RIGHTS ON A BILL OF EXCHANGE

By M. C. TREBILCOCK*

The United Kingdom Bills of Exchange Act 1882 has been described as 'a work of art'[1] and as 'the best drafted Act of Parliament which was ever passed'.[2] This style of thinking seems perpetuated in the Report of the Commonwealth Committee (1964) on the Australian Bills of Exchange Act 1909-1958. Apart from a number of recommendations designed to facilitate the handling of cheques, the Committee recommended almost no changes in other provisions of the Act. Despite this satisfaction with present legislation, it is intended in the course of this article to point to inadequacies in the Act which appear to have been responsible for confusion on fundamental questions.

Section 43 of the Act states:

> (1) The rights and powers of the holder of a bill are as follows:
>
> (a) He may sue on the bill in his own name.
>
> (b) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.
>
> (2) Where a holder's title is defective—
>
> (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and
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> (b) if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

The Act contains no other statement of the rights of holders on a bill of exchange.

Sub-section (1)(a) gives rise to no real difficulty. It is now well settled that this provision is not itself concerned to give the holder of a bill of exchange any right of action on it but merely to entitle him to sue in his own name.[3] According to Harvey J. of the New South Wales Supreme Court in *Stock Motor Ploughs Limited* v. *Forsyth*.[4]

> whether the holder can sue or not, in the sense of can recover or not, depends on his title to the note and the facts known to him when he became the holder, and this sub-section is not addressed to any such question as that.

The term 'holder' is defined in Section 4 as meaning 'the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof'. Possession is therefore of the essence of the status of holder (of whatever kind) and it has accordingly been held that a person cannot

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1 Judge Raleigh Batt, preface to *Chalmers* (11th Ed.), at p. vi.

2 Mackinnon L.J. in *Bank Polski* v. *Mulder & Co.* [1942] 1 All E.R. 396, 398.

3 *Crouch* v. *Credit Foncier of England* (1873) L.R. Q.B. 374, 381; *Sutter* v. *Briggs* [1922] 1 A.C. 1, 22 (H.L.).

4 (1932) 32 S.R. (N.S.W.) 259, 262, affirmed by the High Court in (1932) 48 C.L.R. 128.

bring an action in the capacity of holder of a bill unless he is in possession of it (that is, *is* a holder) at the time of the commencement of the action.[5]

In contrast with sub-section (1) (a), sub-sections (1) (b) and (2) (a), dealing with the status of a holder in due course, give rise to a number of formidable difficulties. Certain propositions are commonly deduced from these provisions and asserted as axiomatic, namely:

> Absolute title gives the right to recover on the bill against the whole world and against any defence whatever. Absolute title to a bill of exchange is that of the true owner; he may be—
>
> (a) the payee of a valid bill not obtained by fraud or duress;
>
> (b) the holder in due course . . .
>
> From the very nature of his holding, a holder in due course has a perfect answer to the defences of all persons liable on the bill—simply that he is a holder in due course.[6]
>
> A holder in due course is certain of a complete and unassailable title to the bill. He will be the true owner and vested with all the rights that can accrue to a holder of a negotiable instrument, particularly the right to be free from all prior defects in title and equities affecting prior parties. . . . There cannot be a holder in due course and a separate true owner since a holder in due course is always the true owner.[7]

The impression which these observations convey and for which Section 43 is to a large extent responsible is that a holder in due course of a bill of exchange necessarily has title to the bill, is the true owner of it and can enforce payment of it against all prior parties to it. It is part of the purpose of this article to examine the soundness of these propositions.

First of all, is it invariably true that a holder in due course has an indefeasible title to a bill? The expressions 'title', 'title to a bill', 'defect of title' are used extensively throughout the Act. In view of this, it is somewhat surprising that neither in the Act nor apparently elsewhere has any attempt been made to explain what it means to say of a person that he has title to a bill of exchange. What is a bill of exchange? The conventional answer to this is that a bill of exchange is a chose in action. This is at least partly true. However to say simply that a bill of exchange is a chose in action fails to emphasize that a bill of exchange may in fact embody any number of choses in action. The primary liability on a bill is that of the acceptor. The drawer and all endorsers undertake a secondary liability akin to that of sureties in the event of the acceptor not discharging his liability. This description of a bill of exchange as a form of property is still inadequate however because, in addition to embodying a number of choses in action, it is also itself (*i.e.* the paper) a chose in possession. This has been recognised in the context of larceny[8] and also, nearer our present context, in actions

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5 *Emmett* v. *Tottenham* (1853) 155 E.R. 1612; *Davis* v. *Reilly* [1898] 1 Q.B. 1.

