

LAWS303
EQUITY
AND
TRUSTS
EXAMINATION NOTES
2017

EQUITABLE ASSIGNMENTS

Assignments are transfers of property, either for consideration or as gifts.

Equity recognises as property certain assets which are not recognised at common law, such as a beneficiary's interest in a trust. Property interests can also be created more **informally** in equity than in law. One aspect of this is equity's attitude to assignments.

Terminology

- Legal property = recognised by the common law
- Equitable property = recognised by equity
- Equitable rights are intangible
- **Real property** is land and **personal property** is chattels or goods.
- **Choses in possession** (tangible property) are things which can be physically held.
- **Chose in action** (intangible property) cannot be 'possessed' and can only be enforced by legal action e.g. a debt.
- **Legal property** is that which is recognised by the common law, whereas **equitable property** is recognised in the equitable jurisdiction. All equitable rights are intangible.
- Property rights can fall into more than one category.

Legal Assignments

In the assignment of property, the nature of the assignment is important. A legal assignment gives the assignee a legal interest in that property. If it is an equitable assignment the assignee obtains an equitable interest in property. The nature of the assignee's property right is crucial in the context of competing rights to that property

- Assignment of Legal Property
 - Common law methods of transfer for different kinds of legal property developed as common-sense responses to the type of property in question and the relative importance of that property. For example:
 - Ownership of banknotes generally passes with possession.
 - 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 frequently specified by statute. Unless every required step is completed, the law will not regard the transfer as effective.

- In *Lampet's case* (1612) 77 ER 994 at 997, Lord Coke said that 'the great wisdom and policy of the sages and founders of our law, have provided, that no possibility, right, title, nor thing in action, who shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of tenants, and the subversion of the due and equal execution of justice'.
- Section 12 of the Conveyancing Act

Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action has had notice that such assignment is disputed by the assignor or anyone claiming under the assignor, or of any other opposing or conflicting claims to such debt or chose in action, the debtor, trustee or other person liable shall be entitled, if he or she thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he or she may, if he or she thinks fit, pay the same into court under and in conformity with the provisions of the Acts for the relief of trustees.

1. ***There must be a clear intention to assign rather than a mere authorisation that the debtor or other person pay another: Norman v FCT***
2. ***The assignment must be absolute and not by way of charge.***
 - The basic reason why the assignment must be absolute is to ensure that the debtor or other person is protected in that at all times he or she knows to whom payment must be made. Furthermore, the requirement that the assignment must be absolute enables the assignee to sue on the debt or chose in action in his or her name because an absolute assignment means that the assignor no longer has any interest at all in the debt or chose in action.
 - In *Durham Bros v Robertson* [1898] 1 QB 765 there was an assignment of a book debt which was expressed to endure until money lent by the assignee to the assignor was repaid. - Not an absolute assignment because it was conditional upon repayment.
 - Part of a debt or chose in action cannot be assigned pursuant to s 12. This is because the assignor still has an interest in the debt or chose in action and thus must be joined in any

proceedings instituted against the debtor by the assignee. A part of a debt of chose in action can only be assigned in equity

3. ***The assignment must be in writing signed by the assignor William Brandt's Sons & Co v Dunlop Rubber Company Limited***

4. ***Express notice in writing must be given to the debtor by either the assignor or assignee.***

- Part There are no formal requirements as to the notice and it need not even state the date of the assignment. The importance of the notice is that the debtor be advised as to whom he or she must pay. Constructive notice is NOT sufficient: Consolidated Trust Co Ltd v Naylor (1936) 55 CLR 423 at 438-9.

- Things Section 12 CANNOT do:

- Future choses in action
- Change priorities - An assignment under s 12 is subject to equities having priority over the rights of the assignee
- Assign choses regulated by other pieces of legislation: *Patents Act 1990* (Cth) s 14; *Copyright Act 1968* (Cth) ss 196–197; *Trade Marks Act 1995* (Cth) ss 106–111; *Life Insurance Act 1999* (Cth) ss 200–203; *Marine Insurance Act 1909* (Cth) ss 56–5
- Assign equitable interests???? Eg a right of partnership?

