The Bill of Exchange as an Assignment of Funds: A Comparative Study

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The Canadian Bills of Exchange Act contains, in general, provisions uniform with the United Kingdom Act. Section 53 of the United Kingdom Act, however, crystallizes a pre-existing point of difference between the law of England and the law of Scotland. Section 127 of the Canadian act follows the English view as made statutory in section 53(1) of the United Kingdom act and states that a "bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof", and that a non-accepting drawee is not liable on the bill.[1] But in Scotland, "where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee".[2] It is the purpose of this article to consider how neighbourly systems of jurisprudence have arrived at opposite results on the same matter, so opposite, apparently, that their agreement to differ had to be recorded in the statute book. Seemingly the Scottish view is not peculiar and perverse. "In France, as in Scotland, when the drawee has funds, drawing a bill operates as an assignment of them in favour of the holder...".[3] The English solution, however, has been copied in various equivalent statutes,[4] and so has embedded itself in the law of some of the greatest financial nations of the world.

Assignment has been a thorny problem at least from the time of the Romans. An *obligatio*, due to its personal character, could not be directly transferred, but the assignee was given a mandate

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[1] Section 127. [2] Section 53(2).

[3] Chalmers' Bills of Exchange (10th ed.) p. 210.

[4] *E.g.*, American Negotiable Instruments Law, s. 127; (South Africa) Cape Act No. 19, 1893 (see, H. O. Evans, The Law of Bills of Exchange and Banking in South Africa, 3rd ed.).

to sue as *procurator in rem suam*.[5] A difficulty was that the debtor could still pay the assignor, but by Justinian's time this had been cured by the rule that if intimation of the assignment was given to the debtor, the assignor no longer could sue or receive payment in discharge of the debt. Thus "a creditor could make a completely effective transfer of his rights".[6] But the fear of maintenance had reared its head in Roman times, and this proved an even greater stumbling block in English law.[7] When there were drastic forms of execution for unpaid debts, the power to transfer a right of action was a serious and perhaps dangerous matter. There were two relevant provisions in Roman law: (i) the assignee could not recover from the debtor more than he had paid;[8] and (ii) assignments were prohibited to assignees who were more powerful than the assignor.[9] Owing to the disorderly state of England in the 15th and 16th centuries, the fear of maintenance was more dominant than in the Roman world.[10] But even in medieval England an escape route was opened up, for, by the 15th century, the common-law courts would allow an assignor to appoint the assignee as his attorney to sue for the debt, and seemingly it was the practice at an early time for the Chancery to give relief where the power of attorney was imperfect in form.[11] The requirement of a power of attorney appears to have been retained, at least as a formality, up to a comparatively modern period. But even before the Judicature Act, 1873, the idea had been long exploded that there could not be an assignment at law of an existing debt, although a "debt presently due and payable" had always been regarded as assignable in equity.[12]

The Continental approach to assignment developed more directly from Roman ideas. Pothier states that credit, being a personal right, could not be directly transferred. The giving of intimation to the debtor played an important part and, prior to intimation, the debtor could legally pay the assignor, and the assignee had then a right of action only against the assignor.[13] After intimation, however, the assignee was himself "non quidem ex juris subtilitate, sed juris effectu, creditor".[14] Scottish law places emphasis

[5] Buckland, A Manual of Roman Private Law, s. 118 and s. 136.
[6] *Ibid.*
[7] Holdsworth, History of Treatment of Choses in Action by Common Law (1920), 33 Harv. L. Rev. 997. Maintenance occurs where a person not really concerned in an action by financial or other inducement encourages a party to the action to maintain his plea.
[8] Code 4-35-22. [9] Code 2-13-2.
[10] Holdsworth, *loc. cit.*
[11] Bailey, Assignments (1932), 48 L.Q. Rev. 248 and 547.
[12] *Holt* v. *Heatherfield's Trust*, [1942] 2 K.B. 1; *Fitzroy* v. *Cave*, [1905] 2 K.B. 364.
[13] Story's Equity Jurisprudence (14th ed., 1918), Vol. III, p. 1394.
[14] *Ibid.*

