PART TEN

MODIFICATION AND DISCHARGE OF OBLIGATIONS
Voluntary Assignment of Simple Debts

I. THE PROBLEM

1. Municipal Differences

The full transfer of choses of action has become recognized in almost every municipal system. But the methods of dealing with the specific problems of this institution are not identical. These problems arise out of the coexistence of three interested parties, the assignor, the debtor, and the assignee, and the additional possibility of conflicts between two or more assignees and their creditors. The influences coming from the bordering fields of attachment, garnishment, and bankruptcy, least favored by international co-operation, further complicate the matter.

Most of the legal diversity is caused by residua from former periods. There is, however, a difficult conflict between the interest of the debtor whose situation should not be altered by the act of two other parties without his consent, and the modern desire for unhampered mobilization of values. A creditor ordinarily may vest any other person with his right, not only without the debtor's consent but without his knowledge. Notice, essentially required in the older codes, such as the influential French Code, in modern systems is only a means for improving the position of the assignee. Particulars in the protection of the debtor, on one hand, and of the assignee and his successors, on the other, vary and are often obscure.

1 For comparative municipal law, see Karl Arndt, Zessionsrecht, 7 Beiträge zum ausländischen und internationalen Privatrecht (Berlin, Leipzig, 1932).
MODIFICATION OF OBLIGATIONS

The involved and delicate structure of the municipal rules has caused a peculiar contrast in classifying the incidents of assignment. This diversity demands a thorough investigation before definitive conclusions are reached with respect to the advisable conflicts rules.

The American decisions in point are numerous but mostly confined to life insurance policies. Appointment of a beneficiary to insurance is not an assignment of the policy but has been adequately treated in conflicts law in an analogous manner. On the other hand, cases concerning bills and notes have been mixed into the discussion, which we must strictly avoid. Transfer of rights through the endorsement of negotiable instruments follows special principles in municipal law as well as in conflicts law, although the differences are not equally accentuated in all systems. In some situations, endorsement has the effect of assignment, but even then the distinction is useful.

To introduce the reader to the conflicts arising from the variety of municipal laws despite the modern tendency to uniform development, the following examples may serve:

(i) Capacity of parties. Cabrera, President of Guatemala, deposited a sum of money with a London bank and later requested the bank to transfer this sum to Nuñez, his illegitimate minor son. The English courts held the transfer void under Guatemalan law under which the son could not accept the assignment, although it would have been valid by English law. In the concurring, though entirely diverse, opinions, the former law was applied either as lex loci actus, or the proper law of the assignment, or the lex domicilii of the assignor and assignee. English law was considered as the lex situs of the debt and as its proper law.

(ii) Assignability of the debt. Carr, injured in a railway accident in Iowa, assigned his claim for damages on the ground of tort by an assignment made in Illinois. The claim

2 República de Guatemala v. Nuñez, see infra n. 23.
could be transferred in Iowa but not in Illinois where tort obligations were nonassignable under common law. The Iowa court applied its own law as that under which the debt arose.3

(iii) Requirement of notification. The English creditor of a French debtor assigns in Switzerland the debt to an American, without giving the debtor notice through formal signification, as required by the French Civil Code, art. 1690, although not in Switzerland. Supposing that French law governs the debt, most European courts hold the transfer incomplete, either because French law governs the debt (Swiss conflicts rule) or because the debtor is domiciled in France (French conflicts rule). In the most frequently expressed American view, however, the transfer is perfected because made in Switzerland.

(iv) Warranty of solvency of the debtor. German parties once made an assignment in Nürnberg of a debt governed by Austrian law. The German courts denied liability of the assignor for the debtor’s solvency according to the Austrian Code, following the Roman law in force in Nürnberg.4

(v) Priority between successive assignees. A firm in the state of New York assigned its accounts receivable as security for a loan to a finance corporation in Philadelphia. The debtors in numerous states were not notified. Afterward, the firm assigned one of these debts in payment to another creditor, who collected the money. At the time (before 1945) in Pennsylvania failure to notify allowed a subsequent bona fide assignee by giving notice to the debtor to acquire a right superior to that of an earlier assignee. According to the “New York rule” (similar to German law) however, a prior assignee is not only to be preferred before payment of the debt but may recover from the subsequent assignee what the latter collects from the debtor. In the United States, under theory of law of the place of assignment, it is uncertain which law would be applied. The Eng-

3 Vimont v. Chicago & N. W. Ry. Co. (1886) 69 Iowa 296, 22 N. W. 906, aff’d, 28 N. W. 612, infra n. 75.
4 RG. (Dec. 3, 1891) 2 Z. Int. R. (1892) 162, Clunet 1892, 1039. See infra p. 423 n. 106.
lish and French conflicts rules call for neither of these laws but for those of the various domicils of the debtors. The German conflicts rule points to the laws governing the individual single debts assigned.

2. The Nature of Assignment

Since in ancient laws obligations were strictly personal, neither in English nor in Roman law could a creditor put another person in his own place as holder of an obligatory right. The auxiliary practices developed in both laws for approaching this purpose were exactly the same. The creditor appointed the intended assignee as his agent for enforcing the claim and retaining the proceeds (mandatum agendi to a procurator in rem suam). Reflections of this stage of history persist in the Anglo-American literature. Notably, the question whether an assignee may sue the debtor in his own name has preserved an anachronistic importance. 5 Also, the distinction between legal and equitable assignment is still significant in common law, although it should not affect the structure of the conflicts rules. 6 Full and present transfer of the complete right of the creditor is the basic form of assignment. Modern efforts, to be sure, have tended to split the right into segments such as legal and beneficiary ownership, or substance of the right and its exercise. These differences are included in what is termed assignability in conflicts law. 7

It is opportune, however, to be clearly aware of the elements of a voluntary transaction in the course of which a chose in action is transferred from the owner to another person. The Romans spoke of the sale of a debt (emptio

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5 See 2 Wharton 1482 § 735; Cheshire (ed. 6) 500 ff., 694 ff.; Robertson, Characterization 273, 278.
6 2 Beale §§ 348-350, 353 (by implication).
7 2 Beale 1251 § 348.2. E.g., if the beneficiary of a spendthrift trust assigns his interest, he constitutes only a revocable power of attorney, Griswold, Spendthrift Trusts 378.
VOLUNTARY ASSIGNMENT OF SIMPLE DEBTS 399

venditio nominis) or of an estate (hereditatis). Nevertheless, only a century ago, the German literature had to be admonished to observe the duality of an obligatory contract containing a promise to assign and a quasi-real contract effecting the assignment. The distinction even now is not very familiar to many lawyers, and sometimes a court in this country thinks it necessary to recall it to the readers of its decision. But the distinction between sale or security arrangement and actual assignment is so well known that it may be surprising that no such distinction appears in any discussion of the conflicts problems. American courts and the Restatement (§ 350) seem to consider only a law governing the assignment, and German courts and writers speak exclusively of the law governing the underlying relationship. The Restatement illustrates its rule exactly by mentioning warranty of the "assignor" for the existence of the debt, although in the modern doctrine (if not in the codes) this particular liability has always been the most characteristic incident, not of assignment, but of a promise to assign for value.

The American attitude is the more striking, as in the most frequent language "assignment" evidently does not mean the entire contract, including the promise to transfer and the transfer, but is thought of as a unilateral manifestation of transferring the right, hence as a part of the all-inclusive transaction. Its definition in the Restatement of the Law of Contracts suggests the same idea. Never-

8 According to the original doctrine laid down in French C. C. art. 1583, sale or gift of a debt includes assignment. Only its effects as to third persons, including the debtor, depend on notice, C. C. art. 1690. However, in modern theory and practice, the situation is very similar to the rules of American statutes requiring notice. Therefore, the transfer of the debt in French law, even though simultaneously with the sale etc., is not a transfer by law, as GULDENER 89 construes it, naturally without French confirmation, but rests on the presumed intention of the parties.

9 See the cases in 6 C. J. S. 1048 n. 50 distinguishing sale and assignment.

10 Restatement of Contracts § 149.
theless, common law assignment is a bilateral transaction, a true contract, requiring acceptance, actual or presumptive, or better said, constructive. The language mentioned may have originated from the ancient appointment of an agent for enforcing the debt and at present may refer more precisely to the customary and useful separate instrument of assignment, evidencing the transfer especially to third parties.

Scope of discussion. Although in the United States and most Latin-American countries assignment is distinguished from conventional subrogation, the kind of subrogation whereby the creditor and a voluntary payor agree on transfer of the debt, is very nearly related to assignment. The practical analogy is so great that the assignment rules are generally applied. The same must be true of conflicts rules.

In American conflicts treatment, the subject is sometimes termed assignment of contracts, which is too broad, since the transfer of an entire contract, occurring in modern commerce, cannot be adequately explained by a mere division into transfers of claims and debts. We must be satisfied with the transfer of single or several claims. On the other hand, the Restatement is not justified in restricting the topic to the transfer of contractual rights. The source of an obligatory claim is immaterial so long as the claim is transferable.

The term "debt" is used in the broad sense of common usage, not restricted to monetary obligations nor to the duty to pay a fixed amount. It means here the right to claim that which is due (French créance, German Forde­ rung), rather than the corresponding duty.

12 See recently, also for the literature, FRÜH, Die Vertragsübertragung im schweizerischen Recht, Zürcher Beiträge zur Rechtswissenschaft, N. F. Heft III (1945). As to the conflict aspects and for further literature, see ZWEIGERT, "Das Statut der Vertragsübernahme," 23 RabelsZ. (1958) 643; EHRENZWEIG, Conflict 438 n. 1.
13 Restatement §§ 348 ff.
3. The Relationships Involved

Simplification is always desirable in conflicts laws. Yet before deciding to what extent it may be reached through rules covering more than one of the relationships involved, we have to note them exhaustively. Although we limit our discussion to those assignments of debt that rest on voluntary obligatory contracts to assign, we have to distinguish four aspects of the problem:

(1) The original debt between C (creditor) and D (debtor), doubtless governed by its own law (lex obligationis);

(2) The contract containing the promise to assign (causa cessionis) between C and P (purchaser), following its own law according to its nature as sale, gift, security, substitution for payment, etc.;

(3) The assignment between C and P, the present transfer of the debt;

(4) The relation between P and D which may be altered by new events, such as payment, release, setoff, etc. between C and D.

