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ASSIGNMENT OF CONTRACT RIGHTS

This subject has been much discussed under the heading "alienability of choses in action." In continuing the discussion our first step should be to abandon altogether the term "chose in action." Its linguistic construction is faulty, in that its individual words lead one to think of something very different from that which the expression as a whole now denotes. There is no "chose" or *thing* or *res*. There is a right (or claim) against some person. In this article we shall speak in terms of rights (or claims) and not about "choses."

It is even more important that we should cease to use such a phrase as "assignment of *contract*." Whatever definition we choose for the word "contract," it is not possible to construct accurate rules by the use of such a phrase. If a contract is defined as consisting of the facts operating to create a binding obligation—offer, acceptance, consideration, etc.—these facts are merely a part of recorded history and surely cannot be assigned. It is meaningless to speak of assigning a past event. If a contract is defined as a promise enforceable at law, we are merely placing emphasis upon one of the operative facts and indicating that it is in fact operative. A promise is merely a past event and cannot properly be said to be assignable by the promisee; much less can a promise be assigned by the promisor who made it, and it would be equally erroneous to say that either party to a bilateral contract can assign *both* promises. If contract is defined as de-

noting the legal relations of the parties created by agreement or promise, it is again erroneous to say that the "contract" can or cannot be assigned. Some of the legal relations can be assigned and some cannot. The legal relations created by any particular contract must be analyzed and the assignability of each one must be considered separately.

The legal relations created by a contract are in various combinations; they can always be analyzed, however, into rights, powers, privileges, and immunities, each havings its necessary correlative. The present article will not consider the assignability of powers, privileges or immunities. They may in some cases be assignable. In the law of agency is to be found the old maxim *"delegatus delegare non potest,"* indicating that the power of an agent is not assignable. We know, however, that this maxim does not tell the whole story.[1] The most important of the legal relations created by contract is the relation of right and duty. The problem of assignment in connection with this relation is the subject of the present article; and it is restricted to rights and duties that are created by contract.

Definition

To say that one person has a "right" against another means that he has the aid of organized society in controlling the conduct of that other person in some respect. Exactly the same idea is expressed when we say that that other person is under a legal duty to the first. The one who has the right is in the superior or more advantageous position; the duty bearer is in the inferior or less advantageous position. A contract may create in the one person rights to more than one performance; also, it may create rights in each of the contracting parties against the other.

Let us determine first what is meant by the assignment of a right. A simple illustration will be of service.

Let us suppose that A has a right that B shall pay him $100. It is established law that A has power to assign this right to C.

[1] In Barber Agency Co. v. Co-op. Barrel Co., 133 Minn. 207, 158 N. W. 38 (1916), it is said: "It is the universal rule that an agent cannot transfer to another *powers* calling for the exercise of discretion, skill, or judgment."

It is also established law that the assignment is operative without the consent of B. After the assignment B is under the same duty as before; that is, he must still pay $100 at the time and place specified. The correlative *right,* however, is no longer in A; it is in C. The social assistance formerly at A's command is now available to C and is not available to A.

If the foregoing is correct, an assignment of an existing right is an act of the possessor of that right which operates to extinguish the right of the assignor and to create an exactly similar right in the assignee. This definition is in terms of legal operation—of the effect of the assignor's act upon the action of organized society. It is not a descriptive definition enabling us to recognize an act of assignment when we see one.

Such a definition as the foregoing renders some service, but it is not sufficient standing alone. In order to predict legal operation we must be able to recognize the facts that will bring it about. This is true even though the courts do not start in the beginning with completed descriptive definitions of facts and definite rules of law determining the legal operation of those facts. Perfect definition and fixed rule are the final goal toward which the courts are striving; they are a goal which, as Judge Cardozo tells us, is never actually reached.[2] In every decision of a case the court may assume a definition and assert a rule; but the facts and decision of that very case add to the inductive basis used by the next court in remaking the definition and correcting the rule.

The law does not start with definitions and general rules already crystallized and put into definite words. Instead, some events occur; A acts and B complains thereof to a court. The court must determine what society will do about it; this is a deter-

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[2] *The Nature of the Judicial Process* (1921), *passim;* especially at p. 166: "I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of birth and the pangs of death, in which principles that have served their day expire, and new principles are born."

mination of the legal operation of the particular events by judicially operating because of them. No second series of events is exactly like the first; and even if it were, it could not be predicted with certainty that a second court, or even the same court, would react to the events in the same fashion. In the course of time there are many series of events with many adjudications thereon. By using the multitude of records a jurist or legal scholar can make rules and definitions. He classifies the judicial and executive reactions of society (the legal operation) and the facts that caused these reactions. By careful analysis he can determine the legal operation that certain facts will produce and can specify the facts that will produce the operation. Thus be creates stated rules of societal action and defines facts with reference to that action. His chief if not only interest is to determine what the legal operation will be, what society will do about it. He is not writing a general natural history or preparing a descriptive "movie" of the world. If his work is well done, however, he will discover the essentials in similar series of events, and will describe in photographic fashion the facts that produce a certain legal effect.

How, then, shall we *describe* an assignment? Shall the term be used to include all the facts necessary to produce the legal effect stated in the foregoing definition (the substitution of right in the assignee in place of the assignor), or shall it be restricted to some one or a few of those facts? This depends solely on usage and convenience; but it is no easy task to determine what "usage" is or what "convenience" requires. A statement of the rules of law will require a full and accurate enumeration of the facts that produce any juristic result, and each fact so enumerated must be identified and described. An attempt at a descriptive definition follows.

As assignment is an expression of intention by the assignor that his right shall pass to the assignee.[3]

This definition, without going into any fine analysis of act or intent, dedicates the term "assignment" to a certain bit of conduct

[3] For this form of definition the writer is indebted to Professor Samuel Williston.

by the assignor, the objective expression of an intention to substitute a new right-holder. It might be criticised because it tells us absolutely nothing about the legal operation of this expression of the assignor, since courts and lawyers are interested in facts only with respect to their legal operation (excluding for the present "evidential" facts). But it is not convenient to include in the definition all the facts necessary to produce the substitution of a new right-holder, because more than one combination of facts will produce that result. "The law" cannot be compressed into a definition. It is convenient to pick out the central fact common to all such combinations, describe it as in the definition above, and then to proceed to state what other facts in combination with this one will produce the substitution mentioned.

In order that an expression of an intention by an assignor may be operative to substitute a right in the assignee, there must be an existing right that can be assigned, and the expression of intention by the assignor must be in a mode that has been adjudicated to be effective. Several modes have been held effective; but we cannot say with assurance that other modes will not be so held. An assignment is operative if the assignor's expression is accompanied by a consideration paid; if it consists of the delivery, along with words of gift, of a "document of title" (a document executed by the debtor acknowledging his duty and describing the performance due); or if the assignor's intention is expressed by a written and delivered documentary assignment (sealed or unsealed). There is a strong tendency for the courts to give legal operation to any oral expression of present intent to assign. An exact determination of the facts that will be recognized as operative will not be undertaken in the present article; but a distinction between an assignment and a promise to assign will be briefly noted.

