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Assignment of Choses in Action

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Assignments of accounts receivable have increased in volume and number to such an extent that accountants have become interested in the legal aspects of such transfers. The court decisions dealing specifically with such assignments are few, but the subject is fully covered by the common law on assignments of "choses in action," a rather broad legal term which includes accounts receivable. Consequently, the statements in this paper that concern choses in action apply to accounts receivable.

By the rules of the early common law, choses in action were not assignable because it was thought to be impossible to transfer property which was not in possession. It was soon found that a rigid adherence to this principle was inconvenient in practice and detrimental to the interests of business, so various methods of getting around it were devised. The first method of evading the rule was by an appeal to the courts of equity, which were liberal in the recognition of new forms of property and had decided at an early date that choses in action were assignable. Stimulated by this liberality, the common-law courts began to search for some way by which they could follow the doctrine of "stare decisis" and permit chose-in-action assignments. Gradually they developed the device of giving power of attorney to the assignee to collect the claim from the debtor and to keep the proceeds under the theory that the assignee acted as the agent of the assignor. The next step has been taken in some states by the enactment of statutes which permit the assignee to sue in his own name if this is necessary in order to collect the debt and make all assignments formerly recognized only in equity equally valid in law (*Hooker* v. *Eagle Bank* (1864) 30 N. Y. 83).

In most jurisdictions the courts agree that accounts receivable based upon goods sold and delivered are assignable in equity (*Dix* v. *Cobb* (1808) 4 Mass. 508). Both liquidated and unliquidated book accounts are included (*Crocker* v. *Whitney* (1813) 10 Mass. 316). According to Justice Hoke in *Atlantic and North*

Carolina Railroad Company v. *Atlantic and Northern Company* (1908) 147 N. C. 368:

> . . . now it may be stated as a general rule that . . . all ordinary business contracts are assignable. . . . The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets . . . are in general assignable. . . .

However, there are some circumstances in which accounts receivable are not assignable. In conformity with the general principle that the intent of the parties controls in a contract, if the terms of the original contract provide that it shall not be assigned, such terms will govern. Justice Hand, in *Mueller* v. *Northwestern University* (1902) 195 Ill. 236, said:

> The rule is laid down . . . that the parties to a contract may in terms prohibit its assignment, so that an assignee can not succeed to any rights in the contract by virtue of the assignment to him and the rule thus announced is well supported by authorities.

Where there are mutual accounts, a particular item of credit in one of them may not be assigned before a balance is struck (*Nonantum Worsted Company* v. *Webb*, 124 Pa. St. 125). The court, in *Whittle* v. *Skinner* (1851) 23 Vt. 531, decided that an unliquidated partnership balance was not assignable.

The equity courts of some states permit the assignment of future accounts receivable, and when the accounts come into existence the situation is the same as in the case of an assignment of existing accounts. The effect of such an assignment is to give the assignee power of attorney to collect the accounts when they come into being. Since one may give power of attorney to collect a debt which is to come into existence tomorrow as readily as to collect one already in existence, there is no reason why the courts of equity should treat an assignment of future accounts as differing from an assignment of present accounts.

That the assignment of a debt not due is valid if there is an existing contract out of which the debt may arise was held by the court in *Monarch Discount Company* v. *Chesapeake and Ohio Railway Company* (1918) 285 Ill. 233. It was decided in *Tailby* v. *The Official Recorder*, 13 A. C. 523, that unearned book accounts are assignable although they are to be earned thereafter by the assignor in another business. It is generally necessary to specify

the transactions whereby the future accounts are to arise (*Sperry* v. *Clarke*, 76 Iowa 503). In *Davis* v. *Pitcher*, 97 Iowa 13, it was held to be sufficient to describe the accounts to accrue from the sale of certain merchandise. But, if the accounts are to arise from contracts not yet made, the assignment of such accounts is generally held invalid as against creditors of the assignor (*Raulins* v. *Levi* (1919) 232 Mass. 42). Where there is no existing contract from which the claim is expected to arise, the right to assign a future account has been denied by the courts of Massachusetts, Pennsylvania and Wisconsin. In *Skipper* v. *Stokes*, 42 Ala. 255, the court decided that accounts to be earned in the future by the practice of medicine were not assignable although there was an earlier decision in the same state to the contrary effect.

In the absence of a statute prescribing the form of assignment or a contract provision between the parties as to the manner of assignment, no particular form of words is necessary to effect a valid assignment of a chose in action. According to Justice Beck in *Moore* v. *Lowrey*, 25 Iowa 336:

> No particular form is necessary to constitute an assignment of a debt. If the intent of the parties to effect an assignment be clearly established, that is sufficient.

Anything which shows an intention to assign on the one side, and from which an assent to receive may be inferred on the other, will operate as an assignment, if sustained by a sufficient consideration.

