Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 19 - Assignment

Section 1. - Assignment [1]

Assignment of choses in action: at common law

19-001

! The term “things in action” or, as they are still called, choses in action, is used to describe “all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession”. [2] Contractual rights, being things in action as opposed to things in possession, were not assignable at common law. This rule seems to have been based initially on the difficulty of conceiving of the transfer of an intangible, at any rate one of such a personal nature, and later on the desire to avoid maintenance, viz officious intermeddling in litigation. It was subject to two exceptions: (1) the benefit of a contract could be assigned to or by the Crown; (2) the holder of a bill of exchange could assign it by the law merchant. [3] Further, there were certain assignments by operation of law, e.g. on the death or bankruptcy of a contracting party. [4] Before 1875, the only methods of achieving the equivalent of an assignment of contractual rights at law were by novation, [5] and by procuring the debtor’s acknowledgment that he held for the assignee [6]: but both of these required the consent of the debtor. Powers of attorney could also be used to effect assignments, but these had considerable disadvantages, being normally revocable. [7]

Assignment in equity

19-002

The rule of equity, on the other hand, was to permit the assignment of contractual rights whether such rights were legal or equitable. If the rights were equitable (e.g. a legacy or a share in a trust fund), the assignee could sue in his own name, but it was necessary to make the assignor a party to the suit if he retained any interest in the subject-matter, for instance if the assignment was not absolute but conditional or by way of charge. If the right was a legal right, equity could compel the assignor to allow the assignee to use his name in a common law action. [8] The assignor had to be a party to such an action in order to bind him at law.

Assignment under particular statutes

19-003

The assignment of certain kinds of choses in action is now regulated by particular statutes. Examples are: bills of lading [9]; policies of life insurance [10]; policies of marine insurance [11]; shares in a company [12]; negotiable instruments [13]; patents [14]; and copyright. [15] Furthermore, to protect the creditors of insolvent assignors, provision has been made for the registration of certain assignments. [16]

Statutory and equitable assignments

19-004

General statutory provision for the assignment of choses in action was first made by s.25(6) of the Judicature Act 1873, which is now repealed and substantially re-enacted by s.136 of the Law of Property Act 1925. But an assignment which fails to comply with the statutory requirements is not necessarily invalid, for it may take effect as a perfectly good equitable assignment: "[t]he statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree". [17] Indeed, it appears that for the purpose of the substantive law, there is often little (if any) advantage in a statutory assignment over an equitable assignment. To a considerable extent the rules governing them are identical, e.g. the rules relating to the question whether a particular right is assignable, [18] to priorities between successive assignees (at any rate in most cases) [19] and to the principle that assignments are "subject to equities". [20] Sometimes, as, e.g. with regard to consideration, the rules may be formulated differently, but appear to be substantially identical in result. [21] And even where the rules governing statutory and equitable assignments are different, e.g. with regard to the necessity for writing [22] and to assignments by way of charge, [23] the distinction is usually of little importance so far as the substantive law is concerned, because the rules of equity are often wider, but never narrower, than the rules governing statutory assignments.

Difference between statutory and equitable assignments

19-005

However, there is one very important procedural consequence which attaches to the distinction between statutory and equitable assignments. A statutory assignee can sue the debtor without joining the assignor as a party to the action, [24] whereas an equitable assignee often cannot do this. [25] Furthermore, it must be observed that whereas a statutory assignment passes a legal right to the assignee, an equitable assignment passes only an equitable right. In practice, as already observed, this usually makes little difference as a matter of substantive law to the efficacy of the assignment; but there are some situations where the distinction can prove of practical importance. For example, it has been held that an assignee of an option to renew a contract for services who had not given notice of his assignment to the other contracting party could not exercise the option: the reasoning is based on the fact that the assignment was equitable only. [26]

Transfer of rights?

19-006

The conventional view is that an equitable assignment, like a statutory assignment, involves a transfer of rights from the assignor to the assignee. However, this orthodox position has recently been challenged. [27] It has been argued that equitable assignment, as distinct from statutory assignment, does not involve any *transfer* of rights. Rather the assignee in equity is given new rights by the assignor in respect of the rights of the assignor which are still retained by the assignor: that is, the assignee's rights encumber the assignor's rights but the assignor's rights are not transferred. In effect, the assignor holds its rights on trust for the assignee. Although this theory runs counter to the prevailing view that all assignments involve a transfer and that an assignment in equity and a trust are different concepts, it does have the merit of providing a convincing substantive reason, rather than a somewhat vague procedural explanation, for why the assignor must (at least normally) be joined to the assignee's action: i.e. as the assignor retains the relevant rights, it follows that the assignee's action must be brought in the assignor's name.

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1. See Marshall, *The Assignment of Choses in Action* (1950); Biscoe, *Credit Factoring* (1975); Goode on Legal Problems of Credit and Security, 4th edn (2009), Ch.5; Salinger on Factoring, 4th edn (2005); Tolhurst, *The Assignment of Contractual Rights* 2nd edn (2016). M. Smith and N. Leslie, *The Law of Assignment*, 2nd edn (2013); Guest on the Law of Assignment (2012). See also Starke, *Assignments of Choses in Action in Australia* (1972). For conflict of laws in

relation to assignment, see below, paras 30-122—30-124, 30-289—30-293.

2. *Torkington v Magee [1902] 2 K.B. 427, 430; reversed [1903] 1 K.B. 644*.

3. See Milnes Holden, *The History of Negotiable Instruments in English Law* (1955).

4. See below, Ch.20.

5. Below, para.19-087.

6. Below, para.19-091.

7. See Marshall, *The Assignment of Choses in Action*, at pp.67–69.

8. *Hammond v Messenger (1838) 9 Sim. 327*.

9. Carriage of Goods by Sea Act 1992.

10. Policies of Assurance Act 1867 s.1.

11. Marine Insurance Act 1906 s.50(2).

12. Companies Act 2006 s.544, replacing Companies Act 1985 s.182(1); Stock Transfer Act 1963.

13. Bills of Exchange Act 1882.

14. Patents Act 1977 ss.30, 32.

15. Copyright Designs and Patents Act 1988 ss.90, 94.

16. Insolvency Act 1986 s.344; Companies Act 2006 ss.860–861, 863, 866–867, 874, replacing Companies Act 1985 ss.395–398; below, paras 19-061—19-067.

17. *Brandt's Sons & Co v Dunlop Rubber Co [1905] A.C. 454, 462*.

18. Below, para.19-043.

19. Below, para.19-069.

20. Below, para.19-071.

21. Below, paras 19-020 and 19-028 et seq.

22. Below, para.19-016.

23. Below, para.19-013.

24. Below, para.19-007.

25. Below, paras 19-039—19-042.

26. *Warner Bros Records Inc v Rollgreen Investments Ltd [1976] Q.B. 430* (see Kloss (1975) 39 Conv.(N.S.) 261). But the authority of the case is somewhat distorted by the formulation of the question to which the Court of Appeal gave an answer, and some of the dicta may go further than was necessary for the decision of the case, which should perhaps be regarded as authority only upon the equitable assignment of options; quaere whether the result would have been the same had the assignment been oral, and so still equitable, but the assignee *had* given notice (even in the same letter). Note also that some aspects of the reasoning in this case were disapproved by a majority of the Court of Appeal (Peter Gibson L.J., with whom Waite L.J. agreed) in *Three Rivers D.C. v Bank of England [1996] Q.B. 292*.

27. e.g. Edelman and Elliott, “Two Conceptions of Equitable Assignment” (2015) 131 L.Q.R. 228

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Chapter 19 - Assignment

Section 1. - Assignment [1]

(a) - Statutory Assignments

Law of Property Act 1925 s.136

19-007

This section provides as follows:

> "(1)
>
> Any absolute assignment by writing under the hand of the assignor [28] (not purporting to be by way of charge only) of any debt or other legal thing 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 claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—
>
> (a)
>
> the legal right to such debt or thing in action;
>
> (b)
>
> all legal and other remedies for the same; and
>
> (c)
>
> the power to give a good discharge for the same without the concurrence of the assignor:
>
> Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—
>
> (a)
>
> that the assignment is disputed by the assignor or any person claiming under him; or

(b)

of any other opposing or conflicting claims to such debt or thing in action;

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.

(2)

This section does not affect the provisions of the Policies of Assurance Act 1867." [29]

19-008

It will be seen that, in order that the section may apply, three conditions must be fulfilled:

(1)

the assignment must be absolute and not purport to be by way of charge only;

(2)

it must be in writing under the hand of the assignor;

(3)

express notice in writing thereof must be given to the debtor or trustee.

The general effect of the section is to allow the assignee to sue the debtor in his own name instead of, as previously, having to sue in the name of the assignor and perhaps having to go to a court of equity to compel his joinder in the action. The section:

> "… is merely machinery: … it enables an action to be brought by the assignee in his own name in cases where previously he would have sued in the assignor's name, but only where he could so sue." [30]

"Debt or other legal thing in action"

19-009

The phrase has been held to include the benefit of a contract for the sale of a reversionary interest, [31] and rights to claim indefinite sums of money, as for compensation under statute for the injurious affecting of land by a railway, [32] or for damages for loss in respect of which the assignee was the assignor's insurer. [33] A debt arising out of an existing contract, but payable at a future time, is capable of assignment under s.136. [34] Examples are future instalments of rent, future instalments of money due under an instalment contract, retention moneys under a building contract, future instalments of salary. A future chose in action in the strict sense is incapable of actual assignment, though it may be the subject of an agreement to assign, which will operate in equity in very much the same way as an

actual assignment. [35]

19-010

In *Stein v Blake* [36] it was held by the House of Lords that, if A and B have mutual claims against each other and A becomes bankrupt, the effect of s.323 of the Insolvency Act 1986 is that the debt due to A ceases, on A's bankruptcy, to exist as a chose in action and is replaced by a new chose in action, namely the claim to the net balance owing. [37] Their Lordships went on to decide that, like any other chose in action, that right to the net balance (if any) can be assigned by the trustee in bankruptcy before it has been ascertained by the taking of an account between the trustee and B.

19-011

In *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [38] the House of Lords clarified that a right to rescind a mortgage is not a chose in action or part of a chose in action and an owner cannot therefore assign a right to rescission separately from his property. On the other hand, a right to damages is a chose in action which can be assigned. It followed that there was no objection to a clause in the Investors Compensation Scheme claim form by which investors assigned a right to damages against a building society to the Investors Compensation Scheme Ltd but which did not assign (because legally impossible) a right to rescission of the investors' mortgages with the building society.

19-012

It might at first sight have been supposed that the expression "debt or other *legal* thing in action" was confined to legal choses in action; but the reference to a "trustee" militates against this and there is authority that the phrase includes equitable choses, or, as they are sometimes called, choses in equity. [39] The point seems, however, to be of no importance, for the principal effect of the section is to enable an assignee of a *legal* chose in action to sue alone in certain cases where he could not otherwise do so; the section seems to make no difference to the assignee of an equitable chose in action who can probably sue alone under the Act only in circumstances where he could do so in equity. [40]

"Absolute … and not by way of charge"

19-013

The assignment must be absolute and not purport to be by way of charge only. An assignment by way of mortgage may, however, be absolute within the meaning of the section, if there is an express [41] or implied [42] proviso for reassignment on repayment of the loan: for the reassignment would involve fresh notice to the debtor, who would thus be in no doubt as to whom he ought to pay the debt. [43] An assignment of all moneys due or to become due from the debtor, which was expressed to be by way of continuing security for all moneys due from the assignor to the assignee, has been held to be absolute. [44] On the other hand, where the assignor charged a sum which would become due to him from the debtor as security for advances made to him by the assignee, and assigned his interest in that sum until the advances were repaid to the assignee with interest, this was held to be by way of charge and not within the section. [45] The fact that the assignment is expressed to be by way of security for a loan does not by itself prevent it from being absolute, [46] though combined with other factors such expressions may have this effect. [47] Thus, a provision that the assignor was entitled to exercise all its rights over the property until in default under the loan agreement has prevented an assignment from being absolute. [48] The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question *as against the debtor*? If so, the assignment will be absolute; but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only. Much may depend on the language of the particular instrument; in construing it, the court will look at the whole of its language. The words italicised above are of crucial importance, for it is no concern of the debtor whether the assignor and assignee have some private arrangement for the disposal of the debt after it has been paid by the debtor. Thus the fact that the assignee is to hold the proceeds of the debt, [49] or the surplus proceeds beyond a stated amount, [50] on trust for the assignor

does not prevent the assignment from being absolute.

Absolute and conditional assignments

19-014

Some cases distinguish between absolute and conditional assignments. [51] To conditional assignments similar criteria will be applied: if the assignor retains, by virtue of the condition, some interest in the debt, it is desirable that he be joined in proceedings regarding it, and the assignment is not absolute.

Part of a debt

19-015

An assignment of an unascertained part of a debt, e.g. of "so much of my salary" as amounts to a fixed sum and "any further sums in which I may hereafter become indebted to you", is not an absolute assignment. [52] And it is settled, though there were formerly doubts, [53] that an assignment of a definite part of a debt is not within the section. [54] This is because it would increase the burden on the debtor if the creditor were allowed to split up the debt into as many separate causes of action as he thought fit [55]; and also because conflicting decisions might result if the existence or amount of the debt was in dispute. [56] It will be seen that neither of these reasons holds good if the assignor and the assignees are all made parties to the action: and it must be remembered that an assignment which is not within the section because it is not absolute may nevertheless be a valid equitable assignment. [57] The result is that if part of a debt is assigned, the assignee cannot sue for that part without joining the assignor, nor can the assignor sue for the balance without joining the assignee. [58]

Written assignment

19-016

The assignment must be in writing under the hand of the assignor. No particular form is however necessary: the writing can be quite informal. [59] A direction in writing by a creditor to his debtor to pay the assignee, handed to the assignee, may amount to an assignment, [60] but such a direction handed to the *debtor* will not by itself constitute an assignment unless there is evidence that the assignee has requested or consented to it [61]; and even if he has, the direction may constitute no more than authority to pay, and gives the assignee no rights. Thus the drawing of a cheque in favour of a third party does not constitute a statutory assignment of a bank balance or part of it. [62]

Written notice to the debtor

19-017

Under the statute notice in writing to the debtor is necessary. It is:

> "… wrong to suppose that a separate document purposely prepared as a notice, and described as such, is necessary in order to satisfy the statute. The statute only requires that information relative to the assignment shall be conveyed to the debtor, and that it shall be conveyed in writing." [63]

Thus a written demand for payment sent by the assignee to the debtor has been held sufficient. [64] Beyond this, however, the statute has been strictly construed, and it has been held that the notice must be unconditional, [65] and that written notice must be given, even though the debtor cannot read.

[66] So also it is essential that the notice be given to the debtor himself: thus, where an insured assigned the proceeds of a policy and notice was given to the broker through whom the proceeds were collected, it was held that the notice was insufficient. [67] The notice is apparently invalid if it purports to identify the assignment by giving its date and that date is a wrong date [68]; though there is nothing in the section which requires the assignment to be dated at all, and it has been held that a notice is valid though it wrongly states that another notice has already been given. [69] On the other hand, the statute does not prescribe any limit of time within which notice must be given, [70] nor does it lay down that the notice must be given by any particular person. [71] It may consequently be given after the death of either the assignor or the assignee. [72] Notice must be given before the assignee starts his action, [73] though failure to do this will not prevent the assignee from proceeding with his action on the footing that he is an equitable assignee. [74] In this event, however, the court may require the assignor to be made a party to the proceedings. [75]

19-018

"The date of such notice" in the section means the date when it is received by or on behalf of the debtor. [76] A debtor with notice of an absolute assignment is entitled, and indeed bound, to treat the debt as transferred to the assignee. Payment by the debtor to the assignor will therefore not give him a good discharge, and he will remain liable to pay the debt again to the assignee. [77] If notice is given late, equities which may come into existence prior thereto may be let in, e.g. the assignee must give credit for any payments made to the assignor by the debtor while the latter was in ignorance of the assignment. If there are more assignees than one, their priority is determined according to the dates on which they gave notice to the debtor. [78] It has been held that if the debtor pays his debt by cheque, he may disregard a subsequent notice that the debt has been assigned: he is under no duty to stop the cheque. [79]

19-019

Since a creditor can assign by directing his debtor to pay the assignee it seems that a single written document could suffice to constitute both the assignment itself and the notice required by the section. [80]

Consideration

19-020

Consideration is not required for a statutory assignment. [81]

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1. See Marshall, *The Assignment of Choses in Action* (1950); Biscoe, *Credit Factoring* (1975); Goode on Legal Problems of Credit and Security, 4th edn (2009), Ch.5; Salinger on Factoring, 4th edn (2005); Tolhurst, *The Assignment of Contractual Rights* 2nd edn (2016). M. Smith and N. Leslie, *The Law of Assignment*, 2nd edn (2013); Guest on the Law of Assignment (2012). See also Starke, *Assignments of Choses in Action in Australia* (1972). For conflict of laws in relation to assignment, see below, paras 30-122—30-124, 30-289—30-293.

28. In view of the specific references to signature by an agent in ss.40 and 53 of the same Act (cf. Law of Property (Miscellaneous Provisions) Act 1989 s.2(3)), it would seem that signature by an agent is here insufficient, at any rate if he signs his own name: see *Wilson v Wallani (1880) 5 Ex. D. 155*; but cf. *Re Diptford Parish Lands [1934] Ch. 151*; Partnership Act 1890 s.6. See also Bowstead and Reynolds on Agency, 20th edn (2014), para.2–024.

29. This Act makes provision for the assignment of life insurance policies. See Vol.II, Ch.42.

30. *Torkington v Magee [1902] 2 K.B. 427, 435; reversed. [1903] 1 K.B. 644*.

31. *Torkington v Magee [1902] 2 K.B. 427*.

32. *Dawson v G.N. & City Ry [1905] 1 K.B. 260*.

33. *King v Victoria Insurance Co Ltd [1896] A.C. 250*; *Compania Colombiana de Seguros v Pacific S.N. Co [1965] 1 Q.B. 101*. See also *Re Battle's Feed Mill Ltd (1975) 59 D.L.R. (3d) 488* (bankruptcy dividend).

34. *Brice v Bannister (1878) 3 Q.B.D. 569* (though the assignment in this case seems to have been treated as equitable); *Buck v Robson (1878) 3 Q.B.D. 686*; *Walker v Bradford Old Bank (1884) 12 Q.B.D. 511*; *Jones v Humphreys [1902] 1 K.B. 10*; *G. & T. Earle Ltd v Hemsworth R.D.C. (1928) 44 T.L.R. 605, 758*. Contrast *Law v Coburn [1972] 1 W.L.R. 1238*. See further, below, para.19-029.

