

to the Principal. This is the theory on which the doctrine of imputed notice is founded.

The Essentials of Imputed Notice

1. *The knowledge must have come to him as an agent* and not in any other capacity. In other words, agency must be strictly proved.

Dyllie vs. Pollen—32 L. J. Ch. 782 (N. S.)

2. Agent must be distinguished from a person employed to do merely ministerial act—*e.g.* a person employed to procure a deed is an agent.

Knowledge to such a person cannot be the basis of imputed notice.

3. In this connection, the position (of)* a person who is in the service of two Principals as their agent has to be considered. Suppose, there are two companies, *A* and *B*, and *C* is an officer employed in both *A* & *B*. Suppose that *A* company transferred their legal right to *B* company which was subject to an equitable right in favour of *D* of which *C* had knowledge.

Can *D* say that *B* company had notice of his equitable right because *C*, their agent, had notice of it in his capacity as the agent of *A*?

The answer is that, his knowledge which had acquired as agent of *A* company, will not be imputed to *B* company unless he owes a duty to the *A* company to communicate his knowledge and also a duty to the *B* company to receive the notice.

(1896) 2 Ch. 743—*In Re Hampshire Land Company*.

Facts :

1. Hampshire Land Company was registered under the Companies Act, 1870.

2. The Company was closely interconnected with the Port Sea Island Building Society. Four Directors and a Secretary by name Wills were common to both.

3. On the 19th February 1881, a general meeting of the Company was held at which a resolution was passed authorizing the Directors to borrow 30,000 £.

4. The Directors borrowed this amount from the Port Sea Society.

5. The Society went into liquidation in 1892. The Liquidator of the Society sought to claim the sum of £ 30,000 lent to the company.

6. It was contended that the resolution of the company authorizing borrowing was *ultra vires* and that because William, the Secretary was a common officer notice to him was notice to Society and therefore Society could not recover.

7. *Held* that the Society could *recover* for reasons at p. 749.

II. The notice to the agent must have been obtained by him *in the same* transaction and not *in a previous* transaction.

There is a further qualification. Even if the notice was acquired by the agent in the *same* transaction, it will not be imputed to the purchaser, unless it is *so* material to the transaction as to make it the duty of the agent to communicate it to the principal.

(1886)—31 Ch. D. 671—*In Re Cousins*.

Facts :

1. In 1871, one William's cousins made a will of his property and left it in trust to his trustees.

2. One William Banks was a solicitor for the trustees.

3. Mathew, a cousin was to receive a share in the proceeds of real and personal property left by William's cousins under the will.

4. Mathew mortgaged his share to William Banks, the Solicitor as security for a loan of £ 35.

5. In 1873, Mathew mortgaged his share to William Richardson through Banks and Banks was paid off.

6. In 1874 Richardson transferred his mortgage to William Drake. No Notice was given to the Trustees.

7. In 1875 Mathew mortgaged his share to Dennis Pepper to secure a payment of £ 500. Banks acted as the Solicitor. The mortgage to Dennis Pepper did not mention the previous mortgage to William Drake, Subsequently a notice of this transaction was given to the Trustee.

8. Drake took out a summons for payment of his mortgage debt due from Mathew out of the funds in the hands of the Trustee in *priority* to Pepper's claim. 1884, 26 Ch. D. 482

9. Pepper's contention was that, he had no notice of Drake's claim—Mathew not having mentioned it in his deed of mortgage.

10. It was replied by Drake that Pepper had notice because Banks, the Solicitor who acted as his agent knew of Mathews mortgage to Drake.

11. That Banks had notice, it was not denied. That Banks was the agent of Pepper was not denied. But the question was whether notice to Banks can be held to be notice to Pepper.

12. *Held*: No—p. 677.

Reasons. The knowledge of Banks did not arise in the course of the transaction with Pepper in 1875. Pepper could not be said to have any notice.

13. Pepper's claim was allowed.

III. Notice to agent will not be imputed to the purchaser when the agent is shown to have intended a fraud on the principal which would require the suppression of his knowledge and not communicate it to the Principal.

(1880) 15 Ch. D. 639 *Cane vs. Cave*.