The original parties to the contract may make any agreement they may desire as to the mode of making assignments and such agreements will govern. If there is more than one assignee the one to whom the chose in action is assigned according to the terms of the contract will prevail over one to whom the claim was not so assigned (*Fortunato* v. *Patten* (1895) 147 N. Y. 277).

Choses in action may be assigned by parol in most jurisdictions. According to Chief Justice Mansfield in *Heath* v. *Hall* (1812) 4 Taunton 326:

> If two men agree for the sale of a debt and one of them gives the other credit in his books for the price, that may be a very good assignment in equity; its resting in parol is no objection.

In *Union Trust Company* v. *Bulkeley* (1907) 150 Fed. 510, the court maintained that an assignment of a chose in action by parol as security was valid. Oral assignments of book accounts have been upheld by the courts of Mississippi and Vermont.

It has been ruled in *Williams* v. *Ingersoll*, 87 N. Y. 508, and by the courts of nearly every jurisdiction that assignments need not be in writing. However, the statutes of a few states make only assignments in writing valid at law (*Planters' Bank* v. *Prater*, 64 Ga. 609). In Iowa it was decided in an early case that assignments of book accounts must be in writing in order to authorize the assignee to sue on the instrument in his own name (*Andrews* v. *Brown*, 1 Iowa 154) but Wisconsin has a contrary rule (*Woolliscroft* v. *Norton* (1862) 15 Wis. 198). Where the statutes authorize assignments of choses in action, when applied to written instruments, it has been held to mean written assignments, according to the court in *Miller* v. *Paulsell*, 8 Mo. 355. Written assignments may be under seal (*Everit* v. *Strong* (1844) 7 Hill 585).

Assignments of accounts receivable may be inferred from the conduct of the parties (*Coates* v. *Emporia First National Bank* (1882) 91 N. Y. 20). That mere delivery of written evidence of the debt may be sufficient was ruled in *Jones* v. *Witter* (1816) 13 Mass. 304, and the giving of power of attorney to collect a debt may be considered an equitable assignment thereof, if the parties so intend (*People* v. *Tioga Common Pleas* (1838) 19 Wend. (N. Y.) 73). In *Ryan* v. *Maddux*, 6 Cal. 247, the court maintained that an account could be assigned by the owner writing the word "assigned" above his signature.

There must be some sort of a delivery in order that an assignment of a chose in action take effect (*White* v. *Kilgore*, 77 Me. 571) but it need not be an actual delivery in order to pass the beneficial interest to the assignee. It may be constructive, according to the court in *Spring* v. *South Carolina Insurance Company* (1823) 8 Wheat. (U. S.) 268. Any act of the assignor indicating that he relinquishes to the assignee the control over the chose in action will amount to constructive delivery thereof (*Richardson* v. *White* (1896) 167 Mass. 58). If the assignment is written, the delivery of the writing is all that is necessary (*Tatum* v. *Ballard*, 94 Va. 370). The delivery of a copy of a book account was held a sufficient delivery in *Akin* v. *Meeker* (1894) 78 Hun (N. Y.) 387 but the court in *Cornwell* v. *Baldwin's Creek* 43 N. Y. Supp. 771, gave a contrary decision. That constructive delivery of the chose in action is valid even as against creditors was held in *Fisher* v. *Bradford*, 7 Me. 28.

There is much confusion in the early English cases as to the necessity for consideration in chose assignments. It seems quite

probable that originally consideration was not essential, but that later there was a change of view on the part of the courts. At the present time an English court of equity will not assist an assignee of a chose in action unless the assignment was made upon valid consideration (*Edwards* v. *Jones*, 1 Myl. & Cr. 226). In the United States the rule is that the assignee is permitted to sue in his own name in the case of an absolute assignment of accounts receivable even though there was no consideration (*Stone* v. *Frost*, 61 N. Y. 614). The same principle was upheld by the court in *Young* v. *Hudson*, 99 Mo. 102. If an assignment of a chose in action is made as collateral it has been held that there must be adequate consideration to render the assignment valid against creditors of the assignor (*Langley* v. *Berry*, 14 N. H. 82). The assignment of a chose in action imposes on the debtor an equitable and moral obligation to pay the assignee, which is a good consideration for an express promise on the part of the debtor to pay the assignee and will authorize a suit in the name of the latter. This was the decision of the court in *Burrows* v. *Glover* (1871)106 Mass. 324, and in several other cases. If the assignment has been made without consideration, the payment by the debtor to the assignor has been held a good defense to a suit by the assignee (*Dunning* v. *Sayward*, 1 Greenl. (Me.) 366).

Except with regard to a few special classes of choses in action, such as future earnings which several states require to be recorded for the protection of the assignee, assignments of choses in action are not included by the recording statutes, and such assignments are valid without filing and recording in any office of public record (*Aultman* v. *McConnell* (1888) 34 Fed. 274). Statutes in many states make a mortgage effective against creditors if it is recorded, but such acts have generally been held not to apply to choses in action (*Young* v. *Upson* (1902) 115 Mass. 192). According to the supreme court of the United States in *Benedict* v. *Ratner* (1925) 268 U. S. 353:

> The statutes which embody the doctrine and provide for recording as a substitute for delivery do not include accounts.