35. Below, para.19-033.

36. *[1996] A.C. 243*.

37. The reasoning on this in *Farley v Housing and Commercial Developments Ltd [1984] B.C.L.C. 442* was approved.

38. *[1998] 1 W.L.R. 896*. A right to a vehicle registration mark is not a chose in action or, if it is, is not capable of being assigned: *Goel v Pick [2006] EWHC 833 (Ch), [2007] 1 All E.R. 982*.

39. *Torkington v Magee [1902] 2 K.B. 427, 430–431; reversed [1903] 1 K.B. 644*; cf. *R. v Victoria Insurance Co [1896] A.C. 250, 254*; *Manchester Brewery v Coombs [1901] 2 Ch. 608, 619*; *Re Pain [1919] 1 Ch. 38, 44–45*.

40. i.e. where the assignment is absolute: below, paras 19-041—19-042.

41. *Tancred v Delagoa Bay Co (1889) 23 Q.B.D. 239*.

42. *Durham Bros v Robertson [1898] 1 Q.B. 765, 772*.

43. *[1898] 1 Q.B. 765*.

44. *Hughes v Pump House Hotel Co [1902] 2 K.B. 190*; *Bexhill UK Ltd v Razzaq [2012] EWCA Civ 1376* at [45].

45. *Durham Bros v Robertson [1898] 1 Q.B. 765*.

46. *Hughes v Pump House Hotel Co [1902] 2 K.B. 190*. See also *Care Shipping Corp v Latin American Shipping Corp [1983] Q.B. 1005, 1016*.

47. *Mercantile Bank of London Ltd v Evans [1899] 2 Q.B. 613*.

48. *The Halcyon the Great [1984] 1 Lloyd's Rep. 283*. See similarly *The Balder London [1980] 2 Lloyd's Rep. 489*.

49. *Comfort v Betts [1891] 1 Q.B. 737*; *Fitzroy v Cave [1905] 2 K.B. 364*.

50. *Burlinson v Hall (1884) 12 Q.B.D. 347*; *Bank of Liverpool and Martins Ltd v Holland (1926) 43 T.L.R. 29*.

51. e.g. *Durham Bros v Robertson [1898] 1 Q.B. 765, 773*; *Grey v Australian Motorists & General Insurance Co Pty Ltd [1976] 1 N.S.W.L.R. 669*; cf. *The Balder London [1980] 2 Lloyd's Rep. 489*, in which Mocatta J. spoke of the assignment being put "in suspense".

52. *Jones v Humphreys [1902] 1 K.B. 10*.

53. See *Brice v Bannister (1878) 3 Q.B.D. 569*; but the point was not argued, and in the Court of Appeal the assignment seems to have been treated as equitable. See also *Skipper v Holloway*

[1910] 2 K.B. 630.

54. *Forster v Baker [1910] 2 K.B. 636*; *Conlan v Carlow CC [1912] 2 I.R. 535*; *Re Steel Wing Co [1921] 1 Ch. 349*; *G. & T. Earle Ltd v Hemsworth R.D.C. (1928) 44 T.L.R. 605, 758*; *Williams v Atlantic Assurance Co [1933] 1 K.B. 81, 100*; *Walter and Sullivan Ltd v Murphy & Sons Ltd [1955] 2 Q.B. 584*; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] 2 W.L.R. 1344* at [60], [75].

55. *Durham Bros v Robertson [1898] 1 Q.B. 765, 774*.

56. *Re Steel Wing Co [1921] 1 Ch. 349, 357*.

57. *National Bank of Abu Dhabi PJSC v BP Oil International Ltd [2016] EWHC 2892 (Comm)* at [24].

58. *Walter and Sullivan Ltd v Murphy & Sons Ltd [1955] 2 Q.B. 584*.

59. *Re Westerton [1919] 2 Ch. 104*; *The Kelo [1985] 2 Lloyd's Rep. 85, 89*.

60. *Brice v Bannister (1878) 3 Q.B.D. 569*; *Harding v Harding (1886) 17 Q.B.D. 442*; *Grey v Australian Motorists & General Insurance Co Pty Ltd [1976] 1 N.S.W.L.R. 669*.

61. *Curran v Newpark Cinemas Ltd [1951] 1 All E.R. 295*. cf. below, para.19-023.

62. *Schroeder v Central Bank of London Ltd (1876) 34 L.T. 735, 736*; Bills of Exchange Act 1882 s.53(1); cf. below, para.19-023. For the different position in Scotland see s.53(2); *Williams v Williams (1980) S.L.T. 25*.

63. *Van Lynn Developments Ltd v Pelias Construction Co Ltd [1969] 1 Q.B. 607, 615*. See also *Denney, Gasquet and Metcalfe v Conklin [1913] 3 K.B. 177*; cf. *James Talcott Ltd v John Lewis & Co Ltd [1940] 3 All E.R. 592* (equitable assignment); see also *Herkules Piling Ltd v Tilbury Construction Ltd (1992) 61 Build. L.R. 107* (the disclosure to the debtor of a document of assignment on discovery in an action by the assignor held to be insufficient notice for a legal or equitable assignment).

64. *Van Lynn Developments Ltd v Pelias Construction Co Ltd [1969] 1 Q.B. 607*. But cf. *Warner Bros Records Inc v Rollgreen Investments Ltd [1976] Q.B. 430* (exercise of option).

65. *The Balder London [1980] 2 Lloyd's Rep. 489, 495*.

66. *Hockley and Papworth v Goldstein (1920) 90 L.J.K.B. 111*.

67. *Amalgamated General Finance Co Ltd v C.E. Golding & Co Ltd [1964] 2 Lloyd's Rep. 163*; *Magee v U.D.C. Finance Ltd [1983] N.Z.L.R. 438*. But cf. the position of an equitable assignment, below, para.19-021 n.86.

68. *Stanley v English Fibres Industries Ltd (1899) 68 L.J.Q.B. 839*; *W. F. Harrison & Co Ltd v Burke [1956] 1 W.L.R. 419*; criticised in *(1956) 72 L.Q.R. 321* and explained in *Van Lynn Developments Ltd v Pelias Construction Co Ltd [969] 1 Q.B. 607* at 612. The *Harrison case [1956] 1 W.L.R. 418, 421* contains a suggestion that a misstatement of the amount of the debt might also vitiate the notice.

69. *Van Lynn Developments Ltd v Pelias Construction Ltd [1969] 1 Q.B. 607*; *Grey v Australian Motorists & General Insurance Co Pty Ltd [1976] 1 N.S.W.L.R. 669* (date referred to but no date inserted).

70. There appears to be no authority on the question of whether notice can be given before the assignment takes place.

71. *Bateman v Hunt [1904] 2 K.B. 530, 538*.

72. *Walker v Bradford Old Bank (1884) 12 Q.B.D. 511*; *Bateman v Hunt [1904] 2 K.B. 530*; *Re Westerton [1919] 2 Ch. 104*.

73. *Compania Colombiana de Seguros v Pacific Steam Navigation Co [1965] 1 Q.B. 101, 128–129*. It is arguable that this should no longer be the rule; and that instead a court could prevent any unfairness to defendants by exercising its discretion to disallow an application to amend the particulars of claim so as to add the assigned claim. Say, for example, a claimant is met by the defence that part (but not all) of what he is claiming is his company's, rather than his personal, claim. If he then takes a legal assignment from the company and gives written notice to the defendant, should he be able to apply for an amendment without bringing a fresh action? Or is the "rule" in the *Compania Colombiana* case a rigid one that would automatically mean that such an application would fail?

74. *Weddell v Pearce & Major [1988] Ch. 26, 42*, in which Scott J. rejected the obiter dicta in the *Compania Colombiana case [1956] 1 Q.B. 101* to the extent that Roskill J. had there said that there was no valid equitable assignment.

75. Below, paras 19-039—19-042.

76. *Holt v Heatherfield Trust Ltd [1942] 2 K.B. 1*.

77. *Jones v Farrell (1857) 1 D & J 208*; *Brice v Bannister (1878) 3 Q.B.D. 569*; Law of Property Act 1925 s.136; *The Halcyon the Great [1984] 1 Lloyd's Rep. 283, 289*. The debtor could prima facie recover the money paid to the assignor if paid under a mistake; below, paras 29-033—29-056.

78. Below, paras 19-069—19-070.

79. *Bence v Shearman [1898] 2 Ch. 582*.

80. See *Curran v Newpark Cinemas Ltd [1951] 1 All E.R. 295*; *Cossill v Strangman [1963] N.S.W.R. 1695*.

81. *Harding v Harding (1886) 17 Q.B.D. 442*; *Re Westerton [1919] 2 Ch. 104*; *Holt v Heatherfield Trust Ltd [1942] 2 K.B. 1, 5*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 19 - Assignment

Section 1. - Assignment [1]

(b) - Equitable Assignments

Notice

19-021

As has been seen above, an assignment cannot be effective under the statute unless written notice is given to the debtor, but an assignment may be perfectly valid in equity without any such notice. [82] Notice is, however, obviously desirable, since, as in the case of statutory assignments, until he receives it the debtor is entitled to treat the assignor as his creditor and to discharge his debt by payment to him [83]; the giving of notice may prevent further equities attaching to the debt [84]; and may affect priorities. [85] From the debtor's perspective it seems that, if the debtor ignores a notice and pays the assignor, he is not discharged [86]: unless the debtor can secure the agreement of the assignor and assignee as to the amounts of their respective interests, it would certainly be unsafe for him to settle alone with either, the only safe course being to interplead. Where the assignment concerns a transaction in which an agent, such as a solicitor, was engaged on behalf of the debtor, notice to the agent will constitute notice to the debtor. [87]

Means of assignment

19-022

An assignor can assign a contractual right in equity in one of two main ways. He can inform the assignee that he transfers the chose to him [88]; or he can instruct the debtor to discharge the obligation by payment to, or performance for, the assignee. [89] Thus an agreement by merchants with a bank that payment for goods sold by the merchants should be remitted direct by the purchasers to the bank has been held to constitute a valid equitable assignment of the amounts to the bank. [90]

Assignment or mandate

19-023

On the other hand, a mere direction by a creditor to his debtor to pay money to a third person is not necessarily an assignment, for such a direction may be nothing more than a revocable mandate to the debtor. [91] So, where a person who was overdrawn at his bank directed his debtor to pay sums due to him directly to the credit of his account at the bank, this was held not to be an assignment, but a mere revocable mandate. [92] Where similar instructions were given in another case, but were expressly declared to be irrevocable save with the consent of the bank, it was held that an assignment had been made, [93] but it has also been held in connection with statutory assignment that even an express provision of this nature did not make the instructions irrevocable unless the assignee had prior or subsequent knowledge of them. [94]

Known to assignee

19-024

Where an assignment is made by instructions to the debtor it is not clear whether it can have any effect at all before the assignee knows of the instructions and therefore has a chance to accept or decline the assignment. The cases cited above establish that the assignment is not effective as against the creditors of the assignor before the assignee knows of it, so that a creditor who serves a garnishee order on the assignor before the assignee gets to know of the purported assignment will have priority over the assignee. [95] It may be that such an assignment would be valid as against the assignor himself even before the assignee knows of the instructions to the debtor. [96] It has been held that an assignment made by letter is complete as soon as the letter is posted to the assignee, [97] but the proposition seems doubtful unless postal communication was in some way authorised or anticipated, as in the rules regarding the acceptance of contractual offers. [98]

Bill of exchange or cheque

19-025

As in the case of statutory assignments, a bill of exchange or cheque drawn on a banker or other fund holder is not an assignment of the amount for which the bill or cheque is drawn even if it is drawn for the precise amount of the debt due to the drawer. [99]

Formalities for equitable assignments

19-026

An equitable assignment of a legal chose in action need not be in writing, nor in any particular form. [100] On the other hand, an equitable assignment of an equitable chose in action must be in writing [101] if it is caught by s.53(1)(c) of the Law of Property Act 1925, which provides:

> "A disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will." [102]

It has been held that the word "disposition" in this paragraph must be given a wide meaning, and that it is apt to cover a direction by the holder of an equitable interest to the trustee to hold the property on trust for a third party, whether or not this is strictly an assignment of the equitable interest. [103] A fortiori a direct assignment should do the same. The paragraph does not prevent the holder of a beneficial interest in a trust fund from himself making an oral declaration of trust, and so constituting himself trustee of his own beneficial interest, for this is neither an assignment nor a "disposition" of his own interest. [104] Nor (it seems) does the provision apply where a person assigns the legal title to a chose in action together with an option to acquire the beneficial interest, and the transferee subsequently exercises this option orally. For in this case the beneficial interest passes not by virtue of any assignment or disposition to the transferor, but by virtue of the exercise of the option. [105]

Disposition of legal and equitable interests

19-027

Nor again does the paragraph apply where a person disposes of the entire interest, both legal and equitable, in a chose in action, for if it did, writing would be required in every case where a legal chose in action is assigned, unless the legal title were transferred without the beneficial interest. [106] So where the holder of the beneficial interest in some shares held on trust absolutely for him directed the trustees to transfer the legal title to the shares to a transferee with the intention that the transferee

should also obtain the full beneficial interest, this was held not to be a disposition requiring writing under s.53(1)(c). [107]

Consideration needed for agreements to assign

19-028

The extent to which consideration is required for an equitable assignment is one of some difficulty. [108] It should first be observed that the question can only arise as between an assignor (or his successors in title) and assignee. So far as the debtor is concerned, the presence or absence of consideration appears to be immaterial. He cannot refuse to pay the assignee merely on the ground that there was no consideration for the assignment, [109] and, conversely, if he does pay the assignee after due notice has been given to him, it seems clear that the assignor cannot make him pay again. As between the assignor and the assignee the position broadly appears to be that consideration is required for an agreement to assign a chose in action, but is not required for an actual assignment of a chose in action. [110] Since a future chose in action is incapable of assignment in the strict sense, it follows that a purported assignment of a future chose can only operate as an agreement to assign, and as such requires consideration. There is no doubt, however, that dicta can be produced which suggest that consideration is always required. [111]

Distinction between existing and future choses in action

19-029

The distinction between an existing chose in action which is capable of immediate assignment, and a future chose in action which is only capable of being the subject of an agreement to assign, is one of difficulty. On the one hand, it is clear that a mere expectancy, not based on any existing legal right, can be nothing more than a future chose in action, and cannot, therefore, be transferred without consideration. Thus there cannot be an actual assignment of property which the assignor hopes to inherit from a person still alive at the date of the assignment [112] or of sums which the assignor hopes to receive under a contract not yet made. [113] On the other hand, sums which are certain to become payable in the future under an existing contract or other legal obligation are not treated for this purpose as future choses in action, but as existing choses in action. So, for instance, a loan repayable at a fixed future date, or rent payable in the future under an existing lease, is an existing chose in action, and is capable of actual assignment without consideration. So also the right to be paid sums in the future under an existing contract is an existing chose in action even though the precise amounts which will become payable are as yet unascertained, e.g. royalties payable under a patent licensing agreement already made. [114]

19-030

The most difficult cases concern those in which there is an existing legal obligation, by way of contract or otherwise, but it is uncertain whether anything will become due under it in the future, either because the obligation is conditional or because it may be terminated. On the one hand, it has been held that sums payable to a builder under an existing contract are an existing chose in action, even though the sums may never become payable if the builder fails to perform the contract. [115] It has even been held that an assignment by a person of sums which will be standing to his credit at his bank at his death is an assignment of an existing chose in action, and therefore needs no consideration, since it is a sum which will become payable under the existing contract between the assignor and his bank. [116] On the other hand, in *Norman v Federal Commissioner of Taxation*, [117] it was held by a majority of the Australian High Court that interest payable in the future on an existing loan was a mere expectancy, because the loan (not being made for a fixed period) might have been repaid before the interest became due. [118] It was also held (unanimously) in the same case that dividends which may become due in the future on shares already held in a company also constitute nothing more than an expectancy, and cannot therefore be assigned without consideration.

Proceeds of existing obligation uncertain

19-031

It is also to be noted that even where there is an existing chose in action which is capable of actual assignment, the *proceeds* of that chose in action may constitute only an expectancy, assignment of which requires consideration. So in *Glegg v Bromley*, [119] where the proceeds of an action for defamation being brought by the assignor were "assigned" by her, it was assumed that this was a mere expectancy incapable of actual assignment. Again, in a New Zealand case [120] it was held that a purported assignment of "the first £500 of the net income which shall accrue to the assignor" from a certain trust fund in which he had a life interest was nothing more than an agreement to assign an expectancy and required consideration even though the assignment was under seal. Although the assignor's life interest was undoubtedly an existing chose in action and could have itself been assigned without consideration, the assignor had not in fact purported to assign the whole or even part of his actual life interest, but merely sums which he had expected to receive by virtue of that interest.

Agreement to assign existing chose in action in the future

19-032

It also seems that an agreement to assign an existing chose in action in the future (as distinguished from an actual assignment intended to operate forthwith) requires consideration. Thus, in *Re McArdle*, [121] five brothers and sisters were entitled to a testator's residuary estate subject to a life interest. The wife of one of the brothers executed and paid for certain improvements to a house which formed part of the estate. Subsequently the five brothers and sisters signed a document addressed to her which read:

> "… in consideration of your carrying out certain alterations and improvements to the property we agree that the executors shall repay to you from the estate when distributed £488 in settlement of the amount."

The Court of Appeal held that this document could not be construed as an equitable assignment [122] because it purported to be a contract to assign, and not an actual assignment. As such it required consideration, and the only consideration being past, it was not enforceable.

Agreement to assign expectancy supported by consideration

19-033

Although a mere expectancy is thus incapable of actual assignment, an agreement for valuable consideration to assign such an expectancy operates in equity to transfer the right to the chose in action as soon as it comes into existence provided only that it is sufficiently identifiable under the agreement. [123] No further action on the part of the assignor is necessary to convert an agreement to assign into an actual assignment. The effect of this equitable principle is that the assignee's interest is more than a mere matter of contract, even before the chose in action comes into existence. So, for instance, in *Re Lind*, [124] a person agreed to assign, for valuable consideration, property which he expected to inherit on his mother's death, at that time his mother being still alive. The assignor became bankrupt, but secured his discharge before his mother's death. It was held that the assignees were entitled to the property inherited by the bankrupt from his mother since they had a valid equitable interest in it even before it became an existing chose in action. Had their interest been merely contractual the assignor's liability would have been discharged when he secured his discharge in bankruptcy.

