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Recommended Citation

Collins, Harold E. (1947) "Creation of an Equitable Assignment," *St. John's Law Review*: Vol. 21 : No. 2 , Article 7.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol21/iss2/7>

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punitive damages should be awarded, may then be apprised of the financial circumstances of the defendant to enable it to determine what amount would be punishment for this particular defendant and this amount would then be added to the compensatory damages of the first determination.

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CREATION OF AN EQUITABLE ASSIGNMENT

Comprehensively speaking, an assignment is an actual or constructive transfer of some species of property, or interest in property with a clear intent at the time to part with all interest in the thing transferred.¹ This broad definition includes within its scope both legal and equitable assignments. Manifestly, therefore, the general rule is subject to certain refinements and qualifications, since assignments, considered from a remedial standpoint, are classified as either legal or equitable according to whether they are recognized and enforced in a court of law or a court of equity.

It has been said that an equitable assignment is such an assignment as creates in the assignee a title which, although not cognizable at law, a court of equity will recognize and protect.² Such an assignment is not cognizable at law because either the legal title to the property or fund assigned has not passed or the thing assigned is not *in esse* at the time.³ Of course, title does not pass to a thing not *in esse* but there may very well be instances where the subject matter is in existence and yet title has not passed. Such situations will be pointed out a little later on.⁴ The title which the equitable

¹ *Hendrick v. Daniel*, 119 Ga. 358, 361, 46 S. E. 438, 439 (1904); *Griffey v. New York Central Insurance Co.*, 110 N. Y. 417, 422, 3 N. E. 309, 311 (1885); *Ormond v. Connecticut Mutual Life Insurance Co.*, 145 N. C. 140, 142, 58 S. E. 997, 998 (1907).

² *Lewis v. Braun*, 356 Ill. 467, 191 N. E. 56 (1934); *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233 (1891).

³ In *Central of Georgia Railway Co. v. King Brothers*, 137 Ga. 369, 73 S. E. 632 (1912), it was held that where the legal title passes the transaction is not governed by the law of equitable assignments. In *Sykes v. First National Bank*, 2 S. D. 242, 257, 49 N. W. 1058, 1062 (1891), it was said: "The distinction between legal assignments that may be enforced in an action at law, and an equitable assignment that can only be enforced in an equitable action, seems to be this: That an assignment, to be valid as a legal assignment that can be enforced in an action at law, must be of a debt or fund in existence at the time. . . . But in an equitable assignment . . . it is not an essential element that the debt should have been earned or the fund be *in esse* at the time . . ."

⁴ See note 11 *infra*.

assignee receives and which a court of equity takes cognizance of is merely an equitable title or property.⁵

For the creation of an equitable assignment no particular form or set of words is necessary, as the transaction is said to be based on principles of justice and fairness, and therefore the court under well established equitable rules looks to the substance of each particular situation and determines from the facts presented whether an assignment in equity has been created. Moreover, the transaction is equally valid whether it be in writing or by parol.

However, in spite of this liberal view certain fundamental elements are indispensable in order to give rise to an equitable assignment and if the particular transaction is lacking in any one of the necessary elements the contention of an equitable assignment will be defeated. As stated above, it is true that a transaction is deemed to be an equitable assignment without regard to form, but an analysis of the decisions indicates that the courts are adamant in their requirements that the underlying principles giving rise to an equitable assignment be stringently met in all their rigor. Indeed, this is aptly illustrated by considering several of the various elements required for such a transfer.

It is well settled that for the creation of an equitable assignment there must be an absolute appropriation by the assignor of the debt, fund, or property assigned, to the use of the assignee for a valuable consideration, with the intent to vest in the assignee a present interest, even though at the time the circumstances will not admit of an immediate enjoyment of the thing assigned.⁶

We see at the outset, therefore, that one of the prime requisites of an equitable assignment is a distinct appropriation of the property, fund, or debt involved by the assignor.⁷ By appropriation is meant that specific property which is distinctly identified is dedicated to the particular transaction. That is, there is such a designation of the fund or property that a holder thereof would be authorized to deliver it to the assignee directly without the intervention of the assignor.⁸

The appropriation may be actual or constructive and, accordingly, may be accomplished in a variety of ways. Thus it has been

⁵ *Globe Indemnity Co. v. Puget Sound Co.*, 53 F. Supp. 51 (W. D. N. Y. 1943); 4 POMEROY, EQUITY JURISPRUDENCE § 1280 (5th ed. 1941).

⁶ *Christmas v. Russell*, 14 Wall. 69, 20 L. ed. 762 (U. S. 1871); *In re Stiger*, 202 Fed. 791 (D. N. J. 1913); *In re Dier*, 296 Fed. 816 (C. C. A. 3d 1924); *Clery v. Fogg*, 244 App. Div. 632, 280 N. Y. Supp. 121 (1st Dep't 1935).

