

UNASSIGNABLE CLAIMS AGAINST THE UNITED STATES: A COMMERCIAL ANACHRONISM*

IN sharp contrast to the well-established policy encouraging the assignability of choses in action,¹ a long-standing federal act declares the assignment or transfer of any claim against the United States "absolutely null and void" unless the Government has authorized its payment.² Originally enacted to prevent frauds upon the Treasury by influential purchasers of claims,³ the statute has subse-

*Lane Industries, Inc. v. United States, 162 F. Supp. 443 (Ct. Cl.), *cert. denied*, 79 Sup. Ct. 96 (1958).

1. "Today most choses in action, including tort claims arising from property damage, are assignable." NEW YORK LAW REVISION COMM'N, ASSIGNMENTS OF ACCOUNTS RECEIVABLE 368 (1946). "[T]he general tendency has constantly been towards extension of the right to assign. . . . In America . . . the only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature [A]ll other demands, claims, and rights of action whatever are generally held to be transferable." 3 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 86 (1906). See *Meech v. Stoner*, 19 N.Y. 26, 29 (1859) (nonassignability the exception rather than the rule).

2. All transfers and assignments made of any claim upon the United States . . . and all powers of attorney, orders, or other authorities for receiving payment of any such claim . . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for payment thereof

REV. STAT. § 3477 (1875), as amended, 31 U.S.C. § 203 (1952).

Similarly, a contractor with the United States may not transfer or delegate any contractual obligations. REV. STAT. § 3737 (1875), as amended, 41 U.S.C. § 15 (1952); see Notes, 52 HARV. L. REV. 296 (1938), 27 VA. L. REV. 692, 694 n.17 (1941).

3. The present antiassignment statute was one section of the Act of Feb. 26, 1853, 10 Stat. 170 (codified into positive law in 1875, as REV. STAT. § 3477), entitled "An Act to prevent frauds upon the Treasury." Seven other sections of the statute were penal and forbade the participation of government officials in the prosecution of claims against the United States. The bill was reported by a select committee of the House created to investigate the alleged connection of the Secretary of the Treasury with the successful prosecution of a fraudulent claim before the Mexican Claim Commission some years earlier when he had been a member of Congress. 26 CONG. GLOBE 32d Cong., 2d Sess. 288 (1853).

The Act of 1853 was preceded by the Act of July 29, 1846, 9 Stat. 41, REV. STAT. § 3477 (1875), which required that, once Congress had appropriated funds to satisfy a claim, the disbursing officers pay only the original claimant except on being presented a warrant of attorney executed with certain specified formalities. For a discussion of the two statutes, see Renick, *Assignment of Government Claims*, 24 AM. L. REV. 442, 876 (1890).

Cases and commentators agree that the basic purpose of the antiassignment statute was the prevention of fraud. *E.g.*, *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 373 (1949) ("Its primary purpose was undoubtedly to prevent persons of influence from buying up claims against the United States"); *Goodman v. Niblack*, 102 U.S. 556, 560 (1880); *Spofford v. Kirk*, 97 U.S. 484, 490 (1878); Renick, *supra* at 453; Wilson,

quently been justified as a measure which prevents multiple payments on a single claim, eliminates investigations into the validity of assignments, enables the Government to deal with original claimants rather than third parties,⁴ curbs "traffic in claims,"⁵ and preserves to the United States all setoffs and counterclaims.⁶ When the rights of private parties alone are involved, however—as in litigation between assignor and assignee—assignments are generally upheld on the theory that the act provides protection solely for the Government.⁷

The Assignment of Claims Against the United States, as Affected by Section 3477, Revised Statutes, 3 GEO. L.J. 69, 70-72 (1915); Federal Legislation, 29 GEO. L.J. 486, 488 (1941); 52 COLUM. L. REV. 287, 288 (1952).

4. One or more of these three purposes have been set forth in most of the many cases interpreting the statute. See, *e.g.*, *Hobbs v. McLean*, 117 U.S. 567, 576 (1886); *Spofford v. Kirk*, *supra* note 3, at 489-90. Modern cases repeat these views. See, *e.g.*, *United States v. Shannon*, 342 U.S. 288, 291 (1952); *United States v. Aetna Cas. & Sur. Co.*, *supra* note 3, at 373. For additional cases stating the purposes of the statute, see 52 COLUM. L. REV. 287, 288 nn.2 & 3 (1952).

5. Although first articulated in *Sherwood v. United States*, 112 F.2d 587, 592 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 584 (1941), this statutory purpose was adumbrated in *Calhoun v. Massie*, 253 U.S. 170, 174 (1920) (opinion of the Court per Brandeis, J.) ("By the enactment . . . of laws prohibiting the assignment of claims . . . Congress has sought both to prevent the stirring up of unjust claims against the Government and to reduce the temptation to adopt improper methods of prosecution . . ."). This goal was also advanced by a representative of the General Accounting Office in the *Hearings Before Subcommittee of the House Committee on the Judiciary on H.R. 10365 and H.R. 10341*, 76th Cong., 3d Sess. (1940) (unprinted, but reported in Federal Legislation, 29 GEO. L.J. 486, 488 (1941)). See Kupfer, *Assignments of Accounts Receivable: A Legal and Practical Look-See (Part I)*, Prac. Law., Nov. 1956, p. 62 ("This [statute] . . . was grounded . . . in the sovereign's desire to prevent champerty . . .").

6. *United States v. Shannon*, 342 U.S. 288, 292 (1952), citing with approval *Grace v. United States*, 76 F. Supp. 174, 175 (D. Md. 1948); see Note, 58 YALE L.J. 1395, 1398-99 (1949).

