

WAGE ASSIGNMENTS IN PENNSYLVANIA—THE NEED FOR JUDICIAL AND LEGISLATIVE CLARIFICATION

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Problems created by wage assignments are far from new, as legal problems go; but developments of recent years have greatly increased their importance. Employers, particularly those operating businesses of any size, are being called upon to make wage deductions—to become in effect collecting agents for a great variety of purposes: union dues, contributions to employee welfare associations, hospital insurance, purchase of necessities on the employees' accounts, payment of personal loans made to employees, purchase of war bonds, and others that might be mentioned. These deductions are frequently authorized by arrangements which are in form or substance partial wage assignments executed by the interested employees. The employer may favor or oppose the particular project involved or he may be a disinterested stakeholder, but, whatever his attitude, he is vitally concerned with the new legal obligations which may be imposed upon him. If a number of employees execute a series of partial wage assignments, must the employer assume the accounting and administrative burden of splitting wage payments between the assigning employees and the assignees, or is he free to disregard the assignments and make full payment to the employees without risk of incurring legal liability to the assignees?¹ In these days of labor shortage, additional office burdens may not be lightly undertaken. Or if after an assignment has been executed the employee notifies the employer that the arrangement is revoked, what course should the employer follow in the event that the assignment purports to be irrevocable? May he safely make payment to either assignor or assignee? These are simple situations; the law should supply equally simple answers, but unfortunately it does not—at least in Pennsylvania.

Doubt as to the legal effect of a partial wage assignment in Pennsylvania seems to be due in no small measure to the lack of any generally available and comprehensive survey of the decisions in this jurisdiction. The present collection and analysis of the cases is offered in the hope that it will fill this need and make some contribution to the future clarification of the law.

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1. Of course, the partial assignee is also interested. What security does he receive when he takes what purports to be an irrevocable wage assignment?

I

The earliest reported Pennsylvania decision on the legal effect of a partial wage assignment was rendered in 1856 by a well-known Philadelphia jurist, Judge Hare,² then sitting in the Philadelphia District Court. But the opinion in *Fairgrievies v. Lehigh Navigation Company*³ is also of particular interest because the views there forcefully expressed have not, in the intervening years, been authoritatively appraised. In fact, a review of subsequent cases will disclose doubt as to the present standing of the *Fairgrievies* decision. It is appropriate, therefore, to begin this study with a consideration of Judge Hare's views.

Fairgrievies, an employee of the Lehigh Navigation Company, was indebted to Mrs. Erwin for rent. He executed an agreement that his landlady should receive fifteen dollars per month out of his pay from the company until the debt for rent was paid. There was no doubt that this purported to be a partial assignment of Fairgrievies' wages, and the company was notified accordingly. Thereafter the company paid Fairgrievies his wages in full and Mrs. Erwin brought an action of assumpsit against the company in the name of Fairgrievies to her own use. Procedurally, this was simply an attempt to adapt to the needs of a partial assignee the "to use" form of action which for some time had been generally employed by total assignees.⁴ The court held that pay-

2. John Innes Clark Hare (1816-1905); elected in 1851 to the District Court of Philadelphia, of which he became President Judge in 1867; transferred to President Judge of the Court of Common Pleas No. 2 in 1875, which position he retained until 1896; Professor of Institutes of Law in the Law School (then the Department of Law) of the University of Pennsylvania, 1868-88, Emeritus Professor of Constitutional Law, 1888-1905; Vice-Provost and Provost of the Law Academy of Philadelphia, 1862-1905; author of *CONTRACTS* (1887) and *AMERICAN CONSTITUTIONAL LAW* (2 vols. 1889). "His principal decisions are preserved in the *Legal Intelligencer* and the *Philadelphia Reports*. These Reports of a local County Court are not always accessible to lawyers in other parts of the state, while outside of the state they are to be found only in the larger law libraries. Nevertheless, Judge Hare's opinions rise so far above the ordinary level even of opinions of courts of last resort, that it is perhaps no exaggeration to say that his name is better known to the more learned portion of the profession than that of any other judge who has never held a position on an appellate court. Not long ago a member of the Bar of Philadelphia was addressing the Supreme Court of the United States. In the course of his argument he referred to one of Judge Hare's opinions, making some slight apology for bringing to the notice of the Court the opinion of a nisi prius tribunal. The Chief Justice said: 'We are familiar with many of the opinions of Judge Hare and no apology is necessary for bringing to our notice any decision of his bearing on the question under discussion.'" Lewis, *John Innes Clark Hare* (1906) 54 AM. L. REG. 711, 712.

3. 2 Phila. 182 (Pa. 1856).

4. It is familiar learning that assignments were first given effect in equity. By the end of the eighteenth century the courts of law adopted the doctrines of equity regarding total assignments and allowed the assignee to sue in the name of the assignor. 2 WILLISTON, *CONTRACTS* (rev. ed. 1936) § 410; Note, *Partial Assignments* (1927) 13 CORN. L. Q. 129, reprinted in *SELECTED READINGS ON CONTRACTS* (1931) 860. Early Pennsylvania decisions indicate that when an action was brought in the name of the total assignor to the use of the assignee, the assignor had no interest in or control over such action. *M'Cullum v. Cox*, 1 Dallas 139 (Pa. 1785); *Steele v. Phoenix Ins. Co.*, 3 Binney 306 (Pa. 1811).

ment to the assigning employee, even after notice of the assignment, was a defense to the company and gave judgment for the defendant. Referring to the instrument executed by Fairgrievies, Judge Hare said:

“The question is, whether this instrument operated as an equitable assignment and precluded the defendants from paying Fairgrievies, after receiving a notice to the contrary from Mrs. Erwin. We are clearly of opinion that it did not; first, because of the partial nature of the assignment; and next, on account of the nature of the interest assigned.”⁵

The judge's first reason for his conclusion—“the partial nature of the assignment”—was the now familiar point that a creditor may not be permitted to split an entire cause of action without the debtor's consent, for to do so would increase the debtor's burdens beyond those of the original contract by requiring the debtor to assume the risk of separate suits and the task of making separate settlements with the assignor and assignee.⁶ The opinion is very clear and specific to the effect that the decision deals only with “the rights of the debtor” and it is not denied “that the assignment of part of a debt may be binding, as between those who are parties to it, and may entitle the assignee to bring suit in the name of the assignor against a defaulting debtor, because such a course merely calls upon the latter to pay the debt, without making him responsible for the appropriation of the money after it is paid.”⁷ This statement indicates that if the Lehigh Company had not paid Fairgrievies, it could be held liable in some form of action by Mrs. Erwin which would not have required it to divide the wages between the assignor and assignee. What this form of action would be is not stated.⁸

5. 2 Phila. 182 (Pa. 1856).

6. For his authority, Judge Hare relied upon the leading cases of *Mandeville v. Welch*, 5 Wheat. 277 (U. S. 1820) and *Gibson v. Cooke*, 20 Pick. 15 (Mass. 1838) as holding “that a partial assignment of a debt will not bind the debtor either in equity or at law, nor deprive him of the right to pay the whole to the assignor, after notice that part has been transferred to the assignee.” 2 Phila. 182, 183 (Pa. 1856). *Mandeville v. Welch*, chiefly relied upon by Judge Hare and cited in many of the subsequent Pennsylvania cases, caused some confusion in the early cases of many jurisdictions because of failure to limit it to actions at law. However, even before the *Fairgrievies* decision, Justice Story, who wrote the opinion, had so limited it. 2 STORY, EQUITY JURISPRUDENCE (3d ed. 1843) §§ 1043-4. *Gibson v. Cooke*, miscited by Judge Hare as “*Gibson v. Clark*,” was also subsequently so limited by the Massachusetts Court. *James v. City of Newton*, 142 Mass. 366, 8 N. E. 122 (1886). Cf. *Gilman v. Raymond*, 235 Mass. 284, 127 N. E. 794 (1920) following *Gibson v. Cooke* in an action at law. The rule was not changed by the adoption of the real-party-in-interest statutes. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 442.

7. 2 Phila. 182, 184 (Pa. 1856).

8. Since Judge Hare referred to a “suit in the name of the assignor against a defaulting debtor,” he apparently had in mind an action at law, rather than a proceeding in equity. Did he mean that the debtor would pay the full amount of the debt into court for distribution to the assignor and assignee? But how would recovery by the partial assignee in such an action be reconciled with the statement that a partial assignment did not bind the debtor either at law or in equity? See the discussion of Dia-

Let us now turn to the second reason for giving judgment in favor of the defendant. Were the partial assignment aspect of the case "less clear than it would seem to be," the opinion reads, "there would still remain a formidable objection to the title of the assignee, growing out of the nature of the right assigned."⁹ This was the right to Fairgrievies' salary as a clerk which was not earned at the time of the assignment. In the words of the Judge, "The interest assigned was, therefore, purely contingent, and depended for its existence, not only upon the will of the assignor, but on that of the Company, who might have discharged him from their employment, and thus rendered the claim of the assignee wholly nugatory."¹⁰ Consequently, the interest assigned did not have sufficient "actual existence" to make the assignment good at law. Only the chancellor, in the exercise of his discretion, could enforce the rights claimed by the assignee. This, Judge Hare was clear, the chancellor should not do:

"If the wages of toil can be pledged before they are earned, for the payment of debts, or for the purpose of obtaining credit; if the creditor can step in and intercept them in their passage from the hand of the employer to that of the workman, in what will the condition of the debtor differ from that of a slave? His life and limbs may still be his own, but the right to use them for his own benefit will be at an end, or subject to the control of another."¹¹

In other words, public policy forbids enforcement of an assignment of future earnings because of the burden which would thus be placed on the earning power of the employee. The Judge explicitly refused to make any distinction in this respect between an assignment of unearned wages from an existing employment, which was the case before him, and an assignment of wages from future employment. He thought that "if equity will sustain and enforce such transactions in any case, it must be prepared to do it in all."¹²

mond Textile Machine Works, Inc. v. International Batting Mills, 7 D. & C. 113 (C. P. Phila. 1925) at p. 34 *infra*. Perhaps all Judge Hare meant to hold was that no recovery could be had against a debtor who had paid the assignor in full prior to the commencement of the suit, which would leave open the question of recovery in the absence of such payment.

9. 2 Phila. 182, 184 (Pa. 1856).

10. *Ibid.*

11. *Id.* at 185.

12. *Ibid.* There was another aspect of the case which troubled the Judge. "Nothing could be more useless than to hold an assignment of future wages valid, and yet leave it to the choice of the assignor whether the work shall be done, for this would be to decide in favor of a right, and then make it dependent upon the caprice or will of the person who created it. . . . Hence the intervention of equity, to be really effectual, must go to the length of enforcing the performance of the task which the assignor has impliedly promised to accomplish, and prohibiting its interruption until the assignee has obtained full satisfaction. . . . The difficulty, or rather the impossibility, of doing this, and the mischief which it would produce if done, are too plain for comment, and render further argument superfluous." *Id.* at 186-7. The cases are clearly against

Such were the views of an eminent Pennsylvania judge in the middle of the last century. Much has happened in the law of assignment since Mrs. Erwin failed to collect her rent in a suit against the Lehigh Navigation Company, but the issues so clearly raised in that litigation have yet to be laid to rest in this Commonwealth, and it is time that they should be. Let us see what the years have produced in the way of judicial affirmation or refutation of Judge Hare's views.

II

The reported cases on partial assignments, which arose in the years immediately following the *Fairgrievies* decision involved the rights of the partial assignee as against subsequent assignees, attaching creditors, and pledgees of the assignor. It should have been clear that this was quite a different question from the one presented in the *Fairgrievies* case. The dispute was over the right to the proceeds as between the partial assignee and persons claiming through the assignor and, since all claimants were parties to the proceeding, there was no question of the debtor's having to make separate settlements or being subjected to a multiplicity of suits.¹³ Apparently, however, the matter did not seem this clear, for the *Fairgrievies* decision was discussed and its effect left in doubt.¹⁴

The most important of this group of cases is *Oakes v. Oram*¹⁵ which appears to be the first partial assignment case to reach the Supreme Court, which it did in 1867. It arose in the Common Pleas of Luzerne County and involved an action by Oakes on a claim against Oram. Attachment was issued against the D. L. & W. Railroad for

the Judge on this. Effect may be given to an assignment, although at the time of the assignment the assignor had not yet performed his contract with the debtor. *Philadelphia v. Lockhardt*, 73 Pa. 211 (1873). See also the following cases which sustain the assignment of contingent interests and expectancies: *Moeser, Adm'r v. Schneider*, 158 Pa. 412, 27 Atl. 1088 (1893); *Kuhn's Estate*, 163 Pa. 438, 30 Atl. 215 (1894); *Norris's Estate*, 329 Pa. 483, 198 Atl. 142 (1938); *Day & Sharpe's Assigned Estate*, 21 Pa. Super. 118 (1902).

13. Clearly the partial assignee should prevail over persons standing in no better position than the assignor who is bound in equity by the assignment. *Webster v. Sterling Finance Co.*, 173 S. W. (2d) 928 (Mo. 1943); *Stewart v. Kane*, 11 S. W. (2d) 971 (Mo. App. 1938); *Burditt v. Porter*, 63 Vt. 296, 21 Atl. 955 (1891); *Petrus v. Pierick*, 199 Wis. 147, 235 N. W. 695 (1929). Cf. *Thiel v. John Week Lumber Co.*, 137 Wis. 272, 118 N. W. 802 (1908) (the assignor may recover from a debtor who refuses to honor a partial assignment) and *Morris v. Nelson*, 124 Kan. 127, 257 Pac. 729 (1927) involving priorities between assignees when the debtor expressly accepts a later partial assignment and refuses to honor earlier ones.

14. Two early decisions by Judge Hare are difficult to appraise because of lack of reported facts. In *McCaffrey v. Cassidy*, 3 Phila. 210 (Pa. 1858) he reaffirmed the general doctrine of the *Fairgrievies* case, that a partial assignment will be "invalid," unless it receives the assent of the debtor. The plaintiff prevailed on his attachment, but who the plaintiff was is not clear. In *Miller v. Insurance Co.*, 5 Phila. 12 (Pa. 1862) the partial assignee prevailed over the assignor's attaching creditors, but on the ground that the debtor had recognized the assignment as binding on him. The Judge expressed doubt as to whether or not a partial assignment, which is "invalid as against the debtor, if he thinks fit to disregard it, is equally so against the assignor and those who claim under him as creditors by attachment."

15. 43 LEGAL INTELLIGENCER 520 (Pa. 1867).

money which the road owed Oram on account of coal he had supplied. The railroad admitted that it owed the money, but stated that it had received various orders drawn by Oram in favor of several of his creditors other than Oakes. It assumed the position of a stakeholder and indicated willingness to pay whatever persons were entitled to the fund. The holders of the orders appeared as parties to the proceeding claiming as partial assignees on the theory that the orders were partial assignments of the debt owed Oram by the railroad.