6 Megrah, *The Bills of Exchange Act 1882* (5th Ed.) 1, 46.

7 Richardson, *Guide to Negotiable Instruments* (3rd Ed.), 78.

8 See *R.* v. *Bennitt* [1961] N.Z.L.R. 452, 456 and cases there cited.

for conversion by persons who have been deprived of a bill, *e.g.* by forgery, against a collecting bank.[9] However, it is notable that the difficulty of attaching any separate significance to a bill of exchange as a chose in possession without assimilating it to the choses in action which it embodies has been recognised in both contexts. In the first, it has recently been stated by the New Zealand Supreme Court,[10] adopting the submission of *Russell on Crime*,[11] that the value of a cheque which has been stolen is not merely the value of the paper on which it was written but apparently its face value. In the second situation, somewhat anomalously the courts have consistently held that an action for conversion will lie for the face value of the bill converted. This is despite the fact that the only thing capable of conversion is a chose in possession, *i.e.*, the piece of paper on which the bill is written, which in itself is virtually worthless. This difficulty was recognised by Scrutton L.J. in *Lloyds Bank* v. *The Chartered Bank of India, Australia and China*[12]:

> Conversion primarily is conversion of chattels, and the relation of bank to customer is that of debtor and creditor. As no specific coins in a bank are the property of any specific customer there might appear to be some difficulty in holding that a bank, which paid part of what it owed its customer to some other person not authorised to receive it, had converted its customer's chattels; but a series of decisions binding on this Court, culminating in *Morison's case (supra)* and *Underwood's case*, have surmounted the difficulty by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it.

It is interesting to note that one of the few references in the Act to 'the true owner' of a bill occurs in the context of actions against the collecting bank, principally for conversion. Section 88 protects a collecting bank in certain circumstances from any liability to the true owner of a cheque where the customer presenting it has no title or a defective title thereto.[13]

It is now convenient to return to Section 43. When for example subsection 2 (a) says that 'when a holder's title is defective—if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill', in what sense is 'title' being used? Does it refer to the right to the primary liability or chose in action embodied in the bill or the right to this liability and all subsisting secondary liabilities or simply the right to the bill as a piece of paper? Despite the fact that the expression *'title to the bill'* suggests proprietary rights or rights *in rem* such as ownership of a tangible thing or chose in possession rather than merely personal rights such as rights of action, the possibility that the notion of title in the Bills of Exchange Act has such a limited

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9 See *e.g. Morison* v. *London County and Westminster Bank Ltd.* [1914] 3 K.B. 356.

10 In *R.* v. *Bennitt, supra.*

11 10th Ed., 1379.

12 [1929] 1 K.B. 40, 55.

13 The other references to 'the true owner' occur in sections 85 and 86.

reference must be rejected for a number of reasons. First, any significance that a bill of exchange might have as a chose in possession arises in contexts in which the Act is in no way concerned to confer rights, *e.g.* larceny or conversion. Secondly, the good and complete title spoken of by Section 43 (2)(a) is produced as a result of a *negotiation.* The concept of negotiations is one for the most part peculiar to the area of bills of exchange and was developed, like the related doctrine of assignment, for the purpose of transferring *choses in action.* The purpose and effect of the doctrine of negotiability was to allow the transfer of rights *on the bill* and moreover, and unlike assignments, to allow these rights to be transferred free of 'equities' to a *bona fide* purchaser for value without notice. Regarding a bill of exchange simply at the level of a chose in possession, no new form of transfer was called for. Like any other chose in possession, it should have been transferable merely by delivery. The doctrine of negotiability was developed for and is concerned only with the transfer of rights of action on a bill. If one recognises this, it must be conceded that the title to a bill which a holder in due course obtains by a negotiation in terms of Section 43 is an entitlement to certain rights of action on the bill. Finally, references in the cases to 'title to a bill' make it clear that the expression refers to the entitlement to rights of action on a bill. For example in *Stock Motor Ploughs Limited* v. *Forsyth*[14] where Harvey J. said in relation to Section 43 (1)(a) that 'whether the holder can sue or not in the sense of can recover or not depends on his *title* to the note',[15] it is quite clear that this cannot refer to title to the note as a piece of paper because this signifies nothing as to rights of action possessed on the bill. If I endorse a bill to you as a gift, presumably you have title to the bill as a chose in possession but that fact gives you no rights whatever against me *on the bill.* Again, in *Mead* v. *Young*,[16] a leading case on forgery, in an action by the endorsee of a bill against the acceptor where the payee's endorsement had been forged, it was said that the plaintiff could not recover because 'no title can be derived through the medium of a forgery'.[17] In *Esdaile* v. *La Nauze*[18] in similar circumstances, it was again explained that the plaintiff could not recover on the bill because

> although in possession of the bill, having paid value for it, yet if the endorsement under which he received it is a forgery, it is the same as if there were no endorsement at all; and then he is not, in truth, the holder of it, for he has no title by endorsement, the only way by which he could obtain a title to this bill.[19]

It will be appreciated that in these last two cases the courts, in explaining the absence of any right of action by the Plaintiff on the bill on the grounds of want of title to the bill, are simply saying that

14 (1932) 32 S.R. N.S.W. 259.
15 *Ibid.*, 262.
16 (1790), 100 E.R. 876.
17 Per Ashurst J. at 878.
18 (1835) 160 E.R. 160.
19 Per Alderson B. at 163.

the plaintiff has no right of action because such a right of action has not been negotiated to him, that is, he has no title to the chose in action.