(1428) ACI—Houghton & Co vs. Nothard)

II. *Where an equitable right has come into being subsequently to the acquisition of a legal right.*

1. Leading case on the question is *Northern countries of England Fire Insurance Co. vs. Whipp*.

1884 26 Ch.D.482

Facts

C, the Manager of a company, executed a legal mortgage to his company, delivered title-deeds. They were kept in a safe of the company, the key to which was in C's possession: C—some time after took out the title-deeds and created another mortgage on the same property in favour of Mrs. Whipp. Mrs. Whipp has no notice of the first mortgage to the Company. *Held*: Company entitled to priority.

2. The proposition laid down in the case is this—

Where the owner of a legal estate has assisted in or connived at the fraud which has laid to the creation of a subsequent equitable estate and the owner of equitable estate had no notice of the prior legal right, the Court will postpone the legal estate to the equitable estate although it is subsequent in its origin.

3. What is the evidence of assistance in or connivance at fraud :

(i) Omission to use ordinary care in inquiry after title-deeds.

(ii) Failing to take delivery in title-deeds are treated as evidence of assistance in or connivance at fraud where such conduct cannot otherwise be explained.

4. The same authority lays down another case in which also a legal estate will be postponed to a subsequent equitable estate.

Where the mortgagee, the owner of the legal estate has constituted the mortgagor, his agent with authority to raise money on the property mortgaged and the estate created has by the fraud or misconduct of the agent been represented as being the first estate.

5. For the operation of this rule, mere carelessness or want of prudence on the part of the legal owner will not be a sufficient ground. There must be fraud and connivance at or assistance therein. Nothing but fraud I will postpone.

(1913) 2 Ch. 18.

III. Where the competition is between two equitable rights.

1. In the two former cases the competition was between a legal right and an equitable right. In the third case the competition is between two equitable rights.

Cave vs. Cave, (1880) 15 Ch. D. 639.

Facts :

A Trustee & *B* a beneficiary.

A purchased land from trust-moneys in breach of trust and executed a legal mortgage thereof to *C*.

C had no notice of the trust.

Later by an equitable mortgage transferred the same land to *D*. There are three persons who have acquired rights. *C*, who has a legal right, is mortgagee, being a legal mortgage.

B has an equitable right flowing out of *A*'s right which has been transferred.

D has an equitable right flowing out of *A*'s right.

What is the position of the parties ?

1. As between *C* and *B*, although *B*'s Equitable right is prior to *C*'s legal right as *C* had no notice, *C* takes priority.

2. As between *C* and *D*, *C* takes priority, because *C* is not party to a fraud in creating the rights of *D*.

3. As between *B* and *D*, their rights are equitable rights: whose right prevails? *B*'s right. The rule is that where there is a competition between two equitable rights, the right earlier in origin prevails over the subsequent right.

4. This rule applies only where the equitable rights have equal equities on their side. If the equities are unequal, the better of the two prevails.

Rice vs. Rice. 2. Drewry, 73 (76-78).

A sells land to *B* and without receiving purchase money (1) conveys land to *B*, (2) signs a receipt for moneys and (3) delivers title-deeds to *B*. *B* subsequently mortgages the property to *C* who has no notice of *A*'s claim. Between *A* and

C although *A*'s equitable right is earlier than that of *C*, yet the equities are unequal. *A* is guilty of negligence, therefore, *C*'s Equity is better and will prevail although later in time.

5. In some cases conflict as to priority between two equitable interests by the respective times at which the interest was transferred. In other cases, it is determined by the respective times at which written notice is given to the proper person or persons of the interest transferred (e.g. in the case of the assignment of chose in action).

Sum up. Three maxims of Equity.

1. Where equities are equal, the law prevails.
2. Where equities are equal, the first in time prevails.
3. Where equities are unequal, the better equity prevails.

Explanation

1. The first proposition has reference to cases where there is conflict between an equitable right and a legal right and applies to both classes of cases : (1) where the equitable right is prior to the legal right as well as to cases (2) where the equitable right is subsequent to the legal right.

2. Law prevails means that legal right prevails over an equitable right where no inequity can be attributed to the owner of a legal right. — Such as notice or fraud.