The assignment of a chose in action conveys, as between assignor and assignee, the right which the assignor then possesses to that thing and the law will assist the assignee to assert that just and proper claim. All remedies open to the assignor for the enforcement of the obligation are open to the assignee (*Crippen* v.

Jacobson, 56 Mich. 386). Justice Treat stated the attitude of the courts in *Chapman* v. *Shattuck* (1846) 8 Ill. 49, where he said:

> The doctrine is now well settled that courts of law will recognize and protect the rights of the assignees of a chose in action, whether the assignment be good at law or in equity only.

Centuries ago the rule became established in England that when the owner of a claim made an assignment of it, he thereby gave the assignee the power to enforce it in his stead, and this power was irrevocable. At common law the assignee did not have a legal right which he could enforce in his own name, but merely an equitable interest to secure which he was given the right to use the name of the assignor (*Usher* v. *D'Wolfe* (1816) 13 Mass. 290). According to Justice Field in *James* v. *Newton* (1886) 142 Mass. 366:

> According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit.

This is the rule in most of our states. Louisiana is an exception. In that state no distinction is made between the legal and the equitable title, and the assignee of an open account may sue in his own name (*Kilgour* v. *Ratcliff*, 2 Mart. N. S. (La.) 252).

In order to entitle the assignee to bring the action in his name, the federal courts and those of Georgia, Iowa, Maryland and Mississippi require that the assignment be in writing. Where the legal title is transferred to the assignee, the assignor can not sue, so the assignee is the only party who can collect from the debtor (*Beck* v. *Rosser*, 68 Miss. 72). That the assignee of an obligation to pay money must sue in his own name was decided by the court in *Carhart* v. *Miller*, 5 N. J. L. 675.

In some jurisdictions the statutes provide that actions must be brought by the real parties in interest, with the result that often the assignee can not sue at law in the name of the assignor but must proceed in his own name on the chose. If the assignee holds the chose for the benefit of another or under an agreement is bound to account to another for the proceeds, he is regarded, in several states, as the trustee of an express trust, and he may sue in his own name without joining his beneficiary (*Murphin* v. *Scovell*, 44 Minn. 530). Where claims were assigned to an attorney for collection and application of the proceeds to the payment of debts

of the assignor in the attorney's hands, the court, in *Wynne* v. *Heck*, 92 N. C. 414, decided that the assignee was the real party in interest and could sue alone. However, according to the decision given in *Pleasants* v. *Erskine*, 82 Ala. 386, if the assignee is to account for the proceeds of an assigned chose in action he is not the real party in interest and can not sue in his own name.

If the debtor makes an express promise to the assignee to pay him the debt, the assignee then has the right to sue in his own name. The reason underlying this rule was stated by Justice Field in *James* v. *Newton* (1886) 142 Mass. 366:

> The law that, if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee as the consideration of the debtor's promise to pay the assignee, and that by this promise the indebtedness to the assignor is *pro tanto* discharged.

An assignment made as collateral security for a debt transfers only a qualified interest in the assigned chose and this is true although the assignment on its face is absolute (*Jarboe* v. *Templer*, 38 Fed. 213). To the extent of his interest, the assignee is the owner of the collateral as against the assignor and he may sue thereon (*Sullivan* v. *Sweeney* (1872) 111 Mass. 366). If he obtains the legal title he may recover the full amount of the chose in action from the debtor notwithstanding the fact that he holds the chose as security for a debt (*Ginochio* v. *Amador Canal*, 67 Cal. 493). However, in *Cerf* v. *Ashley*, 68 Cal. 419, the court maintained that where a chose in action is assigned as collateral security, the assignor must join the assignee in an action against the debtor because the assignor is one of the parties in interest. The English courts do not permit the assignee of a chose in action to sue in his own name where the assignment is for the purpose of security (*Durham* v. *Robertson* (1898) 1 Q. B. 765). After the debt for which the collateral was given is paid, the right to hold the collateral ceases, and the assignee has no interest in it that he can transfer to another. If there is a balance after the debt has been paid from the assigned security, the assignee is liable to the assignor for that amount.

If the assignor becomes insolvent after the assignment and bankruptcy proceedings are begun, the assignee may still use the assignor's name in suing the debtor and the bankruptcy will be no

defense (*Matherson* v. *Wilkinson* (1851) 79 Me. 159). In *Lyford* v. *Dunn* (1856) 32 N. H. 81, the court held that the assignee is a creditor within the meaning of the insolvency act requiring notice to creditors.

