EQUITABLE ASSIGNMENTS.

THE NATURE. REQUISITES AND OPERATION

OF

EQUITABLE ASSIGNMENTS.

[BEING THE YORKE PRIZE ESSAY FOR 1911.]

BY

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LONDON:

SWEET AND MAXWELL, LIMITED,

3, CHANCERY LANE.

1912.

LONDON:

PRINTED BY C. F. ROWORTH, 88, FETTER LANE, E.C.

TO MY FATHER.

PREFACE.

THE rules governing Equitable Assignments are to be found in many works which treat of the principles of Equity. In the following chapters an attempt has been made to discuss further the nature, requisites, and operation of such assignments.

The authorities which have been consulted are referred to specifically in notes throughout the text.

I desire to express my appreciation and thanks to LORD JUSTICE KENNEDY and to Mr. H. D. HAZELTINE for their valuable suggestions and advice with regard to the treatment of the introductory chapter for purposes of publication.

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THE following is a list of the principal works to which reference has been made :—

Anson	Law of Contract.
Addison	Law of Contract.
Ashburner	Principles of Equity.
Austin	Jurisprudence.
Blackstone	Commentaries.
Bouvier	Law Dictionary.
Bracton	De Legibus et Consuetudinibus.
Challis	Real Property.
Coke	Commentary upon Littleton.
Coote	Mortgages.
Fearne	Contingent Remainders.
Fonblanque	Equity.
Gaius	Institutes.
Goodeve	Personal Property.
Holland	Jurisprudence.
Justinian	Digest.
,,	Institutes.
Law Quarterly Review.	
Leage	Roman Private Law.
Leake	Law of Contract.
Maine	Ancient Law.
Maitland	Equity.
Mill	Dissertations and Discussions.
Montagu	Law of Set-off.
Pollock	Law of Torts.
Pollock and Maitland	History of English Law.
Porter	Insurance.
Savigny	Jurisprudence.
Smith	Principles of Equity.
Snell	Principles of Equity.
Spence	Equitable Jurisdiction of the Court of
Story	Equity Jurisprudence. [Chancery.
Strahan	Principles of Equity.
Sugden	Law of Vendors and Purchasers.
The Law Reports.	
Thomson	Principles of Equity.
Warren	Choses in Action.
Welford and Otter Barry	Fire Insurance.
White and Tudor	Leading Cases in Equity.
Williams	Real Property.
,,	Personal Property.

CONTENTS.

CASES CITED.

EQUITABLE ASSIGNMENTS.

CHAPTER I.

INTRODUCTORY.

AT the outset of the present enquiry it is well to draw attention to the very marked distinction which exists in English Law between "legal" and "equitable" transfers of proprietary rights, and though it is with equitable transfers or assignments alone that we are here concerned, a reference to assignments at common law is essential to the full appreciation of this important distinction in our legal system.

"An assignment is a transfer or making over to another of the whole of any property, whether real or personal, in possession or in action, or any estate or right therein" (*a*). In other words, anything which can be described as property or which can be the object of ownership (*b*), is capable of being assigned; for it is inconceivable that a man could have anything, be it tangible (*e.g.*, a field or a table) or intangible (*e.g.*, an interest in the field or a debt), which he could not transfer to someone else if he so wished. There are, of course, rules of law affecting the extent and form of the disposition of every class of property, yet the right of free alienation is inherent in the very idea of ownership.

(*a*) Bouvier's Law Dictionary.

(*b*) The meaning of the word "property," as used in the above definition, would seem to be "the subject of a right of dominium (ownership)." See Austin's Jurisprudence, p. 790.

The alienation of real property was early (*i*) recognised by the common law, corporeal hereditaments by a feoffment with livery of seisin, and incorporeal hereditaments by a deed of grant followed in some cases by an attornment (*k*). This statement, however, requires some qualification; for though it is true of corporeal hereditaments that they were freely transferable by the method mentioned above, there is a class of property of an incorporeal nature, which, whether rightly or wrongly, is generally included under the head of incorporeal hereditaments, and which was never alienable at common law. It is impossible here to investigate the disputed question of what may and what may not be an incorporeal hereditament (*l*); suffice it to say that the particular class of real property with which we are here concerned as being unassignable at common law includes contingent remainders, executory interests, and possibilities generally (*m*).

In equity, however, assignments of these interests would always be carried into effect when agreed for valuable consideration (*n*). This equitable relief was rendered unnecessary, though it was not discontinued, by the passing of the Real Property Act, 1845 (*o*); for by this Act "a contingent, an executory, and a future interest, and a possibility coupled with an interest in any tenements or hereditaments of any tenure, whether

(*i*) Brac. fo. 39 b; Co. Litt. 9 a.

(*k*) Brac. fo. 52 b—55 b; Co. Litt. 121 b.

(*l*) The subject of "Incorporeal Hereditaments" is dealt with fully in Challis's R. P., p. 51; see also the art. in the L. Q. R. Vol. 20, p. 291, on "Future Interests in Land," by Edward Jenks, where he says, "It is fairly clear, at any rate, that, despite difficulties about attornments (difficulties which have probably been exaggerated), a reversion was alienable long before a remainder." He is further very decided as to their being incorporeal hereditaments.

(*m*) Fearne, C. R. 550; Wms. R. P. 358; see also *Hobson* v. *Trevor*, 2 P. Wms. 191; also *Wethered* v. *Wethered*, 2 Sim. 183.

(*n*) *Wright* v. *Wright*, 1 Ves. Sen. 409; *Crofts* v. *Middleton*, 8 De G. M. & G. 192.

(*o*) Stat. 8 & 9 Vict. c. 106, s. 6.

the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force only of this Act, defeat or enlarge an estate tail."

There are, therefore, still some assignments of realty which are effective in equity, and as such are subject to the rules governing equitable assignments. As regards other incorporeal hereditaments it may be said that they were for the most part either inseparable from the land to which they were appendant or appurtenant, *e.g.*, profits *à prendre*, easements, &c., or else they were transferable at law by a deed of grant as already stated, *e.g.*, advowsons and tithes, and so the intervention of the Courts of equity was unnecessary. Lastly, it must be remembered that a contract relating to realty creates a chose in action (*infra*), which may be explained by the fact that at law the only remedy for a breach of contract is in damages, which are personal property (*p*).

The transfer of personal property was not regarded so favourably by the common law. "Personal things," says Williams, "are said to be in possession or in action; or they are called, in law French, choses in possession or choses in action" (*q*). This is a distinction between things which actually exist and can be seen and handled, such as books and money, and things, such as rights and obligations, which exist only in the eye of the law. It is a common distinction as regards property, and though the titles may be confusing, it corresponds with the division of realty, already mentioned, into corporeal and incorporeal hereditaments, and also with the old Roman

(*p*) Goodeve, P. P., p. 124.
(*q*) Williams' P. P., p. 27.

distinction between "res corporales" and "res incorporales"; thus, "res corporalis est quae tangi potest . . . res incorporales sunt quae tangi non possunt qualia sunt ea quae in jure consistunt" (*r*). This comparison with the division of realty has been criticised on the ground that there are some choses in action which are corporeal, *e.g.*, certain documents; but I think that in almost every case such instances can be shown to be merely extensions of the meaning of the phrase "chose in action"; for instance, the term has been extended to include a document only when it exists as the evidence of a right, which is the true "chose in action."

Choses in possession being tangible and movable things have always been transferable by mere delivery, and have never been subjected to any restrictions upon their alienation. Equity had, therefore, no reason to extend or supplement such alienation, and choses in possession are outside the scope of our subject.

Choses in action, on the other hand, were very extensively influenced by equity as regards their disposition, and the assignment of these chiefly occupies the investigations presented in the present essay (*s*). It seems impossible to give an exact definition of the term chose in action, for there appears to be no uniformity of usage as to its meaning; and, as is so often the case with legal expressions, the only method of discovering if a thing is or is not a chose in action is by reference to the decided cases. At common law its meaning appears to have been a present right to sue for a debt or damages, but the Courts of equity have extended this meaning so as to include all rights to sue for relief which was

(*r*) Gaius, ii. 14.

(*s*) See art. in L. Q. R. Vols. ix, x, xi, as to choses in action generally, by Sir H. W. Elphinstone.

not obtainable at common law, and it seems now to embrace property merely analogous to choses in action, *e.g.*, legacies. In the case of the *Colonial Bank* v. *Whinney* (*t*) Lord Justice Lindley said, "The term chose in action has, then, whatever its original meaning may have been, come to be used as denoting a certain class of property. There being no word to denote incorporeal personal property, the meaning of the expression choses in action was gradually extended for the purpose of denoting it," and further on he continues, "No little confusion has arisen from this extended use of the expression chose in action, and where these words are used it is necessary to be careful in ascertaining whether they are used in the wide sense of incorporeal personal property, or in the narrow and strict sense of a right to sue for a debt or damages. Though debts, money in the funds, shares in companies, copyrights and patents, are all incorporeal personal property, they are so different in their nature and legal incidents that care must be taken not to be misled by giving them all a common name which conceals their differences."

The common law did not, generally speaking, recognise the assignment of choses in action. Many views have been expressed as to the reason for this, though it must have been very natural, insomuch as a similar rule existed in regard to this class of property in the early history of many European countries. According to Sir Edward Coke, such assignments were not permitted in that they "would be an occasion of multiplying of contentions and suits, of great oppression to the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice" (*u*); in other words, such

(*t*) 30 Ch. Div. 282.

(*u*) *Lampet's Case*, 10 Rep. 48 a: Coke on Litt.: H. & B. II. L. 3, C. 5, Sect. 377 (232 b, n. 1).

assignments would tend to infringe the legal maxims against maintenance and champerty.

Another suggestion which has been put forward is that, since the ownership of chattels could only be transferred by delivery of possession, if the owner himself had not possession he could not well deliver it to another (*x*). The most probable reason, however, would seem to be that a chose in action, being in reality a right or obligation under a contract between two persons, could not be disposed of, "for the duty of the one to the other can never be transferred, though it may be extinguished and replaced by a similar duty of the former to a third party" (*y*). This, of course, required the concurrence of all three parties, and resembled the old Roman system of novatio: *e.g.*, A. owes B. a certain sum; the only way in which A.'s liability can be transferred to C., so as to make C. B.'s debtor instead of A., is by the formation of a new agreement to which B. must be a party.

This being the sole method by which choses in action could be transferred, it is clear that with the increase of commercial intercourse great inconvenience was experienced therefrom; in fact, with our knowledge of the present facilities for the interchange of debts and accounts, it is difficult to realise that there ever was a time when such transfers were impossible.

It was early in the seventeenth century that the Courts of Chancery, guided by the spirit of reasonableness, recognised this deficiency in the common law and permitted the transfer of choses in action. From that time forward all assignments of choses in action, and assignments of trusts, and possibilities of trusts, and of every kind of future and contingent

(*x*) See L. Q. R. Vol. ii, p. 481, "The Mystery of Seisin."
(*y*) Williams' P. P., p. 30.

interests and possibilities in both real and personal property, were given effect to in equity, if made upon valuable consideration (*z*).

Choses in action are divisible into those which are legal and those which are equitable, and this distinction is important as regards their assignment; for whereas an assignee of property, over which the Courts of equity themselves exercised an exclusive jurisdiction, *e.g.*, interests in the personal estates of deceased persons, trust properties, money in Court, was permitted in equity to sue in his own name upon an assignment of such property; on the other hand, if the assignment was in respect of property regulated by the common law and outside the jurisdiction of the Courts of equity, these latter naturally could not override the common law rules, and the assignee was compelled to sue in the name of the assignor. In the latter case equity gave its support to the assignee by compelling the assignor to consent to his name being employed if he had refused so to do. And further, the assignor was always made a necessary party to any action by the assignee in equity, for if he refused to join as a co-plaintiff he was made a defendant, and so was in any case bound by the judgment of the Court. This rule was necessary for the protection of the third party, for otherwise, after the assignee had secured his verdict in equity, there would be nothing to prevent the assignor from recovering the same amount at law, and the third party would have to pay the debt a second time.

But though, as we have noticed, assignments of choses in action were not generally recognised at common law, there were certain exceptions, which must be mentioned:—

(i) The Crown could always assign or receive a chose in action or a possibility (*a*) (the

(*z*) See Fearne on Contingent Rems., by Butler (7th ed.), pp. 518—550.
(*a*) Co. Litt. 232 b (n. 1); see *Stafford* v. *Buckley*, 2 Ves. Sen. 177.

importance of this will be recognised in connection with the forfeiture of a felon's property).

(ii) Foreign contracts which were assignable by the law of the country where they were made.

(iii) By the law merchant, bills of exchange and certain other instruments (*b*) were not only assignable but even negotiable.

(iv) By operation of law, *e.g.*, death, lunacy.

(v) The common law rule has further been modified by statute, so that the following are now assignable :—

(a) Promissory notes (*c*).
(b) Railway bonds (*d*).
(c) Exchequer bonds (*e*).
(d) Administration bonds (*f*).
(e) East India bonds (*g*).
(f) Bail and replevin bonds (*h*).
(g) Bills of lading, if indorsed (*i*).
(h) Mortgage debentures (*k*).
(i) Choses in action of bankrupts (*l*).
(j) Choses in action of companies (*m*).
(k) Policies of life insurance (*n*).
(l) Policies of marine insurance (*o*).

(vi) By a substituted agreement (*supra*).

(vii) The rule could practically be avoided by giving a power of attorney to the assignee to sue in

(*b*) See under Negotiable Instruments (*infra*, p. 87).
(*c*) Stat. 3 & 4 Anne, c. 9 ; 7 Anne, c. 25.
(*d*) 8 & 9 Vict. c. 16, ss. 41, 46, 47.
(*e*) *Vertue* v. *East Angl. Ry. Co.*, 5 Exch. 280.
(*f*) 20 & 21 Vict. c. 77 ; amended 21 & 22 Vict. c. 95.
(*g*) 51 Geo. 3, c. 64, s. 4.
(*h*) 4 Anne, c. 16, s. 20; and 11 Geo. 2, c. 19, s. 23, respectively.
(*i*) 18 & 19 Vict. c. 3.
(*k*) 28 & 29 Vict. c. 20.
(*l*) 32 & 33 Vict. c. 71, s. 3.
(*m*) Companies Act [1862], ss. 95 and 157.
(*n*) 30 & 31 Vict. c. 144.
(*o*) 31 & 32 Vict. c. 86.

> the assignor's name. (This was frequently done in the fourteenth century, but later it was disallowed for some time on the ground of maintenance.)

In all these cases, excepting the last, the assignee might sue in his own name at law.

Before proceeding to examine more exactly what may be the subjects of an equitable assignment, it will not, I think, be digressing too far to refer to that section of the Judicature Act of 1873, which exercises so important an influence upon the assignment of choses in action, and to notice how far equitable assignments have been affected thereby. By this Act it is provided that :—

> Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor (*p*).

(*p*) Judicature Act [1873], 36 & 37 Vict. c. 66, s. 25, § 6, see Holland's Jurisprudence, p. 310, where he says in reference to this Act: "Similar provisions are contained in several continental codes, *e.g.*, in the Prussian Landrecht, i. II., ss. 376—444; Austrian Code, ss. 1394—1396; German Civil Code, 398—413." Further, in Scots Law, the "assignation" corresponds closely with the assignment under this Act.

From this it will be observed that the conditions imposed by the Judicature Act are:—(a) That the chose in action shall be "legal"; (b) that express notice in writing shall be given to the debtor; (c) that the assignee shall take his interest subject to all equities existing against the assignor; (d) that the assignment shall be absolute, and not merely by way of a charge; and (e) that the assignment shall be in writing and signed by the assignor. These provisions are therefore more stringent than those required for a valid equitable assignment, which are only three in number: (a) that there shall be consideration, (b) that notice (not necessarily in writing) shall be given to the debtor, and (c) that the assignee shall take subject to all equities. For this reason it is obvious that an assignment may be valid in equity though it may fail to be effective under the sub-section of the Judicature Act.

There has been much controversy as to what is the meaning of the phrase "legal" chose in action in the sub-section. It was the opinion of many that the word legal was opposed to the word equitable as then understood, and this was substantiated on the ground that the word legal was inserted so as to exclude the assignee of an equitable chose in action from recovering at law when his assignor could not have done so. But on examination of the decisions upon cases which are within the statute, we find that a much wider interpretation has been put upon the term, and that it includes all choses in action which an owner could now recover by an action in the King's Bench Division, apart from any question of assignment (*q*). This is, of course, only a broad principle, and there are several decided cases which appear to be contrary; for though assignments of trust funds, legacies

(*q*) See *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608.

and claims against the estates of deceased persons which are being administered in Chancery are still regarded as equitable and outside the operation of the statute, yet in the case of *Harding* v. *Harding* (*r*) it was held that the balance of a share due to a residuary legatee in the hands of trustees under a will was assignable either at law or in equity. In order, therefore, to determine whether a particular chose in action is "legal" or not, within the meaning of the sub-section, it is necessary to consult the decided cases and thus see what is the tendency of the Courts.

It is to be remembered that the Judicature Act did not abolish the distinction between legal and equitable assignments, but merely enabled a particular class of interests, which were already assignable in equity, to be assigned at law, upon certain conditions. And so in the case of *Turquand* v. *Fearon* (*s*) it was decided that an equitable assignee of a debt can only obtain the benefits of Ord. XVI. r. 2 (*t*) to add the name of the assignor as a plaintiff, either with his consent or upon proof that all the terms necessary for his protection have been offered to him.

We see, then, that though the Act embraces a very wide range of assignments, there are nevertheless some choses in action which were only assignable in equity before the Act, and, not coming within the provisions of the sub-section, are still only assignable

(*r*) 17 Q. B. D. 446.

