile Community: The Grocers' Company and the Politics and Trade of London, 1000-1485* (London, 1995), pp.435-6 and *Sutton Mercery*, pp.143-6.

<sup>26</sup> Spufford, *Money*, p.394.

The letter of payment, written in French, was read out before the Mayor's Court when Walden brought suit and copied into the record of the case sent to Chancery. It reads:

Let this be given to my very honourable master, Elias Davy, mercer, at London. Very honoured sir, may it please you to know that I have received here, from John Burton by exchange, £30 to be paid at London to the aforesaid John or to the bearer of this letter of payment on the fourteenth day of March next coming, by this my first and second letter of payment. And I beg you that it be well paid on the day. Written at Bruges, the tenth day of December, by your attorney, John Audley.

The document is in the form of a short letter of payment and omits some details of the transaction that were not directly relevant. It does not name Hanworth as the drawee or buyer of the instrument, the sum received in local currency or the exchange rate, as was customary in Italian bills. It has long been recognised that bills of exchange could incorporate an element of interest by varying the exchange rate but, since neither the local payment received nor the exchange rate are given, it is not possible to calculate the interest rate for this transaction.<sup>27</sup> In terms of the modern definition of a negotiable instrument as set out above, the letter of payment ticks all the boxes. It is 'an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer'.<sup>28</sup> The outstanding questions about the negotiability of medieval credit instruments do not concern the form of these documents, but rather how they were treated before the courts, and in particular whether they had the

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<sup>27</sup> A.R. Bell, C. Brooks and T.K. Moore, 'Cambium non est mutuum: Exchange and interest rates in medieval Europe', *Economic History Review* (forthcoming).

<sup>28</sup> Although, in the Middle Ages, authentication was provided not by a signature but by the handwriting of the bill.

characteristics of negotiability: transferability, presumption of consideration, and the holder in due course.

At some point between the issuance of the letter in Bruges on 10 December and when it came due on 14 March, it came into the possession of John Walden.<sup>29</sup> Walden was a London merchant and grocer, who was just beginning an eminent career in city politics and at the Calais staple.<sup>30</sup> Again, we return to the key question of the capacity in which the capacity Walden was acting. Unfortunately, there is a fundamental difference between our two sources on this point. The city's response to the writ of privilege from the Common Pleas states that Burton brought suit 'by a certain John Walden, his attorney recorded in the Chancery of the lord king and admitted in his place by virtue of a writ of the lord king directed to us'. In the record of process before the Mayor's court sent to Chancery, however, Walden is never described as Burton's attorney. Moreover, not only does the record sent to Chancery not mention any royal writ recognising the appointment of Walden as Burton's attorney, but it does not provide any evidence that Walden was appointed by Burton as his representative at all beyond his possession of the letter.<sup>31</sup> Instead, the record always uses the formula 'the bearer of the said letter, who is held and reputed in the place of the said petitioner [Burton], according to the law merchant and the custom of the city of London'.

It is not possible to make a definitive judgement based just on these two sources. However, we can examine the logic of the two situations to test which is more internally consistent. In the case of the reply to the writ of privilege from the Common Pleas, there is a clear legal rationale for the city to describe Walden as Burton's attorney. Although it was not

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<sup>29</sup> M.M. Postan, 'Private Financial Instruments in Medieval England', in *Medieval Trade and Finance*, p.60 and Munro, 'Medieval Origins', p.552 argue that, prior to the transfer of the letter to Walden, Burton must have presented it to Davy, who had accepted it. There is no evidence for this in the sources. While acceptance was standard practice on the continent at this time, it is rarely mentioned in English contexts.

<sup>30</sup> For a short biography, see S.L. Thrupp, *The Merchant Class of Medieval London, 1300-1500* (Chicago, 1948), pp.371-2. For his political activities, see Nightingale, *Community*, pp.491, 497, 502-4, 514-15.

