THE LAW OF MAINTENANCE AND CHAMPERTY AND THE ASSIGNMENT OF CHOSES IN ACTION

TRENDTEX TRADING CORPORATION v. *CREDIT SUISSE**

Introduction

Maintenance means aiding a party in litigation without a valuable interest in the suit or from an improper motive: "Where any man giveth or delivereth to another, that is the plaintiffe or defendant in any action, any sum of money or other thing for to maintain his plea, or else maketh extreme labour for him, when he hath nothing therewith to doe. . . .[1] *Champerty* is maintenance plus an agreement to share in the proceeds of the suit: "Champerty is a species of maintenance; but it is a particularly obnoxious form of it. It exists when the maintainer seeks to make a profit out of another man's action, by taking the proceeds of it, or part of them, for himself."[2] Maintenance and champerty are (or used to be in England prior to the passing of the Criminal Law Act 1967) torts and sometimes crimes.

They are ancient wrongs and the law relating to them first began to develop at around the time of the War of the Roses. With the loss of the French possession in the Hundred Years War, England became overrun with unemployed soldiery, who were only too willing to take up service with any great lord. From the time of Henry VI to the death of Richard III there was much disorder in the realm and the authority of the Crown seemed to have collapsed. Barons abused the law to their own ends and it was common for rich lords to profit from supporting litigation and fostering quarrels. Bribery, corruption and intimidation of judges and justices of the peace became widespread. Perjury was not a crime and thus for a price false evidence could easily be procured. The barons kept bands of retainers in their service which gave them the brute power necessary to protect their excesses. However with the strong monarchy of the Tudors the courts began to denounce maintenance and gave the statutes prohibiting it a wide effect.[3]

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* [1980] 3 All E.R. 721 (Court of Appeal); [1981] 2 W.L.R. 766 (House of Lords).

[1] *Termes de la Ley*, cited by Coleridge, C.J. in *Bradlaugh* v. *Newdegate* (1883) II Q.B.D. I. at 5-6.

[2] *Trendtex Trading Corporation* v. *Credit Suisse* [1980] 3 All E.R. 721 at 741 *per* Lord Denning, M.R.

[3] See W.J.V. Windeyer, *Lectures on Legal History* (2nd ed., revised), 1957, at 151-152.

As can be gleaned from this brief historical outline, maintenance was denounced on public policy grounds because of the abuses of the process of the law to which it could lead. But public policy is an ever-changing concept, and the conditions of society in the fifteenth and sixteenth centuries are of course radically different from those prevailing today. Hence the circumstances in which support for another's cause of action is considered justified have been multiplied, especially in the twentieth century.

> Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the state itself. Very few litigants bring suits or defend them at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side.[4]

It is not necessary for present purposes to trace the development of the law in regard to maintenance as all that would be seen is a gradual alleviation of the strictness of it. It suffices to note the judgment of Danckwerts J. in *Martell* v. *Consett Iron Co. Ltd.*[5] which is considered to be the classic exposition of the modern law in this area.[6] That case held that support of legal proceedings based on a *bona fide* community of pecuniary interest or religion or principles or problems was quite proper and the law would be unnecessarily oppressive if this were not so. One can safely assume therefore that an objection of maintenance can only be raised where there is "wanton and officious meddling with disputes of others in which [the maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse".[7]

A mere agreement to participate in the proceeds of an action without maintaining it does not amount to champerty,[8] as champerty is but a species of maintenance and one cannot be guilty of champerty without first being guilty of maintenance.[9]

Maintenance and the Assignment of Choses in Action

Until the passing of the Judicature Act 1873 the law did not permit the assignment of choses in action, supposedly because such an assignment involved maintenance.[10] As Coke explained in *Lampet's Case,*[11] it was ". . .

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[4] *Hill* v. *Archbold* [1967] 3 All E.R. 110 at 112 *per* Lord Denning, M.R.

[5] [1954] 3 All E.R. 339; [1955] 1 Ch. 363.

[6] This decision was cited with approval by the Court of Appeal and the House of Lords in *Trendtex Trading Corporation* v. *Credit Suisse, supra* n. 2 (Court of Appeal); [1981] 3 W.L.R. 766 (House of Lords).

[7] *British Cash and Parcel Conveyors Ltd.* v. *Lawson Store Service Co. Ltd.* [1908] 1 K.B. 1006 at 1014 *per* Fletcher Moulton, L.J.

[8] *Glegg* v. *Bromley* [1912] 3 K.B. 474.

