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Assignment–Implied Warranty by Assignor of Solvency of Obligator

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STUDENT NOTES

ASSIGNMENT—IMPLIED WARRANTY BY ASSIGNOR OF SOLVENCY OF OBLIGOR.— The American Law Institute in its RESTATEMENT OF THE LAW OF CONTRACTS lays down the rule that "an assignor does not by the mere fact of assigning warrant that the obligor is solvent or that he will perform his obligation."[1] Mr. Samuel Williston, the reporter for contracts, limits his explanatory comments to: "Subsection (2) states well-settled law;"[2] and in his comprehensive treatise on the LAW OF CONTRACTS, cites only authorities in support of the stand taken by the RESTATEMENT, though he there recognizes another view.[3]

The cases, however, do not indicate that this is true, but that there is a conflict of authority upon the problem, one view being in accord with the rule as laid down above, and the other *contra* thereto.[4] There being a split of authority upon the matter, it is not the purpose of this note to attempt to ascertain the better view, but to determine which of them is accepted by the courts of this state.

This discussion is limited to the assignment of non-negotiable choses in action arising in contract, not in tort, and excluding any matters dealing with negotiable instruments; this being the manner in which the RESTATMENT rule is limited by other sections thereof.[5] Generally the term *assignment* is used to denote the transfer of such rights while, on the other hand, the term *endorsement* relates to the transfer of negotiable paper.[6]

A construction of the provision of the RESTATMENT in question here becomes important in order to determine whether or not the

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[1] § 175, sub-section (2).

[2] *Ibid,* Appendix, Explanatory notes to § 175.

[3] 1 WILLISTON, CONTRACTS (1920) 851, § 445.

[4] See 5 C. J. 969-970 and cases there cited. Also 2 R. C. L. 626-627, where it is stated that when an assignment is made without recourse there is no implied warranty of solvency, but, when those words are omitted, the assignor may be held by implication to so warrant. And see Findley v. Smith, 42 W. Va. 299, 26 S. E. 370 (1896), in which a judgment was assigned without recourse and assignor held not to warrant solvency.

[5] § 148, AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONTRACTS.

[6] See Monographic Note on Assignments, 9 Gratt. 429 (Va. 1852); also Freeman's Bank v. Ruckman, 16 Gratt. 126 (Va. 1860); Marietta Bank v. Pindall, 2 Rand 475 (Va. 1824).

West Virginia cases are in accord with it. Two constructions may, reasonably, be placed upon it: (a) that from the mere fact of assignment the assignor assumes no liability whatsoever in regard to solvency of the obligor; (b) that from the mere fact of assignment the assignor simply does not make himself liable as a warrantor or guarantor of the obligor's solvency. Though at this point the distinction may seem highly technical and pedantic, after a discussion of the West Virginia cases it will be seen that it is an important one to make in the determination of the position of the West Virginia courts.

In *National Bank v. Spates*[7] the Court, speaking through Holt, President, says, "The case of *Mackie v. Davis*[8] was decided in 1796, and has been a leading case in Virginia and in this state on the general doctrine of assignment of non-negotiable instruments, and the general doctrine there discussed has from that day to this been followed, expanded, and applied in many cases."

The question involved in *Mackie v. Davis*[9] was, "Can the assignee of a bond maintain an action against the assignor without a special undertaking by the latter to insure payment?" The Court there held that there was such a right based upon common law principles, analagous to the implied warranties in the sale of chattels; and the Court stated that there was no reason for any differentiation between the two cases; *i. e.*, sale of chattels and assignment of non-negotiable bonds.

The first case in West Virginia on this problem, *Nichol's Executor v. Porter*,[10] is quite complicated, but for our purposes it need only be noted that the defendants assigned, in West Virginia, a note made in St. Louis and there negotiable but, as the assignment created a new contract, it had the status of a non-negotiable instrument here. The Court held the defendants not liable because,

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[7] 41 W. Va. 27, 30, 23 S. E. 666, 56 Am. St. Rep. 828 (1895).
[8] 2 Wash. 219 (Va. 1796).
[9] *Ibid*, at p. 231. An action brought by an assignee against his assignor to procure compensation upon failure of the obligor to meet his obligation on the bond assigned, the bond being non-negotiable.
[10] 2 W. Va. 13 (1867).

