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PRIORITIES BETWEEN SUCCESSIVE ASSIGNEES OF THE SAME CHOSE
IN ACTION.*

At the outset, a brief survey of the rights of an assignee as against the assignor will not be amiss. Where a right or claim has been assigned and the transfer is complete, the assignee becomes the owner and the party in interest by succession to the obligee's rights. The assignor is divested of every vestige of ownership, i. e., the aggregate of the legal rights, privileges, powers and immunities, and a similar bundle of rights is invested in the assignee.¹ After the transfer, the assignee is recognized as the real party in interest and the promisee can exercise no more power over it than a stranger. Any acts of his affecting the validity of the contract are fraudulent.²

When good faith permeates the transfer and the rights of a third person are not involved, no consideration is required to convey the obligor's duty to the assignee.³

Since the assignor by a transfer of the entire claim conveys the ownership in it and the assignee takes it subject to collateral equities⁴ the subsequent assignee takes nothing by the purported assignment. The original owner can not convey anything when he

* This Note is confined to a consideration of intangible choses not related to the Negotiable Instrument Law or the Recording Acts.

¹ *Hopkins v. Banks*, 7 Cow. 650 (N. Y. 1827); *Whiting v. Glass*, 217 N. Y. 333, 111 N. E. 1082 (1916); *Klein-Messner Co. v. The Fair Waist & Dress Co., Inc.*, 221 App. Div. 725, 224 N. Y. Supp. 511 (1st Dept. 1927); *Cook, The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816, 820; *Cook, The Alienability of Choses in Action* (1917) 30 HARV. L. REV. 449, 469.

² *Klein-Messner Co. v. The Fair Waist & Dress Co., Inc.*, *ibid.*; *Cook, The Alienability of Choses in Action*, *ibid.* at 829.

³ *Klein-Messner Co. v. The Fair Waist & Dress Co., Inc.*, *ibid.* In this case the assignor sued the debtor to recover the purchase price of goods sold, after it notified obligor, defendant, of the assignment of the claim to a third person. It was held that plaintiff to maintain the action must have the legal title or an equitable interest. At 726, N. Y. Supp. at 513, the court said: "The consideration paid, the purpose of the assignment, the use to be made of any proceeds is immaterial."

⁴ *Cook, The Alienability of Choses in Action*, *supra* note 1 at 821 and 822. At the common law the assignments of non-negotiable choses were never recognized because of champerty and maintenance. In the fifteenth century equity gave effect to them by the *in personam* procedure against the assignor. Equity treated the assignor as trustee, then later the assignee was held out as possessing a power of attorney to evade the illegality of the assignment at common law. The assignee's right, being an equity, he takes the assignment subject to all equities against the assignor.

WILLISTON, WORD "EQUITABLE" (1918) 31 HARV. L. REV. 822. Although the assignee is now allowed to sue in his own name, he is not exempt from the rule that the assignment is subject to defenses and offsets. WILLISTON, IS THE RIGHT OF AN ASSIGNEE OF A CHOSE IN ACTION LEGAL OR EQUITABLE? (1916) 30 HARV. L. REV. 97, 105. The rights of the assignee are nevertheless equitable. The effect of the statutes—§210 C. P. A. (Real party in interest must maintain the action at law). Section 211 C. P. A. Partial assignee of a present claim may enforce his right at law—is procedural only and the substantial rights are not changed. See also N. Y. PERSONAL PROPERTY LAW §41.

retained nothing in his possession. Hence, the principle may be deduced that between conflicting assignments of the same chose, whether legal or equitable, the one prior in time will prevail. This doctrine is in accord with reason and not at variance with the decisions of this state.⁵ That an assignee took the chose free from the latent equities of third persons was the rule in the early nineteenth century.⁶ But it had been overruled shortly thereafter and never followed in subsequent cases.⁷

A prior claimant is not estopped from setting aside or invalidating an assignment on equitable grounds though the subsequent assignee was a *bona fide* purchaser relying upon a writing.⁸

What are the respective rights of successive *bona fide* purchasers for value the second of whom has acquired the legal title? This precise question has not, as yet, been decided by the court of last resort in this state. It has not been confronted with a case containing facts calling for such a determination. But in an outstanding case, *Fairbanks v. Sargent*,⁹ where the plaintiff was the partial assignee of a future claim and the defendant was the later assignee of the entire claim, Finch, J., delivering the opinion of the court, by *obiter dicta*, conceded, in response to defendant's contention, that if Sargent had obtained the legal title before Fairbanks, a superiority would have been conferred upon him (Sargent). As was pointed out by the judge in a comprehensive decision, Fairbanks had the prior legal possession as well as the superior equity. Underwood, the assignor, had never relinquished his claim against the debtor. When the bonds came into the obligee's possession,

