

ASSIGNABILITY OF DOCUMENTARY CREDITS

GEORGE B. MCGOWAN*

Present-day necessity suggests that the rule that a letter of credit "can only be transferred on the express authority of the principal"¹ has stood much too long as a barrier to a source of financial accommodation for a great number of small businessmen engaged in the export trade and many others in domestic business endeavor.

The meaning of the rule becomes clearer if we look upon it as an admonition that a letter of credit "issued in favor of a named beneficiary cannot be assigned *with safety* unless the party who has caused the credit to be issued expressly authorizes or consents to its assignment."²

Strangely enough, although the admonition, or rule, has been generally honored for a great many years by bankers and others engaged in letter-of-credit finance, the reason for it is not nearly so manifest as one might suppose.

Since any attempt to evaluate the rule in terms of rationale must be based upon an understanding of what a letter of credit is, we first must concern ourselves with the nature of the irrevocable documentary letter of credit, which is the type of letter of credit most generally used in commerce. In brief, it is an irrevocable promise which a bank makes to a seller at the instance of a buyer, in which the bank engages itself to pay³ the seller a specified sum upon delivery to the bank within a specified time of shipping documents evidencing shipment of goods purchased by the buyer. By this means the seller is relieved of any risk of non-payment by the buyer. The bank which issues the letter of credit takes that risk upon itself, under an agreement by the buyer to reimburse the bank for such amounts as it may become engaged to pay by reason of the issuance of the credit. Thus the seller obtains a promise of payment backed by the resources of the bank.

There are some, however, who look upon the irrevocable letter of credit not as an irrevocable promise to pay, but as nothing more than a continuing offer which may be revoked before it is accepted.⁴ If the irrevocable letter of credit were nothing

* Vice President, Corn Exchange Bank Trust Company, New York. Author, *TRUST RECEIPTS, THE VARIATIONS IN THEIR LEGAL STATUS* (1947). Special Adviser to the American Law Institute on Foreign Banking Section of the proposed Commercial Code. Member of Committee on Uniformity of Documents and Procedure of Banker's Association for Foreign Trade. Lecturer on Foreign Banking, Practising Law Institute, New York, and on Commercial Letters of Credit and Trust Receipts, American Institute of Banking, New York. Contributor to credit periodicals.

¹ See Art. 49 of the Uniform Customs and Practice for Commercial Documentary Credits, fixed by the International Chamber of Commerce.

² See Harfield, *Secondary Uses of Commercial Credits*, 44 COL. L. REV. 899 (1944).

³ For the purpose of this writing we can dispense with discussion of the type of letter of credit under which a bank engages itself to accept the seller's drafts drawn upon it. Whether the credit provides for drafts payable at sight or some other usance, the bank's ultimate obligation is to pay money.

⁴ See McCurdy, *Commercial Letters of Credit*, 35 HARV. L. REV. 539, 563 (1922).

more than a revocable offer, there would be no reason for this writing, since there would be nothing which could be assigned. In approaching the question of the assignability of irrevocable documentary credits, the common-law mind has found it difficult to perceive any basis valid in law⁵ to support the conviction universally held by merchants and bankers alike, that a letter of credit, "clearly stipulated as irrevocable,"⁶ "can neither be modified or cancelled without the agreement of all concerned."⁷ But since there is ample precedent for giving effect in law to the customs of merchants, there seems to be no reason why all courts should not readily recognize the fact that the business and financial community does not believe that a bank can revoke or even modify a credit which states that it is irrevocable, and has been doing business in reliance upon that belief for years. However, if further reason is required, it would seem that a proper understanding of the circumstances which surround the issuance of an irrevocable documentary credit should leave no doubt.

Ordinarily, the issuance of an irrevocable documentary credit is arranged by the buyer as performance on his part of a condition precedent to the seller's obligation to sell and deliver under a contract of purchase and sale. The seller having agreed to sell on the condition that the buyer shall first open an irrevocable credit, and the buyer having agreed to open such a credit, it follows that the buyer will have breached his contract if he fails to do so.

The bank's issuance of the letter of credit, therefore, has a twofold result, since it not only enables the buyer to do what he has agreed to do (thereby avoiding an action for breach of contract), but (more importantly in so far as a reason for its irrevocability in law is concerned) it also results in a perfection of the seller's obligation to sell and deliver.

When the buyer obtains the issuance of an irrevocable letter of credit, he signs an agreement which promises the bank that in consideration of the issuance of the irrevocable credit, to remain in force until the date specified, the buyer will, *inter alia*, pay the bank a commission. If the fact that such an agreement is given to the bank in exchange for the irrevocable letter of credit is not sufficient to convince the skeptic that the bank has no right to revoke the credit, there is the further fact that by issuing the credit the bank causes an automatic change in the position of the seller, who, because the buyer has opened the irrevocable letter of credit in accordance with the contract of purchase and sale, becomes bound to perform his end of the bargain.

It would be anomalous to permit a bank to be in a position where, by issuing a credit stipulated as irrevocable, it could place a seller under a contractual obligation to sell and at the same time leave itself the right to revoke. On the basis of common-law concepts of contract and estoppel, as well as in the interests of sound public policy, a bank which issues a letter of credit stipulated as irrevocable should have no right to revoke.

⁵ *Id.* at 564.

⁶ See Art. 3, Uniform Customs and Practice for Commercial Documentary Credits, *supra* note 1.

⁷ *Id.*, Art. 5.

Of course there are instances when, instead of opening a letter of credit because of an existing contract requiring such action, a buyer will cause his bank to issue an irrevocable credit in favor of a party to whom he sends an order, for the purpose of inducing that party to accept the order. Under such circumstances, it seems fair to say that acceptance of the order is induced by the fact that the order is accompanied by the letter of credit which states that it is irrevocable, and that, having induced the party to whom the order was sent to obligate himself to sell and deliver, the bank should not be permitted to revoke the credit thereafter. Of course, if the party to whom the order is sent fails to accept the order before it is revoked, he has no right to use the credit after the order is revoked; and in such a case a court should not hesitate to restrain the seller from using the credit.⁸

The position of a seller who holds an irrevocable letter of credit, to which he is entitled as the result of his agreement to sell, is similar to the position of a party for whose benefit an escrow deposit has been made. Each has an irrevocable right to receive money upon the performance of certain conditions—a right to perform those conditions, and by such performance to perfect a right to money. In essence, before such performance is given, each has a present conditional right to money, a right of which he cannot ordinarily be divested. The escrow is irrevocable, and the promise to pay which is contained in the irrevocable credit is irrevocable.