(*s*) [1879] 4 Q. B. D. 280. "The reason," says Field, J., "why it is not just to use the assignor's name without his permission or securing him is, that otherwise an attempt may be made to make him liable to the defendant's costs on the ground that he has heard of the proceedings and acquiesced in them."

(*t*) This provides that "where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as may be just."

in equity. Assignments of these, therefore, are styled equitable assignments, and occupy considerable attention in the ensuing discussion of the subject.

Lastly, it must be observed that there are some choses in action which are not assignable at all (*u*). Public policy forbids the assignment of pensions and salaries of public officers, and such assignments as savour of maintenance or champerty (*x*). Nor are policies of fire insurance transferable without the consent of the insuring firm (*y*). Moreover, rights arising "ex delicto," generally known as "torts," are not assignable. But all these maxims are qualified by certain exceptions and are dealt with in detail in a subsequent chapter.

(*u*) These are dealt with in Chapter III.
(*x*) See *infra*, Chapter III.
(*y*) Note that policies of marine and life insurance are assignable in equity, and further, have been made assignable by statute (*supra*).

CHAPTER II.

What is assignable in Equity.

It is not easy to arrive at a precise definition of an equitable assignment, and the majority of our text writers have avoided an attempt to do so. Mr. Coote describes such an assignment as "an appropriation, for the payment of a debt, of a chose in action or fund of the debtor in the hands of a third person" (*a*), and then he proceeds to say that it may be effected either by agreement between the creditor and the debtor that the debt shall be paid out of specific property belonging to the debtor but not in his possession (*Rodick* v. *Gandell* (*b*)), or by an order upon the holder of the specific property to pay the creditor out of such property (*c*). This definition would appear to fail in two respects: first, it is not sufficiently clear that future interests and possibilities are included; and secondly, an equitable assignment may be effected upon other consideration than the payment of a debt. Perhaps a description which would render these points clearer would be, a transfer upon consideration to another of a chose in action or other interest, whether in real or personal property, such interest being now within the disposition of the transferor, or expected to come within it or capable thereof.

The Courts of equity have always enforced assignments of choses in action when made upon valuable

(*a*) Coote on Mortgages, at p. 1513.
(*b*) 12 Beav. 325.
(*c*) *Burn* v. *Carvalho* [1839], 4 My. & C. 690.

consideration, regarding them "as in their nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt or to reduce the property into possession" (*d*). For an assignment is in reality merely a contract or agreement, and, just like any other agreement, the Courts will cause it to be performed specifically, where it is possible, not leaving the assignee to his action for damages when the assignor is in a condition to transfer the property or to cause it to be transferred to the assignee (*e*). But at the same time it is to be observed that the Courts of equity acted independently of the doctrine of specific performance, and assignments would be enforced even where specific performance was impossible (*f*).

Equitable support, then, has been given to assignments of three distinct classes of interests: (A) present choses in action; (B) mere expectancies; and (C) property which is not yet in existence, but to arise hereafter, *i.e.*, future choses in action (*g*). We proceed to deal with each of these classes separately, though it is with the last two that we are especially concerned, seeing that their assignment is entirely outside the jurisdiction of the common law, and is only effective in equity.

A.

A large number of the interests which come under this head of present choses in action have now been made assignable by statute (*h*), and debts, which afford of course by far the most common examples, have,

(*d*) Co. Litt. 232 b, Butler's note.
(*e*) See Lord Hardwicke in *Wright* v. *Wright* [1749], 1 Ves. 412; also Lord Macnaghten in *Tailby* v. *Off. Rec.*, 13 App. Ca., at p. 546.
(*f*) White & Tudor, L. C. in Eq., p. 105 (note).
(*g*) Sometimes called "choses in equity."
(*h*) *Supra*, p. 8.

together with other "legal" choses in action, been made assignable by the Judicature Act, 1873. Nevertheless, insomuch as they are assignable in equity also, they must be considered here.

Practically all legal choses in action in the nature of a debt or contract were assignable in equity so as to give the assignee a right to sue in the assignor's name, and the assignment of a debt did not even require the assent of the debtor. If, however, the debtor did assent to the transfer of the debt, the assignee could maintain a direct action against him upon his implied promise (*i*). All that is necessary to create a valid assignment in equity as between the debtor and the assignee is that he (the debtor) shall receive notice that the debt has been made over to a third person, and if he disregards such notice he does so at his peril (*k*). And further, an equitable assignment when once created will be valid as against any subsequent assignment whether legal or equitable. Thus, in the case of *Palmer* v. *Culverwell, Brooks & Co.* (*l*), F. wrote to his creditors, C. B. & Co., inclosing all the security he could then give them, and saying that W. & Sons' debt was good. F. had, at that time, a claim against W. & Sons on bills accepted by them, and he had instructed his solicitors, A. C. & Co., to take proceedings to sue W. & Sons for the amount due on the bills, and to hold the proceeds to the disposal of C. B. & Co. On the following day C. B. & Co. sent a copy of the letter from F. to A. C. & Co. Later, F. executed a deed of assignment to a trustee for his creditors; C. B. & Co. agreed to execute this deed, which contained a clause providing that nothing therein was to prejudice the rights of any creditor of any securities held by him, or as

(*i*) *Baron* v. *Husband*, 4 B. & Ad. 611.
(*k*) *Brandt* v. *Dunlop Rubber Co.*, [1905] A. C. 454.
(*l*) [1902], 85 L. T. 758.

against any person other than the debtor. A. C. & Co. received part of the sum due on the bills before the execution of the deed by C. B. & Co., and the remainder afterwards. Bruce, J., held that F. had created an equitable liability binding upon himself, and any interest that the trustee took under the deed of assignment was subject to the equities which affected it in F.'s hands; and that C. B. & Co. were entitled to the money received by A. C. & Co. in respect of the bills.

When an agreement is made that a debt shall be paid out of specific funds belonging to the debtor, or when a debtor gives an order to a person who owes money or holds funds belonging to him (the debtor), directing such person to pay over the debt or funds to the creditor, such an agreement will operate as an equitable assignment (*m*), and the consent of the person upon whom the order is given is unnecessary. So in the case of *Crouch* v. *Martin* (*n*), it was held that an assignment of wages as a security for money bound the wages specifically, and that the money secured thereby must be paid in preference to all other debts. In *Burn* v. *Carvalho* (*o*), A., who owed money to B., promised him by letter that he would order his agent, C., to deliver over goods, which he (C.) held at a foreign port for A., to D., who was B.'s agent at the same port. He then directed C. by letter to do as he had promised. Before the delivery of the goods A. committed an act of bankruptcy whilst his letter was on its way to C., and was declared bankrupt. The goods were delivered to D. by C. in ignorance of the bankruptcy. It was held that B. had a good title to the goods in equity.

But if the fund or debt out of which the payment is

(*m*) *Rodick* v. *Gandell* [1852], 1 De G. M. & G. 776.
(*n*) 2 Vern. 595.
(*o*) [1839], 4 My. & C. 690.

to be made is not specified in the order, no such assignment will be created; as in the case of *Percival* v. *Dunn* (*p*), where A. gave to the plaintiff P., to whom he owed money, an order on D., thus:—"Please pay P. the amount of his account, 47*l*." When this order was given to the defendant D., he was in debt to A. Held, there was no equitable assignment.

We have already seen that debts are now assignable, both at law and in equity. It is questionable, however, whether part only of a debt can be so assigned, and there appears to have been no decision on this point in respect of an equitable assignment. There have been several cases decided under the sub-section of the Judicature Act, 1873 (*q*), and from these it would appear that the tendency of the Courts is against such assignments. Professor Maitland, in his lectures on equity (*r*), states that the objection is based upon the hardship of permitting a creditor to split the cause of action and so to subject his debtor to several actions at law. In the case of *Nelson* v. *Nelson Line, Ltd.* (*s*), Cozens-Hardy, L.J., said "I feel disposed to agree with the view suggested by Chitty, L.J., in *Durham Bros.* v. *Robertson* (*t*), to the effect that there cannot be an assignment of part of a debt under that Act (*i.e.*, the Judicature Act)." This view was also taken by Bray, J., in the recent case of *Forster* v. *Baker* (*u*), but on appeal the Court restricted its decision to the question of a judgment debt, holding that there could not be such an assignment on the ground that as a judgment creditor could not issue separate executions upon different parts of his judgment debt, he could not give that right to an assignee.

(*p*) 29 Ch. Div. 128.
(*q*) 36 & 37 Vict. c. 66, s. 25 (vi).
(*r*) Maitland on "Equity," p. 148, n. ii.
(*s*) [1906] 2 K. B. D. 225.
(*t*) [1898] 1 Q. B. D. 765.
(*u*) [1910] 2 K. B. D. 636.

In the case of *Skipper & Tucker* v. *Holloway & Howard* (*x*), Darling, J., held that part of a debt is assignable under the sub-section, but upon appeal a decision was given on other grounds and this point was not considered. The balance of opinion seems to be in favour of the non-assignability of part of a debt under the Judicature Act, and there is no reason for supposing that such assignments would be treated more favourably in equity. Certainly the objection of Professor Maitland, which appears to be very strong, is equally applicable to an assignment in equity.

It may, however, be noticed in passing, that this view applies only to parts of a debt and not to parts of rights generally. For it is competent to the assignees of a portion of a patent right to sue in respect of an infringement of that portion (*y*). Also in the case of *Lauri* v. *Renad* (*z*) an assignee of a part of a copyright was permitted to sue in respect thereof.

Debentures of a joint stock company are assignable in equity by mere indorsement in blank, and an assignee will thereby acquire a good title as against the trustee in bankruptcy of the assignor even though he may have given no notice to the company before the bankruptcy (*a*).

Where there is an assignment by one instrument of various kinds of property, which are capable of such distinction that it can be read as two or more assignments, then the assignment, though void in

(*x*) [1910] 2 K. B. D. 630.

(*y*) *Dunnicliff and Bagley* v. *Mallet*, 7 C. B. N. S. 209; also *Walton* v. *Lavater*, 8 C. B. N. S. 162.

(*z*) [1892] 3 Ch. 402.

(*a*) *Ex parte Rensberg*, 4 Ch. Div. 685. Savigny (Oblig. ii, p. 112) observes that ordinary shares in a company are not obligations but parts of ownership, producing therefore not interest but dividends. So in the *Colonial Bank* v. *Whinney* (L. R. 30 Ch. Div. 261), Fry, L.J., says that shares before registration were "choses in action," but afterwards "property."

respect of one class of property, will nevertheless hold good in respect of another. So in the case *Ex parte Byrne* (*b*) an assignment was made by deed as a security for a debt of "the several chattels and things specifically described" in a schedule to the deed. The schedule included "personal chattels" and also a gas engine, which did not come within the definition of personal chattels according to the Bills of Sale Act, 1878 (*c*). The deed was void by reason of a failure to comply with the Bills of Sale Act, 1882 (*d*). Held, that the deed was void as to the personal chattels, though it remained valid as to the gas engine. The decision in the case of *Davies* v. *Rees* (*e*), which at first sight appears to conflict with this view, really rests upon a different footing, for in that case the two apparently separate parts of the assignment were both part of one bill of sale, and for that reason the assignment was void *in toto*. "With regard to the general principle," said Bowen, L.J., in this case, "nothing is clearer than that, under the apparent form of a single agreement or covenant, written on one piece of paper and sealed with one seal, you may have several independent contracts or obligations, and in such a case we must take care that the fall of one of those covenants or obligations does not drag the others with it. When an Act makes one thing void, we must see that we do not destroy independent obligations merely because they are contained on the same piece of paper, or because, apparently, they hang together."

It would seem, indeed, that equity is over-zealous in guarding the interests of an assignee, for even in cases where the assignment is apparently void equity

(*b*) 20 Q. B. D. 310.
(*c*) 41 & 42 Vict. c. 31.
(*d*) 45 & 46 Vict. c. 43.
(*e*) 17 Q. B. D. 408.

will fasten upon it and make it effective at a future date if and when it can be valid. So that if an assignor, who has a defective title to property, and who intends to assign property for value, effects such an assignment, any interest which he subsequently acquires in the property will in equity effect the assignment, even though the defect in title is apparent on the face of the assignment (*f*).

It is impossible to give a complete list of the present interests which have from time to time been held to be capable of valid assignment in equity, but in illustration of the general principles set out above the following choses in action may be quoted:— Patent rights (*g*); a misfeasance claim against the directors of a company (*h*); the registered title of a newspaper (*i*); the judgment of a Court of justice (*k*); a share of partnership property and profits (*l*).

B.

We now come to a second class of choses in action. Under the head of expectancies are included all those rights which cannot be exercised until some future date, or upon the happening of some future event; yet the property which they govern is actually in existence, which fact distinguishes them from our third class, where the property is not even in existence, and even may not come into existence at all. As examples of the varied types of interests under this head which have been held to be capable of valid assignment in equity the following may be noticed:—

(*f*) *In re Bridgwater's Settlement*, [1910] 2 Ch. 342; upholding *Noel* v. *Beasley* [1829], 2 Sim. 103.
(*g*) *Hesse* v. *Stevenson* [1803], 3 Bos. & Pul. 565.
(*h*) *Wood* v. *Woodhouse and Rawson United* [1896], W. N. 4.
(*i*) *Longman* v. *Tripp* [1805], 2 N. R. Bos. & Pul. 70.
(*k*) *Fitzgerald* v. *Dalton*, 1 L. T. 662.
(*l*) *Kelly* v. *Hatton*, L. R. 3 Ch. 703.

Expectancies either as heir (*m*) or under a will of a living person (*n*); an expectancy as possible next of kin (*o*); contingent interests (*p*); interests under marriage articles (*q*); possible interests allowable by powers vested in trustees (*r*). In the case of *Warmstrey* v. *Tanfield* (*s*), F., being possessed of the third part of a parsonage for the whole term to come, granted all his interest therein to A., in trust for the use of F. and his wife during their lives, and afterwards to the use of such issue male of their bodies as the said F. should by will appoint. F. appointed the premises on the death of his wife to his son R., who during the life of his mother assigned the premises to the plaintiff; X. claimed the premises under a lease made by the said R. two years after the assignment. Held, that though the assignment was one of a mere possibility, dependent upon R.'s surviving his mother, it was valid in equity, and, therefore, the plaintiff was entitled to the property by reason of his priority of interest.

In the case of *Hinde* v. *Blake* (*t*) a presumptive next of kin assigned the share to which he might become entitled in the personal estate of a lunatic who was then living, on trust to pay the costs and any sums which might be advanced for the purposes of the trust, then to pay an annuity to the assignee, and subsequently to pay his debts. The trustees made some payments in advance. On the death of the

(*m*) *Hobson* v. *Trevor*, 2 P. Wms. 191. In the case of *Wright* v. *Wright* (1 Ves. 409), a distinction appears to have been drawn between assignments of a possibility of an inheritance and assignments of a possibility of a chattel real. The distinction was, however, overruled, Lord Hardwicke referring to the cases of *Beckley* v. *Newland* and *Hobson* v. *Trevor* as conclusive upon the point.

(*n*) *Bennett* v. *Cooper* [1845], 9 Beav. 252.

(*o*) *Hinde* v. *Blake*, 3 Beav. 234.

(*p*) *Wind* v. *Jekyl*, 1 P. Wms. 572.

(*q*) *Bennett* v. *Cooper*, *supra*.

(*r*) *In re Coleman*, 39 Ch. Div. 443.

(*s*) 2 W. & T. L. C. 724.

(*t*) 3 Beav. 234.

lunatic the trustees of the deed filed a bill against the administrator and the assignor for payment of the assignor's share, alleging that the assignor was desirous that it should be paid to them. Held, that a general demurrer by the administrator could not be supported on these allegations.

It is interesting to notice that in the case of *Jones* v. *Roe* (*u*) Lord Kenyon, C.J., held that an assignment by an heir presumptive of his expectancy of succession was a void contract, on the ground of its being but a bare possibility, and not the subject of disposition during the life of the ancestor. From this it may be inferred that damages could not be recovered at law in respect of non-performance of such a contract. In equity, however, on the authority of *Hobson* v. *Trevor* (*x*) and *Beckley* v. *Newland* (*y*), effect will be given to such a contract if for valuable consideration. "This," says Fonblanque, "may be considered an instance in which a Court of equity will decree the specific performance of a contract, though damages could not be recovered at law for the non-performance of it" (*z*).

An assignment, however, of an expectancy will not be effective in equity unless some fund or money is actually bound so as to create a debt.

In the case of the *Western Wagon Co.* v. *West* (*a*), P. assigned to the company his right under a mortgage with the defendant West to further advances which formed part of the consideration for such mortgage. The company gave notice of the assignment to the defendant, who unwittingly advanced a further 500*l.* to P. It was held that as the contract in the mortgage deed was not a contract to lend out of a par-

(*u*) 3 T. R. 88.
(*x*) 2 P. Wms. 191.
(*y*) 2 P. Wms. 182.
(*z*) 1 Fonblanque on "Equity," B. 1, ch. iv, s. 2, note (*n*).
(*a*) [1892] 1 Ch. 271.

ticular fund, no money or fund was bound by it, and that no debt was created by it; and that though the 500*l.* would be bound in the hands of P., it would not in the hands of the defendant. Also that the company could only sue for damages in right of P. if P. had sustained any damages. "The decision of the Court of Appeal," said Chitty, J., "in *Brice* v. *Bannister* (*b*), strongly relied on for the plaintiffs, has, I think, no bearing on the question before me. That was a case of an assignment of part of moneys due or to become due. In substance it was an assignment of that which, when ascertained, became a debt. It was held that the assignment bound the debt in equity, and that after notice of the assignment the debtor could not, by anticipating the time for payment or other dealing with the assignor, defeat the claim of the equitable assignee. In the case before me the contract to make the loan created no debt, nor did any future debt arise out of it."

