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Elliot Axelrod
Baruch College

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SUCCESSIVE ASSIGNMENTS—CONFLICTING PRIORITIES

*Elliot Axelrod**

I. INTRODUCTION

The determination of the relative rights and priorities of successive assignees of the same or overlapping rights has been a serious problem for the courts for more than a century. The application of law to the parties involved in these transactions has caused considerable confusion for both lawyers and litigants. Inasmuch as there is no single statute or common law rule governing multiple assignment situations, there is also little clear methodology concerning a uniform way to effectively deal with the conflicting priorities between parties. While there has been some statutory clarification in certain areas, the common law history of determining the rights and priorities between successive assignees has been characterized by two conflicting theories known as the English and American rules.

This article will examine the salient common law history of both the English and American rules and their application in representative cases. The underlying logic and rationale of both rules will then be scrutinized to form an understanding of the inconsistent application of the two rules. Only by studying the common law picture may a more comprehensive and uniform way of handling conflicting priorities be achieved.

II. THE ENGLISH RULE

The English rule, sometimes referred to as the rule of notification, was set forth in *Dearle v. Hall*,¹ in which the court stated that priority would be given to the assignee who first notified the obligor of his claim, provided that the assignee was a purchaser for value without notice.² In *Dearle*, the beneficiary of a life trust³ under his father's will,

* Associate Professor of Law, Chairperson, Department of Law, Baruch College, City University of New York; J.D., New York Law School; B.S., New York University; member New York State Bar.

1. 3 Russ. 1, 38 Eng. Rep. 475 (Ch. 1828).

2. See *Ward v. Duncombe* 1893 A.C. 369, 391 (P.C.); *Foster v. Cockerell*, 3 Clark & Finnelly 456, 6 Eng. Rep. 1508 (H.L. 1835); *In re Freshfield's Trust*, 11 Ch. D. 198 (1879).

3. The pertinent part of the will stated:

I do hereby direct my said . . . executors . . . to place one moiety of the said residue of my personal estate, and of the money to arise from the sale of my real estates . . . during the life of my son *Zachariah Brown*, and to pay the interest and produce thereof unto

made three assignments of the income payable to him during his life.⁴ The first two assignments were made to the plaintiff and another person. Both of these assignments pertained to a part of the annual income from the trust.⁵ By the terms of the assignment, the assignor was permitted to continue collecting the income assigned. Notice of the assignments was not given to the trustees.⁶ The defendant, before taking the assignment for value, diligently questioned the trustees regarding the beneficiary's title and the amount of income the beneficiary received from the trust.⁷ The defendant, without knowledge of any prior incumbrances, purchased the entire claim in good faith and gave immediate notice of his assignment to the trustees.⁸ The defendant received assurances from the trustees that the income would be paid to him.⁹ When an interest installment became due, it was made payable to the defendant.¹⁰ Subsequently, the first two assignees, one of whom was the plaintiff, gave notice to the trustees of their assignments arising from the same trust and demanded payment.¹¹ The trustees withheld the trust payments and the plaintiff brought suit to establish the priority of his assignment over that of the defendant.¹²

At trial, the plaintiff contended that his title, which was acquired prior to the defendant's acquisition of title, was the preferable title. The plaintiff argued that his claim could not be prejudiced by the earlier notice given to the trustees by the defendant, who was a subsequent assignee.¹³ The defendant argued that by giving notice to the trustees before the plaintiff had given such notice, he had done all that he could to make his title complete in the personal chattel.¹⁴ He further contended that the plaintiff, by failing to give notice of his incumbrance in a timely manner, had elected to accept an imperfect title.¹⁵ This lack of notice by the plaintiff enabled the beneficiary of the trust to commit a fraud and thereby caused the defendant's equity in the trust income to be a "better equity" than the equity of the plaintiff's.¹⁶

him . . . during his life.

Dearle, 3 Russ. at 2, 38 Eng. Rep. at 475.

4. *Id.* at 4-5, 38 Eng. Rep. at 476-77.

5. *Id.* at 3-5, 38 Eng. Rep. at 476-77.