7. Modern cases uphold the right of an assignee to recover funds which the Government has paid to the assignor. *E.g.*, *Lay v. Lay*, 248 U.S. 24 (1918); *New York v. Hanley Milling Co.*, 41 F. Supp. 844 (N.D. Ohio 1940), *aff'd mem.*, 123 F.2d 819 (6th Cir. 1941); *Button v. Anderson*, 112 Vt. 531, 28 A.2d 414 (1942). The assignee may have a receiver appointed in order to assure performance under the assignment. *Sanborn v. Maxwell*, 18 App. D.C. 245 (1901); *cf. Wardman v. Leopold*, 85 F.2d 277 (D.C. Cir.), *cert. denied*, 299 U.S. 570 (1936) (lien upheld on tax refund in escrow). Similarly, if the Government pays the fund into court, assignments of interests in the fund are not voided by the statute. *McGowan v. Parish*, 237 U.S. 285 (1915); *National Ref. Co. v. United States*, 160 F.2d 951, 955 (8th Cir. 1947); *United States v. Certain Lands*, 49 F. Supp. 962, 965 (S.D.N.Y. 1943).

Payment to an assignee discharges the Government's liability to the assignor. *Bailey v. United States*, 109 U.S. 432 (1883) (Government not liable to assignor after recognizing unrevoked power of attorney); *McKnight v. United States*, 98 U.S. 179, 186 (1879) (payment to assignee discharged Government's liability to assignor-contractor); *Freedman's Sav. & Trust Co. v. Shepherd*, 127 U.S. 494, 506 (1888) (dictum) ("The government is acquitted of any liability in respect to the claim for rent, for its officers have acted in conformity with the directions . . . of the original claimant . . .").

A line of early cases held that assignments which did not conform to the terms of the statute were void for all purposes—even between assignor and assignee. See, *e.g.*,

So construed, the statute can only operate to deny the transferee of a chose in action the right to enforce his claim against the United States.⁸

In harmony with the commercially oriented common-law trend toward increased assignability,⁹ Congress and the judiciary have significantly restricted the scope of the antiassignment act. The principal statutory limitation is the

Spofford v. Kirk, 97 U.S. 484, 490 (1878): "We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein . . . shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the government." *Accord*, *National Bank of Commerce v. Downie*, 218 U.S. 345 (1910); *Nutt v. Knut*, 200 U.S. 12 (1906). This interpretation of the statute was finally laid to rest by Justice Cardozo in *Martin v. National Sur. Co.*, 300 U.S. 588, 596 (1937):

The advocates of literalism find color of support in a line of decisions . . . tending to a strict construction of the statute. [Citing cases] . . . Another line of cases exhibit [*sic*] an opposing tendency. [Citing cases] These cases teach us that the statute must be interpreted in the light of its purpose to give protection to the Government To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason.

Recent cases have approved the *Martin* rule. *E.g.*, *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945) ("The provisions of the statute governing assignments of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves."). See Annot., 12 A.L.R.2d 460, 468-75 (1950) (collecting cases).

The statute has been used recently, however, to invalidate assignments between private parties in cases in which the assignor's trustee in bankruptcy is challenging the transfer and attempting to apply the proceeds of the claim for the benefit of the bankrupt's estate. *Matter of Ideal Mercantile Corp.*, 244 F.2d 828 (2d Cir.), criticized in 43 VA. L. REV. 1128 (assignment of tax refund claim more than four months prior to bankruptcy held to pass no interest to assignee because void under antiassignment statute), *cert. denied*, 355 U.S. 856 (1957); *In re Meadow Sweet Farms, Inc.*, 32 F. Supp. 119 (W.D.N.Y. 1940) (similar). *Contra*, *In re Webber Motor Co.*, 52 F. Supp. 742 (D.N.J. 1943) (assignment of claim against the Government upheld against trustee in bankruptcy); *McKenzie v. Irving Trust Co.*, *supra* (similar). See generally 18 REF. J. 115 (1944); 19 REF. J. 78 (1945); 4 COLLIER, BANKRUPTCY ¶ 70.28 n.29 (14th ed. Supp. 1957).

8. Since payment to an assignee discharges the Government's liability to the assignor, the assignment is not void but voidable at the option of the Government. And since assignments are enforceable between the parties, the statute can serve only as a government defense in a suit by an assignee.

In two early cases, the Court of Claims held that the statute did not apply to claims by assignees adjudicated in court. *Lawrence v. United States*, 8 Ct. Cl. 252 (1872); *Cavender v. United States*, 8 Ct. Cl. 281 (1872). This view of the statute is fully discussed and approved in *Renick*, *supra* note 3. The Supreme Court rejected this interpretation in *United States v. Gillis*, 95 U.S. 407, 415 (1877).

9. For the history of this trend, see 4 CORBIN, CONTRACTS § 856 (1951) [hereinafter cited as CORBIN]. Today, most jurisdictions permit the unrestricted assignment of all claims except unearned wages, unaccrued pensions and alimony, and tort claims for personal injury. 4 CORBIN § 857; 2 WILLISTON, CONTRACTS § 417 (rev. ed. 1936); RESTATEMENT, CONTRACTS § 547 (1932). Many legislatures have expressly declared choses in action to be transferable. *E.g.*, CAL. CIV. CODE ANN. § 954 (1954); N.Y. PERS. PROP. LAW § 41. Other statutes either permit or require an assignee, as the real party in interest, to sue in his own name. *E.g.*, ILL. ANN. STAT. ch. 110, § 22 (Smith-Hurd 1956); MASS. ANN. LAWS

Assignment of Claims Act of 1940,¹⁰ which was passed in response to the need for national defense financing¹¹ and which authorizes the assignment to "a bank, trust company or other financing institution" of moneys due or to become due under government contracts.¹² Other types of claims against the Government may also be transferable, for the courts have developed an amorphous

ch. 231, § 5 (1956). See Clark & Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 264-65 (1925) (even assignees for collection or security are real parties in interest).