For the purpose of this writing we can dispense with discussion of the differences between an escrow and an irrevocable credit. The point to be made here is that an irrevocable letter of credit is not an offer, but an existing, irrevocable, conditional right to receive money. Although the beneficiary can acquire an absolute right to the money which the credit promises only by giving the performance which is required as a condition precedent to payment, he nevertheless has, before such performance is given, an irrevocable right to receive the money upon performance. This writing will not suggest that the beneficiary should be permitted to relieve himself of any obligation under the contract by delegating to another the performance required, but it is intended to prove that there is reason why the beneficiary of

⁸ As a matter of policy, banks ordinarily refuse to revoke an irrevocable credit regardless of the reason advanced as justifying revocation, not only because of the accepted doctrine that a credit clearly stipulated as irrevocable cannot be cancelled or modified without the consent of all parties, but for the further reason that the bank does not consider itself in a position to determine whether or not the beneficiary has a legal right to use the credit. Since an irrevocable credit represents a bank's promise to pay its own money to the beneficiary, a court should not, at the petition of the party who caused the credit to be issued, restrain the issuing bank from making payment. When a bank pays drafts under a credit which it has issued, it is in effect paying out its own money; and the debit which the bank makes to the account of the party who caused the credit to be issued is in the nature of reimbursement to the bank of such amounts paid. If the bank chooses to honor its promise by paying out its own money, no one should interfere. The point at which the person who caused the credit to be issued should have something to say is when the bank debits his account to reimburse itself for payments made. If, after paying its own money under a credit, a bank thereafter wrongfully debits the account of the party who caused the credit to be issued, that party will ordinarily have a legal remedy. This legal remedy obviates any reason for issuance of an order restraining the bank from debiting the account of the party who caused the credit to be issued. On the other hand, if it is desired to prevent a beneficiary from using a credit, the court order should restrain the beneficiary from using it, and a copy of the order should be sent to the issuing bank.

an irrevocable credit should be permitted to assign his existing conditional right to money.

As stated above, letters of credit are ordinarily issued because the seller demands them as a condition of the contract of sale. The seller's requirement that a letter of credit be issued in his favor may be motivated by a desire to have a better assurance of payment than he would have if he had only the buyer's promise to pay; or by a desire for some instrument under which he can receive payment as soon as he has shipped the goods and can deliver documents evidencing such shipment; or by a need for some instrument which he can use for the purpose of obtaining the financial assistance necessary to enable him to pay for goods which he has agreed to sell and deliver; or by a combination of any or all of these reasons.

Assuming that the seller asks for a letter of credit with the idea of using it as a means of obtaining the financial assistance he needs in order to complete his purchase of the goods for which the credit will provide payment to him, the form of credit which he will receive may contain express words of assignability; or it may, by virtue of the mere absence of such express words of assignability, be what the rule considers a non-assignable credit.

Dispensing for a moment with discussion of what the seller might do if he received a "non-assignable" credit, let us assume that he has asked for and received an expressly assignable credit. What he will do with the credit depends upon the situation in which he finds himself. If his relationship with the party from whom he is purchasing the goods designated in the credit is such that he can afford to disclose the name of his customer (the buyer for whose account the credit was opened) without fear of future competition from the party to whom he discloses such information, and *if he is willing* to disclose the price at which he is selling, he may simply assign the credit to the party from whom he is buying,⁹ with the understanding that out of the amount received under the letter of credit the assignee will pay to him the difference between the price at which he sells (the amount payable under the credit) and the price at which he purchased from the assignee.

In such a case the seller-beneficiary, by assigning the credit, not only assigns the benefits (*i.e.*, the conditional right to the amount payable under the credit), but in effect he also delegates to the assignee power to render such performance as is required by the conditions of the credit. The assignee supplies the goods, attends

⁹ Provided, of course, that the party from whom the seller-beneficiary is buying is willing to wait for his money until the performance required as a condition precedent to payment under the credit can be given. Assume that an exporter in New York has agreed to sell to a Brazilian importer, on terms C.I.F. Rio de Janeiro, goods which he has purchased from a Cleveland manufacturer on an F.O.B. Cleveland basis. Since the Cleveland seller is entitled to his money against railroad bills of lading showing receipt of the goods in cars at Cleveland, he could hardly be expected to take as a means of payment an assignment of a letter of credit which requires bills of lading showing that the goods have been loaded on board an ocean vessel sailing for Rio. As between one seller and another, the difference in the terms on which they have agreed to sell the same goods to their respective buyers creates a need for a bank's services in bridging the gap. In a situation such as the above, the exporter, having received an assignable letter of credit payable against ocean bills of lading, would assign it to the bank as adjunctive security for a separate letter of credit, under which the Cleveland manufacturer could receive payment against railroad bills of lading.

to the shipment of them, obtains documents, draws drafts and presents them with the documents attached, and receives payment.

Of course, all this may be done, and usually is done, under the supervision of the original seller-beneficiary (the assignor) who cannot help but have an interest in seeing that the performance given by the assignee is the same as that which he, the seller-beneficiary, is obligated to give to his buyer. However, it is the exception rather than the rule for a seller-beneficiary to assign a letter of credit, received from his buyer, to the party from whom he is buying. He prefers not to disclose names or prices for fear of future competition.

There are several ways of using expressly assignable credits for the purpose of obtaining financial assistance without the necessity of making such disclosures to people who might compete on the basis of such information.

When the terms of sale under which the seller-beneficiary has purchased are exactly the same (except for price) as the terms on which he has sold the goods to the party who caused the credit to be issued, the seller-beneficiary of an expressly assignable credit can bestow upon the party from whom he is purchasing the goods the same assurance of payment as the seller-beneficiary himself derives from the letter of credit issued in his own favor. This is done by filing with the same bank that issued the credit an assignment (to the party from whom the seller-beneficiary is buying) of such an amount of the credit as will represent the price to be paid for the goods, under an arrangement by which the bank notifies the assignee without disclosing any information as to the name of the party for whom the goods are eventually intended, or the amount for which the goods will eventually be sold—*i.e.*, the amount of the credit.

The assignment which the seller-beneficiary files with the issuing bank might read as follows:

Dear Sirs:

I/we refer to your Letter of Credit No.,
issued in favor of
in the amount of \$.....
for account of

I/we hereby assign to,
hereinafter referred to as the assignee(s), the right to draw under the credit up to an
amount not exceeding \$.....
provided that the commercial invoices attached to the draft(s) show a price of \$.....
and provided further that draft(s) drawn by virtue of this assignment be presented at
your office not later than

In this connection, I/we hereby request the.....
Trust Company to forward to the assignee(s) a letter informing him/them that this as-
signment has been made and giving him/them all the terms of the letter of credit referred
to above, except the amount for which it was issued and the names of the parties for
whose account it was issued.

I/we understand that upon presentation to the Trust Company of any draft or drafts
by the assignee(s) conforming to the terms of the letter of credit, the Trust Company

will permit me/us to substitute my/our draft(s) and invoices for the assignee's/assignees' draft(s) and invoices provided that my/our draft(s) and invoices are in such form as will conform to the terms of the letter of credit; and that after such substitution the Trust Company will in due course pay me/us the difference between the amount of the assignee's/assignees' draft(s) and the amount of my/our drafts(s) after deducting any expenses or charges which may be due the Trust Company in connection with this transaction.