6. *Id.* at 6, 38 Eng. Rep. at 477.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 7, 38 Eng. Rep. at 477.

11. *Id.* at 7-8, 38 Eng. Rep. at 477-78.

12. *Id.*

13. *Id.*

14. *Id.* at 10, 38 Eng. Rep. at 478.

15. *Id.*

16. *Id.*

The *Dearle* court held in favor of the defendant, the later assignee.¹⁷ The court based its reasoning to a large extent in principles of equity, giving preference to the later assignee who was the first to give notice to the trustees of the assignment.¹⁸ The *Dearle* court stressed the importance of timely notice and recognized that, by giving notice to the obligors,¹⁹ the obligors are

converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance That precaution is always taken by diligent purchasers and . . . if it is not taken, there is neglect The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it.²⁰

The *Dearle* court then related the failure to give notice by the plaintiff to the issue of perfection of title. The court stated that "whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title . . . and they become responsible . . . for the easily foreseen consequences of their negligence."²¹ The English rule established in *Dearle* appears to require a mere showing of prudence on the part of the second assignee in order to defeat the claim of a prior assignee.²² The rule stated by the *Dearle* court in conjunction with signals from other English decisions,²³ leaves the impression that it was

17. *Id.* at 29, 38 Eng. Rep. at 486.

18. *Id.* at 29, 38 Eng. Rep. at 485-86.

19. The obligors in this case, as trustees of a life trust, are charged with an even greater fiduciary duty than that imposed by law. The court, in defining notice in general, looked to the nature of the subject matter of the assignment.

Where a contract, respecting property in the hands of other persons, who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of—that is, by giving notice of the contract to those in whom the legal interest is.

Id., at 12, 38 Eng. Rep. at 479 (emphasis added).

20. *Id.* at 12-13, 38 Eng. Rep. at 479-480.

21. *Id.* at 14, 38 Eng. Rep. at 480.

22. *Smith v. Smith*, 2 C. & M. 231, 149 Eng. Rep. 745 (Ex. D. 1833). The court held that the second assignee in order to obtain priority must show that he exercised *proper caution* in taking the assignment, and that he had applied to the trustees to know if any previous assignment had been made, and that, unless he so applied to each of the trustees, he would not have exercised *due caution* or done all that he ought to have done.

23. See *Ward v. Duncombe*, 1893 A.C. 369, 387 (P.C.); *Foster v. Cockerell*, 3 Clark & Finnelly 456, 6 Eng. Rep. 1508 (H.L. 1835); *Wilmot v. Pike*, 5 Hare 14, 67 Eng. Rep. 808 (V.C. 1845); see also *Ryall v. Rowles*, 1 Ves. Sen. 348, 27 Eng. Rep. 1074 (Ch. 1750).

not entirely clear upon what principle the English rule rested, nor was the rule wholly satisfactory to the courts. It should be noted that the *Dearle* court did not hold that notice by a subsequent assignee after his purchase, without any advance inquiry into his purchase, will subordinate the title of the prior assignee to that of the subsequent assignee.

Another case which examined the underlying logic of the English rule was *American Fire & Casualty Co. v. First National City Bank of New York*.²⁴ The controversy arose out of a dispute between a surety company and a bank when a subcontractor defaulted on its work.²⁵ In its application for performance and payment bonds, the subcontractor signed an indemnity agreement in favor of the surety company in order to guarantee completion of the subcontractor's work on a housing development.²⁶ Since it intended to continue to borrow funds for the project, the subcontractor subsequently entered into an assignment agreement with the bank.²⁷ In return for a revolving line of credit, the subcontractor assigned to the bank all of its future certificates for progress payments from the general contractor.²⁸ The bank then gave notice to the general contractor of the assignment agreement.²⁹ The surety company, however, never notified the general contractor of its assignment.³⁰ After the subcontractor defaulted, the surety and the bank each claimed priority to the payments owed by the general contractor to the subcontractor.³¹ The district court held in favor of the bank to the extent of the amount due on the revolving line of credit.³² On appeal, the surety contended that because its assignment was the first in time of two successive assignments, it should prevail regardless of the fact that the bank had given notice of the assignment and the surety had failed to provide such notice.³³

The court in *American Fire & Casualty* held for the surety based on subrogation principles as to unpaid payments, but held in favor of the bank as to the assignment based on the fact that the bank had given notice.³⁴ The court stated that, with respect to the successive as-

24. 411 F.2d 755 (1st Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970).

