

## CHAPTER IX.

### NEGOTIATION—BY INDORSEMENT.

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§ 94. **Meaning of term negotiation.** Negotiation is an act of the parties or of the law, by which the title to bills and notes is conveyed from one person to another.<sup>1</sup>

As a bill or note is a chattel it may be sold as a chattel; it is also a chose in action and may be assigned as a chose in action; and as it is also a negotiable instrument it may be transferred by indorsement according to the rules of the law merchant.<sup>2</sup>

§ 95. **Who may negotiate.** In general, a bill or note must be negotiated by the *de facto* holder, that is, the person in possession of a bill or note and to whom it is payable, whether his possession be lawful or not.<sup>3</sup> And in such sense it is broader in significance than the term "holder," which customarily means lawful holder. If the bill or note is payable to bearer the person in possession is the *de facto* holder, but if the bill or note is payable to order, the *de facto* holder must have possession and be the person to whom it is payable.<sup>4</sup> But if the name is misspelled, or wrongly designated, the holder may negotiate by writing the name as in the bill, and then his true name. So the

<sup>1</sup> Odell v. Clyde, 57 N. Y. S. 126, 38 App. Div. 333; Whitworth v. Adams, 5 Rand. (Va.) 333, 415; Shaw v. Merchants Nat. Bank, 101 U. S. 557, 562, 25 L. Ed. 892.

<sup>2</sup> Willis v. Barrett, 2 Stark, 29; Bryant v. Eastman, 7 Cush. 111.

<sup>3</sup> Collins v. Gilbert, 94 U. S. 753;

Wilson Sewing Mach. Co. v. Spears, 50 Mich. 534, 15 N. W. 894; Everton v. Bank, 66 N. Y. 14.

<sup>4</sup> Jackson v. Love, 82 N. C. 405; Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 97 Am. Dec. 70, 1 Am. Rep. 71; Durein v. Moesser, 36 Kan. 441, 13 Pac. 797.

person who obtains title by transfer of act of law is a *de facto* holder.<sup>5</sup>

§ 96. **Methods of negotiation.** There are four methods of negotiation, viz.: by assignment, by operation of law, by indorsement, and by delivery.

The holder of a bill or note may transfer it by assignment the same as any other chose in action.<sup>6</sup> Where the holder of a bill payable to order transfers it without indorsement it operates as an equitable assignment, and the transferee may compel indorsement.<sup>7</sup> And when indorsement is subsequently obtained, the transfer operates as a negotiation from the time when given,<sup>8</sup> unless the indorsement was omitted at the time of transfer by fraud, accident or mistake, in which case it operates from the time of the transfer.<sup>9</sup>

The full title to a bill or note passes, without either assignment, indorsement, or delivery; that is, by operation of law, (a) by the death of the holder,<sup>10</sup> where the title vests in his personal representative, or (2) by the bankruptcy of the holder,<sup>11</sup> where title vests in his assignee or trustee, or (3) in some jurisdictions, where the holder is an unmarried woman, on her subsequent marriage the title vests in her husband,<sup>12</sup> or (4) upon the death of a joint payee or indorser, in which case the general rule is that the title vests at once in the surviving payee or indorsee.<sup>13</sup>

The legal title to an instrument made payable to order can regularly be transferred only by indorsement.<sup>14</sup> The transferee of an instrument made payable to order without indorsement is the equitable owner, and takes it subject to all the equities vested in prior parties.<sup>15</sup> The indorsement must be written on the bill

<sup>5</sup> Earhart v. Grant, 32 Ia. 481.

<sup>6</sup> Mitchell v. Walker, 17 Fed. Cas. No. 9,670; Deshler v. Guy, 5 Ala. 186; Biscoe v. Sneed, 11 Ark. 104.

<sup>7</sup> Brown v. Willson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779; Contro v. Rafferty, 7 Montreal Super. Ct. 146; Schoepfer v. Tommack, 97 Ill. App. 562.

<sup>8</sup> Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180; Osgood v. Artt, 17 Fed. 575; Hays v. Plummer, 126 Cal. 107, 58 Pac. 447, 77 Am. St. Rep. 153.

<sup>9</sup> Beard v. Dedolp, 29 Wis. 136.

<sup>10</sup> Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; Campbell v. Brown, 64 Ia. 425, 20 N. W. 745, 52 Am. Rep. 446.

<sup>11</sup> Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Billings v. Collins, 44 Me. 271.

<sup>12</sup> Coles v. Davis, 1 Campb. 485.

<sup>13</sup> Draper v. Jackson, 16 Mass. 480; Allen v. Tate, 58 Miss. 585; Sanford v. Sanford, 45 N. Y. 723. Some jurisdictions have statutes contra.

<sup>14</sup> Hopkins v. Manchester, 16 R. I. 663, 19 Atl. 243, 7 L. R. A. 387; Chadron Bank v. Anderson, 6 Wyo. 518, 48 Pac. 197.

<sup>15</sup> Pavay v. Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716; Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080, 79 Am. St. Rep. 515.

itself,<sup>16</sup> or on a copy,<sup>17</sup> or on a slip of paper attached thereto called an "Allonge" and considered a part of the bill.<sup>18</sup> The indorsement may be on the face of the bill. When the note or bill is made or becomes payable to bearer, it is transferable by delivery without indorsement.<sup>19</sup>

§ 97. **Meaning of indorsement.** An acceptance applies to bills alone, while indorsement applies to both bills and notes. The indorsement cannot be by parol and the proper place for writing it is on the back of the instrument.<sup>20</sup> *"The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement."*<sup>21</sup> Indorsement means an indorsement completed by delivery.<sup>22</sup> The law looks to the intention of the parties rather than to the form as to indorsements. A person writes certain words upon the back of the instrument: was it the intention to indorse the instrument or do something else? And the law is very apt to consider any words as an indorsement rather than something else.<sup>23</sup> *"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."*<sup>24</sup> There is one exception, however, and that is in the case of a guarantor, or a guarantee written on the back of an instrument.<sup>25</sup> And it should be noted that there is a difference between a surety and a guarantor. A guarantor promises to account for the debt, default, or miscarriage of another person. The surety is bound in his own right with his principal and as an original promisor. He is the debtor from the beginning and is held to know of the default of the principal. On the other hand, the contract of the guarantor

<sup>16</sup> Partridge v. Davis, 20 Vt. 499; Gorman v. Ketchum, 33 Wis. 427; Hartwell v. Hemmenway, 7 Pick. 117.

