ASSIGNMENT (*CESSION DE CRÉANCE*)

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ASSIGNMENT involves several questions. The most important seems to be in all legal systems the assignment of contractual rights, what is called in France *cession de créance*, in Germany *Forderungsabtretung*. We shall primarily examine assignment of contractual rights, in the light of which it will be easier to say a few words about assignment of negotiable instruments and shares.

Assignment of contract creates a particular situation in the respect that three persons are interested in it: the assignor, the assignee, and the debtor. Three relations are therefore to be regulated: between assignor and assignee, between assignee and debtor, and between debtor and assignor. One of these, of course, involves no difficulty, that is, the third: the assignor and the debtor were parties to an original contract, and their relations are not changed by the assignment, at least in the sense that while the creditor is changed, the substance of the debt remains the same after the assignment. But the debtor still has to pay the assignee, and the question arises whether his relations with the assignee may be different from those which existed between him and the assignor, or under the conflicts viewpoint whether such relations may be governed by different laws. And finally the relations between assignor and assignee originate in a contract which in itself is entirely separate from the contract by which the debt was created. Will this new agreement be ruled by the same law that ruled the original contract, or by a new one?

We shall consider first the relations between assignor and assignee concerning which it seems easier to get a satisfactory result. Then we shall proceed to the study of the relations between assignee and debtor, on which opinions are much more conflicting. And I hope we shall be able to solve the difficult problem of third parties, taking under later assignments, by which the contractual rights have been transferred to several successive assignees.

It is an interesting fact that in several great legal systems judicial decisions exist which have admitted that an assignment may be governed,

as between assignor and assignee, by a law which will not necessarily be the law of the original contract creating the debt. It seems to be obvious in the United States, where the decisions are too numerous to be cited; we find in England two important judgments so holding, *Lee* v. *Abdy, Republica de Guatemala* v. *Nunez*[1], and some others. The solution has been admitted by the German *Reichsgericht* as neatly as possible in numerous decisions, and the idea is also expressed in a judgment of the *Corte di Cassazione di Roma.*[2] The situation is not so clear in France, where judicial decisions have only had, as yet, to deal with relations between debtor and assignee; but this does not mean that the idea would meet opposition; on the contrary, some dicta lead one to think that the same solution would prevail. Comparative law is here very useful for the French jurist who tries to foresee what will be the position of the courts; if foreign judges have generally taken a certain position, why would not French judges take the same? This would imply of course a kind of objectivity in the statement of legal problems and their solutions.

But, strangely enough, the legal writer, observing the similarity of the tendency toward a proper law of the assignment, as between assignor and assignee, is not sure that the result will always be good. He thinks of the relations between assignee and debtor, which it would seem desirable to submit to the law of the original contract, and he asks if it would not be better to apply that same law of the original contract to the assignment. Here the jurist learns that experience has its role in legal research; in certain problems the reasons motivating decision are conflicting, but as a matter of fact there is a general trend in judicial decisions which solves the problem in one way or another. Of course, and perhaps fortunately for the professors, this is not always the case, but it is an interesting fact for the study of legal method. In our problem we learn that judges consider the assignment of contractual rights as an agreement sufficiently separated from the original transaction to be ruled by a distinct law. Such a position shows how far the courts favor the application of the law which is most proper to every contract.

Now, if the assignment, as such, is governed by a law of its own, what should be that law? It has often been said more or less neatly in American and English decisions that an assignment is governed by the law of the place where it is made. The *Restatement of the Law of Conflict of Laws* takes the same position.[3] But we know that for the *Restatement* the law of the

[1] Lee v. Abdy (1886) 17 Q. B. D. 309; Republica de Guatemala v. Nunez [1927] 1 K. B. 669.

[2] (Nov. 7, 1894) Clunet 1895, 664.

[3] § 350.

place of contracting is the general solution for the problem of the proper law of the contract. We may conclude that the proper law of the assignment will be determined according to the general tendencies of the courts as an aspect of the problem of the proper law of contracts in general.