25. *Id.* at 756 (this indemnity agreement gave the surety the right to "stand in the shoes" of the general contractor should the subcontractor default).

26. *Id.*

27. *Id.*

28. *Id.* at 756-57.

29. *Id.*

30. *Id.* at 757 n.1.

31. *Id.* at 757.

32. *Id.*

33. *Id.*

34. *Id.* at 758.

signments issue, "the law of Puerto Rico is that the assignee who first notifies the debtor of his assignment prevails."³⁵ Although the surety urged the court to follow the American Rule which is to prefer the first assignee (with exceptions),³⁶ the court found the argument to be without merit.³⁷ In doing so, however, they did concede that "the rule ranking assignees in the order of notice to the debtor has very considerable merit from the standpoint of convenience"³⁸ and very impressive case support.³⁹ Furthermore, the court noted that even the counter authority cited by the surety in support of its position⁴⁰ was not persuasive because it suggested that, where an assignment is not registered, the assignee with constructive possession is to be preferred and that perhaps notification to the debtor (the general contractor) is the best form of constructive possession.⁴¹

Although a majority of courts in the United States follow the American rule,⁴² which will be discussed below, some courts continue to follow the English rule, as did the court in *American Fire & Casualty*. However, most courts that have adopted the English rule have modified the rule to some extent.

In *Boulevard National Bank of Miami v. Air Metal Industries, Inc.*,⁴³ the Florida Supreme Court granted certiorari to determine whether the English or American rule comported with Florida jurisprudence, when trying to resolve a dispute between two assignees of an account receivable.⁴⁴ The court began its analysis by stating that "[b]oth rules presuppose the absence of any estoppel or other special equities in favor of or against either assignee."⁴⁵ After a finding that no special equities or rights existed in the present case, the court explained

35. *Id.* at 757 (this is the English rule followed by the courts in Puerto Rico).

36. *Id.*

37. *Id.* at 758.

38. *Id.* at 757 (quoting 4 A. CORBIN, CORBIN ON CONTRACTS § 902, at 616 (1951)).

39. *Id.* (citing *Corn Exch. Nat'l Bank & Trust Co. v. Klauder*, 318 U.S. 434 (1943) (applying Pennsylvania law)); Also, the law of Puerto Rico prefers the assignee who first notifies the debtor. *Id.* (citing P.R. LAWS ANN. tit. 10, § 1741 (1963)(1); P.R. LAWS ANN. tit. 31, §§ 3941-3942 (1963); 10 MANRESA, CODIGO CIVIL ESPANOL 412 (5th ed. 1950); VELAZQUEZ, LAS OBLIGACIONES 259-62 (1964)).

40. *Id.* See also BORRELL Y SOLER, THE CONTRACT OF SALES ACCORDING TO THE SPANISH CIVIL CODE 194-95 (1952).

41. *Id.* at 757-58. The court indicated that [a]n extended discussion in the dissenting opinion . . . in *Salem Trust Co. v. Manufacturers' Finance Co.* suggests that while such a line of reasoning, under the rubric of perfecting title, is the origin of the first-to-notify rule in England, this was merely a misguided extension of a venerable bankruptcy statute.

Id. at 758 n.2 (citation omitted).

42. See 4 A. CORBIN, CORBIN ON CONTRACTS § 902 (1951).

43. 176 So.2d 94 (Fla. 1965).

