

Illustration

Defendant was convicted of driving a motor vehicle without being covered by compulsory third-party insurance. Defendant appealed on the basis that he was insured by a cover note from his previous insurer extending insurance coverage until a new policy was agreed and issued. Plaintiff was not aware of the cover note at the time he drove the car and was charged. **Held:** dismissing the appeal, Defendant was not covered by insurance at the relevant time because such coverage could only result from a contract of insurance. The cover note constituted an offer of such a contract, but that offer could not have been accepted because Defendant was ignorant of its existence at the relevant time.⁷⁶

Determining the time at which an offer is made can also be important given that an offer may terminate by lapse of time.⁷⁷ There is not much authority on the issue. In an early nineteenth century case,⁷⁸ A who had by letter offered to sell to B, misdirected the letter, causing it to be received by B two days later than expected. It was held that A's offer had not lapsed when B received it, and it was still within B's power to accept. It has been suggested that if the delay had not been due to A's fault, time would have run from the time when the offer would, but for such delay, have reached the offeree.⁷⁹ Even where the delay is due to the fault of the offeror, if it is obvious to the offeree that the delay is of such length that it is likely that the offer has lapsed or if the offer is received after the expiry of a stated validity period, the offeree would have no power to accept.⁸⁰ Whichever view is taken, it seems clear that an offeree cannot accept an offer prior to its communication to him.

2.3.6 Where Offer is Made

Sometimes it is relevant to determine where an offer is made. For example, where offers for the sale of protected animals are prohibited by legislation in one jurisdiction but not in another, the place where the offer is made would be relevant in determining whether the laws of the first jurisdiction have been violated. In such cases, however, the factors for determining the place where the offer is made would probably be governed by the legislation of the first jurisdiction.

The probable common law rule is that, where it is sent by post, an offer is made in the place where it is posted.⁸¹

76 *Taylor v Allon* [1966] 1 QB 304, [1965] 1 All ER 557, [1965] 2 WLR 598 (Div).

77 See pp 56–57 post.

78 *Adams v Lindsell* (1818) 1 B & Ald 681, 106 ER 250 (KB).

79 *Treitel* p 17.

80 *Treitel* p 17.

81 *Taylor v Jones* (1875–1876) LR 1 CPD 87 at 90 (CPD), obiter per Lord Coleridge CJ.

2.4 ACCEPTANCE

2.4.1 Definition and Capacity

An acceptance of an offer is 'an indication, express or implied, by the offeree made whilst the offer remains open and in the manner requested by that offer of the offeree's willingness to be bound unconditionally to a contract with the offeror on the terms stated in the offer.'⁸²

The general rule is that only the offeree has capacity to accept an offer.⁸³ However, where the offer is irrevocable because it is the subject of an option agreement,⁸⁴ an assignee of the option agreement⁸⁵ may accept the offer.

2.4.2 Determining Existence of Acceptance

Again, as with the case of an offer, sometimes it is not an easy task to determine whether an acceptance had been effected. The court examines the communications between the parties to determine, on an objective basis, whether a final and unqualified assent to the terms of the offer had been expressed. A communication often fails to take effect as an acceptance because it is qualified or because it attempts to introduce new terms.

Illustrations

(1) J applied for shares in a company. The directors allotted shares to him. In their notification of allotment, the company stated: 'The amount to be paid to the bank on or before the 1st of October next, or the shares will be forfeited.' J did not answer the letter and did not pay. Subsequently when the company was wound up J denied that he was a holder of the shares. **Held:** for J, the letter of notification of allotment was not an effective acceptance of J's offer to take shares because it introduced a new term.⁸⁶

(2) Plaintiff owned various lands in the New Territories which were resumed by Defendant government. Prior to resumption, Defendant offered compensation of more than \$21 million 'in full and final settlement of all and any claims' which Plaintiff might have against Defendant in respect of the resumptions. Plaintiff replied purporting to accept the offer, but adding that it reserved its right to claim interest. Defendant subsequently refused to pay the \$21 million. **Held:** for Defendant. Plaintiff's acceptance of Defendant's offer had been transformed into a counter-offer by the inclusion of a new

82 *Halsbury's (HK)* para [115.049].

83 *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, [1953] 2 WLR 596 (ECA) (offer made to a company prior to its incorporation could not be accepted by its promoter).

84 See pp 49 post.

85 See ch 14 on assignment.

86 *Jackson v Turquand* (1869–1870) LR 4 HL 305 at 312 (HL).

term concerning interest. Defendant never having accepted the counter-offer, there was no agreement to pay the money.⁸⁷

Not every addition to the expression of an offer will render an acceptance ineffective. If, for instance, the addition is merely a clarification of an implied term or intention, a request for indulgence (without making indulgence a condition) or an offer of indulgence, the acceptance is effective notwithstanding any departure from the expression of an offer.

