The Wage Assignment Problem

By Albert F. Strasburger, Jr.*

This last May, the United States Supreme Court decided the case of Local Loan Co. v. Hunt. The holding is quite simple: the interest given prior to bankruptcy by an assignment of future earnings is not such a security interest as to survive a discharge under the terms of section 67d of the Bankruptcy Act. But behind this case there lies a long history of dispute as to the applicable legal theory, and deeper still there is the age-old Ibsenist drama of the poor debtor. Countless are the studies of this broader topic, many of which have illuminated the particular field to be treated herein. Though many of these studies have assumed a legalistic form, their greater value has rested in their presentation of the functional materials; their primary motif has seemed a sociological, rather than a legal, one. This is but natural for the wage assignment problem is factually coextensive with the question of small loan legislation and poor man finance. However, this discussion will in large part take a non-functional approach. The present day use of wage assignments seems to have had its social genesis in the assignments of seamen's wages for necessaries before a voyage; later this device served to protect tradesmen in New England textile mill towns from donating a living to irresponsible labor; the taking of assignments then became common in the small loan field, and today the size of the practice is greatly due to sales drives by post-war installment houses who wished to prevent the lamb who had overloaded from seeking economic repentence. These facts serve as the zero-milestone of the next few pages: into the tripartite set-up of employer, creditor, and worker, the wide use of the wage assignment in lending and merchandising lines has introduced the factor of public interest. That the large

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3Excellent are the reports on the bankruptcy project undertaken by the Institute of Human Relations, Yale Law School, published in (1933) 42 Yale L. J. 473-642.

4Seligman, The Economics of Installment Selling 11, 117.
scale assigning away of the means of livelihood has detrimental effects on a healthy social structure cannot be gainsaid; and it is of the means of escape from this evil that I write. These means are: first, by legislation; second, employer self-help by non-assignment contracts; and third, by employee self-help through bankruptcy.

A claim for wages, just as any other chose in action, was not assignable under the old common law, though such a transfer was enforceable in equity. With the commercialization of the law and the tendency to depersonalize the debtor-creditor relationship, statutes have given the assignee a title sustainable in a court of law. Partial assignments are popularly enforceable only in equity on the assumption of a more than two party controversy. This is not universally accurate for under some practice acts the problem is reduced to one simply of joinder of parties, and the recovery is at law. However, even prior to legislative regulation, not all wage assignments were valid. Though a public servant could assign existing claims for services rendered prior to the assignment, by far the majority opinion voided the assignment

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6An example of such statute, Judicature Act 1873, sec. 25:6.


8The debtor's (i.e., employer's) non-consent to a partial assignment constituted a valid defense in the following: Jermyn v. Moffitt, (1874) 75 Pa. St. 399; Cincinnati, H. & D. v. Lima Ry. Supply Co., (1905) 27 Ohio Cir. Ct. 807; Chicago, B. Q. R. R. v. Provolt, (1908) 42 Col. 103, 93 Pac. 1126; Central Ry. v. Dover, (1907) 1 Ga. App. 240, 57 S. E. 1002. Under the present New York practice, the partial assignee may or may not join the holder of the remainder of the claim. Supposing joinder, if the debtor objects, he thereby consents to a suit by the partial assignee alone; where the partial assignee sues alone, should the debtor object, the holders of the entire claim can be brought in easily. See Porter v. Lane Construction Co., (1925) 212 App. Div. 528, 209 N. Y. S. 54; New York, Civil Practice Act, sec. 278, 192. New York, Rules, Civil Practice, 102.


Many states have codified these rules, and a caution is pointed to the more specific cases. In New York, for instance, aside from the general Personal Prop. Law, sec. 46, Municipal Law, sec. 86a, requires, in case of assignment by a municipal employee, that the department or board head must approve in writing. This approval must be in the full rigor of the instrument. Neubert v. Butler, (1933) 146 Misc. Rep. 467, 262 N. Y. S. 318.
of future earnings from an apprehension that the public would suffer where its servants had prematurely wasted the material reward for their loyalty. This was the English view,\textsuperscript{11} and what slight minority rule exists has never gained headway with its shibboleth of the inapplicability of the rule to American society and policy.\textsuperscript{12} Dictum exists that the doctrine of the non-assignability of unearned government salaries should be extended over quasi-public corporations,\textsuperscript{13} again since the public must rely on the alertness and fidelity of the public utility employee. In the absence of statute the assignment of future earnings by a privately employed assignor is generally valid,\textsuperscript{14} even though the employment be terminable at will,\textsuperscript{15} or on a piece-work basis.\textsuperscript{16} But wages to be earned under a contract of employment not existing at the time of assignment are generally classed as a possibility not coupled with an interest and thus non-assignable; likewise as to a power of attorney to execute an assignment where the power was given prior to the contract of employment.\textsuperscript{17} The only exception to this rule was in those jurisdictions enforcing the assignment in equity provided its duration and the future employment were specified,\textsuperscript{18} and now in some states from a statute prescribing the form of the instrument, as in Massachusetts and Rhode Island.\textsuperscript{19} This was the

\textsuperscript{11} Hunter v. Gardner, (1831) 6 Wilson & Shaw (Scot.) 618; Flarty v. Odlam, (1862) 3 Durn. & East 681; Liverpool v. Wright, (1859) John. 359, 28 L. J. Ch. 868.

