SPECULATION AND THE ENGLISH COMMON LAW COURTS, 1697-1845

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> In the same manner all laws against gaming never hinder it… yet all the great sums that are lost are punctually paid. Persons who game must keep their credit, else no body will deal with them. It is quite the same in stockjobbing. They who do not keep their credit will soon be turned out, and in the language of Change Alley be called a lame duck.[1]

IN 1766, ADAM SMITH keenly observed how essentially unenforceable regulatory legislation was in the chaotic eighteenth-century stock market. Yet according to economist Edward Stringham, the market continued to function under an informal self-regulatory system, a "self-policing club."[2] In the early eighteenth century, stock brokering was a relatively new occupation and in the process of professionalization. The earliest indication of individuals who

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[1] Adam Smith, *Lectures on Jurisprudence*, edited by R. L. Meek, D. D. Raphael, and P. G. Stein (Oxford: Calarendon Press, [1766] 1978), 538.

[2] Edward Stringham, "The Emergence of the London Stock Exchange as a Self-Policing Club," *Journal of Private Enterprise* 17, no. 2 (Spring 2002): 1.

bought and sold securities on behalf of others for a fee is in John Houghton's biweekly newsletter, *A Collection for Improvement of Husbandry and Trade*, which published the first stock prices of the London market in the early 1690s. In June 1695, broker John Castaing advertised to buy and sell "all Blank and Benefit Tickets; and all other Stocks and Shares."[3] There was no clear delineation between active traders and stockbrokers at this time, and both were seen to promote speculative trading and investment strategies commonly believed to undermine the economy. Stockjobbers thus became the target of accusations of conspiracy and fraud. In 1696, shortly before the first regulatory statute was passed, the Commissioners of Trade reported that the "pernicious Art of Stock-jobbing" had "wholly perverted the End and Design of (manufacturing) Companies and Corporations" for "private Profit."[4]

Seven key regulatory acts were passed into law from 1697 to 1737 that set out regulations limiting the number of brokers, setting licensing fees, restricting time bargains, capping broker's fees, and establishing standards for record keeping.[5] Evidence suggests that virtually none of these laws were adhered to or seriously enforced. An apparent gap existed between the legislation and judicial enforcement of regulations. In the few cases brought before the English common law courts from 1697 to 1845, the courts predominantly avoided enforcing stock market regulations and upheld private contracts between individuals.

The 'lame duck' system based on reputation and good credit was, as Adam Smith suggested, very effective. However, occasionally a dispute that could not be resolved ended up in the courts. The relatively consistent refusal to enforce regulatory legislation in cases involving broker licensing, speculation, and transfer of securities suggests that the justices were not acting as state representatives, but as members of the informal London stock exchange. In this manner, justices, who were often 'active in the stocks' themselves, demonstrated that they were acting as an integral part of the private self-regulating stock exchange 'club.' Further, the legal decisions that upheld private contracts involving transfer of securities have important implications for our understanding of the development of judicial interpretation of commercial contract law in the eighteenth century.

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[3] John Houghton, *A Collection for Improvement of Husbandry and Trade*, June 28, 1695.

[4] *House of Commons Journal* 11 (November 25, 1696).

[5] The ten regulatory bills that failed to pass in this time period indicate the vigorous contemporary debate surrounding stockjobbing. See: Julian Hoppit, *Failed Legislation, 1660–1800* (London: Hambleton Press, 1997), 581.

