ASSIGNMENTS

1) ASSIGNMENT OF PROPERTY RIGHTS IN EQUITY

i) RIGHTS AND LIABILITIES

1. Is the party trying to assign a bare right to litigate?
   a. (e.g. Right to sue in tort and equity/right to sue for unliquidated damages in contract)
   b. Law is unsettled:
      i. “Right [is] incapable of assignment either at law or in equity” – Poulton v Commonwealth [1953]
      ii. Has been said, however, that this decision was only obiter (e.g. Campbell’s Cash and Carry v Fostif Pty Ltd [2006])
         1. Trendex exception: where assignee has a genuine commercial interest in the enforcement of the claim – Trendex Trading Corporation v Credit Suisse (1982)
      iii. Further exception is where the right is assigned to an insurer. This is valid if it is the consideration for a payment made by the insurer to the insured in satisfaction of a claim.

2. Is the party trying to assign the right to recover a debt?
   a. Can assign an action to recover a debt or sue in contract for liquidated damages because regarded as rights of property – Fitzroy v Cave (1905)
      i. Can assign right to sue for breach of contract where the assignee has a genuine (and legitimate) commercial interest – Re Daley; Ex Parte National Australia Bank (1992)
      ii. Must be something beyond a mere personal interest in profiting from proceedings – Monk v Australia and New Zealand Banking Group Ltd (1979)
   b. Can also assign the proceeds of a cause of action as distinct from the cause of action itself – Glegg v Blomley (1912)

3. Is the party trying to assign the ‘burden’ of a contract?
   a. Cannot be assigned at law or equity
      b. Only way to do so is ‘novation’ which involves all parties agreeing that a new contract is substituted for one that has already been made – Olsson v Dyson [1969]
         i. Intention is crucial to showing novation – Vickery v Woods (1959)
         ii. May be expressed or implied from the circumstances

4. Is the party trying to assign the benefit of a contract?
a. May be for the entire benefit of the contract – Don King Productions Inc v Warren [2000]
   i. May be separate and severable rights under the contract – Federal Commissioner of Taxation v Everett [1980]
   ii. Entitles the assignee to sue directly the other party to the contract

b. Will be unassignable if:
   i. Parties expressly or impliedly in their contract prohibit assignment – Don King Productions Inc v Warren [2000]
   ii. The right is personal:
      1. Identity of person receiving the benefit material to the contract – Moore v Collins (1917)
      2. Identity of the person performing the contract is material to contractual performance – Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1993]
   iii. Not personal if it makes no difference who does it – Tolhurst v Associated Portland Cement (1903)

ii) EQUITABLE ASSIGNMENT OF LEGAL PROPERTY FOR VALUABLE CONSIDERATION

Principle: An assignment for value which fails at law to assign legal property effects an equitable assignment when consideration is paid or executed – Tailby v Official Receiver (1888)

What is assignment?

1. Transfer of an existing proprietary right
2. If equitable title passes: held on constructive trust for assignee

iii) VOLUNTARY ASSIGNMENT OF LEGAL PROPERTY IN EQUITY

1. Overarching Test for equitable title:
   a. Test: Has assignor done everything necessary for her to do to transfer title? (Beyond recall, Deane J) – Corin v Patton [1990]
      i. Necessary means necessary to be done by the donor; gift complete on execution of instrument and delivery to the donee – Anning v Anning per Griffith CJ
      ii. Cf Isaacs J in Anning: “if the legal title is assignable at law it must be so assigned or equity will not enforce the gift.”
      iii. A mere expression of intention to assign will not suffice – Olsson v Dyson
      iv. Although no legal or equitable interest passes immediately in the case of torrens title; right for donee to become registered proprietor if donor has done everything necessary – Bunker v Perpetual Trustee Co (Ltd) [1937]
b. **NB:** If the gift was intended to have been effectuated by one means, the court will not give effect to it by another means – *Milroy v Lord* (1862)
   
   i. “If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust” – *Milroy v Loyd*
   
   per Turner LJ

c. **Consider:** Is further action on part of assignor required?

