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4. FUTURE PROPERTY

Is the subject matter of assignment future property or present right to future property?

[Identify the operative words. Argue both ways]

- (a) "all my right title and interest in and to an amount equal to ninety per centum of the income which may accrue": present chose (*Shepherd*)
- (b) "all his right title and interest in and to [interest on a loan due to the assignor and repayable at will)": future property (*Norman*)
- (c) "all that the interest, sum of money, or premises to which she is entitled under or by virtue of any verdict, compromise or agreement which she may obtain in the said action": future property (*Glegg*)
- (d) "all the book debts due and owing or which may become due and owing to the mortgagor" (*Taliby*)

If the tree must continue to exist, it is more likely to be present right to future property (*per Kitto J in Shepherd*)

4.1 Present right to future property

Upon the true construction, the subject matter of the assignment is the present right to future property (*Shepherd*)

That a promise may not be fruitful does not make it incapable of assignment (*Shepherd*)

[Assignment of chose in action. Go to section 3]

4.2 Future property

Upon the true construction, the subject matter of the assignment is future property. Future property cannot be assigned in law or equity (*Norman*)

4.2.1 If for value

- (A) Equity will enforce an agreement for valuable consideration to assign future property when the assignor acquires the property (*Holroyd*)
- (B) The contract does not have to be one of which equity would decree specific performance (*Tailby*)
In Holroyd Lord Westbury held that the contract must one of which equity would decree specific performance. This was rejected in Tailby.
- (C) But the property must be sufficiently described to be identifiable (*Norman*) and must answer the description of the assignment (*Holroyd; Tailby*)
- (D) *Re Lind* suggests that the assignee will be regarded in equity as having a proprietary interest in the property. Arguably it cannot be an interest in the property because no property exists
Priority will be determined by the date of the assignment of the future property (*Re Lind*)

4.2.2 If voluntary

Equity does not come to the aid of volunteers. The assignment would be ineffective (*Norman, per Windeyer J*)

[If by deed] For equity a deed does not make good a want of consideration (*Norman, per Windeyer J*)

5. PRIORITY

5.1 Prior legal v subsequent equitable

- 5.1.1 Legal title prevails over any subsequently created interest to the extent to which there is an inconsistency

5.1.2 Exceptions

The legal interest may be postponed to the holder of the later equitable interest when

- (A) Legal owner creates the equitable interest [e.g. declaration of trust]
- (B) Legal owner fraudulently connives in the creation of the equitable interest (*Whipp; Saltoon v Lake*)

The court will not postpone the prior legal estate on the ground of any mere carelessness or want of prudence on the part of the legal owner. But omission to use ordinary care in inquiry

7. ASSIGNMENT AND DISPOSITION OF INTERESTS

7.1 Legal assignment

7.1.1 Real property

See 2.3.1 for old system title and 3.2 for torrens title.

7.1.2 Choses in possession

Choses in possession may be alienated at law by any of the following methods

- (A) Orally and by way of gift, provided the gift is accompanied by delivery of possession (see 5.3.2(B))
- (B) By deed, without delivery, either for consideration or by way of gift (see 5.3.2(B))
- (C) By sale (see 5.3.2(C))

7.1.3 Choses in action

The statutory assignment effects a divesting of legal title correlative to the transfer of the right, so that if notice has been duly given, the debt or chose in action no longer belongs to the assignor and he cannot take proceedings to recover it.

Conveyancing Act 1919

12 Assignments of debts and choses in action

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.

(A) Requirements

(1) Absolute assignment

It requires that the assignment transfer unconditionally all the rights of the assignor in the choses to the assignee.

Assignment subject to a condition precedent, or of part only of a debt, are not absolute.

(2) In writing and signed by the assignor

(3) Subject matter must be a debt or other legal chose in action

Legal chose in action has been interpreted as "lawfully assignable chose in action", therefore including equitable choses in action (*Federal Commissioner of Taxation v Everett*). This interpretation raises a number of difficulties.

(4) Express notice in writing to the debtor

Notice can be given by assignor or assignee.

Showa Shoji Australia Pty Ltd v Oceanic Life Ltd (1994) 34 NSWLR 548

Held: (Giles J) no special form of notice is necessary, and the notice need only convey the obligor the fact that the obligation had been transferred to an assignee. But the notice must do so expressly, by a direct and definite statement of that fact rather than by supplying materials from which the existence of that fact was to be inferred.

(B) **Special category: shares**

Requirements for a legal assignment of shares (default rule under Corporations Act. Company may change in their constitution)

- (1) Signed transfer form
- (2) Share certificate
- (3) Registration at the company

1072F Registration of transfers (replaceable rule)

(1) A person transferring shares remains the holder of the shares until the transfer is registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.

7.2 Equitable assignment of legal interest

(incomplete legal assignment)

Non-compliance with the statutory requirements renders the assignment imperfect. The assignment of a legal chose in action that does not meet the statutory formalities cannot be upheld in equity unless by reason of some fact or circumstances which a court of equity regards as binding the legal owner in conscience to hold the property on trust for the assignee.

7.2.1 Voluntary assignment

If the alleged assignor, even though not all the statutory requirements have been complied with, has nonetheless done all the statute requires her or him to do to effect the assignment, equity restrains the assignor from derogating from the assignment.

(A) **Equity's disinclination to assist volunteers**

Equity will not perfect an imperfect gift.

Milroy v Lord (1862) 4 De GF & J 264

Facts: Owner of shares tried to assign them. The company's constitution provided that shares would be transferred if the change was registered in company. The company never registered the assignment. There is no legal assignment.

Held: (Turner LJ) In order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. There is no equity in this court to perfect an imperfect gift.

(B) **Effectiveness in equity of voluntary assignments**

1. Olivia wants to give some shares to Andrew, so she asks Simon the solicitor to prepare the paperwork.
2. Simon obtains the share certificates and a transfer form, which he gives to Olivia to sign.
3. Olivia signs the transfer form.
4. Olivia delivers the certificates and signed transfer to Andrew.
5. Andrew also signs the share transfer form.
6. The transfer form is deposited with the company.
7. The assignment is registered by the company.

(1) **Different approaches**

Is Olivia required to take all the steps necessary for an effective legal assignment, or is she only required to take certain steps.

Anning v Anning (1907) 4 CLR 1049

Held: (Isaacs J) if property is assignable at law, assignment either succeed or fail at law. Equity has no role to play in failed or incomplete voluntary assignment of legal property.

(Higgins J) a gift will be effective in equity when the donor has taken all the steps necessary to pass the legal title to the donee which are within the donor's power, even though some of those steps are capable of being taken also by the donee (i.e. step 6).