In 1977, Williamson Evers observed the "internal inconsistencies" in the contemporary interpretation of contract law stemming from the "conflicting" influences of "expectation" and "natural rights" schools of interpretation.[6] The expectation school of interpretation, originating in medieval common law and the concept of *assumpsit*, views contracts as protecting expectations or promises. This approach is further characterized by a case-by-case *ad hoc* decision-making process. Interpretation based on expectation was used throughout the feudal period and into the eighteenth century. In contrast, the natural-rights school, emerging in the latter part of the eighteenth century, interprets contracts as direct instruments for the protection of ownership and exchange of property. This interpretative approach, also known as freedom of contract, is more formal and standardized, and focuses on the literal terms of the agreement. Scholars have often made a hard delineation between expectation and natural-rights schools of interpretation, associating them with particular economic policies. Although there is certainly conflict between the two schools, evidence suggests the relationship between judicial interpretation and economic policy was much more fluid. Those who follow Patrick Atiyah and his influential *Rise and Fall of Freedom of Contract* exclusively associate feudal law with price and wage regulations and judicial paternalism, and freedom of contract with laissez-faire capitalism. Atiyah's argument is based on his interpretation of the development of the perception of the private contract in English law. In English law before 1770, according to Atiyah, the terms of a private contract between individuals were considered secondary to "community" values of "fairness," "just price," and "just wage." In fact, Atiyah claims that a contractual promise in the eighteenth century was "neither a necessary nor sufficient condition for the existence of a legal duty."[7] Atiyah discounts the importance of the private contract in the eighteenth century, associating the executory contract with the laissez-faire economic policies of the nineteenth century. Atiyah further dismisses commercial contracts, claiming that contracts involving "speculative risk" in the eighteenth century were interpreted inconsistently, with "no way of predicting" the outcome of a case:

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[6] Evers argues in favor of a "title-transfer model" as an "appropriate law of contracts for a free society." Murray Rothbard similarly argues for title transfer as the "proper… basis" of a "libertarian, natural-rights… property-rights theory." See Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies* 1, no. 1 (1977): 3, 10; and Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, [1982] 1998), 147.

[7] P. S. Atiyah, *Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, [1961] 1979), 146–47, 167–69, 176.

one day the court would uphold a commercial contract, and the next day it would overturn a similar contract.[8] Atiyah predominantly draws his conclusions with respect to eighteenth-century English law from examples of equity cases before the Court of Chancery. However, equity cases fell outside the bounds of the regular common law and typically concerned trusts, estates, land, debt, and guardianship. Cases heard in the courts of equity usually dealt with circumstances of hardship, where a judgment of mercy was sought. Bankruptcies were frequent examples of circumstances that could lead one to a court of equity. Equity judgments represent too specific circumstances from which to draw general conclusions regarding the law of contract, and are inapplicable to a more regularly disputed contract where one of the parties is not experiencing extreme hardship.

This article will demonstrate that for contracts involving transfer of securities on the stock market, the judiciary tended to uphold private contracts between individuals and free market exchange throughout the eighteenth century, regardless of interpretive approach. The decisions of the judiciary in the English common law courts before 1770 in cases involving transfer of securities indicate a more complex history of commercial contract law than has been asserted by Atiyah and others.[9] As Atiyah observes, freedom of contract was a developing theory, particularly in the latter part of the century, and many commercial-contract cases were certainly not decided from a modern freedom-of-contract perspective. However, the older common law expectation model was not antithetical to free market exchange or protection of private property. In three key cases that will be discussed in this article, the courts and judiciary, under the rules of traditional common law, supported an unrestricted transfer of securities by disregarding regulatory statutes and upholding private contracts between individual traders. These cases, although few, indicate the existence of a private stock market, one of the many historical and evolving markets pre-existing those of the nineteenth century that frequently operated outside the bounds of feudal regulation. The four nineteenth-century cases that will be examined show that English courts, from a modern natural-rights perspective, continued to uphold independent contracts and consequently continued to support the private regulatory

[8] Atiyah, *Rise and Fall*, 176, 194.