3. Propositions two & three have reference to cases where there is a conflict between two *equitable rights*.

Equitable Assignment

I. General

1. Although the subject is called Equitable Assignment, it is an abbreviation. The subject is equitable assignment of a chose in action.

2. There are three matters of a preliminary character which must be dealt with at the outset :

- (1) What is an assignment
- (2) What is a chose in action.
- (3) Necessity for the study of the subject.

(1) What is an assignment

1. Under the English Law of Property, property is classified as *Realty* and *Personality*.

2. In connection with the transfer of rights over Realty, the word used is *Conveyance*. In connection with the transfer of rights over Personality, the word used is either *Transfer* or *Assignment*.

3. Assignment, therefore, means the transfer by a person of his rights over personal property and particularly one form of it, namely, *chose in action*.

(2) What is a chose in action

1. Under the English Nomenclature, Personality is divisible into two classes :

- (i) Moveable goods of which one can take physical possession.
- (ii) Personal rights of property which can only be claimed or enforced by action and not by taking physical possession.

2. The former are called :

- (i) Choses in Possession—Things in Possession,
- (ii) Choses in Action—Things in Action.

3. The definition of a chose in action—

(1902) 2 K. B. 427 (430)—*Channell J.*

It is really speaking a debt.

4. The word assignment is used in respect of chose in action. It is something which you can only sign it away if you want to transfer it. You cannot deliver possession of it.

(3) Necessity of Studying Equitable Assignment

1. An assignment is a transfer of a right by its owner, subsisting against another, to a third person to whom the person against whom it was subsisting, becomes bound.

Illustration. *A* is creditor. *B* is debtor. *A* assigns his right to debt against *B* to *C* : *B* becomes bound to *C* and *C* gets a right to recover it from *B*.

2. Three persons are involved in an assignment :

- (i) The original owner,
- (ii) The person bound to the original owner,
- (iii) The person to whom the original owner has transferred the right.

3. The right, i.e., the chose in action may be legal or equitable such as a legacy or an interest in a trust fund.

4. Assignment of a chose in action was differently treated by Equity and by the Common Law.

Common Law and Chose in Action

1. There could be no assignment in Common Law of a Chose in action. Not only there could be no assignment of an equitable chose, there could be no assignment even of a legal chose.

2. The reason was the fear of multiplicity of suits.

3. Statute law and Special law made certain kinds of Choses of action assignable :

(i) Negotiable Instruments became assignable by the law merchant

(ii) Policies of Life Insurance and Marine Insurance were made assignable by Statute.

(iii) Section 25(6) of the Judicature Act : all legal Choses in Action have been made assignable.

Equity and Chose in Action

1. In Equity, a chose in action was always assignable. Not only an equitable Chose was assignable in Equity but a legal Chose was also assignable in Equity.

2. If the Chose was equitable, the assignee could bring his proceedings to recover it in a Court of Chancery in his own name.

3. If it was a legal Chose, the proceedings had to be taken in the name of the assignor and the way the Court of Chancery interfered, was to restrain the assignor from objecting to this use of his name on the assignee giving him a proper indemnity against costs.

4. There were, however, some Choses in action to the assignment of which equity did not give effect on the ground of public policy :

(i) assignment of pay and half pay of public officers paid out of the National Exchequer.

(ii) Assignment of alimony to a wife.

(iii) Assignment affected by maintenance of property.

Conclusion

1. There are thus two ways of making an assignment—

(i) Legal, (ii) Equitable.

2. Although the Judicature Act has laid down the form and procedure for the legal Assignment of a legal Chose, it has not abrogated the rules of Chancery relating to Equitable assignment of a legal Chose. So that if an assignment is ineffective in law by reason of some defect, it will be good if it conforms with the rules of equity. Secondly, the Judicature does not touch the assignment of an Equitable Chose in action.

Categories of cases to be considered

There are three categories of cases to be considered in connection with the assignment of a Chose in action :

(i) Legal assignment of a legal Chose in action,

(ii) Equitable assignment of a legal Chose in action,

(iii) Equitable assignment of an Equitable Chose in action.

Requisites of a legal assignment of a Legal Chose

1. Assignment must be *absolute*, i.e., it must amount to a *complete* divesting of his right by the assignor. The debt must be certain and must be of the whole amount.