II. THE MAIN CONFLICTS SYSTEMS

1. Situs Doctrine

The statutists felt constrained by their territorial dogma to subject even intangibles to the statute real and had, therefore, to give them a local situation in a territory.14 Assignments of debts were sometimes localized at the domicil of the debtor,15 but the vast majority of authors, particularly of the French scholars of the eighteenth century, accentuated the situs of the property which a debt represents and located it at the domicil of the assignor as the party disposing of his property.16

14 Fundamental: 2 LAINÉ 265-278.
15 GUY COQUILLE, Questions et responses etc. (1634) quest. 237.
16 See 2 LAINÉ 265 f.
MODIFICATION OF OBLIGATIONS

This past has left its traces in the conflicts doctrine of the nineteenth century. In England and the United States, the domicil of the owner of a claim has been characteristically identified with the situs of the claim, in analogy to his other moveables.\(^{17}\) Notably in the French and Italian literature, the same old view has found expression\(^{18}\) with some effect on codification.\(^{19}\) Sometimes the domicil has been replaced by nationality.\(^{20}\)

The modern French doctrine has taken the side of the small minority of statutists and consistently favored the law of the debtor. Also in this view the basis of the situs theory may sometimes be recognized.\(^{21}\) The Treaty of Montevideo declares the situs of the debt generally to be at the place of performance.\(^{22}\)

Nevertheless, in the present literature it is universally settled that choses in action do not really have any situs, and that if some fictitious situs must be construed in such

\(^{17}\) United States: Story §§ 397 ff.; Wharton 792 § 363; Vanbuskirk v. Hartford Fire Ins. (1842) 14 Conn. 582: personal property in contemplation of law has no situs but follows the person of the owner. Speed v. May (1851) 17 Pa. St. 91 for general assignments: the actual situs of personal property protects local creditors only against transfer by operation of law. Otherwise, the personal property follows the domicil of the owner, effective against attachment by resident creditors (at the debtor's domicil). This reasoning recurs in Cole v. Cunningham (1889) 133 U. S. at 129 and Barnett v. Kinney (1893) 147 U. S. 476.

England: 4 Phillimore 611 § 759, with citations.

\(^{18}\) France: 1 Foelix § 61; Demolombe, 9 Cours § 61; Survilé, "La cession et la mise en gage des créances en droit international privé," Clunet 1897, 67, 673 (for the cessibility of the claim); Survilé 280 § 171 and n. 3; Roguin, Règle de droit (1889) 141.

Norway: The law of the creditor's domicil (perhaps not as lex situ) is adopted according to Christiansen, 6 Répert. 580 No. 161.

Germany: OLG. Frankfurt (March 4, 1892) 2 Z.int.R. (1892) 477.

\(^{19}\) Japan: Int. Priv. Law, art. 12.


\(^{20}\) E.g., 2 Zittelmann 394; 2 Pontes de Miranda 222.

\(^{21}\) England: In re Queensland Mercantile & Agency Co. [1891] 1 Ch. 536, per North, J., aff'd [1892] 1 Ch. 219. Dicey (ed. 5), Rule 153, but cf. Dicey (ed. 7) 551 n. 72 and accompanying text.

France: Weiss, 4 Traité 431 f.

\(^{22}\) Treaty of Montevideo on Int. Civ. Law (1889) art. 29; (1940) art. 33.
VOLUNTARY ASSIGNMENT OF SIMPLE DEBTS 403

matters as taxation, jurisdiction, seizure, or administration of estates, the voluntary transfer of debts needs no such fixed relation to a territory. In fact, there is no reasonable ground for denying the parties to an assignment the full freedom in choosing the law applicable to it.

Where the domicil of the debtor has been taken as decisive in the modern literature, ordinarily other reasons have prevailed. But the old doctrine did include an insight into the subject matter that should not be entirely forgotten. The creditor's domicil must be important, in the absence of more weighty connections, as the center of the assignor's assets, in relation to his act of surrendering a right, part of these assets. A subsidiary rule, exclusively based on the domicil of the debtor, is condemned thereby. The dilemma of the old and still active controversy, whether the domicil of the creditor or that of the debtor of the assigned debt is decisive, is wrong in itself.

2. England

In the principal English leading case, it was declared that no clear statement of the law applicable to assignment was available; the four jurists, namely, the first judge and the three justices of the Court of Appeal, advanced no less than five different theories on the law determining the validity of, and the capacity to make, an assignment.

Falconbridge offers three theories for choice, and Foote, Cheshire, and Wolff have suggested to supersede the present confusion by a rule similar to the German, extending to the assignment the law that governs the debt assigned.

25 Falconbridge, Conflict of Laws (ed. 2) 495 ff.
26 Foote 426, 296; Cheshire (ed. 6) 489 ff.; M. Wolff, Priv. Int. Law (ed. 2) §§ 511 ff.
Doubtless, the authorities are entirely inconclusive. We may find only some preference for two theories, one that a voluntary transfer of a chose in action is governed by the law of the debtor's domicil,\(^{27}\) and the other that it has its own proper law,\(^{28}\) which is presumably to be found at the place of assigning, either by mechanical rule\(^{29}\) or with better reason in case both parties are domiciled in the same jurisdiction.\(^{30}\)

The judicial indecision is moderated, however, by the incipient insight that the three parties involved in an assignment of rights are connected by different relationships. Thus, the assignment of an English life insurance as a gift from a husband to his wife in Cape Colony was correctly subjected to their domiciliary local law.\(^{31}\) And in Canada it was clearly distinguished that a life insurance policy was under the law of Ontario, but the "assignment of or dealing with the benefits of the policy made by the assured in Manitoba" belonged to the law of the latter province.\(^{32}\)

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\(^{27}\) Lawrence, L. J., in República de Guatemala v. Nuñez, supra n. 23, at 697; approved by Frederic Pollock, 43 Law Q. Rev. (1927) 296.


\(^{29}\) See Cheshire (ed. 6) 495 f. who therefore emphasizes the "retrogression to the days when Private International Law of contracts was still inchoate and undeveloped.”


\(^{31}\) Lee v. Abdy, supra n. 28.

\(^{32}\) Headnote of Nat'l Trust Co. v. Hughes (1902) 14 Man. R. 41 concerning an analogous situation, quoted with approval in In re Sawtell [1933] 2 D. L. R. at 399.
3. United States

During the nineteenth century and sometimes even at present, the law applicable to assignment has been regarded as a very uncertain matter, as in England. But now the courts are more often said to have settled upon a short and definite formula: voluntary assignment is governed by the law of the place where the assigning takes place, except that the question whether the debt is assignable is determined by the law of the place where it is made. In various instances, however, the need for amplifying this formula has been evident. We may take an appropriate suggestion, for instance, from a remarkable dictum of Peaslee, C. J., in the New Hampshire Superior Court. A life insurance policy in a Massachusetts corporation was assigned for security by the insured, a resident of New Hampshire, to a New Hampshire bank, despite the fact that his daughters were beneficiaries. Massachusetts law was held not applicable:

"The rights of the insurer, or of any party against the insurer, are not involved. Nor is there any question as to the power of the assured to take this insurance from his children and give it to his creditors, or make it a part of his estate. The issue is whether his dealings with the policies in this state amounted to such action. The extent of the assignment made by the pledge of the policies as collateral security is the controlling factor in the case. This pledge was made in this state by and to local residents, and the designated beneficiaries also resided here. Such an undertaking is to be dealt with according to local law."

34 See, e.g., Lorenzen, 6 Repert. 319 § 183 and in Cases (ed. 5) at 496; Goodrich 292; Putman, 1945 Annual Survey 44; 6 C. J. S. 1053 § 7; Freutel, 56 Harv. L. Rev. (1942) at 68 n. 160.
See also references in RG., 87 Seuff. Arch. 161 ff.
This distinction between the rights of any party flowing from the insurance contract and "the extent of the assignment" ought to be remembered.

The Restatement has made an attempt to establish more specific rules. Only assignability of the debt, again, is mentioned in § 348 as subject to the law of the place where the assigned contract was made; § 350 determines "the effect of an assignment of a contract right as between the assignor and the assignee" by the law of the place of assignment. Capacity of the assignor and formalities are subjected to the same law (§§ 351, 352). Finally, in application of the broad scope of the law of the place of performance in Beale's scheme, the law of the place where the assigned contract (sic) should be performed, decides "whether the right of an assignee can be destroyed by payment to the assignor" (§ 353), and "whether payment by the obligor to a second assignee destroys the right to performance of the first assignee" (§ 353). Beale later changed his mind with respect to §§ 353 and 354. In his treatise he advocates, for all questions involving priority among successive assignees, the law of the place of assignment.36

Both these attempts at classification are incomplete and doubtful. The local contacts employed to localize both the debt assigned and the assignment are the familiar and misleading mechanical references. No regard is given to the promise to assign. Even so, the American doctrine has the notable merit of giving the transfer of debt a clearly independent function, if an exaggerated one.

4. Germany and Switzerland

The most comprehensive system has been developed and unanimously adopted by the courts and writers in Ger-

many. It is contained in two rules. On the one hand, the law governing the obligation assigned determines not only whether the debt can be transferred, but also all other requirements of a transfer, and even the effect of the assignment on the debt. As the most important consequence, which forms the issue in the great majority of the numerous cases, the law of the debt assigned determines whether notice of the assignment is essential to the change of the person of the creditor. Therefore, a debt of a French domiciliary, governed by German law, does not need the formal signification, prescribed by the French Civil Code, article 1690, regardless of where the assignment is made. Conversely, if a debt is governed by French law, the assignment wherever made needs signification (or a formal acknowledgment by the debtor) as an essential condition. The law of the debt also governs a number of other problems which we shall examine later.

On the other hand, the law that governs the relationship motivating the assignment (causa) such as sale, giving in payment, security, determines the rights and duties arising as between the assignor and assignee. An often-mentioned consequence concerns the liability of a seller of a right for the existence of the debt and possibly for the solvency of the debtor.

The Swiss doctrine has espoused these rules.

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37 Förster-Eccius, Preussisches Privatrecht § 11 n. 33; Gebhard, Materi- alien 160 ff.; 2 Zitelmann 304; Neumeyer, IPR. § 33; Gutzwiller 1616; Lewald 270 §§ 328 ff.; Nussbaum, D. IPR. 265; M. Wolff, IPR. (ed. 3) 151 f.
38 OLG. Köln (Oct. 14, 1890) 2 Z.int.R. (1892) 161; (Nov. 4, 1892) 4 Z.int.R. (1894) 65; OLG. Colmar (June 23, 1905) Clunet 1908, 536.
40 RG. (Dec. 3, 1891) 2 Z. int. R. (1892) 162, Clunet 1892, 1039.
41 BG. (Sept. 17, 1892) 18 BGE. 516, 522; (Oct. 8, 1935) 61 BGE. II 242, 245; (Feb. 19, 1936) 62 BGE. II 108, 110, Clunet 1938, 963; 2 Schnitzer (ed. 4) 659.
5. France

The decisions, none of which were rendered by the Court of Cassation, share the often-proclaimed opinion that the law of the debtor’s domicil at the time of the suit governs assignment. The once almost solitary precursor of this theory, Guy Coquille (A.D. 1523–1603), considered debts localized with the debtor because by his honesty or fraudulent manipulations, by the care or carelessness applied to his business, the obligor makes the claim valuable or fruitless. The outstanding problem to which most decisions and literary utterances have been devoted, however, concerns the application of the French provisions prescribing notification of the assignment to the debtor. The contemporary authors agree, without believing in a fictitious situs, that the effects of an assignment for third persons, including the debtor, are made dependent by the Code on measures procuring publicity in the interest of “public credit.” Technically, these provisions are regarded as prescribing formalities, subject to the law of the place where they should be performed. These statements have often sounded as though assignments were governed entirely by the domiciliary law of the debtor. But the literature has become conscious of the importance of the law governing the debt, citing German decisions, and in prin-

43 Coquille, Questions et responses etc. (1634) quest. 237; 1 Lainé 297; 2 id. 263.
44 2 Lainé 265, in an often-cited passage, approves.
45 Weiss, 4 Traité 431; Despagnet 1140 § 396; Bartin, Traité 760 § 371; Principes 31 § 374; Pillet, Principes 409; Pillet, Traité 760 § 371; Niboyet 820 § 702; 2 Arminjon §§ 141 f.; Lerebours-Pigeonnière (ed. 7) § 474; Arminjon, Droit Int. Pr. Com. 505 § 308.
For Belgium, Poulet § 280.
Institute of International Law, Draft 1927, art. 2, 33 Annuaire (1927) III 198, 217.
VOLUNTARY ASSIGNMENT OF SIMPLE DEBTS 409

ple also recognizes that the validity and effect of the assignment, i.e., the relation between assignor and assignee, must have its own domain. The law of the debtor's domicil seems to be retained for the relation between the assignee and the debtor. This includes, e.g., the right of the debtor to set off a counterclaim that arose against the assignor. Niboyet, finally, has advocated that the law of the domicil of the debtor be neatly restricted to the question of notification.

