# CONSIDERATION IN EQUITABLE ASSIGNMENTS OF CHOSES IN ACTION.

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IT cannot be said that this difficult branch of the law has been greatly clarified since the decision in *Anning* v. *Anning*.[1] The difficulty largely arises from the fact that the Judicature Act, by providing a method by which choses in action can be assigned at law, has considerably modified the operation of the rule in *Milroy* v. *Lord*,[2] viz., that if an intending donor does not do everything necessary, according to the nature of the property, to amount to an assignment, his intended gift will not be carried out in the absence of consideration, nor will any trust be implied in favour of the donee. In addressing myself to this problem, I confine my remarks to *present* assignments.

It is necessary to turn first to consider the position with regard to equitable assignments of *legal* choses in action. It is, of course, well known that before the Judicature Act (now in Victoria the Property Law Act 1928, Section 134) choses in action were not in law assignable at all. It is equally well known that equity would lend its aid to assignments of both legal and equitable choses in action. In the cases of legal choses in action it would interfere by compelling the assignor, who by the common law was alone regarded as competent to sue the debtor or fundholder, to lend his name to an action by the assignee against the debtor or fundholder. Now it would appear to be clear on principle that as equity regarded the assignment as an agreement by the assignor to lend his name for the purpose of allowing the assignee to sue in a Court of Law, such assignment would, in the absence of a declaration of trust, require consideration to support it. But as a matter of fact there has been a difference of opinion as to whether equity required consideration for such an assignment.

Most authorities support the view that consideration is necessary. It is adopted by Anson,[3] and is given expression to by Higgins J. in the well-known case of *Anning* v. *Anning*[4]: "Courts of Equity gave effect to contracts for the assignmeent of legal choses in action; but the contracts from their very nature were for valuable consideration." The learned Judge proceeded to qualify this by stating that if the legal title is not vested in the donor, is, for instance, outstanding in a trustee, and the donor executes a deed purporting to assign his interest to a donee, the Court will treat the gift as effectual and insist on fulfilment. They treat the trustee as being under an obligation henceforth to hold on trust for the donee as he had been for the donor. In such a case the assignor has done all that in him lies to divest himself of his property in the asset. These views are supported by *dicta* in *Re Westerton*.[5] The actual decision turned on the Judicature Act, but the Court seemed clear that equity required considera-

1. 4. C.L.R. 1049.
2. 4 De G.F. & J. 264.
3. 17 L.Q.R. 90.
4. 4 C.L.R. at p. 1079.
5. [1919] 2 Ch. 104.

tion before the Act; they then went on to decide that the Act had relieved the assignee from taking preliminary proceedings to compel the assignor to join, and had further relieved him from the terms formerly imposed by equity as the price of assisting the assignee, viz., that he must have given consideration.

The other view is that supported by Jenks,[6] according to which the assignor had done everything which he could have done to perfect the gift, and hence the fact that the assignee did not give consideration is simply irrelevant. This doctrine seems to be quite a logical deduction from the rule in *Milroy* v. *Lord*. In fact it almost looks as if it were a question of which doctrine one started with, either the historical rule of equity that it regarded an assignment of a chose in action as a contract by the assignor that he would do everything to enable the assignee to enforce his rights by action, or the doctrine of *Milroy* v. *Lord*. However, the chief authorities relied on by the protagonists of this latter theory seem none too strong. The cases appear to be explainable on the ground of the creation of a trust. Thus in *Fortescue* v. *Barnett*,[7] the assignment was of the benefit of a policy of insurance which was held in trust by third parties for the grantor. The case would therefore appear to fall under the qualification adverted to by Higgins J. in *Anning* v. *Anning*.[8]

Exponents of the first view seem to have the weight of authority on their side. Anson in his learned article in the *Law Quarterly Review*[9] can quote a direct authority, namely, the case of *Edwards* v. *Jones*.[10] In this case A held bonds for £300, of which B was the obligor. A indorsed the bonds with words assigning and transferring her interest in them to the plaintiff, to whom they were then delivered. There was no consideration for the endorsement. After the death of A, the obligor paid the amount due to A's executor. Plaintiff thereupon sued the executor. Lord Cottenham held the transaction was "inoperative for the purpose of transferring the bond." The first view, then, seems to be the one to be preferred, but we must attach weight to the remarks of Isaacs J. in *Anning* v. *Anning*,[11] where the learned Judge is of the clear opinion that the only question is, what can the assignee require the assignor to do to make the assignment more complete?

What then has been the effect of the Judicature Act upon such assignments? The Act has of course provided a statutory assignment of choses in action, and such an assignment will be good without consideration. The question that now arises is as to the effect of this on the previous rules as to equitable assignments. An assignment not complying with the formalities as to notice and writing required by the Act may still be good as an equitable assignment. Will consideration be necessary to make such an assignment valid? The above

6. 16 L.Q.R. 241.
7. 3 My. & K. 36.
8. 4 C.L.R. at p. 1079.
9. 17 L.Q.R., at p. 91.
10. 1 My. & Cr. 226.
11. 4 C.L.R., at pp. 1065-7.

discussion as to whether equity required consideration in assignments before the Act, will now be seen to have been no mere academic one; the two views mentioned are vitally related to the problem of consideration in equitable assignments after the Act.