on the effect of intimation of the assignment to the debtor, and intimation acts as a stop on the debtor vis-à-vis the assignor and also as a defence to the debtor if subsequently sued by the assignor. Apparently at an early time in French law the accepted method of giving notice was to deliver to the debtor a copy of the authority of the assignor empowering the assignee to collect the debt. In English law, the attorney system was more a procedural device to enable the assignee to sue the debtor. Up to about the 12th century, in England, there was no real assignment of debts between Gentiles, but there was freedom of assignment among Jewish moneylenders, the Jewish method being to record the transfer, and their court of jurisdiction, the Beth Din.[15] Assignments did occur from Jew to Christian,[16] but only a Jew (on payment of a fine) could recover the debt in the King's courts with the King's licence. From these circumstances arose the method of suing as attorney in the King's courts. These suits, in early times, would have been on money bonds contained in formal instruments. In English common law, a money bond under seal was regarded as more than mere evidence of the debt and the instrument had to be produced in court by the plaintiff, otherwise the action failed. Thus the early conception of the transfer of a debt would probably have been a delivery of a formal instrument into the possession of the assignee so that he could produce it in court as attorney for the assignor.

In the Roman law, and in Continental and Scottish law, the combined effect of assignment and intimation was really to vest in the assignee alone the right to sue for the debt. After intimation, what had been a debt for which only the assignor could sue, and so a personal right of the assignor against the debtor, became transferred into a general right of the assignee against the debtor. But in English law there was no transformation of a personal right $A—B$ into a personal right $C—B$.

The law merchant had a different approach to the question of assignment of a debt, having its origins in early Lombard law,[17] in which there seems to have been considerable freedom of assignment (although there was a later reaction in France). The basis of transferability in very early Continental systems was a formal public investiture usually including manual delivery of a document of title. The focal point of inquiry in early Germanic law was whether

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[15] Bailey, Assignments (1931), 47 L.Q. Rev. 516, and *Case of Sir Alan la Zouche and wife, and Master Elias*, in 1268.

[16] *Ibid.*

[17] Jenks, Early History of Negotiable Instruments (1893), 9 L.Q. Rev. 70.

the defendant was bound to pay, rather than whether it was the plaintiff who was entitled to demand payment, and the determining factor was production of an instrument binding the defendant.[18] Thus, by development, a debtor might promise to pay not merely a specified creditor, but anyone producing the instrument of debt. From this finally emerged the bill of exchange, which had as a primary function the transport of money in the interests of the creditor.[19] At first there was a public instrument whereby a person receiving money for exchange promised to pay the agreed sum to another. He also promised to send the instrument to the creditor and that, if he failed, he would repay the creditor with interest the sum received in the place where he had received it.[20] To an early bill, there was normally a remitter (or exchanger) as well as a drawer, the drawee being in a different country. If the drawee was not put in funds, he was not at first liable, even though he had accepted. Acceptance was an admission by the drawee that he had funds of the drawer and so was something analogous to the modern certification of a cheque in Canada and the United States. Why did acceptance make the bill enforceable later, since there was no consideration moving from the payee to the acceptor? The answer of English law was that the "payee could not sue in debt or indebitatus assumpsit, but must make use of an action on the case based on the custom of merchants". Possibly, the "custom of merchants" in this connection bore some relationship to Roman-Continental legal ideas (and to the canon law). The bill was essentially an authority to the payee to receive payment from the drawee of a debt due to the drawer. Yet, on acceptance, a right of action was created to the payee against the drawee. The acceptor could not discharge this right of action by payment to the drawer of his original debt to him. Thus, substantially, there had been achieved something closely analogous to a transformation of a debt owed by *A* to *B* into a debt owed primarily by *A* to *C*, and without any consideration moving from *C* to *A*. The rights of the payee against the acceptor were regarded as being of a special character and a restricted concession by the common law to the force of mercantile usage. The modern letter of commercial credit appears to present English law with a similar type of problem, namely the absence of consideration moving from the promisee. Bailey refers to the difficulty of obtaining payment of bills in England in connection

[18] Holdsworth, Origins and Early History of Negotiable Instruments (1915), 31 L.Q. Rev. 12.
[19] Scaccia, De Commerciis et Cambis, referred to by Holdsworth.
[20] Holdsworth, Origins and Early History of Negotiable Instruments.

with the England-Calais wool trade in the 15th century,[21] which indicates that the custom of merchants in this relation was not overwillingly received into the English law. Originally, a bill in English law was not regarded as a negotiable instrument. Endorsement arose as a development of a bill payable either to a named payee or to his representative, and later the representative might be anyone, even a mere bearer. The reluctance to extend the idea of a bill is shown in Lord Holt's attitude to the negotiability of a promissory note.[22] "Common law categories have never willingly conceded a place in the sun to the novelties developed by the exigencies of modern business."[23] But eventually, in regard to the bill class of instrument, there had to be a yielding of place. "Life does not exist for the sake of concepts, but concepts for the sake of life."[24] English law, therefore, seems to have made a very restricted concession to Roman-Continental ideas in the form in which they influenced the law merchant, but to have excluded the wider implications of the Roman-Continental general theory of assignment.