It is also understood and agreed that if for any reason whatsoever I/we should fail to substitute my/our draft(s) and invoices conforming to the terms of the letter of credit referred to above on or before the day on which the assignee's/assignees' draft(s) and invoices are presented to the Trust Company in conformity with the credit, the Trust Company will surrender the documents which come attached to the assignee's/assignees' draft(s) to the party/parties for whose account the Trust Company issued the letter of credit referred to, against payment to the Trust Company of the amount of the assignee's/assignees' draft(s), and that I/we shall thereafter have no claim against the Trust Company for any money which might, or would have, become due me/us upon payment of my/our draft(s) and invoices if substituted within the time above mentioned.

I/we assume the full risk of delivering my/our draft(s) and invoices to the Trust Company as above, and the Trust Company will incur no liability to me/us whatsoever by paying the assignee's/assignees' draft(s) under the letter of credit and delivering the documents to the party/parties for whose account the credit was opened, against payment of the amount of the assignee's/assignees' draft(s), if I/we should for any reason fail to furnish my/our draft(s) and invoices within the time mentioned above.

In connection with the above transaction, I/we herewith hand you my/our check to the order of the Trust Company for \$....., representing its advance minimum commission in this matter, which is to be considered as earned whether or not any drafts are drawn and whether or not payments are made under the above letter of credit, and I/we hereby authorize the Trust Company to deduct from any amount which may become due me/us as the result of the proper substitution of my/our draft(s) and invoices, such amount as will represent a total commission of% on the amount of the assignment, after making allowance for the advance commission now paid.

Very truly yours,
SELLER BENEFICIARY

The bank's letter to the assignee will read along these lines:

We take pleasure in informing you that out of an irrevocable letter of credit which we have issued in favor of Mr. Seller Beneficiary in excess of \$9,300, Mr. Seller Beneficiary has filed with us an assignment in your favor by virtue of which you are authorized to draw on us at sight up to an aggregate amount of \$9,300.

The letter of credit requires drafts at sight to be accompanied by the following documents . . . which must be presented at our office not later than January 1, 1949 . . . and contains our engagement that all drafts drawn and presented in accordance with its terms will meet with due honor.

The party to whom such notice is given is then in the position of having an irrevocable letter of credit, since he has the bank's irrevocable promise to honor his drafts if accompanied by the shipping documents which he is prepared to deliver in fulfillment of his contract to sell.

When the drafts and documents are presented, the bank notifies the original seller-beneficiary (the assignor), who draws a draft for the full amount of the credit (just as though he had not assigned). The bank attaches that draft to the shipping documents which came attached to the assignee's draft, and charges to the letter of credit the amount of the seller-beneficiary's (assignor's) draft, which is larger than the amount for which the assignee drew, paying the assignee the amount he drew, and paying the balance (his profit) to the seller-beneficiary (assignor).

By this procedure the seller-beneficiary of an assignable credit is enabled to use the credit to finance his purchase of the goods he is selling. By assigning to the party from whom he is buying he incurs no liability to the bank, as he would if he arranged to have the bank issue a separate letter of credit. The bank incurs no additional financial risk in such a transaction because the part of the credit which is assigned represents an already existing risk which the bank incurred by issuing the letter of credit.¹⁰

However, this procedure is possible only where the terms of the sale between the seller-beneficiary (assignor) and the party from whom he buys (assignee) are the same (except as to price) as those between the seller-beneficiary and the person to whom he is selling (the one who caused the credit to be issued). It can be seen that if the credit calls for ocean bills of lading under C.I.F. terms the seller-beneficiary would not be able to use it for the purpose of assigning to a seller from whom he had purchased on terms F.O.B. Cleveland.

When terms of purchase and sale do not match, the expressly assignable credit can frequently be used as adjunctive security¹¹ for repayment to a bank of money advanced by it in payment to the party from whom the seller-beneficiary is buying the goods or documents designated in the credit. In such a case, although the assignment of the expressly assignable letter of credit carries with it an implied delegation to the bank of the performance required as a condition precedent to payment, so that the bank may perform if the seller-beneficiary fails to do so, it is usually intended between the bank and the seller-beneficiary that the seller-beneficiary will do everything necessary by way of performance (*i.e.*, arrange to ship the goods and arrange for the issuance of the required shipping documents) to enable the bank to collect the amount payable under the credit, out of which it will reimburse itself for the amount advanced and pay over to the assignor (seller-beneficiary) the difference remaining.

¹⁰ In handling such partial assignments, however, there are certain points which must be considered carefully. Is the credit *divisible* or must the assignment be for the same amount as the credit? Is the price per unit as stated in the credit a maximum price per unit or is it a fixed price? If it is stated as a fixed price, it may not be safe to handle an assignment which provides that the assignee's invoices must show a lower price, unless the credit is amended to cover.

¹¹ In such transactions the banker advances money to pay for the goods which are to be shipped under the letter of credit. The goods become the banker's primary security. The assignment of the credit gives the banker assurance that he can convert the goods into a fixed amount of money by shipping the goods and thereby acquiring the shipping documents for which the credit promises to pay. The credit, therefore, is an adjunct to the security, in that it eliminates to a certain extent the possibility of loss through market depreciation.

The assignment is taken by the bank not as primary or full security, but for the purpose of being certain of having a means of liquidating the loan, which is really secured by the goods and documents for which the bank is to advance money or credit. The assignment assures the amount the bank will receive upon release of its security in the goods or documents. It reduces the risk of loss which might result from depreciated values.

It should be apparent, then, that when a credit is expressly assignable its usefulness to commerce is enhanced, since by virtue of its assignability the credit in the hands of the seller-beneficiary represents a means by which he can bestow upon his supplier the same assurance of payment which the credit gives to him; or it can be a key to the door of bank credit¹² when, because he does not wish to disclose his profit or the name of his customer to the party from whom he is purchasing, or for some other reason, the seller-beneficiary finds it desirable to have his own bank issue for his account a letter of credit in favor of another seller who will not sell except on letter-of-credit terms, or for cash.

In the absence of express words of assignability, however, a credit's usefulness is less liquid. Because of the rule, or admonition, as to non-assignability, it does not lend itself to the corollary transaction of purchase and sale between the seller-beneficiary and the party from whom he buys the goods for which he is to receive payment under the credit. A seller who receives such a credit does not ordinarily obtain the support which an expressly assignable credit would afford him in making financial arrangements with his bank to finance a preceding purchase of the goods for which the credit promises payment.

