

# Assignment of Choses in Action

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Property generally may be realty (real) or personalty (personal). Realty are characterized by geographical fixity(land) while personalty are generally mobile.

Personalty is also classified into tangible/corporeal and intangible/incorporeal. The former is capable of physical handling/possession/manipulation/enjoyment while the latter is incapable of any of these.

Incorporeal property is also called a chose in action which has been defined as a legal expression used to describe all personal rights of property which can only be claimed or enforced by action (in a court) and not by taking physical possession.

A chose generally is a thing capable of being owned. Choses in action may be legal or equitable. Legal choses in action are rights which were enforceable or recoverable only by an action at Common law. This category of choses includes debts, benefits under a contract, insurance policies, copyrights, patents etc.

Equitable choses on the other hand are rights over property which were only enforceable/recoverable/cognizable by the courts of Chancery. It could only be recovered by a suit in Equity and the rights under this category include interests of a beneficiary in a Trust, a legacy/reversionary interest under a will etc.

Choses in action may also be in respect of already existing things/property or things/property to be acquired at a future date but which are not yet in possession. The chose in action may be property in itself and it may also be a proprietary right over property.

## **Assignment**

Assignment is the transfer of something from one person to another such that the assignee obtains rights of a nature that were hitherto exercisable only by the assignor. An assignment of a chose is thus the transfer of a chose in action from the assignor to the assignee such that the assignee obtains and becomes entitled to enjoy rights in respect of that chose, which were hitherto exclusively enjoyed by the assignor.

Assignment may be legal (statutory) or equitable.

## **Assignment and Novation**

An assignment is quite distinct from a novation. Novation is essentially a legal device by which parties to a contract may legally vary/shift their obligations under the contract to third parties. Thus, A can agree with B, his creditor, that C, who owes him money, will pay that debt to B in full satisfaction of his own (A's) debt.

Novation is however fundamentally different from assignment in three material aspects:

- The consent of the parties is sine qua non since the original contract is rescinded by the novation. There must thus be consensus ad idem. There can be no novation otherwise. This is contrary to the case in assignment where there only need be communication to the assignee, his consent and that of the trustee of the liability are immaterial.
- The original debt in novation must be totally extinguished under the new arrangement.

There is no such requirement for assignment to be valid.

- For novation to be valid, there must be consideration in all cases as it is essentially a new contract. The requirement for consideration in assignment is much more relaxed.

## **Assignment and Equities**

The general rule as regards assignment of choses in action is that an assignee takes, subject to the equities that already apply to the chose in action (property) in question. Thus, anyone who has an interest (legal or equitable) in an assigned chose is entitled to a higher priority than that of the assignee.

The logic here is based on a recognition that the assignee cannot acquire a better title than that of the assignor. What he essentially gains by virtue of the assignment is a right to continue in the stead of the assignor in respect of that chose and nothing better.

In *Re Knapman (1881) 18 Ch. D 300* the beneficiaries of a will brought an action against the executor seeking to revoke the probate. While the matter was in court, these beneficiaries assigned the right under the will to someone else.

Their action subsequently failed in court, the court ruled that the executor had a right to set off the costs of the suit against the estate. As such, since the right to this had already been assigned, the assignee has to settle this cost since he was assigned a property that had a pre-existing liability.

Claims of equities that arise after notice of the assignment has been given to the trustee would not affect the assignee however, except where the claim is very closely related to the original transaction upon which the chose came into existence.

The rule that the assignee takes subject to equities will not apply where the trustee is estopped, either by conduct or deed, from setting up equities against the assignee. It would not also apply where the agreement occasioning the original transaction includes a clause that the assignees of the assignor would take free from all equities.

## History

Historically, assignment of choses in action was largely unrecognized at Common law. There was the fear that allowing such assignment would bring about Maintenance and even cases of Champerty as well as the risk of encouraging a litany of contentious matters on the same res.

Maintenance arises where a person who has no legal interest in a matter provides assistance by money or otherwise to a party to the suit while Champerty marries the foregoing with the prospect of reward out of the possible spoils of the suit.

Thus, no debt could be assigned at Common law unless the debtor specifically agreed to the assignment. The only exceptions allowed by Common law were in respect of choses in action assigned by or to the King and assignment of negotiable instruments in order to promote trade.

Equity has however always recognized the assignment of choses in action, both equitable and legal. It would not however allow the assignment of bare rights without accompanying interest in property. This was to avoid, as in the case of the Common law, situations that encourage Maintenance.

## Assignability

Not all choses in action are assignable. The courts would not give effect to such assignments either on grounds of public policy or on account of the nature of the subject matter of the assignment.

Choses in action that are not assignable include:

- Salaries of public officials. This is because it is perceived that if allowed to assign their salaries, they may deprive themselves of their means of sustenance and thereby impair the efficiency which is most desirable for the public service.
- Alimony is not assignable on much the same grounds as salaries of public officials as the money is meant for the maintenance of the spouse.
- Rights arising out of a contract of a personal nature i.e. contracts that require personal service like employment.
- Expectancies (future choses) are not assignable at Common law based on the maxim: *Nemo dat quod non habet*. They are assignable in Equity although, such assignment must be for value.