Consideration not needed for actual assignment of existing chose

19-034

The better view seems to be that an actual assignment of an existing chose in action does not require consideration provided that the assignor has done everything which is necessary according to the nature of the property to transfer the title to it. [125] It is true that equity will not perfect an imperfect gift, and also that equity will not assist a volunteer; but it is also true that a person can make a gift of a chose in action no less than a chose in possession. [126] Failure to distinguish an actual transfer from the specifically enforceable contract to transfer referred to in the previous paragraph has however led to difficult and confusing dicta. [127] The better view is exemplified by *Holt v Heatherfield Trust Ltd*. [128] X, being indebted to the claimant, assigned to him a debt due from Y. The assignment was in writing and absolute, but before Y received notice of the assignment, the defendants served a garnishee order nisi on Y. The assignment was therefore not statutory but equitable. Atkinson J., having grave doubts whether the antecedent debt constituted sufficient consideration for the assignment in the absence of a forbearance to sue, [129] held that consideration was unnecessary.

"Everything which is necessary"

19-035

The meaning of the requirement that the assignor must have done everything which is necessary according to the nature of the property to transfer the title to it to the assignee has been elucidated by certain cases on the assignment of shares in companies. If the assignor uses a transfer which is not in the appropriate form, [130] or if Treasury consent to the transfer is required but the assignor dies before it is forthcoming, [131] he has not done everything which is necessary according to the nature of the property to transfer the title to the shares, and the assignment is inoperative unless made for value. On the other hand, if the assignor uses the right form of transfer but dies before the directors have registered the shares in the assignee's name, then the assignor has done everything in his power to transfer the title to the shares, and the assignment will operate in equity as from its date (and not from the date of registration), even if there is no consideration. [132] So if the assignor voluntarily assigns a debt to the assignee, but dies before notice is given to the debtor, it would seem that, as between the assignor's estate and the assignee, the assignment would take effect in equity as from its date: for notice to the debtor need not be, and is not usually, given by the assignor. If the assignment was in writing and absolute, it would be converted into a good statutory assignment if the assignee were to give written notice to the debtor after the death of the assignor. [133]

19-036

According to the Court of Appeal in *Pennington v Waine*, [134] an equitable assignment of shares may be valid even if the assignor has not done everything in his or her power to transfer the title to the shares. Rather it is sufficient that it would be unconscionable for the donor to change his or her mind; and that stage could be reached even before the share transfer form has been delivered to the donee or the company. Alternatively, it is sufficient that the donor and his or her agents have become agents for the donee for the purpose of submitting the share transfer to the company. Clarke L.J., going beyond Arden and Schiemann L.JJ., thought that, in any event and absent compelling reasons to the contrary, the execution of a stock transfer form should have effect as an equitable assignment without delivery of the form or share certificates to the donee or the company.

Defective statutory assignments

19-037

Difficult problems arise where a statutory assignment could have been used but the full requirements were not complied with. Where the defect is that no notice has been given to the debtor, it has been held that the assignment may be valid in equity without consideration, for the assignor has done all that he needed to do to transfer the chose, and notice can be given by the assignee. [135] Where the assignment was not made in writing, i.e. is oral, it will be void by statute if it ranks as a disposition of an equitable interest or trust. [136] If the subject-matter is a *legal* chose in action, it can still be argued

that an assignor who has not made a statutory assignment has not done all that he can to transfer the chose; hence the transaction can at best be regarded as an agreement to assign and requires consideration. This view has been adopted in the High Court of Australia. [137] A counter-argument is, however, that before 1875 an assignee of a legal chose in action could not sue in his own name and only had a right to compel the assignor in accordance with the agreement to allow his name to be used and that this agreement required consideration; but that since 1875 the assignee can sue in his own name, joining the assignor if necessary as co-defendant, so that consideration is no longer necessary for any assignment. This argument may go too far [138] and may be based on an imperfect understanding of the old cases. [139] Those cases do not in fact indicate a settled view, and it may be that the better approach is that the question whether an oral transaction is an assignment or an agreement to assign is to be collected from its terms and not prejudged by the application of supposed rules. [140]

19-038

Where the defect is that the assignment is non-absolute, it should be borne in mind that the distinction between absolute and non-absolute assignments is not the same as that between assignments and agreements to assign. The former distinction has the purpose of isolating those cases where, whether because the assignor may still have some interest in the debt assigned or because the debtor should not be subjected to successive actions on the same debt, it is desirable that all those involved be parties to litigation. [141] It would seem that whereas an assignment by way of charge shall normally be regarded as an agreement to assign, and so require consideration (which it would normally have in any case [142]) the assignment of part of a debt may rank as a completed assignment. [143] As before, the effect of a conditional assignment would depend on the interpretation of the condition. [144]

Enforcement of legal chose in action equitably assigned [145]

19-039

Before the Judicature Act 1873, an assignment of a legal chose in action could not usually have been enforced except in the name of the assignor because a legal chose in action had to be enforced in the common law courts, which would only recognise the assignor as entitled to sue. After the passing of the Judicature Act, it has been held that, although assignments of legal choses not complying with the statute remain valid in equity, [146] and the assignee is entitled to sue in his own name, it also remains the position that, as a matter of practice, the assignee is normally required to join the assignor. [147] Where the assignment fails to be statutory because the assignor has not wholly disposed of his interest (e.g. where it is by way of charge only, or is of part of a debt only), or where there is a dispute as to whether the documents constitute an assignment, [148] joining the assignor serves a useful purpose. It ensures that all parties with an interest in the chose are brought before the court and that the debtor, if he is adjudged liable, obtains a complete discharge from his liability. But where the assignor retains no interest in the chose in action and the assignment only fails to be statutory, e.g. because it was not in writing or because no notice has been given, a requirement that the assignor be made a party to the proceedings would seem to serve no useful purpose and may be dispensed with. [149]

19-040

As the requirement that an equitable assignor be a party to a suit is procedural and not substantive, an action commenced by an equitable assignee is not a nullity and is effective to stop time running for the purposes of statutes of limitation [150] or a contractual limitation period. [151] The debtor may also waive the requirement that the assignor be joined. [152] In any event the Civil Procedure Rules 1998 [153] provide that a court may order a person to be added as a new party either if this is desirable in order that the court can resolve all the matters in dispute in the proceedings; or if there is an issue involving the new party and an existing party, which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue. Where a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise; but if any such person does not agree to be a claimant, he must be made a defendant, unless the court orders otherwise.

Enforcement of equitable chose in action equitably assigned

19-041

Even before the Judicature Act, an assignee of an equitable chose could sue alone to enforce his rights in the Court of Chancery if the assignment was absolute, [154] and this remains the position today, since there is nothing in the Judicature Act to impair this right.

19-042

Although there is no precise authority on the point, it seems that an equitable assignee of an equitable chose must join the assignor wherever the assignor retains an interest in the chose in question. It has already been seen that the reasoning underlying the decisions of the courts on the construction of s.136 of the Law of Property Act 1925 has been founded on the desirability of requiring all interested persons to be made parties to the proceedings; or, where part only of a debt has been assigned, of requiring the debt to be sued for in one action and not in several. [155] These considerations have prompted some of the decisions in which assignments have been held not to be statutory, since (as already seen) a statutory assignee can always sue alone. It would seem, therefore, that even an assignee of an equitable chose cannot sue alone without joining the assignor, wherever the assignor retains an interest in the chose; and, furthermore, that any other party (such as another assignee) who has an interest in it should also be joined.

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1. See Marshall, *The Assignment of Choses in Action* (1950); Biscoe, *Credit Factoring* (1975); Goode on Legal Problems of Credit and Security, 4th edn (2009), Ch.5; Salinger on Factoring, 4th edn (2005); Tolhurst, *The Assignment of Contractual Rights* 2nd edn (2016). M. Smith and N. Leslie, *The Law of Assignment*, 2nd edn (2013); Guest on the Law of Assignment (2012). See also Starke, *Assignments of Choses in Action in Australia* (1972). For conflict of laws in relation to assignment, see below, paras 30-122—30-124, 30-289—30-293.

82. *Gorringe v Irwell India Rubber Works (1886) 34 Ch. D. 128*; *Re Patrick [1891] 1 Ch. 82, 87*; *Re Westerton [1919] 2 Ch. 104*; *Re City Life Assurance Co (Stephenson's Case) [1926] Ch. 191*; *Re Trytel [1952] 2 T.L.R. 32*; *Weddell v J. A. Pearce [1988] Ch. 26*. But as to options see *Warner Bros Records Inc v Rollgreen Investments Ltd [1976] 2 Q.B. 430*, above, para.19-005. On Australian and New Zealand cases see Chin-Aun (2002) 18 J.C.L. 107.

83. *Stocks v Dobson (1853) 4 De G.M. & G. 11*.

84. Below, para.19-071.

85. Below, paras 19-069—19-070.

86. *Jones v Farrell (1857) 1 D. & J. 208*; *Brice v Bannister (1878) 3 Q.B.D. 569*; *Deposit Protection Board v Dalia [1994] 2 A.C. 367 CA* (Simon Brown L.J. dissented, reasoning, with respect incorrectly, that even after notice the debtor remains liable to the equitable assignor: the question did not arise in the House of Lords, *[1994] 2 A.C. 391*, which reversed the decision of the Court of Appeal in holding that, as a matter of statutory interpretation, only the original deposit maker, and not an assignee, was a "depositor" entitled to protection under s.58 of the Banking Act 1987); Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.15–022. See also above para.19-018 n.76.

87. *Magee v U.D.C. Finance Ltd [1983] N.Z.L.R. 438*.

88. In *Kijowski v New Capital Properties Ltd (1990) 15 Con. L.R. 1* this method of assignment was held not to be made out by an answer to enquiries before contract.

89. These are the main ways of effecting a transfer. But provided there is the requisite intention,

any other act by the transferor showing that he is transferring the chose in action appears to be sufficient: *Kijowski v New Capital Properties Ltd (1990) 15 Con. L.R. 1*; *Phelps v Spon-Smith & Co [2001] B.P.I.R. 326*; *Allied Carpets Group Plc v MacFarlane [2002] EWHC 1155, [2002] P.N.L.R. 38*. It is sometimes said that an assignment can also be effected by the assignor declaring himself trustee of the chose in action. It is not, however, clear that this should in all ways be equated with a transfer; and the effect of the rule in *Milroy v Lord (1862) 4 De G.F. & J. 264*, that equity will not perfect an imperfect gift, is that the implication of such a trust will be rare. See, however, *G.E. Crane Sales Pty Ltd v Commissioner of Taxation (1971) 126 C.L.R. 177* (factoring arrangement); *Re Turcan (1888) 40 Ch. D. 5*.

90. *Brandt's Sons & Co v Dunlop Rubber Co [1905] A.C. 454*. See further cases cited at para. 19-026, below.

91. *Percival v Dunn (1885) 29 Ch. D. 128*; *Re Gunsbourg (1919) 88 L.J.K.B. 479*; *Re Williams [1917] 1 Ch. 1*; *Rekstin v Severo, etc., and Bank for Russian Trade [1933] 1 K.B. 47*; *James Talcott Ltd v John Lewis & Co Ltd [1940] 3 All E.R. 592*; *Curran v Newpark Cinemas Ltd [1951] 1 All E.R. 295*; *Re Danish Bacon Co Ltd Staff Pension Fund Trusts [1971] 1 W.L.R. 248*.

92. *Bell v London and North Western Ry (1852) 15 Beav. 548*; *Ex p. Hall (1878) 10 Ch. D. 615*.

93. *Re Kent and Sussex Sawmills Ltd [1947] Ch. 177*. See also *British Eagle International Airlines Ltd v Cie Nationale Air France [1973] 1 Lloyd's Rep. 414, 427; affirmed [1974] 1 Lloyd's Rep. 429*; *Burridge v MPH Soccer Management Ltd [2011] EWCA Civ 835*.

94. *Curran v Newpark Cinemas Ltd [1951] 1 All E.R. 295*. See also *Coulls v Bagot's Executor and Trustee Co Ltd (1967) 119 C.L.R. 460*, where some members of the High Court of Australia appear to have treated a direction as a revocable mandate even though it was intended to be irrevocable, and the payee knew of it.

95. *Curran v Newpark Cinemas Ltd [1951] 1 All E.R. 295*; see also *Rekstin v Severo [1933] 1 K.B. 47*; *Re Hamilton (1921) 124 L.T. 737*.

96. cf. *Standing v Bowring (1885) 31 Ch. D. 282*. An assignment made by declaration of trust probably requires no notice: see *Middleton v Pollock (1876) 2 Ch. D. 104*.

97. *Alexander v Steinhardt, Walker & Co [1903] 2 K.B. 208*; sed quaere as the debt had arguably not yet arisen.

98. *Timpson's Executors v Yerbury [1936] 1 K.B. 645, 657*.

99. *Shand v Du Boisson (1874) L.R. 18 Eq. 283*; *Hopkinson v Forster (1874) L.R. 19 Eq. 74*; *Brown, Shipley & Co v Kough (1885) 29 Ch. D. 848*; Bills of Exchange Act 1882 s.53(1); cf. above, para.19-016.

100. *Brandt's Sons & Co v Dunlop Rubber Co [1905] A.C. 454, 462*; *Re Wale [1956] 1 W.L.R. 1346, 1350*; *Kijowski v New Capital Properties Ltd (1990) 15 Con. L.R. 1, 8*; *Allied Carpets Group Plc v MacFarlane [2002] EWHC 1155, [2002] P.N.L.R. 38* at [32]–[33]; *Burridge v MPH Soccer Management Ltd [2011] EWCA Civ 835*. See, e.g. *Re Westerton [1919] 2 Ch. 104* (bank deposit receipt); *Cotton v Heyl [1930] 1 Ch. 510* (proprietary interest in invention); *Re Wheeler [1938] Ch. 725* (money due under building contract); *Thomas v Harris [1947] 1 All E.R. 444* (insurance policy); *Re Tout & Finch Ltd [1954] 1 W.L.R. 178* (retention money under building contract); *Letts v IRC [1957] 1 W.L.R. 201* (shares); cf. *Re Williams [1917] 1 Ch. 1* (insurance policy); *James Talcott Ltd v John Lewis & Co Ltd [1940] 3 All E.R. 592* (invoice); *Spellman v Spellman [1961] 1 W.L.R. 921* (hirepurchase agreement); *E. Pfeiffer Weinkellerei-Weineinkauf GmbH v Arbuthnot Factors Ltd [1988] 1 W.L.R. 150* (reservation of title clause); *Colonial Mutual General Insurance Co Ltd v A.N.Z. Banking Group (New Zealand) Ltd [1995] 1 W.L.R. 1140 PC* (insurance policy). It was held in *Phelps v Spon-Smith & Co [2001] B.P.I.R. 326* that, although no formalities are required for an equitable assignment, three necessary requirements on the particular facts were: first, the intention to assign; secondly, clear identification of the chose which was being assigned; and thirdly, some act by the assignor showing that he was passing

the chose in action to the alleged assignee. None of these three was held to be satisfied. The third requirement (which Blackburne J., at [33], expressed as being "an outward expression by the assignor of his intention to make an immediate disposition of the subject matter of the assignment") was also held not to be made out in *Finlan v Eyton Morris Winfield [2007] EWHC 914 (Ch), [2007] 4 All E.R. 143*. Going the other way was *Coulter v Chief of Dorset Police [2003] EWHC 3391 (Ch), [2004] 1 W.L.R. 1425* in which it was held that the benefit of a judgment (for costs) had been validly assigned in equity by a retiring chief constable to his successor. Patten J., at [16], said that there was: "… a sufficient outward manifestation of an intention that the successor office holder should obtain the benefits held on trust by a predecessor, for there to be an equitable assignment of the benefit of the judgment". On the question of whether the requirement of writing in the Copyright, Designs and Patents Act 1988 s.90(3) applies to an oral contract for the transmission of a legal interest in copyright, see *Western Front Ltd v Vestron Inc [1987] F.S.R. 66, 76–78*.

101. Perhaps because of the difference in wording with Law of Property Act 1925 s.53(1)(b), which requires trusts of land to be *manifested and proved* by writing, it appears always to have been assumed that an oral disposition is void and not merely unenforceable.

102. Quaere whether an equitable chose in action is necessarily an "equitable interest or trust". By s.53(2) it is expressly provided that the section does not affect the creation or operation of resulting, implied or constructive trusts, and in *Neville v Wilson [1997] Ch. 144* the Court of Appeal held that an oral agreement to assign an equitable interest in shares constituted the promisor an implied or constructive trustee for the promisee, so that the requirement for writing contained in s.53(1)(c) was dispensed with by s.53(2). See further Hanbury and Martin, *Modern Equity*, 19th edn (2012), paras 3–004—3–016.

103. *Grey v IRC [1960] A.C. 1*.

104. *Grey v IRC [1958] Ch. 690, 719; affirmed [1960] A.C. 1*. Perhaps this should be regarded as a "sub-trust": see (1958) 74 L.Q.R. 180, 182. But see Pettit, *Equity and the Law of Trusts*, 12th edn (2012), p.89; *[1960] A.C. at 16*; above, para.19-022 n.88.

105. This seems to follow from *William Cory & Son Ltd v IRC [1965] A.C. 1088* though strictly speaking the decision is not inconsistent with the possibility that the exercise of the option to purchase in that case was invalidated by s.53(1)(c).

106. *Vandervell v IRC [1967] 2 A.C. 291*. See also *Re Vandervell's Trusts (No.2) [1974] Ch. 269*; Harris (1974) 38 M.L.R. 557.

107. *Vandervell v IRC [1967] 2 A.C. 291*. See also *Re Danish Bacon Co Ltd Staff Pension Fund Trusts [1972] 1 W.L.R. 248*.

108. See Megarry (1943) 59 L.Q.R. 58; Hollond (1943) 59 L.Q.R. 129; Marshall, *The Assignment of Choses in Action* (1950), Ch.4; Sheridan (1955) 33 Can. Bar Rev. 284; Hall [1959] C.L.J. 99; Smith, *The Law of Assignment* (2007), paras 7.78—7.83.