\textsuperscript{12} State Bank v. Hastings, (1862) 15 Wis. 83.

\textsuperscript{13} Thompson v. Interborough Rapid Transit, (1905) 49 Misc. Rep. 102, 96 N. Y. S. 416.

\textsuperscript{14} Rudikiet v. Andrews, (1906) 74 Ohio St. 104, 77 N. E. 747; Quigley v. Welter, (1905) 95 Minn. 383, 104 N. W. 236. Minnesota has been cited as holding (prior to statute) that an assignment of future wages indefinite in point of time is invalid. This is incorrect for the supposed leading case and the only one containing a glimmer of such idea, Steinbach v. Brant, (1900) 79 Minn. 383, 82 N. W. 651 held that an assignment ebullient with all sorts of fraud was void as to an attaching creditor.

\textsuperscript{15} Welborn v. Buck, (1897) 114 Ala. 277, 21 So. 786.

\textsuperscript{16} Hartley v. Tapley, (1854) 68 Mass. 565.


\textsuperscript{18} Edwards v. Peterson, (1888) 80 Me. 367, 14 Atl. 936.

\textsuperscript{19} Massachusetts, Gen. Laws 1932, ch. 154, sec. 5, p. 1936; Rhode Island, Gen. Laws, 1923, ch. 304, sec. 6, p. 1304. Gilman v. Raymond, (1920) 235 Mass. 284, 127 N. E. 794, holding that by prescribing the form the legislature, while limiting the duration of the assignment to two years, thereby broadened its application.
bare outline of the legal basis, a device easy of execution and backed by a responsible employer. It was thus no wonder that it led to a social abuse that deserved the jeremiads it has everywhere received. Early legislation, however, was not inspired with thoughts of public weal but was the expression of employer and creditor class protection. The rising tide of public resentment, welled up by the work of the Russell Sage Foundation, began its greatest sweep but a quarter-century ago, so that today thirty-nine states have some statutory regulation. Only thirty-one states have direct wage assignment statutes, and of these only twenty have regulations other than in connection with loans.

From this point, we can but indicate the particular restrictions imposed to effect the sociological goal. The method of complete prohibition of assignment of unearned wages has never been widely accepted because of legislative belief that limitations as to time, amount and to formality of execution were a sufficient safeguard against the poor man’s discounting his future into a helpless peonage. Various limits have been specified as to the amount recoverable by the assignee from any single wage payment: these limits varying in degree and kind (either flat or percentage basis) according to each state’s compromise of the desire to extend some credit facilities to the wage-earner and the social need that he receive a substantial enough proportion of his wage in order to exist. This feature of regulation was incorporated in section 17 of the fifth draft of the Uniform Small Loan Law and through this channel became law in about a score of states. More careful

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20Designed to cure doubt as to priority in cases of assignment and service of attachment or trustee writ; cases of double assignments. See Gallert, Hilborn and May, Small Loan Legislation 184-5.

21Nine states have no statutes: Idaho, Kansas, Nevada, New Mexico, Oklahoma, North Dakota, South Carolina, South Dakota, and Washington.

22Eight out of the thirty-nine states have no statutes apart from small loan laws: Arizona, California, Florida, North Carolina, Oregon, Utah, Virginia, and West Virginia.

23For example, Arkansas, Acts 1911, p. 15. Arkansas, Digest of Statutes (Crawford & Moses), sec. 7133-34, interpreted as applicable only to a lending and not to a merchandising transaction, Missouri Pac. R.R. Co. v. Warren, (1924) 162 Ark. 199, 258 S. W. 130.

24Missouri, Rev. Stat., 1919, sec. 2171; Montana, Rev. Codes, 1921, sec. 4176, forbid the assignment of unearned wages. Georgia, Cole 1926, sec. 3446-66, resemble as to loans. Indiana, Acts 1899, p. 193, sec. 7059, 7059c; Indiana, Statutes (Burns 1901), containing complete prohibition, has since been modified.

drafting has included minima of complete exemption, together with maxima so that creditors should not be needlessly ignored. Time limitations to the validity of assignments of future wages are common. These vary from thirty days in Indiana, sixty days in Minnesota, two years in Massachusetts, to no limit. The requisite formalities of execution are even more varied. Whether as a result of specific legislation or through adoption of the uniform law, the great majority of states requires the consent of the wife or spouse to the assignment. Some states require consent to an assignment of earned wages, some of unearned wages, while some states require it only in specific cases—as in Minnesota, only in the case of assignment as security for a loan of $200 or less. This general type of regulation is certainly praiseworthy for its recognition of the spouse's interest in the domestic economy, but the very nature of the fact situation in these cases is strong evidence of its inadequacy.

More or less despite the fact that protection to the worker has been the mainspring of wage assignment legislation, a few states require the consent of the employer for the validity of the assignment. This provision is not included in the uniform law, and only about ten states, among them Minnesota, retain the requirement in some form. The protection of the employer is

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21 Kentucky, Stat. (Carroll, 1930), sec. 1697 ($75 monthly); Idaho, Comp. Stat. 1919, sec. 6920 ($100); New Jersey, Comp. Stat. Supp., 1924, p. 1207 ($100); Louisiana, Acts 1928 No. 115 uses a 50% rule within $250 maximum and $75 minimum; Michigan, Comp. Laws 1929, sec. 16179 applies a sliding scale.