Illustrations

(1) Plaintiff had a claim against Defendant arising out of a prior contract. After preliminary negotiations the parties reached an oral settlement agreement, subject to confirmation by telex. Defendant telexed Plaintiff: '[T]his is to confirm our offer of £120,800 in full and complete settlement of the claim outstanding for this vessel ...'. Plaintiff replied, '[W]e accept your offer of £120,800 on the understanding that payment to us will be promptly effected.' **Held:** Plaintiff's telex was an effective acceptance.⁸⁸

(2) H applied for shares in a company. The directors of the company allotted shares to him and notified him by letter posted on 15th March 1866 and received by H on 17th March. This letter had the following paragraph: 'As the interest warrants attached to the shares bear interest from 21 March 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at ten per cent per annum.' On 16th March, H posted a letter of withdrawal. **Held:** the company's acceptance was unqualified and effective. James I said, '[T]he statement as to interest does not introduce a new stipulation. It is not that the allottee is to have the shares provided that he undertakes to pay 10 per cent, but it is that he ought to pay exactly on the 21st of March, 1866, and that by way of indulgence the directors have told the bankers, that if the allottee subsequently pays the same rate of interest which he would be entitled to receive, then they are authorised to receive payment, but not otherwise.'⁸⁹

A request for title deeds and a reference to preparation of conveyancing documents does not impose new terms. They are, rather, only consistent with an acceptance of the offer to sell.

Illustration

In an application submitted to the Government, Developer offered to surrender certain Letters B in settlement of debts owed by other members of its group of companies to the Government. Developer further undertook 'to surrender [its]

87 *Capacious Investments Ltd v Secretary for Justice* [2001] 1 HKC 219 (CFI).

88 *Global Tankers Inc v Amercoat Europa NV* [1975] 1 Lloyd's Rep 666 at 672 (QBD).

89 *Re Imperial Land Co of Marseilles, Harris' Case* (1872) LR 7 Ch App 587 at 593 (CACH).

entitlements and, if so required, to deliver up to the Government the original letters in respect of the lots specified in such land exchange entitlements and to execute a memorandum of release in such form as may be required by the Government releasing the Government from all costs, claims and demands whatsoever arising out of or in connection with the surrender of the said lots'. The Registrar General replied on behalf of the Government: 'I have been requested by [another department] to prepare the relevant memorandum of release for your execution. However, prior to execution of the same, your title to the abovementioned land exchange entitlements has to be verified. In this respect I shall be grateful if you would at your earliest convenience forward all relevant title deeds ... for the purpose of title checking ... Upon receipt of confirmation as to your title from District Lands Officer, North, I will arrange for execution of the memorandum of release by you.' **Held,** the Government had accepted Developer's offer: '[T]he request for the title deeds and the reference to preparation of the memorandum of release are only consistent with the acceptance by the Government of the offer made by the [Developer] in the application form. In conformity with time-honoured conveyancing practice and in conformity with the terms of the application form the preparation and execution of a memorandum of release followed upon the creation of a binding agreement and the checking of title followed and did not precede the constitution of a contract.'⁹⁰

The test is whether or not a reasonable person in the position of the offeror would regard it as introducing a new term into the bargain, and not as a clean acceptance of the offer.⁹¹

2.4.3 Counter-offer

If the communication purporting to be an acceptance contains new terms, or if an offeree not purporting to accept, returns to the offeror with a proposal of different terms, the communication from the offeree constitutes a counter-offer which would then be open for acceptance by the original offeror (who then becomes the offeree).⁹² A counter-offer is for all intents and purposes an offer and subject to the same rules that apply to offers.

2.4.4 Subsequent Negotiations

As noted previously, businessmen often negotiate without regard to either legal niceties or to the classification of various statements made or acts done in the course of negotiations. In many cases, negotiations may continue although legally the parties have already reached an agreement. If these subsequent negotiations also result in an agreement, the original

90 *Yau Fook Hong Co Ltd v Attorney General* [1988] 1 HKLR 573 at 576 (PCHK).

91 *Global Tankers Inc v Amercoat Europa NV*, ante, n 88, at 671.

92 Eg pp 83–84 post.

agreement can be considered varied by the new agreement (provided, of course, all the requirements of *consensus ad idem*, consideration, and *animus contrahendi* are also satisfied in respect of the subsequent agreement). If subsequent negotiations break down, however, the original agreement remains valid and unaffected.