109. *Walker v Bradford Old Bank (1884) 12 Q.B.D. 511*; cf. *Harding v Harding (1886) 17 Q.B.D. 442*, but in this case the point was not taken, and in any event consideration was held to be unnecessary

110. Below, paras 19-029—19-036.

111. e.g. "For every equitable assignment … there must be consideration. If there be no consideration, there can be no equitable assignment": *Glegg v Bromley [1912] 3 K.B. 474, 491*.

112. *Meek v Kettlewell (1843) 1 Ph. 342*; *Re Tilt (1896) 74 L.T. 163*; *Re Ellenborough [1903] 1 Ch. 697*; cf. *Kekewich v Manning (1851) 1 De G.M. & G. 176*; Hanbury and Martin, *Modern Equity*, 19th edn (2012), para.4–023.

113. *E. Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd [1988] 1 W.L.R. 150, 161*.

114. *Shepherd v Federal Commissioner of Taxation (1965) 113 C.L.R. 385*.

115. *Hughes v Pump House Hotel Co Ltd [1902] 2 K.B. 190*.

116. *Walker v Bradford Old Bank (1884) 12 Q.B.D. 511*.

117. *(1963) 109 C.L.R. 9*. This case contains lengthy discussion of the principles relating to voluntary assignment of future property.

118. This is the explanation of the case given by the High Court itself in *Shepherd v Federal Commissioner of Taxation (1965) 113 C.L.R. 385*.

119. *[1912] 3 K.B. 474*.

120. *Williams v Commissioner of Inland Revenue [1965] N.Z.L.R. 395*.

121. *[1951] Ch. 669*; criticised in (1951) 67 L.Q.R. 295.

122. If it could, the fact that the consideration was past would not have made it invalid.

123. *Tailby v Official Receiver (1888) 13 App. Cas. 523*; *Glegg v Bromley [1912] 3 K.B. 474*; *Cotton v Heyl [1930] 1 Ch. 510*; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] 2 W.L.R. 1344* at [80]–[81]; *Bexhill UK Ltd v Razzaq [2012] EWCA Civ 1376* at [42]. But, without consideration, the mere fact that the assignment is by deed is insufficient.

124. *[1915] 2 Ch. 345*. See also *Joseph v Lyons (1885) 15 Q.B.D. 280* (after-acquired stock-in-trade); *Re Gillott's Settlement [1934] Ch. 97* (future trust income); *Re Trytel (1952) 2 T.L.R. 32* (royalties); *Syrett v Egerton [1957] 1 W.L.R. 1130* (future income); *Campbell, Connelly & Co Ltd v Noble [1963] 1 W.L.R. 252* (copyright); *The Ugland Trailer [1985] 2 Lloyd's Rep. 372, 374*; *The Annangel Glory [1988] 1 Lloyd's Rep. 45* (future sub-freights under a charter).

125. See *Kekewich v Manning (1851) 1 De G.M. & G. 176*; *Harding v Harding (1886) 17 Q.B.D. 442*; *Re Griffin [1899] 1 Ch. 408*; *German v Yates (1915) 32 T.L.R. 52*; *Re Williams [1917] 1 Ch. 1*; *Holt v Heatherfield Trust Ltd [1942] 2 K.B. 1*; *Re Rose [1949] Ch. 78*; *Re McArdle [1951] Ch. 669, 676–677*; *Re Rose [1952] Ch. 499*; *Re Wale [1956] 1 W.L.R. 1346*; *Pulley v Public Trustee [1956] N.Z.L.R. 771*; *Letts v IRC [1957] 1 W.L.R. 201*; *Norman v Federal Commissioner of Taxation (1963) 109 C.L.R. 9*; *Shepherd v Federal Commissioner of Taxation (1965) 113 C.L.R. 385*. See also *Mascall v Mascall (1984) 50 P. & C.R. 119* (voluntary conveyance of real property).

126. Compare *Kekewich v Manning (1851) 1 De G.M. & G. 176*, with *Milroy v Lord (1862) 4 De G.F. & J. 264*. See also *Fortescue v Barnett (1834) 3 My. & K. 36*; *Voyle v Hughes (1854) 2 Sm. & G. 18*; *Re Patrick [1891] 1 Ch. 82*. But see *Olsson v Dyson (1969) 120 C.L.R. 365*, below, para.19-037, where a different view was taken by the High Court of Australia.

127. See the dicta from *Glegg v Bromley [1912] 3 K.B. 474*, cited above, para.19-028 n.110; see also *Re Westerton [1919] 2 Ch. 104, 111*.

128. *[1942] 2 K.B. 1*.

129. On this point see the judgment of Windeyer J. in *Norman v Federal Commissioner of Taxation (1963) 109 C.L.R. 9 and (1943) 59 L.Q.R. 129, 208*.

130. *Milroy v Lord (1862) 4 De G.F. & J. 264*.

131. *Re Fry [1946] Ch. 312*.

132. *Re Rose [1949] Ch. 78*; *Re Rose [1952] Ch. 499*; *Letts v IRC [1957] 1 W.L.R. 201*.

133. As in *Re Westerton [1919] 2 Ch. 104*.

134. *[2002] 1 W.L.R. 2075*.

135. *Holt v Heatherfield Trust Ltd [1942] 2 K.B. 1*, above, para.19-034; *Magee v U.D.T. Finance Ltd [1983] N.Z.L.R. 438*. But as to options cf. *Warner Bros Records Inc v Rollgreen Ltd [1976] Q.B. 30*, above, para.19-005.

136. Above, para.19-026.

137. *Olsson v Dyson (1969) 120 C.L.R. 365*. See also *Anning v Anning (1907) 4 C.L.R. 1049*. Doubt was cast on some of the reasoning in *Olsson v Dyson* in *Corin v Patton (1990) 169 C.L.R. 540 (High Court of Australia)*.

138. Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.15–035.

139. See *Re Westerton [1919] 2 Ch. 104*; Treitel, *The Law of Contract*, paras 15–027—15–036; below, paras 19-039—19-042.

140. See *German v Yates (1915) 32 T.L.R. 52* (discussed (1955) 33 Can. Bar Rev. 284, 294–296).

141. Above, paras 19-013—19-015; below, paras 19-039—19-042.

142. See *Matthews v Goodday (1861) 31 L.J.Ch. 282*; *Re Earl of Lucan (1890) 45 Ch. D. 470*.

143. *Shepherd v Federal Commissioner of Taxation (1965) 113 C.L.R. 385*; see also *Re McArdle [1951] Ch. 669*, where the court appears to have been willing to construe a gift of part of a debt as an assignment had the circumstances been appropriate. Since part of a debt cannot be statutorily assigned, the reasoning in *Olsson v Dyson (1969) 120 C.L.R. 365*, is inapplicable: see *Re Smyth [1970] Argus L.R. 919*.

144. Above, paras 19-013—19-014.

145. See generally, Tolhurst (2002) 118 L.Q.R. 98.

146. *Brandt's Sons & Co v Dunlop Rubber Co [1905] A.C. 454*.

147. *[1905] A.C. 454*; and see also *Performing Right Society Ltd v London Theatre of Varieties Ltd [1924] A.C. 1*; *Williams v Atlantic Assurance Co [1933] 1 K.B. 81*; *Holt v Heatherfield Trust Ltd [1942] 2 K.B. 1, 5*; *The Aiolos [1983] 2 Lloyd's Rep. 25*; *Weddell v J.A. Pearce & Major [1988] Ch. 26*; *Three Rivers D.C. v Bank of England [1996] Q.B. 292*; *Hendry v Chartsearch Ltd, The Times, September 16, 1998*; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] 2 W.L.R. 1344* at [60]. In the rare converse case, an assignor wishing to recover for himself must join the assignee: *Walter and Sullivan Ltd v Murphy & Sons Ltd [1955] 2 Q.B. 584*; *Three Rivers D.C. v Bank of England [1996] Q.B. 292*.

148. *The Aiolos [1983] 2 Lloyd's Rep. 25*.

149. *The Aiolos [1983] 2 Lloyd's Rep. 25, 33–34*; *Weddell v J.A. Pearce & Major [1988] Ch. 26, 40–41*; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] 2 W.L.R. 1344* at [60]; *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd [2017] EWHC 67 (TCC), [2017] B.L.R. 180* at [50].

150. *Weddell v J.A. Pearce & Major [1988] Ch. 26*; cf. *Compania Colombiana de Seguros v Pacific Steam Navigation Co [1965] 1 Q.B. 101, 127–129*.

151. *The Aiolos [1983] 2 Lloyd's Rep. 25*.

152. *Brandt's Sons & Co v Dunlop Rubber Co [1905] A.C. 454*.

153. CPR rr.19.2–3.

154. *Cator v Croydon Canal Co (1841) 4 Y. & C.Ex. 405, 593*; *Donaldson v Donaldson (1854) Kay 711*.

155. Above, paras 19-013—19-015, 19-039.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 19 - Assignment

Section 1. - Assignment [1]

(c) - Principles Applicable to Statutory and Equitable Assignments

(i) - What Rights are Assignable

In general [156]

19-043

Despite the existence of the statutory form of assignment under s.136 of the Law of Property Act 1925, the assignability of a contractual right [157] in any given case is generally governed by the rules of equity existing before the Judicature Acts, and these rules now apply to statutory and equitable assignments alike. [158] There is also a number of particular statutory provisions prohibiting assignment in certain cases. [159]

Rights declared by contract to be incapable of assignment [160]

19-044

If rights arising under a contract are declared by the contract to be incapable of assignment, a purported assignment will be invalid as against the debtor. In the leading case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [161] the benefits of building contracts were purportedly assigned by lessees of the properties on which the building work was being carried out to assignees of the leases. Under the building contracts there was to be no assignment of the contract by either party without the other's consent. No such consent for the assignments was obtained. [162] It was held by the House of Lords that, on the true construction of the prohibition clause, the assignment of the benefit of the contract, rather than merely vicarious performance, was barred; and that no distinction was here being drawn by the parties between barring an assignment of the right to future performance, as opposed to the fruits, of the contract nor between barring an assignment of unaccrued, as opposed to accrued, causes of action. [163] Moreover there was no reason of public policy not to give effect to the prohibition clause, the legitimate commercial purpose of which was to ensure that the original parties to the contract were not brought into direct contractual relations with third parties. [164]

19-045

In *Hendry v Chartsearch Ltd* [165] the majority of the Court of Appeal (Millett and Henry L.JJ., Evans L.J. preferring to leave the point open) held that, where there is a clause requiring consent, consent not to be unreasonably withheld, [166] it is fatal to the validity of the assignment that the debtor's consent was not sought; it is irrelevant that, on the facts, consent could not have been reasonably withheld.

19-046

However, it seems that a prohibited assignment can be effective as between assignor and assignee. It appears to have been in that context that Darling J. uttered his famous dictum that a prohibition "could no more operate to invalidate the assignment than it could interfere with the laws of gravitation". [167] In the *Linden Gardens* case Lord Browne-Wilkinson, giving the leading judgment, said:

> "… a prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and assignee and even then it may be ineffective on the grounds of public policy." [168]

19-047

Moreover, it has been held that a covenant in a marriage settlement to settle after-acquired property could be enforced by the beneficiaries with respect to the proceeds of a life insurance policy that had been paid to the covenantor's executor, although the policy was expressed to be not assignable. [169] It has also been held that a purported assignment of a contract relating to the promotion and management of boxing that was ineffective at law, because the contract prohibited assignment and involved personal services, was effective in equity as a declaration of trust of the benefit of the contract. [170] On the facts, this ensured that the parties' commercial intentions were effected. The distinction between a prohibited and therefore invalid assignment and a valid declaration of trust of the benefit of a contract was further analysed in *Barbados Trust Co Ltd v Bank of Zambia*. [171] A clause in a loan facility prevented assignment by the lender other than to a bank or financial institution unless the borrower (the Bank of Zambia) gave its prior written consent. There was an assignment to a bank (the Bank of America). That bank, without the borrower's consent, declared itself a trustee of its rights under the loan for the claimant, which was neither a bank nor a financial institution. The Court of Appeal (Waller L.J. dissenting) held that there had been no initially valid assignment to the Bank of America and, without that initially valid assignment, there could be no subsequent valid declaration of trust. However, had there been an initially valid assignment, the majority (Waller and Rix L.JJ., Hooper L.J. dissenting) thought that the Bank of America's declaration of trust would have been effective. The prohibition on assignment to a non-bank did not also prohibit a declaration of trust because a declaration of trust and an assignment are different and, as a matter of construction, the prohibition here did not extend to a declaration of trust. [172]

Assignment prohibited by statute or public policy

19-048

Assignment of certain rights is prohibited by statute; for example, benefits under social security legislation are not assignable. [173] And in other cases an assignment may be void on grounds of public policy, e.g. an assignment of the salary of a public officer has been held to be void, [174] and the same may be true of an assignment by a wife of her right to maintenance. [175]

19-049

The assignment of a right of action by a party not entitled to legal aid (for example, because a corporate claimant) to a party so entitled (for example, the directors and shareholders of a company), where the object and effect of the assignment was to enable the assignee to obtain legal aid that would not have been available to the assignor, was not contrary to public policy or unlawful. [176] The same applied where the object, in effect, of the assignment was to enable the action to be brought by an assignee who, unlike the assignor, did not have to provide security for costs.

Assignments savouring of maintenance [177]

19-050

A chose in action is not assignable if the assignment savours of maintenance or champerty. [178] For this reason it has often been asserted that a bare right to litigate is not assignable. [179] The principle has, however, been qualified in many important respects, and although in *Trendtex Trading Corp v Credit Suisse* [180] it was said to remain a fundamental principle of our law, the House of Lords in that case recognised that it has limited scope in the modern law. Lord Roskill said:

> "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." [181]

So it has been held that rights of action (even in tort) which are incidental and subsidiary to property may be validly assigned when the property is transferred. [182] Again, it has been held that an assignment of rights of action to an insurer who has paid a loss and would, apart from the assignment, have been able to sue the tortfeasor under the doctrine of subrogation in the name of the insured, may be effective to enable the insurer to sue in his own name. [183] It is also well established that a claim to a simple debt is assignable even if the debtor has refused to pay, [184] and even though this may be said in a sense to be an assignment of a "bare right to litigate". [185] The practice of assigning or "selling" debts to debt-collecting agencies and credit factors could hardly be carried on if the law were otherwise. [186]

19-051

In the *Trendtex* case itself it was accepted that a creditor who has financed the transaction giving rise to the right of action will have a legitimate commercial interest in it and an assignment to him will be valid [187] unless it appears that the object of the assignment was not to protect that interest. On the facts the assignment was held void because it 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." [188]

However, the mere fact that the assignee seeks to enforce the assigned rights for another is not fatal where this is a legitimate part of its business activity. [189] So also the fact that the assignee might make a profit out of the assignment does not of itself render the agreement to assign champertous although the prospect of excessive profit can be taken into account in deciding whether the commercial interest is genuine. [190]

19-052

It appears, however, that a purported assignee has no legitimate commercial interest in a purely personal claim so that such a claim is non-assignable. [191] The most obvious example is the right to damages for a personal, as opposed to a proprietary, tort such as assault, defamation, or a tort causing personal injury. In *Simpson v Norfolk & Norwich University Hospital NHS Trust*, [192] it was held, after a detailed consideration of the issue, that while an action for damages for personal injury is capable of being assigned, the claimant in the case had no legitimate interest in the claim (applying the *Trendtex* test) and the assignment plainly savoured of champerty. The assignment was therefore void.

19-053

It is also to be noted that even where a right of action is not assignable on the ground that it amounts to a "bare right to litigate" there is no objection to an agreement to assign the proceeds of an action.

[193] In such a case no question of maintenance need arise, for the assignee is not himself given any right to sue the tortfeasor or debtor on the original cause of action.

19-054

The torts and crimes of maintenance and champerty were abolished by the Criminal Law Act 1967, but s.14(2) of that Act expressly provides that this is not to 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". It is submitted that this phraseology should be interpreted to cover assignments as well as contracts to assign. In *Trendtex* Lord Roskill said that it:

> "… seems plain that Parliament intended to leave the law as to the effect of maintenance and champerty upon contracts unaffected by the abolition of them as crimes and torts." [194]

Personal contracts

19-055

The benefit of a contract is only assignable in:

> "… cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it." [195]

It is to be noted that the question whether an assignment makes any difference to the debtor must be decided by the court on objective grounds, having regard to the nature of the contract and of the subject-matter of the rights assigned. It may in some circumstances make a great deal of difference to a debtor whether his creditor is of an indulgent character, or whether he is likely to enforce his legal rights ruthlessly, but considerations of this kind are ignored by the courts in determining whether a right is assignable or not. [196]

19-056

Prima facie contractual rights to, for example, the payment of money, and to the sale or occupation or use [197] of land, or to building work, [198] do not involve personal considerations and are capable of assignment. A right to be indemnified against a monetary liability may in some circumstances be assignable, [199] but the benefit of a motor vehicle insurance policy involves personal considerations and is not assignable. [200] Indeed, any contractual right involving personal skill on the part of the creditor, or other personal qualifications (such as his credit), [201] is incapable of assignment. Hence neither an author nor his publisher may assign the right to performance of the other's obligations under a publishing agreement, although an author's right to be paid royalties may be assigned [202]; and if the author has actually transferred the copyright in the work to the publisher, he can of course assign that as an item of property. [203] The right to employ a person under a contract of employment is clearly not assignable, [204] though wages or salary due to the employee are normally assignable by him. [205] The mere presence of an arbitration clause in a contract does not as a general rule render the contract incapable of assignment. [206]

Commercial contracts

19-057

Rights arising under ordinary commercial contracts (e.g. for the sale of goods) are prima facie readily assignable, at least if there is no question of credit being granted to the assignee. But commercial

contracts may sometimes be drafted so as to make the requirements of one of the parties a material consideration in determining the obligations of the other. In such circumstances there is often difficulty in deciding whether the benefit of the contract is assignable. In *Tolhurst v Associated Portland Cement Manufacturers Ltd*, [207] the defendant was the owner of certain land upon which there were chalk quarries. He sold part of this land to a company in order to enable the company to carry on there the business of manufacturing Portland Cement. He contracted to supply the company, which was in a small way of business, with 750 tons of chalk per week for 50 years "and so much more as the company shall require for the manufacture of Portland cement upon their said land". The company subsequently assigned the contract, sold its undertaking to the claimant company, which was in a large way of business, and went into voluntary liquidation. The House of Lords held that the new company was entitled to the benefit of the contract and could maintain an action against the defendant in its own name. There were two grounds for this decision: (1) The defendant's liability was measured by the capacity of the original company's land:

> "… the [original] company were not entitled to an unlimited supply of chalk, but only to so much as they might want for making cement on their own piece of land." [208]

Consequently the effect of the assignment was not to increase the burden on the defendant, for the original company might have increased its capital and worked its land more intensively; (2) By entering into a long-term contract the defendant must have contemplated that the benefit of it might be assigned. [209] The contract should therefore be construed as if it had been made between the defendant and his successors and assignees owners and occupiers of the quarries and the company, its successors and assignees owners and occupiers of the cement works. [210] On the other hand, in *Kemp v Baerselman* [211] the defendant contracted to supply X, a cake manufacturer, with all the eggs that he should require for manufacturing purposes for one year: and X undertook not to purchase eggs elsewhere. X transferred his business to a company, and it was held that the contract was not assignable, because the defendant's liability was not limited to the capacity of a particular piece of land, and because X's contract not to purchase eggs elsewhere introduced a personal element inasmuch as this obligation would not have been binding on the assignee. [212]

Contracts with companies

19-058

It has been held that the fact that one of the parties to a contract is a limited company is no ground for assuming that the personality of that party is immaterial to the other party. [213] For example, the benefit of a publishing contract entered into by an author with a limited company is no more assignable by that company than is the benefit of such a contract with an individual publisher. [214] However, the personality of a company may change without any formal change in the legal identity of the company as, for example, where the ownership and management of the company pass into new hands, [215] or where direction passes into the hands of a receiver or liquidator. [216] Thus persons carrying on business in the form of a company may effectively (though not technically) assign all the company's contracts on a transfer of the business, provided that they transfer the company's shares, and not simply the company's assets, to the assignee. Had this course been adopted in, for example, *Tolhurst's* case [217] no difficulties would have arisen.