The case was referred to a member of the bar as an auditor who reported, in favor of Oakes, the attaching creditor, as against the other creditors claiming as partial assignees. His reasoning contained two points, the first of which was apparently based on the *Fairgrieves* decision: (1) if prior to the attachment the railroad had paid Oram, such payment would have been a defense to an action brought against it in the name of Oram to the use of the partial assignees; (2) upon attachment, the attaching creditor succeeded to all the rights of Oram, plus the right that the railroad should not voluntarily pay any claim on the fund which it might, at its option, successfully resist. The weakness of this argument is that it ignores the fact that a partial assignment may create enforceable rights against the assignor regardless of whether or not the partial assignee has a cause of action against the debtor.¹⁶

Judge Conyngham of the Common Pleas Court recognized the error of the auditor's reasoning and held that the partial assignees should prevail over the attaching creditor, on the ground that a partial assignment is binding on the parties to it and an attaching creditor of the assignor, standing in the latter's place, must be considered such a party. However, the portion of the opinion which is of particular interest here is that containing the discussion of the *Fairgrieves* case and the partial assignee's rights against the debtor. Reference is made to Judge Hare's "elaborate opinion" which is cited for "the clear and plain rule . . . that the assignment or transfer of several portions of a single fund, creates no indebtedness of the person owing the debt to the several transferees, unless he accept or assent to the transaction, and expressly or impliedly promise to pay, under circumstances sufficient to furnish a proper consideration."¹⁷ According to Judge Conyngham, the *Fairgrieves* case, among others, "may be considered as fully sustaining the doctrine that the assignment of portions of a claim cannot be made available at law to recover from the original debtors."¹⁸ But it has been pointed out that Judge Hare said he did not deny that a partial assignment "may entitle the assignee to bring suit in the name of the

16. See the cases cited note 13 *supra*.

17. 43 LEGAL INTELLIGENCER 520, 521 (Pa. 1867).

18. *Ibid*.

assignor against a defaulting debtor,"¹⁹ so long as the latter is not required to make separate settlements with assignor and assignee. It is not clear how this statement would be reconciled with Judge Conyngham's interpretation of the *Fairgrieves* decision.

Oakes v. Oram was taken from the Common Pleas Court to the Supreme Court, which, being evenly divided, was unable to reach a decision.²⁰ Probably because of this fact, the case was never officially reported and was not brought to the general attention of the bench and bar until it was printed in the *Legal Intelligencer* in 1886 with a prefatory statement of the editor to the effect that it would be interesting to the profession and tend to a settlement of the question regarding the effect of partial assignments in Pennsylvania.²¹

Although *Oakes v. Oram* may have contributed to the settlement of the partial assignee's rights against the assignor's attaching creditors, it offered little clarification of the assignee's rights against the non-assenting debtor. Judge Conyngham had indicated that the partial assignee could not recover at law and had also expressed doubt as to whether or not any recovery might be had in equity. As a matter of fact, it was becoming established at this time in many jurisdictions outside of Pennsylvania that the rule against splitting a cause of action, which prevented recovery at law by the partial assignee, did not apply in equity.²² The reason was that in an equitable proceeding the partial assignee might join the assignor and any other parties claiming an interest in the chose, thus making possible an adjudication of the assignee's right without subjecting the debtor to more than one suit or more than one settlement. But the doubt as to Pennsylvania law involved more than the question whether or not the courts would adopt the rule permitting recovery in equity. The further question was how would the rule, if adopted, be applied in the light of the unique development of equity in this state.

19. See p. 21 *supra*.

20. The court did decide that one of the orders was a bill of exchange rather than an assignment, because it did not state that it was drawn on a particular fund. This was an application of well-recognized law. See *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210 (1890); 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 425. As to the other orders, which qualified as equitable assignments, the court was able to reach no conclusion, with the result that the judgment below stood.

21. "In view of the doubt expressed by Judge Trunkey in regard to the law of Pennsylvania (see *Ruple v. Bindley*, 91 Pa. 299), relating to assignments of part of a fund, the following report of *Oakes v. Oram* will be interesting to the profession and tend to a settlement of the question. The ability of the late Judge Conyngham and of the late G. B. Nicholson, Esq., justify the printing of the report and opinion of the court below in full." To this statement was attached the footnote: "See also *Geist's Appeal*, 104 Pa. 351." 43 LEGAL INTELLIGENCER 520 (Pa. 1867). G. B. Nicholson was the auditor. The *Ruple* case is discussed at p. 32 *infra*, and *Geist's Appeal* in note 47 *infra*.

22. *James v. City of Newton*, 142 Mass. 366, 8 N. E. 122 (1886); 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 443; 2 STORY, EQUITY JURISPRUDENCE (3d ed. 1843) §§ 1043-4.

Separate courts of chancery have never existed in Pennsylvania, but from the earliest days the courts have applied a goodly portion of the law of equity through common law forms of action. Beginning with the Act of 1836,²³ the courts were given the usual chancery powers, and thereafter equitable relief might be obtained through the customary bill in equity. However, the courts continued to apply equity, when appropriate, in the common law actions.²⁴ The question therefore immediately arises: if the courts adopted the equitable rule for the enforcement of partial assignments, would the rule not be applicable in a common law action brought in the name of the assignor to the use of the assignee, as well as in a proceeding initiated by a bill in equity? If so, the distinction in other jurisdictions between actions at law and proceedings in equity by a partial assignee would have little significance in this state. The cases discussed above give no indication that these problems were recognized.

In 1871 the case of *Caldwell v. Hartupee & Co.*²⁵ was decided by the Supreme Court. Caldwell, being trustee for benefit of creditors of a certain steamboat, held funds for distribution to the creditors, one of whom was Hartupee & Co. which drew against its share of these funds, to the extent of a portion thereof, in favor of Cuthbert. Caldwell refused to honor the draft on the ground that the drawer, Hartupee & Co., was indebted to a firm of which he was a member. Thereupon, an action of assumpsit was brought against Caldwell, in the name of Hartupee & Co., to the use of Cuthbert. The theory of the suit was that the draft operated as an equitable assignment to Cuthbert of a portion of the proceeds owed by Caldwell, as trustee, to Hartupee & Co.²⁶

Counsel for Caldwell argued: "The order was not an assignment, because it undertook to transfer only a portion of the fund in Caldwell's hands."²⁷ The authority relied upon for this statement was Justice Story's famous opinion in *Mandeville v. Welch*,²⁸ which had also been relied upon by Judge Hare in the *Fairgrieves* case and by Judge Conyngham in *Oakes v. Oram*. The court made short work of this

23. Act of June 16, 1836, PA. STAT. ANN. (Purdon, 1930) tit. 17, § 281.

24. Fisher, *The Administration of Equity Through Common Law Forms in Pennsylvania* (1885) 1 L. Q. REV. 455, reprinted in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 810.

25. 70 Pa. 74 (1871).

26. Stated more fully, the facts were: Dexter, being the owner of a steamboat which was largely in debt, made a trust-mortgage of the boat to Caldwell and one Coffin as trustees to secure \$15,000 for the benefit of the creditors, one of whom was Hartupee & Co. Dexter gave three notes to Caldwell for \$5,000 each, which were paid at maturity, whereupon the trust-mortgage became void. Hartupee & Co.'s order on Caldwell read: "Please pay Mr. John Cuthbert \$1,500 out of the proceeds of the last note coming to us from the steamer Quickstep, with interest from date of said note." Cuthbert transferred the draft to Morrow, who became the use-plaintiff. It was admitted that Caldwell had a balance in his hands of about \$1,700.

27. 70 Pa. 74, 77 (1871).

28. 5 Wheat. 277 (U. S. 1820).

argument and affirmed judgment for the plaintiff. After stating that the order was an equitable assignment, the court made this significant observation: "This really practically answers *Mandeville v. Welch*, which was in a court of common law, and the same assignment would have been held good on the equity side of the same. In Pennsylvania, in the present liberal state of the law, as to equitable assignments, there can be no hesitation in recognizing this assignment in a common-law form of action, and in saying in such a case it is not necessary to resort to a court of equity."²⁹

Thus, the Supreme Court, in its first pronouncement on the subject, seemed to accept wholeheartedly the view that a partial assignment would be recognized in equity and, therefore, would be given effect in Pennsylvania in a common law action; just what effect is not clear. In the case before the court, the assignee was permitted to recover from the debtor, but under the circumstances the debtor was not burdened with a multiplicity of suits or settlements. Caldwell as trustee was directed to pay to the partial assignee the amount of the assignment and to pay any balance due Hartupee & Co. to Caldwell's firm as a creditor of Hartupee.³⁰ The funds affected by the assignment were thus completely distributed in the one proceeding. But, did the *Fairgrievies* decision remain law? Was a debtor with notice of a partial assignment still free to ignore the assignee's interest by making full payment to the assignor? The Supreme Court's brief opinion makes no reference to the problem or to the *Fairgrievies* case, which, apparently, was not called to the court's attention.

The development of the law was further complicated by the decision two years later of *Jermyn v. Moffitt*,³¹ which was the first wage assignment case to reach an appellate court in Pennsylvania. The employee Leslie, prior to his employment by Jermyn and while he was employed by the Delaware and Hudson Canal Co., executed the following assignment:

"In consideration of existing indebtedness to Patrick Moffitt, I do hereby assign and set over to the said Moffitt five dollars a month of my earnings, in the employment of the Delaware and Hudson Canal Company, or with whomsoever I may be employed, until the amount due said Moffitt is paid."³²

After this assignment Leslie went to work for Jermyn, and Moffitt showed Jermyn the assignment which the latter refused to pay, claiming

29. 70 Pa. 74, 79 (1871).

30. "Under this state of facts the plaintiffs were entitled to the full amount of the order, with interest, and whatever balance remained of Hartupee & Co.'s interest under the deed of trust belonged to the defendant under his offset of the two notes above stated." *Id.* at 78.

31. 75 Pa. 399 (1874).

32. *Id.* at 400.

that he had certain set-offs against the wages due Leslie. Moffitt brought suit and obtained judgment against Jermyn in the Mayor's Court of the City of Carbondale.

The case was taken to the Supreme Court where counsel for Jermyn, the plaintiff in error, argued: "A bill or order drawn upon a part of a fund only, will not be considered an assignment unless the drawer [sic] has assented to it."³³ The cases cited included *Mandeville v. Welch* and *Fairgrievies v. Lehigh Navigation Co.* This was the argument which had found no favor with the court only two years earlier. However, it seems to have made a different impression this time. In reversing the judgment below, Justice Mercur, speaking for a unanimous court, said:

"It is true, where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the fund in his hands. Where, however, the assignment is of a part only of the fund the law seems to be otherwise. Thus, it was said by Mr. Justice Story, in giving the opinion of the court in *Mandeville v. Welch*, 5 Wheat. 277, 'when the order is drawn on a general or particular fund for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee unless he consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties, as a part of their contract.' The reasons which he gives are, that a creditor should not be permitted to split up a single cause of action into many actions, without the assent of his debtor, thereby subjecting the latter to embarrassments and responsibilities not contemplated in his original contract. It was held in *Gibson v. Clark*,³⁴ 20 Pick. 15, that the assignment of part of a debt will not bind the debtor, either in equity or at law, nor deprive him of the right to pay the whole to the assignor, after notice that a part has been transferred to the assignee. All the decisions relating to this question of assignment are not in entire harmony. We shall not now attempt to reconcile them. We, however, are clearly of the opinion that an assignment like the present one, which professes to transfer a debt to arise for wages not yet earned, against any person by whom the assignor may thereafter be employed, although followed by subsequent notice of the assignment to such an employer, is insufficient, without acceptance, to make a valid transfer of the debt against the employer."³⁵

The last sentence of this quotation seems to base the decision not on the partial character of the assignment but on the fact that it related

33. *Id.* at 401.

34. The correct title of this case is *Gibson v. Cooke*. See note 6 *supra*.

35. 75 Pa. 399, 402 (1874).

to wages to be earned in a future employment.³⁶ Had counsel's partial assignment argument been passed over in silence, there would be no need to consider the case at this place; but, while Justice Mercur did not "attempt to reconcile" the decisions on partial assignments, he certainly indicated that the door was open for a holding that a partial assignment conveys no right against the debtor either at law or in equity. Apparently, *Caldwell v. Hartupee & Co.* was completely overlooked, which is surprising, in view of the fact that it had been so recently decided. Perhaps the oversight is explained by the failure of the defendant in error (the partial assignee) to make an appearance or file a paper-book,³⁷ and further by the changed composition of the court. Since the decision in the *Caldwell* case, two justices had retired and the membership of the court had been increased from five to seven, with the result that four new justices had come to the court, including Justice Mercur. Among the departed was Justice Read, who had written the opinion in *Caldwell v. Hartupee & Co.* But whatever the explanation of the conflicting views, the *Caldwell* and *Jermyn* decisions have provided a high source for divergent streams of judicial thought which have flowed through subsequent Pennsylvania decisions.

Obviously, a decision on whether or not a partial assignment bound the debtor in equity could be obtained by a bill in equity filed by the partial assignee. It was not long before such suits were instituted against the City of Philadelphia, the complainants claiming to be partial assignees of claims against the City. In *Phoenix Iron Co. v. City of Philadelphia*,³⁸ Judge Pierce, sitting in the Court of Common Pleas of

36. The opinion has been so interpreted in later decisions. In *Budd v. Himmelberger & Smith*, 4 Dist. 545, 547 (C. P. Berks 1895) Judge Endlich observed: "As for *Jermyn v. Moffitt*, *supra*, it is true that there is a reference to the observation of Mr. Justice Story, in *Mandeville v. Welch*, 5 Wheat. (U. S.) 277, to the effect that an order drawn on a fund for part of it only is not an assignment thereof unless the drawer consent to the appropriation by acceptance of the order, etc.; the reason being that a creditor shall not be permitted to split up a single cause of action into many causes of action without the assent of the debtor. But the real ground of the decision was that the order, claimed to be an assignment of funds due the drawer in the hands of the drawee, was an indefinite one upon wages as yet unearned by the drawer in the hands of the particular company or of any person by whom he should be employed." See also note 55 *infra*.

37. This explanation was suggested by Judge Beitler in *W. S. Cooper Brass Works, Inc. v. Nass*, 13 Dist. 405, 406 (C. P. Phila. 1904) where he said: "It is somewhat remarkable that in *Jermyn v. Moffitt* no mention of *Caldwell v. Hartupee* was made, but the appellee presented no paper-book, and the order was, as in *Fairgrievies v. Lehigh Navigation Company*, an order to pay installments of wages to be earned in the future."