[9] See also James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991); and A.W. B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975).

system that had evolved out of the many voluntary exchanges of 'Change Alley.[10]

Historiography

The historiography of the regulation and enforcement of stockjobbing has not previously considered the possible influence of the self-regulating aspect of the stock exchange on judicial decisions. Henry Keyser examined judicial interpretation of breach-of-contract cases in his 1850 study *The Law Relating to Transactions on the Stock Exchange*.[11] C. F. Smith looked at the legislative history of the regulation of stockbrokers in his 1929 article in the *American Economic Review*.[12] Stuart Banner considered how the eighteenth-century judiciary adapted older rules of property and markets to the new stock market in his comprehensive history *Anglo-American Securities Regulation.*[13]

Opponents of stockjobbing, or active stock trading, frequently pointed to the lawlessness of the new industry, claiming that brokers operated outside of proper authority with their "extravagant and unaccountable" methods.[14] The ways of the stockjobber were a "new mistery"[15] having "diverse arts and strategems."[16] Opponents argued that speculation was not a method of investing but a clever fraud used by brokers and jobbers to control price fluctuations for private gain and to swindle money from the unwary. Indeed, conspiracies and fraud did exist in the chaotic atmosphere of the fledgling stock market. Swindles were an integral part of the early stock market, from deliberately spread rumors intended to raise or lower stock prices—such as lost East India Company ships, imminent Spanish invasion, or the death of

[10] The seven key cases discussed in this article would not have come before a court of equity, as they directly concerned federal statutes.

[11] Henry Keyser, *The Law Relating to Transactions on the Stock Exchange* (London: L. H. Butterworth, 1850).

[12] C. F. Smith, "The Early History of the London Stock Exchange," *American Economic Review* 19, no. 2 (1929): 202–16.

[13] Stuart Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690–1860* (Cambridge: Cambridge University Press, 1998).

[14] *A Proposal for Putting Some Stop to the Extravagant Humour of Stock-jobbing* (London: 1697).

[15] Daniel Defoe, *The Villainy of Stock-Jobbers Detected* (London: 1701), 4.

[16] *A Proposal.*

Queen Anne—to entirely fraudulent joint-stock companies, such as the unchartered North Sea venture promoted by Francis Caywood in 1722.[17]

Daniel Defoe describes a typical attempt at price manipulation in his 1703 pamphlet *The Villainy of Stock-Jobbers Detected*:

> If Sir F--- had had a mind to buy, the first thing he did was to commission his brokers to look sour, shake their heads, suggest bad news from India… till perhaps the stock would fall 6, 7, 8, 10 per cent, sometimes more. Then the cunning jobber had another set of men employed on purpose to buy, but with privacy and caution, all the stock they could lay their hands on.[18]

Those who advocated state regulation of the new broker occupation articulated a variety of reasons for the necessity of control, including conspiracy to raise and lower stock prices, fraud, increasing the national debt, "engrossing" cash, and generally destroying the economy. However, the underlying reason was really a fear of that which they did not understand: speculation. Following the South Sea Bubble of 1720, critics of stock speculation and trading considered South Sea Company stock to have had "imaginary" value at its highest price of nine hundred pounds:

> At the height of the South-Sea stock, lands, as well as every thing else, were raised to an extravagant price; yet, as that proceeded from the general delusion which all men lay under, as to the imaginary value of South-Sea stock, and a supposed vast increase of their riches, which very soon appeared chimerical and groundless.[19]

R. H. Mottram defines "speculation" in his 1929 classic, *History of Financial Speculation*, as "dealing in fluctuating values." Mottram notes there is no evidence for use of the word in this modern sense until at least 1850.[20] In 1755, Dr. Johnson defined "speculation" as "examination by the eye," suggesting that the concept of "dealing in fluctuating values" was not yet fully articulated.[21] 'Stockjobbing' is the closest eighteenth-century word to the

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[17] Richard Dale, *The First Crash: Lessons from the South Sea Bubble* (Princeton: Princeton University Press, 2004), 18; *Rex v. Caywood* (1722) 1 Strange 472, 93 ER 641.

[18] Defoe, *Villainy*, 1703, cited in Smith, "Early History," 212.

[19] John Castaing, *Course of the Exchange, and other things*, July 12, 1720; *Kien v. Stukeley* (1722) I Brown 191, 1 ER 506.