22 Indiana, Ann. Stat. (Burns 1926), sec. 9352-63, 30 days; Mason's 1927 Minn. Stat., sec. 4135-8, 60 days; Wisconsin Stat. 1929, sec. 241.09, two months; Maryland, Ann. Code (Bagby 1924), art. 8, sec. 16, six months; Connecticut, Gen. Stat. 1930, sec. 4706, one year; Massachusetts, Gen. Laws 1932, ch. 154, sec. 3, two years.

23 Fifth Draft, Uniform Small Loan Law, sec. 17, as proposed January 1, 1932.


28 As to the other half's improvidence, see Statements in favor of legislation to regulate the assignment of unearned wages (Massachusetts, Joint Legis. Comm., 1903), 35, 39.

29 Mason's 1927 Minn. Stat., sec. 4135-8; New Hampshire Public Laws
certainly a factor entitled to legislative attention, and, due to the hostility to non-assignment contracts between employer and employee, this statutory provision is the only easy means of self-help available to the employer. Provisions for recording, since intended for the creditor-assignee, are also uncommon, existing in varied form in only about eight states. These statutes do not change the common law of assignments: actual notice to the employer is still necessary to bind him. However, a few states carry this law of notice further by the requirement that notice must be given within a limited time if the assignment is to be enforceable. Where this limitation exists, a three or a five day interval is usually permitted. This provision is purely public spirited in motive; the rationale is that money lenders in their halcyon days were wont to oblige the employee by keeping the transaction sub rosa if he fulfilled his bargain, and then the timid employee would succumb even deeper,—but with forced notice the lender's goad has supposedly been removed.

The direct relation of wage assignments and small loans is manifest in the more universal requirement that the assignor be given memoranda of the entire transaction or a copy of the instrument,—together with the complementary requirement that an assignment executed under power of attorney is invalid. Aside from the fact that in early days the worker would not nor could assert the rights that were his, remedial legislation, as developed


Massachusetts, Gen. Laws 1932, ch. 154, sec. 3 and Mason's 1927 Minn. Stat., sec. 4135-8, are about typical in requiring filing with the clerk of the town or city where the assignor resides. Substantive requirements for validity, as the consent of spouse or employer, must also be included in the filing.

Three days, as in Colorado, Ann. Stat. (Mills 1930), sec. 4181; Maryland, Ann. Code (Bagley 1924), art. 8, sec. 16; Mason's 1927 Minn. Stat., Sec. 4135-8; New York, Civil Practice Act, 1920, sec. 6841 and New York, Pers. Prop. Law, sec. 46, New York, Laws 1934, ch. 738, Pr. S. No. 31, in effect July 1, 1934; Montana, Rev. Codes 1921, sec. 4173-82, as to earned wages, one day; Georgia, Code 1926, sec. 3446-66, five days.

This provision must in logic assume that the employer cares not how many assignments get plastered on him. This is not always true; so now the rationale is, apparently, that the threat of the assassin is no longer effective when his victim is dead. In fact, the sole utility of the provision would seem to rest in so far as it works a voluntary complete prohibition of assignments. Employees working for firms with a policy of discharging workers after one or two or three assignments will naturally not assign wages, where such notice is a prerequisite to the instrument's validity.
by the Russell Sage Foundation, has attempted to overcome his handicap of ignorance and to assure that he shall have some knowledge of his position. Minnesota and several other states have apparently overlooked this feature, but it is so widely accepted that it may be found in almost any statute previously cited. Other types of regulation are too varied in detail for profitable discussion here. These include statutory prescription of the form of the assignment, the interest rates chargeable, to whom and to what transactions the statutes apply, and the civil and criminal sanctions attendant upon violations and subterfuges.

The constitutionality of these statutes has rarely been questioned, even more rarely denied, and in these days is only of historical interest. The federal Supreme Court on the ground of police power upheld the sweeping Massachusetts statute of 1908. State courts have sustained statutes including absolute prohibition, classified differences in application, requirement of employer consent, of filing with employer within specified time, time limitation and formality of execution, and spousal consent.

However far the remedial legislation has gone in many states, it has still been far from commensurate with the evil it set out to overcome. Few states have a broad and harmonious regulation. Minnesota, for example, which has a reasonably adequate wage assignment law, has, with the exception of a statute applicable

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39 This is not so common a feature. For examples, see Massachusetts, Gen. Laws 1932, ch. 154, sec. 3; Rhode Island, Gen. Laws 1923, sec. 4420-26; Missouri, Rev. Stat. 1919, sec. 2171; Kentucky, Stat. (Carroll 1930), sec. 1697; Connecticut, Gen. Stat. 1930, sec. 4706.

40 The naive "purchase of wages" in place of assignment has never been sustained, where if admittedly an assignment it would run foul. In any event, purchases are usually classed as loans by statute for regulatory purposes. Fifth Draft, U. S. L. L., sec. 16, is typical.

41 The most famous case denying constitutionality, Massie v. Cessna, (1909) 239 Ill. 352, 88 N. E. 152, to the Illinois Act of 1905, on the ground it was too broad in application, was perhaps erroneously decided, see (1911) 5 Ill. L. Rev. 343, but, at any rate, has long since ceased to be a practical rub.