Promises to Make an Assignment

If the holder of a contract right makes a promise for a sufficient consideration to assign it to another, what is the legal operation of the transaction? Beyond question such a promise is a valid contract if there is no legal impediment to the assignment

of such a right as that involved. There would be a legally enforceable duty to the promisee to perform in accordance with the promise as in the case of any other contract.[4] But how does such a promise to assign affect the legal relations of the obligor (the debtor) to the assignor and the assignee? It is quite impossible to answer this question in one general statement, because the term "promise to assign" has several distinct meanings.

In some cases the "promise to assign" has been held to be itself a completed assignment, extinguishing the right of the assignor against the debtor and creating a similar right in the promisee. In such cases the "promise to assign" is self-executing and makes the "promisee" in fact an assignee. Such a holding is quite correct if the words and conduct accompanying the "promise to assign" express an intention to convey the right immediately. That the assignor's words are in promissory form is not conclusive to the contrary. It is clear that such an intention may exist and may be expressed, even though the parties contemplate the subsequent execution of a documentary assignment. In such case the document is to be a mere memorial of an already operative transaction and is not itself to be the operative assignment.[5]

On the other hand a promise that the promisor will on his own behalf collect the money due him and thereafter pay that specific money over to the promisee is not an assignment.[6] The

[4] Hughes v. Burwell, 113 Va. 598, 75 S. E. 230 (1912).

[5] Where for a valuable consideration a promise was made to assign certain insurance policies, it has been held that a subsequent formal assignment of the policies was not in fraud of creditors or an illegal preference, since the assignee's right really dated from the time of the promise: In re Grandy, 146 Fed. 318 (1906), (formal assignment delayed because insurance company required certain forms); Wilder v. Watts, 138 Fed. 426 (1905), (here the promise was to insure certain property and to assign the policy so obtained). See also McDonald v. Daskam, 116 Fed. 276 (1902); *In re* Dier, 296 Fed. 816 (1924), (here a delivery of stock certificates was not an illegal preference, because in consideration of a loan the borrower had promised to incorporate and to assign the stock to the lender).

[6] Carey v. Chase, 197 Iowa 1239, 175 N. W. 60 (1919), (promise by a surety that whatever she might get from a certain company she would apply in payment of that company's debt to the plaintiff); Stock Growers Bank v. Milisich, 233 Pac. 41 (Nev. 1925), (promise to a lender to repay out of a third person's notes held by the promisor); Patterson v. Bank, 236 S. W. 130 (Tex., 1922), (promise to pay a debt with proceeds of sale of crops); Hobbs v. McLean, 117 U. S. 567 (1885), (a promise to pay out of moneys to be received on a contract with the United States is not within the federal statutory regulation of assignments).

promisor's right against the debtor is not thereby extinguished, nor is a right against the debtor created in the promisee. Such a promise is a promise to collect and to pay out of the proceeds. Words of present assignment, however, are not made inoperative as a present assignment by the fact that the assignor at the same time promises to collect the money due as an agent of the assignee and to pay it over to him.[7]

For an effective assignment it is necessary that the right assigned shall be clearly identified.[8] A promise to assign book accounts as security is not operative as a present assignment if the accounts are not clearly indicated and the terms of the assignment are left to future agreement or if the parties understand that the promisor is to be privileged to collect the accounts and use the money in his own affairs.[9] In such a case there is great probability that the agreement is too uncertain in subject matter or terms to be regarded even as a valid contract between the promisor and the promisee.

Assignee Not an Agent or Attorney

It was once believed that a right could not be assigned. A "right" was conceived of as a sort of nebulous, ethereal, *personal* relation.[10] In the *nature* of things it could not be assigned. This

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A promise to pay an attorney compensation out of the proceeds of the litigation is not an assignment, because it creates only a right in the attorney against the client and does not create a right in the attorney against the party who is being sued: Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690 (1902); Trist v. Child, 21 Wall. 441 (U. S., 1874).

[7] Cogan v. Conover Mfg. Co., 69 N. J. Eq. 809, 64 Atl. 973 (1906).

[8] Thus, a promise by a mortgagor to keep the property insured for the benefit of the mortgagee is not an assignment, even though the mortgagor should thereafter cause a policy to be executed in his own name. There was no promise to assign some designated and identified right. Stearns v. Quincy Ins. Co., 124 Mass. 61 (1878).

[9] *In re* Stiger, 202 Fed. 791 (1913), 209 Fed. 148.

[10] The rule that a "chose in action" was not assignable "is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation." Pollock, Contracts (Williston's ed., 1906) 278.

"A personal relation in the very nature of things cannot be assigned . . . where one has a mere right against another, there is nothing that is capable of transfer." Ames, *The Inalienability of Choses in Action*, in Lectures on Legal History, 210. Dean Ames seems to have been subconsciously defining "assignment" as a physical tradition of some sort of subject matter. As defined herein, its operation is to extinguish and to create, just as in the case of any conveyance of property in land or chattels. A contract right is no

supposed difficulty is entirely eliminated by a closer analysis of the concepts expressed by "right" and "relation." Just as in the science of physics, such an analysis shows that the ethereal nebula has substance perceivable by the senses.

In the simple illustration given above, A had a right that B should pay him $100. This is now analyzed to mean nothing more than that the agents of organized society will assist A in inducing or compelling B to pay over certain money. There are various modes in which this societal assistance is given. It is this great fact of societal assistance that constitutes the legal "relation" of "right" and "duty." While jurists were for some centuries saying that a right could not be assigned, they were as judges going steadily on transferring their societal assistance from the assignor to the assignee. In order to make this court action appear to be consistent with their theory that a right cannot be assigned, the jurists said that the "right" was still in the assignor, but that he had given to the assignee a power of attorney to enforce it *for him.* A having assigned to C his right that B should pay $100, when asked whether thereafter C had a right against B the jurists said "no"; but when asked whether A could control the suit against B or could give B a valid discharge they also said "no";[11] and when asked whether C could control the suit and could give a valid discharge they said "yes"; and when asked by the executing sheriff to whom he should pay the money collected, they said "pay it to C."

In invoking judicial or executive compulsion against B, is C (the assignee) acting as the agent or attorney for A?[12] Assuredly not. Such an idea never enters the head of either A or C, and for centuries not a word expressing an intention to make C the agent of A has been required or used in assignment. An

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different in this respect from a land right or a horse right. See Professor Walter W. Cook, *The Alienability of Choses in Action,* 29 HARV. L. REV. 816 (1915).

[11] Welch v. Mandeville, 1 Wheat. 233 (U. S., 1816); Legh v. Legh, 1 Bos. & P. 447 (1799).

[12] This was the particular fiction accepted in early times; and it has persisted to a considerable extent even to the present time. The view here stated is presented with careful analysis by Professor Cook, *loc. cit.,* note 10.

agent is one who is acting in his principal's behalf; C is acting solely for his own interest. Because of the interest of the principal that is being served, an agent is said to occupy a fiduciary relation and to owe duties to the principal connoted by the word "fiduciary." After an unconditional assignment to C, A has no further interest to be served, A's jural relations are not intended to be affected by C's action, and C owes no fiduciary duties to A.