44. *Id.* at 97.

the historical basis for both rules.⁴⁶ The Florida Supreme Court recognized the principle that notice to a debtor of an assignment is necessary to impose upon the debtor the duty to pay the assignee.⁴⁷ The court reasoned:

To regard the debtor as a total non-participant in the assignment by the creditor of his interests to another is to deny the obvious. . . . For the assignee to acquire the right to stand in the shoes of the assigning creditor he must acquire some "delivery" or "possession" of the debt constituting a means of clearly establishing his right to collect. The very nature of an account receivable renders "delivery" and "possession" matters very different and more difficult than in the case of tangible personalty and negotiable instruments [T]he very principles which render a sale of personal property with possession remaining in the vendor unexplained, [sic] fraudulent and void as to creditors *applies with equal urgency to choses in action which are the subject of assignment.*"⁴⁸

The court in *Boulevard National Bank* did not take the position that notice to a debtor is the only method of effecting a delivery or possession of an account, so as to put subsequent interests on notice of the prior assignment. The court did consider, however, that the American rule is not in harmony with these concepts.⁴⁹ The court found that the American rule is based largely upon the doctrine of caveat emptor, which has many equitable exceptions.⁵⁰ Further, the Florida Supreme Court stated that it "regard[s] the commercial transfers of accounts as being the exclusive concern of the owner and assignee and that the assignee has no responsibility for the acts of the assignor with whom he leaves all of the indicia of ownership of the account[s]."⁵¹ It was also noted by the court that statutory provisions generally recognize that notice is an important element in the enforcement of assignments and other rights. Further, this is consistent with the English rule.⁵²

III. THE AMERICAN RULE

The American rule generally gives priority to the first assignee,

46. *Id.* The court primarily cited *Dearle*, 3 Russ. 1, 38 Eng. Rep. 475, for the English rule, and *Salem Trust Co. v. Mfrs.' Fin. Co.*, 264 U.S. 182 (1924) for the American rule. See *supra* notes 43-45 and accompanying text.

47. 6 AM. JUR. 2D *Assignments* § 96 (1963).

48. *Boulevard Nat'l Bank*, 176 So.2d at 98 (emphasis added).

49. *Id.* at 99.

50. *Id.*

51. *Id.*

52. *Id.* at 99 (citing *Coconut Grove Exch. Bank v. New Amsterdam Casualty Co.*, 149 F.2d 73, 78 (5th Cir. 1945); *Town of River Junction v. Maryland Casualty Co.*, 110 F.2d 278, 282 (5th

with certain exceptions. The American rule was established in *Salem Trust Co. v. Manufacturers' Finance Co.*⁵³ In *Salem Trust*, the assignor assigned an account receivable, for valuable consideration, to two different assignees.⁵⁴ The second assignee, shortly after receiving his assignment, gave notice of the assignment to the obligor.⁵⁵ Up to the time he gave notice, the second assignee made no inquiry to the obligor as to his indebtedness to the assignor, and neither the second assignee nor the obligor had any knowledge of the first assignment.⁵⁶ The question presented to the court was whether prior notice to the obligor by the second assignee to an account receivable, without more, would subordinate the rights of the first assignee to the same account.⁵⁷

In reversing the decision of the lower court which had applied the English rule,⁵⁸ the court in *Salem Trust* held that the first assignee should prevail.⁵⁹ The court reasoned that the rights of the assignor passed to the first assignee⁶⁰ and that notice of the assignment to the obligor added nothing to the right or title transferred.⁶¹ The subsequent assignee took nothing because the assignor had nothing to give. This failure of the first assignee to give notice to the obligor did not divest him of any title or right, nor did it vest any claim in a subsequent assignee.⁶² In so holding, the *Salem Trust* court contrasted its reasoning with the English rule and noted:

It cannot injuriously affect an intending purchaser who makes no inquiry of the debtor concerning the assignor's title. The debtor is not bound to answer inquiries concerning the assignor's title, and there can be no assurance that an intending purchaser can ascertain the incumbrance by inquiry of the debtor having notice of the earlier assignment. It is impossible to eliminate all risk from such a transaction. If the second assignee

53. 264 U.S. 182 (1924); see also *Wilson v. Duncan*, 61 F.2d 515 (5th Cir. 1932); *Moores-town Trust Co. v. Buzby*, 109 N.J. Eq. 409, 157 A. 663 (1931); *Fortunato v. Patten*, 147 N.Y. 277, 41 N.E. 572 (1895).

54. *Salem Trust*, 264 U.S. at 187-88.

55. *Id.* at 188.

56. *Id.* at 187-88.

