

ASSIGNMENT OF CONTRACT

The right to property and its enjoyment constitutes ownership. This includes the legal title, and the beneficial interest. The owner may part with the beneficial interest and retain the legal title. Thus another may gain the right to enjoy the fruits of the property. Courts of law do not recognize beneficial ownership, and such owner must obtain relief in equity. Only the holder of the legal title can claim recognition in a court of law.

In the early days of any people tangible property only is known, and its transfer is accomplished by bodily delivery or by giving some symbol indicative thereof. The conception of intangible property and its transfer requires a refinement of thought which develops later.

In the primitive Roman, German and English law a chose in action could not be transferred.¹

In the case of a contract there was a further objection to an assignment. The promisor obligates himself to a particular individual. This was thought to be personal in all cases, and hence it was believed that the promisee only could enforce rights under a promise.²

At an early day, lawyers devised a plan by which the transfer of a chose in action, although not directly possible, could be accomplished in effect. This was done by means of a power of attorney authorizing the proposed transferee to enforce the claim in the name of the principal by action or otherwise.³

¹ See Pollock and Maitland: *History of English Law*. 1st ed. Vol. II, pp. 223, 224.

² According to Coke, (Coke's *Littleton*, 214 a) the explanation is to be found in the doctrine of maintenance. This view is repeated even today. See Bishop—*Contract*—last edition (1907), Sect. 1179, citing Coke and Blackstone. It is now recognized by the best authorities that Coke was mistaken and his explanation incorrect. 2 Spence Eq., 851; Ames, 3 *Harvard Law Review*, 339.

³ In Rome, an assignment was not permitted at first on the ground, apparently, that a transfer changed the substance of the obligated performance. A novation was necessary. Later they devised the plan of giving a power of attorney, permitting an action to be brought in the name of the assignor as with us. Puchta: *Institutionen*. 8th ed. Vol. II, p. 267. Windscheid: *Pandekten*. 4th ed. Vol. II, p. 253. The German Civil Code provides specifically for assignments. Defenses and set offs against the assignor are available against the assignee. Provision is also made as to notifying the obligor. See Sects. 398, 404, 409, 410.

The modern written assignment was developed in this way. It takes the place of the ancient power of attorney, and has the same effect. It follows that the assignment of a contract does not pass legal title, but empowers the assignee to sue in his assignor's name.

This is a legal doctrine. No equitable principle is involved, notwithstanding an erroneous notion which prevailed at one time. Blackstone⁴ speaks of an assignment as being in the nature of a declaration of trust, and Story⁵ also treats an assignee as having "an equitable right or interest." This idea is not unnatural, as the assignee has only the beneficial interest while the legal title remains in the assignor.

If courts of law had failed to offer a remedy, there is no doubt that equity would have taken jurisdiction. As the remedy provided at law has proved ample, there has been no occasion for equitable relief. Should any special circumstance make this remedy inadequate there would be ground for equitable jurisdiction, but not otherwise.⁶ Such a situation would arise if the assignor should propose to release the assigned claim, or should refuse the use of his name for the purpose of suit.

Any defense or set off existing against the assignor at the time of the assignment or previous to notice thereof to the obligor, can be urged against the assignee, because he does not hold the legal title. Therefore, it is immaterial whether the assignee is a purchaser for value or not.⁷

The requisites of an assignment are well expressed by Shaw, C. J., as follows:⁸

"But in order to constitute such an assignment, two things must concur. First, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature

⁴ *Commentaries* (Sharswood's ed), Bk. II, p. 442.

⁵ Story: *Equity Jur.*, Sect. 1057 a.

⁶ *Hammond v. Messenger*, 9 Sim., 327; *Walker v. Brooks*, 125 Mass., 241. See also Ames: *Cases on Trusts*. pp. 60, 61—notes and authorities cited.

⁷ At first sight it might appear that this circumstance would warrant the intervention of equity, but the result is due to the substantive law, and not to any failure of the law courts to give an adequate remedy. An equity judge is as much bound by the substantive law as a common law judge. He cannot ignore the positive law as to legal title nor change the results which flow from absence of such title.

⁸ *Palmer v. Merrill*, 2 Cush., 282.

and circumstances of the case, deliver to the assignee, or to some person for his use, the security if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole⁹ and entire debt or obligation, in which the chose in action consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable."

