THE CONVEYANCING ACT, 1919 (As Amended) Section 12 and Equitable Choses in Action

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What is required for a valid assignment of a purely equitable chose in action? The orthodox answer is as follows. Equity requires no formality beyond a clear expression of intention to make an immediate disposition. Consideration is unnecessary.[1] It may not be necessary to communicate the intention to the assignee;[2] and it is not essential to give notice to the trustee, though for a variety of reasons it is desirable to do so.[3] Equity's object is obviously to give effect to the assignor's clear intention, however expressed. Superimposed on these equitable principles is the statutory requirement of writing. The Conveyancing Act, 1919 (N.S.W.), s. 23C(1)(c) provides that "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing". The subsection probably applies to equitable interests in pure personalty as well as realty.[4]

Section 12 of the same Act is in these terms:

> 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 has 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 been 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. . . .

The section refers to "any debt or other *legal* chose in action", but contemplates notice to a *trustee*. Does it apply to the assignment of an equitable chose in action? If so, is compliance with its requirements mandatory?

If both of these questions were to be answered affirmatively, the section would affect the law in two main ways. First, notice to the trustee would cease to be merely desirable; express notice in writing would be essential for a

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[1] *Norman* v. *Federal Commissioner of Taxation* (1963) 109 C.L.R. 9, at 30 *per* Windeyer, J.

[2] Compare *Comptroller of Stamps (Victoria)* v. *Howard-Smith* (1936) 54 C.L.R. 614, at 622 *per* Dixon, J., with *Timpson's Executors* v. *Yerbury* (1936) 1 K.B. 645, at 658 *per* Lord Wright, M.R.

[3] *Snell's Principles of Equity*, 27 ed., 77-78, and cases there cited.

[4] Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (1975), 181-2; Note, (1974) 48 *A.L.J.* 322; cf. *Adamson* v. *Hayes* (1973) 47 A.L.J.R. 201, at 208 *per* Menzies, J.

valid voluntary assignment, and the assignment would take effect only at the time of notice. Secondly, the assignment would have to be not merely in writing, but under the hand of the assignor; an assignment by his agent would fail, even if the assignor authorised it in writing.

The purpose of this article is to establish that the section does not apply to equitable choses. The cases do not dictate a solution, and there is no completely satisfactory analysis in the texts. But it will be submitted that a recent suggestion by the editors of *Snell* should be acceped as the basis of an answer.

Notwithtanding the views of some English textwriters,[5] the cases do not present a consistent or strong point of view. *King* v. *Victoria Insurance Company Limited*[6] is one of the mainstays of the English texts. There Griffith, C.J. said:

> [T]he test to be applied for determining the validity of an assignment of a "chose in action", which in form is in accordance with [the section], is whether the subject matter of the assignment and the circumstances under which it is made are such that before the Act a court of law or equity would have considered the assignment a lawful one, and would have given in respect of it such relief as, according to the practice of the court, was appropriate.[7]

This statement is literally ambiguous, but in its context it had nothing to do with the application of s. 12 to equitable choses. The transaction before the Court was challenged as an invalid attempt to assign a bare right to litigate. Before 1875 such an assignment would undoubtedly have failed at common law, because the common law regarded any assignment of a chose in action as invalid.[8] Equity was more sophisticated, but it recognised that overriding considerations of public policy ought to vitiate some assignments; hence it would not allow an assignment of a bare right to litigate, because such an assignment savoured of maintenance. In *King* v. *Victoria Insurance Company Limited* it was apparently argued that s. 12[9] had limited or done away with the rule about bare rights, and Griffith, C.J. properly demolished that argument.[10] His test for determining validity is whether a court of law or equity would have considered the assignment *lawful*. He earlier distinguished an unlawful assignment (for instance, of a bare right to litigate) from an ineffectual one; therefore in the passage quoted he was using "lawful" in the sense of "not contrary to public policy". There was no occasion for him to consider the application of s. 12 to the general assignment of equitable choses, and he did not do so.

Nor did the Privy Council, on appeal from the Queensland Supreme Court,[11] contribute to the solution of the present problem. The Board held that the assignment did not savour of maintenance, because the assignee had an interest in the suit as the assignor's insurer. Accordingly the bare right to litigate rule would not have applied to such an assignment prior to 1875, and it was unnecessary to consider whether the section affected the rule:

Their Lordships do not express any dissent from the views taken in the

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[5] Marshall, *The Assignment of Choses in Action* 165; Keeton, *An Introduction to Equity*, 6 ed., 157; *Hanbury's Modern Equity*, 9 ed., 638.