57. *Id.* at 190.

58. The Supreme Judicial Court of Massachusetts has essentially followed the American rule. The lower court, however, held the issue to be one of general jurisprudence, declined to be bound by those decisions, and followed the English rule which had been applied in federal courts and in a number of states. *Id.*; see *Corn Exch. Nat'l Bank & Trust Co. v. Klauder*, 318 U.S. 434 (1943); *Smiton v. McCullough*, 182 Cal. 530, 189 P. 686 (1920); *Hall v. Boston Plate & Window Glass Co.*, 207 Mass. 328, 93 N.E. 640 (1911); see also 4 A. CORBIN, *supra* note 42, § 902.

59. *Salem Trust*, 264 U.S. at 200.

60. *Id.* at 197 (a creditor, of course, has the right to dispose of his own property as he chooses, and the right to require the debt to be paid as he directs without the assent of the debtor).

61. *Id.*

elects to rely on the representations of the vendor as to his title, and is deceived, he cannot shift his loss to the first assignee, unless some act or omission of the latter was proximate to the deception.⁶³

The *Salem Trust* court stated that the notice given by the first assignee to the debtor and the possession of tangible personal property taken by a purchaser are not analogous.⁶⁴ In forming the American rule, the court determined that giving notice of an assignment is not "necessary to or an element in acquisition of title. . . . [Also] [i]f equities are equal, the first in time is the best in right."⁶⁵

The Ohio courts have also experienced difficulties resolving the conflict between assignors who were assigned an interest in the same property. In *General Excavator v. Judkins*,⁶⁶ the Ohio Supreme Court upheld the decision of the lower court, which had awarded the funds to the first assignee.⁶⁷ The court began its decision by stating:

An equitable assignment needs no particular form and may even be oral. So long as there is an intention on one side to assign and an intention on the other to accept, supported by sufficient consideration, and disclosing a present purpose to make an appropriation of a debt or fund, it is enough.⁶⁸

After finding an assignment between the assignor and the first assignee, the court in *General Excavator* noted the two distinct rules governing priority rights between different assignees.

There are two distinct and diverse rules in regard to the priority rights of different assignees of the same fund in the hands of a debtor. The one adopted in England, and perhaps in a majority of the states of this country, is that the assignee who first gives notice of his claim to the debtor is preferred, unless he had knowledge of an earlier assignment or unless his assignment is without a valuable consideration. The other rule, adopted in some of the states and in the federal courts, is that among successive assignees the one prior in point of time should prevail, irrespective of

63. *Id.* at 197-98 (citations omitted).

64. *Id.* at 198-99. The court said "[i]t is impossible in any real sense to transfer possession of accounts receivable or the like, and, as to them, an assignee does not become clothed with the *indicia* of ownership as does one taking possession of tangible things." *Id.* at 199.

65. *Id.* at 199 (this does not proclaim that the failure to give notice of an assignment may become an important element in a situation from which an equitable estoppel may arise against a first assignee).

66. 128 Ohio St. 160, 190 N.E. 389 (1934).

67. *Id.* at 165, 190 N.E. at 391; *see also* Porter v. Dunlap, 17 Ohio St. 591, 596 (1867) (holding that as between two successive assignees of the same claim or demand, from the same assignor, it is subject, in the hands of the subsequent assignee, to all the equitable rights and interests acquired therein by the prior assignee by virtue of the assignment, the prior equity being better in right).

68. *General Excavator*, 128 Ohio St. 165, 190 N.E. at 391 (citations omitted).

notice.⁶⁹

The Ohio Supreme Court, in awarding priority to the first assignee, stated that “[t]here the assignment of the bank was first in point of time and was first brought to the attention of the auditor as fiscal agent. The maxim *Qui prior est tempore, potior est jure*, applies with double force.”⁷⁰

IV. EXCEPTIONS TO THE AMERICAN RULE

In his treatise on Contracts, Professor Corbin lists four exceptions to the American rule governing the priority of assignments.⁷¹ The first exception arises in which a second assignee, who gives value for the assignment, secures payments from the debtor without knowledge of the first assignment in time.⁷² In such a situation, the second assignee will be afforded priority and will retain the proceeds as against the first assignee.⁷³

