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## Priorities Between Successive Assignments of the Same Right

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PRIORITIES BETWEEN SUCCESSIVE ASSIGNMENTS OF THE SAME RIGHT.—There are two prevailing views in the United States upon the question of which assignee should take, when an assignor makes successive assignments of the same right.<sup>1</sup>

One view following the English rule as set forth in the case of *Dearle v. Hall*,<sup>2</sup> is that the first assignee to give notice to the obligor will prevail. Though this view is conceded to be followed by the majority of the American cases,<sup>3</sup> the United States Supreme Court, in *Salem Trust Company v. Manufacturer's Finance Company*,<sup>4</sup> has declared itself in favor of the other view. The rule there applied is that where an assignment is held to vest only equitable title in the assignee the prior assignment, being the prior equity, would prevail, without regard to notice given to the debtor.<sup>5</sup>

This latter view has been adopted by the American Law Institute's Restatement of Contracts,<sup>6</sup> though in the actual number of decided cases it is the majority view; the Reporter stating that in view of the Salem Trust Company Case he did not expect further acceptance of the present majority rule.<sup>7</sup>

The first West Virginia case to deal with successive assignments in any way was *Bank of the Valley v. Gettinger*.<sup>8</sup> In that case the chose in action was assigned, and subsequently an attachment was issued at the suit of the creditor of the assignor against the obligor, after the assignment, but before the obligor had notice thereof. The Court held that the debt passed to the assignee at the time of the assignment, and gave the assignee priority over the subsequently attaching creditor, *though neither the obligor nor the creditor* (of the assignor), *had notice*<sup>9</sup> of the assignment at the time the creditor sought to attach.

Though this case might be more properly classified under situations in which the assignee prevails over subsequently attaching creditors of the assignor,<sup>10</sup> in many respects that situation is analogous to the present one.

*Clarke v. Hogeman*,<sup>11</sup> which actually presents a question of successive assignments, held that the assignor, by the assignment,

<sup>1</sup> WILLISTON, CONTRACTS, 826.

<sup>2</sup> 3 Russell 1.

<sup>3</sup> 31 A. L. R. 880 and 66 L. R. A. 775.

<sup>4</sup> 264 U. S. 182, 68 L. ed. 628, 44 Sup. Ct. 266 (1923).

<sup>5</sup> See also 1 WILLISTON, *op. cit.*, p. 826.

<sup>6</sup> RESTATEMENT OF CONTRACTS, § 173.

<sup>7</sup> Appendix to the Restatement, explanation of § 173.

<sup>8</sup> 3 W. Va. 309, 316 (1869).

<sup>9</sup> Italics ours.

<sup>10</sup> RESTATEMENT OF CONTRACTS, § 172.

<sup>11</sup> 13 W. Va. 718, 729 (1878).

passed equitable title to the assignee, leaving the assignor with no control over it, and that therefore the subsequent assignee would get no right. The Court further states that if both assignments were valid, the equities being equal, the first in point of time would prevail;<sup>12</sup> nor would the Court give any weight to the claim of the second assignee that he did not have notice of the first assignment.<sup>13</sup>

In *Tingle v. Fisher*,<sup>14</sup> the Court again followed these principles, holding no notice of the assignment to the obligor was necessary to give validity to the first assignment; but that if the obligor paid the second assignee without knowledge of the first assignment, he would be discharged of liability to the first assignee. This last bit of dictum is in accord with the view expressed in the Restatement, which states that if the second assignee procures payment from the obligor, he will be entitled to retain it.<sup>15</sup>

*Turk v. Skiles*,<sup>16</sup> in point three of the syllabus states that "the first assignee of a chose in action has preference." However the case limits this very broad statement by confining it to cases when the first assignee is a bona fide purchaser for value; thus presenting an analogous situation to those in *Clarke v. Hogeman*, and *Tingle v. Fisher*.

Judging from the rules laid down in the cases so far discussed, it would seem that the West Virginia Court had determined its stand upon priority of successive assignments. However the case of *State v. Coda*,<sup>17</sup> should be considered. In that case Coda and Nash had built a road under contract with the State Road Commission. A bond was executed by the contractors and a surety company for the faithful performance of the contract and the payment of laborers and materialmen. The action was brought to determine which of certain creditors of the contractors were entitled to share in the \$4,011.06 which was due from the Commission, the claim to which the contractors had assigned in parts to these creditors in payment of their claims.

In the surety contract the contractors had assigned to the surety company any sums that might become due from the Commission to protect it against liability on the bond to pay laborers and materialmen. Subsequent assignments were made to appellant, Riley, a general creditor, and to materialmen. Riley claimed priority over the surety company on the ground that the Commis-

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<sup>12</sup> *Supra*, p. 730.

<sup>13</sup> See also *Thomas v. Linn*, 40 W. Va. 122, 20 S. E. 878 (1894).

<sup>14</sup> 20 W. Va. 497, 510 (1892).

<sup>15</sup> *Supra*, n. 6.

<sup>16</sup> 45 W. Va. 82, 85, 30 S. E. 234 (1898.)

<sup>17</sup> 103 W. Va. 676, 138 S. E. 234 (1927).

sion was never notified of the assignment to the surety company and for the further reason that he had a superior equity, since he had loaned to the contractors in order that they might pay off laborers. The court did not pass upon the priorities between Riley and the surety company, but rested the case upon the priority of the materialmen with respect to Riley, although their assignments were subsequent to Riley's. The case seems to turn on the peculiarities of the particular situation, and the policy in favor of protecting materialmen. The fact that Riley's money was used to pay laborers seems to have been neglected, and he was treated as an ordinary general creditor. It seems that the court took the view that something in the nature of an equitable lien on the claim against the Commission arose by operation of law in favor of the materialmen prior to any assignment to them and this gave them priority over the assignee, Riley. It would seem that this case does not weaken the general rule favoring the prior assignee.

In view of these facts, it would seem that, until further adjudication upon the point, the West Virginia rule can be understood to be in accord with the minority view.

—SIDNEY J. KWASS.

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WILLS—TESTAMENTARY INTENT.—Proceedings to probate as the will of T, a letter to his brother written and signed by T. The letter was to the effect, "If I should fail to pull through this operation I want you to sell the Columbia Carbon Stock \* \* \* \* and divide the proceeds equally among my brothers and sisters \* \* \* \*". T died two days after the operation. The Circuit Court found this to be T's will and ordered it probated. Objected that the letter did not show *Animus testandi*. Held, *animus testandi* is the purpose to direct the posthumous disposition of property. It is not essential to this purpose that the testator should intend to make a will or know that he has performed a testamentary act. The letter written by T showed this intent. *Langfitt v. Langfitt*, 151 S. E. 715 (W. Va. 1930).

A holographic will is good under our statute, ch. 77, 33. It is not necessary that the decedent should know that he has performed a testamentary act, nor that he should intend to perform such an act. *Rice v. Freeland*, 131 Va. 298, 109 S. E. 186. No particular words are necessary to show testamentary intent. *In re Major's Estate*, 264 Pac. 542. One may act *animo testandi* without knowing that he is making a will, if he manifests clear intent to dispose of his property after his decease and observes