[6] (1895) 6 Q.L.J. 202 (Queensland Supreme Court); (1896) A.C. 250 (Privy Council).

[7] (1895) 6 Q.L.J. 202, at 204.

[8] *Norman* v. *Federal Commissioner of Taxation* (1963) 109 C.L.R. 9, at 26, *per* Windeyer, J.

[9] Introduced in England by the Judicature Act, 1873, s. 25(6).

[10] (1895) 6 Q.L.J. 202, esp. at 203.

[11] (1896) A.C. 250.

> Court below of the construction of [the section] with reference to the term "legal chose in action". They prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term.[12]

Other cases cited in English texts may be similarly distinguished: *May* v. *Lane*;[13] *Manchester Brewery Co.* v. *Coombs*;[14] *Tolhurst* v. *The Associated Portland Cement Manufacturers*.[15] The only English decision directly supporting the application of s. 12 to equitable choses is *Re Pain*; *Gustavson* v. *Haviland*.[16] In that case trustees claimed a charge on a trust fund for their costs of defending a suit against them by a beneficiary. The beneficiary had earlier assigned his interest in the fund by way of mortgage, but the mortgagee stood by and allowed the suit to proceed. It was held that the trustees' charge had priority over the mortgagee's interest. It was argued that the trustees had absolute priority irrespective of the innocence of the assignee. Younger, J. observed:

> Since [the section] was passed, it is difficult to see how the contention is tenable with regard to assignments falling within it and not being assignments by trustees. And the assignments in the present case do fall within that section: for, although prior to that Act the interest of the plaintiff in this case, being properly recoverable only in a Court of Equity, was strictly a "chose in equity", not cognisable in a Court of Law, the expression in the section "legal choses in action" includes choses in equity within its scope. These, since *King* v. *Victoria Insurance Co.*[17]—although the Privy Council decision there merely indicated negative approval of a view of the Colonial Court on an analogous Colonial statute—have been treated as including "all rights the assignment of which a Court of law or Equity would before the Act have considered lawful"; or, in the words of Channell J. in *Torkington* v. *Magee*,[18] as including a "debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable".[19]

Channell, J.'s observations in *Torkington* v. *Magee* in fact support the contrary view, as will be shown below. Griffith, C.J.'s dictum in *King* v. *Victoria Insurance Co.* was directed to another issue, and far from giving "negative approval" to it, the Privy Council expressly avoided discussing the question. The cases cited by Younger, J. therefore provided no support for his view.

There are some authorities for the view that s. 12 does not apply to equitable choses, but they too are weak in some ways. *Cronk* v. *M'Manus*[20] is the earliest. There one Cavell was a legal mortgagee of premises, and the mortgagor was the defendant. He assigned to Gardner by way of mortgage "all the £500 now due to Cavell on the deed of [mortgage]". Cavell later made a similar assignment to the plaintiff, who sued the defendant as assignee. Denman, J.'s judgment is inadequately reported, but he held that Gardner had the

[12] (1896) A.C. 250, at 256. The Privy Council's reasoning is not entirely clear, but in *Compania Colombiana de Seguros* v. *Pacific Steam Navigation Co.* (1965) 1 Q.B. 101 Roskill, J. interpreted it in the above way.
[13] (1895) 64 L.J. Q.B. 236.
[14] (1901) 2 Ch. 608.
[15] (1903) A.C. 414.
[16] (1919) 1 Ch. 38.
[17] (1896) A.C. 250, 254.
[18] (1902) 2 K.B. 427, 430-1.
[19] (1919) 1 Ch. 38, at 44-5.
[20] (1892) 8 T.L.R. 449.

legal title to the debt of £500. Cavell retained a mere equity of redemption at the time of his later assignment to the plaintiff, and "it is impossible to say that . . . the plaintiff is the assignee of a debt or other legal chose in action" within s. 12.[21] Accordingly the defendant was entitled to judgment. The result in this case did not depend on any particular view of s. 12. Even if s. 12 applied to the assignment of an equity of redemption, and had been complied with, the plaintiff would still have failed. He was not seeking to exercise his right to redeem the mortgage to Gardner, who was apparently not a party to the suit; rather he was suing the debtor as if he already held the legal title to the debt. However, Denman, J. indicated that s. 12 had no application simply because the equity of redemption was not a "debt or other legal chose in action".