[9] *Supra* n. 2 at 753 *per* Oliver, L.J.

[10] *Norman* v. *F.C.T.* (1963) 109 C.L.R. 9 at 26-7; R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity; Doctrines and Remedies* (1975) at 146 para. 631.

[11] (1612) 10 Co. Rep. at 46a.

the great wisdom and policy of the sages and founders of our law, who have provided that no . . . thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying contentions and suits. . . ." Thus the assignment of a chose in action, according to Coke, amounts to maintenance.[12] This is certainly a contentious argument, and according to Marshall it could not, probably even at law, be supported.[13] Moreover "Courts of Equity from the earliest times thought the doctrine too absurd for them to adopt, and therefore they always acted in direct contradicition to it".[14] For example, from the earliest times debts were assignable in equity. The common law approach has been superseded by legislation,[15] which introduces a statutory method of assignment of choses in action. However neither equity nor the legislature permitted the assignment of what is referred to as a "bare" right of action, that is a right merely to recover damages,[16] unless the right to litigate was assigned incidentally to the assignment of property.[17] A difficulty arises, however, in deciding when one has a right of property, or what constitutes a right of property.

One can easily encounter a circularity of argument in discussing property rights from the point of view of choses in action. For example the benefit of a contract is regarded as property unless the contract involves personal skill or confidence, even though in fact the property is a right of action.[18] The only possible, but not particularly helpful, conclusion is that a right of action which is considered to be property is assignable but one which is not is unassignable because it is a bare right of action. It might be more helpful to rephrase the question and ask when a right of action is considered to be a bare right of action.[19]

The law seems settled that a right to sue for damages for the commission of a tort is unassignable. The reasons seem to be (1) that such a cause of action has never been regarded as property *per se,* though probably it may be incidental to the assignment of property and therefore be validly assigned, (2) only a person who is injured by a wrong is entitled to the remedy for it, and (3) the damages recoverable are uncertain and thus infringe the rule that the subject matter of a grant must be certain.[20] But there are exceptions to the rule. For example, an insurance company is entitled to be subrogated to its insured's right to sue.[21] Also, a bankrupt's choses in action pass to his trustee in bankruptcy under the Bankruptcy

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[12] Meagher, Gummow and Lehane at 174 para. 693.
[13] O. R. Marshall, *The Assignment of Choses in Action,* 1950, at 45 *ff.*
[14] *Master* v. *Miller* (1791) 4 T.R. 320 at 340 *per* Buller, J.
[15] S. 25(6) Judicature Act 1873 (U.K.); s. 12 Conveyancing Act 1919 (N.S.W.).
[16] See the judgment of Parker, J. in *Glegg* v. *Bromley, supra* n. 8 at 489-90.
[17] *Williams* v. *Protheroe* (1829) 5 Bing. 309, 130 E.R. 1080; *Dickinson* v. *Burrell* (1866) L.R. 1 Eq. 337.
[18] See *Tolhurst* v. *Associated Portland Cement Manufacturers* [1902] 2 K.B. 660.
[19] The writer wishes to express his indebtedness to the work of O.R. Marshall *op. cit. supra* n. 13, on which the following section largely draws.
[20] O. R. Marshall, *op. cit. supra* n. 13 at 59-60; *Prosser* v. *Edmonds* (1835) 1 Y. & C. 481; *Defries* v. *Milne* [1913] 1 Ch. 98.
[21] *Compania Colombiana de Seguros* v. *Pacific Steam Navigation Co.* [1965] 1 Q.B. 101 at 121.

Acts, and these include damages for tort. These may also be assigned by the trustee in bankruptcy.[22]