In *Rabinowitz v. Peoples National Bank*,⁷⁴ the assignor assigned certain accounts receivable to the plaintiff as security for a loan.⁷⁵ No notice was given to the obligors of the assignment.⁷⁶ Almost one month later, the assignor again assigned the same accounts to the defendant, as security for a loan.⁷⁷ Affirming the decision of the trial court, the Massachusetts high court reasoned that, “[a]lthough the assignment to the plaintiff was earlier in time than the one to the defendant, the plaintiff can not recover for money had and received.”⁷⁸ The court stated that “[a]s the money was received from the [obligors] by the defendant as its own, in good faith, without notice of the prior assignment, under an instrument duly executed for a good consideration and purporting to assign the accounts receivable, the plaintiff cannot recover in this action.”⁷⁹ The court further stated that there was valid consideration for the later assignment and it appeared that the defend-

69. *Id.* at 166, 190 N.E. at 392 (citations omitted).

70. *Id.* at 167, 190 N.E. at 392.

71. 4 A. CORBIN, *supra* note 42, § 902.

72. *Id.* § 902, at 617.

73. *Id.* § 902, at 617-18; see *Rabinowitz v. People's Nat'l Bank*, 235 Mass. 102, 126 N.E. 289 (1920). *But cf.* *State Factors Corp. v. Sales Factors Corp.*, 257 A.D. 101, 12 N.Y.S.2d 12 (1939) (the first assignee may recover the proceeds collected by the later assignee where plaintiff holds under a legal assignment and the later assignee's right was a mere equity as assignee of a future right).

74. 235 Mass. at 102, 126 N.E. at 289.

75. *Id.* at 103, 126 N.E. at 290.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 104, 126 N.E. at 290 (citations omitted).

ant did not know of the prior assignment.⁸⁰ The court added that the defendant did not receive the money on behalf of, or as plaintiff's agent. Rather, the money was received by the defendant in his own right as the assignee of a chose in action.⁸¹ Therefore, the court found no need to consider whether the American rule applied in this case, even though it had been applied in earlier cases.⁸²

The second exception to the American rule which was noted by Corbin occurs when the second assignee obtains a judgment against the debtor without knowledge of the prior assignment. This second assignee may collect the judgment and retain the proceeds as against the first assignee.⁸³ Professor Corbin states that "[t]his is the general rule where the judgment-getter is merely an attaching creditor of the assignor; and it would apply with even more reason in favor of a purchaser for value."⁸⁴ Further, the judgment may be collected against the debtor, even though notice of the first assignment had been previously given to the debtor. Without notice of the first assignment, however, the judgment should operate as a discharge for the debtor against the claims of the first assignee.⁸⁵

The third situation in which the second assignee in time has priority over the first assignee, occurs when the second assignee enters into a contract of novation with the debtor in good faith, whereby the debtor promises to pay the second assignee in consideration of the debtor's release from the assignor.⁸⁶ Under a contract of novation, as in the first exception, the contract is enforceable against the debtor even though the debtor had notice of an earlier assignment. Like the first exception, here the debtor would be bound to pay a second time.⁸⁷ In contrast, if the debtor had no such notice, he would be bound by the novation contract, but his duty to the first assignee would be discharged.⁸⁸ However, when a novation contract is made without notice of the earlier assignment, the second assignee may retain what he collects even though the first assignee receives nothing.⁸⁹ Otherwise, the second assignee would

80. *Id.* at 103, 126 N.E. at 290.

81. *Id.*

82. *Id.*

83. Mack Mfg. Co. v. Massachusetts Bonding & Ins. Co., 114 S.C. 207, 103 S.E. 499 (1920). *But cf.* Superior Brassiere Co. v. Zimetbaum, 214 A.D. 525, 212 N.Y.S. 473 (1925)(prior assignee can file a cause of action against later assignee to recover money received on accounts payable under the assignment).