> "to make the assignor of such a note liable for its payment, it is well settled that the maker must be shown to be insolvent at the time the note falls due; or that due diligence has been used against the maker without making the money, or by the use of due diligence, the money could not be made.'"[11]

In *Morrison et al. v. Lovell*[12] a certificate of deposit executed by a bank within the confederate lines was thereby rendered void. However, it was assigned by defendants to plaintiff within the Federal lines which, the Court held, constituted a new contract, and stated:[13]

> "As a general rule, the assignee cannot recover from the assignor the amount paid for the assignment, unless due diligence is used, without effect, against the debtor; but it is in no case necessary to pursue the debtor, if it be clear that such pursuit would be unavailing; as if the *obligor be insolvent*[14] at the time of the assignment; or when the note falls due; or where the note is a forgery; or where the maker is a married woman.'"[15]

Slifer v. Howell's Administrator[16] was another case growing out of the invalid bonds issued by the confederate state of Virginia during the Civil War. Though the case is not directly in point, it contains the following dictum:[17]

> "The contract of assignment of what is commonly called "cash paper" has undergone judicial investigation, and the obligation of the assignor is well defined and understood. It is that he *warrants the solvency* of the debtor and the existence and justice of the debt. Upon the assignee using or exercising due diligence to collect the debt, and failing, because of the inability of the debtor to pay, or because the debtor shows that he ought not, in law, to be required to pay the same, and thus defeats recovery; then the law raises an implied promise, on the part of the assignor, to repay the price *which he received for it.*"

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[11] *Ibid*, at p. 21.
[12] 4 W. Va. 346 (1870).
[13] *Ibid*, at p. 350.
[14] Italics in the opinion quoted here, and subsequently, are ours.
[15] Citing Mackie v. Davis, *supra* n. 8.
[16] 9 W. Va. 391 (1876).
[17] *Ibid*, at p. 397; citing Mackie v. Davis, *supra* n. 8 and Caton v. Lenox, 5 Rand. 31 (Va. 1827).

In *Walker v. Henry*[18] the Court permitted a recovery, holding the remote assignee entitled to the same rights in this case as the immediate assignee would have.[19]

> "Now, it had long been well settled that in those actions[20] the assignee does not recover against even his immediate assignor by force of the assignment, but *by force alone of the common law principle of the action for money had and received.*"[21]

Thomas v. Linn,[22] though badly involved and disputed upon its facts, is clearly a case of the assignment of a non-negotiable instrument, and the Court declares:[23]

> "In the absence of an express agreement to the contrary, the assignment of a bond or non-negotiable note imports a guarantee that the assignee shall receive the *full amount of the bond or note assigned*, if he fails to collect the same after exercise of due diligence."

Nevertheless, and in spite of this language, the Court limits the amount of recovery to *that amount paid for the thing assigned.*[24]

Merchant's National Bank v. Spates[25] was concerned with the assignment by defendant of a county order, invalid because improperly made. The Court held that the assignment was, in itself, a new contract which would support the warranties of the assignor, despite the fact that the instrument was invalid. It further held:

> "The assignor warrants by implication, unless it is otherwise agreed, that it is a valid and subsisting debt, and that the *maker of the instrument is solvent*, or will be when the claim falls due."[26]

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[18] 36 W. Va. 100, 14 S. E. 440 (1892). Here A was the maker of a promissory note and B the holder; B assigned the note to C who sued and recovered judgment against A in the amount of the note. C assigned the judgment to D whose execution thereon was returned "no property found". D thereupon brought suit against B.

[19] See W. VA. CODE ANN. (Barnes, 1923) C. 99, § 15.

[20] The reference is to actions by assignees against assignors.

[21] *Supra* n. 18, at p. 110, citing Mackie v. Davis, *supra* n. 8.

[22] 40 W. Va. 122, 20 S. E. 878 (1894).

[23] *Ibid*, syllabus point 3, and at p. 128.

[24] *Ibid*, syllabus point 4.

[25] *Supra* n. 7, at p. 32.

[26] *Ibid*, at p. 30.