Torkington v. *Magee*[22] has been claimed by the supporters of either view.[23] There the defendant contracted to sell his reversionary interest to X. S purported to assign his contractual rights to the plaintiff before breach of the contract by the defendant, and complied with s. 12. The plaintiff sued the defendant to recover damages for a subsequent breach of contract. Counsel submitted that the words "legal chose in action" in s. 12 do not include a right to obtain unliquidated damages for breach of contract. In the Divisional Court Channell, J. (Lord Alverstone, C.J. and Darling, J. agreeing) saw significance in the fact that s. 12 originally appeared as s. 25(6) of the English Judicature Act, 1873. Each subsection of s. 25 prescribed the rule to apply in an area in which the common law and equity had differed.

> [T]he words "debt or other legal chose in action" mean "debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable." That is the point of difference or variance between the rules of equity and common law which it is intended to deal with by this subsection.[24]

These are wide dicta indeed. The assignment in question was not of an equitable interest, but of contractual rights. But properly understood, the judge's view is that s. 25(6) did not extend to equitable choses. An equitable chose was regarded by the common law as not assignable, but not solely by reason of its being a chose in action. Rather, since the rights were purely equitable, the common law exercised no jurisdiction over them at all. There was no variance between a rule of common law and a rule of equity to be resolved by s. 25, because the common law had no rule at all for purely equitable rights.

In Australia there are relevant dicta in *Robinson* v. *The State of South Australia*.[25] The plaintiff sued the State for negligence in the exercise of its duties under wheat harvesting legislation, relying upon an assignment to him of rights under the scheme. However, he failed to allege that he gave notice to the State as required by s. 12. It was held that the rights assigned were a

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[21] *Ibid.*

[22] (1902) 2 K.B. 427. The Court of Appeal reversed the decision of the Divisional Court on the facts, without casting doubt on the principles stated by Channell, J.: (1903) 1 K.B. 644.

[23] In *Snell's Principles of Equity*, 27 ed., 72, it is cited as support for the view that s. 12 does not apply to equitable choses; but Treitel, *The Law of Contract*, 3 ed., 582, *Chitty on Contracts*, 23 ed., 472, Marshall, *The Assignment of Choses in Action*, 165, and Keeton, *An Introduction to Equity*, 6 ed., 157, all follow Younger, J.'s lead and regard it as supporting the contrary proposition.

[24] (1902) 2 K.B. 427, at 430-1.

[25] (1928) S.A.S.R. 42.

legal chose in action, and that the plaintiff could not sue in his own name in the absence of the notice required by the section. Murray, C.J. presented a sound general analysis of the law of assignments, and commented on the unusual wording of the South Australian section, which referred to "any chose in action", rather than "legal chose in action". *Prima facie* the South Australian words would include an equitable chose, but the section included the phrase "the *legal rights* of such chose in action". He interpreted this as referring to "the legal rights, or the rights at law, of the assignor in respect of the chose in action", so that the section "does not touch equitable choses in action".[26] *A fortiori*, presumably, where the section says "*legal* chose in action".

In the result we have dicta of single instance judges that the section does not apply to equitable choses, and the decision of Younger, J. in *Re Pain*; *Gustavson* v. *Haviland*[27] that it does, but he misconceives the cases which he cites in support.

In principle, should the section be construed so that it applies to equitable choses? It is submitted that a negative answer should be given. Provided the interests of third parties are protected, no extra formalities should be required for equitable assignments. If the assignor of an equitable chose or his agent has clearly expressed an intention to assign, and has complied with s. 23C, there is no justification for declining to uphold his assignment as valid between himself and his assignee. The trustee's interests are adequately protected by rules of general equity (according to which if he pays the fund to the assignor without notice of the assignment, he cannot be compelled to pay again[28]) as supplemented by the Trustee Act, 1925 (N.S.W.).

Arguments which rely on the Legislature's presumed intention in enacting s. 12 are risky. It has been suggested that the Legislature intended to establish one test, applicable in all courts, for the effective assignment of all choses in action, legal and equitable.[29] But it might be said with equal cogency that the section was designed to permit the assignee under an absolute assignment to sue the obligor without joining the assignor as a party to the suit; before the section was enacted, the assignee of an equitable chose under an absolute assignment could sue without joining the assignor, and therefore did not need the assistance which the section offered; accordingly it was not intended to cover equitable choses.[30] The truth is more probably that the legislative draftsman had no clear idea of the general law of assignments, which then contained all the ingredients needed to produce the wholesale confusion of the present law. His references to "legal chose" and "trustee" were made with no clear purpose or even understanding. His primary and limited goal was to provide a procedure which would permit the assignee of a legal creditor to sue the debtor at law, but he chose to express himself more widely. However, while we cannot draw firm conclusions by speculating about legislative intention, we are not at liberty to ignore the words in fact used. Is there an approach which will give meaning both to "legal chose in action" and to "trustee"?