Illustration

Plaintiff and son were owners of a public house. On 23 February 1915, Defendant by its secretary wrote to Plaintiff as follows: 'At a meeting of directors held today I was instructed to write and offer you seven thousand pounds for freehold premises, goodwill and possession.' Plaintiff replied by letter on 3 March: 'I am obliged for your offer of seven thousand pounds for above of 23rd of February last. Please note I now accept same, viz. £7000.' Plaintiff did not indicate that the agreement was subject to the conclusion of any formal contract. Plaintiff's solicitor then sent a draft contract to Defendant's solicitor, but the parties failed to agree on the contents of this document. Plaintiff sued Defendant for specific performance of the contract constituted by the two letters. Defendant contended that the two letters were only negotiations. **Held:** the two letters constituted a concluded agreement, unaffected by the failure to reach an agreement on the documentation.⁹³

2.4.5 How is Acceptance Effected

Acceptance of an offer is generally effected by communication of assent to the offeror. When permitted by the terms of the offer, acceptance may be effected by conduct which comes to the offeror's notice or by performance. Exceptionally, by estoppel or the postal acceptance rule, an acceptance not effected in the above manner may nevertheless be effective. Generally, silence is not assent, although even here there are exceptions. Where a method of acceptance is stated in the offer, acceptance by other means may or may not be effective, depending partly on whether or not the stipulated method is exclusive.

2.4.5(a) Requirement of Communication

The general rule is that an acceptance of an offer is not effective until it is actually communicated to the offeror.⁹⁴ Acceptance will be effective when it is actually received by the offeror. This general rule applies to all instantaneous forms of communication, such as face-to-face conversation, telephone, and facsimile (fax). It also applies to written communications

⁹³ *Perry v Suffields Ltd* [1916] 2 Ch 187 at 192 (ECA). See also *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, [1962] 2 WLR 525 (ECA).

⁹⁴ *Mozley v Tinkler* (1835) Cr M & R 692, 149 ER 1258 (Ch); *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161 at 163–164, [1974] 1 WLR 155 at 157 (ECA) per Russell LJ.

not employing the postal service, such as written messages delivered personally or by courier.

A number of the acceptance cases involve subscription for shares (ie, offers to buy shares) in a company and the general rule is clearly stated in one of them.

Illustration

A company invited applications for shares. On 14 November 1865, G applied for shares. In June 1866, a petition for winding up the company was presented and G asked for the return of the deposit he paid with the application for shares. In November 1865, a resolution had been made to allot shares to G and his name was entered in the register of members but he was not notified of this prior to June 1866. **Held:** G was not a shareholder, having withdrawn his application before acceptance. Sir John Rolt LJ stated: 'There must be the consent of two parties to a contract; one man may make an offer to another, and say, "I agree to buy your estate," but the person to whom he has made the offer must say, "I agree to sell you the estate," or he must do something equivalent to an acceptance, something which satisfies the Court, either by words or conduct, that the offer has been accepted to the knowledge of the person who made the offer.'⁹⁵

On the above basis, an offeree who intellectually accepts an offer but then only puts the offer away in his desk⁹⁶ or writes acceptance on a piece of paper which he simply keeps,⁹⁷ has not legally effected an acceptance. Similarly, if the offeree sends the acceptance to his own agent, the offeree has not made an effective acceptance.⁹⁸ The reason is that in either case, the offeree can change his mind before the offeror knows of the acceptance so that the acceptance cannot be said to be final.⁹⁹

Because the reason for the rule is that the offeror has a right to know whether he has a contract with the offeree, it is thought that the communication or source of knowledge need not come from the offeree and two difficult cases concerning company shares were rationalised on this ground.¹⁰⁰ However, before an offeror relies on a communication from

⁹⁵ *Re Universal Banking Corporation, Gunn's Case* (1867) LR 3 Ch App 40 at 43–44 (CACH).

⁹⁶ *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 at 676, 691 (HL).

⁹⁷ *Ibid* at 692; *Kennedy v Thomassen* [1929] 1 Ch 426 (Ch).

⁹⁸ *Re National Savings Bank Association, Hebb's Case* (1867) LR 4 Eq 9 at 12 (Ch).

⁹⁹ *Ibid* at 11.

¹⁰⁰ *Treitel* p 24; *Re New Theatre Co (Ltd), Bloxam's Case* (1864) 33 Beav 529, 55 ER 474 (Ch); *Re International Contract Co, Levita's Case* (1867–1868) LR 3 Ch App 36 (CACH). In neither of these cases did the company send letters of allotment to the subscriber concerned. In both cases, it was held that the contract of subscription for shares was completed. In the latter case, however, the subscriber had learned for himself that he had been entered in the company's register as a shareholder. See also *Anson* p 44.