Everett v Commissioner of Taxation (1980) 143 CLR 440 -equitable assignment of legal property for consideration

FACTS	<p>The assignment of part of a partnership</p> <p>Obiter comment – what if it had been an absolute assignment? It could be assigned . At at CLR 447</p> <ul style="list-style-type: none"> • [T]hough the interest of a partner is an equitable interest, it may be assigned under s 12 of the Conveyancing Act 1919 (NSW), as amended ... The interest, being a chose in action, falls within the expression ‘debt or other legal thing in action’ because the section, in providing that notice shall be given to a trustee ‘as a person liable in respect of such debt or other legal chose in action’, appears to contemplate the assignment by a beneficiary of an equitable chose in action against a trustee. There would be no point in referring to a trustee if the section made provision only for the assignment by strangers to the trust of debts owing by, and choses against, persons who happen to be trustees. The expression ‘legal chose in action’ may be read as ‘lawfully assignable chose in action’.
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Principles	<p>The principles established by the High Court in Everett’s case may be summarised as follows:</p> <ul style="list-style-type: none"> • A partner’s interest in a partnership is a chose in action, which is assignable in whole or in part by way of equitable assignment. • The effect of such an assignment is that the assignor holds that assigned partnership interest on trust for the assignee. • The assignment does not make the assignee a partner in the partnership nor give the assignee any entitlement to the assets, management or administration of the partnership or the right to inspection of books and accounts. • A partner’s partnership interest is an entire chose in action; a partner's entitlement to participate in profits is not separate and severable from the interest of the partner. • A partner’s income is not ‘income from personal exertion’ but ‘income from property’, the relevant property being the partner’s fractional interest in the partnership
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Equitable Assignments

- Equitable assignments exists for:
 - Future property
 - Equitable assignment of legal property for consideration
 - Voluntary equitable assignment of legal property that is assignable at law
 - Voluntary equitable assignment of legal property that is *not* assignable at law
 - Equitable assignment of equitable property
- Equity may regard the transfer of property as complete **even if it is legally ineffective** and can make orders giving effect to it. This depends on whether equity regards the **assignor’s conscience as bound** by the transaction. There are two situations to consider: where the assignee has given **consideration** and where the transaction is a **gift**.
- Equity recognises as property certain assets which are not recognised at common law e.g. beneficiary’s interest in a trust
- In equity, proprietary interests can also be created more informally than at common law
- An example of equity's more informal approach is equitable assignments
- Equity can:
 - consider transfer of property to be complete even if is ineffective at common law
 - make orders giving effect to transfer
 - It depends on whether equity considers the assignor’s conscience to be bound by the transaction
 - This can be in two situations:
 - where the assignee has given consideration and
 - where the transaction is a gift

- Intention:

In all cases, for an assignment to be effective in equity, the assignor must display an intention to assign. The assignor must show that he or she is parting with dominion over the property. No particular form of words is necessary to establish consent.

Burridge v MPH Soccer Management Ltd [2011] EWCA Civ 835 - Intention

- The Court of Appeal had to determine whether the following words amount to an intention to assign: *The fee due to [Harrison] is to be sent to the Football Association for onward transmission to the agent ... [at] Lloyds TSB...Sort code 30-93-71 ... account number... 03717572 MPH Soccer Management Ltd*.
- The court unanimously held that there was an intention to assign the fee.

- The relevance of consideration

Equity assists an assignee who has given consideration. Consideration is equity's cue to do whatever may be required to enforce the transaction, so long as the contract can be specifically performed.

- Equity regards the assignor's conscience as bound by the receipt of consideration. This is the converse of the maxim that equity will not assist a volunteer.
- 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*.

Equitable Assignments: Consideration

- Equity will also intervene if the assigned property is future property
- Once the future property is in the hands of the assignor, equity will:
 - consider done that which ought to be done
 - insist on completion of the transfer by the assignor (if the contract can be specifically performed).
- Equity assists an assignee who has given consideration. Consideration is equity's cue to do whatever may be required to enforce the transaction, so long as the contract can be specifically performed.
 - Equity regards the assignor's conscience as bound by the receipt of consideration. This is the converse of the maxim that equity will not assist a volunteer.
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Equitable Assignments: Gifts

- 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**. This is the rule in *Milroy v Lord*, as redefined for Australian purposes in *Corin v Patton*.

