Richardson

A Guide to Negotiable Instruments

Sixth edition

Butterworths

GUIDE TO
NEGOTIABLE INSTRUMENTS
AND THE
BILLS OF EXCHANGE ACTS

BY

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PREFACE TO THE SIXTH EDITION

The popularity of this little book continues after all these years and once again another edition is called for. I have maintained the original format, namely, a study section by section of the two main Acts because I still feel it to be the best approach. The first three chapters have been repeated with some minor textual changes but I have thought it an improvement to add pictorial reproductions of certain instruments mentioned therein. New to the book is Part V which highlights the legislation as it concerns cheques. Also I have thought it might help students to see typical examination questions on the law of Negotiable Instruments with outline answers. The questions are reproduced with kind permission of the Law Society and the Institute of Bankers. The outline answers are mine. Lastly I am grateful to Cunard-Brocklebank Ltd. for permission to reproduce a bill of lading, to Bass Ltd. for permission to reproduce an English share certificate, and to Messrs. J. Henry Schroder Wagg & Co . Ltd. for permission to reproduce the American-type share certificate.

DUDLEY RICHARDSON

NORTH WOOTTON
January 1980

PREFACE TO THE FIRST EDITION

Whatever the subject, a book of elementary introduction should endeavour to take the reader from the very beginning to a standard of general attainment. If it attempts to be encyclopaedic as well as introductory it must fail in its object. Consequently, this book is by no means the last word on the law of Negotiable Instruments and Banking. It is hoped, however, that it may be the means of facilitating a study of more advanced works that should follow.

The book has been written with the assumption that the reader has little or no knowledge of elementary law, law of contract, etc. Indeed, the intention of preparing this work was to assist those students of banking who, alas, have made no study of English law. This does not mean that the writer presumes to have supplied a royal road to banking knowledge. He merely hopes that he has made a hard road a little easier (for it is indeed a hard road unless it is preceded by a short study of English law).

The decision to plan the greater part of the book in the form of direct observations, section by section, of the Bills of Exchange Act 1882, is the result of some years of experience in coaching students for the examinations of the Institute of Bankers. It is the writer's firm belief that many of the difficulties encountered by students of this subject arise from a wrong approach, *viz.*, the absorbing of facts, often in tabloid form, divorced from the Act of 1882 from which most of them spring. The codification of the law relating to Bills of Exchange in 1882 was a masterly piece of work. The only way, in the humble opinion of the author, of understanding banking law is a direct study of that work, section by section.

If the writer appears guilty of over-emphasis and repetition here and there, he prays for forgiveness. In a desire to impress certain facts clearly in the mind of the student there may appear a certain measure of over-emphasis to some readers – but it is confined to points of vital importance and to points that in the experience of the author continue with strange regularity to cause the greatest difficulty to the young student of banking.

DUDLEY RICHARDSON

NOTTINGHAM
July, 1947

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PART I

INTRODUCTORY

CHAPTER 1

COMMON LAW AND EQUITY

Common Law. – Prior to the coming of William the Conqueror, a primitive type of law existed in Harold's Britain based on the customs of the Ancient Britons, Romans and Saxons. The Normans brought with them new customs and legal usages of the Norman French which, being amalgamated with the old customs of Harold's Britain, became the Common Law of England. It concerned chiefly the rights of an individual and his duties towards his fellow citizens. It was, and still is, unwritten, though at times where some old custom has fallen out of use, Parliament has passed an Act re-stating the custom lest it should be forgotten and pass away from Common Law. Normally, however, Acts of Parliament or Statutes are statute law as distinct from our ages-old Common Law.

In the early days of Norman and Plantagenêt kings, Common Law was our only legal code. It was administered by the King's Courts and in time these Courts became known as the Courts of Common Law.

Courts of Common Law. – These Courts were well known for the jealous and rigid recognition of the ownership of property. If a man was recognised by Common Law as the legal owner of some property then the Courts would afford him all the power of the law to enable him to obtain or retain that property. They would say that he held the legal title to the property. It did not matter how many people had other kinds of interests in it; if one man had the *legal* title and there was no other *legal* interest in the property held by some other person, then the property was his absolutely as far as Common Law was concerned. Shakespeare leaves evidence of this in his "Merchant of Venice." The bond that Antonio gave to Shylock was a right to demand money from

Antonio. Shylock was the legal owner of the property represented by the bond. It was a cruel bond but the Court never questioned the rights of Shylock to demand its complete fulfilment since Shylock was the *legal* owner of the bond, possessing a *legal* title.

