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ASSIGNMENTS — EFFECT OF ASSIGNMENT OF CONTRACT BY RECEIVER OF LIQUIDATING INSOLVENT CORPORATION — The Chicago Tribune contracted to furnish the Washington Post with four comics and two features at a stipulated price per week. The Post went into the hands of a receiver who continued the contract and eventually assigned it to the Washington Post Publishing Company, plaintiff, along with “all assets of said company [the Post] of every kind, character, and description, except cash.”¹ The Post then went out of existence. The plaintiff, assignee, sued to enforce the contract, tendering payment in cash. *Held*, that the contract was assignable, that there had been a valid assignment, and that the contract remained binding on the Tribune. *Meyer v. Washington Times Co.*, (App. D. C. 1935) 76 F. (2d) 988.

Assuming that the contract was non-personal and could be performed as well by the assignee as by the assignor,² the theory that a “successor” of a complete business may stand on a different footing from a mere assignee of a single con-

¹ (App. D. C. 1935) 76 F. (2d) 988 at 991.

² It is conceivable that the Tribune was willing to make a contract favorable to the Post in reliance on the continued editorial policies of that paper, which might not be continued by the plaintiff assignee.

tract has had a growing influence on the federal courts for many years.³ A careful reading of the decisions, however, will show that in none of the previous cases was the precise question of the total assignment of a contract duty involved.⁴ The point was squarely put to the House of Lords⁵ and they felt it necessary to imply a specific contract allowing assignment to a "successor" from the fact that the contract was to last for fifty years.⁶ The general rule is that a contract duty can only be delegated, it cannot be completely assigned so that the assignor is absolved from liability, without a novation.⁷ The reasons most often given for the rule are that to allow assignment permits a person to assign to an insolvent and thus get out of a bad contract, and that a person cannot be bound to rely on someone with whom he did not contract. It may be admitted that in the principal case these reasons are not compelling, since the assignee is solvent and the assignor insolvent, and further, all of the assets on which the non-assigning party relied are in the hands of the assignee.⁸ So far the successor-assignee distinction is logical. But it is suggested that these considerations overlook the well-established rule that when one party to a contract repudiates his obligations, the other is thereby excused from performing.⁹ In the case of *Rosenthal Paper Co. v. National etc. Paper Co.*,¹⁰ the Appellate Division of the New York Supreme Court considered this

³ *Lightner v. Boston & Albany Ry.*, Fed. Cas. No. 8,343 (1869); *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 S. Ct. 78 (1893); *Dunkley Co. v. California Packing Corp.*, (D. C. N. Y. 1920) 277 F. 989, in which Augustus Hand, J., said (p. 992), "the federal courts have treated situations like the present in a broad way and have allowed corporations succeeding to the business of a licensee to succeed to the license where the particular circumstances of the case warranted such a result."

⁴ In the *Lightner* case there was no duty involved, since the license had already been completely paid for; in the *Lane & Bodley* case the decision was based on other equitable grounds of laches, acquiescence, and "dirty hands"; in the *Dunkley* case the contract specifically allowed an assignment to a "successor."

⁵ *Tolhurst v. Associated Portland Cement Mfrs.*, [1903] A. C. 414.

⁶ Cf. the earlier case of *The British Waggon Co. v. Lea*, 5 Q. B. 149 (1880), which upheld such an assignment as long as the assignor remained in existence.

⁷ 1 WILLISTON, *THE LAW OF CONTRACTS*, §§ 411 and 412 (1931); *Crane Ice Cream Co. v. Terminal Freezing & Heating Co.*, 147 Md. 588, 128 A. 280 (1925).

⁸ The rights of the non-assigning party to enforce the contract in case the assignee should refuse to perform may depend on whether there was an express assumption of the liabilities. If there was none, then that right is questionable. See 31 MICH. L. REV. 122 (1932). It is interesting to note that in the *Tolhurst* case, supra, note 4, the decree provided that there was a valid and subsisting contract between the assignee and the non-assigning party. If the court calls the purchaser a "successor," it should consistently hold that such person is as fully bound on the contract as if he had made it himself; otherwise the non-assigning party may be unable to enforce the contract against the successor, and will have lost his right to file a claim against the bankrupt estate of the assignor.

⁹ 2 WILLISTON, *THE LAW OF CONTRACTS*, § 875 (1931); vol. 3, § 1296 et seq.; *Roehm v. Horst*, 178 U. S. 1, 20 S. Ct. 780 (1899); *Hurst v. Champion*, 116 Okla. 228, 244 P. 419 (1925).

¹⁰ 175 App. Div. 606, 162 N. Y. S. 814 (1916). See also *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437 (1897).

point and held that the non-assigning party was excused from performing. The Court of Appeals reversed the decision¹¹ on the ground that the assignment did not attempt to release the assignor from his duties. Certainly it would be logical to say that the assignor in the principal case had repudiated its obligations by selling all its assets and going out of existence. Whether or not the courts are justified in dodging this rule by calling the purchaser a "successor" rather than an assignee must depend on the conflicting equities of the non-assigning party and the creditors of the assignor. The non-assigning party is left to the mercy of the receiver, bound to a contract which is beneficial to him but not to the insolvent.¹² On the other hand, the creditors of the insolvent assignor have some equities in the benefits of an advantageous contract made by their debtor. Even admitting the propriety of the result reached in the principal case, there may still be room for debate if the assignor is solvent, and if the circumstances do not favor an implied contract to allow an assignment to a "successor," as in the *Tolhurst* case.

D. D.

¹¹ 226 N. Y. 313, 123 N. E. 766 (1919).

¹² See the principal case, at p. 991; *Universal Rim Co. v. Scott*, (D. C. Ohio 1922) 21 F. (2d) 346.