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VOLUNTARY ASSIGNMENTS.

A very recent case in England, before the Lord Justices of Appeal,[1] has set at rest the long controversy as to the extent to which a voluntary assignment or settlement of a mere equitable interest, or of choses in action, will be enforced in a Court of Chancery. The question has always been one of considerable difficulty and importance, while the conclusion finally come to is at variance with the admitted tendency of the later authorities. On both these grounds, the decision is worthy at least of a passing notice, and we purpose, therefore, to devote to its examination, a few pages of this journal.

Perhaps the most often repeated maxim of equity is, that the Court never interferes in favor of a mere volunteer. Indeed, this is involved in the very nature of the system, which is not original and independent, but merely ancillary and supplemental. The Court of Chancery has from the beginning, confined itself to the enforcement of these claims, which, while there was no adequate remedy for them at law, it would be contrary to conscience to

[1] Kekewitch *vs.* Manning, 1 De Gex, Mac. & Gord. 176; 12 Engl. L. & Eq. 120.

resist. This "conscience" has perhaps grown in the course of time, to be a merely artificial and technical thing; as much bound by precedents as the law itself, but the idea and ground plan have never altered. It lies on the complainant always to make out a case of equitable right on his part, before the peculiar machinery of the Court can be set in motion. Now, however it may be in other countries, it is of the very structure of our law, that in order to constitute a binding contract, engagement or obligatien of any kind, in the absence of any particular formality, there must be something more than a mere intention of bounty, however decidedly entertained or strongly expressed. Some consideration is needed to give vitality to the obligation or promise. It is not necessary to enter into any defence of this doctrine, which is perhaps the only one possible in a trading people; it is sufficient that it is ours. Under this view, a volunteer has as against a donor or promisor, or those actually representing him, no equity whatever. There is no such thing to be admitted, as a compulsion to benevolence or liberality, as it is said there is none to mercy. It has therefore always been ruled that a Court of Chancery will not lend its aid to perfect any voluntary conveyance or transaction whatever;[1] and in this respect, equity goes even farther than law, in disregarding altogether the technical effect of a seal, in creating an artificial consideration.[2]

Thus much may be considered as perfectly clear. But there is another principle which is equally well founded, and equally of the essence of the doctrine of equity; but which starting from a different point, is sometimes difficult to reconcile with that just stated.

Where property, real or personal, is held in the name of a trustee, a chancellor now, as in the days of uses, treats the *cestui que trust* as absolute owner, and subjects the equitable estate to his dis-

[1] Colman *vs.* Sarell, 3 Bro. C. C., 12; Adams' Eq. 79; Hill on Trustees, 83; Bunn *vs.* Winthrop, 1 J. C. R. 329; Hayes *vs.* Kershaw, 1 Sandf. Ch. 261; Dennison *vs.* Goehring, 7 Barr, 175; Bank *vs.* May, 3 A. K. Marsh, 436.

[2] Ellison *vs.* Ellison, 6 Ves. 656; Cotteen *vs.* Missing, 1 Madd. 176: Kekewitch *vs.* Manning, ut supr., though see Caldwell *vs.* Williams, 1 Bail. Eq. 175; McIntire *vs.* Hughes, 4 Bibb. 186.

position, exactly as a court of law would do the legal estate, did he possess it. Any valid act on his part is considered to affect the conscience of the trustee; just as would a direction by a principal to his agent. Thus conveyances and assignments good at law, even such as would seem applicable only to legal estates, as a common recovery, are enforced in equity. It is plain, then, that in this point of view there is nothing to prevent the *cestui que trust* from transferring his interest by gift, any more than for consideration; for the trustee has as little right to object in the one case as the other. So far consequently, as from the nature of the property, or the mode of transfer, the further aid of the donor is unnecessary to perfect the gift; that is, where the transaction is complete; there is no reason why equity should withhold its assistance from the donee as against strangers.

Of course it is immaterial whether this gift of the equitable interest be cotemporaneous with, or subsequent to the creation of the trust.

But the main difficulty has not been touched. The question still remains, when is a transfer of such an interest perfect, and the transaction complete? The case of a direct immediate trust, where notice has been given to the trustee, and has been acted on, or the legal estate is transferred at the same time, or where the party by an express declaration makes himself a trustee, is free from embarrassment. There, if the donor repents of his act, it is he or some volunteer, who must ask the assistance of the court, to unravel what has been done, and to revest in him what he has parted with; and for that he certainly has no equity.[1] This has, however, been rarely called in question; it is to another class of cases that we refer.

