

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School,
at 34th and Chestnut Streets, Philadelphia, Pa.

VOL. 75.

JUNE, 1927.

No. 8

THE ASSIGNMENT OF UNEARNED BOOK ACCOUNTS

With the ever-changing needs and demands of society and commerce it always is interesting to observe the efforts of the law to adapt itself to new conditions. The change in the conceptions of business relations and in the structure of business associations during the last century makes obvious and sensible many principles and practices once deemed dubious or fraught with danger. In the field of the statutory law of corporations, for instance, it is difficult to understand now just why some of the curious provisions of fifty years ago were considered necessary or desirable.

Often as this struggle for adaptation has occurred in the development of the law, in few instances has it been more intense than in the subject of assignment, especially the assignment of choses in action. Business practices thought undesirable, and, in fact, legally impossible in the time of Lord Coke, now may be not only feasible but highly desirable. That which society demands the law achieves, sometimes by legal fiction, sometimes by direct repudiation of the old and adoption of the new, and sometimes, when all other methods fail, by statute.

It may have been true once that it was not desirable to permit the merchant or the trader to assign his contracts or his accounts, but when the exigencies of commerce demanded that all assets might be utilized for credit or subjected to the grasp of

the creditor, something had to be done to bend the law to the need.

Under the provisions of the law merchant, negotiable instruments were assigned and the assignments recognized at an early date,¹ as were contracts or covenants running with the land; but the face of the common law was set sternly against that which, in any strict interpretation of the term, we know as an assignment. Various reasons were given for this strange and persistent opposition, for even in the United States, as Judge Story remarked in 1831:² "The general principle of law is, that choses in action are not at law assignable." It frequently is said that assignments were not favored by the common law because of the doctrine of maintenance; that is, because of the fear they would be used for oppressing the weak and defenceless. The thought seemed to be that if the law permitted one person to acquire from another the right to a debt owing by a third person, the rich and the powerful thus would be enabled to seize a weapon with which to oppress the debtor. This famous reason was announced by Lord Coke in *Lampet's Case*,³ which involved a lease. Lord Coke there said:

"And first was observed the great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the cause of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice."

To the modern mind this is a somewhat dubious explanation. For serious doubt may be entertained whether even a peculiarly malicious investor would be tempted to any great extent to purchase claims against debtors too poor to pay or too defenceless to interpose a just defence.⁴ And a distinguished American writer

¹ 2 BL. COMM.* 468.

² *Tiernan v. Jackson*, 5 Pet. 580 (1831).

³ 10 Coke 46b (1612).

⁴ See statement of Prof. Williston in 1 WILLISTON, CONTRACTS (1924) § 405, where, referring to Lord Coke's statement, he says: "But had this been the basis of the rule the Courts would not have permitted suit by an attorney with power to retain the proceeds of the suit." Also, Buller, *J.*, in *Master v. Miller*, 4 T. R. 340 (1791): "It is laid down in our old books that for avoiding maintenance a chose in action cannot be assigned, or granted over to another. . . ."

has emphasized the fallacy of this reason by calling attention to the fact that the rule against assignments is older than the doctrine of maintenance.⁵ A better reason seems to be that at law a contract was considered so purely personal that the idea of a third person acquiring the rights of one of the parties violated the real conception of a contract.⁶

Courts of equity, however, early rejected this conception of the parties to a contract, and recognized and upheld assignments. In *Squib v. Wyn*,⁷ Lord Chancellor Cowper said in 1717, with reference to an assignment by a husband of his wife's share in her deceased sister's estate: "Besides, this is the very ground of the difference, that choses in action are assignable in equity, though not at law." In 1723 a bond conditioned to settle real estate upon the future marriage of the obligor's daughter was enforced, and the real estate ordered transferred to the daughter; although at the time the bond was given the obligor had not inherited the

The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case. . . . It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance. Bro. Tit. Maintenance 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpoena, or suppress the truth. That such doctrine repugnant to every honest feeling of the human heart should be soon laid aside must be expected. Accordingly a variety of exceptions were soon made; and, amongst others, it was held, that if a person has any interest in the things in dispute, though on contingency only, he may lawfully maintain an action on it."

⁵ Prof. Ames in 3 HARV. L. REV. 339 (1889): "The rule is not only older than the doctrine of maintenance in English law, but is believed to be a principle of universal law."