⁵ *Muir v. Schenck, et al.*, 3 Hill 228 (N. Y. 1842); *Bush v. Lathrop*, 22 N. Y. 535 (1860); the second assignee takes subject to the interest between the assignor and first assignee. *Greentree v. Rosenstock*, 61 N. Y. 583 (1875); *Williams, et al. v. Ingersoll, et al.*, 89 N. Y. 508 (1882); *Fairbanks v. Sargent*, 117 N. Y. 320, 22 N. E. 1039 (1889); *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572 (1895); the purchase of a chose confers no greater right on an assignee than the assignor possessed; *Central Trust Co. of N. Y. v. The West India Improvement Co., et al.*, 169 N. Y. 314, 62 N. E. 387 (1901); between two conflicting equitable liens, other things being equal, protection is afforded to the one prior in time; *Superior Brassiere Co. v. Zimetbaum*, 214 App. Div. 525, 527, 212 N. Y. Supp. 473, 475 (1st Dept. 1925): "A subsequent assignee takes nothing by his assignment, because the assignor has nothing to give."

⁶ *Murray et al. v. Lyburn, et al.*, 2 Johns. 441 (N. Y. 1817); *Livingston v. Dean, et al.*, 2 Johns. 479 (N. Y. 1817); the assignee not affected by stranger's equity of which he has no notice.

⁷ *Bush v. Lathrop, supra* note 5; *Cutts v. Guild*, 57 N. Y. 229 (1817); the bona fide purchaser from assignee takes subject to the equities between the former assignor and assignee; *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892); no distinction between equities existing in favor of debtor and those of third person; *Central Trust Co. of N. Y. v. The West India Improvement Co., supra* note 5; *Superior Brassiere Co. v. Zimetbaum, supra* note 5.

⁸ *Central Trust Co. v. The West India Improvement Co., supra* note 5; no consideration was given at the time of the assignment; *Owen v. Evans, ibid.*

⁹ *Supra* note 5.

Fairbanks' legal title immediately attached to his share. The view entertained in this case is not supported in subsequent decisions. In *Central Trust Co. v. West India Improvement Co.*,¹⁰ the same tribunal, through Judge Cullen, citing *Fairbanks v. Sargent*, stated that it was not decisive and conclusive as to the subsequent assignee's superiority, as he did not part with present consideration. Past indebtedness does not make the assignee a *bona fide* purchaser for value.

The same principle is applicable to partial assignments. A fractional transfer of a chose takes precedence over a later total assignment of the same claim. If the previous transfer assigns a portion of the debt owing and the original creditor in fraud of the first assignee's rights attempts to make an effective transfer of the entire indebtedness, the subsequent assignment is cancelled *pro tanto*.¹¹ The assignor of his own volition cannot alter or vary the rights of the first assignee.¹²

The rule is qualified to the extent that the second transferee prevails to the exclusion of the first, if the prior assignment is voidable or revocable by the assignor or the principle of estoppel may be invoked.¹³

If the subsequent assignee, a *bona fide* purchaser for value, all other things being equal, secures payment or satisfaction, he cannot retain what he has received. The proceeds are held in trust for the

¹⁰ *Ibid.*

¹¹ *Fairbanks v. Sargent*, *supra* note 5; *Central Trust Co. v. The West India Improvement Co.*, *supra* note 5; *Hinkle Iron Co. v. Kohn*, 229 N. Y. 179, 128 N. E. 113 (1920); *Porter v. Lane Construction Corp.*, 212 App. Div. 528, 209 N. Y. Supp. 54 (4th Dept. 1925), *aff'd*, 244 N. Y. 523, 155 N. E. 881 (1926); *WILLISTON, IS THE RIGHT OF AN ASSIGNEE OF A CHOSE IN ACTION LEGAL OR EQUITABLE?* *supra* note 5 at 107-108.

