*Voluntary Equitable Assignment.*

In *Anning* v. *Anning*[2] two members of the High Court had held that where a purported voluntary assignment had not passed the legal title, the question whether the assignee took an equitable title depended on whether the assignor had done everything *in his power* to make the assignment fully effectual at law. Griffith C.J. on the contrary was of opinion that it was enough that the assignor had done everything which it was *necessary* for him to do to perfect the assignment. Thus in that case the defect which prevented the assignment from being effective at law was failure to give notice to the debtor. Griffith C.J. regarded this as not fatal to the equitable validity of the assignment. It was not obligatory that the *assignor* give the notice; the assignee could have done it. In *Re Rose*[3] the question was as to the title of the transferee under a voluntary transfer of company shares where at the relevant time the deceased transferor had signed transfers in the form required by the company's articles and had handed these together with the relevant share certificates to the transferees, but the transfers had not been registered in the books of the company. Such registration was necessary to pass legal title. It was held that as the deceased had done everything in his power (*sic*) to transfer his legal and beneficial interest there was a valid assignment in equity and pending the registration of the transfers the deceased was a bare trustee for the transferees. In view of the phrasing of the headnote and the emphasis on what lay in the *power* of the deceased to do, this would on the face of it seem to represent an adoption of a test identical with that of Isaac and Higgins JJ. in the Australian case. Yet to so regard it would obviously be a misapplication. The deceased of course could not attend to the registration himself but it lay within his power to lodge or present the transfers for registration. Consequently it could not be said that he had done everything that he could have done. On the other hand there was no explicit adoption of the "necessity" test of Griffith C.J. In truth the Court seems to have limited its enquiry to the question of what could be done in the way of *execution of documents* and the basis of the decision seems to lie in what was said by Evershed M.R.[4] that if a document is apt and proper to transfer the property, if it is in truth the appropriate way in which the property must be transferred, then the transfer is complete from the donor's point of view and *Milroy* v. *Lord*[5] does not prevent the donor from being a trustee for the donee.

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2. 4 C.L.R. 1049.
3. [1952] Ch. 499.
4. [1952 Ch. at 510.
5. 4 De G.F. & J. 264.

## EVIDENCE.

*Evidence Improperly Received without Objection.*

The question that arose in *O'Brien* v. *Clegg* ([1951] St. R. Qd. 1; 1 U.Q.L.J. No. 3 p. 66), as to the effect to be given to inadmissible evidence received without objection, was considered by Smith J. in *Re Lilley* [1953] V.L.R. 98. The affidavit evidence adduced by the applicant on an *ex parte* motion for Letters of Administration contained hearsay, and Smith J. held that he should consider it on the footing that it was properly before him. He took the view that, although a Judge proceeding *ex parte* is entitled to exclude from consideration evidence to which objection could have been taken had the application before him been opposed, and although ordinarily it was perhaps the Judge's duty to do so when the interests of absent persons might be adversely affected by the granting of the application, the present was an unusual case in that it appeared that the only persons who could have any interest to oppose the motion would almost certainly not have objected to the evidence had they been present. He therefore thought that, if he did not give the applicant an opportunity to bring those persons before the Court as respondents, he ought to consider the evidence on the same footing as if this had been done. He therefore found it necessary to consider what the legal position would have been if the other persons interested had been represented and the evidence had been admitted without objection.

He reviewed a number of authorities and concluded that it is necessary to distinguish between cases in which the evidence is irrelevant or is excluded by an absolute rule of law, and cases in which the evidence is relevant and there is merely a privilege or a rule of evidence which a party has an option to take advantage of or not, as he chooses. His view was that in the former class of case a judge would be bound to refuse to consider the evidence notwithstanding a failure to object to it, but in the latter class of case a party by failing to object can effectively waive the privilege or the benefit of the rule of evidence, and when this has been done the evidence should be allowed to have its natural probative effect. In his opinion *Jacker* v. *International Cable Co. Ltd.* (1885) 5 T.L.R. 13 and *Miller* v. *Babu Madho Das* (1896) L.R. 23 Ind. App. 106 do not support the proposition in Phipson that if inadmissible evidence has been received, whether with or without objection, the Judge must reject it when giving judgment. He thought that the latter case was one in which the evidence was either irrelevant or prohibited by statute. As to the former case, which was a decision that evidence "wrongly admitted" without objection should be rejected, he considered that unless evidence was irrelevant, or prohibited by an absolute rule of law, it could not properly be said to have been wrongly admitted when no objection was taken to it. If this was not so he regarded *Jacker's Case*