6. The Netherlands

While the last-mentioned theory combines elements of the French and German conceptions, the Dutch courts have lately combined regard for the debtor, as in French law, with an independent status for the transfer. They hold the transaction between assignor and assignee governed by its own law. Due to the argument, however, that a Dutch debtor cannot be subject to a foreign law by an act in which he does not participate, the effect as to the debtor is determined by the law of his own domicil.

7. Comparison

Leaving aside the uncertain English choice of law and the abandoned situs theories, three systems are recogniz-

46 See Béquignon, 5 Répert. 334 No. 7 and Note, Clunet 1937, at 784; Batiffol, Traité (ed. 3) 587 f. § 540, who, however, extends further the law governing the debt.

47 This has been assumed by App. Colmar (Nov. 16, 1935) Clunet 1937, 781 and approved by the author of the Note, ibid., although he criticizes that the decision (as usual) asserts the law of the debtor's domicil as the general principle of assignment. Cf. infra n. 95.

48 Niboyet 819 § 702; Niboyet, 4 Traité 669, 679; see also Despagnet 1139 § 398.


50 See the five cases in 1 Van Hasselt 115 and the three in id., Supp. 40, where assignment was in Germany between Germans and the debtor was in the Netherlands. In Rb. Haarlem (Feb. 22, 1927) W. 11664, German law was applied to the assignment as between a German assignor and a Dutch assignee, see infra p. 422, n. 102.

A provision to the same effect is contained in art. 21 of the Benelux Draft of 1951.
able. If adequately developed, they agree in distinguishing the relation, Assignor–Assignee, from that of Assignee–Debtor. But they disagree with respect to both the decisive contacts and the classification of problems. The American doctrine emphasizes the law of the place of assignment and gives it wide scope; the German doctrine resorts to the usual individualized contacts and broadly extends the influence of the law governing the original debt; and the French prefer the law of the place of the debtor's domicil at least with respect to the problems concerning notice of the assignment. Moreover, between assignor and assignee the Germans and Swiss emphasize the underlying contract (causa) in contrast to the theoretically abstract act of transfer, whereas in the Latin countries little distinction is made, and in the United States the promise to assign disappears behind the act of assignment when the choice of law is made.

All three systems are visibly defective, which explains the existing uncertainty. Roughly speaking, only in the United States and Germany has the doctrine developed shape. But the American formulations are inexhaustive and use the vague and mechanical contacts of lex loci contractus and the like. The German and Swiss conception has committed the mistake of determining who is the creditor in all respects by the law governing the debt merely because the debtor must be assured against a change in the governing law which might injure his situation. The governing law may, indeed, prevent the debt from being assigned at all or preclude assignment to the particular purchaser, which is, by the way, not a frequent occurrence in present business law (as compared with marital law and succession). Yet, where the debt is assignable, since modern law has adopted the institution of full transfer of debts either without knowledge of the debtor, or at least without his consent, the debtor has no legitimate interest whatever in the motive, form, and effects of an assignment. As a Dutch court said
VOLUNTARY ASSIGNMENT OF SIMPLE DEBTS 411

quite adequately, the debtor may challenge a plaintiff because there was no valid assignment, but he has nothing to do with the events underlying the assignment.\(^{51}\) Hence, while the defenses of the debtor inherent in his contract must be preserved, nevertheless the debt may be transferred anywhere in the world and to anybody, without his consent as well as without interference from the original law of the debt.

III. CLASSIFICATION

I. Formalities

Although older requirements of form have vanished, the laws are divided in some respects, as on the effect of oral assignments. Writing is required, for instance, for an assignment at law in England, generally in Switzerland, and in many Latin jurisdictions. In the United States, except for local statutes of frauds, ordinary oral assignments for value are practically operative and irrevocable, although more doubts prevail when the transfer is made without consideration. The general conflicts rule, asserted by Beale, would strictly invoke the law of the place of the assignment on the question of form.\(^{52}\) But although this was the rule followed in old cases of general assignments for the benefit of creditors,\(^{53}\) there is no corresponding authority for single assignments.\(^{54}\) An analogous dictum by an English Judge has been justly criticized.\(^{55}\)

In the countries following the optional principle of \textit{locus regit actum}, the transfer of a claim may comply with the


\(^{52}\) 2 \textit{Beale} 1255.


\(^{54}\) Of \textit{Beale's} (1255 n. 6) two American decisions allegedly in point, neither is concerned with simple debt. In Capital Finance \textit{v. Metropolitan Life Ins. Co.} (1926) 75 Mont. 460, as \textit{Beale} notes (n. 5), the assignment was made at the place also considered determining the law of the assigned insurance policy.

formalities (or formlessness) either of the law of the place where it is made or of the law governing its contents. A number of Continental writers, however, make the application of the principle dependent on its adoption by the law of the debtor as identified with that governing the assigned debt.\textsuperscript{56} Hence, a French-governed debt would be transferable in the United States according to French formalities, even though the principle were not recognized here. This contention is one of the exorbitant inferences from the alleged paramount role of the law of the debtor or of the debt, but may be refuted also on the ground that the principle \textit{locus regit actum} operates on its own merits at the forum itself.\textsuperscript{57}

It has been insisted, however, that the formalities prescribed by the law of the debt should always be observed in the interest of the debtor, so as to give him an easy opportunity to ascertain his creditor. A debtor owing under Swiss law should be able to rely only on a written assignment in accordance with article 165 of the Code of Obligations.\textsuperscript{58} But this formality is merely one of the conditions for acquiring title. What the debtor needs in order to obtain certainty about the right and the identity of a claimant, is a different matter and may be conveniently left to a local law, either of the debtor’s domicil or of the place of performance.

Formalities to be observed in an assignment, or in the appointment of a beneficiary, are often stipulated in insurance contracts. These agreements naturally participate in the law governing the contract;\textsuperscript{59} they are no concern of \textit{locus regit actum}.

The French provision (Civil Code, article 1690) that

\textsuperscript{56} ZITTEL 394; Valéry 905; 2 FRANKENSTEIN 258.

\textsuperscript{57} In this respect, see RAAPF, IPR. (ed. 5) 70 f., 508 illus. 1 and BGH. (Oct. 28, 1957) IPRspr. 1956–57 No. 32.

\textsuperscript{58} GULDEN 34 f.

\textsuperscript{59} Infra p. 417.
the debtor must be notified by *signification* or must accept
the transfer in an *acte authentique*, has been consistently
characterized in French conflicts law as constituting a
formality,\(^60\) without, however, subordinating it to the prin-
ciple *locus regit actum*. In Germany, the question whether
it is really a formal requirement and therefore is replaceable
by domestic formlessness has been much discussed and
unanimously answered in the negative.\(^61\) The requirement
goes to the substance of the assignment and as such causes
an outstanding problem,\(^62\) important because the French
provisions are the model for numerous enactments and
certain minority rules in the United States. Only the details
of the intimation to be performed under French law by a
*huissier* or the public recognition of acceptance by the debtor
are subject to substitution by local equivalents.\(^63\)

An analogous question arises on the characterization of
the various provisions for regulating priority of claims by
means of recording, registration, or annotation in the
ledgers of the assignor. Also, these provisions are certainly
no mere formalities.\(^64\)

2. Capacity

In principle, the capacity required for the assignor and
assignee has no relation to the original debt. While in most
countries the personal law governs, American decisions have

\(^{60}\) Weiss, 4 Traité 425; Valéry 517.

\(^{61}\) RG. (June 1, 1880) 1 RGZ. 435; (March 20, 1883) 10 RGZ. 273 and many
times thereafter.

\(^{62}\) *Infra* pp. 430 ff.

\(^{63}\) RG. (June 2, 1908) 18 Z.int.R. (1908) 449.

\(^{64}\) *Cf. infra* p. 442. In an English decision, *In re Pilkington’s Will Trusts*
[1937] Ch. 574, cf. 9 Giur. Comp. DIP. (1943) No. 64, a deed of assignment
for the benefit of creditors in Scotland was exempted from the duty of regis-
tration under the English Deeds of Arrangement Act, 1914, despite the English
domicil of the debtor company. The court applied Scottish law as the law
intended by the parties. If the court had considered registration as a
formality, it would probably have only emphasized the Scottish place of
executing the deed. In fact, the assignor was in Scotland, which would be
decisive under the approach submitted *infra* p. 442.
generally preferred the law governing the assignment to that of a party's domicil. 65

New York, however, has sometimes claimed supremacy for its insurance statutes over the laws of the state of assignment. Thus an old New York statute provided that a married woman could not assign without the written consent of her husband a policy of insurance upon the life of her husband for her sole benefit if issued under the laws of New York. 66 In such case, it was held that her capacity should be governed neither by the state of the assignor's domicil nor by that of the place of assignment. 67 On the other hand, the Connecticut court, by unusual reasoning, avoided the application of this statute in a case where New York was the domicil of the husband and wife, and the policy was delivered to them there by the New York agent of the Connecticut insurance company. The court tenuously declared that either the law of New Jersey where the assignment was "completed and delivered" or the law of Connecticut where the contract of insurance was performable, governed, and under either law the assignment was valid. 68 The true choice should have been between New York law protecting its domiciliary and New Jersey as the alleged center of the assignment.

Under the French Civil Code, judges, prosecutors, sheriffs, solicitors, etc. cannot be assigned choses in action that might be in the jurisdiction of the court in whose

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65 Thus, Miller, Executor v. Campbell (1893) 140 N. Y. 457 (married woman, *lex loci cessionis* against law governing insurance); Newcomb v. Mutual Life Ins. Co. (1879) Fed. Cas. No. 10,147 (*lex loci cessionis*, also of the domicil of both parties, against the law governing insurance).