In some jurisdictions it may still be proper for C to bring suit in A's name; but this in no way affects what is stated above.[13] If there are still cases where it is *necessary* for C to sue in A's name, this is a mere empty formality, as it long was in the former courts of common law.

It is no longer even "proper" to sue in the name of A in states where by statute the suit must be in the name of "the real party in interest." On proof that the right has been assigned, the suit will be dismissed unless it is shown that A is suing as the agent and attorney of the assignee C and that C is the real plaintiff.[14] So far from the assignee being the agent of the assignor, it now appears that the assignor can sue only as the agent of the assignee. If the "assignee" merely holds a power of attorney or is an assignee for collection and remission of proceeds to the assignor, he is not the "real party in interest" in whose name the suit must, under many statutes, be brought.[15]

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[13] It appears that in Connecticut the assignee may still sue in the assignor's name and thereby prevent the defendant from counterclaiming in the same action on a separate claim which he has against the assignee, the real plaintiff. Lowndes v. City Bank, 79 Conn. 693, 166 Atl. 514 (1907). It should be observed that this is not a holding that the assignee is a mere agent enforcing the right of the assignor. Its effect is that it gives to the assignee an additional advantage, one that in other States he would not have and one to which the common notions of justice would not entitle him.

[14] Parker v. Simon, 231 N. Y. 503, 133 N. E. 503 (1921); Whiting v. Glass, 217 N. Y. 333, 111 N. E. 1082 (1916); Looney v. Dist. of Col., 113 U. S. 258 (1885).

[15] Spencer v. Standard Corp., 237 N. Y. 479, 144 N. E. 479 (1924); Crum v. Stanley, 55 Neb. 351, 75 N. W. 85 (1898).

An assignee is not an agent or attorney; conversely, a mere agent or attorney is not an assignee. If it is clearly expressed that the agent is to collect and is *by such collection* to effect an assignment, there is no assignment before the act of collection. See Farmers' L. & T. Co. v. Winthrop, 238 N. Y. 477, 144 N. E. 686 (1924).

Assignment of Duties

Before proceeding to determine what rights are assignable and what are not assignable, the easier problem of the assignment of duties will be disposed of. This disposal consists of the flat statement that no duty can ever be effectively assigned, if we adhere to our description of an assignment as a unilateral expression of the assignor. Applying that definition to duties instead of rights, we have: An assignment is an expression of intention by the assignor that his duty shall immediately pass to the assignee. Many a debtor wishes that by such an expression he could get rid of his debts. Any debtor can express such an intention, but it is not operative to produce such a hoped-for result. It does not cause society to relax its compulsion against him and direct it toward the assignee as his substitute. In spite of such an "assignment," the debtor's duty remains absolutely unchanged. The performance required by a duty can often be delegated; but by such a delegation the duty itself is not escaped.[16]

Suppose the following cases: 1. A is under contract with B to deliver for compensation a ton of coal to B's house. A employs C to deliver it for him. By so doing A is not a repudiator of his contract; but he is still bound by the contractual duty. If C delivers the coal, A has a right to payment of the compensation by B. If C does not deliver the coal, B has a right to damages against A for breach of duty. C's failure to deliver the coal may also give to both A and B a right to damages against C. This depends on whether C made a valid contract with A; if he did, A can sue for its breach,[17] and nearly everywhere B can sue C as an obligee-beneficiary of his contract with A.

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[16] "It has been uniformly held that a man cannot assign his liabilities under a contract, but one who is bound so as to bear an unescapable liability may delegate the performance of his obligation to another, if the liability be of such a nature that its performance by another will be substantially the same thing as performance by the promisor himself. In such circumstances the performance of the third party is the act of the promisor, who remains liable under the contract and answerable in damages if the performance be not in strict fulfillment of the contract." Crane Ice Cream Co. v. Terminal Freezing Co., 128 Atl. 280, 283 (Md. 1925). In the foregoing, "liability" means *legal duty*.

[17] Explosive Chemical Co. v. Gray & Co., 207 N. Y. Supp. 638, 124 Misc. 333 (1925).

2. A is under contract with B to play the part of Hamlet in B's theater. In B's absence, A employs C to play Hamlet and C actually does so. In this case A has no right to the agreed compensation; and instead B has a right to damages from A for breach of contract. No more than in the first case could A escape his duty by such an arrangement with C; but in addition, A could not perform vicariously as he could and did do in the first case.

A duty can never be escaped by assignment or delegation; but any duty can be extinguished by performance. Some duties require a performance by a specific person; others do not. In the coal case, the performance required was the delivery of coal at B's house, and it made no difference whether by team or by truck or by whom driven. In the Hamlet case, the performance required was the physical acting of A, involving the co-ordination of A's trained body and brain. Whether or not a contractual duty requires personal performance by a specific individual can be determined only by interpreting the words used in the light of experience. In many cases there will be ample room for a difference of opinion. But whether the performance required is a personal performance or not, the legal duty is not escaped by an assignment or delegation of performance.[18]

It is easy to put striking cases where the performance required is not solely the personal action of the contractor. A contracts with B that C will not expose a trade secret or that D will play Hamlet. Here A can neither escape his duty by assignment, delegate performance to a new person, nor satisfy his duty by performing himself. The contract puts neither C nor D under any duty whatever; but the duty of A can be satisfied only by the silence of C and the acting of D.

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[18] "This ordinarily is all the books mean when they state the proposition in general terms—that a contract imposing liability cannot be assigned; that the assignment of such a contract does not, as a rule, relieve the assignor from responsibility." Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. C. 368, 61 S. E. 185 (1908).

"What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of an obligation on to a substituted contractor, any more than when it is special and personal; but that in the first case the assignor may rely on the act of another as performance by himself, whereas in the second case he cannot." Tolhurst v. Associated Mfrs., [1902] 2 K. B. 660, 669.

If it is impossible for A to assign his duty, how can he get rid of it? Only by some one of the recognized methods by which a contractual duty is discharged. Most of these require the assent of the obligee, the party having the right correlative to the duty to be discharged. One of these methods is called "novation," by which, with the obligee's assent, a substitution of debtors is effected. This is not assignment.

What Rights Are Assignable

It is almost safe to say that all contract rights are assignable —almost but not quite. We are far removed from the notion that all rights are strictly personal and therefore not assignable; but it is still often said that some rights are so personal in character as to be non-assignable. It is believed that this latter limitation on assignability has no more foundation than the earlier and more general one.

Let us consider a few specific cases. 1. A contracts with B to act as B's valet. Surely, it will be said, B's right is so personal that it cannot be assigned. But no, the contrary is believed to be correct although no decision pro or con has been seen by the writer. By this statement it is not meant to say that the character of the service can in any way be changed by assignment. The right of B is that A shall act as B's valet, not that A shall act as valet for whom it may concern. Anyone ought to know that serving as valet to a cross, ill, miserly, old curmudgeon is not the same performance as serving a healthy, happy-go-lucky, generous, young prince. Therefore, when B assigns his right against A, he must assign it as it is. He cannot by assignment to C create in C a right that A shall act as C's valet. That would be a different right to a different performance. But B can assign to C the right that A shall serve as *B's* valet; and if A shall commit a breach it will be C who gets the damages measured by the value of the promised service.[19]

[19] This, of course, is on the assumption that B made it clear by his words of assignment that he was no longer to be regarded as the possessor of a right against A, either to performance or to damages—that a true assignment by substitution of a new beneficial right-holder was intended.