In connection with the subject of expectancies, it must be observed that if an assignor becomes bankrupt before the subject-matter of the assignment falls into his hands, when the property was not in him at the time of the transfer, there will be no equitable assignment created. For it is obvious that a man cannot transfer to another something which he himself does not possess, or which, when it does fall into his possession, becomes, together with the rest of his property, chargeable with his debts under the administration of the trustee in bankruptcy (*c*).

Policies of insurance afford another instance of contingent interests which are, as a general rule, assignable in equity. Such policies are usually classed under three heads, *i.e.*, life, fire, and marine.

Policies of life assurance have been held to be

(*b*) 3 Q. B. D. 569.
(*c*) *Ex parte Hall* [1878], 10 Ch. Div. 615.

assignable in equity, on the ground that as the Act of 14 Geo. III., c. 48, made no reference to the assignment of policies of insurance, such transactions were permissible (*d*). But what is commonly known as an assignment of the policy is really only an assignment of the right to recover the proceeds of a policy and not an assignment of the policy itself. For if the policy could actually be assigned, it would amount to an insurance upon another life. Assignments in the former sense have always been valid in equity (*e*). Further, an assignee is not affected by the rule that no person may effect an insurance on the life of another unless he has an insurable interest in that life (*f*). The reason for this is that a life assurance being not merely a contract of indemnity, so long as there existed an insurable interest at the time of effecting the insurance, a subsequent loss of that interest is immaterial.

The clauses and conditions embodied in a policy of assurance are binding upon an assignee no less than upon the party insured; a clause, therefore, making the policy void should the insured put an end to his life, is binding upon the assignee just as upon the representatives of the insured. So in the case of the *Amicable Assurance Co.* v. *Bolland* (*g*), where a man who had assigned a life assurance policy was convicted of felony and executed; it was held that such a contract was against public policy and must be construed as containing a clause avoiding it in the event of the insured committing a capital felony. Also in the recent case of *Wigan* v. *The English, &c.*

(*d*) *Ashley* v. *Ashley* [1829], 3 Sim. 149.

(*e*) *Chowne* v. *Baltis* [1862], 31 Beav. 351; compare *Griffin* v. *Griffin*, [1902] 1 Ch. 135.

(*f*) Note that a creditor has an insurable interest in the life of his debtor.

(*g*) 4 Bligh, N. S. 194.

Life Assurance Association (*h*); H. was entitled to a policy of insurance for 5,000*l.* on his own life. The policy contained the following condition, which made the policy void:—"If the lives assured died by their own hands . . . . but without prejudice to the *bonâ fide* interests of third parties based upon valuable consideration." H. executed a deed of assignment of the policy to W. by way of mortgage to secure all moneys owing to him from H. No notice of the assignment was given to W. or to the insurance firm during H.'s life. H. subsequently died by his own hand. It was held that the clauses and conditions in the policy were binding, and that the mere existence of an antecedent debt was not a valuable consideration within the meaning of the clause in this policy.

Policies of life assurance issued by friendly societies, governed by the Act of 1875 (*i*), were until recently held not to be assignable in equity. In the case *Caddick* v. *Highton* (*k*), it was held that such a policy was not assignable, though it might be disposed of by nomination. This decision was, however, overruled in the case of *Griffin* v. *Griffin* (*l*), when it was held that a policy of life assurance issued by a friendly society was assignable in equity, Cozens-Hardy, L.J., in his judgment saying: "You must find, if Phillimore, J.'s (*m*) view is correct, some words preventing the owner of property from disposing of that which did not belong to anyone else." From this we may conclude that it will require a very express condition to prevent an assignment of a policy of insurance from being given effect to in equity.

Policies of fire insurance, or rather the beneficial interests under such policies, were assignable in

(*h*) [1909] 1 Ch. 291.
(*i*) 38 & 39 Vict. c. 60.
(*k*) [1899], L. T., p. 307.
(*l*) [1902] 1 Ch. 135.
(*m*) *Caddick* v. *Highton and others*, *supra*.

equity, following the general principle that the benefit of a contract may be assigned in equity. But a fire policy being a contract of indemnity was only assignable with the consent of the insurance firm.

To make a policy of fire insurance binding it is necessary that the insured shall have an interest in the subject-matter not only at the time when the policy is made out but also at the time when the fire occurs. So that if the insured party assigns his policy before the occurrence of the fire, the assignee, having no insurable interest, will not be able to enforce the policy (*n*).

In the case of an assignment not of the policy, but of the property insured, the assignor will not have an insurable interest, and so can only recover for loss in respect of any part of the property which he may have retained: if he assigned the whole he can recover nothing. Nor could the assignee recover anything unless there had been some agreement, to which the insuring company would be a necessary party. For it must be remembered that the policy attaches to the person who effects it, to indemnify him against loss, and so will not pass on a transfer of the subject-matter. In the case of *Rayner* v. *Preston* (*o*) a vendor contracted with a purchaser for the sale of a house which had been insured against fire by the vendor. The contract of sale contained no reference to the insurance. After the date of the contract, but before the time fixed for completion, the house was damaged by fire, and the vendor received a sum of money from the insurance firm. It was held that the purchaser, though he had completed his contract, was not entitled as against the vendor to the benefit of the insurance;

(*n*) *Sadlers' Co.* v. *Badcock*, 2 Atk. 554.

(*o*) 18 Ch. Div. 10. Judgment by Brett and Cotton, L.JJ. (affirming the decision of Jessel, M.R.); James, L.J., dissenting.

for in this case the policy never was assigned since it was not included in the contract.

A mortgagor, upon a mortgage of insured property, does not lose his rights under a policy of fire insurance, because he continues to have an insurable interest in the property; but under the Conveyancing Act, 1881 (*p*), without prejudice to any obligation to the contrary imposed by law or by special agreement, a mortgagee may require that any moneys received upon an insurance in respect of the mortgaged property shall be applied in discharge of the mortgage.

Policies of marine insurance were assignable by the custom of merchants, though floating policies could only be assigned with the authority of the insurers in the same way as fire policies.

Both life and marine insurance policies have now been made assignable by statute (*q*), and the assignee of a life policy can sue in his own name.

The ordinary rules as to domicile apply to assignments just as to any other legal transaction, so that an assignment of a policy of assurance by a man to his wife will be void in a case where assignments by a man to his wife are invalid by the law of his domicile (*r*).

Assignments of policies of insurance are valid in equity in spite of any conditions to the contrary. So that a condition that the company should not be affected by notice of any trust, equitable charge, or lien, and also the words "this policy shall not be assignable in any case whatsoever" will not prevent the policy holder from executing a trust of the policy in favour of another person, though it will not

(*p*) 44 & 45 Vict. c. 41.
(*q*) "Life" by 30 & 31 Vict. c. 144; "marine" by 31 & 32 Vict. c. 86.
(*r*) *Lee* v. *Abdy*, 17 Q. B. D. 309.

exclude the operation of the Policies of Assurance Act, 1867 (*s*).

Finally, in reference to the subject of marine and fire insurance, the doctrine of "subrogation" must be mentioned. Subrogation is in effect very similar to an equitable assignment, and has been described as a transfer to an underwriter "of every right of the assured, whether such right consists in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss, against which the assured is insured, can be or has been diminished" (*t*).

Subrogation differs from an equitable assignment in that it takes place by operation of law and not by agreement between the assignor and assignee. The reason of its existence is that in a contract of indemnity the assured must be fully indemnified in the case of loss, but not more than fully indemnified. It must be noted that subrogation does not give to the insurer a right to sue in a Court of law in his own name (*u*).

C.

The nature and operation of future choses in action will now be considered in the light of a collection of cases illustrating the rules and exceptions governing the assignability of such choses in action as are only to come into existence at some future date. Equitable support has been extended, as we have already stated,

(*s*) *In re Turcan*, 40 Ch. D. 5.
(*t*) *Castellain* v. *Preston* [1883], 11 Q. B. D., per Brett, L.J., at p. 388.
(*u*) *King* v. *Vict. Insur. Co.*, [1896] App. Ca. 250.

to the transfer of these interests just as freely as to the other two classes of choses in action. The following examples of "future choses in action," which have been held to be capable of valid assignment in equity, may be noticed:—The future cargo (*x*) and the future freight of a ship (*y*); future patent rights (*z*); future profits from the working of a patent (*a*); materials which may be brought into a certain place (*b*); future dividends in bankruptcy (*c*); "goods and chattels now in or about a particular messuage or house, or which shall be so hereafter" (*d*). It will be observed that all these interests are mere possibilities, and there is no certainty that they will ever come into existence. The ship might never carry another cargo, or the working of the patent might never yield any profits. That, however, is quite immaterial. If a man chooses to take such a chance in payment of his debt, or upon other consideration, the Courts of equity will give effect to the transfer when and if that chance is realised, and the subject thereof comes into existence.

So, in the case of *Tailby* v. *The Official Receiver* (*e*), it was held that an assignment of "all the book debts due and owing, or which might during the continuance of the security become due or owing to the said mortgagor" is valid, and that it passes an equitable interest in all the book debts incurred after the assignment, whether in the business which the mortgagor carried on at the time of the assignment or in any other business which he might carry on in the future.

In fact any future chose in action may be assigned

(*x*) *In re Ship Warre*, 8 Price, 269.
(*y*) *Brown* v. *Tanner*, 3 Ch. App. 597.
(*z*) *Printing, &c. Co.* v. *Sampson* [1875], L. R. 19 Eq. 462.
(*a*) *Bergmann* v. *Macmillan*, 17 Ch. Div. 423.
(*b*) *Brown* v. *Bateman*, L. R. 2 C. P. 272.
(*c*) *In re Irving*, 7 Ch. Div. 419.
(*d*) *Ex parte Gimes*, 12 Ch. Div. 314.
(*e*) 13 App. Ca. 523.

in equity provided that it is sufficiently identified; but if its terms are so indefinite that it is impossible to ascertain exactly what it is intended to transfer, the Courts will not enforce it. It does not matter, however, that the assignment appeared to be vague at the time of its formation, the important point being that it shall be definite at the time when the contract is to be enforced. Nor can it be said that an assignment is vague merely because it covers a great quantity of property; in the case of *Tailby* v. *The Official Receiver* (*f*) Lord Herschell said, "I can find no trace of the view that a Court of equity would not enforce a contract relating to future-acquired property if it was vague, in the sense of embracing much within its terms, for, as I have pointed out, Courts of equity have frequently enforced such contracts. I think such language only refers to that class of cases, where it could not be predicated of any specific goods that they fell within the general descriptive words of the grant."

An equitable charge upon property has the same attributes as an equitable assignment.

In the case of *Metcalfe* v. *Archbishop of York* (*g*), an incumbent charged his benefice with the payment of an annuity, and covenanted that if he should subsequently be preferred to any other benefice he would fully charge it with the same annuity. Afterwards he was preferred to another benefice, but no legal charge upon it was executed until some years later. Held, that the deed constituted a good equitable charge which attached upon the new benefice as soon as it was acquired. But it is to be noted that no charge will be enforced in equity unless some particular property to be charged is mentioned in the covenant, or property has been acquired presumably with the

(*f*) 13 App. Ca. 523.
(*g*) [1836], 1 My. & C. 547.

intention of satisfying the covenant (*h*); nor must the charge affect the whole of the property which the covenantor may acquire (*i*).

If a man attempts to assign property of which he is not the owner, it is obvious that he does not by such an act affect the true owner's right. A man cannot give to another more than he himself has got. But such an attempt may act as an agreement to transfer the property when, or if, he does become the owner, and immediately he does become the owner such an agreement will in equity be treated as an actual assignment of the equitable interest in it. That is to say, any *bonâ fide* purchaser for value without notice will have the legal interest in the property, and will thus have priority over an equitable interest therein. So, in the case of *Hallas* v. *Robinson* (*k*), where, by a bill of sale in 1875, R. granted to M. the after-acquired chattels which should be upon certain of his premises. The title of M. under the bill subsequently vested in X. R. brought upon the premises chattels which he acquired after 1875; but before the coming into operation of the Bills of Sale Act, 1882 (*l*), he granted these chattels to Z. by another bill of sale. Z. had no notice of the bill in favour of M. In 1884 X. seized the chattels then upon R.'s premises. Z. thereupon brought an action for the recovery of the value of the chattels. Held, that Z. was entitled to recover the value of the goods; for the grant to M. was only an equitable interest, whereas that to Z. was a legal interest without notice of the prior equitable interest, and he therefore had a better title.

The rule in equity, therefore, as regards future choses in action, is that so soon as the property comes into existence, any assignee will, if he has

(*h*) *Mornington* v. *Keane*, 2 De G. & J. 292.
(*i*) *Mitchell* v. *Reynolds*, 1 P. Wms. 181.
(*k*) [1885], 15 Q. B. D. 288.
(*l*) Stat. 45 & 46 Vict. c. 43.

given valuable consideration, and if the property is in the hands of the assignor, take exactly the same interest as if it had belonged to him, and had been within his disposition and control at the time when the assignment was made, and if there is no question as to its identification the beneficial interest will immediately vest in the assignee (*m*).

An undischarged bankrupt may assign his expectancy of a surplus (*n*), but an assignee will not thereby acquire any rights of interference in the bankruptcy administration (*o*); and the same applies to the assignment of a share in a partnership (*p*): an assignee thereof does not acquire any right to participate in the management of the partnership business (*q*).

The title of the trustee in bankruptcy, however, cannot be defeated by an assignment of a chose in action which does not come into existence until after the bankruptcy, for in the case *Ex parte Nichols* (*r*) it was decided that all payments becoming due after the date of the bankruptcy are the property of the trustee. But it is important to notice that this applies only to such choses in action as do not come into existence until after the bankruptcy, and an assignment of a debt which is actually due will therefore be good as against the trustee even though it is not payable until some future date (*s*). In reference to this point, the judgment of Lord Esher in the case *Ex parte Rawlings* (*t*) is very explicit:—"At the commencement of the bankruptcy there was, therefore, existing an assignment by the bankrupts of certain payments which were to become due to them

(*m*) See judgment of Lord Watson in *Tailby* v. *Off. Rec.*, 13 A. C. 523.
(*n*) *Bird* v. *Philpott*, [1900] 1 Ch. 822.
(*o*) *In re Austin*, 10 Ch. Div. 434.
(*p*) *Garwood* v. *Poynter*, [1903] 1 Ch. 236.
(*q*) Partnership Act, 1890; stat. 53 & 54 Vict. c. 39.
(*r*) [1883], 22 Ch. Div. 787.
(*s*) *Ex parte Rawlings*, 22 Q. B. D. 193.
(*t*) *Supra*.

at certain fixed periods. These payments are by the assignment charged in favour of F., and he has a right to receive them. It is an entirely different case from *Ex parte Nichols* (*u*) . . . . There the bankrupts assigned, by way of security for an advance made to them, all the sums of money then due and owing, and thereafter to become due and owing, from the railway company to them . . . . The assignment was of the future profits of the business of the bankrupts."

Having thus reviewed the more important decisions bearing upon the nature of that which is assignable in equity, we now pass on to discuss the principles governing the non-assignability of choses in action.

(*u*) 22 Ch. Div. 787.

CHAPTER III.

What may not be Assigned.

Although, as we have seen in the preceding chapter, equity has given effect to the assignment of a large number of choses in action, there are still many which are never assignable either because of their very nature or for some other reason, such as the interests of public policy. But here again, as in the case of those choses in action which are assignable, it is impossible to tabulate them so that one could see at a glance whether or not a particular interest is transferable. We must therefore content ourselves with an investigation of the general principles as drawn from and qualified by the decided cases.

And first with regard to contracts. In every contract there are two elements of paramount importance—the right or benefit on the one hand and the liability or burden on the other. While the benefit under a contract can, the burden cannot as a general rule be assigned in equity.

It is interesting to note that the rules governing the transfer of contractual rights and liabilities generally in English law resemble very closely those relating to the same subject under the Roman system. In the first place, under both systems the liability under a contract was only transferable with the consent of all the parties thereto. As regards the benefit of a contract, this also originally could only be transferred by "novatio"; thus Gaius says in

speaking of contractual obligations, "Obligationes quoquo modo contractae nihil eorum recipiunt. Nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur id efficere possum, sed opus est, ut jubente me tu ab eo stipuleri, quae res efficit, ut a me liberetur et incipiat tibi teneri, quae dicitur novatio obligationis" (*a*). Later, however, under the praetorian influence, an assignment of the benefit of a contract was effective and became irrevocable if the original creditor showed a clear intention to transfer, as is the case in an equitable assignment with us to-day.

In England, the burden or liability under a contract cannot be assigned without the consent of the party entitled to the benefit thereof, unless there be some benefit assigned along with the burden. This is obviously a necessary principle; for if such liabilities could be transferred a debtor might assign over his debt to a man of straw and thereby evade his responsibility. The only way in which the burden of a contract can be assigned is by an agreement between all the parties.

The benefit of a contract, however, can now, as a general rule, be assigned without the consent of the other party to the contract. Thus, in the case of the *Manchester Brewery Co.* v. *Coombs* (*b*), A. agreed to take an hotel as yearly tenant to B. & Co., and covenanted to purchase all his beer of B. & Co., "and their successors in business." A. occupied the hotel under the agreement, and purchased the beer in accordance therewith. B. & Co. subsequently sold their brewery, tied houses (which included the hotel), and business

(*a*) Gaius, ii, 38; see also Just. Inst. iii, 29 (3), "Praeterea novatione vollitut obligatio. Veluti si id quod tu Scio debeas, a Titio dari stipulatus sit. Nam interventu novae personae nova nascitur obligatio, et prima tollitur translata in posteriorem."

(*b*) [1901] 2 Ch. 608.

to C. & Co., who incorporated B. & Co.'s business with their own. After the transfer B. & Co. ceased to carry on business, and notice of the change was given to A., who continued for a time to purchase beer from C. & Co. It was held that the covenant was not personal to B. & Co., but ran with the land, and that C. & Co., as successors of them and owners of the reversion in fee of the hotel, were entitled to the benefit of it. "The present plaintiffs," said Farwell, J., "are the assigns of the benefit of the agreement, both by implication . . . . and by the express words of the agreement. The plaintiffs could, therefore, obtain specific performance of the contract in this Court so far as it is incomplete."