⁷ "The test of an equitable assignment is the inquiry whether or not an assignment makes an appropriation of the fund so that the debtor would be justified in paying the debt or assigned part to the person claiming to be the assignee." *Hinkle Iron Company v. Kohn*, 229 N. Y. 179, 183, 128 N. E. 113, 114 (1920). See also *Christmas v. Russell*, 14 Wall. 69, 20 L. ed. 762 (U. S. 1871); *In re Dier*, 296 Fed. 816 (C. C. A. 3d 1924).

⁸ *Hoyt v. Story*, 3 Barb. 262, 264 (N. Y. 1848).

held that a mere letter by a creditor to his debtor directing that the debtor pay the amount due the creditor directly to a third person is a valid equitable assignment which could not be revoked by the assignor.⁹ A more technical, and perhaps more common form of appropriation is an order drawn on the debtor of the assignor to pay a certain sum to the equitable assignee.¹⁰ Again, a sufficient appropriation may be made by an agreement between the parties specifically identifying the property or fund involved and, by words of transfer, setting over and assigning the property to the assignee. Of course, this is tantamount in form to a legal assignment but it must be kept in mind in connection with this subject that even though the instrument of transfer may appear to comply with all the necessary legal requirements so as to apparently entitle it to recognition in a court of law, the subject matter of the transfer may not be in existence at the time; or even if the subject matter is in existence and even if sufficient and proper words of transfer are used so as to amount to an appropriation the instrument of transfer may be legally deficient in other respects but still cognizable as an equitable assignment in a court of equity.¹¹

Although the form of appropriation is immaterial it is absolutely essential that an appropriation actually be made. The decisions are legion, therefore, that if a debtor merely enters into an agreement with his creditor that he will pay the debt out of a specified fund an equitable assignment will not be created. Such an agreement does not amount to the appropriation contemplated in the law of equitable assignments. The appropriation to be sufficient must amount to a transfer and to the establishment of a right *in rem* against the fund, or property.¹² An agreement to pay merely gives rise to a right *in personam* against the debtor and does not operate to any extent against the fund specified in the agreement. Likewise, a mere approval of a claim or of a sum claimed to be due is not an appropriation. Where there is a mere approval the only effect given by the courts to such a manifestation of agreement is to create an account stated. Certainly the most that can be said of an account stated is that the amount in controversy has been agreed upon and not that a property right has been established.

These principles have long been recognized by the United States Supreme Court. In a leading case on the subject it was said by the Supreme Court that: "an agreement to pay out of a particular fund,

⁹ Curtis v. Walpole Tire & Rubber Co., 218 Fed. 145 (C. C. A. 1st 1914).

¹⁰ Tobin v. Insurance Agency Co., 80 F. (2d) 241 (C. C. A. 8th 1935).

¹¹ Cf. Adamowicz v. Iwanicke, 286 Mass. 453, 190 N. E. 711 (1934).

¹² State Central Savings Bank v. Hemmy, 77 F. (2d) 458 (C. C. A. 8th 1935).

however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect."¹³

Although the above principles may appear to be harsh in many cases, especially where it seems that the alleged assignee's claim is a *bona fide* one and the sum agreed upon is actually due, the courts cannot very well relax the rule. Very many claims of equitable assignments arise in bankruptcy proceedings and unless the rule as to appropriation is stringently enforced the courts would open the doors wide to manifest frauds. In view of the insolvency of the bankrupt and in many cases the likelihood that he will attempt to dispose of his property by fraudulent transfers it would be virtually impossible for the referee in bankruptcy to determine whether the purported equitable assignment was honestly created or was merely an attempt to evade the bankruptcy laws, unless the courts demanded that an actual appropriation be made. To leave the matter solely up to the conscience of the chancellor would be inadvisable. Equity therefore demands that an appropriation clearly appear from the facts.

Another essential element of an equitable assignment is intent. There must be a definite intention that an assignment is to be created.¹⁴ The parties must contemplate the creation of a present interest or right even though the enjoyment of the interest may be postponed until the occurrence of some future event.¹⁵

This intent may be manifested by a written instrument, or be evidenced by parol testimony, or partly by both, for if a written instrument is a part of an entire transaction the parties may show the entire situation of which the instrument performs only one of its phases.¹⁶ It has been held that any words or transaction which shows an intention on the one side to assign and an intention on the other to receive will operate as an equitable assignment.¹⁷

But the question arises as to how clearly this intent to assign must be expressed. In the course of the transaction is it necessary to use the word "assign" or some term of similar import? A most interesting case on the point is *Sexton v. Kessler & Co., Ltd.*¹⁸ In that case the defendant was associated with a New York firm for

¹³ *Christmas v. Russell*, 14 Wall. 69, 20 L. ed. 762 (U. S. 1871). This case appears to be one of the landmarks in the law of equitable assignments and has been cited in numerous jurisdictions as authority for the proposition that a mere promise to pay is insufficient to operate as an equitable assignment.

