EQUITABLE ASSIGNMENTS

Oral Gift of a Debt

Olsson & Olsson v. *Dyson*[1] is a recent decision of the Supreme Court of South Australia in which Chamberlain J. added his opinion to the wealth of literature surrounding what should be a simple problem, viz., can there be an effective voluntary assignment of a legal chose in action where the assignment does not comply with statutory procedure? In doing so he extended the scope of equitable assignments since the South Australian Law of Property Act (1936-1960) and advanced a novel theory of consideration.

The story begins in January 1959 when the deceased Dyson proposed marriage to the defendant, who pointed out that this would involve her in the loss of her salary and of her pension from a previous marriage, amounting in all to approximately £20 per week. The deceased thereupon promised to make this good by leaving her £20 per week by will, and the parties were married. Soon after the deceased executed a will whereby the plaintiffs in this action were appointed executors and the defendant was left an annuity of £780.

Apparently to compensate for his failure to leave the promised £20 per week by will, the deceased, after nineteen months of marriage, told his wife that she could have a £2,000 loan he had previously made to R.T.E. Constructions Ltd. Two months later the deceased told the company that he had given the principal sum to his wife, and that all future payments of interest were to be made to her. The company's accountant was informed that the loan now belonged to Mrs. Dyson, and several payments, both before and after Mr. Dyson's death, were made to her.

The plaintiff claimed payment of the debt from R.T.E. Constructions Ltd., and the case came before Chamberlain J. on interpleader, as a contest between the defendant, as claimant, and the executors.

Chamberlain J. gave judgment for the defendant, Mrs. Dyson, on three grounds:

1. that there was a complete and perfect assignment of the debt in equity.

2. that, even assuming the assignment was imperfect, equity would recognize it because there was sufficient consideration for it.

3. that the defendant gained a legal right to sue for the debt because the debtor had assented to the assignment.

These three grounds will be examined in turn.

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1. (1967) L.S.J. Scheme 336. Not yet reported in the South Australian State Reports.

1. Complete and Perfect Assignment

The transaction here would not be an assignment of the debt at law, because it did not comply with the procedure prescribed by section 15 of the S.A. Law of Property Act which enables an assignee to sue for the debt in his own name. The assignment was not in writing, and no written notice was given to the debtor as required by section 15. The validity of the assignment therefore depends on equitable principles.

If valuable consideration were given for the assignment, equity would give effect to it, "for then equity looks on that as done which ought to be done"[2]. If there is no valuable consideration, the maxim "equity will not perfect an imperfect gift" applies. Chamberlain J. held that the gift was complete and perfect, and thus did not need consideration to be valid. For this conclusion he relied heavily on the judgment of Windeyer J. in *Norman* v. *Federal Commissioner of Taxation*[3] on the topic of voluntary equitable assignments. This deeply considered judgment has received the approval of Dixon C.J. in the same case[4] and of Kitto J. in *Shepherd* v. *Federal Commissioner of Taxation*[5], and seems to be the accepted law in Australia. An examination of the implications and the historical background for Windeyer J.'s judgment will assist in an analysis of Chamberlain J.'s reasoning.

In England, before the Judicature Act of 1873, most choses in action could not be assigned at law, for reasons historically based on a fear of multiplicity of actions[6]. However, equity refused to follow the law here, and would always enforce assignments made for valuable consideration. Equity would also enforce voluntary assignments where the assignor had sufficiently manifested his donative intention[7], for example by execution of a deed of assignment or by giving the assignee a power of attorney to sue without having to account for the profits. Windeyer J. explains this, saying that "the delivery of a deed couched in terms of present gift manifests, in the best possible way, the intention of the assignor to make an immediate and irrevocable transfer"[8]. Equity would enforce such an assignment (by compelling the assignor to permit the assignee to use his name in suing for the debt) because it was regarded as a gift complete and perfect, at least in equity[9].