Among the rights possessed by the assignee of a chose in action is that of transferring the chose to a second assignee (*Dawes* v. *Boylston* (1812) 9 Mass. 337). The latter would take it subject to all equities between the original parties. Or an assignee may reassign the chose to the original assignor and the latter may maintain an action against the debtor in his own name in spite of a promise of the debtor to pay the first assignee if the debtor has not been notified of the reassignment (*Clark* v. *Parker* (1849) 4 Cush. 361). The assignment of a chose gives to the assignee the right to control the court proceedings and to dismiss the suit (*Southwick* v. *Hopkins* (1860) 47 Me. 362). A court of equity will restrain the assignor from interfering with an action brought by the assignee in the assignor's name (*Deaver* v. *Eller*, 42 N. C. 24) and the assignee can hold the assignor who collects the debt in a common-law action for money had and received (*Camp* v. *Tompkins* (1833) 9 Conn. 545). In some circumstances the assignee may acquire a higher right against the debtor than the assignor had before the assignment. For example, the debtor may act in such a manner that his conduct will estop him from asserting against the assignee his equities against the assignor. If the debtor promises the assignee before the assignment has been made that he will pay the full amount of the claim, equities between the assignor and the debtor with respect to the assigned chose in action will not affect the assignee. This principle is laid down in numerous decisions.

The assignee of a chose in action takes it subject to all equities existing between the debtor and the assignor at the time of the assignment (*Schenuit Rubber Company* v. *International Finance Corporation* (Md. 1925) 130 Atl. 331). The assignment vests in the assignee the same title possessed by the assignor and no more. According to Lord Chancellor St. Leonards in *Mangles* v. *Dixon* (1852) 18 Eng. L. & Eq., 82:

> . . . if a man does take an assignment of a chose in action, he must take his chance as to the exact position in which the party giving it stands. . . . Whatever may be the state of the account . . . the man who takes an assignment . . . must take it just as he finds it . . .

According to Justice Story, in *Greene* v. *Darling*, 5 Mason (U. S.) 201, this principle applies only to the specific chose in action which is assigned and not to other equities subsisting between the parties as to other debts or transactions.

Although the assignee takes the chose subject to the valid liens of the debtor against it at the time of the assignment (*First Ward National Bank* v. *Thomas*, 125 Mass. 278) he does not take it subject to equities of third persons of which he had no notice (*Himrod* v. *Bolton*, 44 Ill. App. 516). The principle and the reason for it have been well expressed by Chancellor Kent, in *Murray* v. *Lylburn* (1817) 2 Johns. Ch. 441, where this great jurist said:

> It is a general and well-settled principle, that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. The assignee can always go to the debtor, and ascertain what claims he may have against the . . . chose in action, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee.

Vermont, apparently, does not follow the general rule, for in *Downer* v. *South Royalton Bank* (1867) 39 Vt. 25, the court decided that the assignee took the chose in action subject to claims in favor of a third person although no notice had been given.

If the assignee suspects equities between the assignor and the debtor and mistrusts deception on the part of the former, it is his duty to inquire of the debtor as to his claims against the assignor when notice is given of the assignment. If he fails to make inquiry and pays more for the assignment than its value, due to the hidden equities of the debtor against the assignor, he must stand the loss. If proper inquiry is made the debtor is bound to inform the assignee of the real circumstances and if he fails to give the information he will not be permitted to take advantage of the equities existing between him and the assignor. The debtor has the same obligation of disclosure if the notice on its face shows the deception of the assignee. But if there is no notice of fraud and nothing to lead the debtor to think that the assignee is likely to sustain a loss, it is usually considered that the former is under no

obligation to volunteer information. In *Mangles* v. *Dixon* (1852) 18 Eng. L. & Eq. 82, Lord Chancellor St. Leonards said:

> I conceive that equity will not require the party who receives the notice, impertinently almost, to interfere between two parties who have dealt behind his back, and who have never made any communication to him or even seen him, on that subject.

The debtor may subject the chose in action in the hands of the assignee to all equities against the assignor and all defenses he had against the assignor prior to the time he receives notice of the assignment (*Littlefield* v. *Albany County Bank*, 97 N. Y. 581). This is true although the assignee is ignorant of such defenses (*Wood* v. *Perry* (1847) 1 Barb. (N. Y.) 114) and he has not had notice of the equities. In order to protect his interests the assignee should notify the debtor of the assignment as soon as possible. After the notification neither the assignor nor the debtor can divest the assignee of his rights in the chose in action (*Brice* v. *Bannister*, L. R. 3 Q. B. D. (Eng.) 569). The debtor can set up no defense which accrued to him after notice of the assignment (*Upton* v. *Moore* (1872) 44 Vt. 552). But he may take advantage of any equities between him and the assignor prior to notice of the assignment for the reason that equities after the assignment but before the notice are usually founded upon a continued course of dealing between the debtor and the assignor, and the debtor has reason to believe that the course of dealing has not been affected by the assignment until he has notice of that transfer. But after receiving the notice, neither payment by him to the assignor nor a release by the latter will affect the rights of the assignee against the debtor (*Jones* v. *Witter* (1816) 13 Mass. 304). The decision given in the case of *Thorn* v. *Myers*, 5 Strobh. (S. C.) 210, is an outstanding exception to the general rule. The court ruled that where the assignment passed the legal title in the chose to the assignee the debtor could not set up equities acquired against the assignor after assignment but prior to notice thereof.