What then do we mean by a "legal title" or a "legal interest"? Simply the owning of property (solely or jointly with others) or the owning of an interest or a right in property in such a manner as our old Common Law has always recognised. This is no peculiar manner of owning property, however. For instance, if I have a gold watch which is undeniably my own property and I transfer it to you for £40 I transfer to you not only the watch but also the legal right to retain it – in other words, I convey to you the legal title. If I have a ship on the high seas and it is legally my property, I can transfer the ship or even a share in the ship to you by completing (or executing) a document of transfer called a deed. In this I should name you as the new owner. In the event of dispute you would produce this deed to the Courts of Common Law and Common Law would acknowledge you as the legal owner having a legal title to or (where you held only a share) a legal interest in the ship. And of course today, when one acquires any type of property it is the legal title or in other words, the legal estate, that one requires, whether the property be land, jewellery, securities, bills of exchange, etc., since then the Common Law of England will give one the utmost power to hold and protect the property against all comers.

It follows from all this, of course, that there must be another kind of title to property, another way of having a right to or an interest in property that cannot be called "legal." That is so. The one other way of holding property or some interest in it is in the possession of an "equitable" title or an "equitable interest." How this differs from the legal title will be shown later.

Common Law has continually been described as rigid and inequitable since it has always been applied without deviation, without consideration of resulting injustice, cruelty, etc. The law is the law, as Antonio discovered with some (temporary) misgivings. Let us take another example. If property had been left by Smith in his will to Brown so that Brown should use the income to

maintain Smith's maiden aunt, then the interest in the property that the aunt had was not recognised by Common Law. And if Brown did not pay the aunt her income that Smith had intended for her she would have received no assistance from the Courts of Common Law. They recognised only Brown, the owner of the legal title conveyed to him by Smith in his will. The only title they acknowledged was the legal title, or the legal estate. But if Smith had left the property to Brown and the aunt jointly then the aunt would have received the help of Common Law because she would have been a joint *legal* owner and her interest in the property would have been a *legal* interest.

In the case of certain types of property, however, the rigidity of Common Law expressed itself in another direction. Though it reserved its recognition only for the holder of the legal estate, it refused to recognise on the other hand the right of the legal owner to transfer such property to someone else. Examples of such property were land, choses in action, etc. (see later). It should be noted however that transfers of such property by the legal owner were not *necessarily* illegal. The position was merely that Common Law refused to acknowledge that any change of ownership had in fact occurred through such a transfer, reserving its recognition to the original owner.

The law of equity. – It was not until the reign of Edward III that some serious attempt was made to ameliorate the rigidity and harshness of Common Law. Though it was never suggested that Common Law itself should be altered, it was felt that some remedy was required to prevent serious injustices arising from this rigidity. Take the case of the maiden aunt above – if the legal owner of the property (we would call him the Trustee today) had refused to pay her the income, she would have had no redress at Common Law. But such injustices were said to offend the King's conscience since he felt a responsibility for each subject in the Kingdom. The Lord Chancellor was the "Keeper of the King's Conscience" and he eventually acquired power to give judgment and decide cases where under Common Law there would have been no redress. The maiden aunt could have appealed to the

Chancellor, and he in his desire to rectify any situation that offended the King's Conscience or, as we would say today, that was not fair and equitable, would have given orders for the Trustee to pay the maiden aunt her income. Since they were the King's orders by virtue of the Chancellor's office, they could not be disobeyed. The Chancellor, however, never overruled Common Law; he merely supplemented it with a view to ensuring fairness or equity. As his work in this sphere increased it had to be deputed in Edward III's reign to other legal lords in proper Courts and these Courts came to be known as Courts of Equity. Interests in property such as that held by the maiden aunt were called *equitable interests* or *interests in equity* (since they were acknowledged only by the Courts of Equity). Later such an interest came to be known as "an equity" (plural "equities").

Another right that was recognised only in Equity was the right known as "set-off" or "counterclaim." If A owed B £100 for a loan and B owed A £20 for a horse then obviously the whole matter could be settled by A's paying £80 to B. But only the Court of Equity would have acknowledged the right of A to set-off the £20 against the £100. Common Law would not have recognised the connection between the two debts. A "set-off" or "counterclaim" is consequently an equity.

A third kind of equity that arose was the "equity of restoration." Suppose that Jones under threats or under the influence of drink had transferred property to Robinson so that the latter obtained the legal title. Common Law would have recognised Robinson as the new legal owner and have ignored Jones completely. But this was inequitable and Jones really had the right to have his property restored – an equitable right or an equity, since only the Court of Equity would assist him. So we find in certain circumstances a person can become the legal owner through, say, fraud, false pretences, threats, etc., but only until such a time as the previous owner takes action through the Law of Equity to obtain restoration of the property. During that time the title of the new legal owner is subject to the previous owner's equitable right of restoration, *i.e.*, subject to an equity. One can say that his title is, therefore, "defective" (*i.e.*, imperfect). Most

authorities describe it so. A defective title is one subject to this special type of equity. But it should be observed that not every title which is subject to equities can be called defective. It has become customary to speak of the defective title separately from other legal titles affected by equities. Thus, in the study of Negotiable Instruments we commonly use the expression "subject to defects in title of previous owners and subject to equities."