38. 11 Phila. 203 (Pa. 1876). *Murphy* contracted to build the South Street Bridge for the city. The iron company furnished him materials and took a paper executed by him and addressed to the City Controller, which authorized the latter to deduct from *Murphy's* warrants such sums as should be due the complainant company for materials supplied. The controller received the paper and agreed to withhold and pay over to the iron company the sums involved. However, the court held that the controller had no authority to make such an agreement, and consequently the assignment could bind the city only by virtue of notice and not because it had assented thereto. Who all the parties defendant were is not stated, but apparently *Murphy* was one of them.

Philadelphia, wrote an able and learned opinion in which he viewed the whole matter in its proper light. He pointed out the distinction between actions at law, "such as *Mandeville v. Welch*, . . . *Fairgrievs v. The Lehigh Navigation Co.* . . . and *Jermyn v. Moffitt*. . . All of which were no doubt rightly decided, but for other reasons than the partial character of the assignments," and suits in equity, where "there is in reality but one suit, in which all the parties having an interest, or in any way liable, are made parties, and the court having full control of the costs, a decree can be made by which full justice and protection will be given to all, without vexation or annoyance to the debtor."³⁹ Demurrers to the bill⁴⁰ were overruled, but the court reserved for decision upon final adjudication the question of whether or not public policy prevented the enforcement of partial assignments against a city.⁴¹

The question reserved in the *Phoenix Iron Company* case came before the Supreme Court in *Appeals of the City of Philadelphia*,⁴² decided in 1878. The court reversed the decree below and dismissed the bill on the grounds: "The probable and natural effect of holding the municipality liable to each [partial] assignee would subject its officers to vexatious annoyances and the city to litigation and costs. . . . The policy of the law is against permitting individuals, by their private contracts, to embarrass the financial officers of a municipality."⁴³ The decision was thus placed on public policy applying only to the partial assignment of a *municipal* obligation.⁴⁴ Justice Mercur, who wrote the opinion, made this clear in a statement which also took notice of a distinction generally between the situation at law and in equity. He said: "It is conceded that at law the enforcement of such assignments would

39. *Id.* at 204.

40. The grounds of the demurrers were: (1) the assignment, because of its partial character, was not valid against the city; (2) the controller had no authority from the city to receive notice of the assignment or to agree to honor it. The court held that the controller did have authority to receive notice, but not to promise to honor the assignment.

41. Since this question had not been raised by the demurrers, it was thought improper to consider it.

42. 86 Pa. 179 (1878). The case involved a bill in equity by Quin against the City, its Treasurer, its Chief Engineer, and Burton. The facts were very similar to those presented in the *Phoenix Iron Company* case. Burton had contracted to build a bridge for the city and had assigned to Quin a portion of the amount due from the city. The city disregarded the assignment and issued a warrant to Burton for the full amount due. The bill prayed for an injunction restraining the payment of the warrant and for a decree directing payment of \$4,800 (the amount of the assignment) to Quin.

43. *Id.* at 182.

44. The court had held earlier in *Philadelphia v. Lockhardt*, 73 Pa. 211 (1873) that an assignee, under a *total* assignment, might recover against the city in action of debt brought in the name of the assignor to the use of the assignee. The city, having notice of the assignment, had refused to honor it and had issued warrants to the assignor. The case was distinguished in *Philadelphia's Appeals* as involving a total assignment. Said the court: "While we adhere to the doctrine of *Philadelphia v. Lockhardt*, *supra*, yet we are unwilling to carry the rule to the extent asked for here, even in equity." 86 Pa. 179, 182 (1878).

be questionable: *Jermyn v. Moffitt* . . . ; *Mandeville v. Welch* . . . ; yet it is claimed that they are good in equity and therefore this assignment may be enforced here. There is no doubt that as between individuals this rule prevails in equity. Whether it shall so be held against a municipal corporation is now the question."⁴⁵ This seems to be perfectly clear recognition that as against a *private* debtor, a partial assignment could be enforced in equity, and until very recent years⁴⁶ all the Pennsylvania decisions indicated that the rule of *Philadelphia Appeals* applied only in the case of municipal obligations.⁴⁷

The opinion in *Philadelphia's Appeals* contains no reference to *Caldwell v. Hartupee & Co.*⁴⁸ and, for all that appears, Justice Mercur was still unfamiliar with that decision. It was about a year later, when

45. *Ibid.* Justice Mercur's reference to *Jermyn v. Moffitt*, 75 Pa. 399 (1874) is particularly interesting, since he also wrote the opinion in that case. Did he mean to imply that the *Jermyn* decision was limited to actions at law?

46. See the discussion of *Gordon v. Hartford Sterling Co.* at p. 35 *infra*.

47. In *Geist's Appeal*, 104 Pa. 351 (1883) the doctrine of *Philadelphia's Appeals*, 86 Pa. 179 (1878) was applied and extended to a controversy between the partial assignee and the assignor's creditors. Again, the matter involved a bridge construction contract, this time with the City of Pittsburgh. The issue was that of priority as between the partial assignees and the assignee under a general assignment for benefit of creditors made by the assignor. The court held that since the partial assignments could not be enforced against the city under the rule of *Philadelphia's Appeals*, the general assignee acted properly in collecting the claim from the city and paying the proceeds to the general creditors of the assignor. According to the court, the assignor could have collected the claim against the city and paid his general creditors. Consequently, the general assignee could do likewise without making himself or the assigned estate liable to the partial assignees. This ignores the fact that a partial assignment is enforceable against the assignor, regardless of whether it is enforceable against the debtor or not. See note 13 *supra*. But, however this may be, the case involved the partial assignment of a municipal obligation and did not extend the rule of *Philadelphia's Appeals* to a private debtor.

The next case to reach the Supreme Court was *Vetter v. Meadville*, 236 Pa. 563, 85 Atl. 19 (1912). This was an action of case in the name of *Vetter*, a streetpaving contractor, to the use of the Pittsburgh & Buffalo Coal Company, the partial assignee, against the City of Meadville. The court held that the statement of claim disclosed no cause for action, for "where the assignment is only of a part of the fund more than notice is required, the assent of the city must be averred and shown." *Id.* at 569, 85 Atl. at 20.

Cf. *Wells v. Philadelphia*, 270 Pa. 42, 112 Atl. 867 (1921) where the use-plaintiff was permitted to recover, not as a partial assignee, but by subrogation under the terms of a construction contract and bond.

Lower Pennsylvania courts have followed these decisions in cases involving municipal obligations. *Cobleigh v. Borough of Courtdale*, 37 Luzerne Leg. Reg. Rep. 122 (C. P. Luz. 1943); *Penn Iron Co. v. City of Lancaster*, 14 Lan. L. Rev. 177 (C. P. Lan. 1897). But when the matter was the subject of judicial observation, it has been pointed out that *Philadelphia's Appeals* and its progeny have no application in suits against private debtors. *W. S. Cooper Brass Works, Inc. v. Nass*, 13 Dist. 405 (C. P. Phila. 1904); *Budd v. Himmelberger & Smith*, 4 Dist. 545 (C. P. Berks 1895). In the latter case it was stated: "For obvious reasons, it had been held in *Philadelphia's Appeals* . . . that a partial assignment of a contract between an individual and a municipality was not binding upon the latter, and that was followed in *Geist's Appeal* . . . ; so that, whilst the same may, to that extent, discredit the case of *Phoenix Iron Co. v. Philadelphia* . . . , it does not establish the doctrine that, as between individuals, there can be no such partial assignments." *Id.* at 547. This interpretation of Pennsylvania law has been accepted by authorities outside the state. *James v. City of Newton*, 142 Mass. 366, 378, 8 N. E. 122, 127 (1886); Note (1932) 80 A. L. R. 413, 426.

48. 70 Pa. 74 (1871).

the court decided *East Lewisburg Lumber & Mfg. Co. v. Marsh*,⁴⁹ that the *Caldwell* decision received its first reported recognition. This was the second case arising upon a bill in equity in which the court had occasion to refer to the partial assignment question. A firm, trading as James S. Marsh, were manufacturers of agricultural implements and Dunkel was their general agent. Marsh executed a written direction to Dunkel to pay over to the East Lewisburg Lumber & Mfg. Co. \$1350 from the proceeds of reapers sold by Dunkel within three months from the date of the order. Dunkel agreed to pay the lumber company as directed. Thereafter the Marsh firm became insolvent and made an assignment for benefit of creditors. Dunkel made sales of reapers in excess of \$1350 and turned the proceeds over to Marsh and the assignees for benefit of creditors. The lumber company then filed a bill against Marsh, Dunkel, and the assignees for discovery of the amount of the sales and for an accounting. The main issue of the case was presented by the lower court's holding that the order on Dunkel was not an effective assignment because it involved claims (proceeds of reapers not yet sold) not in existence at the time it was given. The Supreme Court did not accept this view⁵⁰ and granted plaintiff the relief prayed for. The reference to the *Caldwell* case is contained in the following brief paragraph in Justice Trunkey's opinion:

"Anything which shows an intent to assign on one side, and to receive on the other, will operate as an assignment. . . . A draft on a particular fund in the hands of an attorney for collection is an equitable assignment of it. . . . So is an order for part of the proceeds of a note, though not accepted by the trustee for collecting the note: *Caldwell v. Hartupee*. . . ." ⁵¹

This reference to the *Caldwell* case was dictum, since in the case before the court Dunkel had assented to the order, but perhaps it implied doubt as to whether or not the *Caldwell* decision was limited to orders on persons acting as agents or trustees for collection.⁵²

Three weeks later, in delivering the opinion of the court in *Ruple v. Bindley*,⁵³ Justice Trunkey again considered the *Caldwell* case by way of dictum. The order before the court was in effect a total assignment,

49. 91 Pa. 96 (1879).

50. This aspect of the case is discussed in note 90 *infra*.

51. 91 Pa. 96, 100 (1879).

52. If the debtor against whom the partial assignee seeks to enforce the assignment is acting as collection agent or trustee for the assignor, he may be under an implied or express obligation to honor the various orders of the assignor. If this be true, he is really not in the position of a nonassenting debtor. See *Dunbar v. Mercer*, 128 Pa. Super. 138, 142, 193 Atl. 479, 481 (1937), *aff'd on the opinion below*, 330 Pa. 96, 198 Atl. 617 (1938). Subsequent cases have not interpreted the *Caldwell* decision as resting on this basis. Cf. PA. STAT. ANN. (Purdon, Supp. 1944) tit. 69, § 561, dealing with assignment of accounts receivable.

53. 91 Pa. 296 (1879).

but, referring to a New York decision holding that partial assignments "are good and will be enforced in equity," he stated: "Whether such assignments are valid in Pennsylvania need not now be said; for the order covered the whole [debt]. . . ." ⁵⁴ But, in the following paragraph of the opinion appears this statement: "In *Caldwell v. Hartupee & Co.* an order for part of a fund was held to be a valid equitable assignment."

The question of the effect of a partial assignment of a private debt, as distinguished from a municipal obligation, was not to come before the Supreme Court again until 1935, fifty-five years after Justice Trunkey had said whether or not such assignments were valid in Pennsylvania need not yet be decided. Unfortunately for the lower court judges, they were not in Justice Trunkey's position during this interval; they had to make decisions and it is not surprising that they had difficulty in formulating the law to be applied. ⁵⁵ The decisions left

54. *Id.* at 299.

55. It appears that the nisi prius courts generally followed the lead of the *Caldwell* case and regarded partial assignments as effective. It will be recalled that this was the view taken in *Phoenix Iron Co. v. City of Philadelphia*, 11 Phila. 203 (Pa. 1876) (discussed in note 38 *supra*) and in accord were the other cases in which the lower courts gave specific attention to the problem. *Diamond Textile Machine Works, Inc. v. International Batting Mills*, 7 D. & C. 113 (C. P. Phila. 1925); *W. S. Cooper Brass Works, Inc. v. Nass*, 13 Dist. 405 (C. P. Phila. 1904); *Budd v. Himmelberger & Smith*, 4 Dist. 545 (C. P. Berks 1895). A number of cases apparently involved partial assignments, but left the question unnoticed or went off on other grounds. *McManaman v. Hanover Coal Co.*, 6 Kulp (Luz. Leg. Reg. Rep.) 181 (C. P. Luz. 1890); *Evans v. Kingston Coal Co.*, 6 Kulp (Luz. Leg. Reg. Rep.) 351 (C. P. Luz. 1890); *Trumbower v. Ivey & Rapp*, 2 County Ct. 470 (C. P. Bucks 1886); *Strausser v. Taylor & Co.*, 2 Kulp (Luz. Leg. Reg. Rep.) 214 (C. P. Schuylkill 1881).

The facts in the *Cooper Brass Works* case, *supra*, are worthy of notice. Auchter contracted to make alterations in a church building, made a partial assignment of the proceeds to the Brass Works and then became insolvent, Nass being appointed his trustee in bankruptcy. Both the Brass Works and Nass claimed the amount of the assignment from the church and by order of court joined in an interpleader, framed a case stated, and stipulated that if the legal effect of the assignment was to create an indebtedness by the church to the Brass Works, then the latter was entitled to payment from the church; otherwise, Nass was entitled to the full amount owing by the church. Judge Beitler held that Auchter had executed a valid equitable assignment and gave judgment for plaintiff, saying: "There can be no question that orders such as were passed on in *Fairgrievies v. Lehigh Navigation Co.*, 2 Phila. 182, *McCaffrey v. Cassidy*, 3 Phila. 210, and *Jermyn v. Moffitt*, 75 Pa. 399, drawn for a part of a fund and not accepted by the party on whom drawn, do not constitute, at law, an assignment. . . . The case before us is ruled by *Caldwell v. Hartupee & Co.*, to use, 70 Pa. 74; *Moerer v. Schneider*, 158 Pa. 412; *Beaumont v. Lane*, 3 Pa. Superior Ct. 73; and *Oakes v. Oram*, 43 Legal Intell. 520." 13 Dist. 405-6 (C. P. Phila. 1904). In the *Budd* case, *supra*, Judge Endlich, after discussing *Caldwell v. Hartupee & Co.*, 70 Pa. 74 (1871), *East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. 96 (1879), and *Ruple v. Bindley*, 91 Pa. 296 (1879), as well as *Mandeville v. Welch*, 5 Wheat. 277 (U. S. 1820), said: "I take it, therefore, to be the law of this state that an order delivered by one party to another for present and unconditional payment to the latter of money belonging to the drawer in the hands of a third private party, whether it be of the whole or only a part thereof, constitutes a present equitable assignment to the payee of so much of the fund as the order calls for, if and only if the fund out of which payment is to be made is clearly identified." 4 Dist. 548 (C. P. Berks 1895). (Italics supplied.)