As a general rule agreements of a personal nature cannot be assigned, that is to say, when an agreement requires on the part of an artizan or manufacturer some special skill or knowledge so that it cannot be performed by everyone, it may be said to be of a personal nature and not assignable. The reason for this seems to be that if A. agrees with B. that he (B.) shall do something for him, he has probably selected B. on account of a confidence in his personal capability, and therefore it would be unreasonable that he should be compelled to accept the work of C. instead. If, however, the personal element is only introduced so far as supervision is concerned, then the party entrusted with the work may hand it to any of his employees or agents to execute, provided that he does not attempt to assign the responsibility.

The rule is stated thus in the case of the *British Wagon Co.* v. *Lea* (*c*):—"Where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been

(*c*) [1880]. 5 Q. B. D. 149.

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 party tendered to take the place of the contracting party may be equally well qualified to do the service." And, indeed, in that case, the Court not only held the particular contract to be assignable, but intimated an opinion in favour of extending the assignability of contracts generally.

Again, in the case of *Tolhurst* v. *The Associated Portland Cement Manufacturers* (*d*), the owners of chalk quarries undertook to supply a company with 750 tons of chalk per week, and so much more, if any, as the company should require for the whole of their manufacture of cement upon their land, at 1*s.* 3*d.* per ton, and to provide all rolling stock, stipulating that the agreement should not preclude them from supplying chalk from their quarries to other persons. Subsequently the company conveyed and assigned their land, works, and business, and purported to assign the benefit of the agreement to a new company having a much larger manufacture, giving notice of the conveyance and assignment to the owner of the quarries. The House of Lords held that the contract was assignable, and that an action could be maintained by the new company against the owner of the quarries for breach of the agreement to supply chalk.

But in the case of *Kemp* v. *Baerselman* (*e*), the Court of Appeal held that the contract was of so personal a nature that it was unassignable. A. con-

(*d*) [1903] App. Cas. 414.
(*e*) [1906] 2 K. B. 604.

tracted with B., a cake manufacturer, to supply him with all the eggs "that he shall require for manufacturing purposes for one year," B. undertaking not to purchase eggs from any other merchant during the year, so long as A. was ready to supply them. During the year B. transferred his business to a company, whereupon A. refused to supply any more eggs either to B. or to the company, on the ground that they were discharged from the contract. Held, A. was discharged from his obligation, the contract being with B. personally, and therefore unassignable.

In addition to these interests which we have just mentioned, there are other choses in action whose assignability is forbidden either by public policy or by statute. Salaries and pensions granted by the State to its servants in respect of duties which are being performed, or are to be performed, have been declared not to be capable of assignment; likewise alimony granted by the Court cannot be estranged from the object for which it is ordered to be paid; also assignments which would savour of maintenance or champerty are not permissible. The principles governing the non-assignability of these several classes of interests are qualified by numerous exceptions. We proceed then to discuss them separately.

The general rule applicable to this class may be stated thus: Public policy will not allow an assignment of a salary granted by the State to one of its servants when the public is interested directly in the services of such servant, and here the "public" means the "State." The reason for this rule seems to be that the State pays to its servants a salary of such an amount as it deems necessary to keep them, both in health and appearance, in such a condition that they may be capable of performing the duties with which they are entrusted. If they were permitted to assign their salaries they might not be able

to keep themselves in such a condition, and the public would be the losers thereby.

For this reason the pay of soldiers, sailors and other public officers cannot be assigned. In the case of *Arbuthnot* v. *Norton* (*f*) it was held that the salary of a judge could not be assigned, insomuch as it was paid in respect of services rendered, or to be rendered, for the public benefit. So also, in the case of *Palmer* v. *Bate* (*g*), it was decided that the salary of a clerk of the peace is not assignable, for his is a freehold office connected with the administration of justice and paid out of the public funds. Again, a similar decision has been given in the case of an assistant parliamentary counsel to the Treasury (*h*).

But in order to make an office a public office, so that public policy may be permitted to interfere in the private transactions made in respect of the salaries paid thereunder, it is necessary that the payments shall be made out of the national funds and not merely out of local or municipal funds, voluntary contributions, or private moneys.

The salary, therefore, which may be paid to a clergyman will not be governed by these restrictions upon alienation; for though there is the Established Church, which is recognised by the State, and the public is indirectly interested in the services of its officers, yet it is not sufficiently interested to enable it to control their emoluments, for it does not pay them.

So we may say that a clergyman, though he has the cure of souls, is not a public officer in the sense of a "State" officer, and he may therefore assign his salary. In the case of *In re Mirams* (*i*) it was held that the salary of the chaplain to a workhouse, which

(*f*) 5 Moore, P. C. C. 219.
(*g*) 23 R. R. 535.
(*h*) *Cooper* v. *Reilly*, 2 Sim. 560.
(*i*) [1891] 1 Q. B. D. 596.

is payable out of the poor rates, can be assigned. The case of *Grenfell* v. *The Dean of Windsor* (*k*) does seem to cast some doubt upon the point, for there it was held that an assignment of the emoluments of the canonry as a security was valid on the ground that there was no cure of souls and that the only duties were residence within the Castle and attendance at the chapel on twenty days of the year; this would appear to imply that, had there been a cure of souls, the decision of the Court would have been different. This case is, however, reconcilable with the principles set out above, by the fact that the salaries of officers to the Chapels Royal are paid by the State, so that public policy may be said to have the requisite interest.

Again, in the case of *Feistel* v. *King's College, Cambridge* (*l*), it was held that the emoluments of a college fellowship are assignable in equity, and that effect will be given to any security thereon out of the dividends appropriated from time to time to the fellowship, and it was further held that a receiver might be appointed of future sums to be appropriated to the assignor, or any other mode of securing the assignee's interest might be adopted which might be more satisfactory to any particular college. "There is nothing," said Lord Langdale, M.R., "in the nature of the income to which a fellow of a college is entitled from which it can be inferred that his income and emoluments are not assignable in equity by reason of an uncertain amount or otherwise"; and farther on he continues, "there is nothing in this case which appears to me, in any degree, to resemble any of the cases in which assignments of income have been held void on the ground of public policy."

It may be observed that in the earlier case of

(*k*) [1840], 2 Beav. 544.
(*l*) [1847], 10 Beav. 491.

Berkeley v. *King's College, Cambridge* (*m*) a motion "for a receiver of the dividends and moneys now due, and hereafter to become due, in respect of a fellowship" which had been assigned, was refused.

It is difficult to draw a distinction between these two cases, and perhaps unnecessary, for, though no comment was made upon the earlier decision, it was definitely laid down in the later case that an assignment of such an interest will be effective in equity.

An assignment of a salary, or of a portion of a salary, is not contrary to public policy if it is not to take effect until after the death of the grantee. In the case of *Arbuthnot* v. *Norton* (*n*) a puisne judge of the Supreme Court of Madras directed that a sum "equal to the amount of six months' salary," to which he was entitled by statute (*o*), should be paid over to his personal representatives in the event of his death in or after six months' possession of office. It was held that this created a valid assignment of such amount.

Pensions.—The general rule governing the assignability of pensions is much the same in spirit as that which we have just mentioned in regard to the assignment of salaries. If the pension is granted entirely as a reward for past services it may be assigned; if, on the other hand, the performance of duties in the future is contemplated, the pension is not assignable. The reason for this rule is precisely the same as we have already given for that with reference to the assignment of salaries. If the public is no longer interested in the services of its officers and makes a grant to them in recognition of their past duties only, then they may disburse such grant as seems to them best. But if the public is still interested in duties which may possibly have to be performed in the

(*m*) 10 Beav. 602.
(*n*) 5 Moore, P. C. C. 219.
(*o*) Stat. 6 Geo. 4, c. 85.

future, then again the grant is regarded as being made for the purpose of keeping the grantee in a suitable condition to perform such duties.

There is a noticeable exception to this general rule in that the pensions of soldiers and sailors have been declared to be unassignable by statute.

(a) The Army Act, 1881 (*p*), made unassignable deferred pay or military reward payable to any officer or soldier of the Army, Royal Marines, and Her Majesty's Indian Forces, and the Royal Malta Fencible Artillery, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child, or other relative, or to any person in respect of military service.

(b) The Naval and Marine Pay and Pensions Act, 1865 (*q*), made unassignable naval pensions payable to an officer in the Navy, seaman or marine, or to an officer's widow, allowances from the compassionate fund, marine half-pay, payments, etc., in respect of services in the Navy and Marines to a subordinate officer, seaman or marine.

It must be remembered that half-pay and pensions are very distinct for our purpose; half-pay ranks as a salary, since the State is still interested in possible future services to be rendered by the grantee in so far as it may call upon him to perform duties at any time, and is, therefore, unassignable. A pension, on the other hand, is generally assignable unless expressly prohibited by statute.

Though no longer of importance in regard to our subject, it is interesting to note that in times past, when commissions in the Army were saleable, an

(*p*) Stat. 44 & 45 Vict. c. 58.
(*q*) Stat. 28 & 29 Vict.

officer might, upon the sale of his commission, make an equitable assignment of the profits in the hands of his agent (*r*).

A grant made by the State to a public officer in recognition of a great service rendered to his country cannot be alienated, on the ground that such grant is made that he may maintain a certain dignity in his office. It will be observed that this is quite distinct from a pension granted to a public officer, in accordance with a previous agreement, and not as a special mark of recognition.

In the case of *Davis* v. *The Duke of Marlborough* (*s*) a pension had been granted to the Duke in respect of the great services he had rendered to his country, and as a memento of the nation's gratitude. It was held that this pension was inalienable, because one of the primary objects of the grant, *i.e.*, that he should have it as a perpetual memorial of the nation's gratitude, would thereby be entirely lost. Indeed, the words of the grant will themselves in many cases guide the Courts in their decision as to the assignability of such pensions. For in this last case it was held that, though the estate itself could not be transferred, the words used in the grant for the support of the dignity could not be construed to prevent an alienation of the rents and profits arising therefrom.

A pension allowed to a retired clerk, under the Incumbents Registration Act, 1871 (*t*), has been held not to be assignable either at law or in equity, it being a charge upon the revenues of the benefice (*u*). Yet in the case of *McBean* v. *Deane* (*x*) an annuity

(*r*) *Collyer* v. *Fallon* [1823], T. & R. 459.
(*s*) 1 Swan. 79.
(*t*) Stat. 34 & 35 Vict. c. 44.
(*u*) *Gathercole* v. *Smith*, 17 Ch. Div. 1.
(*x*) 30 Ch. Div. 520.

granted to a retiring incumbent under the Union of Benefices Act, 1860 (*y*) was held to be so assignable.

In the case of *In re Maclean's Trusts* (*z*) a subscriber to the Customs Annuity and Benevolent Fund (*a*) irrevocably assigned, by an instrument duly executed and deposited with the directors, two-thirds of the portion payable on his death to mortgagees to secure an advance made to him, and the mortgagees were duly admitted by the directors as his nominees; it was held that the mortgage was valid as against the widow, children and relations of the subscriber.

But when a pension is granted entirely as a reward for past services, and there are no further duties to be performed by the recipient in which the public has an interest, such pension is freely alienable. The pension granted to a County Court judge may be quoted as an example of such an interest, and in the case of *Willcock* v. *Terrell* (*b*) it was held to be assignable in equity; and further, it would appear to be immaterial whether the grant is made for life or only during pleasure, so far as its assignability is concerned.

Under the Bankruptcy Act, 1883 (*c*), it is provided that the trustee in bankruptcy shall take any salary, half-pay, pension, or other similar income to which the bankrupt may be entitled, and shall set aside a certain proportion thereof for the bankrupt's support.

Moreover, it is to be observed that even the rules making the assignability of pensions dependent upon their being absolute and not conditional will apparently be relaxed in the event of bankruptcy of the pensioner. For in the case of *Spooner* v. *Payne* (*d*)

(*y*) Stat. 23 & 24 Vict. c. 142.
(*z*) L. R. 19 Eq. 274.
(*a*) Stat. 56 Geo. 3, c. 73.
(*b*) 3 Ex. Div. 323.
(*c*) 46 & 47 Vict. ss. 44, 52, 53.
(*d*) 1 De G. M. & G. 383.

an annuity awarded to a County Commissioner of bankruptcy, whose office had been abolished by law, passed to the assignee in bankruptcy of the person to whom it has been awarded, although the annuity depended upon the annuitant's making an affidavit of certain facts before he became entitled to each payment.

Again, in the case *Ex parte Huggins* (*e*), it was held that the pension of a retired judge of a Crown Colony, granted by the Secretary of State for the Colonies and voted annually by the legislature of the colony, vests in the creditor's trustee upon his becoming bankrupt.

Alimony, which is an allowance ordered by the Court to be paid from time to time to a wife by her husband for her maintenance, cannot be assigned (*f*). There would seem to be two reasons for this; first, the Court may alter the amount of such allowance, or even take it away altogether; and secondly, it is an amount which, in the opinion of the Court, is absolutely necessary for the woman's proper support, and if it were not to be used for that purpose it would not be granted. It may also be mentioned here that alimony cannot be made liable, as the woman's separate property, for her debts (*g*), nor are arrears proveable in bankruptcy, even though they may have accrued due before the date of the receiving order (*h*). Yet a pension awarded in respect of services in the legal department of the Government could be charged with the payment of arrears of alimony and costs.

Again, public policy will not allow the assignment of a chose in action, if such a transfer would infringe

(*e*) 21 Ch. Div. 85.

(*f*) *In re Robinson*, 27 Ch. Div. 160.

(*g*) *Anderson* v. *Lady Hay*, 7 T. L. R. 113; nor can a husband's liability to pay alimony be defeated by his bankruptcy (*Linton* v. *Linton*, 15 Q. B. D. 239; also *In re Hawkins*, [1894] 1 Q. B. D. 25).

(*h*) *Kerr* v. *Kerr*, [1897] 2 Q. B. D. 439.

the rules against maintenance and champerty. "The doctrine of maintenance," says Professor Ames (*i*), "was pushed so far that it came to be regarded as the real reason for the inalienability of choses in action, and the notion became current that no contracts were assignable, not even covenants and policies of assurance and the like, although expressly made payable to the obligee and his assigns. Even bills and notes were thought to derive their assignability solely from the custom of merchants."

The offence of maintenance is committed when one maliciously assists a party in a civil action with money or other aid (*k*), but such assistance is not malicious if it be prompted by either kinship or charity. It is clear that great injustice would be done if persons, wholly unconcerned with particular questions before the Courts, though possibly interested in and likely to be affected by the result, were allowed to lend money or other aid to one of the parties.

It can be no hardship, however, but rather a praiseworthy charity, to assist a poor man in bringing an action against his rich oppressor, when but for such help he would be unable to assert his rights, and in such a case there will be no maintenance; for it is an essential element of maintenance that it shall be committed with malicious intent.

There are other instances of apparent infringements of the law against maintenance, which have been held not to amount to the offence. So, in the case of *Cook* v. *Field* (*l*), it was held to be no maintenance for a man to sell his possible interest as devisee of a living owner on the terms that he shall return the purchase money if he does not become the devisee, for there is no unlawful interest created in the

(*i*) See Ames, Harvard Law Review, iii, 341.
(*k*) See Black. Comm. iv, 135.
(*l*) 15 Q. B. D. 460.

present owner's death, nor is it a bargain for a pretended title under the statute.

Although the law (*m*) enabled attorneys and solicitors to make arrangements in certain cases with their clients as to remuneration in lieu of costs, it has been held that an attorney may not purchase the subject-matter of a suit *pendente lite* unless it be merely by way of security for his costs (*n*). In the case of *Davis* v. *Freethy* (*o*), however, it was decided that the rule preventing a solicitor who is conducting an action from purchasing the subject-matter of the suit, does not apply if the assignment precedes the employment as solicitor. The learned judges in their decision distinguished this case from that of *Simpson* v. *Lamb* (*p*) on the ground that here the covenant was made when the relation of solicitor and client did not exist, and a contract so made could not be invalidated by reason of that relation being subsequently entered into.

In the case of *Bradlaugh* v. *Newdigate* (*q*), it was held that it is maintenance to indemnify against costs a person who is suing for a statutory penalty as a common informer. But there is no maintenance so long as there is no agreement to maintain an action in consideration of sharing in the profits to be derived from that action. So in *Hartley* v. *Russell* (*r*), a creditor having commenced proceedings against his debtor agreed with him to abandon those proceedings and to surrender his securities, in consideration of the debtor's giving him a lien on other securities with authority to sue the possessor of those securities, and agreeing to use his best endeavours to assist in their

(*m*) Stat. 33 & 34 Vict. c. 28.
(*n*) *In re Att. & Sol. Act* [1870], 1 Ch. Div. 573.
(*o*) [1890] 24 Q. B. D. 519.
(*p*) 7 E. & B. 84.
(*q*) 11 Q. B. D. 1.
(*r*) 2 Sim. & Stu. 244.

recovery. Here there was no semblance of maintenance, the agreement being nothing more than an assignment of the equity of redemption of the assignor in the securities held by the creditor in exchange for prior securities held by the assignee, and the right to sue the creditor being the usual legal provision in the case of such an assignment.

It seems that a corporation cannot be held guilty of maintenance since "the ground of it is not so much an independent wrong as particular damage resulting from a wrong founded upon a prohibition by statute" —a series of early statutes said to be in affirmation of the common law—"which makes it a criminal act and a misdemeanour" (*s*).

