scope and nature of the standard of care expected of a reasonable schoolteacher. With the size of classes in State schools increasing and the pressure under which many teachers are forced to work becoming more intense, there is a pressing need for a clear exposition from the legislature or the judiciary of the duties of a schoolteacher in this context.

R. S. LANCY

OLSSON v. DYSON[1]

Chose in Action—Gift—Novation of Contract—Dillwyn v. Llewellyn[2]

A Mr Dyson had lent money on interest to a company in 1961. He desired to make an inter vivos gift of the debt to his wife. To this end he told his wife: 'You can have the £2,000 I loaned to Tom' (Tom Francis being the manager of the debtor company). Dyson later told Francis, Mrs Dyson not being present at the conversation, that he had given the debt to his wife, and that the interest was to be paid to her in the future. The company altered its books accordingly and thereafter paid the interest to Mrs Dyson by cheques made out in her name. There was evidence of a pre-nuptial contract between Dyson and his wife, by which Dyson promised her an annuity of £20 a week. In a will executed soon after the marriage, but before the above transaction took place, Dyson left his wife only £780 a year.

Dyson died in 1962 and the debtor company continued to pay the interest to Mrs Dyson. In 1964 the executors of Dyson discovered the existence of the debt and started proceedings against the company to have the debt paid to them. The executors claimed that the debt was part of Dyson's estate at the date of his death, the attempt to give it to Mrs Dyson being ineffective. Mrs Dyson claimed that the debt was hers. The company paid the amount in question into court and the issue then arose between Mrs Dyson and the executors as to whom the debt should be paid. The case came before Chamberlain J. in the Supreme Court of South Australia, and His Honour found in favour of Mrs Dyson.[3] The executors appealed to the High Court. The respondent relied on several grounds to support her claim: on an effective equitable assignment of the debt; an equity to compel the executors to make good Dyson's attempted gift; an estoppel; and on a right to the debt arising from a novation of the contract between Dyson and the debtor company. The High Court, by a majority decision, allowed the appeal, dismissing all these claims. The majority decision was delivered by Kitto J. (Menzies and Taylor JJ. concurring), whilst Barwick C.J and Windeyer J. delivered dissenting judgments.

Assignment of the Debt in Equity

It was not argued that there was an assignment of the debt at law. Section 15 of the Law of Property Act 1936 (S.A)[4] demands of a legal assignment that there be a writing signed by the assignor, and a written notice given to the debtor; Dyson, however, had purported to assign his debt orally.

But could there be an oral *equitable* assignment of the debt? Yes, answered the trial judge. Both of the statutory requirements could be dispensed with, and equity might still consider the gift valid. No, corrected the High Court, unani-

[1] (1969) 43 A.L.J.R. 77. High Court of Australia; Barwick C.J., Kitto, Menzies, Taylor and Windeyer JJ.
[2] (1862) 4 De G.F. & J. 517.
[3] [1967] S.A.S.R. 343.
[4] Compare Property Law Act 1958, s. 134.

mous on the point. There is no equity to perfect a gift which is imperfect as a legal assignment because the assignor has not signed a writing

It is of interest to note that Windeyer J. went on to consider what would have been the position if Dyson had signed a writing and the only thing lacking to complete the assignment at law was a written notice to the debtor. This very problem had split the High Court in *Anning v. Anning*.[5] Isaacs J. there took the rigid view that once a statutory method had been provided for assigning debts at law, this method had to be fully complied with before equity would consider the assignment complete. Higgins J. decided that in those circumstances the gift would not be considered complete in equity. Equity demanded that the assignor do all that it lay within his power to do, and it lay in the assignor's power to give the written notice to the debtor. Griffith C.J., however, took the view that equity would consider a gift valid once the donor had done all that he as donor was required to do; and notice to the debtor could equally be given by the assignee.[6]

In *Olsson v. Dyson*, Windeyer J. adopted the analysis of Griffith C.J., repeating the view His Honour had already enunciated in *Norman v Federal Commissioner of Taxation*.[7] Barwick C.J. and Kitto J., however, felt no need to discuss the much debated point.

The High Court was also unanimous on the point that there was no consideration to save the ineffective assignment. Dyson had promised his wife an annuity of £20 a week under their pre-nuptial contract. In his will he left her only £780 a year. The respondent claimed that she had accepted the debt in satisfaction of Dyson's promise as to the deficiency. The High Court rejected the claim; there was no evidence that Dyson intended the assignment of the debt to be in satisfaction of his promise as to the annuity, and no evidence that his wife accepted it as such.

A Novation of the Contract Between Dyson and the Debtor Company

The respondent relied on the conversation between Dyson and Francis (acting as agent for his company) to establish that the original promise of the debtor to Dyson, to pay the debt to him, was extinguished, and in its place stood a fresh promise by the debtor to pay the respondent instead. Two variations were suggested: that the debtor's promise was made to Dyson alone, or was made to both Dyson and the respondent. But whatever the position the consideration for the debtor's new promise would be the same—Dyson's promise to release it from its indebtedness to himself. On the latter alternative, Mrs Dyson would be a joint promisee with Dyson, and therefore privy to the consideration which flowed from Dyson.[8] Kitto J. rejected altogether the claim that a novation of the contract had taken place.