The debtor has the right of set-off in respect to any equities between him and the assignor and also between him and the assignee prior to notice of the assignment (*Hackett* v. *Martin* (1831) 8 Green 77). But he may not set-off a claim held by him at the time of the assignment if he had notice from the assignee that the assignment was about to be made and did not disclose such claim (*King* v. *Fowler* (1820) 16 Mass. 397). Neither may the debtor

set-off any claim accruing or procured subsequent to the notice (*Bartlett* v. *Pearson*, 29 Me. 9). Furthermore, the chose in the hands of the assignee is not subject to set-off by the debtor if the obligation is not mature at the date of the notice (*Breen* v. *Seward*, 11 Gray (Mass.) 118). A promise on the part of the debtor to the assignee to pay him the full amount of the assigned chose in action has been held to be a waiver of all right of set-off against the assignor, existing at the time or arising at a later date (*King* v. *Fowler* (1820) 16 Mass. 397).

For the purpose of protecting his claim to the assigned chose in action, the assignee should give immediate notice of the assignment to the debtor. According to Justice Dodge, in *Skobis* v. *Ferge*, 102 Wis. 122:

> . . . The authorities are overwhelming, and almost without dissent, that no assignment of a chose in action can have any effect upon the debtor or fundholder, or interfere with his dealings with the fund until brought to his notice.

As between the assignee and the debtor the assignment does not become operative until the time of notice to the latter and until such notice is received. The debtor still remains a debtor to the assignor and may pay him the obligation. Justice Willes, in L. R. 5 C. P. 594, maintained that it is:

> A rule of general jurisprudence that if a person enters into a contract, and, without notice of any assignment, fulfills it to the person with whom he made the contract, he is discharged from the obligation.

But, as between the assignor and the assignee, it is not necessary to the validity of the assignment that the debtor be notified (*Allyn* v. *Allyn* (1891) 154 Mass. 570).

Until the debtor receives notice of the assignment he may deal with the assignor as if the assignment had not been made and he will be protected as to all bona-fide defenses arising before he had knowledge of the assignment (*Campbell* v. *Day* (1844) Vt. 558) and the same evidence that would be admissible between the original parties is admissible against the assignee (*Loomis* v. *Loomis* (1854) 26 Vt. 198). He may safely pay the assignor (*Ashcomb's Case* (1674) 1 Ch. Cas. 232) or the assignor may release him from the obligation. Creditors of the assignor may attach the fund at any time before the debtor has notice (*Woodbridge* v. *Perkins* (1809) 3 Day (Conn.) 364). If a judgment is entered against the debtor garnishee prior to notice, the creditor

will be entitled to preference over the assignee (*Wood* v. *Partridge* (1814) 11 Mass. 488). It is worthy of notice that the court, in *McDonald* v. *Kneeland*, 5 Minn. 352, made a contrary decision in regard to this point. It has been said that notice to the debtor plays a part in the assignment of a chose in action similar to that which recording the deed does in a grant of land.

After the debtor has knowledge of the assignment the chose becomes fixed in his hands and he is inhibited from doing anything which may prejudice the rights of the assignee. Payment by him to the nominal creditor will be no defense to an action brought for the benefit of the assignee (*Littlefield* v. *Storey* (1808) 3 Johns. (N. Y.) 425). Any compromise or adjustment of the cause of action by the original parties, made after notice of the assignment but without consent of the assignee, will be void against him (*Dunn* v. *Snell* (1819) 15 Mass. 481). An accord and satisfaction entered into and carried out between the assignor and the debtor who has had notice will be invalid as against the assignee (*Jenkins* v. *Brewster* (1817) 14 Mass. 291). Neither attachment nor garnishment by creditors of the assignor can defeat the rights of the assignee after the debtor has learned of the transfer of the chose in action. If the assignee has only a qualified interest in the chose, the debtor may deal with the assignor after notice, but he deals subject to the interest of the assignee and is liable to the assignee only to the extent of that interest (*Sanders* v. *Soutter*, 136 N. Y. 97).

The notice to the debtor need not be in any particular form. An assignment will bind him if he has such knowledge of facts and circumstances as ought to put him on inquiry. No special notice is necessary nor need the assignee exhibit to the debtor the instrument itself or any other evidence. However, in *Skobis* v. *Ferge*, 102 Wis. 122, Justice Dodge says:

> The notice to him (the debtor), therefore, must be of so exact and specific a character as to convince him that he is no longer liable to such original creditor, and to place in his hands the means of defense against him, or at least the information necessary to interplead the assignee.