As was noted above, the benefit of a contract is generally regarded as property, and is therefore assignable. However, the situation is much less clear in regard to the assignment of a right to sue for damages for breach of contract where the breach occurs before the purported assignment. Originally such a right was equated with a right to sue in tort and was therefore unassignable.[23] But later, Channel, J. in *Torkington* v. *Magee*[24] opined that if a breach of contract occurred subsequent to the assignment of it, the assignee could claim damages for its breach. McCardie, J. in *County Hotel and Wine Co.* v. *London and N.W. Railway*[25] considered these dicta and took the proposition a step further, holding that a right to sue for damages for breach of contract was generally assignable, except for contactual causes of a particular character, such as breach of promise of marriage, which may not for obvious reasons be assigned. He distinguished between a right of action based on contract and one based on tort. This distinction is well-founded. In the case of torts it is still apparently the rule that only a person who suffers from a wrong is entitled to the remedy for it. But contract has long outgrown its origins as a delictual remedy. Hence the benefit of a contract has come to be regarded as property. Moreover a debt, which has been regarded as property from the earliest times in equity at least, is really just a contract to repay a sum certain. Marshall[26] claims that McCardie, J. restricted the assignment of causes of action for breach of contract to cases where the sums to be recovered were liquidated, such as where the contract fixes the damages for breach at a certain sum, because otherwise there would be uncertainty as to the amount to be recovered, which is one of the reasons why claims in tort cannot be assigned. The writer would disagree that McCardie, J. so restricted his finding (". . . a defendant cannot destroy the assignability of a right of property, whether it be a contract or other form of property, by committing a breach of contract by repudiation prior to the assignment"[27]), but the objection of uncertainty, from the point of view of maintenance and champerty should be kept in mind. One of the reasons why maintenance was against public policy and therefore not allowed was because the assignee could advance inflated and unsustainable claims, seeking to profit from the litigation. However where the sum due is liquidated this objection cannot really be made.

There is support for McCardie, J.'s view in the cases.[28] However if a claim for unliquidated damages for breach of contract *can* generally be assigned, a difficulty arises where assigned claim can be framed either in contract or in tort. For example, an employee who is injured at work can

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[22] See *Sear* v. *Lawson* (1880) 15 Ch. D. 426; *Guy* v. *Churchill* (1888) 40 Ch. D. 481.
[23] *May* v. *Lane* (1894) 64 L.J. Q.B. 236.
[24] [1902] 2 K.B. 427.
[25] [1918] 2 K.B. 251 at 258.
[26] *Supra,* n. 13 at 58.
[27] *Supra,* n. 25 at 261.
[28] See *Earles Shipbuilding and Engineering Co.* v. *Atlantic Transport Co.* (1899) 43 Sol. Jo. 691; *Ertel Bieber and Co.* v. *Rio Tinto Co.* [1918] A.C. 260 at 289; *Defries* v. *Milne, supra,* n. 20.

sue his employer in contract or in tort.[29] The assignability of his right to damages can hardly depend upon the way his claim is framed, but this could be the result on the authorities as they stand. It appears to the writer that the only way around this seemingly ludicrous result is to hold that the benefit of a contract can be assigned before or after its breach, and any cause of action arising from the breach, such an action for damages for breach or, say, an action in tort for negligent performance of the contract is necessarily a right incidental to the property conveyed, the property being the benefit of the contract.

"An assignment of a mere right of litigation is bad ... but an assignment of property is valid even although that property may be incapable of being recovered without litigation."[30] What does the word "property" mean within this statement? In *Prosser* v. *Emonds*[31] it was held that a right in equity to have a conveyance of property set aside for fraud was "a mere right to overset a legal instrument" and was therefore unassignable. This is an old case and would certainly be decided differently today since an equitable interest has come to be regarded as property. In *Dickinson* v. *Burrell,*[32] on a similar set of facts, a different result was reached:

> If [the assignor] had sold or conveyed the right to sue to set aside the indenture, that would not have enabled [the assignee] to maintain this Bill; but if [the assignee] had bought the whole of the interest of [the assignor] in the property, then it would. The right of suit is incidental to the property conveyed.[33]

As Oliver, L.J. points out[34] the distinction made above is a distinction without a difference, the result depending solely on how the assignment is worded. His Lordship claims that the reasoning involved in such a proposition is somewhat artificial. The practical position of the assignee is not altered at all. The property as far as he is concerned has no existence. He has to proceed with a suit for its recovery. This decision is difficult to reconcile with *Prosser* v. *Edmonds,*[35] the only possible explanation for the inconsistency lying in the advance of the law of assignments generally.[36]

There is no clear authority as to whether a claim in tort can be assigned even if it is incidental to the conveyance of property. Holdsworth[37] deduces from *Prosser* v. *Edmonds*[38] and *Dickinson* v. *Burrell*[39] that if an owner out of possession conveyed his right to a third party and the possessor wrongfully refused to hand it over to the third party, the third party could

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[29] *Mathews* v. *Kuwait Bechtel Corporation* [1959] 2 Q.B. 57 at 77.
[30] *Dawson* v. *G.N.R.* [1905] 1 K.B. 260 at 271 *per* Stirling, L.J.
[31] *Supra* n. 20.
[32] *Supra* n. 17.
[33] *Id.* at 342 *per* Lord Romilly, M.R.
[34] *Trendtex Trading, supra* n. 2 at 751.
[35] *Supra* n. 20.
[36] This is O.R. Marshall's view, *supra* n. 13 at 65.
[37] Holdsworth, *History of English Law,* Vol. VII at 533-4, n. 7.
[38] *Supra* n. 20.
[39] *Supra* n. 17.

bring an action of conversion in the name of the true owner, if not in his own name. However one could argue that an action for conversion is an action to enforce a right of property in the thing converted. Why then should this right be considered to be a "bare" right of action?