In cases where the chose in action was assignable at law before 1873, the

2. Per Windeyer J. in *Norman* v. *Federal Commissioner of Taxation* (1962) 109 C.L.R. 9, at 33.
3. *Id.*, at 23, esp. at 26-29.
4. *Id.*, at 16.
5. (1965) 113 C.L.R. 385, at 397.
6. This history owes much to O. R. Marshall: *The Assignment of Choses in Action* (1950), who is generally in agreement with Windeyer J.
7. This conclusion is supported by P. G. Nash: "Assignments: Some Reflections" (1958) 32 Australian Law Journal 34 at 36.
8. (1962) 109 C.L.R. 9, at 32.
9. Note the statement of P. G. Nash in (1964) 32 Australian Law Journal 34, at 34. "Equity will treat as perfect many transactions which the common law would regard as incomplete".

well-known rule in *Milroy* v. *Lord*[10] applied. There was a semantic conflict as to whether this rule meant that (a) the donor must do everything necessary to transfer the legal title, that is, title must vest, or (b) the donor must do everything that *he* must do to transfer the legal title, even if further acts have yet to be done by the donee or a third party.

In 1873, section 25(6) of the English Judicature Act, 1873 (from which section 15 of our Law of Property Act was taken) provided a statutory procedure whereby all legal choses in action could be transferred at law, enabling the assignee to sue in law without having to join the assignor. There was some doubt about the effect of this statute. Some argued that it was merely an addition to the methods of assignment, and that any assignment which would have been valid in equity before 1873 is still valid—the statute is not destructive of equitable assignments[11]. This view was rejected by Windeyer J.[12]. He said:

> "If an attempt is made to assign, by way of gift, a chose in action assignable under the statute, then as I see the matter the requirements of the statute cannot be ignored, for the general rule of equity is that an effective assignment occurs only if the donor does all that according to the nature of the property, he must do to transfer the property to the donee"[13].

Here he is adopting the principle of *Milroy* v. *Lord*[10], without indicating which interpretation he accepts. He is saying that, where there is a prescribed method for assignment, equity cannot regard a gift as complete merely because there is an unmistakable manifestation of donative intention. This test arose before 1873 with reference to choses in action not assignable at law. Where the chose is assignable at law, the test has no application—it is the test in *Milroy* v. *Lord*[10] which applies.

A little later, he indicates that he accepts[14] interpretation (b) of *Milroy* v. *Lord*[10].

> ". . . in equity there is a valid gift of property transferable at law if the donor, intending to make, then and there, a complete disposition and transfer to the donee, does all that on his part is necessary to give effect to his intention and arms the donee with the means of completing the gift according to the requirements of the law"[15].

This is the reasoning which Chamberlain J. has implicitly adopted, recognizing that it involves a departure from the majority view (of Isaacs and

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10. (1862) 4 De G. F. & J. 264 at 274, 275 per Turner L.J.
11. Chamberlain J. quotes Lord Macnaghten's dictum from *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1905] A.C. 454 which seems to support this view. Seeing that Windeyer J. rejects this view, the quotation cannot have this meaning—it must be restricted to its context, that of assignments for value.
12. (1962) 109 C.L.R. 9, at 28.
13. *Ibid.*
14. As does Marshall: *Assignment of Choses in Action* (1950) at 131 and 160.
15. (1962) 109 C.L.R. 9, at 28.

Higgins JJ.) in *Anning* v. *Anning*[16] that there cannot be a valid equitable assignment of a chose in action without full compliance with the statute. This majority view must be taken now as not representing the law.

So far, Chamberlain J. has followed Windeyer J.'s reasoning in *Norman* v. *Federal Commissioner of Taxation*[17] fairly closely in progressing to the statement that "there can be a valid equitable assignment without notice by the donor to the debtor"[18]. He then says:

> "If the requirement of notice can be dispensed with where no-one can be affected by its absence, then I see no reason why the same cannot be said as to the requirement of writing. Writing, like notice, is required so that all parties may be made clear as to their rights and obligations"[19].