42 Mutual Loan Co. v. Martell, (1911) 222 U. S. 225, 32 Sup. Ct. 74, 56 L. Ed. 175.


44 Ex Parte Alabama Brokerage Co., (1922) 208 Ala. 242, 94 So. 87; Re Home Discount Co., (D.C. Ala. 1906) 147 Fed. 538; People v. Stokes, (1917) 281 Ill. 159, 118 N. E. 87.

45 West v. Jefferson Woolen Mills, (1922) 147 Tenn. 100, 245 S. W. 542.


to semi-philanthropic associations, left the field rather wide open for the commercial lender. Taking an instance of a more specific inconsistency, in New York, up to recently, a personal loan company chartered under the Banking Law was limited to ten per cent. of current wages on assignments securing loans of less than $300; the judgment creditor of the employee could by garnishment get ten per cent. of current wages exceeding $12 weekly, but aside from these restrictions one could collect the full wages of the assigning debtor. This disparity was ironed out by statute this year to the ten per cent. above $12 level. In many states, though popular effort continues to cry for a more complete regulation, even yet this path out of the wilderness is blotched with the mudholes of the unmitigated laissez-faire tradition.

But even where statutory regulation is wanting, there are, as suggested above, other confessionals by which we might be shriven of the curse of the improvident worker. What I have designated employer self-help through non-assignment employment contracts is the problem of what can or might be done by a contractual clause limiting or prohibiting assignments,—plus a much larger concept. The first part deals with the recognition, or not, of the employer's desire to save himself expense caused by the filing of wage assignments against him,—determination of their validity, of their priority, loss from an incorrect decision, besides all the departmental incidentals such as filing, notations to the paymaster, etc. That this is at least a dollars-and-cents consideration may be deduced from the fact that in large corporations approximately one employee in fifty-five assigns his wages. Aside from this, though, it would be an instrument to turn employer self interest to a desirable social result, that wages should go to the wage-earner and not to the money changer. Even for the simple soul who shudders at "employer paternalism," asks who is Armour to

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49 Mason's 1927 Minn. Stat., sec. 7042-43.
51 New York, Civil Practice Act, sec. 684.
52 The New York case,—a bill presented by Sen. Cilano in 1932, the same sort of bill was still lodged in the assembly judiciary committee in Spring, 1934, while at its chairman, the World-Telegram edit. March 17, 1934, prodded. Sec. 46 of the Pers. Prop. Law went on the books May 16. Supra, note 26.
53 Fortas, Wage Assignments in Chicago, (1933) 42 Yale L. J. 526. The old N. Y. State Wage Assignment Comm. found thus from records of New York Central, Consolidated Gas, Brooklyn Manhattan Transfer, Standard Oil, etc.
draw a circle around Willie Stevens and clothe him in purple and fine linen—the end is and must be all-justificatory.

The claim for wages is a money claim, a money claim arising from contractual right. Reasoning from this, there has been much criticism of the holding for the assignee in the State Street Co. Case, on the theory that a contract may in terms provide for non-assignability—the broad argument that a contracting party may make his covenant as he wishes. Section 151c of the Contracts Restatement provides that a right may be effectively assigned “unless the assignment is prohibited by the contract creating the right.” A like expression may be found in Williston. After mention of the Portuguese Bank Case, which held invalid a clause prohibiting assignment as applied to a money claim, Professor Williston writes: “It can hardly be admitted, however, that public policy forbids a contract to pay money to the promisee and to the promisee only without the intervention of an agent, or a contract to pay money, only if the beneficial interest in the claim still is in the promisee.” With this basis and many dicta in the cited cases, it is generally stated that two lines of authority exist, one supported by the Supreme Court, and the other by Professor Williston. Nevertheless, such a statement is unfortunate because it seems to represent neither what the law is, nor should be. The should-be is self-demonstrable. A claim for money is a claim for a thing other than a commodity; fluidity is its essence. Thus any validation of an attempt to freeze such a claim unnaturally wipes out the basis of commercial activity. With an eye to the fact that the stronger contracting party will impose such a restraint, but decline the imposition on itself, the result would tend to a steady preemption of opportunity and a repudiation of the sadly-phrased social doctrine of an equal chance to become unequal.

Before attempting to analyze the more pertinent cases, one

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2 Supra n. 54, discussed in Havighurst, Assignment of Wages, Effect of Provision in Employment Contract that Wages Should Not be Assignable without Employer's Consent, (1932) 26 Ill. L. Rev. 800.
4 Williston, Contracts, sec. 422, page 788.
6 The apparent digression at this point seems necessary to the writer in order that the to-him-more-correct possibilities of non-assignment contracts may better be comprehended.
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should put aside the decisions holding the prohibition of assignment of money claims void on statutory grounds, and this whether the statute is unambiguous or whether the case shows a misconception of what is in fact a real party in interest statute. Aside from confining ourselves to cases of formally perfect assignments, and to those decisions dealing with a contractual clause prohibiting or limiting assignment and not those where the defense is asserted that the contract was by nature non-assignable, we must also eliminate cases where the prohibitory clause has been interpreted to apply only to the service part of the contract and not to the right of payment, or where the assignee of a non-assignable contract took with the express consent of the debtor before the intervention of the rights of a fourth party, or even where the assignor has breached a covenant that he would give notice of any assignment, for none of these would test the validity of the debtor's attempt to keep in his own hands the power to control the future course of his obligation.