These conceptual issues were central to *Trendtex Trading Corporation* v. *Credit Suisse.*[40]

The Facts

Trendtex, a Swiss Corporation, contracted to sell to an English company a large amount of cement for shipment to Nigeria. The purchase price and demurrage were to be paid by the English company under a letter of credit to be issued by the Central Bank of Nigeria (C.B.N.). The letter of credit was dishonoured, leaving Trendtex heavily indebted to Credit Suisse, a Swiss bank which had provided the funds necessary for Trendtex to fulfil its contractual obligations. Trendtex sued C.B.N. for damages of US$14,000,000. Credit Suisse agreed to guarantee all the legal fees and costs incurred by Trendtex in the proceedings. At first instance Trendtex's claim failed, C.B.N. pleading sovereign immunity, but Trendtex successfully appealed to the Court of Appeal. While a further appeal to the House of Lords was pending, Credit Suisse obtained an assignment of Trendtex's cause of action against C.B.N. for consideration of US$800,000. Credit Suisse's lawyer, Dr. Patry, had told Trendtex that he had received an offer from a third party to buy Trendtex's cause of action for that price. He said that Credit Suisse would make Trendtex bankrupt unless it agreed to an outright assignment to Credit Suisse, leaving Credit Suisse free to settle with the third party on such terms as it saw fit. Credit Suisse soon after settled with the third party for US$1,200,000. About a month later, Dr. Patry negotiated a settlement with C.B.N. of US$8,000,000. Trendtex brought an action alleging *inter alia* that by English law the assignment was illegal and unenforceable because, as an assignment of a bare cause of action, it savoured of maintenance and champerty.

On the application of Credit Suisse, Robert Goff, J., in the exercise of the inherent jurisdiction of the Court, ordered that the action be stayed. Trendtex appealed to the Court of Appeal. The appeal was dismissed.

The findings of the Court of Appeal which are relevant to this note were, first, that Credit Suisse had a genuine and legitimate interest in maintaining Trendtex's suit against C.B.N., and this interest was sufficient to enable it to take an assignment of the whole cause of action; and secondly, that the cause of action involved in the instant case, a right to sue for damages for breach of contract, was of a proprietary nature and so could validly be assigned without the need for the assignee to have a pre-existing interest in the cause of action. This latter finding was *obiter.*

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[40] *Supra* n. 6. This case also raised some important issues in the conflict of laws, which will not be discussed here.

The Court of Appeal

In the Court of Appeal judgments were delivered by Lord Denning, M.R., and Oliver, L.J. Bridge, L.J. agreed with Oliver, L.J.

After examining the advance of the law of maintenance and the progressive alleviation of the strictness of the doctrine, Oliver, L.J. noted what Lord Denning, M.R. said in *Hill* v. *Archbold*:[41]

> A person is still guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. But the bounds of "legitimate concern" have been widened: and "just cause or excuse" has readily been found.[42]

Oliver, L.J. declined to seek an exhaustive definition of what now constitutes "just cause or excuse" although he did hold that such just cause or excuse exists at least wherever the maintainer has a genuine pre-existing financial interest in maintaining the solvency of the person whose action he maintains. He looked to extending the holding by Chitty, J. in *Guy* v. *Churchill*[43] that a creditor can maintain an action or defence by the trustee of a bankrupt estate to a situation where the creditor wishes to preserve the solvency of a debtor, but said that it was not necessary to do so in the instant case. Credit Suisse had been intimately concerned with the transactions in respect of which C.B.N.'s letter of credit was issued and it was clear that they had relied and had been led to rely on that letter of credit in making their own considerable outlay on behalf of Trendtex, and this gave them a sufficient interest in maintaining Trendtex's action.