There is, however, one notable exception to the rule thus developed. In the case of bills of exchange and promissory notes, legal title passes by transfer when made in requisite form. The origin of this difference is historical.

Bills of exchange were first invented by Lombard¹⁰ merchants and their custom established this peculiarity. In England, the courts were reluctantly compelled to recognize these instruments, but owing to the opposition of Lord Holt,¹¹ an Act of Parliament was necessary to put promissory notes on the same footing. The result is that the holder of commercial paper can pass a legal title by endorsement.

When the term "negotiable" is applied to such paper, it merely indicates this possibility of passing legal title. This is its characteristic. There is no difference in result between the transfer of a cow, and the negotiation of a promissory note. If a thief steals the cow and sells her to an innocent stranger, she may be recovered by legal process in spite of the *bona fides* of the stranger. Should the same thief steal a promissory note, forge the endorsement, and then sell it to the same innocent stranger, the note may be recovered as readily as the cow. This is so because the legal title has not passed in either case. The innocent stranger has received a title neither to the cow nor to the note. In neither case did the thief acquire title, and therefore could give none. Consequently, both cow and note may be recovered wherever found.

Imagine, now, that a business man induces someone by fraud to endorse and deliver to him a note, and also to deliver to him a cow with intent to pass title. If he then sells the cow and transfers the note for value to an innocent third person, the one

⁹ As the assignment must be of the whole claim a transfer of a portion only thereof gives no rights at law, and hence equity takes jurisdiction in such cases. See Ames: *Cases on Trusts*. pp. 61, 63, notes.

¹⁰ See Beawe's: *Lex Mercatoria*, 448. He thinks that the better view is that they were invented by the expelled Italian, Gibelius.

¹¹ *Buller v. Crips*, 6 Mod., 29.

defrauded cannot recover either cow or note, because the title has passed in each case. Thus the innocent purchaser is as fully protected in his title to the cow as to the note.

In the case of *Cundy v. Lindsay*,¹² one, Blenkiron, by a fraudulent contrivance obtained goods from Lindsay & Co. and then sold them to Cundy & Co. who purchased innocently. Later Lindsay & Co. brought action against Cundy & Co. for conversion of the goods. Under the peculiar circumstances of that case, the court found that no title passed from Lindsay & Co. to Blenkiron, and hence none to the innocent Cundy & Co. who were consequently liable in tort. This is similar in principle to the case of the cow in the first illustration.

But suppose in the second illustration the note had been drawn to bearer or endorsed in blank, then the innocent purchaser from the thief could retain the note against the original owner but not the cow. Although a thief has no title and could not retain either a bearer note or money as against the owner, yet the innocent purchaser does acquire title to them, while this is not true as regards the cow.

It is, therefore, a characteristic of commercial paper that legal title can pass, which is not possible where contracts are of common law origin. The latter are said to be assignable and not negotiable. An assignment does not pass legal title, negotiability does.

This may be illustrated by the case of a promissory note, drawn to the order of the payee, sold by him to a third person and accidentally delivered unendorsed. Legal title does not pass without endorsement, but here is the equivalent of the assignment of an ordinary contract. Therefore, it has been held that the holder may sue in the name of the payee, precisely as though an actual assignment had been given. The action is brought subject to all defenses against the payee, who still holds the legal title. This was the situation in the case of *Goshen National Bank v. Birmingham*.¹³ The court, by Parker, J., says:

“It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft, or check, who obtains title without an endorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, with-

¹² L. R., 3 App. Cas., 459.

¹³ 118 N. Y., 349.

out notice of such equities and defenses. (Citations.) The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by endorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities, and defenses, which would have rendered them unavailable in the hands of a prior holder.

"This rule is only applicable to negotiable instruments which are negotiated according to the law merchant.

"When, as in this case, such instrument is transferred but without an endorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor, and may maintain an action thereon in his own name. And like other choses in action it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder."

The decision is clearly sound. In so far, however, as the learned justice states that "the assignee acquires all the title of the assignor" an error is involved, as the assignee does not acquire the legal title from the assignor. It is just for this reason that *bona fides* does not cut out equities.

It is true that in New York an assignee may maintain an action in his own name; this is due to a statute changing the procedure, but the substantive law is unaffected by it.