84. 4 A. CORBIN, *supra* note 42, § 902, at 618.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

hold the property as a constructive trustee.⁹⁰

The fourth exception to the American rule can be found when the first assignment was voidable by the assignor and the second assignment acts to void the first assignment.⁹¹ In this situation, payment by the debtor to the first assignee, without notice of the second assignment, will discharge the debtor.⁹² However, the first assignee will hold the funds as a constructive trustee if he collects, since there has been a valid avoidance or revocation.⁹³

In the final exception to the American rule, the second assignee will receive priority over a prior assignee. This arises when the facts in the case create an estoppel against the first assignee.⁹⁴ Such a situation usually occurs when the assignor's claim is evidenced by a document that is customarily identified with the claim itself, such as a note, insurance policy or a savings passbook. By the debtor's contract, such document must be surrendered upon payment.⁹⁵ If the first assignee allows the assignor to retain possession of the document, he is permitting the assignor to remain the full owner of the claim and will be estopped from asserting his prior right.⁹⁶

V. LEGAL VS. EQUITABLE RIGHT

Whether the English or American rule has application in a given jurisdiction, courts regularly justify their decisions and reasoning in terms of equitable rules and principles, typically contrasted with legal rights.⁹⁷ Williston, in his treatise on Contracts, stated that "[t]he right of an assignee of a chose in action may be called equitable . . . because of [several] characteristics."⁹⁸ First, an assignee takes subject to all existing equities in favor of the debtor.⁹⁹ The assignee will lose the benefit of his assignment if the debtor acquires a defense against the assignor in good faith, even after the date of the assignment.¹⁰⁰ A prior assignment for value is, nevertheless, subordinate to a subsequent assignment for value if the subsequent assignee actually collects the claim in good

90. *Id.*

91. *Id.* § 902, at 619.

92. *Id.*

93. *Id.*

94. *See Keys v. Ponder*, 118 Okla. 234, 226 P.73 (1924).

95. 4 A. CORBIN, *supra* note 42, § 902, at 620.

96. It should be noted that this preference is without regard to priority of notice to the debtor although there are cases in which payment by him to the first assignee without notice of the second assignment will operate as a complete discharge. *See* 4 A. CORBIN, *supra* note 42, § 902; *supra* note 58.

97. *See supra* notes 1-23 and accompanying text.

98. 3 S. WILLISTON, WILLISTON ON CONTRACTS § 447, at 331 (Jaeger 3d ed. 1960).

99. In contrast, the transferee of a legal right frequently takes free of equities.

100. *See* 3 S. WILLISTON, *supra* note 98, § 447.

faith or enters into a novation contract with the obligor.¹⁰¹ Further, a prior partial assignee, whose claim is traditionally held to be equitable, is protected as against a subsequent assignment of the whole claim made for value and in good faith.¹⁰² A majority of the equitable characteristics stated above are, in essence consistent with the view that the assignee's right is legal in nature. However, some are inconsistent. Williston draws an analogy between the assignee who first gives notice to the debtor or the subsequent assignee who collects the claim, and the successive transfers of real property.

In the transfer of chattel property it is often held that a subsequent purchaser with delivery is preferred to a prior purchaser without delivery; and yet the prior purchaser is regarded as having a legal right. So where real estate is conveyed to two purchasers, the second purchaser prevails if he records his deed, and yet the first purchaser had a legal title. In these cases the legal title of the first purchaser is made defeasible by subsequent events.¹⁰³

In *State Factors Corp. v. Sales Factors Corp.*,¹⁰⁴ the first assignee of the obligor's accounts receivable sued the defendant, the second assignee of the same accounts, to recover sums collected by the defendant from the obligor's customers.¹⁰⁵ Prior to the assignments, the obligor entered into successive contracts *to assign* the accounts receivable, the first contract was with the defendant and the second was with the plaintiff.¹⁰⁶ Neither the plaintiff nor the defendant were aware of the other's dealings with the obligor.¹⁰⁷ The court held that the legal rights acquired by the plaintiff were superior to what it termed the equitable rights of the defendant, the second assignee.¹⁰⁸ Therefore, the first assignee, the plaintiff, was permitted to collect the funds. Conceding that the contract *to assign* did not pass legal title of the accounts receivable to the defendant,¹⁰⁹ the court in *State Factors* held that *equitable* rights enforceable against the obligor or any assignee of the obligor having notice thereof, were created.¹¹⁰ The court stated that "the plain-

101. See *supra* note 90 and accompanying text.

102. See 3 S. WILLISTON, *supra* note 98, § 447; see also *Chase Nat'l Bank v. Sayles*, 11 F.2d 948 (1st Cir. 1926), cert. denied, 273 U.S. 708 (1926).