The shift in legal doctrine reflects the need for increased flexibility and specialization in the business community, and the commercial utility of financing by assignment of accounts receivable and other contractual obligations. See 4 CORBIN § 856, at 408; UNIFORM COMMERCIAL CODE § 9-318, comment 4. See also Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 29 (1951); Comment, *Contract Rights as Commercial Security: Present and Intangibles*, 67 YALE L.J. 847, 848-51 (1958).

So favored is the policy of assignability that transfer of the right to payment is generally upheld despite a clause in a contract restricting such assignment. See Gilmore, *The Commercial Doctrine of the Good Faith Purchase*, 63 YALE L.J. 1057, 1118 (1954). Courts have used various legal doctrines to deny effect to such provisions. See Grismore, *Effect of a Restriction on Assignment in a Contract*, 31 MICH. L. REV. 299 (1933); Comment, 67 YALE L.J. 847, 861-66 (1958). Commentators differ as to whether such clauses should be effective. Compare UNIFORM COMMERCIAL CODE § 9-318(4) and Note, 1952 WIS. L. REV. 740 (advocating unenforceability), with RESTATEMENT, CONTRACTS § 164(2) (1932), Note 25 U. CHI. L. REV. 199 (1957) (criticizing Uniform Commercial Code provision) and 4 CORBIN § 872, at 486.

10. 54 Stat. 1029 (1940), as amended, 31 U.S.C. § 203 (1952), quoted at note 12 *infra*. Compare National Industrial Recovery Act, ch. 90, § 207(a), 48 Stat. 205 (1933), discussed in Nichols, *Assignment of Claims Act of 1940—A Decade Later*, 12 U. PITT. L. REV. 538, 545-46 (1951).

Courts have also found the antiassignment statute inapplicable to admiralty claims because of the Suits in Admiralty Act, 41 Stat. 525 (1920), as amended, 46 U.S.C. §§ 741-52 (1952), which provides for in personam suits against the United States whenever a proceeding in admiralty could be maintained against a "privately owned or operated" ship. *The West Grama*, 1924 Am. Mar. Cas. 1444 (S.D.N.Y. 1924) (assignee of admiralty claims against the United States permitted to maintain suit); *Seaboard Fruit Co. v. United States*, 73 F. Supp. 730, 731, 732 (S.D.N.Y. 1946). But see *Ozanic v. United States*, 83 F. Supp. 4, 6-9 (S.D.N.Y. 1949) (alternative ground of decision) (antiassignment statute applicable to admiralty claims against the United States). On appeal, *Ozanic* was impliedly limited to conform to *The West Grama* and *Seaboard Fruit*. *Ozanic v. United States*, 188 F.2d 228, 230-31 (2d Cir. 1951).

Another exception to the antiassignment act has been found in a statute requiring patentees to sue the Government for all patent infringements occasioned by government contracts with private manufacturers. 28 U.S.C. § 1498 (1952); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331 (1928); *Olsson v. United States*, 72 Ct. Cl. 72 (1931).

11. See H.R. REP. No. 2925, 76th Cong., 3d Sess. 1 (1940); Federal Legislation, 29 GEO. L.J. 486, 490-92 (1941).

12. Relevantly, the statute reads:

The provisions of the preceding paragraph [the antiassignment statute of 1853] shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating \$1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency:

Provided,

. . .

category of assignments which are upheld because deemed to occur "by operation of law."¹³ So validated are transfers to a trustee in bankruptcy,¹⁴ to an

. . . no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment . . .

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

. . .

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President . . . may, in time of war or national emergency . . . provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off . . . for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation . . . (2) fines, (3) penalties . . . or (4) taxes . . . whether arising from or independently of such contract.

54 Stat. 1029 (1940), as amended, 31 U.S.C. § 203 (1952).

The no-setoff provision was amended in 1951, 65 Stat. 41, to clarify the meaning of the phrase "arising independently of such contract." The Comptroller General had held that a government claim for withholding taxes on wages earned in the performance of the contract could be set off against the assignee. See 30 DECS. COMP. GEN. 98 (1950). The 1951 amendment reverses this interpretation. Ironically, the Supreme Court later reversed the Comptroller General's interpretation. *Central Bank v. United States*, 345 U.S. 639 (1953); see Notes, 60 YALE L.J. 548 (1951) (criticizing the Comptroller General's interpretation), 101 U. PA. L. REV. 106, 109-17 (1952) (discussing courts' interpretation of the setoff provision). The 1940 and 1951 amendments are also applicable to REV. STAT. § 3737 (1875), 41 U.S.C. § 15 (1952), which prohibits transfer of any interest in a contract with the United States.

The term "financing institution" is defined as "an individual, partnership, or corporation dealing in money as distinguished from other commodities as a primary function of its business activity." 22 DECS. COMP. GEN. 44, 46 (1942). See 31 *id.* 90 (1951). This includes a factoring concern. 20 *id.* 415 (1941). Similarly, a pension trust fund administered by a bank or trust company is a proper assignee. 36 *id.* at 290 (1956). But a business concern which, incident to its principal business of acting as selling agent for packers of food products, advances money to pay for raw materials, is not included within the phrase. 22 *id.* at 44 (1942). Nor is an individually owned insurance agency not regularly engaged in financing, apart from such credit as may be extended in connection with its primary business. 21 *id.* 120 (1941).

13. The phrase "by operation of law" was first used in this context in *Erwin v. United States*, 97 U.S. 392, 397 (1878). Compare *United States v. Gillis*, 95 U.S. 407, 416 (1877): "[T]here are devolutions of title by force of law, without any act of parties, or involuntary assignments, compelled by law, which [are not prohibited by the 1853 act]."