It is now proposed to return to the English law of assignment of choses in action. There are no special requirements as to form. "All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."[25] In *Ex parte South*,[26] Lord Eldon said: "It has been decided in bankruptcy that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor it binds him". In *Burn* v. *Carvalho*,[27] Lord Cottenham said, "In equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds is a binding assignment of so much of the fund". Some years later, in *Rodick* v. *Gandell*,[28] Lord Truro expressed the matter thus —"I believe I have adverted to all the cases cited which can be considered as having any bearing on the present case; and the extent of the principle to be deduced from them is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or

[21] Bailey, Assignments (1932), 48 L.Q. Rev. 248 and 547.
[22] Eventually settled by 3 & 4 Anne, c. 9.
[23] O. F. Hershey (1919), 32 Harv. L. Rev. 1.
[24] Ihering, Geist des romischen Rechts III, 302; cited, Chorley, Conflict of Law and Commerce (1932), 48 L.Q. Rev. 51.
[25] *W. Brandts Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, *per* Lord Macnaghten.
[26] (1818), 3 Swans. 392.
[27] (1839), 4 My. & Cr. 690.
[28] (1851), 1 De G.M. & G. 763.

holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create" an equitable assignment. *Burn* v. *Carvalho* was much cited in cases at least up to the 1870's. The facts were that a person promised to instruct a foreign agent to deliver certain goods of his, held by that agent, to an agent of the promisee in the foreign country. In accordance with the promise, a letter of instructions was sent to the agent holding the goods. The promisor became bankrupt, but the agent continued to act on the instructions and delivered the goods to the other agent in ignorance of the act of bankruptcy. It was finally decided that in equity the promisee had acquired a good title to the goods. Story comments on this case,[29] "So in equity, although not at law, if a debtor having goods in the hands of his agent at a foreign port sends a letter to his creditor *C*, promising to direct *B* to deliver over the goods to *D* as the agent of *C* at the port, and while the letter is on its way to *B* the debtor becomes bankrupt, the creditor will still be entitled to the goods". During the rather extended progress of the case, Lord Lyndhurst had stated that there was no immediate assignment of any certain and specified amount of property, but only an agreement to assign on a contingency (namely, failure to meet certain bills) goods of an unascertained quantity. Later, however, in *Percival* v. *Dunn*,[30] Bacon V-C distinguished *Burn* v. *Carvalho* on the ground that there was the equivalent of an order to pay out of a specific fund. *Percival* v. *Dunn* has been regarded as laying down the rule that it is essential to the effectiveness of an equitable assignment that there must be a specific fund out of which payment is to be made.[31] The same rule prevails in the United States.[32] Percival was a builder and Dunn was the surveyor to an estate. Dunn let parts of the estate to Davis and Cook, respectively, on building agreements and promised to make advances to them from time to time on satisfactory execution of parts of the building. Davis and Cook were indebted to Percival for building materials. Both Davis and Cook wrote notes requesting Dunn to make payments to Percival. These were handed to Dunn, but he refused to pay. He further denied that he had become liable to Percival under the agreement to advance money. Bacon V-C., in his judgment, seems to have proceeded on the basis that not only was no fund specified, but it had not been established that there was any debt to assign. He said that the document simply

[29] Story, Equity Jurisprudence (14th ed., 1918), s. 1410.
[30] (1885), 29 Ch. D. 128.
[31] Hanbury, Modern Equity (5th ed.) p. 82.
[32] *Springer* v. *J. R. Clark & Co.* (1944), 138 F. 2d 722.

meant, "Lend me so much money, as I want to pay the man to whom I am indebted". There was nothing "to the effect that the sums mentioned were to be paid out of a fund for which Dunn was answerable, or on which he was under any obligation to pay". He distinguished *Brice* v. *Bannister*,[33] *Ex parte Hall*[34] and *Burn* v. *Carvalho* on the ground that in these cases a fund had been specified. But, of course, there is a difference between there being no debt to assign, in which case there could be no assignment in any system of law,[35] and a requirement that a fund must be specified. But it seems to be settled in English law that the circumstances must show an intention to appropriate out of a specific fund.