39. One argument suggested for holding that the plenary legislative power could not extend to an alteration of a term of such a contract of service and to a reduction in the pay of public officers was that there was an implied term in the contract by which the Government undertook not to exercise such a power to legislate or, to be more precise, that the Government would not introduce legislation of such a kind. However, no basis for implying such a term has been articulated and the authorities provide no support for such a proposition. ...When regard is had to the wide range of possible exigencies, economic, political and social, which may confront a government and require the introduction of emergency, extraordinary or unexpected legislative measures, there is no sound basis for the implication of an undertaking that government will not introduce legislation to reduce public service pay or vary the terms of public officers' contracts of service. Whether the Government could expressly undertake not to introduce legislation to reduce the pay to which a public servant was entitled pursuant to a contract is not a question which we have to decide.

...

42. The plenary legislative powers enjoyed by the Legislative Council since 1 July 1997 ... clearly extend to the alteration of a term in public officers' contracts of service and a reduction in their pay, subject, of course, to the provisions of the Basic Law. Likewise, there is now no firmer basis for implying a contractual term against introducing legislation to reduce pay than there was before 1 July 1997. If anything, the separation of powers, notably the separation of the legislative from the Executive power, effected by the Basic Law might make the case for making such an implication, if anything, even weaker.

43. ... The contract is subject to the exercise of any relevant legislative power but that is not by virtue of any provision in the contract; it is simply the natural consequence of the nature and scope of the legislative power.

Subject to the Basic Law, therefore, the Government may enact legislation adversely affecting the contractual rights enjoyed by persons contracting with the government and no implied term prevents the government from doing so. Indeed, even an express term which sought to fetter the Government's exercise of legislative or executive power would be ultra vires and void: 'The Government cannot by contract bind its future freedom to govern through the use of Executive power any more than it can agree by contract not to legislate in the future in a manner which may thwart the contract'.²¹³

213 *Fairland Overseas Development Co Ltd v Secretary for Justice* [2007] 4 HKLRD 949 at 971, [2007] 4 HKC 629 at 639, 12 HKPLR 529 at 539 (CFI) per Recorder McCoy SC, citing *Comalco Power (New Zealand) Ltd v Attorney General* [2003] NZAR 1 at 12–15 per Heron J.

6.3.10 Terms Implied by Legislation

The legislature may enact laws requiring that certain terms be implied into contracts. In Hong Kong, the most significant instance of legislatively implied terms is to be found in relation to sale of goods.

In particular, the Sale of Goods Ordinance (Cap 26) provides for certain implied conditions and warranties as to a vendor's title to the goods,²¹⁴ the truthfulness of a description in a sale of goods by description,²¹⁵ the quality or fitness of the goods,²¹⁶ and the correspondence of the goods to their sample where there is a sale by sample.²¹⁷

6.4 CLASSIFICATION OF TERMS

6.4.1 Types of Terms

Once it has been established what the terms of a contract are, the emergence of a dispute frequently makes it necessary to classify them. Terms are classified according to the legal consequences which attach to their breach, some terms being more essential to the contract than others.

The less important terms are usually referred to as 'warranties,' for the breach of which the innocent party is entitled only to damages for losses caused by breach of the term. The more important terms are usually referred to as 'conditions' which, if breached, entitle the innocent party either to recover damages for breach of the term, or to terminate the contract at his election and recover damages for loss of the bargain. The terminology of warranties and conditions stems from that employed originally in the English Sale of Goods Act 1893, since substantially re-enacted in England as the Sale of Goods Act 1979 and effectively transposed to Hong Kong as the Sale of Goods Ordinance (Cap 26). The Ordinance defines a warranty as 'an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated'.²¹⁸ The definition is an apt description of warranties in other contracts other than insurance contracts.²¹⁹

In 1961, a third class of terms was recognised as being neither warranties nor conditions. These are known as 'intermediate terms,' 'indeterminate terms' or, more frequently, 'innominate terms' (meaning, literally, terms

214 Section 14.

215 Section 15.

216 Section 16.

217 Section 17.

218 Section 2(1).

219 A warranty in an insurance contract is a condition: *Forsikringsaktieselskapet Vesta v Butcher* [1989] 1 AC 852 (HL).

with no name). The consequences of a breach of an innominate term depend on the seriousness of the impact inflicted on the innocent party. If the impact is less serious, the consequences will be the same as those which arise from the breach of a warranty—damages only for breach of the term in question. If the impact is more serious, the consequences will be the same as those which arise from a breach of condition—the innocent party may terminate the contract and claim damages for loss of the bargain.