<sup>31</sup> Munro, 'Medieval Origins', pp.551-2 states that 'Walden had to ask Burton to act as the nominal plaintiff against Davy; but Burton, apart from supplying testimony, played no further role in the suit'. However, there is no evidence for either of these statements in the text. Burton never appeared before the court in any capacity or supplied any evidence or testimony.

transcribed into the Letter Book, the bill initiating the plaint before the Mayor's court was attached to the reply. Now, Walden had brought the plaint in person, albeit in Burton's name, and so the city had to account for his appearance. While the Common Pleas presumably would not have recognised his standing to bring suit as the bearer of the letter, describing him as Burton's attorney would have satisfied the conventions of that court. Conversely, if Walden was the named attorney of Burton, appointed by royal writ, why did the record of the case sent to Chancery not mention this, instead using the clumsy 'bearer' circumlocution translated above? There would seem to be no legal advantage to be gained by omitting Walden's official status as an attorney, indeed it only raised potential complications. Further, the record sent to Chancery is the longer and more detailed of the two sources and, although it is not a verbatim record of the arguments made in the London Mayor's court, it is probably closest to the reality of the process in that court. On this basis, it is more likely that Walden was acting as a bearer of a transferred credit instrument rather than as an attorney or collection agent for Burton.

Neither source provides any information about how this credit instrument came into Walden's hands. Certainly, it was common for merchants to satisfy their own creditors by 'setting' or 'making over' debts owed to them.<sup>32</sup> Nightingale states that Walden had received the letter from Burton in settlement of a debt owed to him by Burton but there is no mention of this in either of the sources.<sup>33</sup> This would be a telling omission, since it would have provided a 'common interest' between assignor and assignee and so avoided the objection of maintenance, one of the reasons why assignors could not sue in the name of the assignee at common law.<sup>34</sup> Finally, Burton could have tried to raise some immediate cash in hand by

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<sup>32</sup> A. Hanham, *The Celys and their World: An English Merchant Family of the Fifteenth Century* (Cambridge, 1985), pp.186-202.

<sup>33</sup> Nightingale, *Community*, p.476.

<sup>34</sup> Holden, *Negotiable Instruments*, p.14.

selling the letter on to a London merchant, possibly at a discount.<sup>35</sup> It is even possible that the letter had passed through other hands before reaching Walden. Moreover, the fact that none of the records specify how Walden came to have the letter may demonstrate the second of Holdsworth's three characteristics of a negotiable instrument, namely that consideration was presumed.

Walden then presented the letter to Davy when it fell due on 14 March and repeatedly thereafter, requesting the payment of the £30 in Burton's name, 'according to the force, form and effect of the said letter and the aforesaid law [merchant] and customs [of the city of London]'. Davy refused to pay and, eventually, on 10/11 August Walden appeared before the London Mayor's Court with the letter of payment and brought plaint by bill against Davy in Burton's name.<sup>36</sup> It is noteworthy that Walden waited nearly five months after Davy had technically defaulted before he turned to the courts – obviously law was not the first resort of the medieval merchant. Walden produced the letter of payment and recounted the nature of the original transaction in Bruges, as set out above, as well as Davy's repeated refusals to pay. Davy was then summoned to appear before the court on 1 September, 'to be examined and to be respondent on the said letter of payment and the other said matters, according to the aforesaid law [merchant] and customs [of the city of London]'. The same day was given to Walden as the bearer of the letter.

On 1 September both Walden and Davy appeared before the mayor's court in person and the letter of payment and the bill were read out to Davy. The latter then claimed a day to seek advice but this was rejected, as the mayor and aldermen were not advised of any pressing civic reason why the case should be heard on any particular day and also because, according to the law merchant and the custom of the city of London, 'no discontinuance lies

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<sup>35</sup> For examples of discounting, see A.R. Bell and T.K. Moore, 'The Non-Use of Money in the Middle Ages', in *Peter Spufford's Money and its Use in Medieval Europe - Twenty-five Years On*, ed. N.J. Mayhew, Royal Numismatic Society Special Publication (forthcoming).