But some authors ask if it would not be convenient to presume, where no other intention is expressed, that the parties intended to submit the assignment to the law which governed the original contract. This is the opinion of Professor Cheshire, of Professor Martin Wolff, if I understand him well, and I personally think that it is sound. Conflicts law must avoid, as far as possible, submitting to different laws matters which are closely connected with each other. Every law has its own systematic organization; if we divide a whole between several laws, we cut through the systems, and introduce inconsistency. Some American decisions may support this view.[4]

The law of the assignment being determined, what questions will it govern? Generally speaking, we know that it governs the relations between assignor and assignee, but more specifically this formula includes the validity of the assignment; if, for instance, its validity is criticized on the ground of duress or fraud, or want of consideration, the law of the assignment will apply.[5] The same law will apply to formalities and capacity of the parties in the legal systems which govern such matters by the proper law of the contract. As a matter of fact Beale cites several American decisions applying the law of the place of assignment to formalities and capacity. And we know that for Beale the law of that place is the proper law of the assignment. The result would be the same for those who hold that American courts on the whole apply to capacity the law of the place of contracting as such, whatever may be the proper law of the contract. It would also be the same in systems where formalities are governed by the law of the place of contracting, according to the old rule, *locus regit actum.*

On the other hand, the law of the assignment will govern the effects of this agreement between assignor and assignee, that is, the assignee's obligation to pay the price to the assignor, and the question whether and how far the assignor is liable to the assignee if the debtor fails to pay the latter. Strange as it may appear, we find decisions on these two important points, as far as I know, only in Germany, but in that country they are numerous and clear.[6]

[4] The Monarch Discount Co. v. Chesapeake and Ohio Ry. Co. of Indiana (1918) 285 Ill. 233, 120 N. E. 743; Runkle v. Smith (1918) 89 N. J. Eq. 103, 103 Atl. 382.

[5] See Republica de Guatemala v. Nunez [1927] 1 K. B. 669.;

[6] See particularly, RG. (Oct. 6, 1886) E.18.39; RG. (Dec. 3, 1891) 2 Z. für int. Recht 162.

It seems possible to reach easily enough an agreement on these different points; some others are more doubtful, and we shall examine them after we have stated what law will apply to the relations between assignee and debtor, since they concern mainly the respective fields of the two laws. But we must previously observe that the validity of the assignment necessarily depends, from a certain point of view, on the law of the original contract; if this contract is void, the assignment cannot transfer contractual rights which do not exist.

The determination of the law which will govern the relation between assignee and debtor is a question most discussed among the authors and less clear in the judicial decisions.

Everybody agrees that the question is what law governs the transferred debt. But discussion begins when one tries to state what law governs a debt. Story and Phillimore contend that it is the law of the domicil of the creditor; Westlake and Dicey hold for the domicil of the debtor; French authors are almost equally divided. I think that a better way is shown by recent authors, Professors Cheshire and Wolff, following Foote, who propose to regulate the debt as regards the assignee by the law of the original contract which created it. Strong reasons support this view. There is no doubt that the debtor must not be troubled in any respect by the assignment, which has been executed without his consent. The rights of the assignee, therefore, must not, as a matter of principle, and not to speak of negotiable instruments, be different from the rights of the assignor. We shall be sure that such rights will be the same if they are determined by the same law; the same certainty does not exist any more if the debt becomes subject to a new law. And can the assignee complain of the result? It does not seem so; he has acquired a contractual right concerning which he is supposed to have got information, as one does on any movable or immovable he buys. Among the characteristics of the debt he acquired, one of the most important certainly was that this debt was subject to a certain law, determining the rights of the creditor. It may be said that the application of that law is one of the essential features of the debt. Why would then the assignee object to its application? This is fair for the debtor, and the assignee could foresee it.

The suggestions to apply the law of the domicil of the creditor or of the debtor imply that a debt is subject to a proper law which is different from the law governing the contract in which the debt originates. But, as Professor Cheshire puts it, ". . . a debt is deemed . . . to have a definite locality of its own for several different purposes, such as the exercise of jurisdiction, the payment of death duties, and the grant of probate or of letters of

administration."[7] May I add that, as far as I understand, these purposes, although several, are limited in number, and moreover outside substantive private law. They are matters of procedure or revenue law. I have always had the impression that English and American conflicts law do not separate, as to the applicable law, the debt from the contract in which it originates. This, at least generally speaking, because assignment of contracts, precisely is the point where that distinction appears in substantive private law. And it is of course one of the interesting aspects of our problem.

