ed, widely dispersed parties via the press, as the *Ickes* case would have it, which would justify Margiotti in riding roughshod over plaintiff's reputation. Even the slender justification of releasing an essentially public document, as in the *Ryan* case, was absent here; and the *Ryan* court was unsure whether the defendant had an absolute or qualified immunity.

Perhaps the closest precedent to the *Margiotti* situation is found in *Jacobs v. Herlands*,[77] a New York case which arose over the disappearance of $50,000 from a government bureau. The defendant, apparently a prosecutor or special investigator, called a press conference at which he announced his intention to investigate the plaintiff's bank account in connection with the crime. The court held absolute privilege not available as a defense.

> No prosecuting officer or investigator is justified, in anticipation of finding evidence of wrongdoing, in making a public statement to the press which injures the reputation of any person. *With due regard for the right of the public to be informed of the conduct of its officials, the time for such information to be given is after evidence of wrongdoing has been obtained. The rights of the individual, as well as the rights of the public, are to be considered.*[78]

It therefore appears that defendant Margiotti should have been granted only a conditional or qualified immunity.[79]

Conclusion

The *Margiotti* decision wrongly granted absolute immunity both to defendant's letter and to its release to the press. The result conforms in no way to the policy which alone justifies the privilege. The law of absolute immunity for executive communications is muddled; the underlying problems unresolved. The contribution of the *Margiotti* opinion to their solution is extremely slender.

[77] 17 N.Y.S. 2d 711 (S. Ct., 1940), aff'd, 259 App. Div. 823, 19 N.Y.S. 2d 770 (1940).

[78] Ibid., at 713 (emphasis added).

[79] If the press had absolute immunity for its printing of defendant's letter on the ground that it is a record libel, it would appear that defendant should possess the same immunity for his publication of the libel to the press. Conceivably, however, one who makes a record libel should be without absolute immunity for publishing it to the press. The opportunities for politically-motivated abuse under the opposite rule are obvious. Another answer is that newspapers probably do not have absolute immunity in printing record libel. See Defamation Immunity, 18 Univ. Chi. L. Rev. 591 (1951). Further, it does not appear that defendant's letter is the sort of official record which newspapers can publish. Unlike record libel in regular judicial, legislative, or executive proceedings, defendant's letter could not have been obtained by the press were it not for defendant's publication to them. Thus, the argument fails that defendant should share the absolute immunity of the press.

LATENT EQUITIES

Whether the assignee of a chose in action takes the chose subject to "latent equities" has been a debatable issue among scholars for over a century. *Levenbaum v. Hanover Trust Company*[1] presents a typical "latent equity" problem.

[1] 253 Mass. 19, 148 N.E. 227 (1925).

There, an insolvent debtor made a preferential payment to his creditor. The creditor deposited the payment in the defendant bank and afterward assigned his rights in the deposit to the plaintiff. When the plaintiff sought to claim the money as assignee, the trustee of the debtor notified the bank of its own interest in the deposit, arising out of the preferential nature of the payment, and the bank thereafter refused to pay the plaintiff. The plaintiff brought suit and the trustee intervened. The trial court awarded the deposit to the trustee. On appeal, the judgment was affirmed. The court held that the assignee of a chose in action took only an equitable title. Since the right of the trustee to avoid the preference was an equity prior in time, the trustee's interest was superior to that of the assignee.

Latent equities embrace those rights and claims which are undisclosed at the time of the assignment and which reside in some prior assignor or in a third party who is a stranger to the assignment. Early in the nineteenth century, Chancellor Kent took the position that latent equities should be destroyed by an assignment of the chose in which they attach.[2] Kent argued that the assignee may not be able with the utmost diligence to discover the latent equity of a third party. Dean Ames defended this position in more sweeping terms in his classic article, "Purchaser for Value Without Notice."[3] Dean Ames concluded:

> The purchaser of any right, in its nature transmissible, whether a right *in rem* or a right *in personam*, acquires the right free from all equities of which he had no notice at the time of its acquisition.[4]

Though subsequently criticized, this view is now expressed in Section 174 of the Restatement of Contracts. However, in the reporter's notes to this section, the following comment appears:

> Whatever may be the merit of Chancellor Kent's reasons for the rule he laid down, the decisions based on the rule have commended themselves to the Reporter and his Advisers. There is a growing tendency in the law to deal with transfers of contractual rights according to the same rules as transfers of other kinds of property, and since an innocent purchaser of land or goods from a trustee acting in violation of his trust or from one who obtained the property fraudulently is preferred to the cestui que trust or defrauded party, the tendency justifies similarly preferring an innocent purchaser of a contractual right to one who has previously been deprived of it by fraud and to one for whom the right was held in trust by the assignor. It must be admitted, however, that the weight of authority is at present opposed to that view.[5]

Professor Corbin, in his recently published treatise on contracts,[6] takes the position of the Restatement on this issue.

