

LLB270 Gifts and Sales Topic Summary- The Law of Assignment

- A legal assignment can only occur with rights/liabilities recognised under CL or statute. If the right is only in equity, it can only be subject to an equitable assignment.
- NOTE: Person cannot just say 'I revoke the gift', the assignment would need to have failed for this to be a true statement otherwise if assignment is valid they cannot revoke.

Q1: Can the property be assigned at all?

Rights which cannot be assigned include:

- ✓ **Public pay:** Assignment of pay by holder of a public office is prohibited from assigning the pay as this pay is made to enable the office holder to maintain their office with decorum and propriety. Exception: If pay not payable during the assignor's life then it is capable of being assigned (Norton, Radan 5.7).
- ✓ **Bare rights to litigate:** Includes rights to sue in tort, suing for unliquidated damages in contract and bare rights to sue in equity [5.9]. However, debts and rights to sue for liquidated sums are assignable (Fitzroy), as is the assignment of the verdict (Glegg). Other **exceptions** include:
 - a) Genuine commercial interest (Trendtex Trading Corporation):** If assignee has genuine commercial interest 'in taking the assignment and enforcing it for his own benefit' (Lord Roskill, Trendtex) then this is assignable. Must be beyond mere personal interest in profiting from the outcome of proceedings (Barr)- rights to sue in tort appears to fall under the exception if there is a genuine commercial interest (Haxton). Restitutionary claims appear to be acceptable (Haxton).
 - b) Property with incidental right to litigate (Ellis):** Examples include right to rescind for undue influence (Dickinson, 5.22), right of appeal in relation to judgement debt could be depending on facts (Nilant).
 - c) Assignment to an insurer (Compania Colombiana de Seguros):** Assignment valid if it is made in consideration of a payment made by the insurer to the insured in satisfaction of a claim pursuant to an insurance policy betw/ them.
- ✓ **Contracts for personal services (Nokes):** Contracts for personal services are generally not assignable (Devefi), such as share farming agreements (Moore), employer assigning right of services from an employee (Nokes). Assignment of benefit of contract is not considered 'personal services' (Tolhurst). Exceptions:
 - a) Assignable if contract expressly or impliedly authorises their assignment (Devefi):** For example, in Mid City Skin Cancer & Laser Centre, such as where there is an implied obligation of confidence binding a medical practitioner in relation to records on patients kept by a medical practice where they were employed- the implied ob of confidence was assigned.

NOTE: Contract prov preventing assignment of contractual rights is enforceable, unless it is illegal pursuant to statute or on public policy grounds- will be severable (Linden Gardens

Trust). Effect of this can be circumvented by means of a declaration of trust of the benefit of the clause (Don King Productions Inc)- see 5.34.

Q2: Is the assignment of presently existing or future property?

- **No assignment of future property (i.e. property which does not yet exist) at law** can be made. **However, an assignment of future property in equity can be made if there is valuable consideration provided by the assignee and intention to assign (Holroyd v Marshall).**

- Where valuable consideration has been **provided by assignee**, equity construes it as an agreement to assign the property once it comes into existence. Once the property does come into existence, assignee acquires equitable interest when assignor acquires their legal ownership of the property (then at this point onward assignor holds property on trust for assignee- Norman).

- However, if there is **no consideration** (future property assigned by way of gift) then **assignment is void** b/c no enforceable agreement to assign it once it comes into existence.

Questions:

- i) **What does assignor own themselves- a mere expectancy or a presently existing right?** If there is only an expectancy (future prop), that is all they can assign. (E.g. Hoping to inherit under mother's will but mother not dead yet, then purport to assign the interest in the property under mother's will all that can be assigned is future right- that's all you have to grant).
- ii) **If assignor owns both presently existing right AND expectancy, then what are they assigning?** For instance, in Shepherd, was assigning rights to royalties (and royalties themselves when they eventuated).
 - Distinguish betw/ dividends in Norman (future property) vs right to royalties in Shepard (present prop).
 - Examples of future property: Interest under will (where testator is not yet dead) as this is an expectancy (Re Ellenborough), possible verdict in court case, copyright in songs not yet written, dividends (money paid regularly by company to its shareholders out of its profits) on shares owned by assignor, beneficiary's expectancy of receiving income under discretionary trust (Lygon Nominees).

Cases:

Norman (1963): Norman (N) purported to assign to his wife by deed "all my right title and interest in and to the income being payable" on a loan (3,000 pounds) which could be repaid at any time by borrower- loan was owed to N. Terms of loan- could repaid at any time by borrower w/out notice. N also purported to assign to wife his interest on dividends in shares he owned- wanted to minimise his tax (b/c if assigned would mean wife pays tax on it rather than him). **No consideration by Wife** for either items. **HCA held dividends were future property and no valid assignment b/c no consid.** But, right to the interest was also future property therefore assignment was invalid too.