Now what I may say with some certainty is that French law is in a situation similar to that which seems to be the English and American legal position; debts are governed at French law by the law governing the contract or the tort in which they originate, and it is almost only for the *cession de créance* that a proper law of the debt has been advocated in substantive private law. The situation is very different in Germany where the tradition looks first at the obligation; first comes a law of the obligation, thus the obligations created by the contract determine the law of the contract; the results are often the same, but not always, and there is here one of the most interesting differences of method in comparative private international law, but we do not have time to consider it further.

I will only stress how desirable it seems to keep under the same law contract and obligations. Civil law has developed a sharp distinction between the contract and the obligations it creates, and undoubtedly this distinction is very valuable for many problems of civil law. But it does not seem that it is of interest to private international law. We must not forget that private international law aims at "locating" legal relations; but such operation implies that the relation be in some respect "material," since only matter, strictly speaking, has a place in space; rights in real property are the easiest to locate. Now the distinction between contract and obligation is very abstract; it is rather difficult in many respects to draw the line of separation between the two fields; how could conflicts law enter these subtleties? It is sufficiently difficult to say where a contract is located; let us avoid the greater difficulty of locating an obligation, and of distinguishing the two fields. And would this in any way promote fairness in business or public utility?

If we look at the judicial decisions, we are struck by the fact that they are scanty. Here again, the most numerous are in Germany, where it has been decided very neatly that the law of the transferred right controls the relations between assignee and debtor.[8] In France we have only several

[7] Ed. 3, at 597.

[8] See among many others, RG. (June 2, 1908) 18 Z. für int. Recht 449.

judgments of courts of appeal, but none of the *Cour de Cassation*, holding that the law of the domicil of the debtor decides whether notice of the assignment is to be given.[9] This solution, of course, may be, and has been, understood as implying that the debt is subject to the law of the domicil of the debtor. But we shall observe that the domicil which is considered is the domicil of the debtor at the time of the assignment; is it reasonable to imagine that the rights and obligations of the parties should change every time the debtor changes his domicil? If the domicil of the debtor has something to do with his obligations, it would be fair to the creditor, and under certain circumstances to the debtor, to consider only the domicil of the latter at the time of the original contract. Anyhow the French decisions only deal with formalities of notice to the debtor. Those formalities in French law, the *signification*, are required to warn the debtor and other third parties, especially creditors of the assignor and successive assignees, that the debt has been transferred—it is a matter of publicity; third parties are supposed to get information from the debtor on the status of the debt. The solution may be restricted by this idea to the question of formalities, and with such limitation, be regarded as acceptable. However, I wonder why creditors of the assignor and successive assignees, who wish information respecting a right of their own debtor, might not discover its essential feature, that it originates in a contract which is subject to a certain law; it would be fair to everybody and more simple, to apply that law. However, the *Corte di Cassazione di Roma* has taken the same view that was adopted in France.[10]

There remain two questions for which it is difficult to know what law governs. The first is the assignability of the debt. Beale cites several American decisions applying to that question the law of the original contract, and the *Restatement* takes the same view.[11] Professors Cheshire and Graveson agree, and this solution has been given in Germany by the *Reichsgericht* in three decisions.[12] One may object that it would be better to require that not only the law of the original contract, but the law of the assignment also should admit the assignability of the debt; a contract cannot have an object which is contrary to its proper law. But it is possible to answer that the law of the assignment provides for the assignment of a debt according

[9] See Cour Paris (Nov. 18, 1927) Clunet 1928, 972.

[10] (Nov. 7, 1894) Clunet 1895, 664.

[11] Beale, A Treatise on the Conflict of Laws (1935) § 348.2; Restatement of the Law of Conflict of Laws (1934) § 348.

[12] RG. (Nov. 28, 1887) E. 20.234; (March 6, 1917) Warneyers Rspr. 1917, 173; (Nov. 5, 1932) IPRspr. 1933, 37, Juristische Wochenschrift 1933, 2582.

to its structure under the law of the original contract; and if this latter law considers the debt as assignable, we may conclude that the debt is assignable under the law of the assignment. The result is practically better because a rule which requires compliance with two different laws for the validity of a transaction increases the risks of nullity.