<sup>36</sup> The record sent to Chancery gives the date as the tenth and the reply to the writ of privilege as the eleventh.

here in any kind of mercantile causes'. The parties were given a day for the first court merchant after the morrow of All Souls (3 November). Still, an adjournment of two months is hardly the rapid process associated with the Law Merchant.

Just before the case was due to be heard again, the city received a royal writ of privilege, issued on 3 November by John Juyn, chief justice of the Common Pleas, ordering them to have the particulars of the case, including the date on which the bill was brought, before the court of Common Pleas on 9 November.<sup>37</sup> The royal courts claimed that, according to their liberties and privileges, since time immemorial, litigants (both plaintiffs and defendants) were entitled to safe conduct under the king's protection while coming to the courts, staying there to conduct their business and then returning home.<sup>38</sup> At this time, Davy had a number of pending actions before the Common Pleas, including a plea of debt for £26 against William Clerk of London, a skinner. He complained that, while he was in London to consult with legal counsel, Burton had impleaded him before the mayor's court and compelled him to answer so that he was not able to prosecute his suit against Clerk and his other business before the Common Pleas. Burton, Davy alleged, had brought the plaintiff 'scheming to worry and unduly burden' Davy, 'without regard to the liberties and privileges of the Common Pleas' and to the 'irrefutable weakening of our said court of the bench and to the manifest disparagement of the said liberties and privileges'.

Here we may pause briefly to consider Davy's suits before the Common Pleas. His plea against Clerk does not seem to have proceeded to trial, so the precise nature of the dispute is unknown. *Davy v Clerk* was already at the second stage of mesne process (attachment) in Hilary term 1436 so the matters at issue probably date back to at least the

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<sup>37</sup> In fact this was the second such writ to be sent to the mayor and aldermen – evidently they had ignored the first. The same was the case for the writ of *certiorari* from the Chancery. It was fairly common for the holder of a liberty to assert their status by refusing to answer the first writ addressed to them.

<sup>38</sup> S. Jenks, 'Privileges and their Application in the Main English Central Courts in the Fourteenth and Fifteenth Centuries', *Law and Legal Process: Substantive Law and Procedure in English Legal History*, ed. M. Dyson and D. Ibbetson (Cambridge, 2013), pp.77-102. See *Select Cases*, II, pp.109-13 for a similar case.

autumn of 1435 and hence predate the drawing of the letter of payment by Audley on Davy in Bruges on 10 December.<sup>39</sup> Clerk had not appeared at the quindenes of Michaelmas and the sheriffs of London were ordered to seize him *sicut plures* for the octaves of Hilary. A *postea* note records further process up to the issue of a *sicut alias capias* for three weeks after Easter 1438.<sup>40</sup> Meanwhile, back in Michaelmas term 1436, Davy was also suing John Cotys of Bath, a chapman, over a debt of 77s 6d, William Mollysworth of Bishops Lynn (Norfolk) for the substantial sum of £40; and Richard Honywys of London over a debt of 40s.<sup>41</sup>

So what was going on here? Hall accepts at face value Davy's argument that *Burton v Davy* was brought in an attempt to obstruct his suit against Clerk before the Common Pleas. In Hall's words, 'this statement, made with assurance, may remind us that in those days maintenance was still a fine art'.<sup>42</sup> However, the degree of assurance with which a legal argument is advanced is no sure guide to its validity. In this case, the justices of the Common Pleas rejected Davy's claim that the progress of *Burton v Davy* in the London Mayor's Court would have prevented Davy from prosecuting his suit against Clerk, or any of his other ongoing actions, before them. That they were correct to do so is demonstrated by the fact that Davy later appeared in person at the following return days in those suits. Alternatively, Davy might have been trying to have Burton's plea transferred from the Mayor's Court to the common law courts, who took a firmer view on *choses in action*. However, the usual response to an infringement of the privilege of the Common Pleas was to vacate the process before the inferior court, not to summon it before the superior.<sup>43</sup> This gambit might not have been successful in any case since, as far as the royal courts were concerned, the plea was

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<sup>39</sup> For previous stages, see TNA CP 40/700, m.158; /702, m.231d.