By the Companies Act, 1862 (*t*), claims against the directors of a company in respect of their improper dealings with the assets of the company were choses in action saleable by the liquidator, and even though they were unknown when the assignment was effected. Though this Act has been repealed *in toto*, it is probable that such claims will come within the provision of sect. 151 of the Companies (Consolidation) Act, 1908.

An assignment of a share of prize money, which was the subject of an action in the Admiralty Court, in consideration of the assignee paying the costs of the action has been held to be void for maintenance (*u*), as also has the attempted assignment of a bare right to file a bill in equity (*x*).

Champerty (*y*) is a form of maintenance, and has been described as "the unlawful maintenance of a suit in consideration of a bargain either for part of the thing or some profit out of it" (*z*). It is an

(*s*) Ld. Selborne in *Metrop. Bank* v. *Pooley* [1885], 10 A. C. 218; see Pollock, "Law of Torts," at p. 335.
(*t*) Stat. 25 & 26 Vict. c. 89.
(*u*) *Stevens* v. *Bagwell*, 15 Ves. 139.
(*x*) *In re Paris Skating Rink Co.*, 5 Ch. Div. 959.
(*y*) See Black. Comm. iv, 135; deriv. "campi partitio."
(*z*) Per Grant, M.R., in *Stevens* v. *Bagwell*, *supra*.

aggravated form of maintenance, and an essential element of the offence is that the party shall actively assist in the action, and not merely give information to the other who is bringing the action (*a*). The rule as to champerty was relaxed in the case of the assignment of a legacy, by a person too poor to sue for its recovery, to another, who sought to enforce payment by an action (*b*). And it is to be remembered that a person who has originally a good title to sue will not lose it by making an agreement tainted with champerty, which would otherwise preclude him from doing so (*c*).

By the Bankruptcy Act, 1883 (*d*), it is provided that the rules regarding maintenance and champerty shall not affect an assignment of the subject-matter of an action which has been commenced by a trustee in bankruptcy.

Moreover, in the case of the *Metropolitan Bank* v. *Pooley* (*e*), it was decided that the rights of a person affected by maintenance or champerty pass to his trustee upon bankruptcy, so that the bankrupt cannot sue in respect of them until he has been declared solvent.

Before passing from this question of what may or may not be assigned in equity, rights of action arising out of "tort" must be mentioned. Originally such rights were never assignable, and there is no reason for supposing that equity would assist in their alienation. They have, nevertheless, been held to be "choses in action" within the interpretation of sect. 25 of the

(*a*) *Hartley* v. *Russell*, 2 Sim. & Stu. 244.
(*b*) *Harris* v. *Brisco*, 17 Q. B. D. 504.
(*c*) *Hilton* v. *Woods*, 4 Eq. 432.
(*d*) Stat. 46 & 47 Vict. c. 52, ss. 44, 56.
(*e*) *Metrop. Bank* v. *Pooley* [1885], 10 App. Ca. 218.

Judicature Act (*f*), but only when restricted to imply "rights to recover damages for a tort."

Though it is difficult to estimate how far such rights might be assignable in equity, it may safely be said that rights of action in respect of injury to the person are still never transferable. Actions in respect of injuries to property, however, may in some cases be capable of assignment, supposing that the measure of damages can be estimated by the extent of the injury done to the estate (*g*).

The maxim usually quoted in reference to this subject is *Actio personalis moritur cum persona*, and this rule applies generally (*h*). There are, however, three statutory exceptions which should be mentioned here :—

(a) Under Lord Campbell's Act, 1846 (*i*), if a person is killed as the result of another's wrongful act, an action is competent against the wrongdoer for the benefit of the deceased's relatives.

(b) By Acts passed during the reign of Edward III. (*k*), provision was made that the executors or administrators of a deceased person may bring an action against a wrongdoer in respect of wrongs done during his lifetime to personal property.

(c) By an Act of William IV. (*l*) it was provided that the personal representatives may sue, for the benefit of the personal estate, in respect of injuries to the real estate of a person committed within six calendar months before his death ; and a man's estate may be made

(*f*) *King* v. *Vict. Insur. Co.*, [1896] App. Ca. 254, 256.
(*g*) See Pollock, "Law of Torts," at p. 62.
(*h*) *Pulling* v. *Gt. Eastern Ry. Co.*, 9 Q. B. D. 110.
(*i*) Stat. 9 & 10 Vict. c. 93 ; amended 27 & 28 Vict. c. 95.
(*k*) Stat. 4 Ed. 3, c. 7 ; and 25 Ed. 3, c. 5.
(*l*) Stat. 3 & 4 Will. 4, c. 42, s. 2.

liable for wrongs done by him to another in respect of his property, real or personal, within six calendar months before his death. In these two cases action must be taken against the wrongdoer's representatives within one year and six months respectively.

CHAPTER IV.

FORMALITIES.

THE foregoing discussion has been concerned with the primary question of the nature of an equitable assignment and what may or may not be the subject thereof. We now pass to a consideration of what will amount to such an assignment of a possible subject, the form necessary to its completion, and the extent to which its application is qualified by the interests of third persons. It is convenient to treat these several questions as distinct though they obviously involve one another, and the present chapter is devoted to a discussion of the first of these considerations. For though equity has shown itself to be very favourable as regards the assignment of choses in action, it is necessary to see exactly where the line is drawn, since there are some transactions which at first sight might appear to amount to assignments in equity, yet which the Courts have held upon clear and reasonable grounds not to be effective as such.

The legality of every transfer of property is governed by certain fundamental requirements, and these apply, of course, to an equitable assignment. The more general rules bearing on property transfer scarcely call for discussion here, and we restrict our investigation to those formalities which have a particular bearing upon assignments in equity.

Any mere agreement, when made upon valuable consideration, to assign property will operate as an equitable assignment, and, as has already been stated,

it is immaterial whether the property is in existence at the time of the assignment or is to come into existence at some future date; so that we find in the case of *Diplock* v. *Hammond* (*a*) an informal instrument in the following terms was held to constitute a clear equitable assignment:—"I hereby authorise you to pay B. 365*l*., being the amount of my contract, B. having advanced me that sum," signed "A." Moreover, even if the subject-matter of the assignment (*e.g.*, a banker's deposit book) bears upon the face of it words to the effect that it is not to be assignable in any case whatsoever, it will nevertheless be assignable in equity.

In reference to the varieties of form which an equitable assignment may take, the words of Lord Macnaghten in the case of *William Brandt, Sons & Co.* v. *The Dunlop Rubber Co.* (*b*) are instructive:—"It may be addressed to the debtor. It may be couched in the language of a command. It may be a courteous request. It may assume the form of a mere permission. . . . The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such notice he does so at his peril. If the assignment is for valuable consideration and communicated to the third person, it can't be revoked by the creditor or safely disregarded by the debtor."

"Wherever a clear and definite intention to transfer or appropriate a chose in action to or for the use of the assignee for valuable consideration is indicated, however informal may be the wording of such intention, there will thereby be created an assignment enforceable in equity."

(*a*) [1854], 2 Sm. & G. 141.
(*b*) [1905] App. Cas. 454.

In the case of *Row* v. *Dawson* (*c*), which is the principal early authority on assignments in Equity, T. and C. lent money to G., who gave them a draft in the following terms: "Out of the money due to me from H. W. out of the Exchequer, and what will be due at Michaelmas, pay to T. and C. . . . value received." G. became bankrupt, and it was questionable if a specific lien had been created upon the sum due to the estate by this draft. Lord Hardwicke held that, there being an agreement for valuable consideration beforehand to lend money on the faith of being satisfied out of the fund, the draft was a credit on the fund, and amounted to an assignment of so much of the debt; and that though the law did not recognise the assignment of a chose in action, equity did, and that any words would do, no particular form being necessary thereto. Nor does it matter, as we have seen above, whether the assignment is addressed to the debtor or to the assignee (*d*), though notice must in any case be given to the debtor (*e*).

Even a mere oral agreement will operate as an equitable assignment provided the intention to transfer can be shown, no writing being necessary thereto except in cases where it is demanded by statute, *e.g.*, the Statute of Frauds or the Companies Acts. So in the case of *White* v. *Kilgore* (*f*), where A. owed B. a certain sum on account, and B., already owing C. a sum of money on account, wished to borrow a further amount. An agreement was entered into whereby A. was to pay to C. on B.'s account what he owed to B.; it was held that this created an oral assignment to C. of A.'s debt to B. with constructive delivery, and that the consideration was sufficient.

(*c*) 1 W. & T. L. C. in Eq. (7th ed.), p. 93.
(*d*) *Brandt* v. *The Dunlop Rubber Co.*, *supra*.
(*e*) See *infra*, Chap. VI., "Notice."
(*f*) 77 Me. 571.

Moreover, the mere delivery of the written evidence of a debt, without any direct expression of intention to transfer such debt, may constitute an assignment of the debt itself (*g*); but in such a case the latent intention must unquestionably exist, for it is clear that a man would not, as here, send such evidence of a debt to another unless he intended that it should be of some value. Yet no assignment will be created even in equity in the case of an agreement that one man shall receive a commission for collecting a sum due to another, nor will he thereby have any right of action against the debtor (*h*). In the case of the *London and Yorkshire Bank* v. *White* (*i*), F., in conversation with the manager on December 7th, agreed to assign to the bank, as a security, his interest in certain goods in the hands of G. On December 9th F. sent notice of the assignment to G., requesting him to sell the goods and send the proceeds of their sale to the bank. Held, that the oral agreement on the 7th created a complete equitable assignment, and that the notice to G. on the 9th was unnecessary to complete the title; nor was it a bill of sale.

The intention to assign, however, whether expressed or only implied, must be present in every case, for otherwise people would be continually claiming the advantages of an assignment, when in reality they had merely received instructions or authority to deal with certain property. The line of demarcation is indeed very narrow, and there have been repeated attempts to construe as equitable assignments instruments which have never been intended to operate as such. So, in the case of *Morgan* v. *Larivière* (*k*), the

(*g*) *Mowry* v. *Todd*, 12 Mass. 281.
(*h*) *Plater* v. *Megg*, 30 Fed. Rep. 398.
(*i*) 11 T. L. R. 570.
(*k*) L. R. 7 H. L. 423.

mere opening of a credit for a particular amount, and in *Hopkinson* v. *Forster* (*l*), a letter of instruction to a banker have been held not to create equitable assignments, on the ground that no intention to that effect could be shown; and, in the latter case, it was further held that a cheque is not an equitable assignment of the drawer's balance at the bank. In *Vandenberg* v. *Palmer* (*m*), however, it was held that an instruction to charge a particular account in favour of a third person might operate as the creation of a trust, though the fund would not thereby be outside the control of the person giving the instruction.

Again, a mere instruction from a principal to his agent will not operate as an equitable assignment unless it is communicated to the third party, for it might easily be revoked before it was executed. As, for instance, if a man gives an order to his bankers to pay over a certain sum to a third person, and, before that sum is paid, he countermands the order, no notice having been given to the third person, there will be no assignment (*n*). It must not be supposed that this is a rule which is peculiar to an equitable assignment, though it does seem to have special application here; the rule is in reality only a form of the maxim which holds good in every contract, namely, that a stranger to a contract has no interest therein.

Where the instrument is merely a revocable mandate and not an equitable assignment, the bankruptcy of the principal or person giving the authority will operate as a revocation. Thus, in the case *Ex parte Hall* (*o*), bankers advanced money to a customer on a letter from him addressed to a tenant of a certain farm,

(*l*) 19 Eq. 74.
(*m*) 4 K. & J. 204.
(*n*) *Morrell* v. *Wooten*, 16 Beav. 197.
(*o*) [1878], 10 Ch. Div. 615.

authorising and requesting him when the next rent should become due to pay over to the bankers 200*l.*, the letter containing no reference to the loan nor to any consideration for the authority. The customer was subsequently declared bankrupt. It was held that the letter amounted only to a revocable authority to pay the rent to the bankers, and that such authority was revoked by the bankruptcy of the customer; the bankers, therefore, could not recover the rent from the tenants (*p*).

Likewise the death of the principal will operate as a revocation of any authority which he may have given during his lifetime. In the case of *Lambe* v. *Orton* (*q*), which at first sight appears to conflict with this view, a letter ordering an executor to pay over to a third person certain moneys to which the writer was entitled was held to be effective as an equitable assignment, though it was not acted upon until after the death of the writer. In the case *In re Russell* (*r*), however, Chitty, J., held that in the absence of any absolute intention to assign, a mere authority is, *ipso facto*, revoked by death; moreover, he distinguished the case of *Lambe* v. *Orton* on the ground that there there was a definite letter showing a distinct intention on the part of the writer once for all to make over the property, whereas in the later case there was no such absolute intention.

Nevertheless, so soon as the agent communicates his mandate to the third person and agrees to exercise it for his benefit, he thereupon becomes the agent for and the debtor to that person. So in *Fitzgerald* v. *Stewart* (*s*), Brougham, C., held that after such a communication had been made and even payments

(*p*) Compare *Ex parte Rawlings* [1888], 22 Q. B. D. 193.
(*q*) [1860], 1 Dr. & Sm. 125.
(*r*) [1893], 37 Sol. Jo. 212.
(*s*) 2 Russ. & M. 457.

commenced in respect thereof, such payments could not be discontinued so long as the agent had chargeable funds in his possession. And again, if the consignee of goods, against which a bill of exchange is drawn, directs his agent to realise the goods and pay off the bill out of the proceeds, this will only amount to a revocable mandate; but if it is communicated to the bill holder, it will operate as an equitable assignment of the proceeds (*t*).

In the same way, where there is a clear intention of transferring a chose in action in respect of some particular fund, such will act as a valid charge upon that fund (*u*). A mere promise, however, by a debtor to pay money when he receives payment of a debt due to him from another person will not act as an equitable assignment as regards the debt in the hands of that other (*x*). Nor will a statement by a debtor that the arrival of a certain cargo will put him in funds (*y*).

Lastly, though a creditor by directing his debtor to pay the debt to another person may in equity effectually assign the debt to such other person, a mere direction to a person to receive money and pay it to the party granting the authority will not act as an equitable assignment. In the case of *Bell* v. *The London & North Western Railway Company* (*z*), a railway contractor gave his bankers a letter directing the railway company to pay over cheques to become due to him to his account with the bank. Held, that this did not constitute an equitable assignment, though it would have done so if he had directed that

(*t*) *Ranken* v. *Alfaro*, 5 Ch. Div. 786; see also *Brown, Shipley & Co.* v. *Kough*, 29 Ch. Div. 848.

(*u*) *Gorringe* v. *Irwell*, 34 Ch. Div. 134; also *Smith* v. *Everett*, 4 Bro. Ch. C. 64.

(*x*) *Field* v. *Megaw*, L. R. 4 C. P. 660.

(*y*) *Jones* v. *Starkey*, 16 Jur. 510.

(*z*) 15 Beav. 548.

the cheques should be paid over to the bank itself instead of to his account. Similarly, in the earlier case of *Rodick* v. *Gandell* (*a*), the defendant authorised the solicitors to a certain company to pay over money becoming due to him from the company to his bankers, and the solicitors promised by letter to the bankers to pay it over to them on receiving it. Held, that it was no equitable assignment; Lord Lonsdale, M.R., in his judgment in this case, remarked: "It is not contended that every power of attorney authorising a person to receive money and directing him to pay it to a creditor of the party granting the power would amount to an equitable assignment, and I am unable to come to the conclusion that this transaction amounted to an equitable assignment." This decision was upheld on appeal.

In order to render an assignment operative in equity it must satisfy three essential qualifications. These are:—

(1) There must be consideration for the transfer. (It will be observed that this is unnecessary for a valid assignment under the Judicature Act.)

(2) Notice of the assignment must be given to the party liable thereunder.

(3) The assignee takes his interest subject to all equities existing against the assignor, *i.e.*, any set-off which the debtor might have exercised against the original creditor before the assignment, he may exercise against the assignee.

It is interesting to note that, even as regards these essential features, there is an exact similarity between our equitable assignments and their Roman equivalent; for (a) notice was necessary, as it is with us,

(*a*) 12 Beav. 325

to bind the Roman debtor; (b) the Roman assignee, just as the English, took his assignment "subject to all equities" (*e.g.*, the *exceptio doli*); (c) under both systems valuable consideration was essential; and (d) under neither system was any set form necessary (*b*).

We pass, then, to a discussion upon the necessity of consideration to a valid equitable assignment.

(*b*) Mr. Leage (Roman Private Law, p. 315) draws a distinction under this last head between the two systems, saying that "whereas in England an assignment requires a certain form, *i.e.*, writing, at Rome none was necessary." This statement seems not to be quite accurate, for though "writing" is essential for a valid assignment under the Judicature Act, as we have shown above, no such form is necessary to an assignment in equity.

CHAPTER V.

CONSIDERATION.

"CONSIDERATION is the materiall cause of a contract, without the which no contract can binde the partie" (*a*).

Consideration is strictly a *quid pro quo*, and has been defined by Sir William Anson as "something done, forborne, or suffered, or promised to be done, forborne or suffered, by the promisee in respect of the promise. It must necessarily be in respect of the promise, since consideration gives to the promise a binding force" (*b*). He then gives four general rules which, he says, "govern" consideration:—

(a) It is necessary to the validity of every promise not under seal.
(b) It need not be adequate to the promise, but must be of some value in the eye of the law.
(c) It must be legal.
(d) It must be either present or future; it must not be past.

The general principles of consideration, *e.g.*, when it is legal, adequate, etc., are so fully dealt with in standard treatises on Contract that it seems unnecessary to discuss these questions further here. But before passing to consider the necessity of consideration for a valid equitable assignment, the reluctance of the Courts to depart from their early prejudice

(*a*) Termes de la Ley, 77.
(*b*) Anson, "Law of Contract," p. 88.

against enforcing gratuitous promises must be observed.