Professor Williston, however, has arrived at the result reached in the *Hanover Trust* case.[7] It may be said from a reading of Williston's discussion that, in his

[2] Murray and Winter v. Lylburn, 2 Johns. Ch. (N.Y.) 441 (1817).

[3] 1 Harv. L. Rev. 1 (1887).

[4] Ibid., at 16.

[5] Rest., Contracts 43 (Official Draft No. 1, 1928).

[6] 4 Corbin, Contracts § 900 (1950).

[7] 2 Williston, Contracts § 438 (1936).

view, the rule of the *Hanover Trust* case prevails only in those jurisdictions where "equitable" rather than "legal" title passes by the assignment of a chose. It is true that Williston makes a distinction between "ordinary" choses in action, which he calls "intangible," and choses represented by documents, "the surrender of which is required for the enforcement of the right."[8] However, Williston's broad citation of authority, as well as the fact that at present assignment of an "ordinary" chose carries "legal" title in almost all jurisdictions, indicates that Williston intended his principle to be one of general application and not dependent on whether a particular jurisdiction adopts the "legal" or "equitable" theory of title.

It appears, therefore, that Professors Williston and Corbin are in opposition on these questions, for the general rule, as stated by Professor Corbin, is that the assignee who is a purchaser for value without notice takes the claim free from the equities of all others than the obligor, whether or not in tangible form.[9]

A careful reading of the cases cited by Williston and Corbin leaves the reader in some doubt as to whether either position is well supported or even desirable. The cases are extremely varied both as to fact situations and as to reasoning. It is the purpose of this comment to discover whether a general rule—either Corbin's or Williston's—can be said to embrace all the decisions cited by both authorities, or whether a one-by-one examination of the cases reveals the existence of independent categories needing special and individual treatment by the courts.

A breakdown of Williston's citations results in at least five distinct subgroups.

The first of these categories encompasses those cases in which the decision turns on the inadequacy of the assignee's claim.[10] These cases are decided on the particular facts involved and the legal rules or rationales employed are as varied as the fact situations. For example, compare *Sutherland v. Reeve*[11] and *Owens v. Evans*.[12]

The *Reeve* case was a proceeding in equity to set aside a court order confirming an attorney's ownership of a claim. The attorney had procured an assignment of the claim from one who held it for a limited purpose by falsely representing that he was still the attorney of the original claimant and that he was authorized to prosecute the claim in the latter's behalf. The court decided for the original claimant on the ground that the attorney had, in fact, continued from beginning to end to be the original claimant's attorney and that, hence, the claim which the attorney recovered belonged to the original claimant. In this

[8] Ibid., at p. 1270.

[9] 4 Corbin, Contracts § 900 (1950).

[10] Tripp v. Jordan, 177 Mo. App. 339, 164 S.W. 158 (1914) (assignment of an insurance policy to one who had no insurable interest in the life of the insured held constructive notice of the insured's interest to a subsequent purchaser of the policy); Gillette v. Murphy, 7 Okla. 91, 54 Pac. 413 (1898) (assignee had actual notice of prior claim).

[11] 151 Ill. 384, 38 N.E. 130 (1894).

[12] 134 N.Y. 514, 31 N.E. 99 (1894).

case, the court imposed a constructive trust in favor of the original claimant because of the fiduciary relationship existing between attorney and client. As a result of this relationship, the attorney failed to take any personal interest in the claim.

In the *Evans* case, the assignee of a note and mortgage brought an action against the guarantor of the note. The guarantor argued that the assignor had sold the mortgage to a third party prior to the assignment to the plaintiff. The court ruled in favor of the guarantor that there had been a prior sale of the mortgage and that afterwards the assignor retained no assignable interest in the debt or security. The decision is buttressed by the observation that the assignee was not shown to be a bona fide purchaser.