¹⁴ *East Side Packing Co. v. Fahy Market*, 24 F. (2d) 644 (C. C. A. 2d 1928); *In re Dier*, 296 Fed. 816 (C. C. A. 3d 1924); *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233 (1891).

¹⁵ *In re Stiger*, 202 Fed. 791 (D. N. J. 1913); *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233 (1891).

¹⁶ *State Central Savings Bank v. Hemmy*, 77 F. (2d) 458, 460 (C. C. A. 8th 1935).

¹⁷ *Williams v. Ingersoll*, 89 N. Y. 508, 521 (1882).

¹⁸ 225 U. S. 90, 56 L. ed. 995 (1912). *Contra*: *Wood's Estate*, 243 Pa. 211, 89 Atl. 975 (1914).

many years and the New York firm had been accustomed to draw upon the defendant. The defendant requested the New York firm to set aside sufficient securities to cover the drawing credits. The New York firm placed in a separate package in a safe deposit vault certain securities and marked the package "Escrow for account of Kessler & Co., Limited, Manchester." A certificate was also prepared stating that the securities were held for the defendant's account and a listing made. The Supreme Court held that the defendant was entitled to the securities under these circumstances. Mr. Justice Holmes, speaking for the Court, said, on the question of intent: "The parties were business men acting without lawyers and in good faith attempting to create a present security out of specified bonds and stocks. Their conduct should be construed as adopting whatever method consistent with the facts and with the rights reserved is most fitted to accomplish the result. If an express declaration of an equitable lien, . . . , or any other form of words, would effect what the parties meant, we may assume that it was within the import of what was done, written and said."¹⁹

Thus it would seem that an equitable assignment will arise even if no words of transfer are actually expressed. Quite often individuals, who are not lawyers, intend that a *bona fide* transfer take place, but because of a lack of knowledge of legal technicalities their words or acts are inadequately expressed. The doctrine of the *Sexton* case is certainly commendable and should be applied wherever possible.

The appropriation necessary to the creation of an equitable assignment must be irrevocable. Thus a further requisite of an equitable assignment is that the assignor must not retain any control over the thing assigned. In the *Sexton* case the assignor retained the physical control of the securities and in this respect it would seem that the case does not meet all the tests of an equitable assignment. Some attempt was made, in the opinion, to explain away the control so retained, but the court appeared to be influenced by the obvious intent of the parties to create the transfer and decided the case largely on that point.

The principle as to relinquishment of control is amply illustrated by the New York case of *Farmer's Loan & Trust Co. v. Winthrop* and, it is submitted, that this case appears to state the correct rule.²⁰ There a settlor of a trust attempted to add to the trust certain securities which were due her from another trust of which she was a beneficiary. She gave to the Farmer's Loan & Trust Co. a power of attorney and a letter stating her intent to add the securities to the trust and authorizing the Trust Company to receive the securities. The settlor died and after her death certain of these securities were received by the Trust Company. The court held, Mr. Justice

¹⁹ 225 U. S. 90, 96, 56 L. ed. 995, 1000 (1912).

²⁰ 207 App. Div. 356, 202 N. Y. Supp. 456 (1st Dep't 1923).

McAvoy writing the majority opinion, that this was not an equitable assignment of the securities, as such an assignment does not exist where the assignor retains any control over the funds, or any power to revoke, or any authority to collect. Since the settlor could have received the securities herself during her lifetime, the complete test of an equitable assignment was not met. To be sure, it may not be feasible, or even possible, in some cases, to give manual possession to the assignee²¹ but it is absolutely essential to the validity of the transfer that the right of control exist.

A rather important element of an equitable assignment, and one upon which some confusion on the part of the courts exists, is that the transaction must create a right *in rem*. The assignment must give rise to a title which although not cognizable at law will be recognized and enforced by equity.²² The equitable assignee does not receive a mere right of action against the person holding the property assigned but he receives an equitable property in the subject matter itself which vests in the assignee practically all the attributes of an ordinary title holder. Thus the assignee, on the strength of his title, may recover the subject matter of the assignment from anyone who acquires possession of it without having given value or who had notice of the equitable assignee's prior right.²³

Since an equitable assignment confers a title upon the equitable assignee it is more than a lien or an encumbrance. An important distinction exists between an equitable assignment and an equitable lien. An equitable lien does not constitute an estate or property in the subject matter but is simply a charge or encumbrance upon the property, the legal title remaining in the one who created the lien. A lien is in the nature of a security upon the property while an assignment gives the title itself.²⁴

It is indeed unfortunate that some of the courts have failed to observe this important distinction and have applied the terms interchangeably.²⁵ In view of the vast distinction between the two and the serious difference in consequences this situation is to be deplored.