If 'title to a bill' means not title to a bill as a chose in possession but as a chose in action, when can it be said that a person has title? The expression itself suggests that only one person can possess title to a bill at any one time. Thus in cases where a forgery has occurred the Act appears to envisage that normally the person who has been deprived of the bill by the forgery will remain the true owner.[20] This is despite the fact that rights of action on the part of a subsequent holder may have accrued against persons endorsing the bill after the forgery.[21] Thus it cannot follow that because a holder has *any* right of action on the bill, he has title to the bill. It would appear to be the position that a person only has title to the bill if he has a right to the primary liability on it; in the case of a bill, that of the acceptor, in the case of a cheque, the drawer. Certainly in the forgery cases, where the notion of title has most frequently been relied on, the liability in question has almost invariably been that of the acceptor and it is in relation to his liability that it has been said that the plaintiff has no title. Further, the question who has title to a bill of exchange or, in certain cases, who is the true owner of a bill of exchange, will only be susceptible of a definite answer if the chose in action determining title is regarded as confined to that relating to the party primarily liable. It is therefore submitted that 'title to a bill of exchange' means title to the primary liability arising on the bill and it is in this sense that the expression will be used throughout this article.

It is now possible to ask the question whether it is of the essence of the status of a holder in due course that he has title to a bill? It is proposed to point to a number of circumstances which render it untrue to say that a holder in due course has, for example,

> an indefeasible title good against all the world. . . . Absolute title gives the right to recover on the bill against the whole world and against any defence whatever.[22]

Forgery

Section 29 of the Act provides that a forged or unauthorised signature is wholly inoperative and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature. It is long settled that as a result of the principle embodied in this section, a holder in due course acquires no right to enforce payment of the bill against either the person whose signature has been forged or any prior party.[23] Moreover a holder in due course may be called on to deliver up the bill to the true owner.[24] It is also well settled that the payee or endorsee of a bill whose endorsement has been forged has an action in conversion

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20 See *e.g.* section 88 *supra.*
21 By virtue of section 60, Bills of Exchange Act.
22 Megrah, *op. cit.*, 40, 46.
23 See *e.g. Mead* v. *Young* (1790) 100 E.R. 876.
24 *Ezdaile* v. *La Nauze* (1835) 160 E.R. 160.

against any person into whose hands the bill subsequently comes whether or not that person is a holder in due course:[25] a plea by the ultimate holder that he is a holder in due course is of no avail against the true owner[26] or indeed any person who has a right to immediate possession.[27] This position has of course been recognised by the Act, which in some circumstances confers protection on collecting banks dealing with forged bills.[28] All these consequences of a forgery are explained on the basis that 'the general rule is that no title can be obtained through a forgery'.[29]

Non Est Factum

A situation closely analogous to forgery where a holder in due course apparently does not acquire title to a bill is where the doctrine *non est factum* applies. This doctrine was first applied to bills of exchange by the Court of Common Pleas in the case of *Foster* v. *McKinnon.*[30] Here the defendant had been induced to put his name on the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee. In an action against him as an endorser by a bona fide holder for value it was held that the defendant was not liable on the bill. Byles J. stated that when a person signs a contract which is of a nature altogether different from that which it is represented to be, then the signature so obtained is a nullity: 'He never intended to sign and therefore in contemplation of law never did sign the contract to which his name is appended'.[31] The plaintiff thus failed notwithstanding that he was the equivalent of the present day holder in due course. This point was emphasized by Lord Russell of Killowen in the later case of *Lewis* v. *Clay.*[32] In this case, the payee of a promissory note who had taken bona fide and for value in an action against the maker of the note was met by the defence of *non est factum.* Lord Russell, whilst expressing grave doubts that the payee of a bill of exchange could ever be a holder in due course, said that even if he could, *Foster* v. *McKinnon* established that the defence of *non est factum* prevailed as against a person who since the Act was called a holder in due course, and that nothing in the Act was inconsistent with this position. Lord Russell in dealing with the nature of the defence itself drew an analogy with forgery: 'In plain reason, must it not be said that the use to which the defendant's signature was applied was in substance and effect forgery?'[33]

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25 *Johnson* v. *Windle* (1836) 132 E.R. 396; *Morison* v. *London County and Westminster Bank Limited* [1914] 3 K.B. 356.

26 *Capital and Counties Bank* v. *Gordon* [1903] A.C. 240.

27 *Bute* v. *Barclays Bank Limited* [1955] 1 Q.B. 202.

28 See section 88.

29 Tindall C.J. in *Johnson* v. *Windle, supra,* 398.

30 (1869) L.R. 4 C.P. 704.

31 At 711.

32 (1898) 67 L.J. Q.B. 224.