2. Suppose that A contracts with B to supply all the coal that B may need in a business that B is then conducting or all the coal that B may need in his household use. Just as in the case of the valet, B's right is assignable;[20] but B cannot by assignment to C create in C a right that A shall supply all the coal that C may need in his business or his household. This is true even though at the time of the attempted assignment B sells his business or his house to C and C continues therein. The needs of a business or a house run by C are not identical with those of the same business or house run by B. B's power of assignment, therefore, is limited to the creation in C of the very same right that B possessed, namely, the right that B's needs shall be supplied.

Of course, it is possible for A to contract with B so as to give B a right that A shall valet any person or shall supply a certain house with coal without regard to its occupant. This right, like the previous ones, can be assigned, the performance after assignment remaining exactly the same as before assignment.[21]

To show that the decision in the foregoing cases is not fanciful let us consider two more cases. 3. C wishes that his son B shall have a valet, but not that B shall have a legal right. C therefore contracts with A that A shall serve B as valet, and also that the primary legal right and the secondary right to the value of the services shall be in C alone. No one would doubt that this is a valid contract, that C has a right that A shall serve B as valet, or that C has a right to the value of the services in case of breach by A. This is exactly the result produced in case 1. No sufficient reason appears why they cannot produce this result by assignment as well as by direct contract. No doubt it may be some disadvantage to A to owe a duty to severe, hard-hearted, old Mr. C instead of to young, easy-going B; but it is no more so in this

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[20] Here again, it is assumed that B means the damages to go with the primary right.

[21] Thus where the defendant contracted with X and his "successors or assigns" to supply his premises "222 Main St. all electric service for lighting, fans and heating required by the consumer," it was held that the defendant was bound to supply the promised service to the plaintiff, an assignee occupying the premises. Leader Co. v. Little Rock R. & E. Co., 120 Ark. 221, 179 S. W. 358 (1915). There was a similar holding in Tolhurst v. Associated Port. Cem. Mfrs., [1903] A. C. 414.

kind of a case than in any other assignment. The social service rendered by the assignability of rights so far overweighs the disadvantage to the debtor incidental to a change in creditors that the latter is disregarded. In no case however, is the actual service required of A changed by the assignment.

4. C wishes that his son B shall have an ample supply of coal, but that B shall have no legal right. C therefore contracts with A that A shall supply B's business or B's household with coal, the primary right to delivery and the secondary right to the value of the coal in case of breach to be in C alone. This creates in C exactly the same right that was produced by the assignment in case 2. Further, C's right that A shall supply B with coal is assignable by C. On C's death his right would pass to his personal representative. This in itself shows that there is nothing in the nature of a right that A shall serve or supply B to make it non-assignable.[22]

In almost all cases where a "contract" is said to be non-assignable because it is "personal," what is meant is not that the contractor's *right* is not assignable but that the performance required by his duty is a personal performance and that an attempt to perform by a substituted person would not discharge the contractor's duty. In this sense the statement is correct if a proper interpretation of the agreement shows that the performance by a particular person is required.

A second possible correct meaning is that personal performance by the contractor is a condition precedent to his right to performance by the other party, and an assignee of that right will

[22] It should be observed that the contracts between C and A in cases 3 and 4 might have been of a very different sort. They might have been made so that B would be a donee-beneficiary in each case. If so made, in nearly all jurisdictions there would be created in B both a primary right to performance and (in case of breach) a secondary right to damages. No doubt such a right as C (the promisee) gets in this case could be assigned; but this is not the right that was assigned in cases 1 and 2. No doubt, also, the right of B (the donee-beneficiary) could be assigned; but B was not a donee-beneficiary in any of the four cases put—such was not in fact the contract made. In cases 3 and 4, the services and the coal were sold to C and not to B; on performance of the service or delivery of the coal A could maintain an action of debt against C for the price, and on breach by A the sole right to damages would be in C. The point made is that however unusual a result may be reached by an assignment, exactly the same result may be reached by a direct contract. That the result is an unusual one is irrelevant in either case.

fail in case of non-fulfilment of this condition. In this case, as in the preceding one, performance cannot be delegated.[23] If it should be meant that the assignee of the right would fail even though the contracting assignor himself performs as originally agreed, thus fulfilling the condition precedent, the statement is entirely erroneous.

A third possible correct meaning is that in a bilateral contract the contractor has no power to assign both his right and his duty. Thus it has been said: "When rights arising out of a contract are coupled with obligations to be performed by the contractor and involve such a relation of personal confidence that it must have been intended that the rights should be exercised[24] and the obligations performed by him alone, the contract, includ-

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[23] In the following cases the performance due was held to be personal and not delegable to another person in such manner that his performance would either discharge the assignor's duty or fulfil a condition precedent to the assignor's right to compensation; Wooster v. Crane, 73 N. J. Eq. 22, 166 Atl. 1093 (1907), (services as printer and publisher); Foster v. Callaghan & Co., 248 Fed. 944 (1918), (same); Linn Co. Abstract Co. v. Beechley, 124 Iowa 146, 99 N. W. 702 (1904), (services as abstractor of titles); Corson v. Lewis, 77 Neb. 446, 109 N. W. 735 (1906), (services as attorney at law); N. Y. Bank Note Co. v. Hamilton Bank Note Co., 180 N. Y. 280, 73 N. E. 48 (1905), (services as selling agent); Paige v. Faure, 229 N. Y. 114, 129 N. E. (1920), (same); Barber Agency Co. v. Co-op. Barrel Co., 133 Minn. 207, 158 N. W. 38 (1916), (same); New England Cabinet Works v. Morris, 226 Mass. 246, 115 N. E. 315 (1917), (services in designing and installing druggists' fixtures); Deaton v. Lawson, 40 Wash. 486, 82 Pac. 879 (1905), (services as physician); Thomas-Bonner Co. v. Hooven, 284 Fed. 386 (1922), (sales agency contract); Beard v. Beard, 254 S. W. 430, 200 Ky. 4 (1923), (services in giving support and a home for a mother with her son).

In the following cases the performance due was held not to be personal; the performance by the substitute to whom the assignor delegated it was held to discharge the duty of the assignor and to fulfil the condition precedent to the right assigned to the assignee: Atlantic & N. C. R. Co. v. Atlantic Co., 147 N. C. 368, 61 S. E. 185 (1908), (delivery of cordwood); Browne & Co. v. Sharkey Co., 58 Or. 480, 115 Pa. 156 (1911), (printing advertising booklets); Galey v. Mellon, 172 Pa. 443, 133 Atl. 560 (1896), (drilling oil wells); Overby v. Mona Trust, 240 S. W. 581 (Tex., 1922), (same); Devlin v. Mayor, etc., of N. Y., 63 N. Y. 8, 23 N. Y. Supp. 891 (1875), (cleaning city streets).