He goes on to hold, inevitably, that even though the assignment is not in writing, there is a gift complete in equity.

This further step seems inconsistent with Windeyer J.'s reasoning, and with the current of previous authorities such as *Re Griffin*[20] and *Holt* v. *Heatherfield Trust Ltd.*[21] where there was a written assignment, the only statutory formality missing being notice to the debtor. If the donor has not put the assignment in writing, he has not "armed the donee with the means of completing the gift according to the requirements of the law"[22]. Where only notice to the debtor is missing, and the donee has express or implied authority to give it, then he himself can give notice without having to rely on the donor. But where the assignment is not in writing, the donee himself cannot perfect the assignment at law, as he can where only notice is missing. The ability of the donee to provide the missing statutory formality is the factor which allows equity to enforce an assignment without this formality, not the fact that no one will be affected by its absence, as Chamberlain J. seems to imply.

His decision gains some support from the English edition of Cheshire and Fifoot, *Law of Contract:*

> " . . . it is now clear that a mere failure to observe the statutory form is immaterial in the present context. It does not prevent the assignment from being perfect and complete in the eyes of equity. An absolute assignment of an existing legal chose in action is complete as soon as the assignor has finally and unequivocally indicated that it is henceforth to belong to the assignee. Nothing more is necessary"[23].

In the light of the argument in the previous paragraph, it cannot be said that this statement represents the law in Australia. It is not the law because of the

16. (1907) 4 C.L.R. 1049.
17. (1962) 109 C.L.R. 9.
18. (1967) L.S.J. Scheme 336, at 340.
19. *Ibid.*
20. [1899] 1 Ch. 408.
21. [1942] 2 K.B. 1.
22. Per Windeyer J. in *Norman* v. *Federal Commissioner of Taxation* (1962) 109 C.L.R. 9, at 28.
23. 3rd ed. (1952), at 416.

existence of a statutory procedure for assignment which enables an assignee to sue in his own name, and thus the price of convenience is defeat of the donor's intentions.

It is interesting to note that the Australian editors of *Cheshire and Fifoot* are more cautious. They conclude:

> "At the present day, therefore, if the statutory provisions for assignability do not have the special results attributed to them by Australian judges, the absolute assignment of a legal or equitable chose in action, although not complying with the statutory requirements, would be effectual despite the want of consideration"[24].

If Windeyer J.'s judgment is accepted, as seems likely, then the statutory provisions for assignability *do* have special results.

German v. *Yates*[25] is a case with very similar facts, involving a voluntary oral assignment of a debt. Lush J. said that "the Act had not destroyed equitable assignments or impaired their efficiency in any way, and they still existed alongside of the new assignment under section 25[26]"[27]. He then held that the assignment was perfectly good and complete. The decision, however, cannot be of much authority, for Windeyer J. refers[28] to it as representing the view which he rejects, viz. that the statute does not alter the validity of assignments which would have been valid before it. It is this now discredited view which allows Lush J. to disregard the lack of a written assignment, and which enables G. H. Treitel to assert that voluntary oral assignments "are valid, provided that they are perfect gifts"[29]. O. R. Marshall and J. C. Hall, two writers who share reasoning similar to that of Windeyer J., and who therefore command more authority, have both expressed the opinion that voluntary oral assignments can never be effective in equity[30].