The decisions of the Superior Court were less conclusive, the court not feeling under obligation to decide the question in the cases before it. *Trexler v. Kuntz*, 36 Pa. Super. 352 (1908); *Botsford v. Lull*, 30 Pa. Super. 292 (1906); *Beaumont Bros. v.*

no doubt that the partial assignee of a municipal obligation could not recover against the nonassenting debtor either at law or in equity⁵⁶ and it followed without question that in such a case the debtor was free, regardless of notice, to obtain a discharge by payment in full to the assignor. But in the case of a private obligation, few of the major issues had been settled. It was reasonably clear that the partial assignee could not recover against the nonassenting debtor in an action at law, when such recovery would leave the debtor obligated to the assignor for the unassigned portion of the claim. But beyond this there was little sure ground to build upon. Could the partial assignee recover in a proceeding in equity or at law to which the assignor was a party? The *Caldwell* case looked one way, the *Jermyn* case the other, with subsequent decisions indicating that the issue had not been decided. Could the debtor with notice disregard the claim of the partial assignee and obtain a discharge by paying the assignor? Judge Hare had answered with a resounding yes, but did his answer stand if the *Caldwell* decision was taken at its face value?

Of the various lower court cases which considered these questions, there is one which particularly deserves attention. It is *Diamond Textile Machine Works, Inc. v. International Batting Mills*,⁵⁷ decided in the Court of Common Pleas of Philadelphia in 1925. Plaintiff and defendant entered into an agreement whereby defendant agreed to pay plaintiff certain commissions for selling machinery owned by the defendant. Plaintiff made an arrangement with one Mellman to share the commissions in return for Mellman's services in finding a purchaser. Defendant received notice of this arrangement but did not agree to pay any part of the commissions to Mellman. The sale having been made, plaintiff brought suit for the commissions and defendant denied liability on the ground that the commissions were not payable to plaintiff alone, but jointly to plaintiff and Mellman. The case came on for hearing before Judge Taulane on rule for judgment for want of a sufficient affidavit of defense.

The court held that the arrangement between plaintiff and Mellman amounted to an assignment of one-half of the commissions to the latter. However, this did not make Mellman a party to the contract with defendant and give defendant the right to insist that the suit be brought in the joint names of plaintiff and Mellman. "The question for deci-

Lane, 3 Pa. Super. 73 (1896). The following statement from the opinion in the *Botsford* case is typical: "We are not convinced that it has been conclusively settled in this state that the legal plaintiffs can split up the consideration under such a contract, and assign portions of it to different persons so that they can sue and collect in the name of the legal plaintiffs to their use. But the view we take of this case renders it unnecessary to conclusively determine this question." 30 Pa. Super. 292, 295 (1906).

56. See note 47 *supra*.

57. 7 D. & C. 113 (C. P. Phila. 1925).

sion," said Judge Taulane, "is whether the defendant is obliged to protect the interest of A. J. Mellman, a partial assignee, because if a debtor is under no such duty the rights of A. J. Mellman are no concern of the defendant and he should be obliged to pay the commissions in full to the plaintiff. No one would question that such is a debtor's duty if the assignment, instead of being partial, embraced the whole debt."⁵⁸ After quoting from *Mandeville v. Welch*⁵⁹ and Judge Hare's statement in the *Fairgrievies* case to the effect that a partial assignment will not deprive the debtor of the right to make full payment to the assignor,⁶⁰ Judge Taulane concluded: "There is no justification, either in principle or convenience, for any such distinction between partial and complete assignments."⁶¹ "The courts of this State," he said, "have recognized and enforced partial assignments"⁶² and "as partial assignments are good in equity, and equity is part of our law, . . . they can be enforced through common law remedies."⁶³ This was accomplished by entering judgment against defendant for the commissions in full and staying execution for fifteen days with leave to the defendant to petition to pay into court one-half of the commissions and to frame an issue between plaintiff and Mellman as to which party was entitled thereto.

Thus, the judicial pendulum had swung from the *Fairgrievies* case, through the *Caldwell* case, relied upon by Judge Taulane, to the greatest protection of the partial assignee in the case of *Diamond Textile Machine Works*. But if members of the bar assumed that the Supreme Court would give its approval to any such development of the law when after long silence it again spoke, they were destined for a rude shock.

There came to the court in 1935 the case of *Gordon v. Hartford Sterling Co.*,⁶⁴ which arose on petition by the receiver of Hartford Sterling Co. for leave to compromise suits. The Sterling Company's plant had been destroyed by fire and the company claimed a loss of \$73,000, for which it asserted it was entitled to recover from the insurer. There is more than a suggestion that the claim was fraudulently padded and

58. *Id.* at 114.

59. 5 Wheat. 277 (U. S. 1820).

60. "From this rule [against splitting up a single cause of action] some early Philadelphia cases (*Fairgrievies v. Lehigh Navigation Co.*, 2 Phila. 182; *McCaffrey v. Cassidy*, 3 Phila. 210, and *Miller v. Insurance Co.*, 5 Phila. 12), and some rather recent cases elsewhere (*Thiel v. John Week Lumber Co.*, 137 Wis. 272, and *Gilman v. Raymond*, 235 Mass. 284) have deduced the further rule that a debtor may ignore notice of a partial assignment and pay his creditor in full." 7 D. & C. 113, 114 (C. P. Phila. 1925).

61. *Ibid.*

62. As authority for this statement Judge Taulane cited: *Phoenix Iron Co. v. Philadelphia*, 11 Phila. 203 (Pa. 1876) discussed in note 38 *supra*; *W. S. Cooper Brass Works, Inc. v. Nass*, 13 Dist. 405 (C. P. Phila. 1904) discussed in note 55 *supra*; *Beaumont v. Lane*, 3 Pa. Super. 73 (1896); *Oakes v. Oram*, 43 LEGAL INTELLIGENCER 520 (Pa. 1867).

63. 7 D. & C. 113, 115 (C. P. Phila. 1925) citing, *inter alia*, *Caldwell v. Hartupee & Co.*, 70 Pa. 74 (1871).

64. 319 Pa. 174, 179 Atl. 234 (1935).

the company's president set the fire. The company contracted with Lofland to restore the plant and, as security for payment, assigned the contractor \$26,700 of the claim against the insurance company. The insurer contested its liability and two suits were brought against it,⁶⁵ one by the Sterling Company as the insured and Lofland as assignee, and the other by the Sterling Company, Lofland, and certain mortgagees claiming under a mortgage clause of one of the insurance policies. Thereafter, a judgment creditor⁶⁶ of the Sterling Company obtained the appointment of a receiver for the company and the receiver petitioned the court below⁶⁷ for authority to compromise the suits against the insurance company for \$36,000. Lofland and other creditors⁶⁸ of the Sterling Company objected to the proposed compromise. The lower court approved the receiver's petition. On appeal, Lofland contended that the order approving the compromise over his objection impaired the obligation of his contract, since he was an assignee of part of the compromised claim under an assignment made prior to the appointment of the receiver. Because Lofland raised this question for the first time in the Supreme Court, that court refused to consider it unless the error of the lower court was "basic and fundamental."

As to the issue thus presented Justice Kephart said:

"We do not consider the question now raised as basic or fundamental for the following reasons: The assignment was for a part of the claim recoverable under the insurance policies. It was a partial assignment. We have early held that partial assignments are not binding unless they have been assented to by the debtor . . . [citing *Jermyn v. Moffitt, Philadelphia's Appeal, Geist's Appeal, Vetter v. Meadville*, and *Wells v. Philadelphia*]; the reason advanced is that a creditor should not be permitted to split up a single cause of action into many without the assent of the debtor; to do so subjects the debtor to embarrassments, responsibilities and multiplicity of suits not contemplated in his original undertaking. It was held in *Jermyn v. Moffitt*, supra, that the assignment of part of a debt will not bind the debtor, either in equity or at law, nor deprive him of the right to pay the whole to the assignor, even after notice that a part had been transferred to the assignee. . . . Therefore, where an assignor assigns a part of his claim, he is still the principal creditor and retains control of the claim unless the debtor

65. The suits were brought in the federal court: one for \$53,757.17 with interest by the Sterling Company and Lofland as plaintiffs; the other for \$21,941.70 by the Sterling Company to the use of itself, the mortgagees named in the mortgage clause of the policy, and Lofland.

66. Lansdowne Bank & Trust Company, which later went into the hands of the state liquidator and is therefore represented in the case by William D. Gordon, Secretary of Banking, as receiver.

67. Court of Common Pleas, Delaware County, sitting in equity.

68. Opposing the compromise were: Lofland, asserting a secured claim of \$27,200, an insurance adjuster claiming 5% of the recovery, and three other unsecured creditors asserting claims totaling \$8,500. These parties were the appellants before the Supreme Court.

accepts the assignee as a new creditor to the amount of the assignment. In the instant case there is no evidence that the insurance company assented to the assignments." 69

Language could not more categorically deny that the partial assignee has any interest, legal or equitable, which can be enforced against a nonassenting debtor. Later in the opinion, Justice Kephart repeats the proposition by saying that Lofland, as partial assignee, "had no lien on the fund and his assignment did not bind the fund in any respect," for: "To fasten a lien on the fund where the assignment is only of a part of it, the assent of a debtor must be averred and proven." 70 If these statements are taken at their face value, and apparently they have been as evidenced by dicta in subsequent Supreme and Superior Court decisions,⁷¹ they go beyond anything previously decided. Also, the *Caldwell* case⁷² and the cases which have followed it,⁷³ such as the *Diamond Textile Machine Works* case,⁷⁴ all are repudiated without even the honor of recognition.⁷⁵

69. 319 Pa. 174, 177-8, 179 Atl. 234, 236 (1935).

70. *Id.* at 179, 179 Atl. at 236.

71. *Concrete Form Co., Inc. v. W. T. Grange Construction Co.*, 320 Pa. 205, 181 Atl. 589 (1935). The case involved the partial assignment of a claim due on a construction contract. After notice of the assignment, the debtor had settled by paying the assignor. Since the assignor became insolvent, the partial assignee sued the debtor. In holding for the defendant, the court said: "Defendant cannot be held liable to the bank [assignee] unless it consented to the subcontractor's assignment, irrespective of whether the assignment was total or partial. In the case of a partial assignment we have repeatedly held that notice alone is not enough and that the debtor is not bound thereby unless he gives his consent." *Id.* at 208, 181 Atl. at 590. The only authority given for this statement is the *Sterling Company* case "and cases therein cited." However, the *Concrete Form Company* decision was rested upon the completely adequate ground that the contract out of which the assigned claim arose contained a provision prohibiting assignment. It is well settled that such a provision prevents effective assignment, regardless of the view otherwise taken of partial assignments. RESTATEMENT, CONTRACTS (1932) § 151 (c), cited by the court; 2 WILLISTON, CONTRACTS (REV. ED. 1936) § 422; Grismore, *Effect of a Restriction on Assignment in a Contract* (1933) 31 MICH. L. REV. 299. But the law review commentators who have noticed the *Sterling Company* and *Concrete Form Company* cases have regarded them as placing Pennsylvania with the very few states which take the view that a partial assignment is not effective against the debtor either at law or in equity. See the comments on the *Sterling Company* case in (1936) 2 U. OF PITT. L. REV. 111, and on the *Concrete Form Company* case in (1936) 34 MICH. L. REV. 1037. The last reference to the problem has come from the Superior Court in *Dunbar v. Mercer*, 128 Pa. Super. 138, 142, 193 Atl. 479, 481 (1937), *aff'd on the opinion below*, 330 Pa. 96, 198 Atl. 617 (1938), where it was said: "It is well settled that in the case of a partial assignment the debtor is not bound thereby unless he gives his consent but, as we see it, that principle has no application here." Only the *Sterling Company* and *Concrete Form Company* cases were cited. The principle was not applicable because the debtor was acting as a collection agent who took the proceeds subject to the arrangement which was claimed to be a partial assignment.

72. 70 Pa. 74 (1871).

73. *East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. 96 (1879) and the cases cited in note 55 *supra*.

74. 7 D. & C. 113 (C. P. Phila. 1925).

75. This may not be surprising in view of what is disclosed by the paper-books filed in the *Sterling Company* case. In the court below no issue was made of the validity of the assignment. Lofland took an active part in the proceedings for the appointment of the receiver and concerning the compromise of the suits, thus submitting himself to the jurisdiction of the court. He claimed that if the compromise were approved

None of the authorities cited by the court sustain such an extreme position. *Jermyn v. Moffitt*⁷⁶ has been referred to and it will be recalled that the court refused "to reconcile" the cases on the effect of a partial assignment and finally based its decision on the fact that the assignment in that case related to wages from an employment not yet entered into at the time of the assignment.⁷⁷ *Philadelphia's Appeals*⁷⁸ concerned the partial assignment of a municipal obligation and, while the opinion contained language very similar to that used by Justice Kephart, Justice Mercur, in deciding the case, made it clear that his decision did not apply in the case of a private, as distinguished from a public debtor. *Geist's Appeal*, *Vetter v. Meadville*, and *Wells v. Philadelphia* all involved municipal obligations, followed *Philadelphia's Appeals*, and consequently cannot be regarded as authorities applicable to partial assignments generally.⁷⁹ What Justice Kephart appears to have done in the *Sterling Company* case was to extend the rule of the municipal obligation cases to all partial assignments without being aware that he was making new law.⁸⁰

Such an extreme result should not be approved without careful consideration of the consequences. What justification could there be for holding that a partial assignee may not enforce his claim by a bill in equity against a private debtor and the assignor? The debtor could obtain complete discharge of his obligation by payment into court, thus avoiding any of the burdens of "splitting" his obligation. If such a proceeding is brought, or if an action at law is begun against the debtor by the assignor and assignee jointly, why should the debtor be free to jeopardize or destroy the assignee's asserted interest by single settlement

he would not be paid in full, but the facts are not clear as to this. The lower court held that the proceeds of the policy should be paid first to the mortgagee, then to Lofland, and finally to the unsecured creditors. What the mortgagees were entitled to was not settled; they had foreclosed on their mortgage and taken over the plant. Counsel for appellee took the position: "Appellee recognizes that Clayton Lofland had some rights in the matter under the assignment and contends that his rights were amply protected." Brief for Appellee, p. 12, 319 Pa. 174, 179 Atl. 234 (1935). The lower court stated: "The Lofland claim is for \$27,200. and whatever amount may be found to be due is secured to him by the assignment." Record, p. 51a. Counsel for appellee consequently contended: "We therefore, have a finding that the rights of Clayton Lofland will not be injured or jeopardized by this settlement." *Id.* at p. 13. The only discussion of the partial assignment point is the following: "It is quite obvious that Clayton Lofland alone cannot maintain a suit against the insurance company because it is merely a partial assignment (page 19a, par. 14), and since there is no evidence that the insurance company assented to the assignment no suit could be maintained." *Id.* at pp. 14-5. The only authority cited for this is *Vetter v. Meadville*, 236 Pa. 563, 85 Atl. 19 (1912). None of the other partial assignment cases were referred to in any of the briefs.