## Equitable Assignment

An equitable assignment is of a flexible nature. This flexibility makes it quite distinct from legal assignments as they do not require all of the formality required under the law. It may be in respect of a legal or equitable chose. Thus, there may be an equitable assignment of an equitable chose or an equitable assignment of a legal chose.

### Validity

While there is no strict formality required for equitable assignments, certain criteria are instructive as to whether it would be considered valid or not.

For an equitable assignment to be considered as having been effected, there must be a clear intent to assign. While Equity does not require that the assignment be in writing or made in any particular format, there must be a clearly deducible intent to assign on the part of the assignor.

The intent to assign here will be construed from the words used and the particular circumstances of the case. If what is construed is a mere mandate/authority to hold onto certain property, no intent to assign may be ascribed by the court.

The position that Equity does not require writing for equitable assignments has however been affected by **S. 9 of the Statute of Frauds** and **S. 78(1)(c) of the Property and Conveyancing Law** which require that the assignment of any equitable interest or trust must be in writing.

The assignment is also required to be communicated to the assignee. Although, the assignee may still take in certain instances even without communication, subject to the right of the assignee to repudiate the transfer when he becomes aware of it.

The particular chose intended to be assigned must be identified. It is insufficient to give a vague representation of what is sought to be assigned. Such vagueness may impair the court's construction of an intent to assign in such circumstance.

Consideration in equitable assignment depends on the circumstance. Where the assignment is complete in the sense that there is nothing left for the assignor to do to perfect the assignee's title, there would be no need for consideration.

If it is incomplete though, consideration may be required. Consideration will also be required where the assignment concerns some future chose as the agreement in such instance can only be a contract to assign and all contracts must

be backed by consideration.

No consideration is however required for assignment of existing choses.

There is no real requirement for notice of the equitable assignment to be given to the trustee of the liability. Notice is however useful to the extent that it puts the trustee on guard as to the change of rights affecting the chose and may prevent him from settling in favour of the assignor instead of the assignee.

It also makes the trustee liable to the assignee where he settles in favour of the assignor in spite of the notice given to him. Again, while the assignee generally takes subject to any prior equities affecting the chose, giving notice ensures that he would not be affected by any subsequent equities.

Most importantly, notice allows the assignee to establish the priority of his interest in consequence of the rule in *DEARLE v HALL*.

## Effect

An equitable assignment of a chose in action has bearing on the manner in which the rights can be enforced in a court of law. The effect here is largely dependent on whether the chose in question is a legal or equitable chose and if the chose was absolutely assigned or not.

Where the assignment concerns a legal chose, the assignee cannot assert his title over the property in his own name. He must join the name of the assignor either as co-plaintiff, where he agrees, or as a defendant. Where the chose is equitable though, the assignee can sue in his own name.

An assignment is absolute when the assignor transfers his whole interest in the chose to the assignee. It is however non-absolute where it is made subject to some condition at the happening of which it would become inoperable or where only a charge is made on the chose, in favour of the assignee.

In this instance, only a part of the assignor's interest is transferred. The effect of this is that in situations where the transfer was absolute, the assignee would be able to sue in his own name. Where it is not absolute however, he must join the assignor before he can enforce his rights over the chose.

Where the chose is legal though, it is immaterial whether it is absolute or not, the assignee must join the assignor.

## Legal Assignment

The Common law rule against assignment of choses in action was only lifted in 1875 and this was via the provision of the Judicature Acts, particularly **S. 25(6)**. This provision is *impari materia* with **S. 150(1) Property and Conveyancing Law**.

The purport of those provisions is that there can be absolute assignments by writing of any debt or other legal thing in action when express notice in writing has been given to the trustee of the liability. Also, it shall be effectual to transfer the legal right to sue in respect of such thing, along with the legal and other remedies in respect of it and the power to give a good discharge for the chose without the assignor's permission.

The provisions clearly contain ingredients that would make a legal assignment valid and these include the following:

- The assignment must be in writing and signed by the assignor.
- It must be in respect of some existing debt or other legal thing in action and this includes equitable choses in action.
- It must be absolute.
- There must be an express notice in writing given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive the debt or claim the thing in action.

The assignment takes effect from the date that notice is given. Failure to give notice at all or failure to give it in writing or failure to even execute the writing in the first place will not invalidate the assignment.

Rather, it becomes an equitable assignment instead of a legal one. Further, there is no requirement for consideration here.

## Effect

The position at Common law before the Act amended it was that the assignee had no right independent of the assignor's and was obligated to sue in the assignor's name if he wanted to enforce his rights over the chose.

The Acts have however changed this and the assignee no longer needs to sue in the name of the assignor. He can sue all by himself.