14. *Erwin v. United States*, *supra* note 13; *Chandler v. Nathans*, 6 F.2d 725 (3d Cir. 1925); *In re Gerstenzang*, 5 F. Supp. 904 (S.D.N.Y. 1933); 4 COLLIER, BANKRUPTCY ¶ 70.28, at 1164 (14th ed. 1942).

assignee for the benefit of creditors,¹⁵ to an executor or administrator of a decedent's estate,¹⁶ to a purchaser at a judicial sale,¹⁷ to an insurer¹⁸ or surety by subrogation,¹⁹ to shareholders on winding up a business,²⁰ and to the surviving or successor corporation in a merger²¹ or consolidation.²² The arbitrary and variegated character of these exceptions to the antiassignment act results in the uneven disposition of claims without regard for their relative merit or for a consistent national policy.²³

15. *Goodman v. Niblack*, 102 U.S. 556 (1880).

16. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 375 n.12 (1949) (dictum); *Erwin v. United States*, 97 U.S. 392, 397 (1878) (dictum). Presumably the beneficiary of a testamentary bequest of a claim against the Government would be permitted to sue on the same theory as an executor.

17. *Western Pac. R.R. v. United States*, 268 U.S. 271 (1925); *Davis Sewing Mach. Co. v. United States*, 60 Ct. Cl. 201 (1925), *aff'd*, 273 U.S. 324 (1927). *But see* *St. Paul & D.R.R. v. United States*, 112 U.S. 733 (1885) (alternative holding) (transfer of claim by mortgage, made absolute by judicial sale, prohibited by the statute); *Flint & Père Marquette R.R. v. United States*, 112 U.S. 762 (1885) (same). The validity of the *St. Paul* decision was doubted in *In re Pottasch Bros. Co.*, 79 F.2d 613, 615 (2d Cir. 1935) (opinion of the court per L. Hand, J.).

18. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949); see *United States v. American Tobacco Co.*, 166 U.S. 468 (1897) (insurer's suit in name of insured permitted without discussion of antiassignment statute); *Nashville Industrial Corp. v. United States*, 69 Ct. Cl. 443 (1930) (same).

19. *Morgenthau v. Fidelity & Deposit Co.*, 94 F.2d 632 (D.C. Cir. 1937); see *Prairie State Bank v. United States*, 164 U.S. 227 (1896).

20. *Novo Trading Corp. v. Commissioner*, 113 F.2d 320 (2d Cir. 1940); *Wells Fargo Bank & Union Trust Co. v. United States*, 115 F. Supp. 655, 658 (N.D. Cal. 1953), *aff'd*, 225 F.2d 298 (9th Cir. 1955); *Roomberg v. United States*, 40 F. Supp. 621 (E.D. Pa. 1941).

21. *Seaboard Air Line Ry. v. United States*, 256 U.S. 655 (1921); *Kawneer Co. v. United States*, 100 Ct. Cl. 523 (1943). *But see* *Bolivar Cotton Oil Co. v. United States*, 95 Ct. Cl. 182 (1941) (voluntary sale of personal property of liquidated corporation did not pass valid title to claim).

22. *Pantex Pressing Mach., Inc. v. United States*, 108 Ct. Cl. 735, 71 F. Supp. 859 (1947); *Consolidated Paper Co. v. United States*, 75 Ct. Cl. 215, 59 F.2d 281, *cert. denied*, 288 U.S. 615 (1932); *Kingan & Co. v. United States*, 71 Ct. Cl. 19, 44 F.2d 447 (1930).

23. The "operation of law" exception was originally justified as a category of *involuntary* assignments—as through bankruptcy or death—which were unlikely to encourage frauds upon the Treasury. See *Erwin v. United States*, 97 U.S. 392, 397 (1878).

Subsequent expansion of the "operation of law" exception cannot be justified in terms of involuntariness or by the effect of such transfers upon the Government's alleged protection in dealing with the original claimant. Any transfer excepted from the prohibition of the statute, whether voluntary or otherwise, forces the Government to deal with a stranger and to investigate the validity of the assignment. This imposition was apparently felt to be justified in the case of death, because otherwise the claim would be lost entirely, and in the case of bankruptcy, because of the desirability of allowing creditors to obtain all the debtor's assets. But transfers pursuant to corporate merger or liquidation are certainly "voluntary." Furthermore, by allowing partial subrogees to maintain separate suits in their own name, the Government may have to deal with a greatly expanded number of parties. See *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949). Transfers by will or intestacy may also multiply the number of persons interested in a claim. See *id.* at 375 n.12.

The act was recently applied to bar consideration of the plaintiff's claim in *Lane Industries, Inc. v. United States*.²⁴ The Lane Lifeboat and Davit Corporation (Lane I) had been liquidated in bankruptcy; its assets, which included a right of action against the United States,²⁵ were then bid in at judicial sale by the promoter of Lane Industries, Inc. (Lane II).²⁶ After the bankruptcy court had confirmed the sale to the promoter "or his assigns," he transferred to Lane II his rights under the executory contract of sale. A month later, the trustees in bankruptcy conveyed the claim against the United States directly to Lane II which, paying in full,²⁷ thus acquired its only permanent asset. (The remaining Lane I assets went to yet a third corporation, Lane III.)²⁸ Lane II having instituted suit, the Court of Claims found that the promoter's assignment of his right to purchase Lane I's property was void under the anti-assignment act. The court reasoned that the promoter had acquired equitable title to the claim and that its subsequent transfer to Lane II occurred voluntarily—not "by operation of law."²⁹

The result in *Lane* was neither required by precedent nor necessary to effectuate congressional policy. The promoter's transfer of the claim to Lane II, of which he and an associate were the sole shareholders,³⁰ would appear to fall within the case-law rule that, absent a change in ultimate, beneficial ownership, the antiassignment statute does not bar a transfer of formal title.³¹ Alternatively,

24. 162 F. Supp. 443 (Ct. Cl.), *cert. denied*, 79 Sup. Ct. 96 (1958).