See article by Percy H. Winfield, 35 L. Q. REV. 143 (1919): "It may be added that Coke's theory is perilously close to an anachronism. It is true that maintenance and champerty were well known at an early stage of our law, but if our historical analysis of them be correct, they were known almost exclusively as modes of corruption and oppression in the hands of the King's officers and other great men. Maintenance of the sort that they usually committed was something much coarser than an attempt to assign or receive a chose in action. To say of a chose in action that it could not be assigned in early times because that would infringe the law of maintenance is to imply a development in the law of maintenance which it scarcely possessed till Henry VI's reign—the very period in which it was expressly held that it did not apply to assignment of a debt."

⁶ 4 PAGE, CONTRACTS (1921) § 2236; 1 WILLISTON, *loc. cit. supra* note 4.

⁷ 1 P. Wms. 378 (1717).

land.⁸ In 1749 a draft on a debt due from a particular fund was upheld and enforced;⁹ and in the same way an assignment of an expectancy in an estate was enforced.¹⁰ As a result of this recognition by courts of equity, the law courts permitted the otherwise inflexible rule to bend sufficiently to allow an assignee to sue in the name of the assignor. And so the rule itself, originally a legal principle, became nothing more than a rule of pleading.¹¹ Yet it persisted to a late day, even in the United States.¹² Thus both the law and the equity courts came to give full recognition to the right of one party to a contract to pass on his interest to a third person.

But suppose the interest of the assignor had not yet come into existence? Early in the adaptation of the rule to changing conditions this problem had to be met. An heir assigned his ex-

⁸ *Hobson v. Trevor*, 2 P. Wms. 191 (1723).

⁹ *Row v. Dawson*, 1 Ves. Sr. 332 (1749).

¹⁰ *Wright v. Wright*, 1 Ves. Sr. 410 (1749); see also the remarks of Gibson, C. J., as to a marriage settlement in *Wilson's Estate*, 2 Pa. 325 (1845): "The settlement was executed in the lifetime of the testator, and consequently before any title had vested in her; whence an argument that the settlement was inoperative. It is certain that though a contingent limitation by will, after the death of the testator, or by deed, is a legitimate subject of grant, even at law, yet the hope or expectation of succeeding to the property of another by descent or devise is not so. But it is equally certain that such an interest may be bound by a settlement in equity."

¹¹ 4 PAGE, *op. cit. supra* note 6, § 2237; Percy H. Winfield, in 35 L. Q. REV. 147 (1919): "The doctrine that choses in action are now assignable made its way into modern law with a certain amount of ebb and flow. The familiar rule that they are assignable in equity dates back to the latter part of the seventeenth century."

JENKS, A SHORT HISTORY OF ENGLISH LAW (2d ed. 1921) 301: "Again, the strictness of the common law rule has been circumvented by the practice of appointing the intended assignee of a chose in action the attorney of the assignor, and thus enabling him to sue the debtor in the assignor's name." He then states that this device was known as early as 1641 in *E. of Suffolk v. Greenvil*, 3 Rep. Cha. 50, but the drawback to it was that the death of the assignor revoked the power of attorney, and destroyed the assignee's title, at least at law. "But the most hopeful way of escape was through the doors of a Court of Equity; and, soon after the middle of the seventeenth century, it becomes clear that the common law rule prohibiting alienation is being set at nought by chancery."

Buller, J., in *Master v. Miller*, *supra* note 4: "But still it must be admitted, that though the Courts of Law have gone the length of taking notice of assignments of choses in action and of acting upon them, yet in many cases they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving that shadow when the substance is gone; and that it is merely a shadow, is apparent from the later cases, in which the Court have taken care that it shall never work injustice."

¹² *Tiernan v. Jackson*, *supra* note 2.

pectancy;¹³ a merchant transferred to another his interest in a cargo not yet shipped;¹⁴ a mortgagee endeavored to enforce his mortgage on after-acquired property.¹⁵ If the interest of the heir had vested, if the cargo actually had been shipped, the decision of the question was easy. The difficulty arose when the heir undertook to assign that which he might never possess; and the merchant pledged his cargo, or the shipowner pledged his freight, when the voyage not even had commenced. The equity courts met these situations by holding that the transfer of the possibility became a transfer of the right to the equitable ownership in the property as soon as it came into existence or was acquired by the assignor.¹⁶

Thus it came generally to be recognized that, while the law regards as valid a transfer or assignment of a thing in existence but holds that what a man has not he may not dispose of, equity will give effect to assignments of expectancies when they actually come into existence, certainly whenever good conscience seems to require it and if there is a consideration.¹⁷ And until the expectant interest vests in the assignor the assignment will be treated as an agreement to assign. It indeed is remarkable how much argument and discussion were directed to this subject before courts generally adopted the principle. For, after all, what is it

¹³ *Bennett v. Cooper*, 9 Beav. 252 (1845).