We can, then, for the purpose of our study consider equities as fitting one of the following:–

(1) An interest of a beneficiary under a Trust arising say by a will or settlement.
(2) Set-off or counterclaim.
(3) Right to demand restoration of the legal estate.

Again, though as we observe above Common Law would not recognise the right to transfer certain types of property, this right in many cases was recognised by the Law of Equity. Such transfers were known as equitable transfers (or equitable assignments). If the new owner had difficulty in obtaining or retaining the property and Common Law refused to recognise him, the Courts of Equity would probably compel the old owner to take legal action on behalf of the new owner to ensure his equitable rights. In other words, an equitable assigneee has never had the right under Common Law to bring a legal action or, as we say, to "sue in his own name."

Today, Common Law still exists separately from Equity but the system of maintaining separate Courts was finally abolished in 1875. We now have their amalgamation into the High Court. Nevertheless, it is interesting to observe that there are departments known as Divisions of the High Court that still specialise to a great extent in one side or the other. For example, our old Common Law Courts such as the Court of King's Bench have now become the King's (or Queen's) Bench Division, and our Court of Equity or the Chancellor's Court continues in some distinct identity in the Chancery Division.

CHAPTER 2

CHOSES IN ACTION

What we mean by a chose in action. – A man's moveable property can be divided into two types, denoting whether the property is in actual physical possession such as a library of books, a herd of cows, etc., or whether it is property not possessed physically but in the form of a right or an interest in something of value. The former type of property is described as a "chose in possession" (a "chose" being a French word meaning a "thing") and includes all moveable property that is in a material form. If, however, the property does not exist in material shape but is a right – a valuable right that can be enforced in a Court of law – then it is a "chose in action." Thus, if you have a ton of oranges in your warehouse you have a chose in possession. If you have five pence in coin in your pocket you again have a chose in possession. But if the oranges were in course of shipment, unloaded on a dock or in a shipping company's warehouse, and you held a document showing your *right* to claim the oranges (*e.g.*, a bill of lading, dock warrant, etc.) that *right,* evidenced by the document, would be a chose in action. Again, if you have a postal order for five pence, you have a *right* to demand that sum of money from the Post Office; that *right,* evidenced by the postal order, is a chose in action. Further examples of a chose in action are debts, shares in companies, rights under an insurance policy, patents, copyrights, claims to money evidenced by cheques or bills of exchange, etc., etc.

It can be seen from the name itself that it is a "thing" of value (a chose), immaterial though it may be, that is recognised by law and which can be enforced by "action" at law, *i.e.*, legal proceedings. The Courts if required will uphold your claim and assist you in obtaining all to which you have a right under your chose in action. In nearly every case there will be some document or evidence in writing to prove the right, and the document itself

as representative of the right or claim has come to be referred to as the chose in action. It is interesting to note that in the French language, shares in Companies are called "actions."

The commonest forms of choses in action in commercial use could be grouped under the heading "Documents of Title" since such documents operate as evidence of the right of some person to money or goods not in that person's actual physical possession.

The document of title is the main proof of ownership and, as it is the means or instrument of obtaining or establishing ownership, it is called an "instrument." To obtain music a musician uses an instrument; to undertake an operation a surgeon uses an instrument; to obtain or establish a right to property to which he has a legal right, a man will use an "instrument." The word, therefore, is not misused even though it means nothing more substantial than a piece of paper. Thus documents of title are rightly called instruments.

Each instrument refers to a certain property. The person with whom the property is lodged or, more often, the person who is liable to deliver the money, or goods, will be named in the instrument. Similarly, the person who holds the right – the person who can claim the goods or money – will also be mentioned notwithstanding that he may be named or assumed to be merely the bearer of the instrument. The relationship between the two parties is much the same as exists between an ordinary creditor and debtor except that the person who is to pay or deliver (or hold for the time being) the property concerned will have legally bound himself (possibly by his signature) on the instrument. Having legally bound himself, he has, in other words, "contracted" to fulfil the liability or promise to which the instrument refers. So we say that a document of title also operates as a simple contract between the two people named in the instrument. These two people and their contract are of such fundamental importance to the instrument that they are part of the instrument. And so we call them "parties" to the instrument.

The chose in action and the law. – From the earliest times of English mercantile history it became obvious that if property was not in the owner's physical possession, some evidence of ownership