It is submitted then that, on the principle which he purports to apply, Chamberlain J.'s decision that there is a complete gift is unjustified in law. Yet a rule that a donor is bound by his purported gift whenever he has sufficiently shown his intent to make a permanent gift is perhaps a better principle. It seems unrealistic to hold one man to his gift where he has expressed his intention in writing, and to allow another to go back on his gift where he expressed his intention orally, when both men have the same intentions. Such a rule, it may be said, may lead to numerous fraudulent claims on executors from people who claim that the deceased intended to make a gift to them. However, the courts of equity have faced a similar problem with respect to declarations of trust, which may be enforced by a volunteer-beneficiary. The requirement of proof of an intent to transfer proprietary rights is, like the

24. Australian ed. by J. G. Starke and P. F. P. Higgins (1966), at 636.
25. (1915) 32 T.L.R. 52.
26. Of the Law of Property Act, 1925 (U.K.)—the English equivalent of s.15 of the S.A. Law of Property Act.
27. (1915) 32 T.L.R. 52, at 53.
28. (1962) 109 C.L.R. 9, at 28.
29. *Law of Contract* (1st ed., 1962) at 447.
30. Marshall: *Assignment of Choses in action* (1950) at 152-153. Hall: "Gift of Part of a Debt" (1959) Cambridge Law Journal 99, at 115.

requirement of intent to constitute oneself trustee, not a light one, and the courts will require strong evidence. Deeds and written instruments delivered to the donee are always good evidence, and an oral assignment where the assignor informs the debtor and supervises payment to the assignee would probably be upheld on this rule. Generally, though, a court would be wary of mere oral assignments. It also may be argued that such a rule prevents a donor from changing his mind and retracting his gift, and that there is nothing unconscionable in this where the donee has provided no consideration. But this argument neglects the social reality that gifts are usually thought of as permanent, unless there is some agreement to the contrary. Gifts are retained permanently without any social condemnation, even though the recipient has provided the donor with nothing valuable. A gift is not a commercial arrangement where a person who performs his promise will not be allowed to retract his performance when the other party has provided valuable consideration for the promise.

2. *Sufficient Equitable Consideration*

Chamberlain J., gave a second ground for upholding the validity of the assignment: he held that, even if the gift was deemed incomplete, there was sufficient consideration for equity to enforce the assignment against the assignor and his executors.

Noting Windeyer J.'s statement in *Norman* v. *Federal Commissioner of Taxation*[31] that the consideration which equity deemed sufficient for this purpose was not the same as the valuable consideration required in the law of Contract, Chamberlain J. defined the concept of equitable consideration:

> "I take the principle to be that if there is something to bind the conscience of the assignor, equity will recognize an assignment which the assignor has done all that the nature of the property requires to be done on his part to complete"[32].

Two things should immediately be noted about this principle. First, if the assignment is one in which the assignor has done all that the nature of the property required to be done on his part to complete, then, according to the law in *Norman* v. *Federal Commissioner of Taxation*[33] which Chamberlain J. has adopted, this is a completed gift, and thus one which does not need consideration for equity to enforce it. What he must be referring to here is the requirement of an intent to assign, that is, the donor must have sufficiently manifested his intention to make a permanent transfer of the debt, without necessarily going so far as to complete the gift[34]. This requirement is essential for any purported assignment, whether for value or not.

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31. (1962) 109 C.L.R. 9, at 31.
32. (1967) L.S.J. Scheme 386, at 341.
33. (1962) 109 C.L.R. 9.
34. This was the basic issue in *Antrobus* v. *Smith* (1806) 12 Ves. 39, where an alleged written assignment was kept in the assignor's possession during his life. Held: no equitable assignment.

Secondly, the only authority which his Honour relies on for his statement of principle is by induction from the undoubted rule that an assignment in satisfaction of an antecedent debt was taken in equity as made for value. Apart from the questionable logic in moving to such a broadly stated principle from only one particular premiss, Megarry[35] has cited moden authorities[36] to the effect that "at common law, payment of an existing debt is payment for valuable consideration"[37]. Thus Chamberlain J. cannot use this rule to show that valuable consideration in equity is different from valuable consideration at law.