<sup>40</sup> In May 1436, a William Clerk, skinner of St Andrew Holborn, mainperned for John Rogenhyll, farmer of the subsidy and ulnage of cloth in London (*Calendar of Fine Rolls 1430-37*, p.251). Clerk may be identified with the William Clerk, citizen and skinner of London, who had made a deed of gift of all his goods in April 1427 that was acknowledged on 18 Feb. 1436 (*Calendar of Close Rolls 1435-41*, p.51). It is possible that the deed of gift may have been intended to put his assets beyond Davy's reach.

<sup>41</sup> TNA, CP 40/703, mm.6, 23, 39d.

<sup>42</sup> *Select Cases*, III, p.xxxiii.

<sup>43</sup> Jenks, 'Privileges', p.118 and see *Weston v Westminster (Select Cases*, II, p.113).

between Burton and Davy, and Walden was only the former's attorney. It is more likely that Davy was simply playing for time. Suzanne Jenks quotes a Year Book case from 1432 in which it was claimed that a suit before the Common Pleas was 'not brought for any reason other than to protect the defendant from a threat of a plea in London'.<sup>44</sup> Moreover, there may have been a particular reason why Davy needed to stall at this time. After Philip the Bold of Burgundy switched his support from England to France in September 1435, trade between England and the Low Countries was interrupted until 1441, severely disrupting the mercers' business.<sup>45</sup>

The response from the city began with a matching appeal to the antiquity of its own liberties and customs, describing London as 'one of the most ancient and notable cities and merchant staples of the whole realm of England'. Moreover, its rights had been confirmed by divers royal letters patent and charters of the current king and his predecessors, as well as by statutes and parliaments. The city then set out its right to 'hear and determine causes and actions of each and every merchant coming to the city, and against other merchants residing there, for all kinds of loans, bargains, exchanges and letters of payment, and other matters and mercantile contracts between those same merchants, or their factors, at whatsoever markets, fairs or merchant towns outside the realm of England in the way of merchants'. Such cases were to be decided by juries of foreign and local merchants or by examination of the parties themselves or witnesses, letters and instruments or other types of proof. Thus far the two sources agree. The record sent to Chancery, however, stops here while the response to the writ of privilege addresses Davy's allegation that the suit before the Mayor's Court had been brought in order to obstruct his actions before the Common Pleas. The latter source states that Davy 'is, and was at the time of the delivery of the said writ, and had been for a long time before then, a merchant and citizen of the city of London'. Moreover, he was not in

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<sup>44</sup> Jenks, 'Privileges', p.81.

<sup>45</sup> Sutton, *Mercery*, pp.246-51.



London to consult with his legal counsel but rather ‘awaiting and attending to his articles and merchandise’ when he was summoned before the Mayor’s Court.

After inspecting the city’s response with the attached bill and hearing the arguments of the two parties, the Common Pleas released the case back to the Mayor’s Court. The royal writ rehearsing this decision provides no further explanation beyond stating that it had been made ‘for many reasons moving the said justices’. It is possible that the justices were impressed by the city’s impassioned defence of its liberties and privileges, and accepted London’s right to hear cases involving merchants and exchange. At least the impression that the royal courts had done so may explain why these documents were copied into the Letter Book and also into a later legal compilation, the *Liber Dunthorne*. It is more likely, however, that Juyn was ruling on a much narrower point; not accepting London’s claims so much as he was rejecting Davy’s argument that the suit before the Mayor’s Court was preventing him from prosecuting his pleas pending before the Common Pleas and thereby infringing the privilege of the higher court. Jenks has set out the strict conditions involved in claiming such privilege, and Davy would not seem to qualify.<sup>46</sup> Indeed, as we have seen, Davy was able to continue to appear before the Common Pleas at Westminster to pursue his legal affairs despite the continuation of the plaint before the Mayor’s Court. It is also unlikely that Juyn’s ruling had any relation to Walden’s rights as the bearer of a credit instrument. Certainly the writ makes no specific mention of the question of the legal rights of the bearer of a negotiable instrument, and Juyn may not even have been aware of this part of the story given that the city’s response had described Walden as Burton’s attorney.