Trendtex, however, submitted that even if it were permissible for a person having only a financial interest in the solvency of a party to an action to maintain the action and to take a charge on the future proceeds for what is due to him,[44] it is never permissible for such a person to take an assignment of the cause of action and any agreement under which he purports to do so will be illegal and void. Oliver, L.J.'s short answer to this submission was that it was inconceivable that the interest which would justify Credit Suisse in maintaining the suit and in taking a charge on the proceeds would not equally justify the assignment to it of the whole cause of action. But on the way to this conclusion he considered the argument on which this submission was based, that is that the law will not permit the assignment of a "bare" cause of action. It is here that the main issue of the instant case arises.

Oliver, L.J. accepted that the reason why the assignment of a bare right to litigate was ineffective was because equity refused to lend its aid to such an assignment since the assignment "savoured of or was likely to lead

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[41] [1967] 3 All E.R. 110 at 112; [1968] 1 Q.B. 686 at 694.

[42] Quoted by Oliver, L.J., *supra* n. 2 at 752. Although criminal and civil liability for maintenance and champerty were abolished by the Criminal Law Act 1967, s 14(2) should be noted: "The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."

[43] *Supra* n. 22.

[44] *Glegg* v. *Bromley*, *supra* n. 8.

to maintenance".[45] But this did not mean that the whole agreement in which the purported assignment was contained was illegal and void *ab initio*.[46]

Oliver, L.J. examined what amounts to a bare right of action. He observed that the reluctance of equity to lend assistance to the assignment of a right which was essentially no more than a right to carry on litigation survived the general statutory assignability of choses in action in section 25 of the Judicature Act 1873, which was construed as excluding from the ambit of the expression "chose in action" rights the assignment of which would not, prior to the Act, have been enforced in equity,[47] but noted that the cases on this point tended to be inconsistent and illogical. The cases agreed that, with certain exceptions,[48] a cause of action in tort was not generally assignable. But the assignability or otherwise of the type of action involved in the instant case, a right to recover damages for breach of contract, was not so clear-cut. He rejected the view put forward by cases such as *May* v. *Lane*[49] that such a right was to be equated with a personal right to sue. *Sear* v. *Lawson*[50] and *Ogdens Ltd.* v. *Weinberg*,[51] according to Oliver, L.J., clearly state that a bankrupt's claim for damages for breach of contract can be assigned by the trustee in bankruptcy. This can only be done if the right to sue is "property" of the bankrupt. Looked at from the point of view of maintenance and champerty:

> What is it (if anything) that distinguishes the assignment of the benefit of a subsisting contract from the assignment of a right to enforce a contract the performance of which has been withheld? What logical dividing line is there between the innocent assignee of a contract and the champertous assignee of the right to sue for damages for its breach? Why is it to be assumed that the former will behave with total rectitude whilst the latter may suppress evidence, suborn witnesses and advance inflated and unsustainable claims? Authority gives no certain answer . . . [it] is difficult to see why, logically, a purchaser from the trustee in bankruptcy of the original claimant should be less prone to misconduct than a purchaser himself before the bankruptcy. . . .[52]

Oliver, L.J. referred to *Fitzroy* v. *Cave*[53] which held that despite the fact that the assignee of a debt admitted that he had no interest in the matter aside from making the debtor bankrupt, which seems a plain case of maintenance, the effect of section 25 of the Judicature Act was to make debts assignable as property, and the motive of the assignee in taking the assignment was irrelevant. But what, asked Oliver, L.J., is the difference between a debt and any other contractual right, save the sum due is liquidated? (One notes here that Oliver, L.J. did not think that the uncertainty of the amount to be recovered was a reason affecting the

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[45] *Id.* at 490 *per* Parker, J.
[46] *Id.* at 488 *per* Fletcher Moulton, L.J.
[47] *Supra* n. 24 at 430 *per* Channel, J.
[48] *Supra* n. 21 at 110 *per* Roskill, J.
[49] *Supra* n. 23.
[50] *Supra* n. 22.
[51] (1906) 95 L.T. 567.
[52] *Trendtex Trading, supra,* n. 2 at 754-755.
[53] [1905] 2 K.B. 364.

assignability of the cause of action.) Moreover the debt due in *Fitzroy* v. *Cave*[54] was in fact the right to enforce a contract of sale which had been breached at the time of the assignment. McCardie, J. in *County Hotel and Wine Co. Ltd.* v. *London and North Western Railway Co.*[55] held that ". . . a defendant cannot destroy the assignability of a right of property, whether it be a contract or other form of property, by committing a breach of contract by repudiation prior to the assignment". Oliver, L.J., taking this statement with what was said by the House of Lords in *Ogdens Ltd.* v. *Weinberg,*[56] concluded that now the true dichotomy is not between contractual rights and "bare" rights to litigate, but between strictly personal claims, such as claims in tort or under personal and non-assignable contracts, and claims to enforce what may properly be described as proprietary rights. He went on to say that he would be prepared to hold that where a cause of action arises out of a right which was itself assignable, the cause of action equally remains assignable or if one must use the language of the older cases, that it is not a bare right to litigate but itself a right of property. Such a finding, he said, would not violate current notions of public policy.