Applying his test of consideration, he found that there was something to bind the conscience of the assignor. The deceased had promised to leave his intended wife an annuity of a certain amount. In compensation for not doing so in full, he attempted to transfer a debt to her, and acted as if the debt were hers—for example, he supervised the payment of interest to her. Relying on this, the defendant did not complain about the terms of the will, and did not make a claim under the Testator's Family Maintenance Act, 1918 (S.A.)[38]. These are the circumstances which bind the conscience of the assignor, and which provide the consideration for the assignment.

The best approach to analysis of this reasoning is to isolate the main elements in these facts, and test whether they fit any known category of consideration in equity. This is because, as K. W. Ryan[39] points out, there is nowhere in the text books a consolidated treatment of the concept of consideration in equity. He therefore adopts the approach of analyzing the meaning of consideration in different fields of equity. There appear to be two main elements here:

1. The general moral duty of a husband to maintain his wife in the position in life to which she is accustomed. This moral duty is accentuated by his previous promise. It existed at the time of the attempted gift, and so the consideration, if it is found to be so, is contemporaneous with the gift.

2. The detriment suffered by the defendant in relying on the gift—she failed to complain about the will or to institute proceedings under the Testator's Family Maintenance Act, 1918. This detriment could not be valuable consideration at law, because it was not incurred in return for the gift, or as a condition of the gift. It was just a subsequent consequence of the promise. However, Chamberlain J. maintains that this *"ex post facto"* consideration is sufficient in equity.

As to the first point. This moral obligation to provide is nothing more than

35. In a note in (1943) 59 Law Quarterly Review 208.

36. E.g. *Currie* v. *Misa* (1875) L.R. 10 Ex. 153. Held: at common law a negotiable instrument given on account of a pre-existing debt is given for value.

37. *Taylor* v. *Blakelock* (1886) 32 Ch.D. 568, at 570 per Bowen L.J.

38. An Act enabling relatives of a testator to apply to the Court for more adequate provision out of the testator's estate: the ante-nuptial contract, unenforceable at law for lack of writing, would be relevant in consideration of such an application.

39. "Equity and the Doctrine of Consideration" (1964) 2 Adelaide Law Review 189, at 189.

"meritorious" or "good" consideration[40]. Is meritorious consideration sufficient in equity to enforce an incomplete assignment? K. W. Ryan[41] has traced the meaning of consideration in different branches of the law. He notes that in the 18th century it was thought that meritorious consideration was sufficient to enable an action for specific performance of a promise to be brought. However, he goes on to say[42], "That a decree of specific performance would not be made in favour of a grantee who had given only meritorious consideration was first clearly established only in 1841 in the case of *Jefferys* v. *Jefferys*"[43]. He then discusses the necessity for valuable consideration for a trust to be created where there is either an unperformed promise to create a trust, or an ineffectual attempt at transfer of property to trustees. Next, he discusses voluntary equitable assignments, and he makes it clear that valuable consideration has the same meaning in these three branches of equity, and that meritorious consideration will not suffice.

This conclusion is supported by J. C. Hall[44] and by Dean Pound[45], whose approach in examining the concept of consideration in equity is to start off with the statement that it is the same as consideration at common law, and then to list cases in which this is not so. He lists six such cases[46], none of which supports the proposition impliedly contended for by Chamberlain J., viz., that a moral duty to provide is a sufficient consideration in equity for a gift of a chose in action. The principle of reformation of a defective instrument conveying property to a wife where there is only a moral duty to provide looks close to this proposition. Pound observes that the courts regard this meritorious consideration as "sufficient to validate the transaction in equity, although it creates no obligation in law"[47]. However, this principle does not seem to exist outside the United States, and, even if it did, it is limited to reformation of *written* instruments; for example Davis J. in *Powell* v. *Morisey:* "Upon a review of the authorities, this, we think, is as far as equity as has gone, and it will only perfect or correct mistakes in deeds supported by valuable or meritorious consideration"[48].