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1. See Marshall, *The Assignment of Choses in Action* (1950); Biscoe, *Credit Factoring* (1975); Goode on Legal Problems of Credit and Security, 4th edn (2009), Ch.5; Salinger on Factoring, 4th edn (2005); Tolhurst, *The Assignment of Contractual Rights* 2nd edn (2016). M. Smith and N. Leslie, *The Law of Assignment*, 2nd edn (2013); Guest on the Law of Assignment (2012). See also Starke, *Assignments of Choses in Action in Australia* (1972). For conflict of laws in relation to assignment, see below, paras 30-122—30-124, 30-289—30-293.

156. The issue of what rights are assignable is the subject-matter of a masterly overview by Tettenborn, *Contract Formation and Parties* (eds Burrows and Peel) (2010) pp.183–204.

157. It seems that an irrevocable offer is assignable in the same way and subject to the same conditions as a contractual right: see *Whiteley v Hilt [1918] 2 K.B. 808, 818*; *R.A. Brierley Investments Ltd v Landmark Corp Ltd (1966) 40 A.L.J.R. 425*; *Warner Bros Records Inc v Rollgreen Investments Ltd [1976] Q.B. 430*. But this is an instance where an equitable assignment may be less effective than a legal assignment: above, para.19-005.

158. *Tolhurst v Associated Portland Cement Manufacturers Ltd [1902] 2 K.B. 660, 676*; *Torkington v Magee [1902] 2 K.B. 427, 430–431*; reversed *[1903] 1 K.B. 644*.

159. Below, para.19-048.

160. See generally Allcock (1983) C.L.J. 328; Turner, "Legal assignment of rights of restricted assignability" [2008] L.M.C.L.Q. 306; Tolhurst and Carter, "Prohibitions on Assignment: A Choice to be Made" [2014] C.L.J. 405. The validity of "no-assignment" clauses has been thought to be inconvenient in the context of "factoring", where a company buys up multiple debts the precise terms of which cannot be realistically checked. For this reason, s.1 of the Small Business, Employment and Enterprise Act 2015 authorises regulations invalidating some "no assignment" clauses. So s.1(1) authorises provisions for the purpose of securing that any "non-assignment of receivables term" of a relevant contract has no effect, or has no effect in relation to persons of a prescribed description, or has effect in relation to persons of a prescribed description only for such purposes as may be prescribed. By s.1(2), a "non-assignment of receivables term" of a contract is a term which prohibits or imposes a condition, or other restriction, on the assignment by a party to the contract of the right to be paid any amount under the contract or any other contract between the parties. By s.1(3), a contract is a relevant contract if it is a contract for goods, services or tangible assets which is not an excluded financial services contract and at least one of the parties has entered into it in connection with the carrying on of a business. Draft Regulations were issued in September 2017, see http://www.legislation.gov.uk/ukdsi/2017/9780111160305/pdfs/ukdsi_9780111160305_en.pdf.

161. *[1994] 1 A.C. 85*; Cartwright (1993) 9 Const. L.J. 281; Duncan Wallace (1994) 110 L.Q.R. 42; Tettenborn (1994) 53 C.L.J. 24. See also, following *Linden Gardens*, *Circuit Systems Ltd v Zuken-Redac (UK) Ltd [1996] 3 All E.R. 748, CA*; *Quadmost Ltd v Reprotech [2001] B.P.I.R. 349*; *British Energy Power & Energy Trading Ltd v Credit Suisse [2007] EWHC 1428 (Comm)*, *[2007] 2 Lloyd's Rep. 427*; *Ruttle Plant Ltd v Secretary of State for the Environment and Rural Affairs [2007] EWHC 2870 (TCC)*, *[2008] 2 All E.R. (Comm) 264*; *National Bank of Abu Dhabi PJSC v BP Oil International Ltd [2016] EWHC 2892 (Comm)*. See also, prior to *Linden Gardens* , *Helstan Securities Ltd v Hertfordshire CC [1978] 3 All E.R. 262*; noted by Goode (1979) 42 M.L.R. 553. See further *United Dominions Trust Ltd v Parkway Motors [1955] 1 W.L.R. 719* (benefits of hire-purchase agreement not assignable where agreement so states): the decision on the measure of damages in that case has been overruled by *Wickham Holdings Ltd v Brooke House Motors Ltd [1967] 1 W.L.R. 295* but without affecting the assignment point (indeed the latter case proceeded on the assumption that either the benefit of the hire-purchase agreement was not assignable or that the prohibition against assignment was waived). A prohibition on assignment of a debt in a contract between a creditor and debtor does not operate to undermine the rights of a prior holder of a floating charge over that debt and it can therefore assign its rights, as chargee, over that debt: *Foamcrete (UK) Ltd v Thrust Engineering Ltd [2002] B.C.C. 221*. For a cogent criticism of this decision, see Tettenborn [2001] LMCLQ 472. *Linden Gardens* was applied in upholding a prohibition on an assignment of copyright in *New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd [2003] 3 N.Z.L.R. 1*, noted by Thomas (2004) 120 L.Q.R. 218.

162. In *Orion Finance Ltd v Crown Financial Management Ltd [1994] 2 B.C.L.C. 607*, although the defendant had not given its consent, the assignment was held valid because in the circumstances the defendant was estopped from denying that the assignment was valid.

163. cf. *Flood v Shand Construction Ltd, The Times, January 8, 1997*, where a clause prohibiting assignment, without consent, of a building sub-contract but permitting the assignment of "any sum which is or may become due and payable under this sub-contract" was construed as permitting assignment of the right to recover sums already due, but not the right to claim

damages or other sums that needed to be established as due and payable by litigation or arbitration or contractual machinery.

164. See also *Oakdale (Richmond) Ltd v National Westminster Bank Plc [1997] 1 B.C.L.C. 63*, where a clause prohibiting a company from factoring, discounting, charging or assigning its book or other debts without the bank's consent was held to be necessary if banks were to lend on the security of book debts and, far from being anti-competitive under art.85 EC, it promoted competition because it enabled a company to obtain additional finance from its bank.

165. *The Times, September 16, 1998 CA*.

166. See *British Gas Trading Ltd v Eastern Electricity Plc Unreported, December 18, 1996 CA*, where it was held, upholding Colman J., *The Times, November 29, 1996*, that Eastern had unreasonably withheld its consent to an assignment.

167. *Tom Shaw & Co v Moss Empires Ltd (1908) 25 T.L.R. 190, 191*.

168. *[1994] 1 A.C. 85, 108*. See also *Hendry v Chartsearch Ltd, The Times, September 16, 1998*.

169. *Re Turcan (1888) 40 Ch. D. 5*. See also *Re Griffin [1899] 1 Ch. 408* and *Re Westerton [1919] 2 Ch. 104*, where it was held that bank deposits had been validly assigned though the deposit receipts were expressed to be not transferable in both cases; and *Spellman v Spellman [1961] 1 W.L.R. 921, 925*, per Danckwerts L.J.

170. *Don King Productions Inc v Warren [2000] Ch. 291:* (it was also held that the benefit of the contract could be partnership property even though non-assignable). For criticism of the decision in *Don King*, making the argument that one cannot have a trust of, or charge over, unassignable rights, see Turner, "Charges of Unassignable Rights" (2004) 20 J.C.L. 97.

171. *[2007] EWCA Civ 148*, *[2007] 1 Lloyd's Rep. 494*. See also *Co-operative Group Ltd v Birse Developments Ltd [2014] EWHC 530 (TCC)*, *[2014] B.L.R. 359*.

172. The majority (Hooper L.J. dissenting) was also of the view that, had there been a valid declaration of trust, the beneficiary under the trust could have itself enforced the contractual rights as it had invoked the procedure in *Vandepitte v Preferred Accident Insurance Corp of New York [1933] A.C. 70* of joining the trustee as defendant. See the case-note on *Barbados Trust Co Ltd v Bank of Zambia [2007] EWCA Civ 148*, *[2007] 1 Lloyd's Rep. 495* by M Smith, "Equitable Owners Enforcing Legal Rights?" (2008) 124 L.Q.R. 517.

173. Social Security Administration Act 1992 s.187. See also, e.g. Superannuation Act 1972 s.5(1); Pensions Act 1995 s.91 (the right to a pension under an occupational pension scheme cannot be assigned other than in favour of one's widow, widower, surviving civil partner, or dependant). The Unfair Terms in Consumer Contracts Regulations 1999 para.1(p) of Sch.2, (and, for contracts made on or after October 1, 2015, Consumer Rights Act 2015 para.19 of Sch.2) lists as a possible unfair term one which allows a trader to transfer the trader's rights and obligations under the contract where this may reduce the guarantees for the consumer without the latter's agreement.

174. See *Re Mirams [1891] 1 Q.B. 594*; above, para.16-031.

175. *Re Robinson (1884) 27 Ch. D. 160*; *Watkins v Watkins [1896] P. 222*; *Clark v Clark [1906] P. 331*; *Pacquine v Snary [1909] 1 K.B. 688*.

176. *Norglen Ltd v Reed Rains Provincial Ltd [1999] 2 A.C. 1 HL* (but in such circumstances the Legal Aid Board, in the exercise of its discretion, might refuse legal aid to the assignee); cf. *Sinclair v British Telecommunications Plc [2000] 2 All E.R. 461 CA*, below para.19-071 n.255.

177. This subject is dealt with in more detail above, paras 16-057 et seq.

178. *Rees v De Bernardy [1896] 2 Ch. 437*; *Laurent v Sale & Co [1963] 1 W.L.R. 829*.

179. *Prosser v Edmunds (1835) 1 Y. & C. Ex. 481*; *Dawson v Great Northern & City Ry [1905] 1 K.B. 260, 271*; *Glegg v Bromley [1912] 3 K.B. 474, 489–490*; *Defries v Milne [1913] 1 Ch. 98*; *Torkington v Magee [1902] 2 K.B. 427, 433–434* (decision reversed *[1903] 1 K.B. 644*); *Trendtex Trading Corp v Credit Suisse [1982] A.C. 679*; *Giles v Thompson [1994] 1 A.C. 142*. Trustees in bankruptcy and liquidators, however, are to some extent permitted by statute to make such assignments: Insolvency Act 1986 ss.167, 314, 436 Schs 4 and 5; *Guy v Churchill (1888) 40 Ch. D. 481*; *Re Park Gate Waggon Works (1881) 17 Ch. D. 234*; *Ogdens Ltd v Weinberg (1906) 95 L.T. 567*; *Ramsey v Hartley [1977] 1 W.L.R. 686*; *Freightex Ltd v International Express Co Ltd Unreported April 15, 1980 CA*; *Grovewood Holdings Plc v James Capel & Co Ltd [1995] Ch. 80*; *Re Oasis Merchandising Services Ltd [1998] Ch. 170*; *Norglen Ltd v Reed Rains Prudential Ltd [1999] 2 A.C. 1, 11–12 HL*. In *Ruttle Plant Ltd v Secretary of State for Environment, Food and Rural Affairs (No.3) [2008] EWHC 3238*, *[2009] 1 All E.R. 448* the liquidator of F had assigned the fruits of the cause of action to the claimant. The defendant argued that the cause of action against it must be brought in F's name. It was held by Ramsey J. that, first, the assignment of the fruits of an action by a liquidator as opposed to assignment of the bare cause of action was not authorised by the Insolvency Act 1986 (because it involved the assignment of a fiduciary power to control proceedings commenced in the name of the company) and, without that authorisation, it was objectionable as being champertous; and, secondly, although the claimant's proceedings would therefore be struck out, F would be joined as a party and so could continue the proceedings.

180. *[1982] A.C. 679*, discussed more fully, above, para.16-066.

181. *[1982] A.C. 679, 703*. For a penetrating and persuasive criticism of the "genuine commercial interest" criterion in *Trendtex* and a call for a reconsideration of this area of the law so that assignments of rights to compensation are recognised as valid, subject to a few specific exceptions, see Tettenborn, "Assignment of Rights to Compensation" [2007] LMCLQ 392.

182. *Dickinson v Burrell (1866) L.R. 1 Eq. 337, 342* (right to rescind earlier conveyance); *Dawson v Great Northern & City Ry [1905] 1 K.B. 260* (right to compensation for injurious affecting of land); *Ellis v Torrington [1920] 1 K.B. 399* (breach of covenant relating to land); *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd (1982) S.L.T. 533* (delictual action for damage to building) noted by Street (1983) Conv. 404. But an order for possession is probably not assignable: *Chung Kwok Hotel Co v Field [1960] 1 W.L.R. 1112*. See generally above, para.16-071.

183. *King v Victoria Insurance Co Ltd [1896] A.C. 250*; *Compania Colombiana de Seguros v Pacific Steam Navigation Co [1965] 1 Q.B. 101*; above, para.16-072. Even, probably, if the amount recoverable exceeds the loss suffered by the insurer: see *Compania Colombiana [1965] 1 Q.B. 101, 121*; *Trendtex Trading Corp v Credit Suisse [1980] Q.B. 629, 656*.

184. *County Hotel and Wine Co Ltd v London & North Western Ry [1918] 2 K.B. 251, 258–262; affirmed on other grounds [1919] 2 K.B. 29, [1921] 1 A.C. 85*. See also *Ellis v Torrington [1920] 1 K.B. 399*.

185. *Fitzroy v Cave [1905] 2 K.B. 364*.

186. *Comfort v Betts [1891] 1 Q.B. 737, 739*; *Camdex International Ltd v Bank of Zambia [1998] Q.B. 22*. For an example of "factoring" see *G.E. Crane Sales Pty Ltd v Federal Commissioner of Taxation (1971) 126 C.L.R. 177*.

187. *Trendtex Trading Corp v Credit Suisse [1980] Q.B. 629*. Assignments have been held valid, applying the *Trendtex* test of a "genuine commercial interest" in, e.g. *The Kelo [1985] 2 Lloyd's Rep. 85*; *Bourne v Coloderise Ltd [1985] I.C.R. 291*; *Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All E.R. 499*; *South East Thames Regional H.A. v Lovell (1985) 32 Build. L.R. 127*; *24 Seven Utility Services Ltd v Rosekey Ltd [2003] EWHC 3415 (QB)*; *Massai Aviation Services Ltd v Att-Gen for the Bahamas [2007] UKPC 12*. For the assignment of rights to solicitors, see above, para.16-074.

188. *[1980] Q.B. 629, 704*.

189. *The Kelo [1985] 2 Lloyd's Rep. 85*.

190. *Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All E.R. 499*. Quaere whether, if the assignee did make a profit, he is answerable to the assignor.

191. *Trendtex Trading Corp v Credit Suisse [1980] Q.B. 629, 656*, per Lord Denning M.R., 671, 674, per Oliver L.J.; [1982] A.C. 679, 702.

192. *[2011] EWCA Civ 904*, *[2012] P.I.Q.R. P2*. See above, para.16-068.

193. *Glegg v Bromley [1912] 3 K.B. 474*; *Gould v Skinner [1983] Qd. 377*.

194. *[1982] A.C. 679, 702*.

195. *Tolhurst v Associated Portland Cement Manufacturers Ltd [1902] 2 K.B. 660, 668*; affirmed *[1903] A.C. 414*.

196. *Fitzroy v Cave [1905] 2 K.B. 364* (where the purpose of the assignment was to procure the debtor's bankruptcy).

197. *J. Miller Ltd v Laurence & Bardsley [1966] 1 Lloyd's Rep. 90*.

198. *Charlotte Thirty Ltd and Bison Ltd v Croker Ltd (1990) 24 Con. L.R. 46*.

199. *British Union and National Insurance Co v Rawson [1916] 2 Ch. 476*.

200. *Peters v General Accident, etc., Ltd [1938] 2 All E.R. 267*.

201. *Cooper v Micklefield Coal and Lime Co (1912) 107 L.T. 457*; *Cole v Wellington Dairy Farmers' Co-op Association [1917] N.Z.U.L.R. 372*.

202. *Stevens v Benning (1855) 6 De G.M. & G. 223*; *Hole v Bradbury (1879) 12 Ch. D. 886*; *Griffiths v Tower Publishing Co [1897] 1 Ch. 21*; *Don King Productions Inc v Warren [2000] Ch. 291, 319* , per Lightman J.; decision affirmed *[2000] Ch. 291 CA*.

203. Copyright, Designs and Patents Act 1988 s.90.

204. *Nokes v Doncaster Amalgamated Collieries Ltd [1940] A.C. 1014, 1026*; *Denham v Midland Employers' Mutual Assurance Ltd [1955] 2 Q.B. 437, 443*; cf. *I.T. O'Brien v Benson's Hosiery (Holdings) Ltd [1980] A.C. 562, 572*. See also Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

205. *Shaw v Moss' Empires and Boston (1909) 25 T.L.R. 191*; *Russell & Co v Austin Fryers (1909) 25 T.L.R. 414*. Subject to the rules as to public policy (above, para.16-004) and to statute (e.g. Merchant Shipping Act 1995 s.34(1)(c)).