The judgment of Lord Denning, M.R. covered much the same ground as that of Oliver, L.J. but in some respects went further. For instance, Lord Denning, M.R., in discussing *Glegg* v. *Bromley*[57] held that there is no reason of public policy why the law should permit the assignment of the proceeds of a right of action and refuse to allow the assignment of the right of action itself, except if the right of action is, as in *Glegg* v. *Bromley,*[58] a personal right of action in tort (that is, slander) which is not generally assignable. As noted above Oliver, L.J. reached a decision consistent with this statement on the facts of the instant case, but did not so hold in such wide terms. Lord Denning, M.R. held that damages for breach of contract are capable of assignment provided the assignment is made for good and sufficient consideration such as reasonably to warrant the assignment. He held that since this was so it would seem that damages in tort, for loss of or damage to property, can also be assigned provided there is good and sufficient consideration. He noted that in many cases of loss of or damage to property the cause of action can be framed either as damages for breach of contract or as damages for tort.

As Treitel points out,[59] often claims in tort are brought to assert rights of property, and it is hard to see why the assignment of a cause of action in (for example) conversion is more likely to lead to improper maintenance than the assignment of a debt. And indeed some tort claims can be enforced by quasi-contractual actions such as where the tort can be "waived". This can be done in certain cases where the tort benefits the defendant, such as

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[54] *Ibid.*
[55] *Supra* n. 25 at 261.
[56] *Supra* n. 51.
[57] *Supra* n. 8.
[58] *Ibid.*
[59] G. H. Treitel, *The Law of Contract* (5th ed.) 1979.

where he converts the plaintiff's property. Lord Denning, M.R. seems to have taken account of these considerations in his judgment.

Oliver, L.J. did not go so far as to hold that a cause of action in tort can be assigned. However Lord Denning, M.R. introduced a requirement of "good and sufficient consideration such as reasonably to warrant the assignment" of the types of causes of action he was discussing. With respect, it is not clear exactly what he meant by this, as he surely did not mean *valuable* consideration. But from reading the judgment as a whole it seems that Lord Denning, M.R. meant that there must not be anything against public policy in the assignment. He referred to *Laurent* v. *Sale and Co.*[60] where the assignee was to take three-quarters of the damages from the litigation of a right of action in an obviously champertous agreement as being a case where the circumstances were *not* such as to reasonably warrant the assignment, and he did have public policy considerations in mind. If this is in fact what he meant his judgment on this point is in line with that of Oliver, L.J., who acknowledged that despite the fact that a right may be generally assignable there may still be circumstances in which on the grounds of public policy the law will refuse to enforce an assignment.[61] Oliver, L.J. gave *Grell* v. *Levy*[62] and *In Re Trepca Mines*[63] as examples of such circumstances because in these cases, he said, it was held that an English court will not permit one of its own officers to be put in a position where his interest and duty may conflict.

Lord Denning, M.R. went on to hold that the words "legal thing in action" in section 25 of the Judicature Act 1873 (the equivalent of section 12 of the Conveyancing Act, 1919 (N.S.W.)) should include a right to sue for a disputed debt or for damages for breach of contract or in tort for loss of or damage to property. But if this is the case, the writer would ask, why must the circumstances be such as to reasonably warrant the assignment? Section 25 lays down a procedure for assigning choses in action and "good and sufficient consideration" is not a necessary requirement. And *Fitzroy* v. *Cave*[64] lays down clearly that where a chose in action can be assigned under section 25, the motives of the assignee in taking the assignment are irrelevant. Nevertheless, there is probably a public policy limitation to what is assignable under section 25, although there does not seem to be an authority directly in point.

However if "good and sufficient consideration" is something of the nature of an interest which the assignee must have in the suit before it can be assigned to him, then Lord Denning, M.R.'s judgment on this point is in fact narrower than that of Oliver, L.J. Oliver, L.J. held that an assignment of a cause of action for damages for breach of contract (at least) was in effect an assignment of a property right with an incidental right of litigation attached. In such circumstances the assignee need not have a pre-existing

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[60] [1963] 2 All E.R. 63; [1963] 1 W.L.R. 829.
[61] *Trendtex Trading, supra* n. 2 at 757.
[62] (1864) 16 C.B.N. s. 73, 143 E.R. 1052.
[63] [1962] 3 All E.R. 351; [1963] Ch. 199.
[64] *Supra* n. 53.

interest in the suit. The interest he acquires by taking the assignment of the right of property is sufficient to enable him to enforce the suit.