To this list of authority for the propositions that, in the context of equitable assignments of legal choses in action,

1. meritorious consideration is not sufficient consideration in equity, and

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40. E.g. *Snell's Principles of Equity* (26th ed., 1966) at 136 defines "meritorious considerations" as "considerations of blood and natural affection, or of generosity and moral duty."
41. "Equity and the Doctrine of Consideration" (1964) 2 Adelaide Law Review 189.
42. *Id.,* at 198.
43. (1841) Cr. & P. 138, at 141.
44. "Gift of Part of a Debt" (1959) Cambridge Law Journal 99, at 106, citing *Dillon* v. *Coppin* (1839) 4 My. & Cr. 647 for the proposition that valuable consideration in the legal sense is necessary.
45. "Consideration in Equity" (1919) 13 Illinois Law Review 667, reprinted in *Selected Essays on Equity* (1955) at 207, from which the following citations are taken.
46. *Id.,* at 208, e.g. (1) a gratuitous declaration of trust without transmutation of possession. (2) a covenant to hold real property in trust for another in "consideration" of natural love and affection, etc.
47. *Id.,* at 216.
48. (1887) 98 N.C. 426, at 428.

2. valuable consideration means the same in equity as at common law,

we may add the decision of Gavan Duffy J. in *Bruce* v. *Tyley*[49]. He held there that natural love and affection between husband and wife was not valuable consideration in equity to support an assignment of a legal chose in action.

As to the second element. Chamberlain J. finds sufficient consideration in subsequent circumstances, which bind the conscience of the deceased and his executors, and thus make the assignment effective, at least between assignor and assignee.

This doctrine, based as it is on subsequent circumstances, involves the possibility of a gift changing its nature through matters remote from the intent of the parties. On Chamberlain J.'s theory, the gift, when first made, could not be enforced in equity against the assignor, because there is nothing to bind his conscience—his wife has not yet acted on it to her detriment. Later, when she does rely on it, the gift becomes enforceable. Conceivably, still later circumstances could make the attempted transfer once more unenforceable. This could not happen here, because the assignor is dead, but obviously this theory of consideration would allow it in another situation. Surely, we are entitled to ask, equity does not act like this? The validity of a gift in equity is judged at the time it is made—it does not depend on subsequent circumstances. This assumption runs through all the cases, and the *onus probandi* for his proposition is on Chamberlain J.

When Chamberlain J.'s principle in its widest form is analyzed, it comes down to this: equity will recognize an assignment where, because of the circumstances either before or after the making of the gift, the assignor has a moral obligation not to retract his gift. It has been shown that equity did not regard a moral obligation to make a gift as sufficient consideration. It would be somewhat surprising to find that equity regarded a moral obligation not to retract the gift as sufficient consideration.

A rule of equity which bears superficial resemblance to the situation in the present case where the defendant relied on the gift to her detriment is the rule, expounded in *Dilwyn* v. *Llewelyn*[50], to the effect that if A gratuitously promises to convey land to B, and B, relying on the promise, enters on the land and makes improvements to it, equity will compel A to carry out his promise, and complete the imperfect gift. It seems to be accepted[51] that this rule is an exception to the principle that equity will not perfect an imperfect gift, and that it is based not on any notional contract, nor on a valuable consideration to be found in subsequent conduct, but on a "supervening equity"[52] which arises because the donee, in reliance on the gratuitous imperfect conveyance or promise to convey, acts to his detriment with the acquiesence of the donor.

This rule is restricted to parol gifts of *land*, and does not help Mrs. Dyson.

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49. (1916) 21 C.L.R. 277.

50. (1862) 4 De G. F. & J. 517.

51. By K. W. Ryan: "Equity and the Doctrine of Consideration" (1964) 2 Adelaide Law Review 189, at 207 and by D. E. Allan: "An Equity to Perfect a Gift" (1963) 79 Law Quarterly Review 238, at 245-246.