[24] In its proper sense, a "right" is a claim to certain conduct *by another person,* enforced by society. It is evident that, in this sense, the possessor of a right never "exercises" it. It is always the other party, the one owing the correlative duty, who is to perform or "exercise." The form of language used shows that the court was thinking of performance by the contractor who assigns, and hardly at all of that contractor's right to performance by another.

ing both his rights and his obligations cannot be assigned." [25] As has been seen previously, a legal duty cannot be escaped by assignment; and, as has just been said, a truly personal performance cannot be delegated.

It is sometimes said that where the contract makes it the duty of one party thereto to render a personal service, special trust and confidence being reposed in him, a valid assignment is impossible "as long as such contract is executory on the part of the party in whom such trust and confidence is reposed." [26] While this is correct if the assignment is meant to include both duties and rights, it is not correct if it is meant to say that a right cannot be assigned as long as a duty of the assignor, requiring his personal performance remains executory. The assignor's right is assignable in spite of the personal character of the performance he is still under a duty to render; but if it is a right that was conditional upon some personal performance by the assignor, it remains so conditional after the assignee gets the right by assignment.[27] Thus, a school teacher can assign his wages to be-

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[25] Delaware Co. v. Diebold Safe & Lock Co., 133 U. S. 473, 488 (1890). This was quoted in Burck v. Taylor, 152 U. S. 634 (1893), by Brewer, *J.*, who added: "the contractor could never have transferred an interest in it to the plaintiff so as to vest in him a right to take part in the work or a subsequent right to recover from the State on completion of the work." The words "right to take part" show that Brewer also was thinking of the performance due from the contractor who was the assignor, and meant that performance by a substituted party would not have fulfilled a condition precedent to the right to payment. Judge Jackson, in a dissenting opinion, distinguishes more clearly between performance of duty and the enforcement of right against another when he says: "There is a class of cases where the services to be rendered are of such a personal character that they cannot be assigned; but where is the authority that holds that where a firm is a contractor to do certain work a member of the firm cannot assign or transfer his share of the profits to arise therefrom?" The case is no doubt well decided for the reason that the defendant, a second assignee, had fully performed the building contract under a novation made with the State.

[26] PAGE, CONTRACTS, (2d ed.), §2248.

[27] American Lith. Co. v. Ziegler, 216 Mass. 287, 103 N. E. 909 (1914). In Montgomery v. DePicot, 153 Calif. 509, 96 Pac. 305 (1908), the vendee of land on credit tendered his own notes secured by the agreed mortgage (and at the trial the notes of the assignor also) and got a decree for specific performance against the vendor. In American Bonding & T. Co. v. Baltimore & Ohio R. Co., 124 Fed. 866 (1903), the court said: "There is nothing in the existence of such counter obligation to prevent an assignment by the creditor of his right after he has performed that obligation, and thus perfected his right, or, even before, if no attempt is made to shift the duty of performing it from himself to the assignee."

come due under an existing contract even though his services are still to be rendered; but the assignee's right will be exactly the same as the assignor's, conditional upon proper performance of the work by the teacher in person.

Of course, even in cases where the required performance is not "personal," the non-personal performance that is required may be a condition precedent to the right to payment contracted for in return. In such cases the right is assignable before fulfillment of the condition precedent; and the fact that fulfillment of this condition is delegated to the assignee of the right to payment does not in any way affect the validity of the assignment.[28] Thus, where the duty to pay for coal is conditional on certain instalment deliveries being made, the making of these deliveries is a condition precedent to the seller's right to payment by the buyer; but the making of these deliveries is in no sense a personal performance. A tender of delivery by an assignee of the seller's right would fulfill the condition precedent and the assignee could then enforce the right against the buyer.

An attempt by the assignor to assign both his right and his

It has been supposed that the right was too personal to be assigned in American Smelting & R. Co. v. Belden Min. Co., 127 U. S. 379 (1888). The trouble was, however, that the assignor not only assigned his right to delivery of ore, but also became unready to perform his purely personal duty of crushing, sampling, and assaying the ore so as to determine the amount to be paid. His right to delivery (and therefore the right of the assignee also) was conditional upon his continued readiness to perform in person. Had he fulfilled this condition, the assignee should have won the suit. The right to delivery was not non-assignable.

[28] "In principle it would not impair the rights of the assignee, or destroy the assignable quality of the contract or claim, that the assignee, as between himself and the assignor, has assumed some duty in performing the conditions precedent to a perfected cause of action, or is made the agent or substitute of the assignor in the performance of the contract. If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only with due regard to the intent of the parties, and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not the mere agent or servant, will not operate as a rescission of, or constitute a cause for terminating the contract. Whether the agent for performing the contract acts under a naked power, or a power coupled with an interest, cannot affect the character or vary the effect of the delegation of power by the original contractor. Hackley, the original contractor, was at no time discharged from his obligations to the city, nor was he disqualified for the performance of the contract, but was at all times in a position to perform his part of this agreement." Devlin v. Mayor, etc., of N. Y. 63 N. Y. 8, 23 N. Y. Supp. 891 (1875).

duty under a bilateral contract will sometimes be interpreted as a repudiation of his duty, particularly where the performance required by the duty is personal to the assignor and not possible of delegation. This will prevent any enforcement of the right by the assignee thereof,[29] unless the right is wholly independent of the duty and not conditional upon performance or readiness to perform.

A contract right is hardly ever made non-assignable by the fact that it is conditional [30] or is for some other reason not enforceable until a future date. A right to money not yet due can be assigned. A right to the payment of money to become due on condition of services yet to be rendered [31] and on condition that the obligee does not drink intoxicants is an assignable right. The right of the assignee is, of course, subject to the same conditions as was the right of the assignor.

The power of assignment may exist before all of the facts necessary to the enforceability of the right exist, as appears in the preceding paragraph; but at least some of the operative facts must exist. If A, expecting that he will thereafter make a loan to B, assigns to C his right to repayment, C gets no right against B at the time of the assignment because A had none to assign. The same is true even though B had asked for such a loan. There

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[29] See Crane Ice Cream Co. v. Terminal Freezing Co., 128 Atl. 280, 285 (Md., 1925); American Smelting & R. Co. v. Belden Min. Co., *supra;* ANSON, CONTRACTS (Corbin's ed. 1924), § 303, n. 2.

Where a party has obtained a rescission of his duties under a bilateral contract, his rights dependent upon the fulfilment of such duties will normally be rescinded also by implication. In such case, by a separate assignment of the rights the assignee gets nothing. Tarr v. Veasey, 125 Md. 199, 93 Atl. 428 (1915).

[30] The only exception to the general rule seems to be in the case of a right created by an aleatory contract where the promisor's duty of performing is conditional upon an uncertain event and the assignment to a new party might considerably increase the probability of the happening of this event. For this reason the right of an insured under a policy of fire insurance has been held not assignable. VANCE, INSURANCE, 50. In such a case, an assignment of the right cannot be made without changing materially the conditions and extent of the correlative duty.