25. The claim was based on the War Contract Hardship Claims Act (Lucas Act), 60 Stat. 902 (1946), as amended, 62 Stat. 992 (1948), for losses sustained in performance of government contracts during World War II. 162 F. Supp. at 443.

26. *Id.* at 445. The offer was made by a creditor and former vice president of Lane I. Accompanying the offer was a letter from one of the trustees, a creditor and former director of Lane I, to his cotrustee stating that he was interested in the offer and would either resign or take no action on it as trustee. *Id.* at 444-45.

27. The conveyance stated that Lane II had paid the full consideration of \$35,000 to the trustees. Lane II, however, had issued stock worth only \$1,000 to the promoter and his associate. No evidence was introduced to show the source of the additional funds. *Id.* at 446.

28. *Ibid.*

29. *Id.* at 447.

One of the five judges dissented on the theory that the promoter was an agent of the plaintiff, Lane II, and that the purchase therefore should be considered to have been by Lane II and thus within the "operation of law" exception to the antiassignment statute. *Id.* at 448. The difficulty with this analysis is that the sale was confirmed by the bankruptcy court before the plaintiff corporation legally existed. *Id.* at 445. A person cannot be the agent of a nonexistent corporation. See 1 MECHEM, AGENCY § 1383 (2d ed. 1914). For this reason, promoters of a corporation not yet formed are not its agents. See 1 FLETCHER, CORPORATIONS § 192 (perm. ed. 1931).

30. 162 F. Supp. at 446.

31. Recovery has been permitted after a partnership has assigned its claim against the Government to a corporation owned by the same partners. *Mitchell Canneries, Inc. v. United States*, 111 Ct. Cl. 228, 252, 77 F. Supp. 498, 504 (1948) ("[T]ransfers . . . in conjunction with changes of corporation structure are not assignments prohibited by the statute."). A transfer has also been recognized when a corporation, pursuant to a plan

Lane II, in paying the bankrupt's estate for the claim and acquiring ownership directly therefrom—thus ratifying the promoter's bid—, could be viewed as taking title "by operation of law."³² Since Lane II could have asserted the claim had it made the bid,³³ the effect of the court's decision is to penalize the parties for the form in which they cast the transaction. Moreover, the rights of the Government were not prejudiced. It could not have been held liable for duplicate payments to another claimant;³⁴ nor would it have experienced difficulty in determining the validity of the assignment as between the parties.³⁵

Lane illustrates the fact that, despite the 1940 amendment of and judge-made exceptions to the antiassignment statute, it can frustrate commercially reasonable transfers. In fact, the continued prohibition against assigning contractual rights to other than financial institutions can produce undesirable results.³⁶ For example, a supplier of goods to the Government may find it less expensive to purchase materials on credit from the manufacturer than to borrow from an outside lender; but the manufacturer may be unwilling to advance credit because, under present law, he cannot obtain the security of an assign-

of liquidation, distributes its assets, including a claim against the United States, among its shareholders. *Novo Trading Corp. v. Commissioner*, 113 F.2d 320, 322 (2d Cir. 1940) ("The assignment only passed legal title to parties who already owned the entire beneficial interest in the claim. Such an assignment is not within the evils at which the prohibitions of the [antiassignment] statute are directed."); *accord*, *Wells Fargo Bank & Union Trust Co. v. United States*, 115 F. Supp. 655, 658 (N.D. Cal. 1953), *aff'd*, 225 F.2d 298 (9th Cir. 1955) (transfer by corporation to its sole stockholder); *Roomberg v. United States*, 40 F. Supp. 621 (E.D. Pa. 1941). Compare *Seaboard Air Line Ry. v. United States*, 256 U.S. 655 (1921) (purposes of statute not violated by transfer of claim incident to merger of two railroads).

32. A corporation may adopt or ratify a contract made on its behalf by its promoters prior to its incorporation. See *BALLANTINE, CORPORATIONS* § 36 (rev. ed. 1946). The corporation may not only be liable upon an adopted or ratified contract but may also enforce it by suit for breach. *Id.* § 40; 1 *FLETCHER, CORPORATIONS* § 214 (perm. ed. 1931). Payment of the purchase price by Lane II to the bankruptcy trustees would seem to have constituted ratification of the bid. And since Lane II's title to the claim was derived directly from the trustees, it devolved "by operation of law" within the normal meaning of that phrase. See authorities cited note 17 *supra*.

33. See *ibid.*

34. Payment to Lane II would discharge the Government's liability. *Bailey v. United States*, 109 U.S. 432 (1883); *McKnight v. United States*, 98 U.S. 179 (1879). No claimant other than Lane II could assert the claim. Lane I could not prosecute the claim because the cause of action passed to the trustees in bankruptcy, see note 14 *supra*, and was conveyed by it to Lane II, 162 F. Supp. at 446. The trustees would have no standing to sue, having conveyed the claim to Lane II. Likewise, the promoter divested himself of any interest in the claim by his assignment to Lane II.

35. The conveyance of the claim by the trustees was judicially approved and of record. Hence, its validity would be no more dubious than evidence of transfers of title "by operation of law" in other situations as, for example, by subrogation.