6.4.2 Conditions and Warranties

6.4.2(a) Conditions and Warranties Distinguished

According to a well-known dictum of Fletcher Moulton LJ from 1910:

... from a very early period of our law it has been recognised that [contractual] obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class, he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. ... usage has consecrated the term "condition" to describe an obligation of the former class and "warranty" to describe an obligation of the latter class.²²⁰

Some fifty years later, Diplock LJ characterised a condition as a term every breach of which 'must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract', and a warranty as a term no breach of which 'can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract'.²²¹

That breach of a contractual condition entitles the innocent party to both damages and termination is such a well-worn principle of the common law that authority is rarely cited. Rather, the law reports in every common law jurisdiction are replete with cases which take the point entirely for granted. The difficulty lies not in establishing the principle, but in deciding which contractual terms are conditions and which warranties.

220 *Wallis, Son & Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1012 (ECA).

221 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 69–70, [1962] 1 All ER 474 at 487, [1962] 2 WLR 474 (ECA).

6.4.2(b) Condition, Warranty and Intention of the Parties

The parties may themselves refer to a particular term as a 'condition.' This will prima facie indicate that the term was, indeed, intended by the parties to be a condition. In well-drafted contracts where it is apparent that 'condition' is intended to denote a term of fundamental importance, little difficulty arises. It may be, however, that the parties did not actually intend to use the word in a technically precise legal sense. Sometimes, expressions such as 'condition', 'term', 'clause', 'undertaking', 'warranty', etc are used interchangeably by contracting parties in a poorly drafted contract without really intending thereby to signify anything one way or the other about a potential right of termination. Where this appears to be the case a court may seek to ascertain, according to the objective standard, whether the parties really intended that a breach of a term referred to as a 'condition' would justify the contract's termination. Even in a poorly drafted contract, however, breach of a term expressly described as a 'condition' will give a right of termination to the non-breaching party unless such a result is 'very unreasonable' and a more reasonable interpretation is open having regard to the agreement as a whole.²²²

Illustration

In May 1963, Plaintiff was appointed the sole sales agent for Defendant in the United Kingdom under a distributorship agreement. The following were the relevant provisions:

- 7(a) Subject to Clause 17 [Plaintiff] will use its best endeavors to promote and extend the sale of [Defendant's] products in the territory.
 (b) It shall be [a] condition of this agreement that: (i) [Plaintiff] shall send its representatives to visit the six firms whose names are listed in the schedule hereto at least once every week for the purpose of soliciting orders for [products], (ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and [Plaintiff] will ensure that such a visit is always made by the same alternate representative. 11(a) This agreement and the rights granted hereunder to [Defendant] shall commence on 1 May 1963, and shall continue in force (unless previously determined as hereinafter provided) until 31 December 1967 ... [Defendant] or [Plaintiff] may by notice in writing to the other determine this agreement forthwith if: (i) the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do ...

222 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, [1973] 2 WLR 683 (HL).

14.2 GENERAL REQUIREMENTS

14.2.1 Subject Matter

The subject matters of assignments in equity are legal and equitable choses in action.

The subject matters of statutory assignments are 'debts' or 'other legal choses in action'. A debt has been defined as 'a specific sum of money due by agreement or otherwise'.¹¹ The phrase 'other legal chose in action' has been interpreted to mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable'.¹² This has in turn been interpreted to mean that 'other legal choses in action' include equitable choses in action.¹³ This interpretation has been criticised. Sykes notes that the view that equitable choses in action are within the statute rests on dicta and is incorrect. So to interpret the phrase 'legal chose in action' is to ignore the word 'legal'. Further, there can hardly be a legal right to a *res* which is entirely equitable in nature.¹⁴

It has been held that a right to rescind a mortgage is not a chose in action or part of such a chose, and that the owner cannot assign a right to rescind separately from his property.¹⁵ A right to damages under the mortgage is, however, a chose in action which may be assigned.¹⁶

14.2.2 Intention

For both types of assignment, an intention to assign is required. No particular formula of words is required but it must be clear that the assignor intended to give ownership rights in the debt to the assignee. Illustrations of valid assignments are given below.

