with a taint of maintenance. But prior to such declaration of the common law, merchants had established the usage of transferring bills of exchange (which were also *choses in action*), from hand to hand, by delivery, or by the simple writing of a name on the bill, which assigned at once the right of action, and gave an unwritten contract of guarantee, to the holder of the bill, in silent disregard of both the judicial declaration of the common law, and the legislative prohibition of the Statute of Frauds. The rights of property and the contract liabilities thus established by the custom of merchants, respecting this class of *choses in action*, and the necessity of recognizing bills and notes as part of the negotiable currency of the community, silently incorporated these usages and customs into the common law as part of the *lex mercatoria*, and compelled the harshness of the common law to give way to the more common-sense usages of merchants. But it was not until 1872, that these rules of the *lex mercatoria* were extended to all other classes of *choses in action* by the Ontario Act, 35 Victoria, chapter 12, (now R. S. O. 1887, c. 122 s.s. 6-13).

Another illustration of how mercantile usage has displaced the common law, may be shown in the practice of the Courts, by which a bill of exchange or promissory note, though classed by the common law as a "simple contract," bears on its face the proof of its value in money. No such privilege is allowed to ordinary simple contracts, for the money or other valuable consideration given for them is not presumed, but must be proved. But the specialty or more formal contracts under seal, carry with them the internal evidence of their being made for valuable consideration. Thus by the usage of merchants, the legal privilege of specialty contracts has been conceded by law to bills and notes, for the better facilities of trade and finance ; and for the further reason that these negotiable securities have become part of the recognized currency of the country, in commercial and financial transactions.

This process of law-making has been termed legislation by the judiciary mode, to distinguish it from the ordinary legislative process by which the general laws of a nation are enacted. And as this judicial law has been from time to time formed by judges under the eyes of the sovereign legislature, or has been acquiesced in by its recognition in various statutes, it thereby becomes law by the acquiesence and authority of the sovereign government.

Referring to the mode by which a law is derived from custom or usage, Austin says: "Independently of the position or establishment which it may receive from the sovereign, the rule which a custom implies (or in the observance of which a custom consists), derives the whole of its obligatory force from these concurring sentiments. which are styled Public Opinion. Independently of the position or establishment which it may receive from the sovereign, it is merely a rude morally santioned, or a rule of positive or actual morality. It is properly *jus moribus constitutum* ; its only source, or its authors, are those who observe it spontaneously, or without compulsion by the State."

"Law, styled customary then, is not to be considered a distinct kind of law. It is nothing but judiciary law founded on an anterior custom. As merely customary law (in the loose and improper sense of the term 'law'), or rather as