36. Presently, the only assignees who may acquire enforceable rights against the Government are banks and other financing institutions. And this provision has been rather strictly defined by the Comptroller General. See note 12 *supra* and accompanying text.

ment permitting him to receive payment directly from the Government.³⁷ Consequently, both the supplier and, ultimately, the Government might have to forego the economies of cheaper credit.³⁸ Of still greater significance is the fact that a noncontractual claim—such as one for tax refund,³⁹ subsidy payment,⁴⁰ condemnation award⁴¹ or tort damages—can in most instances be prosecuted only by the original holder.⁴² As a result, a claimant is usually

37. In *In re Italian Cook Oil Corp.*, 190 F.2d 994 (3d Cir. 1951), a manufacturer, anticipating a contract for the sale of mayonnaise to the Army, attempted to secure financing from Leed Products, Inc., apparently a supplier, who, desiring to secure itself, required an assignment of the contractor's right to payment. Since the Assignment of Claims Act of 1940, 54 Stat. 1029, as amended, 31 U.S.C. § 203 (1952), only permits assignments to financing institutions, Leed had to arrange for the prime contractor to assign his claim to a bank, possibly guaranteeing the bank's loan. The contractor then used these funds to purchase supplies.

Similarly, in *First Nat'l Bank v. Pomona Tile Mfg. Co.*, 82 Cal. App. 2d 592, 186 P.2d 693 (1947), china manufacturer *A* secured a large government contract and subcontracted part of it to manufacturer *B*. *B*, fearing *A*'s insolvency, required an assignment of *A*'s contract rights to a bank, which prorated the Government's payments between *A* and *B*.

In *Scarborough v. Berkshire Fine Spinning Associates*, 128 F. Supp. 948 (S.D.N.Y. 1955), *aff'd per curiam*, 243 F.2d 575 (2d Cir. 1957), a textile supplier refused to sell cloth on credit to a handkerchief manufacturer which had a government contract. In order to purchase the cloth, the contractor assigned his right to payment to a New York factoring house which promised to pay the textile supplier 80% of all moneys received.

38. "The interest charged on loans made to finance a Government contract must be included by the contractor as a part of his costs, and is ultimately paid by the government as a part of the contract price." S. REP. NO. 217, 82d Cong., 1st Sess. 8 (1951) (letter from the Comptroller General).

39. *Naylor v. United States*, 102 F. Supp. 308 (S.D. Cal. 1952); *Wooton v. United States*, 114 Ct. Cl. 608, 86 F. Supp. 143 (1949), *cert. denied*, 339 U.S. 903 (1950); 10 MERTENS, FEDERAL INCOME TAXATION § 58.12 (rev. ed. 1958).

40. 26 DECS. COMP. GEN. 873 (1947) (assignment to bank of moneys due airline under its certificate of public convenience and necessity void because not a contract right); see *United States v. Crain*, 151 F.2d 606 (8th Cir. 1945), *cert. denied*, 327 U.S. 792 (1946) (assignment of soil conservation benefits gave assignee no right of action against Government).

41. *United States v. Dow*, 357 U.S. 17 (1958); *United States v. Certain Lands*, 46 F. Supp. 386 (S.D.N.Y. 1942); *Potts v. United States*, 130 Ct. Cl. 88, 126 F. Supp. 170 (1954). *But see* 2 NICHOLS, EMINENT DOMAIN § 5.21[3] (3d ed. 1950).

42. *United States v. Shannon*, 342 U.S. 288 (1952).

Other claims presently not transferable are claims under the Trading with the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1952), treaty claims, Indian claims, salvage claims, postage refunds, customs duties, fines, penalties and forfeitures illegally imposed. This list is, of course, not exhaustive, for the antiassignment statute includes "any claim" against the United States and the 1940 amendment only exempts claims arising under public contracts.

Only the original claimant may prosecute these claims unless they are transferred "by operation of law." See notes 13-23 *supra* and accompanying text.

The significance of the general unassignability of these claims is indicated by the value of the following claims against the Government. In fiscal year 1957, some \$4 billion in tax refunds were paid. 1957 U.S. TREAS. DEPT. ANN. REP. 121. Contracts for goods and services purchased from private industry by the Department of Defense (assignable only to financing institutions) amounted to \$18 billion. 1957 COMP. GEN. ANN. REP. 74. And condemnation payments exceeded \$25 million. 1957 ATT'Y GEN. ANN. REP. 284-89.

unable to avoid the delays and uncertainties of litigation through either selling his claim or assigning it as security for a loan. This restriction upon the transferability of choses in action, like most restraints upon alienation, inhibits the flexible utilization of property rights.

Economic considerations to one side, the Government's unique privilege under the antiassignment statute is of limited utility. Since the courts enforce contracts which give "influence peddlers" an interest in the proceeds from claims against the Government, the statute does not effectively prevent frauds upon the Treasury.⁴³ Nor is the act necessary to preserve to the United States most counterclaims and setoffs, because an assignee's rights would be subject to the assignor's indebtedness to the Government as of the date the Government received notification of the assignment.⁴⁴

The statute also cannot be justified as preventing "traffic in claims."⁴⁵ It is not designed to protect claimants against the superior bargaining power of professional purchasers of lawsuits, and the courts therefore enforce assign-

In the same year, more than \$12 million were awarded to claimants in suits against the Government, and unlitigated claims pending against the United States totaled over \$1 billion. *Id.* at 272.

43. Note, 52 COLUM. L. REV. 287, 290 (1952); see note 7 *supra* and accompanying text.

Federal statutes now provide penalties for bribing public officials and purchasing the services of government employees in connection with claims against the Government. 18 U.S.C. §§ 201-23, 281-91 (1952). Similarly, a fine and damages may be imposed on an individual causing the presentation of any fraudulent claim against the United States. REV. STAT. §§ 3490, 5438 (1875), 31 U.S.C. § 231 (1952).

44. See *South Side Bank & Trust Co. v. United States*, 221 F.2d 813 (7th Cir. 1955) (assignee bank under 1940 amendment denied recovery after assignor had satisfactorily completed performance, because United States asserted setoff of unpaid taxes); 4 CORBIN §§ 892-97; UNIFORM COMMERCIAL CODE § 9-318(1); RESTATEMENT, CONTRACTS § 167 (1932).