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<sup>46</sup> Jenks, ‘Privileges’, pp.80-6. In *Weston v Westminster*, Weston claimed to be travelling to London for the return day three weeks after Michaelmas (20-26 Oct.) but was arrested at Westminster on 23 Oct., held until trial on 25 Oct., and then committed to prison. Although Weston had been released by 29 Oct., he would have been unable to appear before the Common Pleas during the return day and so verdict was given in his favour. By contrast, Davy was never arrested or detained by the London authorities, he had attended the Common Pleas in person at the last return day (the quindenies of Michaelmas) and the next return day was not until the octaves of Hilary (20-6 Jan 1455), so it is difficult to see how the action before the Mayor’s Court would have obstructed the business of the superior court.

The royal writ was issued on 23 November and, according to the record sent to Chancery, Davy and Walden were immediately resummoned to appear before the Mayor's Court on 29 November. Although it is not a verbatim account of the pleading in court, the record does set out the key procedural elements. The case was determined based on the examination of witnesses and evidence rather than jury trial. First, Davy was questioned and was not able to deny that Audley was his factor when the letter of payment was issued, and indeed afterwards, nor that Audley had spent the £30 on merchandise bought for his use and that had come into his possession. The court also heard testimony from both Hanworth and Audley. Despite his headline role, Burton was the one member of the four original parties to the letter of payment not called to testify before the court. Based on this testimony and 'many other types of proof manifestly declaring the truth of the said business', the court adjudged that the bill submitted by Walden as the bearer of the letter, in Burton's name, was true. As Rogers has pointed out, the fact that the parties to the original transaction were examined suggests that Walden did not enjoy the modern rights of a 'holder in due course' as the bearer of the instrument. The verdict, given according to the law merchant and the customs of the city and 'the force, form and effect of the said letter', was that Davy should pay the £30 to the petitioner (Burton) or to Walden as the bearer of the letter, as well as damages assessed at 20s.<sup>47</sup>

But this was not the end of the story as Davy appealed to the chancellor's equitable jurisdiction. As with the writ of privilege, the city seems to have ignored the first writ but responded to a second writ sent on 14 February 1437. Unfortunately, the petition submitted by Davy is missing, so we do not know the reasons he gave for his appeal. It is unlikely that his issue could have been with the transfer of the letter from Burton to Walden in itself, since

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<sup>47</sup> This is equivalent to an annualized interest rate (non-compounded) of 4.6%, assuming that the damages began accruing on 14 March. This rate is similar to those awarded in other cases (P.A. Brand, 'Aspects of the Law of Debt, 1189-1307', *Credit and Debt in Medieval England, c.1180-c.1350*, ed. P.R. Schofield and N.J. Mayhew (Oxford), pp.32-3).

Chancery was generally considered to be more sympathetic to this practice than the rigid common law.<sup>48</sup> However, Davy's repeated legal challenges suggest that he at least thought he had a legitimate grievance. Alternatively, he may have been in temporary financial straits and simply seeking to delay repayment for as long as possible. In response to the *certiorari*, the city sent the record of process before the Mayor's Court, as used above to reconstruct the course of events. Here, there are two further points to stress. First, the record sent to Chancery drops the likely pretence of Walden being Burton's royally-appointed attorney, as he was described in the reply to the Common Pleas' writ of privilege. Second, while quoting the defence of the city's liberties that they made in their reply to the first writ of privilege, they did not directly challenge or raise any objection to Chancery's right to review the case. The Chancery's response is not recorded, so it is unclear whether the case was summoned before the chancellor or if the jurisdiction of the Mayor's Court over mercantile cases was recognised.

