distinguish the two situations on the ground that in the one case performance is promised, while there is no promise in the other.[30]

It is recognised that in this particular case, it requires some stretch of the imagination to regard the performance of the various provisos which hedged Eagle's offer to repurchase, as the consideration for the synallagmatic repurchase contract. The agreement might be summarised as follows: 'If you give notice of defaults within seven days (and if you call on us to repurchase within a reasonable time of repossession), we will repurchase.' The performance of the "if" clauses[31] could technically be regarded as consideration, and it is submitted that they should be so treated. If this is done, the "substantial performance" doctrine can be brought into play. Though there may be a slight air of unreality, this is outweighed by the resulting consistency of approach.

L. L. PROKSCH

OLSSON v. DYSON[1]

(Assignment of choses in action: contract—rights and liabilities of third parties.)

The technical rubric of voluntary assignment of legal choses in action sometimes tends to obscure the fact that most cases subsumed under it are concerned, simply, with the legal requirements for making an effective gift of a debt. Nor is it surprising that such cases have given rise to conceptual difficulties: they necessarily involve three parties—creditor/donor, debtor and donee—and they thereby fall neatly across the established categories of contract and gift. Where effective, a gift of a debt gives rise to a *jus tertii* not by way of contract but nevertheless, in a very real sense, because of it.

Before the Judicature Act 1873 no means existed at common law by which a direct gift of a debt enforceable at law could be made. True, much the same result could be achieved at law by means of novation; and in equity by an assignment in which the Court of Chancery would order the assignor (creditor) to permit the assignee to sue in his name in an action at law against the debtor. But these

30 The position of the Court in support of the distinction is most powerfully presented by Diplock L.J.: [1968] 1 All E.R. 104 at 109-110.

31 See [1968] 1 All E.R. 104, at 109, 110 per Diplock L.J.

1 (1969) 43 A.L.J.R. 77.

were cumbersome procedures. A more effective measure was enacted in section 25(b) of the Judicature Act 1873. This legislation,[2] of which substantially equivalent enactments now exist in all Australian States,[3] provides that an absolute assignment in writing, signed by the assignor, of a debt (or other legal chose in action) of which express notice in writing has been given to the debtor, is effectual in law to assign the debt.

Two questions not unnaturally arose out of this legislation. First, was it necessary for the assignor himself to give the "express notice in writing" of the assignment to the debtor, or was it open to the assignee (or, indeed, any other person) to do so? This question arose not only because the legislation was (and is) silent about the matter, but also because of the inherent ambiguity in the classic dictum of Turner L.J. in *Milroy v. Lord*[4] that 'in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property . . .' In short, did the donor have to do all that it lay within his power to do, or did he merely have to do only those things which he alone was able to do to divest himself of ownership of the property in question?[5] Second, given that prior to the Judicature Act legal choses in action might be effectively assigned in equity, did the new statutory method of assignment stand in addition to or in substitution for equitable assignments?

It is surprising that definite answers to these questions have been so long delayed. But the High Court has now, in two recent cases, apparently answered both of them conclusively. In *Taylor v. Deputy Commissioner of Taxation*[6] the Court[7] appears to have decided that it is not necessary for a donor to do everything that it lies within his power to do to perfect his gift. It is enough if he does just those things that he only is able to do, even though the remaining parts of the transaction (for example, giving the "express notice in writing" to the debtor in the case of a gift of a debt; or lodging a transfer of

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2 Now s. 136 of the Law of Property Act 1925 (U.K.).

3 In Western Australia the legislation has been duplicated: see s. 25(7) of the Supreme Court Act 1935-1964 (W.A.) and also s. 20(1) of the Property Law Act 1969 (W.A.).

4 (1862) 4 De G. F. & J. 264 at 274.

5 Compare the views of Griffith C.J. and Higgins J. in Anning v. Anning (1907) 4 C.L.R. 1049 with those of Lord Evershed in Re Rose [1952] Ch. 499.

6 (1969) 43 A.L.J.R. 237.

7 Barwick C.J., Taylor and Menzies JJ.

land for registration) might equally have been done by him as by the donee. This case has been noted elsewhere[8] and it is not intended to deal with it further in this note.

The second point arising from the legislation was considered by the High Court in *Olsson v. Dyson*.[9] Here an otherwise divided Court held unanimously that the statutory method of assigning legal choses in action has in fact replaced whatever might have been recognized in equity as an effective assignment before the Act of 1873. In the words of Windeyer J. 'the result is that a creditor who wishes to give a donee a debt owed to him must follow the statutory procedure: he must sign a document by which he assigns the debt to the donee; and his gift will be complete in law when express notice in writing of his having done so is given to the debtor'.[10] As we have seen, *Taylor's Case*[11] seems to have established that either donor or donee (or even a third person) may give notice to the debtor.

The point established by *Olsson v. Dyson* is not without interest, especially when one is tempted to read the dissenting judgments as disclaimers of the result naturally flowing from the foregoing proposition in which all members of the Court had concurred. In the result, the task of predictability on facts essentially simple remains as difficult as it has ever been.