67 Hanna Milhous v. Johnson (1889) 21 N. Y. St. Rep. 382, 4 N. Y. Supp. 199: married woman, in Ohio, beneficiary of a New York policy, assigned it in Ohio for security without the express consent of her husband; the New York court declares the act void under its own statute, applied under peculiar criteria.

68 Connecticut Mutual Life Ins. Co. v. Westervelt (1884) 52 Conn. 586, 592. The case wrongly goes under the head of "cessibility."
forum they exercise their functions.\textsuperscript{69} This is a provision of exclusively domestic application.\textsuperscript{70}

How is the requirement of an insurable interest, by which American statutes restrict the persons able to acquire life insurance policies by assignment, to be classified? The American decisions treat it as a part of the law of the "place of assignment."\textsuperscript{71} This may be based either on the normal classification of capacity under the law of the contract, or on the idea of protecting the assignor who in every case was domiciled in the state of the assignment. Considering that the doctrine of this requirement is "a complex of rules of public policy designed to avert a number of harmful social and economic tendencies,"\textsuperscript{72} it may turn up primarily as an obstacle to assignability because of the nature of the debt, and pertain to the law of the original contract. Yet in any case, the states establishing the requirement may feel impelled to enforce their public policy.\textsuperscript{73}

3. Assignability

As noted before, the American doctrine concedes, apparently as the sole exception to the law of the assignment,

\textsuperscript{69} C. C. art. 1597; see Arndt, supra n. 1.
\textsuperscript{70} See 2 Bar 85 n. 14.
\textsuperscript{71} Manhattan Life Ins. Co. v. Cohen (Tex. Civ. App. 1911) 139 S. W. 51, aff'd (1914) 234 U. S. 123: law of the place of assignment, also of the making of the insurance and the domicil of the assignor, against the domicil of the insurance company and the domicil of the assignee. Haase v. First Nat'l Bank of Anniston (1920) 203 Ala. 624, 84 So. 761: place of assignment and domicil of both parties to it.
\textsuperscript{72} Edwin W. Patterson, "Insurable Interest in Life," 18 Col. L. Rev. (1918) 421.
\textsuperscript{73} See Griffin v. McCoach (1941) 313 U. S. 498: public policy of Texas, domicil of the insured, may refuse to enforce the rights of beneficiaries who have no insurable interest despite the New York law of the insurance contract recognized by the lower Texas federal courts. Harper, "Policy Bases of the Conflict of Laws," 56 Yale L. J. (1947) at 1175 n. 63, stresses the conflict with New York law and the interest vested under this law, but is sympathetic to the decision. On certain earlier decisions, see Carnahan, Conflict of Laws and Life Insurance Contracts (ed. 2, 1958) 463 f. § 89 with a strong argument for the liberal attitude.
that the transferability of a debt is controlled by the law
governing the debt. Hence, it may be stated that on this
classification all conflicts systems agree. 74

(a) Legal restrictions on assignment. Hostility to the
institution of assignment or to the full transfer of obliga-
tory rights has all but disappeared. But prohibitions are
frequently imposed, whether on account of the special na-
ture of certain debts, or for the protection of legal policies,
or through contractual limitations, which are prevalingly
held valid in the United States and abroad.

Thus we may note cases extending the law governing the
debt to such questions as—whether a tort action may be
assigned; 75 whether an unconditional beneficiary of an in-
surance policy may be replaced, 76 or replaced without his
consent; 77 in particular, under what circumstances a wife as
beneficiary of a life insurance policy acquires a vested
right; 78 whether an insurance policy may be assigned with-
out the consent of the insurer and may be pledged 79 to the
company; 80 and whether an employee may assign his right

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74 Westlake § 237; RG. (Nov. 28, 1887) 20 RGZ. 234; Gebhard, Mate-
rialien 160; Diens, 2 Dir. Com. Int. 260; 2 Zittelmann 394; Neumeyer, IPR.
29; 2 Frankenstein 260 n. 85. Contra: Ehrenzweig, Conflict 638 f.
75 Vimont v. Chicago & N. W. Ry. Co. (1886) 69 Iowa 296, 22 N. W. 906,
aff’d, 28 N. W. 612.
Switzerland: Similarly, for an alimony claim, BG. (Feb. 13, 1897) 23 BGE.
I 136, 140.
76 Wilde v. Wilde (1911) 209 Mass. 205.
Canada, Sask.: In re Duperreault (1940) 3 W. W. R. 385.
Switzerland: App. Zürich (Nov. 23, 1934) and BG. (March 7, 1935) 10
Z. ausl. PR. (1936) 587.
Contra: Fourth Nat’l Bank of Montgomery v. Norfolk (1929) 220 Ala. 344,
probably to protect the woman, a citizen, but without invoking public policy.
78 N. W. Mutual Life Ins. Co. v. Adams (1914) 155 Wis. 335, 144 N. W.
1108 grants the vested right to the husband; incidentally, the court eliminates
classification of the problem as one of family law depending on the domicil.
79 For the legal prohibitions in Italy, see Vivante, Trattato Dir. Com.
§ 1877; in Argentina, I. Halperin, El contrato de seguro (1946) 522.
VOLUNTARY ASSIGNMENT OF SIMPLE DEBTS

to wages, once wrongly subjected to the law of the place of assignment.

Conversely, an analogous classification is suitable to a legal provision that the debtor cannot avail himself of a contractual agreement not to assign the debt, as against an assignee who did not know of this agreement at the time of the assignment. Although the assignee is protected thereby, the debt is so directly affected that its law should govern.

(b) Formalities or conditions stipulated. The law governing an insurance contract applies when the policy requires written notice of assignment, or when the by-laws of an insurance company make a change in the beneficiary void unless certain formalities are observed. The gold bonds of the United States Treasury have been an outstanding illustration. The text printed on the bonds indicated as creditor a named person or his assignee registered in the books of the Treasury, and provided for the making of assignments in a foreign country before a diplomatic or consular officer of the United States. On the occasion of the assignment of such gold bonds by notarial instrument in Germany, the Reichsgericht had difficulty in interpreting these clauses and co-ordinating them with the German conflicts rules. It is quite certain, however, that American law governed the entirety of the effects of these stipulations.

81 Coleman v. American Sheet & Tin Plate Co. (1936) 2 N. E. (2d) 349 (statute of Indiana); see also St. Louis etc. R. Co. v. Crews (1915) 52 Okla. 744, 151 Pac. 879.

82 Monarch Discount Co. v. Chesapeake and Ohio Ry. Co. of Indiana (1918) 285 Ill. 233, in fact applying the law of the forum, and deciding against the loan company on other grounds such as usury. I do not regard this decision as justified by the lack of specifying the place of performance, as BATIFFOL 430 n. 4 suggests.

83 Italy: C. C. (1942) art. 1260 par. 2.

84 Colburn's Appeal (1902) 74 Conn. 463.

85 Brotherhood of Railroad Trainmen v. Adams (1928) 222 Mo. App. 689.

86 RG. (Nov. 5, 1932) 87 Seuff. Arch. 161 No. 87, IPRspr. 1933 No. 20, criticized by M. WOLFF, 7 Z.ausi.PR. (1933) 794.
and, according to the prevailing opinion, recognized their force as against third persons. If it were true that in the United States the law of the place of assignment governs such question, this would include a renvoi to the German law of the *locus contractus*. But it is submitted that American law, as governing the original debt on every possible theory, extends to the contractual restrictions on its transfer.

(c) Under the *lex Anastasiana*, which continued in force in various parts of Germany before 1900, the assignee of a debt was not allowed to collect more from the original debtor than the consideration stipulated in the assignment. By constant court practice, this rule was applied when it was included in the law governing the original debt. The French Code, article 1699, and many codes following it, have maintained the late Roman rule with regard to debts in litigation. Continental conflicts literature is extremely divided in this regard, mainly because it is not clear whether the *retrait litigieux* serves primarily to protect the debtor against a virtual deterioration of his situation, to discourage unsound law suits, or to avoid exploitation of creditors by professional traders in dubious debts. Moved by this doubt, Pillet has preferred the *lex fori*. In my opinion, this doubt should lead to the law of the assignment, since technically the effects of the transfer are modified.

(d) Partial assignment. Finally, whether a debt can be divided and partially transferred, is subject to the law of the debt. Thus, it was decided as early as 1840, in the case of a claim payable by a debtor in Maryland and assigned in Tennessee, that the assigned claim was enforceable in

87 Thus, M. Wolff, *ibid.*
88 Cod. 4, 35, 22; 23.
89 Oberapp. Ger. München (Jan. 7, 1845) 1 Seuff. Arch. No. 402; Prussian Obertribunal (Nov. 16, 1853) 30 Striethorst 353; 2 Bar § 276; 2 Zitelmann 394; Walker 431; 2 Brocher 199.
90 Pillet, *i Traité* 763; 2 id. 499 § 646.
equity in Louisiana to the extent that it would be in Maryland. 91

4. Relation between Assignee and Debtor

An assignee has no more rights than his assignor. Hence the debtor can use defenses that would be available to him as against the assignor, in addition to those which he may have against the new creditor. The German doctrine is unanimous in declaring that, since the law under which the obligor owes cannot be changed by the act of other parties, all his defenses are determined by the law governing the debt. 92

It is scarcely believable that under American conflicts rules the law of the debt should be restricted to the question of its "assignability." In the above-quoted dictum of 1932, the Supreme Court of New Hampshire referred to the law of the original insurance debt in considering the rights of the insurer and/or any party claiming rights against him as well as the right of changing the beneficiary. 93 Defenses of lack or failure of consideration, of frustration of a condition or breach of contract, 94 are obviously determined by the same law. This law ought no less to govern defenses against the assignee on the ground of his own behavior or of setoff (if characterized as substantive) of the debtor's own counterclaims.

Compensation, setoff, and recoupment available to the debtor against the assignor at the time of assignment or

91 Jackson v. Tiernan (1840) 15 La. 485. The place of the payment was also the place of the debtor's domicile but not of the assignment, as Batiffol 430 n. 4 thought.
92 Walker 490 and n. 12 simply concludes: the law controlling the debt also governs the relation between assignee and debtor.
93 Barbin v. Moore, supra n. 35.
94 No confirmation, though, seems to be afforded by Bankers Life Co. v. Perkins (1936) 284 Ill. App. 122, 1 N. E. (2d) 112, mentioned by Batiffol 431 n. 2.
before notice of it to the debtor, are clearly in the same class, provided they are considered to be substantive. Such counterclaims, hence, are subjected to the law of the debt by the Germans, to the law of the debtor's domicil by the French, and probably to the law of the forum in jurisdictions where they are regarded as merely procedural means of defense.