52. In the words of Gresson J. in *Thomas* v. *Thomas* (1958) N.Z.L.R. 785 at 794.

D. E. Allan has speculated[53] on the consequence of extending *Dilwyn* v. *Llewelyn*[50] into a general principle relating to the enforcement of voluntary promises by people who have acted on them to their detriment with the acquiescence of the promisor. He is in favour of this, although he realizes that it would mean an end to the doctrine of consideration as we know it as a detriment suffered in return for, or as a condition of, the promise. It would involve both an extension of the scope of the *High Trees*[54] doctrine of promissory estoppel (which the Privy Council in *Emmanuel Ayodeji Ajayi* v. *Briscoe*[55] seemed loathe to do), and its change from a shield into a sword. At the moment, both these changes seem a long way off in English Law.

The case of *German* v. *Yates*[25] again seems to be a direct authority in favour of Chamberlain J.'s ruling that there is consideration on the facts, but his Honour did not cite it. There, Lush J. held that there was consideration for an assignment which to all intents was voluntary, apparently because the parties believed that the assignment was a valid transaction. The case seems against the weight of authority, and the reasoning is obscure and unconvincing. G. H. Treitel[56] did not accept this argument.

3. *Assent by Debtor*

The third ground of the decision seems to be independent of any question of whether there has been a valid assignment of the debt. It turns on the fact that the debtor, R.T.E. Constructions Ltd., has assented to the assignment. Chamberlain J. recounts the case of *Harding* v. *Harding*[57] in which it was held, *inter alia,* that because the debtor assented to the assignment, he is regarded as trustee for the assignee. The debtor could not be trustee in this case, but his assent is still significant, according to Chamberlain J., who goes on to say:

> ". . . there was a binding arrangement between the deceased and the debtor consisting of a promise by the deceased to forgo any further claim to the debt in exchange for the debtor's promise to pay it to the defendant. Whether by way of a principle of equity, or by the ordinary law of contract, this arrangement appears to me to be sufficient to have precluded both the deceased from denying the gift and the debtor from disputing that the gift belonged to the defendant"[58].

He does not specify exactly the reasoning for his decision, but three possible grounds suggest themselves.

The emphasis on "precluded from denying the gift"[59], and, later, "the plaintiffs are estopped from denying the validity of the assignment"[60] suggests

53. "An Equity to Perfect a Gift" (1963) 79 Law Quarterly Review 238, at 246.
54. *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (1947) K.B. 130.
55. [1964] 3 All E.R. 556.
56. *The Law of Contract* (1st ed., 1962) at 447, n. 95.
57. (1886) 17 Q.B.D. 442.
58. (1967) L.S.J. Scheme 336, at 339.
59. *Ibid.*
60. *Id.,* at 341.

a use of the principle of promissory estoppel, as expounded in the *High Trees* case[54]. The deceased's promise to forgo any further claim to the debt was, we assume, communicated to the assignee, it was intended to be acted upon, and it was so acted on. In this case, equity will not allow the deceased to act inconsistently with it—he is estopped from asserting that the debt is his.

If this reasoning is accepted, there are two objections to it. First, in the latest statement of the principle of promissory estoppel the Privy Council in *Emmanuel Ayodeji Ajayi* v. *Briscoe*[61] showed a tendency to restrict the scope of the principle, and confined it to promises not to enforce contractual rights made by one party by a contract to another[62]. In *Olsson & Olsson* v. *Dyson*[1] there is no such contract between the deceased and his wife, and thus no scope for any promissory estoppel.

The second, perhaps more fundamental, objection to the use of the doctrine is this: "the doctrine may afford a defence against the enforcement or otherwise of enforceable rights: it cannot create a cause of action"[63]. *Olsson & Olsson* v. *Dyson*[1] involves proceedings where the defendant claims payment of the debt. To be able to do so she must be able to say that she is the owner of the debt, and able to sue, by transfer or by enforceable contract. That the deceased is estopped from making a claim does not help the defendant—it effects no transfer and creates no cause of action in contract. A similar fate befalls any attempt to rely on the debtor's promise to pay the defendant.