<sup>18</sup> Crosby v. Roub, 16 Wis. 645; Folger v. Chase 18 Pick. 63; French v. Turner, 15 Ind. 59.

<sup>19</sup> Wilton v. Williams, 44 Ala. 347; Haines v. Dubois, 30 N. J. L. 259.

<sup>20</sup> Freund v. Importers Nat. Bank, 76 N. Y. 352; Partridge v. Davis, 20 Vt. 499; Gorman v. Ketchum, 33 Wis. 427.

<sup>21</sup> Neg. Inst. Law, § 61 (31), where all cases directly or indi-

rectly bearing upon or citing the Law are grouped.

<sup>22</sup> Neg. Inst. Law, § 2 (191), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>23</sup> Myers v. Wright, 33 Ill. 284; Brown v. Butchers etc. Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

<sup>24</sup> Neg. Inst. Law, § 113 (63), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>25</sup> Edgerly v. Lawson, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432; Ely v. Bibb, 4 J. J. Marsh. (Ky.) 71. See Chap. XXI on Suretyship and Guaranty.

is his own separate contract. It is in the nature of a warrant by himself that the thing to be done by the principal shall be done. The contract is not his contract and he is not bound to take notice of non-performance. A surety obligation is a primary obligation. The surety and the principal may be joined as defendants in one suit, or the surety may be sued alone. So, we see, then, there is that exception as to a guaranty; when a guarantee is written on the back of an instrument it will not be construed as an indorsement, but most any other agreement or arrangement will be construed as an indorsement.

§ 98. **Who indorse.** The party to whose order the instrument is made payable should indorse the instrument.<sup>26</sup>

*"Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others."*<sup>27</sup>

*"Where an instrument is drawn or indorsed to a person as 'cashier' or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer."*<sup>28</sup>

§ 99. **Nature of indorsement.** As to its nature the indorsement is a contract<sup>29</sup> and also a transfer. Every indorser is a new drawer and the terms are found on the face of the bill or note. There is an exception in case the indorsement is to A and not to his order, A could not negotiate it. There is an added obligation upon the instrument aside from what appears upon the face of the instrument. The person who indorses it says, "Yes, I made that contract, but you must present that for payment and you must notify me if it is not paid. If that is presented for acceptance and not accepted, or presented for payment and not paid, then I will pay it." That is the contract that the indorser on an instrument makes. He says, "I will pay the instrument according to the face of the bill,<sup>30</sup> provided you give me notice of its non-acceptance or non-payment."<sup>31</sup> So an indorsement

<sup>26</sup> Cock v. Fellows, 1 Johns. (N. rectly bearing upon or citing the Y.) 143; Freeman v. Perry, 22 Conn. 617; Woodbury v. Woodbury, 47 N. H. 11; Ellis v. Brown, 6 Barb. 282.

<sup>27</sup> Neg. Inst. Law, § 71 (41), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>28</sup> Neg. Inst. Law, § 72 (42), 148, where all cases directly or indi-

rectly bearing upon or citing the Law are grouped.

<sup>29</sup> Furgerson v. Stapels, 83 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470; Mudd v. Harper, 1 Md. 110, 54 Am. Dec. 644.

<sup>30</sup> Van Vleet v. Sledge, 45 Fed. 743; Prentiss v. Savage, 13 Mass. 20; Woodward v. Lowry, 74 Ga.

<sup>31</sup> Jones v. Robinson, 11 Ark.

performs two things: It makes a contract and it transfers the instrument; the indorser says to every person on the face of that instrument and to every person who precedes him as an indorser of the instrument, "If this instrument is not paid by the person who is primarily liable on the instrument, and if you give me due notice that the instrument has not been paid, then I will pay it." That is the contract. He doesn't say that he would pay it absolutely, but "if you give me notice that the person who is liable on the instrument will not pay or has failed in some respect, I will pay the instrument." Of course, if it is a bill of exchange, and it is not accepted by the acceptor, the indorser says by indorsing it, "If it is not accepted and you duly notify me, I will then pay the instrument." In that case, if the drawee did not accept it, the drawer would be primarily liable. In the case of a note, the indorser says, "In case that instrument is not paid, and you give me notice of the fact that the maker does not pay the note, then I will pay the note myself."

The indorsement of a bill or note implies an undertaking from the indorser to the person in whose favor it is made and to every other person to whom the bill or note may afterwards be transferred, exactly similar to that which is implied by drawing a bill, except that in the case of drawing a bill the stipulation with respect to the drawer's responsibility and undertaking do not apply.

In the beginning of the course we saw that a note might waive presentment and notice. Of course, under such circumstances it will not be necessary to make them a part of the contract that the indorser makes.

**§ 100. Requisites of indorsement.** There are certain requisites of an indorsement.

The Negotiable Instruments Law provides:

*"The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue."*<sup>22</sup>

Take a bill for \$500. Suppose the payee should indorse \$250 to A and \$250 to B. That could not be done, for the indorse-

504, 54 Am. Dec. 212; Beer v. Cliff- where all cases directly or indirectly bearing upon or citing the Law Am. St. Rep. 172, 20 L. R. A. 580. are grouped.