Indeed, as late as the thirteenth century, it is doubtful whether a purely gratuitous promise, even though made by a sealed instrument, would have been enforced if its gratuitous nature had been declared; and according to Pollock and Maitland's History, it seems "that all along there is a strong feeling that, whatever promises the law may enforce, purely gratuitous promises are not and ought not to be enforceable" (*c*).

Now, however, it is possible to give effect to such promises by executing a deed of transfer, under which no consideration is necessary. This is certainly a step towards the natural principle expounded by Grotius (*d*); and it is possible that in the future purely gratuitous promises, informal and without sealed writing, may be established as binding at law.

Equitable assignments are no exception to this rule requiring consideration, and since, as we have already pointed out, no form or writing is necessary to their validity, consideration is an essential element in their execution. Most of the authorities are reconciled in this view (*e*), though Mr. Jenks holds the opposite opinion, saying that the proposition is not only unfounded, but is actually contradicted by the decided cases (*f*). He states that the doctrine has arisen from a misconception of the limits of two rules in equity; first, that a voluntary assignment cannot prevail against a person with a better claim; and

(*c*) Pollock and Maitland's Hist. of Eng. Law, vol. ii, p. 211.

(*d*) See Grotius, "De belli pacisque," lib. 2, c. ii.

(*e*) In the case of *Tailby* v. *The Off. Receiver* (13 App. Ca. 543), Lord Watson said: "As soon as they come into existence, assignees *who have given valuable consideration*, if the new chose in action is in the disposal of the assignor, take precisely the same interest as if it belonged to him." So also Lord Macnaghten: "It has long been settled that future property, possibilities and expectancies, are assignable in equity *for value*."

(*f*) See Law Quarterly Review, 1900, p. 241.

secondly, that equity will not lend its aid to complete an imperfect attempt at an assignment where there is no consideration. As upholding his contention, Mr. Jenks relied largely upon the case of *Kekewich* v. *Manning* (*g*), and here he receives the support of Joshua Williams (*h*), who says that, on the authority of *Kekewich* v. *Manning*, it is now finally settled that an equitable chose in action may be effectually transferred by an assignment thereof though made without valuable consideration (*i*).

In the recent case of *Towry Law* v. *Burne* (*k*) the decision in *Kekewich* v. *Manning* was fully discussed, as also was that in *Meek* v. *Kettlewell* (*l*), which was the previous authority on this point, and which, it was contended, had been overruled by *Kekewich* v. *Manning*. This contention was not, however, allowed to prevail, and it was held that the voluntary assignment of an expectancy, even though under seal, will not be enforced in equity. In this case Buckley, J., drew a distinction between the two earlier cases, giving it as his opinion that the assignment in *Kekewich* v. *Manning* was not of an expectancy, but of actual property.

"The other cases," says Sir William Anson, "such as *Harding* v. *Harding* (*m*), which at first sight suggest that consideration is not necessary to support an equitable assignment, prove on examination not to be cases of assignment at all, but of declaration of trust; or else go merely towards showing that as between assignee and debtor the question whether the assignor received or did not receive consideration does not concern the debtor." And

(*g*) 1 D. M. & G. 176.
(*h*) Williams' P. P. (16th ed.), p. 398.
(*i*) Williams' P. P. (16th ed.), p. 398.
(*k*) [1903], 1 Ch. Div. 697.
(*l*) 1 Hare, 464.
(*m*) 17 Q. B. D. 442.

as proof that this was the light in which the Court looked upon the transaction in this case, the judgment of Willes, J., may be referred to:—"In my opinion the question of want of consideration has no application to such a case as the present. But there is a further fact in the present case: H. authorized his daughter to communicate his letter to the trustees; she did so, and the trustees assented to the assignment. . . . . Under such circumstances the assignee is regarded as the *cestui que trust* of the debtor, if the debtor has assented to the obligation" (*n*).

Hence, though a Court of Equity would not enforce an assignment in favour of a mere volunteer, yet it would always give effect to a voluntary declaration of trust. This appears to be a very fine distinction, in view of its important result in regard to an intended transfer. For instance, if a man executes an assignment in favour of a mere volunteer, and does not transfer the subject-matter there and then, equity would regard the transaction as an imperfect gift, and would not enforce it; but if the man had executed a declaration of trust of the property in favour of the volunteer, equity would give effect to the declaration by compelling the trustee to transfer the stock to the *cestui que trust*. So in the case of *Bridge* v. *Bridge* (*o*), the plaintiff executed a voluntary deed, granting realty to A. and B. to the use of himself and A. and B., upon trust to sell, and directing that certain produce and bonds should be considered vested in him and A. and B. on trusts for volunteers. The realty and the produce and bonds were vested in trustees under the will of the plaintiff's uncle. It was held that the deed was valid as to the shares and bonds which had actually been transferred to the plaintiff and A. and

(*n*) *Harding* v. *Harding*, *supra*, at p. 445.
(*o*) 16 Beav. 315.

B., but that it was ineffectual as regards the foreign bonds and stock, which had not been so transferred, neither had there been any acceptance of the trust by the trustees of the uncle's will, in whom they were vested; further, it was held that the deed was ineffectual as regards the realty, since the legal estate had not passed. In the case of *Collinson* v. *Patrick* (*p*) a bond was assigned to trustees in trust for a married woman's separate use, subject to her power of appointment. She, by a deed of indenture, appointed her interest in the bond to certain persons as an indemnity to them for a fraudulent appropriation made by her husband, their solicitor, of sums belonging to them. It was held that the assignment would be supported, though made without consideration, as a trust executed. But in the case of *Beech* v. *Kemp* (*q*) some consols, belonging beneficially to A. with remainder to B., stood in the names of two trustees, of the survivor of whom B. was the representative. B. made a voluntary assignment of the stock to A., though without actually transferring it. The Court refused either to declare B. a trustee of the stock for A., or to compel her to transfer it. In his judgment in this case Romilly, M.R., said: "I admit that there is a very thin distinction between an assignment for the benefit of a volunteer and a declaration of trust in his favour, but it is one which is to be found to have been taken in all the cases. If the absolute owner of a fund says, 'I hold this stock in trust for A. B.,' the trust is complete; but if there be only an assignment, a different relation exists between the parties, and it would be destroying the distinction between an assignment and a declaration of trust to say that an assignment, because it may create a trust, is to be considered the same as a declaration

(*p*) 2 Keen, 123.
(*q*) [1854], 18 Beav. 285.

of trust. If I were to hold that there was no distinction between an incomplete transfer and an express declaration of trust with respect to personal estate, I do not see why the same doctrine would not apply to land. It would be contrary to all previous decisions to hold that if a party voluntarily executed a deed, not passing the legal estate, the relation of trustee and *cestui que trust* had been created."

Another instance of what appears to be an exception to the necessity of consideration is, that if a man has done all that it is possible for him to do in order to transfer an interest to another, even though he be a volunteer, equity will give effect to his intention. This is illustrated by the case of *In re Griffin* (*r*), where a father indorsed a banker's deposit receipt, "Pay my son," and signed his name to the indorsement. He then handed the document so indorsed to his son, saying, "Here you are, my lad; this is yours." The father appointed this son one of his executors. It was held that there was a complete gift or equitable assignment of the amount on deposit at the bank. And so, again, in the case of *Bull* v. *Smith* (*s*), a testator a few days before his death bought, through a broker, certain stocks and shares. On the day before his death, which was also name-day on the Stock Exchange, in accordance with the testator's instructions, his wife's name was passed as the transferee of the stocks and shares. The testator died before the transfers were executed. It was held that the gift of the stocks and shares was complete, as the testator had left nothing undone which he could have done in order to complete the transaction in favour of his wife.

It is necessary, therefore, to the validity of a voluntary settlement, that the settlor shall have done

(*r*) [1899] 1 Ch. 408.
(*s*) [1901] 84 L. T. 835.

everything which, according to the nature of the subject-matter of the settlement, ought to be done in order to render the transfer effective and the settlement binding upon him.

"The reason," says Willes, J., "why equity will not interfere in favour of a mere volunteer, but requires a valuable consideration to support the assignment, is that in such a case there is nothing wrong in the donor changing his mind and withdrawing from the object of his liberality the contemplated benefit. But if there is value given on the one side in exchange for the donor's intention, then there is a contract or something approaching to a contract between the parties, and the donor cannot withdraw from his expressed intention."

It may safely be said, therefore, that unless consideration has been given, equity will not give effect to an assignment if it does not amount either to a declaration of trust or to a voluntary settlement in the circumstances set out above. But the debtor or third party cannot claim the absence of consideration to relieve him of his obligation to pay the assignee, unless he can show that the assignee is thereby disabled from giving a good discharge of the debt. And so in the case of *Mackusick* v. *Fleming* (*t*), money due to the vendor under a contract of sale was by common consent paid by the purchaser to a third party, to whom the vendor executed an assignment of the contract. Payments were made from time to time by the purchaser to the assignee to be applied for a specified purpose. There was a failure of consideration on the part of the vendor which would have entitled the purchaser to repayment from him. It was held that the purchaser was not entitled to

(*t*) [1904], 90 L. T. 101.

repayment from the assignee of the money paid by common consent, nor of the periodical payments in so far as they were in fact appropriated to the specific purpose.

We now pass to the second element in a valid equitable assignment, namely, the giving of notice to the party liable thereunder.

CHAPTER VI.

NOTICE.

"IT does seem to me," said Bramwell, L.J., in the case of *Brice* v. *Bannister* (*a*), "a strange thing, and hard on a man, that he should enter into a contract with another, and then find that, because that other has entered into a contract with a third, he, the first man, is unable to do that which is reasonable and just he should do for his own good. But the law seems to be so, and anyone who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon." This hardship, however, would seem to exist only in theory. For there is a rule, generally known as the rule in *Dearle and Hall* (*b*), which amply protects the interests of the third party or debtor, demanding that he shall not be compelled to reckon with B. instead of with A., unless and until he shall have received notice of the transfer of the debt. Indeed it is only fair to the person liable that he should know to whom his liability is due, and if he receives no notice of a transfer he is entitled to the benefit of any reckoning he may make with A., with whom he originally contracted, regardless of any assignment or other agreements between A. and B.

It must be clearly understood that the giving of notice is not a necessary element of a valid equitable

(*a*) [1878], 3 Q. B. D. 569.
(*b*) [1823], 3 Russ. 1. The rule in *Dearle* v. *Hall* was incorporated in the Judicature Act of 1875 with respect to "legal" choses in action.

assignment in the same sense as in the last chapter we have shown "consideration" to be.

For an assignment will be effective in equity even though no notice is given to the party liable; that is to say, as between the contracting parties (the assignor and the assignee) such notice is not necessary to the validity of an assignment, and in the case of fraud the assignee would have a remedy against the assignor, who would be considered as a trustee for the assignee (*c*).

There have been many suggestions as to the reason for this necessity of giving notice, and some of them are quite misleading. It has frequently been said that notice is essential in order to "perfect" or "complete" the title of the assignee. But the assignment is complete so soon as the agreement is made, and, if for value, the Court will enforce it in favour of the assignee without making any enquiries as to whether notice has been given. Another view which has been expressed is that there exists a duty on the part of an assignee to give notice to the third party in order to take the property out of the "order and disposition" of the assignor, and to prevent him from repeatedly taking the same security into the market, and inducing others to buy under the erroneous belief that he is still entitled to the property. Mr. Firth points out (*d*), and I venture to think rightly, that if the doctrine is supported upon these grounds, it must be assumed first, that an assignee owes a duty to possible future assignees; secondly, that it is an absolute duty of an intending assignee to make enquiries of the trustees; and thirdly, that it is the duty of the trustees to answer the enquiries. He then proceeds to show that none of these duties do in fact exist, for (a) an assignee cannot owe such a duty to

(*c*) *Lee re Patrick*, [1891] 1 Ch. 82.
(*d*) L. Q. R., 1895, p. 342.

possible future assignees, and if there is no duty there can be no negligence; (b) it is immaterial whether the enquiries are or are not made if they would not have led to the discovery of a prior assignment; and (c) it is no part of the duty of trustees to answer any enquiries by intending assignees of the beneficial interest in trust property.

The true reason for the existence of this rule may be said to be, that notice is required in order to secure effectually the necessary substitution of a new duty to the assignee on the part of the third person (*e*). For without some means of making the third party liable to the new creditor (the assignee), it is obvious that these assignments could be of no practical use; the mere remedy against the assignor would in most cases put the assignee in no better position than he was in before the assignment was effected; or, again, the assignor might be insolvent, or he might have disappeared, or other circumstances might have arisen, which would make it impossible for the assignee ever to recover the amount to which he was entitled. He could not require the debtor or third party to perform his obligation a second time, for if he had received no notice of the assignment, and had performed his obligation to the assignor, he had acted perfectly *bonâ fide* in discharging the duty imposed upon him by the original contract.

And so we find the doctrine of "notice" established, not as a necessary element to the validity of an assignment, but for the purpose of protecting the assignee against the party liable, first, in order to prevent his avoiding liability to the assignee by paying the assignor; secondly, to prevent any subsequent

(*e*) See Sugden on "Law of Vendor and Purchaser," p. 700, where he says: "Notwithstanding the rule 'qui prior est tempore potior est jure,' equity would prefer a subsequent purchaser who had given a proper notice to the trustees to a prior purchaser who had neglected to do so."

assignee from obtaining a prior claim; and thirdly, to avoid the subject-matter of the assignment coming within the operation of the reputed ownership clause of the Bankruptcy Act (*f*).

Yet, though the giving of notice has no effect upon the validity of an assignment as between the assignor and the assignee, the importance of the rule cannot be over-estimated in its function of protecting the assignee, and, as was said in the judgment in *Ward* v. *Duncombe* (*g*), "If the rule in *Dearle and Hall* had never been invented it still would have been necessary for an equitable assignee, for his own protection, to give notice to the legal holders of the fund, the subject of the assignment. A solicitor employed in such a transaction would still have incurred serious liability if he neglected so obvious a precaution. And I rather doubt whether the existence of the rule has led to notice being given in any case in which it would not have been given if the rule had been unknown."

The effects of not giving notice where it is necessary have been shown to be very serious; and even if the assignee is not deprived entirely of the benefits of the assignment, he is in any case governed by all equities which may exist or be created prior to the actual time of his giving notice.

The rule in *Dearle and Hall* (*h*) may be stated thus:—An assignee must in equity give notice of an assignment to the debtor or other party liable; and where there are more than one assignment of the same subject-matter priorities of interest will rank according to the precedence in date of notice, and not according to that of assignment. The facts in this case were as follows:—Brown, being entitled for life to the yearly sum of 93*l*., the dividend on a

(*f*) 46 & 47 Vict. c. 52, s. 44 (iii).
(*g*) [1893] App. Ca. 392.
(*h*) [1823], 3 Russ. 1.

sum invested in the names of the executors of his father's will, assigned it to Dearle by an indenture dated December, 1808, to secure an annuity granted in consideration of the sum of 204*l.* By another indenture dated September, 1809, he assigned the same yearly sum to Sherring to secure an annuity granted in consideration of the sum of 150*l.* No notice of either of these assignments was given by Dearle or Sherring to the executors. By an indenture dated March, 1812, Brown assigned the same sum absolutely to Hall, in consideration of 711*l.* : 3*s.* 6*d.*, who had previously asked for all information respecting the fund and the title from the acting executor, and in April, 1812, served a written notice upon the executors to pay to him, as assignee of Brown, the dividends during Brown's life, and they accordingly paid him a sum of money on account thereof. In the following October the executors received notice of the assignments to Dearle and Sherring, and refusing to make any more payments until the rights of the different parties were ascertained, the action ensued. It was held that Hall had a better equity to the possession of the fund than had Dearle or Sherring, and for that reason the assignment to him, though posterior in date, was to be preferred to the earlier assignments.

The judgment of Plumer, M.R. (*i*), in this case is so precise and explanatory of the position that extracts from it must be given verbatim :—"The question here is, not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sherring can set up; or rather the question is, shall these plaintiffs now have equitable relief to the injury of Hall . . . . All that has happened is owing to

(*i*) *Dearle* v. *Hall*, *supra*, p. 23.

their negligence, a negligence not accounted for, in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a plaintiff to be heard in a Court of equity, who asks its interposition on his behoof, to indemnify him against the effects of his own negligence, at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is, not as in *Evans* v. *Bicknell* (*k*) . . . . it is simply, whether they are entitled to relief against their own negligence . . . . They say that they were not bound to give notice to the trustees, for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on a contract with the individual you do not need to give notice; from the moment of the contract, he with whom you are dealing is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice, and unless notice is given, you do not do that which is essential in all cases of transfer of personal property . . . . The doctrine was explained in *Ryall* v. *Rowles* (*l*). If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties, on the hypothesis of his being the owner of that which in fact belongs to you . . . . It is true that a chose in action does not admit of tangible actual possession . . . . But, in *Ryall* v. *Rowles*, the judges held that in the case of a chose in action, you must do

(*k*) 5 R. R. 245.
(*l*) 3 Rep. 80.

everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession by placing every person who has a legal or equitable interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund."

This principle was directly followed in the more recent case *In re Lake* (*m*). L. was a solicitor and trustee. He appropriated certain moneys of a client and *cestui que trust*, and executed in his favour a mortgage of some policies of life insurance. No notice was given to the insurance companies. Subsequently L. executed another mortgage of the same policies to a clerk in his office as trustee for other defrauded clients. The clerk gave notice to the insurance companies and his claim prevailed.

In applying the principles laid down by this rule the first question which naturally presents itself is, to whom must notice be given? It must, of course, be given to the third party or party liable, but in the case of an assignment of property which is in the hands of trustees there has been much divided opinion.

In the first place it is important that notice should be given to the trustees of the assignor—to those who will have to account for the funds to the assignor—and this rule holds good whether the funds are in the hands of those trustees or not, *e.g.*, if the funds assigned are affected by successive trusts, the notice should be given to the trustees of that *cestui que trust* who is the assignor, and not necessarily to the trustees of the original settlement.