Illustrations

(1) In February 1854, F and G were indebted to Plaintiff. F and G were then constructing a mill for Defendant M. In order to obtain further credit from Plaintiff, F and G offered security which included the following letter addressed to Defendant M: 'We desire you to accept this order upon you for the sum of £1,000 and pay [Plaintiff] that sum or any less amount

- 11 *Black's Law Dictionary* (9th edn, 2009, West Publishing Co).
- 12 *Torkington v Magee*, ante, n 1, at 430–431, reversed on other grounds [1903] 1 KB 644.
- 13 *Re Pain, Gustavson v Haviland* [1919] 1 Ch 38 at 44.
- 14 Edward I Sykes *The Law of Securities* (5th edn, 1993, The Law Book Co) pp 768–769; see also Fisher & Lightwood's *Law of Mortgage* 10th edn, 1988, Butterworths) p 124.
- 15 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896 (HL).
- 16 *Ibid.*

which may from time to time be owing by you to us'. Plaintiff gave notice to Defendant M and Defendant M wrote: 'I promise to pay to [Plaintiff] whatever balance may be due from me to [F and G]'. **Held:** there was a good assignment.¹⁷

(2) A and B wrote to C as follows: 'We now have pleasure in stating that in consideration of your services as the practical manager in working both our patents ... we hereby agree to give you one third share of the patents above mentioned, the same to take effect from this date ...'. **Held:** there was a good assignment.¹⁸

(3) A sub-charterparty provided: 'Owners shall have a lien on all cargoes and sub-freights for any amounts due under this charterparty including general average contributions'. **Held:** the clause constituted an assignment of sub-freights.¹⁹

The question of intention often arises where the 'assignor' directs the debtor to pay to the 'assignee'. Where the direction does not refer to any particular fund, the direction does not constitute an assignment.²⁰ Reference to a particular fund, however, does not necessarily mean that the direction constitutes an assignment. Such a direction may be considered a mere authority, not creating any proprietary interests.²¹ It is settled law that the drawing of a cheque is issuing an order to the bank to pay and not an assignment of the funds standing to the account of the drawer.²² An authorisation to the debtor to pay the 'assignee' not apparent on its face to be an assignment cannot be supplemented by parol evidence as to the parties' intention to assign where such an assignment is required to be in writing.²³ Authorisations to pay to an 'assignee' who is a volunteer would more readily be construed as mere revocable authorisations and not assignments.²⁴

The distinction between an authorisation to a debtor to pay to the 'assignee' and an assignment is that an authorisation to pay does not confer any rights on the 'assigned' and is revoked on the death or bankruptcy of

- 17 *Jones v Farrell* (1857) 1 D & J 208.
- 18 *Re Casey's Patents, Stewart v Casey* [1892] 1 Ch 104 at 112, 116, 118.
- 19 *Itex Itagrani Export SA v Care Shipping Corporation, The Cebu (No 2)* [1990] 2 Lloyd's Rep 316; see also *G & N Angelakio Shipping Co SA v Compagnie Nationale Algerienne de Navigation, The Attika Hope* [1988] 1 Lloyd's Rep 439.
- 20 *Watson v Duke of Wellington* (1830) 1 Russ & M 602; *Percival v Dunn* (1885) 29 Ch D 128; *Re Gunsbourg, ex p Trustee* (1919) 88 LJKB 479.
- 21 *Rodick v Gandell* (1852) 1 De GM & G 763; *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460.
- 22 *Schroder v Central Bank of London Ltd* (1876) 34 LT 735 at 736, 737; *Timpson's Executors v Yerbury (HM Inspectors of Taxes)* [1936] 1 KB 645 at 657, 659, 666, 668, [1936] 1 All ER 186 (ECA).
- 23 *Re Whitting, ex p Hall* (1879) 10 Ch D 615.
- 24 *Re Williams, Williams v Ball* [1917] 1 Ch 1.

the 'assignor'. Although authorisations can be construed and can operate as assignments in some cases,²⁵ it is clearly preferable to avoid the use of mere authorisations to pay, and instead to use words such as 'I assign'.

An undertaking by the assignor to pay out of a particular fund is also a good equitable assignment.²⁶ There must be an obligation on the 'assignor' to pay out of the fund;²⁷ an agreement as to the application of a fund in a certain manner is insufficient.²⁸

A direction by the assignor to the trustee in whom the legal estate is vested to hold the property on trust for the assignee is an equitable assignment.²⁹ An agreement to hold the chose in trust for the creditor also amounts to an equitable assignment.³⁰

14.2.3 Consideration

Consideration is not required for the validity of a statutory assignment.³¹

A question arises as to whether consideration is required for the validity of an equitable assignment. The question is a difficult one and has generated diverse answers.³²

The better view is probably that consideration is required for an agreement to assign but is not required for an actual assignment.³³ This was certainly the belief of Knight Bruce LJ:

[I]t is on legal and equitable principles ... clear 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.³⁴

Since a person can make valid gifts without consideration, it should follow that actual assignments need no consideration; only promises to assign require consideration.