Illustration. Buschel in Berlin assigned a claim against a buyer in Strassburg to a bank in Berlin. The buyer countered the action of the assignee by claiming une exception de compensation against the assignor. The court of Colmar assumed that primarily under the French doctrine the law of the domicil of the debtor governed the problem; the defendant, having recognized the assignment by letter, would not be permitted to resort to compensation (C. C. art. 1295). The parties seemed to agree on the application of German law which perhaps governed the debt and allowed the debtor compensation (BGB. § 404); this right, however, was waived, as the court held.95

The German doctrine includes in the law of the debt also the rules permitting the debtor in good faith to pay to the assignor or a wrong assignee, or to transact with him to the detriment of the assignee. We shall have to examine this point specifically.98

5. The Promise to Assign

Limiting our discussion to cases where the assignment is based on an obligatory contract rather than on obligations ex lege, we have to deal with such transactions as sale of a debt, agreement to assign for accord and satisfaction or for security of payment, agency and partnership including the duty to confer claims acquired upon the principal or partner, etc. According to the distinction discussed in

96 Infra pp. 427 ff.
the beginning of this chapter (p. 399), the validity of such contracts is tested by their governing laws, not that of the assignments. The American decisions have not faced the question. They inquire into the efficacity of assignments in view of usury, gambling, and absence of valuable consideration, or the lack of insurable interest. But in the cases decided, the places of the promise to assign and of assigning were indistinguishable.

In the German doctrine, it has been characteristically regarded as a matter of course that the law governing the

97 In Runkle v. Smith (1918) 89 N. J. Eq. 103, an interest in a trust in New Jersey was assigned as security for a loan to a loan company in Pennsylvania. It seems that the court localized both the loan and the assignment in Pennsylvania, although the court speaks only of the latter. The interest was excessive under both laws. In In re Eby (1929) 39 F. (2d) 76, the parties, in contracts including assignment of book accounts, stipulated for the law of Delaware although the Commercial Credit Co. was incorporated and had its home office in Maryland. The court localized "the contracts" either in Maryland ("last act") or Delaware, both having no usury law. It would seem that if the court incorrectly emphasized the assignment as such, it should reasonably have considered the law of North Carolina where the assignor was a merchant and kept his books. Cf. infra IV, 3.

Personal Finance Co. v. Gilinsky Fruit Co. (1934) 127 Neb. 450, 255 N. W. 558, 256 N. W. 511, LORENZEN, Cases 472 deviates by declaring the excessive interest on the loan for which the assignment was made as security, contrary to the settled public policy of the forum, the domicil of the debtor; perhaps the court had a hidden feeling that wages should not have been assigned for a small loan at 3½% a month. But juridically the dissenting vote was right.

98 Manhattan Life Ins. Co. v. Cohen (1911) 139 S. W. 51: assignor, citizen of Texas, and the agent of the assignee made the agreement as to the assignment of two life insurance policies in Texas, also place of the insurance company. Under Texas law, it was a gambling contract. Cf. Phillips v. Green (1922) 194 Ky. 254: draft given in a gambling house to carry on gambling; Bernstein v. Fuerth (1928) 132 Misc. 343, 229 N. Y. Supp. 791: check endorsed on board a ship moving along the coast for a gambling loss, but no place of endorsement where gambling was illegal "was proved."

99 Glover v. Wells (1891) 40 Ill. App. 350: assignment for security for a pre-existent loan which was held to be a sufficient consideration under Iowa law; evidently the entire arrangement took place in Iowa. Colburn's Appeal (1902) 74 Conn. 463: while the policy was governed by New York law and the prescribed written notice was observed, the question whether the transfer of the interest of the insured to his wife was for valuable consideration, depended on the law of Massachusetts where the couple was domiciled.

Contra, for the law of the debt: GULDENER 59, stressing the basic nature of consideration in common law, but forgetting that it regards only the relation Assignor-Assignee.

100 Supra n. 71.
original debt should decide whether a change of creditor requires the existence of a valid underlying cause (e.g., promise) between assignor and assignee. The law governing the promise to assign (the "cause" of assignment), then, should determine whether this requirement is fulfilled. Since the Dutch courts are firm in classifying the conditions of assignment with the law governing the latter,¹⁰¹ the following Dutch case has been criticized in Germany.¹⁰²

A German in Germany made a loan to another German domiciled in Holland and assigned the claim to a Dutchman by correspondence. The debtor questioned that there was valid title, essential for the transfer under Dutch law. But the court held that the assignment was made in Germany where an assignment is valid by itself (as an "abstract" transaction) and it was immaterial, therefore, to inquire into the consideration. German writers object that if the loan was governed by Dutch law, the Dutch requirement of a cause was peremptory.¹⁰³

The decision was correct as to the classification. A debtor is not entitled to reject an assignee purchasing an entirely assignable claim under a foreign law. Whether the assignor or the assignee is the true creditor, is an exclusive matter for the law governing their relationship. The American view is in full harmony with this conception, which has an analogue in the English rule: A debtor may not decline performance to an assignee on the ground that there is no consideration for the assignment as between assignee and assignor.¹⁰⁴

Effects. The underlying transaction between assignor and assignee determines what accessory rights, liens, securities or preferences ought to be transferred together with the

¹⁰¹ Supra p. 409.
¹⁰³ LEWALD 272, followed by RAAPE, IPR. (ed. 5) 508 f.
VOLUNTARY ASSIGNMENT OF SIMPLE DEBTS 423

main object and whether the grantor enters into a warranty for the existence of the debt, and possibly for the solvency of the debtor; also what steps to enforce the debt must be taken by the assignee in case of legal or contractual warranty of solvency; for what period a warranty is presumed to last, and what may be recovered on this or other grounds from the assignor.

The law governing the internal relationship also decides whether a person is entitled to have a chose in action transferred on the ground of such claims as may belong to a principal, a partner, a surety paying the debt, a codebtor paying, etcetera.

6. The Transfer

Formation. Assignment may be conceived as a unilateral declaration by the assignor, but in any reasonable view requires at least tacit acceptance. The consent must be serious, not simulated. These requirements have nothing to do with the original debt. Likewise, essentials, such as notice, recording, and registration, pertain to the orbit of the transfer, but not of the debt.

The same is true of the admission of a fiduciary assign-

105 This is usually confused with the question whether such collateral rights actually follow the assigned right without an express clause.


In the decision of the Bavarian Supreme Court, supra n. 106, the assignor paid the assignee the deficiency, and after the debtor had come to fortune again, sued the assignee for recovery; also this incident was correctly subjected to the law of the sale.

108 BG. (June 3, 1897) 23 BGE. II 818, 8 Z.int.R. (1898) 170 applied the law of the assignor, meant to be the law governing the act of transfer. But the same court (Nov. 24, 1906) 32 BGE. II 696 subjected the problem to the law of the debt, as also 2 FRANKENSTEIN 26 advocates.
MODIFICATION OF OBLIGATIONS

ment for the purpose of collecting the debt, and the conditions of a security assignment. Also, if the law of the assignment were to recognize a unilateral act of the assignor as constituting the transfer, this ought to suffice even though unknown to the law of the debt.

This is contrary to the German and Swiss principle that a mode of transfer not permitted by the law governing the debt has no effect against the debtor; although the obligatory contract may follow a different law, its fulfillment by assignment should be amenable to the law of the debt. This principle is a curious obstacle to the international negotiation of claims, subjecting without any justification cause and transfer necessarily to different laws. A doubt in this respect may arise in the case of future and conditional debts. Thus, where a French real-estate broker assigned his Swiss-governed claim for a conditional fee in France under French law, the Swiss Federal Tribunal classified the problem whether this claim was assignable, without hesitation under the law of the debt; on this ground the court was able to affirm its jurisdiction which is restricted to revising the application of Swiss law. The American theory leads to the opposite result, since the law of the assignment is considered independent. The latter view is the

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Contra: OLG. Hamburg (Dec. 31, 1924) 34 Z.int.R. (1925) 447, though stating that such a trust is known to both English and German law, applies German law as the "national law" of the debtor. (Recognition of fiduciary assignment as a full transfer is not yet a matter of course; in Switzerland, doubts have been dispersed only by BG. (June 12, 1945) 71 BGE. II 167).

110 Contra: GULDENER 25 f.

111 On this point, GULDENER 41, as the only Continental writer, has seen the right solution.

112 BG. (Feb. 24, 1915) 41 BGE. II 132, 134.

113 In Monarch Discount Co. v. Chesapeake and Ohio Ry. of Indiana (1918) 285 Ill. 233, the assignability of future wages is determined under the law believed to govern the assignment, cf. supra n. 71. In the decision In re New York, New Haven and Hartford R. Co. (D. C. Conn. 1938) 25 F. Supp. 874, 876, it is not certain for what reason the assignment of a partly conditional right as collateral security is determined under New York law; probably because this choice of law was not disputed.
correct one, so far as classification is concerned and thereby the state competent to protect the assignor is indicated. The Dutch courts hold likewise.\textsuperscript{114} The objections against transfer of future or conditional debts are well known; they continue in a great number of countries and of American states to produce the requirement that the contract from which the debt should flow must exist at the time of the assignment.\textsuperscript{115} Historically, the reluctance to treat a half-completed chose in action as an object of disposition is quite comparable to the slow process by which a future crop was admitted as the \textit{res} for a sale.\textsuperscript{116} In addition to remainders of this conceptual difficulty, there is always a suspicion of fraudulent acts to deprive creditors of an asset.\textsuperscript{117} Surrender of future means of livelihood or of entire stocks of assets has been disapproved also in the manifest interest of the assignor.\textsuperscript{118} But no interest whatever of the original debtor is involved. His situation remains unchanged, since the debt can only be enforced when it is mature.

\textit{Scope.} Two cases may illustrate the question of the scope of an assignment:

A seller of merchandise in Le Havre, France, drew a draft on his German buyer and discounted it at his local banker. Did he imply assign to the banker his right to recover the price on the ground of the sale? Under French law, indorsement in fact transfers the \textit{provision}, the claim of the drawer against the drawee.\textsuperscript{119} The Reichsgericht abandoned the rigid observance of German concepts\textsuperscript{120} and followed the French law, excusing this application by reference to French business practice. French law was not

\textsuperscript{114} Hof Amsterdam (March 4, 1936) N. J. 1936, No. 746.
\textsuperscript{115} Restatement of Contracts 154; WILLISTON, 2 Contracts § 413, \textit{cf}. § 1681 A.
\textsuperscript{116} See in the Roman development, PAULUS, Dig. 18, 1, 8.
\textsuperscript{117} Thus, in Germany see ARNDT, \textit{supra} n. 1, 33 ff.
\textsuperscript{118} 2 WILLISTON 1183 and 5 \textit{id}. § 1652.
\textsuperscript{119} C. Com. art. 116. See \textit{supra} pp. 398-400.
\textsuperscript{120} OLG. Hamburg (Dec. 15, 1900) 56 Seuff. Arch. 260, Clunet 1905, 669, had expounded these principles.
thought to be applicable because the debt was under German law, and notification therefore was declared unnecessary.\textsuperscript{121} Without such prejudice, it would have been obvious that French law governed the scope of the transfer. This result is laid down at present in the Geneva Convention on the conflict of laws relating to bills of exchange (article 6) as incidental to the law creating the draft.