Acceptance of the notice by the debtor is not essential to its validity (*Kingman* v. *Perkins* (1870) 105 Mass. 111) because the assent of the debtor is unnecessary to complete the assignment.

The determination of the rights of assignees where the assignor makes a second assignment of the same chose in action has caused

the courts considerable trouble. In the leading English case on the subject, *Dearl* v. *Hall* (1823, Ch.) 3 Russ 1, the court established the rule that a subsequent assignee of a cestui's interest who inquired of the trustee and gave notice of his assignment would be given precedence over a prior assignee who did not give such notice. This principle was approved by the house of lords in *Foster* v. *Cockerell* (1835, H. L.) 3 Cl. & F. 456. The rule was later broadened to such an extent that it now includes all choses in action. The court, in *Meaux* v. *Bell* (1841, Ch.) 1 Hare 73, said:

> The omission of the puisne encumbrancer to make inquiry can not be material where inquiry of the circumstances of the case would not have led to a knowledge of the prior encumbrance.

This statement has been interpreted to mean that inquiry of the debtor by the subsequent assignee was not required, with the result that since 1841 the subsequent assignee could fix his rights without inquiry if he gave the necessary notice. An excellent present-day statement of the English rule is given by Justice Lawlor in *Adamson* v. *Paonessa* (1919) 180 Cal. 157 where he quotes the court in *Widenmann* v. *Weiniger*, 164 Cal. 667 as follows:

> As between successive assignees of a chose in action, he will have a preference who first gives notice to the debtor, even if he be a subsequent assignee, providing at the time of taking it he had no notice of the prior assignment.

The basis for the English rule seems to be that the negligence of the prior assignee in failing to notify the debtor of his assignment should estop him from asserting any claim that would jeopardize the interest of the subsequent assignee who has paid full value for the chose in action and who has no way of learning of the prior assignment. This is an application of the principle of estoppel and of the old rule of equity, that of two innocent parties, one of whom must suffer, he whose act or omission caused the loss must bear it. Later courts adopting this rule have justified their action on the ground that it was the only way to protect against the fraud of the assignor (*Jenkinson* v. *New York Finance Company* (1911) 79 N. J. Eq. 247).

There are some circumstances in which the English rule does not apply. The second assignee may not recover unless he has given consideration to the assignor for the assignment. A gratuitous assignment of a chose in action or one given in consideration of an

antecedent debt is not sufficient, according to the court in *Davis* v. *State National Bank* (1913) 156 S. W. 321, although there has been at least one decision to the contrary in which a creditor assignee was considered to be in the same secure position as an assignee for value (*In re Furnace Company* (1916) 233 Fed. 451). The court, in *Laclede Bank* v. *Schuler* (1887) 120 U. S. 511, decided that an assignee in bankruptcy would be given the same protection by law as an assignee for value. In *Third National Bank* v. *Atlantic City* (1903) 126 Fed. 413, the prior assignee was permitted to prevail over the attaching creditor of a subsequent assignee who had given first notice of the assignment. Notice of the prior assignment will defeat the rights of the subsequent assignee (*Powell* v. *Powell* (1909) 217 Mo. 571). There is some conflict of authority as to who has the burden of proof in respect to the notice. In *Wagenhurst* v. *Wineland* (1902) 20 App. D. C. 85, the court ruled that the subsequent assignee should be responsible but it was decided in *Peters* v. *Goetz* (1916) 136 Tenn. 257, that the prior assignee must prove the notice in order to defeat the later assignee.

The American rule is that between equal equities the prior assignee takes good title to the chose in action. The subsequent assignee gets nothing, because the assignor transferred all his right to the chose to the first assignee and consequently he had nothing which he could assign to the second assignee. Notice to the debtor by the subsequent assignee can not affect the title of the prior assignee because the latter already has the right to the chose in action. Although no notice to the debtor is necessary as between assignee and assignor (*Quigley* v. *Welter* (1905) 95 Minn. 383) if notice of the assignment is not given the debtor may discharge his liability by paying the subsequent assignee or the assignor (*Commonwealth* v. *Sides* (1896) 176 Pa. 616). If the debtor pays the debt to the subsequent assignee or to the assignor without notice of the assignment it is only just that he be protected against the prior assignee since it is through the silence of the latter that the debtor has made the payment to the wrong party. Should the last assignee receive payment when estoppel is not present he holds the funds as trustee for the first assignee (*Rabinowitz* v. *Peoples National Bank* (1920) 235 Mass. 102).

