

ASSIGNMENT

Introduction

- Assignments are transfers of property, either for consideration or as gifts.
 - e.g. the sale of a computer is an assignment.
- Assignment is affected by the common law, equity and statute.
- The key thing to look at with assignment is the characterisation of property.
- Property is divided into:
 - Real property (buildings, immovable) and chattels/personal property (moveables).
 - Tangible and intangible property (e.g. copyright, patents).
 - An option is an example of intangible property that can be assigned to someone.
 - **NB: all equitable rights are intangible.**
 - Choses in possession and choses in action. A chose is a thing.
 - Something that can be possessed is a chose in possession.
 - Assets that cannot be possessed but which are enforceable by legal action are choses in action, e.g. a contractual debt, company shares, intellectual property.
 - Legal property (property recognised at common law) and equitable property.

Assignment of legal property

- Common law does not recognise a transfer of property unless and until all formal requirements have been met.
- The nature and importance of property determines how legal property is transferred.
- The more important the property, the more formality there is:
 - Ownership of banknotes generally passes with possession.
 - Negotiable instruments (e.g. cheques) are transferred by endorsement (you sign the back of them and the right to claim is given to whoever receives it).
 - Title to chattels (in the absence of statutory input) passes either by deed or delivery with the intention to confer ownership.
 - Company shares sold off-market require a transfer form signed by the transferee and transferor to be registered in the company books.
 - Legal choses in actions could not originally be assigned at law. This can now be done by statutory methods.
 - Transfer of title to land has always required strict compliance with formalities, reflecting the historical importance of land.
- Assignment methods are now regulated by different statutes.

Equity and legally ineffective assignments

- An ineffective transfer at common law might in fact be recognised in equity.
- It depends on whether equity considers the assignor's conscience as bound by the assignment.
- Relevant question: **was consideration given?**

CONSIDERATION GIVEN

- At common law, consideration is not enough – there must be other requirements and steps done.
- At equity, consideration binds the assignor.

- Equity will do whatever may be required to enforce the transaction, so long as the property is of the type that can be assigned.
- Receipt of consideration also attracts equity's intervention where the property assigned is **future property**.
 - Once the future property comes into the hands of the assignor, equity will deem done that which ought to be done and will insist the assignor complete the transfer, so long as the contract can be *specifically performed*.

GIFTS: CONSIDERATION NOT GIVEN

- In the absence of consideration, equity regards the donor's conscience as bound when the **donor has done all that they alone must do to make the assignment effective**: *Milroy v Lord (1862)*, refined by the HC in Australia by *Corin v Patton (1990)*.

Milroy v Lord (1862)

- **Facts:** An uncle attempted to assign shares to a trustee to hold on behalf of his niece. He executed a deed assigning the shares and gave the intended trustee the share certificates, however, this was not the method required to assign shares. At law the shares were not transferred until the assignment was recorded in the company books, following a receipt of transfer executed by both the assignee and the assignor. Failure to comply with the relevant procedure was not discovered until after the uncle's death.
- **Issue:** At what point will equity enforce the assignment of a gift?
- **Held:** It was held that he had not done enough to transfer the shares. He had taken no steps to sign the relevant transfer and had not armed his agent with sufficient authority to sign it without further reference to him and had therefore not done all that he alone must do to make the assignment effective.

Corin v Patton (1990)

- **Facts:** A dying woman attempted to assign her interest in land, held as joint tenant with her husband, to her brother on trust. She was to be the beneficiary and then would leave her beneficial interest to her children in her will. The aim was to ensure that her husband would not be entitled to the whole of the land as sole surviving joint tenant. She executed all the necessary transfer documents. However, the land was mortgaged, and the woman died without making arrangements for the production of the title deed by the mortgagee to allow registration of the transfer to occur.
- **Issue:** Meaning of *Milroy v Lord* test.
- **Held:** She had *not* done all that she alone had to do to allow the assignment to be recognised in equity. She had to arrange for the production of the title or at least arm her brother with the authority to request the title and complete the remaining steps himself.

- The *Corin v Patton* interpretation has the advantage of **certainty**.
- However, sometimes there can be **factual doubts** concerning whether the donee has yet been placed in a position where they can complete the gift without assistance.
- This kind of problem can arise where there is doubt about the extent of the authority given to a donor's agent to complete a transaction, e.g. in *Marchesis v Apostolou (2007)*

Marchest v Apostolou (2007)

- **Facts:** One solicitor acted for both the transferor and the transferee in an attempted gift of land to a trustee. Transfer documents were executed but no other steps were taken. Never having been registered, the transfer was incomplete at law. It was argued that the transfer was complete in equity once the solicitor held the executed documents on behalf of the transferee; thereafter the transferee could have completed the assignment himself.
- **Issue:** Extent of authority given to a donor's agent.
- **Held:** Jessup J held that, where a solicitor acted for both parties in a transaction, the solicitor would not hold the transfer documents on behalf of the transferee until he had the transferor's authority to treat them as the property of the transferee. On the facts the solicitor did not have this authority, thus he was not in a position to complete the transfer.