103. 3 S. WILLISTON, *supra* note 98, § 447; see also *In re Lafayette Agency*, 43 F. Supp. 330 (S.D.N.Y. 1942).

104. 257 A.D. 101, 12 N.Y.S.2d 12 (1939).

105. *Id.* at 103, 12 N.Y.S.2d at 14.

106. *Id.* at 103, 12 N.Y.S.2d at 13-14.

107. *Id.* at 103, 12 N.Y.S.2d at 14.

108. *Id.* at 103, 12 N.Y.S.2d at 15.

109. That result is possible only through some further action by the assignor after the sale of merchandise which creates the accounts receivable.

110. 257 A.D. at 103, 12 N.Y.S.2d at 14.

tiff acquired legal title to the accounts without knowledge of infirmity and upon payment of a new consideration, it occupied the position of a purchaser for value without notice, whose legal title is superior both to the defendant's earlier equitable rights under the contract . . . and to subsequent assignments."¹¹¹ While the court's reasoning appears logical on the surface, it was cogently challenged by one commentator:

It is difficult to accept the court's assertion that the defendant acquired any equitable rights under the contract to assign to it the accounts receivable, though that was the first in point of time. A contract to assign is not an assignment, and an analogy may be drawn to the general view that an executory agreement to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an equitable assignment thereof. Therefore, under the contract to assign defendant acquired only a contract right, and there seems to be no necessity for the interference of equity, since damages at law for a breach of such contract would appear to be adequate.¹¹²

In further support of an assignee's equitable right, the applicable rules of evidence must be reviewed. If an assignee's right were to be regarded as a defeasible legal right, then the burden of proof should be upon the one who asserts that the legal title of the assignee had been defeated. Instead, it has been held that if the obligor paid the assignor after the assignment, the burden of proof is upon the assignee to show that the obligor had notice of the assignment prior to the payment.¹¹³ It would seem that an assignee's right should, by the weight of authority, be regarded as equitable, at least to the extent it is governed and defined in most cases by principles originally established by courts of equity.¹¹⁴

VI. CONCLUSION

While most successive assignment problems in the United States are decided by the application of the American rule, which gives priority to the first assignee in time, with limited exceptions, the English rule continues to be followed in some jurisdictions, particularly with respect to certain kinds of assignments. Regardless of which rule is ap-

111. *Id.* at 103, 12 N.Y.S.2d at 15 (citations omitted).

112. Note, *Contracts: Assignments: Contracts to Assign and Assignments of Future Rights: Successive Assignments: Rights of Creditors*, 25 CORNELL L.Q. 283, 284 (1940) (footnotes omitted); see also *Miller v. Wells Fargo Bank Int'l Corp.*, 406 F. Supp. 452 (S.D.N.Y. 1975), *aff'd*, 540 F.2d 548 (2d Cir. 1976) (although an equitable assignment does not take effect until the assigned funds actually come into existence, a legal assignment is perfected when made, absent statutory requirements such as filing).

113. *Burritt v. Tidmarsh*, 1 Ill. App. 571 (1877); see 3 S. WILLISTON, *supra* note 98, § 447.

114. See 3 S. WILLISTON, *supra* note 98, § 447; Cook, *The Alienability of Choses in Action*, HARV. L. REV. 816 (1916).

plied, there is much authority and rationale to support the basic notion that an assignee's rights are, in any event, governed by principles originally established by courts of equity. As a result of jurisdictional precedent favoring either the English or American rule, or based upon the subject matter of a particular assignment, the conflict in determining the priorities of the rights of successive assignees will not be completely vitiated until more uniform rules are broadly applied to all types of assignments. Such rules may follow existing statutory schemes, but must encompass traditional principles of equity.