If the second assignee is clever or swift enough to obtain payment from the debtor he will be able to defeat the claims of the prior assignee (*Rabinowitz* v. *Peoples National Bank* (1920) 235 Mass. 102). When the last assignee makes a novation with the

debtor his claim to the chose in action is better than that of the earlier assignee according to the court in *New York, New Haven & H. R. R.* v. *Schuyler* (1865) 34 N. Y. 30. If the last assignee sues the debtor and reduces his claim to a judgment he will be permitted by the courts to prevail over the prior assignee (*Judson* v. *Corcoran* (1854, U. S.) 17 How. 612). In this case, a second assignee of a claim against the Mexican government, who gave immediate notice of his assignment to the secretary of state, prosecuted his claim before the commissioners and obtained an award. The court held that the subsequent assignee had a better title than the prior assignee who gave no notice of his assignment and made no effort to enforce his claim until after the award had been made. That the first assignee may act in such a manner as to estop him from denying that the last assignee has priority was decided in *Security Company* v. *Delfs* (1920) 47 Cal. App. 599. If he permits the assignor to retain possession of the evidence of the chose, thus enabling the latter to dispose of it to a bona-fide assignee for value or by his laches he stands by and permits a subsequent assignee to recover on the chose in action there is excellent authority which denies him a claim to the property involved.

Neither the English nor the American rule applies where the assignor and the debtor specify the method of assignment. That assignee has the best claim with whom the assignor made the assignment according to the provisions of the contract with the debtor, irrespective of whether he is the prior assignee or the subsequent assignee (*Fortunato* v. *Patten* (1895) 147 N. Y. 277). If the assignment is made with power of revocation, a subsequent assignment of the same chose in action will revoke the first assignment, according to the court in *McCormick* v. *Sadler*, 14 Utah 463. If the statutes of a jurisdiction require the recordation of this type of assignment, the assignee who fails to record will have no priority over another assignee, prior or subsequent, who obeys the law and places his assignment on the public records (*Peabody* v. *Lewiston* (1891) 83 Me. 286).

There seems to be an irreconcilable conflict among the American decisions in respect to the status of the assignees where there have been subsequent assignments. The federal courts and those of California, Connecticut, District of Columbia, Iowa, Maryland, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Tennessee, and Canada follow the English rule while the American rule is followed by the courts of Alabama, Illinois, Indiana, Kansas, Ken-

tucky, Massachusetts, Minnesota, North Carolina, New Hampshire, New Jersey, New York, Oregon, South Carolina, Texas, West Virginia, and Washington. The supreme court of the United States in early times seemed to favor the English rule. In *Spain* v. *Hamilton's Administrator* (1863) 1 Wall (U. S.) 604 the court stated the following rather strong dictum:

> As the assignee is generally entitled to all the remedies of the assignor so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice.

Since this dictum was not law the position of our highest court was uncertain until 1924 when the English rule was rejected and the American rule was adopted in *Salem Trust Company* v. *Manufacturers' Finance Company* (1924) 44 Sup. Ct. 266. In this case the Nelson Company assigned to the petitioner for value a debt amounting to $45,000 due it under a contract and later the assignor assigned the same debt to the defendant who failed to inquire of the debtor regarding previous assignments and had no notice of the prior assignment to the petitioner. The defendant notified the debtor of the assignment before the petitioner. Later the Nelson Company became bankrupt, and the supreme court held that as between the petitioner and the defendant, the one whose assignment was prior in time should prevail.

Some of the early writers justified the English rule on the ground of an analogy to the sale of a chattel to a later vendee by a vendor who had been allowed to remain in possession in which case the first vendee is not permitted to assert his title against that of the second assignee because he allowed the vendor to retain the indicia of ownership. This reasoning is not now applicable in the states which have adopted the uniform-sales act because section 25 of that act provides that a second assignee who relies on the retention of possession by the vendor and who purchases for value and obtains delivery is protected. Consequently, the second vendee does not need the protection of the common law. Others maintain that the prior assignee knows that he has the opportunity to protect himself against subsequent assignments by notifying the debtor of the assignment and if he is so negligent that he fails to

take this precaution his claim should not take precedence over that of a subsequent assignee for value without notice.

The American rule seems more reasonable because the assignor transfers all his interest in the chose in action to the first assignee and he should not be permitted to accept value from a second assignee for the assignment of a right which he no longer possesses. To hold otherwise would encourage fraud on the part of the assignor. According to the court in *Columbia Finance Company* v. *First Natonal Bank* (1903) 116 Ky. 364:

> The rule of caveat emptor applies to sales of choses in action as in other sales of personal property, and if the seller has sold the thing to one person, and therefore has no title to pass to a second, the latter takes nothing by his purchase.

At common law partial assignments of choses in action may not be enforced against the debtor without his consent to the division of the debt. In the leading case, *Mandeville* v. *Welch* (1820) 5 Wheat. 277, Justice Story said:

> A creditor shall not be permitted to split up a single cause of action into many actions, without the consent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract, that he should be obliged to pay in fractions to any other person.