2. Is there an attempt to assign an **interest in land**?

   a. Legal Requirement
      
      i. Instrument of transfer signed by both parties and certificate of title; and
      
      ii. Registration (ultimately dependent on Registrar)

   b. **Sufficient at equity** (*Corin v Patton*)
      
      i. Instrument of transfer in registrable form;
      
      ii. Delivered to donee along with certificate of title.
          
          1. **Delivery:** Note principles from *Thomas* regarding constructive delivery

   c. Examples where donor has not done enough
      
      i. Failing to request certificate – *Corin*
      
      ii. Wrong form of transfer – *Milroy v Lord*

3. Is the party trying to assign **old system land**?

   a. Legal requirements:
      
      i. No assurance of land shall be valid to pass an interest at law unless made by deed - Conveyancing Act s 23B(1)

   b. **Exceptions:**
      
      i. Lease or tenancy; Vesting order; Surrender – s 23B(2)

   c. **Deed Formalities:**
      
      i. Must be written on parchment;
      
      ii. Must be sealed;
      
      iii. Must be delivered – *Scook v Premier Building Solutions Pty Ltd* [2003]

      iv. Deed “shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed” – s 38 CA

   d. **Corporations** sealing a deed:
      
      i. Deed may be sealed by attaching its seal and witnessed by either two directors or a director and a company secretary – Corporations Act s 127
ii. Alternatively, may be executed by two directors or a director and Secretary.

iii. Must be expressed to be executed as a deed and the parties must have objectively intended that the document be executed as a deed - 400 George Street (Qld) Pty Limited v Ors & BG International Limited [2010]

4. Is there an attempt to assign shares off-market?
   a. Legal requirements:
      i. Signed transfer;
      ii. Delivered to transferee;
      iii. Transferee signs transfer and it is delivered to company;
      iv. Company registers transfer - s 1071B Corporations Act
   b. Sufficient at equity: to execute transfers and hand over certificates - Milroy v Lord

5. Is there an attempt to assign a complete chose in action?
   a. Examples: Absolute debts
   b. Legal assignment requires four elements to be effective s 12 CA:
      i. Clear intention to make an immediate transfer of the chose in action to the assignee;
      ii. Must be absolute and not by way of charge (by way of mortgage is absolute) – Tancred v Delagoa Bay & East Africa Railway (1889)
      iii. Assignment must be in writing and signed by the assignor;
      iv. Express notice in writing must be given to the debtor by either the assignor or the assignee (though notice to the assignee is not required) – Grey v Australian Motorists & General Insurance Co Pty Ltd (1976)
   c. NB: s 12 includes assignment of equitable choses in action; ‘legal chose in action’ is to be understood as a ‘lawfully assignable chose in action’ – Everett v Commissioner of Taxation (1980)
   d. Sufficient at equity:
      i. If equipped with valid notice and merely needs to show debtor to achieve title, this suffices for equitable title to transfer – Norman v FCT (1963)

6. Is there an attempt to assign tangible personal property (chattels)?
   a. Legal Requirement: Intention + Delivery (same in equity)
   b. Delivery:
      i. Telling someone where property is: Constructive delivery – Patten v Thomas (1965)
      ii. If already in donee's possession:
1. Merely need to show intention: No redelivery – *Re Stoneham [1919]*
   c. **Invalid:** requesting money be applied for a certain cause

7. Is there an attempt to assign a cheque?
   a. Legal requirement: Endorsement and delivery (Same as equity - *Lock*)

**iv) VOLUNTARY ASSIGNMENT OF EQUITABLE PROPERTY**

1. Examples
   a. **Examples:** Part of a chose in action; Right of beneficiary under trust; partner’s interest in partnership