33 At 228.

It is not entirely clear from the cases how closely this analogy with forgery is to be adhered to. As *Williston* has rightly pointed out,[34] an endorsement of a bill of exchange operates both as a contract and as a conveyance. By endorsing a bill, an endorser thereby himself undertakes liability to subsequent holders and also conveys to his immediate endorsee the benefit of subsisting liabilities on the bill. Forgery destroys both effects of an endorsement. The decided cases on *non est factum* have been concerned only with the liability of the party to whose signature the doctrine relates; there have been no cases, so far as can be ascertained, where prior parties have pleaded that *non est factum* has prevented the negotiation of their obligations on the bill to the benefit of subsequent parties. However in the absence of any direct authority on the point, the forgery analogy which has been drawn, if at all exact, seems to suggest that *non est factum* prevents a signature operating either as a contract or as a conveyance. The operation of the doctrine upon any signature which is essential to the creation or negotiation of the primary chose in action on the bill will thus prevent even a holder in due course acquiring title to the bill.

The view that a party is nevertheless a holder in due course notwithstanding forgery or fraud amounting to *non est factum* and thus notwithstanding that he has no title to a bill is recognised by the Act itself. Section 60(2)(b) states:

> The endorser of a bill, by endorsing it, is precluded from denying to a *holder in due course* the genuineness and regularity in all respects of the drawer's signature and all previous endorsements.

Despite these entirely unambiguous words *Richardson* says (specifically in relation to the liability of an acceptor to a holder in due course under Section 59 but also apparently in relation to the liability of an endorser to a holder in due course under Section 60) that the ultimate possessor

> will have the rights of a holder in due course against the acceptor (though he is certainly not a holder in due course). It is considered that the words 'holder in due course' in subsection (2) here, are intended to mean someone who, except for the forgery of the drawer's signature, etc., would have been a holder in due course.[35]

This conclusion can only be reached by starting from the premise that a party to a bill of exchange to be a holder in due course must necessarily have title to the bill.

Material Alteration

By virtue of Section 69, where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself authorised or assented to the alteration, and subsequent endorsers. This is subject

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34 *Williston on Contracts* (Revised ed. 1936) Vol. 6, 4733.

35 *Op. cit.*, 107.

to the proviso that where the alteration is not apparent and the bill has subsequently come into the hands of a holder in due course, he may enforce it according to its original tenor. This proviso excepted, the section embodies the rule laid down in *Master* v. *Miller*.[36] This was an action by bona fide endorsees for value of a bill of exchange against the acceptor who sought to escape liability on the ground that subsequent to his acceptance the bill had been altered in a material particular, *viz.* the due date. In holding for the defendant, Lord Kenyon described the issue as follows:

> The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument? — for the instrument is the only means by which they can derive a right of action. The right of action which subsisted in favour of W. and C. (the payees) could not be transferred to the plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law.[37]

Thus the only relevant question in determining whether the plaintiffs had a right of action on the bill against the acceptor was quite properly seen as being simply whether they had acquired the relevant chose in action. The Court held that a material alteration renders a bill 'a nullity'—even in the hands of a bona fide endorsee for value, now a holder in due course.

Discharge

Once a bill has been discharged, by payment or otherwise, it ceases to be negotiable.[38] According to *Chalmers*,[39]

> a bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable, and if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument.

It has been argued that the authorities upon which *Chalmers* relies for these propositions leave room for the operation of the doctrine of estoppel in favour of a holder in due course in the special case where the maker of a promissory note payable on demand allows the note to remain in the hands of the payee after payment.[40] However this exception, if it can be sustained, does not seriously detract from the fact that a holder in due course of a bill which has been discharged acquires no rights on the bill against parties whose liabilities have been extinguished by the discharge. These of course do not include endorsers subsequent to the discharge who may be liable on the bill under Section 60(2)(C):

> The endorser of a bill, by endorsing it is precluded from denying to his immediate or a subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill and that he had then a good title thereto.

A bill may be discharged in a number of ways: by payment in due course,[41] by renunciation by the holder at or after the maturity

36 (1793) 100 E.R. 1042.
37 At 1047.
38 Section 41(1).
39 13th ed., 198.
40 Kadirgamar (1959) 22 *M.L.R.*, 146.
41 Section 64.

of a bill (although a subsequent holder in due course will only be affected by the discharge if he has notice of the renunciation),[42] and by an intentional and apparent cancellation.[43] In all these circumstances obligations which were subsisting and negotiable before the discharge cannot after the discharge be acquired even by a holder in due course.

Duress

While duress normally only renders a contract voidable and not void, circumstances can be envisaged where as in the ***non est factum*** situation a signature cannot really be attributed to a party at all. For example, in the American case of *Fairbanks* v. *Snow*,[44] the Court said,

> no doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name and the note had been carried off and delivered, the signature and delivery would not have been her acts; and . . . no contract would have been made, whether the plaintiff knew the facts or not.

It might be argued then that the obtaining of an endorsement by physical force in the circumstances envisaged here would, by rendering the endorsement to all intents and purposes non-existent, prevent any new liability arising and also prevent the negotiation of any subsisting liabilities in this way, no matter who sought to assert them.