It has been said that the rule as to non-assignability of credits which do not expressly state that they are assignable is based upon a presumption—a presumption that the party who causes the credit to be issued does not intend that it shall be assigned.¹³ It is more likely than not, however, that the omission of words of assignability in most credits is the result of an absence of any conscious intention one way or the other, on the part of the party who causes the credit to be issued, as to whether it shall be assigned. It does not seem rash to suggest that, given a

¹² This does not mean that anyone who has an assignable credit needs nothing more to induce a bank to finance his transaction. There are many other considerations involved. The bank must always keep in mind that conditions beyond its control may prevent it from collecting under the assigned credit and leave it in possession of goods for which the bank may be unable to find a ready market. The borrower, therefore, should have some means of his own, so that the bank will not bear the market risk if conditions beyond control prevent the performance required by the credit and the goods depreciate in value because of market conditions. The trucking and shipping strikes furnish an excellent example of conditions under which a bank which has paid for goods under one credit may be unable to obtain the shipping documents which would enable it to obtain payment under an assigned credit which will expire before the bank can get the goods on board a vessel and obtain ocean bills of lading. If the buyer or his bank should refuse to extend the shipping and expiry dates of the credit to which the assignee bank is looking for payment, the assignee bank will have on its hands goods for which it may be difficult to find a market. A similar situation is involved where a credit requiring proof of arrival at Chicago is assigned as security for payment against warehouse receipt for goods in warehouse in New York. If the goods do not move in time and the credit expires, the bank is left with goods which may drop in value.

¹³ See the discussion of reasons why the buyer might be unwilling to give the seller an assignable credit, *infra*.

proper understanding of the consequences of permitting assignment, a large number of credits now issued without such permission would be issued in expressly assignable form.

It has been said that "when the buyer opens a credit in favor of a designated seller without express provision for transfer or assignment, he naturally wants not only the documents required by the credit, but also the personal action and implied warranty of the seller himself in procuring and tendering those documents. . . . So the courts have pretty generally held that a letter of credit in favor of a specific beneficiary is non-assignable."¹⁴

Such a statement suggests as its basis an idea that, if a seller does not personally procure and tender the documents required by a credit, but instead assigns the credit so that someone else procures and tenders them, the seller's implied warranty will not be obtained and the buyer will have recourse only against the assignee, who might be of such poor financial standing that no recovery could be had if the goods were not right.

It is case law that "a party affected by a contract cannot by merely assigning it to a third party relieve himself of his obligations."¹⁵ A seller who assigns a credit remains the seller after the credit is assigned, in so far as the buyer is concerned. The assignment of an assignable credit could not effect a novation. The seller in whose favor the credit was issued is still the one to whom the buyer has a right to look to for the goods purchased. On such grounds, a theory of no implied warranty by the seller to the buyer seems invalid as a reason for the rule of non-assignability.¹⁶

Furthermore, and in so far as *personal* performance is concerned, the seller-beneficiary of a credit seldom procures personally the documents required by the credit. In most instances this is done by an employee of the seller-beneficiary (which may even be a corporation) or by a forwarding agent. In most instances the seller-beneficiary never sees the goods he has sold, nor even the cases, drums, bags, or cartons containing them. They may even pass through several hands by way of documents without ever being seen by any of the purchasers or sellers. Goods in warehouse frequently change hands many times without anyone's actually seeing anything more than a warehouse receipt. Purchasers of merchandise know this when they cause a letter of credit to be opened.

Generally, the seller-beneficiary is not a manufacturer or producer of goods, but is only a middleman whose specialized knowledge of the market and of sources of supply enable him to perform a service for which the party who purchases from him is glad to pay by way of allowing him a profit on the sale. The buyer seldom

¹⁴ Harfield, *Secondary Uses of Commercial Credits*, 44 COL. L. REV. 899, 900 (1944), citing, *inter alia*, *Eriksson v. Refiners Export Co.*, 264 App. Div. 525, 35 N.Y.S. 2d 829 (1942). The *Eriksson* case is discussed *infra*.

¹⁵ *Smith v. Morin Bros., Inc.*, 233 App. Div. 562, 253 N. Y. Supp. 368 (1931).

¹⁶ These comments are offered not as a basis for argument that letters of credit should be generally assignable, but only in refutation of the suggestion that the seller's implied warranty is lost when a credit is assigned.

expects that the seller-beneficiary has done or will do anything more of a personal nature than to pick up a telephone and purchase the goods from people whom he considers reliable, or to effect the purchase by letter or wire. The buyer knows that the goods themselves move under the direction of employees or agents. In a great many instances, the seller-beneficiary does not even make the purchase himself, but has employees who carry on the business.

If, then, the assignment of a letter of credit leaves the seller-beneficiary liable as a warrantor of such performance as is required under the contract of sale and the conditions of the credit, would it make any material difference to the buyer—who knows or expects that the beneficiary will not do such things personally—whether the documents are procured by an employee or an agent of the seller or by his assignee, over all of whom the seller-beneficiary could logically be expected to exercise supervision consistent with his obligation to deliver according to contract, or such supervision as will preserve his reputation in the trade?

Another theory which has been advanced as justifying the rule against assignability is that the buyer's right to effect a set-off against a particular seller might be defeated if a credit which did not carry the principal's consent to assignment could be effectively assigned.¹⁷ Thus it was said in the *Eriksson* case¹⁸ that one of the "advantages to a purchaser in having his financial arrangements limited so that they apply only as between himself and the person from whom he has elected to purchase . . . is the possibility of offsets arising in his favor. . . ."¹⁹ However, it seems fair to suggest that the advantage which the court had in mind might well be only the result of, and not the reason for, the supposed rule of non-assignability.

In that case *Eriksson* was the assignee of a cause of action belonging to a buyer in a letter-of-credit transaction, the Swedish Marine Board. Although the cause was against the seller-beneficiary, Refiners Export Company, it was in no way connected with the letter of credit, nor with the purchase of gasoline from Refiners, for which the credit had been issued. Refiners had itself purchased this gasoline from Cities Service Oil Company under an agreement to open a letter of credit in the latter's favor; and, since the Marine Board credit was not in expressly assignable form, it endeavored to get the Marine Board to amend it to make it assignable. Failing to obtain the amendment, Refiners nevertheless purportedly assigned the credit to Cities Service and notified the issuing bank that the credit had been assigned. Refiners also sent the bank a draft drawn to its own (Refiners') order and endorsed to Cities Service, which wrote to the issuing bank requesting that its general checking account be credited with the amount of the draft when paid. The report does not state who delivered to the bank the shipping documents required under the credit, but immediately after their delivery, while the documents were being checked for conformity with the terms of the credit, the sheriff arrived with

¹⁷ See note 14 *supra*.

¹⁸ *Eriksson* was not an assignee of a letter of credit. He was the assignee of a cause of action.

¹⁹ 264 App. Div. at 528, 35 N. Y. S. 2d at 832. The court went on to add that "an apt illustration of" this advantage was presented by the situation in this case. See the discussion of this point at page 676 *infra*.

an attachment issued out of the Eriksson suit against Refiners and levied on the proceeds. After the documents had been checked the sheriff again levied. Cities Service claimed that the levy was without effect, pleading that the money which became available upon presentation of the draft and documents was theirs as assigned. The Appellate Division, reversing an order of the lower court, concluded that because of the existing rule of non-assignability the purported assignment gave Cities Service no higher rights than as agent of the assignor,²⁰ and held the attachment valid against this third-party claim.

In discussing the court's reasoning in support of this holding that one of the "advantages to a purchaser" arising out of the non-assignability of an ordinary straight credit "is the possibility of offsets arising in his favor," it should be first noted that true set-off is not at all involved in this situation. The obligor of a letter of credit is the issuing bank, not the buyer; the motivating reason behind the seller's insistence upon a letter of credit is a desire to obtain the bank's independent obligation—whether because of greater reliance upon the bank-obligor's solvency, a desire for payment as soon as goods are shipped, or a need for assistance in the financing of the seller's own purchases.²¹ Unlike a mere guaranty of payment, a letter of credit is a bank's independent undertaking to pay its own money—on conditions which normally require the seller only to ship the goods and present the shipping documents in order to receive cash. There can be no set-off in any letter-of-credit transaction unless it be a set-off available to the bank. Moreover, it is generally agreed that defenses of the buyer, even though arising out of the sale contract in connection with which the letter of credit was issued, do "not concern

²⁰ Some bankers who have read the report of this case have become somewhat reluctant to enter into transactions which require, for the repayment of secured loans or advances, the presentation of documents with drafts drawn by beneficiaries of credits which are not expressly assignable. This hesitancy in part arises from too literal an acceptance of the Appellate Court's comment that "If the draft and documents are presented by one other than the beneficiary, even though such person claims as assignee, he must be deemed to be the agent of the beneficiary and not the owner of the credit." It seems highly probable, however, that the court did not mean to suggest that a banker who is holding documents of title as security for a loan or advance, with all the rights of a pledgee in possession, will lose his security interest in the documents if he offers them to the issuing bank in exchange for payment to him of the amount of a draft drawn by the beneficiary of a credit which is not expressly assignable. In such a situation the banker presenting the draft might be considered the agent of the beneficiary as to any amount in excess of the amount for which he holds the documents as security; but he is certainly not the agent of the beneficiary as to the amount which is owing to him and which he is endeavoring to collect for himself. His security interest should not be defeated by an attachment order relating to property of the beneficiary. If the issuing bank refuses to pay the banker against the beneficiary's draft, drawn or endorsed to the banker, on the ground that the credit is payable only to the beneficiary, the banker would certainly seem to be entitled to have the documents returned to him. Of course, the return of his documents would not solve the problem of market risk for the banker; but as a practical matter the fact that the banker would be entitled to the return of his documents would seem to be good reason to honor the draft he is presenting, for if the draft were not honored there would be nothing to attach; whereas, if the draft were honored, the excess over and above the amount due the banker could be attached. The record on appeal of the *Eriksson* case (Vol. 8142, 1943, Supreme Court, Appellate Division) discloses by a reproduction of the bill of lading which was attached to the draft that the bill of lading showed the Refiners Export Company as shipper and the Swedish Marine Board as consignee. From this fact, one must assume that Cities Service relinquished title to and control of the gasoline to Refiners, and in demanding payment from the presenting bank was not in the position of a secured seller offering surrender of documents of title in exchange for payment of the purchase price.

²¹ See page 669 *supra*.

the bank and in no way [affect] its liability. . . . The bank [is] concerned only in the drafts and the documents accompanying them."²² *A fortiori*, claims such as the one assigned to Eriksson here, that are wholly independent of the transaction for which the letter of credit was issued, could not be expected to be available as set-offs to the issuing bank.

Moreover, the advantage which Eriksson exercised in this case was not that of set-off, even in form. It was simply the special advantage of being able to reach an asset of his debtor's—the proceeds of the credit—by legal process as soon as it became available—an advantage arising out of the buyer's peculiar knowledge of the existence of this asset. Such a special advantage to the buyer may be a legitimate consequence of the letter-of-credit device, even though it tends to achieve the same result for him as that which is otherwise foreclosed if, as I assume, a claim by the buyer against the seller is unavailable to the issuing bank as a set-off. But it ought hardly to rise to the dignity of a contracted-for interest which would justify depriving the letter of credit of the assignability usually incident to any chose in action, unless it is plainly inferable that the parties to the credit contracted against assignment just so as to protect that special advantage.

One of the strongest reasons motivating a seller's request for an irrevocable letter of credit is the desire to avoid any obstacle to payment which the buyer might raise after the goods have been put in transit. He wants the letter of credit so that he can be sure of payment, and, if necessary, to assure the bank or other party which he asks to finance his purchase of the goods he has sold that it will be paid as soon as he furnishes documentary evidence that he has shipped. The buyer ordinarily arranges the letter of credit with the intention that the seller shall have just such an unfettered assurance of payment as soon as he supplies this documentary evidence. It is improbable that the average buyer ever intends that his simple request that the bank issue a letter of credit should furnish him with any more protection than the assurance that he will receive the shipping documents specified in the credit as conditions to payment of the amount which it specifies. If proof be required, all one need do is to read the agreement which the purchaser gives to the issuing bank.²³ It may be fair enough to say that a purchaser should be able to attach the proceeds of his credit while they are still owing to his seller, conditionally or absolutely, but it is carrying the idea much too far when, in order to give a few people a chance to effect this roundabout sort of set-off, a vast number of people are prevented from obtaining bank credit by a restriction on the assignability of an instrument which is usually issued for their benefit as sellers.

Surely the average purchaser who opens a letter of credit would be surprised to learn that he had acquired a right, in case of collateral claims against his seller, to

²² See *Maurice O'Meara Co. v. National Park Bank*, 239 N. Y. 386, 395, 146 N. E. 636, 639 (1925); HERMAN N. FINKELSTEIN, *LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT*, c. VI, *passim* (1930).

²³ The fact that the buyer accepts such responsibility in his agreement with the bank is not, as has sometimes been suggested, the result of the low charge which banks make for issuing letters of credit. The buyer must accept such responsibility because a bank could not assume responsibility for the seller's acts at any price. It has no means of control and by law is not permitted to guarantee performance.

treat the credit as his seller's own even in the hands of an assignee, merely because he had remained silent as to whether the credit should be assignable or not. If the purchaser had no conscious intent to set himself up in such a strategic position, it should not be said that the rule against assignability arises to protect such an advantage; rather the advantage arises from the rule.

The word "assignable" has an altogether different meaning from that of the word "negotiable," and the mere fact that a credit has been validly assigned would not be sufficient to overcome defenses or set-offs which would be good against the assignor (seller-beneficiary). Possibly the fact that a credit contains words of express assignability might be sufficient to raise an estoppel in favor of an assignee, as against such defenses or set-offs, but this would hardly seem to square with the rule of law that defenses good against an assignor are good against his assignee. If a court had before it a "straight" credit (by the terms of which no one could become a holder in due course of drafts drawn under it) it would seem that even if it contained express words of assignability the assignee might be confronted with defenses or set-offs which are good against the assignor. Even in the case of a credit under which it is possible for third parties to acquire rights superior to those of the beneficiary, *i.e.*, a "negotiation" credit, an *assignee* (even if the credit contained express words of assignability) might not acquire such superior rights. Such rights are assured only to parties who take, not by assignment of the credit, but by negotiation in good faith of drafts drawn under it.

The rule as to non-assignability does not distinguish between straight credits and negotiation credits. Yet under a negotiation credit a bona fide purchaser of drafts and documents acquires rights superior to those enjoyed by the beneficiary. Set-offs or defenses valid against the beneficiary are impotent as against a bona fide purchaser of drafts drawn under the negotiation form. By what process, then, can one arrive at a conclusion that this rule, which does not differentiate between straight credits and negotiation credits, is based upon the purchaser's desire to preserve set-offs or defenses which would be valid against the seller-beneficiary?²⁴ The issuance of a credit in negotiation form, to which the rule is equally applicable, contemplates the creation of third-party rights free from any defenses.

The buyer is not the one who decides (ordinarily) whether the credit shall be in "straight" or "negotiation" form. That point is usually decided by the issuing bank as a matter of banking procedure, on the basis of objective reasoning as to which form of credit the seller needs. Since the straight form of credit gives the bank a measure of safety (not related to assignability)²⁵ which is absent in the case of a negotiation credit, the bank will issue a straight credit whenever it appears from the facts involved that a negotiation credit is not needed.²⁶

²⁴ See Harfield, *Secondary Uses of Commercial Credits*, 44 COL. L. REV. 899, 900 (1944).

²⁵ Relating to possible double negotiations, discussion of which is not necessary here.

²⁶ Ordinarily, a straight credit is issued when the currency in which the credit is issued is the currency of the country of the seller-beneficiary. When the credit is issued in a currency different from that of the seller-beneficiary's country, a negotiation credit is issued, on the theory that the seller should not be prevented from selling his drafts to the one who will pay the highest rate of exchange.

The fact that it is left to the bank's discretion whether the form of credit issued shall be such as to enable third parties to acquire rights against which the buyer will have no defense seems to indicate that people who arrange to have their banks issue credits are not thinking in terms of set-offs or defenses. Why, then, should there be attributed to such people an intention which does not exist? And how, then, can the reason for the rule be the result of such an intention?

It would seem, however, that any purchaser who causes a letter of credit to be issued might reasonably be deemed to expect that the law will protect him as against a person who is named as beneficiary as the result of fraud or mistake, or against a beneficiary who, although he originally had a legal right to perform the credit's conditions and receive payment, has lost such right to use the credit as the result of a breach of the contract in connection with which the credit is opened. Nevertheless, the fact that such protection should be given to the purchaser is no reason why the rule as to assignability should not be more realistically interpreted.

The common-law rule that an assignee cannot obtain rights superior to those which his assignor possesses would seem to apply just as much to credits which are expressly assignable as to those which are not. The mere fact that a letter of credit designates a person as beneficiary does not of itself bestow upon him a legal right to perform its conditions and receive the money payable under the credit. It is only evidence of an apparent right; and the existence of a legal right to perform and receive the money payable under the credit results not from the mere fact that a credit has been issued, but from other circumstances which precede or attend the issuance of the credit.²⁷ To see that this is true one need but consider the position of a person who receives a letter of credit naming him as beneficiary as the result of a mistake. Such a person surely would have no legal right to give performance of the credit's terms and receive payment; yet, from the face of the credit, he apparently has such a right. This would seem to be true in the case of any credit, whether expressly assignable or not.

Unless the circumstances which precede or attend the issuance of the credit are such as to invest the person named as beneficiary with a legal right to perform its conditions (and receive such money as is payable upon performance of its conditions), the named beneficiary has no legal right to give performance. It is doubtless true that the courts would enjoin a person named as beneficiary as the result of a mistake from using the credit; nor does it seem likely that the issuing bank would pay drafts drawn under the credit after receiving notice of such a restraining order.²⁸

²⁷ *I.e.*, the seller's right and obligation to deliver the goods for which the credit promises payment, which arise from a contract to sell or an order accepted as a result of the credit's having been issued.

²⁸ Provided, of course, that the credit is a straight credit, *i.e.*, a credit the promise of which is made only to the seller, and under which there can be no bona fide third-party holder. In the case of a negotiation credit, *i.e.*, a credit agreeing with bona fide holders that drafts drawn and negotiated in accordance with its terms will be honored, the party named as beneficiary (if he were willing to be held in contempt) could nullify the defense against payment under the credit by negotiating his draft to another bank, against which a court order premised on the buyer's right against the seller would be impotent to prevent ultimate payment.

Also, if circumstances subsequent to the issuance of the credit are such as to divest the beneficiary of the legal right to perform and receive payment, the court should restrain him from obtaining payment; *e.g.*, where a credit is issued for the purpose of paying a seller who ships under an installment contract calling for a number of monthly shipments, and one or more deliveries are so defective as to constitute a material breach, the buyer, having a legal right to treat the entire contract as broken, would seem to be entitled to a court order which would restrain the seller from obtaining further payments under the credit.

This theory might be equally applicable to credits which are expressly assignable. Therefore, possible cause for cancellation could hardly be said to give reason for the alleged rule as to non-assignability of credits which do not contain express words of assignability, unless it be that an assignee of an expressly assignable credit is an assignee *sui generis*, who can acquire, as against the purchaser who caused the credit to be issued, rights superior to those his assignor enjoyed.

Finally, if the assignee of a credit that is held to be assignable can acquire better rights than his assignor (the seller-beneficiary) enjoys, and even if ordinary claims and defenses of a buyer against his seller may be asserted by an issuing bank on the buyer's behalf, we must recognize the fact that in the great majority of cases the buyer never acquires any such claims or defenses,²⁹ so that in most cases an assignment would not in fact deprive the buyer of any actual advantage. Perhaps it would be more in keeping with reality if the rule were interpreted as follows:

The proceeds of all irrevocable credits not expressed to the contrary are assignable prior to or after performance of the conditions precedent to the actual existence of such proceeds. Performance of the terms of a credit not expressly stated as being assignable or transferable must be given only by the beneficiary or his agent. When a credit contains express words of assignability or transferability, performance may be given by the assignee or transferee, and an assignee or transferee of such a credit who takes in good faith and without notice shall be free of any defenses or set-offs which (except for this provision) would be valid as against the beneficiary or his assignee or transferee.

This would assist the seller-beneficiary to obtain the financial aid needed to pay for the goods to be shipped under the credit; it would leave the buyer who desires to preserve any right of set-off he may have free to effect, as against the assignee of a credit not expressly assignable, the same set-offs or defenses as he could successfully assert against the seller-beneficiary (assignor); and performance of the conditions of the credit would be given by the named beneficiary unless the credit were expressly assignable.

We may pause to consider, however, the question: What performance does a letter of credit which is payable against documents insure? The mere fact that a seller-beneficiary draws drafts and presents documents under a letter of credit is not conclusive evidence that the performance which the buyer is looking for (*i.e.*,

²⁹ If we look upon the letter of credit as evidence of the purchaser's desire to acquire the goods for which the credit promises payment, perhaps it would not be too far-fetched to say that the rule tends to frustrate the fulfillment of that desire in cases where the rule prevents the seller-beneficiary from obtaining the financial assistance he needs in order to buy the goods which his purchaser desires.

the shipment of the goods he intended to buy) has been given. There are any number of cases in which seller-beneficiaries have presented, and received payment against, shipping documents which purported to evidence the shipment of the merchandise which the buyer intended to receive, when in fact what was shipped was rubbish, such as ashes, rocks, or newspapers.

Bills of lading always contain words of reservation, such as "said to contain," in order to convey notice to anyone receiving them that the carrier makes no representation that the goods which the bills of lading purport to represent have actually been received. Thus, anyone who authorizes payment against bills of lading is in fact paying not for goods, but for the legal rights which he acquires by making payment to a person who obtains payment on a representation that he has shipped the goods for which payment is made. It follows that when a buyer causes his bank to issue a letter of credit under which the seller is to be permitted to receive payment upon delivery of bills of lading (or other documents) and invoices describing goods of the nature desired, he is in fact buying, in the alternative, a cause of action against the seller, or the goods which he intended to receive—depending entirely upon which the seller chooses to give him for his money. If the seller chooses to ship him drums containing water instead of glycerine, the buyer has in fact purchased nothing more than a right of action against the seller, who gets paid against invoices representing the goods as glycerine and bills of lading acknowledging receipt of drums "said to contain glycerine" but in fact containing water.

On first impulse, then, one might be inclined to say that it is not safe to issue a letter of credit payable against bills of lading to any person who is not in such financial position that a judgment could be successfully prosecuted, *i.e.*, the beneficiary should be of such financial situation as to make judgment a mere matter of execution.

But is it not true that the buyer will be sufficiently safe if the seller-beneficiary is experienced in handling the line of goods which are being purchased, and is honest? For proof that honesty and experience combined are sufficient grounds on which to base an expectation of contract performance, we need look no farther than the great number of C.I.F. transactions in which the buyer pays a seller, who may have very little financial substance, against documents. Thousands of letters of credit are issued in form payable against documents to sellers who are known to have meager assets as compared to the amount of money involved in the transaction, but whose record of past performance is unblemished.

Certainly, a right of action against a man who has little, if any, money is not worth much; in such a case the buyer must transact his business in such a way as to preclude any possible reason for a right of action to arise. If the letter of credit is in such form that no one except the person upon whose honesty the buyer is depending can give such performance as the credit requires, the buyer has an excellent chance of receiving what the credit is intended to pay for. If the credit were assignable to such an extent that performance could be delegated to another, the

seller-beneficiary might unwittingly assign it to someone who might, because he is placed in a position enabling him to do so, misuse the credit or ship trash instead of merchandise. Honesty and experience in a line of merchandise is not sufficient to prevent bad judgment as to character.

When a buyer obtains a letter of credit, he signs an agreement with the issuing bank which indemnifies the bank against any loss through misuse of the credit, and relieves the bank of any responsibility for the quality, quantity, or character of the goods which are shipped. This means one thing. The buyer is relying upon the seller-beneficiary, and unless the buyer expressly states that he wants the credit to be in assignable form the credit will be issued in such form as is considered non-assignable. In this way the buyer is given as much protection as is possible against the chance that the credit will get into unscrupulous hands. The seller-beneficiary chosen by the buyer is the only one who can give performance under it, and the buyer assumes responsibility for the acts of that particular seller.

We see here perhaps the best reason there is for the present rule of non-assignability of credits which do not contain express words of assignability. The buyer is willing to be responsible for the acts of a named seller, and he should not be placed in a position such that someone else's acts may cause him loss or trouble. But we also see here a reason why an interpretation of the rule which would prohibit a delegation of performance and yet would permit the assignment of the proceeds of the credit (subject to every defense or set-off his bank may assert on his behalf) would give the buyer all the protection he needs, and would also give the beneficiary a better chance of obtaining the financial assistance he needs in order to give such performance.

The fact that a great many beneficiaries are of very small means, and yet enjoy the confidence of buyers, suggests that their character is such that they should be entitled to bank credit whenever the risk entailed in giving such credit is consistent with sound banking principles. Toward that end (until the rule is reworded or more realistically interpreted), the following form is suggested as being a means by which letters of credit which are not expressly assignable may be used as adjunctive security:

ASSIGNMENT AND POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That I/we
of.....
County of..... and State of New York, in order to induce
the Bank, hereinafter called the Bank, to make loans or
advances, or to give, grant or extend credit in any other way or manner against or in
connection with goods and/or documents which I/we have purchased or may hereafter
purchase for the purpose of shipping or delivering under.....,
do hereby deliver to the Bank the said letter of credit, and as security for the repayment
of such loans or advances or credit granted or extended as above, do hereby assign to
the Bank all my/our right, title and interest in and to all monies which may become
payable under the said letter of credit upon presentation of drafts and/or documents as
required by the said letter of credit; and in order to enable the Bank to collect such sums

of money as may become payable under the said letter of credit upon presentation of drafts drawn in my/our name, accompanied by the documents required under the said letter of credit, do hereby appoint and constitute the Bank as my/our attorney to draw and sign drafts in my/our name, issue invoices in my/our name and to do and execute for me/us in my/our name all and any other acts, deeds and things which the Bank may in its discretion deem necessary to accomplish the collection of such sums of money as may become payable under the said letter of credit by performance of the conditions of the said letter of credit.

I/we also hereby agree to perform myself/ourselves all acts, deed and things which are required by the said letter of credit or which may be necessary to enable the Bank to collect such sums of money as may by reason of my/our performance become payable under the said letter of credit.

IN WITNESS WHEREOF, I/we have hereunto set my/our hand and seal the.....
 day of.....in the year one thousand nine hundred.....
 Sealed and delivered in the presence of(L. S.)
(L. S.)

The real benefit which an assignee derives from the assignment of a letter of credit is the ability to collect the money which will become payable under the credit. In other words, it is the money which the letter of credit represents rather than the letter of credit itself which makes the assignment of the credit attractive to the assignee. The alleged rule as to assignability, however, refers to the letter of credit itself and not to the money which will become payable on performance of its terms. Therefore, the rule will not be violated by a present assignment of the benefits which will accrue to the beneficiary when the credit's requirements have been satisfied. "This assignment must be sharply distinguished from an attempted assignment of the credit itself. It avoids the impediments to such assignment by transferring only the benefits, and not the duties."³⁰ It is an assignment of something over which (after performance is given and provided no defense or set-off interferes) no party to the transaction except the seller-beneficiary would have any right of dominion. It is an assignment of a conditional right to money which will be the seller-beneficiary's own as soon as he performs according to the credit's terms, and it therefore would appear that the beneficiary has an assignable, present right, subject to the performance of the conditions of the credit.³¹

Admittedly, the mere act of assignment is not sufficient to give the assignee perfect protection; for under the New York view on successive assignments (that he who assigns something has divested himself of it and therefore cannot make a valid subsequent assignment of the same thing) a prior assignment would make a subsequent assignment invalid. Honesty—or shall we say the existence of circumstances which would tend to make a man act in a way we consider honest—would therefore be the indispensable ingredient for protection to the assignee in the transaction.