2. The assignment must be in *writing* signed by the assignor.

It need not be by deed.

It need not be for value.

3. Express notice must be given to the debtors of the assignment.

The Section does not say :

- (i) By whom is notice to be given—by the assignor or assignee.
- (ii) At what time notice is to be given so that it may be given, by the assignee after the death of the assignor.

Effect of Want of Notice

1. Absence of notice does not disentitle an assignee of suing on the assignment. It only imposes certain disabilities and results in certain disadvantages.

(i) The assignee cannot sue the debtor in his own name without making the original creditor a party to the action.

(ii) The assignee will be subject to equities arising between the debtor and his original creditor before the date of the assignment and will lose his right against the debtor altogether if the debtor pays the original creditor. On the other hand, if the debtor pays the original creditor after receiving notice of assignment, the assignee could still recover the debt from him.

(iii) The assignee, who fails to give notice to the debtor of his assignment, will be postponed to a subsequent assignee for value who has no notice of the previous assignment, and gives notice of his assignment to the debtor.

Requisites of an Equitable assignment of a Legal Chose in action

An Assignment which does not comply with the statutory requirements is not necessarily ineffectual, for it may operate as an Equitable Assignment.

Two things are necessary :

- (1) There must be value given by the assignor.
- (2) A charge created by agreement between the debtor and the creditor upon specific funds or by an order given to the creditor upon a person holding money belonging to the debtor, will amount to an assignment.

1839. *Burn vs. Carvallo*
4 Hylve & Craig's Reports. 690

Facts

F was in the habit of sending consignments of goods to *R*, who was trading in a different town and used to draw Bills of Exchange upon *R*. It was arranged by *F* with *B & Co.* that they should endorse and negotiate his Bills drawn upon *R* against

consignment and they were to credit him with the amount and he was to draw upon it and *B & Co.* was re-imburse itself by recovering the amount from *R*. *F* drew for certain amounts on *B & Co.* But *R* failed to meet the Bills on maturity.

F, who was the debtor of the *B & Co.* by a letter to *B & Co.* promised that he would direct and by a subsequent letter did, direct to deliver the goods to *V* as the agent of *B & Co.*

F wrote to *R* to transfer the goods in his possession to *V*, the agent of *B & Co.* in the town. *R* accordingly delivered the goods to *V* on the 30th of June 1829.

On the 23rd of June 1829, *F* was adjudged insolvent for an act done on the 23rd of May 1829. His trustee in bankruptcy sued for the recovery of the value of the goods from *B & Co.* *B & Co.* contended that there was an equitable assignment of the value of the goods by *F*. *Held* the order of the debtor was a good assignment in Equity.

Rodick vs. Gandell.

(1851-2) 1 *Degex.* 763. 42. *E. R.* 749

Gandell was an Engineer and was indebted to a certain Bank for a large amount and the Bank was pressing for payment.

Gandell was a creditor of a Railway Co. To induce the Bank not to press for payment and also to pay other drafts outstanding against him, it was arranged that Gandell should instruct his Solicitor to recover the amount due to Gandell from the Railway Co. and pay it to the Bank. G, by a letter to the Solicitors of the Company, authorized them to receive the money due to him from the Railway Co. and requested them to pay it to the Bankers. The Solicitors by letter promised the Bankers to pay such money on receiving it.

Why—no agreement between debtor and creditor. The Solicitor recovered the amount from the Railway Co. but instead of paying it to the Bank, paid it to Gandell. Gandell became insolvent and his property was taken possession of by the official assignee. The Bank sued for a declaration that there was an equitable assignment by Gandell of his funds claimable from the Railway in favour of the Bank and collected by the Solicitor and the

Bank was therefore entitled to recover the amount from the official assignee. *Held*, this was not an equitable assignment. It was not an order given by the debtor to his creditor upon a person owning money or holding funds belonging to the debtor directing the *person* to pay such funds to the Creditor.

There must *be privity* between the *assignor* and *assignee* in order to constitute an equitable assignment. If there is no privity then there is no assignment even in equity.

Consequently, if the Principal directs his agent to collect money owing to the principal and pay it to a third person such third person is not an assignee in equity if the mandate is not communicated to him. It may be revoked by the principal.