¹⁴ *In re Ship Warre*, 8 Price 269 (1817); *Lindsay v. Gibbs*, 22 Beav. 522 (1856).

¹⁵ *Holroyd v. Marshall*, 10 H. L. Cas. 191 (1861).

¹⁶ 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §1288. See also opinion of Sharswood, J., in *P. W. & B. R. R. v. Woelpper*, 64 Pa. 366, 371 (1870): "But it is objected that no person, natural or artificial, can grant what he does not possess or own at the time of the grant. *Qui non habet, ille non dat*. Yet even at law this rule is not without some qualifications. A man may grant the future accretions or increase of any subject which he owns at the time of the grant, as all the wool which shall grow on his sheep for a term of years. *Grantham v. Hawley*, Hobart 132, was the case of a covenant by a lessor that a lessee of a term certain might take the corn that should be growing at the end of the term, and upon an issue whether it did of right belong to the lessee it was held to be a good grant. And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruit that may arise upon it after, and the property shall pass as soon as the fruits are extant; Ass. 21 Henry 6. A parson may grant all the tithe wool that he shall have in such a year: 1 Plowd. 13a. So, if a man grant *vesturam terrae*, the grantee shall have the corn, grass, underwood, sweepage and the like: 1 Inst. 4b."

¹⁷ *Kuhn's Estate*, 163 Pa. 438, 30 Atl. 215 (1894).

but the application of the general equitable rule that equity regards as done that which ought to be done? Apparently there was little difficulty about holding a defective conveyance a valid contract to convey; or in declaring the title in the grantee when a grantor without title had warranted the title in his conveyance and subsequently acquired the title; although this latter rule is said to be based on the principle of estoppel. And yet, while the illustrations given show how firmly these principles now are applied to the transfer of expectancies in tangible property, in one branch of the subject a wide diversity of opinion still exists in the courts of the various jurisdictions.

There seems to be little controversy over the right of one who has contracted to furnish services or materials to transfer to another the expected profits or proceeds from his contract. In a Pennsylvania case,¹⁸ *A*, a stair builder, not being able to finance the purchase of materials for his contract with *X*, applied to *B* to furnish the money and assigned to *B* enough of the contract price he was to receive from *X* to repay *B*. The assignment was upheld as valid.¹⁹ Mr. Justice Trunkey set forth definitely and without qualification that, if made for a valuable consideration, an assignment of demands having no actual existence but resting in expectancy only is valid in equity as an agreement to assign, and that it takes effect as an assignment when the demands are subsequently brought into existence. And this rule is generally followed.

In Massachusetts,²⁰ an assignment by a sailor of his share of the oil a whaling ship expected to obtain during a voyage not

¹⁸ *Ruple v. Bindley*, 91 Pa. 296 (1879).

¹⁹ The report of *Ruple v. Bindley* indicates that a contract existed between *A* and *X*. *A* made a bid to *X* for building the stairs, and *X* agreed to accept the bid. Afterwards *A* applied to *B* for financial assistance.

²⁰ *Gardner v. Hoeg*, 18 Pick. 168 (Mass. 1836); *Tripp v. Brownell*, 12 Cush. 376 (Mass. 1853). In *Low v. Pew*, 108 Mass. 347 (1871), the owners of a schooner about to sail on a fishing voyage assigned, at so much per pound, all the halibut that might be caught during the voyage. This was held void, the Court saying that the halibut had no actual or potential existence. The Court distinguished the whaling cases by saying that in those cases the assignment was not of the oil to be made from the voyage, but of the debt under the shipping articles which would become due to the seaman at the end of the voyage; saying as to the halibut case: "There was a possibility that they might catch halibut, but it was a mere possibility and expectancy coupled with no interest."