Contingencies and possibilities, choses in action, such as debts, stock, policies of insurance, and all reversionary interests in personalty, are not capable of transfer by any means known to the law; but, in equity, they may unquestionably be assigned for a

[1] See Exparte Pye, 18 Ves. 140; Bill *vs.* Cureton, 2 My. & K. 503; Wheatley *vs.* Purr, 1 Keen, 551; McFadden *vs.* Jenkins, 1 Phill. 153; Bycroft *vs.* Christy, 3 Beav. 238; Collinson *vs.* Patrick, 2 Keen, 123.

valuable consideration; the assignor being treated as trustee for the assignee, and bound to permit the use of his name, in order to the recovery of the money or property. To make the transaction complete, in England, notice to the debtor or trustee is necessary,[1] though in America, in general, this is not required to the title of the transferree.[2] The ground in these cases for the interference of the Court is, as it once was in the creation of uses on the sale of land, that it would be inequitable for the assignor to refuse to perform his contract.

Suppose, now, the owner of such property wishes to make a gift of it. As he cannot transfer the title at law; nor, if *cestui que trust* himself, can equity, following the law, confer upon him any greater capacity of disposition, than if he were actually the holder of the legal title; is it sufficient for him to do all that is in his power, by manifesting distinctly his intention to transfer his equitable interest; or, on the other hand, will the Court treat it simply as an agreement to transfer, and therefore refuse its assistance to the assignee, as being a mere volunteer? On this question the cases have been very greatly in conflict, until the decision which we have referred to above, *Kekewitch* vs. *Manning*, which has at last settled the law, at least for England.

Before stating this case, however, we shall refer briefly to the prior decisions in order to a clear understanding of the extent and limits of the doctrine which it establishes.

As was remarked by Chancellor Kent, in *Bunn* vs. *Winthrop*,[3] there seems to have been much floating and unsettled opinion on these questions in the earlier cases. *Coleman* vs. *Sarel*[4] is usually referred to as the first which has laid down any definite rule on the subject. There a voluntary deed had been executed, purporting to be an assignment of stock to trustees, for J. S., a stranger, and her children; and in case the assignor survived them, he covenanted to pay the dividends for the benefit of the children. Lord Thurlow refused to support the assignment, remarking,

[1] See the cases in notes to Ryall *vs.* Rowles, 2 Lead. Cases Eq. p. 2, 209.
[2] Ibid, page 236, &c.
[3] 1 John. Ch. R. 336.
[4] 3 Br. C. C. 12; 1 Ves. jr. 50.

"Whenever you come into equity to *raise* an interest by way of trust, you must have a valuable, or at least a meritorious consideration." This was followed in *Ellison* vs. *Ellison*,[1] which was a voluntary settlement of leaseholds, &c., upheld by Lord Eldon. The latter stated the distinction thus: "If you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of creating you *cestui que trust*. As upon a covenant to transfer stock; if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced." In *Ex parte Pye*,[2] a case of an express declaration of trust of stock in the declaror's name, and also sustained, much the same language is used by the same learned judge. And in *Bunn* vs. *Winthrop*,[3] and other American decisions, this distinction has been quoted and acted on.

Other cases illustrate and develop the rule. Thus, in *Antrobus* vs. *Smith*,[4] there was an endorsement on a receipt for one of the subscriptions to a navigation company, purporting to be an assignment to the assignor's daughter, of all his right, title and interest in the call, and it was endeavored to support this as a declaration of trust; but Sir W. Grant refused to enforce the assignment, on the ground that it could pass no title in itself, and that the party could not be compelled to complete an imperfect gift. On the same ground a memorandum endorsed on a bond, accompanied by delivery;[5] a voluntary assignment of stock and shares by deed poll incapable of passing such property;[6] an assignment by deed of a contingent interest in personalty;[7] or of turnpike or road bonds or shares,[8] have each been held ineffectual to transfer any interest therein.

[1] 6 Ves. 656. [2] 18 Ves. 140. [3] 1 J. C. R. 329.

[4] 12 Ves. 39. [5] Edwards *vs.* Jones, 1 My. & Cr. 226.

[6] Dillon *vs.* Coppin, 4 My. & Cr. 647.

[7] Meek *vs.* Kettlewell, 1 Hare, 464; 1 Phill. 342.

[8] Searle *vs.* Law, 15 Sim. 95; see also Colman *vs.* Sarel, 3 Brown C. C. 12; Holloway *vs.* Headington, 8 Sim. 324; Beatson *vs.* Beatson, 13 Sim. 281.