In *Goff v. Miller*[27] the Court held that the assignee of a note not negotiable can only recover from a remote assignor the consideration paid such assignor for the note by his immediate assignee.[28]

> "In an action brought by an assignee against his assignor he is entitled to recover, not on the ground of the assignment, for the transferror of the bond is equally liable by the sale of the bond, even without assignment, but on the principle of natural justice that if a man buys of another that which afterwards turns out to have been worthless, he is bound to refund the price. *The consideration having failed, he must pay back the money.* Hence the *assignor is never liable for more than the price the assignee gave for the bond,* with interest, and the costs sustained in prosecuting the obligor. Hence, too, the assignee who sues the remote assignor can recover from him *only so much as he has received from his immediate assignee.*"[29]

Still, in *Teter v. Moore*[30] the Court makes this statement, though it is clearly dictum:

> "It is assignor and they are its assignees, and an assignor guarantees that the assignee shall receive the *full amount of the bond or note assigned,* if he fails to collect the same by the exercise of due diligence."

And the Court cites *Thomas v. Linn*[31] and *Mackie v. Davis*[32] as authority.

From this review of the West Virginia cases it seems clear that if the RESTATMENT rule is construed as meaning that the assignor, from the mere fact of assignment *incurs no liability whatsoever* with regard to the solvency of the obligor, the West Virginia cases are *contra* to that view. If, on the other hand, the rule is construed as meaning that, from the mere fact of assignment, the assignor

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[27] 41 W. Va. 683, 24. S. E. 643, 56 Am. St. Rep. 889 (1896). Here defendant gave a certain tract of land to A who gave the same to B. B sold it to C, C executing a note payable to defendant in whose name the property remained. Defendant, at B's request, assigned the note to B for the purpose of showing that the land was to be deeded over. B then assigned the note to D who assigned it to plaintiff who, when he could not recover against C, sought a recovery against defendant.

[28] *Ibid,* syllabus point 1.

[29] *Ibid,* at p. 685. Accord: Trustees of Broaddus Institute v. Siers, 68 W. Va. 125, 69 S. E. 468, Am. Ann. Cases 1912A, 920 (1910); Hughes v. Frum, 41 W. Va. 445, 23 S. E. 604 (1895). And see Kidd v. Beckley, 64 W. Va. 80, 85, 60 S. E. 1089 (1908); Young v. Sehon, 53 W. Va. 127, 44 S. E. 136, 62 L. R. A. 499, 97 Am. St. Rep. 970 (1903).

[30] 80 W. Va. 443, 446, 93 S. E. 342 (1917).

[31] *Supra* n. 22.

[32] *Supra* n. 8.

simply does not obligate himself as a strictly technical warrantor or guarantor to the full amount of the obligation in case of the obligor's insolvency, then the West Virginia cases are in accord.

This conclusion is based upon the fact that, though the cases use language indicating that an assignor warrants the solvency of the obligor, nevertheless, when a decision of the amount of liability of the assignor is actually involved, his obligation to the assignee is limited to that amount which the assignor received as consideration for his assignment, analagously to the quasi-contractual principle of recovery upon failure of consideration.

The true rule of the Court would seem that which it actually applies, and not those of which it merely speaks. Thus the West Virginia cases indicate liability by the assignor to the assignee to the amount which the assignor actually received as consideration for the assignment in the event that the assignee failed, after expending due diligence in the attempt, to collect the obligation for which the consideration had been paid the assignor, whether that failure was the result of insolvency of the obligor, or of some other cause.

Though, as was previously stated, it is not the purpose of the writer to seek a so-called "better view", this *quaere* might profitably be considered: why extend an implied warranty as to solvency of the obligor in the case of an assignment of non-negotiable instruments so as to involve greater liability than in the case of qualified indorsements of negotiable instruments?[53]

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[53] See NEGOTIABLE INSTRUMENTS LAW, § 65; W. VA. CODE ANN. (Barnes, 1923) C. 98A, § 65, which is as follows: WARRANTY WHERE NEGOTIATION BY DELIVERY OR QUALIFIED INDORSEMENT.—"Every person negotiating an instrument by delivery or by a qualified indorsement warrants:

(a) That the instrument is genuine and in all respects what it purports to be;

(b) That he has a good title to it;

(c) That all prior parties had capacity to contract;

(d) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision (c) of this section do not apply to persons negotiating public or corporate securities, other than bills or notes,"

It is submitted that this limitation would be properly applicable and desirable in regard to the warranty of solvency of an obligor by the assignor in the assignment of a non-negotiable instrument. Special attention is called to subdivision (d) which might be used as a substitute for the present rule.

See WILLISTON, CONTRACTS, *op. cit. supra* n. 3, where the limitation is suggested.