The second, and a most difficult, question is the problem of successive assignees. Whom must the debtor pay? It seems clear that if the successive assignments are governed by different laws, it is hardly possible to apply these laws, since they may have different and conflicting rules on the question;[13] one, for instance, may prefer the assignee who has first given notice to the debtor, another provide that the first assignee must be paid. We cannot therefore apply the law of the assignment, and it seems reasonable to conclude that the law of the original contract should govern. Practically, I do not see who would complain on this account, since the successive assignees are supposed to know that the right they acquired is subject to a certain law. They ought to get information on the requirements of that law about the successive assignments, as the purchaser of an immovable investigates the law of the *situs* to ascertain how far he is protected against a later purchaser.

Professor Cheshire also recommends the application of the law of the original contract, while Beale stands for the law of the place where the original contract is to be performed[14] for the reason that this law decides who is the proper person to receive payment. This would certainly be the solution of the French courts, whenever the place of performance is at the domicil of the debtor, since they apply this law to formalities; in French law, priority depends on formalities, i.e., notice to the debtor. But the criticism I have directed against the position of the French courts can also be directed against Beale's opinion. Generally speaking, it is not desirable to have several laws governing operations which constitute a whole or which are closely connected with each other. This obviously increases the risks of inconsistency.

As for the judicial decisions, Beale only cites in the United States, *Hanna* v. *Lichtenhein*,[15] applying the law of the place of assignment in a case where both assignments were made in the same state. I must add that Beale also admits a certain role of the place of assignments in the conflicts between assignees, and I confess to having some difficulty in understanding

[13] See Graveson, The Conflict of Laws (1948) 192.

[14] And this is also the solution of the Restatement, § 354.

[15] (1918) 182 App. Div. 94, 169 N. Y. Supp. 589.

how he reconciles this role with the primary jurisdiction of the law of the place of performance.

In England three cases are at stake. In *Lee* v. *Abdy* and in *Republica de Guatemala* v. *Nunez*,[16] the law of the place of assignment was considered, but only to conclude that an assignment was void for lack of capacity of one of the parties. The meaning of *Kelly* v. *Selwyn*[17] is disputed; Professor Wolff writes that there is no definite solution therein, Professors Cheshire and Graveson think that it may support the view that the law of the original contract governs.

We shall finally say a few words about assignment of negotiable instruments and shares. The problem is not fundamentally different, but there is wide discussion, as regards negotiable instruments, respecting the law which governs indorsement. It has often been said that the law of the place of indorsement governs, and many decisions in all countries support this view. It was adopted also by the British Bills of Exchange Act, 1882, by the Geneva Conventions of 1930 and 1931 on bills of exchange and cheques; in Germany the *Reichsgericht* favors the view; the American *Restatement* also has accepted it.[18]

Many decisions, at least in France, involve only formalities, and especially the validity of indorsement in blank; as such the solution is but the application of the traditional rule, *locus regit actum*. But it may be questioned, as Professor Lorenzen has suggested,[19] whether it is sound to govern each indorsement by the law of the place where it was made, whereas all these indorsements are closely connected with one transaction, that is, the payment of the bill or check. If an indorser opposes to the claim of a later indorsee that the law of his own indorsement bars the suit whereas the law of the place of payment admits it, how shall we decide? The British Act provides that inland bills, that is, both drawn and payable within the British Isles, are subject to British law even for foreign indorsements, as regards the rights of the indorsee.

The question of shares of stock is easier, since it seems obvious that the law of the company governs the relation between the company and the assignee, for all the reasons which have been developed for assignments

[16] Lee v. Abdy (1886) 17 Q. B. D. 309; Republica de Guatemala v. Nunez [1927] 1 K. B. 669.

[17] [1905] 2 Ch. 117.

[18] Nussbaum, Deutsches Internationales Privatrecht (1932) 322; Restatement § 349.

[19] The Conflict of Laws Relating to Bills and Notes (1919) 126.

of contracts, but are particularly clear here: the purchaser of a share knows that he acquires a right subject to a certain law, which he cannot ignore, and the company cannot have different regimes for its shares according to the place of assignment. The relations between assignor and assignee may, of course, be ruled by a different law, but here also it could perhaps be presumed that the parties intended to submit the transaction to the law of the company; it does not seem, however, so easy as for contractual rights.