Fraud

This like duress normally renders a contract merely voidable and not void, but again like duress circumstances can be envisaged where in relation to a signature on a bill it might have the latter effect. The specific situation which springs to mind is the case of fraud producing mistaken identity of a kind which would render a contract void. It is unnecessary here to enter the controversy as to when a mistake as to identity will render a contract void, it is sufficient to cite a situation where A endorses a bill to B in circumstances where A makes a mistake as to B's identity which would on established principles render the transaction between A and B void.[45] While there seems to be no authority on this situation, there is no reason to suppose that the mistake as to identity would have any different effect in relation to this particular contract than it would have in relation to any other kind of contract. There presumably, the mistake would destroy the effect of the endorsement both as a contract and as a conveyance as against all subsequent parties.

The following three cases differ from the foregoing in that they only prevent liabilities arising, they do not prevent the negotiation of subsisting liabilities. They affect only the contractual aspect of a signature, not its affect as a conveyance.

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42 Section 67.
43 Section 68.
44 145 Mass. 153, 13 N.E. 596, cited by Green, 9 *Tulane L.R.* 78, 79.
45 *E.g.* a variation on the *Ingram* v. *Little* situation ([1961] 1 Q.B. 31): A imagines he is negotiating a cheque to B for goods to be supplied. In fact it is C.

Illegality

Where a bill is rendered void by statute, it will of course be void even as against a holder in due course. Formerly this situation was of much more frequent occurrence than is now the case. Under section 1 of the Gaming Act of 1710,[46] which was in force for more than 100 years, all bills, notes etc. given or executed in payment of gaming losses were declared 'utterly void, frustrate and of no effect, to all intents and purposes whatsoever'. It was well settled that this section extended to prevent even a holder in due course from recovering on a bill against the person who had accepted or endorsed it in payment of gaming debts.[47] However, despite the fact that no liability could arise on his part, it would seem to have been the case that he was nevertheless capable of negotiating subsisting liabilities to subsequent holders.[48] This position may seem a little surprising in view of the very explicit wording of the statute, but it is in line with a substantial body of American authority which has emphasized the dual effect of an endorsement as both a contract and a conveyance. Statutes concerned with bills given in payment of gaming debts have been treated as directed only at the first aspect.[49]

The Gaming Act was amended in 1835[50] by providing that bills, notes, etc., which would have been void by virtue of the previous Act should thereafter be deemed to have been given for an illegal consideration. An illegal consideration is merely a defect of title[51] and a party taking without notice of it is not affected by the illegality. This position seems to be that now obtaining in most of the Australian States, either by virtue of the enactment of similar legislation or by virtue of the English legislation applying as received law.[52]

Examples of current legislation invalidating bills even as against holders in due course are difficult to find. The Victorian Full Supreme Court in the case of *Plant* v. *Johnston*[53] held that section 21 of the Land Act 1869, providing that instruments given as security in relation to certain prohibited arrangements were void, enured even as against a holder in due course. However this Act is not now in force. The only example of current legislation in Australia apparently having this effect which the author has been able to find is section 37 of the New South Wales Money Lenders and Infants Loans Act 1941-1948. This section provides that if any infant who has contracted a loan which is void or voidable agrees after he comes of age to pay the loan, any negotiable instrument given in pursuance of such agreement is 'void absolutely as against all persons whomsoever'.

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46 9 Anne c. 14.
47 *Shillito* v. *Theed* (1831) 131 E.R. 156.
48 *Edwards* v. *Dick* (1821) 106 E.R. 915.
49 See Williston *op. cit.*, Vol. 6, 4732.
50 5 & 6 Wm. IV, c. 41, 51.
51 See section 34, Bills of Exchange Act.
52 Note, 1 *A.L.J.* 40.
53 (1881) 7 V.L.R. 457.

Want of both Completion and Delivery.

Section 26(1) of the Bills of Exchange Act provides that every contract on a bill, whether it be the drawer's, the acceptor's, or an endorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto. Further, delivery is made an essential ingredient of any negotiation.[54] Section 26(2) however provides that if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed. Thus any thief who has stolen a bill from the owner will nevertheless be regarded as having received it by delivery if it has reached the hands of a holder in due course. It would seem however that notwithstanding section 26(2) this presumption of delivery will not operate in favour of a holder in due course where the bill was incomplete or inchoate when it left or was removed from the owner's possession. In *Baxendale* v. *Bennett*[55] the defendant made out an acceptance in blank and put it in a drawer from which it was stolen. C afterwards filled in his own name as drawer without the defendant's authority and the bill was subsequently endorsed to the plaintiff who took it bona fide for value and without notice of the fraud. Brett C. J. in holding the defendant not liable on the bill said that whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. 'No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person'.[56]

Even where there has been a voluntary delivery by the acceptor etc. of an incomplete bill to another party as envisaged by Section 25 of the Act, it does not follow that the first party will be liable even to a holder in due course. In *Smith* v. *Prosser*[57] the defendant in anticipation of the possibility of funds being required during his absence, signed his name on two blank unstamped promissory note forms and handed them to an agent, with instructions that they should be retained in his custody until the defendant should by letter or telegram give instructions for their issue as promissory notes and as to the amount for which they should be filled up. The agent, in fraud of the defendant, filled in the blanks in the document, making them out as promissory notes for considerable sums and sold them to the plaintiff who took them for value in good faith and without notice of the fraud. The Court of Appeal held that the defendant was not liable on the bill on the ground that, in delivering the blank forms to his agent, he did not intend that they should be issued as negotiable instruments. 'The promissory notes never became negotiable instruments'.[58] The absence of this intention excluded the operation of section 25(1), as did the

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54 Section 36.
55 [1878] 3 Q.B. 525.
56 At 531.
57 [1907] 2 K.B. 735.
58 Per Buckley L.J. at 755.

fact that the forms were unstamped as required by the section, whilst the proviso to it was of no avail to the plaintiff because the notes had not been negotiated after completion.