The second category encompasses those cases in which the decision turns on the inadequacy of the claim asserted by a third party against the assignee. This category is strikingly illustrated by the case of *Brown v. Equitable Life Assurance Society*.[13] There the plaintiff, the owner of a life insurance policy, assigned the policy to H by a written assignment absolute in form, but in fact merely as security for a loan which H agreed to procure but failed in securing. H was allowed to remain in possession of the policy for eleven years and fraudulently assigned the policy to a bank as security for a loan. The bank made the loan, relying upon the absolute assignment from the plaintiff to H and believing that it was the true owner of the policy without any knowledge of equities between plaintiff and H. The court held that the plaintiff was negligent in delaying eleven years before asserting his equity and was therefore estopped by his inaction. Similarly, in *Pearson v. Leucht*,[14] the latent equity was found to be inadequate on the ground that the underlying allegation of fraud was without merit. In citing these cases, Professor Williston apparently makes the questionable assumption that had the asserted equities been valid they would have prevailed simply because they were prior in time. It may very well be that had the facts been otherwise the courts in the *Brown* and *Leucht* cases would have employed the "priority" rationale. But as they stand, the cases invite application of the principles of estoppel and fraud, and any discussion of priority under such circumstances is fruitless.

The third category is composed of two cases, one from Vermont[15] and the other from Massachusetts,[16] in which the law of the forum is, or was, such that an assignee of a chose in action takes only an equitable title. Since the latent equity invariably arises prior in time, the decisions in these jurisdictions rely upon the rule that as between two competing equities, the one that arises prior in time is held to be first in right. Presently, however, in all but a few jurisdictions, the assignee's claim is recognized as "legal." Furthermore, in the Massa-

[13] 75 Minn. 412, 78 N.W. 103 (1899).

[14] 199 Ill. 475, 65 N.E. 363 (1902).

[15] Downer v. South Royalton Bank, 39 Vt. 25 (1866).

[16] Levenbaum v. Hanover Trust Co., 253 Mass. 19, 148 N.E. 227 (1925).

chusetts annotations to the Restatement of Contracts, the committee expressly states that Section 174 of the Restatement is not the law in Massachusetts.

The fourth category is composed of cases involving contests between sureties on construction bonds and lenders who take assignments of the contractor's rights after creation of the surety's well-recognized right to subrogation.[17] This category is illustrated by *Prairie State Bank v. United States*,[18] in which the court held that the claim of a surety to percentages retained by the government under a building contract was superior to that of an assignee lender. The decision was in favor of the surety, not because the surety's lien was prior in time, but rather on the ground that it was a surety's lien and that the assignment to the bank, if allowed, would impair rights acquired by the surety through subrogation, i.e., the right of the surety to have funds held for its indemnity.

The fifth category is limited to the single agency case of *Lasser v. Philadelphia National Bank*.[19] In that case, the court held that an assignee of a distributor who sold goods and billed customers in his own name but was in fact the agent of the manufacturer took free of the manufacturer's latent equity. It should be noted that in this case, as in the cases in the third category, it is the later claimant who prevailed. The case clearly moves on an agency rationale and no discussion of "priority" is involved.

Of the numerous cases cited by Professor Williston for the proposition that an assignee of a chose in action takes subject to latent equities, only six cases are directly in point.[20] These six cases involve a common fact situation. In each case, one holds the chose of another in trust and thereafter assigns the chose to a purchaser for value without notice. A controversy then arises between the original holder of the chose and the purchaser, as to who has the better right. Both parties are innocent. Both have been tricked by the unscrupulous trustee. In this situation, Williston's citations, although no more than a handful, support the view that the original holder of the chose possesses the superior interest.

But this result is far from satisfying, for the cases, in great degree, present a picture of equal blamelessness and equal merit on either side of the litigation. The South Carolina court, in *Noland v. Law*,[21] faced with a contest between a bona fide purchaser and original holder, decided in favor of the latter, using the

[17] Scarsdale National Bank & Trust Co. v. United States Fiduciary & Guaranty Co., 264 N.Y. 159, 190 N.E. 330 (1934); First Nat. Bank v. Fidelity and Deposit Co. 65 F. 2d 959 (C.A. 10th, 1933); Linden v. Vail, 113 N.J. Eq. 113, 166 Atl. 154 (1933).

[18] 164 U.S. 227 (1896).

[19] 231 Pa. 189, 183 Atl. 791 (1936).