[20] R. H. Mottram, *A History of Financial Speculation* (London: Chatto and Windus, 1929), 3, 41. For a modern theory of the positive aspects of speculation as a stabilizing influence in the currency market, see Milton Friedman, "The Case for Flexible Exchange Rates," in *Essays in Positive Economics* (Chicago: University of Chicago Press, 1953), 175–77.

[21] Cited in Mottram, *History*, 2.

modern concept of 'speculation' as defined by Mottram. The newly forming concept of modern speculation in the eighteenth century accounts for the varied and contradictory definitions of a stockjobber, who was sometimes a legitimate broker, investor, or trader, and sometimes a gambling, swindling knave. Dr. Johnson, for example, defines stockjobber as "a low wretch who gets money by buying and selling shares in the funds."[22] The stock trader speculates in Mottram's sense, while earlier, eighteenth-century legislators defined stockjobbing more narrowly and in line with Dr. Johnson's definition.

City of London Broker Regulation

The first of the seven statutes that attempted to regulate speculation was the 1696 *Act to restrain the Number and ill Practice of Brokers and Stock jobbers.* The Broker's Act was the first legislative attempt to differentiate a stockbroker from a jobber and from the respectable commodities broker, where in practice there was often no distinction. According to the statute, anyone selling cattle, corn, or coal was not to be "esteemed a Broker." The act instituted licensing requirements for the City of London and Westminster, which limited the number of official stockbrokers to one hundred. The brokers were to take an oath before the lord mayor of the City of London to perform their duties "without fraud or collusion."[23] They were issued a silver medal bearing their names and the king's coat of arms. Stockbrokers' names and addresses were to be recorded and publicly displayed at the Royal Exchange and at London Guildhall. They were not to trade on their own accounts. Their fees were capped at ten shillings *per centum*. They were to keep a registry book in which they were to enter all contracts within three days. The time between the contract date and the transfer date of the stock was limited to a three-day period.

This requirement to register contracts was a deliberate attack on speculation, which effectively limited time bargains to seventy-two hours, making them almost worthless. Time bargains were credit transactions whereby an investor contracted to buy or sell shares at a future date and price. A length of time longer than three days was necessary to make the contract financially viable by giving enough time for the market to fall or rise. It was not necessary to own the actual shares to engage in a sell transaction. This was the speculative trading practice that came under the most criticism,

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22 Samuel Johnson, *A Dictionary of the English Language* (London: J. F. and C. Rivington, [1755] 1785).

23 8&9 William III c.32.

and it was associated with reckless gambling. According to an early-nineteenth-century critic of time bargains, "Gamblers of all denominations in the Stock Exchange" buy and sell "fictitious property to the amount of millions."[24]

The intention of the legislators, not merely to regulate a new industry, but specifically to curb speculation is apparent throughout the text of the act. The preamble to the Broker's Act states:

> Whereas divers Brokers and Stock Jobbers, or pretended Brokers, have lately set up and carried on most unjust Practices and Designs, in selling and discounting of Tallies, Bank Stock, Bank Bills, Shares and Interest in Joint Stocks, and other Matters and Things, and have, and do, unlawfully combined and confederated themselves together, to raise or fall from time to time the Value of such… as may be most convenient for their own private Interest and Advantage.[25]

The emphasis on speculator control of price fluctuation is a commonly repeated theme in the eighteenth-century stockjobbing debate. Defoe argued in 1701 that the new "Mistery or Machine of Trade" was responsible for fluctuations in East India Company stock:

> The Old East India Stock by the arts of these unaccountable People, has within 10 years or thereabouts, without any material difference in the intrinsick value, been sold from 300l. per Cent. to 37l. per Cent. from thence with fluxes and refluxes, as frequent as the Tides, it has been up at 150l. per Cent. again… nor can any Reasons for the rise and fall of it be shown, but the Politick management of the Stock-Jobbing Brokers.[26]

In his complaint, Defoe gives an excellent example of a healthy and regularly traded stock. This pervasive anxiety about price fluctuation reveals a fundamental misunderstanding regarding the regular ebb and flow of supply and demand in which high and low price thresholds are expected. As historian W. R. Scott has observed, regarding price instability in the early eighteenth-century, "It is remarkable that the quotations display so little of the see-saw movement due to market manipulation, but on the contrary

[24] A Gentleman of the Exchange, *The Cause of the Rise and Fall of the Public Funds Explained* (London: C. Chapple, 1814), 29.