yet commenced was held valid. Upon the same principle, and providing there is no statutory prohibition, assignments of wages are upheld where there is an existing contract of employment, although not where there is no existing contract.²¹

Taking one step further, however, we come to the cases where there is in existence no contract whatsoever, but simply a going business with the hope or expectation of being able to enter into contracts in the future. The attempted assignment of the proceeds of these expected transactions is the common instance of the assignment of "unearned book accounts." The manufacturer or merchant, prior to making any sales or knowing definitely, except from past experience, that he will be able to make any sales, assigns his future accounts. That is, he assigns those accounts which will accrue from the purchasers of his goods if he sells and when he sells; but if he does not sell then nothing will accrue. A wide diversity of opinion exists as to the validity of this practice. In some jurisdictions it is considered wholly invalid. In a Wisconsin case,²² *A* assigned all the amounts that might become due for milk to be delivered to a cheese factory; but he had no contract to deliver the milk, nor was the factory under any obligation to take any. The court rested its decision, holding the assignment invalid, on the distinction between having an existing vested interest in the property assigned and having only a mere possibility or expectancy of acquiring property "not coupled with an interest."

In Alabama the courts refuse to recognize such assignments. In one case,²³ *X* contracted to carry on his shop during the year 1847 and assigned all the accounts to be created by his labor in that year. The court questioned whether such accounts could be the subject of assignment against a debtor who, without notice of the assignment, had acquired a legal set-off. In another case²⁴ a blacksmith assigned all accounts he expected to have dur-

²¹ *Metcalf v. Kincaid*, 87 Iowa 443, 54 N. W. 867 (1893); *Close v. Independent Gravel Co.*, 156 Mo. App. 411, 138 S. W. 81 (1911); *Jermyn v. Moffitt*, 75 Pa. 399 (1874); *Lehigh Val. R. R. v. Woodring*, 116 Pa. 513, 9 Atl. 58 (1887).

²² *O'Neil v. Kerr Co.*, 124 Wis. 234, 102 N. W. 573 (1905).

²³ *Stewart v. Kirkland*, 19 Ala. 162 (1851).

²⁴ *Purcell's Admr. v. Mather*, 35 Ala. 570 (1860).

ing the year 1858 with certain named persons, and this was held invalid. In a later case *A*,²⁵ a physician, in consideration of *B*'s furnishing a horse for *A* and paying *A*'s board, assigned to *B* all his professional accounts for one year. This, too, was held invalid. A warehouse company assigned all notes and accounts "then in hand or thereafter to be acquired during the year 1912,"²⁶ and this was held unenforceable as to accounts not existing at the time of the assignment.

In Massachusetts the subject was discussed elaborately by Chief Justice Rugg.²⁷ *A* assigned to *B* "all our book accounts which are now due or which may become due," and *B* reassigned to the plaintiff. *A* became bankrupt and the plaintiff sought to compel the transfer to him of certain accounts. But the Court would not allow it. Starting out with the statement that there can be no present conveyance of property not in existence or of property not in the possession of the seller, and to which he has no title, the Chief Justice refers to the rule that a sale of personal chattels is not good as against creditors unless there has been a delivery; and that manifestly there cannot be a delivery of chattels not in existence.²⁸ And as there must be some act of the parties subsequent to the time the chattels come into existence in order to bring after-acquired chattels under the lien of a mortgage, the mortgage is held not to have the effect of changing the title without some further act of the parties. Stating that it would be anomalous for a court governed by such principles as to sales and mortgages of future acquired goods and chattels to uphold assignments of future acquired book accounts, Chief Justice Rugg held these invalid. He conceded that some of the incidents of book accounts differ from those of a tangible thing, but said that

²⁵ *Skipper v. Stokes*, 42 Ala. 255 (1868).

²⁶ *Clanton Bank v. Robinson*, 195 Ala. 194, 70 So. 270 (1915).

²⁷ *Taylor v. Barton Child Co.*, 228 Mass. 126, 117 N. E. 43 (1917).

²⁸ See comment of Prof. Williston in 1 WILLISTON, *op. cit. supra* note 4, at 769 on this subject: "In many of the cases involving assignments of money not yet due, the analogy is suggested of contracts to sell chattel property which the grantor has not yet acquired. The analogy between choses in action and chattels is, however, not so perfect as seems to be assumed by the decisions, . . . The practical effect of the assignment of such property is produced whether the parties so state or not, by the legal authority or power of attorney which the owner of the chose gives to the assignee to collect it and keep the proceeds."

these are not sufficient to warrant the application of legal principles different from those governing transactions concerning property with a "physical and tactile body."