By taking the position that the section applies to equitable choses, one can give a meaning to every word in it. "Legal" may be interpreted as meaning no more than "enforceable in a court of justice",[31] or more cogently, "lawfully

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[26] (1928) S.A.S.R. 42, at 49-50.
[27] (1919) 1 Ch. 38.
[28] *Re Southampton's Estate* (1880) 16 Ch. D. 178.
[29] Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (1975), 136.
[30] Heydon, Gummow & Austin, *Equity: Cases & Materials* (1975), 89.
[31] *Jenks' English Civil Law*, 4 ed., 891.

assignable" (thus making it clear that s. 12 does not alter the public policy rules, such as the rule about bare rights to litigate).[32] But this view leads us into a morass of consequential problems. It is established in Australia that, in order to make a voluntary assignment of a legal chose in action, the assignor must at least execute a written assignment, and it may be necessary for him to give notice to the obligor as well.[33] That is, with respect to legal choses compliance with the section is either entirely or to a large extent mandatory for validity. It is implausible to suggest that the very same statutory language is mandatory for legal choses, but not for equitable choses.[34] It appears that before 1875 equity's requirements for voluntary assignments of legal and equitable choses were identical (though the Statute of Frauds, s. 9, the forerunner of the Conveyancing Act (N.S.W.), s. 23C(1)(c), applied to the latter).[35] The rationale articulated by Windeyer, J. for regarding the section as largely mandatory for legal choses[36] is just as applicable to equitable choses.

Therefore, if s. 12 applies to equitable choses, it must follow that it is either wholly or largely mandatory.[37] The consequences are that equity's goal of effectuating the assignor's intention would be further inhibited; the common assertion in cases[38] and texts that notice to the trustee is not essential to perfect as between assignor and assignee an assignment of an equitable chose may well be wrong; and s. 12 would substantially overlap with s. 23C(1)(c). The last point may lead judges to distinguish between equitable interests (to which s. 23C(1)(c) would apply) and equitable choses (to which s. 12 would apply). Such a distinction would unhappily multiply entities in a field already complex enough, and it is hard to envisage a rational principle to support it.

If, on the other hand, s. 12 does not apply to equitable choses, how is one to explain the word "trustee"? Until recently those advocating this view were forced to ignore that word.[39] But the editors of *Snell's* twenty-seventh edition have suggested a way out.[40] They suggest that "trustee" be confined to "trustee in bankruptcy". One's initial reaction is to reject as implausible the suggestion that the general word "trustee" should be used to denote only a special and highly atypical kind of trustee. But the notion has three claims on our support. First, the legislative draftsman's primary objective was to deal with the assignment of debts. He was working mainly in the law of debtor and creditor, and it was natural for him to juxtapose debtor and trustee. Secondly, the Bankruptcy Act, 1966 (Cth.) does not itself deal with the requirement of notice of assignment of a bankrupt's debt. The section thus interpreted nicely clarifies the area, establishing that an assignment under s. 12 is complete once notice is given to the bankrupt's trustee in bankruptcy. Thirdly and above all, it offers the only solution which gives some effect to the whole section without doing violence to established equitable concepts. Orthodoxy is thus vindicated.

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[32] Marshall, *The Assignment of Choses in Action*, 167.

[33] Depending on the true meaning of Turner, L.J.'s dictum in *Milroy* v. *Lord* (1862) 4 De GF & J 264; see *Anning* v. *Anning* (1907) 4 C.L.R. 1049; *Norman* v. *Federal Commissioner of Taxation* (1963) 109 C.L.R. 9; *Olsson* v. *Dyson* (1969) 120 C.L.R. 365.

[34] Cf. Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (1975), 137.

[35] *Norman* v. *Federal Commissioner of Taxation* (1963) 109 C.L.R. 9; *Shepherd* v. *Federal Commissioner of Taxation* (1965) 113 C.L.R. 385.

[36] *Norman* v. *Federal Commissioner of Taxation* (1963) 109 C.L.R. 9, at 28.

[37] The position in England may well be different, in view of Lord Macnaghten's celebrated dictum in *William Brandts' Sons & Co.* v. *Dunlop Rubber Co.* (1905) A.C. 454, at 461.

[38] E.g. *Ward* v. *Duncombe* (1893) A.C. 369.

[39] E.g. Sykes, *The Law of Securities* 2 ed., 599.

[40] R. E. Megarry and P. V. Baker, *Snell's Principles of Equity*, 27 ed., 72.