With respect, from the point of view of the issues which this note is discussing, Lord Denning, M.R.'s judgment might have been clearer if he had discussed the validity or otherwise of the assignment by Credit Suisse to the third party who did not seem to have any pre-existing interest in the claim against C.B.N. But he obviously thought that Trendtex could only challenge the validity of the assignment to Credit Suisse, and decided the issues on that basis. Oliver, L.J. discussed the assignment to the third party on the hypothesis that he was wrong in finding that the right involved was of a proprietary nature, but there was an "exclusive jurisdiction" clause in the agreement between Trendtex and Credit Suisse which said that any disputes arising under the agreement were to be tried by a Swiss court. He held that an unenforceable assignment did not make the whole agreement in which it was contained void *ab initio* so the exclusive jurisdiction clause still stood. Hence he also did not decide the point. This is unfortunate as the intervention of the third party was a crucial consideration in the judgment of the House of Lords.

The House of Lords

An appeal from the Court of Appeal was unanimously dismissed by the House of Lords.[65] The main speeches were delivered by Lord Wilberforce and Lord Roskill, with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed.

Lord Wilberforce agreed with the Court of Appeal's findings on the law of maintenance and champerty and cited *Martell* v. *Consett Iron Co.*[66] with approval. He held that an assignment of Trendtex's cause of action against C.B.N. to Credit Suisse would have been lawful, but the introduction of the third party, whom he held not to be interested in the suit, affected the validity of the assignment:

> It appears from the face of the agreement [between Trendtex and Credit Suisse] not as an obligation, but as a contemplated possibility, that the cause of action against C.B.N. might be sold to a third party for a sum of $800,000. This manifestly involved the possibility, and indeed the likelihood, of a profit being made, either by the third party or possibly also by Credit Suisse, out of the cause of action. In my opinion this manifestly "savours of champerty" since it involves trafficking in litigation — a type of transaction which, under English law, is contrary to public policy.[67]

Lord Wilberforce cited *In Re Trepca Mines*[68] and *Laurent* v. *Sale and Co.*[69] with approval, saying simply that he thought those decisions were sound in law and the principle of them should be applied in the instant case.

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[65] *Supra* n. 6.
[66] *Supra* n. 5.
[67] *Supra* n. 6 at 771.
[68] *Supra* n. 63.
[69] *Supra* n. 60.

However in view of what the Court of Appeal said about these cases, and from reading the cases themselves, it is, with respect, difficult to see what "the principle" of them is or at least how "the principle" applies in the instant case. Both of these cases seem to concern particular fact situations and policy considerations which underlie them and can be distinguished from the instant case. Lord Wilberforce's speech, from the point of view of the issues raised by this note, is therefore not particularly helpful. He addressed no comments to the Court of Appeal's finding that a right to sue for damages for breach of contract is of the nature of a proprietary right.

Lord Roskill recognised the progressive liberalisation of the law in regard to lawful maintenance, and the more liberal approach of the law to the circumstances in which it would recognise the validity of the assignment of a cause of action and not strike down such an assignment as one of only a bare cause of action. However he disagreed with Lord Denning, M.R. who said that "the old saying that you cannot assign a 'bare right to litigate' is gone".[70] Lord Roskill thought that this still remains a fundamental principle of the law. But he restated the law in this area in broad terms:

> The court should look at the totality of the transaction. If the assignment is of a property right or interest, and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.[71]

Lord Roskill gave *Ellis* v. *Torrington*[72] as an example of the former case and *Compania Columbiana de Seguros* v. *Pacific Steam Navigation Co.*[73] as an example of the latter case.

