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Commentary on 'Assignment of Contractual Burdens'

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Professor Michael Furmston begins his fine paper[1] with the statement that 'Contract textbooks treat it as axiomatic that contractual burdens cannot be assigned'. This commentary can begin with the equally forceful statement that contract textbooks *in the United States* treat as axiomatic the proposition that most contractual burdens *can* be freely assigned. Consider, for example, the following passage from a treatise on contract law:[2]

> The general rule of the second Restatement is that an assignment carries with it a presumption that the assignee has assumed the assignor's duties of performance. The assignee has the right to demand performance from the obligor, but by the same token, the assignee must render performance to the obligor, and if he fails to do so, he may be liable to the assignor. Section 2-210 includes the same presumption, and, in fact, the drafters of the second Restatement consciously followed the language and phrasing of the UCC. There is one important qualification: Assignment for a security interest does not ordinarily act as a delegation of the duty of performance.

There are some important and well-known exceptions. The assignment of a contract to buy an interest in real property may not carry with it the obligation to do so. *Langel v Betz*,[3] a 1928 decision of the New York Court of Appeals, is the leading case. The vendee under a contract for the sale and purchase of real estate assigned his interests to a third party who subsequently requested an extension of time for the closing, to which the vendor assented. The assignee then failed to complete the purchase and the vendor sued for specific performance, a remedy that clearly would have been available against the assignor. The Court of Appeals found that there was no privity between assignee and vendor and no assumption of a duty to perform by the assignee. The tentative draft of what later developed into s 164 of the first Restatement of Contracts was brought to the attention of the court. It stated that an assignment of rights includes a presumptive assumption of the obligation to perform. The court rejected the draft and stated: 'the law remains that no promise of the assignee to assume the assignor's duties is to be inferred from the acceptance of an assignment of a bilateral contract, in the absence of circumstances surrounding the assignment itself which indicate a contrary intent'.[4]

The holding in *Langel* would not prevent the assignee from suing the vendor for specific performance should the vendor be reluctant to go forward, but it does remain a leading precedent for the rule that in contracts for the sale of land there is no presumption of a delegation of duties. In almost all other

1 M Furmston, 'The Assignment of Contractual Burdens' (1998) 13 *JCL* 42.
2 H O Hunter, *Modern Law of Contracts*, Rev ed, Warren, Gorham & Lamont Inc, New York, 1993, §21.05, p 21-16. Citations omitted.
3 250 NY 159, 164 NE 890 (1928).
4 250 NY 159 at 164, 164 NE at 892.

circumstances, except personal service agreements, American case law consistently holds that an assignment of rights carries with it a presumptive acceptance of the obligations of performance. Section 164 of the first Restatement and s 328 of the Restatement (Second) of Contracts state the rule in favor of the presumption. The latter contains the following enigmatic statement that 'The Institute expresses no opinion as to whether the rule stated in Subsection (2) [presumptive delegation of duties] applies to an assignment by a purchaser of his rights under a contract for the sale of land'. This statement is amplified by comment c to s 328:

> Decisions refusing to infer an assumption of duties by the assignee have been influenced by doctrinal difficulties in the recognition of the rights of assignees and beneficiaries. Those difficulties have not been overcome, and it is doubtful whether adherence to such decisions carries out the probable intention of the parties in the usual case. But since the shift in doctrine has not yet produced any definite change in the body of decisions, the Institute expresses no opinion on the application of Subsection (2) to an assignment by a purchaser under a land contract.

The practical difficulty with the *Langel* rule is more likely to arise in connection with the sale of a property subject to a mortgage. Assume that the vendee buys subject to the mortgage but without an express assumption of obligations. Assume further that the vendee makes timely mortgage payments for a period and then defaults. Can the lender hold the vendee liable for the deficiency upon default and a foreclosure? Under the reasoning of *Langel* the answer would be no; the lender would have to look to the original debtor/assignor, who might have moved across the country by the time of the foreclosure.

In order for an assignee to be personally liable for a deficiency judgment, it is necessary either that he negotiate a contract directly with the vendor, producing a novation, or that he enter into an express agreement with the purchaser assuming the contractual obligation to pay. Under the second alternative, the assignee would be liable to the vendor under the third party beneficiary theory.[5]

Lenders can protect themselves with 'due on sale' or anti-assignment clauses, but the effect of the *Langel* rule is to create protection for a defaulting buyer at the expense of the lender and the original debtor. *Langel* and the cases that adhere to its precedent are anachronisms in modern American law in their reliance on what generally are considered to be outdated notions of privity. The cases following *Langel* also are inconsistent with the use of free assignability and the concomitant delegation of duties in the development of the credit economy.