[31] It has been held that such an assignment remains effective even though the assignor is discharged in bankruptcy after the assignment but before the wages are earned. Citizens Loan Assn. v. Boston & M. R. R., 196 Mass. 528, 82 N. E. 696 (1907); Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564 (1904). *Contra:* Leitch v. Northern Pac. R., 95 Minn. 35, 103 N. W. 704 (1905); Hupp v. Union Pac. R., 99 Neb. 654, 157 N. W. 343 (1916).

must at least be a contract at the time of the assignment; acceptance as well as offer must have taken place.

On the other hand, if the right against B that A purported to assign to C afterwards comes into existence, the assignment has been held in a number of cases to transfer the right at once to C.[82] There seems to be nothing in the interests of A and B—the assignor and the debtor—to prevent such a result; but in giving effect to such an assignment the interests of A's creditors should be protected. Assignments in advance of the creation of the right assigned may easily be used in fraud of creditors.

Thus far, with the exception mentioned in note 30, we have discovered no contract right that is not assignable. There are a few cases, however where the welfare of the public is believed to be involved and where the substitution of a new obligee by assignment is against the public interest. There are some statutes forbidding assignment; and other assignments have been held invalid by the courts on some supposed principle of public policy. Thus, a right to a Federal pension has been made non-assignable; and the right of a public officer to future salary not yet due has been held non-assignable.[83]

Prohibition of Assignment.

The parties to a contract may themselves agree that a right created thereby shall not be assignable. It may be regarded as doubtful whether a mere oral agreement to this effect would invalidate a subsequent assignment to an assignee who had no notice of the agreement. But a provision of this sort in a written contract may properly be regarded as notice to any assignee of a right based on that contract. There are many cases where such a prohibition in writing has been held operative to prevent any power to assign and where the assignee failed in his action to enforce the right. Thus where an employee's time pay check was

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[82] Field v. Mayor of N. Y., 6 N. Y. 179 (1852); Tailby v. Official Receiver, 13 App. Cas. 523 (1888).

[83] Stewart v. Sample, 168 Ala. 270, 53 So. 182 (1910); Anderson v. Branstrom, 173 Mich. 157, 139 N. W. 40 (1912); Roesch v. Worthen Co., 95 Ark. 482, 130 S. W. 551 (1910).

on its face made payable only to the named payee and declared non-transferable, and where on the detached stub of such pay check the employee had signed an agreement that he would present the check in person and would not transfer it, it was held that an assignee got no enforceable right.[34] The like has been held in several cases where trading stamps have been marked on their face "not transferable." [35] This has been assumed to be the rule as a matter of course in many cases.[36]

In one case, however, the United States Supreme Court has said that a prohibition against assignment contained in a written contract was ineffective, likening the contract right to personal chattels.[37] There has been a strong tendency to hold that goods and chattels cannot be made inalienable. According to expressions used by the Supreme Court, not only are already existing contract rights not inalienable; they cannot even be made inalienable *ab initio* by the party who is their original creator.

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[34] Barringer v. Bes Line Const. Co., 23 Okla. 131, 99 Pac. 775 (1909). In accord: Joint School Dist. v. Marathon Bank, 204 N. W. 471 (Wis., 1925); Bonds-Foster L. Co. v. No. Pac. R. Co., 53 Wash. 302, 101 Pac. 877 (1909); State v. Kent, 98 Mo. App. 281, 71 S. W. 1066 (1902); Tabler & Co. v. Sheffield Coal Co., 79 Ala. 377 (1885). *Contra:* Aldridge L. Co. v. Graves, 131 S. W. 846 (1910); Bewick Lumber Co. v. Hall, 94 Ga. 539, 21 S. E. 154 (1894), relying on a statute declaring that choses in action shall be assignable. But Oklahoma had a similar statute, and the court rightly said that it was only for the purpose of nullifying the old common law rule against assignment, not for the purpose of invalidating express agreements that the contract right shall not be assignable.

[35] Sperry & Hutchinson Co. v. Siegel, Cooper & Co., 225 Ill. App. 540 (1922); holding that the assignee got no *primary* right by delivery with intent to assign, and also that such delivery did not assign the *secondary* right to damages for anticipatory breach in absence of evidence to show intent to do this. In accord: Sperry & Hutchinson Co. v. Weber & Co., 161 Fed. 219 (1908). *Cf.* Same v. Fenster, 219 Fed. 755 (1915), saying: "The right to redeem the stamps is a property right transferable by possession while the license to use them for advertising purposes is not transferable." The provision against assignment is not discussed.

[36] See discussion in the excellent case of American Bonding & T. Co. v. Baltimore & Ohio R. Co., 124 Fed. 866 (1903).

[37] Portuguese Bank v. Welles, 242 U. S. 7 (1916). The supposed policy on which this statement was based cannot be said to have been demonstrated. See Comment, 26 YALE L. J., 304 (1917). It should be observed that in this case the obligor did not object to the assignment, but paid the money into court. If he is willing to abandon his immunity, the assignee may well get the money as against other claimants. The prohibition was not for their protection. To the same effect is Fortunato v. Patten, 147 N. Y. 277, 52 N. Y. Supp. 872 (1895).

There are some cases that definitely hold a prohibition against assignment of a right to be invalid.[38]

Express provisions against assignment are usually found in bilateral contracts and are in some such general words as "this contract shall not be assignable." In the pay check and trading stamp cases this was not the case, for there the contracts were unilateral and the prohibition was clearly directed against the holder of the right alone. Such a general prohibition in a bilateral contract is much more likely to be directed against attempts to delegate performance of a duty by the promisor rather than against assignment of a right by the promisee. For such a limited purpose they should always be held valid; but they should not be interpreted to forbid assignment of contract rights.[39]

Assignment Does Not Affect Performance.

The performance, whether action or forbearance, that an obligor is under a duty to render cannot be changed in any material way by assignment of the right by the obligee. It must be admitted that it is some disadvantage to a debtor that his creditor

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[38] The Iowa Code, §9452, provides: "When by the terms of an instrument its assignment is prohibited, an assignment thereof shall nevertheless be valid."

A provision in a policy of fire insurance that it shall not be assigned *before loss* is valid, because the risk is not the same with a new owner. But a provision that the policy shall be void if assigned *after loss* is not valid, since the risk is not affected by such an assignment. Spare v. Home Mut. Ins. Co., 17 Fed. 568 (1883); Pennebaker v. Tomlinson, 1 Tenn. Ch. 598 (1874), (*semble*); Nease v. Insurance Co., 32 W. Va. 283, 9 S. E. 233 (1889), (*semble*); May, Insurance (3d ed.) §386. Where a bank issued a pass book expressly subject to all rules and regulations that might be posted thereafter in the banking room, and later the bank posted a rule that money was payable only to *the depositor in person*, this rule was held void as against an assignee of the entire deposit. Bank of U. S. v. Public Bank, 151 N. Y. Supp. 94 (1915).