In the case of *Stevens* v. *Green* (*n*) a fund was in

(*m*) [1903] 1 K. B. D. 151.

(*n*) [1895] 2 Ch. Div. 148. "The Court has the custody of the fund for the purposes of the action under which it was paid in, but not for any other purposes." (Per Stirling, J., *ibid.*, p. 155.)

Court representing certain legacies bequeathed by a testator, A., whose estate was being administered in an action, *X.* v. *Y.* A.'s son was entitled to a reversionary interest in this fund, and his estate was also being administered in a second action, *Y.* v. *Z.* The daughter of A.'s son was entitled to a share in the fund under her father's will, and by a post-nuptial settlement had agreed to assign her share to a company without notice of that settlement. In November, 1883, the company obtained a stop-order (*o*) in the first action, and in December of the same year the trustees obtained a like order in the same action. In January, 1884, the trustees gave notice of the settlement to the legal personal representatives of the son. Held, that the trustees were entitled to the priority.

Further, it is essential that the notice shall be given to a trustee who is trustee at the time. It is not good notice if it is given to some person who is to become trustee, even though he actually becomes trustee the very next day. He must be a trustee at the time when notice is given (*p*). But it will be good notice if it is given to an agent or solicitor of the trustee, if such agent or solicitor has been expressly authorized to act in such capacity and for such purpose (*q*).

Whether or not, and if so to what extent, notice to one of several co-trustees is sufficient, would still appear to be an open question, though the weight of authority seems to be in favour of its being sufficient.

In the early case of *Willes* v. *Greenhill* (*r*), Lord Westbury said, "It is well established that upon assignments or mortgages of equitable interests in property held by trustees, the duty devolves upon the

(*o*) Ord. XLVI. rr. 12, 13.
(*p*) *Somerset* v. *Cox*, 33 Beav. 634.
(*q*) *Willes* v. *Greenhill*, 29 Beav. 392; 4 D. F. & J. 147.
(*r*) *Supra*.

assignee or mortgagee to give notice to the trustee of the assignment or mortgage. . . . . The whole question (here) depends upon the kind of notice required, and I entirely adopt what was decided in the case of *Smith* v. *Smith* (*s*) and the reasons laid down in that decision. It was there held that notice to one trustee was sufficient."

In the case of *Timson* v. *Ramsbottom* (*t*), however, the opposite opinion was taken, but this case is not of great importance in that it was appealed, and before the appeal was decided the parties came to a compromise.

The most important case bearing upon this point is that of *Ward* v. *Duncombe* (*u*). The facts were as follows :—A. was entitled in remainder under a will to a share of a fund in the hands of B. and C. as trustees thereof. A. married D. and settled her share, reserving a life interest. B. had notice of this settlement; C., the other trustee, had not. A. and her husband proposed to mortgage her share as unincumbered. The intending mortgagees applied for information to the trustees B. and C.; B. gave an evasive answer, but was not pressed further, and C. stated with truth that he had not received notice of any incumbrance. The mortgage was completed and formal notice was sent to both trustees. C. acknowledged the notice, B. did not. B. died without having informed C. of the settlement. C., therefore, the sole trustee of the will, had notice of the mortgage but not of the settlement. Then one Evitt was appointed trustee of the will in place of B. deceased, and together with C. Held, affirming the judgments of Stirling, J., and the Court of Appeal (*x*), that the

(*s*) [1833], 2 C. R. & M. 231.
(*t*) 2 Keen, 35.
(*u*) [1893] App. Ca. 392.
(*x*) See *In re Wyatt*, [1892] 1 Ch. 188.

trustees of the settlement were entitled in priority to the mortgagees, for the death of B. could not deprive the trustees of the settlement of the priority which they had already acquired during his life. In this case the case of *Dearle* v. *Hall* was thoroughly examined, together with other leading cases on the point, and, to make a general statement following the judgment, it may be said that the knowledge of one of the trustees of a fund of an incumbrance affecting it amounts to express notice and for the benefit of the incumbrancer. Further, priority over such incumbrance cannot be gained by a subsequent incumbrancer giving notice to one or all of the trustees, so long as one of them has knowledge of the former incumbrance. If, however, such trustee died or resigned, and on a further incumbrance being made notice was given to the existing trustees, none of whom had knowledge of a prior incumbrance, it was a question whether the subsequent incumbrance would or would not gain priority over the earlier one by reason of such notice. In his judgment on this case Lord Macnaghten concludes with the words, "Certainly I can imagine nothing more inconvenient than that it should be possible to have a scramble for priorities on the appointment of new trustees. Nothing, I think, would be less likely to conduce to the security of equitable titles."

This decision was followed in the more recent case of *Britton* v. *Partridge* (*y*), where the same principle is upheld under what has been termed the registration rule. Here A. and B. were appointed sole trustees under a will, under which X. was entitled to a reversionary interest in certain property. X. assigned his interest to Y., who gave notice of the assignment to A. and B., who subsequently died. C. and D. then

(*y*) [1899] 1 Ch. 263. (*In re Wasdale*.)

became trustees in their place. Later X. assigned his interest to Z., who gave notice to C. and D. When the interest fell into possession it was claimed by both Y. and Z., but it was held that Y. had priority by reason of his earlier notice.

In the case *In re Phillips' Trusts* (*c*), the most recent case bearing upon this point, the view taken in *Timson* v. *Ramsbottom* was upheld. It is surprising, and not a little disappointing, that Kekewich, J., does not appear to have referred to the decision in the case of *Ward* v. *Duncombe* (*a*), though this case was urged in argument, and reference was made to Lord Macnaghten's opinion. The facts were these:—A. and B. were trustees of a settlement under which C. was entitled to the reversionary interest in a sum of 10,000*l.* C. voluntarily charged his interest for 5,000*l.* in favour of his nephew, who gave notice to A. A. did not communicate the notice to B. before he (A.) died, and E. became a trustee with B. C. subsequently assigned his whole interest, without giving notice of the charge in favour of his nephew, to an insurance company in consideration of an annuity. The company gave notice of the assignment to B. and E. Held, that the insurance company had the priority.

This, therefore, is still a debatable question, and until a binding decision is given it is safer to give notice to all the trustees. But it seems probable that notice to one of several co-trustees or to one of several obligors is sufficient to give priority over all subsequent assignees or incumbrancers (*b*), and that such priority, when once obtained, will be unaffected though there be a complete change of trustees following such notice.

(*c*) [1903] 1 Ch. Div. 183.
(*a*) [1893] App. Ca. 392.
(*b*) *Ward* v. *Duncombe*, *supra*.

It is important, however, to observe that if one of several co-trustees be a beneficiary, notice to him alone will not act as constructive notice to the others, seeing that it would be to his interest to conceal the assignment (*c*). Yet, if such a trustee assigns his beneficial interest to a co-trustee, the notice which that co-trustee acquires as assignee is valid notice to the other co-trustees during his life (*d*); for it is obviously not to his interest, as assignee, to conceal the assignment, and such notice and assignment will therefore have priority over subsequent incumbrancers with notice.

Under no circumstances will notice to one of several trustees operate so as to make the other co-trustees personally liable for what they may do in ignorance of such notice.

It is not necessary that the notice shall be in any way formal, *e.g.*, by writing; in fact, any informal notice will do so long as it is sufficient (*e*), and it may be received by the trustee from other sources than from the assignee or incumbrancer. So in the case of *Lloyd* v. *Banks* (*f*) it was held that reading an announcement of a transfer in a newspaper was sufficient notice. And further, it is immaterial for what purpose the notice is given, so that a mere statement made casually in the course of a general conversation has been held to be sufficient (*g*). Such a statement, however, will not be binding as notice to a company. In order to give good notice to a company it is necessary to give it to the proper officers at a

(*c*) *Ex parte Hennessey*, 1 Con. & Law. 559.

(*d*) And perhaps absolutely. (See *Ward* v. *Duncombe*, *supra*.) It must further be mentioned that if the assignor is himself one of the trustees, notice should certainly be given to his co-trustees. (*Lloyd's Bank* v. *Pearson*, [1901] 1 Ch. 865.)

(*e*) *Newman* v. *Newman*, [1895] 2 Ch. 148; *Smith* v. *Smith* [1833], 2 Cr. & M. 231; also *Willes* v. *Greenhill*, 29 Beav. 392.

(*f*) L. R. 2 Ch. App. 488.

(*g*) *Smith* v. *Smith*, *supra*; *In re Tichener* [1865], 35 Beav. 317.

time when they are engaged upon the business of the company; *e.g.*, verbal notice to the directors at a board meeting will be sufficient (*h*), or notice to the secretary during his office hours.

A difficulty presents itself in the possible event of there being no person at the time of the assignment to whom notice can effectively be given. Under such circumstances the notice should be given as soon as it is possible to do so, and priorities will obtain in respect thereof just as in any other assignment. In the case *In re Dallas* (*i*), A., an expectant legatee under the will of his father, who was then living, charged his expectancy first in favour of B., and then of C.; upon the death of his father, he, being named executor in the will, renounced probate. D. thereupon took out administration, and C. immediately gave notice of his charge to D. B. also, when he became aware of the grant of administration to D., gave notice. It was held that C. had the priority by reason of his earlier notice.

Where an assignee is unable to give notice because of some legal inability, *e.g.*, infancy or lunacy, it is probable that his priority will not be affected thereby (*k*). All that one is required to do in respect of giving notice is to do all that lies within one's power, and if, owing to some legal restriction, it is impossible to give notice, equity will not allow itself to operate in favour of another person.

There is no obligation on the part of an assignee to enquire of the trustees as to the existence of any prior assignment; and, where no notice of a prior assignment has been given at the time of a subsequent

(*h*) *In re Worcester* [1868], 3 Ch. App. 555. But the fact that a director and actuary of the company happen to have private notice of a trust is not notice to the company. (*Ex parte Watkins*, 2 Mont. & Ayr. 348.)

(*i*) [1904] 2 Ch. Div. 385.

(*k*) *In re Mills*, [1895] 2 Ch. 564.

assignment, the later assignee obtains his priority by giving notice even if an enquiry would have informed him of the earlier assignment. In the case of *Foster* v. *Cockerell* (*l*), A. conveyed estates to trustees on trust to sell and pay the creditors of B., and subject thereto on trust for A. for life, and remainder to B. in fee. A. died and B. granted annuities charged on the estate and then mortgaged the estate without notice of the annuities. The trustees sold the estate, and the mortgagees, who had not made any enquiry of the trustees, gave notice to them five years after it was created. It was held that the mortgagees had priority over the annuitants by reason of their notice. From this it is clear that the conduct of assignees will not prejudice them in the application of the rule as to priority of notice, and it may be mentioned that in the case *In re Freshfield's Trusts* (*m*), it was held to be equally valid where the assignee has taken his assignment from the legal personal representatives of the *cestui que trust*, and not from the *cestui que trust* himself.

In the case of *Elder* v. *Maclean* (*n*), it was held that where a trustee advanced money to a beneficiary and took an equitable assignment of the trust fund, he was entitled to priority over those who took a subsequent assignment, and further, such a trustee does not lose his priority merely by omitting to inform a subsequent incumbrancer or assignee that he has a prior charge (*o*).

Courts of equity will not, however, assist anyone to take advantage of the formality of giving notice so as to gain a priority, when he was aware of a previous incumbrance, if he knew of that incumbrance at the time of his taking the assignment.

(*l*) 3 Cl. & F. 456.
(*m*) [1879], 11 Ch. Div. 198.
(*n*) 5 W. R. 447.
(*o*) *Ex parte Garrard*, 5 Ch. Div. 61.

This is merely an application of the maxim that "he who seeks equity must do equity." Thus in the case of *Spencer* v. *Clarke* (*p*), X. advanced money on a policy which was deposited with him, but gave no notice to the company. Y. afterwards advanced money on the same policy, which the assignor promised to deliver to him, and it was further expressed in writing that the policy was to be assigned to Y. Y. gave notice to the company of his loan and memorandum of deposit. He frequently applied to the assignor for the policy, but the latter made various excuses, and died, leaving it in the possession of X. Held, that the circumstances of the case were such as to put Y. on enquiry at the time of the loan, and to fix him with constructive notice of X.'s security, and that the title of A., as in possession of the policy, must prevail over that of Y., although Y. gave notice to the company and X. did not. But there is nothing to prevent a subsequent assignee, who is unaware of a previous assignment at the time of the assignment but later discovers that there is a prior incumbrance, defeating the priority of the previous incumbrancer by giving notice so soon as he discovers the prior claim. For this is not a fraud upon the previous incumbrancer but merely an act of self-defence, and the previous incumbrancer must pay the penalty for his own negligence.

Where there are several assignees, all of whom have given notice simultaneously, they will take their priority according to the order in date of their respective assignments (*q*), and in the case of conflicting rights the law will take notice of the fraction of a day (*r*).

Before leaving the subject of notice we must mention

(*p*) [1878], 9 Ch. Div. 137.
(*q*) *Calisher* v. *Forbes*, L. R. 7 Ch. App. 109.
(*r*) *Johnstone* v. *Cox* [1880], 16 Ch. Div. 576.

the one or two cases in which the rule in *Dearle* v. *Hall* has been held not to apply. In the first place, notice is unnecessary in the case of negotiable instruments by reason of their very nature (*s*). Nor will it affect the position of a judgment creditor, probably for the reason that he is really in the position of the assignor and so is bound by any prior assignment. This seems a very reasonable view, for, as was said in the case of *Watts* v. *Porter* (*t*), "The judgment creditor has trusted to no particular security; he has rights which may be made to charge all the available assets of the debtor, and among the rest his stock; but he has advanced nothing on the stock, and has been in no way deceived in respect thereof; and the judgment debtor, by suffering judgment, has not used deception nor been guilty of any fraud. The reason, therefore, for giving priority to a second mortgagee over the first wholly fails in respect of a judgment creditor."

Subsequent voluntary assignees can neither gain priority as against the original assignee nor even among themselves by giving notice (*u*).

Notice is unnecessary in the transfer of shares in a company (*x*). Nor does the reputed ownership clause in the Bankruptcy Act apply to the case of winding-up of companies (*y*), and therefore equitable charges on shares in registered companies are not thus affected

(*s*) In the case of *Bence* v. *Shearman*, [1898] 2 Ch. 582, it was held, reversing a decision of Kekewich, J., that notice to a debtor who has given a negotiable instrument in payment of a debt, that the debt has been assigned by the creditor, while retaining the negotiable instrument in his possession, can be disregarded by the debtor.

(*t*) [1854], 3 Ellis & Bl. 761.

(*u*) *Justice* v. *Wynne* [1860], 12 Ir. Ch. R. 289.

(*x*) *Bradford Banking Co.* v. *Briggs*, 12 App. Ca. 29. And this will probably hold good whether the company is registered or not. It must be remembered that equitable charges on shares in registered companies hold priority by date, irrespective of notice. (See *Société Générale de Paris* v. *Walker* [1885], 11 App. Ca. 20.

(*y*) *Gorringe* v. *Irwell* [1886], 34 Ch. Div. 128. Observe that no notice to the company is necessary to effect an equitable assignment of shares as against a judgment creditor of the shareholder. (*Beavan* v. *Ld. Oxford*, 6 D. M. & G. 492; *Arden* v. *Arden*, 29 Ch. Div. 702.)

by notice, since they have priority in order of date and not in order of notice (*z*). In the case of shares in a company the equitable assignee should file an affidavit and notice formally at the Central Office of the Supreme Court, and serve copies of these upon the company; such notice will have the same effect as a writ of "distringas," and will prevent the fund being dealt with in any way before the person who gave the notice has an opportunity of putting forward his claim (*a*). Nevertheless, even after having given such notice it is necessary to obtain an order (*b*) to prevent the company from transferring any stock or shares or paying any dividends until all questions are settled (*c*). But this principle does not apply so far as the company itself is concerned, though the directors may be personally liable if they give effect to a transfer of shares when they have notice of a previous equitable assignment (*d*). In the case of the Bank of England this same result is effected by obtaining an injunction in an action against the person interested in the stock (*e*).

Notice of an assignment to the debtor will therefore secure the assignee's right *in rem* to the debt, but he can further secure his position by obtaining a "charging order" upon the funds, or a transfer of them into Court (*f*). If the fund is already in Court the assignee can protect his security by obtaining a "stop order" (*g*), which has the same effect as notice to a trustee while the fund is in his hands (*h*), but for

(*z*) *Société Générale de Paris* v. *Walker* [1885], 11 App. Ca. 20.

(*a*) *Wilkins* v. *Sibley*, 4 Giff. 446. And it must be noticed that a trustee of shares cannot create an equitable title in priority to the title of his *cestui que trust*. (*Shropshire Union, &c. Co.* v. *Reg.*, L. R. 7 H. L. 496.)

(*b*) Stat. 5 Vict. c. 5, s. 4.

(*c*) *In re Blakeley*, 23 Ch. Div. 549.

(*d*) *Société Générale de Paris* v. *Tramways Union Co.* [1884], 14 Q. B. D. 424.

(*e*) 39 & 40 Geo. 3, c. 36.

(*f*) Ord. XLVI.

(*g*) *Ibid.*

(*h*) *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26.

such an order to have the effect of notice it must be obtained in the proper suit (*i*). It must be remembered, however, that by obtaining such an order one cannot claim priority over an assignment of which notice was given prior to the payment into Court (*k*).

Finally, the rule as to notice does not apply to assignments of assurances or mortgages of realty or of chattel interests in land. It does appear that in the case of *Foster* v. *Cockerell* (*l*), in which case the rule in *Dearle and Hall* was applied by the House of Lords, the contending parties were the assignees of chattel interests in land. But since the decision of Shadwell, V.-C., in the more recent case of *Jones* v. *Jones* (*m*), it has never been doubted that the rule does not apply to the assignment of such interests. It does, however, apply to assignments of equitable interests in money secured upon or to be raised out of real estate (*n*), and also to the transfer of moneys secured by debentures on or the proceeds of the sale of real estate (*o*).