¹² *Williams v. Ingersoll*, *supra* note 5; *Superior Brassiere Co. v. Zimetbaum*, *supra* note 5, N. Y. Supp. at 476, " * * * he (assignor) has no right to collect or compromise the chose, nor in any way to discharge the debtor therefrom, nor to modify the chose, as by an extension of time to the debtor. If thereafter the assignor does collect the chose, the money in his hands arising therefrom will be held as trust funds belonging to the assignee * * *."

¹³ *Bush v. Lathrop*, *supra* note 5, *cf.* *Coates v. First Nat'l Bank*, 91 N. Y. 20 (1883) (Plaintiff, a volunteer, did not succeed); *Fairbanks v. Sargent*, *supra* note 5 at 330, N. E. at 1040; *Owen v. Evans*, *supra* note 7; *Central Trust Co. v. The West India Improvement Co.*, *supra* note 5, 323, N. E. at 390, " * * * between two conflicting interests or liens, other things being equal, the one that is prior in time is superior in right * * *." *Ferndon v. Canfield*, 39 Hun 571 (1886), *aff'd*, 104 N. Y. 143, 10 N. E. 146 (1887); *Weeks v. City of New York*, 42 Misc. 436, 87 N. Y. Supp. 98 (1904); *Erie R. R. Co. v. Smith, et al.*, 68 Misc. 136, 123 N. Y. Supp. 973 (1910), *aff'd*, 144 App. Div. 911, 128 N. Y. Supp. 1122 (2d Dept. 1911); *Selwyn & Co. v. Waller*, 212 N. Y. 507, 106 N. E. 321 (1914). Illustrations: *Bradley v. Root*, 5 Paige 632, 640 (N. Y. 1836), additional responsibility must be assumed or security given upon faith of new assignment. If *A* sells to *B* for past consideration and *C* takes a later assignment without notice for present value, *C* will prevail. Again, if *B* and *C* are volunteers and *C* obtains payment or satisfaction, he prevails and invalidates *B's*.

first purchaser.¹⁴ *Superior Brassiere Co. v. Zimetbaum*¹⁵ is the first and only New York case, in which the rights of a subsequent *bona fide* purchaser for value who reduced the claim to legal possession first, are adjudged. The facts were as follows: the obligee assigned the same accounts for value first to the plaintiff and then to the defendant. Both took without notice. The defendant collected the same and converted the proceeds to his own use and purpose. It was there held, the defendant acquired no interest under the assignment as it was void. The proceeds were held in trust for the plaintiff.

The same principle would seem to apply where a judgment or new obligation was secured by the junior assignee from the obligor.¹⁶

Priority of notice does not destroy the superiority of the assignment earlier in time. The first of successive transferees is not compelled to do any further act to be protected, i. e., it is not essential to a valid disposition of the claim that the obligor should be apprised of it. The previous transfer, being the prior equity, will prevail.¹⁷ In *Superior Brassiere Co. v. Zimetbaum*,¹⁸ the court quoted verbatim, from a case cited for an authority, as follows: "It seems

¹⁴ *Fairbanks v. Sargent*, *supra* note 5; *Central Trust Co. v. The West India Improvement Co.*, *supra* note 5 at 323 N. E. 390; " * * * that between two conflicting interests or liens, other things being equal, the one that is prior in time is superior in right. It is further the settled law of this state, though a different rule prevails not only in England, but in the Federal Courts and in some of the states, that a bona fide purchaser for value of a chose in action takes it subject not only to the equities in favor of third persons * * *." (Pltf., senior assignee, prevailed as he had the equitable as well as the superior title. Defendant paid no new consideration. Obligated to pay over money received.)

¹⁵ *Supra* note 5.

¹⁶ *Ibid.* at 527, N. Y. Supp. at 475; " * * * and so a judgment thereafter recovered by the assignor against the debtor will be for the use of the assignee." It is reasonable to deduce that a subsequent assignee cannot retain benefits if assignor is unable (*Klein-Messner Co. v. The Fair Waist & Dress Co., Inc.*, *supra* note 1). Assignee has no greater rights than his immediate assignor. The assignee stands in the shoes of the assignor (*Bush v. Lathrop*, *supra* note 5). Debtor's promise to pay the second, fails by reason of a prior assignment. No consideration for the promise (*Muir v. Schenck*, *supra* note 5).