[39] In Lockerby v. Amon, 64 Wash. 24, 116 Pac. 463 (1911), a contract for the sale of land provided that "no assignment of this agreement shall be valid without the consent of Amon." It was vigorously argued that this was inserted in order to secure payment and that on tender of payment in full by the assignee Amon must convey to him; but the court held otherwise. In accord is Omaha v. Standard Oil Co., 55 Neb. 337, 75 N. W. 859 (1898). In a note, 35 L. R. A. (N. S.) 1064, it is said that the great weight of authority is against this decision. See Cheney v. Bilby, 74 Fed. 52 (1896); Wagner v. Cheney, 16 Neb. 202, 20 N. W. 222 (1884); Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14 (1898). In Butler v. San Francisco Gas & E. Co., 168 Calif. 32, the court said: "The contract expressly provided that no assignment of it should be made by Butler (the building contractor) nor any portion of the work sublet by him." The court held that this prohibition went only to the performance of the work and did not apply to the right to payment.

has power to substitute a new creditor without the debtor's consent. It would be a much greater disadvantage, without any particular gain to the community, to give the creditor power to change the performance due from the debtor. We have seen above that if B has a right that A shall serve as his valet, he cannot by assignment make it A's duty to serve C as valet; also that if B has a right that A shall supply his needs for coal he cannot make it A's duty to supply the needs of C.[40] In like manner, if A owes B a debt of $100 payable at the First National Bank on May 1, B can assign his right to the Second National Bank; but he cannot make it A's duty to pay at the Second Bank or on any other day than May 1. If A sells his stock of hardware, business, and good will to B and promises to forbear from competition for five years, B can assign his right along with the business to C; but he cannot by such assignment make it A's duty to forbear to solicit hardware business in any greater territory than the business covered previously, even though C's business may be more widely extended.

In certain classes of cases and to a very limited extent, it seems that the actual performance by the obligor can be changed by an assignment. Thus, if no particular place is specified for the payment of a debt, the debtor must search for his creditor and pay him in person. If the creditor should assign his right, it seems that the debtor must now seek the assignee in order to make payment. This might require the assignee to pay at a much more distant place. There is an equal possibility, however, that it is the original obligee and not the assignee who goes to the distant place; and in such case the assignment would save trouble. As business is now conducted, it is not difficult to pay at a distant

[40] Crane Ice Cream Co. v. Terminal Freezing Co., 128 Atl. 280 (Md., 1925), (one having a right to all the ice he may use in his business for three years cannot create in an assignee a right to all the ice such assignee may use in its business); Frankfort & C. R. Co. v. Jackson, 153 Ky. 534, 156 S. W. 103 (1913); Kemp v. Baerselman, [1906] 2 K. B. 604, (B agreed to supply K with "all fresh eggs that he shall require for manufacturing purposes for one year); Lansden v. McCarthy, 45 Mo. 106 (1869), ("all fresh beef . . . that might be ordered or required by B. & K. for the use and consumption of said hotel"); Tifton, etc., R. Co. v. Bedgood, 116 Ga. 945, 43 S. E. 257 (1903), (R. R. contracted to haul all lumber cut by H. & S.). *Cf.* Leader Co. v. Little Rock R. & E. Co., 120 Ark. 221, 179 S. W. 358 (1915); Tolhurst v. Associated Port. Cem. Mfrs., [1903] A. C. 414.

place through the banks or other established agencies. The possible added burden put upon the debtor by the assignment is seldom great, and thus far it has been disregarded by the courts in the interest of the business community.

Wherever the promised performance consists partly in the creation of new legal relations in the obligee—as in the case of a sale of goods—it may be said that the assignment causes the performance to differ in that these legal relations must now be created in a different party. This difference is immaterial to the debtor.[40a]

In cases where the performance of the obligor is not changed in any way by the assignment, it may reasonably be said that the right of the assignee is the *same* right as that previously held by the assignor; but to the extent that the right can be and is slightly changed by assignment, the assignee's right must be said to be a *new* right *pro tanto,* similar in all other ways to that previously held by the assignor.

Defenses and "Equities"

The great difference between instruments ordinarily described as "negotiable" and contracts not so described is that the holder of a negotiable instrument frequently has power to create a right in a transferee when he has none himself. No such power exists in any case of assignment as distinguished from negotiation. An assignee never gets a better right than the assignor had. If for any reason the assignor's claim was void, voidable, unenforceable, or conditional, so also is the claim of the assignee.[41] If the debtor had any defense, counterclaim, or set-off

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[40a] Usually it can be made the duty of the obligor to deliver goods into the possession of an assignee; not so, however, where the delivery to the assignor was to enable him to render a purely personal performance for the benefit of the obligor and delivery into the hands of an assignee would make this impossible. American Smelting & R. Co. v. Belden Min. Co., *supra,* n. 27.

[41] Thus, if the assignor's claim was based on an informal promise without sufficient consideration, the assignee has no right. If the assignor's claim was voidable for fraud or infancy, so also is the assignee's. If A has promised B $1000, payable after the completion of specified work by B in person and only after A's ship comes in, the right of any assignee from B will be conditional on the completion of the work by B and on the arrival of A's ship.

If the defects in the assignor's right were removable (*e. g.,* by a ratification), they remain so removable after assignment.

good against the assignor, it is good also against the assignee, provided it existed before notice of the assignment is received by the debtor.[42] If a first assignee assigns to a second assignee, any defense that the debtor had against the first assignor is good against both the first and second assignees; and any additional defense, counterclaim, or set-off that the debtor had against the first assignee while he was in possession of the claim, or after the second assignment but before notice thereof by the debtor, is good against the second assignee.[43] Such is the case even though the assignee in question, or any previous assignee, is a purchaser for value without notice. A debtor cannot by assignment be put in a worse position in any respect, except so far as this may result from being indebted to a new and more pressing creditor.

A difference must be taken, however, with respect to so-called "latent equities." These are claims of third persons, persons other than the debtor. The rule followed by the majority of courts is that the "latent equity" of a third person does not survive an assignment to an innocent purchaser for value.[44] Thus if the assignor is a mere trustee for X, but he holds a document that reasonably leads the assignee to believe that the assignor is unlimited owner and to pay value to him for the assignment, the claims of X are inferior to those of the assignee. Again, if a

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[42] WILLISTON, CONTRACTS, §433.

[43] The point was well argued in Metzgar v. Metzgar, 1 Rawle 227 (Pa., 1829). Counsel said: "Notice puts an end to all privity between the assignor and obligor, and the assignee becomes the owner of the bond, subject to any existing equity against the obligee. After notice of the assignment, a new contract arises between the obligor and the assignee, who holds a chose in action no more negotiable than it was in the hands of the obligee. If he transfers it, he does so liable to all the equity arising from the contract between him and the obligor. If this be not the case, the effect of an assignment would be to make the instrument negotiable." The court agreed, Gibson, *C. J.*, saying: "At the time of the assignment, the right of defalcation (set-off) existed in full force between the obligor and the intermediate assignee. By what right, then, can the latter put a subsequent assignee in a more advantageous situation than he held himself? In this state, no assignee, whether legal or equitable, can affect to be prejudiced by want of notice; it being his duty, as established by many decisions, to sound the obligor before he parts with his money, as to the amount actually due." In accord is Martin v. Richardson, 68 N. C. 255 (1873). (A owed B on bond. B assigned to C, who at that time already owed A on another bond. Later C assigned back to B, who had no notice of C's debt to A. Held, A has a set-off against B.)