What Chamberlain J. may have had in mind in referring to the "ordinary law of contract"[64] is a novation. The three parties agree that, from henceforth, the debt previously owed to the deceased shall be owed to the defendant. This is a tripartite contract, and depends for its validity on all the usual requirements for a contract being present. There is consent to this arrangement in all parties. The deceased releases the debt owed by him in consideration of the debtor's promise to pay to the person nominated by the deceased. The defendant obtains his right to sue under the new contract, and not by any form of assignment. Thus to obtain this right, she must have provided consideration for the debtor's promise to pay her. The consideration must move from the promisee, but it does not necessarily have to move to the promisor. In many cases, the person in the defendant's position will be a creditor of the person in Mrs. Dyson's position, and will provide consideration in agreeing to release his former claim. Here the defendant is not a creditor, and it is apparent that she has provided no consideration, and thus she cannot obtain a right to sue for the debt by novation at common law.

A principle of quasi-contract turning on the assent given by the debtor which supports Chamberlain J.'s decision is that drawn from the recent case of *Shamia* v. *Joory*[65]. The principle is stated in the Australian edition of *Cheshire & Fifoot:*

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61. [1964] 3 All E.R. 556, at 559.
62. This is the conclusion drawn by Spencer Bower and Turner: *The Law Relating to Estoppel by Misrepresentation* (2nd ed., 1966) at 341.
63. *Beesly* v. *Hallwood Estates Ltd.* [1960] 2 All E.R. 314, at 324, per Buckley J.
64. (1967) L.S.J. Scheme 336, at 339.
65. [1958] 1 Q.B. 448.

"A may sue B for money had and received to his use if

1. B has in his hands money belonging to X or is under a monetary liability of any kind to X;

2. X directs B to pay the whole or part of the sum involved to A; and

3. B notifies A he is ready and willing to pay him."[66]

In *Shamia* v. *Joory*[65], J owed Y £13,000 on a running account. Y wished to give S (his brother) £500, and requested J to pay £500 to S. J agreed, and wrote to the plaintiff promising to pay him the money. Later he refused to make payment. S sued J for money had and received, and Barry J. allowed the action. In the present case, the defendant is a donee, not a creditor, like S, and R.T.E. Constructions Ltd. merely owes money to the deceased, and does not have a fund in their hands representing his money, like J. These facts might have been relevant if old authorities had been cited[67]. However, Barry J. did not advert to these problems.

Thus, it seems that, on the authority of *Shamia* v. *Joory*[65], Mrs. Dyson has a legal right to recover the money from the debtor, and Chamberlain J.'s judgment for the defendant is justified. It is noteworthy that because the debtor assents, the donee gains a legal right to recover the debt in quasi-contract without having to provide any consideration for the gift. She would have to provide consideration if there were no assent, and if she had to rely on assignment for her right of recovery. This position causes J. D. Davies and A. L. Diamond to doubt *Shamia* v. *Joory*[65].

Summing up, it appears that Chamberlain J.'s decision for the defendant can be upheld on the third ground, but it must be incorrect on the first ground (that there is an assignment complete in equity) and on the second (that there is valuable consideration for the assignment). The defeat of a donor's intentions which would have eventuated if the debtor had not assented to the assignment leads one to the conclusion that the law of assignments is in an unsatisfactory state. Perhaps a statute giving the assignee the remedies provided by section 15 of the S.A. Law of Property Act and embodying the terms of the rule contended for in the English edition of *Cheshire and Fifoot*[70] would be an improvement.

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66. Australian ed. (1966), at 799.
67. See J. D. Davies: "A Forgotten Chapter in Quasi-Contract" (1959) 75 Law Quarterly Review 220.
68. *Id.*, at 232.
69. In a note on *Shamia* v. *Joory* in (1959) 22 Modern Law Review 204 at 206.
70. *The Law of Contract* (3rd ed., 1952) at 415.

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