Part of the difficulty in this area arises from the trouble in distinguishing an actual assignment from an agreement to assign. Where the creditor

25 *Hutchinson v Heyworth* (1838) 9 Ad & El 375; *Shaw & Co v Moss Empires Ltd* (1908) 25 TLR 190.

26 *Cotton v Heyl* [1930] 1 Ch 510; *Re Warren, ex p Wheeler v The Trustee in Bankruptcy* [1938] Ch 725.

27 *Swiss Bank Corp v Lloyds Bank Ltd* [1982] AC 584, [1981] 2 All ER 449, [1981] 2 WLR 893 at 898 (HL).

28 *Palmer v Carey* [1926] AC 703 (PC).

29 *Re Wale, Wale v Harris* [1956] 3 All ER 280 at 284, [1956] 1 WLR 1346.

30 *Crane Sales Pty Ltd v Commissioner of Taxation* (1971) 46 ALJR 15 at 17.

31 *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104 at 114.

32 *Anson* pp 667-669; *Treitel* pp 725-730, *Chitty* paras 19-027-19-035.

33 *Anson* p 668; *Treitel* p 728; *Chitty* para 19-027.

34 *Kekewich v Manning* (1851) 1 De GM & G 176 at 188.

uses words to indicate that he is only promising to assign, the case is relatively easy. Where the creditor uses words such as 'I hereby assign', his 'assignment' may, nevertheless, be construed as an agreement to assign for various reasons.

Where the subject matter is future property, an assignment operates only as an agreement to assign. Future property is property that does not yet exist or does not yet belong to the assignor at the time of the purported assignment. Sums which are due in the future are not necessarily future property. Sums due in the future under an existing contract are present property if there are no contingencies or conditions affecting the liability of the other party to pay that are beyond the control of the assignor.³⁵ Conversely where the liability to pay is dependent on contingencies or conditions in the control of others, the chose is future property.³⁶ An analogy sometimes used in this context to distinguish present and future property is that of a tree and its fruits. If the assignor assigns a tree, all the fruits that the tree may bear in the future are considered present property.³⁷ If the assignor assigns fruits of a tree, then the fruits that the tree may bear in the future are considered future property.³⁸

Where the subject matter is present property, an assignment of the proceeds of the present chose in action (as opposed to assignment of the chose in action itself) requires consideration.³⁹

An assignment of present choses in action operates as an agreement to assign when it is incomplete, ie, the assignor did not do all that he has to do to give effect to his intention. The reason 'equity will not interfere in favour of a mere volunteer, but requires a valuable consideration for the transaction, is that in such a case there is nothing wrong in the donor changing his mind and withholding from the object of his liberality the contemplated benefit'.⁴⁰ Distinguishing a completed assignment from an incomplete one is also a difficult task since the assignment almost always falls short of the statutory assignment. The guiding principle is that the assignor must have done all that had to be done by him to transfer the property.⁴¹ For example, a bank deposit which cannot be withdrawn without the production of the deposit receipt is validly assigned by the endorsement and delivery of the receipt to the donee by way of gift. The

35 *Treitel* p 724, citing *Hughes v Pump House Hotel Co* [1902] 2 KB 190.

36 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9.

37 *Shepherd v Commissioner of Taxation* (1965) 113 CLR 385 at 396; see also *Walker v Bradford Old Bank* (1884) 12 QBD 511.

38 *Norman v Federal Commissioner of Taxation*, ante, n 36.

39 *Glegg v Bromley* [1912] 3 KB 474.

40 *Harding v Harding* (1886) 17 QBD 442 at 444.

41 *Milroy v Lord* (1862) 4 DF & J 264 (incomplete); *Re Rose, Rose v Inland Revenue Commissioners* [1952] Ch 499, [1952] 1 All ER 1217 (ECA) (complete); *Anson* pp 667-669; *Treitel* p 728; *Chitty* paras 19-033-19-034.

absence of notice to the bank is not relevant because notice can be given by the donee. The donor had done everything required to be done by him.⁴²

Property can be actually transferred by the owner, thereby constituting himself a trustee. Where the owner attempted to assign the property to someone else, but failed to complete the assignment, the court would not give effect to the incomplete assignment by declaring a trust.⁴³

14.2.4 Absolute Assignment

A statutory assignment must be absolute. This means that it must be an assignment of the whole and not part of the debt⁴⁴ and the assignment must not be by way of charge or otherwise conditional.