Similarly a Power of attorney or authority to collect money and to pay it to the creditor of the party granting the power does not amount to an equitable assignment. A cheque is not an equitable assignment or appropriation of money in the drawer's Bank.

Hopkinson vs. Forster, (1874) L. R. 19 Eq. 74.

There can be no valid appropriation or assignment if no specific fund is specified out of which the payment is to be made.

Percival vs. Dunn, (1885) 29 Ch. D. 128

Whether notice is necessary in the case of an equitable assignment ?

1. An equitable assignment is complete between the assignor and assignee although no notice is given to the debtor.

2. Notice of the assignment should, however, be given to the debtor for two reasons.

(i) If there is no notice, the debtor will be free to pay to the assignor, the original creditor and will not be liable to the assignee. On the other hand, if he pays to the assignor in disregard of the notice, he will be liable to pay over again to the assignee.

Stocks vs. Dobson (1853) 4 De. G. M & G. 11

(ii) If there is no notice, then the assignee will not be allowed to have priority over subsequent assignee of the same chose in action by the same assignor.

This is called the rule in **Dearl vs. Hall** (1823) 1 Rsess 1=S. F. C. p. 57.

Facts :

Peter Brown died and left a Will whereby he made a trust of his personal estate and of the monies to arise from the sale of his real estate and directed his executors to invest the same and pay interest to his son Zachariah Brown during his life. The income came to about £ 93 a year.

On 19th December 1808, Brown, in consideration of £204 paid to him by William Dearle, assigned a part of his annuity of £ 37. On 26th September 1809, Brown, in consideration of £ 150, assigned another part of his annuity of £ 27 to Sherring, subject to the assignment in favour of Dearle.

Neither Dearie nor Sherring had given notice of assignment to the executor.

In 1812 Brown advertized the life interest of 93 pounds p. a. in trust funds for sale as an unincumbered fund.

Joseph Hall proposed to purchase it and through his Solicitor investigated Brown's title. He also made inquiries of the executors, who knew of no incumbrance affecting Brown's interest. Thereupon Hall purchased Brown's interest for £ 711 -3-6 and had it assigned to him.

On the 25th April 1812, Hall gave the executors written notice of the assignment to him.

On the 27th October 1812, Dearie and Sherring gave notice of their assignment to the executors.

The executors refused to pay any one of the three until their rights were decided.

Dearle and Sherring brought a Bill in chancery against Hall praying that the income of £ 93 should be applied in satisfying their's before that of Joseph Hall.

Dearle contended that the doctrine *first in time is first in law* should be applied and as he was first he should be preferred to Hall.

Held No. Hall should be preferred.

Judgement of Plumer M. R. S. & C. p. 55

The rule was based on carelessness and negligence to perfect one's claim. But the rule is now absolute and independent of conduct. The assignee who gives proper notice first will be paid first, whether the other assignee has been guilty of carelessness nor not.

Re Dallas. (1904). 2 Ch. 385.

The rule in *Dearie vs. Hall* has always applied to assignment of all equitable interests in personality.

**To whom notice should be given under the rule in
*Dearle vs. Hall***

1. It must be given to the debtor, trustee or other person whose duty it is to pay the money to the assignor.

Stephens vs. Green, (1895) 2 Ch. 148

2. Notice to the Solicitor will be effectual only if Solicitor was expressly or impliedly authorized to receive it.

(1880) 14 Ch. D. 406.

3. If there are several debtors or trustees, notice to one is notice to all.

4. Fresh notice to new trustees is not necessary, if notice is given to old trustees.

What should be the form of Notice

1. Formerly, notice need not be a formal notice and might have been by word of mouth.

2. But since 1925, it must be in writing.

**What title is acquired by the assignee by an
Equitable assignment.**

1. It has always been the rule of equity that the assignee of a thing in action cannot acquire a better right than the assignor had.

2. In other words, the assignee takes it subject to all the equities affecting it in the hands of the assignor.

Roxburghe vs. Cox, (1881) 17 Ch. D. 520.

So that—

(1) If the Contract between the assignor and the debtor was voidable, the debtor can set up the voidable character of the contract against the assignee, even if the assignment was for valuable consideration.