Milroy v Lord - Failure to Comply with Procedure - voluntary assignment of legal property assignable at law

- **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.
 - The uncle had not:
 - taken steps to sign the relevant transfer or given his agent sufficient authority to sign the transfer without further reference to him
 - done all that he alone must do to make the assignment effective

The issue then arises: has the assignor done all that they alone must do to make the assignment effective, even if that leaves some outstanding step to be done by the assignee or a third party? Or does it really mean, 'all that can possibly be done to transfer the property'? The following case illustrates this distinction:

Re Rose, Rose v Inland Revenue Commissioners [1952] 1 Ch 499

Facts: A husband assigned shares to his wife. He executed all the necessary forms and forwarded them to the company. The transfer was eventually registered. The husband died soon afterwards, and the question arose as to which of the husband or wife had been entitled to the shares on a

certain date some months prior to his death (for taxation purposes). On the relevant date, the transfer forms had been forwarded to the company but registration had not yet occurred.

Held: If the test from Milroy meant that ‘all that had to be done by the assignor alone’, then the husband had done all that he had to do (as the remaining steps were to be taken by the company secretary) and the wife would be the owner of the shares in equity. However, if the test meant ‘all that could possibly be done to transfer the property’, the wife would not be the owner in equity until the company secretary registered the transfer.

The question was resolved in *Corin v Patton*:

Corin v Patton - Answer to Milroy Test

Facts: A dying woman attempted to assign her interest in land, held with her husband as joint tenant, to her brother on trust. Woman was to be the beneficiary and then would leave her beneficial interest to her children in her will. Aim was to ensure that the husband did not become entitled to all of the land as the sole surviving joint tenant. The woman 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 for the registration of the transfer.

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.

- As long as the donee can complete any remaining steps without the assistance of the court, equity will regard the transfer as binding.
- Deane J adopted a more complex test, whereby in addition to the donor taking all steps that they alone must take to ensure the assignment, they also have to put the gift “beyond the recall or intervention of the donor”.
- 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.

Marchest v Apostolou - Solicitor Acting for Both Parties

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 themselves.

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.

Non-Assignable Rights

- **Some assets or rights cannot be assigned at law or equity** and therefore if the transaction in question is an attempted assignment of one of these kinds of rights the assignment will fail.
- The **benefit of contracts of personal service** cannot be assigned because the identity of the person for whom the service is to be performed may matter to the person who has to perform it.
- Public policy dictates that most assignments of **bare rights of action** are void unless the assignee has a genuine interest in the litigation.
- **Contracts** can stipulate that contractual rights are not assignable.
- **Statutes** may expressly or impliedly make an asset un-assignable.
 - In *Re Bruynius* legislation expressly forbade assignment of superannuation pensions. In *Tasmanian Seafoods Pty Ltd v MacQueen* the statute impliedly restricted assignments of abalone diving licences.
 - In *Tasmanian Seafoods Pty Ltd v MacQueen* [2005] TASSC 36 the relevant legislation impliedly restricted assignment of abalone diving licences
- However, in equity:
 - The holder of a contractual right, can by **self-declaration**, hold that right on trust for another.
 - Rights that are really **expectancies or hopes** cannot form the subject matter of a trust by self-declaration because they are in no sense property (*Kennon v Spry*).

Assignments of future property in equity

- Future property cannot be assigned at common law because the assignor has no title to assign. Future property cannot be effectively assigned without **consideration** in equity. Property can be future in two sense:
 - A. The property may exist, but not yet be owned by the would-be assignor.
 - B. Or the property may not yet be in existence.
- Most problems arise over what can generally be called “**income cases**”. Here it is crucial to determine whether.

- A. The assignor is attempting to assign only the income not yet earned, which is future property. E.g. an unborn foal.
- B. Or is 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.

Norman v Federal Commissioner of Taxation

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.

- In relation to the dividends, the High Court (Dixon CJ, McTiernan, Windeyer, Menzies and Owen JJ) unanimously held that the assignment was not effective because it involved future property for which the assignee did not provide valuable consideration. A bare majority (Dixon CJ, Menzies and Owen JJ; McTiernan and Windeyer JJ dissenting) came to the same conclusion in relation to the interest on the loan.

Shepherd v Federal Commissioner of Taxation

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.

- If who has a mere expectancy or an interest that is “future property” attempts to assign it to another for valuable consideration, equity treats the transaction as a **contract to assign**.