In another case the courts of West Virginia refused to uphold an assignment by an agricultural society of the proceeds of a fair the society expected to hold in the future.²⁹

Turning, however, to other jurisdictions, we find an entirely different conception of such transactions. The courts of New York had the question before them in 1852.³⁰ *A* had done printing for the City of New York and expected to do more in the future. He had no contract to do all the printing, but each transaction, apparently, was separate from every other transaction. He assigned to *B* all accounts that might become due him for printing. At the time of the assignment some bills were due, but most of the bills accrued and most of the services were rendered after the date of the assignment. Meeting the contention that no interest passed by the assignment because no contract existed, the court said it was true there was no present existence of the thing to which the assignment related, and, therefore, of course, it could not operate *eo instanti* to transfer the claim to *B*; but it did create an equity which would seize upon those claims as they should arise. Moreover, it was said that whatever doubts had theretofore existed on the subject the better opinion was that courts of equity "will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them." This case is quoted widely and has been approved in many subsequent New York decisions.

In Pennsylvania, the case of *East Lewisburg Lumber Co. v. Marsh*,³¹ was decided in 1879. In that case *A*, a manufacturer of reapers, and indebted to *B*, assigned to *B* the proceeds of future

²⁹ *Huling v. Cabell*, 9 W. Va. 522 (1876).

³⁰ *Field v. The Mayor*, 6 N. Y. 179 (1852). The decision has been approved and adopted in many subsequent cases, *viz.*: *Devlin v. Mayor*, 63 N. Y. 8 (1875); *People v. Comptroller*, 77 N. Y. 45 (1879); *Jones v. Mayor*, 90 N. Y. 387 (1882); *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. 297 (1891); *Kimball v. Bank*, 138 N. Y. 500, 34 N. E. 337 (1893).

³¹ 91 Pa. 96 (1879).

sales of the reapers he expected to sell during the remainder of the current year. Holding the assignment valid, the court said that equity will support assignments of expectations, not as a present transfer, but as a contract to take effect and attach as soon as the thing "comes *in esse*." In a note to the section on "Assignment of Possibilities," Professor Pomeroy³² refers to both *East Lewisburg Co. v. Marsh*, and *Ruple v. Bindley*, as illustrating the assignment of expectancies. But there is a difference between the cases. In *Ruple v. Bindley*,³³ apparently, there was a contract or an accepted bid in existence before the assignment of the proceeds of the contract was made; whereas in *East Lewisburg Lumber Co. v. Marsh* the reapers had not yet been sold. The doctrine of *Ruple v. Bindley* would be upheld in all jurisdictions recognizing the assignment of the proceeds of an existing contract; but that enunciated in *East Lewisburg Lumber Co. v. Marsh* would not necessarily be upheld in all such jurisdictions.

The most interesting case, however, arose in England. It is the most interesting not only because it involved an assignment of unearned book accounts as we know them, but because of the thorough argument and discussion the subject received from both counsel and court; and because the court, in upholding the assignment, expressly overruled two former cases and gave additional interpretation to the decision of the famous case of *Holroyd v. Marshall*. In *Tailby v. Official Receiver*³⁴ *A*, a manufacturer, assigned to *B* "all the book debts due or owing or which may during the continuance of this security, become due and owing to the said mortgagee." *B* subsequently assigned to *C* certain book debts then owing to *A* by *X*. These debts owed to *A* by *X* had become due subsequent to the assignment, and *A* having become bankrupt, *X* paid *C*. The receiver of *A* then sued *C*, claiming the assignment was invalid; but the court said it was not. This was in 1888. Prior to that time it had been stated by Lord Westbury in *Holroyd v. Marshall*³⁵ that the principle pur-

³² 3 POMEROY, *op. cit. supra* note 16, § 1287.

³³ 91 Pa. 296 (1879).

³⁴ 13 App. Cas. 523 (1888).