- i) **Right to dividends (future property):** The actual right to dividends was not being assigned, he should have assigned the shares if he wanted to achieve this

(despite the deed saying this). Since the **dividends** were shares that did not exist yet they were **future property**.

- ii) **Interest on loan (present property):** He was assigning right to the interest, rather than interest itself (see deed). HCA said presently existing right to something that may or may not be fruit in the future is present property (i.e. present right to income that may exist at some point in future=present property). However, if you are assigning the income itself which obviously does not exist=future. Majority had problems w/ nature and structure of the loan, loan repayable at any time by borrower therefore right to interest was future property. However, Justice Windeyer (dissent) said right to interest was present (doesn't matter the right never bore fruit, N assigned presently existing contractual right to be paid at a future date- fact sum may never eventuate does not matter).

Shepherd (1965)- Right to royalties is present property: Mr S purported to assign via deed "all my right title and interest in and to an amount equal to 90% of the income which might accrue to me [from date of deed]... from royalties payable to me". License agreement about casters (chair bottom thing) that S designed, tried to minimise tax. No consid paid to him. If it was present prop=valid assignment, if future=not valid assignment b/c no consid. HCA found right to royalties was present property. Radan argues in Norman what was being assigned was income itself (not yet arisen) but in Shepherd was right to income (present right)- although distinguish betw/ type of loan. Therefore fact the royalties may never be paid was irrelevant.

Q3: What are the requirements for an assignment at law, and have these been complied with? (not relevant to future prop b/c cannot be assigned at law)

NOTE: Cannot assign equitable interests at law- focus on legal assignment of legal interests in prop

Requirements:

- **Land/real prop:** OS land- s 23B CA deed of conveyance from assignor to assignee. TT land- registration (s 41(1) RPA).
- **Goods/choses in possession:** By delivery with donative intent (can be actual or constructive delivery- Nolan) by deed of gift, declaration of trust or by will (Rowland). 'Constructive delivery'- where 'nature or bulk of the goods renders manual delivery impossible or impractical' (e.g. putting hands on piano is enough). If donee already in possession donor does not need to retake possession (Nolan).
- In common establishments, need for donor to give, rather than donee to take possession- still need identifiable act of delivery (Tudberry). Donative intent does not need words of gift, although donee bears onus of proving the intent. Delivery must occur whilst donative intent exists (Nolan). For sale, see uniform sale of goods legislation (not in exam).

- In Rowland, handing of the keys to the boat to Mr Rowland prior to party for son was the delivery, also donative intent was evidenced through his words 'And you can have the boat', 'it's all yours son' etc. Therefore was valid gift of the boat.
- **Debts and other choses in action (s 12 CA)**- don't continue going through all s 12 CA elements if the gift fails one.
 - i) Clear intention to make 'immediate and irrevocable transfer' to assignee. Insufficient to merely authorise them to pay someone else (Norman).
 - ii) Assignment must be absolute, not conditional- therefore if there is part of debt/chose in action go to equity!. Although if assignment provides/implies re-assignment back to assignor this is permissible (Clyne).
 - iii) Assignment in writing and signed by assignor- this is even if another person supposedly gets authority of the assignor to sign (Technocrats International).
 - iv) Express notice in writing given to debtor/other person by either assignor or assignee (Norman)- must be at time of or after assignment (Bishop).

Practically, equity generally requires assignor to lend their name to any suit to recover the debt or enforce the chose in action- therefore assignor must become a party to proceedings (APT Finance, Radan 5.44).

NOTE: s 12 permits voluntary assignment of debts or choses in action by means of a deed or gift (Re Westerton).

Q4: If there has not been an assignment at law, has there been an assignment in equity?

1. Was there an intention to assign? (William Brandt's Sons & Co, Norman).

- Assignor must display an intention to assign. This means assignor must show they are parting with dominion over the prop- no particular form of words necessary (5.62, William Brandt's Sons).
- Intention to give a revocable mandate, while retaining ownership of the property is not enough (Comptroller of Stamps (Victoria)).

2. Pick the situation

- i) **Where there has been an assignment of future property**
- ii) **Failure to comply with legal reqs for assignment of legal interest**
- iii) **Assignment of equitable interest in prop to begin with**

Where there has been an assignment of future property:

- Mention again why it's future property (from Q2)
- **Was there valuable consideration given? (must be paid/executed by assignee- JT Nominees). Note: Costin says nominal consideration (e.g. \$1) is treated as a gift.**

If **yes to valuable consid**> There is a chance the property can be assigned in equity (Holroyd). This agreement does not need a particular form of words (Ansett Australia). Is construed as an agreement to assign the thing when it is acquired (Norman, Windeyer J)- conscience of assignor is bound.

If **no**> Cannot be enforced in equity.