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EFFECT OF RESTRICTING ASSIGNABILITY OF MONEY CLAIMS.

In *Bank of United States v. Public Bank of New York City*,[1] there was a rule of the bank which required the depositor to appear *in person* to withdraw his account. The depositor assigned his account to the plaintiff, who sought to recover from the bank. The court held that the rule was a reasonable one as regards the depositor, but that it would not justify the bank's refusal to pay the assignee for the reason that the bank is a debtor and "cannot make rules and regulations which will limit the right to assign the debt." This leads to the inquiry whether it is possible to make a debt non-assignable, and further, if the debt can be made non-assignable, whether an assignment in such a case vests in the assignee any rights and privileges?

At early common law a chose in action could not be assigned. Later courts of law permitted the assignee to sue in the

[1] 151 N. Y. Supp. 26.

assignor's name. Of course at early common law when a chose in action could not be assigned at all, the question of the effect of providing in express terms that the chose in action shall be non-assignable could not arise. But when later an ordinary money claim could be assigned, was the power to assign absolute or could it be prevented from arising at all?

In the absence of any stipulation to the contrary, the contract to pay money can be assigned by the creditor.[2] But suppose it is expressly stipulated, as part of the contract, that the money claim shall be non-assignable unless debtor consents that it be assigned. A, creditor of B, notwithstanding such a provision, assigns the claim to C. Can C successfully sue B, who has not consented to the assignment? The courts that have only common law principles to guide them answer this question in the negative.[3] It should be noted that in several of these cases, the language of the agreement seemingly affects only the exercise of the power of assignment. But the courts are prone to interpret the intention of the parties to be that the obligee has no power at all to assign rather than that he has power and is merely under an obligation not to exercise it.

But notwithstanding the fact that C has no cause of action against B, the assignment is not void to all intents and purposes. The right to transfer the money claim never having arisen, the law refuses to permit the assignee to sue the debtor. But inasmuch as A did make an attempted assignment to C and the specific intent that C get the benefit of the claim will not be effectuated at law, equity will, for the purpose of carrying out this intent, cause A to be a constructive trustee of the claim for C. So that where B produces money into court for interpleader, C and not A will be entitled to the money.[4] Similarly where, after assignment to C without the consent of B, A assigns to D with the consent of B, and B pays the money into court, it is held that C, the first assignee, is entitled to the money.[5] The conclusion to be drawn from these cases is that though, due to

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[2] *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488.

[3] *Tabler v. Sheffield Land, Iron & Coal Co.*, 79 Ala. 377 (Labor tickets marked non-transferable); *Devlin v. Mayor*, 63 N. Y. 8, 17; *Murphy v. City of Plattsmouth*, 78 Neb. 163; *Staples v. Somerville*, 176 Mass. 237; *Mueller v. Northwestern University*, 195 Ill. 236.

[4] *Staples v. Somerville*, 176 Mass. 237. Here C was held entitled to money as against assignee in insolvency of A.

[5] *Fortunato v. Patten*, 147 N. Y. 277.

the stipulation that the claim be non-assignable, the assignee gets no rights against the debtor, all the other legal equitable incidents still attach to the assignment, at least where the assignee did not know of the non-assignability.

Assuming now that we are in a jurisdiction where statute provisions state that money claims are assignable so as to vest the legal title of the claim in the assignee, can a transfer of a money claim be prohibited effectually? This depends on how the statutes should be construed. If we bear in mind the common law principles of assignment, the obvious purpose of the statute would seem to be merely to change the common law rule which prevented the transfer of choses in action and which did not permit the assignee to maintain the suit in his own name. Upon this theory, several courts hold that the statutory provisions do not invalidate any agreement that the parties may have made in regard to assignment. So that where it is agreed that the claim shall be non-transferable, an attempted assignment is void as between the assignee and the debtor.[6] But there are authorities holding that money claims are assignable and all efforts to make them non-assignable are unavailing.[7] What leads these courts to such a result?

An agreement between two parties will be valid and enforced by the courts unless it is against public policy. Is this stipulation that the claim be non-assignable against public policy? Superficially there seems to be an analogy between the restriction imposed upon a power of alienation of choses in possession and the restriction of assignment of a money claim. But it is submitted that to make the situations precisely analogous, A, the owner of the assignable claim, would have to restrict the assignment by his assignee. Moreover, the power of alienation of choses in possession stands upon a footing differing from the power to assign a claim, which is a chose in action. The ownership of a tangible res should carry along as an inseparable proprietary incident the power of alienation to facilitate exchange and commercial activities. But a money claim being an intangible res the grounds are much weaker for invoking public policy to prevent the restriction of assignability.

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[6] *Barringer v. Bes Line Construction Co.*, 23 Okla. 131; *La Rue v. Groezinger*, 84 Cal. 281.

[7] *Bewick Lumber Co. v. Hall*, 94 Ga. 539 (credit check marked non-transferable, held to be assignable). See also principal case.