¹⁷ Note (1924) 24 COL. L. REV. 501 (Notice as determining the rights of successive assignees); 1 WILLISTON, CONTRACTS (1924) §435 (Notice affecting the mutual rights of successive assignees); *Fortunato v. Patten*, *supra* note 5. Provision in the contract between assignor and debtor to the effect that if an assignment is made without the debtor's consent, no right under the contract can be asserted against it. The first assignment was to the defendant without debtor's consent, second to a bank with consent. *Held*, Defendant prevailed; assignee only obliged to notify defendant if he sought to sue debtor. *Yorke v. Conde*, 20 N. Y. Supp. 961 (1892); *Hannah v. Lichtenhein*, 182 App. Div. 94, 169 N. Y. Supp. 589 (1st Dept. 1918). As between different assignees of a chose by express agreement from the same person, the one prior in time prevails though no notice of assignment was given to the subsequent assignee or debtor. *Reynolds v. Title Guarantee & Trust Co.*, 208 App. Div. 556, 203 N. Y. Supp. 851 (2d Dept. 1924), *aff'g*, 120 Misc. 561, 200 N. Y. Supp. 105 (1923); *Muir v. Schenck*, *supra* note 5 at 231. "Between assignor and assignee the contract is complete without any notice to the debtor."

¹⁸ *Supra* note 5.

to us that the better reasons are against such a rule. By the first assignment the rights of the assignor pass to the assignee. The creditor has a right to dispose of his own property as he chooses and to require the debt to be paid as he directs without the assent of the debtor. * * * Failure of the first to give notice does not divest him of any title or right, or vest any claim in a subsequent purchaser. * * * It is impossible to eliminate all risk from such a transaction."

A senior assignee is not even required to give notice to the obligor to prevent *bona fide* creditors of the assignor from acquiring a valid lien on the chose attaching after the assignment.¹⁹

Although no notice is necessary so far as title is concerned it is advisable to give it. Notification reserves to the assignee the right to assert the claim against the debtor; it puts the debtor on guard against dealing with the assignor on the belief he is the owner. If prior to appraisal, the obligor makes payment to the obligee, secures a release or acquires any defense or set-off against the assignor, he may set it up against the assignee.²⁰ This is sound as it would be inequitable to compel the promisor to pay twice. He is not a trustee until notice is given. If he is sued as the debtor he is entitled to pay the first who presents the claim. But if the obligor, at the time of the payment to the second was aware of the existing prior transfer, he is not immune from further liability.²¹

The views expressed by the decisions herein are sound for social and economic reasons. Writers of repute and distinction²² approve of them. If the Court of Appeals sanctions the rule expressed in the *Brassiere* case, both lawyer and student will willingly follow it.

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¹⁹ *Columbia Bank v. Equitable Life Assurance Society of the U. S.*, 61 App. Div. 594, 70 N. Y. Supp. 767 (1st Dept. 1901).

²⁰ *Field v. Mayor*, 6 N. Y. 179 (1852); *Herman v. Ellsworth*, 64 N. Y. 159 (1876); *Wood v. Mayor*, 73 N. Y. 556 (1878), debtor allowed to set off against the assignee claims that matured at time of assignment and those that existed prior to notice; *Yorke v. Conde*, *supra* note 17; *Heiliger v. Ritter et al.*, 78 Misc. 264, 138 N. Y. Supp. 212 (1912); 1 WILLISTON, CONTRACTS (1920) *supra* note 18, §433; *Cook, The Alienability of Choses in Action*, *supra* note 2.

²¹ *Carnegie Trust Co. v. Battery Place Realty Co.*, 67 Misc. 452 (1910); *Hannah v. Lichtenhein*, *supra* note 17; *Reynolds v. Title G. & T. Co.*, *supra* note 17; WILLISTON, *ibid.*

²² *Cook, The Alienability of Choses in Action*, *supra* note 1 at 836: "* * * because of the historical origin of the doctrine, with its beginnings in equity, as well as because of certain notions of policy, the equitable doctrine which protects bona fide purchasers for value has not been extended to cover this form of property which became alienable only in modern times."

WILLISTON, IS THE RIGHT OF AN ASSIGNEE OF A CHOSE IN ACTION LEGAL OR EQUITABLE? *supra* note 4 at 107: "* * * it is thought unfair to subject the assignee to equities which he is unable to discover. On the other hand, it is to be observed that intangible choses in action are not primarily intended for merchandising, as chattels are."

Id. at 108: "On the whole, therefore, it seems to me that the system worked out by the courts during several centuries, coupled with a statutory change in procedure allowing the assignee to sue in his own name, produces the most desirable results and best fits in place with other rules of our legal system."