As a broad formulation of the law in this area Lord Roskill's statement seems to be sound. No longer is there an antiquated general rule with what is probably not even an exhaustive list of exceptions; there is now a rule which in effect takes account of the exceptions. However Lord Roskill went on to hold that the agreement between Trendtex and Credit Suisse was not an assignment designed to enable Credit Suisse, having a genuine commercial interest in taking the assignment, to recoup their own losses, but was rather designed to enable the claim against C.B.N. to be sold to the third party. He held that the agreement was a step towards the sale of a bare cause of action to a third party who had no genuine commercial interest in the claim in return for a division of the "spoils", Credit Suisse taking the fixed amount of $1,100,000. This is a rather unexpected finding as one cannot divide "spoils" which do not exist. The $1,100,000 was not to be paid out of the "spoils"; it was paid out of the third party's own pocket.[74]

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[70] *Supra* n. 6 at 779 (House of Lords), *supra* n. 2 at 744 (Court of Appeal).
[71] *Supra* n. 6 at 779.
[72] [1920] 1 K.B. 399.
[73] *Supra* n. 21.
[74] This is one point which distinguishes the instant case from *Laurent* v. *Sale and Co.*, *supra* n. 60.

With respect, it would appear that Lord Roskill speciously attempted to force the facts of the instant case into a "champerty" mould with the result that understanding of the matter is not really advanced. He also (with Lord Wilberforce) omitted to concern himself with the judgment of the Court of Appeal which found that the right of action involved in the instant case was in fact a right of property. He seemed simply to assume that this was not so.

However an interesting point to note is that Lord Roskill's statement seems to imply that rights in tort can be assigned providing, of course, that the assignee has a "genuine commercial interest" in taking the assignment.[75] This could be what Lord Denning, M.R. meant by "good and sufficient consideration such as reasonably to warrant the assignment". If this is so then Lord Roskill and Lord Denning, M.R. would be in agreement on this point. However Lord Roskill did not define the term "genuine commercial interest". Thus one must await judicial interpretation of this term. But one may tentatively conclude, on the authority of the instant case, that an interest arising out of a contract can be assigned after breach of the contract has occurred where the assignee has financed the assignor's contractual obligations. Other types of commercial interests, such as an interest in maintaining the solvency of the assignor may also be sufficient, since Credit Suisse were in a position to make Trendtex bankrupt if Trendtex did not assign the cause of action against C.B.N. to it. Whether a pre-existing debt is a sufficient interest is unclear (*Glegg* v. *Bromley*[76] is an authority to the contrary).

Generally the House of Lords and the Court of Appeal were in agreement that a commercial interest sufficient to enable a party to maintain a suit is sufficient to enable that party to take an assignment of the whole cause of action. But the extent of this interest, which presumably must exist separately from the assignment, was not gauged, apart from the requirement that the interest be "genuine".

Conclusion

On the basis of the foregoing discussion the following submissions can be made:

1. The objection that an assignment of a cause of action savours of maintenance and champerty and is therefore invalid cannot be raised where:

(a) the assignment is of a "property right or interest" and the cause of action is ancillary to that right or interest; or
(b) the assignment is of any claim, whether based on contract or tort, provided that the assignee has a "genuine commercial interest" in taking the assignment and in enforcing it for his own benefit.

2. Arguably the case under discussion has extended the law relating to assignments in holding that a right of action based on tort is assignable

[75] This implication is borne out by Lord Roskill's citation of *Compania Colombiana de Seguros, supra* n. 21.
[76] *Supra* n. 8.

where the assignee has a "genuine commercial interest" in the suit. Such an interest exists at least where:

(a) the assignee has financed the assignor's contractual obligations — the assignee can take an assignment of the benefit of the contract even where the contract has previously been breached, and even where the cause of action arising from the breach is framed in tort; or

(b) the assignee has a commercial interest (as, say, a creditor) in maintaining the solvency of the assignor.

3. In any event the above submissions are subject to considerations of public policy which may yet render ineffective an otherwise valid assignment, for example where an officer of the court takes an assignment of a cause of action and is thereby put in a position where his interest and duty may conflict.[77]

4. A cause of action for damages for breach of contract is probably unassignable (subject to point 1. (b)) since it is not a property right or interest. It is a bare right of action. The word "probably" is used here because there may be considerations involved in the facts of the instant case which indicate that this conclusion is not necessarily to be reached. However, neither Lord Roskill nor Lord Wilberforce directed any comments to the matter, which is unfortunate in the light of the *County Hotel and Wine Case*[78] and the speeches of the Court of Appeal in the instant case.

In any event the tools of analysis provided by Lord Roskill will no doubt be valuable in any examination of the validity of purported assignments of choses in action, even though one must await judicial determination of the precise scope of some of the concepts which His Lordship used in his restatement of the law. However at the very least one can say that the discussion has been given a much clearer direction.

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[77] See *In Re Trepca Mines, supra* n. 63.
[78] *Supra* n. 25.