[44] Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 7, 8 (1886).

creditor, the holder of a right, is induced by the fraud of X to assign the right to X, and X thereafter assigns to an innocent purchaser for value, the latter is not affected by the "equities" of the defrauded creditor—the first assignor.[45] The *debtor* is not the possessor of these "equities." He would have no sure defense even as against X, the defrauder; although if he has knowledge of the fraud he would be well advised to interplead X and the defrauded creditor. In such an interpleader the latter could win as against X, but not (by the majority rule) as against the innocent second assignee. This is the rule in the case of other kinds of property, and there seems to be no sufficient reason for applying a different rule in the case of contract rights. They, too, are "property." The reasons for protecting an innocent purchaser for value are the same in both classes of cases and uniformity is desirable.

Successive Assignments By the Same Assignor

Where the holder of a right makes two successive assignments thereof to two different persons, there has been much conflict in the solution of the problems involved. Some of this conflict cannot be explained away. Thus, the English rule is that the right against the debtor belongs to that assignee who first gives notice to the debtor of his assignment.[46] Most of the American jurisdictions refuse to follow this rule,[47] and hold that the right is in the first assignee except in two classes of cases, as follows:

1. The right belongs to the second assignee if the prior assignment was itself inoperative for any reason and no such reason

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[45] Putnam v. Clark, 29 N. J. Eq 412 (1878), (bond and mortgage); Eversole v. Maull, 50 Md. 95 (1878); Ambrose v. Evans, 66 Calif. 74, 4 Pac. 960 (1884), (certificate of stock). *Contra:* Cutts v. Guild, 57 N. Y. 229 (1874), (judgment debt); Blackman v. Lehman, 63 Ala. 547 (1879), (bonds assigned by bailee); Commercial Bank v. Burch, 40 Ill. App. 505 (1890); Sutherland v. Reeve, 41 Ill. App. 295 (1890), 151 Ill. 384, 38 N. E. 130 (1894). Some of the cases *contra* can doubtless be reconciled on the ground that the assignor did not have the indicia of ownership.

[46] Dearle v. Hall, 3 Russ. 1 (1823); Foster v. Cockerell, 3 Cl. & F. 456, (H. L., 1835); Adamson v. Paonessa, 180 Calif. 157, 179 Pac. 880 (1919).

[47] Salem Trust Co. v. Mfrs. Finance Co., 264 U. S. 182 (1924), discussed in 33 Yale L. J. 767 (1924); Muir v. Schenck, 3 Hill, 228 (N. Y., 1842).

exists as to the second. This is self-explanatory. An example is a case in which the first assignment was a mere oral expression of gift and the second was for value.

2. The prior assignee's right will be extinguished and the duty of the obligor will be to the subsequent assignee in case the latter pays value without knowledge of the prior assignment and in reasonable reliance on a document evidencing the existence of the right in the assignor and negligently left in the assignor's possession by the prior assignee.[48]

An innocent assignee for value should be protected against a prior assignee who made it possible for the assignor to perpetrate a fraud. If the prior assignee knew or ought to have known of the existence of a document evidencing the existence of the right in the assignor and that its possession would enable the assignor to induce a reasonably prudent person to pay value for another assignment, the law compels the prior assignee to bear the loss (unless he can collect from the defrauder), and confers the right upon the subsequent innocent assignee for value. The document may be either a negotiable or a non-negotiable instrument. It may be a formal bond, a certificate of stock, a savings bank book, or an insurance policy. The only limitation upon its character is that it must be a document that is so customarily surrendered upon payment or assignment that the inference of non-payment and non-assignment may reasonably be drawn from its continued possession by the assignor.

For the second assignee to be preferred, there must be an element of "estoppel" in the broad general use of that word. Merely obtaining possession of such a document with actual knowledge of an earlier assignment or without paying value in reliance on it will not make the second assignment superior to the first. It is believed that it is no longer sound to prefer the sec-

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[48] Herman v. Conn. Mut. L. Ins. Co., 218 Mass. 181, 105 N. E. 450 (1914); Bridge v. same, 152 Mass. 343, 25 N. E. 612 (1890); Maybin v. Kirby, 4 Rich. Eq. 105 (S. C., 1851). The second assignee may also be preferred if he made inquiry of the debtor and was induced to become a purchaser for value by the fact that the debtor had received no notice of a prior assignment. See Salem Trust Co. v. Mfrs. Finance Co., *supra*.

ond assignee on the basis of the ancient distinction between "equiable" and "legal" title.[49]

It has also been said that the second assignee is in all jurisdictions preferred over the first if he is an innocent purchaser for value and gets payment, gets a judgment, or enters into a novation with the debtor.[50] In these cases, however, whatever right the second assignee has is a very different right from the one that the creditor purported to assign to him. His rights are either "property" rights[51] or "judgment" rights or "novation" rights, determined solely by the new transaction and not by the assignment. The assignment to him gave him the power to discharge the debtor, as long as the debtor had no notice of the first assignment and no longer.[52] This power to discharge is not restricted to the three methods above named. A sealed release, an accord and satisfaction, a judgment on the merits in favor of the debtor, and an award of an arbitrator would all operate to discharge the debtor.[53] By a sealed release or by a judgment or award in favor of the debtor, the second assignee would get no rights whatever. By the other methods he would get the rights appropriate to the method, but not the right of an assignee—the same right in substance against the debtor that the assignor had.

It should be observed that this power to discharge the debtor is not dependent upon the second assignee's being innocent. It is exactly the same power that the guilty creditor had prior to notice to the debtor. It depends upon the debtor's lack of notice of the first assignment and upon the fact that the debtor is justified in believing that the second assignment is a valid one. If, however, the second assignee is not an innocent purchaser for value, he will have to account to the first assignee for whatever he gets out of the new transaction whereby the debtor is dis-

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[49] See 33 YALE L. J. 768 (1923), n. 15. There is no *res* or "fund" to which "title" can exist.

[50] AMES, CASES ON TRUSTS, 328 n.

[51] He may keep the money paid to him in good faith by the debtor. Rabinowitz v. People's Bank, 235 Mass. 102, 126 N. E. 425 (1920).

[52] WILLISTON, CONTRACTS, §433.

[53] Two of these, of course, are not the exercise of a "power" by the assignee; nor, indeed, is a judgment in *favor* of the assignee.

charged. Indeed in some instances the second assignee may be liable in damages to the first as for a tort. In this respect, if he had knowledge of the first assignment, he is in the same position as the guilty creditor would be in if he should discharge the debtor after having assigned to an assignee.

If the debtor has notice of the first assignment, the second assignee has no power of discharge, however innocent he may be. A debtor with notice must fight all other claimants at his peril, using a bill of interpleader when necessary. A voluntary payment to the second assignee would not affect the right of the prior assignee; nor would a judgment obtained by the second assignee or a new contract in the form of a novation. Yet the second assignee would have the same "property," "judgment," or "novation" rights against the debtor that he would have had if his assignment had itself been effective. These rights are not the rights of an assignee.

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