(2) If the debtor had a right of set-off against the assignor, the same would be available to him against the assignee.

3. The assignee is, however, free from equities arising after notice.

A debtor cannot diminish the rights of the assignee such as they are, on the date of notice, by any act done after date of notice.

Assignment of rights to be acquired in future

1. So far, we have dealt with assignments of rights which had accrued when the assignment had taken place.

2. We must consider the assignment of rights to be acquired in future.

3. Example of such rights :

- (i) The expectancy of an heir-at-law to succeed to the Estate.
- (ii) The expectancy of a next of kin to succeed to personality,
- (iii) Freight not yet earned,
- (iv) Future Book-debts.

4. At Common Law, they were all void. A man could not assign what he had not got. In equity, they were assignable, if for valuable consideration.

5. Equity treated them not as assignments but as *contracts to assign*, and when the assignee became possessed of it, he was compelled to perform his contract.

6. When the right was acquired by the assignor, the beneficial interest passed immediately to the assignee. But the legal interest remained with the assignor. So that, if the assignor transferred it to a subsequent assignee who gave value and had no notice of the previous assignment, the title of the subsequent assignee would prevail.

Conversion

I. NECESSITY FOR THE DOCTRINE OF CONVERSION.

1. The English Law had prescribed a different mode of devolution of the *Realty* and *Personality* of the owner, if he died *intestate*. His Realty went to his *heir* and *Personality* went to his *next-of-kin*.

2. That being so, whether the property will go to the heir or to the next of kin must depend upon the state of the property on the date on which the succession opens.

3. Ordinarily there is no difficulty. The actual state in which the property will be found on the material date will determine its devolution. But suppose, circumstances are such that on the date on which the succession opens, land *is to be sold* for money *but is not sold*, or money *is to be invested* in the purchase of land *but is not so invested*, how is the devolution of the property to be determined? If the land is to be treated as land, until it is actually sold, then it will go to the heir. On the other hand, if it is to be treated as money, because it was intended to be sold for money, then although it is land, it will go to the next-of-kin. In other words, the question was whether property was to devolve according to the actual state in which it is found to exist or according to the form in which it was intended to be converted. The answer given by equity was, that property was to devolve, not according to the actual state in which it exists, but according to the form in which it was intended to be converted.

4. This is what is called the doctrine of conversion. There would have been no necessity for the doctrine, had there been no difference in the rules of inheritance for Real and Personal Property. This difference is now abolished by Sections 33,45 and therefore, conversion has lost all its importance.

5. In India there is no such distinction in the inheritance of property—Realty to heir and Personality to next-of-kin.

II. THERE ARE FOUR CASES WHICH GIVE RISE TO CONVERSION.

(1) By operation of the law.

(2) By operation of the order of the Court.

(3) By operation of a Contract.

(4) By operation of a direction in a deed or a will.

(1) Conversion by operation of the Law

1. There is only one case in which conversion takes place by operation of the Law. That case is the case of Partners. Under the Partnership Act of 1890, Section 39, every partner has a right to require, that the property belonging to the Partnership shall be sold and the proceeds, after the discharge of all debts and liabilities, shall be divided among the partners according to their shares in the capital. As a result, land which is partnership property is treated as Personality and not as Realty.

2. It is treated as Personality, not only as between Partners themselves and their representatives after death, for the purposes of distribution of the partnership assets, but it is also treated as personality for purposes of inheritance as between the persons entitled to the property of a deceased partner.

3. The conversion of Realty into Personality under the Partnership Act takes place not on the date of the dissolution of the Partnership or the death of a partner but at the moment when it became Partnership Property.

4. The doctrine of conversion applies to Partnership Realty unless the contrary intention appears. The reason why partnership agreements convert Realty into Personality is, because a partner ordinarily is not entitled on dissolution to any specific part of the partnership property. But there may be a proviso in the partnership agreement permitting a partner to have specific property, in which case conversion will not apply, there being intention to the contrary.

(2) Conversion by order of the Court

1. Where an order is made by the Court for the sale of Realty, the Realty is treated as being converted into Personality for purposes of succession to the estate of the person whose property was ordered to be sold.

Illus. ABC have equal shares in a Realty. The Court orders the sale of the Realty. This order has the effect of converting their