In regard to the application of the rule it must be observed that, though the validity of an assignment has to be determined by the law of the place where it was executed, the priority of assignees will be determined by the law of England, notwithstanding the doctrine of notice may not be recognised by the law of the place where the assignment was executed (*p*).

(*i*) *Stevens* v. *Green*, [1895] 2 Ch. 148.
(*k*) *Livesey* v. *Harding* [1856], 23 Beav. 141.
(*l*) 3 Cl. & F. 456.
(*m*) 8 Sim. 639.
(*n*) *Arden* v. *Arden*, 29 Ch. Div. 702.
(*o*) *Christie* v. *Taunton*, [1893] 2 Ch. 175.
(*p*) *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.

CHAPTER VII.

Subject to Equities.

The principle upon which equity has invariably acted in giving effect to assignments of choses in action has been that by the transfer the assignee stepped into the shoes of the assignor. Not only did he acquire the benefit of all the assignor's rights in respect of the subject-matter, but he was bound by all the assignor's obligations in relation thereto. It is with regard to these obligations that the third rule qualifying equitable assignments exists, namely, that an assignee takes his interest subject to all the equities which would, except for the assignment, obtain against the assignor right up to the time of the third party's receiving notice. For, as we have seen in the preceding chapter, in reference to the position of the party liable, the time when the assignee is assumed to take upon himself these rights and liabilities is not the moment when the assignment is completed, but the moment at which the third party receives notice of the transaction.

Equities, or rights of set-off, are rights of which a debtor is permitted to avail himself when making a settlement with his creditor. For instance, if a debtor has a claim against his creditor arising out of the same transaction as the debt, in any action by the creditor he shall be allowed to deduct the amount of his claim from that of the debt in a payment thereof. This principle is by no means a modern institution,

and it existed under the Roman system—compensatio est debiti et crediti inter se contributio (*a*).

And this right of the party liable was not extinguished by an assignment of the debt or other chose in action. James, L.J., in the case of *Roxburgh* v. *Cox* (*b*), expressed the rule as follows:—"An assignee of a chose in action takes subject to all rights of set-off and other defences which are available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action, the debtor cannot, by payment or otherwise, do anything to take away or diminish the rights of the assignee as they stood at the time of the notice" (*c*).

As regards debts, therefore, it may be said that an assignee is bound by the state of accounts between the assignor and the debtor at the date of the debtor's receiving notice of the assignment (and not at the date of the assignment, as is stated in White and Tudor's Leading Cases (*d*)). Supposing, then, that a creditor assigns over a debt on the 1st January and the assignee does not give notice of the assignment to the debtor until the 1st February, there are three ways in which the amount of the debt may vary from that declared upon the face of the assignment and to the detriment of the assignee. First, the debt may have been partially satisfied before the assignment without the knowledge of the assignee (*e*); secondly, the debtor may have made a payment to the creditor during the month of January (*f*); and thirdly, a debt may have accrued due to the debtor from the assignor

(*a*) Just. Dig. 16, ii, 1.
(*b*) 17 Ch. D. 520.
(*c*) Where a debt is legally assignable apart from the Judicature Act, the assignee takes free from equities. So that in *David* v. *Sabin*, [1893] 1 Ch. 523, it was held that an assignee suing for a breach of covenant which runs with the land at law is not subject to a defence personal to the original covenantee.
(*d*) White & Tudor, L. C. in Equity, at p. 142.
(*e*) *Ord* v. *White*, 3 Beav. 357.
(*f*) *Stocks* v. *Dobson*, 4 De G. M. & G. 11.

during that month, the amount of which the debtor may deduct from the amount of the original debt in a settlement thereof (*g*).

So that if a mortgagee assigns a mortgage debt without the knowledge of the mortgagor, the rights of the assignee are subject to the state of account between the mortgagor and the assignor at the date of notice. In the case of *Turner* v. *Smith* (*h*) a mortgagor gave money to her solicitor with which to pay off her mortgage debt. The solicitor fraudulently retained the money, and later attempted to take an assignment of the debt to himself and assign it to the defendant without the knowledge of the mortgagor. It was held that the right of the defendant was subject to the state of accounts between the mortgagor and the assignor, and that, since as between them no debt existed, the defendant had no right against the mortgagor and therefore must reconvey.

In another case (*i*) it has been held that if a bond is given by a customer to his bankers, and the firm is altered, the bond being assigned by the original obligees to the new firm, the customer is in equity entitled to set off any balance due to him against the bond debt due from him (*k*). And in the case of the *Bank of New South Wales* v. *Goulbourn Valley Butter Factory* (*l*), it was held that a banker is entitled to set off what is due to a customer on one account against what is due from him on another, even though the moneys due on the former account may in fact belong to other persons, unless the banker has notice of fraud.

Again, supposing a debt is contracted which is

(*g*) *Watson* v. *Mid-Wales Ry. Co.* [1867], L. R. 2 C. P. 593: also *In re Gov*, [1900] 2 Ch. Div. 140.
(*h*) [1901] 1 Ch. 213.
(*i*) See *Cavendish* v. *Greaves*, 24 Beav. 163.
(*k*) *Doering* v. *Doering*, 42 Ch. 203.
(*l*) [1902] A. C. 543.

payable only upon the fulfilment of a condition, that condition will, upon an assignment of the debt, be binding upon the assignee just as it would have been upon the assignor (*m*).

As has been said, an assignee of a debt takes his interest subject to the state of accounts existing as between the assignor and the debtor at the date of the latter's receiving notice of the assignment, so that it is immaterial whether the set off arises out of the same transaction as the original debt or not (*n*).

But a set off which does not accrue due until after notice is good only if it arises out of the same contract (*o*).

So in the case *Ex parte Mackenzie* (*p*) it was held that a company might set off subsequent calls upon shares which had been assigned after the commencement of the winding-up, because the liability to contribution accrued with the winding-up and before the assignment. With this may be compared the case of *Christie* v. *Taunton* (*q*). T., who held shares and debentures in a company, deposited in March, 1890, debentures with the plaintiff bank to secure a debt. The debentures were not payable until the 31st December, 1890, but in the case of a winding-up the debentures became due at once. On the 3rd November a call was made, and immediately became a debt due to the company. On the 6th November the plaintiff bank gave notice to the company of T.'s

(*m*) *Tooth* v. *Hallett*, 4 Ch. 242.

(*n*) *Biggerstaff* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93.

(*o*) *Govt. of Newfoundland* v. *Newfoundland Ry. Co.* [1888], 13 A. C. 199; also *Jeffreys* v. *Agra Bank* [1866], L. R. 2 Eq. 674; and *Watts* v. *Driscoll*.

(*p*) [1869], L. R. 7 Eq. 240.

(*q*) 2 Ch. 175. It must be noticed that set off differs from a counterclaim. So that if a debt be assigned and the debtor has a right to set off another debt against the assignee, the amount of which exceeds the amount of the original debt, the debtor can only set off up to that amount and must bring an action against the assignor for the balance. (See *Young* v. *Kitchin* [1878], 3 Ex. Div. 127: approved in *Newfoundland Govt., &c.* [1888], 13 A. C. 199.

assignment. On the 12th November the plaintiffs commenced a debenture-holders' action against the company, and on the 19th November the company went into voluntary liquidation and further calls were made upon T. It was held that the company were entitled to set off in respect of the calls made before the winding-up but not in respect of those made after, for an assignee will only take subject to equities arising out of the same transaction as the debt assigned.

In the case *In re Milan Tramway Co.* (*r*), where creditors, having proved their debts in the liquidation of a company, assigned them to X., and X. assigned them to Y., and the official liquidator afterwards recovered 2,000*l.* against X., Y. was held entitled to the dividend on his debt, and it was held that the official liquidator could not claim to set off the 2,000*l.* against the dividend.

But a debtor, after having received notice of an assignment, cannot assert any equity against an assignee which has arisen out of a subsequent transaction with the assignor; and this statement holds good even if it is the result of a contract entered into previously to the receipt of such notice, unless it can be shown that it was the intention of the original parties that the one should be set off against the other. So in the case of *Watson* v. *The Mid-Wales Railway Company* (*s*), the assignees of a bond sued the makers in the name of the original bondholder, there being arrears of rent due from the original bondholder which had become due since the notice of the assignment upon a lease granted after the making of the bond; the makers sought to set this off, but the Court held that this was impossible.

Where by the articles of association of a company

(*r*) 25 Ch. Div. 564.
(*s*) [1867], L. R. 2 C. P. 593.

it is provided that the company shall have a prior and permanent charge, available at law and in equity, on every share, for all debts due from the shareholders to the company, the company cannot claim priority over subsequent incumbrances on shares in respect of moneys which become due from the shareholders after the company has received notice thereof (*t*).

It is clear that a man cannot assign to another something which he does not in fact possess. If by chance such an assignment is effected, even though the assignee acted *bonâ fide*, having no notice of the invalidity of the purported assignment, and gave value in respect thereof, he will not obtain any title to the subject-matter of such assignment. And further, if the assignment is liable to be set aside as against the assignor by reason of fraud, misrepresentation, or other ground of relief, the assignee will acquire a defeasible title, and any relief which could be obtained against the assignor will be obtainable against him (*u*).

Before passing to the exceptions to this rule as to the right of set off it may as well be mentioned that an assignee for value of a residue takes that interest subject to the legacies payable and to the general costs of any action in respect of the administration of the estate; he also takes subject to the testamentary expenses and debts (*x*), and the provision (*y*) that such costs are payable out of the legacies and not out of the residue is rarely of value to the residuary legatee or his assignee (*z*).

There are, however, three classes of exceptions to this rule that an equitable assignee takes his interest subject to all equities. First, negotiable instruments are not only assignable, but must also, from their very

(*t*) *Bradford Banking Co.* v. *Briggs*, 12 A. C. 29.
(*u*) *Mangles* v. *Dixon*, 3 H. L. Cas. 702.
(*x*) *Hooper* v. *Smart*, 1 Ch. Div. 90.
(*y*) Ord. LXV. r. 14 b.
(*z*) *Booty* v. *Groom*, [1897] 2 Ch. 407.

nature, carry with them a title free from any equities or cross claims. A negotiable instrument may be defined as one which is such, and in such a condition that the rights under it are transferred by mere delivery to a *bonâ fide* transferee for value. Its essential characteristics are that the holder for the time being, if he is a *bonâ fide* transferee for value, has all the rights of owner, including the rights of maintaining an action in his own name, and therefore notice need not be given to the party liable; he may also have a better title than the transferor. The recognition of these instruments was brought about by the law merchant by reason of the inadequacy of a mere assignment for the purposes of commerce; for there were two insurmountable inconveniences in the ordinary assignment which rendered it practically useless for such purposes—(a) the assignee had to prove his own title, and (b) he took the assignment subject to all equities. Both of these attributes were eliminated by the recognition of negotiability.

It is difficult to say exactly what constitutes a negotiable instrument, but the following have been recognized as such:—Bank notes, bills of exchange, indorsed bills of lading, foreign scrip, foreign bonds, promissory notes, cheques drawn on bankers, exchequer bills, dividend warrants issued by the Bank of England on government stock; also debentures (*a*) and railway bonds payable to bearer, when they are sufficiently clear to show that the transaction is to be regarded and performed irrespective of any equities which may subsist between the original contracting

(*a*) In the case of the *Bechuanaland Exploration Co.* v. *London Trading Bank, Ltd.*, [1898] 2 Q. B. D. 658, it was held, upon proof that the modern usage of merchants had annexed the character of negotiability to debentures payable to bearer by an English company in England, that such debentures were negotiable. And it has since been held that evidence of usage is unnecessary, the Courts taking notice of the fact that they were negotiable.

parties (*b*) ; for a document may become negotiable by estoppel so long as it is consistent with the terms of the document. But bills of exchange indorsed when overdue are not so treated, and pass subject to all defects of title which affected them at maturity (*c*).

In order to acquire the benefit of equities the defendant must show some equitable ground for relief against the plaintiff's full demand (*d*), and if any equity intervenes, the later equity will not be allowed. So, a shareholder in a limited company, if he is a creditor, will not be allowed to set off his debt against calls made upon him, for the other creditors have an intervening equity (*e*). But, on the other hand, a company which has received notice from a particular assignee from a shareholder of a debt cannot set off calls made subsequently to the receipt of such notice against the assignee (*f*).

Secondly, if the original parties to a contract have stipulated that the debtor shall not, upon an assignment, set up any counterclaim against the assignee which he might have against the assignor, he will thereby lose his right to such equity after an assignment has been effected (*g*). For in such a case the agreement forms part of the original contract, and its benefit passes to the assignee along with the debt. So, in the case *Ex parte the Asiatic Bank* (*h*), a bank gave to T. & Co. a letter addressed to them as follows: "You are hereby authorized to draw upon this bank to the extent of 15,000*l*., and such drafts I undertake

(*b*) *In re Blakeley Ordnance Co.*, 3 Ch. 154.
(*c*) *Holmes* v. *Kidd*, 3 H. & N. 891.
(*d*) *Best* v. *Hill*, L. R. 8 C. P. 10.
(*e*) *Grissell's Case*, L. R. 1 Ch. App. 528.
(*f*) *Christie* v. *Taunton & Co.*, [1893] 2 Ch. 175; also *Roxburgh* v. *Cox*, 17 Ch. Div. 520.
(*g*) "There is nothing to prevent a debtor from contracting with his creditor that he will not avail himself against a transferee of any rights which he may possess against the creditor or any assignee of his." (Per Stirling, J., *In re Goy & Co.*, [1900] 2 Ch. p. 154.)
(*h*) [1867], 2 Ch. App. 391.

to honour upon presentation. This credit will remain in force for twelve months from its date, and parties negotiating bills under it are requested to indorse particulars on the back hereof." T. & Co. drew bills to the amount of 6,000*l.* under this letter and indorsed them to X., who duly indorsed particulars on the letter of credit. The bank was subsequently wound up, T. & Co. being indebted to it to an amount greater than that due on the bills. Held, that the letter constituted a contract to the benefit of which all persons taking and paying for bills on the faith of it were entitled in equity, without regard to the equities between the bank and T. & Co., and that X. could prove for the amount due on the bills, regardless of the state of account between the bank and T. & Co.

Also a third party may lose his right to enforce his equities against an assignee by neglecting to give him notice of any fact, to which they have been accessory, tending to mislead him as to the real interest of the assignor (*i*). And so if a third party who has a secret equity does not disclose such equity when he knows that the assignor is dealing with the assignee as if no such equity existed, he will not be allowed to set up the secret equity against the innocent assignee (*k*).

Another circumstance which will operate in favour of an assignee and relieve him of the burden of equities, which would otherwise qualify the assignment, is lapse of time. If a debtor does not declare his grounds of relief at the time when action is being taken to recover the debt, then it seems that he will lose his right altogether by reason of his own neglect or carelessness. And so, in the case of *Hill* v. *Caillovel* (*l*), where a bill for relief was brought by the

(*i*) *Ex parte City Bank*, L. R. 2 Ch. 762.
(*k*) *Troughton* v. *Gitley*, Ambl. 633.
(*l*) 1 Ves. Sen. 122.

executrix of a man, who had entered into a bond upon certain conditions, against the representative at a fourth hand of the obligee and also against the executor of an assignee for value, Lord Hardwicke, C., said: "The rule is right that whoever takes the assignment of a bond, being a chose in action, takes it subject to all the equity in the hands of the original obligee, but length of time and circumstances may vary that, and make the case of the assignee stronger; for why was not the bill brought when the facts were recent?"

A man must take all reasonable care and precaution to assert his rights under an assignment, and equity will not assist him to assert them if he has not done so. For instance, if a person takes from another, without making any enquiries, an instrument signed in blank by a third party, and fills up the blanks, he cannot claim the benefit of being a *bonâ fide* purchaser for value, even if the instrument were negotiable, and he will obtain no better title than the person had from whom he received it. In the case of *France* v. *Clark* (*m*) it was held that a man who received a blank transfer as security for a debt could not give authority to a third person to fill it up for purposes other than those of the original contract.

In conclusion, there are one or two rules governing the effect of assignments as regards "stoppage *in transitu*." This may be described as a right existing in favour of an unpaid vendor, upon learning of the insolvency of the purchaser, to retake the goods sold before they reach the purchaser's possession. It is a right based upon the "law merchant."

The assignment of a bill of lading gives a title to the property, but it cannot give a better title than is possessed by the assignor, though the assignee's title

(*m*) 26 Ch. Div. 257.

does override the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee. But it is to be noted, in contrast with this right, that the stoppage *in transitu* is not lost in the case of a purchaser's selling the goods and the bill of lading being made out in the name of the second purchaser.

The principle is clearly laid down by Cotton, L.J., in the case *Ex parte Golding Davis* (*n*), "that the vendor cannot exercise his right to stop during the transit if the interests or rights of any other persons, which they have acquired for value, will be defeated by his doing so. Except so far as it is necessary to give effect to interests which other persons have acquired for value, the vendor can exercise his right to stop *in transitu*. . . . Can the vendor make effectual his right of stoppage *in transitu* without defeating in any way the rights of the sub-purchaser? In my opinion he can. He can say 'I will not defeat the right of the sub-purchaser, but what I claim is to defeat the right of the purchaser from me, that is, to intercept the purchase-money which he will get, so far as is necessary to pay me' . . . ."

This is but a further illustration of the elasticity of equitable principles in meeting the obvious requirements of trade usage; for an assignment could not be said to be equitable if commercial interests were hampered in its operation.

(*n*) 13 Ch. Div. 628.

INDEX.

LONDON: PRINTED BY C. F. ROWORTH, 88, FETTER LANE, E.C.