The point is of course open in this case that the Court was not considering the position of a holder in due course because the plaintiff was the payee of the notes in question.[59] However, as appears particularly from the Court's consideration of the application of the proviso to section 25, the plaintiff was assumed to possess the status of a holder in due course and in any event on the reasoning employed, that 'the promissory notes never became negotiable instruments', it is difficult to see how a true holder in due course could have been in any better position, at least vis-a-vis the defendant.

Incapacity

Section 27(1) provides that capacity to incur liability as a party to a bill is co-extensive with capacity to contract. It is well settled that an infant incurs no liability by signing a bill, even to a holder in due course,[60] nor even where the bill has been given for the price of necessaries.[61] A corporation also lacks capacity to become liable on a bill unless expressly or impliedly empowered by its constitution. This power will normally be implied in the case of a trading company.[62] However, although an infant or corporation may not be liable on a bill, section 27(2) enables their signature to effect a negotiation of subsisting obligations on the bill. Thus incapacity affects the operation of a signature as a contract but not as a conveyance.

Despite propositions which are commonly asserted, it can be seen from the foregoing cases, which are not necessarily exhaustive, that it is not an essential characteristic of a holder in due course that he has an unassailable title to a bill. Furthermore, despite what is suggested by the very sweeping language of section 43, it is submitted that a closer examination of the Act reveals that the operation given all of the 'defences' discussed is entirely consistent with its provisions. First, the obvious point might be made that the Act does not define a holder in due course in any way by reference to the element of ownership. It has never been argued that because a holder has title to a bill he is a holder in due course, but rather that because a holder is a holder in due course, he has title to the bill. Do the rights then given a holder in due course by section 43 include title to a bill? The section merely states that where a holder is a holder in due course, he holds the bill free from any *defect of title* of prior parties and that where a holder *whose title is defective* negotiates the bill to a holder in due course, the latter obtains a good and complete title to the bill.

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59 See *Jones* v. *Waring and Gillow Limited* [1926] A.C. 670 (H.L.).

60 *Williamson* v. *Watts* (1808) 170 E.R. 1054.

61 *In Re Soltykoff* [1891] 1 Q.B. 413; *Aroney* v. *Christianus* (1915) 15 S.R. (N.S.W.) 118.

62 *Re Peruvian Rlys. Co.* [1867] 2 Ch. App. 617.

The distinction between defective title and complete want of title has rightly been emphasized; Falconbridge states:

> A person whose title is defective must be distinguished from a person who has no title at all and can give none. In the latter case, there is a real defence good against all the world; in the former case there is defective title which may be set up against a holder other than a holder in due course.[63]

and,

> A real defence is so-called because at least as regards a particular defendant who is entitled to set it up, it is based upon the nullity of the *res* without regard to the merits or demerits of the plaintiff. It is a good defence so far as that defendant is concerned, even against a holder in due course, and as a general rule a holder cannot even obtain title through the signature of that defendant.[64]

The distinction between defective title and want of title seems largely to be that between 'voidable' and 'void'. Real defences produce voidness and prevent the creation of a liability and in some cases the negotiation of subsisting liabilities. Defences based on defects of title such as those enumerated in Section 34 render the relevant contract on the bill voidable and not void, the contract remaining voidable until negotiation of the bill to a holder in due course. If this distinction is valid, section 43 confined as it is in its terms to defects of title leaves room for the operation of real defences against a holder in due course. Other provisions in the Act would seem to support such a distinction. For example Section 64 provides that a bill is discharged by payment in due course. 'Payment in due course' is defined as meaning payment at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is *defective*. If the distinction between want of title and defective title has efficacy, one would suppose from this that payment to a holder of any kind taking after the occurrence of one of the circumstances which prevents the conferment of any sort of title would not discharge the bill. This conclusion seems recognised by section 65 which extends special protection to bankers by deeming a bill to be discharged in certain circumstances 'although (an) endorsement has been forged or made without authority (*i.e.*, in terms of section 29)'.

While this classification of defences into those producing defective title and those producing a complete want of title seems generally a tenable and certainly a necessary one, at least two cases of difficulty occasioned by it must be admitted.