The claim that there was a tripartite agreement between Dyson, the debtor, and the respondent, was according to Kitto J. 'out of the question'.[9] The respondent had not been present at the conversation between Dyson and Francis and she had never spoken to Francis about the matter. The argument that Francis had promised Dyson alone to pay the debt to the respondent was more feasible; but it too could not stand. For it inheres in the nature of a contract, as a bargain, that consideration is to be understood not merely as representing

[5] (1907) 4 C.L.R. 1049.

[6] The dispute between Griffith C.J. and Higgins J. turned on the interpretation to be given to the now classical statement in *Milroy v. Lord* (1862) 4 De G. F. & J. 264, *per* Turner L.J.

[7] (1963) 109 C.L.R. 9.

[8] *Coulls v. Bagot's Executor and Trustee Co. Ltd* (1967) 40 A.L.J.R. 471.

[9] (1969) 43 A.L.J.R. 77, 81.

the commercial element in every bargain, but as also expressing the necessary correlation of bargain.[10] Dyson, however, according to Kitto J., did not 'request' Francis to do anything—he did not 'offer' Francis his promise to release the debtor from its indebtedness to himself in return for the debtor's promise to pay the respondent the amount of the debt. On the contrary, Dyson presented Francis with 'a fait accompli'.[11] It was as though Dyson had told Francis during the conversation: 'I have given the debt to my wife. I would like your co-operation in the matter, but if you do not agree, nothing to the point for you have no say in the matter'. There could not be, in these circumstances, any contract.

The Chief Justice and Windeyer J., however, accepted that a novation of the contract between Dyson and the debtor had taken place, and that the respondent would succeed in her claim to be paid the debt on this ground. Both rejected, as did Kitto J., the argument that there was in the place of the old contract between Dyson and the debtor a new tripartite agreement. The dissenting judgments were rather based on the ground that Francis had promised Dyson alone to pay the respondent the debt. This interpretation of the facts, however, caused some difficulty to the respondent's case. For in those circumstances she would be neither privy to the agreement nor to the consideration, and so could not sue the debtor on its promise made to Dyson to pay her. *Coulls v. Bagot's Executor and Trustee Co. Ltd*,[12] in the High Court, and *Beswick v. Beswick*,[13] in the House of Lords, were clear authorities for this proposition. How then could Barwick C.J. and Windeyer J. find in favour of the respondent? The answer lies in the form of the question presented to the High Court for decision. The issue before the High Court was whether the debt was 'payable to and recoverable by the plaintiffs [the appellants] or the claimant [the respondent]'.

According to Barwick C.J. and Windeyer J. the rights of the parties were to be governed by the new contract between Dyson and the debtor. The situation effected by the novation of the old contract between Dyson and the debtor was 'the old and much discussed question of a contract for the benefit of a third party—a contract between A and B that B will pay money to C'.[14] The executors of Dyson could not 'recover' the debt, for the debtor's promise to pay Dyson the debt was extinguished by the novation of the contract. Nor, however, could the respondent 'recover' the money, for she was not a party to the new substituted contract. As Windeyer J. puts it: 'Dyson had ceased to be a creditor of the company; but his wife had not become a creditor in strict sense of the law'.[15] But this was a technicality only. The question was, who was to get the money? The debtor promised to pay it to the respondent; and the executors could, if they so wished, obtain a decree of specific performance to compel the debtor to fulfil its promise. In justice then, for it accorded with the undoubted intention of Dyson, and with the understanding of the respondent and the debtor, the money should go to the respondent. It was not so much that the respondent had a *right* to recover the debt; but rather, that as between the parties, the appellant's claim was weaker than that of the respondent.

According to the dissenting judgments, no assignment of the debt had taken place; rather, the respondent succeeded in her claim because a novation of a contract had taken place. According to Windeyer J.

[10] *Australian Woollen Mills Pty Ltd v. Commonwealth* (1954) 92 C.L.R. 424.
[11] (1969) 43 A.L.J.R. 77, 81.
[12] (1967) 40 A.L.J.R. 471.
[13] [1968] A.C. 58.
[14] (1969) 43 A.L.J.R. 77, 87.
[15] *Ibid.* 88.

> The ultimate distinction, in juristic analysis, between a transfer of a debt by assignment and by novation is simple enough. Novation is the making of a new contract between a creditor and his debtor in consideration of the extinguishment of the obligations of the old contract . . . The assignment of a debt, on the other hand, it not a transaction between the creditor and the debtor. It is a transaction between the creditor and the assignee to which the assent of the debtor is not needed'.[16]

It could be argued, however, that a novation is not, as His Honour stated, a 'transfer' of a debt, and that herein lies the 'ultimate juristic distinction between novation and assignment'. For one cannot save an intended assignment by creating a novation out of the facts—an assignment involves an intention to transfer an existing debt, whereas a novation effects the extinguishment of the existing debt and the creation of a new one. Windeyer J. appears to accept that Dyson's intention was to transfer his debt by giving, or assigning it to his wife. By accepting that a novation took place, His Honour's judgment must therefore reduce Dyson's intention to the following. Dyson intended to assign the debt to his wife. If, however, the assignment was invalid, then he intended to effect a novation of his contract with Francis by entering into a new contract with Francis. His Honour, however, did not allude to this point.