[20] Noland v. Law, 170 S.C. 345, 170 S.E. 439 (1933); Morgenthaler v. Cohen, 103 Ohio St. 328, 132 N.E. 730 (1921); Selwyn v. Waller, 212 N.Y. 507, 106 N.E. 321 (1914); Keys v. Ponder, 118 Okla. 234, 226 Pac. 73 (1924); Rice v. Hearn, 109 N.C. 150, 13 S.E. 985 (1891); Culmer v. American Grocery Co., 21 App. Div. 556, 48 N.Y. Supp. 431 (1897).

[21] Noland v. Law, 170 S.C. 345, 170 S.E. 439 (1933).

"priority" rationale. The court was more than uneasy about the justice of its result and gallantly admitted:

This is a very hard case, one we regret to have to decide. Either . . . Mrs. Noland, [the bona fide purchaser] or . . . Miss Caroline Law and Mrs. Elizabeth S. Dantzler [the original holders], by our decision, will sustain a heavy loss. All three of them are estimable ladies, who, unfortunately, put their trust in an unfaithful member of the Bar.[22]

It has been shown that where fault is present on the side of one party or the other, the courts have employed more substantial doctrine than the "priority" rule, reaching just results on the grounds that the purchaser was not bona fide, that the original holder acted negligently or was estopped, and so on. *Noland v. Law*, which presents perhaps as pure a case of equal innocence as can be found, shows a court employing the "priority" rule with the utmost reluctance, conscious of its formalism and lack of substance. It may be questioned whether a toss-up rule of justice is adequate to a situation where one of two parties must "sustain a heavy loss." It is submitted that a realistic business community, accustomed under many circumstances to "splitting the difference" for a wide variety of practical reasons, might well accept claim-splitting where two innocent parties are victimized by a third person. At all events, it is well to recognize that Williston's "priority" rule is a principle of limited and very special application and cannot be said to stand as an adequate generalization of the cases cited to support it.

There is a well-marked tendency in the law to protect the bona fide purchaser in preference to one having an equitable right only against the assignor, where the chose is represented by a document, the surrender of which is required for the enforcement of the right. Familiar agency principles support this tendency. It is argued that if the owner of a nonnegotiable instrument clothes another with the usual incidents of ownership, and a third person is led thereby into dealing with such person as the true owner, he must be protected on the grounds that the original assignor is estopped from disputing the existence of the title which, through negligence or mistaken confidence, he caused or allowed to be vested in the party making conveyance. Professor Williston acknowledges this development in the law, but only as an exception to his general position. Although Professor Williston has overstated his own position on the authorities, his point that the necessary document cases form only a small part of the category of assignable choses is well taken.

Professor Corbin has said that, "in general," the assignee of a chose in action takes free of latent equities. In re-examining the cases cited by Corbin, it quickly becomes apparent that a majority of these cases concerns assignments of choses in action having a tangible form, e.g., certificates of stock,[23] policies of insur-

[22] Ibid., at 349 and 440.

[23] Winter v. Montgomery Gas Light Co., 89 Ala. 544, 7 So. 773 (1889), where the court held that a purchaser for value from a party who was the last registered stockholder and to whom new certificates had been issued is not affected by rights of holders back of the registry.

ance,[24] nonnegotiable bonds,[25] overdue negotiable instruments,[26] and tax certificates.[27] Once again, the reader is forced to the conclusion that there has been some selection in the citing of authority and a tendency to overgeneralize from a particular group of cases. The document cases, then, should be added as an additional subgroup if it is desired to describe the factors influencing the courts in their decisions.

Other cases cited by Corbin for his general position are explicable in terms of several of the subcategories that have already been suggested. For example, *DeWitt v. Van Sickle*,[28] *Livingston v. Dean*,[29] *Mullison's Estate*,[30] and *Murray v. Lyburn*[31] are cases in which the decision turns on the inadequacy of the assignee's claim. *First National Bank of Bridgeport v. Perris Irrigation District*[32] is a case in which the decision turns on the inadequacy of the claim asserted against the assignee.

Only two of the cases cited by Corbin are arguably in point. However, these cases concern a judgment[33] and mortgages,[34] and are treated, to some degree, as if they belonged in the category of choses in action having a tangible form.