Potter & Co. in Augusta, Georgia, drew a draft representing the price of fifty bales of cotton sold by them to a firm in Winterthur, Switzerland. The draft was successively endorsed to a broker, a firm in New York, and a banker in Paris who sent the paper for collection to a bank in Winterthur. The Paris banker sued the buyer exclusively on the basis of the sales contract. The assignments conditioning his right were inferred by the Appeal Court from the special usages of the cotton trade, whereas the Swiss Federal Tribunal recognized that American law governed the original endorsements and assumed that the lower court could, without so stating, base its recognition of the usages upon American law. The claim for the price itself was considered governed by the Swiss law of the debt.\textsuperscript{122}

A last example may show the effect of an assignment as between the parties:

An American case was decided upon the following assumptions.\textsuperscript{123} Under the law of Louisiana, if the holder of a claim secured by a lien assigns part of this claim, the assignor loses his priority to the assignee insofar as the proceeds of the lien are insufficient to pay both assignor and assignee; under Mississippi law, assignor and assignee share the proceeds equally pro rata. The court rested its choice of law on the place of the assignment and could have supported this choice by the situs of the lands subject to the lien.

\textsuperscript{121} RG. (March 19, 1907) 65 RGZ. 357, Clunet 1908, 531; 1910, 227; cf. KUHN, Comp. Com. 258; GULDENER 46.
\textsuperscript{122} BG. (Sept. 17, 1892) Kindlimann v. Marcuard, Krauss & Cie., 18 BGE. 516.
\textsuperscript{123} Couret v. Conner (1918) 118 Miss. 374.
IV. Protection of Good Faith

1. Fundamental Distinction

Since a debtor should not be harmed by a transfer of the claim to a new creditor without his consent, it is a universal principle that he may deal with his original creditor, or with an assignee, so long as he may in good faith believe him to be the owner of the claim. The older legal systems prescribed, for this purpose, that notification to the debtor or his acceptance of the assignment should be an essential requisite of the transfer. Noncompliance with such provisions prevents the completion of the assignment and certainly belongs to the law governing its formation (supra II, 6).

By modern methods, mere agreement to transfer constitutes assignment. Separate rules have to safeguard the interest of debtors, despite the validly completed transfer,—rules forming a distinct complex closely connected with the debtor rather than with the parties to the transfer.

From the situation of a bona fide debtor, however, we have thoroughly to distinguish the somewhat analogous problems occurring when the claims of several successive assignees conflict with each other, or an assignee comes into competition with an attaching creditor of the assignor or with his trustee in bankruptcy. Confusion with the first-mentioned group of problems is facilitated by their twofold similarity: bona fide ignorance of a prior assignment may favor a later purchaser of a claim, and notification to the debtor often has been made a decisive factor also in acquisition of priority by an assignee or garnishor. In the older systems, best represented by the French Code, in fact, the same "signification" to or acceptance by the debtor, decisive for the debtor's position, likewise determines the effects of assignment as to all other "third persons." In England "it
is established, in the case of statutory and equitable assignments, that an assignee must give notice to the debtor in order to secure his title against later assignees." In fact, English and some American courts make no distinction between conflicts involving protection of the debtor and those which concern priority between successive assignees. The German courts do not even see the problem. French writers emphasize strongly that notification to the debtor serves as a general measure of publicity, guaranteeing the notifying assignee priority of rank over any other claimant. Insofar as this argument reaches unity of criterion for the effect of all assignees and other claimants, it has great force. But the "publicity" resulting from knowledge by the debtor is not very impressive. There is no law anywhere constraining a debtor to impart his knowledge to someone else, except in actual garnishment proceedings.

However, that there is a great difference of policy and purpose between protecting the debtor and marshalling priorities, becomes manifest in considering the modern form of assignment by formless agreement. Nothing can demonstrate this better than the most recent American development of the technique for ascertaining priority. From 1945, numerous new American statutes have established recording in public files or marking in the books of the assignor of accounts receivable as the method to secure priority of claims. These devices illustrate the fact that priority is a matter connected with the assignor rather than with the debtor.

These statutes, however, have been necessitated by another confusion ensuing upon a mysterious amendment of 1938 to the Bankruptcy Act. Transfers by an insolvent debtor to one of his creditors, in preference to others of the same class, for an antecedent debt are vitiated by Sec-

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125 Batin, 3 Principes 33 f. § 374; Niboyet, 4 Traité 672 f.
VOLUNTARY ASSIGNMENT OF SIMPLE DEBTS 429

tion 60(a) of the Act if made within a certain period before the petition for bankruptcy is filed. A transfer falls within the critical period if it is not "perfected" previously. The former Bankruptcy Act required for this purpose that recording or registering should be done if it was required or even only permitted "by law." 126 The amended test requires for perfection:

"That no bona fide purchaser from the debtor 127 and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein."

This formulation introduced a new test, the "hypothetical bona fide purchaser test," not defined in the Act. It is common opinion that even in the old version the federal provision referred to the state law applicable according to the rules of conflicts law, and this view is upheld upon the amended test. 128

To the surprise of many lawyers and the finance institutions concerned, the courts have applied the section to the assignment of book accounts for security, which are in most cases made without notice to the debtors. Such application by the Supreme Court of the United States in the Klauder Case 129 was the more striking, because the section deals with preferences given to antecedent debts to the detriment of other creditors of the same class and in the case at bar the bank assignees of the debt, with consent of a consortium of creditors, furnished new capital to the now bankrupt assignor. The assignment was held imperfect because under

126 Judicial construction seems to have distorted this provision by giving publication a retroactive effect.
127 Debtor, here, of course, means the bankrupt, not the person of whom we speak as debtor in our context.
129 The Klauder Case, supra n. 128.
MODIFICATION OF OBLIGATIONS

the then law of Pennsylvania the debtors in their various states should have been notified, and therefore a subsequent assignee in good faith could have acquired a right superior to the bank.

This and other decisions, prejudicial to nonnotification financing of accounts receivable, have provoked the large series of new statutes assuring measures of publicity. Their confusing variety adds to the present difficulties of the courts in interstate cases. Thereby the conflicts problem, unsolved thus far, has become particularly acute, and it would seem time for agreement on an adequate rule.

2. Protection of the Debtor

(a) Municipal systems. The debtor obtains his most secure position in those jurisdictions where, according to the repeatedly mentioned French model, notification by either the assignor or the assignee is rigorously required for completion of the transfer. In English equity and in a


132 SCHUMANN, 2 Rechtsvergl. Handwörterbuch at 37; ARNDR, supra n. 1, 83 ff.

133 See, e.g., England: Law of Property Act, 1925, s. 136; Holt v. Heatherfield Trust, Ltd. [1942] 2 K. B. 1 clarifies that the decisive time is when the debtor receives the written notice.

Italy: C. C. (1942) art. 1264 par. 1.
Mexico: C. C. art. 2047.
Portugal: C. C. arts. 789, 790.
Switzerland: C. Obl. art. 167.
number of codes, positive knowledge is equivalent to notification;\textsuperscript{134} in contrast, the French Court of Cassation allows the debtor to resist an assignment of which no notice has been given, although known to him.\textsuperscript{135} In some laws, including the United States, not even a debtor without knowledge is protected, if he has reason to inquire at the time of payment to his original creditor.\textsuperscript{136} In Germany, the debtor is entitled to require presentation of a written assignment or a formal notice by the assignor.\textsuperscript{137}

The provisions vary greatly with respect to the form of notification. In the United States, it is immaterial who notifies and whether he does it orally or by writing. The French Civil Code demands a formal \textit{signification} by the assignee employing a \textit{huissier}, the enforcement officer, or an acceptance of the assignment by the debtor in an \textit{acte authentique} (article 1690). A written document of assignment shown to the debtor is enough to be effective in the United States and Germany.\textsuperscript{138}

The French provision, however, following the \textit{Coutume de Paris}, speaks only of the relation as between the debtor and third parties. A widespread theory contrasts the relation \textit{inter partes}, between assignor and assignee, as independent of notification.\textsuperscript{139} In the numerous countries following the French lead, it is often said accordingly that notification

\footnotesize

\textsuperscript{135} After a long controversy, Cass. civ. (June 20, 1938) D. 1939.I.26; (Nov. 27, 1944) Gaz. Pal. 1945.I.13, strongly criticized as illogical and inequitable by \textsc{Boitard}, 43 Revue Trim. D. Civ. (1945) 119 f.

\textsuperscript{136} Restatement of Contracts § 170; Switzerland: C. Obl. art. 167; Germany: broad judicial construction of § 407 \textit{cit}.

\textsuperscript{137} BGB. § 410.

\textsuperscript{138} Restatement of Contracts § 170, comment to subsec. 2 and illus. 6; BGB. § 410.

\textsuperscript{139} Arg. C. C. art. 1138; see \textsc{Albert Wahl}, Note, S. 1898.I.113. Against this dominant opinion, \textsc{Planiol et Ripert}, 7 Traité (ed. 2) § 1128.
is not a requisite of validity of the assignment but a condition of its effect as to third persons.\textsuperscript{140} In similar formulas, the present English literature states that to perfect title as between assignor and assignee no notice to the debtor is necessary, but notice serves to prevent the debtor from paying the assignor.\textsuperscript{141} The Supreme Court of Tennessee having proclaimed the minority rule essentially requiring notification, subsequently dispensed with it as between assignor and assignee.\textsuperscript{142} The meaning of these distinctions is not exactly the same everywhere and often doubtful.\textsuperscript{143} But their mere existence helps to underline the dual relationship, too often disregarded in conflicts law.

In the United States, the prevailing system is closely analogous to the legal provisions of the German Code. As the Supreme Court expressed it, after one nonnotified assignment, a subsequent assignee takes nothing by his assignment because the assignor has nothing to give.\textsuperscript{144} If Williston objects that according to the same decision an assignor retains the power to discharge the claim by settlement until notice is given to the debtor,\textsuperscript{145} this is only a means to protect the debtor. The transfer of a claim resembles that of a chattel, the possession of which, retained by the vendor, helps a bona fide purchaser to acquire title. Until the debtor's good faith is broken, he may pay the

\textsuperscript{140} See, e.g., for Argentina, C. C. arts. 1493 (1459), 1501 (1467); cf. I. Halperin, El contrato de seguro (1946) 522.

\textsuperscript{141} England: Pollock, Contracts (ed. 13) 176; Gorringe v. Irwell India Rubber Works (1887) 34 Ch. D. 128.


\textsuperscript{143} Arndt, supra n. 1, at 89 denies any real importance to the distinction in France.

\textsuperscript{144} Salem Trust Co. v. Manufacturers' Ins. Co. (1923) 264 U. S. 182, 197.