³⁵ *Supra* note 15.

suant to which courts would enforce equitable assignments rested on the doctrine of specific performance. The Judges in two cases³⁶ had interpreted the decision of Lord Westbury in *Holroyd v. Marshall* as meaning that equitable assignments would not be upheld unless the contract was such that equity specifically would enforce it. The Judges in the *Tailby* case completely rejected this doctrine. They said in effect that they did not believe Lord Westbury had intended to go as far as the decisions in *In re d'Epineuil* and *Belding v. Read* might indicate; but that if he did he was wrong, as there were many assignments which would be upheld but which equity would not specifically enforce.

In the argument of counsel the assertion was made that in the discussion of the subject two quite different things had been confused—"vagueness" and "wideness." If the description of the thing assigned were so vague that it could not be identified, it was said, of course the assignment could not be enforced; but this is very different from refusing to recognize the assignment because of the "wideness" of the thing assigned. The argument was that there should be no limit to the liberty of a man to assign anything he wishes, excepting only considerations of morality or of public policy. It was argued that the description is too "vague" only if the court cannot see what the parties intended to deal with; and that the assignment is too "wide" only where it is against public policy, as where a debtor assigns all his property in the future. Furthermore, it was urged, a description of the thing assigned may be precise and yet vague; for instance, as of an assignment of "my ten shares in the *L* Railway." An assignment of "all of my shares in the *L* Railway," though "wider," would be less "vague." One the court would uphold, the other it would not.³⁷ The Judges practically adopted this argument. In order to make the assignee's right attach to a future chose in action when it comes into existence, Lord Watson said, only one thing is necessary. That is, it must be capable

³⁶ *Belding v. Read*, 3 H. & C. 955 (1865); *In re d'Epineuil*, 20 Ch. D. 758 (1882).

³⁷ See opinion of Potter, J., in *Page v. Moore*, 235 Pa. 161, 83 Atl. 580 (1912), holding invalid an assignment of six out of fourteen bonds, the particular six bonds not being specified.

of being identified as the thing assigned. "Vagueness comes to nothing," he said, "if the property is definite at the time when the Court is asked to enforce the contract." Lord Macnaghten entirely repudiated the contention that an assignment of future book accounts not confined to a specified business is too vague. Why should this be so, he asked? If the future book debts be assigned, the subject matter is capable of being identified when the book debts come into existence, whether the description be restricted to a particular business or not. He then lays down the broad rule: "Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy?" And, after all, why should not book accounts be utilized for purposes of credit? If only those actually earned can be assigned, the limits of credit are considerably restricted. The point here emphasized is that unearned book accounts are capable of assignment. The only restrictions should be those laid down in the English cases: "vagueness" or impossibility of identification of the thing assigned; and "wide-ness"—so wide as to offend against that which may be considered sound public policy.³⁸

The practice is not unusual for the pledgor or assignor to substitute for accounts collected others not yet due, and so constantly to keep sufficient collateral in the possession of the assignee. This practice long ago was upheld as valid by the Supreme Court of the United States³⁹ in the case of accounts due for sales actually made, even though the accounts had been turned back to the assignor for collection. He was held to have acted simply in a fiduciary capacity for the assignee.

In the recent case of *Benedict v. Ratner*⁴⁰ Mr. Justice Bran-

³⁸ I WILLISTON, *op. cit. supra* note 4, § 414: "It is possible to assign a claim the performance of which is not yet due, and apart from considerations of public policy, there seems no limit to this principle. An agent may be appointed to collect all money which shall be due in the future, not only under existing contracts but under future contracts, as readily as to collect what is due at the present time. . . . It is obviously opposed to public policy to permit a man by means of any legal machinery to deprive himself of all rights which he may ever have in the future. Some limit must be set."

³⁹ *Clark v. Iselin*, 21 Wall. 360 (1874).

⁴⁰ 268 U. S. 353 (1924).

deis indicates that a similar rule would have applied to future accounts if dominion over them had not been reserved to the assignor. There the assignor, under the terms of the assignment, had the right to use the proceeds of the accounts when collected, unless the assignee demanded they be applied to his loans. It was argued that the rule that "reservation of dominion" over the collateral invalidated the pledge rested upon the principle of "ostensible ownership," and that this principle is not applicable to book accounts. Conceding it is not applicable, the Court said it is true that there is nothing in the transfer of book accounts which corresponds to the delivery of possession of chattels; but the principle of "reservation of dominion" is not based upon, or delimited by, the doctrine of ostensible ownership. It rests, it was said, "not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved." The doctrine imputing a fraud where full dominion is reserved was held to apply to assignments of accounts, although the doctrine of ostensible ownership does not. But the fact that the assignor collects the accounts and pays the proceeds to the assignee does not invalidate the assignment. That is so only where the assignor may use the proceeds as he pleases. Accordingly, the assignment was held void under the New York statute forbidding a transfer of property when the transferor reserves the right to dispose of it and apply the proceeds to his own use.