First, it is well settled that a thief who steals a bearer bill can nevertheless render the person from whom he stole it and parties under subsisting liabilities liable to a holder in due course.[65] This is so notwithstanding that it is difficult to see how the thief by his theft himself acquires any title to the bill. In no readily acceptable sense has there been a negotiation of the bill to him. Akin to the case of a sale of goods by a thief in market overt, is this in fact a case of a

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63 Falconbridge, *Banking and Bills of Exchange* (6th ed.), 669.
64 *Ibid.*, 665.
65 *Miller* v. *Race* (1758) 97 E.R. 398.

holder in due course acquiring title to a bill through a person in whom there is a complete want of title? The immediate difficulty has perhaps been disposed of by section 26, which deems a valid delivery to have occurred between all prior parties once the bill reaches the hands of a holder in due course. By virtue of this retrospectively constructed delivery, one might have to accept the somewhat difficult notion of a void title being translated into a voidable title once the bill reaches the hands of a holder in due course, by which time of course it is no longer voidable. A simpler explanation might be that any transfer of possession, however effected, is a delivery to constitute a negotiation and that, irrespective of the language of the cases and the operation of section 26, a thief does acquire some sort of title to a bill by virtue of the theft, although of course a voidable one. Certainly section 34 appears to treat theft as never giving rise to more than a defect of title.

The second case of difficulty arises where A draws a cheque payable to B and hands it to him as a gift. Should A dishonour the cheque on presentment by B, it is quite clear that B would have no right of action against A on the cheque. Yet it is equally clear that should B, instead of presenting it for payment, negotiate it to C, A may become liable on the cheque to C. But what has B to negotiate to C? Some sort of title to a chose in action or no title at all? If there is complete want of title in B, how is he able to effect a title to C so as to render A liable on the bill? Is this consistent with the distinction between defective title and want of title? This situation raises the whole problem of the nature of a bill of exchange and in particular in this situation whether the bill while it is still in the hands of B can properly be described as a chose in action at all. No analysis of this difficult problem can be attempted here. However in the interests of accuracy attention is drawn to it.

It has been seen that it is far from the essence of a holder in due course that he has title to the bill, and that in fact he is exposed to a number of possible defences to actions on the bill. However, the question must now be asked, does the inquiry as to title to a bill conclude the inquiry as to a holder's rights on a bill? This must obviously be answered in the negative. In every case discussed where a holder in due course does not acquire title to a bill, he may nevertheless acquire rights of action on the bill against parties to it as extensive and valuable as any right of action against the party primarily liable. In the cases of forgery, *non est factum*, fraud producing mistake as to identity, duress, discharge, illegality and want of completion and delivery, section 60(2)(b) and (c) will frequently render subsequent endorsers liable to a holder in due course. In the case of material alterations, liability on the part of subsequent endorsers is expressly preserved by section 69. In the case of incapacity, the Act again specifically preserves liability on the part of all parties other than the party under the incapacity.

Because of this diversity of rights which may arise on a bill of exchange, it is suggested that the concept of title to a bill is of limited utility and is in fact misleading. First of all, it strains language to talk about title to any right of action. This is tantamount to talking of a right to a right of action. Why not a right to a right to a right of action? But this aside, it may nevertheless be at least intelligible to talk of title to a chose in action such as a debt or shares. Here the chose in action is ever only one unit of property and with an assignment only this one unit of property or right of action is in question. However, the singleness of the notion of property implicit in the expression 'title to the bill' and indeed in the conventional definition of a bill of exchange as 'a chose in action' is entirely inappropriate to describe the rights received as the result of a negotiation of a bill. It is suggested that there is in fact little room for a concept of title in the law of bills of exchange, certainly not in any conventional sense. The status given the concept both in the Act and in the cases has often distorted the form of the inquiry into a party's rights on a bill.

So far we have looked at this question from the point of view of the person seeking to assert rights on a bill. Is anything to be achieved by looking from the opposite end and defining rights by reference to the liabilities of parties to the bill? Section 43 provides that a holder in due course 'may enforce payment against all parties liable on the bill'. Who are the parties liable on a bill of exchange? We know of course that the acceptor, the drawer, and endorsers *can* legally all be liable. But whether they will in fact be liable in a particular case will depend upon what defences are open to them. And what defences will be open to them will depend entirely upon who is suing them. This can be very easily demonstrated. Taking the extreme case of real defences, even here it is not always possible to say that a party to whom such a defence is open will never be liable on the bill. For example, the payee of a cheque who has been deprived of it by a forgery will if he is able to recover it from a subsequent holder be able to enforce payment against the drawer. The drawer is therefore a party potentially liable on the bill—to the payee, although he is not a party liable on the bill to a subsequent holder in due course. Furthermore, circumstances can be envisaged where a party to whom no real defence is open will nevertheless not be liable to a holder in due course yet still remain potentially liable to subsequent parties. For example A who is the endorsee of a bill of exchange negotiates it to B who takes it bona fide for value (goods supplied) and in every way in compliance with section 34 so as to constitute himself a holder in due course. However B makes an innocent misrepresentation about the goods to A. This would not deprive him of the status of holder in due course: he has still acted bona fide etc. Does B's status as holder in due course defeat A's right to rescission for innocent misrepresentation? Surely if B sued A on the bill, A could set up this defence. While there is no direct authority in point, in the Canadian case of *Kinsman*

v. *Kinsman*[66] the payee of a promissory note was ordered to deliver the note up to the maker for cancellation where the note had been issued as a result of an innocent misrepresentation. There is nothing in the case to suggest that had the payee been a holder in due course he would have enjoyed any more privileged position. Indeed the status of the payee was never raised. Moreover nothing in section 43 requires any different conclusion. The section is concerned only with the position of a holder in due course where the title of previous holders has been affected with defects or 'equities' (the pre-Act expression for defects of title), not with the situation where the holder in due course has placed himself under an 'equity'.