Promissory Estoppel

Dyson had told his wife that the debt was hers; she claimed that on the faith of this representation she refrained from applying for additional provision out of her deceased husband's estate—she acted, that is, to her detriment. The executors of Dyson, she argued, were therefore estopped from denying her title to the debt.

The High Court gave a short answer to this claim. The issue was, to whom should the debt be paid, and even if all the grounds for a promissory estoppel were respent, it could only operate as a 'shield' or a defence to a claim made against her by the executors. It could not operate as a 'sword'— so as to give the respondent a right to the debt.

An Equity to Compel Completion of the Gift

Perhaps the most interesting argument advanced by the respondent, was that based on the 'rationale of *Dillwyn v. Llewellyn*.[17] Mrs Dyson claimed that she had an equity to compel the executors to complete Dyson's admittedly imperfect gift to her.

Professor Allen has written on the consequences of *Dillwyn v. Llewellyn* being 'liberated from its context of purported gifts of land and stated in terms of a general principle relating to the rights of volunteers'.[18] The judgment of Kitto J. has apparently effected such a 'liberation'. His Honour, in the context of the statement that equity will not perfect an imperfect gift, recognized an exception to this rule.

> True it is that some subsequent conduct of the intending donor, encouraging or inducing the intended donee to act to his prejudice on the footing that the property or some interest in it has become his, may make it unconscionable for the donor to withhold the property or interest from the donee, and equity may on that ground hold the donee to be entitled to the property.[19]

[16] *Ibid.* 86.
[17] (1862) 4 De G.F & J. 517.
[18] 'An Equity to complete a Gift' (1963) 79 *Law Quarterly Review* 238.
[19] (1969) 43 A.L.J.R. 77, 81.

Kitto J. interpreted the equity to compel completion of an imperfect gift as dependent upon some conduct of the donor subsequent in time to the initial representation. 'Thus in a case of this kind what gives rise to an equity which the attempted making of the gift did not by itself create is the conduct of the intending donor after the act of incomplete gift'.[20] There was not, however, according to His Honour, any such 'subsequent conduct' after the making of the representation by Dyson. Dyson believed that he had made his wife a gift of the debt by his telling her the gift was hers. And the matter ended there, for Dyson did nothing to induce his wife to act to her detriment.

LESLIE GLICK

CARRACHER v. COLONIAL MUTUAL LIFE INSURANCE SOCIETY LTD[1]

Constitutional Law—Inter se *Questions*—*Insurance*

The case concerned an application by the defendant society under section 5 of the Arbitration Act 1958 to stay proceedings and refer the subject of litigation to arbitration in accordance with the agreement arrived at between the parties. The proceedings had been instituted by Mrs Jacqueline Carracher, as the assignee of a policy issued in 1960, to recover the sum assured by the defendant society on the life of her late husband, Desmond Carracher. The society by the policy agreed to pay the sum of £5000 together with bonuses upon the death of the assured. In addition, on 8 August 1962, the society agreed with the then assignees of the policy (the trustees of Carracher Brothers) in a document called 'an annexure' to pay, *inter alia*, an additional amount equal to the sum assured upon the death of the assured by accident happening after the date of the assignment. There was thereafter a further variation of the policy (important in relation to aspects of the case not fully noted here) and two further assignments whereby on 20 October 1966 the assured's wife, the present plaintiff, became entitled to the benefit of the policy. In December of the same year the assured, Desmond Carracher, died in a motor accident.

The defendant society upon the death of the assured admitted its liability under the original policy but denied liability under the annexure, relying upon one of the exclusions contained in the annexure which expressly provided that it did not extend to or cover death caused wholly or partly, directly or indirectly, whilst the assured was, because of intoxicating liquor, less capable than usual of exercising care. It appeared from the depositions of the coronial inquest that the alcohol content of the deceased's blood was very high.

The plaintiff then sued to recover the amount assured but the society sought to stay these proceedings relying upon a condition of the annexure to the effect that all differences between the parties arising out of the annexure should, if so required by the society, at any time be referred to arbitration of two persons (one to be appointed by each party to the reference) or their umpire and further that the annexure should be deemed to be a submission to arbitration within the statute or statutes regulating submissions to arbitration for the time being in force in Victoria. It was further provided that a determination in the manner aforesaid should be a condition precedent to the liability of the society under the annexure or the commencement of any proceedings against the society at law or equity.

The question, therefore, for Gillard J. was whether the defendant was en-

[20] *Ibid.* 82.

[1] [1968] V.R. 605. Supreme Court of Victoria; Gillard J.