Non-assignable rights

- Some assets or rights cannot be assigned at law or equity.
- If the transaction attempted is one of the following, the assignment will fail:
 - Contracts involving personal service (e.g. for Da Vinci's painting services)
 - Public pay to officials
 - Exception: public pay owed after death is assignable: *Arbuthnov v Norten (1946)*
 - Contractual rights that create a burden on the other party.
 - E.g. Selwyn has a contract with William – he can't assign his part of contract to his son in NYC because William would have to transfer exchange rates etc.
 - Liabilities
 - Mere expectancies: *Kennon v Spry (2008)*
 - Bare right to litigate
 - Exceptions: if you have a genuine commercial interest in the litigation and you are personally going to benefit and subrogation of insurance.
- Certain rights are by statute unassignable.
 - E.g. *Superannuation Act 1916* (NSW) prevents the assignment of your right to claim a pension.
- The unassignability of a right can be inferred or implied in a statute, even if the statute itself did not expressly say so.
 - E.g. in *Tasmanian Seafoods v McQueen (2005)* – statute dealing with issues of licenses to dive for abalone provided in one sentence that the license was personal, and that if you stopped commercial diving then you had to surrender the license. Court held it was implied in the wording that you could not assign your license to someone else.

Future property

- Often referred to as 'expectancy'.
- Future property cannot be assigned at common law because the assignor has no title to assign.
- Future property can be effectively assigned in equity if there is consideration.
- Future property can mean one of two things:
 - Property that exists, but not yet owned by the person who wants to assign it.
 - Property that is not yet in existence.

Examples of future property

- Interest under the will of someone still living (e.g. future inheritance that is subject not only to the person dying, but also they can still change will while alive)
- Damages in impending litigation (unliquidated claim)
- Future book debts (money that people will owe it in the future)
- Royalties to be earned on an artistic work in the future
- Copyright on a song that has not yet been written
- Freight that I will earn when I deliver the goods I have not yet delivered
- Rent that is payable under a lease
- Interest under a mortgage

Income not yet produced

- Most problems arise over “**income cases**”. Here it is crucial to determine whether:
 - The assignor is attempting to assign only the income not yet earned, which is **future property**.
E.g. an unborn foal. → **assignable in equity by consideration**
 - The assignor trying to assign the underlying property that gives rise to the income, which is **presently existing property**.
E.g. the horse pregnant with the foal. → **assignable by gift**

CASES – without consideration (gifts):

- Yet-to-be declared dividends are future property and CANNOT be assigned without consideration: *Norman v Federal Commissioner of Taxation (1963)*.
- The right to receive royalties is presently existing property and CAN be assigned without consideration: *Shepherd v Federal Commissioner of Taxation (1965)*.

Norman v Federal Commissioner of Taxation (1963)

- **Facts:** A taxpayer tried to assign income. The deed of assignment voluntarily assigned dividends to be earned on shares. Another clause of the deed attempted to assign interest earned on a loan. Interest only became payable on the loan on an annual basis but the borrower could repay the loan at will, meaning that if the borrower chose to repay the loan in a particular year, no interest would become payable in the following year. It could not be said at the time of the assignment that the interest would ever be payable.
- **Issue:** Assignment of future property.
- **Held:** The High Court held that the yet-to-be declared dividends were future property and could not be assigned without consideration. They were ‘future’ in that the dividend did not yet exist and indeed might never be declared by the company. The interest on the loan was also an assignment of future property because it was uncertain whether it would exist and therefore, because there was no consideration, it was also ineffective.

Shepherd v Federal Commissioner of Taxation (1965)

- **Facts:** The inventor of a furniture castor granted a licence to produce the castors to a manufacturer who was to pay him royalties based on the number produced. He attempted to assign voluntarily a percentage of royalties. The Commissioner argued that this was an assignment of future property. As the manufacturer was not obliged to produce any castors at all, it could not be said with certainty that any royalties would be earned under the agreement.
- **Issue:** Assignment of future property.
- **Held:** The High Court held that the transaction was an assignment of part of the **contractual right** to receive royalties (akin to underlying property), rather than the assignment of the as yet unearned royalties. Shepherd therefore, appears to be good authority for the proposition that assignments of assets that may produce income in the future can be made voluntarily.

CASES – with consideration:

- If you receive consideration for future property, then equity will compel you to hand it over if and when you get it. Equity says it is unconscionable to not hand over something when you have received consideration for it. However, it has to be the type of property that can be assigned: *Holroyd v Marshall (1862) 11 ER 999*
- When someone receives consideration for an agreement to assign future property, it is not a contract – it the creation of a constructive trust: *Re Lind [1915] 2 Ch 345*
- The assignor will be holding the expectancy on behalf of the beneficiary as soon as it comes into existence: *Re Lind [1915] 2 Ch 345*
- NB: the decision in *Re Lindt* has been approved multiple times by the HC – there is no question that **it is law**.

Re Lind [1915] 2 Ch 345

- **Facts:** Lind set out to assign his inheritance in his mother's estate while she was still alive. He used it as security against two beneficiaries, then went bankrupt and was released from bankruptcy.
- **Issue:** whether he had effectively assigned the right to his inheritance before he went bankrupt – because if he didn't, then he could get it back once he was released from bankruptcy.
- **Held:** Bankruptcy has the effect of wiping out contractual debts. Bankruptcy only deals with unsecured claims. Contract analogy with debt is not what we apply in equity. What happened was not based on contract, it was based on the fact that **having taken consideration, we treat Mr Lind as a trustee sub modo and the moment he gets the interest he is holding it for the beneficiaries**. The first two claims were not wiped out by bankruptcy because they were not debts, they were equitable rights in trust.
- Judge Swinfordedee in *Re Lind*:
"An assignment for value of future property actually binds the property itself, directly it is required. Automatically on the happening of the event and without any further act on the part of the assignor and it does not merely rest in or amount to a right in contract giving rise to an action. The assignor having received the consideration becomes in equity on the happening of the event trustee for the assignee of the property... of which he had previously sold and been paid for."

Assignment of equitable property

- Equitable property can only be assigned in equity, as common law does not recognise it.
- Equity does not differentiate between varieties of equitable property.
- There is only one method of equitable assignment: **intention**.

Windeyer J in *Norman's case* (1963):

*"An assignment can be by way of gift; and, except that writing is required by s 9 of the Statute of Frauds, no formality is necessary beyond a **clear expression of an intention to make an immediate disposition**."*

- A gift is effective when the assignor has manifested an immediate, irrevocable intention to assign property.
- The formality of writing is also required by **s. 23C of Conveyancing Act 1919**.

s 23C of Conveyancing Act 1919 – Instruments required to be in writing

- (1) Subject to the provisions of this Act with respect to the creation of interests in land by parol:
 - a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law,
 - b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's will,
 - c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by the person's will, or by the person's agent thereunto lawfully authorised in writing.
- (2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

- Four ways to assign equitable interests:
 - By assignment
 - By directions of beneficiaries to trustees
 - where beneficiaries are of full age and capacity and are absolutely entitled to the property (*Saunders v Vautier*) they can call upon the trustee to cancel trust and hand it over. (This is a method of assignment, of transferring property from ownership of trustee to beneficiary). The beneficiaries can also ask to give the property to someone else. If you have a beneficial interest, you can transfer it to someone else.
 - Agreements to assign
 - Declaration of trust (sub-trusts)

Rules for a valid equitable assignment

- Issues to consider:
 - The assignment of future property
 - Where there has been a failure to comply with a legal assignment of property
 - Where the assignment is of equitable property
- The assignor must show an intention to assign, that he/she is parting with the dominion over the property and no particular words or formality is required. Authority: *William Brandt v Dunlop (1905)*

Statutory assignment

- Many kinds of legal choses in action such as bills of exchange and insurance policies have specific statutory methods of transfer but additionally the legislature had provided a 'default' mechanism for other legal choses.
- In NSW, **s 12 of the *Conveyancing Act 1919*** sets out four requirements for assigning choses in action:
 - There must be a clear intention to make an immediate and irrevocable transfer
 - The assignment must be absolute (no partial assignment)
 - The assignment must be in writing, signed by the assignor
 - Express notice in writing must be given to the debtor
- There is controversy as to whether s 12 applies to equitable choses in action as well, or only common law choses in action.
- s 12 is the only way that a common law chose in action can be transferred.
- s 12 has no application for future property.

Legal property that can only be assigned in equity

- The statutory assignment method above only applies to absolute assignment of legal choses in action – the common law still does not allow partial assignments of a legal chose in action.
- Equity may be able to recognise a partial assignment.
- Equity will treat part assignments in the same manner as equitable property for assignment purposes and therefore it will be sufficient if there is a **clear expression of an intention to make an immediate disposition** of the part chose.