\textsuperscript{145} Williston, 2 Contracts 1258.
VOLUNTARY ASSIGNMENT OF SIMPLE DEBTS

433
debt, or be released, or acquire defenses for value, irrespective of the transfer. 146

(b) Conflicts rules. Again, three systems are in dispute. (i) Law of the assignment. American courts, subjecting an assignment to the law of the place where it is made, could be expected to include the provisions concerning notification. This has been the method of dealing with general assignments for the benefit of creditors in the last century when such transactions were frequent. A general assignment, good where made, has been deemed to be good everywhere, irrespective of a requirement of notice in other states, 147 although with certain reservations for other local creditors. 148 Also ordinary assignments have been treated likewise in a few decisions, 149 and by Beale. 150

(ii) Law of the debt. Squarely opposed, the established German doctrine asserts that it depends on the law governing the original claim, not only what effect an unknown assignment has on the debtor's position but even whether its transfer is completed by the agreement or only by notification. The literature has insisted upon this result with emphasis. 151 As mentioned before, when a debt governed by French law is assigned in Germany, the solemnities of

146 WILLISTON, 2 Contracts § 433; Restatement of Contracts §§ 167, 170.


148 Cf. STUMBERG (ed. 2) 401 f. n. 60.


To the same effect once in Germany, Oberapp. Ger. Lübeck (Nov. 29, 1855) cited by 2 BAR 81 n. 2 (at least where the lex loci was more favorable to the assignee) and in France, Trib. Seine (March 15, 1907) Clunet 1908, 1118, Revue 1908, 182 (superseded).

150 2 BEALE § 354.1, abandoning the position taken in Restatement §§ 353, 354; see MALCOLM, letter printed by KUPFER and LIVINGSTON, supra n. 36, at 925.

151 2 BAR 82; GEBHARD, Materialien 162; 2 ZITELMANN 394; 2 FRANKENSTEIN 261; NEUMEYER, IPR. § 33; LEWALD 271 f.; NUSBAUM, D. IPR. 265; GUTZWILLER 1616; M. WOLFF, IPR. (ed. 3) 151 f.; RAAPE, IPR. (ed. 5) 506 f.; KEGEL, Com. (ed. 9) 577 note 251 before art. 7 EG. BGB.
MODIFICATION OF OBLIGATIONS

signification have been held indispensable,\textsuperscript{152} while assign-
ment in France of a German-governed debt is considered complete without any notification.\textsuperscript{153} Accordingly, the law of the debt decides the effect of a payment by the debtor to his original creditor;\textsuperscript{154} the debtor is supposed to rely on it.\textsuperscript{155} The Swiss courts follow this view,\textsuperscript{156} which has been recommended also for England\textsuperscript{157} and France.\textsuperscript{158}

(iii) Law of the debtor's domicil. The French courts firmly apply the local law of the debtor's domicil,\textsuperscript{159} allegedly as a general rule for assignments, but in fact dealing usually with the requisite of signification.\textsuperscript{160} More or less in the same application, this theory is shared by most French and Italian writers,\textsuperscript{161} and has found favor also in England\textsuperscript{162} and sometimes in the United States.\textsuperscript{163} Even the German Supreme Court has twice spoken of the debtor's domicil as if it were decisive by itself, instead of being only the presumptive place of performance of the debt;\textsuperscript{164} and the Hanseatic Appeal Court has concluded that every debtor may rely on the protection afforded by such provisions as

\textsuperscript{152} See \textit{supra} n. 39.
\textsuperscript{153} See \textit{supra} n. 38.
\textsuperscript{154} \textit{Walker}, 487.
\textsuperscript{156} BG. (Oct. 8, 1935) 67 BGE. II 242; (Feb. 19, 1936) 62 BGE. II 108.
\textsuperscript{157} \textit{Foote}, 296; \textit{Cheshire} (ed. 6) 498; \textit{M. Wolff}, Priv. Int. Law (ed. 2) 538
\textit{§ 512}.
\textsuperscript{158} \textit{Batiffol}, 429, 432.
\textsuperscript{159} \textit{Supra} n. 42.
\textsuperscript{160} \textit{Batiffol} §§ 530, 531; \textit{cf. Niboyet}, cited \textit{supra} n. 48.
\textsuperscript{161} See citations \textit{supra} n. 45.
\textsuperscript{162} Italy: Cass. Rome (Nov. 7, 1895) S. 1895, 4-13; Clunet 1895, 664 speaks of the national law of the debtor.
\textsuperscript{163} \textit{In re} Queensland etc. Co. [1891] 1 Ch. 536; [1892] 1 Ch. 219, C. A. In this connection, Kelly v. Selwyn [1905] 2 Ch. 117, 121 f., requiring notification, in contrast to New York law, makes sense, as it adopts English law, because an interest in an English trust is assigned. \textit{Cf. Westlake} 152.
\textsuperscript{164} See \textit{Parmele} in \textit{1 Wharton} 796 and the cases collected \textit{infra} ns. 166 ff.
the Belgian Civil Code, article 1690, as well as the German Civil Code, § 410, according to the laws and usages in his country.\textsuperscript{165} The same current of thought can be found in American decisions, sometimes influenced, as in France, by the conflict of assignment and garnishment. Thus, in 1874, notice was declared necessary in Tennessee for the protection of its own citizens, even in the case of a foreign general assignment.\textsuperscript{166} In an 1883 case, the Minnesota court stated that the assignment was executed in Illinois and as far as the rights of assignor and assignees were concerned \textit{inter se}, they were governed by Illinois law, that is, they were valid without notification, but in a garnishment suit affecting attaching creditors, Minnesota, the debtor’s domicil, “cannot permit the laws of another state to be imported and override the settled policy of our own laws. In such a case comity must yield to policy, otherwise ... a citizen of our own state who had been debtor to a nonresident would never be certain to whom he was liable, for his liability would be as uncertain and variable as might be the domicile of his creditor.”\textsuperscript{167} A decision of a New York court held the collecting agent of English creditors, suing for tort, capable of standing in court as a fiduciary assignee, according to New York law.\textsuperscript{168} This holding was not based on local procedures,\textsuperscript{169} but on the argument that under New York law the assignment was full and complete, although it was executed in England and under English law its validity required a written notice to the debtor. English law “can-

\textsuperscript{165} OLG. Hamburg (July 30, 1934) IPRspr. 1934 No. 15.\textsuperscript{166} Fickey v. Soney (1874) 4 Baxt. (Tenn.) 169.\textsuperscript{167} Lewis v. Bush (1883) 30 Minn. 244 at 247. Only at the end the opinion verges to the qualification of Minnesota also as place of performance.\textsuperscript{168} Moore v. Robertson (1891) 17 N. Y. Supp. 554.\textsuperscript{169} Also the precedents cited for the capacity to sue of an assignee appointed for the purpose of collection use substantive reasoning: Church, C. J., in Sheridan v. Mayor (1876) 68 N. Y. 30, 32; Ruger, C. J., in Greenwood v. Marvin (1888) 111 N. Y. 423, 440.
not control the law of this state," of which the defendants (the debtors) are residents. A more recent New York case may be mentioned as a parallel, although exclusively dealing with the priority problem. It was recognized that despite the facts pointing to New York as the place where the assignment was to be localized, Missouri law applied in granting priority to the second assignee giving first notice to the debtor, an insurance company of that state, the insurance contract having been made there with a resident to be performable there.\(^{170}\) These additional factors, of course, may also support the application of the law of the debt or of the place of performance.

(iv) *Lex loci solutionis.* Finally, the Restatement intervenes on the ground of its theory that the place of performance always determines the person to whom performance is due. Consequently, this law, that is, the law governing performance of the original debt, determines whether the debtor can effectively pay to the assignor (§ 354). Such fragmentary rules at least indicate a tendency to abandon the application of the law of the assignment to this problem. Others have reached the same approach on the general principle of *lex loci solutionis*,\(^ {171}\) which is the normal judicial rule in Germany because this law would generally govern the debt and effects of the assignment on the debt.

(v) *Rationale.* The problems regarding the protection of an innocent debtor are not solved adequately either by the Germans, indiscriminately applying the law governing the debt,\(^ {172}\) or by Beale's ubiquitous law of the place of performance.


\(^{171}\) Batiffol 433 § 537; Stumberg (ed. 2) 261.

\(^{172}\) When S. Laurent 198, 200 § 131 declared that he did not understand why the law of the debt should govern as to third persons, 2 Bar 80 n. 1 (b) replied that Laurent stayed in the dark, because he assumed a statute real of a debt. But Bar and the other German writers have, in their turn, lumped too many things together under the law of the debt.
assignment. Take the simplest cases. Under the German approach, an American debtor does not effectively pay anywhere to any assignee without formal signification, if the debt is governed by Argentine law as in the case of a credit given by a bank in Buenos Aires. And according to Beale, a French debtor in Paris may effectively pay to an assignee if the latter purchased the claim in the United States, contrary to French law which would not recognize the payment.

We should think, on the contrary, that existence of a debt is one thing, transfer of a claim as an asset is another thing, and sure identification of the actual creditor is something still different. The German provision that the debtor may require a written instrument stating the assignment is an example. From the Swiss requirement of written assignment, it follows that a debtor domiciled in Switzerland must not pay without a written document or otherwise assuring guarantee.

Certainly a debtor must know that the possibility of foreign assignments imposes on him the risk incurred by ignorance of foreign laws. But it is legitimate for his domiciliary law to mitigate his difficulties.

Forced by the conflicts situation, we may discover that the principal rules in discussion are no part of the effects of assignment with which the codes naturally associate them. Recently, Judge Goodrich found that the privilege, if any, of a second assignee having notified the debtor, "comes not from his status as bona fide purchaser, but from his activities following his belated assignment." The situation is changed after his assignment by a new event. We may say that the legal systems, each in its way, modify the result of their rules regulating assignment by a separate set of rules regulating the conditions and effects of an excused ignorance of these results by the debtor. It seems perfectly natural.

to think of the law at the debtor's domicil as competent to do so.

If, instead, the place of payment should be urged, it is true that the question concerning the right of the debtor to deposit the sum due in court or with a public office, differently treated by the laws, has the closest connection with the mode of payment. But the debtor may well have, in addition, a special right of deposit in the case of a pretended assignment, dependent on the law of his domicil. More important, we should not forget that payment is not the only subject of this class of rules, which includes release, deferment of the time of performance, acquisition of counterclaims against the assignor, the effect of judgments, etc. Likewise, the debtor may be entitled to deal at any place with a pseudo assignee showing him a genuine token or written instrument of assignment, with effect against his true creditor. At the same time, it may be seen again, that all these are not incidents of the original contract or of the assignment, to which they run counter.

It is true that the debtor may change his domicil whereas he cannot unilaterally change the place of performance. But the latter place is too often uncertain, and has other well-known drawbacks.