A material distinction is made between a voluntary assignment of stock, or other choses in action, and a direct declaration of trust of the same species of property. In the former case, the party manifests no intention of becoming a trustee, and can be only made so by the construction of equity; in the latter, the Court only acts on the expressed intention.[1]

There are other decisions, however, which it has been found difficult to reconcile with those just stated. *Sloane* vs. *Cadogan*[2] is a case which has caused great discussion in this respect. There, Cadogan, who had an equitable reversionary interest in a fund vested in trustees, assigned to other trustees on trusts for volunteers. It was urged by Sir Edward Sugden, in arguing the case, that the settlement was ineffectual, as the property was incapable of actual transfer, and that the settler did all he could under the circumstances was not enough. But Sir W. Grant held that a complete trust had been created. He said, "The Court will not interfere to give perfection to the instrument; but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees; Mr. W. Cadogan had an equitable reversionary interest in that fund, and he assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here; for, when the trust is treated, no consideration is essential, and the Court will execute it, though voluntary." It is to be observed in this case, that there was no claim against the donor, or his representatives, and, therefore, the assistance of the Court was not invoked in aid of the assignment.

Two subsequent cases follow and support *Sloane* vs. *Cadogan*.

The first of these, *Fortescue* vs. *Barnett*,[3] was a decision of Sir John Leach. There had been an assignment by deed, of a policy of insurance on the assignor's life, in trust for volunteers. The deed was delivered to the trustees; but the grantor kept the policy in his own possession, and no notice of the assignment was given to

[1] Lord Cottenham in Dillon *vs.* Coppin, 4 My. & Cr. 647; Sir W. Grant in Antrobus *vs.* Smith, 12 Ves. 39.

[2] Stated in the Appendix to 3 Sugd. Vend. and Purch. No. xxvii. 10th Ed.

[3] 3 My. & K. 36.

the office. The Master of the Rolls supported the assignment as against the assignor, on the ground that all had been done of which the subject was capable. The other case was that of *Blakely* vs. *Brady*,[1] before Lord Plunkett in Ireland, in which he went to the length of holding, that a voluntary assignment by deed, (with an irrevocable power of attorney however,) in trust, of a debt, was valid, though no title passed at law; and the administrator of the assignor was declared a trustee.

These cases differ from those mentioned before, in adopting as the test, whether the party had done all he could, not whether the property was capable of transfer at all. On this point they might, until recently, have been considered overruled. In *Edwards* vs. *Jones*,[2] Lord Cottenham obviously considers *Sloane* vs. *Cadogan* and *Fortescue* vs. *Barnett* very doubtful authorities for the length to which they are cited. Sir Edward Sugden, whose opinion in such matters is of the greatest weight, disapproved of the former.[3] Sir Launcelot Shadwell, in *Beatson* vs. *Beatson*,[4] comments at length on it, and considers it sustainable on different grounds from those stated by Sir W. Grant; or else "the decision would not have been right." Lord Langdale, in *Ward* vs. *Audland*,[5] in a very similar case to *Fortescue* vs. *Barnett*, came to an opposite conclusion. And Sir J. Wigram in *Meek* vs. *Kettlewell*,[6] intimates his dissent from *Sloane* vs. *Cadogan*, in very distinct terms. The case of

[1] 2 Drc. & Walsh, 311. [2] 1 My. & Cr. 238. [3] 3 Vend. Purch. 297.

[4] 13 Sim. 281. See to same effect Holloway *vs.* Headington, 8 Id. 324.

[5] 8 Beav. 201.

[6] 1 Hare 474. On appeal (1 Phill. 341,) Lord Lyndhurst affirmed this case, which was that of the voluntary assignment by deed of a mere expectancy; he distinguished it from Sloane *vs.* Cadogan, on the ground that in the latter the reversionary interest was *vested;* while in the one before him nothing could pass presently in any way. But expectancies and possibilities may be assigned in equity for a consideration, so as to create a trust as well as vested interests. If then Sloane *vs.* Cadogan were right in asserting the criterion to be the assignor's "doing all in his power" to make the transfer; it is difficult to understand why the assignment in Meek *vs.* Kettlewell was held insufficient.

Antrobus vs. *Smith*,[1] on the other hand, is recognized and approved by Lord Cottenham in *Dillon* vs. *Coppin*.[2]

The doctrine then that the later cases establish is that a voluntary assignment which cannot operate on the legal title, amounts to an agreement to transfer only, and cannot be enforced in equity. For unless that title so passes, the donee or his trustees can never make the gift effectual with using the donor's name to sue at law; and to get the right to do this he or they must (at least theoretically) ask the aid of a Court of Chancery.