206. *Shayler v Woolf [1946] Ch. 320*, explaining *Cottage Club Estates Ltd v Woodside Estates Co Ltd [1928] 2 K.B. 463*; *The Halcyon the Great [1984] 1 Lloyd's Rep. 283, 289*; *Montedipe SpA v JTP-Ro Jugotanker [1990] 2 Lloyd's Rep. 11*; *Baytur SA v Finagro Holding SA [1992] 1 Q.B. 610*.

207. *[1902] 2 K.B. 660*, *[1903] A.C. 414*.

208. *[1903] A.C. 414, 423* in Court of Appeal, 673.

209. *[1903] A.C. 414, 419* in Court of Appeal, 674–675.

210. *[1903] A.C. 414, 420, 421, 423*; *Nokes v Doncaster Amalgamated Collieries Ltd [1940] A.C. 1014, 1020*.

211. *[1906] 2 K.B. 609*.

212. Yet in *Tolhurst's case [1903] A.C. 414* the assignor company was also bound to take all its chalk from Tolhurst, a point totally ignored in the House of Lords. The result of the decision seems to be that although the assignee was not bound by the duty to take chalk from the defendant, if it did take any, it was bound to take all its requirements of chalk for the manufacture of cement on that piece of land from him. See below, para.19-080. See also *National Carbonising Co Ltd v British Coal Distillation Ltd (1936) 54 R.P.C. 41, 57*.

213. *Griffith v Tower Publishing Co [1897] 1 Ch. 21*; *Crane Co v Wittenberg A/S Unreported December 21, 1999 CA*.

214. *Griffith v Tower Publishing Co [1897] 1 Ch. 21*.

215. But in *Crane Co v Wittenberg A/S Unreported December 21, 1999 CA*, a manufacturing/distribution contract, which was expressly stated to be personal, was held not to be transferred when the company which was a party to the contract was taken over—i.e. merged—into another.

216. See *Griffiths v Secretary of State for Social Services [1974] Q.B. 468* (managing director's contract).

217. *[1974] Q.B. 468*.

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Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 19 - Assignment

Section 1. - Assignment [1]

(c) - Principles Applicable to Statutory and Equitable Assignments

(ii) - Validity of Assignments against Assignor's Creditors and Successors in Title

General

19-059

Even where an assignment is valid against the assignor, the position may be different between persons deriving title through the assignor on the one hand and the assignee on the other. Four different cases must be considered: the validity of an assignment against the assignor's personal representatives; the validity of an assignment against a trustee in bankruptcy of the assignor; the validity of an assignment against the liquidator or creditors of a company assignor; and the validity of an assignment against creditors generally. These four cases do not necessarily exhaust the cases in which some outside party may wish to dispute the validity of an assignment. For example, tax liability may in some cases turn on the validity of an assignment; in such circumstances it has been assumed that the question must be determined by inquiring whether the assignment is valid against the assignor. [218]

Personal representatives

19-060

It never seems to have been doubted that an assignor's personal representatives are bound by an assignment which was binding on the assignor, [219] even where the assignment was not intended to operate until the death of the assignor. [220] It has been suggested that an assignment not binding on the assignor may become binding on his death, inasmuch as an assignment without consideration may be revocable by the assignor but will not be revocable by his personal representatives. [221] This seems questionable, however, for if the "assignment" is truly revocable, then it seems that it cannot be an assignment in the strict sense at all [222]; and on the other hand, an actual assignment (as distinct from an agreement to assign) is not revocable merely because of want of consideration. [223]

Trustee in bankruptcy [224]

19-061

Prima facie the position of a trustee in bankruptcy is the same as that of the assignor himself, i.e. an assignment valid against the assignor will be equally valid against his trustee in bankruptcy. This could clearly cause grave injustice to creditors, especially in view of the effectiveness in equity of an agreement to assign future choses in action, and there are two important limitations on the principle that a trustee in bankruptcy is bound by assignments binding on the assignor.

19-062

First, an assignment of rights which cannot be *earned* by the assignor until after he has become bankrupt, in the sense that the consideration for the rights is not yet wholly executed by the assignor, is void as against the trustee in bankruptcy as from the commencement of the bankruptcy. [225] Thus, an assignment of sums already due to the assignor, or of sums which will become due to him without the need for any further action on his part, will be good against the trustee in bankruptcy; but an assignment of sums to be earned by the assignor in the future (that is, after the commencement of the bankruptcy) will be void as against the trustee from the commencement of the bankruptcy.

19-063

Secondly, s.344 of the Insolvency Act 1986 provides that a *general* assignment of existing or future book debts (or any class thereof) by a person engaged in trade or business is void against the assignor's trustee in bankruptcy as regards any debts not paid at the commencement of the bankruptcy unless the assignment has been registered as a bill of sale. This provision, however, does not apply to an assignment of debts due from specified creditors or under specified contracts, nor to an assignment made on a bona fide transfer for value of the assignor's business, nor to an assignment made for the benefit of creditors generally. [226]

19-064

Apart from these particular cases, there are also other more general statutory provisions enabling an assignment to be set aside, by a trustee in bankruptcy, as a transaction at an undervalue, a preference, an extortionate credit transaction, or as a transaction defrauding creditors. [227]

19-065

An assignment made between the date of the petition and the making of the bankruptcy order will bind the trustee in bankruptcy against a bona fide purchaser for value without notice that the petition had been presented [228] but will otherwise be void unless the court has given its consent or has subsequently ratified the transaction. [229]

Company liquidator or creditors

19-066

The position of a liquidator of a company which, prior to the commencement of the winding up, has assigned any of its rights is basically the same as that of a trustee in bankruptcy; that is, apart from assignments of future earnings, and from particular statutory provisions, a liquidator is bound by an assignment which would be binding on the company itself. But the statutory provisions relating to companies differ markedly from those relating to individual bankrupts in this particular respect. Apart from the general provisions relating to preferences, extortionate credit transactions, and transactions at an undervalue, [230] which are similar to those applying to individual bankrupts, the requirements of the Companies Act only apply to assignments by way of charge, normally but not necessarily a floating charge. By ss.860–861, 863, 866–867, 874 of the Companies Act 2006, a company is required to register, inter alia, a charge on book debts, and failure to comply with the Act renders the charge void against a liquidator [231] or any creditor. [232] On the other hand, these sections, unlike s.344 of the Insolvency Act 1986, apply to any charge over book debts, and not merely to a general charge or assignment. Further, failure to comply with the requirements of the Companies Act renders the charge void against any creditor of the company as well as against the liquidator.

19-067

An assignment which is absolute under s.136 of the Law of Property Act 1925 may sometimes nevertheless be an assignment by way of charge within the meaning of the Companies Act 2006. [233] Under s.136, as already seen, [234] the question is whether the assignor has unconditionally transferred

to the assignee for the time being the sole right to the debt in question as against the debtor. But under the Companies Act, the question is whether the assignor retains any interest in the nature of an equity of redemption as against the assignee. Thus an assignment intended to operate by way of security, under which the right is vested in the assignee unless and until reassigned to the assignor, would be absolute under s.136 of the Law of Property Act, [235] but registrable as a charge under the Companies Act. [236]

Creditors

19-068

Except in the cases mentioned in the last two paragraphs, an assignment which is valid against an assignor will generally be valid against the assignor's creditors. Thus, except in those cases, a creditor cannot generally attach any debt already assigned by the assignor. [237] There is, however, one other possible case in which an assignment may be valid against an assignor but void against creditors. It has already been seen [238] that an assignment may be constituted by instructions given by the assignor to the debtor to pay the assignee. Where the assignee has no notice of the instructions, and has therefore had no chance to accept or decline the assignment, it has been held that the assignment is not binding on creditors of the assignor since it is incomplete. [239] It is thought that the assignment may be binding on the assignor himself in these circumstances. [240]

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1. See Marshall, *The Assignment of Choses in Action* (1950); Biscoe, *Credit Factoring* (1975); Goode on Legal Problems of Credit and Security, 4th edn (2009), Ch.5; Salinger on Factoring, 4th edn (2005); Tolhurst, *The Assignment of Contractual Rights* 2nd edn (2016). M. Smith and N. Leslie, *The Law of Assignment*, 2nd edn (2013); Guest on the Law of Assignment (2012). See also Starke, *Assignments of Choses in Action in Australia* (1972). For conflict of laws in relation to assignment, see below, paras 30-122—30-124, 30-289—30-293.

218. See, e.g. *Vandervell v IRC [1967] 2 A.C. 291* (surtax); *Re Rose [1952] Ch. 499*; *Letts v IRC [1957] 1 W.L.R. 201*; *Dalton v IRC [1958] T.R. 45* (estate duty); and the cases cited above, which concerned stamp duty.

219. *Re Westerton [1919] 2 Ch. 104*; *Re Rose [1905] 1 Ch. 94*. Moreover, notice after the death of the assignor is sufficient to comply with s.136 of the Law of Property Act 1925: see *Walker v Bradford Old Bank (1884) 12 Q.B.D. 511*; *Bateman v Hunt [1904] 2 K.B. 530*; *Re Westerton [1919] 2 Ch. 104*.

220. *Re Westerton [1919] 2 Ch. 104*.

221. *German v Yates (1915) 32 T.L.R. 52*; cf. *Errington v Errington [1952] 1 K.B. 290*, as explained in *National Provincial Bank Ltd v Hastings Car Mart Ltd [1975] A.C. 1175, 1252*.

222. See above, para.19-023.

223. Above, paras 19-020, 19-034.

224. See below, para.20-026.

225. *Ex p. Nichols (1883) 22 Ch. D. 782*; *Wilmot v Alton [1897] 1 Q.B. 17*; *Re Collins [1925] Ch. 556*; *Re Trytel (1952) 2 T.L.R. 32*; cf. *Drew & Co v Josolyne (1887) 18 Q.B.D. 590*.

226. See Insolvency Act 1986 s.344(3)(b).

227. Insolvency Act 1986 ss.339–349, 423–425. See below paras 20-027—20-031.

228. Insolvency Act 1986 s.284(4).

229. Insolvency Act 1986 s.284(1).

230. Insolvency Act 1986 ss.238–246. The provisions governing transactions defrauding creditors (ss.423–425 of the 1986 Act) are the same as those for individual bankrupts.

231. See, e.g. *Orion Finance Ltd v Crown Financial Management Ltd [1996] 2 B.C.L.C. 78 CA*; *Orion Finance Ltd v Crown Financial Management Ltd (No.2) [1996] 2 B.C.L.C. 382 CA*. A liquidator includes, in certain circumstances, a person appointed in foreign proceedings in the nature of a winding-up: *NV Slavenburg's Bank v Intercontinental Natural Resources [1980] 1 W.L.R. 1076, 1086–1087*.

232. On the meaning of creditor see Gough, *Company Charges*, 2nd edn (1998), pp.740–741; Goode on Commercial Law, edited by McKendrick, 4th edn (2010), pp.709–111; *Re Ehrmann Bros Ltd [1906] 2 Ch. 697*.

233. Companies Act 2006 ss.860–861, 863, 866–867, 874.

234. Above, paras 19-013—19-015.

235. Above, para.19-013.

236. See *Re Kent and Sussex Sawmills Ltd [1947] Ch. 177*; *Re Miller, Gibb & Co [1957] 1 W.L.R. 703*; and *Paul and Frank Ltd v Discount (Overseas) Ltd [1967] Ch. 348*, in all of which assignments which were probably absolute under s.136 of the Law of Property Act were held to be registrable under the Companies Act. Certain reservations of title, commonly known as *Romalpa* clauses, may create a registrable charge (*Re Bond Worth Ltd [1980] Ch. 228*; *Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch. 25*; *E. Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd [1988] 1 W.L.R. 150*; *Tatung (UK) Ltd v Galex Telesure Ltd (1989) 5 B.C.C. 325*; *Re Weldtech Equipment Ltd [1991] B.C.C. 16)*; Vol.II, paras 44-168—44-180. So also certain liens: *The Ugland Trailer [1985] 2 Lloyd's Rep. 372*; *The Annangel Glory [1988] 1 Lloyd's Rep. 45*. cf. a "block discount" agreement which constitutes an absolute assignment of debts and does not create a registrable charge: *Lloyds & Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd [1992] B.C.L.C. 609 HL*.

237. *Holt v Heatherfield Trust Ltd [1942] 2 K.B. 1*.

238. Above, paras 19-022—19-024.

239. *Rekstin v Severo, etc., and Bank for Russian Trade [1933] 1 K.B. 47*.

240. Above, para.19-024.

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(c) - Principles Applicable to Statutory and Equitable Assignments

(iii) - Priorities between Successive Assignees

Priorities

19-069

As seen above, notice to the debtor is not necessary to perfect an equitable assignment as between assignor and assignee, but where there are successive assignments (whether statutory or equitable), the rule in *Dearle v Hall*, [241] which originally related to equitable interests in pure personalty, regulates priorities. Under this rule the assignee who first gives notice to the debtor has the prior right, unless he knew of the earlier assignment when he took his assignment. [242] The fact that he knew of the earlier assignment when he gave notice is irrelevant. [243] Thus where a debt due to a firm was assigned by one partner to the defendants by writing and afterwards by the other partner to the claimant by deed, and the claimant gave notice to the debtor before the defendants, it was held that there was a valid equitable assignment to the claimant in priority to the defendants. [244] And a second statutory assignment will not prevail over an earlier equitable one merely because it confers a legal right upon the assignee [245]: in Phillips J.'s words in the *Pfeiffer* case:

> "… even if the [statutory] assignment is effected for value without notice of a prior equity, priorities fall to be determined as if the assignment had been effected in equity, not in law." [246]

The issue of priority must be distinguished from the rule that an assignee takes "subject to equities". [247] Such equities are independent of the assignments and prevail over all assignees.

Nature of notice required

19-070

In general, notice need not be formal for the purpose of conferring priority over a subsequent assignee: any kind of notice will suffice so long as the fact that assignment has taken place is brought to the notice of the debtor. A letter stating that the writers had authority to collect freight "against which we have made payments" was held a good notice. [248] And oral notice acquired in the ordinary course of business has been held sufficient, even though no notice was given by the assignee. [249] But as regards the assignment of an equitable interest in real or personal property, s.137(3) of the Law of Property Act 1925 lays down that oral notice of the assignment to a trustee does not affect the priority of competing claims of purchasers in that equitable interest.

1. See Marshall, *The Assignment of Choses in Action* (1950); Biscoe, *Credit Factoring* (1975); Goode on Legal Problems of Credit and Security, 4th edn (2009), Ch.5; Salinger on Factoring, 4th edn (2005); Tolhurst, *The Assignment of Contractual Rights* 2nd edn (2016). M. Smith and N. Leslie, *The Law of Assignment*, 2nd edn (2013); Guest on the Law of Assignment (2012). See also Starke, *Assignments of Choses in Action in Australia* (1972). For conflict of laws in relation to assignment, see below, paras 30-122—30-124, 30-289—30-293.

241. *(1823) 3 Russ. 1*.

242. *Dearle v Hall (1823) 3 Russ. 1*; see also *Lloyd v Banks (1868) L.R. 3 Ch. App. 488*; *Re Holmes (1885) 29 Ch. D. 796*; *Ward v Duncombe [1893] A.C. 369*; *Kelly v Selwyn [1905] 2 Ch. 117*; *Ellerman Lines Ltd v Lancaster Maritime Co Ltd [1980] 2 Lloyd's Rep. 497*; *The Attika Hope [1988] 1 Lloyd's Rep. 439*; *Compaq Computer Ltd v Abercorn Group Ltd [1991] B.C.C. 484*; *E. Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd [1988] 1 W.L.R. 150*. The principle does not however apply in favour of a trustee in bankruptcy (*Re Anderson [1911] 1 K.B. 896)*; a judgment creditor (*Scott v Lord Hastings (1858) 4 K. & J. 633)*; nor a volunteer (*Justice v Wynne (1861) 12 Ir.Ch.Rep. 289*). For further discussion of this difficult topic see Snell's Equity, 33rd edn (2014), paras 4.56–4.71–00; Smith and Leslie, *The Law of Assignment*, 2nd edn (2013), paras 27.48–27.105; Beale, Bridge, Gullifer, Lomnicka, *The Law of Security and Title-Based Financing*, 2nd edn (2012), paras 14.09–14.20. See also Goode (1976) 92 L.Q.R. 554–559; Donaldson (1977) 93 L.Q.R. 324; Goode (1977) 93 L.Q.R. 487; McLauchlan (1980) 96 L.Q.R. 90; Oditah (1989) 9 O.J.L.S. 513; De Lacy [1999] Conv. 311.

243. *Mutual Life Assurance Society v Langley (1886) 32 Ch. D. 460*.

244. *Marchant v Morton, Down & Co [1901] 2 K.B. 829. Joseph v Lyons (1884) 15 Q.B.D. 280*; *E. Pfeiffer Weinkellerei-Weineinkauf GmbH v Arbuthnot Factors Ltd [1988] 1 W.L.R. 150*.

245. *E. Pfeiffer Weinkellerei-Weineinkauf GmbH v Arbuthnot Factors Ltd [1988] 1 W.L.R. 150, 161–163*. For a contrary approach, see Thomas (1951) 1 J.S.P.T.L. 480; Oditah (1989) 9 O.J.L.S. 513.

246. *[1988] 1 W.L.R. 150, 162*. It was left open, 163, whether a statutory assignee, who has actually been paid the debt, can claim priority as a bona fide purchaser for value of the legal title to the payments received. This was conceded in favour of the assignee in *Compaq Computers Ltd v Abercorn Group Ltd [1991] B.C.C. 484, 500*. See also *Taylor v Blakelock (1886) 32 Ch. D. 560*.

247. Below, paras 19-071—19-077.

248. *Smith v S.S. Zigurds (Owners) [1934] A.C. 209*.

249. *Re Worcester (1868) L.R. 3 Ch. App. 555*; *Lloyd v Banks (1868) L.R. 3 Ch. App. 488*; *Re Dallas [1904] 2 Ch. 385, 399*.