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174 For the law of the place of payment, Weiss, 4 Traité 398; Despagnet § 311. For the law of the debt, 2 Zitelmann 399; Walker 450.
176 In an interesting section of his work on Spendthrift Trusts (ed. 2, 1947) 114 § 113, Griswold looks for a subsidiary conflicts rule for the application of the statutes restraining the beneficiary of a trust in disposing of his interest in life insurance proceeds. He decides in favor of the place where the proceeds are payable, but concedes that when the policy gives no clear indication of this place, it is difficult to choose between the domicil of the insurance company and the domicil of the beneficiary.
176a Ehrenzweig, Conflict 647 agrees that application of the debtor's domiciliary law "may furnish the most generally acceptable solution," whereas the Restatement (Second), Tent. Draft No. 6 (1960) § 353 suggests that the debtor be protected if either the law governing the obligation or the law governing the assignment grants such protection.
3. Priority of Assignees

(a) Municipal systems. Two opposite solutions are provided in the French and the German laws. In the former, not until notification is the assignment perfected as against all "third" parties, including the creditors of the assignor and subsequent assignees from the assignor. Also the new Italian Code seems to give absolute preference to the assignment first notified to the debtor or first accepted by the latter by an act provided with a certain date. The German Code simply perfects the transfer through the contract of assignment; the assignee hence has a complete priority over all other pretenders. Consequently, if the debtor is discharged in good faith by payment to a subsequent purchaser, really a pseudo assignee, the prior assignee is entitled to recovery from the second on the ground of unjust enrichment. 177

In the United States, there has been for a long time an "irreconcilable conflict" on the question whether notification is necessary for the priority of an assignment. 178 The federal courts, for a time, operating a separate doctrine of "general law" in diverse citizenship cases did not require notification, but reserved undetermined equitable exceptions for a second assignee where notice was given only by the latter. 179 At present, in the great majority of states, choses in action are transferred by the agreement between assignor and assignee, with full effect against all parties. Within this

177 France: C. C. art. 1690; Germany: BGB. §§ 398, 408, 816 par. 2; Italy: C. C. (1942) art. 1265.
178 6 C. J. S. 1145, Assignment § 91. Cf. list for 1923 in 264 U. S. 191 ns. 3 and 5; and see the articles by KÖSSLER, supra n. 131.
179 Salem Trust Co. v. Manufacturers’ Finance Co. (C. C. A. 1st 1922) 280 Fed. 803; rev’d (1923) 264 U. S. 182. The decision is superseded by the Erie Railroad v. Tompkins Case (1938) 304 U. S. 64, also n. 8 in 318 U. S. 437; but has been mentioned more recently as representing the "federal rule" expressed in Judson v. Corcoran (1854) 17 How. 612, by Chief Justice Stone in McKenzie v. Irving Trust Co. (1945) 323 U. S. 365, 373.
group, however, there are differences. In particular, the so-called "New York rule" agrees with the German conception, whereas according to the "Massachusetts rule" a subsequent assignee may retain what he collects on the ground of his notification.\(^\text{180}\) The latter variant, adopted by the Restatement on contracts is usually explained by the assumption of negligence or estoppel on the part of the prior assignee, which, however, is nonexistent in nonnotification financing.

The more suitable new statutes have adopted the methods of filing in a public record, or notation in book accounts.\(^\text{181}\)

(b) Conflicts law. In the jurisdictions directing priority among domestic claims by the test of notification, following some idea of publicity, the competition of foreign-governed claims is apparently subordinated to the same principle. On the other hand, in the German type of system if the law governing the first assignment recognizes its validity, the subsequent transfers are ineffective. Beyond these partial results, no certain conflicts rule is discoverable anywhere. In an English decision, the place of the debtor was preferred to all other local connections, without any convincing reason.\(^\text{182}\) Some examination of the problem involved has been occasioned by recent discussion in the United States on the following subject.

(c) United States: Accounts receivable. The scarce authority includes two cases in which the parties to a security transfer of accounts receivable stipulated for the law at the place of the financing bank, and in each case the court disregarded this stipulation. In the extravagant decision by a federal district court in *In re Vardaman Shoe*

\(^{180}\) See the articles by Koessler, and that by Kupfer and Livingston, supra ns. 130, 131.

\(^{181}\) Ibid.

\(^{182}\) *In re* Queensland Mercantile & Agency Co. [1891] 1 Ch. 536, aff'd [1892] 1 Ch. 219.
Company, it was held that such a clause could not be opposed to the trustee in bankruptcy, he being "a stranger to the contract." The judge refers to the law of the assignor's place as the situs of the debt. In the remarkable decision in In re Rosen, Judge Goodrich eliminated the agreement which most clearly referred to Pennsylvania law for all rights of the parties, validity, construction, and enforcement and "in all respects," for the reason that this clause was part of the general arrangement of financing and assigning, while the claims and even the contracts producing them were not yet all in existence. This was contrasted with the actual transfer, not of the claims which did not take place, but of the money collected by the debtor bank. But it would seem that the court was moved rather by the striking fact that routine had led the Philadelphia bank to a stipulation for Pennsylvania law manifestly disastrous to its own interests in view of the notification requirement, which was in force in Pennsylvania at that time and was thereafter quickly repealed. The pleadings themselves referred to the law of New Jersey, where the assignor carried on his business and the debtors were domiciled. No general conclusion against party disposition of the applicable law should, hence, be inferred from either case.

The same two decisions, however, in pointing to the assignor's place of business, provide us with a strong hint respecting the needed rule in the absence of stipulation for the applicable law. Thus far, every writer states that the courts are very inconsistent in this matter. A qualified ob-

184 See against this thesis, KUPFER and LIVINGSTON, supra n. 130, 32 Va. L. Rev. (1946) at 917.
186 Id. at 998.
server has noted only with diffidence that the courts "confine their attention to the laws of either the borrower's domicil or the lender's domicil."\textsuperscript{188} The immense increase of financing by assignment of existent and future business accounts should be bolstered by an absolutely sure and more adequate law.

The place of the debtor has, indeed, been unanimously discarded in recent American legislation. "It is virtually impossible to base a course of conduct upon the laws of the states of domicile of the account-debtors because the mechanical problems arising from any such theory of operation would be so complex as to be prohibitive."\textsuperscript{189} This was said against the Supreme Court decision in the \textit{Klauder Case}\textsuperscript{190} and may likewise be objected to an old decision of the German Supreme Court.\textsuperscript{191} The place of the lending bank\textsuperscript{192} has no visible merits either.

The only suitable contact of accounts receivable is with the business place where the books are conducted. Two American courts, long ago, understood this need.\textsuperscript{193} In the case of \textit{In re Rosen}, the result reached was practically identical through the consideration that assignor and debtor made and had to perform their original contract in New Jersey and the actual assignment was to be localized there.\textsuperscript{194} In \textit{In re Vardaman}, the judge emphasized that the situs of the debt was at the debtor's place of business, although he

\begin{footnotes}
\item[189] MALCOLM, \textit{id.} at 41.
\item[190] Supra p. 429 n. 128.
\item[191] RG. (March 23, 1897) 39 RGZ. 371, 374 f.
\item[193] Trust Comp. v. Bulkeley Union (C. C. A. 6th 1906) 150 Fed. 510, and the result agrees with Engelhard v. Schroeder (1920) 92 N. J. Eq. 663; the parties resided in New Jersey, but the firm was in New York and New York law was applied as \textit{lex loci contractus}.
\item[194] Supra n. 185.
\end{footnotes}
pointed out that the result would not be different under the law of the place where the assignment was executed.\textsuperscript{195}

The situation is finally clarified by the weight accorded to recording or "book-marking" in the statutes. If these publicity measures in the state of the assignor were merely regarded as territorial, they would exclusively operate by public law within their jurisdiction. Such a theory would be irreconcilable with Section 60(a) of the Bankruptcy Act. It is indispensable that these provisions should be respected everywhere.

(d) Other assignments. The domicil of the assignor should be competent to determine priority in all cases. This is the true reason behind the situs doctrine.\textsuperscript{195a}

V. Contacts

The American doctrine overestimates the scope of the law that may govern the assignment, and is obscure on the scope of the law of the original debt. The German doctrine commits the opposite, and worse, mistake of extending the law of the debt, against reason, to the questions whether the transfer may be "abstract,"\textsuperscript{196} what its form should be,\textsuperscript{197} whether the transfer requires notification to the debtor or his knowledge,\textsuperscript{198} at what time it may take place,\textsuperscript{199}

\textsuperscript{195} 52 F. Supp. 562, 565 f., \textit{supra} n. 183.

The rule advocated above has been adopted in the Restatement (Second), Tent. Draft No. 6 (1960) § 354 (2); see comment, \textit{id.} at 177 ff., and note, \textit{id.} at 180 f. Moreover, see Flanagan, "Assignments of Accounts Receivable and Conflict of Laws under the Bankruptcy Act," 2 Vand. L. Rev. (1949) 409; Comment, "Multistate Accounts Receivable Financing: Conflicts in Context," 67 Yale L. J. (1958) 402; Ehrenzweig, Conflict 637 f. All of these authors urge the application of the law of the assignor's place of business, partly because the books will be kept there.

\textsuperscript{195a} More complicated rules have been furnished by Ehrenzweig, Conflict 640 f. and by the Restatement (Second), Tent. Draft No. 6 (1960) § 354.

\textsuperscript{196} Lewald 272; RAAPE 277.

\textsuperscript{197} Lewald 273; RAAPE 277.

\textsuperscript{198} Lewald 271.

\textsuperscript{199} Lewald 273 § 332.
whether future and conditional claims are assignable,\textsuperscript{200} and connected problems.\textsuperscript{201}

These two best developed systems, furthermore, contrast in emphasis; Americans stress the actual transfer of a chose in action, Germans, the underlying relationship causing the transfer. Without doubt, it is desirable to have one conflicts rule covering the entire relationship between assignor and assignee, particularly in view of the theory prevailing in the majority of systems that an assignment is not valid without a valid promise to assign.

From these premises, we reach the following conclusions. 

\textit{Assignee-debtor.} The law governing the debt (by no means necessarily the law of the place of contracting) determines the rights and obligations between assignee and debtor, excepting the provisions respecting a debtor ignoring the assignment in good faith.

\textit{Assignor-assignee.} Where assignor and assignee are domiciled in one jurisdiction and there enter into both the agreement to assign and the assignment, this determines the law in every opinion. Judge Learned Hand's proposal to subject voluntary assignments to the formula \textit{lex loci contractus} contemplated precisely this situation.\textsuperscript{202}

In the rare cases where promise and transfer occur at different places, the analogy to sales of chattels and also due regard to the interests of third persons in intangible things that have no visible situs, give prime consideration to the actual transfer. The American theory is right also on this point.

Where assignor and assignee are domiciled in different jurisdictions, the old idea that the debt is located at the

\textsuperscript{200} BG. (Feb. 24, 1915) 41 BGE. II 132.
\textsuperscript{201} LEWALD §§ 333, 334.
assignor's domicil furnishes the most convincing test for the relationship between the parties to the assignment.\textsuperscript{203}

This same test has been in particular deduced above from the needs of a transfer of accounts receivable for security, and more generally as the most advisable criterion for determining the priority of successive assignments by the original creditor.

\textit{Debtor's protection.} With respect to the protection of a bona fide debtor, a third rule is desirable. The law of his domicil should determine the conditions and effects of his dealing with a person whom he is entitled to believe his creditor, although this person is not really his creditor. This contact, used by French and Dutch courts, is preferable to the law of the place of performance indicated in the Restatement (§§ 353, 354), a place often uncertain or left to the option of the creditor. Above all, the statutes are more or less understood to intend the protection of their domiciliaries and must be applied accordingly, if unnecessary conflicts are to be avoided.

\textsuperscript{203} With regard to the assignment of an insurance claim, the same opinion is suggested as a matter of course by BRUCK, Privatversich. R. (1930) 722.