Apparently, in their mode of approach to assignment, the chancery courts were influenced by the ideas of the common law. During the argument in *Walker* v. *Rostron*,[36] Parke B. had said, "Is not an equitable assignment of a chose in action the same in equity as the assignment of a chattel at law?" and there seems to have been a measure of truth in the implication. The same judge said in *Dixon* v. *Yates*[37] that the sale of a specific chattel passes the property without delivery, but that a sale of unspecific goods passes no property until delivery "because until then the very goods sold are not ascertained". In the case of *Godts* v. *Rose*,[38] the plaintiff had a quantity of oil at a wharf and agreed to sell an unascertained and undefined amount of the oil to the defendant. The plaintiff's clerk went to the wharfinger with an order requiring him to transfer that quantity of oil to the defendents. The wharfinger acted on the order, transferred the amount of oil over to the name of the defendant and gave the clerk a paper acknowledging the order. The clerk took this paper to the defendant and gave it to him on the basis that the defendant would give a cheque in exchange. This the defendant did not do. It was decided that there had been no real intention by the clerk to transfer property in the oil and that he had delivered the paper to the defendant on a misunderstanding. There was no agreement among the parties for the transfer of an ascertained quantity of oil. "Now, when one man sells to another goods which are not specifically defined, it is necessary that they should agree upon what is to be delivered in fulfilment of the contract."[39] "All these cases of the delivery of the symbols of property are founded upon that sort of tripartite contract which is adverted to in some of the cases, between the vendor, the vendee and the wharf-

[33] (1878), 3 Q.B. 569.
[34] (1876), 10 Ch. D. 615.
[35] *E.g.*, *Kirkwood* v. *Clydesdale Bank*, (1908) S.C. 20.
[36] (1842), 9 M. & W. 411.
[37] (1834), 5 B. & Ad. 34.
[38] (1855), 17 C.B. 229.
[39] *Per* Willes J.

inger."[40] Where goods sold are in the hands of a bailee for the seller, the tripartite agreement of seller, purchaser and bailee, that the bailee shall henceforth hold the goods for the purchaser, operates as a receipt of the goods by the purchaser. All three must be parties to the agreement. The mere delivery by the purchaser to the seller of a delivery order does not operate as a receipt of the goods by the purchaser until it has been assented to by the bailee.[41] The buyer too must assent. The mere segregation of goods by the seller will not pass the property to the buyer unless it is done with his consent express or implied.[42] The seller cannot force acceptance of goods on the buyer. One might reason by analogy that when *A* has agreed to purchase a chose in action from *B*, the mere segregation by *B* of property to which the chose in action relates from other property does not pass that property without the consent of *A*. *A* and *B* must be *ad idem* as to the property to be appropriated. If the property is in the hands of *C*, is unspecific and there is no tripartite agreement as to appropriation, *C* cannot be said to hold for *A* in place of *B*. But when money is deposited in a bank it becomes mixed with the general funds of the bank. A problem concerning the sale of a proportion of a mass of grain occurred in *Laurie and Morewood* v. *Dudin*.[43] There was a sale and sub-sale of 200 quarters out of 600 quarters of grain held by a warehouseman. The sellers received a delivery note which they lodged with the defendants. Sankey J. said that the law was different in Canada and the United States and quoted *Benjamin on Sale*.[44] There, on the delivery of grain to a grain elevator, the deliverers might become tenants in common of the whole mass, each for the amount of his share. Some countenance had been given to this doctrine in *Whitehouse* v. *Frost*,[45] but the judge declined to follow that case. He quoted with approval the statement of Bayley B. in *Gillett* v. *Hill*,[46] "Where there is a bargain for a certain quantity [of goods] *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection. . .". Thus, again reasoning by analogy, if a *res* underlying a chose in action consists of a quantity of something and the chose in action relates to a certain quantity *ex* that quantity, then there is no passage of

[40] *Per* Jervis C.J.

[41] *Farina* v. *Home* (1846), 16 M. & W. 119.

[42] *F. W. Woolworth & Co.* v. *Covington Bros. & Co.* (1921), 191 Ky. 67, 229 S.W. 48; *Godts* v. *Rose*, *Jenner* v. *Smith* (1869), L.R. 4 C.P. 270.

[43] [1925] 2 K.B. 383.

[44] (6th ed.) p. 380.

[45] (1810), 12 East 614.

[46] (1834), 2 Cr. & M. 530, approved by Scrutton L.J. in *Sterns Ltd.* v. *Vickers*, [1923] 1 K.B. 78.

property until there has been an appropriation out of the larger quantity. There is indeed a significant parallel between the rules relating to passage of property in unascertained goods and the requirement that for a valid assignment of a chose in action there must be a specified fund out of which payment is to be made. In an assignment there does not need to be an appropriation *in specie* of the actual coin in which the debt is to be paid, but it seems there must be an appropriation of a fund to the payment of the debt. That is, a fund must be ear-marked as charged with the debt.