<sup>22</sup> Neg. Inst. Law. § 62 (42).

ment must be in accordance with the bill.<sup>33</sup> But if \$250 was paid on the bill, the rest could be indorsed to someone else. The test then is, does the transfer cut up the right of action, or does it vary the rights of the parties? If a note for value was transferred and there was a neglect to indorse it, the transferrer may be compelled, in equity, to make the indorsement.<sup>34</sup> The transferee is the rightful holder of it until it is indorsed, and equity would compel that there should be an indorsement. Suppose a case where the note was indorsed by A to B, and then B indorsed it to A, each transfer being for value, can A recover from B on that indorsement? No. Because of circuitry of action. If A sued B, B could turn right around and sue A. Consequently, it is held that that could not be done, unless A, in the first instance, should indorse "without recourse," and B did not.<sup>35</sup>

The indorsement must follow the tenor of the bill or note. A bill or note cannot be divided into two different parts, and one cannot accept part and not the other, or pay part of it and not pay the other part, providing it divides the cause of action. It would not be absolutely void to divide it up in this way; it would be binding between the parties, yet it would not be negotiable by the law merchant.<sup>36</sup> That means not good by the law merchant. Then, a second requisite is that the indorsement be by the payee or subsequent holder. And the third requisite is as to delivery. There can be no question as between the immediate parties but that a delivery is necessary, and when the instrument gets into the hands of a *bona fide* holder a delivery is necessary unless certain things arise whereby the transferrer would be estopped. And there must arise something of that nature in order to say that an indorsement is valid without delivery.

§ 101. *Varieties of indorsement.* There are various liabilities which may be engrafted on a negotiable instrument, evidenced by the character and terms of the indorsement thereon. An indorsement may be (a) special, or (b) in blank; it may be (c) absolute, or (d) conditional; it may be (e) restrictive; it may be (f) without recourse on the indorser; and there may

<sup>33</sup> *Planters Bank of Tenn. v. 779; Couter v. Rafferty, 7 Montreal Evans, 36 Tex. 592; Hughes v. Kid- Super. Ct. 146.*  
dell, 2 Bay (S. C.) 324; *Douglas v. 35 Bishop v. Hayward, 4 Term R.*  
*Wilkeson, 6 Wend. 637; Hawkins v. 470; Moore v. Cross, 19 N. Y. 227;*  
*Cudy, 1 Ld. Raym. 360; Erwin v. Wilders v. Stevens, 15 Mees. & W.*  
*Lynn, 16 Ohio St. 547. 208.*

<sup>34</sup> *Schoepfer v. Tommack, 97 Ill. App. 562; Brown v. Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep.*  
<sup>35</sup> *Cock v. Fellows, 1 Johns (N. Y.) 143; Newman v. Ravenscroft, 67 Ill. 493; Pease v. Dwight, 6 How (U. S.) 190.*

be (g) joint indorsements of the instrument, (h) successive indorsements, and also (i) irregular indorsements.

The Negotiable Instruments Law provides:

*"An indorsement may be either special or in blank; and it may also be either restrictive or qualified or conditional."*<sup>87</sup>

Below are given some of the most common forms of indorsement:

|                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                           |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>(Indorsement in full)<br/>Pay to DONALD S. MORRIS<br/>or order.<br/>NATHAN REDDING.</p> <p>(Indorsement in blank)<br/>DONALD S. MORRIS.</p> <p>(Qualified Indorsement)<br/>Without recourse.<br/>JOSEPH THOMPSON.</p> <p>(Conditional Indorsement)<br/>Pay HENRY HUDER or order<br/>on the completion of the New-<br/>castle Road.<br/>HENRY STEVENSON.</p> | <p>(Restrictive Indorsements)<br/>1. Pay only to EARL MATLOCK<br/>for collection for my account.<br/>HENRY HUDER.</p> <p>2. Pay to HENRY REEVE or<br/>order as Trustee for GEORGE<br/>GRAVES.<br/>WILLIAM ADDISON.</p> <p>(Indorsement by guaranty)<br/>For value received I hereby<br/>guaranty the payment of this<br/>note together with any costs in-<br/>curred in collection.<br/>LOUIS EWBANK.</p> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

§ 102. **Indorsement in full or special indorsement.** A special indorsement or an indorsement in full is one which mentions the name of the person in whose favor it is made and to whom, or to whose order, the sum is to be paid. For instance: "Pay to B, or order," signed "A," is an indorsement in full by A, the payee or holder of the paper, to B.

The special indorsement is the same as an indorsement in full. It is an indorsement to someone or order; that is, *"a special indorsement specifies the person to whom, or to whose order, the instrument is to be payable."*<sup>88</sup>

The subsequent indorsee must write his order on the instrument; that is, *"the indorsement of such indorsee is necessary to the further negotiation of the instrument."*<sup>89</sup> And the subse-

<sup>87</sup> Neg. Inst. Law, § 63 (43), are grouped. But see *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004.

<sup>88</sup> Neg. Inst. Law, § 64 (44), where all cases directly or indirectly bearing upon or citing the Law are grouped.

quent holder of the instrument would be required to make more proof in order to recover on the instrument when it is indorsed in full. When there is a special indorsement, one endeavoring to recover from one who has received it by special indorsement must prove the signature of two persons; where it is indorsed in blank, one would have to prove the signature of the party only against whom he was endeavoring to recover.

§ 103. **Indorsement in blank.** An indorsement in blank is one which does not mention the name of the indorsee, and generally consists simply of the payee placing his name in writing on the back of the instrument.<sup>40</sup> The holder of a bill with a blank indorsement may, by writing a name over the indorser's signature, convert it into a special indorsement,<sup>41</sup> but such a bill is not restrained thereby and is payable to bearer, except that the special indorser is only liable to parties making title through his indorsement.<sup>42</sup>

§ 104. **Absolute and conditional indorsements.** An absolute indorsement is one by which the indorser binds himself to pay, upon no other condition than the failure of prior parties to do so, and of due notice to him of such failure. A conditional indorsement is one by which the indorser annexes some other condition to his liability; that is, where there is some condition in the indorsement.<sup>43</sup> Now as to the condition, if it is in the indorsement, the courts hold that it is valid. There may be a valid conditional indorsement and it accomplishes justice, and yet it seems to restrict the circulation of the instrument to some extent, because there is some condition attached to it. Yet it does not in any way interfere with the face of the instrument as such; it is a primary obligation when it is on the face of the instrument, and is invalid, but if it is an indorsement it is valid, and does not make the instrument a non-negotiable instrument.<sup>44</sup>

*"Where an indorsement is conditional a party required to pay the instrument may disregard the condition and make payment to the indorser or his transferee whether the condition has been fulfilled or not. But any person to whom an instrument so in-*

<sup>40</sup> Neg. Inst. Law, § 64 (44), 383; Johnson v. Mitchell, 50 Tex. 212. where all cases directly or indirectly bearing upon or citing the Law are grouped. See also note 1 L. R. A. 712.