What does this all mean for the subtitle of this paper – were medieval credit instruments negotiable? On the affirmative side, the form of the letter of payment issued by Audley on Davy meets all the criteria of a modern negotiable instrument. Moreover, the fact that neither of the sources specifies how Walden acquired the letter suggests that consideration was presumed. On the negative side, the simple fact that the case is known as *Burton v Davy* and not *Walden v Davy* poses a major challenge to accepting it as evidence for negotiability as it demonstrates that Walden could not sue in his own name. In practice, as we shall see, this may not have been such an impediment if the right of the bearer to sue in the name of the initial beneficiary was generally recognised. Finally, the Mayor's Court examined the parties (except Burton) about the facts of the underlying transaction, so it seems

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<sup>48</sup> W.T. Barbour, *The History of Contract in Early English Equity*, Oxford Studies in Social and Economic History 4 (Oxford, 1914), pp.107-9. For case studies taken from Chancery petitions, see Bell and Moore, 'Non-Use'. Sutton, *Mercery*, pp.218-26 reconstructs the mercers' credit relationships from more than 250 fifteenth-century Chancery petitions concerning debt, many of which involved transfers or assignments.

that the holder in due course doctrine did not apply and that the bearer was not free from objections relating to the original debt. Overall, on this point we have to agree with Rogers and Sachs, rather than Beutel and Holden, that *Burton v Davy* does not support the full negotiability of credit instruments in medieval London.

At the same time, *Burton v Davy* does provide evidence for the assignment of debts in practice and their *de facto* enforcement by the London courts. As A.H. Thomas neatly put it: if the law merchant as interpreted by the city courts of London ‘did not make the transferable instrument fully negotiable, it made it as negotiable as was necessary for ordinary business purposes’.<sup>49</sup> The court of Chancery would also entertain petitions from the holders of assigned credit instruments according to equity. Even the situation of the transferee before the common law courts may not have been as hopeless as often thought. It has been suggested that many bearers of transferred credit instruments could have sued as the attorney of the original creditor, as indeed Walden was described in the reply to the writ of privilege.<sup>50</sup> In 1426, for example, before the London Mayor’s Court William Woodward delivered to Martin Allen an obligation for £10 owed to him by Sir Henry Hussey of Harting in Sussex. Woodward also granted that ‘he would be prepared either personally or by attorney to prosecute and avow all kinds of suits in whatsoever courts, moved or to be moved, whenever it should be necessary and he should be reasonably required thereto by the said Martin’.<sup>51</sup> This raises the possibility that the practice of assignment may have been much more widespread than the legal records would indicate, as some of the cases apparently pleaded by attorney may actually have been brought by bearers of transferred credit instruments.

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<sup>49</sup> *Calendar of Plea and Memoranda Rolls of the City of London 1381-1412*, p.xxxvi.

<sup>50</sup> See the year book case of 1455 cited in F. Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (9<sup>th</sup> ed., London, 1921), pp.753-4; S.J. Bailey, ‘Assignment of Debts in England from the Twelfth to the Twentieth Century’, *Law Quarterly Review*, 48 (1932), II, pp.265-6, III, pp. 551-4, 580-1; Holdsworth, *History*, VII, pp.534-5.

<sup>51</sup> *Calendar of Plea and Memoranda Rolls of the City of London 1413-1437*, pp.200-1.