A promise by a non-accepting drawee, who has been put in funds, that he will pay a bill can found an action by the payee for money had and received to the use of the payee. In such an action, if "a person had obtained money which honesty forbade him to keep the law would supplement the pressure of conscience".[47] In *Griffin* v. *Weatherby*,[48] *A* was indebted to the plaintiffs and was also a creditor of a company in liquidation of which the defendant was liquidator. *A* signed an order to the defendant asking him to pay to the plaintiffs or order the sum of £600 on account of money advanced by him to the company. A letter was sent to the plaintiffs and a copy went to the defendant asking if he would honour the order. He promised to do so when funds came into his hands. It was decided that the document was a bill of exchange, but that there had been no presentment. However, Blackburn J. decided the case on the basis of *Walker* v. *Rostron*, saying that ever since that case it had been settled law that where there is a transfer, on account of a debt due or to become due, of a fund existing or accruing in the hands of a third person and the holder of the fund is notified, "although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holders". There is an affinity between this approach and the assent of a bailee to hold goods for and on behalf of the assignee by virtue of his assent. In *Walker* v. *Rostron*, there was a tripartite agreement authorizing the defendant to pay acceptances as they fell due out of any remittances he might receive against the proceeds of consignments. In the words of Abinger C.B., "This is a case of a party engaging himself to appropriate the proceeds of

[47] Fifoot, History of the Common Law (1949) p. 365.
[48] (1868), L.R. 3 Q.B. 753.

the goods according to certain directions of the owner and appears to us to fall within that class of case where, when an order has been given to a person who holds goods to appropriate them in a particular manner and he has engaged to do so, none of the parties are at liberty without the consent of all to alter that arrangement".

Seemingly then there was something in the suggestion of Parke B. that an assignment of a chose in action was the equivalent in equity of the assignment of a chattel at law. Where the chose in action is related to a *res* this line of thought is understandable, but, of course, the analogy breaks down if any attempt is made to extend it to a pure *jus in personam* without something corporeal directly conjugate to the chose in action. Now the term "chose in action" is not employed with a uniform meaning in English law. Sometimes it means "the rights of a person entitled to property, sometimes the property over which he has rights, and sometimes the instrument which evidences these rights".[49] The English judges of the 19th century clearly seem to have directed their attention to "the property over which he has rights". There was even rather a tendency to speak of "money in bank" in words appropriate to the holding of coin in possession. In a note on *Re Hallett's Estate*,[50] the second edition of *Nathan's Equity through the Cases*[51] rightly describes the example of Jessel M.R. relating to the bag of 1,000 sovereigns as "probably antiquated". A Scottish judge, Lord Dunedin,[52] has said, "Where money is in question under modern conditions (by which I mean not put into bags or stockings) there never will be a *jus in re*". The words of Jessel M.R. in *Re Hallett's Estate* are specially interesting, where he quotes Lord Ellenborough in *Taylor* v. *Plumer*[53] as saying that "the difficulty which arises in such a case is a difficulty of fact, and not of law, and the dictum that money has no earmark must be understood in the same way, i.e., as predicated only of an undivided and indistinguishable mass of current money", and comments, "There, again, as I say, he did not know that equity would have followed the money, even if put into a bag or into an indistinguishable mass, by taking out the same quantity". In the period preceding the Bills of Exchange Act there seems to have been quite a leaning towards a "sovereigns in bags" concept of a bank deposit and a strong tendency to regard the assignment of a chose in action as a transfer of rights in relation to possessory personal property.

[49] Goodeve on Personal Property (9th ed) p. 196.
[50] *Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696. [51] At p. 392.
[52] *Sinclair* v. *Brougham*, [1914] A.C. 398. [53] (1815), 3 M. & S. 562.