The Comptroller General has recognized that under this rule the United States, as an obligor, would lose independent setoffs against the assignor arising after notice. See 20 DECS. COMP. GEN. 458, 459 (1941):

While an assignee . . . takes the assignment subject to any existing right of set-off, his rights under the assignment are not affected by independent claims subsequently accruing in favor of the government against his assignor. That is to say, a debtor cannot set off rights acquired under other transactions subsequent to the date of receipt of notice of a valid assignment.

But see United States v. Munsey Trust Co., 332 U.S. 234 (1947) (upholding setoff of Government's independent claim for damages arising subsequent to surety's right of subrogation; Government probably had "notice").

Although notice of an assignment would deprive the Government of after-arising setoffs and counterclaims against the assignor, it could take advantage of any claims it might have against the assignee. See 18 Stat. 481 (1875), as amended, 31 U.S.C. § 227 (1952); 28 U.S.C. §§ 1346, 1503 (1952).

The argument that the Government's right of setoff would be lost to the extent that the amount due the Government exceeded the amount of an assignee's claim was considered academic in *Aetna Cas. & Sur. Co. v. United States*, 170 F.2d 469 (2d Cir. 1948), *aff'd*, 338 U.S. 366 (1949).

45. See note 5 *supra* and accompanying text.

ments as between the parties.⁴⁶ Furthermore, validating assignments is not the equivalent of "stirring up unjust claims,"⁴⁷ for assignees are not necessarily more "unjustly" litigious than original claimants.⁴⁸ In any event, the enforcement of contingent-fee agreements is just as likely to promote the litigation of unmeritorious demands. To be sure, the purchaser of a contested claim may be speculating in rights of action against the Government, but transfers of uncertain claims are uniformly upheld if "by operation of law," as at a judicial sale. Assuming adequate judicial determination of a claim's validity, the Government is not prejudiced by the fact that the plaintiff's purchase price was unreasonably high or low.

On the other hand, were the antiassignment act repealed, the Government would be required to determine the party entitled to payment,⁴⁹ and, in order to protect itself, would have to establish administrative machinery for recording the transfer of claims. This difficulty should not prove insurmountable, however, since apparently satisfactory procedures are employed to ensure proper payment under assignments made pursuant to the 1940 amendment.⁵⁰ These procedures could be extended to cover all claims against the Government and to record the interest (still invalid under the 1940 amendment) of a partial assignee or one who derives title from a prior assignee. To offset the administrative expense of recordation and the possibilities of multiple payments, an insurance plan may be desirable. Accordingly, if it repealed the antiassignment act, Congress might require every assignee to pay a recording fee before being allowed to assert his claim.⁵¹

46. Note 7 *supra* and accompanying text. For the view that the antiassignment statute is designed to prevent champerty and maintenance, see *Calhoun v. Massie*, 253 U.S. 170, 174 (1920); *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314, 335 (1853).

47. See note 5 *supra*.

48. From the obligor's viewpoint, an assignee may be a more desirable plaintiff. In so far as civil actions are prosecuted because the plaintiff is attempting to punish the defendant, an assignee would be more likely to settle a claim since he is unlikely to be motivated by vengeance. Furthermore, persons purchasing many claims will develop an expertise in evaluating their worth and likelihood of success.

49. Once a debtor has received notice of a valid assignment, he can discharge his debt only by payment to the assignee. *Central Nat'l Bank v. United States*, 117 Ct. Cl. 389, 91 F. Supp. 738 (1950) (having paid assignor in disregard of notice, Government liable to assignee); 4 CORBIN § 890; UNIFORM COMMERCIAL CODE § 9-318(3). If two assignees of the same obligation both notify, the obligor must pay the party obtaining the earlier assignment rather than the first to notify. 4 CORBIN § 902; RESTATEMENT, CONTRACTS § 173 (1932).

50. The 1940 amendment to the antiassignment statute, note 12 *supra*, required the assignee to file notice with various government officers. The results have evidently been satisfactory. See S. REP. NO. 217, 82d Cong., 1st Sess. 5 (1951); Nichols, *Assignment of Claims Act of 1940—A Decade Later*, 12 U. PITT. L. REV. 538, 566-67 (1951); Kupfer, *The Federal Assignment of Claims Act*, 125 N.Y.L.J. 2050 (1951).

51. The fee would shift the cost of permitting the assignment of claims from the taxpayers to those making use of the privilege. The fee might be a percentage of the amount of the claim assigned or, in the case of an unliquidated demand, a fixed amount. Payment of the fee should be a condition precedent to the assignee's cause of action against the United

In the absence of the statute, partial assignments would increase the number of parties entitled to payment. More important, since one partial assignee is not an indispensable party to an action by another, the Government could be subjected to multiple lawsuits over a single transaction.⁵² Arguably, therefore, a partial assignee should be prohibited from suing the Government unless he is able to join the others.⁵³ The Supreme Court has ruled, however, that the antiassignment act does not prohibit litigants who are partial assignees "by operation of law" from maintaining separate suits.⁵⁴ Besides, in most instances, all partial assignees would be joined in a single action either because subject to service of process or because they would appear voluntarily in order to share the costs of litigation.⁵⁵ Inasmuch as the right to assign part of a claim is valuable to the government contractor—who often has more than one supplier and desires to assign the value of the contract proportionally among those extending credit—partial assignments should not be prohibited.

On balance, the convenience and commercial advantages of assigning claims against the United States suggest that this privilege be limited only in those

States. Thus, even a nonnotifying assignee would not escape liability for the fee. In all likelihood, an assignee would notify immediately to protect himself against a settlement between the Government and the assignor, and against possible government setoffs maturing subsequent to the assignment with respect to the assignor.