Dyson had loaned a company $4,000 at 8% interest, the principal being repayable on demand. He said to his wife: 'You can have the $4,000 that I have loaned to Tom' (managing director of the company); and 'I will advise Tom to pay the interest to you.' No document was executed, but the wife had previously been given custody of the company's receipt for the principal, which was the only written evidence of the loan. Two months later Dyson told the managing director that he had given the principal sum to his wife and that the interest should henceforth be paid to her. The company thereupon duly paid the interest to the wife. Dyson then died. His executors claimed the debt against the company as property of the estate. The company took advantage of the inter-pleader procedure of the Supreme Court of South Australia: the principal sum was paid into court; the widow was substituted for the company as defendant; and the issue was tried before Chamberlain J. whether at the date of Dyson's death, the money loaned by him to the company, and interest

8 43 A.L.J. 392.
9 (1969) 43 A.L.J.R. 77.
10 Ibid. at 85.
11 (1969) 43 A.L.J.R. 237.

thereon since his death, was payable to and recoverable by the plaintiffs as executors of Dyson's will or the widow. The trial judge found for the widow but on grounds of which the High Court, reversing the decision, unanimously disapproved on appeal.

On the question of law, Chamberlain J. thought that there was, in equity, a completed assignment of the debt. It was true that the statutory method of assignment had not been complied with—Dyson had executed no document. But there is authority for the propositions both that a legal chose in action could be effectively assigned in equity without consideration so long as the assignor had done everything required to be done by him to transfer the chose, and also that the Judicature Act merely supplemented and did not supplant this equitable assignment. There are equally authorities the other way on both propositions,[12] including dicta of the High Court in *Coulls v. Bagot's Executor and Trustee Co. Ltd.*[13] as to the first, and in *Anning v. Anning*[14] and *Norman v. Federal Commissioner of Taxation*[15] as to the second. There is in fact no discussion of either point in *Olsson v. Dyson* and the case resolves these important and difficult points of law by the simple expedient of judicial legislation. In deciding that a debt cannot be voluntarily assigned except by compliance with the statute the Court has avoided a thicket of conflicting cases and proposed a rule which at least has the merit of simplicity and workability.

But however simple and workable the rule might be the fact remains that its application may, and in this case clearly did, operate to frustrate the unequivocally expressed intention of the donor and the reasonable expectations of all the parties. Dyson clearly intended to give the debt; the debtor acquiesced in that intention. As a layman knowing nothing of the statute, Dyson could be forgiven for assuming that unequivocal words of gift to both donee and debtor, accepted and acted upon by the debtor, would be sufficient. It is submitted that the result reached by the majority[16] of the High Court in this case is not satisfactory, and the "salvage" dissenting judgments of Barwick C.J. and Windeyer J. lend colour to that view. Nor was the Court without recourse to a quite different approach to the case which would have preserved the widow's interest. Indeed, having

12 See generally on this question and especially the authorities collected therein: R. E. Megarry *Consideration and Equitable Assignments of Legal Choses in Action* 59 L.Q.R. 58 (1943).

13 (1967) 40 A.L.J.R. 471 at 480.

14 (1947) 4 C.L.R. 1049, per Isaacs J. at 1067 and ff.

15 (1963) 109 C.L.R. 9, per Windeyer J. at 28.

16 Kitto, Menzies and Owen JJ.

agreed with the majority that the statutory procedure must be followed, both dissenting judges finally adopted an argument which it is submitted is preferable both in law and in the result.

The interpretation of the facts by the dissentients was the eminently sensible one that Dyson's original contract with the company was novated. That is, that it was terminated by agreement between himself and the company and that in consideration of Dyson relieving the company of its obligation to pay him, the company promised to pay his wife. As the law stands this arrangement gives no contractual rights to the wife, although Windeyer J. was unsuccessfully at pains to find rights arising from it on the grounds either or both that Dyson entered into the novated contract as agent for his wife and/or also that he was a trustee for her of the promise under it. The point was, though, that under the interpleader procedure the money was in court, and the issue was whether it was recoverable by the executors. Barwick C.J. and Windeyer J. held that it was not: Dyson's rights to the money had gone when the contract was novated, and his damages for breach of the novated contract could be nominal only. For the company to pay the money to anyone but the widow would have been a breach of this contract. Consequently she was the proper person to receive payment of the money in court.

If this dissenting view is attractive it is also anomalous. It results from the chronic inability of our courts and legislatures to give a *jus tertii* by way of contract. It means that a person may have a remedy but no rights. And it is submitted that on facts as commonplace as those in *Olsson v. Dyson* the destination of money should depend neither on the technicalities of pre-Judicature Act equity jurisprudence nor on the vagaries of procedure.

NEVILLE CRAGO

P. 303 line 30: *for* insome *read* in some.

P. 305 line 24: *after* of *insert* the.

P. 318 line 28: *for* control *read* controls.

P. 477 line 23: *for* (1) *read* (i).

P. 489 note 38 line 4: *for* "a priori *read* a priori.

P. 492 line 9: *for* case *read* ease.

line 15: *for* case *read* ease.

P. 556 line 18: *for* impartiality *read* partiality.

The words and phrases placed in internal quotation marks in the following footnotes should appear in italics:

P. 480 note 10 line 1.

P. 484 note 24 lines 8 and 9.

P. 489 note 38 lines 2, 4 and 5.

P. 515 note 106 lines 1 and 2.

P. 526 note 145 lines 5 and 6.

P. 530 note 161 line 4.