Often the assignor in fact assigns the debt or part thereof to the assignee by way of security. He may nevertheless effect a statutory assignment provided that the assignment is such that the debtor is to pay the whole debt to the assignee. As between assignor and assignee, the assignee may be placed under an obligation to hold the balance of the debt in trust for the assignor or to reassign to the assignor on certain conditions:

Illustration

Defendant owed £285 to W. W owed money to Plaintiff. W assigned Defendant's debt to Plaintiff. The assignment provided as follows: '[W]e ... hereby assign unto [Plaintiff] all that debt or sum of £285 due ... to hold the same unto [Plaintiff] absolutely ... and it is agreed and declared that the amount recoverable under these presents shall not at anytime exceed the sum £150'. **Held:** the assignment was a good statutory assignment. It was 'an absolute assignment of the whole debt, with a proviso that if [Plaintiff] should recover more than £150 from the debtor they must hold the balance in excess as trustee for [W]'.⁴⁵

An express provision that the assignment is by way of security⁴⁶ and an express provision for retention by the assignee of the surplus for the assignor⁴⁷ do not affect the 'absoluteness' of an assignment. It is strongly recommended, however, the word 'charge' be avoided.⁴⁸ Although assignments containing a reference to the amount secured have been held

⁴² *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408.

⁴³ *Milroy v Lord*, ante, n 41.

⁴⁴ *Walter & Sullivan Ltd v J Murphy and Sons Ltd* [1955] 2 QB 584, [1955] 1 All ER 843, [1955] 2 WLR 919 (ECA).

⁴⁵ *Bank of Liverpool & Martins Ltd v Holland* (1926) 43 TLR 29 at 30.

⁴⁶ *Hughes v Pump House Hotel Co*, ante, n 35.

⁴⁷ *Burlinson v Hall* (1884) 12 QBD 347; *Comfort v Betts* [1891] 1 QB 737.

⁴⁸ *Durham Brothers v Robertson* [1898] 1 QB 765; *Court Line Ltd v Aktiebolaget Gotaverken, The Halcyon the Great* [1984] 1 Lloyd's Rep 283.

to be absolute,⁴⁹ it is advisable to omit references to the amount secured.⁵⁰ Such a reference may leave the debtor in doubt as to the proper payee for the surplus. Where the assignor remains entitled to deal with the chose in action until default occurs under his agreement with the assignee, the assignment is not absolute.⁵¹

Equitable assignments, on the other hand, need not be absolute.

14.2.5 Writing

An assignment of a legal chose in action (other than an interest in land) may be oral.⁵² An assignment of an interest in land⁵³ or equitable interest in or trust of land⁵⁴ must be in writing.⁵⁵ A statutory assignment is by definition required to be in writing.

14.2.6 Notice to Assignee

Notice to the assignee is necessary to complete an assignment.⁵⁶ As between assignor and assignee the notice takes effect on receipt.⁵⁷ As between the assignee and other creditors of the assignor, it is likely that the notice takes effect on posting.⁵⁸

14.2.7 Notice to Debtor

Express notice in writing of the statutory assignment is required to be given to the debtor. The statutory written notice requirements are strict, so that a failure to comply will prevent the assignee from bringing an action in his own name against the debtor even where the debtor otherwise knew that the assignment had occurred.⁵⁹ Lack of notice is not excused on the ground that it would be useless since the debtor knows of the assignment,

⁴⁹ *Bank of Liverpool & Martins Ltd v Holland*, ante, n 45.

⁵⁰ *Mercantile Bank of London Ltd v Evans* [1899] 2 QB 613.

⁵¹ *Court Line Ltd v Aktiebolaget Gotaverken, The Halcyon the Great*, ante, n 48.

⁵² *Cf Smith v SS Ziguards (Owners)* [1934] AC 209 at 213 (HL).

⁵³ *Re Whitting, ex p Hall*, ante, n 23.

⁵⁴ Conveyancing and Property Ordinance s 5.

⁵⁵ In England, by reason of s 53(1)(c) of the Law of Property Act 1925 (UK), an assignment of an equitable chose in action must be in writing: *Oughtred v Inland Revenue Commissioners* [1960] AC 206 (HL). In Hong Kong the corresponding provision (s 5(1)(b) of the Conveyancing and Property Ordinance (Cap 219)) is limited to equitable interests in or trust of land. Therefore in Hong Kong an assignment of an equitable chose in action, not being an equitable interest in or trust of land, need not be in writing.

⁵⁶ *Alexander v Steinhardt, Walker & Co* [1903] 2 KB 208; *Timpson's Executors v Yerbury*, ante, n 22, at 658, 665.

⁵⁷ *Timpson's Executors v Yerbury*, ante, n 22, at 658, 665.

⁵⁸ *Alexander v Steinhardt, Walkers & Co*, ante, n 56.

⁵⁹ *Coole v Pasco* (1923) 18 HKLR 62 (SC).