[25] 8&9 William III c.32.

[26] Defoe, *Villainy*, 1701.

follow well defined lines of movement."[27] The considerable and consistent emphasis on price fluctuation reveals a pervasive trepidation about possibly exaggerated market volatility, which legislators associated with economic instability.[28]

If some members of Parliament thought speculation undermined the economy, the City of London may have thought otherwise. The city's reluctance to strictly enforce the penalty provisions in broker legislation ensured de facto support for speculation and the new trading industry as well as continued revenue for the city. Under a new statute, 6 Anne c.16, the city retained control over regulation of brokers through licensing and levying an annual fee of forty shillings. The city frequently prosecuted unlicensed brokers at the Court of Aldermen to enforce payment of the annual fee in order to raise revenue, but significantly did not enforce the hefty penalties of five hundred pounds that would have put most out of business.[29] The majority of brokers ignored the law, and it was estimated in 1761 that two-thirds of brokers remained unlicensed.[30]

This reluctance to enforce the strict terms of the statute reveals the widening gap between legislators and the courts. In 1767, the City Chamberlain, a lower court and traditional office responsible for revenue collection, prosecuted brokers referred to as T---J and J---S for "buying and selling government securities for their friends" without a license.[31] Both defendants were tried and acquitted by special jury. These cases were featured in *The Annual Register* as a victory for the average investor and public credit, suggesting a popular support for stock trading and investing. *The Annual Register* sympathized with the jury, concluding that,

> it is now settled, that every person is at liberty to employ his friend to buy or sell government securities, without being obliged to be at the expence of employing a broker; which will be a great

[27] W. R. Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720*, vol. I (Cambridge: Cambridge University Press, 1912), 358–59.

[28] Anne Murphy has argued that business failure in the 1690s was not connected to stock speculation but due to the considerable exposure to risk that new businesses faced. See Anne L. Murphy, *The Origins of English Financial Markets: Investment and Speculation before the South Sea Bubble* (Cambridge: Cambridge University Press, 2009), 71.

[29] E. V. Morgan and W. A. Thomas, *The Stock Exchange: Its History and Functions* (London: Elek Books, 1962), 64–65.

[30] Thomas Mortimer, cited in Morgan and Thomas, *Stock Exchange*, 65.

[31] *The Annual Register* 10 (December 1767): 68; Morgan and Thomas, *Stock Exchange*, 65; C. F. Smith, "Early History," 214–15.

> inducement for people to lay out their money in the funds, and consequently a great addition to public credit.[32]

Time-Bargain Cases

The following three time-bargain cases were heard before the Court of King's Bench. King's Bench originally heard cases considered to be a "breach of the peace" and a threat to the rights, *jura regalia,* of the Crown.[33] It is significant that by the 1830s, cases involving the stockjobbing acts were more frequently heard at the Court of Common Pleas, a court that heard disputes between subjects that did not involve the Crown. This shift in court location suggests the declining relevancy of the stockjobbing statutes to private contractual disputes between traders. Stock-transfer contracts were clearly interpreted from a freedom-of-contract perspective by the 1840s.