76. 75 Pa. 399 (1874).

77. See p. 28 *supra*, and cases cited in note 36 *supra*.

78. 86 Pa. 179 (1878).

79. For citations and discussion of this point, see note 47 *supra*.

80. Also, it should be noted that the lower court's order, which was affirmed, gave some effect to the partial assignment. Lofland was given priority over the unsecured creditors of the Sterling Company. See note 75 *supra*.

with the assignor?⁸¹ Before the institution of proceedings there is much to be said for the debtor's privilege to obtain discharge by single settlement with the assignor, for otherwise he must assume the burden either of separate settlements or of going to court. However, this is no longer true, once the other parties have taken the matter to court. These questions will be discussed more fully in the last part of this article.

The new procedural rules, adopted since the decision of the *Sterling Company* case, have some bearing on this problem. Rule 2002 (a)⁸² adopts a provision which has long been a part of code procedure in many states. With certain exceptions not here important, it provides: "all actions shall be prosecuted by and in the name of the real party in interest." If a partial assignment does not bind the nonassenting debtor either at law or in equity, it is difficult to see how the partial assignee is a real party in interest to any extent in an action against the debtor, for it is generally agreed that the real-party-in-interest rule is entirely procedural in character and does not give a cause of action to a party who had none before.⁸³ However, the leading commentators on the Pennsylvania rules have interpreted Rule 2002 (a) as requiring the partial assignor and assignee to join in any action against the debtor. Their reasoning is pertinent here: "While the partial assignee does not have a claim which was recognized at early common law, he is the beneficial owner of part of the original cause of action. As to that part, he, and he alone should have the right to grant a discharge or control an action."⁸⁴ This is directly contrary to the views expressed by Justice Kephart in the *Sterling Company* case.

This discussion of the past and present Pennsylvania law of partial assignment will not be prolonged. It is the present writer's opinion that the subject should be thoroughly reconsidered de novo in the light of present conditions and the law in other jurisdictions, which has

81. See *Diamond Textile Machine Works, Inc. v. International Batting Mills*, 7 D. & C. 113 (C. P. Phila. 1925), and discussion at p. 53 *infra*.

82. 332 Pa. lxxxiii (1938).

83. GOODRICH AND AMRAM, PENNSYLVANIA PROCEDURAL RULES SERVICE (1940) §§ 2002 (a)-2 and 2002 (a)-3; Note (1940) 89 U. OF PA. L. REV. 220; CLARK, CODE PLEADING (1928) 96-106; Simes, *The Real Party in Interest* (1922) 10 KY. L. J. 60. See also *Cable v. St. Louis Marine Ry. & Dock Co.*, 21 Mo. 133 (1855).

84. GOODRICH AND AMRAM, PENNSYLVANIA PROCEDURAL RULES SERVICE (1940) § 2002 (a)-10. The other new rules bearing on the problem are those relating to interpleader. Rules 2301-2325, 335 Pa. xxxiv (1939). After commencement of an action, the court, of its own motion or upon petition of defendant, may interplead the plaintiff and any claimant not a party of record. Rule 2302. But it is doubtful that a partial assignee may be interpleaded if the *Sterling Company* case is law, for to sustain interpleader the defendant must show risk of double liability *on his part*. Rule 2303 (a) (1). Interestingly enough, the annotations to the rules, in connection with this problem, make reference to the *Diamond Textile Machine Works* case without any indication that it has been overruled. 335 Pa. xxxv (1939). It should be noted that the above interpleader rules relate only to interpleader after the commencement of the action; equitable interpleader is preserved. Rule 2318.

greatly developed since the decision of most of the cases discussed above. However, this is only one phase of the wage assignment problem, and before considering the possible Pennsylvania law of the future we should give some attention to the Pennsylvania decisions on the other phase of the problem—the assignability of unearned wages.

III

In the *Fairgrievies* case,⁸⁵ Judge Hare thought that wages to be earned in the future from an existing employment did not constitute a sufficiently present interest to be assignable at law, and to enforce an assignment in equity would burden the employee's earning power contrary to public policy. In enunciating this view, he expressly refused to make any distinction between wages to be earned in an existing employment (which was the case before him) and those to be earned in future employments.⁸⁶

This question first came before the Supreme Court in *Jermyn v. Moffitt*,⁸⁷ which, insofar as it involved the partial assignment point, has been discussed above.⁸⁸ It will be recalled that the assignment purported to cover wages to become due in the future from any person by whom the employee might be employed, and, in fact, the defendant Jermyn had not employed the assignor until after the execution of the assignment. On its facts, then, the case involved the assignability of wages earned in an employment contracted after the assignment and the court rested its decision on this basis, being of the opinion "that an assignment like the present one, which professes to transfer a debt to arise for wages not yet earned, against *any person by whom the assignor may thereafter be employed*, although followed by a subsequent notice of the assignment to *such an employer*, is insufficient, without acceptance, to make a valid transfer of the debt against the employer."⁸⁹

85. 2 Phila. 182 (Pa. 1856).

86. "It is true, that the transfer now in question is limited to what might be earned in the service of a particular master; but, if equity will sustain and enforce such transactions in any case, it must be prepared to do it in all." *Id.* at 185. This is the distinction which has been made in other jurisdictions. See note 153 *infra*.

87. 75 Pa. 399 (1874).

88. See p. 27 *et seq. supra*.

89. 75 Pa. 399, 402 (1874). (Italics supplied.) In the court below, one of the points made by Jermyn was: "An assignment can only be made of moneys due or owing, and not *in futuro* of moneys to be earned." *Id.* at 400. The lower court rejected this view and replied, *inter alia*: "A party is competent to assign wages to come due if the vested rights of third parties are in nowise prejudiced thereby, and we answer defendant's first point in the negative." *Ibid.* The supreme court held that the lower court committed no error as to this point, saying: "In some cases a valid assignment may be made of moneys thereafter to be made, or of grain thereafter to be grown. . . . If counsel desire an answer applicable to the evidence in the case being tried, they should so indicate it in their point submitted." *Id.* at 401. This statement certainly carries the implication that future wages from existing employment may be assigned without violation of public policy.

There is nothing in the facts or the reasoning of the court in the *Jermyn* case to justify the conclusion that the decision supported Judge Hare's broad denunciation of all unearned wage assignments as being in violation of public policy. Furthermore, the early cases⁹⁰ do not so interpret the decision. Of these, *Ruple v. Bindley*⁹¹ should be mentioned. Ruple agreed to build a flight of stairs for Bindley and, before he performed the contract, made a total assignment of the proceeds. Notice was given to Bindley, who later settled with Ruple. An action of assumpsit was brought in Ruple's name to the use of the assignee. The Supreme Court held that the assignment should be given effect, regardless of the fact that the stairs were not constructed until after the assignment. No issue of public policy is mentioned in the opinion, although the interest assigned was apparently Ruple's compensation as a carpenter to be earned after the assignment.⁹² The *Jermyn* decision was limited to its particular facts, i. e. the assignment of wages from future employment.⁹³ Thus, by the early 1880's (the *Ruple* case had been decided in 1879) there was every indication that the law of Pennsylvania would develop along the lines followed in other jurisdictions,⁹⁴ and the assignment of future wages from existing employment would not in any way be regarded as contrary to public policy, although it is

90. The first cases discussing the *Jermyn* decision involved the assignment of money to be earned from construction and sales contracts, rather than employment contracts, but the broad position indicated is that any money to be earned from an existing contract may be assigned. In *Phoenix Iron Company v. City of Philadelphia*, 11 Phila. 203 (Pa. 1876), Judge Pierce, of the Philadelphia Common Pleas, rejected the argument that proceeds from a bridge construction contract were not assignable, because at the time of the assignment the assignor had not yet performed the contract. He said: "By a reference to the authorities it will be perceived that not only present but expectant interests may be assigned in equity, such as money thereafter to be made; the earnings of a railway company; grain thereafter to be grown. . . . *A fortiori* money to become due upon a contract already made and existing at the time of the assignment would seem to be within the rule." *Id.* at 208. One of the authorities cited is *Jermyn v. Moffitt*. In *East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. 96 (1879) the Supreme Court held effective in equity an assignment of proceeds from sales of agricultural implements to be made within three months from the date of the assignment. The *Jermyn* case was not cited, but the court discussed with approval the leading case of *Mulhall v. Quinn*, 67 Mass. 105 (1854), in which the Massachusetts court pointed out that future wages from existing employment are assignable.

91. 91 Pa. 296 (1879).

92. Relying heavily upon *East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. 96 (1879), Justice Trunkey said: "An assignment, for a valuable consideration, of demands having at the time no actual existence, but which rest in expectancy only, is valid in equity as an agreement, and takes effect as an assignment, when the demands intended to be assigned are subsequently brought into existence." 91 Pa. 296, 299 (1879).

93. "The defendant seems to rely on *Jermyn v. Moffitt* . . . where it is held that a transfer of 'a debt to arise for wages not yet earned, against any person by whom the assignor may afterwards be employed, although followed by a subsequent notice of the assignment to such an employer, is insufficient, without acceptance, to make a valid transfer of the debt against the employer.' The soundness of this principle is unquestioned, and was strictly applicable to the facts of the case. *Jermyn's* name was not on the instrument; Leslie, the assignor, had no contract with him, was not then in his employ, and, consequently, there was neither a present nor expectant fund on which the assignment could attach." *Id.* at 300.

94. See note 153 *infra*.

true Judge Hare's decision in the *Fairgrievies* case had not specifically been repudiated.⁹⁵

That the course of judicial decision was not to remain this placid was soon shown by what happened in *Lehigh Valley R. R. v. Woodring*.⁹⁶ It appears that on September 7, 1885, Woodring executed a "power of attorney," which purported to grant Eliza McDermott the following authority: ". . . to receive, collect, sue for, and receipt for all wages or moneys due, or that may hereafter become due me from . . . , and I do hereby authorize and empower the said Eliza McDermott to fill up this power of attorney with the name of any person, firm or corporation for whom I may be working at any time during the time I am receiving groceries and provisions as aforesaid from the said store of the said Eliza McDermott; . . . and I hereby declaring that this power of attorney is, for the considerations above mentioned, by me irrevocable."⁹⁷ Thereafter, Woodring became employed by the Lehigh Valley Railroad and was so employed during the months of September and October, 1886. Eliza McDermott supplied groceries as contemplated, and on October 6 or 7, 1886, notified the railroad of the power and stated she would look to the company for Woodring's wages. On October 8, 1886, Woodring notified the company that he claimed all of his wages and no other person had any legal right to them. Thereafter, the railroad paid some of the wages to Eliza McDermott and Woodring brought suit against the company to recover them.

The case came before the Court of Common Pleas of Northampton County, where judgment was given for the plaintiff. The opinion of

95. One of the most interesting lower court decisions of this period which took such a view was *Trumbower v. Ivey & Rapp*, 2 County Ct. 470 (C. P. Bucks 1886). The case involved conflicting claims under wage assignments given two different assignees. While Trumbower was employed by the firm of Rapp & Applebach, he made an assignment to a storekeeper, Laubach, of wages to become due from the firm or "any other party employing me." Applebach sold out his interest in the firm of Rapp & Applebach and the new firm of Ivey & Rapp was formed to carry on the business. A short time before this change, Trumbower left the employ of the old firm and after the reorganization was employed by the new one. Trumbower then made other wage assignments to another storekeeper, Bachman. Both assignees notified Ivey & Rapp of the assignments, Laubach's notice being first. In holding that Bachman had priority over Laubach as to wages earned by Trumbower in the employ of the new firm, the court took the view that the existence of the employment at the time of the assignment was the determining factor. Since Trumbower's engagement by Ivey & Rapp was regarded as a new employment, taking place after the assignment to Laubach, that assignment was held ineffective under the *Jermyn* case. On the other hand, Bachman's assignment was regarded as effective because given after the new employment. The fact that the wages involved were unearned at the time of Bachman's assignment was held immaterial, the court saying: "But where there is a present engagement for work of a subsisting employment, it appears that the wages to become due, through such employment, from the employer named in the assignment may be transferred, and, where notice is proved, will be enforced in equity." *Id.* at 471. Cf. *Strausser v. Taylor & Co.*, 2 Kulp (Luz. Leg. Reg. Rep.) 214 (C. P. Schuylkill 1881) (a partial wage assignment was enforced against an employer who had assented to it). The fact of the employer's assent was regarded as distinguishing the *Jermyn* case.

96. 116 Pa. 513, 9 Atl. 58 (1887).

97. *Id.* at 514, 9 Atl. at 58.

the lower court is printed in full in the Supreme Court Reports and, in view of the later per curiam approval of the higher court, the views of Judge Schuyler merit careful consideration. He advanced two reasons for his conclusion that the power of attorney was ineffective as an assignment of Woodring's wages earned in the employ of the railroad. The first reason was simply an application of *Jermyn v. Moffitt*.⁹⁸ Woodring was not an employee of the railroad at the time he executed the power, and the legal inference was that the railroad had never accepted his order, since the jury had made no finding of such acceptance.⁹⁹ Hence, under the *Jermyn* decision the power of attorney could not be held a valid assignment. Apparently not willing to rest his decision upon the inference of nonacceptance by the railroad, Judge Schuyler gave as his second reason what amounted to a vigorous revival of Judge Hare's public policy argument. "But aside from these authorities [*Jermyn v. Moffitt*, *Ruple v. Bindley*, and others],¹⁰⁰ and aside from the question of acceptance," he said, "we think all assignments such as the one in controversy here, should be declared void as being against the principles of public policy. The present assignment is by a day laborer, in consideration of groceries and provisions furnished him and his family, and it covers all wages, past and future, due and to become due, to the assignor from any person, firm or corporation, whatever, so long as the assignee's claim remains unpaid. . . . Should the law be declared to be that such an assignment is valid, it is not difficult to see that it would open the door to improvidence and profusion on the part of the assignor, and in the end to utter and hopeless poverty."¹⁰¹ This language points the finger of condemnation only at general assign-

98. 75 Pa. 399 (1874). Judge Schuyler also discussed *East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. 96 (1879) and *Ruple v. Bindley*, 91 Pa. 296 (1879), distinguishing them on the ground that there "the thing assigned was individuated, and was the fruit of an employment existing at the time of the assignment." 116 Pa. 513, 516, 9 Atl. 58, 59 (1887).