But it may be argued that the statute gives the creditor a power to assign which the debtor cannot nullify. This, however, is not necessarily true. The statute has only added to the content and extent of the power that the creditor was given at common law. Hitherto the creditor had the power to grant a privilege to an assignee to sue in the assignor's name. The statute gave the creditor the power to extinguish his own claim against the debtor and vest a new and corresponding claim in the assignee against the debtor. But we have seen that the power of assignment could be contracted away at common law. Should we allow the power given by the statute to be contracted away? Again we must resort to the consideration of public policy. What was considered to not be violative of public policy at common law may be otherwise to-day. Perhaps the legislatures enacting the change in the law with regard to assignments thought that the public weal required that secret agreements between the original parties of which the assignee is not cognizant should not be valid. And it can be strongly urged that the public welfare which required a change from the common law rules of assignment would require also that no impediment be placed on this power of assignment unless the assignee has notice. And just as an agent whose agency has been revoked may still bring his principal into contractual relationship with third parties prior to notice of this revocation, due to a naked power with which the law vests an agent until notice, so the law might vest the creditor with a naked power to assign in cases where the assignee has no notice of the stipulation prohibiting assignment.

But if we should attempt to make a distinction between cases where the assignee has notice of the non-assignability and cases where he has no notice, we are met by a serious difficulty. The language of the statute does not permit a construction whereby any distinction can be drawn. Either *all* money claims cannot be made non-assignable, or all money claims can be made non-assignable by express stipulation between the original parties. The principal case plainly intimates that no money claim can be made non-assignable. We have already seen that this result does not necessarily follow from the statutory enactment. And inasmuch as the freedom of the contract is of paramount importance to society, a construction of statute should be sought that will not nullify the restriction of assignment by express agreement. There being no specific language in the statute invalidat-

ing the prohibition of transfer by express agreement, in principle, a money claim can be made non-assignable by the original parties.

IS THE TELEPHONIC DELIVERY OF AN INTERSTATE TELEGRAM AN INTRASTATE TRANSACTION?

For a single charge, which was prepaid, a telegraph company undertook to transmit a message from a point in one state to a point in an adjoining state, to which there was no direct telegraph line but which was connected with the nearest telegraph office by telephone. *Held,* that the telephoning of the message was a purely intrastate transaction, and the telegraph company's liability for negligence in that particular was governed by the law of the state of the destination of the message.[1]

"A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods,"[2] and has recently been brought within the provisions of the Interstate Commerce Act.[3] It has long been the established law of England and of many American jurisdictions that when the carrier accepts for carriage goods directed to a destination beyond its own route, it assumes, by the very act of acceptance, in the absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed.[4] The majority of state courts have, however, pronounced with emphasis against the rule and have held that, in the absence of any other contract than such as is generally implied for the acceptance of the goods for carriage, the obligation of the carrier extends only to the transportation to the end of its route and delivery there to the next succeeding carrier to further or complete the transportation. In order to be bound further there must be a positive agreement, either express or implied, extending the liability, and the burden of proof will be upon the shipper to prove that such an agreement was made.[5] The latter rule prevails in the jurisdiction of the principal case, and assuming that the majority of the court intended that it

[1] *Young v. Western Union Telegraph Company,* 84 S. E. (N. C.) 45. Two judges dissented.

[2] Chief Justice Waite in *Telegraph Co. v. Texas,* 105 U. S. 460.

[3] U. S. Comp. St. 1913, §8563.

[4] Hutchinson on Carriers, 3d ed., §§228-30.

[5] Hutchinson on Carriers, 3d ed., §231.

should apply and that in admitting liability of the defendant for negligence it had reference to its liability as a forwarding agent, yet we cannot escape the view that there was but a single contract for the transmission of the message to its ultimate destination to be performed entirely by the defendant, in part, it is true, by the instrumentality of the telephone. But the telephone company did not act as a 'connecting carrier' or have anything to do with the handling of the message as such; there was no delivery of the message to the telephone company for transmission but simply a hiring of its services by the defendant. Undoubtedly the telephoning of the message would have been an intrastate transaction had it been done at the instance of the addressee, or if it had been handled by the telephone company on a special contract limited with its own lines, and without dividing charges with any other carrier or assuming any obligations to or for it[6]; but that is not the case which is presented to us. Here the carrier, by undertaking to deliver beyond the end of its line, transformed the contract which the law of the jurisdiction made for it into such a contract as the English law would have made for it. We cannot regard the telephoning of the message in this instance as materially differing from the telephonic delivery of the ordinary message within ordinary delivery limits; it was simply the delivery which the defendant chose to consider itself bound to make as a part of a single contract to transmit the message. The rule which the majority of the court would establish would constitute each relay in the transmission of a telegram a separate undertaking and it seems clearly erroneous.

[6] 1 Barnes on Interstate Transportation, 120; Judson on Interstate Commerce, 2d ed., §140.