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Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 19 - Assignment

Section 1. - Assignment [1]

(c) - Principles Applicable to Statutory and Equitable Assignments

(iv) - Assignments “subject to equities”

Assignments “subject to equities” [250]

19-071

Assignments normally take effect “subject to equities”. This was always so in equity, [251] and is also the position with a statutory assignment, for s.136 of the Law of Property Act 1925 lays down that an assignment takes effect “subject to equities having priority over the right of the assignee”. [252] Thus, where a claim arises out of the contract under which the debt itself arises, and the claim affects the value or amount of the debt which one of the parties purported to assign for value, then if the assignee subsequently sues, the other party to the contract may set up that claim (including the right to set the contract aside [253]) by way of defence against the assignee as cancelling or diminishing the amount to which the assignee asserts his rights under the assignment. [254] Many of the cases have arisen in the context of receivership. The appointment of a receiver by a debenture-holder converts the incomplete assignment constituted by the debenture into a completed equitable assignment of the assets charged by it. [255] The authorities were reviewed in *Business Computers Ltd v Anglo-African Leasing Ltd* [256] and it was said that the result:

> “… is that a debt which accrues due before notice of an assignment is received, whether or not it is payable before that date, [257] or a debt which arises out of the same contract as that which gives rise to the assigned debt, or is closely connected with that contract, [258] may be set off against the assignee. A debt which is neither accrued nor connected may not be set off even though it arises from a contract made before the assignment.” [259]

The rationale for this is that, after notice of the assignment, the debtor cannot “do anything to take away or diminish the rights of the assignee as they stood at the time of the notice”. [260] A direct claim by the debtor against the assignee may, however, be the subject of a set-off although it would not have been available against the assignor. [261]

Claims for damages

19-072

It is clear that provided a claim for unliquidated damages can be set off against the assignor, [262] it can also be set off against the assignee if it arises out of the transaction giving rise to the assigned debt, irrespective of whether the claim itself could have been assigned. [263] But in *Stoddart v Union Trust* [264] it was held that a claim for damages for fraudulently inducing the debtor to enter into the contract with the assignor could not be set up against the assignee unless the debtor rescinded the whole

agreement. The decision appears to draw a distinction between a claim in tort for damages for fraud and a similar claim for breach of a term of the contract, and may turn on a procedural point. [265] In the somewhat analogous case where the fraudulent party becomes bankrupt (instead of assigning his rights) it has been held that the fraud may be set up as a defence against the trustee in bankruptcy. [266]

Modification of "equities" rule

19-073

Sometimes the rule that an assignee takes subject to equities is excluded or modified by statute, [267] or by the terms of the contract between the debtor and the assignor. [268]

Successive assignments

19-074

Where there have been several assignments, there is authority for the view that the rule that an assignee takes subject to equities does not include claims available against an intermediate assignee and that a claim or defence against the intermediate assignee could not be set-off in a claim by a subsequent assignee. [269] It has, however, been argued that where the claim or defence against the intermediate assignee arose after the first assignment it should be available in a claim by a subsequent assignee. [270] Moreover, where the assignment is statutory, as "the debt is transferred to the assignee and becomes as though it had been his from the beginning", [271] it is possible that the subsequent assignee would be required to sue in the name of the intermediate assignee and therefore be subject to such equities available against the intermediate assignee as arose before the subsequent assignee gave notice of the assignment to the debtor. [272]

Assignee cannot recover more than assignor

19-075

A further aspect of the idea that an assignee takes an assignment "subject to equities" is the principle that an assignee cannot recover more from the debtor than the assignor could have done had there been no assignment. For example, in *Dawson v Great Northern & City Ry Co* [273] the assignment of a statutory claim for compensation for damage to land did not entitle the assignee to recover extra loss suffered by reason of a trade carried on by him, but not the assignor, that the assignor would not have suffered.

19-076

The application of this principle has given rise to particular difficulty in relation to building contracts or tort claims for damage to buildings. Say, for example, a building is sold at full value along with an assignment to the purchaser of claims in contract or tort in relation to the building. The building turns out to need repairs as a result of a breach of the builder's contract with the assignor (whether that breach is prior, or subsequent, to the sale to the assignee) or of a tort (damaging the building prior to the sale). The assignee pays for the repairs. It might be argued that the assignor in that situation has suffered no loss so that, applying the governing principle that the assignee cannot recover more than the assignor, the assignee has no substantial claim. If correct, "the claim to damages would disappear … into some legal black hole, so that the wrongdoer escaped scot-free". [274] Acceptance of the argument would also nullify the purpose of the governing principle which is to avoid prejudice to the debtor and not to allow the debtor to escape liability. Perhaps not surprisingly, therefore, that argument was rejected in *Offer-Hoar v Larkstore Ltd*. [275] The Court of Appeal said that, in applying the principle that the assignee cannot recover more than the assignor, one should be asking what damages the assignor could itself have recovered had there been no assignment and *had there been no transfer of the land* to the assignee. Substantial damages were, therefore, recoverable where an assignor had sold its land to an assignee along with, or prior to, the assignment of the relevant cause

of action relating to the land.

19-077

The problem has, in any event, normally been circumvented because of the courts' recognition that, where a third party is, or will become, owner of the defective or damaged property, there is an exception to the general rule that a contracting party can recover damages only for its own loss and not the loss of the third party. [276] Where the exception applies, the contracting party (the assignor) is entitled to substantial damages for the loss suffered by the third party (the assignee): by the same token, there is no question of an award of substantial damages to the assignee infringing the principle that the assignee cannot recover more than the assignor.

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1. See Marshall, *The Assignment of Choses in Action* (1950); Biscoe, *Credit Factoring* (1975); Goode on Legal Problems of Credit and Security, 4th edn (2009), Ch.5; Salinger on Factoring, 4th edn (2005); Tolhurst, *The Assignment of Contractual Rights* 2nd edn (2016). M. Smith and N. Leslie, *The Law of Assignment*, 2nd edn (2013); Guest on the Law of Assignment (2012). See also Starke, *Assignments of Choses in Action in Australia* (1972). For conflict of laws in relation to assignment, see below, paras 30-122—30-124, 30-289—30-293.

250. See in general Derham, *Set-off*, 4th edn (2011), Ch.17. See also Derham (1991) 107 L.Q.R. 126.

251. *Mangles v Dixon (1852) 3 H.L.C. 702, 731*; *Phipps v Lovegrove (1873) L.R. 16 Eq. 80, 88*.

252. Above, para.19-007.

253. *Stoddart v Union-Trust [1912] K.B. 181, 189*.

254. *Young v Kitchin (1878) 3 Ex. D. 127*; *Newfoundland Government v Newfoundland Ry (1883) 13 App. Cas. 199*; *Lawrence v Hayes [1927] 2 K.B. 111*; *Banco Santander SA v Bayfern Ltd [2000] 1 All E.R. (Comm) 776 CA* (assignee of the promise to pay under a letter of credit is subject to the "fraud exception" as the assignor would have been); *Sinclair v British Telecommunications Plc [2000] 2 All E.R. 461 CA* (where the assignor's action would have been stayed for failure to pay the costs of an earlier substantially similar action, the courts can grant a stay against the assignee to prevent it being in a better position than the assignor).

255. *George Barker (Transport) Ltd v Eynon [1974] 1 W.L.R. 462, 467*. See also *Watson v Duff, Morgan & Vermont (Holdings) Ltd [1974] 1 W.L.R. 450, 456*.

256. *[1977] 1 W.L.R. 578*.

257. *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd [1974] Q.B. 1*; *Biggerstaff v Rowatts Wharf Ltd [1896] 2 Ch. 93*.

258. *Newfoundland Government v Newfoundland Ry (1888) 13 App. Cas. 199, 213* (claims "flowing out of and inseparably connected with … the transactions which also give use to the subject of the assignment"); *William Pickersgill & Sons Ltd v London & Provincial, etc., Ins. Co Ltd [1912] 3 K.B. 614*; *The Raven [1980] 2 Lloyd's Rep. 266*; cf. *Provident Finance Corp Pty Ltd v Hammond [1978] V.R. 312*; *The Evelpidis Era [1981] 1 Lloyd's Rep. 54, 66*; *The Dominique [1989] A.C. 1056*.

259. *[1977] 1 W.L.R. 578, 585 (Templeman J.)*. See also *Re Taunton, Delmard Lane & Co Ltd [1893] 2 Ch. 175, 183*; *Re Pinto Leite & Nephews [1929] 1 Ch. 221*; *Jeffryes v Agra & Mastermans Bank (1866) L.R. 2 Eq. 674*; *Watson v Mid-Wales Ry (1867) L.R. 2 C.P. 593*; *Re Pain [1919] 1 Ch. 38*; *The Khian Captain (No.2) [1996] 1 Lloyd's Rep. 429*; *Marathon Electrical Manufacturing Corp v Mashreqbank P.S.C. [1997] 2 B.C.L.C. 460*. In *Bibby Factors Northwest Ltd v HFD Ltd [2015] EWCA Civ 1908, [2016] 1 Lloyd's Rep 517*, there was a helpful application

and clarification of the passage from Templeman J.'s judgment, cited in this paragraph, in *Business Computers Ltd v Anglo-African Leasing Ltd [1977] 1 W.L.R. 578, 585*. The assignor supplied goods to customers. The customers were contractually entitled to a rebate on the money owing under those contracts. The question was whether the rebate applied—that is, whether the customers were entitled to set-off the rebate—as against the assignee (who had bought the debts as a factor). The rebate arose in respect of debts owing both before and after notice of the assignment. It was held that the customers (i.e. the debtors) could set-off the rebate against the claims brought by the assignees. It did not matter whether the debts to which the rebate related were before or after the notice of assignment. This was because the rebate fell to be set-off applying the rules of equitable setoff. By those rules, there is an equitable set-off if the monetary cross-claim is so closely connected to the claim that it would be manifestly unjust to enforce payment without taking into account the cross-claim (see *Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667, [2011] 1 Lloyd's Rep. 517*). The passage from Templeman J.'s judgment in the *Business Computers* case was therefore setting out alternatives. Where equitable set-off applies, it does not matter whether the debt to which the set-off relates accrues before or after the notice of assignment because the principle being applied is that the assignment is subject to equities and the assignee cannot be in a better position than the assignor. This is distinct from the principle that the debtor cannot "take away" the rights of the assignee (referred to in the text of this paragraph), to which the timing of the accrual of the debt is relevant.

260. *Roxburghe v Cox (1881) 17 Ch. D. 520, 526*.

261. *The Raven [1980] 2 Lloyd's Rep. 266*.

262. *The Dominique [1989] A.C. 1056*.

263. *Young v Kitchin (1878) 3 Ex. D. 127*; *Newfoundland Government v Newfoundland Ry (1883) 13 App. Cas. 199*.

264. *[1912] 1 K.B. 181*. For criticism of this decision, see Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.15–041.

265. viz that the debtor had "counterclaimed" for damages for the fraud against the assignee instead of merely setting the fraud up by way of defence. See also *Lawrence v Hayes [1927] 2 K.B. 111* . The case was, however, followed in *Provident Finance Corp Pty Ltd v Hammond [1978] V.R. 312*.

266. *Jack v Kipping (1882) 9 Q.B.D. 113*; *Tilley v Bowman [1910] 1 K.B. 745*; cf. *Kitchen's Trustee v Madders [1950] Ch. 134*; see below, para.20-042. In none of these cases was there, or indeed could there have been, a counterclaim for damages for fraud, for this would have been a provable debt in the bankruptcy.

267. e.g. Marine Insurance Act 1906 s.50(2); Bills of Exchange Act 1882 s.38(2). On s.50, see *The Evelpidis Era [1981] 1 Lloyd's Rep. 54*.

268. *Re Agra and Masterman's Bank (1867) L.R. 2 Ch. App. 391, 397*; *Re Blakely Ordinance Co (1867) 3 Ch. App. 154, 159–160*. Such provisions are often inserted into debentures. See also *William Pickersgill & Sons Ltd v London & Provincial etc., Ins. Co Ltd [1912] 3 K.B. 614*. As to equities attaching to the debt in the hands of an intermediate assignor, see *Southern British National Trust Ltd v Pither (1937) 57 C.L.R. 89*. If the assignee in a notice of assignment to the debtor says "no set-off", it is an interesting question, on which there appears to be no authority, whether the debtor is estopped from a set-off if, e.g. he continues to order goods from the assignor.

269. *The Raven [1980] 2 Lloyd's Rep. 266, 273*; *Re Milan Railways Co (1884) 25 Ch. D. 587, 593*.

270. Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.15–043.

271. *Read v Brown (1888) 22 Q.B.D. 128, 132*.

272. Derham, *Set-off*, 4th edn (2011), para.17–48.

273. *[1905] 1 K.B. 260*.

274. *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd (1982) S.L.T. 533, 538*, per Lord Keith.

275. *[2006] EWCA Civ 1079*, *[2006] 1 W.L.R. 2926*. *Offer-Hoar v Larkstore Ltd [2006] EWCA Civ 1079, [2006] 1 W.L.R. 2926* was applied in *Landfast (Anglia) Ltd v Cameron Taylor One Ltd [2008] EWHC 343 (TCC)*. See also the earlier cases of *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd (1982) S.L.T. 533* (a Scottish delict case); *Linden Gardens Ltd v Lenesta Sludge Disposals Ltd (1992) 57 B.L.R. 57, 80–81*, per Staughton L.J.

276. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 A.C. 85*; *Darlington BC v Wiltshier Northern Ltd [1995] 1 W.L.R. 68*; *Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 A.C. 518*. The exception is based on *Dunlop v Lambert (1839) 6 Cl. & F. 600* and *The Albazero [1977] A.C. 774*. For detailed discussion, see above, paras 18-051—18-070.

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(c) - Principles Applicable to Statutory and Equitable Assignments

(v) - No Assignment of Liabilities

Consent of other party required for release of contracting party

19-078

Everybody has a right to choose with whom he will contract and no-one is obliged without his consent to accept the liability of a person other than him with whom he made his contract. Consequently, the burden of a contract cannot in principle be transferred without the consent of the other party, so as to discharge the original contractor. As Sir R. Collins M.R. said in *Tolhurst v Associated Portland Cement Manufacturers Ltd* [277]:

> "Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee."

Benefit and burden

19-079

The principle that the burden of a contract cannot be transferred so as to discharge the original contractor without the consent of the other party means that, as a general rule, the assignee of the benefit of a contract involving mutual rights and obligations does not acquire the assignor's contractual obligations. Thus, where goods are purchased, and the seller assigns the right to the price to a credit factor, the factor is under no liability to the purchaser if the goods are defective although, in an action by the factor, the principle that assignments are subject to equities means that the purchaser will generally be able to rely on any defence or claim which he could raise against the seller. [278] Similarly in *Pan Ocean Shipping Ltd v Creditcorp Ltd* [279] it was held by the House of Lords that an assignee of the payment of hire under a charterparty is not liable to the debtor (the charterer), whether in contract or restitution, to repay the hire paid for a period when the ship turned out to be off-hire: rather the liability to repay the unearned hire, which on the facts was contained in an express term of the charterparty, remained exclusively with the assignor. This was so irrespective of whether the debtor would have had a defence to an action for nonpayment of hire by the assignee.

Conditional benefits

19-080

However, where contractual rights are assigned, the extent of those rights will be defined by the

original contract. This means that (for example) an exemption clause in the original contract may be binding on the assignee. [280] Again, a patentee who assigned his patent by a contract which provided that certain payments were to be made to him was permitted to sue a company to which the assignees had later assigned their rights. [281] In *Tolhurst's* case, [282] the assignee acquired the benefit of a contract to supply chalk for the manufacture of Portland cement on a particular piece of land. The assignee was not bound by the duty to take chalk from Tolhurst, [283] but if it did take chalk, it was bound to obtain all its requirements for the manufacture of cement on that piece of land from him. Although these cases have sometimes been seen as applications of the principle that he who takes the benefit of a transaction must also bear the burden, it appears that they are examples of another principle; the conditional benefit principle. [284] The conditional benefit principle arises where the right assigned is only conditional or qualified, the condition being that certain restrictions shall be observed or certain burdens assumed. The restrictions or qualifications are an intrinsic part of the right which the assignee has to take as it stands. [285] The question whether a contract creates a conditional benefit is one of construction. [286]

"Pure" benefit and burden principle

19-081

In *Tito v Waddell (No.2)* Megarry V.C. distinguished the conditional benefit principle from what he termed the "pure principle of benefit and burden". [287] By a series of contracts, a mining company acquired the right to extract phosphates on a Pacific island on the condition that it would "return all worked out lands to the original owners and … replant such lands". In 1920 the rights were transferred to government commissioners "subject to … the covenants and conditions therein contained". Megarry V.C. held that the right to extract phosphates given in the contracts between the owners and the company was not qualified by or conditional on the replanting obligations but that the "pure principle" of benefit and burden rendered the present commissioners liable to the owners for breach of the covenant to replant. But in *Rhone v Stephens* [288] the House of Lords cast doubt on Megarry V.C.'s views to the extent that he was recognising a "pure principle" that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Lord Templeman instead said that the condition must be relevant to the exercise of the right. On that basis, it was held that the fact that the roof of D's house was supported by C's cottage did not mean that C could enforce against D a covenant made by D's predecessor in title with C's to repair the roof.

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1. See Marshall, *The Assignment of Choses in Action* (1950); Biscoe, *Credit Factoring* (1975); Goode on Legal Problems of Credit and Security, 4th edn (2009), Ch.5; Salinger on Factoring, 4th edn (2005); Tolhurst, *The Assignment of Contractual Rights* 2nd edn (2016). M. Smith and N. Leslie, *The Law of Assignment*, 2nd edn (2013); Guest on the Law of Assignment (2012). See also Starke, *Assignments of Choses in Action in Australia* (1972). For conflict of laws in relation to assignment, see below, paras 30-122—30-124, 30-289—30-293.

277. *[1902] 2 K.B. 660, 668 CA*; *C.B. Peacock Land Co Ltd v Hamilton Milk Products Co Ltd [1963] N.Z.L.R. 576*; *Hirachand Punamchand v Temple [1911] 2 K.B. 330, 80 L.J.K.B. 1155*; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 A.C. 85, 103*. See also Birks and Beatson (1976) 92 L.Q.R. 188–202.

278. Above, paras 19-071—19-072.

279. *[1994] 1 W.L.R. 161*.

280. See *Britain & Overseas Trading Ltd v Brooks Wharf Ltd [1967] 2 Lloyd's Rep. 51*; *National Carbonising Co Ltd v British Coal Distillation Ltd (1936) 54 R.P.C. 41, 57* et seq. See also *Aspden v Seddon (No.2) (1876) 1 Ex. D. 496, 509*. In *Glencore International AG v Metro Trading International Inc [1999] 2 All E.R. (Comm) 899*, the assignee of the obligation to pay the price under a contract of sale was held "bound" by the exclusive jurisdiction clause in that contract (and such an assignment was held to fall within art.17 of the Brussels Convention, given effect to in the UK by the Civil Jurisdiction and Judgments Act 1982).