Contracts for personal services also reject the presumption of a delegation of duties but for quite different reasons. Personal service contracts often are just that — *personal*. Notwithstanding the absence of an anti-assignment clause some may be so particularly related to the skill or personality of one or both parties as not to be assignable at all. In other instances the recipient of services may object to a delegation to a third party unknown to him or perceived to be of lesser quality. In reverse, a performing party may not want

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5 William McGovern, *Cases, Statutes and Readings on the Law of Contracts*, Bobbs Merrill Inc, New York, 1980, p 396.

to perform services for an assignee for any number of understandable and acceptable reasons.[6]

The rule about personal service contracts is not so hard and fast as the *Langel* rule. Many personal service contracts are sufficiently 'impersonal' to be treated the same as those for the sale of chattels. Section 318(2) of the Restatement (Second) of Contracts states that '[a] promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised'.

A personal example assists in the understanding of rules about personal service agreements. In 1983 I entered into a long term publishing contract with Warren, Gorham & Lamont, Inc, an established publishing house for legal texts with offices in New York and Boston. About six or seven years later Warren, Gorham & Lamont, Inc, was acquired by another publishing house, and, in 1997, the acquiring corporation was merged into the West Group, an even larger publisher with headquarters in Chicago. In each instance my contract, along with those of scores of other authors, was assigned to the acquiring entity with the presumption that my obligations of performance would continue notwithstanding the assignment. Unless the assignee failed in its duties (did not pay royalties when due, for example) or unless there was a clear conflict of duties (for example, a restrictive covenant in another contract preventing employment by the acquirer/assignee), my obligations to perform would continue as under the original agreement with Warren, Gorham & Lamont, Inc, in 1983.

A case from a federal court in Washington, DC, states the principle. The owner of a television station sold the station and, among other things, assigned the contract of a newsman who served as the 'anchor' on one of the station's news programs. The employee objected to the assignment because he had not given his consent, but the court rejected his argument. There had been no substantial changes in his duties. Therefore he had to perform or be found to be in breach.[7]

Two employees of a business in North Carolina found, to their dismay, that a personal service agreement was not enough to prevent enforcement against them of onerous terms by the assignee. As part of a sale of a business, the seller assigned the employment contracts of two sales representatives. The buyer accepted the assignments, but, some time after the closing, terminated the two sales representatives. The buyer sought to enforce the covenants not to compete; the sales representatives argued that the contracts, including the covenants not to compete, were non-assignable personal service contracts. The court disagreed.[8] In doing so the court made an interesting distinction between limitations on the assignment (and delegation) of personal service provisions in a contract and the treatment of restrictive covenants.[9]

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6 See, eg *Aslakson v Home Savings Association*, 416 NW 2d 786 (Minn Ct App 1987). (Concern about creditworthiness).

7 *Evening News Association v Peterson*, 477 F Supp 77(DDC 1979).

8 *Reynolds & Reynolds Co v Tart*, 955 F Supp 547 (WDNC 1997).

9 955 F Supp 547 at 557.

> Limitations on an employer's liberty to assign the right to enforce personal service contracts, like restrictions on an employee's liberty to delegate her duty to perform under an employment contract, involve different issues than assignment of covenants not to compete. For while the former two primarily involve the relationship between the employer and the employee, the latter concerns an employer's investment in its employee and the possibility of that investment being pawned off to a rival competitor. Covenants not to compete facilitate and protect capital investment.

In contracts governed by the UCC and in all other contracts except those involving real property transfers, those involving highly personal services, or those with anti-assignment or anti-delegation clauses, the presumption is that an assignment includes a delegation of duties.[10]

The assignee usually stands in the shoes of the assignor. The assignee may assert rights held by the assignor, but the assignee also is subject to claims and defences of the obligor as against the assignor. The assignee does not have to do any more than the assignor and should not be in a worse position than the assignor, but, for all intents and purposes, is akin to a substituted party in a novation. Indeed, direct negotiations between the obligor and the assignee which result in changes to the contract may create a novation.

There is no doubt that the American rule on assignment and delegation, with the notable exception of the *Langel* precedent, stands the doctrine of privity on its head. Free assignability and the concomitant presumption of a delegation of duties, however, have been extraordinarily useful in the development of a credit economy and in the free alienation of property in a dynamic, fluid economy.

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10 See s 328, Restatement (Second) of Contracts (1981), s 2-210 UCC. American courts even tend to read anti-assignment clauses narrowly and sometimes strain to interpret them consistently with the principle of free assignability. See generally A Farnsworth, *Contracts*, Little Brown & Company, Boston, 1982, s 11.4, pp 764 5. H O Hunter, above, n 1, §21.04[6].