52. Under FED. R. CIV. P. 19, an action is dismissed only for failure to join indispensable parties. 3 MOORE, FEDERAL PRACTICE ¶ 19.07, at 2152 (2d ed. 1948). Partial assignees are necessary (not indispensable) parties. *Id.* ¶ 19.14[1]. A court may in its discretion proceed without them and their right to maintain suit will not be prejudiced. FED. R. CIV. P. 19(b), *Hirsch v. Glidden Co.*, 11 FED. RULES SERV. 19b.1, 7 (S.D.N.Y. 1948); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 401, 144 N.E.2d 387, 390, 165 N.Y.S.2d 498, 502 (1957). "On the one hand is the desirability of preventing a multiplicity of suits, and that there may be a complete and final decree between all parties interested. Opposed to this is the desirability of having some adjudication, if at all possible, rather than none, that leaves the parties remediless due to an ideal desire to have all interested persons before the court." 3 MOORE, *op. cit. supra* ¶ 19.07, at 2154-55.

53. One commentator suggests that "if the plaintiff will not join the other parties necessary to the final adjudication of the entire claim, or if they cannot be joined, the refusal to give judgment . . . may be justified." 4 CORBIN § 889, at 572. (Emphasis added.) *Accord*, RESTATEMENT, CONTRACTS § 156 (1932).

54. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 380-82 (1949) (partial subrogee as real party in interest may maintain suit in his own name; United States on timely motion could have compelled joinder of other parties in interest). Compare *Lawrence v. United States*, 8 Ct. Cl. 252, 257 (1872): "It is better that this inconvenience should occasionally arise than that every party to whom vouchers are issued should be prohibited from using them in the manner which modern mercantile usage has made a necessity in trade."

55. The problem of multiplicity of suits would be avoided by provision for nationwide service of process, as is now available under the Interpleader Act, 28 U.S.C. § 2361 (1952). See Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 629-30 (1954).

If a partial assignee brings suit in the Court of Claims, the Government or the court on its own motion can compel joinder under the third-party practice rule of that court, which provides for service anywhere in the United States. CR. CL. R. 19.

situations where a compelling need to protect the Government,⁵⁶ or overriding local policy, is established.⁵⁷ The United States would thus be treated like states, municipalities and private persons and generally made liable to the assignees of claims against it.⁵⁸ Possibly, so permitting assignments would reduce litigation by fostering the consolidation of claims.⁵⁹ In any event, withdrawal of the antiassignment statute's anachronistic immunity would comport with prevailing commercial practices necessitating free assignability, and with current legal doctrines equating the sovereign's responsibility to that of private obligors.⁶⁰

56. National security could be compromised if third parties obtained an interest in a claim under a contract for classified equipment. See 54 Stat. 1029 (1940), as amended, 31 U.S.C. § 203 (1952) (authorizing no-assignment clauses; quoted note 12 *supra*), explained in 86 CONG. REC. 12556-57 (1940) (need for military secrecy).

57. Most jurisdictions prohibit the assignment of the unearned salary of public officers or employees in order to protect against a possible unwillingness to perform adequately. See *Kaminsky v. Good*, 124 Ore. 618, 265 Pac. 786 (1928); 4 CORBIN § 857; RESTATEMENT, CONTRACTS § 547 (1932). Although unearned wages of private employees may be assigned, statutes often limit the percentage assignable. See Fortas, *Wage Assignments in Chicago*, 42 YALE L.J. 526 (1933); Strasburger, *The Wage Assignment Problem*, 19 MINN. L. REV. 536 (1935). The purpose of these laws is to protect the employer against inadequate performance and extra bookkeeping and the employee against his own improvidence. See 4 CORBIN § 873, at 490.

Since the Government is liable as a private tort-feasor in the state where the tort was committed, 28 U.S.C. § 1346(b) (1952), the Government would be liable to assignees only if a private tort-feasor would be. On the other hand, the assignment of a federal pension is void and a person receiving an interest in a pension is subject to criminal liability. REV. STAT. § 4745 (1875), as amended, 38 U.S.C. § 129 (1952).

58. Tax refund claims against states and other governmental units are generally assignable. See *People ex rel. Stone v. Nudelman*, 376 Ill. 535, 34 N.E.2d 851 (1940) (state tax refund); *Laing v. Township of Forest*, 139 Mich. 159, 102 N.W. 664 (1905) (claim for repayment of township real property tax); *Hillsdale Distillery Co. v. Briant*, 129 Minn. 223, 152 N.W. 265 (1915) (refund on city liquor license); *First Nat'l Bank v. Achenbach*, 110 Okla. 246, 237 Pac. 574 (1925) (county property tax refunds). Local government eminent domain awards are also assignable. See *Johnson v. Washington County*, 179 Ark. 1116, 20 S.W.2d 179 (1929); *In re White Plains Road*, 224 N.Y. 454, 121 N.E. 354 (1918) (by implication); 2 NICHOLS, EMINENT DOMAIN § 5.21[3] (3d ed. 1950).

59. Compare *The Mandu*, 102 F.2d 459 (2d Cir. 1939) (several foreign insurers assigned to single local insurer claims for cargo damage); *Cooper v. Runnels*, 48 Wash. 2d 108, 291 P.2d 657 (1955) (claims for paint spray damage to 137 automobiles assigned to one of 91 owners for purposes of suit).

60. See *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944) ("Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situations."); *United States v. National Exch. Bank*, 270 U.S. 527, 534 (1926) (opinion of the Court per Holmes, J.) ("The United States does business on business terms."); *Cooke v. United States*, 91 U.S. 389, 398 (1875) ("If it [the Government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.").