The remaining cases concern the priority to be afforded one of two claimants

[24] Akin v. Security Savings and Trust Co., 157 Ore. 172, 68 P. 2d 1047 (1937), where the assignee of an insurance policy commenced suit to determine who had the superior right to an insurance policy. The Municipal Bank and Trust Company claimed the proceeds upon the theory that certain premiums of the policy were paid from funds the assignor wrongfully appropriated from it. The court held that since the assignor was in possession of the policy and there was nothing on its face to indicate the interest of the Trust Co. the assignee took free of latent equities.

[25] Moore v. Holcombe, 30 Va. 597 (1832).

[26] Mohr v. Byrne, 137 Cal. 87, 67 Pac. 11 (1901) where the court held that an endorsee of a note for valuable consideration, taking the same after maturity, does not take subject to equities of third persons whose rights are latent and do not appear from an inspection of the note or the endorsement.

[27] William v. Donnelly, 54 Neb. 193, 74 N.W. 601 (1898) where the court held that the assignee of tax certificates took free of the equities as between assignor and third parties.

[28] 29 N.J. Eq. 209 (1878).

[29] 2 Johns. Ch. (N.Y.) 479 (1817) where plaintiff sold land to D, taking back a mortgage and bond which he failed to record. Subsequently D resold portions of the land and assigned the mortgage and bond he received from the sale to other parties who were defendants in this suit. The court held that one of the assignees had notice and therefore took subject to the plaintiff's equity.

[30] 68 Pa. 212 (1871).

[31] 2 Johns. Ch. (N.Y.) 441 (1817), where the court held that an earlier bill filed against the trustee for breach of trust was constructive notice to all the world of the cestui que trust's interest.

[32] 107 Cal. 55, 40 Pac. 45 (1895), where the decision rested on failure of a materialman to give notice within the required statutory period.

[33] Appeal of Mifflin Nat. Bank, 98 Pa. 150 (1881).

[34] Putnam v. Clark, 29 N.J. Eq. 412 (1878), where the language in the opinion was restricted to the particular type of chose involved.

where there has been a mistaken,[35] defective,[36] or fraudulent recording.[37]

A breakdown of the cases cited by Professor Williston throws great doubt upon the notion that there is a single general rule in this area of the law. Williston's position is supported by few cases at best. These cases center about an extreme and very special fact situation. The tendency of Williston's assertion, however, is to create the appearance of stability and likeness where, in fact, there is great variety.

The position taken by Corbin that an assignee who is a purchaser for value without notice takes the claim free from the equities of all others than the obligor, is open to similar criticism. A breakdown of the cases cited by Professor Corbin reveals an indiscriminate lumping of significantly varying cases. The cases are selected on the basis of their holding rather than in terms of recurring fact situations or similarity of reasoning. The result is an imposing list of authorities which ostensibly support Corbin's position but which, upon closer scrutiny, are seen to be distinguishable. Professors Williston and Corbin are in agreement that where the chose has a tangible form, such as a certificate of stock, a policy of insurance, or a nonnegotiable bond, a bona fide purchaser is preferred to one having an equitable right against the assignor. On the basis of these cases, Corbin goes on to assert that in all assignments of a nonnegotiable chose, the bona fide purchaser takes free of latent equities. Williston, on the other hand, indicates that where the chose is *not* associated with evidentiary paper, the bona fide assignee of the chose takes subject to latent equities. The cases indicate that both Williston and Corbin have overstated their respective positions.

Some of the uncertainties in this area can undoubtedly be attributed to historical rigidities in the law of assignment. Further distortions are attributable to the disposition of some writers to treat title as a "thing." Finally, the compulsion to make an all-or-nothing judgment, under circumstances inviting equal treatment of the contending parties, imposes a restrictive formalism which may limit the capacity of the courts to do ultimate justice. However, general rules of agency and common-law fraud suffice in reaching just results in the majority of cases.

[35] Madson v. Ballou, 63 S.D. 501, 260 N.W. 831 (1935), where a bank brought an action to reinstate a mortgage lien released through mistake. In reliance upon satisfaction of record, defendant had purchased a judgment lien on the property. The court ruled that the bank's lien could be restored if the bank would reimburse the defendant.

[36] Congregational Church Bldg. Soc. v. Scandinavian Free Church of Tacoma, 24 Wash. 433, 64 Pac. 750 (1901), where the court held that the assignee was not bound by his assignor's knowledge of a prior, defectively recorded mortgage.

[37] Sabatino v. D'Aloise, 107 N.J. Eq. 426, 152 Atl. 761 (1931), where the original assignor's rights, not latent equities, are involved.