Further reasons for the rule are given by Justice Field in *James* v. *Newton* (1886) 142 Mass. 366 where this learned jurist said:

> It is not wholly a question of procedure, although the common law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor can not sue his debtor for a part of an entire debt, and, if he bring such an action and recover judgment, the judgment is a bar to an action to recover the remaining amount. There must be distinct promises in order to maintain more than one action.

It is only reasonable that the courts should not permit a creditor to divide an obligation to pay him a stated sum into parts, and assign them to several parties, thereby subjecting his debtor to the trouble of having more than one claim presented to him or of

defending more than one suit arising out of the original contract. The law requires the debtor to comply with his contract but it requires no more than this. However, where the debtor consents to an assignment of part of his debt, the assignee may sue him on this part (*Richmond* v. *Parker*, 12 Metc. (Mass.) 48). The right to recognize partial assignments of choses in action is personal to the debtor and may not be insisted upon by a third party who has sued him (*Burditt* v. *Porter* (1891) 63 Vt. 296). Where the code provides that actions may be brought by the real parties in interest, the assignor of a partial assignment of a chose in action may join the assignee in an action to enforce payment by the debtor (*Singleton* v. *O'Blemis*, 125 Ind. 151).

The main reason for not enforcing a partial assignment of a chose in action at common law does not exist in equity because all the parties at interest may be brought before the court and their rights under the original contract and the assignment or assignments can be settled in one decree so the debtor will not be annoyed or inconvenienced by more than one suit on his contract. Courts of equity have always recognized partial assignments of choses in action for many purposes and will protect the assignee, after notice to the debtor, if it is possible to do so without inflicting a hardship upon the latter (*Richardson* v. *White* (1896) 167 Mass. 58). The theory of equity seems to be that the debtor owes part to the assignee and part to the assignor. According to Justice Field in *James* v. *Newton* (1886) 142 Mass. 366:

> It is said that in equity, there may be, without the consent of the debtor, an assignment of part of an entire debt. It is conceded that, as between assignor and assignee, there may be such an assignment. . . . In many jurisdictions, courts of equity have gone still further, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and the assignor while the debt remains unpaid. . . . But some courts of equity have gone still further, and have held that after notice of a partial assignment of a debt, the debtor can not rightfully pay the sum assigned to his creditor, and, if he does, that is no defense to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule, he can not, if he have notice or knowledge of an assignment of any part of it.

The equity courts will not force the debtor to pay the claim piecemeal. He may insist upon making a single payment unless his contract with his creditor provides otherwise. If he objects to paying fractional parts of his indebtedness he may pay the whole sum into a court of equity to be distributed by it among the parties entitled to the fund. But if he is unable to pay the entire indebtedness upon a single decree of the court, he may refuse to recognize the partial assignment and nullify the act of the assignor (*Wilson* v. *Carson* (1857) 12 Md. 54).

By the fact of assignment for a consideration, the assignor guarantees that he will not interfere with the chose in action thereafter. Furthermore, he creates an implied covenant that he has done and will do nothing to prevent the assignee from collecting it (*Eaton* v. *Mellus* (1856) 7 Gray (Mass.) 566). Justice Story, in *Mandeville* v. *Welch* (1820) 5 Wheat. 277, said:

> It has long since been settled, that where a chose in action is assigned by the owner, he shall not be permitted fraudulently to interfere and defeat the rights of the assignee in the prosecution of any suit to enforce those rights. And it has not been deemed to make any difference, whether the assignment be good at law, or in equity only.

If the assignor does interfere and damage results to the assignee, he renders himself liable to the latter (*Sanders* v. *Aldrich*, 25 Barb. (N. Y.) 63).

In every chose assignment there is an implied warranty on the part of the assignor that the chose in action is a genuine and real claim in his favor against the debtor (*Tyler* v. *Bailey*, 71 Ill. 34). Should the claim be invalid, the warranty is broken as soon as it is made, and the assignee may immediately sue the assignor and he need not return the assigned chose (*Flynn* v. *Allen*, 57 Pa. St. 482). If he sues to collect and fails, he is entitled to recover from the assignor what he paid for the assignment and his reasonable expenses in such suit (*Phoenix Insurance Company* v. *Parsons* (1891) 129 N. Y. 86) but if he does not bring an action he is entitled to the amount he paid for the chose (*Barley* v. *Layman*, 79 Va. 518). The assignee may seek the return of the consideration paid before commencing suit if he so desires (*Walsh* v. *Rogers*, 15 Nebr. 309) but he must give the assignor notice of any defense set up against the assigned chose (*Drayton* v. *Thompson*, 1 Bay (S. C.) 263).

It seems to the writer that the courts show by their decisions in cases involving chose in action assignments that they appreciate

the importance to business of liberal laws in respect to the transfer of claims from one party to another. Since transfers of this nature are apparently to occupy a place of more significance in the future than they have in the past, such an attitude on the part of our jurists will prove helpful to business in general.