2. Assignment of **these interests can be done** in equity
   a. Must show (*Norman, per Windeyer*)
      i. Must be a “clear expression of an intention to make an immediate disposition” – *Norman v FCT*
      ii. **Invalid:** Wrote to solicitor and requested that he use some of the money that he would receive as a beneficiary under the estate, and pay it directly to the people on the list – *Comptroller of Stamps (Victoria) v Howard Smith (1936)*

**v) FUTURE PROPERTY**

1. Is this **future property**?
   a. The amount will definitely be received. Examples:
      i. interest due to be paid on a fixed term loan
      ii. bank interest on a savings account
      iii. instalment repayments of a debt
   b. These can be assigned voluntarily or for value – *Shepherd v FCT (1936)*

2. Is this an **expectancy**?
   a. Present right to receive. Something may or may not eventuate. For example:
      i. Royalties due in intellectual property
      ii. Dividends on shares
      iii. Interest on a loan repayable at will
      iv. Interest of a residual beneficiary in a deceased estate
   b. **Question:** whether the deed upon its true construction demonstrates an intention to assign the right or the property – *Shepherd v FCT*
      i. **Example of assigning right:** “absolutely and unconditionally” assigned all of “right title and interest in and to an amount equal to 90 per centum of the income which may accrue during a period of three years from the date of this assignment from royalties”
   c. If it is the **right to receive** can be assigned voluntarily – *Shepherd v FCT*
d. If it is **after-acquired property** can only be assigned for value (provided intention clear) – *Tailby v Official Receiver (1888)*

   i. If consideration is paid, vests in recipient as soon as assignor receives property which falls within the description – *JT Nominees Pty Ltd v Macks [2007]*

   ii. **Failed:** tried to assign dividends themselves voluntarily – *Norman*

e. Look carefully: At the wording of the instrument

3. Is this a **mere expectancy**?

   a. No present right to receive. Examples:

      i. An interest under the will of a person who is still alive.

      ii. The interest of a beneficiary under a discretionary trust

   b. **Cannot be assigned!**

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2) **STATUTORY FORMALITIES**

1. **Assignment of land:**

   a. Consider:

      i. s 23C(1)(a);

      ii. s 23C(1)(c) (only if it is an equitable interest)

      iii. s 23C(1)(b) (only if it is a trust)

      1. **NB:** trust itself

2. **Assignment of personal property:**

   a. Consider s 23C(1)(c) if it is an equitable interest

   b. Personal property **includes:**

      i. Corporeal: **See trusts**

      ii. Incorporeal: **See trusts**

   c. If it is not an equitable interest there will be no writing requirement (oral sufficient).

   **Section 23C(1) Conveyancing Act**

      (a) No interest in land shall be created or disposed of except in writing signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law;
(b) The creation of a trust respecting land or any interest therein must be in some writing signed by some person capable of declaring such a trust, or by the person’s will;

(c) The disposition of an equitable interest or trust subsisting at the time of disposition must be in writing signed by the person disposing of the same, or by the person’s will, or by the person’s agent thereunto lawfully authorised in writing.

(1) This section does not effect the creation of constructive, implied or resulting trusts.

- NB: s 23C(1)(c) includes equitable interests in both real and personal property – *PT Ltd v Maradona Pty Ltd (No. 2)*

### 2.5.4) EQUITABLE ASSIGNMENT AND PART PERFORMANCE

- **EXCEPTION TO WRITING.** “The acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged” – *Maddison v Alderson;* espoused in *Regent v Millett*

- Can be generally referable.

- Examine the performance and the general nature of a contract that is implied by that conduct. *CF* general nature of the oral contract that is pleaded – *Thwaites v Ryan*

### PRIORITIES

#### 1) COMPETING LEGAL INTERESTS

1. Earlier interest takes priority

   a. E.g. A held a legal interest in a parcel of land and transferred it to B. If A later purported to convey that same interest to person C, person C will receive nothing because person A has already transferred the interest.

   b. E.g. A grants a legal lease to B and then later A purports to grant a fee simple to C. This will be subject to the leasehold previously granted.