<sup>41</sup> Illinois Conference v. Plagge, 177 Ill. 431, 53 N. E. 76, 64 Am. St. Rep. 252; Hunter v. Hempstead, 1 Mo. 67, 13 Am. Dec. 468.

<sup>42</sup> Habersham v. Lehman, 63 Ga. 24, 55 E. C. L. 24.

<sup>43</sup> McGorray v. Stockton Sav. etc. Soc., 131 Cal. 321, 63 Pac. 479; Rowe v. Haines, 15 Ind. 445, 77 Am. Dec. 101; Johnson v. Barrow, 12 La. Ann. 83.

<sup>44</sup> Tappan v. Ely, 15 Wend. (N. Y.) 362; Soares v. Glyn, 8 Q. B. 24, 55 E. C. L. 24.

*dorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.*"<sup>45</sup>

Suppose an indorsement as follows: "Pay to A, or order, if he marries before he is 25." This is written on the back of the instrument and is not a part of the original instrument. Now, that is a conditional indorsement and is held good. It is not good if on the face of the instrument, but is held good if it is an indorsement. When a condition is written on the face of the instrument it is not negotiable,<sup>46</sup> but where it is written on the back the courts say it is negotiable by the law merchant. It is a contract, and the person who makes it is bound by it, providing the conditions are fulfilled.<sup>47</sup> We are now considering whether it is a good principle. Suppose this condition is written on the face of the note, it would apply to every man who indorses it, whereas, when it is written on the back by one indorser it only applies to him and not to the others.

Suppose an instrument is worded, "Pay to the order of A," and signed "B," "A" being the payee indorses it with a conditional indorsement and says, "Pay to C, provided he marries before he is 25." What is the value of that instrument? Could anybody get anything on that instrument? It means at any time he gets married *before* he is 25 years old. This is an exceptional case and really seems to make the note non-negotiable at the very first instance, but it does not, if not made contemporaneously with the instrument and a part of it. If a memorandum of agreement of the parties is written upon the bill or note contemporaneously with its execution, and intended by the parties to make a part of the note or bill, it is construed in the same manner as if in the body of the instrument.<sup>48</sup>

§ 105. **Restrictive indorsement.** A restrictive indorsement is one so worded as to restrict the further negotiability of the instrument; and it is then called a restrictive indorsement.<sup>49</sup> Thus, "Pay the contents to J. S. only," is such an indorsement.

The Negotiable Instruments Law provides:

*"An indorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the in-*

<sup>45</sup> Neg. Inst. Law, § 69 (39), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>46</sup> Palmer v. Sargent, 5 Nebr. 223, 25 Am. Rep. 479; Hill v. Nutter, 82 Me. 199, 19 Atl. 170; Swank v. Nichols, 24 Ind. 199.

<sup>47</sup> Johnson v. Barrow, 12 La. Ann. 83.

<sup>48</sup> Parsons v. Jackson, 99 U. S. 434, 25 L. Ed. 457.

<sup>49</sup> Fawcett v. U. S. Nat. L. Ins. Co., 97 Ill. 11, 37 Am. Rep. 95; Hook v. Pratt, 78 N. Y. 371; Fassin v. Hubbard, 55 N. Y. 465. See note 12 L. R. A. 370.

*dorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.*"<sup>50</sup>

*"A restrictive indorsement confers upon the indorsee the right, (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his right as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement."*<sup>51</sup>

The restrictive indorsement may or may not restrict the circulation of the instrument, depending on the indorsement. There are two classes—collection indorsements and trustee indorsements. If it is a collection, it is no longer negotiable. "Pay to A," and then the words "for collection" written afterwards. That would indicate that A no longer had any right to negotiate that instrument, but only had a right to collect it.<sup>52</sup> But if it is "Pay to A, or order, for the use of B," or "A or order, as trustee for B," or words to that effect, then the very indorsement itself would indicate that A could place an order upon that indorsement, and that certainly would not restrict the instrument. A trustee indorsement containing the words "or order," or words of similar import, can be passed from hand to hand.<sup>53</sup>

An indorsement for collection is not a transfer of the title of the instrument to the indorsee, but merely constitutes him the general agent of the indorser to present the paper, demand and receive payment, and remit the proceeds.<sup>54</sup> An indorsement for collection made by the payee is cancelled by his subsequent indorsement to another indorsee for value.<sup>55</sup>

An indorsement of a bill or draft to a bank for deposit is

<sup>50</sup> Neg. Inst. Law § 66 (36), Brooklyn v. Wescott, 118 N. Y. 468, 23 N. E. 900.

<sup>51</sup> Neg. Inst. Law, § 67 (37), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>52</sup> Neg. Inst. Law, § 67 (37), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>53</sup> Peoples etc. Bank v. Craig, 63 Ohio St. 374, 59 N. E. 102, 81 Am. St. Rep. 639, 52 L. R. A. 372; Continental Nat. Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; National City Bank of

Brooklyn v. Wescott, 118 N. Y. 468, 23 N. E. 900.  
<sup>54</sup> Leavitt v. Putnam, 3 N. Y. 494; Leland v. Parriott, 35 Ia. 454.  
<sup>55</sup> Northwestern Nat. Bank v. Bank of Commerce, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102; Boyer v. Richardson, 52 Neb. 156, 71 N. W. 981. See also notes 2 L. R. A. 699, 7 L. R. A. 852, 8 L. R. A. 42, 14 Am. St. Rep. 793, and 4 Am. St. Rep. 203.