In *Smith v. Westall* (1697), one of the first cases prosecuted under the Broker's Act, Chief Justice John Holt unwittingly created the foundational precedent that allowed the legal continuance of time bargains.[34] In this decision, the conservative chief justice strictly upheld the new regulatory legislation and did not protect the damaged party in a broken time-bargain contract. Holt was known for being insensitive to accused parties, having a high degree of respect for parliamentary legislation, and applying the law strictly. Significantly, he did not think the bench should innovate in the areas of commerce and trade, as witness his rulings in *Clerke v. Martin* (1702) and *Buller v. Crips* (1703), where he refused to equate promissory notes with bills of exchange. His decisions reflect his view that bankers and creditors were threatening the established protective debt laws with their new innovations and that legal acceptance of the new bills of exchange should come from parliament and not from the courts.[35]

It is therefore not surprising that Holt declared the time bargain in *Smith v. Westall* as illegal under the terms of the Broker's Act. The events of the case are as follows: Smith, the plaintiff, and Westall, the defendant, made a time bargain in February, predating the May 1 start date of the statute. Smith was to transfer bank stock to Westall upon the latter's request. According to the contract, Westall had until May 10 to request transfer of the

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[32] *The Annual Register*, 68.

[33] T. W. Williams, *A Compendious and Comprehensive Law Dictionary Elucidating the Terms and General Principles of Law and Equity* (London: Gale and Fenner, 1816).

[34] *Smith v. Westall* (1697) 1 Ld. Raym. 316, 91 ER 1106.

[35] Paul D. Halliday, "Holt, Sir John (1642–1710)," in *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004, online edn., Oct. 2009).

shares. Westall did not request the shares, because he wanted out of the bargain. Smith prosecuted Westall, and Westall pleaded the statute as his defense, arguing that he should be released from the contract as time bargains were illegal under the terms of the Broker's Act. Defendants in time-bargain cases commonly misused the statutes in this manner to avoid performance of a contract. Holt, however, decided in favor of the defendant Westall, as the latter had not requested the shares before May 1. According to Holt, the contract fell under the terms of the statute in this case and was therefore void. It is evident from Holt's judicial history that he did not support speculative contracts. This is further suggested by Holt's 1703 exacting decision in *Callonel v. Briggs*, where he declared that "if the plaintiff do not set forth in his declaration that he was at the South Sea House… on the day agreed, at such a time, and staid 'till the last hour of the day to transfer his stock, he cannot maintain his action."[36]

It is thus ironic that *Smith v. Westall* became the foundational precedent for the legal allowance of time bargains. In *Mitchell v. Broughton* (1701),[37] Holt's ruling in *Smith v. Westall* was employed to create a loophole that would allow time bargains to continue legally. Similar to *Smith v. Westall*, *Mitchell v. Broughton* concerned a broken time bargain. Broughton, the defendant refused to transfer shares to Mitchell, the plaintiff. Broughton pleaded the Broker's Act in order to be released from the contract. Mitchell had requested the transfer of the shares in writing within the three days allowed by the act. The court decided in favor of Mitchell and upheld the time bargain. This ruling created a precedent that if shares were formally requested within the three days allowed by the statute and the transfer occurred at a later date, then the bargain would be legal.

The creative interpretation of *Smith v. Westall* in *Mitchell v. Broughton* exemplifies how the common law ad hoc decision-making process was applied to support unregulated market exchange. In upholding Mitchell and Broughton's time bargain, the court aimed to give justice in the case of a broken promise. The court record of the case in fact begins with a description of the "special promise to transfer stock," indicating that the court viewed the contract between Mitchell and Broughton from the older perspective of promise and expectation.

The 1804 decision in *Heckscher v. Gregory* deviated from the general trend to support private stock-transfer contracts. In this case, a private contract was dismissed in favor of the statute. Under the 1734 statute 7

[36] *Callonel v. Briggs* (1703) Holt, K. B. 664, 90 ER 1267.

[37] *Mitchell v. Broughton* (1701) 1 Ld. Raym. 674, 91 ER 1349.