The suggestion that negotiability enables anyone to give a better title than he has himself is also erroneous. It is true of bearer instruments and those endorsed in blank, but not of others. In other words, purchase for value without notice does not give title except in the case of the above-named instruments and money.¹⁴

The doctrine which attaches equities to the holder of a legal title unless he has taken *bona fides*, is purely equitable, and applies to the transfer of any title. If the legal title is transferred in any case the new holder of such title takes it clear of any equities unless the circumstances are such that courts exercising equitable jurisdiction can attach such equities. In dealing with

¹⁴ There are also some instances under *Recording Acts*, and in England, sales in market overt produce the same results. See Langdell: *Summary of Equity Pleading*. 2nd ed. Sects. 182-185.

commercial paper, courts of law may have borrowed this doctrine from equity.¹⁵ At least the result is identical.

The characteristics of some contracts render assignment impossible. This is so whenever the contract is personal and made with reference to some quality in the promisee.¹⁶ Thus suppose a promise to deliver goods upon credit. The question of credit depends upon the financial standing of the promisee. This right to the goods on credit cannot be assigned. But suppose the contract to be assigned and the assignee to desire the goods, tendering the cash and not asking credit. In such case the promisor has no reasonable ground for objection, and should perform.¹⁷

So also in employment cases. If the work promised is personal, the promisor must perform. If, however, there has been performance, and payment alone remains due, there may be assignment.¹⁸ In these cases the personality of both employer and employee is involved. Should the employer die, his executor cannot exact performance.¹⁹ This is true only when the employment has a personal element,²⁰ but generally this would be the case.

The test is whether the promisor will be put to any disadvantage or may reasonably object. Can he realize his just expectations under such an assignment?²¹

Rights under a contract may be assigned but not obligations. No one can relieve himself of obligations by passing on his burdens.

In England, the sovereign may sue in his own name, upon a contract assigned to him, as may also an assignee from the sovereign.²² The same thing is true of the United States when an assignment is made to that government.²³

¹⁵ See Langdell: *Summary of Equity Pleading*. 2nd ed. Sects. 182-185. See Ames: *Summary—Bills and Notes—Title, Purchase for Value without Notice*. p. 863.

¹⁶ *Farrow v. Wilson*, L. R., 4 C. P., 744.

¹⁷ *Arkansas Valley Smelting Co. v. Belden*, 127 U. S., 379.

¹⁸ *Carter v. Nichols*, 58 Vt., 553.

¹⁹ *Lacy v. Getman*, 119 N. Y., 109.

²⁰ *British Wagon Co. v. Lea*, L. R., 2 Q. B. Div., 149.

²¹ Thus in a contract for personal service, if money is due for work performed this claim may be assigned. *Stubbs v. Holywell Ry. Co.*, L. R., 2 Exch., 311; *Devlin v. Mayor*, 63 N. Y., 8.

²² *Lambert v. Taylor*, 4 B. & C., 138, 150.

²³ *U. S. v. Buford*, 3 Peters, 12, 30.

Assignments may take place by operation of law in which case the legal title may pass, as in the case of executors or administrators. So, too, under acts of bankruptcy, and in a few instances where statutes vest the legal title in receivers.

Upon an assignment, notice should be given promptly to the obligor. If one, in ignorance of an assignment, pays his debt to the original creditor, or takes a release for value paid or performs his promise, no objection can be raised by the assignee.²⁴ But should he pay money or do other act under his contract after knowledge of the assignment he performs at his peril, and is still responsible to the assignee.²⁵

In some jurisdictions statutes enable the assignee to bring the action in his own name.²⁶ These statutes affect procedure only, and the legal title is not affected and still remains in the assignor. Thus suppose a New York contract assigned in New York. Should the assignee, in such a case, bring an action in a State adhering to the common law, he must sue in the name of his assignor. The New York statute affects procedure only, and hence does not make any change in the legal title. Such a statute does not change the substantive law.²⁷

In cases where statutes cause a change of title, this substantive change should be recognized in all jurisdictions.

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²⁴ The burden of establishing notice is upon the assignee. *Heermans v. Ellsworth*, 64 N. Y., 159.

²⁵ *Legh v. Legh*, 1 B. P., 447; *Littlefield v. Storey*, 3 John, 425.

²⁶ For example see *N. Y. Code of Civil Procedure*. Sects. 1909, 1910.

²⁷ *Green v. Busey*, 5 Mack, 233.