<sup>56</sup> Brook v. Van Nest, 58 N. J. L. 162, 33 Atl. 382; Atkins v. Cobb, 51 Ga. 86.

common in business transactions.<sup>56</sup> Such an indorsement, like an indorsement for collection, constitutes a retention of title in the depositor in the absence of any practice or agreement to the contrary. It is likely, however, that the title to a check so indorsed which is credited, according to the practice prevailing between the bank and the indorser, to the account of the indorser, will be held to have passed to the bank. In any event a restrictive indorsement of an instrument for collection or deposit, or to the use of the indorser and for his benefit, in the absence of any other circumstances, will not divest the indorser of his title thereto, until the money is paid.

§ 106. **Indorsement without recourse.** An indorsement qualified with the words, "without recourse," "sans recourse," or "at the indorsee's own risk," renders the indorser a mere assignor of the title to the instrument, and relieves him from all responsibility for its payment,<sup>57</sup> though not from certain liabilities.

The indorsement without recourse means just as the word signifies. A says to B, "I indorse this over to you, but you have no recourse on me, providing the parties on the instrument are not financially able to pay this instrument. I don't stand good for the financial ability of the other parties who have preceded me on the instrument."

The form of the indorsement without recourse is "sans recourse," or "without recourse," or "at the indorsee's own risk," or such equivalent words. It transfers the legal title to the instrument. "*A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse,' or any words of similar import.*"<sup>58</sup> It does not free him from all liability. He warrants that the instrument is in all respects genuine as to prior parties,<sup>59</sup> (2) that he has a good title and a right to transfer it;<sup>60</sup> and (3) that he has no knowledge of any fact to impair its validity.<sup>61</sup> In

<sup>56</sup> Barbour v. Bayon, 5 La. Ann. 304, 52 Am. Dec. 593.

<sup>57</sup> Cross v. Hollister, 47 Kan. 652, 28 Pac. 693; Corbett v. Fetzer, 47 Neb. 269, 66 N. W. 417; Drom v. Sherwin, 20 Colo. 234, 38 Pac. 56; Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129. As to effect of indorsement without recourse see notes 12 L. R. A. 371, and 7 Am. St. Rep. 365.

<sup>58</sup> Neg. Inst. Law, § 68 (38), 14 S. W. 93; Hannun v. Richard-

where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>59</sup> Lobdell v. Baker, 1 Metc. (Mass.) 193; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17.

<sup>60</sup> Dumont v. Williamson, 18 Ohio St. 515; Palmer v. Courtney, 32 Neb. 781, 49 N. E. 754.

<sup>61</sup> Smith v. Corege, 53 Ark. 295,

other words, anyone who writes his name on a paper "without recourse" says "all parties to that paper are genuine." If it had been forged he would be held liable. He says, "I am the lawful holder of that paper, and I have title to it and know of no reason why you could not recover on it as a valid instrument, but one thing I do not guarantee; I do not guarantee the financial responsibility of the parties on that paper, but I do say that I hold the title to it just the same as if it were a horse I was selling you."

The regular indorser guarantees that the instrument will be paid by the other parties; that they are financially responsible, and if they do not pay it, he will see that it is paid. Indorsers "without recourse" do not make such guarantees as we have seen. "Without recourse" only applies to the person who writes those words after his name.

Now, strange to say, this does not interfere with the negotiability of the instrument. "*Such an indorsement does not impair the negotiable character of the instrument.*"<sup>62</sup> Nor does it cause any suspicion on the character of the paper. In that way the indorser restricts his liability. A party might enlarge his liability by writing over his signature an absolute guarantee, waiving the usual demand and notice of non-payment: this is a facultative indorsement.

**§ 107. Joint indorsement.** If a bill or note be made payable to several persons not partners, the transfer can only be made by a joint indorsement of all of them.<sup>63</sup>

**§ 108. Successive indorsements.** When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them to liability as to each other in the order they indorse.<sup>64</sup>

**§ 109. Irregular or anomalous indorsement.** When one not a party to an instrument places his name irregularly upon an instrument it is known as an irregular or anomalous indorsement.

If a note is made payable to A or bearer, and we should see

son, 48 Vt. 508; *Challiss v. McCrum*, (Mass.) 361, 28 Am. Dec. 306; 22 Kan. 157; *Furgerson v. Staples*, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470. *Cooper v. Bailey*, 52 Me. 230; *Hungerford v. Perkins*, 8 Wis. 267. See § 98, *supra*.

<sup>62</sup> Neg. Inst. Law, § 68 (38), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>63</sup> *Pitcher v. Barrows*, 17 Pick.

<sup>64</sup> *Camp v. Simmons*, 62 Ga. 73; *Brewer v. Boynton*, 71 Mich. 254, 39 N. W. 49; *Knox v. Dixon*, 4 La. 466, 23 Am. Dec. 488.

indorsements on the back of the note, X, Y and Z, we would find no difficulty since the instrument is made payable to bearer; or a blank indorsement would be regular and would be valid. But suppose the instrument is made payable to the order of A, and instead of the indorsement being A's, the first indorsement, we see is the indorsement of Y. Now, Y is not a party to the instrument; the instrument has been made, say, by X, and made payable to the order of A, while Y is a complete stranger to the instrument. What liability did he intend to assume by placing his name that way on the instrument? His liability is not governed by the law merchant. It does not make provision for any such person. Now, suppose that bill or note is made payable to the order of A, and A does not write his name upon the instrument, but the first name appearing on the back of the instrument is the name of B, the note or bill being made or drawn by X. X does not pay the note and A proceeds against B. It is important to know what the liability of the irregular party to the instrument is in order to know whether or not he should be given notice of the non-payment or non-acceptance of the instrument. If we hold this person who is irregular or anomalous upon the back of the instrument as an indorser, then we must perform the conditions which should be performed toward an indorser in order to hold him, and one of the conditions is, that he shall be given notice. It becomes important to know whether the name of B, or rather whether B himself is an indorser, or what his obligation is. Now, suppose B's signature was there when A took the note. Suppose when A took the note, he didn't know the maker; he said to B, "I don't know this man; I am not willing to count anything on his financial responsibility, but I tell you what I will do. If you will put your name on the back of that instrument, I will accept that as payment, because I know your responsibility; now, if you will lend credit to this instrument by putting your name on it, I will take the instrument." B says, "All right," and does so. But B is a stranger to the instrument. What is B's liability?