It now remains to consider the case which has given rise to the foregoing remarks—*Kekewitch* vs. *Manning*.[3] There, the report states, R. Kekewitch had bequeathed his stocks, funds and securities, to "his wife Elizabeth and his daughter Susannah, in trust for the wife, for her life, remainder to his daughter, absolutely; and appointed his wife and daughter executrices of the will." By a settlement made in contemplation of marriage, the daughter assigned during the mother's life, her interest under the will to trustees,[4] on certain trusts for the issue of the intended marriage, and a niece, as tenants in common; and in case there should be no issue of the marriage or they did not survive the mother, then, after life estates, to the niece. The mother was not a party to this settlement, but had notice of it before her death. The husband died shortly after the marriage and there was no issue; and no transfer of the fund was ever made. Susannah, then Lady Farrington, then being about to marry again, made a settlement of the same property to other trustees in trust for the issue of the second marriage; with a remainder as before to the niece. There was issue of this marriage, one child. The trustees of the first settlement then filed a bill against the second set of trustees, Susannah, and the child, to have the stock transferred by Lady Farrington to the first trustees; that the trusts of the first settlement might be executed; and that Lady Farring-

[1] 18 Ves. 39. [2] 4 My. & Cr. 671; see also Jefferys *vs.* Jefferys, Cr. & Ph. 120. See Hill on Trustees, 83, &c. Notes to Ellison *vs.* Ellison, 1 Lead. Cas. Eq. 210, &c., for a similar view of the authorities.

[3] Ut. Supra. [4] There was also a power of attorney in the deed, but no notice is taken of this in the opinion of the Court.

ton might be restrained from transferring the fund into the names of the trustees of the second settlement. Here was obviously a case of the very strongest kind against the interference of the Court. The interest was equitable, reversionary, and in property in action alone. The person against whom the deed was to be enforced, and that by the most stringent means at the disposal of a Chancellor, was the voluntary assignor herself, who had actually revoked it before it had ever been acted on. The circumstances to which the settlement was intended to apply had entirely changed; and its anticipations had proved unfounded. The whole transaction certainly appears in itself inchoate, imperfect, and ambulatory; while the attempt of the niece to avail herself of this chance, this obvious slip of the counsel who advised or the scrivener who drew the first deed, in order to appropriate a large part of the fortune of the child of the second marriage, is shocking to the natural feelings of every man. The rule must have been an unbending one indeed, and the precedents most ancient and harmonious which could force a Court of equity to submit to be the engine of such gross injustice. The Vice Chancellor, acting probably on some such idea, dismissed the bill with costs; but the Lord Justices reversed the decree, and held that the first assignment of Lady Farrington was irrevocable, and should be sustained.

The opinion of the Court was delivered by Sir Knight Bruce, and is characterized by the usual lucidity and force of that learned Judge. It was fully concurred in by Lord Cranworth, the present Chancellor, and must be understood, unless reversed by the House of Lords, to have laid down for the future the doctrine of equity on this much vexed subject. Our limits do not permit us to refer at any length to the case, which, indeed, is readily accessible to our readers; but we may state in a few words the conclusions established.

The basis and ground work of the whole argument is to be found in the broad and sweeping proposition announced by the Court at the outset. It was said to be clear on legal and equitable principles, "that a person *sui juris*, acting freely, fairly and with sufficient knowledge, ought to have, and *has it in his power*, to make,

in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced." This being admitted, it of course reduces the whole matter to the extremely narrow question, as to the mode by which the gift is to be effected; and doubtless, as the Court remarks, there is no better or more effectual way of doing this, than by an assignment. As to the doctrine, usually stated in such unqualified terms, with regard to the enforcement of voluntary deeds and agreements, which would interfere to check, in many cases, the practical application of this principle, admitted to be true, it is disposed of in these cautious words: "It is probably, or certainly in some instances the course of this jurisdiction, to decline acting at the suit of those whom it terms 'volunteers.' * * * But whatever rule there may be against these, it does not apply to the case of one who, in the language of this Court, is termed a *cestui que trust*, claiming against his trustee; for what is considered by this jurisdiction a trust, may certainly be created gratuitously." It is not stated directly, indeed, that an assignment is equivalent to a declaration of trust; but it is necessarily the suppressed premise of the enthymeme; and is also to be inferred from another part of the opinion, where it is intimated "that an instrument may be effectual as a declaration of trust, though it contain not the word 'confidence,' the word 'trust,' or the word 'trustee.'" On principle, the Court therefore hold, that a voluntary settlement of an equitable reversionary interest is perfectly binding, and may be enforced as against the settler. With regard to the authorities, *Sloane* vs. *Cadogan* and *Fortescue* vs. *Bennett*, are approved and followed, while *Colman* vs. *Sarel*, *Antrobus* vs. *Smith*, *Edwards* vs. *Jones*, and a string of other cases,[1] so far as they contravene or are contravened by the former,