Decisions sustaining a condition of non-transferability in theatre tickets may be adequately explained on the ground of license in a service contract; cases concerning the redemption of unused railway tickets by the original purchaser's transferee, on the ground that the railway, not being bound to redeem for anyone, may need to be re-evaluated.

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60State v. Kent, (1903) 98 Mo. App. 281, 71 S. W. 1066, held valid a city ordinance forbidding assignment of wages of city employees, and thus was part of the employment contract and bound the relator-assignee. Iowa, Code 1927, sec. 9452, "When by the terms of an instrument an assignment is prohibited, an assignment thereof shall nevertheless be valid." But see limitation, Snyder v. Bernstein Bros., (1926) 201 Iowa 931, 208 N. W. 503.

The Georgia, Code, sec. 2244, which is a general assignment section, was taken in Bewick Lumber Co. v. Hall, (1894) 98 Ga. 539, 21 S. E. 154, to require that a "non-transferable" credit check was still assignable. See Weber v. Rosenheim, (1890) 37 Ill. App. 72. For a lower New York decision which rambles all over the field, Sacks v. Neptune Watch Co., (1932) 144 Misc. Rep. 70, 258 N. Y. S. 254, aff'd in an unsatisfactory opinion in (1933) 238 App. Div. 82, 263 N. Y. S. 462.


62Devlin v. Mayor, (1875) 63 N. Y. 58.


66Collister v. Hayman, (1905) 183 N. Y. 250, 76 N. E. 20; Purcell v. Daly, (1886) 19 Abb. N. C. (N.Y.) 301.
validly affix the condition against transfer. The more difficult cases which Professor Williston cites are trading stamp cases (like modern cigar store coupons, except that the stamps come from a third party), and the pay check cases. The trading stamp cases really involve service contracts, and these, or the offers to make such, may be made assignable or not as the contracting parties, or the offeror wish; they are not claims for money and thus are not holdings against the proposition that the assignability of such a claim may not be restricted. What the stamp company does is this: it sells the stamps to merchants subscribing to its plan, at the same time making an irrevocable offer to redeem to any bona fide purchasers from its subscribing members; this offer is not made to nor is the company bound to redeem for those who secure the stamps improperly. In short, these are offer and acceptance cases,—not assignment. The pay check cases, since they are plainly money claim cases, call for a different and narrower differentiation, but none the less real. The pay checks or tokens are in essence nothing more than receipts for services rendered; considered in this aspect alone, the employer is probably justified in refusing to recognize them except in the hands of the original holder. The cases sustaining their nontransferability have simply neglected to see the more sensible view that the transfer of the checks is itself a formal assignment of the money claim for the wages owing, and the checks themselves are really not the subject of a title-changing process but are only handed over to the assignee as pieces of evidence to show the amount due. With the exception of the rule in one jurisdiction, the reason for which Professor Williston repudiates, there is no


Mention might be made here of another case supposed to support the anti-Supreme Court view. Joint School Dist. v. Marathon City Bank, (1925) 187 Wis. 416, 204 N. W. 470, where a contractor made a partial assignment to a bank, which had not received the debtor's consent. On refusal to pay, the bank levied on the deposit which the debtor had with it. The debtor recovered; the bank did not take a legal title by the partial assignment, thus had no right at law to take the debtor's deposit.

City of Omaha v. Standard Oil Co., (1898) 55 Neb. 333, 75 N. W. 859 held for the debtor over the assignee on the theory that the debtor could by contract relieve himself of the embarrassment of deciding conflicting
square holding in support of his view. It would thus seem that
the Supreme Court is correct that not only is a money claim assi-
nable but that no restraint may be put on its alienability; and
the chattel analogy, which that Court draws, is accurate, notwith-
standing its alleged inapplicability from the difference in point
of time when the restraint was sought to be imposed. The force
of the Portuguese Bank Case and of Fortunato v. Patten does
not seem abated by the fact that the debtor paid the money into
court. A party filing a bill of interpleader is but asking the court
to help him do the right thing, and the right thing according to
the view expressed by Professor Williston would in the former
case have given the money to the statutory lienee and in the latter
to the junior assignee, for in each the party who in fact took held
an assignment invalid for nonconsent of the debtor, and in neither
case was there an express waiver which could have been the basis
for a holding for those to whom the court finally gave the money.
We might refer here to the well-known and universal holding in
fire insurance policy cases, that a restriction on assignment after
loss is void—obviously these cases are only consistent with the
Supreme Court view. The conclusion that has been sought to be
established would thus leave the non-assignment contract sterile
as a method of escaping the wage assignment evil, and the State
Street Co. Case, as far as it went, correct.