Regularly, A, the payee, should indorse first because the instrument is made payable to him, and consequently, being the first indorser and no one before him on the instrument, he could only hold the parties on the face of the instrument liable; but suppose the name of this irregular person precedes him on the paper as an indorser. Wouldn't the facts indicate that he took that instrument because the name of this irregular indorser is there? In the absence of the Negotiable Instruments Law, different jurisdictions have different rules.

The Negotiable Instruments Law provides:

*"Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."*<sup>65</sup>

As above stated, different jurisdictions have applied different rules as to the liability of the irregular or anomalous indorser. Some hold him as indorser,<sup>66</sup> some as maker,<sup>67</sup> and some as guarantor;<sup>68</sup> different jurisdictions make different liabilities for him. We must know what the liability of the anomalous indorser is that we may protect ourselves. If an irregular indorser is a maker or surety, it is not necessary to give him notice if the instrument is not paid, because if he is a joint maker he is primarily liable and he says absolutely that he will pay it. But if he is to be held as an indorser, his contract is to pay provided he is given notice, and if we have not given him notice, we cannot hold him liable.

The most general rules in the absence of the Negotiable Instruments Law, are as follows:

A person whose name is on the back of a bill or note, transferable by delivery, or payable to bearer, is to be deemed an indorser. A person signing on the back of a bill or note payable to order before the payee is *prima facie* presumed to be a second indorser, and not liable to the payee; but this may be rebutted by showing that his indorsement was given to give the maker credit with the payee, and he thus becomes liable as first indorser, the payee being permitted to indorse to him without recourse.

Parol evidence is always admissible in these cases to show what he intended to do under the circumstances.<sup>69</sup>

**§ 110. Miscellaneous matters as to indorsement.** The fol-

<sup>65</sup> Neg. Inst. Law, § 114 (64), Mich. 521; McGraw v. Union Trust Co. (Mich.), 99 N. W. 758; Union Bank v. Willis, 8 Metc. (Mass.) 504; Childs v. Wyman, 44 Me. 441. 33, and 72 Am. St. Rep. 676.

<sup>66</sup> Blakeslee v. Hewett, 76 Wis. 437; Knight v. Dunsmore, 12 Ia. 341; Phelps v. Vischer, 50 N. Y. 35; Chandler v. Westfall, 30 Tex. 69; Gilbert v. Finkbeiner, 68 Pa. 477; Webster v. Cobb, 17 Ill. 459.

<sup>67</sup> Good v. Martin, 95 U. S. 90; Dow Law Bank v. Godfrey, 126 Kohn v. Consolidated Butter &

lowing miscellaneous provisions as to indorsement are found in the Negotiable Instruments Law:

"(a) Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature."<sup>70</sup>

"(b) Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability."<sup>71</sup>

"(c) Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue."<sup>72</sup>

"(d) Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated."<sup>73</sup>

"(e) An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise."<sup>74</sup>

"(f) The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument."<sup>75</sup>

Where an instrument is transferred by a special indorsement, the holder has no right to strike out the name of the person mentioned in such indorsement and insert his own name in the place thereof; nor can he strike out such name and convert such special indorsement into a blank indorsement.

"(g) Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, re-issue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable."<sup>76</sup>

Egg Co., 30 Misc. 725, 63 N. Y. S. 265. See note 18 L. R. A. 36.

<sup>70</sup> Neg. Inst. Law, § 73 (43), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>71</sup> Neg. Inst. Law, § 74 (44), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>72</sup> Neg. Inst. Law, § 75 (45), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>73</sup> Neg. Inst. Law, § 76 (46).

<sup>74</sup> Neg. Inst. Law, § 77 (47), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>75</sup> Neg. Inst. Law, § 78 (48), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>76</sup> Neg. Inst. Law, § 80 (50), where all cases directly or indirectly bearing upon or citing the Law are grouped.

## CHAPTER X.

### NEGOTIATION—BY TRANSFER WITHOUT INDORSEMENT.

§ 111. In general.  
112. By delivery.

§ 113. By operation of law.

§ 111. In general. Transfer without indorsement may be made by one of two methods, either by delivery<sup>1</sup> or by operation of law.<sup>2</sup>

§ 112. By delivery. *"An indorsement in blank specifies no indorsee. And an instrument so indorsed is payable to bearer and may be negotiated by delivery."*<sup>3</sup>

One holding an indorsement in blank may transfer it without writing upon the instrument, and in this way he escapes some liability which he would otherwise have. He is only liable to the party who receives it from him, and as his name does not appear on the instrument, he has not added any credit to it.<sup>4</sup>

*"Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery, but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."*<sup>5</sup>

*"The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement."*<sup>6</sup>

<sup>1</sup> Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232; United States v. Vermilye, 10 Blatchf. (U. S.) 280, 28 Fed. Cas. No. 16,618, affirmed 21 Wall (U. S.) 138; Marskey v. Turner, 81 Mich. 62, 45 N. W. 644; Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336; O'Connor v. Clarke (Cal., 1896) 44 Pac. 482. See also note 12 U. S. L. Ed. 399.

<sup>2</sup> Wooley v. Lynn, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; Crist v. Crist, 1 Ind. 570; Hendric v. Richards, 57 Neb. 794, 78 N. W. 378; Billings v. Collins, 44 Me. 276; Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Earhart v. Grant, 32 Ia. 481.

<sup>3</sup> Neg. Inst. Law, § 64 (34), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>4</sup> McDonald v. Balley, 14 Me. 101; Crenshaw v. Jackson, 6 Ga. 509, 50 Am. Dec. 361; Smith v. Carden, 1 Swan. (Tenn.) 28.

<sup>5</sup> Neg. Inst. Law, § 70 (40), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>6</sup> Neg. Inst. Law, § 65 (35), where all cases directly or indirectly

The person who in getting a negotiable note or bill of exchange payable to order, neglects to have the indorsement put on it, gets it just as if he had received it by assignment and takes it subject to the equities.<sup>7</sup> It is his duty to notify the parties on the instrument the same as in an assignment. If any equities accrue between the time he received the instrument and the time he secured the indorsement, the equities would run against it.<sup>8</sup> When a person offers you an instrument by delivery when it is payable to bearer, you are not obliged to take that instrument without indorsement; if it is not indorsed by the person offering it, you need not take it.