The courts have to a large extent preserved the efficacy of contractual defences against immediate parties by denying to a payee the status of holder in due course.[67] However as the above example demonstrates, this expedient is not comprehensive. It is interesting to speculate how the House of Lords would have reacted in *Jones* v. *Waring and Gillow* if the fraud of the third party had induced the plaintiff to *endorse* a cheque to the defendant rather than draw one in his favour. Once the notion that a holder in due course enjoys some special and totally impregnable position is forgotten these situations need occasion no special difficulty.

It will be seen from the foregoing that section 43 is not helpful when it says that a holder in due course may enforce payment against all parties liable on the bill: this amounts to little more than saying that he may enforce payment against all parties against whom he can enforce payment. It should be sufficiently apparent by now that who these parties are will depend upon considerations extrinsic to the section, and in particular upon what defences are open to a given party to a bill, and then whether the defences open to that party will avail against the particular party suing. The question of what parties 'are liable on the bill' cannot be determined in the abstract. The question can only be answered adequately if one has a point of reference, that is, the party who is seeking to render the particular defendant liable.

Having stressed the essentially relative nature of liabilities on a bill, the same point can obviously be made as to the rights of a party on a bill in that it is simply not possible to determine a particular party's rights in the abstract but only in relation to the particular party whom he is seeking to make liable. Furthermore, classifying a particular party as falling within this or that category of holder makes the task no more feasible. For example, one cannot even say of a holder in due course that he can enforce payment of a bill against all prior parties to it other than those to whom real defences are open, because in the innocent misrepresentation example and the *Jones* v. *Waring and Gillow* situation (substituting an endorsement) we have discovered

66 (1912) 5 D.L.R. 871.

67 *Jones* v. *Waring and Gillow* [1926] A.C. 670 (H.L.).

at least two further cases where his rights may be affected. Furthermore, and perhaps more significantly, in some cases it will be impossible even to determine into what category of holder a party falls without reference to the parties whom he is seeking to render liable. The Act itself recognises two such situations.

First, section 34(3) provides that

> A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

A holder who comes within this provision is often called a holder in due course by derivation. This section follows the equitable rule that a purchaser with notice of a prior equity is entitled to shelter himself behind a prior purchaser for value without notice. The latter by purchasing in these conditions in effect extinguishes the equity.

The position may therefore arise as a result of this provision that a person is regarded as a holder in due course in relation to some parties, *i.e.*, those prior to the holder in due course through whom he has derived title, but at the same time not being regarded as a holder in due course in relation to others, namely, the holder in due course in question and subsequent parties. Certain types of defences would be available to the latter parties against the holder which would not be available to the former. His status and to some extent his rights would depend upon whom he was suing.

The second provision which reflects recognition of the relative nature of a holder's rights is section 32(2):

> Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

Thus as regards some parties a holder will be a holder for value, as regards others he will not. As regards the former, lack of value is not a good defence, as regards the latter it is.

The foregoing discussion of rights arising on a bill of exchange leads one finally to examine in this context at least the significance of the characterisation of holders suggested by the Act, and now conventional, as either simple holders, holders for value, or holders in due course. It is submitted that these characterisations must be regarded as having a negative value only: the terms in question are terms of exclusion which indicate which of the whole range of possible defences to an action on a bill are not available against a certain party. They do not affect in any way the defences which have not been excluded. Looking at the three categories of holders, none of the range of possible defences is excluded from application to a simple holder; lack of value is excluded from the range of possible defences available against a holder for value; as against a 'holder in due course', which expression has frequently been stated to be merely a substitution for

the pre-Act expression, 'bona fide holder for value without notice',[68] bad faith, lack of value and notice of enumerated defects of title are not available. On this view the Act might equally well have created the categories of holder without fraud (i.e. fraud is not available against such a holder, whatever other defences might be), holder without duress, holder without breach of faith, etc., etc.. On this analysis, it can very readily be seen why the characterisation of a particular holder as of this or that kind can provide no basis for any positive and definitive statement of his rights on the bill.

It is submitted that in any action on a bill of exchange whomsoever by, the question which must ultimately be asked is, to echo the words of Lord Kenyon in *Master* v. *Miller*,[69] can this action be sustained by this party on this bill against this defendant? Only a question such as this adequately recognises the relativity of rights and liabilities which arise on a bill of exchange.

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[68] See *e.g.* Lord Russell of Killowen in *Lewis* v. *Clay* (1898) 67 L.J. Q.B. 224, 228.

[69] (1793) 100 E.R. 1042, 1047, quoted *supra*.