However, the broad and venerable juridical tradition of free-
don of alienability should not be dispositive, for the policy of
protecting the worker has here a legitimate application. This
counter-policy, especially in its particular application of keeping
the wages where they belong, would manifestly not be a subject
for debate under a craftsman economy, and finds both its factual
and legal justification only in the last few decades. With an all-
embracing industrial economy, with union regimentation, the
worker has lost his individuality, and whether or not we choose

73See (1917) 26 Yale L. J. 304.
74(1895) 147 N. Y. 277, 41 N. E. 572; for a straight holding of assignee
N. Y. S. 26.
75The corollary of Williston's position is that the employer-debtor could
sue the assigning wage-earner for breach of contract. But, of course, prac-
tical considerations would explain the absence of a precedent with no flukes.
so to call it, the employer-employee relationship is one of status. Therefore, in the field of wage assignments, the policy against restraints has lost the reason for its existence. In final result, protection of the employee status is no different from protection of the status of the public official, or the divorced wife, though the reasons for restricting the alienability of their claims may have another origin. The policy basis from which the courts would act in upholding employer-employee non-assignment contracts would be the whole statutory and common law panorama of small finance and working class amelioration. While this policy of restraint is broad enough to cover the case where there is no prohibition of assignment, the legal foundation for its exercise would exist only when the employer and worker had so contracted. At the same time, there should be no abuse of such a rule, for the nature and size of wage assignment transactions, and their purpose, would provide sufficiently precise criteria to delimit its useful scope, and allow the policy of free alienability its proper sphere. However, up to the present, no court has shown any sympathy with such an approach.76

What the debtor can by himself achieve is no solution of the problem, but only a puerile evasion. After the evil is done, after the wage-earner has assigned away all he has—then, with the dunning of creditors throbbing in his ears, bankruptcy will stand out like an Elijah’s chariot to the gates of salvation.77 After the granting of a discharge, which is only a personal release, the creditor will, for the sake of his balance sheet, attempt to keep the assignment in force, and collect wages earned after the adjudication.

76 This argument would probably bear little weight in the Illinois court. The State St. Co. Case reasoned thus,—that the Illinois legislation was a demonstration of the wage-earner’s right to assign, thus he could, nor could his employer hinder him. The fallacy here is historically and logically retrogressive, for the course of legislation has always tended toward a goal of further delimitation or, in some states, even refusal to recognize the right at all.

However, should this theory prove acceptable, the problem of draftsman ship would arise. Grismore, (1933) 31 Mich. L. Rev. 299 discusses the effect of a restriction when drawn (1) promise to refrain, (2) declaration that an assignment shall be void, (3) non-assignment as an express condition precedent to performance. The Armour contract included the first two. The third as a practical defense in our case seems imaginative, for even the firms which do discharge employees for assigning wages do not do so immediately on reception of notice; thus in many cases an estoppel would operate. Calling this a waiver would probably conform better to the classical definition.

77 This vision may be marred by the spectre of legal fees. The Legal Aid Society, at least in New York, does not file petitions for its clients.
THE WAGE ASSIGNMENT PROBLEM

With the threat of a suit against the employer, with the consequent possible loss of his employment, the worker's usual step is to move for injunctive relief to prevent the creditor's interference. The creditor's answer is that section 67 d of the Bankruptcy Act, "Liens given or accepted in good faith . . . and for a present consideration . . . shall . . . not be affected by this act," provides for the integrity of the assignment despite the discharge. Usually the same remedy is sought and the same procedure is invoked, for, the motion for such relief being ancillary and dependent, the jurisdiction of the bankruptcy court follows the original cause, and is a far preferable alternative than a plea in bar in a state court suit, which latter is quite inadequate due to the disproportionate trouble, cost, and possible loss of employment involved. The Massachusetts and Illinois state courts formerly held for the assignee, but the uniform rule of the federal courts, with one exception, and the majority rule in the state courts supported the view that the assignment was not such a lien as to claim the protection of section 67 d. The Supreme Court has now concluded the point in favor of this holding, and it is with the principles supporting this decision that we are here concerned.

That one may obtain specific performance of a contract to give security is elementary. Equally so is the legislative fiat that a contract claim is provable in bankruptcy and thus dischargeable. These factors should partly solve the problem whether the assignment should survive discharge. Aside from the proposition that statutory declarations should govern the public policy of a jurisdiction, the worker has the strong precedent of an ethical judgment. This fact that the pertinent cases talk so buoyantly of broad public policy and the spirit of the statute suggests the query whether this concept of policy lies deeper than the Bankruptcy Act.

Where the device of an assignment of wages to be earned in the future under a term of service at will is used as collateral to a debt of the assignor, the assignment is enforceable after the service has been performed and to the extent of performance.\footnote{Local Loan Co. v. Hunt, (1934) 292 U. S. 234, 54 Sup. Ct. 695, 78 L. Ed. 1230; Seaboard Loan Corp. v. Ottinger, (C.C.A. 4th Cir. 1931) 50 F. (2d) 856, 18 A. B. R. (N.S.) 500.}

\footnote{Matter of Bean, (D.C. Ohio, 1930) 15 A. B. R. (N.S.) 332, which entirely overlooked its own 1905 decision of In Re Karns, (1905) 16 A. B. R. 841.}

\footnote{Public Finance Co. v. Rowe, (1931) 123 Ohio St. 206, 174 N. E. 738, 17 A. B. R. (N.S.) 487.}
The possible limitation is manifest that equity will not attempt specific performance of such a contract in any positive sense, i.e., the performance of the service in order to carry out the terms of the assignment. In practice, therefore, the assignee has a very unsubstantial and precarious right, since it depends both on the employer’s continued kindliness and the assignor’s capacity and willingness to work. By hypothesis, the wages have no present existence, but will come into being at some future date. Discussion of this point has thus often drawn analogies from the cases of assignments of expectancies, mortgages of future crops, and mortgages with after-acquired property clauses, as illustrative of the rule applicable to such property. To review, by the ancient common law, things in action, expectancies, possibilities, and the like were not assignable; an assignee thereof acquired no right which was recognized by a court of law, for the act of assignment was regarded as against policy, if not actually illegal. Equity, however, adopted a broader rule and gave effect to assignments of every kind of future and contingent interest in real or personal property, when made upon a valuable consideration, for as soon as the assigned expectancy or possibility had fallen into possession, the assignment was enforced. This doctrine was supported in the leading American case of Mitchell v. Winslow. The same rationale has been applied to the case of assignment of future earnings, and has thus provided the foundation of one argument against the survival of the assignment after discharge: the lien has no prior validity, but attaches to the wages only from the moment of existence, and thus the discharge in bankruptcy is operative before the wages intended as security come into being.