*"Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."*<sup>9</sup>

§ 113. By operation of law. Suppose A becomes a bankrupt and has in his possession an instrument calling for \$500, payable to X. That instrument vests in A's assignee in bankruptcy. There is a transfer by operation of law.<sup>10</sup> So, if a person dies leaving a certain note payable to himself, his administrator or executor gets title to that paper by operation of law.<sup>11</sup>

The person who gets the paper gets just as good title as the dead man had, if it passes or is transferred by operation of law.<sup>12</sup>

ly bearing upon or citing the Law are grouped.

<sup>7</sup> Hopkins v. Manchester, 16 R. I. 663, 23 S. E. 630, 55 Am. St. Rep. 779; Hersey v. Elliott, 67 Me. 526, 24 Am. Rep. 50; Pavey v. Stauffer, 45 La. Ann. 353, 12 So. 512, 19 L. R. A. 716. But see Brown v. Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779.

<sup>8</sup> Osgood v. Artt, 17 Fed. 575; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180. But see Beard v. Dedolph, 29 Wis. 130.

<sup>9</sup> Neg. Inst. Law, § 79 (49), where all cases directly or indirectly bearing upon or citing the Law are grouped.

<sup>10</sup> Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308.

<sup>11</sup> Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; Crist v. Crist, 1 Ind. 570; Rand v. Hubbard, 4 Metc. (Mass.) 256.

<sup>12</sup> Billings v. Collins, 44 Me. 271; Earhart v. Gant, 32 Ia. 481; Nichols v. Hill, 42 S. C. 28, 19 S. E. 1017.

## CHAPTER XI.

### NEGOTIATION—BY ASSIGNMENT.

|                                        |                              |                                 |
|----------------------------------------|------------------------------|---------------------------------|
| § 114. In general.                     |                              |                                 |
| 115. Assignment by a separate writing. | and notes payable to bearer. | § 117. Rights of the parties.   |
| 116. Liability of assignor of bills    |                              | 118. Transfer by legal process. |

§ 114. **Assignment in general.** Bills of exchange and promissory notes are negotiated either by indorsement, transfer by delivery without indorsement, or assignment. Only negotiable instruments can be transferred by indorsement. An instrument payable to bearer may be transferred by delivery without indorsement.<sup>1</sup> A non-negotiable instrument is transferred by assignment.<sup>2</sup> The difference between the transfer of a negotiable and a non-negotiable instrument is that the latter is transferred subject to all defenses that might have been set up against the original payee,<sup>3</sup> while the former is taken free from equitable defenses by a bona fide holder. Therefore the effect of the assignment of a non-negotiable instrument is that the party holding the right drops out of the contract and another takes his place. The assignee is substituted in place of the assignor. The assignee and every subsequent person to whom the instrument comes by assignment may be considered as the person who made the instrument in the first instance, and as having said and done everything in making the instrument which the original assignor said or did. Hence if the original assignor said or did something which under the ordinary law of such contracts would prevent him from enforcing the contract, or asserting his right against the other party to the original contract, the assignee, although he knows nothing of the original transaction, may be deemed to have said and done the same things. And further, if any subsequent assignee from whom, as an assignor, the holder in turn derives the contract, has done anything to prevent its enforcement against the original party, the last holder cannot

<sup>1</sup> *Dunham v. Peterson*, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556, 36 L. R. A. 232.      <sup>2</sup> *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Warner v. Whittaker*, 6 Mich. 133; *Tims v. Shannon*, 19 Md. 296.

<sup>3</sup> *Franklin v. Twogood*, 18 Ia. 515.

enforce it against the original party. Each assignee takes his chances as to the exact position in which any party making an assignment of it stands. And as it is called in law, the assignee takes the contract subject to equities; that is, to defenses to the contract which would avail in favor of the original party up to the time the notice of the assignment is given to the person against whom the contract is sought to be enforced.

A person taking an instrument negotiable by the law merchant and writing an assignment of that instrument on a separate piece of paper, takes it subject to the rules applying to assignments; that is, he takes it subject to the equities the parties had on the instrument before the assignment had been made to him. One might think that a certain instrument is in the hands of A, and that he being indebted to A, say, in the sum of \$500, that when A comes to him and wants to become indebted to him to the extent of that sum, he would be safe in making those advances to A. He is, until he gets notice to the contrary. If the original instrument has gotten into the hands of someone else by assignment, it is his duty to notify the obligor instantly of that fact so that the conditions existing between him and the party will remain unchanged. In other words, when you get an instrument by assignment, it is your duty immediately to notify the person liable on the instrument that you hold that instrument and that you hold it by assignment.<sup>4</sup> But it is not your duty so to do if the paper is negotiable by the law merchant.

§ 115. **Assignment by a separate writing.** The mode of assignment of non-negotiable instruments differs in no respect from that of any other contract.<sup>5</sup> Although some sort of written assignment is customarily employed, it may be written either on the instrument itself or on a separate piece of paper.<sup>6</sup> The instrument may be assigned on a separate paper so as to authorize an action thereon in the name of the assignee.<sup>7</sup> But the assignment of a mortgage which was given as security for the payment of a promissory note will not operate as an assignment of the note.<sup>8</sup> This is the result of statutes in many states which declare that the legal title of the note cannot be assigned by a separate in-

<sup>4</sup> Van Buskirk v. Insurance Co., No. 9,670; Deshler v. Guy, 5 Ala. 14 Conn. 141; Merchants & Mechanics Bank v. Hewett, 3 Ia. 93; Richards v. Griggs, 16 Mo. 416.

<sup>5</sup> Maxwell v. Goodman, 10 B. Mon. (Ky.) 286; Stiles v. Farrar, 18 Vt. 444; Halsey v. Dhart, 1 N. J. L. 109.