99. However, the jury did find "that after October 8, 1886, and after the service of the last named notice, the defendant paid the amount in controversy to Eliza McDermott." *Id.* at 515, 9 Atl. at 59. It is interesting that the Judge did not regard this as a finding of "acceptance" on the part of the defendant. In the Supreme Court, counsel for the railroad argued: "In our case the employer recognized the assignment and actually paid the debt to the assignee." *Id.* at 521.

100. See note 98 *supra*.

101. 116 Pa. 513, 517-8, 9 Atl. 58, 60 (1887). The Judge's only reference to authority for his public policy argument is the following: "When the court[s] say to the laborer that he shall not beggar himself and family by making merchandise of what is virtually his entire wage-earning power, they merely extend to the laborer the same rule which is applicable to the judges themselves, and to the officers of our army and navy; for neither the salaries of the judges, nor the pay of these officers, may be assigned, either by the party or by operation of law; and for the same reason to wit: that it is against public policy that they should be: 2 Story Eq. Jur., § 1040." *Id.* at 519, 9 Atl. at 61. But if the "same rule" were applied to laborers as is applied to public officials, all assignments of unearned wages, including those from present employment, would be contrary to public policy. 2 STORY, EQUITY JURISPRUDENCE (3d ed. 1843) § 1040 (a); 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 417; RESTATEMENT, CONTRACTS (1932) § 547.

ments covering all future wages, but it is not clear that the Judge would take a different attitude toward assignments limited to earnings from existing employment.

What the members of the Supreme Court, who reviewed the case, thought of Judge Schuyler's public policy argument will never be known; they neither approved it nor rejected it. The judgment below was affirmed in a brief *per curiam* opinion reading as follows:

"The learned judge committed no error in entering judgment in favor of the plaintiff below, on the special verdict. The attempt was to assign that which had no existence, either substantial or incipient. There was no foundation or contract on which an indebtedness might arise. It was the mere possibility of a subsequent acquisition of property. This is too vague and uncertain. It cannot be sustained as a valid assignment and transfer of property: *Jermyn v. Moffitt*. . . ." ¹⁰²

According to the evidence in the reports, the *Woodring* case had no particular effect on the course of judicial decision for twenty-five years after it was decided. Apparently, the lower courts correctly interpreted it as authority for the invalidity of only those assignments which purported to cover earnings from future employments. They continued to give effect to assignments which were limited to wages from employment existing at the time of the assignment.¹⁰³ The public policy issue dropped from notice until it was revived again in 1914 by Judge Sultzberger, sitting in the Quarter Sessions Court of Philadelphia. The manner in which it was raised was unusual.

In 1909 Judge Sultzberger had held invalid, as class legislation, the Small Loans Act of May 11, 1909.¹⁰⁴ This was a simple act providing for the issuance of licenses to persons making loans of \$200 or

102. 116 Pa. 513, 522, 9 Atl. 58, 61-2 (1887). It appears from the abstracts in the report that the case was quite fully briefed and argued in the Supreme Court. Apparently counsel distinguished with some care between unearned wages from present employment and those from future employment. The public policy argument was used to bolster the unassignability of the latter. Counsel for *Woodring* said: "The very cogent reasons resulting from public policy, as they appear in the opinion of the court below in this case and in *Fairgrievies v. Lehigh Navigation Co.*, 2 Phila. 182, should influence this court in refusing to extend the operation of equity powers beyond what has been decided in *Mulhall v. Quinn* and *Jermyn v. Moffitt*. . . ." 116 Pa. at 522. See the reference to the *Mulhall* case in note 90 *supra*.

103. *Berresford v. Susquehanna Coal Co.*, 24 County Ct. 557 (C. P. Schuylkill 1900); *Sally v. Berwind-White Coal Mining Co.*, 5 Dist. 316 (C. P. Jeff. 1896); *Evans v. Kingston Coal Co.*, 6 Kulp (Luz. Leg. Reg. Rep.) 351 (C. P. Luz. 1890); *McManaman v. Hanover Coal Co.*, 6 Kulp (Luz. Leg. Reg. Rep.) 181 (C. P. Luz. 1890). In the last case, Judge Rice instructed the jury: "Now, the right of *McManaman* to assign his wages to be earned in the future, in payment of a debt already due, or of a debt to be incurred in the future is valid, provided, he was employed by the company or person, or was about to be employed by the company or person, which or whom he directs to pay his wages in payment of his indebtedness." *Id.* at 182. Cf. *Lenahan v. Kingston Coal Co.*, 16 Luz. Leg. Reg. Rep. 589 (C. P. Luz. 1913) where the assignment purported to cover wages from existing and future employment.

104. (1909) Pa. P. L. 518.

less,¹⁰⁵ authorizing the rates to be charged in excess of the legal rate,¹⁰⁶ and providing that "no assignment or order for wages to be earned in the future," given to secure a loan, should be valid against the employer, unless accepted in writing by him. It also provided that no such assignment should be valid, when made by a married man, unless accompanied by his wife's written consent. Judge Sultzberger thought this act placed wage-earners in a separate class in violation of Article 3, section 7, of the state Constitution,¹⁰⁷ and consequently, in *Application of Jefferson Credit Co.*,¹⁰⁸ he held it invalid.

After this decision and possibly because of it, the legislature made another attempt to legalize and regulate the small-loans business. It passed the so-called Loan Shark Law of 1913,¹⁰⁹ which was very similar to the Act of 1909. However, in the 1913 Law no provisions as to wage assignments were included and the day before the Law was passed the legislature enacted the Act of June 4, 1913,¹¹⁰ which contained provisions identical with the wage-assignment sections of the Act of 1909. No assignment of, or order for wages, given as security for a loan, should be valid against the employer without his written acceptance and, in the case of a married employee, his wife's written consent was required.

The Loan Shark Law came before Judge Sultzberger in *Foster's Application*,¹¹¹ which arose upon an application for a license to do business under the act. The Judge regarded the whole legislation, particularly the separate enactment of the wage-assignment provisions in the Act of June 4, 1913, as an effort by the legislature to circumvent his decision in the *Application of Jefferson Credit Co.* It is not surprising, therefore, that he reached the conclusion the legislature had again acted unconstitutionally. The involved route by which he reached this conclusion can be summarized as follows: (1) the Loan Shark Law exempted from its operation the four established classes of money-lenders, namely, banks, trust companies, building associations, and pawnbrokers.

105. Section 1 provided that no person "shall engage in the business of making loans in sums of two hundred dollars or less, upon which any other charge is made than the legal rate of interest, and for which no security other than a note or contract, with or without indorser, is taken, without first obtaining a license" from the Clerk of the Court of Quarter Sessions of the county where the business is located. Section 6 exempted from the provisions of the act national banks and all banks and loan companies under the supervision of the Banking Commissioner.

106. Section 2 authorized a "brokerage fee" of 10%, in addition to the legal rate of interest.

107. Article 3, section 7, of the Pennsylvania Constitution of 1874, provides, *inter alia*, "The General Assembly shall not pass any local or special law: . . . Fixing the rate of interest."

108. 18 Dist. 634 (Q. S. Phila. 1909).

109. Act of June 5, 1913, Pa. P. L. 429. Unlike the Act of 1909, the statute placed no maximum limit upon loans covered by the law.

110. (1913) Pa. P. L. 405.

111. 23 Dist. 558 (Q. S. Phila. 1914).

Consequently, it was the "avowed purpose" of the act to create a new fifth class of loan business in which higher than the legal rate of interest might be charged; (2) what the framers of the law had in mind, as this new fifth class of money-lending, was the business of making loans on the security of wages to be earned in the future and the wage assignment statute of June 4, 1913, was passed to legalize such security and make possible the class of business on which the Loan Shark Law was to operate;¹¹² (3) the "time-honored" rule of Pennsylvania law has been that a man may not pledge his wages to be earned in the future and the Act of June 4, 1913, is invalid, because in violation of the Pennsylvania Bill of Rights; (4) since the Act of June 4, 1913, is invalid and a man may not pledge his wages to be earned in the future, there is no constitutionally recognizable class of business to which the Loan Shark Law may apply. Consequently, that law, like the Act of 1909, is invalid as class legislation.

What concerns us here is not the general validity of small-loans legislation, but Judge Sultzberger's conclusion, basic to his decision, that under prior Pennsylvania law a man could not pledge his future wages, and to authorize him to do so would violate the Bill of Rights. The Judge enumerated his reasons for this conclusion as follows:

"1. A legal pledge or assignment must be of something in existence. Potential existence in the future may, under certain conditions, give rise to equitable assignments, enforceable in chancery, if they should be just in themselves and not contrary to public policy.

"2. The policy of our Commonwealth protected against the attachment of creditors wages even when already earned.

"3. This court had decided that a man cannot pledge or assign wages to be earned in the future, because such a pledge or assignment creates a form of peonage or modified slavery in violation of the 1st section of the Bill of Rights."¹¹³

112. "In the light of what has been said, the purpose of the Act of June 4, 1913, P. L. 405, seems quite clear. It was intended to destroy a time-honored rule of law and to establish in its place one directly opposed to it. Men were to be allowed to pledge the wages of their future labor for an indebtedness previously incurred. If this act should be sustained as constitutional, a new branch of the money-lending business not covered by established classes would have been created." *Id.* at 563. There is certainly nothing in the form or provisions of the Act of June 4th to suggest that this was its purpose. It did not purport to legalize any transactions theretofore not legally effective. On the contrary, it placed certain *restrictions* on effective wage assignments, i. e. the requirements of written notice to the employer and written consent by the employee's wife. These regulations as to the form of an effective assignment may have been placed in an act separate from the Loan Shark Law, because the legislature desired the validity of that law to be determined independently of the validity of the assignment regulations. This interpretation of legislative history is suggested by the decision in *Commonwealth v. Lynch*, 22 Dist. 454 (Q. S. Blair 1913) which came down a short time before the enactment of the Loan Shark Law. The decision sustained an indictment under the Small Loans Act of 1909 and distinguished the *Jefferson Credit Company* case on the ground that it involved only the wage-assignment provisions of the 1909 Act, which were not involved in the *Lynch* case.

113. 23 Dist. 558, 562 (Q. S. Phila. 1914).

Let us consider these points in order, noting particularly any implied conclusion regarding the assignability of unearned wages from existing employment. Under his first point, Judge Sultzberger referred to two cases, *East Lewisburg Lumber & Mfg. Co. v. Marsh*¹¹⁴ and *Ruple v. Bindley*,¹¹⁵ observing that in both cases "there was an actual subsisting contract at the bottom of the transaction."¹¹⁶ This would seem to imply recognition on the part of the Judge that his first point would have no application to an assignment of wages from employment which had been contracted at the time of the assignment.

He regarded as more substantial his second point, i. e. the policy against the attachment of wages. This "policy" he found in the proviso of section 5 of the Act of April 15, 1845,¹¹⁷ to the effect "that the wages of any laborers . . . shall not be liable to attachment in the hands of the employer." It is true that the purpose of this proviso is "the preservation for employees and their families of the fruits of mental or manual labor in order that their earnings may go to supply their daily needs without hindrance from their creditors."¹¹⁸ It is also true, as the Judge pointed out, that an agreement of the employee to waive the exemption of the statute is void.¹¹⁹ But the statute, by its terms, applies only to attachment and it cannot properly be interpreted as evidencing a more general and fundamental policy, which would invalidate voluntary assignments. The Superior Court has pointed out that the proviso in the Act of 1845 is "itself special legislation in favor of a class" which "is not invalid because enacted prior to the Constitution of 1873." It may be repealed at any time.¹²⁰ No other case has been found which makes the slightest suggestion that the attachment legislation embodies a policy that would invalidate voluntary wage assignments.¹²¹ Judge Sultzberger's second point will not bear up under analysis.

114. 91 Pa. 96 (1879) discussed in note 90 *supra*.

115. 91 Pa. 296 (1879) discussed at p. 41 *supra*.

116. 23 Dist. 558, 563 (Q. S. Phila. 1914).

117. (1845) Pa. P. L. 460.

118. *Bell v. Roberts*, 150 Pa. Super. 469, 28 A. (2d) 715 (1942).

119. *Morris Box Board Co. v. Rossiter*, 30 Pa. Super. 23 (1906); *Firmstone v. Mack*, 49 Pa. 387 (1865). Both were cited by Judge Sultzberger.

120. In *Schmidt v. Schmidt and Erie R. R.*, 83 Pa. Super. 125 (1924) the court sustained the Act of May 8, 1876, P. L. 130, authorizing hotel and boarding-house keepers to attach wages. Judge Keller said: "The Act of 1876, in our opinion, is not unconstitutional. . . . Its effect is only to repeal pro tanto the proviso in section 5 of the Act of April 15, 1845, P. L. 460. . . . The proviso in the Act of 1845, exempting wages and salaries from attachment was itself special legislation in favor of a class. It is not invalid, because enacted prior to the Constitution of 1873; but an act which tends to generalize such special legislation, by repealing its provisions in behalf of persons recognized as a proper subject of classification, will not be held to contravene the constitutional provision against special legislation." *Id.* at 127-8.

121. In fact, the implication is just the contrary. See *McManaman v. Hanover Coal Co.*, 6 Kulp (Luz. Leg. Reg. Rep.) 181 (C. P. Luz. 1890); *Evans v. Kingston Coal Co.*, 6 Kulp (Luz. Leg. Reg. Rep.) 351 (C. P. Luz. 1890). In the latter case, Judge Woodward referred to "the natural right of the workman to deal where he

It is the third point regarding the Bill of Rights¹²² which contains the meat of the Judge's argument.¹²³ Here reliance is placed upon the *Jefferson Credit Company* case and particularly Judge Schuyler's opinion in the *Woodring* case.¹²⁴ That opinion is devoted to a discussion of public policy at common law and makes no mention of the Constitution. Judge Sultzberger does not consider the Pennsylvania cases which really have the most bearing on the possible application of the Bill of Rights to wage assignments. They involved wage legislation, such as the old Store Order Act and the Semi-Monthly Pay Act, and interpret the Constitution as protecting, rather than restricting, the right of the employee to dispose of his wage claims as he sees fit.¹²⁵

pleases" and said: "If, therefore, a laboring man, in the exercise of this right, transfers to a merchant any portion of his wages as security for a store account that he is running up with the merchant, he is just as much bound by that transaction as any other man would be." *Id.* at 353.