George II c. 8, known as Barnard's Act, which outright banned time bargains, a seller could sue for damages in the case of a broken contract after he had resold the same shares to someone else. The seller was then eligible to claim the price difference between the first and second contract in damages. The statute attempted to prevent speculative contracts by legislating the physical transfer of securities. In this dispute, Heckscher had a contract to sell stock to Gregory at a specific price. Gregory refused to accept and pay for the stock after the market price suddenly dropped by thirteen pounds. Heckscher then contracted to sell the stock to another party. This contract had not yet been executed at the time Heckscher began legal action against Gregory. The court record notes that this second contract was considered "not completed" and "only a contract for sale." Counsel for Heckscher argued that actual transfer of the shares was "not necessary to support the action." The court disregarded the pending contract and interpreted the statute strictly: as the stock had not been transferred by the commencement of the lawsuit, Heckscher's claim fell outside the bounds of the rule. Justice Le Blanc referred to time bargains as "gambling transactions" and dismissed Heckscher's claim, noting that the case "would turn out to be one of those transactions that the legislature meant to prevent."[38]

Nineteenth-Century Cases

In *Rex v. Dodd* (1808), Lord Chief Justice Ellenborough avoided enforcing the Bubble Act of 1720. *Rex v. Dodd* (1808) was the second case to be prosecuted based on the Bubble Act.[39] The statute made it illegal to sell or transfer shares in unchartered joint-stock companies, and was repealed in 1825 after over a century of neglect.[40] Ellenborough argued that the court should not interfere in the obviously illegal activities of the two unchartered companies in *Rex v. Dodd*, due to the eighty-seven-year gap since the most recent prosecution of the act, and because the case involved an aware investor and not a vulnerable shareholder. An individual posing as an investor to entrap the instigators of two joint-stock schemes initiated the action. The justice declared that since the case was "brought forward by a party who does not profess to have been himself deluded… the statute having been passed principally for the protection of unwary persons from delusions of this kind; the Court think, in the exercise of their discretion, that

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[38] *Heckscher v. Gregory* (1804) 4 East 608, 102 ER 964.

[39] *Rex v. Dodd* (1808) 9 East 516*,* 103 ER 670; 6 George I c. 18 (1720).

[40] Banner, *Anglo-American*, 76, 78, 79.

they should not now enforce the statute."[41] *Rex v. Dodd* particularly highlights the general wariness of the courts to interfere in the regulation of the stock market.

In 1836, the Court of Common Pleas held strictly to the text of Barnard's Act in ruling that the statute did not apply to transactions on foreign securities. In *Wells v. Porter*, a broker, Wells, sued his client, Porter, for nonpayment for work done on the client's behalf to buy and sell time bargains on Spanish and Portuguese public stocks. Porter argued that the contract between himself and Wells should be considered void under the terms of the statute. The court disagreed and judged in favor of Wells. The justices concurred that the statute did not apply in this case and that it should not "extend" to include foreign stocks. The court upheld the contract between the two parties, asserting that the plaintiff should be able to recover damages.[42] *Wells v. Porter* is significant in that the court supported both speculative contracts on foreign stocks and freedom of contract. This decision indicates a clear shift in judicial interpretation from an expectation perspective to a modern natural-rights-based perspective by the 1830s for cases involving transfer of stock.

In *Mortimer v. M'Callan* (1840), the judiciary continued to avoid enforcing legislation passed against speculative contracts, and took a modern perspective in deciding to uphold the specific terms of the contract between the two traders. Mortimer brought an action against M'Callan for nonpayment of transferred shares. M'Callan pleaded Barnard's Act in order to be released from a contract he had made with Mortimer. Counsel for M'Callan argued that the contract was "null and void" because at the time the parties entered into the contract, Mortimer did not own the shares he intended to sell. Mortimer's counsel asserted that the act only applied when the physical transfer of shares had not taken place and therefore did not apply in this case, as stock had already been transferred to M'Callan. The court agreed and decided for the plaintiff in enforcing payment of the broken contract.[43]

Justice Cresswell upheld the terms of a stock-transfer contract in *Humphrey v. Lucas* (1845). In this case, the defendant, Lucas, refused to transfer the agreed-upon shares to Humphrey, the plaintiff. Lucas claimed that the plaintiff was not permitted to sue, given a rule of the Liverpool Stock

[41] *Rex v. Dodd* (1808).