<sup>6</sup> Mitchell v. Walker, 17 Fed. Cas. No. 9,670; Deshler v. Guy, 5 Ala. 186.

<sup>7</sup> Morris v. Poillon, 50 Ala. 403; Thornton v. Crowther, 24 Mo. 164; Clapp v. Cedar County, 5 Ia. 15, 68 Am. Dec. 678.

<sup>8</sup> French v. Turner, 15 Ind. 59; Doll v. Hollenbeck, 19 Nebr. 639, 28 N. W. 286. But see Coombs v.

strument. It is presumable that an oral assignment, accompanied by a delivery of the instrument, would pass a good title to the assignee.<sup>9</sup>

§ 116. **Liability of assignor of bills and notes payable to bearer.** The assignor of bills and notes payable to bearer assumes certain liabilities by way of guaranty. But his liability is not so extensive as that of an indorser of negotiable paper.<sup>10</sup> The liability of an assignor and indorser differs principally in respect to the guaranty of the solvency of the parties to the instrument and in the guaranty that the instrument will be honored at maturity.<sup>11</sup> The assignor is not responsible for the solvency of the parties to a bill or note payable to bearer, neither can he be held responsible if the instrument is not paid when due, unless he had knowledge of the insolvency of the parties. The assignor warrants that the parties to the instrument were competent to contract and if any one of them is incompetent, on account of infancy, marriage, lunacy and the like, the assignor is responsible to his assignee.<sup>12</sup> There is one exception to this rule, and that is in the case of government securities.

The assignor of an instrument payable to bearer warrants that the signatures and the body of the instrument are genuine,<sup>13</sup> so that if either proves to be a forgery, the money he received for the transfer can be recovered back. The assignor also warrants that he does not know anything affecting the validity or value of the instrument. To attempt to sell an instrument which one knows to be worthless is a fraud upon the purchaser, and naturally vitiates the contract of sale.<sup>14</sup>

The assignor also guarantees to the purchaser that he has a good title to the instrument and that he has a right to convey it away. If he attempts to transfer property to which he has

Warren, 34 Me. 89; Cortelyou v. Jones (Cal., 1900), 61 Pac. 918. <sup>12</sup> Butler v. Slocomb, 33 La. Ann. 170, 39 Am. Rep. 265; Edmunds v.

<sup>9</sup> Moore v. Miller, 6 Oreg. 254, 25 Am. Rep. 518; Sackett v. Montgomery, 57 Nebr. 424, 77 N. W. 1083, 73 Am. St. Rep. 522; Guy v. Briscoe, 6 Bush. (Ky), 687. <sup>13</sup> Rhodes v. Jenkins, 18 Colo. 49, 31 Pac. 491, 36 Am. St. Rep. 263;

<sup>10</sup> Cochran v. Strong, 44 Ga. 636; Boylan v. Dickerson, 3 N. J. L. 24. <sup>14</sup> Wood v. Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523; Zwazey v. Parker, 50 Pa. St. 441, 88 Am. Dec. 549.

<sup>11</sup> Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708; Lyons v. Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129; Milligan v. Chapman, 75 Me. 306, 46 Am. Rep. 486. <sup>14</sup> Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Delaware Bank v. Jarvis, 20 N. Y. 226; May v. Dyer, 57 Ark. 441, 21 S. W. 1064.

no title he is held to have committed an actual or constructive fraud upon the purchaser, according to the knowledge or ignorance of the vendor in respect to his want of title.<sup>15</sup>

§ 117. **Rights of parties.** In the transfer of a negotiable instrument by indorsement the indorsee is the holder in due course and takes it free from all defenses, while in the transfer of a non-negotiable instrument by assignment the assignee takes the same subject to any equities between the original parties thereto, and any defenses which may be interposed by the maker. The assignment of a negotiable instrument confers upon the holder only such rights as he would acquire upon the assignment of a non-negotiable instrument.<sup>16</sup> The assignee of a non-negotiable instrument holds it subject to all equities or counterclaims between the original parties existing at the time of the assignment.<sup>17</sup> The maker of a note may set up the same defenses against it in the hands of the assignee that he might set up if it were held by the payee. But all such defenses and equities must have existed in favor of the maker prior to the assignment. The equities and defenses which can be asserted against the assignee are only such as relate to the contract between the original parties, and therefore it has been held that the assignee of a non-negotiable note is not bound to inquire whether the note was made to defraud creditors.<sup>18</sup>

§ 118. **Transfer by legal process.** Property may be transferred to a creditor in satisfaction of his claim by attachment, garnishment and execution. These processes are created by statute, and whether commercial paper can be transferred by them for the satisfaction of the holder's debts depends upon the language of the particular statute under which the question arises.<sup>19</sup>

It is generally held that promissory notes and other commercial instruments cannot be garnisheed in the hands of an agent, in an attachment proceeding against the payee. Nor is commercial paper attachable for the debts of the payee, when it is in the hands of a receiver for the benefit of creditors, nor when

<sup>15</sup> *Ferguson v. Staples*, 82 Me. 432; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 470; *Merchants Nat. Bank v. Spates*, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828.

<sup>16</sup> *May v. Dyer*, 57 Ark. 441, 21 S. W. 1064; *Johnson v. Welby*, 2 B. Mon. (Ky.) 122; *Cochran v. Strong*, 44 Ga. 636.

<sup>17</sup> *Rockwell v. Daniels*, 4 Wis. 432; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 470; *Merchants Nat. Bank v. Spates*, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828.

<sup>18</sup> *May v. Dyer*, 57 Ark. 441, 21 S. W. 1064; *Johnson v. Welby*, 2 B. Mon. (Ky.) 122; *Cochran v. Strong*, 44 Ga. 636.

<sup>19</sup> *Rockwell v. Daniels*, 4 Wis. 432; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 470; *Merchants Nat. Bank v. Spates*, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828.

it is placed in the hands of an agent to collect and apply the proceeds to the payment of a specific debt; and even when it is merely placed in the hands of an agent for collection or for any other purpose, resulting in benefit to the payee. It is not even subject to attachment, if the agent delivers it up to the attaching officer.