A bill of exchange must be an unconditional order, but an unqualified order to pay is unconditional when it is "coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount . . .".[54] In *Chalmers' Bills of Exchange*[55] four examples are given of instruments not valid as bills, though according to Chalmers such instruments may be valid as equitable assignments. Three of the cases were decided in the 18th century and one in 1879. Apart from one (decided in 1723), they all relate to special sums due to be received by the mandatee. Presumably in those days the sums would have been paid in coin and the mandate was simply to take a quantity *ex* a mass of coin when received and deliver that quantity to a creditor of the mandator. In other words, a bailment analogy could be applied. Falconbridge[56] gives further examples, much on the same lines. But the bailment analogy is inapplicable to a valid bill by reason of the requirement that the order must be unconditional. Suppose *A* receives a legacy of $100 and (already having an account in credit) opens a new account with the same bank and deposits the $100 to the credit of the new account. There are no other operations on the new account. *A* draws an instrument consisting of an order on the bank to pay to *B* a sum "out of the amount of the $100 legacy paid into the special account with you". What is the logical interpretation of this order? Is it an appropriation of funds in the hands of a banker? But if money is paid into a bank account (even a special account) there is no physical property in the hands of the banker to appropriate. There is between *A* and the bank simply a relation of creditor and debtor. It is suggested that the logical interpretation of the foregoing order is that *A* has ordered the bank to pay to *B* a certain sum, only provided the balance of the special account is sufficient. The order is a conditional mandate, the condition being the adequacy of the balance in the special account. It is an order to the banker to pay, but not out of the other, prior account.

The question was indeed canvassed in England that the drawing of a bill or a cheque operated *per se* as an assignment. In *Keene* v. *Beard*,[57] Byles J. had said of a cheque, "In one respect it differs from a bill of exchange; it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn for the purpose of discharging a debt or liability of the drawer to

[54] Canadian Bills of Exchange Act, section 3.
[55] (12th ed.) p. 17.
[56] Banking and Bills of Exchange (5th ed.) p. 524.
[57] (1860), 8 C. B. (N.S.) 372.

a third person; whereas it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange". But Jessel M.R. would have none of this distinction between a bill and a cheque: "I do not understand the expressions attributed to Mr. Justice Byles in the case of *Keene* v. *Beard*; but I am quite sure that learned Judge never meant to lay down that a banker who dishonours a cheque is liable to a suit in equity by the holder".[58] In *Hopkinson* v. *Foster*, the plaintiffs were army bankers and agents of the defendant. They had received sums due to the defendant at the time of presentment of the cheque and these sums were sufficient to cover its amount. The cheque had been given by the defendant to a Dr. Cullen in exchange for an advance of funds abroad. Clearly the defendant's intention was to transfer to Dr. Cullen his right to collect a certain sum due to be paid into his bank and the purpose of the cheque was to transform his own right as a creditor of the bank into a similar right vested in Dr. Cullen. But the purpose failed, although it would have succeeded under the Roman-Continental theory. Jessel M.R. said, "A cheque is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's". Bailment concepts cannot be applied to a valid bill because it must be unconditional. Hence a bill cannot operate as an assignment. In *Shand* v. *Du Boisson*,[59] decided in the same year, *X* held a fund belonging to the defendant and a bill was drawn by the defendant on *X*, as garnishee, for the amount of the fund. *X* had been authorized to hold this fund to meet the bill, which had been given in consideration of certain debts of the drawer's being met by the payee. The facts were complicated and in doubt, being bound up in some rather inscrutable Indian commercial finance. However, Bacon V-C. said, "It is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears, can amount to an equitable assignment of a debt. The note might have been endorsed to any individual, or any number of people who might have endorsed it in succession. A mercantile instrument it is in its origin, and in that shape it remains and has no other vitality or effect and to call it an assignment of a debt would be to call it out of its right name." Indeed a strong pronouncement. Bacon V-C. was also concerned in the same year with a similar sort of question in *Vaughan* v. *Halliday*,[60] where he was overruled on appeal. In *Vaughan* v. *Halliday, A* & Co. in

[58] *Hopkinson* v. *Foster* (1874), L.R. 19 Eq. 74.
[59] (1874), L.R. 18 Eq. 283.
[60] (1874), L.R. 9 Ch. 561.

Brazil drew bills on *B* in Manchester for £2,000, sold the bills to Vaughan and about the same date transmitted to *B* acceptances of a financial house for £1,900 to cover the bills (allowing for exchange). But before the remittance reached England, *A* & Co. failed. *B*, also in difficulties, declined to accept the bills. *B* finally failed. Vaughan as holder of the dishonoured bills claimed to have the remittances applied in payment to him. There was a question as to whether there was a double proof so as to admit the rule in *Ex parte Waring*.[61] Bacon V-C. thought the rule applied and said, "Trusts may be declared in a variety of ways; trusts may be inferred from the course of dealing". He decided that there was "a clear right to have this appropriation". "But", he said, "does it signify that the plaintiff, Mr. Vaughan, is not a party to the transaction between Ashton and Ryder? Not, in my opinion, in the slightest degree." On appeal, Mellish L.J. seemingly agreed that there was a specific appropriation, but thought this created no trust. If the drawee was not prepared to accept, his proper course was to return the money to the drawer. A bill holder is "a creditor without security". Regarded on bailment principles, the conclusions of Mellish L.J. are understandable by analogy. If goods are sent to a bailee, he ought either to accept the bailment, including the requirement to deliver the goods to the bailor's order, or refuse the bailment and return the goods.