[1] Sixteen of these are cited by the Lord Justice, to which may be added Sewell *vs.* Moxey, 2 Sim. (N. S) 182; 12 Eng. L. Eq. 304, decided a few days after Kekewitch *vs.* Manning, and apparently in ignorance of it, in which V. C. Kindersley treats the ineffectuality of a voluntary assignment by deed poll of a chose in action, as too clear for argument. On the other side are but three cases, for Wheatley *vs.* Purr, 1 Keen, 551, (particularly in connection with Lord Langdale's

(which the Court, however, thought it unnecessary to express any opinion on,) or were opposed to the plaintiff's title to relief, are overruled.

One question, indeed, the Court still leave open—the effect of the absence of notice to the debtor, in the case of a chose in action, or the trustee, in that of an equitable interest. But though some stress has been laid on this, in one or two prior cases, it can hardly be very material now, in the view which the Court, in the case before us, take of the subject. For, it might well be asked, what right could debtor or trustee have to resist any disposition, voluntarily or otherwise; and, therefore, why should they need any information with regard thereto? It could be only with reference to the intervening claims of third persons, that notice could be necessary, so as to protect against an ignorant or innocent mispayment.

The foregoing appears to be a fair abridgment of the reasoning of the Court. With the utmost deference to the opinion of the two extremely able and experienced equity judges, from whom that reasoning proceeds, we must confess that we do not find it so satisfactory or conclusive as that which has, certainly in a majority of the cases, been accepted. It appears to us, in the first place, that what we have seen to be laid down as the fundamental proposition, is merely a begging of the whole question. It is certainly the reverse of true, as a "*legal* principle," that "a man has the power to make a voluntary gift of any part of his property," for at law, as to all but property in possession, and vested reversionary interests in real estate, he cannot transfer his title even for a consideration. Then as an "*equitable* principle," whence does it arise? A Court of Chancery only gets over this imperative prohibition against the assignment of possibilities and choses in action,[1] where there *is consideration*, on the ground of such assignment being a

subsequent decision in Ward *vs.* Audland, 8 Beav. 201,) and Ellison *vs.* Ellison, *ut supra*, can hardly be deemed very direct authorities on the particular point on either side.

[1] Created, says Lord Coke, 10 Rep. 48, "by the great wisdom and policy of the sages and founders of our law."

contract or *engagement*, which must be specifically performed, and not because it operates in any way on the debt or reversionary interest itself.[1] In order, therefore, to uphold such an assignment when voluntary merely, it must be established that a Court of Equity is ever known to enforce specifically a contract or engagement, where there is *no consideration*. Then, in the next place, as to the assumption that an assignment may be treated as a declaration of trust; though it is true that no particular words are needed for this; yet the two things are inherently different. An assignment effectual at law, creates no trust in equity; why should it do so, if ineffectual? The assignor, indeed, might be willing to give, in a way to disembarrass himself altogether of the property, and yet be very reluctant to assume the character and duties of a trustee for his beneficiary.

There is one more observation which we have to make, in conclusion, upon this decision. In asserting the power of one entitled to a reversionary equitable interest, stock, &c., to make an effectual transfer of it by way of gift, Sir Knight Bruce remarks, "Surely it would not be consistent with natural equity, with reason, or with expediency, to hold the contrary." To this, the answer is written distinctly on the front of the case itself, which shows the danger of treating as absolute and irrevocable, a settlement intended to meet only a particular set of circumstances, which in fact never arose. In family arrangements, and voluntary transactions in general, it seems to us, on the contrary, that wherever practicable and consistent with the rules of law, a large *lucus pœnitentiæ* should be allowed. If in the case of testamentary bounty, though his errors of judgment can in no wise affect the donor, he is given unlimited capacity to revoke and alter his dispositions, and indeed where, when such errors might affect the interests of others, as in the case of the unforseen marriage of the testator, or birth of a child, the prior arrangements are *ipso facto* revoked, in whole or part, why ought not as much latitude be permitted where the instrument is to operate against the grantor himself, and at once.

[1] See Lord Hardwicke, in Wright *vs.* Atkens, 1 Ves. Sr. 412.