This reconstruction of *Burton v Davy* has some legal significance. In particular, although medieval credit instruments were not negotiable in their full modern sense, there is nonetheless substantial historical evidence that, in practice, debts were assigned and transferred. This could be read as supporting Rogers's recent argument that the enhanced rights of the holder in due course are not essential for a functioning secondary credit market, and indeed they may have undesirable consequences.<sup>52</sup> More generally, there is a danger of reading our modern legal interest in negotiability back into the past. Most of the evidence for the transfer of credit instruments can be found in incidental mentions during the course of pleading rather than forming the subject of dispute itself. As noted above, we do not know what Davy's objections to honouring the letter of payment actually were. Indeed, he may simply have been seeking to drag out proceedings for as long as possible for financial reasons.

This re-interpretation also has implications for our understanding of economic history. Medieval litigants tailored their legal strategies and terminologies to suit the particular courts that they were using. *Burton v Davy* provides a neat illustration of this; Walden was described as Burton's attorney in the city's reply to the common pleas but as the 'bearer of the letter' in that to Chancery. The constant shifting of terms to fit in with court procedure and jurisdiction, and the ways that contracts were structured to enable the use of the courts, further suggests that public-order institutions were important to merchants and they did not rely solely on private-order enforcement mechanisms. On the other hand, the law courts may have only been used as a last resort; as we have seen, Walden waited nearly five months before bringing suit. It is clear that reputation was vitally important in medieval trade. A merchant needed to assess the creditworthiness of potential counterparties to know whose

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<sup>52</sup> J.S. Rogers, *The End of Negotiable Instruments: Bringing Payment Systems Law Out of the Past* (Oxford, 2011).

bills obligatory to accept and whose to reject.<sup>53</sup> From the borrower's perspective, as the cuckolded merchant in Chaucer's *Shipman's Tale* put it: 'we may creauce whil we have a name'.<sup>54</sup> In fact, rather than an inherent conflict, there was an intimate link between public and private order enforcement mechanisms during the Middle Ages.<sup>55</sup>

Finally, what does it mean for the potential of credit to mitigate the 'bullion famines' of the later Middle Ages? It seems that, although not fully recognised by the courts, the transfer of credit instruments may have been much more extensive than previously thought. Frederick Lane and Reinhold Mueller have suggested that English merchants compensated for the absence of moneychangers or *giro* banks 'by assigning and discounting such credit instruments as letters obligatory and bills of exchange long before endorsement became widespread'.<sup>56</sup> In modern terms, the Flemish and Italians used bank finance while the English merchants engaged in market finance (today's 'shadow banking').<sup>57</sup> The fact that such credit instruments were not fully negotiable probably meant that they could not circulate widely as money substitutes; most examples from the Middle Ages involve only a handful of transfers whereas early modern bills could be transferred by endorsement dozens of times. As a result, they may not have served to expand the money supply *per se*. However, the inventive use of credit minimised the need to make payments in cash. This could have increased the velocity of circulation and so have had a similar economic effect in countering the deflationary impact of a reduction in the amount of coin available.

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<sup>53</sup> For examples, see Hanham, *Celys*, pp.189, 195, 203.

<sup>54</sup> *The Riverside Chaucer*, ed. L.D. Benson (3<sup>rd</sup> ed., Boston, 1987), VII line 289. The importance of perception is clear from the description of the merchant from the General Prologue (line 280) that 'ther wiste no wight that he was in dette'.

<sup>55</sup> This also applied to the medieval political system. As Christine Carpenter (*The Wars of the Rose: Politics and the Constitution in England, c.1437-1509* (Cambridge, 1997), p.61) describes it: '[the king] was head of a public system of law and administration but he was also at the apex of the unofficial hierarchy of landed power that made the public system work at all'.

<sup>56</sup> F.C. Lane and R.C. Mueller, *Money and Banking in Medieval and Renaissance Venice: Coins and Moneys of Account* (Baltimore, 1985), p.68. The trading of credit instruments described above can be seen as the precursor of the 'inland bills' described by Eric Kerridge, *Trade and Banking in Early Modern England* (Manchester, 1988).

<sup>57</sup> I owe this observation to my colleague Richard Comotto.