The use of an analogy to the preference cases, where a mort-

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51 DeRivafronoli v. Corsetti, (1833) 4 Paige Ch. (N.Y.) 264.
53 (C.C. Me. 1843) 2 Story 630.
54 In re West, (D.C. Or. 1904) 128 Fed. 205, 11 A. B. R. 782; accord, Matter of Fellows, (D.C. Okla. 1930) 43 F. (2d) 81, 16 A. B. R. (N.S.) 355; Leitch v. Northern Pac. R. R., (1905) 95 Minn. 35, 103 N. W. 704, 14 A. B. R. 409; Matter of Potts, (D.C. Idaho 1931) 54 F. (2d) 144, 18 A. B. R. (N.S.) 436; Seaboard Small Loan Corp. v. Ottinger, (C.C.A. 4th Cir. 1931) 50 F. (2d) 856, 18 A. B. R. (N.S.) 500, 502, “The assignment in this case did not, therefore, create a lien upon the wages of the bankrupt at the time it was executed but such lien was to arise at the time the wages should be earned. Until then the assignment was no more than a contract of the bankrupt, the obligation of which was discharged by the bankruptcy in the same way that his other personal obligations were discharged.”
gagee is sustained in taking possession under an after-acquired property clause within the four months period, to argue that some present property interest must have passed at the time of the contract of assignment, which, had bankruptcy not intervened, would provide a basis for equitable relief—would misconceive that rule. Those cases hold simply that such perfecting of his lien by the mortgagee is not within the voidable preference section of the Bankruptcy Act. This argument of the transfer of a present property interest was the chief foothold of the old Massachusetts minority view: that the debt was not extinguished by the discharge, but only the remedy on the debt was at an end; the interest of the worker under contract for service is actual and real, as illustrated by the fact of his ability to recover for an unjustifiable interference with it as for an injury to any other vested property right; money to accrue from such service is not a bare expectancy or mere possibility but a substance capable of grasp and delivery; his potential possession is thus subject to a transfer which will make the assignee a lienee of a property right.86

If one prefers to be a Shylock, one could separate the interest of the laborer in his future wages and the actual wages, and call them both property interests capable of founding a lien. But this rationalization seems to sacrifice the substantial before the idol of a factual prejudice, for it both confuses a property right with a human liberty and fails to distinguish between a rule of substantive law and the adjective law. The careless use of analogies from cases of future crops or next year’s fleece breaks down at this point, for policy considerations prevent a complete application. Taking the case of future crops, it has been well settled ever since the leading decision of Grantham v. Hawley87 that assignments of nonexistent property will be recognized where the subject matter has a potential existence. Since state policy is at least implicit in all law, and since it is too obvious to argue that better policy would deny a man the ability by any legal machinery to deprive himself of all rights which he may ever have in the future, it becomes necessary to set up some standard defining the permissible from the non-permissible. It is submitted that wherever courts can talk of potential existence, possession of the means of production.

87(1615) Hob. 132, holding valid an assignment of crops to be grown 21 years thereafter.
etc., they are willing to sustain the assignment as something in the nature of a property interest, being a contract right to a specific thing. In short, the concept is capable of a rough sort of reification. On the other hand, not only does it seem difficult to reify a laborer's right to his future wages in order to classify it as a transferable property interest, but such a process would violate one of the most holy axioms of Anglo-American jurisprudence—that of personal liberty. Following this analysis, it is apparent that when courts scorn to enforce an assignment after discharge on the ground that it is against the policy of the Bankruptcy Act to allow a man to mortgage his future, the rationale has a foundation deeper than the statute.

The second criticism of the Massachusetts view is that it confuses substantive and adjective law. The argument seems plausible that there must be a present interest in future earnings, else how explain the case of a worker's recovery for an unjustifiable interference with his employment, or injunctive relief against the vendor of a business, who sold out with a two year non-competition agreement. The first is just another illustration of a personal right. The second is closer to our present point. It is simple bankruptcy law that ordinarily, when a trustee in bankruptcy adopts a contract, he takes it cum onere, and is bound to perform as the bankrupt would have been had bankruptcy not intervened. Thus in the case of a realty contract the trustee would be liable to specific performance. But even broader cases exist where specific performance has been decreed in contract cases where the contract could not have been so enforced against the bankrupt had he remained solvent. This last factor should throw into relief the proposition that equity is a remedial process and that while it acts directly on a res, the ground for its exercise of power

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89 Matter of Voorhees, (D.C. Ohio 1930) 41 F. (2d) 81, 15 A. B. R. (N.S.) 666, denominating the interest given by an assignment of future earnings at time of contract as too vague to be considered a present property transfer capable of sustaining a lien under sec. 67 (d) of the act.
92 Sparhawk v. Herkes, (1891) 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915.
is the inadequacy of the legal remedy, not any right, title, or interest which the plaintiff has in the res. The same applies as to contracts to give security. A more practical application of in rem process is the stoppage in transitu where the seller having parted with title and given credit may yet reclaim his goods. It thus seems erroneous to infer what the substantive interest is from the nature of the remedy afforded.