#### 2) EARLIER EQUITABLE INTEREST AND A LATER LEGAL INTEREST

- Legal interest prevails if it has been acquired by a *bona fide* purchaser for *value without notice*

- Onus is on the purchaser of the later legal interest – *Attorney-General v Biphosphated Guano Company* (1879)

  i) **BONA FIDE**

1. Must be acquired in good faith.
2. Usually satisfied by proving lack of notice, but nevertheless remains a separate element to be proved – *Midland Bank Trust Co Ltd v Green* [1981]

**ii) CONSIDERATION**

1. Must have been acquired for value (consideration). Voluntary disposition of legal title is insufficient.
   
a. Although nominal consideration will not suffice, not necessary for consideration to equal the full value of the property – *Basset v Nosworthy* (1673)

2. The fact that the grant is done by way of deed will not satisfy the requirement that the purchase be for ‘value’
   
a. “Equity, paying no attention to the mere presence of a seal, does not regard a voluntary promise as binding on the conscience of the promisor” and property will not pass in equity – *Redman v Permanent Trustee Co* [1916]

**iii) NOTICE**

- Purchaser cannot have notice (actual, constructive or imputed)

- Purchaser who knows that anyone is in possession of a property takes subject to their rights – *Hunt v Luck* [1902]

  o Not just limited to possession pursuant to lease agreement. May also apply to the use of land. For example, overt use of a right of way over a parcel of land puts a purchaser on notice – *Jensen v Hawksley*

1. Does the party have **actual notice** of the interest?
   
a. Actual knowledge of the facts.
      
i. Source of notice must be someone with an interest in the property;

   ii. A purchaser is not put on notice by rumours – *Williamson v Bors* (1900)

2. Does the party have **constructive** notice of the interest?
   
a. P has CN of facts that would have come to their attention had they made the inquiries and investigations that a reasonably prudent person would have made in the circumstances – *Australian Central Credit Union v Commonwealth Bank of Australia*
      
i. For example: a purchaser who has had notice of a document that affects the title to land is fixed with constructive notice of its contents – *Cosser v Collinge* (1832)

      ii. Example: Public register might be constructive notice; question of reasonable person acting prudently – *Australian Credit Union*

   b. However, purchaser is only obliged to make prudent enquiries, no more:
      
i. Example: J purchased farm. J knew farm occupied by S, as inspected tenancy agreement. J believed S liable for repairs (agreement). Many
1. Purchaser has to ask for the agreement and ensure that it is the correct agreement, but no more

2. Purchaser entitled and bound to assume that agreement correctly states the relationship between the tenant and the landlord.

1. Conveyancing Act s 164(1): a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless:

(a) In purchaser’s own knowledge/would have come to attention if made inquiries (searching registers) ought reasonably to have been made; or

(b) Same but relates to their solicitor/agent.

(1A) Omission to search ASIC register, shall not of itself affect notice mortgage/charge. (cf Australian Credit Union)

3) EARLIER LEGAL INTEREST AND A LATER EQUITABLE INTEREST

1. Unless the equities are not equal, the legal interest will prevail

2. Equitable interest will prevail in circumstances where the person holding the earlier legal interest has assisted in some way in a fraud or gross negligence to create the later equitable interest.

   a. Must be more than mere carelessness – Northern Counties Fire Insurance v Whipp (1884)

3. Equitable interest prevails where:

   a. Owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice o the prior legal estate;

      i. The omission to use ordinary care in inquiry after or keeping title deeds may be held to be sufficient evidence where such conduct cannot otherwise be explained

   b. The owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud of misconduct of the agent been represented as being the first estate

   c. Where a legal mortgagee or purchaser has made no inquiry for title deed

4) COMPETING EQUITABLE INTERESTS

1. Earlier interest will generally prevail, unless:

   a. Question is whose is the better equity bearing in mind: