

An assignment is a transfer, but a transfer is not necessarily an assignment. If the transfer is less than absolute, it is not an assignment; the obligee must have intended, at the time of the transfer, to dispossess himself of an identified interest, or some part thereof, and to vest indefeasible title in the transferee. The appointment of an agent or the grant of a power of attorney cannot qualify as an assignment, since both are revocable, and the latter expires at the grantor's death. A mere communication to the holder of the fund (the obligor), containing no words of present assignment and merely authorizing and directing him to pay to a third party, may properly bear the interpretation that it is a mere power of attorney to the obligor himself, empowering him to effectuate a transfer by his own subsequent act. With this interpretation, the communication to the obligor is not an assignment; and, like most other powers of attorney, it is revocable by its creator and it is terminated by its creator's death. *Kelly Health Care, Inc. v. Prudential Ins. Co.*, 226 Va. 376, 309 S.E.2d 305 (1983).

It is true that if a debt is extinguished, the mortgage is also discharged because the incident cannot survive the principal. See *Mortgages and Deeds of Trust*, § 166.

The intention of the assignor is the controlling consideration. The intent to transfer a present ownership of the subject matter of the assignment to the assignee must be manifested by some word, written or oral, or by some act inconsistent with

the assignor's remaining as owner. This has sometimes been called a "present appropriation." **The assignor must not retain any control over the fund or property assigned, any authority to collect or any form of revocation.** *Kelly Health Care, Inc. v. Prudential Ins. Co.*, 226 Va. 376, 309 S.E.2d 305 (1983).

Where a deed of trust authorizes the trustee to sell the property upon the request of the beneficiary or creditor therein secured, **such request is a condition precedent to the trustee's right to sell**, and in the absence of such request the sale may be set aside in a court of equity. *Wills v. Chesapeake Western R. Co.*, 178 Va. 314, 16 S.E.2d 649 (1941).

A person not in possession of an instrument is entitled to enforce the instrument if the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, **the loss of possession was not the result of a transfer by the person** or a lawful seizure, **and** the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. ***A person seeking enforcement of an instrument as described above must prove the terms of the instrument and the person's right to enforce the instrument.***

If that proof is made, the statute controlling proof of signatures and status as holder in due course applies to the case as if the person seeking enforcement had

produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means. Generally. § 8.3A-309, Code of Virginia (1950); see § 8.3A-308, Code of Virginia (1950).

“...under the law as it existed before enactment of the Uniform Commercial Code, the presumption was that destruction by the holder of a negotiable instrument was done intentionally to cancel the instrument. The burden of proof was on the party alleging that the apparent cancellation was made unintentionally or under mistake, or without authority. *Jones' Adm'rs v. Coleman*, 121 Va. 86, 88-89, 92 S.E. 910, 911 (1917). As the Uniform Commercial Code is silent on the burden of proof, preexisting law governs and the burden presumably remains on the person suing on a negotiable instrument to rebut the presumption arising from the destruction of the original.” *SWEENEY v. FIRST VIRGINIA BANK*, 224 Va. 579, 584 (1983)