An equitable assignment to be valid must be supported by a valuable consideration. Hence another necessary and essential ele-

²¹ *In re Macauley*, 158 Fed. 322, 327 (E. D. Mich. 1907).

²² *Tobin v. Insurance Agency Co.*, 80 F. (2d) 241 (C. C. A. 8th 1935); *In re Interborough Consol. Corp.*, 288 Fed. 334 (C. C. A. 2d 1923); *Globe Indemnity Co. v. Puget Sound Co.*, 53 F. Supp. 51 (W. D. N. Y. 1943).

²³ 4 POMEROY, *loc. cit. supra* note 5.

²⁴ *In re Conoley*, 50 F. Supp. 542 (S. D. N. Y. 1942).

²⁵ *Cf. Ketchum v. St. Louis*, 101 U. S. 306, 25 L. ed. 999 (1879); *In re Bliss*, 124 F. (2d) 819 (C. C. A. 7th 1941); *East Side Packing Co. v. Fahy*, 24 F. (2d) 644 (C. C. A. 2d 1928); *In re Dier*, 296 Fed. 816 (C. C. A. 3d 1924); *McAvoy v. Schramme*, 219 App. Div. 604, 220 N. Y. Supp. 423 (1st Dep't 1927); *Bacon v. Schlesinger*, 171 App. Div. 503, 157 N. Y. Supp. 649 (1st Dep't 1916); *Holmes v. Bell*, 139 App. Div. 455, 124 N. Y. Supp. 301 (1st Dep't 1910).

ment of such a transfer is a valuable consideration.²⁶ An equitable assignment is an agreement in the nature of a trust which a court of equity will enforce but being amenable to the jurisdiction of equity it is subject to the equitable maxim that equity will not aid a volunteer. Therefore, a consideration is required in all cases.

As pointed out in the earlier part of this note it is not required for the validity of an equitable assignment that the subject matter be *in esse* at the time of the transfer.²⁷ However, it is essential that the subject matter be identified and ascertained. For example, where only a part of a fund is assigned it is necessary to state a specific sum or a certain percentage in order that the interest created can be sufficiently appropriated for the purpose intended.²⁸ In this way the subject matter of the assignment becomes definite and certain. But it has been held that an intangible right may be the proper subject of an equitable assignment.²⁹ Apparently this does not violate the rule of definiteness ordinarily required.

Finally, it may be said that an equitable assignment will be enforced if it is not contrary to public policy.³⁰ Since equity is the forum it is rather axiomatic that the transaction must be free from any fraud or illegality which violates the rule of public policy.

In summary it may be said that the line of demarcation between legal and equitable assignments appears to be exceedingly thin. The attributes of both types of assignments are for all practical purposes similar, for as we have seen, the equitable assignee, since he holds a title, although only an equitable one, is permitted to pursue the subject of the assignment and recover it if wrongfully disposed of.

The party who claims an equitable assignment is wielding a useful legal weapon which because of its peculiar advantages over an ordinary lien may result in the equitable assignee being decisively declared the victor in a struggle for disputed property; but woe unto the party who does not prove each and every element of such a transfer. The chancellor, although reputed to be the champion of hardship cases, stands firm in the matter of equitable assignments.

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²⁶ Tallman v. Hoey, 89 N. Y. 537 (1882), where it was held that the circumstance which justifies an imperfect transfer being construed as an equitable assignment is the existence of a valuable consideration. The court said, at p. 540, ". . . the presence of a valuable consideration upon which the order, or direction to pay, was founded, becomes the essential and necessary element of an equitable assignment." See also, Perkins v. Parker, 1 Mass. 117 (1804); Brill v. Tuttle, 81 N. Y. 454 (1880); Brokaw v. Executors of Brokaw, 41 N. J. Eq. 215, 4 Atl. 66 (1886).

²⁷ See note 3 *supra*.

²⁸ International Harvester Co. of America v. McFerson, 95 Col. 482, 37 P. (2d) 390 (1934).

²⁹ *In re Dier*, 296 Fed. 816 (C. C. A. 3d 1924).

³⁰ Trist v. Child, 21 Wall. 441, 22 L. ed. 623 (U. S. 1874); Caulfield v. Van Brunt, 173 Pa. 428, 34 Atl. 230 (1896); Farmers Market v. Austin, 118 Wash. 103, 203 Pac. 42 (1921).