[42] *Wells v. Porter* (1836) 2 Bing. (N.C.) 722, 132 ER 278. See also *Oakley v. Rigby* (1836) 2 Bing. (N.C.) 732, 132 ER 282.

[43] *Mortimer v. M'Callan* (1840) 7 M. & W. 20, 151 ER 662.

Exchange. Because Humphrey's broker did not disclose the name of his principal at the time of the contract, the rules of the exchange stated that Humphrey's broker was then solely and legally responsible for the contract. However, the court found in favor of Humphrey, dismissing the rule of the Liverpool Exchange. Justice Cresswell stated that the law on the matter was "clear… [A]n agent duly authorized may make a contract in his own name… [T]he principal may afterwards sue upon it." Significantly, Cresswell made his judgment solely on the basis of freedom of contract: "The only question on this record… is whether the plaintiff made a contract with the defendant or not. I think he did." [44]

Conclusion

It is clear that in the general lack of enforcement of legislation regarding speculation, a breach existed between legislators and the judiciary. Legislators were suspicious of stockjobbing practices and passed statutes accordingly. With few exceptions, the courts did not enforce the legislation when they had the opportunity to do so. This apparent support for the stock market is highly suggestive of a shared interest in investment, trading, and speculation among the judiciary. Lord Ellenborough invested 74 percent of his entire fortune in government stocks. Lord Mansfield was known to be a shrewd investor in stocks, government securities, and land. Mansfield gradually built his net worth of more than £500,000 not through inheritance but through wise investment strategies. Sir John Nicholl owned £91,000 in consolidated annuities and was a known stock speculator.[45] Justices such as these, who were both stockjobbers and judicial officers, were in a prime position to act on behalf of fellow investors, as members of the self-regulating stock club.

In the evolving system of self-policing within the stock-brokering and stockjobbing community, brokers who trespassed the rules of the private club were punished by expulsion and public embarrassment. Particularly those with poor credit were expelled from the coffeehouses and other places of exchange. The names and addresses of the 'lame ducks' were written on a public blackboard.[46] The blackboard system was still in use in London in

[44] *Humphrey v. Lucas* (1845) 2 Car. & K. 152, 175 ER 64.

[45] James Oldham, "Murray, William, First Earl of Mansfield (1705–1793)," in *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004, online edn., Oct. 2008); Daniel Duman, *The Judicial Bench in England, 1727–1875: The Reshaping of a Professional Elite* (London: Royal Historical Society, 1982), 135, 143, 137–38.

[46] Stringham, "Emergence," 6; Morgan and Thomas, *Stock Exchange*, 61.

1814 after trading had moved from the informal coffeehouse venue to the formal stock exchange building. A critic of the "self-constituted and congregated" power of the London Stock Exchange described the practice thus: "All is conducted upon honour; but if a man get into difficulties which he thinks he cannot recover from, he makes a dash (a high risk speculation;) if he be lucky, he takes the profit, if not, he leaves the house and gets stuck upon the Black Board, which is kept for the purpose."[47]

Barnard's Act was finally repealed in 1860, according to Banner largely due to "over a century" of "ineffectiveness."[48] Contemporary literature indicates that illegal speculation continued regularly in open defiance of the legislation and that a great many investors and brokers made their living in speculative time bargains. In 1850, lawyer Henry Keyser observed, "A numerous and highly-respectable body of men earn their livelihood by the daily and hourly violation of the clauses of the statute" (Barnard's Act).[49] The cumulative reluctance to enforce legislation regarding speculation, for well over a century, suggests that the judiciary supported the self-determining legal system of the emerging London Stock Exchange, playing an important role in buffering the nascent industry from any kind of real governmental interference.

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[47] A Gentleman of the Exchange, *Cause of the Rise and Fall*, 34–35.

[48] Banner, *Anglo-American*, 107.

[49] Keyser, *Law Relating*, 152.

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