122. The provision referred to is Article I, section I, of the Pennsylvania Constitution of 1874, which reads: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

123. "The 1st section of the Bill of Rights is still a living force in this Commonwealth: *Jefferson Credit Co.'s* case, 18 Dist. R. 634. One of the inherent and indefeasible rights thereby guaranteed is the enjoyment and defense of liberty. It is a declaration against slavery in any form, however modified or disguised. The distinction between a man's acquired estate (that is, his property) and his personal earning power by labor (that is, his freedom) is carefully preserved and sedulously guarded. A man may pledge his property, but not his person. However great may be the volume of police power entrusted to the legislature, it cannot extend to the impairment of the mere right of a man, even though he be a debtor, to earn a living by labor and to apply his earnings to the support of himself and his family. This right is so fundamental and so necessary, not only for himself and his family, but also for the Commonwealth, that it cannot be waived by the man himself. It is true that the freedom of contract is a great and necessary right, but it has its limit. And this limit is reached and passed when a man's future labor is pledged to pay his past debts, with the consequence that he and his family are rendered liable to fall from the status of free citizenship into the degradation of pauperism." *Foster's Application*, 23 Dist. 558, 564 (Q. S. Phila. 1914).

124. 116 Pa. 513, 9 Atl. 58 (1887).

125. The earliest case discussing the application of the Bill of Rights to wage legislation is *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354 (1886). The case involved the Store Order Act of June 29, 1881, Pa. P. L. 147, which required mining and manufacturing companies to pay their employees once a month in money or cash order. Plaintiff, a puddler, asked and received orders from the defendant employer to various persons for the purchase of coal and other articles. These orders were honored by the merchants and defendant paid the bills. Plaintiff then sued for his wages and defendant claimed a set-off. The court held that the act was unconstitutional as an attempt to "prevent persons who are *sui juris* from making their own contracts." Judge Gordon said that the act was "an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States." *Id.* at 437, 6 Atl. at 356. To similar effect are decisions holding invalid the Semi-Monthly Pay Act of May 20, 1891, Pa. P. L. 96, which required mining and manufacturing companies to pay their employees semi-monthly in cash and forbidding assignment of future wages payable semi-monthly under the Act. *Showalter v. Ehlan*, 5 Pa. Super. 242 (1897); *Sally v. Berwind-White Coal Mining Co.*, 5 Dist. 316 (C. P. Jeff. 1896); *Commonwealth v. Isenberg & Rowland*, 4 Dist. 579 (Q. S. Clearfield 1895); *James Hamilton v. C. Jutte & Co.*, 16 County Ct. 193 (C. P. Fayette 1895). Subsequent semi-monthly pay legislation (Act of April 24, 1913, Pa. P. L. 114) has been sustained, but only on the ground that under the statute the parties are free to contract for whatever mode of payment they desire, and the form of payment specified in the statute applies only in the absence of agreement otherwise. *Commonwealth v. Muller*, 31 D. & C. 372 (Q. S. Lack. 1938); *Commonwealth v. Lipschutz*, 19 D. & C. 415 (Q. S. Phila. 1933).

The opinion in *Foster's Application* closes with the statement: "After mature consideration, we cannot resist the conclusion that there is no power of contract in the individual and no power of legislation in the general assembly to authorize a man to pledge or assign the wages of his future labor, and that the attempt of the legislature to exercise such power is a futile assault upon the very basis of our frame of government."¹²⁶ Whether "wages of his future labor" means only wages from future employment, or includes unearned wages from present employment, is not clear, but if it means the latter, the statement is not supported by the decisions of Pennsylvania, or of any other state so far as is known. However, members of the bar may with justification hesitate to disregard the decision in *Foster's Application*. Judge Sultzberger's opinion, like that of Judge Schuyler in the *Woodring* case, stands in the reports without having been repudiated in any subsequent case. Other small-loans legislation has been enacted and sustained, but upon grounds having no relation to the assignability of unearned wages.¹²⁷

IV

In the above discussion, Pennsylvania legal history has assumed a prominent place, for we must know the past, if we are to consider intelligently where we are and whither we go. It has been made abundantly clear that one deficiency in the decisions has been the failure of later opinions to assess the standing of earlier ones, a failure due, no doubt, sometimes to fortuitous circumstance and other times to lack of full presentation. The courts of Pennsylvania have yet to come to grips with the modern problems of wage assignments. When they do, there will be much to be clarified as to both (1) the effect of partial assignments and (2) the assignability of unearned wages. It is now appropriate to consider the problems of today and make some suggestions for the law of tomorrow. The law of the future may sometimes be the special delight of law professors, but it is certainly also the concern of the bench and bar.

When consideration is given to the effect of a partial assignment upon the debtor who has received notice, but has not assented, there are two aspects of the problem which should be differentiated. The first is :

126. 23 Dist. 558, 564-5 (1914).

127. In *Commonwealth v. Young*, 248 Pa. 458, 94 Atl. 141 (1915) the Loan Shark Law of 1913 was held unconstitutional as class legislation, but no reference was made to wage assignments or the Act of June 4, 1913. Thereafter, the decision in the *Foster* case was affirmed per curiam on the authority of the *Young* case. *Foster's License*, 60 Pa. Super. 8 (1915). In *Commonwealth v. Puder*, 261 Pa. 129, 104 Atl. 505 (1918) the Small Loans Act of June 17, 1915, Pa. P. L. 1012, was sustained because it was applicable only to loans of \$300 or less, which was regarded as a reasonable classification. See also *Equitable Loan Society, Inc. v. Bell*, 339 Pa. 449, 14 A. (2d) 316 (1940) sustaining the Pawnbrokers' License Act of 1937, Pa. STAT. ANN. (Purdon, 1941) § 281.

What procedure is available to the partial assignee, whereby he may secure satisfaction of his claim from the debtor without risking loss of the funds through their payment to a faithless or financially embarrassed assignor? The second is: Should the debtor be free, prior to the institution of proceedings against him, to make full settlement with the assignor who is the obligee named in the original undertaking? The desirability of distinguishing between these aspects of our problem will be made clear by a statement of the guiding considerations which must govern any satisfactory solution of the partial assignment question.

The more ancient and venerable consideration—oft-repeated without critical analysis—is that a party to a contract ought not, because of the contract, be subjected to burdens outside the scope of his undertaking. This proposition is fundamental to the law of assignments, total as well as partial. But, obviously, the rabbit in the hat is the “scope” of the debtor’s undertaking. The early common law judges thought that when a person contracted to pay Jones, he could not be compelled to pay Smith, for his promise was to pay only Jones. Consequently, even a total assignment did not give the assignee a cause of action against the nonassenting debtor.¹²⁸ However, the Chancellor thought otherwise and permitted the total assignee to recover against the debtor. In time, this view was completely accepted by the common law courts.¹²⁹ Now, what interpretation of the debtor’s undertaking did this imply? The enforcement of a total assignment against the debtor involved two possible risks for the debtor, not involved in an obligation to pay only the assignor. The assignor might be a more lenient creditor than the assignee, and if the debtor became financially embarrassed he might receive much less generous treatment from the assignee. Another risk for the debtor was the possibility that a dispute might arise between the assignor and assignee over the ownership of the claim, in which case the debtor would be uncertain as to which party he should pay in order to secure a discharge. It is true that the debtor might obtain a binding adjudication of any such dispute through a proceeding in equity initiated by interpleader, but such a course would at least involve the burden of employing counsel and going to court. The courts did not consider these risks sufficiently substantial to justify withholding relief from the total assignee; consequently, he was permitted to have his action against the debtor. It was probably thought that if the debtor wished

128. See 7 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (2d ed. 1937) 515-523.

129. Of the various discussions of the law of assignments, the well-known articles of Professors Cook and Williston are now classics: Cook, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816; Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?* (1916) 30 HARV. L. REV. 97; Cook, *The Alienability of Choses in Action: A Reply to Professor Williston* (1917) 30 HARV. L. REV. 449; Williston, *The Word “Equitable” and Its Application to the Assignment of Choses in Action* (1918) 31 HARV. L. REV. 822.

to prevent such a result he should expressly make his contract non-assignable. In the absence of a provision against assignment the debtor's undertaking was interpreted to be to pay the original party *or his total assignee*. With this interpretation vanished the question of imposing burdens on the debtor beyond the scope of his original undertaking.

Why were first the equity courts and later the common law courts so ready to extend the debtor's obligation beyond the letter of the contract? The answer seems to lie in the second guiding consideration which commanded attention. There was obviously great social and economic advantage in promoting the transferability of property and the liquidity of money claims.¹³⁰ The judges were not willing to have the assignability of choses in action dependent upon an express contract to that effect, when the absence of such a contract would be due in most instances, not to the desire of the parties to have the claim nonassignable, but to lack of forethought on their part.

So much for the enforcement of total assignments. The problem of the recognition of partial assignments was more complicated. If the debtor promised to pay Jones \$150 and Jones assigned \$50 of this claim to Smith, the common law judges were unwilling to hold that the debtor now was under two separately enforceable obligations, one of \$100 to Jones and another of \$50 to Smith. And this time the Chancellor agreed.¹³¹ How much this result was due simply to the technicalities of pleading and procedure may be debatable; but there was certainly more to it than that.¹³² Such recognition of a partial assignment would impose upon the debtor the burdens involved in a total assignment, plus others. He would not only have to settle with a different party and run the risk of disputed ownership of the claim, but he would also have to make two settlements instead of one, and face the possibility of two suits instead of one. Neither the judges at common law nor those in equity were willing to interpret the debtor's contract as authorizing this result and their conclusion was phrased in terms of the rule forbidding one party to a contract "splitting a single cause of action" without the consent of the other party. However, equity did not leave the partial assignee without effective relief. He was permitted to sue

130. "The fact therefore that a right under a contract was regarded by the common law as a purely personal relationship was no bar to the adoption by the court of Chancery of a very different view. In fact that court regarded the right to receive a definite sum under a contract as property, and therefore assignable either *inter vivos* or after death. Perhaps both the early association of the Chancery with mercantile business, and the far more liberal conception which from the first it had held as to the enforceability of agreements, helped it to arrive at this conclusion." 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW (2d ed. 1937) 334-5.

131. 2 WILLISTON, CONTRACTS (rev. ed. 1936) §§ 442-3.

132. See *James v. City of Newton*, 142 Mass. 366, 371, 8 N. E. 122, 123 (1886).

and recover in a proceeding against the debtor who had not paid, provided the assignor was joined in the suit. Since the debtor was thus subjected to only one suit and could secure a discharge by one settlement, i. e. by paying the total amount of his obligation into court, he was placed under burdens no greater than those resulting from the recognition of a total assignment. Also, the partial assignee's interest was substantially promoted by enabling him to recover directly from the debtor at the ordinarily slight inconvenience of having to join the assignor.

For the most part, the American law of assignment has developed in the manner just outlined. When we look to the decisions outside of Pennsylvania, we find complete agreement on the proposition that a partial assignee may not recover the assigned portion of the claim from the debtor in a proceeding (such as the old action at common law) which would leave the debtor liable to the assignor to recover the remainder of the debt.¹³³ This was the real basis of Justice Story's decision in *Mandeville v. Welch*¹³⁴ and, for the very sufficient reasons already outlined, it has not been undermined. On the other hand, the courts in almost all the states have come to the conclusion that the partial assignee may recover from the debtor in a proceeding in equity, or in an action under modern code procedure, in which the assignor and other parties in interest may be joined.¹³⁵ There are decisions in one or two states, other than Pennsylvania, taking the position that the partial assignee may not recover from the nonassenting debtor either at law or in equity.¹³⁶ Apparently, these decisions resulted from a misinterpretation of the argument against splitting a cause of action, which was given leading prominence by *Mandeville v. Welch*. They cannot now be justified, either by consideration on the merits, or by the course of authority.

Where do the courts of Pennsylvania stand on this question, which is fundamental, not only to wage assignments, but to all partial assignments? If it is true, as Justice Kephart stated in the *Sterling Company* case,¹³⁷ that in Pennsylvania a partial assignment does not bind

133. 2 WILLISTON, CONTRACTS (rev. ed. 1936) §§ 442-3; RESTATEMENT, CONTRACTS (1932) § 156; Note, *Partial Assignments* (1927) 13 CORN. L. Q. 129, reprinted in SELECTED READINGS ON CONTRACTS (1931) 860. *Gibson v. Cooke*, 20 Pick. 15 (Mass. 1838); *Gilman v. Raymond*, 235 Mass. 284, 127 N. E. 794 (1920).

134. 5 Wheat. 277 (U. S. 1820).

135. See authorities cited in notes 132, 133 *supra*. The time is past when we need be squeamish about stating that the partial assignee has a cause of action subject only to the procedural requirement of correct joinder of parties. The New York courts have reached this position. *Porter v. Lane Construction Corp.*, 212 App. Div. 528, 209 N. Y. Supp. 54 (4th Dep't 1925), *aff'd*, 244 N. Y. 523, 155 N. E. 881 (1926); *Schwartz v. Horowitz*, 131 F. (2d) 506 (C. C. A. 2d, 1942); *Grosner v. Abramson*, 162 Misc. 731, 295 N. Y. Supp. 372 (Sup. Ct. 1936).

136. See *Howard Undertaking Co. v. Fidelity Life Ass'n*, 59 S. W. (2d) 746 (Mo. App. 1933); Note, *Partial Assignments in Missouri* (1941) 27 WASH. U. L. Q. 106.

137. 319 Pa. 174, 179 Atl. 234 (1935).

the nonassenting debtor in any way and in order for the partial assignee to recover the assent of the debtor must be averred and proven, then, at the late date of 1935, this jurisdiction joined a small company in error. Furthermore, it did so without the justification of precedent for, as the above review has shown, the earlier Pennsylvania cases took the sounder and more generally accepted view.¹³⁸

There remains for consideration what was referred to above as the second phase of the partial assignment problem: May a debtor with notice disregard a partial assignment and obtain a discharge by settlement with the assignor alone? Of course, if the assignment does not bind the debtor in any way and the assignee may not proceed against him either at law or in equity, the answer is obviously in the affirmative. But should the result be different if it is held, as practically all the courts do, that the partial assignee may recover against the debtor in equity or under the modern codes? Here an important distinction should exist between a settlement made after suit is brought against the debtor and one made before. If the assignee has brought suit against the debtor and joined the assignor there would seem to be no justification for permitting the debtor to obtain a discharge by payment to the assignor, which would jeopardize the interest of the assignee, for a discharge could just as readily be obtained by payment into court, which would protect the interests of all parties.¹³⁹ However, if suit has not been brought, the debtor can protect the interest of the assignee only by (1) making separate settlements with assignor and assignee, or (2) joining those parties in a proceeding instituted by interpleader. Either course will involve the debtor in risks or burdens which do not exist when payment into court in a proceeding already pending is the only move he need make.