At first sight one would say that whichever of the two views a lawyer might adopt as to assignments before the Act, he could come to one conclusion only as to assignments after the Act, viz., that the Act has made consideration necessary in equitable assignments. The reason is that, as there is a statutory form made available for the assignment of choses in action, and an assignor chooses not to comply with the statutory requirements, he cannot be said to have done everything in his power to have perfected his gift, and hence equity will not, in the absence of consideration, assist him. Thus we have Judges who disagreed as to the necessity of consideration in equitable assignments before the Act agreeing that consideration is necessary in such assignments after the Act. Thus Isaacs J., who took the second view above expounded, and Higgins J., who took the first view, can both agree in *Anning* v. *Anning* that consideration is required for an assignment which has not conformed to the requirements of the Judicature Act. It is the judgment of Griffith C.J. in the same case that creates the doubt whether their reasoning is quite sound.

In *Anning* v. *Anning*[12] the facts were these: A person resident in Queensland just before his death executed a deed of gift voluntarily conveying to his wife and infant children the whole of his property. This property included, amongst other things, certain bank deposits and book debts, and it was as to these that the important question arose. No notice had been given to the debtors. The Court (Griffith C.J., Isaacs and Higgins JJ.) agreed there was not a sufficient notice given to comply with the requirements of the Queensland Judicature Act, but there unanimity ended. Higgins J., who dissented, thought that the assignment could not be good as an equitable assignment because the donor had not done all that he could have done under the Act to perfect the gift. Isaacs. J. agreed with Higgins J. on this principle, but he supported the validity of the gift deed by implying in it a covenant by the donor not to exercise any rights of ownership over the property. Griffith C.J. reached the same conclusion as Isaacs J., but his main argument proceeds along an entirely different road. He too found an implied covenant in the deed by the donor not to exercise any rights of ownership. But this is not the only nor the main ground of his judgment. He agreed that the requirements of notice of the Act had not indeed been satisfied, but gave it as his opinion that, *as notice could equally well have been given by the donee,* the donor had done all that he could. Thus in the result, the validity of the assignment was upheld by Griffith C.J. and Isaacs J., but in substance on different grounds, Isaacs J. on the question here under discussion agreeing with the dissenting Judge, Higgins J.

If the reasoning of Griffith C.J. is correct, then there are cases

12. 4 C.L.R. 1049.

where, though the formalities which by the Judicature Act must be complied with are not satisfied, for instance notice has not been given by the donor, yet the assignment, though voluntary, is good. For instance, in the case where the donor has omitted to give notice, the possibility of notice being given by the donee is enough to validate the assignment in equity. Probably the case of omission to give notice would be the only instance in which Griffith C.J. would claim the doctrine could apply. It could hardly be argued that if the assignor had omitted to put the assignment in writing, as required by the Act, then it could be said that he had done all he could, because the assignee might then proceed to put the same into writing. The view of Griffith C.J. finds support in *Re Griffin*,[13] where it was held that the indorsement of a banker's deposit receipt with the words "Pay my son," followed by the signature of the donor and subsequent delivery to the son, was sufficient to complete the gift. Of course in this case significance may attach to the fact that the son was also appointed executor under the donor's will. The judgment of Byrne J., contains a wide dictum.[14] "It is, I think, clear that the test is whether anything remains to be done by the donor, not by the donee." It may be questioned whether this is anything more than *obiter*. In an earlier case, *Re Patrick*,[15] there was a voluntary settlement, by which settlor assigned certain personal property, including four debts due to him on the security of certain bills of sale, to trustees with power to sue for the debts, sell and convert into money the property, and apply proceeds for the benefit of settlor's wife and relatives. It was held that there was a complete assignment, and the fact that notice of the assignment was not given to the debtors did not render the gift inoperative. It may be, however, that the gift in this case could possibly be construed as a declaration of trust, and thus would not depend on the *Milroy* v. *Lord* doctrine. Salmond and Winfield[16] also favour the view of Griffith C.J.

It is submitted, however, that it is not legitimate to look beyond the fact that the assignor has *not done everything necessary to vest the legal title.* It seems to be quite irrelevant that assignee could go on if he liked and do what the assignor had left undone. Before the Act the donor could not give a legal title; now since the Act he can give a legal title to the assignee, and if he omits to do so, how can it be said that he has done everything that he could have done to perfect the gift?

Of course it is arguable that the Judicature Act itself does not require notice to be given *by the assignor.* Section 134 of the Property Law Act only says "of which express notice in writing has been given to the debtor." On this view Griffith C.J., in *Anning* v. *Anning,* could have held that the assignment there in question did actually conform to the requirements of the Act. All that can be said here is that Griffith C.J., even if he may have regarded such a line of

13. [1899] 1 Ch. 408.
14. *Ibid.* at p. 411.
15. [1891] 1 Ch. 82.
16. Salmond and Winfield, *Law of Contracts,* at pp. 410-11.

argument as possible, certainly did not adopt it. Consideration of the tenability of such an argument is out of the scope of the present article.

So far only assignments of *legal* choses in action have been noticed, little space remains to speak of assignments of *equitable* choses in action, such as an interest in a trust fund. It seems clear that before the Judicature Act such assignments did not require consideration. As the assignee could sue in a purely equitable cause of action, without the risk of exposing the debtor to two actions, there was no need for equity to imply an agreement by the assignor to lend his name to the assignee for the purpose of enforcing his right against the debtor, and hence no logical need for consideration. But the Judicature Act has complicated matters. It has been decided that the words "debt or other legal thing in action" in the Act are not limited merely to legal choses in action, but extend to equitable choses in action, such as legacies and interests in trust funds. Hence the Act has provided a form of statutory assignment for such interests. It cannot, therefore, be said that an assignor who has not complied with the formalities of the Act has done all that he could do perfect the gift, and in the absence of consideration it would appear to be ineffectual. There appears to be no authority on this point, but on principle that would seem to be the position.