Professor Williston suggests a solution of the problem in favor of the minority view, on the theory that the assignee of wages has an authority or power to collect, plus an implied agreement on the assignor's part not to revoke this power, and that neither of these are such contract rights as to be provable in bankruptcy and thereby dischargeable. But though a chose in action may be pledged, or be the subject matter of a power of attorney for collection which will survive a discharge, no case has adopted this argument so far as to hold valid through discharge a power to collect choses to spring into existence at a future date. The Illinois court, which was a minority court, had before it an instrument which was patently framed on this theory, but the opinion sheds no light on this point. It seems, though, that even an irrevocable contract of agency should be provable, and thus that Professor Williston's view implies a confusion of provability in the bankruptcy sense with provability of damages in the bread-and-butter sense. But be this as it may, there exist more apposite answers.

When the creditor seeks to enforce his power of attorney after discharge, claiming that his lien is preserved under section 67 d, he is taking refuge in a provision not intended for him. Section 1 (23) of the Bankruptcy Act defines a secured creditor as one who (a) holds security against the property of the bankrupt, or (b) is secured by the individual obligation of another who holds such security. Reading this with section 67 d, it seems the liens there contemplated are liens directly or indirectly on some existing property of the bankrupt. It is plain that before the institution of bankruptcy proceedings, the holder of the power is a secured creditor in the popular acceptation of the term, though not such a one in the bankruptcy sense under section 57 h. Now the usual

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94 D'Aquila v. Lambert, (1761) Amb. 399, 2 Eden 75.
95 1 Williston, Contracts, sec. 414, page 772.
96 Stedman v. Gasset, (1846) 18 Vt. 346.
cases of creditors secured in the popular sense but not the bankruptcy sense are cases where the security is the property of another, or is exempt property, or is the personal indorsement of third parties, as on a note made by the bankrupt. Reducing this, it is clear that the security comes either from a third party or from the bankrupt. With the former we are not concerned. With the latter we are, for whatever security the holder of the power has must have come from the bankrupt. The bankruptcy court has jurisdiction of the bankrupt's assets, and the secured creditor must there assert his lien. Even exempt property which is of such a nature to be assignable passes into the jurisdiction of the court, for the bankrupt must claim his exemption and the allowance must be ruled on by the judge. Where a creditor has a lien on exempt property (supposing the exemption not waived) which would not make him a secured creditor in the sense of section 571, he must still assert his right through the bankruptcy court. But no case ever contended that the right of the laborer to future earnings was an asset which passed to the trustee or which the bankruptcy court could control, and of course the future wages themselves are excluded, and thus likewise the power of attorney to collect those wages. Therefore, it follows that the power of attorney is the only type of security emanating from the bankrupt which does not in some fashion go through the bankruptcy court. Taking the rule of statutory interpretation that an enumeration is equivalent to an exclusion of what is not enumerated, and extending it so as to read that what is enumerated by necessary implication from the various sections excludes what is not, the conclusion is that the power of attorney or agency is not such a security interest as to take shelter under section 67d as against a plea of discharge.

A second answer might be the following. Taking the granting of the power of attorney for collection and splitting the contract into two parts, one could say the first part is the granting of the power, and the second a contract to keep the proceeds. One may accept the first arguendo, and still reject the second. A bankrupt

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*Gilbert's Collier on Bankruptcy, 2nd ed., page 20.*


cannot by himself vacate or surrender a discharge,\textsuperscript{102} though after discharge he may fail to plead it, or else make a new promise. Of course, a bankrupt could not make a binding agreement before bankruptcy to waive his discharge afterward or not to apply for one so that his future earnings would remain subject to collection.\textsuperscript{103} In effect, this is exactly what the creditor has tried to achieve by a power of attorney or by an assignment, but this subterfuge should avail him naught.

With the decision of \textit{Local Loan Co. v. Hunt} by the Supreme Court, no tribunal can now enforce the assignment after discharge, for the bankruptcy court, having exercised its power to determine the status of the debtor,\textsuperscript{104} will be ready to grant injunctive relief to maintain the integrity of that status.\textsuperscript{105} The old minority was doubtless inspired by the belief that the device of an assignment enabled a poor man to get credit without detriment to his creditors, and that to deny to an honest creditor the self-protection for which he had bargained would be a great hardship.\textsuperscript{106} The opposing side\textsuperscript{107} has equally recognized that its holding would prejudice the wage-earner in not having an interest on which he could capitalize. But this is not an undesirable consummation, and the creditor must now assume the risk of a bankruptcy discharge, just as he has already assumed the risk of continued employment, or compliance with statutory requirements. The inapplicability of a complete analogy to cases of next year’s fleece or of future crops reveals itself. It is one thing to take all of a man’s property in satisfaction of his obligations. It is quite another for his creditor to put a rope around his neck and drag him like a marionette without life or hope along the pauper’s road of destiny.

\textsuperscript{102}In \textit{Re Shaffer}, (D.C. N.C. 1900) 104 Fed. 982.