There are not many cases which involve the right of the debtor to disregard a partial assignment and make settlement with the assignor. Most of the decisions there are on the subject take the view that the recognition by the courts of an equitable right in the assignee precludes the debtor with notice from settling with his original creditor, the

138. See the citations and discussion note 55 *supra*.

139. It does not follow from this statement that the *Sterling Company* case, 319 Pa. 174, 179 Atl. 234 (1935), was incorrectly decided. That case involved settlement with the debtor (the insurance company) after suit had been instituted by the partial assignee (Lofland) and others. But the settlement was made by an equity receiver of the assignor acting for the assignor's creditors generally; it was subject to court approval, and the partial assignee's interest was protected in the distribution of proceeds which the court directed. This is quite different from a settlement made by the assignor alone, acting in his own interest and not subject to court supervision. However, Justice Kephart's broad language would seem to indicate that the debtor would be discharged by the latter type of settlement just as fully as by the settlement before the court.

assignor.¹⁴⁰ This view is approved by Professor Williston¹⁴¹ and the American Law Institute,¹⁴² but the issue remains unsettled in most states and it is not too late to ask what reasoning dictates such a conclusion. Professor Williston and the courts which accept his view argue that to give the debtor a discharge on account of payment to the assignor would be "inconsistent with a recognition of *any* equitable right in the partial assignee."¹⁴³ This amounts to saying that, as against the debtor, the partial assignee must be treated in equity as the owner of a separate claim or he must be regarded as having no right. The general development of the law of assignment and the considerations back of it are against any such dichotomy. The above discussion should have made clear that it is not at all inconsistent to hold that the debtor has a right of settlement with the assignor prior to suit and at the same time to recognize an equitable right in the partial assignee to recover against the debtor who has not paid, provided all parties in interest may be joined in the suit.¹⁴⁴ In fact, the assertion of inconsistency ignores the fundamental point of view of equity that partial assignments should be sustained only when it can be done *without substantial detriment to the debtor*.¹⁴⁵

Supporters of the view espoused by Professor Williston apparently believe that any question of detriment to the debtor is disposed of simply by pointing out: "The debtor can bring the entire fund into court, and

140. *Graham v. Southern Ry.*, 173 Ga. 573, 161 S. E. 125 (1931); *Todd v. Meding*, 56 N. J. Eq. 83, 38 Atl. 349 (1897), *rev'd on other grounds*, 56 N. J. Eq. 820, 41 Atl. 222 (1898); *Brill v. Tuttle*, 81 N. Y. 454, 457 (1880); *Doyle v. East New York Savings Bank*, 44 N. Y. S. (2d) 318 (N. Y. Mun. Ct. 1943), *aff'd*, 44 N. Y. S. (2d) 328 (2d Dep't 1943), *appeal denied*, 266 App. Div. 922, 44 N. Y. S. (2d) 337 (2d Dep't 1943); Note (1932) 80 A. L. R. 413, 421.

141. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 444.

142. RESTATEMENT, CONTRACTS (1932) § 156.

143. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 444. (Italics supplied.) In *Todd v. Meding*, 56 N. J. Eq. 83, 38 Atl. 349 (1897) it is said: "It is too late to dispute the proposition that a part of a debt may be effectually assigned in equity. The qualifying rule that such an assignment cannot be enforced by action at law without the acceptance or assent of the debtor does not vary the result. The qualifying rule avails the debtor only to the extent that if he wishes to dispute the existence of the debt, he is entitled to make his defence in a single suit, and cannot be subjected to several suits at law. But it does not justify him in ignoring the partial assignment, after he has notice of it, and paying the whole sum to the original creditor. To so hold would be to nullify the doctrine which sanctions partial assignments." *Id.* at 92, 38 Atl. at 352.

144. Of course, it must be recognized that the right of the debtor to settle with the assignor greatly limits the value of an assignment to which the debtor has not assented. But the burden should be on the assignee to obtain such assent, if he wishes to rely upon an obligation completely binding the debtor.

145. Section 151 of the Restatement of Contracts states: "A right may be the subject of effective assignment unless, (a) the substitution of a right of the assignee for the right of the assignor would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract, or impair materially his chance of obtaining return performance. . . ." Note also the following statement in a leading case frequently cited as supporting the maximum enforceability of partial assignments: "We think, upon reason and principle, partial assignments should be sustained in a court of chancery, in all cases when it can be done without detriment to the debtor or stakeholder, whenever equitable and just results may be accomplished by it." *National Exchange Bank of Boston v. McLoon*, 73 Me. 498, 506 (1882).

run no risks as to its proper distribution. If he be in no fault, no cost need be imposed upon him, or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it."¹⁴⁶ It has already been questioned whether or not in any case the debtor, in order to preserve his right to single settlement, should have the burden of taking the matter to court. Even reimbursement for court costs and counsel fees may not adequately compensate him for time and trouble involved in such a proceeding. However this may be, payment of the fund into court is certainly no solution for the employer who must decide whether or not to honor a typical wage assignment.

The most common form of modern wage assignment calls for the payment each pay day of a stated sum to the assignee. If the employer is to meet the responsibility of honoring such an assignment he must be prepared to remit to the assignee and adjust wage payments accordingly at the end of each payroll period—usually two weeks or a month. Furthermore, he must continue to do this, not two or three times, but for so long as the assignment remains effective. In the case of many assignments, such as those for hospital insurance, the cooperating employer must continue to remit to the assignee as long as the assignor remains in his employ. Also, under modern conditions of unionization, the arrangement may well result from a plan covering all employees and the employer is presented with a few hundred or even thousand assignments. The accounting burden is likely to be substantial and it is obvious that the employer cannot escape it by taking his payroll to court each pay day. Anxious as the chancellor may be to adapt the law to changing conditions, he will not and cannot become paymaster for the employee. To say that the employer may readily be compensated for his extra expense is to ignore the realities of the situation. To attempt to estimate the expense and allocate it to the various assignments may be the source of serious disputes with the employees; and if this difficulty is surmounted the employer may not even be in a position to obtain the additional office help which will be required. All of this amply justifies the conclusion that a wage assignment should not prevent the employer from continuing to pay the full wages to the employee, unless he indicates his willingness to honor the assignment.

Two recent decisions of the Supreme Court of South Carolina support this conclusion. In *Pacific Mills v. Textile Workers' Union*,¹⁴⁷ the employer, having declined to agree to the "check-off," refused to deduct union dues from employees' wages. Thereupon, union members made

^{146.} *National Exchange Bank of Boston v. McLoon*, 73 Me. 498, 505 (1882).

^{147.} 197 S. C. 330, 15 S. E. (2d) 134 (1941), 41 Col. L. Rev. 1439, (1942) 40 Mich. L. Rev. 455.

some 1100 wage assignments to the union of \$1 each per month. The employer refused to honor the assignments and sued in equity to enjoin their enforcement. The court recognized the general rule in South Carolina to be that a debtor with notice is bound in equity by a partial assignment whether he assents to it or not. But a majority of the court pointed out that this rule would apply only "if no legal reason appears why it [the assignment] should not be given force and effect."¹⁴⁸ The employer showed that the clerical services of one person six hours per week would be required to honor the assignments. The court regarded this burden as sufficient to justify the decision that the assignments were void and of no effect as against the employer. The same conclusion was reached in *Orr Cotton Mills v. St. Mary's Hospital*.¹⁴⁹ In that case, fifteen employees had executed assignments to the hospital, ranging from \$1 to \$10 per month.

These decisions should receive approval as correct applications of the general principle that a right may not be the subject of effective assignment, if "the substitution of a right of the assignee for the right of the assignor would vary materially the duty of the obligor, or increase materially the burden or risk imposed upon him by his contract."¹⁵⁰ It is true that the burden placed upon the employer by his recognition of wage assignments will differ with the type and number of assignments involved. Because of this, some may argue that the view of the South Carolina court should be limited to the more burdensome assignments. But the inevitable uncertainty which would result from the application of such a rule would largely, if not completely, destroy its utility. The value of an assignment which binds the debtor lies in the fact that the assignee may look to the debtor as well as the assignor for payment. This value amounts to little if in many cases the effect of the assignment on the debtor cannot be determined without a court decision. Consequently, the view should be adopted that no wage assignment will impose upon the employer the burden of separate settlements, in the absence of action on his part which indicates assent. Thus, we are brought to the conclusion that *Fairgrieves v. Lehigh Navigation Co.*¹⁵¹ should still be regarded as correctly decided on its facts.

Attention may now be directed briefly to the assignability of unearned wages. This question should not cause difficulty, when it is presented to a Pennsylvania court which does not feel bound by the views expressed in the *Fairgrieves* case and in *Foster's Application*.¹⁵²

148. 197 S. C. 330, 341, 15 S. E. (2d) 134, 138 (1941).

149. 203 S. C. 114, 26 S. E. (2d) 408 (1943).

150. RESTATEMENT, CONTRACTS (1932) § 151, quoted in part in note 145 *supra*.

151. 2 Phila. 182 (Pa. 1856).

152. 23 Dist. 558 (Q. S. Phila. 1914).

So far as public policy at common law is concerned, courts and commentators are generally agreed that an assignment of a debt not yet due should be sustained if such assignment is limited to debts arising from a contract or an employment in existence at the time of the assignment. In the case of unearned wages the existing employment may be either for a term or at will.¹⁵³ There is no sufficiently cogent reason why this well-settled doctrine should be rejected in Pennsylvania. It is true that it enables the employee to burden his future earning power, but the power to borrow does that in the case of any conscience debtor and the burden is one that may be discharged in bankruptcy.¹⁵⁴ There may well be reason for restricting the amount of an effective assignment to a portion of the assignor's wages or its duration to a period of years, but these limitations raise questions of policy properly within the sphere of the legislature and not for judicial decision at common law.

There is even less justification for holding that an assignment of unearned wages violates a general constitutional guarantee of liberty and property, such as that contained in the Bill of Rights. The privilege to make such an assignment means greater freedom, not less—greater freedom to borrow money and to secure what is in effect prepayment of wages.¹⁵⁵ What has already been said in criticism of Judge Sultzberger's views should render unnecessary further elaboration of this point.¹⁵⁶

In conclusion, it is submitted that the wage assignment problem is badly in need of comprehensive reconsideration in Pennsylvania, and upon reconsideration the common law should be restated along the following lines: (1) wages, earned or unearned, arising from an employment in existence at the time of the assignment, may be effectively assigned; (2) an assignment, of which the employer has notice but to which he has not consented, entitles the assignee to recover from the employer in a proceeding in which all parties in interest are joined, provided the employer has not settled with the assignor prior to the suit; (3) prior to the institution of proceedings against him, the employer,

153. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 413; RESTATEMENT, CONTRACTS (1932) §§ 154, 151, 547; 6 C. J. S. 1063-5; 4 AM. JUR. 260. No attempt will be made here to discuss the effect of a purported assignment of wages to be earned from future employment. See Note (1938) 116 A. L. R. 955.

154. *Local Loan Co. v. Hunt*, 292 U. S. 234 (1934), holding that an assignment of wages to be earned under an existing employment did not create a "lien" within the meaning of Section 67 (d) of the Bankruptcy Act which would survive the employee's discharge in bankruptcy and attach to his wages earned thereafter. The decision was not based upon any general public policy against wage assignments, but upon the purpose of the Bankruptcy Act to free the bankrupt's future earning power from the claims of his creditors. It casts no doubt upon the general effectiveness of wage assignments in the absence of bankruptcy.

155. See note 125 *supra*.

156. See p. 48 *supra*.

who has not consented¹⁵⁷ to the assignment, may obtain a complete discharge by settlement in full with the assignor, although he has notice of the assignment.

To avoid possible misunderstanding it may be well to point out that so long as an assignment remains in effect the employer is free to honor it if he chooses. Thus, if an assignment is irrevocable by its terms and the assignor attempts by unilateral action to revoke it, the employer may nevertheless obtain a discharge by making payments to the assignee in accordance with the assignment. This is simply a recognition of the fact that the assignment is binding on the assignor, although it may not obligate the employer to settle separately with the assignor and assignee.¹⁵⁸

But there is need for more than judicial clarification of the law in Pennsylvania. There is still on the books the Act of June 4, 1913,¹⁵⁹ requiring written notice to the employer and the written consent of the employee's wife, which act was held unconstitutional in *Foster's Application*.¹⁶⁰ It has been shown that the case is of doubtful authority, although it has never been overruled or affirmed.¹⁶¹ The legislature should give consideration to the enactment of legislation comprehensively regulating wage assignments. To discuss the possible provisions of such legislation would unduly extend this article, and attention will merely be called to the fact that several states have wage assignment laws which might be made the basis of a Pennsylvania act.¹⁶² There is no doubt, however, that both judicial and legislative action is required to bring the Pennsylvania law of wage assignments abreast of the times.

157. It may well be held that an employer who honors an assignment by making payments to the assignee has sufficiently indicated his assent to the assignment to be bound by it and thus prevented from thereafter settling with the assignor. See 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 423; RESTATEMENT, CONTRACTS (1932) § 162; *Strausser v. Taylor & Co.*, 2 Kulp (Luz. Leg. Reg. Rep.) 214 (C. P. Schuyllkill 1881).

158. See note 12 *supra*. It is also true that if an assignment is revocable by its terms and the employee has notified the employer of the revocation, the employer must recognize the termination of the assignment and act accordingly. See *Wood's Estate*, 243 Pa. 211, 89 Atl. 975 (1914). An assignment may be revocable, not because it expressly so states, but because it is part of a revocable arrangement between assignor and assignee. An example is a partial assignment of wages for the payment of union dues which may be revoked by the employee withdrawing from the union. *Fisher v. Stevens Coal Co.*, 143 Pa. Super. 115, 17 A. (2d) 642 (1940).

159. (1913) P. L. 405.

160. 23 Dist. 558 (Q. S. Phila. 1914).

161. See p. 49 *supra*. It is also worthy of note that legislation in other states, similar to the Pennsylvania Act of June 4, 1913, has generally been sustained. *Mutual Loan Co. v. Martell*, 222 U. S. 225 (1911); *Morris v. Holshouser*, 220 N. C. 293, 17 S. E. (2d) 115 (1941); Note (1925) 37 A. L. R. 872; 4 AM. JUR. 262 (1936).

162. See, for example, the Illinois legislation enacted in 1935, ILL. ANN. STAT. (Smith-Hurd, Supp. 1944) c. 48, §§ 39.1-9, which is discussed in (1936) 30 ILL. L. REV. 759. General discussion of wage assignment legislation may be found in Fortas, *Wage Assignments in Chicago* (1933) 42 YALE L. J. 526; Strasburger, *The Wage Assignment Problem* (1935) 19 MINN. L. REV. 536; (1932) 45 HARV. L. REV. 581. A summary of statutory provisions is to be found in Fortas, *op. cit.* at 551-8 and in Strasburger, *op. cit.* at 539-541.