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CONTRACTS - ASSIGNMENT - AUTHORITY TO PAY OUT OF A PARTICULAR FUND

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CONTRACTS — ASSIGNMENT — AUTHORITY TO PAY OUT OF A PARTICULAR FUND — Plaintiff had a contract to receive a commission from the defendant based on the number of shares of stock sold by the defendant. Plaintiff subsequently made an agreement with Gray in which it was stipulated, "that the first $2,500 received by the said George Allardyce [plaintiff] shall be given to John C. Gray, and the said George Allardyce hereby gives the said Dart & Company [defendant] authority to issue a check to John C. Gray in that amount." Because the state securities commission authorized fewer shares of stock for sale than was anticipated, plaintiff's commission amounted to only $2,250. Defendant's affirmative defense to the action by plaintiff to recover his commission was that plaintiff was not the real party in interest by reason of his "assignment" to Gray. *Held*, plaintiff is the real party in interest and is entitled to recover because the written order plaintiff gave to Gray cannot be held to be an assignment. *Allardyce v. Dart*, 291 Mich. 642, 289 N. W. 281 (1939).

An assignment is generally held to have taken place when there has been an expression of intention by the assignor that his right shall pass to the assignee.[1] An assignment of a chose in action, as in the principal case, does not have to be in writing;[2] nor does it have to convey a present interest. On the contrary, the interest transferred may arise only on the happening of a condition, or it may be one not enforceable until a future date.[3] But, whatever the interest assigned, the intention of the assignor must be to rid himself immediately of all control over it,[4] and to transfer the right instantly to the assignee. Though the interest

[1] Other definitions: "A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." 1 BOUVIER, LAW DICTIONARY, Rawle's 3d rev. ed., 260 (1914). " 'assignment' of a right is a manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person or to a third person." 1 CONTRACTS RESTATEMENT, § 149 (1) (1932).

[2] See 5 C. J. 900 (1916) for the few jurisdictions that hold that assignments of choses in action must be in writing. The type of interest assigned, and the presence of statutes will affect the question. 2 WILLISTON, CONTRACTS, rev. ed., § 430 (1936).

[3] Chatterton v. Clayton, 150 Kan. 525, 95 P. (2d) 340 (1939); Corbin, "Assignment of Contract Rights," 74 UNIV. PA. L. REV. 207 (1926).

[4] Sneesby v. Livington, 182 Wash. 229, 46 P. (2d) 733 (1935); In re Wood's Estate, 243 Pa. 211, 89 A. 975 (1914). "The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he does, it is fatal to the claim of the assignee. The transfer must be of such a character that the fundholder can safely pay, and is compellable to do so, though forbidden by the assignor." Christmas v. Russell, 14 Wall. (81 U. S.) 69 at 84 (1871).

conveyed may not be enforceable until a future date, its transfer must take place completely in the present if there is to be a valid assignment. Thus, neither an agreement to assign nor a promise to appropriate and pay is an assignment, for these indicate that the alleged assignor intends to retain control over the right until some future date.[5] An assignment may also be of only part of a claim, though such an assignment is enforceable only in equity unless the obligor has consented.[6] Tested by these requirements, the agreement in the instant case would appear to be an assignment. The Michigan court found difficulty with the agreement as an assignment because it contained no express language of transfer, but only an authorization to the obligor to pay to the alleged assignee.[7] But it has often been held that no particular words or form need be employed to effect an assignment, provided that an intent to transfer the right is clearly shown from the facts of the whole transaction.[8] While an order drawn generally on a drawee is not an assignment,[9] it has usually been held that the delivery

[5] In re Lynch's Estate, 151 Misc. 549, 272 N. Y. S. 79 (1934); Myers v. Forest Hill Gardens Co., 103 N. J. Eq. 1, 141 A. 808 (1928), affd. 105 N. J. Eq. 584, 147 A. 911 (1929); Lone Star Cement Co. v. Swartwout, (C. C. A. 4th, 1938) 93 F. (2d) 767. "An agreement to pay a certain sum out of, or that one is entitled to receive, from a designated fund, when received, does not operate as a legal or equitable assignment, since the assignor in either case retains control over the subject-matter. . . . 'an agreement . . . to pay a debt out of a designated fund, does not give an equitable lien upon the fund or operate as an equitable assignment thereof.'" Donovan v. Middlebrook, 95 App. Div. 365 at 367-368, 88 N. Y. S. 607 (1904). Although the words of the agreement in the instant case, "it is mutually agreed . . . that the first $2500 so received by the said George Allardyce shall be given to John C. Gray," may appear to come within the above quotation, the Michigan court did not consider the possibility of its being an agreement to pay when received, and it seems that when the words of order following it are taken into consideration, it should not be so construed.

[6] Robbins v. Klein, 60 Ohio St. 199, 54 N. E. 94 (1899); Andrews Electric Co., Inc. v. St. Alphonse Catholic Total Abstinence Society, 233 Mass. 20, 123 N. E. 103 (1919); In re Brogan's Estate, 165 Misc. 111, 300 N. Y. S. 447 (1937).

[7] "What is it that was set over or transferred to Gray by Allardyce? . . . The language of the Allardyce-Gray agreement did not give Gray the right to recover the commission but did authorize Dart and Company to pay Gray when, as and if moneys were due Allardyce, all of such moneys up to and including the first $2,500. Such a written order cannot be held to be an assignment." 291 Mich. at 645. Cf. In re Geismann's Will, 133 Misc. 826 at 829, 234 N. Y. S. 92 (1929), where the court after stating that the true test is "whether the debtor would be justified in paying the debt or the portion contracted about to the person claiming to be the assignee," decided that the agreement in that case was an assignment because "the executors were authorized to make payments."

[8] Citizens State Bank v. City of Sheboygan, 198 Wis. 416, 224 N. W. 720 (1929). "No particular phraseology need be used to effect the equitable assignment of the fund to be affected or an interest therein; still the intent to transfer must be manifest and such intent and its execution are indispensable. . . ." Farmers' Bank of Greenville v. Blount, (C. C. A. 4th, 1925) 8 F. (2d) 443 at 446, affirming (D. C. N. C. 1924) 297 F. 277. See also 2 WILLISTON, CONTRACTS, rev. ed., § 404 (1936).

[9] Brill v. Tuttle, 81 N. Y. 454 (1880); McDonald v. Village of Ballston Spa, 34 Misc. 496, 70 N. Y. S. 279 (1901).

of an order drawn by the obligee on the obligor and made payable out of a particular fund, due or to become due from the obligor, operates as an assignment of the fund to the payee.[10] In the light of these principles, it would seem that the order in the instant case drawn on a particular fund should be sufficient to show the plaintiff's intention to assign the fund to Gray, and consequently might properly be held to amount to an assignment.

[10] Youngberg v. El Paso Brick Co., (Tex. Civ. App. 1913) 155 S. W. 715; Christmas v. Russell, 14 Wall. (81 U. S.) 69 (1871); 1 CONTRACTS RESTATEMENT, § 163 (1932). "There can be no doubt as to the rule that when, for a valuable consideration from the payee, an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment pro tanto of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order and to no other purpose, and the payee may, by action, compel such application." Brill v. Tuttle, 81 N. Y. 454 at 457 (1880).