³⁰ See Harfield, *Secondary Uses of Commercial Credits*, 44 COL. L. REV. 899, 908 (1944). But I do not intend to suggest by this that the assignment of an expressly assignable credit transfers the duties which rest on the original beneficiary by reason of the dealings which gave rise to the letter of credit.

³¹ See McCurdy, *Commercial Letters of Credit*, 35 HARV. L. REV. 715, 740 (1922).

Given the expectation of honest action by the beneficiary, what risks does reliance upon such an assignment entail? The risk which seems most apparent to those contemplating such action is the risk of non-performance by the assignor; but, borrowing an expression which seems perfect to describe the situation, the problem is "tactical rather than strategic."³² Our problem, bear in mind, is to accomplish an effective assignment of monies which will become payable only upon performance of the requirements of a credit which is itself not expressly assignable. We are not concerned herein with a solution of the practical problems of shipping and documentation which are implicit in practically every situation where one credit is assigned as security for the issuance of another credit or a loan of money. Our sole concern is to find a way to use the existence of a credit which is not expressly assignable to the same extent to which we might use it if the credit itself were expressly assignable.

Assuming, then, that the transaction itself would be attractive if the credit were expressly assignable, and realizing that performance by the beneficiary is necessary to the successful conclusion of a transaction based upon an assignment of the proceeds of such performance, I suggest that such a conclusion is possible through the use of an instrument similar to the one outlined above.

By the use of such an instrument in a transaction where, by reason of a proper contractual relationship, there is no power in the buyer to defeat the beneficiary's right to use the letter of credit, it would seem that the banker would overcome the problem of non-performance since he acquires a right to perform in the beneficiary's name.³³

Even if the original beneficiary should die before the transaction is concluded, it would seem that the assignee's power would survive the beneficiary's death, because it is coupled with an interest—a security interest which would seem strong enough to insure such survival. "If a power be coupled with an 'interest' it survives the person giving it and may be executed after his death."³⁴

It will be noticed that the assignment is given as security for credit or money to be used to pay for goods purchased or to be purchased by the original seller-beneficiary. Although I do not suggest that a purchase by the beneficiary is such a duty as would not be transferable, nevertheless the suggested form of assignment

³² See Harfield, *supra* note 30, at 913.

³³ Such an instrument, with slight modification, would also furnish a means of avoiding a problem which might arise under an expressly assignable credit from threatened or actual non-performance by the beneficiary-assignor of such acts as would be required to place the assignee in possession of the documents required under the credit. Without the power to perform such acts as the agent of the assignor, the banker-assignee would have to rely upon the implications of his relationship with the assignor if the assignor should die or fail to perform such acts for any other reason. The question of the banker-assignee's liability to the buyer might also be clarified if such acts as the banker performed were expressly agreed upon as to be done as agent for the assignor. If, after assigning a credit and getting the banker-assignee to advance money or credit to pay for goods, the assignor should refuse to go forward with the transaction so as to enable the assignee to obtain the documents required as a condition precedent to payment under the assigned credit, the banker-assignee, if he used such an instrument, would have express authority to proceed, and his authority would be irrevocable because it is coupled with an interest.

³⁴ *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174, 203 (U. S. 1823).

reflects the fact that the only action of the beneficiary which might be regarded as being of such a personal nature has been, or will be, performed personally by the beneficiary. If the beneficiary fails to make the purchase, no money will be paid out; thus the banker has no risk in leaving this matter to the beneficiary. The buyer also has no complaint; if he contemplated the beneficiary's personal action in making the purchase he will not be frustrated by such an assignment as this.

After the purchase has been made by the beneficiary, the tasks which the banker (as agent of the beneficiary) has the power to perform in the name of the beneficiary are such ordinary day-to-day matters that they would hardly suggest themselves as being of a personal nature, and are such that the beneficiary could reasonably be expected to delegate their supervision to others anyway: *e.g.*, arranging shipment from mill or other location to the seaboard, reserving ocean freight, and obtaining bills of lading. Even the drawing of drafts and the making up of invoices is usually done by people who are employed by the beneficiary and not by the beneficiary himself, who not infrequently has an employee sign the drafts for him.

There seems to be nothing antagonistic to the interests of the buyer when the seller-beneficiary empowers a banker to do such things. It might even be said that having a banker in the picture would tend to insure a satisfactory result for the buyer, since the banker at the outset has given the strongest indication of his belief in the value of the goods by putting up his own money to pay for them, after which he is bound to perform meticulously the terms of the credit in order to get his money out. It seems to be without dispute that a banker's knowledge of letter-of-credit procedure would promote the presentation of documents which would conform not only to the express requirements of the credit, but to the many requirements of custom and practice, not all of which could be expressly stated in any letter of credit.

From the buyer's point of view, then, he gets what he wanted—goods appropriated to the sale by the personal action of the beneficiary, the beneficiary's implied warranty of the goods, and the documents which have been obtained under conditions such that the beneficiary remains liable to the buyer.

From the seller's (beneficiary's) standpoint, he gets the financial help he needs to handle the business, plus the business judgment of the banker, who ordinarily can be relied upon to make credit inquiries as to the reputation and experience of the people from whom the beneficiary is buying the goods to be shipped, thus protecting the beneficiary against loss, claims as to quality, etc. In addition he gets what would appear to be a facility of inestimable value in the case of an individual; for if the beneficiary becomes ill, or dies, the banker is clothed with all the necessary power to bring the transaction to its intended conclusion by giving, on behalf of the beneficiary, the performance required under the credit—which might otherwise expire before the beneficiary or his estate could perform, if illness or death delayed performance.

For the banker, the arrangement has the attraction of enabling him to assist the seller to acquire the goods for which the credit promises payment, and to earn a commission in a transaction in which the avoidable risks are reduced to a minimum. His security will not be affected by the death or illness of the beneficiary, nor even by an unwillingness of the beneficiary to perform. His power to give performance under the credit is irrevocable.

As to third-party creditors of the seller-beneficiary (assignor), there is nothing antagonistic to their interests in such an assignment. If anything, an assignment of this nature would be beneficial to the assignor's creditors. The conditions under which the assignee would collect the money assigned to him would be conditions under which the assignor would make a profit on the transaction, and thereby become better able to settle with his creditors.

By assigning his right to receive money payable only after the performance of conditions precedent—which would not be performed but for the financial assistance to be rendered by the assignee as a result of the assignment—the assignor is not divesting himself of anything which would go toward the settlement of his debts in the absence of such an assignment. To the extent of the assignor's profit, there becomes available to his creditors a new asset which would not have come into existence if the assignment had not been made.

But even if the conditions precedent to payment under the credit could have been performed without the assignee's financial assistance, the amount of money which the assignee can collect for himself under the assignment will not exceed the amount of new money which he advances as the result of the assignment.