In regard to the point under discussion the American Negotiable Instruments Law, as stated, follows the English example. Commenting on *Schroeder* v. *Central Bank*,[62] Ames says:[63] "The very essence of a bill of exchange lies in the fact that the obligations of all parties to it are based upon a general personal credit. To construe a cheque, therefore, as an order to pay a part or whole of a specific fund, is to deny its existence as a bill of exchange." This poses the dilemma presented by English law to the holder of an unaccepted cheque who tries to claim rights in a credit balance at the drawer's bank. If the instrument operates as a transfer of something specific, it is not unconditional and hence not a bill. If it is a bill, it is unconditional and so cannot operate as a transfer of something specific. Ames points out, however, that before the Negotiable Instruments Law there were opposing views in different states. The Law deals specially with the cheque position as well as with bills in general: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer

[61] (1815), 19 Ves. 345.
[62] (1876), 34 L.T. (N.S.) 735. [63] Cases on Bills and Notes II, p. 735.

with the bank and the bank is not liable to the holder unless and until it accepts or certifies the check".[64] Where the intention is that the debt shall be paid out of a specific fund and not at all events, that is an assignment.[65] It has been said that the purpose of section 189 was to protect the bank against double claims,[66] but the reason is not clear. It has also been decided that a cheque may operate as an assignment if so intended by the parties.[67] A cheque for the exact credit balance may operate as an assignment.[68] Apparently the real purpose of section 189 was not to deal with the relationship between bank and depositor,[69] though again the reason is not clear. Since the drawing of a cheque does not operate as an assignment, the drawer may at any time before acceptance or certification stop payment.[70] Where a power of attorney to collect constitutes a mere naked authority it does not operate as an assignment, but probably *aliter* where there is consideration or an intention to appropriate a part of the fund.[71] Broadly speaking, the American courts seem to be rather more ready to "smell out" an assignment in cheque transactions than the English courts.

In Scotland, it has been long settled that a bill drawn and protested will receive effect as an assignation[72] of funds at the credit of the drawer with the drawee. From an early date protest was treated as constituting intimation.[73] Debts have been classified as (1) such as are "incorporated with the document", as in the case of bills, and transferable by "endorsation"; and (2) such as are independent of a document by which they may be proved and are transferable by assignation and notice.[74] According to the earlier Scottish law, a creditor had not in general power to assign his right to demand payment from a debtor.[75] But it has been long

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[64] N.I.L., s. 189.

[65] *Muller* v. *Kling* (1913), 209 N.Y. 289.

[66] *In re Thornton's Guardianship* (1943), 10 N.W. 2d 193 (Wis.), and *Elgin* v. *Gross-Kelly* (1915), 150 P. 922.

[67] *Dunlap* v. *Commercial Nat. Bank* (1920), 50 Cal. App. 476.

[68] *McEwen* v. *Sterling State Bank* (1928), 5 S.W. 2d 702; and *Riegert* v. *Mauntel* (1933), 185 N.E. 811.

[69] *Caledonia Nat. Bank of Danville* v. *McPherson* (1950), 75 A. 2d 685.

[70] *In re Winborne's Will* (1950), 57 S.E. 2d 795, *Third Nat. Bank in Nashville* v. *Carver* (1948), 218 S.W. 2d 66.

[71] *Scott* v. *Hall* (1945), 163 P. 2d 517 (Oregon); *Arcweld Mfg. Co.* v. *Burney* (1942), 121 P. 2d 350 (Washington).

[72] *Watt* v. *Pinkney* (1853), 16 D. 279. "Assignation" is the Scottish term equivalent to "assignment".

[73] *Gordon* v. *Anderson* (1712), M. 1490, Mitchel (1734), M. 1464, *Stewart* v. *Ewing* (1744), M. 1493.

[74] Bell's Principles, s. 1468.