281. *Werdman v Société Générale d'Electricité (1881) 19 Ch. D. 246*.

282. *[1903] A.C. 414*; above, para.19-056.

283. *National Carbonising Co Ltd v British Coal Distillation Ltd (1936) 54 R.P.C. 41*.

284. See generally *Tito v Waddell (No.2) [1977] Ch. 106, 290* et seq. See also *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty [1994] 1 W.L.R. 161, 171*.

285. *[1977] Ch. 106, 290, 302*.

286. *[1977] Ch. 106, 302*.

287. *[1977] Ch. 106, 290, 302*.

288. *[1994] 2 A.C. 310*. See also *Thamesmead Town Ltd v Allotey [1998] 37 E.G. 161*.

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Section 2. - Vicarious Performance

Vicarious performance

19-082

A contracting party can in the case of many contracts enter into an arrangement by which some other person may perform for him, as far as he is concerned, the obligations of the contract, and the other contracting party will be obliged to accept that performance if it is performance in accordance with the terms of the contract. The contracting party will, however, be liable for any breach that may happen, and the other contracting party is not bound or, indeed, entitled to sue the substituted person for breach of contract, [289] although there may, of course, be a remedy in tort, e.g. where the substituted person negligently damages or causes the loss of goods entrusted to him. This is technically known as vicarious performance, and it is "quite a mistake to regard that as an assignment of the contract: it is not". [290]

19-083

It has been said that:

> "Whether or not in any given contract performance can properly be carried out by the employment of a subcontractor must depend on the proper inference to be drawn from the contract itself, the subject-matter of it, and other material surrounding circumstances." [291]

An obligation to pay money can plainly be vicariously performed. [292] Some contractual obligations are obviously too personal to admit to performance by anyone other than the original contracting parties: for example, a contract to paint a picture, or to write a play or a book. [293] A contractual obligation to store furniture [294] and to carry out building work, [295] has been held to be incapable of vicarious performance, because of the personal confidence reposed by the customer in the original contracting party. And in *Johnson v Raylton* [296] it was held that where a manufacturer of goods contracts to supply specific goods to a buyer, there is an implied term in the contract that the goods shall be those of the seller's own manufacture. [297] The case should, however, probably not be regarded as laying down a general rule still applicable in modern conditions, for clearly much must depend on the nature of the goods and the customs of the trade. [298] The terms of the contract may also throw light on the question whether it can be vicariously performed, the test being: Did the contracting party promise personal performance, or did he merely promise a result? In *Davies v Collins*, [299] the Court of Appeal hesitated to say that a contract to clean clothes was incapable of vicarious performance. They reached the conclusion that the particular contract in that case was not so capable because of the language of an exemption clause.

19-084

In *Robson and Sharpe v Drummond*, [300] the defendant hired a chariot from Sharpe for five years at a yearly rent, payable in advance each year, the chariot to be kept in repair and painted once a year by

Sharpe. After three years Sharpe retired from business and purported to delegate performance of the contract to his partner Robson. It was held that the defendant was entitled to repudiate the contract and was not liable to pay the rent for the last two years. Lord Tenterden based his judgment on the ground that the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharpe, and therefore might have agreed to pay rent in advance. Littledale and Parke JJ. also said that the defendant had a right to the personal services of Sharpe, and to the benefit of his judgment and taste. On the other hand, in *British Waggon Co and Parkgate Waggon Co v Lea*, [301] the defendant hired 100 railway wagons from the Parkgate Waggon Company for seven years at a yearly rent payable quarterly, the wagons to be kept in repair by the company. After four years the Parkgate Company, which had gone into voluntary liquidation, assigned the benefit of the contract to the British Waggon Company and delegated performance of its obligations to the assignees. It was held that the defendant was not entitled to repudiate the contract. Cockburn C.J. laid down the general principle:

> "… that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract for the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service." [302]

He held that the principle did not apply to a contract for the repair of railway wagons—"a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute"; and that the defendant could not have attached any importance to whether the repairs were done by the Parkgate Company or by a sub-contractor.

Vicarious performance and agency

19-085

As already seen, in a case of vicarious performance the original contracting party remains liable on the contract. There is nothing to prevent a person contracting on such terms that he is entitled either to perform the contract himself, or to secure performance by making a new contract with a third party as agent of the other contracting party. If such a new contract is in fact made the original contracting party may be subject to no further liability on the contract. Such an arrangement is not unusual in certain types of business, [303] though difficulty may sometimes arise in deciding whether the case is one of agency or of vicarious performance. [304] Whether it is the one or the other depends on the intention of the parties objectively ascertained.

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289. *Stewart v Reavell's Garage [1952] 2 Q.B. 545*. This is to be distinguished from where the debtor's promise is not one to render the performance but merely to arrange for the services to be performed by another person (as the debtor's agent). In respect of the latter type of promise, the debtor's only obligation at common law is to exercise reasonable care and skill in selecting a competent person to perform. For this distinction (albeit that the promise in question was held to be of the former type) see *Wong Mee Wan v Kwan Kin Travel Services Ltd [1996] 1 W.L.R. 38*. See also Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.17–013.

290. *Davies v Collins [1945] 1 All E.R. 247, 249*; cf. *Nokes v Doncaster Amalgamated Collieries Ltd [1940] A.C. 1014, 1019*.

291. *Davies v Collins [1945] 1 All E.R. 247, 250*; *Kollerich & Cie SA v The State Trading Corp of India [1980] 2 Lloyd's Rep. 32*.

292. *North v Brown [2012] EWCA Civ 223*.

293. *Tolhurst v Associated Portland Cement Manufacturers Ltd [1902] 2 K.B. 660, 669*, per Sir R. Collins M.R.; *Fratelli Sorrentino v Buerger [1915] 1 K.B. 307, 313*; *Southway Group Ltd v Wolff & Wolff (1991) 57 B.L.R. 33, 52*.

294. *Edwards v Newland & Co [1950] 2 K.B. 534*.

295. *Southway Group Ltd v Wolff & Wolff (1991) 57 B.L.R. 33*.

296. *(1881) 7 Q.B.D. 438*.

297. A clause to this effect was originally included in the Sale of Goods Bill 1889.

298. The dissent of Bramwell L.J. puts strong arguments against the majority decision.

299. *[1945] 1 All E.R. 247*.

300. *(1831) 2 B. & Ad. 303*, a much criticised case. cf. *Boulton v Jones (1857) 2 H. & N. 564*; *Jaeger's Sanitary Woollen System Co v Walker & Sons (1897) 77 L.T. 180*.

301. *(1880) 5 Q.B.D. 149*. See also *C.B. Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd [1963] N.Z.L.R. 576*.

302. *(1880) 5 Q.B.D*. at 153. cf. *Fratelli Sorrentino v Buerger [1915] 3 K.B. 367, 370*.

303. Bills of lading, for example, may contain clauses permitting transhipment without further liability on the original contracting carrier: see Scrutton on Charterparties, 22nd edn (2011), Art.144. See also *Investors in Industry Commercial Property Ltd v Bedfordshire DC [1986] 1 All E.R. 787, 807*.

304. e.g. if a person takes some article to a shop for repair and the shopkeeper sends it on to the manufacturer with the consent of the customer; cf. *Stewart v Reavell's Garage [1952] 2 Q.B. 545*; *Morris v C.W. Martin & Sons Ltd [1966] 1 Q.B. 716*; *The Pioneer Container [1994] 2 A.C. 324*.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 19 - Assignment

Section 3. - Assignment and Negotiability

Assignment and negotiability

19-086

Negotiable instruments, governed formerly by the law of merchants, differ in several ways from contracts which are assignable under the law as explained in the foregoing pages. In particular:

(a)

They are transferable by delivery (or in some cases by delivery and indorsement) though it would be more accurate to say that the contract contained in them is transferred.

(b)

No notice need be given to the debtor.

(c)

The right or contract embodied in them cannot be transferred without the instrument. Thus the rule in *Dearle v Hall* [305] as to priority of notice to the debtor has no application to negotiable instruments. [306]

(d)

A bona fide transferee for value may obtain a good title even though the title of his transferor was defective. Thus the transferor of a negotiable instrument can give a better title than he himself has. [307]

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305. *(1823) 3 Russ. 1*.

306. See *Bence v Shearman [1898] 2 Ch. 582*.

307. Bills of Exchange Act 1882 ss.29, 30, 38. But not if the bill is overdue: s.36(2). See also Consumer Credit Act 1974 s.125. See further Vol.II, Ch.34.

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Volume I - General Principles

Part 6 - Joint Obligations, Third Parties and Assignment

Chapter 19 - Assignment

Section 4. - Assignment, Novation and Acknowledgment

Novation

19-087

Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained [308]: in this necessity for consent lies the most important difference between novation and assignment.

Main examples of novation

19-088

Most of the reported cases in English law have arisen either out of the amalgamation of companies, or of changes in partnership firms, the question being whether as a matter of fact the party contracting with the company or the firm accepted the new company or the new firm as his debtor in the place of the old company or the old firm. [309] That acceptance may be inferred from acts and conduct, but ordinarily it is not to be inferred from conduct without some distinct request. [310] Thus where a banking firm consisted of two partners and one died, the acceptance by a customer from the surviving partner of a fresh deposit note for a balance of a debt due was held sufficient evidence of novation to discharge the estate of the deceased partner, as the customer took the money out of a current account and placed it on deposit at the request of the surviving partner. [311]

Novation is not an assignment

19-089

The effect of a novation is not to assign or transfer a right or liability, but rather to extinguish the original contract and replace it by another. It is therefore necessary that consideration should be provided for the new contract. [312] If A owes B money and both parties agree with C that C, not A, is to pay the money to B, B provides consideration for C's promise to pay him by agreeing to release A; while A provides consideration for B's promise to release him by providing the new debtor, C. As novation is different from assignment, it follows that the rule that assignment is "subject to equities" does not apply to novation. Say, for example, a contract was induced by a misrepresentation and there has then been an assignment by the person making the misrepresentation: the debtor can rely on the misrepresentation vis-`a-vis the assignee. In contrast, it is irrelevant to a novation that the original contract was induced by a misrepresentation. Once there has been a novation, the original contract has been extinguished and with it the power to rescind for the original misrepresentation.

Novation of part of a contract

19-090

In principle, there seems no reason why there cannot be a novation of part of a contract while leaving the rest of the contract to survive, although this may require some variation of the original surviving terms. Whether that is what is being achieved in any particular situation will largely turn on the intention of the parties. In principle, it further follows that there can be a novation of the whole or part of a multiparty contract with the original contract being left in place entirely as regards some parties while there is a whole or partial novation as regards other parties.

Acknowledgment

19-091

There is a difficult line of mainly nineteenth century cases [313] that appears to accept what one can call "acknowledgement". [314] In so far as this concerns debts, it is closely related to, but distinct from, assignment. It must be recognised, however, that this line of authority is difficult to rationalise [315] and a number of alternative explanations to "acknowledgement" have been offered, including attornment [316] and restitution of unjust enrichment. [317]

19-092

The principle may be stated as follows: where the defendant holds a fund on behalf of a third person, or acknowledges that he owes a debt to the third person, [318] and the third person directs the defendant to pay the claimant out of the fund or debt, then, if the defendant acknowledges that direction and promises the claimant to pay him accordingly, the claimant may uphold the promise against the defendant by an action for money had and received. It is not clear how this principle can be reconciled with the doctrine of consideration or, if one views the claimant as the beneficiary of a contract between the person giving the direction and the defendant, the doctrine of privity of contract. [319] In a leading statement of the law, Blackburn J. in *Griffin v Weatherby* [320] said the following:

> "Ever since the case of *Walker v Rostron*, [321] it has been considered as settled law that where a person transfers … on account of a debt, whether due or not, a fund actually existing or accruing … and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder."

19-093

The most important modern case applied this principle to a situation where there was no transfer of a fund and where there was no debt owed by the third person to the claimant. In *Shamia v Joory* [322] the defendant owed the third person, Y, some £1,300 as remuneration for services rendered, and when Y requested the defendant to pay £500 from this money to the claimant (Y's brother), the defendant agreed to do so and wrote to the claimant promising to send him the money. The claimant later received a cheque for £500 from the defendant but, owing to a technical irregularity, the cheque was not met. Although the defendant promised to send the corrected cheque back to the claimant, it was not sent, and the claimant sued to recover the £500 as money had and received by the defendant to the use of the claimant. Barry J. held that although the £500 was to be a gift from Y to the claimant, [323] the claimant could recover the money under the principle laid down by Blackburn J., above; there was a "fund" in the defendant's hands when he accepted Y's instructions and promised the claimant to pay him. Barry J. held that there was no need for the third person to hand an identifiable sum of money to the defendant before there could be a "fund" in the hands of the defendant. He said [324]:

> "… all that the law requires [325] is that there must be in the hands of or accruing to the third person either a sum of money, or a monetary liability, over which the transferor has a right of disposal. It matters not … from what source the liability arises, and I see no reason why it should not include a debt for money lent, or goods sold, or services rendered, or a debt of any kind; nor do I think that the situation can be altered if the debt is of a temporary nature, which in the ordinary course of things would shortly be extinguished by items of contra account, provided, of course, that the debt still exists at the date of the transfer and of the debtor's promise of payment made to the transferee."

It appears from this judgment that the "fund" need not be a specific sum, but may be a general "monetary liability". However, the extension of the principle in *Shamia v Joory* has not been applied in any subsequent reported case, and its authority remains in some doubt.

19-094

This principle is distinct from the equitable assignment of a chose in action [326] which takes immediate effect as between the assignor and assignee, without any notice to the debtor [327]: the third party in *Shamia v Joory* did not transfer anything until the defendant acknowledged his instruction, and the defendant was not bound to accept the third party's instruction, nor to make any promise of payment to the claimant. The consent of the debtor is essential before the principle in *Shamia v Joory* can apply, whereas in assignment it is not necessary. Further, while consideration may sometimes be required for an equitable assignment, [328] it is clear that the acknowledgement principle applies even though no consideration has been provided by the claimant.

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308. e.g. *Rasbora Ltd v J.C.L. Marine Ltd [1977] 1 Lloyd's Rep. 645*; *The Blankenstein [1985] 1 W.L.R. 435*; *The Aktion [1987] 1 Lloyd's Rep. 283, 310–311*.

309. *Wilson v Lloyd (1873) L.R. 16 Eq. 60, 73*; *Miller's Case (1877) 3 Ch. D. 391*; *Perry v National Provincial Bank [1910] 1 Ch. 464*; *Meek v Port of London Authority [1918] 2 Ch. 96*. For the use of novation or "quasi-novation" in analysing certain credit card transactions, see *Re Charge Card Services [1989] Ch. 497, 513*.

310. *Re European Assurance Association Society Arbitration Acts, Conquest's Case (1875) 1 Ch. D. 334*; *Chatsworth Investments Ltd v Cussins (Contractors) Ltd [1969] 1 W.L.R. 1*. See also *Scarf v Jardine (1882) 7 App. Cas. 345*; *British Homes Assurance Corp v Paterson [1902] 2 Ch. 404*.

311. *Re Head [1894] 2 Ch. 236*.

312. *Tatlock v Harris (1789) 3 T.R. 174, 180*. See also *Cuxon v Chadley (1824) 3 B. & C. 591*; *Wharton v Walker (1825) 4 B. & C. 163*. But there can be difficulty in seeing how consideration moves from the promisee: see *Olsson v Dyson (1969) 120 C.L.R. 365, 390*.

313. e.g. *Israel v Douglas (1789) 1 H. Bl. 239*; *Stevens v Hill (1805) 5 Esp. 247*; *Williams v Everett (1811) 14 East 582*; *Lilly v Hays (1836) 5 A. & E. 548*; *Hamilton v Spottiswoode (1849) 4 Ex. 200*; *Griffin v Weatherby (1868) L.R. 3 Q.B. 753*; *Shamia v Joory [1958] 1 Q.B. 448*.

314. Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.15–004.

315. Davies (1959) 75 L.Q.R. 220; Yates (1977) 41 Conv.(N.S.) 49. See generally Jackson, *History of Quasi-Contract* (1936), pp.30–34, 92–103; Munkman, *The Law of Quasi-contracts* at pp.52–61. Discussion of the principle is hampered by inconsistent use of the term "third party".

316. Burrows, *The Law of Restitution*, 7th edn (2007), Ch.28; Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2011), para.6–61. For attornment of chattels, see Vol.II, para.33-030).

317. Birks, *An Introduction to the Law of Restitution*, revised edn (1989) pp.134–135, 144–145;

Birks, *Unjust Enrichment*, 2nd edn (2005), p.78.

318. *Shamia v Joory [1958] 1 Q.B. 448*.

319. For the suggestion that the claimant in *Shamia v Joory [1958] 1 Q.B. 448* might now have a right under the Contracts (Rights of Third Parties) Act 1999, see Peel, *Treitel on The Law of Contract*, 13th edn (2011), para.15–004.

320. *(1868) L.R. 3 Q.B. 753, 758–759*.

321. *(1842) 9 M. & W. 411*.

322. *[1958] 1 Q.B. 448*. See the criticism of Davies (1959) 75 L.Q.R. 220 and *Liversidge v Broadbent (1859) 4 Hurl. & N. 603*, which was not cited in *Shamia v Joory*.

323. In most of the earlier cases, the claimant was a creditor of the third person, and not a donee. But see *Fleet v Perrins (1869) L.R. 4 Q.B. 500* (which was a "donee" case not cited in *Shamia v Joory [1958] 1 Q.B. 448)*.

324. *Shamia v Joory [1958] 1 Q.B. 448, 459*.

325. But see Davies (1959) 75 L.Q.R. 220, who cites *Liversidge v Broadbent (1859) 4 Hurl. & N. 603* as authority for the proposition that where the claimant is a creditor of the third party he cannot sue the defendant without furnishing consideration.

326. See above, paras 19-021 et seq. A statutory assignment requires written notice to the debtor: above, para.19-017. The principle is also distinct from novation (see above, paras 19-087 et seq.), and from a completely constituted trust: Davies (1959) 75 L.Q.R. 220.

327. See above, para.19-021.

328. See above, para.19-028.