In those jurisdictions where assignments are not upheld unless the book accounts actually are due, or unless, at least, sales have been made or contracts of sale are outstanding, much stress is laid upon the argument that to uphold them would be a fraud on creditors. But is this so? Take the case of an established business with large annual sales. Of course, no one can guarantee that the history of prior successful years will be repeated in the next year. Theoretically, it is possible that people will cease to purchase. But it is not likely. And, if the business is to fail, it is not easy to see how creditors are defrauded to a greater extent if the accounts have been assigned before the sales actually are made than if the assignments were made after the merchandise

has been sold. In either case a dishonest merchant can defraud his creditors. And, as the assignment of accounts already due is not invalidated by the assignee's allowing the assignor to collect them as his agent, it cannot be said to be controlling that in one case the assignee can give notice to the debtor and in the other he cannot.

In several of the cases above mentioned the contest was between the trustee in bankruptcy or assignee for the benefit of creditors and the transferee of the accounts, and the title of the transferee of the accounts was upheld.

The real reason for the difference in the decisions seems to be that some courts still incline to adhere strictly to the formal legal conception of the transaction, while others apply equitable principles to a greater extent and seek to carry out the intention of the parties. Undoubtedly a man should not be permitted to sell himself or his services for all time to come. Sound reasons of policy forbid this, and justify statutes or decisions establishing some reasonable limit. Also the question of adequacy of the consideration enters as a factor to be considered. But public policy is the real restriction, not that future accounts are incapable of assignment or that to assign them defrauds creditors. If the assignment is too "wide," as the English courts say, it will not be allowed, even if legally possible. But if the description of the subject matter is not too "vague," the assignment is legally possible.

It is interesting to note in this connection two cases of a character markedly different from most of the cases discussing the subject. In the Second Circuit, the Circuit Court of Appeals⁴¹ had for decision the validity of an assignment involving "the sole and exclusive production rights for all operettas, musical comedies, farces with music," etc. which *A* "may write during the course of the next five years." The case was decided on a question of *res adjudicata*, but in the course of the opinion Judge Rogers said⁴² it would seem that an agreement of this kind, if supported by a valuable consideration and limited in time, is as

⁴¹ *Harms v. Hunter*, 229 Fed. 42 (C. C. A. 2d, 1915).

⁴² *Ibid.* 48.

much entitled to be specifically enforced as agreements made by a patentee who assigns all future improvements on a patented device. And in England ⁴³ an author assigned an intended copyright of a book he proposed to write. This case was somewhat unusual, as it involved a novel application of the rules relating to the assignment of expectancies. *A* had sent to *B*, a publisher, the synopsis of a story. *B*, the publisher, offered *A* £200 for "the complete copyright of a story containing not less than 80,000 words, on the lines of said synopsis, copy to be delivered within six months if possible." This was accepted by *A*, who later wrote a story and delivered it to *B*. A dispute arose between them over the amount due *A* and *A* sold the same story to *C*. *B* then sought an injunction against *C*. In granting the injunction and upholding the assignment, the Court said there was no doubt that there can be an assignment of an article to be produced "when it shall be produced—book debts, for instance, and many other things of a like nature."

The fruits expected from a going business, in the form of sales and accounts receivable resulting therefrom, would seem less vague than a song as yet only in contemplation; and less uncertain of coming into existence than a story reposing solely in the mind of the author.

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⁴³ *Ward, Lock & Co. v. Long*, [1906] 2 Ch. 550.

⁴⁴ Since this article was written there has been published by the American Law Institute the Tentative Restatement No. 3 of the Law of Contracts. In the "Commentaries" (p. 24) the Reporter (Professor Williston) makes the following statement: "In considering mortgages of future goods and also to some extent mortgages of book accounts, the chief consideration seems to have been given to the possibility of the transaction operating as a fraud on creditors, but it seems clear that if a person is allowed to have entire liberty to dispose of all future rights which he may ever acquire, the transaction may result in something approaching slavery."