[75] Before 1862 an assignation contained (a) the appointment of the assignee as irrevocable attorney for the assignor; (b) surrogation of the assignee in the place of the assignor. The Transmission of Moveables Act, 1862, introduced forms omitting these clauses.

settled that a claim for the payment of money is assignable.[76] Where all that remains to be done on a contract is to transfer the property or pay the price, the benefit of the contract may be transferred.[77] As mentioned, the doctrine of intimation to the debtor has a central position in the Scottish theory. The objects of intimation are (i) to divest the assignor—the debtor, after intimation, has an answer to a demand for payment by the assignor; and (ii) to put the debtor in *mala fide* to pay the assignor after intimation. Thus the effect of intimation was to enlarge the rights of the assignee. The conception of a mandate as a means of transforming rights is well developed in Scottish law. For example, a mandate termed a "precept of sasine" was given in connection with the grant of a charter of land, and was a warrant or authority for taking investiture. It was "a command by the superior who granted the charter to his bailie to give sasine as possession of the subject disponed, to the vassal or his attorney, by the delivery of the proper symbols". A modern conveyance also contains a warrant to have it recorded in the Register of Sasines in order to complete the title. According to the Scottish common law of sale of chattels, a completed contract did not of itself transfer property. The *jus in re* remained with the seller (whether or not the price was paid) until the goods had been delivered to the buyer. Although a *bona fide* purchaser of goods for value can acquire a good title despite defects in that of his predecessor, the general rule for assignations is "assignatus utitur jure auctoris". In regard to bills and cheques, the acceptance or protest proves intimation and completes the assignation of a money debt,[78] but it has been long settled that a precept to account to a third party for goods is a mere executory contract transferring no *jus in re*.[79] In the case of goods an act of investiture is required to complete title, namely, delivering (or appropriation where the goods are with a third party).

In *Carter* v. *McIntosh*,[80] a bill was drawn and presented to a person in whom certain funds were due to vest. Acceptance was refused. It was decided that there was a good assignation of the fund, the assignation to take effect on vesting. Inglis L.J.C. said regarding the bill, "But it does not follow if it failed of being a bill of exchange, for want of acceptance, or of any other requisite necessary to give it legal privileges and the quality of a bill, it had

[76] Stair iii, 1, 3.
[77] *Constant* v. *Kincaid & Co.* (1902), 4 F. 901, *National Bank* v. *Union Bank* (1886), 14 R. (H.L.) 1.
[78] Thomson on Bills of Exchange, 1, III, 4.
[79] *Anderson* v. *Turnbull* (1706), M. 1460, *Stewart* v. *Ewing*, *supra*.
[80] (1862), 24 D. 925.

therefore no effect in law at all". He pointed out that before bills were known precepts were in use. The instrument in this case was a precept for value and so irrevocable. He added, "I have only to say in conclusion, that an order to pay, or a precept to pay, is one of the best known forms of assignation in the law of Scotland". The same judge was concerned in the *British Linen Co.* v. *Carruthers*,[81] which decided that a cheque for an amount in excess of the balance at the drawer's credit operated as an assignation of that balance. He said there that when a cheque is granted for value it constitutes a "procuratory *in rem suam*" to go to the bank and collect the money. "This is just an assignation." Thus it would appear that Scottish law regards an assignation as the transfer of a right, whereas English law regards an assignment as the transfer of property in the hands of a third party.

But if the drawer of a cheque has a credit balance at the bank, there is a clear intention on his part (if he is acting in *bona fide*) that the payee should obtain money against that balance. This intention is put into operation by the delivery of the cheque to the payee (the cheque being an unconditional mandate to the payee to collect the money). If the cheque is dishonoured and protested, then there has been intimation and the bank has been brought into the transaction. To say that these circumstances do not constitute an assignment of so much of the debt owed by the bank to the drawer is surely to deny the possibility of the assignment of a personal right of credit as such, and this seems to be the attitude of English law. It does seem, therefore, that subsection (2) of section 53 of the United Kingdom Bills of Exchange Act represents a more liberal (and also simpler) approach to the problem of assignment of a debt than subsection (1) of the same section and section 127 of the Canadian act, and an approach more in keeping with the normal intention of the parties. Hence, it is submitted, that in some future revision of the Bills of Exchange Act consideration should be given to the repeal of section 127 and its replacement by a section on the lines of subsection 2 of section 53 of the United Kingdom act.

He should avoid all sharp practice and he should take no paltry advantage when his opponent has made a slip or overlooked some technical matter. No client has a right to demand that his counsel shall be illiberal or that he shall do anything repugnant to his own sense of honour and propriety. (From the Canons of Ethics of the Canadian Bar Association)

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[81] (1883), 10 R. 923.